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See Also

Response

The Dual Message of Moral Rights

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I. Introduction: The Morality of Moral Rights

Moral rights denote a set of entitlements that creative individuals may enjoy as a reward for investing their personality in authorial and artistic expressions.¹ The right of attribution and the right of integrity are the two most prominently recognized moral rights. The former safeguards the author's right to be recognized as the author of the work,² and the latter encompasses the author's power to prevent "distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation."³ Both rights are intended to "safeguard the author's meaning and message, and thus are designed to increase an author's ability to safeguard the integrity of her texts."⁴

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1. See Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 263–64 (2009) (identifying the control that artists retain of their work even after its sale).

2. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

3. Visual Artists Rights Act (VARA) of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified as amended in scattered sections of 17 U.S.C.). Some jurisdictions did not include the word *honor* in their right-of-integrity protections. For example, the Irish provision gives authors the right to "object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would prejudice his or her reputation." Copyright and Related Rights Act 2000, c. 7, § 109 (Act. No. 28/2000), available at <http://www.irishstatutebook.ie/pdf/2000/en.act.2000.0028.pdf>. But see Copyright, Designs and Patents Act, 1988, c. 4, § 80 (U.K.) (retaining the word *honour*, and allowing authors to object to the derogatory treatment of their work when it is treated in a manner detrimental to the "honour or reputation of the author or director"). For a discussion of this definitional discrepancy, see generally Elizabeth Adeney, *The Moral Right of Integrity: The Past and Future of "Honour,"* 2005 INTELL. PROP. Q. 111.

4. ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 6 (2010).

The typical example involving the right of integrity is that of a buyer of an original work of art who then decides to modify the work and change its original artistic message by either transforming the color composition (e.g., using green and orange instead of red and blue), writing words on it, adding or changing items central to the work's message (e.g., using dates instead of apples), or altering its artistic content by any other addition of the buyer's own creative input. Then, the buyer decides to sell it to an auction house or to lend it to an art museum. The doctrine of moral rights was invented to limit any such modifications that affect the artist's soul—as embedded in the work.⁵

Approaches to protecting this right vary. Certain jurisdictions—mainly common law countries—favor a narrow approach according to which the right of integrity protects against modifications of a work that might affect the author's honor or reputation.⁶ Other jurisdictions adopt a broader approach that defines the right of integrity as the power to prevent modifications without any reference to that power's limits.⁷ The United States belongs to the first group of countries.⁸ Although the discipline of moral rights is less cultivated and applied in American copyright law, two competing camps of these rights developed. Opponents highlight the risks in adopting moral rights. Stephen Carter, for example, wrote against “such elitist and despotic doctrines as ‘moral right,’ lately incorporated by the Congress.”⁹ He continued,

The idea that the government should enable the artist to forbid the owner's acts, or, as some suggest, should make the artist's right to forbid inalienable, is worse than uncultured. It is classic special-interest legislation, regulating the ability of an owner to do with her property as she likes, not so much for the benefit of artists or filmmakers as such, but for the benefit of a minority who will feel better knowing that the owner is not allowed to act in an uncultured way.¹⁰

Similarly, Amy Adler challenged the use of moral rights doctrine to protect contemporary art, arguing that these rights are harmful to the art that they are intended to protect.¹¹ In contrast, proponents advocate for a stronger regime for the United States—one that is not only commensurate with international obligations but necessary in order to protect, as Roberta Rosenthal Kwall

5. *Id.*

6. See Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 153 (criticizing the scope of the VARA's protections as “extremely narrow”).

7. Agustin Waisman, *Rethinking the Moral Right to Integrity*, 2008 INTELL. PROP. Q. 268, 277–79.

8. See *supra* note 6.

9. Stephen L. Carter, *Owning What Doesn't Exist*, 13 HARV. J.L. & PUB. POL'Y 99, 100 (1990).

10. *Id.* at 101.

11. Adler, *supra* note 1, at 265.

writes, expressions of “inspirational motivations and the intrinsic dimension of creativity.”¹²

Morality is a key concept in intellectual property. It defines and demarcates the boundaries of ownership of intangible property in order to strike the necessary balance between individual rights and other wider social, cultural, and ethical considerations. In patent law, for example, it tells inventors whether their business method is patentable¹³ and whether a process that involves removal of a stem cell from a human embryo—entailing the destruction of that embryo—can be patented.¹⁴ The application of morality in copyright is achieved through various principles such as the idea–expression dichotomy¹⁵ and the limited-duration-of-the-right and fair-use exceptions.¹⁶ Moral rights of attribution and integrity are an additional element signifying the morality of copyright systems. These rights are unique to copyright.¹⁷ They treat authors as parents of their creative works and guides of their accurate meaning and potential social future.¹⁸ Although certain European jurisdictions allow authors control over the “social future” of their work in perpetuity,¹⁹ most jurisdictions allow moral rights to last as long as economic rights—namely the life of the author plus seventy years.²⁰

Moral rights are premised on the Kantian and Hegelian view that copyrighted commodities are manifestations and reflections of authors’

12. KWALL, *supra* note 4, at 6; *see also* Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 300 (2004) (arguing that VARA is “too limited to supply a meaningful source of attribution rights”).

13. *See* *Bilski v. Kappos*, 130 S. Ct. 3218, 3231 (2010) (holding that a method for hedging risk in commodities trades was not patentable).

14. For a recent case considering the issue, *see* Case C-34/10, *Brüstle v. Greenpeace eV* (Oct. 18, 2011), *available at* <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-34/10#>.

15. *See* Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 TEXAS L. REV. 1921, 1921–22 (2007) (explaining that, through the “ideas/expression distinction,” the Copyright Act protects authors against “illicit appropriations of expressive aspects of their works, although not of the ideas the works contain”).

16. Lior Zemer, *Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use*, 60 DEPAUL L. REV. 1051, 1070 (2011).

17. *See* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 354 (2006) (tracing the history of moral rights law—domestically and internationally—under the umbrella of copyright law).

18. *See id.* (“The orthodox theory of moral rights is that authors of copyrightable works have inalienable rights in their works that protect their moral or personal interests.”). As Henry Hansmann and Marina Santilli explain, “A plausible justification for this distinction between inventors and artists is that the marketability of an invention has little relationship to the personal identity of the inventor and, in particular, to the other items that the inventor has patented.” Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 110 (1997).

19. These jurisdictions include France and Spain. Seth Tipton, Note, *Connoisseurship Corrected: Protecting the Artist, the Public, and the Role of Art Museums Through the Amendment of VARA*, 62 RUTGERS L. REV. 269, 296 (2009).

20. *See, e.g.*, Rigamonti, *supra* note 17, at 361 n.51 (identifying such an expiration period in German law).

unique personalities.²¹ Are these rights societal wrongs by virtue of the limits that they impose on users and new creative individuals? Are they violations of constitutional values such as free speech and creative freedom? Or should these rights be considered social goods in the sense of protecting not only authors but the public's right to enjoy good dialogic practices and to be informed of the accurate meaning and message of copyrighted works?

International law embodies the individual and social dimensions of moral rights. Article 27(2) of the Universal Declaration of Human Rights of 1948 emphasizes the individualistic dimension of moral rights by providing that "[e]veryone 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."²² Debates preceding the adoption of the Declaration highlighted its social dimension. For example, the Polish delegation to the Brussels Conference of the Berne Convention in 1948 noted the following: "[The] right and its recognition by the countries of the Union are based on the idea that the necessity for the protection of the moral rights is not motivated only by the interests of the authors, but first and foremost by the interests of the community."²³

To view moral rights as societal wrongs is the wrong message to the public and the creative community. When Congress invited European-style moral rights into United States copyright law through the Visual Artists Rights Act (VARA) of 1990, it did so primarily to comply with the nation's obligations under the Berne Convention for the Protection of Literary and Artistic Works.²⁴ Article 6*bis* of the Berne Convention requires all

21. See Natalie C. Suhl, Note, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1203, 1208–10 (2002) (discussing the Kantian and Hegelian view that artistic creations are manifestations of the artist's will). In the words of one court, moral rights are of a "spiritual, non-economic and personal nature. [Moral] rights spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should therefore be protected and preserved." *Carter v. Helmsley-Spear Inc.*, 71 F.3d 77, 81 (2d Cir. 1995). Hansmann and Santilli have similarly observed,

It is frequently said that the interests protected by moral rights doctrine, and particularly by the right of integrity, are "personality" interests that are fundamentally different from the "economic" or "commercial" interests that are protected by the copyright, trademark, and right of publicity doctrines that, until recently, were the principal bodies of law governing the interests of artists in the United States.

Hansmann & Santilli, *supra* note 18, at 102.

22. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at art. 27(2), U.N. Doc. A/RES/217 (Dec. 10, 1948).

23. ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS* 142 (2006) (emphasis omitted).

24. For this Convention and the law implementing it in the United States, see Berne Convention for the Protection of Literary and Artistic Works, Sept 9, 1886, 828 U.N.T.S. 222 [hereinafter 1886 Berne Convention]. For the most recent revision to the Convention, see Paris Act, July 24, 1971, 21 U.S.T. 1538, 1161 U.N.T.S. 30. The Convention was later amended. For the version as amended, see Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1979, 102 Stat. 2853.

signatories to protect the moral rights of authors.²⁵ Furthermore, Congress adopted the VARA to signal to the international community that it recognizes the personal dimension of the creative process. VARA is carefully crafted and resulted in “a limited version of the civil-law concept of the ‘moral rights of the artist’ into our intellectual-property law.”²⁶

In *Moral Rights: Well-Intentioned Protection and Its Unintended Consequences*, Lindsay A. Mills argues that although moral rights ideology is a good thing, the way it was brought into American copyright law was flawed and imposes detriments on the creative community.²⁷ In this Response, I address her argument against moral rights and, in particular, the right of integrity. Ms. Mills rejects the arguments of proponents of moral rights and attempts to show how “misconceptions [about moral rights protections] cause moral rights advocates to argue for broad protections that impose real costs but illusory benefits, to the ultimate harm of both of the interests they purport to protect—the artists themselves and the public interest in artistic creation.”²⁸ Ms. Mills concludes her note by arguing that “[b]road integrity rights protection imposes substantial social costs” and finds that these costs are unjustifiable.²⁹ The constitutional provision that authorizes copyright and patent law explains its purpose as “promot[ing] the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁰ I agree that “[p]rogress is achieved when the public benefits from the creativity of others, by building on what has come before to further create.”³¹ This freedom, however, requires the protection of important and long-neglected norms of “authorship morality.”³² In this Response, I argue that moral rights serve as one of the primary legal vehicles to protect these norms.

25. Article 6bis(1) provides,

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.

1886 Berne Convention, *supra* note 24, at 235.

26. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 291 (7th Cir. 2011).

27. See Lindsay A. Mills, Note, *Moral Rights: Well-Intentioned Protection and its Unintended Consequences*, 90 TEXAS L. REV. 443, 445 (2011) (arguing that protections of integrity rights threaten to harm artists and the public interest in art).

28. *Id.* at 452.

29. *Id.* at 463–64.

30. U.S. CONST. art. I, § 8, cl. 8.

31. David L. Land et al., *Golan v. Holder: Copyright in the Image of the First Amendment*, 11 J. MARSHALL REV. INTELL. PROP. L. 83, 84 (2011).

32. This norm refers to the need to protect the “textual integrity” of an author’s work. KWALL, *supra* note 4, at 4.

II. Beyond the Economic Bundle of Sticks

Ms. Mills begins by observing that “moral rights protection has no place in the United States, let alone as part of the Copyright Act, which is principally aimed at promoting artists’ and authors’ incentives to create by granting them a temporary monopoly right over their work.”³³ Applying the property principle of the bundle of sticks,³⁴ Ms. Mills argues that moral rights doctrine removes two rights embedded in this rule—namely the right to alter the work and the right to destroy it.³⁵ These rights, she claims, should be retained by the person who purchased the work.³⁶

Ownership is “a cluster-right,”³⁷ “a complex aggregate of rights,”³⁸ “a range of ownership interests along the ownership spectrum,”³⁹ “sticks in the bundle of entitlements,”⁴⁰ or just a “bundle of sticks.”⁴¹ In Michael A. Heller’s words, “private property can be defined in terms of a core bundle of rights chosen from the infinite relations that may exist among people with respect to a scarce resource.”⁴²

Copyright is not different. It is a host to a cluster of rights that gives rise to incentives for authors to create and contribute more wealth to society. Copyright laws were designed to protect these ambitions. The rights may vary depending on the nature of the work. Tony Honoré once attempted to identify the rights that one can have by being the owner of an object. In his argument, he covers eleven standard features, or incidents, of the “liberal concept of full individual ownership:” “The right to possess;” “the right to use;” “the right to manage;” “the right to income;” “the right to the capital;” “the right to security;” “the incident of transmissibility;” “the incidence of absence of term;” two social limitations which are “the duty to prevent harm” and “liability to execution;” and “residuary character.”⁴³ The same list applies to copyrighted works.

33. Mills, *supra* note 27, at 444.

34. For a discussion of this concept, see *infra* note 41 and accompanying text

35. Mills, *supra* note 27, at 444.

36. *Id.*

37. JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 55–57 (1990).

38. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 96 (photo. reprint 1978) (1919).

39. J.W. HARRIS, *PROPERTY AND JUSTICE* 86 (1996).

40. For a recent usage of this popular conception of ownership, see Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 *YALE L.J.* 226, 277 (2006).

41. A recent illustration using this term is available at Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus*, 61 *U. TORONTO L.J.* 467, 491–92 (2011).

42. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *HARV. L. REV.* 621, 665 (1998).

43. A. M. Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107 (A.G. Guest ed., 1961), *reprinted in* *MAKING LAW BIND* 161, 166–79 (1987).

These rights are not absolute. They need to be balanced against other social and cultural interests prior to declaring a given work the sole ownership of a particular author owner.⁴⁴ Ms. Mills objects to the implications of the bundle-of-sticks principle for moral rights. The addition of these rights to modern copyright laws diminishes “the value of the economic rights in the work, which ultimately harms not only the artist, but also society as a whole, to the extent that artistic expression and the social dialogue it create are deemed socially desirable.”⁴⁵

To rebut similar critiques, Professor Kwall produced an outstanding study of why moral rights are fundamental to the American copyright tradition. In her book, she proclaims that while certain legal systems provide moral rights protection to authors similar in strength to the set of economic rights, “American copyright law rewards economic incentives almost exclusively and lacks adequate moral rights protection.”⁴⁶ She strongly criticizes the hegemony of economic parameters in copyright and stresses the need to look beyond economics.⁴⁷ The United States’ “capitalist culture and its classical utilitarian tradition”⁴⁸ and the First Amendment’s emphasis on “the importance of society’s ability to recycle material” were the two main arguments as to why moral rights should not have made it into our copyright law.⁴⁹ In her study, Kwall answers another relevant question (one that appears to trouble Ms. Mills): “whether . . . the enactment of moral rights protections would inappropriately encroach upon the public domain?”⁵⁰ Kwall finds that “[m]oral rights are neither explicitly prohibited nor sanctioned by the Copyright Clause,”⁵¹ and their absence from the Clause is because its Framers “were not fully cognizant of these specific rights [(attribution and integrity)] given their subsequent emergence in Europe years later.”⁵² Their eventual emergence does not conflict with the Clause’s goal to “promote the Progress of Science and useful Arts.”⁵³ First, moral rights promote progress by letting the public know the true meaning and original source of a work;⁵⁴ and second, they are available for “limited times.”⁵⁵

44. See Heller, *supra* note 42, at 664–65 (observing how the bundle of rights affects marketability and gives rise to a hierarchy of property interests).

45. Mills, *supra* note 27, at 444.

46. Kwall, *supra* note 4, at xiii.

47. See *id.* (arguing that authors maintain a noneconomic, “self-connected” relationship with their work).

48. *Id.* at 53.

49. *Id.*

50. *Id.* at 55.

51. *Id.* at 57.

52. *Id.*

53. U.S. CONST. art. I, § 8, cl. 8.

54. Kwall, *supra* note 4, at 57.

55. *Id.* at 56.

III. Stewardship and Intrinsic Motivation

Every attempt to justify moral rights solely on economic grounds is deemed flawed because the essence of moral rights—the rights that represent the inner process of the creative act and its final embodiment in expressive enterprises—is distinct from the economic aspirations of the creative act.⁵⁶ This is one of the shortcomings in Ms. Mills’s and other opponents’ arguments against moral rights. Works of visual art—the limited category of works that receive moral rights protection under VARA—are extensions of the artist’s self and identity. These works represent the personal connectedness of artists to their works. The relationship between authors and their work “is that of a parent and child.”⁵⁷ Therefore, every harm inflicted on these rights is not only a violation of legal rules but of “human-moral duty.”⁵⁸ Critics of moral rights often

do not sufficiently account for the inspiration dimension of authorship. Indeed, the very act of authorship entails an infusion of the creator’s mind, heart, and soul into her work. Many authors of creative works maintain a certain type of relationship with their artistic “children.” This relationship is unique among other types of human production given the highly personalized and intrinsic nature of creative authorship.⁵⁹

The intrinsic dimension argument is a necessary “supplement to the conventionally understood economic incentive paradigm.”⁶⁰ Ms. Mills strongly opposes this vision of moral rights. For her, “[t]o the extent that integrity rights protection ignores the commercial nature of artwork and rests instead on the antiquated notion that there is some intrinsic value to artistic creation, it imposes real costs on both artists and society by diminishing the value and alienability of artwork.”⁶¹ Mills criticizes proponents of moral rights from being unaware of the changing nature of the market for art that moved from signifying purchasing art for its embodiment of artistic spirit to a signal for luxurious taste. Consequently, integrity rights will affect market demand for art, “lower investment funds’ demand for art as an investment,”

56. For a discussion of this distinction, see generally Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519, 1528–41 (2011).

57. KWALL, *supra* note 4, at xiv; cf. Adler, *supra* note 1, at 269 (criticizing the idea that “the artist feels personal anguish when someone else modifies his artwork/child”). Kwall further argues, “The Parental metaphor of authorship provides one of the most compelling examples of the inspirational motivation characteristic of the intrinsic dimension of creativity.” KWALL, *supra* note 4, at 13.

58. See, e.g., KWALL, *supra* note 4, at 42 (citing CA 2790/93, *Eisenman v. Qimron* 54(3) PD 817 [1993] (Isr.)) (recounting the Israeli supreme court’s finding of such a harm where a publisher declined to list a translator of the Dead Sea Scrolls in a text reproduction of the same).

59. *Id.* at 2.

60. *Id.* at xv.

61. Mills, *supra* note 27, at 453.

and even possibly “eliminate artwork appreciation potential to the extent that art will no longer be a sound investment vehicle for these funds.”⁶²

Let us assume that the framers of a future copyright act would accept Ms. Mills’s rationale. The French and the Italians will follow suit, and the Berne Convention will be amended to delete Article *6bis*.⁶³ Now let us think about the immediate consequences and take, for example, Picasso. A new owner of *Les Demoiselles d’Avignon* and *Guernica* will be able to do with the works as he thinks fit. Both paintings are considered radical departures in art and are prime examples of the transcendence of creative thinking in the arts.⁶⁴ Should distortion and mutilation of these works be tolerated? Although this Response to Ms. Mills is not the occasion to address this question in full, I assume most readers will have a strong intuitive answer expecting the law to create mechanisms that will allow future generations to enjoy radical artistic moments. Ms. Mills would apparently join those who would not accept any interference with the owner’s set of exclusive rights—especially not through the right of integrity.

Copyright has a social dimension. It protects art for the sake of future generations: for their ability to be exposed to radical artistic messages and join dialogic communities that have been developed on the premises of these messages. I join Professor Kwall’s contentions that copyright has a strong personal message and that the resistance of the United States “to explore more fully the implications of the intrinsic dimension of the creative process has resulted in a legal system lacking sufficient moral rights protections so that authors by and large do not have the ability to safeguard their works from textual-integrity violations.”⁶⁵ In other words, the creative impulse emanates from “inner drives that exist in the human soul.”⁶⁶ Moral rights protect the expressions of these drives and their textual integrity.

One of the key elements in Kwall’s unbundling process of the intrinsic-dimension argument is stewardship. Stewardship highlights awareness of both externally endowed inspiration and the cyclical dimension of creative enterprise—“Drawing from the ‘dust to dust’ cycle of Divine creativity in Genesis’s creation narratives, the idea is that humans also must continually keep their creative gifts in a state of motion.”⁶⁷ That is, art requires artists to communicate to the public the gift that artists received—the external

62. *Id.* at 454.

63. For a discussion of Article *6bis*, see *supra* note 25 and accompanying text.

64. For a historical review of these works and their radical nature, see Lior Zemer, *The Copyright Moment*, 43 SAN DIEGO L. REV. 247, 294–98 (2006).

65. KWALL, *supra* note 4, at xv.

66. *Id.* at xiii; see also JOHN H. MERRYMAN ET AL., *LAW, ETHICS AND THE VISUAL ARTS* 423 (5th ed. 2007) (arguing that a work of art is an “expression of [the artist’s] innermost being”).

67. See Roberta Rosenthal Kwall, *The Author as Steward “For Limited Times,”* 88 B.U. L. REV. 685, 703 (2008) (book review) (footnote omitted).

inspirational sources that artists consume in the creative process.⁶⁸ For Kwall, stewardship, just as self-transcendence, is a way to show that creativity is premised on noneconomic incentives—on an author’s “inherent drive” to create⁶⁹ and on his “responsibility to others as well to the creator’s own substantive personality.”⁷⁰

Market demand and investment funds are necessary features in contemporary debates about the incentive and reward systems in copyright. They should not, however, diminish the social and personal dimensions of artistic works.

IV. The Dual Message of Moral Rights

A. *Authorial Entitlements*

Ideologically, moral rights were born out of the need to protect the special and natural bond between authors and their works. As such, they are part of the bundle of entitlements that authors should enjoy when creating social wealth. The individual dimension of moral rights can be justified in external and internal ways. The former includes considerations, such as economics, that are external to the author’s identity, internal creative processes, and inner personality, while the latter covers the elements of the personal dimension of the author that may be affected by a harm inflicted on the reputation or honor of the author’s artistic message. In their economic analysis of moral rights, Hansmann and Santilli explain the external dimension. They claim that if the right of integrity is a “reasonable exception” to property law’s general prohibition of servitudes to chattels, this is because owners “can seriously affect the interests of the artists who created those works or of other persons.”⁷¹ The interests that owners can affect include pecuniary interests in the future sales price of the work. Artistic works are “an advertisement” for the other works of the artist; the freedom of the owner to cause harm to one of the artist’s works may affect market demand for that artist’s future works.⁷² It follows that an alteration to the artist’s works will also affect the pecuniary interests of previous purchasers. Finally, the public has an interest in preserving works since they serve as “important elements in a community’s culture” or ideals that should be preserved for the sake of the ideas they represent.⁷³

68. Cf. LEWIS HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* 4 (1983) (elucidating the nature of truly altruistic acts).

69. KWALL, *supra* note 4, at 19.

70. *Id.* at 20.

71. Hansmann & Santilli, *supra* note 18, at 102. For criticism of this perspective, see Mills, *supra* note 27, at 456–58.

72. Hansmann & Santilli, *supra* note 18, at 104, 105.

73. *Id.* at 106. For Ms. Mills’s discussion of the social value of preserving artistic creations, see Mills, *supra* note 27, at 450–51.

The justification for prohibiting reputational harm and value losses receives support from areas outside economics, namely from internal aspects of the creative act. I elsewhere argued that personalities are socially constructed,⁷⁴ but even so, artists should retain control of their artistic message.⁷⁵ When Kwall employed the concepts of stewardship and inner labor⁷⁶ to support artists' moral rights, she directed us to view the creative process as involving more than incentives that are external to the author's personal realm. To reiterate, moral rights must recognize authors' independent, spiritual drive to create. The ownership of an artist's inner personality justifies his entitlement to moral rights.

B. Authorial Duties

Moral rights do not protect authors only. Although they can be understood as natural rights associated with individuality,⁷⁷ they also carry a public duty. If copyright ownership is understood as involving "duties to the public as well as rights in the work,"⁷⁸ the owner of a work cannot do with it as he can do with his garden, umbrella, or a pair of shoes. A duty imposed on owners of artistic creations includes safeguarding the right of the public to be accurately informed of the meaning and message of artistic creations. As Ms. Mills explains, "Another major argument in favor of art preservation as a social interest views art as an embodiment of the culture that inspired its creation."⁷⁹ And, Edward Damich once wrote that "[p]rotecting irreplaceable works from irreversible physical changes presents the most compelling case for moral rights protection."⁸⁰ As such, the public has a right to be aware of accurate authorial messages and solid dialogic spaces furnished with authentic artistic and authorial commodities. As John Merryman remarked,

[T]here is more at stake than the concern of the artist There is also the interest of others in seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted We yearn for the authentic, for contact with the work in its true version⁸¹

74. See LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* 4 (2007) ("[E]very copyrighted entity is socially constructed and historically contingent.").

75. See Zemer, *supra* note 56, at 1561 (positing that a duty exists to "provide the public optimal accuracy regarding the intention and authorial message of the original author").

76. Kwall, *supra* note 4, at 12.

77. See *supra* subpart IV(A).

78. Kwall, *supra* note 67, at 704.

79. Mills, *supra* note 27, at 451.

80. Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 950 (1990).

81. John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041 (1976). Similarly, Hansmann and Santilli remarked,

[W]orks of art often become important elements in a community's culture: other works of art are created in response to them, and they become common reference points The loss or alteration of such works would therefore be costly to the community at

Using Kwall's words, if the intention of the Framers of the Copyright Clause was to "stimulate an open culture steeped in knowledge and education,"⁸² then the objectives of the Clause can be maintained "through a legal framework that promotes the public's interest in knowing the original source of a work and understanding it in the context of the author's original meaning and message."⁸³

The stewardship model, as recently employed by Helena Howe to land and copyright, further justifies the public interest in moral rights.⁸⁴ Raff writes, "The idea behind stewardship in land is that land is held by the owner of it as a steward, who must hold the interests of present and future society and ecological values in mind when exercising discretions with respect to it."⁸⁵ Howe explains:

This means both that the community has an acknowledged existence and, significantly, that its interests are recognised as constituting intrinsic limitations on property rights. By linking the rights of the owner with the interests of the community, the stewardship model suggests a view of property in which ethical concerns beyond mere self-interest are part of property law. . . .

The owner-as-steward is commonly considered to bear two principal duties. The first of these is to manage and conserve the natural resources which the land provides for the benefit of future generations. This duty provides an inherent limit to the rights of the property owner to deal with the land in their own interest. Secondly, the landowner is under a duty in respect of the needs which others might have in respect of the land.⁸⁶

In copyright, "the 'core' rights are limited by community interests. The rights of the copyright owner to control commercial reproductions of the work may be circumscribed where the community has a particularly strong, legitimate interest in using the work."⁸⁷ Moral rights are not different. They serve similar social goals. The noneconomic nature of moral rights creates a duty for owners of these rights to not violate community interests. These interests are not waivable, as they are embedded in the very definition of the social bargain between owners of artistic works and the public. Owners will enjoy a bundle of property rights in exchange for protecting the moral rights

large, depriving that community . . . of a widely used part of its previously shared vocabulary.

Hansmann & Santilli, *supra* note 18, at 106.

82. KWALL, *supra* note 4, at 57.

83. *Id.*

84. See Helena R. Howe, *Copyright Limitations and the Stewardship Model of Property*, 2011 INTELL. PROP. Q. 183, 200 (elucidating the model).

85. Murray Raff, *Environmental Obligations and the Western Liberal Property Concept*, 22 MELBOURNE U. L. REV. 657, 671 (1998).

86. Howe, *supra* note 84, at 200 (footnotes omitted).

87. *Id.* at 204.

of attribution and integrity so the public will have access to authentic cultural messages.

Art is a vibrant construction. It reproduces cultural spaces and adds new dimensions to existing patterns, templates, and visions. Ms. Mills warns us about treating art as static and claims that integrity rights may result in artistic stagnation.⁸⁸ I understand her concern that “the social value of art is in its ability to communicate ideas and spark social dialogue,”⁸⁹ and “measures that are intended to preserve works of art and the original ideas they represent . . . are an improper means of promoting this value.”⁹⁰ However, does this concern mean that art should be measured by “the frequency with which it changes hands, with the movement of art throughout society serving as a proxy for the movement of ideas throughout society[?]”⁹¹ I respectfully disagree with Ms. Mills. The same dangers to the creative process and to the dissemination of new works that the right of integrity creates exist in other rights within copyright law. In copyright law, the allocation of rights is a direct impediment to collective exposure and public consumption.⁹² Why should moral rights be judged according to different normative standards?

What is needed is a properly defined right of integrity—one that allows artistic progress, preserves artists’ moral rights, and protects common reference points, spaces of memory, and authenticity for the public. The right of integrity is an important public right—the right to be informed and aware of the true origin and message of artistic endeavors.⁹³ This, however, does not make the right absolute. First, courts, even in civil law countries, will not allow the right to be used as a means to advance illegitimate social barriers that may eventually lead to artistic stagnation. Second, courts will balance the right against public interests.

An illustrative example is a case brought before the French Cour de Cassation dealing with two literary sequels to Victor Hugo’s *Les Misérables*.⁹⁴ In this case, the court was asked to balance Victor Hugo’s right of integrity and the freedom to create enjoyed by all authors.⁹⁵ Since moral rights are perpetual in France,⁹⁶ Pierre Hugo, the heir of Victor Hugo,

88. Mills, *supra* note 27, at 455–56.

89. *Id.* at 455.

90. *Id.*

91. *Id.*

92. See ZEMER, *supra* note 74, at 43 (explaining that copyright law prevents the public from infringing on an author’s work by granting the author a property right against other conflicting rights and interests).

93. For a discussion of related arguments, see Mills, *supra* note 27, at 450–51.

94. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 30, 2007 (No. 04-14.543), available at http://www.courdecassation.fr/jurisprudence_2/premier_chambre_civile_468/arret_n_9850.html. For an analysis of this case, see KWALL, *supra* note 4, at 43–44.

95. Cass. 1e civ., No. 04-14.543; KWALL, *supra* note 4, at 43.

96. See *supra* note 19 and accompanying text.

could sue the publisher of the sequels, alleging a violation of the right of integrity due to the misrepresentation of an original character, Inspector Javert.⁹⁷ On January 30, 2007, the court decided that the freedom of expression—as enshrined in Article 10 of the European Convention of Human Rights—cannot bar a new author’s right to create sequels to a copyrighted work after the term of protection of the original author’s economic rights expired.⁹⁸ The court struck down a lower court’s decision that found a violation of the right of integrity and remanded the case for a new decision on the merits.⁹⁹ In doing so, the court emphasized that such an examination requires analysis of whether the sequels “altered Victor Hugo’s work,” and the high court directed the lower court to determine whether the sequels respect the spirit of the original work.¹⁰⁰

Similarly, in a West German case involving *The Neverending Story*, an appellate court found that a producer of a movie adaptation of the book had seriously distorted the work by changing the ending of the story.¹⁰¹ The court, however, denied injunctive relief to the author of the novel because he permitted the distortion of his book’s ending in the past, and the economic loss to the producer would be severe.¹⁰² We learn from this case that courts in civil law countries do not necessarily apply the right of integrity in a vacuum. When one “transfers” his personality by allowing a party to distort the textual integrity of the original message, the transferor will be treated as one that has already signaled the weakness of his right of integrity.

In two recent cases involving architectural designs, courts in Germany¹⁰³ and Spain¹⁰⁴ did not ignore the author’s right of integrity but emphasized that the right has to be limited in light of the public interest. In the German case, it was suggested that “if the period of copyright protection

97. Cass. 1e civ., No. 04-14.543; KWALL, *supra* note 4, at 43.

98. Cass. 1e civ., No. 04-14.543; KWALL, *supra* note 4, at 43.

99. Cass. 1e civ., No. 04-14.543; KWALL, *supra* note 4, at 43–44.

100. Cass. 1e civ., No. 04-14.543; KWALL, *supra* note 4, at 44.

101. Rigamonti, *supra* note 17, at 365 (citing Oberlandesgericht München [OLG München] [Munich High Regional Court] Aug. 1, 1985, 1986 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 460 (W. Ger.)).

102. *Id.* (citing Oberlandesgericht München [OLG München] [Munich High Regional Court] Aug. 1, 1985, 1986 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 464 (W. Ger.)).

103. The German court’s recognition of a public interest in modern public transportation, however, did not change the court’s analysis of the right of integrity, whose “term of protection is absolute and protected against any form of balancing against competing interests.” Thorsten Lauterbach, *A Narrow Defeat Is Still a Defeat: Integrity Clipped Before Its Best-Before Date*, 6 J. INTELL. PROP. L. & PRAC. 371, 373 (2011) (citing Oberlandesgericht Stuttgart [OLG Stuttgart] [Stuttgart High Regional Court] Oct. 6, 2010, 2011 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT-RECHTSPRECHUNGS [GRUR-RR] 56 (Ger.)).

104. The Spanish court allowed the public’s interest in a pedestrian bridge to prevail over the author’s plans to restore the bridge to its original configuration (without facilities for pedestrians). José J. Izquierdo Peris, *A Bridge Too Far: Calatrava’s Bridge Is Copyright-Protected, but Not Enough*, 3 J. INTELL. PROP. L. & PRAC. 218, 219 (2008) (citing S. Juz. Com., Nov. 23, 2007 (No. 543 (Spain) (on file with author))).

is close to its conclusion, it may be more difficult than usual to enforce that right to be enforced vis-à-vis interests of the owner of the building at issue, especially when coupled with the presence of public interest for the latter to prevail.”¹⁰⁵

These decisions show that courts in jurisdictions that favor a strong moral rights regime do not leave public interests unaddressed. Agustin Waisman explains this by showing that it is plausible that even jurisdictions that favor a broad approach to moral rights would still recognize that “the right to integrity is subject to the limits that govern the narrow approach.”¹⁰⁶ Needless to say, the same applies to artistic creations. The right of integrity is a good mechanism that should survive as long as it can be balanced against constitutional values and the public good. For Ms. Mills, I trust, this balance should not be sought, as it probably cannot be found.

V. “I’ll Do Art for Food”

I saw this slogan in many different places and languages. I noticed it in art shows, on t-shirts, on subway walls, and in street graffiti. But mostly I saw this slogan displayed by street artists opening their violin boxes or sets of acrylic colors, showing their proven musical, sculpting, or painting abilities, and asking for people to stop, look, and then buy. They sometimes offer a brief discussion of their art—something that makes the least interested person stop and rethink a decision not to buy their wares. Although this does not represent the artistic community en masse, it does convey a condition that most creative artists share—the intrinsic motivation to create. For artists, the artistic process is part of what defines who they are—it is part of their basic sustenance. They view the creative expressions of their soul as carrying a feeding effect on their well-being. It represents how they want us to see them. Moral rights doctrine rewards authors and artists for their creative impulse, intrinsic motivation, and unique personal contribution to the cultural life of our society. It would be wrong then to dismiss the contention that “artistic creation is not motivated solely by the expectation of monetary reward but also by some additional nonpecuniary satisfaction that results from that creation.”¹⁰⁷

David Throsby singles out artists as a special category of creators for various reasons, including that “[a]rtists in general do not regard work as a chore where the only purpose is to earn an income.”¹⁰⁸ In a similar vein, Hans Abbing poses the following question: Why are artists poor?¹⁰⁹ He argues that poverty in the artistic community is structural because some

105. Lauterbach, *supra* note 103, at 372 (emphasis omitted).

106. Waisman, *supra* note 7, at 278.

107. Mills, *supra* note 27, at 458.

108. DAVID THROSBY, *THE ECONOMICS OF CULTURAL POLICY* 81 (2010).

109. HANS ABBING, *WHY ARE ARTISTS POOR? THE EXCEPTIONAL ECONOMY OF THE ARTS* 88 (2002).

artists participate in an unequal exchange that allows the status of the “winners” to be protected.¹¹⁰ He writes, “[B]y making art, artists receive *private satisfaction*. Creating art is a fulfillment in itself. . . . The satisfaction comes from the labor of love and stems from an intrinsic drive.”¹¹¹ Having said that, artists are still subject to a “minimum-income constraint”¹¹² in order to prevent starvation and allow them to continue producing art.

The right of integrity for Ms. Mills carries severe implications for artistic supply. Integrity rights, she claims, “decrease the market demand for the artist’s work by limiting the ability of artwork purchasers to realize the maximum possible return on their investment.”¹¹³ I return to my frequent claim that art is a different enterprise. Concepts such as market demand and economic rewards are not always central to the creative process. There are enough artists who did not earn one cent during their lifetime and were underappreciated or rejected, but nevertheless continued producing art. Vincent Van Gogh is one of many examples of an artist who sold only one painting during his lifetime.¹¹⁴ I find it difficult to accept an argument that exclusively associates cultural production and art with economics and material rewards to the degree that the former is dependent on the latter for its survival.

VI. Unintended Consequences?

The right of integrity is “perhaps the most important moral right.”¹¹⁵ The right, David Vaver explains, allows the author to “control the way her work is presented . . . though this control should not prevent reasonable adaptations and changes over time.”¹¹⁶ VARA was enacted in order to comply with international obligations.¹¹⁷ In fact, the lack of moral rights in United States law was one of the reasons why it took the United States over a hundred years to join the Berne Convention.¹¹⁸ At the same time, the Framers of VARA ensured that its protections do not violate sacred constitutional values or detrimentally affect “reasonable adaptations and changes over time.”¹¹⁹ VARA is very limited in the protections that it

110. *Id.* at 287–88.

111. *Id.* at 88 (footnote omitted) (internal quotation marks omitted).

112. This constraint is defined by artists’ interest in preventing starvation, which is “a condition often romantically associated with artists but rarely observed in practice.” THROSBY, *supra* note 108, at 81.

113. Mills, *supra* note 27, at 461.

114. Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1573 n.191.

115. Rigamonti, *supra* note 17, at 364.

116. DAVID VAVER, *INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENTS, TRADE-MARKS* 208 (2d ed. 2011).

117. *See supra* text accompanying note 24.

118. *See* Damich, *supra* note 80, at 946–47 (observing that VARA fostered greater compliance with international obligations under the Berne Convention).

119. VAVER, *supra* note 116, at 208.

affords to artists—it subjects moral rights to waivers,¹²⁰ limits their duration, and does not include other Continental moral rights that might have resulted in unintended consequences.¹²¹ For example, France prohibits the right of an author “to reconsider or . . . withdraw[], even after publication of his work, with respect to the assignee.”¹²²

Moral rights are not societal wrongs; they benefit both artists and the public, and they send an important signal to established artists and newcomers—as well as to the users’ community and industry. Moral rights are so *intended* in most jurisdictions that “there can be little doubt that the worldwide trend is towards greater acceptance of moral rights principles.”¹²³ Every legal field is embedded with good and less desirable consequences that are sometimes *unintended*. However, the law as a constantly changing phenomenon adapts to new circumstances to avoid unintended or unforeseeable results. I agree that moral rights create heavy burdens on users and the public in general as they require protection for something that is difficult to define. These burdens led Ms. Mills to argue that moral rights—in particular, the right of integrity—lack justification.¹²⁴

But, elimination of the right *is* an unintended consequence. True, there is a need to develop a more rigorous theory of moral rights and criteria to determine whether a particular modification amounts to an infringement. If the United States-style open-ended doctrine of fair use has been exported to other jurisdictions and developed by courts to determine fairness in copyright, why, as Adolf Dietz proposed, should the moral right of integrity be different?¹²⁵ Jacques de Werra recently asserted that “[t]he reasonableness of the exercise of the right of integrity means that the scope of protection should largely depend on the specific circumstances of the case

120. For Ms. Mills, “the principal limitation on integrity rights—the statutory waiver—is an inefficient mechanism that provides little additional protection while multiplying transaction costs for both artists and purchasers.” Mills, *supra* note 27, at 445, 461–63.

121. See Rigamonti, *supra* note 17, at 359 (observing that some European countries protect the rights of disclosure, attribution, integrity, and withdrawal). VARA, however, only protects the rights of attribution and integrity in United States law. Mills, *supra* note 27, at 443.

122. CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] art. 121, § 4. For more information about this provision, see generally Edouard Fortunet, *The Author’s Moral Right to Withdraw a Work (droit de repentir): A French Perspective*, 6 J. INTELL. PROP. L. & PRAC. 535 (2011).

123. MIRA T. SUNDARA RAJAN, *MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY* 533 (2011).

124. Mills, *supra* note 27, at 445. According to this argument, moral rights should not have been imported into United States copyright law because even the narrow legal transplantation of moral rights from civil law traditions “has turned out to be counterproductive and in fact has reduced overall moral rights protection for authors.” Rigamonti, *supra* note 17, at 411.

125. Adolf Dietz, *The Artist’s Right of Integrity Under Copyright Law—A Comparative Approach*, 25 INT’L REV. INDUS. PROP. & COPYRIGHT L. 177, 187 (1994).

at hand . . . and that the protection should depend on various factors which should be analysed by courts in each individual case.”¹²⁶

Agustin Waisman proposed we begin by asking the obvious question:

[W]hich modifications of a work may be considered an infringement of the right and why. To put it differently, which are the powers granted by copyright law to the holder of the right of integrity? What may an author do with his right or, rather, what he may prevent others from doing?¹²⁷

He then argued that “the right to integrity can be considered infringed when a modification may potentially affect the way in which the work is perceived by the public . . . irrespective of whether a statute defines infringement by reference to a harm to its author’s reputation.”¹²⁸ In other words, “the claim that a work has been modified is defensible only if the alteration of a support is capable of creating the register of a modified version in the mind of an observer.”¹²⁹ This may be a viable solution. Courts will be required to address tensions between subjective harm and collective perceptions. I think that it would be wrong to neglect the realm of the individual when dealing with moral rights infringements. But I do accept a criterion that would place the observer as a key element.

Eliminating or severely limiting the scope of the right of integrity *would be* a societal wrong—first, by ignoring the personal realm of the artist and his unique contribution to our culture and, second, by creating an artistic reality bereft of constraints on what owners can do with artistic works that may eventually transform this reality into an empty vessel where original artistic messages remain available for public inspection and cultural consumption for an insufficient time.

VII. Conclusions

The right of integrity is here to stay. However, in order to secure constitutional values and vibrant dialogic patterns, the right of integrity should be carefully demarcated. Mills’s argument is very convincing for those who embrace the economic rationale for copyright and view moral rights as alien and unnecessary. The economic argument is fundamental. It highlights the tensions between ownership and its limitations as well as between ownership and core constitutional values. It cannot, however, serve as a sole justification for rights allocation in modern copyright systems. People who create artistic works are artists. Works created by creative people embody elements of physicality and mentality. Both deserve

126. Jacques de Werra, *The Moral Right of Integrity*, in RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 267, 283 (Estelle Derclaye ed., 2009) (footnote omitted).

127. Waisman, *supra* note 7, at 274 (emphasis omitted).

128. *Id.* at 279 (emphasis omitted).

129. *Id.* at 285 (emphasis omitted).

appropriate and well-balanced protection. For the same reasons that economics protect future creations and rewards, moral rights doctrine protects future incentives and eliminates harm and its derivative consequences for artists *and* the community.

Theoretically, as someone who believes that copyrighted commodities are collective enterprises and thus, their ownership should be severely limited, I trust that moral rights should be protected. Practically, this does not mean absolute protection. Rather, it means that these rights should not be made available at the expense of creative progress. Ms. Mills concludes with the observation that “[e]ven if there is a need to formally signal art’s social value . . . integrity rights protection is an improper means of doing so because it prevents art from serving its social purpose by making works of art less subject to transformation.”¹³⁰ Ms. Mills, like many others, sees the right of integrity as a nuisance in copyright policy and would like, as I understand her argument, to find a way to not only minimize its presence but to eliminate it altogether. However, the right of integrity has much to offer both society and authors. It is not a societal wrong. It is one of the primary features within contemporary copyright systems that benefits the system in general.

130. Mills, *supra* note 27, at 464.