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THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES, by Roberta Rosenthal Kwall. Stanford University Press, 2010, 247 pp. Cloth $22.45.

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Professor Roberta Kwall's book brings together a wealth of academic literature and case law analysis to make the argument for a more fully developed and rounded moral rights regime in the United States. For those readers unfamiliar with the debate within copyright law, a moral rights regime is a system of legal rights and duties that protects the rights of an author of a work from the distortion, misattribution, or unauthorized or unfavorable publication of the work. Continental Europe originated such a system in the Nineteenth Century. The theoretical underpinnings are in the work of Immanuel Kant on the relationship between the private and public spheres and the need for protecting the dignity interests of individuals who publicize their private thoughts. Moral rights developed on the European continent through the efforts of Victor Hugo as a means to protect the interests of authors against publishers. A moral rights regime recognizes an inalienable right in the dignity of authors against publishers who would treat authorial works as mere commodities to be altered, distributed, and commercialized as the market demanded.

Professor Kwall offers an original argument in support of legal reform in the United States that would recognize the moral rights of authors. Her argument begins with a recognition of the creative urge in individual authors (pp.11-12). This creative urge, grounded in spirituality, imbues works of authorship with a meaning and message (pp.20-21). Professor Kwall argues that a moral rights regime is needed to protect this meaning and message from misattribution and from adaptations and uses that compromise the integrity of the work (pp.21-22). With this aim in mind, Professor Kwall explores how moral rights are consistent with the public domain (pp.66-67), with separating the rights of employer and employees in

copyrighted works (pp 100-101), with protecting the artistic persona more effectively than traditional right of publicity doctrines (pp.129-131), and with recognizing international human rights treaties (pp.143-44). She concludes with a reform proposal for recognizing a right of attribution and a limited right of integrity in the Copyright Act (pp.148-150).

As Professor Kwall reminds us, United States Copyright law has long eschewed such subtleties and treated copyrighted work as an ordinary commodity subject to utilitarian-based legal regulation (pp.42-43). This arrangement suited the United States fine until the country had to recognize some form of moral rights in order, in the late 1980's, to be able to sign onto the Berne Convention, a multilateral treaty governing global copyrights. Professor Kwall's case for moral rights, needless to say, is not based on such expediency. Her goal is to develop a rich theoretical justification for a moral rights regime and a legislative proposal for implementing moral rights within existing copyright law. Her broader goal is to break free of the utilitarian constraints on United States copyright law in order to recognize greater legal protections for creators and the creative persona (which may or may not be distinct depending on how one reads the argument). The book is provocative and a seminal academic work on the topic of moral rights. But for those mindful of intellectual property policy, I would be very cautious in moving its ideas out of the academic realm and into that of concrete policy, for reasons I develop below.

At a very basic level, Professor Kwall is making the case for non-economic rights in copyright law. She begins the book with a discussion of how U.S. copyright law does not protect authorial integrity or attribution. For example, if I publish a work but put the name of the wrong author on the work, I have not violated copyright law. Similarly, if I destroy the work or physically mutilate the work, I also have not violated copyright. In some circumstances, the author can obtain a remedy for the economic harm created by these acts through tort remedies, such as defamation or conversion. But federal copyright law offers no or limited redress. What is troubling for Professor Kwall is copyright law's silence as to the noneconomic harm created in these two examples, specifically the harms to the authorial personality and the creative vision imbued by the author. The work is an extension of the author, and the distortion and destruction of the work inure to the author. A system of economic rights misses this point entirely.

What is original about Professor Kwall's argument is her grounding of these non-economic interests in a more sophisticated understanding of the

motivations of individual creators. Utilitarian foundations for copyright, Professor Kwall implies, are based on material gain as the sole, or primary, motivation for creation. Psychology and religion prove otherwise. It would not be a distortion of Professor Kwall's argument to say that she sees the roots of creativity as spiritual, whether understood in emotional or theological terms. This argument is developed in the second chapter of her book and is the basis for the rest of her argument, which consists of identifying how U.S. copyright law is out of step with the legal regimes of other countries. I would argue that her case for understanding the motivations for creativity is the keystone for her book. Starting from that premise, I will make it the primary focus of the rest of this review. Does Professor Kwall have it right about what motivates creativity and, if so, do her critique and policy recommendations follow?

Professor Kwall isolates two distinct types of motivation for creativity, non-economic and spiritual. Although they can be confused, they are different. Non-economic motivation is based on something other than the calculation of the return or reward of creating a new work. An artist may create spontaneously or on a whim. The work may be a labor of love, resulting from much sacrifice and both emotional and physical pain. Nonetheless, the creator continues to produce the work purely for the sake of creating. Spiritual motivation may also involve such sacrifice and may, from a cost-benefit perspective, not be worth it. But a creator driven by spritual motivation gains something: a spiritual reward, the ecstasy of spiritual release, the satisfaction of serving one's muse. One can go so far as to say that spiritual motivation may include the love of lucre, the reward that comes from material success is a sign of divine election. Adam Smith's infrequent use of the term "invisible hand" in *The Wealth of Nations* was meant ironically, a jab at those who viewed wealth as the result of invisible forces as opposed to the hard work and energies of the mercantile class and workers. A case could be made that the wealth of nations derives from non-economic motivation, individuals acting in their narrow interest to work and provide labor independent of any direct reward from that labor.

Motivations for any act are complex. Do we write law review articles for monetary reward? Spiritual ones? Purely personal ones? I imagine all of these motives are true. An acquaintance who is an English professor asked why I cared so deeply about a specific author and his novels. From his perspective, a new novel from the particular author meant more things to write articles about and the greater prospect for a raise. The time I spend reading, thinking, and writing on the same novel goes seemingly unrewarded. Is this an investment in some yet-to-be seen reward, a frolic, a

source of spiritual satisfaction? Depending on how one looks at my acts, and when, my motivation can be construed to be any one of these. Because of the inherent ambiguity of motivations, they generally do not serve as a compelling linchpin for policy and legal doctrine. They may be a factor to consider in some cases, for example in discerning mens rea. But too much should not be made of them.

Yet motivations are critical to Professor Kwall's argument, and they are critical in any incentive-based justification for intellectual property rights. I am not a big fan of incentive-based theories, largely for the same reasons that I am skeptical about the concept of motivation. Nonetheless, I may be in a minority on this point, and the dominant rhetoric to justify intellectual property rights is some variation of an incentive-based theory. The problem is that even within incentive-based theories, Professor Kwall's proposal for a moral rights regime in the United States seems flawed for several reasons.

First, if one accepts the proposition that motivations are mixed, it is not clear why protection for economic motivations would not be adequate for protecting non-economic and spiritual ones. Other areas of law also cover multiple types of injuries without providing redress for all harms. Contract breach can result in emotional injury for which contract law offers little remedy. Tort law distinguishes between recoveries for physical injuries, emotional injuries, and economic injuries and carefully circumscribes what can be recovered for the latter two categories and has limits on the first one as well. These choices may reflect ideology or conceptual biases towards quantification. But more assuredly, they reflect practical choices about what the legal system is capable of doing. Professor Kwall is less convincing about why a focus solely on economic motivations in intellectual property is inadequate for what the legal system can deliver.

Second, even if Professor Kwall responds to the last objection on deontological grounds, that we need to protect noneconomic motivations because it is the right thing to do, she would still need to distinguish between noneconomic and spiritual motivations. If creators would produce even without the economic reward of copyright, what then should be the basis for remedy? It does not necessarily follow that a creator with such noneconomic motivation would care about correct attribution or integrity either. My guess is that much of the content on YouTube is spontaneous creation, people who happen to have a recording device at the right time and in the right place. Much is also staged creation by people who act on a whim with what seemed at the time to be a funny idea. Would misattribution or distortion of the sort Professor Kwall espouses be of

concern to such creators? I am skeptical. I am confident, however, if such spontaneous or whimsical creation became iconic or economically valuable (think, for example, of the Zapruder film of President Kennedy's assassination), the creators would pursue those interests zealously. What is labeled noneconomic motivation masks this implicit lottery.

However, Professor Kwall's case becomes stronger for creators who are driven by spiritual motivations. For such creators, the injury that occurs from a misattribution or a distortion cannot be readily quantified or even translated into the calculus of legal claims protecting against defamation or conversion. On this point, Professor Kwall stands on stronger grounds. Skeptics may harp on the abstruseness and lack of clarity in protecting "spiritual interests." But let me be the first to defend Professor Kwall's identification of spiritual motivations. The defense has little to do with one's theological beliefs. Rather, I am willing to accept and argue in the defense of the existence of psychological factors that are associated with creation. Perhaps they can be reduced to brain chemistry, the equivalent of a runner's high. Furthermore, these motivations do not fall neatly into dichotomies such as religion versus science. Darwin's *On the Origin of Species* ends with a long paragraph describing the invisible, incremental forces that lead to the development of speciation and the spread of life on the planet. To call it spiritual may belie the materialistic theory that he was espousing. But when compared with the literalism, the fixation on the Biblical text, that his critics, then and now, essentially extoll, Darwin's view should be understood as spiritual. Aestheticians, like Edmund Burke, would call the feeling sublime. It is perhaps the feeling some of you may have had upon first seeing a natural wonder—Mt. Shasta, the Himalayas, the Grand Canyon—a feeling that is stirred and amazingly inspired by a hunk of rocks. Professor Kwall is correct in identifying this emotion, and I have no doubt that it plays an important role in creation, both artistic and scientific.

The problem is identifying precisely the implications the existence of spiritual motivations has for law. John Muir, Rachel Carson, Ansel Adams individually and collectively identified the sublime in the natural world. Such feelings stirred the environmental movement which in turn helped to shape environmental law. But it would be a leap to say that environmental law somehow protects these spiritual feelings, even if they were an inspiration for the law. The problem of contingent valuation illustrates the problem of how to incorporate these values into a measure of recoverable damages. Once again practicality limits how much the sublime can shape the law.

It is true that within a purely incentive theory of intellectual property, spiritual motivations do not necessarily lead to the protections for attribution and integrity that Professor Kwall is advocating. The problem, however, is that her recognition of spiritual motivations is too underinclusive. Much labor arguably involves spiritual motivation. The notion of craft, for example, is in part a spiritual one. But copyright law, like all intellectual property law, makes distinctions among different types of work, in part for practical reasons, in part because the incentive theory cannot fully explain the structure of intellectual property law. Why is the integrity of the creator more needing of protection than other providers of labor and service in society? Dignity should have more of a role in the structure of the legal system than it does, but I feel hard pressed to conclude that it should take the form that Professor Kwall prescribes.

Admittedly, Professor Kwall's case is limited to recognizing dignity-based claims in copyright law and so the previous critique may be deemed as misguided. But even within the parameters of copyright law, Professor Kwall's appeal to spiritual motivations is underinclusive. If the laying of paint on canvas, the putting of words on paper, the snap of a photograph, each has a spiritual component, then so do the viewing and reading of objects. The notion of the sublime applies equally, and perhaps more forcefully, to the audience for a work. Music has charms to sooth the savage breast, and that spiritual soothing, within the terms of Professor Kwall's argument, deserves recognition within intellectual property law. Once one also recognizes that spirituality is as much a collective experience, as an individual one, Professor Kwall's claims return us to the central questions that inform intellectual property policy. Is IP law about individual reward or access? Are the terms of IP individual or collective? Is IP policy about individual ownership or commons management? Professor Kwall's identification of spiritual motives in creation does not clarify these questions and merely adds to the ongoing debate over the structure and purpose of intellectual property.

Underlying Professor Kwall's arguments is an appeal to stewardship in intellectual property (pp.18-19). Unfortunately, this concept is not well developed in the book, except for a brief discussion in the context of copyright duration (p.58). The concept of stewardship certainly is connected to notions of spirituality and the sublime in intellectual property as it is in environmental law. To view intellectual property in terms of stewardship is to recognize that creativity is beyond the scope of finitely lived individual authors and the needs of the current generation. The

problem is how to channel the notion of stewardship into concrete legal reform. In Professor Kwall's book, the concept of stewardship is raised and then dropped as the author takes the concept of spirituality to support the rights of attribution and integrity. But in taking such a narrow focus, the author ignores how the concept of stewardship would apply to all users and creators within the intellectual property system. The reform proposals assume intellectual property rights are individual and not within a broader communal system. As a result, the argument replicates some of the criticisms of intellectual property and belies the appeal to stewardship that was an enticing start to the book.

The individualistic focus of Professor Kwall's argument is ironic in light of the origins of the moral rights tradition in copyright. Immanuel Kant's conception of the moral rights system recognized an intimate connection between the public and private realms. Creators would retreat to private domains to develop their ideas and their work which in turn would be disseminated in the public realm. Distortions of the work in the public realm would affect what creators did in the private realm by either influencing creators to retreat permanently from the public or to refrain from creating altogether. This vision of private and public realms in tandem informs much of contemporary intellectual property law, as can be seen in discussions of secrecy, branding, and privacy in the fair use context. Needless to say and perhaps not surprising, Kant had a very monastic view of creation. In the modern world, the public and private are not distinct realms and overlap in the creation and dissemination of creative works. Professor Kwall's defense of moral rights strikes me as a retreat from the public-private remix we inhabit today to an individualistic notion of creativity. This point may be most apparent in her discussion of joint authorship and the claim that one co-author may have a claim against distortions of the work by other co-authors (pp.100-101). I was left wondering why this veto power is justified and what about the role of user generated creation and remix more broadly. Arguably, it takes a village to make a work or to shape an individual soul, even one driven to create.

Grounding moral rights law in spiritual foundations ignores the practical politics that drove the development of what we call the moral rights tradition. As a protection for the dignity of authors and artists, moral rights was a means of protection against publishers, whose focus was solely on the commercial potential for a work, ignoring the vision of the creator. The famous case of *Gilliam v. American Broadcasting Companies, Inc.*[1] is an example of this tension. The broadcast company, as publisher, distorted the work of the Monty Python troupe as it was first being introduced to the U.S.

audience. The court fashioned a remedy based on contract law and trademark law, that was, as Professor Kwall points out, unsatisfactory as a policy matter (pp.32-33). But the court's solution illustrated the height of pragmatism in protecting the interests of the authors against the acts of the publishers. The U.S. statutory attempt at moral rights through the Visual Artists Rights Act (VARA) completely ignores the roots of moral rights in limiting the rights of publishers. The published cases interpreting VARA illustrate a tension the Act creates between artists and users, specifically municipalities or museums as surrogates for users.

Although I find much of value in her book, I am concerned that Professor Kwall's reform proposal might also create further tension between artists and users, ignoring the purpose of moral rights law as protection against publishers. The source of this tension is in identifying creativity as a personal, spiritual experience which ignores the social context of both creativity and spirituality. It is too limiting to view religion as purely a personal matter. Religion and spirituality are not only about personal salvation or personal expression. Instead, religion and spirituality see personal salvation as part of building community norms and values, which would include in the copyright context values of access. Perhaps Professor Kwall does not pay enough attention to these communitarian values. But her book may pave the path for a broader, more inclusive notion of intellectual property.

ENDNOTES

[1] Gilliam v. American Broadcasting Co., Inc., 538 F.2d 14 (2d Cir. 1976).

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