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## In Defence of Honour? A Case for Moral Rights From Relational Autonomy

### Introduction:

One of the most philosophically interesting aspects of moral rights is the way in which they constrain the economic element of property rights in works of art by attributing to authors certain inalienable rights of control over their creations.<sup>1</sup> Alienability is typically considered a hallmark of property rights. To have full ownership of something is taken to include the ability to dispose of it, sell it, give it away, or lend it to someone else under conditions of your own choosing.<sup>2</sup> Limits to the alienability of property rights therefore require special justification. With respect to moral rights, the Berne convention stipulates: “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.”<sup>3</sup> As such, it would be apt to question whether the concept of honour could play a part in the justification of moral rights, and if so, what concept of honour might be up to the job. This article will focus specifically on the justification of inalienable rights of attribution and integrity.

The restrictions that moral rights impose on property rights in creative works have historically been justified by appeal to the idea that there is a special relation between an author and their work, such that moral rights are required in order to protect the personality of the author.<sup>4</sup> This approach poses a distinct philosophical

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<sup>1</sup> A note on terminology: I will use the word ‘author’ throughout to refer to creators of works, in line with the terminology of the Berne Convention, though I do not mean to restrict this to literary works only. The argument I put forward will apply, I take it, to any creative works protected under systems of intellectual property that assign property rights to authors on the basis that their work constitutes original expression.

<sup>2</sup> For a detailed explication of the incidents of ownership see Anthony M. Honoré, ‘Ownership’, in *Readings in the Philosophy of Law* (Routledge, 2013), 563–64.

<sup>3</sup> (1967). Berne convention for the protection of literary and artistic works, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967. Geneva, United International Bureaux for the Protection of Intellectual Property.

<sup>4</sup> C.f. Gillian Davies and Kevin M. Garnett, *Moral Rights* (Sweet & Maxwell London, 2010). “The concept and justification for moral rights is the notion that the personality of the author is bound up in and expressed by

challenge to justifying alienability constraints on a person's rights over their own creative output. The crux of the puzzle is how to justify constraints on an author's ability to alienate their moral rights by their own free choice. What is it about an author's relation to their work that requires their control over it to be protected, even if the author would prefer to transfer those rights to someone else?<sup>5</sup> It is unsurprising, then, that the question of whether an author can contractually bind themselves not to exercise their moral right of attribution has been referred to as "one of the most difficult in the entire realm of moral rights".<sup>6</sup>

This chapter interrogates the philosophical justifications for the alienability restrictions that moral rights impose. I will argue that personality-based approaches provide a more limited justification for moral rights than they have typically been taken to yield. In particular, I will argue that a Kantian personality-based approach fails to establish that the relation between an author and their work is such that moral rights are required as a matter of moral necessity. In light of these shortcomings, I argue that the best explanation for such alienability restrictions are not that they are deeply 'moral rights' in the sense that any system would, as a matter of moral necessity, have to protect such rights. Instead, in the context of an economic system that allows private property rights in creative works, that system gives rise to reasons that stand in favour of including some alienability restrictions. In particular, I'll suggest a possible case in favour of protecting rights of attribution and integrity by drawing on insights from theories which emphasize the relational dimensions of autonomy.

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his work. Thus, the term moral rights refers collectively to a number of rights which are concerned with protecting the expression of the author's personality and his personal and continuing relationship to his work"

<sup>5</sup> The form of this problem is the same as the famous problem in political philosophy of what to make of voluntary slavery contracts. While writers such as J.S. Mill and Rousseau sought to argue that there is an inherent contradiction in the idea of allowing an autonomous person to voluntarily sell themselves into slavery, others such as Robert Nozick have been open to accepting that having full ownership of oneself would include full powers of alienation, including the ability to voluntarily bind oneself under a slavery contract. John Stuart Mill, 'On Liberty', in *A Selection of His Works* (Springer, 1966), 1–147, ch.5; Robert Nozick, *Anarchy, State, and Utopia*, vol. 5038 (New York: Basic Books, 1974).

<sup>6</sup> Martin A. Roeder, 'Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators', *Harv. L. Rev.* 53 (1939): 554. p. 564

Examining the reasons that stand in favour of moral rights from the perspective of relational autonomy offers a different perspective on the concept of honour such rights might serve to protect. This involves moving away from the traditional notion of honour as a mark of esteem judged by reference to existing social norms. Instead, I'll suggest that we can think of the sphere of art as a domain in which individuals contribute to the very shaping of social norms. In a free market system where works of art are up for sale to the highest bidder, concerns arise about people's contributions to that process being undermined or distorted by economic forces. In that context, moral rights can be seen as protecting individuals' equal standing in the process of norm-creation. If the ability to participate in the shaping of social norms is an important aspect of functioning as an autonomous individual embedded in a web of social relations with others, then there is a relational autonomy-based case for protecting the expressive contributions of artists from manipulation by others.

### 1. The Personality-Based Approach:

The most robust philosophical case for protecting inalienable rights of attribution and integrity comes from conceptions of creative expression which view authorial works as constitutive elements of an author's personality. Chief among these are Kantian approaches which assume a moral connection between an author and their work as a form of expression. For Kant, literary works constitute an act of communication between an author and the public.<sup>7</sup> As acts of communication, literary works count as an aspect of the person, rather than as external objects of property.<sup>8</sup> Unconsented uses of an author's communicative works are therefore protected by the

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<sup>7</sup> Immanuel Kant, 'On the Wrongfulness of Unauthorized Publication of Books', *Practical Philosophy (Cambridge Edition of the Works of Immanuel Kant)*, 1996, 23–36. For arguments as to the implications of this view for copyright more widely, see Abraham Drassinower, 'Authorship as Public Address: On the Specificity of Copyright Vis-a-Vis Patent and Trade-Mark', *Mich. St. L. Rev.*, 2008, 199.

<sup>8</sup> On literary works, emphasizing their status as actions of an author, Kant writes, "Hence these latter belong exclusively to the person of the author\*, and the author has in them an inalienable right (*ius personalissimum*) always *himself* to speak through anyone else, the right, that is, that no one may deliver the same speech to the public other than in his (the author's) name." Kant, 'On the Wrongfulness of Unauthorized Publication of Books', 35.

author's innate and inalienable right in their own person. From a Kantian perspective, unauthorized publication of or modifications to an author's work can be considered a form of compelled speech.<sup>9</sup>

The basics of the Kantian approach, however, don't yet provide a full response to the alienability puzzle. We can push the puzzle as follows against the Kantian account: Even if one accepts that each person has an inalienable right to engage in acts of communication, one might question why the relation between an author and an individual instance of communication, as expressed in a particular work, may not be alienated. That is, accepting the inalienability of the general right to engage in communicative act-types does not explain why each token of communication must also be inalienable. Why should a general and inalienable right to engage in communicative acts by publishing my thoughts in writing prevent me on occasion from contracting to allow someone else to permanently use my words in their name (waiving my right of attribution), or indeed to allow them to modify or alter my text as they please, without requiring my consent (waiving the right to integrity)? To allow such individual instances of alienation would not necessarily undercut my general right to engage in authorial acts.<sup>10</sup>

From this perspective, we can notice that the Kantian approach supports a connection between the right of attribution and the right of integrity, rather than establishing each as severally necessary. If authorial works constitute acts of communication, whenever a piece of work is presented with attribution to its author, it must be presented in its original form. Otherwise it constitutes a distortion of the author's communication in their own name, amounting to compelled speech. This

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<sup>9</sup> Abraham Drassinower, 'Copyright Infringement as Compelled Speech', *New Frontiers in the Philosophy of Intellectual Property* 203 (2011).

<sup>10</sup> John Christman makes a similar argument, though not directly against a Kantian account of IP. Christman takes the view that selves are socially constituted in the sense that relations to other persons, traditions and social institutions are part of the defining conditions of constituting the self. Even so, Christman argues, autonomy-based defences of intellectual property rights would need to show that the denial of rights of intellectual property would erode cultural practices to such a devastating effect as to undermine the defining conditions of selfhood. Simply allowing some alienability of moral rights would not erode the conditions of autonomy to that extent. John Christman, '1 Autonomy, Social Selves and Intellectual Property Claims', *New Frontiers in the Philosophy of Intellectual Property*, 2012, 33.

leaves open, however, the possibility that altering an author's work and presenting the altered form without attribution is not wrongful.<sup>11</sup> In other words, on a view of authorial works as acts of communication, the justification of an inalienable integrity right hangs on the question of author attribution. If there is no right of attribution, there may yet be a right of integrity, but only in cases where a distorted work has been attributed to you as the author. If there is an inalienable right to attribution, then the integrity right follows in its wake.

The most robust way to justify inalienable rights of attribution and integrity, then, would be to show that there is an innate personal right to be identified as the author of one's works whenever they are published or presented to an audience. But as Anne Barron points out, "at no point does [Kant] argue that individual rights to freedom of expression, much less authors' rights, are directly deducible from the idea of moral autonomy."<sup>12</sup> That is, such rights are not required as a matter of necessity due to the moral nature of persons. The most promising path to establishing authors' rights from a Kantian perspective comes instead from accounts which contextualize the role of authorial speech in establishing the necessary social conditions for the right to freedom of thought.<sup>13</sup> Barron explains that for Kant, freedom of thought requires more than mere liberty of expression. Freedom of thought involves attaining enlightenment or maturity of thought, which requires the ability to think for oneself, to think from the perspective of others, and to think consistently. This can only be attained with the right social and institutional conditions that make that kind of self-reflection towards

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<sup>11</sup> This would appear to be consistent with Kant's view of the permissibility of editors making changes to an author's text, as long as the editor's role is clearly publicized: "But if someone so alters another's book (...) that it would even be a wrong to pass it off any longer in the name of the author of the original, then the revision in the editor's own name is not unauthorized publication and therefore impermissible." Kant, 'On the Wrongfulness of Unauthorized Publication of Books', 35. The point I am making here is that in the absence of author attribution, the case that presenting the author's ideas to the public in the abstract would amount to compelled speech becomes less compelling.

<sup>12</sup> Anne Barron, 'Kant, Copyright and Communicative Freedom', *Law and Philosophy* 31, no. 1 (2012): 1–48., p. 29.

<sup>13</sup> See Barron; Laura Biron, 'Public Reason, Communication and Intellectual Property', *New Frontiers in the Philosophy of Intellectual Property* 18, no. 2 (2012): 225.

enlightenment possible. What is required is a system of communicative freedom that supports equal access to free, critical debate.<sup>14</sup>

## 2. The Case From the Public Use of Reason

Taking as its starting point a moral imperative for intellectual autonomy, the Kantian account establishes the necessity of having social and institutional structures of the right kind to support communicative freedom. But the precise form those structures must take is not determined – there could be any number of different institutional structures which could fulfil the conditions of communicative freedom. Several scholars have explored the implications of this argument for assessing the limits of copyright as balanced against the interests of the public in having access to works in order to engage in the system of public reason.<sup>15</sup> Our question for current purposes is what to make of authors' rights of attribution on this Kantian picture. According to Barron, Kantian communicative freedom requires "the freedom to articulate one's thoughts in public, subject to principles entailed by the internal logic of communication itself as a mode of interaction between a plurality of (at least potentially) rational persons."<sup>16</sup> The point I wish to press here is to what extent this requires each individual to be able to publish their thoughts *as their own*.

Imagine, for example, a system in which individuals were able to publish their thoughts through various means, though no works were ever published with author attribution, and authors had no right to be identified as the originators of specific works. Relative to the Kantian aim of establishing a culture of maturity of thought, such a public forum of ideas unattached from the identities of specific persons might have some distinct advantages – for example, by minimizing forms of cognitive bias which can impede the ability to think consistently, such as authority bias or the halo effect.

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<sup>14</sup> Barron, 'Kant, Copyright and Communicative Freedom'.

<sup>15</sup> Barron; Biron, 'Public Reason, Communication and Intellectual Property'; Drassinower, 'Copyright Infringement as Compelled Speech'; Drassinower, 'Authorship as Public Address'

<sup>16</sup> Barron, 'Kant, Copyright and Communicative Freedom', 29.

If the kind of institutional system described above for regulating the exchange of ideas could be justified on the basis of Kantian principles without ascribing a right of attribution, then the Kantian approach would seem to leave us with a more limited defence of the moral rights of authors. Specifically, rather than defending rights of attribution and integrity as morally necessary, it would leave a more limited formulation of the integrity right. That is, an author would have a claim to object to distortions of their work only in cases where they were publicly identified as the author of that work.<sup>17</sup> Under a system where all authorial communication were required to be published anonymously, the question of authors having a personal right to object to false attribution would not arise, as those actions would be precluded by the rules of the system. That is, the justification of a rule requiring author anonymity is available at the level of providing a good communicative system for the public use reason towards enlightenment. Moreover, in light of the absence of a Kantian argument to demonstrate that the moral connection between an author and their work requires rights of attribution, such a proposed system would not obviously violate the rights of individuals within it.

On the question of whether there is a special personal relation between an author and their work that necessitates rights of attribution and integrity, this suggests that even a Kantian approach may have to concede that these rights are contingent on the shape of the existing institutional conditions under which authorial works are made public. Under systems which do protect authors' rights to publish in their own name, there may nevertheless be a robust Kantian case for protecting rights of integrity and attribution on the basis that publishing content under a person's name that distorts their originally intended communication amounts to compelled speech. In summary, it seems that rights of attribution and integrity are not necessary, on a Kantian view. They may, however, be justifiable within some forms of institutional

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<sup>17</sup> One might think other questions arise with respect to claims typically protected under the right to attribution, namely the right to object to false attribution of authorship, and the right to remain anonymous as the author of a piece. However, the question of the necessity of these rights only arises within a system where author attribution is assumed as the norm.



arrangements aimed at establishing adequate conditions for the public use of reason. If rights of attribution are protected, then rights of integrity which give authors claims against distorted work being presented in their name will be necessary too.<sup>18</sup>

The point of engaging with Kantian arguments for authorial rights is not merely to downplay the extent to which rights of attribution and integrity are necessary as a matter of protecting an innate right of personality. Rather, we can draw some insights from the Kantian approach which indicate a different, and perhaps surprising justificatory basis for moral rights even from the perspective of systems of intellectual property rights premised on Lockean or utilitarian justifications. The insight is this: once you have an institutional system that attributes to authors certain rights over their works by virtue of being the originators of those works, that system might function to instantiate the kind of authorial relations which require moral rights-type protections. In other words, if we happen to have a system that protects private intellectual property rights in creative works, there may be reasons that arise from the existence of that system in favour of protecting inalienable rights of attribution and integrity.

In the next sections, I will make the case that systems of intellectual property that privilege original expression as a property-right creating act may create the conditions under which the protection of moral rights of attribution and integrity becomes important, even if those systems are initially justified on Lockean or utilitarian grounds. That is, even in contexts where the justification for having a system of intellectual property rights is neither taken to be rooted in the importance of providing the right kind of communicative forum for achieving enlightenment of thought, nor in the importance of protecting any special moral relation between an author and their work.

### **3. Departing From Personality**

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<sup>18</sup> Though as Drassinower points out, drawing on Kant's remarks on edited works cited above, if the work is sufficiently modified and presented as edited by a transformative author, this will not amount to compelled speech. Drassinower, 'Copyright Infringement as Compelled Speech'.

Legal systems which have historically taken Lockean or utilitarian arguments as the justificatory basis of IP have tended to provide weaker protections for moral rights than their continental counterparts. From a philosophical perspective, this coheres with the fact that both Lockean and utilitarian approaches to property rights presuppose alienability.<sup>19</sup> This is perhaps most obvious on the utilitarian picture: if the main justification for having a system of intellectual property rights is to maximise the availability of new inventions and cultural goods to the public, granting authors intellectual property rights over their work is justified to the extent that it incentivizes the production such goods. The basic premises of the utilitarian justification for IP do not place any inherent value in the relation between an author and their work. Instead, they prioritize the instrumental value to the community of the work being produced. Alienability restrictions might be justifiable on such a view, but they would hang on empirical evidence about the extent to which providing authors with inalienable rights of integrity would maximize incentives for production, resulting in more or better access to cultural goods for the public.

In contrast to utilitarian views, Lockean approaches see property rights as justified on the basis that each individual has a property in their own person, which gives them exclusive ownership of their labour and the products thereof. One might think, then, that a Lockean approach to intellectual property would be more amenable to protecting a special relation between authors and their work. However, Lockean approaches tend to see the products of one's labour as straightforwardly alienable. While the Lockean approach differs from utilitarian approaches by starting from the premise of authors having natural rights over the products of their intellectual labour, unlike the Kantian approach, it sees no contradiction in the possibility of alienating those products.

As we saw, Kantian theory provides principles to underpin the inalienability of moral rights as part of its rationale for the general structure of rights governing the

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<sup>19</sup> See Neil Netanel, 'Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law', *Cardozo Arts & Ent. LJ* 12 (1994): 1. And Neil Netanel, 'Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation', *Rutgers LJ* 24 (1992): 347.

dissemination of intellectual works. To the extent that authorial expression constitutes an extension of the self within a given institutional structure, it must be protected as an inalienable aspect of personality. Utilitarian and Lockean approaches to intellectual property, however, don't provide any such alienability constraints as a necessary requirement of the principles that underpin such property rights. However, one might still seek to justify moral rights on the basis of a specific conception of the values or interests which systems of intellectual property are supposed to protect. For example, while rejecting as obscure the notion that an 'intimate bond' between an author and their work makes the work a constitutive element of their personality, Charles Beitz proposes an analysis of the interests of creators, audiences, and society at large which he argues may justify some protection for moral rights, but not their inalienability.<sup>20</sup> Taking the perspective of the social value of art, Burton Ong has provided a defense of moral rights based on the idea that moral rights function as a mark of respect for the artistic contribution of authors, thus expressing norms about the value of art and artists within the community, as prioritized above the pecuniary interests of owners and traders of the objects of art.<sup>21</sup>

These kinds of arguments need not rely on premises about creative expression requiring protection as a constitutive element or extension of personality. Rather, they assert the importance of constraining the commodification of art as a purely economic good by emphasizing the value of art as art. In doing so, that approach assumes that the value of art depends on it being preserved in the original state in which it was created. The idea that the best way to protect the value of art is by reference to the original intentions of the artist is open to the criticism that this simply misconstrues the value of art. By holding the artist's original intentions to be the prime source of value in art, it ignores the fact that art exists in a dynamic social context in which it may

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<sup>20</sup> Charles R. Beitz, 'The Moral Rights of Creators of Artistic and Literary Works', *Journal of Political Philosophy* 13, no. 3 (2005): 330–58.

<sup>21</sup> Burton Ong, 'Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights', *Colum. JL & Arts* 26 (2002): 297.

be exposed to interpretation, modification, and a process of change over time in a way that enriches, rather than diminishes, its artistic value.<sup>22</sup>

So far, then, we've seen that personality-based views that seek to establish a necessary moral connection between an author and their work as an aspect of the self end up making only a contingent case for the protection of moral rights. The necessity of protecting a right of integrity appears to hang on the question of whether authors are granted rights of attribution, and the Kantian account doesn't appear to require rights of attribution as a necessary condition of autonomous expression. Alternatively, making the case for moral rights as constraints to a system of intellectual property rights justified on utilitarian or Lockean principles by reference to the value of art comes with its own challenges and involves relying on contested claims about the primacy of the original author's intentions to the value of art.

In what follows, I'll suggest an alternative approach to establishing moral rights which relies neither on a strong personality view of authorial works as an extension of the self, nor on claims about the value of art requiring preservation in its original form. Instead of seeing moral rights as standing in tension with the principles of intellectual property, we can see the way in which assumptions embedded in even utilitarian or Lockean justifications of IP can fit with justifications for moral rights in a mutually reinforcing manner. This happens when we consider the way in which systems of IP function within a wider system of the rights of individuals.

#### **4. The Case From Relational Autonomy**

I started the chapter by indicating that it would be worth interrogating the place of the concept of honour or reputation in the justification for moral rights. In this section, I'll suggest that we can draw on insights from theories that emphasize the relational dimensions of autonomy to make a case for the role of moral rights in protecting the standing of authors and artists as contributors in the process of shaping of social norms. While this represents a departure from the traditional concept of honour, the

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<sup>22</sup> See e.g. Amy M. Adler, 'Against Moral Rights', *Calif. L. Rev.* 97 (2009): 263.

notion of standing I discuss can be thought of as a reimagining of a concept analogous to honour which the law may have reason to protect.

First, however, it will be instructive to compare an approach to justifying a more limited conception of moral rights by direct reference to the notion of reputational damage, namely, as a way of protecting against defamation. Rights against defamation are one of the mechanisms that have been used in common law countries to provide authors with some limited claims of integrity.<sup>23</sup> However, rather than protecting the integrity of the work itself as a matter of principle, rights against defamation only allow an artist to object to their work being used or modified in a way that is detrimental to their reputation. This would not preclude modifications to a work which detract from its artistic integrity (by the lights of the artist's original intentions) while leaving the artist's reputation intact relative to the normative standards of the community. From that perspective, while rights against defamation might provide recourse to protect the integrity of a work in some limited cases, they typically fall short of protecting a full moral right of integrity. To seek to justify moral rights by appeal to the right against defamation will thus fall short of justifying inalienable rights of attribution or integrity. In order to develop a conception of honour that could underpin such inalienable moral rights, it will therefore be necessary to go beyond the limited conception of honour or reputation that rights against defamation protect. In this section, I'll interrogate the reasons why we might value rights against defamation in the first place, and see how those could be harnessed to underpin an alternative justification for inalienable rights of attribution and integrity.

The case I'll put forward here is that some assumptions behind the reasons that support rights against defamation also stand in support of protecting more extensive moral rights under certain institutional structures of intellectual property. This becomes most evident when we examine the way in which systems of IP privilege acts of individual expression as meriting property-type protections.

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<sup>23</sup> Netanel, 'Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law'.

I argued above that the Kantian approach to intellectual property fails to establish that rights of attribution and integrity are required as a matter of moral necessity. I also argued that Kantian arguments about the importance of providing the right conditions for the public use of reason don't establish the necessity of a system of private rights in intellectual property. However, we can still draw some insights from the general structure of the Kantian approach to thinking about the role of institutions in regulating our social practices and the standing of individuals within them. When it comes to assessing systems of intellectual property, we can think of legal institutions for regulating the public sharing of private expression as shaping the conditions in which we exchange ideas and contribute to public discourse.

In addition to providing a sphere in which ideas can be robustly challenged by reference to standards of rationality and reason, the public exchange of ideas also serves as a mechanism for contributing to and contesting the shared norms of a community. From that perspective, systems of IP which attach significance to authorial creation as a property-right creating act support a culture in which we expect objects of art to function as acts of expression of identifiable individuals. In that context, to manipulate the object plausibly can have the effect of distorting the original expression it represents.

That does not yet provide an answer to the question of how to justify attributing to authors an inalienable right to the integrity of their expression. The clearest path to identifying reasons to support moral rights, I suggest, comes from understanding authorial expression as an institutionally-constructed way for individuals to participate in the process of shaping the norms of the community. By that, I mean that the way in which the law defines the conditions for attributing intellectual property shapes the conditions in which authorial expression becomes socially significant in various ways. That social significance, in turn, gives rise to reasons that speak in favour of protecting the connection between authors and their work in various ways. One justifiable way to do that may be by attributing inalienable rights of attribution and integrity.

The right against defamation protects individuals from other people making false claims about them which damage their reputation. The standard of whether a false claim is defamatory is whether it lowers the standing of the defamed person in the eyes of the community – that is, judged by reference to existing community norms. This reference to community norms makes sense in the context of defamation construed as a right that protects each person’s entitlement that no other person determines one’s standing in the eyes of others.<sup>24</sup> One can see how a standard of defamation could apply to cases where works of art are distorted or manipulated in such a way to make them seem like the artist’s intended message was one that is deemed wrong or offensive by the community. But as I pointed out above, this would fall far short of supporting inalienable rights to attribution and integrity.

Taking a view of authorial expression as a way of participating in the very shaping of community norms reveals further limitations of applying rights against defamation straightforwardly to the manipulation of authorial works. That is because within the context of an institutional structure which functions as one of the forums for shaping, testing, and contesting community norms, it does not make sense to apply a test of interference with a person’s reputation by the standards of existing community norms. Rather, there is a case to be made in favour of protecting the integrity of authorial expression by reference to the author’s own expressive intentions in creating the work. That case emerges once we start to interrogate the importance of the way in which individuals stand to systems of honour or reputation to which the right against defamation makes reference.

Arthur Ripstein argues that the interest in reputation protected by the right against defamation is “fundamentally juridical” in nature, as it arises not from a contingent interest that individuals have in being thought well of by others, but rather from the basic structuring ideas presupposed by private law: “Like other rights that figure in tort law, it is not an interest that the law has contingently taken up and given

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<sup>24</sup> For a detailed account interpreting the right against defamation in this way, see Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016).

relational form. Your right to your own good name is relational in a sense that goes beyond the mode of its protection. It is already present in the very possibility of a system of relational rights."<sup>25</sup> When we hold people accountable for wrongs they do to others, we assume as a basic ordering principle that each person be made to answer only for things that are properly attributable to them, not on the basis of false allegations made by others.

One might ask why the norms of any given community should matter so much in a system of relational rights. That is, why should the standard of defamation be that the false allegations against me count as wrongful in the eyes of the community, rather than by the standards of conduct to which I hold myself? Why shouldn't my right to my own reputation extend to being able to shape it the way I want – whether that is as a rebel or a conformist – as long as I am judged on my actions rather than what other people say about me (or even lies I might tell about myself). Ripstein's explanation is that the right against defamation is not a right to a certain state of affairs that everyone only believe true things about you. Rather, it is a constraint on the conduct of others, that they not put you in a position to answer for wrongs that you have not done.

This juridical view of the right to one's own good name contains no value judgement on the content of the existing norms of the community. In applying the standard of which false claims count as defamatory, it takes no account of the moral status of the community's norms. Consider, for example, the fact that false allegations that a person had leprosy or a sexually transmitted disease have historically been considered defamatory, on the basis that a person who had such a disease was considered to have brought it upon themselves through sinful behaviour, and was therefore fit to be shunned by polite society.<sup>26</sup>

If the right against defamation is based on the principle that an individual not have their social standing damaged by dishonest interference by others, this assumes

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<sup>25</sup> Ripstein, 189.

<sup>26</sup> For discussion of these, see Ripstein, *Private Wrongs*, 189.



a view of the individual as embedded within a social structure in which reputation matters. More precisely, it matters that each person stand on an equal footing with respect to their own reputation, answerable to society on the basis of their own deeds. One way to interpret the function of such a right is to see it as securing a condition for individuals to stand as independent responsible agents, even as they are embedded within a social structure which imposes certain expectations and norms of conduct on all members of the community.

Putting things this way, however, invites questions about the position of the individual in relation to the very shaping of the community norms to which they are held accountable. This is where we can instructively draw on insights from theories that emphasize the relational dimensions of autonomy. If it is important not to be held answerable to the community for things that one did not do, once we push the question back to a slightly higher level of abstraction, one might also think it important that individuals not be held accountable to social norms imposed on them in unilateral or arbitrary ways. One way to think of the relation between these two levels is that the value to any given individual of the right against defamation will at least partially depend on the extent to which they take the system of social norms that govern one's reputation in the first place not to be overly constrictive or oppressive. To explain this by example, it would be cold comfort to have a right against being defamed as promiscuous in a puritanical society if what one really wanted was to be able to have sexual relationships outside of marriage without facing social sanctions or stigma.<sup>27</sup>

The idea that the concept of individual autonomy itself can only be fully understood by taking into account the way in which individuals are embedded in a complex social environment has been a key focus of feminist approaches to relational autonomy.<sup>28</sup> Accounts that conceptually define individual autonomy in terms of the

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<sup>27</sup> That is not to say that the right against defamation would be worthless under such circumstances. No doubt someone would still wrong you by defaming you in a puritanical society by levelling false allegations of promiscuity against you, even if you didn't believe that acting promiscuously should result in social disapprobation.

<sup>28</sup> For a collection of essays exploring the social and relational dimensions of autonomy, see Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the*

individual's wider social relationships have been criticized as being overly perfectionist in their criteria for determining which relationships and social values are constitutive of autonomy.<sup>29</sup> In rejoinder to the charge of perfectionism, some proponents of relational autonomy have sought to focus on the importance of the standing of individuals in relation to their community not by reference to the content of the social norms in question, but in the formal sense of individuals having a part in the creation and maintaining of social norms.<sup>30</sup>

Taking on board this insight from theories of relational autonomy of the importance of having a contributing role in the creation of social norms offers a perspective on a possible defence of moral rights of integrity which needn't rely on a view of artistic expression constituting part of an author's personality. To be clear, I do not mean to argue that moral rights to the integrity of one's artistic expression are a necessary condition of relational autonomy. Rather, once there exists an institutional system which attributes property rights in expression, that creates a forum in which individuals contribute to creating, contesting, and recreating social norms. Systems of intellectual property which attribute exclusive property rights to individuals as the originators of expressive acts ensure that this forum of expression is not just one in which ideas and expressions are shared and tested in abstraction, but one in which expressions stand explicitly as the expressions of particular identifiable individuals. Moreover, by privileging original acts of expression as those which merit property-type protection, such systems explicitly designate objects of art as physical instantiations of individual expression.

In his discussion of the various interests which provide reasons in support moral rights (though not, in the author's opinion, their inalienability), Charles Beitz draws an

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*Social Self* (Cary, UNITED STATES: Oxford University Press, Incorporated, 2000), <http://ebookcentral.proquest.com/lib/mcgill/detail.action?docID=430598>.

<sup>29</sup> See John Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves', *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 117, no. 1/2 (2004): 143–64.

<sup>30</sup> See Andrea C. Westlund, 'Rethinking Relational Autonomy', *Hypatia* 24, no. 4 (2009): 26–49; Ann E. Cudd, 'Connected Self-Ownership and Our Obligations to Others', *Social Philosophy and Policy* 36, no. 2 (ed 2019): 154–73, <https://doi.org/10.1017/S0265052519000402>.

interesting parallel to an argument for voting rights on the basis that they “constitute a form of communal affirmation of equal individual worth”.<sup>31</sup> Beitz suggests the relevant analogy to moral rights is that they “give public recognition to the social value of creative activity”.<sup>32</sup> The case I’m making here suggests a different take on the analogy to voting rights, which is the case for the procedural importance of individual voters having an equal voice in shaping the political landscape. The analogy is not direct, at least not if voting rights are considered necessary to the legitimacy of the democratic process. It may be possible to secure the conditions in which individuals can participate in the creation of social norms without giving property protection to acts of expression. However, once such a system of IP is in place, the way in which it functions as a forum for contributing to norm-creation gives rise to reasons that support protecting the integrity of the expressive works of individuals produced within that framework.

On this view, the case for protecting the integrity of expressive works can be linked to the importance of individuals having standing as contributors to the shaping of social norms. If systems of intellectual property provide a forum for individuals to make public authorial expressions as a way of contributing to and contesting social norms, the full commodification of the objects in which those expressions are reified raises a distinct set of concerns. We can tease out a few of these by taking the right of attribution and the right of integrity in turn.

The case in favour of the right to be attributed as the author of a work derives from the importance of protecting an individual’s ability to claim standing as an independent contributor to the process of shaping social norms. The right to remain anonymous can be defended on the basis of the same principle. This is most clear if we consider the dangers of expressing disagreement with deeply entrenched social norms. A right to remain anonymous protects each individual’s ability to publish controversial or dissenting views without exposing the author to social stigma or

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<sup>31</sup> Beitz, ‘The Moral Rights of Creators of Artistic and Literary Works’, 343.

<sup>32</sup> *Ibid.* For a similar case in favour of the expressive value of moral rights, see Ong, ‘Why Moral Rights Matter’.

shunning. To allow these rights to be alienated along with the economic rights to the work in question would threaten to undermine the standing of individuals as equal participants in the system of norm-shaping. It would allow those with more purchasing power to exert greater influence by accumulating authorial objects and presenting them as their own contributions.

Similar reasons can be marshalled in defence of the right to integrity. Full commodification of creative works with no integrity protections would raise concerns about those with less commercial power having their contributions co-opted or manipulated by those with more purchasing power. This concern would perhaps be most evident in cases where a piece of work was distorted but still presented to the public or to the market as the work of its originator. This would amount to a manipulation of the author's contribution to the shaping of social norms, while still ostensibly presenting the contribution as her own. But one might equally raise concerns about the contributions of anonymous authors being distorted beyond their original meaning, insofar as this would erase their contribution entirely. Considering some of the reasons that stand in favour of the right to remain anonymous, there may be particularly strong reasons to protect the right to integrity for anonymous authors whose work may be most vulnerable to being manipulated into a more socially palatable form.

It should be evident from the above that a right against defamation would not provide adequate protection from the perspective of protecting authors' standing as contributors to the shaping of social norms. If systems of intellectual property provide the institutional conditions under which authorial expression functions as a way of contributing to the very shaping of social norms, the importance of integrity protections cannot be established by reference only to existing normative standards of reputation. Such defamation-based integrity rights would only stand in protection of the status-quo, and risk stifling the ability of individuals to stand not only as subjects of, but contributors to the construction of those social norms.

## **Conclusion:**

This chapter sought to interrogate what concept of honour, if any, might play a part in the justification for attributing to authors inalienable rights of attribution and integrity with regard to their creative output. I argued that the Kantian personality-based approach falls short of justifying such rights as morally necessary. Appeals to the importance of securing the right conditions for the public use of reason also fail to establish the moral necessity of a system of copyright in which rights of attribution and integrity would require protection. As such, we have reason to be sceptical that there is anything intrinsically special about the connection between an author and their work which requires special protection.

The case for moral rights from relational autonomy from the perspective I have offered avoids the pitfalls of the personality-based approach. It need not commit to the idea that any instance of interference with the integrity of an authorial expression constitutes an interference with an aspect of that person, and therefore an affront to their autonomy. Instead, it offers reasons from the perspective of the existing legal context in favour of preserving the conditions to support relational autonomy. The form of the argument is as follows: when you have an existing system of copyright which protects artistic contributions as the property of creators, and in which art functions as a way of contributing to shaping the norms of the community, then we can think of the domain of art and copyright as part of the conditions for relational autonomy.

If we think it important that individuals have equal standing in the process of norm shaping, this gives rise to reasons in favour of attributing to authors inalienable rights of attribution and integrity with respect to their artistic creations. Even if it would not necessarily threaten a particular individual's autonomy to allow her to alienate her moral rights with respect to a certain piece of work, the general implications of allowing widespread market alienability of authorial expression without protecting rights of attribution or integrity would undermine an important aspect of the conditions of autonomous participation. In that sense, the case from relational

autonomy provides a system-level, rather than personality-based justification for limiting the alienability of moral rights. This idea that moral rights could serve to protect the standing of artists to contribute to the process of shaping social norms could, I suggested, be seen as a re-interpretation of the concept of honour referenced in the Berne Convention.

That said, there may well be a balance to be struck in favour of allowing some ways for authors to waive rights of attribution or integrity in limited or specific ways, in order to allow for dynamics of creative collaboration, evolution and interpretation such as those performed by transformative authors. The case I've put forward from the value of relational autonomy does not mandate moral rights as absolutely inalienable or non-waivable, but it provides a robust way of defending moral rights protections that goes beyond rights against defamation, without relying on a strong view of the significance of authorial output as a constitutive element of personality.

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