The Death of the Transformative Author

An analysis of how Moral Rights in Copyright Law have the potential to limit creative freedom

Sarah Hook
LLB. BA (Hons). Grad Dip Legal Prac.

This Thesis is presented for the degree of Doctor of Philosophy, University of Western Sydney, School of Humanities and Communication Arts, 2013
ACKNOWLEDGEMENTS

The highs and lows of my Doctoral journey have been shared by many people who have encouraged, inspired and propelled me through the last four years.

My foremost debt of gratitude goes to my supervisor Professor Peter Hutchings who bravely took on the project half way through. He was able in a short time to get my thesis back on track and with workshopping, polishing and guidance helped turn it into a piece of research I can be proud of. Thank you for your patience, your creativity and your understanding. Also my Co-Supervisor, Ivor Indyk, who at the very beginning of the thesis helped formulate the direction of the research.

My fellow candidates on similar journeys shared with me the frustrations, joys, and stress of research and were great sources of laughter and support. The staff of the Humanities department I owe a great deal of recognition for in allowing me to frequently bug them and cheerfully helping out with all the little details despite their own busy workloads.

To the people that got me on this path: My previous law professors who instilled in me the skills to critically analyse legislation and to always question its validity, my Honours supervisor Professor Leon Cantrell who has always been a source of inspiration to me, and my parents and family who have always supported me. My friends and family helped keep the experience from being lonely and isolating and their constant questions helped keep me enthused about the subject. Special thanks go to Ryan and Lindsay Hook for proof reading and giving me space and time to work, and to my little boy Alex for being so well behaved while Mummy was busy on the computer.

Finally, to my relatives that passed before seeing me reach this stage: Richard Scott, Harry Josling, Edith Scott and in particular Robyn Hook. I hope that this would have made you proud.
The work presented in this thesis is, to the best of my knowledge and belief, original except as acknowledged in the text. I hereby declare that I have not submitted this material, either in full or in part, for another degree at this or any other institution.

...............................................................

Sarah Hook
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acknowledgements</td>
<td>2</td>
</tr>
<tr>
<td>Statement of Authentication</td>
<td>3</td>
</tr>
<tr>
<td>Abstract</td>
<td>10</td>
</tr>
<tr>
<td>Chapter 1</td>
<td></td>
</tr>
<tr>
<td>Introduction</td>
<td>11</td>
</tr>
<tr>
<td>Thesis Structure</td>
<td>14</td>
</tr>
<tr>
<td>Methodology and Sources</td>
<td>19</td>
</tr>
<tr>
<td>Chapter 2</td>
<td></td>
</tr>
<tr>
<td>The Author-Work Bind</td>
<td>24</td>
</tr>
<tr>
<td>Authorship and Copyright</td>
<td>25</td>
</tr>
<tr>
<td>The Romantic Authors – The Unacknowledged Legislators</td>
<td>34</td>
</tr>
<tr>
<td>Romanticism in law</td>
<td>41</td>
</tr>
<tr>
<td>Romantic Myths of Origin in Copyright Discourse</td>
<td>46</td>
</tr>
<tr>
<td>Conclusion</td>
<td>51</td>
</tr>
<tr>
<td>Chapter 3</td>
<td></td>
</tr>
<tr>
<td>Contemporary Literary Theory, Writing Practices and Production</td>
<td>53</td>
</tr>
<tr>
<td>Postmodernism and the Birth of the Reader</td>
<td>55</td>
</tr>
<tr>
<td>Genres under threat</td>
<td>63</td>
</tr>
<tr>
<td>Conclusion</td>
<td>84</td>
</tr>
<tr>
<td>Chapter 4</td>
<td></td>
</tr>
<tr>
<td>The History of Moral Rights</td>
<td>86</td>
</tr>
<tr>
<td>The French Beginning</td>
<td>87</td>
</tr>
<tr>
<td>German Jurisprudence</td>
<td>93</td>
</tr>
<tr>
<td>The Berne Convention</td>
<td>100</td>
</tr>
<tr>
<td>The Australian Development of Moral Rights</td>
<td>104</td>
</tr>
<tr>
<td>The arguments for Moral Rights legislation</td>
<td>110</td>
</tr>
<tr>
<td>The arguments against Moral Rights legislation</td>
<td>115</td>
</tr>
<tr>
<td>Conclusion</td>
<td>119</td>
</tr>
<tr>
<td>Chapter 5</td>
<td></td>
</tr>
<tr>
<td>Legal Analysis</td>
<td>121</td>
</tr>
<tr>
<td>Case Study</td>
<td>123</td>
</tr>
<tr>
<td>Persuasive Authorities</td>
<td>140</td>
</tr>
<tr>
<td>International Cases</td>
<td>149</td>
</tr>
<tr>
<td>Conclusion</td>
<td>153</td>
</tr>
</tbody>
</table>
Constitutional Provisions
Commonwealth of Australia Constitution Act 1900 (UK) S51(xviii) 120
Commonwealth of Australia Constitution Act 1900 (UK) S51(xxix) 120

Commonwealth Statutes
Acts Interpretation Act 1901 127
Copyright (Moral Rights) Amendment Act 2000 passim
Copyright (Moral Rights) Amendment Act 2000 S195AI(1) 125
Copyright (Moral Rights) Amendment Act 2000 S195AI(2) 125
Copyright (Moral Rights) Amendment Act 2000 S195AJ 125, 72
Copyright (Moral Rights) Amendment Act 2000 S195AQ(2) 134, 135
Copyright (Moral Rights) Amendment Act 2000 S195AQ(3)(b) 135
Copyright (Moral Rights) Amendment Act 2000 S195AS 125
Copyright (Moral Rights) Amendment Act 2000 S195AVA 136
Copyright (Moral Rights) Amendment Act 2000 S195AW 72
Copyright (Moral Rights) Amendment Act 2000 S195AWA 190, 227
Copyright (Moral Rights) Amendment Act 2000 S195AWB 191
Copyright (Moral Rights) Amendment Act 2000 S195AZA 132, 184, 188
Copyright (Moral Rights) Amendment Act 2000 S195AZH 134
Copyright Act 1968 passim
Copyright Act 1968 S110B 216
Copyright Act 1968 S35(5) 109
Copyright Act 1968 S35(6) 71
Copyright Act 1968 S55(2) 109
Copyright Act 1968 S9A, 41A 172
Copyright Amendment (Digital Agenda) Act 2000 218
Copyright Amendment Act 2006 12, 156, 162, 170
Statute of Westminster Adoption Act 1942 102

NSW Statutes
Defamation Act 2005 198, 199, 204, 206

International and Foreign Legislation
Authors Rights Act (Germany) 96
Civil Code (France) 88
Copyright Act 1842 (UK) 41
Copyright Act 1911 (UK) 42, 48
Copyright Act 1956 (UK) 103, 218
Copyright Designs and Patents Act 1988 (UK) 219
Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst (LUG, 19 June 1901) (Germany) 95
The Law of 11 March 1957, Article 41 (France) 169
The Law of 10 July 1965, Statute No 65-557 (France) 88
The Licensing Act 1662 (UK) 28
The Statute of Anne 1710 (UK) 27, 29, 41
The Statute of Westminster 1931 (UK) 102
Visual Artists Rights Act of 1990 (VARA) (USA) 110

Cases

Adams v Quasar Management Service Pty Ltd [2002] 56 IPR 385.................. 189
Anatole France v Lemerre (4 December 1911, Pataille 1912.1.98).................. 149
Antocks, Lairn Ltd v J Bloohn Ltd [1972] RPC 219....................... 72
Archibald v Sweet (1832) 5 C&P 219........................................ 148
Association for Molecular Pathology v Myriad Genetics (2013) 569 USSC...... 18
Autodesk Australia Pty Ltd v Dyason (1992) (No1) 173 CLR 330.................. 148
1952, 66........................................................................ 151
Barrucand c Wekerlin Trib civ Siene, 9 December 1892, Ann 1893, 23........... 91
Beloff v Pressdram Ltd [1973] 1 All ER 241.......................... 164
Bernanos v Bruckberger Cass Civ 1967, DJ Jur 485............................... 151
Bosseange c Moutardet Ann XII, 475........................................ 91
Bouillet Rebet v Davoine Civ Trib Bordeaux, 15 January 1951.................. 150
British Broadcasting Corporation v British Satellite Broadcasting Ltd [1992] Ch 141
........................................................................ 164
Buffet v Ferstling Gaz Pal 1965.1.126................................. 150
Camoin v Carco Paris, 6 March 1931, DP 1931.2.88.................. 150
Campbell v Acuff-Rose Music Inc. (1994) 510 U. S. 569............... 169
Campbell v Acuff-Rose Music Inc 510 U.S. 569.......................... 165
Campbell v Acuff-Rose Music Inc 62 USLW 4169 (7th March 1994)........ 168, 179
Carrou v Prince (2013) 714F 3d 694 (2d Cir 2013).......................... 61
Carter Swing and John Veronis v Helmsley-Spear Inc (1995) 71 F 3d 77........ 151
Cate v Devon and Exeter Constitutional Newspaper Co (1889) 40 Ch.D 500... 41
Childress v Taylor (1991) 945 Fd 500 (USA- 2nd Circuit)................. 69
Church of Scientology of California Inc v Reader’s Digest Services Pty Ltd [1980] 1
NSWLR 344.................................................................. 187
Consolidated Trust Co Ltd. v Browne (1948) 49 SR 86......................... 198
Coyne v Citizen Finance Ltd (1991) 172 CLR 211............................ 190
Curwood v Affiliated Distributors 283 Fed 219 (SDNY 1922)................. 151
Data Access Corporation v Powerflex Services Pty Ltd (1999) 166 ALR 228... 223
David Syme & Co Ltd v Caravan (1918) 25 CLR 234............................. 208
Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd (2002) 55 IPR 1.... 43
Donaldson v Beckett (1774) 98 ER 257............................................. 31, 32, 47
Donoghue v Allied Newspapers Ltd [1938] Ch 106............................... 68
Eagle Homes Pty Ltd v Austec Homes Pty Ltd (1998) 39 IPR 565.............. 149
Emerson v Davies 8 F Cas 615 at 619 (No 4,436) (CCD Mass 1845))........... 169
Express Newspapers Plc v News (UK) Ltd [1990] 1 W.L.R. 1320............ 43
Farquhar v Bottom [1980] 2 NSWLR 380....................................... 198
349............................................................................. 47, 270
Hough v London Express Ltd [1940] 2 KB 507.................................. 198
Ice TV Pty Limited v Nine Network Australia Pty Ltd (2009) 239 CLR 458...... 44
John Fairfax & Times Limited v Carson (1993) 178 CLR 44........................ 190
Kambrook Distributing Pty Ltd v Delaney (1984) 4 IPR 79.......................... 72
Kelly v Morris (1866) L.R.1.Eq. 697............................................. 41
Zeccola v Universal City Studios Inc [1982] AIPC 90-019 ........................................ 135
Zorich v Pietroff (1957) 152 Cal App 2d 806 .................................................. 204
Abstract

The Romantic conception of authorship situates an author as the organic, solitary creator of genius as well as the prime authority on interpretation. Works that are a modification, adaptation, parody and satire, as well as works resulting from collaborative authorship, are deemed a deviant form of authorship despite their historical prevalence. Literary studies from this point have critiqued the function of the author and the concept of originality however the law has yet to embrace the range of implications stemming from the diminishing relevance of the Romantic vision.

This thesis is a sustained argument that romantic conceptions of authorship are a historically particular, unstable set of ideas that translate poorly into the realities of textual production both historically and in contemporary society. A reliance on such an unstable set of ideals creates an environment where secondary transformative authorship, a historically significant and socially accepted mode of writing, becomes illegitimatised. The Copyright (Moral Rights) Amendment Act 2000 (Cth), it is argued, is an embodiment of the Romantic conception of authorship and thus has the potential to stifle creativity in a very real, tangible way.

A critique on the legislation, this thesis traverses legal analysis, literary theory, historical inquiry and cultural investigation in an attempt to offer a broader understanding of the role and rationale of moral rights theory and its incongruence in contemporary creative industries.

Ch. 2 — Unravels the myth of Romantic conceptions of authorship, investigates its incorporation into copyright discourse
Ch. 3 — Queries why the law has yet to be affected by postmodern theories of authorship and examines ‘deviant’ genres of texts that have acquired cultural acceptance
Ch. 4 — Traces moral rights theory through its inception in civil law countries and its translation into common law spaces
Ch. 5 — Legally analyses the inherent problems of judging aesthetic values through a legal system
Ch. 6 — Considers the paradox of ‘Fair Dealing’ legislation versus moral rights, and poses how the two can possibly intersect
Ch. 7 — Contemplates how one can compensate for a non-economic loss, and asks whether Defamation is a better environment for such rights
Ch. 8 — Argues the adoption of moral rights as a further step towards a future consent culture and considers the alternatives to save freedom of creative expression
CHAPTER 1

Introduction

Once expressed, it is impossible for [the idea] to remain the author’s property…. It is precisely for the purpose of using ideas that most people buy books …. A published book is a secret divulged. With what justification would a preacher forbid the printing of his homilies, since he cannot prevent any one of his listeners from transcribing his sermons? Would it not be just as ludicrous for a professor to demand that his students refrain from using some new proposition he had taught them as for him to demand the same of book dealers with regard to a new book? No, no, it is too obvious that the concept of intellectual property is useless …. Just let someone try taking back the ideas he has originated once they have been communicated so that they are, as before, nowhere to be found.¹

It could be imagined that Jane Austen would be aghast at Seth Grahame-Smith’s adaptation *Pride and Prejudice and Zombies.*² Shakespeare might have cringed at *West Side Story.*³ If they were Australian and alive, they would have a right under the current moral rights provisions to stop production and publication of these adaptations and perhaps even claim damages for loss of reputation. This thesis asks whether society is ready to give authors such power to stop creators from transforming, adapting and building on previous works.

This thesis examines the *Copyright (Moral Rights) Amendment Act 2000* (Cth) which was passed in December 2000. For over fifteen years these provisions have sat on the books with only a handful of cases to its name despite its great potential to be used by authors and artists to control derivative use. Now that it has been around for over a decade uncontested, it is time to consider its appropriateness. This thesis looks at moral rights, with a focus on the right of integrity, as an anomaly. Theoretically contradictory, riddled with practical dilemmas, this thesis asks whether moral rights are the wrong direction for Australian society and whether we are heading towards what many view as a ‘consent culture.’⁴

⁴ This term is further analysed in Chapter 8.
It is easy to confuse moral rights with copyright, especially when one does not have a legal background, and given that they are contained within the *Copyright Act*.\(^5\) Also the term lends itself to confusion, suggesting morality is somehow associated with the rights in question, which is not the case. The term ‘moral’ comes from a literal translation of the French term “*droit moral,*” which in France is understood to mean rights of personality.\(^6\) It is sometimes helpful to regard them as personal rights, but again this causes confusion in the legal sense as personal rights can often (as in the case of torts) have an economic element, while moral rights do not. In the legislative sense, moral rights pertain to an author’s personal and continuing relationship with their own work. It is implied that when one creates, even if that work is sold to another, it is still the author’s creation, and that author still has a bond with their work that cannot be broken. Creating a work is viewed as a manifestation of oneself, hence something to be protected as of right.

The moral right amendments to Australia’s *Copyright Act* 1968 (Cth) allow an author who feels their honour or reputation has been tarnished by a modification (or “mutilation”), to sue even though whoever may have made the modification sought permission from the copyright owner (for example the publisher).\(^7\) The Act also gives authors the right to attribution and the right against false attribution, rights with which this thesis is not concerned.\(^8\)

This thesis argues that moral rights, with its insistence on Romantic conceptions of authorship, fails to take into account the realities of writing practices and contemporary authorship theory. Instead of encouraging artistic endeavor by giving authors greater protection, it has the potential to limit creative production in a very

---

\(^{5}\) Moral Rights are now contained in Part IX of the Copyright Act 1968—‘Moral rights of performers and of authors of literary, dramatic, musical or artistic works and cinematograph films’.


\(^{7}\) See Division 4, Section 195AI ‘Author’s right of integrity of authorship’.

\(^{8}\) This thesis focuses primarily on the right of integrity as that is the right that causes the most problems for transformative creators. The rights of false attribution and the right of attribution are rights that don’t necessarily contain the same ideological inconsistencies and the same threat for deterring creative activity. When this thesis uses the term ‘moral rights’ it is referring mainly to the right of integrity unless stated otherwise. For an argument against the right of attribution see Ginsburg J, ‘The Author’s Name as Trademark: A Perverse Perspective on the Moral Right of “Paternity”?’ (2005) 23 *Cardozo Arts & Entertainment* 379-389.
real, tangible way. The advent of moral rights is yet another hurdle for the transformative author, a transformative author being anyone who uses a prior text to comment upon or communicate a message other than the one the original author intended. The ‘fair dealing’ in relation to parody and satire subsequently passed also offers a new paradox to the legislation: either it ameliorates the usefulness of moral rights or moral rights are an affront to the efficacy of the fair dealing exceptions. History suggests that moral rights are quintessentially a Continental, civil law idea, transplanted without the underlying ideology to support it. This thesis questions whether moral rights would be more suited to a defamation context given its absurdity in the laws of copyright. Finally this thesis suspects the move towards such rights supports the theory of a consent culture, a culture from which the “copyright left” and similar movements are seeking to move away.

The potential to stifle artistic creativity through the use of moral rights is a real possibility. This is a danger that much of the literature seems to discount, arguing that moral rights in fact stimulate the arts. That view entails the notion that artists who feel more protected under the moral rights regime would be more willing to produce and promote their work. There are many inconsistencies with this argument. There is no proof that legislative protection increases the production of creative works. In times without such protection authors still continued to write. Also, authors whose reputations have been prejudiced have always had an action in defamation law. In fact this was one of the main reasons it took almost 60 years for the bill to pass through the Australian Federal Parliament. Proponents against the introduction of moral rights argued that Australia had already fulfilled its obligations to the Berne Convention through related laws such as defamation, contract law and the consumer protection legislation.

This initial argument, that of questioning the limits of the legislation, has evolved to include notions of personality in opposition to property. The author/work bond,

---

9 The fair dealing legislation is contained in the Copyright Amendment Act 2006 (Cth) Schedule 6, now part of the Copyright Act 1968 (Cth) Section 41A and 103AA.
10 This is a claim pursued in Chapter 4.
11 This argument is explored in Chapter 7.
which was to serve as an introduction and historical account of the concept of moral rights, has taken on greater proportions in this research. Romantic theory and Post-modern criticism have created a whole new viewpoint from which to perceive the legal discourse. It has become evident that, while many scholars have voiced concerns about interpreting the moral rights legislation, there is a lack of focus on what the legislation is designed to protect – the author/work bond. It is often noted in passing that it is a Romantic concept, or a Continental concept, but there is no questioning of how this fits in with our society, our culture and values, and how we view artists and their work. It is also not clear what exactly this ‘bond’ is. Although obviously tied up with notions of integrity, honour and reputation, what is it exactly that ties an author to their work and is this phenomenon real? Why does an author get preferential treatment over, for example, a carpenter and his creation? These are questions through which this thesis will navigate in the hopes of bridging the apparent chasm in the literature.

**Thesis Structure**

**Chapter Two**

In the Minister’s speech preceding the introduction of the moral rights legislation, the “author work bond” was given as the main concern that required protection. Chapter Two shows how this “bond” is a Romantic aesthetic concept borne out of the Romantic Movement and tied in with the beginnings of copyright law. This aesthetic values originality, genius and authority over one’s work. This ideology is traced to the Romantic writers, such as William Wordsworth, Samuel Taylor Coleridge and Percy Shelley amongst others. Chapter Two looks at what these authors believed about authorship before exploring how even they, not to mention their literary forebears, such as William Shakespeare and John Milton, did not live up to this high standard. Chapter Two sees the Romantic sensibility of an author creating from nothing as a myth. It is an argument used and abused by industry rather than authors since the very inception of copyright law.

The chapter also looks at the beginnings of copyright as wars brought by publishers to secure their economic potential, rather than authors seeking to enforce their rights.

---

14 See for example Note 12 at 4.
Since that time it is common for industry to provide the author/work bond as well as the creator parent/work child and the field myth to promulgate their side. The chapter critically evaluates the most popular arguments for the protection of copyright in turn to show how these metaphors ignore the notion that all works are in some sense communally created and the necessity of rigid protection over property rights to encourage creativity is actually antithetical to the cause. In our system copyright is designed to give authors a limited monopoly over their works to exploit their value. This limited time frame grows increasingly larger every generation, despite the original reasons it was designed for. This chapter looks at the originating cases of copyright in the eighteenth century to explore how the Romantic myth somehow ended up becoming precedent.

Chapter Three
Chapter Three starts with the view of postmodernism as a defining movement that helps us to see through the myths and metaphors used as the basis for the Romantic authorship ideology. Postmodern theory proposes that originality is largely a myth, and that a reader has as much authority over a work as the author. It has influenced literary and critical theory to suspect values such as genius, authority and originality and to question the idea of grand narratives. The chapter reveals how deep the chasm between contemporary literary theory and law has become whereby a mythical conception of authorship long questioned and distrusted within literary fields is reincarnated through moral rights legislation.

Chapter Three argues that genres such as adaptation, parody and satire, fan fiction and collaborative writing could be substantially curtailed by the moral right provisions. The provisions seek to compel anyone using another’s work to try and respect that author’s feelings in regard to that work. Instead, it acts as a deterrent as it is impossible to know what an author would construe as debasing a work. Could it be a simple character change? A change of style or mere editing? In such an environment, it is safer to bypass any threat of litigation by not using the work. This leaves authors with two options: greater originality, or use of public domain material. Many people believe it will cause people to become more ‘original,’ yet modern authorship theory has taught us that this is impossible: all ideas that form expression are borrowed whether consciously or not, originality being a highly contested
concept. The other option is to use works already in the public domain, works that have already been adapted, parodied and appropriated in depth. This in turn will create a vacuum in which new works are free from criticism and adaptation. The risk of litigation could also discourage investors from buying the rights to Australian author’s film rights, sabotaging our already flagging film industry.

Chapter Four
Chapter Four focuses solely on the history of moral rights. It talks of moral rights as a ‘transplanted law,’ a law transplanted without the underlying ideology to govern it. Civil law countries such as France, Italy and Germany have had moral rights for centuries and it wasn’t until the Berne Convention that international pressure was placed on Australia (and other countries) to adopt something similar. The argument of Chapter Four is that civil law countries have a very different system of copyright, born out of different contexts and different social mores. Germany believes its authors’ works to be part of a national heritage to be protected as heavily as its nation’s borders. France sees its authors as fragile geniuses, to be protected against the unnecessary stress that derogatory treatment of their work would bring. In Australia, the public views its authors quite differently. Although Australians may respect their authors they do not shy away from belittling or parodying their work. In fact it could be argued that parody, satire and criticism are part of an Australian tradition of authorship, one that is very different to the European countries. This chapter proposes that Australian legislators were perhaps too eager to align themselves with their European counterparts without first surveying the Australian literary and artistic community and considering whether the idea of a ‘Romantic bond’ is largely a myth, inappropriate for our context.

Chapter Five
Chapter Five uses a hypothetical test case to test how moral rights could be interpreted by the courts. Without precedent being available, the chapter draws mainly on commentary regarding the provisions as well as overseas decisions that could be influential. A hypothetical situation is used to highlight the inconsistencies and complexities of the legislation and the problems judges will be faced with when asked to aesthetically judge creative works. This will hopefully show that, despite the legislation’s purpose to promote creative endeavor, its application is more likely
to turn it into a deterrent for future creators. It explores the questions left hanging by the words used in the legislation – such as honour, reputation – whether the perspective is subjective or objective and who the relevant community is and how this would effect the outcome of any case.

Chapter Six
Chapter Six looks solely at the issue of parody and satire, arguably the epitome of the ideological clash of moral rights versus free criticism. The chapter looks at the introduction of fair dealing for parody and satire as inconsistent with moral rights, with neither legislation acknowledging how the two rights can possibly interact. The chapter reasons that parody and satire could be interpreted from the fair dealing legislation as a reasonable use defence to moral rights infringement. Using the hypothetical case in Chapter Five it also queries why an adaptation that pokes fun at and insults an author’s integrity on purpose can be an accepted infringement of moral rights, while an adaptation that merely changes context or social situation is considered too derogatory. This is used as a further example of the lack of consistency within the ideology that underpins moral rights.

Chapter Seven
Chapter Seven looks at the remedies for moral rights, and the impracticalities of damages for a non-economic tort. As in defamation, it is clear that no remedy can undo the perception a public has once an author’s reputation has been tarnished, and thus without proper remedy the effect of moral rights for original authors is little, yet the constraints on secondary authors are great. It looks at the issue of consent as invalidating the very ideology used to support moral rights as well as evidencing the clear favouritism toward established authors rather than emerging ones.

The second half of the chapter discusses the relationship moral rights has with defamation and whether defamation terminology could help solve some of the interpretive issues of moral rights. The chapter then goes further to suggest that perhaps the right of integrity for moral rights would suit a defamation context better than a copyright one: the ideological clashes would then disintegrate, and judges familiar with defamation issues of honour and reputation would be on familiar ground when looking at the damage of derogatory treatment of a work. Of course,
given that defamation law is state law, national co-operation would be required, something that has historically been rather elusive to obtain. Nevertheless it is a suggestion that hopefully will open the debate of the appropriateness of moral rights within an economic regulated piece of legislation such as Australia’s Copyright Act.

Chapter Eight
Chapter Eight uses a sociological viewpoint from which to view moral rights. The chapter is presented in three parts. The first looks at the culture of today as hyper-referential with recycling, recoding and re-sampling part of our discourse in everyday life. This aspect of society is undermined by our increasing paranoia and obsession over property laws. In the last decades we have witnessed many new species of intellectual property, some of which hardly require much creativity and some of which, like the human genome, can prove to be disastrous to society. The second part of the chapter looks at a future run by draconian laws. It foresees a consent culture where individuals are blocked at every turn from creativity and expression by mega conglomerates who own the rights to our culture. The third part looks at the resistance to this pressure. It looks at movements such as the cultural commons and the Copyleft movement to show that not every creator is as eager to lock up their work under strict copyright and moral right deadbolts.

The chapter looks at the opposite of a consent culture: the ‘cultural commons’, a society where information is freely shared and use is encouraged to further learning and understanding. It looks at the ‘commons’ projects undertaken by a number of American universities and suggests that this is a road society should be looking to instead: co-operation instead of litigation. While a cultural commons may be an idealistic utopia, it sheds some light on the progression of copyright law and why Australia should relax laws rather than force creators underground.

Chapter Nine
Chapter Nine, the concluding chapter, discusses the hypotheses of each chapter and what conclusions they reveal when drawn together. It is an argument to rethink, re-examine, and perhaps re-draft such a confusing, potentially limiting legislation and

16 In Association for Molecular Pathology v Myriad Genetics (2013) 569 USSC, the US Supreme Court found that the mere process of isolating a gene did not make that DNA sequence patent eligible.
encourage more creators to look past the positive gains they might receive from such legislation to the negative impact on their whole industry. Contrary to the moral rights assumption: change is good.

**Methodology and Sources**

This thesis is an attempt to examine moral rights through a literary, legal, historical and cultural perspective in order to fully understand its policy and implications. The theoretical and practical problems are highlighted to argue the utility of the legislation. To achieve this aim a variety of literature has been surveyed. Literary theory, history and legal analysis have been merged to subject moral rights to a thorough investigation.

Attempts to understand the relationship between the conception of authorship and the rise of intellectual property has been prefigured by such scholars as Benjamin Kaplan, Roland Barthes, and Michel Foucault. More recently a renewed interest in the history of publishing by authors such as Mark Rose and John Feather have revealed the political and legal conditions for the emergence of the author. The collaborative and imitative features of text production have also been fore-grounded by Anne Jamison. The problematic nature of Romantic authorship in a legal framework has also been raised by scholars such as Martha Woodmansee, Carla Hesse, Peter Jaszi, and Jane M. Gaines.

The main Australian commentators on the subject of moral rights include Elizabeth Adeney, Maree Sainsbury, Patricia Loughlan, Kathy Bowrey, and Sam Ricketson. These authors mainly approach their analysis through the interpretation of the legislation and surrounding legal concerns. This thesis merges literary discourse with legal theory and therefore stands largely on its own. American scholars are drawn upon (although moral rights exist in America only for visual artists) as well as writers such as Martha Woodmansee and Peter Jaszi, who provide evidence of the discrepancy between Romantic conceptions of authorship and contemporary writing practices, and do so with both literary and legal analysis, a perspective not as apparent in the Australian authorities.
The second chapter looks at the primary writings of William Wordsworth, Samuel Taylor Coleridge, and Percy Shelley, where the Romantic conception of authorship gained momentum. Secondary, historical sources are then relied on to show how these authors often plagiarized, collaborated and relied on genre tropes in their works, at odds with their own theories.

The third chapter relies on a cultural analysis of modern writing practices. Genres such as adaptations, collaborative writing, and even fan fiction are shown to be prevalent and accepted in society. The chapter takes an overview of the ideas of postmodernism, including the work of Stéphane Mallarmé, Roland Barthes, Michel Foucault, and Jacques Derrida. These scholars highlight the unstable nature of texts, their questionable originality and the role of the reader in interpretation. They prefigure the idea of the author as only one participant in the collaborative enterprise that is textual production.

The fourth chapter focuses on a historical perspective of how civil law countries came to embrace a discourse of author-centred rights as opposed to the common law countries whose focus on copyright reveals its economic rather than moral nature. Primary documents are used to distill the arguments used for and against moral rights in Australia, from the Berne Convention, discussion papers and government committees through to the second reading speech of the proposed bill prior to enactment.

For the legal analysis a hypothetical case is presented due to the lack of available Australian case law. It allows the opportunity to go through the legislation step by step to demonstrate questions left unanswered regarding interpretation. International cases are also looked at as they present a guide as to how other judges have coped with the difficult questions the law presents. A legal analysis is also used in the chapter on damages and defamation.

Chapter Six’s analysis of parody, fair dealing and moral rights, again uses both literary theory and legal analysis to demonstrate the discrepancy between the two discourses and the theoretical and practical problems that arise from a lack of
harmony between the two. Chapter Seven’s treatment of defamation includes an argument for changing moral rights from a copyright context to a defamation one. This bold argument is an attempt to open the channels of communication to find solutions to the problems of moral rights rather than merely criticise its utility.

American authors are mainly presented in Chapter Eight as they are leading the way in the movements against copyright: in particular, Laurence Lessig, a lawyer who is also one of the founders of creativecommons.org, presents copyright as a force to be undermined rather than promoted. Australian commentators such as Peter Drahos, John Braithwaite, and James Arvanitakis also show that Australians are not immune to these ideas and the movements are slowly gaining popularity in a move to counter the over-privatisation of cultural capital.

As this thesis canvases different disciplines as well as case law and legal commentary a legal referencing style has been selected using the guidelines found in Anita Stuhmcke’s reference textbook.17 Medium Neutral citation is used for all case law, and the short title is used for all statutes.

It is always difficult to pull different disciplines together. In a thesis that mainly relies on literary theory and legal analysis but also uses sociological and historical approaches, it is understood that at times the threads may seem too disparate to be read together. Fueled by critics such as Woodmansee who see the gaps between literary theory and law as an anomaly,18 it is hoped that this thesis follows in that tradition of not being afraid to cross the boundaries between the two fields. In the area of copyright in particular, literary theory and research should have more of an impact upon those laws that control and govern their field. Rather than being ignored as the whining of the academic elite, the difficulties shown by the moral rights legislation prove that ignoring contemporary values of the area legislated over can create real tangible problems in interpreting the law. Rather than intellectual property being used as a shield for protection of authors it is branded as a sword by

industry and corporations for the destruction of new, innovative research and creative expression.

The overall argument of this thesis is that copyright law and in particular moral rights serve to protect the established rather than the emerging authors, artists and creators. The term “transformative” is used throughout the thesis to designate a creator whom the law deems to be secondary. Obvious transformative users are adaptationists, parodists and satirists however every time you build your knowledge from other sources and apply that knowledge to creating, that use is transformative. The law deems that a person who presents their work to the public first is the creator of that work and entitled to keep it as was intended. This idea ignores the fact that even the simple act of reading a novel is transformative. Subtexts and meanings that the author may not have intended are found by a reader who brings their own knowledge and background to the act of reading.

It is common in the books that promote a level of free speech and a path away from copyright to include a disclaimer in their introductions. This is mainly because critics look at a work that is published and that pushes against intellectual property law as hypocritical as the author of that work receives financial gain by the very same copyright laws they loathe. This author would argue that this is the wrong way to interpret these ideals. Most of these books and this thesis are not anti-copyright: they are merely anti-over-protection. They promote “thin” rather than “thick” copyright. Of course, to encourage authors to write, a financial incentive is needed and this takes the form of a monopoly given by copyright laws. However this monopoly should be limited.

An idea expressed is no longer a secret kept and that is the risk anyone takes when offering their work to the world. The proper forum to counter misinterpretations and unwanted contexts associated with one’s work is not within the court system. The proper forum is in the community itself. While writing a thesis one is subjected to criticism, ideas to modify, and communal authorship. It is expected to be judged,

criticised and adapted, just as within the thesis the author judges, criticizes and adapts other’s arguments and ideas. This is learning and this is the development of ideas, art and culture. To limit this use by placing the author as the pinnacle of all interpretation is a curtailment of learning and development, an argument it is hoped that this thesis can carry across to the reader.
CHAPTER 2

The Author-Work Bind

[Moral Rights are] non-property attributes of an intellectual and moral character which give legal expression to the intimate bond which exists between a literary or artistic work and its author’s personality; it is intended to protect his personality as well as his work.1

A bond is often thought of as something that binds, fastens or holds together. Yet it could also be described as something that restrains or imprisons. The author work bond encompasses both descriptions. An imaginary tether is attached to an author — the umbilical cord of their creations. If you interfere with the creation, then you will endure the wrath of the parent. The author work bond is therefore an author work bind – an easement on the use of existing works predicated on the whims of the ‘first’ author.

Moral rights regimes are underpinned by an ideology that supports the notion that an author’s personality is enshrined within a work. An attack on the integrity of a work becomes a personal attack on the author’s character, their honour and reputation. Modern writing practices and contemporary authorship theories no longer elevate the author to such an exalted status, if ever they did, yet the law seeks to reconfirm such outdated philosophy. This in itself is hardly unusual. Copyright’s very existence is premised on a Romantic theory of individual originality. If we question the very idea of originality, whether originality even exists, we are unraveling the very fabric of copyright law.

Authors, such as Christopher Aide2 and Martha Woodmansee3 argue that Copyright law is dominated by the conceptions of authorship promoted by the Romantics. Aide

---

sees moral rights as the embodiment of Romantic conceptions while Woodmansee sees the law’s denial of collaborative authorship practice as the result of such philosophy. This chapter seeks to explore the Romantic conception of authorship and argue that relying on such literary philosophy maintains a misunderstanding, not only of contemporary literary production but indeed all literary production, even in the Romantic period.

The chapter will explore Romantic conceptions of authorship before showing how this myth became entangled with copyright law. The next chapter looks at how postmodernism further unravels the authorship myth and how these theories sit at odds with modern writing practices such as collaborative writing and adaptation. This chapter seeks to undermine not only the Romantic myth of conception but also further metaphors used to support copyright restrictions. These metaphors include the work as a child, the creator as parent and the over used metaphor of tilling one’s field. It is shown that these myths confuse property ownership with the original basis for copyright.

The attitude adopted towards transformative users and the labeling of them as “pirates” and “thieves” is also explored to show how society has been fooled into the dominant mode of thought on copyright: a thought that neglects the fact that copyright has always been held to protect publishers and industry rather than authors. The chapter looks at how Romantic authorship models have come to dominate cases in copyright and how they influenced the law’s progression. Ultimately, this chapter seeks to convince the reader that Romantic ideology involves a restrictive approach to copyright law, and that a reliance on the concept in the area of moral rights has the capacity to limit creative expression.

**Authorship and Copyright**

Textual practices before the seventeenth century rarely concerned notions of authorship as we know it today. Until the twelfth century bookmaking was a

---

profession for clerics. From the thirteenth to the fourteenth centuries, a transformation took place whereby the nobility and the wealthy became patrons of literature and most finished works were the product of patronage.5

As John Walsh puts it, “[t]he book trade was actually a scribe trade. Books were produced from hand written manuscripts and writers were scribes.”6 The practice of patronage meant the wealthy had the power to choose which books were to be preserved, who would write them and how they were to be written. The patronage system concerned itself more with accruing ‘credit’ by status and honour rather than any property rights.7 It sought to reward the individual for their contribution to society and encourage creative endeavour, without reference to any proprietary rights.8

Woodmansee argues that the Renaissance “author” was situated as more of a craftsman:

He was a master of a body of rules, or techniques, preserved and handed down in rhetoric and poetics, for manipulating traditional materials in order to achieve the effects prescribed by the cultivated audience of the court to which he owed both his livelihood and social status.9

Before 1450 books were expensive to make and, given the low literacy rate, most works were produced on a ‘to order’ basis.10 The invention of the printing press in 1450 brought about a shift from a scribe’s trade to a book trade, although early printers still relied on patronage:11

recent scholarship in the Renaissance period has emphasized the importance of patronage to literary production and reception in early print. Given the socioeconomic dependency of most writers, especially those who deliberately arranged to have their work printed, patronage was a social and financial necessity.12

---

5 Note 4 at 452.
6 Note 4 at 451.
7 Rose M, Authors and Owners: The Invention of Copyright, Harvard University Press, Massachusetts, 1993 at 16.
8 Note 7 at 17.
10 Note 4 at 452.
11 Note 4 at 453.
Patronage was a safety net for the early printers but as mass production of texts began this relationship became less vital to the industry. Instead of financial support, patronage became more about the use of a powerful name to endorse the book for others: “bookmakers now sought patronage as a way of legitimating and endorsing printed texts, rewarding them for producing such work, and lending prestige to the whole enterprise.”

From 1450 onwards, printing technology caused a shift in the readership as books became less expensive and able to be procured by a more well-read middle class readership. The diminishing influence of the patron and the expanding readership “contribute to the emergence of the author” in the book trade whereby printers start to name authors as a marketing tool and authorship gains a professional status and authors gain authority over textual interpretation:

Within the literature of print culture, however, another set of social relations was emerging in which the patron was ultimately eclipsed by the increasing socio-cultural authority of authors as well as by the economic and interpretative importance of the reader, the ‘patron’ of the work as buyer and consumer in the modern sense of the term ‘patronage’.

Although author’s rights were not properly defined in any statute before the Statute of Anne (1710), it would be fallacious to assert that authors therefore had no legal property rights before this time. Although traditional scholars argue that author’s rights went unrecognised with the exception of a few Crown grants of patents to individual authors, John Feather argues that it is these exceptions that constitute a “de facto recognition of rights.” In the sixteenth and early seventeenth centuries the only legal basis for copyright rights was the Royal Prerogative. By this the Crown could give “book privileges” that worked as a modern day patent. These patents were mostly given to classes of books, such as those with unknown authors like the Bible,

---

13 Note 12 at 2.
15 Note 4 at 457.
16 Note 12 at 2.
18 Blackstone’s Commentaries http://avalon.law.yale.edu/18th_century/blackstone_bk1ch7.asp (9 April 2012)
or whole groups of books on a single subject such as law books and dictionaries.  
Patents for individual authors or translators were also given, although they were rarer and normally concerned learned works that involved intense periods of compilation and expense which, if not protected, would cause financial hardship on the author. These patents only covered a minority of works: other works were generally dealt with by the custom of recognising the rights of the first publisher of a new book.

In 1557 a trade guild (“the Company of Stationers of London,” most often referred to as the Stationers’ Company) that consisted of members of the book trade was granted a monopoly by Royal Charter. This monopoly was given due to the increase in the proliferation of books and the trouble the Crown had in censoring them. In exchange for giving the Stationers’ Company the responsibility to control censorship the Company was given great power to control the output of books. This was done through a register into which every book had to be entered for a licence. The entry merely noted the fact that the book had been properly licensed and did not contain offensive material. By the early 1560s the register came to take on more meaning, indicating “that the license was not merely a testimony to the right to print a particular book, but the unique right to do so ... we have every indication that “copies” were being treated as property.” By 1576 it was generally accepted that one could transfer by purchase, inheritance and gift as well as subdivide into shares the right to print copies.

For more than a century after the invention of printing, it was the printers, with their command of the limited technical facilities for book production, who controlled the trade.... Gradually, however, the copy-owning booksellers took over from them. Printers came to be, as they have remained, the paid agents of the copy owners.

In 1662 The Licensing Act was passed which confirmed the monopoly of the Stationers’ Company and made it illegal to publish without authority from them. In the 1690s objections to the hold that the Stationers’ Company had over the book

---

19 Note 17 at 192.
20 Note 17 at 193.
21 Note 17 at 194.
22 Note 17 at 195.
23 Note 17 at 197.
24 Note 17 at 197.
25 Note 17 at 197.
26 Note 17 at 199.
27 Note 7 at 31.
trade had begun to flood Parliament. For instance, John Locke submitted to Parliament that licensing was unduly restricting the printing and importing of new editions of ancient authors. In 1695 the act expired and was not renewed. These laws did not address any author-work bond but were a reaction to piracy and censorship and were for the benefit of publishers rather than of authors themselves.

There were no professional police forces in early modern Europe and “piracy” (the reprinting of books without permission from the publisher) was enforced through Guild members having the right to search members’ premises. This was done with the knowledge that any investigation into a member would reciprocate a similar investigation into those who initiated the investigation. “The system rested order and a kind of property on the golden rule of “do as you would be done by.” Of course the Guild could only police their own members and so printers from Scotland and other places beyond the reach of the Guild were free to publish as they wished. The figure of the ‘pirate’ caused many, including Daniel Defoe, to advocate for a law that insisted on the author’s name being published. In 1709 the London Stationers’ submitted a new petition to Parliament to secure property in books and the passage of the Statute of Anne began, an event described by Mark Rose as “a process of cultural transformation.”

The Statute of Anne (1710) was the pinnacle of Copyright legislation. It was a departure from the Stationer’s Guild monopoly and introduced two important concepts that were to dominate common law copyright theory from then on. First, it limited the term of protection for authors and, second, it legally recognised authors as possible proprietors of their works:

An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.

28 Note 7 at 32.
29 Note 7 at 32.
31 Note 30 at 201.
32 Note 7 at 35.
33 For a recounting of the Parliamentary debates and arguments over the wording of the Statute see further Note 7 at 42-48.
34 Note 7 at 48.
Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Print-ed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, To their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books; May it please Your Majesty, that it may be Enacted…. the Author of any Book or Books already Printed, who hath not Transferred to any other the Copy or Copies of such Book or Books, Share or Shares thereof, or the Bookseller or Booksellers, Printer or Printers, or other Person or Persons, who hath or have Purchased or Acquired the Copy or Copies of any Book or Books, in order to Print or Reprint the same, shall have the sole Right and Liberty of Printing such Book and Books for the Term of One and twenty Years, to Commence from the said Tenth Day of April, and no longer; and that the Author of any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and his Assignee, or Assigns, shall have the sole Liberty of Printing and Reprinting such Book and Books for the Term of Fourteen …. 35

The limitation on the term of protection is a very important feature in our copyright system. The Statute of Anne clearly showed that the law regarded works as the property of society; however the author can continue to gain economic benefits of their work for fourteen years. It showed that the law was created to encourage the writing of useful books but also illustrates the prominence of the publishers’ right once assigned.

After the passage of this Statute a number of cases appeared to argue over the question of literary property. 36 This question concerned whether there was a natural or common law right which was perpetual, or whether copyright is only a creature of Statute and therefore limited in term. Importantly these cases were not brought by authors but by booksellers who wished to further their hold over their property in copies over the statutory term. The statute was essentially a booksellers’ bill, as argued by Lyman Ray Patterson. 37

36 These cases included Tonson v Walker (1739) 96 ER 184, Millar v Kinkaid (1750) 98 ER 210, Tonson v Collins (1761) 96 ER 169, Osbourne v Donaldson (1765) 28 ER 924 and Millar v Taylor (1769) 98 ER 201.
Pope v Curl\textsuperscript{38} is the first major instance where an author in England asserted his rights in court. Prior to this, authors in court were normally defendants due to libellous or scandalous censorship charges. In this case Alexander Pope was complaining against a series of correspondence between Jonathan Swift and himself that had been published without his consent.\textsuperscript{39} The decision is important in establishing that copyright exists in letters and that an author has the right to withhold texts. More importantly the decision drew a distinction between the property in the paper and the property in the words.

Perhaps the most important case along this line is Donaldson v Beckett.\textsuperscript{40} This case overturned Millar v Taylor\textsuperscript{41} which had found a common law right existed, and finally decided the issue on perpetual copyright. The trial was between two booksellers, Messrs. Donaldson (appellants) and Mr Beckett (respondent) and concerned the rights over James Thomson’s The Seasons, the same book argued over in Millar v Taylor. Interestingly this book was later adapted into music by Antonio Vivaldi and has since become a classic.\textsuperscript{42} The booksellers used the figure of the author to lend weight to their arguments and thus the relationship between an author and their work was first discussed in a court of law.

The appellants, Mr Attorney General Thurlow and Sir John Dalyrmple (as counsel), argued against perpetual copyright and pleaded that the lordships should “rescue the cause of literature and authorship from the hands of a few monopolising booksellers” for “what property can a man have in ideas? Whilst he keeps them to himself they are his own, when he publishes them they are his no longer. If I take water from the ocean it is mine, if I pour it back it is mine no longer.”\textsuperscript{43} Mr Thurlow argued that once a man had sold his right for publication it was “absurd to contend that he had any claim upon the purchaser.”\textsuperscript{44}

\textsuperscript{38} (1741) 26 ER 608.
\textsuperscript{39} Note 37 at 211.
\textsuperscript{40} (1774) 98 ER 257 also see appendix B of Note 10 for further documents relating to the case.
\textsuperscript{41} (1769) 98 ER 201.
\textsuperscript{42} See Note 7 at 113-4 for an interesting view on the metaphoric nature of the text to the case.
\textsuperscript{44} Note 43.
The respondents, led by Mr Dunning, contended it was extraordinary that the very first moment an author attempts to exercise his beneficial interest in property he should lose it.\textsuperscript{45} The reasoning of the Lords in the judgment of the matter highlights the struggle over literary property itself. In support of a common law right Mr Ashurst used the analogy of a highway: “That a man, by publishing his book, gave the public nothing more than the use of it. A man may give the public a highway through his field, and if there was a mine under that highway, it was nevertheless his property.”\textsuperscript{46} Mr Baron Eyre argued that, as ideas are produced by thinking, which is a common faculty, the products should no more be deemed subject to exclusive appropriation than any other gifts of nature.\textsuperscript{47} Lord Camden questioned when one does part with an idea, and queried if a person were to speak in public would he then claim “the breath, the air, the words in which his thoughts are clothed?”\textsuperscript{48} Lord Camden, among others, argued that literary works were too important to society to give a monopoly to print or restrict forever (even Samuel Johnson agreed\textsuperscript{49}).

\textit{Donaldson v Beckett} decided by majority that the Statute overrode any common law right but did not discount that a common law right existed and could be exercised within the statutory term\textsuperscript{50}. The case and similar cases surrounding it were brought by booksellers who were concerned with their rights to copy authors such as William Shakespeare and John Milton, books that were always in demand but that had lapsed from the Statutory term.\textsuperscript{51} Scottish booksellers, such as Donaldson, had begun to flood the market with cheaper editions of these works and these cases were predominantly argued for the benefit of the publishers.

According to Mark Rose, cases such as the ones above have not figured prominently in literary history yet, “the eighteenth-century struggle over copyright clearly was important in the development of the modern idea of the author as the creative

\textsuperscript{45} Note 43.
\textsuperscript{46} Note 43.
\textsuperscript{47} Note 43.
\textsuperscript{48} Note 43.
\textsuperscript{49} Note 7 at 105. Although Dr Johnson still saw the statutory term as too short and recommended an extension to the author’s lifetime plus thirty years, see Note 7 at 108.
\textsuperscript{50} For further detail on the arguments, controversies as well as attendance and media surrounding the case see Note 7. For an in-depth look at the proceedings see Note 43.
\textsuperscript{51} Note 7 at 67-68.
originator of a work that bears the imprint of his or her unique personality.” The question of originality and personality came to dominate commentaries and letters by both authors as well as legal scholars. Francis Hargrave, in particular in his *Argument in Defence of Literary Property* (1774), echoes the theories of Edward Young (discussed below) in that the author’s work bears the stamp of his personality as he set out to define the distinctiveness of a work to its author:

[A] literary work really original, like the human face, will always have some singularities, some lines, some features, to characterise it, and to fix and establish its identity.

While Rose finds in this commentary a link to originality it is argued by Simon Stern that no such preoccupation is apparent in Hargrave’s work. Indeed Stern argues that, while Young and others may have concerned themselves with originality, in eighteenth century England neither the law nor the book trade had any interest in an aesthetics of originality and creativity. He argues that when Blackstone talks of “originality” he means that which is not copied from another. Stern cites as an example that there was no restrictions on adaptations, parodies, satire or translations.

While the eighteenth century saw questions on literary property and the beginnings of copyright emerge, authors themselves were coming to terms with their role in society. It was at this time that the Romantic thinkers flourished, aggrandizing the figure of the poet and lauding authorship as one of the highest callings.

---

55 Note 54.
56 Note 54.
57 Note 54.
The Romantic Authors – The Unacknowledged Legislators

... numerous questions ... deserve attention in this context: how the author was individualised in a culture like ours; the status we have given the author, for instance, when we began our research into authenticity and attribution; the systems of valorisation in which he was included; or the moment when the stories of heroes gave way to an author’s biography; the conditions that fostered the formulation of the fundamental critical category of “the man and his work.”

Despite Michel Foucault’s observations above, the genesis of the status of the author encompassed by the Romantics and enshrined in our laws has received scant attention. Though the strict definition of the Romantic inheritance is contested, moving beyond it remains persistently complicated. The continuing impact of Romanticism can be witnessed in any classroom in Australia. Students are taught to look at a text through the eyes of an author. They are taught to contextualize and ask what an author was trying to say, rather than what the words actually convey. Yet our earliest attempts at writing at school are often imitative and adaptative and we are further encouraged to analyse works using our own interpretations. It is this inconsistency that has led to the confusion over moral rights.

It is hard to abandon Romantic notions when one attempts to gather an array of sources. The very idea of a ‘canon’ of Romantic authors sits at odds with the postmodern cynicism about canons and consensus. This is a further example of the enduring heritage of Romantic thought. To gain insight into what exactly embodies Romantic conceptions of authorship, the canonical authors prove themselves useful, despite the paradox. The Romantic Movement is most closely associated with William Wordsworth (1770-1850), Samuel Taylor Coleridge (1772-1834), Lord Byron (1788-1824), Percy Bysshe Shelley (1792-1822) and John Keats (1795-1821).

---

59 Note 9 at 35.
1821). Others would also include Sir Walter Scott, Samuel Rogers, Thomas Moore and Thomas Campbell. The movement is often described as an emotional break from the rational notions of the Enlightenment and was often thought about in terms of the sublime. Nature, the imagination and ‘the poetic faculty’ were thought of as absolutes. This chapter will look at three attributes of the Romantic author that support moral right theory: that of the author as originator, the author as genius and the author as supreme authority over a work.

In 1759, Edward Young published a work entitled Conjectures on Original Composition. This work pleads the cause of ‘original’ rather than ‘imitative’ genius, internalising the author model and reflecting the prejudice against transformative authors. While the essay received little attention in England, it did get the attention of German theorists such as Johann Wolfgang von Goethe, Immanuel Kant, Friedrich Schiller and Johann Gottlieb Fichte. These writers in turn influenced Coleridge who then co-authored the Lyrical Ballads with Wordsworth. The Conjectures was a declaration of independence against the tyranny of classicism and informs the later laments of Wordsworth against the urban sprawl he saw growing around him and the mass production of manufactured novels.

The themes of Young’s work prefigure the central tenets of Romanticism: the author as superior and genius, originality being more valuable than classic indoctrination or imitation, and the author as master over his/her works.

The mind of a man of genius is a fertile and pleasant field … Of that spring, Originals are the fairest flowers: Imitations are of quicker growth, but fainter bloom. Imitations are of two kinds; one of nature, one of authors: The first we call Originals, and confine the term Imitation to the second.

---

66 Note 52 at 62.
68 Note 65.
Original works are thought of as something organic. A genius does not make poetry: it simply comes to him/her; while “Imitators” who work with mechanical devices and pre-existent works are merely considered manufactured goods, an idea that is echoed in Wordsworth’s *Preface* which is considered below.

An *Original* may be said to be of a *vegetable* nature; it rises spontaneously from the vital root of genius; it *grows*, it is not made: *Imitations* are often a sort of *manufacture* wrought up by those *mechanics, art and labour*, out of pre-existent materials not their own. ⁶⁹

This mystification of the root of original poetic creation supposedly supports a view that the genius is the authority over the work and owns it in absolute terms.

His works will stand distinguished; his the sole property of them; which property alone can confer the noble title of an author; that is, of one who (to speak accurately) thinks and composes; while other invaders of the press, how voluminous and learned soever, (with due respect be it spoken) only read and write. ⁷⁰

The author was perceived as not just an inventor, but someone who creates something from nothing and is therefore logically entitled to the property of his or her invention. From this it is argued we can view the creation of copyright as a justification borne through the Romantic privileged status of the author.

Wordsworth and Coleridge published *Lyrical Ballads* in 1798, prefaced by a brief essay by Wordsworth regarding the effect of the poems. In 1800, when the second edition was published, this earlier essay was expanded into the famous “Preface” which was again revised and expanded in 1802. ⁷¹ In the preface Wordsworth constructs his theory of poetry as well as the function of poets in society. As argued by Anne Jamison, it is here that he seeks to firmly separate his individual authorship from that of Coleridge. ⁷² He espouses the Romantic ideals of originality and genius and condemns transformative authors and modern authors who rely on drama, a

---

⁶⁹ Note 65.
⁷⁰ Note 65.
trend he sees as a result of “the increasing accumulation of men in cities.” He accordingly, is one that “looks at the world in the spirit of love.” What is a poet ...? He is a man speaking to men: a man, it is true, endued with more lively sensibility, more enthusiasm and tenderness, who has a greater knowledge of human nature, and a more comprehensive soul ....

Wordsworth, who is commonly cited as one of the founding members of the Romantics, clearly despised literary pretension and the “inane phraseology” which he felt encumbered traditions of verse forms. Echoing Young’s earlier essay Wordsworth insists that, to be a true genius, the poet must carefully consider his language, and to reject anything that is a mere mechanical device or style, laying bare the true emotions of the poet. “I have wished to keep my reader in the company of flesh and blood.” Thus Wordsworth’s poetry has an almost stubborn consistency of tone.

Wordsworth, along with Coleridge, was heavily influenced by the French Revolution (whose part in moral rights ideology is discussed in Chapter Four). This interest in social justice influenced Wordsworth’s poetry in that he concerned himself with characters of a lower social standing, often in a rural setting, where conceptions of “high” and “low” language is displaced. Wordsworth writes that it is these people who have achieved spiritual fulfilment “because in that condition the passions of men are incorporated with the beautiful and permanent forms of nature.”

Wordsworth’s stubborn authenticity when it comes to his work can be described as a mechanical process rather than an imaginative one. He championed the role of author as legitimate heir to the thoughts of his own imagination yet often published anonymously. The Lyric Ballads itself was published anonymously in September

---

73 Wordsworth W, ‘Preface’ in Lyrical Ballads
74 Note 73.
75 Note 73.
77 Note 73.
78 Note 73.
79 Note 76 at 238.
80 Note 73.
1798. It was then later published in 1800 with Wordsworth’s name on the title page yet no reference to its co-author Coleridge. Another edition was published in 1802 and between these times heavy editing on behalf of Wordsworth was made.

Wordsworth and Coleridge thus waver between acknowledging the artistic benefits of collaboration and being consumed by an anxiety that collaborative authorship, and even collaborative systems of creativity that operate within singular authorship, are not real authorship. 81

Wordsworth and Coleridge both worked within a collaborative model, yet at the same time denied its worth. Similarly, heavy editing was used on behalf of Wordsworth contradicting the idea that once a work is published it should not be changed. “Wordsworth not only wrote new poems but also revised (not always for the better) his earlier work.” 82 If the Romantic conception of an author as a true genius whose works should not be meddled with cannot even apply to one of the founders of such ideology then who could reach such an exalted status? Wordsworth cites poetry as “the spontaneous overflow of powerful feelings,” 83 yet his poems cannot be termed spontaneous if he critically revised them over and over again. Further, as Vincent Leitch et al. have argued:

Wordsworth is less original than his bold tone and manner suggest: much of what he says about figurative language, poetic diction, and the relationship between poetry and prose draws on an array of eighteenth century English writings on emotion, knowledge, and aesthetic theory. 84

Wordsworth warns us that in the future authors will have to defend their ‘activity’ against that of scientists, yet his own methodical, critical revisions bear similar traits to a scientific method.

While Wordsworth felt truth lay in nature, fusing natural descriptions with the inward states of mind “Man and nature as essentially adapted to each other,” 85 Coleridge was more sceptical of the relation between ‘objective’ reality and the ‘subjective’ perceptions of the individual. In 1788, the year of the *Lyrical Ballads*, Coleridge and Wordsworth left for a stay in Germany; Coleridge soon went his own way and spent much of his time in university towns. During this period, he became

81 Note 72 at 220.
83 Note 82 at 646.
84 Note 82 at 646.
85 Note 73.
interested in German philosophy, especially that of Immanuel Kant and the literary criticism of the eighteenth-century dramatist Gotthold Lessing (the significance of these theorists is discussed in Chapter Four).\textsuperscript{86}

Most importantly, for our purposes, Coleridge enunciated the view that poetry and art are not contrived, they appear in the imaginative mind of a genius and grow.

The poet, described in \textit{ideal} perfection, brings the whole soul of man into activity, with the subordination of its faculties to each other, according to their relative worth and dignity. He diffuses a tone and spirit of unity, that blends, and (as it were) \textit{fuses}, each into each, by that synthetic and magical power, to which we have exclusively appropriated the name of imagination.\textsuperscript{87}

As for being merely a mechanical agent, Coleridge argues that it is only when we press a pre-determined form onto material that the form is mechanical. The “organic form” develops from within, giving support to the theory that an author is both genius and originator and thus the sole authority over their works. This view is espoused despite claims of plagiarism against Coleridge:

In an age most concerned with ‘the originality’ of genius, there were many disputes about plagiarism, most of which have now been forgotten. Chatterton was accused of plagiarising the medieval Rowley (though he invented him); Walter Scott was accused of plagiarising Coleridge in his ballads; Wordsworth of plagiarising Walter Savage Landor in a poem; even Byron of plagiarising Coleridge in “The Maid of Corinth” (rather exquisitely, he made the accusation himself). But Coleridge was a special case.\textsuperscript{88}

Coleridge was a special case not because his work epitomised the originality the Romantics focused on but rather the opposite: his plagiarism was pronounced, stealing liberally from German authors and lying about doing so.\textsuperscript{89} In his biography

\textsuperscript{86} Note 67 at 275-276.
\textsuperscript{87} Coleridge S.T, ‘Biographia Literaria’ (1817) [http://www.gutenberg.org/catalog/world/readfile?fk_files=1461994 (19 May 2011)].
\textsuperscript{88} Note 67 at 280n.
of Coleridge, Richard Holmes views this practice in a sympathetic light drawing to attention Coleridge’s drug addiction, his poor self-image and the humiliations he endured in his private life. These mitigating factors are perhaps unnecessary. The prevalence of such copying and borrowing by literary greats is not just a tradition: it is the process of creating texts especially in times where copyright infringement was yet to be controlled by over-zealous copyright police.

Although it is ironic that Coleridge’s writings on the “organic form” were stolen from German authors, Coleridge translated, adapted and clarified those works. His writings have stood the test of time not from riding on the backs of those before him but because every transformative author adds value to a work, “he brought ideas to life in a unique way .... one can say that Coleridge plagiarised, but that no one plagiarised like Coleridge.”

Jamison argues that Coleridge, throughout his career suffered confusion over his own creative processes:

For Coleridge, the refraction of individual compositional authority into a diffused set of prior ‘texts’ made known and new through an enabling poetic tradition rather than ex nihilo creation, is painfully suggestive of the social nature of authorship.

The public collaborative relationship of Coleridge and Wordsworth thus undermines the solitary genius authorship model put forward by them signalling an internally contradictory struggle over what it means to be a poet.

Both Coleridge and Wordsworth looked to Shakespeare as an embodiment of the ‘poetic imagination’ they wished to ascribe to the Romantic author. Coleridge described Shakespeare as “himself a nature humanized, a genial understanding ‘directing self-consciously a power and an implicit wisdom deeper than consciousness;’” as Wordsworth lamented “the works of Shakespeare and Milton, are driven into neglect by frantic novels, sickly and stupid German tragedies, and

---

90 Note 67 at 281n.
91 Note 72 at 217.
92 Coleridge in particular saw the character of Hamlet as the embodiment of the Romantic artist-introverted with an intense inwardness of imagination: see Coleridge, S, Lectures and Notes on Shakespeare and Other English Poets which can be accessed at http://shakespearean.org.uk/ham1-col.htm (23 December 2011).
93 Note 87.
deluges of idle and extravagant stories in verse.”\textsuperscript{94} Yet it can be argued that neither Shakespeare nor Milton epitomized the author’s work as “the spontaneous overflow of powerful feelings.”\textsuperscript{95} Milton’s \textit{Paradise Lost}, one of the greatest adaptations of a biblical story, is full of allusions and intertextuality.\textsuperscript{96} Shakespeare himself wrote for an audience and did not protest pirated, corrupt or unauthorised versions of his work, borrowing liberally from ancient authors and allowing the Kings Men to ad lib during performances.\textsuperscript{97}

The Romantic vision of the author as central to the text, creating from thin air to impart his own genius for the benefit of others is a theory still important to literary criticism. Yet it is only a theory, one that has never accorded with the actual production of texts. Despite this the ideology behind moral rights supports a Romantic vision of authorship. The impact of Romanticism is not discernible in the early cases concerning copyright, its influence was to come later. The next section examines how and to what extent Romantic notions of originality, genius and solitary authority have become entrenched within the legal framework of copyright.

**Romanticism in law**

The Statute of Anne had been repealed with the passing of the \textit{Copyright Act} 1842.\textsuperscript{98} It was only in the early 1900s that originality entered the copyright discourse and in a form quite distinct from what Wordsworth and Coleridge imagined. The scarce authority on this issue before 1900 can be explained by there being no legal requirement for originality in either the \textit{Statute of Anne} or the successive \textit{Copyright Act}. Since that time street directories,\textsuperscript{99} lists of deeds of arrangement,\textsuperscript{100} and lists of advertisements\textsuperscript{101} had all been held to be capable of being copyrighted despite no original thought or form having taken place.

\textsuperscript{94} Note 73.
\textsuperscript{95} Note 73.
\textsuperscript{97} See Boyle, J, ‘The Search for an Author: Shakespeare and the Framers’ (1987-88) 37 \textit{American University Law Review} 625-644 on the many different charges levelled at Shakespeare including the charge that he did not actually write his plays. See also Note 7 at 25-26 where Rose comments that Shakespeare “participated in a collaborative and traditional enterprise of cultural production.” (25).
\textsuperscript{98} \textit{Copyright Act} 1842 (UK)
\textsuperscript{99} \textit{Kelly v Morris} (1866) L.R.1.Eq. 697
\textsuperscript{100} \textit{Cate v Devon and Exeter Constitutional Newspaper Co} (1889) 40 Ch.D 500
\textsuperscript{101} \textit{Lamb v Evans} [1893] 1 Ch 218

41
The classic case on the meaning of originality in regards to copyright is generally considered to be *Walter v Lane*\(^\text{102}\) where it was held that literary skill or originality are not necessary to authorship according to the law. The case concerned a newspaper report on a speech, copies of which were copied into a book. The reporters wished to claim copyright infringement of the reports which were largely verbatim transcripts of a public speech by Lord Robertson. It was held “Copyright has nothing to do with the originality or literary merits of the author or composer”\(^\text{103}\) and this authority was relied on in subsequent cases.\(^\text{104}\) The word ‘original’ first appeared in the 1911 *Copyright Act* which introduced a requirement that copyright could only subsist in original works. This requirement was explained by Peterson J in *University of London Press Ltd v University Tutorial Press Ltd*\(^\text{105}\):

The word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of ‘literary work,’ with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.

The author in law is not considered a genius: his works need not be original in the sense that they offer a contribution of his genius to the world. The Romantic conception of authorship and the concept of originality and authorship in law are two distinct concepts. As Lionel Bently and Brad Sherman state:\(^\text{106}\)

‘Originality’ is concerned with the relationship between an author or creator and the work. That is, originality is not concerned with whether the work is inventive, novel or unique. While the novelty requirement in patent law focuses on the relationship between the invention and the state of the art … [w]hen copyright says that a work must be original, this means that the author must have exercised the requisite intellectual qualities … in producing the work. More specifically, in determining whether a work is original,

\(^{102}\) [1900] AC 539

\(^{103}\) Note 102 at 552.

\(^{104}\) For a full account on the importance placed on this authority see Gravells, N, ‘Authorship and originality: the persistent influence of Walter v Lane’ (2007) 3 Intellectual Property Quarterly 267-293.

\(^{105}\) [1916] 2 Ch 601 at 608.

copyright law focuses on the input that the author contributed to the resulting work.

Cases in which this line of reasoning features – that a work need only be original in the sense it is the author’s own work – continued in *Robertson v Lewis*\(^{107}\) and *Express Newspapers Plc v News (UK) Ltd.*\(^{108}\) In the latter case Browne-Wilkinson V.C opined that the word “original” in the 1911, 1956 and 1988 Acts “does not imply inventive originality; it is enough that the work is the production of something in a new form as a result of the skill, labour and judgement of the reporter.”\(^{109}\)

There is nothing to suggest that this view of originality has changed. Australia’s current copyright law states that:

1. Subject to this Act, copyright subsists in an original literary, dramatic, musical or artistic work that is unpublished and of which the author:
   1. was a qualified person at the time when the work was made; or
   2. if the making of the work extended over a period—was a qualified person for a substantial part of that period.\(^{110}\)

As recent as 2002 the Federal Court of Australia re-iterated the long line of English authority in regards to originality in *Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd*\(^{111}\) In another compilation case, this one concerning a telephone directory, the court concluded that the skill, judgment, knowledge, effort and expense involved in the “industrious collection” of the underlying information were sufficient to satisfy the element of originality required for authorship and entitlement to literary copyright. Lindgren J. expressed the view that *Walter v Lane* “may represent the

\(^{107}\) (1976) R.P.C 169. Although the court found that *Walter v Lane* was no longer good law (at 175) the requirement of originality remained static.

\(^{108}\) [1990] 1 W.L.R. 1320.

\(^{109}\) Note 108 at 1325.

\(^{110}\) Section 32 *Copyright Act* (Cth) 1968, a ‘qualified person’ is someone who is Australian or who meets the requirements of eligibility of a country that is a party to the International Convention for the Protection of Literary and Artistic Works concluded at Berne on 9 September 1886 as revised from time to time; or a country that is a member of the World Trade Organization and has a law that provides consistently with the TRIPS Agreement for: (i) the ownership and duration of copyright or a related right in works, sound recordings and cinematograph films; and (ii) the owner of the copyright or related right to have rights relating to the reproduction of the work, sound recording or cinematograph film. (See Definitions Section 10-Interpretation).

high point of the line of authority supportive of the proposition that one can be the ‘author’ of a work without scope for variance in expression.”\textsuperscript{112}

However later cases have substantially built upon this making it clear that if the particular form of expression is dictated by the nature of that information that will not be enough to claim copyright. In \textit{Ice TV Pty Limited v Nine Network Australia Pty Ltd}\textsuperscript{113} the court looked at a computer generated list of shows. Copyright was held not to subsist due to the material in question not being the result of human authorship. In particular “independent intellectual effort” must be exercised or “sufficient effort of a literary nature” is required. Thus substantial labour and expense by itself will not be sufficient to come within the meaning of ‘original’ under the Act. However in \textit{Telstra Corporation Limited v Phone Directories Company Pty Ltd}\textsuperscript{114} the court held that, despite the decision in \textit{IceTV}, the level of intellectual effort necessary to produce an original work is not required to rise to the level of “creativity” or “inventiveness.”

Thus the Romantic conception of authorship does not find legal precedence in any legislation or cases from the inception of the Statute of Anne. Wordsworth’s speaker of men to men “singing a song in which all human beings join with him,” Coleridge’s communicator of absolute truth, and Shelley’s nightingale are not the ‘original’ author contemplated by the \textit{Copyright Act}.

It is not until moral rights entered copyright discourse that the Romantic author resurfaces and attempts are made to embrace it within legal doctrine. Yet one cannot argue that Romantic ideology has had no place in Copyright law. While ‘originality’ in Young’s sense bears little resemblance to ‘originality’ in the cases mentioned previously, the law does still grapple with pre-conceived notions of what an author should be. In particular the law struggles to grasp with notions of communal authorship, collaborative authorship as well as how to define acceptable parody and satire. The legal author is still posited as a solitary author and the influence of pre-existing works, culture and society inherent in the production of texts is left ignored. These issues are further explored in the next chapter.

\textsuperscript{112} Note 111 at 59.
\textsuperscript{113} (2009) 239 CLR 458
\textsuperscript{114} [2010] FCAFC 149
The next section looks at how origin myths stemming from the Romantic writings have come to dominate copyright discourse. The idea of a ‘pirate,’ the agrarian metaphor, and the idea of an author as ‘parent’ over their works are myths that have become permanently fixed on the terrain of copyright.
Romantic Myths of Origin in Copyright Discourse

We reach here the very principle of myth: it transforms history into nature ... Myth does not deny things, on the contrary, its function is to talk about them; simply, it purifies them, it makes them innocent, it gives them a natural and eternal justification, it gives them a clarity which is not that of an explanation but that of a statement of fact.\(^{115}\)

The origin myths of copyright are narratives that authorise the advancement of strict protection over intellectual property. The myths also serve to conceal the reality of copyright law and to polarise users of creative works as immoral.

[M]yths serve to naturalize what are in fact historically, culturally and politically contingencies and represent them as something simply given in *natura rerum*, in the nature of things and, as such enduring and inviolable. The conception of individual property rights promulgated in the copyright industries’ claims is just such a myth.\(^{116}\)

Copyright infringement prosecutors, and lobbyists for strict intellectual property laws, rely on the myths of copyright to foster a sense of the author or creator as being vulnerable. The metaphors are used to belie the fact that most copyright cases are brought by large media industry conglomerates seeking to stop individual users from transforming works over which those conglomerates own monopolies. Of special interest is the fact that these myths date back to the very first cases on literary property. Then, as now, the author is summoned on behalf of the publishers, booksellers and other industry investors to promote a cause that benefits the trade rather than authors seeking to uphold their integrity and honour.

Most of these myths can easily be seen as taken from Romantic writings. Young’s comparison of the artistic genius’ mind to a “fertile field” is extended to the agrarian metaphor of reaping what one has not sown. This metaphor promotes a view of the author as a hard working labourer whose work is being ‘stolen’ from lazy or immoral people who don’t possess the same talent or the capacity for hard work to make their own works. This metaphor assumes that the author created from nothing and that the unauthorised users of the material add nothing to the work.


William Patry has traced the use of this metaphor back at least 588 years, the most famously employed use being in the case of *Millar v Taylor* where Justice Wiles stated that “It is certainly not agreeable to natural justice, that a stranger should reap the beneficial pecuniary produce of another man’s work.” This appeal to natural justice was overturned in *Donaldson v Beckett* (discussed above) yet the metaphor has consistently resurfaced in intellectual property rhetoric.

In America the Supreme Court has rejected the agrarian metaphor outright:

> It may seem unfair that much of the fruit of the compiler’s labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not “some unforseen by product of a statutory scheme”.... It is, rather, “the essence of copyright,” ... and a constitutional requirement. The primary goal of copyright is not to reward authors, but “to promote the Progress of Science and useful Arts.”

Despite this rejection by the courts the metaphor is still employed in defence of stricter Copyright laws. A prime example is the statement made by the Australian Prime Minister’s Science and Engineering Council: “Without [intellectual property law], innovation is like a crop in an unfettered field, free to be grazed by competitors who have made no contribution to its cultivation.”

Although the metaphor is not grounded in any legal argument, it is still distributed as part of the rhetoric surrounding stricter copyright laws. This myth fails to account for the fact that copyright can subsist in works that require little labour or imagination. Pamphlets, slogans, and even accidental photographs are all pulled under this umbrella of works created by the “hard devotion of original genius”.

Another myth prevalent in copyright discussions is that of authors as the parents of their works. This birth metaphor most directly relates to moral rights where the attachment of the author to his or her work is the relationship protected by law.

---

118 Note 37.
119 Note 37 at 218.
The creation-as-birth metaphor posits an intimate connection between an author and his or her work. Under the metaphor, it is a violation of the author’s personhood to use his or her work without permission. The author, having given birth to the works, should have the right to raise and protect them as if they were the author’s children. Those who copy from the author’s work without permission are kidnappers, the vilest form of thief.122

This metaphor is traced by William Patry as far back as Plato who described poems created by Homer as their intellectual children.123 Miguel Cervantes,124 John Milton,125 James Joyce,126 and Daniel Defoe127 have all at one time described their creative efforts as offspring.128 The evolution of this creation myth to a copyright myth was brought about by the invocation of booksellers who wished to increase their financial gain, not authors worried about their children works, a situation all the more apparent when employed by contemporary media conglomerates who continue to invoke the Romantic metaphor.129

The interests most directly at stake in disputes over the content of copyright law usually are those of firms and individuals with capital investments in the means by which the productions of creative works are distributed to consumers. These distributors have reaped most of the benefits of copyright’s cultivation of Romantic “authorship.” The myth also lacks the ability to adapt to contemporary intellectual property where things that require little labour and no emotion to produce inherit this underlying ideology to promote their ownership.

One of the most entrenched metaphors in copyright is the presentation of unauthorised users as pirates or thieves. This particular myth does not appear in the discourse of transformative authorship “because they have added to the larger pool

---

122 Note 117 at 70.
123 Note 117 at 70.
125 Note 124 at 3-4.
127 Note 7 at 39.
128 See further Friedman, S, ‘Creativity and the Childbirth Metaphor: Gender Difference in Literary Discourse’ 13 Feminist Studies (Spring 1987) 49-82.
129 In particular see the support surrounding the Sonny Bono Copyright Term Extension Act in the USA as detailed in Martin S, ‘The Mythology of the Public Domain: Exploring the Myths behind attacks on the Duration of Copyright Protection’(2002) 36 Loyola of Los Angeles Law Review 253-322.
of raw ingredients,”¹³⁰ their work is considered through the lens of creativity and innovation.¹³¹ Piracy is a term reserved for those who use unauthorised works for ‘pleasure’ or commercial profiteering, neither of which would fall into the majority of moral rights abuses. However some forms of derogatory treatment could also be found to be illegal such as fan fiction, or indeed merely a teenager lip-synching a song on YouTube, and so a brief account of the myth is required.

The first time the judiciary was confronted with the term was in discussion of the Copyright Act 1911 (UK) which was to refer to “pirated copies.”¹³² Frederick Handel Booth MP objected to the language preferring the term “unauthorised” as a suitable alternative: “The use of th[e] word [“pirate”] is calculated to create a large amount of prejudice.”¹³³

Woodmansee examines the figure of the ‘pirate,’ the “spectral figure,”¹³⁴ in eighteenth-century Germany where the view that “a vicious piratical assault” was underway was promoted by publishing houses who were enraged at the cheaper editions being sold across borders of works they held copyright over.¹³⁵ Piracy was a way to level charges against re-publishers who were in fact not committing any crime as copyright did not extend over borders:

Examination of the activities that triggered eighteenth-century Germany’s legendary intellectual debate reveals that many of the activities that were vilified as “piracy” were not only lawful but morally justifiable and extremely efficacious.¹³⁶

The “pirate prince” Johann Thomas Trattner (1717-98) is credited with spreading literacy in the south of Germany by his reprints, bringing medical knowledge to

¹³¹ Note 130 at 169 and 174.
¹³² Note 117 at 88.
¹³³ Note 117 at 88.
¹³⁵ Note 134 at 182.
¹³⁶ Note 134 at 192.
backwater little towns where it was most needed, yet he will be remembered in history as the Romantic figuring of a pirate, raiding book markets instead of naval vessels.

This myth is so infused in our legal system that rarely does one question its authority.

The negative associations of lawlessness and violence that are associated with the pirate-predator-parasite metaphor lend legitimacy and even urgency to another set of metaphors, namely, the metaphors of battle, or the armed and righteous aggressive action to be taken against the ‘pirates’.

For a modern example one need not look further than the fairly recent advertisement used by the Motion Picture Association of America to squash unauthorised use made the piracy theme the focus of its message “You wouldn’t steal a car so don’t steal a movie.” As Tarleton Gillespie puts it, “[t]hroughout these campaigns a complex legal bargain is portrayed as a clean, ethical distinction.”

This concept is also taught in high schools in America, framing people who download songs as “songlifters” to equate them with “shoplifters.”

The current piracy campaign is intended to create a negative association with all acts not authorised by copyright owners, including uses that are clearly fair use and therefore, lawful, such as non-commercial copying for personal use.

Moral rights rhetoric invents its own lexicon to describe the situation. The people who “steal” the work could have permission from the publisher and paid the rights to

---

137 Note 134 at 190.
139 Motion Picture Association of America (2004) can be viewed at http://youtu.be/HmZm8vNHBSU
141 Note 140 at 220. For an Australian example see the NSW Board of Education program “All My Own Work”, an online module that all HSC students must undertake. The module makes clear that stealing is wrong. It is also interesting that under moral rights although they define moral rights as respecting the works of authors they state that to observe moral rights it is necessary only to attribute works to the author. An interesting situation would occur if for example an arts or music student appropriately referenced a work yet the original author feels it is distorted, especially if that work were then to appear in ART Express or similar public viewings. See http://amow.boardofstudies.nsw.edu.au/module2/module2s2.html
142 Note 117 at 94.
use a work, but have not acquired the original author’s consent. Instead of thieves or pirates these users are labelled as “mutilators,” destroyers of integrity and assassins of reputation. In reality they are engaging in a process of transformative use that has been around since before copyright existed.

Transformative use is now termed “mutilation.” Mutilation in reference to moral rights is anything done to a work. This demonstrates the lack of recognition on the part of legislators as to the benefit to society through transformative use. Being able to access, translate and adapt prior works builds upon our cultural capital and is the main process to creating new expressive texts. Copyright is meant to protect authors for a limited time to offer an incentive to create which in turn benefits society.

Moral rights legislation impedes this aim. As it is not clear (as discussed in Chapter Five) whether it is a subjective or objective view of what derogatory treatment consists of or who the relevant community who sets the standard is, further creative expression is now controlled by a minority of hands who hold an unfair monopoly over cultural works. As moral rights duration is the same as copyright, it will be society who will lose the benefit of new creative texts: adaptations, parodies, satires and other uses that are limited for another average one hundred and fifty years.

Conclusion

Concern over the law’s insistence of promoting this Romantic ideology has been voiced by a number of well-known theorists. In relation to copyright generally, Mark Rose argues that Romantic conceptions of authorship are inappropriate to discuss modern cultural productions. Martha Woodmansee’s “The Author, Art and the Market” similarly questions the theoretical validity of the law’s approach. Peter Jaszi also voices his concern, particularly in relation to collaborative writing. This study aims to take these views that are predominantly American and British and show how they relate to Australia. This argument will show that in Australia, moral

143 See the use of the word in the Copyright Act 1968 (Cth) Section 195AJ
144 Note 7.
145 Note 9.
rights inappropriately compares modern (or indeed all) authorship practice with idealistic Romantic conceptions.

The uses of these myths and metaphors which stem from the Romantic conceptions of authorship and the prevalence of their use and their entanglement within legal doctrine suggest that the law misunderstands the production of creative texts. It ignores the function of transformative use and elevates all authors and creators, regardless of their situation, to holders of a very strict monopoly despite the transformative use the original author had already engaged in to produce the work. This chapter has argued that the Romantic conception of authorship is merely an ideal that the great poets themselves failed to live up to. Originality, genius and interpretative authority have never been linked to authorship in any legal sense as Copyright was designed to promote market efficiency, encouragement of creative endeavour and the benefit to society of limiting monopolies over socially beneficial works.

The next chapter looks at how post modern theory has further weakened the legitimacy of Romantic conceptions of authorship. It looks at a number of genres of text production that are left vulnerable in the wake of moral rights legislation and argues that its potential for limiting creative expression far outweighs any benefit an author may gain in asserting such rights.
CHAPTER 3

Contemporary Literary Theory, Writing Practices and Production

“talk to me of originality and I will turn on you with rage. I am a crowd, I am a lonely man, I am nothing.”

W.B. Yeats

Chapter Two examined the myth of the Romantic aesthetic, arguing that the conception of authorship the Romantic vision entails is an ideal one that doesn’t take into account the actual production of texts. This chapter continues this sequence of argument by introducing postmodern theory as further alienating Romantic aesthetic concepts of authorship in literary theory. Postmodern theory has forced literary theorists to look beyond the author when searching for meaning in a text and has revealed the ways political, cultural and social contexts can influence how a text is produced and read. Most importantly, postmodern theory has allowed modern theorists to move away from the notion of the author as the originator of meaning, to recognize the role of the reader in interpretation, and to seek strains of intertextuality rather than points of origin. More specifically, the collaborative nature of textual production is unveiled, in direct contrast to the solitary Romantic author.

One of the central tenets of postmodernism posits that the author is only one agent in the process of making meaning through a text. The reader also contributes to the process, a function often overlooked by law, in particular by the moral rights ideology. Through the process of reading, deconstructing and understanding every reader becomes a transformative user of a text. The law, however, still posits the legal author as the ultimate originator ignoring the other factors involved in the production of texts. The law legitimises only those texts which fit in with the Romantic conception that there is a solitary originator, and fails to consider genres which use existing models to comment on society. The unfaltering faith that the law has in the Romantic conception of authorship creates a blindfold for the protection of

non-conforming creative works, which overlooks the inherently pluralistic nature of all textual production.

This chapter also examines categories of texts that the law fails to protect. These include adaptation, Indigenous works, collaborative works and fan fiction. These genres of texts are most at threat from moral rights legislation despite being legitimate modes of writing that have been accepted throughout history. This chapter argues that these processes of writing are not only tolerated but are a part of a culture of textual production.

Moral rights legislation legitimises the origin myth and privileges the author as the originator of meaning and intent within a text. Secondary uses of these texts are therefore subject to censorship from the original author. These genres of texts, especially adaptation, parody and satire, have been engaged in since the dawn of literature. William Shakespeare and John Milton, the heroes of the Romantic writers, not to mention the Romantics themselves, all engaged in similar practices. New genres of texts such as online fan fiction and social media are modern creative outlets that contain the basic tenets of postmodern thought: that of usurping the original author’s authority over meaning. Fan fiction is a current phenomenon where fans of an author write chapters or sequels to their favourite novels. There is also what is termed ‘ventriloquist fiction,’ wherein a character, someone who is often mute in an original work, is given a voice in a subsequent work.

Adaptations and appropriations often question the author’s intent and motives but, by so doing, can also injure the feelings of an author. It could be argued that if postmodernism asks us to question what Romantic theory argues — that the author’s

---

2 As argued in Chapter 2.
3 This thesis is limited to literary texts in order to explore moral rights in more depth. It must be noted however that moral rights has the capacity to limit quite a large amount of new innovative genres in music, film and art. For example ‘Chiptune’ music (music which is designed to instil a sense of nostalgia from video games), rap and mixing are just a handful of examples of genres which are under threat from censorship by original authors.
4 This type of fiction was discussed in the US case of Suntrust Bank v Houghton Mifflin Company (2001) 136 F Supp 2d 1357. This case concerned the adaptation of Margaret Mitchell’s Gone with the Wind, a parody called The Wind Done Gone written by Alice Randall. This transformative text gave the African American characters a voice in the novel, highlighting the racism inherent in the original text. While the case turned on whether the novel was a ‘parody’ and therefore ‘fair use’, rather than moral rights (of which the US does not have for literary works) it is an example of how modern texts recycle older ones in order to create meaning.
authority is to be believed and that their work is an organic original idea — then postmodernism is in direct conflict with how the law proposes we treat our authors. More troubling, the moral rights legislation’s misunderstanding of textual production in the aftermath of postmodern theory suggests that, at a more fundamental level, the law has failed to engage with the very nature of literature. This chapter seeks to convince the reader that it is time that legal theory confronted modern literary theory and contemporary writing practices. Legislation based solely on Romantic ideology constitutes a restrictive, backward approach to copyright law, especially in the arena of moral rights where the capacity to limit creative expression is unlimited.

Postmodernism and the Birth of the Reader

The postmodern movement critiques the authorship model, questioning the Romantic idea of creativity and originality. Schools of thought from post-structuralism, New Historicism, the sociology of literature and the deconstructionists have torn apart the Romantic ideal to show that a book is more than an index to an author’s personality. Contemporary literary theory has become critical as to the divination of originality, no longer so naïve as to think a novel can be produced without influence by the author’s social, cultural and political context. The semiotics of the text itself creates meaning and often factors outside the text can effect interpretation. These constructions of meaning through text largely ignore the role of the author, instead viewing a text as a self-contained system.

Postmodernism was mostly a philosophical movement, however its impact has been apparent in many cultural fields such as literary criticism, linguistics, architecture

---

5 This is a sentiment also shared by Martha Woodmansee who sees the discrepancy between the discourses of law and literature and recognises a "pressing need to re-establish communication between the two disciplines" cf. Woodmansee, M, ‘On the Author Effect: Recovering Collectivity’ in Jaszi, P & Woodmansee, M (eds) The Construction of Authorship: Textual Appropriation in Law and Literature, Duke University Press, London, 1994 at 15-28 at 28.

6 For Post-structuralism see further the works of Jacques Derrida, Michel Foucault, Gilles Deleuze, Judith Butler and Julia Kristeva. For New Historicism see in particular the works of Steven Greenblatt. For the sociology of literature which has ties to New Historicism see George Lukacs The Theory of the Novel. For Deconstructionism, a form of semiotic analysis, see Ferdinand de Saussure, Jacques Derrida, Timothy Bahti and Harold Bloom.

and music. It is often described as a reaction to modernism and its main aim was to undermine society’s acceptance of objective truths, especially in relation to identity, unity, authority and certainty. Symbolism, a movement which preceded both modernism and postmodernism, was one of the first theories that sought to break the link between the author and his or her work. Stéphane Mallarmé, in particular, denied that a poet could control the meaning of a poem, arguing rather that the work of the language itself creates meaning, signs and symbols that speak from beyond the page:

The pure work of art implies the elocutionary disappearance of the poet who yields the initiative to words, set in motion by the clash of their inequalities; they illuminate each other with reciprocal lights like a virtual trail of fire on precious stones, replacing the perceptible breath of the old lyric or the individual enthusiastic direction of the sentence.

For Mallarmé, a poem’s language, the clashes and rhymes, provide the workings of the text rather than any intention or emotion on behalf of the poet. Language ‘performs’ rather than the poet. This break from the author destabilises the origin myth of Romantic conceptions of authorship. Roland Barthes picks up on this idea in ‘The Death of the Author’ where he replaces the disappearance of the poet with the re-appearance of the reader: “[we] know that to give writing its future, it is necessary to overthrow the myth: the birth of the reader must be at the cost of the death of the Author.”

In this essay Barthes examines a passage from Balzac’s Sarrasine. In the story a castrato dressed as a woman is described as follows: “This was woman herself, with her sudden fears, her irrational whims, her instinctive worries, her impetuous boldness, her fussings, and her delicious sensibility.” Barthes asks who is speaking these words – the narrator, the character, the author or a universal wisdom:

---

8 For example it is so defined in Wynne-Davies, M, Bloomsbury Guide to English Literature, Bloomsbury Publishing Ltd, London, 1989 at 812.
10 Note 9 at 849.
13 Note 11 at 1466.
We shall never know, for the good reason that writing is the destruction of every voice, of every point of origin. Writing is that neutral, composite, oblique space where our subject slips away, the negative where all identity is lost, starting with the very identity of the body writing.14

Barthes goes on to argue that the work is less the author ‘confiding in us’ than a multi-dimensional space where varieties of writing blend together, the “text is a tissue of quotations drawn from the innumerable centres of culture.”15 A text, according to Barthes, is the centre for these writings, drawn from many sources which are focused on the place of the reader rather than the author.16

The reader is the space on which all the quotations that make up writing are inscribed without any of them being lost; a text’s unity lies not in its origin but in its destination. Yet this destination cannot any longer be personal: the reader is without history, biography, psychology; he is simply that someone who holds together in a single field all the traces by which the written text is constituted.17

In Barthes’ essay “From Work to Text,”18 he argues that the metaphor of the text is separate from that of the work, the work being a development, the text as more of a network. He insists that no ‘respect’ is due to a text; it can be ‘broken’, read without the guarantee of the author, ‘abolishing any legacy.’19 This is true even in a society where the “author is reputed [to be] the father and the owner of his work: literary science therefore teaches respect for the manuscript and the author’s declared intentions, while society asserts the legality of the relation of author to work.”20 The author loses all privileges within the text: it is the reader who works in collaboration with the text to produce meaning a “single, signifying practice.”21

Michel Foucault further questioned the origin assumption of literary criticism. His essay ‘What is an Author?’22 is an attempt to understand how he himself had used

---

14 Note 11 at 1466.
15 Note 11 at 1468.
16 Note 11 at 1469.
17 Note 11 at 1469.
19 Note 18 at 1473.
20 Note 18 at 1473.
21 Note 18 at 1474.
the author function in his previous work *The Order of Things*, highlighting the problematic nature of the concept. For Foucault the notion of an “author” is a function of discourse, and the classification of such, he reminds us, only came about when history started to punish authors whose works were considered ‘transgressive.’ This legal author function then evolves into a function of textuality – a means to limit the array of meanings a text can produce by referring back to the author:

the author is not an indefinite source of significations that fill a work; the author does not precede the works; he is a certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction …. The author is therefore the ideological figure by which we fear the proliferation of meaning.

Foucault sees the author as a way of limiting meaning through a work and is tied to the legal and institutional systems that decide the realm of discourses. The ‘author’ does not refer to an actual individual rather a construct of an individual, a ‘second-self’ whose similarity to the author undergoes considerable alteration and is never fixed.

Although Foucault dispels the notion of a culture in which fiction is unrestrained by the author figure “to imagine a culture in which the fictive would operate in an absolutely free state, in which fiction would be put at the disposal of everyone and would develop without passing through something like a necessary or constraining figure,” he does see a future where the author function changes, no longer a constant in form, where fiction will function according to a different mode altogether.

In a similar vein, Jacques Derrida questioned the approach taken to reading, the search for the “psychobiographical signified” and concluded that such an approach

---

24 Note 22 at 212.
25 Note 22 at 221.
26 Note 22 at 216.
27 Note 22 at 222.
is “banal, most academic, most naïve.”

Derrida sought a different type of reading (most commonly referred to as ‘deconstruction’) that reads between the space of the signified (what is meant) and the signifier (the vehicle for meaning or the sign in the writing). There is only text, the contexts of a text being further texts rather than keys to a text. Words that have double meanings, ‘indecipherables,’ need not be given an either/or meaning but can simultaneously encompass both meanings.

Readings that look to extrinsic methods to search for the signified he calls ‘transcendent,’ and uses for an example a book on Rousseau in which a chapter on the ‘problem of sexuality in Rousseau’ refers to an Appendix of the author’s medical case history. The medical case history report is used to anchor the meanings of the text, without the acknowledgement that the report is a further text capable of interpretation. Derrida calls such a reading a ‘blindness,’ a literary ‘symptom’ which is extrinsic to the work, as opposed to the reading advocated that relies only on the space between what is intended and what is written, an absence of the referent.

Like Foucault, Derrida sees the method of literary biographical interpretation as one couched in history, and, like Foucault, he questions the authority of such an approach that attempts to singularize and control meaning.

According to Derrida, words when spoken are merely symbols of an experience, those words written are merely symbols of the spoken words, twice removed, one can never come close to the interiority of meaning and absolute truths:

If words and concepts receive meaning only in sequences of differences, one can justify one’s language, and one’s choice of terms, only within a topic [an orientation in space] and an historical strategy. The justification can therefore never be absolute and definitive. It corresponds to a condition of forces and translates an historical calculation.

That is not to say that words are secondary to speech; Derrida finds such binary oppositions as dependent upon a differential that is not there. Rather, words themselves are the medium for the space between thought and intent, always

---

29 Note 28 at 157.
30 Note 28 at 157.
31 Note 28 at 157.
32 Note 28 at 69.
33 Note 28 at 70.
changing rather than fixed in time. It is the urge to look to the biography and the history that fixes words in a certain place.

From the Romantic view that the poetic faculty can encompass true emotion and nature we now have a critique that argues that words are poor imitators of actual intent. Original thought (if it exists) is distorted by the very act of being spoken or written, which is again distorted by the translation to the reader. Barthes, Foucault and Derrida all see the author as a varying function rather than a defining reality. The author function seeks to constrain proliferations of meaning and fix words in a certain historical, psycho-biographical time period. These authors question readings that look to the author to divine meaning from a text and encourage readings that challenge such practices. The reader is now equal with the author as the mechanism for translation into meaning.

These theories have come to the fore in what is now termed ‘postmodernism.’ As postmodernism seeks to unravel myths such as origin, truth and authority it can be seen as directly conflicting with authorship models encouraged by Romanticism. Linda Hutcheon’s *A Poetics of Postmodernism: History, Theory, Fiction*[^35] seeks to articulate a “poetics” of postmodernism. Rather than a concise definition, Hutcheon tries to pinpoint certain characteristics that inform postmodern discourse. She does this through comparing the postmodern aesthetic to postmodern architecture through theorists such as Paolo Portoghesi and Charles Jencks. Postmodernism tends to point out to the reader that you can’t believe or accept what you read as truth, you must question the motives and the authority of the author as well. As Hutcheon puts it:

> Such a process reveals rather than conceals the tracks of the signifying systems that constitute our world—that is, systems constructed by us in answer to our needs. However important these systems are, they are not natural, given or universal.^[36]

This statement could be talking about intellectual property itself. It is easy to confuse intellectual property as a given, universal right of an author while forgetting that “intellectual property” is a legal fiction, important, but still a system invented to control economic returns.

[^36]: Note 35 at 13.
This chapter does not argue that postmodernist theory is the discourse within which our contemporary texts operate, nor does it argue that postmodernism is the ultimate guiding theory on textual production. Instead, this chapter argues that, if nothing else, postmodernism has reminded us of the extent to which the Romantic model is historically particular, and indeed, aberrant. Indeed not all theorists credit postmodernism with creating anything at all and Romantic authorship models are still taught at schools and universities.\textsuperscript{37} Frederic Jameson’s paper “Postmodernism and Consumer Society”\textsuperscript{38} generates quite a different analysis of postmodernism. Jameson sees the advent of postmodernism as “distressing”\textsuperscript{39} as it blurs the distinction between high culture and popular culture. Jameson sees postmodernism as seeking to destroy in order to make anything new.\textsuperscript{40} In this critique Jameson is not referring to postmodernist literary theory but rather to genres of postmodernism which he sees as a product of a world in which stylistic innovation is dead and the only thing left to do is to imitate old styles, ‘the disappearance of a sense of history.’\textsuperscript{41} A similarly critical review is offered by Terry Eagleton who charges postmodernism with “not resisting” and reinforcing consumer capitalism.\textsuperscript{42}

While postmodern literary theory may not have destroyed the myths of origin, genius and authority generated by the Romantics it could be argued that, at the very least, it has given society new perspectives on the author function. While someone who reads a book may still look to the author’s biography to supplement interpretation, it is also now common for an interpretation that would not have been conceived by the original author to be held as valid through the production of meaning by the reader. The author has not been ‘murdered’ but the reader has emerged as just as authoritative in the process of interpretation as sequences of intertextuality are given more importance within texts.


\textsuperscript{39} Note 38 at 1.

\textsuperscript{40} Note 38 at 1.

\textsuperscript{41} Note 38 at 11.

Martha Woodmansee and Peter Jaszi argue that legal scholars have largely ignored this aspect of literary theory, ignoring the implications of the Derridean proposition that “the inherent instability of meaning derives not from authorial subjectivity but from intertextuality.”43 This is an important factor when looking at moral rights. With standard intellectual property rights author-centric ideas relegate certain classes of fiction to a ‘secondary’ status. While, in the legal sense, ‘originality’ falls short of the genius required by the Romantics it is still an issue over ‘who wrote it first.’ Thus genres of text which use original material to comment upon or transform are considered to be inferior to the rights of the original author, a fact cemented in the right of integrity in moral rights legislation.

The legal fiction of a solitary creative genius and ‘originator’ also sits in direct opposition to modes of production that turn ‘authorship’ into a collaborative enterprise. The collaborative method is largely ignored by copyright as copyright is given to the singular author only rather than a joint authorship between authors, editors, producers and marketers who all contribute to the end product. Similarly culturally produced works that have no known singular author are not protected leaving a large portion of indigenous, culturally sensitive works vulnerable. This position is then reversed when it comes to an employee/employer relationship when the employer is designated the author of an employee’s ‘creative genius.’ These situations of textual production cause insurmountable ideological and practical problems under the rubric of moral rights legislation, issues that are addressed further in the chapter.

The moral right of integrity insists that the author is the sole conveyer of meaning through their texts. Interpretations, modifications and adaptations that portray a meaning that the author did not intend can be argued as a “mutilation” of the author’s work. As we have seen, this is in direct conflict with contemporary literary studies that attempt to generate meaning through means other than that of the author. Contemporary theory elevates a reader from passive consumer to co-creator, while

the author function is limited by the Romantic notion of absolute authority. Postmodernism, by questioning an author’s motives and authority, gives the reader a new dimension to cultural texts. It argues that we can only know that the past existed from texts, but that texts are not to be taken at face value. Any interpretation is as valuable as the author’s original intent. Therefore, any law whose presumptions entail an absolute authority on the part of the author, as well as the idea of organic originality, is out of touch with modern writing practices and theory as well as textual modes of production.

Genres under threat

The purpose of this section is to examine a number of genres of texts whose production falls outside the ambit of the Romantic conceptions of authorship. Most of these genres – such as adaptation, appropriation, collaborative writing, parody and satire – are historically significant textual modes that are to be found littered among the canon of our historically valued and highly regarded literary texts. Some of the genres, such as online fan fiction and social media, are specifically contemporary modes of artistic production that the law has failed to acknowledge as part of creative enterprise by holding fast to concepts of ‘originality’, demanding copyright permission and now moral rights permission which is not always available. While the problems generated by the law’s failure to see transformative use as just as valid as ‘original’ use is not a contemporary problem, a look at the creative culture in which we live exposes the depth to which these methods of text production have become the standard.44

Consider the following:

1. Looking at the top 100 song hit songs of 2012, most are collaborations between artists as well as a few remakes of old songs.45 For example “Payphone” by Maroon 5 featuring Wiz Khalifa, “Somebody I Used To Know” by Gotye featuring Kimbra, and “Titanium” by David Guetta featuring Sia. Another example is the One Direction song “Up All Night” which was initially intended for Kelly Clarkson but written by Matt Squire

44 See also Chapter 7 which argues that contemporary culture is actually a hyper-referential, ‘remix’ culture in which intertextuality pervades various discourses from advertising and media to literature and film.

and Kotecha. Collaborative writing, which will be discussed further on, sits at odds with moral rights discourse as there is no black and white formula to decide who owns the moral rights of which part, even though copyright issues may have been agreed to by the artists. It is also common for studio writers to write the songs which are then sung by an artist who gets the credit. Remakes of old songs are made by paying royalties to the copyright holder, not by asking the permission of the original artist. As most of these songs are from the USA, which has only taken on moral rights for visual artists, the only problem stems from when an Australian artist is involved.

2. Similarly, looking at the recent box office hits, most are adaptations of popular novels, with even a few remakes of old movies or fairytales. In fact 85% of all Oscar-winning Best Pictures have been adaptations. In 2012 cinema goers are flocking to see the following: *Prometheus* which is a prequel to *Aliens*, *Snow White and the Huntsman* a retelling of the famous fairy tale, *The Amazing Spiderman* yet another adaptation of the comic book hero, *The Three Stooges* a remake of the old TV classic, and *Dr Seuss’ The Lorax* a film adaptation of the popular children’s book.

3. Current theatre productions: *Mamma Mia* (based on songs by Abba), *Mary Poppins* (based on the stories of P.L Travers and The Walt Disney Film), *Wicked* (based on a prequel by Gregory Maguire, which was an allusion with borrowed characters and plot lines from the movie *The Wizard of Oz* which, in turn, was based on the book by L.F Baum.)

4. Finally, novels, which are the focus of this study. Not only are we seeing adaptations such as *Wicked* by Gregory Maguire and *Pride and Prejudice and Zombies* by Seth-Graeme Smith; P.D. James has also attempted to transform *Pride and Prejudice*, with a detective story *Death Comes to Pemberley* released in 2011. Then there are novels such as *Julie and Julia*,
which is based on a blog, which was based upon a story written around a person’s engagement with another text. This novel was then also turned into a movie. As you can see, a number of moral rights issues would surface with this practice that is increasingly becoming the norm. Yet again, as these texts are American, they escape Australian moral rights limitations. The fact that the USA was so hesitant to adopt moral rights should make us argue that, if it would be too limiting for creative freedom in America, perhaps in Australia, where we share these modern writing practices, we too should have exercised more caution.

The following pages will look at four prevalent writing practices in contemporary society – adaptation, collaborative writing, fan fiction and social media – and reveal how they present a challenge to moral rights theory. It will also show how these writing practices will be placed in jeopardy, thereby limiting creative expression. Instead of fostering creative endeavor the copyright amendments have the potential to limit artistic innovation.

**Adaptation**

Clearly, modern writing practices have embraced adaptation even if the law has not. Adaptation is by definition, evolution: a recycling of the old to make something new or more appropriate for the times. However, that is not to say that adaptation is not still seen as somehow ‘secondary’ to the original source, both in law and in criticism, despite postmodernism’s effect upon how we view texts.

Postmodern theory has affected our interpretation of authorship. As discussed above, theorists such as Mallarmé, Barthes, Foucault and Derrida have alerted us to the presence of the reader in shaping meaning through a text. As Hutcheon suggests, “to be second is not to be secondary or inferior; likewise, to be first is not to be originary or authoritative.” Despite this postmodern dialogue, some critics still harbour the prejudice that the source text is the superior, “Even in our postmodern age of cultural

---

51 These are but a few of numerous examples of contemporary modes of writing, for example there is also ventriloquist fiction, as well as chain novels, where consecutive authors add to the story.  
52 Note 49 at xiii.
recycling, something – perhaps the commercial success of adaptations\textsuperscript{53} – would appear to make us uneasy.”\textsuperscript{54} However there is no denying that, despite this somewhat tainted view of adaptations, they are still very much prevalent, and can be justifiably argued as an historically significant form of literary practice.\textsuperscript{55}

Adaptation differs to parody in a number of ways. Although parody may have a possible legal defence (as detailed in Chapter 5), adaptation has no legal defence except if the treatment was ‘reasonable.’ Just as parody’s motivation is often to denigrate the source text, adaptation may also be used to highlight apparent discrepancies within a source text, to comment on a social or political issue the original author did not intend or even to pay homage to the original text. As Hutcheon puts it:

Adaptation is repetition, but repetition without replication. And there are manifestly many different possible intentions behind the act of adaptation: the urge to consume and erase the memory of the adapted text or to call it into question is as likely as the desire to pay tribute by copying.\textsuperscript{56}

Adaptation, as seen by these motivating factors, very clearly falls within the ambit of moral rights infringement, “the doing of anything” clearly conceived to encompass adaptations. The ‘doing of anything’ is treated as derogatory treatment and is thus a right of integrity issue. If every transformative author had to seek another author’s permission, as well as paying the copyright holder royalties, before creating an adaptation, the practical difficulties of such would be insurmountable. Firstly there is getting in touch with the original author, which might be near impossible, especially if the transformative author is an unknown in the industry. Secondly, the transformative author would be subject to the original author’s every whim, forced to agree to any amendments or rejection of permission. The original author holds an unfair advantage over the transformative author inhibiting creative freedom and exerting undue influence over the new work. It is also possible that the very threat of

\textsuperscript{53} In fact commercial success is one of the factors taken into account when the courts wish to determine whether the doing of something to a text is reasonable. See Chapter 5 for further discussion of the factors courts take into account.

\textsuperscript{54} Note 49 at 3.

\textsuperscript{55} For example where would our literary canon be without Milton’s adaptation of the Bible in \textit{Paradise Lost} or Shakespeare’s use of historical texts in his plays as discussed in Chapter 2.

\textsuperscript{56} Note 49 at 7.
litigation would be enough to deter any would be adapter contrary to the principle of fostering creative endeavor.

There are a myriad of genres that fall under the umbrella of adaptation and are similarly open to vulnerability under the legislation. Take, for example, the practice of ‘literary ventriloquism’ as illuminated by David Brennan. This is where minor characters or plot lines are taken from other texts and made the focus, such as Tom Stoppard’s play *Rosencrantz and Guildenstern are Dead,* which combines characters from Shakespeare’s *Hamlet* and Samuel Beckett’s *Waiting for Godot.* What it puts into focus is the distinction made in copyright between the protection of expression and the non-protection of ideas. Brennan asks whether the new telling of an old story could possibly infringe the rights of the original storyteller?

Our society is known for its adaptations: would we call Leonardo Da Vinci’s *Mona Lisa* “mutilated” by Duchamp, or Shakespeare’s *Romeo and Juliet* “mutilated” by *West Side Story?* In contemporary literary criticism the author is dead. We no longer look for the author’s personality in a work; rather we explore our own interpretations and claim they are as valid. Re-inventing, recycling and re-interpreting works are all acts of creation that would be severely limited if the legislation now requires us not only to receive the copyright holder’s consent but also ask the author permission, and still be liable if the author feels his work has been distorted by the “transformative author,” which was probably what the transformative author’s aim was in using the former work.

**Collaborative writing**

Are there influences at work that will in time abate feelings of proprietorship and thus modify conceptions of copyright….? Probably so. Much intellectual work including the distinctively imaginative is now being done by teams, a practice apt to continue and grow. The French have a name for it – *travaux d’équipe.* Such collaboration, I fancy, may diffuse and diminish emotions of original discovery and exclusive ownership.

---

As we have seen, modern copyright law promotes the view that an author is the sole contributor to a work, the originator of a new and innovative creation. In contrast, what has become most apparent, especially through technology and media, is that this view has been recast to view creativity as a collaborative activity rather than an individual activity. While this is most apparent with media such as films, it is also true in the production of literary texts. The law, nevertheless, is yet to acknowledge this ever-increasing fact:

Copyright law rejects the very nature of copyright creation as a collectively imagined and produced activity … and denies the contribution of the public to the copyright creation process and imposes and maintains an imbalance of power between private and public interests.  

The role of copyright is to bestow property relations upon copyright holders. It is to assist this economic facility that copyright is given to an author solely at first instance despite collaborative approaches to individual texts. In intellectual property, it is a well-established doctrine that an idea cannot be the subject of copyright, only the idea embodied in a material form. It is the written expression, rather than the idea, that is restricted by proprietary rights, otherwise known as the “idea/expression dichotomy,” “probably the most difficult concept of the law of copyright.” As Justice Farwell stated:

A person may have a brilliant idea for a story, or for a picture, or for a play, and one which appears to him to be original; but if he communicates that idea to an author or artists or a playwright, the production which is the result of the communication of the idea to the author or the artist or the playwright is the copyright of the person who has clothed the idea in form …. The explanation of that is this, that in which copyright exists is the particular form of language by which the information which is to be conveyed is conveyed.

When one considers a literary work, however, this is not always the case. An author may approach a publisher with an idea embodied in a draft manuscript. Agents, editors and publishers then work and re-work the “form of language” until they are confident it is in a form that will best appeal to a particular audience. In many cases the language, turns of phrase, and character descriptions have been changed and created not by the author but by an editor.

---

61 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479
62 *Plix Product Ltd v Frank M Winstone (Merchants) Ltd* (1984) 3 IPR 390 at 418
63 *Donoghue v Allied Newspapers Ltd* [1938] Ch 106 at 10 per Farwell J.
An interesting example is William Golding’s *Lord of the Flies*. In an article that later formed a chapter in a biography about Golding, his original editor Charles Monteith describes the process from a manuscript entitled *Strangers from Within* to its evolution into the classic now familiar on bookshelves across the globe. Monteith describes how the character of Simon was changed to make the allegory of Christ less obvious, how the language of the character Piggy was ‘toned-down,’ and how the structure was completely overhauled. Long parts were eliminated, and the very title was coined by another editor, Alan Pringle. Yet, despite this collaboration, copyright law reduces the author function to the singular ‘originator,’ as well as contracts between the editors and the authors preserving this state of being. In industry, this hiding or covering up of the collaborative nature of the textual production is necessary. An author is not denied exclusive authorship status based on the fact that others have rendered help to mould and develop their work, as the American court argued:

> A writer frequently works with an editor who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a writing whole, yet very few writers would expect the editor to be accorded the status of joint author, enjoying an undivided half interest in the copyright in the published work.

While this is an understandable function of law when it comes to economic entitlements, when it comes to moral rights the law’s denial of this collaborative enterprise becomes problematic. It is hard to understand how one can say they have a bond with a work, that a turn of phrase has been mutilated, a character denigrated, when the author claiming such abuse may have had very little to do with that section of the text in the first place: that is, that sole authorship is a legal fiction. A spiritual bond becomes harder to discern when the realities of textual production obscure the origin of the form of the language and the material expression covered by copyright.

---

66 *Childress v Taylor* (1991) 945 Fd 500 (USA- 2nd Circuit) at 507.
**Indigenous Works**

Community works, Indigenous stories and folkloric tales are outside the ambit of protection, leaving questions of authorship as a stumbling block to acquiring rights over the works. As Peter Jaszi argues:

That Romantic “authorship” is alive and well in late twentieth-century American legal culture has consequences for the law’s engagement with (or failure to engage) the realities of contemporary polyvocal writing practice—which increasingly is collective, corporate and collaborative …. the law is not so much systematically hostile to works that do not fit the individualistic model of Romantic “authorship” as it is uncomprehending of them.\(^{67}\)

This is certainly the case for the legal recognition of Australian Indigenous works. As has been argued throughout this thesis, in our culture the author-function is a legal and social construct that makes it difficult to establish an inherent spiritual tie with an author and his or her work. In other cultures this spiritual tie between artistic expression and the individual may be more apparent yet the author-function remains problematic. For Indigenous cultures in particular the difficulty with the law’s insistence upon singular authorship and artistic originality corresponds with a denial of protection. Many culturally sensitive works that would most benefit from an application of moral rights are in fact denied protection and left vulnerable. Duncan Miller argues that:

Where the subject matter of an Aboriginal artistic work is sacred to the tribe there is, under Aboriginal customary law, no notion of individual ownership of that work. Rather Aboriginal law considers those works to be collectively “owned” (in the sense of a custodial or protective ownership) by the tribe. The right to depict spiritual images or dreaming is a matter of great sensitivity. With this it follows that inappropriate display, or mass reproduction of such works, is totally opposed to these notions of collective custody.\(^{68}\)

The question of how moral rights can serve to further the protection of Indigenous culture has been voiced by a number of scholars.\(^{69}\) Scholars such as Terri Janke\(^{70}\)

---


and Stephen Gray\textsuperscript{71} believe that as moral rights further the law’s intolerance of community produced works of authorship, moral rights has failed to resolve or even seriously engage with the problems at hand. Others, such as Patricia Loughlan,\textsuperscript{72} see moral rights as making possible small, incremental changes to improve the situation “the exercise of moral rights by individual artists can result in some benefits to the community itself and to unified collective life within that community.”\textsuperscript{73}

In 2003 a draft bill was distributed by the Attorney-General’s Department that looked directly at this issue of Indigenous moral rights: the \textit{Copyright Amendment (Indigenous Moral Rights) Bill 2003}.\textsuperscript{74} As of 2015 the bill has yet to be scheduled for a Parliamentary sitting.\textsuperscript{75} It is hard to comment on how the bill will address the problems of authorship and moral rights without access to its proposed provisions, however criticisms from experts who have had the opportunity to study the bill provide some assistance.

Justice Lindgren, Federal Court Judge, President of the Australian Copyright Tribunal, is critical of the complex and ambiguous language of the draft legislation.\textsuperscript{76} It is noted that the draft contains five requirements for an acknowledgement of Indigenous moral rights to exist.\textsuperscript{77} The first is the insurmountable problem that the subject matter must be the subject of copyright; hence the collective authorship problem has not been addressed. Further, as some of the indigenous work’s original authors have passed on before the \textit{Copyright Act} came into existence, even if they could prove an original authorship the limitation of an author’s life plus 70 years...


\textsuperscript{73} Note 72 at 21.

\textsuperscript{74} Although the Aboriginal Education Board of Studies NSW argues that it was not made publicly available and was only given to a handful of organisations, see \url{http://ab-ed.boardofstudies.nsw.edu.au/go/aboriginal-art/protecting-australian-indigenous-art/background-information/proposals-for-change/indigenous-communal-moral-rights-icmr} (1 February 2011).

\textsuperscript{75} As checked on \url{http://www.comlaw.gov.au/Home} (1 February 2011).


would restrict any rights in the works. The most controversial requirement is that a voluntary agreement must be made between an Indigenous community and the individual creator of the work acknowledging the communal nature of the work. This means that if the Indigenous community is unaware of such rights prior to giving permission or copyright they simply miss out.

This is an area of copyright law in which the problems of Romantic conceptions of authorship are highlighted. The law, while trying desperately to cling to a version of authorship that has never corresponded to the realities of textual production, is finding itself hindered by its own ideology. As new technologies unfold, and as greater awareness of collaborative authorship practices develops, the law is unable to change to meet the new challenges to the accepted doctrine.

**Employer/Employee Collaboration**

Another area where collaborative practices produce inconsistencies with the law’s approach is that of employee/employer relationships. Ownership of works created in the course of employment traditionally belong to the employer as the “first owner” of the copyright. Under s35(6) of Australia’s *Copyright Act* 1968, copyright in any work made by an author ‘in pursuance of the terms of his or her employment by another person under a contract of service or apprenticeship’ belongs to the employer. The main decisive factor is whether creation of the work falls within ‘normal duties’ of the employment. As Jaszi puts it:

> If the essence of “authorship” is inspiration, then it is the “employer’s” contribution as the “motivating factor” behind that work ... that matters, rather than the mere drudgery of the employee.

The ideology surrounding this is that the employer provides the genius or inspiration, as well as the research and materials, and the employee carries out these instructions using his or her skill and talent. Section 35 is a concept well accepted in Australian copyright law as well as many other countries. Subsection (3) of that section allows employees to modify or exclude by agreement however this is restricted in Australia

---


79 Note 67 at 34.
by limiting it to a “particular work” rather than a range of future and existing works.80

Moral rights however do not credit employers with the same ‘inspiration’ and creators rather than employers retain moral rights in any works created within their employment.81 To get around the practicalities of this problem, the provisions have allowed consent to be given by an employee to any ‘infringement’ of his/her moral rights in relation to any work created in the course of his/her employment:

(4) A consent may be given by an employee for the benefit of his or her employer in relation to all or any acts or omissions (whether occurring before or after the consent is given) and in relation to all works made or to be made by the employee in the course of his or her employment.82

In the same piece of legislation, two different theories emerge. Firstly, in regards to copyright, the employee does not pass on copyright to the employer: they never had copyright in the work in the first place; the employer is the author of the work. In regards to moral rights, despite the employee never having a copyright interest in the work, they are regarded as the author for moral rights purposes but can consent to anything the employer (the copyright author) wishes to do with the work. It is inevitable that such consent would be tied in with employment contracts giving very little opportunity for authors to retain such rights.83 While practical problems are overcome by contract, the underlying contradictory theory of the two versions of authorship is illuminated.84

The employer as ‘first owner’ situation is a common phenomenon in contemporary textual production. The music industry, film and television, journalism and website

80 Monotti, A.L “Power to modify the vesting of Copyright in an employer: Subsection 35(3) of the Copyright Act 1968 (Cth) and Australian Universities” (1997) 19(12) European Intellectual Property Review 715-722 at 716.
82 Copyright (Moral Rights) Amendment Act 2000 Section195AW. For further discussion over the inconsistencies between moral rights ideology and consent see Chapter 5.
84 In the USA, moral rights vest with the employer rather than the employee, (they also only have moral rights for visual artists) see for further discussion Fielkow C, ‘Clashing Rights Under United States Copyright Law: Harmonizing an employer’s economic right with the artist-employee’s moral rights in a work made for hire’ (1997) Spring:7 DePaul-LCA Journal of Art and Entertainment Law 218.
design are all areas infused with employer copyright ownership relationships. Literary texts also avail themselves to these kinds of contractual relationships, the most obvious being teaching materials and lectures.85

Ghost writing is another interesting example.86 In many cases ghost-writers sign non-disclosure contracts to remain anonymous and copyright is given to the person who hires them. The collaboration in each case may vary with the ghost-writer writing from an outline, putting notes together or writing the whole text supervised by the contractor.87 While contracts waiving moral rights would protect the contractor in these situations it is less clear what would happen when a transformative author wishes to use the text. When gaining permission by the ‘so-called author’ or legal author, is the onus on that author or the transformative author to gain consent for moral rights infringement? A consent clause will only be held valid between the contracting parties, therefore any transformative use is at risk of later being identified as a moral rights infringement by an author the transformative author didn’t know even existed. While in this case it may have been ‘reasonable in the circumstances’ not to identify the author, under the right of integrity; it is the treatment which must be reasonable rather than the failure to gain consent, leaving transformative work vulnerable to liability.88

85 The particular case of Universities and academic employees is not addressed in this thesis as it is a distinctive category beyond the scope of this work. For a discussion on the distinctiveness and unusual character of the relationship see Ann Monotti and Sam Rickston in their work Universities and Intellectual Property, Oxford University Press, New York, 2003. For further information see the breadth of research by Ann Monotti and the National Principles of IP Management by the Australian Research Committee at http://www.arc.gov.au/national-principles-intellectual-property-management-publicly-funded-research-0.


88 For a discussion on the ghost writing situation in India see http://lawmatters.in/content/ghost-writing-plagiarism-and-copyright, (2 February 2012) (note they have no waiver provisions within their statute).
The whole idea of ghost writing undermines the Romantic conception of how an author should operate and act towards their work. That an author can easily allow his or her work to be passed off as another’s for mere financial reward shows an absence of an author work bond: no spirituality, responsibility or paternity ties the ghost writer to their work. Ghost writing is not a new phenomenon either: in 1859 in a Paris court it was revealed that Auguste Maquet had ghost-written a number of Alexandre Dumas’ works.89 The French court dismissed Maquet’s claim to revoke his transfer of copyright upholding the contract. If the decision were to be held today a very different result would have occurred. If the situation had been different in 1858 it is also questionable whether Dumas’ work with the author’s name as Maquet would still be in the literary canon.90 The law’s employer as “first owner” doctrine shows an understanding of the collaborative processes underlining many aspects of textual production, yet the moral rights provisions lack this awareness of how texts are produced, constricted as they are to Romantic notions of solitary, originary genius. This is a further example of how moral rights legislation, tied into problematic ideologies of Romantic authorship, fails to account for contemporary authorship.

**Fan Fiction**

Fan fiction and ‘Internet Fandom’ is an interesting genre to raise at this juncture. Fan fiction is viewed by “black letter” law as illegal of itself. In essence, fan fiction can be defined as “an unauthorized derivative work,”91 and has lately attracted a lot of attention after production companies began suing fans for copyright infringement on their online blogs. As most of the criticism surrounding fan fiction stems from America, which has a more limited version of moral rights, it would be interesting here to investigate what kind of impact moral rights could have on this genre of writing that is becoming increasingly popular for younger writers. Fan fiction is prevalent in Australia92 and, apart from the broader issues of copyright infringement

---

90 Ginsburg (Note 86) suggests that it would not given that Maquet’s own works without the “trademark” of Dumas’ name had little success with the public.
92 See Australia Fan-Fiction Archive at [http://b.fanfiction.net/community/An_Aussie_Affair/70956/3/0/1/](http://b.fanfiction.net/community/An_Aussie_Affair/70956/3/0/1/) (6 February 2012) and [http://forum.aceboard.net/?login=206175](http://forum.aceboard.net/?login=206175) (6 February 2012).
generally, Australian fan fiction writers have an added threat of being sued for a violation of an author’s moral rights.

Fan fiction began in fanzines before erupting in popularity online but has been around in some form since the eighteenth century. It usually concerns fans of a certain novel, epic, or series of novels who wish to pay tribute to an author or enjoy writing and discussing characters with others while building a community from this base. The fan fiction authors (whom from now on will be termed “transformative authors”) rarely use their actual names, preferring the anonymity of pseudonyms. Online, it is hard to trace the transformative authors and often the posts and stories are un-archived. This makes prosecution of any moral rights trespass incredibly difficult and expensive. The transformative authors use the universe, characters, and/or plot created in the original work and either write a prequel, sequel, alternative endings or sometimes rewrite chapters. From the examples of fan fiction sampled on http://www.fanfiction.net/book/ - the authors seem to try to keep close to the descriptions and writing style of the original author.

Sheenagh Pugh makes a clear distinction between adaptation and fan fiction: that being the criteria of payment. “It is a distinction often made by fan fiction writers themselves, between “fanfic” (unpaid, done for love) and “profic” (professional writing, done for money).” This aspect of fan fiction traditionally would insulate a transformative author against copyright litigation. If there were no profit being made, then it would prove difficult to establish any damage to the copyright holder’s economic entitlements in the work. However, moral rights concern more than economic rights, in that the author’s integrity can be tarnished without any damage to their economic interests. For example, a transformative story may in fact increase the interest in a particular author, but that does not change the fact that a moral rights trespass may have occurred even if the original author has benefitted economically.

93 For example, many fans wrote to Sir Conan Doyle with their own versions of a Sherlock Holmes mystery see further Brown S, ‘Scott Brown on Sherlock Holmes, Obsessed Nerds and Fan Fiction’ Wired magazine 17.05, 20 April 2009 available at http://www.wired.com/techbiz/people/magazine/17-05/pl_brown (2 February 2012)
95 Note 91 at 11. The distinction is also noted in Berger R, ‘Out and About: Slash Fic, Re-imagined Texts, and Queer Commentaries’ in Cooper, M & Pullen, C LGBT Identity and Online New Media, Routledge, New York, 2010 at 173-184 at 173.
Authors themselves have often been quite vocal over such transformative uses of their work. The main debate over fan fiction concerns “ownership” of an author’s characters. Unless an author trademarks a character in the way Walt Disney regularly does, characters are not copyright protected per se. Copyright may be given to characters if they are developed with enough specificity to constitute expression worth protecting, however in the literary field, sometimes a simple change of name can result in overcoming any copyright issue.96 Authors do not see it this way though. Many authors, such as Anne Rice, feel as though as creator a character belongs to them, and only they can decide what a character can say or do and any use of their character is an insult to their honour and reputation:

I do not allow fan fiction. The characters are copyrighted. It upsets me terribly to even think about fan fiction with my characters. I advise my readers to write your own original stories with your own characters. It is absolutely essential that you respect my wishes.97

Note the use of the phrase “my characters.” This statement shows how emotional this debate can be. Contrary to Rice, many members of fan sites also believe that the characters belong to them, that through engagement they have an actual relationship with the fictional character. Fan fiction writers don’t necessarily use elements of a character that would be able to be copyrighted as it is assumed by the fan fiction community that other readers know these characters merely by the use of a name.

Rice’s stories borrow from ancient myth and tales as well as from the mythological genre in general. How does one separate what she has taken from myth from her own creations and then decide whether a transformative author has transgressed her work or another author’s? For example, in some ways Twilight could be read as Anne Rice fan fiction, although it is doubtful that Stephanie Meyer would ever admit to that. The characters involve similar descriptions, character flaws, and plot lines, however a change of setting, age and name sets Meyer free from any liability. Similarly the best selling Fifty Shades of Grey trilogy originates from Twilight fan fiction yet the

change of location and setting allow it to remain protected. Fan fiction does not wish to break ties with the author, but most clearly acknowledge the source. In terms of respecting an author then, fan fiction could be seen as more obviously the fairer writing practice.

However, authors feel that, by acknowledging the source, they are claiming ownership over the characters rather than just stealing them, which to them is an even bigger insult to the integrity of their work. What is called into question is whether one should care whether the author appreciates the fan fiction, as Pugh has argued: “Two of the basic premises of fan fiction are the beliefs that (a) fictional characters and universes can transcend both their original context and their creator and (b) the said creator cannot claim to know everything about them.” This statement highlights the view that, once an author creates a character, that character is then in existence, free to be influenced by anyone’s interference, much like when a child leaves home, as it becomes a part of popular culture.

This idea reflects the theories discussed above regarding the absence of the referent in postmodern theory. Postmodern theory legitimises practices such as fan fiction, even while the law continues to allow authors to ban it. This is because the originator of the character or story line is only one player in the process of making meaning. In this instance, the reader has gone one step further in creating meaning by actively engaging with the text. That the text can perform on its own, characters and stories living in a world kept alive by fans, is a capacity highlighted by postmodern theory. As Mallarmé argued that the ‘clashes and rhymes’ of a text perform unbidden by the hand that originated them, so too can a character manifest itself from within the text into a virtual reality where fans, through engagement, prolong their lives and stories.

Christina Ranon believes that fan fiction is:

99 Note 91 at 222.
an accessible and important form of social criticism for non-academics. Internet fan sites deconstruct both the marginalization of certain groups and the traditional representation of gender roles in popular culture.\textsuperscript{101}

Ranon sees fan fiction as readers taking back contemporary myths. It is a genre where the boundary between reader and writer is broken down, and new creative endeavour is encouraged within an online community. Moral rights thus pose a challenge to the freedom of this artistic expression. Ranon argues that America’s failure to extend moral rights protection to authors, drawing a line between individual works of art and “mass produced creativity,” suggests that “widely distributed characters ‘belong’ in part to the audiences who make them hits.”\textsuperscript{102} In Australia no such line is drawn, and so the threat of litigation over fan fiction is a very real one. Ranon goes on to note that:

Legal scholars have observed that the public generally believes that there is a distinction between commercial and non-commercial activities, with the former constituting infringement and the latter acceptable behaviour; and while that perception has never been the law, it has largely reflected actual practice.\textsuperscript{103}

Moral rights legislation again presents a challenge to the traditional leniency toward non-profit activities. Here it is the author’s integrity that matters, not its impact on society. Thus if an author feels fan fiction is a corruption of their work, and a lawsuit ensues, it is difficult to fathom a defence available for the transformative author. No economic rights were infringed and correct attribution was made, however it does not counter the argument that their work is a bastardization of the source material that is offensive to the author’s honour and integrity. Whether or not such cases succeed in the courts, the threat of litigation and the confusion surrounding moral rights may be enough of a deterrent to limit the use of such creative expression. This is especially considering that the individuals who create the work (generally teenagers) are generally not in a position to litigate over a single story and would just remove the work after receiving a cease and desist letter.

\textsuperscript{101} Note 91 at 422.
\textsuperscript{102} Note 91 at 439.
\textsuperscript{103} Note 91 at 445.
It is quite clear that fan fiction is an emerging contemporary writing practice that engages readers of all educations and backgrounds to become creators themselves. It is a practice that encourages new and upcoming writers to practice their craft within a safe community of like-minded thinkers, rather than the harsh reality of publishing criticism. If moral rights seek to encourage creative endeavour then the curtailing of fan fiction writing practices seems nonsensical. It establishes a situation where it is most clear that the law is out of touch with the reality of modern writing practices, and where it is obvious that the moral rights regime is in fact a limitation on creative expression.

Social Media and the changing Digital World
Arguably the most contemporary modern writing practice is the use of networked sites to relay information. Although many people bemoan the use of social media sites and are critical of their value, there is no denying that they involve a communication revolution. Broadcasting thoughts, opinions and ideas to a group of potentially millions at one time by any and every individual heralds a new type of media democracy. In this system anyone can have a say and everyone can be heard. The legal implications of these sorts of SNSs (Social Networking Sites) are generally thought of as in the realm of defamation and privacy. It is often forgotten that a clip on YouTube, a photo on MySpace, or a status update on Facebook or Twitter, are in fact texts that contain rights and responsibilities in regards to copyright.

Under Australian copyright law there are traditional classes of ‘works’ that are given protection: literary works, dramatic works, artistic works and musical works. After 1968 the categories were broadened to include films, sound recordings, television and sound broadcasts, as well as published editions of works. To attract copyright the work must also be in a material form. A mere idea or information is not protected unless it is expressed in a material form. Thus an idea for a story told to friends

---

105 The categories are continually expanding with the new category of performers rights to be added to the list.
106 This is a fundamental concept of copyright: see Hollinrake v Truswell [1984] 3 Ch 420 at 427, Blackie & Sons Ltd v Lothian Book Publishing Co Pty Ltd (1921) 29 CLR 396 at 400, Victoria Park Racing & Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479 at 498 and the more recent cases of Autodesk Inc v Dyason (1992) 173 CLR 330 at 344-5 and IceTV Pty Ltd v Nine Network Australia Pty Ltd (2009) 239 CLR 458 at 472.
does not mean that if another friend writes a story with the same plot line there is a
breach, for the idea itself is not protected until it is preserved in a material form. If
comments on a blog, or an uploaded photo attract copyright, then they also attract
moral rights. This leads to some very interesting questions over moral rights versus
freedom of speech. There is not enough space in this thesis to cover all of the moral
right problems such modern writing practice engineers, but a few short examples
will reveal how these questions will arise.

To use “Facebook,” when you upload a photo you do so after accepting the site’s
“Terms of Use.” Those “Terms of Use” principally involve allowing Facebook
access to your copyright rights; allowing the site to reproduce and distribute as they
wish. There is no express consent waiver for moral rights, although as it’s an
American site, this is not unusual. The user also agrees that if any copyright issue
does ensue, any litigation involving Facebook creators has to be pleaded in a San
Diego Jurisdiction. The “Terms of Use” for a site that boasts over 500 million
members is rather poorly drafted. There is no severance clause: thus if the
jurisdictional clause were to be held invalid, the whole contract could be void. Also
when lodging a complaint, a user is required to do so “under penalty of perjury”
which is impossible over email, perjury only occurring from being under oath in a
courtroom or select government offices. For most users, the copyright rights and
responsibilities barely cross their minds as they post and upload photos for people to
see and comment upon. Many artists and creators, however, display their work,
uploading artworks and posting chapter sections, in an effort to gain support and
feedback. They may care if their work is used in a derogatory way. While most
people may not care if a stranger copies a photo of them, —what if that stranger then
uses that photo or text in a derogatory way: a photo in a “most ugly list,” or a poem
in a “world’s worst poetry” forum?

In 2013 a US Court of Appeal\(^{107}\) found Richard Price’s use of photographs in a book
— to which blobs of colour, blurriness and sharpening had been added, then printed
and hung in galleries — was a transformative appropriation and fair use. Further, in
2015 the same artist took Instagram pictures submitted by individual users and added

\(^{107}\) *Cariou v Prince* (2013) 714F 3d 694 (2d Cir 2013)
comments below, selling them for considerable amounts in a New York Gallery.\textsuperscript{108} While only copyright issues have been looked at in these cases it is easy to perceive that moral rights could play a role.

Take for example a website called “The Anti-Bogan” (\url{http://theantibogan.wordpress.com/}). This website is a blog whereby the creators take comments (often accompanied by a profile photo) from an individual’s Facebook site and display them under the context of being discriminatory. Their comments are ridiculed as well as their photos. Contextually, moving someone’s work onto this site is in itself derogatory treatment as the photo and comments are often labelled as racist and the comments others make on them point out their obscene nature. The work is taken without permission and the idea is to attack the integrity, honour and reputation of the person who created the text and photograph. On one hand the site is providing social commentary in an effort to point out how ridiculous it is in this day and age to hold certain racist views, on the other hand however, a copyrighted work has been taken without permission and used in a derogatory manner.

It could be argued that this is a reasonable use, commenting for the social good. Yet it is doubtful a judge constricted by moral rights would allow it. It is also doubtful whether the site would fall under news or criticism defences or even satire and parody. Although the individual’s whose comments are used may be unaware of this treatment of their work, or are not in an economic position to sue, it would be a different situation when a politician or other person whose reputation is at stake is used.

Of course this is not the purpose of copyright. Most people do not put a large amount of creative effort into a status update, although some may. It is not as if the status updates are going to be reproduced for a published book (although that is not impossible) and thus the protection is to guard against reproduction to the economic detriment of the author. As will be discussed in Chapter Six, this line of reasoning

\textsuperscript{108} Roberts, J, “‘Art or theft’ Famous artist sells Instagram Shots for $100K” \textit{Fortune}, 26 May 2015, available at \url{http://fortune.com/2015/05/26/instagram-copyright-art/} (accessed 1 June 2015)
belongs more in the defamation arena, where enquiry over reputation and honour is an entrenched part of the legal enquiry.

As shown above, this modern writing practice raises interesting intellectual property issues, issues which moral rights serve to further complicate. To use another example, often ads are parodied on “YouTube.” The “Dove Beauty Campaign” was an ad that showed a little girl being exposed to a montage of beauty products and slogans about self-image, its catch line “talk to your daughter before the beauty industry does.” After its release a few ‘modified’ ads appeared on YouTube parodying the ad. The same ad is shown but the product placement is changed to Dove beauty products meaning to criticise the fact that Dove is campaigning against an industry they are a part of. Obviously the ad is copyright protected and what the individuals who upload the videos are doing is a breach of moral rights, derogatory treatment of a work that attacks the integrity and honour of the original composer. It could be argued that this is fair criticism and social commentary, and should be encouraged rather than outlawed, yet moral rights would see the original creator as having their work mutilated so the commentary could be suppressed. Perhaps this ad could get away with being a parody, but, as discussed in Chapter Six, it is not clear whether this would be a reasonable use. It also means social criticism that doesn’t rely on irony and humour can be suppressed under the rubric of moral rights.

Moral rights seem to add yet another layer of obstacles to the right of people to criticise the social and political world around them. Commenting and debates over SNS’s have had a lot more influence than other media outlets. The Egyptian protests owe their success to Facebook posts encouraging people to attend, police use Facebook for emergency messages, and people are starting to realise that what they say on Facebook reveals a lot about the incorrectness of their views (for example soldiers caught with racist remarks). While most of Facebook, Twitter and MySpace may concern mundane updates on what people had for breakfast, the

---

111 See the ABC’s AM program’s account of the Defence force investigating soldier’s Facebook profiles at http://www.abc.net.au/am/content/2012/s3442909.htm (4 March 2012).
opportunity to get artworks, films, and stories supported and published is akin to a cultural renaissance and should be encouraged. How far will moral rights intrude on this new democratic system?

**Conclusion**

There may exist an author who produces organically original texts in solitary confinement. Unperturbed by social, cultural or political contexts every word is the product of crafted, intentional genius. There may even be a way that this wholly original text may make it to the public sphere without intrusion or influence by editors, publishers and marketers. This book may be read by readers along with a biography, introduction and explanatory notes by the author to not just assist, but to control interpretation. This, however, is not the reality of textual production.

As seen in Chapter Two, this has never been the reality, only an idealistic, Romantic vision of what an author should be. The stability of the author concept has been undermined by postmodern literary theory. Authorship, unity, certainty, and the boundaries of a text have been prized apart to reveal a text as a system of signified meanings, woven with intertextual allegory with an absence of any absolute and fixed referent.

Mallarmé has argued that the semiotics of the text gives it its meaning, the ‘clashes and rhymes’ performing beyond the control of the hand that guides them. Foucault and Barthes have alerted us to the legal and social functions of authorship. Authorship in the legal sense is used to limit and assign responsibility and property. In the social sense it is to limit and assign meaning, to restrict the proliferation that would ensue if there was nothing to ground the intent of a text. Derrida highlights the inherent instability of all texts that may only be fixed by assigning a psycho-biographical referent: a time, a place, an author.

Postmodern theory has allowed the literary world to approach texts with a healthy dose of scepticism towards such ‘truths’ as intention, authority and originality. For creators, postmodern theory merely legitimises practices that are couched in history. Creators can argue over intent through engagement with prior texts, they can convey inconsistencies, honour the original author or merely translate the work for another
purpose. Genres such as adaptation, parody and satire, collaborative authorship ventures and social media are all genres which question the utility of restricting a text to authorial intention and openly question the idea of originality. These texts, with their place enshrined in history and their acceptance within popular culture reveal the true realities of textual production.

These are textual practices that are legitimised by postmodern theory yet illegitimated by moral rights legislation. Moral rights ignore the impact of postmodern theory and show a disregard for the realities of textual production. Inevitably this failure results in a law that is stringent, restrictive and incapable of adapting to changing social and cultural needs.

The next chapter examines the history of moral rights in civil code jurisdictions and their introduction into the international arena in an attempt to explain why Australia would adopt such restrictive laws. Re-asserting a Romantic conception of authorship requires the law to become oblivious to non-conforming creative endeavour. Assigning an authority to a mystical ‘author’ while ignoring the realities of how texts are made produces an inconsistency. What is disturbing is that this theory is now law, law that is supposed to be a reflection of contemporary social and cultural values.
CHAPTER 4

The History of Moral Rights

We are concerned here, properly, with the law of the spirit, with the law of the genius. Law bows down, it drops to its knees before the heroes of literature, and even the most insignificant writer is recognized by the law as worthy of protection, since he has enriched the nation, since he has enriched the world with the fruits of his inspiration.¹

To argue that the moral rights legislation is inappropriate for contemporary Australian society, it is necessary to examine the conditions in which the legislation was adopted. This chapter investigates the origin of moral rights through their development in civil law countries, their introduction to the international arena and, finally, their adoption and ratification into Australian domestic law. The chapter seeks to demonstrate that moral rights ideology is embedded within those particular civil law countries and that, while Australia may have adopted the legal rights, we have done so without an appreciation of our own ideology of copyright and our own conceptions of authorship.

As demonstrated in Chapter Two, the concept of author’s rights is a relatively recent one for English jurisprudence. This can be contrasted with the situation in France and Germany, where piecemeal cases recognized copyright as a natural right rather than one given by Statute. Ideologies behind the Enlightenment and the French Revolution meant the French relied on concepts of positive law and the legal system as enforcing rights that exist due to the human condition, rather than the Anglo-Saxon tradition of perceiving the law as man-made rules to regulate society. This chapter seeks to show that this rift between the two systems of law have produced very different ideologies of individual rights and property rights which in turn directly affect the very conception of copyright.

After exploring this history the chapter looks at the Berne Convention which first introduced moral rights into the international arena. It will show that the delegates from the common law countries at that time did not believe that moral rights legislation was necessary for their respective countries and signed the treaty in the belief that their existing domestic laws were sufficient to cover any obligations that would arise from the treaty.

Sixty years later, the Australian Federal Parliament decided it was time to ratify these provisions into a separate piece of legislation. The chapter will examine what pressures were placed upon Parliament to do so, and by whom. It will look at the varied reports and arguments by scholars and industry that both promoted and argued against ratification of moral rights legislation. Lastly this chapter ends with a query as to whether moral rights have actually accomplished any of their intended outcomes. Over a decade has passed since the legislation was enacted, yet there have only been a handful of cases litigated. This chapter will argue that the lack of cases is further evidence that moral rights sit uncomfortably in modern Australian creative industries and shows how Australian legislators have failed to look at modern production of texts.

The French Beginning
The concept of an author’s ‘moral right’ in their creations can be traced back primarily to France, although it is debated between scholars whether moral rights existed before or after the French Revolution. According to David Saunders, the absence of written law is evidence that there was no right attached to personality until well after the French Revolution.\(^2\) For Stig Strongholm, the absence of theoretical unity between the idea of ‘personality’ in a work and the rights in question relegates the subject to abstraction.\(^3\) Elizabeth Adeney argues that the piecemeal rights afforded to authors via individual cases shows an underlying assumption that the right of personality was recognised, even though it was some

---


time before being codified in statute. This is a view similarly expressed by Mark Rose, who discusses a case as early as 1586 where the Parlement of Paris accepted an argument recognising an author’s interest in controlling publication of their works. Although Rose states that other European countries had analogous cases, he makes the point that there are no early English cases involving authorial rights leading to the perception of author-centred rights in the sixteenth and seventeenth centuries as a particularly Continental construct.

To find the delineation between English and European copyright systems we must first examine where they both originated. Both systems began with comparable regimes of privileges that were granted by the monarch to publishers rather than authors. These privileges were made in an effort to control libellous, seditious or blasphemous books rather than to grant exclusive rights to creators. Chapter Two examined the privilege system in England and the monopoly of the Stationers Guild. In particular, this chapter examines how the European and English system diverged which is most easily discerned through the ideologies that evolved from the Enlightenment and the influence of the French Revolution.

The history of civil or continental law is generally regarded as a modern continental law being brought forth through a Roman law tradition. This Roman law was ‘rediscovered’ during the eleventh century as a rescue from the chthonic institutions in place at the time, aided by a perception from the public that the judiciary in place was mainly corrupt. With this rediscovery came the separation of state and church, the creation of universities and the beginnings of a legal profession.

---

6 Note 5 at 21.
8 ‘Chthonic’ is the term used by Edward Goldsmith to describe a people who live more in harmony with nature. Glenn Patrick utilises this term to describe a legal tradition “internal to itself as opposed to imposed criteria”, “A chthonic legal tradition simply emerged, as experience grew and orality and memory did their work”, Note 7 at 60-61. Thus it is a legal system comprised mainly by oral decisions based on memory of past judgements and thus easily corruptible.
9 Note 7 at 140.
The French Revolution had an impact on the way property is regarded in France. To speak of the French Revolution we need to inspect the ideas of Enlightenment and their impact “one of the oldest theories of the Revolution.”10 The Enlightenment was an age where it was believed that traditional thought was limiting and “necessarily immutable.”11 Natural social ordering and an increased value placed on the human individual’s basic rights were hallmarks of the thinking of this period. The religious rationalists – René Descartes, Hugo Grotius and John Locke, amongst others – had come to view human reason as God’s gift to humanity.12 As humans were created in God’s image, we share his power of reasoning. As God’s delegate on earth, humans were to utilise this power of reasoning to fulfil God’s directives. This tradition of human law was inspired by religion but developed as a matter of human reason.13

The renewed value of human reasoning resulted in an increasing awareness of the value of individual rights. “Law becomes subjective and in becoming subjective it generates rights. *Le droit* (or law) in French gives rise to *le droit subjectif* (or rights).”14 This is in direct contrast with the advancement of the common law in England which is described as:

A law of relations, of mutual obligations, is not a law which concentrates attention on the legal powers or interests of the individual. It is not a law of rights, and the notion of the subjective right (as they say in the civilian language) played little or no role in the history of the common law in England.15

Accordingly the civil law tradition is one of natural rights: rights belonging to every person regardless of race, existing from birth. The law’s aim is to control wrongs against such rights whereas the common law developed as one of positive rights – rights made by written law. Judges in the civil law tradition merely apply and enforce the law while judges in the common law are held to interpret legislation and create law following precedent.

The consequences of the French Revolution were enshrined in two documents. Feudalism was abolished by the decree of 11 August 1789 and the Declaration of the

11 Note 7 at 140.
12 Note 7 at 143.
13 Note 7 at 143.
14 Note 7 at 141.
15 Note 7 at 238.
Rights of Man and Citizen promulgated on 26 August of that year. The Declaration, intended as a preamble for a new constitution, is described by William Doyle as “an indictment of the arbitrary power wielded by the old monarchy, so inimical to the ‘natural and imprescriptable rights’ of liberty, security, and resistance to oppression (clause II).”

The liberal individualism of the eighteenth century formulated an absolutist view on property rights. France’s article 544 of the Civil Code (enacted in 1804) defines ownership as “the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations.” The term ‘absolute’ is used “to mark a clear cut-off point from the preceding period of feudalism.” In contrast to common law countries, ownership lasts as long as the object lasts and is perpetual even if the property owner has not exercised their rights within a certain period of time. Individual ownership is exclusive with most forms of communal ownership not legally recognised.

Civil law most clearly differs from the English common law system. While common law grew through an accumulation of precedent, the defining characteristics of civil law remains the importance of codification, the denial of judicial law-making, and a situation where judges have to actively establish the facts which justify the law’s application. This began the ‘inquisitorial’ type of legal proceeding as opposed to the common law ‘adversarial’ approach. As H. Patrick Glenn puts it, the codes “relate to the value of the human person, and the need for extricating the human person from much of the social fabric which had come to envelop the human person.”

English law headed in the direction of contractual, capitalistic dominated legal structures, as Saunders has argued. Economics, market trade, and the freedom for

---

17 Note 16 at 205.
19 Note 18 at 385.
20 Note 18 at 386.
21 Due to the Civil Code text of all property being exclusive certain laws have been enacted to allow communities to hold ownership over property see Statute No 65-557 of July 10, 1965.
22 Note 7 at 139.
23 Note 2 at 75-76.
people and business to contract influenced legislation. France, on the other hand, was more preoccupied with a “unitary network of state agencies,”24 with the view that the economic and political power should be controlled by a central government rather than by individuals and the market. Thus while English law sought to open the market for trade in books, with a view to protecting the publishers, France sought more to encourage and protect its national authors:

Protection of an author’s non-economic rights of personality would thus be difficult to imagine in the framework of a legal system which was not largely founded on individualistic principles and on a respect for the human person in general.25

With two quite distinct histories and jurisprudential principles, it is difficult to fathom how English copyright law can now embrace this French view of authorial rights.

The right of integrity, the focus of this thesis, began its development as early as 1804 in the case Bossange c Moutardet,26 where the Cour de cassation held that, by making editing changes without the consent of the author, a publisher had infringed the right of literary property. Gradually, other cases followed this line of reasoning, stating that these changes had the ability to compromise the author’s reputation. However, reputation was not always the determining element: in Barrucand c Wekerlin,27 a book was taken out of circulation despite no harm being caused, merely on the basis that the author had not consented to the changes. In Maeterlinck c Fevrier et autres,28 the court referred to this reasoning as “the moral right of control and supervision which [the author] retains over the products of his intellect and which allows him to oppose any act which compromises his work’s integrity and betrays his thought.” However, until the legislation in 1973, these cases were quite random and “its parameters therefore remained hazy.”29

24 Note 2 at 76.
25 Note 2 at 78.
26 Bossange c Moutardet Ann XII, 475.
27 Barrucand c Wekerlin Trib civ Siene, 9 December 1892, Ann 1893, 23
28 Maeterlinck c Fevrier et autres Trib civ Siene, 25 March 1909, Gaz Pal 1909.1.451
It was not until the early twentieth century that draft legislative provisions were made to encompass the breadth of moral rights protection. However, despite the drafts taking place, it was not until 1958 that a statute came into force. In 1973, copyright legislation was relied on, whereby a plaintiff would allege a copyright violation for an integrity right. To restrict the performance of dramatic works the law of 1971 was relied on, and other laws regarding natural rights could also be used. This legislation was later replaced by the Intellectual Property Code of 1992, the first to use the term ‘droits moraux’. Adeney describes this legislation as a “legislative scaffolding:” a statement of principles to allow room for the continued progression of case law on the topic.

In the current model, the French right of integrity is an example of “laconic drafting,” its loose terms to be supplemented by the judicial understanding in a case by case basis. It is startlingly different to the Berne Convention wording, stating only that “the author enjoys the right to respect for his … work” and attaches to the person rather than the text. Again, this allows the courts to continue with their judicial doctrine of the subject. It is worth noting that, in France, an infringement of the right is considered a criminal act, liable to penalties and even imprisonment, rather than a mere civil misdemeanour.

In France, moral rights are inviolable, perpetual and inalienable. They cannot be sold or transferred and any waiver is null and void. Even when a work enters the public domain, the moral rights of the author still remain and are to be respected. To put that in perspective an illustration may help conceptualise the problems this presents. James Joyce’s *Ulysses* was first serialised in a magazine in America before being first published as a whole in Paris. If that work had not first been serialised Joyce scholars would have cause to be devastated. The Joyce estate has prevented many adaptations, biographies and scholarly works on Joyce. The novel enters the public

---

30 See Note 4 at 33-35 for the draft provisions.
31 Note 4 at 35.
32 Note 4 at 166.
33 Note 4 at 181.
34 Note 4 at 181 and 35.
domain in 2012. As discussed, if the novel had been first published in France the Joyce Estate for all of eternity could proceed to block any adaptation, parody or even contextualisation that would injure Joyce’s honour and reputation as an author. Thankfully, America has no moral rights for authors and so this year will see a flood of new and older suppressed works which will become available to the public.

**German Jurisprudence**

Germany presents an interesting point of exploration for moral rights. Dissimilar to France, where moral rights concepts are abstract in its codification, in Germany, the legislative provisions have been drafted in fine detail, and the history and ideology behind the rights explored exhaustively. The social and political climates in Germany at different times have had a significant impact on how copyright and author’s rights developed in the country. The escalation of piracy, the influence of philosophers and the German Romantics and the nationalism accompanying the First and Second World Wars have all left their marks on the German conception of authorship.

Eighteenth century Germany found itself at a critical period between the aristocratic age of patronage and the more democratic age of the market place. Similar to England and France, the expansion of a literate middle class fuelled demand for reading material. However in Germany this growth was slower than in England and France, where, by the middle of the seventeen hundreds there had arisen a flourishing middle class literary culture. Conversely, as argued by Martha Woodmansee, at the same period the common German household still owned little more than a Bible. With Germany at this time comprising over three hundred independent states the market for the un-authorised reproduction of books was wide open due to the lack of a centralised state control of publication.

Before examining the legal reaction to this climate a brief discussion of the main philosophers of this time is helpful given they were instrumental in shaping copyright laws in Germany. Eighteenth century philosophy was mainly dominated

---


38 Note 37 at 41.
by British empiricists such as John Locke, David Hume, and George Berkeley. Empiricism was concerned with knowledge and proof. John Locke (1632-1704), who is regarded as the founder of Empiricism, argued that there are no innate ideas or principles, that all knowledge is derived from experience. German idealism is seen as a reaction to this philosophy and most often affiliated with the Romantic Movement. In particular, Immanuel Kant (1724-1804) heavily influenced Coleridge and Wordsworth who embraced the Romantic vision of authorship. Kant’s main philosophical principle was that every man should be considered as an end in himself. For Kant, the essence of morality is to be derived from the concept of law. Nature will always act in accordance with law but only a rational being has the power of willingly acting according to the ideal of law. As well as treatises on metaphysics, politics and reason, Kant also turned himself to discussions of authorship.

Kant saw the literary form as an author delivering a speech to an audience. Possession of a manuscript did not then mean the right to call upon the author to speak without permission:

The author and someone who owns a copy can both, with equal rights, say of the same book, “it is my book,” but in different senses. The former takes the book as writing or speech, the second merely as the mute instrument of delivering speech to him or to the public, i.e., as a copy. This right of the author is, however, not a right to the thing, namely to the copy (for the owner can burn it before the author’s eyes), but an innate right in his own person....

including transformative authors.”45 She argues that intertextuality is a central part of creativity for Kant: “Even genius breakthroughs react to tradition. The second genius does not imitate but is aroused by the first genius to a feeling of his own originality.”46

Kant’s immediate successor, Johann Gottlieb Fichte (1762-1814), is often referred to as the theoretical founder of German nationalism.47 According to Fichte:

[E]ach writer must give his thoughts a certain form, and he can give them no other form than his own, because he has no other. But neither can he be willing to hand over this form in making his thoughts public, for no one can appropriate his thoughts without thereby altering their form. The latter thus remains forever his exclusive property.48

Fichte believed the privilege system of giving printers a right to publish was not a positive law, as it was thought of in England, but rather an exception to a natural law which accords everybody the right to reprint every book.49 Fichte argued that a book is a “verbal embodiment or imprint of that intellect at work.”50

These philosophies directly impacted the conception of authorship. They were instrumental in the debate surrounding whether unauthorised reproduction should be illegal, where traditionally the pirates had won the favour of opinion. As Woodmansee puts it:

Here we find another instance of the kind of interplay between discourses to which historians of aesthetics and criticism need to become more sensitive, for it is precisely in this interplay between legal, economic, and social questions on the one hand and philosophical and aesthetic ones on the other that critical concepts and principles as fundamental as that of authorship achieved their modern form.51

It was through these writers that the problems of the traditional ‘honorarium’ (privilege) system came to be debated. At the same time piracy had become

46 Note 45 at 1080.
47 Note 39 at 651.
49 Note 37 at 51.
50 Note 37 at 52.
51 Note 37 at 47.
epidemic throughout the country as the privilege system of protection could not cross the borders of individual States.

In 1794 the first legislation to regulate publishing rights was enacted in Prussia, making the bookseller, rather than the author, the subject of legal protection. In 1810 Baden adopted the Napoleonic Code yet inserted into the section on literary property the recognition of the author. In 1813 Bavaria defined the rights in the same terms as Fichte had argued:

Anyone who publicizes a work of science or art without the permission of its creator, his heirs, or others who have obtained the rights of the creator, by reproducing it in print or in some other way without having reworked it into an original form will be punished.

These new laws recognised the author as the owner of literary property, yet piracy still continued to be a problem as the laws only protected an author within each state. It wasn’t until 1845 that the Federation of German States adopted a law that could protect authors across borders.

In 1841 the philosopher F.W.J. Schelling had given a lecture at a University in Darmstadt. An audience member made a transcript and had it published in Berlin without consent. In 1846 the Berlin tribunal stated that an author “can demand that his manuscript not be printed, that his speech remain in spoken form, and indeed spoken only to those who were entitled to hear it ...” Adeney argues that this is early evidence of the German judiciary thinking in terms of moral rights. Adeney further argues that, despite scarce support in legislation at the time cases continued to be decided on the basis of moral or personality rights.

52 Note 37 at 52.

53 Bavarian Penal Law Book, Munich (1813), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org using translation provided by Note 37 at 53.

54 Note 37 at 53.


56 Note 4 at 39.

57Note 4 at 40. Adeney relates a few cases which seem to elaborate author rights outside of any statutory regime including a case where a title was changed and an alteration of a deceased author’s work. While the ‘spiritual interests’ of these authors were discussed the cases mainly rested on the unauthorised use issues. While they hardly constitute valid evidence of legally relevant attitudes it is hard to dispute Adeney’s claim as it seems these cases are not available by any other translator.
From 1901 the right of integrity (though not named) was present in Germany’s copyright legislation. In 1912 a case came before the German tribunal concerning a situation where the owner of a house, which had a fresco painted on it, had the nude figures clothed. The court stated the author had a right:

The express provisions of § 12, 13, 15 ff, 18 paragraph 3, 19, paragraph 2, 21 do not exhaust the copyright powers. They reveal that the artist, the modern sense of justice accordingly, a legally protected right to have the created works, as an outcome of his individual artistic creativity, the contemporaries and posterity made available only in its unaltered individual design ....

This idea of protection of “individual” artistic creativity shifted from the 1920s into a rhetoric of works of art as part of the culture of the whole people. During the First World War and in the aftermath of the war, individualistic concepts had become unstable:

With the rise of nationalist and collectivist movements in the first half of the 20th century, the view that individualism was secondary to more general social interests inevitably affected the way the droit moral was seen.

In the period between World Wars I and II, culture and nationhood were the most valued concepts and the rights of the author were framed to reflect protecting cultural heritage rather than individual author’s rights. In this context it is the work that is protected, rather than the author, yet there is a duty upon the author to act to protect the work and so the rights are bestowed upon them.

Germany represents a system of ‘monist’ moral rights. It was Josef Kohler who imagined the dualist system of moral rights theory, although it was a monist view...
which Germany eventually adopted. In a dualist system the personality rights of an author can co-exist with the commercial rights, each protecting the rights that the other cannot protect. For example, the technicalities in the commercial law could be overcome by the broad spectrum of the personality rights. The two rights however had a clear distinction, and Kohler rejected any notion that the commercial aspect of copyright as a whole was a part of personality rights, or that “works of an author remained part of the authorial property.” It was Otto von Gierke who developed the monist view believing that both sets of rights were inseparable. This was based on a natural rights perspective on law wherein reason allows us to recognise rights that are given to humans by virtue of being human and exist independently of any statute or law. These laws are less about the property relations of people but are based on “abstract principles of justice common to all mankind.” The monist view perceives moral rights as intertwined with economic rights, both belonging in a package of rights. According to this view, moral rights, have economic consequences, and economic rights have moral consequences, there being no need to make a distinction between the two.

Currently in Germany protection is granted to the author rather than the work, protection of the work being merely the means by which the author can gain access to the right. However it is viewed that the author is under a duty to protect their works for the benefit of society.

The rights are made up of two interests, the intellectual interests and personal interests of the author. Intellectual interests are the author’s interest in his or her “intellectual or spiritual child” and can be infringed when there is no harm to the

---

65 Note 4 at 28.
66 Note 2 at 116.
68 Note 4 at 75.
69 Authors Rights Act, Section 1 as translated by Adeney, Elizabeth in Note 4 at 222.
70 Note 4 at 223.
author’s reputation. The personal interests centre upon the prestige and reputation of the public’s perception of the author’s work.

Whereas in most countries moral rights provisions are separate sets of rights, forming their own provisions distinct from their economic counterparts, in Germany these rights are connected with economic rights and are not separate, but rather form a network that runs through the whole legislation. Significantly for Germany, and its stance on moral rights, is the fervour with which a unified theorization of the rights was pursued prior to implementation. A concrete set of ideals and rationale behind the laws made it possible for judges to try cases knowing exactly what the balancing act in question should be. Instead of judges grappling with distancing economic concerns from personal rights, as the rights are part of the one bundle there is no need and they can reflect back on the theory and philosophy to determine derogatory treatment rather than having to invent reasons for why something that is insulting should be censored.

Having this theory, or, in the case of France, having such a long judicial history, meant that a unified thread of moral rights ideology could be formed leaving little ambiguity to those who wished to engage in creative activities of their rights and obligations. The Germans are maintaining their cultural heritage, making sure their valued composers and artists aren’t distorted into rap songs and shameless advertising. In France, the protection is intertwined with a natural law theory concerning the priority of rights of the individual. As we have seen, English copyright law has never been concerned with protecting cultural heritage or natural law theories and individualistic ideologies. Common law countries that have adopted moral rights merely adopt the law, not the history nor the ideology. This means judges reared in the economic rhetoric of copyright are suddenly thrust in a milieu of author’s personality rights. Without a unified theory expressly codified and defined in the legislation, creators are also left unaware as to what exactly they need to gain permission for, from whom, where and most importantly, why?71

71 This discussion is further picked up in Chapter 5.
The Berne Convention

Although Continental countries such as France and Germany have been accustomed to the notion of moral rights, the English copyright system, with its emphasis on the freedom to contract, remained mainly ignorant of authorial rights up until the twentieth century. This state of affairs altered with the Berne Convention, which has been described by Adeney as “the main bridge” over which moral rights crossed from the Continental countries to the Copyright states.

The first call for some form of international intellectual property regime started after a number of foreign inventors refused to attend the International Exhibition of Inventions in Vienna in 1873 because of the fear that their inventions would be exploited in other countries where they had different intellectual property regimes, or where foreign creators were not protected. In 1883, this led to the Paris Convention for the Protection of Industrial Property and the first major international treaty on the subject of intellectual property law, which mainly concentrated on inventions, trademarks and industrial designs. Copyright (in the context of the conventions) was only introduced with the Berne Convention for the Protection of Literary and Artistic Works (1886), which set up an administration (the United International Bureaux for the Protection of Intellectual Property later known by the French acronym BIRPI) which eventually became the World Intellectual Property Organisation (WIPO). In 1974 WIPO was recognised as a specialized agency of the United Nations and in 1996 was further broadened to co-operate with the World Trade Organisation. From one international treaty there are now over 24, each attempting to harmonize intellectual property regimes around the world.

The treaty that brought moral rights to the copyright states was a revision to the Berne Convention in Rome in 1928. Before this revision the main principles of the

72 See further Note 5 at Chapter 2.
74 Note 4 at 105.
76 Note 75.
77 Note 75.
treaty were to give the same protection to foreign authors in other contracting states, the principle of “automatic” protection and the protection being independent of the existence of protection in the country of origin. Minimum standards of protection were also adopted.

In 1928 moral rights were promoted at the Rome conference by delegates from such continental countries as Italy, France, Poland, Romania and Czechoslovakia. It is obvious why this became such an issue for the continental countries: without reciprocal rights in other countries, moral rights for their authors could only be protected in certain countries that recognised them. To gain an international recognition would substantially benefit their creators. Piola Caselli, the Italian delegate, became the most forceful promoter. The end result was a provision that was heavily compromised, which is quite ironic given the status the provision now receives and the strict adherence to the wording given by member states.

The moral right supporters relied on an increasing fear of new technologies and the opportunities of abuse and distortion. Another threat was the development of a “paying” public domain where the author loses control of the work and statutory licensing where an author has no discretion over use. Moral rights then became seen as an alternative avenue to protect author rights as the economic rights were increasingly eroded. Germany and Italy also lent a conservationist attitude to the protection of nationalist cultural products, shifting the debate from individual protection of an author to a community interest, although the end result showed no sign of these concerns. Rather than rushing to the defence of their non-moral rights regimes, the copyright countries, for the most part, remained silent in the debate, in

79 Note 78.
81 Note 4 at 109.
82 As opposed to the broader rights in civil countries only three rights were adopted at the Convention. Rajan M, Moral Rights: Principles, Practice and New Technology, Oxford University Press, USA, 2011 at 240.
83 Note 4 at 106.
84 Note 4 at 107.
85 Note 4 at 108.
particular the UK and Australia. The United States held merely observer status. The only initial objection from the Australian delegate was the query over whether the Australian constitution would allow them to pass such a law, moral rights falling short of the copyright power.

The Australian delegate, Harrison Moore, claimed his acquiescence on the subject came from Mr Caselli’s argument that it was unfair that the common law countries, whose protection was satisfied in other ways (for example: defamation law) would stand in the way of other countries being obligated to provide some sort of protection. Mr Caselli’s report stated otherwise, indicating that he had convinced the English legal traditionalists that they should not “forget the lofty and noble tradition of English law relative to the protection of the human personality.” This report curiously does not mention that the copyright countries were already compliant with the terms agreed upon through other domestic legislation even though that was what they had come to believe.

Adeney argues that the impression given to her by the records, is that the delegates of the civil law countries at Rome were not seriously concerned to form any judgement on questions of present compliance. They were intent primarily on eliciting the votes of the copyright countries so that the required unanimous support for the new provision could be achieved.

The opinion, held by both Adeney and Sam Ricketson is that the common law delegates believed that what they had agreed to require no changes to their domestic law. This was because of their belief that current adjunct laws sufficiently covered the rights in question, such as defamation law. James Crawford counters that argument, his view entailing that the non-common law countries accepted that what

---

86 It was not until 1988 that the USA became a signatory. See Note 78.
89 Note 4 at 111.
90 Note 4 at 112.
laws they had could be sufficient for this purpose but the onus was on the copyright countries to establish what that was.\(^{92}\)

It is interesting to note that the common law countries were given no warning that moral rights would be on the agenda at the convention and subsequently “had some genuine puzzlement as to what this new concept of moral rights entailed.”\(^{93}\) It could be argued that, caught by surprise, Mr Moore’s acceptance of the provisions shows no intent whatsoever of Australia changing its domestic laws.\(^{94}\) Ironically the main reason Australia finally adopted the moral rights legislation in 2000 was to bring the country in compliance with its international obligations, as discussed further in this chapter.

The Article became Article 6bis. It was mostly drafted by the Italian delegation and became whittled down from an extensive range of rights to just three.\(^{95}\) The right we are concerned with is the right of integrity, although it must be noted, as Adeney proposes, that the term “author” was never brought up as an issue during the conference even though it has become an issue today.\(^{96}\)

The first limb of Article 6bis involved defining the rights. Each civil law country had their own formulation of the right of integrity, but what remained at the end was a general statement that had become quite narrow, referring only to actions to the work itself (for example it left out offensive contexts).\(^{97}\) The second limb, that of damage, was initially drafted as “which is prejudicial to his moral interests.”\(^{98}\) This vague terminology was not accepted by the common law countries who, within their legal systems, had no way to correctly approach that definition.\(^{99}\) Further precision was needed to clarify the rights for the common law countries and so, after negotiation,


\(^{93}\) Note 92 at 64, this is also the view of Cate Banks in Note 80 at 200-201.


\(^{95}\) Note 80 at 202-203.

\(^{96}\) Note 4 at 114.

\(^{97}\) Note 4 at 115.

\(^{98}\) Note 4 at 120.

\(^{99}\) Note 4 at 120.
the phrase “prejudicial to the author’s honour or reputation” was agreed upon. From a copyright country perspective, one could still argue that these terms too are quite vague and imprecise, but at the time it satisfied all parties and was eventually adopted.

The most contested issue was that of the duration of rights. Not only could France, Germany and Italy not agree on a time frame but, in order to base their rights in defamation law, the copyright countries could not agree to anything past the author’s lifetime. Within the conference, this was yet another example in which it was thought the copyright countries were already in compliance. The issue was eventually reserved for the determination of the individual states. It should be noted, as Adeney does, that the Berne Convention delegates showed no interest in remedies to, or penalties for, contravention of these rights, believing the main aim of the article was to establish minimum levels of protection rather than imposing “a model law.” It is also worth noting that the convention did not set any conditions upon the rights of reasonableness or practicality, querying whether what was intended is a subjective view by the author or an objective view.

Australia entered the treaty believing that the varied rights under other heads of damage in its domestic laws were already substantially in compliance. This explains why no legislation was introduced to ratify the treaty until well over 60 years had passed. The next section attempts to explain what occurred between the signing of the Rome Convention in 1928 and the moral rights legislation in 2000 in Australia and the impetus to finally pass the moral rights legislation.

The Australian Development of Moral Rights

In 1931 The Statute of Westminster (UK) was passed that allowed the Australian Parliament to make laws without restriction from Britain, yet it was only in 1942 that

---

100 Note 4 at 120.
101 Note 4 at 121.
103 Note 4 at 125.
104 Note 92 at 64.
the Statute of Westminster Adoption Act (Cth) was passed.\textsuperscript{105} According to Cate Banks there is no archival material available to suggest that the issue of moral rights ever entered discussion in the Federal Parliament until 1959,\textsuperscript{106} a fact Ricketson attributes to the underlying assumption that Australia was already in compliance with its obligations under the Berne Convention.\textsuperscript{107}

The Gregory Report of 1952 (UK) looked at moral rights yet decided that any issues authors had could be dealt with by other existing laws.\textsuperscript{108} However, in 1956 the United Kingdom passed a new Copyright Act which included the right against false attribution and a right of integrity: this led the Australian Government to form a committee to look at the new implementations, and whether they would be appropriate for Australia.\textsuperscript{109} The committee (the Copyright Law Review Committee) formed by the Australian Government in response met on 37 occasions and invited any person or organisation to make submissions.\textsuperscript{110} As only a few submissions were made relating to moral rights the attention given was relatively brief and the Committee concluded that, in line with the Gregory Report, Australia was sufficiently in compliance with the Berne Convention and that no further changes were necessary.

In 1959 the Committee released ‘The Spicer Report,’ which specifically addressed the changes in the UK legislation, in particular Section 43 of their new Copyright Act which granted a right of false attribution of authorship and a civil remedy for cases of wrongful alteration of a work. The report details one strong objection to following the United Kingdom’s lead:

\begin{quote}
The subject [of moral rights] has no connection with copyright. Section 43 confers no rights on the owner of copyright as such. The provision applies to authors of works which are not the subject of copyright as well as the authors of works which are. The acts prohibited bear no relation to infringement of
\end{quote}

\begin{itemize}
\item \textsuperscript{105} Note 80 at 207.
\item \textsuperscript{106} Note 80 at 207.
\item \textsuperscript{107} Note 92 at 67.
\item \textsuperscript{108} Board of Trade, Copyright Committee Report of the Copyright Committee (1952) HMSO: Cmd 8662, para 219, 80, Para 220.
\item \textsuperscript{110} Note 110 at Para 5.
\end{itemize}
Despite this strong objection, the majority favoured a right for false attribution of authorship and, while conceding that it did not fall within the strict ambit of copyright, they still argued that it would be favourable especially in light of the provisions of the Berne Convention. They did not, however, feel the same about the right of integrity:

We do not consider that any further protection for artists should be provided for, even if the Commonwealth had the necessary constitutional power. The artist is free to protect himself by inserting terms in his contract of sale. Also, as the matters raised primarily concern the reputation of the artist, we consider that the action for defamation is more appropriate than any statutory cause of action....

Curiously Cate Banks’ article suggests that the Gregory Report resulted in a continuation of “the status quo” in the UK, failing to mention that the UK had actually enacted moral rights legislation. She is then critical of Australia for following the United Kingdom’s lead: “Despite Australia being free to enact its own laws relating to copyright, it was very clear that common law unity, conformity and deference to the UK were paramount when considering this issue.”

Yet Australia did not follow the United Kingdom’s lead and, in response, drew criticism from the British Joint Copyright Council in 1961:

This council regrets that the Committee has not seen fit to recommend a provision for the moral right. Quite shocking debasement of great works of music and art, in particular, for the purpose of commercial advertising is common nowadays, sometimes even when the work is still copyright.... It is submitted that the State has a duty to discourage, at the least, the defilement of the national treasures of music, literature and the arts.

The criticisms here are a departure from normal moral rights rhetoric. This view suggests that it is less about the author’s relationship to a work than about protecting national ‘treasures.’ This sort of argument fails to take into account that moral rights applies to all works, not just the “great works,” works that may or may not have

---

111 Note 110 at Para 423.
112 Note 110 at Para 487.
113 Note 110 at Para 489.
114 Note 80 at 208.
116 Note 117.
involved a level of high originality or labour to produce. The “shocking debasement” comment also leads to the problem of judges becoming the arbiters of taste, rather than authors objecting to modifications of their work.

The issue was discussed by the members at the Stockholm Revisions of the Berne Convention in 1967, however this resulted in no changes to the treaty, and moral rights were not included in Australia’s new Copyright Act 1968. Moral Rights did not enter the public debate again until the mid-1970s. In 1978 the Whitford Committee was formed in England, which once again looked at whether England had gone far enough to satisfy its Berne Convention International requirements. It held that Section 43 did not go far enough and legislation similar to that of the Netherlands would be recommended, which limits the right of an author to object to modification of a work where it would be unreasonable to do so. This led the Australian Government to re-examine their stance on moral rights and, in 1979, an Australian Symposium was held with artists, authors, as well as professionals and industry representatives who were encouraged to give their opinions, leading to some interesting results.

It is quite clear from Peter Banki’s discussion of the symposium that authors and artists were totally unfamiliar with what moral rights were, although they were clearly pushing for them:

Many people in that first seminar ten years ago thought that when you were talking about moral rights you were talking about your sex life, not about rights of attribution or integrity.

For example, Frank Moorhouse believed it had something to do with high schools being stopped from setting his work as school texts, and performing artist Robyn Archer believed it was about discrimination against artists based on their political affiliation. Banki suggests the problem most artists had was the way they had been treated by industry and that attitudes towards artists and authors is the major factor

117 See www.wipo.org ‘Stockholm Revisions.’
118 Note 80 at 210.
120 Interestingly in Chapter Five this question is posed as a hypothetical moral rights case.
121 Note 121 at 9.
that needed to be changed in Australian society.\textsuperscript{122} He voices the opinion that moral rights would give artists more bargaining power and that this would enable an attitudinal shift in the way authors and artists are perceived, although conceding that for some artists it would be used merely for economic gain.\textsuperscript{123}

The next public discussion surrounding moral rights came from a report commissioned by the Australian Council to “advise the Australia Council on whether legislation to protect artists’ moral rights should be introduced and, if so, what form it should take.”\textsuperscript{124} Banks argues this is the first time form had been included in the debate “signifying a movement towards a new way of conceptualising the debate.”\textsuperscript{125} An intriguing point about this report (commonly referred to as the Martin and Bick Report) is its recommendation that moral rights should not form part of copyright but should be contained in a separate statute. They also recommended moral rights to be transmissible to heirs, an idea that confuses the original idea of moral rights as protecting the inherent relationship between author and work. Despite these reports and symposia being largely in favour of moral rights, the Copyright Law Review Committee’s Report (1984–89) put all these issues to rest by a majority vote in favour of not adopting moral rights.

On 4 October 1984 the Copyright Law Review Committee’s Chairman issued a press release regarding a discussion paper on moral rights. Copies were circulated and 33 submissions were received in response. In 1988 the report was concluded – with the committee divided five votes to four – that it was inappropriate to introduce moral rights at the time. The majority’s reasons for not enacting moral rights were:

(1) The practical problems associated with its introduction especially what would be considered ‘reasonable’

(2) That the theoretical basis for moral rights protection in a common law system has not been identified

(3) There is insufficient indication for support by authors

(4) The lack of violations to warrant legislative intervention

\textsuperscript{122} Note 121 at 10.
\textsuperscript{123} Note 121 at 11.
\textsuperscript{125} Note 80 at 213.
(5) The Australian community would be unlikely to support or endorse such laws.\footnote{126}

The minority reasons for implementation were:

1. Such legislation is fair and equitable
2. Necessary to give effect to the Berne Convention
3. World-wide trends towards moral rights and the desire for international copyright laws to be uniform
4. Greater community perception of the value of authors and artists
5. The rise of digital technology which makes it easier to reproduce works.\footnote{127}

Despite the Attorney-General accepting the majority’s recommendation not to enact any legislation, the 1990s saw further action by moral rights promoters to keep moral rights on the agenda. The focus of these arguments centred on the Berne Convention requirements.

In 1989 a ‘Moral and Pecuniary Rights Seminar’ was held to discuss the problems. This seminar was held by the Institute of Cultural Policy at Griffith University and was supported by the Australia Council, the Federal Government’s arts funding and advisory body and the Australian Film Commission.

In 1992 the Copyright Council wrote to the Attorney-General recommending the minority views of the 1989 CLRC Report. In 1993 a policy statement was released by the Government, entitled \textit{Distinctly Australian}, indicating future action in the area of moral rights. In 1994 a Discussion Paper was released by the Attorney-General: instead of merely presenting the arguments for or against moral rights, the discussion paper focused more on what form the rights should take, signalling that the moral rights debate was over and legislation was coming in the near future.

An exposure draft of an amendment to the Copyright Act was released in 1996 and a Bill was introduced in 1997. In 1998 the Attorney-General held a forum on the issue of waiver and in 1999, after most of the technical difficulties had been debated, the

\footnote{127} Note 128 at 35-36.
Copyright Amendment (Moral Rights) Bill 1999 was tabled. In 2000 the Copyright Amendments came into force and Australia now had moral rights for authors and artists.

The arguments for Moral Rights legislation
The preceding account of reports, policies and final legislation only hints at the issues that were being dealt with by the committees, scholars, artist groups, and industry. This section looks at the main reasons that moral rights were being pushed for and the reasons given in dissent. As discerned through the literature, the three main arguments for moral rights protection are as follows:

1. Australia is in breach of its obligations stemming from the Berne Convention;
2. Artists and authors need rights to promote consultation on uses of their works and achieve a better bargaining position which in turn encourages creative endeavour; and
3. Moral rights legislation protects cultural heritage.

1. Compliance with the Berne Convention
One of the main arguments used to promote moral rights in Australia was the increasing recognition of moral rights in international treaties and conventions as well as the adoption of the rights in Canada and the United Kingdom. According to Ricketson, before 2000 Australia was in breach of its obligations to the Berne Convention.128

The only two rights that are required under the Convention are the right of attribution and the right of integrity. The obligations only apply to the treatment of foreign authors and works claiming protection in Australia and not to Australian nationals. In regards to the right of attribution, Australia accorded authors a right to claim authorship under Part IX of the Copyright Act 1968. There was also a remedy available of “passing off” under s52 of the Trade Practices Act 1974.129 Ricketson

---

129 Now superseded by the Competition and Consumer Act 2010 (Cth).
argues that this partial protection has no positive obligation for attribution, merely negative rights, although he concedes that the situation could be remedied by terms put into contracts.\textsuperscript{130}

In relation to the right of integrity the Copyright Act contained two relevant provisions. Section 35(5) gave authors of certain commissioned works a veto against uses not envisaged at the time of commissioning. Section 55(2) also allowed an exception to statutory licensing in relation to adaptations of musical works that debase the work.\textsuperscript{131} Much like the current right of integrity this section allows the original composer of a piece of music to object to uses that ‘debase’ their work. The difference between this section and the right of integrity is that music has a system in place whereby a collection authority holds licences which can be bought and leased by third parties with royalties going back to the original artist. The third party does not need to contact the original artist; it is all done through the registry. This section thus acts as a defence to the rigid system of automated licensing. Creative works under moral rights do not have a system for licensing works other than contracting with the copyright holder. If a centralized registry were made for other creative works then moral rights can be seen as a safeguard to protect authors and artists. As it stands however, since permission must be sought through the copyright holder there is no reason why an artist or author can’t contractually restrict uses of their work without the need for a safety provision in legislation.

More significantly, however, is the availability of a remedy under Defamation law. Defamation law allows someone who feels that something said or written about them that prejudices their reputation has an action for suit.\textsuperscript{132}

[S]uccessive Revision Conferences saw this requirement of prejudice as being analogous to what had to be shown in a common law defamation action. Accordingly, it is hard to say that the availability of this action does not meet the requirements of article 6\textsuperscript{bis}(1).\textsuperscript{133}


\textsuperscript{131} This is discussed further in Chapter 5.

\textsuperscript{132} Chapter 7 goes into detail regarding the availability of defamation law for moral rights type infractions.

Defamation may provide adequate protection because it makes mutilations and modifications subject to the test of honour or reputation and was clearly in mind by the delegates at the conference. Ricketson argues that these “fail to give effect to the spirit, if not the letter, of article 6bis.”\textsuperscript{134} He also argues that as defamation rights of action do not survive the plaintiff, that we have failed to give \textit{post mortem auctoris} protection as required by Para (2) of article 6bis.\textsuperscript{135} It is also argued by Maree Sainsbury that, as defamation is a state law and there is little harmony between the states and territories, it is difficult to generalise about whether moral rights would be protected in every case.\textsuperscript{136}

The present practice of other Berne members can be pointed out as an argument against any requirements that more protection is needed. Although the UK and Canada enacted moral rights legislation, the USA, who acceded to the convention in 1988 has not.\textsuperscript{137} As Ricketson has put it:

\begin{quote}
We have not seen riots outside the Australian embassies throughout the world concerning our failure to comply with moral rights protection. Unlike some other international conventions, the Convention itself provides no real mechanism for resolving differences and ensuring compliance.\textsuperscript{138}
\end{quote}

The only way another State could object to Australia’s failure to abide by the Convention would be through the International Court of Justice, yet that path is most unlikely as Ricketson notes:

\begin{quote}
It may not be completely impossible, but governments usually have other things on their minds than compliance with the provision of what, to many of them, is not a very important convention.\textsuperscript{139}
\end{quote}

Although Australia may have failed to provide moral rights after the death of the author, before 2000 we still had covered the rights required by the Berne Convention through other laws. As discussed, our failure to ratify specific legislation was hardly an immediate concern in the international arena and there was nothing in the Berne

\textsuperscript{134} Note 92 at 76.
\textsuperscript{135} Note 135 at 475.
\textsuperscript{136} Sainsbury M, \textit{Moral Rights and their Application in Australia}, The Federation Press, Sydney, 2003 at 80, however as detailed in Chapter 7, this is no longer the case with Defamation law due to Uniform legislation being enacted.
\textsuperscript{137} Except for the Visual Artists Rights Act of 1990 (VARA) which gives moral rights protection for visual artists only.
\textsuperscript{138} Note 92 at 77.
\textsuperscript{139} Note 92 at 77.
Convention to require integration within the Copyright Act. That being said, compliance with the Berne Convention was a large motivation behind enacting moral rights. Promoters such as Sam Ricketson, Peter Banki and the Australia Council felt that the Government was in breach of the treaty and this argument was finally accepted by the Attorney-General. Chapter Seven looks at how moral rights may have been better served by strengthening related laws rather than integrating personal rights within an economic piece of legislation.

2. Encouraging creative endeavour a.k.a achieving a better bargaining position for authors and artists
The main reason artists and authors sought such rights was to allow them to control their works after copyright was passed. Although they may stipulate what they liked in contracts when selling their works, there was nothing they could do once their works were sold to another purchaser. They wished for more consultation and more bargaining power.  

140 As Jane Ginsburg argues:

A writer who feels secure that she will receive name credit for her work, or an artist who can rely on the continued existence of his sculpture, may find this background knowledge more conducive to creative activity. Indeed, for some creators, the non-pecuniary rewards such as recognition and hoped-for immortality through preservation of the work, may be more important than immediate material gain. Adoption of moral rights sends a message that a society cares about creation, and about authorship. 

141

It cannot be proved whether the availability of moral rights encourages more creative production, nor can the obverse be proved. Moral rights allows authors more control to include such terms in their contracts with industry, more monetary gain from negotiations on consent clauses, and the ability to recover compensation from uses not consented to, but what is lacking in discussions centred around this point, is the role of transformative authors. This idea of the artist being rewarded ignores the transformative use of previous works that an artist used to produce the work in the first place. Discussions on transformative use are displaced within the dialogue on moral rights. While the bargaining position of an artist may be strengthened, the bargaining power of transformative authors is weakened. This is despite the original

140 See generally the comments by (predominantly) artists at the moral rights symposium as discussed in Note 121.

authors being themselves transformative in relation to prior cultural works. All work is transformative but those that do not seek to hide such a process are illegitimated. The author has the power to censor all transformative uses of their work which clearly could act as a deterrent for any artist and author seeking to comment on, or experiment with, contemporary texts.

In respect to industry, moral rights can provide a large stumbling block for negotiations with creators. Investors are less likely to invest in, for example, a film made and produced in Australia when they are confronted with the possibility of later litigation from anyone from the original author, scriptwriter, music composer, performers and directors who dislike any modification made to the final product. Jon Baumgarten has argued that:

To subject such decisions to idiosyncratic individual interventions at virtually any time, and far into the future, could destroy the ability to undertake works for which there is great or potentially great popular demand, because the producers and investors would simply never, in the near term or many years hence, have the confidence they have today in their ability freely to market their products as they seem appropriate.142

Rather than encourage creative endeavour, the deterrent effect of moral rights may indeed restrict, censor and discourage.

3. Protects cultural heritage

The right of integrity ensures that no detrimental changes can be made to the work, making it more likely that the work will be presented in the way the author intended it to be.143

This argument entails the view that once an adaptation or transformative use is made of an original work, the original work is forever tarnished for future generations. Most transformative uses do not actually “touch” the original work in a literal manner. Artworks, photographs and manuscripts are copied or digitally scanned and so the original piece is always still available in its original form. The argument is that the public will forever link the transformative product with the original, thereby damaging the original’s preservation. J.H. Merrymann argues that:

143 Note 143 at 21.
Art is an aspect of our present culture and our history: it helps tell us who we are and where we came from. To revise, censor or improve the work of art is to falsify a piece of culture.144

The history of art is a history of transformative use. The Pre-Raphaelites, Dada, Surrealism and Pop Art are examples of genres that were not just influenced by previous works and cultural signs and symbols, but who actually incorporated them into their works. All creative works are transformative in some way. Revising and improving works shows a culture that is in open dialogue with its art and cultural symbols rather than mere reverence. It can be argued that West Side Story has not diminished the way Romeo and Juliet is appreciated by future generations and any claims for preservation of works should be understood in light of contemporary creative production.

It is also often forgotten that moral rights apply to all works, not just those considered ‘great’ or worthy of preservation. The majority of copyrighted works fail to offer royalties past a few years and are often forgotten in the memory of the public. Also as works fall into the public domain they are then free to be transformed and so any moral rights protection will fail to deliver preservation of works forever (although in France works in the public domain are still subject to moral rights).

The arguments against Moral Rights legislation

Apart from the majority views in the CLRC report, in Australia, it is difficult to find opponents to the introduction of moral rights. The main proponents against moral rights are largely American, perhaps because of their insistence of protecting their constitutional right to freedom of speech, a right that could be delineated by any censorship on transformative works. This section looks at the most common arguments against moral rights. It should be remembered, however, that the most compelling reason against moral rights, the very heart of this thesis, is that the conception of authorship embedded in moral rights has become obsolete, a fictional theory that was never the reality, and working on such an obsolete model curtails the creative freedom of transformative authorship. This section looks at the three other main arguments against the introduction of moral rights:

(1) Restrictions on property rights;

(2) Limits creative use of existing works; and

(3) Practicality and industry.

I. Restrictions on property rights

The *droit moral* concedes primacy to the subjective purpose or subjective whimsy of individuals.\(^{145}\)

Moral rights significantly impact how a property owner can use legally procured property. A school that pays for the rights to put on a play can find themselves in trouble with the playwright if parts or characters are changed. A band that legally pays royalty fees to cover a song can be stopped from mixing it from the original recording artists if that artist feels that the new use is unsuitable. As an even more extreme example, take an artwork legally bought and displayed at home. If that artwork is changed, for example, to suit the decor, and the original artist finds out, for example it might be in a design magazine, the property owner could get into a lot of trouble. In the 1990s it could have been argued that these uses would not trouble the original authors or artists as they would never find out about such uses. A playwright doesn’t get notice if his or her play has been bought by a school, neither is a music artist notified. However, in the decades since, the increased use of the internet and social media means that more of our lives are chronicled and recorded. YouTube videos of that play, clips on MySpace of that song, and photos of that artwork on Facebook means that an artist, author or lawyer can continually screen sites for possible abuses and misuses of their work.

While in modern society it is acknowledged that property rights are restricted (for example real estate by local councils and the National Trust), any restriction on property use should be balanced for the public good. In other words moral rights must be a legitimate reason for the compromise of property rights, as the Martin and Bick report argues:

While members of the public may reluctantly accept that there are limitations on their use of land, they can see that these constraints have an overall public

\(^{145}\) Note 143 at 88.
interest foundation relating to health, safety or general quality of life. Laws which impose limitations on a person’s use of his or her personal tangible property that are based upon another individual’s perception of interest in that property are alien to our legal system.\footnote{146}{Note 128 at 27.}


Usually this is directed at companies that manufacture software and mechanisms in CDs, DVDs and computers that stop people from transferring their songs and videos from one medium to another. The other issue in copyright is biomedical companies attempting to patent genes and vaccines. It is interesting then, that there are so few vocal opponents to moral rights, especially in Australia, when it could be argued as a further attempt for copyright laws to restrict and control uses of private property.

2. \textit{Limits Creative Use of Existing Works}

Artistic sensibilities, and the likely battle of expert witnesses over whether a particular modification was ‘reasonably objectionable’ or not, simply do not readily provide \textit{standards} to which the public is normally expected to conform its behaviour.\footnote{148}{Note 143 at 90.}

The issue of moral rights limiting creative use of existing works is discussed throughout this thesis. Transformative artists and authors are put in jeopardy by legislation that fails to acknowledge their worth to creative industries. The practicalities of how a transformative user can gain consent are complex and onerous. For example, how does an individual contact a famous author or artist in the first place? The publisher may not even know how to contact them. Even if an individual has the power to get in contact with the original author there is no reason
an artist or author would agree to consent. Unless the individual has financial means, they have no bargaining power against the original author. The counter argument to this is that moral rights do not restrict every subsequent use of the work, only those prejudicial to the author’s honour or reputation. Yet the legislation offers no guide for an individual to measure how a use could be reasonable. Without a body of precedent it is unknown how subjective or objective the test will be. This in turn acts as a deterrent for the production of new creative works.

3. Practicality and industry

The next chapter looks at the legal practicalities of moral rights legislation. For the creative industries adjustments will have to be made from the normal course of business. Investors in creative industries take on risks knowing well that the substantial majority of works will not turn a profit. They take such risks because of the chance that the small minority will make enough to support the rest of the works. It is the ability to adapt the works for a variety of media and marketing purposes that allow them to turn a work into profit.

While artists and authors may celebrate the fact they now will have to be involved in every step of this process, vetoing advertising, changing book jackets, disagreeing with editors, for the industries that support these artists and authors, they know that while an artist may not like an advertising sign, they are not advertising experts. A work that, if it had been marketed properly, may have been a bestseller, may be consequently a work that fails to offer a profit. Creative industries are intensely collaborative and deal with people who can be extremely sensitive over their works. Moral rights impede the usual business model which causes publishers and others to warrant consent provisions in their contracts. This means that rights that individual authors and artists may have been able to negotiate on have been excluded from any contract: for example, an artist may not mind any modification at all yet as blanket waivers are not allowed in the legislation the contracting parties cannot rely on the artist not changing their minds down the track despite any contractual agreement.
Conclusion
The research shows that both France and Germany have had a long tradition of moral rights. Both countries have philosophers who have theorised and ordered conceptions of authorship that have in turn shaped their laws. The French pride themselves on their respect for the individual and their laws reflect natural rights law that pose that the law merely protects rights with which every human is born. Germany started off in a similar fashion, yet its historical context has grounded moral rights in a rhetoric founded on the social good and cultural nationhood, artists and authors as protecting their country’s heritage.

For Australia, we have transposed the laws without any unifying philosophy or ideology to ground them. Without an underlying theory any subsequent case law is bound to be irregular and based on notions of economic rather than personality rights, as the judges have nothing else to refer to. Instead of asking what ideology does this law support, the discussions and debates during the legislation’s inception focused more on which rights they should adopt, bypassing a theoretical rationale for the rights.

The rationale for moral rights is normally considered the author/work bond but, as demonstrated in the preceding chapters, this is not a theory that Australia supports in either its conception of authorship or its textual literary practices. What has happened is that a law was passed merely on the basis that we would otherwise be contravening an international treaty. This is despite countries such as America, who still are yet to offer broad protection of moral rights, not being similarly persuaded that this is enough of a reason to restrict people’s uses of creative works.

It has also been argued that it is highly desirable that every country has similar copyright laws given the international reach of creative industries. This argument ignores the problem that every country has a different history, culture and social context and that laws that suit one country can have a very different effect on another. Since the inception of moral rights in Australia there has been no drastic change to foreign authors and artists investing in Australian creative industries, and the lack of moral rights cases tends to point out that moral rights were perhaps not needed in an Australian literary and artistic climate.
The next chapter looks in detail at the moral rights provisions currently in force in Australia. It looks at the confusion, inconsistencies and glaring holes left in the legislation. These complexities have arisen for two reasons. Firstly, the moral rights theory is supported by a conception of authorship that is contradictory to modern textual production. Secondly, these problems arise due to there being no grounding ideology or rationale for the rights. As demonstrated by the few cases that have dealt with moral rights, the judges are left to interpret provisions when they are at a loss as to why they are there in the first place.
CHAPTER 5

Legal Analysis

[T]his bill is not just about fulfilling international obligations. More importantly, it is about acknowledging the great importance of respect for the integrity of creative behaviours. At its most basic, the bill is a recognition of the importance to Australian culture of literary, artistic, musical and dramatic works and of those who create them.¹

[I]f man has any “natural” rights, not the least must be a right to imitate his fellows and thus to reap where he has not sown.²

This thesis has looked at the Romantic ideology of moral rights, how modern writing practices fit in with that ideology, and how moral rights came to be law in Australia. This chapter takes a step back from literary theory, philosophy and history, to present a detailed legal analysis of the actual legislation. Next, the provisions themselves are looked at in close detail.

Since there is no body of case law dealing with moral rights,³ the analysis is speculative, as is much of the commentary surrounding the provisions. Given the complexity of the legislation, this chapter attempts to demonstrate the confusion and irregularity of the provisions through a hypothetical case scenario. It is hoped that this will illustrate the potential difficulties and grey areas the judiciary will face in interpreting moral rights. It is also hoped that the scenario will illustrate the practical effects of the legislation and how it can be used to curtail, rather than foster, creative endeavour.

Previous authority relating to copyright, trade practices and contracts is summarised to show the different avenues the judiciary may take when deciding how to interpret the provisions. This chapter also traverses the international landscape to look at how

³ There have been a handful of cases dealing with the provisions which will be examined as well as persuasive authorities from overseas. On the whole however there has been no cohesive class of cases upon which to draw conclusions as to the provision’s reach.
judges, who are more familiar with moral rights, come to their reasons for decision. What this chapter hopes to achieve is an analysis of a very complex law. The openings left to the judiciary are wide in scope and give little guidance to practitioners and the art community as to what is derogatory treatment and how best to avoid it. This is a situation that needs to be remedied but, given Copyright’s tendency to slow advancement and the dearth of cases on moral rights, it is a situation that will remain unchanged for perhaps some time.

There are two ways of viewing moral rights and their relationship with copyright. The first view, the ‘monist’ view – held by countries such as Germany, France, and Canada – is that moral rights are copyrights. This view entails the notion that economic and moral rights of authors are part of the same whole. Therefore moral rights have economic consequences and vice versa. The dualist perspective sees economic and moral rights as entirely different conceptually: on the one hand, notions of property and, on the other, notions of personality.4

In practical terms, moral rights have similarities with copyright: both rely on the copyright concept of originality for the rights to arise; they offer the same period of protection, which continues after the author’s death; and they both involve the concept of plagiarism. The similarity stops there. A moral rights claim is not brought by the copyright holder, and moral rights do not behave as property rights in that they cannot be assigned. Conceptually they are very different, despite both rights having certain commercial consequences: moral rights derive from the bond linking author and work, whereas copyright concerns the enjoyment of property rights only.

Although Elizabeth Adeney describes Australia as embracing a hybrid system,5 the practical application of moral rights rather suggests a dualist perspective. We have moral rights grafted onto a framework that was developed to protect the economic interests of the copyright owner rather than the author. They are in a sense “tagged on” to a completely different set of rights.

5 Note 4 at 10.
Despite the attachment to copyright moral rights are personal rights, acting more as a tort against a person than as an infringement of copyright. In this way moral rights act as defamation upon a work rather than upon a person. It is for this reason that defamation terminology will be helpful in interpreting its provisions and why the rights themselves would have been more suited to the arena of defamation law rather than copyright.

**Case Study**

Turning now to an analysis of the moral rights provisions within the *Copyright Act* 1968 (Cth), imagine the following case scenario: Richard Burrows is an imaginary author with a literary profile comparable to such Australian authors as Bryce Courtenay or Helen Garner. He is also a devout Catholic. He writes and publishes a novel called *The Western Front*, an historical Australian tale about the western suburbs of Sydney in the 1970s. The main protagonists are two Indigenous Australians growing up in Penrith. Despite the intentions of Mr Burrows, the book is quickly picked up by the Gay and Lesbian community as a book about a couple with homosexual overtones. Social media and internet blogs identify the book as gay fiction although the book is not marketed as such. The book is a best seller: consequently, two years after publication it is shortlisted to be chosen as a HSC text in NSW. This is chosen under a new diversity part of the curriculum that concerns gay and lesbian literature.

At the same time, as part of a creative writing project, two university students rewrite *The Western Front*, with the main protagonists recast as two homosexual teenagers living in Glebe, and publish this version via an online site that allows unknown

---

6 This is not to suggest Courtney and Garner are literary equals, merely to point out that their fame and wealth would allow them to bring such an action.

7 These text lists are devised by a representative committee of teachers and academics, and then passed to a wider reference group before being approved or rejected by the Board of Studies. Research in the area has failed to reveal whether authors are made aware of their text being selected although anecdotal evidence from teachers and authors suggest that they are not informed nor consent asked. For further information see generally [http://www.boardofstudies.nsw.edu.au/](http://www.boardofstudies.nsw.edu.au/) and [http://www.aate.org.au/view_journal.php?id=90&page_id=93](http://www.aate.org.au/view_journal.php?id=90&page_id=93)
authors to publish their works for free. The storyline is almost identical but the writing has more of a contemporary tone. It is an obvious re-write borrowing characters, situations, plot and even dialogue. The story does so well in the online community that the two students approach the publisher of *The Western Front* to obtain permission to publish their story while acknowledging the source, and of course paying royalties to the publisher who owns the copyright rights in the work. The publishers, on assessing the potential market for the modern adaptation, including the increased interest in the original work which will follow, have their legal representatives write up a contract allowing the book to be published, as well as offering to publish the work.

Richard Burrows subsequently files suit against both the NSW Department of Education and the two university students claiming his right of integrity has been infringed by both the selection of his work as an HSC text and the modern adaptation.

**Burrows v Board of Education NSW**

Richard Burrows, being the author of *The Western Front*, has, under section 195AI (1), a right of integrity of authorship in respect of the work. That right is the right not to have the work subjected to derogatory treatment (s195AI(2)). Derogatory treatment, in relation to a literary work, is defined as:

**195AJ**

(a) the doing, in relation to the work, of anything that results in a material distortion of, the mutilation of, or a material alteration to, the work that is prejudicial to the author’s honour or reputation; or

(b) the doing of anything else in relation to the work that is prejudicial to the author’s honour or reputation.

‘The doing of anything else in relation to the work’

Mr Burrows must prove that the Board of Studies has done something, in selecting the text as an object of study for senior students, as an example of LGBT literature, which is prejudicial to his honour or reputation. Is putting the title and author of a
work on a list within the ambit of “doing of anything else in relation to the work”? The “doing” implies a positive action component, ‘anything else’ being quite ambiguous. Thus a question of substantiality arises. How much of the work must be treated in order for something to have been “done” to it? Can it be as simple as the title and author being placed on a list? In the Revised Explanatory Memorandum to the Bill it was stated:

The latter part of the definition [the ‘doing of anything else’] is intended to address those instances where a work is used in an inappropriate context and prejudices the author’s honour or reputation.8

Thus the nature of the use of the work is removed from the equation to focus only on the prejudicial outcome. Thus Mr Burrows could argue that it is the context that the work is placed in that is to cause the prejudicial outcome even though there isn’t any treatment of the work per se.

Issues surrounding substantiality when it comes to copyright infringement tie closely into issues of originality yet “they are discrete issues and the answer to one does not necessarily produce an answer to the other”9 In relation to substantiality in copyright a substantial part will not have been taken if only the underlying idea or concept has been used.10 Therefore if the part copied is unoriginal, even if it is part of an original work, it would not be a substantial part11

The reproduction of a part which by itself has no originality will not normally be a substantial part of the copyright and therefore will not be protected. For that which would not attract copyright except by reason of its collocation will, when robbed of that collocation, not be a substantial part of the copyright and therefore the courts will not hold its reproduction to be an infringement.12 Therefore it is necessary to consider not only the extent of what is copied but also the quality of what is copied.13 The requirement that the part taken be substantial to

---

8 Revised Explanatory Memorandum, Copyright Amendment (Moral Rights) Bill 1999 (Cth) at Para 44.
9 Clarendon Homes (Aust) Pty Ltd v Henley Arch Pty Ltd (1999) 46 IPR 309 at 316
10 Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd (2008) 172 CLR 580
11 Ladbroke (Football) Ltd v William Hill [1964] 1 WLR 273
12 Note 23 at 293
constitute copyright infringement assumes that some measure of appropriation is therefore legitimate.\(^\text{14}\) In Copyright however the issue goes back to the agrarian metaphor previously discussed of “reaping what one has not sown.” For moral rights and derogatory treatment in particular it is the connotations of the use that are at issue. It is therefore easy to assume that, if a finding of copyright infringement is found, there is easily a claim for moral rights infringement. The reverse however is not so easily answered: if the “part” copied does not amount to an infringement of copyright does that mean necessarily no moral rights claim could also be met? For example, the destruction of a canvas obviously has no copyright infringement involved but is a classic example of derogatory treatment of a work; yet when it comes to literary work the issue is more complex than seen in this hypothetical example. The title of the work may or may not be enough to be defined as a ‘substantial part’ in copyright, but the use of the work in the context may or may not be enough to show derogatory treatment as the part refers to the whole.\(^\text{15}\)

‘That is prejudicial to the author’s honour or reputation’

By placing the title of the book on a list, the NSW Board of Studies has not done any harm. It is the capacity to produce harm that Mr Burrows will try to prove. He will argue that his work being deconstructed and simplified for younger readers, and becoming the subject of online chat rooms by teenagers, would devalue his position of a literary author of merit to that of a writer for young teenagers, which was not the intended audience for the book. He will argue that the work was not meant to suggest that the two main characters were in a homosexual relationship, even though most people who read that book come to that conclusion which was the basis for the inclusion of the work in the HSC. He will argue that the connotation that it is about a gay couple will harm his reputation in the Christian community and also raise questions about his personal life.\(^\text{16}\)

\(^{14}\) *Ice TV v Nine Network Australia* [2009] HCA 14

\(^{15}\) See below at 138 and also the discussion in Chapter Six on substantiality in parody.

\(^{16}\) While courts are reluctant to find that imputations of homosexuality are capable of being defamatory in this day, and it could be argued this would extend to interpretations of works, given Mr Burrows involvement in the Catholic community it is used to highlight the significance between an objective and subjective view. See Lo, G “Queer Lies in the Law’s Eye: is it still defamatory to call someone gay?” *Polemic*, Vol 13, 1 November, 2004, 1-6. In *Horner v Goulburn City Council* [2000] NSWSC 1012 Levine J held that the imputation of homosexuality was capable of being defamatory. In *Rivkin v Amalgamated Television Services Pty Ltd* [2002]
Does the legislation protect the ‘capacity’ for harm or only actual harm? The ordinary meaning of the word ‘prejudicial’ has the implication of future effects arising out of present actions. The wording of the Berne Convention Article 6bis uses the terms ‘which would be prejudicial’ indicating that the drafters considered that no actual harm need be proved. The Canadian decision in Prise de Parole Inc v Geurin, Editeur Ltee further supports this interpretation that the mere capacity for future harm is enough to fall within the ambit of the section.

Another difficulty inherent in the provision is the use of the words ‘honour’ and ‘reputation’. The legislation does not define ‘honour’ and, as it is not a term embedded within our legal system, we must look to:

\[
\text{a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.}
\]

‘Reputation’ is a more familiar term, however this is only in reference to defamation law, the principles of which, argues Adeney, if relied on in a moral rights context, may lead to error.

The 1994 Discussion paper suggested:

NSWSC 432 Bell J held that it was the context in which the imputations were made that mattered, as for example, an abuse of position. In Kelly v John Fairfax Publications Pty Ltd [2003] NSWSC 586 Levine J held that while homosexuality was lawful that did not establish that it was socially acceptable. In John Fairfax Publications Pty Ltd v Rivkin [2003] HCA 50 at 140 Kirby J said: “In most circumstances, it ought not to be the case in Australia that to publish a statement that one adult was involved in consenting, private homosexual activity with another adult involves a defamatory imputation. But whether it does or does not harm a person’s reputation to publish such an imputation is related to time, personality and circumstance. Once, it was highly defamatory in many countries to allege, or suggest, that a person was a communist. Now, in most circumstances, it would be a matter of complete indifference. The day may come when, to accuse an adult of consenting homosexual activity is likewise generally a matter of indifference. However, it would ignore the reality of contemporary Australian society to say that that day has arrived for all purposes and all people. At least for people who treat their sexuality as private or secret, or people who have presented themselves as having a different sexual orientation, such an imputation could, depending on the circumstances, still sometimes be defamatory.” In Tassone v Kirkham [2014] SADC 134 Judge Cole held that a false allegation of homosexuality was not capable of defamatory meaning- this case is currently on appeal. In relation to moral rights, again, how far defamation jurisprudence will be relevant is unclear. Here it is the characters that the imputations are made about not the author. The imputations change the character and genre of the book itself.

18 Acts Interpretation Act 1901 (Cth) s15AA(1)
The terms ‘honour’ and ‘reputation’ may also need to be defined, given their different meanings. That is, the term ‘honour’ is generally associated with personal integrity and how a person considers he or she is perceived. ‘Reputation’, on the other hand, is associated more, in the defamation context, as relating to a person’s professional, business or personal standing in the community.20

The use of both terms suggests that they are distinguishable concepts. Thus if our author’s reputation is enhanced by the selection of his work as an HSC text, nevertheless the treatment may still be considered prejudicial to his honour.

Traditional copyright does not concern itself with reputation. Copyright is about the exploitation of a property right rather than the effect copying has on the author and artist. For defamation however, reputation is central to the tort. Consequently, it makes sense that, when determining “the effect on the author’s honour or reputation resulting from any damage to the work,” judges may turn to defamation jurisprudence to define and evaluate what “reputation” is.

In *Plato Films Ltd v Speidal* [1961] AC 1090 at 1138 Lord Denning framed the concept as follows:

> a libel action is concerned only with a man’s reputation, that is, with what people think of him; and it is for damage to his reputation, that is, to his esteem in the eyes of others, that he can sue, and not for damage to his own personality or disposition.

In *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150 Windeyer J stated that “the law does not protect the reputation that a man has, but only the reputation that he deserves.” Despite the centrality of reputation it is still a contentious subject with “scant attention given to this crucial concept.”21 Robert Post defines reputation as inextricably linked with honour rather than any proprietary right.22 Indeed, the many dictionary meanings for the word “honour” seem to fall into one of two categorizations, either as dependant on reputation, or independent. Dennis

---

Lim argues that it is the second category that should be adopted to avoid a replication of the tort of defamation, as moral rights were “enacted with a view to offer authors protection that goes further.” This is in line with French authority but substantially different to UK and Canadian case law, which treat both honour and reputation as a singular concept.

An argument regarding subjectivity arises from these terms. Does honour incorporate the subjective feelings of our author, or an objective one, i.e. how the community would perceive his honour? Is it enough that Mr Burrows will perceive his work as being mutilated or is it what a person in the general public, the Christian community or artistic public would consider prejudicial? Adeney argues that the test should be an objective one and that the subjective response of the author to an act committed against the work is essentially irrelevant to a finding of derogatory treatment. Sam Ricketson, on the other hand, argues that the inclusion of honour as distinct from reputation suggests more subjective factors should be taken into account.

Robert Post, writing on the concept of honour in defamation law, defined it as:

A form of reputation in which an individual personally identifies with the normative characteristics of a particular social role and in return personally receives from others the regard and estimation that society accords to that role.

Adeney counters Post’s definition with that of Walter Arthur Copinger and James Skone, who argue that:

honour is something which is found in the attitudes which other people have towards the artist, not something which is found in the artist himself: Thus ‘reputation’ has an objective connotation, referring to what is generally said or believed about a person. “Honour” which is associated with both

24 Note 31 at 299-305.
reputation and good name is more a matter of respect for a person and his position.28

The raison d’être for the moral rights amendments, as discussed in Chapter One, was the protection of the ‘author-work bond’. The notion that an author has a unique relationship with their creative works, that their personality is thus embedded within the lines of text, means that an assault on their works is an assault on their person. Thus an element of subjectivity can be claimed as part of this protection. Adeney argues that an author’s interest in his or her reputation is separate from the interest of preserving the personality in the work, and that to decide whether that preservation interest is infringed by referring to whether their reputation is prejudiced is incoherent.29

It ties protection against one type of harm to findings that another type of harm altogether has been committed. Whatever the policy justifications for it may be, at a conceptual level, it does not make sense.30

This follows from her argument (relying primarily on Canadian case law) that the separate use of the word ‘honour’ does not validate a subjective response and that ‘honour’ and ‘reputation’ are not distinct concepts. She backs this argument up with Australia’s policy choice to adopt the non-European model.

Adeney also argues that, as moral rights continue to exist after an author’s death, honour and reputation must be based on more than authorial perceptions: “Any interpretation of ‘honour’ in Australia should likewise express community standards and should not be predicated on particular authorial reactions, real or imputed.”31

The word ‘honour,’ to be construed in a way that will promote the objects of the amendment, namely the protection of the author–work bond, must be held to be distinct from reputation, and inferring at least some type of subjective element, otherwise the purpose of the amendments is self-defeating in its language, and, as suggested by Dennis Lim,32 is merely an extension of defamation law. Therefore it could be argued that, to avoid such an ambiguity, the rights may have found a better

29 Note 37 at 194.
30 Note 37 at 194.
31 Note 31 at 584-5.
32 Note 31 at 296.
home in the Defamation Act rather than the Copyright Act. This is an argument that will be picked up later in this thesis.

Thus, from a purposive approach to the legislation, Mr Burrows could argue that the word ‘honour’ confers a subjective element in the protection of the author–work bond. Mr Burrows would argue therefore that ‘honour’ is in relation to his subjective view of how his work is seen by others, with reputation being an objective view from what a reasonable person in the circumstances would see as an attack on someone’s reputation.

*The Macquarie Dictionary* defines ‘reputation’ as “the estimation in which a person or thing is held, especially by the community or the public generally.” The *Australian Legal Dictionary* defines it as “what other people think of a person.” Reputation is to be distinguished from character, which refers to a person’s actual traits. Reputation has a clear-cut definition in defamation law, an evidentiary rule extrinsic to any subjective feelings of an author.

Mr Burrows would thus have to prove that an objective person would find his reputation tarnished. Another query then becomes, who is the objective person? Is it a simple layperson or an expert in the artistic field? The different contexts of the reasonable person produce a different outcome.

**Defences**

If the judge decides that the potential for harm has been made out, and that that harm is prejudicial to the author’s honour and reputation, then the next step in the case would be for the defendants, the NSW Board of Studies, to explore all defences available to them. The first thing they would argue would be that their actions were reasonable in the circumstances.

Section 195AS states that a person does not, by subjecting a work, or authorising a work to be subjected to derogatory treatment, infringe the author’s right of integrity.

---

34 *Butterworths Australian Legal Dictionary*, Nygh P & Butt P (eds), Butterworths, Sydney, 1997 at 1014.
of authorship in respect of the work if the person establishes that it was reasonable in all the circumstances to subject the work to that treatment. The section also lists the matters to be taken into account being:

(a) - the nature of the work;
(b) - the purpose for which the work is used;
(c) - the manner in which the work is used;
(d) - the context in which the work is used;
(e) - any practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
(f) - any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
(g) - whether the work was made:
   (i) - in the course of the author’s employment; or
   (ii) - under a contract for the performance by the author of services for another person;
(h) - whether the treatment was required by law or was otherwise necessary to avoid a breach of any law;
(i) - if the work has 2 or more authors-their views about the treatment.

Was it reasonable in the circumstances for the Board of Studies to include Mr Burrows’ book as an HSC text without obtaining his opinion and permission? Can the Board of Studies argue that it is industry practice to only inform authors of their selections and that they are under no duty to ask permission since all they are doing is requiring students to purchase the book? Although they may be encouraging discussion by teenagers of the book, there is no direct causal connection between their selection of the novel and the online chat forums and essay guides which they do not authorise. That leaves the perception that the work is young adult literature, which it would be hard for the Board of Studies to argue is not a harm caused by their selection. The Board of Studies would have to argue that it is unreasonable, given the context and nature of the work used, to obtain consent and an author’s permission to use the work. They would have to argue that, in the circumstances, it is reasonable to use the work in such a way without such requirements. They could argue the social benefit and the loss to students if such requirements were mandatory.

Another defence the defendants could argue concerns the fair dealing provisions, in particular the exception for fair dealing for research and study. As explored in detail
in Chapter six, it is unclear how the fair dealing provisions and the moral rights provisions will intersect, if they do so at all. The fair dealing provisions are stated as an exception to “copyright,” and it would be up to a judge to determine whether Parliament intended that to extend to moral rights. It could be argued that the fair dealing exceptions show what is reasonable use to the community, supporting the idea that the Board of Studies’ use was reasonable under Section 195AS.

**Remedies**

If the judge does not agree with the Board of Studies’ defence, and finds in favour of Mr Burrows, the question of remedies arises. Remedies for non-economic losses are a controversial issue, and are explored in more detail in Chapter Seven. The infringement of an author’s right of integrity is not an offence but a civil matter (Section 195AZ). The remedies available to Mr Burrows are set out in Section 195AZA:

(1) Subject to section 203 [limitation of courts’ power], the relief that a court may grant in an action for an infringement of any of an author’s moral rights in respect of a work includes any one or more of the following:

   (a) an injunction (subject to any terms that the court thinks fit);
   (b) damages for loss resulting from the infringement;
   (c) a declaration that a moral right of the author has been infringed;
   (d) an order that the defendant make a public apology for the infringement;
   (e) an order that any false attribution of authorship, or derogatory treatment, of the work be removed or reversed.

(2) In exercising its discretion as to the appropriate relief to be granted, the court may take into account any of the following:

   (a) whether the defendant was aware, or ought reasonably to have been aware, of the author’s moral rights;
   (b) the effect on the author’s honour or reputation resulting from any damage to the work;
   (c) the number, and categories, of people who have seen or heard the work;
   (d) anything done by the defendant to mitigate the effects of the infringement;
   (e) if the moral right that was infringed was a right of attribution of authorship—any cost or difficulty that would have been associated with identifying the author;
(f) - any cost or difficulty in removing or reversing any false attribution of authorship, or derogatory treatment, of the work.

(3) In deciding whether or not to grant an injunction under subsection (1), the court must consider whether the parties have made any attempt to negotiate a settlement of the action and whether it should adjourn the hearing or further hearing of the action for the purpose of giving the parties an appropriate opportunity to negotiate a settlement, whether through a process of mediation or otherwise.

In this case the judge would most likely look to an injunction to stop the Board of Studies from including Mr Burrows’ work on the HSC text list. In other words it would be telling the Board of Studies to find a different, perhaps less sensitive, author. A public apology or declaration would not be sought in this case given that the Board of Studies really did not do anything wrong, it is only a perceived harm on behalf of the author that has occurred. As the students have yet to start studying the text, an injunction will stop the threat of harm from occurring. It is also doubtful that costs would be awarded, but in the end it will come down to the opinion of the individual judge who hears the case.

**Burrows v Uni Students**

Turning now to the second hypothetical scenario, have the university students “done” anything that results in “a material distortion of, the mutilation of, or a material alteration to, the work that is prejudicial to the author’s honour or reputation”?

This case becomes more complex when the context of the players is taken into account. As the work was part of a university assignment, does that mean the University should be a third party to the proceedings? Also, the publisher, in giving permission, has conceivably aided in the act and could also possibly be joined to the proceedings. Given the shallow pockets normally attributed to university students, Mr Burrows would argue that both the University and the publisher be held accountable. So who is accountable for what?

‘The doing of anything that results in a material distortion of, the mutilation of, or a material alteration to, the work’

---

35 Section 195AJ
By their admission, the university students have made an adaptation of the work. The similar plot line, the parody of the title, and their request for permission off the publisher all point to an obvious use of Mr Burrows’ original work. By its very definition an adaptation is a material alteration to a work: in most cases however, this element will not be so easy to establish. Narrative theft is a headache for judges who have to determine the extent of similarity with little guidance. “To the casual observer, there must be a sense of absurdity in the spectacle of a court sagely embarking upon this exercise in literary demarcation.”36 In Zeccola v Universal City Studios Inc,37 Gray J stated that “ultimately the matter comes down to the subjective impression of the judge who makes the comparison.”38 Thus, if the university students had not gone to the publisher and could show enough disparity between the texts, they may have been able to defeat Mr Burrows’ claim.

The judge must look at s195AZH to determine whether “a substantial part” has been appropriated. In copyright, substantiality is traditionally looked at in terms of the quality or quantity of what has been taken. It is uncertain whether these tests will apply to moral rights given the different context and purpose of the set of rights.39 Adeney counters the substantiality test by arguing that the requisite substantiality should be considered proven by reason of the harm occurring, believing the substantiality tests of copyright are inappropriate for moral rights. She asks whether there is a correlation between the violation of the author’s interests and either the quality or quantity of the part affected. The uncertainty of subjective or objective assessments of prejudice help make this decision even harder, as the community would conceivably see a large part of the work as distortion, whereas an author may see distortion in the barest hint of modification. In this scenario it could be assumed that the judge will assess the substantiality issue as having been met.

When it comes to the University and its relationship with the adapted work, questions of copyright ownership are irrelevant. In wishing to join the University as

38 Note 49 at 296-7.
39 A brief discussion of copyright law’s treatment of substantiality is provided above at 128.
a party to the proceedings Mr Burrows must prove only that it authorised the derogatory treatment.

195AQ(2) - A person infringes an author’s right of integrity of authorship in respect of a work if the person subjects the work, or authorises the work to be subjected, to derogatory treatment.

Although the University may not have been involved with the contract between the publisher and the university students, it was involved in the upload to the online site and, as the students had to submit the work beforehand, it is reasonable to assume that the academic, as agent for the University, authorised its publication on the net. The ISP hosts may also be liable in that they authorised the content to be uploaded, and it was their site that published the work online.

In terms of the publisher, again Mr Burrows is arguing that the publisher authorised derogatory treatment in terms of the work under 195AQ(2) and possibly also 195AQ(3)(b) in relation to publishing a distorted work. This authorisation is contained in the written contract between the publisher and the university students.

‘That is prejudicial to the author’s honour or reputation’
Is the adaptation of Mr Burrow’s original work prejudicial to his honour or reputation? Here we have a situation, as in the case with the Board of Studies, where the treatment of the work actually increases sales, awareness and popularity of the original work. Mr Burrows’ main concern with the adaptation is that the book promotes homosexuality and that, being Catholic, he feels this has mutilated the message of his original work and will destroy his reputation in the Catholic community. This raises a very interesting point: is it only the author’s reputation as an author that must be harmed, or can the harm be extended to his or her reputation as a citizen in the community? This argument leads back to the debate over objective or subjective views on “honour” and “reputation.” As discussed above, reputation seems to imply an objective view as it concerns how the public sees the author, whereas honour appears to be more subjective in that it is a self-awareness of a person’s integrity. The inclusion of both terms suggests a combination of the two that, in practical terms, will come down to a judge’s assessment.

Defences
The university students could argue the original act (uploading the work to the net) was a reasonable use as it was a fair dealing for research and study, being that it was part of a course requirement. As mentioned previously, it is unclear whether fair dealing will comprise a defence to moral rights. They could argue that the nature and context of their work, being different and modern, does not affect Mr Burrows’ target audience, who probably would not ever hear of the modern adaptation. Again however, Mr Burrows could argue that the potential for harm is still there.

For the University, the ISP host, and the Publisher, they also have a defence of reasonable use:

Section 195AS:
(4) A person who does any act referred to in subsection 195AQ(3), (4) or (5) in respect of a work that has been subjected to derogatory treatment of a kind mentioned in that subsection does not, by doing that act, infringe the author’s right of integrity of authorship in respect of the work if the person establishes that it was reasonable in all the circumstances to do that act.

These defendants could argue industry practice as a reasonable use. As this section has not been tested it is impossible to speculate on what matters the court would take into account to determine this.

Section 195AVA states that merely providing the facilities for making, or facilitating the making of a communication is not to be taken as authorisation. This is against the current trend in case law in relation to copyright which suggests reasonable steps should be taken by facilitators to stop infringement.40

In the case of University of New South Wales v Moorhouse41 the High Court found a University responsible for authorising copyright infringement by the mere placement of photocopiers in its libraries. Of importance to the High Court was the fact that the University had not taken any reasonable steps to prevent such infringement happening (which is why all university libraries now have signs detailing the legislation above photocopiers: apparently this step was all that was needed).

40 The mere supply of equipment or facilities which might be used to infringe copyright however does not necessary mean authorisation has taken place: see A & M Records v Audio Magnetics Inc [1979] FSR 1 and CBS Songs Ltd v Amstrad Consumer Electronics plc (1988) 11 IPR 1
41 (1975) 133 CLR 1.
As for the ISP, under Section 195AVA they could argue no liability for merely hosting a website containing infringing material, that something extra is needed.\textsuperscript{42} However, industry practice seems to suggest warnings are relevant as to reasonableness. The Internet Industry Association’s Code on Internet Content Code 7.5\textsuperscript{43} states:

Internet Content Hosts will take reasonable steps, for example through the inclusion of a relevant term of the relevant hosting contract or an acceptable use policy, to inform Content Providers for whom hosting services are provided by the Internet Content Host not to place on the Internet content in Contravention of any State, Territory or Commonwealth Law.

A Judge may decide it would have been reasonable for both the University and the ISP provider to provide some sort of warning to the users of their facilities that moral rights and copyright laws may apply.

The publisher may also have a consent clause in the original contract with Mr Burrows, however these consent clauses will be read very finely so that, if this sort of treatment was not to be expected, it would be read down in Mr Burrows’ favour (see Chapter Seven).

\textsuperscript{42} In \textit{Universal Music Australia Pty Ltd v Sharman License Holdings Ltd} (2005) 65 IPR 289 the “something more” was the capacity and encouragement to undermine copyright protected music files as well as in \textit{Cooper v Universal Music Australia Pty Ltd} (2006) 156 FCR 380 where the “something more” was the capacity to prevent copying that was not undertaken.

\textsuperscript{43} Codes for Industry Self Regulation in Areas of Internet Content Pursuant to the Requirements of the Broadcasting Services Act 1992 As Amended, May 2002, Version 7.2. Available at \url{http://www.iia.net.au/contentcode.html}
Remedies

The remedies involved in such a case would depend on timing. If the adaptation has already been published online and has gone viral, there may be little an injunction could do to stop it being made public. An injunction may be the option however when it comes to the contract between the publisher and the university students.

Mr Burrows may ask for a public apology or declaration but this is doubtful as it would only engender more publicity around the adaptation and further the damage claimed to his reputation and honour.

The question of damages then comes into play. In the first case where a moral rights breach was found (which did not concern the right of integrity), the damages awarded were nominal, that is, small.\textsuperscript{44} Calculating a non-economic loss without guidance from the legislation is very difficult: it is not based on sales projections or actual monetary loss, and the loss of reputation and honour is simply unquantifiable.

To mitigate the amount of damages the defendants could argue that they were unaware of the author’s moral rights, believing they were doing the right thing in going to the publisher, and that the publisher, who would be more aware of such laws, should have pointed it out to them. The court would also look at any cost or difficulty in removing the derogatory treatment. In the end, however, the amount is at the discretion of the individual judge hearing the case.

This hypothetical case scenario highlights the problems, grey areas, and confusion the provisions generate and which the judiciary has yet to solve. What would constitute a ‘substantial part,’ whether an objective or subjective view is taken, what a reasonable community is and how to calculate damages are all questions left hanging leaving users of creative works in the dark regarding what is acceptable use of previous creative works. The next section shows how the handful of cases regarding moral rights in Australia illustrate the confusion applicants have when relying on the provisions and the reluctance of the judiciary to examine what would constitute non-economic loss.

\textsuperscript{44} This case Meskanas v ACP Publishing Pty Ltd is discussed later in the chapter.
Persuasive Authorities

The following section examines cases the judiciary may look to for guidance. These cases are persuasive only, being that only a handful of cases so far have involved the actual application of the moral rights legislation. As demonstrated in the above case study, there are significant gaps in the provisions that the judiciary will have to invent including the substantiality of derogatory treatment, whether it involves a subjective or objective opinion and how damages will be calculated. The issue of damages is discussed in detail in Chapter Seven.

In 2005 a case raised the issue of moral rights in an essentially trademark related claim.45 The court quickly pointed out in that case that moral rights could only apply to individuals not companies,46 and leave was not given in respect of the claim. Clearly this case shows the uncertainty practitioners have surrounding moral rights.47

One case in which moral rights have applied is the case of Meskanas v ACP Publishing Pty Ltd.48 This case involved a photo of Princess Mary standing in front of a portrait of Victor Chang. The Australian Women’s Weekly, who ran the picture, falsely attributed the work to a different artist. Almost a year later an apology was published which was accompanied by a photo of the portrait which had been reversed. At first the points of claim pleaded copyright infringement and passing off (a Trade Practices Act claim). Almost as an afterthought a moral rights claim was later pleaded.49 This involved the right of attribution as well as the right against false attribution. The magistrate found that both rights were infringed. Curiously, an infringement of the right of integrity was not pleaded, even though the reversed picture clearly infringed upon this right.

46 See s190 for the exact provision.
47 The same mistake (company instead of individual pleading) was made in the case of M.D.I International Pty Ltd v Trio Brothers [2010] FCA 486 (18 May 2010). In a case concerning the trademarks of the ‘Hogs Breath’ logo, the right of integrity was at first pleaded in the statement of claim but later amended and was not discussed at trial: Lamb v Hogs Breath Company Pty Ltd (No2) [2007] FCA 201 (26 February 2007).
49 It is to be noted that a passing off claim (now a part of Australian Consumer Law), while often pleaded concurrently, is actually a different legal claim entirely with nothing to do with either moral rights or copyright.
As Adeney points out, the reasoning in the judgment is open to question. 50 In particular, the magistrate did not consider that inadvertence or lack of wrongful intent alone could cause a failure of attribution to be reasonable. 51 Thus a great burden is placed upon the publishing industry, arguably an unfair one. Another point of contention is the relationship between the breach of moral rights and damages awarded. The magistrate stated:

the primary damages for the infringement of moral rights in this case should reflect those which I would have awarded if I had believed that there was an infringement of the applicant’s copyright. 52

In this case the damages awarded were quite modest. This raises a question the legislature has failed to address. An infringement of copyright concerns an economic trespass, which is easier to calculate in monetary terms. Moral rights, however, concern an author’s honour, reputation and integrity, concepts with no monetary application. Is it appropriate to accord the same damages as a copyright infringement? Does an economic trespass equal a personal trespass? These questions will be explored further in this thesis.

The next case to plead moral rights occurred in 2008. 53 This case concerned the infringement of copyright in practice exam questions and answers that a company, ‘MedEntry,’ sold as part of a preparation course for candidates for the Undergraduate Medicine and Health Sciences Admissions Test (‘UMAT’). The applicants sued for damages, a declaratory injunctive and other relief, primarily for breach of copyright. They also sued for conversion, detention, breach of moral rights, and a breach of s52 of the Trade Practices Act 1974 (Cth). However, in final submissions the applicants dropped the moral rights and the trade practices claim. No doubt this was because, by the end of the trial, it was apparent that these claims added little, if anything, to the applicants’ primary claim of copyright infringement, which was upheld. This is hardly the case of a person asserting their special relationship with their work, rather the moral rights claim was merely tacked on to a

51 Note 62 at 77.
52 Meskenas v ACP Publishing Pty Ltd [2006] FMCA 1136 at 40.
series of claims in order to have a fallback provision in case copyright infringement was not made out.

As seen in the Meskenas case, while authors seem to be reluctant to utilise the right of integrity, the right of attribution has received some judicial attention. The case of Rutter v Brookland Valley Estate Pty Limited concerned a flautist and composer, Jane Rutter. In mid 1993 she wrote a complete musical piece based on a melody of hers called ‘Blo.’ Her fourth album was also entitled ‘Blo’ and was released in 1996. This album included an arrangement of the original ‘Blo.’ Ms Rutter claimed that her copyright as author of ‘Blo’ was infringed when the first respondent was, in 1999, granted a twelve month license to reproduce the score of the melody for specified purposes yet continued to do so thereafter without her permission. In deciding whether her right of attribution had been made out, the court held that, as there was no increase in economic loss flowing from the breach, there was no need to consider any separate order. Given that moral rights are meant to be separate from economic loss, this case presents a clear indication of hesitation on the part of the judiciary to look to the non-economic implications of such claims.

A fairly recent case that is cause for concern is the case of Perez & Ors v Fernandez. This case demonstrates a number of arguments explored in this thesis:
- No work is original, so why should we protect one adaptation over a further one?
- Moral rights are designed to protect established artists rather than emerging
- Moral rights will be used not to protect an artist’s “integrity” but merely as a further step to protect economic interests, an add-on to receive compensation when one is not the copyright holder
- The difficulty in compensating for injury to feelings

54 It could be argued that the right of integrity is utilised in negotiations and may have led to many settlements prior to any court action, but this opinion can only be speculative due to the private nature of these transactions.
56 The right of attribution was also pleaded in the case of Wills v Australian Broadcasting Corporation (No 3) [2010] FCA 1227 (11 November 2010). An applicant argued the ABC had infringed copyright and moral rights by broadcasting five music videos on their program ‘rage’. The claimant, in closing submissions failed to rely on the provisions and so no discussion of their application ensued.
57 Perez & Ors v Fernandez [2012] FMCA 2
- Damage to reputation is better promoted in the area of defamation than copyright.

The facts of the case are a little complex. The Applicant (plaintiff) was Armando Perez, better known as “Pitbull”. Pitbull is an internationally recognised recording artist and a household name for anyone with teenagers into hip hop. He is also a citizen of the United States. Mr Fernandez is a DJ and local tour promoter from Perth who also owns and operates a website called “Suave”. There have been disagreements between the two that have resulted in different litigation concerning a cancelled tour.

The “first” work was a song called “Bon, Bon”. This song is an adaptation of two other songs. “We no speak Americano” written by Nicolo Salerno, Matthew Handley, Duncan MacLennon and Andrew Stanley, and “Tu Duo Fa L’Americano” written by Renato Carsone. Presumably Pitbull obtained copyright permission to use these songs and “arranged” them with the inclusion of ‘original’ lyrics and music. However it was not discussed in the case how much of the song was original or adapted, it was merely a given that Pitbull was the ‘creator’ of the work. Ironically moral rights permission would not have to have been obtained by Pitbull to arrange the songs as it was recorded in America where there are no moral rights provisions for sound recordings.

The “distorting work” was a copy of the “Bon, Bon” song that had an audio drop of 10 seconds placed at the beginning. This song was then uploaded to Mr Fernandez’s website where it could be streamed (note not downloaded) by anyone visiting the site. It was estimated around 10 or so people may have heard it before it was taken down. The Audio Drop says “Mr 305 and I am putting it down with DJ Suave” and had been provided to Mr Fernandez in connection with an Australian tour that he was promoting. There is nothing in the judgement to reveal whether a contract was involved with the use of the Audio Drop when it was given.

The first question to ask is why an internationally recognised hip hop star would even care about a small DJ promoter in another country that changed the beginning to a song that anyone could stream for free off Pitbull’s own MySpace page? It
appears from the context of the litigation that this was an incidental finding from litigation that was concurrently held in the NSW Supreme Court concerning a failed concert tour between the two parties. Animosity between the two perhaps fuelled the litigation.

Pitbull did not attend the court proceedings. In fact even his lawyer did not attend. She (also a US citizen) supplied an affidavit and was cross-examined by phone. This itself is concerning. In a case that has the author’s feelings regarding integrity as central to the litigation, how can someone not even file their own affidavit describing their hurt feelings? Especially when the judge actually relies on those hurt feelings to award aggravated damages? As Mr Fernandez was unrepresented for parts of the case, it is interesting to contemplate whether, if he had been represented, this issue would have arisen. The Judge (Driver FM) stated “I am prepared to accept her [Ms Martinez, the lawyer for Pitbull] evidence that Mr Perez was concerned and upset by the distortion.”

The judgement goes on to talk about the limbs of s195AJ. The ‘derogatory treatment’ limb was easily accepted by the judge as having been made out. The second limb “prejudice” was argued to consist of two components. Firstly the judge noted that as the song had only just been released in the United States a class of listeners on hearing the distorted version would have thought it part of the work. “They would have presumed that Mr Fernandez was indeed a subject of the song, and that Mr Perez had written and performed it about him.” While it is easy to accept that some people may have thought it was part of the song, most of the public are used to audio drops being placed on songs as part of the industry. It is highly doubtful that anyone would have entertained the notion that Pitbull would have “written” the song about a random tour promoter from Australia.

The second component was that there would have been a class of listeners who were aware of the legal proceedings between the two parties and would have assumed that Mr Fernandez was mocking Pitbull. If this was a correct assumption, then it is

---

38 Note 69 at 60.
39 Note 69 at 86.
worrying that the issue of fair dealing for parody and satire did not receive a mention.

The judge goes on to say (relying on the authority of *Meskenas v ACP Publishing Pty Ltd*)\(^60\) that “an author may also claim for injured feelings arising from the infringement. In this case, the Martinez affidavit establishes to my satisfaction that such harm was suffered by Mr Perez.”\(^61\) The judge then goes on to compare the compensation with that of a defamation case. The judgement then ends curiously with the statement “I do not accept that Mr Perez’s reputation has suffered any lasting damage”\(^62\) yet orders compensation as well as additional damages under s195AZA(1) for injured feelings.

This case is worrying for a number of reasons. The judge seemed to adopt a subjective view of what is derogatory treatment and harm to reputation.\(^63\) This was done despite the absence of the subject themself who did not offer any evidence of his feelings. The court merely relied on hearsay from a lawyer who also was not present. The fact that Mr Perez is a US citizen also did not cause any discussion about standing to sue. For moral rights to arise the subject matter must be a work in which copyright subsists. For copyright to subsist the author must be a “qualified person” who, under Part XIA of the Copyright Act 1968 (Cth) means an Australian citizen or a person resident in Australia. Given that the USA has no reciprocal protection for our authors for moral right transgressions, it seems unfair that a recording artist in the USA can claim such rights here.

The song that all the fuss is about was not an “original” work. It was an arrangement, adapted from other songs. The “Bon, Bon” song by Pitbull is a transformative

\(^{60}\) Note 64.
\(^{61}\) Note 69 at 91.
\(^{62}\) Note 69 at 107.
\(^{63}\) Although Nicole Reid in her article believes it is both a subjective and objective view, “it appears that his approach to assessing prejudice to honour or reputation was both *objective* and *subjective* (i.e., finding that Mr Perez’s moral rights had been infringed both because Mr Perez felt that the conduct damaged his honour and because it was reasonable for him to have felt that way, having regard to the musical genre in which he worked and the characteristics of the rap world.)” Reid N, “’Rappers, Moral Rights and Infringement”, 9 March 2012 [http://tmnblog.minterellison.com/2012/03/rappers-moral-rights-and-infringement.html](http://tmnblog.minterellison.com/2012/03/rappers-moral-rights-and-infringement.html) (September 2012).
secondary work. Mr Fernandez’s adaptation of it is a further derivative work. It is difficult to argue why one should be honoured and one should be an infringement when both works copy previous works.

The judgement places great weight on the “unimpressive” character of Mr Fernandez. His actions and testimony are given as the compelling reasons for why judgement is found against him. Given that he was unrepresented against an army of American and Australian high powered lawyers this seems highly unfair and leads to the impression that the use of moral rights is to protect established artists rather than emerging. How could a transformative little-known author or artist compete with artists backed by large corporations? This case sets a worrying trend for moral rights litigation. The focus has shifted from an author’s integrity to merely the damage to reputation, even if that damage is temporary and, compared to the millions that Pitbull and others make, would hardly place a dent in their earnings.

One firm has described the case as a warning to the public not to touch songs,64 another laments the lack of explicit consideration of the specific principles that are relevant to whether a work is prejudicial to an author’s integrity.65 The case is a great example of how the legislation is too vague to offer real guidance and how judges are grappling with trying to discern guiding principles.

The issue of derogatory treatment has been discussed in cases concerning s55(2) of the Copyright Act 1968.66 This provision is a limitation on the statutory licence for the recording of musical works. The statutory licence (not to be confused with a ‘compulsory licence’ as seen in other countries as the copyright holder is not obligated to perform any positive action) allows an arrangement and recording of musical works to be made, notwithstanding any copyright infringement, where a licence has previously been given to another person. This section was intended to stop any anti-competitive monopolies being granted to recording companies when

65 Note 75.
66 Now repealed.
the music industry was in its infancy. Subsection 2 of the provision limits this right where the adaptation of the work “debases” the work.

The difference between this section and the moral right of integrity is that this limitation right can only be brought by the copyright holder, and not by the original composer. The debasement is of the work not of the bond between the author and his/her work. Adeney argues that “it is unlikely that future courts will be either inclined or able to use the reasoning which will build up around moral rights cases to explicate the notion of debasement.” Inversely, it is also unclear whether the reasoning in debasement cases will have any impact on moral rights cases.

The case of Schott Musik International GmBH & Co v Colossal Records of Australia Pty Ltd is the first case in 30 years to deal with the issue of what constitutes a “debasement”. The case concerned an adaptation of Carl Orff’s Carmina Burana by a techno music group. This case was brought before the moral rights provisions were enacted as the case can be seen, prima facie, as an example of an infringement of the right of integrity. It should also be noted that the case was brought by a German national, someone who would be familiar with a culture of author’s moral rights. The court held that, as the original score was preserved, there was no debasement and thus no breach of s55(2) of the Act. The case is important in that it presents arguments for and against whether a subjective or objective test should be used for issues of debasement. The full bench of the Federal Court remained divided with two judges favouring subjective and one favouring objective. Lindgren J offered the test of debasement as to whether the adaptation had its own “integrity.” “Integrity” is used here as meaning a sufficient identity in its own right, rather than any notions of honour or reputation. If a work is lacking in its own merit it is then a “mere travesty” and is limited by the section.

In my view, an arrangement will be less likely to be a debasement where, as here, it is an arrangement which “makes available” the original musical work to the

---


68 Especially as s55(2) has now been repealed- the principles over debasement may have even less persuasive authority.

musical tastes of a different period of time or of a different sub-culture, or (as here) of both, and which thereby acquires its own integrity.\textsuperscript{70}

It was unavoidable in this case, and indeed will be in any moral rights case, that considerations of artistic merit and taste will be left to judicial deliberation.

Other cases from which the judiciary may seek guidance might include cases from contract, trade practices (now consumer law) and defamation law. These laws were once thought to house moral rights, and as discussed earlier in the thesis, were the main reason it took so long for the Berne Convention to be ratified.

As early as the nineteenth century issues of derogatory treatment have been discussed in the courtroom. In \textit{Archibold v Sweet}\textsuperscript{71} the issue of derogatory treatment was discussed. The case concerned a textbook on criminal procedure in which a publisher published an edition containing gross errors and incorrect procedures. The court held that the errors could be injurious to the author, and using contract law, the plaintiff was awarded damages.

In \textit{Southey v Sherwood}\textsuperscript{72} a publisher sought to publish a poem 23 years after it had been sold to a bookseller. The author wished to stop publication on the grounds that he no longer held the same views from his youth and its publication would damage its reputation. The court held that as the author had done nothing to secure the poem earlier he had forfeited any control over the work. The court stated \textit{in obiter} that it would be different if an author composed a work of which he subsequently repents and decided to withhold it from public view. It would be interesting to see how the moral rights legislation could change the decision in such a case.

In \textit{Autodesk Australia Pty Ltd v Dyason}\textsuperscript{73} substantiality was debated in terms of copyright.\textsuperscript{74} The court held that if the part infringed represented a high degree of skill and labour on behalf of the author, despite the part taken being comparatively slight, it would be regarded as substantial in qualitative terms. \textit{Eagle Homes Pty Ltd}

\textsuperscript{70} Schott Musik International GmBH & Co v Colossal Records of Australia Pty Ltd (1996) 36 IPR 267 at 17.
\textsuperscript{71} (1832) 5 C&P 219.
\textsuperscript{72} (1817) 35 ER 1006.
\textsuperscript{73} (1992) (No 1) 173 CLR 330.
\textsuperscript{74} See above at 128 for further discussion on substantiality in copyright.
v Austec Homes Pty Ltd\textsuperscript{75} gives the authority that if the part infringed is highly original it is more likely to be taken as a substantial part. University of London Press Ltd v University Tutorial Press Ltd\textsuperscript{76} stated, when discussing the Copyright Act, that it is not a requirement that the part taken is in an original or novel form, merely that it should originate from the author. This authority was later applied in Victoria Park Racing & Recreation Grounds Co Ltd v Taylor.\textsuperscript{77} However, these infringements stem from the economic consequences of copyright, not a loss of integrity to the author. It is unclear whether, by merging moral rights within the Copyright Act, the legislature meant for copyright principles on substantiality to apply. It could be argued that given an author’s sensibility is that which is to be protected an even lesser test would be applied. Conversely, it may take more than a mere error or sentence to prove damage to reputation.

**International Cases**

International cases are also relevant in that, since there is no precedent in our own domestic law, the judiciary will be forced to look overseas to compare how such legislation is to be interpreted. However, it is worth noting that, while our legislation is close to that of Canada, the US and Britain, we are quite apart from France, Italy and other continental countries who have a strong history of moral rights to fall back upon. The cases demonstrate what may or may not be termed derogatory treatment, what other countries term substantial and the different tests for reputation and honour. None of these cases have any binding impact on the Australian judiciary and are for illustrative purposes only, although it is assumed they may provide some guidance when judges come to solving the gaps in the legislation.

Many cases, especially those originating in France, discuss the right of publication, or the right to withdraw publication, both of which rights Australia chose not to adopt. However, it could be argued that publications on such grounds are injurious to an author’s honour or reputation and so may be still relevant. In Anatole France v Lemerre\textsuperscript{78} the opposite conclusion to Southey v Sherwood (discussed above) was reached when an author wrote a history of France and sold it to a publisher who tried

\textsuperscript{75} (1998) 39 IPR 565.
\textsuperscript{76} [1916] 2 Ch 601 at 608-609.
\textsuperscript{77} (1937) 58 CLR 479.
\textsuperscript{78} (4 December 1911, Pataille 1912.1.98): 8.
to publish it 25 years later. In Bouillet Rebet v Davoine\textsuperscript{79} it was also held that an artist could not be compelled to deliver a bust that the artist believed unsatisfactory. One of the most interesting cases is Buffet v Fersling,\textsuperscript{80} where an artist had painted a refrigerator and donated it to a charity auction. Later the purchaser attempted to sell one panel. The artist argued that to break up the piece was a mutilation and the Court of Cessation agreed. Similarly, in Australia, the radical art group ‘Subdivision Art’ subdivided a Picasso lithograph, which outraged the Picasso Estate but no legal action could be brought. Of course if the same thing were to happen today the outcome would be changed by the moral rights legislation. In Camoin v Carco,\textsuperscript{81} a painter had slashed and discarded a number of canvasses which were recovered and put up for sale. The Paris Court of Appeal ordered the destruction of the restored canvasses:

> literary and artistic rights comprise a right which is no way pecuniary in nature, but which, attached to the very person of the author of the artist, permits him during his lifetime to surrender his work to the public only in such a manner and under such conditions as he sees fit.\textsuperscript{82}

Cases in the United Kingdom and America do not take moral rights ideology as far as the French cases seem to suggest. These “conditions as he sees fit” are understood in the common law countries to be “conditions as he sees fit, if they are reasonably held by an objective layperson.” The exact meaning of “prejudicial to his honour and reputation” has been struggled with in a few cases. In Tidy v Trustees of the Natural History Museum\textsuperscript{83} (an attempt to colour a black and white film) J Rattee argued that:

> Before accepting the plaintiff’s view that the reproduction ... complained of is prejudicial to his honour or reputation, I have to be satisfied that that view is one which is reasonably held, which inevitably involves the application of an objective test of reasonableness.\textsuperscript{84}

If this principle had been applied in the above French cases, different results may have ensued. For example, a bust that an artist thinks is unsatisfactory, may look complete to any other person examining it, even an art expert. This “objective” criterion is the common law logic and reason trying to break through laws based on

\textsuperscript{79} Civ Trib Bordeaux, 15 Jan 1951.
\textsuperscript{80} Gaz Pal 1965.1.126.
\textsuperscript{81} Paris, 6 March 1931, DP 1931, 2.88.
\textsuperscript{83} (1995) 39 IPR 501.
\textsuperscript{84} Note 95 at 504.
artistic sensibilities. In America, the case of *Carter Swing and John Veronis v Helmsley-Spear Inc* 85 further demonstrates this tendency when a court determined that ‘honour’ meant ‘good name or public esteem’ and ‘reputation’ to be ‘the condition of being regarded as worthy or meritorious.’ Expert witnesses from the artistic community were also relied upon, showing that common law countries are uncomfortable simply relying on an artist’s subjective view of injury. This case also supports the notion that an artist need not have a pre-existing reputation to show damage.

The area of adaptation rights is where moral rights arguments really emerge. As discussed in Chapter Three, adaptation is not a modern phenomenon, although our culture is well supplied with examples of it. It is almost comical to think of *West Side Story* as an adaptation of *Romeo and Juliet*, when Leonard Bernstein had such strict licensing conditions on his musical that not one part of it may be changed by a subsequent performance. 86 No adaptations are allowed of one of the most famous theatrical adaptations. When books are transposed to films, many adaptations are unavoidable. Upholding the integrity of a work in such conditions is fraught with complexities. In *Barrillet v Credy v Soc Burgus Films*, 87 a moral rights claim was rejected on the basis that an author has to consent to necessary changes required for adaptation to a different medium. This case concerned a playwright who had assigned adaptation rights to a film studio. This decision was echoed in *Bernanos v Bruckberger*, 88 where it was stated that an author must accept all necessary changes, however a caveat was placed upon the transposer that he must “transpose with honesty the spirit, character and substance of the original work.”

In America this caveat was imposed even earlier than the French authority:

> I take it that, while scenery, action and characters may be added to an original story, and even supplant subordinate portions thereof, there is an obligation upon the elaborator to retain and give appropriate expression to the theme, thought and main action of that which was originally written.... 89

---

89 *Curwood v Affiliated Distributors* 283 Fed 219 (SDNY 1922).
This case concerned an author, James Oliver Curwood, who assigned adaptation rights to a story to the defendants. In granting the rights the contract stipulated that the defendant was allowed to “elaborate on said story, with addition of characters etc., however needed.” The defendant produced a movie called I am the Law, which the plaintiff argued was not based on the story to which he had assigned the rights and actually infringed other stories that had been assigned to others. The defendant argued that they had bought the use of Curwood’s name and the changes were covered by the elaboration clause. The court disagreed and refused to let the defendant advertise or use Curwood’s name or the name of the story in connection with the movie.

Notice, however, that the American case talks of the work rather than the author, the “theme” and “thought” of what was written rather than the author’s subjective view of how his story is to be interpreted. In this case the differences between the author’s intention and theme of the story and the end result of the adaptation were obvious. This would not always be the case however, and it is left to the adapters in the first place to contact the author to gain their interpretation or risk a judiciary finding them liable for mutilating the previous author’s work. It is difficult to imagine how a judge is able to decide on factors that relate solely to questions of aesthetics and literary interpretation.

From Charlie Chaplin arguing over music and colour being added to his silent films,90 to films being interspersed with advertising, these cases show that these are not just modern complaints. Of course the introduction of new technologies present even more challenges to moral rights. For example the 2005 controversy over the Italian colourised version of The Seventh Cross,91 the symbolic fine given by a French court to a publisher of a sequel to Les Miserables in 2004,92 and Tom Waits’ suit in Barcelona over an adaptation of his song for a television commercial.93 All over the globe such arguments are being held, for example in Stockholm, Sjöman

91 See http://www.film-foundation.org/common/11004/aboutNewsStory.cfm?QID=2886&ClientID=11004&TopicID=0&sid=1&ssid=3
93 http://www.tomwaitslibrary.com/copyright-audi.html
and Erikson successfully stopped advertising breaks during broadcasts of their films,\textsuperscript{94} and the estate of the artist Miro claimed against Google for adaptation of an artwork used to frame a homepage.\textsuperscript{95} These cases show the unwillingness of an author or artist to let go of control over their work, a relationship that is further explored in Chapter Eight.

**Conclusion**

The moral rights provisions have been placed awkwardly inside an Act designed to control an economic market in intellectual property. It is unclear how concepts within copyright jurisprudence can transfer to moral rights decisions and whether defamation definitions can or should apply. The exact definition of derogatory treatment will have to be tried on a case by case basis, and it is still uncertain whether an objective or subjective view will apply. Substantiality is another legislative quagmire wherein lawyers are unable to guide the community over how much or how little they may use previous works. It is also unknown what would be considered reasonable and what section of the community would determine this.

The hypothetical case argued above demonstrates these gaps in the provisions and is illustrative of the kind of task the judiciary might face when attempting to adjudicate aesthetic notions of taste and judgement. Finding the aesthetic underpinning central to the integrity of a work without reference to economic rationalizations is a major feat for common law countries centred within a legal discourse that relies on economic justifications. Having laws to compensate tortious injury with no apparent damage within a rubric of market control and property rights seems out of place. The gates are open to any sensitive artist aggrieved over any minor modification of their work to pursue such a case and in effect stagnate future creative endeavour that builds upon previous works.

When Harrison Moore signed the Berne Convention he could not have imagined these provisions to be the end result. A set of provisions cut and pasted within the *Copyright Act*; a set of provisions so ambiguously drafted a lawyer would be at a

\textsuperscript{95} [http://comparativeiplaw.com/pdf/moral1.pdf](http://comparativeiplaw.com/pdf/moral1.pdf)
loss to advise a person whether a right has or has not been infringed; a set of provisions that do not belong in the Copyright Act.

This chapter has demonstrated the provisions are clouded with glaring holes for interpretation. Taken to its extreme, moral rights could become a powerful vehicle for authors to seek out monetary reward for works in which the copyright has already been sold. At its best it is a persuasive deterrent against creators working and building on previous works, translating older works into modern times and critically examining and re-interpreting works that could be argued as cultural capital.

Respect is not engendered by forceful laws, rather it is a cultural phenomenon brought about through education and understanding. Trying to foster respect through such laws is not only a waste of the court’s time but can lead to serious consequences for transformative artists. This is a group who, as argued previously, have come to define modern modes of artistic production.
“This is not a Pipe”*: The Fate of Parody and Satire

Parodies and caricatures are the most penetrating of criticisms.¹

Aldous Huxley

Parody, and its fate under moral rights legislation, generates such complexity and confusion that a whole chapter must be dedicated to its discussion. Parody is a prime example of how modern writing practices are in conflict with the ideology of moral rights. As a literary genre, it has risen above the ranks of popular culture to become a genre deserving of scholarly interest, and is an example of how literature comments on society at large as well as the art establishment itself. The introduction of fair dealing legislation in relation to parody and satire illustrates an undercurrent of worry that moral rights may relegate such literary forms to extinction. While many commentators have looked at fair dealing and parody, and some have even briefly looked at moral rights, there has been no sustained inquiry into how the two will operate together in an Australian context. This chapter hopes to fill that void and question the irregularities that (might) ensue.

Legal theory and literary theory have never been harmonious acquaintances. Considerable overlap between the two of them, especially in intellectual property law, has produced a cool detachment between each other. This is most apparent when it comes to parody. In relation to parody, literary theorists have arisen above Augustan usage and, through formalism and postmodernism, have transformed the genre into a unique species of form which relies as much on distance between works as similarity. However, courts tend to stand by lexicographic meanings, bypassing complex theories and ignoring their influence on contemporary writing practices. This is not the complaint of the offended sensibilities of literary theorists but an actual practical problem when the courts are asked to judge contemporary writing practices aesthetically. What kind of dilemmas does this incongruence generate?

¹ Huxley, A, Point Counter Point, Vintage, UK, 2004 at 431.
There are two main issues this chapter will explore. First, when the definition of a parody is the sole determining factor of a defence to an infringement of copyright, it would make sense that what the arts sector would term a parody should also be what the courts would define as one, in other words, the ‘industry standard.’ Second, when trying to interpret whether Parliament’s intention was that parody should also comprise a defence to moral rights, it is important to figure out the social value of parody, which cannot be done without a proper exploration of the genre. Without literary theoretical knowledge on the subject, and only relying on dictionary definitions, many modern writing practices that are considered by literary theorists and artists as common practices of parody may be unprotected. On the other hand, delving too deeply into the complexities of literary theory may unintentionally breed more problems with inconsistencies, ambiguities, and vague notions which would limit the efficiency of litigation. When unprotected against litigation, the threat of suit might deter many creators from investing in this field. Parody and satire – in forms that are not outright funny or traditional – could be facing extinction unless a middle ground is formed where literary theory, ordinary usage, and legal interpretation can meet to allow creators to know exactly where they stand when it comes to infringement. While it may be a matter of judgement in each case, a workable definition would allow parodists to at least understand where their work may cross boundaries rather than forcing them to abandon projects due to uncertainty.

The first aim of this chapter is to grapple with the differences between literary theory and law in their definition of parody and satire and examine what the differences between the two could mean in practice. It will also look to US interpretations to show how these fail to correspond with the legislation adopted by Australia. While the US courts engage in definitions that require a separation of parody and satire, Australian law requires no such limitation, meaning that the definitions our courts must rely on will be quite different and any reliance on US definitions would lead to error. The chapter will then explore in detail the fair dealing provisions before questioning how they engage with moral rights provisions. It will speculate on how two diametrically opposed ideologies – such as fair dealing for parody and moral rights – can fit together in the same piece of legislation before constructing a case scenario where the two provisions entangle with one another. Finally this chapter
will hypothesize on how these problems will affect contemporary writing practices and contemplate what solutions, if any, can ameliorate the impact upon the transformative author.

**Literary Theory on Parody**

When the fair dealing legislation for parody and satire\(^2\) was passed, Senator Chris Ellison described the fair use of parody as protecting Australia’s “fine tradition of poking fun at itself.”\(^3\) For the lawmakers then, parody and satire is mainly about comedy, comedians and cartoonists. The underlying breadth of the genre perhaps didn’t even enter the discussions on the subject. Thus what they, and perhaps judges, will call a parody comes down to what makes one laugh. Literary theorists, however, have long known that humour is not always necessary in parody and indeed does not define it.\(^4\) This section will give an analysis of the modern theories concerning parody to highlight the difference between the lay understanding of the courts and that of the creators. At the moment someone who fancies themselves a parodist is suspended in limbo. No legal advice is available to tell them what the courts would consider to be a parody and what the courts would then see as a “fair” parody. It is probable that any legal advice would be along the lines of ‘try to use an author who has been dead for over 70 years,’ thus stagnating any new commentary on modern works and stifling artistic expression.

As stated in Chapter Two, the moral rights regime, not to mention copyright law in its entirety, is centred within a Romantic aesthetic. This aesthetic values genius, originality and individual creativity over all else. Thus parody, in its imitative, destructive form, is the philistine enemy of the Romantic ideology. For it to be protected within a system with such strong Romantic ties is a miracle. How it will fit neatly within such a system in practice will be another miracle. Looking at authors such as Margaret Rose, Linda Hutcheon, and Seymour Chatman it is clear that literary theorists paint a different portrait of parody from the “poking fun at oneself”

\(^2\) *Copyright Amendment Act 2006 (Cth)* Section 103A ‘Fair Dealing for purpose of parody or satire.’


\(^4\) For example, Linda Hutcheon, as discussed below defines parody in terms of imitation. Simon Dentith defines parody as “any cultural practice which provides a relatively polemical allusive imitation of another cultural production or practice” *Dentith S, Parody*, Routledge, New York, 2000.
theory the law embraces. The literary theories are complex and evolved and unable to be squared into a neat definition whereby one can tick three boxes and declare a text a parody.

Margaret Rose, in her book *Parody/Meta-fiction*, defines parody as a meta-fictional mirror to fiction as well as a reflexive “‘archaeology’ of the text” in which epistemological, historical and social conditions affecting the composition and reception of fictional texts are foregrounded and analysed.\(^5\) Rose sees parody as a modern critical tool which contributes to progress in literary history while also critiquing processes, structures and assumptions used in the writing and the reception of texts.\(^6\) This can easily be agreed with if we look to novels such as Jane Austen’s *Northanger Abbey* which not only critiqued the society which Austen portrayed but also the stylistic features of the gothic novel.\(^7\) Similarly, *The Rocky Horror Picture Show* is often acknowledged as a parodic critique on the stylistic functions used in Hollywood horror movies.\(^8\) Rose believes that it is the comic effect of parody which has misled theorists and condemned parody to become merely a “mocker of other texts”\(^9\) when in fact the target text is not only satirised but also ‘refunctioned,’ “parody is not only destructive … but it is also reconstructive.”\(^10\)

Rose defines meta-fiction as fiction that criticizes the often naïve representations of nature in art. Parody as a meta-fiction takes this further by holding up a ‘mirror’ to the process of composing and receiving literary texts, commenting on the limitation of art to imitation and representation.\(^11\) Rose reforms her definition as the “critical

---


\(^6\)Note 5 at 13.

\(^7\)Within *Northanger Abbey* itself Austen talks about the reception of texts seen as inferior “Although our productions have afforded more extensive and unaffected pleasure than those of any other literary corporation in the world, no species of composition has been so much decried. From pride ignorance, or fashion, our foes are almost as many as our readers…..there seems almost a general wish of decrying the capacity and undervaluing the labour of the novelist, and of slighting the performances which have only genius, wit, and taste to recommend them.” Here she is talking about novels, Gothic novels in particular, of which she parodies the style. Austen J, *Northanger Abbey*, Wordsworth Editions Limited, Kent, 1993, pp.19-20.


\(^9\)Note 5 at 21.

\(^10\)Note 5 at 30.

\(^11\)Note 5 at 66.
quotation of preformed literary language with comic effect,”¹² but concedes that parody need not necessarily ridicule the work of its target. Citing the ambiguous Latin root of “para” in “parodia” she concludes (as does Hutcheon) that the term can mean either nearness or opposition, or both: empathy with and distance from the text imitated. This definition comes closer to Hutcheon’s definition of “repetition with ironic critical difference.” Hutcheon eschews the need for comic effect, replacing it with ironic inversion instead. “Quotation” is also replaced with ‘repetition.’

Unlike imitation, quotation, or even allusion, parody requires that critical ironic distance. It is true that, if the decoder does not notice, or cannot identify, an intended allusion or quotation, he or she will merely naturalise it, adapting it to the context of the work as a whole ... such naturalization would eliminate a significant part of both the form and context of the text. The structural identity of the text as a parody depends, then, on the coincidence, at the level of strategy, of decoding (recognition and interpretation) and encoding.¹³

For Hutcheon then, a text will not be a parody if the receiver does not decode it as such. Thus for a judge to find a text to be parody they must first recognize the repetition, and most importantly understand the ironic inversion at play, their roles thus becoming equivalent to literary critics. “Is parody in the eye of the beholder? The stress on the pragmatics of parody as well as on its formal properties has perhaps suggested that this is the case. The recognition and interpretation of parody are obviously central to any description of its functions.”¹⁴

Hutcheon agrees with Rose that parody need not be mocking, but can in fact sympathise and build upon previous texts: “many parodies today do not ridicule the backgrounded texts but use them as standards by which to place the contemporary under scrutiny.”¹⁵ An interesting argument put forward by Hutcheon is that of “authorized transgression.”¹⁶ Comparing parody to the ‘carnivale,’ a festival tolerated by the Church for a temporary period,¹⁷ she sees parody as an authorized

¹²Note 5 at 59.
¹⁴ Note 13 at 84.
¹⁵ Note 13 at 57.
¹⁶ Note 13 at 75.
¹⁷ Here Hutcheon is influenced by Mikhail Mikhailovich Bakhtin who describes the ‘carnivalesque’ in his *Problems of Dostoevsky’s Poetics* [1929] University of Minnesota Press, Minneapolis, 1984 and *Rabelais and His World* [1965] Indiana University Press, Indiana, 1984. Bakhtin sees the carnival as a release of suppressed energies, a break from the solemnities of social hierarchies.

159
transgression on another’s work, restricted by the confines of the original text and its ‘recognizability:’

Parody’s transgressions ultimately remain authorized – authorized by the very norm it seeks to subvert. Even in mocking, parody reinforces; in formal terms, it inscribes the mocked conventions onto itself, thereby guaranteeing their continued existence.18

She explains that sometimes the work is so pretentious that it “begs deflating” but, more often, it is successful works that, by their inscription into popular culture, become a text owned by everyone who recognizes it and thus opens it to inspire parodic critique. For example, as most people are familiar with *Pride and Prejudice*, *Pride and Prejudice and Zombies* instantly causes a reaction in most people. Similarly with the popularity of the *Harry Potter* books and *Twilight* books, parodies in film and books have quickly followed.

Seymour Chatman, in his article “Parody and Style,”19 believes that Margaret Rose and Linda Hutcheon, although insightful, may perhaps go too far in making “parody the prototypical post-modern genre, a generalisation achieved only by the most generous stretch of the term.”20 To Rose’s contention that all self-conscious fictions are by definition parodic, he asks what they are parodying, and, if in fact they are parodying themselves, then how can parody be any use for commenting on the styles of others? This author does not agree. A parody that parodies itself does not negate the usefulness of parody to comment on other works, even at the same time. It is not necessary to have to fall back on more traditional terms as “travesty” and “burlesque” (or the more contemporary terms “take-off” and “send-up”), in an effort to keep parody pure. In the legal context as well it would be foolish to try and designate every parody to a more specific genre and to give higher precedence to one over the other.

Chatman disagrees with Hutcheon’s argument that ridicule does not define parody, parody being merely “repetition with critical distance, which marks difference rather than similarity.”21 Chatman expresses doubt that replacing ‘ridicule’ with ‘irony’

18 Note 13 at 75.
20 Note 19 at 28.
21 Note 19 at 33.
does any better, fearing the term is too broad and blurs important distinctions between the genre and the whole postmodern movement. Chatman seeks to reaffirm the importance of ridicule, thinking of parody “as a kind of twitting or rallying of the original, such that even the target, the parodee, can admire the accomplishment.”

One could easily counter this with the argument that Henry James may have accepted good-natured parodies of his work, but it is hard to imagine most authors being similarly good-natured about their work being parodied.

Chatman’s main problem with Hutcheon’s definition is ‘reductivism,’ using *Ulysses* as an example of what would not be caught under the umbrella term although which, Chatman argues, parody was Joyce’s intention. This raises an interesting question that Chatman fails to address. How far does the author’s intention define whether something is a parody? In the aftermath of postmodernism the author’s intention is only one of a proliferation of meanings available through a text. It is argued that it is the reader who defines parody rather than the author. If a reader does not grasp the allusion to the prior work, or the irony in its use then a parody is not made out.

The second problem he finds is the problematic term ‘irony’ itself, as well as her terms “revising, replaying, inverting and ‘trans-contextualizing,’” “the net still too coarse to catch the tinier stylistic fish.” Perhaps this is the problem in itself. Parody, as demonstrated by the conflicting opinions above, is so wide and varied a concept let alone a genre, movement and style, that it is impossible to define it in a way that one can, with authority, point to one and not another text as being “parodic.” If literary theorists such as Rose, Hutcheon, and Chatman fall over themselves grappling with terms, one can only imagine the difficulties when a judge tries to apply hard and fast rules to what will define the genre.

I would argue that, despite Chatman’s misgivings, Hutcheon’s ‘repetition with ironic critical distance’ might perhaps be the most useful definition to use in a legal analysis. This terminology is broad enough to cover most literary theories on parody without being too inclusive. The ‘irony’ comes about when a tense expectation based

22 Note 19 at 33.
23 Note 19 at 35.
24 Note 19 at 35.
on the familiarity of the prior work is transformed into something unexpected. Using this definition we could see how judges may begin to grapple with defining a parody. The most obvious traits would be:

(a) repetition of another’s work – whether in style, quotation or other imitation
(b) ironic inversion – recognising a transformation has taken place to the work, a critique or unexpected intention of the author
(c) critical distance – the work need not be mocking or ridiculing, but through the distance from the original text is able to comment upon the form, style or processes of writing and receiving texts.

Ironic inversion is the cornerstone of the definition. Without the inversion of the intent or meaning the parody is merely an adaptation. It is the transformative value of the inversion that is critical. It is what elevates the imitation to a new work different to the original despite the necessary similarity. It is these “new” works that need protection. Parodies work on established artistic conventions to highlight their shortcomings which in turn advances our understanding of art. Satire does this also but goes one step further by highlighting society’s shortcomings and criticising widely held beliefs in an effort to unveil folly. There can be no highlighting of folly without often bringing ridicule to the original work which relied upon the criticised assumptions. By definition, any inversion is also a distortion. When one talks about “the precarious balance” we must question whether the line between fair and unfair is possible to draw.

Of course this definition also has its consequences. If a judge does not recognize and decode the intention of the author then a parody is not made out. Thus an attempt at parody that fails is unprotected. In practical terms however, it should be fairly easy to allow an expert or the author themselves to be called upon to argue what the parody was meant to do and that, although the judge may not find the ironic inversion, other readers with the requisite knowledge would. This definition goes further than pure legal definitions that look at outdated dictionary definitions that often ignore the fact that parody not only destroys but also reconstructs.

25 However, it is likely that, as in Defamation law, judges would be unwilling to call upon experts or authors to explain a parody, preferring to believe that if an ordinary, reasonable person does not ‘get it’ then the defence is not made out. This is further discussed in the next chapter.
Legal Theory on Parody

Parody can be seen as a market failure, a concept within economic theory wherein the allocation of goods and services by a free market is not efficient. Market failures can be viewed as scenarios wherein individuals’ pursuits of pure self-interest lead to results that are not efficient in respect of society. The existence of a market failure is often used as a justification for government intervention. Parody is a market failure because the controllers of the goods, the copyright owners, do not allow others to parody their works thus disintegrating the fabric of the market. Thus government intervention, such as fair dealing legislation, is needed to overcome these resulting inefficiencies. Moral rights, however, present an opposition to this view, whereby new controllers of the goods come into play.

Prior to the Copyright Amendment Act 2006 (Cth) Australia had fair dealing defences for the purposes of criticism and review. Case law in this area has historically been rare and the authorities for the most part quite complex and contradictory. The last case to look at fair dealing was The Panel Case, a decision that today would have been decided quite different given the new laws. For our purposes we can overlook the reasoning concerning ‘substantive parts’ and the definition of a broadcast as this thesis focuses only upon the impacts on literature. The case is important, nonetheless, to use as a guide as to how judges deal with ‘fair dealing’ legislation. To be clear, this case looks at Part IV rights, not parody and satire, however it is helpful in seeing how the idea of “fair” is decoded by the courts. The Panel was a talk show on Channel Ten which often broadcast segments of rival networks to comment upon, often to ridicule or criticise. Channel Nine sued Channel Ten alleging copyright infringement. After judgement was entered for Channel Ten at

---

first instance the case was appealed to the Full Court where it was held that Channel Ten had infringed Channel Nine’s copyright in the broadcasts. Channel Ten then raised the defence of fair dealing. The Court looked at authorities such as *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* (1999) 48 IPR 333 as well as UK authorities such as *Beloff v Pressdram Ltd* [1973] 1 All ER 241, *British Broadcasting Corporation v British Satellite Broadcasting Ltd* [1992] Ch 141 among others. Conti J then discerned eight principles from these authorities:

1. Fair dealing involves questions of degree and impression, it is to be judged by the criterion of a fair minded and honest person, and is an abstract concept;
2. Fairness is to be judged objectively in relation to the relevant purpose, that is to say, the purpose of criticism or review or the purpose of reporting news, in short, it must be fair and genuine for the relevant purpose;
3. Criticism and review are words of wide and identifiable scope which should be interpreted liberally, nevertheless criticism and review involve passing of judgement;
4. Criticism and review must be genuine and not a pretence for some other form of purpose, but if genuine, need not necessarily be balanced;
5. An oblique or hidden motive may disqualify reliance upon criticism and review, particularly where the copyright infringer is a trade rival who uses the copyright subject matter for its own benefit;
6. Criticism and review extends to thoughts underlying the expression of copyright works or subject matter;
7. News is not restricted to current events; and
8. News may involve the use of humour though the distinction between news and entertainment may be difficult to determine.31

The full court then went on to hold that nine out of the 19 excerpts could be excused as fair dealing. The others, however, were ‘satire’ and for entertainment purposes only and thus there was no defence. The case turned out to be controversial, with networks then seen to be reluctant to air such commentary shows (for example after

---

31 Note 30 per Conti J at 285-299 (paraphrased).
Channel Nine accused Channel Seven of infringement, *Sportswatch*, which showed highlights of other networks’ sports events, was cancelled).

The decision has also been queried by Michael Handler and David Rolph as creating a list of untidy statements drawn from authorities without any analysis or criticism.\(^{32}\) The principles outlined above fail to indicate either their relative importance or how they are to be used in practice: “the fact that similar principles have been consistently referred to across a number of cases does not necessarily indicate those principles have been consistently *interpreted*.\(^{33}\) Most importantly for our purposes the judges failed to look at the issue of ‘fairness,’ only whether the dealings were for the permitted statutory purposes, and so not only are we unclear about what would be found to be a parody, we are also unclear over what distinguishes a ‘fair parody’ from an ‘unfair parody.’

In Handler and Rolph’s article “A Real Pea Souper,” the authors put forth a number of factors the court should consider when confronted with a fair dealing defence.\(^{34}\) These include the amount of copyright material used in comparison with the length of the copyright material, the extent of the use made of the copyright material by the defendant, the motives of the defendant, as well as commercial rivalry and industry practice.\(^{35}\) While these factors are relevant for news, criticism and review they are of less importance when it comes to parody.\(^{36}\) As noted below in the American jurisprudence, issues of substantiality are irrelevant in terms of parody. For a parody to be defined as parody a substantial part of a work must be infringed to ‘conjure up’ the original work making the reference explicit.\(^{37}\) Thus it would be incongruent to cite substantiality as a factor in determining fairness. Commercial rivalry also is out

---

33 Note 28 at 391.
35 Note 34 at 418
36 It is noted that this article was written before the parody amendments and therefore doesn’t deal directly with parody as an exemption. It looks more particularly at the defences of news, criticism and review only.
37 See Souter J in *Campbell v Acuff Rose Music Inc* 510 U.S. 569 at 588 “Parody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation...When parody takes aim at a particular original work, the parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognisable” at 588.
of place in such discussions as the market for parody is different to the market for the original work.

In the case of *Campbell v Acuff Rose Music Inc* this became apparent when the United States Supreme Court overturned the decision by a lower Court of Appeal that a parody was not fair use. In that case the question of commerciality had arisen. The Court of Appeal held that the parodic song’s commercial character, as well as its excessive borrowing, barred it from claiming fair use. The United States Court of Supreme Court overturned this ruling noting that commercial use is only one factor to take into account and that when:

the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. This is so because the parody and the original usually serve different market functions.38

Thus we see the problems with equating fair use adjudication of news, criticism and review to a genre such as parody.39

**Dictionary Definitions**

Statutory interpretation guidelines generally state that if there is no indication to the contrary, a word in a statute should be interpreted according to its ordinary meaning in everyday use. This is where it is common for judges in Australia to turn to the dictionary for support, in particular, to the *Macquarie English Dictionary*. A judge’s first recourse when it comes to defining ‘parody’ will be to turn to this dictionary and gather its common usage from the definition given. Why is this a problem when it comes to parody? Let us examine the dictionary meaning in closer detail:

**Parody** 1. a humorous or satirical imitation of a serious piece of literature or writing. 2. a poor imitation; a travesty. 3. to imitate (a composition, author, etc.) in such a way as to ridicule 4. to imitate poorly.40

The first definition includes both humour and satire. As noted under literary theory, humour is not always present in parody. Humour is a subjective element, and parodies that are for educational or homage purposes would thus be excluded from

---

38 Note 30 at 591. This case is further explored below.
39 The difference between the American concept of ‘fair use’ and the Australian ‘fair dealing’ is explored below under “The American Position.”
protection. Also, as previously noted, satire is a criticism of the world at large, rather than criticism aimed directly at another work. While parody often does utilise satire it is not always a requirement. The second definition, ‘a poor imitation,’ a ‘travesty’ does not correspond to a culture appreciative of parody. This type of definition would be more suited to a Romantic conception of authorship where anything imitative is instantly decried. The third definition requires ‘ridicule’ which is not always apparent in parody and is a more suited term for ‘burlesque’ or perhaps ‘spoof.’ Similarly, the fourth definition is of no help to us. It is easy to decipher that dictionary definitions used in this context generate much confusion. This is because a dictionary tries to cover its bases by including all definitions, even outdated ones. The postmodern updates to the definition are not included, so our working definition of “ironic inversion” is not mentioned. In all likelihood a judge will not refer to literary theories at all to determine meaning. This leaves the parodist in difficulty. An ordinary, reasonable person would assume a parody involves making fun of something, but if presented with an ironic rather than a comic parody, they would probably also classify it as parodic. Thus even the ordinary, reasonable person would be unsure how to properly define the term.

Condren et al. explore the problem of dictionary meanings in relation to parody in their article “Defining parody and satire: Australian copyright law and its new exception.” They note that such definitions do not anticipate future uses of the terms. They also suggest that the purposes of dictionaries have changed over the years, becoming less selective “abridgements from patterns of de facto use and including previous patterns of change.” The lexical distinction of satire and parody belies the complexity of separating the two forms. In a world where art forms are always evolving, where digital technology continually changes our assumptions on art, it is questionable how relevant the ‘ordinary meaning’ definition is to the fair dealing exceptions. As Condren et al. argue:

Rarely can dictionaries take into account the evanescence of the forms of slang which differentiate social groups and which can be a vital factor in current use. Sensibly, in order to maintain their formal relevance, they opt for definitions of open-ended generality with apposite and clarifying illustration; but neither the general mapping of meaning, nor the illustration is legislative;

nor can they be if they are to withstand the vagaries of time. Dictionary definitions are useful but not the end of the argument, especially where culturally and formally dynamic activities like parody and satire are concerned.\textsuperscript{43}

Even well known parodies could well fall short of this definition. In a postmodern world texts tend to play with multiple levels of meaning and ambiguousness. Even a show such as \textit{The Panel} blurs once distinct practices such that news and satire converge to create a new media outlet.

\textbf{The American position}

\begin{quote}
"Oh high, Oh high, If Disney sues we’ll claim fair use, Oh high, Oh High"
\end{quote}

\textit{The Simpsons}, Season 20, Ep. 20 “Four Great Women and a Manicure” Air Date 5/10/2009

America’s much talked about case \textit{Campbell v Acuff-Rose Music Inc} (62 USLW 4169 (7\textsuperscript{th} March 1994), “The Acuff-Rose case,” is ubiquitously mentioned when looking at fair dealing for parody. Australian commentators, such as Andrew Buckland and Maree Sainsbury, believe this case will become a persuasive authority for Australian judges. The case concerned a rap parody of the song “Pretty Woman” and laid down guidelines for courts in relation to fair use in parodies. The unanimous judgement in the Supreme Court found that a parody, even if involving commercial purposes, could still constitute fair use under their equivalent copyright legislation. Although an American case, Buckland points out the increasing trend of Australian courts to look to developments in the US: “(especially in the field of intellectual property) and the similarities that exist between the Australian and United States copyright statutes, the decision in \textit{Acuff-Rose} is bound to have an impact on Australian law.”\textsuperscript{44}

The analysis of the purpose of copyright protection was central to the reasoning in the judgement. The US Supreme Court noted that:

[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout.

\textsuperscript{43} Note 43 at 291.

Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.\textsuperscript{45}

From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfil copyright’s very purpose.\textsuperscript{46}

The Supreme Court argued that the fair use doctrine “permits (and requires) courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster,”\textsuperscript{47} and aims to resolve “the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it.”\textsuperscript{48}

Although stating that there is no presumption that a fair use automatically applies to a parody, the American court realised that parody requires special protection given that it serves to progress Art. According to the Court, “the nub of the definitions [of parody] is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on the author’s works.”\textsuperscript{49} Thus the parody must be critical and the criticism must be directed at the original work. Pierre Leval, an American scholar, believes the opinion of the Court has ‘rescued’ fair use. By dismissing the opinion that fair use is intrinsically non-commercial, Leval believes Souter J’s “fixed the rudder and restored the compass bearing”:

Every advance in knowledge or art builds on previous advances. An author's exclusive control must not be so stringent as to prevent those who come after from using the prior work for further advancement. The 2 Live Crew opinion refocuses the fair use doctrine on the central purpose of copyright. The opinion teaches us further that every fair use factor is to be understood as a subset of that overall goal. They are not separate factors. Each is part of a multifaceted assessment of the question: Where should the author's exclusivity stop in order to best serve these familiar overall objectives of the copyright law? The opinion stresses this dynamic interrelationship.\textsuperscript{50}

Strangely the Court was at pains to establish a distinction between parody and satire, being that parody focuses on an individual work whereas satire involves a more

\textsuperscript{45} Campbell, aka Skywalker, et al. v. Acuff-Rose Music Inc. (1994) 510 U. S. 569 at 575 (quoting Story J in Emerson v Davies 8 F Cas 615 at 619 (No 4,436) (CCD Mass 1845)).

\textsuperscript{46} Note 46 at 575.

\textsuperscript{47} Note 46 at 577.

\textsuperscript{48} Note 46 at 575.

\textsuperscript{49} Note 46 at 580.

general criticism, for example of a particular genre or society, reasoning that a satirical piece need not take from a particular work and thus there is less justification to take from a copyrighted work. As Buckland points out, this distinction is at variance with their purposive approach.\footnote{Note 45 at 603. “Purposive” is used here as in the legal usage which is a construction of statutory interpretation that promotes the purpose or object underlying the statute.} If parody is important due to its criticism of a particular work progressing new forms of work, why is satire, which comments on society at large, less important when it also creates a new work and allows for the progression of art? Buckland submits that “this public benefit generated by a satire is as great, if not greater, than that derived from a parody.”\footnote{Note 45 at 603.} Given the wording in Australia’s new fair dealing provisions “for the purpose of parody or satire” it is unlikely that Australian courts will draw such distinctions as it is clearly intended by parliament to protect both genres.

Buckland believes the extent of the influence of this American case on Australian law is the Court’s definition of parody as a critique of the work parodied, rather than the Australian case history of labelling parodies as “works that more accurately should be called “burlesques” (or “spoofs”).”\footnote{Note 45 at 607. While Buckland may believe that the American position, and this case in particular, may influence Australian jurisprudence, to date (except for a short mention of the case in Schott Musik International v Colossal Records of Australia Pty Limited [1997] FCA 531, there have been no cases where this view has been upheld. Of course to date there have not been any substantive cases looking at the parody fair dealing provision.} Also influential is the point that a substantial part of the original work must be used for a parody to succeed (the ‘conjure-up test’) and more of a focus on the transformative value of the parody and the “move back to the approach adopted earlier this century in England where the courts, in determining whether a parody infringed the copyright in the parodied work, would look at the effort bestowed in creating a new work.”\footnote{Note 45 at 608.} 

Although this article was written five years before moral rights legislation was enacted, Buckland does point out that parodies and moral rights immediately present a problem. “Because parodies do distort or modify works to a critical end there is every likelihood that they would be classified as infringing the right of integrity of the authors whose works they critique. Perhaps the only way to safeguard the
protection of parodies against this would be to legislate for their protection.”

Obviously this has not been done in Australia, unlike in moral rights countries like France (Art 41(4) of the law of 11 March 1957), where our Fair Dealing provisions refer only to copyright infringement without any express reference to moral rights. It is uncertain whether this was deliberate and, if so, how one should manage the intention of Parliament to protect parody on one hand against the copyright owner but allowing the original author to not allow it on the other. It is also uncertain whether courts will interpret the fair dealing provision to extend to moral rights given that for practical purposes the fair use provision would be rendered void if it were not. Or will, as Buckland suggests, fair use only extend to parodies that are not obscene? Given the lack of any reference in either legislation to ‘obscene parodies’ this is doubtful. It is doubtful the legislature intended to give judges the power to censor works by declaring them obscene. Thus this article sheds light on some approaches of fair use that Australian courts could very well adopt. We will however, have to sit on our hands until a crop of cases are litigated before we can be assured at how Australian judges will interpret fair dealing and parody.

Condren et al. disagree with Buckland’s insistence of the influence this case will have on Australian law. For one thing, the structure of each country’s legislation is entirely different, for instance the inclusion of satire as a protected work. This approach would distort and curtail definitions of parody by arbitrarily relegating works to categories that are pointless and unnecessary under the legislation. Most importantly, according to Condren et al., the US definition of parody is the requirement that a protected parody “must target the original copyright work by commenting or criticising its substance or style.” Thus parodies that are merely for entertainment, for educational purposes, or are in honour of the original work would not be protected: “[T]he precedent problem is that this test does not match with meanings of parody as they are understood among those who produce, analyse and consume actual parodies in the world beyond the United States, including in

---

55 Note 45 at 609.
56 Note 43.
57 Note 43 at 281.
Australia." This reductionist approach to parody is at odds with the literary theory canvassed above.

As noted earlier, a parody is not always meant to criticise the original author, nor is it always outright funny. Our definition, of “ironic inversion,” taken from Hutcheon, is a much better fit for an umbrella term to cover parodies, rather than the US “critical wit.” Irony is to make one expect X and to give one Y. There is a meaning behind the imitation that the original author did not intend. This covers both comic parodies, educational parodies, parodies made in homage, as well as any critical parodies, while being neither too inclusive nor exhaustive. Reliance upon the American definition, while a step up from “if it’s funny it’s a parody,” would still become a deterrent for future producers of parody and would limit the creative freedom that the Fair Dealing doctrine was intended to achieve.

It is worth noting also the difference between the American ‘fair use’ and the Australian ‘fair dealing.’ Section 107 of the American Copyright Act 1976 holds a defence of fair use that is quite open, whereas the Australian Fair Dealing regime is restricted to closed categories of works. In its 1998 report the CLRC recommended the broader fair use concept such as in America however in 2000 the IPCRC took a different approach recommending:

> The Committee recommends that, in considering the CLRC report on fair dealing, the Government should ensure the balance between owners and users remain clear and certain. We do not believe there is a case for removing the elements of the current Copyright Act which define certain types of conduct as coming within the definition of fair dealing.

This approach has seemingly been followed given the 2006 amendments added new categories such as parody and satire while retaining the closed categories rather than an open ended approach.

---

58 Note 43 at 283.
Fair Dealing vs. Moral Rights

The Fair Dealing provisions for parody and satire came with the Copyright Amendment Act 2006 (Cth). This was a bill that was hurried through Parliament to allow Australia to keep its obligations with America under the Australia–US Free Trade Agreement.61 The major obligation was to make anti-circumvention of TPM’s (technological protection measures) illegal. That, along with other reforms of a controversial nature, including copyright breaches by consumers by time shifting formats and the exceptions for research and study (which would limit the existing exception of 10% or a chapter), meant that the miniscule provision on parody and satire barely had a chance of getting any real inquiry time.62

In Senator Ellison’s second reading speech and the Parliamentary debates, the only mention of the exception is as follows:

Another exception promotes free speech and Australia’s fine tradition of satire by allowing our comedians and cartoonists to use copyright material for the purposes of parody or satire.63

Senator Ellison later added:

The government is also ensuring that Australia’s fine tradition of poking fun at itself and others will not be unnecessarily restricted by providing an exception for fair dealing for the purpose of parody and satire.64

There is little guidance on the purpose of the section, as to why parodists should be protected and the ideology surrounding the exception.

Senator Crossin, from the Senate Standing Committee on Legal and Constitutional Affairs, in his retort only mentioned the Fair dealing provisions once to add: “It seems to add another unnecessary level of complications for little consumer benefit.”65 However he did ask the question, of whether “if the Senate committee had much longer to actually inquire into and report on this bill, would we have come

63 Sen Santoro, Senate 2nd reading speech, 6 November 2006 at 135.
64 Commonwealth of Australia, Parliamentary Debates, 29 November 2006 at 112 (Chris Ellison, Minister for Justice and Customs).
65 Note 65 at 109.
out with a piece of legislation that could be better re-drafted and rewritten to provide better clarity for both consumers and users in this area?"66

In these Parliamentary debates, it is amusing to hear Chris Ellison’s remark that “People like Australia’s fair dealing regime. They like certainty of exceptions. They do not want a fine-line exception that tells them they can only do what a court tells them they can do.”67 The exceptions are far from certain: what is ‘fair’? what is a “parody”? what is a “satire”? and will moral rights still apply? are all issues left open to the courts to determine.

As discussed above Fair Dealing is a doctrine which allows authors to defend copyright infringement if the purpose was for research, criticism, study, parody, or satire. Section 9A, 41A states:

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purposes of parody and satire.68

On the face of the law, it is unclear how, and to what extent, fair dealing doctrines intersect with moral rights legislation. A few American commentators, such as Dane Ciolino,69 suggest that moral rights should not be subject to fair use given that moral rights is of a higher “moral” ground and should protect the author against any such ravages. Others, including this author, see this as quite limiting for the genres of parody or satire, leaving transformative authors with their hands tied to create new works. The law in Australia allows for fair dealing in respect to ‘copyright.’ As discussed in Chapter Four, moral rights can either be seen as a part of copyright or as a distinctly different set of rights. The monist view would assist the speculation that fair use would apply to moral rights, a dualist view would suggest that the plain wording of ‘copyright’ especially given the enactment after moral rights introduction, suggests it does not apply to moral rights, elevating moral rights to spectacular heights.

66 Note 65 at 109.
68 Copyright Act 1968 (Cth) Section 9A, 41A: Fair Dealing for Purpose of parody or satire.
This author believes that the correct interpretation would be that, as there is no mention to the contrary, moral rights and fair dealing must intersect. The fair dealing legislation suggests to the public that Australian society believes that parody, satire, criticism and review are worthy of protection and are thus “reasonable” uses of another author’s material.

Section 195AS of the *Copyright Act 1968* (Cth) states:

(1) A person does not, by subjecting a work, or authorising a work to be subjected, to derogatory treatment, infringe the author’s right of integrity of authorship in respect of the work if the person establishes that it was reasonable in all circumstances to subject the work to the treatment.

(2) The matters to be taken into account in determining for the purposes of subsection (1) whether it was reasonable in particular circumstances to subject a literary, dramatic, musical or artistic work to derogatory treatment include the following:

a) The nature of the work

b) The purpose for which the work is used;

c) The manner in which the work is used;

d) The context in which the work is used;

e) Any practice, in the industry in which the work is used, that is relevant to the work or the use of the work;

f) Any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of the work;

g) Whether the work was made:
   
   (i) In the course of the author’s employment; or
   (ii) Under a contract for the performance by the author of services for another person;

h) Whether the treatment was required by law or was otherwise necessary to avoid a breach of any law;

i) If the work has 2 or more authors-their views about the treatment.

Using the theory that parody and satire, by their inclusion as an exception to copyright, shows that the Australian public wishes to protect and foster such uses, it could speculatively be argued that such a use could be termed “reasonable.” The courts must then decide the purpose of a parody. As discussed above, this process is a complex one, and it is uncertain what “purposes” will be allowed for parody to be “reasonable”. For example, it is uncertain whether a parody that attempts to honour the original work will be more or less “reasonable” than a parody that seeks to criticise the author. Industry practice also assists the reflection that parody is reasonable.
Thus we are left with the question of fairness. Will a work be automatically protected if it is determined to be a “parody?” To be a “fair” dealing, where will the line be drawn so as to balance the protection of parody on the one hand, and, on the other hand, the protection of the reputation, honour and integrity of the original author?70

An interesting article that explores such questions is Geri Yonover’s “The Precarious Balance: Moral Rights, parody and fair use.”71 This article is from an American perspective and thus it is to be remembered that different cultural, social and legal factors are involved, especially as Americans have the right of freedom of speech, a right Australians lack. As earlier mentioned, America only has moral rights for visual artists, yet controversy has already arisen over moral rights and their part in dealing with parody.

The article is one of the first that directly faces the issue, however again it remains unsatisfactory in many ways. First of all the author uses a cliché parody – The Mona Lisa and Duchamp’s amendments to it – thereby opting out of the preliminary hurdle of having to prove why the work is in fact a parody. The article explores the tension between the originator and the imitator, and believes the goal of “VARA”72 should be to balance interests carefully so as not to “diminish the sum of art which enriches our lives:”73

Art is both evolutionary and revolutionary. Art mutates according to the conscious, or even unconscious, sensibilities of the artist. That which has come before is fodder for artistic creation and is linked inextricably to the present.74

Yonover believes that, when it comes to moral rights, fair use should yield to the right of the parodist. In other words if, prima facie, it is a parody then it should be

70 While the question may be one of simple statutory interpretation (i.e. what was Parliament’s intent when introducing the Fair Dealing provisions?) commentators such as Stewart et al have noted this as an area of “potential conflict.” See Stewart et al., Intellectual Property in Australia (5th Edition) LexisNexis Butterworths, Chatswood, 2014 at p. 248 where it is noted that the parodist will have to argue that the derogatory treatment of the work was reasonable in the circumstances.
73 Note 72 at 80.
74 Note 72 at 80.
exempted from moral rights infringements. Although this would be welcome news to parodists, it would mean moral rights would become null and void to a certain extent. An adapter that pays homage to an author but merely translates the original work to suit a contemporary audience is seen as infringing moral rights whereas a parody that seeks to attack an author’s integrity as an author is protected. Authors would be advised by legal counsel to make sure that an attack on the original author is included when adapting a work to avoid infringement, thereby frustrating the very purpose of the moral rights legislation.

Yonover also raises the question of compulsory licence schemes as a possible answer, although he finds the solution problematic. This idea entails that a parodist can buy rights to parody the work, whether or not the author agrees, but has to pay royalties through a scheme run by an independent body. The very notion of such a scheme was enough to scare countries into signing the Berne Convention in the first place, so it is slightly ironic that it is now given as a solution to moral rights problems.

Compulsory licences are often used when new technology evolves such that new transmissions impact on copyright infringements. This is not the case with parody and moral rights. In such a scheme there is no balancing of interests, and economic interests are the only rights protected. If an author is forced to approve changes to a work, then what is the point of having moral rights in the first place? Most importantly, a parodist does not want the author to condone the work. In a sense, that is taking the fun away from it. The transgression that the transformative author and the reader share is the intimate joke which creates the parody. As Yonover so eloquently puts it: “How can you ‘up the establishment’ if the establishment says ‘right-on?’”

Yonover offers a solution as to remedies but recognises that this also does not help. Damages do not solve the deterrent nature of the threat of litigation nor do they give the author what they really want: “freedom from criticism.” Yonover also discounts a per se rule of non-liability as “a right without a remedy is, of course, no

---

75 Note 72 at 113.
76 Note 72 at 114.
right at all."77 His concluding solution is to shift the burden of proof. Thus, instead of the defendant having to prove the parody was fair, in this case the plaintiff would have to prove the parody was unfair. Presumably there would then be a presumption that all parodies are fair. This presents an interesting solution, but it still does not alleviate the deterrent effects, nor does it make it simpler to define what is a parody or indeed a ‘fair parody.’

Yonover argues that protecting transformative authors too much will lead the original artists to lose the incentive to create. This is an argument heard many times, especially in the pro moral rights papers before the legislation’s inception. It is a point with which this author strongly disagrees with. Protection does not correlate with incentive. It is absurd to think that because someone one day might parody their work or perhaps adapt, abridge or modify it writers will cease to write. If this was the case we would have seen a surge of new creative works in the market since the moral rights legislation passed: works that had been held back from the public due to a fear of being parodied or adapted. Of course this has not been the case. What is clear, is that people who do use other’s work often seek legal advice beforehand, and that the threat of litigation will in most cases stop the creative piece being created. Unless we want to see only works that are 90 years old being parodied we should think carefully about what we are doing here and what exactly it is that we are protecting: an artist’s right to have their work preserved as if under glass at a museum, or the freedom from criticism?

While Yonover stresses the importance of clearing the confusion between moral rights and fair dealing, in her article “Parody, satire, honour and reputation: The interplay between economic and moral rights,” Maree Sainsbury believes that the incompatibility between moral rights and fair dealing is fine, that it leaves room for judges to make precedents and make a more harmonious legal position.78

She believes that given the lack of guidance the fair dealing provision gives, judges will look to the reasonable defence in moral rights – that is – to parody as a

77 Note 72 at 114.
transformative use of benefit to society, as being reasonable in the circumstances. Sainsbury also mentions commerciality and substantiality as things court will look to, however, looking at the decision in the *Acuff-Rose* case, it is clear that these two points are insignificant in application to parody. It is probable that Australian judges will agree that parody must use a lot of the original work to ‘conjure-up’ the original whilst also holding commercial use as no bar to the defence.

In 2014 the Australian Law Reform Commission published a report titled “Copyright and the Digital Economy.”79 This report looked at whether to introduce a broader, general “fair use” exception along the lines of the United States doctrine. In the report the Commission argued that such reforms would allow “transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit.”80 The report notes that the new provisions would have the same impact on moral rights as the current provisions but fails to comment on what that impact might be leaving it up to the “jurisprudence ... [which may] be expected to be developed to clarify what is good practice in regard to respecting moral rights.”81

**Case Scenario Revisited**

This case scenario will again draw on the facts of the case scenario in Chapter Four. This hypothetical will be used to demonstrate the inherent problems of parody versus moral rights, and attempt to discover some line of reasoning that may stabilise the balance between the two more equitably.

To recap on the facts, our players are Richard Burrows who has written the published novel called *The Western Front*, an historical Australian tale about the western suburbs of Sydney in the 1970s. The main protagonists are two Indigenous Australians growing up in Penrith. Then we have our university students who, as part of a creative writing project, rewrite *The Western Front*, with the main protagonists as two homosexual teenagers living in Glebe. The story line is almost identical but the writing is more contemporary in tone. Now let us assume that the story is in fact

---

80 Note 80 at 61.
81 Note 80 at 115.
a parody. The new adaptation *The Inner West Backside* imitates the tone of the original novel but changes the storyline to show dramatizations of smaller events. This could be interpreted either to show how homosexuals are portrayed as overly dramatic, or perhaps even that all of society is overdramatic when things are actually quite well-off, or it could be interpreted as aiming critically at the original work whose overdramatic plot line borders on the hysterical.

The lawyers for the university students (the defendants) have just filed a motion to plead fair dealing as a defence. The trial judge, who has not yet come across this legislation, is curious and allows it, much to the chagrin of Mr Burrows’ (the plaintiff) lawyers who were unaware even of its existence. The criterion for the success of this defence relies on a number of factors. First, is ‘fair dealing’ a defence for moral rights or only for copyright infringement? Second, is the adaptation defined as a parody? Third, if it is a parody was it still a ‘fair’ use for the purposes of parody?

**A Defence?**

As argued earlier in this chapter, fair dealing could be interpreted as a defence to moral rights. Obviously the plaintiffs will argue that, since moral rights legislation was enacted before the fair dealing provisions, its absence suggests that Parliament wilfully excluded the provision from applying to moral rights. They would argue that, given the incongruence between the two sets of principles, fair dealing cannot apply to moral rights for what is the sense of having such a right to apply to all usages of an author’s work except for those that make fun of it? A use which obviously attacks the author’s honour and reputation, the very heart of the purpose of moral rights?

The defendants will argue that, although the legislation specifically says parody “does not infringe the copyright,” using a purposive approach, that a government would not enact a provision that, if not also applying to moral rights, would be rendered null and void. That such a provision could not protect parody from extinction if it only protected it from the copyright holder and not the author. The copyright holder is less inclined to sue than the author over a parody in any case as a
parody in most cases does not harm the market value of the work, given the different audience markets, and in some cases even increases demand for the original. Thus it is the author’s sensibilities that will propel him to sue and stop any creative dealing with his work. In light of moral rights legislation, the most obvious way to read this provision, the defence will argue, is to use Section 195AS. That provision states that a person does not infringe the right of integrity if the person establishes that it was reasonable in all the circumstances to do that act. Thus the defendants must argue that, given the introduction of fair dealing, ‘reasonable’ must be read to include for the purposes of parody and satire. Thus the nature, purpose, manner and context in which the work was used must be found to be reasonable as it was for the purposes of parody.

Is it a parody?
Let’s assume our judge has agreed with the defence, in light of the fair dealing provisions, parody is a reasonable use and thus a defence to moral rights. The next question to plague the litigants (and the judge) is how exactly does one prove that a work is or is not a parody? As detailed earlier in the chapter, dictionary meanings will not help the cause, nor will a reliance on US authority. The US distinction between parody and satire, parody being a critique of the original work, and satire being a critique of society at large, is useless in the Australian context given that both genres are covered. Will the judge allow the defence to call in experts? What would an expert be? Someone from a literary background? Other authors? A publisher or a critic? Will the judge look to The Panel Case for authority? Here the burden of proof lies upon the defence.

Ideally we would wish the judge to look at this thesis’s definition of parody as ‘repetition with ironic critical distance,’ with a work found to have the following traits:

(a) repetition of another’s work – whether in style, quotation or other imitation;
(b) ironic inversion – recognising a transformation has taken place to the work, a critique or unexpected intention of the author; and
(c) critical distance – the work need not be mocking or ridiculing, but through the distance from the original text is able to comment upon the form, style or processes of writing and receiving texts.

Thus *The Inner West Backside* must have enough repetition of the earlier work to ‘conjure up’ the original. Without the recognition of the earlier work a parody is not made out. An ordinary, reasonable person must be able to acknowledge that the work is taken from an earlier work. The defence points out the obvious similarities, the plot lines, the tongue-in-cheek title as well as the dust jacket’s mention of the earlier work as all clues that would lead a reasonable person to assume the parodic nature of *The Inner West Backside*. The defence could then argue that the ironic inversion is made out through the dramatization of events. The same language is used to describe an event in *The Western Front*, however in *The Inner West Backside* the event is a ridiculously small one, for example a storm that wrecks the property in the original is turned into a gale wind that upsets the protagonists’ potted dahlias in the parody. The defence will argue that this forms the critical distance, commenting on the over-dramatisation of the original work as well as the embellished language. Whether it is aimed at the genre of the original work, or the original piece in particular, does not matter as regardless of whether the piece is a parody or satire it would still be a “reasonable use.”

If, as is most probable, the judge eschews looking at literary definitions, instead relying on dictionary definitions and US authority, the defence would have to work even harder. Let’s assume they don’t call in any experts (which is likely in practice) and merely rely on *The Panel Case* and ordinary lay meanings of parody. Will this alter the result? In line with the authority in *The Panel Case*, the defence would have to prove the parody was fair and genuine for the relevant purpose and that no hidden or oblique motives are behind the work. It is difficult to determine what fair and genuine in relation to parody will mean, there being no interpretation of these words in the judgement. The judge may just concede that, once the parody is found, as long as there is a genuine comment on the original work, and the parody is not just a rant against a particular author, that the defence is made out. If the judge prefers to rely on dictionary meanings, the defence would then have to prove that humour is involved. Irony is not always comic, thus this step would be a stumbling block to our
defendants. It would come down to the aesthetic tastes of the particular judge, something no one could predict beforehand.

As this case scenario has portrayed, there are no clear answers when it comes to moral rights litigation and fair dealing for parody and satire. It will be a long time before cases are raised to look at these questions as without some kind of precedence lawyers would have to advise their clients to settle before cases go to court. Not only does this mean that no cases will be generated to establish precedents and guidelines for the future, it will also mean that governments will not notice the underlying problems inherent in the system. They will be fooled into thinking the two different sets of rights are working peacefully when in actual practice they are merely forcing parodists to quickly settle out of court and deterring any future uses of other people’s work. It also will not be apparent in the market place: we will not see a sudden stop to parodic movies, literature, and games as most of these texts are produced in America where moral rights only apply to visual artists. It will only be by artists petitioning the government to re-examine the legislation that any notice will be taken. With so many other threats hanging over artists and creators, this small problem would hardly be top priority for the major firms. Authors with enough respect to rally against moral rights interfering with parody, would be wont to do so, given that they are the more likely to be targeted by parodies. It is the struggling artists, the innovative, transformative artists and authors who will suffer.

**Conclusion: signing the death warrant**

Do moral rights signal the death of the parodist, or does the fair dealing legislation grant them new life? Parody is a very controversial issue. Many people see parody as undermining works of cultural or historical value, while others see parody as necessary for the progression of art as well as society. Others simply enjoy poking fun at recognisable texts, sharing “in” jokes and making light of serious literature. It is undeniable that parody forms a large share of the entertainment market, while also being a genre that literary theorists take quite seriously. It is within this context that parody and satire are protected in the same domain as criticism, review and education. In a way it is the closest one can get to a freedom of speech in Australia.
Moral rights seek to protect an author’s honour, reputation and integrity: in other words their feelings. It is supposed that an author has ties to his or her work akin to a mother and her child, and that this special bond should not be distorted by others. It should be remembered, however, that there comes a day when every mother must send her child into the world to be criticised, bullied and ridiculed. Protecting the sensibilities of an author to their work should be balanced with the right of society to criticise and point out their folly. If we treated every word an author wrote as gospel sent from heaven, our literature will become stagnant and grow stale. It is from parody that we learn the vices and folly of our contemporary art and from there grow from it, constantly destroying and ridiculing but also re-inventing.

As an exception to copyright infringement, fair dealing for parody and satire is but one step in the right direction to recognising the value of parody and satire to society. Unfortunately, if not considered properly, moral rights may cause parody and satire to become illegitimate genres. It is hoped that judges will not discard literary theories on parody when it comes to definition, although this is unlikely given law and literature’s constant disdain for one another. Without this amalgamation of literary, legal, and ordinary meanings parodists are left unprotected. It is not just a matter of an author being brave enough to accept the challenge of litigation after creating a work, one must also note the hesitancy publishers will bring to any work that may seem parodic or disrespectful.

Any decision on moral rights must take into account the intention of Parliament to safeguard parody and satire, and accept that society intends parody to be seen as a “reasonable” use of copyrighted work despite the offended sensibilities of the original author. It is impossible to predict the fine line between a fair and unfair parody, once again demonstrating how moral rights and parody are incongruent with each other, their opposing ideologies ruling each other out. As suggested in the next chapter, perhaps the solution lies in a complete overhaul of the moral rights regime, transposing the rights to a legislation more suited to such non-economic complaints and intense scrutiny of texts.
CHAPTER 7

Damages and Defamation

_Ubi jus, ibi remedium_

The Latin maxim above may be translated as “for every right there is a remedy.” Rights and remedies are mutually dependant, meaning that without a remedy, the right does not exist and vice versa. Moral rights in Australia have a variety of statutory remedies. This chapter will look at the problems of compensating a non-economic loss and whether the remedies satisfy the rights. It will also question whether these remedies are appropriate or if they indicate an economic rationale rather than the spiritual or philosophical underpinning of the moral rights rhetoric.

While media industries — such as large advertising companies, production companies and publishing companies — can afford to negotiate, independent transformative artists are unable to settle, given that they have very little to bargain with. The threat of compensation itself is enough to deter authors and artists from transforming and critically engaging with contemporary cultural works.

This chapter will then turn to an analysis of the consent and waiver provisions and whether these sections ameliorate any power the statute wished to confer upon authors. It asks whether the consent provisions contradict moral rights ideology and queries why, if derogatory treatment is an affront to a person through the author–work bond, monetary compensation can satisfy the claim.

The second part of this chapter deals with defamation. The reader may be somewhat confused as to why defamation is contained within a work focused on moral rights. Defamation has nothing to do with moral rights or copyright. The _Copyright Act_ is a Commonwealth statute whereas defamation laws are State based. Defamation concerns things written or said, while moral rights concern the use of someone else’s

---

work. Despite this, many situations will arise in a moral rights claim that will overlap with defamation law. Although it is unclear how much (if any) influence defamation case law will have on moral rights, it is worthwhile considering how courts traditionally explore concepts such as reputation, the relevant community standard and reasonable use.

The last section of this chapter takes the relationship of moral rights and defamation even further. It is this author’s contention that defamation may present an opportunity to save moral rights. Transposing moral rights from the Copyright Act to be incorporated within defamation statutes could solve most of the tensions and apparent inconsistencies previously canvassed, a proposal outlined and argued below.

**Compensating a non-economic loss**

When it comes to compensation the differences between copyright and moral rights become quite obvious. Copyright infringement, brought by the copyright holder, is a civil action that can also lead to criminal penalties in certain circumstances. The role of remedies in a copyright case is to rectify the commercial loss suffered by the copyright holder. In that case, the effect on the market, the effect on sales and other economic loss is taken into account to produce a quantum of damages. Moral rights, however, compensate a non-economic loss. Although any loss in sales would be a factor taken into account, it is not necessary. Moral rights, being a wrong against a person, should properly be termed a tort. Having what could be seen as a tortious remedy within a commercial regime is but a further example of the ill-fitting nature of moral rights within a copyright framework.

Supposedly, a person who is bringing a moral rights action isn’t after economic compensation. It is also not about punishment, but more a public example of how their work was mistreated, and an action to rectify such. The problem, as demonstrated in the field of defamation law, is that once something goes public even retractions and media apologies do little to rectify the loss to reputation.\(^2\) Once the public has seen the adaptation, parody or other transformative work, it cannot be

\(^2\) “Money and reputation are not commensurables.” Per Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 177 CLR 118 at 150.
deleted from their memories. If the transformative work has demoted the original author’s reputation in the eyes of the public, a public apology and removal of the work is too little too late. Also when we talk about moral rights as protecting the ‘bond’ between author and work, it is difficult to imagine how any form of monetary compensation can equate to the injury of what is in essence a spiritual tie.

Division 7 of the Copyright Act 1968 sets out the remedies available for infringement of moral rights which includes an injunction, damages, declarations, orders for public apologies, and reversal or removal of derogatory treatment:

195AZA Remedies for infringements of author’s moral rights

(1) Subject to section 203, the relief that a court may grant in an action for an infringement of any of an author’s moral rights in respect of a work includes any one or more of the following:
(a) an injunction (subject to any terms that the court thinks fit);
(b) damages for loss resulting from the infringement;
(c) a declaration that a moral right of the author has been infringed;
(d) an order that the defendant make a public apology for the infringement;
(e) an order that any false attribution of authorship, or derogatory treatment, of the work be removed or reversed.

An injunction would be sought by most authors before publication or performance of the transformative work. Pre-trial injunctions are notorious for being quite hard to obtain as the original author must show the potential for harm before any harm has even occurred. More significantly, however, is the fact that the original author is more likely only to learn of the transgression of their rights after publication. Traditionally, judges in defamation law have been hesitant in granting injunctions to restrain publications due to the opportunity it breeds to limit freedom of speech.3 They generally consider, despite the damage to reputation, that damages serve as an adequate remedy.4

Given the context of a digital age, in particular the rise of online content and social media, it is even more difficult to rectify any moral rights transgression Whereas as in the case in Canada in which a shopping centre purchased a sculpture by Michael

---

3 See for example ABC v O’Neill [2006] HCA 46 per Crennan J and Gleeson CJ at 8.
4 Church of Scientology of California Inc v Reader’s Digest Services Pty Ltd [1980] 1 NSWLR 344 at 351-2 per Hunt J.
Snow, but then hung Christmas decorations from it,\(^5\) the moral rights transgression could easily be rectified by removing the offending decorations, it is not so simple when it comes to literary transgressions. A parody or adaptation in visual media would quickly be transposed to YouTube. Even if the service provider were to take down the infringing content there is the problem of jurisdiction. American service providers situated in America, which does not have moral rights except for visual artists, would be under no obligation to remove offensive works without a great deal of pressure. Social media sites also contribute to the complexity by allowing quick dissemination of texts. Even if, by some impossible feat an author were able to remove their work from internet sites a digital trace of that work would always remain. Whereas a hundred years ago an injunction to stop publishing a work may have meant that a book would quickly fade from memory, these days the situation is different. Once a text has been published electronically an author cannot ‘recall’ the text from individual consumers who then could pass the work along or garner media interest and dissemination.

The nature of contemporary mass media itself also creates inherent problems. Any litigation or threat of litigation would do more to advertise the transgressive work and popularise it then rectify the reputation of an author in the public eye. Australians tend to bat for the underdog, so the parodists or adapter would probably find more support through such media scrutiny than the original artist who, depending on the media spin, could do further damage to their reputation.\(^6\) A public apology, likewise, would do little to ameliorate harm and repair any honour or integrity in the eyes of the public.

Thus we are left with economic compensation. A moral rights breach is not the same as copyright. A person has not necessarily used work without permission as the copyright holder may have been in a different mind to the original author. As the market for the transformative work would be different to the market for the original it would not make sense to account for loss, and by statute no actual economic loss need be proven. Likewise an account of profits is unnecessary as the remedy is a

\(^5\) *Snow v Eaton Shopping Centre* (1982) 73 CPR (2d) 204.

deterrent rather than a punishment. How does one put a price on honour or integrity? An author would be at pains to show that since the publication of the transformative work their work has somehow been devalued, as often transformative works garner interest in the original. How then does an author show that although he may have made money from the publication, and in fact become more popular, it is not the sort of popularity that author wanted. How does an author show that people are buying his or her books out of ridicule rather than respect?

Any monetary damages would be assessed by a judge as to the degree of injury. In other words, it will be an invented sum based on the particular judge’s whim. The first judgement on moral rights awarded the original artist a modest sum of $6,000.\(^7\) In the *Pitbull* case the damages were assessed at $10,000.\(^8\) The first case considered that quantum should reflect that which would have been awarded for copyright infringement,\(^9\) and the second case followed this reasoning.\(^10\) This is despite the difference between a copyright infringement that looks to commercial gains and a moral rights infringement that is a claim “for injured feelings arising from the infringement.”\(^11\) In the false attribution case of *Adams v Quasar Management Service Pty Ltd*\(^12\) the court held that, as the defendant had received damages for breach of contract, no further damages were warranted. If you take into account the cost of litigation and perhaps further loss of reputation by bringing the litigation, it hardly seems worth it.

For the fictitious Romantic author (whom moral right ideology holds out as existing), damages would seem an inadequate remedy for the insult and abuse upon their work. The author–work bond theory reinforces the idea that derogatory use of a work is a trespass on the person, on their spiritual relationship with their creations. While some artists may feel their honour or integrity has been impugned, the motivating factor and the remedy they seek could suggest economic gain is their motivating factor rather than an admission by the transgressor of the wrong...
committed. Otherwise an apology or declaration would more than suffice. It should be noted that the Act itself encourages economic compensation rather than any other remedy. For example Section 195AZA(3) states:

(1) In deciding whether or not to grant an injunction under subsection (1), the court must consider whether the parties have made any attempt to negotiate a settlement of the action and whether it should adjourn the hearing or further hearing of the action for the purpose of giving the parties an appropriate opportunity to negotiate a settlement, whether through a process of mediation or otherwise.\(^\text{13}\)

Theoretically damages would normally be composed of two parts. Firstly there is the damage to reputation followed by compensation for mental pain and anguish. If any actual loss can be proven, such as a fall in sales or a contract cancelled with the requisite proof of causation, then special damages would also comprise a part. As any actual damage to reputation need not be proven, only the potential for harm, it is up to the judge to decide the quantum of damages. In defamation cases in the past, it was proved correct authority for appellate courts to judge the amount of the award in comparison to personal injury claims.\(^\text{14}\) Thus an award for damage to reputation that far exceeds the damages awarded for loss of limbs or going blind can be said to be excessive. It is noted that it is not to be used as a precise comparison tool but merely as some sort of general criteria to test against. This comparison, which initially was prohibited at trial stage, is now allowed to be given to the jury but with the very precise direction that the award is their decision alone to make.\(^\text{15}\) However since the Uniform legislation (discussed below) damages have been further reigned in, capped and indexed.

Because reputation is not bought and sold, it is only in the courts that money values are assigned to the consequences of infliction of harm to reputation.\(^\text{16}\) It is unclear whether such comparisons will be made with moral rights claims, although if the theory that damage to a person’s reputation should not exceed

---

\(^{13}\) Copyright Act 1968 (Cth) Section 195AZA ‘Remedies.’


\(^{15}\) For a complete discussion of this authority see the Seminar Materials, in particular the paper delivered by Scot Wheelhouse in Defamation – The Principles, practices and Trends for compensating words that injure (presented in Sydney on 23 March 1995), held by Legal and Accounting Management Seminars Pty Ltd (LAAMS) NSW.

\(^{16}\) Rogers v Nationwide News Pty Ltd (2003) 201 ALR 184 at 200
horrible injuries that can ruin a person’s life it is logical that this rule is applicable to damage of an author or artist’s reputation also.

In moral rights claims the jurisdiction is to be exercised by a single Judge of the Court. Not only is this single judge responsible for deciding what a reasonable person does or thinks, they also decide the level of compensation without reference to any guideline figures. The Act does include a number of mitigating factors; matters that can reduce the level of compensation. These include:

(a) whether the defendant was aware, or ought reasonably to have been aware, of the author’s moral rights;
(b) the effect on the author’s honour or reputation resulting from any damage to the work;
(c) the number, and categories, of people who have seen or heard the work;
(d) anything done by the defendant to mitigate the effects of the infringement;
(e) if the moral right that was infringed was a right of attribution of authorship—any cost or difficulty that would have been associated with identifying the author;
(f) any cost or difficulty in removing or reversing any false attribution of authorship, or derogatory treatment, of the work.\textsuperscript{17}

The best outcome for any author would be to settle by negotiation. Given the very few cases it is probable that this is what is happening in practice.\textsuperscript{18} Here, however, the original author holds all of the power. This is because lawyers for the defendants would appreciate that, without precedent, there is no prediction as to how any litigation would turn out. Thus they would encourage their clients to discontinue their work or settle on a sum of damages to avoid turning up to court to face the unknown. Thus the original author evades the bad publicity from bringing litigation and the transformative author concedes defeat.

The idea of damages – compensating for the breach of a sacred bond– goes against the philosophical underpinnings of moral rights. Yet it is naive to think that moral rights, at their very core, are not entangled within an economic rhetoric. To illustrate,

\textsuperscript{17} Section 195AZA
there is an example in the book *Moral Rights Protection in a Copyright System* by David Jones to support moral rights.\textsuperscript{19} A Western Australian artist, he was commissioned by Alan Bond to create a sculpture for the foyer in an international hotel to be completed in time for the America’s Cup in 1988. A few months into the project his contract was cancelled as Mr Bond had another artwork in mind. For all of Mr Jones’ fervour that his work was site-specific and it was an outrage to his integrity as an artist, his justifications within his speech reveal his true motivations.

\begin{quote}
“I took a leave of absence...three months without salary”\textsuperscript{20}
“The actual contract was for twenty thousand dollars for a work from the floor 2.5 metres up to the ceiling and over ten metres long. Anybody here in the art market knows that price is a joke”\textsuperscript{21}
“He came up with an offer and I went back home. I was feeling pretty pleased.”\textsuperscript{22}
\end{quote}

Frequently he refers to the time and cost of the project, he laments at how little he is paid despite his abilities as an artist and compares the money Mr Bond spends on tap fittings as opposed to his artwork. It was not so much the tearing down of his unique artwork that angered him: it came down to the economic implications. People were going to see that artwork in a prominent public space and therefore enhance his reputation and his ability to earn more money as an artist. Mr Jones took Alan Bond to court but settled for a large sum of money further indicating the economic basis of his moral rights claim. There was no apology given and no ‘rectification’ of the injury apart from an undisclosed sum of money that was privately negotiated.

When Senator Williams introduced the moral rights bill as an act designed to foster respect for authors,\textsuperscript{23} it would have been more honest to use the word ‘empower.’ Most moral right claims could have been settled contractually. Having a moral right empowers artists and authors to have the right to include such clauses in their contracts. An artist may have little bargaining sway with, for example, Australia Post, when commissioned to make a stamp. When Australia Post then licenses that

\begin{footnotes}
\item[20] Note 19 at 118.
\item[21] Note 19 at 119.
\item[22] Note 19 at 121.
\end{footnotes}
stamp out to another company to make mugs or placemats, the artist can now object on moral grounds. They can claim that the editing, cropping and colour changes are mutilations. What they are really objecting to is the disempowerment and loss of control over their original artwork. As discussed below, however, this power is delineated by Australia Post including specific consent clauses in its contracts, clauses over which an unknown artist has little power to negotiate.

Where the real power lies in terms of moral rights is where an original author is confronted with a transformative use. Transformative authors – adapters, parodists, satirists, fan fiction authors, etc. – are at the bottom rung of the ladder. They have little to negotiate with and while they may be able to change their work to better suit the original author’s tastes, what is lost is the ability for these authors to honestly and critically examine contemporary texts without adhering to the whims of an overly sensitive original author. It is society that will suffer the loss of secondary creative products and rather than fostering respect the awards of damages will only reinforce the idea that authors and artists, their sense of honour and integrity, can be bought for a price. This is a price that industries such as publishing and media can afford, but which independent transformative artists and authors cannot and are thus left in a vulnerable position.

**Consent and Waiver**

The very notion of consent is beguiling when it comes to moral rights. It is inconsistent with the concept of a natural right of personality that the author should be able to contract out of it and clearly shows the flaws in the underlying ideology of moral rights. Section 195AWA in the *Copyright Act* 1968, sets out the conditions for consent:

(2) It is not an infringement of a moral right of an author in respect of a work to do, or omit to do, something if the act or omission is within the scope of a written consent genuinely given by the author or a person representing the author.

Further guidelines are given in subsection (3):

(3) a consent does not have any effect unless it is given:
(a) in relation to specified acts or omissions, or specified classes or types of acts or omissions, whether occurring before or after the consent is given; and
(b) in relation to either of the following:
   (i) a specified work or specified works existing when the consent is given; or
   (ii) a specified work, or works of a particular description, the making of which has not begun or that is or are in the course of being made.

(4) A consent may be given by an employee for the benefit of his or her employer in relation to all or any acts or omissions (whether occurring before or after the consent is given) and in relation to all works made or to be made by the employee in the course of his or her employment.

(5) A consent given for the benefit of the owner or prospective owner of copyright in the work or works to which it relates is presumed, unless the contrary intention appears in the consent instrument, to extend to his or her licensees and successors in title, and to any persons who are authorised by the owner or prospective owner, or Moral rights of performers and of authors of literary, dramatic, musical or artistic works and cinematograph films by such a licensee or successor in title, to do acts comprised in the copyright.

Section 195AWB also allows consent provisions to become invalid if made on the basis of duress or false and misleading statements. These provisions raise some important questions. First, the idea of consent itself counters the philosophical underpinning of moral rights and leads to the conjecture that moral rights are in fact just another form of economic entitlement. Second, the drafting of consent clauses is problematic given the above provisions. In particular the ability of an employer or copyright licence holder to give consent contravenes the notion of an inalienable right. Third, and perhaps most importantly, the issue of bargaining power reveals that the consent provisions have been drafted to help the publishing, marketing and advertising industry leaving transformative authors with no protection. In other words, the provision fosters the curtailment of transformative creative endeavour while protecting the major players in the media industry. As Brett Cottle puts it:

‘Would you mind if someone fooled around with your best work for a hundred thousand dollars?’ If they are honest they will usually answer: ‘No, I would not mind, everything has its price’... That to me places a further question mark on the philosophical basis said to underpin the rights in question.24

---

If moral right infringements attack the integrity of a work and, by association, through the author–work bond, the author themself, then why would an author consent to such treatment? The answer is simple: money. Despite the Romantic ideal of the author genius who merely wishes for his work to remain preserved unblemished for future generations to marvel at his or her creativity, it is naive to think that economic entitlements do not enter the equation.

The consent clauses allow publishers to avoid litigation over matters such as covers for books, editing, marketing strategies and advertising campaigns as these modifications can be specifically drafted in a consent clause. However, for a transformative author there is no way to draft a consent to an adaptation when the transformative author would be unaware of what specific part of the transformation the author might later object to. They would have to first finish the product and then send it to the author for objections. In practice, this would mean cost and delay for the transformative author, for which, at the end, the product might have to be scrapped altogether. This situation is not conducive to fostering secondary creativity.

The Explanatory Memorandum states that “the consent under this provision may range from a specific consent to a comprehensive consent. It is not necessary to specify the actions or omissions in relation to a work that are consented to under such a comprehensive consent.”25 The legislation however does not provide for a comprehensive consent and its language suggests specificity as a prevailing requirement. There is nothing ambiguous in the language and so it must be interpreted with reference to the word’s ordinary usage and meaning, despite the Memorandum.

In particular, as detailed in the chapter on parody, for parodists and satirists, obtaining consent is actually antithetical to their purposes. Yet relying on untested fair dealing provisions would mean hesitation on the part of publishers to commission or buy any parody or satire without moral right consent by the author. An author would in most cases not consent to a parody given that it may cause the

author embarrassment in the eyes of the public and demean his or her reputation. This in itself could result in stagnating critical endeavour.

The rule that a consent clause is invalid if made under duress is interesting. What would constitute duress? The threat of cancellation of a $100,000 contract to a starving artist could be seen as considerable duress. Duress is a feature of contract law where there is a concern that contractual assent of one of the parties is affected by unlawful pressure. While threats to physical injury are the most obvious example, economic duress is also valid, as Balkin and Davis state:

> There is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent and that the victim must have entered the contract against his will, must have had no alternative course open to him and that the pressure must be such that the victim’s consent to the contract was not a voluntary act on his part.\(^{26}\)

While mere commercial pressure will not suffice to prove duress, “a threat to break an existing contract can constitute such economic duress.”\(^{27}\) A threat to not make a contract with an author or artist unless moral rights consent is given will likely not be illegitimate pressure as it is perfectly legal for someone to refuse to contract. However if the threat is to break an existing contract, then economic duress may be established although the court will question why the author didn’t pursue an action for breach of contract.

In contract law, a finding of duress renders a contract voidable rather than void.\(^{28}\) The plaintiff is then left with the choice of rescinding or affirming the contract, a rule which is designed to protect third parties from claims of duress made after part completion of the contract. If judges follow this rationale when considering duress in a moral rights consent claim then an author can complain that the consent was made under duress after the contract has been signed and once the editor or publisher has sent the final proofs, but theoretically cannot once the book is published.


\(^{27}\) *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705

Thus economic duress will not help authors and artists who fail to find publishers and promoters without such consent given. It will become common publishing industry practice to draft with detail such consent clauses ameliorating the power of moral rights.

The right to pass on consent to further parties is also quite unusual. The rights themselves are non-transferable but the withdrawals of the rights are. Presumably this is to protect third parties who approach the copyright holder for permission and expect that permission is already granted. For example, a copywriter may sell the copyright to an agency who then passes on permission to advertisers and marketers. Again this is a protection that clearly favours industry yet offers little to the transformative authors and artists who would be unable to define, with a sufficient degree of specificity, the transgression of moral rights by the transformative use.

When the bill for Moral Rights was first drafted, waiver, instead of consent was initially provided for. This would have allowed flexibility for authors to either effect a waiver completely or partially. It would have been beneficial for transformative authors (those that have a good relationship with the original author anyway) as they could get a complete waiver for an adaptation. The current consent provisions may provide the same result on behalf of the original author but, for adapters, it would still be impossible for the consent clause to be specific enough to cover all uses of the work.

Consequently the consent provisions stand as a stark contrast to moral rights rhetoric. They suggest that the author–work bond is nothing more than a further economic consideration, while transformative use of contemporary cultural works are further discouraged.

**Relationship with Defamation**

The purpose of the law of defamation is to strike a balance between the right of reputation and freedom of speech.  

---


Defamation law concerns a remedy for people who have been defamed publicly and is usually associated with the news media. Defamation is a tort and is a wrong committed against a person, much like moral rights. Defamation can be anything that’s published, “communicating matter”\(^{31}\), which lowers someone in the estimation of others. This includes publishing something which holds someone up to hatred, ridicule or contempt, or which leads people to shun or avoid them, or damages their business reputation.\(^{32}\) This thesis will examine the NSW statute as an example of the Uniform laws applying across each state and territory.\(^{33}\) The Defamation Act 2005 came into force in 2006, repealing the earlier 1974 Act. Cases that dealt with the earlier law still remain authority except where they contravene specifics in the new law.

The two main issues in a defamation action are:

(a) Whether the ordinary reasonable reader would, in fact, have read the matter complained of as conveying those imputations, and (b) whether that reader would, in fact, have understood such imputations as being such as to cause ordinary decent folk in the community, taken in general, to think the less of the plaintiff.\(^{34}\)

Defamation has a strictly objective criterion. If a reasonable person does not find the matter defamatory then there is no case. Of course if special knowledge of facts are needed to prove defamation evidence may be called.\(^{35}\) It is not necessary to actually name the person defamed, only that it was published and the person is otherwise identifiable from the matter.\(^{36}\)

The main relationship between moral rights and defamation is this criterion of a ‘reasonable person.’ This reasonable reader in defamation cases is taken to embody a set of standards normative to general society.\(^{37}\) In Readers’ Digest Services Pty Ltd v Lamb\(^{38}\) it was held the general test is for the hypothetical referees to “share a moral or social standard by which to judge the defamatory character of that imputation,

\(^{31}\) George, P. Defamation Law in Australia, 2nd Ed, LexisNexis Butterworths, NSW, 2012 at 125.

\(^{32}\) Note 31 at 528.

\(^{33}\) Note 31 at 89.

\(^{34}\) Farquhar v Bottom [1980] 2 NSWLR 380 at 385 per Hunt J.

\(^{35}\) Hough v London Express Ltd [1940] 2 KB 507 at 513-515.

\(^{36}\) Consolidated Trust Co Ltd v Browne (1948) 49 SR 86 at 89 per Jordon CJ. Also see Rolph, D Reputation, Celebrity and Defamation Law, Ashgate, England, 2008 at p74-75.

\(^{37}\) Rolph, D Defamation Law (2016) Thomas Reuters, Pyrmont NSW at 116

\(^{38}\) Readers Digest Services Pty Ltd v Lamb (1982) 150 CLR 500 at 505
being a standard common to society generally.” According to Roy Baker this suggests the courts need to consider prevailing values but where there is no consensus they lean to the majority despite lack of empirical evidence.\(^3^9\) In *Hepburn v TCN* the issue arose where a registered medical practitioner was accused of performing legal abortions. Despite the fact that the procedures were lawful it was held that, as some readers could be advocates for the pro-life movement, the plaintiff would suffer injury to reputation.\(^4^0\) This case seemingly opens the test from the standard common to society generally to an “appreciable” or “substantial section,” or even a minority view. David Rolph argues that this approach is much closer to the test adopted in America but has not been widely followed in cases since.\(^4^1\) In *Radio 2UE* it was re-affirmed that the general test applies in all cases involving all aspects of reputation.\(^4^2\) For a transformative author the general test would appeal as an “appreciable” artistic minority could well see injury in a work in a way that the general society would not.

As noted in Chapter Four, it is unknown whether moral rights will consist of a subjective or objective view of whether a work has been subjected to derogatory action that causes harm to their honour and reputation. If a wholly objective element were involved then the question would be whether a reasonable person would find the action offensive to an author’s honour and reputation. Likewise, in defamation cases, harm is identified by the effect it has on others, rather than the effect on the plaintiff.\(^4^3\)

This determination involves a contested view of an ordinary person within the community. If we lived in a homogenous society there would be no qualms with this process. We do, however, live in a heterogeneous and pluralistic society with sub-communities espousing different moral standards and a sense of honour. People who identify with a religion, nationality, or culture, may find something offensive even if


\(^4^0\) *Hepburn v T.C.N. Channel Nine Pty Ltd* [1983] 2 NSWLR 682

\(^4^1\) Rolph D, *Defamation Law*, Thomas Reuters, Pyrmont, NSW, 2016 at 116

\(^4^2\) *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16 at 46-47.

\(^4^3\) *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16 at [5]
the general public (if there is such a thing) believes the action to be reasonable. For example, a person off the street may not see any harm with a painting being turned into a rug. An Indigenous Australian however may see that action as quite offensive as people are literally walking over their spiritual art.44

In terms of moral rights, will judges choose the art community as the purveyor of moral standards, or will they rely on a general consensus only? As in defamation it is likely that no expert witnesses, surveys or polls will be undertaken to determine whether the infringement would harm the author’s reputation within one or more of a sub-community.45 It will come down to the particular judge’s ‘intuition’ or general knowledge of the community at large. Lyrissa Lidsky points out that this is an absurd state of affairs given that “community values are a moving target.”46 Writing on the difficulty with defamation cases she criticises this system as “allowing courts to favour the values the community ought to hold over those it actually does.”47

If moral rights were enacted to recognise the particular sensibilities of authors and artists, it seems quite contradictory that the standard would then come down to the reasonable person. As in defamation, it is not whether the artist feels insulted by the infringement, but whether that action devalues him or her in the eyes of the community. This community, one would assume, would be mostly made up of the artistic community. This is a community that would be comparably over sensitive to the general community, and would have a lower threshold to meet.

Derogatory treatment is not the same as defamation, yet it involves a number of similar characteristics. Derogatory treatment can consist of any use of a work, yet not all uses will be derogatory. Only uses which would lead a reasonable person to think less of the original author would be derogatory. Similarly something is

44 See for example the test espoused in Sim v Stretch [1936] 2 All ER 1237 at 1240 where a publication is defamatory if the effect is “to lower the plaintiff in the estimation of right-thinking members of society generally.”
46 Lidsky L, “Defamation, Reputation and the Myth of Community,” (1996) 71 Washington Law Review 1, 1-49 at 8. While this is an American viewpoint it holds true in a similar heterogeneous society such as Australia.
47 Note 46 at 9. Also see Baker, R, Defamation Law and Social Attitudes: Ordinary Unreasonable People, Edward Elgar, Cheltenham, UK, 2011 for a critique on the reasonable person test in defamation.
defaming only if the words, read by a reasonable person, could be taken to say or imply something that would cause the community to think less of that person.\footnote{Radio 2UE Sydney Pty Ltd v Chesterton [2009] HCA 16 at 37.} As Balkin and Davis put it:

The tort of defamation would be too narrowly restricted were it limited to those statements which all concur in as demeaning of a person. It is sufficient if the imputation is one which might lead at least a group of people to think less of the plaintiff, provided that the statement is made to members of that group.\footnote{Note 26 at 529-530.}

In defamation the person defamed need not be referred to by name. It will be sufficient that some people, who have knowledge of the extrinsic circumstances, might reasonably believe the statement referred to the unnamed plaintiff.\footnote{Morgan v Odhams Press Ltd [1971] 1 WLR 1239 at 1244 Note 26 at 536.} In contrast, moral rights imply an actual use of the work, tied up as it is within copyright doctrine. A heavily critical review or parody of a work that falls short of using, citing, or naming the original, yet clearly refers to it for a small number of people, would not be considered an infringement of moral rights as there is no “doing” of anything to the work.

A further element defamation has at its disposal that moral rights lack, is the ability for group identification. In moral rights only the original author may file a claim. In defamation a person from within a group, the group of which is defamed, may file an action. They are prevented from filing as a class: rather they can sue as individual members of that class.\footnote{Bjekle-Peterson v Warburton [1987] 2 Qd R 465 at 466} Generally, for a finding of group defamation, the smaller the class, and the more specifically referring to that class, the easier it will be for an ordinary person to infer that the plaintiff was referred to. In other words as long as the class of persons is sufficiently narrow that allegations can reasonably refer to each member of the class an action will be available.\footnote{Bjekle-Peterson v Warburton [1987] 2 Qd R 465 at 466} For example if a newspaper article criticised Indigenous Australians in a way that is defamatory, the only action lies with a suit against racial vilification. If however the article specifically refers to a tribe, a person who is known to be among that tribe may more readily be seen as being referred to. Historically this has been hard to prove. Take for example the plaintiff in \textit{Knupffer v London Express Newspaper Ltd} [1944] AC 116, who was a
member of a political party. The article in question implied that a certain character in the party was an agent for Hitler, yet the plaintiff was unable to prove that general society would believe the representative character referred to him. If, however, someone has a notorious reputation it is possible to argue this point even if not named.53 In moral rights only the author can sue. If, instead of an article, the newspaper published a photo of an artwork that was community owned and made by that tribe (in that they consider the community to be the artist rather than individuals), the individuals of that tribe would have to prove to be the author. In most cases this would be difficult and thus no remedy exists.

A further issue to decide in defamation cases is whether there has been a publication. As the tort of defamation protects the opinion that others hold of a person, not one’s estimation of oneself, the defamatory statement must be made to someone other than the plaintiff.54 Moral rights have no such limits. An artwork bought by a private person for display in their own home, is still subject to moral rights even if the derogatory treatment would not be seen by anyone else. This is because of the ‘potential’ for harm rather than any actual harm being needed to satisfy the provisions.

As discussed above, moral rights centres on monetary relief rather than any proclamation or apology to restore the author’s reputation and sense of honour. The new defamation legislation offers better defences and a more mediation and apology centred list of remedies. However, despite this it is noted that the principle remedies remain compensation and, to a lesser extent, injunctions.55 The Defamation Act (NSW) is part of ‘uniform legislation’, a compromise act between eight states to enact substantially similar laws. This means no longer do plaintiffs have to be careful where they elect to sue.

The new uniform defamation laws differ from the old laws in several important respects. The old distinction between libel and slander has disappeared. Plaintiffs can now only sue in one state or territory instead of several at once. Damages or payouts

53 See Consolidated Trust Co Ltd v Browne (1948) 49 SR (NSW) 86
54 Rolph D Defamation Law Thomson Reuters, Pyrmont NSW, 2016 at 69
55 Note 54 at 349.
have been reined in, and there are now several new and improved defences and ways in which defamation matters can be settled before they reach the courts. The caps on damages means it has to be a very serious case of defamation to make it financially viable for a plaintiff to sue.

Under the uniform legislation, truth alone is a defence, repealing earlier laws that insisted that it also be for the public benefit. Additional defences to the common law which still apply include justification, contextual truth, absolute privilege, honest opinion, innocent dissemination and triviality. For moral rights the only defence is whether something is a reasonable use which may or may not include the fair dealing provisions contained in the Act.

The ideology behind the defamation defences is to abstain from restricting freedom of speech. If something should be known to the public, or an honest opinion is publicised, then the courts should not have the power to stop such social criticism. Conversely with moral rights: that is exactly the power the courts have. A parody which expresses an honest opinion about the work is still a derogatory use. An artwork displayed on a website that criticises the work or places it in context of other works, is still derogatory use even if it is in the interest of the public to have access to these opinions and criticisms.

The damages awarded in defamation cases have to have a rational relationship to the harm sustained by the plaintiff and a limit of $250,000 is set subject to a statutory indexation mechanism. The court is instructed to disregard any malice or intent of the defendant when awarding damages and multiple causes of action can be assessed as a single sum. Moral rights claims have no set limit to damages and no restriction on proportionality.

There are many circumstances where moral rights and defamation will overlap. The first moral ‘right’ concerning the right of attribution is unlikely to meet defamatory

---

56 Note 54 at 175.
57 See ABC v O’Neill [2006] HCA 46 “the public interest in free communication of information and opinion, which is basic to the caution with which courts have approached the topic of prior restraint of allegedly defamatory matter.” At 14.
58 Defamation Act 2005 (NSW) Section 35.
59 Note 58 at Section 39.
criteria in that there has been no loss of reputation, only the loss of the ability to enhance their reputation.\textsuperscript{60} Work that has been attributed to another person generally would also not fall under defamatory as there is no direct statement made about the author\textsuperscript{61} unless that author could prove the public would make certain conclusions from the wrongful attribution. Defamation will occur however when the artist or author’s name is attributed to a work of which they are not the author.

The right of integrity shares the most similarity with defamation and in such claims the two would overlap. Defamatory alterations to a work, that lower the author’s reputation, would in most cases be found as both derogatory treatment and a defamation. A plaintiff would have to elect which route to take. Defamation would lead to capped damages, whereas with moral rights it is unknown what range of damages would be likely to be given. It is unclear whether a plaintiff could sue on both accounts and receive separate damages for each, however, it is probable given the principle against double compensation, that a defendant would not be required to compensate twice for one action, a situation most courts would not allow.\textsuperscript{62}

**Right of Integrity in Defamation legislation – a better fit?**

Throughout this thesis moral rights have been presented as a problem for copyright jurisprudence. Moral rights are seen as incongruous to the notion of property rights and an uneasy fit into a system designed primarily to control an economic market. This section offers a possible solution to this problem. It argues that incorporating moral rights into the *Defamation Act* of each state would not only strengthen the underlying rationale for moral rights, that of increasing awareness and respect for literary and artistic authors, but it would also make the rights less complex and clearer for transformative users.

Before the specific moral rights were enacted defamation was seen as a way to enforce these rights. Proponents of moral rights argued that these provisions did not go far enough. This section argues that it would have made more sense to increase

\textsuperscript{60} See *Zorich v Pietroff* (1957) 152 Cal App 2d 806 where a screenplay writer was not given screen credit. His claim in defamation was denied due to no damage to his reputation.

\textsuperscript{61} Note 26 at 534.

\textsuperscript{62} See *Adams v Quasar Management Service Pty Ltd* [2002] 56 IPR 385 for an example.
protection by adding extra provisions into the Defamation Act, rather than burying them inside the Copyright Act. Ratifying a treaty is the domain of the Federal Government; however, with negotiation with the States it would be possible to strengthen the Defamation Act to include such rights.

There are many reasons why the current protection under defamation was considered to fall short of the Berne Convention’s requirements. Firstly, the Defamation Act had different provisions and case law depending in what State the claim was filed. It was seen as complex and confusing when choosing jurisdictions. Now that uniform legislation has been passed this problem has been solved.

Another reason why the defamation law was determined to be insufficient to cover the moral right of integrity was that the rights do not survive the death of the author. This was a contested issue at the Berne Convention. Germany, who took moral rights from a monist view (that they are part of copyright), had a term of 30 years after the author’s death, whereas France saw the rights as indefinite. As the members of the Convention were eager to have the common law countries agree to the treaty on the basis that their defamation laws covered the provisions, it was decided that it would be left to each country to decide on the duration of protection. The civil law countries, which see moral rights as protecting both personal and cultural interests, have extended durations. In the member states respective Acts, the durations range from no protection after the author’s death, to the same period as copyright, to indefinite duration. According to the words of the Convention, it is up to member states to define their own parameters and there is no obligation from the Convention to continue to protect rights post mortem.

The next question is: should this protection be extended? If the underlying rationale for moral rights is the protection of the author–work bond, it is to be surmised that this bond is broken upon the author’s death. To argue that the author’s heirs have a right to continue this protection is unconvincing in that the rights as they stand are not perpetual. A somewhat arbitrary line is drawn at the 70 year mark arguing that moral rights do have an end point. If the justification of moral rights centres on respect for the author’s own perceptions of his or her honour and reputation, it is only logical that that justification diminishes upon their death. This would mean that
transformational authors would be able to re-work cultural texts sooner than their entry into the public domain and would decrease the possibility of stagnating future innovation and creative endeavour.

The main problem with the existing defamation rights is their classification as negative rights. There are no positive obligations on people dealing with the work which would mean the right of attribution would disappear. As discussed above, the failure to acknowledge an author is not defamatory as there has been no damage to their reputation only the loss of the opportunity to enhance it. There are provisions in the Copyright Act, as well as contractual provisions, that provide analogous protection. It had been argued that these related laws did not give the broader protection envisaged by the Berne Convention.63 By integrating a specific provision arranging for attribution in the Defamation Act this problem can be overcome. The problem that may arise with this is the obligation of positive rights, i.e. a right which commands a person to an action, such as “when using a work the original author’s name must be attributed”. Traditionally torts are seen as negative rights which only impose upon a person the obligation to refrain from doing something. This is not always the case however as negligence imposes a duty of care upon citizens, arguably a positive one. Remedies for torts such as defamation, for instance injunctions, rarely include positive obligations. The Court can, however, make an order for specific performance to ensure that the defendant carries out their legal obligations.

A substantial argument for redirecting moral rights into defamation is its re-classification as a tort. Copyright infringement, while typically a civil action, is also a criminal act, whereas moral rights involve civil remedies. A tort, derived from the French word for ‘wrong,’ is loosely defined as an injury to a person or their property and stems from a breach of duty imposed by law.64 This re-classification would move the focus of moral right arguments from copyright concepts of originality and authorship to centre on the actual harm caused by the act, while also distancing

moral right infringements (a civil infringement) from the more harsh criminal penalties of copyright contravention.

It could be assumed that copyright infringement, being also a criminal act, would exude more authority for artists. This is not the case. Within the *Copyright Act* moral rights do not attract criminal sanctions and so their power is diminished. Anti-piracy advertisements continually criminalise the copyright infringer in the eyes of the public. Having moral rights within the same act could be seen as portraying transformative users as criminals also. On the other hand, despite the anti-piracy warnings, it could be argued that the public do not respect copyrights in the same way that they would respect an assault or defamatory remark. Copyright is seen as a way authors can make money rather than enhancing their reputation. Most of the public commit copyright infringement on a daily basis, either unaware, or in defiance of the copyright laws. Burnt DVDs, downloaded songs, pictures pulled from Google, and paragraphs cut and pasted from Wikipedia into essays, are not seen as reprehensible criminal actions, although most people do not condone them. Having moral rights present as part of defamation centres the debate on an author or artist’s reputation rather than the limiting of a cultural product. It brings the argument back to harm rather than exploiting proprietary interests.

As discussed in Chapter Two, the author–work bond concerns the relationship between an author and his or her creation. It is a peculiar property right that attaches to the person–: assault on the work is an assault on the person, a trespass of their property. This right would be made clearer to the general public if it were to be explained in the terms of defamation. This would ease the confusion caused by the author–work bond’s apparent relationship to copyright.

Moral rights are internationally recognised as a form of intellectual property, hence their incorporation in most countries’ Copyright regimes. They are defined as such due to their attachment to creative works yet it should be remembered that they are not really property. Property gives a person a right to exploit and enforce rights as well as a measure of control over the work. The owner of the copyright in the work is the proper property owner, not the author. In this way moral rights are a mere
caveat upon that owner’s rights. It is the damage to reputation that is the core
determiner of the rights: the realm of defamation.

Moral rights are not ‘copyrights.’ They exist in a separate discourse and operate from
a different ideology divorced from traditional copyright objectives.
A strong argument for the reclassification into defamation law would be the ability
to protect indigenous authors and artists who are constrained by traditional copyright
limitations of authorship. While in defamation a class cannot be defamed, individual
members of the class would have an action.65 This would mean works that are
collectively owned and collaboratively made would still have an integrity right to
their creative works rather than being limited in the present legislation due to the
lack of a solitary author.

In practice the changes to defamation law would not have to be drastic. A simple
provision included under Division Two ‘Causes of Action for Defamation’66 to
include something along the lines of:

1. A person has a cause of action for defamation in relation to the
derogatory treatment of an artistic, literary, musical or performance work
made by that person.
2. A person who is a class of persons who collectively made or collaborated
on an artistic, literary, musical or performance work has a cause of action
for defamation in relation to derogatory treatment of said work.

This would also mean the defences available for defamation could be used to defend
a moral rights infringement.

First: the defence of justification.67 The transformative author can prove that the
defamatory imputations carried by the derogatory treatment are substantially true.
For example an adaptation that makes obvious some bias in the original, (for
example the racism shown to exist in Gone With the Wind by the parody The Wind
Done Gone), could be held to be justified on a reasonable person’s reading of the
original text. The justification defence under the Uniform Acts is not limited by

65 David Syme & Co Ltd v Caravan (1918) 25 CLR 234.
66 Defamation Act 2005 (NSW).
67 Defamation Act 2005 (NSW) s25

208
restrictions showing that it also must be for the public benefit\textsuperscript{68} to reveal the truth making it easier for adapters and parodists to prove the worth of their secondary creation.

Second: the defence of honest opinion.\textsuperscript{69} If the derogatory treatment was merely presenting an honest opinion, which an honest person might hold based on material which was completely proper material for comment but is not the opinion of the original author, then the transformative author would be safe in publishing the work. As long as the opinion was one that was honestly held and not motivated by malice then the transformative author can defend the work.\textsuperscript{70}

Third: the defence of triviality.\textsuperscript{71} One of the most troubling aspects of moral rights concerns uses that could be held to be derogatory even if it is only in the mind of the artist. Given the little judicial guidance on the subject it is hard to foresee what is a reasonable use and how much the sensibilities of the first author will impact upon whether a use was derogatory treatment. The defence of triviality would help overcome these problems by squarely placing the criterion of reasonable in the objective category. If an artist is unlikely to sustain harm from the transformative use despite that artist’s ‘feelings’ then the triviality defence could be called upon. This defence is operative on the circumstances of publication.\textsuperscript{72} Thus a small local community group putting on a play for a local high school could argue that there is limited causative potency for the plaintiff to suffer harm.\textsuperscript{73}

A genuine argument for the transference of moral rights into the realm of defamation law is the idea of a jury rather than a judge deciding what is reasonable.\textsuperscript{74} A jury consisting of the ordinary public would give a clearer picture of what the community would see as unjustified use of a work. Rather than a judge, who may hold certain

\textsuperscript{68} Note 54 at 184
\textsuperscript{69} Defamation Act 2005 (NSW) s31
\textsuperscript{70} See Note 31 at 464. See Note 54, malice under the statutory regime will not defeat a defence of honest opinion (at 290).
\textsuperscript{71} Defamation Act 2005 (NSW) s33
\textsuperscript{72} Note 54 at 298.
\textsuperscript{73} See further Note 31 at 486.
\textsuperscript{74} Although under the Defamation Act 2005 (NSW) and similar provisions in other States and Territories the parties can elect to have a jury but it is the judge that assesses the damages payable. In South Australia and the territories there is no right to a jury trial.
opinions regarding aesthetics, attempting to define a reasonable use, a jury would provide a more tolerant attitude towards the public benefit of transformative use. The relevant community attitudes are more easily ascertained by the community rather than through a judge’s appreciation of those attitudes. This is not to say that the use of juries in defamation cases hasn’t itself attracted a large amount of criticism, as Baker notes:

Jurors are used not so much as a sample of public opinion as experts in public opinion. They are not asked for their personal response to the publication in question, from which might be inferred the general response of the community, but instead they are asked to consider the likely responses of ‘ordinary reasonable people’. The rule seems to arise from concern that, given its small size, the constitution of the jury may not accurately reflect that of society generally.

While perhaps still not ideal at least a jury injects a sense of everyday reality “in contrast to the cloistered lives of judges”. There is also however the fear of the “chilling effect” given by jury awards. The idea is that free speech, or the saying or publishing of things that are legal and would probably not give rise to an action, is deterred by the prospect of jurors misusing awards to punish the defendant rather than compensating the plaintiff. Despite this, the Law Council of Australia still believes it is best that juries determine the amount of damages payable in successful defamation cases.

---

75 Defamatory meaning is a question of fact for the jury: see Note 54 at 96. However, as seen in Roy Baker’s critique, a jury’s consensus is not without its own controversy (Baker, R, *Defamation Law and Social Attitudes: Ordinary Unreasonable People*, Edward Elgar, Cheltenham, UK, 2011). Note however at Note 74: there is no requirement for a jury.


77 Note 76 at 37.

78 As noted in the New South Wales Law Reform Commission, “Defamation- Discussion Paper 32” [1993] NSWLRCDP 32 “The prospect of large awards causes self-censorship of speech and writing...juries (under the guise of giving aggravated damages) may still award sums which reflect their primary desire to censure the defendant rather than compensate the plaintiff.” This can be seen in the record damages over the last few years such as in *Cripps v Vakras* [2014] VSC 279 (damages totalling $450,000), *Pedavoli v Fairfax Media Publications Pty Ltd* [2014] NSWSC 1674 ($350,000), *Polias v Ryall* [2014] NSWSC 1692 ($340,000), *North Coast Children’s Home Inc. trading as Child & Adolescent Specialist Programs & Accommodation (CASPA) v Martin* [2014] NSWDC 125 ($250,000) and *Fisher v Channel Seven Sydney Pty Ltd (No 4)* [2014] NSWSC 1616 ($125,000) to name only a few examples.

Overall, for transformative users such a translation of moral rights in copyright into defamation law would mean there is more certainty in what they can and cannot do. Artists would find more comfort and more stability in knowing that they can continue their creative expression as long as they are not defaming a person’s reputation on purpose.

There are of course a number of problems that may arise from such a transition. Given the insignificant use of the current moral rights legislation, convincing the government a change is needed would be a major burden. Also given the lack of awareness of moral rights it would be hard to find enough individuals and organisations willing to lobby towards such an effort. There might also be a backlash from authors and artists who, without fully understanding the moral rights restrictions on their future creative endeavour, would see such a move as taking rights away from them.

Taken as a whole, however, the idea of such a transference of rights holds many positive gains for transformative authors and may provide a solution in the future when moral rights awareness has arisen and the availability of trivial suits are opened. Transformative authors will be left to transform, adapt and parody works within copyright guidelines without the unnecessary limiting addition of worrying whether they may offend the original author’s sensibilities. Authors also are not left without a way to correct harmful uses that destroy their reputations as long as the use was not trivial.

**Conclusion**

For a moral rights transgression there is no way to put the plaintiff back into the position they would have been in had the transgression not occurred. Feelings have been hurt and reputations have been questioned. Righting a non-economic loss with monetary damages does nothing to undo the transgression of the work. In our digitalised world a copy of the adaptation will always survive somewhere, even if it is only in the minds of a select few. The reason the Berne Convention did not include a uniform remedy for the international parties could perhaps stem from the
inadequacy of any remedy. Moral rights legislation is purported to be about engendering respect rather than punishing transformative authors yet the remedies are incapable of fostering anything other than an economic disincentive. There has been no education for the general public leaving the impression that moral rights are about punishment and monetary gain after all.

The very fact that Australia allows an author or artist to consent to having their reputation tarnished and their feelings towards their work mocked leads the whole ideology into disrepute. It appears as a safeguard for media industries to continue to use and remodel prior work while transformative authors, those that create to express dissent, cultivate new expression and educate through expressive means are hampered.

This chapter has canvassed to what extent defamation terminology would interact with interpreting the moral rights provisions. The crux of defamation law is to balance the interests between freedom of speech and protecting someone’s reputation. For moral rights there is no consideration of freedom of speech being that the provisions are housed within copyright discourse. Terms such as ‘honour’ and ‘reputation’ have a history within defamation law yet it is unclear whether moral rights will adopt similar reasoning and interpretation.

The most important focus of this chapter has been the hypothesis of whether moral rights provisions would suit a defamation context better than a copyright one. This hypothesis has been explored from the practical implications, the theoretical underpinning of the idea, to the problems that might arise from such a transition. Overall the argument lends itself to suggest that defamation is a better fit for moral rights. Defamation law limits the curtailment of freedom of expression and opens the doors for transformative use while still protecting authors’ and artists’ reputations.
CHAPTER 8

Consent Culture versus Creative Commons

The ultimate consequence will mean the delimiting of access to knowledge and information and the free flow of ideas, as well as the stifling of creativity, all of which are necessary conditions not only for social but also capitalist economic development.¹

Copyright law is the vehicle through which we reward hard labour, recognise genius and creativity, encourage artistic and scientific experimentation and provide easy access to information that is for the benefit of our society. Constantly changing, these ideals have come full circle. We now reward not hard labour but who got there first and who has the most power to back up such claims, we discourage artistic and scientific experimentation, and limit access to information that is for the benefit of our society.

It has come to the point where pointing a finger and saying ‘you’re fired’ is an infringement against someone else’s trademark.² Patenting of scientific software, the attempts at patenting the human genome, and the restriction of access to educational materials portrays a society which values ownership over innovation. Economics has buried the ideals of creativity and of artistic and scientific experimentation and this situation is becoming increasingly worse. This chapter is a departure from the current thread of the thesis, that of the specific moral rights provisions: it is an attempt to show what the moral rights provisions are really about, - the excessive privatisation of intellectual property to the detriment of society. Moral rights are merely a further step in the use of intellectual property to curb and control artistic and scientific endeavour.

Whereas most of this thesis has concerned the why, how, and what of moral rights, using literary and legal analysis, this chapter represents a cultural interpretation of the direction of intellectual property law. This chapter attempts to situate this thesis as a part of the growing body of literature surrounding the threat of the over commodification of intellectual property and the growing concern for future creators. The chapter begins by looking at our society today, arguing that it is a hyper-referential culture consumed with recoding, remoulding and reworking cultural icons and symbols. The next section explores a future where intellectual property laws reign supreme and the price that future generations will pay for this. The third section examines the growing movement for a cultural commons as a reaction to the pressure of over-legislating creativity in an attempt to show how intellectual property can regain its original ideals. The chapter then examines alternatives before returning to the heart of the moral rights paradigm: can a modification of an existing work harm the honour and integrity of an author? That section asks whether the idea of honour and reputation in the society of today is even relevant and, if so, what are the real implications of modifying a work? The intention is to warn against the dangers of the over privatisation of cultural texts, a direction that the acceptance of moral rights doctrine symbolically represents. To allow the law to create a monopoly over who controls access to the full spectrum of information and knowledge, innovation and cultural materials, is to limit the potential of the future for innovation and experimentation.

Hyper-referential Culture

This section looks at the creative culture of today. It is an argument that we inhabit a ‘remix culture.’ While remixing, modifying and adapting have always had a part to

---


play in the history of textual production, now more than ever our creative culture is seen to be dominated by allusions to other texts. This section examines the idea of ‘free culture’ and how this culture is being eroded by over-zealous copyright regimes. It looks at how the internet has changed the landscape for creating and distributing texts as well as detection and enforcement of property rights. It looks at how society has moved beyond passive consumerism to actively engaging with texts. Ultimately, this section is another example of how the law fails to understand creative production and the consequences this has on our cultural capital.

We exist in a society made up of individual and collective identities. These identities are formed through interactions in social forums. People who participate in these forums become conscious of their shared experience and knowledge and thereby become subjects in communities of similarity otherwise known as culture. For our mass media dominated society cultural forms often take the shape of expressive texts that people recognise and share which makes them forms of cultural property. “[M]edia forms provide the cultural vehicles through which new social meanings are forged and stress their constitutive role in the creation of identity.” Media and expressive texts reflect the values of the society of the day as well as reinforce them. Therefore our reaction and acceptance of these forms determine new media forms and texts, as what does well in the market will be continued while anything that is not accepted or made popular is discontinued.

Given this circle of influence, consumers are agents in the production of meaning. As Jean Baudrillard argued in 1981, signs have taken priority over the things signified. We relate to each other through our shared cultural inheritance which has increasingly become inundated with signs and symbols taken from the advertising and entertainment markets. When communicating with each other, codes such as “Barbie” denotes a certain stereotype of person without having to explain the metaphor. We include references to *The Simpsons* in our daily discourses to point

---

6 Note 5 at 30.
out irony in everyday situations, and we react with a shared sense of nostalgia at certain music from our adolescent years. As Rosemary Coombe puts it:

Scholars in literary theory, communications, film studies, and political theory point to the social importance of media-circulated cultural forms and their political significance in contemporary consumer societies.9

In the twenty first century consumers have stepped up from mere influence through economic means (i.e., we buy a type of book or product based on advertising thus that advertising strategy is re-implemented and vice versa) to becoming ‘conducers’10 in the process of making texts. We now inhabit a space where we can publicly comment, share, change, connect, mix, collage, re-shape, rewrite and change cultural forms to suit a particular need.

We now inhabit a ‘remix culture’, a culture which is dominated by amateur creators – creators who are no longer willing to be merely passive receptors of content. Instead, they are demanding a much broader right, a right to mashup and remix material – to take on the role of producers – to cut, paste, sample or jam with content, in order to produce something which is distinctive of their own social and creative innovation.11

This hyper referential culture, or ‘remix culture,’ brings about a different set of property law problems. Cultural forms that are owned by media conglomerates exist with sets of rules and rights attached to them which make commenting and re-mixing them problematic. As media products become part of a shared culture, the question then becomes who owns this culture and should they hold a monopoly over its use.

An example of this property debate over culture is easily reflected in the creation of rap music. Rap music is often described as a hyperlinked web of references. Just as T.S Eliot’s The Waste Land does, music in this genre requires extensive footnotes.12 As James Joyce is often referred to as using literature as a library,13 rap musicians use prior music, including beats, rhythmic strains and lyrics to connote other

---

9 Note 5 at 6.
10 Reuveni E, “Authorship in the Age of the Conducer,” (2006-2007) 54 Journal, Copyright Society of the USA 285- 343. “Consumers who both consume creative works and simultaneously add creative content to those same works are known in some industries as ‘conducers’” at 286.
musicians, eras and emotions that are shared by the people who listen to the genre. Take for example Missy Elliot’s “Funky Fresh Dressed:”

It features a sample hook by the influential female rapper MC Lyte, and begins with the line, “Here’s a little story that must be told.” It’s from Rodney Cee’s “Stoop Rap,” a track from the 1982 hip-hop flick *Wild Style*, and it is followed by another sample, “and it goes a little something like this,” culled from Run DMC’s “Here we Go.”

Missy Elliot uses these references as shorthand to evoke shared nostalgia and emotion that is tied up with the cultural properties they are taken from. This is a tool used in film, art, architecture, literature and indeed every expressive text. It is not about stealing, or riding on the backs of others, it is more about using the lexicon of shared cultural forms to evoke messages and emotions in audiences.

Hyper-referential, adaptive and inter-textual: these are the distinguishing hallmarks of our culture. These features of cultural production have always been allowed by society and traditionally have been out of the law’s grasp. This ‘free culture’ is what allows us to share books we have purchased with friends, loan CDs and DVDs, create book clubs, amateur theatre, readings with friends, high school cover bands, copy dances off video clips, sing along to our favourite music, and generally engage with texts we have bought without requiring any extra permission. Once the preliminary sale has been transacted, the law, the original author, and the copyright holder traditionally had no other control over the use and enjoyment of the property acquired unless it was being copied for sale. These other uses, ‘transformative’ uses, traditionally do not concern authors and copyright holders as they do not decrease the value of the work, and are seen as the normative way of engaging with texts.

The internet has changed this basic premise of ‘free culture’ in two important ways:

(1) More access to texts, software and easier publication; and

---

17 This is known as the “First Sale Doctrine” in the USA, and in Australia as the “exhaustion of rights” doctrine.
(2) More awareness by the copyright holders over possible breaches of copyright.

The internet and digital technology have marred the distinction in creative industries between professional and amateur.18 Individuals can purchase relatively cheap software such as ‘Photoshop’ to produce professional quality digital photographs. Similar software is also available for sampling songs, creating video and comics. Online journalism also allows individuals that are not associated with a media outlet to comment and criticise on events in the world and stream and share their blogs and websites through social media. In this culture any individual can be a publisher of creative works, and other people’s works are freely available to work with, modify, add-on, criticise and comment on.

The consequence of easier publication is that uses to which the law traditionally turned a blind eye are now easily found by copyright holders who wish to stop such uses of their works. As people crop, share and chronicle their lives on-line, lawyers for copyright holders who own the rights to music, brands and creative works can now find these uses to stop them. On-line fan sites, amateur theatre posted on YouTube, online book clubs as well as similar ‘harmless’ transformative uses of cultural capital can now be found and stopped. These are uses that do not harm the economic interests of the copyright holders yet are still seen as a transgression on property rights as permission has not been sought. As digital technologies and the internet encourage creative expression, experimentation and engagement with works, copyright law acts in the opposite direction, constantly trying to bar access to information and prevent transformative use.

As long as copyright holds on to Romantic conceptions of authorship these practices will continue to be unacknowledged, illegitimised, and branded illegal. The Romantic conception of authorship constrains the act of authorship to a singular genius whose work becomes immutable once fixed in a medium of expression. It allows no scope for recognition of other players in the creation of meaning, and fails

to acknowledge that all texts are built upon those of others. Ignoring this fact while criminalising others who wish to build on these texts once again severs the chain of progression for creative texts, causing texts to become constrained to a limited time frame and fixed medium. Re-writing works for a different context, changing players to comment on gender or stereotypes is not about stealing or copying but rather about engaging with shared experiences to draw attention to particular social values and critique society. The law’s failure to engage with this process provides a block for creative producers who are either forced to abandon plans or to use material already in the public domain. Consequently, this means that society misses out on one of our historically important ways of challenging convention and opening up dialogue.

Consent Culture
A constant worry for any creator or user is the future of a ‘consent culture.’ This is a culture where every attempt to use or engage with cultural texts is blocked by restrictions, access permits and legal challenges. It is feared that this aspect of regulation will become a prominent feature in the lives of intellectual properties and will cause great burden on all users of texts and products.\(^\text{19}\) This fear is not ungrounded. There are numerous examples of the ways that intellectual property laws can restrict and deter harmless uses of texts. One of the more extreme examples can be found in Lawrence Lessig’s book \textit{Remix}, where a woman videoed her 13 month old child dancing to a Prince song and uploaded it to YouTube to show family across the globe.\(^\text{20}\) The Universal Music Group promptly sent a cease and desist letter and demanded YouTube take the offending video down and threatened action. Unfortunately these cases are not rare. It is not seen as ridiculous to threaten individuals who are clearly not commercial pirates with lawsuits over harmless uses of texts. This section examines the ways society is geared towards a permission culture. It investigates how information is locked up, the barriers to getting permission to use intellectual property, and the impact copyright can have in our future.

\(^{19}\) For scholars that voice this fear see the works of James Boyle, Siva Vaidhyanathan, Lawrence Lessig and Kembrew McLeod.

\(^{20}\) Note 15 at 1.
The law’s refusal to acknowledge our hyper-referential, ‘remix’ culture causes problems not only in the creative fields. Education, research, science and technology also suffer under the strain of over-protective monopolistic copyright laws. These laws have the effect of ‘locking up’ research and knowledge that could be used to benefit society. There are numerous examples of disciplines that are constrained by such laws. This section briefly examines two: libraries, and software and technology. These examples highlight the burden of intellectual property regimes and the very real problems they create, not just for innovators but, for society itself.

Libraries
Libraries may be the one example of a historical cultural commons left in contemporary society. They are basic repositories of our culture available for the public at no cost. As technology develops, and more and more works become digitalised, the role of the library is being constrained by copyright laws. In addition to loaning out books, libraries are an important institution involved with the preservation of works.\(^{21}\) As this preservation method involves making multiple copies of a work, distributing these among multiple institutions and migrating works to new formats, copyright law becomes a restrictive barrier to many efforts at preservation. Although Australian copyright law allows exemptions for the purposes of preservation,\(^{22}\) there are gaps where libraries are forced to abandon preservation processes. TPM (Technological Preservation Mechanisms) themselves present problems for libraries as, although they might be exempted from any criminal charges at removing them, they are still costly and challenging to remove. ‘Orphaned’ works also present challenges, as there can be no permission sought if the author is unknown and so there can be no preservation. Libraries are also forced to ‘lock-up’ their repositories and bar free access to protect the commercial viability of the works procured, even after any realistic commercial viability has long since passed. Jessica Coates argues that:

A more permissive legislative approach to the preservation of copyright material is unlikely, however, until legislators are convinced that allowing for


\(^{22}\) See *Copyright Act* 1968 (Cth) Section 110B.
format shifting and multiple copying will not undermine the copyright owner’s commercial market.\textsuperscript{23}

Under s200AB there is a ‘flexible dealing’ exception for the sector, however there have been questions as to whether the provision is broad enough given it is limited by the purpose of the dealing\textsuperscript{24}, does not include patrons using materials for their own research and does not include sound recordings or films.\textsuperscript{25}

Performers’ moral rights also present challenges for libraries as preserving live performances requires the consent of every performer, a time-consuming and costly enterprise that compromises their ability to perform preservation activities. There is also a question as to whether digitising work to a different format will fall under the exemption of s195AT(5) or the more general ‘reasonable’ exemption. It may be a question that libraries would rather not risk:

In many cases institutions are more comfortable in deleting or withholding public access to digital content where copyright issues cannot be resolved— even if unsuccessful efforts have been made to identify or locate copyright owners. Although any potential liability for damages might be small, the possibility of legal breach itself appears to dissuade use.\textsuperscript{26}

The case of Aaron Swartz illustrates many of the issues libraries are grappling with. Swartz ‘hacked’ into MIT’s campus network (while he was a student at Harvard) and mass downloaded millions of scholarly articles from the JSTOR database.\textsuperscript{27} Most universities provide access to this database to their students, however, the licence agreement restricts mass downloading. Swartz was charged with numerous offences including unlawfully obtaining information from a protected computer, despite the fact he could have accessed this information from his own university network. From a copyright standpoint the issues are whether this is ‘stealing’ in light of the fact it is analogous to checking out too many books from the library. It also begs the question whether libraries should restrict access for students, allowing them certain download limits. On face value alone this seems a harsh restriction on learning and education,


\textsuperscript{25} Note 24 at 45.

\textsuperscript{26} Note 24 at 40.

\textsuperscript{27} Reynolds S, “Copywrong?” The Peak, 27 August 2011.
However, for libraries it may just help them avoid getting into any legal battles over access.

Another worrying issue is schools in Australia (Primary and Secondary) paying for material that is already freely available. Under a compulsory licensing regime, schools pay almost $56 million a year to copy material, some of which is freely available online. These ‘draconian’ laws might “eventually become prohibitive” meaning students and teachers will find the breadth of knowledge out there out of reach.

Disturbingly, as books and creative works become more digitalised, access to them is becoming stricter. To buy a novel on your iPod or iPad, the copyright licenses vary from not allowing you to keep a copy on another machine to a warning to not allow others to borrow your iPod. As libraries begin to accumulate digital copies of books there will come a time when even borrowing a book from the library will require entering into a licence agreement, paying a fee, and agreeing to extensive terms and conditions. The days of lending a good book to a friend may soon be over.

**Software and Technology**

Computer programmers write down a set of instructions that are then turned into a ‘source code’, which is then turned into a code that a machine can read ‘machine code.’ These sets of instructions then become programs that perform functions. As this is an idea expressed in written form it is then copyrightable. In Australia, under s10(1) of the *Copyright Act*, a literary work is defined as “a table, or compilation, expressed in words, figures or symbols” and “a computer program or compilation of computer programs.” This has been the state since the *Copyright Amendment (Digital Agenda) Act* 2000. The copyright protection protects the source code only.

---


29 Note 28.

30 *Copyright Act* 1968 (Cth) Section 10(1)

rather than the function of the program meaning a program can be recreated that performs the same function with a different code.\textsuperscript{32}

Programmers draw upon prior lines of code in their ordinary course of business.\textsuperscript{33} Programs are written according to what other programs are popular so that they can work within those systems. They also often turn to ‘decompilation’ which is akin to reverse engineering, taking the program apart to understand it and build something similar. While computer companies may have felt safe in the knowledge that their programs can now be sufficiently ‘locked up,’ the very act of giving code copyright protection spawned a whole new way of sharing and encouraging creative innovation: ‘open source code.’ This is where the beginning of the commons movement started. This is examined in the next section.

Turning to the use and misuse of copyright one need go no further than Alice in Wonderland. Lewis Carroll’s text belongs in the public domain. By converting the text into digital form companies have managed to recapture the original copyright holder’s rights. Adobe’s e-book edition states that:

\begin{itemize}
  \item COPY No text selection can be copied from the book to the clipboard
  \item PRINT No printing is permitted of this book
  \item LEND This book cannot be lent or given to someone else
  \item GIVE This book cannot be given to someone else
  \item READ ALOUD This book cannot be read aloud\textsuperscript{34}
\end{itemize}

The act of turning Carroll’s work into a digital copy has eroded the rights of the public in public domain works. Not to mention that children or blind people cannot even have the book read aloud to them. The act of copying has given a company even more rights than the original author and copyright holders could have even conceived of.

In terms of moral rights, computer programs fit uneasily within its ideology. Computer programs are drawn from others, adapted, modified and used to fulfil functions that are obvious. In the UK computer programs are exempt from moral

\textsuperscript{32} Data Access Corporation v Powerflex Services Pty Ltd (1999) 166 ALR 228
rights protection.\textsuperscript{35} There is no such exemption under Australian legislation, so theoretically the authors of computer programs have a right to attribution and integrity. The derogatory treatment must be to the code itself, not the graphics, sound or text. To the ordinary observer one would not see a program that allows one to play Solitaire as ‘original’ nor highly inventive. Yet the programmer who has turned the simple card game into a set of instructions is at the same level as a poet. That programmer’s honour and integrity must be taken into account if the source code for the program is tampered with.

The above illustrates the absurdity and, at times the danger, of over legislating intellectual property. The aims of copyright to strike a balance between private property rights and the public good have been tipped enormously towards the companies holding those rights. This has resulted in a ‘locking up’ of knowledge, research and the ability to express oneself creatively. The next section looks at how getting permission is yet a further barrier to creative expression.

\textit{Getting Permission}

Requiring permission off an author or a copyright holder means asking for the liberty or licence to do something. In respect to copyright holders generally this equates to economics. If what the permission seeker is doing will decrease the value of my property I decline, if it will increase not only will I give permission but I will also charge for the use and part of the royalties of everything that comes from that use. This is so even though the copyright holder has no part in the activities of the permission seeker, but merely sits back and watches the value of his property increase. If we visualise the intellectual property as a shop and the copyright holder as a landlord, this would mean that not only does the landlord demand rent but also a percentage of all sales within the shop. The logic being that without the shop there would be no grounding for the permission seeker’s wares, hence but for the copyright holder’s property, the permission seeker could not create a business.

Moral rights are meant to be held above economic terms. They are rights concerning integrity and reputation. Yet in practice and reality they will also boil down to ‘how

\textsuperscript{35} \textit{Copyright Designs and Patents Act} 1988 (UK) Section 81.
much.’ Unless a creator has economic power, the prospect of their work being used for (as an example) an advertisement at a premium price could well let them overlook any negative associations. A parody which may or may not include negative associations where the parodist can offer little in the way of monetary compensation is less likely to obtain permission.

On the part of the transformative author, ‘permission’ becomes a large stumbling block. A publisher will not accept a work that has not already gained permission. The transformative author must track down all the authors whose work has been adapted. If there is more than one author for one text, they must have both authors’ permission, if the author has passed away they must deal with the estate: this is on top of asking the copyright holder’s permission. The author is unlikely to give permission unless it benefits them in some way, i.e. money. The legislation states that, for an action of attribution, it is enough if all reasonable steps were taken to find the author. However, for the right of integrity, the actual treatment of the work has to be reasonable rather than the means of getting permission. This means that if permission is not obtained and a written consent not procured then a publisher will not accept the work. This means only the wealthy can afford to become transformative authors. With all the technology available today, all the knowledge and all the young talent out there, it will only be the established, wealthy authors who will be able to get their work to an audience. Imagine if Shakespeare’s works were still under copyright today. Imagine the landscape of the film industry if the laws we have in place today had been around since the 1600s? How much creativity and innovation would have been restricted and lost? Imagine a future where we no longer buy books and put them on our bookshelves to come back to whenever we feel the urge. A world where you would be committing a crime if you were to lend a book to a friend. Imagine a society so scared at infractions of copyright that every book, film, song and artwork must be rented not bought. That all creative works can no longer be owned by anyone but for a fee can be viewed for a limited time. Imagine walking into an aerobics class, paying an entry fee and then paying a fee for listening to every song that will be played.

This would be a world where creators cannot stand on the shoulders of giants, cannot comment on contemporary works, where parody and satire are genres learnt only in
history books. All musicians would have to work under a company with licences to allow them to use common riffs, beats and melodies. All researchers and scientists would have to pay licence fees for every study and article mentioned or critiqued in their work. It is not hard to see that this is a world that would stifle creativity and it is also not hard to believe that unless we start to reign in this copyright madness it could become a very real threat.

An even larger debate in the world of copyright is the extent to which strict patenting and copyright laws hamper the progress of science and health technology. Given this subject is a tangent to the ideas expressed in this thesis the idea of patenting the human genome and other scary intellectual property debates is not discussed. However it is worth noting that it is not only the arts, literature and education sectors that are being limited by over-protection of copyrightable materials but also things as important as research for illnesses and disease and science and innovation. A restrictive future will complicate more than we can imagine given the fact that most things in our lives have some form of copyright connotation, from the clothes we wear, the books we read down to the medicines we purchase and the medical tests we need.

This is a future we do not wish for the next generation. We have the technology available to widen education, knowledge and power. With education and information technology we can give power to the underprivileged and allow for a more democratic society. However with the pursuit of money and monopoly on power we have turned the other direction, attempting to restrict this power over knowledge, over education even over expression. Until the public is made aware of what is happening in the world of copyright no one will address these problems until it is too late. It is time for education on copyright principles and practice and time to ask society where we really want our future direction to be.

**Creative Commons**

The idea of universal access to research, education, and culture is made possible by the Internet, but our legal and social systems don’t always allow that idea to be realized. Copyright was created long before the emergence of the Internet, and can make it hard to legally perform actions we take for granted on the network: copy, paste, edit source, and post to the Web. The
default setting of copyright law requires all of these actions to have explicit permission, granted in advance, whether you’re an artist, teacher, scientist, librarian, policymaker, or just a regular user. To achieve the vision of universal access, someone needed to provide a free, public, and standardized infrastructure that creates a balance between the reality of the Internet and the reality of copyright laws. That someone is Creative Commons.36

Frustration with the over-protection of copyright is being expressed by authors and artists themselves. Despite the moral rights rhetoric, authors and artists do not always see themselves as akin to the Romantic conception of the solitary, genius author who wishes their created texts to remain static, unchanged and unused. Increasingly the artistic and literary communities are expressing contempt for the ‘lock down’ procedures of intellectual property law as they embrace the reality that culture is formed in a discursive fashion, building and manipulating prior works in conversation with users. Severine DuSollier argues that:

Anti-copyright sentiment is indeed rising from the ranks of authors who no longer see copyright as anything but a hegemony of financial interest that presents an insurmountable hindrance to freedom of creation.37

This frustration can clearly be felt and seen by the introduction of creative commons licences. These licenses depart from traditional copyright regimes in that they allow an artist or author to freely disseminate their work and allow other creators to comment, modify and appropriate at will as long as the derivative work is also open to the same freedoms.

The creative commons movement started in the arena of computer software. It is often stated to be ‘born’ out of Richard Stallman’s MIT laboratory in the late nineteen eighties.38 The fabled story is that Stallman was frustrated over functions and improvements he had added to a printer that was termed a copyright infringement. From this frustration began a network of open source computer code.39 This was a code that was freely available to everyone to use and modify as long as subsequent users also allowed others to freely use their derivations. This started the

36 Creative Commons, ‘About’ at http://creativecommons.org/ (July 2012).
38 Note 37 at 283.
39 Note 37 at 284
Free Software Foundation and the ‘GNU’ project. Subsequently in the early nineties, Linus Torvald shared an operating system with a similar licensing scheme “LINUX” which is used today all over the world as an alternative to Microsoft and other operating systems that don’t allow user modification and experimentation.

In France this idea quickly caught on in the art scene. Antoine Moreau and the Copyleft Attitude Movement created the ‘Free Art Licence’ which encourages diffusion, sharing and appropriation to further the creation of artistic works. Other creative industries have followed suit:

- The Design Science Licence for science and artistic creation;
- The Free Music Public Licence;
- The Open Audio Licence of the Electronic Frontier Foundation;
- The HyperNietzsche Licence for intellectual research;
- La Licence Ludique Générale;
- La Licence de Libre Diffusion de Documents;
- The Adelphi Charter;
- The Consumer Project on Technology (A2K Initiative);
- Creative Commons and the iCommons project;
- The Yale A2K Initiative; and
- Unlocking IP Research Project.

41 Note 16 at 280.
42 Note 37 at 285.
43 Written by Michael Stutz and part of the GNU project the license can be found at http://www.gnu.org/licenses/dsl.html (September 2012).
45 Created by the Electronic Frontier Foundation in 2001, the organisation now prefers people to use the creative commons ‘Share-Alike” rather than their licence: https://www.eff.org/ (September 2012).
47 Written by Oliver Fontan in 2000, mainly a licence for the gaming community http://jeuxlibres.free.fr/lld.htm (September 2001).
51 See http://creativecommons.org/ and http://icommons.org/ (September 2012).
52 http://www.law.yale.edu/intellectuallife/7118.htm (September 2012).
These initiatives have been started by the creators themselves rather than the users of the material. It is interesting that these projects come from authors and artists as they are rejecting the very framework that is set to protect them. It highlights the use of the author’s plight by industries (in particular the movie industry and companies such as Disney) as a political call to arms to strengthen copyright, rather than a real issue with authors themselves, a situation not dissimilar to the bookseller’s wars in the eighteenth century. Authors and artists realise that increased pressure on copyright laws affect their ability to produce new works even if they protect previous texts. Using contracts to licence their works they can out manoeuvre these laws and allow control over their derivative works. Authors and artists are not ‘giving up’ their copyright: instead they are enforcing and protecting them in a more democratic and practical way. These creators understand that derivative works will happen whether licensed or not, and so they allow it to happen within limits set by themselves. As DuSollier puts it:

> What unifies copyleft across the disciplines of computer science and the arts is the shared belief that mutual exchange of knowledge and creations is mandated by an understanding of such work as the “collective property of humanity.”  

The creative commons organisation is a user-generated database of licenses that are open for use. Users choose a license to suit their needs ranging from non-commercial use only to all and any derivative uses. The “Share-Alike” mechanism allows an author to prescribe that any use of their work is acceptable as long as the derivative work is similarly shared on the database. An example of such a licence is below:

> You are free: to copy, distribute, display, and perform the work, and to make derivative works under the following conditions: you must attribute the work in the manner specified by the licensor; you may not use this work for commercial purposes; if you alter, transform, or build upon this work, you may distribute the resulting work only under a license identical to this one. For any reuse or distribution, you must make clear to others the license terms of this work. Any of these conditions can be waived if you get permission from the licensor. Your fair use and other rights are in no way affected by the above.  

---


54 Note 37 at 285.

55 Available at [http://creativecommons.org/licenses/by-nc-sa/2.5/au/](http://creativecommons.org/licenses/by-nc-sa/2.5/au/) (September 2012).
This is not a new movement, nor an unusual one. One of the best-known creative commons databases is “Wikipedia”\(^56\) where users generate the content but no copyright is claimed on the work produced. The reason authors give up their rights to include their work on these sites is that they allow quick and easy dissemination of their texts, getting their work out there, but more importantly there is the basic premise that everything is built upon someone else’s work and allowing less restrictions on use encourages and fosters creative activity which is a benefit to all of society.

The usefulness of such an organisation is that secondary users can quickly see from whom it is they need to get permission, and use a work without having to contact a lawyer first. It is like a central registry, where an artist can find out straight away whether an artist allows for distortion or whether permission is required. For the transformative author it is a gateway to express oneself through the use of previous cultural material without the deterrent effect of draconian copyright regulations.

Many people question how an author or artist can engage in an economic market and, at the same time, allow people to freely use their work. This is the prime rationale for copyright regimes after all: to allow an author to profit from their labour. However in today’s society profit is not calculated the same way it would have been in eighteenth-century London. As argued above, copyright holders often argue that they are losing profits from trespasses on copyright where there may never have existed a profit in the first place. As Lawrence Lessig argues, there are two groups of consumers out there:

1. Those that will buy the product, be it a CD, book or DVD despite it being freely available on the web due to fandom, or wanting an original copy as well as the extras that come with the product such as the booklets in CDs or the DVD extras.
2. Those who would never have heard of the product in the first place unless it is available on the web but who would never purchase the product anyway.\(^57\)

Of course there is considerable overlap between the two groups:

\(^{56}\) www.wikipedia.org
\(^{57}\) Note 16 at 284 (paraphrased).
Some part of (1) will download Cory’s book instead of buying it. Call them bad – (1)s. Some part of (2) will download Cory’s book, like it, and then decide to buy it. Call them (2) – goods. If there are more (2) – goods than bad – (1)s, the strategy of releasing Cory’s book free online will probably increase sales of Cory’s book.\(^{58}\)

For first time novelists, underground artists and transformative creators this system produces the best result for all involved. They are able to get their work known and circulated and build up a fan base and at the same time allow other creators to engage with their work and build upon it. A similar network would allow fan fiction authors to come out of hiding and legitimise their practices if their favourite authors could only see the potential for such a system. Instead of suing each fan fiction author individually and hiring lawyers and technicians to regularly trawl the internet for infractions, this system allows the author to oversee the use of the work and make sure that the secondary creators are not commercialising or profiting from it.

Interestingly an ‘open access’ plan is currently being discussed by the UK government in relation to science research.\(^{59}\) There is debate as to whether open access journals would damage the peer review system and put in jeopardy the quality of scientific publishing. The research suggests this is not the case and it is hopeful that this type of open access will reach other areas of education.\(^{60}\)

This thesis has argued that copyright law has yet to embrace the effect that postmodernism has had on how we understand authorship. Moral rights confirm that lack of understanding by re-emphasizing an outdated mode of authorship that does not correlate to creative textual production. The Copyleft and Creative Commons movement can be seen as “a better translation of the postmodern space of creation than copyright.”\(^{61}\) In this context we have texts unburdened by the “constraining figure” of the author.\(^ {62}\) As Michel Foucault predicted we now have a network of texts that operate in a free state without any mechanisms to control the ‘proliferation

---

\(^{58}\) Note 16 at 284. In this real life example sales actually did increase.

\(^{59}\) Curry S, “UK plan for open access to research is a golden opportunity, not a cost”, *The Guardian*, 23 July 2012.


\(^{61}\) Note 37 at 288-9.

of meanings." The Barthesian concept of the user who is bored with a text unless they can engage with it comes to fruition in this context as users gain pleasure from the active production of meaning rather than being mere passive consumers. The theories behind the Copyleft movement denounce the fiction of the author as the sole source of original content, accept the normality of appropriation and ‘stress current modes of collective creation and free exchange of work.”

Moral rights present a problem for such a democratic system as the network of cultural commons. In the Australian legislation a waiver can only be used if it is written in very strict terms, a complete waiver is not allowed. This means that a transformative author must still be aware that using someone else’s work even under a General Licence Agreement can still result in a lawsuit if the author changes his or her mind. This again allows an author to control the types of derivative uses of their works. Any uses which are highly critical, parodic or offend some sensibility on the part of the creator, can still be thwarted and locked down. This goes against the rhetoric of the creative commons who sees the first author as merely the instigator of a conversation rather than the controller.

While the creative commons appears to be a logical alternative to overburdened copyright regulation it has its limitations. For one, an author can use the “No Derivatives” function which places transformative users back to square one. The ND license seems to clash somewhat with the creative commons slogan “Share, Remix, Reuse.” Also confusing is the “Non-Commercial” licence which allows any use unless it is for commercial purposes. What is termed commercial can be quite ambiguous, for example a blog that reviews books might contain a link to the free e-book, but if that blog gains money from advertising space, that could count as commercial use. It also seems unreasonable to restrict commercial uses that the first author would never have been able to capitalise on, for example an adaptation into an artwork. However, the biggest problem with the creative commons is encouraging

63 Note 62 at 222.
65 Note 37 at 292.
66 Copyright Act 1968 (Cth) Section 195AWA
67 See http://creativecommons.org/licenses/by-nd/3.0/ (August 2012) for an example of the licence. The ‘No Derivates’ is an add-on to a contract that expressly forbids any adaptations.
68 http://creativecommons.org/about (September 2012).
69 http://creativecommons.org/licenses/by-nc/3.0/ (September 2012).
creators to use it. While first time authors, underground artists and the more social minded authors and artists may clearly see the benefit of such projects, convincing the majority of famous authors and artists to similarly share their work would seem problematic. It is these works that parodists, satirists and adapters are more likely to want to use as they are known to a wider audience who can then understand the message of the transformative use though recollection of the previous work.

Alternatives

The Copyleft/ Creative Commons movement is one alternative to the strict character of intellectual property law. This section will look briefly at other alternative models in copyright discourse before turning to alternatives to the moral rights legislation specifically. What the creative commons movement suggests is that authors and artists wish to remain in control with licensing aspects of their work. Allowing parties to contract freely gives authors and artists the ability to change and modify licenses to suit their needs without giving up control.

There are of course many different alternatives to our current copyright regime. For example, monetary incentives rather than an allocation of property rights. This would mean the Government would own the rights to all intellectual property with adequate reward and compensation provided by public funds. The intellectual property would then become available immediately in the public domain. This idea has also been suggested as a form of public conservancy. The main argument against such proposals is practicality. It would necessitate throwing our whole system of copyright overboard and starting anew. Also with the pressure from industry lobbyists behind the government, such reforms are unlikely to get made. It is also unclear what an ‘adequate reward’ would be for authors and artists and how licensing in other countries would work.

Jessica Litman believes the only way to reform copyright is for the general public to show their dissatisfaction through disobedience of the laws. This disobedience is already apparent in regards to fan fiction and illegal downloading of music. The


public rejection theory however has done nothing to influence policy but has made digital protection measures increase as has trolling for trespasses online to scare users that partake in such schemes. It is unclear how far the public would have to take such measures before policy begins to take notice.

For Peter Drahos, the inequities in the balance between private interests and public good can be adjusted through a focus on human rights rhetoric:

The human rights community and the intellectual property community should begin a dialogue. The two communities have a great deal to learn from each other. Viewing intellectual property through the eyes of human rights advocates will encourage consideration of the ways in which the property mechanism might be reshaped to include interests and needs that it currently does not.73

This could include policy review to incorporate a ‘freedom of expression’ into legislation or considerably widening defences to copyright infringement for works that are in the public’s interest.

With the expansion of copyright laws the ability to freely contract is hampered by restrictions and regulations that apply regardless of the situation. Many commentators have suggested that the solution to this problem is to relax copyright laws to allow for individual tailoring and to re-balance the public need against that of the private needs of copyright holders. This type of alternative is also known as “thin” versus “thick” copyright.

You have probably heard the expressions "thin copyright" and "thick copyright referring to different philosophies about copyright law." Very briefly, thin copyright usually refers to a minimalist approach to copyright, giving works only as much protection as is needed to encourage creativity but with a goal of making works readily available to the public. Thick copyright is a more maximalist approach, and crudely put the goal of thick copyright is generally to maximize profits. We appear to be moving toward thick copyright, not only in this county but around the world in general. This movement is being spearheaded, as you might expect, by companies whose main product is in the form of intellectual property, such as books, movies and music.74

This is more of a policy type of alternative. It encourages awareness, education and public debate over copyright rather than policies made behind closed doors by experts and private institutions.

    Copyright is the result of a wise utilitarian bargain, and it exists to encourage the investment of time and money in works that might not otherwise find adequate reward in a completely free market. There are costs and benefits, winners and losers in every policy act. Examining these costs and benefits, and publicly debating them, can yield a more just and efficient copyright system, and possibly a more dynamic culture and democracy.75

Thin copyright is not only about relaxing laws regarding copyright; it also involves public discourse and education. It is about turning the tables to control the balance between public and private interests. Thin copyright allows enough support to writers and artists to be encouraged to create, while being flexible enough to allow full democratic participation in culture and the expansion of knowledge and education.

Thin copyright would allow adaptations as long as they met transformative criteria (i.e not just a ‘copy’). It would decrease the terms of copyright to a more realistic figure, given that the majority of works do not make any money after the first couple of years, this in turn would provide a richer public domain in which citizens can communicate and interact with cultural capital and in turn encourage new works and innovative ideas that would otherwise be stalled or barred. It would also mean that when policy issues arise, the public (instead of only private groups, companies and industry) would have a say as they are the ones who interact with the creative outcomes allowing a more democratic, porous, intellectual property regime that can be understood without a team of lawyers. Of course this is a utopian dream. Unless the public begins to take a real interest in what government and private industry is doing behind the scenes with copyright there will be no relaxation on restrictions but rather further containment and more complex regulations barring artistic freedom.

*Alternatives to Moral Rights*

It is futile to criticise a position without offering an alternative. In the moral rights scenario policy makers decided that there was a lack of respect and understanding

---

for the relationship between an author and their text. As this study has demonstrated, that this relationship exists at all is a matter of opinion and whether we should level this relationship over and above other relationships, such as the one between a reader and a text, is a matter of controversy. However, if one were to dismiss the concerns over a problem that relates largely to a misunderstanding of textual production and an unhelpful reliance on an inherently unstable Romantic conception of authorship, there are more reasonable ways to address the problem that do not harshly constrain the efforts of transformative authors.

Chapter Seven outlined the alternative of transposing moral rights legislation to the domain of defamation thereby allowing transformative authors more scope to work with previous texts. There are several other alternatives which this section will now examine.

One of the main concerns of the moral rights debate is leaving aesthetic judgement in the hands of a judiciary ill-equipped to decide on appropriate industry standards and literary theory. This is a chief concern particularly among parodists and satirists, whose work is made illegitimate if not properly categorized as a parody. An alternative to moral rights legislation would therefore be to remove such questions from any legal environment and position them back within the arts community.

One way this may be achieved would be for the Australian Council for the Arts to offer a tribunal like setting. This could be done via delegated legislation to make decisions binding or contractually between parties. Instead of judges schooled on the legal implications of using previous works, the judges could consist of literary scholars from diverse fields. Having expert witnesses allowed to be called would also allow transformative authors a right of reply to the accusations made against them. It could operate along the procedural lines of the Administrative Appeals Tribunal to ensure procedural fairness and there would have to be an appeal process.

For example if an author thinks a parody has ruined his or her reputation and distorted his or her work, rather than turning up to the Federal Magistrate’s Court and simply saying “they have done something that involved my work and I am upset,” they would instead have to state how the modification on their work has
changed professional opinion regarding their work and caused them injury. Critics
and experts would have to be called to verify the injury and a case made for
compensation (as opposed to current moral rights cases where there is no use of
expert witnesses.) The parodist could then state their case: that the parody is a
separate work that does not impact on the first, that audiences acknowledge the
difference between the two works and whether the parody is justified given the
message it was intended to convey and whether that message is obvious on first
reading of the original work to a majority of readers. Having the artistic community
adjudicate on these matters may ensure industry practice is better realised. This
alternative may be a stretch but it is worth opening the dialogue over whether the law
should be involved in matters of integrity of a work.

Another alternative, which is already open to the aggrieved author, is the right of
reply. If a work appears in the market place that appears to use their work in a
derogatory way the author is at liberty to respond publicly. For example, if
characters or words are changed from the original script of a play, the author is at
liberty to publicly denounce that performance and distance themself from it. This
would be a logical way to alert the public that the intention of the author was
different to the transformative use and in no way portrays the views and opinions of
the author. This is a statement that could be made to the press or even put within the
pages of the transformative play’s playbill. The audience are therefore not deceived
and no injury can be done to the author’s reputation or honour. Most importantly the
transformative use is not curtailed and artistic freedom is again at liberty.

Engendering respect through means of the law is a poor substitute to education. The
fact that there are so little cases invites the assumption that moral rights is relatively
unknown to the general public, even the arts sector. Thus respecting an author’s
integrity is not forefront in the minds of transformative users until a complaint has
already been made and the damage to reputation already seemingly made. Educating
the public about an author’s rights would be a more useful policy. Of course this
education would have to involve highlighting an outdated Romantic conception of
authorship as well as ignoring the realities of textual production and the role of the
author in the aftermath of postmodernism, but at least it wouldn’t involve the
criminalisation of ubiquitous cultural genres of texts.
The Heart of the Matter

“Until you have lost your reputation, you never realize what a burden it was or what freedom really is.”

Margaret Mitchell, *Gone with the Wind* 76

In defamation law it is a given that a person’s character can be tarnished through false accusations and implications made by others. That person’s character is said to be made up by their honour and reputation. The moral right of integrity is an extension of this theory: that a person’s honour and reputation can be tarnished or injured through uses of their work not foreseen by the first author. This is a given that needs to be examined further.

The French have a word for the sum total of an artist or author’s work: *oeuvre*. The right of integrity states that it is this *oeuvre* that is injured by adaptations of a work that an author does not like. This has come to include adaptation, parody, satire as well as other transformative uses discussed throughout the thesis. The French cases have shown that changes such as gender, race and viewpoint can injure an author’s reputation as an artist. What is not apparent is whether a transformative use can actually harm the previous work.

The problem with reputation and honour is that it cannot be measured. In defamation law, if a person is implied to be of bad faith the results can be more easily identified, such as ostracism from a community or a loss of business, although it is not always so straightforward. Judges use common sense or the standard of reasonableness to conclude that such an imputation will have repercussions on a person’s life. With literature and the arts and the effect on the artist it is even harder to use reasonable sense as the modifications are not ‘false’ or ‘cannot be proven’ as in defamation of character.

The right of integrity does not necessitate a loss in sales or ostracism from an artistic community to prove injury. In fact nothing need be proven except the fact that the

---

modification might impact how people view the author’s oeuvre. However it is yet to be proven that a modification can injure how people view an author’s work.

Shakespeare, Wordsworth, and Coleridge remain in the canon of great authors despite many varied adaptations and parodies made of their work. Mozart is still considered a great despite rap and heavy metal versions of his works.77 Gone with the Wind is still read by thousands despite the racism inherent in the work made obvious by an adaptation. In this world, you can say Shakespeare did not write his plays, that Coleridge was a plagiarist, and level any criticism imaginable upon the author or the work yet the work still stands. This is because if an author’s work is good, it will stand the test of time despite any modification.

Previously this thesis has canvassed what honour and reputation mean in their ordinary usage. It is now time to examine whether a distortion to a text can hurt an author’s reputation or honour. The distorting work is a separate work: the author’s work still stands alone as originally published by the author. The public know it is not the author’s work nor did the author authorise it (as is common to parody, satire, fan fiction and adaptation practices). If the distorting work is critical of the author it could be argued that it could harm his or her reputation. If it is a parody or satire, however, the criticisms aimed at the work are normally obvious in the work itself. If it is a comment on the portrayal of a character, for example perhaps gender relations, if it is used as a starting point for an adaptation, the criticisms would have to be obvious to the audience in the first place otherwise the first work would not have been used. This again is the case if it is criticism aimed at the type of writing or the genre.

It is unlikely that people who have bought the first work and enjoyed it will stop enjoying it because of a further distorting work. Similarly if a person liked one work they are not going to hesitate to buy a second work for the sole reason of a further distorting work. In regards to fan fiction and adaptations in particular, it can raise the

77 “Coming 2 America” by Ludacris being one example that comes to mind. The song is an adaptation of Mozart’s Requiem “Dies irae” and Dvorak’s Symphony No 9, 4th Movement “Allegro con fuoco”. The song was released on the album “Word of Mouf” (2001). “Symphony for Destruction” by Megadeath also begins with Mozart’s Offertorium, Domine Jesu Christe. The song was released on their album “Countdown to Extinction” (1992).
esteem of the author by enshrining the work in popular culture through its integration with the secondary work. This however is only conjecture. It could be argued that it cannot be proven that someone would stop enjoying a work on the basis of a further distorting work. There is however an excellent example of an adaptation that levelled criticism at a work, yet the author’s reputation and honour still remain intact. If moral rights had been available at the time the adaptation would not be available to us today, and the adapter would have had to pay compensation for the alleged injury.

The example is of course *Gone with the Wind*. While the sequel to Victor Hugo’s *Les Misérables* was barred by a French Court, the *Wind Done Gone* by Alice Randall is available to us today. *Gone with the Wind* was written by Margaret Mitchell and published in 1936. It has sold more than 30 million copies and has been adapted for the stage and screen. In 2001 Houghton Mifflin Company published a work by Alice Randal entitled *The Wind Done Gone* in which the tale of *Gone with the Wind* is retold from the perspective of the minorities in the story. The parody highlights the inherent racism in the first work. Litigation ensued regarding an infringement of copyright and an interlocutory injunction was applied for. The American Court of Appeal (Eleventh Circuit) concluded that the parody was a product of ‘fair use’ and thus exempted from copyright infringement. America, as pointed out throughout this thesis, does not have moral rights for authors. If this had occurred in Australia today, a different result may have ensued.

---


81 The most memorable being the 1939 film adaptation starring Clark Gable and Vivien Leigh, directed by Victor Fleming For information on the movie adaptation see [http://m.imdb.com/title/tt0031381/](http://m.imdb.com/title/tt0031381/) (September 2012). Stage adaptations include the 1972 West End production *Scarlett* (music and lyrics by Harold Rome) and the 2008 West End production *Gone with the Wind* (music and lyrics by Margaret Martin) amongst others.

According to David Brennan, if the case had been an Australian one *The Wind Done Gone* would not have amounted to derogatory treatment. 83 This conclusion is given based on the 1994 discussion paper which states:

The right [of integrity] exists to prevent unreasonable action in respect of a work or film that clearly offends the honour or reputation of the author, rather than the work or film. 84

However one could argue that this is the exact opposite of the justification given for the existence of moral rights. Moral rights rhetoric emphatically relies on the concept that an author’s personality is enshrined within a work and that actions in respect of a work imply an injury on behalf of the author. A work that mocks another work thus mocks the author as well. One could argue that a parody does not mock an author but the context from which the author is writing. For example the parody is not saying the author is a racist but that the time of which she is writing was racist and this can be observed within the work. Yet the parody is also allowing that, while *Gone with the Wind* may have included the racist sentiments of its characters for historical accuracy, the work still reinforces negative stereotypes without any satirical comment by the author. Therefore it could be argued *The Wind Done Gone* is a treatment of the work that portrays the original work (and thus the author) as racist. While Brennan believes a finding of derogatory treatment in an Australian court to be unlikely, this conclusion amounts to nothing more than a hopeful guess.

The use of the previous material in *The Wind Done Gone* was necessary to highlight the racist sentiments of the original work. The novel took the scenes and characters from *Gone with the Wind* and retold the story through a new character ‘Cynara,’ a former slave. The use of *Gone with the Wind* broadens the audience and deepens the discussion. Arguably an essay published in a literary journal that explored these tensions would not have as much impact. The parodist uses the medium of the original work to gain the attention of the audience of the original work. An essay or review would not have the same impact as a parodic novel. The parody must therefore mimicry the primary material.

---


Thomas Haddox believes the issues surrounding the case extend far beyond mere copyright infringement:

> Encompassing such vexed and potentially metaphysical topics as the definition of history, the use of fiction as a vehicle for historical inquiry, the relationship between representation and truth, and the degree to which identity translates into historical authority.85

According to Ben Bagdikian, it is the mythic status of the novel that allows such issues to be uncovered:

> Mitchell’s novel has become a prime source of knowledge about plantation life for much of mainstream America. Now is the time for the American public to hear another perspective on this legend.86

Alice Randall herself, characterised her role as a “revisionist historian” seeking to correct the “inaccurate portrait of southern history” described in the original novel.87 Yet it is not whether a novel is ‘wrong’ or ‘right’ that is the issue. The issue is allowing different perspectives to be shared on what is arguably shared cultural capital such as classic, iconic literature that is handed down to generations.

If we are to assume that the parodic novel raises some moral rights concern, it then makes a useful example of the aftermath of a moral rights infringement. We can now determine whether there has been any impact on the way Gone with the Wind is seen, whether the treatment has had any negative influence on Margaret Mitchell and her reputation.

There has been no discernible decrease in sales of Gone with the Wind since publication of Randall’s novel. A simple Google search shows that schools across America and indeed other countries still teach the novel within the classroom. Time magazine lists Gone with the Wind in its 100 All time best English language novels.88 There has been nothing to indicate that the parodic take on the original has had any impact on Mitchell’s honour, reputation or integrity. Yet if this had been a

87 Note 81 at 120.
moral rights case the Mitchell estate would have argued that damage would have ensued and the revisionist take would no longer be available to us. This is further proof that the moral rights ideology is flawed. Great writers do not lose their honour from mere adaptations and parodies.

Another issue that has been overlooked in the author–work bond debate is the issue of authors turning against their own works. There are ubiquitous examples out there of authors who later despise earlier works, attempt to stop their works being published or who want their works burned and forgotten. This raises very interesting issues when looking at it from a moral rights angle. If an author wishes his or her work to be brought back from publication it is arguably unfair to those that have already purchased the books. To give an author the power to rescind on the publication means that people who have already read and become involved with the work can no longer write about it, blog about it or talk to the media about it without being vulnerable to a moral rights transgression. While Australia does not have the ‘right of publication’ such as France does, it is arguable that an author could say a review of a book they no longer wish to have published, or a syllabus that contains passages of the novel, is an attack on their integrity. If an author can turn against their work, then it also raises the question of the existence of the author–work bond. Here are just a few examples of authors who have later turned on their work:

- Virgil, *Aenid*. (29-19 BCE). Virgil was in the process of correcting and perfecting this poem when he died. In his will he asked that the manuscript be burned. This wish was not followed. 89
- Nikolai Gogol, *Dead Souls*. In 1852 Gogol burned the completed manuscript of the second volume, “destroying the labour of long years because he finally realized that the completed book was untrue to his genius.” 90
- Franz Kafka (1883-1924) wanted his works destroyed upon his death. His good friend Max Brod saved them. Nine boxes remain where the manuscripts have been hidden in safety deposit boxes in Tel Aviv and Zurich. After much legal debate a court order demanded they be opened, however, publication

has been banned due to the executor’s of Max Brod’s estate and his heir Esther Hoffe’s objection that their “property” will be “compromised.”

- Stephen King, *Rage* (1977). While not exactly turning on his work, after the Columbine shootings King asked his publishers to take the novel out of print.

- Thomas Pynchon, *The Crying of Lot 49*. In his later book *Slow learner* Pynchon disparages his earlier work: “As is clear from the up-and-down shape of my learning curve, however, it was too much to expect that I'd keep on for long in this positive or professional direction. The next story I wrote was *The Crying of Lot 49*, which was marketed as a 'novel,' and in which I seem to have forgotten most of what I thought I'd learned up until then.”

While this author did not ban or try to destroy his work, his disparaging remarks are an example of how authors can later turn against or dislike their work despite favourable reception.

There are many more examples of such instances where authors and artists become disillusioned with earlier versions of works. The ideology of the author–work bond is then called into question. If these authors despise these works and no longer wish to be attached to them shouldn’t they then be free for others to revisit, rewrite and rework? Moral rights ideology would burn these works from our memory in accordance with the author’s wishes. These are works which have been published, which people have read and engaged with. Imagine the loss to future generations if all our favourite novels were able to be called back and destroyed because an author has changed their mind.

**Conclusion**

This chapter has made obvious the worry and concern many academics and commentators have for the future of intellectual property. Our hyper-referential culture is being thwarted by a new culture which will have permission, licensing and

---


constraints as its hallmark of use with anything involving fixing an idea to expression. The growing movement for a cultural commons and the Copyleft movement is evidence that creators, artists, scientists and researchers are not satisfied with established copyright regimes and that copyright needs to adapt to the technologies and trends of modern times more than ever before.

The first step to any Copyright reform will have to include a rethinking and reworking of the ties to romantic conceptions of authorship. These ideals constrain the future of copyright policy. They allow aspects of our creative capital to remain unacknowledged, illegitimised and in some cases branded illegal. Not only are present and future creators constrained but also users of works as well as conservationists such as libraries, research and innovators in fields such as software and technology will have limitations thrust upon them. This in turn harms the public good, slowing progress, limiting education and knowledge and continuing to encourage monopolisation on the power of information. It is society that will lose from such policy and legislative direction and yet it is the majority of society who remain uninformed of the direction copyright law is taking.

Alternatives to copyright needs to start with open dialogue. Engaging public interest by programs and education that allow the public to understand the complexity of draconian copyright laws in an effort to make them realise they need change should be a top priority for the Government. Artists, authors and creators also need to be able to understand what they are licensing, what they are selling, and what they can and can’t do with other works before laws are made to restrict their rights, not after. Moral rights are a prime example of artists and authors believing they are securing rights without fully comprehending what they lose in return.

The author-work bond is a subject that needs to be re-examined. The idea that an adaptation can hurt a prior work has no real evidence. The idea that a further work can harm an author’s honour or reputation has not been shown to outweigh the benefits to society of access to new works. The very fact that authors and artists can turn against their work defies the credibility of such a relationship. If this relationship does exist it has not been evidenced clearly how this relationship could be so important as to override the public benefit in access and encouragement of new
creative activity. Moral rights therefore are just a further step in the over-
commodification of intellectual property, a further step in restricting access and
locking down creative culture.
CHAPTER 9

Conclusion

The role of the moral rights legal construct in all this is clear, though it is of course neither direct nor immediate. Through its conceptual grounding and support for an aesthetic of individuation, through its portrayal of the artist as god-like maker and truth-giver, and its fetishism of the artistic artefact, the moral rights construct functions to confirm the sanctity of art and its removal and distance from the praxis of life. The moral rights of artists thereby interfere with art’s transformative, cultural and political power. The rights interfere, ironically, with the artists themselves; with the clowns rolling past on their one wheeled cycles who are watching and understanding and describing us.¹

The Death of the Transformative Author

This thesis began as an examination of the Romantic conception of authorship in moral rights rhetoric. Further research revealed the issue was more complicated than envisioned. Not only did moral rights stem from an obsolete ideology, but this ideology itself was only ever a literary theory which had not been incorporated into either the legal rubric of copyright law or the actual production of texts. The Romantic authors who philosophised such expectations for authors and artists themselves partook in a cultural production of texts that stressed the social nature of authorship over an individualistic one.

The moral rights provisions set up an idealised state where an author or artist can free themselves from criticism from society. Their works can be safely protected behind locked gates. They can be viewed but not engaged with. This is after postmodern theory has caused society to question the stability of labels such as ‘author’ and ‘originality.’ Genres that are prevalent today, and that will become more prevalent with the development of technology incorporate elements of hybridity and intertextuality with other prior texts. Despite their popularity and acceptance by society, these genres are left vulnerable in the face of moral rights provisions.

This chapter re-examines the many hypotheses explored within the thesis to show how moral rights in copyright law have the potential to limit creative freedom, which in turn, signals the death of the transformative author.

**Hypothesis: Chapter 2**  
**The Romantic conception of Authorship is largely a myth**

When analysing moral rights rhetoric the Romantic conception of authorship must also be examined given that it is the scaffolding upon which moral rights lie. The assumption that an ‘author–work bond’ exists and is worthy of protection is the prime rationale of moral rights legislation. Through this research it has become apparent that this conception of authorship is flawed when confronted with the realities of textual production and the historical significance of the transformative use of prior works.

The Romantic conception of authorship as distilled through the writings of Wordsworth, Coleridge and Shelley, promulgates the idea of a work being a representation of the personality of the author. It is through writers such as these that the tenets of Romanticism such as the author as genius, the author as originator, and the author as supreme authority over a work came into being. The Romantic Movement individualised the role of authorship, establishing authenticity, attribution, and the biography of an author as critical elements of authorship. These claims were brought within an environment in which these authors themselves published anonymously, collaborated heavily, failed to acknowledge co-authors and collaborators, edited and revised after publishing works, plagiarised, copied, borrowed, translated, adapted, and clarified earlier works. While theorising and promoting the individual nature of authorship their actions and works reveal the more social nature of authorship.

As to where Romantic conceptions of authorship intersect with legal protection of authorship, the research reveals that the two have very little in common with each other. The Statute of Anne, while giving authors proprietorship over works, also limited the term for such ownership reinforcing the view that works are a property of society. From eighteenth-century England to the modern Australian copyright regime, neither the law nor the book trade has had any real interest in an aesthetics of
originality. With cases such as *Walter v Lane* still looked to as the high authority on the matter, even as recently as 2002 in Australia, it is clear that what copyright conveys by the word ‘originality’ is not the sense in which it is used in Romantic rhetoric. The law questions whether a work is ‘original’ in that it has not been written in the exact same expression by another first, caring nothing for genius, whether the ideas are adapted from another, literary skill, nor inventiveness. The only residue of Romantic thought that is conjured by the law lies within its inability to properly grasp communal authorship and collaborative authorship. The law does not trouble itself too much over whether the content itself is original, rather concerning itself over who wrote it first. While not caring too much over levels of originality the law seems perturbed by any form of authorship that cannot be attributable to a solitary source despite the inherent nature of authorship as social and transformative.

Apart from moral rights, the only other place where Romantic conceptions of authorship are invoked is within the rhetoric of lobbyists and strict copyright law promoters. Following the footsteps of eighteenth century booksellers invoking the figure of the author to gain sympathy, large media conglomerates and industry lobbyists use the figure of the author as genius who creates from organic thought, imprinting their personality, only to have it cruelly denigrated by modern forms of transformative authorship. This denial of the social nature of authorship, the constant use of pre-existing works in the ‘original’ works, and the role of transformative use in society is furthered by the introduction of moral rights that seek to limit transformative use. The reliance on Romantic conceptions of authorship by the moral rights legislation maintains a misunderstanding, not only of contemporary literary production but indeed of all literary production, even in the Romantic period. What the moral rights legislation has failed to consider is that, as evidenced by the research, Romantic conceptions of authorship are largely a myth.
Hypothesis: Chapter 3

Moral rights theory is blind to the instability of the role of the author after postmodernism and ignores the reality of textual production.

Arguably one of the most important impacts postmodern literary theory has made is the undermining of the seemingly stable Romantic authorship concept. Postmodernism has produced a cynic in all of us when it comes to original, organic form. Our culture looks beyond the unity, certainty and boundaries of a text to acknowledge unintended meanings and links to other texts over which an author has little control. In today’s society, the author is not the principal interpreter for a work; rather in most cases it is used as a brand name to attract consumers.

Authorship is a social and legal function created to assign property rights and attach responsibility. When one gives authorship more importance, such as moral rights do, then the function also encompasses a limiting quality, restricting proliferations of meanings that can stem from transformative use. Intention, authority and originality – concepts once thought as inherently unstable – have now come to the forefront of a legal theory of authorship. This theory, while ignoring literary theory’s scepticism towards such ‘truths’, also reveals a misunderstanding of textual production.

The research reveals that textual production is always a collaborative enterprise. An author is entrenched within a literary heritage of which he or she cannot help but be influenced by. Then there are the collaborative efforts of editors, publishers and advertisers who all transform the work in slightly different ways before that work reaches the market. After publication, readership can also influence the meaning of a text, especially through engagement within the online community.

A strict adherence to an ideal ‘author’ also subjects those who do not conform to this view to vulnerability. Indigenous and communal artists and authors, parodists and satirists, adapters and samplers are all relegated as second class authors that fail to adhere to the legal theory’s embracement of the ideal Romantic author. This is despite many of our artistic and literary works enshrined to our literary canons belonging to these genres of text. This strict adherence also honours textual production that is neither original nor very creative. Books written through guidelines, such as the average detective fiction novel or romance novel that borrow
overused plot lines and stereotypical characters, are promoted by moral rights theory to be original pieces of literary genius. Internet blogs, reports, and exam questions are also raised above transformative use despite the little labour or original creative thought that may go into such texts. Romanticising an author is questionable in a society that legally recognises the authorship rights of a person who collates a phonebook.

Transformative users of texts benefit society in a myriad of ways. They encourage one to delve beneath authorial intent, to engage with a work on several different levels. They reveal inconsistencies, criticise anomalies and question the values underpinning prior works. They may be works translated for a modern or different audience, a commentary upon cultural stereotypes or they may wish to honour an author through a Romanticising of the text. These texts engage with the reader, and especially through new technologies, allow other readers to similarly engage with them. Fan fiction is just one example where a community of people democratically engage with a text and characters to create new creative texts.

Ultimately the moral rights ideology criminalises the very acts of textual production. Editors and publishers must now be careful to include consent provisions in all contracts with authors to avoid litigation over editing that could result in ‘mutilation’. Transformative authors have no similar avenue to access these works, which in turn deters, stagnates and inhibits the creative freedom to comment on existing works in a creative dialogue.

Hypothesis: Chapter Four
Transplanting a civil moral rights law into a common law copyright discourse is illogical without also transplanting, transposing and translating the ideology behind it. Was Australia perhaps too quick to ratify laws that do not adapt well to the social nature of its authorship culture?

‘Transplanting’ is a term that comes from gardening where one relocates one plant to another location. If the conditions in the new location are not the same as the original then either the plant dies or that plant often becomes a weed, a noxious, overgrown product that remains stubborn to remove yet cannot be made to co-exist with the plants surrounding it. To transpose something involves moving something to a
different position. It often means changing the first object to create the second. For example: transposing a Shakespearian comedy to a modern day language. Translating is different again. To translate something you are reproducing something from one language into another that often changes the meaning due to inconsistencies between languages. For moral rights all of these terms are relevant.

Moral rights provisions were transplanted without any attempt to transpose them to a modern day Australian creative industry context. They were also transplanted without any effort to translate what the terms would mean in a traditionally economic piece of legislation. Thus, in an Australian climate where transformative use is generally celebrated (especially in the case of parody and satire), and Indigenous works are communally owned, where collaboration is an entrenched part of our creative industry, moral rights extends out like an electric fence in front of a public library.

The research illustrates a moral right rhetoric that gained seed in countries such as France and Germany where the development of copyright diverged from that of England and common law countries. Where civil law countries enforce rights that exist due to the human condition, common law countries base their ideology from man-made rules used as an attempt to regulate society. Civil law, with its absolutist views on property, is a law of rights; whereas the common law exists as a law of relations and mutual obligations for the benefit of society. The tradition of copyright in France is to protect the individual. The tradition of copyright in Germany is to safeguard national treasures. The tradition of copyright in the UK and Australia is to allow authors a limited economic monopoly in works that properly belong to society once published. These divergent copyright regimes cannot co-exist together given their fundamental differences. This is why when Australia transplanted a set of rights from France to its own climate the rights appear irregular.

The problems identified in the 1994 CLRC paper – those of the practical problems (in particular what ‘reasonable’ would mean), no identified theoretical basis for protection, insufficient indication for support by authors, lack of violations to

---


252
warrant intervention and an Australian community that would be unlikely to support an intrusion on their property rights – have never been addressed. From that point on moral rights were put on the agenda without considering these issues that needed to be resolved. The argument that our international obligations were paramount overtook any deliberate debate on the issues. This is despite America, from where a large proportion of our books and entertainment are made, not yet acknowledging the same rights even though they are also a party to the Convention.

Given the lack of cases, moral rights merely stand as a deterrent for transformative authors. There has been no educational program to address the vulnerabilities of changing or modifying legally procured creative works and there has been no sudden increase in the amount of creative texts being offered in the market. At the moment the moral rights amendments merely exist to discourage transformative experimentation for very little gain for artists and authors.

Hypothesis: Chapter Five
The complexity and confusion of the moral rights provisions act as a deterrent to transformative users

The moral rights provisions, when examined in detail, produce more questions than answers. This is principally because it is a set of personal rights concerned with sensibilities grafted onto a complex system of economic management and market control. The research has revealed a number of grey areas that make it impossible to advise the public what they can and can’t do with legally procured creative works.

Firstly there is the issue of substantiality to consider. How much of the work has to be ‘treated.’ It seems that a simple listing of books compiled together would be enough to raise an inappropriate context argument. This borders on the ludicrous. Secondly the ‘capacity to produce harm’ means that no actual harm need ever be proved to have occurred for an act to be a contravention. It is enough that someday, somewhere, someone will think less of an author or artist due to a transformative use of their work.
It is not clear how the judiciary is to judge ‘honour’ or ‘reputation’. Whether they are related or involve an objective or subjective view. The relevant community in whose eyes the reputation is to be tarnished is also not clearly defined. It is not clear whether it could entail the general public’s view, a selection of the artistic community, or even more specialized communities such as certain religious groups or political parties. The legislation is still untried in terms of what would be a reasonable use and whether fair dealing exceptions apply to moral rights. This means even fair use examples such as research, study, and news may not be immune to moral rights claims. The few cases show that inadvertence or lack of wrongful intent is not enough alone to be reasonable in the circumstances. Even the issue of damages is unclear with damages seeming to be equated with that of copyright infringement damages with no justification.

This leaves the Australian public in a curious situation. To avoid moral rights trespasses, an educational program needs to be put into place to allow citizens to know when they are or are not breaking the law. Yet this would be near impossible when the legislation is so vague that no one can ever be sure that any use of another’s work will amount to an infringement on the original author’s moral rights. With the end result in all cases relying upon the subjective impression of the judge, it is unavoidable that considerations of artistic merit and taste will be left to judicial deliberation. With no guidance transformative authors are left hanging in a vulnerable position. This in itself is the biggest deterrent for transformative creative expression.

Finding the aesthetic underpinning central to the integrity of a work without reference to economic rationalisations is a major feat for common law countries centred within a legal discourse that relies on economic justifications. Given this, judicial deliberations are largely to be left to subjective impressions of whether the judge appreciates the transformative use. Judges are to become the guardians of cultural capital. It is not an ideal place to encourage transformative creative expression of prior cultural texts.
Hypothesis: Chapter Six
The juxtaposition of fair dealing for parody and satire and moral rights highlights the flawed ideology behind moral rights

If the fair dealing exceptions for parody and satire apply to moral rights then it is fine to ‘mutilate’ another’s work as long as you are commenting on it. Transformative works that seek to honour the original author or that merely do something new and inventive with the material will not be seen as exemptions, however works that ridicule or expose folly will be. This is indeed a strange combination.

Moral rights ideology supports the notion that an attack on a work is an attack on the author. In order for artists and authors to be encouraged to create they must have protection from future uses of their work that they may not agree with. The ideology behind the fair dealing exceptions supports the notion that Australian society supports and endorses parodic and satiric uses of prior works and do not require copyright permission to be published. Parody and satire are uses that would most commonly be of the type that an original author would want suppressed. Yet these two opposing ideologies sit within the same framework, the Copyright Act. On one hand the fair dealing legislation is enshrining the importance of transformative use to society, yet on the other, moral rights legislation is invalidating transformative use.

This research implies that the Romantic conceptions of authorship, upon which the moral rights legislation is based, are not the contemporary conceptions of authorship with which the Australian community engages. In a culture that seeks to support criticism, review and exposing the irony within works, moral rights presents a flawed argument for protecting the sensibilities of authors and free them from ordinary, expected criticism.

Hypothesis: Chapter Seven
Moral rights type provisions would suit a defamation context better than a copyright one

The research has exposed the many problems associated with a non-economic personal right housed within an economically motivated copyright discourse. This thesis has advocated that to address the many problems highlighted, the solution may lie in the realm of defamation, as first thought by the Australian delegate upon
signing the Berne Convention treaty. This would require the States to enact provisions within the uniform defamation acts. This would require aggressive lobbying and would probably never come to fruition but is provided as a solution nevertheless as to criticise without offering an alternative achieves little.

The arguments for such a solution are as follows:

- It could be drafted to allow Indigenous authors that communally own texts to be able to bring an action upon proof of being a member of that community;
- Defamation is already familiar with ‘honour’ and ‘reputation’ and would be a stricter test than an artist or author’s sensibilities regarding their work;
- The confusion over the Fair Dealing exceptions would be replaced with a more straightforward ‘public benefit’ exception;
- The triviality defence would mean harmless uses would not be abstracted into trespasses;
- The ‘truth defence’ would limit artists and authors using moral rights as a way to circumvent fair criticism;
- A jury rather than a judge would decide relevant community attitudes revealing a more culturally based approach;
- Apologies would be the standard form of remedy and defamation damages which are more suitable than those equated with copyright damages; and
- Transformative authors would see it as less of a deterrent than moral rights as it is easier for people to comprehend what might be defamation to a work than the often ill-explained logic of moral rights.

Of course one cannot consent to defamation so it is not in the interests of industry to argue such a point but for transformative authors it would allow them a little more leeway to experiment with prior cultural works which in turn benefit society.

Hypothesis: Chapter Eight

Moral rights legislation is a further step towards a consent culture, an environment where creativity is stifled through over regulation
The last chapter of this thesis revealed the ways in which creative expression is becoming more hybrid, more intertextual, and more amalgamated through new technologies and increased access to creative tools and works. A ‘consent culture’ is a culture imbued with restrictions to access knowledge, learning and creative capital. Harmless uses of texts that have never before been queried are now illegitimised, such as lending a book to a friend. Uses of works that had traditionally been ‘under the radar’ are now easier to find and challenge.

The rise of technology offers the possibility of access to knowledge for everyone with an internet connection. Science, learning and education, art and literature is available to explore, engage with and transform. A consent culture seeks to restrict this access, piling subscription fees, access fees, viewing fees and technological protection measures upon such access and in the process blocking opportunities for people to build upon each other’s works.

Moral rights may seem like an innocent proposal to give authors and artists more rights and bargaining power and in turn foster creativity but the reality is it is a further step in an effort to ‘lock-up’ creativity. Moral rights criminalise transformative authors and artists. They act as a deterrent for people to engage with texts at a more fundamental level and they reduce the rights and bargaining power of transformative authors. Moral rights seek to identify and sanctify ‘original authorship’ in a world where every text has elements of hybridity, intertextuality and collaborative authorship.

Movements such as the creative commons reveal a society that is sceptical of over-regulation in the area of copyright. Authors and artists themselves are realizing the potential of allowing widespread dissemination of their work and opening their texts up to others to comment, parody, transform, modify and alter. These authors and artists are able to do this without foregoing their economical recompenses and are acknowledging the collaborative, hybrid enterprise that is authorship.

The heart of the matter is that authors and artists do not suffer from transformative uses of their work. In all the research there was not one example of an original work
that had been ruined by a modification by a secondary use. Moral rights are simply a further step along the way to creating a future obsessed with copyright regulation, an environment where criticism, art and culture is stifled. This is a future where first one hires a lawyer, and then attempts to create art.

Limitations of research and Further Research Directions

There are many obvious limitations to this research. By necessity I tried to limit my research and criticisms to literature. This is despite many unique and specialised problems that arise in areas such as music, visual arts, scientific research and educational materials and many more. As more genres of artistic expression are created and added to the list (such as the recent one of performers’ rights) the more this line of research could develop.

While I do believe in their current format moral rights is an excessive restriction on creative freedom of expression I tried to contain my bias by researching to the best of my ability both sides of the argument. If I raised a point with no counter argument against mine it is from not being able to find a source rather than lack of research for an opposing view.

One of the biggest limitations of the research was the lack of case law and the unavailability of evidence concerning settled cases and how often moral right abuses are raised. As these would be private matters before legal practitioners that do not result in a public trial there is no avenue for acquiring this information. This means there may be moral right violations that happen every day that result in settlements or it may mean that most practitioners have never even heard of moral rights (personally I believe the latter to be true, but that is only a personal conjecture and not based on any real evidence). It is also uncertain as to whether moral rights are a real deterrent to transformative users as it is impossible to know whether projects have been started and left due to concerns or whether those in the industry have never heard about moral rights and continue to do whatever they want with prior material without the original author’s consent. It would probably take a very public case to raise these issues and to get people to step forward.
There are many ways in which the research in this thesis could be extended and furthered. For example it would be enlightening to explore in detail models of authorship in French and German civil law and deepen the inquiry into the legal and literary traditions of these countries.

Another avenue to explore would be a more culturally based approach to how our culture views and receives authorship. Questionnaires and interviews with authors, artists and the public might reveal interesting aspects of authorship that have not surfaced in the research.

The shifts in debate regarding traditional authorship versus the more engineered technological production of works would also lead to promising insights. It would be interesting to research how our artistic and literary community is changing to a more media saturated, digital market place and whether this informs and modifies traditional authorship theories.

An aspect this thesis did not touch upon is the emergence of performers’ rights. Further research into this area could demonstrate how authorship is altering from the solitary author to a more collective authorship where everyone from the writer, director, producer to performers are playing a part and how the law identifies these players and determines their worth.

**Conclusion**
Moral Rights are designed to protect the bond linking an author to their work. This bond is a culmination of the original thought, genius and personality imprinted upon a work by its creator. Moral rights seek to engender respect for this bond, to protect an author’s integrity— their honour and their reputation. A work of art into which a creator has breathed life, a work that a person has laid bare their soul with, deserves special protection from harm, mutilation and derogatory treatment.

In protecting this bond, moral rights place transformative users as secondary, as trespassers, as merely imitative. They reduce the value of transformative use and criminalise cultural artistic practices. The theory surrounding moral rights is flawed as is the theory behind an author–work bond. That is not to say that a special
relationship does not exist between a creator and a creation, merely that this relationship ignores the complexity of textual production.

Textual production involves the use of pre-existing materials either consciously or unconsciously. An author cannot escape his or her context, intertextuality seeps into every creation. Society has moved beyond the notion that creativity happens within a vacuum, with literary theory in particular emphasising the collaborative nature of creative works. Collaboration has already begun before pen is put to paper, it then continues from the process of manuscript to a product in the marketplace. Within this context it is impossible to isolate parts of a creative work that are purely original and the origin of each line of text is impossible to allocate to one source.

With the rise of digital technology transformative use has become more prevalent. Digital technologies and new software allow people from all different backgrounds to access and transform new cultural capital. From music, art, photography and literature, digital technology is changing the consumer from a passive user to a transformative artist in their own right. This is a new phase of creative expression that can foster new creative enterprises and allow people to interact and engage with texts in novel and intriguing ways.

Moral rights legislation provides a limitation to this engagement. It requires transformative users to only use texts in the way the original author wished them to be used. In interpretation, it asks transformative users to interpret only in reference to the original author’s intent. It discourages innovation and makes transformative appropriation of cultural capital a costly enterprise outside of the domain of most users. It is an attempt to reign in the proliferation of creativity that can flow from a single text in the cultural marketplace.

It is time to re-evaluate the logic behind such rights. Copyright is a balance of interests: the right of an author must be weighed up against the benefit to society. In this case the balance is tipped in favour of the author, for very little gain. Authors will still be subject to pressure from industry to allow adaptation of their works by industry that can exert pressure in contract negotiations. The only control authors have really gained in respect to moral rights is that over transformative users who
have no leverage to counter any claims of infringement. The loss of the transformative use is a great loss to society, one the legislature has failed to give consideration to.

This thesis situates itself amongst the literature that calls for further consideration of the ideology behind the Romantic conception of authorship and its dominance over copyright discourse. Its aim was to analyse the moral rights provisions in an attempt to show the precarious position transformative users stand amidst such legal constraints. It asks why transformative users have no voice in the legal battles over rights and property when our culture so clearly accepts transformative use as beneficial to innovation and creative industry. In a culture so diffuse with transformative use why are we now creating legal restraints to block access, impede advancements, and stifle creative activity? Moral rights have the capacity to reincarnate the author as the original genius whose authority over one’s work is not questioned, despite the long persuasive history of literary theory that suggests otherwise. It is hoped this thesis has made the point clear that moral rights signal the death of the transformative user.
WORKS CITED


Adeney E,


Balkin R & Davis J, Law of Torts. 2nd ed, Butterworths: Sydney, 1996


Barthes R,


Bavarian Penal Law Book, Munich (1813), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org


Blackstone’s Commentaries
http://avalon.law.yale.edu/18th_century/blackstone_bk1ch7.asp (9 April 2012)


Board of Studies, “All My Own Work”

Board of Trade, Copyright Committee Report of the Copyright Committee (1952)
HMSO: Cmd 8662

Bond, C “More Convenient Copyright? The Copyright Amendment Act 2006”
[2006] ANZCompuLawJl 22


Boyle, J, “The Search for an Author: Shakespeare and the Framers” (1987-88) 37
American University Law Review 625-644


British Joint Copyright Council, Memorandum on the Report of the Committee on Copyright Law Revision of the Australian Commonwealth (1961) NAA:A432/80, 1960/2101 PT1

Brown, S “Scott Brown on Sherlock Holmes, Obsessed Nerds and Fan Fiction”
Wired Magazine 17.05, 20 April 2009 available at
http://www.wired.com/techbiz/people/magazine/17-05/pl_brown (2 February 2012)


Carter JW & Harland D J, Contract Law in Australia. 4th ed, Butterworths, Sydney, 2002


Cérésa F, Cosette or The Time of Illusions, Plon, Paris, 2004


Codes for Industry Self Regulation in Areas of Internet Content Pursuant to the Requirements of the Broadcasting Services Act 1992 As Amended, May 2002, Version 7.2. Available at
http://www.iia.net.au/contentcode.html

Coleridge S.T, “Biographia Literaria” (1817)

Coleridge, S, Lectures and Notes on Shakespeare and Other English Poets which can be accessed at
http://shakespearean.org.uk/ham1-col.htm (23 December 2011)

Expert Opinion on Schelling v. Paulus (1846), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org)


Friedman, S, “Creativity and the Childbirth Metaphor: Gender Difference in Literary Discourse” 13 *Feminist Studies* (Spring 1987) 49-82

Fruman N. *Coleridge, the Damaged Archangel*, G Braziller, New York, 1971

George, P. *Defamation Law in Australia*, 2nd Ed, LexisNexis Butterworths, NSW, 2012


266
(September 2012)
Haddox T, “Alice Randall’s The Wind Done Gone and the Ludic in African American Historical Fiction” (2007) 53.1 Modern Fiction Studies 120-139
Halbert D, Resisting Intellectual Property, Routledge, New York, 2005
Hargrave F, Argument in Defence of Literary Property (1774), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org (22 July 2010)
Hauslohrner A “Is Egypt about to have a Facebook revolution” Time World, 24 January 2011 available at http://www.time.com/time/world/article/0,8599,2044142,00.html (4 March 2012)
Huxley A, Point Counter Point, Vintage, UK, 2004
267


Lefebure M, Samuel Taylor Coleridge: a bondage of opium, Stein and Day, USA, 1974

Legal and Accounting Management Seminars Pty Ltd (LAAMS) NSW, Defamation- The Principles, practices and Trends for compensating words that injure (presented in Sydney on 23 March 1995)


Lessig L,

268
Litman J, Digital Copyright, Prometheus Books, New York, 2001
Loughlan P,
Manovich L, “New Media as Remix Culture” New York Arts Magazine, September/October 2004


McNamara, L Reputation and Defamation, Oxford University Press, Oxford, 2007


Monotti, A.L “Power to modify the vesting of Copyright in an employer: Subsection 35(3) of the Copyright Act 1968 (Cth) and Australian Universities” (1997) 19(12) European Intellectual Property Review 715-722


Moore S, “General aspects of literary patronage in the middle ages”, (1913) 3:16 The Library 369-92


Nabokov V, Nikolai Gogol, New Directions Publishing Corporation, Toronto, 1961 [1944]

Netanel, N Copyright’s Paradox, Oxford University Press, New York, 2008


Nygh P & Butt P (eds), Butterworths Australian Legal Dictionary Butterworths, Sydney, 1997


Rose M,
- “Copyright and Its Metaphors” (2002) 50 University of California Law Review 1
- “Mothers and Authors: Johnson v Calvert and the New Children of Our Imagination” (1996) 22 *Critical Inquiry* 613
- *Authors and Owners: The Invention of Copyright*, Harvard University Press, Massachusetts, 1993


Copyright: A Critical Overview With Source Texts in Five Languages
The Macquarie Australian Encyclopedic Dictionary, Atkinson A et al, The
Macquarie Library, Sydney, 2006
Treiger-Bar-Am K, “Kant on Copyright: Rights of Transformative Authorship”
UK Public Records, Rome Copyright Conference 1928, Report of the British
delegates, Public Record Office FO 371/13444, 17
Ulaby N, “A Kookaburra Causes Trouble ‘Down Under’, NPRMusic, 1 December,
2009
Vaidhyanathan S, Copyrights and Copywrongs: The rise of Intellectual Property and
how it threatens creativity, New York University Press, New York, 2001
Review 451-460
Ward A & Jones D, “The Creators’ perspective on moral rights protection” in
Anderson P & Saunders D (eds) Moral Rights Protection in a Copyright System,
Institute for Cultural Policy Studies, Griffith University, Queensland, 1992, 111-
123
Weber, B, Hired Pens: Professional Writers in the Golden Age, Ohio Uni Press,
Athens, 1997
Wellek R, A History of Modern Criticism 1750-1950: Volume 2, The Romantic Age,
Wheelhouse S, Defamation – The Principles, practices and Trends for compensating
words that injure (presented in Sydney on 23 March 1995), held by Legal and
Accounting Management Seminars Pty Ltd (LAAMS) NSW
Williams D, “Copyright Amendment (Moral Rights) Bill 1999: Second Reading
Speech”, House of Representatives, Parliamentary Debates, 8 December 1999
Williams D, “Second Copyright Amendment (Moral Rights) Bill 1999”. House of
Representatives: Hansard, 8 December 1999, pp13026.
Construction of Authorship: Textual Appropriation in Law and Literature, Duke
University Press, London, 1994 at 1-13
Woodmansee M,
- “On the Author Effect: Recovering Collectivity” in Jaszi P & Woodmansee
M (eds) The Construction of Authorship: Textual Appropriation in Law and
- “Publishers, Privateers, Pirates: Eighteenth Century German Book Piracy
Revisited” in Biagioli M, Jaszi P & Woodmansee M (eds) Making and
Unmaking Intellectual Property Law: Creative Production in Legal and
181-197
- “The Genius and the Copyright: economic and legal conditions of the
emergence of the “author”(1984 ) 17 Eighteenth Century Studies, 425-448 at
445
- The Author, Art and the Market: Rereading the History of Aesthetics,
Columbia University Press, New York, 1994

273
Wordsworth W, “Preface” in *Lyrical Ballads*

World Intellectual Property Organization. “WIPO Treaties- General Information”


Yar M, “The Rhetorics and Myths of Anti-Piracy Campaigns: Criminalization, Moral Pedagogy and Capitalist Property Relations in the Classroom” (2008) 10 *New Media Society* 605 at http://nms.sagepub.com/cgi/content/abstract/10/4/605 (5 December 2011)


Young E, “Conjectures on Original Composition” in “A Letter to the Author of Sir Charles Grandison”
http://rpo.library.utoronto.ca/display/displayprose.cfm?prosenum=16 (19 May 2011)


Zemer L “Rethinking Copyright Alternatives” (2006) 14:1 *International Journal of Law and Information Technology* 137-146

274
Websites

Amazon, (International Book Delivery) www.amazon.com
Australia Fan-Fiction Archive, http://b.fanfiction.net/community/An_Aussie_Affair/70956/3/0/1/
Australian Broadcasting Network, ‘AM Program’, http://www.abc.net.au/am/content/2012/s3442909.htm
Billboard, Rovi Corporation, http://www.billboard.com/charts/hot-100#
Creative Commons Organisation, http://creativecommons.org
Electronic Frontier Foundation, https://www.eff.org/
Facebook, (Social Networking Site), www.facebook.com
iCommons Organisation, http://icommn.org/
Internet Movie Database, http://www.imdb.com/chart/
La licence ludique générale, http://jeuxlibres.free.fr/lldg.htm
Law Matters India, http://lawmatters.in/content/ghost-writing-plagiarism-and-copyright
The Anti-Bogan, http://theantibogan.wordpress.com/
Wikipedia (Creative Commons Encyclopaedia) www.wikipedia.com

275
Yale Law School, ‘Technologies for Access’,
http://www.law.yale.edu/intellectuallife/7118.htm
You- Tube (Online Video Sharing Network), www.youtube.com
Bowrey K, “Copyright, the paternity of artistic works and the challenge posed by postmodern artists” (1994) 8:3 Intellectual Property Journal 285-317
Craig C, “Putting the Community in Communication: Dissolving the conflict between freedom of expression and copyright” (2006) 56 University of Toronto Law Journal 75-114
Fox H, “Some Points of Interest in the Law of Copyright” (1945-1946) 6 University of Toronto Law Journal 100-144


Grasser U & Ernst S, “From Shakespeare to DJ Danger Mouse: A Quick look at Copyright and User Creativity in the Digital Age” available from the Berkman Center for Internet and Society:


Lim D, “The Reasonableness exception to infringement of the right of integrity in copyright law: Part 2” (2008) 13 MALR 166


McCausland S, “New Room to lampoon: The new fair dealing exception for parody and satire” Newsletter of the Arts Law Centre of Australia, March 2007, 1-5


Miller J et al. “Collaborative Literary Creation and Control: A Socio-Historic, Technological and Legal Analysis” available at:


