

Moral rights (a view from the town square)

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The thesis of this article is that moral rights, as that term is used in copyright law, are legal constructs which may inhibit the progress of art and constrain its transformative power. Such rights are based upon a particular aesthetic which embodies romantic, individualistic and canonical conceptions of artistic creativity and which does not recognise or accommodate the collective, continuing nature of all creativity. An author exercising a moral right wrongfully gains a right of control over meaning, context and use which takes absolute precedence over the needs of other artists who may wish to change the work's meaning and context and over the role of readers and viewers as meaning-makers of the work. The article further argues that moral rights, by canonising the artist and consecrating the art work, may function to separate the discursive practices of art from daily life and thereby inhibit art's cultural and political power.

A town square is a place which no one owns, a public space for serious social and political discussion and decision-making and for clowns rolling by on one wheeled cycles. It is the thesis of this short article (and the view of one standing in the town square and interested in its values of political involvement and shared cultural experience) that moral rights, in the particular and peculiar sense that that term is used in copyright law, function to constrict this public space. I will argue that moral rights are regressive legal constructs which move within the legal order to constrain art's transformative power and inhibit the development of vital aesthetic and political values and practices.

Law of moral rights

First, to definition. 'Moral rights' are in fact not moral rights at all, at least in the ordinary philosophical understanding of that term as being rights which are conceptually prior to and independent of the legal and constitutional orders and which can continue to exist in some sense even

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when the relevant legislation or social practice is against them.² The legal phrase ‘moral rights’, as used in the intellectual property universe, is a translation of the French term ‘*droit moral*’ and refers to a set of legally enforceable rights granted to the creators of certain types of works, usually only literary, dramatic, musical and artistic works and films which also simultaneously qualify for copyright protection.³ The most significant and widespread of these ‘moral rights’ are the right of attribution (the right to be identified as the creator of the work in question) and the right of integrity (the right to restrain objectionable treatment of the work in question). Moral rights are non-alienable personal rights,⁴ conceptually and legislatively distinct from copyright, which is, on this line of reasoning anyway, to be understood as a purely proprietary and ‘economic’ right.

The relevant legislative provisions for the implementation of moral rights in different countries⁵ usually derive their wording from Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works, a Convention of which the subject matter is copyright but which nonetheless requires its adherents to ensure legal protection for an author’s moral rights quite independently of the author’s copyright rights.⁶ Article 6*bis* reads:

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- 2 See J Feinberg, ‘In Defence of Moral Rights’ (1992) 12 *Oxford Journal of Legal Studies* 149, 151, quoting a definition from RG Frey, *Interests and Rights, The Case Against Animals* (1980) 7: ‘... a right which is not the product of community legislation or social practice, which persists even in the face of contrary legislation or practice, and which prescribes the boundary beyond which neither individuals nor the community may go in pursuit of their overall ends.’
 - 3 One might note, however, when making a claim that a ‘moral right’ is not a moral right in the sense accepted by philosophers of law, that Article 27(2) of the Universal Declaration of Human Rights, adopted in 1948 by the General Assembly of the United Nations, says this: ‘Everyone has the right to the protection of the *moral* and material interests resulting from the scientific, literary or artistic production of which he is author’ (emphasis added). Article 27(2) was later incorporated into Article 15 (1) of the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on December 16, 1966.
 - 4 Martin A Roeder, ‘The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators’ (1940) 53 *Harvard Law Review* 554, 564: ‘Moral rights are personal rights ... akin to those rights in tort which protect the individual against injury.’
 - 5 See the *Visual Artists’ Rights Act* of 1990 (VARA) 17 USC (Supp V 1993) (USA); Law No 63 of April 22, 1941, arts 20-24 (Italy); *Copyright, Designs and Patents Act* 1988 ss 77-89 (UK); *Copyright Act* 1994 ss 94-110 (NZ); Copyright Amendment Bill 1997 Part IX (Aust) [Editor’s note, and now see Copyright Amendment (Moral Rights) Bill 1999]. Each of these statutes provides both for the right to claim authorship of a work and, in words derived from 6*bis*, ‘the right to object to distortions, mutilations or other derogatory actions taken in respect of a work which would be prejudicial to the honour or reputation of the author’. The French moral rights legislative provision is both the simplest and the one least imitative of Berne Convention terminology. It provides that an author ‘shall enjoy the right to respect for his name, his authorship and his work. This right shall be attached to his person’: *Code de la Propriete Intellectuelle* (Law No 95-597 of 1 July 1992).
 - 6 Although Article 6*bis* has been in the Berne Convention since the Rome Revision in 1928, implementation of domestic legislation for the support of moral rights has in fact been much delayed. Moral rights in full statutory and direct form only entered the law of England in 1988, the law of New Zealand in 1994, the law of Canada in 1988, the law of France in 1957, and they are still only under active consideration in Australia. The United States did not accede to the Berne Convention until 1989 but shortly thereafter, in 1990, passed a federal statute ensuring moral rights protection for certain types of works. It should be noted, however, that even prior to the enactment of such purpose built legislation, moral rights were sometimes enforced in one form or another, with varying degrees of protection, in many countries: through judge-made doctrine, as was the case in France prior to 1957, through related actions such as the law of defamation and contract, as is still the case in Australia, or through piecemeal state legislation, as was the case in the US prior to 1990.

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 honour or reputation.

The extent to which moral rights are legislatively articulated and then enforced varies from country to country within the Berne Union itself. In the US, for example, only a circumscribed variety of tangible artefacts are covered by the federal legislation and films are specifically excluded from protection; in England, films are included but computer software is not, and so on.

The inclusion of moral rights into the legislative regime of a country is conventionally justified by reasoning similar or identical to that found in this often quoted passage from the literature of moral rights:

When an artist creates, be he an author, a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitative possibilities; he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than merely economic ones; these the copyright statute does not protect.⁷

Although moral rights regimes are sometimes (accurately) referred to as 'artist-centred' legislation in which the artist's status as creator and truth-teller is recognised and strengthened, such regimes could with equal validity be termed 'artifact-centered,' because the artist's personality is, it seems, the work and the work is the personality, or maybe even the soul.⁸ The vision of art which underlies and legitimates

7 Roeder, above n 4, 557. This is not to deny the existence or importance of other reasons for the implementation of moral rights regimes, such as fulfilling the obligations of a signatory to the Berne Convention, a clear factor in the enactment of moral rights legislation in the United States (see Ginsburg and Kernochan, 'One Hundred and Two Years Later: The US Joins the Berne Convention' [1988] 13 *Columbia-VLA Journal of Law & the Arts* 1, 3) or protecting the market value of existing works and the 'reputational externalities' of artists (see Hansmann, Henry and Santilli, Marina, "Authors" and Artists' Moral Rights: A Comparative Legal and Economic Analysis' (1997) 26 *Journal of Legal Studies* 95, 102-105). But the central theoretical justification remains the 'projecting of the artist's personality into the world' line and the prevalence of this justification can be a little trying, especially when, as is frequently the case, no analysis is offered to support it and it functions in an article as the only justification for the suggested implementation of a legislative moral rights regime. See, among many other possible references, Kate Paras, 'Is Australia on the Road to Formally Recognising Moral Rights, or is this One International Obligation which will Never be Formally Implemented?' (1997) 2 *Media & Arts Law Review* 16, 18 ('a work is an extension of the creator's personality and as such both the work and the creator's relationship to the work must be acknowledged and respected'); Carl H Settlemeyer, 'Between Thought and Possession: Artists' Moral Rights and Public Access To Creative Works' (1993) 81 *Georgetown Law Review* 2291, 2303; Mary Wyburn, 'The Attorney General's Department's Moral Rights Discussion Paper: Background and Proposals' (1995) 23 *Australian Business Law Review* 318, 319 ('The original basis for the rights is the recognition that incorporated into a work created by an artist or other author is the personality of the creator. The work is seen as an extension of the creator'); Michael Weir, 'The Story of Moral Rights or the Moral to the Story' (1992) 3 *Australian Intellectual Property Journal* 232, 232 ('This doctrine is explained on the basis that an artist's work is an extension of the personality of the artist ...'). And so on.

8 See D Ciolino, 'Rethinking the Compatibility of Moral Rights and Fair Use' (1997) 54 *Washington & Lee Law Review* 33, 35: 'Moral rights protect an artist's work as an outgrowth of his soul ...'. Occasionally, the imagery of moral rights moves from the work of art being a part of the artist's personality or soul to the work being the subject of an 'intimate bond' with the artist (See Tan, David 'Seeing Red Over Stravinsky's Firebird' (1996) 7 *Australian Intellectual Property Journal* 63, 65) or to being a child, so that an artist's work is to be understood as 'his spiritual child ... an outgrowth

the introduction of moral rights into the legal order seems to be one in which a creative individual, a kind of author-genius, preferably inspired directly by nature,⁹ produces an autonomous art object which embodies the author's personality and individual consciousness. To subject a work to derogatory treatment is therefore to subject the artist herself to such treatment.¹⁰ The law of moral rights exists to protect the person, the artist, against such harm.¹¹ How could any reasonable, decent minded person object? Well, I'll tell you. But first, consider the following representative types of moral rights cases.¹²

Case type one: physical mutilation of an original work

This type of invasion of an author's right of integrity involves a physical act done to a tangible artefact, and, in particular, at its worst involves an irreversible mutilation of the original work. In *Buffet v Fersing*,¹³ a celebrated decision of the French courts, for example, an artist, Bernard Buffet, executed a painting on six panels of a single refrigerator and signed only one of the panels. The court took the single signature as evidence of the artist's intention that the work be understood as a unified whole and allowed him to recover damages for violation of his integrity right from the owner of the refrigerator who had taken apart the object and sold off the six panels separately.

of his soul.' (See Ciolino, 35). See also Zachariah Chafee Jr, 'Reflections on the Law of Copyright' (1945) 45 *Columbia Law Review* 503, 506 '[t]he man who brings out of nothingness some child of his thought has rights therein which cannot belong to any other sort of property' and Adolf Dietz, 'The Artist's Right of Integrity Under Copyright Law — A Comparative Approach' (1994) 25 *ILC* 177, 182 (describing the relation between work and author as a 'relation of spiritual childhood and namegiving').

- 9 Jaszi points out that in the Romantic hierarchy of artistic productions, those which were produced by an artist whose inspiration was drawn directly from nature were accorded primacy: see Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) *Duke Law Journal* 455, 462.
- 10 The cynical view of such assertions is, perhaps regrettably, so often compelling, especially when expressed through a masterful image. See Lawrence Beyer's description of this process, by which damage to a *thing* becomes damage to a *person*, as a kind of 'voodoo aesthetic', in 'Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights' (1988) 82 *Northwestern University Law Review* 1011, 1091.
- 11 One might particularly question the legitimacy and theoretical coherence of such regimes when they deprive the author of his or her moral right in those circumstances where the author was a paid employee when the work was created. Is there a sacred, intimate bond here or not and if there is, then how come the sacred, intimate bond gets cast aside for no better reason than that the creator was an employee? It has been pointed out that in Anglo-American countries, in particular, employed authors are usually excluded from moral rights protection: Dietz, above n 8, 183. Why protect the artistic vision of the one and not the other if the basis for protection is authorial integrity and personality? Jaszi has criticized the law of copyright for this anomaly and his criticism becomes even more pointed if it is applied to moral rights regimes: '[I]t is somewhat surprising to encounter the individualistic Romantic conception of "authorship" deployed to support a regime that disassociates creative works from a legal interest in their creations: the work for hire doctrine of American copyright law. Where the doctrine applies, the firm or individual who paid to have a work created rather than the person who created it is regarded as the author for copyright purpose'; Jaszi, above n 9, 485.
- 12 I raise the cases here merely as illustrations of the sorts of issues which can arise in connection with moral rights and no inference should be drawn from any particular case as to how it might now be decided under the current law of the country in question or in other countries with similar legislation.
- 13 Judgment of May 30, 1962 Cour d'appel de Paris, 1962 D Jur 570 (Fr) affd Judgement of July 6, 1965, Cass civ 85 II Gaz Pal 126 (1965).

Case type two: physical mutilation of a reproduction or copy

Here an act is done not to the original and only artefact but to a copy, a reproduction, one print out of many. In *Huston v la Cinq*,¹⁴ for example, the heirs of John Huston and the screenwriter of *The Asphalt Jungle*, a film which had originally been filmed in black and white, sued in France on the basis of an infringement of the right of integrity when a version of the movie which had been altered through the addition of colour was broadcast on television. The law of copyright was not available to the plaintiffs because Huston had earlier assigned it. The economic, proprietary right was accordingly gone, but not the personal — and it was held by a French court that the moral right of the author of the film had been infringed. Substantial damages were obtained from those responsible for the broadcast.

Case type three: changing the context or situation of a work

Here, no distorting or mutilating act is directly committed against either the original work or against a reproduction. Rather, the immediate context or situation of the work is altered from what the author intended or finds artistically acceptable. In the case of *Shostakovich v Twentieth Century Fox Film Corp*,¹⁵ for example, the Russian composer of a musical work protested in an American court the use of the work in an anti-Soviet and anti-communist film. The political stance of the film was contrary to the composer's own political views. The claim was rejected on the basis that no right to artistic integrity as argued by the plaintiff could be found in American law.

Case type four: performance and interpretation of a work

Here again the work, viewed as an artefact, is not altered or harmed but it is performed and interpreted in a way that is different from what the author intended or finds acceptable. For example, a French court recently held a stage director liable for an infringement of Samuel Beckett's right of integrity because the director had staged *Waiting For Godot* with the two lead roles played by women instead of men, contrary to the playwright's stage directions.¹⁶ The exercise of the moral right in respect of a performance despite the absence of any damage to an original, physical text or score is justified by the argument that from the point of view of the audience the work and the performance become one and the damage inflicted upon the work by a particular 'distorting' performance or interpretation may therefore be permanent.¹⁷

Case type five: creating a new work using the old

Here an artist commits an act against the work of another artist in any of the ways stated above, but does so in the course of creating an entirely new work of his or her own. That new work might be a collage or montage, for example, in which fragments of earlier art works or other images are picked up and used again as raw materials for the later work. Appropriation art in fact functions only by the use of pre-existing images.¹⁸ The subsequent work by an alleged moral rights violator might also be a parody in which the original work becomes a target and is distorted in some way for the purposes of the amusing

14 Judgment of May 28, 1991, Cass Civ Ire 1991 Bull Civ 1, No 172; the Cour de Cassation.

15 80 NYS 2d 575 (Sup Ct 1948), aff'd 87 NY 2d 430 (App Div 1949). The corresponding litigation in France, a country which had at the time an established right of integrity for works of art including films, had an opposite result. See *Soc le Chant de Monde v Twentieth Century Fox* [1953] DA (1954) 16.

16 See TGI Paris 3e ch Oct 15, 1992, 155 Revue Int'l du Droit d'Auteur (1993), cited in T Cotter, 'Pragmatism, Economics and the Droit Moral' (1997) 76 *North Carolina Law Review* 1, fn 62.

17 Tan, above n 8, 68.

18 Niel Shaumann provides the following definition of 'appropriation art' in 'An Artist's Privilege' (1997) 15 *Cardozo Arts & Entertainment Law Journal* 249, 252: '... a post-modern technique using images fundamental to a culture (and therefore not created by the artist, who creates from the standpoint of an outsider) to make a point about that culture.'

art of the parodist. In the Netherlands, for example, a cabaret singer who had altered the lyrics of the plaintiff's song during her performance was enjoined from doing so in any future performance on the basis that she had destroyed the atmosphere of the song by her low humour and had thereby infringed the plaintiff's right of integrity.¹⁹

The fact that only one of these representative types of moral rights cases involves the physical and irreversible defacing of an original work of art provides some indication that it is in fact the issue of subsequent interpretations and re-contextualisations of the work of art by others that constitutes the heart of the matter here. One's instinctive revulsion against permanent physical defacement should, in view of the rarity of cases involving such defacement, therefore be somewhat controlled when formulating an opinion about the general legitimacy of legislatively based moral rights regimes. That revulsion is largely irrelevant here.

This essay will focus exclusively on the exercise of an author's moral right of integrity and will not address any issues arising from the right of attribution.

Moral rights and the art of exclusion

Moral rights function by excluding persons who are in fact significant to the existence and meaning of a work of art from that work and from the discourse of art as it speaks to the public through the work. This exclusion is, arguably anyway, a kind of moral wrong engendered by a moral right and, like any other form of wrongful exclusion from consideration or control or entitlement, it is harmful to those who are excluded. And they are legion. Those who are excluded by moral rights from art's dynamic productive and communicative processes are at least these:

- (1) other artists — performing, interpretive, directorial, parodic, appropriationist and derivative; and
- (2) readers/viewers/listeners — that is, recipients of the work of art, constructors of its meaning and participants in the ceaseless cultural discourse which itself enables the work to be made, given meaning and understood.

The Beckett case from case type four above illustrates all this quite nicely. Through the exercise of his legal right of integrity, Samuel Beckett could stop a stage director from casting a couple of his characters in a gender which he did not intend and he could thereby control both the gendered meanings of the play and the artistic, interpretive freedom of the director. As the 'original' artist of the 'original' work, Beckett had what has been called a 'charter for private censorship',²⁰ and his right trumped the director's freedom. Through the exercise of his moral right, Beckett could also simultaneously stop us from seeing some of his characters through another artistic mind and across a gender shift and he could stop us from thinking thoughts like 'Hey! That's a female! It doesn't matter! Her existence is meaningless too!'. Thoughts like that might interfere with the thoughts which Beckett intended us to have during a performance of the play which he wrote, but maybe we should be able to have them nonetheless. They might be good for us and we might like the new play that we create by having them.

A fairly narrow, but taut and cohesive, set of beliefs, values and ideas makes a moral rights regime acceptable and plausible. (One could describe this set of beliefs and values as making up the ideology of moral rights if one wanted to be provocative and, actually, one does want to be.) The ideology of moral rights and in particular, its central, controlling idea of the importance of the author, fixes the primary relation between author and work in such a way as to legitimate the exclusion of relevant persons from the creative discourses of art. One proponent of moral rights has suggested that to change a work of art

19 Pres Dist Ct Amsterdam 21 Dec 1978 discussed in J Merryman, 'The Refrigerator of Bernard Buffet' (1976) 27 *Hastings Law Journal* 1023, 1030-31 and R Gorman, 'Federal Moral Rights Legislation: The Need for Caution' (1990) 14 *Nova Law Review* 421, 425.

20 Jazsi, above n 9, 497.

'is to *falsify* a piece of the culture',²¹ and so it seems that truth itself is in the artefact, which becomes a kind of sacred vessel, a 'piece of culture'. If the work of art is holy and its maker is a god, then it seems to be OK to kick out the person who wants to target the work for parody or cross-dress the protagonist.

I don't think it's OK. I wish to challenge the ideology and its legitimization of exclusion by arguing that legally enforced moral rights regimes are based upon theories of authorship and meaning which are either flawed and discredited, or at least far enough out of the mainstream of informed thinking in the area as to be inappropriate bases for contemporary legislation. I also wish to argue that moral rights, by canonising the artist and consecrating the artwork, function to separate the discursive practices of art from daily life and thereby enervate both. Moral rights can be viewed, it seems to me, as a successful strategy of affirmative culture and as such, as a legal construct which embodies and promulgates particular political values and practices.

Moral rights, the artefact and (the death of) the author

When a work of art is legally protected by a right of integrity, so that any change to the work or to a copy of the work or to the context of the work must be tested against the author's right, the author has a right of control over meaning and context and use which takes legally mandated precedence over both the needs of other artists who may have designs on the work and wish to change its meaning and context and over the role of readers and viewers as meaning-makers of the work. The author's view of his or her work as visually contained solely in black and white contrasts or as an integrated refrigerator-painting or as an entirely serious creation free of comic overtones becomes, under a moral rights regime, the one authentic vision of the work to which we artists and readers and viewers have to defer and which we, it seems, must respect even to the extent of yielding up our own creative freedom. Our interest in knowing and using works not as locked in, frozen up artefacts or texts in a 'preserved' culture,²² but as part of a continuing, changing, interactive communicative and creative process, yields to authorial interpretive majesty.

Despite the apparently natural and inevitable relation which we and our language make between the concepts of 'author' and 'authority', however, the category of individual and individually inspired creation and authoritative, authorial interpretation has in fact been negated or at least substantially renegotiated. The Author, as it was put in one of the most striking and memorable phrases of our time, is dead.²³ What does it mean to say that the Author is dead? What it means is something like this: that the concept of an author as a fixed, determinate authoritative source of both the work *and* its meaning has been discredited, in literary and artistic theory at least, in favour of an understanding of authorship as something which is constructed and constantly reconstructed by social and aesthetic practices and which must be de-centred by our increased understanding of the importance of the reader or viewer in giving meaning to the work. The reader/viewer completes the communication circuit that any work of art actually is. Since all responses to works of art are of necessity interpretive — the text does not 'exist'

²¹ Merryman, above n 19, 1025 (emphasis added).

²² Moral rights are frequently justified by reference to the need to 'preserve' culture. See, for example, Michelle Cooper, 'Moral Rights and the Australian Film and Television Industries' (1997) *Copyright Reporter* 166, 178 ('Alterations to copies can ... impinge on the preservation of cultural heritage if the original is not generally available to the public'); DS Ciolino, 'Moral Rights and Real Obligations: A Property Law Framework for the Protection of Authors' Moral Rights' (1995) 69 *Tulane Law Review* 935, 958 ('In short, moral rights protect ... the public by preserving its cultural legacy'). To preserve may be to pickle, however.

²³ For the texts that launched a thousand articles, see Roland Barthes, 'The death of the author', in *Image — Music — Text* (1977) (originally published in French, 1968), 148 'A text's unity lies not in its origin, but in its destination — the birth of the reader must be at the cost of the death of the Author.' Foucault described the disappearance of the author as 'an event of our time': see M Foucault, 'What Is An Author?' in *Language, Counter-Memory, Practice* (ed Donald Bouchard) (1977) 120.

in some pure form in the absence of an interpretation — the interpreter makes or completes the work. The reader of any literary (or artistic) text is always an interpreter of that text and the author, when once the work has become a work, is no more than another one of its interpreters, and not a privileged or powerful or special one either. The author cannot provide any criterion for interpretation that is better or truer than any other. There is no final, authoritative meaning in a work of art. Although we might hunger for a powerful, authentic voice telling us the truth (as we might hunger for a god), moral rights regimes cannot just conjure one up for us when one does not and perhaps cannot exist.

Although governments are under no obligation to incorporate the ideas of flashy French intellectuals into their legislative regimes, even in France, the theory of authorship and meaning presented here is now so widespread as, arguably at least, to be accepted as the conventional wisdom in literary and cultural theory. And if one accepts that, in principle, the author is not the sole origin or interpreter of the authentic meaning of his or her text, one cannot then help, it seems to me, but question the legitimacy of a legislative regime which accords *legal* power to an author to be the sole origin or interpreter of the authentic meaning of his or her text. Even if we cannot quite go so far as to believe Foucault when he says that '[w]e can easily imagine a culture without any need for an author',²⁴ we can still resist a legally mandated, static vision of art as the creation of personality-embodying artefacts instead of a dynamic communication between an artist and ourselves which comes into existence because of and in the shape of an artistic artefact. We may not be ready for an 'author-function',²⁵ but we can do without an author-god in our statute books.

This is not to say that all interpretations have the same transformative potency or that all appropriations or recontextualisations of existing works are equally valuable. And it may be that the one subsequent act committed in relation to a work of art which should not be legally permitted is the act of permanent mutilation or defacement or destruction of an original work, despite the possibility that such an act can itself be a work of art. But all other appropriations and interpretations (commercial, tasteless or obscene though they may be) should be able to exist, to be assessed, to take their place in the procession. The town square has a place for the Fool and the Whore.

Moral rights and political values

It may be that traces of broader social and political visions and values can be found within the moral rights legal construct in so far as that construct repudiates and marginalises the collective, the communitarian and the discursive in favour of the individual and the artefact. Moral rights does not have within its ideology any idea which recognises or accommodates the collective, continuing nature of all creativity, either the inevitable fact that, 'the very act of authorship in any medium is more akin to translation and recombination than it is to creating'²⁶ or the fact that whole networks of people, including the *cognoscenti* of the 'art worlds', are in fact required to work together to produce and disseminate art.²⁷ Further, as we have seen, the legal concept of moral rights reflects acceptance of a theory of art which is author and artefact-centred and which embodies romantic, individualistic and canonical conceptions of artistic creativity. Alternative visions of art as discourse or communication-

²⁴ See Foucault, above n 23, 120.

²⁵ This is a view of the 'author' as purely a function of discourse. See *ibid*, 125.

²⁶ J Litman, 'The Public Domain' (1990) 39 *Emory Law Journal* 965, 966. See also Beyer, above n 10, 1091: '[G]iven that the auteur can create only by using existing entities and drawing upon others' ideas, there would seem to be multiple personalities embodied within any creation. Why should only the most recent contributor be recognised to the exclusion of all others?'

²⁷ See Frazier and his reflections on the work of Howard Becker in 'Art As Collective Action' (1974) 39 *American Sociology Review* 767 in 'On Moral Rights, Artist-Centered Legislation, and the Role of the State on Art Worlds: Notes On Building a Sociology of Copyright Law' (1995) 70 *Tulane Law Review* 314, 320-326.

centred and as reflective of communitarian values and collective practices do not fit easily within a moral rights conceptual or legislative framework. Those art practices (like appropriation, montage and parody) which most directly challenge ideas of authorial control and private ownership of artistic images and products²⁸ are in fact also those most directly and negatively affected by moral rights regimes. Parody, in particular, is an inherently subversive art form, a kind of natural check on the cultural success of an artistic work and on the vested interests which flow from success,²⁹ and its inherent susceptibility to an inhibiting moral rights assertion and an affronted 'original' artistic sensibility is plain.

Moral rights seem to support and contribute to, or at least reflect, both the privatisation of art and artistic discourse and the commodification of culture which are proceeding apace in our societies.³⁰ It is increasingly the case that the 'aesthetic vocabulary,' to which an artist needs access in order to function, is privately owned because it includes images and works which are protected by copyright (and trade mark and rights of publicity) and privately owned and controlled. The public domain is shrinking.³¹ Freedom of movement in the town square is decreasing and if copyright is 'the principal weapon used against artists by their cultural landlords',³² a moral rights regime is a fellow firearm. When a sculptor uses his right of integrity to stop a shopping centre from putting Christmas decorations on his sculpture of flying geese,³³ he is removing his sculpture from the aesthetic vocabulary, even if those shopkeepers who put the decorations on the sculpture had no motivation beyond the commercial, no intention of 'speaking art'. The sculptor is taking latent, inchoate, potential meanings of 'his' work of art away from us. But there are shops in the square and we buy things and look around ourselves and meet people there. We can talk there about whether putting decorations reflective of the religious festivals of a dominant social group is a bad thing — and when we do that, we are part of the public sphere which Habermas says is constituted whenever private persons come together (even in shops) to talk of matters of general interest.³⁴ When the Christmas decorations come off the sculpture, the exercise of the moral right not only removes some 'words' from the aesthetic vocabulary; it confirms a radical discontinuity between the aesthetic and the commercial, the sacred and the profane.³⁵

28 It has been argued that 'the act of [artistic] appropriation itself imparts a political message and challenges the bias toward individual property interests' and that the process of appropriation 'manifests a rejection of private property in favour of a more communitarian conception of society': see Patricia Krieg, 'Copyright, Free Speech, and the Visual Arts' (1984) 93 *Yale Law Journal* 1565, 1578.

29 See S Brand, 'Dan O'Neill Defies US Supreme Court: A Really, Truly Silly Moment in American Law' (1979) 21 *CoEvolution Quarterly* 41: 'Prodigious success and its responsibilities and failures draws parody. That's how a culture defends itself. Especially from institutions so large that they lose track of where they stand and the world begins so that they try to exercise their internal model of control on outside activities.'

30 See N Schaumann, 'An Artist's Privilege' (1997) 15 *Cardozo Arts & Entertainment Law Journal* 249, 250 ('[a]lmost without our noticing, American culture has become private property') and C Graber and G Teubner, 'Art and Money: Constitutional Rights In The Private Sphere' (1998) 18 *Oxford Journal of Legal Studies* 61, 68: '[modern] dangers lie not only in the old repressive power of the State or in more recent forms of political corruption of art. They lie especially in forms of exclusive privatization of art.'

31 See J Litman, 'The Public Domain' (1990) 39 *Emory Law Journal* 965 and R Coombe, 'Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue' (1991) 69 *Texas Law Review* 1853.

32 Schaumann, above n 30, 250.

33 *Snow v The Eaton Centre Ltd* (1982) 70 CPR 2d 105.

34 Jurgen Habermas, *The Structural Transformation of the Public Sphere* (translated Burger 1989; first published in German 1962) *passim*.

35 Frazier has pointed out the parallels between society's selection of some objects to be 'sacred' rather than 'profane' and its parallel selection of some objects to be 'art' rather than 'non-art' and he argues that 'the American movement to enhance artists' rights and to protect their moral rights must be seen as a semi-religious movement': see Frazier, above n 27, 354-355.

But just as art itself is relatively remote from contemporary political culture, moral rights appear to be a relatively apolitical matter. They have not in fact tended to create party line divisions within those Western democracies which have legislatively implemented them and, indeed, the very absence of party politics seems to suggest some principle of harmony between moral rights and the prevailing ideology of culture in the relevant countries.³⁶ I wish to argue here that this is the case, and that the legal construct of moral rights is both product and instrument of what Marcuse has described as affirmative culture; that is, a culture in which art is detached from daily life in order that it may inhabit a transcendental sphere which must be experienced as the special, the separate and the sacred. I may not be able to preserve the texture of daily life in my urban neighbourhood in the face of unbridled property development because a neighbourhood is not 'art', but I can keep the colour off the print of my black and white movie because it is. Here is Marcuse's definition of affirmative culture:

By affirmative culture is meant that culture of the bourgeoisie epoch which led in the course of its own development to the segregation from civilisation of the mental and spiritual world as an independent realm of value that is also considered superior to civilisation. Its decisive characteristic is the assertion of a universally obligatory, eternally better and more valuable world that must be unconditionally affirmed: a world essentially different from the factual world of the daily struggle for existence, yet realisable by every individual for himself 'from within', without any transformation of the state of fact. It is only in this culture that cultural activity and objects gain that value which elevates them above the everyday sphere. Their reception becomes an act of celebration and exaltation.³⁷

Art's function within affirmative culture becomes one of solace and pacification. Art's transformative and potentially revolutionary power of negating and challenging established reality³⁸ is neutralised by being exiled to a realm separate from the praxis of life and from the factual world of struggle and necessity which Marcuse describes as 'civilisation'.³⁹ The happiness and freedom that are attained in the world of art ironically then function to confirm and stabilise existing social relations, no matter how radical or threatening or progressive the actual content of the work of art might be. Although art may allow us to 'experience alternative worlds'⁴⁰ in ways which other forms of communication cannot, affirmative culture precludes their potential realisation and removes any threat to the established order which such alternative worlds might otherwise offer. Art then appeases the critical mind and thus stabilises the social relations against which it may seem to protest. Art's subversive potential may be

36 This is not to suggest that there has not been plenty of wrangling over and resistance to the introduction of moral rights legislation. The process of introducing the relevant legislation in Australia, for instance, has now dragged on for almost a decade, with Bills rising and falling and rising again and never achieving enactment. The point here is simply that the disputes are not 'party line' political. In Australia, virtually the same piece of moral rights legislation has been introduced into the House of Commons by both Labor and Liberal governments at different times.

37 Herbert Marcuse, 'On The Affirmative Character of Culture' [originally published in German in *Zeitschrift für Sozialforschung* (1937)] in *Negations, Essays In Critical Theory* (1986) 95.

38 Marcuse in dialogue with Richard Kearney: 'Yes, I would claim that all authentic art is negative, in the sense that it refuses to obey the established reality, its language, its order, its conventions and its images.' R Kearney, *Dialogues With Contemporary Continental Thinkers: The Phenomenological Heritage* (1984) 74. See also Marci A Hamilton, 'Art Speech' (1996) 49 *Vanderbilt Law Review* 73, 74-75, fns 2 and 3 for an account of art's increasing political and social marginalization.

39 For a more recent critical account of the politically neutralising and hegemonic effects of an aesthetic in which art is considered to belong exclusively to an autonomous sphere, see G Yudice, 'For A Practical Aesthetics' in B Robbins (ed), *The Phantom Public Sphere* (1993) 209.

40 Hamilton, above n 38, 76.

essential to representative democracy⁴¹ and to a living political culture in the town square. But when the experience of art has no continuity with the experience of daily life and the work of art is consecrated, then the work is politically neutralised and politically ineffective, no matter how radically critical of the existing order it may be.

The more that the work of art is celebrated and treasured as providing a private and unique experience of authentic values and meaning created by the artist, away from the antagonisms of daily social and economic relations, the more, according to this line of reasoning, that work of art functions as an instrument of affirmative culture. Consider this line of Marcuse: 'That soul is of the essence makes a good slogan when only power is of the essence.'⁴² Now substitute the word 'art' for the word 'soul' and you get the point I'm making. Conservative social and political forces can easily and safely celebrate art because art loses its radical negating and alienating power when it is preserved and deified. When the prevailing aesthetic is 'artist and artefact' rather than 'discourse and communication' centred, the immense and irreplaceable pleasure of art remains, but it also becomes largely politically irrelevant or little more than the instrument of other sources of social and political power.

The role of the moral rights legal construct in all this is clear, though it is of course neither direct nor immediate. Through its conceptual grounding and support for an aesthetic of individuation, through its portrayal of the artist as god-like maker and truth-giver, and in its fetishism of the artistic artefact, the moral rights construct functions to confirm the sanctity of art and its removal and distance from the praxis of life. The moral rights of artists thereby interfere with art's transformative, cultural and political power. The rights interfere, ironically, with the artists themselves; with the clowns rolling past on their one wheeled cycles who are watching and understanding and describing us. ●

41 Ibid, 76.

42 Marcuse, above n 37.