Copyright Law, Free Speech and Self-Fulfilment

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> In a civilised nation much of reality is artifact. Too broad a set of intellectual property rights can give one set of persons control over how that reality is viewed, perceived, interpreted, control over what the world *means*.
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> Wendy Gordon, 'Reality as Artifact: from Feist to Fair Use' (1992) 55(2) *Law and Contemporary Problems* 93 at 101.

1. Introduction

The proposition that we are a civilised nation with, in consequence, a largely artifactual reality, is unlikely to be particularly contentious, but any proposition that we have granted too broad a set of intellectual property rights is likely to be hotly contested. How broad is *too* broad? The question, at least in that form, is probably ultimately unanswerable because it is essentially a question about contested political choices and about who wins and who loses when intellectual property rights expand. Certainly no amount of empirical evidence about trade surpluses, deficits, the dead weight loss of monopolies or the positive externalities of research and development can tell us finally that, yes, *this* broad is too broad or not broad enough. The issue is resolvable, if at all, only by the development, in a civilised nation, of some social and legal consensus on the appropriate limits of intellectual property regimes, and that consensus can only be forged by the making of many different arguments, discussions and negotiations — narrow and broad, partisan and academic.

The aim of this article is to make one such contribution to the development of a consensus by selecting a clear and relatively undisputed social good, namely, freedom of speech, and considering one potential effect of copyright law's encroachment upon that good.[1] Two fundamental assumptions, drawn from the existing extensive literature on freedom of speech, will be used as a basis for the specific argument being made. The first such assumption is simply that freedom of speech is indeed a social good, something which is so worth having that it can be used as itself a reason to constrain other activities, however meritorious or welfare-

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1 I include within the concept of copyright law, for the purposes of this paper at least, the law of moral rights which, though technically distinct from copyright law, is integrally connected with it and is in fact almost uniformly implemented through general copyright legislation by parties to the *Berne Convention for the Protection of Literary and Artistic Works 1886*.

enhancing, which inhibit or thwart it.[2] The second relevant assumption is that the idea of free speech as a clear social good is reliably and strongly supported by three principal arguments,[3] namely, that freedom of speech is conducive and indeed essential to the autonomy and self-fulfilment of the individual; that freedom of speech creates a market-place of ideas which in turn leads to the discovery and promulgation of truth and, finally, that freedom of speech promotes and is required for the functioning of a representative and democratic government.[4]

The analysis here is reasonably restricted in scope. It will proceed by considering the ways in which copyright regimes (including moral rights legislation) through the substantial restrictions which they impose upon free speech, have an impact upon one, in particular, of those social goods which free speech helps to create and sustain, namely, autonomous and fulfilled individuals. This is not to imply that the restrictions on freedom of speech brought about by copyright law do not affect in serious and important ways the other two social goods which free speech protects, namely, the market-place of ideas and the democratic dialogue. If anything, the effect of intellectual property rights on those two social goods is more pronounced. The focus of the present paper is, however, only upon the particular effects, if any, of copyright law upon the construction and expression of individual identity.

That copyright law does interfere with freedom of speech is not itself in question in this paper. Copyright owners are without doubt able to constrain the

2 See Frederick Shauer, 'Free Speech in a World of Private Power' in Tom Campbell & Wojciech Sadurski (eds), *Freedom of Communication* (1994) at 2, referring to Joseph Raz, *Practical Reason and Norms* (1975) and Joseph Raz, *The Morality of Freedom* (1986). See also Frederick Shauer, 'The Second Best First Amendment' (1990) 31 *William and Mary LR* at 1–23; Frederick Schauer, *Free Speech: A Philosophical Enquiry* (1982) at 35–59; Wojciech Sadurski, *Freedom of Speech and its Limits* (1999) at 7–35.

3 Michael Chesterman, *Freedom of Speech In Australian Law* (2000) at 20; Tom Campbell, 'Rationales for Freedom of Communication' in Tom Campbell & Wojciech Sadurski (eds), *Freedom of Communication* above n2 at 17; Frederick F Schauer, *Free Speech: A Philosophoical Enquiry* above n2.

4 These three justifications for the principle of freedom of speech will be the focus of attention here and are by far the most widely accepted and significant. There are, however, other justifications which are sometimes proffered. See, for example, Thomas Emerson, 'Toward a General Theory of the First Amendment' (1963) 72 *Yale LJ* 877 at 884–86 where the fourth justification for protecting free speech is said to be that free speech contributes to 'maintaining a balance in society between change and stability.' See also the additional list by Tom Campbell, 'Rationales for Freedom of Communication' in Tom Campbell & Wojciech Sadurski (eds), *Freedom of Communication*, above n2 at 17, that free speech provides (4) the stimulus to tolerance (5) the flourishing of plurality and (6) the efficient allocation of resources. Campbell also refers to a 7th justification, namely, 'the intrinsic worth of the communicative experience.' Note also that the literature also contains 'negative' justifications for the protection of freedom of speech. See Keith Werhan, 'The Liberalization of Freedom of Speech on a Conservative Court' (1994) 80 *Iowa LR* 51 at 88–89: 'These justifications are positive in that each claims that the freedom of speech deserves special protection because it enhances our ability to achieve some valuable benefit – the discovery of truth, self-government and/or personal autonomy.... By contrast, negative justifications for the freedom of speech focus not on any special value of free speech but on the special dangers presented by government regulation of that right.'

speech of non-owners. The owners of copyright works, making use of the law which creates and enforces their property rights, are able to stop people from saying what they want, when they want, in the way that they want to say it, in the forum and in the form in which they choose to say it and therefore, without more, there is an obvious prima facie interference with their right to expressive freedom.[5] In the recent case of *Ashdown v Telegraph Group Ltd* [2001] Ch 685, where the interaction between copyright law and the right to freedom of expression guaranteed by Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* was considered for the first time by an English court, the particular free speech constraints of copyright were expressly recognised:

> Copyright does not protect ideas, only the material form in which they are expressed. It is therefore a restriction on the right to freedom of expression to inhibit another from copying the method of expression ... of the same idea. It must follow that intellectual property rights in general and copyright in particular constitute a restriction on the exercise of the right to freedom of expression.[6]

Similarly, in *Harper & Row Publishers Inc v Nation Enterprises* 471 US 539 (1985), which is one of the most significant decisions by the Supreme Court of the United States on the matter of copyright and the First Amendment, the court itself acknowledged that, although it may be otherwise justified, the law of copyright does lead to suppression of speech:

> [C]opyright ultimately serves to further First Amendment purposes by providing a financial incentive for creative speech, but the fact remains that in order to provide that incentive for some speech, other speech is restrained.[7]

Although copyright law undoubtedly both restricts freedom of speech and incorporates measures within itself (such as the doctrine of fair dealing and the

5 Patricia Loughlan, 'Looking at the Matrix: Intellectual Property and Expressive Freedom' (2002) 24 *European Intellectual Property Review* 30. The article provides an account of the extent to which the First Amendment guarantee of freedom of speech is currently being used to limit the reach of intellectual property rights in the United States.

6 *Ashdown v Telegraph Group Ltd* [2001] Ch 685 at 693. In the *Ashdown* case, a newspaper published a series of articles in which substantial sections of a confidential minute of a meeting with the Prime Minister and others which had been made by the plaintiff were extracted without authorisation. The plaintiff copyright owner sued for copyright infringement. The significant issue in the case was whether the right to freedom of speech guaranteed by the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* could provide a defence separate from and beyond that provided by the *Copyright, Designs and Patents Act* 1988 (UK) itself. It was held at trial that the necessary balance between freedom of speech and protection of private property had already been struck by the domestic legislation (and its provisions for, inter alia, 'fair dealing' with copyright works) and any restriction on freedom of speech brought about by that legislation was no more than was 'necessary in a democratic society' at 685.

7 *Harper & Row Publishers Inc v Nation Enterprises* 471 US 539 (1985), 558.

idea/expression dichotomy)[8] to alleviate the harshness of that restriction, the aim here is not to track the extent of the restrictions or delineate the alleviations. The aim is to take the most simple and fundamental restriction of copyright law, namely, the prohibition on copying — the rule that one shall not copy the expression of another — and ask how that restriction can be viewed as interfering with an individual's self-fulfilment. If the basic restriction upon free speech which copyright law imposes has little or no impact upon one of the very social goods which free speech helps to create and sustain, then that is a relevant matter to be taken into account in working out a consensus about the appropriate limits of copyright law. The article concludes that the impact of copyright law upon the particular social good under consideration is at its highest in those precise circumstances (such as where the works in question are parodic or appropriative) wherein a person *cannot* express himself or herself without quoting from or otherwise using another person's work. This impact, it is suggested, is relatively limited but nonetheless sufficiently serious as to warrant special attention consistently being given to free speech concerns when copyright rules are being formulated, interpreted or enforced, domestically or internationally.

Arguments about the specific legal mechanisms by which those concerns can best be implemented in any particular country, whether by (i) independent constitutional protections, like the First Amendment to the Constitution of the United States, which provides that 'Congress shall make no law... abridging the freedom of speech', or multinational Conventions such as the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*, which provides in Article 10 that '[e]veryone has the right to freedom of expression',[9] (ii) internal mechanisms within particular intellectual property legislation, like fair dealing in copyright law, or (iii) judge-made, case-based doctrines like public interest defences to infringement actions, are beyond the

8 These two doctrines are often (though possibly wrongly) viewed, by judges at least, as having the ability to resolve any conflict between copyright law and freedom of speech concerns. See, for example, *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 32 ALR 485; *Sid & Marty Kroffi Television Prod Inc v McDonald's Corp* 562 F 2d 1170 (1977), 1157: 'the idea expression dichotomy already serves to accommodate the competing interests of copyright and the First Amendment'. The idea expression dichotomy is believed to achieve this by allowing the full and free circulation of ideas and facts while inhibiting only the reproduction of the plaintiff's actual specific images and forms of expression. The fair dealing doctrine (known as the doctrine of 'fair use' in the United States), whereby use can be made of a copyrighted work by other persons provided that the use is 'fair', is another provision of copyright law which has been widely viewed as being especially helpful in the resolution of freedom of speech concerns in the law of copyright. The fair dealing doctrine, arguably anyway, strikes an appropriate balance between the relevant competing interests.

9 Australia is bound by the protection of freedom of expression in Article 19 of the *Universal Declaration of Human Rights* 1948 as a matter of customary international law, or possibly even *jus cogens*, and is also bound specifically by Article 19 of the *International Covenant on Civil and Political Rights* 1966 which Australia has ratified.

scope of this article.[10] The point to be made here is simply that an understanding of one possible, specific, negative social consequence of the curtailment of free speech which is brought about by copyright law can help to create both a political and a legal will to curtail what may be the excesses of that law.

2. *The Autonomy and Self-Fulfilment of the Individual*

The premise here is that freedom of speech is conducive and indeed essential to the autonomy and self-fulfilment of the individual. We are by our very nature cognitive and communicative beings, social but nonetheless interested in ourselves as individuals, capable of engaging with the world as individuals and forming and expressing our individual views on what we find there. We cannot, on this view, fully develop our potential as individuals without the freedom to think and to speak as we please, to formulate, articulate and express our own thoughts:

> Such freedom is conceived as a fundamental personal right directly attributable to the fact that all people are independently endowed with their own separate capacity for self-expression and indispensable if they are to develop their moral and intellectual capacities to the full. They should therefore be free to formulate and express their own statements on any issue which to them appears important and should be exposed to the full range of competing arguments.[11]

The individual, cognitive self is developed and constituted through expressive, communicative activity and, accordingly, to interfere with that activity is to interfere with the development and realisation of the self and the manifestation of a unique personality.[12]

Without challenging that argument, one can deny its relevance to questions concerning the reach of copyright law. Self-expression may be a 'core intrinsic individual right'[13] but the issue is this: does my legal inability to express something *in the same way that someone else has expressed it* have any

10 As a practical matter, in a country like Australia where there is no, or only a very limited, constitutional protection for freedom of speech, free speech concerns have to be worked out through specific legislation and case law. A recognition of the inhibiting effect of copyright on free speech might mean, for example, an increased scope given, by express statutory provision or by judicial interpretation, to the doctrine of 'fair dealing' with copyright works. It might mean that when a characterisation of something like a compilation of facts as either 'idea' or 'expression' must be made, the recognition that ideas are not brought within the exclusive control and therefore within the exclusive speech-right of a private owner will help to persuade a judge to lean toward a characterisation of the thing as 'idea'.

11 Michael Chesterman, above n3 at 20; Martin Redish, 'The Value of Free Speech' (1982) 130 *U of Penn LR* 591; Tom Campbell, 'Rationales for Freedom of Communication', above n3. See also S Ingberm, 'Rediscovering the Communal Worth of Individual Rights: the First Amendment in Institutional Contexts' (1990) 69 *Tex LR* 1; Martin Redish & Gary Lippman, 'Freedom of Expression and the Civil Republican Revival in Constitutional Theory: The Ominous Implications' (1991) 79 *Cal LR* 267.

12 A number of terms could be used reasonably interchangeably here. See, for example, the use of the various terms 'self-expression/self-development/self-determination/autonomy' by Tom Campbell in 'Rationales for Freedom of Communication', above n3 at 33 to describe the intrinsic individual right which theorists point to as a legitimation of the protection of free speech.

13 Id at 35.

detrimental effect upon my ability to become autonomous, my self-fulfilment? Arguments can be made against the thesis that copyright law interferes with free speech in a way which interferes with individual autonomy and development. One commentator has expressed such an argument as follows:

> Copyright does nothing to inhibit self-fulfilment, since expressing the beliefs and opinions of another person in the exact words used by that other person is not necessary to the development of one's own ideas.[14]

That is the key argument — copyright law may interfere with your freedom to say what someone else has said, in the way that he or she said it, but so what? You do not have to use the words of another to express yourself and doing so does not enhance your identity. Saying what someone else has said in the way that that other person said it does not strengthen your development as an individual and you cannot fulfil yourself by quoting someone else. In fact, the law of copyright is probably helpful to your development as an individual because it forces you to express yourself in your own individual and unique way, to speak in your own words. The law of copyright does not protect ideas, so there is no substantive interference with your freedom to develop and communicate your ideas, perceptions and insights about the world. Your potential as a unique cognitive being is enhanced by formulating and expressing your own thoughts, not by parroting others.

If this argument is right, then it follows that, although copyright law may indeed restrict freedom of speech, such a restriction ought not to be a matter of concern. Freedom of speech is a social good in so far as it aims, inter alia, to develop autonomous, unique and self-fulfilled individuals. Since the particular restriction on freedom of speech which is brought about by the interdiction against copying does not affect that aim and can have no effect on individual self-development, then the particular restriction on freedom of speech which is brought about by copyright law should be of little concern.

That argument is highly persuasive and mostly right, and it probably helps to explain why the restrictions on speech brought about by copyright law have been largely ignored, at least until recently, by First Amendment theorists and others interested in free speech theory. But a counter-argument is nonetheless viable here. It is possible to argue that, in limited but significant circumstances, copyright law can inhibit the capacity for individual self-fulfilment, provided that self-fulfilment is not understood exclusively as involving the expressing of unique ideas in a unique form. That counter-argument will be made in this paper, with the intention of qualifying, though not supplanting, the proposition that laws against copying do not interfere with individual development and autonomy.

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14 Michael J Haungs, 'Copyright of Factual Compilations: Public Policy and the First Amendment, (1990) 23 *Colum JL & Soc Probs* 347 at 366, fn 122. See also *Nimmer on Copyright* para 1.10[B][2] at [1–78]: 'free speech as a function of self-fulfilment does not come into play. One who pirates the expression of another is not engaging in *self*-expression in any meaningful sense.'

The circumstances in which the prohibition on copying results not just in a restriction of an individual's freedom of speech but in a restriction of that individual's autonomy and self-fulfilment, are those in which a person *cannot* express himself or herself without quoting from or otherwise using another person's work. Consider once again the argument set out above: copyright does nothing to inhibit self-fulfilment, since expressing the beliefs and opinions of another person in the exact words used by that other person is not necessary to the development of one's own ideas.

But if persons cannot develop and communicate their ideas without copying expression, then restricting their copying of expression silences them. As that restriction on copying inhibits their communicative potential, it also inhibits their human potential and harms them in precisely the way that is under consideration here. The free speech restriction has obstructed a particular social good, the creation of autonomous and fulfilled individuals and, if that is the case, then the strength of the argument in the passage set out above disappears.

This all depends upon the premise that there are circumstances in which persons cannot develop and communicate their ideas without copying expression. But such circumstances must, according to conventional copyright wisdom anyway, be relatively rare if they can exist at all. The idea/expression dichotomy is one of copyright law's most resonant and foundational concepts and it seems to militate against the existence of such circumstances. The principle that copyright can be granted for a form of expression but not for an idea has been described as 'the dominant principle of copyright law'[15] and it depends upon acceptance of the view that expression can always be separated from idea and that ideas are always free for use by individuals. No person can therefore be said to have to use someone else's expression to communicate his or her ideas.[16] Although the idea/expression dichotomy is subject to serious criticism and it is arguable that the principle exhibits an indeterminacy so radical as to call its legitimacy as an effective and functioning principle of law into question,[17] it will be roughly accepted here for the purposes of this paper.

The argument here will instead be based upon the effect of copyright law on particular types of speech, namely, the two speech-forms of appropriation art and parody. What these two speech-forms share is the inevitability of copying prior

15 *Autodesk Inc v Dyason (No. 2)* (1993) 176 CLR 300 at 303 (Mason CJ).

16 It should be noted that it is acknowledged in copyright law, through the doctrine of merger, that there may be rare instances in which the expression of an idea is found to be inseparable from the idea because there is only one possible way of expressing that idea. In such cases, the expression is not entitled to the protection of copyright. See *Kenrick & Co Ltd v Lawrence & Co* (1890) 25 QBD 99; *Autodesk Inc v Dyason* (1992) 22 IPR 163 at 172 (Dawson J); *Powerflex Services Pty Ltd v Data Access Corp (No. 2)* (1997) 75 FCR 108 at 124. The expression is to be 'given therewith to the public': *Baker v Selden* 101 US 99 (1879), 103, a case which is generally viewed as the authoritative source for the idea/expression dichotomy and the doctrine of merger in the United States. The doctrine of merger has, however, been doubted by the High Court of Australia recently in *Data Access Corporation v Powerflex Services Pty Ltd* (1999) AIPC 39,919 at 39 928 and also by Jacob J in *Ibcos Computers v Barclays Mercantile* [1994] FSR 275 at 289–91.

expression, and it should be noted that in each of these speech forms, the prior *expression* is exactly the *idea* that the speaker wants to use. Both are of necessity constituted by the incorporation within themselves of the prior expression of another individual and while neither can exist as an original, independent, autonomous creation, both are themselves undoubtedly 'authored' by individuals who are expressing themselves through their creation.

Turning first to the speech of the appropriation artist, the argument is that the prohibition on copying interferes with a specific type of artistic expression (one which requires, by its very nature and purpose, the quotation or appropriation of another's form of expression) and that suppression of that appropriation suppresses the artist's autonomy and self-fulfilment in a way that the prohibition on other types of copying of speech does not. It should be noted that there is an underlying issue here about the status of artistic creations (especially those which are artifactual rather than obviously textual) as forms of communication or expression which are within the ambit of legal mechanisms designed to protect free speech. Discussions of whether or not artistic expression, including the non-representational, can be viewed as a form of speech have often centred around the issue of the extent to which artistic expression can achieve constitutional protection under the First Amendment in the United States.[18] Whether or not artistic communication is speech for that particular purpose, it is strongly arguable, and will largely be assumed here, that it is a form of speech, a way of communicating ideas to others, a way of describing, analysing, commenting on

17 There is a substantial body of opinion that the idea/expression dichotomy is indeterminate, impossible to apply and largely non-functional as a principle of law except as a way of rationalising and justifying decisions on copyright issues actually reached on other grounds. This is an argument beyond the scope of the present paper, but for judicial and academic critiques, from various countries, of the idea/expression distinction and its legal effectiveness, see for example Patricia Loughlan, 'The Marketplace of Ideas and the Idea/Expression Distinction of Copyright Law' (2002) 23 *Adelaide LR* (in press); Laddie, Prescott, Vitoria, *The Modern Law of Copyright* (2nd, 1995) at 273–291; *Herbert Rosenthal Jewelry Corp v Kalpakian* 446 F 2d 738 (1971), 742; John Shepard Wiley Jr, 'Copyright at the School of Patent' (1991) *U of Chi LR* 119 at 123: 'a doctrine that announces results but does not determine or justify them'; Edward C Wilde, 'Replacing the Idea/Expression Metaphor with a Market-Based Analysis in Copyright Infringement Actions' (1995) 16 *Whittier LR* 792 at 817: 'The idea/expression metaphor does not contain an inherent principle to determine where to draw the line between idea and expression; therefore, the court must look outside the metaphor for guidance'; Richard H Jones, 'The Myth of the Idea/Expression Dichotomy in Copyright Law' (1990) 10 *Pace LR* 551; *Nichols v Universal Pictures Corporation* 45 F 2d 119 (2d Cir.1930), 121, cert. denied 282 US 902 (1931): 'It is of course essential to any protection of literary property, whether at common law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations. That has never been the law, but as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that, as was recently well said by a distinguished judge, the decisions cannot help much in a new case... Nobody has ever been able to fix that boundary and nobody ever can.' The last sentence in this passage was approved by the Full Federal Court in *Powerflex Services Pty Ltd v Data Access Corp* (1997) 75 FCR 108 at 123.

18 See for example Sheldon H Nahmod, 'Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment ' [1987] *Wisconsin LR* 221; Patricia Krieg, 'Copyright, Free Speech and the Visual Arts' (1984) 93 *Yale L J* 1565 at 1565.

and even constituting some aspects of the world.[19] This is so even though the communication may be symbolic, emotional, non-rational, visual, or consisting of a sequence of sounds without words or overt meaning. These are forms of expression of the maker which are, on this view anyway, at least as significantly communicative as rational, discursive prose. Art speech has an instrumental value to society[20] but it also functions as an assertion of the self and the value of individual experience and vision.

Restrictions on artistic expression are therefore restrictions on freedom of speech. The issue here is whether or not the copyright prohibition on the copying of artistic expression can be viewed as an interference with the development and self-fulfilment of the individual. It will be recalled that ordinarily the prohibition on copying is not viewed as so interfering, because the parroting of others' expressions is not conducive to individual development and self-fulfilment anyway. Is there anything different about inhibiting the copying of artistic expression? Arguably, yes, because there are forms of artistic expression which *require* copying so that if you cannot copy then you cannot speak, and if you cannot speak then your development as a unique and cognitive being is stunted.

Many significant contemporary art practices, in the latter part of the 20th Century in particular, took and continue to take the form of 'appropriation art', that is, art which relies on quotation and takes 'possession' or 'appropriates' to itself images from other artworks or from commercial sources. Appropriation art, and the montage genre, borrow images (or sequences of words or sounds) from other works and recontextualise those images, in order to critique the earlier work and the social or aesthetic values which it embodies, and to bring out other meanings and potentialities hidden within it.[21] In appropriation art, in its various forms, the pre-existing images or forms of words or sounds which are appropriated are needed by the artist as a language, a way of describing the world, shaping her vision of the world and realising her self and identity. Freedom of access to those images is therefore essential to this whole form of expressive cultural and communicative activity.

Famous practitioners of appropriation art, such as Barbara Kruger, with borrowed images from magazines and catalogues, and pop artists, like Andy Warhol with prints of Campbell's soup tins and Roy Lichtenstein with reproduced comics, showed their society something of what its culture really was, through their unique vision and through their use of images which were 'owned' by someone else and, potentially at least, 'protected' by the law of copyright. An appropriation artist who suffered the particular misfortune of being caught up in

19 The last of these, namely, 'constituting some aspects of the world' is intended to reflect the lines from Wendy Gordon with which this paper began, namely, that, 'in a civilised nation, much of reality is artifact...'. See above, opening quotation.

20 Marci A Hamilton, 'Art Speech' (1996) 49 *Vanderbilt LR* 73 provides a powerful account of art's instrumental function in a representative democracy.

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

copyright litigation through his appropriation of a copyright-protected image was Jeff Koons.[22] The plaintiff in this now-famous case owned the copyright in a photograph of a wholesome-looking couple, sitting on a bench and holding some puppies. The photograph, which was on a post card, was entitled 'Puppies' and had been taken by an artist working within a very different artistic tradition from that of Koons. Koons got the image made up into a sculpture, entitled 'String of Puppies' which was then exhibited in a New York art gallery as part of an exhibition entitled 'The Banality Show'. He was subsequently successfully sued for copyright infringement by the owner of the copyright in the photograph and the work was accordingly removed from the public sphere. Koons has explained why he uses materials such as the 'String of Puppies':

> Everybody grew up surrounded by this material ... I try not to use it in a cynical manner. I use it to penetrate the mass consciousness and to communicate to other people. *This is the only material I know how to manipulate.* [Emphasis added]

It is plain from Koons's statement that if he is prevented by the law of copyright, as he was in this case, from using material such as previously published images, then he cannot speak at all. Pre-existing images are the only materials he knows how to manipulate. The law of copyright has deprived the public of new and transformative meanings in 'String of Puppies', but more to the point here, it has prevented the self-fulfilment of the artist himself and all those like him.

When Margaret Mitchell freely wrote and published *Gone With The Wind*, her inchoate capacity for self-expression came to fruition, as did the self-fulfilment flowing from that expression. Alice Randall later also had a self to express, develop and fulfil through communicative action, but her book, *The Wind Done Gone*, appropriated characters, scenes and plot structures from *Gone With The Wind* (so that the latter book's latent racist themes and images could be made apparent and criticised) and was suppressed by a copyright infringement action brought by Mitchell's estate. At trial, the judge was particularly unsympathetic to arguments based on Randall's need for the previous work, that her specific critical and creative vision required the appropriation of parts of *Gone With The Wind* itself:

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22 *Rogers v Koons* 960 F 2d 301(2nd Cir.) (1992), cert. denied 113 SCt 365. Koons has in fact quite frequently found himself involved in copyright infringement actions over his critical, sculptural use of prior artistic works in which copyright is held by another. See *Campbell v Koons* 91 Cir. 6055, 1993 (SDNY); *United Features Syndicate, Inc v Koons* 817 F Supp. 370 1993 (SDNY). Koons's defence of 'fair use' of the earlier artistic work in the *Rogers* case was not accepted and the case generated much controversy, most of it strongly critical of the decision and supportive of an expanded understanding of 'fair use' based on a recognition of the First Amendment freedom of speech values involved. See, for example, Lynne A Greenberg, 'Art of Appropriation: Puppies, Piracy and Post-Modernism' (1992) 11 *Cardozo Arts & Entertainment LJ* 33; Marlin H Smith, 'The Limits of Copyright: Property, Parody And The Public Domain'(1993) 42 *Duke LJ* 1233. The arguments have been very largely instrumental and strongly focused on the social harm done by the decision in depriving the public of the new meanings and ideas contained in the defendant's appropriative works. The point being made in this paper is not, of course, that those arguments are not important, but that they can and should be supplemented by an understanding that such a decision also affects the defendant's capacity for, and right to, the self-fulfilment that flows from self-expression.

> Many other writers... have found ways to criticise slavery without taking from *Gone With The Wind*.[23]

Randall would, of course, be thwarted by that suppression. Quite apart from any harm done to the public sphere and to the market-place of ideas by being deprived of the new meanings and ideas and insights potentially generated by her appropriative exegesis of *Gone With The Wind*,[24] Randall was, on the argument presented in this paper, harmed by the law of copyright in her capacity to express herself and, accordingly, to construct and fulfil her unique identity and self. In this context, Gordon's statement that '[t]oo broad a set of intellectual property rights can give one set of persons... control over what the world *means*',[25] starts to feel full of potent content and Nimmer's statement that 'one who pirates the expression of another is not engaging in *self*-expression in any meaningful sense'[26] starts to falter in its persuasive power.

Parodic expression is another form of speech which of necessity involves copying and which is also potentially severely curtailed by the law of copyright.[27] Anglo-Australian copyright law has in fact been particularly stringent and unyielding in its suppression of parody and particularly closed to considerations of the special status of parodic works.[28] Texts of all kinds have messages of all kinds and parodies of those texts subvert them with messages of their own. Parodists play around with cultural forms, and express themselves by 'jamming' the messages being sent by others.[29] Although both the original and the subversive messages have (arguably anyway) a potentially equal speech and truth value, the subversive, parodic message is legally constrained by the rules of copyright in ways that the original is not. The parodist is thwarted in ways that the original creator is not, with obvious consequences for her self-expression and fulfilment.

The problem flows from the fact that the parodist, like other appropriation artists, cannot express her idea in any way that does not involve reproduction at

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23 *Suntrust Bank v Houghton Mifflin Co* 136 F Supp 2d 1357 (ND Ga. 2001) (Pannell J). The trial decision, granting a preliminary injunction barring the sale of *The Wind Done Gone* was reversed on appeal: *Suntrust Bank v Houghton Mifflin Co* 60 USPQ 2d 1225 (11th Cir. 2001). The Court of Appeals held that the defendant would be entitled to a fair use defence for the parody. The injunction barring publication constituted a wrongful prior restraint, in the absence of an affirmative showing of irreparable injury.

24 The Court of Appeals was particularly persuaded by arguments based on the harm done to the public good by the suppression of the defendant's speech. See *Suntrust Bank v Houghton Mifflin Co* 60 USPQ 2d 1225 (11th Cir. 2001), 1283 citing *Leibovitz v Paramount Pictures* 137 F3d 109 (1998), 115: 'Because the social good is served by increasing the supply of criticism – and thus, potentially, of truth – creators of original works cannot be given the power to block the dissemination of critical derivative works'.

25 Wendy Gordon, 'Reality as Artifact' see above, opening quotation.

26 See *Nimmer*, above n14

27 Definitional boundaries between appropriative art and art which is specifically parodic are blurred, but, at least for the purposes of the point being made in this paper, do not need to be clarified or tightened.

28 See, for example, *Williamson Music Ltd v The Pearson Partnership* [1987] FSR 97 and *AGL Sydney Ltd v Shortland County Council* (1990) AIPC 36, 193, where both courts simply applied the usual copyright infringement tests for reproduction of a work in material form.

least to some degree. To express him or herself, the parodist not only needs a target source, he or she needs to be able to imitate that target and reproduce its essential characteristics, because parodic works are never autonomous or independent. That is how they work. Parodic works are parasitic on their sources because without reproduction, the audience could not identify the target and both the joke and the critique would be lost. When *2 Live Crew* wanted to parody Roy Orbison's song 'Oh Pretty Woman', they had to reproduce enough of the words and music of the song to catch it and cause us to think 'Oh! It's "Oh Pretty Woman"! Ha! No it's not!'.[30] If 'Oh Pretty Woman' could not be reproduced, then *2 Live Crew's* raunchy, funny, scathing, misogynist work about 'Big Hairy Woman' could never exist — the parodist could not speak and in so far as self-fulfilment is dependent upon being able to speak, the parodist could not participate in that particular benefit of self-fulfilment which freedom of speech is intended to bring about.

So far in this discussion it has been assumed that copyright law only prevents the copying of previous works, but the advent in the common law countries of moral rights legislation and, in particular, the statutory right of integrity, has begun yet another regime of potential speech inhibition. Pursuant to the argument in this paper, this is another regime, under the umbrella of copyright, that potentially strongly interferes with the self-expression and self-fulfilment of, in particular, artists and parodists.[31] The right of integrity is a personal, non-alienable right which lasts at least for the duration of the copyright period but can be exercised by the author of the work (or his or her estate) regardless of who owns the copyright. In general terms, it creates a conservation of cultural forms through a prevention of any material mutilation, distortion or alteration of the author's work, at least if such change prejudices the author's honour or reputation. The right of integrity has been called a 'charter for private censorship',[32] and it has been highly

29 Naomi Klein in *No Logo* (2000) at 280 describes the practice of 'culture jamming' as 'the practice of parodying advertisements and hijacking billboards in order to drastically alter their messages.' But the metaphor of 'culture jamming' is a powerful one and can be extended to include all parody. Parody 'jams' the culture in the sense that it absorbs and then improvises with and beyond the message being sent by the particular cultural form which it is attacking. Parody also 'jams' in the sense that it interferes with the transmission of the target's message. Arguably, the more dominant and entrenched the cultural form is, the more powerful its message is and therefore the more useful the 'jamming' parody. See S Brand, 'Dan O'Neill Defies US Supreme Court — A Really Truly, Silly Moment in American Law' (1978) 21 *Co-Evolution Q* 41: 'Prodigious success and its responsibilities and failures draws parody. That's how a culture defends itself, especially from institutions so large that they lose track of where they stop and the world begins so that they try to exercise their internal model of control on outside activities'.

30 *Campbell v Acuff-Rose Music, Inc* 114 St.Ct 1164 (1994). The actual outcome of the case was of course that the parody was allowed as a 'fair use' of the copyrighted work. The point here is not that the law of copyright does not have ameliorating doctrines which can and do allow some copying to take place but that when those doctrines are being judicially considered in individual cases or even legislatively reviewed, the matter of free speech and the construction of individual identity and self-fulfilment should be factored strongly into the result.

31 Moral rights legislation has long existed in many civil law countries but is relatively new to many common law countries, which have only enacted such legislation in the last two decades. See *Copyright, Designs and Patents Act* 1988 (UK); *Copyright Act* 1994 (NZ); *Visual Artists' Rights Act* 1990 17 USC (USA); *Copyright Amendment (Moral Rights) Act* 2000 (Aust).

controversial on the basis that while it protects the expression of one artist, it has a strongly inhibiting effect on the expressive freedom of other artists who may want or need to make use of the original author's work in order to express and communicate their own artistic ideas:

> When a work of art is legally protected by a right of integrity, so that any change to the work or to a copy of the work or to the context of the work must be tested against the author's right, the author has a right of control over meaning and context and use which takes legally mandated precedence over both the needs of other artists who may have designs on the work and wish to change its meaning and context and over the role of readers and viewers as meaning-makers of the work. The author's view of his or her work... becomes, under a moral rights regime, the one authentic vision of the work to which we artists and readers and viewers have to defer and which we, it seems, must respect even to the extent of yielding up our own creative freedom.... Parody, in particular, is an inherently subversive art form, a kind of natural check on the cultural success of an artistic work and on the vested interests which flow from success, and its inherent susceptibility to an inhibiting moral rights assertion and an affronted 'original' artistic sensibility is plain.[33]

The inhibiting effect of the right of integrity can be seen at its strongest with respect to appropriation artists and parodists and interpretive artists, such as directors, conductors, performers — all of those who literally cannot engage in their own art without dealing with the work of another, earlier artist. Perhaps the most egregious example of this in recent years occurred when a French court held a stage director liable for an infringement of Samuel Beckett's right of integrity because the director had staged *Waiting For Godot* with the two lead roles played by women instead of men, contrary to the playwright's stage directions.[34] The example is perhaps extreme but it is not in fact noticeably outside the core meaning of the right of integrity in the Australian moral rights legislation[35] and the potential

32 Peter Jazsi, 'Toward a Theory of Copyright; The Metamorphosis of "Authorship"' (1991) 40 *Duke LJ* 455 at 497.

33 Patricia Loughlan, 'Moral Rights: a View from the Town Square' (2000) 5 *Media and Arts LR* 1 at 7.

34 See TGI Paris 3e ch, Oct 15 1992, (1993) 155 *Revue International du Droit d'Auteur* cited in T Cotter, 'Pragmatism, Economics and the Droit Moral' (1997) 76(1) *North Carolina LR* 1 at 14, fn 62.

35 The relevant statutory provisions of the now amended *Copyright Act* 1968 (Cth) are these:
s195AQ (2) A person infringes an author's right of integrity of authorship in respect of work if the person subjects the work, or authorises the work to be subjected, to derogatory treatment.
s195 AJ. In this Part:
derogatory treatment in relation to a literary, dramatic or musical work, means:
(a) the doing, in relation to the work, of anything that results in a material distortion of, the mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or
(b) the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation.
Ss195 AK and 195AL deal in a similar manner to s195AQ with derogatory treatment of, respectively, artistic works and films.

within Australia for similar cases based on similar reasoning with similar results is reasonably plain.

In the *Godot* case, the stage director had an idea which the law did not permit him to express. His expressive freedom was interfered with, and, arguably, interfered with in precisely the way that is under consideration in this paper. He had an idea about how it would be if the two lead characters in *Godot* were cast as women. That, precisely, was the idea. It was not an idea about how it would be to cast two female characters in any play other than *Godot*. If the director could not speak his idea in the way that he proposed because the law of moral rights stopped him, then he could not speak his idea at all. He was silenced and in so far as his self-fulfilment depended upon being able to express himself, that self-fulfilment did not occur.

Similarly, Alice Randall had an idea, not about how it would be if any white man from the ruling class in the Old South before the Civil War were a homosexual, but about how it would be if, specifically, Ashley Wilkes were a homosexual.[36] Her idea was not about any black and white people having sex together in the Old South, but about how it would be if black and white people were having sex together in the specific literary world of the Old South created by *Gone With The Wind*. If the law of moral rights could stop her (as it very well might do in Australia) from expressing her ideas on the basis that her work would distort and mutilate the literary work of Margaret Mitchell, then she would be very effectively silenced and stunted in her ability to express herself.[37]

It is perhaps ironic that moral rights regimes are legitimated by pointing to the intense and personal bond that exists between the artist and the created work, which is viewed as being an extension of the very self of the artist, an externalisation of inner experience:

> When an artist creates, be he an author, a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitative possibilities; he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than merely economic ones; these the copyright statute does not protect.[38]

36 Ashley Wilkes is a male character in *Gone With the Wind* who is, at least overtly, heterosexual – in love with and indeed married to a woman.

37 The United States has, unlike Australia, only a very limited moral rights legislative regime, which does not cover literary works, and accordingly a moral rights action could not have been brought by the plaintiff in *Suntrust Bank v Houghton Mifflin Co* 60 USPQ 2d 1225 (11th Cir. 2001).

38 Martin A Roeder, 'The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators' (1940) 53 *Harvard LR* 554 at 557; see also D Ciolino, 'Rethinking the Compatibility of Moral Rights and Fair Use' (1997) 54 *Washington & Lee LR* 33 at 35: 'Moral rights traditionally protected an artist's work as an outgrowth of his soul... "his spiritual [sic] child"': see also Zachariah Chafee Jr, 'Reflections on the Law of Copyright' (1945) 45(4) *Columbia LR* 503 at 506, citing Solberg, 'Copyright Reform' (1939) *Notre Dame Lawyer* 343 at 358 who refers to the words of Harvard geologist Nathaniel S Shaler in 1818: '[t]he man who brings out of nothingness some child of his thought has rights therein which cannot belong to any other sort of property.'

The right of integrity is a legal recognition of the proposition that self and identity are forged through expressive cultural activity, in particular, activity that results in particular cultural forms called works. It is nevertheless that same right of integrity which inhibits and indeed prevents from existing the self-realisation and identity of the later artist (like Alice Randall or the stage director of *Waiting for Godot*) who needs the work of the earlier artist (like Margaret Mitchell or Samuel Beckett).

3. *Conclusion*

> 'O, there has been much throwing about of brains'
> *Hamlet* (II, 2, 361–2)

There has indeed been much throwing about of brains over the legitimacy and desirability of each proposed extension to the law of copyright, including moral rights, in recent years. Because such extensions have, once proposed, generally been enacted, it befits (as Hamlet might say) members of the Anglo-Australian copyright community to engage in constructing a coherent and responsible copyright jurisprudence, one which includes consideration of copyright's effect on matters such as expressive freedom and the social goals of that freedom. The particular goal which has been under consideration here is the construction of individual identity and self-fulfilment, in so far as such identity and fulfilment are constituted through expressive, communicative activity and in particular, through artistic expression. Some of the negative and inhibiting effects of copyright law on that goal have been identified and the argument that the copyright prohibition on copying cannot affect the self-realisation that flows from expressive activity has been shown to be flawed.