

It's A Wise Text That Knows Its Own Father: Some Problems in Paternity Rights

Dr. Stina Teilmann

AHRC Network Conference
Birkbeck School of Law
27-28 June, 2005

When the right of paternity was introduced in Britain by the Copyright Designs and Patents Act in 1988 it was defined in the following way:

77 (1) The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director of the work in the circumstances mentioned in this section; but the right is not infringed unless it has been asserted in accordance with section 78.

The 'circumstances' mentioned refer mainly to situations when the various types of works are published commercially, or are broadcast, or are presented or exhibited in public. In all these situations an author has the right to be identified. However, as we learn, the right to be identified is not infringed if it has not been 'asserted.'¹ Such 'assertion' is a way of bringing notice to third parties: only those with notice of the right are bound by it.² Section 78 of the Copyright Designs and Patents Act describes the various ways by which an author may assert his right of paternity:

78 (2) The right may be asserted generally, or in relation to any specified act or description of acts-

(a) on an assignment of copyright in the work, by including in the instrument effecting the assignment a statement that the author or director asserts in relation to that work his right to be identified, or

(b) by instrument in writing signed by the author or director.

(3) The right may also be asserted in relation to the public exhibition of an artistic work-

¹ 78 (1) A person does not infringe the right conferred by section 77 (right to be identified as author or director) by doing any of the acts mentioned in that section unless the right has been asserted in accordance with the following provisions so as to bind him in relation to that act.

² And it is not enough that the author's name is on the title page (Section 78 (4)).

(a) by securing that when the author or other first owner of copyright parts with possession of the original, or of a copy made by him or under his direction or control, the author is identified on the original or copy, or on a frame, mount or other thing to which it is attached, or

(b) by including in a licence by which the author or other first owner of copyright authorises the making of copies of the work a statement signed by or on behalf of the person granting the licence that the author asserts his right to be identified in the event of the public exhibition of a copy made in pursuance of the licence.

Outside of the legal sphere, the most obvious sign of the introduction of the right of paternity in Britain has probably been its effect on the limitation pages of books published after 1988. The requirement that the right of paternity must be asserted has resulted in a number of interesting additions to the copyright notices that we find on limitation pages. A variety of authors' 'assertions' have appeared. I shall offer a few examples:

One of the most common formulations is the one we find in Adam Thorpe's new novel *The Rules of Perspective* (London: Jonathan Cape, 2005). It goes like this:

Adam Thorpe has asserted his right under the Copyright, Designs and Patents Act 1988 to be identified as the author of this work.

In Derek Walcott's collection of poems *The Prodigal*, also from 2005 (London: Faber and Faber, 2005), the assertion is put in the passive:

The right of Derek Walcott to be identified as author of this work has been asserted in accordance with Section 77 of the Copyright, Designs and Patents Act 1988.

Another typical formulation can be found in works ranging from Anthony Trollope's *The Way We Live* (London: Penguin, 1994) to the authorized King James version of *The Bible*. Here we learn that

The moral right of the author has been asserted.

We are dealing here with nothing less than the moral right of the author of all things: namely of The Creator himself. And in the case of Anthony Trollope we seem to be speaking of a post-humous assertion.

In order to avoid any speculation as to post-humousness an alternative approach has been chosen in a recent re-publication of short-stories by Virginia Woolf, *Monday or Tuesday* (Hesperus Press, 2003). Here it is proclaimed, 82 years after the first publication of the volume, that:

The Estate of Virginia Woolf asserts the moral right of Virginia Woolf to be identified as the author of *Monday or Tuesday*.

A final example is from a volume of legal scholarship by my fellow speaker here today, Professor Joost Smier. We read that:

The right of Joost Smiers to be identified as the author of this work has been asserted by him in accordance with the Copyright, Designs and Patents Act 1988. Nevertheless, the author discusses in this the untenability of the present copyright system.

If one did not know better it would be tempting to say that some of these authors' assertions suffer from a somewhat redundant ring. Moreover, these notices do not constitute performative acts of 'assertion': they do not say: 'I, the author, hereby assert my moral right.' Rather, the notices seem to refer to some such event that has already taken place. We are given the impression that on a given day Adam Thorpe proclaimed 'I assert my right to be identified as the author of this work.' And supposedly there were witnesses who recorded this event and subsequently put it in print in the book. Such an event, however, has surely not taken place in the cases of Trollope and The Creator. It is thus left to speculation who exactly asserted the rights of these authors. Meanwhile the Estate of Virginia Woolf presents itself as the asserter of the moral right of Virginia Woolf – on behalf of Virginia Woolf.

This selection of limitation pages is meant not only as an illustration of the way legal fictions can be found in works of fiction. It also exemplifies ways in which the right of paternity in the UK differs from its counterparts on the Continent. The requirement that an author should assert his right to be identified as the author of his work would be unthinkable in those countries in which the right of paternity originated. In France it would run directly counter to the nature of *les droit moreaux*.

I shall use this occasion to look at the way the ‘right to be identified as the author of one’s work’ in Britain diverges from the *droit à la paternité* as it is defined in France. Furthermore, to gain a better understanding of the nature of the right of paternity I shall look into the way the right came into being in French case law. We need to appreciate that the right was introduced as a non-pecuniary right which was independent of the right of reproduction: it was, moreover, considered a necessary condition for the *droit d’auteur*.

The present French Intellectual Property Code defines the first moral right of the author in the following way :

The author enjoys a right of respect for his name, his status and his work.

This right is attached to the person of the author. It is perpetual and inalienable and cannot be given up in advance. Upon the death of the author moral rights are transmissible to heirs.³

³ Art. L. 121-1 L’auteur jouit du droit au respect de son nom, de sa qualité et de son œuvre. Ce droit est attaché à sa personne. Il est perpétuel, inaliénable et imprescriptible. Il est transmissible à cause de mort aux héritiers de l’auteur. L’exercice peut être conféré à un tiers en vertu de dispositions testamentaires. [L. n° 57-298 du 11 mars 1957, art. 6]. The first of the moral rights defines the author’s right to his name, his ‘properties’ (for example titles) and his work. The right is attached to the person of the author. It is perpetual and inalienable and cannot be given up in advance. The basis for the perpetuity of the right is that the work survives its author, while remaining an imprint of his personality. Upon the death of the author moral rights are transmissible to heirs – who can be testamentary heirs and who are not necessarily the heirs of the exploitation rights. (See *Vve Picabia c/ Mme Berest*. Cour de Cassation, 17 déc. 1996. Note by Jaques Ravanans. See also *Cons. Bowers C. Cons. Bonnard* Trib. De la Seine 10 oct 1951; D.1952.390. Cour d’appel d’Orleans, 18 févr. 1959; D.1959.440 and *Assoc. La Fraternité blanche universelle C. Boizeau et autre*, Cour de Cassation, 10 mars 1993, D.1994.78) Inherited moral rights, arguably, are a duty more than a right. (See for instance [Durrande, 1989 #213]) It is the late author’s wishes that have to be followed, not the heir’s. Moral rights are, anyway, seldom exercised after an author’s death. Either the exploitation rights are still in force to accommodate control or heirs simply abstain from lawsuits. ([Matthyssens, 1980 #637], p. 15) The perpetuity of *droit moral*, in that sense, is theoretical. (Yet it is necessary, as expressed in the closing line of Matthyssens: ‘Le domaine public n’est pas une fille public.’ [Matthyssens, 1980 #637], p. 23). The inalienability of the right means that it is non-transferable and that even when not exercised it cannot be lost. The notion of inalienability should not be taken in an absolute way, however. (As discussed by [Parisot, 1972 #691]) Disputes between moral rights and property right have come out in favour of the latter right.

The author's right to respect for his name is what is commonly referred to as the *droit à la paternité*. The right was recognised by statutory law in 1957, which was the first Copyright Act in France since the Revolutionary Act of 1793. However, the moral rights of the author had received increased recognition in case law during the one-hundred-and-sixty-four years between the Acts.

Professor Stig Strömholm, who to date has written the most comprehensive study of the moral rights of authors, dates the first decision to affirm the principle of the right of paternity to 1832.⁴ The case concerned the theatre piece *The Tower of Nesle* (1832) by Frédéric Gaillardet (1808-1882). At the suggestion of the director of the theatre, Gaillardet had had the play rewritten by his famous contemporary Alexandre Dumas, who on his part stipulated that his name should not be credited. Unable to persuade Dumas to change the stipulation, the director of the theatre decided to announce on the poster that the play was written by MM.xxxx and F. Gaillardet, and, then, to let it be known by word of mouth that the mysterious author was the great Dumas. This was the case as presented to the Tribunal de Commerce of Paris in 1832. In the judgement there was no mention of a right of paternity, but it was declared that no one has the right to intervene against the will of the author in a case concerning his work. The poster was changed. And this principle was in accordance with the basic idea of what was to become the *droit moral* in France.

A nice addendum to the legal dispute is that the play soon became very successful and Alexandre Dumas changed his mind about his self-willed obscurity, and this then led to a duel between the co-authors.

After 1832 we find more cases relating to an author's right to respect for his name. We can view the nineteenth century as the 'first phase' of the development of the right of paternity. It was still a rather diffuse sort of right, and legal commentators such as Renouard and Pouillet were not quite in agreement about the status of the moral right. But in case law it received increased recognition. A typical case during this phase was one that concerned uncredited citations. We might say that authors were seeking legal protection against plagiarism. And they were increasingly successful. Guidelines for literary conduct were actually being developed in courts. The case *Garnier c. Bastard* (1895) is an example of this. The plaintiff in the case was the publisher of a historian, Dick de Lonlay, who had written a book on the Franco-Prussian war of 1870-71. Bastard, the defendant, was also a historian who had published a book

⁴ Gaillardet c. Harel Trib. Comm., Paris 26 juin 1832. [Strömholm, 1966 #617], pp. 143ff

on this topic. However, about 2000 lines of Bastard's book had been copied from de Lonlay's book. Bastard had thereby infringed de Lonlay's copyright. But there was more to the matter: the court recognised that Bastard's book constituted both plagiarism and infringement of de Lonlay's right of reproduction. It was therefore stipulated that:

no conscientious writer may make legitimate use of unpublished documents as of events and episodes recorded for the first time in a work of a previous writer unless the double condition is met that this work as well as the name of its author is made known by citation. Furthermore, any formulations, descriptions or ideas that are taken from the first writer are to appear in quotation marks, indicating their source.⁵

In this way, Bastard was given a lesson on the elementary rules of what is familiar to academics today as 'referencing'.⁶ The court in other words recognised that the author has a right which goes beyond the economic copyright. If the author's work is used by another he has a right to be acknowledged and quotation marks should indicate which words originate with that author.

In 1919 the French legal scholar J.Labaurie published his dissertation on the *droit d'auteur*.⁷ In the dissertation it is proposed that the law of copyright should protect authors against plagiarism. Plagiarism means the appropriation of another's work without acknowledgement: this violates the *droit moral* of the author—more specifically his right of paternity—for the author is thereby deprived of the merit of his creation.⁸ On the basis of nineteenth century case law Labaurie argues that authors have a right to respect for their name. Courts have acknowledged that there is an indestructible bond between an author and his work. Labaurie notes, however, that prominent legal commentators of the nineteenth century, Renouard and Blanc, are of the view that copyright is not designed to prevent plagiarism. Their view is that punishment for plagiarism does not belong in the legal domain.⁹ Yet, Labaurie maintains that what leads his predecessors to reason thus is that the *droit moral* was not very developed at their time. By 1919, when Labaurie's dissertation was published, the right of paternity and other moral rights were well-

⁵ *Garnier C. Bastard*, Cour de Paris, 4 December 1894, D.1895.2.491.

⁶ [Mitchell, 1983 #103]

⁷ [Labaurie, 1919 #192]

⁸ *Ibid.*, p.202.

⁹ *Ibid.*, p. 198f

defined and well-founded in case law; and the time had come, Labaurie insists, for them to be recognised by statutory law.

Labaurie links the coming into being of the *droit moral* in nineteenth century case law to sentiments about literary ethics. He contends that the bond between an author and his work, which justifies the author's economic rights, also justifies protection of the author's literary interests in the work.

In the twentieth century a new development appeared in the shaping of the *droit moral*. A number of cases concerning the right of paternity in artworks had taken place during the nineteenth century. It had for example been acknowledged that an engraver had the right to prevent the removal of his name from copies of his engraving.¹⁰ In the twentieth century moral rights cases relating to the right of paternity in artworks became much more common in France. And a majority of these cases have concerned what is known under British law as 'false attribution'. I shall give an example:

Aage Fersing c. Ministère Public et Musée Rodin from 1992 was an appeal case that involved a statue attributed to the sculptor Auguste Rodin.¹¹ At a Versailles auction in 1971, the appellant, Aage Fersing, had bought the moulds for a statue representing 'a lady with a face looking as if she were about to faint'. The mould carried no indication of origin of authorship. In 1980 Mr Fersing contacted the Musée Rodin in Paris, announcing his intention to make a cast from the moulds, which he claimed to be those of a sculpture by Rodin. The curator at the Musée Rodin was unable to authenticate the moulds and Mr Fersing was informed that he would not be allowed to use them to create a work bearing the signature of Rodin.

Nevertheless, in 1982 Mr Fersing presented a mould indicating the title *L'Extase* with the signature 'A. Rodin' at a foundry and ordered that a bronze sculpture be made from it. In 1983 Mr. Fersing was crossing the French border on his way to London in order to sell the bronze sculpture at Sotheby's. The custom control, however, reported this to the Musée Rodin and orders were given for the statue to be held back.

The museum subsequently sued Mr Fersing for infringement of Auguste Rodin's right of paternity. The Musée Rodin had been appointed by Rodin as the guardian of his moral rights. It was thus the museum's duty to ensure the integrity of the artist's name and work. The

¹⁰ *Fortin c. Prévost-Blondel*. Cour d' Appel, 25 January 1889, D. 1890.2.243

¹¹ *Aage Fersing c. Ministère Public et Musée Rodin*, Cour d' Appel de Paris, 23 March 1992, 155 RIDA janv. 1993, p. 181.

museum's effort was supported in court. It was ruled—and confirmed by the Court of Appeal—that false attribution of a sculpture to Rodin constituted an infringement of the 'artist's right of respect for his name' and for the 'artistic identity of his work'.¹²

It is not surprising that there should be a need for protection against false attribution in art. After all, the signature on the artwork is crucial for its value. Enormous amounts separate the sketch by Picasso from the sketch by a lesser known artist, and the real Rodin from the fraudulent one. Laws against forgery—in France the Law of 9 February 1895—have long regulated this area but it is not always easy to apply a law of forgery to the various different artforms. This is why protests against false attribution have found their way into the *droit moral*. The reasoning is that if you have a right of respect for your name and status as an author you should have not only a right to be acknowledged, but also a security against 'misleading' acknowledgement and falsely ascribed responsibility. However, the claim that protection against false attribution is a part of the paternity right is a controversial issue in France. In case law there is a growing willingness to admit it – but all the leading copyright scholars object to it. Henri Desbois, Claude Colombet, André Francon, Bernard Edelman and Lucas&Lucas all agree that the right of paternity does not apply to cases where the author's name is falsely attributed to a work.¹³ Their position is that the right of paternity is not a general personal right in the sense that all offences afflicting the author's name are an infringement of the right.¹⁴ Its purpose is not to prevent attacks on an author's honour or reputation. Rather, the right of paternity serves to protect the special bond between an author and his work.¹⁵ The *droit moral* of the author is always defined in relation to a particular work by the author. According to this principle, forgeries—which are of course not made by the author—are not preventable by reference to moral rights. Conversely, the author can stop the reproduction of his signature on mechanical copies of his work—for example on photographs—in case they may be confused with the original.¹⁶

¹² Ibid., p. 184.

¹³ [Lucas, 2001 #652], pp. 330ff.

¹⁴ 'Notament, il n'a pas pour objet de protéger l'auteur contre des atteintes à l'honneur ou à la réputation.' Lucas, p. 328.

¹⁵ Teil 'Le droit de la personnalité est celui qui protège la personne sous n'importe quel rapport. Or. Le droit moral ne porte pas sur la personne comme telle mais sur *la relation qui existe entre le créateur et l'oeuvre*.' [Gavin, 1960 #624], p. 50.

¹⁶ [Bonet, 2002 #707], p. 76. It is not a violation of the moral right to reproduce the signature if it is a part of the picture.

To sum up the fundamental principles of the *droit à la paternité* we have noted that it protects an author's relationship to his work. Because the work is the mark of the author's personality—it is his intellectual creation—it is tied to him in a way that goes beyond his economic rights in the work.¹⁷ The *droit moral* is thus inalienable and perpetual—unlike pecuniary rights—and it protects the freedom of creation.¹⁸ We have also seen how the right of paternity in France has come into being under the influence of norms from the spheres of literature and art. Indignation over plagiarism affected the early shaping of the right. And the art world's outcries against fraud has played a role in its development in the twentieth century.

If we compare the French right of paternity with the right as it has been implemented into British law it is tempting to say that from a Continental point of view the British did not really get a 'droit moral'. To begin with, the English term for the right: 'moral' right, is somewhat confusing. It is, of course, a transliteration of the French. However, the connotations of 'moral' in English diverge from those of the French '*moral*.' '*Les Droits moraux*' do not concern issues of ethics or conscience, as an English speaker might be led to believe. '*Moral*' in *droit moral* denotes: 'that which is related to thinking and intellectual life – as opposed to material life'.¹⁹ Moral rights thus protect the author's intellectual interests, separate from other interests, in his work. The personal nature of the rights suggests that they should be inalienable. The facts that under British law an author has to assert his moral right and that moral rights are waivable (according to section 87 of the 1988 Act²⁰) thus contradict the most fundamental principles of the *droit moral*. As Henri Desbois expresses it: 'The author proclaims his paternity by virtue of a right inherent in his personality, not by a simple act of the will.'²¹

The requirement of assertion of the right of paternity also gets some harsh words from a commentator on the common law side. Jane Ginsburg, professor of law at Columbia University, declares that:

¹⁷ Desbois p. 461: 'pour un auteur qui communique son œuvre au public, la proclamation de la paternité procède d'un droit inné et se relie à l'acte de *création intellectuelle*.' See also Desbois pp. 461f

¹⁸ See [d'Argoeuves, 1926 #767].

¹⁹ 'Relatif à l'esprit, à la pensée', *Le Petit Robert* CD-ROM. Version électronique du nouveau Petit Robert. 1997, Dictionnaire Le Robert, Paris.

²⁰ Can be subject to waiver: formal and informal. The waiving of moral rights is standard practise in many publishing contracts. See [Stokes, 2003 (2001) #734], p. 69.

²¹ 'L'auteur proclame sa paternité, en vertu d'un droit inhérent à sa personnalité, et non par l'effet d'un simple accord de volontés.' [Desbois, 1958 #639], p. 462.

This precondition derives from a peculiar, not to say perverse, reading of article 6bis of the Berne Convention. The Berne Convention declares that the “author shall have the right to claim authorship of his work.” From a provision entitling authors to recognition of their status as creators, the drafters of the CDPA fashioned an *obligation* to assert authorship before the right to be recognised can take effect. Not only does the UK text torture the Berne text, but the assertion requirement may well violate the Berne Convention’s rule that ‘the enjoyment and exercise of authors’ rights, including moral rights, “shall not be subject to any formality.”²²

There is no tradition in British law for connecting copyright to personal rights, and the right of paternity has not come into being via such a link as it has in France. Rather, the precursors of the paternity rights were located in a number of other fields of law. The laws of defamation, contract and passing off all provided some protection in this vein. Furthermore, a specific protection against false attribution of authorship has existed since Section 43 of the 1956 Copyright Act prohibited the insertion or affixation of a person’s name to a work of which he was not the author. The 1862 Art Copyright Act offered a similar protection – but to artworks only.

Now, if the right of paternity in Britain is not founded in a right of personality we might ask: What, then, is its rationale? Due to the shortage of case law concerning the paternity right,²³ I suggest that we look for inspiration in the few decisions that do exist on another of the moral rights: the right to prevent derogatory treatment. In *Tidy v. The Trustees of the Natural History Museum* (1995)²⁴ and *Pasterfield v. Denham* (1998)²⁵ a decisive factor in determining whether there had been infringement was an objective test as to whether the public would consider derogatory treatment to have taken place. If so, the author’s reputation would have suffered and there would be infringement. The moral right thus serves primarily to protect an author’s reputation, in the sense of his ‘goodwill’. In other words, it protects the relationship between the author and his audience, rather than, in France, the relationship between the author and his work. I shall propose, accordingly, that the justification for the right of paternity in Britain should be understood as a protection of the public interest. It has always been in the

²² [Ginsburg, 1990 #619], p. 128.

²³ There is a very recent case involving a musical work: *Sawkins v. Hyperion Records Ltd.* (2005) [2005] EWCA Civ 565 [2005] All ER (D) 288 (May) (Approved judgment)-

²⁴ Ch. D., 29 March 1995 [1996] EIPR D-81. See [Teilmann, 2005 #763].

²⁵ Plymouth County Court 9 and 10 March 1998 [1999] FSR 168. See [Teilmann, 2005 #763].

public interest to establish fatherhood for a child. The paternity metaphor brings this appeal in to the domain of copyright law. The paternity right protects not just the author's right to announce his name: it protects the public's right to know his name.