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## **Against Integrity: A Feminist Theory of Moral Rights, Creative Agency & Attribution**

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# Against Integrity:

## A Feminist Theory of Moral Rights, Creative Agency & Attribution

*Carys Craig & Anupriya Dhonchak*

*[This is a pre-publication draft version of a chapter that is forthcoming in YSOLDE GENDREAU, RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND MORAL RIGHTS (Edward Elgar)]*

### Abstract

*This Chapter explores insights that feminist theories can bring to the study and development of moral rights protections in copyright law. It begins by explaining why certain facets of conventional moral rights theory are ill-suited to—indeed inconsistent with—a feminist approach in both concept and effect. In particular, to the extent that strong moral rights of integrity and association limit dialogic engagement with, and transformation of, protected works, they risk suppressing critical and counter-hegemonic expression, and support an individualized and romanticized conception of the (patriarchal) author-figure. Employing alternative feminist conceptions of situated selfhood, relationality and dialogic authorship, the Chapter then explores what it might mean to reimagine moral rights in a way that better reflects and protects the personal, social and political value of creative agency. It presents a defence of the right of attribution on these terms and concludes with a call for attribution as feminist praxis.*

### 1. INTRODUCTION

It is generally agreed that moral rights occupy a unique place within the realm of copyright law. Specifically, unlike the alienable economic rights central to today's copyright system, moral rights assume an intimate and ongoing personal connection between the author and their work that deserves acknowledgement and respect. And yet it is not generally recognized that feminist theory might have something significant to say about the nature of this intimate connection and the personal rights that it seemingly entails. In this chapter, we hope to persuade the reader that a feminist frame does indeed have much to offer when it comes to theorizing, rationalizing and instrumentalizing moral rights in the copyright landscape. Critical feminist scholarship has already explored certain core elements of copyright law, from originality to fair use, providing key insights into the triadic author-work-audience relationship upon which we hope to build.<sup>1</sup> Feminist

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<sup>1</sup> See eg Ann Bartow, 'Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law' (2006) 14 American University Journal of Gender, Social Policy & the Law 551; Malla Pollack, 'Toward a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter' (2006) 12 William & Mary Journal of Women and the Law 603; Dan L Burk, 'Copyright and Feminism in Digital Media' (2006) 14 American University Journal of Gender, Social Policy & the Law 519; Dan L Burk, 'Feminism and Dualism in Intellectual Property Law' (2007) 15 American University Journal of Gender, Social Policy & the Law 183; Carys J Craig, 'Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law' (2007) 15 American University Journal of Gender, Social Policy & the Law 207; Carys J Craig, 'Feminist Aesthetics and Copyright Law: Genius,

engagement with moral rights should similarly offer a fresh viewpoint from which to interrogate this particularly controversial but consistently compelling aspect of copyright law and the assumptions on which it depends. Moreover, feminist inquiry serves the crucial purpose of situating power and the ability to exercise it within the privileged discourse of moral rights, authorship and reputation, illuminating a potential path towards its cautious redeployment in service of equality. By reimagining moral rights within a feminist frame, we mean to challenge the false neutrality of these rights within standard legal discourse and practice while embracing their instrumentality in advancing feminist political objectives.

Section 2 begins with a brief overview of what is meant by “moral rights” and where these fit in the copyright scheme, both historically and in the current international system. It then lays out the common theoretical justifications offered in support of moral rights, with a view to identifying various facets of conventional moral rights theory that are ill-suited to, or indeed inconsistent with, a feminist philosophy and politics. Section 3 proposes an alternative feminist theoretical framework for interrogating moral rights. It begins by presenting a relational theory of the situated author-self, which in turn entails a conception of authorship as an exercise of expressive agency within a dialogic community. We then consider some potential implications of this theoretical shift for defining and limiting the moral rights of integrity and attribution. In particular, we suggest curtailing the right of integrity to create space for critical, transformative and counter-hegemonic speech; and cautiously consider the strategic power of the attribution right to advance equality through the acknowledgement and amplification of culturally marginalized voices. Ultimately, we conclude, it is possible to reimagine moral rights through a critical feminist lens in a way that better reflects and protects the personal, social and political value of dialogic creativity—but we doubt whether copyright law can serve such ends.

## 2. UNDERSTANDING MORAL RIGHTS

### 2.1 What are Moral Rights?

The term “moral rights” captures a collection of personal rights of the author, recognized to varying degrees around the world, which run parallel to the economic copyright interests that attach to works of authorship: the right of attribution (the author’s right to claim authorship); the right of integrity (the right to object to modifications of the work); the right of disclosure (the right to decide when and how the work will be published); and the right of withdrawal (the right to withdraw a work after publication).<sup>2</sup> Such rights vest in the author and remain with the author (or, after death, with their estate), notwithstanding the transfer or alienation of the economic rights

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Value, and Gendered Visions of the Creative Self” in Irene Calboli and Srividhya Ragavan (eds), *Protecting and Promoting Diversity with Intellectual Property Law* (Cambridge University Press 2015); Sonia K Katyal, ‘Slash/ing Gender and Intellectual Property: A View from Fan Fiction’ in Calboli and Ragavan (eds), *ibid*; Rebecca Tushnet, ‘The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity’ in Calboli and Ragavan (eds), *ibid*; John Tehranian, ‘Copyright’s Male Gaze: Authorship and Inequality in a Panoptic World’ (2018) 41 *Harvard Journal of Law and Gender* 343. See generally, Kara W Swanson, ‘Intellectual Property and Gender: Reflections on Accomplishments and Methodology’ (2015) 24 *American University Journal of Gender, Social Policy & the Law* 175.

<sup>2</sup> See Cyrill P Rigamonti, ‘Deconstructing Moral Rights’ (2006) 47 *Harv Intl LJ* 353, 356.

granted by copyright law (the exclusive rights of reproduction, public performance, first publication, and so forth).

By way of example, perhaps the most well-known moral rights action, at least in North America, is the Canadian case of *Snow v. The Eaton Centre*, in which the plaintiff artist, Snow, had sold a sculpture of a flock of geese to the Eaton Centre shopping mall in downtown Toronto. When red ribbons were placed around the necks of the geese as part of the mall's Christmas decorations, Snow sought and obtained an interim injunction, successfully arguing that the ribbons rendered ridiculous his naturalistic sculpture, and so would prejudice his honour and reputation as an artist.<sup>3</sup> The notion that the artist can continue to exercise control over how their work is treated, even after obtaining full value for the transfer of the property and/or the licensing or assignment of copyright to a third party, is precisely what animates the normative debate around moral rights, placing their protection in tension with the efficiencies of clean and unencumbered market transactions.

Some scattered varieties of moral rights emerged in continental Europe well before the inception of the modern copyright system,<sup>4</sup> but their conceptual solidification as a cohesive body of non-transferrable creators' rights ("droit moral" in France and "Persönlichkeitsrecht" in Germany) occurred only towards the end of the nineteenth century.<sup>5</sup> The internationalization of moral rights was later achieved by their inclusion, in 1928, in the *Berne Convention for the Protection of Literary and Artistic Works* (Berne), which essentially codified the rights of attribution and integrity.<sup>6</sup> Under the Berne mandate, an 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 honor or reputation."<sup>7</sup> Today, however, moral rights occupy an uneasy position in the global copyright context, assigned to a category separate from—and lesser to—the economic rights around which our international copyright system is built. When the *Agreement on Trade-Related Aspects of Intellectual Property Rights Protection* (TRIPS) was concluded, the relevant article of the *Berne Convention* was carved out of the compliance obligations of member states.<sup>8</sup> In spite of *Berne* and the "largely symbolic references to moral rights" built into the 1948 *Universal Declaration of Human Rights* and the 1966 *International Covenant on Economic, Social, and Cultural Rights*,<sup>9</sup>

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<sup>3</sup> *Snow v The Eaton Centre* (1982) 70 CPR (2d) 105.

<sup>4</sup> See eg Cyrill P Rigamonti, 'The Conceptual Transformation of Moral Rights' (2007) 55 Am J Comp L 67,

<sup>5</sup> See *ibid* 92–3; Marilyn Randall, *Pragmatic Plagiarism: Authorship, Profit and Power* (Toronto: University of Toronto Press, 2001), 80–81, 93.

<sup>6</sup> See Rigamonti (n 4) 356, citing eg Lionel Bently and Brad Sherman, *Intellectual Property Law* (2nd edn, OUP 2004) 232.

<sup>7</sup> Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 25 UST 1341, 828 UNTS 221 (Berne Convention).

<sup>8</sup> Agreement on Trade Related Aspects of Intellectual Property Rights, art 9(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 ILM 81 ("[m]embers shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom."); International Covenant on Economic, Social, and Cultural Rights, GA Res 2200A (XXI), art 15(1)(c), UN GAOR, 21st Sess, Supp No 16, at 49, UN Doc A/6316 (1966), 993 UNTS 3 (declaring the right of every individual to "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author").

<sup>9</sup> Universal Declaration of Human Rights, GA Res 217A (III), art 27(2), UN Doc A/810 (Dec. 10, 1948) (stating "the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author").

moral rights have remained the poor cousin of the economic rights enshrined in multilateral trade agreements.<sup>10</sup> Given the conceptual and practical cleavage between moral and economic rights, this hierarchy is readily understandable: the economic rights are an instrument of exploitation that fits well with the commodification of copyright in the international trade regime, while moral rights are effectively (and by design) a potential restraint on such economic exploitation. But it is worth interrogating further our sense of these competing conceptualisations of economic and moral rights—and asking what else, beyond the machinations of the modern marketplace, is at stake in the distinction.

## 2.2 Troubling Traditional Moral Rights Theories

### 2.2.1 The Economic/Moral Divide

The distinction between moral and economic rights is indeed typically cast as one between the mundanity of the market and the spirituality of the authorial enterprise. Canada's Supreme Court has explained it thus, in the paradigm shifting case of *Théberge v. Galerie d'Art du Petit Champlain Inc.*:

The economic rights are based on a conception of artistic and literary works essentially as articles of commerce. (Indeed, the initial *Copyright Act, 1709* (U.K.), 8 Ann., c. 21, was passed to assuage the concerns of printers, not authors.) Consistently with this view, such rights can be bought and sold.... The owner of the copyright, thus, can be, but need not be, the author of the work. ... Moral rights, by contrast, descend from the civil law tradition. They adopt a more elevated and less dollars and cents view of the relationship between an artist and his or her work. They treat the artist's *œuvre* as an extension of his or her personality, possessing a dignity which is deserving of protection. They focus on the artist's right...to protect throughout the duration of the economic rights (even where these have been assigned elsewhere) both the integrity of the work and his or her authorship of it (or anonymity, as the author wishes).<sup>11</sup>

Almost a century prior to this ruling in *Théberge*, Chief Justice Fitzpatrick of the Supreme Court of Canada drew the distinction along similar lines in *Morang & Co. v. LeSueur* when interpreting the rights of an author to reclaim his alienated but unpublished manuscript:

I cannot agree that the sale of the manuscript of a book is subject to the same rules as the sale of any other article of commerce, *e.g.*, paper, grain or lumber. The vendor of such things loses all dominion over them when once the contract is executed and the purchaser may deal with the thing which he has purchased as he chooses. It is his to keep, to alienate

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<sup>10</sup> Moral rights provisions were also notably absent from The Universal Copyright Convention Sept. 6, 1952, 6 UST 2731, 216 UNTS 132, *revised* July 24, 1971, 25 UST 1341, 943 UNTS 178, and the North American Free Trade Agreement US-Can.-Mex., Dec. 17, 1992, §§ 1701(2)(b), 1701(3), annex 1701.3(2), 32 ILM 605 (“[n]otwithstanding Article 1701(2)(b), this Agreement confers no rights and imposes no obligations on the United States with respect to Article 6bis of the Berne Convention, or the rights derived from that Article.”), *revised* November 30, 2018. One notable exception to the general exclusion of moral rights from international treaties post-*Berne* is the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT), art 1(4), Dec. 20, 1996, 36 ILM 65, and indeed the expansion of moral rights to performing artists by the WIPO Performances and Phonograms Treaty (WPPT), art 5, Dec. 20, 1996, 36 ILM 76. See generally Rigamonti (n 4) 356–9.

<sup>11</sup> 2002 SCC 34, [2002] 2 SCR 336 [12]–[14] (*Théberge*).

or to destroy. But . . . [a]fter the author has parted with his pecuniary interest in the manuscript, he retains a species of personal or moral right in the product of his brain.<sup>12</sup>

For our purposes, it is worth pausing here to note that this distinction between the public and the private—between the public realm of commercial exchange, that is, and the intimate realm of personal relationship—maps onto the public/private divide that “is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about.”<sup>13</sup> Recognizing the way in which the law perpetuated inequality by separating the public from the private sphere, first wave feminists mobilized under the banner “The personal is political.”<sup>14</sup> Second wave feminists sought to show how the gendering of public and private explained the subordination of women, while subsequent waves have sought to destabilize the conceptual pairing, deconstructing the distinction.<sup>15</sup> A critical theoretical approach understands such binaries in law as choices about what to privilege and what to suppress. By mapping economic/moral rights onto a gendered binary of public/private, it can come as no surprise to the critical feminist scholar that the distinction between economic and moral rights would be a hierarchical one, with the feminized personal side of the binary being marginalized in law and structurally subordinated.

Similarly, feminists might note, the economic/moral divide mirrors the rational/emotional binary that is even more obviously infused with a gendered masculine/feminine hierarchy. In copyright circles, the moral rights’ claim of the author is often eyed with suspicion as inherently subjective and vulnerable to the artist’s emotional caprice, in contrast to the practical reason and rationality that surely steers the copyright owner and their exploitation of the economic right.

Already, then, a critical feminist insight reveals the gendered nature of the moral right and its “feminization,” and offers up a way to understand—and to question—the relative subordination of moral rights within the conventional copyright scheme. But of course, this is not the end of the matter. It should come as no surprise that the defence of moral rights and their import is typically presented in terms that implicitly resist this feminization by reframing the personal or emotional connection at the core of the moral right claim in more masculinized terms of individual proprietary right (the power to exclude others) or paternal control, measured in terms of public reputation and honour. So let us turn now to consider this conventional moral rights’ orthodoxy and its feminist critique.

### 2.2.2 Moral Rights and Personhood Theories

The common theoretical justification for the protection of moral rights rests upon personhood theories “derived loosely from the writings of Kant and Hegel.”<sup>16</sup> These personhood theories

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<sup>12</sup> *Morang & Co v LeSueur* (1911), 45 SCR 95 [97]–[98], cited in *ibid* [16].

<sup>13</sup> Carole Pateman, ‘Feminist Critiques of the Public/Private Dichotomy’ in SI Benn and GF Gaus (eds), *Public And Private In Social Life* (Croom Helm 1983) 281.

<sup>14</sup> See Charlotte Kroløkke and Anne Scott Sørensen, ‘Three Waves of Feminism: From Suffragettes to Grrls’ in *Contemporary Gender Communication Theories & Analyses: From Silence to Performance* (SAGE Publications 2005) 1–23.

<sup>15</sup> See Michael Warner, ‘Public/Private’ in Catharine R Stimpson and Gilbert Herdt (eds), *Critical Terms for the Study of Gender* (University of Chicago Press 2014).

<sup>16</sup> William W Fisher, ‘Theories of intellectual property’ in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 171. See also Neil Netanel, ‘Alienability Restrictions

emphasize the author's special connection with his work, which is, in the Hegelian formulation, regarded as an extension of the author's personality into the external world.<sup>17</sup> What follows as a matter of natural justice from this outward externalization of the author's free will is the appropriative power to claim ownership over the work as an externalized object, and for that property right to be recognized as such by others.<sup>18</sup> In the Kantian formulation, the work is cast not as a thing but rather as a speech act, uttered by the author in his own name (and which no one else can therefore copy without speaking on his behalf).<sup>19</sup> In both versions, however, the author's entitlement to control the work—*le droit d'auteur*—emanates from the investment of his personality and individuality, through which he lays a proprietorial claim to the externalized products of his free and independent mind.

The scope of this entitlement, and in particular the degree of ongoing control over use and alienability that the author enjoys—or that Kant or Hegel would have approved—over the work remain the subject of debate amongst proponents of either variety of personhood theory; but our interest here is not in debating the nuances of Kant or Hegel's philosophical contentions. What is clear is that the author's rights, presented through a personhood frame, are firmly rooted in enlightenment notions of independence, free will, and private appropriation. Moreover, rightly or wrongly, these personality-based justifications are ideologically intertwined with romantic conceptions of the individualized self.<sup>20</sup>

Of course, such enlightenment conceptions of selfhood have also been a target of sustained feminist critique. The fiction of the atomistic self, with its dual claim to individuality and universalizability, has been attacked as disguising difference and so neutralizing a history of domination, subordination, and exclusion. It also discounts the lived reality of interdependence and social situatedness. This omission, as Shelley Wright explains, is reflected in the copyright discourse:

The existing definition of copyright as both economic and personal within a political or civil context presupposes that individuals live in isolation from one another, that the individual is an autonomous unit who creates artistic works and sells them, or permits their sale by others, while ignoring the individual's relationship with others within her community, family, ethnic group, religion .... The community has only the most tenuous identity. Society itself is seen as an aggregate of anomic individuals, each separate,

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and the Enhancement of Author Autonomy in United States and Continental Copyright Law' (1994) 12 *Cardozo Arts & Entertainment Law Journal* 1, 7–20.

<sup>17</sup> GWF Hegel, *The Philosophy of Right* (TM Knox tr, OUP 1967); Hegel, 'Remarks on Intellectual Property' (Berlin, 1821) in L Bently and M Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (2008) <[http://www.copyrighthistory.org/record/d\\_1821](http://www.copyrighthistory.org/record/d_1821)>. See generally, Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Geo L J* 287.

<sup>18</sup> Maurizio Borghi, 'Copyright, property and personality. Note on Hegel' <[https://eprints.bournemouth.ac.uk/31036/3/Copyright%20property%20and%20personality\\_final.pdf](https://eprints.bournemouth.ac.uk/31036/3/Copyright%20property%20and%20personality_final.pdf)>; Hughes (n 17); Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth 1996). But see also Jeanne L Schroeder, 'Unnatural Rights: Hegel and Intellectual Property' (2006) 60 *U. Miami L. Rev.* 453 (disputing the conventional Hegelian theory of copyright and moral rights, and explaining that, for Hegel, such a right is actually *unnatural*).

<sup>19</sup> Abraham Drassinower, *What's Wrong with Copying?* (Harvard University Press 2015). See also Anne Barron, 'Kant, Copyright and Communicative Freedom' (2012) 31 *Law and Philosophy* 1; Kim Trieger-Bar-Am, 'Kant on Copyright: Rights of Transformative Authorship' (2008) 25:3 *Cardozo Arts & Entertainment Law Journal* 1059.

<sup>20</sup> See Schroeder (n 18) 453-4 ("The personality theory of property that dominates American intellectual property scholarship is imbued by a romanticism that is completely antithetic to Hegel's project.")

segregated, fragmented...., This vision...places the emphasis on the individual rights of the artist as a “creator”....<sup>21</sup>

A significant body of copyright scholarship has directed critical attention to the mythology of this romantic authorship—the lone original genius that inhabits copyright’s normative core—arguing that it distorts our understanding of deserving authorship, neglecting the role of community, shared culture, and collaboration in the creative process.<sup>22</sup> As one of us (Craig) has argued elsewhere, this romantic author-figure is not only profoundly ideological and historically contingent, but also reflects a patriarchal ideal derived from what feminist literary theorists have identified as a strongly gendered vision of creativity and genius.<sup>23</sup>

But perhaps the easier route to the conclusion that Hegelian theories of selfhood and artistic expression are inherently gendered is to point to the words of Hegel himself:

“...the difference in the physical characteristics of the two sexes has a rational basis and consequently acquires an intellectual and ethical significance ... man has his actual and substantive life in the state, in learning and so forth, as well as in labour and struggle with the external world ... Woman, on the other hand, has her substantive destiny in the family and to be imbued with family piety is her ethical frame of mind.<sup>24</sup>

Women are capable of education, but they are not made for activities which demand a universal faculty such as the more advanced sciences, philosophy and certain forms of artistic production. Women may have happy ideas, taste and elegance, but they cannot attain to the ideal.<sup>25</sup>

Women are educated – who knows how? – as it were by breathing in ideas, by living rather than by acquiring knowledge. The status of manhood, on the other hand is attained only by the stress of thought and much technical exertion.<sup>26</sup>

Similarly, Kant’s writing on aesthetics and the sublime<sup>27</sup> explicitly excluded women from the ranks of genius on the basis that woman are passionate creatures, whereas genius is a matter of reason.<sup>28</sup> For Kant, women’s overriding duty was to *be* beautiful, to pursue feminine qualities of grace, charm, domesticity, from which it followed that the pursuit of knowledge or deep understanding was defeminizing: the woman who knew Greek or mechanics “might as well even

<sup>21</sup> Shelley Wright, ‘A Feminist Exploration of the Legal Protection of Art’ (1994) 7 *Canadian Journal of Women and the Law* 59, 73–4.

<sup>22</sup> See eg Martha Woodmansee, ‘The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author”’ (1984) 17 *Eighteenth-Century Studies* 425; Peter Jaszi, ‘Toward a Theory of Copyright: The Metamorphoses of “Authorship”’ [1991] *DukeLJ* 455; Martha Woodmansee and Peter Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press 1994); James Boyle, ‘The Search for an Author: Shakespeare and the Framers’ (1988) 37 *AmULRev* 625; James Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Harvard University Press 1996).

<sup>23</sup> See Carys J Craig, ‘Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law’ (2007) 15 *American University Journal of Gender, Social Policy & the Law* 207.

<sup>24</sup> GWF Hegel, *The Phenomenology of Spirit* (AV Miller tr, OUP 1977) #474, 287 (cited in Antoinette M Stafford, ‘The Feminist Critique Of Hegel On Women And The Family’ (Animus 2, 1997) <<https://www2.grenfell.mun.ca/animus/Articles/Volume%202/stafford1.pdf>> 69).

<sup>25</sup> Hegel (n 24) #166 Addition (cited in Stafford (n 23) 69).

<sup>26</sup> Hegel (n 24) #166 Addition (cited in Stafford (n 23) 70).

<sup>27</sup> Immanuel Kant, *The Critique of Judgment* (first published 1790, Werner S Pluhar tr, Hackett 1987).

<sup>28</sup> Christine Battersby, *Gender and Genius: Towards a Feminist Aesthetics* (Quartet Books, 1994) 113.



have a beard,” he wrote, and the woman who succeeds in laborious learning “destroy[s] the merits that are proper to her sex.”<sup>29</sup> Further denigrating remarks about women are scattered throughout Kant’s writings,<sup>30</sup> earning him the “unhappy status as the modern moral philosopher feminists find most objectionable.”<sup>31</sup>

It might reasonably be objected that these statements of Hegel and Kant simply reflect an essentialism around sexual difference that is more attributable to historical context and a failure of imagination than any inherent flaw in their theories of personhood *per se*.<sup>32</sup> Indeed, many scholars have looked to rehabilitate Hegelian and even Kantian philosophies for feminist purposes.<sup>33</sup> We do not mean to dismiss the value or promise of such efforts, broadly speaking. More specifically, in the intellectual property context, we recognize the important work of scholars such as Margaret Jane Radin and Anne Barron who draw on Hegelian and Kantian philosophies, respectively, to advance positions on art and ownership that arguably avoid patriarchal assumptions and resonate with a feminist politics of empowerment.<sup>34</sup>

In our view, however, statements such as those of Hegel and Kant quoted above reveal the fundamentally gendered nature of the theoretical premises—the conceptions of selfhood, autonomy, ethics, and aesthetics—upon which the conventional moral rights orthodoxy is built. These justificatory frameworks have their foundations in theories that specifically and explicitly denied the intellectual capabilities and creative capacities of women. As Deborah Halbert notes, “[t]he origins of intellectual property law, authorship, originality, and plagiarism are indebted to understanding creation as the domain of males who are the only ones authorized to speak and write.”<sup>35</sup> From a feminist perspective, then, it is hard to imagine why these theoretical frameworks, extracted and extrapolated from the misogynistic musings of eighteenth century white men, should be endorsed today and embraced as a conceptual starting point for a normative theory of moral rights. As we suggest below, from such a starting point, further silencing and systematic exclusion seem all but inevitable.

### 2.2.3 Paternity and Patriarchy

It should also be unsurprising that what flows from masculinist theories of authorship and entitlement is, predictably, a claim right over the work with its own tinge of patriarchy. The

<sup>29</sup> Immanuel Kant, *Observations on the Feeling of the Beautiful and Sublime* (first published 1764, John T Goldthwait tr, University of California Press 1960) 78 (cited in *ibid* 112).

<sup>30</sup> See generally Kurt Mosser, ‘Kant and Feminism’ (1999) *Philosophy Faculty Publications* 21 <[https://ecommons.udayton.edu/phl\\_fac\\_pub/21](https://ecommons.udayton.edu/phl_fac_pub/21)>

<sup>31</sup> Barbara Herman, ‘Could It Be Worth Thinking About Kant on Sex and Marriage?’ in L. Antony and C. Witt, (eds.) *A Mind of One's Own* (Westview Press, 1993) 50.

<sup>32</sup> Compare Seyla Benhabib, ‘On Hegel, Women and Irony’ in Mary Shanley and Carol Pateman (eds), *Feminist Interpretations and Political Theory* (Pennsylvania University Press 1991) 84.

<sup>33</sup> See eg Kimberley Hutchings, *Hegel and Feminist Philosophy* (Wiley 2003); Kimberley Hutchings and Tuija Pulkkinen (eds.) *Hegel's Philosophy and Feminist Thought: Beyond Antigone?* (Palgrave Macmillan 2010); Carol Hay, ‘A Feminist Defence of Kant’ in *Kantianism, Liberalism, and Feminism: Resisting Oppression* (Palgrave MacMillan 2013); Anne Barron, ‘Feminism, Aestheticism and the Limits of Law’ (2000) 8(3) *Feminist Legal Studies* 275.

<sup>34</sup> See eg Margaret Jane Radin, ‘Property and Personhood’ (1982) 34 *Stanford Law Review* 5; Anne Baron, ‘Kant, Copyright and Communicative Freedom’ (2012) 31 *Law and Philosophy* 1.

<sup>35</sup> Deborah Halbert, ‘Poaching and Plagiarizing: Property, Plagiarism, and Feminist Futures’ in Lise Buranen and Alice M Roy (eds), *Perspectives on Plagiarism and Intellectual Property in a Postmodern World* (State University of New York Press 1999).

author's moral right to have their name attached to a work they created is commonly known as the "right to *paternity*."<sup>36</sup> Authorial attribution is the right to be identified and so to protect the patrilineal line, as it were. The paternity metaphor supports the notion that "the work of art is an extension of the artist himself," such that the artist/father feels personal anguish when something is done to his artist/child (even if the artist/father has chosen to sell that artwork/child, as Amy Adler wryly notes).<sup>37</sup> Indeed, the integrity right extends to protect the artist/father against associations that might be prejudicial to his honour and reputation. The notion that one's metaphorical offspring can, in their social or cultural interactions or adaptations, bring shame or dishonour to the paternal line is similarly a deeply patriarchal one.

Christine Battersby's blistering critique of the gendering of genius takes aim at the metaphor of authorship as "male motherhood," which became common in 19<sup>th</sup> century aesthetics and still persists in the portrayal of the author as conceiving, gestating, labouring, and birthing the creative work.<sup>38</sup> As Mark Rose observes in his insightful article on "Mothers and Authors," the analogy of authorship to procreation invokes the gendered mind/body (male/female, intellect/matter) dichotomy, with the necessary implication that "authorship is a gendered category."<sup>39</sup>

William Patry has also criticized the "creation-as-birth" metaphor and the way it is wielded to suggest that authors should enjoy extensive control over their works.<sup>40</sup> In urging the passage of the first modern copyright statute, Daniel Defoe declared: "A Book is the Author's Property, 'tis the Child of his Inventions, the Brat of his Brain; . . . 'tis as much his own, as his Wife and Children."<sup>41</sup> The oft-quoted words of Nathaniel Shaler also exemplify this link between paternity and property: "The man who brings out of the nothingness some child of his thought, has rights therein which cannot belong to any other sort of property."<sup>42</sup> Such statements gesture at the patriarchal link between Romantic authorship and *le droit d'auteur*: conjuring up "patriarchal domesticity; the author as master of his household."<sup>43</sup> The relationship between the male author-mother and his text-child is not presented as one of maternal nurturing, but rather one of paternal control. The author's work is complete—his paternal claim established—with the act of conception/creation; it requires no ongoing relationship of care.<sup>44</sup> The paternal author-figure seeks only recognition for the work's successes and control over its subsequent social interactions lest they diminish the esteem in which he is held. But more fundamentally, the male motherhood metaphor mischaracterizes the creative process itself. Recast through the prism of patriarchy, the

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<sup>36</sup> See Mark Rose, 'Mothers and Authors: Johnson v. Calvert and the New Children of Our Imaginations' (1996) 22 *Critical Inquiry* 613, 614. See also Amy Adler, 'Against Moral Rights' (2009) 97 *Cal L Rev* 263 at 269 (critiquing the notion that the "work of art is an extension of the artist himself," and noting her choice of the term "himself" in light of the "metaphor of paternity.")

<sup>37</sup> Adler (n 36) 269.

<sup>38</sup> Battersby (n 28) 107 ("The artist conceived, was pregnant, labored (in sweat and pain), was delivered, and (in an uncontrolled ecstasy of agonized—male—control) brought forth. These were the images of 'natural' childbirth that the male creators elaborated.")

<sup>39</sup> Rose (n 36) 623.

<sup>40</sup> William Patry, *Moral Panics and the Copyright Wars* (OUP 2009) 69–70.

<sup>41</sup> Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press 1993) 39.

<sup>42</sup> *ibid* 9 (quoting Nathan Shaler, *Considerations on the Nature of Intellectual Property and Its Importance to the State* (1878) 9).

<sup>43</sup> Mark Rose, 'Copyright and its Metaphors' (2002) 50 *UCalLALRev* 1, 5.

<sup>44</sup> Thanks are due to Wendy Gordon for bringing this point into focus.

collaborative conditions of creative (re)production – biological and authorial – disappear from view:

[T]he paternity metaphor obscures the fact that literary works are the products of complex collaborations in which many individuals are involved..., and that literary works are produced through acts of generation that involve the adaptation and transformation of materials from the literary gene pool rather than creation out of nothingness... The paternity metaphor is patriarchal and obsolete. More significantly, the entire conception of authorship embedded in the paternity trope is obsolete. We need a better biology of authorship.<sup>45</sup>

The masculinist underpinnings of traditional theories of personhood, authorship, and appropriative power cast a shadow over conventional conceptions of moral rights and their common justifications. Any feminist reimagining of moral rights must therefore begin by rejecting this gendered vision of the author-self and reconceptualising creativity. Only with a better *ontology* of authorship can we conceive a different vision of the author’s moral claim—and its limits.

### 3. REIMAGINING MORAL RIGHTS

#### 3.1 A Feminist Relational Theory of the Author-Self

As we have seen, copyright law protects the moral rights of the artist, but “[t]he image of the ‘artist’ underlying the words of the *Copyright Act* is that of the solitary male genius, isolated both spatially and temporally from his community and the background of the art in which he works.”<sup>46</sup> A feminist theory of authorship resists the romantic myth of individual origination and instead firmly locates the creativity of author-self in the context of cultural situation and social relations. In doing so, however, feminist theorists must also be wary of communitarian conceptions of selfhood that threaten to undermine agency by subsuming the self within her social situation; and of postmodernist deconstructions of the author-figure that potentially disaggregate both her selfhood and meaning-making capacity. Feminist political engagements with moral rights must, after all, begin from a place of reckoning with the invisibilization of women’s artistic productions and the “scratching out of women’s writing as a historical and political process.”<sup>47</sup> The challenge is to interrogate the systematic exclusion, suppression, appropriation and mutilation of women’s creative contributions without falling into the trap of reinforcing the ideologies of possessive individualism, romantic aesthetic value, and patriarchal control that the feminist project seeks to upset.

One possible path to this end, as Craig has argued more fully elsewhere, begins with a feminist relational understanding of the author-self.<sup>48</sup> Relational theory takes as its premise that “persons are socially embedded and that their identities form within the context of social

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<sup>45</sup> *ibid* 14–5.

<sup>46</sup> Shelley Wright, ‘A Feminist Exploration of the Legal Protection of Art’ (1994) 7 *Canadian Journal of Women and the Law* 59, 62.

<sup>47</sup> Somer Brodribb, *Nothing mat(t)ers: A feminist critique of postmodernism* (Spinifex Press 1992) xxiii.

<sup>48</sup> See Carys J Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar Publishing 2011). See also, Carys Craig and Ian Kerr, ‘The Death of the AI Author’ (2021) 52 *Ottawa Law Review* 31, 81–6.

relationships.”<sup>49</sup> Genuine autonomy is not a matter of independence but product of *interdependence*, as legal theorist Jennifer Nedelsky explains, and the exercise of “autonomy within relations” demands that we are “always in a creative process of interaction, of mutual shaping, with all the dimensions of our existence.”<sup>50</sup> Creativity—including artistic creativity—is a vital component of this capacity to resist and transform existing patterns and structures:

Part of what we cherish in the *human capacity* for innovation, for *artistic creation*, for new forms of social relations... is the ability of individuals not to be determined by their history or the prevailing norms and practices of their communities. We observe and honour the capacity to bring forth the new, to create, to transform, to resist.<sup>51</sup>

The human creative capacity allows us “to envision something new, to shift...the terms of relations—whether through an idea, an invention, art...” Although this involves a capacity, “at least in small ways to be imaginative and innovative,” she explains, “[i]t is important not to read the above as invoking a human capacity for greatness or genius.”<sup>52</sup> A relational approach means resisting the “caricature” of the independent man and recognizing that the creative capacity for imagination comes from within the human actor “enabled by her relational web.”<sup>53</sup>

Recast in these terms, what is at stake when we talk about the author’s “honour” is not protecting the reputation and honour of the great artist as independent originator, but rather honouring the creative capacity of the author as an exercise of expressive agency and relational autonomy. What may merit or require protection, then, is not “the fundamental category of the-man-and-his-work,”<sup>54</sup> but the “mutual, reciprocal, communicative social interactions [that] are necessary for the formation, sustenance, and repair of the self.”<sup>55</sup> What might this mean for our vision of moral rights?

### 3.2 A Feminist Reflection on the Right of Integrity

#### 3.2.1 Authorship as Dialogue

A relational theory casts authorship as discursive interaction as opposed to independent origination. The author’s work is not reducible, from this perspective, to a stable object of property to be owned, but is rather an act of communication—and so a site of discursive struggle. It is, in the terms of literary scholar Mikhail Bakhtin, a dialogic utterance. The idea of authorship as relational meaning-making—as *dialogue*—is a powerful one that resists the reification of the text while also refusing to deny the creative capacity of the author-as-speaker. A Bakhtinian approach portrays discourse as inherently dialogic and multivocal: every text contains within it a myriad of

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<sup>49</sup> Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (OUP 2000) 4 (cited in Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (University of Toronto Press 2008) 18).

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.* 51 (emphasis added).

<sup>52</sup> Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011) 48.

<sup>53</sup> *ibid.* 73

<sup>54</sup> Michel Foucault, ‘What Is an Author?’ in Paul Rabinow (ed), *The Foucault Reader* (Vintage 1984) 101.

<sup>55</sup> Amy Allen, ‘Foucault, Feminism and the Self: The Politics of Personal Transformation’ in Dianna Taylor and Karen Vintges (eds), *Feminism and the Final Foucault* (University of Illinois Press 2004) 240 (quoted by Leckey, *Contextual Subjects: Family, State and Relational Theory* (University of Toronto Press 2008) 8).

voices that stand in dialogic relationship with one another. From a feminist perspective, this discredits formalistic, ahistorical analyses of language and literature (those which privileged the solitary author as the monologic source of meaning) while also emancipating subordinated voices (which are recognized as interactive and interanimating).<sup>56</sup> Rather than a binary opposition between, say, the marginal woman's voice and the central dominant male voice, dialogism invites "exploration and activating of the unvoiced exiled world of women."<sup>57</sup> Moreover, dialogic textuality drags the power struggle over meaning out into the open: "by articulating otherness, [it] inevitably articulates the powers attempting to marginalize or eliminate otherness."<sup>58</sup> It also illuminates the way that texts exist within and over time (in the context of an "utterance chain") responding to what has gone before (the *already spoken*), and anticipating that which might be to come (the *not yet spoken*).<sup>59</sup> It is along this "chain of speech communication" that meaning-making happens.<sup>60</sup> The social nature of dialogue defies closure and finality and perpetually serves, instead, as a "vehicle for reformulating old elements into new patterns."<sup>61</sup>

The dialogic nature of authorship has much to tell us about the appropriate limits of copyright and the power of control that it can and should confer to the author of any particular text. It throws into doubt the "original" author's claim over the work, by revealing the extent to which each utterance is informed by and dependent on others for its meaning; and it underscores the need to leave space for others' dialogic responses along the utterance chain.<sup>62</sup> The work that copyright hails as one author's original expression is in fact "a profoundly intertextual social unit."<sup>63</sup> In Bakhtin's terms, "[t]he speaker is not [the biblical] Adam, and therefore the subject of his speech itself inevitably becomes the arena where his opinions...meet others' speech..."<sup>64</sup> When each work is seen as a link in the chain of communication, we can see more clearly the harm that can be done to communicative practices when we seek to sever those links through law's construction of copyright. In the arena of social discourse, there is a risk to rendering the work as a stable, free-standing entity, somehow shielded by law from the dynamics of dialogism.

It could reasonably be contended, at this point, that the dialogic nature of authorship supports the protection of the moral right of integrity. Lior Zemer argues along these lines that moral rights "foster genuine dialogue" by ensuring that "the author, in his capacity as the other, received protection for his expression and that the public receives accurate information based on

<sup>56</sup> Laurie A Finke, *Feminist Theory, Women's Writing* (Cornell University Press 1992) 111

<sup>57</sup> Mary O'Connor, 'Subject, Voice, and Women in Some Contemporary Black American Women's Writing' in David M Bauer and Susan J McKinstry (eds), *Feminism, Bakhtin, and the Dialogic* (State University of New York Press 1991) 214–15.

<sup>58</sup> See Gale M Schwab, 'Irigarayan Dialogism: Play and Powerplay' in *ibid.* See generally Dale Bauer, *Feminist Dialogics: A Theory of Failed Community* (State University of New York Press 1988) (adding gender considerations to refashion Bakhtin's sociological stylistics into feminist dialogics).

<sup>59</sup> Carys J Craig, 'Transforming "Total Concept & Feel": Dialogic Creativity and Copyright's Substantial Similarity Doctrine' (2021) 38 *Cardozo Arts & Entertainment Law Journal* 603, 609-12. See also, Leslie Baxter, *Voicing Relationships: A Dialogic Perspective* (Sage Publications 2010) 51.

<sup>60</sup> *ibid* 51, quoting Mikhail Bakhtin, 'The Problem of Speech Genres' in Caryl Emerson and Michael Holquist (eds), *Speech Genres & Other Late Essays* (Vern W McGee tr, University of Texas Press 1986) 93.

<sup>61</sup> Lior Zemer, 'Dialogical Transactions' (2016) 95 *Oregon Law Review* 141.

<sup>62</sup> See generally Craig (n 59).

<sup>63</sup> Baxter (n 59) 52.

<sup>64</sup> "[A]n utterance is a link in the chain of speech communication, and it cannot be broken off from the preceding links that determine it both from within and from without, giving rise within it to unmediated responsive reactions and dialogic reverberations."

the real message and meaning intended by the author.”<sup>65</sup> The notion is that “genuine dialogue requires seeing the other *qua* other, that is, as he wishes to be seen and treated”—a principle that is protected “by moral rights that preserve the integrity of the author’s creative text its ‘meaning and message.’”<sup>66</sup> The idea of seeing and being seen surely appeals to feminists seeking recognition of women’s voices and involvement in the creation of meaning.

In our view, however, this vision of dialogue that supports the integrity right still clings to a Romantic vision of the author-work relationship (the text as bounded by the intentions of the author and therefore as a projection of his creative soul),<sup>67</sup> and gives insufficient regard to intertextuality and the centrality of dialogic practice. Taking dialogue seriously means abandoning the belief “that we can discern, let alone police, artistic intention, that it is necessarily relevant to the meaning of a work.”<sup>68</sup> A multitude of meanings and a myriad of voices already reside *within* the work, which is—even if unaltered—in a constant process of being reworked and re-authored. Dialogism wholly displaces the premise that a work contains a true and intended “meaning and message,” bestowed by the author and under his control; it therefore rejects the conclusion that other meanings and messages imposed upon or extracted from the work are mistaken or distortive and to be prevented.<sup>69</sup> The notion of an author’s authority and capacity to control meaning beyond the act of communication simply suffers from a fatal “confusion about the ontological status of ideal objects and their relationship to their creators.”<sup>70</sup>

### 3.2.2 The Politics of Protecting Integrity

From a critical feminist perspective, it should be stressed, there is an important political component to what might seem like a philosophical quibble: the moral right of integrity—the power to prevent unwelcome distortions, modifications, and associations—erects barriers to dialogue in ways that we believe threaten to disempower the transformative and critical voices of those who do not fit the dominant authorial mould. Of course, the idea of preventing the mutilation or distortion of works may hold appeal for those who are used to seeing their narratives twisted and their stories co-opted by dominant culture—and to the extent that moral rights can be politically harnessed to push back against such uses, we support that pragmatic stance as a matter of social justice.<sup>71</sup> But

<sup>65</sup> Zemer (n 61) 187–8.

<sup>66</sup> *ibid* 187, citing Roberta Rosenthal Kwall, *The Soul of Creativity: Forging A Moral Rights Law For The United States* (Stanford University Press, 2010) 58.

<sup>67</sup> *ibid* 187 (explaining that the right of integrity “gives an author the exclusive right to project his ‘soul of creativity,’” and describing the relationship between work and author as resembling that of “a parent and child.” Citing Kwall (n 59) 6, XIV). But see also Lior Zemer, ‘Moral Rights: Limited Edition’ (2011) 91 BULRev 1519, 1561–7 (agreeing with Kwall on the need for moral rights but departing from the neo-Romantic individualism that grounds her argument).

<sup>68</sup> Adler (n 36) 277.

<sup>69</sup> Compare Rebecca Tushnet, ‘Naming Rights: Attribution and Law’ (2007) 3 Utah Law Review 781, 801–802 (rejecting the premise that works contain “a proper, intended message or set of messages” and that “unintended interpretations are misreadings to be minimizing.”)

<sup>70</sup> Tom Palmer, ‘Are Patents and Copyright Morally Justified? The Philosophy of Property Rights and Ideal Objects’ (2001) 13 HarvJL&PubPoly 817, 843. See also Adler (n 36).

<sup>71</sup> See eg Kevin J Greene, “‘Copynorms,’ Black Cultural Production, And The Debate Over African-American Reparations’ (2008) 25 Cardozo Arts & Entertainment Law Journal 1179, 1203 (noting that “African-American artists have been particularly vulnerable to moral rights violations of attribution and integrity,” such that US copyright law’s refusal to protect the right of paternity “further burden[s] Black cultural production”); KJ Greene, ‘Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues’ (2008) 16 American University Journal of

if, as we know, the copyright system privileges a particular kind of creator—the dominant author hailed for his ostensible original genius—then the right to integrity is most likely to disproportionately disadvantage downstream creators excluded from this authorship trope. In particular, we fear, it can be wielded against culturally subordinated creators who “use the expressive tools of the dominant culture to ‘talk back’ to inequality.”<sup>72</sup> When we hear invoked the author’s right to control his intended meaning, we have to ask for whom his message was intended. This use of existing works to create new meanings, by those who were never intended to interact with the work concerned, is transgressive. It is a means to claim cultural space by those who have been ousted from it.

Sarah Ahmed describes the ability of “queer use” to disrupt existing meanings, to make audible alternative interpretations, and so to deny history (or those who would write it) a final say over what *the* meaning of anything can be.<sup>73</sup> Acts of recycling, reusing and reorienting works to alter one’s historic relation to them powerfully reveal the temporality and fragility of meaning signified by existing cultural expressions. Consider, for example, the queering of *Swan Lake*. Choreographer Matthew Bourne’s celebrated re-gendering of the ballet upsets the conventional categories of sex, gender and desire, subverting the “traditional expectations of male spectatorship and female objectification” that permeates the world of classical ballet, and the “taken-for granted heterosexuality” of the “male gaze.”<sup>74</sup> Challenging the established meaning and value of existing works communicates a refusal by the later user-creator to venerate—or serve as a willing vessel of—dominant cultural understandings. Now consider the controversy over Samuel Beckett’s classic play, *Waiting for Godot*, traditionally played by five male actors. Beckett’s estate has actively sought to enjoin productions that cast women in these roles, demanding fidelity to Beckett’s original intentions.<sup>75</sup> As Guy Rub notes, however, it is not obvious that Beckett would have held the same views were he alive today. Nor is it obvious why we should permit the diversity norms of a prior era to dictate the rules for performances today. Norms evolve, and so freezing a work’s meaning to accord with the dominant standards of the artist’s lifetime “seems undesirable from both artistic and broader societal perspectives.”<sup>76</sup> As Rebecca Tushnet has argued, then, “there are good reasons to deny authors control over *interpretations* of their works, including interpretations driven by authorial identity.”<sup>77</sup> The right of the author to guard his intended meaning, throughout his lifetime and thereafter, allows him to claim his role as “originator” by “removing traces of those who were here before,”<sup>78</sup> and to constrain future creators by preventing those who come after from recharting his chosen path.

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Gender, Social Policy & the Law 365, 372 (identifying the general absence, in the US copyright law, of moral rights protections against harms to authorial dignity as a doctrinal factor that disadvantages black cultural production). See also Anthea Kraut, *Choreographing Copyright: Race, Gender, And Intellectual Property Rights In American Dance* (OUP 2016) (exploring the racialized power of intellectual propertization in the context of dance).

<sup>72</sup> Elizabeth L Rosenblatt, ‘Copyright’s One-Way Racial Appropriation Ratchet’ (2019) 53 UCalDavisLRev 591, 594.

<sup>73</sup> Sara Ahmed, ‘Queer Use’ (*feministkilljoys*, 7 November 2018) <<https://feministkilljoys.com/2018/11/08/queer-use/>>.

<sup>74</sup> See Kent G. Drummond, ‘The Queering of *Swan Lake*’ (2003) 45 *Journal of Homosexuality* 235, 237-8.

<sup>75</sup> Barbara McMahon, ‘Beckett Estate Fails to Stop Women Waiting for *Godot*,’ *The Guardian* (February 4, 2006). See Robert Spoo, ‘Ezra Pound’s Copyright Statute: Perpetual Rights and the Problem of Heirs’ (2009) 56 *UCLA L Rev* 1775, 1824-25.

<sup>76</sup> Guy A. Rub, ‘The Challenges of Posthumous Moral Rights’ in Peter Karol and Sharon Hecker (eds), *Posthumous Art, Law and the Art Market* (forthcoming), 9-10 (citing to draft, on file with the author).

<sup>77</sup> Tushnet (n 69) 802.

<sup>78</sup> Ahmed (n 73).

Elizabeth Rosenblatt has argued that copyright's hierarchies of value—informed by “a historically Eurocentric, male conception of authorship”<sup>79</sup>—are implicitly racialized, disadvantaging certain speakers and denying the merit in culture “outside the colonizer's frame.”<sup>80</sup> When copyright gives control over discourse to “dominant-culture creators,” it allows them “to silence challenges to copyright's value hierarchy.” Moreover, by framing this control in terms of “deserving” authors, Rosenblatt cautions, it “teaches that this hierarchy is somehow necessary or correct.”<sup>81</sup> John Tehranian has also argued that copyright empowers the person hailed as author to shape and control the representation of others—often the bodies of women and racialized minorities rendered visible as “fungible commodities”<sup>82</sup>—while suppressing counterhegemonic narratives that resist these dominant representations.<sup>83</sup>

In our view, the moral right of integrity potentially serves in this way to sanctify and solidify the “male gaze,” as it were, of the author who speaks from a position of cultural dominance, preserving his vision of the world. Through a feminist lens, in a cultural context of colonization, dominance and subordination, the demand for the integrity of the already-created is akin to a demand to revere a thing bestowed upon the masses as an imperial gift—whereas the political act of “talking back” to power or “decolonizing culture” sometimes requires, instead, “an act of vandalism, a willful destruction of our universals; knocking off the heads of statues, snapping at the thrones of the philosopher kings.”<sup>84</sup> The recent toppling of statues and dismantling of monuments to history's “great men” should have attuned our senses to the suppression of political speech that could be served by the invocation of artists' moral rights to prevent the mutilation of their work.<sup>85</sup>

An illustrative controversy is the installation, on International Women's Day in 2017, of the Fearless Girl statue in front of the Charging Bull on Wall Street. Kristen Visbal, the sculptor of the statue of the young girl obstinately facing the bull, meant to address the issue of gender representation on corporate boards.<sup>86</sup> Arturo DiModica, the sculptor of the famous bull statue, intended to portray a positive message about the ambition of Wall Street, and objected to its prejudicial co-optation as a symbol of male dominance.<sup>87</sup> For the many visitors to the statue who created their own downstream works, taking photographs of their daughters replicating the girl's stance, for example, the work represented something larger about feminism and the power of resistance.<sup>88</sup> Most recently, following the death of US Supreme Court Justice Ruth Bader Ginsburg, photographs circulated of the Fearless Girl (now relocated) with the RBG's famous

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<sup>79</sup> Rosenblatt (n 72) 598.

<sup>80</sup> *ibid* 605.

<sup>81</sup> *ibid* 597.

<sup>82</sup> Kraut (n 71) xviii.

<sup>83</sup> Tehranian (n 1) 343.

<sup>84</sup> Ahmed (n 73).

<sup>85</sup> See eg ‘How Statues are Falling Around the World’ (*New York Times*, 24 June 2020) <<https://www.nytimes.com/2020/06/24/us/confederate-statues-photos.html>>.

<sup>86</sup> See Annemarie Bridy, ‘Fearless Girl Meets Charging Bull: Copyright and the Regulation of Intertextuality’ (2018) 9 *UCallIrvineLRev* 293, 295–6.

<sup>87</sup> Specifically, it was claimed that the alteration of Charging Bull by the addition of the Fearless Girl damaged its integrity and was prejudicial to the sculptor's honour and reputation. See Letter from Norman Siegel, Partner, Siegel Teitelbaum & Evans, LLP, and Steven Hyman, Partner, McLaughlin & Stern, LLP, to The Honorable Bill de Blasio (11 April 2017) <<https://www.scribd.com/document/344998311/Letter-to-Mayor-DeBlasio-on-Charging-Bull-vs-Fearless-Girl>>.

<sup>88</sup> Bridy (n 86) 297.



“dissent collar” lace around her neck.<sup>89</sup> (We would be remiss not to note the parallel to the placement of ribbons around the necks of Snow’s geese). With each contribution to the chain of communication we see the transformation of meaning laced with the politics of power.

Annemarie Bridy examines the Fearless Girl controversy through the frame of Bakhtinian dialogism, concluding that copyright law, as an engine of free speech and an incentive to promote artistic progress, should encourage and not prohibit this discursive interplay of meaning.<sup>90</sup> For Bridy, the absence of broad moral rights protections and the availability of fair use in the US copyright system “encodes the principle that cultural production is inherently dialogic and intertextual.”<sup>91</sup> But in jurisdictions with strong moral rights and minimal exceptions—and even in Canada, where a broadly framed right of fair dealing appears not to afford a defence to moral rights violations<sup>92</sup>—such dialogic practice could potentially be enjoined in the name of the author’s integrity right. Such a result would cede dialogic creativity to the dominant author’s control over meaning, silencing critical transformative speech.

The capacity to modify, mutilate, and resituate others’ words and works is a powerful way to challenge privileged voices and artefacts of the dominant culture, to re-tell stories from different social sites, and so to advance a counter-hegemonic narrative.<sup>93</sup> To endorse the right of integrity misunderstands the relationship between author, text and public in a way that casts disruptive dialogic engagement as a moral—and legal—wrong. This is not, in our view, a position that ultimately aligns with a feminist politics of confrontation, resistance and social reform.

### 3.3 A Feminist Reimagining of the Right of Attribution

#### 3.3.1. Dialogic Creativity and the Demand for Authorship Credit

We have argued that a relational feminist theory of dialogic authorship resists the idea of the individual author’s control over his work, meaning and message. It therefore grounds a feminist position *against integrity*. But there is a distinction to be drawn between control over meaning and the attribution of authorship that merits more attention. Once again, a feminist political critique of moral rights must begin by recognizing that such rights operate within a copyright system that systematically misunderstands and misattributes authorship, routinely denying credit to the creative contributions of woman and others from racialized and culturally marginalized groups.<sup>94</sup>

<sup>89</sup> See eg Ryan Millar, ‘NYC’s “Fearless Girl” statue dons white, lace collar to honor Ruth Bader Ginsburg’ (*USA Today*, 21 September 2020) <<https://www.usatoday.com/story/news/nation/2020/09/21/ruth-bader-ginsburg-fearless-girl-statue-dons-white-lace-collar/5852310002/>>.

<sup>90</sup> Bridy (n 86) 299

<sup>91</sup> *ibid* 300.

<sup>92</sup> Copyright Act, RSC 1985, c C-42, ss 29, 29.1, 29.2 prescribe that fair dealing “does not infringe copyright,” but makes no mention of moral rights.

<sup>93</sup> See eg ‘A Conversation with Alice Randall’ (*HOUGHTON MIFFLIN HARCOURT*) <[http://www.houghtonmifflinbooks.com/readers\\_guides/wind\\_done\\_gone/index2.shtml#conversation](http://www.houghtonmifflinbooks.com/readers_guides/wind_done_gone/index2.shtml#conversation)> accessed 19 November 2019 [https://perma.cc/S98H-RSDF], cited by Rosenblatt (n 72) 642. See also Rebecca Tushnet, ‘Comments of the Organization for Transformative Works’ (13 November 2013) <<https://www.transformativeworks.org/wp-content/uploads/old/Comments%20of%20OTW%20to%20PTO-NTIA.pdf>> 29–38.

<sup>94</sup> See Catherine L Fisk, ‘Credit Where It’s Due: The Law and Norms of Attribution’ (2006) 95 *GeoLJ* 49, 55–6 (“Women have long provided uncredited research, editorial, and technical assistance on creative projects undertaken by the men in their lives. Who can and should be credited with invention is thus culturally specific and wrapped up as much in norms about honor and credit as in the supposedly simple fact of who conceived a new idea.”)

When the (mis)attribution of authorship is recognized as a function of power in the context of inequality, then the demand for attribution appears as a potential route towards empowerment—and so a tempting avenue of feminist activism.

But the notion that the right of attribution can aid in the furtherance of social justice and equality—that it can be opportunistically wielded as a tool against oppression and silencing rather than to discount the creative contributions of the culturally marginalized—is sustainable only if and to the extent that the copyright system corrects course on its (mis)construction of what it means to be an “author.” The concept of dialogic authorship describes a work’s complex multivocality, while the notion that one person should wear the Original Author badge of honour reifies a monologic ideal. In the context of a system that venerates ostensible originality, attribution rights will misallocate the title of author by denying the contributions of other voices that inhabit the text and potentially silencing those who seek to respond to it. They will also risk reinforcing the idea of the work as a stable object to be owned, rather than a dialogic, communicative act. As Berenice Carroll explains: “claims of ‘originality’ and associated terms (‘innovation,’ ‘creativity,’ etc.) [are used] to rationalize and justify claims to property in ideas and lines of inheritance, preserving for small groups...both intellectual hegemony and control of a variety of rewards and privileges.” Such claims of ownership and inheritance, based on traditional conceptions of individual entitlement, will only preserve “the class system of the intellect”—a system that, as one might expect, operates on “appropriation and exploitation of the...labor of those relegated to lower classes, including predecessors erased from memory and history.”<sup>95</sup> From a feminist political perspective, however, acknowledging those voices from the margins has the transformative potential to disrupt this class system. Recognizing the subaltern speaker-as-author in turn recognizes her expressive agency and her capacity, through creative acts, to challenge hegemonic knowledge production, rewrite narratives, influence and undermine existing spatial arrangements.<sup>96</sup> Naming, in itself, signifies a reclamation of power that resists epistemic erasures of personhood.<sup>97</sup>

Through the feminist lens, then, one can reconceive of the demand for authorial attribution as seeking recognition of a contribution to the collective conversation that is cultural discourse. When authorship is regarded as fundamentally dialogic and relational, to attribute authorship to another is to recognize the other’s creative capacity, which is, in turn, to acknowledge their relational autonomy. The claim to attribution need not silence the *already-spoken* or the *not-yet-spoken*, but merely acknowledge the voice of the speaker as an active agent of discourse. If this sounds somewhat Kantian, the distinction is worth underscoring. Whereas a Kantian theory of the author’s entitlement turns on the harm of “compelled speech”—the copier speaks for the author and not on his own behalf—from our perspective, the harm, if any, of using another’s expressive

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<sup>95</sup> Berenice A. Carroll, ‘The politics of “originality”: Women and the class system of the intellect’ (1990) 2(2) *Journal of Women's History* 136, 138 (quoted in Richa Nagar, ‘Storytelling and co-authorship in feminist alliance work: reflections from a journey’ (2013) 20:1 *Gender, Place & Culture* 1, 3).

<sup>96</sup> Katherine McKittrick, *Demoniac grounds: Black women and the cartographies of struggle* (Minneapolis: University of Minnesota Press, 2006), xxiii.

<sup>97</sup> See Suze G. Berkhout, ‘Private talk: testimony, evidence and the practice of anonymization in research’ (2013) 6(1) *International Journal of Feminist Approaches to Bioethics* 19; Carol Smart, Jenny Hockey and Allison Janes, *The Craft of Knowledge: Experiences of Living with Data* (Basingstoke: Palgrave Macmillan, 2014, 1–20. See also Anupriya Dhonchak, ‘Interrogating the Norm of Anonymity in Research Ethics: Visibility, Representation and the Right to Attribution’ (August 2020), SpicyIP <<https://spicyip.com/2020/08/interrogating-the-norm-of-anonymity-in-research-ethics-visibility-representation-and-the-right-to-attribution.html>>.

work without acknowledgement, looks more like that of *silencing*: it is the refusal to acknowledge the other as speaker, and in many cases, the power to deny that they spoke at all.<sup>98</sup> Such refusal reproduces the muted subject of the subaltern woman.<sup>99</sup> The role for attribution that we see is therefore not about natural right and individual entitlement but about shaping relations of communication to advance social values of equality and shared participation in cultural dialogue. It is not about hailing the author's unique personality but acknowledging her expressive agency as a situated, speaking subject. It is not, therefore, a paternal claim to authority, but an appeal to be seen and heard.

### 3.3.2 The Politics of Attribution

Actor and activist Ossie Davis notes the political power of art: “[I]t has impact, it can affect change – it can not only move us, it makes us move.”<sup>100</sup> This power of art to make us *feel* has the potential to spur engagement, mobilisation, empathy and action.<sup>101</sup> As Martha Nussbaum observes, art and its narratives expose us to alternate emotional perspectives, refining our moral and emotional sensitivities.<sup>102</sup> The creation of expressive narrative allows the articulation of lived experiences of marginalisation from the perspective of those who experience it, engendering empathy, and challenging the objectivity of truth perpetuated by dominant narratives.<sup>103</sup> In Foucauldian terms, it supports the emergence of subjugated knowledges from below and outside the institutions of official knowledge production.<sup>104</sup>

Creative agency resides at the heart of the feminist conception of selfhood and its political project: the discursive subject that is constituted by discourse also has the capacity to revise and resist discourses from within.<sup>105</sup> In India, Dalit feminism advocates for social change through engagement that involves non-linear, ever-involving dialogue, intertwining education with the organisation of struggles, attentive to the unknowable “possibilities and constraints on agency as

<sup>98</sup> See Bitá Amani, ‘Disabused of Copyright’s Use?: Not Quite But You Had Me at Non-use’ (2016) 29 Intellectual Property Journal 141 (arguing that Drassinower’s Kantian frame fails to account for copyright’s discrimination between authors and exclusion of marginalized authors-in-fact from the category of author-in-law).

<sup>99</sup> Gayatri Chakravorty Spivak, ‘Can the Subaltern Speak?’ in “Can the Subaltern Speak?” in *Marxism and the Interpretation of Culture*, eds. Cary Nelson and Lawrence Grossberg. Basingstoke: Macmillan. 271–313. 1988.

<sup>100</sup> ‘Truth: Ossie Davis’ (*Charter for Compassion*) <<https://charterforcompassion.org/truth-anti-war-and-human-rights-activists/truth-ossie-davis>>.

<sup>101</sup> Olafur Eliasson, ‘Why art has the power to change the world’ (*World Economic Forum*, 18 January 2016) <<https://www.weforum.org/agenda/2016/01/why-art-has-the-power-to-change-the-world/>>.

<sup>102</sup> Martha C Nussbaum, *Love’s knowledge: Essays on philosophy and literature* (OUP 1990).

<sup>103</sup> This also aligns with the emphasis in Critical Race Theory on narrative as a valuable research methodology for articulation of concerns around equality, involving “autobiographies, self-portraits, allegories, fables, and fictive narratives”: Margaret E Montoya, ‘Celebrating Racialized Legal Narratives’ in Francisco Valdes, Jerome McCristal Culp and Angela Harris Jerome (eds), *Crossroads, Directions, and a New Critical Race Theory* (Temple University Press 2002) 243. See also Anjali Vats and Deirdré Keller, ‘Critical Race IP’ (2018) 36 *Cardozo Arts & Entertainment Law Journal* 735, 767–9 (reflecting on the power of story-telling specifically in the context of a critical race theory of intellectual property law).

<sup>104</sup> Michel Foucault, *Power/Knowledge: Selected interviews and other writings* (Pantheon Press, 1980) 81–82. See also Avery F Gordon, *Ghostly Matters* (University of Minnesota Press 2008) xviii.

<sup>105</sup> Susan Hekman, ‘Reconstituting the Subject: Feminism, Modernism and Postmodernism’ (1991) 6 *Hypatia* 44; Julia Kristeva, *In the Beginning Was Love: Psychoanalysis and Faith* (Columbia University Press 1987).

it intersects with social formation.”<sup>106</sup> For the resistive potential of that creative agency to be fully realized, however, it is important to locate and identify the speaking subject within her socio-political circumstances, allowing the work to circle back to the contexts from which resistance emerges. The power to subvert hegemonic discourses depends in part upon the nature of the dialogic engagement and the source of the disruption.<sup>107</sup> Moreover, as Richa Nagar powerfully reminds us:

For each one of us who is afforded the means or tools to step in with an authority to make knowledge claims, there are millions of others whose words and knowledges we stand on, but who have been systematically erased from, or made invisible, on the pages and spaces of formal learning...

In the context of the historical and ongoing violence of these absences and erasures, it becomes important to ask:

“[W]ho else do we bring with ourselves onto the page or stage? Whose are the voices we rely on for weaving our stories, but whose tones and accents remain unheard and unacknowledged in our scripts? Who are the people who remain forgotten in our citational practices...?”<sup>108</sup>

Reimagined in relational terms, a demand for attribution uses the subject’s situatedness to convey information about the work *as dialogue*, building the links in the speech chain of communication, and so enabling a more meaningful dialogic response.<sup>109</sup> It is a small step towards “radically reworking the ways in which these unheard tones, stolen voices, and erased knowledges are rendered.”<sup>110</sup> In this sense, a relational right of attribution recognizes voices from the margins while potentially facilitating the transformative act of “talking back.”<sup>111</sup> It also serves a broader public interest by illuminating the exchange of knowledge and our collective “drive to meaning.”<sup>112</sup>

Importantly, however, the attribution right includes the right to be associated with a work under a pseudonym or to remain anonymous. This too finds a firm foothold in a feminist political

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<sup>106</sup> Richa Nagar, ‘Storytelling and co-authorship in feminist alliance work: reflections from a journey’ (2013) 20 *Gender, Place & Culture* 1, 3 (citing Sharmila Rege, ‘Education as Trutiya Ratna: Towards Phule-Ambedkarite Feminist Pedagogical Practice’ (2010) 45 *Economic and Political Weekly* 88, 95).

<sup>107</sup> Compare Tushnet (n 69) 811 (describing the problem of misrepresentation when authors write as if they belonged to historically disadvantaged minority groups, but in fact were members of the majority).

<sup>108</sup> Richa Nagar, *Hungry Translations: Relearning the World Through Radical Vulnerability* (University of Illinois, 2019), 1.

<sup>109</sup> This conclusion ultimately dovetails with arguments by other commentators that focus on the public interest in identifying the author as the source of the work. The public interest here is in knowing the source of the work, although the capacity of authorial attribution to function as an accurate identifier of source should not be assumed. For further discussion on this point, see eg Jane C Ginsburg, ‘The Right to Claim Authorship in U.S. Copyright and Trademarks Law’ (2004) 41 *Houston Law Review* 263; Laura A Heymann, ‘The Birth of the Authonym: Authorship, Pseudonymity, and Trademark Law’ (2005) 80 *Notre Dame Law Review* 1377; Greg Lastowka, ‘The Trademarks Function of Authorship’ (2005) 85 *BULRev* 1171; Tushnet (n 69)

<sup>110</sup> Nagar (n 108).

<sup>111</sup> Rosenblatt (n 72) 634.

<sup>112</sup> Rosemary J Coombe, ‘Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue’ (1991) 69 *Texas Law Review* 1853, 1878.

theory of moral rights. For artists whose works challenge established hierarchies—especially those who hail from marginalised communities, are subject to restrictive gender norms, or fear retaliation and other adverse consequences to their privacy and safety—anonymity can be wielded as a shield.<sup>113</sup> In this context, the right to prevent attribution by name becomes a tool to enable a contribution to the cultural dialogue by a speaker who might otherwise remain silent. Indeed, anonymity can emerge as an expressive strategy in itself; part of the power to represent oneself (or not) on one’s own terms—but only if the author enjoys meaningful agency to opt for or out of anonymity. After all, “for much of history, anonymity did not protect the vulnerable, but excluded women and others from authorship and ownership of their own words, erasing them from the archive, even from history and in the process creating vulnerability through rendering people nameless.”<sup>114</sup> As Niamh Moore reminds us, “anonymity has a history—and a politics—as well as an ethics.”<sup>115</sup> Its moral weight and political potential is necessarily contingent on place and time.

Judith Butler writes that “there is no self...who maintains ‘Integrity’ prior to its conflictual cultural field. There is only a taking up of the tools where they lie, where the very ‘taking up’ is enabled by the tools lying there.”<sup>116</sup> A feminist politics of moral rights, in our view, cannot permit existing works, as tools of expressive resistance, to be occupied or frozen in time and place by any particular author in the name of protecting “integrity”; but feminist politics can support the assertion that it matters who is taking up these tools and where they are situated in our social and knowledge hierarchy. Without contradiction, we suggest, a feminist reimagining of moral rights can accommodate the author’s claim to attribution as a matter of theory and politics, even as it resists the normative assumptions behind the rights to integrity and paternity.

And so, our feminist theory of moral rights grounds a stance against integrity but in favour of attribution. It does not follow, however, that the structures of copyright law as currently constructed are—or are likely to become—the appropriate vehicle through which to achieve the political goals of attribution described here.<sup>117</sup> The political potential of moral rights to upset the stability of gender, caste and class hegemonies is sobered by the unabating risk of further harms within these contexts of cultural dominance and subordination—harms of misattribution, exclusion and the chilling threat of legal sanction. There may indeed be moments when the moral right to attribution can be harnessed as a tool against oppression and silencing and a means to better realize the political power of our creative agency. But we are not blind to the bluntness of such legal tools, nor to the power needed to wield them.

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<sup>113</sup> During the 18<sup>th</sup> and 19<sup>th</sup> centuries, of course, many acclaimed women writers published their work under male pseudonyms because scholarly writing was considered an exclusively male bastion. See Greg Buzwell, ‘Women writers, anonymity and pseudonyms’ The British Library, <<https://www.britishlibrary.cn/en/articles/women-writers-anonymity-and-pseudonyms/>>. Virginia Woolf was surely right when she “ventur[ed] to guess that Anon...was often a woman.” Virginia Woolf, *A Room of One’s Own* (London: Penguin Classics, 1929/89), 49. But Woolf also spoke with envy of the anonymous creative artist whose authorship was profoundly *communal*, with “no sense of property” or need to “stamp one’s name,” in contrast to “the isolation of the individual writer who emerged in the Renaissance.” Virginia Woolf (Brenda R. Silver (ed)), “‘Anon’ and ‘The Reader’: Virginia Woolf’s Last Essays” (1979) *Twentieth Century Literature* 356. See Sharon O’Dair, ‘Laboring in Anonymity’ (2008) 16 *symplekē* 7, 8-10.

<sup>114</sup> Niamh Moore, ‘The politics and ethics of naming: Questioning anonymisation in (archival) research’ (2012) 15(4) *International Journal of Social Research Methodology* 331, 332.

<sup>115</sup> *ibid.*

<sup>116</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 145.

<sup>117</sup> Compare Tushnet (n 69) 820 (concluding that the norms of credit are a moral matter, which is best left separate from law “when law’s tools are too crude to make the fine distinctions that prevail in ethics.”)

What is really called for, we suggest, is a wider politics and ethical practice of attribution—in and between creative communities, in the academy, in the media, in public discourse—that acknowledges the contributions and amplifies the voices of women and other marginalized actors as equal participants in our cultural dialogue. We can (and must) critique conventional conceptions of authorship, creativity and originality without denying the critical importance of creative agency and attribution.<sup>118</sup> Indeed, the call for advancing a *feminist praxis* of attribution and acknowledgment is ultimately aimed at disrupting traditional assumptions about authority, voice and value. It builds not upon tired patriarchal norms of individual ownership and control (“it is mine”), but upon aspirations of inclusion in the dialogic process of meaning-making (“I hear you and am heard”).

#### 4. CONCLUSION

There is so much more that could be said from a feminist perspective about particular aspects or applications of moral rights—and their limits—in law, policy and practice. Our goal here, however, has been more modest. First, we hope to have convinced our reader that feminist theory has something to say about moral rights in the copyright system, and that this, in itself, pushes toward a new way of situating, defining and debating moral rights claims and requests for reform. Beyond that, we hope to have unsettled the moral rights system from its comfortable perch atop copyright’s moral high ground. Far from the pure and spiritual *Other* of copyright’s much maligned commodified form, moral rights as currently theorized represent a similar kind of claim to dominance, exclusion and control. Whether moral rights can now be meaningfully reimagined to advance equality and expressive agency is a question we mean to pose—but not one we purport to answer.

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<sup>118</sup> Compare Brian L. Frye, ‘Plagiarism is Not a Crime’ (2016) 54 *Duquesne Law Review* 133. We resist the notion that attribution norms are unjustified in the absence of personality-based rights, ownership of ideas, or a sound economic rationale. However, our call for generous attribution practices should not be understood as support for punitive academic anti-plagiarism norms, which typically reinforce the logic of originality and ownership, reinscribing knowledge hierarchies and exclusions.