

## Analogy in IP: Moral Rights

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21 YALE J.L. & TECH. 337 (2019)

*This Article critically examines the analogies scholars use to explain the special relation between the author and her work that copyright law protects under the doctrine of moral rights. Authors, for example, are described as parents and their works as children. The goal of this Article is to determine “when to drop the analogy and get on with developing” the content of the relation between the author and the work. Upon examination, that moment approaches rather quickly: none of these analogies provide any helpful framework for understanding the purported relation. At best, these analogies are first attempts at describing the relation between the author and her work. At worst, they are misleading rhetorical devices used to gain support for moral rights. So I assume that analogies are valuable as starting points for thinking about the relation between the author and her work, rather than explaining the nature of the relation. Even when viewed this way, however, the analogies raise more questions than they purport to answer. Because the analogies discussed do not explain the author-work relation, scholars must look elsewhere for arguments to support moral rights.*

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## I. INTRODUCTION

This Article critically examines the analogies scholars use to explain the special relation between the author and her work that copyright law protects under the doctrine of moral rights. The goal of this Article is to determine “when to drop the analogy and get on with developing” the content of the relation between the author and the work.<sup>2</sup> Upon examination, that moment approaches rather quickly: none of these analogies provide any helpful framework for understanding the purported relation. At best, these analogies are first attempts at describing the relation between the author and her work. At worst, they are misleading rhetorical devices used to gain support for moral rights. So this Article assumes that analogies are valuable as starting points for thinking about the relation between the author and her work, rather than as a means of explaining the nature of the relation. Even when viewed this way, however, the analogies raise more questions than they purport to answer. Because the analogies discussed do not explain the author-work relation, scholars must look elsewhere for arguments to support moral rights.

Copyright law provides authors with economic rights: rights to exploit the work for monetary gain. Moral rights, by contrast, are considered to be “noneconomic” rights. To varying degrees, they enable the author to control how and when her work is divulged (right of divulgation or disclosure), attributed (right of attribution), altered (right of integrity), and withdrawn from public view (right of withdrawal). 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>3</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>4</sup> The right of integrity enables

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<sup>2</sup> Brian Barry, *On Analogy*, 23 POL. STUD. 86, 93 (1975).

<sup>3</sup> See ELIZABETH ADENEY, THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS 194 (2006) (in France); *id.* at 236 (in Germany); Code de la Propriété Intellectuelle [C.P.I.] [Intellectual Property Code] art. L112-2 (Fr.) [hereinafter FIPC] (divulgation).

<sup>4</sup> Some scholars do not consider this last right a moral right at all because 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.]

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> Finally, the right of withdrawal allows the author to rescind a publication contract so long as she indemnifies the publisher.<sup>6</sup> In some cases, authors also are provided with the *droit de suite*, which entitles the author to royalties from any resale of their work. Typically, this applies to fine art, such as paintings.<sup>7</sup>

Moral rights are codified or recognized (differently) in 165 countries. The current codification and prevalence of these legal rights is, in large part, a function of Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works (“Berne”), the most widely acceded-to copyright treaty covering literary and artistic works. For performers, a separate treaty—the World Intellectual Property Organization (“WIPO”) Performances and Phonograms Treaty (“WPPT”)—provides slightly different moral rights protections.<sup>8</sup>

Berne mandates that its signatories, or “member states,” implement two moral rights: the rights of attribution and integrity. Although Berne<sup>9</sup> and the WPPT<sup>10</sup> direct all member countries to protect the rights of attribution and integrity for authors and performers, they do not specify how countries ought to do so. And because member states have discretion to implement these provisions, moral rights differ by country—both in form and content. In other words, different countries have different versions of the rights of attribution and integrity.

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[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).

<sup>5</sup> 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]. The United States did not accede to Berne until 1989.

<sup>6</sup> FIPC art. L112-4.

<sup>7</sup> See ADENEY, *supra* note 3.

<sup>8</sup> WIPO PERFORMANCES AND PHONOGRAMS TREATY, December 20, 1996 [hereinafter WPPT].

<sup>9</sup> BERNE art. 6*bis*.

<sup>10</sup> WPPT art. 5.

Additionally, some countries choose to provide protection over and above what Berne mandates. Frequently this includes the other two “core” rights mentioned above—the right of divulgation and the right of withdrawal—which are standard in countries that traditionally have been thought the “home” of moral rights: France, Germany, and Italy. Protection also can include further rights, such as the author’s the right to prevent excessive criticism, to revise a work and to use a title of a copyrighted work (if it is likely to cause confusion)—even when the copyright of the work itself has lapsed.

Despite the different legal protections offered by various countries, moral rights are widespread. The belief that the author has a special relation to her work—a “special bond”<sup>11</sup>—underwrites their existence. Yet the underlying rationale for such rights is not always clear. Various theories have been offered.<sup>12</sup> In explaining the special relation between the author and her work, analogies are often offered as arguments. These analogies are supposed to provide support for the “specialness” of the relation or the “bond” between the author and her work.

This Article examines whether these analogies actually perform that function. Comparing the author to parent, master, lord, God, and the work to child, slave, vassal, and creature, each analogy highlights a particular aspect of the relation between the author and her work that scholars find compelling. More generally, they draw on our intuitions about relations between people, and attempt to show how those intuitions should apply to the relation between author and work. Suppose, for example, one intuits that an author stands in the same relation to her work as a parent to her child. Presumably, some aspect of the parent-child relation can explain in a meaningful way the author-work relation. The aspiration, then, is that these analogies may illuminate the substance or contours of the author-work relation.

Unfortunately, none of these analogies are particularly illuminating. As rhetorical devices, they are somewhat effective. They capitalize on emotionally-charged relationships to advance the claim that the author has a special relation with the work. The most notable example of this is the parent-child analogy. As arguments, however, analogies are less than convincing. When taken seriously, the

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<sup>11</sup> MIRA T. SUNDARA RAJAN, MORAL RIGHTS: PRINCIPLES, PRACTICES, AND NEW TECHNOLOGY 33 (2011).

<sup>12</sup> See David A. Simon, *A Personality for Moral Rights?: The Self, Society, and the Author-Work Relation*, Chapter 1-3, Unpublished Dissertation (on file with author) [hereinafter Simon, *Personality*].

analogies collapse on their own terms. Analogies are best understood as an expression of scholars' intuitions about the "specialness" of the author-work relation. Intuitions, however, are not the same as arguments.

That is not to say that analogies are never arguments. When arguing *by* analogy, the argument consists in showing the similarity between the two sets of objects. One achieves this goal only if the analogy is convincing. On this score, the moral rights analogies fail. If, instead, their goal is to stimulate thinking about this author-work relation, then they are only slightly more helpful: they show us that these analogies show us only what the author-work relation is not, rather than what it is. From this I conclude that, on the whole, the analogies offered by moral rights proponents obscure, rather than illuminate, the relation between the author and the work.

The Article proceeds as follows: Part II reviews analogical reasoning in general, in law, and in the sciences. It argues that analogy has less value for theoretical inquiries in non-scientific disciplines than in scientific disciplines. As a result, it contends the analogies invoked by moral rights scholars should be viewed skeptically. Part III analyzes the analogies proffered by moral rights theorists. It argues that they add very little to the explanation of the relation between the author and the work. Their contribution, if they have one, is to highlight the features that are thought critical to moral rights. This includes ideas like "creation implies control" and "specialness-of-authorship implies vicarious harm." Whatever the value this contribution has, it is outweighed by the analogies' tendency to obfuscate. Analogies used by moral rights scholars, I conclude, are rhetorical rather than analytical tools.

## II. ANALOGICAL REASONING

Before analyzing these analogies, it is helpful to review the nature of reasoning by analogy for at least three reasons. First, reasoning by analogy is a prominent—if not *the* prominent—feature of legal reasoning. Moral rights scholars are, after all, *legal* scholars above all else. Second, since moral rights scholars argue by analogy, understanding analogical reasoning helps us to understand arguments of moral rights scholars. Third, both legal and nonlegal thinkers have scrutinized the value of reasoning by analogy, and here that one can determine whether analogies are valuable in explaining the author-work relation.

In this Part, I argue that analogical reasoning is most useful as a starting point for further inquiry, rather than as a means for conclusive argumentation. By examining how analogical reasoning

works in the sciences—where hypotheses are tested against observation and experiment—I show that analogical reasoning rarely provides definitive answers in science. Yet legal scholars often want analogical reasoning to do more work in law than in science. They want, in other words, analogical reasoning to provide arguments *and* answers even when it fails to perform this task in science. Moral rights analogies are thus best viewed as starting points for thinking about the relation between the author and the work, rather than as arguments in its favor.

To reach this conclusion, I take several steps. I first explain analogical reasoning (Part II.A). Then I describe how that reasoning works in law, noting briefly the positions of its proponents and opponents (Part II.B). Next, I analyze analogies in science, where analogy has played an important role in speculation and discovery (Part II.C). In the process, I highlight important differences in analogical reasoning in the law and in science. I conclude with a short discussion of how analogical reasoning factors into explaining the relation between author and work.

### *A. An Overview of Analogical Reasoning*

An analogy is a relation between two sets of objects— $a : b :: c : d$ .<sup>13</sup> So if  $a$  and  $b$  stand in relation to one another  $r$ , and  $c$  and  $d$  stand in relation to each other  $r$ , then  $a$  and  $b$  are analogous to  $c$  and  $d$ . To illustrate this concept, John Stuart Mill used an example of the term “mother country, . . . signifying that the colonies of a country stand in the same relation to her in which children stand to their parents.”<sup>14</sup> Namely, the colonies must be obedient and provide proper affection to the mother country. Mill also describes, in the context of an analogical argument for an elected representative form of government, the analogy between a nation governed by an elected group (in this case British Parliament) and a joint-stock company.

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<sup>13</sup> Julian S. Weitzenfeld, *Valid Reasoning by Analogy*, 51 PHIL. SCI. 137 (1984). This notation means “A is to B as C is to D.” In mathematics, this indicates numerical identity  $1 : 2 :: 5 : 10$ , or  $1/2 = 5/10$ . See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 949 n.76 (1996) (citing PLATO, TIMAEUS ¶ 31c-32a (Benjamin Jowett trans., 1949)); Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197 (2001).

<sup>14</sup> JOHN STUART MILL, A SYSTEM OF LOGIC, RATIOCINATIVE AND INDUCTIVE 86 (1843).

The value of an analogy turns on the *relevant, similar properties of two objects*.<sup>15</sup> Also important to similarity is the *number* of relevant, shared properties.<sup>16</sup> If two objects *x*, *y* have one similar property relevant to a conclusion, and two objects *x*, *z* have ten similar properties relevant to a conclusion, then all things being equal, *z* is a better analog of *x* than is *y*.

Analogies are often used as a kind of problem-solving tool. Like any tool, analogies are not designed to solve every problem. Analogs must share relevant similarities, and those similarities must, in general, outweigh the differences between two objects. Also, they are always at risk of being dismantled by counteranalogy, or by showing that the analogy has unintended consequences.

### ***B. Reasoning by Analogy in Law***

Traditionally, legal reasoning—at least in common law countries—has two prominent features. The first is precedent. A precedent is a rule or decision that is binding on a judge deciding a subsequent, similar case.<sup>17</sup> The second is reasoning by analogy, which is a necessary complement of the principle of precedent.<sup>18</sup> Reasoning by analogy means analyzing a case by comparing it to past, similar cases. One might say that precedent supplies the rule, and analogical reasoning is the process by which one applies the rule.

How legal reasoning by analogy should proceed in any particular case, its strengths and weakness, and its efficacy are all legitimate questions that scholars have sought to answer. These efforts have produced different opinions. Some scholars believe that legal

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<sup>15</sup> Whether, in general, a shared property is relevant is a separate question altogether.

<sup>16</sup> See DAVID HUME, INQUIRY CONCERNING HUMAN UNDERSTANDING § IX (1748), reprinted in *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* (P. H. Nidditch ed., Oxford Univ. Press 3d ed. 1975).

<sup>17</sup> Precedent is binding in virtue of the principle of *stare decisis*.

<sup>18</sup> Dan Hunter takes pains to point out the difference between analogy and metaphor. Hunter, *supra* note 13, at 1209-10. According to Hunter, analogy “has an explicit explanatory or predictive component, which metaphors lack.” *Id.* at 1210. I do not make any hard and fast distinctions between the two. When I use the term metaphor in this Article, I often mean what Hunter thinks of as analogies. The idea of metaphor and analogy in intellectual property has been discussed elsewhere. See, e.g., Brian L. Frye, *IP as Metaphor*, 18 CHAPMAN L. REV. 735 (2015); WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* (Oxford 2009).



reasoning by analogy is the law's most important and unique feature. Reasoning by analogy, on this view, is a distinct and valuable tool employed widely by the law to reach the best decision possible.<sup>19</sup>

Others who support reasoning by analogy take a more tepid view, arguing that its benefits are instrumental, and that reasoning by analogy in law is not, in itself, to be desired. Some of the benefits scholars have extolled are increasing information available to judges making decisions; increasing "collaboration" by requiring judges and lawyers to consult prior reasoning and rules; correcting biases by tying decisions to prior rules; slowing the pace of legal change; providing a mechanism to resolve disputes practically where no general theoretical agreement exists; allowing judges with limited time to make a decision relatively quickly; allowing judges to adapt to different situations; and enabling societal ideas to influence judicial decisions.<sup>20</sup>

Not everyone, however, is convinced that reasoning by analogy in law is useful. Richard A. Posner, for one, often finds the process vacuous.<sup>21</sup> Rather than providing any particular benefits, on his view, reasoning by analogy offers cover for the judge to choose based on her own wants and desires.<sup>22</sup> In other moments, though, Posner is less dismissive about reasoning by analogy: rather than providing some separate reasoning tool unique to lawyers and the law, reasoning by analogy is a label for a diverse set of reasoning tools that include induction and deduction. According to Posner, judges should focus on the *practical* consequences of decisions, and

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<sup>19</sup> See, e.g., LLOYD WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* (2005); see also EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 5 (1949); Cass R. Sunstein, *On Analogical Reasoning*, 106 *Harv. L. Rev.* 741 (1993); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 *Tex. L. Rev.* 35, 56-57 (1981).

<sup>20</sup> See Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 *U. CHI. L. REV.* 1179 (1999); Sunstein, *supra* note 19, at 782-83; LEVI, *supra* note 19, at 5.

<sup>21</sup> RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 72-73, 86-98, 105-08 (1990) [hereinafter POSNER, PROBLEMS]; Larry Alexander, *The Banality of Legal Reasoning*, 73 *NOTRE DAME L. REV.* 517 (1998).

<sup>22</sup> See RICHARD A. POSNER, *HOW JUDGES THINK* 86-98 (2008) [hereinafter, POSNER, JUDGES].

then apply a rule, analogic or not, to resolve the current case that best accounts for those consequences.<sup>23</sup>

Scott Brewer takes a slightly less caustic view and surmises that analogy can serve as a jumping-off point for an abductive,<sup>24</sup> reflexive reasoning process.<sup>25</sup> He views the processes somewhere between “no argument” and “totally unique.” Finding room for analogy in legal reasoning, he concludes that the analogy allows a judge or lawyer “in the context of doubt”<sup>26</sup> to form an “analogy-warranting-rule” from past cases, from which he can “test” reflexively against “analogy-warranting-rationales” for that rule.<sup>27</sup> Once an analogy-warranting-rule has been sufficiently “tested” and “confirmed” by an analogy-warranting-rationale, the judge can decide the case by deductively applying the “correct” analogy-warranting-rule.<sup>28</sup>

In a somewhat similar vein, Dan Hunter has argued that analogical reasoning in law works through the same cognitive pathways as analogical reasoning elsewhere.<sup>29</sup> What this is supposed to show about the *special value* of analogical reasoning *in law* is less clear. By his own account, analogies involve constrained mapping from one domain (subject matter area) to another. But the types of constraints on judges do not seem especially strong. The constraints can be practical (e.g., lack of time to decide cases),<sup>30</sup> institutional (e.g., precedent and deciding like cases alike), or contextual (e.g.,

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<sup>23</sup> RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 28-56 (1993).

<sup>24</sup> “Abduction” is a term coined by pragmatist Charles Pierce. It refers to a process of reasoning where a reasoner proposes hypotheses (e.g., it was raining last night) to explain a particular event (e.g., the lawn is wet), where the hypothesis would make the particular event follow as a matter of course.

<sup>25</sup> Brewer, *supra* note 13. See also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in THE PHILOSOPHY OF LAW 17, 23 (R.M. Dworkin ed., 1977).

<sup>26</sup> Brewer, *supra* note 13, at 980 (“Typically, but not always, these questions arise because of vagueness in some of the terms or central concepts used to express the norms—‘equal protection,’ ‘due process,’ and ‘unreasonable search and seizure’ are famous examples.”).

<sup>27</sup> *Id.*, at 962-963, 965-66 (noting that for an analogy to have sufficient “rationale force” there must be “sufficient warrant” to believe the analogy permits an inference based on a property or characteristic of the “analogized item”).

<sup>28</sup> *Id.* (noting that analogy-warranting-rationales justify or explain analogy-warranting-rules, and that they share a logical relation to one another); *id.* at 966-71, 978-80, 982-83.

<sup>29</sup> Hunter, *supra* note 13, at 1214-18.

<sup>30</sup> *Id.* at 1215-16.

geographical location of the judge). In Hunter's own examples, judges seem to be making highly context-dependent judgments through a variety of cognitive processes.<sup>31</sup> If anything, his analysis vindicates the critics' idea that "reasoning by analogy" in law is neither unique to law nor a "method" of reasoning its proponents hope. That judges should strive to decide like cases alike does not really do much to show how analogy operates specially to constrain judges in law.

More recently, Frederick Schauer and Barbara Spellman have tried, unsuccessfully, to rescue legal analogy from skeptics like Posner and Larry Alexander.<sup>32</sup> Their primary argument<sup>33</sup> is that legal expertise enables judges and lawyers to "see connections . . . that might seem unfathomable to the nonexpert."<sup>34</sup> Although this may be true, the example they provide (of lawyers seeing a connection between Nazi marchers and the civil rights demonstrators) is not convincing.<sup>35</sup> We can easily imagine philosophers, economists, or

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<sup>31</sup> The one example where he argues that "analogy has a strongly constraining, predictive effect on the outcome of the" case fails to appreciate that constraining effect of *the structure of law*, rather than the cognitive processes involved in analogical reasoning. *Id.* at 1207 n.40 (citing MARTIN GOLDING, LEGAL REASONING 104 (1984) (citing *Adams v. New Jersey Steamboat Co.*, 151 N.Y. 163, 45 N.E. 369 (N.Y. 1896))). In this example, the judge is asked to decide a case where a ferry passenger's baggage was stolen. Case law provided two competing analogies. The first involved stolen luggage in a hotel (hotel found liable); the second stolen luggage on a train (train company found not liable). Courts decided each based on the purpose of the proprietor (e.g., the purpose of a hotel is lodging while the purpose of a train is travel).

<sup>32</sup> See Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249 (2017).

<sup>33</sup> They also put forward another argument: since "finding the rule or principle" is an unconscious process, it cannot be, as the skeptics claim, that judges are "consciously retrieving a principle and deciding to use it . . ." *Id.* at 266. This is designed to rebut the observation that judges routinely select analogies with underlying principles that match the outcomes they desire. Critics of analogical reasoning in law, however, do not make this claim. One of Posner's books explicitly addresses the judicial unconscious. POSNER, JUDGES, *supra* note 22.

<sup>34</sup> Schauer & Spellman, *supra* note 32, at 264.

<sup>35</sup> *Id.* The authors also provide another example, citing two product liability cases to illustrate their point. One case involved a defect in an automobile. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916). The other concerned a dried snail in a bottle of ginger beer. *Donoghue v. Stevenson* [1932] UKHL 100. They claim that it is "unlikely that a layperson would think of automobiles as being in any way analogous to decomposed snails or bottles of ginger beer." Schauer & Spellman, *supra* note 32, at 264. But a lawyer or judge might similarly be puzzled by the proposed analogy if presented this way. A

anyone who has an interest in free speech connecting the two scenarios. More importantly, they do not make an argument that, even if such connections exist, analogies lead to better decisions, or a special kind of decision.<sup>36</sup>

While the criticisms and positions of scholars are numerous, a general theme is that analogies in law are, at best, simply disguised inductive, deductive, abductive reasoning processes, or, at worst, merely a cover for judges to decide cases based on personal preferences. Nevertheless, there are those who view analogical reasoning in law as a unique process distinct from logical argument.<sup>37</sup> And, as a consequence, these scholars think the process occupies a special place in legal reasoning. Regardless of the position, the fact remains that judges, lawyers, and legal scholars all use analogical reasoning.

Given the ubiquity of analogical reasoning in law, it is not surprising to find moral rights scholars using analogies to attempt to justify their position.<sup>38</sup> Indeed, the doctrine, at least in France, grew up from incremental legal decisions. And while France is a civil law country, reasoning by analogy was not something foreign to French courts and lawyers.<sup>39</sup> The problem, of course, is that reasoning by analogy in law—in common law to “find a rule” or in civil law to “fill in a gap” in a code<sup>40</sup>—functions differently in law than in life, or in philosophy. Legal analogy draws on a discrete and particular factual situation that implicates, at least in theory, a limited set of legal rules drawn from either prior cases (i.e., discrete factual situations) or statutes, which judges apply to decide the factual

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layperson asked to decide the similarity *between these cases*, on the other hand, might find the guiding principle just as easily as the judge.

<sup>36</sup> In fact, they argue in a previous section that experts may use analogies *less* than nonexperts. Schauer & Spellman, *supra* note 32, at 263. Experts have less need to use analogies because they have greater command than nonexperts of principles and theories. *Id.* This all raises the question the authors ignore: if lawyers and judges are such experts, then why do they rely so heavily on analogical reasoning?

<sup>37</sup> See WEINREB, *supra* note 19.

<sup>38</sup> Of course, some of the original moral rights scholars came from civil law disciplines, but analogical reasoning would not have been foreign to them.

<sup>39</sup> For a historical review of moral rights, including how French law built them up incrementally, see CYRILL P. RIGAMONTI, *MORAL RIGHTS IN COPYRIGHT LAW: A COMPARATIVE AND HISTORICAL STUDY* (May 2006) (Unpublished Partial Dissertation on file at Harvard Law School Library)

<sup>40</sup> See Katja Langenbacher, *Argument by Analogy in European Law*, *CAMBRIDGE L.J.* 481 (1998).

situation before them. For better or for worse, philosophical questions do not come ready-made with past precedents that command respect. To be sure, there is wiggle room for a decision-maker in either category, but lawyers are, at least in principle, constrained in some way (though not in every case) by a body of law.

Philosophers are therefore (in principle) less constrained than lawyers. This tells us something about the value of legal reasoning by analogy. At least in the context of arguing about whether moral rights should exist at all, the analogical reasoning process *distinct to law* has little value.<sup>41</sup> The issue is whether the relation between the author and work exists and, if it does, what kind of content it has. The question is not, given existing laws and precedents, should the law cover (or be extended to cover) moral rights? That question is largely settled in favor of the rights. (In any case, that question ultimately turns on the deeper, philosophical issue that the analogy seeks to resolve.)

The question, instead, is constitutive: *why* have moral rights law in the first place? Unless one is conducting a purely legal or historical analysis, the question does not look directly to past cases, nor is it constrained by them in a traditional, legal sense by which the cases may constrain a judge. No precedent cabins the analysis or forces it into a particular analogical argument. Analysis and argument—analogue or otherwise—take place more freely, searching for reasons wherever they may be found. Understood in this light, the presence of analogical argument in moral rights theory is at least partially a remnant of legal reasoning more than a form of analogical reasoning to be criticized.

Some room, however, remains for *legal* analogical argument, but it does not appear in analogies used by moral rights scholars. Suppose that one finds a particular justification for moral rights. And suppose further that this justification contains property *p*. If property *p* is also present in other areas of law independent of moral rights, it might be that analogical reasoning *from other areas in law* could be illuminating. Since these other areas contain *p*, they might also contain compelling rationales for *p*. These other areas could then

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<sup>41</sup> By “distinct to law” here I mean the process of analogical reasoning that involves precedent.

potentially justify—if they themselves were justified—the existence of moral rights.<sup>42</sup>

When dealing with the analogies in this Article, however, a different problem arises. The question is not about whether analogous laws—or justifications for such laws—exist. Rather the question is about the nature of the special relation between the author and her work, which, moral rights scholars assert, should be protected by law. In this context, legal analogical reasoning, by itself, is not likely to provide a solution. This is because the problem is philosophical, not legal; there are no legal decisions or codes with which a case should be compared and evaluated. Nevertheless, the analogies propounded by moral rights scholars can be seen, at least in part, as an outgrowth of this tradition, in which early and modern students of the law are steeped.

### *C. Reasoning by Analogy in Science*

Like their colleagues in law, scientists tend to use analogies to help them solve problems. These problems, however, are usually more complex and of a different nature than those in law.<sup>43</sup> Physicists James Clerk Maxwell and Michael Faraday, for example, investigated the concept of the “field” using imagery and analogy.<sup>44</sup> Johannes Kepler used musical analogy—based on the Pythagorean view of “cosmic harmony”—to help him discover the third law of

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<sup>42</sup> Notice, however, that even here the method is not purely legal analogical reasoning. That would require adherence to precedent, and that is not what would occur. Other areas of law here serve as possible analogs. If one of these areas suggests that the rule or rationale underlying it should apply to moral rights, that does not end the matter. One must also independently justify the original rule or rationale. Because the justification of moral rights rests on a philosophical point, it cannot be constrained by legal rules or rationales as such.

<sup>43</sup> See Nancy J. Nersessian, *Reasoning from Imagery and Analogy in Scientific Concept Formation*, 1 PHIL. SCI. ASS'N 41, 44 (1988).

<sup>44</sup> Faraday first postulated “‘lines of force’ that are formed when iron filings are sprinkled around a magnetic source.” *Id.* at 42. After elaborating on this imagery, Maxwell used “the method of physical analogy”—which “provides both a set of mathematical relationships and a pictorial representation of those relationships, drawn from a sufficiently analyzed source domain, to be applied in constructing a representation of a domain of which there is only partial knowledge (‘target’).” In this case, “[t]he analogy expressed potential stresses and strains in a mechanical electromagnetic medium (aether) in terms of well-formulated relationships between known mechanical phenomena.” *Id.*

planetary motion.<sup>45</sup> Galileo, drawing on Plutarch and the Ancients, analogized the Moon to the Earth, which, along with further observations, facilitated his determination that the Moon was a physical celestial body.<sup>46</sup> Uses of analogical reasoning in science even date back to the Ancients.<sup>47</sup>

Although scientists, like lawyers, use analogies to help them solve problems, I want to focus on one crucial difference between *how* both groups use analogies. Here, in other words, is where the analogy between lawyers and scientists breaks down. Science has a process of verification that non-scientific disciplines like law and moral philosophy lack. Maxwell, Faraday, Kepler, and Galileo can all formulate analogies just like lawyers; but eventually, their results will be tested by empirical means, or something approximating them. Either results will be verified or they will not.

Verification<sup>48</sup> or falsification<sup>49</sup> (or, if you like, both) is a crucial step in the analogical reasoning process in science. The process of verification often forces scientists to modify or discard an analogy in favor of another one that better matches the evidence.<sup>50</sup> This is partly why Mary Hesse has argued that analogies “are meant to be exploited energetically and often in extreme quantitative detail and in quite novel observational domains.”<sup>51</sup> Analogies can generate theories that serve as experimental fodder. Once tested, such

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<sup>45</sup> Gerard Simon, *Analogies and Metaphors in Kepler*, in METAPHOR AND ANALOGY IN THE SCIENCES 71, 75-77, 85 (Fernand Hallyn ed., 2000).

<sup>46</sup> See William Shea, *Looking at the Moon as Another Earth: Terrestrial Analogies and Seventeenth-Century Telescopes*, in METAPHOR AND ANALOGY IN THE SCIENCES 83-103 (Fernand Hallyn ed., 2000).

<sup>47</sup> See Giannis Stamatellos, *Argument by Analogy in Thales and Anaximenes*, in JUST THE ARGUMENTS: 100 OF THE MOST IMPORTANT ARGUMENTS IN WESTERN PHILOSOPHY (Bruce & Barbone, eds. Blackwell 2011).

<sup>48</sup> Verification denotes using a process of induction, through experiment and observation, to confirm or disconfirm scientific fact. I employ the term “verification” in this Section despite its drawbacks.

<sup>49</sup> See KARL POPPER, LOGIC OF SCIENTIFIC DISCOVERY 18 (Routledge Classics 2002) (1959). For a concise summary of the problems with a pure falsification theory of scientific fact, see ALAN SOKAL & JEAN BRICMONT, INTELLECTUAL IMPOSTURES 58-67 (1999).

<sup>50</sup> Scientists, of course, do not always formulate correct hypotheses or discard the appropriate models. See, e.g., THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

<sup>51</sup> Mary B. Hesse, *The Explanatory Function of Metaphor*, in LOGIC, METHODOLOGY AND PHILOSOPHY OF SCIENCE: PROCEEDINGS OF THE 1964 INTERNATIONAL CONGRESS 249, 255 (Yehoshua Bar-Hillel ed., 1966).

theories can be discarded, retained, or modified. Lawyers (and philosophers) lack such verification techniques. The best they can do is look to the results of the decision they have made or the rule they argue should be followed. Evaluating the results, however, is normative: whether they are good or bad cannot be falsified or, perhaps more importantly, verified.<sup>52</sup>

An example of this difference is illustrated by Niels Bohr's analogy between the internal structure of atoms and the structure of a solar system.<sup>53</sup> While Bohr's analogy can be used to understand that atoms rotate the nucleus of an atom, it does not follow that they do so identically to the way planets rotate the sun. Indeed, observations show that electrons "jump" around a nucleus in a way that planets do not move around the sun. In such cases, the analogy is useful for thinking about a problem and potential solutions, but it cannot furnish those solutions directly. Science requires that the facts must fit the data. Scientists must modify or abandon the analogy if observations or theoretical considerations from the target domain require it. In Bohr's case, this meant modifying the solar system model to account for how electrons behave.

No similar process of verification seems available in the case of moral<sup>54</sup> or legal reasoning.<sup>55</sup> Crucially, there are no similar observable "brute facts"<sup>56</sup>—facts that exist independently of human institutions—that can alter the appropriateness of an analogy. Even most of those who value reasoning by analogy (at least in law) admit this.<sup>57</sup> Verification occurs, if it can be said to occur at all, by

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<sup>52</sup> One way in which law *could* be verified is if it sought to verify the efficacy of the laws or the factual claims that underlie it. If, for example, laws providing a tax benefit for homeownership are designed to encourage homeownership, their *efficacy* could, in principle, be verified. Likewise, if deterrence justifies capital punishment, then one can investigate whether capital punishment actually deters particular crimes and which ones.

<sup>53</sup> Niels Bohr, *The Structure of the Atom*, 112 NATURE 29 (1923); Hailyn Fernand, *Atoms and Letters*, in METAPHOR AND ANALOGY IN THE SCIENCES 35-52 (Fernand Hallyn ed., 2000).

<sup>54</sup> There have been efforts to show that there *are* ways to verify objective moral facts.

<sup>55</sup> For a discussion of verification in law and science, see POSNER, PROBLEMS, *supra* note 21, at 61-70.

<sup>56</sup> This terminology comes from JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 27-28 (1995).

<sup>57</sup> See, e.g., WEINREB, *supra* note 19, at 2-3.



“consensus” of public opinion or rationality<sup>58</sup> in morality, judicial decree (and, to some extent, legislative action) in law, or ecclesiastical proclamation in religion. Whatever the field, no observation-and-experimentation technique can verify the results.

One might deny this. Some scholars, for example, believe that there are moral facts that exist “out there”<sup>59</sup> in the same way natural law theorists believe the law exists “out there.”<sup>60</sup> Whether this approach is true is irrelevant. What almost everyone agrees on is that there is no generalized method to “discover” such moral or legal facts,<sup>61</sup> though philosophers have proposed some for morality.<sup>62</sup> Or perhaps it is best to say that whatever methods people have devised to discover or verify moral facts, these methods have not proven successful in the way that the scientific method has proven successful. In light of this, I work off the assumption that the verification problem exists in the non-scientific disciplines in a way it does not in science.

That is not to say that all analogies in science are perfect, nor that they always lead to some discovery. Some claim that analogies are antithetical to science, while others contend they are central.<sup>63</sup> Whichever view is correct, analogies do not always have positive effects. In some cases, they can affirmatively distort the scientific process, as when scientists allow existing cultural metaphors to guide analysis of human differences.<sup>64</sup> A prime example of this

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<sup>58</sup> I do not foreclose the possibility of objective moral facts, though I am most-tempted to label myself an error theorist. But I am even uncomfortable committing myself to the error theorist’s view.

<sup>59</sup> This was once thought to be *the* problem in moral philosophy.

<sup>60</sup> For a discussion of natural law, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). For a very brief history and explanation of natural law, positive law, formalism, and realism, see POSNER, *PROBLEMS*, *supra* note 21.

<sup>61</sup> Obviously, there is agreement among particular theorists that natural law, for example, exists. But the agreement is both of a different kind and quality that surrounding the scientific method.

<sup>62</sup> See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971); SHELLY KAGAN, *THE LIMITS OF MORALITY* (1991); T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998).

<sup>63</sup> Nancy Leys Stepan, *Race and Gender: The Role of Analogy in Science*, 77 *ISIS* 261, 261-62 (1986). The debate over metaphor in the sciences is not new. See, e.g., Hesse, *supra* note 51.

<sup>64</sup> This view is based on the one propounded by Max Black, who argued that metaphors in the sciences can create similarities, rather than ferret them out. Max

occurred in the late 18th century when some scientists analogizing women to “lower races” given their similar brain sizes.<sup>65</sup> The analogy itself blinded these scientists to the flaws inherent in their methods and measurements (e.g., they measured and compared brain size without accounting for relative body weight).

Analogies, then, can be of different kinds and qualities. Some philosophers of science distinguish between *strong* and *weak* analogies. Weak analogies are “mere heuristic tools to generate testable solutions.”<sup>66</sup> Bohr’s analogy illustrates a weak analogy, as it merely was a way of thinking about, or guiding our thinking about, how electrons might move about a nucleus of an atom. John Stuart Mill thought this weakness was probably the most important aspect of analogy in the sciences. “There is no analogy, however faint,” wrote Mill, “which may not be of the utmost value in suggesting experiments or observations that may lead to more positive conclusions.”<sup>67</sup> That did not mean Mill took analogies as being “science” in and of themselves. Although analogies often help to generate questions and hypotheses, they were no substitute for science and the method of induction.

Whereas weak analogies are merely tools of investigation, strong analogies “suggest a solution to [a particular] problem.”<sup>68</sup> Strong analogies, in other words, provide an answer by their very nature. An example of this is Isaac Newton’s use of the seven-note diatonic scale as an analog of the color spectrum.<sup>69</sup> Newton surmised that colors might correspond to the notes on a diatonic scale. His initial supposition proved a useful starting point for testing, and retesting, his theory. Newton even revised his initial empirical observation

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Black, *Metaphor*, 55 PROC. ARISTOTELIAN SOC’Y 273 (1954). MAX BLACK, *MODELS AND METAPHORS: STUDIES IN LANGUAGE & PHILOSOPHY* (1962).

<sup>65</sup> Stepan, *supra* note 63, at 267-71, 273.

<sup>66</sup> Joke Meheus, *Analogical Reasoning in Creative Problem Solving Processes: Logico-Philosophical Perspectives*, in *METAPHOR AND ANALOGY IN THE SCIENCES* 17, 26 (Fernand Hallyn ed., 2000).

<sup>67</sup> MILL, *supra* note 14, at 92-93.

<sup>68</sup> Meheus, *supra* note 66. See also Neil M. Ribe, *Goethe’s Critique of Newton: A Reconsideration*, 16 *STUD. HIST. & PHIL. SCI.* 315, 331-32 (1985). The difference between weak and strong analogies will be contextual. For any given analogy between *x* and *y*, the analogy may be strong if the same rules or laws apply to *x* as to *y*. It will be weak if the reverse is true. If, for example, the same laws of physics applied to electrons and planets, then Bohr’s analogy could have been considered strong. The inferences would be ampliative: inferences from the source domain could have been drawn directly to the target domain.

<sup>69</sup> The diatonic scale is actually an *eight*-note, octave-repeating scale: C, D, E, F, G, A, B, C. But the last note is also the first note, meaning the scale has seven unique notes.

that the color spectrum had five colors in light of the analogy *and subsequent observation*.

Regardless of whether they are strong or weak, analogies in science do not always “prove” a conclusion or suggest a useful answer. Indeed, analogies in science usually are useful for raising questions, rather than answering them directly. To put things generally, they are tools for discovering problems, rather than solving them.

Ironically, though, law seems to value analogies more highly than science. Legal and other non-scientific scholars often rely heavily on analogical reasoning—sometimes to the point that some legal scholars claim that legal analogical reasoning is something “of its own kind,” and valuable in itself. This is curious because only in science do analogies present a means for “discovering” some fact, even if they do so only after further experiment and observation.

On the other hand, analogies in both scientific and non-scientific disciplines are one method of “understanding” new problems in old ways. The familiarity may—as in the case of Bohr’s analogy in science or prior cases in law—provide a means of grappling with a new situation in the only way one knows how. Analogies may, in this way, thus provide real value by enabling understanding. When and how they do this in non-scientific disciplines, of course, is a matter of debate. The following Section explores when and how analogies aid in understanding the relation between the author and the work.

#### *D. The Value and Structure of Moral Rights Analogies*

Because law and non-scientific disciplines face the problem of verification, analogical reasoning in these disciplines cannot suggest testable hypotheses. They can, however, illuminate new questions, or hone thinking about a particular problem. Typically, analogies do this by discussing the unfamiliar in familiar terms. In this sense, an analogy may help generate discussion about the target domain, and how one should think about the problem being solved. “The power of analogy,” as Posner puts it, “is as a stimulus to thinking.”<sup>70</sup>

If analogies like those that moral rights advocates employ are valuable, their value will be in bringing an unfamiliar concept into familiar terms. Trying to articulate what is involved in the author’s relation with her work is challenging. An analogy—such as the parent-child analogy—makes that challenge seem surmountable.

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<sup>70</sup> POSNER, PROBLEMS, *supra* note 21, at 455.

Everyone knows what it is like to be a child, and many know what it is like to be a parent. Not everyone has the same experiences, but the familial institution is shared, and many people can understand—even if they cannot articulate—what that institution means. Specifically, they understand that there is something special about the relationship between parents and children. And they understand that parents have particular obligations and rights with respect to their children.

Without more, however, the analogy is not very useful. So far, the analogy is mostly rhetorical. The questions should be: What queries does the analogy raise, or what intuitions does it challenge? How does it help refine thinking about the relation between the author and her work? It may turn out that the analogies point to some overlooked questions or positions. In this way, they can be useful for thinking about what the parent-child relationship adds to the discussion of the author-work relationship. Analogies also may be able to highlight the salient features thought critical to the author-work relationship. Alternatively, analogies may be simply a rhetorical device used to persuade in lieu of valid arguments or explanations.

Given the discussion of analogy thus far, one should be skeptical that analogies will provide us with a complete understanding of any given problem. This applies to the analogies moral rights scholars use to argue for a special relation between the author and her work—parent-child (*p-c*), God-creation/human (*g-c*), master-slave (*m-s*), and lord-vassal-fief (*l-v*). One should view these analogies like any other: as starting points for reasoning about particular problems in the case of moral rights. This is, in part, because an analogy will rarely, if ever, conclusively show a particular relation exists between objects *in science*. At their best, analogies suggest answers to unfamiliar problems. Why analogies should work better in the case of a non-scientific problem, like that in moral rights, than in science is not apparent.<sup>71</sup> For this reason, a general stance of skepticism means that the moral rights analogies are rhetorical devices first, and arguments or starting points second.

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<sup>71</sup> I do hold open the possibility that thought experiments—a different kind of analogy—can help hone our intuitions about specific problems. See David A. Simon, *On the Author-Work Relation* (working paper) (on file with the author).

At a minimum, moral rights analogies seek to provide some frame of reference for the relation between the author and the work. Whether it does that adequately, of course, depends upon the details of the analogy. That is precisely what the rest of this Article explores. In what follows, I examine each of the moral rights analogies.

For analytical purposes, it is important to point out the common, inductive<sup>72</sup> structure of these analogies, which looks like this:

- (1) *x* has features *a*, *b*, *c*.
- (2) *y* has features *a*, *b*, *c*.
- (3) *x* also has feature *d*.
- (4) *y* probably has feature *d*.

The analogies examined could be characterized as following this pattern.<sup>73</sup> Better to be more precise, though, and say that the analogies examined below will be identical to this simple form:

P<sub>1</sub>: [*p-c*, *g-c*, *m-s*, *l-v*] have a special relationship that should be protected.

P<sub>2</sub>: Authors and their works are like [*p-c*, *g-c*, *m-s*, *l-v*].

C: Authors and their works have a special relationship that should be protected.

Stated this way, the questions raised by the analogies become rather obvious: Why does a special relationship arise in P<sub>1</sub>? How should it be protected? When should it be protected? Is P<sub>2</sub> really true? How? Part III of this Article explores these questions.

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<sup>72</sup> Hunter attempts to draw some fine distinctions between analogical reasoning and induction. Hunter, *supra* note 13, at 1207-09. Analogies, by contrast, “[do] not rely on any generalizations of prior experience.” *Id.* at 1209. Though, he admits, analogy is “related to induction in that both rely on similarity comparisons of prior experience.” *Id.* At this point, the distinction has become so fine as to break. Whether an analogy is an inductive reasoning process, or merely involves inductive reasoning, is not clear. To compare any two objects based on prior experience, some generalizations will be necessary. To the extent this is distinct from the observational method of induction common to sciences, I acknowledge the difference.

<sup>73</sup> Other patterns can be suggested, but they essentially amount to refined versions of the same thing.

### III. ANALOGIES TO EXPLAIN THE RELATION BETWEEN THE AUTHOR AND HER WORK

This Part critically examines the analogies scholars use to explain the nature of the relation between the author and her work: the parent-child (*p-c*) analogy, the master-slave (*m-s*) analogy, the lord-vassal-fief (*l-v*) analogy, and the God-creation (*g-c*) analogy. This examination shows that each of these analogies is deficient, and none explain the nature of the relation between the author and her work. I achieve this first by explaining the general nature of each analogy, stating the analogical argument more formally, and, then analyzing it. I spend the most time analyzing the *p-c* analogy because it the primary analogy used to explain the relation between the author and her work. I analyze the remaining three analogies with greater brevity, in part because the primary analysis mirrors that of the *p-c* analogy (as in the case of the *g-c* analogy), and in part because the other analogies (*m-s*, *l-v*) are weaker than the *p-c* and *g-c* analogies.

#### A. *The Parent-Child Analogy*

Many have compared the author and her work to a parent and her child.<sup>74</sup> Governments, too, seem to think the analogy is apt. The Swedish Royal Commission on Copyright Law adopted this view in 1956:

[W]e . . . are . . . confronted with . . . a form of human activity where to a greater extent than in other connections the producer puts into his product his personality, his spiritual apprehensions and experiences, and where in consequence there often arises an emotional connection between the author and the results of his work which is seldom found to the same extent in any other sphere of activity. Authors are therefore sensitive in a different way

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<sup>74</sup> See, e.g., MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 120-21 (1993); ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 2 (2010); ADOLF DIETZ, *COPYRIGHT LAW OF THE FEDERAL REPUBLIC OF GERMANY* 106-07 (1983).

from other producers to what happens to ‘their spiritual children’.<sup>75</sup>

The parent-child analogy has been used more recently in arguing for a *droit de suite* in the United States. During United States Congressional Hearings on the subject, one supporter argued that “the resale royalty—functioning as a sort of economic ‘umbilical cord’—might serve as a means through which visual artist could maintain a continuing relationship with the works of their own creation.”<sup>76</sup> Other examples of the *p-c* analogy applied to authors and their works appear in other subjects, both in academic scholarship<sup>77</sup> and popular culture.<sup>78</sup> The analogy can even extend beyond simply creating a work. When discussing works with no locatable author, many scholars, lawyers, and laypeople refer to these works as “orphan works.”<sup>79</sup>

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<sup>75</sup> Stig Strömholm, *Droit Moral: The International and Comparative Scene from a Scandinavian Viewpoint*, 42 SCANDINAVIAN STUD. L. 217, 228 (2002) (quoting the Swedish Royal Commission report, 1956 SOU No.25 (*cf* Documents de la conference riunie A Bruxelles du 5 au 26 juin 1948, at 586 (Berne, 1951).), at 85.). Of course, in many continental European countries moral rights are known as “rights of paternity.” *See, e.g.*, Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67 (2007).

<sup>76</sup> Stephen E. Weil, *Copyright Office Hearings on Droit de Suite, Mar. 6, 1992*, 16 COLUM.-VLA J.L. & ARTS 185, 231 (1992). This description further distorts the nature of the relation by introducing *money* as the operative connective tissue between the author and work. The connection, on this view, is somehow furthered by the author receiving compensation for the sale of her work. Although I refrain from exploring this claim here, it is not one moral rights scholars typically make.

<sup>77</sup> *See, e.g.*, Nicola Lacey, *Out of the ‘Witches’ Cauldron’?: Reinterpreting the Context and Reassessing the Significance of the Hart-Fuller Debate*, in THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY 8-9 (Peter Cane ed., 2010).

<sup>78</sup> *See, e.g.*, *Curb Your Enthusiasm: The Surrogate* (HBO television broadcast Feb. 22, 2004).

<sup>79</sup> The “Orphan Works” Problem and Proposed Legislation: Hearing Before the S. Comm. on Courts, the Internet, and Intellectual Property, Comm. on the Judiciary, 110th Cong. 2 (2008) (statement of Marybeth Peters, Register of Copyrights), <http://www.copyright.gov/docs/regstat031308.html>; Matthew Sag, *Orphan Works as Grist for the Data Mill*, 27 BERKELEY TECH. L.J. 1503 (2012); European Union Directive 2012/28, *On Certain Permitted Uses of Orphan Works*, Oct. 25, 2012, <https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>.

Whatever the setting in which the analogy is described, it breaks down into the structure noted in the previous Part:

P<sub>1p</sub>: Parents and children have a special relationship that should be protected.

P<sub>2p</sub>: Authors and their works are like parents and children.

C<sub>p</sub>: Authors and their works have a special relationship that should be protected.

Each premise raises a series of questions that I analyze below. First, I tease apart what makes the relationship between parents and children special. Second, I examine whether the specialness in the parent-child relation is similar to the specialness in the author-work relation. Finally, I examine the nature of legal protection given to the parent-child relationship. This protection often is used as a tacit justification for legal protection in moral rights.

### 1. *P<sub>1p</sub>—The special parent-child relationship*

At the outset, I should stipulate that I do not intend to challenge this premise. If there ever was a natural bond, it is the one between parent and child (though not all parents and children need to share it in precisely the same way). What needs discussing is why this relationship is special. If we want to understand why authors have a special relation with their work that deserves protection, we need to understand why the *p-c* relation is special in the first place.

Several plausible candidate reasons exist. The first is what we can call the “from me” argument. Here, a special relationship between parents and children is a function of physical and biological facts. The parent “creates” the child by giving it genetic material (and, if a mother, birthing it). The child then has physical and mental similarities with the parents.

A second contender is the “raised by me” argument. A special relationship arises on this view in virtue of the time, care, and nurturing that a parent bestows upon a child. This was a feature of the parent-child relationship that Socrates sought to exploit in *Crito* to argue for obedience to the state.<sup>80</sup> This argument has the benefit

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<sup>80</sup> See PLATO, CRITO ¶ 90 (Benjamin Jowett trans., MIT Classics).



of allowing for foster or adoptive parents to share the same kind of bond as biological parents.

A third possibility is the “shared experiences” argument. Children and parents *build* a bond, on this view, by sharing in parent-child experiences, such as feeding, teaching, attending activities, etc. This is slightly different from the “raised by me” argument, which does not value the experiences as such, but rather the time, effort, and attention given by the parent to the child. It is, in that way, more of a unilateral relation, with the parents “giving” and the children “taking.” One problem with this “shared experiences” argument is that it is difficult to distinguish between this relationship and relationships with other non-children (e.g., friends).

Fourth, one might make a “rule-giver” argument.<sup>81</sup> Here the parent and child have a special bond in virtue of the parent’s role as rule-giver and disciplinarian. The bond between the parent and a child is one of obedience. This relationship produces a definite structure that is considered “special.” This is different from the “raised by me” argument because it focuses on the hierarchy of power, rather than the acts of care by the parent. A tamer version of this argument, which can be called the “for your own good” argument, sees the parent as a steward who must, to make the child “good,” provide the child with rules that the parent enforces. We can see here the reason why the term “paternalistic” frequently refers to laws that limit the choices of individuals (purportedly) to reduce the harm to the individual and the community.

Any of these—in some combination or alone—may be enough to conclude that this relationship should be protected. As noted above, I presume that it is. In any case, it is easy enough to see the legal and nonlegal protections afforded to children and parents alike. What is interesting about the “specialness” of this relationship, however, is not that it deserves protection, but rather that what protection it deserves has changed markedly over time.<sup>82</sup> At one time, “many children were unwanted and negative parent-child relations existed, which led to serious abuse and neglect of children.”<sup>83</sup> Particularly telling in this regard is that until the mid-1850s, children served

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<sup>81</sup> This is similar to the argument that appears in the God-creature analogy, below.

<sup>82</sup> See Stuart N. Hart, *From Property to Person Status: Historical Perspective on Children’s Rights*, 46 AM. PSYCH. 53 (1991).

<sup>83</sup> *Id.* at 54.

mainly economic functions.<sup>84</sup> They were expected to do as they were told: disobedience could be punished by death.<sup>85</sup> And, even today, the protections—legal and nonlegal—that exist to protect that relationship are different in different places.<sup>86</sup> The underlying reason for this is that the *nature of the relationship* itself is subject to change. What people think it is and should be changes with time, which has important implications for its use as an analogy.

In Plato's time, for example, the parent-child analogy was mixed with the master-slave analogy to emphasize obedience to the state as a primary duty of the subject.<sup>87</sup> Socrates, condemned to death, was *obligated* to obey the sentence—for it was commanded by his master, the state.<sup>88</sup> And this command had a similar force to one issued by a father.<sup>89</sup>

Today such mixing would reduce the force of the analogy, not simply because people do not feel duty-bound to their state as a slave

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See, e.g., MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES. ; Elizabeth T. Gershoff & Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy*, 30 SOC. POLICY REP. 1 (2016) (explaining that in the 19 states where corporal punishment is legal, it is used on more than 160,000 children each year); *Ingraham v. Wright*, 430 U.S. 651, 681 (1977) (finding Florida's law allowing corporal punishment (paddling) did not violate either the procedural due process clause of the 14th Amendment or the 8th Amendment's proscription against cruel and unusual punishment). See also Viola Vaughan-Eden, George W. Holden, Stacie Schrieffer LeBlanc, *Commentary: Changing the Social Norm about Corporal Punishment*, 36 CHILD & ADOLESCENT SOCIAL WORK JOURNAL 43 (2019) (reviewing literature on the varied use of corporal punishment among different racial and socioeconomic groups).

<sup>87</sup> PLATO, *supra* note 80.

<sup>88</sup> *Id.* (“And if this is true you are not on equal terms with us; nor can you think that you have a right to do to us what we are doing to you. Would you have any right to strike or revile or do any other evil to a father or to your master, if you had one, when you have been struck or reviled by him, or received some other evil at his hands?- you would not say this?”).

<sup>89</sup> *Id.* (“And he who disobeys we[, the state,] is, as we maintain, thrice wrong: first, because in disobeying us he is disobeying his parents; secondly, because we are the authors of his education; thirdly, because he has made an agreement with us that he will duly obey our commands; and he neither obeys them nor convinces us that our commands are wrong; and we do not rudely impose them, but give him the alternative of obeying or convincing us; that is what we offer and he does neither.”).

feels to his master. The parent-child relationship itself is not one of pure obedience—and parents no longer set absolute rules and enforce them as they please.

This presents a challenge for the *p-c* analogy, which relies, tacitly, on the existence of legal duties in one setting to justify legal duties in the other. If the parent-child relationship is contingent, then so is the specialness that is derived from it. Given that, whatever maps onto the author-work relation will be contingent as well. This means the analogy's explanatory or even emotive force seems diminished, though not totally vitiated.<sup>90</sup> I say something more about this in the context of legal rights and the *p-c* relation below.

## 2. *P<sub>2p</sub>—Similarity of parent-child to author-work*

*P<sub>2p</sub>* asserts that parents and children are similar to authors and works. This implies, as Part I.A stated, not mere similarity, but relevant similarity. It also implies that the dissimilarities between *p-c* and *a-w* are not relevant. I argue to the contrary. In this Section, I show that there are crucial differences between parents and children on the one hand, and authors and works on the other. These differences undercut the force of the *p-c* analogy.

There are two obvious factual dissimilarities between parents/children and authors/works. First, two biological parents produce one child.<sup>91</sup> In the traditional cases of creativity, by contrast, one author produces one work.<sup>92</sup> Paradoxically, however, one might argue that this *strengthens* the bond an author has with a work. Imagine if humans were true hermaphrodites, and so could reproduce by self-fertilizing—being both the mother *and* the father (though I note here the family categories start to get murky). Would not we say that this parent's bond is *stronger* than the bond of a mother and a child? It is unclear how one could evaluate such a claim, though this is not necessarily a strike against the analogy.

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<sup>90</sup> The contingent nature of something does not, in itself, disqualify it from justification or explanation. Many moral rules are continually revised with further examination and deliberation. But in the case of moral rights—which purport to protect some unbreakable and everlasting bond, this seems to reduce the force of the analogy.

<sup>91</sup> Obviously, two biological parents can “create” more than one child, either at once or at different times.

<sup>92</sup> Here I leave collaborative works out of the discussion because moral rights seem to focus on the idea of the Romantic Author. Even so, the introduction of more authors may make the problem worse, rather than solve it.

Regardless of this first point, one might try to address this issue by characterizing previous authors—authors upon whose works the current work is based—as “parents.” But that does not solve the problem; it only pushes it back one generation to what would, within the analogy, aptly be called grandparents or something else entirely. In essence, the 2:1 relation typical in parent-child relationships—and required for fertilization—does not hold for the author-work relation. Perhaps it would be more accurate to call “parents” the *works* of those past artists. The works, after all, influence subsequent artists who author a new painting or book. These “parents” (the works that are used by subsequent artists), however, are actually children—they are works produced by other authors. Children can never become parents without destroying the force of the analogy.

This is actually the second point of factual dissimilarity: parents and children are both human beings; authors are human beings but works are not. This idea—that the analogy compares the wrong kinds of objects (people and works)—breaks apart the analogy even further. Works—as compared to living, breathing, sentient organisms—cannot, for example, behave badly or deserve punishment.<sup>93</sup> This is similar to the disconnect in economist Joseph Schumpeter’s analogy between the “economic marketplace” and the “political marketplace.” Because there is no political equivalent of prices (votes cannot be exchanged for precise policies), Schumpeter’s “analogy . . . [compares] free-market competition—of which prices are the essence—and a system in which there are no prices.”<sup>94</sup> Here the “economic” domain cannot map onto the “political” target; without a notion of costs and revenues, economic models are relatively useless.<sup>95</sup> Likewise, the *p-c* analogy attempts to map the parent-child relationship onto a target for which the language itself is inapt. Comparing works to people raises questions about the duties, obligations, and care that both authors and others owe to the work. And yet obligations between parents and children attach *precisely because* they are two human beings. Given this, it is not

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<sup>93</sup> Nor can works “grow” once they have been published. Their authors can add to them, of course, but generally paintings do not paint themselves once they are hung on a wall. (It may be possible to design a computer program to make “live” work—that is, a work that constantly adds to itself and in this sense could be “living.” But even this work would not be continually changed by the author herself.)

<sup>94</sup> Barry, *supra* note 2, at 100-01.

<sup>95</sup> *Id.*

clear how the analogy *could* map onto the author-work relation. I set these questions aside until later in this Section.

For the moment, however, there are two important points to make about the argument that the idea of the author “looking after” a work—*as a cultural artifact*—in the way a parent looks after her child. First, the claim assumes that moral rights are serving *cultural interests* apart from those of the author herself. Since the law serves cultural interests, the law does not seem to be concerned *specifically* with the author’s special bond with the work. Rather, it is concerned with the preservation of the work *as a cultural artifact of a particular society*.<sup>96</sup> Since the author is most familiar with it, the author is best positioned to preserve it. Second, there is still a problem with comparing a work to a living being. The reasons why children need looking after are not for cultural heritage, or even necessarily because we want children to replace adults. It is because, at least in substantial part, *human beings are moral agents*. There is no similar concern with works. And since the thrust of moral rights is a non-legal, *moral* demand, this seems like a crucial defect in the analogy.

In addition to these factual dissimilarities, there are points of comparison that bear on the *special relationship* asserted in P<sub>2p</sub>. Indeed, since the crucial implication of the *p-c* analogy is a special relationship, the relevant similarity with the author-work relationship is the common properties that give rise to such a relationship. Above, I outlined four possible arguments for a special relationship in the *p-c* context. Two of those arguments—the “shared experiences” and the “rule-giver” arguments—can be discarded given the factual differences between *p-c* and *a-w* relations. What matters in the “shared experiences” argument is that two human beings share particular experiences and, presumably, carry those experiences with them as they grow older. Authors may have experiences when creating a work, but works cannot, in any meaningful sense, “share” in those experiences with a work in a way a child can with her parent(s). Because it is the shared nature of

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<sup>96</sup> See, e.g., INTELLECTUAL PROPERTY CODE 121-3 (explaining that if the author’s heirs “abuse” the exercise or non-exercise . . . the right of disclosure,” or there are no heirs, “the first instance court may order any appropriate measure,” and the courts may refer such matters “to the Minister Responsible for culture”).

experience that matters to the *p-c* relation, the lack of this duality in the *a-w* relation renders the comparison meaningless.

A similar problem arises for the “rule-giver” argument, the force of which is premised on the parent’s authoritarian role. On the one hand, authors cannot prescribe rules because a work has no potential for behavior.<sup>97</sup> On the other hand, the author may be, in one sense of the word, the rule-giver vis-à-vis the *characters* or *agents in a work*, such as in a novel. The author sets the rules for the characters’ behavior in the same way a parent sets the rules for her child.

Notice first that we are now talking about the characters *in* the work, rather than *the work itself*—a division that cannot be applied to a child. More importantly, however, the analogy fails because the work is not like a child in a relevant way; namely, the characters in the work (or the content of the works themselves) do not have an independent capacity for free choice. Those agents cannot, therefore, be “rule-abiders” at all.

The best case for similarity comes in the form of the “from me” and “raised by me” arguments. The “from me” argument, at first sight, has the most promise. The work in this case “looks like” the author, much like the child bears resemblance to the parent. More than that, though, the author, like the parent, can be thought to “create” in the same way that the parent creates. This is precisely why the argument seems so attractive. After all, if the parent-child relation was not biological, the parent could not be said to “create” the child in the traditional sense.<sup>98</sup> So the “from me” argument makes the author-work analogy tighter because it tries to track the “biological” aspect of being a parent.

Yet this is precisely what makes the “from me” argument defective. It implies that only biological parents can have a special relationship

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<sup>97</sup> I suppose a “work” could, if it was a computer-generated work, have some capacity for action. But, as I note below, it would still not be an independent, conscious agent in the way child is. To be sure, the capacity for free will, however limited, is something that must be present for the rule-giver argument to even make sense. To what extent children (or adults for that matter) have free will is an issue that is outside the scope of this Article.

<sup>98</sup> It is quite possible, of course, for a parent to “mold” a child as a foster parent. One may even want to use the word “create” to describe the process of raising a child. But at some level the word is simply inapt, as the foster parent does not provide any hereditary material that shapes the child. Although parental influence can be large, foster parents stand in a different biological relation to their children and are not “responsible” for their features in the same way as biological parents are.

with their children. The argument, therefore, overlooks foster or adoptive parents who develop lasting and genuine relationships with “their” non-biological children. Because the “from me” argument flies in the face countless numbers of lasting and special relationships between adoptive or foster children and their parents, it fails to explain the relation between the author and her work.

Now enter the “raised by me” argument. The primary benefit of this argument is that it allows for nonbiological parents to have a special relationship with their child that should be protected. Yet this benefit is also a drawback when employing the *p-c* analogy in the context of moral rights. Recognizing that foster or adoptive parents *are parents with a special connection to the child* destroys much of the analogy’s explanatory force. If foster parents can stand in relation to their adopted child just as biological parents stand in relation to their biological child, then a work’s translator, curator, restorer, or replicator—the functional equivalents to a work’s adoptive parents—could stand in the “same” relation to the work as the author stands in relation to the work. It is no answer to say these individuals failed to “create” anything. To do so would be to deny the significance of the relation between children and foster or adoptive parents.

One relatively strong reply is that the “raised by me” argument works, but in a way slightly different from the way described. In the context of a work, “raising” would mean something like developing an idea and seeing it to a final form. The care and attention devoted to developing the initial idea into a “work” matches up with the *p-c* relationship. And it is in this process of nurturing that the special relationship arises.

This is probably the most plausible view of the *p-c* analogy. It simultaneously provides a reason for a special relationship and limits others’ claims to that relationship. It frees authors to use others’ “ideas” because, even though they “came from” someone else, they were developed into a final product by the author. So it seems that the process of developing and finishing the work is the relevant similar process that links *p-c* to *a-w*.

There is an issue here about whether generating the idea itself is part of the “nurturing” process. One is probably inclined to say that it is, as authors seem to care not merely about the development of an idea, but the idea itself. This is what it means to be “original” in the lay (but not legal) sense of the word, and artists value “originality”

widely, if not universally, throughout history.<sup>99</sup> When someone else uses an author's idea to create a work, the author often feels as if the idea has been stolen. Whether we agree will probably depend on the circumstances, but it is enough to point out there is a potential problem with using the development of an idea as the criterion for "specialness" in the *a-w* relation.

Assuming this difficulty can be overcome, the revised "raised by me" argument has a critical failing. Humans cultivate and nurture many things in their lives that are not children, and for most of these no one presumes a "special relationship that that deserves protection," or at least they presume a relationship decidedly less special than the *p-c* one. Examples include gardeners and plants, carpenters and their woodwork, masters and their pets, chefs and their cuisine, readers and their books, technologists and their computers.<sup>100</sup> The list can be extensive, and in each case a human "raises" an object, a living creature, or a plant.

So there must be something unique to the "raising" of a child by a parent, and it also must exist for the author that "raises" her work. The only thing to point to, however, is the "from me" argument. In other words, the distinguishing feature between the special relationships described above and those of the *p-c* and *a-w* is that the child and the work are literally "from" the parent and the author. This, however, returns us to the analysis of the "from me" argument above. Because that argument is unconvincing, it cannot be used to rescue the special relationship between the author and her work.

Both the "from me" and "raised by me" arguments about the *p-c* relation therefore fail to map onto the *a-w* relation. Beyond that, both arguments in the context of *a-w* suffer from a larger defect: they do not explain anything at all. The arguments serve—in the form of the *p-c* analogy—as a disguise or an analogical intuition-pump.<sup>101</sup> They

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<sup>99</sup> See generally WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995).

<sup>100</sup> See, e.g., Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445 (2008); Jessica Litman, *Readers' Copyright*, 58 J. COPYRIGHT SOC'Y U.S.A. 325 (2010). See also, e.g., Deborah R. Gerhardt, *Consumer Investment in Trademarks*, 88 N.C. L. REV. 427 (2010).

<sup>101</sup> See DANIEL C. DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* 12 (1984).



capitalize on one's familiarity and emotions relative to parents and children in general, and their own relationships in particular.

The analogy also surreptitiously smuggles in preconceptions about property in general and labor theory in particular. The "from me" and "raised by me" arguments both expressly point to elements of Lockean property theory, which are second nature for many people in the Western world. Locke's idea—that we own our bodies first and whatever products we produce with our bodies via our labor second<sup>102</sup>—encompasses in a broad sense these arguments for specialness. One way to play on people's property-like intuitions about books, paintings, and other "intellectual *property*," is to recast them in a mold of a sacred bond. What may be an underlying "intuition" or perhaps even Lockean rationale is now seen through a historical and emotional prism of the *p-c* relation. Immediately, what already has an explanation (i.e., why authors have control over their works, re: labor theory) now has another, more pliable one (i.e., moral rights). Our emotional bonds suggest not only that the analogy fits, but that it explains why authors should have special rights.

More broadly, the analogy cannot help but appeal to our conception of property given the ubiquity and generalized acceptance of ownership of intellectual objects.<sup>103</sup> Any attempt to isolate a special relationship that is *not* based on ownership will, therefore, be contaminated by notions of property. Additionally, the parent-child relation at one time implied a purely property relation, and remnants of that conception probably still inform our thinking about it.<sup>104</sup>

The *p-c* analogy dulls logical argument by trumpeting a relationship that plays on two sets of overlapping intuitions and emotions: the

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<sup>102</sup> See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

<sup>103</sup> See, e.g., BERNE, *supra* note 5 (treaty on copyright law); MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS, MADRID AGREEMENT (Marks) (1891), revised at Brussels (1900), at Washington (1911), at The Hague (1925), at London (1934), Nice (1957) and at Stockholm (1967), and amended in 1979 (treaty on trademarks); THE PROTOCOL RELATING TO THE MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS (1989), amended in 2006 and in 2007 (treaty implementing formal system governing international trademark registration and priority under Madrid Agreement); PATENT COOPERATION TREATY June 19, 1970, amended September 28, 1979, modified on February 3, 1984, and on October 3, 2001.

<sup>104</sup> See *supra* note 103.

parent-child relationship on the one hand, and ideas about property on the other. Using the *p-c* analogy, what does one learn about the nature of the relationship between the author and her work? One learns only that it is like the parent and child's relationship. But as discussed above, when that relationship is dissected and applied to the relationship between the author and work, it becomes unworkable. So the *p-c* analogy actually tells us nothing at all.

The rhetorical nature of the analogy becomes impossible to ignore when comparing the analogy to the others (*g-c*, *m-s*, *l-v*), explained below, invoked to support moral rights. Could a person endorse likening the author to a master of a slave or a lord of a vassal? These choices are rather abnormal, and this probably explains their absence from contemporary usage.<sup>105</sup> The choice of the *p-c* analogy is attractive because it furnishes a time-tested, emotionally-charged "bond" that is ingrained into our psyche and biology. Although perhaps difficult to define outright, the specialness of the *p-c* relation is something most people seem to accept reflexively.

Lingering here is a chicken-or-egg question: is it that the *p-c* analogy merely capitalizes on our emotions (as I suggest above), or is it that the *p-c* analogy simply matches up better with the author-work relation than the *g-c*, *m-s*, and *l-v* analogies I explore below? This sort of question is misleading because the attractiveness of the alternative (that the analogy simply "fits best") is not the only alternative, nor is it a complete one. It may be that the *p-c* analogy is better than the *g-c*, *m-s*, and *l-v* analogies, but it does not follow that it is the *best*, or that it adequately explains anything about the relation between the author and work. Nor does it serve as a useful starting point for such a discussion. As this Section has shown, although the analogies have succeeded in sparking discussion, they have failed to provide any meaningful guidance on the author-work relation.

### *3. C<sub>p</sub>—Legal protection for the special author-work relationship*

For the parent-child relationship, legal protection is a foregone conclusion.<sup>106</sup> But the analogy implies that because the *p-c* and *a-w*

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<sup>105</sup> I say more on this idea in the Sections that discuss these analogies.

<sup>106</sup> See, e.g., UN Convention on the Rights of the Child, Art. 3, Art. 5, Art. 7 Art. 9, Art. 10, Art. 18-24, Art. 27, Art. 29, Art. 40 Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 (spelling out various rights and duties of parents vis-à-vis their children) entry into force 2 September 1990, in accordance with article 49.

relations are analogous, the law should protect the *a-w* relationship in a similar manner as it protects the *p-c* relation. I argue below that the analogy is not able to sustain in any meaningful way this comparison between legal protection for the *p-c* and *a-w* relationships. Much of this argument depends on the impossibility of mapping the *p-c* relation onto the *a-w* relation. Like with Schumpeter's analogy between economic and political marketplaces, the analogy between *p-c* and *a-w* cannot be mapped in any useful way. The reason is that work is not a person, and the very crux of the specialness of the relation in the *p-c* analogy consists in the relation between human beings. This has implications for the legal protection that moral rights advocates think should follow from the *p-c* analogy.

If the analogy implies similar legal rights for *p-c* and *a-w*, then one should begin by examining the legal duties involved in *p-c* relationship. Legal duties apply to all persons, including parents and their children.<sup>107</sup> Indeed, that non-parents owe legal and moral duties to others' children as human beings is a maxim reflexively accepted.<sup>108</sup> Some of these legal duties depend on the parent-child relationship. The law will charge special obligations (and provide special permissions) toward children from third parties—such as teachers, governmental entities, or stepparents—who assume and discharge parental responsibilities.<sup>109</sup> That obligation is based upon the relationship between the child and the parent. This relationship is what gives the parent the right to act on the child's behalf. The reasons for this are rooted in various aspects of the relationship (e.g., capacity, maturity, intellect, bond between parent and child, etc.).

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<sup>107</sup> Parents have a special obligation to care for their children, and the state may obtain custody of a child if the parent does not meet his obligation. *See, e.g.*, ABUSED AND NEGLECTED CHILD REPORTING ACT, 325 ILL. COMP. STAT. 5/1 *et seq.* (2010) [hereinafter CHILD REPORTING ACT].

<sup>108</sup> Parents also might have *moral* duties to others' children. In the same way we might have *moral* duties to a work separate and apart from our legal duties. To keep things much neater, this Section examines the analogy with respect to *legal* duties between parents and children. *See also* UN Convention on the Rights of the Child, *supra* note 106.

<sup>109</sup> *See, e.g.*, Daniel v. Spivey, 386 S.W.3d 424, 428-29 (S. Ct. Ark. 2012); Smith v. Smith, 922 So.2d 94, 98 (2005) (explaining that teachers and the Alabama Department of Human Resources can both stand *in loco parentis* to a child, and further explaining when a nonparent may stand *in loco parentis*).

It is worth noting, however, that the rights relating to the parent-child relationship have changed over time. This is because, as noted above, the conception of the parent-child relationship has changed over time.<sup>110</sup> Law traditionally has viewed children as parents' property rather than as individuals with their own rights.<sup>111</sup> As a result, children in the past had fewer rights vis-à-vis their parents than they do today. While this does not doom the *p-c* analogy as applied to moral rights, it does at least raise questions about its value. Which kind of *p-c* relationship does the analogy purport to use? Which rights and duties are involved in the *p-c* relationship? Why do these rights and duties exist? Does it matter that the analogy is not timeless? The answer to this last question is likely "no." It is safe to assume, I think, that the *p-c* analogy has in mind some version of the modern *p-c* relationship.

The legal duties that arise from this relationship illustrate a problem with using the *p-c* analogy to illuminate the relation between author and work. Although a legal duty toward a child may implicate the child's parent, one's duty *toward the child as such* is not based solely on this relationship. The duty derives from the fact that the child is a (legally recognized) person. Assume, for the moment, that a child is slandered, or is beaten up at school. In either case, the legal duties of *others* toward the child arise, not from the parent-child relation, but from the child's status *as a person*.<sup>112</sup>

This is a critical point for understanding the limitations of this *p-c* analogy as applied to the *a-w* relation. Because works are not people, the legal duties that arise toward a work cannot be based on the work's status as a person. If one owes a legal duty toward a work, it is different from the legal duty one owes to a child or even to the "parent." Thus, others' independent legal obligations towards works are based on something different than others' obligation towards children. What it means to "mistreat a work," then, is something fundamentally different from what it means to "mistreat a child." On

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<sup>110</sup> See Susanna Lee, *Revisiting the Parent-Child Analogy: Implications for Law and Judgment*, 8 *LAW CULTURE & HUMAN*. 195 (2012).

<sup>111</sup> See, e.g., Carter Dillard, *Future Children as Property*, 17 *DUKE J. GENDER L. & POL'Y* 47, 55 (2010) (citing Mary Ann Mason, *FROM FATHERS' PROPERTY TO CHILDREN'S RIGHTS* (1996)).

<sup>112</sup> This is true even though parents may act as the legal conduits of such rights.

this point, the analogy proves to be less useful than it originally seems.<sup>113</sup>

All this is to say nothing of the duties *parents* owe to their children. Up until the age of a child's emancipation, the parent acts as the child's guardian (and *de facto* and *de jure* agent).<sup>114</sup> The parent makes decisions for the child—where and whether to go to school, religious or otherwise; how, what, and when to eat; and a variety of other choices. These duties derive from a basic (Western) conception of the parent-child relationship, of the obligations that parents and children hold, and of the values or ends we want to promote within that relationship.

No similar structure exists for authors and their works. To make this analogy work, such a structure must be devised; we must outline a set of underlying values and ends (of particular classes of works) that ought to be preserved or promoted in works. And these values must tell us when, how, and why authors have a *duty* to intervene on behalf of their work. Currently, the doctrine of moral rights does not require any such duty; it provides only the *right* to intervene should the author think it appropriate. To make the analogy work, perhaps a mandate to intervene (within reason) is required.

There is still, though, the question of how to decide when the author must exercise her right to protect a work. Some moral rights scholars have posited a few values or ends—authenticity-of-meaning, authorial feelings, expression. But these values hardly are based on the same kind of intuitions that arise in the parent-child context. Although that does not doom them, it requires explaining why these values, in particular, matter so much. Perhaps some or all of the

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<sup>113</sup> One way to save the analogy is to compare the duties of governmental bodies—such as schools and the like—to the duties that others owe to a work. If the work is a child, it is not “mature” enough to let others do to it whatever they please. It needs a guardian to look out for it. But here again, the analogy breaks down. Works have no capacity at all, and using them in various ways does not harm the “work” in any similar way a child would suffer harm. The asserted harm is to the *author* (parent) rather than the work. But parental harm is not the basis on which the law protects children *per se*. The law provides parents status to act on the child's behalf—to avoid harm *to the child*.

<sup>114</sup> *See, e.g.*, *In re Marriage of Baumgartner*, 912 N.E.2d 783 297 (Ill. App. Ct. 2009) (stating that “a child becomes emancipated when he or she attains the age of majority,” and that “a child becomes emancipated when he or she attains the age of majority,” and explaining when a child can perform acts of self-emancipation).

values described by scholars can be used to bridge the gap in the analogy, but the bulk of the work remains to be done.

To complicate things further, the state may intervene on the child's behalf—in some cases terminating parental rights—when parents maltreat, mistreat, neglect, or abandon a child.<sup>115</sup> The law may direct the state to appoint a guardian who represents the child's best interests, interests which may diverge from, or be independent of, the parents' interests.<sup>116</sup> If the *p-c* analogy is taken seriously, then a similar role for the state may be appropriate in a moral rights regime. In some cases, it may be the state, rather than the author, that decides what is best for the work. Some countries' laws actually provide the state with this power in particular circumstances.<sup>117</sup> Again, this would require an articulation of values that the state must promote (perhaps the “best interests” of the work), which has yet to be done.

The issue of care also highlights how the parent-child analogy may have perverse conceptual implications. The moral rights of withdrawal and destruction illustrate this. Imagine an author seeks to hide her work from public view or, worse yet, destroy it. If the work is considered a child in these circumstances, there is little doubt the “parent” would not have the former right in most cases, and would not have the latter right at all.<sup>118</sup> The destruction of the work could be described only as the “killing” of the child, an act that is clearly prohibited in the modern world.

The basic point is this: if obligations to a work exist, they—and the basic claims for them—need to be spelled out more clearly. This includes explaining not only what obligations authors have toward

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<sup>115</sup> See, e.g., THE ADOPTION OF SAFE FAMILIES ACT OF 1997, Pub. L. No. 105-89, 111 Stat. 2115.

<sup>116</sup> Many states in the United States provide such guardianship by law. See, e.g., JUVENILE COURT ACT OF 1987, 705 ILCS 405/2-17.

<sup>117</sup> See *Foujita v. Sarl ACR and others*, [1988] ECC 309 (French case where French ministry of culture intervened on behalf of public where heir abused her rights.); CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] arts. 122-09 (abuse of rights), 122-10 (Fr.). See ADENEY, *supra* note 3. See also NATIONAL FILM PRESERVATION ACT OF 1988, PUB. L. 100-446, 102 STAT. 1782 (repealed 1992).

<sup>118</sup> Here again problems of defining “creation” arise. If, on the one hand, “creation” is taken to mean the development of a child until some point, then these rights illustrate the absurdity of the analogy. On the other hand, defining “creation” to mean “moment of fixation” guts the analogy by precluding adoptive parents from having a special parental bond with their children.

their works, but also towards others. If the parent-child analogy were any help, it would have to be in this realm. Without attempting to erect such obligations here, it seems clear that analogy suggests different obligations for different people (authors and users, listeners, etc.). In light of the problems posed by the parent-child analogy, it will be difficult to explain why inanimate objects should be treated like human children.

Additionally, legal duties (and moral rights) between a parent and a child are limited in duration. Parents have legal control of their children until legal emancipation. At some point, the author must relinquish her control over her work.<sup>119</sup> Presently, copyright owners in every Berne Convention member state control the work for a period of time that well exceeds her death. Oddly, it seems a parent-child analogy vitiates, rather than supports, the case for such extended rights. How could it be, for example, that a parent is legally obligated to control and care for a living and breathing object for eighteen years, but an inanimate object must be looked after beyond its author's life?<sup>120</sup> Thus, even if the analogy supports some care requirement, it likely would be one shorter than the current copyright term required by the Berne Convention.

### ***B. Creator-Creature (g-c) Analogy***

The next analogy to examine is that of the relation between creator and creature or, framed differently, between God and God's creations, specifically human beings.<sup>121</sup> Sometimes metaphors are mixed, and the *g-c* analogy overlaps with the parent-child analogy and some elements of property theory, as exemplified in Nathaniel Shaler's work:

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<sup>119</sup> This point has also been made by Paul Edward Geller, *Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms?*, in *OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* 159, 167 (Brad Sherman & Alain Strowel eds., 1994).

<sup>120</sup> One might suggest that *because* works are not living, they need greater care. Children grow up and can care for themselves; but works are forever devoid of an inner and outer life. But this suggestion tries to make an argument by disregarding the analogy.

<sup>121</sup> Johann Caspar Bluntschli, *On Authors' Rights*, in *PRIMARY SOURCES ON COPYRIGHT (1450-1900)* (Lionel Bently & Martin Kretschmer eds., 2008) (1853); KWALL, *supra* note 61.

[I]ntellectual property is, after all, the only absolute possession in the world . . . The man who brings out of nothingness some child of his thought has rights therein which cannot belong to any other sort of property . . . the inventor of a book or other contrivance of thought holds his property as a God holds it, by right of creation.<sup>122</sup>

Just as with the *p-c* analogy, the *g-c* analogy has conceptual simplicity and a rich historical and cultural hook. Perhaps it was for this reason that early moral rights scholars like Bluntschli invoked this analogy to explain the relationship between the author and her work.<sup>123</sup> In some ways, the metaphor must mix the *p-c* analogy and the *g-c* analogy because, in at least Christianity, God is perceived as “our Father.”<sup>124</sup> Whatever the precise reason, the emotionally-charged nature of the analogy is hard to miss.

Below I explain the deficiencies of the *g-c* analogy in a directed—albeit brief—fashion. The *g-c* analogy breaks down into the familiar form:

P<sub>1g</sub>: God and human beings have a special relationship that should be protected.

P<sub>2g</sub>: Authors and their works are like God and human beings.

C<sub>g</sub>: Authors and their works have a special relationship that should be protected.

I analyze both premises and the conclusion in the following subsections.

### 1. P<sub>1g</sub>—*The special god-human relationship*

As in the *p-c* analogy, the *g-c* analogy must put forth certain arguments about the source of the specialness that results from god

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<sup>122</sup> Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law*, 24 S. CAL. L. REV. 375, 381 (1951) (quoting Thorvald Solberg, *Copyright Reform: Legislation and International Copyright*, 14 NOTRE DAME L. REV. 343, 358-59 (1939) (quoting NATHANIEL SHALER, LITERARY PROPERTY (1878)).

<sup>123</sup> Simon, *Personality*, *supra* note 12, at Chapters 1-2.

<sup>124</sup> See generally BOOK OF MATTHEW, KING JAMES BIBLE.



creating creatures, in this case humans. There are several possible sources for this special relationship. Unlike the *p-c* relationship, I challenge the specialness that might arise from the god-creature relationship. Although there are a variety of reasons for doing so, I sketch only a few here. Moving too far into them would mutate the discussion from law and philosophy to theology.

Even before reaching the arguments for specialness, however, the analogy faces a significant problem: one might deny the existence of a god in general, or a god of the particularities spelled out by the individual offering the analogy (though this, tellingly, is never done). Unable to sustain even  $P_{1g}$ , the analysis would halt. Assuming for the moment that a god does exist, there are many possible features such a god might have, and many versions of this god or gods.

It is for this reason—and for purposes of discussion—that I start with the most common, current argument for specialness from God. It is a version of the “from me” argument discussed in the *p-c* analogy context. A (Judeo-Christian) God, who is eternal, omnipotent, omniscient, omnipresent, and omnibenevolent, creates *ex nihilo* humans *in God’s image*. God gives them life and they, in turn, obey God’s commands. This relationship is sacred and unbreakable.

Taking this as the general account of the relationship between God and humans, one other issue remains. All of God’s authority, at least in the Judeo-Christian tradition, is premised on God’s status as creator. In other words, God rules by dint of creation. The specialty of the relation between God and creature is derived from God making man in God’s own image, and by giving him life and the means to continue it. It should be obvious that this conclusion is a non-sequitur; creation does not logically entail control. One should still spell out why creation entitles God to, if not control outright, the power to set immutable laws for his creation to follow.

Regardless of the difficulties with  $P_{1g}$ , there are at least four further problems with the *g-c* analogy. Two of these problems are related to the factual comparison of *g-c* to *a-w*. The other two relate to the legal protections, or rights, that follow from the specialness of the relationship. I examine them in this order.

## 2. $P_{2g}$ —*Similarity of God-human to author-work*

Assuming  $P_{1g}$  is correct, it does not map onto the *a-w* relation. The chief error is supposing that God and the author stand in exactly the same relation to the materials they use to create. They do not. The

typical Judeo-Christian God is considered omniscient, omnipotent, omnifiscient, and morally perfect, and the creator of the universe. The author, by contrast, is none of these things. She creates using the limited knowledge she acquires in her specific culturally- and temporally-bounded environment.<sup>125</sup> Other constraints also limit her creative ability: she can create only those things that her body allows, and those things are limited by the physical tools and known-methods she has at the time. Thus, the author is very unlike God in many ways.

Even assuming an author has total creative control over her works as God does over God's creation, the analogy fails. In the Section on the *p-c* analogy, I explained that this kind of control is specious because works are not autonomous. They have no capacity to make decisions independently. It is a trick to say that the author has total control, for example, over what her characters "do" because her characters are not capable of "doing" anything. She has control in some sense—over what she writes those characters "have done"—but that is much different. And even this kind of control is open to question. Many authors—and some proponents of moral rights<sup>126</sup>—claim that there is a creative force that is external to them. If authors are merely the vehicle through which some outside force communicates, then it is difficult to see in what sense they are God-like in their creative abilities. Consequently, it is unclear why they should have further control over their works because of their creative abilities.

A second difficulty with the analogy lies in the comparison of humans to works—something that also dogged the *p-c* analogy. When God creates a sentient being, the being eventually dies while God remains forever. For authors, the temporal relation is reversed: the author dies while her work "lives" forever.<sup>127</sup> The obligations that run towards God's creations are of a different kind than those

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<sup>125</sup> Simon, *supra* note 45; Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007); Michael Spence, *Justifying Copyright*, in DEAR IMAGES: ART, COPYRIGHT, AND CULTURE 388, 397 (Daniel McClean & Karsten Schubert eds., 2002).

<sup>126</sup> KWALL, *supra* note 74; David A. Simon, *In Search of (Maintaining) the Truth*, 16 MICH. TELECOMM. TECH. L. REV. 255 (2010) (describing this phenomenon in the religious context); *see, e.g.*, TOWNES VAN ZANDT, INTERVIEW (describing how *Pancho and Lefty* came "from out of the blue" and "came through me," making it "hard to take credit" for it). <https://www.youtube.com/watch?v=g3bFAuuUeXU> (last visited May 23, 2019)

<sup>127</sup> Tom Palmer has made a similar point in a different context. Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 845 (1990).

that run toward an author's creation. The obligations that run toward God are eternal, at least in part, because God is eternal. Creations come and go, but God continues to exist. Not so with the author. Authors come and go, but their works remain (potentially) forever. A third-party's obligation to obey the author's command, then, cannot derive from the *author's* immortality. And because God's laws derive from God, and not from the fact that God's creations exist, the work's existence cannot create the obligation that moral rights need.

3. *C<sub>g</sub>*—*Legal protections for the special author-work relationship*

Improperly comparing works to humans leads us to a third problem with the *g-c* analogy: it presents a mismatch between the structure of obligations involved in the *g-c* and *a-w* relationships. Recall Barry's example of applying the "marketplace" metaphor from economics to politics. The trouble was that the structural components that determined the usefulness of the source (i.e., economics) of the analogy did not map onto the target (i.e., politics) in any meaningful way: economics required concepts of price and revenue to achieve anything as a theory, and the structure of politics could not build in the notion of price. The same problem exists in trying to apply the structure of the *g-c* relation to the *a-w* context. God's law is absolute, set absolutely by God. Moral rights, by contrast, are limited rights, regardless of whether they are based on natural or positive law theories. In other words, the creator does not dictate totally what others can do with her works.<sup>128</sup> Others' interests limit the author's rights. As Michael Spence puts it, "while the theological claim has to do with the relationship between the Creator and His creation, the arguments for copyright from creation concerns the relationship between the creator and third parties."<sup>129</sup>

Finally, the thrust of the argument itself—that creation implies *rights*—is merely question begging. Why does creation imply rights? Frequently the answer is because of some *other* theory, such as a labor- or personality-based property theory.<sup>130</sup> Or it may be

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<sup>128</sup> See generally ADENEY, *supra* note 3 (reviewing the moral rights laws of various countries and explaining their scope).

<sup>129</sup> Spence, *supra* note 125.

<sup>130</sup> See Simon, *Personality*, *supra* note 12, at Chapter 1-2; see also Justin Hughes, *Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1998); Wendy J. Gordon,

based on authorial autonomy.<sup>131</sup> These arguments, however, show that creation itself is not doing the work; rather, some other theory must justify the rights at issue. Thus, the God-creation analogy does not offer insights into the rationale for the authors' rights, nor does it illuminate in any meaningful way the author-work relation. Instead, like the *p-c* relation, the analogy is a rhetorical device rather than a substantive argument.

### C. Master-Slave Analogy

Less attractive analogies have also been used to describe the author-work relation. The Latin poet Marcus Valerius Martialis (known as "Martial") likened the author-work relation to the relation between master and his slave.<sup>132</sup> Again, the familiar structure of the argument appears:

P<sub>1m</sub>: Masters and slaves have a special relationship that be protected.

P<sub>2m</sub>: Authors and their works are like masters and their slaves.

C<sub>m</sub>: Authors and their works have a special relationship that should be protected.

Setting aside the fact that a work is inanimate, in some ways the master-slave analogy is more useful than parent-child analogy for

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*A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1535 (1993).

<sup>131</sup> See, e.g., Neil Weinstock Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347 (1993); Neil Weinstock Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994).

<sup>132</sup> RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 50 (2007) (citing Martial, epigram no. 52). See also DAVID SAUNDERS, *AUTHORSHIP AND COPYRIGHT* 89-90 (1992) (noting that Frenchman "avocet Marion in the 1586 Muret case . . . [argued that] 'the author of a book is the absolute master' of it . . . 'and, as such, can freely dispose of it, whether keeping it forever private in his hand, as a slave, or liberating it, granting to the work common liberty.'") (emphasis provided) (quoting Marion in M.C. DOCK, *ETUDE SUR LE DROIT D'AUTEUR*, PARIS: LIBRAIRIE GENERALE DE DROIT ET DU JURISPRUDENCE, 78-79 (1963)).

moral rights. The slave is at the master's beck and call; the author can decide what to do with her work as she pleases. The slave does the author's bidding without the master having to be physically present; the author can send her work around the world, and people can enjoy it in her absence. The master can decide how to use, or how others use, a slave; authors (on the moral rights theory) can decide how to use their work and to limit how others use their work.

But the analogy is also fundamentally deficient. Moral rights are based on the idea of personality—of the self being infused into the work and thereby creating an inseverable bond between the work and the author.<sup>133</sup> Rather than mirror that bond, the slave analogy distorts and perverts it. What kind of bond exists between a slave and his master? It is one of dominion and control, of subjection and oppression. Although the master has the right to limit what others do with her slave, the right is not predicated on some fundamental or sacred bond. It is instead dependent upon a particularly base proprietary relation. As a result, it suffers from the conceptual difficulties of analogizing intangible forms (or types) to property.

Moreover, the *m-s* analogy does not reflect the chief benefits of the *p-c* and *g-c* analogies, which tie the work to the author in some *personal* way. In both of those cases, the target “looks like” the source. What else could be more important than the work “resembling” the author in some way? Even more importantly, the *p-c* and *g-c* analogies at least give some account of the target “coming from” the source. The master-slave analogy cannot perform even this most basic function. Thus, if there is anything the relation between a slave and a master is not, it is an unbreakable personal bond. For this reason, the master-slave analogy does not help to explain what is special about the author-work relation. To the contrary, the morally repugnant nature of the master-slave analogy seems to militate against the specialness the author-work relation takes for granted.

#### ***D. The Lord-Vassal-Fief Analogy***

In PHILOSOPHY OF LAW, Josef Kohler suggests the author is like a lord, the publisher is like a vassal, and the work is like a fief.<sup>134</sup> Lords, vassals, and fiefs are the three components of an arrangement

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<sup>133</sup> See Simon, *Personality*, *supra* note 12, at Introduction, Chapters 1-3.

<sup>134</sup> JOSEF KOHLER, PHILOSOPHY OF LAW 78 (Adalbert Albrecht trans., 1914).

in the 10th–12th centuries known as feudalism.<sup>135</sup> Lords were those who held control of (sometimes allodial<sup>136</sup>) land, or fiefs.<sup>137</sup> Lords would “contract”<sup>138</sup> with vassals, who would exploit the land for the lord’s benefit. In exchange, the lord would provide to the vassal protection and maintenance. Kohler saw in this arrangement an analogy to the relation among the author, publisher, and work. The author is the lord, who has dominion over the work.<sup>139</sup> The author then appoints a publisher (as a vassal) to commercialize the work (the fief) so that the author (the lord) can reap the benefits.<sup>140</sup> Again, for consistency, the structure looks like this:

P<sub>1v</sub>: Lords and vassals have a special relationship with their fiefs that should be protected.

P<sub>2v</sub>: Authors and their works are like lords and fiefs.

C<sub>v</sub>: Authors and their works have a special relationship that should be protected.

Notwithstanding these differences, what happens when one applies the analogy to the author (as lord) and her work (as fief)? The analogy fails outright. Moral rights theorists object to characterizing the work as property, which is exactly what a fief is.<sup>141</sup> Thus,

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<sup>135</sup> F. L. GANSHOF, FEUDALISM, at xv-xvi (Philip Grierson trans., Univ. Toronto Press 1996).

<sup>136</sup> To hold land allodially meant to hold it in fee simple absolute, free and clear of title. But many times a lord held title by virtue of heredity, such as in England where “the king had become in law the only allodist” (as a result of the conquest). *Id.* at 130. Fiefs also could be held by vassals, and the lords of these vassals may not have held the land allodially.

<sup>137</sup> *Id.* at xi. Fiefs, however, were not limited to land; they could also be “some form of public authority, or a duty or right,” *id.* at 113, though such authority, duty, or right usually extended over some territory or land, *id.* at 114. The term “fief” was used only after the lord vassal relationship arose; prior to its use, the term “benefice” was commonly used. *Id.* at 106-12.

<sup>138</sup> In theory, the contract was entered into freely, but Ganshof writes that “it no doubt frequently happened that a man was compelled by force of circumstances to become the vassal of a lord.” *Id.* at 30.

<sup>139</sup> See KOHLER, *supra* note 123.

<sup>140</sup> *Id.*

<sup>141</sup> GANSHOF, *supra* note 135, at 46, 56, 82, 113-14.

whatever “personal bond” the author has with a work cannot be the kind of bond a lord has with his fief. The lord-fief relation, after all, is one of exploitation. Like the master and his slave, the lord exercises dominion over his fief solely for his own benefit. There is no role for a third party, the vassal, to play. The relationship seems to apply only to Kohler’s scenario of author-publisher-work.

What if, however, the work is somehow cast as the vassal, the entity that labors for the author’s benefit? This conception fares no better; again, it fails because the relation is one of reciprocal exploitation agreed to by contract, rather than a unique bond. Whatever bond had formed between the lord and his vassal during the early years of feudalism, Ganshof describes it as one of both compulsion and duty. It would be more than generous to characterize this as a duty to fulfill by a promise forced by circumstance. In reality, it is more aptly described as a coerced propriety relation.<sup>142</sup> To this end, Gansoff has emphasized “the ‘totalitarian’ character of the subordination of the vassal.”<sup>143</sup>

Worse still, the lord-vassal-fief relation often arose arbitrarily. Being a lord and, after a time, being a vassal, was a matter of heredity. The circumstances by which this occurred—namely, one’s birth—were purely arbitrary. That much is true also of an individual with high creative capabilities. But at least in latter case she is required to exercise her talents, to use them to produce whatever *she* is capable of producing. She does this without exploiting the services of another. The lord, by contrast, merely *uses someone else* and reaps the benefits they produce. For these reasons, moral rights will have to look elsewhere to explain the nature of the relation between and author and her work.

#### IV. MOVING PAST ANALOGIES

The key task for moral rights scholars is to explain the relationship between the author and her work. Analogies provide one method of doing this. At the very least, the analogies presented in this Article should illustrate what features of the author-work relation its proponents think are vital. They do so by forcing us to compare a familiar relation such as the parent-child relation, to a less familiar one: the author-work relation. Parents “create” children who

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<sup>142</sup> Ganshof describes how “Notker was elected abbot in 971, in the presence of Otto I, and became an imperial vassal: *meus tandem eris, ait, manibusque receptum osculatus est; moxque ille evangelio allato, fidem iuravit, ‘now at last you will be mine,’* said the emperor.” *Id.* at 78.

<sup>143</sup> *Id.* at 32.

resemble them, and likewise authors must “create” the work which will, in a looser sense, “resemble” the author or some aspect of her.

For all their potential usefulness, however, analogies also have inherent limitations. Because they describe one phenomenon in terms of another, they will almost never yield a definitive solution when employed as a problem-solving device. Many times, for example, they demonstrate differences between concepts, rather than similarities. In pointing out that children are like works, are we to seriously consider the duties we have to children as human beings the same or substantially similar to the duties we think nonauthors should have to works?

This problem with analogies in disciplines like law is not new, not even to moral rights. The conception of intellectual products as “property” is a prime example of this problem.<sup>144</sup> Both intellectual products and property require labor, can be owned, etc. But they are also fundamentally different: one is metaphysical while the other is physical; one is a public good while the other is not.

Early moral rights scholars faced similar problems.<sup>145</sup> These scholars wrestled with the idea of property, how it applied to intangible works, and its effect on authors’ rights. Morillot, Gareis, and Bluntschli, for example, rejected the property analogy outright while others like Kohler thought the analogy was useful.

In the context of moral rights, this Article showed that analogies tend to hide, rather than reveal, important questions. Each analogy seems to tap into an intuition or a feeling about the author’s relationship with her work. Maybe the author stands to her work as a parent stands to her child—the creator and guardian. Or perhaps the relation is closer to God and God’s creatures, those that God created out of whole cloth and over which God is entitled to dominion. Scholars also have offered other analogies: master and slave, lord and vassal. Ultimately, however, this Article showed that all of these analogies fail to describe the nature of author-work

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<sup>144</sup> The problem, of course, is not limited to property and intellectual property. Analogies face this problem in all areas. Discussions of the internet, for instance, face metaphorical problems. See, e.g., Brett M. Frischman, *The Prospect of Reconciling Internet and Cyberspace*, 35 LOY. U. CHI. L.J. 205 (2003).

<sup>145</sup> See Simon, *Personality*, *supra* note 12, at Chapters 1-2.



relation. The deficiencies of the analogies, in other words, outstrip their usefulness.<sup>146</sup>

Rather than illuminate, the analogies obfuscate. For this reason, they can be discarded. This is the first step. The second is to analyze the actual relationship between an author and her work. This is work that remains to be done.

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<sup>146</sup> Some analogies also fail in virtue of the faulty premises of the analogy's source. The God-creation analogy, for example, assumes that a creator should have dominion over his creatures simply because God created them. But this is a non-sequitur. Whether creation *implies* control is an open question.