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Moral Rights 2.0

Peter K. Yu

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Chapter 2
Moral Rights 2.0

*Peter K. Yu**

1. INTRODUCTION

In his Chapter, André Bertrand provides an excellent discussion of *Soc. Le Chant de Monde v. Soc. Fox Europe*[1] (*Shostakovitch*) and *Turner Entertainment Co. v. Huston*[2] (*Huston*) – two cases that US courses on international and comparative intellectual property law have frequently covered. These two cases provide excellent illustrations of the differences between continental Europe and the United States concerning the protection of moral rights.[3] While the Anglo-American copyright regime and the French author's right (*droit d'auteur*) regime were quite

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* Copyright © 2010 Peter K. Yu. Kern Family Chair in Intellectual Property Law & Director, Intellectual Property Law Center, Drake University Law School; Wenlan Scholar Chair Professor, Zhongnan University of Economics and Law; Visiting Professor of Law, Faculty of Law, University of Hong Kong. The Author is grateful to Christopher Heath and Anselm Kamperman Sanders for their kind invitations and hospitality and Cory McAnelly and Megan Snyder for excellent research and editorial assistance.

1. Cour d'appel [CA] [regional Court of Appeal] Paris, 13 Jan. 1953, D.A. Jur. 16 (Fr.). The US companion case is *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (1st Dep't 1949).
2. Cour d'appel [CA] [regional Court of Appeal] Versailles, civ. ch., 19 Dec. 1994, translated in *Entertainment Law Report*, March 1995 (Fr.).
3. Cyrill P. Rigamonti, 'Deconstructing Moral Rights', *Harvard International Law Journal* 47 (2006): 354.

Christopher Heath and Anselm Kamperman Sanders (eds), *Landmark Intellectual Property Cases and Their Legacy*, pp. 13–32.
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similar in the eighteenth century,[4] the protection of moral rights did not attain formal international recognition until 1928.[5] The gap between the US and French systems has also grown considerably since the enactment of the 1909 US Copyright Act.

In 1988, the United States finally joined the Berne Convention for the Protection of Literary and Artistic Works[6] (Berne Convention), the leading multilateral copyright treaty, after holding out for more than a century.[7] Notwithstanding this new international obligation and the United States' emerging role as a vocal global champion of intellectual property rights, the country has yet to protect moral rights to the same extent as its counterparts in continental Europe. The Visual Artists Rights Act of 1990 (VARA), which the US Congress enacted to ensure compliance with the Berne Convention, affords only limited protection to the rights of attribution and integrity in a small category of visual art.[8] That statute, sadly, might not even have entered into force had the US Senate not needed a political compromise between the Democrats and the Republicans over the passage of a federal judgeships bill.[9]

During the negotiation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) at the World Trade Organization (WTO), the United States also worked hard to ensure that WTO members could not use the mandatory dispute settlement process to address inadequate protection of moral rights. Article 9.1 of the TRIPS Agreement explicitly states that 'Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of [the Berne] Convention or of the rights derived therefrom.'[10] Many of the TRIPS-plus bilateral and plurilateral agreements that the

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4. Jane C. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', *Tulane Law Review* 64 (1990): 1023.
5. During the Rome Revision Conference in 1928, the Berne Convention was revised to provide international recognition to the rights of attribution and integrity. Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond*, 2nd edn (Oxford: OUP, 2005), 108.
6. Berne Convention for the Protection of Literary and Artistic Works, 9 Sep. 1886, as last revised in Paris, 24 Jul. 1971, 828 U.N.T.S. 221 (Berne Convention).
7. Berne Convention Implementation Act of 1988, Pub. L. No. 100–568, 102 Stat. 2853. The Berne Convention was adopted in 1886.
8. 17 U.S.C. § 106A (2006).
9. As Professor Kwall recounted:

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

   Roberta Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford: Stanford University Press, 2009), 28.
10. Agreement on Trade-Related Aspects of Intellectual Property Rights Art. 9.1, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (1994) 33 ILM 1197.

United States negotiated in the 2000s did not even mention moral rights at all. Thus, the differences between the United States and continental Europe over the protection of moral rights – as *Shostakovich* and *Huston* have illustrated – are likely to persist into the future.

Interestingly, as wide as they are, these differences are unlikely to present significant challenges to the future development of moral rights. Some commentators, in fact, have cautioned us not to overstate the differences between the two regimes. As Justin Hughes reminds us, although philosophical differences exist between Anglo-American and continental European copyright laws, neither their differences nor the role moral rights play in them 'should be sketched in caricature'.[11] Likewise, Cyrill Rigamonti observes that differences continue to exist among the different author's rights regimes in Europe – *droit d'auteur* in France, *Urheberrecht* in Germany, *diritto d'autore* in Italy, and *derecho de autor* in Spain. As he declares:

> Despite the fact that it has harmonized virtually every aspect of copyright protection over the past fifteen years, the European Union has excluded moral rights from its harmonization efforts on various occasions. Moreover, the European Commission currently does not see any need for harmonization in this field and resists the demands of some European academics for community-wide regulation of moral rights.[12]

In the digital age, the protection of moral rights has raised four new sets of questions: (1) Are moral rights becoming obsolete? (2) Can the protection of these rights meet the demands of a growing semiotic democracy? (3) Would such protection threaten the development of a participatory democratic culture in countries with heavy information control? (4) Should moral rights be extended to cover a new 'right to delete' in the digital environment? This chapter picks up from where the previous chapter left off and examines each of these questions in turn. It examines the legal and policy challenges digital technologies have posed to the moral rights regime. It also raises questions about whether moral rights need to be modernized to reflect ongoing changes in our socio-technological environment.

2. OBSOLESCENCE

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

> [M]oral rights are premised on the precise conception of 'art' that artists have been rebelling against for the last forty years. Moral rights law . . . purports to protect art, but does so by enshrining a vision of art that is directly at odds with contemporary artistic practice. It protects and reifies a notion of art that is dead.[13]

11. Justin Hughes, 'Fixing Copyright: American Moral Rights and Fixing the Dastar "Gap" ', *Utah Law Review* (2007): 662.
12. Rigamonti, *supra* n. 3, 357–358.
13. Amy M. Adler, 'Against Moral Rights', *California Law Review* 97 (2009): 265.

As a result, moral rights are now obsolete; they 'endanger art in the name of protecting it'.[14] The right of integrity, in particular, 'fails to recognize the profound artistic importance of modifying, even destroying, works of art, and of freeing art from the control of the artist'.[15]

Among the many examples cited for support, the most memorable one concerns Robert Rauschenberg's artwork, 'Erased de Kooning Drawing'. As the article describes:

> In 1953, Rauschenberg took a drawing by Willem de Kooning and spent a month erasing it. The resulting work is a 'sheet of paper bearing the faint, ghostly shadow of its former markings.' Entitling the work 'Erased de Kooning Drawing/Robert Rauschenberg/1953', Rauschenberg exhibited the erasure as his own art. Rauschenberg wrote: 'I wanted to create a work of art by [erasing] . . . Using my own work wasn't satisfactory . . . I realized that it had to be something by someone who everybody agreed was great, and the most logical person for that was de Kooning'.[16]

Rauschenberg's artwork is important not because of the erasing act itself, but because of the context surrounding the act: Willem de Kooning held an important place in the US art scene in the 1950s, and destruction art had yet to become as pervasive in contemporary art as it is today.[17] As Professor Adler elaborates:

> At that time, abstract expressionism so dominated American art (and our artistic place in the world) that de Kooning and his compatriots had come to be viewed as heroic and almost godlike. In that climate, erasing a drawing by de Kooning was a shocking, sacrilegious act. It captured, perhaps better than anything else Rauschenberg did, his scandalous assault on a particular conception of 'art'. For the generation of artists after de Kooning the question was: how would it be possible to make art in the wake of the godlike artists who came before them? Rauschenberg's answer was that new art might be about its own failure to achieve greatness, its impotent rebellion against the heroic past. Rauschenberg began to make art that . . . was about 'its own destruction'.[18]

Rauschenberg's 'creative' assault on de Kooning's drawing, therefore, provides an excellent illustration of 'how art can emerge from the near destruction of a previous piece'[19] – a fact that moral rights seem unable, or at least reluctant, to recognize. In fact, the successful completion of Rauschenberg's artwork largely 'depends on the fact that he violated not a reproduction of a work but an original, and not just any original, but an original by Willem de Kooning'.[20]

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14. *Ibid.*
15. *Ibid.*
16. *Ibid.*, 283. It is worth noting that de Kooning *gave* the drawing to Rauschenberg. *Ibid.*, 283, fn. 111.
17. Roberta Rosenthal Kwall, 'Hoisting Originality: A Response', *DePaul Journal of Art, Technology and Intellectual Property Law* 20 (2009): 7.
18. Adler, *supra* n. 13, 283.
19. *Ibid.*
20. *Ibid.*

Although Professor Adler's insights are important for both the online and offline worlds, they become particularly important to the online world, for three reasons. First, moral rights were created with traditional works of art – such as writings, paintings, drawings, and sculptures – in mind. As new works are being created using digital technologies or disseminated through new technological means, it is fair to question whether the protection of moral rights has, in fact, become outdated. Obsolescence is an issue Professor Adler tackles head-on in her article, but this debate has only just begun.

Second, while moral rights *as an institution* deserve our urgent attention, moral rights *as protected under statutes or through case law* are equally important. Indeed, digital technologies have threatened to make existing moral rights statutes obsolete. VARA, for example, was drafted with a specific limitation on the maximum number of autographed and consecutively-numbered copies visual artists can have before losing protection. Section 101 of the US Copyright Act provides:

> A 'work of visual art' is –
>
> (1) —a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
>
> (2) —a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.[21]

While this limitation makes sense in the physical world, and it most certainly did in the late 1980s when VARA was drafted, the application of the statute to digital visual art warrants close scrutiny. Consider photographs for example. As Llewellyn Gibbons recently pointed out, VARA does not sit well with digital photographic works.[22] What does the language 'a still photographic image' or 'produced for exhibition purposes' mean? Would ephemeral copies count toward the 200 maximum copies? How should the artist sign and number photos to comply with the statutory formalities? On a theoretical level, should copy still be used as a foundational concept in moral rights law in the digital age?[23]

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21. 17 U.S.C. § 101 (2006).
22. Llewellyn Joseph Gibbons, 'Visual Artists Rights Act (''VARA'') and the Protection of Digital Works of ''Photographic'' Art', *North Carolina Journal of Law and Technology* 11 (2010): 531–552.
23. Committee on Intellectual Property Rights and the Emerging Information Infrastructure, National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age* (Washington, DC: National Academy Press, 2000), 230–232 (*Digital Dilemma*).

Finally, and most importantly, the digital environment has provided a new opportunity for users, appropriate artists, and other creative appropriators (hereafter known collectively as 'users') to reconcile their re-creations with the originals. For example, Jessica Litman points out that digital technologies have made it easier to protect the integrity of a creative work. Under her proposal, 'any adaptation, licensed or not, commercial or not, should be accompanied by a truthful disclaimer and a citation (or hypertext link) to an unaltered and readily accessible copy of the original'.[24] This proposal would allow users to access the original work to judge for themselves how the two works compare to each other. It would help 'safeguard the work's integrity . . . and protect[] our cultural heritage' while at the same time providing users with an unencumbered ability to make the needed modifications.[25]

Likewise, Roberta Kwall, a staunch and passionate defender of moral rights in the United States, proposed to use attribution and disclosure to reconcile the protection of moral rights with the competing demands of American constitutional values and our strong need to maintain a well-endowed public domain. In her new book on moral rights, she 'recommend[s] a narrowly tailored right of integrity designed to vindicate the author's right to inform the public about the original nature of her artistic message and the meaning of her work'.[26] Similar to Professor Litman's proposal, where the right of attribution was prioritized and the right of integrity somewhat replaced by a right of full disclosure,[27] Professor Kwall calls for reforms that require 'a disclaimer adequate to inform the public of the author's objection to the modification or contextual usage'.[28]

3. CREATIVE REUSE AND SEMIOTIC DEMOCRACY

Thanks to the high speeds and low costs of reproduction and distribution, the anonymous architecture, and the many-to-many communication capabilities, the Internet has become a particularly effective means of communication. As Judge Stewart Dalzell recognized in *Reno v. ACLU* in the early days of this communication medium: '[T]he Internet is the most participatory form of mass speech yet developed . . . It is no exaggeration to conclude that the content on the Internet is as diverse as human thought'.[29]

In light of the Internet's immense potential for political, social, economic, and cultural developments, commentators – most notably William Fisher – argue for

24. Jessica Litman, *Digital Copyright* (Amherst, NY: Prometheus Books, 2001), 185.
25. *Ibid.*
26. Kwall, *supra* n. 9, 151.
27. Jane C. Ginsburg, 'Have Moral Rights Come of (Digital) Age in the United States?', *Cardozo Arts and Entertainment Law Journal* 19 (2001): 17; Jacqueline D. Lipton, 'Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas', *Fordham Intellectual Property, Media and Entertainment Law Journal* 21 (2010): forthcoming.
28. Kwall, *supra* n. 9, 151.
29. 929 F. Supp. 824, 883, 842 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

the allowance of greater reuse and modification of digital works to promote semiotic democracy.[30] Coined by John Fiske in *Television Culture*,[31] the term 'semiotic democracy' was used by Professor Fisher to denote 'the ability of "consumers" to reshape cultural artifacts and thus to participate more actively in the creation of the cloud of cultural meanings through which they move'.[32] As he explains, there are many benefits when individuals can freely recode pre-existing works:

> People would be more engaged, less alienated, if they had more voice in the construction of their cultural environment. And the environment itself . . . would be more variegated and stimulating . . . In the future, sharing could encompass more creativity. The circulation of artifacts would include their modification, improvement, or adaptation. To some degree, at least, such habits could help ameliorate the oft-lamented disease of modern culture: anomie, isolation, hyper-individualism. Collective creativity could help us become more collective beings.[33]

The need to develop a semiotic democracy is particularly important today, when media ownership has become highly concentrated in a few corporate oligopolies and users actively and frequently question the appropriateness of the existing copyright regime. Although the treatment of user-generated content remains a new issue and policymakers and commentators have yet to reach a consensus on the appropriate standards, there is no doubt that the creation of this new type of content has inspired innovative thinking about the development, dissemination, and exploitation of creative works.[34] The need for user-generated content to coexist with those the traditional entertainment industries develop has also raised important questions about the future development of the copyright and moral rights systems.[35]

In his latest book, *Remix*, Lawrence Lessig argues passionately for the need to enable Internet users to remix pre-existing works.[36] As he, Henry Jenkins, and others aptly point out, digital literacy in the future will go beyond texts to include

30. William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford: Stanford University Press, 2004), 28–31.
31. John Fiske, *Television Culture* (London: Routledge, 1987), 76.
32. Fisher, *supra* n. 30, 184.
33. *Ibid.*, 31.
34. Chris Anderson, *Free: The Future of a Radical Price* (New York: Hyperion, 2009); Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, CT: Yale University Press, 2006); Clay Shirky, *Cognitive Surplus: Creativity and Generosity in a Connected Age* (New York: Penguin Press, 2010); Clay Shirky, *Here Comes Everybody: The Power of Organizing without Organizations* (New York: Penguin Press, 2008); Don Tapscott & Anthony D. Williams, *Wikinomics: How Mass Collaboration Changes Everything*, expanded edn (New York: Portfolio, 2008).
35. Peter K. Yu, 'Digital Copyright Reform and Legal Transplants in Hong Kong', *University of Louisville Law Review* 48 (2010): forthcoming.
36. Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008), 76–82.

other forms of creative media.[37] Remixes, therefore, need to include not only texts, but also images, audio, and video clips. As Professor Lessig eloquently writes:

> Text is today's Latin. It is through text that we elites communicate . . . For the masses, however, most information is gathered through other forms of media: TV, film, music, and music video. These forms of 'writing' are the vernacular of today. They are the kinds of 'writing' that matters most to most.[38]

Thus, if society is to ensure that users in future generations can fully develop their creative, communicative, and intellectual capabilities, reforms to the copyright and moral rights systems are badly needed to provide greater flexibility for individuals to creatively reuse or modify pre-existing works. Such reforms will also open up the possibilities for developing a different form of creativity that is 'more collaborative and playful, less individualistic or hierarchical'.[39]

Unfortunately, moral rights may stand in the way of efforts to promote greater semiotic democracy and digital literacy. By conferring on authors an 'aesthetic veto',[40] moral rights have made it difficult and costly for users to obtain the needed permission to reuse or modify pre-existing works. To begin with, determining whether and how authors should be compensated is challenging, especially when only a small, yet non-*de minimis* portion of the work has been used[41] or when the new work has become far more successful than the original one – economically or otherwise. Even Professor Fisher's attractive alternative compensation proposal does not completely address this problem. As he concedes: '[S]emiotic democracy, like all forms of democracy, carries with it risks and costs . . . There are ways . . . that these risks and costs could be substantially mitigated. But it is impossible to eliminate them altogether'.[42]

More importantly, the protection of moral rights is not about pecuniary compensation. Rather, it speaks to creative control and artistic integrity. In her book, Professor Kwall underscores an important spiritual linkage between the author and her work. By protecting the author's meaning and message that the work embodies,[43] moral rights recognize the author's dignity

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37. Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York: New York University Press, 2006), 186; Lessig, *supra* n. 36, 68–76.
38. Lessig, *supra* n. 36, 68.
39. Fisher, *supra* n. 30, 31.
40. Robert A. Gorman, 'Federal Moral Rights Legislation: The Need for Caution', *Nova Law Review* 14 (1990): 424.
41. 'Virtual Reality, Appropriation, and Property Rights in Art: A Roundtable Discussion', *Cardozo Arts and Entertainment Law Journal* 13 (1994): 94–97.
42. Fisher, *supra* n. 30, 37.
43. As Professor Kwall explains:

> The concepts of a work's 'meaning' and 'message' . . . are related in that they are dependent upon the creator's subjective vision rather than the vision of the creator's audience, but these terms nonetheless embrace somewhat distinct ideas. The creator's meaning personifies what the work stands for on a level personal to the author, whereas the creator's message represents what the author is intending to communicate externally on a more universal level. A work's 'meaning' therefore exemplifies the idea of 'why I as the

interests[44] and the inherent drive that led her to create the work in the first place.[45] To a great extent, moral rights highlight an important 'intrinsic dimension' of creativity that economic rights fail to recognize.[46]

Some authors and commentators have gone even further to analogize the relationship between the author and her work to that between a parent and her child,[47] an analogy Professor Kwall endorses.[48] As Gary Larson, the creator of *The Far Side Cartoons*, wrote in a cease-and-desist letter concerning the online reposting of his cartoons:

> These cartoons are my 'children,' of sorts, and like a parent, I'm concerned about where they go at night without telling me. And, seeing them at someone's web site is like getting the call at 2:00 a.m. that goes, 'Uh, Dad, you're not going to like this much, but guess where I am.'
>
> I hope my explanation helps you to understand the importance this has for me, personally, and why I'm making this request.
>
> Please send my 'kids' home. I'll be eternally grateful.[49]

Thus far, commentators have questioned the appositeness of the work-child analogy,[50] especially in situations where waivers or assignments are involved – such as in the United Kingdom[51] or in the case of cinematographic works.[52] After all, parents are not supposed to sell or license their children. Notwithstanding these criticisms, many authors, undeniably, are personally attached to their creations.[53]

> creator got involved in doing this work and what I see in it.' In contrast, a work's 'message' embodies the notion of 'what I as creator expect others to see in it, and what I hope they'll take from it'.

Kwall, *supra* n. 9, 2–3.

44. *Ibid.*, 4.
45. *Ibid.*, 19.
46. *Ibid.*, 11–22.
47. '[A]n artist may identify with his works as with his children: prize them for their present character and not want that character changed'. Henry Hansmann & Marina Santilli, 'Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis', *Journal of Legal Studies* 26 (1997): 102.
48. Kwall, *supra* n. 9, xiv.
49. One of the cease-and-desist letters is available at <www.portmann.com/farside>, 12 Oct. 2010.
50. William Patry, *Moral Panics and the Copyright Wars* (Oxford: OUP, 2009), 75; Cory Doctorow, 'In Praise of Fanfic', *Locus Magazine*, 22 May 2007 <www.locusmag.com/Features/2007/05/cory-doctorow-in-praise-of-fanfic.html>, 12 Oct. 2010.
51. Copyright, Designs and Patents Act, 1988, § 87, c. 48 (Eng.).
52. John Cross et al., *Global Issues in Intellectual Property Law* (St Paul, MN: Thomson West, 2010), 132; Michael Spence, *Intellectual Property* (Oxford: OUP, 2007), 99–101; Neil Netanel, 'Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law', *Cardozo Arts and Entertainment Law Journal* 12 (1994): 27; Rigamonti, *supra* n. 3, 365 and fn. 74.
53. Christopher J. Buccafusco & Christopher Jon Sprigman, 'The Creativity Effect', *University of Chicago Law Review* 78 (2011): forthcoming; Christopher J. Buccafusco & Christopher Jon Sprigman, 'Valuing Intellectual Property: An Experiment', *Cornell Law Review* 91 (2010): forthcoming.

In fact, many authors find moral rights an important means to ensure the healthy growth of their 'children'.

Historically, moral rights served as a powerful legal device for authors to protect their 'children' against what Anthony Trollope called 'the book-selling leviathans'.[54] As George Wither, an English author, wrote emphatically in 1625:

> For many of our moderne booksellers are but needlesse excrements, or rather vermine, . . . yea, since they take upon them to publish bookes contrived, altered and mangled at their own pleasures, without consent of the writers; and to change the name sometymes, both of booke and author (after they have been imprinted).[55]

Even today, *Author v. Copyright Holder* – or its licensees or assignees, as in *Shostakovich and Huston* – remains 'a common fact pattern in attribution disputes'.[56]

As the public becomes more active in digital publishing and dissemination, however, moral rights will precipitate more disputes between authors and users. Consider, for example, the recent incident surrounding the unauthorized release of an incomplete draft of Stephanie Meyer's *Midnight Sun*.[57] Written by the best-selling author of the *Twilight* Saga, the book seeks to retell the story in the series' first book from the perspective of Edward Cullen, the vampire love interest of Bella Swan, the series' heroine.

When Meyer was halfway through the writing project, she circulated drafts to a number of people for various reasons, not the least of which was her eagerness to help those working on the film production of *Twilight* to better understand her characters. One of these drafts, unfortunately, was leaked onto the Internet. As a result, the author received – both directly and via the Internet – a large number of comments from readers about what they liked or disliked about the draft. Frustrated by the experience, Meyer eventually posted the incomplete draft onto her official website and suspended the project indefinitely.

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

> I did not want my readers to experience *Midnight Sun* before it was completed, edited and published. I think it is important for everybody to understand that what happened was a huge violation of my rights as an author, not to mention

54. Anthony Trollope, *An Autobiography*, ed. M. Sadleir & F. Page (Oxford: OUP, 1980), 308.
55. Gillian Davies, *Copyright and the Public Interest* (London: Sweet & Maxwell, 2002), 22–23.
56. Hughes, *supra* n. 11, 674.
57. Lipton, *supra* n. 27.

> me as a human being. As the author of the *Twilight Saga*, I control the copyright and it is up to the owner of the copyright to decide when the books should be made public; this is the same for musicians and filmmakers . . .
>
> . . . My first feeling was that there was no way to continue. Writing isn't like math; in math, two plus two always equals four no matter what your mood is like. With writing, the way you feel changes everything. If I tried to write *Midnight Sun* now, in my current frame of mind, James [Bella's other love interest] would probably win and all the Cullens would die, which wouldn't dovetail too well with the original story. In any case, I feel too sad about what has happened to continue working on *Midnight Sun*, and so it is on hold indefinitely.[58]

While receiving comments from readers might be helpful to authors after they have completed their work, the untimely release and the resulting comments disrupted Meyer's creative process. The comments she read or heard about inevitably will colour the work she eventually creates (if she continues at all). Indeed, there is a very strong likelihood that the finished product will be quite different from what she originally intended.

Finally, violations of moral rights affect more than authors. Third parties can have strong interests in preserving the work and stabilizing its social and cultural meanings. In their economic analysis of moral rights, Henry Hansmann and Marina Santilli explain how damage to the integrity of one work could generate negative externalities on owners of the author's other works as well as the public at large.[59] Justin Hughes also explores in great depth the oft-overlooked audience interests in creative works. As he points out, in some situations, 'the utility derived by passive non-owners from the stability of propertized cultural objects [may be] greater than the utility that would accrue to non-owners who want to recode cultural objects so much that those non-owners need to be freed from existing legal constraints'.[60] In those situations, recoding seems inappropriate, and moral rights will be needed to prevent unwanted recoding.

4. LIBERATIVE REUSE AND DEMOCRACY

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

58. 'Midnight Sun: Edward's Version of Twilight', 28 Aug. 2008 <www.stepheniemeyer.com/midnightsun.html>, 12 Oct. 2010.
59. Hansmann & Santilli, *supra* n. 47, 105–107.
60. Justin Hughes, ' "Recoding" Intellectual Property and Overlooked Audience Interests', *Texas Law Review* 77 (1999): 928.

frequently lead to calls for government action and response'.[61] The Internet has also provided users with information about the way of life in other countries, thereby enabling them to make informed judgment about possibilities of life.[62]

More importantly, Internet communication carries with it texts, images, audio, and video clips that enable users to explore new perspectives and worldviews. As Marci Hamilton points out in an important article about art speech, art is subversive by nature and has transformative potential. It enables us to experience unfamiliar worlds and thereby gain new insights into the prevailing status quo.[63] Art is also safe; it helps us experience new worldviews without the attendant risks of living in an alternative universe or the need to push for political or social change.[64] As Professor Hamilton explains:

> Through the imagination, art evinces what purely didactic speech cannot – the 'sensation' of an experience never had, a world never seen. Conjuring up that which has not been experienced, it poses a challenge to the participant's preconceived and preordained world view. At a level similar to empathy . . . the imagination takes one beyond one's preexisting conceptions and intuitions about life, power, and reality. The aesthetic experience does not occur at the level of the semantic but rather the imaginary; thus, to be conceptually available, it must always be translated into the semantic. Art does not challenge existing reality by posing counterfactuals. Nor is the work of art a representation of 'concepts of reality' or a copy of reality. Instead, it creates the condition for imaginatively living through a different world altogether. Two phenomena occur simultaneously within the participant's experience of art: (1) the recognition of preexisting world views, and (2) the act of defamiliarization, the distancing of oneself from one's assumptive world view. They operate together to create a reorientation experiment, the commitment-free experiencing of a perspective different from one's own.[65]

Given art's ability to challenge the status quo, Taliban Afghanistan imposed a complete ban on the Internet.[66] Meanwhile, other countries – including both democracies and authoritarian regimes – have introduced content regulations to control or temper with the digital environment.[67]

Although government censorship, thus far, has been widely covered both by the Western press and in academic literature, the potential barrier copyright and moral rights pose to Internet freedom is sparsely addressed. In fact, despite evidence to the

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61. 'China (Including Hong Kong)' in *Access Denied: The Practice and Policy of Global Internet Filtering*, ed. R. Deibert et al. (Cambridge, MA: MIT Press, 2008), 265.
62. Peter K. Yu, 'Bridging the Digital Divide: Equality in the Information Age', *Cardozo Arts and Entertainment Law Journal* 20 (2002): 23.
63. Marci A. Hamilton, 'Art Speech', *Vanderbilt Law Review* 49 (1996): 73–122.
64. *Ibid.*, 76.
65. *Ibid.*, 87–88.
66. Yu, *supra* n. 62, 37–38.
67. Peter K. Yu, 'Six Secret (and Now Open) Fears of ACTA', *SMU Law Review* 64 (2011): forthcoming.

contrary,[68] the public at large in the West seemed greatly surprised when intellectual property rights were used as a pretext for human rights abuse and civil liberties violations. In September 2010, *The New York Times* provided a detailed report on the complaints by an outspoken Siberian environmental activist group about how Russian authorities had confiscated their computers (as well as those of other advocacy groups and opposition newspapers) in the name of protecting Microsoft's copyrighted software.[69] That report generated a spirited – and for rights holders, highly unwanted – public debate about the need to re-examine intellectual property protection and enforcement through the lens of corporate social responsibility. *The New York Times* report and the ensuing debate eventually led Microsoft to publicly announce a new plan to provide blanket licenses to advocacy groups and media outlets, thereby distancing itself from repressive authorities that have misused intellectual property rights to suppress or silence dissent.[70]

In a recent article, I discuss how the balance of the copyright system needs to be adjusted to reflect the different social conditions in countries where information flows are heavily regulated[71] – a point Neil Netanel has also observed.[72] In countries with heavy censorship, for example, Internet users often will need to reuse, without permission, materials previously approved by censors or that are only available abroad. To provide an alternative source of information, they may need to repost copyrighted stories, videos, or photos that otherwise would not have been available. They may also need to repurpose pre-existing materials to address issues that they otherwise cannot discuss because of government censorship.

In repressive societies, parodies, satires, coded words, euphemisms, and allusions to popular culture remain dominant vehicles of communication.[73] Materials that are seemingly unrelated to the intended original message are often used to create associations, build in tacit meanings, provide emotional effects, and ultimately avoid censorship. Whether it is a remix of video clips from Western movies, the synchronization of contents to rock'n roll songs, or the modification of news reports from foreign media, repurposed contents carry within them rich 'hidden transcripts' that provide important social commentary.[74]

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68. William P. Alford, 'Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World', *New York University Journal of International Law and Politics* 29 (1997): 144–145; Peter K. Yu, 'Three Questions that Will Make You Rethink the U.S.-China Intellectual Property Debate', *John Marshall Review of Intellectual Property Law* 7 (2008): 424–432.
69. Clifford J. Levy, 'Using Microsoft, Russia Suppresses Dissent', *New York Times*, 12 Sep. 2010, A1.
70. Clifford J. Levy, 'Microsoft Changes Policy Amid Criticism It Backed Suppression of Dissent in Russia', *New York Times*, 14 Sep. 2010, A4.
71. Peter K. Yu, 'Promoting Internet Freedom Through the Copyright System', *eJournal USA*, (June 2010): 7.
72. Neil Weinstock Netanel, 'Asserting Copyright's Democratic Principles in the Global Arena', *Vanderbilt Law Review* 51 (1998): 277–278.
73. Ashley Esarey & Qiang Xiao, 'Below the Radar: Political Expression in the Chinese Blogosphere', *Asian Survey* 48 (2008): 752–772.
74. James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven: Yale University Press, 1992).

Although we sometimes distinguish works that are of public interest – such as news stories – from those that are created for commercial or entertainment purposes, this type of distinction is usually unhelpful in countries where circulation of information is limited. Entertainment products that are uncontroversial, highly commercial, and seemingly frivolous could easily contain useful political information. It is, indeed, not uncommon to find Hollywood movies or American television programmes portraying different forms of government, the need for checks and balances or separation of powers, and the protection of constitutional rights and civil liberties.[75] While these commercial products may have been created to provide entertainment, in some countries they also supply an important window to the outside world.

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

> A democratic culture is the culture of widespread 'ripping, mixing, and burning', of nonexclusive appropriation, innovation, and combination. It is the culture of routing around and glomming on, the culture of annotation, innovation, and bricolage. Democratic culture . . . makes use of the instrumentalities of mass culture, but transforms them, individualizes them, and sends what it produces back into the cultural stream. In democratic culture, individuals are not mere consumers and recipients of mass culture but active appropriators.[76]

Creative reuse and modification of pre-existing materials, therefore, are highly valuable to society. They ensure that '[e]veryone – not just political, economic, or cultural elites – ha[ve] a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and the communities and subcommunities to which they belong'.[77]

While the need to realize this democratic culture is not new, and such realization draws on the socio-political foundations free speech has helped build,[78] digital technologies 'change the social conditions in which people speak . . . [and therefore] bring to light features of freedom of speech that have always existed in the background but now become foregrounded'.[79] As Professor Balkin forcefully argues, democratic cultural participation is important for two reasons:

> First, culture is a source of the self. Human beings are made out of culture. A democratic culture is valuable because it gives ordinary people a fair opportunity to participate in the creation and evolution of the processes of

75. The three prequels to *Star Wars*, for example, are filled with issues concerning corruption, slavery, federalism, democracy, racial tension, and the American government.
76. Jack M. Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society', *New York University Law Review* 79 (2004): 45.
77. *Ibid.*, 4.
78. *Ibid.*, 34.
79. *Ibid.*, 2.

> meaning-making that shape them and become part of them; a democratic culture is valuable because it gives ordinary people a say in the progress and development of the cultural forces that in turn produce them.
>
> Second, participation in culture has a constitutive or performative value: When people are creative, when they make new things out of old things, when they become producers of their culture, they exercise and perform their freedom and become the sort of people who are free. That freedom is something more than just choosing which cultural products to purchase and consume; the freedom to create is an active engagement with the world.[80]

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

Unfortunately, moral rights may stand in the way of a democratic culture the same way it does in the way of semiotic democracy. One of the widely reported examples in China concerns a viral video about a bloody murder caused by a *mantou* (steamed bun). Developed in the emerging tradition of *egao* – a form of online parody or satire that relies on the author's 'messing' with or making fun of pre-existing media content[81] – the video was created by mashing up the footage of acclaimed Chinese film director Chen Kaige's extravagant, yet disappointing movie, *Wuji* (*The Promise*), and a legal affairs programme from CCTV, China's state broadcaster, as well as a small amount of other copyrighted contents.

Instead of a historic epic fantasy Chen intended, the video took the form of 'a mock legal-investigative TV program', reporting about a murder that a steamed bun had caused.[82] This frivolous-sounding video touched on many contemporary socio-economic problems in China. It was timely and entertaining and arguably contained some socio-political value. Upset by the misuse of his work, the famous film director threatened to sue the video's author for copyright infringement and defamation. As Chen told reporters from Sina.com, a Chinese Internet portal: 'I think this [parody] has exceeded the normal bounds of issuing commentary and opinion. It's an arbitrary alteration of someone else's intellectual property'.[83] Although news about the lawsuit slowly disappeared, the film director's reactions to the parody clip have sparked an important debate about the need for greater protection of parodies and satires in China.

To alleviate the tension between free speech and moral rights, commentators have called for greater recognition of parodies in the moral rights regime.[84]

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80. *Ibid.*, 35.
81. Esarey & Xiao, *supra* n. 73, 764; Wu Jiao, 'E'gao: Art Criticism or Evil?', *China Daily*, 22 Jan. 2007 <www.chinadaily.com.cn/china/2007-01/22/content_788600.htm>, 12 Oct. 2010. A sociology professor at Peking University defines *egao* as 'a subculture characterized by satirical humour, revelry, grassroots spontaneity, a defiance of authority and mass participation'. *Ibid.*
82. Dexter Roberts, 'A Chinese Blogger's Tale', *Business Week*, 2 Mar. 2006 <www.businessweek.com/globalbiz/content/mar2006/gb20060302_026709.htm>, 12 Oct. 2010.
83. *Ibid.*
84. Robert S. Rogoyski & Kenneth Basin, 'The Bloody Case that Started from a Parody: American Intellectual Property Policy and the Pursuit of Democratic Ideals in Modern China',

The introduction of a parody exception, however, does not always resolve this tension. In fact, many strong moral rights regimes already include a parody exception. Article L. 122-5(4) of the Code de la Propriété Intellectuelle, for example, provides: 'Once a work has been disclosed, the author may not prohibit . . . parody, pastiche and caricature, observing the rules of the genre'.[85] Despite this exception, which courts have narrowly construed, the ability of individuals to make unauthorized reuse or modification of a creative work remains severely curtailed in France.[86]

5. RIGHT TO DELETE

The above sections discuss areas where moral rights may be too strong. This section, by contrast, focuses on an area where these rights may not have gone far enough. Commentators, policymakers, and the public at large have become increasingly concerned about the permanent existence of personal information and other materials on the Internet.[87] As a result, they began to explore whether a new 'right to delete' needs to be introduced to the online environment.[88]

The debate on this new right ties well into our present discussion of moral rights; it touches on both the right of withdrawal and the right to destroy. As Jeremy Phillips observes, even though the right of withdrawal is rather insignificant within the moral rights regime, that right paradoxically has become 'the most significant moral right in the context of the wiki [or other digital platforms], where a work may be of only temporary or ephemeral interest and the author may have a pressing and continuing need to change his posted text or withdraw it completely from its . . . host'.[89]

In their recent works on the right to destroy, Joseph Sax and Lior Strahilevitz describe the many actions artists have taken to destroy their creative works.[90]

UCLA Entertainment Law Review 16 (2009): 262–263; Geri J. Yonover, 'The Precarious Balance: Moral Rights, Parody, and Fair Use', *Cardozo Arts and Entertainment Law Journal* 14 (1996): 109–121.

85. Code de la Propriété Intellectuelle Art. L. 122–5(4) (1992) (Fr.).
86. Mary LaFrance, *Global Issues in Copyright Law* 228 (St Paul, MN: Thomson West, 2009).
87. J.D. Lasica, 'The Net Never Forgets', *Salon*, 25 Nov. 1998 <www.salon.com/21st/feature/1998/11/25feature.html>, 12 Oct. 2010; J.D. Lasica, 'The World Wide Web Never Forgets', *American Journalism Review*, June 1998 <www.ajr.org/article.asp?id=1793> 12 Oct. 2010.
88. Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton: Princeton University Press, 2009).
89. Jeremy Phillips, 'Authorship, Ownership, Wikiship: Copyright in the Twenty-First Century', in *Research Handbook on the Future of EU Copyright*, ed. E. Derclaye (Cheltenham: Edward Elgar Publishing, 2008), 208.
90. Joseph L. Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (Ann Arbor: University of Michigan Press, 2001); Lior Jacob Strahilevitz, 'The Right to Destroy', *Yale Law Journal* 114 (2005): 830–835.

As Professor Strahilevitz reminds us, a strong justification exists for the right to destroy in creative works:

> A society that does not allow authors to have their draft works destroyed posthumously could have less literary product than a society that requires the preservation of all literary works not destroyed during the author's life. Protecting authors' rights to destroy should encourage high-risk, high-reward projects, and might prevent writers from worrying that they should not commit words to paper unless they have complete visions of the narrative structures for their work.[91]

Likewise, Professor Sax believes that 'an artist should be entitled to decide how the world will remember him or her'.[92] A right to destroy, therefore, serves important functions for not only the authors, but also society at large.

In the digital context, Viktor Mayer-Schönberger underscores the need for individuals to delete works they have created on the Internet. As he observes, 'tensions will remain between an individual's desire to forget and a society's desire to remember (and vice versa)'.[93] To help resolve these tensions, Professor Mayer-Schönberger proposes to 'mimic human forgetting in the digital realm . . . by associating information we store in digital memory with expiration dates that users set'.[94] This proposal dovetails with Professor Balkin's recent proposal for greater regulation of the collection, use, or purchase of personal data by government.[95] Professor Balkin argues further that Congress should 'institutionalize government "amnesia" by requiring that some kinds of data be regularly destroyed after a certain amount of time unless there were good reasons for retaining the data'.[96]

As far as moral rights are concerned, the right to delete raises important questions that require us to revisit the debate on the right of withdrawal. Although many countries, including France[97] and Germany,[98] have recognized a right of withdrawal, retraction, or revocation as part of their moral rights regimes, this specific right usually comes with significant qualifications. As Cyrill Rigamonti describes:

> [I]n France and Germany, if authors reconsider their decision and further divulge their work after retracting it, the assignees enjoy a right of first refusal and have the option of exploiting the work under the terms and conditions of

91. Strahilevitz, *supra* n. 90, 832.
92. Sax, *supra* n. 90, 200.
93. Mayer-Schönberger, *supra* n. 88, 190.
94. *Ibid.*, 171.
95. Jack M. Balkin, 'The Constitution in the National Surveillance State', *Minnesota Law Review* 93 (2008): 21.
96. *Ibid.*
97. Code de la Propriété Intellectuelle Art. L. 121–4 (1992) (Fr.). In France, this right is known as *droit de retrait et de repentir* (right of withdrawal and repentance).
98. Urheberrechtsgesetz [Copyright Law], 9 Sep. 1965, Art. 42 (F.R.G.). In Germany, this right is known as *Rückrufsrecht wegen gewandelter Überzeugung* (right of revocation for changed conviction).

> the initial contract. Moreover, the right of withdrawal may not be exercised for just any reason. The German copyright statute specifically states that the right of withdrawal can be exercised only if authors can no longer reconcile the contents of their works with their personal convictions, and the Italian copyright statute explicitly requires 'serious moral reasons.' The same is true in France on the grounds that the right of withdrawal is subject to the general civil law rule that the abuse of rights is not protected, whereas such abuse is assumed whenever the author's exercise of the right of withdrawal is not motivated by his or her personal internal debate about whether to further divulge the work. In other words, monetary concerns alone will not suffice.[99]

Given these substantial qualifications and the fact that the right of withdrawal is rarely litigated, Professor Rigamonti considers this right 'largely an example of symbolic legislation'.[100]

At the international level, the Berne Convention does not include this rarely litigated right either. Article 6*bis* of the Convention protects only the rights of attribution and integrity.[101] Similarly, and in a large part due to omission in the Berne Convention, weak moral rights regimes do not offer protection to the right of withdrawal. Consider, for example, VARA in the United States. Although the statute includes a right to prevent destruction of 'work[s] of recognized stature', that right is closer to a right of preservation than a right of withdrawal or a right to destroy.[102]

Finally, given the complexity of the digital environment, it remains unclear how broad a right to delete should or could be, how practical and effective it would be if such a right comes into existence, and whether users in collaborative settings (such as contributors to fan sites, web logs, wikis, or virtual worlds)[103] can ensure the modification or removal of unwanted postings or creations.

Today, the Internet has made it awfully difficult, if not virtually impossible, for individuals to withdraw creative works once they become available – be they photographic images, audio, or video clips. Sometimes, these works will appear in their original format. At other times, however, they will appear in the form of collages, remixes, or mashups – as in the oft-cited, yet unfortunate case of the *Star Wars* Kid, many of whose videos still remain widely available on YouTube. Even when the electronic files are deleted, there is no guarantee that it does not retain an 'electronic footprint' in the form of edit history, archives, or privately-controlled digital memory.[104]

If these questions are not challenging enough, the right to delete recalls the oft-discussed dilemma copyright and moral rights scholars face: who should decide

99. Rigamonti, *supra* n. 3, 363.
100. *Ibid.*
101. Berne Convention, *supra* n. 6, Art. 6*bis*.
102. Justin Hughes, 'The Line Between Work and Framework, Text and Context', *Cardozo Arts and Entertainment Law Journal* 19 (2001): 22.
103. Phillips, *supra* n. 89, 207–208.
104. *Ibid.*, 208, fn. 33.

whether a work can be destroyed? The textbook illustration of this dilemma involves Franz Kafka's instructions to his executor and friend, Max Brod, to destroy all unpublished manuscripts upon his death. Had Brod followed his instructions, two of Kafka's then-unpublished masterpieces, *The Castle* and *The Trial*, would not have seen the light of day. Because these two works are now 'widely acknowledged as being highly influential in modern Western literature',[105] readers and scholars are, most certainly, thankful that the executor defied the author's ill-advised dying wish.

The Kafka example raises difficult questions about not only the author's right to control, but also who is in a better position to make decisions about such control, especially after the author's death.[106] As Linda Lacey asked two decades ago in a hypothetical drawn from Kafka's will, 'Who should prevail . . . when an artist's will orders the destruction of her paintings and an art expert challenges the will, declaring that the paintings are masterpieces that would become an integral part of the culture of the artist's homeland?'[107] To some extent, the right to delete brings back the debate on this very difficult question. After all, the Internet is as much about individual users as it is about the collaborative exchange among these individuals.

6. CONCLUSION

This chapter outlines four new sets of questions posed by the arrival of the Internet and new media technologies. Digital technologies, however, do not pose a unidirectional challenge to the moral rights regime. Rather, in a creative destructive way, these technologies help reinforce moral rights protection at the same time as they are posing new challenges. For example, digital rights management tools 'serve purposes akin to moral rights, first by assuring *attribution* to the author, artist, or composer, and second by ensuring the *integrity* of documents, images, and music'.[108] By preventing false attribution of authorship and the intentional removal or alteration of copyright management information, the WIPO Internet Treaties,[109] the Digital Millennium Copyright Act,[110] and the EU Information Society Directive[111] have greatly strengthened the existing moral rights regime.[112]

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105. Linda J. Lacey, 'Of Bread and Roses and Copyrights', *Duke Law Journal* (1989): 1594, fn. 263.
106. Peter K. Yu, 'Cultural Relics, Intellectual Property, and Intangible Heritage', *Temple Law Review* 81 (2008): 474–481.
107. Lacey, *supra* n. 105, 1593–1594.
108. Kenneth W. Dam, 'Self-help in the Digital Jungle', *Journal of Legal Studies* 28 (1999): 405.
109. WIPO Copyright Treaty Art. 12, 20 Dec. 1996 (1996) 36 ILM 65; WIPO Performances and Phonograms Treaty Art. 19, 20 Dec. 1996 (1996) 36 ILM 76.
110. 17 U.S.C. § 1202 (2006).
111. Directive 2001/29/EC, On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society Art. 7, 2001 O.J. (L 167) 10.
112. Kwall, *supra* n. 9, 26; Ginsburg, *supra* n. 27, 11.

The wide availability of digital technologies for tracking down the originals and to fashion a disclosure remedy have also provided authors with additional protection. To some extent, digital technologies may have ensured that moral rights 'come of age' in the United States, as Jane Ginsburg surmises.[113]

In short, the arrival of the Internet and new media technologies has presented a similar 'digital dilemma' as the one widely discussed in the copyright context.[114] Although the challenges – and perhaps the stakes, especially in the United States – are somewhat different, resolving these challenges is unlikely to be easy. In fact, if the difficulty in providing satisfactory responses to the challenges in the copyright arena provides any guidance, the prospects for resolving challenges in the moral rights context can be equally dim. It is, therefore, high time that we start paying attention to questions in this area.

In his seminal article, *The Refrigerator of Bernard Buffet*, Henry Merryman reminds us that 'the moral right of the artist, still comparatively young even in the nation of its origin, has not reached anything like its full development'.[115] Although Professor Merryman wrote the article more than three decades ago, his important insight is still alive today. Digital technologies have provided moral rights with both reinforcements and challenges. As moral rights continue to grow and mutate, their development, undoubtedly, will be shaped by the needs and demands of a rapidly-changing socio-technological environment. Whether moral rights will become stronger or weaker, broader or narrower, relevant or obsolete will remain highly contingent on the development of this environment.

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113. Ginsburg, *supra* n. 27, 9.
114. *Digital Dilemma*, *supra* n. 23.
115. John Henry Merryman, 'The Refrigerator of Bernard Buffet', *Hastings Law Journal* 27 (1976): 1026.