THE CREATOR'S MORAL RIGHTS UNDER PHILIPPINE LAW

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I. INTRODUCTION

> Experience has shown that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works. The higher the level, the greater the encouragement for authors to create; the greater the number of a country's intellectual creations, the higher its reknown; the greater the number of productions in literature and the arts, the more numerous their auxiliaries in the book, record and entertainment industries; and indeed, in the final analysis, encouragement of intellectual creation is one of the basic prerequisites of all social, economic and cultural development.[1]
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> ARPAD BOGSCH
> Director General
> WIPO

It is tragic that the people who have devoted their lives to intellectual creation must often be victimized by those who would wrongfully appropriate not only their works, but the honor and recognition due them. This has made the protection of the rights of an author against the ever-increasing rise of intellectual piracy a perennial problem not only in our country but in the international community as well.

The Charter of the United Nations provides for the respect of the fundamental rights and freedoms of the individual.[2] Pursuant to its goals, the Commission on Human Rights has obligated itself to take the necessary measures to preserve those rights and freedoms,[3] among them being those that are now embodied in Article 27 of the Universal Declaration, viz:

> 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefit.
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> 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[4]

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1 World Intellectual Property Organization (WIPO) Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) 3 (1978).

2 Arts. 55 and 56.

3 G. EZEJIOFOR, PROTECTION OF HUMAN RIGHTS UNDER THE LAW 85 (1964).

4 Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resoution 217 A (III) of 10 December 1948.

These principles were adopted in the International Covenant on Economic, Social and Cultural Rights. Thus, Article 15 thereof provides:

> The States Parties to the present covenant recognize the right of everyone:
> a) To take part in cultural life;
> b) To enjoy the benefits of scientific progress and its applications;
> c) To benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author.[5]

The international protection given to cultural rights has also been consistently recognized by our own fundamental laws. Hence, Article XIV, Section 4 of the 1935 Constitution had mandated that:

> "The state shall promote scientific research and invention, arts and letters shall be under its patronage. The exclusive right to writings and inventions shall be secured to authors and inventors for a limited period."

When the 1973 Constitution came into effect on January 17, 1973 by virtue of Proclamation No. 1102, the essence of the aforementioned provision was subsumed under a broader article. Article XV, Section 9(2) recites, thus:

> Filipino culture shall be preserved and developed for national identity. Arts and letters shall be under the patronage of the State.

The recently ratified 1987 Charter embodies a more defined recognition of the rights of an author. Its State Policies emphasizes "priority to education, science and technology, arts, culture and sports to foster patriotism and nationalism, accelerate social progress, and promote total human liberation and development."[6] In addition, Article XIV provides that:

> Section 13. The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.
> Section 14. The State shall foster the preservation, enrichment and dynamic evolution of a Filipino national culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression.
> Section 15. Arts and letters shall enjoy the patronage of the State.

This innovation is significant particularly when we read it in consonance with Section 39 of Presidential Decree 49, better known as the Decree on the Protection of Intellectual Property, which declares that the moral rights of a creator are perpetual and imprescriptible. Both the Constitution and the copyright law evidence a public concern on, and the state's direct interest in, the protection of the rights of a creator and closely links

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[5] International Covenant on Economic, Social, and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1986.

[6] CONST., Art. II, sec. 17.

that protection to the preservation and integrity of the nation's cultural heritage.

Consistent with the constitutional mandates, P.D. 49 was promulgated "to give further protection to intellectual property, and to encourage arts and letters, as well as stimulate scientific research and invention at the same time safeguard the public's right to cultural information."[7] This decree has been considered the proper complement to the Constitution, a landmark legislation in the field of intellectual property law and definitely a major step in the right direction.[8]

II. THE THEORETICAL FOUNDATION OF MORAL RIGHTS

> When an artist creates, be he an author, a painter, a sculptor, an architect or musician, he does more than bring into the world a unique object having only exploitative possibilities; he projects into the world part of his personality and subjects it to the ravages of public use...[9]

The above passage can best describe the theoretical foundation of Presidential Decree No. 49. The law adopts a two-dimensional approach to the protection of intellectual property. On the one hand are property rights which involve the pecuniary or economic elements of exploitation of created works that are recognized in the provisions pertaining to copyright, and the residual economic right of *"droit de suite."*[10] On the other hand are personal rights which belong to an artist as creator of the work as exemplified in the chapter on "Moral Rights."[11] The recognition of these so called "moral rights of an artist," as founded upon the philosophy expressed by Kant, "who conceived literary creation as part of author's personality, and his right to the product of his mind as a personal right (*ius personalissimium*)."[12]

The moral right of an artist to his own creation developed as a doctrine largely through the efforts of nineteenth century French and German jurists.[13] The term "moral right" as applied to art is derived from

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[7] *Ibid.*

[8] Interview with Atty. Esteban B. Bautista, Head of the Division of Research and Law Reform, University of the Philippine Law Center, Quezon City, January 23, 1987. He is also the author of the Presidential Decree on Intellectual Property better known as PD 49.

[9] Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators,* 53 HARV. L. REV. 557 (1940).

[10] Address by Prof. Esteban B. Bautista, Institute on Intellectual and Industry Property: Law, Practice and Government Regulation, UP Law Center, February 17-24, 1975, LAW ON INTELLECTUAL AND INDUSTRIAL PROPERTY 7-117 (1975).

[11] Pres. Decree No. 49 (1972), Chap. X, Secs. 38-40.

[12] F. KASE, COPYRIGHT THOUGHT IN CONTINENTAL EUROPE: ITS DEVELOPMENT, LEGAL THEORIES AND PHILOSOPHY 10 (1967).

[13] However it would be wise to point out that there is no common doctrinal approach to the nature of the right. Even the continental states which recognize the moral right doctrine are not in accord as to all elements of the various moral rights which govern the relationship between artist and his work. See Marvin, *The Author's Status in the United Kingdom and France: Common Law and the Moral Right Doctrine,* 20 INT'L & COMP. L.Q. 676 (1971).

the French concept *"droit moral"*; however, it has been opined that its intended meaning is better expressed by the German term *"Urheberpersonlichkeitsrecht,"* which means "the right of the author's personality."[14] The French concept of *"droit moral"* utilized as the conceptual springboard for this paper, inasmuch as the doctrine of moral rights, it is said, has been best expressed and studies in France — "The country which pays the greatest homage to moral rights."[15]

Under the French legal system, the concept of literary and artistic rights involves two basic elements. The first is parallel to the British and American concept of copyriught. It is a property right which assures to the artist the exclusive right to control the reproduction and distribution of his creation to the public. The second element is the *"droit moral"* encompassing "non-property attributes of an intellectual and moral character which give legal expression to the intimate bond which exists between an... artistic work and its author's personality."[16] The latter element exists independently of the former.

The development of the property right may be traced to the Decree of January 13-19, 1971, relating to theatrical productions, by virtue of which the prerogative of authors to authorize or prohibit public performance of their compositions was recognized. Two years later, another decree was issued giving the authors exclusive rights over the publication of their works. Unlike the property right element, the *"droit moral"* had at the outset no basis in statute or code. Instead, the doctrine slowly took shape from the numerous decisions handed down by French tribunals and courts in the last century.[17] Two sweeping changes which became evident in the nineteenth century have been cited as providing impetus to its development.[18] One of these was economic in nature. The quantity and frequency of aristocratic patronage or church commissions slowly declined, thus artists could no longer rely on commissioned works as a primary source of income. It was observed that:

> Instead, works were thrust out upon the open market just like any other commodity and were subject to the vicissitudes of the free market economy in aesthetic creations. As an entrepreneur of sorts, the artist became dependent upon his public reputation in order to develop a clientele. This reputation was easily damaged if the artist was deprived of credit or associated with a work which was not his, or if his works were altered so that they did not represent his artistic personality.[19]

The other change was a matter of aesthetics.

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[14] P. Karlen, *Moral Rights in California,* 19 SAN DIEGO L REV. 684 (1982).
[15] S. ROTHENBERG, COPYRIGHT AND PUBLIC PERFORMANCE OF MUSIC 90 (1954).
[16] Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law,* 16 AM. J. COMP. L. 465 (1968).
[17] *Ibid.*
[18] P. Karlen, *op. cit. supra,* note 22 at 682-684.
[19] *Ibid.,* p. 683.

> With the flowering of romanticism in the nineteenth century, the artist's right to "follow the call of his feelings and individual disposition" was emphasized as never before. The work of art was no longer severely restricted by patrons in terms of subject matter, form and content. Rather, it became the personal expression of the artist, revealing his individual perceptions and sensibilities. Thus, false attribution of work and interference with the integrity of the work by mutilation, alteration, or presentation out of context, were increasingly construed as personal attacks on the artist. The public, also imbued with romantic notions about art, was sympathetic regarding moral rights, . . .[20]

In the course of time, the doctrine of *droit moral* was embodied in the dualist theory of copyright crystallized in French statute. Partaking of the Latin concept of copyright, the theory construed the work of the mind as inseparable from the artist and remained indissolubly attached to the person of the artist, thus "excluding all possibility of an absolute transfer, the personal, moral element retaining always a pre-eminence over the pecuniary, commercial element in the exploitation of the work."[21] So that by the mere fact of creation, an intellectual manifestation of the personality of the artist, the rights of the artist to his creation are vested — pecuniary and moral. The latter includes his right "to enforce the use of his name attached to his work, to oppose any modification of his work and anything that might harm his honor and his reputation".[22]

III. LEGAL DIMENSIONS OF THE MORAL RIGHT DOCTRINE

> *Le droit moral est le droit pour 'auteur de creer, de presenter ou non sa creation au public sous une fome de son choix, de disposer de cette forme souverainement et d'exiger de tout le monde le respect de sa personalite en tant qu'elle est liee a sa qualite d'auteur.*[23]

After decades of redefinition, the moral right of an artist to his creation has finally evolved into the present basic concept of an artist's personal right to protection of his artistic reputation.[24] It comprises diverse interests and that might harm his honor and his reputation".[22]

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[20] *Ibid.*

[21] Pares, *The French Conception of Copyright,* 2 REVUE INTERNATIONAL DU DROIT D'AUTER 4 (1954).

This conception must be contradistinguished from the Anglo-Saxon conception of copyright where a work of the mind is a saleable work, a personal property similar to any other commercial article, the ownership of which can pass, and fact does pass, in its entirety from the head of the author to that of the publisher, the transfer having the effect of eliminating the author from the exploitation of his work, at least as owner of the publishing and reproduction rights. The conception is deemed to be "rational and logical, and more concerned with practice considerations." See also Monta, *The Concept of "Copyright" versas the "Droit D'Auter,"* 32 SO. CALIF. L. REV. 185 (1959).

[22] R. Monta, *ibid.,* p. 181.

[23] Definition of Michaelides-Novaros, cited in M. ROEDER, *op. cit. supra,* note 16 at 578.

The right of the creator to create, to present his creation to the public in any desired form or to withhold it, and to demand from every one respect for his personality as creator and for his morals.

[24] Strauss, *The Moral Right of the Author,* 4 AM. J. COMP. L. 506 (1955).

[25] P. Karlen, *op. cit. supra,* note 22 at 684-685.

1. The rights to create and to control disclosure and publication of artistic works, and the corollary rights to withhold or withdraw them from publication;
2. The rights of authorship or paternity rights, including the right to be acknowledged as the author of the work under one's own name or pseudonym, rights to protection against false imputation, and the right to object to excessive criticism and attacks on the author's professional reputation; and
3. The rights of integrity, including the rights to object to the destruction of one's own work and to prevent its mutilation, distortion or alteration.

Again, it must be noted that while a number of countries have recognized the moral right doctrine, either through their respective legislative enactments, or through international conventions such as the Berne Convention, the substantive components of this doctrine are yet to be accepted by all. Nevertheless, Article 6 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)[26] to which the Philippines is signatory, enshrines two basic moral rights of an artist.

Article 6

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

. . . . .

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

The two basic rights protected under this Article are the right to paternity and the right to the integrity of the artist's work, i.e., "right of respect." These rights exist independently of the artist's economic rights and even after the transfer of the said right.[27] However, the drafters of the revised Convention apparently thought it wise to adopt a general formula for the setting up of minimum standards as regards the substantive components and legal consequences of the moral rights. An illustration of this approach was the non-categorical treatment of the alienability issue of moral rights. Article 6 does not expressly state that moral rights are

There are other alternative ways of classifying moral rights. See Devlin, *Moral Rights in the United States,* 35 CONN. BU. J. 509 (1961): paternity, integrity, disclosure, withdrawal and protection from excessive criticism and R. Sarraute, *op. cit. supra,* note 9 at 467: paternity, integrity, withdrawal and disclosure.

[26] The History of the Berne Convention is marked by five revisions and two additions. The Berne Convention for the Protection of Literary and Artistic Works was concluded on September 9, 1886 at Brussels. It was, thereafter, revised on November 13, 1908 (Berlin); June 2, 1928 (Rome), June 26, 1948 (Brussels), July 14, 1967 (Stockholm) and finally June 24, 1971 (Paris). In addition to the revision conferences, an additional act and interpretative declaration was signed at Paris, May 4, 1896 and an additional Protocol at Berne, March 20, 1954. Article 6 was included in Rome at the 1928 conference. See WIPO, *op. cit. supra,* note at 6.

[27] WIPO, *Ibid.*, note 1 at 42.

inalienable (French proposal). The general report of the Rapporteur confirmed that in adopting the above article, the Rome Conference intended to leave that issue outside the scope of the Convention and within the jurisdiction of national legislation.[28] Consequently, the correct construction of the article, as confirmed by Rapporteur General E. Pida Caselli of the Rome Conference, would read that "the transfer of economic rights does not in and of itself include the transfer of moral rights and does not necessarily mean that moral rights themselves are incapable of transfer."[29] In effect, a wide and elastic area for legislative and judicial action was left to the union countries.[30]

It was in the spirit of the Berne Convention that Presidential Decree No. 49 was formulated. Independently of the economic rights accruing to copyright ownership, Chapter IV of the Decree articulated the moral rights of a creator, which vest from the moment of creation,[31] and the conditions under which they may be invoked and exercised.

> Section 34. Independently of the rights conferred by Chapter II [Limitation on Copyright] and III [*droit desuite*] of this decree, or the grant of an assignment or license with respect to any of such rights, a creator shall have the right:
> a) To make alterations of his work prior to, or to withhold it from publication;
> b) To require that the authorship of the work be attributed to him;
> c) To object to any alteration of his work which is prejudicial to his reputation;
> d) To restrain the use of his name with respect to any work not of his creation or in a distorted version of his work.

Incidentally, a perusal of section 2 of the Decree which enumerates the various artistic, literary, scholarly and scientific works protected under this law would reveal that ideas as such are not protected under P.D. No. 49. It is only when the idea has been expressed and elaborated in some form that protection attaches. "It is the form of expression which is capable of protection, and not the idea itself."[32]

A. RIGHT TO CREATE, ALTER AND WITHHOLD

The first of the rights enumerated in Section 34 constitutes the very basis of all creative work — the right to create, "which is a function of the right of individual liberty."[33] A corollary to this right is the right *not* to create, i.e., to refuse to create in whatever form or medium.

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[28] Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 524 (1967).
[29] *Ibid.*
[30] Under Philippine Law the absolute inalienability doctrine has been rejected. See later discussion on Article 36 of PD No. 49.
[31] Pres. Decree No. 49 (1972), sec. 2.
[32] WIPO, *op. cit., supra*, note 1 at 12.
[33] M. Roeder, *op. cit., supra*, note 16 at 558.

> So long as a work of art has not been completely created — of which the artist alone can be judged — it remains a mere expression of its creator's personality, and has no existence beyond that which he tentatively intends to give it. It is only a rough draft, and no one but the artist can have any rights in it. Only the author can decide whether his work corresponds to his original conception, at what moment it is completed, and whether it is worthy of him. He alone is able to determine when it should be disclosed, put into circulation, and treated as a chattel which may be exploited for profit.[34]

Naturally, an extension of the right to create is the right of divulgation — right to publish or, otherwise, to make secret the work. It was held to consist of the right of the creator to decide independently when and how to communicate his work to the public.[35]

Three leading French cases have been cited by the notable French jurist Raymond Sarraute as clearly outlining the principal characteristics of these rights.

The Whistler v. Eden Case[36]

American painter Whistler was commissioned to paint the portrait of Lady Eden for a fee of 100 to 150 guineas. He completed the portrait and publicly displayed it in his salon with some of his other works. Lord Eden proferred a check in the sum of 100 guineas. Whistler complained that the amount was insufficient, but he nevertheless encashed the check. Thereafter, he overpainted Lady Eden's portrait, claiming he was dissatisfied with the portrait and refused to deliver the painting.

The lower court held that the contract was valid and ordered Whistler to restore the painting to its former state and deliver it to Lord Eden, and to pay, among others, 1,000 francs as damages. On appeal, the Paris Court of Appeals held that the contract was executory and since Lord Eden had never received the painting, he acquired no ownership rights thereto. Consequently, Whistler could not be legally forced to restore the painting and to deliver it to Lord Eden. However, he was liable to return the fee he received in consideration for the portrait and to pay damages.

The Court of Cassation, affirming the appellate decision, stated:

> Whereas, the agreement by which a painter engages himself to execute a portrait for a predetermined price constitutes a contract of a special nature, by virtue of which ownership of the painting is not definitively acquired by the party which commissioned it until the artist has put the painting at the party's disposal and the party has accepted it;
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> Until that moment, the painter remains master of his work, without, however, it being permissible for him to retain it for himself or to assign it to a third party in the state of a portrait, since the right to reproduce

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[34] R. Sarraute, *op. cit., supra,* note 24 at 467.

[35] W. Strauss, *op. cit., supra,* note 32 at 512.

[36] Trib. Civ. Seine, D.H. 1898. 2, 465. Courd' Appel Paris, S. 1900.2.201. Cour de Cassation, S. 1900.1.489

> the model's features has been ceded to him only conditionally, for the purpose of fulfilling the contract; and if the artist fails to perform his contract, he is liable for damages.[37]

The Camoin v. Carco Case[38]

This second leading decision was handed down on March 6, 1931. French painter Camoin had slashed and discarded a number of canvasses that he was not content with. Thereafter, they were recovered by a third party, restored, and sold to the writer Francis Carco. These were eventually put up for publication in 1925 as part of Carco's private collection. Camoin had the paintings seized under court order and prayed that they be destroyed. The Paris Court of Appeal held that the artist Camoin had the moral right to destroy his work, thereby removing them from public circulation.

> Whereas, literary and artistic rights comprise a right which is in no way pecuniary in nature but which, attached to the very person of the author or the artist, permits him during his lifetime to surrender his work to the public only in such a manner and under such conditions as he sees fit, the gesture of the painter who lacerates a painting and throws away the pieces because he is dissatisfied with his composition does not impair this right; and although whoever gathers up the pieces become the indisputable owner of them through possession, this ownership is limited to the physical quality of fragments, and does not deprive the painter of the moral right which he always retains over his work. If the artist continues to believe that his paintings should not be put into circulation, he is within his rights to oppose any restoring of the canvas and to demand, if necessary, that it be destroyed.[39]

The Rouault v. Vollard Heirs Case[40]

The painter Rouault was under contract with art dealer Vollard that he would turn over to the latter the entirety of his artistic production. A large number of unfinished canvasses (806) were transferred to Vollard's gallery, where they remained at Rouault's disposition in a room to which he had a key, to enable him to put the finishing touches thereon. After Vollard's death, his heirs claimed ownership of these canvasses. Rouault, asserting that they were unfinished, contended that he alone could decide on their final delivery.

The Paris Court of Appeals, affirming the lower court's decision, ruled in favor of the painter.

> Whereas, one who negotiates with an artist for an uncompleted work which the author retains in his possession, reserving the right to finish it, contracts for future goods whose ownership can be only transferred by

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[37] R. Sarraute, *op. it., supra,* note 32 at 512.
[38] Cour d'Appeal Paris, D.P. 1931.2.88.
[39] R. Sarraute, *op. it., supra,* note 24 at 468.
[40] Cour d'Appeal Paris, D.P. 1949.20.31.

> delivery without reservation after completion, and is not like the buyer who purchases an artistic production in any state which the painter intends definitively to part with even though it is in the form of a sketch;
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> Therefore, until final delivery the painter remains master of his work, and may perfect it, modify it, or even leave it unfinished if he loses all hope of making it worthy of himself;
>
> This inalienable right, an attribution of the artist's moral right persists notwithstanding any agreement to the contrary; and the breach of any such agreement exposes the author who changes his mind only to damages.[41]

The tenor of the decision in the above case was adversely commented upon since it went much too far in upholding the moral right of the painter. The double standard allegedly utilized by the Court, that is, one set of laws for intellectual works and artists outside the ordinary law and above any contract, was deplored. "The expression ... 'despite any contract the right is inalienable,' is outdated and, in any case, too general. The theory of a right in the personality has consequences which appear more and more dangerous. Let us hope that the decision in the *Rouault* case will not make the moral right the basis of error and whim, and that it will not be involved in the face of a contract freely entered into."[42]

At any rate, this particular problem of inalienability may be considered settled under Presidential Decree No. 49, which in effect, rejected the French Principle of inalienability of moral right. Section 36 of the Decree provides that:

> "A creator may assign or waive his rights mentioned in section 34 of this decree by a written instrument expressly so stating, but no such assignment shall be valid where its effect is to permit another:
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> a) To use the name of the creator, or the title of his work, or otherwise to make use of his reputation with respect to any version or adaptation of his work which because of alterations therein, would substantially tend to injure the literary or artistic reputation of the author; or
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> o) To use the name of the creator with respect to a work he did not create."

Although, Presidential Decree No. 49 embodies the ideal component of the right of a creator against compulsion to perform his contract to create or publish his work, it adopts the principles enunciated in the above stated cases, which makes the creator liable for damages for breach of such contract.[43]

Moreover, because of the right of divulgation, it has been held that the author is shielded against creditors proceeding against him for nonpayment of the rent of his apartment and levying execution of a manuscript

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[41] R. Sarraute, *op. cit., supra,* note 24 at 469-470.

[42] W. Strauss, *op. cit., supra,* note 32 at 512.

[43] Section 35. A creator cannot be compelled to perform his contract to create a work or for the publication of his work already in existence. However, he may be held liable for damages for breach of such contract.

in order to publish it.[44] While the author is not released from his personal debts, no other person may effect the publication of his work for the satisfaction thereof.

Recognition has been made of the right of an artist to rescind his contract of publication at any time before actual publication has taken place. As an incident to the right of divulgation, the right may be exercised for such personal reasons as change of conviction on the part of the artist, or new discoveries or unforseen events which render the work created obsolete.[45] In the case of *Anatole France v. Lemerre*,[46] the famous author France had written in 1882 a history of France which had been sold to the defendant publisher. The latter did nothing with the manuscript for 25 years; at the end of such period, it decided to publish the work. France protested on the ground that within the 25-year time span, so many eventful changes had occurred rendering his work obsolete. Consequently, to permit the publication of such work would greatly prejudice his literary reputation. Upon the finding that the delay was unreasonable, the court decided in plaintiff's favor, ordering the rescission of the contract, i.e., the return by France of the consideration paid to him, and the delivery of manuscript by the publisher to the author.

In *Morang & Co. v. Le Seur*[47] the Canadian Supreme Court permitted the rescission of a contract and decreed the return of the manuscript which the publisher himself refused to publish because the "ideas expressed did not coincide with the general temper of the series in which the manuscript was to be published.[48]

Although the two cases just cited are illustrative of the failure of the publisher to perform under the contract of publication, it has been argued that a creator should have the right to rescind in the case of honest changes of conviction or in case of unforseen events making injury to him. Otherwise, he would be gravely misrepresented to the public and might suffer irreparable damage. The creator should be required, of course, to make the publisher whole restitution for any pecuniary outlay as a condition precedent to the rescission.[49]

Indeed, Sections 34 and 35 of Presidential Decree No. 49 recognize the creator's right to withhold his work from publication and, at the same time, liability for damages for breach of such contract in the event he exercises such right. However, following the reasoning of the cases cited above, where the failure to publish is due to the publisher's fault or to a party other than the creator or author, simple rescission is available to the

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44 Bartlett v. Critterden, 2 Fed. Cas-967, No. 1, 076 (C.C.D. Ohio 1849).
45 E. Bautista, *op. cit., supra,* note 18 at 19.
46 Civ. Trib. Seine, December 4, 1911, Dat. 12.1.98.
47 45 Can. Sup. Ct. 96 (1911).
48 M. Roeder, *op. cit., supra,* note 16 at 560.
49 *Ibid.,* note 14 at 561.

creator and thus, he is not liable for damages. Consequently, where there is no fault on the part of the publisher, and the reason for the invocation of the right under section 34(a) is an honest charge of conviction on the part of the creator or loss of his creative inspiration, damages for breach of contract could be and should be made available against the creator. Raymond Sarraute had suggested that a dealer could not obtain indemnity, i.e., damages, from the painter who fails to fulfill his contract for "no court will find that the lack of inspiration on the artist's part constitutes breach of contract. It is a normal risk inherent in any contract having as its object the production of a work of art."[50] It is unlikely that such generous position would be adopted by the courts in this jurisdiction. To recognize "lack of inspiration" or even "change of mind" on the part of the creator as a normal risk in any creative contract would run counter to section 1182 of our Civil Code which declares potestative conditions[51] as void. Moreover, when a contract is reduced to writing, it is generally held, in the absence of mistake or fraud, that the written contract includes or embodies the whole agreement of the parties and all material provisions and that no additional agreements, obligations, warranties or *risks* can be implied,[52] except those provided by law or recognized by jurisprudence (i.e., fortuitous events, loss of the thing due). Neither is it likely that lack of creative inspiration or change of conviction would be considered as a ground for invoking impossibility of performance under section 1266 of the Civil Code or even manifest difficulty of performances under section 1267 of the same code.[53] It is a basic principle that for a supervening physical impossibility of performance to operate as a defense available for an obligor, it must be fortuitous and unavoidable on his part.[54] Moreover, the provision expressly provides that it must be without *fault on the part of the obligor.* Manifest difficulty of performance, or moral impossibility or impracticability under section 1267 is also premised on the occurrence of objective conditions beyond the responsibility and contemplation of the parties. Thus, in the *Labayen v. Talisay-Silay Milling Co. Case*[55] the non-construction of the railroad because of iminent danger to life and property, was excused. However, in the case of *Castro, et al. v. Longa,*[56] when instead of extreme danger there is proved only the existence of mere inconvenience, unexpected

[50] R. Sarraute, *op. cit., supra,* note 24 at 480.

[51] Civil Code, Art. 1182: "When the fulfillment of the condition depends upon the sole will of the debtor, the conditional obligation shall be void . . ."

[52] Birmingport Lumber Co. v. Chickasaw Wood Products Co., 244 Ala. 345, 13 So. 2d 770 (1943).

[53] Civil Code, Art. 1266: "The debtor in obligations to do shall also be released when the prestation fault of the obligor." See also Civil Code, Art. 1267: "When the service has become so difficult as to be manifestly beyond the contemplation of the parties, the obligor may also be released therefrom, in whole or in part."

[54] Sale v. State Highway and Public Works Commission, 242 NC ....12, 89 SE 2d 290 (1955); Wilson v. Page, 45 Ternn. App. 475, 325 SW 2d 294 (1958).

[55] 32 Phil. 440 (1915).

[56] 89 Phil. 581 (1951).

impediments, or increased expenses, failure to comply with obligations under the contract is not excused.

Another corollary to the right to refuse publication is the right to withdraw the work from public circulation. The creator has "the right to purchase at wholesale price all outstanding copies of his work still in the hands of a person to whom he has add his copyright or given a license."[57] The exercise of this right may be permitted where the convictions of the creator have undergone a radical change, or the work has become obsolete.[58] On the other hand, the right of withdrawal, as suggested by Raymond Sarraute, is of little efficacy for "once a thought is expressed, circulated, criticized, it cannot be erased. Copies of a book which have been sold cannot be destroyed."[59] If an author does not have the inclination nor financial resources to pay the necessary indemnity to the publishing house for a printed work not yet published nor circulated,[60] the only other recourse for him is to set forth his modified views in a new work.[61] But where the publisher or assignee of the work has infringed a moral right of the creator, the right to withdraw and destroy the works in the possession of the infringer may be granted as a remedy to the creator.[62]

The temporal dimension of the creator's right to create, alter or withhold his work is anchored on the fact of "publication." Under Section 41(d) of PD No. 49, "publication" is restrictively defined as the issue or offering to the public of copies of a sound recording in reasonable quantity. Unfortunately, such a definition is confined within the context of rights of performances, producers of sounds, recordings and broadcasting organizations. A more definitive and appropriate definition may be inferred from Article 3 paragraph (3) of the Berne Convention (Paris Act 1971) which defines "Published works", as follows:

> The expression "published works" means works published *with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work.* The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication. (Emphasis supplied)[63]

The revised definition was formulated in the Stockholm Conference of 1967. It makes clear that the author's consent is required, the purpose being to disregard any publication which is itself a violation of the artist's

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57 M. Roeder, *op. cit., supra,* note 16 at 561.
58 *Ibid.*
59 R. Sarraute, *op. cit., supra,* note 24 at 477.
60 C. Marvin, *op. cit., supra,* note 21 at 40.
61 R. Sarraute, *op. cit., supra.*
62 M. Roder, *op. cit., supra.*
63 WIPO, *op. cit., supra,* note 1 at 28.

rights under the convention.[64] Where copies of a work were made under a compulsory license, the author may refuse to consider as published such work.[65] If a stolen literary composition was reproduced, and sufficient copies thereof were made available to the public for sale, the composition cannot be deemed "published" as against the author of the work. Thus, he may absolutely invoke his right to alter or withdraw his work, and copies thereof, from circulation.

Moreover, a more elastic formula to determine when a work is brought to public notice has been adopted. Two elements are taken into consideration: "reasonable requirements of the Public", and "nature of the work." The inclusion of these elements in the definition is recognition of the fact that other works, such as cinematography films, are not placed on sale like books, magazines and paper;[66] and that copies of works need not be sold. The availability to the public maybe by means of renting or loan or even the free distribution of copies.[67]

Yet, the above paragraph specifies certain acts which do not constitute publication, i.e., performance, public recitation, communication by wire, broadcasting, exhibition of a work of art, and the construction of a work of architecture, because these "produce only a fleeting impression of the work, whereas publication involves the distribution of material things (books, discs, films, etc.). For a work to the published, there must exist something tangible embodying it... and these tangible things must, in principle, be something one can hold in one's hands."[68]

B. Right of Paternity

The paternity right of an artist consists of his right to be made known to the public as the creator of his work to prevent others from usurping his work, and to prevent others from wrongfully attributing to him a work he has not created, or presenting a distorted version of his own work.[69] As early as August 8, 1837, the Paris *Cour d'Appel* found that "the collaborator whose name has been omitted without his knowledge from the title of a work may obtain recognition of his authorship and his rights through the court."[70] Another dimension of this right was expounded in the case of *Fortum v. Prevost-Blondel*,[71] where a third party was not allowed to write his own name in place of the signature of the creator on the work. The second and fourth rights enumerated in section 34 of

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[64] *Ibid.*
[65] *Ibid.*, note 1 at 27.
[66] *Ibid.*, note 1 at 28.
[67] *Ibid.*
[68] *Ibid.*
[69] W. Strauss, *op. cit., supra,* note 32 at 508.
[70] D. Repeteroire de Jurisprudence V. Prop. Lit. et Art. No. 194, cited in R. Sarraute, *op. cit., supra,* note 24 at 448.
[71] Cour de Paris, January 25, 1889. D.P. 1890. 2.243.

Presidential Decree No. 49 embody this concept when it states that a creator shall have the right:

> . . . . .
> "(B) To require that the authorship of the works be attributed to him;
> . . . . .
> (D) To restrain the use of his name with respect to any work not of his own creation or in a distorted version of his work."

Similar to the French doctrine, the general rule is that the right of paternity is perpetual and unassignable.[72] Section 39 of the Decree provides that the rights under the Moral Rights Chapter shall be *perpetual* and *imprescriptible.* An exception to this general rule of inalienability is articulated in Section 37, which provides that when a creator contributes to a collective work, like a newspaper or an encyclopedia, his right to have his contribution attributed to him is deemed waived unless he expressly reserves it.

May the right to require that the authorship of the work be attributed to him be waived or assigned? A perusal of Section 36 would lead to a positive conclusion. According to this section, the right to use the name of the creator may not be assigned nor waived. Thus, applying the principle of *expressio unius et exclusio alterius,* it could be argued that the 'non-use' of the name of the creator may be stipulated by the creator. This statutory exception runs counter to the French doctrine embodied in *Guille v. Colmant,*[73] where the Paris Court of Appeals declared a contract between a painter and an art dealer void on the ground that it violated, among others, the painter's right to have his authorship recognized and his name respected. Under the contract, the dealer agreed to pay the painter a monthly allowance in return for a part of his production. The artist, on the other hand, obligated himself to sign with a pseudonym all the canvasses reserved for the dealer, and to place no signature on the rest. The Appellate Court held that the contract was void since it prohibited him from signing certain works and compelled him to utilize a pseudonym.[74] The strong censure by the Court may be attributed to the fact that the contract in question was to be in effect for a long period of 10 years, subject only to the dealer's option for termination upon a 90-day advance notice. In fact, the underlying tenor of the court may be traced to its recognition of the disadvantageous position taken by the painter.

The right of an artist to claim paternity of his work may be exercised as he wishes. It can be used in a negative way, that is, by publishing his work under a pseudonym or keeping anonymous. Also, he may at any time change his mind and reject his pseudonym or abandon his anonymity.[75] The moral right ensures protection of the identity of the creator as he has

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[72] C. Marvin, *op. cit., supra,* note 21 at 494.
[73] Cour d'Appel Paris, Guille c. Colmant, Gaz. Pal. 1967.1.17.
[74] R. Sarraute, *op. cit., supra,* note 24 at 478-479.
[75] WIPO, *op. cit., supra,* note 1 at 41.

chosen it. In the case of *Ellis v. Hurst,*[76] the plaintiff-author had published two uncopyrighted stories under the pen name "Lieutenant R.H. Jayne." Forty years later, after the plaintiff had acquired a reputation in his own name, the defendants published the two stories under the plaintiff's real name. The New York court ruled in favor of the plaintiff, thereby upholding his right to prevent his actual name from being used in connection with the two stories, without his consent.

In another New York case, *Clemens v. Press Publishing Co.,*[77] the plaintiff offered a manuscript story to the defendant. The latter agreed to accept it for $200 if the plaintiff shortened the story. After the plaintiff did so, the defendant refused to publish the revised manuscript with the plaintiff's name as author, despite the fact that the original manuscript contained his name. The plaintiff brought an action for the price. On appeal the right of the plaintiff was upheld; however, the doctrines utilized by the judges were diverse and dissimilar from the moral rights doctrine as appreciated in continental jurisprudence since American Law did not recognize this doctrine. Nevertheless, the opinion of Judge Seabury is relevant in this discussion:

> ...While an author may write to earn his living and may sell his literary productions, yet the purchaser, in the absence of a contract which permits him to do so, cannot make as free a use of them as he could of the work which he purchased... If the intent of the parties was that the defendant should purchase the rights to the literary property and publish it, the author is entitled not only to be paid for his work, but to have it published in the manner in which he wrote it. The purchaser cannot garble it or put it out under another name than the author; nor can be omitted altogether the name of the author, unless his contract with the latter permits him to do.[78]

The artist is also protected against false imputation of paternity. Public interest and policy have mandated this right to be unassignable, under Section 36 of Presidential Decree No. 49. In the English case of *Lord Byron v. Johnston,*[79] the court granted an injunction against the defendant where the latter advertised for sale certain poems falsely claimed to have been written by the plaintiff. An interesting dictum on this personal right was expressed by the US Court in the *"Mark Twain"* case.[80]

> An author has the right to restrain the publication of any of his literary work which he has never published.... So, too, an author of acquired reputation and, perhaps, a person who has not obtained any standing before the public as a writer, may restrain another from the publication of literary matter purporting to have been written by him, but which, in fact was never so written. In other words, no person has the right to hold another out to the world as the author of literary matter

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[76] 121 N.Y.S. 438 (1910).
[77] 122 N.Y. Supp. 206 (Sup. Ct. 1910).
[78] M. Roder, *op. cit., supra,* note 16 at 563.
[79] 2 Mer. 29 (1816).
[80] Clemens v. Belfor, Clark & Co., 14 Fed. 728 (C.C.Ill., 1883).

> which he never wrote; and the same would undoubtedly apply in favor of a person known to the public under a *nom de plume,* because no one has the right, either expressly or by implication, falsely or untruly to charge another with the composition or authorship of a literary production which he did not write. Any other rule would permit writers of inferior merit to put their compositions before the public under the name of writers of high standing and authority, thereby perpetrating a fraud not only on the writer, but also on the public.[81]

C. RIGHT TO PREVENT DEFORMATION

Section 34 of Presidential Decree No. 49 provides that the creator shall have the right:

> "(c) To object to any alteration of his work which is prejudicial to his reputation."

This third right enumerated, sometimes called the "right of respect or integrity," has often been called the oldest and best known component of the moral rights doctrine.[82] It arises after a completed work has been put on the market by the artist, sold, or made the subject of contracts of publication or performance.[83] Because of its survival in the creator even after his assignment of the copyright, it is most sharply differentiated from the economic right of exploitation, and has aroused the most bitter antagonism.[84] Under Section 36 paragraph (a), this right is not susceptible to assignment nor waiver by the creator.

This right must be distinguished from the counterpart right of the creator to modify his work. The latter is defined as the "right to make any additions, suppressions and other modifications which the author may deem necessary in order to make the work conform to the state of his intellectual convictions."[85] It is significant to note that this counterpart right is not recognized under Section 34 as regards to works after publication or after it has been made a subject of contracts of publication or performance.

The right to prevent deformation has been regarded essentially as negative in nature and does not encompass positive rights, i.e., to conserve, restore, or repair works which have been damaged.[86] Nevertheless, the additional standard of prejudice to the creator's reputation embodied in the law must be kept in mind. Thus, an alteration, whether positive or negative, on the work which results in subjecting the creator's reputation or artistic integrity falls within the scope of this right.

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[81] Cited in W. Strauss, *op. cit., supra,* note 32 at 522.
[82] M. Roeder, *op. cit., supra,* note 16 at 565.
[83] R. Sarraute, *op. cit., supra,* note 24 at 480.
[84] M. Roeder, *op. cit.*
[85] *Ibid.*
[86] P. Karlen, *op. cit., supra,* note 22 at 690.

The classic illustration of this right is the *"Rocky Island with Siren"* case.[87] A German artist was commissioned by the defendant to paint a mural in the stairway of his house. After it was completed, the defendant found the naked sirens objectionable. Thereafter, he employed another artist to paint-over the figures so that they appeared dressed. The German Supreme Court tribunal held that the artist had the right to present his work to the public in its original form. The defendant, as owner of the artwork, had no right to change it without the artist's authorization, although he had the right to sell or destroy the work.

In the case of *James v. Bouillet & Hachette Publishers,*[88] the plaintiff permitted defendant Bouillet to reproduce in a school reader certain extracts from his stories. Unfortunately, without plaintiff's consent, defendant made considerable changes in the stories. The court held that there was a violation of rights, and declared that if defendant wanted to utilize plaintiff's stories, "he should have respected the thoughts of the author and not have distorted them."

The right against alteration or deformation covers not only physical defacement but also the use of the work.[89] Certain unreasonable or reckless uses can, in substance, amount to alteration prejudicial to the artist's reputation. Thus, it is imperative that the work be presented or reproduced in the *proper context* and in its *full form and contents.* The "right to full presentation implies that the work be displayed in its entirety should exhibition of the separate parts detract from the impact of the work as a whole."[90] A case in point is that of *Bernard Buffet.*[91] Buffet painted and decorated six panels on a refrigerator, and on July 6, 1965, the Court of Cassation, affirming the appellate court's decision, decided in favor of the painter. The refrigerator panels formed an individual artistic unit and the artist had a right to prevent its piecemeal sale.

"The right to full presentation also involves the concomittant right to retain the structural and organizational integrity of the work. Thus, even if the work is shown in its totality, there will be no excuse to distort the arrangement, shape or balance of the work in a way which thwarts the artist's intention."[92] This is the maintenance of a proper context within which to reproduce or perform a created work.

The concept of alteration also consists of a modification or revision of the "outward and/or inner form of the work." The doctrine of outward and inner form was first enunciated by Joseph Kohler, and pervades the German copyright theory.[93] The Austrian Alfred Seiller expressed the doctrine this way:

[87] 125 R6Z 174, July 3, 1929; cited in W. Strauss, *op. cit., supra,* note 17 at 510.
[88] Civ. Trib. Seine, Dec. 31, 1924, D.H. 1925.2.54, cited in W. Strauss, *ibid.*
[89] P. Karlen, *op. cit.,* note 22 at 691.
[90] *Ibid.*
[91] Gaz. Pal. 1965. 126.
[92] P. Karlen, *op. cit.,* note 22 at 691-682.
[93] Hoffman, European Legislation and Judicial Revisions in the Field of Copyright, N.Y.U.L.Q. REV. 374 (1930).

> Form may be considered from two points of view: every product of the mind enters the world in the certain appearance, as writing a speech, as painting or copper etching, as a many-voiced or solo composition. This appearance of the work may appropriately be called its outward form. If the outward form should be altered, the prose rendered in speech, the painting as etching, the orchestral composition as a piano piece, the same work as before is nevertheless embodied in the new form. This leads us to recognize, in addition to the outward form, also an inner form which lies in the construction of the work, in its ordering, in the balance of its parts, in the unique handling of the idea.[94]

The doctrine is extremely helpful in shedding light on that delicate and vibrant area of adaptation of a creative work from one medium to another. Section 38 of Presidential Decree No. 49 recognizes this area and provides for an exception to the right of respect or integrity.

> "In the absence of a special contract at the time a creator licenses or permits another to use his work, the necessary editing, arranging or adaptation of such work, for publication, broadcast, use in a motion picture, dramatization, or mechanical or electrical reproduction in accordance with reasonable and customary standards or requirements of the medium in which the work is to be used, shall not be deemed to contravene the creator's right secured by this chapter."[95]

The French landmark case on the adaptation of a work is *Bernstein v. Matador et Pathe Cinema,*[96] where the court made a distinction between changes in the work itself and changes resulting from adaptation of work from one medium to another. Playwright Henry Bernstein, sued the defendant motion picture producers for violation of his moral right because of changes made by defendants in adapting his work. The defendant argued that these changes were necessary and had been agreed to by the plaintiff. The court held that an agreement which permitted all necessary changes was binding on the parties. On the plaintiff's allegation that he retained the right to prevent any change which appeared unacceptable to him notwithstanding the agreement, the court replied:

> To maintain this theory, [plaintiff] relies on the textwriters and certain court decisions giving to authors of literary and artistic works the continuing right to watch over the integrity of their works that they have assigned, and to prevent mutilation and deformation of such works. These principles have never really come under discussion except in actions on contracts regarding publication and reproduction of a work [as distinguished from adaptation]. In such cases they are explained and justified because any change mutilates and alters the work. The case is different where a dramatic or literary work is adapted for a motion picture. There the original work remains intact, regardless of what is done in the new work which is inspired by, and more or less closely resembles, the original work but which is necessarily different because it is subject to different techniques and serves different ends. Therefore, it is an absolute necessity that such changes be permitted by the author and the author, once he has

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94 *Ibid.*
95 Pres. Decree No .49, sec. 38.
96 The "Molo Case," D.H., 1933.533, D.A. 1933.104.

> consented to them, is definitely bound by his consent even if later the changes seem completely to distort his work. The author may also consent to leave the decision concerning the amount of changes to his assignee.[97]

But the adaptor's freedom is not absolute. The right of integrity of the creator allows him to demand respect and faithfulness to the "inner-form" of his work. Indeed, the bottom line is found in Section 36 of the law which absolutely prohibits the waiver or assignment of rights, the result of which is to permit another to make use of the creator's reputation with respect to any version or adaptation of his work which, because of alterations therein, would substantially tend to injure his literary or artistic reputation. Thus, he may demand the preservation of his plot and the main characterizations of his protagonists from changes which will alter the nature of the work, or the creator's basic message.[98]

The right to prevent alteration or deformation of work does not include the right to prevent destruction of a created work. By virtue of Section 38 of the decree, the *complete* destruction of a work *unconditionally* transferred by the creator shall not be considered a violation of his moral rights. This provision is confirmation of the principle that the complete destruction of a work does not produce the result of deforming or altering or mutilating the work prejudicial to the creator's artistic reputation. In effect, the "spiritual link" between work and creator is broken.[99] The French case in point is *Lacasee et Welcome v. Abbe Quenard.*[100] The plaintiff's murals were accepted by the parish priests, unfortunately, upon instructions of the bishop, the murals on the wall of the church were removed and completely destroyed, without notice to the plaintiff. The French tribunal held that the artist could not recover damages since the artist had made no reservation of right, as against the ordinary right of a vendee or transferee to dispose of his property and destroy it.[101]

IV. JUDICIAL SANCTIONS AND SAFEGUARDS

P.D. 49 has done away with the technical procedure on the procurement of copyright protection. Pursuant to Section 2, copyright and other rights granted by it are acquired and protected from the moment of creation.[102] Registration and deposit of the work together with other formalities are no longer necessary.[103] Consequently, a creator may prohibit any infringement of his work through injunction.[104] In addition, all infringing copies and devices may be impounded.[105] The acts of registration and

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97 Quoted in W. Strauss, *op. cit., supra,* note 32 at 515.
98 WIPO, *op. cit., supra,* note at 42.
99 W. Strauss, *op. cit.,* note 17 at 59.
100 Cour de Paris, April 27, 1934, D.H. 1934.385.
101 W. Strauss, *op. cit., supra,* note 32 at 528-529.
102 Pres. Decree No. 49 (1972), sec. 2.
103 E .Bautista, *op. cit., supra,* note 18 at 5.
104 Pres. Decree No. 49 (1972), sec. 28 (a).
105 *Ibid.,* sec. 28 (c and d).

deposit, however, are necessary prerequisites to a suit for damages.[106] Thus, a case for recovery of damages in the case of a work that has not undergone the process of copyright is a futile endeavor. The Courts cannot grant any relief to the plaintiff other than injunction and similar remedies. There is an exception to this general rule, however, in the case of moral rights. In addition to the rights and remedies available to a copyright owner, "damages which may be availed of under the Civil Code may also be recovered."[107] There are several provisions in the Civil Code which are relevant in the determination of damages accruing to a person whose rights may have been violated, among them the provisions on Human Relations.

The cardinal rule on human conduct has been enunciated in the Civil Code, thus:

> Article 19. Every person must, in the exercise of his duties, act with justice, give everyone his due, and observe honesty and good faith.[108]

Under this article, a person cannot intentionally cause damage to another in a manner that is contrary to good morals or public policy, even if he merely exercises his rights in the process.[109] Hence, it has been held in decided cases that where a person exercises his rights but does so arbitrarily, or unjustly performs his duties in a manner that is not in keeping with honesty and good faith, he opens himself to liability.[110] This article provides an adequate legal remedy to any act of deformation or alteration perpetrated on the work of a creator which would be prejudicial to the latter's reputation.

Thus, while the authorship of the creator has been acknowledged, there may still exist a violation of the obligation not to make any deformation. Generally speaking, "authorship implies that there has been put into the production something meritorious from the author's mind,"[111] while deformation would involve "a modification or a change in some of the elements, ingredients or details."[112] Due respect must always be afforded to an author's right to present his work to the public in its original and intended form.[113]

In another instance, the right to alter may have been warranted but there exists an abuse of rights. There is undoubtedly an abuse of right when it is exercised only for the purpose of prejudicing or injuring the

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[106] E. Bautista, *op. cit.*
[107] Pres. Decree No. 49, sec. 40.
[108] Civ. Code, Art. 19.
[109] A. TOLENTINO, CIVIL CODE OF THE PHILIPPINES 58 (1974).
[110] See Sanchez v. Rigos, G.R. No. L-25494, 45 SCRA 368 (1972); Phil. National Bank v. Court of Appeals, G.R. No. L-27155, 83 SCRA 237, (1978).
[111] National Tel. News Co. v. Western Union Tel. Co., 119 F. 294 (1902).
[112] Noyes v. Rothfeld, 78 N.Y.S. 2d 433, 436, 191, Misc. 672 (1947) cited in H. Black, *Black's Law Dictionary*, 46 (5th ed., 1979).
[113] E. Bautista, *op. cit., supra,* note 18 at 21.

reputation of the author.[114] Reputation would mean "the good name of a person, the credit, honor or character which is derived from a favorable public opinion or esteem an character by report.[115]

Meanwhile, the following provision of the Civil Code may illustrate the possible liability of persons for violating the moral rights of a creator.

> Article 20. Every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same.[116]

This article furnishes the general sanction for the various provisions of law which may not provide for their own sanction.[117] It is broad enough to cover all violations of the law. For example, a creator may not be compelled to perform his contract when there are justifiable reasons for such refusal, as where events may have rendered his work obsolete, or there is a radical change in his convictions.[118] A denial of his right would result in a misrepresentation of the creator to the public which would result in injury or damages.[119] Additionally, people who wrongfully present themselves to be the authors of a work or attribute a work to be that of a reputable creator thus exposing him to criticism of a work not his own, may incur damages under this provision.[120]

Liability may also arise from acts which are not illegal or prohibited *per se,* if such wilful acts are contrary to morals, good customs, or public policy under Article 21 of the Civil Code.[121] This article provides an effective remedy to many victims of moral wrongs who have suffered both material and moral damages. The term "damages" refer to the loss or harm due to a person, his rights or property, as well as to the compensation that may be due him.[122]

Thus, under Article 2219 of the Civil Code, moral damages may be recovered for "acts and actions referred to in Articles 21 and 26."[123]

Justice Perfecto, in justifying of the award of moral damages in this jurisdiction, pointed out that such is the practice in most civilized countries of the world.

> Physical pain and injured feelings are among the damages recognized in the most civilized countries of the world, such as the US, England, Germany, Italy, Austria and Switzerland. Without admitting that they

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114 A. Tolentino, *op. cit., supra,* noet 116 at 58.
115 Andre vs. State, 5 Iowa 389 .1957, cited in 77 C.J.S. 265.
116 CIV. CODE, Art. 20.
117 A. Tolentino, *op. cit.,* note 116 at 66.
118 E. Bautista, *op. cit.,* note 18 at 20.
119 *Ibid.*
120 *Ibid.,* p. 22.
121 A. Tolentino, *op. cit.*
122 Manzanares v. Moreta, 38 Phil. 892 (1918).
123 CIVIL CODE, Art. 2219.

> enjoy an infallible wisdom, there is no question that their concept of damage is based on reason and human experience.[124]

Moral damages include "physical suffering, mental anguish, fright, serious anxiety, besmirch reputation, wounded feelings, moral shock and social humiliation suffered by the offended party and other similar injury."[125] This enumeration is clearly not exhaustive nor all inclusive. Thus, any and all forms of "injury" which is "similar" in nature to those enumerated, may properly fall under the term "moral damages" which may give rise to an action for the recovery of the same.[126]

There is no clear-cut definition contained in the Civil Code regarding the former of injury falling under the term "moral damages" and neither is there Philippine jurisprudence on the matter.

In the United States however, there has been quite a thorough discussion on the matter.

Physical Sufferings

It means bodily suffering caused by physical injuries.[127] It does not include mental distress, although a strong mental emotion may produce bodily injury.[128]

Mental Anguish

"It is a high degree of mental suffering, and not mere disappointment to regret."[129] It is necessary that the mental anguish suffered is real and with cause and not merely the result of a morbid imagination or an oversensitive mind.[130]

Mental suffering includes mental worry, distress, grief and mortification.[131] It is synonymous with mental agony, torture, or torment and may result from physical injuries and other causes.[132]

Fright

It is a form of mental suffering experienced by an injured person.[133] As a rule, no recovery of damages may be availed of for fright alone which is neither accompanied nor followed by physical injury.[134]

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124 Lilius, et al. v. Manila Railroad Co., 59 Phil. 758 (1933).
125 CIVIL CODE, Art. 2217.
126 22 Am. Jur. 2d. 13.
127 McGlone v. Haugher, 56 In. App. 243, 104 N.E. 116 (1914).
128 Walker v. Kellar, 218 S.W. 792 (1920).
129 Southwestern Bell Tel. Co. vs. Cook, 30 S.W. 2d 497 (1830); Gerock v. Western Union Tel. Co. 60 S.E. 637 (1808).
130 Western Union Telegraph Co. v. Archie, 121 S.W. 1045 (1909).
131 Merill v. Los Angeles Gas & Electric Co., 158 Cal. 499; 139 Am. St. Rep. 134 (1910).
132 Western Union Tel. Co. v. Taylor, 114 So. 529 (1927).
133 15 Am. Jur. 607.
134 *Ibid.*

Serious Anxiety

It is another kind of mental anguish, although lesser in degree and intensity.[135]

Besmirched Reputation

"It is the soiled, sullied or discolored estimation in which one is generally held by others."[136]

Reputation is a right to enjoy the good opinion of others, and is capable of growth, and has as real an existence as an arm or leg.[137] It is a personal right, and an injury to reputation is a personal injury within the meaning of statutes.[138]

Wounded Feelings

This results from indignities to the pride or sensibilities of a person as distinguished from mental pain and suffering consequent to physical injuries.[139]

Moral Shock

"It is an insult to the nervous system."[140] It constitutes a sudden agitation which may affect both the mind and the body.[141]

Shock is a state of profound depression of the vital processes of the body characterized by restlessness, anxiety or mental dullness.[142]

Social Humiliation

It is a state of mind brought about by an awareness of the injured party that others are cognizant of the insult and wrong suffered by him.[143]

Similar Injury

It includes "indignity, insult, mortification, vexation, annoyance, inconvenience, suspension of mind, exposure to danger, worry, apprehension of future consequences, terror and fear.[144]

Moral damages are by nature "incapable of pecuniary computation" due to the great difficulty, if not impossibility, of estimating in precise

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135 Graham v. Yellow Cab Company of Los Angeles, 13 P. 2d. 773 (1932).
136 Webster New International Dictionary 211 6(2nd ed., 1951).
137 Jones v. Bradstreet Company, 13 S.E. 250, 251 (1891).
138 *Ibid.*
139 Interstate Life and Accident Company v. Brewer, 193 S.E. 458 (1937). "Wounding a man's feelings is as much actual damages as breaking his limb. The difference is that one is internal and the other external; one mental, and the other physical." (Haert v. Georgia Pacific Railroad Co., 7 S.E. 217 (1887).
140 Lumbermen's Mutual Casualty Co. v. Braham, 48 F. Supp. 141 (1942).
141 Haile's Curator v. Texas and P. R. Company, 60 F. 557 (1894).
142 Vera v. Swift and Company, 56 P. 2d 96 (1936).
143 McClene v. Haugher, *supra*, note 135.
144 25 C.J.S., Damages, sec. 70, 559 (1966).

terms the physical or mental suffering of a human being.[145] They are recoverable despite the fact that there is "no proof of pecuniary loss provided that the damages are the proximate result of the defendants wrongful acts of omission."[146]

Another remedy afforded to a creator whose rights have been violated comes in the form of nominal damages, the purpose of which is to vindicate or recognize his right which has been violated or invaded by the defendant.[147] Finally, exemplary or corrective damages may also be imposed "by way of example or correction for the public good, in addition to the moral, temperate, liquidated or compensatory damages.[148]

V. *Conclusion*

An author or creator who seeks a judicial remedy for the violation of his rights has several potential avenues of relief available to him despite his inability to avail of copyright protection. The least he can do is to bring a conventional injunction suit.[149] Additionally, he may also demand that all infringing copies and devices be impounded.[150] He may also resort to a suit for the recovery of damages.[151]

In any event, a plaintiff should be aware of the fact that he may proceed on several grounds. This clearly demonstrates that with regard to moral rights, PD 49 is relatively extensive and quite comparable with the protection granted by countries that are signatories to the Berne Convention.[152]

If the moral right doctrine is to be effectuated in this jurisdiction, our legal system must then be sensitive to the intrinsic value of artistic creation. It must strive to be the unbreakable bond between the personality of the artist and his work. This is necessary if the *droit moral* is ever to play a viable part in the growing concern for the protection of the intellectual creation of men.

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145 CIVIL CODE, Art. 2217.
146 CIVIL CODE, Arts. 2216 and 2217.
147 CIVIL CODE, Art. 2221.
148 CIVIL CODE, Art. 2229.
149 See note 111, *supra.*
150 See note 112, *supra.*
151 See note 114, *supra.*
152 See note 115, *supra.*