Natural Law Basis for the Copyright Doctrine of Droit Moral

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NATURAL LAW BASIS FOR THE COPYRIGHT DOCTRINE OF DROIT MORAL

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The copyright doctrine of moral right—the droit moral1—has achieved its greatest development in Europe,2 especially France3 and Ger-

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1 P. Masse, Le Droit Moral (1906). Masse was one of the earliest commentators to analyze the concept of moral right and to popularize the term "droit moral". He defined the author's moral right as "the negative right to prevent violations of the literary personality of the author." Id. See generally infra note 14 (definition of "moral right").
2 See 2 M. Nimmer, Nimmer on Copyrights § 8.21, at 8-247 (1985). The doctrine of moral right achieved early continental recognition under the Berne Convention, which identifies three components of the author's right: publication, paternity and integrity. Diamond, Legal Protection for the "Moral Rights" of Authors and Other Creators, 68 Trade-Mark Rep. 244, 245 (1978). Publication includes the right to create and the right to withhold or withdraw from publication. Id. Paternity includes the right to receive credit as the author; protection of the author's anonymity; protection from false attribution and other attacks on the author's personality and professional standing. Maslow, Droit Moral and §§ 43(a) and 44(i) of the Lanham Act—A Judicial Shell Game?, 48 Geo. Wash. L. Rev. 377, 379 n.14, (1980). Integrity concerns the author's right to modify the work, and to prevent its mutilation or destruction. Id. at 379 n.15. Since most of the early signatories of the Berne Convention were European countries or their colonies, these nations have had the longest tradition of providing protection for the author's moral rights. One of several reasons the United States has never joined the Berne Convention is the required adoption of the doctrine. Id. at 380-81.
3 See DaSilva, Droit Moral and the Amoral Copyright: A Comparison of Artist's Rights in France and the United States, 28 Bull. Copyright Soc'y, 1, 2 (1980) (France is vanguard of artists' rights); Sarraute, Current Theory on the Moral Right of Authors and Artists Under French Law, 16 Am. J. Comp. L. 465, 465 (1968) (moral right has grown from decisions handed down by French courts since middle of last century); Strauss, The Moral Right of the Author, 4 Am. J. Comp. L. 506, 506 (1955) (France has pioneered application of doctrine). France has produced some of the most influential treatises on the doctrine of moral right. See, e.g., D'Arguerne, Le Droit Moral (1925); P. Masse, supra note 1, E. Pouillet, Propriete Litteraire et Artistique (3d ed. 1908); C. Aussy, Du Droit Moral (1911).
Beginning in 1928 with the Rome revision of the Berne agreement, the droit moral began to receive worldwide recognition as a legal right. One recent commentator suggested that the doctrine has been accepted by over sixty countries. It has elicited, in recent years, a great deal of commentary, both in countries that fully adopt and recognize the principle, and those like the United States that have displayed an equivocal, often ambivalent, reaction to the theory. Yet, in all of this analysis and discussion, there has been comparatively little attention paid to the jurisprudential origin of the doctrine. This is not to say that the legal

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* See, e.g., Hathaway, American Law Analogues to the Paternity Element of the Doctrine of Moral Right: Is the Creative Artist in America Really Protected? 30 COPYRIGHT L. SYMP. (ASCAP) 121, 122 n.4 (1980) (term “droit moral” thought to be misleading while German term “Urheberpersonlichkeitsrecht” held to be more precise); Marcus, The Moral Rights of the Artist in Germany, 25 COPYRIGHT L. SYMP. (ASCAP) 93, 93 (1975). Marcus prefers the term “Urheberpersonlichkeitsrecht”, literally “creator’s personal rights,” as far more descriptive than the French “droit moral.” Id. But see Roeder, The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators, 53 HARV. L. REV. 554, 554-55 (1940) (difficult to find expression other than droit moral which would not become unwieldy). Hoffman distinguishes two approaches in the protection of the author’s right. Hoffman, European Legislation and Judicial Decision in the Field of Copyright in 1930, 8 N.Y.U. L. REV. 369, 372 (1931). Id. The German view consists of merely a series of particular legislative grants of protection and can be found in the systems of Denmark, Finland, Holland, Austria, Sweden, Switzerland, Spain, Czechoslovakia, and Hungary in 1930. Id. He characterizes the other system, which he labels as Roman, as giving the author full right to exploit his work in every direction and form without limitation of particular legislative grants and prohibitions. Id. The system is attributed to the French and was followed as of 1930 by Belgium, Bulgaria, Greece, Great Britain, Poland, Portugal and Romania. Id.


* See id.

* See, e.g., H Desbois, Le Droit D’auteur En France (2d ed. 1976); A. Dietz, Das Droit Moral Des Urhebers Im Neuen Franzosischen Und Deutscher Urheberrecht (1968); Sarraute, supra note 3, at 486 (moral right theory superior because takes better account of nature of creative act); Colas, Le Droit Moral De L’Artiste Sur Son Oeuvre, 59 CAN. B. REV. 521 (1981).

* See, e.g., Amarnick, American Recognition of the Moral Right: Issues and Options, 29 COPYRIGHT L. SYMP. (ASCAP) 31, 81 (1979). Amarnick is of the opinion that “American ‘analogues’ of the moral right fail to articulate, as a shared value and a social policy, an attitude of respect for the creative process and its fruits.” Id. DaSilva contends that the doctrine of droit moral is not only overly complicated to apply, but as a product of the European legal milieu, its transfer to the United States is impossible. DaSilva, supra note 3, at 57; see also Hathaway supra note 4, at 151 (there is no single analogue in the United States to doctrine of moral right).

* The few articles that treat the jurisprudential origin of the droit moral include; Streibich,


The Second Circuit Court of Appeal's decision in Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976), was the basis of many of the above articles. In Gilliam, the Second Circuit held that television presentation of a Monty Python "special" which resulted in cutting 24 minutes from a 90 minute program constituted mutilation of the work and was violative of section 43(a) of the Lanham Trademark Act. Id. at 24-25. The Act provides in part:

Any person who shall affix, apply, or annex, or use in connection with any goods or services, . . . a false designation of origin, or any false description or representation . . . and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C. § 1125(a) (1982). The court held that 43(a) of the Lanham Trademark Act may afford a remedy when editing by an artist's licensee results in a violation of the artist's "moral right" to prevent the presentation of his work in distorted form. Gilliam, 538 F.2d at 24; see also Note, Author's Script Protected from Excessive Editing Under Doctrine of Common Law Copyright and Section 43(a) of the Lanham Act—Monty Python v. American Broadcasting Cos., 50 Temple L. Q. 151, 159-60 (1979) (Gilliam court saw no inconsistency between current copyright statutes that protect economic interest and protection of artist work from mutilation or misrepresentation); Comment, The Monty Python Litigation of Moral Right and the Lanham Act, 125 U. Pa. L. Rev. 611, 634 (Gilliam is significant because it recognizes American Legal System can accommodate assertion of artist's moral rights).
What is the Doctrine of Moral Right?

The precise meaning of the author's moral right varies nation by nation according to jurisdiction. Indeed, the author's moral right is not a single right but a bundle of rights that protect the personality of the creator as he has expressed it in his artistic works. It is often said to include the author's right to paternity in his works and the right to the integrity of his work as conceived. It is in addition ascribed more specific rights. These include: the right to be acknowledged as the author of his work; the right to prevent others from falsely attributing to the creator the authorship of work which he has not in fact written; the right to prevent deformation or destruction of his work; the right to withdraw a published work from distribution or disavow the work generally if it no longer represents his views; and the right to prevent others from using the work or the author's name in such a manner as to reflect adversely on his artistic reputation. Other incidental rights have also been referred to as moral rights although their legal standing is less certain.

Although the doctrine of moral right has an established legislative and judicial foundation in France, Germany, Italy, and Berne member

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14 See Sarraute, supra note 3, at 465. The moral right includes "non-property attributes of an intellectual and moral character which give legal expression to the intimate bond which exists between a literary or artistic work and its author's personality; it is intended to protect his personality as well as his work." Id.; see supra note 4; see also West German GG, art. I; European Declaration of Human Rights, Judgment of May 25, 1954, 13 Entscheidungen des Bundesrichters in Zivilsachen (BGHZ) 334; Italy Const. arts. 2 & 22.

15 See supra note 2.

16 See 2 M. Nimmer, supra note 2, § 8.21, at 8-247; Krigsman, Section 43(a) of the Lanham Act as a Defender of Artists' "Moral Rights," 73 TRADE-MARK REP. 251, 253 (1983); Maslow, supra note 2, at 379; Roeder, supra note 4, at 561-65.

17 See Strauss, supra note 3, at 508-09.


19 See Whistler v. Eden, D.H. 1898.2.465, S. 1900.2.201, S-1900.1.498 (France); Caroim v. Carco, D.P. 1928.2.89, Gaz. Pal. 1931.1.678 (France); G. MICHAELIDES-NOUAROS, supra note 18, at 185-86; 2 M. Nimmer, supra note 2, § 8.21, at 8-247; E. ULMER, URHEBER-UND VERLAGSRECHT 197 (1951); Krigsman, supra note 16 at 253; Maslow, supra note 2, at 379.

20 See 2 M. Nimmer, supra note 2, § 8.21, at 8-247.

nations generally,22 the 1976 Copyright Act accords no formal recognition of moral right in the United States.23 Protections comparable to those discussed above have most often been sought in state common law actions of unfair competition, defamation, invasion of privacy, and breach of contract.24 A number of federal and state courts have concluded that moral rights are not recognized in the United States, regardless of the theory under which they have been proposed.28 Other courts have made statements to the contrary26 and there is growing evidence that authors do have the right under the law of the United States to prevent truncation or distortion of their work,27 to demand truthful attribution regarding their authorship of a work,28 to prevent false attribution of authorship to work they did not write,28 and to prevent others from wrongfully challenging the copyright proprietor's ownership of his work.30 Finally, a recently enacted state law, The California Art Preservation Act,31 protects the works of the fine artist from physical defacement, mutilation, altera-

22 See supra note 2; see also 2 M. Nimmer, supra note 2, § 8.21, at 8-247 (certain European countries and other Berne Convention Countries have long recognized rights personal to authors).
28 See 2 M. Nimmer, supra note 2, § 8.21[D], at 8-266 to 8-270. Until recently the prevailing view was that an author who sold his work did not, absent an appropriate contractual provision, have a right to be credited as the author of the work. See, e.g., Clemens v. Press Publishing Co., 67 Misc. 183, 184, 122 N.Y.S. 206, 207 (Sup. Ct. App. T. 1st Dep’t 1910).
30 2 M. Nimmer, supra note 2, § 8.21[E], at 8-270 to 8-270.5.
tion, or destruction.\textsuperscript{2} However, works of literary content, of merely decorative value,\textsuperscript{3} or those “made for hire” and purchased for commercial purposes,\textsuperscript{4} are not protected.

\textbf{A NATURAL LAW FOUNDATION FOR THE MORAL RIGHT OF THE AUTHOR}

Natural law theories are among the oldest jurisprudential theories known.\textsuperscript{5} Early natural law theories can be traced to the ancient Greek philosophers, especially Plato and Aristotle.\textsuperscript{6} Plato, in his \textit{Minos}, described law as tending toward discovery of the ideal form of perfect law.\textsuperscript{7} Aristotle developed the distinction between natural justice and conventional justice.\textsuperscript{8} Neither, however, went so far as to create a systematic natural law theory.\textsuperscript{9}

Early natural law theories, like much of primitive law\textsuperscript{10} generally, paid scant attention to property relations between men. Rather, the emphasis was on the ethical and the just, and the abstract principles of justice common to all mankind.

The Roman lawyer and orator Cicero, a student of the Stoics, a group which revived natural law teaching after Aristotle,\textsuperscript{11} deviated from the path of the developing Roman law. He imported into Roman law the idea

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    \item No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.
  \end{itemize}
  \textit{Id.}
  \item \textsuperscript{3} Cal. Civ. Code § 987(b)(2) (West Supp. 1986). “Fine Art” is defined in the California Civil Code as “an original painting, sculpture, or drawing, or an original work of art in glass of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.” \textit{Id.}
  \item \textsuperscript{4} Cal. Civ. Code §§ 987(b)(2) & (b)(7) (West 1982 & Supp. 1986). Section 987(b)(7) defines “commercial use” as “fine art created under a work-for-hire arrangement for use in advertising, magazines, newspapers, or other print and electronic media.” \textit{Id.}
  \item \textsuperscript{5} E. Patterson, Jurisprudence Men and Ideas of the Law 6 (1953); Rose, The Law of Nature: An Introduction to American Legal Philosophy, 13 Ohio St. L.J. 121, 122 (1952).
  \item \textsuperscript{6} See R. Hutchins, Natural Law and Jurisprudence in Natural Law and Modern Society 30 (1963).
  \item \textsuperscript{7} Rose, supra note 35, at 12-23.
  \item \textsuperscript{8} See Aristotle, Nicomachean Ethics in The Great Legal Philosophers, 21 (Morris 1959), “A rule of justice is natural that has the same validity everywhere, and does not depend on our accepting it or not. A rule is conventional that in the first instance may be settled in one way or the other indifferently, though having once been settled it is not indifferent . . . .” \textit{Id.}
  \item \textsuperscript{9} See J. Salmond, Jurisprudence 16 (12th ed. 1966).
  \item \textsuperscript{10} A. S. Diamond, Primitive Law 260-76 (1935).
  \item \textsuperscript{11} G. Paton, A Text-Book of Jurisprudence 101-02 (4th ed. 1963); see E. Patterson, supra note 35, at 342.
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of the *jes gentium*, a conception of law universal to all peoples.42 Although unsubstantiated, it is likely that Cicero influenced Gaius, an early commentator on Roman law. Gaius maintained that the *jus rationale* derived from the *naturalis ratio*, or the natural reason of man,43 and thus provided a non-theistic philosophical justification for the civil law of Rome.44 It is especially significant that the first appearance of natural law theory in relation to property45—and to literary property46—appears in Gaius’ treatise.

Examples given by Gaius in his treatise are in accord with what we know about literary life in historical Rome. Plagiarism and censorship, forms of misappropriation and mutilation encompassed under the moral rights protections, were widespread in both ancient Greece and Rome.47 The natural law theories that Cicero and Gaius infused into Roman law helped combat these practices48 and much later, the natural rights of authors would be used as a clarion call to protect authors’ moral rights.

Natural law theories were revived again after a period of quiescence in the middle ages. Their popularity at this time has been attributed to the inherent flexibility of natural law and its “respectable” ancestry. It was thus a doctrine able to attract supporters from both the liberal and conservative political camps and accommodate, at least in some fashion, widely disparate views.49 The very chaos of the age may have made universal principles attractive, if no more persuasive than they might be expressed in other periods.50

The doctrine of moral right may have its most direct ancestry in the emergence of rights theories generally. Theories of natural rights may be traced as far back as the twelfth century rediscovery of the Roman Law Digests.51 Since the sixteenth century, a proverbial “tug of war” has raged between supporters of natural law theories and the proponents of positive

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42 See E. PATTERSON, supra note 35, at 342-43.  
44 Id.  
45 Id. at II, §§ 65 (transfer of property), 69 (property captured by enemies), 74 (rights of riparian owners), 75 (plants), 79 (ownership in general).  
46 Id. at II, §§ 77 (literary works), 78 (painting).  
47 Streibich, Part I, supra note 10, at 4-10.  
48 See J. MUIRHEAD, supra note 43, at II, §§ 77, 78. Gaius, for example, announces the value of literary and artistic production. These equitable doctrines provided for recovery actions against the misappropriation of either the implements of writing or art, as well as the writing or art itself. Id.  
50 G. PATON, supra note 41, at 99.  
51 Id. St. Thomas Aquinas, Francisco Suarez and Richard Hooker exhibited generally similar concepts of Natural Law, however due to their differing political assumptions they differed considerably in its detailed application. Id.
legal codes. The heritage of our modern dichotomy of statutory and non-statutory protections for authors most likely derives from this long-standing philosophical struggle.

The conceptual grounds for such a view are not hard to find. Natural law differs from positive law most directly in this respect: natural law provides ultimate principles such as the inviolability of an author's personality which determine the ends of action. Positive law is more earthly in its aims; it designates a course of action only after consideration of all the temporal alternatives. The former relies on reason and conscience to recognize universal, fundamental truths; the latter binds men because of sanctions built into social relationships and enforced by the state. These differences parallel the difference between the doctrine of moral rights and the protections embodied in positive copyright law. Thus, even in this early period the germ of later theories of natural rights appears poised in opposition to positive legal developments.

Natural rights theories forced themselves to the forefront of public debate in the eighteenth century. The doctrine arose that there were certain innate rights, issuing from the very nature of man as a rational being, which were beyond the protections or constraints embodied in positive law. The two major tenets of the seventeenth and eighteenth centuries—individualism and rationalism—inspired this insistence upon inherent natural rights. Grotius, Rousseau, and Pufendorf were among the most influential natural law theorists to fuel the secular natural law resurgence. Pufendorf went so far as to demonstrate that the acquisition and use of property can be, and indeed must be, deduced from reason alone, and hence from the natural law. Thus, positive law must be founded on natural law, and subservient to it, so that inalienable human

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63 See G. PATON, \textit{supra} note 41.
64 See E. BODENHEIMER, Reading in Jurisprudence 31-32 (1962); H. ROMMEN, The Natural Law 75-109 (1947).
65 Adler, The Doctrine of Natural Philosophy, in \textit{Natural Law Institute Proceedings} 65, 67-68 (A. Scanlon ed. 1947); Brogan, The Natural Law and the Right to Liberty, in \textit{Natural Law Institute Proceedings} 24, 26, 29 (E. Barrett ed. 1951). Brogan quotes the Declaration of Independence as an acknowledgement of Natural Law Principles: "We hold these truths to be self evident, that all men are created equal; they are endowed by their Creator with certain inalienable rights . . ." Brogan, \textit{supra}, at ____ . Locke, Montesquieu and Rousseau are also discussed.
66 See generally H. ROMMEN, \textit{supra} note 54, at ch. 4. Natural law in the so-called age of natural law differed from traditional natural-law in its emphasis upon individualism and rationalism. \textit{Id.} at 75; A. HARDING, NATURAL LAW AND NATURAL RIGHTS 71 (1955).
rights should not be oppressed by man or the state.\textsuperscript{58}

The turning away from natural law in the nineteenth century was inspired by critics from two quarters—agnostics like Hume and utilitarians like Bentham.\textsuperscript{59} Common to both was pronounced distrust of power and insufficient belief in the rational abilities of man to overcome his base nature. Both embraced varieties of positivism, arguing that the clarity of the rational mind was not the source of law, but rather the origin of law derived from the cloaking of human conventions with the power of the state.\textsuperscript{60}

Another influential force in the turn to positivism in law during the last two centuries was the emergence of natural science and the success of the industrial revolution it sparked. Both scientific positivism and legal positivism embodied an aversion to metaphysical speculation and the search for ultimate principles.\textsuperscript{61} Empiricism in scientific and philosophical thinking was much more in accord with a skeptical, secular, pragmatic age. The successes of the natural sciences in the early nineteenth century not only inspired emulators in the social sciences such as Comte, but contributed to the search for a scientific jurisprudence as well.\textsuperscript{62} Although several different theories of law would have benefited from the shift in emphasis, natural law was the clear loser.

The twentieth century witnessed a third major revival of natural law and value-oriented thinking,\textsuperscript{63} which corresponded to an emphasis on human rights.\textsuperscript{64} While there has been some effort to distinguish the develop-

\textsuperscript{58} See H. Rommen, \textit{supra} note 54, at 138-41; see also J. Locke, \textit{The Second Treatise of Government} chs. XI, XIII (1690).

\textsuperscript{59} See H. Rommen, \textit{supra} note 54, at 110-13.

\textsuperscript{60} Id. at 127.

\textsuperscript{61} B. Brown, \textit{The Natural Law Reader} 6-9 (1960).

\textsuperscript{62} See A. Kocourek, \textit{An Introduction to the Science of Law} ch.1 (1930). The positivist language of the law emphasized its conception of law and jurisprudence as a meta-science. In part, this adoption of meta-scientific language can be understood as a desire to trade on the success and prestige of the sciences and to earn a reputation for wholly objective, rigorous professionalism. Id; see also J. Reddie, \textit{Science of Law} chs. 1-3 (1980).

\textsuperscript{63} C. Haines, \textit{The Revival of Natural Law Concepts} 210-12 (1930). Federal and state courts, at the turn of the century, became "champions of a revived eighteenth-century individualism" who "gave the natural rights or modern higher law doctrine the peculiar trend which now marks the process of constitutional interpretation in state and federal courts." \textit{Id.} at 211; see, \textit{e.g.}, Pavesich v. New England Life Insurance Co., 122 Ga. 190, \ldots, 50 S.E. 68, 69 (1905) (right of privacy flows from natural law). During the first three decades of the twentieth century the higher law doctrine constituted "the central feature of American constitutional law." C. Haines, \textit{supra}, at 212 (emphasis in original); see also Charmont, \textit{La Renaissance du Droit Naturel} (1910).

\textsuperscript{64} L. Strauss, \textit{Natural Right and History} ch.3 (1953); see also J. Maritain, \textit{The Rights of Man and Natural Law} 64-68 (1951). The human person possesses rights merely because "it is a person, a whole, a master of itself and of its own acts, and which consequently is not merely a means to an end, but an end, an end which must be treated as such." \textit{Id.} at 65.
opment of natural rights theories from the progress of natural law,66 the history of the twentieth century and its legal thought attest to their intimate connections and common sources.66 These are openly expressed and recognized as early as the eighteenth century. The influence of such natural law theorists as Locke, Montesquieu, and Rousseau upon the American Declaration of Independence and the French Declaration of the Rights of Man has been widely acknowledged.67 Subsequent national and international charters and declarations have continued to ground their existence in natural law and natural rights concepts.68 Among these, one may find the Berne Convention and its doctrine of moral rights of authors. Its heritage in the natural law tradition and the natural rights movement of the twentieth century can be discovered in the substantive meaning of its principles or its formal incorporation in natural law and natural rights documents. The Berne Agreement, for example, has received formal recognition as one part of the Universal Declaration of Human Rights.69 A closer examination of the creation of the doctrine of moral right will substantiate and clarify its origin in the revival of twentieth century natural law and natural rights jurisprudence.

PRECEDESNTS AND ATTRIBUTIONS: NATURAL LAW/NATURAL RIGHTS REASONING AND THE DOCTRINE OF THE AUTHOR'S MORAL RIGHTS

Evidence supporting the view that the moral rights of authors has its origin in natural law and natural rights doctrines may be found in two sources—precedents and attributions. The history of the late nineteenth and twentieth centuries is replete with examples of each form. Further, there is ample evidence that both civil law and common law countries recognized the intimate connection of the moral rights of authors and

66 See A. Harding, supra note 56, at 70-71.
64 J. Maritain, supra note 64, at 58-68. The natural law and the conscience of a person "do not prescribe merely things to be done and not to be done; they also recognize rights, in particular, rights linked to the very nature of man." Id. at 64-65.
67 N. Korkunov, General Theory of Law 379-80 (1909). Montesquieu’s theory concerning the separation of the powers of government quickly became popular. Id. at 380; E. Corwin, Liberty Against Government 45 (1948); Durant, Rousseau and Revolution (1967).
69 Universal Declaration of Human Rights, General Assembly of the United Nations (1948). Article 27 reads:
(1) Everyone has the right freely to participate in the culture of the community, to enjoy the arts and to share in the scientific advancement and its benefits.
(2) Everyone has the right to protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author.

Id.
natural law theories at relatively early stages. Indeed, it appears that such formal recognition may have appeared earliest in the common law countries where the development of the doctrine has been slow.\textsuperscript{70} The language of cases and commentaries asserting the author's moral rights are woven with frequent references and digressions into natural law and natural rights discussions.

Civil Law Systems

Evidence from the civil law systems is most readily accessible to American scholars from precedents and commentaries on French law. One may note extensive reference to natural law, natural rights, and inalienable rights as the basis for the author's right to receive recognition for and control of his work.

The Roualt case is exemplary.\textsuperscript{71} Roualt agreed to deliver the entire portfolio of his works—over 800 extant paintings—to Amboise Vollard. Roualt had access to the paintings and made changes and additions as he saw fit. Upon Vollard's death, his heirs sued for delivery. The Paris Court of Appeal concluded that the painter remains master of his work until delivery without reservation after full completion to the artist's satisfaction. In a lengthy discussion of this aspect of the author's moral right, the Court described it as an "inalienable right" so fundamental that the Court thought it could not be abrogated by contract or agreement to the contrary.\textsuperscript{72}

In addition to the explicit references to inalienable rights and natural law, it is important to recall that, in effect, all of the nineteenth century French cases were implicitly decided on natural law and natural rights grounds. There existed no positive law protections equivalent to the rights regularly sanctioned by French Courts. As Sarraute and others have noted,\textsuperscript{73} the droit moral originated as judge made law. The only existing French statute prohibiting literary crimes during the first eighty years of the nineteenth century were criminal statutes against plagiarism passed during the period of the Revolution.\textsuperscript{74} These were pressed into ser-

\textsuperscript{70} See infra notes 85-112 and accompanying text.
\textsuperscript{72} Sarraute, supra note 3, at 465. French law separates the concept of literary and artistic rights into two elements, the second of which is the "moral" right. Id. The moral right had no basis in any code, but rather evolved gradually out of the decisions handed down by French courts. Id. The "real credit" for differentiating the various aspects of the moral right belongs to the courts. Id. at 466. The moral right has since acquired a statutory character as well. Id.
\textsuperscript{73} Id. The moral right of the artist in France has been put into statutory form, although it also continues to develop through judicial interpretation. Id.
\textsuperscript{74} See, e.g., Decree of January 13-19, 1791; Decree of July 19 and August 6, 1973.
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vice occasionally to buttress the developing theory of droit moral, a civil protection. The Tribunal Correctionnel in 1845\(^7\) held that the sculptor Clesinger had the right to institute criminal proceedings against the transferees of a statute created by him. The court did so not on the ground that the transferees had stolen the sculpture, for it was not a theft case, but rather on the novel theory that they had mutilated it.\(^7\) The court declared that “independent of the pecuniary interest, there exists in the artist an interest more precious, that of his reputation . . . .” The theory was imported into the law out of whole cloth, yet this theory was absent from positive law. The obvious inference is that its source is some law superior to the statutory law—natural law. Slowly, accretions to the French law resulted in a statutory basis for the author’s moral rights. In 1881, the French recognized a corollary to the rights of paternity and reputation under statute—the right to reply to criticism of an author’s creative work and to have the reply published.\(^7\) The 1957 revision of the civil code incorporated and unified the judge-made laws concerning droit moral into the civil code. While it is axiomatic that the civil law nations do not have law outside their codes,\(^7\) France, the archetype of civil law jurisdictions, created the droit moral from unnamed and sub-rosa sources in the natural law a century before it formally recognized its existence.

While references in many of the cases are oblique, commentators on the French law of droit moral are in agreement. As DaSilva noted: “French scholars regard the droit l’auteur as a natural right, deeply rooted in the principles of the French Revolution from which modern French Jurisprudence emerged.”\(^7\) Monta, discussing the 1957 French statute, expressed a similar recognition of the sources of droit l’auteur. “It sounds like the proclamation of the rights of man. These are obviously proclaimed to be natural rights independent of statute, and the statute acknowledges the existence thereof by providing for appropriate ways and means of protection.”\(^8\) As DaSilva observed, it is widely accepted that the droit moral is part of the “natural law” that arose, specifically, from the same spirit as natural law theories that inspired the French Revolu-

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\(^7\) Clesinger et Laneuville C. Gauvain, Trib. corr. de Lyon, Jan. 5, 1850, D.P. 1850.3.14.
\(^8\) Roeder, supra note 4, at 555.
\(^7\) Law of July 29, 1881, as amended by Law of September 29, 1919, Article 15, D.P. 1921.4.7.
\(^7\) H. LIEBESNY, FOREIGN LEGAL SYSTEMS: A COMPARATIVE ANALYSIS 26-32 (4th rev. ed. 1981). “[T]he law should be clear, and stated in written form so that, as much as possible, every citizen would know what are his rights and duties. Only by this clarity may litigation be decreased, injustices avoided, and freedoms preserved.” Id. at 30.
\(^7\) DaSilva, supra note 3, at 7.
References to the "natural right" character of the droit moral appear side by side, intermixed, with discussions of the "natural law" origin and the development of doctrines associated with moral rights. Natural rights and natural law appear to be used as distinctions without a difference in the history of the droit moral.

The recent history of French droit moral coincides with international recognition of the doctrine. It is instructive that it has been incorporated into the international human rights declarations as part of the body of universal human rights. The natural law basis of universal human rights movements has been amply documented.

British Common Law

Similar evidence may be adduced with respect to development within British common law countries that accords roughly equivalent protections under copyright from a natural law heritage. Early restatements of the English law of property and literary property relied on the views propounded by Gaius in his treatise on Roman law. English commentators adapted the Roman theories of occupatio and possessio, and acknowledged the natural law origin of notions of literary justice.

The literary property debates that erupted in the sixteenth and seventeenth centuries between authors, booksellers, Crown, and public provide a plethora of natural law references to the "inalienable" rights of authors. The earliest English case to construe the meaning of modern English copyright, Millar v. Taylor, shows such an influence. Mr. Justice Aston stated:

The common law, now so called, is founded on the law of nature and reason. Its grounds, maxims, and principles are derived from many different fountains... from natural and moral philosophy, from the civil and canon law, from logic, from the use, custom, and conversation among men, collected out of the general disposition of nature and condition of human kind.

Millar is widely accepted as substantiating the existence of a common law copyright under English law.

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81 See DaSilva, supra note 3, at 9; Sarraute, supra note 3, at 465.
82 DaSilva, supra note 3, at 8, 11.
83 See supra note 69.
84 J. Maritain, supra note 64, at 64-68.
85 2 W. Blackstone, Commentaries 404-07.
88 Id. at 223.
89 See generally id. at 201-66. Some modern authors also explicitly acknowledge that Mill-
Seven years after Millar, Donaldson v. Beckett reassessed the opinion concerning common law copyright delivered in Millar, but did so amidst frequent admission that the natural and common law were the sources for rights that had been incorporated into the Statute of Anne. The court in Donaldson concluded that common law copyright had been supplanted by statutory copyright. However, the case did not really address any of the author’s rights at common law other than the right to perpetual ownership, including the right to reprint. Copies were regularly defaced and mutilated during this historical period to permit dishonest booksellers and publishers to issue volumes insignificantly “different” than the original and thereby evade the spirit of the law. Such practices, while at the heart of the economic issue, were not the legal focus of Donaldson.

Other commentaries and cases from this period reflect the legal recognition of natural law and common law rights to literary works and the divided nature of society and the law on the subject. Enfield wrote a lengthy learned commentary on the subject in 1774 in response to the Donaldson case. He described the debate in perspective terms: “the author of any literary composition has a natural right of property in the work, is the point now to be established.” Enfield goes on to suggest that this question is merely one aspect of determining whether the right of property in general is founded upon “the general laws of nature” or is an “institution of civil society.” Enfield concludes that property must be part of the natural inheritance people entrust in “sacred deposit” in the hands of their governors. By analogy, literary property must arise from the same source and be entitled to the same unstated protections.

To take possession of any work, for any purposes which interfere with the interest of the author, farther than he himself of his assigns assent to it, is, on the principles of natural law, no less an invasion of property, than that of plundering a man’s granaries of his coffers.

lar v. Taylor admitted to the existence of an author’s creative rights in sixteenth and seventeenth century England. See L. Patterson, Copyright in Historical Perspective 71-73 (1968).


** An Act for the Encouragement of Learning, 1709 8 Annee, ch. 19.

** L. Patterson, supra note 89, at 173-75.

** H. Ransom, The First Copyright Statute 127-28 (1956). During the 1590’s a number of works, including Romeo and Juliet and Henry the Fifth, were pirated. Id. at 127; see also Enfield, Observations on Literary Property, in The Literary Property Debate: Eight Tracts (1774-1775) (Park ed. 1975).

** See Enfield, supra note 93, at 9-52.

** Id. at 12.

** Id.

** Id. at 23.
Enfield concluded:

The sum of the preceding observations is this. The right of authors to the exclusive possession of their own works is founded in nature; and unless any sufficient cause appears for depriving them of it, ought to be secured and guarded by law.\(^8\)

A similar view was expressed in a dissenting opinion in a Scottish case reconsidering the issues raised in Donaldson.\(^9\) Lord Monboddo stated:

The common law of Scotland and England must, I think, be the same in this case, as the common law of both is founded upon common sense and the principles of natural justice, which require that a man should enjoy the fruits of his labors.

Upon the whole, therefore, I am of the opinion, first, that authors had a right of property in their works before this act was made; and second, that such a right was not taken away by the act.\(^10\)

English common law acceptance of the natural law origins of author's rights permeates American law as well. As in England, common law copyright has been replaced—in most instances—by statutory copyright.\(^11\) Vestiges of common law protection remain in certain equivocal pockets of indecisive national policy. One of these is the doctrine of droit moral.

American Law

An early American copyright case, Wheaton v. Peters,\(^12\) recognized the natural law basis for common law copyright but followed the English lead in Donaldson in subordinating common law copyright to statutory copyright.\(^13\) In the American view, however, publication and statutory protection not only secured common law rights and superseded them, it essentially negated and replaced them. The case for natural law and com-

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\(^8\) Id. at 51.
\(^10\) See Enfield, supra note 93, at 13.
\(^11\) See Copyright Act of 1976, 17 U.S.C. § 301 (1982). Section 301 provides, in part, "[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title." Id; see also Brown, Unification: A Cheerful Requiem for Common Law Copyright, 24 U.C.L.A. L. Rev. 1070, 1078-89 (1977) (unified system does not significantly diminish rights existing under state law). But see Goldstein, Preempted State Doctrines, Involuntary Transfers of Compulsory Licenses: Testing the Limits of Copyright, 24 U.C.L.A. L. Rev. 1107, 1108 (1977) (act abolishes state laws equivalent to copyright). Section 301 is a prime example of what it means to depart from the objects of copyright. Id. at 1108.
\(^12\) 33 U.S. (8 Pet.) 591 (1834).
\(^13\) Id. at 657-59.
mon law copyright appeared in the dissenting opinions of Mr. Justice Thompson and Mr. Justice Baldwin. Mr. Justice Thompson described the common law copyright as "established in sound reason and abstract morality," a reference intended to evoke the principles of right, reason, and natural law. The majority held to the contrary, stating that copyright was a grant from the government in the form of a statutory privilege, not the sanction of a preexisting natural right.

Early American commentators on domestic and international copyright continued to recognize the contribution of natural law to the protections available to authors either through common law or statutory copyright. The common natural law basis for authors' creative rights was one shared strand that influenced supporters of international copyright in the nineteenth century. American commentators in recent years have, either implicitly or explicitly, stated their acknowledgement of the natural law origin of many of the rights equivalent to the European author's moral rights. Some American courts have made similar statements, although it is widely understood that the author's moral and creative rights are not, at present, either fully recognized or protected under American law. This is one explanation for the lack of critical discussion on the origin of the author's moral rights in American law: if the rights don't exist, how can they have antecedents? Frequent calls for reform of the American copyright law have been made so that the author's moral rights might acquire the protection that many commentators believe they deserve.

CONCLUSION

The doctrine of moral right has an established place in the national laws of the European countries. Under the auspices of the Berne Convention, the doctrine has been accepted in many other nations throughout the world. Even in countries where the theory of the author's moral rights

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104 Id. at 672 (Thompson, J., dissenting). Justice Thompson argued that the copyright of authors was protected by the principle of "right and wrong, the fitness of things, convenience and policy." Id. at 671 (Thompson, J., dissenting); see also Wheaton v. Peters, 29 F. Cas. 862, 866-67 (E.D. Pa. 1832) (No. 17,486).
105 33 U.S. at 661.
108 Patterson, supra note 10, at 1183.
109 Streibich, Part II, supra note 10, at 63-72.
110 See supra notes 26-27.
111 See supra note 25.
112 See, e.g., Bill introduced to amend Copyright Act of 1976, H.R. 288, 96th Cong., 1st Sess. (1979); see also supra note 2.
Natural Law

has not achieved the status of recognized law, certain protections exist within existing legislation. Further, there continues to be frequent expressions of support for adoption of the doctrine.

There has been, however, a paucity of scholarly inquiry into the historical and jurisprudential origin of the doctrine. Allusions to the source of the theory usually end with reference to nineteenth century French courts. To the contrary, many small bits of evidence exist which tend to demonstrate, in sum, that the philosophical origin of the theory of the author's creative and moral rights may be found in natural law. Natural law theories of property found in the early Roman law and adopted by the English provide one source of data. Similarly, early natural law jurists and philosophers concerned with natural rights provide another source of support for the type of rights embraced by the doctrine. Moreover, renewals and revivals of natural law jurisprudence and natural rights movements coincide with the development of the doctrine. A complete lack of data indicating other potential sources of the theory essentially closes other alternative possibilities. The best argument that can be made is that the droit moral has its philosophical roots buried deeply in natural law theories that permeate both the later English and American common law and the natural rights movements of the eighteenth, nineteenth, and twentieth centuries.