

## Book Review: *Moral Rights, Creativity, and Copyright Law: The Death of the Transformative Author*

Sarah Hook

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Authors often regard moral rights as important and valuable, yet there is a lack of up-to-date, detailed consideration of their nature. Much of the influential scholarly literature on moral rights in Australia dates back to the 1990s and early 2000s. There is also a paucity of case law, despite nearly 25 years of the rights' recognition in Australia,<sup>2</sup> further limiting understanding. *Moral Rights, Creativity, and Copyright Law: The Death of the Transformative Author*, with its focus on the moral right of integrity, is a very welcome addition to copyright discourse.

In this book, Australian Dr Sarah Hook offers a fresh take on moral rights, exploring their historical and theoretical justifications and practical effects on downstream creativity. The book blends doctrinal insights, literary theory, legal history, and analysis of cultural production. This unique combination makes it an engaging and thought-provoking read, with a multitude of illuminating examples taken from within and outside of the formal legal frame.

Hook's arguments are cleverly and emphatically constructed. Her position fundamentally relies on the idea that all textual production involves the use of pre-existing materials, and that social commentary and critique is a public good that should not be foreclosed by the meaning that authors ascribe to their works. Following in the tradition of intellectual property lawyer and scholar Christopher Aide who locates in moral rights Romantic conceptions of authorship<sup>3</sup> and Professor Martha Woodmansee, who identifies the law's preference for individual authorship over collaborative authorship in this philosophy,<sup>4</sup> the book can be read as an extended argument against the pervasiveness of Romantic conceptions of authorship in copyright law. Hook's primary concern is with the chilling effect of copyright on "transformative" authors and the stifling of the creation of new texts that rely on derivative uses of existing copyright material.

While the primary focus is on Australian law, the book also covers some French, German, United Kingdom and Canadian content. The comparative analysis of Australian, UK, and Canadian moral rights cases provides much needed insight into the approach taken by the courts into damages calculations for violations of rights of attribution and integrity. As does the consideration of the relationship between the right of integrity that protects an author's honour and reputation and the tort of defamation, and the analysis of the applicability of fair

dealing provisions to moral rights. These doctrinal insights will be of great interest to legal practitioners. Nevertheless, I most enjoyed Hook's challenge to the assumption that strong intellectual property laws are needed to protect the fruits of labour and incentivise creativity.

Chapter One, "Introduction", explores the nature of the creative process and introduces Hook's critique of Romantic conceptions of authorship that dominate copyright law. She describes the process of creating works as dynamic, contextual and exploratory; as involving "connecting, imagining, dreaming, asking 'what if?'"<sup>5</sup> Hook emphasises that reader engagement in deconstructing and understanding texts is as creative and important as the authors' acts of creation and similarly involves connection, imagination, dreaming, and wonder. She suggests that all texts build on other works and involve a communal creative process, even when produced by a single person.

These views are contrasted with Romantic conceptions of authorship that promote a vision of the author as a solitary genius. Hook argues that Romantic ideas present a factually incorrect vision of authorship and, due to their embedding within copyright law, have real consequences for the rights of "transformative authors". That is, authors and artists such as adaptationists, parodists, and satirists, who consciously build on knowledge from other sources and apply that knowledge in their own creative practice. Hook identifies that placing legal limitations on engaging with existing texts is at odds with all authorship practice. She expresses concern that moral rights have a chilling effect on transformative expression; stifling the political messages and social commentary that enrich public discourse.

Chapter 2, "The Author-Work Bind", examines the Romantic notion that an author's genius and personality are imprinted on their work, making any attack on the work a personal attack on the author. Hook calls Romantic authors the "unacknowledged legislators"<sup>6</sup> for their influence on copyright's preference for sole authorship and moral rights theory. She identifies three key attributes of the Romantic author that have been particularly influential on copyright: the author as originator, the author as genius, and the author as supreme authority over the work. Hook uses examples from renowned Romantic poets Edward Young, William Wordsworth, and Samuel Taylor Coleridge to illustrate these traits, but also highlights their contradictions, such as Coleridge's plagiarism of German texts and Coleridge and Wordsworth's public collaborative relationship. These examples highlight that the Romantics themselves failed to live up to Romantic ideas, rendering any notion that a work might be a coherent imprint of a sole author inherently suspect.

Hook further develops her argument that contemporary copyright's foundations on Romantic authorship is inappropriate with reference to the prejudice against collaborative authorship that, by implication, prioritises the creativity of first authors and conceives of the creativity of transformative authors as inferior, and the gap between what is legally considered "original" (such as works that require little labour or imagination like lists, pamphlets, and accidental photographs) and the Romantic ideal of genius. She also identifies and debunks myths that justify strong copyright protection such as those based on agrarian, birth, and pirate

metaphors. Anyone who remembers the “You Wouldn’t Steal a Car” anti-piracy cinema campaign from the early 2000s may find the discussion of the pirate metaphor particularly interesting, including facts such as that the pirate figure first emerged in discussions of the *Copyright Act 1911* (UK). Hook encourages readers not to jump to conclusions about the strength of the relationship between an author and their works and the ethics of copying.

Chapter 3, “The Death of the Author and Contemporary Writing Practices”, explores postmodern literary theory, and contextualises postmodern insights with close reference to contemporary writing practices that challenge the author-work bond. Hook critiques Romantic ideas of creativity and originality through the perspectives of theorists like Foucault, Derrida, and Barthes. This provides the theoretical base for her argument that the law fails to engage with the actual nature of literature. She puts forward that all ideas are borrowed, texts have unstable meanings, and readers are co-creators.

Hook then examines contemporary writing practices, including the rise of the machine author, Indigenous works, ghostwriting, and fan fiction, to further question the authenticity of the Romantic vision of the author. Pop culture examples, such as the controversy over JK Rowling’s trans-exclusionary comments, are drawn upon to challenge the author-work bond. Specifically, Hook shows that reputational damage to an author does not necessarily harm their works. She writes:

*When an author has suffered reputational damage, they are not silenced. There is no evidence of loss of sales or fandom. ... It is [...] not clear that the works themselves are any less enjoyed and consumed.<sup>7</sup>*

I found Hook’s treatment of fan fiction – that is legitimised by postmodern theory, and illegitimised by the law if an author feels that fan fiction corrupts their work sufficient to harm their honour or reputation – particularly noteworthy. The discussion on Anne Rice’s opposition to readers using her characters is especially compelling, given Rice’s own borrowing from ancient myths and tales. Rice’s direct quote underscores this tension:

*I do not allow fan fiction ... it upsets me terribly to even think about fan fiction with my characters. I advise my readers to write your own original stories with your own characters. It is absolutely essential that you respect my wishes.<sup>8</sup>*

This quote effectively highlights the conflict between original authors seeking to control the meaning of their works and downstream users. I would have appreciated even more direct quotes from authors in this chapter to further illustrate these tensions.

Chapter 4, “The History of Moral Rights”, examines the origins of moral rights in the civil law systems of France and Germany, highlighting their association with natural rights and cultural preservation, respectively. Cases such as *Zivilsenat Urt v 8 Juni 1912 i SSWH* (Bekl) w HM (KI) Rep I 382/11 (Berlin), which involved a homeowner painting clothes onto nude

figures in a fresco, are used to illuminate the historical nature of the right of integrity. Historical details of the move towards international moral rights harmonisation, culminating in the Berne Convention in 1928, are also included. The puzzlement of the common law countries delegates during the Berne discussions after being given no warning that moral rights would even be on the agenda, nor what they entailed, is noted, as is the delegates' belief that moral rights would not need to be adopted in countries like Australia because existing laws such as defamation law and consumer law already covered the field. Hook concludes by considering arguments for and against moral rights in common law countries, raising concerns about free speech.

Chapter 5, "Examining the Benefits to a Right of Integrity", offers a close examination of how courts in Australia, the UK, and Canada have applied moral rights provisions. Even for someone aware of the limited moral rights litigation, the numbers of successful attribution and integrity cases in these jurisdictions is surprisingly low: nine in Australia, seven in the UK, and eight in Canada. Comparative analysis highlights that remedies in each jurisdiction are often minimal, typically just a licence fee or a small top-up to the damages awarded for copyright infringement. Moral rights damages calculations are also strikingly dissimilar to those for the tort of defamation, that also protects reputation.

Hook observes that authors without copyright ownership would likely see little benefit in litigating moral rights violations. Rather than suggesting that the timid adoption of these rights means they are unlikely to impact downstream users, she argues that their legislative enshrinement is likely to have a chilling effect on transformative uses. This effect is particularly likely in cases of parody or satire, in circumstances where it is unclear whether fair dealing provisions inform the moral rights defence of reasonable use.

Chapter 6, "Curbing the Creative Commons", critiques stringent copyright protections, positioning moral rights as just one of many steps in the commodification of intellectual property that stifles creative culture. Hook highlights how the internet has changed the landscape for creating and distributing texts and made remix culture especially vivid. She connects modern practices like rap music to historical borrowing by composers like Mozart.

Anti-copyright sentiment amongst creators and movements such as commons projects and copyleft are also canvassed. Hook suggests that such projects recognise the postmodern nature of contemporary authorship practices and secure tangible benefits for authors. Copyright policy suggestions are also put forward. Hook expresses a strong preference for the right of reply for aggrieved authors over litigation. She reminds that authors are at liberty to respond publicly to transformative uses of their works: "they have a voice to separate themselves from such transformative uses. Most importantly, the transformative use is not curtailed, and artistic freedom is again at liberty."<sup>9</sup> Alice Randall's parody, *The Wind Done Gone* (2001), that provides an alternative account of Margaret Mitchell's *Gone with the Wind* (1936), is used to show that such works do not harm the original author's reputation or sales.

Reflecting on the book's overall contribution, it is clear that it addresses important questions. How do we view artists and their works? What forms of creativity and critique do we value as a society? Who should, if anyone, be able to control the meaning of texts? Should the law be responsive to the increasingly blurred boundaries between consumption and creativity? Are the incentives in Australia's *Copyright Act 1968* (Cth) contributing to – or stifling – a vibrant creative culture?

Hook challenges readers to reconsider the rationale for moral rights and the effects of these rights on public goods like political speech and social commentary. The arguments she develops in favour of greater innovation, and against the restrictive culture of authorisation and permission in Australian copyright law, are strongly stated and compelling. Long live the transformative author!

I enthusiastically recommend *Moral Rights, Creativity, and Copyright Law: The Death of the Transformative Author* to intellectual property scholars, legal practitioners, policymakers, law students, and creators. Indeed, to anyone who is, or should be, interested in challenging the foundational assumptions of our copyright law system.

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<sup>2</sup> Moral rights of attribution, false attribution, and integrity were first formally recognised in Australia in 2000, with the passing of the *Copyright Amendment (Moral Rights) Act 2000* (Cth).

<sup>3</sup> Christopher Aide, 'A More Comprehensive Soul: Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right' (1990) 48 *University of Toronto Faculty of Law Review* 211.

<sup>4</sup> Martha Woodmansee, 'On the Author Effect: Recovering Collectivity' in Peter Jaszi and Martha Woodmansee (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press, 1994) 15.

<sup>5</sup> Sarah Hook, *Moral Rights, Creativity, and Copyright Law: The Death of the Transformative Author* (Routledge, 2023) 1.

<sup>6</sup> Sarah Hook, *Moral Rights, Creativity, and Copyright Law: The Death of the Transformative Author* (Routledge, 2023) 14.

<sup>7</sup> Sarah Hook, *Moral Rights, Creativity, and Copyright Law: The Death of the Transformative Author* (Routledge, 2023) 44-5.

<sup>8</sup> Anne Rice, 'Important Message from Anne on "Fan Fiction"' *Anne Rice: The Official Site* (Web Page, 14 September 2009) <<http://www.annerice.com/ReaderInteraction-MessagesToFans.html>> cited in Sarah Hook, *Moral Rights, Creativity, and Copyright Law: The Death of the Transformative Author* (Routledge, 2023) 56-7.

<sup>9</sup> Sarah Hook, *Moral Rights, Creativity, and Copyright Law: The Death of the Transformative Author* (Routledge, 2023) 148.