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The Battle between Anglo-American Copyright and European Authors' Rights

Works are created by their authors, reproduced and distributed by their disseminators, and enjoyed by the audience. These three actors, each with their own concerns, negotiate a delicate dance. Most generally, all must be kept content: the author productive, the disseminator profitable, and the audience enlightened. Get the balance wrong and things fall out of kilter. If authors become too exacting, the audience suffers. If the disseminators are greedy or the audience miserly, culture and eventually the public domain dessicate. But within these extremes there is much room for adjustment. Will copyright laws take as their first task protecting authors? Or will they consider the audience and the public domain also as important? Seen historically, that has been the fundamental choice faced as copyright developed in the Anglo-American world and in the major continental European nations, France and Germany. Each position has much to recommend it: public enlightenment for one, nurturing high-quality culture for the other. Neither can exist alone. The choice between them has never been either/or but always a question of emphasis, a positioning along a spectrum. And yet the battle between these views has also been what the Germans call a *Kulturkampf*, a clash of ideologies and fundamental assumptions, that has stretched back well over two centuries.

The laws governing how artists, writers, musicians, choreographers, directors, and other authors relate to their works are usually called “copyright” in English. But this one word covers two different ap-

proaches. The very terms used to designate the European “authors’ rights” alternative—*Urheberrecht* in German and *droit d’auteur* in French—voice a more encompassing approach. To capture it as we examine how these two approaches arose and evolved, this book will attempt consistently to call the Anglo-American approach “copyright” and the continental European view “authors’ rights.”¹

Copyright and authors’ rights take very different approaches to authors and their social role. Seen historically over its long development, copyright has focused on the audience and its hopes for an expansive public domain. Authors’ rights, in contrast, have targeted creators and their claims to ensure the authenticity of their works. Copyright’s defenders see it as imbued with the spirit of the common good. Copyright promotes authors’ creativity to benefit the public domain, allowing rights owners to exploit works efficiently. For its detractors copyright is philistine and commercial, treating noble creation as a mere commodity. It regards the creator as an entrepreneur and the work as a product.²

The authors’ rights tradition, in turn, valiantly protects the creator’s vision from commercialization and exploitation. It claims to rest on the eternal verities of natural rights and regards copyright as a utilitarian, man-made creature of statute.³ For its detractors the authors’ rights approach indulges seemingly whimsical *artistes* at the expense of the public.⁴ Its culturally conservative insistence that the creator retain the final say on a work’s form hinders collective and collaborative efforts, let alone acknowledgment of the audience’s role in determining a work’s meaning. From this vantage the authors’ rights approach embodies in statute an outmoded Romantic notion of the individual *artiste*, alone in a garret, dictating how his genius should be venerated. Copyright encourages innovation and promotes dissemination. Authors’ rights restrain distribution, inhibiting experimentation and public exposure. Authors’ rights speak for creators, while copyright favors disseminators and interpreters and ultimately the audience.⁵

Copyright sees culture as a commodity. Its products can be sold and changed, largely like other property. But the authors’ rights, especially their “moral rights,” run counter to the market. Inalienable claims, they remain with the creators or their representatives even if

they conflict with the commercial ambitions of the rights owners. The authors' rights ideology sees itself speaking for high culture. It is elitist and exclusive, while copyright is democratic and egalitarian.⁶ Copyright gives authors a limited economic monopoly over their work to stimulate their creativity, eventually enrich the public domain, and thereby serve the public interest. Private interests are thus subordinated to the public good. Authors' rights, in contrast, make no attempt to serve the public good as such, except tangentially insofar as happy authors better society.

The Continental ideology assumes that the author's and the audience's interests do not contradict each other directly. The public eventually benefits when authors are treated well. But copyright's adherents see a tense negotiation between author and audience. In their utilitarian calculation the public domain is served by protecting authors only as necessary to keep them contented and productive. Rewarding authors is not the goal but only the means to further their productivity. Social goals are preeminent, and the author's and the audience's claims do not always reconcile. "It is somehow typical of the American reasoning regarding copyright," says a French observer, "to oppose the interests of consumers to those of authors and performers."⁷

Authors' rights, in contrast, derive from natural rights. The Continental approach defends creators and their work. In a sense it seeks no other interest—public or otherwise. Authors' rights, says a distinguished French jurist, seek to protect the author, not society.⁸ Because it sets the author before all, writes a French law professor, balancing interests, on the model of the copyright systems, is foreign to the French tradition.⁹ The author, in the words of a standard French legal textbook, "owes society nothing. He has no more obligations in this respect than the mason who builds or the farmer who ploughs. Quite the contrary, society owes him."¹⁰

This contrast between copyright and authors' rights has often escalated into a "clash of civilizations" between the Anglophone world and the Continent.¹¹ As one observer has recently ventured, the European position, represented especially by France, is directly antithetical in almost all respects to that of the United States.¹² Copyright is but the regulation of the entertainment industry's affairs, as

a Continental jurist put it in 1990. It ignores the author's personality, on whose protection the essence of civilization rests. "An intimate and mysterious tie binds the work to its author. It is this connection which French law strives to protect. American law is not even aware of its existence."¹³

As the battle between copyright and authors' rights has been fought across the channel and especially across the Atlantic from the late eighteenth century on, such vague cultural confrontations have been increasingly anchored in statute. That copyright speaks mainly for the content industries is a European commonplace. One German observer calls Anglo-American copyright the "producer's copyright," an instrument of industrial policy corresponding to the Americans' fondness for competition.¹⁴ Europeans protect the author's "basic human property rights," another German insists, while the Anglo-Americans aim only at a "simple protection of commercial and technical interests."¹⁵ In the United States and the United Kingdom it is inconceivable that business should be disturbed by an author's scruples.¹⁶ French law, as a legal textbook puts it, specifically repudiates the idea that protecting intellectual property serves to stimulate creativity. Rather, it is a mark of respect to works of the spirit and their creators.¹⁷

Europeans often insist that copyright is primitive and archaic compared to their refined approach.¹⁸ Recognition of creativity and "establishment of authors' rights is one of the essential features of European culture."¹⁹ The danger, French commentators warn, is letting the Anglo-Saxons gain the upper hand. That way lies the "slow decline of the authors' rights to mere copyright" and the rise of a "mercantilistic Europe" built on the "ruins of humanistic Europe."²⁰

When in 1957 the French passed their first comprehensive law on the subject since the 1789 revolution, they invoked the author's moral rights to distinguish themselves from the mercantile Anglo-Saxons.²¹ Down to our own day, the French battle for their "cultural exceptionalism." In 2004 a French government report praised the nation for having formulated the principle of the author's personal rights, while the Anglo-Saxons protected merely business investors.²² As of this writing in 2014, trade negotiations between the European Union and the United States hinge on whether an exception to free

trade will be permitted to the French cultural industries. On such issues all French agree, left and right. During recent parliamentary debates Communist and Socialist senators vied with each other in support of France's tradition of moral rights, railing against the "facile logic of copyright *à l'américaine*."²³

Such clashes pit against each other not just two legal systems but diametrically opposed philosophies.²⁴ The French take for granted that there is a contrast, indeed a debate and an antagonism across the Atlantic.²⁵ A standard French legal textbook from 2005 insists that the individualistic French approach radically differs from the more communitarian line—guided by the public's interest, not the author's—taken by the Communists, Nazis, and Americans (together at last!).²⁶

THE STAKES

Why should we care about woolly-headed disputes over authorial rights and the social role of creativity? More is at stake than the amour propre of the creative classes. Fought in a recognizably modern sense for over two centuries, such debates have recently flared up again as intellectual property has become increasingly important to modern economies. The human mind, claims the internet visionary John Perry Barlow, "is replacing sunlight and mineral deposits as the principal source of new wealth."²⁷ The cost of manufacturing a pair of Nike shoes is 4 percent of its retail price. The rest consists of intangibles: patents, trademarks, brand image, know-how, and the like.²⁸ In 2010 industries heavily based on intellectual property provided 27 percent of US jobs.²⁹

Issues of ownership and its enforcement have extended beyond obvious industries like film, music, publishing, and software also to manufacturers—computers, pharmaceuticals, agricultural chemicals, car parts, and fire alarms. Pirating digital products is far more lucrative than counterfeiting physical items. A knock-off Gucci handbag costs roughly the same in materials as the original, though spared the investment of whatever design genius lies behind it. To develop a semiconductor chip can cost \$100 million, to copy it a thousandth

of that.³⁰ With software the disparity is even starker. Digitization has steered the marginal cost of a pirated software program, song, or film toward zero. The laws originally formulated for writers, artists, composers, and publishers have become serious business. Modern economies demand legally clear and enforceable intellectual property rights across a global economy.

International trade too has become more focused on intellectual property. During the 1990s the United States, Europe, and Japan faced the developing world and the rising Asian nations in disputes over copyrights and patents. Threatened with being cut-off from access to first-world markets for their—mainly agricultural and commodity—export goods, poor countries now had to impose regulations against counterfeiting and infringement formulated in Washington and Brussels.³¹ Arguably, this strict global enforcement of intellectual property rights introduced late in the twentieth century prevented emerging nations from following the same low road of piracy that the currently industrialized ones—none more shamelessly than the United States—had themselves travelled during the previous two centuries.³² Today, the US shakes its fist at China's pirates, as Europe did at America's a century ago. But China is already the third largest patentor in the world, trailing only the United States and Japan, and it joined the Berne Convention (the first international copyright union) in 1992, only three years after the Americans.³³ At some point soon, if it has not already happened, China too—like the US in the 1980s and '90s—will switch from pirate to policeman.

THE BATTLE IS JOINED

Inherent in the clash between copyright and authors' rights are strikingly divergent attitudes toward the creation and dissemination of culture, the reciprocal obligations and interests of creators and society, and the nature and social function of art, literature, and music. While authors' rights have many defenders in the English-speaking world, few Europeans believe in the Anglo-Saxon system. European criticism of copyright as sacrificing culture on the altar of

commodity is therefore commonly known on both sides of the Atlantic. But defenders of copyright are scarce on the Continent. Europeans are unfamiliar with the idea that the copyright ideology could be something more than support of the content industries' self-interest. The traditional copyright approach's defense of the public interest and of a balance between the competing claims of audience and author are rarely heard there. But in the English-speaking world, copyright's social purpose was widely debated up until the late twentieth century, when the United States changed course and largely adopted the Continental position of strong intellectual property rights.

The dichotomy between the two ideologies has not always been equally pronounced. Early in the eighteenth century both Anglo-Saxon and Continental nations deprived booksellers of their royal publishing privileges, instead giving authors property rights in their works, based on natural rights. But during the nineteenth century the seas parted. In Britain and America the fiction of a natural right to works was largely abandoned, replaced instead with claims founded merely on statute. On the Continent, however, the idea of authors' strong property claims, anchored in natural rights, continued. Late in the nineteenth century it was reinforced by an allegedly equally natural claim based no longer on property, but on personality. The work was not just the author's possession. It was part of his very being. The Anglosphere received such ideas skeptically.

Formed in 1886, the Berne Union was long the foremost international venue for propagating the authors' rights ideology. Britain joined from the start, but grudgingly. To this day its allegiance to crucial Berne tenets has been partial at best. As the most radical interpreter of the copyright tradition, the United States long resisted Berne, joining only in 1989. But during the 1990s the US swung around, and the erstwhile copyright outlaw became intellectual property's international policeman. Spurred on by its now powerful content exporters, it began championing strong property rights for authors and their assignees. For other aspects of the Continental ideology, especially the pesky nuisance of the author's moral rights, the United States and Britain were eventually compelled to don legal fig leaves just big enough to render modesty its due.

The digital era's debates over intellectual property echo these battles of the past two centuries. Will the internet be a free and open forum? Or will it be a turbo-charged but traditional form of dissemination, restrained by inherited property rights? In the 1990s public opinion was whipped to a froth as the recording industry sued its downloading customers for seven-figure sums, while lawmakers were deluged by e-mails from irate music fans. Shadowy bands of digital hackers shut down corporate websites. Current disputes are heavily colored by inherited positions. The digital millennialists, so prominent in the United States, dream of a dramatically expanded public domain. They formulate what is arguably a modern version of the now-embattled US copyright tradition. In Europe, in contrast, inherited concepts of intellectual property continue to dominate. The internet is seen more as a threat to authors than a promise for the public. Until recently, digital visionaries have been marginalized. Shunned by the establishment, their views have been advocated mainly by a radical fringe of pirate parties in nations like Sweden and Germany.

The dichotomy between copyright and authors' rights has thus fluctuated. Moderate during the eighteenth century, it became pronounced in the nineteenth. The postwar American conversion to strong intellectual property rights tempered it again, but in recent years the tension has flared up anew. Polemical accounts supporting authorial rights often emphasize the distinction between the two approaches as they attack Anglo-Saxon cultural mercantilism. Since they survey the long sweep, historical accounts have done so too. But legal scholars, writing for today's practitioners, sometimes downplay the distinction.³⁴ Some differences remain stark: the role of work-for-hire (where the employer receives the author's rights) and the importance of fair use (exceptions to the author's exclusive rights) are greater in the copyright systems than on the Continent. But other differences have been effaced as intellectual property regulation globalized. As Berne members most nations now downplay the once-important role of certain formalities that used to be required for staking authorial claims. Today, the United States and the European Union both set the length of protection at seventy years postmortem. Given the internationalization of intellectual property

legislation, the differences between the two approaches can best be identified through historical analysis. Seen over the *longue durée*, for example, terms have invariably been longer, and they have been extended earlier on the Continent than in the Anglosphere.

Though waxing and waning, the distinction between the two systems persists to this day. In 2006 the French conducted an extended debate over whether author or audience should take priority. They now located the origins of the divergence between European-style authors' rights and Anglophone copyright not with the world's first modern copyright law, the British Statute of Anne of 1710. Instead they regarded the first American national copyright law of 1790 as the more dangerous precedent.³⁵ The immediate enemy had shifted westward within the Anglosphere, but the fundamental antagonism remained. The trans-Atlantic spat over authors' rights is thus part of a broader quarrel that has long pitted the Continent against the Anglo-Saxon world, or more narrowly, the French against the Americans.

PARSING THE DIFFERENCES BETWEEN COPYRIGHT AND AUTHORS' RIGHTS

Differences between copyright and authors' rights are clear at a general and philosophical level. But in the hurly-burly of implementation and administration, they are frequently obscured by everyday practical considerations. Outcomes are often dictated by functional necessity, not philosophical disagreement.³⁶ Courts on both sides of the Atlantic have sometimes reached similar conclusions, but for different reasons.³⁷ Let us therefore clarify the specific distinctions between these two systems. How have the ideological differences been expressed in law and jurisprudence?

Among the concrete ways in which copyright and authors' rights have differed are these:

1. *Duration of term.* The Continental systems have historically had longer terms of protection for authors. Indeed, over three centuries terms have always been shorter in the United States than in France or Germany, and only as of 1998 have they been largely the same.³⁸

That holds for the United Kingdom too, except between 1911 and 1934 when Britain adopted the Berne fifty-year postmortem term before Germany did, and the two years of 1995–1997 until the French got around to implementing the EU requirement of seventy years. Anglophone term extensions have almost invariably followed Continental precedents. Natural rights ideology instinctively dictated perpetual rights, using the analogy of conventional property.³⁹ Perpetual rights made it into statute in Venice in 1780, in 1814 in Holland, at the end of the nineteenth century in Mexico, Venezuela, and Guatemala, and in Portugal in 1927. But on the whole they have not proven realizable. Yet to this day perpetuity remains a constant ideal of the Continental rhetoric of strong authorial rights. Recent standard French legal textbooks advocate perpetual rights in ways that are inconceivable in their Anglophone equivalents.⁴⁰ In contrast, the American Constitution prohibits perpetuity, specifically restricting copyright protection to limited times. Perpetual Anglophone copyrights have existed only as a few rare anomalies: the British Crown for the King James translation of the Bible; Oxford and Cambridge universities for works given them by their authors; and the Great Ormond Street Hospital for Children for J. M. Barrie's *Peter Pan*.⁴¹

European opinion has almost unanimously seen long terms as an unmitigated good. Only the maximum possible protection, as one observer put it, can enhance the full development of culture.⁴² In contrast, the Anglophones have more often worried that the public domain would thus be curbed. *Eldred v. Ashcroft* (2003) challenged the constitutionality of extending terms for existing works after the United States had stretched them from fifty years postmortem to the EU norm of seventy.⁴³ The Supreme Court, however, ruled that yet another retrospective extension of term did not render it unlimited and thus unconstitutional. Despite the plaintiffs' failure, *Eldred* highlighted a basic trans-Atlantic difference. Their lawyer, Lawrence Lesig, questioned whether there was a constitutional limit on America's ability to imitate the Europeans "as they continually expand the term in light of their own vision of what copyright is about."⁴⁴ Europe had nothing like the American outpouring of legal opinion criticizing the relentless lengthening of copyright's duration.⁴⁵

The globalization of intellectual property regulation has erased many of the actual differences between copyright and authors' rights. Most nations now have largely the same lengthy term durations. But their national preferences have been revealed by whether they have actively espoused long terms or have reformed only under pressure, with dispute and foot dragging. Seen historically, authors' right countries have favored longer terms, while copyright nations resisted them.

2. *Formalities of protection.* Based on authors' inherent claims to their work, the Continental approach has discounted the formalities traditionally required to protect works—registering, affixing notice to and depositing the work, renewing rights, and the like. Protection is triggered by the sheer fact of creation. Why should authors lose their claims for having overlooked some paperwork? The work is often covered even without being fixed—as for lectures, improvisations, and the like.⁴⁶ On the few occasions where the Continental systems require formalities, neglect of them generally merely delays or curtails protection.⁴⁷

In the Continental view formalities are artificial obstacles to the author's natural property rights. But from copyright's vantage the point of formalities was to ensure that only those works worth jumping hoops for were kept in private hands and out of the public domain. A 1975 US Senate report's first reason to support formalities was that they placed in the public domain the large body of published material that no one bothered to copyright.⁴⁸ The opposition between the two systems can be summed up thus: in authors' rights works were born as private property. But in copyright they belonged automatically to the public domain unless the author took pains to register them. "No registration, no right."⁴⁹ Formalities thus underlined the copyright thesis that intellectual property was not based on natural rights but was an artificial creation of statute.

On this point, too, the two approaches have come to approximate each other. And yet the antagonism has not wholly vanished. The UK followed Berne's dictate to eliminate formalities in 1911, but it now also requires that authors formally assert their moral rights—a true muddle. Though the US eliminated formalities starting in 1976

as it edged toward joining Berne, American critics to this day still lament the sacrifice and have attempted to challenge its constitutionality, arguing that automatically protecting most works impedes the progress of science and the useful arts.⁵⁰

3. *Alienability*. Eighteenth-century reforms aimed to give authors property rights in their works to sell on the market. Unless the works were entirely theirs to alienate, they would receive less than full value.⁵¹ In this respect, copyright regarded the work as akin to other forms of property. After alienation the creator and creation had parted. In authors' rights systems, in contrast, works can never be wholly divorced from their creators. They retain significant control, even after having assigned economic rights. As a free man cannot sell himself into slavery, so the author cannot alienate his work. In German law authors quite simply cannot assign or transfer the work as such but only limited use rights. In France today moral rights (to which we come shortly) are inherently inalienable. As shown in the case of Prince Michael of Greece, discussed in the introduction, even if alienated by contract, moral rights remain with the author. By contrast, in the Anglophone world rights (including those moral rights recognized in statute) are largely assignable. Indeed, as we will see with the work-for-hire doctrine, in legal terms owners are regarded as authors.

4. *Contracts*. Since copyright allows fuller alienability of works, contracts in the Anglosphere have usually been freer than in authors' rights countries.⁵² Continental nations often regulate how authors can transfer rights to future works.⁵³ The French law of 1957, for example, forbade all blanket transfers of future works and then specified allowable transfers in numbing detail. Only five future works in any given genre within five years were legal. The publisher had to decide to accept each work within three months after submission. The author was able to revoke the agreement if the publisher rejected two successive works in one genre, and so forth. The author was assumed to be the weaker party, in need of protection against rapacious disseminators.⁵⁴ We want to defend the author against himself, explained Jean Zay, minister of education in the French Popular Front government of the late 1930s.⁵⁵ Authors were helpless,

unworldly *Luftmenschen*, unable to defend themselves—or so the French argued during their campaign to insert strong authorial rights into the U.N. Declaration of Human Rights in 1948.⁵⁶

Copyright nations, on the other hand, have generally considered authors able to manage their own affairs. Authors are seen as free agents in the marketplace, knowing the value of their works and selling them only for a fair price. But even market-driven systems have sometimes cosseted them. The 1976 US Copyright Act allowed authors a second bite of the apple. After thirty-five years they could renegotiate terms (termination of transfer) since the “unequal bargaining position of authors” meant they could not know the value of their work until it had been exploited.⁵⁷ But only rarely did US law allow copyright law to trump contract.

5. *Identity of the Author and Work-for-Hire*. Work for an employer (work-for-hire) or by corporate or collective entities has been closely connected to alienability. The Continental systems have recognized mainly flesh-and-blood creators, not legal entities nor anyone other than the actual author. There are exceptions to this generalization. For collective works with many individual contributors, authorship is sometimes vested in corporate entities.⁵⁸ In 1985 France vested rights for software in the corporate employer of the programmers. But, as a rule, even work done for hire in the French and German systems entitles employee authors to similar rights in their creations as their self-employed peers.

In contrast, copyright systems have routinely vested authorship in corporate entities, attributed work-for-hire to the sponsoring entity, and resolved issues surrounding collective, collaborative, and corporate works by contract.⁵⁹ Not only is the corporate entity behind the work the first owner of copyright, it is often regarded as the author too.⁶⁰ Who was the author of *Citizen Kane*, Milos Forman asked rhetorically in 1994? And who is it today? RKO Pictures in 1941 and now Turner Broadcasting were the—in his eyes—ludicrous answers.⁶¹ The 1909 US Copyright Act founded corporate authorship by including employers as authors of work-for-hire. The 1911 UK Copyright Act introduced work-for-hire too and vested authorship of photographs and musical recordings in the corporate owner. The 1976 US Copyright Act deemed the employer of the cre-

ator not only the owner of “all of the rights comprised in the copyright” but also the author of the work.⁶² Work-for-hire demonstrated how copyright resisted Romantic ideas of individual authorship even as the Continent remained indebted to them.⁶³ It remains perhaps the most important divergence between the two systems, especially considering the large fraction of all content that is produced as work-for-hire in the Anglo-Saxon nations.

6. *Exceptions to the author’s exclusive rights.* As we would expect, the Anglophone nations have generally accepted broader exceptions to authorial rights, allowing other authors, interpreters, and the audience to make use of works without the permission of rights holders. The US “fair use” doctrine has allowed use of protected works without permission or compensation for broad, socially beneficial purposes. American practices have been more expansive than the “fair dealing” of other Anglophone nations. That in turn has tended to be more inclusive than the Continental counterparts, with their specific excepted uses enumerated in statute. Here too, international standardization has scrubbed away stark differences. But, as we will see, the issue has reappeared in recent years as France and Germany were pushed to expand their otherwise miserly exceptions to authorial rights.

7. *Compulsory licensing.* Compulsory licensing (sometimes known as equitable remuneration) allows works to be reproduced without the author’s permission so long as certain criteria—usually royalty payment—are met. It has been used to bring works efficiently to the public without much regard for the author’s rights, other than that of being paid. It has meshed more naturally with copyright practices than the Continental approach and was adopted earlier and with less fuss in the Anglophone world.⁶⁴ Licensing violated the core Continental principle of the author’s exclusive rights since, in effect, it legalized infringement in return for automatically paid fines. Licensing destroyed his power of bargaining, George Bernard Shaw complained to a parliamentary committee in 1909. If competitors could issue their own editions at rates determined by law, the first publisher would offer less than for exclusive rights.⁶⁵ Compulsory licensing thus spoke to the interests of the public and disseminators. Some advocates have seen it as a way to overcome the perennial con-

flict between authors' property rights and society's insistence on access. Squaring the circle, compulsory licensing granted authors their (pecuniary) due, perhaps even perpetually, while throwing open the doors to any royalty-paying disseminator. Both Mark Twain and Ezra Pound proposed systems of perpetual authorial rights, tempered by compulsory licensing to reprint.⁶⁶

Compulsory licensing has also been used to override authors' attempts to suppress works altogether. Most nations allow new editions, even against the rights holder's will. The British 1842 Copyright Act permitted the Privy Council to grant compulsory licenses. Early in the twentieth century American and British composers were forced to accept compulsory licensing in return for being granted rights to sound recordings of their works. More recently, developing nations have favored compulsory licensing to gain better terms than those allowed by a classic regime of exclusive rights. And some open access advocates support licensing to break the "cyberlords' information monopolies."⁶⁷

8. *Originality.* We might have expected that the Continental nations, with their emphasis on the personal connection between author and work, would demand a higher standard of originality than the copyright countries. In fact, the contrast has not been dramatic. The Anglophone nations imposed a doctrine of "sweat of the brow," demanding effort but not necessarily creativity. The United States, however, also required a minimum level of originality. This was reaffirmed in 1991, when the Supreme Court refused protection to a telephone directory that had merely been copied from another.⁶⁸ In the meantime the Continental originality bar has never been high, though it is defined more stringently in Germany than in France. In 1991, for example, the EU Software Directive broadly harmonized the standard of originality for computer programs at the Anglo-Saxon level. Such works had to be the author's own intellectual creation, but nothing more.⁶⁹

9. *Moral rights.* The fundamental premise of the European authors' rights ideology is to consider works as a form of property, sanctified by natural rights. During the nineteenth century this was expanded to include also a personal connection that—equally based on nature—reinforced the tie between authors and their works. Moral

rights seek to protect in law that investment of authorial personality. By granting authors powers to control works even after they have sold their exploitation rights, moral rights privilege creators at the expense of disseminators, interpreters, and the audience. In Anglo-American copyright, in contrast, moral rights have played a much smaller role, protected—if at all—only incidentally or outside the copyright statutes.

THE IDEOLOGY OF MORAL RIGHTS

Moral rights allow the author to determine when and how his work is released (disclosure). They ensure that he is recognized as its author (attribution). And they prevent his work from being changed without approval (integrity). In addition to these three primary moral rights has also come the author's right to withdraw his work from dissemination should he change his mind. And finally, the resale right, usually called the *droit de suite*, is an ordinary economic right that guarantees artists a bite of the apple each time their artworks are resold. Evidently not a moral right, the *droit de suite* has nonetheless often been invoked to demonstrate the author's strong position in the Continental nations. It was a further enrichment of the artist's legal position, one Italian commentator celebrated during the Fascist era.⁷⁰ France was the first to institute the resale right in 1920, followed by the Belgians in 1921, and the Italians in 1941.⁷¹

The term "moral rights" is a translation from the French (*droit moral*). Effectively a misnomer, it has nothing to do with morality but serves to distinguish such rights from the economic rights of exploitation. Usually attributed to the French legal writer André Morillot around 1870, in fact the term had been used in France already during the 1840s.⁷² As a bulwark against the market, moral rights are the anti-copyright. They subordinate private law—contracts, property, divorce, inheritance, bankruptcy—to the author's aesthetic interests.⁷³ But what the author gains from the law he may lose from his pocket as disseminators discount works in proportion to the control the author continues to exert.⁷⁴ From the Continental vantage such objections miss the point. The exercise of moral rights

defends authors' idealistic aspirations, even if it undermines their economic ambitions.

From copyright's view, the more incisive argument against moral rights has been not economic but social and aesthetic. Moral rights not only curb the disseminator's sway, they also deprive the public. By strengthening the control of authors and their descendants—sometimes perpetually—moral rights in effect prevent the work from ever falling wholly into the public domain.⁷⁵ More broadly, moral rights restrict artistic possibilities, not just for disseminators and the audience, but also for interpreters and performers. They give authors an aesthetic veto.⁷⁶

Copyright is freely alienable. Moral rights are not. In copyright, authors assign rights to their works, retaining little if any interest. Indeed, the aim of copyright was to give the creator something to take to the marketplace. As first legislated during the eighteenth century in all the nations examined here, the point of depriving booksellers of their privileges in favor of authors was to allow writers to sell their works. As personal rights, moral rights, in contrast, remain the author's whatever happens to the work. At any time, authors can change their minds. Even after signing away a right to integrity or attribution, they have prevailed in Continental courts to enforce them. As we have seen, ghostwriters—whom the French call “Negroes”—have come in from the self-imposed obscurity of their contracts to be named on their books.⁷⁷

Moral rights cover a broad field, and no one definition in the voluminous European literature is canonical. Least controversially, they include three main ones: disclosure, attribution, and integrity.

Disclosure (or divulcation) is the authors' right to decide when and how their work appears. The most self-evident of the moral rights, it is similar to the fundamental premise of copyright, the right of publication.⁷⁸ After having cut up and thrown away some paintings in 1914, the French painter Charles Camoin discovered that they had been retrieved, repaired, and sold to collectors. When they were put up for auction, he sued for their return and for damages. By discarding them he may have renounced his physical claims, the court ruled, but the moral right to decide whether his works should appear remained.⁷⁹

Other cases have been morally less clear-cut. In 1843 the Heidelberg theologian Heinrich Paulus published his notes on lectures by the philosopher Friedrich Schelling, adding a critical commentary four times as long. When Schelling sued to block publication, he lost on appeal. A lower court had supported the philosopher's right to determine when and how his work appeared. But a higher instance judged that the length of the commentary made the published work more than just Schelling's. The public had a legitimate interest in Paulus's views.⁸⁰ Paulus accused Schelling of summoning "the police to make himself irrefutable."⁸¹

Whatever its intrinsic virtues, the disclosure right has consequences for the audience and for culture more generally. If we took seriously the claims of authors—and their families and estates—to decide whether, when, and how works appear, we would have lost Virgil's *Aeneid*, possibly Ovid's *Metamorphoses*, most of Kafka, all of Foucault's posthumous works, some of Philip Larkin, Sainte-Beuve, T. S. Eliot, Anatole France, George Sand, Maurice Barrès, Antonin Artaud, Thomas Hardy, and much of Katherine Mansfield.⁸² Emily Dickinson's poems would be known only in her family's heavily edited version.⁸³

Attribution (or paternity) gives authors the right to be recognized as the creator of their work (even under a pseudonym) and conversely not to be falsely identified as the author of works not theirs. This too has been largely uncontroversial. Variants exist in copyright systems, though an attribution right is nowhere spelled out in US copyright law.⁸⁴ Copyright's major exception to attribution is that work-for-hire vests both owner- and authorship of commissioned works with the employer. In the Continental systems, whatever the details of their contracts, employee authors fully retain their moral rights, and corporate authorship is broadly ruled out of court.

Can an author refuse to be acknowledged as the creator of a work? Edward S. Ellis, author of many novels, including the *Deerfoot* series, failed to prevent a publisher from cashing in on his fame by reissuing in his birth name novels that had originally appeared under a nom de plume.⁸⁵ Conversely, the painter de Chirico denied authorship of a painting that bore his signature and that was shown

to be his. Since his disavowal lowered its value, he had to pay damages.⁸⁶ Hollywood has elegantly sidestepped the need to withdraw works while still sparing authors the pain of being associated with something they detest. From 1969 directors horrified by their film's editing could ask to have their name replaced with "Allen Smithee," who thus joined Anonymous as among our most versatile and protean authors.⁸⁷

Integrity (sometimes called the "right of respect") protects the work from changes unapproved by its author. Even though they may already have assigned economic rights, authors can still veto uses or changes of works. Arguably the core moral right, integrity has had the least counterpart in the Anglophone systems. It is also the trickiest of these claims. It varies depending on the art form. Singular works—paintings or sculptures, say—are protected against physical change or defacement. In the performing arts, however, author and performer or interpreter more equally rely on each other: playwright and director, composer and conductor, screenwriter and director, choreographer and dancer. Staging Mozart's *Se-raglio* in a brothel is not the same as adorning the *Mona Lisa* with a moustache.

Integrity comes in at least two variants. A strong version, found in French and Belgian law, forbids any alteration the author has not explicitly approved. As early as 1932, French courts decided that "it is up to the author to ensure that his work is not altered or deformed in either its form or its spirit."⁸⁸ In its most extreme interpretations even restoring an artwork might violate integrity as it substitutes a new work for the original and imposes an unwanted collaboration on the original author.⁸⁹ Other nations, like Germany, Denmark, and Italy, protect the author only against changes that demonstrably injure his reputation or honor. The author cannot object, for example, to changes not shown in public, nor to changes that might improve the work. In this interpretation of integrity, the author does not decide whether a modification is actionable. To judge how a change affects his reputation or honor requires knowledge of his social position, society's sense of what counts as a violation, and evidence that harm has been done—ultimately matters the author alone cannot evaluate.

Moral rights are commonly portrayed as the opposite of exploitation rights. But, in fact, the moral and the mercenary blur. Personality rights are also economic rights.⁹⁰ Some observers have even argued that moral rights are a new form of property since an author's control over his work has economic value, much as a lease on a rent-controlled apartment is a form of ownership.⁹¹ Insofar as an author's reputation and the work's authenticity affect his market value, he has an economic stake in his attribution and integrity rights. "By protecting the authorship and authenticity of a work, moral rights also serve consumer interests," a 1996 EU report concluded unflinchingly.⁹² Seen thus, moral rights are akin to trademark protection, the guarantee of a brand.⁹³

Yet impairing a work's integrity does not invariably damage the author's reputation. Indeed, it may improve it. A painter was not harmed by having his work photographed or engraved, Lord Fermoy argued during discussion leading to the British Fine Art Copyright Act of 1862. The more it happened, the higher the artist's reputation.⁹⁴ "Editors have been known, on occasion, actually to improve an article," the *New Republic's* editors waspishly opined a century later in 1988.⁹⁵ Against the artist's objections, the prominent art critic Clement Greenberg (one of Tom Wolfe's kings of Cultureburg), stripped the paint off several of David Smith's metal sculptures, claiming to enhance them both aesthetically and economically. They did eventually command higher prices, though whether thanks to any inherent improvement or Greenberg's influential opinions is hard to say.⁹⁶

If authors could forbid changes to their work, should they not also be allowed to prevent its destruction? This seemed a logical corollary of integrity and arguably the ultimate moral right. But it has rarely been legislated.⁹⁷ In the early 1920s the French Assembly pondered allowing artists to buy back works from owners who intended to destroy them.⁹⁸ The Swiss law of 1992 permitted authors to repurchase art that owners were going to destroy, though mercifully this did not apply to architecture.⁹⁹ French cases have punished the neglect and destruction of public fountains.¹⁰⁰ But on the whole, the owner's property rights have trumped the author's claims. While alterations might threaten an author's honor or repu-

tation, complete destruction of the work did not.¹⁰¹ A perversely logical consequence came in the 1981 case of a German artist, Otto Herbert Hajek. He had decorated a corporate building with sculptures, strips of color, textured areas, and paintings. When the building was remodeled, parts of these adornments were removed, and Hajek sued for violation of the work's integrity. The Munich court returned a Solomonic judgment: the owner could restore the work to its original state or he could end the violation of its integrity by removing it altogether.¹⁰² Destruction trumped integrity.

Contemporary artists who work with the detritus of everyday life have run an especially high risk of inadvertent destruction. Gustav Metzger's plastic bag of trash was discarded, even though proudly part of his *Recreation of First Public Demonstration of Auto-Destructive Art* in 2004. The beige paint stain under Martin Klippenberger's 2011 *When It Starts Dripping from the Ceiling* was mistakenly scrubbed away. The photographer Alfred Stieglitz is thought to have tossed out the original of Duchamp's *Fountain* with the trash.¹⁰³ Not surprisingly Joseph Beuys, whose favorite materials were felt and fat, suffered this indignity twice: a child's bathtub full of junk was mistakenly cleaned out in the 1970s (and then—injury to insult—used by the Social Democratic Party of Leverkusen in West Germany to cool beer). A museum janitor mopped up an artistic grease stain by Beuys in 1986.¹⁰⁴ And what if the work cried out to be defiled? What integrity rights did Duchamp's Ready-mades demand when one of their points, as everyday objects, was to undermine the remaining craft aspects of art? And what of the claims made by the five artists who took up what they considered Duchamp's challenge and urinated in one of the eight copies of his *Fountain*?

Beyond this classic trinity of moral rights (disclosure, attribution, integrity), some nations have also extended others.

Repenting (or withdrawal) is the most controversial and least applied of these additional moral rights. It allows authors to withdraw a work from circulation should it no longer express their meaning. Their ideal interests trump their contractual obligations. From copyright's vantage that is the least of the withdrawal right's offenses. Subtracting from the common store of knowledge by withdrawing a work violates the primacy of the public domain. In the

foundational copyright case *Millar v. Taylor* (1769), Justice Yates made this point forcefully: “But when an author prints and publishes his work, he lays it entirely open to the public. . . . Neither the book, nor the sentiments it contains, can be afterwards recalled by the author.”¹⁰⁵

A limited repenting right, proposed in Nazi Germany, came to nothing.¹⁰⁶ Yet in the midst of the Second World War, Fascist Italy introduced a proper one, allowing authors to withdraw their work if they could no longer stand by it.¹⁰⁷ In France withdrawal rights were introduced in 1957, and Germany gained them in 1965.¹⁰⁸ As the most extreme moral right, repenting has also been the least invoked. Authors have to compensate assignees for losses, and in practical terms their repenting is unlikely to have much effect on an already published work.¹⁰⁹ Yet, however inconsequential in practice, withdrawal lay at the heart of the central conundrum of moral rights—how a personal right survives the person. Other moral rights are assignable and inheritable. Spouses, descendants, heirs, representatives, and sometimes the state itself were expected to safeguard what they understood to be the author’s intentions. The withdrawal right, in contrast, almost by its nature dies with the author. It can generally not be exercised by anyone else.¹¹⁰

By assuming the fiction of a coherent lifelong authorial personality, the withdrawal right implicitly allows an author to rewrite his own history. The author should be able to withdraw a work that embarrassed him in old age, one delegate insisted at the International Literary Congress in Paris in 1878, the fountainhead of the author’s rights ideology.¹¹¹ The French law of 2012 on digitizing out-of-print works specifically permits authors to block the reappearance of works that harm their honor or reputation. A work written during the occupation of the Second World War, but now regretted, was offered as the disconcertingly frank example of what authors could quietly bury.¹¹² Withdrawal gave the old writer purchase over his youthful enthusiasms and indiscretions.

Should Céline have been allowed to expunge his anti-Semitic writings, as his widow tried to? Wagner the political radicalism of his youth? Saint Augustine the paganism of his early years? Manzoni his atheism, and Hugo or Lamennais their early Catholicism? Hav-

ing criticized the kings of Poland and Sweden in his *Anti-Machiavel* shortly before ascending the Prussian throne in 1740, Frederick the Great vainly implored Voltaire to convince his Dutch publisher to make it disappear.¹¹³ Voltaire in turn regretted his youthful satire of Joan of Arc, *La Pucelle d'Orleans*, and published a heavily edited version thirty years later, in 1762.

Though an ardent champion of authors' rights, Victor Hugo proposed a moderated version of withdrawal. The work was intimately tied to the author's personality but only at the moment of creation. An author could thus correct the style of an earlier work, but no longer suppress his meaning. Why? "Because now another person, the public, has taken possession of the work."¹¹⁴ Even the author, Hugo argued, should not be allowed to rewrite his works. Imagine what might happen. The elderly Racine disliked his mature tragedies.¹¹⁵ Goethe distanced himself from his *Werther*. Though Mahler's First Symphony originally had five movements, the composer removed one (only to have it reintroduced by Seiji Ozawa's recording).¹¹⁶ Having fled Berlin for exile in Stockholm, Nelly Sachs refused to reprint her prewar German works.¹¹⁷

But if the work was part of the author's personality only at its birth, why have a withdrawal right at all? In effect, the author's withdrawal right contradicts the work's integrity right. Arguably the work has to be protected even against its own author. In defending their right to stage *Godot* with female actors, a French theater troupe argued that "a formal respect for the author's wishes could be contrary to the interests of his work."¹¹⁸

In the Anglo-Saxon world the fear has been that withdrawal would allow authors to rewrite their histories. Before the Royal Copyright Commission in 1878, Thomas Farrer, permanent secretary of the Board of Trade, argued that lengthening copyright terms allowed authors to suppress their earlier opinions by vetoing new editions. "I do not think that copyright exists or ought to exist in order to enable an author to recall that which he has once given to the public."¹¹⁹ Farrer cut to the heart of the matter. The withdrawal right potentially contradicted integrity. Did integrity protect the inviolability of the work as such or of the author's personality? If the work expressed the author's personality, then he determined integrity and

could do what he pleased. But if the work itself was protected, then its creator might have no more right than anyone else to violate it. The Austrian expressionist writer Hermann Bahr took the latter line, seeking a form of habeas corpus protecting works against later mutilations, even by the author.¹²⁰

Who said an author's intentions were always pure? What if the author used withdrawal for greed or revenge, to stiff creditors or an ex-spouse? Or, for that matter, to foil pirates? Rudyard Kipling rewrote the end of *The Light That Failed* in hopes of spoiling pirate editions, as did Gabriel Garcia Marquez with his *Memories of My Melancholy Whores*.¹²¹ Was that an aesthetically valid motive?

What if authors insist on new and revised editions mainly to prolong their economic rights?¹²² That was a venerable strategy. In the early eighteenth century Jacob Tonson thus extended his hold over Shakespeare.¹²³ Late in life Walter Scott warded off creditors by bringing out new editions of his works.¹²⁴ Much as modern textbook authors issue ever-new editions, Stravinsky revised his compositions to extend his claims. He sold the copyrights of at least three versions of the *Firebird*—in pre- and post-revolutionary Russia and in American exile. When the Leeds Music Corporation, owner of the third version, released a fox-trot rendition, Stravinsky was incensed. But usually he was less picky. In Hollywood during the war, he allowed Disney drastically to prune the *Rite of Spring* for *Fantasia*.¹²⁵ Is the author always the best steward of his works?

MORAL RIGHTS IN THE LONG RUN

Moral rights link author and work by insisting that works mean only what the author intended. Since the work expresses its author's personality, his control must continue even after alienation.¹²⁶ But what happens at his death? Many personal rights expire with the person. In the Anglophone nations defamation and libel law protect only the living. But the Continental nations have had to grapple with the paradox of personal rights outliving the person.

Though moral rights generally last only as long as economic claims, in some nations, like France, they continue forever. That has

raised the question of whom to entrust as caretaker of the author's wishes. However devoted the author's family and however specific his instructions, in the long run the work slips into posterity's hands. When moral rights are inherited, on what terms? Are their recipients caretakers of the author's intent or actors in their own right? Are the authors' families, as the likely successors, the best safeguards of their interests?

The Marquis de Sade's family burned his unpublished manuscripts, though they were spared further effort when his published works were outlawed after his death in 1814. Samuel Richardson's grandson strongly disliked fiction, including *Pamela* and *Clarissa*. Boswell's eldest son thought his father's *Life of Johnson* "a blot in the escutcheon of the family."¹²⁷ As a good Christian, Baudelaire's mother, Madame Aupick, sought to pull one of the poems from the posthumous edition of *Les Fleurs du Mal*.¹²⁸ Rimbaud's sister, Isabelle, tried to prevent publication of his work after his death in 1891.¹²⁹

And even if the author has a sympathetic postmortem representative, are they obliged to follow the deceased's intentions? Jules Verne's five posthumous novels were heavily altered by his son, then restored by his grandson.¹³⁰ Nietzsche's posthumous *Will to Power* was a concoction of snippets from his unpublished writings by his sister, Elisabeth Förster-Nietzsche, which she tailored to make him sound like Hitler's court philosopher. In 1964 the first edition of Hemingway's memoirs appeared, titled *A Moveable Feast*. Unfinished at his suicide in 1961, the manuscript was edited and introduced by his fourth wife, Mary, and harshly portrayed his second wife, Pauline Pfeiffer. In 2009 his son Seán released a new edition, which softened the portrait of his mother, Pauline.¹³¹ Where does it end? A right may be personal and die with the person, or be perpetual and inheritable. Can it be both?¹³²

As many examples from the copyright world attest, obstructive heirs or representatives are not empowered by moral rights alone. Conventional exploitation rights have often been used to assert personal control too. But in those countries where they are enforced, like France and Germany, moral rights give descendants especially powerful tools. The secretary of Maurice Utrillo's widow inherited the painter's right of attribution and thus the right to authenticate

or challenge the provenance of paintings said to be his. He used this to good effect in the Paris and London art markets.¹³³ In 1984 the children of Albert Camus successfully invoked the writer's moral rights against his British publisher, Hamish Hamilton, maintaining that it had damaged the writer's reputation with a critical biography by Patrick MacCarthy.¹³⁴

Heirs have invoked aesthetic motives to achieve their own economic goals. The Gershwin heirs—mostly nephews and grandnephews of George and Ira—have been keenly commercial. “Our responsibilities are to not have *Porgy and Bess* stuck in an attic, to open up the property to younger generations,” said Jonathan Keidan, a digital-media executive, whose grandmother was George and Ira's sister, “and to make money for the families.”¹³⁵ Who says that heirs are concerned mainly with upholding the artistic vision of their ancestor author? Picasso's offspring has chased the unauthorized use of his name and images on coffee mugs, T-shirts, plates, and makeup, the better to license them for eyewear, clocks, textiles, stationery, posters, shopping bags, scarves, wallpaper, and even a Citroën car.¹³⁶

Even without money as a motive, heirs have exerted an onerous tutelage. Stephen Joyce's control of his grandfather's estate was notorious. Like most writers, Joyce himself believed in a natural right to intellectual property, and the ethos seems to have permeated the family.¹³⁷ New print and digital editions of his works were denied until copyright finally lapsed in 2011; exorbitant fees were charged for public readings, translations, and anthologies; musical adaptations were forbidden altogether.¹³⁸ Bertolt Brecht sought to determine the precise staging of his plays, and his daughter continued this after his death.¹³⁹ John Cage's publishers have collected royalties on his silent piece *4'33"* and threatened performers of other soundless compositions for infringing on his silence.¹⁴⁰

Richard Wagner illustrates the dilemma of achieving suitable balance between giving primary authors and their heirs full control of works and the concern of other authors, and their audience, to make free use of them. The Nazis worried lest his music be trivialized in light comedies.¹⁴¹ In the meantime we have gone to the opposite extreme. Many films use his music—usually the “Ride of the Valkyries”—to suggest Nazism or more general evil. In D. W. Griffith's

Birth of a Nation, it accompanied the KKK's ride against liberated slaves. In Francis Ford Coppola's *Apocalypse Now*, it undergirded a helicopter attack on a Vietnamese village (as it had accompanied Nazi newsreels reporting Luftwaffe airstrikes). It appeared in Chaplin's *Great Dictator*, Kubrick's *Full Metal Jacket*, Nicholas Ray's *Rebel without a Cause*, and Fellini's *8½*.¹⁴² Had moral rights on the French model given Wagner's heirs the ability to forbid using his music, as Shostakovich could, little of this would have been possible. But would we wish such powers for the Wagner estate?

For every author legitimately concerned about vulgarizing exploiters, others have eagerly sought to enforce their personal control. Alexander Calder rightfully complained that a massive mobile, bought and donated to the Pittsburgh airport, had been repainted from black and white to the splendid colors of Allegheny County, green and gold, and its elements soldered in place to make it a *stabile*.¹⁴³ In 1981 Michael Snow successfully objected when his sculpture of flying geese, *Flightstop*, commissioned for the atrium of the Eaton Centre in Toronto, was festooned with Christmas ribbons around their necks.¹⁴⁴

But, on the other hand, authorial vanity is legion. Miffed at the cutting of a scene of an opera for which he was set and costume designer, Fernand Léger sought to have the program indicate the absence of his "Crossing of the Andes."¹⁴⁵ The widow of Georges Dwelshauvers, the Belgian psychologist and philosopher, felt denigrated when a new edition of one of his books failed to list all his positions and other publications.¹⁴⁶ The cellist Mstislav Rostropovich objected to the use of his recording of *Boris Godunov* as soundtrack for the filmed version of the opera by Andrzej Żuławski because at certain moments cinematic noise (expectoration, urination, gasps) interfered with the perfect enjoyment of his work.¹⁴⁷ One could go on. Artistic skin is thin.

THE DEAD HAND OF THE PAST

Authors and their heirs have often hoped to preserve works in aspic. In nations like France and Germany, they have enlisted their moral rights to that end. But performers and interpreters want to use them

for their own purpose. Difficult choices are unavoidable, especially if moral rights are perpetual and heirs active. No *West Side Story*? No Manet redoing Titian? No Warhol *Mona Lisas*? Why is it fair that the passing of Johann Sebastian's heirs allows Wendy Carlos to switch on Bach, while Gustav Holst's estate hinders Tomita's electronic version of the *Planets*? What if the Grimm brothers had not wanted to be a Disney cartoon or if Rodgers and Hammerstein spurned John Coltrane? Are we condemned in all eternity to Bach played on original instruments?

When decisions pass to descendants and representatives, who polices the policemen? In France and Italy moral rights are perpetual. And forever is a long time. The consequences of enforcing the author's moral rights for decades, sometimes centuries, after his death have often been peculiar. In 1988 the sole lineal descendant of the painter Achille Deveria (died 1857) secured a court decision against the French magazine *L'Express* for printing a portrait of Franz Liszt from 1832, removing its bottom part and adding some color.¹⁴⁸ Should Sophocles's heirs hold integrity rights to his works? A facetious example, perhaps. But consider the 1989 case of the Danish director Jens Jørgen Thorsen. His early 1970s film on the life of Christ spiced it up—in the tediously predictable way of would-be provocateurs—with brothels and orgies, Mao and Uncle Sam. The Danish parliament and public asked whether the project was blasphemous and if it violated the moral rights of the authors of the gospels of Matthew, Mark, Luke, and John (whoever they were). When the Danish Film Institute withdrew its financial support, Thorsen sued. The court took expert testimony from Lars Trier, the future *auteur* of the Danish 1990s Dogme school of filmmaking (who then did not yet affect his faux aristocratic “von”). The Film Institute was wrong to recall its support, it ruled. But it was no longer obliged to finance the project.¹⁴⁹ Echoing Louis Vaunois, one of the few Frenchmen to criticize moral rights, we might well ask: who are the heirs of King David, author of the Psalms?¹⁵⁰

If moral rights are perpetual, it follows that eventually they have to be entrusted to an institution, presumably some sort of government authority. Moral rights are then transformed into a caretaking of cultural patrimony—something like the preservation codes that uncontroversially guard buildings, monuments, and landscapes.¹⁵¹ In

1913 Wagner's copyrights were set to expire. With them Wagner's insistence on limiting *Parsifal* performances to his purpose-built theater in Bayreuth would go too. Wagner's family and followers suggested a compromise, permitting stagings elsewhere, but only if closely supervised by a government authority—in effect a *Reichsparsifalkommissar*.¹⁵² Later, the collectivist-minded Nazis drew the ultimate conclusion from the inevitable passing of the author's work into government hands. Since the author, in their view, was the mouthpiece of the people, the collectivity could prevent him or his heirs from mutilating or desecrating his works.¹⁵³ The work, not the author, was the focus of protection.

In the long run, as the protection of the authors' rights turned against the creator himself, the ultimate contradiction of perpetual personal rights emerged in those nations with such legislation. At the outset of any work's trajectory, moral rights were highly individualistic. They undergirded the author's claim to enforce the singularity of his vision even after death. But the passage of time gnawed away at this personal tie. His descendants and heirs allegedly did his bidding. But their motives weakened as his presence receded. Ultimately, the collectivity necessarily stepped in to preserve what by now—if he remained of interest—had become the author's position in a canon. By this point cultural bureaucrats safeguarded not his individual vision, but a socialized understanding of where he fit in the pantheon.¹⁵⁴

Such control could take the innocent form of preventing destruction of valuable works. One of the first instances of the state using moral rights, introduced by the Italian Fascists in 1925, came four years later at the death of Marco Praga, a popular playwright. His will ordered his manuscripts destroyed, but the minister of education decreed otherwise. To this day Praga's works and letters remain in the Brera Academy of Milan.¹⁵⁵

But what happens when the motives are more personal? Even the French—fervent moral rightists—recognized the problem. In 1959 the Société des Gens de Lettres sought an injunction against use of *Les liaisons dangereuses* as the title of a film based on the eighteenth-century novel by Pierre Choderlos de Laclos. The film was by Roger Vadim, he who launched Brigitte Bardot and turned Jane Fonda into Barbarella. Though perhaps no more erotic than the original

book, the film was set in the contemporary underworld, not a rococo court. The lower court injunctions against the film were criticized for accepting the Société's pretensions to speak for Choderlos's moral interests. The society had not even existed during his lifetime! Choderlos's own intentions were not mentioned since it was difficult to say whether a writer who died in 1803 would have welcomed a filming of his novel. Ultimately, reason prevailed and the Society did not. The Court of Appeals dismissed the Société's claim to represent the author as a task it had arrogated, not one anchored in law.¹⁵⁶

In 1964 the French National Literary Fund, created in 1946 to defend the integrity of public domain works, similarly sought to suppress an abridgment of Victor Hugo's *Les Misérables* (1862). The court refused, reasoning that Hugo's living heirs—two great-grandchildren, Jean and Marguerite Hugo—were the ones to safeguard his moral rights.¹⁵⁷ When, thirty-seven years later in 2001, a writer was commissioned to write two sequels to *Les Misérables*, a great-great-grandchild, Pierre Hugo, a goldsmith from Aix-en-Provence, went to court to enforce respect for his ancestor's oeuvre. In the first instance the courts proved themselves more sensible stewards of the French cultural legacy than the legislators. Since he had lived long before moral rights had been legislated, the court divined Hugo's intentions by analyzing his writings and speeches. At the 1878 International Literary Congress, he had adamantly opposed heirs controlling their ancestors' works. The court concluded that Hugo's wishes should be respected in this instance too.¹⁵⁸

On appeal in 2004, however, the great-great-grandchild was granted standing and indeed won his claim that the sequels violated Hugo's moral rights. But the law on moral rights was upheld only by emasculating it. The court symbolically fined the publisher two euros, while not blocking sales of the sequels.¹⁵⁹ For good measure, the highest court then overturned this ruling in 2007, declaring that, although they could not violate the moral rights of the original, sequels were among the adaptation rights allowable once the work was in the public domain.¹⁶⁰

Disappointed, Pierre Hugo lashed out at those who would cash in on the genius of famous authors. "I am not just fighting for myself, my family and for Victor Hugo," he claimed, "but for the de-

scendants of all writers, painters and composers who should be protected from people who want to use a famous name and work just for money.”¹⁶¹ Alas for the conviction his complaint carries, this is the same descendant who invokes his ancestor to hawk his luxury fountain pens on the web. These he describes as “truly works of art,” which have been “launched at Bergdorf Goodman.” The most “prestigious” of the entirely hand-engraved Bois d’Epave line (also available in ballpoint technology) is “dedicated to his great-great-grandfather Victor Hugo.”¹⁶²

THE BATTLE LINES

Moral rights are a political issue swaddled in culture. They encompass more than the legal leverage they give the author in dealing with disseminators, assignees, interpreters, performers, and the public. Speaking to the implicit social compact between author and society, they testify to the priorities of a culture. Is the author or the audience primary? Should this unique individual, the author, stand inviolate? Or are even authors citizens, owing the public domain in return for their legally protected claims and the social recognition of their talent?

Moral rights have thus epitomized the broader cultural clash between Anglo-American copyright and European authors’ rights. Each system sees the author’s role differently. The Continental system has hoped to insulate culture from the market and protect authors from disseminators, interpreters, and the audience. Moral rights are a “fundamental human right,” while copyright is merely a “socially useful right,” granted to encourage authors and benefit society.¹⁶³ At their most elevated authors’ rights—and especially moral rights—have been considered human rights, a legacy of the Enlightenment and the French Revolution.¹⁶⁴

So universal have the French regarded moral rights that foreigners can assert their claims in French courts regardless of their standing at home.¹⁶⁵ In the case of Bragance’s authorial credit for the novel she had ghostwritten with Prince Michael, French law trumped a contract signed according to New York law.¹⁶⁶ With the colorization

of Huston's *Asphalt Jungle*, French courts took up a case where the American plaintiffs had received no satisfaction at home.¹⁶⁷ In an act of what the French approvingly hailed as French legal imperialism, countering American economic hegemony, Huston's moral rights in French law trumped those of the California jurisdiction where he had signed the contracts and undertaken the work.¹⁶⁸ French courts assumed that for moral rights foreign local law violated the principles of international law to which French statute corresponded.¹⁶⁹ This was, as one observer of the Bragance case put it, "to slide towards recognizing a universal principle or a natural right."¹⁷⁰ It was certainly a heady dose of cultural and legal hubris.

In the most heroic formulations of the Continental ideology, authors' rights go beyond even property claims to become human rights. The inalienability of moral rights demonstrate the affinity most clearly. "You can no more sell your authors' rights in what you create than you can (legally) sell your soul," one observer has claimed.¹⁷¹ The French jurist Bernard Edelman voiced the Continental ideology at its most messianic in 1987. Since the work embodies the author's personality, harming it also attacks its creator, he insisted. Just as a worker cannot rent out his labor permanently without becoming a slave, so the author cannot alienate his work without alienating himself. Juridically, the work is equivalent to the person, except that it is perpetual. It is thus quasi-divine.¹⁷² The author cannot alienate his moral rights, another French observer agreed. Renouncing the defense of his personality would be a form of "moral suicide."¹⁷³ Moral rights are absolute, yet another French commentator wrote in the 1930s. As natural rights they live forever. They are beyond relativity (*hors de la relativité*).¹⁷⁴ When law professors and jurists, ostensibly discussing a topic as pedestrian as copyright, are moved to speak of slavery, soul-selling, the absolute, quasi-divinity, and moral suicide, something odd is afoot.

Until recently, authors' rights have been the received orthodoxy in continental Europe, with little if any dissent. In the Anglosphere, however, there have long been two sides to the issue. Many have favored the Continental approach, agreeing with its criticism of copyright. Others, in contrast, have argued that the Anglo-American copyright approach does not just represent the narrow self-interest

of the content industries but also embodies principles of public access, broad dissemination, flexible use of works, and efficient stimulus of creativity. From this vantage copyright is as consistent, as socially motivated, and in that sense, as ideological as the Continental defense of authors' rights. The difference comes down to the broader social values that are defended in each system: artistic quality and authorial authenticity in one, public enlightenment and democratic access in the other.

Moral rights privilege the author's intended meaning at the time of creation. Other possible interpretations are restricted by his rights—meanings that are inadvertent, revealed only in new contexts, plumbed by interpreters and other creators, or otherwise outside the author's expressed aim. "The work remains and perpetuates the person after his death," writes the author of a standard French textbook on intellectual property. "[T]hose responsible for ensuring its respect do not exercise it in their own interest but . . . should seek, as it were, to put themselves in his shoes or adopt his viewpoint."¹⁷⁵ In practical terms supporters of the authors' rights ideology have listed examples of the consequences: No shortening of Shakespeare, Molière, or Balzac. No translating Rabelais into modern usage. No modern-dress versions of classic plays. No playing Mozart's *Ave Verum* in coffeehouses. No jazz versions of Strauss waltzes. No performing Chopin's funeral march on a theater organ.¹⁷⁶

Prompted by the Grieg Fund, the Norwegian Academy of Music, upholder of cultural standards *à la française*, once expressed its considered opinion that Duke Ellington's version of the *Peer Gynt* suites infringed moral rights. Because the offending records were voluntarily withdrawn from the Norwegian market, no legal action was required.¹⁷⁷ Norwegian commentators condemned the *Song of Norway* (1944), the operetta based on Grieg's life and music, for its American "lack of piety," as an "act of vandalism towards the music of the Master," and as "commercial prostitution."¹⁷⁸ In 1987 US congressman Richard Gephardt introduced a bill to ban film colorization. As illustrative of the artistic desecration he sought to spare the nation, he offered Louis Armstrong's music set to a disco beat.¹⁷⁹ How difficult to know—much less uphold—the supposed purity of the original author's intent! At no moment do we more date our-

selves than when we draw the line between culture and barbarism. Your artistic abuses are your children's classics.

The defenders of moral rights have typically portrayed themselves as progressives, defending the artist against the Moloch of the market. But others see such cementing of the author's power as culturally conservative, stifling experimentation and transformation.¹⁸⁰ Consider how the Wagner family squabbled with the opera-going public as his copyrights expired in 1913. The immediate issue was only the end of his copyright. But the broader concern was the sort of aesthetic control that moral rights were intended to secure for authors and their heirs. Wagner regarded *Parsifal* as a religious expression and insisted that it would be degraded by performance at any theater other than the one built in Bayreuth as a shrine to his own oeuvre. His followers agreed.¹⁸¹ *Parsifal* on another stage would be like hearing "Ave Maria" from the lipsticked mouth of a harlot, warned Hans Richter, first conductor of the Bayreuth festival. As 1913 neared, his supporters sought to extend Wagner's terms or at least restrict *Parsifal* to Bayreuth. They failed. Rarely has the liberation into the public domain been as spectacularly demonstrated as with the outpouring of pent-up *Parsifal* stagings outside Bayreuth at the close of 1913. In Barcelona the curtain rose a few seconds after midnight on 1 January 1914. Later that same day a performance struck up in Berlin, the next day in Frankfurt and Mainz; St. Petersburg followed on January 3, with a new series in Berlin again on January 5, and the following day in Dresden. In all, *Parsifal* was staged in more than fifty European cities between January and August 1914—a climax of European high culture before the trenches were dug.¹⁸²

COLOR AS A SIN

More recently the dispute over film colorization has exemplified the mutual incomprehension of copyright and authors' rights. Today, colorization is no longer contentious. But in the late 1980s fierce battles were fought both in the United States and across the Atlantic as American directors sought to assert their moral right to spare pristinely black-and-white works from chromatic manipulation.

When are changes to an older incarnation of a work a technical improvement? When are they an aesthetic alteration? Few recording artists have railed against remastering mono renditions in stereo. But some writers resisted replacing Fraktur (Blackletter) with Antiqua as the dominant typeface in German publishing late in the nineteenth century. Opinions differ about playing Scarlatti on the piano rather than the harpsichord. Whether silent films could be given voice-overs has prompted discussion.¹⁸³ Whether conventional films can be remade in 3-D is perhaps a question that awaits us. Now the issue was whether colorization was an improvement or vandalism.

Colorization was easier in the Anglo-Saxon world than on the Continent because the film copyright owner tended to be the corporation that made it, not the director. A few directors (Orson Welles for *Citizen Kane*, Warren Beatty for *Reds*, and Woody Allen for most of his work) deliberately retained rights. But generally the producer owns the adaptation rights, including that of colorizing. A black-and-white film might earn \$100,000 in ten years, the colorized version a million dollars annually.¹⁸⁴ No wonder the media mogul Ted Turner aimed to colorize several thousand films. As we have seen, the dispute culminated with the French case over a colorized version of Huston's *Asphalt Jungle*. In 1991 Huston posthumously won: in France colorized films could not be broadcast if authors objected.

The United States responded with a half-hearted attempt to emulate European standards while also protecting the owners' economic exploitation rights. In 1987 Representative Richard Gephardt introduced a film integrity bill to give a movie's "artistic authors" (the principal director and screenwriter) the right to prohibit colorization or other "material alteration" of the work, regardless of copyright ownership. The outcome was the National Film Preservation Act of 1988, which drew up a list of culturally significant films and outlawed screening a listed work that had been colorized or otherwise altered without disclosing the fact.¹⁸⁵

Interestingly, only Americans debated colorization. Europeans seem to have simply assumed that colorization was indefensible. Some Americans in favor of authorial rights, and thus against color-

ization, were as vociferous as any European. Sydney Pollack, the well-known director, was shocked. American film masterpieces, he testified before Congress, “are being altered and then exhibited or sold to mass markets.” But rank commercialism was not the only charge leveled by this consummate Hollywood insider. The colorizers were trying to rewrite history too. “In Orwellian fashion, the machines revise film history, trampling upon the honor and reputation of the great directors who created those works.”¹⁸⁶ Woody Allen remained firmly in character as an American auteur, leading the charge against the vulgarians, even though he had colorized a newsreel snippet in *Bullets over Broadway* and inserted himself into old news footage in *Zelig*—not to mention chopping, rearranging, and redubbing two Japanese spy movies in his 1966 directorial debut, *What’s Up, Tiger Lily?*

The auteur’s opposition to colorization was predictable. More interesting was how others defended it. Business interests donned the vestments of populism and democracy. “The choice lies with the public,” argued an executive at one of the colorizing companies. “The public loudly and clearly indicates a preference for color.”¹⁸⁷ The expressed wishes of the viewing public, hypocritically trumpeted by the companies with most to gain, clashed with the Hollywood masters’ unabashed elitism.¹⁸⁸ “The creation of art is not a democratic process,” Steven Spielberg pontificated before Congress. “The public has no right to vote on whether a black-and-white film is to be colored any more than it has the right to vote on how the scenes should be written.”¹⁸⁹

Why the fuss, others asked? As long as the monochromatic originals remained, “let a thousand skunk weeds bloom.”¹⁹⁰ Ideological pro-colorizers had no economic interest in the dispute and did not necessarily think colorization was a worthy enterprise. Instead they asked what was best for the public domain and for cultural innovation. How did colorization differ from other changes to works intended to broaden their audience: modern-dress versions of historic plays, Baroque music played with Romantic instrumentation, or translations of novels? What concept of authenticity held once a work’s performance differed from that at its first release?¹⁹¹ Filmmakers were often the first to appropriate, change, and even mutilate

others' works. Why this sudden persnickety emphasis on authorial authenticity in cinema?¹⁹²

In Europe no controversy spoiled the consensus. All united behind the author. This was true not only of colorization but also of most disputes over authors' rights during the digital revolution of the 1980s and '90s. To the Europeans the Anglo-Saxons seemed incomprehensible. American courts, one French jurist insisted, simply failed to understand the essence of moral rights.¹⁹³ That there might be another side to the story rarely occurred to Continental observers. Only once before the digital age had the Europeans seriously debated the preeminent role of the author and his relationship to the public good. That, as we shall see, was during the fascist era. The 1920s and '30s brought the first sustained challenge to the author's supremacy on the Continent, though it was mixed with a great deal of cultural posturing on behalf of strong creative personalities. After 1945, however, the European position reverted to its mean. The perverted collectivist vision of interwar Europe made any later challenges to authorial preeminence impossible. The authors' rights ideology enjoyed its apotheosis during the Cold War as a riposte to the mass culture of both Babelsberg and Hollywood. As in so many other respects, postwar Europe abjured its own past demons, avoiding anything even remotely tainted by totalitarianism.

WHAT IS THE PUBLIC INTEREST?

Seen historically, copyright has aimed to serve the public interest directly. The Continental ideology claims to do so too, but only insofar as protecting authors also benefits their audience. The European Commission betrayed its order of priorities when it noted in 1991 that a high level of protection helped to stimulate creativity "in the interests of authors, the cultural industries, consumers, and ultimately of society as a whole."¹⁹⁴ Both systems appealed to the public good; both believed themselves to take account of the interests of authors, disseminators, and the audience. But much hinged on how the public interest was defined. Did adhering faithfully to the au-

thor's wishes and vision produce high-quality culture? Or was the goal a great variety of culture, cheaply and universally available?

The public interest has not been a given. One might cynically say that every interest group—authors, disseminators, public—has its own definition. Do we want to stimulate new creativity or distribute existing content? Was the goal the best, the most, or the cheapest cultural production? Pirates dreamed of cheap, ready, and fast access to works. In its 2010 election platform, the Swedish Pirate Party advocated open digital access to works after five years.¹⁹⁵ But what if incentives were insufficient? A short-term boon for the public might prove a cultural catastrophe in the longer run. A widely opened public domain could dampen creativity and eventually shrink to a size smaller than one restricted by copyright.

The public interest could also mean an emphasis not just on availability but on the richness, multiplicity, and quality of cultural creation. Moral rights, a French observer insists, serve the public interest.¹⁹⁶ Stronger protection encourages authenticity and quality, even as it restricts audience access. That is the golden-goose problem: poor nesting conditions mean the laying ceases. The public interest, in other words, is not necessarily the same as the interest of the public.¹⁹⁷ Consumer wants might contradict citizens' higher aims. That is the democracy problem: what the public thinks it wants is not necessarily what (others conclude) is best for it.¹⁹⁸

Take John Ruskin, advocate of traditional craftsmanship and self-professed friend of the laboring classes. As was customary in nineteenth-century Britain, his works appeared in editions too expensive for the poor. In America, where publishers pirated foreign works and paid no royalties, cheap editions made Ruskin almost as popular as Dickens. Perhaps British publishers would have issued affordable editions for the US market, one American commentator ventured. But why would the English publisher "see his interest in selling a large edition at a low price, when the sale of a small costly edition would afford an equal pecuniary return"?¹⁹⁹ The jurist and statistician Leone Levi thought that British publishers had "yet to learn the first lessons of political economy respecting supply and demand." As they ignored the "wonders of the penny newspapers"

and kept editions small and prices high, only subscription libraries and retail competition allowed books to “pass beyond the upper classes of society.”²⁰⁰ Market logic could not settle the issue. The same profit was attainable one way or the other. Other reasons were needed to prompt authors and publishers to choose whether to be known among a select few for sumptuous editions or to cut a broad swath across the reading public with cheap and cheerful ones.

Authors deserved protection, but how much? Nineteenth-century French observers advocated authors’ perpetual property rights to their works. The sight of great writers’ heirs living off their ancestors’ works was a public good, they insisted, that stimulated others to exercise their talents.²⁰¹ During the British debates of the 1830s over lengthening copyright terms, the poet Wordsworth argued that extensive protection most helped quality literature, which, being less popular, took longer to catch on. Not only did authors gain, but society benefited too through better literature.²⁰² But in the copyright systems authors’ rewards were justified only insofar as they stimulated creativity and enriched the public domain. Wordsworth’s nemesis, the historian Thomas Babington Macaulay, argued that copyright “ought not to last a day longer than is necessary for the purpose of securing the good” of encouraging authors.²⁰³ Any expansion of authors’ deserts had to be justified by higher social goals.

Such battles have been fought continuously for almost three centuries within Britain, France, Germany, and the United States. And each of these nations belonged to larger groupings of legislative affinity. No country purely exemplified either copyright or authors’ rights. Today all are hybrid and ever more similar. Yet fundamental differences over whether to focus primarily on authors or on the audience remain embodied in legislation and given voice in debates. Through distinctions in degree and emphasis, these disputes persist even today. Both the Continental and copyright systems have sought to balance the interests of authors and audience, but they did so at different angles. It is to how that divergence of emphasis, and its profound cultural implications, arose historically that we now turn.