

Introduction

THE ACT OF CREATIVE AUTHORSHIP implicates the honor, dignity, and artistic spirit of the author in a fundamentally personal way, embodying the author's intrinsic dimension of creativity. In many countries, copyright laws, which are concerned generally with authors' rights, emphasize author autonomy, personal connectedness to one's original work, and the integrity of the author's message through a doctrine known as moral rights. In contrast, American copyright law rewards economic incentives almost exclusively and lacks adequate moral rights protections. As a whole, our copyright law fails to take into account that human creativity embodies an intrinsic dimension, a process characterized by inspirational motivations. Steeped in a utilitarian tradition, copyright law in the United States is concerned with calibrating the optimal level of economic incentive to promote creativity. Such a perspective emphasizes the merchandising and dissemination of intellectual works. Absent from the discussion, however, is a focus on the intrinsic workings of creative enterprise. This intrinsic dimension of creativity explores the creative impulse as emanating from inner drives that exist in the human soul. These drives do not depend upon external reward or recognition but instead are motivated by powerful desires for challenge, personal satisfaction, or the creation of works with a particular meaning or significance for the author. When a work of authorship is understood as an embodiment of the author's personal meaning and message, the author's desire to maintain the original form and content of her work becomes manifest.

By way of definition, I use the terms *inspirational* or *spiritual* as shorthand designations for the type of relationship authors maintain with their creations. This relationship does not emphasize artistic creation for the sake of reaping economic reward. Instead, I believe this relationship is one characterized by a dual sense of self-connectedness to the work, and self-imposed distance with respect to the work. In other

words, this relationship requires the author to infuse herself into her work, while simultaneously maintaining the appropriate distance and perspective so that the work can emerge. Perhaps the best analogy to the type of relationship I am proposing is that of a parent and child. The parenting experience, perhaps one of the most humbling of all, requires the same delicate balance as that needed to produce highly creative works of authorship. Parents must learn when to become invested and when to take a step back and allow their offspring to grapple with life's challenges on their own. Moreover, both parents and authors know that their relationship with their "offspring" (both human and intangible) requires a strong degree of faith—not necessarily in God or a higher power, but faith in oneself as a creator, and in the vision of one's emerging work.¹ Ultimately, this perspective places an equal degree of importance on the process of nurturing one's creation as it does on the ultimate product. Significantly, this perspective, though it is shared by many authors, psychologists, scholars of creative theory, and even theologians, is very different from the economically driven approach that has shaped the law governing authors' rights in the United States.

As the twenty-first century progresses, the world will likely continue toward an orientation that is based on information processing rather than pure knowledge. Creative thinking is particularly essential in this environment,² and our legal structure must reflect a fuller comprehension of the creative being so that it can respond more effectively to all aspects of authors' needs. The theoretical premise of this book is that the law can, and should, be shaped in response to all relevant forces motivating creativity, not just those concerned with economic reward. It seeks to augment the law's understanding of human artistic enterprise in the United States by illuminating the intrinsic dimension of creativity. By emphasizing the importance of inspirational motivations as an integral part of the creation process, this book calls for the incorporation of a variety of viewpoints into the dialogue on authors' rights. By no means does this discussion intend to disregard the traditional economically based model for authors' rights in the United States. It does, however, argue that the economic model alone is not a sufficient basis for formulating the direction of the law and thus calls for consideration of the

intrinsic dimension of innovation as a supplement to the conventionally understood economic incentive paradigm.³

The United States' resistance to exploring more fully the implications of the intrinsic dimension of the creative process has resulted in a legal system lacking sufficient moral rights protections so that authors by and large do not have the ability to safeguard their works from textual integrity violations such as lack of attribution, misattribution, and mutilation. The failure of American law to embrace a multidimensional perspective of human creativity is problematic on several fronts, which is explored throughout this book. On the most global level, my argument is that once the intrinsic dimension of the creative process is more fully understood, it will be possible to think more expansively about legal protections that will facilitate safeguarding the messages conveyed by works of authorship. But how do we begin to unbundle the intrinsic dimension of creativity? I suggest this can be done through an examination of a variety of narratives that seek to explain human creativity as inspirationally motivated. I rely on a diverse group of narratives, including firsthand testimonials from authors, literary and psychological works, and even the Creation narratives in Genesis and other theologically based sources. Interestingly, all of these narratives contain consistent insights about the intrinsic dimension of human creativity. Collectively they suggest that the philosophies supporting authors' personal rights embody long-standing and widely held norms of authorship.

The ultimate challenge, however, is to craft legal measures that will facilitate authors' ability to safeguard the textual integrity of their works without sacrificing too much of the current legal structure in place. I leave to others the enormously complex task of evaluating the balance the current copyright system strikes as a general matter and instead, I concentrate on the issue of textual integrity. Most recently, Congressional action and heated litigation involving copyright law have been focused on other avenues such as access circumvention,⁴ term extension,⁵ file sharing,⁶ and other technology-driven agendas. Given the uncertainties created by these controversial topics, enhanced protection for the textual integrity of works of authorship is an unlikely topic for center stage, absent a greater degree of public awareness of the issues involved in the

discourse. This book attempts to open the dialogue on moral rights in the United States by highlighting the problem of safeguarding textual integrity. As such, it treats issues of vital importance to those who use the creative process to reveal themselves to the outside world.

Chapter 1 explores the relationship between authorship and textual integrity. An author's ability to safeguard the integrity of her texts is explained as a fundamental component of authorship morality. A complete view of the creative process embraces widely held foundational norms of authorship. Once the relationship between authorship and textual integrity is fully mined, it is easier to understand more fully not only the importance of authors being able to safeguard the integrity of their texts but also how legal doctrines can facilitate this objective.

Chapter 2 develops the theory of the intrinsic dimension of creativity relied upon throughout the remainder of this book. Drawing from psychological and theological sources, as well as personal narratives of authors, this chapter illustrates that authorship largely is the product of "inner labor"—an intrinsic process motivated by inspirational forces. This chapter examines the inspirational motivations that comprise the intrinsic dimension of creativity and addresses their relevance to authors' rights.

Chapter 3 discusses the legal structure governing authors' rights in the United States. Initially, this chapter traces the philosophical foundations of American copyright law and their relationship to the relevant copyright doctrines. Specifically, it analyzes the traditional economic incentive paradigm and its impact on copyright law. It then provides an overview of moral rights, trademark and unfair competition, right of publicity, and other relevant common law doctrines. This chapter demonstrates the overall inadequacy of the current intellectual property legal framework with respect to safeguarding textual integrity.

Chapter 4 explores in general terms the treatment accorded authors in foreign jurisdictions. In contrast to the United States, many countries maintain authors' rights protections that enable authors to safeguard the integrity of their texts far more readily than authors in this country. Thus, the United States is out of step with global norms by not recognizing more substantial authors' rights. Moreover, the Internet environment makes the United States' deficiency particularly problematic because vio-

lations of textual integrity can occur with unprecedented ease, and the results can be disseminated to countless recipients with the mere press of a key. Yet, these differences cannot be so easily remedied because certain cultural and legal differences preclude the wholesale adoption of another country's approach absent careful consideration of its fit into our existing legal framework.

Chapter 5 explores the United States' historical concern for the preservation of the public domain and its impact on our laws regarding textual integrity. Initially, this chapter addresses why enhanced moral rights protection fosters the objectives of the Copyright Clause. It also discusses the problem confronting authors in safeguarding the integrity of their messages in the face of the United States' strong public domain tradition emphasizing public access and use of information. This chapter further illustrates the consistency between the type of moral rights protection I advocate and several current free speech and public domain theories proposed by legal scholars.

Chapters 6 through 8 discuss three distinct types of challenges for authors in maintaining textual integrity. Chapter 6 addresses works whose level of originality, while perhaps sufficient to obtain copyright protection, is nonetheless arguably too low to qualify for the stronger protections for textual integrity addressed in this book. Chapter 7 discusses works of authorship that are not written by a single known author such as anonymous works, works written under a pseudonym, and works for hire under copyright law. If the purpose of providing enhanced textual integrity protection is to safeguard the author's message, it would seem as though the author's identity should be preserved and publicly known. Yet, it is not possible to access authorship identity for all types of works. This chapter also explores the complexities of maintaining textual integrity in the context of collaborative works, which are becoming increasingly prevalent. Chapter 8 is devoted to a somewhat different type of text. This chapter addresses the issues implicated when the text in question is a public persona constructed by an individual rather than a more conventionally understood work of authorship.

Chapter 9 examines a relatively uncharted area within the study of American intellectual property law—the role of human rights and

authorship norms. The history of the International Bill of Human Rights demonstrates that although there may not have been a universal consensus as to whether moral rights are human rights, there was a significant recognition that these interests are deemed worthy of protection in a human rights framework. Thus, rather than focusing on whether moral rights are within the scope of human rights, the better question is whether the widespread recognition of moral rights means they should be considered as “authorship norms.” This chapter ultimately calls for a broader spectrum of theoretical justifications for copyright law than the utilitarian framework typically invoked to justify copyright protections. A more fluid view of copyright generally allows for the incorporation of enhanced moral rights into our legal system.

The final chapter of this book offers a proposal for how, in light of the theoretical position I develop, the law in the United States can be reformulated to incorporate measures manifesting a greater sensitivity to authors’ needs in maintaining the integrity of their texts. As stated earlier, the challenge is to formulate a set of reforms that will incorporate authorship morality through new measures designed to supplement, but not displace completely, the current legal system. This challenge is substantial but it can be accomplished. The key to crafting such reforms lies in paying greater attention to the intrinsic dimension of creativity and all of the forces motivating authorship rather than just those that are based on economic incentives.