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Moral Rights 2.0

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MORAL RIGHTS 2.0

By: Peter K. Yu*

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You have no right to mutilate my music by introducing into it passages, the accompaniments of which are of your own composition. It was quite enough to put into the *Freischütz* a duet from *Euryanthe*, the accompaniment of which is not mine.—You compel me, Sir, to address myself to the public, and to make it known through the French Papers, that it is a robbery which has been committed on me, not only on my music, by taking that which belongs to no one but myself, but also on my reputation, by bringing forth, under my name, mutilated specimens. To avoid all public quarrels, which are never more advantageous for the art than they are for the professors of it, I pray you, Sir, forthwith to withdraw from the piece which you have arranged, all the passages which belong to me.

—Carl Maria von Weber¹

* Copyright © 2014 Peter K. Yu. Kern Family Chair in Intellectual Property Law and Director, Intellectual Property Law Center, Drake University Law School. This Article was expanded and updated from *Moral Rights 2.0*, in *LANDMARK IP CASES AND THEIR LEGACY* 13 (Christopher Heath & Anselm Kamperman Sanders eds., 2011). Earlier versions of this Article were presented at the Inaugural Intellectual Property Symposium organized by the *Texas A&M Law Review*, the 14th Annual Association for the Study of Law, Culture and the Humanities Conference at the William S. Boyd School of Law at the University of Nevada, Las Vegas, the Internet Law Works-in-Progress Symposium at Santa Clara University School of Law, the “Balancing Rights and Interests in the 21st Century” Roundtable at the University of Technology, Sydney, the Digital Interactive Symposium at the University of Edinburgh, and the 10th Anniversary Institute of European Studies of Macau Intellectual Property Seminar in Macau, China. The Author is grateful to Megan Carpenter, Eric Goldman, Christopher Heath, Anselm Kamperman Sanders, Ren Reynolds, and Natalie Stoianoff for their hospitality and the participants of these events for their valuable comments and suggestions. He would also like to thank Cory McAnelly and Megan Snyder for excellent research and editorial assistance.

1. 4 *THE HARMONICON*, A JOURNAL OF MUSIC 42 (1926), quoted with a different translation in KEVIN GARNETT & GILLIAN DAVIES, *MORAL RIGHTS* 1065 (2010). The German composer wrote this in 1826 “to complain that six pieces from operas of his had been adapted for use in another drama (the practice of *pasticcio*) in Paris.” GARNETT & DAVIES, *supra*, at 1065.

I. INTRODUCTION

When the protection of moral rights is brought up in the United States, commentators have always emphasized the differences between continental Europe and the United States.² Cases that have been widely used as textbook illustrations include *Soc. Le Chant de Monde v. Soc. Fox Europe*³ and *Turner Entertainment Co. v. Huston*.⁴ While the Anglo-American copyright regime and the French author's right (*droit d'auteur*) regime were quite similar in the eighteenth century,⁵ the protection of moral rights did not attain formal international recognition until 1928.⁶ The gap between the U.S. and French systems has also grown considerably since the enactment of the 1909 U.S. Copyright Act.⁷

2. As Cyrill P. Rigamonti observed:

[I]t had been a canon of comparative copyright scholarship that the most significant difference between Anglo-American and Continental European copyright law was their respective attitudes toward moral rights. The inclusion of moral rights in statutory copyright law was generally understood to be the defining feature of the Continental copyright tradition, while the lack of statutory moral rights protection was considered to be a crucial component of the Anglo-American copyright tradition. This dichotomy had been celebrated and cultivated since World War II on both sides of the Atlantic to the point where the statutory protection of moral rights or the lack thereof had become an integral part of each legal system's identity, essentially dividing the world of copyright into two fundamentally different ideal types, one that includes moral rights, and another that excludes moral rights.

Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 354 (2006).

3. Cour d'appel [CA] [regional court of appeal] Paris, Jan. 13, 1953, D.A. Jur. 16 (Fr.). The U.S. companion case is *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (App. Div. 1949).

4. Cour d'appel [CA] [regional court of appeal] Versailles, civ. ch., Dec. 19, 1994 (Fr.), translated in ENT. L. REP., Mar. 1995, at 3.

5. See Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 1023 (1990) ("The revolutionary French and American systems shared much not only in theory, but also in practice. In both systems, formalities encumbered, and sometimes defeated, the acquisition or exercise of copyright protection. And both systems primarily protected works useful to advancing public instruction."); Susan P. Liemer, *On the Origins of Le Droit Moral: How Non-economic Rights Came to Be Protected in French IP Law*, 19 J. INTELL. PROP. L. 65, 116 (2011) ("Today literary, visual, and performing artists struggle to assert their rights while using new technology, just like the early French writers in print did. Present day legislatures struggle to draft effective intellectual property legislation for our wireless internet society, much like the Comédie-Française playwrights did once untethered from royal oversight.").

6. During the Rome Revision Conference in 1928, the Berne Convention was revised to provide international recognition to the rights of attribution and integrity. See SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 108 (2d ed. 2006).

7. One of the key differences between the United States and continental Europe was the retention of formalities in U.S. copyright law. These formalities include, among others, the affixation of copyright notices, the registration and renewal of copyright, and the requirement to deposit two copies of the copyrighted work into the Library of Congress. See generally Christopher Sprigman, *Reform(aliz)ing Copyright*,

In 1988, the United States, after holding out for more than a century, finally joined the Berne Convention for the Protection of Literary and Artistic Works⁸ (“Berne Convention”), the leading multilateral copyright treaty.⁹ Article 6*bis*(1) of the Convention 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.¹⁰

Although many different types of moral rights exist throughout the world, the Berne Convention recognizes only two: the right of attribution (*le droit à la paternité*) and the right of integrity (*le droit au respect de l’oeuvre*). As of this writing, more than 160 countries have introduced some form of moral rights.¹¹

Notwithstanding the United States’s obligations under the Berne Convention and its role as a vocal global champion of intellectual property rights, the country has yet to protect moral rights to the same extent as its counterparts in continental Europe.¹² The Visual Artists Rights Act of 1990 (“VARA”), which U.S. Congress enacted to ensure compliance with the Berne Convention, affords only limited protection to the rights of attribution and integrity in a small category of visual art.¹³ That statute, sadly, might not even have been enacted had the U.S. Senate not needed a political compromise between the Democrats and the Republicans over the passage of a federal judgeships bill.¹⁴

57 STAN. L. REV. 485, 491–94 (2004) (discussing the formalities requirements in the early U.S. copyright statutes).

8. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (revised at Paris July 24, 1971) [hereinafter Berne Convention].

9. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. Established in 1886, the Berne Convention entered into force in the United States in March 1989.

10. Berne Convention, *supra* note 8, art. 6*bis*(1).

11. See GARNETT & DAVIES, *supra* note 1, at 1033 & n.1.

12. See ROBERTA K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 37 (2009) (warning that “there is the stark reality that [the United States] may not be in compliance with [its] obligations under the Berne Convention”).

13. 17 U.S.C. § 106A (2012).

14. As Roberta Kwall recounted:

[O]n the last day of the 101st Congress, a major bill was passed that authorized eighty-five new federal judgeships. Sponsors of this bill had to include several unrelated measures in order to appease senators who would otherwise oppose the federal judgeships bill. One such measure was VARA, which had already been passed by the House of Representatives but had been blocked in the Senate Judiciary Committee by some Republican senators. Thus, VARA was passed by the full Senate only because those Republi-

During the negotiation of the Agreement on Trade-Related Aspects of Intellectual Property Rights¹⁵ (“TRIPS Agreement”) at the World Trade Organization (“WTO”), the United States also worked hard to ensure that WTO members could not use the mandatory dispute settlement process to address inadequate protection of moral rights. Article 9.1 of the TRIPS Agreement explicitly states that “Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of [the Berne] Convention or of the rights derived therefrom.”¹⁶ The TRIPS-plus bilateral, plurilateral, and regional agreements that the United States negotiated in the 2000s did not even mention moral rights.¹⁷ Thus, the differences between the United States and continental Europe over the protection of moral rights are likely to persist into the future.

Interestingly, as wide as they are, these differences are unlikely to present significant challenges to the future development of moral rights. Some commentators, in fact, have cautioned us not to overstate the differences between the two regimes. As Justin Hughes reminded us, although philosophical differences exist between Anglo-American and continental European copyright laws, neither their differences nor the role moral rights play in them “should be sketched in caricature.”¹⁸ Likewise, Cyrill Rigamonti observed that differences continue to exist among the different author’s rights regimes in Europe—*droit d’auteur* in France, *Urheberrecht* in Germany, *diritto d’autore* in Italy, and *derecho de autor* in Spain. As he declared:

can senators acquiesced in light of their desire to pass the federal judgeships bill.

KWALL, *supra* note 12, at 28.

15. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 869 U.N.T.S. 299 (1994).

16. *Id.* art. 9.1; *see also* MIRA T. SUNDARA RAJAN, MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY 252–58 (2011) (discussing the impact of the TRIPS Agreement on the international protection of moral rights). It is worth recalling that moral rights “are noncommercial, individual, and cultural rights that, apart from shared roots in the prerogatives of authorship, do not have much in common with the economic aspects of copyright law.” *Id.* at 253. Because the WTO dispute settlement process focuses primarily on trade distortions, the TRIPS negotiators might have considered significant the differences between moral rights and economic rights.

17. *See, e.g.*, Central America–Dominican Republic Free Trade Agreement ch. 15, May 28, 2004, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>; Australia–United States Free Trade Agreement ch. 17, U.S.–Austl., May 18, 2004, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Textsites/default/files/uploads/agreements/fta/australia/asset_upload_file469_5141.pdf; Singapore–United States Free Trade Agreement ch. 16, U.S.–Sing., May 6, 2003, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Textsites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf.

18. Justin Hughes, *Fixing Copyright: American Moral Rights and Fixing the Dastar “Gap,”* 2007 UTAH L. REV. 659, 662 [hereinafter Hughes, *Fixing Copyright*].

Despite the fact that it has harmonized virtually every aspect of copyright protection over the past fifteen years, the European Union has excluded moral rights from its harmonization efforts on various occasions. Moreover, the European Commission currently does not see any need for harmonization in this field and resists the demands of some European academics for community-wide regulation of moral rights¹⁹

In the digital age, the protection of moral rights has raised four new questions: (1) Have moral rights become obsolete? (2) Can the protection of these rights meet the demands of a growing semiotic democracy? (3) Would such protection threaten the development of a participatory democratic culture in countries with heavy information control? (4) Should moral rights be extended to cover a new “right to delete” in the digital environment? Closely examining these questions, this Article explores the legal and policy challenges digital technologies have posed to the moral rights regime. The Article also queries whether moral rights need to be “modernized” to reflect ongoing changes in our socio-technological environment.²⁰

II. OBSOLESCENCE

In a recent article, Amy Adler lamented how moral rights have become badly outdated. As she observed:

[M]oral rights are premised on the precise conception of “art” that artists have been rebelling against for the last forty years. Moral rights law . . . purports to protect art, but does so by enshrining a vision of art that is directly at odds with contemporary artistic practice. It protects and reifies a notion of art that is dead.²¹

As a result, moral rights are now obsolete; they “endanger art in the name of protecting it.”²² The right of integrity, in particular, “fails to recognize the profound artistic importance of modifying, even destroying, works of art, and of freeing art from the control of the artist.”²³

Among the many examples cited for support, the most memorable one concerns Robert Rauschenberg’s artwork, “Erased de Kooning Drawing.” As Professor Adler described:

19. Rigamonti, *supra* note 2, at 357–58 (footnotes omitted).

20. “Modernizing copyright” has been the focus of the 2011 copyright law amendment in Canada and a number of recent public consultations in Europe concerning copyright law revision. *See, e.g.*, Copyright Modernization Act, S.C. 2011, c. 22 (Can.); IRISH COPYRIGHT REVIEW COMMITTEE, MODERNISING COPYRIGHT (2013); U.K. INTELLECTUAL PROP. OFFICE, MODERNISING COPYRIGHT: A MODERN, ROBUST AND FLEXIBLE FRAMEWORK (2012); Press Release, European Commission, Commission Agrees Way Forward for Modernising Copyright in the Digital Economy (Dec. 5, 2012), available at http://europa.eu/rapid/press-release_MEMO-12-950_en.htm.

21. Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009).

22. *Id.*

23. *Id.*

In 1953, Rauschenberg took a drawing by Willem de Kooning and spent a month erasing it. The resulting work is a “sheet of paper bearing the faint, ghostly shadow of its former markings.” Entitling the work “Erased de Kooning Drawing/Robert Rauschenberg/1953,” Rauschenberg exhibited the erasure as his own art. Rauschenberg wrote: “I wanted to create a work of art by [erasing] . . . Using my own work wasn’t satisfactory . . . I realized that it had to be something by someone who everybody agreed was great, and the most logical person for that was de Kooning.”²⁴

Rauschenberg’s artwork is important not because of the erasing act itself, but because of the context surrounding the act: Willem de Kooning held an important place in the U.S. art scene in the 1950s, and destruction art had yet to become as pervasive in contemporary art as it is today.²⁵ As Professor Adler elaborated:

At that time, abstract expressionism so dominated American art (and our artistic place in the world) that de Kooning and his compatriots had come to be viewed as heroic and almost godlike. In that climate, erasing a drawing by de Kooning was a shocking, sacrilegious act. It captured, perhaps better than anything else Rauschenberg did, his scandalous assault on a particular conception of “art.” For the generation of artists after de Kooning the question was: how would it be possible to make art in the wake of the godlike artists who came before them? Rauschenberg’s answer was that new art might be about its own failure to achieve greatness, its impotent rebellion against the heroic past. Rauschenberg began to make art that . . . was about “its own destruction.”²⁶

Rauschenberg’s “creative” assault on de Kooning’s drawing therefore provides an excellent illustration of “how art can emerge from the near destruction of a previous piece”²⁷—a fact that moral rights seem unable, or at least reluctant, to recognize. In fact, the successful completion of Rauschenberg’s artwork largely “depends on the fact that he violated not a reproduction of a work but an original, and not just any original, but an original by Willem de Kooning.”²⁸

Although Professor Adler’s insights are important for both the on-line and offline worlds, they become particularly important to the on-line world, for three reasons. First, moral rights were created with traditional works of art—such as writings, paintings, drawings, and sculptures—in mind. As new works are being created using digital technologies or disseminated through new technological means, it is

24. *Id.* at 283 (footnotes omitted and ellipses in original). It is worth noting that de Kooning gave the drawing to Rauschenberg. *Id.* at 283 n.111.

25. See Roberta Rosenthal Kwall, *Hoisting Originality: A Response*, 20 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 7 (2009) (noting that Rauschenberg’s “erasure work was unorthodox in its time” while “the concept of ‘destruction art’ is [now] ubiquitous in the world of contemporary art”).

26. Adler, *supra* note 21, at 283 (footnote omitted).

27. *Id.*

28. *Id.*

fair to question whether the protection of moral rights has, in fact, become outdated. Obsolescence is an issue Professor Adler tackled head-on in her article, but this debate has only just begun.

Second, while moral rights *as an institution* deserve our urgent attention, moral rights *as protected under statutes or through case law* are equally important. Indeed, digital technologies have threatened to make existing moral rights statutes obsolete. A case in point is VARA. Even though VARA is not applicable to the digital environment,²⁹ it is instructive to highlight the significant problems works of digital visual art could pose to the present statutory language.

VARA was drafted with a specific limitation on the maximum number of autographed and consecutively numbered copies visual artists can have before losing protection. Section 101 of the U.S. Copyright Act specifically provides:

A “work of visual art” is—

- (1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
- (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.³⁰

While the limitation included in this definition makes sense in the physical world, and it most certainly did in the late 1980s when VARA was drafted, it would raise complications in the digital environment.

Consider photographs for example. As Llewellyn Gibbons recently pointed out, VARA does not sit well with digital photographic works.³¹ What does the language “a still photographic image” or “produced for exhibition purposes” mean? Would ephemeral copies count toward the 200 maximum copies? How should the artist sign and number digital photos to comply with the statutory formalities? On a theoretical level, should “copy” still be used as a foundational concept in moral rights law in the digital age?³²

29. See 17 U.S.C. § 101 (2012) (stating that “[a] work of visual art does not include . . . any . . . electronic information service, electronic publication, or similar publication”).

30. *Id.*

31. See Llewellyn Joseph Gibbons, *Visual Artists Rights Act (“VARA”) and the Protection of Digital Works of “Photographic” Art*, 11 N.C. J.L. & TECH. 531, 531–52 (2010) (“VARA poses numerous challenges to creators of digital visual art.”).

32. See COMM. ON INTELLECTUAL PROP. RIGHTS & THE EMERGING INFO. INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 230–32 (2000) [hereinafter *DIGITAL DILEMMA*] (exploring whether “copy” is still an appropriate foundational concept for copyright law in the digital age).

Finally, and most importantly, the digital environment has provided a new opportunity for users, appropriate artists, and other creative appropriators—hereafter referred to as simply users—to reconcile their re-creations with the originals.³³ For example, Jessica Litman pointed out that digital technologies have made it easier to protect the integrity of a creative work. Under her proposal, “any adaptation, licensed or not, commercial or not, should be accompanied by a truthful disclaimer and a citation (or hypertext link) to an unaltered and readily accessible copy of the original.”³⁴ This proposal would allow users to access the original work to judge for themselves how the two works compare to each other. It would help “safeguard the work’s integrity . . . and protect[] our cultural heritage” while at the same time providing users with an unencumbered ability to make the needed modifications.³⁵

Drawing on this proposal, Neil Netanel called for the introduction of a requirement for “those who disseminate a creative appropriation . . . to label it as an unlicensed modification of the original work.”³⁶ As he explained: “Those requirements would serve to accord authorship attribution for the underlying work, avoid confusion regarding which is the ‘authentic,’ copyright holder–authorized version, and refer interested persons to the underlying works so that they can see what has been changed.”³⁷ According to his proposal, compliance can be easily fulfilled by acts as simple as “leaving intact the copyright management information that is digitally embedded in the underlying work when portions of that work are incorporated in the creative appropriation.”³⁸ After all, the WIPO Internet Treaties,³⁹ the Digital Millennium Copyright Act (“DMCA”),⁴⁰ and the EU Information Society Directive⁴¹ already prohibited the intentional removal or alteration of such information.

In a recent book, Roberta Kwall, a staunch and passionate defender of moral rights in the United States, also proposed to use attribution and disclosure to reconcile the protection of moral rights with the competing demands of American constitutional values and our strong need to maintain a well-endowed public domain. Among her recom-

33. See SUNDARA RAJAN, *supra* note 16, at 312–13 (discussing moral rights protection in the context of appropriation art).

34. JESSICA LITMAN, *DIGITAL COPYRIGHT* 185 (2001).

35. *Id.*

36. NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* 215 (2008).

37. *Id.* at 215–16.

38. *Id.* at 216.

39. WIPO Copyright Treaty art. 12, Dec. 20, 1996, S. Treaty Doc. No. 105-17, at 1 (1997); WIPO Performances and Phonograms Treaty art. 19, Dec. 20, 1996, S. Treaty Doc. No. 105-17, at 18 (1997).

40. 17 U.S.C. § 1202 (2012).

41. Directive 2001/29, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 7, 2001 O.J. (L 167) 10 [hereinafter EU InfoSoc Directive].

mendations is “a narrowly tailored right of integrity designed to vindicate the author’s right to inform the public about the original nature of her artistic message and the meaning of her work.”⁴² Similar to Professors Litman and Netanel’s proposals, which prioritized the right of attribution and replaced the right of integrity with the right of full disclosure,⁴³ Professor Kwall called for reforms that require “a disclaimer adequate to inform the public of the author’s objection to the modification or contextual usage.”⁴⁴

III. CREATIVE REUSE AND SEMIOTIC DEMOCRACY

Thanks to the high speed and low costs of reproduction and distribution, the anonymous architecture, and the many-to-many communication capabilities, the Internet has become a particularly effective means of communication. As Judge Stewart Dalzell recognized in *Reno v. ACLU* in the early days of this communication medium, “the Internet is the most participatory form of mass speech yet developed,”⁴⁵ and its content “is as diverse as human thought.”⁴⁶

In light of the Internet’s immense potential for political, social, economic, and cultural developments, commentators—most notably William Fisher—have argued for the allowance of greater reuse and modification of digital works to promote semiotic democracy.⁴⁷ Coined by John Fiske in *Television Culture*,⁴⁸ the term “semiotic democracy” was used by Professor Fisher to denote “the ability of ‘consumers’ to reshape cultural artifacts and thus to participate more actively in the creation of the cloud of cultural meanings through which they move.”⁴⁹ As he explained, there are many benefits when individuals can freely recode preexisting works:

People would be more engaged, less alienated, if they had more voice in the construction of their cultural environment. And the environment itself . . . would be more variegated and stimulating. . . . In the future, sharing could encompass more creativity. The circula-

42. Kwall, *supra* note 12, at 151.

43. See Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 1, 17 (2001) [hereinafter Ginsburg, *Have Moral Rights Come of (Digital) Age*] (noting that Professor Litman’s proposal does not provide for “a true integrity right,” but only “a full disclosure right”); Jacqueline D. Lipton, *Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 537, 563 (2011) (noting that both Professor Litman’s and Professor Netanel’s proposals prioritize the right of attribution over other moral rights, such as the right of integrity).

44. Kwall, *supra* note 12, at 151.

45. *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997).

46. *Id.* at 842.

47. See WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 28–31 (2004).

48. JOHN FISKE, TELEVISION CULTURE 76 (1987).

49. FISHER, *supra* note 47, at 184.

tion of artifacts would include their modification, improvement, or adaptation. To some degree, at least, such habits could help ameliorate the oft-lamented disease of modern culture: anomie, isolation, hyper-individualism. Collective creativity could help us become more collective beings.⁵⁰

The need to develop a semiotic democracy is particularly important today, when media ownership has become highly concentrated in a few corporate oligopolies,⁵¹ and users actively and frequently question the appropriateness of the existing copyright regime. Although the treatment of user-generated content remains a new issue and policy-makers and commentators have yet to reach a consensus on the appropriate standards, the creation of this new type of content has undoubtedly inspired innovative thinking about the development, dissemination, and exploitation of creative works.⁵² The need for user-generated content to coexist with those the traditional entertainment industries develop has also raised important questions about the future development of the copyright and moral rights systems.⁵³

In *Remix*, Lawrence Lessig passionately argued for the need to enable Internet users to remix preexisting works.⁵⁴ As he, Henry Jenkins, and others aptly pointed out, digital literacy in the future will go beyond texts to include other forms of creative media.⁵⁵ Remixes

50. *Id.* at 31.

51. See generally BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* (2004) (examining the increasing concentration of the media industries); ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (1999) (examining the adverse impact concentrated corporate control of media have on participatory democracy).

52. For discussions on the changes user-based creations and mass collaborations have brought to the innovation system, see generally CHRIS ANDERSON, *FREE: THE FUTURE OF A RADICAL PRICE* (2009); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); CLAY SHIRKY, *COGNITIVE SURPLUS: CREATIVITY AND GENEROSITY IN A CONNECTED AGE* (2010); CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* (2008); DON TAPSCOTT & ANTHONY D. WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* (expanded ed. 2008).

53. See Peter K. Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 *VAND. J. ENT. & TECH. L.* 881, 893–99 (2011) (discussing the ample and exciting opportunities YouTube has provided for disseminating both traditional and user-generated content and for shaping the development of copyright laws and user norms); Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 *U. LOUISVILLE L. REV.* 693, 760 (2010) (noting the importance of the treatment of user-generated content to digital copyright reform).

54. See LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 76–82 (2008).

55. See HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* 177 (2006) (“More and more literacy experts are recognizing that enacting, reciting, and appropriating elements from preexisting stories is a valuable and organic part of the process by which children develop cultural literacy.”); LESSIG, *supra* note 54, at 68–76 (discussing the importance and effectiveness of remixing media content and how “these other forms of ‘creating’ [have become] an increasingly dominant form of ‘writing’”).

therefore need to include not only texts, but also images, audio files, and video clips. As Professor Lessig eloquently wrote:

Text is today's Latin. It is through text that we elites communicate For the masses, however, most information is gathered through other forms of media: TV, film, music, and music video. These forms of "writing" are the vernacular of today. They are the kinds of "writing" that matters most to most.⁵⁶

Thus, if society is to ensure that users in future generations can fully develop their creative, communicative, and intellectual capabilities—or the various forms of literacy⁵⁷—reforms to the copyright and moral rights systems are badly needed to provide greater flexibility for individuals to creatively reuse or modify preexisting works. Such reforms will also open up the possibilities for developing a different form of creativity that is "more collaborative and playful, less individualistic or hierarchical."⁵⁸

Unfortunately, moral rights may stand in the way of efforts to promote greater semiotic democracy, digital literacy, or "expressive diversity."⁵⁹ By conferring on authors what Robert Gorman described as an "aesthetic veto,"⁶⁰ moral rights have made it difficult and costly for users to obtain the needed permission to reuse or modify preexisting works. To begin with, determining whether and how authors should be compensated is challenging, especially when only a small, yet non-*de minimis* portion of the work has been used⁶¹ or when the new work has become far more successful than the original one—economically or otherwise. Even Professor Fisher's attractive alternative compensation proposal does not completely address this problem.⁶²

56. LESSIG, *supra* note 54, at 68.

57. See John Hartley, *Uses of YouTube, Digital Literacy and the Growth of Knowledge*, in JEAN BURGESS & JOSHUA GREEN, *YOUTUBE: ONLINE VIDEO AND PARTICIPATORY CULTURE* 126–43 (2009) (discussing YouTube in relation to the promotion of digital literacy).

58. FISHER, *supra* note 47, at 31.

59. See NETANEL, *supra* note 36, at 38–42 (discussing "expressive diversity").

60. Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421, 424 (1990).

61. See Symposium, *Virtual Reality, Appropriation, and Property Rights in Art: A Roundtable Discussion*, 13 CARDOZO ARTS & ENT. L.J. 91, 94–97 (1994) (discussing the challenge posed by including small parts of copyright works into a larger conglomerate work).

62. See FISHER, *supra* note 47, at 199–258 (proposing to set up a government-administered system that compensates copyright holders for the commercial and non-commercial use of copyrighted works). Other commentators and organizations have also advanced similar proposals. See FRED VON LOHMANN, ELEC. FRONTIER FOUND., *A BETTER WAY FORWARD: VOLUNTARY COLLECTIVE LICENSING OF MUSIC FILE SHARING* (2004) (recommending that the recording industry adopt a voluntary collective licensing model similar to the one used by radio stations), available at <http://www.eff.org/files/eff-a-better-way-forward.pdf>; DANIEL GERVAIS, *APPLICATION OF AN EXTENDED COLLECTIVE LICENSING REGIME IN CANADA: PRINCIPLES AND ISSUES RELATED TO IMPLEMENTATION* (2003) (calling for an extended collective licensing system in which copyright holders opt out of a peer-to-peer licensing system while

As he conceded: “[S]emiotic democracy, like all forms of democracy, carries with it risks and costs. . . . There are ways . . . that these risks and costs could be substantially mitigated. But it is impossible to eliminate them altogether.”⁶³

More importantly, the protection of moral rights is not about pecuniary compensation. Rather, it speaks to creative control and artistic integrity. In her book, Professor Kwall underscored an important spiritual link between the author and her work. By protecting the author’s meaning and message that the work embodies,⁶⁴ moral rights recognize the author’s dignity interests⁶⁵ and the “inherent drive” that led her to create the work in the first place.⁶⁶ To a great extent, moral rights highlight an important “intrinsic dimension” of creativity that economic rights fail to recognize.⁶⁷

Some authors and commentators have gone even further to analogize the relationship between the author and her work to the parent-child relationship,⁶⁸ an analogy Professor Kwall and Mira Sundara Rajan have independently endorsed.⁶⁹ As Gary Larson, the creator of

remaining inside on default), available at http://aix1.uottawa.ca/~dgervais/publications/extended_licensing.pdf; Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 311–22 (2002) (proposing to impose statutory levies on Internet service subscriptions and the sales of computer, audio, and video equipment); Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003) (offering a blueprint for the establishment of a “noncommercial use levy”); see also Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 704–15 (2005) (discussing these proposals).

63. FISHER, *supra* note 47, at 37.

64. As Professor Kwall explained:

The concepts of a work’s “meaning” and “message” . . . are related in that they are dependent upon the creator’s subjective vision rather than the vision of the creator’s audience, but these terms nonetheless embrace somewhat distinct ideas. The creator’s meaning personifies what the work stands for on a level personal to the author, whereas the creator’s message represents what the author is intending to communicate externally on a more universal level. A work’s “meaning” therefore exemplifies the idea of “why I as the creator got involved in doing this work and what I see in it.” In contrast, a work’s “message” embodies the notion of “what I as creator expect others to see in it, and what I hope they’ll take from it.”

KWALL, *supra* note 12, at 2–3.

65. See *id.* at 4–5 (noting the need for the legal system to “safeguard[] authorship dignity”).

66. See *id.* at 19 (“The intrinsic dimension focuses on creativity as a response to an inherent drive rather than simply as a quest for economic reward.”).

67. See *id.* at 11–22 (discussing the “intrinsic dimension of human creativity”).

68. “[A]n artist may identify with his works as with his children: prize them for their present character and not want that character changed.” Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 102 (1997).

69. Professor Kwall described the “spiritual” relationship between the author and her work:

[T]his relationship requires the author to infuse herself into her work, while simultaneously maintaining the appropriate distance and perspective so that

The Far Side Cartoons, wrote in a cease-and-desist letter concerning the online reposting of his cartoons:

These cartoons are my “children,” of sorts, and like a parent, I’m concerned about where they go at night without telling me. And, seeing them at someone’s web site is like getting the call at 2:00 a.m. that goes, “Uh, Dad, you’re not going to like this much, but guess where I am.” I hope my explanation helps you to understand the importance this has for me, personally, and why I’m making this request. Please send my “kids” home. I’ll be eternally grateful.⁷⁰

Thus far, commentators have questioned the appositeness of the work-child analogy,⁷¹ especially in situations where waivers or assignments are involved—such as in the United Kingdom⁷² or in the case of cinematographic works.⁷³ After all, parents are not supposed to sell

the work can emerge. Perhaps the best analogy to the type of relationship . . . is that of a parent and child. The parenting experience, perhaps one of the most humbling of all, requires the same delicate balance as that needed to produce highly creative works of authorship. Parents must learn when to become invested and when to take a step back and allow their offspring to grapple with life’s challenges on their own. Moreover, both parents and authors know that their relationship with their “offspring” (both human and intangible) requires a strong degree of faith—not necessarily in God or a higher power, but faith in oneself as a creator, and in the vision of one’s emerging work. Ultimately, this perspective places an equal degree of importance on the process of nurturing one’s creation as it does on the ultimate product.

KWALL, *supra* note 12, at xiv (footnote omitted); SUNDARA RAJAN, *supra* note 16, at 9 (“The work could only have been produced by its author, and was considered to be a reflection of his unique personality. Accordingly, the work was practically an extension of the author himself—his ‘spiritual child.’”).

70. The letter is available at <http://www.portmann.com/farside> (last visited Oct. 12, 2010).

71. See WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 75 (2009) (“[A]t least in common law countries, including the United States, copyright is an economic right, not a moral right concerned with preserving an ongoing, intimate relationship between the author and the work. Acceptance of the parent-child metaphor would mean authors would not be permitted to sell or license their ‘children.’”); Cory Doctorow, *In Praise of Fanfic*, *LOCUS MAG.*, May 16, 2007, <http://www.locusmag.com/Features/2007/05/cory-doctorow-in-praise-of-fanfic.html> (“Writers can’t ask readers not to interpret their work. You can’t enjoy a novel that you haven’t interpreted—unless you model the author’s characters in your head, you can’t care about what they do and why they do it. And once readers model a character, it’s only natural that readers will take pleasure in imagining what that character might do offstage, to noodle around with it. This isn’t disrespect: it’s *active reading*.”).

72. See Copyright, Designs and Patents Act, 1988, c. 48, § 87(2) (Eng.) (“Any of [the rights conferred by Chapter IV on moral rights] may be waived by instrument in writing signed by the person giving up the right.”).

73. See JOHN T. CROSS, AMY LANDERS, MICHAEL MIRELES & PETER YU, *GLOBAL ISSUES IN INTELLECTUAL PROPERTY LAW* 132 (2010) (discussing the complications raised by the large number of authors involved in a cinematographic work); MICHAEL SPENCE, *INTELLECTUAL PROPERTY* 99–101 (2007) (discussing film copyright under U.K. copyright law); SUNDARA RAJAN, *supra* note 16, at 375–435 (discussing moral rights protection in relation to film and other collaborative works); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 *CARDOZO ARTS & ENT. L.J.* 1, 27 (1994)

or license their children.⁷⁴ Notwithstanding these criticisms, many authors, undeniably, are personally attached to their creations.⁷⁵ In fact, many authors find moral rights an important means to ensure the healthy growth of their “children.”

Historically, moral rights served as a powerful legal device for authors to protect their “children” against what Anthony Trollope called “the book-selling leviathans.”⁷⁶ As George Wither, an English author, wrote emphatically in 1625:

For many of our moderne booksellers are but needlesse excrements, or rather vermine, . . . yea, since they take upon them to publish bookes contrived, altered and mangled at their own pleasures, without consent of the writers; and to change the name sometymes, both of booke and author (after they have been imprinted).⁷⁷

Even today, *Author v. Copyright Holder*—or its licensees or assignees—remains “a common fact pattern in attribution disputes.”⁷⁸

As the public becomes more active in digital publishing and dissemination, however, moral rights will precipitate more disputes between authors and users. Consider, for example, the incident surrounding the unauthorized release of an incomplete draft of Stephanie Meyer’s *Midnight Sun*.⁷⁹ Written by the bestselling author of the *Twilight Saga*, the book seeks to retell the story in the series’ first book from the perspective of Edward Cullen, the vampire love interest of Bella Swan, the series’ heroine.

When Meyer was halfway through the writing project, she circulated drafts to a number of people for various reasons, not the least of which being her eagerness to help those working on the film produc-

(noting that “the French and German Acts contain special provisions that sharply limit the right in the area of film production”); Rigamonti, *supra* note 2, at 365 (“In Germany, a separate statutory regime was established for motion pictures and for works used in the production of motion pictures.”).

74. See PATRY, *supra* note 71, at 75.

75. See Christopher J. Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31 (2011) (providing the results of an experiment demonstrating that intellectual property transactions are subject to a creativity effect—“a valuation anomaly . . . that may affect the way in which the originators of creative works assign value to their creations”); Christopher J. Buccafusco & Christopher Jon Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1 (2010) (providing the results of an experiment demonstrating that a substantial valuation asymmetry exists between creators and purchasers of intellectual property, with creators valuing their work more than twice as highly as potential buyers do).

76. ANTHONY TROLLOPE, AN AUTOBIOGRAPHY 308 (Michael Sadleir & Frederick Page eds., 1980).

77. GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST 22–23 (2d ed. 2002).

78. Hughes, *Fixing Copyright*, *supra* note 18, at 674.

79. See Lipton, *supra* note 43, at 556–58 (discussing the incident). Thanks to Jacqueline Lipton for first bringing the incident to the Author’s attention. See Jacqui Lipton, *Digital Copyright Law: What Authors Want*. . . ., MADISONIAN.NET (Oct. 19, 2009), <http://madisonian.net/2009/10/19/digital-copyright-law-what-authors-want/>.

tion of *Twilight* to better understand her characters.⁸⁰ One of these drafts, unfortunately, was leaked onto the Internet. As a result, the author received—both directly and indirectly (via the Internet)—a large number of comments from readers about what they liked or disliked about the draft. Frustrated by the experience, Meyer eventually posted the incomplete draft onto her official website and indefinitely suspended the project.

As she implied in her posted explanation, her concern was not so much about free riding or the lack of monetary compensation. After all, readers may still want to buy the finished product even if an incomplete unauthorized draft has been posted onto the Internet.⁸¹ Novels are experience goods; readers want more than mere information about the plots, characters, dialogues, and most certainly the ending. Rather, Meyer was frustrated by the lack of artistic control over her work and the manuscript's ill-timed disclosure. More importantly, she was disappointed by her inability to continue with the project and complete it to her satisfaction. As she wrote:

I did not want my readers to experience *Midnight Sun* before it was completed, edited and published. I think it is important for everybody to understand that what happened was a huge violation of my rights as an author, not to mention me as a human being. As the author of the *Twilight Saga*, I control the copyright and it is up to the owner of the copyright to decide when the books should be made public; this is the same for musicians and filmmakers. . . . My first feeling was that there was no way to continue. Writing isn't like math; in math, two plus two always equals four no matter what your mood is like. With writing, the way you feel changes everything. If I tried to write *Midnight Sun* now, in my current frame of mind, James [a tracker vampire who wanted to hunt Bella for sport] would probably win and all the Cullens would die, which wouldn't dovetail too well with the original story. In any case, I feel too sad about what has happened to continue working on *Midnight Sun*, and so it is on hold indefinitely.⁸²

While receiving comments from readers might be helpful to authors after they have completed their work, the untimely release of the in-

80. See Lipton, *supra* note 43, at 556.

81. As Professor Lipton explained:

Meyer could potentially . . . suffer economic harm if an early draft of her manuscript is available online and she later commercially publishes an official version. It is conceivable that someone might read the version available online, decide they do not like it, and not bother to buy the final version, when otherwise they may have bought it. Of course, it is equally possible—and probably more likely—that her fans would have been titillated by the online draft into buying the final published version to see what happens next and perhaps to compare the early draft with the final product.

Id. at 558.

82. *Midnight Sun: Edward's Version of Twilight*, STEPHENIEMEYER.COM (Aug. 28, 2008), <http://www.stepheniemeyer.com/midnightsun.html>.

complete draft and the resulting comments disrupted Meyer's creative process. The comments she read or heard about inevitably will color the work she is eventually to create (if she continues at all). Indeed, there is a very strong likelihood that the finished product will be quite different from what she originally intended.

Finally, violations of moral rights affect more than authors. Third parties can have strong interests in preserving the work and stabilizing its social and cultural meanings. In their economic analysis of moral rights, Henry Hansmann and Marina Santilli explained how damage to the integrity of one work could generate negative externalities on owners of the author's other works as well as the public at large.⁸³ Justin Hughes also explored in great depth the oft-overlooked audience interests in creative works.⁸⁴ As he pointed out, in some situations, "the utility derived by passive non-owners from the stability of propertized cultural objects [may be] greater than the utility that would accrue to non-owners who want to recode cultural objects so much that those non-owners need to be freed from existing legal constraints."⁸⁵ In those situations, recoding seems inappropriate, and moral rights will be needed to prevent unwanted recoding.

IV. LIBERATIVE REUSE AND DEMOCRACY

While the Internet and the development of user-generated content are important to societies in general, they become critically important to countries with heavy information control. In China, for example, "[t]he growth of the Internet, in tandem with other technologies such as short messaging services, has . . . engendered a phenomenon of increasingly relevant 'public opinion' . . . , where incidents not necessarily prioritized by traditional media receive national attention and

83. See Hansmann & Santilli, *supra* note 68, at 105–07.

84. See generally Justin Hughes, "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999).

85. *Id.* at 928. Nonetheless, the audience may not always want these objects to have stabilized meanings. As Professor Sundara Rajan pointed out, in some non-Western cultures, the audience may take on the active role of an aesthetic participant:

The idea of the audience as aesthetic participant may be somewhat unfamiliar to Western "high" culture. However, it is an ancient and well-established principle in cultures of the East. The Sanskrit term, "*rasa*," describes the ecstatic essence of the creative moment, and it is made possible by the shared experience of artist and audience. The idea is beautifully explained by Bharata, the fabled author of the Sanskrit treatise on classical performance known as the *Natya Shastra*: "Born in the heart of the poet, [aesthetic experience] flowers as it were in the actor and bears fruit in the spectator. All three in the serene contemplation of the work, form in reality a single knowing object fused together."

SUNDARA RAJAN, *supra* note 16, at 21–22 (footnotes omitted). Indeed, "[b]y enabling a physical *rapprochement* between author and audience, through engagement with the work, digital technology supports the possibility of a new and closer relationship between them." *Id.* at 22.

frequently lead to calls for government action and response.”⁸⁶ The Internet has also provided users with information about the way of life in other countries, thereby enabling them to make informed judgment about possibilities of life.⁸⁷

More importantly, Internet communication carries with it texts, images, audio files, and video clips that enable users to explore new perspectives and worldviews. As Marci Hamilton pointed out in an important article about art speech, art is subversive by nature and has transformative potential.⁸⁸ It enables us to experience unfamiliar worlds and thereby gain new insights into the prevailing status quo.⁸⁹ Even better, art is also safe, and it helps us experience new worldviews without the attendant risks of living in an alternative universe or the need to push for political or social change.⁹⁰ As Professor Hamilton explained:

Through the imagination, art evinces what purely didactic speech cannot—the “sensation” of an experience never had, a world never seen. Conjuring up that which has not been experienced, it poses a challenge to the participant’s preconceived and preordained world view. At a level similar to empathy . . . the imagination takes one beyond one’s preexisting conceptions and intuitions about life, power, and reality. The aesthetic experience does not occur at the level of the semantic but rather the imaginary; thus, to be conceptually available, it must always be translated into the semantic. Art does not challenge existing reality by posing counterfactuals. Nor is the work of art a representation of “concepts of reality” or a copy of reality. Instead, it creates the condition for imaginatively living through a different world altogether. Two phenomena occur simultaneously within the participant’s experience of art: (1) the recognition of preexisting world views, and (2) the act of defamiliarization, the distancing of oneself from one’s assumptive world view. They

86. *China (Including Hong Kong)*, in ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING 265 (Ronald Deibert et al. eds., 2008).

87. See Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1, 23 (2002) [hereinafter Yu, *Bridging the Digital Divide*] (“Bridging the global digital divide . . . would facilitate the flow of information from the less developed countries to the developed countries, and vice versa. Such an effort would enable citizens and businesses in the developed countries to make more informed decisions about matters concerning foreign countries and the global community.”).

88. See generally Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73 (1996) (positing a theory that art performs a singular function in providing the means of challenging government).

89. See *id.* at 86–96 (discussing how art enables the participant to recognize preexisting worldviews and distance oneself from one’s assumptive worldview through the act of defamiliarization).

90. See *id.* at 76 (“Art permits individuals to experience alternative worlds, thereby providing an efficient and effective means of testing the status quo without risk.”).

operate together to create a reorientation experiment, the commitment-free experiencing of a perspective different from one's own.⁹¹

Given art's ability to challenge the status quo, Taliban Afghanistan imposed a complete ban on the Internet.⁹² Other countries—including both democratic and authoritarian regimes—have also introduced content regulations to control or temper with the digital environment.⁹³

Although government censorship, thus far, has been widely covered both by the Western press and in academic literature, the potential barrier copyright and moral rights pose to Internet freedom is sparsely addressed. In fact, despite evidence to the contrary,⁹⁴ the public at large in the West seemed greatly surprised when intellectual property rights were used as a pretext for human rights abuse and civil liberties violations. In September 2010, *The New York Times* published a detailed report on the complaints by an outspoken Siberian environmental activist group about how Russian authorities, in the name of protecting Microsoft's copyrighted software, had confiscated their computers as well as those of other advocacy groups and opposition newspapers.⁹⁵ That report generated a spirited—and for rights holders, highly unwanted—public debate about the need to re-examine intellectual property protection and enforcement through the lens of corporate social responsibility.⁹⁶ *The New York Times* report and the ensuing debate eventually led Microsoft to publicly announce a new plan to provide blanket licenses to advocacy groups and media outlets,

91. *Id.* at 87–88 (footnotes omitted).

92. See Yu, *Bridging the Digital Divide*, *supra* note 87, at 37–38 (discussing the ban the Taliban regime imposed upon television and the Internet).

93. See Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 1050–59 (2011) (discussing how the establishment of the Anti-Counterfeiting Trade Agreement by developed and like-minded countries has greatly undermined the protection of free speech, free press, privacy, and other civil liberties throughout the world).

94. See William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 NYU J. INT'L L. & POL. 135, 144–45 (1997) (noting that the U.S. coercive trade policy provided China with “a convenient legitimization” for its repressive measures while constraining the United States's capacity to complain about such actions); Peter K. Yu, *Three Questions that Will Make You Rethink the U.S.-China Intellectual Property Debate*, 7 J. MARSHALL REV. INTELL. PROP. L. 412, 424–32 (2008) (discussing how the United States's foreign intellectual property policy has greatly undermined its efforts to promote free flow of information and ideas in China).

95. Clifford J. Levy, *Using Microsoft, Russia Suppresses Dissent*, N.Y. TIMES, Sept. 12, 2010, at A1.

96. See generally REBECCA MACKINNON, CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM 115–65 (2012) (discussing how the failure of Internet companies to be socially responsible and accountable has eroded the Internet's democratic potential).

thereby distancing itself from repressive authorities that have misused intellectual property rights to suppress or silence dissent.⁹⁷

In a recent article, I discussed how the balance of the copyright system needs to be adjusted to reflect the different social conditions in countries where information flows are heavily regulated⁹⁸—a point Neil Netanel also observed.⁹⁹ In countries with heavy censorship, for example, Internet users often will need to reuse, without permission, materials previously approved by censors or that are only available abroad. To provide an alternative source of information, they may need to repost copyrighted stories, videos, or photos that otherwise would not have been available. They may also need to repurpose pre-existing materials to address issues that they otherwise cannot discuss because of government censorship.

In repressive societies, parodies, satires, coded words, euphemisms, and allusions to popular culture remain dominant vehicles of communication.¹⁰⁰ Materials that are seemingly unrelated to the intended original message are often used to create associations, build in tacit meanings, provide emotional effects, and ultimately avoid censorship. Whether it is a remix of video clips from Western movies, the synchronization of contents to rock 'n roll songs, or the modification of news reports from foreign media, repurposed contents carry within them rich “hidden transcripts” that provide important social commentary.¹⁰¹

Although we sometimes distinguish works that are of public interest—such as news stories—from those that are created for commercial or entertainment purposes, this type of distinction is usually unhelpful in countries where circulation of information is limited. Entertainment products that are uncontroversial, highly commercial, and seemingly frivolous could easily contain useful political information. It is indeed not uncommon to find Hollywood movies or American television programs portraying different forms of government, the need for checks

97. See Clifford J. Levy, *Microsoft Changes Policy amid Criticism It Backed Suppression of Dissent in Russia*, N.Y. TIMES, Sept. 14, 2010, at A4.

98. Peter K. Yu, *Promoting Internet Freedom Through the Copyright System*, E JOURNAL USA, June 2010, at 7, available at <http://ipdigital.usembassy.gov/st/english/publication/2010/07/20100727141034enelrahc5.498904e-02.html#axzz2x86oqpEH>.

99. See Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 277–78 (1998) (arguing that “copyright should be carefully tailored to give greater potency to its support of democratization and to minimize the barriers that it may pose under various local conditions” and that “it may be more conducive to democratic development to allow for a good measure of compulsory licensing, with royalties set to enable widespread access, while also providing some remuneration to copyright owner”).

100. See Ashley Esarey & Qiang Xiao, *Below the Radar: Political Expression in the Chinese Blogosphere*, 48 ASIAN SURV. 752 (2008) (discussing the use of parodies, satires, coded words, euphemisms, and allusions to popular culture in communication in repressive societies).

101. JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* (1992).

and balances or separation of powers, and the protection of constitutional rights and civil liberties.¹⁰² While these commercial products may have been created to provide entertainment, in some countries they also supply an important window to the outside world.¹⁰³

Furthermore, the creative reuse and modification of preexisting materials can help promote the development of a vibrant democratic culture, which in turn can affect a country's political future. As Jack Balkin observed with respect to digital speech:

A democratic culture is the culture of widespread “ripping, mixing, and burning,” of nonexclusive appropriation, innovation, and combination. It is the culture of routing around and glomming on, the culture of annotation, innovation, and bricolage. Democratic culture . . . makes use of the instrumentalities of mass culture, but transforms them, individualizes them, and sends what it produces back into the cultural stream. In democratic culture, individuals are not mere consumers and recipients of mass culture but active appropriators.¹⁰⁴

102. The three prequels to *Star Wars*, for example, are filled with issues concerning corruption, slavery, federalism, democracy, racial tension, and the American government. *STAR WARS: EPISODE I—THE PHANTOM MENACE* (Twentieth Century Fox 1999); *STAR WARS: EPISODE II—ATTACK OF THE CLONES* (Twentieth Century Fox 2002); *STAR WARS: EPISODE III—REVENGE OF THE SITH* (Twentieth Century Fox 2005).

103. Commentators noted the significant influence of Western popular culture on the former Soviet Union and Eastern Europe. As a retired foreign service officer observed:

From foreign films, Soviet audiences learned that people in the West did not have to stand in long lines to purchase food, did not live in communal apartments, dressed fashionably, owned cars, and enjoyed many conveniences not available in the Soviet Union. Through foreign films—European as well as American—they were able to see aspects of life in the West that contradicted the negative views promulgated by the Soviet media. Audiences were not so much listening to the soundtrack or reading the subtitles as watching the doings of people on the screen—in their homes, in stores, on streets—the clothes they wore, and the cars they drove. Such details, which showed how people lived in the West, were very revealing for Soviet audiences.

Yale Richmond, *Cultural Exchange and the Cold War: How the Arts Influenced Policy*, 35 J. ARTS MGMT., L. & SOC'Y 239 (2005); accord DEBORA J HALBERT, *THE STATE OF COPYRIGHT: THE COMPLEX RELATIONSHIP OF CULTURAL CREATION IN A GLOBALIZED WORLD* 87 (2014) (“[Western] television programs cracked the state-sponsored cultural projects of the Soviets by providing a visual representation of another possible world. They also captured their audiences with the soap opera qualities of *Dallas*, where everyone wanted to know who shot J.R., and the adventures of Michael Knight and his intelligent car.”); Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 619 (1996) (“After the Berlin Wall fell, some said that East Germany fell because the East Germans were enthralled with the ethos and consumer goods viewed every Friday night on the U.S. television show ‘Dallas.’”).

104. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 NYU L. REV. 1, 45 (2004) (footnote omitted).

Creative reuse and modification of preexisting materials are therefore highly valuable to society. They ensure that “[e]veryone—not just political, economic, or cultural elites—ha[ve] a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and the communities and subcommunities to which they belong.”¹⁰⁵

While the need to realize this democratic culture is not new, and such realization draws on the socio-political foundations free speech has helped build,¹⁰⁶ digital technologies “change the social conditions in which people speak . . . [and therefore] bring to light features of freedom of speech that have always existed in the background but now become foregrounded.”¹⁰⁷ As Professor Balkin forcefully argued, democratic cultural participation is important for two reasons:

First, culture is a source of the self. Human beings are made out of culture. A democratic culture is valuable because it gives ordinary people a fair opportunity to participate in the creation and evolution of the processes of meaning-making that shape them and become part of them; a democratic culture is valuable because it gives ordinary people a say in the progress and development of the cultural forces that in turn produce them.

Second, participation in culture has a constitutive or performative value: When people are creative, when they make new things out of old things, when they become producers of their culture, they exercise and perform their freedom and become the sort of people who are free. That freedom is something more than just choosing which cultural products to purchase and consume; the freedom to create is an active engagement with the world.¹⁰⁸

Thus, in countries where information flows are heavily controlled, *creative* reuse can actually become *liberative* reuse. Such reuse enables the development of not only semiotic democracy, but democracy in general.

105. *Id.* at 4.

106. As Professor Balkin pointed out:

The populist nature of freedom of speech, its creativity, its interactivity, its importance for community and self-formation, all suggest that a theory of freedom of speech centered around government and democratic deliberation about public issues is far too limited. The free speech principle has always been about something larger than democracy in the narrow sense of voting and elections, something larger even than democracy in the sense of public deliberation about issues of public concern. If free speech is about democracy, it is about democracy in the widest possible sense, not merely at the level of governance, or at the level of deliberation, but at the level of culture. The Internet teaches us that the free speech principle is about, and always has been about, the promotion and development of a democratic culture.

Id. at 34.

107. *Id.* at 2.

108. *Id.* at 35.

Unfortunately, moral rights may stand in the way of a democratic culture the same way it does in the way of semiotic democracy. One of the widely reported examples in China concerns a viral video about a bloody murder caused by a *mantou* (steamed bun).¹⁰⁹ Developed in the emerging tradition of *egao*—a form of online parody or satire that relies on the author’s “messaging” with or making fun of preexisting media content¹¹⁰—the video was created by mashing up the footage of acclaimed Chinese film director Chen Kaige’s extravagant, yet somewhat disappointing movie, *Wuji* (*The Promise*), a legal affairs program from China’s state broadcaster CCTV, and a small quantity of other copyrighted materials.¹¹¹

Instead of a historic epic fantasy Chen intended, the video took the form of “a mock legal-investigative TV program,” reporting about a murder that a steamed bun had caused.¹¹² This frivolous-sounding video touched on many contemporary socio-economic problems in China. It was timely and entertaining. It arguably also contained some socio-political value. Nonetheless, the famous film director was upset and eventually threatened to sue the videomaker for copyright infringement and defamation. As Chen told reporters from Sina.com, a Chinese Internet portal: “I think this [parody] has exceeded the normal bounds of issuing commentary and opinion. It’s an arbitrary alteration of someone else’s intellectual property.”¹¹³ Although news about the lawsuit slowly disappeared, the film director’s reactions to the parody clip have sparked an important debate about the need for greater protection of parodies and satires in China.

To alleviate the tension between free speech and moral rights, commentators have called for greater recognition of parodies in the moral rights regime.¹¹⁴ The introduction of a parody exception, however, does not always resolve this tension. In fact, many strong moral rights regimes already include a parody exception. Article L. 122-5(4) of the *Code de la Propriété Intellectuelle*, for example, provides: “Once a work has been disclosed, the author may not prohibit . . . parody, pas-

109. See Dexter Roberts, *A Chinese Blogger’s Tale*, BUS. WK., Mar. 23, 2006 (reporting about the video).

110. See Esarey & Xiao, *supra* note 100, at 764; Wu Jiao, *E’gao: Art Criticism or Evil?*, CHINA DAILY, Jan. 22, 2007, http://www.chinadaily.com.cn/china/2007-01/22/content_788600.htm. A sociology professor at Peking University defines *egao* as “a subculture characterized by satirical humour, revelry, grassroots spontaneity, a defiance of authority and mass participation.” *Id.*

111. See Roberts, *supra* note 109.

112. *Id.*

113. Robert S. Rogoyski & Kenneth Basin, *The Bloody Case that Started from a Parody: American Intellectual Property Policy and the Pursuit of Democratic Ideals in Modern China*, 16 UCLA ENT. L. REV. 237, 262–63 (2009).

114. See, e.g., Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 122 (1996) (proposing that “when moral rights under section 106A are asserted against a parodist, . . . a court should presume that the parodist’s use is a fair one, even if it is a commercial use”).

tiche and caricature, observing the rules of the genre.”¹¹⁵ Despite this exception, which courts have narrowly construed, the ability of individuals to make unauthorized reuse or modification of a creative work remains severely curtailed in France.¹¹⁶

V. RIGHT TO DELETE

Parts I to III have examined areas in which moral rights may have been too strong. This Part focuses instead on an area where these rights may not have gone far enough. Commentators, policymakers, and the public at large have become increasingly concerned about the permanent existence of personal information and other materials on the Internet.¹¹⁷ As a result, they began to explore the need to introduce a new “right to delete” into the digital environment.¹¹⁸

The debate on this new right ties well into our present discussion of moral rights; it touches on the right of withdrawal (or the right of retraction—*le droit de repentir ou de retrait*).¹¹⁹ As Jeremy Phillips observed, even though the right of withdrawal is rather insignificant within the moral rights regime, that right paradoxically has become “the most significant moral right in the context of the wiki [or other digital platforms], where a work may be of only temporary or ephemeral interest and the author may have a pressing and continuing need to change his posted text or withdraw it completely from its . . . host.”¹²⁰

The debate on the right to delete also touches on what commentators have referred to as the “right to destroy”¹²¹—a right that has not

115. Code de la Propriété Intellectuelle Art. L. 122-5(4) (1992) (Fr.); see also EU InfoSoc Directive, *supra* note 41, art. 5(3)(k).

116. As Mary LaFrance observed:

[T]he limiting phrase “observing the rules of the genre” leaves much room for interpretation. In an attempt to balance moral rights against free expression, the French courts have applied this exception only where the parodic work has a humorous intention, and only where the parody is clearly distinct from the work being parodied.

MARY LAFRANCE, GLOBAL ISSUES IN COPYRIGHT LAW 228 (2009); see also GARNETT & DAVIES, *supra* note 1, at 380 (discussing the limited exception in France in relation to song parodies).

117. See, e.g., J.D. Lasica, *The World Wide Web Never Forgets*, AM. JOURN. REV., June 1998, at 68; J.D. Lasica, *The Net Never Forgets*, SALON (Nov. 25, 1998, 2:00 PM CST), http://www.salon.com/1998/11/25/feature_253/.

118. See generally VIKTOR MAYER-SCHÖNBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE (2009) (discussing the need to introduce into digital technology a capacity to forget).

119. As Professor Kwall pointed out, “[t]he right of withdrawal . . . is connected to the right of disclosure in that the author also enjoys the right to determine whether a work should be withdrawn from the public if it no longer reflects the author’s convictions or spirit.” KWALL, *supra* note 12, at 44.

120. Jeremy Phillips, *Authorship, Ownership, Wikiship: Copyright in the Twenty-First Century*, in RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 193, 208 (Estelle Derclaye ed., 2008).

121. E.g., Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

yet been recognized as a moral right. In their works on the latter, the late Joseph Sax and Lior Strahilevitz described the many actions artists have taken to destroy their creative works.¹²² As Professor Strahilevitz reminded us, a strong justification exists for the right to destroy in creative works:

A society that does not allow authors to have their draft works destroyed posthumously could have less literary product than a society that requires the preservation of all literary works not destroyed during the author's life. Protecting authors' rights to destroy should encourage high-risk, high-reward projects, and might prevent writers from worrying that they should not commit words to paper unless they have complete visions of the narrative structures for their work.¹²³

Likewise, Professor Sax believed that "an artist should be entitled to decide how the world will remember him or her."¹²⁴ A right to destroy therefore serves important functions for not only the authors but also society at large.

In the digital context, Viktor Mayer-Schönberger underscored the need for individuals to delete works they have created on the Internet. As he observed, "tensions will remain between an individual's desire to forget and a society's desire to remember (and vice versa)."¹²⁵ To help resolve these tensions, Professor Mayer-Schönberger proposed to "mimic human forgetting in the digital realm . . . by associating information we store in digital memory with expiration dates that users set."¹²⁶ This proposal dovetails with Professor Balkin's earlier proposal for greater regulation of the collection, use, or purchase of personal data by government.¹²⁷ Professor Balkin argued further that Congress should "institutionalize government 'amnesia' by requiring that some kinds of data be regularly destroyed after a certain amount of time unless there were good reasons for retaining the data."¹²⁸

As far as moral rights are concerned, the right to delete raises important questions that require us to revisit the debate on the right of

122. See JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 200–01 (2001) (discussing the mistreatment of some of the greatest artifacts of our civilization by their owners, including their destruction); Strahilevitz, *supra* note 121, at 830–35 (exploring whether a creator has more leeway to destroy a piece of property than an ordinary owner who acquires it through purchase, inheritance, or gift).

123. Strahilevitz, *supra* note 121, at 832.

124. SAX, *supra* note 122, at 200.

125. MAYER-SCHÖNBERGER, *supra* note 118, at 190.

126. *Id.* at 171.

127. See Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 21 (2008) (calling for Congress to "pass new superstatutes to regulate the collection, collation, purchase, and analysis of data").

128. *Id.*

withdrawal. Although many countries, including France¹²⁹ and Germany,¹³⁰ have recognized a right of withdrawal, retraction, or revocation as part of their moral rights regimes, this specific right usually comes with significant qualifications. As Cyrill Rigamonti described:

[I]n France and Germany, if authors reconsider their decision and further divulge their work after retracting it, the assignees enjoy a right of first refusal and have the option of exploiting the work under the terms and conditions of the initial contract. Moreover, the right of withdrawal may not be exercised for just any reason. The German copyright statute specifically states that the right of withdrawal can be exercised only if authors can no longer reconcile the contents of their works with their personal convictions, and the Italian copyright statute explicitly requires “serious moral reasons.” The same is true in France on the grounds that the right of withdrawal is subject to the general civil law rule that the abuse of rights is not protected, whereas such abuse is assumed whenever the author’s exercise of the right of withdrawal is not motivated by his or her personal internal debate about whether to further divulge the work. In other words, monetary concerns alone will not suffice.¹³¹

Given these substantial qualifications and the fact that the right of withdrawal is rarely litigated, Professor Rigamonti considered this right “largely an example of symbolic legislation.”¹³²

At the international level, the Berne Convention does not include this rarely litigated right either. As noted earlier, article *6bis* of the Convention protects only the rights of attribution and integrity.¹³³ Similarly, and in a large part due to the omission in the Berne Convention, weak moral rights regimes do not offer protection to the right of withdrawal. Consider, for example, VARA in the United States. Although the statute includes a right to prevent destruction of

129. Code de la Propriété Intellectuelle Art. L. 121-4 (1992) (Fr.). In France, this right is known as *droit de retrait et de repentir* (right of withdrawal and repentance).

130. *Urheberrechtsgesetz* [UrhG] [Copyright Law], Sept. 9, 1965, as amended, art. 42 (Ger.). In Germany, this right is known as *Rückrufsrecht wegen gewandelter Überzeugung* (right of revocation for changed conviction).

131. Rigamonti, *supra* note 2, at 363 (footnotes omitted); see also GARNETT & DAVIES, *supra* note 1, at 388 (“Although the author is the only person who can decide whether to withdraw his work from circulation or to modify it, it is agreed that he can only do so for moral or intellectual reasons; there should be no financial motivation for the decision, as this would constitute an abuse of his rights.” (footnote omitted)); SUNDARA RAJAN, *supra* note 16, at 66 (noting that the clause concerning the right of first refusal and the option of exploiting the work under the original terms and conditions “provides careful protection against the possibility of an author using the right of withdrawal to escape from the terms of a publication contract which he might later find undesirable—or, indeed, to alter those terms through the exercise of the right, by seeking to re-publish the work on new terms, with a new publisher”).

132. Rigamonti, *supra* note 2, at 363.

133. Berne Convention, *supra* note 8, art. *6bis*.

“work[s] of recognized stature,”¹³⁴ that right is closer to a right of preservation than a right of withdrawal or a right to destroy.¹³⁵

Finally, given the complexity of the digital environment, it is unclear how broad a right to delete should or could be and how practical and effective it would be if such a right came into existence. It also remains to be seen whether users in collaborative settings (such as contributors to blogs, wikis, fan sites, or virtual worlds) could ensure the modification or removal of unwanted postings or creations.¹³⁶

Today, the Internet has made it awfully difficult, if not virtually impossible, for individuals to withdraw creative works once they become available—be they photographic images, audio files, or video clips. Sometimes, these works will appear in their original format. At other times, however, they will appear in the form of collages, remixes, or mashups—as in the oft-cited, yet unfortunate case of the *Star Wars Kid*,¹³⁷ whose videos remain widely available on YouTube. Even when the electronic files are deleted, there is no guarantee that it does not retain an “electronic footprint” in the form of edit history, archives, or privately controlled digital memory.¹³⁸

If these questions are not challenging enough, the right to delete recalls the oft-discussed dilemma copyright and moral rights scholars face: Who should decide whether a work can be destroyed? The textbook illustration of this dilemma involves Franz Kafka’s instructions to his executor and friend, Max Brod, to destroy all unpublished manuscripts upon his death. Had Brod followed the instructions, two of Kafka’s then-unpublished masterpieces, *The Castle* and *The Trial*, would not have seen the light of day. Because these two works are now “widely acknowledged as being highly influential in modern Western literature,”¹³⁹ readers and scholars are, most certainly, thankful that the executor defied the author’s ill-advised dying wish.

The Kafka example has raised difficult questions about not only the author’s right to control, but also who is in the best position to make decisions about such control, especially after the author’s death.¹⁴⁰ As

134. 17 U.S.C. § 106A(a)(3)(B) (2012).

135. See Justin Hughes, *The Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L.J. 19, 22 (2001) (equating “a right to prevent destruction of a work” with “a right ‘of preservation’”).

136. See SUNDARA RAJAN, *supra* note 16, at 513–19 (discussing moral rights protection in relation to Wikipedia and other collective creations); Phillips, *supra* note 120, at 207–08 (discussing the difficulties in applying moral rights principles to the creation of wikis).

137. See *Star Wars Kid Files Lawsuit*, WIRED (July 24, 2003), <http://www.wired.com/culture/lifestyle/news/2003/07/59757> (reporting the lawsuit sparked by the posting of the “*Star Wars Kid*” video).

138. Phillips, *supra* note 120, at 208 n.33.

139. Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1594 n.263.

140. See Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 474–81 (2008) (discussing the tension between the need of

Linda Lacey asked two decades ago in a hypothetical drawn from Kafka's will, "Who should prevail . . . when an artist's will orders the destruction of her paintings and an art expert challenges the will, declaring that the paintings are masterpieces that would become an integral part of the culture of the artist's homeland?"¹⁴¹ To some extent, the right to delete brings back the debate on this very difficult question. After all, the Internet is as much about individual users as it is about the collaborative exchange among these individuals.

VI. CONCLUSION

This Article closely examines four new questions the arrival of the Internet and new communications media has posed to the moral rights regime. Digital technologies, however, do not pose a unidirectional challenge to the moral rights regime. Rather, in a creative destructive way, these technologies help reinforce moral rights protection at the same time as they are posing new challenges. For example, digital rights management tools "serve purposes akin to moral rights, first by assuring *attribution* to the author, artist, or composer, and second by ensuring the *integrity* of documents, images, and music."¹⁴² In addition, by preventing false attribution of authorship and the intentional removal or alteration of copyright management information, the WIPO Internet Treaties, the DMCA, and the EU Information Society Directive have greatly strengthened the existing moral rights regime.¹⁴³ The wide availability of digital technologies for tracking down the originals and to fashion a disclosure remedy have also provided authors with additional protection. To some extent, digital technologies may have ensured that moral rights "come of age" in the United States, as Jane Ginsburg surmised.¹⁴⁴

In short, the arrival of the Internet and new media technologies has presented a similar "digital dilemma" as the one widely discussed in the copyright context.¹⁴⁵ Although the challenges—and perhaps the stakes, especially in the United States—are somewhat different, resolving these challenges is unlikely to be easy. In fact, if the diffi-

scientific and museum communities for access to indigenous artifacts and body remains on the one hand and the interests of indigenous peoples and traditional communities on the other).

141. Lacey, *supra* note 139, at 1593–94.

142. Kenneth W. Dam, *Self-help in the Digital Jungle*, 28 J. LEGAL STUD. 393, 405 (1999).

143. See KWALL, *supra* note 12, at 26 ("[W]hen Congress enacted the Digital Millennium Copyright Act in 1998, it included a de facto right of attribution through the copyright management information provisions."); Ginsburg, *Have Moral Rights Come of (Digital) Age*, *supra* note 43, at 11 ("The DMCA may contain the seeds of a more general attribution right: with sufficient ingenuity and effort, these seeds might be made to germinate. The seeds may be found in the section 1202 provision on 'Copyright Management Information.'").

144. Ginsburg, *Have Moral Rights Come of (Digital) Age*, *supra* note 43, at 9.

145. DIGITAL DILEMMA, *supra* note 32.

culty in providing satisfactory responses to the challenges in the copyright arena provides any guidance, the prospects for resolving challenges in the moral rights context can be equally dim. It is therefore high time we start paying attention to questions in this area.

In his seminal article, *The Refrigerator of Bernard Buffet*, Henry Merryman reminded us that “the moral right of the artist, still comparatively young even in the nation of its origin, has not reached anything like its full development.”¹⁴⁶ Although Professor Merryman wrote the article close to four decades ago, his important insight is still alive today. Digital technologies have provided moral rights with both reinforcements and challenges. As moral rights continue to grow and mutate, their development will undoubtedly be shaped by the needs and demands of a rapidly changing socio-technological environment. Whether moral rights will become stronger or weaker, broader or narrower, relevant or obsolete will remain highly contingent on the development of this environment.

146. John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1026 (1976).