

When Art Becomes Free: Inverse Moral Rights as a Guardian of a Truly Liberal Society and Economy

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Abstract: In this paper I argue that just as there are moral rights in copyright law, which secure attribution and integrity, so too, there should be 'inverse' moral rights that can protect artists from being impelled or compelled to create in the first place. This research comes against the backdrop of one of the most contentious issues in the Western world today, that pertaining to same-sex marriage. But the discussion applies to all other fields where creativity finds itself in the cross fire in hotly contested issues. In my view, the inverse moral rights are a true reflection of the extent of liberalism. I contend that absent inverse moral rights, liberalism itself will decline which in time will detract from a healthy economy. Ultimately, society at large will lose.

"If speech is of silver, then silence is of gold"¹

Introduction

We live in a world of diversity. liberal thought (which I support) dictates that we need to tolerate one another, in what we say and in how we choose to live. For

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¹ Idiom that appears in many cultures today.

this to endure such tolerance needs to be reciprocated by all social agents and all market actors; namely that one should not enforce one's beliefs (or way of life) on others (even if one can). That is to say one's freedom should not subdue another's freedom. This is obviously easier said than done. For in reality, the rich diversity of human society has also produced many flashpoints and, unfortunately, manifestations of intolerance. Indeed, many of us are driven by the innate inclination to 'better' the world (as we subjectively deem 'better' to be). However, these personal views need to make room for other (opposing) views. This is clearly evident in the same-sex marriage face-off (no less) that is threatening to tear Western society apart.

In this paper I argue that just as there are moral rights in copyright law, which secure attribution and integrity, so too, there should be a clear recognition for INVERSE moral rights that can protect artists (all artists) from being impelled (or compelled) to create in the first place. In my view 'Inverse Moral Rights' (IMR) embody the true reflection of liberalism. I contend that absent inverse moral rights, liberalism itself will decline and in time, society at large will lose. The battle rages on as these lines are being written. There should be no illusion about the long term negative impact on the economy. That is to say, if creativity is a precondition to a healthy economic environment that attracts investments, then any negative impact on creativity, including limiting its freedom could be detrimental to society at large.

While I am aware of the broader convictions, beliefs, obligations and rights, of both sides involved, in the same sex marriage debate, I believe that the proposed IMR (Inverse Moral Rights) model can provide a solution that side-steps these points of debate and liberate ALL artists (both gay or otherwise) and set artists free! In my view, IMR constitutes the only viable solution to extracting art out of the crossfire in this long-standing social clash. To my mind, IMR constitutes the true measure of liberal society.

From the outset, I should like to clarify that this paper then is NOT intended to support one side (or another) of the debate. In this paper I assert the rights of ALL artists to be freed from 'market' pressure, so as to allow them the right to full self-expression. It is only through this freedom that democracy, liberalism and ultimately a healthy business economy can be sustained. When art is not free, and when it is dragged into such outstanding social debates fewer people will be prepared to create and even less will be prepared to invest in for fear of getting bogged down in contentious never ending arguments.

This research is comprised of three chapters. In the first chapter I explain the nature of the same-sex debate and how it has come to impact artistic expression. Here, I explain why art is indeed at the center of the debate regarding the interface between creativity and personal convictions. In the second chapter, I discuss the liberalism theme and how it fits well into the moral rights narrative. In chapter three, the operable section of this research, I draw a distinction between circumstances where inverse moral rights can be invoked and other cases where they should not be invoked. This distinction is intended to ensure that the personal convictions of artists are respected, yet are not allowed to become a tool for injustice.

Chapter One **The Catalyst for this Research**

1.1 The Wedding Photographer and the Graphic Artist: A Tale of Two Cities

This paper entertains two stories. The first involves a book designer who is openly gay, who refuses to design the cover of new book. That new book is titled: "Same Sex Marriages: Demise of Society". In that book the authors one of whom is a Christian minister and the other a Rabbi claim that same sex marriages should be banned in the world because it defies religious teachings and will ultimately bring down western culture, as it did with other empires such as the Roman Empire. That book designer is bewildered. He is furious about the books its message. He feels that the book negates his convictions and portrays (in his view) a demented view of the world. The authors are unimpressed. They tell the book designer that he runs a public business and that he cannot refuse to render a service to them based on their views, and that this constitutes blatant discrimination.

But then, in another part of the country, another story unfolds.

A gay couple approaches a wedding photographer requesting that he attend their wedding and provide them with pictures and film to commemorate their special happy occasion in which they intend to celebrate their unity. The photographer declines their request, contending that he cannot bring himself to offer a service for a wedding involving two people of the same sex; which in his view, as a devout Christian is wrong, immoral and sinful.

Admittedly, while the first story is fictional (to the best of my knowledge) the other is not. In fact, the Supreme Court for the State of New Mexico has ruled that

a wedding photographer has acted contrary to a New Mexico law that protects the civil rights of all. The court has ruled that in her refusal to grant services to a lesbian couple, the wedding photographer has discriminated against that couple based on their sexual orientation. As such, the photographer has been obligated to pay damages to the couple in order to compensate them for the damage that she has inflicted.

But be things as they may, the two stories described above are both possible and equally plausible. The authors of the book and the couple appear to have a very good case against the book (designer and the wedding photographer respectively). These defendants appear to have infringed other people's civil rights. Thus, both the authors and the couple can seek damages based on the contention that their civil rights have been infringed. Indeed, in both cases the authors and the couple are likely to argue that the defendants who operate a public business must not discriminate against any client who comes knocking at their door. On the opposite end; both the gay editor and the wedding photographer are likely to assert their right not to be part of a project, which negates their personal views and convictions.

Can these opposing cases be settled in a coherent manner? Is there a single and viable legal solution to all cases of this nature? Can copyright law provide the answer? Does copyright law have the capacity to address such conflicts, and to settle them?

In this paper, I answer all of these questions in the affirmative; my contention is that moral rights in copyright and specifically, what I refer to as 'inverse' moral rights can provide the only amicable solution to these cases. The proposed 'inverse' moral rights model can resolve the issue in a manner that side-steps the debate that is taking place in society over same-sex marriages.

But first, I shed light on the ongoing legal battle that is taking place in the US and which requires a game-changer such as inverse moral rights in order to change the paradigm and to ultimately set art free.

1.2 The Ongoing Legal Battle

Ms. Elane Huguenin, a wedding, photographer turned down a request from a lesbian couple (Ms. Vanessa Willock and Ms. Misti Collinsworth) to photograph their commitment ceremony. Ultimately, the lesbian couple hired a different photographer, but also filed a complaint against Ms. Huguenin and her studio

(Elane Photography). The defendant photographer has explained that while she would be ready to provide such a couple with portrait photography, she cannot bring herself to document the event given that that would be similar to telling a story that she opposes given her religious convictions. The New Mexico court ruling which found her refusal to be a wedding photographer in a lesbian wedding as contrary to a New Mexico law which forbids business that are open to the public to discriminate against people (including gays). Ms. Huguenin petitioned the US Supreme court to overturn that ruling.²

The court recognized that while the wedding photographer acted from "heartfelt convictions", and while photographic expression is protected by the constitution, the equal treatment of gay couples is more important than the free speech rights of commercial photographers. Indeed, the American Civil Liberties Union (A.C.L.U.) had also filed a brief supporting the lesbian couple's position.

The court asserted that the photographer is engaged in a business that renders services for photographing weddings and that the wedding photographer's refusal was tantamount to putting up a sign that says 'Heterosexual Couples Only.'³ On the other side of the case, those who supported the photographer's actions have asserted the first amended rights that is granted to artists (including photographers, writers, singers, actors, painters) to protect their speech by allowing them the right to decide which work to accept and which to reject.⁴

Notably, the emphasis in this case was not on the right to freedom of religion but rather on the right to free speech as provided by the First Amendment. The New Mexico Supreme Court did not view creative expression as sufficient reason to recognize the wedding photographer's reasoning that the law cannot compel her to say something (through her photographs) in which she does not believe. In the court's view "services can be regulated, even though those services include

² For a full copy of the Petition for certiorari to the New Mexico Supreme Court see <http://www.adfmedia.org/files/ElanePhotoCertPetition.pdf>

³ The Supreme Court of New Mexico, Docket 33,687 ELANE PHOTOGRAPHY, LLC, Petitioner, v. VANESSA WILLOCK. (Rendered August 23, 2013). For a full copy of the court's opinion see <http://www.becketfund.org/wp-content/uploads/2012/11/Elane-amicus-final-pfc.pdf>. and <http://librables.com/p/1721876>

For a vast collection of online resources and responses and analysis of the case see Librables, New Mexico Supreme Court Elane Photography, <http://librables.com/new-mexico-supreme-court-elane-photography-s>

⁴ This position was advocated for before the New Mexico Supreme Court by the Cato Institute and two law professors Eugene Volokh of the University of California, Los Angeles, and Dale Carpenter of the University of Minnesota.

artistic and creative work.” Laws banning discrimination, the court said, apply to “creative or expressive professions.” It should be noted that while Justice Richard C. Bosson concurred with the majority's opinion, he did so while recognizing the merits of the photographer's position. Justice Bosson stated that the photographers are “not trying to prohibit anyone from marrying” and that “they only want to be left alone to conduct their photography business in a manner consistent with their moral convictions.” Instead, that judge held that the photographer and her business are “compelled by law to compromise the very religious beliefs that inspire their lives.” But ultimately the judge aligned himself with the majority's position in light of the dictations of the rule of law.

1.3 The Rationale of Civil Rights

Respectfully, in a beautifully written opinion (though I don't agree with its outcome for the reasons stated in this research) the Supreme Court for the State of New Mexico has ruled against Elane Photography for its refusal to photograph a same-sex commitment (marriage) ceremony. The court ruled that wedding photographers can not refuse to shoot gay ceremonies. In its unanimous verdict, the court has stated that:

“When Elane Photography refused to photograph a same-sex commitment ceremony, it violated the [New Mexico Human Rights Act, or NMHRA] in the same way as if it had refused to photograph a wedding between people of different races.”

The court also has rejected Mrs. Elaine Huguenin's arguments, particularly one in which Huguenin argued that her refusal did not discriminate against same-sex customers. Huguenin had testified that she would readily photograph gay customers, but not in a context that seemed to endorse same-sex marriage. Here the court explained that there cannot be any legally recognized differentiation between homosexuality and homosexual conduct. The Hon. Justice Edward Chávez held that:

“The difficulty in distinguishing between status and conduct in the context of sexual orientation discrimination is that people may base their judgment about an individual's sexual orientation on the individual's conduct,” [and that to] To “allow discrimination based on

conduct so closely correlated with sexual orientation would severely undermine the purpose of the NMHRA."⁵

Significantly, the court also rejected Huguenin's free speech argument, saying that the NMHRA does not compel speech. The court did not invalidate Huguenins' position and personal views against same sex marriages. It allowed them to voice their views by suggesting that they post a disclaimer (on their website or in their studios) wherein to the effect that they "oppose same-sex marriage but that they comply with applicable antidiscrimination laws." In his concurring opinion, the Hon. Justice Richard Bosson went further by holding that the defendant (the Huguenins) "now are compelled by law to compromise the very religious beliefs that inspire their lives. Though the rule of law requires it". The Hon. Bosson when on to state that:

"The Huguenins are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects the Huguenins in that respect and much more. But there is a price, one that we all have to pay somewhere in our civic life. In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship."

Clearly, not all accept this argument, despite it seemingly fitting well into the constitutional construct of 'live and let live'. Indeed, liberty and the respect thereof necessitate tolerance. In my view, there is no argument about that. However, the

⁵ In the court's reasoning a photographer who does refuse to photograph gay people but not gay marriages is equivalent to a restaurant offering a full menu to male customers, but refusing to serve entrees to women, and defending itself by saying women could order appetizers.

opposing view sees this reluctance as infringing on the defendants' liberties, not to provide services against their will and faith. Indeed, the alliance defending freedom senior counsel Jordan Lorence, (who represented the defendant - Elane Photography in the case) has said the decision was a step toward "tyranny" (no less). In his view "Government-coerced expression is a feature of dictatorships that has no place in a free country," he said. In his view: "This decision is a blow to our client and every American's right to live free." Just over the past few days (February, 25, 2014) the Governor of Arizona vetoed a proposed bill for religious freedom granting business owners in their business conduct the right to refuse rendering service based on religious convictions. This issue is not unique to the State of Arizona; the conflict over liberties and civil rights vis-à-vis religious freedom has become a wide and broad national debate with similar laws being considered in other states including Georgia and Ohio.⁶ Each position has staunch supporters. I expect that given the deep convictions on both sides, they won't budge any time soon (or ever).

Not surprisingly, then, this case (in New Mexico) has been closely watched because it deals with many conflicting issues including, among others, gay rights, religious freedom, and free speech. And as stated above, this case constitutes the catalyst and forms the impetus for my research and my ensuing proposal. In a nutshell, I propose to extract art from this battle field by applying what I refer to as Inverse Moral Rights. It is the only pragmatic and fitting solution to the complex predicament that a liberal and tolerant society now finds itself. In the next section, I explain why the current ruling, despite its clear noble intentions, as expressed by the Hon. Justices, is inadvertently a disservice to liberty, to civil rights and to art.

1.4 The Dead-End Outcome for Art: Hard Cases and Bad Law

As is evident from the two sides of the debate, there are compelling arguments for or against the photographer's refusal. On the one hand is the couple's right to be treated equally. On the other is Ms. Huguenin's right to conduct herself in line

⁶ Stacey Abrams and James Richardson, Stop Arizona-style anti-gay bill in Georgia, <http://www.cnn.com/2014/02/27/opinion/abrams-richardson-georgia-anti-gay/index.html?iref=allsearch>; Also see Also see, John McCormack, Top Law Professors: Arizona Religious Freedom Bill Has Been 'Egregiously Misrepresented', FEB 26, 2014, HTTP://WWW.WEELYSTANDARD.COM/BLOGS/TOP-LAW-PROFESSORS-ARIZONA-RELIGIOUS-FREEDOM-BILL-HAS-BEEN-EGREGIOUSLY-MISREPRESENTED_783466.HTML.

with her religious values. Indeed, this clash has been recognized by the Supreme Court for the State of New Mexico.

The issue of same sex marriages threatens to split the world right down the middle as to the views and outlooks regarding human freedom; sexual freedom; personal choice; public good; the need to set limits of conduct; theology; religious beliefs and morality.⁷ D'souza explains the ongoing clash between traditional (religious) morality and secular morality as the 'cultural wars' in America. These wars involve issues such as abortion; divorce and homosexual marriage. In his view these "can be largely understood as a clash between traditional morality and secular morality."⁸ On the other end of the spectrum rests the idea of individualism, secularism and even further still, the queer theory. Simply stated, these two approaches cannot be truly reconciled. While the religious view sees same sex-marriages as a sin that is contrary to human nature and religious teachings, supporters for same sex marriage see this as a natural and necessary extension of individual liberty and life choice between consenting adults.⁹ In this confrontation Berg provides us with powerful insights where he observes that "there are important common features between the arguments for same-sex civil

⁷ Dinesh D'souza, *What's Good About Christianity?*, MJF Books, New York, 2007, 3. D'souza rejects 'Liberal Religion'. He asserts basics of faith that cannot be reconciled with other actions. "Here is the West, there are lots of liberal Christians. Some of them have assumed a kind of reverse mission: instead of being the church's missionaries to the world, they have become the world's missionaries to the church. They devote their moral energies to trying to make the church more democratic, to assure equal rights for women, to legitimize homosexual marriage, and so on."

⁸ D'souza, *Supra*, 251-252. D'souza, in 57-60 also explains that "in the Christian era pederasty and homosexuality were considered sinful". He goes on to explain that "Instead, Christianity exalted monogamous love, which would provide the basis for a lasting and exclusive relationship between husband and wife, oriented toward the rearing of children."

⁹ See Naomi Zack, *The Big Book of Philosophy*, Fall River (2010), referring to Queer Theory. Zack explains that "Queer Theory emerged in the 1990s, along with LGBT (Lesbian Gay Bisexual Transsexual) studies, as a positive affirmation of sexual difference that does not fit into any of its predecessor categories, including lesbianism"; Also, see Naomi Schor's *Feminism Meets Queer Theory* (1997) and Susan Stryker's, *Transgender History* (2008). Also see, Mark E. Wojcik, *The Wedding Wedding Bells Heard Around the World: Years from Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24(3) *Northern Illinois University Law Review*, 589-682, (2004). In his paper, Wojcik argues that it is irrational to view same-sex couples as a threat to the institution of marriage. In his view same-sex couples deserve the same recognition and protection as that afforded to opposite-sex couples. For a study on the expansion of recognition for same sex marriage in the US and around the world see Sonia Bychkov Green, *Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States* (2010), Available at SSRN: <http://ssrn.com/abstract=1562234> or <http://dx.doi.org/10.2139/ssrn.1562234>.

marriage and those for broad protection of religious conscience. Even though the two are pitted against each other in disputes, the strongest features of the case for same-sex civil marriage also make a strong case for significant religious-liberty protections for dissenters."¹⁰ Berg further explains that while there may be good reasons for recognizing same-sex civil marriage, strong religious accommodation should be made, so as to ensure consistency and even-handedness. Berg sheds light on the fact that both same-sex couples and religious believers are committed to their claim that their respective central identity and to living in in a public way. In his view just as gay couples have staked their claim in the institution of marriage, so too it should be possible for religious people to live their faith beyond their place of worship, and this in his view needs to include nonprofit organizations like Catholic Charities, as well as wedding photographers.¹¹

The ramifications of this deadlock are aptly summarized by Laycock and Berg, wherein they explain that this "conflict between religious liberty and gay rights is bad for both sides and dangerous for the American tradition of individual liberty."¹² In their view, the courts need to address the respective aspirations of both groups, namely; the gay/lesbian couple marriage on the one hand, and the rights of religious believers and organizations not to facilitate such events.¹³

Given the rift between the two described polar positions, it is clear that the positions cannot be reconciled. It appears the argument will go on until one group is 'converted'. But so long as one person retains that his view is the correct one there will never truly be a right answer and only time will tell. That is why, when hotly contested issues such as this come to the doorstep of creativity the solution has to be achieved from within and not from without. That is to say that the nature of creativity must be factored into the equation (as a primary factor). What I mean to say is that when it comes to the interface between creativity and morality, copyright needs to be applied free of such dictates because it is the public square of free speech. But here is the main point, just as the public square is bound to tolerate all expression and grant copyright protection absent any contextual considerations, so too the same needs to apply to the artist's rights to also choose not to participate in expression. In my view both are necessary (indeed, imperative) in order to complete the true liberal paradigm. Thus, what we have here is not a one-sided claim for civil rights but rather a legitimate competition of

¹⁰ Thomas C. Berg, What Same-Sex Marriage and Religious Liberty Claims Have in Common, 5 Northwestern Journal of Law and Social Policy, (2010).

¹¹ Berg, Id.

¹² Douglas Laycock and Thomas C. Berg, Protecting Same-sex Marriage and Religious Liberty, 99 Virginia L. Rev. In Brief (2013).

¹³ Douglas Laycock and Thomas C. Berg, Id.

varying rights but which are of equal caliber. Thus, when faced with such a horizontal challenge of rights of equal caliber, the only solution is to resort to a tie breaker a truly 'neutral' position. That is to consider the basic nature of the artist's refusal to participate in creating certain artistic expression. In this case, and cases of similar circumstances, that tie breaker, I submit is found in the moral rights that form part of copyright law. In the next chapter I shall explain, why moral rights in their essence are not only about the right of attribution and integrity but also about the rights to abstain from creating. What I would refer to as inverse moral rights.

In closing this section, as to why art stands apart and outside the debate, I should like to add that art is not another regular form of rendering service. Granted, other professions are also an art in and of themselves but the primary character in cases such as (health, teaching, and transportation) is about the service rendered and not the expression in that service. They are after all not contingent on personal expression as art predominantly is. And therein lies the main point of divergence that allows us to address art-oriented services from other services.

Chapter Two **Moral Rights at the Core of Creativity**

As I have demonstrated above, the debate over same-sex marriages has now engulfed art. And art, which is the very fabric of liberal society, is (evidently) fast becoming one of its biggest victims. What is more, this clash between different view-points will never truly be settled (amongst people) one way or another given the deep-seated beliefs and convictions of the parties on opposite sides of this debate. Unfortunately, in light of the current situation it is plain to see the civil rights based reasoning does nothing to get art out of this cross fire.

Therefore, another solution must to be applied to art in order to free it, for the benefit of all society, from this battle. It is not art's battle. Art must be free for all artists, whomever, they are, and regardless of their world-views. So the main focus of this chapter is towards a solution that is, in my view, best suited to address the main issue here, namely how to preserve the freedom of artistic expression and to keep it out of this on-going struggle (that I predict will go on for many decades to come). This solution, as I show in this chapter, is vested in moral rights concept. I submit that moral rights theory is broad enough to encompass the solution. This chapter is devoted to explaining my proposal.

To my mind, (and here I respectfully agree with the New Mexico court ruling) in a liberal society, respect for 'the other' is an imperative. However, Liberal society that is by definition free must ensure freedom for all. Moral rights are at the heart of that freedom when it comes to creative works. That is why this case should have been approached from a different angle, one that hinges primarily on the true nature of the topic which pertains to the limits of artistic expression. Indeed, the core question in this case should be: Can an artist be compelled or impelled to produce art (or to be fined for refusal to produce art) in a case where his product will negate his spirit as an artist? In my view, the answer to all of this question should be a resounding no! To my mind this approach is not only the correct one but the only approach that can truly be tolerated by both parties because it is impartial to the ideological debate and can apply to all artists whatever their world view, and whatever their beliefs, personal convictions and moral views.

2.1 The Nature of Moral Rights

Historically, the term "moral rights" is a direct translation of the French term "droit moral". Moral in this case denotes the right to control the fate of the product that is the original work of authorship. In essence the concept is attributed by some to Hegel.¹⁴ The concept is that a person's domain does not end with his physical being, but rather that it extends to his (or her) broader persona, namely; that we as individuals are greater than our physical being. It is worth noting that this idea is not mystical but rather prevalent in our existing legal system. It is not new to the law. Many legal rules today recognize the impact on a person can extend beyond physical being of the person. Consider, for example, libel and slander or defamation. This is a direct legal recognition of a person's good name that might justify payment of damages despite their not being any physical harm

¹⁴ Not all accept this inference from Hegel's works. See for example Schroeder, Jeanne L., and Unnatural Rights: Hegel and Intellectual Property (March 1, 2004). Cardozo Law, Legal Studies Research Paper No. 80. Available at SSRN: <http://ssrn.com/abstract=518182> or <http://dx.doi.org/10.2139/ssrn.518182>. Schroeder explains Hegel's position according to which property is deemed to play a role in the constitution of personality. However, he rejects the notion that Continental moral right of artists emanate from Hegelian analysis of property. But be things as they may, and the for the purpose of this research, suffice it to note that in while in Hegel's view rights are unnatural, Hegel still justifies the concept of property on purely functional grounds namely the role it plays in the modern state. As Schroeder explains in Hegel's view property is necessary for the development of one limited aspect of personality which Schroeder refers to as "legal subjectivity." Legal subjectivity is the mere capacity to respect the rule of law - nothing more. According to Schroeder Hegel's property analysis does not directly relate to any other aspect of personality. In this regard he rejects Margaret Jane Radin's position according to which Hegel's concept of property is geared towards "human flourishing."

to the plaintiff (the victim). The same idea applies to the need to protect persons against sexual harassment. In both cases the perpetrator is held accountable even absent any direct physical impact on the person (or contact with him or her). This also applies to 'threats' in criminal law. Here too, despite the lack of any physical impact on the person, the act is still deemed to be illegal because of the victim's perceptions that are outside his physical senses.

Going back to moral rights, it is clear that while it is easier to expect that the law would protect the financial rights in the work, it is much more difficult conceptually to justify any on-going linkage between the person and his work even after that work is transferred to another, who now stands to reap the economic benefits from the work. Specifically, moral rights maintain the linkage between the author and his work on two levels namely attribution and integrity of the work. In this regard, moral rights are set in place to secure that the work is attributed to the original creator of said work and that the work be protected against any destruction (or mutilation). Clearly then moral rights go beyond the basic financial oriented rights (the bundle of rights) and protect the protect personal interconnections between the author and her work. It is, as stated above, an extension of the persona i.e., the author into her work.

While moral rights originate in the continental system they have now become an integral part of national laws around the world through the TRIPS agreement and its adoption of the substantive terms of the Berne convention. Interestingly, moral rights compel us to recognize the difference between authorship and ownership. Obviously with the ability to assign copyrighted works this has become very important. What is more, the creator's right for attribution includes not only the creator's right to receive credit for his (or her) work, but to decline to receive credit as well. This by all accounts is dramatic! It shows that the author remains sovereign over his work. And while he is entitled to get credit for it he is also at liberty to detach himself from said work. I shall revisit this issue in the next chapter because it constitutes the basis for the inverse moral rights theory. What is more, moral rights also entitle the author to prevent his or her work from being altered without his (or her) permission.¹⁵ Even more so, moral rights are in fact broadly construed. They are not mechanical in scope, they are not only concerned with attribution and integrity but also deal with more in-depth ethical questions that impact the way in which we view creativity and the impact of that creativity on other social values.¹⁶

¹⁵ For a survey of moral rights in both Europe and US law and case law as well as moral theory see Amy M. Adler , *Against Moral Rights*, 97 *California Law Review*, 263, (2009), 2-5.

¹⁶ One such example is that relating to the ownership over photographs that depict

United States law recognizes moral rights, but not in a direct manner as is found in the laws of European countries. In the US moral rights have been protected through judicial interpretation of several copyright; trademark (the Lanham Act); privacy; and defamation statutes as well as the doctrine of misappropriation.¹⁷ More specifically, moral rights appear in the Visual Artists Rights Act of 1990 (VARA), which only regulates visual arts.¹⁸

According to VARA, the author of a visual work has a moral right to avoid being associated with works that are not entirely her own, and to prevent the defacement of her works. But, despite the numerous rules that seem to recognize moral rights, protection for this type of right remains relatively weak in the US as compared with that which is granted in other countries including France and the UK. But, Bird contends that nature of protection for moral rights in the US "stems from a long-standing perception that moral rights conflict with fundamental American cultural, historical, and legal traditions."¹⁹ With that being said, Bird asserts that this need not be the outcome with respect to moral rights in US law given that "moral rights are more compatible with American socio-legal theory than currently believed."²⁰ Rajan argues that moral rights should be viewed comprehensively. In her view moral rights "represent vital social interests; they are vested in authors, at least for a period, because authors are personally linked to their work, enjoy human rights as the person who created the work, and are well placed to champion the protection of the work."²¹ In Rajan's view, and with which I agree, "the characterization of moral rights as 'personal' rights is both correct and useful, but it provides only a partial picture of the rights. Other terms that arise in

celebrities or other people in the news. See for example Larry Gross, *Image ethics: The moral rights of subjects in photographs, film, and television*, (1991), http://books.google.com/books?hl=en&lr=&id=Ma7LvZaB1xsC&oi=fnd&pg=PR5&dq=moral+rights+&ots=_Jk58KFv_z&sig=IShpviyDEhVftRM5qmXF5KFyCi8#v=onepage&q=moral%20rights&f=false

¹⁷ Moral rights developed in the US over time and in reluctant steps. For a survey of the developed of this type of right in the US see Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C.L.Rev. 1 (1997). Also see *Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976); Flore Kringsman, Section 43(a) of the Lanham Act as a Defender of Artists' "Moral Rights," 73 Trade-Mark Rep. 251 (May-June 1983).

¹⁸ 17 U.S.C. §106A, It is worth noting that in some states such as New York and the California there are specific protections for moral rights similar to those found in VARA

¹⁹ Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation* (2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1033021.

²⁰ Bird, *Id.*

²¹ Mira T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology*, Oxford University Press (2011), 6.

the literature – personality rights, intellectual rights, or spiritual rights - may help to capture their larger significance".²²

Given that in this research I am focusing on moral rights in the context of creativity and specifically photography, it is only relevant to focus on how VARA prescribes moral rights and how they function within. These will later in this work assist me in building my case for inverse moral rights.

It is first important to note that visual arts as defined by VARA are quite broad. They cover paintings; drawings; prints; sculptures; and photographs. But VARA sets limits and exclusions. For example protection of photographs is limited to exhibitions involving no more than 200 photographs. VARA excludes posters; maps; globes; motion pictures; and even electronic publications. Another substantial exclusion in VARA involves visual arts that are essentially work made for hire. The US Copyright Act excludes works-for-hire from the definition of "works of visual art". Obviously, this issue is of less relevance here because the wedding photographer and the book editor are not performing under a classic employment relationship but as independent contractors, thereby excluding such works from VARA protection.²³

VARA's rules pertaining to moral rights are particularly important in that they provide a defined approach to moral rights and a clear recognition of their existence. VARA grants two (moral) rights to authors of visual works: the right of attribution, and the right of integrity. As in general copyright law, the right of attribution allows an author to prevent misattribution of a work, but also to allow authorship of the work to remain anonymous if he (or she) so desire. The right of integrity, the second type of rights that is recognized under moral rights is the right of artists to demand that their (respective) works not be distorted, mutilated, or otherwise modified wherein such acts are liable to harm the author's reputation, and to prevent the destruction of any work of recognized stature.

It is worth emphasizing that while moral rights are placed in copyright laws; there are additional auxiliary sources for protecting for such rights in the US. This obviously allows for expanding the list of ways in which moral rights may be infringed upon in the U.S., by protecting the integrity of certain works that might

²² Rajan, Id.

²³ For a more in-depth discussion of the interrelationship between moral rights and works made for hire see Colleen Creamer Fielkow, *Clashing Rights under United States Copyright Law: Harmonizing an Employer's Economic Right with the Artist-Employee's Moral Rights in a Work Made For Hire*, 7 DePaul-LCA J. Art & Ent. L. 218 (Spring 1997).

otherwise not be covered by VARA (especially works for hire).²⁴ The expanded protections for moral rights can include the following protections:

1. Derivative rights: Here it is possible to look at distortion of works through the prism of a "derivative work." Namely, that the distortion of the work (my in some cases) amount to an unauthorized work. Thus, the artist should be able to prevent such works because they also trespass on the economic rights that are generally vested in him.
2. Defamation: If the work is attributed to an artist against his will, then the author may have a state action for defamation against the person responsible for the attribution
3. Misappropriation: If an artist identity is assumed, then this might create a legal cause of action based on violation of publicity or misappropriation (of the relevant work).

From all these it is possible to conclude that moral rights are not narrow or mechanical issues but in essence are about the recognition of the interconnection between the persona that is the artist and his (or her) work of art. The artist has a vested right in his work, and his own honor and name are intertwined in the work. In essence the work is seen as an extension of the artist himself.²⁵ Extending moral rights beyond the basic attribution and integrity of works of art has manifested itself in various contexts. Consider for example various moral rights' based controversies including: plans to redesign the landscape architecture of the National Museum of Australia, a Los Angeles tower block that appeared in the film *Batman Forever*, a community garden mural, a sculpture park, and the

²⁴ If someone attempts to pass off an author's work as her own, or conversely tries to pass off his own work as the author's, he may be acting in a manner that constitutes "unfair competition," which is barred by the Lanham Act (15 U.S.C. §1051). If the author's work possesses sufficient renown, it might also be recognized as a well-known trade mark and thus qualify for protection under the Lanham act and protected against dilution. But this is not an automatic outcome and needs to meet the criteria set by the Lanham act see for example *New Kids on the Block v. News America Publishing*, 971 F.2d 302 (9th Cir. 1992).

²⁵ In the context of the connection between the persona and the expression See N. Netanel, 'Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation', *Rutgers Law Journal* 24 (1993), 401. Netanel contends that expression is part of the projection of oneself – of choosing which aspect or conception of one's identity one wishes to present to others. To convey one's words . . . is to define oneself publicly. It is to seek to make oneself understood as one wishes to be. For an in-depth analysis of the the interface between moral rights and expression see Leslie Kim Treiger-Bar-Am, *The Moral Right of Integrity: A Freedom of Expression*, in Fiona Macmillan, ed., *NEW DIRECTIONS IN COPYRIGHT*, Vol. 2, Edward Elgar, (2006), 127.

Freedom Tower.²⁶ Moral rights are so distinct in their underlying aims that any limitation on them, even through statutory fair use, has been called into question. Indeed, moral rights are there in a realm of their own outside utilitarian constraints.²⁷ They are, if you will, an end in themselves and as such, need to be applied to their fullest potential both in the positive (i.e. conventional sense) and in their expressive (or inverse sense).

This broad rationale that underlies moral rights dictates a works' integrity and its attribution are reflected directly on the work. From this, I derive the idea of utilizing my proposed 'Inverse Moral Rights' to solve issues of art in controversial surroundings. Crucially, moral rights are not strange to the Anglo-American legal system, in fact Liemer contends that those were once part of the system, and were repressed therein until the advent of VARA. So even in this regard it is not conceptually problematic to explain why reverting back to moral rights as a core concept in the history of protecting creativity is not an unreasonable step even in a system that is primarily based on utilitarian principles.²⁸ It should be noted that on the other side of the scale, to where I stand, there are those who do not all support (or even oppose) moral rights. In fact there are those who are highly skeptical about its benefits and who believe that moral rights actually "endanger art in the name of protecting it."²⁹ Adler contends that "the conception of 'art' embedded in moral rights law has become obsolete."³⁰ Adler explains her view that granting the right of integrity to the artist might ultimately allow artists to destroy their

²⁶ Matthew Rimmer, *The Garden of Australian Dreams: The Moral Rights of Landscape Architects*, in *NEW DIRECTIONS IN COPYRIGHT LAW: Vol. 3*, Fiona MacMillan, Kathy Bowrey, eds., Edward Elgar, 2006

²⁷ See, Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54(1) *Washington and Lee Law Review*, 33 (1997). Also see Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81(5) *Notre Dame Law Review*, 1945 (2006). Kwall makes a clear distinction between the rationales underlying utilitarian theory and those supporting protection of moral rights: "Copyright's provision of economic incentives is consistent with its underlying utilitarian philosophy.3 A perspective grounded in economic and conventionally understood utilitarian rationales for legal protection emphasizes the commodification and dissemination of intellectual works. This perspective fails to take into account that human enterprise also embodies inspirational or spiritual motivations for creativity. This failure creates turmoil for many authors because it fosters a dominant market exchange reality that ignores the importance of noneconomically-based motivations for innovation."

²⁸ Susan Liemer, *How we Lost our Moral Rights and the Door Closed on Non-Economic Values in Copyright*, 5(1) *John Marshall Review of Intellectual Property Law*, (2005). Liemer explains that the Visual Artists Rights Act ("VARA") of 1990, revived moral rights that been "shut out of Anglo-American intellectual property law for over 200 years." Liemer sheds light on the history of moral rights in the Anglo-American system.

²⁹ Amy M. Adler, *Against Moral Rights*, 97 *California Law Review*, 263, (2009)

³⁰ Adler, Id.

own work at will (as some have done in the past). But to my mind, even though these stories of abuse of moral rights are true, they cannot provide sufficient justification with doing away with moral rights altogether. Cars kill people. Still we allow people to use them and to drive them despite their lethal potential. That is because in the greater scheme of things the social benefits outweigh the (unfortunate and tragic losses) associated with cars. And so it is, I believe, with moral rights.³¹

2.2 Copyright Law and Personal Liberties

Something amazing has happened to copyright in the course of human development. It became free! The law recognized copyright in any creative work of authorship that is fixed in a tangible means of expression. The content of the work was not part of the threshold, and that is a very good thing. It is a good thing because judges could not invoke their personal views as to the consent of the art or work for which one seeks copyright protection. Protection for creative works is not contingent on the quality of that work in the eyes of the beholder. Creating a copyright law system that is not contingent on quality of a work is the best thing that happened to copyright, and the thing that allowed it to facilitate free speech. This trend can be traced as far back as the Statute of Anne, which in my view represents the 'magna-carta' of copyright law. In essence it symbolizes the emancipation of all artists, and their right to enjoy the fruits of their labor absent content-considerations and/or social status.³² Obviously, it is important to protect creativity in this way lest we as a society reach the slippery slope. And that is the good thing that happened to copyright law.

But, this good thing that has happened is now facing a new challenge. It involves an issue that is hotly contested between two unwavering groups over the issue of same-sex marriages. Without elaborating much on the history of the position of the Catholic church or other staunch opposers to same sex interaction or the views of the proponents of same sex to attain legal and special recognition, I should say, that while most differences in Western society can be bridged, this issue is likely to endure, and its ramifications remain beyond the scope of this research. Suffice to note that all parties involved in this debate, have deep convictions about their personal actions and all parties also have a firm legal basis on which to establish their respective arguments.

It is because of the nature of this conflict that I suggest a way in which art can be shielded from the shrapnel in this fight. This is the shield of moral rights, that I

³¹ Adler, Id.

³² See History of the Statute of Anne, <http://www.copyrighthistory.com/anne.html>

think would be accepted by both parties given that it provides equal protection to both. It is applicable to both stories that I have introduced earlier: The gay book designer and to wedding photographer.

So the idea of freedom in copyright, applies to all artists whatever their personal convictions. Just as all original works of authorship that are fixed in a tangible medium of expression are protected by copyright law, so too, I would argue, that it is the right of artists not to be impelled or even compelled to create a work that stands contrary (in content) to their views and beliefs. Personal values and personal expression are an innate part of the artist and hence also part of his moral rights much like attribution and integrity are. As such, artists must not be compelled to create mechanically or to be punished for their refusal to do so. Artists have civil rights too, and part of that right is to be free as artists must be. The law needs to uphold artists', all artists', right to self-expression through abstention! This is the essence of what I refer to her as 'Inverse Moral Rights'. Consider a regime whose leader forces poets to write poems praising him. What would be our view, of such a regime? Would 'liberty' be befitting of him? I should think not!

2.3 Inverse Moral Rights: A Warranted Extension of Moral Rights Theory

Art and copyright that protects it do not exist in a vacuum. That is to say, they are formed created and bound by society's visions and views. Art in essence is about communicating ideas in an honest manner that reflects the views and beliefs of the artist. Vetrone reminds us that "art is the only thing created by humans that can communicate so powerfully and honestly to the point of transformation. This is why it is worth protecting".³³ Kwall emphasizes this personal connection between the artist and the creative work wherein he states that: "the act of creative authorship implicates the honor, dignity and artistic spirit of the author in a fundamentally personal way, embodying the author's intrinsic dimension of creativity".³⁴ These observations reflect the spirit of all legal systems in the west (and I dare say around the world). That is to say both civil system and common (Anglo-American) law system in the West do indeed protect art and reflect the importance we hinge on creativity; its value and its contribution to society. Thus, to talk about creativity absent other social debates in society would be a lacking discussion, just as to talk about these debates absent expression is equally lacking. Moral rights (and inverse moral rights as I see them) are not a new concept in copyright law. But they remain vibrant and are increasingly relevant and crucial

³³ Amelia Vetrone, *The Legal and Moral Rights of All Artists*, Trufflehunters Inc. (2003), 8.

³⁴ Roberta Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States*, Stanford Law Books, (2009).

in modern day issues. They affect, among other things, the debate pertaining to creativity on the internet. In this regard, an interesting and relevant offshoot of moral rights relates to the "right to delete" with respect to works of authorship that are set in the digital media. In this context, I find myself in agreement with Peter Yu that the rights to delete is not limited to cases where the work has yet to be published or is not yet known by the world but also is relevant in the context of modern media. The right to retract work and to delete content that is found online poses the same questions that were posed in the past in Kafkas' dilemma. In Yu's view, "to some extent, the right to delete brings back the debate on this very difficult question. After all, the Internet is as much about individual users as it is about the collaborative exchange among these individuals."³⁵ In my view, the right to delete is in many ways similar to the right not to create. In both of these cases, the artist chooses to exercise his right to retract content that he has created or can create.

My position on the need to extend moral rights to the realm of inexpression can also find additional support in the 'right not to speak'. Indeed, the basic human right for free speech which is also part of the Constitution of the United States (Article 19) can just as easily be applied to the right not to speak. Just as it is part of a person's liberty to communicate ideas and opinions, so too a person in a free society needs to be free from having to communicate ideas and to participate in rendering content that he or she do not agree with. Both types of rights are intertwined and interdependent and are imperative pre (and ongoing) requirement if society is to be truly free. Otherwise, we would be placed in an 'Emperor's New Cloths' type paradigm, where not to speak would degrade a person, and conformity is the norm (even if not the truth). But on a more serious note, it is worth noting that the US Supreme court has upheld the right to refrain from expression as a constitutional right. In *Wooley v. Maynard* a group of Jehovah's Witnesses persuaded the US Supreme Court to strike down a New Hampshire law, which required cars to carry a license plate inscribed with the state's motto, "*Live Free or Die*".³⁶ Clearly all rights have limitations, including the right

³⁵ Peter K. Yu, Moral Rights 2.0, in Christopher Heath and Anselm Kamperman Sanders, eds., LANDMARK INTELLECTUAL PROPERTY CASES AND THEIR LEGACY, pp. 13-32, Kluwer Law International (2011).
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1692500&download=yes.

³⁶ *Wooley v. Maynard*, 430 U.S. 705 (1977), That court held in a 6-to-3 decision that the state of New Hampshire could not constitutionally require citizens to display the state motto upon their vehicle license plates when the state motto was offensive to their moral convictions. In his (majority) opinion Chief Justice Burger held that the statute in question effectively required individuals to "use their private property as a 'mobile billboard' for the State's ideological message." Significantly, Justice Berger invoked the free speech principle under the First Amendment which protects the "the right of individuals to hold a point of view different from the majority and to refuse to foster . . .

not to speak. Suffice it to mention the obligation to testify, the obligation to declare income in the tax reporting process and the obligation to disclose the contents of products and medicines. Still, Bosmajian asserts the freedom not to speak is an implicit 'right', that extends beyond mere speech into cases including the freedom not to speak when commanded by church and state, not to sign an oath, not to salute a flag, not to assert a belief in God, or not to reveal one's political beliefs and associations. Bosmajian also contemplates the argument for the need to create of a specific 'freedom not to speak'.³⁷ It should be noted that the narrative of silence is not new to copyright. It has various off-shoots that directly impact the shape of our society. Consider for example the right to consume content anonymously.³⁸ In this regard, Cohen explains the connection between digital monitoring and traditional notions of freedom of thought and expression.³⁹ Brown looks at the link between limitations on access and freedom of expression.⁴⁰ I agree with such linkages between the various elements that together impact content-generation.

an idea they find morally objectionable." It should be noted that not all agreed with this view. In his dissenting opinion in the case, Justice Rehnquist (joined by Justice Blackmun) held that a citizen is not compelled to assert the motto but rather to only place it on the license plate. Rehnquist observed that that "The defendants' membership in a class of persons required to display plates bearing the State motto carries no implication and is subject to no requirement that they endorse that motto or profess to adopt it as matter of belief." He found that the petitioners are free to express their opposition to said motto. Interestingly, while the majority opinion upholds the right not to engage in certain speech, the minority decision does not strike down that right but rather views the right to free speech as suffice to separate one's self from any apparent agreement with the content of the motto.

³⁷ For a comprehensive study on the right not to speak see Haig Bosmajian, *Freedom Not to Speak* Hardcover, NYU Press (1999).

³⁸ Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management"* In *Cyberspace*, 28 Conn. L. Rev 981 (1996). Cohen submits that while the 'information age' "conjures up images of a reader's paradise ~ an era of limitless access to information resources and unlimited interpersonal communication. In truth, however, the new information age is turning out to be as much an age of information about readers as an age of information for readers."

³⁹ Cohen, Id.

⁴⁰ For more on the connection between use, content and expression see Ian Brown, *Internet Filtering - Be Careful What You Ask for*, in *FREEDOM AND PREJUDICE: APPROACHES TO MEDIA AND CULTURE*, S. Kirca, L. Hanson, eds., pp. 74-91, Istanbul: Bahcesehir University Press, (2008). Brown looks at the worldwide practice of imposing mandatory requirements on Internet Service Providers (ISPs) to prevent their subscribers from accessing overseas content that would be banned under local laws. Brown considers the impact of such practices on peer-to-peer networks, and their compatibility with principles of freedom of expression. He also explains that while such a system will have a limited effect determined users; it will effectively entail "mass censorship on mainstream Internet users". For more on the impact of censorship and

The concept of inverse moral rights is also compatible with the first amendment. Sedlers explains that the First Amendment that upholds protection for freedom of speech and freedom of association also mandates a right of silence.⁴¹ Silence is not only about suppressed speech, it is also about the right to exclude one's self from a certain discussion or rendering of expression about it. Thus, by definition when we accept the importance of speech and expression we also need to adhere to the other side of the same coin that is the right to be silent. Sedler, discusses five contexts in which the First Amendment protects the right of silence:

1. The right to refuse to disclose one's beliefs and associations to the government.
2. The right to speak anonymously without disclosing one's identity.
3. The right not to be compelled to speak the government's message.
4. The right not to be associated with particular ideas.
5. The right to avoid (not to listen to) unwanted communications.

As such, Freedom of expression is not a slogan, or a fancy feel-good principle, it is more like a living tree that is continuously evolving, changing and most importantly affected by the elements including the legal soil in which it is planted and the winds of change. Beyond this, somewhat, poetic metaphor, is the harsh reality that absent freedom of speech there will be no liberty, no democracy and no freedom at large. Indeed, in recent years, much attention has been devoted to the idea of freedom of expression in the information age.⁴² By similar measure, my assertion is that freedom of expression has to be construed in the broadest measure possible including the freedom not to participate in certain expression whether as a creator (or consumer). In this regard it is worth noting that the idea of inverse content as part of the social debate is not new. In fact, in the age of mass media and information the potential consumer has not only been concerned with the content that he is exposed to but also and not less with what he does not want to be exposed to.⁴³ What is more, the idea of abstention from various

expression see, Kay Mathiesen, Censorship and Access to Information, in HANDBOOK OF INFORMATION AND COMPUTER ETHICS, Kenneth E. Himma, Herman T. Tavani, eds., John Wiley and Sons, New York, 2008.

⁴¹ Robert A Sedler, The First Amendment Right to Silence, (November, 2007), Wayne State University Law School Research Paper No. 07-39

⁴² Jack M. Balkin, Digital Speech and Democratic Culture: a Theory of Freedom of Expression for the Information Society, 79(1) New York University Law Review, (2004). Balkin explains that a democratic culture is cultures in which individuals have a fair opportunity to participate in the forms of meaning - making that constitute them as individuals.

⁴³ Michael I. Meyerson, The Right to Speak, the Right to Hear, and the Right Not to Hear:

socially accepted obligations has also been debated and substantiated in the context of employment and voting.⁴⁴ In the context of artistic expression whereas moral rights protect attribution and integrity, so too they also must adhere to the fact that artists are not mercenaries, but free people who are free not only in the integrity of their expression also in their choice not to express themselves. That is why an 'Inverse Moral Right' has to be recognized and asserted by artists.

Think if you will of a world in which artists (an author, book designer, poet, photographer, dancer, film maker is compelled to engage in art with which content they do not agree. Think that the law compels them to do so whether directly (forces them to act) or indirectly (forces them to pay penalties). How would one define such a society? I don't know the exact words that fit such a society. I can say what such a society is not. It is not truly free!

Chapter Three **The Limitations of Inverse Moral Rights**

Now that we have established that moral rights are broad enough to encompass inverse moral rights, we need to come back full circle to the issue of discrimination. Discrimination is an ailment that has plagued humanity and still does. Thus, to overlook the risk of its existence is both wrong and unfair to the victims whoever they may be. The question here is relevant if moral rights are expanded as I suggest they should be. While there is a need to expand moral rights, caution needs to be applied lest righting a wrong, wrongs another right. It is a fine line and this third chapter addresses this fine line. Therefore, in this chapter I address the limits of inverse moral rights.

3.1 Inverse Moral Rights and the Discrimination Argument

Discrimination is the prejudicial treatment of an individual based on their actual or perceived membership in a certain group or category. The treatment is usually

⁴⁴ The Technological Resolution to the Cable/Pornography Debate, 21 (1) and (2) University of Michigan Journal of Law Reform, 1987/1988. Meyerson sheds light on the possibility to employ technology instead of censorship.

For more on the abstention debate in different legal and social contexts see William F. Keefer, Has a Person the Constitutional Right to Abstain from Work, 29 W. Va. L. Q. 20 (1922-1923); Jeffrey A. Blomberg, Protecting the Right Not to Vote from Voter Purge Statutes, 64 Fordham L. Rev. 1015 (1995-1996).

negative, namely by restricting benefits, opportunities, and privileges as well as enjoying rights that are granted to others. This discrimination is and has been directed at various groups based on one or more of the following factors: Racial, religious, gender, skin odor, education, financial standing, as well as sexual orientation. Discrimination in the sexual orientation context is an attitude of a person towards another based on the latter's sexual orientation. It is a form of prejudice. The two stories at the base of this research seem to fit well into this type of conduct. Both the book designer and the wedding photographer refuse to render their services based on the other's sexual orientation. While all discrimination needs be rejected on its merits, this claim cannot become a smoke screen where all other rights and social interests are lost. When trying to examine a refusal of an artist to create we cannot allow the discrimination argument to trump other social interests. We must consider all factors and reach a balance amongst them. Similarly, inverse moral rights cannot justify all types of refusal by artists to act or to render services.

The main premise that underlies the doctrines of freedom of speech and freedom of expression, indeed copyright thereof at large is that artists are able to express themselves. Barring extreme cases such as pedophilia, racism, public safety artistic expression should be allowed and be protected even if many of us do not find ourselves in agreement with its content. This is the glue that holds us together. This is what tolerance is all about. Tolerance is not about what we agree with, it is about expression that we do not agree with. By the same measure, abstention from expression in art should also be tolerated. It is the expressive right to refrain from expression. I have referred to this legal state of this tolerance as inverse moral rights. From all of the above it is possible to conclude that just as an artist expressing a work might discriminate against the artistic sense of others, so too he can abstain from any form of art without being seen as discriminating against others. Again, let me be clear on this. It does not mean artistic expression can be invoked across the board, nor does it mean that it will be accepted outright. What it means is simply that artists should also not be forced to engage in artistic expression that negates their vision as artists and as people engaged in expression. Otherwise, artists will essentially and effectively be dragged to the podium to express something that is contrary to their vision as artists. Ironically, in such a case, they will now become 'hostages' by an ideology of free choice. And that outcome would by all measures create another cost that might outweigh a generalized fear from discrimination. Granted there is a fine line between condoning discrimination and tolerating silence. One cannot know what is in the heart of the artist. Nor should we be concerned with that. The actions of the artist do not prevent that book from being published or the gay wedding from taking

place. But, when art (or the abstention by artists) starts to influence the event then the law can implement defenses against the discrimination.

Consider a country, which forbids books pertaining to women's liberation. Or another that prohibits literature pertaining to democracy and freedom. Imagine the secret police in those countries is scanning the Internet to discover the identity of users in order to track or to arrest and prosecute them. By inclination such régimes will be seen by many (and me included) as oppressive and dark. So the idea of anonymity is in some cases equated to the ideas of creativity. If you oppress the reader and listener you ultimately oppress the writer or the composer. I should add here that anonymity is not sacred. In some cases involving national security; public safety or basic immoral acts (such as pedophilia), anonymity should not and cannot constitute a defense. But that is where it should end. In my opinion the same relationship exists in the case of the right to silence and the right to fend off discrimination. The former should be limited in order to ensure the effectiveness of the latter. But the latter cannot blindly trump the former. Indeed, just as (authentic) national security interests can be a good justification for exposing anonymity, so too anti-discrimination can be used to counter the rights not to create. But, by default, anonymity and silence should be part of the copyright system. Discrimination, much like, 'national security,' cannot be uncontested buzzwords that automatically subdue all other rights.

Again, in closing this very delicate issue, allow me to emphasize the following: Just as copyright law protects original works of authorship without regard for their content, so too that same law should look at silence as a form of expression within moral rights. Note that the content is protected by copyright law even if it is contrary to the views of a specific group big or small. By similar manner a choice to refrain from expression (i.e., not to engage in creativity) should be accepted and tolerated even if a certain group finds itself insulted by that lack of expression. Expression and lack thereof are two sides of the same coin and just as with the first there can be no claim of discrimination so too in the latter the same rationale should apply. Thus, the argument of discrimination should not and cannot blind us. Yes, discrimination is a disease that plagues human society, and should be rejected, but that disease cannot be remedied by choking other crucial characteristics of civilized human society namely the right to express as well as not to express art. Just as individuals have a legitimate right not to be subjected to discrimination, so too freedom of expression is also a civil right.⁴⁵ As such, when

⁴⁵ Kara L. Smith, *The Freedom to Speak is a Civil Right: The First Amendment and Supreme Court Rulings of Thurgood Marshall*, (2006) <http://ssrn.com/abstract=1096306> or <http://dx.doi.org/10.2139/ssrn.1096306>

tackling such an issue, we are confronted with two competing civil rights. It is a horizontal balance among equals, and thus additional circumstances as to the nature of the law and the ramifications of the outcome need to come into interplay. I have explained above why the right to silence or to abstentions of expression is part of the border right of freedom of expression. In the next section, I shall discuss the mechanism of inverse moral rights and illustrate its limitation in view of the discrimination argument.

3.2 The Limitations on Inverse Moral Rights

Notwithstanding the relevance and need for invoking inverse moral rights, there are situations where the art needs to make way for other social interests. That is to say, even though art and artists must be free, there are cases when that freedom needs to be constrained in order to accommodate other social interests. Thus, inverse moral rights like other rights in copyright law are subject to some limits. Consider cases where an artist is providing a certain service and whose services have no accessible substitute. It is at this point that inverse moral rights need to bow down to the legitimate interests of the individual client. Here the individual's civil rights need to kick in and to overcome inverse moral rights. I believe that in this manner inverse moral right can be invoked and applied fairly. It is not a weakness in my proposed model. On the contrary, this enhances the proposed model and secures its application. I will explain.

My proposed inverse moral rights model is about expression through inexpression, silence or abstention. This model assumes that the artist involved in creating art cannot be compelled (directly or indirectly) to create content that does not fit with her vision and artistic outlook. However, if the artist in specific cases becomes primarily a service provider more than an artist, due to external circumstances, then she no longer qualifies for the inverse moral rights claim. Consider the following two cases that provide examples of cases that should not qualify for inverse moral rights:

1. The producer of a news program wherein an interview is being conducted with a person with whose view he does not agree;
2. A band performing to a general audience at a public event.

Furthermore, even in the fringe case including a book designer or wedding photographer where there is no other reasonably accessible person that can provide such a service, the moral right of the artist needs to be balanced against the civil rights of the client. The burden of proof needs to be shifted to the petitioner contending an infringement on his or her civil rights. In those cases the

petitioner needs to explain why she cannot with reasonable effort receive the same type of service from someone else. In such a case the petitioners civil rights can overcome the artists inverse moral rights. This is intended to deal with those cases where specific artists (on both side of the debate) are targeted in order to force them to produce and create in a manner that is contrary to their beliefs.

Conclusion

Moral rights that are intended to secure attribution and integrity in works are conceptually broad enough to encompass INVERSE moral rights. That being the rights of artists to remain free from any measure that is intended to compel them to create. This is especially crucial in those cases where the work is primarily of an expressive nature. And this, as I have stated earlier, undermines the very spirit of creativity that is crucial pillar for the functioning of a healthy and vibrant economy, where innovation, creativity and investment in the same are free to flourish.

My IMR model is very sensitive to the risk of abuse and discrimination, but is also intended to keep art out of the crossfire in hotly contested social debates (such as same-sex issues). That is because it is my firm belief that the right to participate in expression and the right to refrain to participate from expression are crucial pillars for a truly liberal and free society where tolerance and equality prevails.

The crossfire to which I refer is all too real. Indeed, while the same sex couple is seeking social recognition and equal treatment, some artists find themselves acting in their artistic capacity directly against their most basic views and beliefs. Forcing an artist to participate or pay his way out (through fees) of participating in artistic expression that is contrary to his beliefs is equivalent to not recognizing copyright protection in work because of its content. While all would rail against the latter, the former reaction remains in contention. In my view, this is the source of the problem. Copyright law must not be dragged into the debate surrounding contentious issues. The health of the environment for expression is on the line. This freedom in expression can only be attained by recognizing inverse moral rights. With that being said, IMR has to be balanced with other considerations so as to ensure that IMR does not become a vessel for discrimination. And so, in the final chapter of this research I have devoted my attention to drawing the borderline beyond which inverse moral rights should not be claimed. In closing, I should say this. Copyright law was created under the conception of reward and incentive, but untimely behind it is the greatest single idea for true liberty; the freedom of expression including the freedom to express through in-expression. Both are crucial pillars for liberty.

Summary

While the law against discrimination (and I am fully against discrimination) is about inclusion of others in social life, the case that is presented by artists (in this case by a wedding photographer) is about excluding oneself from participation in the creation of art. This latter right secured through Inverse Moral Rights is crucial for the preservation of a truly free society. This measure of freedom not only impacts artists, but also the artistic economy at large.

Therefore, when this clash is viewed from the narrow context of art, the issue is no longer about discrimination, but about choosing to be silent. I have explained why moral rights can and should be expanded to encompass the right to silence or inexpression. This is what I have referred to here as 'Inverse Moral Rights'. There is a need to protect artists from the 'social obligation' which forces them to participate in the creation of art that negates her personal beliefs and convictions. Importantly, IMRs should be applied to every artist whoever she is and whatever the social view she possesses. Furthermore, it extracts art from social and moral debates. Art is simply not equipped to solve the rift that exists between individuals in a free and liberal society, it is there to express. Thus, art's freedom is a true measure of a society's liberty. That is why art must remain free so that society can endure all the (legitimate) inner debates between its members.

That tolerance of expression or the lack thereof (i.e., abstention of expression) will ultimately be the guardian of liberty not only in art but in the economy and in investment in that economy as well. Much is at stake when it comes to art. Its freedom through IMRs must be preserved.

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