

# Copyright, Moral Rights, and the Social Self

David A. Simon\*

*Moral rights—non-economic rights that enable authors to control how their copyrighted work is divulged, attributed, modified, and withdrawn—are grounded on the Investment Theory: when an author creates a work, she invests part of her self in it. Because the work is an extension of the author’s “self,” special rights—not merely economic rights—are needed to protect it. Although intuitive, the rationale raises two central questions any moral rights theorist must address: how can an author invest her “self” in a work, and how might the law protect this investment? Moral rights scholars have not provided a satisfactory answer to the first question, making the second one difficult to address. This Article argues that an idea from social psychology might help answer the first question and shape how we respond to the second. Rather than some philosophical or abstract conception of the self, the authorial self the law protects is the social one: the self created and maintained through social interaction.*

*On this account, moral rights are tools to present and manage aspects of this social self. They are limited “rights of impression management.” This framing enables two analytical moves. First, it precisifies what moral rights protect (the social self as externalized in the work) and the harm they protect against (potential inconsistencies in that self). Second, it provides a framework for discussing how moral rights ought to protect the self from harm, raising the ultimate questions of whether and to what extent the Investment Theory is justified.*

## INTRODUCTION

Copyright law protects original works of authorship fixed in any tangible medium of expression—basically, human creative expression that does not vanish—by providing the author transferable, exclusive rights to reproduce,

---

\* Associate Professor of Law, Northeastern University School of Law. For comments and suggestions, I thank Oren Bracha, Lionel Bently, Jonathan Griffiths, Peter Karol, Henning Grosse Ruse-Khan, Eva Subotnik, and Talha Syed. I thank Katie Kelleher for her assistance editing this Article. For their thoughtful feedback and diligent editing, I thank the editors of the Yale Journal of Law & the Humanities.

distribute, create derivatives of the work, as well as to publicly display or perform it.<sup>1</sup> Traditionally, the justification for these rights is economic: they enable authors to legally require payment for uses of their work. Because authors can use their exclusive rights to exact an economic return on their creative investment, copyright law supplies potential authors with an incentive to create the work. Copyright, then, incentivizes the creation of works that would not be created in its absence.<sup>2</sup>

Moral rights are different. Rather than a transferable, exclusive right to the uses mentioned above, moral rights provide to the author of a work nontransferable rights to divulge, modify, attribute, and withdraw their works.<sup>3</sup> Although the specific content of moral rights has varied through history and by geography,<sup>4</sup> the doctrine comprises four core rights: the right of integrity, the right of attribution, the right of divulgation, and the right of withdrawal. The right of integrity enables the author “to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the [author’s] work, which would be prejudicial to his honor or reputation.”<sup>5</sup> The right of attribution, on the other hand, requires affixing the correct author’s name to a work. It may also encompass three subsidiary rights: the author’s rights (i) to require her name appears on her work; (ii) to prevent another’s name from appearing on her work; and, sometimes, (iii) to prevent her name from appearing on another’s work.<sup>6</sup> The right of divulgation provides the author with the sole authority to decide when and where to expose her work to the public for the first time.<sup>7</sup> Finally, the right

---

1. 17 U.S.C. §§ 101, 105-106.

2. This is an oversimplification, of course. A variety of economic justifications have been offered. *E.g.*, Mark A. Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129 (2004); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012). And the economic justification bottoms out in a more philosophical one. *E.g.*, Patrick Goold & David A. Simon, *On Copyright Utilitarianism*, 99 INDIANA L.J. \_\_ (forthcoming 2024).

3. These rights, however, may be waivable. For an exploration of the possibility of moral rights of inventors of patentable inventions, see Nari Lee, *Inventor’s Moral Right and the Morality of Patents*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND MORAL RIGHTS (Ysolde Gendreau, ed. 2023) [hereinafter HANDBOOK ON IP AND MORAL RIGHTS]. For a feminist perspective on the author’s self and moral rights, see Carys Craig and Anupriya Dhonchak, *Against integrity: A Feminist Theory of Moral rights, Creative Agency and Attribution*, in HANDBOOK ON IP AND MORAL RIGHTS, *id.*

4. For the historical development, see Cyril P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 76-77 (2007); Cyril P. Rigamonti, *Moral Rights in Copyright Law: A Comparative and Historical Study* 127 n.11, 128 (May 2006) (unpublished partial dissertation on file at Harvard Law School Library).

5. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and as amended Sept. 28, 1979, 102 Stat. 2853, 1161 U.N.T.S. 3 [hereinafter Berne].

6. This last right is not favored by some scholars, as it does not expressly involve an author’s work. *See* Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 479 n. 37 (1968) (citing and arguing against Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 3, 1968 (Martin-caille c. Bergerot), 60 RIDA 135 (Fr.), where the Court of Cassation overruled the appellate court’s finding that the law does not recognize harm to the artist’s prestige reputation unless that harm resulted from some act to a specific work).

7. *See* ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS* 194 (2006) (in France); *id.* at 236 (in Germany). This

of withdrawal allows the author to rescind a publication contract so long as she indemnifies the publisher.<sup>8</sup> These rights are inalienable: the author cannot contract them away.<sup>9</sup>

While copyright law writ large is justified on economic grounds, moral rights are designed to protect some other, non-economic authorial interest. What is unclear, however, is the nature of this interest. But the most common, and perhaps banal, view is that the authorial interest derives from the special relation—an “unbreakable bond”—the author has to her work by virtue of creating it.<sup>10</sup> This bond is central to moral rights theory, and its special protection is thought to require that moral rights entail inalienability restrictions.

Despite nearly universal agreement among their proponents that moral rights derive their justification from this unbreakable bond,<sup>11</sup> explaining the author-work relation has been almost impossible.<sup>12</sup> However full-throated and high-minded scholars’ explanations, they all seem to distill to a common intuition: the specialness of this relation arises because the author invests her *self in the work* – what this Article refers to as the investment<sup>13</sup> theory of moral rights (“Investment Theory”).<sup>14</sup> While attractive, the force

---

provision is not specifically a “moral right” but is a general right afforded under the IP Code. CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.] [INTELLECTUAL PROPERTY CODE] art. L121-2 (Fr.) [hereinafter FIPC].

8. FIPC, *supra* note 7, art. L121-2. In some jurisdictions, these rights can be waived.

9. *E.g.*, FIPC, *supra* note 7, art. L121-1. § 106A(e)(1), § 106A(d). Berne doesn’t explicitly require inalienability, but most countries have assumed it to be a feature of moral rights. Many countries, including the United States and the United Kingdom, however, allow moral rights to be waived.

10. For a complete overview of moral rights and some of the historical and theoretical background, see David A. Simon, *Moral Rights in Copyright Law: the Self, Society, and the Author-Work Relation*, Unpublished Dissertation (2019) (on file with author); David A. Simon, *The Unexamined Foundations of Moral Rights Theory* (working paper 2023) [hereinafter *Foundations of Moral Rights*].

11. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 338 (1988) [hereinafter *Philosophy of IP*]; Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 86 (1998) [hereinafter *Personality Interests*]; Neil Weinstock Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 374 (1993) [hereinafter Netanel, *Alienability Restrictions*]; Roberta Rosenthal Kwall, “*Author Stories*”: *Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 24 (2001); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940). For similar personality-based claims, see, for example, Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law – A Proposal*, 24 S. CAL. L. REV. 375 (1950); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authority*, 23 GA. L. REV. 1 (1988).

12. For criticisms, see David A. Simon, *Analogies in IP: Moral Rights*, 21 YALE J.L. & TECH. 337 (2019); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1240-43 (1996); Charles Beitz, *The Moral Rights of Creators of Artistic and Literary Works*, 13(3) J. POL. PHIL. 330, 340 (2005); William Fisher III, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 191 (Stephen R. Munzer ed., 2001); Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U.L. REV. 1011, 1107-95 (1988).

13. The term “invest” here is not meant to have any economic connotation. *Cf.* RONALD DWORKIN, LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 91-99 (1993).

14. Harm to the work is harm to the author-work relation not *just* because the author experiences it, but because the work contains part of the author’s self.

of this intuition is undercut by the two important and equally vexing questions it raises. If moral rights protect the unbreakable author-work bond that is created when the author “invests” her “self” in her work, then what is an author’s self, and how can it be invested in a work?<sup>15</sup>

To answer these questions, this Article takes seriously the claim that the work is a “manifestation of the self.”<sup>16</sup> It argues that the best understanding of the self in this context is the social, rather than philosophical, one. The social self, unlike the philosophical or transcendental self or ego, is constructed by and consists in social relations. Crucially, the social self is empirical and *depends upon others besides the individual* for its existence. In contrast to other highly abstract theories that seek to connect the author-work through concepts of self-definition or autonomy,<sup>17</sup> this account provides a concrete understanding of how the author remains connected to the work via her “social self.” A social self *includes* the work, and the work contains aspects of the social self. Because the social self is constructed and maintained through interpretation by others, so too are those aspects of the self contained in the work. Put differently, using the social self to explain the author-work relation not only provides a substantive account of the self, but also shows how the self can be “invested” into a work by dint of the author’s creating the work. Importantly, however, explaining the self this way shows that the relevant relation is not a dyadic one between author and work, but rather a triadic one between author, work, *and others*.

In answering the two critical questions raised by moral rights theorists, this Article posits a new function for moral rights: they are tools that authors can use, in limited ways, to present and manage a particular version of their “social self”—the self as externalized in the work. The social self, in turn, consists in the relation between the work, the other, and the author. Moral rights protect the author’s right to *initially present and manage* this relation.

Yet this new function raises an old question: *just how much control* should the author have over her social self as externalized in the work? This question requires a normative answer but, in part, the response is dictated by the description of what moral rights are designed to protect in the first instance—the social self. While this Article does not itself stake out a normative position on control, it does take a position on how to develop one. Before describing this Article’s approach, however, it is important to understand the choices available.

To illustrate, consider two alternative versions of moral rights protections: a “strong” version that protects the externalized social self at all costs, and a “weak” version that provides a minimum level of protection,

---

15. In a working paper, I argue there was one strange possibility: the author-work relation was grounded in the author’s memories of creating the work. David A. Simon, *Copyright’s Memory-Based Rights* (working paper 2023).

16. Netanel, *Alienability Restrictions*, *supra* note 11, at 401-02.

17. See Simon, *Foundations of Moral Rights*, *supra* note 10.; Netanel, *Alienability Restrictions*, *supra* note 11; Hughes, *Philosophy of IP*, *supra* note 11; Hughes, *Personality Interests*, *supra* note 11.

heavily conditioned on a variety of factors.<sup>18</sup> The former might provide the author the ability to control any and all uses of the work that she thinks would alter her social self. The latter may include a divulgence right but not an integrity right, or versions of both rights that provide some authors with some control over how the work is attributed and used.

One might conclude that using the social self as the touchstone for moral rights has no bearing on whether one ought to gravitate toward either a strong or weak version of them. That is, one's view about what moral rights *ought to do* doesn't depend on what moral rights *protect*. Regardless of whether moral rights protect an ineffable bond or the social self, moral rights should have fixed content—they should embody rights with particular features, whatever they protect. Subscribing to a strong version or weak version of moral rights is a matter of normative argument, not empirical description.

This Article accepts the plausibility of this argument but partially rejects it.<sup>19</sup> Instead it takes the position that *what the self is* matters to the question of *how moral rights ought to protect it*. Description, in other words, is not a neutral exercise. There are at least two ways that description can influence our normative conception of rights. One (perhaps banal) way is by changing the shape of rights to reflect the target of protection. A strong (or weak) version of moral rights ought to protect the social self differently from the author's "soul" because each represents a distinct conceptual entity that can be harmed in different ways. The things "ought" to be protected differently because they have different conceptual shapes.<sup>20</sup> Like liquid in a container, modes of protection must fit the conceptual shape of the thing protected.

A second, perhaps more controversial, way is when the conception of the protected *thing* influences *how it ought to be protected substantively*. In contrast to simply changing the rights to fit the thing protected, here defining the thing protected *substantively changes* how we *ought to protect the thing*. If the thing moral rights protects is the social self as externalized in the work, then features of the social self will influence how, substantively, it *ought* to be protected. What I will argue below, for example, is that using the social self as the thing protected influences whether moral rights ought to be strong, weak, or something in between. A description of a thing, in other words, can provide normative reasons for more or less protection.<sup>21</sup>

This latter concern reveals that there are normative elements baked into

---

18. See 17 U.S.C. § 106A.

19. If this rejection is unwarranted, then the analysis of Part III will likely change, but it will not die.

20. In some sense, this may be an indefensible position because interests shape rights. And to the extent that one protects different interests, one will necessarily have different rights. Different interests, after all, implicate different concerns and wrongs against which the law protects.

21. One might suggest that the description smuggles in normative reasons. Perhaps so. But this doesn't worry me here, or in other contexts. See David A. Simon, *The Grammar of Law* (working paper 2023) (on file with author).

the description of the social self. Of course, these normative reasons extend only as far as the description will lead until they force affirmative normative choices. Consider the following. For purposes of this Article, the social self consists in the relation between the author, “others,” and the work.<sup>22</sup> Each of these terms must be defined, and a broad or narrow definition will influence the scope and nature of the rights. For example, “others” may include those who have merely heard about but not seen a painting (as well as those who have seen it); or it may exclude them. Whichever choice is made has the potential to influence the shape of moral rights.

For the remainder of this Article, I intend to embrace the normative elements inherent in the description of the social self.<sup>23</sup> Where the description forces normative choices, I explain the implications of making such choices rather than make them myself. In so doing, I note that such decisions should be based on theoretical coherence rather than personal normative preference. But sometimes such distinctions are hard to draw.

I also assume that there exists a justification for protecting the social self as externalized in the work. But this is only an assumption. A critic may point out, similar to the way critics pointed out the flaws with personality theory generally, that one will have a hard time explaining why the author’s social self ought to be insulated while the plumber’s remains vulnerable to repair and replacement.<sup>24</sup> Plumbers (or carpenters)—or even scientists or engineers—seem to invest part of themselves in their work, too.<sup>25</sup> Why not grant them rights to control their work after completing a job? Whatever these criticisms, they are left aside.

Why? The purpose of this Article is not to argue that moral rights are justified on an Investment Theory.<sup>26</sup> Rather, it is to make possible *an assessment* of moral rights *on this theory* by rendering comprehensive and empirical the justification that underlies it. It does this using the concept of the social self. Here we must give up on some of the normative choices posed by the definition of the social self. This is unavoidable because without an independent justification of why we must protect the social self, it is impossible to say *exactly* how much we should protect it. To answer that question one needs to understand, for example, why the author’s social self externalized in the work should be protected more than the author’s other social selves, including those that may be externalized in other

---

22. See *infra* Parts I-II.

23. In other words, this Article does not consider normative arguments on the plausibility of the Investment Theory or other theories that might provide a justification for moral rights. One may object that I simply get this point wrong, either in the way I define the social self or in the more controversial claim that the definition affects the rights. While there is not space to rebut these arguments, I try to note these concerns when they arise throughout the Article.

24. E.g., JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS (1996); James Boyle, *The Search for an Author: Shakespeare and the Framers*, 47 AM. U.L. REV. 617 (1988).

25. United States patent law does not grant moral rights in inventors. For a discussion of other countries, see Lee, *supra* note 3.

26. The Investment Theory may turn out to be a loser. If it is, then theorists have significant work ahead of them.

material objects owned by the author (such as jackets, cars, houses, or even *others'* artistic works) or those non-externalized selves she might develop and cultivate in various social circles. Questions like these are left for another time.

Despite the normative limitations of such an approach, taking this conception of the self seriously has significant implications for moral rights, both in content and form. Moral rights enable the author to present and manage a particular version of the social self, but they are no guarantee that such a self can be maintained. Nor are they a guarantee that an author has a cause of action if a use of her work is prejudicial to her honor or reputation, or if the work is attributed to someone else. Because the social self is constructed and maintained through social relations, the author's moral rights can change with it.

The first two Parts of this Article explain how moral rights can be understood as limited rights of self-presentation and management, and what these rights would look like if they tracked the theory of the self I present below. To do this requires understanding two concepts: the social self and the *externalized* social self, the social self that exists "in" the work and "outside" and apart from the physical body. Part I achieves this goal. It explains how the concept of the social self arose and identifies seven "existence conditions," which are the conditions necessary—and together sufficient—for the social self to exist.

Part II uses the social self to describe the relationship between the author and the work, which includes non-authors in a variety of ways. The author-work relation, then, consists in a particular kind of external social self as negotiated between authors and non-authors, mediated through interpretation of the work—what I refer to as the work-other-author relation. This relationship, in turn, provides a means for understanding what moral rights are designed to protect. Since moral rights are designed to protect this tripartite work-other-author relation, and since this relation consists in the external social self, moral rights are designed to protect, in some way, the external social self. From this emerges a new function for moral rights: to present and manage this externalized social self by limiting uses of the work that are inconsistent with it.

Part III preliminarily discusses how and to what degree moral rights might do this. Here, I apply the framework described in Part II, exploring how moral rights might work in practice. The purpose of this Part is to examine whether and how the theory I've sketched can be used as a framework for understanding moral rights. As explained above, this Part assumes that the Investment Theory of moral rights is justified. I assume, in other words, that the law really wants to protect the author's social self to preserve the relation between the author, the work, and the other.

The critical question is how it does so. As noted above, the description of the social self has normative force that influences the nature and type of

legal protections afforded by moral rights. Within this Part, I show how this influence could require changes to the nature and scope of the rights on an Investment Theory. Like rights based on any theory, the precise shape of moral rights depends heavily on the strength of the underlying justification of the Investment Theory. For that reason, I chart the general scope of these rights, assuming some justification for them—here the Investment Theory, sometimes illustrating what the rights might look like on a strong or weak version of it. Regardless of the Investment Theory’s strength, the analysis yields a new emphasis on continual construction and maintenance of the self that depends on others. This differs from traditional accounts of moral rights, which typically focus on the author’s relation to the work, by placing the determination of meaning outside the author’s *de facto* or *de jure* control. Instead of focusing primarily on the author’s interests in exercising the rights, the theory I describe asks us to consider how changes to the self over time can affect the scope of the rights. While the rights themselves may have a similar form to their traditional construction, their content is likely to change in significant ways. Principally, the scope of these rights will depend heavily on what others take the work to represent, something that changes over time as others encounter and interpret the work.

### I. THE SOCIAL SELF AS THE SELF TO STUDY

The concept of the social self is “the self that can be apprehended or verified by ordinary observation.”<sup>27</sup> And it grew out of early Pragmatist philosophers’ attacks on transcendentalism. Charles S. Pierce (1839–1914)<sup>28</sup> was one of the first American philosophers to initiate what would become an expansive front on the concept.<sup>29</sup> It was an assault that psychologists such as William James (1842–1910) and James M. Baldwin<sup>30</sup> (1861–1934) would seize upon to uncover a different version of the self, one created and developed by the society into which it was born.

#### A. *The Social Self*

Pierce argued that the self was not something to be intuitively known, as

---

27. CHARLES HORTON COOLEY, HUMAN NATURE AND THE SOCIAL ORDER 168 (Transaction Publishers 2009) (1902) [hereinafter COOLEY, HUMAN NATURE I]; CHARLES HORTON COOLEY, HUMAN NATURE AND THE SOCIAL ORDER 136 (Charles Scribner’s Sons New York) (1902) [hereinafter COOLEY, HUMAN NATURE II].

28. Charles S. Pierce, *Questions Concerning Certain Faculties Claimed for Man*, 2 J. SPECULATIVE PHIL. 103 (1868).

29. He was not, of course, one of the first philosophers to attack transcendentalism or the notion of a transcendental self. DAVID HUME, *Of Personal Identity*, in A TREATISE OF HUMAN NATURE 251 (L. A. Selby-Bigge ed., Oxford: Clarendon Press 1896) (1739); JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Alexander Campbell Fraser ed., Oxford: Clarendon Press 1894) (1690).

30. JAMES M. BALDWIN, SOCIAL AND ETHICAL INTERPRETATIONS IN MENTAL DEVELOPMENT: A STUDY IN SOCIAL PSYCHOLOGY (1897).

Descartes claimed,<sup>31</sup> but something which arose from previous cognitions and was built up from experience.<sup>32</sup> James likewise noted that a person demands to be treated certain ways not because—as Georg Wilhelm Friedrich Hegel claimed<sup>33</sup>—of her existence “as being a bare I”; but because she is a member of a particular group of persons, with a particular background, a particular family, and with particular experiences and achievements.<sup>34</sup>

For James, the social self was part of a larger “empirical self,” which had two primary aspects: the “me” (the self-as-known) and the “I” (self-as-knower). “I” was the thinker, the doer, the entity that acted. This was, I think, what Hume could “never catch.”<sup>35</sup> The poet Robert Creeley juxtaposes the “I” and the “me,” providing a segue into the latter concept:

The other who I'd be  
Never the same as me  
No way to step outside and see  
More than some penitence of memory—<sup>36</sup>

While the “I” acts and does, the “me” is what the “I” becomes and is all the self can know about itself. Or, as G.H. Mead put it, “If the ‘I’ speaks, the ‘me’ hears.”<sup>37</sup> John Dewey helpfully quipped that “‘I think’ is statement about voluntary action.”<sup>38</sup>

The “me,” James thought, could be divided up into various “social selves”<sup>39</sup> according to the variety of social groups to which one belonged. A man may have been a butcher by trade, but also a member of a local poker club. His fishing club may have met in the summer and his book club in the winter. And in each of these clubs he would find a different “self.”

Each of these selves, too, would have to remain self-contained—separate from other selves—to continue existing. This much was required, James said, to maintain a particular self at all. The necessity of separation forced individuals to choose particular social selves and exclude other selves entirely, for it was not possible to

31. RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* (Donald A. Cross trans., Hackett Classics 3d ed. 1993) (1641).

32. Pierce, *supra* note 28, at 107-09.

33. See Simon, *Foundations of Moral Rights*, *supra* note 10; see also GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 69-83 (Kurt H. Wolff ed. & trans., 1950); BERTRAND RUSSELL, *RELIGION AND SCIENCE* 120 (1997).

34. WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* (1890), *reprinted in* 53 *GREAT BOOKS OF THE WESTERN WORLD* 1, 207 (William Benton ed., Encyclopedia Britannica 1952).

35. HUME, *supra* note 29, at 252.

36. ROBERT CREELEY, *Loops*, in *LIFE & DEATH* 33 (1998).

37. George H. Mead, *The Social Self*, 10 *J. PHIL., PSYCH. & SCI. METHODS* 374, 375 (1913).

38. JOHN DEWEY, *THE PHILOSOPHY OF JOHN DEWEY* 713 (John J. McDermott ed., 1981), *excerpt from* JOHN DEWEY, *HUMAN NATURE AND CONDUCT: AN INTRODUCTION TO SOCIAL PSYCHOLOGY* 314-32 (Modern Library 1930).

39. James argued that the self actually had three constituents: the material self (the body, possessions, and family); the social self (described above); and the spiritual self (“a man’s subjective being”). JAMES, *PRINCIPLES OF PSYCHOLOGY*, *supra* note 34, at 188-91.

be both handsome and fat and well dressed, and a great athlete, and make a million a year, be a wit, a *bon-vivant*, and a lady-killer, as well as a philosopher; a philanthropist, statesman, warrior, and African explorer, as well as a ‘tone-poet’ and saint. . . . The millionaire’s work would run counter to the saint’s; the *bon-vivant* and the philanthropist would trip each other up; the philosopher and the lady-killer could not well keep house in the same tenement of clay. Such different characters may conceivably at the outset of life be alike *possible* to a man. But to make any one of them actual, the rest must more or less be suppressed.<sup>40</sup>

In this passage, James identifies one of seven necessary conditions for the existence of a social self (“Existence Conditions” or “ECs”). First,

EC<sub>1</sub>: a social self *S* exists for any individual *i* only if<sup>41</sup> *S* is *externally consistent*.<sup>42</sup>

To be externally consistent means, at a minimum, that an *S* cannot be in direct conflict (i.e., inconsistent) with another social self (*S'*) attributable to *i*. Whatever *S* exists, then, the opposite of that self cannot also exist. A miser, for example, cannot also be known—at least to the same audience—as generous. Nor, for that matter, can some inconsistency exist that would destroy a conception of the social self. So it would be challenging for a butcher to be known as an animal lover, at least in present times.<sup>43</sup>

The social self is not *merely* an empirical thing. It also shapes how we act. James notes that each social self requires a different mode of social action: the philanthropist to give and the millionaire to earn; the *bon-vivant* to cavort; and the philosopher to think. Indeed, conceptions and emotions of fame, honor, and dishonor all exist relative to our social selves. A ship captain is unlikely to abandon his ship (or at least he used to be) and will encounter shame if he does. Likewise, a doctor will remain in a cholera-infested city while others leave. “Club-opinion,” as James called it, shapes the way we feel about ourselves and the duties and obligations we see our selves as having.<sup>44</sup> James’ hypothesis is borne out by empirical research—the social situation in which individuals find themselves influences how they behave.<sup>45</sup> This is the second existence condition of a social self:

EC<sub>2</sub>: *S* exists for *i* only if *S* influences *i*’s action.

---

40. *Id.* at 199-200.

41. As explained below, an individual existence condition is necessary but not sufficient to create and maintain the social self.

42. It is important to distinguish between *external* and *internal* consistency, which I discuss more in this Section.

43. Notice that this example highlights how contingent the social self is.

44. JAMES, *supra* note 39.

45. For a review of the literature showing how situations affect behavior, see, for example, Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 150 U. PENN. L. REV. 129, 158-179 (2003).

This rules out, for *i*, any social self that “exists” but does not influence the *i*’s actions.

### *B. Elaborations of the Social Self*

Since James planted the seeds of the empirical self—of the thinker (I) and the selves (me) comprised of the material, social, and spiritual—psychology has blossomed. James, then, represented a point of an initiation rather than termination. He articulated the idea of the social self and explained part of its existence and function. But he did not specify precisely *how* it came to exist.

This task fell to other theorists, who built upon James’ notion of the social self and elaborated it considerably. Much of this development took place in psychology and sociology. James M. Baldwin (1861–1943), Charles H. Cooley (1864–1929), and George Herbert Mead (1863–1931) spear-headed this movement.<sup>46</sup> Although adhering to slightly different theories, all three argued, like James, that the self could not be understood without reference to its social aspect—and society more broadly.

This Pragmatism was, in some sense, an outgrowth of the Idealism of philosophers whose names are invoked to justify moral rights, such as Hegel and Kant. Though both conceptualized the self as abstract and preexisting social relations, sometimes bordering a soul or “transcendental” version, they also recognized that some aspects of the self were fluid and constructed by social relations.<sup>47</sup> Hegel, in particular, emphasized that the self was, at first, a purely a self-conscious abstract ego, which instantiated or actualized itself in the world, as part of a larger course of development in a grand philosophical theory.<sup>48</sup>

Thus, while Hegel, Baldwin, Cooley, and Mead all saw the self coming into existence by recognizing itself, this process was different for each. For Hegel, the self was philosophical and abstract, achieving “self-consciousness” by a continuous process of *contrasting itself* to other egos through several stages using legal instruments like contract and property.<sup>49</sup> Like for Hegel, for Baldwin, Cooley, and, Mead, the self was dialectical in nature. But unlike Hegel’s self,<sup>50</sup> the Pragmatist was more social and empirical, coming into existence through, and constituted by, social

---

46. Other scholars included John Dewey, William I. Thomas, Florian Znaniecki, Robert E. Park, Earnest W. Burgess, Herbert Blumer, Everett C. Hughes, and Louis Wirth. Arnold M. Rose, *Preface to HUMAN BEHAVIOR AND SOCIAL PROCESSES: AN INTERACTIONIST APPROACH*, vii (Arnold M. Rose ed., 1962). A similar movement also arose independently in Germany with George Simmel and Max Weber. *Id.* at 3-4.

47. Simon, *Foundations of Moral Rights*, *supra* note 10.

48. Frances Berenson, *Hegel on Others and the Self*, 57 *PHILOSOPHY* 77-90 (1982). Indeed, the self comes to be self-conscious through experience with objects and other consciousness. The dialectical realization of the self comes from understanding others’ consciousness as his own, not as “thing-like” but instead as “worthy of self-consciousness”. *Id.* at 84.

49. Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 *U. MIAMI L. REV.* 453 (2006). See HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 513-15 (1949).

50. Michael Rosen, *HEGEL’S DIALECTIC AND ITS CRITICISM* 80-81 (1982).

interaction, or what has been called “symbolic interactionism.”<sup>51</sup> Pragmatists were not, in so many words, doing metaphysics *proper*; they were engaged in a different, more sociological project.<sup>52</sup>

Baldwin, for instance, argued that the self grew out of interaction with others, and that, indeed, others become *part of the self*.<sup>53</sup> Whereas Hegel’s self could exist only by distinguishing itself from others, Baldwin’s self could not exist without *including* others. Thinking of the self, on Baldwin’s view, is thinking of the other: “*the ego and the alter are to our thought one and the same thing*.”<sup>54</sup> Thus, judgments about one’s self-interest or how one should be treated require the individual to conceive of the self in terms of the other.

For Cooley, this meant co-extensive development, where the self and society did not stand in opposition but were complementary and unified. Following Baldwin, Cooley argued that self and society fed into each other and encouraged parallel development. Because the self was “built” within (and with) society and not in opposition to it, its construction required other individuals. Cooley famously argued that it was through the looking glass of other people that selves were constructed:

Each to each a looking-glass

Reflects the other that doth pass.<sup>55</sup>

The self on this view had three parts: (1) our imagination of our appearance to others; (2) our imagination of their judgment about this appearance; and (3) a self-feeling, such as anguish, disgust, or joy that results from imagination of others’ judgment.<sup>56</sup> Because the self requires others to exist and because others shape the self, Cooley argued that the self does not exist in perfect or ideal form. It arises through this social process, as self comes to recognize it means “different things to different people.”<sup>57</sup>

Likewise, Mead held that the self existed only by recognizing itself as an object of social discourse.<sup>58</sup> Mead’s theory was different from Cooley’s because it elaborated in more detail the process by which an individual becomes a self (*i.e.*, becomes self-conscious). This occurred through “role-taking”: assuming the role of what Mead called the “generalized other,” or

51. This phrase, coined by Herbert Blumer, is typically applied only to the work by Cooley and Mead, but Baldwin’s work on the development of the self might be included as an early symbolic interactionist.

52. *E.g.*, Berenson, *supra* note 48, at 87-88 (“For me to have the possibility of knowing the Other implies knowledge of him as a subject, as an individual who claims my recognizing his concrete being, as well as an object in the universal.”).

53. BALDWIN, *supra* note 30, at 7-12, 13-15, 28.

54. *Id.* at 12.

55. COOLEY, HUMAN NATURE II, *supra* note 27, at 152.

56. *Id.* at 146-153. Cooley’s definition of the social self was actually much broader: “The social self is simply any idea, or system of ideas, drawn from the communicative life, that the mind cherishes as its own.” *Id.* at 147.

57. COOLEY, HUMAN NATURE I, *supra* note 27, at 165.

58. GEORGE HERBERT MEAD, MIND, SELF, AND SOCIETY 377 (Charles W. Morris ed., University of Chicago Press 2015) (1934).

the perspective of the community. Building on James' idea, Mead saw "community" as system or systems (*i.e.*, group or groups) in which multiple selves are constructed. In articulating his concept of the social self, Mead also added to Cooley's looking-glass self the more general mirror of the community. Mead thought that individuals' imagined judgments of the community, rather than simply others' judgments, shaped their self. This was a process that began at a young age, where individuals first began to take various roles in games before learning how the rules of society prescribed rules for action. The self, in this way, became *known as social*.

The contrast with the transcendentalist self is stark. Hegel's self, like Kant's, knew itself only *in contrast to others*.<sup>59</sup> Mead's self knows itself only as *constitutive of social relations*. Hegel's self was an abstraction that became concrete through continual opposition and distinction, and progressed toward some final Absolute. Indeed, Hegel's entire philosophy was Idealist. Mead's self, on the other hand, was continually "disintegrate[d]" and "reconstructed" through reflective thought.<sup>60</sup> It had no final resting place and did not require specific conditions to construct itself "fully."

Indeed, it is rather odd that moral rights scholars have used Hegel's transcendental self as an archetype given that an abstract ego leaves little room for creative development.<sup>61</sup> The Hegelian and Kantian rational egos are striving for freedom along universal dimensions; the Romanticists who tout moral rights, on the other hand, emphasize the "personal uniqueness of [the individual's] nature and his activities."<sup>62</sup> Yet, as German sociologist and philosopher Georg Simmel (1858–1918) noted, the direction of both is the same: "the individual seeks his *self* as if he did not yet have it, and yet, at the same time, is certain that his only fixed point is this self."<sup>63</sup> John Dewey, a student of Hegel, likewise could not understand "[t]he notion that an abstract ready-made conscience exists in individuals. . . ."<sup>64</sup> Why then, does Hegelian thought have such a prominent place in moral rights scholarship? The answer lies, I think, in understanding not how Hegel can be applied to law, but what lawyers in a particular context were trying to do with Hegel.<sup>65</sup> Some lawyers may have been seeking increased protection for new technologies and forms of communication at the behest of authors, whose economic security these new technologies threatened.<sup>66</sup> Economic

---

59. Peter Singer suggests a charitable reading of Hegel that is similar to this aspect of Mead's theory. "Unfortunately, it is difficult to relate [this interpretation] to the words Hegel uses." PETER SINGER, *HEGEL: A VERY SHORT INTRODUCTION* 77 (Oxford Univ. Press rev. ed. 2001) (1983).

60. Mead, *The Social Self*, *supra* note 37, at 378.

61. GEORGE HERBERT MEAD, *THE INDIVIDUAL AND THE SOCIAL SELF* (David L. Miller ed., 1982).

62. SIMMEL, *supra* note 33, at 82.

63. *Id.* at 79.

64. DEWEY, *supra* note 38, at 716-18; *id.* at 100-02.

65. ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 30 (1959).

66. It is important to note that this impulse to find the "self" in a work was not exclusive only to those

motivations are not, ironically or unironically, the only reasons for pursuing non-economic rights. As detailed elsewhere, political currents throughout Europe may also help to explain the rise of both moral rights and Hegelian philosophy.<sup>67</sup>

The problem is that Hegelian thought—apart from its abstract nature of the self—was aimed at too large a project.<sup>68</sup> Absolute Freedom, or even for that matter, Absolute Knowledge, required an apparatus that was so overly complex and wrought with inevitability that it seems an unlikely candidate for helping us explain moral rights. What Hegel lacks in this regard, the Pragmatists seem to have in bounty. They have given us a plausible notion of the self that is concrete enough to give a coherent picture of what moral rights are for.

James, Baldwin, Cooley, and Mead all developed the notion of the social self in different ways. James partitioned the self into forms created by others' recognition. Baldwin and Cooley drew on James' insights to explore the possibility of the social self as being present in another's mind, and that this shaped the way one thought of her self. Mead took this a step further and noted that becoming a self requires taking the role of someone else, forcing the individual's self-conception to become part of the society of which we are made.

The self, then, not only depends on internal consistency and practical influence, but also on *others*. The self cannot exist in isolation. It requires others not just for its maintenance but also its creation. Thus, we can add:

EC<sub>3</sub>: *S* exists for *i* only if (a) *i* has some conception of *S* and (b) others have some conception of *S*.

This is really a prior condition of the external consistency of the social self. For a self to exist, it must be *recognized* as externally consistent. In other words, it is not just that the self must be externally consistent, but that both *i* and others *recognize the social self at all*.

Is it enough merely for *i* and others to *think S* exists? The answer is no. What else, then, is required? One answer provided by sociologist Erving Goffman (1922–1982) is some kind of agreement between *i* and others about just what *S* is. But this answer alone would be insufficient; it would gloss over the important contribution Goffman made to the idea of the social self. Goffman homed in on everyday social interaction as the locus of the social self. He took the self to be a derivative of social interaction and the events that shaped such interaction. To explain such everyday interaction he famously invoked the metaphor of theater, which, in turn, shaped his

---

who consulted Hegel. The idea that the creator's "inner person" was always visible in the author's writings grew out of copyright law's contingent social history. See BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW* 51-55 (1999).

67. Simon, *Foundations of Moral Rights*, *supra* note 10.

68. GEORG W. HEGEL, *PHILOSOPHY OF RIGHT* (S.W. Dyde trans., 2001); Dudley Knowles, *Hegel on Property and Personality*, 33 *PHIL. Q.* 45, 48 (1983).

conception of the self. In his words:

A correctly staged and performed scene leads the audience to impute a self to a performed character, but this imputation—this self—is a product of a scene that comes of it, and is not a *cause* of it. The self, then, as performed character, is not an organic thing that has a specific location, whose fundamental fate is to be born, to mature, and to die; it is a dramatic effect arising diffusely from a scene that is presented, and the characteristic issue, the crucial concern, is whether it will be credited or discredited.<sup>69</sup>

The self is created by the social scene, by the props and efforts of all involved. The self does not cause events to happen, but events happen to a self.<sup>70</sup>

For Goffman, like for James, Cooley, and Mead, the self grows from social interaction; it is not, like it was for Hegel, a separately existing entity. The self arises through a process of presentation, in which the individual seeks to impress upon his audience a particular view of himself. Rather than arising from the ego's universal act of marking the world, presentation of the self occurs (or not) through a complex set of social arrangements, props, and institutional schemas.

The audience plays a vital role in the development of the self-as-presented. For the presentation to proceed as planned, the audience must accept the definition presented by an individual. Once accepted, this “working consensus”—the rough definitional agreement between the actor and the audience about what social roles each takes—is the basis for social interaction.<sup>71</sup> Goffman, in other words, is following Mead's basic idea that unilateral meaning is not possible. People must agree on some core aspects of meaning for any self to be constructed, to exist.<sup>72</sup> So we can modify, or at least add:

EC<sub>4</sub>: *S* exists for *i* only if *i* and others roughly agree<sup>73</sup> about the content of *S*.

Here we should note the social self is something individuals seek to impress upon others. Individuals, Goffman argued, use various tools to facilitate others' recognition and maintenance of the self-as-presented. He agreed with James that social roles (or social selves) have to be kept separate from one another and sometimes require the exclusion of other roles

---

69. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 252-53 (1959); see also Daniel Dennett, *The Self as a Center of Narrative Gravity*, 15 *PHILOSOPHIA* 275 (1986).

70. This is reminiscent of how William James described “truth” as “happen[ing] to a thing.” WILLIAM JAMES, *PRAGMATISM* 78 (Dover Publications 1995) (1907).

71. The self, however, was not something static. It was always in flux. Rose, *supra* note 46, at ix.

72. See Gregory P. Stone, *Appearance and the Self*, in *HUMAN BEHAVIOR AND SOCIAL PROCESSES: AN INTERACTIONIST APPROACH* 86 (Arnold M. Rose ed., 1962).

73. “Rough agreement” is not defined in any systematic or statistical way. It is meant to denote some kind of agreement, however imperfect, of the self's general core and contours—even if the features of the self are somewhat disputed either at its periphery or towards its center.

(external consistency). Thus, individuals often engage in “audience segregation,” keeping those who encounter the individual in one social role separate from the individual who perceives another social role.<sup>74</sup>

To essentialize the social role further, individuals impress upon their audience that they are performing their “normal” or “only” routine, and that this routine is unique. Audience impressions therefore tend toward thinking that the performance is “all there is to the individual who acts out the projection for them.”<sup>75</sup> Social psychology research has validated this idea. People take their initial impressions of a person in a given situation to reflect upon all aspects of the person, a phenomenon dubbed for those whose first impressions are positive the “halo effect.”<sup>76</sup>

Working consensus is not static; it must be actively preserved. To maintain it, the individual engages in what Goffman termed “the arts of impression management.”<sup>77</sup> Using a variety of techniques, individuals attempt to prevent the disruption of their performances and maintain their projection to the audience. The audience, in turn, may assist in maintaining the social role of the performer “because of immediate identification with performers, or because of a desire to avoid a scene, or to ingratiate themselves with the performers for purposes of exploitation,”<sup>78</sup> or for other reasons.

From this perspective, the “social role” one seeks to assume is of vital importance for two reasons. First, one’s social role to a particular audience defines the person to that audience, and does so in a particular way. Second, each role has, by its social terms, particular rights and duties attached to it. To claim a particular self is to insist that others treat you in a particular manner. Doctors, lawyers, and teachers all assume these roles, and, when accepted, take on varying rights of authority and varying duties to those they serve. So not only does the self influence an individual’s behavior, it *influences the behavior of others*:

EC<sub>5</sub>: *S exists for i only if S influences how others treat i and how i treats others.*

All of this presumes, as Herbert Blumer argued in 1962, that the interaction between self and other was mediated by a process of interpretation.<sup>79</sup> Interpretation can occur through existing definitions or categories available to the individual based on previous experience with any given situation. For example, if a person has experience dealing with physicians, they will interpret a doctor-patient situation through their prior

---

74. GOFFMAN, THE PRESENTATION OF SELF, *supra* note 69, at 49.

75. *Id.* at 48.

76. The first study documenting this was E.L. Thorndike, *A Constant Error in Psychological Ratings*, 4 J. APPLIED PSYCH. 25 (1920); see also DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

77. GOFFMAN, THE PRESENTATION OF SELF, *supra* note 69, 183-209.

78. *Id.* at 232.

79. Herbert Blumer, *Society as Symbolic Interaction*, in HUMAN BEHAVIOR AND SOCIAL PROCESSES: AN INTERACTIONIST APPROACH 179, 188 (Arnold M. Rose ed., 1962).

experience and the categories defined partially by this interaction (*e.g.*, treating physician, patient, staff). For situations unfamiliar to the individual, she must develop a novel interpretation, perhaps based on analogous situations. An individual with experience of Shamanistic but not Western medicine, for example, might interpret a clinical encounter with a Western physician by analogizing to the typical experience and social roles assigned in a Shamanistic experience. Like with all aspects of the social self, interpretation is an act done by all who encounter the self.

So, we arrive at another existence condition of *S*:

EC<sub>6</sub>: *S* exists for *i* only in virtue of interpretation

Recognition and external consistency play a role in the development and existence of the social self. But the *i*, the individual, is also a person who plays a role in the development of her social self. Does it matter what *i* thinks about herself? Must what *i* *really* thinks be consistent with what others think? *Internal* consistency refers to a case where the answer to this question is yes. That is, where *i*'s motivations, desires, wants, *etc.* match that of others' conception of the social self, I can say that the social self is consistent.<sup>80</sup> For example, if *i* is a philanthropist, internal consistency would require that *i* actually regard herself, at least to some threshold degree, as a philanthropist by having motivations for charity, a desire for charity, *etc.*

Why might such consistency be necessary? For one thing, internal consistency seems to be an existence condition of *S*—at least to a particular kind of *S*, a *genuine S*. Suppose, for example, that *i* gave away all her money to charity because she did not like managing it, found the burden too much, or some other a-benevolent reason. Whichever the reason, *i* does not regard herself as a philanthropist. If *i* herself does not think her self a philanthropist—at least to some minimal degree—then it does not seem able to exist, at least not in a genuine way.

I add the caveat “in a genuine way” because it is possible for *S*-as-philanthropist to “exist,” but in a different way. Suppose others regard *i*'s *S*-as-philanthropist because of her charitable donation. And suppose that *i* attempts to deceive the public about her motives, perhaps to increase her stature in the community, and so represents her *S*-as-philanthropist. To the extent that *i* does not in fact think of her *S* as philanthropist, then it is difficult to see how *S* exists since, according to EC<sub>3</sub>, both *i* and others must think *S*-as-philanthropist exists. Because *i* does not actually think *S* as philanthropist exists, EC<sub>3</sub> is not satisfied.

But *i* may, in fact, *think* *S*-as-philanthropist exists, but for nefarious reasons. The question is whether such nefarious reasons should “count” as constitutive of *S*. If they do count, then *S* represents not only what one *actually* thinks, but rather what one *wants others to think*. *S*, then, could be

---

80. *Pure* internal consistency would be near absolute consistency between a social self and the individual's motivations, desires, wants, *etc.*

a pure projection (assuming it meets all ECs). Perhaps there is no right answer here, and the best we can do is to distinguish between *genuine S* and *mere S*. An *S* is a *genuine S* just in case it is internally consistent. An *S* is a *mere S* just in case it is not internally consistent.

Setting aside whether there is a right answer to whether internal consistency is an EC of *S*, what about for moral rights? The question is whether moral rights advocates should be committed to *genuine S*. The answer, I think, is yes. Remember that part of the “self” is “in” the work; the *self* is what deserves protection. It is hard to understand why moral rights should protect against harm to a fraudulent or at least disingenuous *S*. This is true not only because the work is supposed to manifest some core aspect of *S*, but because the *S* is constructed by perspective-taking.<sup>81</sup>

So, we can add a fourth existence condition of the social self:

EC<sub>7</sub>: *S* exists for *i* only if *S* is minimally *internally consistent*.

The picture painted by symbolic interactionists is of an identifiable self in flux. Mediated by interpretation, a self is constructed through constant interplay between individuals. The self develops only by what Cooley called the looking glass and what Mead called “role-taking”: imagining one’s self from the perspective of others. Goffman showed that the self was both “presented” to an audience and built up through non-verbal communication with that audience, through what Gregory P. Stone has called appearance.<sup>82</sup> Blumer noted that individuals had to interpret, rather than simply receive, the symbols and selves that they encountered.

The views of James, Cooley, Mead, and Goffman provide a rich analytical framework to study the idea of the self in moral rights. Working from the hypothesis that the self is by nature social—that it exists only in relation to others—the focus of moral rights is forced to expand beyond the individual author and abstract Hegelian self. A Hegelian self simply will not do because it isolates and essentializes the self as an abstract object.<sup>83</sup> Even if the Hegelian self required contrasting itself to others, the methods for doing so leave the content of the self highly abstract and uncertain. And hardly the stuff on which concrete use-rights are based. The social self, on the other hand, makes concrete and observable what Hegel conceived of as abstract.

\* \* \* \*

As I have shown, the social self is definable and capable of being studied.

---

81. A counterexample involves the artist who tries to create a “fictional” social self for artistic purposes. Moral rights scholars, as I note below, have been split on a similar question in the attribution context. Some argue that one does not have the right to use a pseudonym because the use does not protect the bond between the author and the work; others disagree. Similar questions arise in this context.

82. Stone, *supra* note 72, at 86-93.

83. See SINGER, *supra* note 59, at 76-80. Singer suggests that Hegel may have in fact thought that the self can only develop by social interaction. Even if this is so, the self is a much different kind of thing on Hegel’s view than on the view I have sketched in this Article.

In fact, I argued that there are seven Existence Conditions for a social self (listed nonsequentially):

*S* exists for *i* only if all of the following conditions are met:

- EC<sub>1</sub>: *S* is externally consistent;
- EC<sub>7</sub>: *S* is minimally internally consistent;
- EC<sub>3</sub>: (a) *i* has some conception of *S* exists *and* (b) others have some conception of *S*;
- EC<sub>4</sub>: *i* and others roughly agree about the content of *S*;
- EC<sub>2</sub>: *S* influences *i*'s action;
- EC<sub>5</sub>: *S* influences how others treat *i* and how *i* treats others;
- and
- EC<sub>6</sub>: *S* exists for *i* in virtue of interpretation.

These existence conditions of the self describe in what the self consists. But we still need to understand (1) how the self could be invested in a work and (2) the nature of harm that occurs to this self when moral rights are violated. In the next Part, I explore both of these questions in three steps. First, I introduce the work as a component of a social self that is external to the individual person. Second, I explain how this externalized social self is structured through a negotiated relationship between author, work, and others. Finally, I explain why this structural relation provides reasons to think that the author has an interest in maintaining a particular version of the externalized social self as constructed and maintained by these relations. Specifically, Part II frames the nature of this harm in terms of inconsistencies that arise from distortions in the relation that holds the externalized social self together (*i.e.*, via existence conditions).

## II. CONSTRUCTING THE EXTERNALIZED SELF: THE AUTHOR-WORK-OTHER TRIAD

In this Part, I continue the expansion started by scholars like Goffman, Blumer, and Stone. They recognized that possessing an object was sometimes tantamount to communicating a message. This was most apparent with props such as clothes, which can communicate, for example, whether you are in law enforcement, in the military, an employee, *etc.* This also holds true for objects like the books on display in your house. When others see your library, these props construct a narrative about you. And in placing them in your home, you attempt to construct a narrative about yourself.<sup>84</sup>

It would be a mistake, though, to limit the construction of the self to mere possessions. Surely, for example, Salvador Dalí's *The Persistence of*

---

84. Your *attempt* to create some kind of self is no guarantee that such a self will exist.

*Memory* is more than merely a possession *for* Dalí. That is, even absent his owning the painting, *The Persistence of Memory* has some role in constructing Dalí's social self. More than that, something about the painting is fundamentally different than a book Dalí might purchase: namely, he painted it. Surely if one's appearance can generate judgments about the self,<sup>85</sup> so too can one's creative outputs. This is a somewhat Hegelian idea: creation is both a construction of identity and an addition to it. An artist's work is at once a "new," constructed part of their identity while at the same time shaping who they are now. In this Part, I argue that these facts make creative works of art amenable to analysis as a particular aspect of the social self: the social self externalized in the work. Section II.A explains how this externalized social self is constructed through a triadic relation between author, work, and other. Section II.B then suggests that harm to this externalized social self occurs through certain distortions or inconsistencies that develop in the triadic relation.

#### A. *The Author-Other-Work Triad*

The social self is built up through social interaction and therefore includes "others" in a broad sense. An artistic work, such as a painting, is not a self, but rather a thing with which a self is associated. Insofar as a work includes this association, it is acceptable to say that a work is "part of" the social self. At the very least the work represents some "aspect of" the social self.

But it bears re-emphasizing that this conception is different from traditional conceptions. It is not that the self "moves into" the work in any abstract sense. Instead, it is the associations with the work that create part of a social self. In this sense, we can say that the work "contains" two aspects of the social self: the individual's own associations and thoughts; and others' associations, thoughts, *etc.* This is reflected in EC<sub>3</sub>. Because the self is constituted by one's own thoughts, associations, *etc.* as well as others', it must take both into account.

This is particularly true when identifying what harm moral rights seek to protect against. If moral rights—at least as personality theorists describe them—protect anything, they protect the author from harm that occurs when someone uses the work in a way that affects the social self as externalized in the work.<sup>86</sup> We can call this "social self as externalized in the work" and its two constitutive components (the social self and the work) the *externalized self*.<sup>87</sup>

If others' views play such a prominent role in the self, then they also play

---

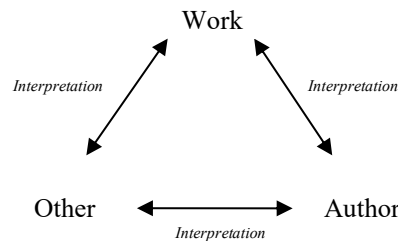
85. See Stone, *supra* note 72, at 92-93.

86. Simon, *Foundations of Moral Rights*, *supra* note 10.

87. Whether the "externalized self" is a separately existing "thing" is not relevant, though, given the nature of the self, it is not. The reason is the externalized self exists only insofar as it is recognized to exist. So, it cannot exist independent of recognition.

a role in the externalized self.<sup>88</sup> The social self envisioned by Goffman—and to a lesser extent by James, Cooley, and Mead—is one based on social interaction in one another’s immediate presence.<sup>89</sup> The externalized self, though, does not depend exclusively on this kind of interaction.<sup>90</sup> It is instead concerned with the interaction between author and object (work); others and object (work); and author and other. There is a person-to-object-to-person triad, with each node of the triad constructing some element of the self, as reflected in the other nodes. The work, for example, contains some aspect of the author, and the author herself is composed in part by the “other.”<sup>91</sup> “Nodes” of the triad are mediated by what Blumer called “interpretation”—interpretation by the author and other. Interpreting symbols is part of the process by which the externalized self is constructed. This occurs through perceiving and reflecting on that perception, as discussed by Mead, Cooley, and others. It is reflected in EC<sub>6</sub>: *S* exists for *i* in virtue of interpretation. Figure 1 below illustrates the relationships between the three features of the embodied self: author, other, and work.

**FIGURE 1. WORK-OTHER-AUTHOR TRIAD**



The meaning of each node is relatively straightforward. “Work” here means the creative product the author produces (book, painting, poem, *etc.*).<sup>92</sup> “Author” means the individual who creates the work.<sup>93</sup> “Other” refers to both individual people as well as the Mead’s “generalized other.”

88. As moral rights depend on the social self, any analysis of the harm moral rights protect against must account for this fact.

89. This is in contrast to symbolic interactionism, particularly that of Goffman, which based its conclusion on the interaction between people (for Goffman, people in one another’s immediate physical presence). The goal here is to integrate the notion of the externalized self into this symbolic interactionist framework—to account for perceptual harms as they occur through the use of an object in a particular way, a way inconsistent with the notion of the self.

90. Nevertheless, it does not exclude it. The physical and direct social interaction between people can play into this relationship.

91. There may be some philosophical debate about whether the work without an observer can contain anything, but that discussion is unimportant here. This section concerns only the social self, which exists only relative to and because of others. Whatever the objection, this section assumes the existence of a work as such for purposes of the analysis.

92. Whether this creative output is something “finished” or something “never finished” is not answered here.

93. Remember that this Article is concerned only with the traditional artist as she pertains to moral rights. That means the painter who paints a painting, writer who writes a book, *etc.*

Each node is mediated by a process of interpretation.<sup>94</sup> The author interprets the other—via Cooley’s looking glass and the community. The other does the same with the author. Each also interprets the work. During this process of interpretation, “meaning” is constructed and reconstructed.

One plausible view is that “other” refers to those individuals who James visualizes viewing and judging the work (*i.e.*, the “community” as Mead would have it). This need not (but may) include those that *actually perceive* the work, though *someone* other than the author must perceive the work and its subsequent use to implicate moral rights and the triad described above. Remember that the social self cannot exist without others both conceiving of *S* (EC<sub>3</sub>) and roughly agreeing upon *S* (EC<sub>4</sub>).<sup>95</sup> So if no one perceives the work, then no social self exists in the work—and, therefore, there is no harm.

What does it mean to “perceive” a work? We might think, as explained above, that perception is limited to direct experience, as when one *sees* a painting. We can call this *direct perception*. But perception also can have a broader meaning, and one might perceive a work even though they do not actually see it, as when one *hears about* a work, or a work is related to them through an intermediary. This latter possibility—which we could call *indirect perception*—invites a “telephone” scenario, where others’ impressions are based, not on the work, but on the impressions of those who transmit the work to them. In other words, by gossip, opinion, or criticism.

Our definitional choice influences how we construct the social self and the concept of harm. The wider our definition, the greater the opportunity for distortion of the social self; the narrower our definition, the smaller the opportunity. With a broad definition more people must negotiate meaning, making the social self more variable and the meaning harder to manage; the narrower the definition, the easier to achieve consensus, and likely the simpler it is to manage. Given that moral rights theorists generally favor broad rights of the author, they may well prefer a narrower definition of the social self. Conversely, proponents of moral rights may find a tactical advantage in broad definitions, which allow them to control a greater range of uses, despite the more limited real effectiveness of the rights.<sup>96</sup> Note, though, that whatever definition one chooses, *S* exists in virtue of interpretation, so each satisfies EC<sub>6</sub>. Ultimately, there is no clear answer, at least not yet, as to which definitional constraint we should prefer. Here

---

94. Blumer, *supra* note 79.

95. If no one ever viewed the work, no one would have the chance to violate the author’s moral rights in the work. In other words, rights violations presuppose access.

96. Moral rights advocates may prefer broad definitions for two reasons. First, they may be willing to make a tradeoff between effectiveness and reach. Second, they may surmise that broader definitions will enable authors to more plausibly assert moral rights violations. Authors may wrap plausibility into legal bludgeons to quell uses they don’t like. For how this might happen, see, for example, Stacey Dogan, *Bullying and Opportunism in Trademark and Right-of-Publicity Law*, 96 B.U. L. REV. 1293 (2016); Joseph P. Liu, *Copyright and Breathing Space*, 30 COUM. J.L. & ARTS 429 (2007) (on how copyright can produce a chilling effect on creators).

definition forces normative choice, but it is one we must defer for now.

Here is a simple, though incomplete, example to illustrate how the triad functions to construct the externalized self. John decides to paint a painting, and in the process may imagine (consciously or subconsciously) how others, such as his friend, Bruno, would interpret the work. John then shows his painting to Bruno. The painting is the work, John is the author, and Bruno is the other. Also included within the “other” is the “community” against which John interprets his work. Just who comprises the community is an open question that depends on the precise externalized self or selves we want to protect.<sup>97</sup> It is a question I leave open for now.<sup>98</sup>

John, after showing his work to Bruno, (re)interprets the work in light of his own views of the work, and what he imagines are the views of Bruno (and those of the other). Bruno (and the other) interpret the work in light of themselves, their views of the author, and the other. *This process of interpretation and reinterpretation constructs the externalized self.* Although the “self” is open to further change, it obeys some constant structure over time—that is, the structure of the triad subject to EC<sub>1-7</sub>. Changes to the externalized self occur when interpretation by any part of the triad changes via a new or different interpretation. How much change occurs depends on some combination of the following: whose views change, how many individuals’ views change, how often their views change, whether the change “sticks,” how often and by whom the work is viewed, whether the work changes, how and by whom the work is presented, and what the author attempts to do to combat or encourage change.

With all this change occurring, just how does the self remain stable? Here we can fall back on the ECs laid out earlier. Each EC is required for the self to exist. And since stability presupposes existence, ECs are at least minimal conditions of stability. So, for example, *S* must maintain internal and external consistency (EC<sub>1</sub> & EC<sub>7</sub>), must be the substantially same *S*, or at least be similar enough to say that, in referring to *S* at *t*<sub>1</sub> and *t*<sub>2</sub>, we are in fact referring to approximately the same thing.<sup>99</sup> What it means for *S* to be substantially the same thing depends upon rough agreement of *S* (EC<sub>4</sub>). So, in this way, we can say that the existence and stability of *S* both depend upon ECs. There remains, as noted above, a question of how we define

---

97. Here the concept of the social self leaves open space for normative argument about how broadly or narrowly we conceive of the other. But it also may be a descriptive question. Others can include only those who in some way come to experience the work. At first blush, it appears the concept of the social self mandates a wide berth since the self is constructed in part by anyone who constructs the self. Yet we may decide that the externalized self is too attenuated for this kind of expansive definition, and thus limit it to a narrower definition. Ultimately, this may be a matter of normative argument, but the social self interpretation of the Investment Theory sets the descriptive terms of the normative debate.

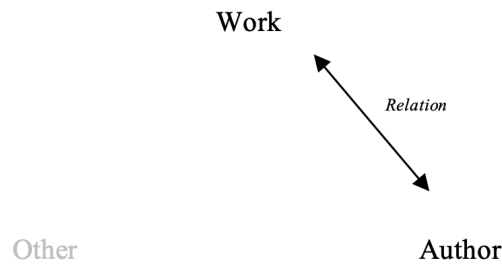
98. See *infra* Part III; Introduction.

99. Since we are not concerned with the “essence” of *S* or *S*-ness, there is no trap of what kind of thing *S* is. We know what kind of thing *S* is. See, e.g., John Locke, *Of Identity and Diversity*, in *PERSONAL IDENTITY* 33 (John Perry ed., 2d ed. 2008).

“other,” which will also have important consequences for how we think about *S*. So, too, will our explanation of what it means for “*i* and others roughly agree about the content of *S*” (EC<sub>4</sub>).

For now, we can regard ECs as helpful to understanding how the author’s social self comes into existence—and how it stays “alive.” ECs give form to the view of the self as a continual process between the author, the other, and the work. This process also explains the relation that exists between the work, other, and author. It differs from the traditional manner in which moral rights scholars conceptualize and isolate the relation between the author and work. The work-other-author triad does not exist. Instead, there is a dyadic relation between only the author and work:<sup>100</sup>

**FIGURE 2. AUTHOR-WORK DYAD OF MORAL RIGHTS  
ORTHODOXY**



To the extent the other exists here, it is only as an intermeddler who can distort the author-work relation. This Section took a different approach. Rather than conceptualizing the relation in terms of *only* the author and the work, it suggested using the social self to broaden our view. With the social self as the focal point, a more complex, triadic relation emerges, one that includes the “other” in addition to the author and the work. Highlighting the Triadic Relation illustrates that the traditional view of moral rights, which focuses on one segment of the author-work-other triad, misses a critical aspect of the relation between the author, the other, and the work.

*B. Harm to the Self as Certain Changes to the Author-Other-Work Triad*

This model, using the externalized self, captures this missing element. The triad itself *is* the relation that moral rights should be concerned with; the triad builds up, so to speak, the externalized self. Thus, if there is a relation between the author and the work, it necessarily entails the relation between the author and the other, as well as the other and the work. Call this “the Triadic Relation.”<sup>101</sup>

100. This “Orthodoxy” is defined in Simon, *Copyright’s Memory-Based Rights*, *supra* note 15.

101. See Figure 1.

The Triadic Relation is continuous and exists between all three nodes on the triad. It is this relation that both constitutes and builds the externalized self. The Triadic Relation is also a process, which is in flux. Nevertheless, as explained above, it provides a stable concept (the externalized self) to ground moral rights. This stability is generated by the EC required for *S* in the first instance. If *S* does not exist, it is not stable. But if it exists, it is *necessarily* stable because *S* cannot exist if it is unstable. Stated differently, ECs entail stability.

Satisfied existence conditions, structured through the Triadic Relation, constitute a particular externalized version of the social self. Since the externalized self *just is* the Triadic Relation, harm to this self is, in effect, a specified *type* of change to the Triadic Relation that occurs in a particular *manner*. I argue that the change must arise from the use of a work (manner of change) that is inconsistent with the existing Triadic Relation (type of change).<sup>102</sup> Inconsistent uses of a work threaten the externalized social self by undermining cases the existence conditions currently maintained by the Triadic relation. Harm, then, does not mean any physical or emotional harm as such, instead it refers only to the *changes* to the Triadic relation in virtue of uses of a work that are inconsistent with the existing externalized social self. In the next Part, I use this conceptualization of harm to analyze how moral rights might protect the social self.

\* \* \* \*

Proponents of moral rights argue that the rights protect the author's "self," or some version of the self, from harm. Harm to the self, they argue, is in some sense harm to the author personally. Destroying a sculpture,<sup>103</sup> moving a sculpture,<sup>104</sup> removing artwork from a physical location,<sup>105</sup> painting over graffiti,<sup>106</sup> or papering over a mural<sup>107</sup> are all contemporary examples where authors alleged moral rights violations. But we could easily imagine others, such as showing excerpts of a movie or song in contexts the author finds objectionable, such as religious services or pornography. In each case, the author claims that, in some sense, the use harmed not just the work (by changing it in some way), but also—and critically—her "self" or

---

102. I do not suggest this is the only possible conceptualization of harm or authorial interest generated from it. Given the position of most moral rights proponents and the features of moral rights discussed in Part III, however, it seems reasonable to use it here.

103. *Martin v. City of Indianapolis*, 4 F. Supp. 2d 808, 809-10 (S.D. Ind. 1998), *aff'd*, 192 F.3d 608 (7th Cir. 1999).

104. *Phillips v. Pembroke Real Est., Inc.*, 288 F. Supp. 2d 89, 93-96 (D. Mass. 2003), certified question answered, 443 Mass. 110, 819 N.E.2d 579 (2004), *aff'd*, 459 F.3d 128 (1st Cir. 2006).

105. Aaron Moss, *Artist Brings VARA Claim Over Trashed Tote Bags*, COPYRIGHT LATELY (2020), <https://copyrightlately.com/artist-vara-trashed-tote-bags>.

106. *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162 (2d Cir. 2020), as amended (Feb. 21, 2020).

107. *Urbain Pottier v. Hotel Plaza Las Delicias, Inc.*, 379 F. Supp. 3d 130, 131 (D.P.R. 2019).

her person. The harm has been described in physical (a “slap”),<sup>108</sup> religious (harm to the “soul”),<sup>109</sup> and moral (harm to “dignity”) terms,<sup>110</sup> among others. Harm to the work means, in some important sense, harm to the author’s “self.” By safeguarding the author’s self as externalized in the work, moral rights protect harm to the self by protecting harm to the work.

Yet a central challenge for moral rights scholars has been to describe what a self is and how it can be harmed. Part II provided answers to both of those questions using the concept of the social self. It argued that because the object of moral rights is the author’s work and not the author’s self as such, the object of harm is the social self (or that aspect of the social self) as externalized in the work—the externalized self, as I have described it. The advantage of the externalized self—as opposed to vague concepts like the “innermost self” or “artistic self”—is that it provides a coherent, identifiable concept through which harm can be assessed. We all can understand what a social self is, and, though somewhat complex, the conditions required for its existence.

One might, after digesting this argument, think that the social self vitiates the author’s “connection” or “bond” to the work. The mystical element, it is true, is gone. But the bond is not. Quite the opposite: the author’s connection to the work is what gives her standing to bring claims for harm to *her* externalized self. Moral rights orthodoxy sees a connection of the self to the work; and the externalized self I have sketched has just that property. It is some aspect of the author’s social self, but it is also external to the author as a work. It is thus created through social interaction, and it is “in” the work. The author’s self is connected to her in whatever way an externalized self is connected to its internal counterpart.<sup>111</sup> So when a harmful use occurs, this harm occurs to the social self. Inasmuch as the social self is a relation between author-work-other, the resultant harm captures any possible “link” between the author and the work. This connection, in turn, provides the author a basis for bringing her claim. So this account seems to capture exactly the kind of harm moral rights have in mind. First, it gives a plausible account of the self and how it could be “in” a work. Second, this conception of the self entails the author’s connection to the work. Finally, since harm to the work is harm to the self, and since the self is in part a relation to the work, harm to the self is harm to the relation between the author and the work.

This conception of the self provides a clear answer of to what exactly

---

108. Susan P. Liemer, *Understanding Artists’ Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 50 (1998).

109. See generally ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (1st ed. 2009).

110. Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 799 (2001).

111. I am not here arguing that there *is* such a thing as an “internal self” or that there is such a thing as a “self” at all, in the metaphysical sense. I am only suggesting that any external aspect of the social self is connected to the social self that is reflected in the individual herself.

harm is occurring, and the nature of the relation between the author and the work: the externalized social self. Violating the right of integrity—or any other moral right—is in some way harming this externalized self. Since the externalized self is one and the same as the Triadic Relation, harm to this self is also harm to the Triadic Relation.

### III. APPLICATION

Using the social self to ground the Investment Theory had an important analytical payoff. It provided a framework for understanding the thing moral rights protect and how the thing protected may be harmed. By explaining the Existence Conditions for the social self, it identifies *when* harm might occur. And since it enabled identification of the self and when it might be harmed, it also enabled understanding how legal rights might protect it. This Part uses these analytical payoffs to suggest a new function for moral rights: to present and manage, in limited ways, the social self.<sup>112</sup> It then analyzes this new function through the lens of current moral rights doctrine.

Section III.A argues that moral rights can plausibly be conceived of as limited rights to present and manage the social self. In other words, if moral rights protect the social self, and if the social self depends on the Triadic Relation, then moral rights protect this relation in some way. Given the social self's existence conditions, the moral rights are best understood as a limited means to present and manage their social self as contained in the work. To trace the outlines of these rights, this Section examines how moral rights work to protect the Triadic Relation.

But precisely *how* moral rights could—or *ought* to—do this in practice is an open question. Sections B and C then explain how, given this new function, moral rights might be applied. As explained above, accepting the Investment Theory without justifying it means that these two Sections will eventually force normative choices—choices I will not make. This does not, however, foreclose all discussion. Some normative choices—even some that are precluded from analysis—are limited in type and scope by the description of the social self. The reason is because the social self has a particular empirical character—and this character is constructed and maintained according to conditions the author may not be able to control even with extensive legal entitlements. Sections III.B and III.C explore the degree to which the social self constrains and leaves open these normative choices, articulating the logical structure of moral rights designed to protect the social self.

Section III.B shows that this structure can be seen in both the broad outlines of rights themselves (*e.g.*, scope, duration) and the subtle intricacies of their operation (*e.g.*, presumptions, burden-shifting, evidentiary

---

112. Specifically, moral rights are *limited rights of externalized self-presentation and management*.

standards). Section III.C then concludes by illustrating how the scope and nature of these rights may change over time. The upshot is this: if moral rights protect the social self, then they may look rather different from how their advocates envision them. And they may be unlike any one area of intellectual property law existing today.

*A. How Moral Rights Protect the Work-Other-Author Relation*

If moral rights are to present and manage the social self, they give the author control over certain aspects of her externalized social self (*i.e.*, a particular aspect of her social self).<sup>113</sup> To put things another way, the rights of divulcation, attribution, integrity, and withdrawal enable the author to engage in, as Goffman called it, the “art of impression management.”<sup>114</sup> Each right serves this function by enabling the author to set the terms of, and then attempt to preserve in some fashion, the Triadic Relation that she sought originally to establish.

While moral rights protect the externalized social self, they are not absolute protections. The rights themselves set out their limits, and, thus, provide some insight into the kind of harm—I argue incongruity of the externalized social self—they seek to prevent. Moral rights cover four basic areas: attribution, integrity, divulcation, and withdrawal. Harm occurs when any right is violated. Generally speaking, harm occurs under each right when a non-author:

1. fails to affix the author’s name to her work, and sometimes when a non-author’s name is affixed to the author’s work (*right of attribution*);
2. uses the work in a way that distorts, mutilates, or modifies the author’s work (*right of integrity*);
3. divulges, publishes, or forces the author to publish the author’s work without the author’s consent (*right of divulcation*); or
4. prevents the author from withdrawing her work from the public (or from the publisher prior to publication) (*right of withdrawal*).

When viewed through the lens of the externalized social self, the harm moral rights protect against becomes more clearly defined in two interconnected ways. First, we now have a picture of the relationship between the author and the work. This picture shows us what is harmed when a use violates moral rights—*i.e.*, the Triadic Relation. Second, we are now able to articulate how that relation is “harmed” when moral rights are violated—*i.e.*, when a use produces some incongruity or inconsistency of

---

113. This is true to whatever extent the social self shapes the externalized social self, and *vice versa*.

114. Goffman, *The Presentation of Self*, supra note 69, 183-209.

the externalized social self, causing *S* to change or cease to exist.<sup>115</sup> This becomes clearer with an analysis of the rights themselves.

The right of divulgation is a reasonable place to begin because it is, in effect, the first in a sequence: the author publishes the work (*i.e.*, initiates the construction of the externalized social self) and then seeks to regulate its use (*i.e.*, manage the externalized social self). This right is, in other words, an important precursor to and companion of the other rights, at least within the context of the Triadic Relation. Giving the author the right to decide when, where, what, and how to publish a work allows the author to *propose* the initial terms of the externalized social self and, thus, the Triadic Relation. It provides the author with, as Goffman might say, the opportunity to present her externalized social self in a particular manner.

Presentation is the beginning, not the end, of a conversation about the externalized social self. The author brings to the public her work in a particular form and fashion, and does so to represent a particular kind of externalized social self. But there are no guarantees that the proposed self will endure. The right of divulgation protects the author's ability to set the stage, so to speak, or frame the discussion. It gives her the right to cast her externalized social self in a particular way—perhaps to convince others that her externalized social self has some particular characteristics, attributes, or virtues. Or maybe to present what she thinks is her “authentic” self, her “innermost self,” *etc.*<sup>116</sup> In the process, this right also serves to prevent incongruity or inconsistency.

The author can, in some circumstances, prevent others from introducing an externalized social self (the Triadic Relation) that is incongruous with the one the author wants to present. Indeed, violating this right produces harm by virtue of this incongruity, which threatens the ECs of the social self at all. It is what the right, in the second instance, is designed to protect. As we will see in Section III.B, the right is flexible and looks different from current moral rights. It allows the author, for example, to divulge under conditions more or less conducive to establishing a particular self. If she is especially concerned about who will perceive her externalized self and how they will perceive it, she can divulge on terms that allow her maximum “audience segregation.” Likewise, she can do the opposite, and divulge it to a wide audience.

If this all sounds like a right of self-definition, it is probably because that has been the conventional way commentators have interpreted the right.<sup>117</sup>

---

115. It is important to note that my description of harm as inconsistency itself projects a normative vision. This descriptive choice may influence normative judgments in ways other conceptions of harm to the social self do not.

116. Note that the social self does not care much what the author calls the self she presents. From this standpoint it has the advantage of capturing whatever it is the author thinks is her “self” to be without passing judgment on whether such a self in fact exists. The ultimate test of whether the self exists is borne out by ECs.

117. *E.g.*, Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 13-14 (1988).

Self-definition and self-presentation, however, are not identical concepts. Here the idea of self-presentation is more limited and defined than the idea of self-definition described by most scholars in the personality tradition.<sup>118</sup> Self-presentation refers to exposing one's externalized self and controlling various aspects of how it is used and interpreted consistent with the ECs I described earlier. Self-definition in its traditional, wider sense, however, is more amorphous and encompasses how one's *person* is perceived and defined. Indeed, theorists in the self-definition camp have often failed to define exactly what it is that is being defined: the self or one's identity.<sup>119</sup> To distinguish the two and to reflect the conception of the externalized self, I refer to the right of divulgation as one of *self-presentation*.

Without any other rights, the right of divulgation would protect only this limited ability to present the externalized social self. It would not prevent further inconsistencies between versions of the externalized social self that arise when non-authors use a work in certain ways that threaten the existence of the externalized social self. Absent the rights of attribution and integrity, for example, non-authors would be free to attribute falsely, fail to attribute, or mutilate the author's work.<sup>120</sup> The rights of attribution and integrity enable the author, in some cases, to preserve the Triadic Relation as it began under the right of divulgation.

The attribution right, for example, functions to prevent inconsistency between the author's externalized social self and some other inconsistent version of that externalized social self. It does this by providing a cause of action to the author when the author's name is not affixed to a work,<sup>121</sup> or, in some cases, when a non-author's name is placed on the author's work. Using this right, the author can attempt to ensure that *she* is identified with her externalized social self. In effect, the author can preserve a particular kind of Triadic Relation. Thus, the rights prevent the meaning of the externalized social self from becoming inconsistent with whatever meaning would have been presented had the Triadic Relation been preserved. The harm that results from this inconsistency occurs *via the author node* of the Triad (see Figure 3). One "leg" of the triad is compromised, and the attribution right enables the author to attempt to prevent this. "Preventing" this inconsistency eliminates a potential threat to EC<sub>3</sub> and EC<sub>4</sub> by preserving the *S* that both *i* and others roughly agree exists.

---

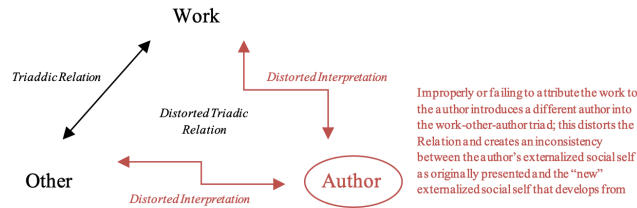
118. See Simon, *Foundations of Moral Rights*, *supra* note 10.

119. Taking the social self view seriously means acknowledging that all attempts at self-definition are not inward facing acts—they are meant to both define for one's self and to project to others. Self-definition theorists may resist this view by falling back on an autonomy-based theory to justify the right of divulgation on self-identification grounds. Simon, *Foundations of Moral Rights*, *supra* note 10. This view is not explored here.

120. Other recourse may still be available for authors, but it will not be aimed at protecting the self.

121. Another feature of the attribution right: it provides the author with the affirmative right to publish under her own name, pseudonymously, or anonymously. This feature allows the attribution right to function similar to the divulgation right—it is a tool for the author to construct and maintain a particular externalized social self.

FIGURE 3. HARM &amp; THE ATTRIBUTION RIGHT



By preventing this inconsistency, the attribution right allows the author to preserve the Existence Conditions for the social self. If the work is published without the author's name, for example, others may fail to include the work in their interpretation of the author. Hence, they may think *S* does not exist ( $EC_3$ ) or they may not agree with *i* about the content of *S*. Of course, either of these could be true *even if* the author's name is properly attributed. So, it is important—as emphasized above—that there is a causal link between the use and the distortion of the Triadic Relation. In other words, it may not be that *all* failures to attribute the author's name violate the attribution right. Instead, violating the attribution is harmful *only* where failure to attribute work causes a distortion in the Triadic Relation *that would not occur with attribution*. In this way, the attribution right enables the author to preserve the Triadic Relation in circumstances only where harm occurs in the right's absence. In cases where harm would occur even if the attribution right was exercised effectively, the attribution right will not exist. Remember that not all changes to the Triadic Relation are violations of moral rights. And not all uses that seem to violate moral rights will cause harm the Triadic Relation—at least, that is the thought. The causal requirement limits moral rights to cases where harm (to the social self) is causally related to the offending use.

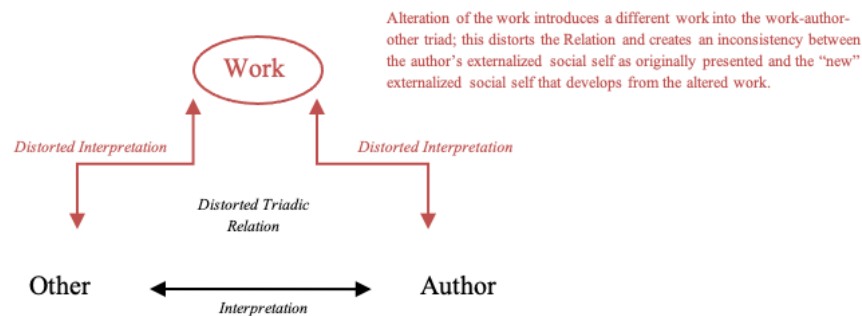
A different analysis applies to the right of integrity, which, on the view sketched so far, does not have a strong basis for support. When a non-author, without permission, distorts or mutilates the work, the construction of the externalized social self *can be* altered. That is, the meaning of the externalized social self *could* change in ways it could not have if the original the Triadic Relation had been maintained. The change must be different, however, from the change that occurs with the attribution right.

Here there are at least two possibilities.<sup>122</sup> First, a non-author distorts or mutilates a work without removing or replacing the author's name. Any change to the externalized social self occurs via the work node of the

122. On the points that follow, I thank Oren Bracha for his thoughtful critique and for helping me refine my thoughts and arguments.

Triad.<sup>123</sup> In other words, the Triadic Relation is maintained but distorted by the alterations to the work. An example might be when an author writes a book about the O.J. Simpson murder in the style of Dr. Seuss, titles it *A Cat Not in the Hat*, and leaves Dr. Seuss's name on it.<sup>124</sup> Here, however, it appears the violation is of the attribution, not the integrity, right. That is, the harm seems to occur *because* Dr. Seuss's name is left on, "sourcing" his social self, so to speak.<sup>125</sup>

### FIGURE 5. HARM & THE INTEGRITY RIGHT



A similar analysis applies when we know that Dr. Seuss did not in fact write the new book. When we know that one person did not write a book, then we also know that some *other* person did.<sup>126</sup> Here it is difficult to understand how harm could occur to the Triadic Relation. That seems to apply to *A Cat Not in the Hat*, the cover of which clearly identified Alan Katz and Chris Winn as the author and illustrator, respectively. Though similar in style to *A Cat in the Hat*, the content of *A Cat Not in the Hat* differed markedly from Dr. Seuss, and it did not use Dr. Seuss' name. Since it is clear that Dr. Seuss did not write the book, there is no distortive affect on the Triadic Relation. The justification for an integrity right, in other words, is lacking. What's more, the fact that Dr. Seuss is *not* attributed prevents the harm from occurring via the author node, eliminating attribution right claims.

123. See Figure 4.

124. *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997).

125. One might also argue that there may not be an attribution right violation if the work has been changed substantially. The reason is because there can be no inconsistency in the Triadic Relation *by reason of attribution* if it is clear that the misattributed work is *not* the same as the original. What is damaged in this case is the work node of the Relation, not the author node. If this argument prevails, then in such cases a use would violate neither the attribution right nor the integrity right.

126. I assume that it is also clear that a computer program or some form of artificial intelligence did not write the book. I also assume that compiling a book comprised of other texts is "writing."

This leads to the question of whether there is some other way to understand harm to the Triadic Relation that the integrity right could capture. A second method might be possible, but it focuses on how we consciously or subconsciously *associate* the work with the author. When an author's work is used, we may consciously or subconsciously interpret the work through that association, potentially changing the Triadic Relation. Consider again *A Cat Not in the Hat*. Although Dr. Seuss is not identified as the author, we do understand that some other version of that work *was* the author's (by similarity in the title, prose, and illustrations). In this way, either consciously or subconsciously, *A Cat Not in the Hat evokes* Dr. Seuss. And it is *through this* association that the the Triadic Relation can be harmed when, for example, a work evokes or elicits the association with Dr. Seuss' to tell a gruesome story of murder.

When stretching the Triadic Relation this far, however, its coherence as an analytical instrument comes apart, even on a strongly justified account of moral rights. Since many things, including critical or humorous uses of the author's work, will invoke the author's prior work, one must provide an explanation of why merely using a work is different from talking about the work or the author in connection with their works. And, perhaps more problematically, one must explain how using *any* work would not run afoul of moral rights violations. While this latter point is not an obstacle in principle, it is a serious objection that asks us to consider deeper questions of justification and balancing of interests that I have bracketed.

All this may lead some to conclude that the integrity right is not supported by the account I have offered so far. This will foreclose some claims entirely. To rescue the integrity right violation, one must point to some other way in which the Triadic Relation could be harmed. Because that is not the aim of this Article, I do not explore this possibility further.

\* \* \* \*

Using moral rights, the author may prevent certain uses that threaten the Existence Conditions of her externalized social self. She may not always succeed, and the rights themselves are crucial for her ability to *manage* how others interact with her work. Therefore, I refer to them as *limited rights of self-presentation and management* or, for short, "Rights of Impression Management." In the next Section, I explain how these Rights of Impression Management function in practice.

### *B. Moral Rights as Rights of Impression Management*

If moral rights protect the social self from distortion, what might these rights look like? For the purposes of this Section, I will take the view that moral rights include the four "core" moral rights: attribution, integrity,

divulcation, and withdrawal.<sup>127</sup> I will not assume that such rights have any necessary features, such as inalienability. So, I will take the rights themselves as fundamental, but their precise formulation as dependent upon my account of moral rights as Rights of Impression Management. This is consistent with my methodology as explained in the Introduction.

This also is practical. Many of the “core” elements of moral rights—such as inalienability—are not required under international treaty or convention.<sup>128</sup> And in some cases these features are limited quite significantly by law.<sup>129</sup> An added benefit of this approach is removing the need to answer the question of whether moral rights provide additional protection over and above copyright generally.<sup>130</sup> The goal of this Section, then, is to draw out the shape of such rights *given* the justification for moral rights as Rights of Impression Management.

### 1. Divulcation

The right of divulcation is the right to divulge or disclose the work to the public. Assuming such a right is justified by an Investment Theory, the relevant question is what features does this right have? There are two types of features this right could have. First, it could entitle the author to control the *timing* of divulcation. Second, the divulcation right could entitle the author to control *the method* of divulcation. The right, for example, might include any or all the following features,<sup>131</sup> namely the author’s right (DR), some of which meld both features:

1. to disclose the work to anyone;
2. to disclose the work to the public;
3. to disclose the work in a particular manner to anyone or to the public;
4. to disclose *repeatedly* the work in *the same manner* to anyone, or to the public
5. to disclose *repeatedly* the work in *different manners* to anyone, or to the public; and
6. to force publication of the work.

---

127. I do not analyze whether this implication is warranted. The debate over which moral rights ought to count as moral rights is outside the scope of this Article.

128. Moreover, because the Berne Convention does not require member states to protect inalienability, member states need not include that character feature. *See infra* note 129.

129. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and as amended Sept. 28, 1979, 102 Stat. 2853, 1161 U.N.T.S. 3, 6*bis* [hereinafter Berne Convention].

130. Cf. Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 380-86 (2006).

131. These are drawn from Adeney’s discussion of moral rights in France. ADENEY, *supra* note 7, at 192-95; *see also* COPYRIGHT THROUGHOUT THE WORLD § 15:20 (Silke von Lewinski ed., 2017). In Germany, the right of disclosure is limited to “public disclosure.” ADENEY, *supra* note 8, at 231-32. She notes that although the definition of this term is not settled, it operates on a sliding scale: the broader the disclosure, the more likely the right has been exhausted. *Id.* at 231-33.

The right of divulgation typically includes the first three of these features but generally not the last three. The right to force publication (DR<sub>6</sub>) is not generally recognized because it would impose on a third party a duty to publish a work at its expense.

The account I have offered also seems to cut against the right to force publication (DR<sub>6</sub>). There is no obvious reason why one should be allowed to require another to create a social self. It also cuts against the notion that the social self is in part determined by others. If others refuse to participate in the creation of the self, there must be a compelling reason that they will be forced to do so. None is readily apparent.<sup>132</sup> That said, it is theoretically possible for a strong justification of the Investment Theory to support the opposite result.

The precise scope of *what else* the divulgation right should include is a normative question not addressed here. Despite this limitation, the descriptive shape of the social self suggests several contours it is likely to reflect. For example, moral rights probably will be broadest at the point of divulgation for at least two reasons.<sup>133</sup> First, the author's ability to shape her social self using moral rights diminishes immediately after others view and interpret the work.<sup>134</sup> This is because whatever *de jure* or *de facto* control the author exercises after divulging the work will necessarily be less than before divulging it. This empirical reality suggests that moral rights are likely to have the most impact before, rather than after, the work reaches the public. Second, the ability to decide when and on what terms to initiate the discussion of the externalized social self is crucial to its existence and meaning. If moral rights actually protect the social self—regardless of how strongly they do so—the ability to set the terms of the interpretation of the self seems critical to their functioning.

Simply because the rights will *probably* be broadest at the point of divulgation does not mean that those rights *will be broad*. The former derives from the right's purpose, which is to allow the author to “set the stage” for her audience, to impress upon them the social self she wishes to cultivate.<sup>135</sup> But the latter depends on a variety of factors, including the author's (and others') actions, beliefs, circumstances, and abilities. For example, the author may be a well-known criminal or a volunteer at her local soup kitchen. She may have been born blind and in poverty or sighted and in affluence. Various details of her life, like those just mentioned, and their interpretive scope may be determined before divulgation. The blind

---

132. It is possible, of course, that one could present such reasons in justifying the Investment Theory. Here, then, is a potential place for normative disagreement.

133. Ultimately, of course, how strong or weak these rights actually are will depend on the persuasiveness and strength of the underlying justification of the Investment Theory.

134. See *infra* Part III.C.

135. Although these factors limit the author's ability to set the interpretive stage, they do not destroy it. In deciding what to create and whether to divulge it, the author exercises a kind of *de facto* control that is critically important in shaping the social self. It is in this narrower sense that I wish to convey that the author “sets the stage” or initiates meaning of her work.

author may be praised for visual work while the rich author may be denounced for culturally appropriating fiction on the blind working class. Lack of control over these props necessarily reduces, but does not eliminate, any control afforded by moral rights.

While these factors bear on the *de facto* control the author exerts over presenting her self, the ultimate shape of particular rights will depend on the normative justification of protecting the social self. If we assume the Investment Theory is justified, even if we do not know the precise strength of the justification supporting it, it seems likely that the right of divulgation will likely include the right to disclose the work to anyone privately (DR<sub>1</sub>) and to the public generally (DR<sub>2</sub>). Some version of the right includes divulging the work in a particular manner to anyone or to the public (DR<sub>3</sub>). It is possible, of course, that a weak justification supports only the right to decide the time when to divulge the work rather than the method of doing so. While possible, it is difficult to imagine such a right given that we assume there *is* a justification for the Investment Theory.

But the existence of a justification for one feature of the divulgation right does not necessarily mean it applies equally to all of the remaining features that relate to timing and method of divulgation. Consider the rights to disclose the work repeatedly in the same or different manners (DR<sub>4</sub> and DR<sub>5</sub>), which are just broader formulations of the right to divulge the work publicly (DR<sub>3</sub>). Whether Rights of Impression Management include these additional rights is a question of scope: what actions are required to “exhaust” the right, *i.e.*, to exercise it so that it cannot be exercised again. The right’s scope, again, is a normative question that depends on the strength of the justification underlying the Investment Theory. Germany, where the divulgation right is exhausted upon sufficiently public disclosure, presents an example of a moderately strong divulgation right. The larger the audience, the more likely the right is exhausted. So a public disclosure of a work in one manner does not also provide the author with another right to disclose in a different manner. In Germany, therefore, an author’s divulgation right is relatively strong with respect to timing, but not with respect to method of disclosure because the author does not have a “repeat” divulgation right to the same audience. Yet some in Germany, just as in France, argue that “first disclosure” translates into “first disclosure in a particular medium.”<sup>136</sup> They argue, in other words, for a stronger right as to the method of disclosure. To accept such an argument, however, requires a correspondingly strong justification supporting the need to protect the social self.

So, here again, the descriptive question of what *kind* of disclosure or *how many* disclosures “exhaust” the right cannot be answered outright without a sufficient normative frame. Still, a few remarks can be made assuming various degrees of normative strength. First, if the justification of moral

---

136. See ADENEY, *supra* note 7, at 234; COPYRIGHT, *supra* note 131, at § 16:20.

rights (as Rights of Impression Management) is strong, then moral rights will be more likely to protect a greater number of disclosures to a wider audience, or set of audiences, than if the justification for them is weak. A strongly justified Investment Theory, therefore, suggests that exhaustion will likely be quite broad, broad enough to encompass rights to disclose the work repeatedly in different manners (DR<sub>5</sub>), and, possibly, in the same manner to different audiences (DR<sub>4</sub>). A weakly justified version of the theory suggests that perhaps an initial disclosure is enough to exhaust the rights.

Second, even without assuming a strong justification, moral rights will likely protect more than simply *the first or subsequent private or quasi-public* disclosures of the work. In some if not all cases, a social self cannot exist without proper audience segregation. This is doubly true if an author wants to convey two distinct social selves using the same work—either as an expression of her “self” or simply because it is convenient. Of course, a weakly justified Investment Theory may suggest the author ought to have very limited control over disclosure. But even a weak justification—that the author’s social self should be protected by moral rights—suggests that the author ought to be able to control who sees the work first if in doing so the author is careful to segregate audiences.

If the justification is strong, this may even be true of *more than one public* disclosure (DR<sub>4</sub> & DR<sub>1</sub>). Just as people can maintain different personas in different public settings, a work can help to maintain different externalized selves in different contexts. If repeated disclosures to various audiences, even large audiences, counted as sufficiently public, the author would lose her ability to initiate the construction of her different externalized social selves.

In this context, exhaustion will turn on how many and what kind of (public) disclosures will exhaust the divulgation right, *i.e., the manner of disclosure and nature of audience segregation*. The more segregated an audience for any given disclosure, the less likely a subsequent disclosure to a different audience will exhaust the divulgation right. Likewise, the more distinct a manner of disclosure, the less likely a given disclosure will exhaust the divulgation right. It follows, then, that the more distinct the disclosure *and* the more segregated the audience, the less likely the divulgation right will be exhausted by any given disclosure. Thus, a strong right of divulgation, if justified, would protect a number of different (manners of) disclosures to different audiences before the right has been deemed “exhausted.”

The nub of this right is to enable authors, in certain cases, to *attempt* to present and manage different externalized selves.<sup>137</sup> If an author wishes to impress a particular self on her patrons in Europe, but a different one on her

---

137. Her attempts, of course, may fail, and this failure may influence her future rights. See *infra* Part III.C.

fans in Africa, then the right of divulgation may protect her ability to do so. This right would be strongest if she disclosed the work in a different manner to each audience, such as a print in Africa and a collage in Europe. If the right did not protect this, then moral rights (like those in Germany) would not prevent her work from being divulged in Africa as a print, say, after it is exhibited in a collage in Europe.<sup>138</sup>

Given the presence of the internet, it may seem difficult to imagine audience segregation is ever possible once a work is public. But whether this is possible and to what degree depends on a variety of factors, such as the type of work, its location, and the author's ability to exclude others from it.<sup>139</sup> For example, excluding audience from performance art is easier than excluding individuals from streaming music online. Likewise, many countries do not have strong and consistent internet networks and many sites are password protected, both facts that make public disclosure less of a threat to exhaust a right. Furthermore, if given the opportunity and knowledge of the benefits, authors also might be able to better segregate their audiences. This is doubly true if they had *rights* to do so. New forms of content licensing and distribution might emerge.

Moral rights, strongly or weakly justified, should attempt to protect different selves (to varying degrees) when audience segregation occurs. Versions of this right, depending on the justification, are unlike the sliding scale employed in Germany. For example, if the divulgation right is strongly justified, it might protect *multiple public disclosures regardless* of whether they differ from each other. A slightly weaker version might protect multiple public disclosures *only if* the subsequent disclosure differs from the original in manner and nature and in the intended audience, and audience segregation is at least possible.<sup>140</sup> An even weaker version might protect only a single public disclosure.

There is one final issue related to exhaustion. Under moral rights doctrine, the right of divulgation can be exhausted only if it is properly exercised. And an author can properly exercise a right only by consenting to a disclosure. This means that unauthorized disclosures do not count as public disclosures, even if that disclosure occurs to every single person on the planet.<sup>141</sup> This legal fiction serves two important functions: it disincentivizes unauthorized publication, and it protects the author's right from forfeiture.

A need to prevent forfeiture of the right stems from the interests the divulgation right protects. But because the interests are shaped by the social self, there are reasons to think that the exhaustion right may be conditioned

---

138. Of course, other copyright entitlements may allow her to prevent this.

139. On excludability, see generally Amy Kapczynski & Talha Syed, *The Continuum of Excludability and the Limits of Patents*, 122 YALE L.J. 1900 (2012).

140. Repeated disclosures in the same manner may also be entitled to protection, but it will likely be less than the protection for repeated disclosures in different manners to different audiences.

141. See ADENEY, *supra* note 7, at 232.

on and correlated with how widely a work is disseminated after an unauthorized disclosure. This is because the externalized social self *just is* the working consensus about the Triadic Relation. One cannot change that simply by stating it does not exist. On the other hand, in cases where disclosures are not especially widespread, or can be retracted easily, the fiction probably can be preserved.

One must be careful, however, not to solely condition the right on the effectiveness of any remedy for someone else violating it. So, while the extent to which the public disclosure can be rectified should be a factor in this analysis, it should not determine whether the right of divulgation is exhausted. Simply because a remedy does not exist for some cases should not necessarily determine that the author loses her right to disclose the work as she chooses. At the same time, however, even when a remedy is not possible, the right itself may lose any significance. A work that is extensively, widely, and publicly disseminated without authorization may render the divulgation right as a mere formality with little support from the account offered so far. This dovetails with the wider and stronger view of the divulgation right I have described. A single disclosure to a single audience, even a large one, likely does not *necessarily* exhaust the right. So, although unauthorized disclosures of the author's work may vitiate the divulgation right, it will not destroy it outright in every case. In some cases, though, the disclosure will be so widespread and so pervasive that, although unauthorized, it will effectively exhaust the divulgation right.<sup>142</sup> Alternatively, if a divulgation right is lost, strongly justified moral rights might increase the strength of other rights, such as the right of withdrawal, which is discussed in the next Section.

## 2. *Withdrawal*

The right of withdrawal (WR) contains at least two possible rights. First, the right entitles the author:

1. to retract or terminate the economic right of exploitation based on a change in conviction.

It may also entail the author's right:

2. to make changes to the work; that is, to withdraw and revise the work.<sup>143</sup>

When the author exercises a termination or withdrawal right, she must indemnify the publisher for any economic harm caused by exercising the

---

142. This does not mean the author has no *remedy* for this violation of her divulgation right. It only means that she may lose her right to *divulge* the work for the first time.

143. ADENEY, *supra* note 7, at 195-96. In France, if the author withdraws and republishes her work, she must offer exploitation rights first to the original assignee of such rights on the same terms as originally offered. COPYRIGHT, *supra* note 131, at §15:20.

right.<sup>144</sup> This might include lost profits, the cost of shipping, *etc.*

How would this right change in a regime where moral rights are Rights of Impression Management? Here again, the strength of the justification for the Investment Theory will influence the scope of the rights. Consider, first, that initially it may seem that the right of withdrawal may be as narrow or narrower than the right as it exists today. The reason follows from an empirical reality: the social self is not something that can be extirpated or destroyed by the author's unilateral act. Once the self has been divulged it cannot be undivulged.

Another important factor suggesting a narrow right of withdrawal, at least in cases where the author later changes her mind about publication, is that the author's conviction about the work is not determinative or constitutive of the externalized self. Rights of Impression Management generally do not protect *only* what the author thinks or decides the work means; they enable her, in a limited way, to present and manage the social self she wants to project. There is no guarantee she will be successful. Once the social self has been divulged, its meaning is left up to others, subject to the author's ability to manage it. The social self, remember, *just is* the working consensus between work-author-other. From this perspective, it is nonsensical to suggest that the author could "withdraw" the social self entirely.<sup>145</sup>

On second glance, however, the withdrawal right may increase in scope depending on (1) the conception of the divulgation right and (2) whether others have violated it. As noted above, even a strong divulgation right may be violated, which then may limit how effective the other moral rights may be.<sup>146</sup> In such cases, a strong justification for moral rights might suggest a more robust right of withdrawal to protect the ability of the author to *present* her self for the first time.<sup>147</sup>

The general point is that a strong justification of the Investment Theory might show that the author ought to have more control over the social self even after a working consensus about it has developed (or perhaps because her divulgation right was violated). The author's ability to dictate the

---

144. This is true in both France and Germany, though in France the author must indemnify the publisher *before* exercising the right, or at least before the disruption such exercise causes. ADENEY, *supra* note 7, at 195-96, 259; COPYRIGHT, *supra* note 131 at §§ 15:20, 16:20. And this obligation to indemnify may go beyond even lost profits.

145. One might ask why we wouldn't apply this line of reasoning to *any* moral right. That is, if the social self exists in spite of violations, then why take pains to prevent and remedy violations at all? This question confuses a general point about how the social self exists with the effectiveness of the potential remedy. This is not merely the point that once a right has been violated there is no sense in preventing further violations. It is a slightly different point: that once the divulgation right has been violated, the ability to prevent further publications will not likely address the kinds of harms that may arise. The social self has been disclosed. Removing it from the discourse seems quite difficult—though it may not be impossible. As noted in this Section, a strongly justified version of the Investment Theory may present a different argument.

146. See *infra* Section III.C.

147. Of course, like most of the normative questions in this Article, this one is not resolvable.

conversation about her social self, for example, may cut in favor of her ability to (attempt to) course correct the damage to her social self—here the difference is in her social self as it developed through unauthorized divulgation and what would have developed through authorized divulgation (assuming the author intended to divulge it).

Imagine, for example, an author whose draft manuscript was divulged without their consent and with chapters that explicit descriptions of trauma (*e.g.*, sexual or physical abuse or drug addiction) endured by fictional characters that they no longer wished to include. Perhaps it was because the author thought “their characters” should not undergo or be associated with such trauma, or perhaps their author no longer wanted their work to include such experiences. Suppose further that this draft circulated widely before the author discovered its existence. In such cases, a strong version of the divulgation right might require the publisher to withdraw the work, and perhaps otherwise make statements or support the author in making statements, that note that this disclosure was unauthorized and does not reflect the author’s choices. The initial disclosure may also affect how we conceptualize the other relevant moral rights, perhaps as tools necessary to remedy an initial violation, a point I return to below in Section III.B.3.

While one cannot definitely say which conception of the divulgation right we ought to implement, one can see how this right, whatever its form, is shaped both by the purpose of moral rights as well as the strength of the justification underlying them. The ECs of the social self influence the questions one asks about the shape and scope of the divulgation right. For example, a proponent of strong(ly justified) rights of withdrawal would need to show how reducing or retracting publication of the work would lead to better authorial control of the social self than some other arrangement of rights that did not include a strong right of withdrawal. But answering such questions may not end the inquiry, which extends to the effects of the rights themselves. Extremely powerful moral rights in such instances may end up undercutting other societal goals (both inside and outside of copyright).<sup>148</sup>

### 3. Attribution

The next of the core moral rights I examine is the right of attribution. Its most basic and widely accepted form is the right (AR) of the author:

1. to have her name appear on her work.

Among the other rights that scholars debate are the author’s right to:

2. prevent a non-author’s name from being affixed to the author’s work;
3. *not* affix the author’s name to the author’s work (anonymity);

---

148. See *infra* Section II.B.5.

4. affix a pseudonym to the author's work (pseudonymity);<sup>149</sup>
5. prevent the author's name from being affixed to *another's* work; and
6. be identified as the *author* of the created work (as opposed to merely having the name affixed to the work), which might include, among other subsidiary, rights of the author to:
  - a. *not* be identified as the author of a work;
  - b. be identified as the pseudonymous author of the work;
  - c. to prevent a non-author from being identified as the author of the work;
  - d. prevent the author from being identified as the author of a work she did not create;
  - e. be identified as the author of an individual work in a collection; and
  - f. be identified as the author when a portion of the work is used by a non-author.

Generally, the attribution right includes the right to prevent the affixation of a non-author's name to a work (AR<sub>2</sub>). It is not clear, however, whether the right on my account also includes any of the other rights mentioned above (AR<sub>3-6</sub>).<sup>150</sup>

Orthodox moral rights scholars tend to think that the right of attribution does not entail the right to prevent the author's name from being affixed to another's work (AR<sub>5</sub>) or being identified as the author of such a work (AR<sub>6d</sub>), though some French courts have decided otherwise.<sup>151</sup> The rationale, like that for moral rights generally, is that central feature that deserves protection—the connection between the author and the work—does not exist. In other words, the right *not* to be known as the author of *another's* work—either by the affixation of the author's name or otherwise—cannot be based on the connection between the work and the wrongly-named-author *because no connection exists*. (The actual author, of course, still has a claim for a violation of her attribution right.) Similar reasoning applies to the rights of anonymity and pseudonymity (AR<sub>3-4</sub> and AR<sub>6a-b, d</sub>): the author's connection to the work gives them a right to insist on attribution and authorship, but not to insist on hiding that connection.

---

149. This broader scope is present in French law, which protects the right of attribution *and* the right to be recognized as the author. Loi 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle art. 121-1 [Law 92-597 of July 1, 1992 on the Intellectual Property Code], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 3, 1992, p. 8801 [hereinafter French IP Code].

150. See Rigamonti, *supra* note 130, at 364.

151. ADENEY, *supra* note 7, at 180-81.

These rights as applied to authorship (AR<sub>6</sub>) are not particularly clear. Adeney has remarked that, at least in France, the right to “respect for . . . [the author’s] authorship”<sup>152</sup> refers to

(1) the author’s right to have his titles, academic qualifications etc[.] mentioned in association with the work, and (2) the author’s right to be known as *author* rather than as some other participant in the work’s production, and as the sole author rather than co-author (if this is the case).<sup>153</sup>

As I have mentioned above, these rights seem to track all of the above-listed rights (AR<sub>1-5</sub>) in application.

Which, if any, of above-listed rights (AR<sub>1-6</sub>), ought to exist on this new account? If the attribution right is designed to aid the author in presenting and managing her social self, then it will have at least the author’s rights to require that the author’s name appear on her work and that a non-author’s name not appear on the work (AR<sub>1-2</sub>). If the author is able to manage her externalized self, she must be able to distinguish her externalized self from others’. This requires her to tell the public when it should recognize her as part of her externalized self. Hence, she should have some version of a right to control whether her name or another’s name appears on her work.

A slightly different but related problem arises when a non-author’s name appears on the work (AR<sub>2</sub>): the public will think that the work is *another’s self*—rather than the one the author intends to present. In this case, enabling the author to prevent this initial (mis)impression seems like a reasonable right to provide the author if our goal is to allow the author the limited ability to present and manage her social self. This seems to hold true regardless of how strong or weak the justification of the Investment Theory.<sup>154</sup>

Relatedly, when an individual’s name appears on a work she did not create, there is again a kind of false presentation. Here the individual is presented as the author when she in fact is not. The individual has lost her ability to manage her externalized social self because one such self is being represented as hers when it is not. Once more it seems reasonable to provide Rights of Impression Management to the individual to prevent her name from appearing on another’s work (AR<sub>5</sub>). It is also important to note that in this situation another right is also violated: the *actual author’s* right to have another’s name *not* appear on the work (AR<sub>2</sub>).<sup>155</sup>

What, then, about the author’s right to use a pseudonym or to publish anonymously? Here there are arguments pushing either way. On the one

---

152. French IP Code art. 121-1.

153. ADENEY, *supra* note 7, at 180 (citations omitted).

154. As with all rights, it is possible to construct a justification of the Investment Theory that excludes, or is so weak that it cannot justify including, this right. But at first blush this seems unlikely.

155. Perhaps this is why French scholars are divided on whether the Attribution Right includes the right to prevent the author’s name from appearing on another’s work (AR<sub>5</sub>). ADENEY, *supra* note 7.

hand, some orthodox theorists argue the author has no right to publish a work *without a self* associated with it. A pseudonymously or anonymously published work, on this theory, has no self with which to associate. Because there is no harm to the author's actual self, the thought goes, there is no basis for a moral rights violation.

On the other hand, the social self is empirical and not abstract—there is no “true self,” only selves that the author is known by. It is not inconsistent to say that an author's social self can exist without a name or by another name. The other interprets the work and constructs a social self—one that the author plays a part in constructing through publication of the work. Nothing about the social self requires the audience to know the precise person who created the work.<sup>156</sup> This would also cover situations where the author “pretends” to be a particular person by leaving authorship unknown or using a different name. Although the social self is not directly connected to the person the audience knows as the author, it is still one of the author's social selves. The other constructs a version of the self “behind” the art because, assuming it is human-generated, the other has no psychological choice.<sup>157</sup> Therefore, it is at least not implausible that the Rights of Impression Management will include an attribution right that includes the rights to publish it under her own name (AR<sub>1</sub>), anonymously (AR<sub>3</sub>), or pseudonymously (AR<sub>4</sub>).<sup>158</sup>

Three issues emerge from this discussion. The first is a question of scope. Just how broad or narrow this right will be, however, depends on the underlying normative justification for the right. Should it apply to computer programs? Only works where the public is likely to see the author's name? Only works where it is practical to include a name? These questions must be bracketed for now.

The second is the issue of “fake” artists or those that deliberately create identities (or lack of identities). How one resolves this question depends, as noted above, on one's view of the social self. But it also depends on whether there are any relevant differences between the externalized self attributed to the author and those that are anonymous or pseudonymous. For example, the self that is harmed for the anonymous or pseudonymous work may have different characteristics than the eponymous one. Some of these characteristics may alter how the social self is constructed and maintained.

---

156. All that is required, it seems, is that the social self exists.

157. Recent developments in artificial intelligence may challenge this assumption.

158. One may reach the opposite conclusion: this new picture lacks basis for an author's right *not* to attribute or to attribute pseudonymously. The reason is because the author's “self” cannot exist if the work is not attributed to her. Of course, a social self may be entirely a construct of the author, and in this way may not represent the self the author uses her name to identify with. But this is true even of works the author attributes to her person. And it illustrates that the social self *just is* the working consensus between the author, the other, and the work. There does exist, however, the question of whether this social self is a *genuine* self. Regardless, the relevant fact seems to be that the author *has in mind a kind of self* she is interested in shaping rather than the fact that the author may be trying to pull one over on an audience.

As a result, they may justify stronger moral rights for works attributed to the author than those with anonymous or pseudonymous attribution.

The third issue is that the right to prevent the author's name from appearing on another's work (AR<sub>5</sub>) and the right to prevent a non-author's name from appearing on the work (AR<sub>2</sub>) may seem like trademark concerns masquerading in copyright's clothes.<sup>159</sup> There is, however, an important difference between moral rights of attribution and trademark law causes of action. In particular, the rationale for moral rights—though it can be couched in the language of consumer confusion—is something different than that motivating trademark law. It is not just that the “consumer” may be “confused” about who the author is; it is that the author's self has become someone else's. And this not only harms the author economically, but it allows a distortion and/or dilution of her externalized social self. In one sense it denudes the self of selfhood at all. For how can one be *known* as X if one cannot be known at all, or if one is known as *another* self? That is not to imply that confusion is irrelevant here. Confusion certainly plays an important role, both in motivating the concern and seeking to remedy it. But consumer confusion, as trademark law defines it, is not the touchstone for the decision. The rationale for preventing an element of confusion in authorship, in other words, is not like the one at play in trademark law.<sup>160</sup>

A final note: given the limitations and assumptions of my methodology, I cannot address whether my account includes a general “right of authorship” (AR<sub>6</sub>), or any of its formulations. The best we can do is suggest that the foregoing analysis of the rights mentioned (AR<sub>1-5</sub>) will likely apply to general “right of authorship” (AR<sub>6</sub>).

#### 4. Integrity

The last of the “core” moral rights is the right of integrity. Under the Berne Convention, the right of integrity confers upon the author the right to object to a “distortion, mutilation or other modification of, or other derogatory action in relation to, the . . . work, which would be prejudicial to [the author's] honor or reputation.”<sup>161</sup> In France, however, the right is stated broadly and affirmatively in terms of “respect” and without adjectival limitation.<sup>162</sup> In Germany, the right is one to “prohibit the distortion or any other derogatory treatment of his or her work which is capable of prejudicing his legitimate intellectual or personal interests in the work.”<sup>163</sup>

---

159. See, e.g., *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23 (2003). For one account of why this occurs, see David A. Simon, *The Grammar of Law*, *supra* note 21.

160. Ultimately, whether trademark law can provide an independent justification for an attribution right is beyond the scope of this Article.

161. Berne Convention, *supra* note 129, 102 Stat. 2853, 1161 U.N.T.S. 3, 6*bis*.

162. French IP Code art. 121-1.

163. Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, Bundesgesetzblatt, Teil I [BGBl I] at § 14 (Ger.). Adeney's translation of the German is slightly different.

It also prohibits “the distortion or any other derogatory treatment of his or her work which is capable of prejudicing the author’s legitimate intellectual or personal interests in the work.”<sup>164</sup> As with the other core moral rights, the right of integrity can be broken down into potential content features (IR), including the author’s right to:<sup>165</sup>

1. prevent a distortion of her work
  - a. as such;
  - b. that is prejudicial to the author’s honor or reputation; or
  - c. apt to endanger her legitimate intellectual or personal interest in the work prevent a mutilation of her work.
2. prevent a mutilation of her work
  - a. as such;
  - b. that is prejudicial to the author’s honor or reputation; or
  - c. apt to endanger her legitimate intellectual or personal interest in the work
3. prevent a modification (or alteration) of her work
  - a. as such;
  - b. that is prejudicial to the author’s honor or reputation; or
  - c. apt to endanger her legitimate intellectual or personal interest in the work
4. prevent an impairment of her work
  - a. as such;
  - b. that is prejudicial to the author’s honor or reputation; or
  - c. apt to endanger her legitimate intellectual or personal interest in the work
5. prevent a *use* of her work that would violate IR<sub>1-4</sub>.

If moral rights are Rights of Impression Management, *some* form of the right of integrity is essential to their function. One cannot manage the social self without regulating, to some extent, its use, modification, *etc.* At the same time, however, the empirical view of the social self is one that changes based on audience interpretation, something that the author cannot totally control.

---

164. *Id.*

165. An endless variation of rights could be conceived with other standards under this same structure.

How much control depends, as it does in all other moral rights, on the strength of the underlying justification of the Investment Theory. On the one hand, then, the right of integrity must persist in some form—in a form that enables the author to manage the presentation of her externalized self. On the other hand, this is unlikely to be anything as strong as it is in France, where the right allows the author to object to “any alteration or modification, *no matter what its importance*.”<sup>166</sup> If a modification has no importance to the maintenance of the social self—but instead relates only to some idiosyncratic tendency of the author—then moral rights seem unlikely to protect it. This conclusion is reinforced by the view of the externalized self as empirical and negotiated rather than fixed and dictated.

Based on the foregoing, conceiving of moral rights as Rights of Impression Management suggests the integrity right may be important, but it is unlikely to include rights to prevent violations *as such*. This means moral rights likely will not include the rights to prevent distortions as such, mutilation as such, modifications as such, impairments as such, and uses that violate any of the aforementioned rights (AR<sub>1a</sub>, AR<sub>2a</sub>, AR<sub>3a</sub>, AR<sub>4a</sub>, AR<sub>5a</sub>).

The remaining two types of integrity rights protect the author’s honor and reputation (AR<sub>nb</sub>) and intellectual and personal interest (AR<sub>nc</sub>). Turning our attention to honor and reputation (AR<sub>nb</sub>): for the moment, let us set aside the differences between “distortion,” “mutilation,” “modification,” and “impairment,” and focus instead on only the idea of prejudice to honor or reputation. Would moral rights as Rights of Impression Management endorse this standard of harm? Does honor or reputation accurately capture the harm against which Rights of Impression Management attempt to protect?

The short answer is not entirely. One reason is that relevant concepts of harm to honor or reputation require a *value judgment* about (1) the work, (2) the author, and (3) the relationship between the two. Moreover, each value judgment must be a *positive* or *good* one. Honor seems to suggest both some necessary positive association and the potential for a duel. At the very least, the term sets out a distinction between honorable and dishonorable behavior, with the latter potentially not counting. Reputation, while not necessarily leading to duels, also seems to require a positive assessment of the work. Both seem to presuppose some standard of behavior that merits protection.

Positive value judgments do not seem to be required to present and manage a social self. Moral rights should protect externalized social selves *whatever* the artist’s behavior. It is true, of course, that moral rights may be more or less robust depending on the notoriety or publicity of a particular externalized social self. The social self of an artist known for impressionist

---

166. ADENEY, *supra* note 7, at 182 (quoting *Sté TF 1 c Sté Sony et autre*, Cass, 1 ch civ, 24 February 1998, (1998) 177 RIDA 212; *Sté EMI Music Publishing France c. Sté CLM-BBDO, Consrts Brel, CA Paris*, 1 ch, 25 June 1996, (1997) 171 RIDA 337).

art may be at greater risk than an unknown one. But the fact that her art is viewed as honorable or reputable should not, strictly speaking, bear on whether she has moral rights. If one really cares about the relation between the author and the work—or the author *qua* author, whatever that means—then they should take seriously every author, good and bad alike.<sup>167</sup>

These conceptual shortcomings notwithstanding, reputation does seem to capture at least part of what protecting the social self is all about. Reputation taps into both what the author thinks and what others think. Fundamentally, the right of integrity is about the managing the conversation of uses that change the working consensus—that create a difference between what the author perceives as her externalized self and the potential for the modified work to alter this perception in the mind of others. Of course, establishing one’s reputation has been harmed requires one to show an initial *consistency* between what the author claims is distorted and what others already perceive. But once done, the right is designed to protect potential distortions between this relation between work, other, and author.

For example, recently Hayley Williams explained that her band’s (Paramore) music suggested she was bubbly when in fact she thinks of herself as the opposite.<sup>168</sup> If her song is used in a way that suggests she is introverted, should she have a claim? Reputation is likely to encompass what the public thinks rather than what Hayley thinks about herself personally. But since Hayley also understands and seems to roughly agree with the public about her externalized self, her claim may fail.<sup>169</sup> Control over use in such cases does not prevent an inconsistency from developing in the working consensus between work, other, and author. There may be other cases, however, where such control does prevent an inconsistency from arising. In such cases, the question is whether a justification of the Investment Theory can support providing the author with management control over the uses that cause, or threaten to cause, the inconsistency.

Not commenting on this justification, though, does not prevent all analysis of the integrity right. Here it is helpful to divide the right of integrity into two broad categories.<sup>170</sup> One we might call a *structural* right of integrity. This would focus on the work and alterations to the work itself. For example, deleting chapters of a book or altering an image by changing its colors would violate this right, so conceived. The second we might call a *semantic* right of integrity. Violations of this right would occur when, even though the work is unchanged, it is presented in a way different from that

---

167. And is not one canon of copyright (at least in the United States and Canada) that the law judgeth not the merits of a work? Yet is not this exactly what reputation asks the law to do?

168. Leila Fadel & Milton Guevara, *This Is Why It Was a Tough Road to Paramore’s New Album*, NAT’L PUB. RADIO (Feb. 10, 2023), <https://www.npr.org/2023/02/10/1155698435/hayley-williams-2023-interview-paramore-new-album-this-is-why>.

169. There may be other cases where reputation is too broad, focusing too much attention on the individual person who created the work rather than the externalized self contained within it.

170. This bifurcation, though not this terminology, reflects the current thinking in France about the two “limbs” of the right of integrity. ADENEY, *supra* note 7, at 182.

authorized by the author. Most commonly, commentators seem to think that this occurs when a use or presentation violates the “spirit” of the work, or the work’s meaning (as intended by the author). We can imagine each of the ARs described above falling within either of these conceptions (*e.g.*, AR<sub>s1-5</sub> and AR<sub>c1-5</sub>).

Viewed this way, three immediate implications of moral rights as Rights of Impression Management become visible. First, the right of integrity will almost certainly in practice resemble a *structural* right of integrity, rather than a personal one (*i.e.*, a right to the integrity of one’s *person*). Moral rights focus on the externalized social self, which is the self that appears in the work. Because moral rights provide the author a means for managing this social self, they must also give the author the rights to manage, to some degree, the form of the work. Therefore, the right of integrity must include the structural right.

Second, this structural right will be tied to the semantic right. The semantic right is a right about the work’s meaning, whatever that meaning is. If the structural right is one in form only, it would not effectively provide the author with any managerial authority over uses of the work that clearly deviated from the working consensus. As a result, the structural right must depend on the semantic right.

Third, the semantic right of integrity will likely be different from the one described above (such as in France). One will not violate the semantic right by using the work in a way inconsistent with its “spirit”, or the author’s intended “meaning.” As noted above, the author cannot fix the meaning of the work, even if she intends the work to have a particular meaning. Instead, the semantic right will relate to a standard that judges whether a particular use violates a particular version of the externalized self. This version is not whatever version the author wishes it to be, though what she wishes it to be may be an important consideration. At bottom, however, what the externalized self is will be an empirical question about what the work is taken to be both by others and the author.

While the practical implementation of these rights is beyond the scope of this Article, one could imagine using survey evidence to evaluate the “working consensus” of the externalized self. Unlike surveys in trademark law, however, surveys in this context would not evaluate the source of the product. Instead, the survey’s task would be to propose and evaluate consensus around the meaning of the externalized self. We can further imagine that survey evidence would be needed only after showing a structural right violation. That is, the author would have the burden of proving a structural right violation. Once shown, the author would then have the burden of showing that the semantic right had been violated.

### 5. *Conflicting Rights*

Moral rights may protect the social self, but the limitations on them do

not stem only from their internal theoretical and doctrinal shape. A better way to say this: other doctrines (fair use), theories (utilitarianism), and interests (free speech, expression) may conflict with moral rights as outlined above. When they do, they may impose further limitations on the scope and nature of the rights.

The most obvious example in the United States is the fair use exception (or in the United Kingdom “fair dealing”), which generally allows for criticism and comment on the work. A use of a work that is fair does not violate an author’s moral right. The point can be made more broadly: in societies that value free speech, just how constrained should moral rights be to protect this value? Answering this question is outside the scope of this Article. But we can note that, like other substantive normative questions, the answer to this one will play a significant role in just how much control an author has over the social self.

It also suggests that any justification of the Investment Theory must adequately address why authors should have not just the rights described above, but the rights to prevent distortions of the social self when the point of distortion or inconsistency is to *exercise free expression*. If, for example, the right of integrity exists, then poking fun at an artist’s work, say by inverting the author’s externalized self to make a humorous point, will surely create, or threaten to create, an inconsistency in the working consensus the author wishes to develop. But it may also be an activity that is crucial to creative expression and freedom of speech. A moral rights theorist must either concede that the values that undergird such expression trump moral rights or provide some rationale for why they shouldn’t. This may be a hill too tall for the moral rights theorist—but it is not one I need to climb.

### C. *How Time Affects Moral Rights*

Up to now, I have been discussing the rights (mostly) as if they are static. In this Section, I explain how the scope of rights can change *over time*.<sup>171</sup> Moral rights, on my account, protect the externalized social self. Over time, the social self changes. This means that *what* moral rights protect will change over time. If moral rights protect the self and the self changes over time, then should the scope of moral rights change as well? Put another way, should moral rights become more or less capacious based on something as simple as when one tries to assert them? Does right scope fluctuate?

Suppose, for example, an author divulged a work fifty years ago, and it has since been used in divergent political contexts, as has happened many

---

171. In using the term “rights” here I do not mean to convey any technical jurisprudential meaning. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

times with Bruce Springsteen's *Born in the USA*.<sup>172</sup> To Springsteen, the song is a critique of the U.S. war in Vietnam and its aftermath at home.<sup>173</sup> But the song has also appeared in political campaigns of those like Pat Buchanan<sup>174</sup> and Ronald Reagan. Reagan's use, which occurred within the first few years of the song's release (over Springsteen's objection), seems to be the first prominent political one that conflicts with Springsteen's view of the song.<sup>175</sup>

Assume for the moment that Springsteen had a viable claim against the Reagan campaign. Now consider an identical claim by Springsteen against Donald Trump, nearly forty years later, for Trump's use of the song during his political rallies.<sup>176</sup> Despite the near identity of the claims, there is at least a plausible argument that these cases should be resolved differently. The reason is because an author's right of integrity depends upon the working consensus of her externalized social self. Over forty years and numerous divergent uses, the working consensus is likely to have changed and taken on a variety of meanings. As a result, Springsteen's right of integrity seems different in shape than it when Reagan first used the song, a time that was quite close to the initial divulgation.<sup>177</sup> Of course, if Springsteen had been diligent in exercising his integrity right against Reagan and future users, the shape of his claim against Trump may look quite different. That is, if Springsteen has successfully presented and managed his social self to keep it consistent throughout a forty-year period, he may have just as much success suing a U.S. president with a neoliberal agenda as one that's simply a huckster.<sup>178</sup>

Shape-shifting rights may give us the willies. Rights that change with time suggest that timelessness is not a characteristic of rights. But of course

---

172. MuchMoreMusic, *Interview with Bruce Springsteen*, YOUTUBE (Jan. 22, 2017), [https://www.youtube.com/watch?v=6\\_EqYcNtF\\_0](https://www.youtube.com/watch?v=6_EqYcNtF_0).

173. The phenomenon is not limited to Springsteen. Eveline Chao, *Stop Using My Song: 35 Musicians Who Told Politicians to Stop Using Their Songs*, ROLLING STONE (2015), <https://www.rollingstone.com/politics/politics-lists/stop-using-my-song-35-artists-who-fought-politicians-over-their-music-75611>.

174. Chris Nelson, *Pat Buchanan Adopts Boss' "Born In The U.S.A." In Presidential Campaign*, MTV (Aug. 20, 1999), <https://www.mtv.com/news/we3m65/pat-buchanan-adopts-boss-born-in-the-usa-in-presidential-campaign>.

175. For a discussion of more examples and at least three potential harms that could result from this type of use, see Jake Linford & Aaron Perzanowski, *Calculating the Harms of Political Use of Popular Music*, 75 U.C. L. San Francisco J. \_\_\_ (forthcoming 2024).

176. Cf. Chris Jordan, *Trump Tunes Up Bruce Springsteen's "Born in the U.S.A."*, ASBURY PARK PRESS (Jan. 11, 2016), <https://www.app.com/story/entertainment/2016/01/11/trump-tunes-up-bruce-springsteens-born-us/78658444>.

177. Of course, the opposite may also be true.

178. Further problems lurk here. Springsteen may have a strong claim against Reagan, but his claim may weaken against those who use the song as private creative expression, like those who used the song to support President Trump while admitted to the hospital with COVID-19. See Josh Terry, *Politicians Have Always Misunderstood Springsteen's 'Born in the U.S.A.'* VICE (Oct. 5, 2020), <https://www.vice.com/en/article/pkyjvn/misunderstood-bruce-springsteens-born-in-the-usa-trump>. Here difficult choices will have to be made, and other interests (such as free speech and creative expression) may force moral rights advocates to make concessions. On the other hand, a very strongly justified version of moral rights might not make room for such other values. See *supra* Part III.B.5.

we know this already. It shows up explicitly in doctrines like statutes of limitations and laches.<sup>179</sup> By failing to exercising a right in a timely manner, for example, the right is eliminated with respect to the particular defendant. Behavior (in this case behavior by the plaintiff) can influence whether and to what degree one can assert her rights against others. If Springsteen had the ability to enforce an integrity right against Reagan but did not do so in a timely manner, he may have lost his legal right of enforcement. What I suggested above is that failing to exercise this right might affect claims *as to individuals beyond Reagan*, such as Trump. And, further, that merely exercising the right against Reagan was no guarantee that the same right could be exercised against Trump for nearly identical behavior.

Joseph Liu has made a similar point in copyright using the doctrines relating to stock characters of *scènes a faire*.<sup>180</sup> The latter refers to copyright's exclusion from protection of general themes or plots. Liu argues that the doctrine may not apply to the first person to use a particular vignette or character, such as "a scene involving a villain tying a heroine to the train tracks or a story involving a hard-boiled private detective."<sup>181</sup> But over time, and with repeated use and exposure, this claim "wane[s]" and what was once original become general and abstract ideas undeserving of protection.<sup>182</sup>

And changing scope or shape does not imply that the underlying reasons for the rights have changed. Some areas of law are more explicit about this than others, and perhaps most areas of law are not expressly directed at changing rights' scope based on time. Consider a contract, which the law regards as a meeting of the minds, where the changing nature of the thing protected is not generally an issue.<sup>183</sup> Unless the parties change their agreement, the content of the contract remains static. This is indeed essential to the private ordering benefit of contract law. Parties use contract law to allocate risk, plan behavior, and benefit themselves. Without the consistent and steady content of contract, the benefits of the legal regime would evaporate.

One way to understand the changes in moral rights is in contractual terms. If moral rights represent a contract wherein terms change according to conditions subsequent, then it is no mystery why moral rights protections may change. As conditions change, the terms of the contract change. The

---

179. One might also say laches eliminates the right, or reduces its strength to zero, as applied to a particular defendant or defendants. A potential counterargument to this point is that these doctrines are *external* to the rights. In short, doctrines like laches impose limitations on the rights because of other interests. This is different from *self-emanating limitations on the rights themselves*. While important, this argument assumes that interests within a body of law are quarantined from other interests writ large. But many internal doctrines in copyright limit themselves because of interests external to copyright law.

180. Joseph P. Liu, *Copyright and Time: A Proposal*, 101 Mich. L. Rev. 409, 441-442 (2002).

181. *Id.* at 442.

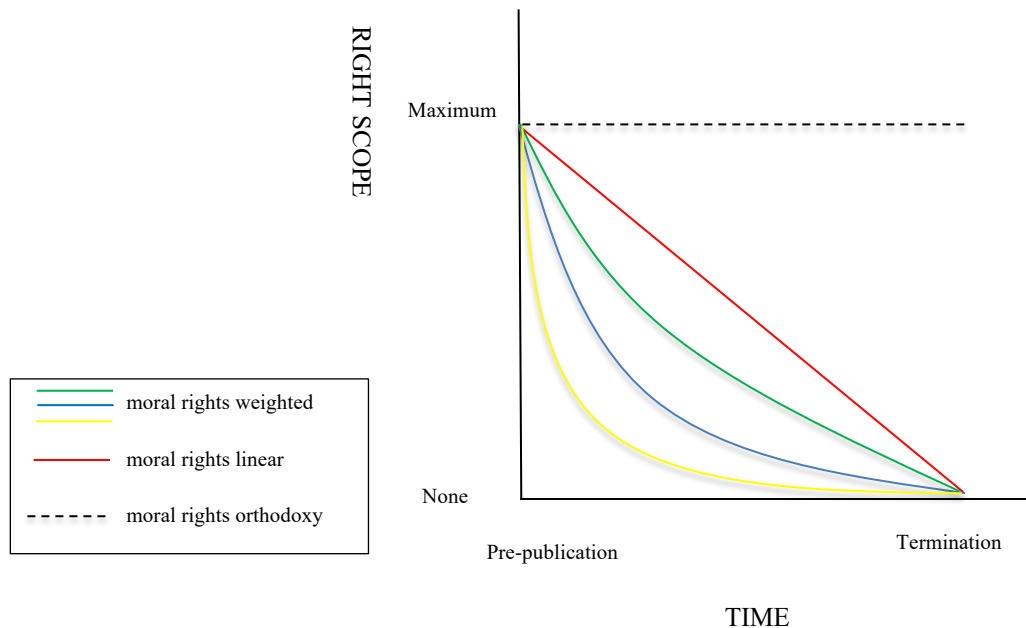
182. *Id.*

183. A contract may concern tangible property that can change, but the parties can account for this change using the contract itself.

scope of the rights change along with the changes to the externalized self. The analogy shouldn't be pressed too far because it is not completely apt. But it does illustrate that other legal regimes can account for changes in the scope of protection or even the protection in the first place.

If this general line of thought is correct, the law will need to be more explicit about how it determines right-scope and its fluctuation. The nature of the social self, and the ways in which it can be protected, suggest that the scope of certain rights will be broader or narrower at various points in time. The exact relationship between the two is context dependent.<sup>184</sup> In general, though, a reasonable assumption is that *time- and right-scope are inversely related*.<sup>185</sup> The longer the work has been divulged, the narrower the scope of the moral rights. The relationship is not a perfectly linear one; the slope might have different curves, as Figure 3 depicts.

**FIGURE 6. MORAL RIGHTS RIGHT SCOPE OVER TIME**



184. Right strength, as noted repeatedly, also depend on the strength of the justification. Here, however, the strength of the justification can do only so much. Once a working consensus has developed and sustained over a long period, the strength of the author's claim to change that working consensus will likely diminish even if the justification for management remains strong.

185. There may be a non-trivial (or larger) number of cases when this is not true. But absent strong empirical evidence, the assumption seems warranted for at least two reasons. First, a work may undergo a wide variety of uses and interpretations. Second, the potential number of uses increases over time.

The withdrawal right, for example, will have the broadest scope immediately after divulgation (even at this point it will be quite weak) and then fades rapidly. The farther away from divulgation one gets, the narrower the scope becomes. This can be explained by nature of the Triadic Relation. The longer the externalized social self has existed, the longer it has been interpreted, constructed, and reconstructed. Therefore, the more time that has elapsed since divulgation, the more likely the externalized social self will be (1) different from the one the author hoped to convey, (2) different from the one first agreed upon, and (3) strongly associated with any particular self at all. Moreover, these facts, as we will see, influence the author's ability to manage the externalized social self over time via the attribution and integrity rights. There is a feedback loop where time reinforces a changing self, a feedback loop which is reinforced further if the author fails to exercise her rights of attribution and integrity (or cannot do so).

This feedback loop is not automatic. Sometimes a social self may be reinforced, rather than diluted, over time. Perhaps that is so because the justification for protection is strong and the author has carefully and systematically asserted her robust moral rights. Law needs a shortcut to accommodate this fact. One is a rebuttable presumption. We can imagine the following rule: the law presumes that the greater the duration of time elapsed since divulgation, the narrower the scope of the right. This presumption may be rebutted, however, by introducing evidence to show that the externalized social self has actually become cemented, rather than distorted, the way the author claims. Such evidence might include surveys of the relevant audience, public opinion polls, and media articles. The presumption could be easily reversed if one could show that a strong justification for the Investment Theory suggested a positive correlation between time- and right-scope.

These lessons also apply to the rights of divulgation, attribution, and integrity. Additionally, for these rights, the right's scope may depend both on time and how the right is exercised. Successfully exercising a right of attribution or integrity close in time to divulgation, for instance, will tend to increase right-scope because it will help to cement the social self as presented. So, although the strength of a right is likely to decline over time, it may decline less. If an author exercises her rights more frequently within, say, the first six months of divulgation.<sup>186</sup> These variations are meant only to show that we have room to craft the exact contours of any given moral right (according to the strength of the underlying justification). But the right strength will probably be positively related to how often it is exercised and

---

186. In such a case one might have to adjust for not exercising *e* because there was no opportunity to do so. Otherwise, we would reward strong rights to only those whose rights are challenged. On the other hand, it is not obvious why in such a case the rightsholder should *not* be entitled to stronger rights. In a sense, an express attempt to remake her social self has been made. In attempting to quash such a threat, she makes her claim to that social self stronger.

negatively related to time.

There are two apparent paradoxes that result. First, it now appears that the author's ability to exercise her moral rights may be beyond her control. This is because the scope of moral rights depends on how often the author asserts them—and she may not have the opportunity to assert her moral rights because no one is violating them. There are two responses to this. One is to try to accommodate this concern by, in some circumstances, giving positive weight to *non-exercise* of moral rights or discounting incongruities that develop because of rights violations. The latter was discussed above in the context of the withdrawal right.<sup>187</sup> There I suggested that violations of the divulgation right might militate in favor of *increasing* the scope of the integrity or withdrawal rights. If the author loses her chance to set the stage for formation of her externalized self, then the importance of other rights that allow her to manage that externalized self become more important.

The other response, particularly if the justification of the Investment Theory is weak, is to dismiss this concern by reminding us that the construction of the social self is in a fundamental way beyond the control of the artist. That the scope of the rights is contingent upon potential uses and violations is just part of the way the social self functions. Authors are simply not able to manage completely or control the development and changing of the working consensus about their externalized self. And, in some cases, their ability to do so will be affected by those who violate their rights—for example, by divulging work without their consent. This approach would mollify concerns that the relationship between time-and-right strength creates a paradox: the longer the author's work exists, the less likely the author is able to assert moral rights.

#### CONCLUSION

This Article started with the general intuition of moral rights scholars, which it called the Investment Theory, that moral rights are justified by an author's investment of her self into a work. Yet there has been very little discussion of how, exactly, a self could move into a work or why this would entitle the author to special protection. This Article argued that understanding the self through the lens of social psychology provides a plausible answer to answer both questions. On this view, the self is an empirical concept that refers to how the author and others perceive of a person. Critically, this "social self" cannot exist without the others interpreting it. Nor can it exist without the author interpreting it and what others may or do think about it.

Using this framework, this Article argued that moral rights provide the author limited rights to present and manage a version of her self that is

---

187. Section III.B.2.

externalized in the work. These rights are limited because the author cannot have complete control over her externalized social self. At the same time, however, how much control the author *should* have is a normative question that depends on the strength of the justification for the Investment Theory. Because this Article bracketed this normative question, its analysis of moral rights was not prescriptive. Instead, it sought to draw the outlines of these rights in general terms, noting where the description ran out and normative analysis might change the fundamental conceptual shape of the rights.

Rather than recapitulate this analysis, the Article concludes by analyzing the inalienability of moral rights, often thought to be a core feature of the rights. Its centrality to moral rights doctrine has never really been questioned, especially within the Kantian and Hegelian versions of the doctrine. This is because moral rights are supposed to be based on a personal connection or bond with the work created by investing one's self in it.<sup>188</sup> Transferring the rights to another is thought to either sever this bond or defeat the purpose of protecting it. In either case, this Article has reframed the personal connection that forms the basis for the Investment Theory as one that is socially constructed and maintained.

This reframing has potential implications for whether moral rights should be inalienable. At a general level, inalienability still seems an important component of moral rights. The purpose of moral rights is to allow the author to present and manage the construction and maintenance of the social self. A crucial component to that construction is what the author thinks, and the nub of moral rights theory is to try to justify the *author's* ability to control a work. That normative element seems difficult to discard even if the author's control may not be as strong under this theory as the ones moral rights proponents seem to favor.

On the other hand, if moral rights are really management tools, they may not necessitate that the individual *personally* exercise control over uses of her work. Here the author might decide *someone else* is better able to manage her social self than she is and transfer the rights to them. An obvious example might be delegating this authority to someone in the event of mental disability. A less obvious example may be a government (or a third party) managing moral rights of works of cultural significance after the author's death.<sup>189</sup> But we need not limit the situation to exceptions for mental capacity. Authors may simply not want to bother with management, and think that someone else knows what they want better than they do. Or they may simply not care.

Transferring moral rights, of course, would not necessarily mean the holder could successfully enforce them. What the author thinks will still be

---

188. See generally Netanel, *Alienability Restrictions*, *supra* note 11; Hughes, *Philosophy of IP*, *supra* note 11; Hughes, *Personality Interests*, *supra* note 11.

189. France has provisions that allow for state intervention where heirs "manifest[ly] abuse" the divulgation right. French IP Code, art. L121-3.

a crucial component of any successful claim. Recall that the author cannot maintain an action unless she thinks the use of the work is somehow inconsistent with her social self. If she alienates her rights, that obligation does not fall away. Now the transferee would need to prove, among other things, that the *author's* conception of her social self is inconsistent with the allegedly violating use.

What proof is required will affect whether a transferee can exercise this right without the author's consent. If an author's blanket sworn statement that all uses in films, for example, are inconsistent with her social self is sufficient, then real alienation is possible. The author could issue blanket statements about proposed uses, and the transferee could use that statement to assert claims against any use of the work in a film. But this would not hold if courts demand that the author specifically state *why* she perceives the inconsistency in any given case. If they did, the transferee would need the author's cooperation, if not her specific consent, to exercise the alienated moral rights. Moreover, the changing nature of the social self suggests that such blanket statements should not be allowed as proof of inconsistency. Contemporaneous, specific authorial declarations would, at the very least, address whether a specific use at a specific time was inconsistent with the author's social self. So, while the author may, in principle, alienate her rights for someone else to exercise, in practice it would be almost impossible to exercise them without the author's consent.<sup>190</sup>

If it is at least theoretically possible for non-author transferees to exercise moral rights, might non-authors *in general* be able to exercise moral rights? If so, who might exercise these "rights"? Individuals? Governments? Corporations? And even if non-authors can exercise these rights, when will they be successful in doing so? I cannot answer these questions completely. But I can offer a few preliminary comments. If the purpose of moral rights is to provide *the author* with rights of self-presentation and management, then it is not clear why we ought to provide the same rights to non-authors who lack the author's consent (*i.e.*, non-transferees). Alienation at least provides the pretense that the author's view dictates when and how a transferee may exercise the author's moral rights. It is, of course, not impossible to imagine how non-authors generally (*e.g.*, the public, a government, *etc.*) might exercise moral rights.

Whether authors *ought* to have that right, and how broad or narrow its contours, are questions of justification. Although I have not attempted to address the normative question posed by the Investment Theory, future work should. In particular, it should examine whether there are any alternative accounts of the author-work relation that might justify the

---

190. Additionally, on this view, the author can waive her moral rights. If it is up to the author how to present and manage her social self, then she can decide *not* to manage it. In effect, the author can *consent* to the (future) destruction or change of her social self.

Investment Theory. And, if no such alternative exists, future work should explore whether *any* philosophical theory can explain the special relationship between the author and work that supposedly justifies moral rights.