Authors' rights in the creative economy

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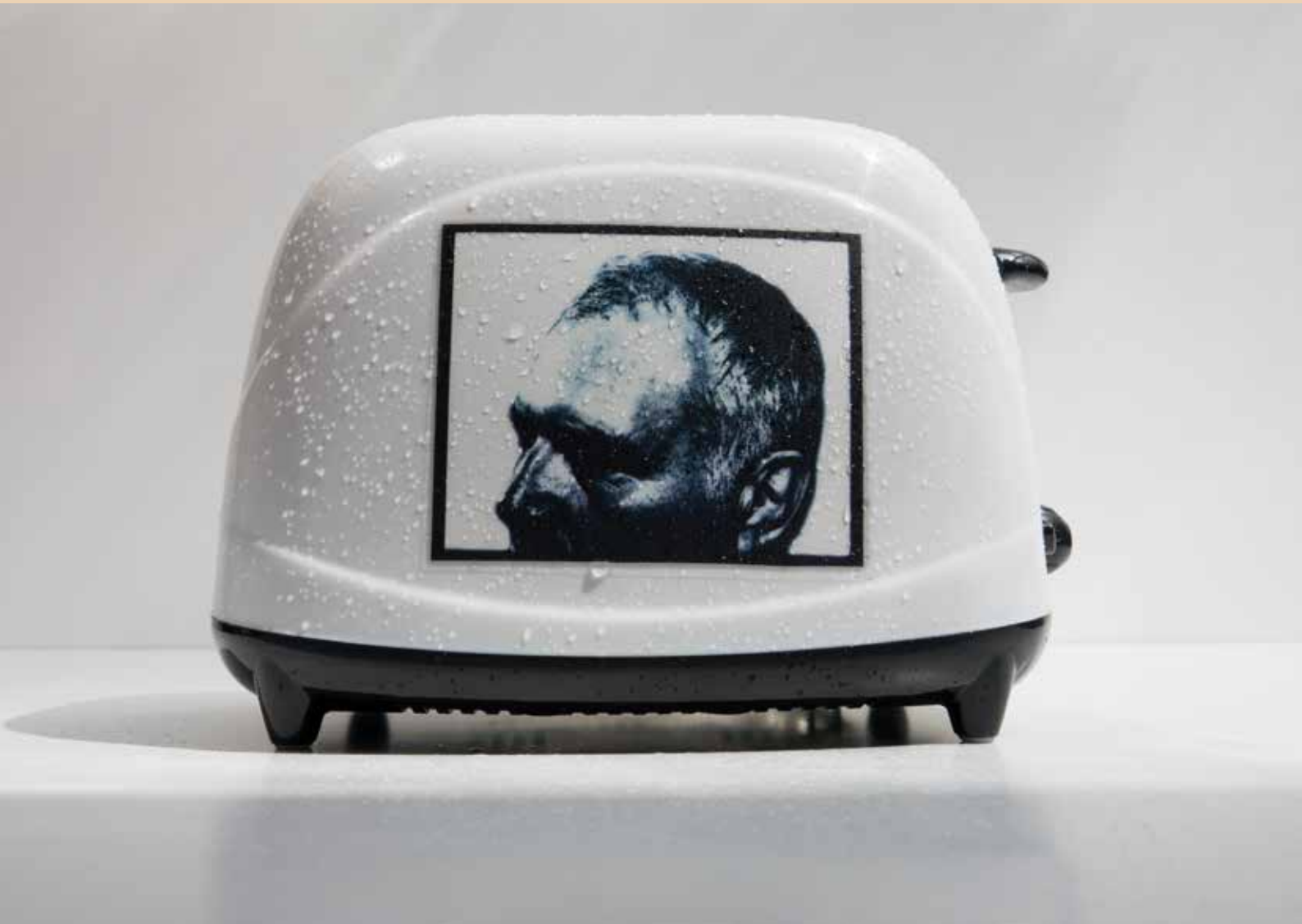

Perpetually a work in progress

Ellen Loots

Authors' rights in the context of the arts is a thorny question. Ellen Loots outlines the complexity of existing legal systems and the tense relationship between moral rights and authors' rights in relation to the dynamics of the creative industry. Only by making it clear how the creative industry functions, can progress be made in improving the protection of the rights of both authors and consumers.

In the so-called creative economy, innovation and creativity are considered important sources of post-industrial growth, and human capital assets and knowledge its crucial ingredients. That is why numerous developed and developing economies recognize the intellectual property regime as a pillar for growth policy.[1] At the same time, the 'digital revolution' urges policymakers and academics to rethink the form and function of authors' rights.[2] Production and consumption of cultural goods have become largely intertwined, and many among us are simultaneously users and creators of potentially copyright protected works. The swift developments in digitization at a global scale can be a double-edged sword. On the one hand, the current era is characterized by an intense proliferation of diverse creative content and democratic opportunities for distribution. On the other hand, creative works have become 'fragile', as they are easily subject to piracy, imitation and other violations of authors' rights. The aim of this text is to deepen the understanding of moral rights and copyright and some of the complexity of the legal regimes today, in relation to the dynamics of the creative industries. Hence, only by recognizing and making explicit how creative industries operate, the protection of authors can be improved.

WHY IS THE OPTIMIZATION OF AUTHORS' RIGHTS SYSTEMS SO COMPLEX?

Despite the central roles authors' rights systems have been credited in cultural consumption, in the protection of creators, and even in the growth of the economy, they are far from picture-perfect. It seems that the problems that a well-functioning present-day authors' rights system needs to address are constantly shifting, due to the perpetual motion with which creative content and its protection are confronted. Several reasons why the optimization of authors' rights systems is such a conundrum can come to mind.

First, authors' rights deal with the governance of valuable resources. The governing of authors' rights reflects a 'complex judicial reality, because it tries to synthesise the claims of the different actors of the process of creation and reception of works, namely the author, the public, and the exploiter'.[3] An appropriate authors' rights system needs to balance these diverging interests in such a way that it maximizes what economists refer to as 'social welfare'. It may not come as a surprise then, that next to policymakers, also legal experts, economists and industry insiders are involved in continuously optimizing authors' rights policies.

A second explanation for the complexity of an authors' rights system and the difficulties that its optimization incur, relates to its path-dependency and long and strong traditions that differ fundamentally across jurisdictions. In continental Europe, the tradition of authors' rights is deeply embedded within humanist principles and Enlightment ideas, often traced to Immanuel Kant, who defended the rights of an artist not because he had created objects for which a compensation was due, but because these creations embodied or extended his personality.[4] Also, the removal of the sovereign's control over artistic production was a major motivation for the coming-into-being of a legal framework for authors' rights, particularly in France where today still 'le droit moral' is resilient. In the United Kingdom, copyright had other purposes. During the industrial revolution, the Statute of Anne (enacted in 1710) was meant to break the booksellers' monopoly and to encourage the education of civilians. [5] Even today these fundamentally distinct conceptual baselines of authors' rights leave an imprint in the systems of Civil Law and Common Law countries. In the former, the law generally articulates the 'moral rights' doctrine as serving the 'personality' of the author and protects his nonpecuniary interests.[6] In contrast, in the U.S. and United Kingdom copyright inscribes in a tradition of intellectual property protection and thus serves the economic interests of copyright holders but also the social good.[7] These national and cultural differences form clear obstacles when it comes to developing supranational regulations. For example, the resistance of the U.S. to moral rights was one of the reasons why for over a century it did not join the 1886 Berne Convention for the Protection of Literary and Artistic Works, despite its international importance and widespread acceptance.[8] But also within European Union borders, the harmonization campaign over the copyright legislations of Member States experiences difficulties as a consequence of discrepancies among national laws.[9]

A third obstacle to rights' optimization relates to the swift developments of production, distribution and consumption methods in the creative industries at large. One of the sources of these changes relates to digitization, which clearly holds implications for the distribution of content, for access and the prevention of unauthorized use, and for the trading infrastructure for licenses (i.c. collecting societies).[10] But next to technological innovations, the creative industries have also undergone structural changes that inflict the relationships between creators, intermediates and consumers. In the remainder, we expose how such changes may call for adjustments of authors' legal protection schemes and we refer to two recent—not uncontroversial— academic contributions that challenge the current conceptions of moral rights and copyright, respectively.

MORAL RIGHTS

Moral rights refer to the inalienable rights held by an author or artist[11] that permit his control over the use and dissemination of his work, independently of any pecuniary reward. Moral rights preserve the personal and reputational value of an artwork and the artist from mistreatment, also long after the work has been completed. Underlying moral rights is the idea that the artwork and the artist are intricately connected: an artistic creation is not just a product that can be traded, but also a reflection of the author's creativity, identity and personality.[12] Notwithstanding this fairly romantic baseline, a major purpose of moral rights is to shelter the interests of the author.[13] Most authors, as artisans, presumably feel some attachment to their work, and harm or anguish when they see it being abused, mutilated or mocked. Also, authors may derive a reputation from the creative signature they lay in their works, which would be harmed or at least questioned if a work, due to alteration, would deviate from the personal style that is associated with them.[14]

A number of protections fall under the moral rights umbrella. Many jurisdictions recognize the rights of disclosure, withdrawal, attribution or paternity, and integrity. Under the right of disclosure, an author can decide at which point he wants to share his work with the public. Under the right of withdrawal, he can decide to withdraw his work, even after it has left his hands. Under the right of attribution, the author can claim that his name is connected with his work displayed or distributed. Under the right of integrity, the author can prevent alterations to his work.

The right of integrity can be considered the more prominent and controversial. It permits the author to prohibit significant modification of his creation. An illustrative case is that of a massive mobile sculpture by Alexander Calder in Pittsburgh Airport. The airport authorities decided to solder the elements to prevent them from moving and to re-paint the sculpture in green and gold, colours that would accord with their brand and interiors. Despite Calder's objections, it took over two decades before the airport agreed to restore the object in its original condition. An author could also invoke the right of integrity to prevent an unfavourable presentation of his work, what De Chirico did when he found that his earlier paintings were overrepresented in a retrospective exhibition at the 1955 Biennale of Venice. [15]

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Albeit the moral rights regime is premised on the idea that creators have certain rights in the integrity of their work, according to some observers, moral rights also serve to protect the nonpecuniary interests of the public. One such source of public interest lies in that great works of art become common reference points or icons within a community's culture. Likewise, a work of art may represent an aesthetic innovation or a social critique or ideal that is valuable to a society at large.[16]

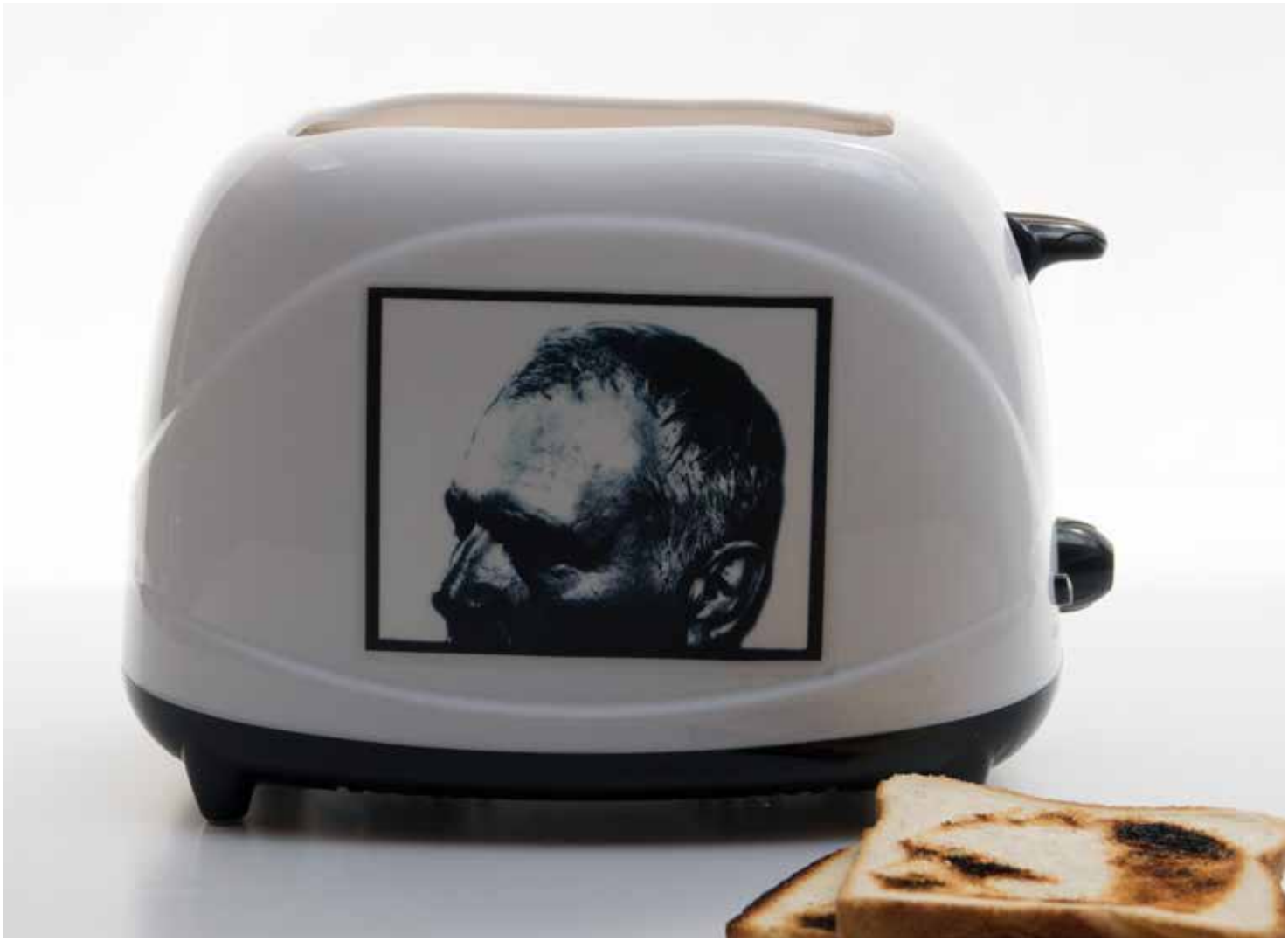
Even though they are conceived of as personal civil rights and even fundamental human rights independent of an author's economic rights, several experts claim that moral rights do have a commercial character as well, due to their ability to vindicate artists' pecuniary interests.[17] Hypothetically, each of an author's works can be considered as a powerful advertisement for his other works, and the mutilation of one work can, by damaging the author's reputation, lead to a decline in the value of other works. The moral rights regime, and in particular the right of integrity, can prevent the depreciation of the value of artworks that would come forth of formal alterations. By protecting authors' reputations, moral rights indirectly serve to protect the interests of other people and institutions involved as well. For example in the visual arts, intermediates such as gallerists and museums have a strong stake in the protection of the integrity (thus financial value) of an art work, as do collectors and other owners.

MORAL RIGHTS, REPUTATION AND TRADEMARK IN THE CONTEMPORARY ARTS

In concurrent intermediated arts markets, is it sustainable to defend that a bundle of authors' interests unlike any other should be protected under a distinctive rights regime? According to Xiyin Tang, an intellectual property associate and lecturer at Yale University, it is hard to retain to a special status or treatment for art objects compared with pure commodity objects because many of contemporary art today is industrially fabricated or assistant-produced.[18] Drawing upon examples from the fine arts and the practices of mega-celebrity artists such as Andy Warhol, Damien Hirst, Jeff Koons and Richard Prince, Tang underscores that, 'because works of art have become increasingly mechanized in their production, the artist's brand, or his signature, has replaced the artist's hand (via brushstroke, for example) as the foremost signifier of a work's value and meaning'.[19] Tang proposes to shift the conversation about moral rights in contemporary arts from one that underwrites the sentimental connection between the artist and his work to one that is fully aware of the function of an artist's reputation in his career development. As she points out, 'reputation is what informs our understanding of new work that might otherwise remain context-less and inexplicable, and it is also what art buyers and sellers are implicitly trading off (...)'.[20] Yet, so she argues, precisely because art has turned into a commodity object, a society needs moral rights to protect her authors' economic interests. As copyright principally governs reproductions, Tang favours a separate regime for moral rights, because,

> moral rights, much like trademark law (...), can instead regulate a set of distinctly economic rights—both by decreasing search costs for art buyers and the art-viewing public, and by giving artists an incentive to create without having other actors unfairly reap the benefits of their goodwill (which, in turn, incentivizes the creation of a consistent, quality body of work).[21]

Thus, introducing the 'trademark' notion in the conceptual framework of authors' rights is not so odd and would provoke a shift of the conversation from one exclusively about authors' intellectual and pecuniary interests to a broader focus on protecting consumers and the art market via truthful source indication, and as such serve a society's social welfare function.



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Copyright law permits authors to reserve in the expressive works they create a continuing property right. The conventional justification for copyright law is that 'it transforms what would otherwise be a public good (...) into a private good, and in so doing creates stronger incentives for authors to create new works'.[22] Indeed, copyright law allows an author to establish a property right in all copies made, including the original. Furthermore, copyright law permits an author to exert a substantial influence on the quality of all copies made and as such to protect himself substantially against any harm he may suffer from any alteration of his work.[23]

Copyright scholars generally conceive of copyright's impact on the production of cultural goods in two ways. First, copyright law creates the conditions for more widespread access to the products of a common culture. Particularly, it enables intermediaries such as publishers, record labels, libraries, broadcasters, performing rights organizations and also contemporary variants such as search engines, to distribute cultural works for wider consumption.[24] It does so by supplying to authors and intermediaries incentives for cultural production. Second, as an instrument that recognizes intellectual property, copyright has since its origin been a means to guarantee the free circulation of ideas in society.[25] Although it is a form of state intervention, by establishing property rights where they would otherwise not exist, copyright enables the market to work efficiently.[26] Taken together, copyright acts as a catalyst for cultural progress, as it accelerates cultural production in properly functioning copyright markets.

According to cultural economists, the main challenge of copyright law is finding an appropriate balance between the interests of different stakeholders.[27] Economists would argue that an effective, rational copyright policy should trade off the interests of the rights holders against those of consumers: rights holders would seek to maximize returns, whereas consumers would benefit from maximum access to the existing stock of copyright works at minimum cost.[28] Furthermore, people have a right to information. Yet, there is a vital tension between copyright and the public's right to information which is only increasing in this era of digitization where many works are easily accessible and non-excludable.[29] The optimal degree of copyright protection would 'balance the benefits of encouraging the creation of new works by ensuring economic returns to the creator, and the cost of restricting public access to the work'.[30] In a similar vein, the law must strike a balance 'between the protection of the author and the costs that imposes on other authors, such as search costs for novel means of expression and of obtaining permission to use the copyrighted works of others'.[31] In this respect, copyright can have both a positive and negative impact on creativity; the former by incentivizing authors, and the latter by imposing constraints on novel creations.

COPYRIGHT, INCENTIVES AND PROPERTY IN TODAY'S CREATIVE INDUSTRIES

Within the contemporary debates on copyright and intellectual property, Julie Cohen, professor in Law and Technology at Georgetown University, Washington DC, recognizes two major misconceptions of the baseline of copyright that hinder the development of an effective copyright law and policy. She urges to take a more accurate account of, first, the economic incentives that copyright provides and second, to think about property in a different way.

Conventional wisdom holds that copyright creates incentives to authors, which leads to the fulfilment of the ultimate goal of copyright, namely the promotion of cultural production, or cultural progress. While this '(...) incentives-for-authors formulation of copyright's purpose is so deeply ingrained in our discourse and our thought processes that it is astonishingly hard to avoid invoking it (...)', Cohen reserves some fundamental objections against this rationale.[32] Hence, it has utterly been demonstrated that copyright itself plays very little role in motivating creative work.[33] Therefore, holding on to the incentives-for-authors rationale impedes a clear assessment of copyright's true economic and cultural functions in today's information society. Cohen draws on the example of capital-intensive industries like the movie industry to highlight another role of copyright: 'the purpose for copyright is to enable the provision of capital and organization so that creative work may be exploited'.[34] Furthermore, an inappropriate conceptualization of 'property' casts a shadow over the development of a well-functioning copyright regulation. Conceiving of the property of a creative work analogous to the property of land, may be an outdated mode leading to coordination problems. Instead, a contemporary copyright system could make the distinction between the authorship of and the control over information resources and as such facilitate both 'coordination' and 'combination'.[35] Taking stock of the above, Cohen proposes to step away from the 'incentives-for-authors' story that generally underlies copyright issues and instead consider an 'incentives-for-capital' baseline, which is more tailored to how creative industries today operate. The copyright system has too long subscribed a 'personality-centered (...) property paradigm', while the focus should be on 'how authorial interests ought to be recognized and protected within a post-industrial property system organized around resource coordination'.[36]

CONCLUSION

Authors' rights (comprising moral rights and copyright) are all but a recent phenomenon. Due to the traditions that many nations have in authors' rights legislation, current systems may

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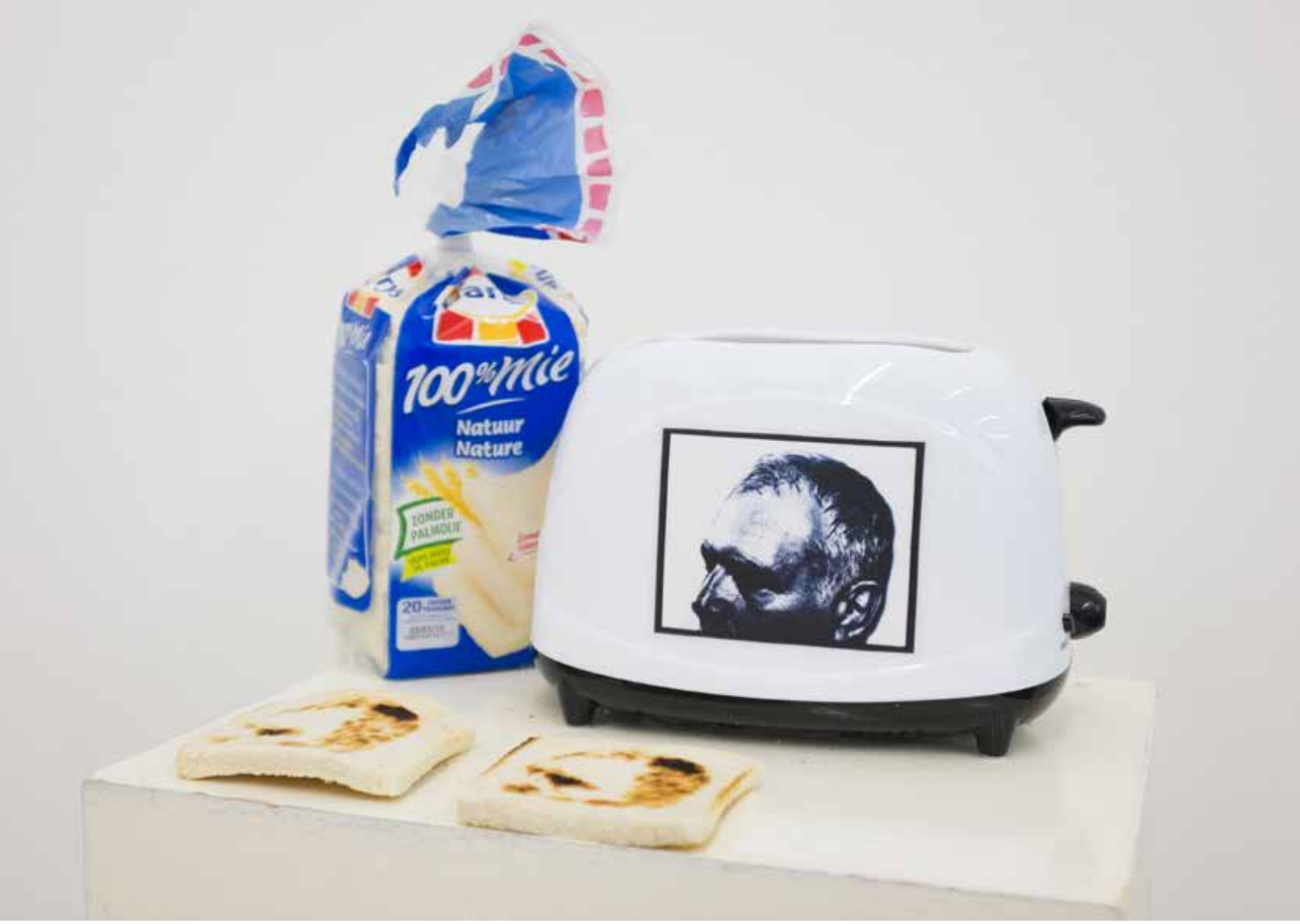
The swift developments in digitization at a global scale can be a double-edged sword. On the one hand, the current era is characterized by an intense proliferation of diverse creative content and democratic opportunities for distribution. On the other hand, creative works have become ‘fragile’, as they are easily subject to piracy, imitation and other violations of authors’ rights.

not be all too adapted to accord to ongoing developments in the production of cultural goods. Compared with the dynamics that typify contemporary creative production, authors' rights systems are unwieldy, particularly when it comes to harmonizing cross-border differences. Even though 'meaningful reforms in the governance of valuable resources will always lag well behind implementation of the initial coordination mechanism, and may be doomed to remain perpetually a work in progress',[37] every now and then the tortoise still catches up with the hare. Regardless, several authors have pointed to the fundamental role that misconceptions play, leading to malfunctions of the system.

One misconception relates to the presumed discrepancy between the artistic and commercial values of artworks and the idea that the regulation of both could and should be settled entirely separately. Although legislation (for example the Berne convention) puts forward that moral rights are independent of the author's economic rights, this characterization has limitations. Hence, moral rights, and in particular the integrity right, can serve to protect the market value of original works and the pecuniary and nonpecuniary interests of authors and other persons as well. [38]

Furthermore, the author-centricity that underlies the protection by law may be an outdated perspective that eventually does not benefit the author too much. As Richard Caves already stipulated in 2000, many creative activities can be conceived of as 'contracts between art and commerce', and the involvement of manifold intermediate organizations that support the production, distribution and consumption of cultural goods should not be granted a too moderate of a role in these activities. [39] By trading the idea of the 'brushstroke' of an author by that of his 'reputation', which radiates to all involved in the production and dissemination of his work, a contemporary moral rights regime would not just abolish the artificial distinction between arts and commerce, but could also craft appropriate incentives for the author and others involved.[40] Similarly, a shift in copyright law from an incentives-for-authors scheme to an incentives-for-capital scheme, could better account for the peculiarities and demands of mediated markets in the creative industries. [41]

A third misconception that is being left relates to law's sturdy distinctions between authors vis-à-vis users, and ideas vis-à-vis expressions. In our information society with its popular distribution platforms, both may be hard to hold on to. The creative output of authors does not originate in a vacuum, but is often a 'remix', developed by authors who are situated in their proper communities and cultures. According to Cohen, 'works of mass culture so often supply the raw material for new creative efforts because that is what users see every day'.[42] Therefore, the ideal copyright regime, 'as a regime of rights designed with the immediate purpose of incentivizing the intermediation and privatization of culture while minimizing cultural obstruction', should take into account the 'cumulative creativity of situated users' in order to minimize the adverse effects of its 'obstructive function'.[43] Even though authors' rights herald to celebrate authors—also those who are not superstars—, when it does not catch up with the turbulence in the environment, society runs the risk of sustaining a system that 'regulates authors to the economic and political margins of the intellectual property system'.[44]



Ready Made by Tom Vansant on expo *A Belgian politician*, Antwerp 2015, photo by Katrijn Van Giel © ID/ Katrijn Van Giel

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Berne Convention for the protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1886, as last revised, Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, 235.
Originally drafted in 1886, the international Berne Convention for the protection of Literary and Artistic Works is a treaty administered by the World Intellection Property Organization (WIPO). Under its protection falls every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, lectures, dramatic and choreographic works, musical compositions, cinematographic and photographic works, works of drawing, painting, architecture, sculpture, etc. Ever since 1928, the safeguarding of the rights granted by the Berne convention must be governed by the legislation of the country where protection is claimed. By means of article 6bis it suggests that next to economic rights, authors have another right as well, which relates to reputation: 'Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.' Albeit it is the 'weakest statement of moral rights' (Rushton, p. 16), precisely this article for several decades withheld the U.S. of becoming a signatory.

9 Within Europe, some jurisdictions classify author's rights as an artistic or literary property right, other jurisdictions as an industrial or commercial property right. Since the 1980s, the harmonization of the author's right legislations of its Member States has been a priority of the EU. The EU's primary goal for this campaign has been economic, to ensure that its internal market functions soundly. 'Copyright' was defined narrowly, such that moral rights are excluded. This implies that member states are free to legislate the area of moral rights. This is an obstruction to a unified author's rights system, because, as a general principle among civil law countries, copyright law encompasses economic and moral rights. Sirvinskaite.

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11 In legal terms, 'author' refers to the creator of an original work; we use 'author' and 'artist' interchangeably.

12 Bird.

13 Rushton.

14 Hansmann & Santilli.

15 Beide voorbeelden: Hansmann & Santilli.

16 Hansmann & Santilli.

17 Hansmann & Santilli. Bird. Tang.

18 Tang, Xyiyn. "The artist as brand: toward a trademark conception of moral rights." *The Yale Law Journal*, vol. 122, no. 1, 2012, pp. 218-257.

19 Tang, p. 231.

20 Tang, p. 243.

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23 Hansmann & Santilli. In this manner, copyright law and the right of integrity address similar interests.

24 Cohen.

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28 Handke. Towse.

29 Non-excludability refers to the economic property of public and common goods, that also people who have not paid for something can still benefit from its consumption, also known as the 'freeriding problem'.

30 Rushton, p. 22.

31 Towse, Handke & Stepan, p. 6. Landes & Posner.

32 Cohen, p. 143.

33 Also the cultural economics literature has repeatedly articulated that copyright is not an incentive for authors/artists: artists are not likely to get a deal as good as intermediating and distributing entities who have more economic power. Moreover, many artists are not so much motivated by pecuniary rewards but driven by non-pecuniary rewards as well (Towse, 2001).

34 Cohen, p.143.

35 In Belgium, the separation of authors' rights in moral and patrimonial (including reproduction) rights makes this distinction already to some extent. Authors' rights are conceptualized as property rights and stipulated in Book XI of the Code of Economic Law (title 5 "Intellectual Property", chapter 2), inserted by the law of 10 April 2014. Before, it was arranged by the Belgian Copyright Act of 1994. The rights of the author consist of two types: moral and patrimonial rights (including the right to reproduction). In order to qualify for protection under the Belgian law, a work must meet two requirements. First, it must have a concrete form. Belgian law does not protect mere ideas. And second, the work must be an original creation. In legal terms, the originality requirement refers to the personal imprint of an author, or the fact that the work is his 'own intellectual creation' which makes the originality requirement easily achievable. Copyright arises automatically out of the creation of an original work and continues to exist until 70 years after the death of the author. An author may assign his patrimonial rights to a third party, but may not relinquish his moral rights. Law inserting the Book XI"Intellectual Property" in the Code of Economic Law, 19 April 2014, MB (12 June 2014) 44352

36 Cohen, p. 161.

37 Cohen, p. 164.

38 Hansmann & Santilli.

39 Caves, Richard. Creative industries: Contracts between art and commerce. Harvard University Press, 2000.

40 Tang.

41 Cohen.

42 Cohen, p. 149. Also in Belgium, 'creative practices based on the re-use of existing works are at odds with a legal regime based on the prohibition of unauthorized reproduction'. In a thought-provoking article on emerging remix practices in the digital environment and artistic transformative uses, Cabay and Lambrecht argue that current EU (including Belgian and French) laws are among the most restrictive when it comes to the flexibility and freedom to create, a critical situation of legal uncertainty that must be addressed. Cabay, Julien & Lambrecht, Maxime. "Remix prohibited: how rigid EU copyright laws inhibit creativity." *Journal of Intellectual Property Law & Practic*e, vol. 10, no. 5, 2015, pp. 359-377. p. 360.

43 Cohen, p. 149.

44 Cohen, p. 144.