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## MORAL RIGHTS: LIMITED EDITION

LIOR ZEMER\*

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### INTRODUCTION

Copyright is a state mechanism designed “to enhance the democratic character of civil society.”<sup>1</sup> The law provides creators with exclusive property rights as incentives to produce and disseminate creative wealth. The law also recognizes a set of limitations to these rights in order to maintain a vibrant public domain. “*Who is an author?*” is a question that the law does not explicitly address. An intuitive response to this question is that authors are laborers that imbue and fix their personal qualities in creative expressive commodities. In this way, authors participate in the nurturing process of our cultural reality. That is, the act of producing creative commodities involves, aside from internal calls and external motivations for recognition and reward, physical labor and talent, the “honor, dignity and artistic spirit of the author in a fundamentally personal way,” representing “the author’s intrinsic dimension of creativity.”<sup>2</sup>

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\* Lecturer in Law, Interdisciplinary Centre Herzliya, and Visiting Assistant Professor, Boston University School of Law. For helpful conversations or comments on previous drafts, or both, I would like to thank Wendy Gordon, Ann Bartow, Adolf Dietz, Kim Treiger Bar-Am, Miriam Bitton, Laura Heymann, Irena Zolotova, and the participants in the symposium on The Boundaries of Moral Rights held at the Radzyner School of Law Interdisciplinary Centre Herzliya, Israel, held on December 2010.

<sup>1</sup> Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996).

<sup>2</sup> ROBERTA ROSENTHAL K WALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS

This view of the institution of copyright holds that authors are entities of both economic and moral stature. Certain legal systems provide moral rights protection to authors similar in strength to the set of economic rights. “In contrast, American copyright law rewards economic incentives almost exclusively and lacks adequate moral rights protections.”<sup>3</sup> Changing the lack of moral rights protection in the United States requires serious conceptual and legal changes. It requires compromising the purity of American copyright tradition. This compromise has been the subject of ample debates in legal scholarship. *The Soul of Creativity*, by Professor Roberta Rosenthal Kwall, is the most recent exposition attempting to redefine the scope of moral rights and debate this compromise. In her study, Kwall does to moral rights what Margaret Jane Radin did to the economics of property almost three decades ago.<sup>4</sup> Kwall’s new book vigorously reminds us to seriously challenge the lack of protection to the expressions of authorial and artistic personalities in the United States copyright tradition.

In this Essay I join Kwall’s argument that “traditional law and economics analysis fails to capture fully the struggles at the heart of . . . intellectual property law.”<sup>5</sup> Kwall claims that legislation regulating moral rights in the United States “not only is poorly drafted, but also reflects questionable and seemingly inexplicable choices.”<sup>6</sup> This brings her to conclude that a modern copyright regime absent a strong moral rights protection conflicts with basic norms of authorship morality. This Essay is a dialogue between a proponent of moral rights and opponents of these rights. The argument builds on Kwall’s multidimensional theoretical groundwork and the paradigmatic formula she proposes for moral rights protection specific to American legal ideology.<sup>7</sup> I concur with her on certain issues and depart on others, attempting to show that her vision for the proper boundaries of moral rights is, theoretically and practically, a too-limited edition of what moral rights ought to be, even for an American copyright audience.<sup>8</sup>

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LAW FOR THE UNITED STATES xiii (2010) [hereinafter Kwall, *THE SOUL OF CREATIVITY*]; see also Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1983-91 (2006) (arguing that “appropriately crafted moral rights protections foster the objectives of the [Constitution’s] Copyright Clause”).

<sup>3</sup> Kwall, *THE SOUL OF CREATIVITY*, *supra* note 2, at xiii.

<sup>4</sup> See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

<sup>5</sup> Madhavi Sunder, *IP<sup>3</sup>*, 59 STAN. L. REV. 257, 263 (2006).

<sup>6</sup> Kwall, *THE SOUL OF CREATIVITY*, *supra* note 2, at 147.

<sup>7</sup> Kwall began exploring the possible adoption of moral rights to U.S. copyright law in her seminal article *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985).

<sup>8</sup> Changing U.S. copyright law to incorporate a more suitable regime of moral rights requires grappling with three intersecting considerations: “the existing provisions in VARA, the constitutional issues concerning enhanced protection, and the practicalities of

*The Soul of Creativity* is an exciting read that reaches far beyond existing studies on moral rights. It is the first book to offer a thorough, sustained, profound, and sophisticated account of the much-neglected doctrine of moral rights in American copyright jurisprudence. These qualities make Kwall's approach one of the most important juridical studies written in recent years on moral rights in the common law part of the globe.<sup>9</sup> The problem with moral rights, as Amelia Vetrone writes, is that "[a]rt, when it is created, is honest. It tells us so much and gives us so much. If the people who own it have the right to change it they can make the art say what they want it to"<sup>10</sup> and discount the honesty with which the artist freed his work to the world. In this Essay I make a stronger case for moral rights than Kwall did, which is necessary to deal more adequately with the honesty problem in copyrighted materials that moral rights were invented to solve.

Attempting to negotiate the gap between textual integrity and freedom to create,<sup>11</sup> creativity and commerce, inspirational motivation and ownership,<sup>12</sup> and between authorship morality and copyright economic objectives, Kwall's contribution is both conceptual and normative. Conceptually speaking, her contribution lies in her profound articulation of a conception of moral rights consistent with basic principles of American copyright law, while the normative contribution is reflected in her recognition of a set of rights without which copyright law is incomplete and lacks basic "authorship morality."<sup>13</sup> In this Essay I shall focus on both her contributions and her call to adopt a stronger – yet, "narrowly crafted"<sup>14</sup> – version of moral rights in American copyright law. Although Kwall and I agree on various issues, two main points of departure explain the contrasting philosophical approaches we favor in copyright. First, while Kwall presents a neo-romantic approach to moral rights, viewing these rights as reflecting the authorial properties of authors, I argue that authorial personalities are not the sole dominion of authors. One of the difficulties in contemporary copyright discourses is that we tend to ignore issues such as the origin of authorial and artistic knowledge. In the words of Michael Madison: "How do 'creative' works of authorship come about? We care about the copyright system because we care about the answers to these

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successfully implementing stronger protection." KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 147.

<sup>9</sup> For other significant recent developments, see MIRA T. SUNDARA RAJAN, *MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY* (2011), and ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS* (2006).

<sup>10</sup> AMELIA V. VETRONE, *THE LEGAL AND MORAL RIGHTS OF ALL ARTISTS* 8 (2003).

<sup>11</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 43-44.

<sup>12</sup> *Id.* at 20-21 (explaining how an author's inspirational motivations correlate to her moral ownership over the meaning and message of the work).

<sup>13</sup> *Id.* at xvi, xviii, 4-5.

<sup>14</sup> *Id.* at 58, 61, 157.

questions, yet the questions are rarely asked in a formal way in connection with copyright debates.”<sup>15</sup> Authorial personalities are socially constructed entities and, as such, cannot be justified as the authors’ exclusive dominion. Their biological origin is not what makes authors capable of creatively expressing their personality traits. It’s their exposure to the outer social environment, their consumption of and participation in cultural processes, that make persons in possession of authorial personalities.

Second, moral rights’ orthodoxy claims a set of inalienable authorial rights protecting the special bond between authors and their works and against market intermediaries. Kwall does not follow this construction and offers a limited version of moral rights protection. On the one hand Kwall vocally defends moral rights for all the good reasons she discusses in the design of the theoretical part of her argument. On the other hand, in order to make moral rights consistent with American copyright norms, she is willing to seriously compromise their practical viability. This Essay argues that despite the fact that authorial personalities are socially constructed, moral rights should receive stronger protection than Kwall offers.

Any call to strengthen moral rights in American copyright tradition is an invitation for fierce criticism. Some contemporary scholars reject this idea altogether. For example, Rebecca Tushnet believes that American copyright law has enough problems identifying owners and that the addition of moral rights – and identifying authors – will introduce further complexities that may end with stagnation of copyright development unless we reshuffle copyright theory and embrace a comprehensive author-centered approach.<sup>16</sup> Amy Adler goes further and declares that “moral rights laws endanger art in the name of protecting it.”<sup>17</sup> This Essay is a critique of these arguments. It exposes the misconceptions that opponents to moral rights tend to raise in support of their vision. The critique I shall offer is friendly and I hope it will be read as a challenge to prevailing American philosophy of moral rights.

The Essay will proceed as follows: Part I deconstructs moral rights into their defining components, both domestically and internationally. Part II critically examines Kwall’s reply to the question “who is an author?” and emphasizes her approach to the connectedness between authors and their creative works. Conceptually building on Blackstone’s legendary vision of property, Part III claims that a thick individualistic approach to authorship and moral rights contradicts what Kwall strives to secure, namely, authorial morality. Part IV defends a thinner account of authorial personalities premised on the social

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<sup>15</sup> Michael J. Madison, *Comment: Where Does Creativity Come From? and Other Stories of Copyright*, 53 CASE W. RES. L. REV. 747, 759-60 (2003).

<sup>16</sup> See Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789, 822 (2007).

<sup>17</sup> Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 265 (2009). This is because, for example, the right of integrity “fails to recognize the profound artistic importance of modifying, even destroying, works of art.” *Id.*

construction theory and supported by John Locke's theory of property and knowledge. Finally, Part V challenges Kwall's system of disclaimers and her "looking forward" agenda for moral rights. I argue that despite the nature of moral rights as social constructs, *and* because they are emanations of authorial personalities, moral rights deserve thicker – yet, well-defined and balanced – legal protection. A stronger version of moral rights protection will not only allow authors to realize their creative potential and contribute to social development and cultural exchanges, but also will allow the public a "moral right" to know the true meaning of authorial and artistic messages – the ingredients of every cultural construction.

### I. THE MORAL RIGHTS CODE

Influenced by the Kantian<sup>18</sup> and Hegelian belief that authors retain general rights of personality that should survive market exploitation of the external work, civil law traditions, as opposed to their common law counterparts, provide extensive moral rights protection.<sup>19</sup> The theoretical Hegelian premise holds that private property is acquired by joining one's individual will to a given external object.<sup>20</sup> The person who mixes his labor with land deserves a reward for attaching his existence to the object.<sup>21</sup> Personality for Hegel "does not simply require external objects for its development. Its development *is* its objectification through externalization of its will."<sup>22</sup> Moral rights, then, are justifiable as manifestations of one's personality in one's intellectual

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<sup>18</sup> For a Kantian approach to copyright, see Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1062 (2008) ("Kantian theories can be used to illuminate the theoretical justifications for an authors' rights perspective on copyright in the United States and United Kingdom.").

<sup>19</sup> Moral rights were first developed by French case law in the Nineteenth Century at the time when personalist doctrines began influencing authors' rights systems. Despite the difference between common law and civil law countries, the systems share some common features. For example, John Merryman commented that "the moral right is the product of legal development in western, bourgeois, capitalist nations with whom we have deep cultural affinity." John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1043 (1976). And, "[e]ven though our legal traditions often seem quite different from theirs, the differences are superimposed on a common, shared cultural base." *Id.*; see also Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 994 (1990) ("[T]he differences between the U.S. and French copyright systems are neither as extensive nor as venerable as typically described.").

<sup>20</sup> G.W.F. HEGEL, PHILOSOPHY OF RIGHT 44, 50, 51-58 (T.M. Knox trans., 1967) (1821). For further analysis see Peter G. Stillman, *Property, Freedom, and Individuality in Hegel's and Marx's Political Thought*, in NOMOS XXII: PROPERTY, 130-48 (J. Roland Pennock & John W. Chapman eds., 1980).

<sup>21</sup> See JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 343-89 (1988).

<sup>22</sup> Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 838 (1990).

expressions, and as barriers to expropriation of inalienable features of one's personality, invested in one's authorial creations; they are "specialized legal devices"<sup>23</sup> that protect the integrity of the message that underlies the creative work.<sup>24</sup> From this standpoint, moral rights consist of "rights personal to authors, and as such viable separate and apart from the economic aspect of copyright."<sup>25</sup>

The right of attribution and the right of integrity are the two most prominently recognized moral rights.<sup>26</sup> The former safeguards the author's right to be recognized as the author of the work and the latter guarantees that the author's work truly represents his creative personality, free of distortions and mutilations amounting to misrepresentation of his creative vision and personality. Both rights are intended to "safeguard the author's meaning and message, and thus are designed to increase an author's ability to safeguard the integrity of her texts."<sup>27</sup> Due to the special connection between the author's personality and the work, civil law systems have traditionally regarded moral rights as inalienable, and at times indefinite, rights and have restricted the possibility of waiving the rights.<sup>28</sup> Common law traditions, on the other hand,

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<sup>23</sup> ADENEY, *supra* note 9, at 1.

<sup>24</sup> See Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 4 (1988); Joshua M. Daniels, Note, "Lost in Translation": *Anime, Moral Rights, and Market Failure*, 88 B.U. L. REV. 709, 715-16 (2008) ("[R]emoval of . . . cultural references might effectively strip the author of an important aspect of her persona, and might also garble or diminish the author's attempt to communicate the nature of her culture to the audience.").

<sup>25</sup> 3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 8D.01[A] (David Nimmer ed., 2007).

<sup>26</sup> Continental countries often recognize additional moral rights – e.g., the right of disclosure and the right of withdrawal and repentance. The former recognizes the author as the ultimate judge of when and under what conditions a work can be disseminated, and the latter provides the author with the power to withdraw the work from the public, even after publication, if it no longer reflects his convictions. See, e.g., ADENEY, *supra* note 9, at 192-96.

Interestingly, the European Union has not, to date, harmonized moral rights protection, although all member states have such provisions. The Wittem Project Report, however, which introduces a copyright code for Europe, suggests thorough harmonization of moral rights. The Report recognizes the following three moral rights: the right of divulgation, the right of attribution and the right of integrity. The Wittem Project, *European Copyright Code*, 13-14 (2010), [http://www.copyrightcode.eu/Wittem\\_European\\_copyright\\_code\\_21%20april%202010.pdf](http://www.copyrightcode.eu/Wittem_European_copyright_code_21%20april%202010.pdf); see also Eleonora Rosati, *The Wittem Group and the European Copyright Code*, 5 J. INTELL. PROP. L. & PRAC. 862, 865-66 (2010) (explaining the *European Copyright Code*'s integration of moral rights).

<sup>27</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 6.

<sup>28</sup> The French copyright code extends perpetual protection to the rights of attribution and integrity. CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] art. L121-1 (Fr.) ("An author shall enjoy the right to respect for his name, his authorship and his work."). Article L121-2 provides similar protection to the right of disclosure. See also KWALL, THE SOUL OF

have reacted to the idea of inalienable personality-based rights with ample suspicion and were late to transplant a rather restrictive version of these rights into their own domestic copyright laws.<sup>29</sup> Despite their partial success at penetrating common law systems and their limited inclusion in international legal instruments, moral rights protection are available in, for example, the copyright laws of the United Kingdom,<sup>30</sup> Canada,<sup>31</sup> New Zealand,<sup>32</sup> Australia,<sup>33</sup> South Africa,<sup>34</sup> Israel,<sup>35</sup> and Ireland.<sup>36</sup>

The United States has joined this group of countries, but chose a more restrictive application of moral rights. The result is that “American authors find substantially more protection for violations of their moral rights abroad than at home.”<sup>37</sup> Nowhere is the challenge to narrow the domestic integration of moral rights greater than in the United States, “where the copyright industries mounted a stubborn and organized opposition of the rights.”<sup>38</sup> Kwall is concerned that “copyright law in this country predominantly safeguards the pecuniary rights of the copyright owner.”<sup>39</sup> In reality, the Copyright Act of 1976 recognizes “quasi-moral rights” only.<sup>40</sup> The protection

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CREATIVITY, *supra* note 2, at 45-47. Other civil law countries provide similar strong moral rights. See Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 213-217 (1995).

<sup>29</sup> In one empirical study, Landes and Posner found no evidence that moral rights legislation in the United States actually benefits authors. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 287-93 (2003).

<sup>30</sup> Copyright, Designs and Patents Act, 1988, c. 4, §§ 77-89 (U.K.) (stating the moral rights granted to copyright authors). See generally W.R. Cornish, *Moral Rights Under the 1988 Act*, 11 EUR. INTELL. PROP. REV. 449 (1989); Gerald Dworkin, *Moral Rights in English Law – The Shape of Rights to Come*, 11 EUR. INTELL. PROP. REV. 329 (1986); David Vaver, *Moral Rights Yesterday, Today and Tomorrow*, 7 INT’L J.L. & INFO. TECH. 270 (1999).

<sup>31</sup> Copyright Act, R.S.C. 2011, c. C-42, s 14.1 (Can.).

<sup>32</sup> Copyright Act 1994, pt. 4 (N.Z.).

<sup>33</sup> *Copyright Act 1968* (Cth) pt 9 (Austl.).

<sup>34</sup> Copyright Act 98 of 1978 § 20 (S. Afr.).

<sup>35</sup> Copyright Act 2007, ch. 7 (Isr.).

<sup>36</sup> Copyright and Related Rights Act 2000 ch. 7 (Act No. 28/2000), available at <http://www.irishstatutebook.ie/2000/acts.html>.

<sup>37</sup> Kwall, *THE SOUL OF CREATIVITY*, *supra* note 2, at 37.

<sup>38</sup> ADENEY, *supra* note 9, at 3.

<sup>39</sup> Kwall, *THE SOUL OF CREATIVITY*, *supra* note 2, at 23. The Copyright Act of 1976 secures authors exclusive rights of enjoyment and distribution of their original works. 17 U.S.C. § 106 (2006).

<sup>40</sup> Kwall, *THE SOUL OF CREATIVITY*, *supra* note 2, at 26; see also 17 U.S.C. §§ 106(2), 115, 1202 (2006) (giving the owner of a copyright the exclusive right to “prepare derivative works,” limiting the exclusive right in musical works with a compulsory license for making and distributing phonorecords, and protecting the integrity of “copyright management information”).

of moral rights is so inefficient that it perpetuates the hegemony of utilitarian justifications to copyright that treat “works of authorship as fungible commodities”<sup>41</sup> and protect only one convenient subset of the creative process. The ubiquity of utilitarian justifications<sup>42</sup> creates a morally imbalanced copyright tradition in the United States in that it fails to afford authors comprehensive moral rights protection and devalues holistic approaches to copyright while emphasizing dissemination, commodification, and financial gains.

To this there is one exception: the Visual Artists Rights Act (VARA),<sup>43</sup> which was passed two years after the United States joined the Berne Convention for the Protection of Literary and Artistic Works.<sup>44</sup> Enacting VARA was meant to accommodate the obligations imposed on the United States by Article 6*bis* of the Berne Convention, which requires all signatory states to provide at least some protection for the moral rights of authors.<sup>45</sup> In

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<sup>41</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 24. The utilitarian justification for copyright and patent regimes is best captured by the United States Constitution’s Copyright Clause, empowering Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. Legislative instruments adopting a similar vision can be traced to the first modern copyright law, the Statute of Anne, 8 Ann., c. 19 (1710) (Eng.), and its influences on the evolution of Anglo-American copyright laws. The title of that legislation reads: “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.” *Id.* at § 1.

<sup>42</sup> Natural law approaches, although less dominant, are often used as a justificatory premise for copyright. *See, e.g.*, Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1535 (1993); Lior Zemer, *The Making of a New Copyright Lockean*, 29 *HARV. J.L. & PUB. POL’Y* 891, 912-18 (2006).

<sup>43</sup> Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (codified in scattered sections of Title 17 of the United States Code).

<sup>44</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 30 (revised July 24, 1971, amended 1979).

<sup>45</sup> Article 6*bis*(1) provides:

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

*Id.* at art. 6*bis*. This article is not self-executing. *See* 1 MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT* § 1.12[A] (David Nimmer ed., 2007) (“Congress declares in the [Berne Convention Implementation Act] that the Berne Convention is not self-executing, and that the United States performs its obligations thereunder solely pursuant to appropriate domestic law.” (footnotes omitted)).

Only two treaties on the international level require protection to moral rights. Apart from Berne, article 5(1) of the WIPO Performances and Phonograms Treaty (WPPT) incorporated Berne’s article 6*bis*. WIPO Performances and Phonograms Treaty, art. 5, Dec.



essence, VARA imported “a limited version of the civil-law concept of the ‘moral rights of the artist’ into our intellectual-property law.”<sup>46</sup> Despite the United States’ expressed will to join the group of nations that accept moral rights as a legitimate principle in copyright law, VARA is “largely insufficient”<sup>47</sup> and suffers from several flaws.<sup>48</sup> Critics claim that it does not adequately comply with Berne’s obligations<sup>49</sup> because of the narrow nature of the moral rights enacted.<sup>50</sup> Also, the lack of a definitional guide for critical terms such as “prejudice” or “honor” complicates the application of these rights.<sup>51</sup> More importantly, VARA is widely ignored by the creative community<sup>52</sup> and “courts tend to read the statute narrowly.”<sup>53</sup>

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20, 1996, 36 I.L.M. 76. Although the 1994 Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) incorporates in its article 9(1) Berne’s articles 1 through 21, the U.S. ensured that article 6*bis* is excluded. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9(1), Apr. 15, 1994, 1869 U.N.T.S. 299.

From a human rights perspective, the separation between economic and moral rights can be traced back to article 27(2) of the Universal Declaration of Human Rights from 1948 that reads as follows: “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 27(2), U.N. Doc. A/RES/217(III) (Dec. 10, 1948). For an analysis of moral rights as human rights, see KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 133-45.

<sup>46</sup> Kelley v. Chicago Park District, No. 08-3701 & 08-3712, 2011 WL 501161, at \*1 (7th Cir. Feb. 15, 2011).

<sup>47</sup> Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 452 (2009).

<sup>48</sup> Cf. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 853 (2004) (praising VARA’s “balanced and sophisticated approach”).

<sup>49</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 37.

<sup>50</sup> 17 U.S.C. §§ 101, 106A (2006).

<sup>51</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 28. This wording derived from article 6*bis*(1) of the Berne Convention. Due to the lack of certainty in the term “honor,” Ireland abandoned the use of the term in its 2001 copyright legislation. See Copyright and Related Rights Act 2000 (Act. No. 28/2000) (Ir.), § 109, available at <http://www.irishstatutebook.ie/pdf/2000/en.act.2000.0028.pdf>. The term is ambiguous “because the ‘intellectual’ or ‘spiritual’ interests denote the author’s concern for the work, rather than for the self. ‘Honour’ and ‘reputation’ are both objects of the author’s self-interest.” Elizabeth Adeney, *The Moral Right of Integrity: The Past and Future of “Honour”*, 2 INTELL. PROP. Q. 111, 131 n.3 (2005); cf. Copyright, Designs and Patents Act, 1988, c. 4, § 80 (retaining the word “honour”). The Irish omission was probably triggered by the omission of the “honour” component from the WIPO Performances and Phonograms Treaty. See Patricia Loughlan, *The Right of Integrity: What Is in that Word Honour? What Is that Word Reputation?*, 12 AUSTL. INTELL. PROP. J. 189, 191 (2001) (“The dropping of the word ‘honour’ suggests that the word is in fact now viewed as unnecessary and outdated.”).

<sup>52</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 28-29. Prior to the enactment of VARA, moral rights were statutorily protected in California, Connecticut, Louisiana, Maine, Massachusetts, Nevada, New Jersey, New Mexico, New York, Pennsylvania, and Rhode

The project of internationally harmonizing pecuniary rights in copyright was successful. Non-pecuniary rights did not attract similar protection and their transplantation into common law countries did not yield the anticipated results. Importation of legal doctrines, as Cyrill Rigamonti remarked, is likely to fail unless it is attentive to a variety of cultural and legal differences. Rigamonti shows how even the narrow legal transplantation of moral rights from civil law traditions “has turned out to be counterproductive and in fact has reduced overall moral rights protection for authors.”<sup>54</sup> In reality, some legal systems approach the idea of non-pecuniary rights with a degree of hostility, while other systems adopt different standards of moral rights protection as a lip service for Berne’s obligation. The present situation of moral rights requires serious theoretical rethinking and legal changes. From an American perspective, adopting a coherent doctrine of moral rights “is important on both a practical and legal level given our duty to comply with the Berne Convention and our relative individualistic stance regarding moral rights in an era of globalization.”<sup>55</sup>

## II. REDRESSING THE AUTHOR

### A. *Spiritual Childs, Textual Integrity, and Giftedness*

An author not only pushes the pen onto paper, but also imbues unique personal qualities into the work and makes it *his* message. As the British Judge Laddie once remarked:

In my view, to have regard merely to who pushed the pen is too narrow a view of authorship. What is protected by copyright in a drawing or a literary work is more than just the skill of making marks on paper or some other medium. It is both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words or lines have fixed in some tangible form which is protected. It is wrong to think that only the person who carries out the mechanical act of fixation is an author. There may well be

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Island. *Id.* at 29. In addition to the Copyright Act and state laws, section 43(a) of the Lanham Act was also invoked as a substitute measure for moral rights protection. *See, e.g., Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 36-38 (2003); *Gilliam v. Am. Broad. Cos., Inc.*, 538 F.2d 14, 19-20 (2d Cir. 1976).

Other common law doctrines, such as breach of contract, defamation, and invasion of privacy, were invoked as substitutes to moral rights protection but, as Kwall observed, “none of these areas of law function as sufficient substitutes for moral rights.” KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 32.

<sup>53</sup> Adler, *supra* note 17, at 268.

<sup>54</sup> Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L. L.J. 354, 411 (2006).

<sup>55</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 165.

skill and expertise in drawing clearly and well but that does not mean that it is only that skill and expertise which is relevant.<sup>56</sup>

The author is the person who emotionally *and* manually executes a creative enterprise. No one would object to the argument that the author who manually authored a work did so, except in certain circumstances,<sup>57</sup> by also expending personal talent, qualities, and other creative labor and personal abilities. Thus, the question “who is an author?” cannot be limited to the definition of the “economic author” – the author who creates for matters of pecuniary rewards. It must also include the “personal author” – the author that is concerned with the textual integrity of his work and is spiritually motivated by his personality.

Authorial creation involves the author’s expression of intrinsic dimensions of creativity. Copyright law in the United States lacks adequate reward for this part of the creative process. This amounts to an assault on the author’s dignity.<sup>58</sup> Kwall advocates a stronger moral rights protection as a recognition of the author’s “inspirational motivations.”<sup>59</sup> Rejecting the dominance of utilitarian theories in the landscape of American copyright tradition, she claims that authors create for other reasons, not only for matters of economic rewards. The creative impulse emanates from “inner drives that exist in the human soul.”<sup>60</sup> I argue that Kwall’s argument reads as a neo-romantic approach to copyright where the author – or “creator,” as she refers to creative people – is treated as an entity endowed with abilities to generate original works of personal content that are almost entirely dependent on his mind’s innate constitution. As the French Tribunal civil de la Seine remarked in 1911, moral rights protect “the superior interests of human genius.”<sup>61</sup>

Although I find myself in agreement with Kwall’s concern regarding the lack of moral rights protection in United States copyright law and the importance of valuing authors’ intrinsic dimension of creativity, I have long advocated a social construction approach to copyrighted materials, rejecting romantic authorship and showing that authorial and artistic abilities and their

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<sup>56</sup> *Cala Homes (South) Ltd. v. Alfred McAlpine Homes E. Ltd.* [1995] FSR (Ch.) 818 at 835 (Eng.).

<sup>57</sup> For example, photographs of historic events taken by sheer happenstance. *See, e.g., Time Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 131 (S.D.N.Y. 1968) (involving Zapruder’s photos of the assassination of the late President Kennedy).

<sup>58</sup> Kwall, *THE SOUL OF CREATIVITY*, *supra* note 2, at 4.

<sup>59</sup> *Id.* at xiii (describing “inspirational” as a shorthand for a type of relationship between an author and his work”).

<sup>60</sup> *Id.*; *see also* JOHN H. MERRYMAN, ALBERT E. ELSER & STEPHEN K. URICE, *LAW, ETHICS AND THE VISUAL ARTS* 423 (5th ed. 2007) (a work of art is an “expression of [the author’s] innermost being”). The Second Circuit remarked, using similar parlance, that moral rights “spring from the belief that an artist in the process of creation injects his spirit into the work.” *Carter v. Helmsley-Spear Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

<sup>61</sup> Merryman, *supra* note 19, at 1029 (quoting Millet, Tribunal civil de la Seine, May 20, 1911 *Amm. I.* 271).

laborious creative fruits are never the sole creation of the creative mind.<sup>62</sup> I agree with Kwall that “authorship morality”<sup>63</sup> requires a wider acceptance of the idea that authors’ expressions of creative impulse do not depend upon external rewards only or societal recognition “but instead are motivated by powerful desires for challenge, personal satisfaction, or the creation of works with a particular meaning or significance for the author.”<sup>64</sup> However, while Kwall employs an individualistic tone, I consider myself part of the legion of commentators who strongly oppose romantic approaches to authorship and art.<sup>65</sup> I reject declarations supporting the view that copyright is authors’ territory – whether with regards to economic rights of reproduction and distribution or moral rights of attribution and integrity – and argue that the interdependent nature of human intellectual creation means that its products represent the creative collectivity:

Given this vital dependence of a person’s thoughts on the ideas of those who came before her, intellectual products are fundamentally social products. Thus even if one assumes that the value of these products is entirely the result of human labor, this value is not entirely *attributable to any particular laborer . . .*<sup>66</sup>

In this Essay I shall argue that every claim to authorial rewards – whether pecuniary or not – cannot discount the sociality of the creative process. Authors create in a cultural and social context and their creations are embodiments of properties and other materials they absorbed from external resources. The idea of romantic authorship, in the words of James Boyle, “plays down the importance of external sources by emphasizing the unique

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<sup>62</sup> See, e.g., LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT 1-25 (2007). A recent article argued that while “[t]he history of art is replete with examples of artists who have broken from existing conventions and genres . . . such as Pablo Picasso . . . The new art is not so much a creature of one artist, but rather a movement that seeks to appropriate cultural norms and cultural signals, reinterpreting them to create new meaning.” Randall Bezanson & Andrew Finkelman, *Trespassory Art*, 43 MICH. J. L. REFORM 245, 246 (2010). Taking Picasso as an example, in an earlier study I showed how reliance on the collective and appropriation of cultural resources is not different between new art and old art. Lior Zemer, *The Copyright Moment*, 43 SAN DIEGO L. REV. 247, 294-98 (2006).

<sup>63</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 4. Authorship morality is imperative for copyright laws not only because they protect the author’s dignity, but, from a practical point of view, “[l]aws governing authors’ rights can be ignored if they fail to embrace widely shared norms regarding authorship.” *Id.* at 5.

<sup>64</sup> *Id.* at xiii.

<sup>65</sup> See, e.g., ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES 99 (1998); THE CONSTRUCTION OF AUTHORSHIP (Martha Woodmansee & Peter Jaszi eds., 1994); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 810 (2001); Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L.J. 1 (1999); Zemer, *The Copyright Moment*, *supra* note 62.

<sup>66</sup> Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 38 (1989).

genius of the author and the originality of the work.”<sup>67</sup> Every argument supporting the propertization of cultural commodities, whether from the lens of pecuniary or non-pecuniary rewards, should rely on external resources and recognize the contribution of the collective to the creative process and to the evolution of an author’s creative capacity.

In the first two chapters of her book, Kwall articulates the bare theoretical structure of “authorship morality.”<sup>68</sup> Through exploration of the relationship between authorship and textual integrity she finds that authorship is largely a product of internal labor – an intrinsic process motivated by inspirational forces.<sup>69</sup> Treating the author as a solitary entity producing works of creative wealth portrays authors as a special category of privileged entities. Simply put by James Boyle: “Authors tend to win.”<sup>70</sup> For Kwall, authors should be allowed to win: “Although authors freely borrow from the landscape of existing cultural production, a work of creative authorship nonetheless manifests the author’s individual process of creativity and artistic autonomy.”<sup>71</sup> This raises the fundamental question which Justin Hughes eloquently asked:

To transpose Robert Nozick’s classic query, why should we think putting our personality out into the world gives us rights to the things we create? Why should we not assume that when we mix our personality with the world, we lose part of our personality instead of gaining part of the world?<sup>72</sup>

In her defense of a stronger set of moral rights, Kwall provides that what justifies exclusive moral rights in creative artifacts is the combination of *internal private properties* and *external public properties*. For Kwall, this combination is a mix of “personal originality”<sup>73</sup> and “borrowing from the existing artistic landscape.”<sup>74</sup> In reality, however, Kwall draws limited benefits from this mixture and remains steadfast to her view of authorial personalities as almost entirely constructed by authors themselves. Judge Türkel of the Israeli Supreme Court, discussing copyright in the Dead Sea Scrolls, remarked that authors enjoy a legitimate claim to own the set of economic and moral rights in their works because these works are “children of

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<sup>67</sup> JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 114 (1996).

<sup>68</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 1-23.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 116; *cf.* Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 873-75 (1997) (book review) (questioning the power of the Romantic authorship idea to explain intellectual property law).

<sup>71</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 2.

<sup>72</sup> Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT L.J. 81, 84-85 (1998).

<sup>73</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 2.

<sup>74</sup> *Id.*

[the authors'] spirit,"<sup>75</sup> and every harm inflicted on this set is not only a violation of legal rules, but of the "human-moral duty."<sup>76</sup> Similarly, Kwall writes that the relationship between authors and their work "is that of a parent and a child."<sup>77</sup> Kwall contends that postmodern scholarship sometimes go too far:

[Scholars] do not sufficiently account for the inspiration dimension of authorship. Indeed, the very act of authorship entails an infusion of the creator's mind, heart and soul into her work. Many authors of creative works maintain a certain type of relationship with their artistic "children". This relationship is unique among other types of human production given the highly personalized and intrinsic nature of creative authorship.<sup>78</sup>

Kwall's affection towards the original contribution of authors to the creative process is also evident in statements such as "[p]ersonal connectedness to one's original work,"<sup>79</sup> "author's original contributions,"<sup>80</sup> "original personality"<sup>81</sup> and "author's original conceptions."<sup>82</sup> Frequent use of this terminology leaves little room to question her vision of authorial rights as synonymous with Blackstone's vision of property rights as the sole and despotic dominion of individuals.<sup>83</sup>

From a behavioral point of view, an author communicates with members of the public via commodifying the products of his creative personality.<sup>84</sup> This commodification process involves interaction between public and authors when the latter frees creative objects to the outer environment. Kwall emphasizes the importance of preserving the author's original conception in this process. She supports her argument with Charles Beitz's remark that the case for moral rights remains strong even when authors "produce an interesting

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<sup>75</sup> CA 2790/93 Eisenman v. Qimron 54(3) PD 817, 840-842 (2000) (Isr.).

<sup>76</sup> *Id.*

<sup>77</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at xiv; *cf.* Adler, *supra* note 17, at 269 (criticizing the idea that "the artist feels personal anguish when someone else modifies his artwork/child"). Kwall further writes: "The Parental metaphor of authorship provides one of the most compelling examples of the inspirational motivation characteristic of the intrinsic dimension of creativity." KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 13. Drawing on Genesis, she continues: "The concept that an author 'gives birth' to her artistic creations provides the foundation for the insurmountable connection between an author and her work." *Id.* at 13-14.

<sup>78</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 2.

<sup>79</sup> *Id.* at xiii.

<sup>80</sup> *Id.* at 2.

<sup>81</sup> *Id.* at 43.

<sup>82</sup> *Id.* at 3.

<sup>83</sup> *See infra* Part III.

<sup>84</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 4.

object for interpretation” and lack a clear “propositional content.”<sup>85</sup> This is so because their main wish is to convey a particular message.

Continuing her quest towards her preferred definition of who is an author, in the second chapter, Kwall defines the intrinsic dimension of human creativity. Drawing on rich literature from psychology, sociology, poetry, and Jewish religious sources, she claims that intrinsic motivation such as intellectual stimulation and personal affection and enjoyment of the creative process are conducive to creativity. The intellectual tool Kwall emphasizes is “inner labor.”<sup>86</sup> In 1922 Pierre de Tourtoulon recognized inner labor as a prominent intellectual tool and wrote that “[e]verything which develops the brain develops its power of observation. Now what develops the brain is not – in no case is it solely – minute attention to exterior facts. It is entirely the inner labor – memory, comparison, classification, interpretation, deduction – which is afterwards spent on the impressions drawn from reality.”<sup>87</sup> This inner labor plays a special role. It “embodies a drive to create emanating from powerful forces within the soul and the author.”<sup>88</sup>

Kwall further supports her argument for the intrinsic dimension of human creativity with the connections between faith, self-transcendence, and the state of giftedness. The “gifted” theory of the creative process emphasizes inspiration as emanating from an external source beyond that of the author herself.<sup>89</sup> In *The Gift*, Lewis Hyde spoke of inspiration as a gift: “As the artist works, some portion of his creation is bestowed upon him. An idea pops into his head, a tune begins to play, a phrase comes to mind, a color falls in place on the canvas.”<sup>90</sup> Realizing the gift requires self-transcendence. This is critical to the development of the artistic soul because the soul feeds itself from the ability of an author to go beyond himself. An artist must “enlarge [his] connection to that force lying within, a force that can make it possible to transcend the ordinary self and reach . . . fullest potential.”<sup>91</sup>

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<sup>85</sup> Charles R. Beitz, *The Moral Rights of Creators of Artistic and Literary Works*, 13 J. POL. PHIL. 330, 341 (2005).

<sup>86</sup> Kwall, THE SOUL OF CREATIVITY, *supra* note 2, at 12.

<sup>87</sup> PIERRE DE TOURTOULON, PHILOSOPHY IN THE DEVELOPMENT OF LAW 425 (Martha McC. Read trans., 1922).

<sup>88</sup> Kwall, THE SOUL OF CREATIVITY, *supra* note 2, at 12.

<sup>89</sup> *Id.* at 14-15.

<sup>90</sup> LEWIS HYDE, THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY xii (1983).

<sup>91</sup> JOHN S. DACEY & KATHELEEN H. LENNON, UNDERSTANDING CREATIVITY: THE INTERPLAY OF BIOLOGICAL, PSYCHOLOGICAL, AND SOCIAL FACTORS 130 (1998). For example, Dada artists claim they go beyond themselves in order to fully enjoy the gift. See, e.g., Allan Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569, 596-600 (2002).

B. *Author-as-Steward*

Kwall uses the concept of stewardship to explain inspirational motivation for human creativity.<sup>92</sup> Stewardship, which assumes a prominent theological focus, blends an awareness of both externally endowed inspiration and the cyclical dimension of creative enterprise. “Drawing from the ‘dust to dust’ cycle of Divine creativity in Genesis’s creation narratives, the idea is that humans also must continually keep their creative gifts in a state of motion.”<sup>93</sup> That is, if art wants to be considered “art,” it must communicate to the public the gift the artist received and used in the creative process. “[T]he gift must always move.”<sup>94</sup> The stewardship notion sees the author as the guardian of the work’s message and meaning during the time he is in possession of his gift. For Kwall, stewardship, just as self-transcendence, is a way to show that creativity is premised on noneconomic incentives, on an author’s “inherent drive” to create<sup>95</sup> and on his “responsibility to others as well to [his] own substantive personality.”<sup>96</sup> Similarly, Rebecca Tushnet recently showed that the desire to create can be excessive, beyond rationality, and free of substantial needs for economic incentives.<sup>97</sup> Classical economics plays down the role of psychological and sociological concepts that can do more to explain creative impulses. In the words of Kwall, an “exclusive focus on commodification at the expense of the intrinsic dimension of creativity denudes the beauty of the ‘inner labor.’”<sup>98</sup>

The connection between Divine power and internal motivation to create is aptly captured by the words of Pat Allen. Writing in *Art as a Spiritual Practice*, he informs us that every artistic image “has a life of her own and a lesson to teach me. The lesson of the rose is different from the lesson of the snake, and I may not know which is right for me at a particular moment.”<sup>99</sup> The art of creating “is a facet of the Divine intelligence of the universe. To create means to walk on holy ground, to engage with the Divine, and to experience it moving through me to manifestation.”<sup>100</sup> That is, “I surrender to

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<sup>92</sup> See Roberta Rosenthal Kwall, *The Author as Steward “For Limited Times”*, 88 B.U. L. REV. 685, 703-04 (2008) [hereinafter Kwall, *The Author as Steward*] (reviewing LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT*).

<sup>93</sup> *Id.* at 703 (footnotes omitted).

<sup>94</sup> HYDE, *supra* note 90, at 4.

<sup>95</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 19.

<sup>96</sup> *Id.* at 20.

<sup>97</sup> Rebecca Tushnet, *Economics of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009).

<sup>98</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 22.

<sup>99</sup> Pat B. Allen, *Intention and Creativity: Art as Spiritual Practice*, in TONA PEARCE MYERS, *THE SOUL OF CREATIVITY: INSIGHTS INTO THE CREATIVE PROCESS* 168, 172 (1999).

<sup>100</sup> *Id.*



the Divine, the creative life force, and welcome its manifestation through me.”<sup>101</sup>

These statements on inner labor and internal voices are strong and convincing. But something is missing here. The connection between the Divine and the internal requires an additional source. This connection alone cannot bring an artist to paint or a musician to write music. The public, acting as a social conduit to connect the Divine and the author’s inner calls, does not receive sufficient acknowledgment in Kwall’s argument. The dialogue between the public and the authors, and the latter’s consumption from the pull of materials owned and nurtured by all, is fundamental to the development of authorial personalities. In most circumstances, undeveloped personalities will find it difficult to generate works that qualify for Kwall’s heightened standard of originality and creativity – a condition she requires for moral rights protection.

Kwall recognizes that “some might criticize the ‘author-as-steward’ model because it reinforces an author-centered copyright framework.”<sup>102</sup> For Kwall, this model facilitates a better balance between “public access and ownership rights because its underlying premise is that ownership rights exist to further a greater societal need.”<sup>103</sup> I respectfully disagree. The sociality of the creative act imposes limits on what a person can come to own. I argue in the following part of this Essay that we, as social creatures, have an obligation to recognize the public – the entity composed of each and every one of us – as the source that influences and nurtures every authorial endeavor. The gifts authors receive from the collective are fundamental to the execution of the creative act. The collective does not merely contribute raw materials.<sup>104</sup> We have to remind ourselves, as Wendy Gordon remarks, of the “gifts all artists receive, namely, a tradition and world they have not made.”<sup>105</sup>

### C. *Authors, Ownership, and Originality*

Moral rights require overcoming complicated definitional and practical hurdles, such as their potential harm to the public domain and free speech,<sup>106</sup> the level of originality that merits moral rights protection,<sup>107</sup> and the problems associated with collaborative works.<sup>108</sup> The first of these hurdles is perhaps the most complex. Although it is difficult to define and articulate a concise theory

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<sup>101</sup> *Id.*

<sup>102</sup> Kwall, *The Author as Steward*, *supra* note 92, at 708.

<sup>103</sup> *Id.* at 708.

<sup>104</sup> See ZEMER, *supra* note 62, at 73-122.

<sup>105</sup> Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 77 (2004).

<sup>106</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 56.

<sup>107</sup> *Id.* at 69-85.

<sup>108</sup> *Id.* at 87-110.

of the public domain,<sup>109</sup> it is best defined as a source of “common ownership”<sup>110</sup> – as a storehouse of raw materials “free as the air to common use”<sup>111</sup> – that is needed in order to feed the creative impulse and fuel free speech engines.<sup>112</sup> Admitting that the “United States’ capitalist culture and its classical utilitarian tradition,”<sup>113</sup> and the First Amendment emphasis on “the importance of society’s ability to recycle material,”<sup>114</sup> influenced the lack of moral rights in our copyright regime, Kwall addresses the question of “whether . . . the enactment of moral rights protections would inappropriately encroach upon the public domain.”<sup>115</sup> She finds that “[m]oral rights are neither explicitly prohibited nor sanctioned by the Copyright Clause”<sup>116</sup> and their absence from the Clause is because “the Framers were not fully cognizant of these specific rights [attribution and integrity] . . . given their subsequent emergence in Europe years later.”<sup>117</sup>

Moral rights do not conflict with the Copyright Clause’s goal to “promote the Progress of Science and useful Arts”<sup>118</sup> for two main reasons: first, moral rights promote progress by virtue of letting the public know the true meaning and original source of a work;<sup>119</sup> and second, they are available for “‘limited times.’”<sup>120</sup> In fact, Kwall suggests limiting the duration of moral rights only to the lifetime of authors.<sup>121</sup> This is in line with copyright’s goal of preventing

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<sup>109</sup> See, e.g., Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783, 788 (2006) (“At least thirteen definitions or conceptions of the public domain are evident in this literature.”).

<sup>110</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 54.

<sup>111</sup> *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

<sup>112</sup> As Jessica Litman put it: “The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving raw material of authorship available for authors to use.” Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 968 (1990).

For discussions on the public domain, see Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain: Part I*, 18 COLUM. J.L. & ARTS 1 (1993); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652 (2010); Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183 (2004); Samuelson, *supra* note 109, at 783.

<sup>113</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 53.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 55.

<sup>116</sup> *Id.* at 57.

<sup>117</sup> *Id.*

<sup>118</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>119</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 57.

<sup>120</sup> *Id.* at 58.

<sup>121</sup> *Id.*

monopolization of intellectual properties and with the theory of stewardship “to the extent it encourages dedication of creative work back to its original, inspirational source.”<sup>122</sup>

The moral rights argument Kwall articulates is consistent with other scholars’ free speech models. For example, Edwin Baker proposed a “liberty” model of First Amendment protection according to which speech is protected “because of the value of speech conduct to the individual.”<sup>123</sup> Baker emphasizes the importance of an individual’s autonomy, recognizing that “respect for the integrity and autonomy of the individual usually requires giving each person at least veto power over the use” of his speech.<sup>124</sup> Consequently, speech is subject to control when it is “designed to disrespect and distort the integrity of another’s mental processes.”<sup>125</sup> Moral rights arm authors with this veto power. After all, “[i]t is human nature to care about how one’s product is packaged for external consumption.”<sup>126</sup>

Kwall’s theory is also consistent with various visions of the public domain. For example, David Lange defines the role of the public domain as preventing “the encroachments upon the creative imagination threatened by intellectual property.”<sup>127</sup> Edward Lee argues that in a democratic society the public domain acts as the ultimate keeper of “the common culture and knowledge.”<sup>128</sup> Lawrence Lessig provides that a good public domain is a commons that is “within the reach of members of the relevant community without the permission of anyone else.”<sup>129</sup> Jessica Litman defines the public domain as “a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.”<sup>130</sup> Finally, for Pamela Samuelson, the public domain conception acts as “a building block for the creation of new knowledge, and as an enabler of competitive imitation, follow-up creation, free or low cost access to information, public access to cultural heritage, education, self-expression and autonomy, various governmental functions, or deliberative democracy.”<sup>131</sup> The limited duration of moral rights Kwall advocates, and their weaker subsistence, as opposed to civil law systems, “reinforces a vibrant

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<sup>122</sup> *Id.* at 58.

<sup>123</sup> C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978).

<sup>124</sup> *Id.* at 1000.

<sup>125</sup> *Id.* at 1002.

<sup>126</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 3.

<sup>127</sup> David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 476 (2003).

<sup>128</sup> Edward Lee, *The Public’s Domain: The Evolution of Legal Restraints on the Government’s Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 165 (2003).

<sup>129</sup> Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE L.J. 1783, 1788 (2002).

<sup>130</sup> Litman, *supra* note 112, at 968.

<sup>131</sup> Samuelson, *supra* note 109, at 826-27 (footnotes omitted).

public domain”<sup>132</sup> and attests to Kwall’s depiction of the public domain “as the mechanism that ensures everyone access to information and facts in expressive works.”<sup>133</sup>

Originality is another hurdle that proponents of moral rights must confront<sup>134</sup>: “It does not make sense to discuss the application of moral rights to works that do not possess at least [a] minimal level of originality.”<sup>135</sup> This protection should not be limited to fine art. Works must meet a certain standard of independent contribution and creativity to qualify for the *Feist* formula.<sup>136</sup> Moral rights “should apply to more narrow categories of works of authorship than are currently eligible for copyright protection.”<sup>137</sup> Kwall suggests that while “certain functional types of works should be excluded per se from moral rights protection, other works such as art, literature, music, and even architecture presumptively should qualify if a sufficient showing of originality can be made . . . .”<sup>138</sup> That is, a requirement of “heightened originality and substantial creativity”<sup>139</sup> for moral rights protection is necessary in these cases. This raises a fundamental concern. If authorship, as one court remarked, is “elusive and inexact,”<sup>140</sup> are courts or copyright tribunals the appropriate forums to develop a clear sliding scale of originality and creativity or elaborate on a workable test to determine the boundaries of “true artistic skill?”<sup>141</sup> The problems with judges determining aesthetic creations were

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<sup>132</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 160.

<sup>133</sup> *Id.* at 53.

<sup>134</sup> See Roberta Rosenthal Kwall, *Originality in Context*, 44 Hous. L. Rev. 871, 883 (2007) (“[D]espite the minimal threshold for originality developed under copyright law, moral rights protection should only be accorded to works satisfying a heightened standard of originality, as manifested by substantial – rather than a modicum – of creativity.” (internal quotation marks omitted)).

<sup>135</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 69.

<sup>136</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“To qualify for copyright protection, a work must be original to the author.”). Trivial or mechanical labor is insufficient grounds on which to base a legitimate claim for authorship and copyright entitlement. *Id.* at 362 (“[T]he selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever.”). Sufficient labor requires investment of creative labor. *Id.* at 345. However, “the requisite level of creativity is extremely low; even a slight amount will suffice” and “[t]he vast majority of works make the grade quite easily.” *Id.*

<sup>137</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 72.

<sup>138</sup> *Id.* at 79. Kwall refers to “databases, building codes, office memos, cabinets, and software” as examples of works to which moral rights should not be extended. *Id.* at 73-74 (citations omitted).

<sup>139</sup> *Id.* at 73.

<sup>140</sup> *Follet v. New Am. Library, Inc.*, 497 F. Supp. 304, 312 (S.D.N.Y. 1980) (holding that a misleading attribution of authorship violated section 43(a) of the Lanham Act).

<sup>141</sup> *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (holding that, for reproductions of artistic works, a higher degree of skill is required to render a reproduction

highlighted in Justice Holmes's famous statement: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."<sup>142</sup>

VARA can serve as a useful guide by analogy, since it distinguishes between "a work of recognized stature"<sup>143</sup> and works that are explicitly excluded from its scope. The excluded works include any "poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication" and "any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container."<sup>144</sup> The Act covers only "painting[s], drawing[s], print[s], or sculpture[s], existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."<sup>145</sup> In order to avoid the muddy task of determining levels of creative and artistic content, Kwall offers a test to determine when a work qualifies for moral rights protection by examining "the author's narrative with respect to the design process and on evidence concerning the perceptions of ordinary reasonable observers."<sup>146</sup> This, Kwall claims, would allow courts "to assess whether a work possesses the requisite originality to be within the scope of moral rights protection."<sup>147</sup>

Attempts to define the boundaries of originality in copyright may lead to stalemates rather than offer practically workable templates. Kwall's test for originality joins copyright scholars' recent inquiries into whether originality should be substantially redefined. Joseph Miller proposes to model copyright protection "on patent law's nonobviousness requirement."<sup>148</sup> The "creative" constituent of originality should be judged in a "patent-inspired" manner,<sup>149</sup>

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copyrightable).

<sup>142</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). Indeed, this remark has "become[] a refuge for judges who do not want to engage with aesthetics questions." Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 818 (2005).

<sup>143</sup> 17 U.S.C. § 106A(a)(3)(B) (2006).

<sup>144</sup> 17 U.S.C. § 101.

<sup>145</sup> *Id.* This section limits the protection to photographic images. It provides that "a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author," qualifies as "a work of visual art." *Id.*; *see also* Kwall, *The Soul of Creativity*, *supra* note 2, at 74-79.

<sup>146</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 85; *see also id.* at 148 (expanding on Kwall's recommended test).

<sup>147</sup> *Id.* at 85.

<sup>148</sup> Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 463 (2009).

<sup>149</sup> *Id.* at 464. In fact, the Supreme Court has invoked patent law analogies on at least two occasions. *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 439-40 (1984); *see also MGM Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 935-36 (2005).

that is, by whether it reflects “the unconventional, the unpredicted, and the unorthodox.”<sup>150</sup> Kwall herself announced that “if given the opportunity . . . I would certainly be open to elevating the standard for copyright protection,”<sup>151</sup> and suggested originality that depends upon “substantial creativity.”<sup>152</sup> Gideon Parchomovsky and Alex Stein, in their attempt to refashion originality, challenge it as meaningless and propose to focus on disaggregating originality into three tiers.<sup>153</sup> They design a different set of rights and liabilities to creative works in each tier.<sup>154</sup> These studies strive to design a test for determining when art is sufficiently artistic. The risk that always exists in such paradigms is that works worthy of protection will be left outside the ambit of copyright protection.

Kwall sees the creative act as a process; the test she favors requires examination of “the author’s narrative with respect to the design *process*”<sup>155</sup> of the work. This view is consistent with studies defining creativity as a continuous process. Robert Weisberg, for example, suggests that “for a product to be called creative, it must be the novel result of *goal-directed* activity; novelty brought about by accident would not qualify as creative, no matter how valuable the outcome.”<sup>156</sup> Mihaly Csikszentmihalyi, considering the creativity of Picasso’s art, provides that the latter undoubtedly ventured beyond the works of his predecessors, “but even he recognized that without mastering the best achievements of a domain, one is left only with one’s naked talents, having to reinvent the wheel without tools.”<sup>157</sup> A heightened level of originality for moral rights protection might act as an adequate requirement, but again, the risk is in fencing moral rights in a way that excludes works of artistic-content such as Arp, Duchamp, and other Dadaists’ famous chance creations.<sup>158</sup> In other words, Judge Peterson’s maxim that “what is worth copying is *prima facie* worth protecting”<sup>159</sup> is not necessarily correct.

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<sup>150</sup> Miller, *supra* note 148, at 484-85.

<sup>151</sup> Roberta Rosenthal Kwall, *Hoisting Originality: A Response*, 20 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 2 (2009).

<sup>152</sup> *Id.* at 8.

<sup>153</sup> Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505, 1507 (2009).

<sup>154</sup> *Id.*

<sup>155</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 85 (emphasis added).

<sup>156</sup> ROBERT W. WEISBERG, CREATIVITY 242-43 (1993).

<sup>157</sup> MIHALY CSIKSZENTMIHALYI, CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION 421-22 n.252 (1996).

<sup>158</sup> See Durham, *supra* note 91, at 574 (“I discuss the use of indeterminate processes in the arts, concentrating on the works of Jean Arp, Marcel Duchamp, and John Cage. Through their experiments with the processes of creation, these highly ‘original’ artists defied conventional expectations of authorship.” (footnote omitted)).

<sup>159</sup> Univ. of London Press Ltd. v. Univ. Tutorial Press Ltd., [1916] 2 Ch. 601 at 610 (Eng.).

Scholars try to reconcile unintended creativity and personhood. For Alan Durham, authorship should be defined in a way that encompasses indeterminate art,<sup>160</sup> and Justin Hughes argues that personhood interests justifying protection “can arise from simply being the human source of an intellectual property *res*.”<sup>161</sup> Justice Holmes once remarked that “[p]ersonality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone.”<sup>162</sup> That is, the connection between the author and his work will always exist. The question is whether this connection merits moral rights protection. Perhaps a higher level of originality and creativity should be satisfied before cultural properties become tradable as the exclusive dominion of certain individuals. This concern is one of the many debatable areas within our copyright regime that urge us to rethink the basic principles of copyright and their ideological structure. Reopening debate on the basics of copyright should be done more often, especially given contemporary attempts to find new normative justifications for our copyright regime.

### III. BLACKSTONIAN MORAL RIGHTS

Pioneering approaches to legal change, such as that of Kwall, do not have an immediate effect on the prevailing conceptions of rights. They require a gradual process of social digestion before they reach maturity sufficient to create a real change. For a new agenda of moral rights to succeed, close attention must be paid to sacred constitutional principles, the objectives of the Copyright Clause, and norms of authorial morality and textual integrity. It also requires a willingness by the community of authors, users, and the industry to accept a novel conceptual change. To accommodate these concerns, Kwall designed a “narrowly crafted”<sup>163</sup> formula for moral rights protection.

In what follows I argue that Kwall’s theoretical argument is *not* “narrowly crafted.” Kwall offers a Blackstonian approach to moral rights by individuating authors and treating them as legitimate sole creators of their personalities and proprietors of the latter’s expressions, while discounting the social nature of the creative act. William Blackstone’s legendary claim is:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.<sup>164</sup>

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<sup>160</sup> Durham, *supra* note 91, at 638.

<sup>161</sup> Hughes, *supra* note 72, at 83.

<sup>162</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

<sup>163</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 58, 61, 157.

<sup>164</sup> 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*2.

I use the term “Blackstonian moral rights” despite the fact that Kwall does not enter into the property debate and instead emphasizes honor, dignity and internal motivations as the basis for owning personalities and their material creative expressions. Kwall treats authorial personalities as the “sole and despotic dominion” of authors: authors have inner motivations and innate creative abilities that make them sole proprietors of their personalities. The sociality of the creative act fundamentally affects the realization and construction of authorial personalities, yet has a minimal role in Kwall’s theory. Consequently, authors are entitled to a set of “exclusionary privileges to be treated largely analogous to ordinary tangible property.”<sup>165</sup>

In his abbreviated discussion of copyright Blackstone provides that:

When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that right.<sup>166</sup>

Kwall employs similar ideology for moral rights. Authors exercise the exclusive power they have over their personalities, investing “personal originality”<sup>167</sup> and becoming authors of an “original text.”<sup>168</sup> Therefore, any violation of the rights attached to the work amounts to an invasion of an author’s personality – an assault on the authorial self:

It is human nature to care about how one’s product is packaged for external consumption. And when the packaging violates the original author’s vision of the work’s meaning and message, there is an assault to the author’s dignity. This assault, though arguably justifiable in light of other people’s enjoyment of free speech and artistic freedom, nonetheless violates a well-established code of authorship morality. There is, quite simply, something wrong with damaging a work’s textual integrity.<sup>169</sup>

In recent decades, though, copyright has expanded significantly to the extent that it imposes “unacceptable burdens” on social values such as free speech.<sup>170</sup> Kwall is well aware of potential risks to sacred constitutional values and offers thin doctrinal changes. A reader might find an inherent paradox in Kwall’s depiction of moral rights. On the one hand, Kwall offers a Blackstonian approach to moral rights ideology. On the other hand, she heavily compromises its effectiveness by offering a system of disclaimers. Arguably, Kwall’s offer is a simple, yet convincing, call to recognize that the creative act involves investment of certain authorial qualities that come from the author’s

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<sup>165</sup> Shyamkrishna Balganes, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1135 (2009).

<sup>166</sup> 2 BLACKSTONE, *supra* note 164, at \*405-06.

<sup>167</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 2.

<sup>168</sup> *Id.* at 144.

<sup>169</sup> *Id.* at 3-4.

<sup>170</sup> See NEIL W. NETANEL, COPYRIGHT’S PARADOX 5 (2008).



inner soul and identity. However, as Parts IV and V of this Essay show, this call for recognition cannot adequately protect the intrinsic dimension of human creativity. This compromise better suits an argument *rejecting* individualist theories of moral rights, such as the one I shall develop in the next Part. From a theoretical standpoint, Kwall offers strong moral rights. However, the practical spectrum Kwall structures is so limited that it raises the question whether the protection she sought to offer authors and artists can be referred to as *rights* at all.

Although Kwall does not define “rights” for matters of authorial morality, her argument implicitly embraces the Hohfeldian meaning of a “right.”<sup>171</sup> Hohfeld tells us that when an individual has a right over a given resource, a duty will be attached to that right on those who do not hold the right.<sup>172</sup> A justified property right over a given resource is the calculation of the three primary rights in property – the right to use, the right to exclude others from use and possession, and the power to transfer the owned object by gift, sale, or bequest – and the duties they impose on others. Hohfeld provides that “even those who use the word and the conception ‘right’ in the broadest possible way are accustomed to thinking of ‘duty’ as the invariable correlative.”<sup>173</sup> In property, to have a Hohfeldian right means that there are at least two players in the game: the right-bearer and the duty-bearer. The entitlements of each are correlative: “if X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.”<sup>174</sup> Thus, every question pertaining to private property is actually a question of restraints. Similarly, Kwall’s version of moral rights puts restraints on non-authors in the guise of duties to recognize the authorial integrity of the text.

Any recognition of restraints requires defining the spectrum of the rights and the trespassory rules they impose on non-authors in a way that reflects the sociality of the creative act. Blackstonian ideologies on human creativity and the construction of authorial personalities simply fail to do so. The English poet Samuel Taylor Coleridge, who with his close friend William Wordsworth founded the Romantic Movement in England, had a clear conception of authorship, which excluded external stimuli or social contributions.<sup>175</sup> Sonia

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<sup>171</sup> The Hohfeldian conception of “right” is articulated in Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

<sup>172</sup> *Id.* at 32.

<sup>173</sup> *Id.* at 31.

<sup>174</sup> *Id.* at 32.

<sup>175</sup> In his criticism of this approach, Leader writes: “[T]he writing of the Romantic period (as of all periods) is the product of a network of literary and social relations, one in which the nominal author’s contribution and authority are dominant but not exclusive. Even when fiercely professing independence, the author typically draws on a range of personal and institutional collaborators, including family, friends, publishers, reviewers, and readers.” ZACHARY LEADER, *REVISION AND ROMANTIC AUTHORSHIP* 15 (1996).

Hofkosh observes that Coleridge held a decidedly subjective view of authorship and authorial rights: “Coleridge’s rationale regarding the author’s natural right to own and to profit from his literary labor registers the stake the writer has in choosing ‘what an author means’ ‘for himself.’”<sup>176</sup> Hofkosh continues and remarks that:

Authorship in Coleridge’s ideal description enacts a self-fulfilling economy, an organic circulation, in which value accrues to individuality within a naturally closed system without substantial change or exchange: no risk, no excess, nothing for which the author cannot himself account.

Literary property is in this way crucially distinguished from “all other property,” and the author from “ribbon-weavers, calico-printers, cabinet-makers, and china-manufacturers” insofar as *what the author produces is the inalienable stuff of his own subjectivity*.<sup>177</sup>

*The Soul of Creativity* is distanced from Coleridge’s excessive ideal of solitary authorship, but Kwall’s subjective and individualistic approach to authorial personalities risks the invitation of similar justifications to moral rights. It risks treating authorial personalities as the sole dominion of authors rather than a construction of a multiplicity of sources. This approach may also refuel the emergence of neo-romantic approaches to copyright in general.

The next Part of this Essay argues that authorial selves are social constructs and that any allocation of rights in the expressions of creative personalities requires recognition of the public’s contribution to the formation of creative selves. I do not intend to deny authors their moral rights, but I do reject thick theoretical approaches to the creative process that romanticize the nature of authorial personalities.<sup>178</sup>

#### IV. THIN MORAL RIGHTS

##### A. *The Construction of the Authorial Self*

Authorial entities are socially constructed and historically contingent. They are nurtured by cultural and social properties owned and maintained by the

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<sup>176</sup> SONIA HOFKOSH, *SEXUAL POLITICS AND THE ROMANTIC AUTHOR* 15 (1998).

<sup>177</sup> *Id.* (emphasis added).

<sup>178</sup> To clarify this point, I should mention that a system of rewards is fundamental to the success of any copyright system. These rewards, however, must not exceed normative expectations. As Jane Ginsburg remarks:

[W]hether one sees copyright as a personality right conferring on the author the ownership of the fruits of her labor, or as an economic incentive scheme to promote the production of works of authorship, or as a public works program designed to fill the public domain (or, most accurately, as a combination of the three), giving credit where it is due is fully compatible with both the author-regarding and the public-regarding aspects of these goals.

Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 306-07 (2004).

creative collectivity. Kwall presents an individualistic account of authorship and moral rights and discounts the social and collective nature of the creative act. For Kwall, postmodern arguments “questioning the ability of authors to draw upon personal originality as their creative inspiration, notwithstanding liberal borrowing from the existing artistic landscape, . . . do not sufficiently account for the inspirational dimension of authorship.”<sup>179</sup> Authors embody a “highly personalized and intrinsic nature of creative authorship.”<sup>180</sup> The authorial self then, on this account, is the unlimited property of the person – “a kind of bounded container, separate from other similarly bounded containers and in possession or ownership of its own capacities and abilities.”<sup>181</sup>

Kwall celebrates the authorial self. She treats it as a container of intrinsic values and motivations – as a source for generating original creative expressions embodying unique personality traits. Treating authors as “distinctive, independent agents who own themselves and have relatively clear boundaries to protect in order to ensure their integrity and permit them to function more effectively in the world”<sup>182</sup> is synonymous with what Macpherson terms “possessive individualism”: being the owner of one’s own capacities and self.<sup>183</sup>

Although “thinking of the person as a container is a rather commonplace feature of our everyday lives [sic],”<sup>184</sup> the building blocks of this container would not have existed without the contribution of external resources. The creative act’s dependence on these resources weakens the applicability of the “possessive individualism,” as well as the Blackstonian arguments, to authorial personalities. In other words, a robust and exclusive set of moral entitlements for authors and artists is inconsistent with the true nature of the creative act. A juridical inquiry that attempts to claim that “[a] viable approach to the implementation of moral rights in this country should reflect both a complete view of creativity as well as the realities of the laws already in place,”<sup>185</sup> is expected to account for the implications of the nature of the creative process as a socially constructed phenomenon.

Thus, an author’s personality is a social construct. Ian Hacking provides that a construction is a kind of “building, or assembling from parts.”<sup>186</sup> Hacking continues: “Anything worth calling a construction was or is

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<sup>179</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 2.

<sup>180</sup> *Id.*

<sup>181</sup> Edward E. Sampson, *Possessive Individualism and the Self-Contained Ideal*, in *SOCIAL CONSTRUCTION: A READER* 123, 123 (Mary Gergen & Kenneth J. Gergen eds., 2003).

<sup>182</sup> *Id.*

<sup>183</sup> C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 263 (1962).

<sup>184</sup> Sampson, *supra* note 181, at 126.

<sup>185</sup> KWALL, *SOUL OF CREATIVITY*, *supra* note 2, at 56.

<sup>186</sup> IAN HACKING, *THE SOCIAL CONSTRUCTION OF WHAT?* 49 (1999).

constructed in quite definite stages, where the later stages are built upon, or out of, the product of earlier stages. Anything worth calling a construction has a history. But not just any history. It has to be a history of building.”<sup>187</sup> Similarly, in *The Social Construction of Reality*, Berger and Luckmann provide a sociological analysis of everyday life and the knowledge that guides conduct in everyday life.<sup>188</sup> They begin with the reality of everyday life and argue that it is premised on social relations and material objects.<sup>189</sup> They claim that a person’s “natural attitude to this world corresponds to the natural attitude of others.”<sup>190</sup> Every person is a member of society and participates in its dialectic environment, internalizes its social elements, and uses them in his daily reality.<sup>191</sup> Participation and interaction render the products of these activities derivative. Berger and Luckmann also argue that social reality has both objective and subjective dimensions.<sup>192</sup> This explains why copyrighted entities are neither wholly public nor private, but a joint enterprise that takes authors and artists *beyond* what is already known.

References to the social nature of the creative act are not absent from Kwall’s argument.<sup>193</sup> In fact, she writes:

My perspective assumes individuals are the products of their cultural environments and therefore, the intrinsic dimension characteristic of any one creator necessarily subsumes these cultural influences. In other words, an author’s particular internal dimension of creativity is a product of her own individualistic perspective and personality, her cultural environment, as well as the interaction between an author’s individualism, and her external cultural milieu.<sup>194</sup>

However, her criticism of postmodern approaches to authorship and her emphasis on concepts such as innate endowment and inner processes in her theoretical landscape leave hardly any room to question the individualistic stance of her argument. Kwall emphasizes the “innate nature of the urge to create,”<sup>195</sup> the authors’ “inner cognitive processes,”<sup>196</sup> the “inner labor [that] embodies a drive to create emanating from powerful forces within the soul of

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<sup>187</sup> *Id.* at 50.

<sup>188</sup> See generally PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966).

<sup>189</sup> See *id.* at 19-34.

<sup>190</sup> *Id.* at 22.

<sup>191</sup> See *id.* at 27 (“The reality of everyday life is shared with others. . . . The most important experience of others takes place in the face-to-face situation, which is the prototypical case of social interaction.”).

<sup>192</sup> See *id.* at 45-118 (discussing objective reality); *id.* at 119-68 (discussing subjective reality).

<sup>193</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 119.

<sup>194</sup> *Id.* at 12.

<sup>195</sup> *Id.* at 20.

<sup>196</sup> *Id.*

the author,”<sup>197</sup> the “inner personality,”<sup>198</sup> or the “inner creative process.”<sup>199</sup> Kwall does not acknowledge the limits of innate or inner abilities, even though these abilities are limited *ab initio* due to their reliance on the creative collectivity.

There is no single definition of what is “innate,”<sup>200</sup> and no consensus on when a trait is innate within a person. Stephen Stich defines innateness as the disposition to appear in the normal course of development;<sup>201</sup> André Ariew explicates innate traits as insensitive to variations in the developmental environment;<sup>202</sup> William Wimsatt uses the principles of “generative entrenchment” to explain that innate traits are those upon which many other features of the organism are built and whose presence is therefore imperative for normal development.<sup>203</sup> Despite the disagreements, innateness is definitely “a term in common use” and Kwall’s theory agrees with the observation that it is “one that represents a highly intuitive way of thinking about living systems.”<sup>204</sup>

Thus, treating authors as a special category of gifted individuals who deserve moral rights because of their internal processes amounts to a denial of the social and cultural nature of the creative act and the dependence of authors on the collective creativity. This is the direct result of inherited and unmodified conceptions of ownership. Before we rethink modern authorial morality we “must take into account the mutually constitutive relationships between and among the self, community, and culture.”<sup>205</sup> In other words, the copyright bargain must reflect the fact that each copyright work is dependent on the public’s social and cultural input, and each work owes much to its predecessors while each informs its successors.<sup>206</sup> The question, “who authors authorial personalities?” is not idle. Authorship is not a solitary and internally

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<sup>197</sup> *Id.* at 12.

<sup>198</sup> *Id.* at 152.

<sup>199</sup> *Id.* at 144.

<sup>200</sup> See, e.g., Richard Samuels, *Is Innateness a Confused Concept?*, in 3 *THE INNATE MIND* 17, 17 (Peter Carruthers, Stephen Laurence & Stephen Stich eds., 2007).

<sup>201</sup> See Stephen P. Stich, *Introduction: The Idea of Innateness*, in *INNATE IDEAS* 1, 6 (Stephen P. Stich ed., 1975).

<sup>202</sup> See André Ariew, *Innateness is Canalization: In Defense of a Developmental Account of Innateness*, in *WHERE BIOLOGY MEETS PSYCHOLOGY* 117, 117 (Valerie Gray Hardcastle ed., 1999)

<sup>203</sup> See William C. Wimsatt, *Generativity, Entrenchment, Evolution, and Innateness: Philosophy, Evolutionary Biology, and Conceptual Foundations of Science*, in *WHERE BIOLOGY MEETS PSYCHOLOGY: PHILOSOPHICAL ESSAYS*, *supra* note 202, at 139, 153.

<sup>204</sup> Paul E. Griffiths, *What is Innateness?*, 85 *MONIST* 70, 81 (2002).

<sup>205</sup> Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 372 (2005).

<sup>206</sup> As Zechariah Chafee famously remarked: “The world goes ahead because each of us builds on the work of our predecessors.” Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 *COLUM. L. REV.* 503, 511 (1945).

motivated process of the individual. Perhaps, as Tom Palmer most poignantly remarked, “if special personal rights governing works of art are to be recognized anywhere, they should be in the audience, and not in the artist, for it is on the audience that the art work depends for its continued existence, and not on the artist.”<sup>207</sup>

B. *Lockean Authorial Selves*

Modern copyright debates invoke Locke’s natural right philosophy of property for two main reasons:

First, Locke’s main theme of property ownership is based on a person’s natural entitlement to the products of his labor [and talent]. Second, scholars find in Locke’s theory of property, and the limits he sets on what a laborer can come to exclusively own and control, a solid argument with which to solve contemporary problems in copyright.<sup>208</sup>

In addition to criticizing the role of utilitarianism in American copyright jurisprudence, Kwall also criticizes the ubiquity of Lockean justifications:

[A] Lockean theory of copyright law maintains that an author’s expression, having been created with her mental labor, is an ideal object for commodification. . . .

Thus, in light of the utilitarian and Lockean underpinnings of copyright law in the United States, the prevailing law and policies de-emphasize the intrinsic process of creation in favor of a narrative favoring dissemination, commodification, and economic reward.<sup>209</sup>

However, Locke’s political philosophy and epistemology has much to offer Kwall in the search for a balanced moral right regime. It can support her view

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<sup>207</sup> Palmer, *supra* note 22 at 848.

<sup>208</sup> Zemer, *supra* note 42, at 892; see Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURIS. 3, 6 & n.6 (2003) (citing some prominent North American authors who “find in John Locke’s labour theory of property support not only for the author’s natural right to her work, but also for the public’s countervailing right to limit the author’s entitlement”); Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138, 139 (Stephen R. Munzer ed., 2001) (“The desire to use Lockean theory to ground intellectual property rights is understandable in light of its theoretical and practical advantages. Locke’s approach to property appears to offer a strong, principled justification for private property rights. . . . [I]t appears to offer a principled alternative to consequentialist approaches, one that might reduce the need for empirical investigation. Consequentialist foundations for property rights rely upon contingent, empirical facts that may fluctuate with variations in the economic context . . . .”); Gordon, *supra* note 42, at 1540 (“Locke’s labor theory of property and allied approaches have been used so frequently as a justification for creators’ ownership rights that Locke’s *Two Treatises* have been erroneously credited with having developed an explicit defense of intellectual property.”); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

<sup>209</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 25.

that “[t]he act of creative authorship implicates the honor, dignity, and artistic spirit of the author in a fundamentally personal way, embodying the author’s intrinsic dimension of creativity.”<sup>210</sup> It also supports her call to revise the agenda of American copyright law in a way that emphasizes “author autonomy, personal connectedness to one’s original work, and the integrity of the author’s message through a doctrine known as moral rights”<sup>211</sup> instead of going astray after economic models only.

Three Lockean arguments can support the present debate. First, Kwall expresses special interest in the stewardship model: “From a theological standpoint, stewardship reaffirms that gifts are endowed by a Divine power, beyond that of the artist. Also, stewardship embraces a temporary view of possession to the extent it conceives of gifts returning to their original source.”<sup>212</sup> Therefore, “[s]tewardship also is consistent with the idea of the author as the guardian of her meaning and message during her lifetime.”<sup>213</sup> The stewardship model has much in common with Locke’s model of creation. According to Locke, God gave man the earth as a gift. Because this gift was given in common, privatization of commonly owned objects requires compliance with certain social conditions such as leaving “enough, and as good” in common for others to create property,<sup>214</sup> avoiding spoliation of the properties taken from the common,<sup>215</sup> as well as catering for those in extreme want.<sup>216</sup> These conditions ensure that the gifts God gave man are not illegitimately and perpetually used in ways that affect other commoners’ right to property entitlement.<sup>217</sup>

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<sup>210</sup> *Id.* at xiii.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 19.

<sup>213</sup> *Id.*

<sup>214</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT, SECOND TREATISE, ch. v, § 27, at 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter LOCKE, SECOND TREATISE] (“Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. . . . For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.”).

<sup>215</sup> *See id.* ch. v, § 31, at 290 (“As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy.”).

<sup>216</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT, FIRST TREATISE, ch. iv., § 42, at 170 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter LOCKE, FIRST TREATISE] (“As *Justice* gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so *Charity* gives every Man a Title to so much out of another’s Plenty, as will keep him from extream want, where he has no means to subsist otherwise . . .”).

<sup>217</sup> *See* LOCKE, SECOND TREATISE, *supra* note 214 ch. v, § 31, at 290 (“And thus

Philosophers have studied the question of whether Locke's metaphor of labor mixing means that a laborer simply mixes his labor or creates something totally new. James Tully introduces the workmanship model, which regards God as a maker and man as his workmanship.<sup>218</sup> According to Tully, "[d]ue to the analogy between God and man as makers, anything true of one will be, *ceteris paribus*, true of the other."<sup>219</sup> On this account, making is an activity associated with bringing something into being *ex nihilo* and a laborer thus possesses God-like, absolute rights. Jeremy Waldron criticizes Tully's model, contending that "[t]here are serious difficulties with [his] interpretation of property rights as creators' rights [because] it yields a conclusion which is far too strong."<sup>220</sup> Men do not have divine powers of creation. Locke himself asserts:

The Dominion of Man . . . in the great World of visible things; wherein his Power, however managed by Art and Skill, reaches no farther, than to compound and divide the Materials, that are made to his Hand; but can do nothing towards the making the least Particle of new Matter, or destroying one Atom of what is already in Being.<sup>221</sup>

Kwall's argument is situated somewhere in between the approaches of Tully and Waldron. I argue that Kwall embraces creative individualism, and she sees creative personalities and creative identities as the sole ownership of authors. At the same time, Kwall recognizes restraints on the spectrum of moral rights ownership. Also, Kwall does not reject the social construction of personalities and creative abilities argument in its entirety, and argues that the stewardship model requires limited-in-time moral rights so that creative gifts return to their original source.<sup>222</sup>

Second, a distinction Locke makes between a "man" and a "person" and between a manual laborer and a gentleman attests to his sensitivity towards allocation of rewards for manual *and* mental expenditure of labor. Locke

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considering the plenty of natural Provisions . . . and to how small a part of that provision the industry of one Man could extend it self and ingross it to the prejudice of others; especially keeping within the *bounds*, set by reason of what might serve for his *use*; there could be then little room for Quarrels or Contentions about Property so establish'd.").

<sup>218</sup> JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES 35-50 (1980).

<sup>219</sup> *Id.* at 37.

<sup>220</sup> WALDRON, *supra* note 21, at 198.

<sup>221</sup> JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. II, ch. ii, § 2, at 120 (Peter H. Nidditch ed., 1975) (1690) [hereinafter LOCKE, ESSAY].

<sup>222</sup> See KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 58 ("[M]oral rights are measures that, conceptually speaking, should last for the lifetime of the authors, and thus comport with the 'limited times' constitutional requirement. . . . For example, the concept of stewardship, to the extent it encourages dedication of creative work back to its original, inspirational source, is consistent with the Framers' intentions of preventing monopolistic control over intellectual works in perpetuity.").



remarks that property encompasses that which “Men have in their Persons as well as Goods.”<sup>223</sup> In the chapter “Of Property,” in the *Second Treatise of Government*, he further clarifies this statement by drawing a clear distinction between persons in the natural, or biological sense, and an evolving person that includes the self. This is illustrated in his remark that “every Man has a *Property* in his own *Person*. This no Body has any Right to but himself.”<sup>224</sup> This distinction should be read in tandem with his essay *Labour*<sup>225</sup> where Locke highlights his concern for the moral value of labor and its importance for human happiness. Locke explicitly refers to “labour in useful and mechanical arts,”<sup>226</sup> and draws a clear distinction between manual labor performed by the “country man,” “the working artisan,” and the “man of manual labour,” and intellectual labor carried by the “gentlemen and scholar.”<sup>227</sup>

The United States Supreme Court has already referred to the principle “as you sow, so shall you reap” in copyright cases.<sup>228</sup> For Kwall, this principle also applies to labor originating from the intrinsic dimension of creativity and should allow authors to reap the benefits of their mental labor in the guise of limited rights of attribution and integrity.<sup>229</sup> Locke’s distinction between a man and a person shows that labor for him is physical and mental – the labor of the peasant and of the artisan. A copyrighted work is a good but it is also a manifestation of the *person* – of the self. When a person is an author who expends laborious efforts on both the physical and mental composition of a work, he deserves rights that protect the moral and economic aspects of the property created.

Indeed, scholars have interpreted Locke as subscribing to a personality theory. Karl Olivecrona writes: “The acorn becomes the property of the collector when he picks it from the ground. This is the moment when something of his personality is infused into the acorn.”<sup>230</sup> Additionally, Walter Hamilton asserts that “Locke never disassociates property from the personality of which it is an expression; because it is the creation of man it has the

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<sup>223</sup> LOCKE, *SECOND TREATISE*, *supra* note 214, ch. xv, § 173, at 383.

<sup>224</sup> *Id.* ch. v, § 27, at 287; *see also id.* ch. v, § 44, at 298 (asserting that man is the “*Proprietor of his own Person*”).

<sup>225</sup> JOHN LOCKE, *Labour* (1693), in JOHN LOCKE: *POLITICAL ESSAYS* 326, 326-28 (Mark Goldie ed., 1997).

<sup>226</sup> *Id.* at 326.

<sup>227</sup> *Id.* at 327-28.

<sup>228</sup> *See, e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545-46 (1985); *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 239-40 (1918); *see also* *Millar v. Taylor*, 98 Eng. Rep. 201, 252 (1769).

<sup>229</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 12.

<sup>230</sup> Karl Olivecrona, *Appropriation in the State of Nature: Locke on the Origin of Property*, 35 J. HIST. IDEAS 211, 225 (1974).

sacredness which he attaches to human life itself.”<sup>231</sup> Kwall mistakenly claims that Lockean justifications cherish commodification at the expense of authorial morality – discounting the intrinsic dimension of creativity.<sup>232</sup> For Locke the institution of property encompasses water drawn from a fountain<sup>233</sup> or drunk from a river;<sup>234</sup> deer killed;<sup>235</sup> fish caught in the ocean;<sup>236</sup> land that is cultivated.<sup>237</sup> But this is not a closed list. Intellectual property is explicitly and implicitly referred to by Locke.<sup>238</sup> Intellectual property requires protection of the laborer’s personality – of his self and identity. Locke supports commodification of mental labor but also recognition of the efforts of the ‘person’ – the internal entity that motivates the creative act.

Third, Locke’s theory of epistemology supports social views on the intrinsic process of creation and recognizes the special connection between authors and their works. Kwall invests efforts in defending inner processes and innate creativity that may lead to valid claims for owning authorial messages while maintaining a robust public domain.<sup>239</sup> In the *Essay Concerning Human Understanding*, Locke examines the nature of knowledge.<sup>240</sup> He dismisses the possibility of having innate ideas and principles from epistemology and the philosophy of mind.<sup>241</sup> A Lockean laborer cannot be said to create a physical object or an original cultural object *ex nihilo*, though he can be said to improve that which God gave us in common. Locke tells us that we are controlled by experience.<sup>242</sup> Our brain at birth is a blank slate and it is only experience that

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<sup>231</sup> Walter H. Hamilton, *Property – According to Locke*, 41 YALE L.J. 864, 868 (1932); see also MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 114 (1993); Hughes, *supra* note 208, at 329.

<sup>232</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 25 (“Thus, a Lockean theory of copyright law maintains that an author’s expression, having been created with her mental labor, is an ideal object for commodification. . . . Locke’s perspective thus underscores that ‘the passion for material appropriation is viewed as fundamental, even primary, in motivating the creation acts of the individual.’”) (quoting Sibyl Schwarzenbach, *Locke’s Two Conceptions of Property*, 14 SOC. THEORY & PRAC. 141, 157 (1988)).

<sup>233</sup> LOCKE, *SECOND TREATISE*, *supra* note 214, ch. v, § 29, at 289.

<sup>234</sup> *Id.* ch. v, § 38, at 295.

<sup>235</sup> *Id.* ch. v, § 37, at 294-95.

<sup>236</sup> *Id.* ch. v, § 30, at 289-90.

<sup>237</sup> *Id.* ch. v, § 32, at 290.

<sup>238</sup> JOHN LOCKE, *Liberty of the Press* (1694), in JOHN LOCKE: *POLITICAL ESSAYS*, *supra* note 225, at 329, 330-31 (arguing for the repeal of the Licensing Act of 1662); see also Zemer, *supra* note 42, at 898-906 (examining how Locke, in his *Liberty of the Press* essay, appears to be the inventor of modern copyright).

<sup>239</sup> See, e.g., KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 53-67.

<sup>240</sup> See LOCKE, *ESSAY*, *supra* note 221.

<sup>241</sup> See *id.*, bk. I, ch. ii, at 48-65 (describing how there are “No innate Principles in the Mind”).

<sup>242</sup> *Id.*, bk. II, ch. i, § 2, at 104 (“Whence has it all the materials of Reason and Knowledge? To this I answer, in one word, From Experience.”).

transforms blank slates into actual brains capable of absorbing knowledge and using it in the creative process. In other words, “all we know about the world is what the world cares to tell us.”<sup>243</sup> In the words of Locke:

Let us then suppose the Mind to be, as we say, white Paper, void of all Characters, without any *Ideas*; How comes it to be furnished? Whence comes it by that vast store, which the busy and boundless Fancy of Man has painted on it, with an almost endless variety? Whence has it all the materials of Reason and Knowledge? To this I answer, in one word, From *Experience*: In that, all our Knowledge is founded; and from that it ultimately derives it self. Our Observation employ’d either about *external, sensible Objects*; or about the *internal Operations of our Minds, perceived and reflected on by our selves, is that, which supplies our Understanding with all the materials of thinking*. These two are the Fountains of Knowledge, from whence all the *Ideas* we have, or can naturally have, do spring.<sup>244</sup>

We are, after all, as Locke says, “sociable Creature[s].”<sup>245</sup> We can transform our innate constitution into real abilities only when we interact in society. In this way the public joins the creative process, contributes to authors’ capacity to internalize external social and cultural elements, and then translates these elements into the language of copyright creation. The intrinsic dimension of creativity “explores the creative impulse as emanating from inner drives that exist in the human soul.”<sup>246</sup> For Locke these drives are not innate; they are socially constructed; their creative maturity is dependent not only on the individual author, but more on the exposure of his personality to the social and cultural realities and consumption of common properties and other symbols.<sup>247</sup> It is only then – when the individual interacts and the personality is socially matured – that a work of authorship can be understood as “an embodiment of the author’s meaning and message.”<sup>248</sup>

This argument captures Kwall’s examinations of personas. Kwall devotes an entire chapter to discussing the legal status of celebrity and other personas and claims that a moral rights regime, if properly incorporated into domestic legislation, could be extended to personas.<sup>249</sup> Celebrities are active participants – just as authors – in the construction of their personas.<sup>250</sup> They

<sup>243</sup> *Empiricism*, in THE OXFORD COMPANION TO PHILOSOPHY 226 (Ted Honderich ed., 1995).

<sup>244</sup> LOCKE, ESSAY, *supra* note 221, bk. II, ch. i, § 2, at 104.

<sup>245</sup> *Id.*, bk. III, ch. i, § 1, at 402.

<sup>246</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at xiii.

<sup>247</sup> See LOCKE, ESSAY, *supra* note 221, bk. II, chs. i-xxxiii, at 104-401 (explaining the role of experience in ideas).

<sup>248</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 72-73.

<sup>249</sup> See *id.* at 111-31 (discussing the role of personas and how this role fits with copyright law).

<sup>250</sup> *Id.* at 112.

“themselves laboriously construct their personas.”<sup>251</sup> This view diminishes the role of the public in the construction of the persona. Rosemary Coombe, for example, argues that the celebrity’s “successful image is frequently a form of cultural *bricolage* that improvises with a social history of symbolic forms.”<sup>252</sup> A “celebrity is authored in a multiplicity of sites of discursive practice, and that in the process, unauthorized identities are produced, both for the celebrity and for her diverse authors.”<sup>253</sup> In another article Coombe asserts that “[p]ublicity rights arguably enable celebrities, their assignees, and their estates to control the meaning of the celebrity image in a fashion that deprives us of access to our collective cultural heritage . . . .”<sup>254</sup>

In contrast, for Kwall, “[t]he effort in constructing the celebrity persona-text represents an intellectual, emotional, and physical effort *on the part of* the celebrity similar to that engaged in by any author.”<sup>255</sup> And, “[i]dentity is a concept completely intrinsic to the individual to whom it is attached and therefore properly subject to that individual’s control.”<sup>256</sup> I agree that a celebrity’s “effort requires protection, not just from economic encroachment, but also from damage to the human spirit as a result of unauthorized uses of the persona the celebrity would find objectionable on moral grounds.”<sup>257</sup> But this strong claim must recognize the sociality of the creative act. Authorial personalities and creative identities take from the creative collectivity. Exclusive private ownership of cultural properties is an encroachment into the collective identity. These encroachments are justified on different theories of wealth creation and the value they add to the common stock of knowledge. However, every theoretical approach to moral rights that views individuals as the authors of their creative personalities must also reflect the sociality of these entities.

There are different creative personalities. Painters, for example, may have a great capacity to process and store visual information. They might not, however, possess the respective qualities necessary to design the future extension to the Guggenheim Museum or the London 2012 Olympic Village. That is, we consume and internalize collective properties in different ways; we transform collective properties by adding our subjective abilities, personality, and judgement. In this way we create a work that reflects our contribution; we create an entity that presents our identity and unique internal constitution. Moral rights should not be an alien concept in copyright, but at the same time,

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<sup>251</sup> *Id.* at 117.

<sup>252</sup> Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 370 (1991).

<sup>253</sup> *Id.* at 365.

<sup>254</sup> Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1876 (1991).

<sup>255</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 119 (emphasis added).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

their underlying ideology should be more reflective of the sociality of the creative process.

True, the creative personality is a special creature. Creative individuals possess a unique set of characteristics. They infuse their internal code, composed of inborn and adaptive capacities, into an external object.<sup>258</sup> As the United States Supreme Court remarked in *Bleistein v. Donaldson Lithographing Company*, originality denotes the “personal reaction of an individual upon nature.”<sup>259</sup> If the way one expresses one’s personality is by a reaction to the environment, then personality is a transformative entity which needs the external environment for its full realization.

## V. DISCLAIMERS, WAIVERS, AND DURATION

### A. *Moral Rights Enclosure*

Authorial moral rights, a unique conceptual architecture, catch the mind as a romantic reward for those who enrich our cultural life. As beautiful as this legislative monument can be, it is regulated by the institution of copyright that, in some legal systems, remains suspicious towards its beauty. Moral rights were only recently and grudgingly absorbed into American copyright law. Still, traditional conceptions of moral rights, closer to European systems, are considered alien and unwanted by many.<sup>260</sup> Kwall calls to change the culture of weak protection to moral rights in the United States.<sup>261</sup> Although I share with Kwall this call to adopt a wider and stronger moral rights regime, for the reasons mentioned above, I claim that Kwall’s approach to the beauty of moral rights is too narrow. Its defined corners enclose moral rights in a way that leaves authors with less than what moral rights ethics aims to achieve. I already explained the reasoning for my departure from Kwall’s theoretical premise.<sup>262</sup> In this Part, I shall explain my departure from her practical offerings.

Kwall advocates following Berne and a “substantial overhaul of VARA’s current terms of protection for moral rights.”<sup>263</sup> Kwall’s recommendation

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<sup>258</sup> As Hegel put it: “Attainments, erudition, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody them in something external and alienate them . . . .” HEGEL, *supra* note 20, at 41.

<sup>259</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

<sup>260</sup> *See, e.g.*, Tushnet, *supra* note 16, at 821 (“Attribution rights . . . are too alien to our copyright law to work well with the rest of the system.”).

<sup>261</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 148 (developing the argument that moral rights should be applied to works manifesting heightened originality with substantial creativity).

<sup>262</sup> *See supra* Part IV (discussing Kwall’s faulty theoretical premises).

<sup>263</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 148. This overhaul does not necessarily mean expansion of the rights. In some instances Kwall suggests to limit the

refers to the two primary moral rights, namely the right of attribution and the right of integrity. Kwall claims that the former should be defined broadly and a viable statute should make actionable the following four conducts:

(1) actual uses that are more than *de minimis* of an author's original work without attribution, or with false attribution; (2) reproductions of an author's work that are more than *de minimis* without attribution, or with false attribution; (3) modifications of an author's original work, or modifications of an exact reproduction or close copy of the author's work, resulting in a substantially similar version to the original, without attribution, or with false attribution; and (4) false attribution of authorship of a work to an author.<sup>264</sup>

Adopting this model of the right of attribution ensures that the public is not "harmed by a requirement of accurate authorship designation, especially in light of the proposed law's application only to works that manifest heightened originality in the form of substantial creativity."<sup>265</sup> Attribution violations will be enforceable by declaratory relief governing future distributions. In addition, given the noneconomic nature of the injury, a damage remedy will be available primarily in situations "where a clear showing of economic harm exists as a result of the attribution violation."<sup>266</sup>

As opposed to the broader application of the right of attribution, the right of integrity should be tailored narrowly "to vindicate the author's right to *inform the public* about the original nature of her artistic message and the meaning of her work."<sup>267</sup> Regarding remedies for integrity violations, Kwall's proposal is "more narrowly crafted than VARA in that it requires a disclaimer remedy and disallows prospective injunctive relief for works displaying an appropriate disclaimer."<sup>268</sup> These limits are proposed as recognition for "the duality of the First Amendment interests"<sup>269</sup> and the need to forge "a compromise between respecting the author's intrinsic dimension of creativity and the user's freedom to create and build upon prior works."<sup>270</sup>

Three issues receive special attention from Kwall. These issues are crucial for the success of her theory and forward-looking agenda and she introduced them to eliminate some of the criticism of her vision: the adequacy of disclaimers, the duration of the rights, and the possibility of waiving the rights. First, Kwall offers a system of disclaimers in order to avoid "the concern that stronger protections for the integrity interests of today's authors will privatize

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spectrum of the rights prescribed by VARA. *Id.* at 152.

<sup>264</sup> *Id.* at 149.

<sup>265</sup> *Id.* at 150.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 151.

<sup>268</sup> *Id.* at 152.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

more than is necessary to provide an incentive for tomorrow's creators"<sup>271</sup> and to "compromise between respecting the author's intrinsic dimension of creativity and the user's freedom to create and build upon prior works,"<sup>272</sup> thereby securing the dissemination of "accurate knowledge about the storehouse of our creative surroundings,"<sup>273</sup> and "inform[ing] the public that the material in question was used without the author's permission."<sup>274</sup>

The multidimensional approach presented in *The Soul of Creativity* and the passion with which it was written direct readers to question the limited protection Kwall attached to both rights. With regards to the right of integrity, Kwall is aware of this criticism: "After all, disclaimers can be small and barely noticeable."<sup>275</sup> However, she believes that this offering will serve as a useful indication "even if somewhat symbolic in certain instances – that the United States is sensitive to integrity interests"<sup>276</sup> and even if a disclaimer will not be noticed "its very existence is reaffirming at a psychological level for authors whose works have been distorted without their permission."<sup>277</sup> A disclaimer as remedy "may not be viewed as ideal by everyone, but it is practical, constitutionally sound, and better than the current system under which only a small minority of works are offered somewhat broader protection from a remedial context."<sup>278</sup>

The following summarizes what Kwall considers as the appropriate doctrinal payoffs resulting from her theory:

I believe that for moral rights to be viable in the United States, attribution should be mandated in most circumstances, whereas the right of integrity must be more cabined. Specifically, I recommend that the right of integrity be enforced by requiring public disclaimers acknowledging variations inconsistent with the original author's meaning and message

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<sup>271</sup> *Id.* at 154.

<sup>272</sup> *Id.* at 152.

<sup>273</sup> *Id.* at 153.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* Similarly, Jessica Litman is mainly concerned with false endorsement and proposes recognition of minimal moral rights via a system of citations: when someone appropriates creative content he should be required to label it as an unlicensed modification of the authentic/original source. Litman proposes that the user will attach to the modified version "a citation (or hypertext link) to an unaltered and readily accessible copy of the original." JESSICA LITMAN, *DIGITAL COPYRIGHT* 185 (2001). This, she claims, is a balanced solution that digital media offers, and it allows a gentler solution to Berne's traditional right of integrity. *Id.* Neil Netanel finds this solution to mediate between according "authorship attribution for the underlying work, avoid[ing] confusion regarding which is the 'authentic,' copyright holder-authorized version, and refer[ing] interested persons to the underlying work so they can see what has been changed." NETANEL, *supra* note 170, at 215-16.

<sup>276</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 153.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 154.

when a work is used in a manner deemed objectionable by the original author during the author's lifetime.<sup>279</sup>

Such a framework, she claims, "allow[s] moral rights to be exercised by the author, the person whose intrinsic dimension of creativity is most clearly connected to the work,"<sup>280</sup> and is consistent with the nature of liability rule protection "because the user's conduct is allowed as long as the appropriate attribution and disclaimers are provided."<sup>281</sup> This would allow users to "build upon the original author's work, subject to designated conditions."<sup>282</sup>

Purposive reading of Kwall's offering seems unsuitable to provide *good rights* for authors. Her strong theoretical premise begs a stronger regime of moral rights. Rebecca Tushnet – one of the firmest advocates against moral rights – clarifies, remarking that "Kwall's recommendation regarding integrity is more of a disclaimer remedy or reverse attribution right rather than a traditional integrity right . . . ."<sup>283</sup> I claim that Kwall does not offer moral rights in the strict sense of the word. Kwall offers a right of public recognition to authors and artists for their efforts and investment of personality in their creative expressions. Moral rights denote entitlements. Kwall was careful in crafting her vision of moral rights – perhaps too careful. This is due to "the legitimate concern with the shrinking public domain and its impact on the future of creativity in this country."<sup>284</sup> However, "it should not be assumed that enhanced protections for authors' attribution and other integrity interests will undermine the future of the public domain or contradict constitutional norms."<sup>285</sup>

To treat moral rights as entitlements, copyright systems must remain sensitive and address the precarious balance between authorial interests and societal needs. This, however, does not mean avoiding the meaning of giving *rights*. Arguably, the right of attribution is well protected under Kwall's paradigm, and her paradigm recognizes that giving credit is a moral obligation.<sup>286</sup> Also, a disclaimer might have the potential to serve as a good

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<sup>279</sup> *Id.* at 61.

<sup>280</sup> *Id.* at 65.

<sup>281</sup> *Id.* at 66.

<sup>282</sup> *Id.*

<sup>283</sup> Tushnet, *supra* note 16, at 792.

<sup>284</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 56.

<sup>285</sup> *Id.*

<sup>286</sup> *See id.* at 91-108 (explaining how moral rights supports attribution for both individual and collaborative authorships); *see also* Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 264 (2004) ("[F]ew interests seem as fundamentally intuitive as that authorship credit should be given where credit is due."); Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 175 (2002) (arguing that attribution norms are moral obligations); Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW &



informational tool<sup>287</sup> and generate good psychological effects.<sup>288</sup> But, is this what the doctrine of moral rights is about? Are these moral *rights*? Kwall, I argue, offers a too limited right of attribution and a right of integrity that is almost unprotected. A system of disclaimers cannot vindicate the author's right, because disclaimers are so thin in their ability to inform the public. Their meaning is truly questionable. This is best captured by the Second Circuit in *Gilliam v. American Broadcasting Companies*, a case involving unauthorized editing of Monty Python episodes for American television:

We are doubtful that a few words could erase the indelible impression that is made by a television broadcast, especially since the viewer has no means of comparing the truncated version with the complete work in order to determine for himself the talents of plaintiffs. Furthermore, a disclaimer . . . would go unnoticed by viewers who tuned into the broadcast a few minutes after it began.<sup>289</sup>

Second, although the possibility of waiving moral rights becomes redundant in Kwall's system, she points out that if, as a general matter, the nature of moral rights is to recognize "inspirational motivations for creativity"<sup>290</sup> and to "redress violations of authorship dignity, they should not be capable of being waived."<sup>291</sup> I concur with Kwall and believe this is a message to send to common law systems that allow personalities to be waived and exchanged as tradable commodities in ways that violate the very essence of moral rights. Personalities are not interchangeable or transferrable; their internal constitution, which is made of unique capacities and characteristic, is inalienable. Waiving a moral right harms the public, the author, and the work.<sup>292</sup> At one end of the spectrum, common law systems allow unlimited

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CONTEMP. PROBS. 135, 152-55 (2007).

<sup>287</sup> Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1231 n.294 (2005) (citing MELVIN SIMENSKY ET AL., ENTERTAINMENT LAW 1005-1120 (3d ed. 2003) (explaining the history of credit in the motion picture industry and the benefits of including credits today)). Lastowka then remarked that small credits do not suggest, however, "that these long lists of film credits provide much of value to the average consumer." *Id.*

<sup>288</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 153.

<sup>289</sup> *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 25 n.13 (2d Cir. 1976); *see also* KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 30, 32, 175 n.30 (explaining that the court found the defendant guilty of copyright infringement under the 1909 Copyright Act for improperly editing the film by exceeding the scope of the license granted to it).

<sup>290</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 157.

<sup>291</sup> *Id.* *But see* Agustin Waisman, *What is There Not To Waive?: On the Prohibition Against Relinquishing the Moral Right to Integrity*, 2 INTELL. PROP. Q. 225, 226 (2010) (challenging the claim that law should prohibit authors from waiving the right to integrity).

<sup>292</sup> *See, e.g.*, Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 43 (1998) ("Because the artist infuses her work with her own personality, a harm to the work or her relationship to the work may well harm the artist herself.").

contractual waivers of moral rights.<sup>293</sup> At the other end of the spectrum, French law prohibits blanket waivers of the right of integrity<sup>294</sup> because it is against *ordre public*.<sup>295</sup> Furthermore, if authorial endeavors are social constructs and represent the creative collectivity, the public retains a right that overrides possible waivers of moral rights; the public retains a right to be informed of the author's original message and meaning – to know the real message of the socially constructed personality. This argument is supported by the social construction theory and resembles German communal or collectivist approaches to copyright from the last century placing the work – not the author – at the centre of the copyright debate. A copyright work “was seen as a product that could only come into existence because the community made it possible for the author to make it. The author had not only the right, but also the duty, to create on behalf of the community.”<sup>296</sup>

Third, Kwall proposes to limit the duration of moral rights to the author's lifetime.<sup>297</sup> This further weakens moral rights and signals their second-in-importance status – a signal Kwall would want to avoid. “No one, not even the author's spouse and children, can substitute a personal judgment regarding the substance of the author's meaning and message of her work.”<sup>298</sup> On this account, why should they utilize the economic rights for seventy years after the death of the author whose works they inherited by law? This is a serious compromise between the American rejection of moral rights and the Continental version of authorial morality. On Kwall's account, the personality infused into a work ceases to exist once the author dies and the work enters the public domain. In reality, however, the personality *continues* to exist *indefinitely*. That is, moral rights should be considered good candidates for

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<sup>293</sup> See, e.g., Copyright, Designs and Patents Act, 1988, c. 4, § 87 (Eng.).

<sup>294</sup> CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] art. L121-1.

<sup>295</sup> Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Jan. 28, 2003, Bull. civ. I, No. 00-20014, 1 (Fr.).

<sup>296</sup> Willem Grosheide, *Moral Rights*, in RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 242, 246 (Estelle Derclaye ed., 2009).

<sup>297</sup> See KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 159-62.

<sup>298</sup> *Id.* at 160. A possible difficulty with not subjecting the duration of moral rights to that of economic rights is the Berne Convention's requirement to protect moral rights “at least until the expiry of the economic rights.” Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*(2), Sept. 9, 1886, 828 U.N.T.S. 221 (revised July 24, 1971, amended 1979). According to Berne, in “those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.” *Id.* Although “a duration for moral rights limited to the author's lifetime would seem to be legally appropriate pursuant to Berne given the absence of postmortem moral rights in the United States at the time we ratified Berne,” KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 160, Berne allows this condition to apply to only “some of the[] rights” mentioned in article 6*bis*(1). KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 160.

perpetual protection. I shall clarify this point shortly. If the basic rationale for moral rights is based on the special connection of the author's personality to his work, then the death of the physical author should not mark the end of the personal link. This is part of our duty to the public: a "textual commitment" to provide the public optimal accuracy regarding the intention and authorial message of the original author. This commitment is a good candidate for Kwall's model of "authorship norms."<sup>299</sup>

B. *Public Rights, Private Truth, and "Strange Bedfellows"*

A triangle of dominant beliefs characterizes the landscape of moral rights literature. This triangle, according to Rebecca Tushnet includes three groups. First, authorial low-protectionists who claim that strong copyrights harm "creativity and access to creative works."<sup>300</sup> Tushnet argues that "[l]ow-protectionists favor attribution as a substitute for expansive economic rights in copyrighted works."<sup>301</sup> Second, authorial high-protectionists who insist on the special bond between authors and their works and "who believe that authors should in general be able to control most uses of their works"<sup>302</sup> and "also favor attribution rights, often as part of a greater package of moral rights."<sup>303</sup> Members of this group "object to the complete commodification of copyrighted works, but not on the same grounds as low-protectionists."<sup>304</sup> Needless to say, Tushnet includes Kwall in this group. The third group is called "strange bedfellows" by Tushnet, because they "find themselves borrowing from each other's copyright theories."<sup>305</sup> In addition, there is the new trademark-style consumer protectionists group which has an interest in consumer-oriented rationale for attribution rights.<sup>306</sup> Given the above

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<sup>299</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 133.

<sup>300</sup> Tushnet, *supra* note 16 at 792.

<sup>301</sup> *Id.* As Jessica Litman remarks:

[A]ny adaptation, licensed or not, should be accompanied by a truthful disclaimer and a citation or hypertext link to an unaltered copy of the original. That suffices to safeguard the work's integrity, and protects our cultural heritage, but it gives copyright owners no leverage to restrict access to public domain materials by adding value and claiming copyright protection for the mixture.

Jessica Litman, *Revising Copyright for the Information Age*, 75 OR. L. REV. 19, 47 (1996); see also, Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 62 (2007) ("[I]t would be a mistake to conceive of reputation economies as essentially tertiary and negligible because they are 'extra-market.');" *id.* at 64 ("Attribution must become more central to copyright law."); Tushnet, *supra* note 286.

<sup>302</sup> Tushnet, *supra* note 16, at 793.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> See, e.g., Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377 (2005); Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. 55 (2007); Lastowka, *supra* note 287.

discussion, I consider myself a low-protectionist with a zest of a strange bedfellow. Let me explain.

I believe moral rights' goal is to maintain fairness for both authors and the public. For example, as Laura Heymann recently remarked, the desire for attribution in the age of digital media requires striking a balance between authors and the public: "from the creator's perspective, to receive credit for what one does (and to have credit not falsely attributed) and from the audience's perspective, to be able to identify the source of material with which one engages."<sup>307</sup> This need is more acute "[i]n an age in which traditional publishers play less of a role in distributing, and thus controlling the quality of, material disseminated to audiences . . . ."<sup>308</sup>

The public interest, as I recently argued,<sup>309</sup> overrides private authorial interests. However, a system that rewards individuals for the creation of social wealth has to find a way to allocate *reasonable rights* in the event of such contribution and allow the public access to accurate information. That is, copyright ownership ought to be understood as involving "duties to the public as well as rights in the work."<sup>310</sup> In her work, Kwall directs readers to search for a balance between the individualistic dominion of authors and the public interest.<sup>311</sup> Kwall emphasizes the innate creative abilities of authors and inner processes and minimizes their reliance on the collective cultural and social contribution.<sup>312</sup> On the one hand, Kwall advocates a neo-romantic conception of moral rights based on individualistic values. On the other hand, Kwall reaches a compromise that diminishes the exclusive moral rights of authors and artists – despite treating them as a "more compelling case for human rights"<sup>313</sup> and as synonymous with "authorship norms"<sup>314</sup> – in the name of protecting constitutional values and public access to copyrighted commodities.

I am certainly, using Tushnet labels, a strange bedfellow. If copyright law involves a "communicative impact"<sup>315</sup> on society and is the source for a variety of discursive activities, knowing the exact – or as close as possible to the original – message and meaning of authorial works is imperative. This is not only an author-centered argument praising the special connection between authors and their copyrightable "spiritual child."<sup>316</sup> This is a public right.<sup>317</sup>

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<sup>307</sup> Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 382 (2011).

<sup>308</sup> *Id.*

<sup>309</sup> See generally ZEMER, *supra* note 62.

<sup>310</sup> Kwall, *The Author as a Steward*, *supra* note 92, at 704.

<sup>311</sup> See *id.* at 708.

<sup>312</sup> See *id.* at 689.

<sup>313</sup> KWALL, *THE SOUL OF CREATIVITY*, *supra* note 2, at 136.

<sup>314</sup> *Id.* at 137 (internal quotations omitted).

<sup>315</sup> *Id.* at 61 (internal quotations omitted).

<sup>316</sup> See *supra* Part III.A.

<sup>317</sup> Shifting the focus from authors to the benefit for society in general can also be found

As Mira Sundara Rajan, the great-granddaughter of the famous Indian Poet Bharati, writes, moral rights were created in order to avoid “false attribution . . . ; inaccurate and inappropriate translations; misleading representations of the poet’s personality; and erroneous statements about his life and works.”<sup>318</sup> At the same time, moral rights protect cultural integrity. Governments are under a duty to protect “national culture for its own prestige, and for the benefit of the public.”<sup>319</sup> That is, my argument does not labor to legitimize enclosing copyright by providing further rights to authors. I consider misattribution, manipulation, and distortion of information a public wrong. This information defines the essence of the “[c]ertain things” which – as the Supreme Court recently reminded us in *Bilski v. Kappos* – “are free for all to use.”<sup>320</sup>

Building on a Netanel-like idea of copyright as a democracy-enhancing mechanism,<sup>321</sup> I believe that copyright can keep its goal, as Justice Brennan eloquently expressed in his dissent in *Harper & Row Publishers v. Nation*, as “the engine of free expression,”<sup>322</sup> notwithstanding the allocation of real moral rights to authors and artists. If authors, as consumers of the collective culture, absorb materials and change them in a way that reflect their own unique contribution, then knowing the real message and meaning will allow the public a reward for its contribution in the guise of access to accurate information. Free speech requires access to such information. Practically, by offering limited duration for moral rights and a weak right of integrity protected under a system of disclaimers, Kwall’s attempt to overcome possible conflicts with constitutional values and other norms does not fully achieve her objectives.

From a social perspective, I argue that limiting moral rights amounts to a violation of a powerful authorship norm. Moral rights are not only vehicles that afford fairness to authors. The right of attribution, for example, is a “moral obligation.”<sup>323</sup> True, the right has an “obvious utility in protecting artists from theft of the reputation they have cultivated.”<sup>324</sup> But this is not its only goal. The right exists to protect “the public at large from being misled”:<sup>325</sup> “[T]here is more at stake than the concern of the artist . . . . There

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in the rhetoric preferred by the new trademark-style consumer protectionists. *See, e.g.*, Lastowka, *supra* note 287, at 1175-76.

<sup>318</sup> Mira Sundara Rajan, *Moral Rights in the Public Domain: Copyright Matters in the Works of Indian Poet C. Subramania Bharati*, 2001 SING. J. LEGAL STUD. 161, 167.

<sup>319</sup> *Id.* at 181.

<sup>320</sup> *Bilski v. Kappos*, 130 S.Ct. 3218, 3237 (2010) (internal quotation marks omitted) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989)).

<sup>321</sup> *See generally*, NETANEL, *supra* note 170.

<sup>322</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

<sup>323</sup> Green, *supra* note 286, at 175.

<sup>324</sup> Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 130 (1997). Greg Lastowka also remarked that the right of attribution is important in order to “promote the smooth functioning of reputation economies.” Greg Lastowka, *supra* note 301, at 78.

<sup>325</sup> Hansmann & Santilli, *supra* note 324, at 131.

is also the interests of others in seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted . . . . We yearn for the authentic, for contact with the work in its true version . . . .”<sup>326</sup> Using Kwall’s words, if the intention of the framers of the Copyright Clause was to “stimulate an open culture steeped in knowledge and education,”<sup>327</sup> then “through a legal framework that promotes the public’s interest in knowing the original source of a work and understanding it in the context of the author’s original meaning and message,”<sup>328</sup> the objectives of the Clause can be maintained.

I understand the tendency to differentiate between the strength of the right to attribution and the right of integrity. The latter attracts “suspicion and resistance”<sup>329</sup> in the United States “as a result of a culture emphasizing strong First Amendment and public access values,”<sup>330</sup> and since “such a right may appear as the expression of an abusive power by the authors over their works.”<sup>331</sup> If the right of integrity is ever to be properly applied and internationally harmonized it will have to be done reasonably. Although this is a challenging task, it is nonetheless possible.<sup>332</sup>

A crucial question related to moral rights and to the public’s right not to be misled when exposed to copyrighted materials is whether this right should have an expiration date. If the author retains a “right to *inform the public* about the original nature of her artistic message and the meaning of her work,”<sup>333</sup> why should Picasso’s moral rights end in 1973? An expiration date means that personalities die. Once the human brain stops operating the personality ceases too. However, works of creative content – embodying their author’s personality – never cease to exist, even when destroyed. Cultural history tells us that creative personalities never die. In copyright, personalities have a perpetual lifespan. This perpetual existence requires the law to adjust itself accordingly.

The concept of ownership, when authorial and artistic commodities are concerned, cannot be interpreted using the parameters of economic benefits

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<sup>326</sup> Merryman, *supra* note 19, at 1041. Praising the public interest in the right of integrity, Hansmann and Santilli remark:

[W]orks of art often become important elements in a community’s culture: other works of art are created in response to them, and they become common reference points . . . . The loss or alteration of such works would therefore be costly to the community at large, depriving that community . . . of a widely used part of its previously shared vocabulary.

Hansmann & Santilli, *supra* note 324, at 106.

<sup>327</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 57.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 144.

<sup>330</sup> *Id.*

<sup>331</sup> Jacques de Werra, *The Moral Right of Integrity*, in RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT, *supra* note 296, at 267, 281.

<sup>332</sup> *Id.* at 282-84.

<sup>333</sup> KWALL, THE SOUL OF CREATIVITY, *supra* note 2, at 151.

and rewards. Authorial commodities display a special connection between human behavior and physical expressions. The anatomy of copyright, in other words, is premised on a similar dichotomy to that of human anatomy: body and soul. The body and its parts can expend labor and manually create and invest efforts in the creation of an object. The soul is that inspirational part of the human entity entrusted with the emotional and creative execution of thoughts, aesthetics, emotions, and talent and other features of the human personality. In *The Soul of Creativity*, Kwall urges us to rethink the anatomy of copyright and criticizes the hegemony of economic justifications to human creativity. Kwall's book is not another call to refine copyright, a call that will be shelved in a year or two in the annex parts of law libraries. This is a pioneering work that has much to offer and inform those who are entrusted with constructing rights, duties, and rewards – not only for economic aspirations but also for society's members' personal integrity and the public's right to know the true ingredients of its cultural composition.

Still, the combination of limited-to-lifetime and a system of disclaimers detrimentally affect the normative standing of Kwall's moral rights paradigm of securing "duties to the public as well as rights in the work."<sup>334</sup> Moral rights should not attract less protection than economic rights. This is not only because of Berne's stipulations, but also due to the social nature of these rights – from both the perspective of authors and public. Moral rights should last as long as economic rights.<sup>335</sup> In fact, the Berne Convention – due to the French influence on the drafting of the text – leaves it for the countries to determine whether they would like to allow an extended duration of moral rights beyond that of economic rights.<sup>336</sup> The non-pecuniary nature of moral rights should make them better candidates for a longer term of protection. Once a work enters into the public domain, a mandatory system of disclaimers informing the public should continue to operate.<sup>337</sup>

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<sup>334</sup> Kwall, *The Author as a Steward*, *supra* note 92, at 704.

<sup>335</sup> To this there is one exception: if calls to adopt a renewable term of protection in copyright reach fruition, then the duration of moral rights should not be subject to a similar scale. Personalities, for the reasons discussed above, are non-renewable. Once a given degree of personality has been infused into a work, that particular degree will never change. *See, e.g.*, Lior Zemer, *Rethinking Copyright Alternatives*, 14 INT'L J.L. & INFO. TECH. 137, 142-44 (2006).

<sup>336</sup> Article 6 *bis*(2) provides: "The [moral] rights granted to the author . . . shall, after his death, be maintained, *at least until* the expiry of the economic rights . . ." Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*(2), Sept. 9, 1886, 828 U.N.T.S. 221 (as last revised in Paris on July 24, 1971) (emphasis added).

<sup>337</sup> This is a preliminary recommendation and its particularities require substantial examination. The immediate response is likely to be, who should enforce the duty of a disclaimer? Should it be, for example, a state agency – similar to the recently proposed administrative agency responsible for generating regulations – that determines what constitutes fair use in specific contexts? *See generally* Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395 (2009).

In an exchange between bloggers on Lessig's Blog, Joseph Riolo rejected the idea of moral rights as amounting to censorship, chilling the free exchange of ideas and free speech:

If you really want to have moral rights, you should probably move to France where you can enjoy perpetual moral rights and can scare away people who "abuse" your works. Or, lobby Congress to add moral rights to the copyright law so that you can trump Fair Use Doctrine, freedom of speech, and freedom of press with your moral rights. Or, learn to ignore those who abuse your works.<sup>338</sup>

I am aware of the problems associated with perpetual moral rights and agree that, as Diane Zimmerman contends, the limited duration of copyrighted materials is "[t]he most certain contribution of the Intellectual Property Clause to a mandatory public domain . . ."<sup>339</sup> My proposal, however, does not mean extending the duration of moral rights such that the son of the painter Millet will bequeath a right to an injunction against reproduction of his father's *The Angelus*,<sup>340</sup> or the granddaughter of Henry Rousseau prohibit the use of reproductions of her grandfather's works as window decorations of a Paris department store.<sup>341</sup> I believe the public deserves a *right* to be informed of the accurate meaning and message of authorial works.

A balanced translation of this right into a workable legal standard requires a redefinition of the rigid set of time limitations to which moral rights are subject, to reward the author for his investment of human capital and cater to the public interest and its role as the entity that eventually takes the work in new directions. Practically, accommodating these concerns can be achieved by a limited-in-time actionable right for authors for infringement of their moral rights, lasting as long as economic rights. Once the actionable right expires, the public's unlimited right to be informed begins. The right of the public can

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Interestingly, an argument that a state agency should act as the institution responsible for enforcing these rights – once the term of protection of both the economic and moral rights has expired – can rely on article 6 *bis*(2) of the Berne Convention, which stipulates that moral rights "shall be exercisable by the persons *or* institutions authorized by the legislation of the country where protection is claimed." Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*(2), Sept. 9, 1886, 828 U.N.T.S. 221 (as last revised in Paris on July 24, 1971).

<sup>338</sup> Joseph Pietro Riolo, comment to *On the Challenge of Moral Rights*, LESSIG BLOG (Feb. 26, 2005, 8:34 AM), [http://www.lessig.org/blog/2005/02/on\\_the\\_challenge\\_of\\_moral\\_righ.html](http://www.lessig.org/blog/2005/02/on_the_challenge_of_moral_righ.html).

<sup>339</sup> Diane Leenheer Zimmerman, *Is There a Right To Have Something to Say? One View of the Public Domain*, 73 *FORDHAM L. REV.* 297, 374 (2004).

<sup>340</sup> Tribunal civil de la Seine [Civil Court of the Seine] Paris, May 20, 1911, *Amm. I.* 271.

<sup>341</sup> *Bernard-Rousseau v. Soc. des Galeries Lafayette*, Tribunal de grand instance [TGI] [ordinary court of original jurisdiction] Paris, 3e ch., 13 Mar. 1973 (unpublished), *referred to in* MERRYMAN, ELSÉN & URICE, *supra* note 60 at 428; *cf.* Rajan, *supra* note 318, at 177-80.



be secured via a system of perpetual mandatory disclaimers requiring a user of an original work for which copyright has expired and moral rights are no longer actionable to provide sufficient attribution to the author of the original work.<sup>342</sup>

This recommendation does not conflict with the claim that “artists are not necessarily the best ones to make decisions about the future of their art,”<sup>343</sup> because it allows the public open-ended opportunities to modify the work and reinterpret it alongside its right to be accurately informed regarding the meaning and message of the author’s creative statement. From an individualistic perspective, this recommendation provides support to those who argue that “according authorship credit has the salutary benefit of encouraging the creation and dissemination of original expression and underscoring the value of individual contributions to culture and public discourse.”<sup>344</sup> From a social perspective, viewing moral rights as perpetual moral obligations towards the public is commensurate with constitutional values, concerns for the public domain, authorial collectivity, and cultural integrity.

#### CONCLUSION

Incorporating moral rights in common law systems, has not, so far, generated good results. The versions legislated “are not even remotely as extreme as the solemn statutory declarations and high flying rhetoric of the civil law tradition.”<sup>345</sup> Moral rights might not need to be as strong, but if they have been invited into the copyright discourse because of their fundamental importance for coherent copyright regimes, then quasi-moral rights cannot give authors and the public what moral rights were designed to give. Despite their rejection by many, moral rights ambitions are good and necessary.

A frequent argument against moral rights is the risk of harming sacred constitutional norms embedded in the American copyright tradition. Benjamin Cardozo once wrote that law is an “endless process of testing and retesting” in the name of constantly rejecting the dross and avoiding the presence of mistakes, while preserving “a constant retention of whatever is pure and sound and fine.”<sup>346</sup> Recent scholarship on moral rights makes an enduring contribution for avoiding the presence of mistakes in copyright by discounting the power of tradition to block the social advancement of the law and its subjects. Kwall succeeded in crafting a blueprint for moral rights that highlights the subtle and conflicting considerations these rights invite. This blueprint, however, is too limited for what moral *rights* were designed to achieve.

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<sup>342</sup> I thank Wendy J. Gordon for this idea.

<sup>343</sup> Adler, *supra* note 17, at 299.

<sup>344</sup> NETANEL, *supra* note 170, at 216.

<sup>345</sup> Rigamonti, *supra* note 54, at 412.

<sup>346</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 179 (1921).

A Canadian committee once submitted that “moral rights are of equivalent importance to pecuniary rights”;<sup>347</sup> they reflect the cultural identity of authors and in turn inform the public of the accuracy of authorial messages. Providing accurate information is also a reward to the public for its contribution to the creative process. I agree with recent calls to better integrate moral rights into American copyright law, and to the extent that I differ, my reasons derive from the individualistic nature of these calls, their limited effectiveness and, to some extent, their departure from the very essence and social message of these *rights*. I believe that recognizing a less limited edition of moral rights will wean copyright law away from its misplaced reliance on romantic authorship rhetoric and the criticism it attracts, and in the process will focus attention more directly on the social and cultural responsibilities copyright laws owe to both authors and the public.

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<sup>347</sup> A.A. KEYES & C. BRUNET, CANADIAN DEPARTMENT OF CONSUMER AND CORPORATE AFFAIRS, COPYRIGHT IN CANADA: PROPOSALS FOR A REVISION OF THE LAW 192 (1977).