



AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES

A REPORT OF THE REGISTER OF COPYRIGHTS

APRIL 2019





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ACKNOWLEDGEMENTS

It is my pleasure to deliver this report focusing on the personal rights of individual authors and artists, who have often been excluded in broader conversations about copyright legal reforms. The report represents a comprehensive review of this important topic by many people within the U.S. Copyright Office, and in particular, in the Office of Policy and International Affairs. Senior Counsels for Policy and International Affairs Kimberley Isbell and Chris Weston served as principal authors. Without their efforts in managing the complex research and writing needed to tackle this difficult subject, and their keen insight in identifying policy paths forward, this Report would not have been possible.

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Register of Copyrights and
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EXECUTIVE SUMMARY

Moral rights is not a topic that has generated significant policy focus within the United States until the past several years. Some may suggest this is a result of the United States' lack of strong protections in this area. Thus, the current Report represents the first comprehensive review of the United States' moral rights regime in three decades.¹ It provides a much-needed and comprehensive overview of how the rights of attribution (the right to be credited as the author of one's work) and of integrity (the right to prevent prejudicial distortions of one's work) are protected in the United States through a patchwork of federal and state laws, as well as industry customs and other forms of private ordering. It also suggests some potential changes to the patchwork that could, if implemented, enhance moral rights protections for all types of authors.

The landscape of moral rights in the United States is complex. At the time the United States formally agreed to recognize the rights of attribution and integrity with ratification of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") in 1988, Congress relied on a combination of federal and state law protections to do so, electing to forego adoption of a generally-applicable moral rights provision in federal copyright law. While the interests underlying moral rights have been legally protected, in varying degrees, for decades in the United States, the contours and substance of the patchwork of protections for these interests have shifted over time—enlarged by federal and state legislation, including certain narrowly tailored additions to title 17 adopted by Congress in the 1990s,² and contracted by judicial decisions limiting the availability of unfair competition and misappropriation laws, particularly lower courts applying the Supreme Court's 2003 decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.* ("*Dastar*").³ At the same time, a rich landscape of contractual agreements and other private ordering has risen up to further supplement the protections for authors' attribution and integrity interests available in the United States; these practices are well-established and vary substantially from industry to industry. Adding to the complexity, the U.S. moral rights

¹ The last government review occurred prior to the United States acceding to the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") in 1989. The need for a review of U.S. moral rights protections was first suggested by House Judiciary Committee Chairman Bob Goodlatte and Representative Jerrold Nadler in 2014, and formally requested by House Judiciary Committee Ranking Member John Conyers in 2015. See *Moral Rights, Termination Rights, Resale Royalty, and Copyright Term: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 4 (2014) ("*2014 Moral Rights Hearing*") (statements of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary; Rep. Jerrold Nadler, Ranking Member, H. Subcomm. on Courts, Intellectual Prop., & the Internet); *The Register's Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 49 (2015) ("*Register's Perspective Hearing*") (statement of Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary).

² Expansion of the protections for the rights of attribution and integrity include the passage of the Visual Artists Rights Act ("VARA") of 1990, the addition of section 1202 to title 17, and the passage of additional state statutes in the areas of the right of publicity and moral rights for authors of visual art works.

³ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

patchwork as it exists today also coexists and intersects with important limitations on the economic rights of authors as well as important First Amendment values.

In analyzing the U.S. moral rights framework, the Copyright Office embraced three general principles to guide its analysis. First, any potential changes to the U.S. moral rights framework must be harmonized with other critical elements of U.S. law, particularly the First Amendment, fair use, and respect for the constitutional requirement of limited copyright terms. Second, the vital importance to authors of adequately protecting their attribution and integrity interests cannot be overstated. Third, a review of U.S. moral rights protections must recognize that there is broad diversity among creative industries and categories of works, and that, accordingly, effective moral rights protections are not one-size-fits-all.

Based on all of these considerations, the Copyright Office concludes that many diverse aspects of the current moral rights patchwork—including copyright law’s derivative work right, state moral rights statutes, and contract law—are generally working well and should not be changed. Further, the Office concludes that there is no need for the creation of a blanket moral rights statute at this time. However, there are aspects of the U.S. moral rights patchwork that could be improved to the benefit of individual authors and the copyright system as a whole. Accordingly, the Office concludes that Congress may wish to consider narrow legislation in certain very specific cases:

- Lanham Act. While the Supreme Court’s *Dastar* decision narrowed the ability of authors to bring moral rights type claims under section 43(a) of the Lanham Act, there are still several avenues left for successful Lanham Act claims. Specifically, the Office believes that the text of the Lanham Act and the reasoning of the *Dastar* decision leave open claims for mis- or non-attribution of creative works in the following cases: (i) claims for passing off or material distortions of a work; (ii) false advertising claims under section 43(a)(1)(B),⁴ and (iii) claims for repackaging of expressive works in a way that misattributes them. However, Congress may want to consider adopting an amendment to section 43(a) of the Lanham Act that would expand the unfair competition protections to include false representations regarding authorship of expressive works. Any such amendment should be narrowly crafted to protect only against consumer confusion or mistake as to authorship or attribution of such works, and not to provide copyright protection or afford the author any additional control over permissible uses of the work. A narrowly focused amendment would mitigate

⁴ Section 43(a)(1) applies to “false designation[s] of origin, false or misleading description[s] of fact, or false or misleading representation[s] of fact.” Subsection (a)(1)(a) allows claims for such statements when they are “likely to cause confusion. . . as to the origin, sponsorship, or approval of his or her goods,” while subsection (a)(1)(B) provides a claim in connection with such statements when they are used “in commercial advertising or promotion[to] misrepresent[] the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods.” 15 U.S.C. § 1125(a).

the *Dastar* court's policy concerns about overlapping IP doctrines generally, and limitations on public domain uses specifically.

- Visual Artists Rights Act. The Office has identified three relatively minor legislative improvements to the Visual Artists Rights Act ("VARA"), codified in title 17 as section 106A, for consideration by Congress. VARA provides limited moral rights of attribution and integrity to authors of qualifying "works of visual art." Specifically, it protects a qualifying artist's right to claim or disclaim authorship in a work, and provides a limited right to prevent the distortion, mutilation, or modification of a work, as well as preventing the destruction of a "work of recognized stature." The first proposed change would clarify that VARA's exclusion for "commercial art" is limited to artworks both created pursuant to a contract and intended for commercial use. The second proposed change would add language clarifying how courts should interpret the "recognized stature" requirement, requiring courts to consult a broad range of sources. The third proposed change would provide that no joint author could waive another joint author's moral rights under VARA without the written consent of each affected author. These changes, taken together, would improve significantly the usefulness of VARA to protect artists' attribution and integrity interests—addressing some of the limitations that have hampered successful VARA claims without expanding VARA's scope beyond the sorts of works that Congress sought to protect.
- 17 U.S.C. § 1202. Congress may want to consider adding a new cause of action as section 1202A to title 17, which would offer a creator the ability to recover civil damages upon proof that a defendant knowingly removed or altered copyright management information ("CMI") with the intent to conceal an author's attribution information. Such a dual intent standard would, in a manner similar to the existing section 1202, protect against liability for innocent or good faith removal of CMI, while giving creators a new tool to prevent deliberate efforts to conceal their authorship of a work. This would address the difficulty in proving intent to commit infringement, while narrowly focusing on issues of authors' attribution rights.
- Right of Publicity. Congress may also wish to consider adoption of a federal right of publicity law as a means to reduce the uncertainty and ambiguity created by the diversity of state right of publicity laws. A federal right of publicity law, rather than preempting state laws, could serve as a floor for minimum protections for an individual's name, signature, image, and voice against commercial exploitation during their lifetime. Any such law, if adopted, should include an exception for First Amendment-protected activities and may require significantly more government analysis since this was not the sole focus of the current review.

The Copyright Office believes that the U.S. moral rights patchwork continues to provide important protections, despite acknowledging the value of targeted improvement in some areas. Title 17 and other federal and state laws, including unfair competition and misappropriation doctrines, combined with a robust private ordering landscape, provide an author with a

patchwork of means by which to protect and enforce their interests in being credited as the author of their work and to preserve the integrity of that work. Nonetheless, this patchwork has been narrowly interpreted over the years in ways that could undermine the important rights of individual authors and artists. Should Congress wish to strengthen—and/or streamline—the U.S. moral rights framework, this Report provides a roadmap for doing so.

I. INTRODUCTION AND STUDY HISTORY

Taken from the French phrase *droit moral*, the term “moral rights” generally refers to certain non-economic rights that are considered personal to an author.⁵ Central to the idea of moral rights is the idea that a creative work, such as a song or book, actually expresses the personality of the author.⁶ Society has long recognized the importance of such a bond between a creative work and its author: as far back as the early 1500s, courts in France recognized that only the author has a right to publish their work.⁷ Over the course of the last two centuries, countries have increasingly codified this close connection between the author and their work, first through judicial doctrines and limited statutory protections for certain aspects of moral rights, such as a right of first publication, and later through formalized statutory moral rights schemes.⁸

While countries have come to recognize a variety of different moral rights, the two most commonly recognized moral rights are the right of an author to be credited as the author of their work (the right of attribution),⁹ and the right of an author to prevent prejudicial distortions of their work (the right of integrity), both of which were codified at the international level in the

⁵ See 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* ¶ 10.02, at 586–87 (2d ed. 2006) (“RICKETSON & GINSBURG”). However, while moral rights are typically considered non-economic, study commenters pointed out that the right of attribution in fact has economic importance for an author as well as a reputational importance. See *Session 4: The Importance of Moral Rights to Authors*, in *Symposium Transcript, Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, 8 GEO. MASON J. INT’L COM. L. 87, 91 (2016) (“*Session 4, Symposium Transcript*”) (remarks of David Lowery, songwriter/recording artist) (noting the importance of proper attribution for building a fan base and achieving ancillary licensing deals).

⁶ As used in this Report, the term “author” includes all human creators of copyright-protected works, including visual artists and performers.

⁷ See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 18–19* (1993) (“ROSE, AUTHORS AND OWNERS”) (discussing decisions by the Parlement of Paris (acting as a court of first instance) prohibiting booksellers from engaging in the unauthorized printing and selling of certain works, ultimately granting the authors of those works the exclusive right to publish the works at issue).

⁸ See *infra* Section II.A.

⁹ Attribution can include both positive and negative rights, *i.e.*, the author’s right to be identified as the author of their work as well as the right to not be identified as the author of works they did not author. See WORLD INTELLECTUAL PROPERTY ORGANIZATION, *GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS* (PARIS ACT, 1971) 41 (1978) (“GUIDE TO THE BERNE CONVENTION”), available at https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf; Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 219 (1995).

1928 Rome revision of the Berne Convention.¹⁰ It was not until 1989, however, that the United States became subject to an obligation to provide moral rights protections for authors by joining the Berne Convention.¹¹ At that time, Congress determined that the United States provided protection for the rights of attribution and integrity through an existing patchwork of laws.¹² This patchwork included federal laws such as the Lanham Act and certain provisions of the Copyright Act, as well as state laws relating to privacy and publicity, contracts, fraud and misrepresentation, unfair competition, and defamation.¹³ The exact contours of this patchwork of protections for moral rights in the United States has changed over the ensuing three decades, with Congress adding two additional elements to the patchwork: in 1990, Congress passed VARA, which guarantees to authors of “works of visual art” the right to claim or disclaim authorship in a work and limited rights to prevent the distortion, mutilation, or modification of the work;¹⁴ and in 1998 Congress added section 1202 to title 17, which prohibits both providing false copyright management information (“CMI”) and removing or altering CMI in certain circumstances.¹⁵

Along with the post-Berne accession changes wrought by VARA and the advent of section 1202, significant changes in technology and business practices have altered how rights of attribution and integrity are experienced by authors in the United States.¹⁶ Most notably, the growth of the internet as the primary locus for buying, selling, and licensing works of authorship has meant that original works in digital form have become more accessible to more people. On the one hand, this has meant that the attribution and integrity of works have been more susceptible to mishandling and manipulation. For example, the metadata containing attribution and other information for creative works is very simple to remove (or “strip”) or replace with

¹⁰ Berne Convention for the Protection of Literary and Artist Works art. 6bis(1), Sept. 9, 1886, *as revised* June 2, 1928, 123 L.N.T.S. 233, 248, 250 (“Rome Text”) (“Indépendamment des droits patrimoniaux d'auteur, et même après la cession desdits droits, l'auteur conserve le droit de revendiquer la paternité de l'oeuvre, ainsi que le droit de s'opposer à toute déformation, mutilation ou autre modification de ladite oeuvre, qui serait préjudiciable à son honneur ou à sa réputation.”). English did not become an official language for the Berne Convention until the 1967 Stockholm Text. For an unofficial English translation of the Rome Text, see *id.* at 249, 251 (“Independently of the author’s copyright, and even after the transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation.”).

¹¹ See Berne Convention Implementation Act (“BCIA”) of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified in scattered sections of 17 U.S.C.).

¹² See H.R. REP. NO. 100-609, at 37–38 (1988); S. REP. NO. 100-352, at 9–10 (1988).

¹³ See *id.*

¹⁴ Visual Artists Rights Act (“VARA”) of 1990, Pub. L. No. 101-650, 104 Stat. 5128, 5128–29 (codified at 17 U.S.C. § 106A).

¹⁵ Digital Millennium Copyright Act (“DMCA”), Pub. L. No. 105-304, 122 Stat. 2860, 2872–74 (1998) (codified as amended at 17 U.S.C. § 1202).

¹⁶ See Study on the Moral Rights of Attribution and Integrity: Notice of Inquiry, 82 Fed. Reg. 7870, 7874 (Jan. 23, 2017) (“Moral Rights NOI”).

erroneous information. A work stripped of proper identifying information then can be disseminated widely to the detriment of both the author's reputation and ability to profit from the work.¹⁷ Similarly, the increasingly accessible video editing technology behind "deepfake" software can not only fundamentally alter the content of an author's work, but can also lead to social and moral harm for the artists and the subject of the video through malicious use.¹⁸ On the other hand, digital technologies such as fingerprinting and visual recognition software that allow photographers to identify and track metadata related to their works on the internet have enabled authors to combat some of these threats to their attribution and integrity interests.¹⁹ Whether considered as a useful tool or a threat to protection of integrity and attribution interests, there is no question that technology has transformed the moral rights landscape in the United States.

Acknowledging this transformed landscape of moral rights protections in the current era, Congress held a hearing on July 15, 2014, on the topic of moral rights protections in the United States as part of its broader review of U.S. copyright law. At the hearing, both the Chairman of the House Judiciary Committee and the Ranking Member of the Committee's Subcommittee on Courts, Intellectual Property, and the Internet expressed interest in knowing more about how existing U.S. law, including provisions found in title 17 of the U.S. Code and other federal and state laws, protects the moral rights of attribution and integrity, and whether any additional protection is advisable in this area.²⁰ At a subsequent hearing in 2015, responding to a suggestion from then-Register of Copyrights Maria Pallante, the Ranking Member of the House Judiciary Committee requested that the Copyright Office conduct a moral rights study.²¹

¹⁷ See, e.g., *Session 4*, Symposium Transcript, 8 GEO. MASON J. INT'L COM. L. at 90–91 (remarks of David Lowery, songwriter/recording artist) (commenting on the negative effects of having a song of his misattributed for several years to Tom Petty on online music sites); Coalition of Visual Artists, Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 25 (Mar. 28, 2017) ("CVA Initial Comments") ("The Internet displays images and allows the copying and theft of those images by a simple right click of a mouse without permission from the creator. In the process, sometimes the metadata is stripped from the image. The loss of attribution causes the visual creator to lose control and income from his/her work and lose the ability to license those images.").

¹⁸ See, e.g., *I Never Said That! High-Tech Deception of 'Deepfake' Videos*, CBS NEWS (July 2, 2018), <https://www.cbsnews.com/news/i-never-said-that-high-tech-deception-of-deepfake-videos/>; George Dvorsky, *Deepfake Videos are Getting Impossibly Good*, GIZMODO (June 12, 2018, 1:05 PM), <https://gizmodo.com/deepfake-videos-are-getting-impossibly-good-1826759848>.

¹⁹ See *Session 4*, Symposium Transcript, 8 GEO. MASON J. INT'L COM. L. at 93 (remarks of Yoko Miyashita, Getty Images) (discussing the digital fingerprinting technology used by Getty Images).

²⁰ See *2014 Moral Rights Hearing* at 4 (statements of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary; Rep. Jerrold Nadler, Ranking Member, H. Subcomm. on Courts, Intellectual Prop., & the Internet).

²¹ *Register's Perspective Hearing* at 49 (statement of Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary). The Department of Commerce's Internet Policy Task Force has also been touching on these issues in its exploration of the digital marketplace for copyrighted works, particularly with respect to how technology can aid in connecting attribution to works and facilitating creator control of downstream uses. The most recent public meeting of the task

As part of the preparation for this Study, the Copyright Office co-hosted a daylong symposium on moral rights in April 2016 in order to hear views about current issues on this subject from authors, scholars, and other stakeholders. On January 23, 2017, the Copyright Office published a Notice of Inquiry in the *Federal Register* announcing the study and soliciting public input.²² The Copyright Office received 46 initial comments and 16 reply comments from a broad range of interested stakeholders in response to the Notice.²³

This Report evaluates the current state of protections for the rights of attribution and integrity in the United States, assessing the myriad changes to the moral rights landscape that have resulted from significant legal, technological, and business developments over the past thirty years. The Study's record reveals a great diversity of opinions among different stakeholders concerning the strength of existing, and the potential need for additional, moral rights protections. Based on the Office's review of the record, as well as additional research conducted by the Office, we do not recommend the introduction of a blanket moral rights statute at this time. Instead, we conclude that many aspects of the U.S. moral rights landscape remain useful for authors and performers. We also acknowledge the desirability of certain targeted changes to strengthen protections for individual creators.²⁴ Thus, should Congress wish to take further steps to update the moral rights regime, this Report offers possible pathways for improvements in the areas of the Visual Artists Rights Act ("VARA"), section 1202 of title 17, the Lanham Act, and the right of publicity.

II. DEVELOPMENT OF MORAL RIGHTS IN THE UNITED STATES AND ABROAD

To lay the foundation for this Report's discussion of current U.S. moral rights issues, it is necessary to sketch the development of the legal concept of moral rights internationally, as well as its evolution in the United States.

force was held on March 28, 2019. Further information about the task force's work on this area can be found at <https://www.ntia.doc.gov/category/copyright>.

²² See Moral Rights NOI.

²³ A transcript of the symposium and links to all written comments, as well as other background material on this Study, are available at <https://www.copyright.gov/policy/moralrights/>. A list of symposium participants is attached to this Report as Appendix A, the text of the Notice of Inquiry is attached as Appendix B, and a list of commenters in response to the Notice is attached as Appendix C.

²⁴ In addition to this Report, the Office recently issued a letter to Congress discussing responses to challenges faced by authors of visual works. See Letter from Karyn A. Temple, Acting Register of Copyrights & Dir., U.S. Copyright Office, to Lindsey Graham, Chairman, Comm. on the Judiciary, U.S. Senate, and Dianne Feinstein, Ranking Member, Comm. on the Judiciary, U.S. Senate (Jan. 18, 2019), available at <https://www.copyright.gov/policy/visualworks/senate-letter.pdf>; Letter from Karyn A. Temple, Acting Register of Copyrights & Dir., U.S. Copyright Office, to Jerrold Nadler, Chairman, Comm. on the Judiciary, U.S. House of Representatives, and Doug Collins, Ranking Member, Comm. on the Judiciary, U.S. House of Representatives (Jan. 18, 2019), available at <https://www.copyright.gov/policy/visualworks/house-letter.pdf>.

A. International Development of the Concept of Moral Rights

The rights of attribution and integrity have long histories; the concepts embodied therein have been recognized in some form in many countries of the world for centuries. In the cultures of Nigeria, oral literature was put into written form with attribution to the original author.²⁵ Similarly, some scholars see precursors of both the rights of attribution and integrity in social norms dating back to Roman times.²⁶ Formal statutory codification of moral rights, however, is a more recent development.

Some of the earliest legal recognitions for something analogous to modern moral rights date back to the Renaissance, when courts and legislatures began to recognize that authors had a reputation-based interest in controlling at least the initial public dissemination of their works. In France, often considered the birthplace of modern moral rights, a court recognized that only the author has a right to publish his work as early as 1504.²⁷ Other countries began recognizing a similar right of first publication in the decades that followed. Such a right was recognized in a public edict by the Venetian Council of Ten in 1545, while the English Parliament issued a decree in 1642 requiring publishing houses to receive author consent before publishing works.²⁸ In fact, in many countries recognition for a first publication right predated the legal recognition of copyrights, which began to be codified throughout Europe during the eighteenth century.²⁹

At the same time countries were codifying economic copyright protections for authors, the rights of attribution and integrity began to receive explicit, but limited, statutory legal protection. The French National Assembly codified in national law a proto-right of attribution and integrity

²⁵ See Nkem Itanyi & Madunatu Chikaodili Nwamaka, *An Appraisal of the Operational Problems Hindering the Protection of Performer's Rights as Copyright in Nigeria*, 14 U.S.-CHINA L. REV. 608, 610 (2017).

²⁶ See Katharina de la Durantaye, *The Origins of the Protection of Literary Authorship in Ancient Rome*, 25 B.U. INT'L L.J. 37, 68–76 (2007).

²⁷ ROSE, AUTHORS AND OWNERS 18–19.

²⁸ ROSE, AUTHORS AND OWNERS 20–22.

²⁹ See, e.g., *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Copies, during the Time therein mentioned* (“Statute of Anne”), 8 Ann., c. 19 (1710) (Gr. Brit.); *Décret du 19 julliet 1793 de la Convention Nationale relatif aux droits de propriété des Auteurs d’écrits en tout genre, des Compositeurs de musique, des Peintres et des Dessinateurs* [Decree of July 19, 1793 of the National Convention regarding the property right of authors to writings of all kinds, of composers of music, of painters and illustrators] (Fr.). The impetus for such “copyright” statutes grew out of the philosophy of John Locke, with his idea of ownership stemming from the mixing of man’s labor with anything man removes from nature, along with the European Renaissance’s romanticized notion of the author. See ROSE, AUTHORS AND OWNERS 5, 18; see also JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

for playwrights in 1791.³⁰ Similarly, early forms of protection for the rights of attribution and integrity were codified in the German Laws of 1870 and 1876.³¹

Although copyright protections were harmonized at the international level in 1886 through the adoption of the Berne Convention, over forty years elapsed before the first international codification of the emerging rights of attribution and integrity. In 1928, the Berne Convention was updated to add a requirement for recognition of the rights of attribution and integrity as article *6bis*, which read:

. . . the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honor or reputation.³²

At the time of the 1928 revisions to the Berne Convention, recognition of these moral rights had been statutorily codified in a few, but not all, signatory countries.³³ While Japan added a statutory moral rights provision as early as 1899,³⁴ many other countries did not adopt such statutory protections until years later. Canada added a statutory protection for the rights of attribution and integrity to its copyright law in 1931.³⁵ Later adopters of statutory moral rights

³⁰ See Susan P. Liemer, *On the Origins of Le Droit Moral: How Non-Economic Rights Came to be Protected in French IP Law*, 19 J. INTELL. PROP. L. 65, 108–09 (2011).

³¹ See 1 RICKETSON & GINSBURG ¶ 10.03, at 588.

³² Berne Convention for the Protection of Literary and Artist Works art *6bis*(1), Sept. 9, 1886, *as revised* June 2, 1928, 123 L.N.T.S. 233 (“Rome Text”). Relatedly, but in a separate section, in 1948 WIPO members amended the Berne Convention to include a requirement for attributing the source and name of the author of a quotation. See Berne Convention for the Protection of Literary and Artistic Works art. 10(3), Sept. 9, 1886, *as revised* June 26, 1948, 331 U.N.T.S. 217 (“Brussels Text”). Additional international recognition of moral rights was provided in the 1948 Universal Declaration of Human Rights, which states, “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” G.A. Res. 217 (III) A, Art. 27(2), at 76, Universal Declaration of Human Rights (Dec. 10, 1948). However, the Declaration is “not a treaty or international agreement . . . impos[ing] legal obligations.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–35 (2004) (internal quotation marks omitted).

³³ By the mid-1920s, Bulgaria, Czechoslovakia, Finland, Germany, Italy, Japan, Poland, Romania, and Switzerland had all adopted statutory protections for the right of attribution, the right of integrity, or both. See 1 RICKETSON & GINSBURG ¶¶ 10.03–10.06, at 587–90.

³⁴ Article 18 of the Copyright Act, Law No. 39 of 1899, art. 18, protected *mukeijo no kenri*, rights belonging “exclusively to the author and constitut[ing] a part of his personality right.” Teruo Doi, *Parody, Fair Use, and Moral Rights from the Japanese Perspective*, 24 J. INT’L ASS’N FOR PROTECTION INDUS. PROP. JAPAN 16, 24 (1999) (internal citation omitted).

³⁵ Copyright Act, S.C. 1921, c 24, s 1, art 12(5) (Can.), *amended by* the Copyright Amendment Act, 1931, 21 & 22 Geo. 5, c. 8 (UK). One scholar suggests that this is because of Canada’s somewhat unique mix of common and civil law traditions. See Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 232 (1995); see also PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES,

included two original 1886 signatories to the Berne Convention: the United Kingdom in 1988³⁶ and Switzerland in 1992.³⁷ Even Australia and New Zealand, which both signed the Rome Text in 1928 with its new article *6bis*,³⁸ did not add explicit moral rights protections to their copyright statutes until 2000³⁹ and 1994,⁴⁰ respectively. Similarly, while Singapore has codified certain moral rights in its copyright laws, it was not until this year that it proposed the adoption of a statutory right of attribution after a multi-year public consultation.⁴¹ It bears repeating that the relatively recent trend towards statutory codification of moral rights does not mean that these

LAW, AND PRACTICE 346 (2d ed. 2010) (“GOLDSTEIN & HUGENHOLTZ”) Emir Aly Crowne Mohammed, *Moral Rights and Mortal Rights in Canada*, 4 J. INTELL. PROP. & PRAC. 261, 261 (2009).

³⁶ See Dworkin, 19 COLUM.-VLA J.L. & ARTS at 238.

³⁷ See Jacques de Werra, *Switzerland*, in MORAL RIGHTS 579 (Gillian Davies & Kevin Garnett eds., 2010) (“Werra in MORAL RIGHTS”).

³⁸ See CONFÉRENCE DE ROME, *Acte Adopté par la Conférence Convention de Berne pour la Protection des Œuvres Littéraires et Artistiques du 9 Septembre 1886, Révisée à Berlin le 13 Novembre 1908 et à Rome le 2 Juin 1928* at 332–33 (signature of W. Harrison Moore on behalf of Australia and S. G. Raymond on behalf of New Zealand), available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=278725.

³⁹ Copyright Amendment (Moral Rights) Act 2000, 2000 No. 159, pt. IX (Austl.).

⁴⁰ Copyright Act 1994, 1994 No. 143, pt. 4, art. 106 (N.Z.).

⁴¹ See MINISTRY OF LAW & INTELLECTUAL PROP. OFFICE OF SING., SINGAPORE COPYRIGHT REVIEW REPORT 19–20 (Jan. 17, 2019), available at <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Press%20Release/Singapore%20Copyright%20Review%20Report%202019/Annex%20A%20%20Copyright%20Review%20Report%2016%20Jan%202019.pdf>.

jurisdictions did not previously recognize or protect moral rights,⁴² just that such protection tended to exist either in criminal statutes,⁴³ case law,⁴⁴ or by analogy in economic copyright law.⁴⁵

B. Variability in the Protection of Moral Rights Internationally

As the foregoing indicates, there is a significant amount of variation in how moral rights are recognized around the world, as well as the manner in which they are protected. For example, in addition to the rights of attribution and integrity, other countries have recognized a number of additional moral rights, some of which are counterparts to economic rights, including:

- the right of withdrawal, or *droit de repentir*, which allows authors to retract works from public circulation that they feel no longer represent them or their views;⁴⁶

⁴² See ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS* 89–93 (2006) (discussing Romanian, Italian, Polish, Czechoslovakian, Portuguese, Swiss, and Finnish laws that provided protection of moral interests and led to the development of Article 6*bis* in the Rome Text).

⁴³ Moral rights were protected in Canada by provisions in the criminal code and by common law principles. See DAVID VAVER, *INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENTS, TRADE-MARKS* 88–89 (1997). In Liberia, plagiarizing another's work was a crime. See 2 LIBERIAN CODE OF LAWS OF 1956, TITLES 12–26, at 921 tit. 25, ch. 2, § 35 (Cornell Univ. Press) (1957).

⁴⁴ As mentioned earlier, court cases in France recognized some protection for the rights of attribution and integrity in the nineteenth century. See Liemer, 19 J. INTELL. PROP. L. at 111–22; STINA TEILMANN-LOCK, *BRITISH AND FRENCH COPYRIGHT: A HISTORICAL STUDY OF AESTHETIC IMPLICATIONS* 134 (2009); Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 IND. INT'L & COMP. L. REV. 423, 426 (1999). Australia used a smattering of common law rights and different provisions of their Copyright Act, including a prohibition against false attribution, a derivative works right, a tort of passing off, the tort of defamation, and contract law. See COPYRIGHT LAW REVIEW COMM., REPORT ON MORAL RIGHTS 6–10 (1988); COPYRIGHT LAW REVIEW COMM., REPORT OF THE COMMITTEE APPOINTED BY THE ATTORNEY-GENERAL OF THE COMMONWEALTH TO CONSIDER WHAT ALTERATIONS ARE DESIRABLE IN THE COPYRIGHT LAW OF THE COMMONWEALTH 90 (1959).

⁴⁵ The United Kingdom's pre-existing publication and adaptation rights were seen as protecting the rights of disclosure and integrity, respectively. See Dworkin, 19 COLUM.-VLA J.L. & ARTS at 232–33.

⁴⁶ Such a right is recognized in, for example, Belgium, France, Germany, India, Italy, Spain, and the countries of the Organisation Africaine de la Propriété Intellectuelle ("OAPI"). See GOLDSTEIN & HUGENHOLTZ at 354–55; Dietz, 19 COLUM.-VLA J.L. & ARTS at 203 n.23, 205; Arathi Ashok, *Moral Rights—TRIPS and Beyond: The Indian Slant*, 59 J. COPYRIGHT SOC'Y U.S.A. 697, 708 (2012); Robert Platt, *A Comparative Survey of Moral Rights*, 57 J. COPYRIGHT SOC'Y U.S.A. 951, 981–82 (2010). This right has been compared to the U.S. Copyright Act's sections 203 and 304(c) termination rights. See GOLDSTEIN & HUGENHOLTZ at 355 ("The U.S. Copyright Act's termination of transfer provisions roughly approximate the civil law right of recall by giving authors and their statutory successors a nonwaivable right to terminate copyright transfers after a specified period.").

- the right of divulgation, through which an author can control the public disclosure of their work, and which supports the economic right of first publication;⁴⁷
- the right of the author to have access to the original copy of a work in order to “exercise his author’s rights”;⁴⁸
- the right to prevent others from associating one’s work with an undesirable “product, service, cause or institution”;⁴⁹
- the right to pseudonymity;⁵⁰ and
- the right of an author to compel the completion of a commissioned work of art.⁵¹

Additionally, not all countries protect the rights of attribution and integrity in the same manner, and many countries have laws protecting discrete aspects of those rights using different terminology.⁵² As many scholars have noted, civil law and common law countries historically took different approaches to the protection of authors’ moral rights: while many civil law countries conceived of moral rights as separate and distinct from an author’s economic rights, common law countries tended to conceive of moral rights as part and parcel of the general

⁴⁷ Such a right is recognized in, for example, Egypt, France, Germany, India, and the OAPI countries. See GOLDSTEIN & HUGENHOLTZ at 353; Ashok, 59 J. COPYRIGHT SOC’Y U.S.A. at 708; Heba A. Raslan, *Shari’a and the Protection of Intellectual Property—the Example of Egypt*, 47 IDEA 497, 542 (2007); Platt, 57 J. COPYRIGHT SOC’Y U.S.A. at 977, 981–82.

⁴⁸ Such a right is recognized in, for example, Switzerland. See Werra in MORAL RIGHTS at 591.

⁴⁹ Such a right is recognized in, for example, Canada. See Lesley Ellen Harris, *Moral Rights in Canadian Copyright Law*, 34 LAW NOW 14, 15 (2010).

⁵⁰ Such a right is recognized in, for example, Indonesia and the United Kingdom. See Undang-Undang Republik Indonesia Nomor 28 Tahun 2014 tentang Hak Cipta [Law of the Republic of Indonesia Number 28 Year 2014 Copyright] art. 5(1)(b); Copyright, Designs and Patents Act 1988, c. 48, § 77(8) (UK); see also GUIDE TO THE BERNE CONVENTION 41.

⁵¹ Such a right is recognized in, for example, France. See Vera Zlatarski, Note, “Moral” Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States, 23 COLUM.-VLA J.L. & ARTS 201, 205–06 (1999) (referring to recognition of the right by French courts as an extension of moral rights).

⁵² See, e.g., Yong Wan, *Moral Rights of Authors in China*, 58 J. COPYRIGHT SOC’Y U.S.A. 455, 475 (2011) (discussing the right of alteration in China, which gives the author the right to alter or authorize others to alter a work); Zhiwen Liang, *Between Freedom of Commerce and Protection of Moral Rights: The Chinese Experience and a Comparative Analysis*, 57 J. COPYRIGHT SOC’Y U.S.A. 107, 111 (2009–10) (noting that moral rights in China include paternity and integrity, as well as disclosure and revision/alteration rights); Josabeth A. Antonio & Jannette V. Sevilla, *The Creator’s Moral Rights Under Philippine Law*, 62 PHIL. L.J. 16, 22 (1987) (discussing the right of alteration in the Philippines as separate from the right of integrity or the right to control derivative works); Leanne Wiseman, *Moral Rights in the Australian Academy: Where to Now?*, 28 U. NEW SOUTH WALES L.J. 98, 108 (2005) (discussing the Australian right to prevent false association, in addition to the right of attribution).

copyright protections afforded to an author.⁵³ Although the Berne Convention largely adopted the civil law approach, conceptualizing moral rights as separate from economic rights,⁵⁴ member states have wide discretion in how they chose to implement the moral rights protections of Article 6bis.⁵⁵ For this reason, the contours of the rights of attribution and integrity look quite different, depending upon the country.⁵⁶

One area in which there is significant variance among countries is in how they approach the concepts of waivability and alienability of moral rights. While moral rights are often described as “inalienable,” “nonwaivable,” or in other terms that express the inherent relationship between author and work, moral rights are in fact often waivable and sometimes also alienable under many countries’ moral rights schemes.⁵⁷ In some countries like Canada, waivability is explicitly spelled out in the statute.⁵⁸ Elsewhere, it is inferred by the ability of authors to authorize certain uses of their works, such as in Nigeria, Germany, France, China, and

⁵³ See, e.g., Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.’s New Performances Regulations*, 24 B.U. INT’L L.J. 213, 213–14 (2006). But see A. G. Matveev, *Models of Copyrights System*, 8 WORLD ACAD. SCI., ENGINEERING & TECH. INT’L J.L. & POL. SCI. 2393 (2014); Emilian Ciongaru, *The Monistic and the Dualistic Theory in European Law*, 1 ACTA UNIVERSITATIS GEORGE BACOVIA. JURIDICA 212 (2012); Özge Akun Mengenli, *Does it Make a Difference to Follow Monism or Dualism?*, 3 ANKARA B. REV. 85 (July 2010).

⁵⁴ See Bird & Ponte, 24 B.U. INT’L L.J. at 214.

⁵⁵ 1 RICKETSON & GINSBURG ¶ 17.81, at 1149.

⁵⁶ See, e.g., Cyrill P. Rigamonti, *Article, Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 380 (2006) (theorizing that there are seven decisional rules core to any moral rights regime and that these may be rationalized differently in different regimes).

⁵⁷ See, e.g., GOLDSTEIN & HUGENHOLTZ at 355–56 (noting that “[a]lthough there is a popular tendency to view moral rights as absolute, legislation in only a few countries even approaches this extreme,” as moral rights in most countries last the same duration as an author’s economic rights, may be subject to waiver (even if not alienable), and are also subject to exemptions); Dietz, 19 COLUM.-VLA J.L. & ARTS at 221 (1995), (discussing that “a concept of absolute inalienability and of exclusion of waiver is not compatible with the laws of even the most fundamental moral rights countries”); Rigamonti, 47 HARV. INT’L L.J. at 380 (“[T]he element of inalienability, although absolutely central to Continental moral rights consciousness, boils down to little more than a handful of rather narrow limitations on the content of copyright contracts.”).

⁵⁸ Copyright Act, R.S.C. 1985, c C-42, art 14.1(2)–(4) (Can.).

Switzerland.⁵⁹ This ability to waive moral rights is generally tempered by limits designed to protect authors from unwittingly or unwillingly waiving their rights.⁶⁰

Another area of variation in international approaches to moral rights has to do with how the country's laws treat situations where a work is "authored" by a corporation or has many "authors" that all contribute a small piece to a larger whole.⁶¹ In some countries that have adopted copyright ownership rules similar to the work-for-hire doctrine in the United States, corporations are allowed to hold and assert moral rights in such works. For example, South Korea, Japan, and China all designate employers as the default legal author of works created by employees, including for some moral rights purposes, although they allow the parties to contract

⁵⁹ See, e.g., BANKOLE SODIPO, *COPYRIGHT LAW: PRINCIPLE, PRACTICE & PROCEDURE* 159 (2d ed. 2017) ("SODIPO") ("Notwithstanding the inalienable nature of moral rights under Nigerian law, it follows that where the owner of a moral right being aware of his right signs an agreement or does an unequivocal act affirming that he will not enforce his right, he will be estopped from enforcing his moral right."); *Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 100th Cong. 92 (1987–88) ("1987 BCIA Hearings") (statement of Dorothy Schrader, General Counsel, U.S. Copyright Office) ("[I]n Germany it is common to transfer the moral right by contract."); GOLDSTEIN & HUGENHOLTZ at 356 ("For example, while moral rights are in civil law deemed unwaivable and nontransferable, it is generally accepted that a license granted to adapt a work implies a degree of freedom to the adapter."); 1987 BCIA Hearings at 327 (written statement of Kenneth W. Dam, Vice President, Law and External Affairs, International Business Machines) ("French courts tend to enforce contracts permitting reasonable alterations of an author's work"); Liang, 57 J. COPYRIGHT SOC'Y U.S.A. at 124–26 (pointing out that "[a]lthough the ability to waive moral rights under Chinese copyright law is not clear, it can be inferred from statutes and also is recognized by judicial opinions"); Werra in MORAL RIGHTS at 595–97 (noting that the waivability of moral rights in Switzerland often involves analysis of copyright, civil, and contract interpretation).

⁶⁰ See, e.g., SODIPO at 155–61 (explaining that Nigeria's law requires any waiver of moral rights to be unequivocal and in writing); Werra in MORAL RIGHTS at 585 (explaining that Swiss law prohibits blanket waivers).

⁶¹ In the United States, many of these types of works are subject to the work-made-for-hire doctrine, which resolves the issue of multiple authors by substituting a legal fiction of a single author—the employer. See generally Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1 (2003) (discussing work made for hire practices developing early in cartography, then theater, publishing, and collaborative art works; and outlining the rationale behind the introduction of a statutory work-made-for-hire doctrine in the 1909 Copyright Act).

around this default.⁶² Indian courts have also recognized moral rights for corporations.⁶³ In contrast, under both Swiss and French law, moral rights can attach only to natural authors and not corporate entities; employees may maintain or waive their rights, but employing companies cannot hold them.⁶⁴ Several countries, including France and Israel, require that moral rights remain with the natural author even when the law or a contract transfers economic rights away.⁶⁵ Countries have also adopted different approaches regarding how to address potential conflicts that may arise resulting from the grant of moral rights to different contributors. For example, Guatemalan authors contributing to newspapers do not have control of their contributions when combined in a newspaper, but they do have rights in their works when those works stand alone.⁶⁶

⁶² See Copyright Act, Act No. 432, Jan. 28, 1957, *amended by* Act No. 14634, Mar. 21, 2017, arts. 9–10 (S. Korea); Chosakuken Hō [Copyright Act], Law No. 48 of 1970, *amended by* Law No. 35 of 2014, arts. 15, 17 (Japan); Copyright Law of the People’s Republic of China (promulgated by Order of the President of the People’s Republic of China, Feb. 26, 2010, effective Apr. 1, 2010) No. 26, art. 16, *available at* <http://en.ncac.gov.cn/copyright/contents/10365/329083.shtml>; see also Liang, 57 J. COPYRIGHT SOC’Y U.S.A. at 118–21 (noting that while the right of attribution remains with the natural author in China, employers maintain the right of integrity and may set limits on the creator’s attribution rights). The Chinese work-made-for-hire situation is particularly interesting given the otherwise complete inalienability of moral rights under Chinese law. *Id.* at 111–12 (“Moral rights under the Chinese Copyright Act . . . cannot be transferred to third parties, including the heirs of an author.”).

⁶³ See *Sholay Media & Entm’t Private Ltd. v. Parag Sanghavi*, Delhi HC, Aug. 24, 2015, CS (OS) 1892/2006, 20 (India) (issuing a permanent injunction in favor of plaintiff film corporation that included an injunction “from infringing the moral rights of the plaintiffs, and from distorting, mutilating, modifying or doing any other act that is prejudicial to the honour and reputation of the work as well as to the plaintiffs and their work”).

⁶⁴ See Werra in MORAL RIGHTS at 581 (noting that under Swiss copyright law, an author, defined as the physical person who created the work, is the beneficiary of moral rights; meaning corporate entities “can never become legal beneficiaries of moral rights (even if they may benefit from waivers of moral rights obtained from relevant authors”); Marie-Andrée Weiss, *Corporations Have No Moral Rights over Works in France, Even if They Commissioned It*, 1709 BLOG (Nov. 29, 2016), <http://the1709blog.blogspot.fr/2016/11/corporations-have-no-moral-rights-over.html> (citing Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 16, 2016, No. 15-22723 (Fr.)) (“[N]either the existence of a contract of employment nor ownership of the material support of the work are likely to confer on the corporation employing the author the enjoyment of that [moral] right.”).

⁶⁵ See Marie-Andrée Weiss, *Corporations Have No Moral Rights over Works in France, Even if They Commissioned It*, 1709 BLOG (Nov. 29, 2016), <http://the1709blog.blogspot.fr/2016/11/corporations-have-no-moral-rights-over.html>; Ruth Levush, *Israel: Photographer’s Moral Right over a State-Copyrighted Photograph Recognized*, LIBRARY OF CONGRESS GLOBAL LEGAL MONITOR (Aug. 10, 2015), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404557_text (discussing a 2015 Israeli judicial decision confirming that, pursuant to Israeli copyright law, a state photographer retained the moral rights in his photograph even though the state was the owner of the copyright).

⁶⁶ Decreto Cong. No. 33-98, June 21, 1998, Ley de Derecho de Autor y Derechos Conexos [Law on Copyright and Related Rights] art. 42bis, LA GACETA OFICIAL, May 21, 1998, *amended by* Decreto Cong. No. 11-2006, May 29, 2006, Reformas Legales para la Implementación del Tratado de Libre Comercio República Dominicana-Centroamérica-Estados Unidos de América [Legal Reforms for the Implementation of the Dominican Republic-Central America-United States of America Free Trade Agreement] LA GACETA OFICIAL, May 29, 2006 (Guat.).

The question of moral rights protection for multi-author works has been particularly acute in the area of audiovisual works. Some countries have adopted special rules for moral rights in these works, attempting to balance the interests of the producer, the director, individual performers, and the authors of incorporated works such as musical scores. For example, while China recognizes motion pictures as collaborative works with several individual authors, the various authors are only granted the right of authorship while all other copyrights belong to the producer.⁶⁷ While Guatemala grants moral rights to the producer (who is also holder of the economic rights), this right includes mandatory attribution for the director, the script author, the author of any underlying work, and the authors of the musical compositions in the audiovisual work.⁶⁸ In Nigeria, which also grants moral rights to the producer, the law is designed to encourage performers and others involved in films to execute contracts with the producer in order to preserve any of their rights.⁶⁹ Performers in audiovisual works in France are considered employees, and thus their rights of attribution and integrity are governed not only by the moral rights regime, but also by employment law regulations and collective bargaining agreements.⁷⁰ In Germany, although moral rights attach to both filmmakers and performers, a rightsholder may only prohibit gross distortions of their work and their interests must be balanced with the legitimate interests of the other film creators and the producer.⁷¹

C. U.S. Accession to the Berne Convention

The United States' accession to the Berne Convention was the culmination of many decades of work. Almost as soon as the Berne Convention came into force, Berne member

⁶⁷ See Copyright Law of the People's Republic of China (promulgated by Order of the President of the People's Republic of China, Feb. 26, 2010, effective Apr. 1, 2010) No. 26, art. 15, available at <http://en.ncac.gov.cn/copyright/contents/10365/329083.shtml>; see also Liang, 57 J. COPYRIGHT SOC'Y U.S.A. at 121–22.

⁶⁸ See Decreto Cong. No. 33-98, June 21, 1998, Ley de Derecho de Autor y Derechos Conexos [Law on Copyright and Related Rights] arts. 27 & 28, LA GACETA OFICIAL, May 21, 1998, amended by Decreto Cong. No. 11-2006, May 29, 2006, Reformas Legales para la Implementación del Tratado de Libre Comercio República Dominicana-Centroamérica-Estados Unidos de América [Legal Reforms for the Implementation of the Dominican Republic-Central America-United States of America Free Trade Agreement] LA GACETA OFICIAL, May 29, 2006 (Guat.).

⁶⁹ See Itanyi & Nwamaka, 14 U.S.-CHINA L. REV. at 627–28 (referring to section 9(4) of the Nigerian copyright law).

⁷⁰ See Marjut Salokannel, *Study on Audiovisual Performers' Contracts and Remuneration Practices in France and Germany*, WIPO DOC. AVP/IM/03/3B, at 3–4, 21 (Mar. 31, 2003). French law regulates the relationship between authors' rights, including directors and producers, and related rights, such as the rights of performers. Because related rights cannot prejudice authors' rights under French law, performers' cannot usurp control from film authors, thus addressing directors' concerns with maintain creative control of the end product. *Id.* at 4.

⁷¹ See Dietz, 19 COLUM.-VLA J.L. & ARTS at 223 (citing article 93 of the German copyright act); see also GOLDSTEIN & HUGENHOLTZ at 357 (pointing out how civil law countries, such as France and Germany, accommodate moral rights in the motion picture realm).

countries were urging the United States to join.⁷² The United States had been attending the conferences related to the Berne Convention since the second conference discussing creation of an international copyright union in 1885.⁷³ The United States continued to participate as an observer at subsequent conferences of the Berne Union Members, including the 1908 Berlin Conference where the original convention was revised.⁷⁴ But while U.S. interest in joining the Berne Convention was reflected in two major bills introduced in the 1930s, the United States did not accede to the Berne Convention until 1988.

1. Efforts to Join the Berne Convention

During the 1930s, two major pieces of legislation were proposed to implement the Rome Text, and enable the United States to accede to the Berne Convention. Both were unsuccessful. The first bill, introduced by Senator Bronson M. Cutting in 1933, included brief language explicitly protecting attribution and integrity rights, without any caveats.⁷⁵ Several groups opposed joining the Berne Convention if it required an explicit recognition of moral rights— including motion-picture producers and distributors, periodical publishers, and radio broadcasters.⁷⁶ The motion picture industry in particular objected to incorporating the right of

⁷² See *Table Talk*, LITERARY WORLD, Sept. 27, 1895, reprinted in 52 LITERARY WORLD 220, 222 (James Clarke & Co. JULY–Dec. 1895) (“It would be a great gain to British authors if the United States Government would announce its adherence to the ‘Berne Convention’[.]”); *Hall Caine on Copyright*, LITERARY WORLD, Nov. 15, 1895, reprinted in 52 LITERARY WORLD, 395, 395 (James Clarke & Co. JULY–Dec. 1895) (citing a speech of British author Hall Caine gave in Toronto on October 25, 1895, in which he stated that the “one great country which has not yet entered into the Berne Convention . . . is your neighbour, the United States”).

⁷³ LIBRARY OF CONGRESS COPYRIGHT OFFICE, INTERNATIONAL COPYRIGHT UNION: REPORT OF THE DELEGATE OF THE UNITED STATES TO THE INTERNATIONAL CONFERENCE FOR THE REVISION OF THE BERNE COPYRIGHT CONVENTION, HELD AT BERLIN, GERMANY, OCTOBER 14 TO NOVEMBER 14, 1908, COPYRIGHT OFF. BULL. NO. 13, at 9 (1908) (indicating that the United States participated at the second meeting of the International Union for the Protection of Works of Literature and Art as a “listening delegate”).

⁷⁴ See *id.* at 10–11 (pointing out that the German government, as hosts of the Berlin conference, invited twenty non-union countries to attend the conference because “delegates from nonunion countries would at all events contribute to arouse and increase interest in the Berne Union and its beneficial work”).

⁷⁵ See A Bill to Enable the United States to Enter the International Copyright Union, S. 1928, 73d Cong. § 4 (1933) (“[T]he author of any copyrighted work, even after the assignment of the copyright in such work, shall at all times have the right to claim the authorship of his work, and the right to oppose every distortion, mutilation, or other modification of the said work which might be prejudicial to his honor or his reputation, as well as the right to restrain the publication and/or the performance of the mutilated work.”).

⁷⁶ See Letter from Thorvald Solberg, Register of Copyrights (1897–1930), to Sen. Bronson Cutting (May 30, 1934) (on file with the Library of Congress in the Bronson M. Cutting Papers); LIBRARY OF CONGRESS COPYRIGHT OFFICE, THIRTY-SEVENTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1934, at 7–9 (1934) (“THIRTY-SEVENTH ANNUAL REPORT”); *Film Men Fight Copyright Bill*, L.A. TIMES, May 30, 1934, at 4. In 1934, The Senate Committee on Foreign Relations held a series of restricted and public hearings on the United States’ potential joining of the Berne Convention. They heard from a variety of stakeholders and witnesses who both supported and opposed the

integrity because “some modification of a work is often necessary to adjust it to the requirements of screen production.”⁷⁷

The second major bill was introduced by Senator F. Ryan Duffy in 1935, and it also included explicit moral rights protections, this time with carve outs for contractual override, exceptions to the right of integrity for certain industries, and a proviso protecting existing common law and equitable remedies.⁷⁸ The Dramatists’ Guild and the American Association of Book Publishers both objected to the moral rights provision.⁷⁹ The American Association of Book Publishers suggested amendments to the bill that would leave any changes required by the moral rights provisions in Berne to be handled by contracts rather than by statute.⁸⁰ Authors, on the other hand, “desired provisions that would make it less easy for publishers to edit, arrange, or adapt their works without their express consent.”⁸¹ The exception to the right of integrity for certain industries was, however, supported by the Motion Picture Producers and Distributors of America who stated, “Without restriction of the moral rights of authors, our industry is lost.”⁸² Music publishers also wished for the exception to be extended to their industry.⁸³ The Duffy bill died in 1936.

United States joining Berne. See THIRTY-SEVENTH ANNUAL REPORT at 7–9 (1934); see generally *International Copyright Union: Hearings Before the S. Comm. on Foreign Relations on S. 1928, A Bill to Enable the United States to Enter the International Copyright Union*, 73d Cong. pt. 2, at 23 (1934).

⁷⁷ THIRTY-SEVENTH ANNUAL REPORT at 8.

⁷⁸ See An Act to Amend and Consolidate the Acts Respecting Copyright, S. 3047, 74th Cong. § 23 (1935).

⁷⁹ See LIBRARY OF CONGRESS COPYRIGHT OFFICE, THIRTY-NINTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1936, at 10–11 (1936) (“THIRTY-NINTH ANNUAL REPORT”); see also *Revision of Copyright Laws: Hearings Before the H. Comm. on Patents*, 74th Cong. 1417 (1936) (“*Revision of Copyright Laws Hearings*”) (statement of Edwin P. Kilroe, Attorney, Fox Picture Corporation, Motion Picture Producers’ Association) (noting that “[w]ithout restriction of the moral rights of authors, our industry is lost. We must, by the very nature of our business, make changes in stories and plays. We have to meet censorship laws, and we have to meet various laws throughout the country, and unless we have the right to make those changes, we are completely at the mercy of the authors”); Elmer Davis, Vice President, Author’s League, Letter to the Editor, *Case Against the Duffy Bill*, SATURDAY REV., Apr. 4, 1936, at 9 (the Authors’ League objected to joining the Berne Convention altogether).

⁸⁰ THIRTY-NINTH ANNUAL REPORT at 11.

⁸¹ Letter from Wallace McClure, Chairman, Inter-Departmental Comm. on Copyright, to Sen. F. Ryan Duffy (May 1, 1937) (on file with the Wisconsin Historical Society).

⁸² Letter from Wallace McClure, Chairman, Inter-Departmental Comm. on Copyright, to Sen. F. Ryan Duffy (May 18, 1935) (on file with the Wisconsin Historical Society) (quoting a motion picture representative’s testimony during an executive session with the Senate Committee on Patents on May 8, 1935; discussing S. 2465, 74th Cong. (1935), a precursor to S. 3047).

⁸³ See Letter from Wallace McClure, Chairman, Inter-Departmental Comm. on Copyright, to Sen. F. Ryan Duffy (May 31, 1935) (on file with the Wisconsin Historical Society) (discussing S. 2465, 74th Cong. (1935), a precursor to S. 3047).

Momentum for amending U.S. copyright law and ratifying the Berne Convention was soon overtaken by World War II.⁸⁴ By 1950, focus in the United States had moved away from joining the Berne Convention to exploring a new copyright agreement being negotiated through the auspices of the United Nations Educational, Scientific and Cultural Organization (“UNESCO”).⁸⁵ These negotiations would ultimately lead to the creation of the Universal Copyright Convention (“UCC”) in 1952, which did not contain any provisions on moral rights.⁸⁶ Thereafter, in 1956, Congress and the U.S. Copyright Office initiated an extensive review of the U.S. copyright law necessary for a planned full revision of the Copyright Act of 1909.⁸⁷ With a full review of domestic copyright laws underway and international copyright protection for U.S. works secured through a variety of bilateral agreements and the UCC, Congress paid little attention to the Berne Convention and its moral rights article again until the late 1970s.

No sooner had the brand new Copyright Act of 1976 come into force in 1978 than serious conversations about the United States joining the Berne Convention were re-started.⁸⁸ That year, Register of Copyrights Barbara Ringer attended a meeting at the World Intellectual Property Organization (“WIPO”)⁸⁹ to analyze whether the new United States copyright law was compatible with the Berne Convention, where she reported receiving questions about a number of issues, including “the lack of express protection for the moral rights of authors in the U.S. statute.”⁹⁰ By this time, the Berne Convention had reached its (to date) final revision, in Paris in 1971, and article 6*bis* read, in pertinent part:

⁸⁴ A Committee for the Study of Copyright planned a series of conferences regarding revision of the copyright law and a draft bill for complete revision of the copyright law was introduced in the Senate in January 1940, but copyright review halted. Following World War II, the United States did not turn back to domestic copyright revision until 1955. See U.S. COPYRIGHT OFFICE, EIGHTIETH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1977, at 8 (1978).

⁸⁵ See U.S. COPYRIGHT OFFICE, FIFTY-FOURTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 20, 1951, at 4–5 (1952).

⁸⁶ See U.S. COPYRIGHT OFFICE, FIFTY-SIXTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1953, at 1 (1954); see generally Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132 (“UCC”).

⁸⁷ See U.S. COPYRIGHT OFFICE, FIFTY-NINTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1956, at 5 (1956).

⁸⁸ See LIBRARY OF CONGRESS, ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1978, at 92 (1979) (“1977–78 ANNUAL REPORT”) (“It seems likely that future copyright historians will mark 1978 as the year in which concerted efforts to achieve U.S. adherence to the International Convention for the Protection of Literary and Artistic Property (the Berne Convention) began anew.”).

⁸⁹ WIPO is “the global forum for intellectual property services, policy, information and cooperation” within the United Nations. *Inside WIPO*, WIPO, <http://www.wipo.int/about-wipo/en/>. It is self-funded and has 191 member states, including the United States. See *id.*

⁹⁰ 1977–78 ANNUAL REPORT at 93.

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.⁹¹

In the late 1980s, members of Congress began to introduce bills to facilitate the United States joining the Berne Convention. At least one of the proffered bills included express statutory protections for moral rights.⁹² Other bills expressly declared that protections for moral rights would be unaffected by adherence to the Berne Convention.⁹³ Familiar discussions on whether legislative changes were necessary for the United States to join the Berne Convention, including whether changes were required to implement the moral rights provision, resumed.⁹⁴ As part of these discussions, the U.S. State Department urged the establishment of an Ad Hoc Working Group to identify and analyze provisions in U.S. law relevant to Berne adherence.⁹⁵ The Ad Hoc Working Group, comprised of copyright professionals working in their private capacity, determined that, while there were no explicit moral rights provisions in title 17, U.S. law was

⁹¹ Berne Convention for the Protection of Literary and Artist Works, art. 6bis(1), Sept. 9, 1886, as revised July 24, 1971, 1161 U.N.T.S. 3 (“Paris Text”).

⁹² See, e.g., Berne Convention Implementation Act of 1987, H.R. 1623, 100th Cong. § 7(a) (1987):

§106a. Moral rights of the author

Independently of the copyright in a work other than a work made for hire, and even after transfer of copyright ownership, the author of the work or the author’s successor in interest shall the right, during the life of the author and fifty years after the author’s death—

- (1) to claim authorship of the work; and
- (2) to object to any distortion, mutilation, or other alteration of the work that would prejudice the author’s honor or reputation.

The rights conferred by this section shall be referred to in this title as “moral rights.”

⁹³ See, e.g., Berne Convention Implementation Act of 1988, H.R. 4262, 100th Cong. § 4(b) (1988):

(b) Certain Rights Not Affected.—The adherence of the United States to the Berne Convention does not expand or reduce any right of an author of a work—

- (1) to claim authorship of the work; or
- (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author’s honor or reputation.

⁹⁴ See, e.g., 1987 BCIA Hearings at 91 (statement of Rep. Carlos Moorhead) (“This is a very important point to us in California where you can’t get a motion picture studio to buy a play or a book unless they can make a picture that they can make some money on. And if it’s going to be totally controlled throughout the process by the person that sold their rights, it could certainly cut down the value to the producer of the picture.”).

⁹⁵ See AD HOC WORKING GRP. ON U.S. ADHERENCE TO THE BERNE CONVENTION, FINAL REPORT 2 (1986), reprinted in 10 COLUM.-VLA J.L. & ARTS 513, 554 (1986) (“AD HOC WORKING GRP.”).

nonetheless compatible with the Berne Convention through the protections afforded by a combination of existing federal and state laws, as well as various common law principles.⁹⁶

The United States acceded to Berne in 1988 after passage of the Berne Convention Implementation Act (“BCIA”).⁹⁷ When considering whether the United States’ legal framework adequately provided moral rights protections, Congress drew upon the Ad Hoc Working Group’s analysis of existing moral rights protections, as well as congressional testimony and international copyright experts’ conclusions.⁹⁸ The majority of those who testified before Congress argued against any change to U.S. law concerning an author’s right to control attribution or the integrity of a work, stating that current U.S. law was sufficient.⁹⁹ For example, a representative of Walt Disney Productions testified that “developments in the laws of unfair competition, trademark, privacy, [the section 106 right to prepare derivative works, the law of defamation], and the like” precluded the need for new statutory moral rights.¹⁰⁰ Additionally, then-Director General of WIPO, Arpad Bogsch, explained that the United States could become a Member of Berne without making any changes to U.S. law for the purposes of implementing article 6*bis*.¹⁰¹ While many copyright stakeholders argued that U.S. law provided Berne-compliant moral rights, some witnesses argued that existing law “simply isn’t [sufficient].”¹⁰² They pointed out that common law principles such as defamation failed to provide consistent protection of a creator’s right of integrity, short of “extreme cases of blatant and outrageous misrepresentations.”¹⁰³ Similarly, state moral rights statutes were criticized as being few in number; the Lanham Act was criticized as providing “insufficient [remedies] to meet the goals of Berne”; and the proponents’ reliance on

⁹⁶ See *id.* at 554.

⁹⁷ *Berne Notification No. 121: Berne Convention for the Protection of Literary and Artistic Works: Accession by the United States of America*, WORLD INTELLECTUAL PROP. ORG. (Nov. 17, 1988), available at https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_121.html.

⁹⁸ See H.R. REP. NO. 100-609, at 37–38 (1988).

⁹⁹ See *id.* at 33 (noting that “[t]he great majority [of congressional witnesses] testified that the United States should adhere to Berne, and that no additional law-making was needed to satisfy the standard of Article 6*bis*”); see also 1987 *BCIA Hearings* at 692 (written statement of Barbara Ringer, former Director, Copyright Division, UNESCO; former Register of Copyrights, U.S. Copyright Office (1973–80)) (“[C]urrent U.S. legislation and jurisprudence, especially the common law, are fully sufficient to meet our obligations under Berne without the need for federal statutory provisions on the so-called ‘moral right.’”); *id.* at 244 (statement of Kenneth W. Dam, Vice President, Law and External Relations, IBM) (“[C]urrent U.S. protection of moral rights is fully compatible with article 6 *bis* of Berne.”).

¹⁰⁰ 1987 *BCIA Hearings* at 230 (statement of Peter Nolan, Vice President and General Counsel, Walt Disney Productions, on behalf of the Motion Picture Association of America); see also *id.* at 233.

¹⁰¹ See Letter from Arpad Bogsch, Dir. Gen., World Intellectual Property Organization, to Irwin Karp, Esq. (June 16, 1987), reprinted in 1987 *BCIA Hearings* at 213–14.

¹⁰² 1987 *BCIA Hearings* at 408 (statement of Sydney Pollack, Directors’ Guild of America).

¹⁰³ *Id.*

evolving case law was deemed “largely speculative.”¹⁰⁴ The Register of Copyrights, in his testimony on the BCIA, did not take a position on the question of whether or how to implement article *6bis*, other than to note the importance of the issue.¹⁰⁵

Congress acknowledged both viewpoints, but ultimately concluded that existing U.S. laws provided protections substantively equivalent to moral rights, and therefore the United States fully complied with the requirements of article *6bis* through a “composite,” “mélange,” or “patchwork” of laws.¹⁰⁶

2. The Moral Rights Patchwork

Congress’ conclusion that there was “a composite of laws in this country that provides the kind of protection envisioned by Article *6bis*”¹⁰⁷ identified a number of legal routes by which an aggrieved author-plaintiff could pursue moral rights-like claims under federal and state law. These included:

- preventing false attribution under section 43(a) of the Lanham Act;¹⁰⁸
- adjusting their moral rights vis-à-vis specific works, through guild agreements or party-negotiated contracts;
- authors’ exclusive right to create and authorize derivative works;¹⁰⁹
- restrictions on compulsory licensees’ right to arrange musical works recorded and distributed under a mechanical license;¹¹⁰

¹⁰⁴ *Id.* See also 1987 BCIA Hearings at 443 (written statement of William Pierson, Writers Guild of America) (arguing that the Lanham Act “only allows a disclaimer,” which does not provide adequate integrity rights); *id.* at 446–49 (statement of William A. Smith, Academician, National Academy of Design) (noting that after his mural was altered and still attributed to him, “[n]either our common law, nor U.S. statutory law provide[d] me redress; in any Berne Convention member nation I would surely have such redress”).

¹⁰⁵ See 1987 BCIA Hearings at 48 (written statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services, Library of Congress) (“It should be stressed that careful Congressional examination of moral rights is essential.”).

¹⁰⁶ H.R. REP. NO. 100-609, at 34 (1988). See also *Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 104 (1989) (“1989 VARA Hearing”) (statement of John B. Koegel, Esq.); Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 800 (2001).

¹⁰⁷ H.R. REP. NO. 100-609, at 34 (1988).

¹⁰⁸ See 15 U.S.C. § 1125(a).

¹⁰⁹ See 17 U.S.C. § 106(2).

¹¹⁰ See 17 U.S.C. § 115(a)(2).

- terminating or transferring licenses;¹¹¹
- state statutes protecting authorship and integrity rights in certain works;¹¹² and
- state laws covering privacy and publicity, contracts, fraud and misrepresentation, unfair competition, and defamation.¹¹³

Since passage of the BCIA, there have been two important additions to the U.S. moral rights patchwork.¹¹⁴ The first is the Visual Artists Rights Act of 1990, known as VARA, which grants authors of certain “work[s] of visual art” the right to claim or disclaim authorship in the work, as well as a limited right to prevent distortion, mutilation, or modification of a work that is of recognized stature.¹¹⁵ The second is section 1202 of title 17—enacted in 1998 as part of the Digital Millennium Copyright Act—which limits the removal, alteration, or falsification of certain categories of information regarding a copyrighted work, including the name of the author of the work.¹¹⁶ Both VARA and section 1202 are discussed in detail in Section IV of this Study.

D. Post-Berne Developments: New WIPO Treaties

In 1996, WIPO finalized two new treaties which aimed to update international copyright norms for the digital environment: the WIPO Copyright Treaty (“WCT”) and the WIPO

¹¹¹ See 17 U.S.C. § 203.

¹¹² See H.R. REP. NO. 100-609, at 34 (1988) (citing California, Louisiana, Maine, Massachusetts, New Jersey, New York, Pennsylvania, and Rhode Island as examples).

¹¹³ See *id.* at 34.

¹¹⁴ Not included in Congress’ list of provisions that, in combination, provide moral rights-like protections was the National Film Preservation Act (“NFPA”) of 1988, which required that films added to the National Film Registry must display a notice during distribution or exhibition if they had been “materially altered” without the director, screenwriter, or other creators’ participation, a designation that included colorization of black-and-white films. Pub. L. No. 100-446, § 4, 102 Stat. 1774, 1784–85 (1988) (codified at 2 U.S.C. §§ 178–178l), *repealed by* Copyright Amendments Act of 1992, Pub. L. No. 102-307, § 214, 106 Stat. 264, 272 (1992). By requiring a label to warn consumers that a film had been altered without permission, the NFPA allowed some creators to “disclaim responsibility” and establish a form of “anti-attribution” for their edited works. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02[D][3] (3d ed. 2017) (“NIMMER ON COPYRIGHT”). This notice requirement did not survive when the NFPA was reauthorized in 1992, and thus lasted a mere four years. See Copyright Amendments Act of 1992, Pub. L. No. 102-307, §§ 201–214, 106 Stat. 264, 267–72 (1992) (codified at 2 U.S.C. §§ 179–179k), *repealed by* Pub. L. No. 104-285, 110 Stat. 3382 (1996).

¹¹⁵ VARA, Pub. L. No. 101-650, §§ 602–603, 104 Stat. 5128, 5128–30 (1990) (codified at 17 U.S.C. §§ 101, 106A(a)).

¹¹⁶ See DMCA, Pub. L. No. 105-304, § 103, 122 Stat. 2860, 2872–73 (1998) (codified as amended at 17 U.S.C. § 1202(a)–(c)).

Performances and Phonograms Treaty (“WPPT”).¹¹⁷ The United States signed both treaties in 1997, and ratified the treaties in 1999.¹¹⁸ Both treaties entered into force in 2002.¹¹⁹

Of particular interest, article 5 of the WPPT provides for moral rights for performers in their “live aural performances or performances fixed in phonograms.”¹²⁰ The Senate Foreign Relations Committee, when presenting the treaties to the full Senate for advice and consent, explained that performers’ moral rights could be covered by the existing patchwork of protections in the United States, the understanding of which had been pieced together during the time of Berne implementation.¹²¹

¹¹⁷ WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 121 (“WCT”); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 203 (“WPPT”).

¹¹⁸ See S. TREATY DOC. NO. 105-17, at III (1997); *WCT Notification No. 10: WIPO Copyright Treaty: Ratification by the United States of America*, WIPO (Sept. 14, 1999), available at https://www.wipo.int/treaties/en/notifications/wct/treaty_wct_10.html; *WPPT Notification No. 8: WIPO Performances and Phonograms Treaty: Ratification by the United States of America*, WIPO (Sept. 14, 1999), available at https://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_8.html.

¹¹⁹ *WCT Notification No. 32: WIPO Copyright Treaty: Entry into Force*, WIPO (Dec. 6, 2001), available at https://www.wipo.int/treaties/en/notifications/wct/treaty_wct_32.html; *WPPT Notification No. 32: WIPO Performances and Phonograms Treaty: Entry into Force*, WIPO (Feb. 20, 2002), available at https://www.wipo.int/treaties/en/notifications/wct/treaty_wct_32.html.

¹²⁰ WIPO Performances and Phonograms Treaty, art. 5, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 203. Article 5(1) reads as follows:

Independently of a performer’s economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

¹²¹ See S. EXEC. REP. NO. 105-25, at 10 (1998) (“This deference to national law may allow the United States to rely upon a patchwork of existing state laws and the federal trademark law as the legal basis for satisfying the Treaty obligation, without enacting new federal legislation.”). Similar discussions about moral rights did not need to occur with the ratification that same decade of two other treaties involving copyright—both the North America Free Trade Agreement (“NAFTA”) and the World Trade Organization (“WTO”) Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) incorporate Berne but not Article 6*bis*—because these were trade agreements and moral rights are non-economic and therefore not related to trade. See U.S. GEN. ACCOUNTING OFFICE, NORTH AMERICAN FREE TRADE AGREEMENT: ASSESSMENT OF MAJOR ISSUES REPORT TO THE CONGRESS, VOLUME I, at 95 (1993); IFAC-3, REPORT ON THE INTELLECTUAL PROPERTY CHAPTER AND OTHER INTELLECTUAL PROPERTY-RELATED ELEMENTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) 9 (1992) (“As in the . . . [draft TRIPS text] the NAFTA copyright obligations do not extend to moral rights but only to the economic rights provided in the Berne Convention. This exclusion recognizes the undeveloped nature of what constitutes moral rights violations in Berne countries and that they are not trade-related.”); *Intellectual Property and International Issues: Hearings Before the Subcomm. on Intellectual Prop. & Judicial Admin. of the H. Comm. on the Judiciary*, 102d Cong. 350–51 (1991) (written statement of Eric M. Smith, General Counsel, International Intellectual Property Alliance) (“Unlike the well-understood economic rights in Berne that must govern the

Furthermore, both the WCT (article 12) and the WPPT (article 19) also contained obligations concerning rights management information (“RMI”). Congress added section 1202 to title 17 to implement these RMI obligations in October of 1998.¹²² The Senate gave its advice and consent to the ratification of both of these treaties in 1998, and they were ratified the following year.¹²³

In 2012, after many years of negotiations, WIPO completed the Beijing Treaty on Audiovisual Performances (“Beijing Treaty”). Article 5 of the Beijing Treaty grants performers rights of attribution and integrity in their live and fixed audiovisual performances.¹²⁴ The United States is a signatory to the treaty but has not yet ratified it. President Obama’s administration transmitted the Treaty to the Senate Committee on Foreign Relations for advice and consent in 2016.¹²⁵ The Administration also submitted to Congress additional legislation that addressed “limited statutory changes for the United States to implement the Treaty.”¹²⁶ This legislative proposal did not include any statutory changes that would address issues related to moral rights.¹²⁷ There was no legislative proposal on the Beijing Treaty pending before the 115th Congress, which ended its session on January 3, 2019, and no such legislative proposal has yet been introduced in the 116th Congress.

III. GUIDING PRINCIPLES FOR REVIEW OF MORAL RIGHTS REGIME

In its review of the results of the moral rights symposium and the written comments submitted as part of this Study, the Copyright Office identified three general principles to guide its analysis of the current U.S. moral rights regime. The first is the need to harmonize any

international trade in protected works, moral rights are non-economic, non-trade related in purpose and in operation and are inappropriate for inclusion as a mandatory rule in a GATT agreement.”).

¹²² See DMCA, § 103 Pub. L. No. 105-304, 122 Stat. 2860, 2872–74 (1998) (codified as amended at 17 U.S.C. § 1202). Title I of the DMCA was known as the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998. It amended title 17 to add a new chapter 12, which prohibits circumvention of copyright protection systems and provides protection for copyright management information.

¹²³ See Resolution of Ratification: Senate Consideration of Treaty Doc. No. 105-17 (1998); *WCT Notification No. 10: WIPO Copyright Treaty: Ratification by the United States of America*, WIPO (Sept. 14, 1999), available at https://www.wipo.int/treaties/en/notifications/wct/treaty_wct_10.html; *WPPT Notification No. 8: WIPO Performances and Phonograms Treaty: Ratification by the United States of America*, WIPO (Sept. 14, 1999), available at https://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_8.html.

¹²⁴ Beijing Treaty on Audiovisual Performances, art. 5, June 24, 2012 (not yet in force).

¹²⁵ See S. TREATY DOC. NO. 114-8 (2016).

¹²⁶ Letter from John F. Kerry, Sec’y of State, to President Barack Obama (Jan. 22, 2016), in S. TREATY DOC. NO. 114-8, at vi (2016).

¹²⁷ Letter from Michelle K. Lee, Under Sec’y of Commerce for Intellectual Prop. & Dir. of the U.S. Patent & Trademark Office, to Joseph R. Biden, President of the Senate (Feb. 26, 2016), available at <http://www.uspto.gov/sites/default/files/documents/Beijing-treaty-package.pdf>.

proposals with certain foundational precepts of U.S. law, namely the First Amendment, fair use, and respect for the constitutional requirement of limited copyright terms. The second is acknowledging the critical importance of the attribution and integrity rights to authors. The third is the importance of recognizing that, due to the diversity among creative industries and categories of works, one size of moral rights protections cannot fit all industries.

A. Respect for Foundational Principles of U.S. Law

In considering possible changes or additions to the moral rights scheme in the United States, the Copyright Office believes any modifications must align with other aspects of U.S. law. In particular, any changes to the law must comport with the First Amendment, fair use, and constitutional requirement of limited copyright terms.

1. Moral Rights and the First Amendment

The First Amendment is a fundamental constitutional protection guaranteeing the right of free speech.¹²⁸ Copyright law works in concert with the First Amendment to further the goals of protecting and promoting free speech and original expression. As the Supreme Court said in 1985, “[T]he Framers intended copyright itself to be the engine of free expression.”¹²⁹ To that end, copyright law also includes important safeguards to ensure the free speech rights of secondary users—notably the fair use exception and the idea/expression dichotomy.¹³⁰

In response to the Office’s Notice of Inquiry, some commenters raised concerns that adoption of stronger protections for moral rights in the United States could not be harmonized with the First Amendment,¹³¹ or that such laws would weaken current First Amendment protections, particularly with regard to critiques or criticisms of a work. For example, commenters asked that the Office consider the possibility that a right of integrity would impose an additional legal chilling effect on those publishers, authors, and scholars who critique the work of another author in a way that may damage the initial author’s reputation.¹³² Another

¹²⁸ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

¹²⁹ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

¹³⁰ See *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (discussing the idea/expression dichotomy and the fair use doctrine as free speech safeguards).

¹³¹ See Wendy J. Gordon, Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 2 (Mar. 30, 2017) (“The only way to stop the incursions on free speech is to stop the creation and expansion of new private rights to control speech. So-called ‘moral rights’ can give authors precisely that dangerous and unwise power.”).

¹³² See Association of American Publishers (“AAP”), Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 9 (Mar. 30, 2017) (“AAP Initial Comments”) (noting that “moral rights would pose significant hurdles” to scholars who criticize another’s work); Library Copyright Alliance (“LCA”), Comments

commenter also suggested that a statutory right of attribution could violate the First Amendment by compelling speech, specifically by requiring a corporate author to identify all of the creative contributors to a work.¹³³

Commenters put forth several suggestions for potential means of ensuring free speech protections under an enhanced moral rights regime. One commenter asserted that “[t]o ensure free speech protections, the original author should bear the burden of proof when claiming infringement of the right of integrity.”¹³⁴ The same commenter, and others, suggested establishing a reasonableness standard that would work to prevent frivolous moral rights claims and protect speech.¹³⁵ A number of commenters also discussed how the moral rights of attribution and integrity can actually work to protect free speech rights of authors. The right of integrity, and to a lesser extent the right of attribution, can protect an author’s right *not* to speak by ensuring that creative works are not modified or used in a way that the author fundamentally disagrees with or disavows.¹³⁶

Existing protections for attribution and integrity interests in U.S. law have been implemented consistent with the First Amendment.¹³⁷ And, while the Office recognizes that

Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 3 (Mar. 30, 2017) (“LCA Initial Comments”) (stating that additional moral rights “would chill criticism”). *But see* Creators’ Rights Alliance (“CRA”), Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 2 (May 15, 2017) (“CRA Reply Comments”) (stating that “this is to misread” Article 6*bis* of the Berne Convention and explaining that proving a use is “prejudicial to [the author’s] honor or reputation” is a high bar).

¹³³ See Motion Picture Association of America, Inc. (“MPAA”), Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 11 (Mar. 30, 2017) (“MPAA Initial Comments”) (citing *U.S. Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 213 (2013) (“It is . . . a basic First Amendment principle that ‘freedom of speech prohibits the government from telling people what they must say.’”). *But see* Music Creators of North America, Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 4–5 (Mar. 30, 2017) (“Music Creators Initial Comments”) (suggesting that moral rights could be used to prevent compelled speech).

¹³⁴ Future of Music Coalition (“FMC”), Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 8 (May 15, 2017) (“FMC Reply Comments”).

¹³⁵ See FMC Reply Comments at 9 (“To further protect free speech, a reasonableness benchmark could be established[.]”). See Authors Alliance, Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 6 (Mar. 30, 2017) (“Authors Alliance Initial Comments”) (“A robust ‘reasonableness’ limitation on integrity and attribution rights should also be in place to prevent these rights from stifling onward creativity.”); Jani McCutcheon, Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 3 (Mar. 6, 2017) (“[I]t may be desirable to introduce a reasonableness defense, similar to that existing in Australian moral rights legislation.”).

¹³⁶ See, Authors Guild, Inc., Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 7–8 (May 15, 2017) (“Authors Guild Reply Comments”) (explaining that writers’ “bad experiences with the editing process” prompts a desire for an integrity right).

¹³⁷ For example, in cases involving expressive works, courts have formulated tests for reconciling First Amendment concerns with the application of both state right of publicity claims and false attribution claims under the Lanham Act.

enhanced moral rights protections could potentially create new tensions with the right of free speech, it does not see these tensions as inevitable or irreparable. At a minimum, for example, further statutory codification of moral rights could easily be limited by both the fair use exception and the idea/expression dichotomy.¹³⁸

2. Moral Rights and Fair Use

Reconciling the First Amendment with moral rights protections raises the related issue of how more explicit protections for moral rights could implicate the fair use doctrine, a vital First Amendment safeguard. The fair use doctrine works to balance the ability of authors to control the use of their copyrighted works with the free speech interests of secondary users. Fair use also enables scholarship and criticism of existing works by allowing authors to use not only the facts and ideas of a work but the expression of that work itself.¹³⁹ Even prior to its statutory codification, the fair use doctrine allowed courts to “avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”¹⁴⁰ Fair use furthers the goals of copyright law by simultaneously promoting a robust marketplace of ideas while also incentivizing authors to create new works that build or comment upon existing ones. However, more explicit protections for the rights of integrity and attribution in the United States may create tensions with the fair use doctrine, depending upon how these protections are implemented.

While fair use allows secondary users to criticize, comment on, or parody an original work without facing liability for infringement, the moral right of integrity protects an author’s work against any “derogatory action” that is damaging to the author’s honor or reputation. Consequently, the Office heard some concern regarding “how a statutory right of integrity. . . would bode with a court’s ability to make a fair use determination.”¹⁴¹ At least one commenter also raised concerns about reconciling the fair use doctrine with the right of attribution, expressing concern that an attribution right “would conflict with many ordinary practices of citation, and would threaten standard quotations and fair uses.”¹⁴² Some commenters also raised

See, e.g., Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186 (9th Cir. 2001); *Rogers v. Grimaldi*, 875 F.2d 994, 998–99 (2d Cir. 1989).

¹³⁸ *See, e.g.,* FMC Reply Comments at 8–9; Kernochan Center for Law, Media and the Arts, Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 9 (Mar. 30, 2017) (“Kernochan Center Initial Comments”); National Writers Union (“NWU”) & Science Fiction and Fantasy Writers of America (“SFWA”), Joint Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 6 (Mar. 20, 2017) (“NWU-SFWA Joint Initial Comments”).

¹³⁹ *See Eldred v. Ashcroft*, 537 U.S. 186, 197, 219 (2003).

¹⁴⁰ *Iowa State Univ. Research Found., Inc. v. Am. Broad. Corp.*, 621 F.2d 57, 60 (2d Cir. 1980).

¹⁴¹ AAP Initial Comments at 8.

¹⁴² Organization for Transformative Works (“OTW”), Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 8 (Mar. 30, 2017) (“OTW Initial Comments”).

the issue of the difficulties that would result if an attribution right was applied to works with multiple authors.¹⁴³ Many noncommercial, transformative works could be chilled, it was argued, if attribution were required in such cases, especially when the original work is authored by several people, or when the original work is being incorporated into a larger work.¹⁴⁴

Other commenters opined that fair use would not be an adequate safeguard to protect secondary works that follow-on or use elements of prior works if moral rights were to be applied more strictly. As one commenter stated, “[W]e are most concerned about how an extension of the copyright law to encompass moral rights will affect the rich culture of follow-on creators and fair use in the United States.”¹⁴⁵ Another commenter stated that implementing statutory rights “could cause courts to restrict the scope of fair use” in order to give these new rights meaning.¹⁴⁶ Commenters also argued that creators would face uncertainty in trying to apply fair use to statutory moral rights given the fair use doctrine’s present unpredictability, which could have a chilling effect on speech.¹⁴⁷

One illustration of a fair use case that implicates moral rights is *Campbell v. Acuff-Rose Music, Inc.*¹⁴⁸ That 1994 Supreme Court case concerned an unauthorized parody of Roy Orbison’s 1964 pop hit “Oh, Pretty Woman” recorded by the rap group 2 Live Crew.¹⁴⁹ 2 Live Crew had originally asked permission from Acuff-Rose (the assignee of the song’s copyright) to parody the song but was refused.¹⁵⁰ When 2 Live Crew released a parody anyway, Acuff-Rose sued. 2 Live Crew prevailed on its fair use claim in the District Court, but the Court of Appeals found no fair use, despite recognizing 2 Live Crew’s version as a parody.¹⁵¹ The Supreme Court reversed the Court of Appeals and remanded the case, holding that neither the commercial nature of 2 Live Crew’s recording, nor the amount of content it copied from the Roy Orbison song should be

¹⁴³ See, e.g., OTW Initial Comments at 8; MPAA Initial Comments at 8.

¹⁴⁴ See, e.g., Center for Democracy & Technology (“CDT”), Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 4 (May 15, 2017) (“CDT Reply Comments”); OTW Initial Comments at 8. Cf. MPAA Initial Comments at 8 (arguing that a right of attribution could be at odds with the ability to make a fair use of material incorporated into a larger work because display of the original author’s name “would be impractical or would detract from the fair user’s critical or parodic message”).

¹⁴⁵ Public Knowledge (“PK”), Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 3 (Mar. 30, 2017) (“PK Initial Comments”).

¹⁴⁶ Electronic Frontier Foundation (“EFF”), Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 3 (Mar. 30, 2017) (“EFF Initial Comments”).

¹⁴⁷ See EFF Initial Comments at 3; Motion Picture Association of America (“MPAA”), Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 9 (May 15, 2017) (“MPAA Reply Comments”).

¹⁴⁸ 510 U.S. 569 (1994).

¹⁴⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572 (1994).

¹⁵⁰ *Id.* at 572–73.

¹⁵¹ *Id.* at 573–74.

factored against the defendant's fair use claim, considering "the parodic purpose of the use."¹⁵² Parody, the court found, falls into the favored statutory category of "criticism or comment."¹⁵³ Additionally, the Court held that, because musical parody requires the use of that part of the original work that "most readily conjures up the song," the use of the "heart" of the work is not excessive.¹⁵⁴ *Campbell* exemplifies the fair use doctrine's function as a safeguard on secondary users' right to free expression, but also illustrates how fair use can allow for a work to be used in a way that the original author may disavow. Accordingly, any implementation of greater moral rights protections would need to allow for uses such as 2 Live Crew's parody as a fair use in order to maintain the balance between copyright protections and free expression.

Many commenters expressed optimism that fair use as it is currently constituted could be applied to any additional moral rights protections. Some noted that applying fair use to moral rights protections, as is the case with the moral rights afforded in VARA,¹⁵⁵ would keep a statutory right of attribution or integrity from impinging on uses that courts should deem fair.¹⁵⁶ Indeed, the robust fair use jurisprudence developed by the courts can be applied to moral rights claims with no less uncertainty than it is currently applied to alleged infringement of economic rights.¹⁵⁷

Additionally, at least one commenter believed it was unlikely that cases where a fair use was found would have a different result if a statutory right of integrity had existed.¹⁵⁸ The Berne Convention standard for integrity is much narrower than an author's mere unhappiness with a derivative work, and thus "if altering a work is found 'fair' because the change gives the work 'new meaning or message,' . . . the first author's 'honor or reputation' remains unscathed precisely because the point is that the new message is *not* the first author's message."¹⁵⁹ Thus, the Office is of the opinion that, as with the First Amendment, any tensions between potential statutory moral rights protections and the fair use doctrine can be overcome through proper calibration of any statutory framework.

¹⁵² *Id.* at 594.

¹⁵³ *See id.* at 579.

¹⁵⁴ *Id.* at 588–89.

¹⁵⁵ *See* 17 U.S.C. § 106A(a).

¹⁵⁶ *See, e.g.,* American Association of Law Libraries ("AALL"), Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 2 (Mar. 29, 2017) ("AALL Initial Comments"); Authors Guild Reply Comments at 7; FMC Reply Comments at 8.

¹⁵⁷ *See* AALL Initial Comments at 2.

¹⁵⁸ *See* Kernochan Center for Law, Media and the Arts, Reply Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 11 (May 15, 2017) ("Kernochan Center Reply Comments").

¹⁵⁹ Kernochan Center Reply Comments at 11.

3. Moral Rights and Copyright Term Limits

Internationally, jurisdictions vary as to the duration of their moral rights protections. Berne article 6*bis* provides that the moral rights of attribution and integrity shall, posthumously, “be maintained, at least until the expiry of the economic rights.”¹⁶⁰ While some countries accordingly limit their moral rights duration to be coextensive with economic copyright rights,¹⁶¹ other countries go further and provide a perpetual duration for the rights.¹⁶²

It is one of the most fundamental tenets of U.S. copyright law that the exclusive rights granted to a copyright holder shall be limited in term. Recognizing the importance of a strong public domain in promoting the progress of culture and the useful arts, the framers of the Constitution made sure to include in the Copyright Clause that exclusive rights shall be secured to authors only for “limited times.”¹⁶³ It is not entirely clear to the Office whether this constitutional requirement would apply to moral rights, as such application would likely depend upon how those rights were implemented into U.S. law, *e.g.*, as rights deriving from the Copyright Clause, or deriving from some other authority (such as the Commerce Clause, which contains no such limitation on duration).¹⁶⁴ Nonetheless were the U.S. to enact a blanket moral rights statute, the constitutional “limited times” language supports the notion that such rights should be limited in time.

Duration was also an issue of great importance for several commenters who, in response to the Copyright Office’s Notice of Inquiry, urged the Office not to adopt a perpetual approach to moral rights, opining that to do so would be contrary to U.S. copyright law.¹⁶⁵ Additionally, a

¹⁶⁰ Berne Convention for the Protection of Literary and Artistic Works art. 6*bis* (2), Sept. 9, 1886, *as revised* July 24, 1971, and *as amended* Sept. 28, 1979, S. Treaty Doc. 99-27, 1161 U.N.T.S. 3 (“Berne Convention”).

¹⁶¹ *See, e.g.*, Law on Copyright and Neighboring Rights (1999) art. 18 (Andorra); Copyright Act s 18 (2003) (Ant. & Barb.); *Copyright Act 1968* s 195AM (Austl.).

¹⁶² *See, e.g.*, Law No. 82 of 2002 (Pertaining to the Protection of Intellectual Property Rights), *al-Jarīdah al-Rasmiyah*, vol. 2*bis*, June 2, 2002, art. 143 (Egypt); CODE DE LA PROPRIÉTÉ INTELLECTUELLE [Intellectual Property Code] art. L121-2 (Fr.); Ley Federal de Derechos de Autor [LFDA] [Authors’ Rights Law] art. 18, Diario Oficial de la Federación [DOF] Dec. 24, 1996, June 15, 2018 (Mex.).

¹⁶³ U.S. CONST. art. 1, § 8, cl. 8.

¹⁶⁴ *See* Alexander Bussey, *Traditional Cultural Expressions and the U.S. Constitution*, 10 BUFF. INTELL. PROP. L.J. 1, 28 (2014) (“Rights derived from the Commerce Clause are not subject to the ‘limited times’ requirement, however. Therefore, any trademark-like rights can last perpetually. Furthermore, some limited moral rights resemble trademark rights, so based on an expansive view of trademark law, some limited moral rights might be able to last perpetually.”). Additionally, there is some question of whether moral rights, being rights of personhood and not of economic utility, are a good fit for the “limited times” language. *See* Ashley Packard, *Copyright Term Extensions, the Public Domain and Intertextuality Intertwined*, 10 J. INTELL. PROP. L. 1, 8 (2002).

¹⁶⁵ *See* AALL Initial Comments at 1; AAP Initial Comments at 7; Authors Alliance Initial Comments at 8.

perpetual approach to moral rights would also conflict with the durational limits of some state statutory and common laws concerning defamation.¹⁶⁶

Moreover, multiple commenters asserted that, since moral rights relate to the personhood of the author, the policy rationale for statutory protections for the rights of attribution and integrity is strongest during the life of the author and weakens thereafter.¹⁶⁷ A limited term of protection for moral rights would “avoid[] the difficulties of trying to evaluate hypothetical desires of creators after they have passed, and allow[] the public domain to be freely exploited for the public good.”¹⁶⁸

The Office is of the opinion that there are strong policy reasons for any statutory right of attribution or integrity incorporated into the Copyright Act to be limited—either limited to the lifetime of the author, or, at the outer edge, coextensive with the economic term.

B. Importance of Attribution and Integrity to Creators

Throughout this Study, the Office has heard from many working authors—writers, musicians, visual artists, filmmakers, and others—and one of their primary messages is the importance of the moral rights of integrity and attribution for authors everywhere. These commenters pointed to factors like honor, pride, and recognition as some of the reasons that attribution and integrity are important to them, as well as the role that these moral rights interests play in incentivizing new works and in forming the basis for an author’s economic well being.

Authors’ works are, in many cases, a source of honor and pride, and thus authors have a “deep interest” in having their works correctly attributed to them, and in ensuring that what they created is made available in an unadulterated manner.¹⁶⁹ To be recognized for one’s work is a basic human desire, and an author cannot build a reputation without such recognition for both the fact of their authorship and the ongoing integrity of their work.¹⁷⁰ As one commenter advised,

¹⁶⁶ See AAP Initial Comments at 7 (citing *Gugliuzza v. K.C.M.C., Inc.*, 606 So. 2d 790, 791 (La. 1992)) (“Once a person is dead, there is no extant reputation to injure or for the law to protect. Since the cause of action is intended to redress injuries flowing from harm to one’s reputation, we conclude that to be actionable defamatory words must be ‘of and concerning’ the plaintiff or, directly or indirectly, cast a personal reflection on the plaintiff.”). However, state rights of publicity sometimes apply perpetually. See, e.g., TENN. CODE § 47-25-1104 (2014) (allowing for perpetual protection for the right of publicity so long as the right is commercially exploited by the rightsholder); *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982) (holding that the right of publicity in Georgia extends past the death of its owner).

¹⁶⁷ See Authors Alliance Initial Comments at 8 n.28; FMC Reply Comments at 4–5; Roberta Kwall, Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 4 (Mar. 14, 2017).

¹⁶⁸ FMC Reply Comments at 4–5.

¹⁶⁹ Authors Guild Reply Comments at 2. See also Authors Alliance Initial Comments at 3.

¹⁷⁰ See Authors Alliance Initial Comments at 3.

“[a]lthough it is often difficult to quantify the value to authors of reputation enhancement by virtue of public dissemination of their works, the value is real and meaningful to authors.”¹⁷¹

Also real and meaningful to authors is the role that attribution and integrity play in providing incentives to create new works. This is especially important to academic authors and authors of user-generated content on the internet—authors for whom monetary incentives are secondary to recognition as drivers of creation.¹⁷² The knowledge that their works are being disseminated without reputation-harming mutilation also encourages such authors in their creations.¹⁷³

Finally, several commenters spoke of the economic importance of attribution and integrity rights. Recognition for one’s unadulterated work leads to a positive reputation, which leads to more work as well as an increase in valuation of extant works. “Many times,” one commenter wrote, “it is the reputation of the artist . . . that adds or gives value to her work.”¹⁷⁴ Additionally, the very act of attributing a work to its author can serve as a form of advertising.¹⁷⁵

Perhaps the most vivid testimony addressing the combined personal and economic importance of moral rights to authors was this statement from musician/composer Melvin Gibbs at the Office’s Moral Rights Symposium in 2016:

For us, attribution—that is our currency. I don’t exist if people don’t know who I am. I mean that in the most literal sense of “I don’t eat.” You know, so every time something goes out that I’ve participated in that I don’t get attribution for, it affects my family. And how that affects the community is that the less I am able to create, the less I am able to help other people create. And the less the community of—it shrinks the art—community of artists, which will eventually shrink the creativity of this country as a whole.¹⁷⁶

The Copyright Office takes very seriously the importance of attribution and integrity interests to authors. This factor was, along with the other guiding principles outlined in this section, preeminent in our considerations as we drafted this Report. While the Office recognizes that our decision not to recommend adoption of a new statutory moral right at this time may disappoint some authors, the Office is not yet prepared to recommend a course that would

¹⁷¹ *Id.*

¹⁷² *See id.* at 4.

¹⁷³ *See id.* at 4.

¹⁷⁴ CVA Initial Comments at 2.

¹⁷⁵ *See* Zandra Kubota, Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry (May 13, 2017).

¹⁷⁶ *Session 4*, Symposium Transcript, 8 GEO. MASON J. INT’L COM. L. at 89–90 (remarks of Melvin Gibbs, musician/composer).

represent such a significant change to U.S. law and industry practices. The Office believes that the existing patchwork, supplemented by the recommended changes to various federal laws outlined below, should address many of the concerns expressed by authors during the course of this study, and believes that further study of whether those targeted changes fully address the primary concerns of artists would be warranted before adoption of a blanket broad new moral rights provision.

C. Recognize and Respect Diversity Among Creative Industries and Types of Works

The Copyright Office recognizes that any changes to the current U.S. moral rights regime should respect the fact that the need for moral rights protection varies by creative sector. A one-size-fits-all solution that fails to account for the differences between sectors and types of works would serve no creative community well. For example, take the example of a photograph and a motion picture. A blanket moral rights regime could well protect the individual author of a photograph in ways that they are not currently protected—such as providing attribution rights against persons with whom the author is not in contractual privity.¹⁷⁷ However, such a blanket system would likely produce only an overlay of duplicative attribution protection for directors, screenwriters, and performers who are already substantially protected by industry-specific collective bargaining agreements.¹⁷⁸ Conversely, a blanket regime that, in recognition of the role that private agreements already play in protecting moral rights, waived statutory protection for all works covered by contracts, would likely *under*-protect individual artists and authors who lack the negotiating power of collective bargaining but who frequently work under contract, such as most freelance journalists¹⁷⁹ or commercial visual artists.¹⁸⁰

Another consideration in thinking about how a U.S. moral rights regime would work across industries and types of works is those sectors where attribution interests tend to be

¹⁷⁷ See Authors Guild, Inc., Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 9 (Mar. 30, 2017) ("Authors Guild Initial Comments") ("[I]n the case of unauthorized copies, such as un- or misattributed works in the context of digital piracy, contract law won't help ensure attribution."); CVA Initial Comments at 18–19 ("Even if attribution is part of an artist/client contract, it is very difficult to enforce.").

¹⁷⁸ See, e.g., *Session 6: New Ways to Disseminate Content and the Impact on Moral Rights*, in Symposium Transcript, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, 8 GEO. MASON J. INT'L COM. L. 125, 133 (2016) (remarks of Alec French, Directors Guild of America) ("And there are things [in collective bargaining] that are facsimiles of rights of attribution and rights of integrity that you'd find in a moral rights regime."). *But see* Directors Guild of America ("DGA") & Writers Guild of America, West ("WGAW"), Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 3 (Mar. 30, 2017) ("DGA/WGAW Initial Comments") ("[W]hile the DGA and WGA's collective bargaining agreements establish certain minimum economic benefits in recognition of their artistic contributions to the work, the legally recognized author of these works is the copyright holder. As a result, directors and writers are not recognized as authors of their own artistic works and have no recognized mechanism to enforce their rights of integrity and attribution under U.S. law.").

¹⁷⁹ See Authors Guild Initial Comments at 7-8).

¹⁸⁰ See CVA Initial Comments at 18–19.

governed by sometimes-written, sometimes just generally understood norms, rather than by contract or statutory law. Like with agreements, these norms—particularly about when to cite the author of source material or the professional punishment that attaches to plagiarism of another author—vary across industries and even across mediums, and would not fit easily into a blanket moral rights regime. For example, in legal writing, attribution norms for academic articles are quite rigid, whereas practicing lawyers routinely copy without attribution “the form and language of legal instruments.”¹⁸¹ Likewise, attribution in historical writing intended for a popular audience tends not to be as detailed or thorough as writing intended for a scholarly audience.¹⁸² A one-size-fits-all moral rights regime would risk obliterating these context-specific and largely self-governing differences between types of works and industries.

IV. DISCUSSION AND FINDINGS

There remains a qualitative issue of whether U.S. moral rights protections are currently sufficient to the needs of individual authors. Many commenters to this study asserted that the U.S. moral rights regime offers a robust menu of options for individual authors to protect their rights of attribution and integrity,¹⁸³ with some arguing that the U.S. patchwork style of protections offers superior protection to that of a statutory scheme.¹⁸⁴ However, other commenters seeking more comprehensive protections for the rights of attribution and integrity in the United States identified several holes in the current U.S. moral rights regime, arguing in effect that the patchwork leaves many areas of the underlying fabric insufficiently or entirely uncovered.¹⁸⁵ Even when these commenters acknowledge that the United States is in compliance

¹⁸¹ LCA Initial Comments at 3-4.

¹⁸² See LCA Initial Comments at 4; see also OTW Initial Comments at 5 (discussing varying attribution norms between fiction and non-fiction writing as well as between print news and television news).

¹⁸³ See, e.g., AAP Initial Comments at 5; MPAA Initial Comments at 3; National Music Publishers' Association (“NMPA”), Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 4 (May 15, 2017) (“NMPA Reply Comments”).

¹⁸⁴ See, e.g., Computer & Communications Industry Association (“CCIA”), Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 2 (Mar. 30, 2017) (“CCIA Initial Comments”) (“In some cases, U.S. law provides more substantial protection than other Berne Convention adherents.”); LCA Initial Comments at 2 (regarding private institutional punishments for plagiarism); NMPA Reply Comment at 6 (“Songwriters gain much more through contractual bargaining—either directly or through industry-wide agreements—than they would through a one size fits all statutory solution.”).

¹⁸⁵ See, e.g., Janice T. Pilch, Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 1 (Mar. 30, 2017) (“Pilch Initial Comments”) (“The need to extend moral rights to all categories of works to eliminate reliance on the ‘patchwork’ of laws that up to now has served to justify moral rights protection in the U.S. has never been greater.”); International Federation of Journalists (“IFJ”), Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 6 (Mar. 30, 2017) (“IFJ Initial Comments”) (“The reputation of the United States among authors and performers internationally is not enhanced by the absence of moral rights in that country.”); Music Creators Initial Comments at 3 (“In general, MCNA agrees with those many commentators who believe that the United States has not yet enacted laws to codify its moral rights treaty obligations under the Berne Convention.”).

with its obligations under Berne article 6*bis*, they point out that “none of the sources of US law, separately or together, provides adequate protection for authors’ rights of attribution and integrity.”¹⁸⁶

Recommendations: No federal moral rights statute; improvements to the current patchwork

For the reasons discussed below, the Copyright Office does not recommend creating a broad federal moral right as a new exclusive right at this time. During the enactment of the BCIA, Congress followed the approach to amend the Copyright Act “only where there is a clear conflict with the express provisions of the Berne Convention” and “only insofar as it is necessary to resolve the conflict in a manner compatible with the public interest, respecting the pre-existing balance of rights and limitations in the Copyright Act as a whole.”¹⁸⁷

As we outline in this Report, many aspects of the patchwork have remained the same since passage of the BCIA. Those changes that have occurred to the moral rights patchwork have been a mixed bag: although some aspects of the existing patchwork have frayed, such as the narrowing of the availability of claims under section 43 of the Lanham Act for violations of the rights of attribution and integrity, new squares have been added to the patchwork that provide additional protections, such as the addition of the Visual Artists Rights Act and section 1202 of title 17. Nonetheless, the Copyright Office believes that the approach taken by Congress thirty years ago should be respected absent significant, detrimental changes to the patchwork that would warrant abandoning the current framework in favor of adoption of a new federal moral right. The Copyright Office does not find that such changes have occurred.

While new technologies have modified the moral rights landscape, new business practices have also developed, relying in part on the current legal framework.¹⁸⁸ Enacting a federal moral rights law could adversely impact this carefully developed schema of contracts and industry

¹⁸⁶ Kernochan Center Initial Comments at 4.

¹⁸⁷ H.R. REP. NO. 100-609, at 20 (1988); S. REP. NO. 100-352, at 10 (1988) (“S. 1301 will not, and should not, change the current balance of rights between American authors and proprietors, modify current copyright rules and relationships, or alter the precedential effect of prior decisions.”).

¹⁸⁸ See, e.g., MPAA Initial Comments at 2 (“Further statutory recognition of the moral rights of attribution and integrity risks upsetting this well-functioning system that has made the United States the unrivalled world leader in motion picture production for over a century.”); Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”), Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 2 (Mar. 30, 2017) (“SAG-AFTRA Initial Comments”) (“But to the American performer, there are perhaps no greater rights than the ability to enforce contracts, and to collectively bargain under federal labor laws.”); Recording Industry Association of America, Inc. (“RIAA”), Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 2 (May 15, 2017) (“RIAA Reply Comments”) (“[R]ecord labels’ agreements with third-parties generally include attribution requirements. Such contractual provisions are preferable to government mandates that would presumably apply identical rules to all classes of creative works, rather than treating sound recordings (which typically involve numerous creative contributors) differently than photographs or novels or videogames (the first two of which typically involve a single creator).”).

norms in a way that would actually be detrimental to the protection of attribution and integrity interests.¹⁸⁹ For instance, contracts and licenses, which are governed by state law, have been at the forefront of protecting moral rights in the United States for many years and are commonly used in creative industries for that purpose. The ability of parties to freely negotiate the inclusion or exclusion of moral rights in a contract is a flexible way of addressing the interests of both parties. Likewise, the social and professional norms related to plagiarism, while not legally enforceable, regulate attribution for many different types of authors across various institutions and media.¹⁹⁰ Changing the “plagiarism patch” would disrupt the decades of social ordering established via dependence on these practices. Authors without the benefit of certain mechanisms for protecting their attribution and integrity interests, such as collective bargaining, can utilize other features of the framework, such as plagiarism norms and contract law, to protect their interests.¹⁹¹

Further, depending upon how it would be implemented, and what exceptions and limitations it would admit, a new moral rights statute could also present tensions with well-established legal principles, such as the First Amendment, on which the copyright ecosystem depends.¹⁹² Thus, the Office concludes that a blanket statutory moral right for authors of all types of copyrightable subject matter would disproportionately disrupt current economic transactions as well as the legal structure that guides them.

Nonetheless, as in the 1980s, a “minimalist” approach towards reform does not entail ignoring deficiencies within the current moral rights framework. For this reason, the Office believes that updates to individual pieces of the patchwork may be advisable to account for the evolution of technology and the corresponding changes within certain business practices. Specifically, we note that the gaps in Lanham Act protection caused by the *Dastar* decision, while not as large as some suggest, could be filled by a narrowly crafted amendment expanding the Act’s unfair competition protections to include false representations regarding authorship. Additionally, the Office suggests three minor changes to VARA: clarifying the definition of “work of visual art” with regard to commercial works; amending VARA’s “recognized stature” requirement in order to more firmly guide courts in interpreting that phrase; and amending VARA’s waiver provision to require all authors to consent to a VARA waiver. The Office’s analysis of the section 1202 provisions limiting CMI removal or alteration concludes that

¹⁸⁹ See, e.g., NMPA Reply Comment at 2 (“The existing U.S. legal framework is in fact preferable to the adoption of a European-style moral rights regime which would only stand to bring uncertainty and disruption to the music marketplace and will provide a serious disincentive to the use of musical works by prospective licensees.”).

¹⁹⁰ See *infra* Section IV.B.6.a.

¹⁹¹ See NMPA Reply Comment at 4 (“Together the combination of statutory and common law rights, and contracts forms a healthy moral rights jurisprudence that provides songwriters, their music publisher partners, and other authors, with the protections they need. This brings certainty and efficiency to enforcement of these rights in the marketplace.”).

¹⁹² See, e.g., MPAA Initial Comments at 10 (“New, as-yet-unspecified, statutory protections for either the rights of integrity or attribution could indeed implicate the First Amendment.”).

Congress may want to consider adding a new section 1202A that would better protect authors and copyright owners against removal or alteration of CMI when intended to conceal attribution. Finally, the Office proposes that Congress consider a narrowly tailored federal right of publicity, to address the uncertainty and ambiguity caused by conflicting state laws in this area.

A. Federal Law

1. Misappropriation and Unfair Competition: The Lanham Act

When the BCIA was passed in 1989, the Lanham Act (the federal trademark and unfair competition statute) was a major component of the U.S. patchwork providing moral rights protections. Specifically, district and circuit courts had repeatedly held that certain violations of the rights of attribution and integrity, such as failure to properly credit an author¹⁹³ or editing an author's work without permission "into a form that departs substantially from the original work,"¹⁹⁴ could give rise to a claim under section 43(a) of the Lanham Act.¹⁹⁵ The continued viability of section 43(a) as a vehicle for protecting authors' attribution and integrity interests has been called into question, however, following the Supreme Court's 2003 decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.* ("*Dastar*"),¹⁹⁶ which some courts and commenters have interpreted as precluding any such claims under the Lanham Act. As discussed below, however, the Court's opinion in *Dastar* is susceptible to more than one interpretation, a situation that has implications for the continued usefulness of the Lanham Act as part of the moral rights patchwork.

a) Pre-BCIA Case Law

Section 43(a) provides a remedy for certain "false designation[s] of origin, false or misleading description[s] of fact, or false or misleading representation[s] of fact" in connection

¹⁹³ See, e.g., *F.E.L. Publ'ns, Ltd. v. Catholic Bishop of Chi.*, No. 81-1333, 1982 WL 19198, at *10 (7th Cir. Mar. 25, 1982); *Smith v. Montoro*, 648 F.2d 602, 607-08 (9th Cir. 1981); *Follett v. New Am. Library, Inc.*, 497 F. Supp. 304, 311-12 (S.D.N.Y. 1980). As the Ninth Circuit noted when holding that an actor who alleged his name had been replaced on all film credits and advertising with another actor's name properly stated a valid claim under section 43(a), an actor's name can be of critical importance to a film's "power at the box office" and to the actor's ability to become recognized as a box office star. *Montoro*, 648 F.2d at 607.

¹⁹⁴ *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 24-25 (2d Cir. 1976).

¹⁹⁵ Despite this pre-BCIA case law, some study commenters questioned the effectiveness of the Lanham Act for protecting authors' moral rights even pre-*Dastar*. See, e.g., OTW Initial Comments at 12 ("At the very least, pre-*Dastar* trademark law is a poor way to serve authors' interests in attribution."); cf. NWU-SFWA Joint Initial Comments at 8 ("[R]egardless of the *Dastar* decision, the Lanham Act neither protects nor provides effective remedies for violations of authors' moral rights.").

¹⁹⁶ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

with “any goods or services.”¹⁹⁷ A number of different claims are cognizable under section 43(a), including claims for infringement of an unregistered trademark, claims for false implications of sponsorship or endorsement, and claims for “passing off” or “reverse passing off.”¹⁹⁸ Claims arising from violations of the rights of attribution and integrity typically fall into the last category: either a claim for “passing off,” whereby a plaintiff/author asserts that the defendant is attributing to the plaintiff a work that either was not authored by the plaintiff or that has been modified in a way to make it no longer the plaintiff’s work, thereby “passing off” the defendant’s work as being that of the plaintiff; or a claim for “reverse passing off,” whereby a plaintiff/author asserts that the defendant is representing himself as the source of the plaintiff’s work by removing attribution to the plaintiff, thus passing off plaintiff’s goods as his own.

One of the seminal pre-BCIA “passing off” cases implicating authors’ moral rights (in that instance, the right of integrity) was 1976’s *Gilliam v. American Broadcasting Cos.* In *Gilliam*, the British comedy troupe Monty Python brought a passing off claim against the television network ABC after ABC “substantially” edited certain Monty Python sketches without permission and then broadcast them.¹⁹⁹ The edits omitted 27 percent of the original program and included removing crucial elements of several skits, so that they became unintelligible.²⁰⁰ The comedy troupe members sued ABC and alleged that ABC had violated section 43(a) of the Lanham Act by using their name in connection with a “mutilated” version of their work that did not accurately represent their authorship.²⁰¹ The Second Circuit concluded “that the truncated version at times omitted the climax of the skits to which appellants’ rare brand of humor was leading and at other

¹⁹⁷ Section 43(a) states:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a).

¹⁹⁸ 2 ANNE GILSON LALONDE, GILSON ON TRADEMARKS § 7.02[5] (Matthew Bender 2018) (“GILSON ON TRADEMARKS”).

¹⁹⁹ *Gilliam*, 538 F.2d at 24.

²⁰⁰ *Gilliam*, 538 F.2d at 25 (describing one of ABC’s edits).

²⁰¹ *Gilliam*, 538 F.2d at 24.

times deleted essential elements in the schematic development of a story line.”²⁰² Significantly, the court stated that “the edited version broadcast by ABC impaired the *integrity* of appellants’ work and represented to the public as the product of appellants what was actually a mere caricature of their talents.”²⁰³ Following passage of the BCIA, several courts followed *Gilliam*, permitting a right of action under the Lanham Act for instances where an author’s work was mutilated, garbled, or mangled but their name remained attached to it.²⁰⁴

b) The Supreme Court’s decision in *Dastar*

In 2003, the U.S. Supreme Court issued an opinion in *Dastar* that many have viewed as having the effect of narrowing, if not eliminating, the availability of the Lanham Act as a proxy for moral rights.²⁰⁵ *Dastar* involved the sale and distribution by Dastar Corp. of edited videotapes of a television series first created by an affiliate on behalf of Twentieth Century Fox. Twentieth Century Fox asserted a “reverse passing off” claim against Dastar under section 43(a) of the Lanham Act, based on Dastar’s failure to attribute the footage used in its videotapes.

Titled “Crusade in Europe” and based on a book by the same name, the series at issue was produced on behalf of Twentieth Century Fox and aired by it in 1949.²⁰⁶ Fox did not renew the copyright in the television series, and in 1977 the series entered the public domain.²⁰⁷ But in 1988, Fox reacquired the television rights to the underlying book and licensed the exclusive rights to distribute the “Crusade” video set to SFM Entertainment and New Line Home Video. Subsequently, in 1995, Dastar Corp. purchased eight beta cam tapes of the original 1949

²⁰² *Gilliam*, 538 F.2d at 25. As one court later put it, “[t]he edited version simply made no sense.” *Choe v. Fordham Univ. Sch. of Law*, 920 F. Supp. 44, 49 (S.D.N.Y. 1995). See also *Gilliam*, 538 F.2d at 25 n.12 (“In one skit, an upper class English family is engaged in a discussion of the tonal quality of certain words as ‘woody’ or ‘tinny.’ The father soon begins to suggest certain words with sexual connotations as either ‘woody’ or ‘tinny,’ whereupon the mother fetches a bucket of water and pours it over his head. The skit continues from this point. The ABC edit eliminates this middle sequence so that the father is comfortably dressed at one moment and, in the next moment, is shown in a soaked condition without any explanation for the change in his appearance.”).

²⁰³ *Gilliam*, 538 F.2d at 25 (emphasis added).

²⁰⁴ See, e.g., *Choe*, 920 F. Supp. at 47–49 (student brought a section 43(a) claim against law school journal for publishing his comment with typographical and substantive errors); *Playboy Enters., Inc. v. Dumas*, 831 F. Supp. 295, 315–17 (S.D.N.Y. 1993) (artist brought a section 43(a) counterclaim against Playboy for publishing a collection of his works that were altered and attributing them to the artist); *Wojnarowicz v. Am. Family Ass’n*, 745 F. Supp. 130, 141–42 (S.D.N.Y. 1990) (artist brought a section 43(a) claim against a non-profit organization for publishing a pamphlet that incorporated his attributed images for criticism purposes).

²⁰⁵ *Dastar*, 539 U.S. 23.

²⁰⁶ The book contained General Eisenhower’s written account of the European theatre of World War II, and was first published by Doubleday. Doubleday granted the exclusive television adaptation and broadcast rights to an affiliate of the plaintiff. *Dastar*, 539 U.S. at 25–26.

²⁰⁷ *Dastar*, 539 U.S. at 26.

“Crusade” series, copied and edited that footage, and released it as a new video set entitled “World War II Campaigns in Europe.” The “Campaigns in Europe” video set was a little more than half the length of the original “Crusade” series and featured a new opening sequence, credit page, and closing, as well as new chapter-title sequences and narrated chapter introductions, among other revisions.²⁰⁸ Dastar Corp. then manufactured and sold copies of the “Campaigns” video set, with all markings identifying itself as the producer and distributor; the videos, sold at major retailers and online for significantly less than the “Crusade” set, also made no reference to the “Crusade” series.²⁰⁹

Twentieth Century Fox, SFM Entertainment, and New Line Home Video sued Dastar Corp. asserting, among other claims, reverse passing off in violation of section 43(a) of the Lanham Act based on Dastar Corp.’s failure to identify and credit the creators of the original “Crusade” television series as the origin of the footage in its “Campaigns” series. The U.S. District Court for the Central District of California granted summary judgment for the plaintiffs, noting that Dastar Corp. copied the entire television series, made only “minor changes,” and packaged the edited product as its own.²¹⁰ In a short opinion, the Ninth Circuit affirmed, concluding that Dastar Corp. committed “a ‘bodily appropriation’ of Fox’s series” by copying the series and marketing the edited product without attribution.²¹¹

The question before the Supreme Court was whether “the Lanham Act protect[s] creative works from uncredited copying, even without a likelihood of consumer confusion.”²¹² Section 43(a)(1)(A), which was at issue in *Dastar*, prohibits a “false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . . as to the origin . . . of [the defendant’s] goods.”²¹³ In interpreting the applicability of the Lanham Act, the Court focused on the statute’s use of the terms “origin” and “goods.”²¹⁴

²⁰⁸ *Id.* at 26–27.

²⁰⁹ *Id.* at 27.

²¹⁰ *Twentieth Century Fox Film Corp. v. Dastar Corp.*, No. CV 98-7189, 2000 WL 35503105, at *11–12 (C.D. Cal. Jan. 4, 2000).

²¹¹ *Twentieth Century Fox Film Corp. v. Entm’t Distrib.*, 34 Fed. App’x. 312, 314 (9th Cir. 2002) (quoting *Clery v. News Corp.*, 30 F.3d 1255, 1261 (9th Cir. 1994)).

²¹² Brief for Petitioner at i, *Dastar Corp. v. Twentieth Century Fox Film Corp.*, No. 02-428, 2003 WL 367729, at *I (Feb. 13, 2003). The Court also granted cert on a second, related question: “May a court applying the Lanham Act award twice the defendant’s profits for purely deterrent purposes?” *Id.* The Court ultimately did not address this question, which it said was mooted by its conclusion on the first question. See *Dastar*, 539 U.S. at 38.

²¹³ *Dastar*, 539 U.S. at 31 (quoting 15 U.S.C. § 1125(a)(1)(A)).

²¹⁴ See *id.* at 29–37.

The Court on an 8–0 vote rejected “[r]eading ‘origin’ in § 43(a) to require attribution of uncopyrighted materials.”²¹⁵ It began its analysis with the dictionary definitions of “origin” and “goods,” which the Court interpreted as referring to “the producer of the tangible product sold in the marketplace.”²¹⁶ The Court next discussed the purpose of section 43(a), which the Court characterized as guarding consumers against deception and protecting a producer’s goodwill, and concluded that a “consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product, or designed the product.”²¹⁷ In other words, the Court thought that consumers are not confused when a manufacturer’s name appears on a product and that name differs from the name of the creator of the underlying content, because consumers are only worried about who manufactured the tangible product.

While the Court acknowledged the possibility that consumer interests might be different for “a communicative product” such as a novel, for which “[t]he purchaser . . . is interested not merely, if at all, in the identity of the producer of the physical tome (the publisher), but also, and indeed primarily, in the identity of the creator of the story it conveys (the author),”²¹⁸ the Court ultimately found that “[t]he right to copy, and to copy without attribution, once a copyright has expired, like the right to make (an article whose patent has expired)—including the right to make it in precisely the shape it carried when patented—passes to the public.”²¹⁹ The Court reasoned that to hold otherwise would result in the creation of “a species of mutant copyright law that limits the public’s ‘federal right to copy and to use’ expired copyrights.”²²⁰ Further, citing the Visual Artists Rights Act of 1990, the Court stated that Congress had previously added an attribution right to copyright law “with much more specificity than the Lanham Act’s ambiguous use of ‘origin.’”²²¹ In the end, the Court “conclude[d] that the phrase refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.”²²²

c) Post-*Dastar* Case Law

The Court’s opinion in *Dastar* has been interpreted by many commenters as undermining the continued viability of the Lanham Act as a vehicle for an author seeking to vindicate their

²¹⁵ *Id.* at 35.

²¹⁶ *Id.* at 31.

²¹⁷ *Id.* at 32. It is worth noting that this conclusion was not based on consumer surveys or evidence from the record.

²¹⁸ *Id.* at 33.

²¹⁹ *Id.* at 33 (quoting *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964)).

²²⁰ *Id.* at 34 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989) (cleaned up)).

²²¹ *Id.* at 34.

²²² *Id.* at 37.

rights of attribution and integrity.²²³ The exact extent to which such claims are precluded by *Dastar* remains up for debate, however. Lower court opinions applying *Dastar* have fallen into two primary camps: a broad reading that precludes most claims under the Lanham Act for violation of the rights of attribution or integrity interests in expressive works,²²⁴ and several more narrow readings that limit *Dastar* more closely to its facts and leave open the possibility of certain claims based on violation of these interests.

Most of the courts that read *Dastar* broadly have held that it forecloses claims “premised on the false designation of the origin of ideas, concepts, or communications embodied in tangible goods,”²²⁵ rejecting claims for lack of attribution in connection with movies,²²⁶ video footage,²²⁷

²²³ See Artists Rights Society (“ARS”), Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 3 (Mar. 27, 2017) (“ARS Initial Comments”) (“The ability of artists or estates to rely on Section 43(a) may be limited as a result of the Supreme Court’s decision in *Dastar*.”); Authors Guild Initial Comments at 2 (stating that *Dastar* is a main factor in “the result that our law no longer provides a full right of attribution for authors of books and other literary works”); FMC Reply Comments at 3 (“[A]ny resemblance to moral rights protections from section 43(a) were lost by *Dastar*.”); Kernochan Center Initial Comments at 3 (“*Dastar* has, accordingly, undermined much of the law under section 43(a) on which the United States’ claimed right of attribution rested at the time of Berne adherence.”); SAG-AFTRA Initial Comments at 7 (“We are concerned that the 2003 Supreme Court decision, *Dastar v. Twentieth Century Fox*, will one day undermine our SAG-AFTRA members’ ability to use the Lanham Act to address attribution or misattribution to intangible entertainment products.”). But see, Broadcast Music, Inc. (“BMI”), Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 2 (May 15, 2017) (“BMI Reply Comments”) (discussing composers objecting to political candidates’ use of songs, “the Lanham Act helps to fill gaps in the United States’ compliance with Berne”); CCIA Initial Comments at 4–5 (explaining that *Dastar* has not affected the moral rights paradigm in the United States); University of Michigan Library, Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 1 (May 15, 2017) (“[W]e remain unconvinced that the patchwork of laws, which were viewed as sufficient when the United States acceded to Berne, has unraveled following *Dastar*. The excessive focus on *Dastar* does a disservice to a patchwork that has always been far more extensive than the Lanham Act.”). Some commentators see such preclusion as a good thing. See, e.g., CDT Reply Comments at 4 (“To the extent that the *Dastar* decision has limited the legal avenues for pursuing attribution claims, it was correct to do so.”).

²²⁴ See, e.g., *Kent v. Universal Studios, Inc.*, No. CV 08–2704, 2008 WL 11338293, at *10 (C.D. Cal. Aug. 15, 2008) (holding that the term “origin” in section 43(a) “exclude[s] the identification of the authors of communicative works”); *Atrium Grp. de Ediciones y Publicaciones, S.L. v. Harry N. Abrams, Inc.*, 565 F. Supp. 2d 505, 512–13 (S.D.N.Y. 2008); *Weidner v. Carroll*, No. 06-CV-782, 2007 WL 2893637, at *4 (S.D. Ill. Sept. 28, 2007).

²²⁵ *Narrative Ark Entm’t v. Archie Comic Publ’ns, Inc.*, No. 16 CV 6109, 2017 WL 3917040, at *12 (S.D.N.Y. Sept. 5, 2017) (finding *Dastar* preemption of Lanham Act claim based on defendants’ failure to attribute authorship to plaintiff of stories, artwork, and characters first created by plaintiff under a freelance agreement for defendants); see also *Gary Friedrich Enters. v. Marvel Enters.*, 713 F. Supp. 2d 215, 234 (S.D.N.Y. 2009) (finding *Dastar* preemption of Lanham Act claims because § 43(a) “does not . . . cover misrepresentation about the author of an idea, concept, or communication embodied in . . . goods”).

²²⁶ See, e.g., *Williams v. UMG Recordings, Inc.*, 281 F. Supp. 2d 1177, 1185 (C.D. Cal. 2003) (rejecting claims based on failure to provide attribution for plaintiff’s contributions to motion picture, including narration, editing, and musical scoring).

²²⁷ See *Fioranelli v. CBS Broad. Inc.*, 232 F. Supp. 3d 531, 539 (S.D.N.Y. 2017).

web designs,²²⁸ textbooks,²²⁹ poetry collections,²³⁰ and photographs,²³¹ to name a few. In adopting a broader reading of *Dastar*, these courts have often focused on Justice Scalia’s expressed fear that the availability of Lanham Act claims for mis- or non-attribution of expressive works might create a form of “mutant copyright,”²³² and have sought to clearly police what they view as the boundaries between trademark and copyright law.²³³ A smaller minority of courts have extended this reading of *Dastar* even further to prohibit any Lanham Act claim related to works that are potentially covered by copyright, such as precluding claims even for misattribution of the tangible goods embodying works of authorship²³⁴ or for false representation of “affiliation” between an author and a publisher of a novel.²³⁵

In contrast, courts adhering to a narrower interpretation of *Dastar* have been less concerned with maintaining a bright line between copyright and trademark law, and have been willing to entertain some claims for mis- or non-attribution of expressive works under certain theories. The courts that have allowed such Lanham Act claims to proceed have generally done so on one of four grounds:

²²⁸ See *Mays & Assocs., Inc. v. Euler*, 370 F. Supp. 2d 362, 371 (D. Md. 2005).

²²⁹ See *Zyla v. Wadsworth*, 360 F.3d 243, 251–52 (1st Cir. 2004); *Vogel v. Wolters Kluwer Health, Inc.*, 630 F. Supp. 2d 585, 589–92 (M.D.N.C. 2008).

²³⁰ See *Silverstein v. Penguin Putnam, Inc.*, 522 F. Supp. 2d 579, 601–02 (S.D.N.Y. 2007).

²³¹ See *Agence Fr. Presse v. Morel*, 769 F. Supp. 2d 295 (S.D.N.Y. 2011).

²³² *Dastar*, 539 U.S. at 34.

²³³ See, e.g., *Friedman v. Zimmer*, No. CV 15-502, 2015 WL 6164787, at *4 (C.D. Cal. July 10, 2015) (“[G]iven the [*Dastar*] Court’s concerns about creating overlap between the Lanham Act and other intellectual property regimes, it would have made little sense for the Supreme Court to reject the *Dastar* plaintiff’s claims under 15 U.S.C. § 1125(a)(1)(A) but permit the same sort of claim to be asserted under a different prong of the same statute.”); *Morel*, 769 F. Supp. 2d at 307 (“In *Dastar*, the Supreme Court admonished that section 43(a) of the Lanham Act—which governs trademarks—cannot be invoked as an end run around the copyright laws or to add another layer of protection to copyright holders.”); *Maule v. Phila. Media Holdings, LLC*, 710 F. Supp. 2d 511, 518 (E.D. Pa. 2008). Other courts have extended this concern to preclude claims under the Lanham Act that might overlap with other intellectual property laws. See, e.g., *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1307 (Fed. Cir. 2009) (holding that *Dastar* also sought to prevent “overlap between the Lanham and Patent Acts”); *United Servs. Auto. Ass’n v. Mitek Sys., Inc.*, No. SA-12-CV-282, 2013 WL 781900, at *3–5 (W.D. Tex. Feb. 15, 2013) (following *Baden Sports* to extend *Dastar* to trade secrets); *Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc.*, 299 F. Supp. 2d 565, 571–72 (E.D. Va. 2004) (extending *Dastar* to trade secrets).

²³⁴ See *Weidner*, 2007 WL 2893637, at *4.

²³⁵ *Antidote Int’l Films, Inc. v. Bloomsbury Publ’g, PLC*, 467 F. Supp. 2d 394, 398–99 (S.D.N.Y. 2006).

- (i) *Dastar* precludes only claims for non-attribution or “reverse passing off,” but leaves available claims for misattribution or “passing off”;²³⁶
- (ii) *Dastar* precludes only claims under section 43(a)(1)(A),²³⁷ but leaves open claims under section 43(a)(1)(B), which prohibits “misrepresenting the nature, characteristics, [or] qualities” of goods or services in advertising;²³⁸
- (iii) Unattributed copying of works that are themselves the goods, as opposed to works embodied in separate, tangible goods, constitutes “repackaging” of the sort cognizable under *Dastar*;²³⁹
- (iv) *Dastar* only applies to works that are in the public domain, and does not prohibit claims under section 43(a) for either passing off or reverse passing off in connection with works that are still under copyright protection.²⁴⁰

Availability of claims for misattribution or passing off

As mentioned above, prior to the Supreme Court’s decision in *Dastar*, the Second Circuit found that the act of making prejudicial, material alterations to a work could support a claim for passing off under section 43(a) under the theory that “[t]o deform [plaintiff’s] work is to present him to the public as the creator of a work not his own, and thus makes him subject to criticism for

²³⁶ *Auscape Int’l v. Nat’l Geographic Soc’y*, 409 F. Supp. 2d 235, 250–51 (S.D.N.Y. 2004) (citing *Gilliam*). Cf. *Craigslist Inc. v. 3Taps Inc.*, 942 F. Supp. 2d 962, 978 (N.D. Cal. 2013) (“The Copyright Act provides no recourse for Craigslist to prevent others from trading on Craigslist’s name and mark, and thus does not overlap with the present Lanham Act claim.”).

²³⁷ Prohibiting the use of a “name, . . . false designation of origin, false or misleading description of fact, or false or misleading representation of fact” in connection with “goods, services, or commercial activities” in a manner that is likely to cause confusion. 15 U.S.C. § 1125(a)(1).

²³⁸ See, e.g., *Pearson Educ., Inc. v. Boundless Learning, Inc.*, 919 F. Supp. 2d 434, 438 (S.D.N.Y. 2013) (“*Dastar* explicitly left open the possibility that some false authorship claims could be vindicated under the auspices of section 43(a)(1)(B)’s prohibition on false advertising.”); *Clauson v. Eslinger*, 455 F. Supp. 2d 256, 261 (S.D.N.Y. 2006) (“The *Dastar* Court explicitly left open the possibility that some false authorship claims could be vindicated under the auspices of this section’s prohibition on false advertising.”); cf. *Zyla*, 360 F.3d at 252 n.8 (noting in dicta that “*Dastar* left open the possibility that some false authorship claims could be vindicated under the auspices of § 43(a)(1)(B)’s prohibition on false advertising”); *Defined Space, Inc. v. Lakeshore E., LLC*, 797 F. Supp. 2d 896, 901 (N.D. Ill. 2011) (agreeing with the plaintiff’s interpretation that “*Dastar* explicitly left open a claim under § 43(a)(1)(B) under the Lanham Act”).

²³⁹ See, e.g., *Defined Space*, 797 F. Supp. 2d at 901 (permitting a section 43(a) claim brought by a photographer against the defendants who failed to provide proper accreditation); *Levine v. Landy*, 832 F. Supp. 2d 176, 189, 191 (N.D.N.Y. 2011) (permitting a section 43(a) claim brought by photographer whose photos were used by a publisher without attribution); *Cable v. Agence Fr. Presse*, 728 F. Supp. 2d 977, 981 (N.D. Ill. 2010).

²⁴⁰ See, e.g., *Defined Space*, 797 F. Supp. 2d at 901; *Do It Best Corp. v. Passport Software, Inc.*, No. 01 C 7674, 2004 WL 1660814, at *17–18 (N.D. Ill. July 23, 2004).

work he has not done.”²⁴¹ Post-*Dastar*, at least two courts have reasoned that certain acts of misattribution may still present cognizable claims under section 43(a). The Southern District of New York has stated, albeit in *dicta*, that a claim for passing off under section 43(a) could proceed when an “author’s name [is used] to suggest authorship or approval of a work substantially modified without the author’s consent.”²⁴² Similarly, the Northern District of California found that *Dastar* does not preclude claims for “regular ‘passing off,’” noting that such a claim “does not raise the ‘perpetual patent and copyright’ concerns that the Supreme Court identified in *Dastar*” and that, in that case, “[t]he Copyright Act provides no recourse for [plaintiff] to prevent others from trading on [its] name and mark, and thus does not overlap with the present Lanham Act claim.”²⁴³ Scholars and commenters have likewise argued that misattribution claims such as those at issue in *Gilliam* should survive *Dastar*.²⁴⁴

Only one court has directly considered *Dastar*’s application to a passing off claim premised on material alterations to a plaintiff’s work.²⁴⁵ In *Dankovich v. Keller*, the *pro se* plaintiff asserted a claim for passing off under section 43(a) based on allegations that defendants published his article with an unapproved headline and with additional unapproved changes to the substance of the article, which resulted in “[d]efendants falsely misrepresent[ing] that [plaintiff]

²⁴¹ *Gilliam*, 538 F.2d at 24 (citing Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 569 (1940)).

²⁴² *Auscipe*, 409 F. Supp. 2d at 251 (citing *Gilliam*). See also *Cyber Websmith, Inc. v. Am. Dental Ass’n*, No. 09-CV-6198, 2010 WL 3075726, at *3 (N.D. Ill. Aug. 4, 2010) (stating, in *dicta*, that passing off claims avoid *Dastar* preemption).

²⁴³ *Craigslist*, 942 F. Supp. 2d at 978.

²⁴⁴ See, e.g., Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap,”* 2007 UTAH L. REV. 659, 695 (2007) (arguing that reading *Dastar* to preclude misattribution claims would dramatically undermine the Lanham Act’s ability to protect consumers against false facts, such as the author “market[ing] my new high-energy drink as ‘formulated by the people at Coca-Cola’ or my new line of clothing as ‘designed by Karl Lagerfeld’”); International Trademark Association (“INTA”), Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 4 (Mar. 27, 2017) (“INTA Initial Comments”) (arguing that “removing misattribution from the scope of trademark law can only harm consumers and producers and frustrate the goals of trademark law”); SAG-AFTRA Initial Comments at 7 (“Incorrectly billing a film is analogous to but worse than a toy manufacturer selling an unauthorized action figure, because inaccurate billing decreases a performer’s chances of finding gainful employment. It also potentially calls his or her integrity into question if she or he has claimed to have appeared in a work in which they have not been correctly billed. In addition, such inaccurate billing misleads a consumer into paying for a movie that the performer had no creative or professional involvement in.”). Cf. *A.V.E.L.A., Inc. v. Estate of Marilyn Monroe, LLC*, No. 12 Civ. 4828, 2019 WL 367842, at *17–9 (S.D.N.Y. Jan. 30, 2019) (allowing a claim for false endorsement under section 43(a) to proceed based on the licensing and distribution of products bearing the name and likeness of a dead celebrity).

²⁴⁵ Separately, the Central District of California has called into question the continued viability of *Gilliam*, stating in *dicta* that “*Dastar* . . . effectively overrules *Gilliam*.” *Kent*, 2008 WL 11338293, at *4. It is worth noting, however, that the claims at issue in *Kent* were for reverse passing off based on non-attribution, similar to the claims directly at issue in *Dastar*, rather than claims for passing off or false attribution of the type at issue in *Gilliam*.

authored the piece he now claims he ‘did not write.’”²⁴⁶ The court, citing several post-*Dastar* reverse passing off cases, rejected the Lanham Act claim, stating that plaintiff’s claim “is exactly the type of false authorship claim barred by *Dastar*, regardless of how [plaintiff] attempts to characterize it.”²⁴⁷ The Office was unable to locate any cases where a court rejected a claim under section 43(a) based on defendant’s attribution of his own work to the plaintiff.

Availability of claims under section 43(a)(1)(B)

Another theory that has been employed by courts to limit the scope of *Dastar* preemption is that the Supreme Court’s holding applies only to claims under section 43(a)(1)(A) of the Lanham Act, leaving available claims for non-attribution under section 43(a)(1)(B). In finding the claims before it to be preempted by the Copyright Act, the *Dastar* Court noted that “[i]f, moreover, the producer of a video that substantially copied [plaintiffs’ series] were, in advertising or promotion, to give purchasers the impression that the video was quite different from that series, then one or more [plaintiffs] might have a cause of action . . . for misrepresentation under . . . § 43(a)(1)(B).”²⁴⁸ Several lower courts have seized upon this language to hold that “*Dastar* explicitly left open the possibility that some false authorship claims could be vindicated under the auspices of section 43(a)(1)(B)’s prohibition on false advertising.”²⁴⁹ In reaching such a conclusion, the Southern District of New York noted that the *Dastar* court “grounded its holding in what it ruled was the ‘natural understanding’ of section 43(a)(1)(A)’s phrase ‘origin of goods,’” but that “Congress did not incorporate any such reference into section 43(a)(1)(B).”²⁵⁰

Other courts have rejected this line of reasoning. The Federal Circuit found that similar reliance on the *Dastar* dicta quoted above was misplaced, noting that “[w]hile the dictum in *Dastar* might suggest that the Supreme Court left open the possibility of a claim arising from a misrepresentation concerning the qualities of certain goods, it does not necessarily suggest that claims based on false designation of authorship are actionable under Section 43(a)(1)(B),” expressing the concern that allowing such claims “could create overlap” between the Lanham Act and other intellectual property laws.²⁵¹ The Sixth Circuit similarly rejected claims under section 43(a)(1)(B), stating that “a misrepresentation about the source of the ideas embodied in a tangible object (such as misrepresentation about the author of a book or the designer of a widget) is not a mischaracterization about the nature, characteristics, or qualities of the object,” and that “a misrepresentation is actionable under § 43(a)(1)(B) only if it misrepresents the ‘characteristics of

²⁴⁶ *Dankovich v. Keller*, No. 16-13395, 2017 WL 5571354 (E.D. Mich. July 27, 2017).

²⁴⁷ *Id.* at *8.

²⁴⁸ *Dastar*, 539 U.S. at 38.

²⁴⁹ *Pearson*, 919 F. Supp. 2d at 438. See also *Clauso*, 455 F. Supp. 2d at 262 (stating that a “film’s credits and promotional materials wrongly credit defendant as being producer” state a claim under section 43(a)(1)(B)).

²⁵⁰ *Pearson*, 919 F. Supp. 2d 438.

²⁵¹ *Baden Sports*, 556 F.3d at 1307.

the good itself.”²⁵² The Southern District of New York likewise found that authorship was not a characteristic or quality of a work, because to find otherwise would result in allowing under section 43(a)(1)(B) “the very claim *Dastar* rejected under § 43(a)(1)(A).”²⁵³

A number of courts in the Ninth Circuit have similarly read into the Ninth Circuit’s opinion in *Sybersound Records, Inc. v. UAV Corp.*²⁵⁴ a blanket prohibition against claims based on false designation of authorship under section 43(a)(1)(B).²⁵⁵ In *Sybersound*, the Ninth Circuit rejected a claim under section 43(a)(1)(B) premised on allegations that defendant misrepresented its pirated karaoke recordings as being licensed by the copyright owner, which in turn put plaintiffs, who licensed (and paid royalties for) the recordings, at a competitive disadvantage. In finding that such misrepresentations were not actionable, the Court stated that “the licensing status of each work” was not part of the “nature, characteristics, or qualities of the karaoke products.”²⁵⁶ Complicating this analysis, however, is the fact that the *Sybersound* court stated that “the nature, characteristics, and qualities of karaoke recordings under the Lanham Act are more properly construed to mean characteristics of the good itself, *such as the original song and artist of*

²⁵² *Kehoe Component Sales, Inc. v. Best Lighting Prods., Inc.*, 796 F.3d 576, 590 (6th Cir. 2015) (rejecting claims under section 43(a)(1)(B) based on counterclaim defendant’s advertising of products identical to products it produced on behalf of counterclaim plaintiff, without attribution to counterclaim plaintiff for originating the design). It is worth noting that neither *Kehoe* nor *Baden Sports* involved copyrighted or expressive works. *Baden Sports* involved a false advertising claim based on defendant’s marketing of its product as “proprietary,” “exclusive,” and “innovative,” when plaintiff alleged that defendant copied features of plaintiff’s product, infringing a utility patent that plaintiff had obtained for those features. *Baden Sports*, 556 F.3d at 1303. Similarly, in *Kehoe* a seller brought various claims, including a false advertising claim, against its former supplier after the latter used molds and tooling designed for manufacture of the seller’s products to create identical lighting products that the supplier then marketed directly to the seller’s customers. *Kehoe*, 796 F.3d at 580.

²⁵³ *Antidote Int’l Films*, 467 F. Supp. 2d at 399–400; see also *Morel*, 769 F. Supp. 2d at 308 (citing *Antidote*); *LaPine v. Seinfeld*, No. 08 Civ. 128, 2009 WL 2902584, at *15 (S.D.N.Y. Sept. 10, 2009) (same); *Gurvey v. Cowan, Liebowitz & Latman, PC*, No. 06 Civ. 1202, 2009 WL 1117278, at *4 (S.D.N.Y. Apr. 24, 2009) (“A failure to attribute the authorship of an idea simply does not amount to the misrepresentation of the ‘nature, characteristics, qualities, or geographic origin of . . . goods, services, or commercial activities’ as required under section 43(a) of the Lanham Act.”), *rev’d in part on other grounds*, 462 Fed. App’x. 26 (2d Cir. 2012); *Thomas Publ’g Co., LLC v. Tech. Evaluation Centers, Inc.*, No. 06 Civ. 14212, 2007 WL 2193964, at *3 (S.D.N.Y. July 27, 2007).

²⁵⁴ 517 F.3d 1137 (9th Cir. 2008).

²⁵⁵ See, e.g., *Friedman*, 2015 WL 6164787, at *4 (citing *Sybersound* for the proposition that a claim of false designation of authorship is not viable under section 43(a)(1)(B) under the Lanham Act); *A.H. Lundberg Assocs., Inc. v. TSI, Inc.*, No. C14-1160, 2014 WL 5365514, at *4 (W.D. Wash. Oct. 21, 2014) (citing *Sybersound* for the proposition that “claims of false designations of authorship as false advertisement are not actionable under § 1125(a)(1)(B) in the Ninth Circuit”); cf. *Baden Sports*, 556 F.3d at 1307 (“Following *Sybersound*’s reasoning, we conclude that authorship, like licensing status, is not a nature, characteristic, or quality, as those terms are used in Section 43(a)(1)(B) of the Lanham Act.”).

²⁵⁶ *Sybersound*, 517 F.3d at 1144.

the karaoke recording."²⁵⁷ This statement seems to recognize that the identity of the artist can be a material characteristic of the good, and thus misattribution of the artist could support a claim under section 43(a)(1)(B).²⁵⁸

Availability of claims for repackaging of works

Some courts have read Justice Scalia's discussion of the meaning of "origin" in section 43(a)(1)(A) as being limited to situations where the copyrighted works at issue are embodied in tangible goods (such as an audiovisual work embodied in a videotape or a novel embodied in a physical book), and thus inapplicable to situations where the work and the goods are merged (such as a digital photograph).²⁵⁹ In reaching such a conclusion, these courts often analogize to the *Dastar* court's hypothetical regarding the repackaging of goods, wherein the Court stated that a section 43(a) claim "would undoubtedly be sustained if Dastar [Corp.] had bought some of New Line's Crusade videotapes and merely repackaged them as its own."²⁶⁰ In several cases finding no *Dastar* preemption, the courts found it notable that the defendant copied the plaintiff's expressive work without modification or addition.²⁶¹

This approach is exemplified by the Northern District of Illinois' opinion in *Cable v. Agence France Presse*.²⁶² In that case, the plaintiff photographer sued the defendant news agency alleging violations of the Copyright Act and the Lanham Act for displaying, disseminating, and distributing copies of his photos without permission or attribution. Defendant argued that the Lanham Act claim was precluded by *Dastar* because the photographs were not a tangible good, but rather embodied the photographer's communication. The court disagreed, and held that plaintiff's claim — "that AFP took the plaintiff's photos and repackaged them as their own without revision" — was permitted by *Dastar*.²⁶³ The Northern District of New York used similar reasoning

²⁵⁷ *Sybersound*, 517 F.3d at 1144 (emphasis added).

²⁵⁸ *But see Friedman*, 2015 WL 6164787, at *4 (rejecting this reading of *Sybersound*).

²⁵⁹ *See, e.g., Defined Space*, 797 F. Supp. 2d at 901 (holding that facts alleging that a defendant took the plaintiff's "photographs and passed them off as their own photographs without revision or proper accreditation . . . cleanly fit within the exception enunciated by *Dastar*"); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. 06-2662, 2011 WL 4596043, at *11–12 (D. Md. Sept. 30, 2011); *Gen. Sci. Corp. v. SheerVision, Inc.*, No. 10-cv-13582, 2011 WL 3880489, at *3 (E.D. Mich. Sept. 2, 2011); *Cable*, 728 F. Supp. 2d at 981; *Covent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 936 (E.D. Va. 2010); *Michael Grecco Photography, Inc. v. Everett Collection, Inc.*, 589 F. Supp. 2d 375, 387 (S.D.N.Y. 2008), *vacated in part on other grounds*, No. 07 Civ. 8171, 2009 WL 969928 (S.D.N.Y. Apr. 7, 2009).

²⁶⁰ *Dastar*, 539 U.S. at 31.

²⁶¹ *See, e.g., Cisco Tech., Inc. v. Certification Trendz, Ltd.*, 177 F. Supp. 3d 732, 737–38 (D. Conn. 2016); *Defined Space*, 797 F. Supp. 2d at 901; *Do It Best*, 2004 WL 1660814, at *17–18. *Cf. Flaherty v. Filardi*, No. 03 Civ. 2167, 2009 WL 749570, at *9 (S.D.N.Y. Mar. 20, 2009) (stating in *dicta* that had the defendant "merely changed the cover page of the script to list himself as author and provide a new title, Plaintiff might have had a Lanham Act claim").

²⁶² *Cable*, 728 F. Supp. 2d 977.

²⁶³ *Cable*, 728 F. Supp. 2d at 981.

in *Levine v. Landy*.²⁶⁴ Distinguishing an earlier Southern District of New York case that found *Dastar* preemption of a claim for failure to identify the plaintiff as the creator of a comic book character, the *Levine* court noted that the comic book character at issue in the previous case was “embodied” in a film and merchandise, while in the case before it, plaintiff “alleges defendants misrepresented the origin of the photographs *themselves*; not the ideas, concepts, or communications embodied in the photographs.”²⁶⁵ The District of Connecticut likewise found that a claim under section 43(a) might be available were the defendant to sell works consisting solely of questions and answers from plaintiff’s certification exams, but that “[i]f . . . it can be shown at summary judgement that Defendants have added content to these exams in the form of answer explanations, Plaintiff’s false designation of origin claim would likely fail under *Dastar* and its progeny.”²⁶⁶

In contrast, other courts have rejected such a distinction, even on similar facts.²⁶⁷ The Southern District of New York, evaluating claims that a news agency and its licensees distributed and reproduced plaintiff’s photographs without authorization and with improper attribution to a third party, found that the photographs were “communicative products” as described by the *Dastar* Court, and thus “false designation of their authorship is not cognizable under section 43(a)(1)(A).”²⁶⁸ Similarly, the Southern District of Illinois rejected the idea that the defendants merely repackaged the plaintiffs’ goods despite “[t]he fact that the ‘product’ (i.e., the manuscript) in this case is nothing more tangible than an idea or communication that it embodies,” and accordingly found that plaintiffs’ Lanham Act claim for false designation of origin was precluded under *Dastar*.²⁶⁹

Public Domain

At least one court has nominally distinguished *Dastar* by noting that “*Dastar* rested heavily on the fact that the materials at issue were in the public domain,” finding that Lanham Act claims relating to works that are not in the public domain do not pose “the fear of a perpetual copyright regime such as the Supreme Court faced in *Dastar*.”²⁷⁰ The majority of courts have

²⁶⁴ *Levine*, 832 F. Supp. 2d 176.

²⁶⁵ *Id.* at 191 (emphasis added).

²⁶⁶ *Certification Trendz*, 177 F. Supp. 3d. at 737–38.

²⁶⁷ See, e.g., *Tech. Evaluation Ctrs.*, 2007 WL 2193964, at *2–3 (holding that *Dastar*’s prohibition on protection for “the author of any idea, concept or communication embodied in those goods” extends to services embodied in non-tangible goods like websites); *Morel*, 769 F. Supp. 2d at 307 (rejecting claim for reverse passing off based on reproduction of photograph); cf. *Fioranelli*, 232 F. Supp. 3d at 541 (finding that footage incorporated into defendants’ media products was not a tangible good, and that failure to credit plaintiff as the author of the footage did not support a claim under section 43(a)(1)(A)).

²⁶⁸ *Morel*, 769 F. Supp. 2d at 307.

²⁶⁹ *Weidner*, 2007 WL 2893637, at *4.

²⁷⁰ *Defined Space*, 797 F. Supp. 2d at 901.

rejected limiting *Dastar* to works in the public domain, however.²⁷¹ For example, the Southern District of New York noted that “the Supreme Court did not articulate any distinction between copyrighted and uncopyrighted material,” but rather “the Court was clearly concerned that applying Lanham Act protection to otherwise unprotected material would result in an extension of copyright law through the back door of the Lanham Act,” and thus would have “declined to extend Lanham Act protection to the [video], whether it was under copyright or not.”²⁷² The Middle District of Tennessee likewise rejected this distinction, stating that the result of such an interpretation would be that “‘origin of goods’ in § 1125(a)(1) [would] mean one thing when addressing copyrighted works, and mean something quite different when addressing works whose copyrights had expired.”²⁷³

Despite the weight of authority rejecting such a limitation of *Dastar* to works in the public domain, some scholars and commentators have expressed support for this theory as a basis for a narrow reading of *Dastar*.²⁷⁴ As one copyright scholar stated at the Office’s moral rights symposium, *Dastar* “was mostly about . . . content no longer protected by copyright.”²⁷⁵

²⁷¹ See, e.g., *Narrative Ark*, 2017 WL 3917040, at *5; *Fioranelli*, 232 F. Supp. 3d at 539; *Personal Keepsakes, Inc. v. Personalizationmall.com, Inc.*, No. 11 C 5177, 2012 WL 414803, at *4 (N.D. Ill. Feb. 8, 2012); *Kinney v. Oppenheim*, No. CV-10-6287, 2011 WL 13217573, at *10 (C.D. Cal. Mar. 3, 2011); *Contractual Obligation Prods., LLC v. AMC Networks, Inc.*, 546 F. Supp. 2d 120, 130 (S.D.N.Y. 2008); *Vogel*, 630 F. Supp. 2d at 591; *Brainard v. Vassar*, 561 F. Supp. 2d 922, 934 (M.D. Tenn. 2008); *A Slice of Pie Prods., LLC v. Wayans Bros. Entm’t*, 392 F. Supp. 2d 297, 313 (D. Conn. 2005); *UMG*, 281 F. Supp. 2d at 1185.

²⁷² *Atrium Grp.*, 565 F. Supp. 2d at 512. In fact, the Southern District of New York has found in at least one instance that an attempt to distinguish *Dastar* on this grounds in order to pursue a Lanham Act claim for failure to credit the plaintiff as the producer rises to the level of bad faith required to support an award of attorneys’ fees to the defendant. See *Contractual Obligation*, 546 F. Supp. 2d at 130–31.

²⁷³ *Brainard*, 561 F. Supp. 2d at 934.

²⁷⁴ See, e.g., Hughes, 2007 UTAH L. REV. at 697; AAP Initial Comments at 6 (“the decision is arguably limited to works in the public domain.”); Authors Alliance Initial Comments at 7–8 (“The *Dastar* decision articulated a strong U.S. commitment to a robust public domain and the public’s right to freely use works that have entered into it. Attempts by those who would interfere with the public domain by attaching non-economic author rights to public domain works should be rejected.”). Cf. Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 269 (2004) (“The Court placed great emphasis on the unconstrained ability of the public to copy and distribute public domain works. Requiring accurate attribution of creative origin, according to the Court, improperly impedes the public’s entitlement. Where, by contrast, the work is still subject to the author’s exclusive right to make the work available in copies or by transmission, the requirements as to how the copies or transmissions are labeled take nothing from the public.”).

²⁷⁵ *Session 2: The U.S. Perspective*, in Symposium Transcript, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, 8 GEO. MASON J. INT’L COM. L. 26, 33 (2016) (hereinafter “*Session 2, Symposium Transcript*”) (remarks of Peter K. Yu, Professor of Law, Texas A&M University School of Law).

d) The Implication of *Dastar* for the Moral Rights Patchwork

It is indisputable that the Supreme Court's holding in *Dastar* has narrowed the applicability of the Lanham Act to claims for violations of the rights of attribution and integrity, and thus has resulted in the fraying of one square of the moral rights patchwork as originally envisioned by Congress. It would nevertheless be inappropriate to write off the Lanham Act entirely. Based on the Office's review of lower court decisions interpreting *Dastar*, the Office believes that, when *Dastar* is properly interpreted, the Lanham Act remains a viable square of the moral rights patchwork.²⁷⁶ Though limited in its availability—as individual squares in the patchwork tend to be—the Lanham Act provides a vehicle for authors to protect both their attribution and integrity interests under certain facts. The question that must be answered, however, is what types of section 43(a) claims remain, and what level of protection do such surviving claims provide for authors who have seen their work mis- or non-attributed, or distorted in a manner that they find prejudicial?

The Office acknowledges that the majority of courts considering claims under section 43(a) arising from either mis- or non-attribution of creative works or prejudicial distortions of those works have rejected such claims post-*Dastar*. It does not follow, however, that all potential claims under section 43(a) for violations of the rights of attribution or integrity are foreclosed. Further, while a small minority of such courts have stretched *Dastar*'s expressed concern regarding the creation of “a species of mutant copyright law that limits the public's federal right to copy and to use expired copyrights”²⁷⁷ to preclude any claims under section 43(a) related to works potentially covered by copyright, such a result does not appear to be consistent with either the purpose of the Lanham Act or the wording of the *Dastar* opinion itself.²⁷⁸

As the *Dastar* Court noted, the Lanham Act is at its heart a consumer protection statute.²⁷⁹ For it to fulfill this purpose, courts must acknowledge that, at least with respect to certain products, a consumer's purchasing decision is likely to be influenced “not merely, if at all, [by] the identity of the producer of the physical tome (the publisher), but also, and indeed primarily, [by] the identity of the creator of the story it conveys (the author).”²⁸⁰

²⁷⁶ To the extent that state trademark statutes and common law are consistent with the Lanham Act, most states have found that analysis of the state principles are to be interpreted under the same analysis as the federal law. See 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 22:1.50 (5th ed. 2017) (“MCCARTHY ON TRADEMARKS”); see also *Grupo Gigante SA De CV v. Dallo & Co., Inc.*, 391 F.3d 1008, 1100 (9th Cir. 2004); *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1219 (10th Cir. 2004); *Rolls-Royce Motors Ltd. v. A & A Fiberglass, Inc.*, 428 F. Supp. 689, 694 (N.D. Ga. 1976).

²⁷⁷ *Dastar*, 539 U.S. at 34 (cleaned up).

²⁷⁸ See *supra* discussion on pages 47–54, and cases cited therein.

²⁷⁹ *Dastar*, 539 U.S. at 32 (“Section 43(a) of the Lanham Act prohibits actions like trademark infringement that deceive consumers and impair a producer's goodwill.”).

²⁸⁰ *Dastar*, 539 U.S. at 33.

Nor has there ever been a bright line separating copyright and trademark protection in all instances,²⁸¹ and a reading of *Dastar* that requires such a result would upend decades of copyright and trademark jurisprudence. The language of the *Dastar* opinion itself recognized that a cognizable section 43(a) claim may still exist under certain circumstances with respect to works covered by copyright, such as if a defendant “substantially copied” a plaintiff’s work and “in advertising or promotion, [gives] purchasers the impression that [defendant’s product] was quite different from” the plaintiff’s product,²⁸² or if a defendant purchases plaintiff’s work “and merely repackage[s it] as its own.”²⁸³ Still, a full reckoning with the consequence of *Dastar* for the moral rights patchwork has to recognize and take into consideration the Court’s concerns, as expressed in *Dastar* and other cases, regarding the proper scope of any overlap between intellectual property rights regimes.²⁸⁴

The Office believes that both the wording of and the public policy behind the Lanham Act counsel in favor of permitting claims under section 43(a) to proceed for certain violations of the attribution and integrity interests. While the Office perceives at least four different judicial theories under which courts have allowed such claims to move forward post-*Dastar*,²⁸⁵ the Office finds some of these theories to be better reasoned than others.

The Office finds persuasive the argument, as articulated by the Northern District of California²⁸⁶ and the Southern District of New York,²⁸⁷ that instances of passing off, such as through misattribution of a work to an author or the prejudicial distortion of the content of the author’s work, are rightly the subject of a claim under section 43(a).²⁸⁸ To date, no court has articulated an argument that the Office finds persuasive for why such claims should be considered preempted under *Dastar*.²⁸⁹ Such cases do not raise the specter of “perpetual

²⁸¹ Indeed, as courts have long recognized, “[d]ual protection under copyright and trademark laws is particularly appropriate for graphic representations of characters.” *Frederick Warne & Co., Inc. v. Book Sales Inc.*, 481 F. Supp. 1191, 1196 (S.D.N.Y. 1979). See also *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Patten v. Superior Talking Pictures*, 8 F. Supp. 196 (S.D.N.Y. 1934).

²⁸² *Dastar*, 539 U.S. at 38.

²⁸³ *Dastar*, 539 U.S. at 31.

²⁸⁴ *Dastar*, 539 U.S. at 34 (“[In] construing the Lanham Act, we have been ‘careful to caution against misuse or over-extension’ of trademark and related protections into areas traditionally occupied by patent or copyright.”) (quoting *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29 (2001)).

²⁸⁵ See *supra* notes 236–275 and accompanying discussion.

²⁸⁶ See *Craigslist*, 942 F. Supp. 2d 962.

²⁸⁷ See *Auscapes*, 409 F. Supp. 2d 235.

²⁸⁸ It remains an open question as to whether such claims are properly brought under section 43(a)(1)(A) or 43(a)(1)(B).

²⁸⁹ Looking at the legislative history of section 43(a), particularly as it was revised by the Trademark Law Revision Act of 1988, and within the context of the closely related BCIA and VARA statutes, one scholar has argued that “*Dastar*’s conclusion may be precisely the opposite of what Congress intended.” Mary LaFrance, *When You Wish upon Dastar*:

copyright” feared by Justice Scalia, as permissible acts of copying could still be accomplished without misattributing the resulting work to the original author. Nor is it clear that the Copyright Act provides a vehicle for vindication of an author’s interest in avoiding the reputational harm that comes from having her or his name associated with a work produced by a third party.²⁹⁰ Allowing such claims to move forward would also further the Lanham Act’s purpose of preventing consumer confusion, so that consumers do not purchase the resulting work under the false impression that it represents the output of the author. While this approach does not provide the bright-line separation between copyright and trademark law that some courts may wish, it is in keeping with the historical development of copyright and trademark jurisprudence, where such a bright line has long been notably absent.

The Office likewise finds persuasive the reasoning employed by those lower courts that have found *Dastar* to leave open the possibility of asserting claims for mis- or non-attribution in advertising under section 43(a)(1)(B). As several lower courts, including the First Circuit,²⁹¹ have noted, the *Dastar* opinion explicitly leaves open the possibility of claims under section 43(a)(1)(B) in certain circumstances.²⁹²

This conclusion is supported by the text of the Lanham Act itself. As noted by the Southern District of New York, the *Dastar* holding was premised chiefly on a textual reading of the term “origin of goods” in section 43(a)(1)(A).²⁹³ In contrast, the ordinary meaning of the terms “nature,”²⁹⁴ “characteristics,”²⁹⁵ and “qualities”²⁹⁶ are far broader than the term “origin.” Even giving credence to Justice Scalia’s intuition that the “entity that came up with the idea for the

Creative Provenance and the Lanham Act, 23 CARDOZO ARTS & ENT. L.J. 197, 219 (2005). Rather, LaFrance argues, the legislative history indicates that if Congress wanted section 43(a) to protect any types of goods against reverse passing off, it was intangible, expressive works. *Id.* at 219–33. “This history received no attention whatsoever in the *Dastar* opinion.” *Id.* at 201.

²⁹⁰ Admittedly, the Copyright Act may provide a vehicle for an author to challenge prejudicial distortions of her or his work, provided that such distortions both result in the creation of a derivative work and are not excused by fair use. See 17 U.S.C. § 106(2).

²⁹¹ See *Zyla*, 360 F.3d at 252 n.8 (noting in *dicta* that “*Dastar* left open the possibility that some false authorship claims could be vindicated under the auspices of § 43(a)(1)(B)’s prohibition on false advertising”).

²⁹² See *Dastar*, 539 U.S. at 38.

²⁹³ See *Pearson*, 919 F. Supp. 2d at 438.

²⁹⁴ Defined as “the inherent character or basic constitution of a person or thing: essence.” *Nature*, WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 789 (1987).

²⁹⁵ Defined as a “distinguishing trait, quality, or property.” *Characteristics*, WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 227 (1987).

²⁹⁶ Defined as a “peculiar and essential character: nature” or “an inherent feature: property.” *Qualities*, WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 963 (1987).

product” is “typically of no consequence to purchasers,”²⁹⁷ it may be that a not insignificant number of customers would find the actual author of a book, song, or movie to be a nature, characteristic, or quality of the goods that is relevant to their purchase decision.²⁹⁸ Allowing a company to distribute a video of a 10-year-old child’s scene-by-scene illustrations of *Hamlet* while advertising it as the Kenneth Branagh motion picture version, merely because the advertisement relates to authorship of the content rather than the manufacturer of the DVD, is a result that would appear to be in conflict with both the literal wording of and the purpose behind section 43(a)(1)(B) of the Lanham Act. While such an approach—as with allowing claims for misattribution or prejudicial distortion of a work—does not neatly separate copyright and trademark protections, a court’s policy preference for a bright line demarcation should not displace clear statutory language.²⁹⁹

Although three post-*Dastar* Circuit Court decisions have been cited by lower courts as precluding claims for mis- or non-attribution of expressive works under section 43(a)(1)(B), each of these cases is readily distinguishable. Both the Federal Circuit’s decision in *Baden Sports*³⁰⁰ and the Sixth Circuit’s decision in *Kehoe*³⁰¹ address claims for non-attribution of the concept behind physical products, as opposed to non- or misattribution of the content of communicative products. Such claims are more similar to the *Dastar* Court’s cola hypothetical,³⁰² and the identity of the originator of the concept is less likely to be considered by consumers to be relevant aspects of the nature, characteristics, or quality of the goods. Likewise, the Ninth Circuit’s decision in *Sybersound* addressed a claim under section 43(a)(1)(B) related to purportedly false assertions that the karaoke products at issue were licensed, as opposed to infringing.³⁰³ A representation that the products were licensed is not a representation regarding the nature, characteristic, or quality of

²⁹⁷ *Dastar*, 539 U.S. at 32–33.

²⁹⁸ Of course, the Office’s intuition regarding the relevance of such information to consumer purchasing decisions would properly be the subject of a consumer survey, as are other topics of relevance in Lanham Act litigations.

²⁹⁹ See *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 220–21 (1980) (“Since our present task is one of statutory construction, questions of public policy cannot be determinative of the outcome unless specific policy choices fairly can be attributed to Congress itself.”).

³⁰⁰ *Baden Sports*, 556 F.3d 1300.

³⁰¹ *Kehoe*, 796 F.3d 576.

³⁰² “[T]he brand-loyal consumer who prefers the drink that the Coca-Cola Company or PepsiCo sells, while he believes that that company produced (or at least stands behind the production of) that product, surely does not necessarily believe that that company was the ‘origin’ of the drink in the sense that it was the very first to devise the formula. The consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product, or designed the product—and typically does not care whether it is.”

Dastar, 539 U.S. at 32.

³⁰³ See *Sybersound, Inc. v. UAV Corp.*, 517 F.3d 1137 (9th Cir. 2008).

the goods themselves, however, but instead is a representation regarding the economic arrangements related to the goods.³⁰⁴

The Office similarly believes that a strong argument can be made for allowing claims under section 43(a) for certain instances of unattributed copying of communicative works that are not otherwise embodied in tangible goods. The Office sees no textual support in the Lanham Act for a reading of “origin of goods” that allows a defendant to obtain an electronic copy of an Ansel Adams photograph and resell it as its own, while prohibiting the same defendant from purchasing a videotape and repackaging it as his own. Treating the author of a communicative work that is not otherwise embedded in tangible goods as the “origin” of those goods would thus give meaning to the term “origin” in section 43(a) with respect to such goods.³⁰⁵ It also serves the consumer-protection purposes of the Lanham Act since, as Justice Scalia acknowledged, the purchaser of a communicative product is likely to have a greater interest in the origin of the content of such communicative product than the origin of a design for a widget.³⁰⁶

For much the same reason, however, the Office is not persuaded by the arguments made by some commentators and at least one court that the copyright status of a work provides a meaningful basis of distinction when determining whether a claim for non-attribution can go forward under section 43(a) after *Dastar*. While such a reading may address the public policy concern regarding creation of a “mutant copyright” that was articulated by the *Dastar* Court, the Office does not see any textual support in the Lanham Act for such a finding. The nature of the goods, and thus the meaning of the term “origin” as a modifier of the goods, simply does not magically change at the point a work passes from within the copyright term into the public domain.

e) Potential Lanham Act Changes

While the Office finds persuasive certain courts that more narrowly interpret the Supreme Court’s holding in *Dastar* to allow certain claims for violations of integrity and attribution interests to proceed under section 43(a), case law on this issue will likely continue to develop after issuance of this Report. Should Congress determine at any point that these remaining section 43(a) protections are insufficient to vindicate either, on the one hand, authors’ legitimate interests in protecting their attribution and integrity interests, or, on the other hand, consumers’ legitimate interest in knowing the authorship of the cultural products they consume, Congress may consider adopting an amendment to section 43(a) that would expand the unfair competition protections to

³⁰⁴ The *Sybersound* court itself noted such a distinction, stating, “the nature, characteristics, and qualities of karaoke recordings under the Lanham Act are more properly construed to mean characteristics of the good itself, such as the original song and artist of the karaoke recording.” *Sybersound*, 517 F.3d at 1144.

³⁰⁵ To the extent that courts have read *Dastar* “to suggest that electronic products are not covered by the Lanham Act,” such an interpretation does not seem to find any textual support in the actual language of the Lanham Act. *Cvent*, 739 F. Supp. 2d at 936.

³⁰⁶ *Dastar*, 539 U.S. at 33.

include false representations regarding authorship of communicative works. The Office believes further study of the issue is warranted before drafting specific statutory language to accomplish this goal, and for this reason is not providing draft legislation at this time. Nonetheless, in the Office's view, any such an amendment should be narrowly crafted to focus on the purpose of the Lanham Act, and thus protect only against consumer confusion or mistake as to authorship or attribution, and not to provide expanded copyright protection, or afford the author any additional control over permissible uses of the underlying work. Such a limitation would mitigate against the *Dastar* court's policy concerns about overlapping IP doctrines generally, and limitations on public domain uses specifically.

2. Visual Artists Rights Act ("VARA")

The Visual Artists Rights Act ("VARA"), which added section 106A to title 17, provides limited moral rights of attribution and integrity for authors of qualifying "works of visual art."³⁰⁷ Specifically, section 106A protects a qualifying artist's right to claim or disclaim authorship in a work, and provides a limited right to prevent the distortion, mutilation, or modification of a work, as well as to prevent the destruction of a "work of recognized stature."³⁰⁸ VARA permits the author to waive these moral rights, which are not absolute, via a signed, written agreement that specifies the work and the particular uses of the work to which the waiver applies.³⁰⁹ However, rights under VARA are non-transferrable.³¹⁰ Because these rights are personal to the author, the rights under VARA for works created after it took effect are not coextensive with the term of copyright but expire upon the death of the author.³¹¹

Congress took up the question of moral rights protection for visual artists two years after the BCIA. In the Report accompanying H.R. 2690 (Visual Artists Rights Act of 1990), the House Committee on the Judiciary noted that the 100th Congress, at the time of the BCIA debate, agreed that "both Federal and State [laws], statutory and common, were sufficient to comply with the

³⁰⁷ Pub. L. No. 101-650, 104 Stat. 5128, 5128 (1990).

³⁰⁸ 17 U.S.C. § 106A(a). A "work of visual art" is defined as:

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."

17 U.S.C. § 101.

³⁰⁹ 17 U.S.C. § 106A(e)(1).

³¹⁰ *Id.*

³¹¹ See 17 U.S.C. § 106A(d). For works created before VARA took effect, the duration is coextensive with the term for economic rights: life of the author plus 70 years. See 17 U.S.C. § 106A(d)(2).

requirements of the [Berne] Convention[)]” and “therefore enacted legislation to implement the Convention’s requirements without also enacting additional moral rights laws.”³¹² The Report continued that the 100th Congress, however, believed that “adherence to the Berne Convention did not end the debate about whether the United States should adopt artists’ rights laws,” and thus pursued further consideration of moral rights protections in the United States, in the context of visual art and artists.³¹³

In enacting VARA, Congress was responding to “[v]isual artists, such as painters and sculptors, [who] have complained that their works are being mutilated and destroyed, that authorship of their works is being misattributed, and that the American copyright system does not enable them to share in any profits upon resale of their works.”³¹⁴ Congress intended the rights outlined in VARA to be “analogous to those protected by Article 6*bis* of the Berne Convention.”³¹⁵ While several states at that time offered limited rights for visual artists, Congress expected VARA to establish a “uniform Federal system of rights for certain visual artists.”³¹⁶

The narrowness of the statute, both as drafted and as interpreted by the courts, has, according to many, undermined the effectiveness of the moral rights afforded under VARA. The study comments, in addition to the case law, highlight four areas of concern with the interpretation and application of VARA’s rights: (1) the statutory definition of a work of visual art as a threshold for VARA claims; (2) the effect of this limited definition of a work of visual art on exercising the rights of attribution and integrity, coupled with the difficulty of extracting a workable standard from the statute for these rights; (3) drafting inconsistencies with the duration provision; and (4) limited public awareness of the waiver provision.

a) Limitations of VARA

VARA protections apply only to a “work of visual art,” as defined by section 101 of the Copyright Act.³¹⁷ Under this statutory definition, a work of visual art is a (i) painting, drawing, print, or sculpture, (ii) existing in a single copy or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.³¹⁸ A still photographic image produced for exhibition purposes also qualifies as a “work of visual art” as long as it exists in a single copy

³¹² H.R. REP. NO. 101-514, at 7–8 (1990).

³¹³ *Id.* at 8.

³¹⁴ *Id.*

³¹⁵ *Id.* at 5.

³¹⁶ *Id.* at 9.

³¹⁷ Pub. L. No. 101-650, § 602, 104 Stat. 5128, 5128 (codified at 17 U.S.C. § 101).

³¹⁸ 17 U.S.C. § 101. Limited editions of sculptures may contain a “signature or other identifying mark of the author.” *Id.*

signed by the author or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.³¹⁹

The case law, as well as the comments received in response to this Study, illustrate the significance of the statutory definition of a “work of visual art” as a threshold for the rights under VARA. The statutory definition excludes two large categories of works, the first being—obviously—works that are not visual in nature. The second exclusion is those visual artworks that do not qualify as “works of visual art” under the section 101 definition, such as posters, advertising material, and works made for hire.³²⁰ Many commenters, both in and out of the NOI process, argue that this second exclusion limits the usefulness of VARA in enforcing the attribution and integrity rights of many authors of visual works.³²¹

(1) VARA Applies Only to “Visual” Works

VARA does not apply to copyrightable works that are not “visual” in subject matter, such as literary and musical works. Congress, when enacting VARA, specifically chose to limit the scope of the moral rights ascribed in the legislation to “works of visual art” only, and not to works belonging to other categories of copyrightable subject matter. To justify this limited scope, Congress explained that, unlike a motion picture or a literary work, which are susceptible to reproduction without any diminution in their value, when an original work of visual art is modified or destroyed, “it cannot be replaced.”³²² According to one witness before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice during a hearing on the VARA bill, while section 106 exclusive rights ensure that creators of literary and audiovisual works retain exclusive control over their works, they do not necessarily reflect the needs of visual artists to protect and control the uses of their works, which tend to exist in single copies (or very limited quantities) and not multiple reproductions like literary or musical works.³²³

Further justifying the limited scope of VARA, one academic that testified during hearings before the House contended that an artist imparts his or her personality into a single- or limited-copy work of visual art more than into a mass-produced work, and thus visual art that exists solely in a single original or in very limited copies is particularly deserving of moral rights

³¹⁹ *Id.* The statute does not specify at what point in the creative process the author must express the intent to exhibit, or whether the author can use the photograph for any other purpose. See *Lilley v. Stout*, 384 F. Supp. 2d 83, 87–89 (D.D.C. 2005) (holding that photographs taken as part of a collaborative project were not for exhibition purposes only).

³²⁰ See 17 U.S.C. § 101.

³²¹ See *infra* discussion on pages 64–70.

³²² H.R. REP. NO. 101-514, at 9 (1990).

³²³ See 1989 VARA Hearing at 100–01 (written statement of John B. Koegel, Esq.).

protections.³²⁴ The House Report for VARA quotes testimony before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice on this point, emphasizing the unique value of the original work of art:

The original or few copies with which the artist was most in contact embody the artist's "personality" far more closely than subsequent mass produced images. Accordingly, the physical existence of the original itself possesses an importance independent from any communication of its contents by means of copies.³²⁵

At the time of VARA's enactment, Congress and stakeholders both noted the important relationship between a single copy of a work that embodies an artist's personality and moral rights protection.

With these differences in mind, Congress drafted VARA to apply only to visual art and not to other copyrightable works. Interpreting the statute strictly, courts have immediately dismissed VARA claims when the work at issue is not a work of visual art subject matter. For example, the district court in *Hijrahannah v. Def Jam Recordings* dismissed the plaintiff's VARA claims because the work at issue was sheet music.³²⁶ Similarly, the district court in *Kettenburg v. University of Louisville* dismissed a VARA claim because it was for a literary work.³²⁷

At least two commenters have proposed that the protections outlined in VARA should be extended to musical works and sound recordings. The Society of Composers & Lyricists explained that music made to accompany audio-visual works is typically produced under work-made-for-hire contracts, and urged that such musical works be "afforded the same protection" as VARA works.³²⁸ Likewise, the Recording Academy advocated that VARA-type protections for

³²⁴ See 1989 VARA Hearing at 84 (statement of Jane C. Ginsburg, Associate Professor of Law, Columbia University School of Law).

³²⁵ H.R. REP. NO. 101-514, at 12 (1990) (quoting 1989 VARA Hearing at 84 (statement of Jane C. Ginsburg, Associate Professor of Law, Columbia University School of Law)). Notably, this argument better supports the moral right of integrity than that of attribution. The right of attribution, Professor Ginsburg maintained, should be afforded to visual art of all stripes, regardless of multiplicity of copies. See 1989 VARA Hearing at 85 (statement of Jane C. Ginsburg, Associate Professor of Law, Columbia University School of Law).

³²⁶ *Hijrahannah v. Def Jam Recordings*, No. 14 C 0872, 2014 WL 3586055, at *2 (N.D. Ill. July 21, 2014) (dismissing for failure to state a claim upon which relief can be granted, plaintiff's VARA claims regarding the use of his sheet music by other artists).

³²⁷ *Kettenburg v. Univ. of Louisville*, No. CIVA 3:06CV79, 2005 WL 4444092, at *2 (W.D. Ky. June 16, 2005) (dismissing the plaintiff's VARA claim concerning proper attribution for his creative writing class assignment).

³²⁸ Society of Composers & Lyricists ("SCL"), Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 3 (Mar. 30, 2017) ("SCL Initial Comments").

attribution should be accorded creators of musical works and sound recordings, specifically so “songwriters, producers, engineers and non-featured artists” are given credit for their work.³²⁹

Whether musical works or sound recordings should be protected by federal rights of attribution and integrity is part of the fundamental question of whether there should be a blanket statutory federal moral rights regime, and the Office has addressed that question above.³³⁰ However, on the narrower question of whether VARA in particular should be expanded to encompass musical works and sound recordings, the Office believes that such an approach would contradict the purpose of VARA as explained in the legislative history. First, musical works and sound recordings are made available to the public in mass-produced editions, not the single or limited editions that make certain works of visual art so suitable for moral rights protection. Second, as explained by the Society of Composers & Lyricists, musical works created to accompany audio-visual works tend to be made-for-hire.³³¹ Works-made-for-hire are explicitly excluded from VARA even if they are original visual art works.³³² Third, musical works and sound recordings can benefit from contractual protections for attribution and integrity interests of the sort not available to visual artists, who typically work without such contracts.³³³

(2) Not All Visual Art Works are Covered by VARA

Although VARA covers visual art works, not all works of visual art qualify under the statutory definition of a “work of visual art.”³³⁴ Case law and the study comments highlight the narrow scope of VARA resulting from this limited definition. According to the House Report for VARA, “courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition.”³³⁵ The following discussion outlines the various types of visual works of art that the courts have interpreted as excluded from the statutory definition of a “work of visual art” for which the artist can exercise his or her moral rights under VARA: (a) works made for hire, (b) commercial art, (c) applied art, (d) non-copyrightable art, (e) preparatory works, and (f) site-specific works.

³²⁹ Recording Academy, Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 2 (May 15, 2017) (“Recording Academy Reply Comments”).

³³⁰ See *supra* pages 38–39.

³³¹ SCL Initial Comments at 3.

³³² See 17 U.S.C. § 101 (definition of “work of visual art”).

³³³ See American Association of Independent Music (“A2IM”), Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 5 (May 15, 2017) (“A2IM Reply Comments”) (“There is no compelling reason for this expansion [VARA to sound recordings], and in fact, would negatively impact the independent music community. Contractual provisions incorporating protections for attribution and integrity are already part of many recording agreements.”).

³³⁴ See *supra* notes 317–320 and accompanying discussion.

³³⁵ H.R. REP. NO. 101-514, at 11 (1990).

(a) Works Made for Hire

Section 101's definition of a "work of visual art" specifically excludes works made for hire.³³⁶ The House Report for VARA does not explain this exclusion, but in its comments on the 1989 VARA bill the U.S. Copyright Office noted that, "[a]s a practical matter, most works described in the bill [*e.g.*, works of visual art in single or limited editions] are not usually created for hire."³³⁷ Even witnesses in 1989 opposed to the work-made-for-hire exclusion pointed out that a work created as a commissioned work-made-for-hire would typically be a mass-produced work, and thus not covered by VARA.³³⁸ These two pieces of testimony bolster the supposition that VARA's authors did not perceive a significant relationship between the visual art works they were seeking to protect and the types of visual art that tend to be made for hire; thus they excluded works made for hire from the definition of "work of visual art." Recall that to qualify as a work made for hire, a work must be either "prepared by an employee within the scope of his or her employment," or

specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.³³⁹

Commissioned works in most, if not all, of these categories tend not to be works of visual art in single or limited editions, hence the arguments above that the universes of works made for hire and works intended to be protected by VARA seldom intersect.

There have been, however, cases that found that single-edition works which would otherwise be covered by VARA were ultimately not protected by the statute because of the employee status of the artist. For example, the Second Circuit in *Carter v. Helmsley-Spear* found the plaintiffs' sculpture to be a work made for hire as the plaintiffs were directed under contract to

³³⁶ 17 U.S.C. § 101 ("A work of visual art does not include . . . (B) any work made for hire"). A work made for hire, as defined by the Copyright Act, is a "work prepared by an employee within the scope of his employment" or "a work specially ordered or commissioned for use as [nine categories of works] if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." *Id.*

³³⁷ See 1989 VARA Hearing at 65 (1989) (written statement of Ralph Oman, Register of Copyrights).

³³⁸ See *id.* at 86 (written statement of Jane C. Ginsburg, Associate Professor of Law, Columbia University School of Law) ("Nor, I believe, is a works made for hire exception needed. The exception would essentially benefit proprietors of the kinds of works listed in Section 101, for example, encyclopedias, atlases and periodicals. These are mass-produced works, to which the right of integrity would not in any event apply.").

³³⁹ 17 U.S.C. § 101 (definition of "work made for hire").

design, create, and install the sculpture while receiving employee benefits, such as a weekly salary.³⁴⁰ Thus, the court dismissed the plaintiffs' VARA claims.³⁴¹

Some commenters suggested amending the statute and extending VARA protections specifically to works made for hire.³⁴² One of these commenters stressed that the focus should be on granting the right of attribution to commissioned works of visual art, and expressed concern about whether artists are generally sufficiently informed of the details of contract law to negotiate for attribution rights within work-made-for-hire contracts.³⁴³ The other commenter argued for both attribution and integrity rights for works-made-for-hire, which the commenter argued will primarily apply to employee-created works.³⁴⁴ With the aim of continuing to honor the integrity of contracts, the Office at this time does not recommend extending VARA protections to visual works made for hire.

The Office remains in agreement with its 1989 observation that, because of the limitations of the statutory definition of "work made for hire," the worlds of single- or limited-edition visual art works and visual art works made for hire seldom intersect,³⁴⁵ and further, that this argues for excluding works made for hire from the section 101 definition of "works of visual art." In its comments for the current study, the Kernochan Center pointed out that "the number of works for hire that would otherwise qualify as 'works of visual art' is likely to be relatively small," both in terms of specially ordered or commissioned works and works created by employees.³⁴⁶ While this comment was intended to bolster the argument for including works made for hire in the definition of "work[s] of visual art," it can just as easily cut in the other direction. Specifically, if the universe of works made for hire contain relatively few otherwise VARA-eligible works, then removing the work made for hire exclusion won't make much of a difference to the majority of

³⁴⁰ Referring to the work-made-for-hire test articulated by the Supreme Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), the Second Circuit held that the artwork was a work made for hire under the same standard. *Carter v. Helmsley-Spear, Inc.* ("Carter II"), 71 F.3d 77, 87–88 (2d Cir. 1995).

³⁴¹ See *Carter II*, 71 F.3d at 88. See also *MG Design Assocs., Corp. v. Costar Realty Info. Inc.*, 224 F. Supp. 3d 621, 634–35 (N.D. Ill. 2016) (dismissing plaintiff's VARA claim because the designs at issue were done as a work made for hire).

³⁴² See CVA Initial Comments at 5–9; Kernochan Center Initial Comments at 7; see also David E. Shipley, *The Empty Promise of VARA: The Restrictive Application of a Narrow Statute*, 83 Miss. L.J. 985, 1010 (2014) ("[T]he idea that the employee-artist does not have moral rights in the creations done for an employer is antithetical to moral rights theory.").

³⁴³ See CVA Initial Comments at 5–7, 9 ("There is no reason why the moral right of attribution should be stripped from an independent creator and assigned to someone else who is not their employer in a work made for hire contract . . .").

³⁴⁴ See Kernochan Center Initial Comments at 7 n.19.

³⁴⁵ See 1989 VARA Hearing at 65 (written statement of Ralph Oman, Register of Copyrights).

³⁴⁶ Kernochan Center Initial Comments at 7 n.19. See also *id.* ("Most commissioned artworks do not fit within the nine statutory categories of 'specially ordered or commissioned works' that are capable of being works made for hire. . . . Moreover, most employee-created artworks (such as greeting cards and comic books) are not likely to be produced as single originals or only as limited editions of under 200 copies signed and numbered.").

working artists. On the contrary, the Office believes that it would negatively alter the very nature of a work made for hire relationship by undercutting the claim of the employer to “authorship” status.

(b) Commercial Art

Section 101’s definition of a “work of visual art” also excludes “any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container,” preventing authors from exercising their moral rights for these works under VARA.³⁴⁷ The House Report on VARA does not explain or give examples of what is meant by this limiting language.

Contemporaneous hearings have but one reference, in written testimony to a Senate Judiciary Committee hearing by the National Newspaper Association (“NNA”), illustrating several complications that could result from granting moral rights to artists who create images used in advertising.³⁴⁸ While there is no way to know if the NNA’s testimony influenced Congress, it is at least one indication of what Congress might have been considering. Of course, this does not help in understanding the other exclusions in the definition, such as promotional or descriptive material that are not used in advertising.

A number of cases have denied an artist protection under VARA because the work was considered promotional or advertising material.³⁴⁹ For example, the court in *Pollara v. Seymour* found that the “objective and evident purpose” of a banner created as part of a lobbying effort to promote a specific message rendered the banner as promotional and advertising material and not an eligible work of visual art, despite the artistic ability and creativity inherent in the work.³⁵⁰ The concurrence, however, disagreed with the majority’s test for commercial or promotional material and explained that excluding from the definition of visual art all works that “promote” is unworkable, because, under that formulation, any painting or sculpture commissioned to

³⁴⁷ 17 U.S.C. § 101.

³⁴⁸ See *Moral Rights in Our Copyright Laws: Hearings on S. 1198 and S. 1253 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 101st Cong. 689 (1989) (written statement of Jack Fishman, National Newspaper Association) (“Would the newspaper have to receive permission to reduce the size of a drawing, or to augment a simple drawing, or combine several? Would permission have to be obtained before a black and white ad was run in color, or a color ad run in black and white? What would we do when our ad department received camera-ready copy which had no attribution on it? Refuse the ad? Track down the artist?”).

³⁴⁹ See, e.g., *MG Design*, 224 F. Supp. 3d at 634–35 (finding that renderings of trade show designs were not visual art in part because they “were a design for a client’s commercial promotion and intended to profit MG and attract more business for MG and its client”); *Benke v. Departure Agency, Inc.*, No. CV 11-397, 2011 WL 13129964, at *4 (C.D. Cal. Aug. 11, 2011) (finding that photographs commissioned by a hotel were not visual art because they were produced “solely to advertise the hotel services”).

³⁵⁰ *Pollara v. Seymour*, 344 F.3d 265, 269–71 (2d Cir. 2003).

promote a specific idea such as the Olympics or AIDS awareness “could *never* receive protection under VARA.”³⁵¹

In its comments, the Coalition of Visual Artists objected to VARA’s exclusion of commercial art as sending the message that certain types of commercial art, specifically design, illustration, and photography, are “unworthy of moral rights.”³⁵² According to the Coalition, these types of artworks do not have different artistic merit than fine art — the art typically associated with VARA. Instead, the Coalition argued that the distinction between fine art and commercial art is not as clear in the digital age as it might have been when VARA was enacted, and commercial art should not be excluded in this manner from moral rights protection.³⁵³

The Office does not believe that Congress excluded commercial and promotional works from the definition of “work of visual art” because it believed such images to be somehow artistically less worthy than so-called “fine art.” Instead, it appears more likely that, following the sort of arguments put forth by the NNA, that Congress wanted to avoid interfering with works of art that were controlled or influenced by an entity other than the artist—and hence presumably are less attached to the artist’s reputation—as well as avoid interfering with contractual freedoms. The Office accepts this apparent reasoning, but does believe that the commercial/“fine art” distinction can be drawn more narrowly than the current statute has it. Regarding *Pollara*, the Office agrees with both the majority and the concurrence: The majority is correct in its finding that the exclusion of a banner “created for the purpose of promoting and advertising” is required by the statute, regardless of the content of its message or skill of its design.³⁵⁴ The concurrence, also, is correct in pointing out the logical conclusion of this broad exclusion—that artwork that merely promotes an idea or a cause, without commercial intent, would be excluded from VARA protection.³⁵⁵

Pollara indicates, then, the need for re-visiting VARA’s exclusions from the term “work of visual art.” Despite the clear message of the statutory language, Congress in 1989 betrayed no intent to exclude artworks that independently promote ideas or causes.³⁵⁶ It did, however, as shown in the 1989 hearing transcripts, take testimony regarding the necessity of excluding

³⁵¹ *Id.* at 271 (Gleeson, J., concurring).

³⁵² CVA Initial Comments at 3.

³⁵³ *Id.* at 13.

³⁵⁴ *Pollara*, 344 F.3d at 270.

³⁵⁵ *Pollara*, 344 F.3d at 271–72 (Gleeson, J., concurring).

³⁵⁶ For discussions of some examples of such artwork, see, e.g., Margaret Carrigan, *What Happens When Social Practice Art Meets the Market?*, ARTSY (Aug. 30, 2017, 6:44 PM), <https://www.artsy.net/article/artsy-editorial-social-practice-art-meets-market> (discussing the impact of social practice art); Maria D. Leake, *Art as Social Practice: Exploring the Contemporary*, ART EDUC., Mar. 2012, at 25, 26–32; M.H. Miller, *Protest Art in the Era of Trump*, N.Y. TIMES STYLE MAG. (Feb. 20, 2017), available at <http://www.nytimes.com/2017/02/20/t-magazine/protest-art-betty-tompkins-postcommodity-rirkrit-tiravanija.html>.

artworks created on the basis of a contract.³⁵⁷ Hence, barring VARA protection for some commercial art may be appropriate for moral rights protection, but barring art that independently promotes a social or political message absent of any commercial intent seems to the Office to be a step too far.

Based on its analysis in the discussion above, the Office recommends that Congress consider a statutory amendment concerning the definition of a “work of visual art” to enable more artists to claim moral rights protection for visual art that promotes a particular cause or viewpoint, and to clarify the scope of “commercial art” excluded from VARA protections. Specifically, the Office recommends adopting the definition of an eligible work similar to that used by the California Art Preservation Act, adding the phrase “prepared under contract for commercial use by its purchaser” to the definition in section 101.³⁵⁸ A proposed section 101 would thus read:

a work of visual art does not include – (A) . . . (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container, any of which are prepared under contract for commercial use by its purchaser.

This proposed standard specifically excludes art created to call attention to a particular product or service in the commercial context. However, art that may promote a particular social/non-commercial message carries the same concerns for attribution and integrity as other visual art. Therefore, “protest art” or art created for a political purpose or social cause that promotes a particular message would not be excluded based on the particular use of the work under the proposed section 101 work of visual art definition.³⁵⁹ The content and meaning of the work should not serve as a barrier to these important moral rights protections.

(c) Applied Art

VARA’s standard for a “work of visual art” also specifically excludes “applied art,”³⁶⁰ which the statute does not define. While Congress in the VARA legislative history referred to the exclusions, including applied art, as “self-explanatory,”³⁶¹ courts have struggled to find a workable standard for when a work qualifies as applied art in the context of VARA. In *Carter v. Helmsley-Spear, Inc.*, the Second Circuit held that a sculpture consisting of pieces of a school bus, automobile parts, and a number of interactive components affixed to a wall and ceiling and

³⁵⁷ See 1989 VARA Hearing at 65 (written statement of Ralph Oman, Register of Copyrights) (addressing potential VARA protection of works made for hire).

³⁵⁸ CAL. CIV. CODE § 987(b)(2).

³⁵⁹ For example, the banner created to lobby a social cause (legal aid for prisoners) in *Pollara* would qualify as a work of visual art under the proposed standard. See *supra* notes *infra* [x]-[xxx] and accompanying text.

³⁶⁰ 17 U.S.C. § 101 (“A work of visual art does not include— (A)(i) . . . applied art[.]”).

³⁶¹ H.R. REP. NO. 101-514, at 13 (1990).

embedded in the floor and wall of a building lobby was not applied art.³⁶² The appellate court reiterated the district court’s explanation that “applied art” encompassed “two- and three-dimensional ornamentation or decoration that is affixed to otherwise utilitarian objects.”³⁶³ The appellate court further held that the sculpture in this particular case was not applied art even though it was affixed to “the lobby’s floor, walls, and ceiling,” because “[i]nterpreting applied art to include such works would render meaningless VARA’s protection for works of visual art installed in buildings.”³⁶⁴

Attempting to create a workable standard for “applied art,” the Ninth Circuit in *Cheffins v. Stewart* considered whether *La Contessa*, a school bus adorned in the trappings of a 16th-century Spanish galleon, was applied art—that is, the object of the art “initially served a utilitarian function and . . . continues to serve such a function after the artist made embellishments or alterations to it.”³⁶⁵ While the concurrence contended that this standard would frustrate the purpose of VARA by “unduly narrowing the protections of artists,”³⁶⁶ the majority defended this standard by focusing on the object’s “practical utility” instead of its “artistic merit.”³⁶⁷ While acknowledging the artistic qualities of *La Contessa*, the court concluded that *La Contessa* was applied art as it began as a rudimentary object and continued to be used for transportation and as an entertainment stage after its transformation.³⁶⁸

While commenters in this study did not specifically discuss applied art in this context, the concurrence in *Cheffins* criticized the lack of appropriate definitions in VARA and the absence of any guidance developing in the case law.³⁶⁹ The concurrence further emphasized that a more nuanced test was necessary that would “evaluate the work as a whole” and serve the greater purpose of VARA.³⁷⁰ The Office finds persuasive the *Cheffins* concurrence’s assessment of the

³⁶² *Carter II*, 71 F.3d at 80, 85.

³⁶³ *Id.* at 84–85 (2d Cir. 1995) (quoting *Carter v. Helmsley-Spear, Inc.* (“*Carter I*”), 861 F. Supp. 303, 315 (S.D.N.Y. 1994)).

³⁶⁴ *Carter II*, 71 F.3d at 85.

³⁶⁵ *Cheffins v. Stewart*, 825 F.3d 588, 594 (9th Cir. 2016).

³⁶⁶ *Id.* at 597–98 (McKeown, J., concurring). More specifically, the concurrence argued that the definition fails to consider the work as a whole and “fails to clarify when the product of artistic creation has crossed the threshold of functionality that transforms it from visual to applied art.” *Id.* at 599. The concurrence proposed that the standard should consider the primary purpose of the work instead and whether the artistic features are subservient to a useful function. *Id.* at 602.

³⁶⁷ *Cheffins*, 825 F.3d at 594.

³⁶⁸ *Cheffins*, 825 F.3d at 595.

³⁶⁹ *See id.* at 600 (McKeown, J., concurring) (“The difficulty of our job is compounded because VARA provides no definitions of applied art. Leaders of the art community warned Congress that VARA ‘does not offer firm definitions’ of applied and visual art, leaving ‘open for conjecture the kinds of art and artists eligible for protection.’ [But] Congress was unmoved.”) (internal citation omitted).

³⁷⁰ *Id.* at 602 (McKeown, J., concurring).

inadequacy of current judicial standards. The absence of any applicable statutory or legislative guidance has led to an imprecise judicial standard and uncertainty, at the very least, in the art world.³⁷¹ The Office suggests that Congress re-evaluate VARA's lack of guidance as to the exclusion of applied art and consider whether an amendment making its intent clear is warranted, to ensure the exclusion is not overly broad and that courts can apply a uniform standard. Specifically, the Office recommends further study of how working artists understand the term and how courts have interpreted it.

(d) Non-copyrightable Art

Works ineligible for copyright protection also do not qualify as works of visual art under VARA.³⁷² In *Kelley v. Chicago Park District*, the Seventh Circuit Court of Appeals dismissed Chapman Kelley's claim that the park district violated his right of integrity under VARA for modifying his *Chicago Wildflower Works* (1984–2004), a wildflower display planted in a public park.³⁷³ The Seventh Circuit found that because Kelley's garden was "neither 'authored' nor 'fixed' in the senses required for copyright," the work could not qualify for moral rights protection under VARA.³⁷⁴ Chapman Kelley, in his comment for this study, argued that VARA's definition of a "work of visual art" should be amended to include works similar to his *Chicago Wildflower Works*.³⁷⁵ Kelley contended not only that his work satisfies the fixation requirement for copyright, but also that "it is unwise to set 'art' guidelines . . . and to make legal constraints for it."³⁷⁶

The Office disagrees that including non-copyrightable art within the VARA framework is appropriate. Providing moral rights protection to art that does not qualify for copyright protection would improperly extend the scope of copyright law. Recall that VARA protects only a "work of visual art," which definitionally excludes "any work not subject to copyright

³⁷¹ See Lena Saltos, *Cheffins v. Stewart: Burning Man; Burning Ships*, HHRART LAW (July 5, 2016), <http://www.hhrartlaw.com/2016/07/cheffins-v-stewart-burning-man-burning-ships> ("[T]he test the majority adopted may not provide the clarity and objectivity for which it hoped. . . . This will significantly narrow the reach of VARA and deter artists from bringing claims with respect to destruction of works that may incorporate utilitarian elements, thusly undermining one of VARA's main goals.").

³⁷² See 17 U.S.C. § 101 ("A work of visual art does not include— . . . (C) any work not subject to copyright protection under this title.").

³⁷³ *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 306 (7th Cir. 2011).

³⁷⁴ *Id.*

³⁷⁵ See Chapman Kelley, Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 3 (Mar. 27, 2017) ("Chapman Kelley Initial Comments"); see also Jenny Keller, Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 1 (Apr. 4, 2017) ("Pleases [sic] amend VARA to include works of art, especially Chicago Wildflower Work (CWW) by Chapman Kelley. This original work is important to art history and to the arts community, but especially to the viewing public.").

³⁷⁶ Chapman Kelley Initial Comments at 3.

protection under this title.”³⁷⁷ Extending VARA to non-copyrightable works could require a statutory amendment and would threaten the creation of the very kind of “mutant copyright” warned against by the Supreme Court in the *Dastar* case.³⁷⁸ Moreover, it would be unreasonable to grant moral rights—rights that are personal to the author—to art that does not qualify as having sufficient original, *human* expression for copyright protection.³⁷⁹

(e) Preparatory Works

The text of VARA specifically excludes “models” from the definition of a work of visual art. Nevertheless, artists have attempted to bring VARA claims regarding preparatory works made in the process of creating the final product. While the House Report accompanying H.R. 2690 advises that “courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition,”³⁸⁰ VARA’s legislative history does not specifically discuss the relationship between barring “models” and the question of preparatory works in general.

With this limited guidance, the courts have not consistently held whether preparatory works qualify as a work of visual art or as an ineligible “model.” In *Flack v. Friends of Queen Catherine, Inc.*, the court for the Southern District of New York considered whether a clay head that was used to cast a bronze statue was a work of visual art or a “model” excluded from VARA protection.³⁸¹ The court observed that neither the statute nor the legislative history of VARA provides much guidance with determining the meaning of the word “model.”³⁸² Relying on the art community’s acceptance and exhibition of clay sculptures as works of art in their own right, the court found that the preparatory clay head in this case was a work of visual art independent of the final bronze statue.³⁸³ The Third Circuit in *NASCAR v. Scharle*, however, did not refer to the standards of the artistic community when determining whether drawings for the two-dimensional design of a trophy fell into the purview of VARA.³⁸⁴ Instead, the court interpreted these particular drawings as “technical drawings, diagrams, or models for the trophy,” and not

³⁷⁷ 17 U.S.C. § 101 (definition of “work of visual art”).

³⁷⁸ *Dastar*, 539 U.S. at 34.

³⁷⁹ See *Naruto v. Slater*, 888 F.3d 418, 420 (9th Cir. 2018) (finding that animals lack statutory standing under the Copyright Act).

³⁸⁰ H.R. REP. NO. 101-514, at 11 (1990).

³⁸¹ *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526, 532 (S.D.N.Y. 2001).

³⁸² *Id.* at 533 (“The legislative history is completely devoid, however, of any indication of the meaning of the word ‘model.’ Indeed, when the exclusionary portion of the definition of ‘a work of visual art’ is discussed at all, the distinction emphasized is that between fine art, on the one hand, and movies, books, newspapers, magazines, and other creative works on the other.”).

³⁸³ *Id.* at 533–34.

³⁸⁴ See *Nat’l Ass’n for Stock Car Auto Racing, Inc. (“NASCAR”) v. Scharle*, 184 Fed. App’x. 270 (3d Cir. 2006).

works of visual art, as the drawings only “represented multiple attempts to arrive at the optimal design for the trophy,” the final product.³⁸⁵

The Study comments did not specifically discuss models or preparatory works in the context of VARA’s definition of a “work of visual art,” and the Copyright Office has no cause to make a recommendation on this topic beyond a suggestion that courts take seriously the House Report’s admonition to “use . . . generally accepted standards of the artistic community” when evaluating a work’s status as a “work of visual art.”³⁸⁶ So far, the courts have inconsistently applied this instruction when evaluating preparatory works. The Office, however, finds a useful model in the court’s application of community standards in *Flack v. Friends of Queen Catherine, Inc.* In different areas of copyright law, the courts tend to avoid any analysis of the artistic merits of the work and defer to the expertise of those in the community.³⁸⁷ Adopting this approach for interpreting preparatory works in the VARA context more appropriately responds to the particular goals of the statute.

(f) Site-specific Art

VARA does not specifically mention “site-specific works” — works that are fundamentally integrated with their setting and are considered incomplete when perceived in isolation. The nature of site-specific art signifies that removing the work from its original site ultimately destroys the work, rendering this category of art particularly relevant in the VARA context.

With the absence of any mention of site-specific works in the statute, courts have again inconsistently interpreted whether site-specific works fall under the definition of “work of visual art.” For example, the First Circuit in *Phillips v. Pembroke Real Estate*, found that VARA does not apply to site-specific art, in this case a multi-element sculpture designed for a specific park.³⁸⁸ The court relied upon the public presentation exception under section 106A(c)(2), which states that a “modification of a work of visual art which is the result of . . . public presentation . . . is not a destruction, distortion, mutilation, or other modification.”³⁸⁹ According to the court, allowing VARA to protect site-specific works would ultimately create two different regimes: “one for free-standing works of art . . . and one for site-specific art that can never be moved and must always

³⁸⁵ *Id.* at 276 (internal citations omitted).

³⁸⁶ H.R. REP. NO. 101-514, at 11 (1990).

³⁸⁷ See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”); *Esquire, Inc. v. Ringer*, 591 F.2d 796, 805 (D.C. Cir. 1978) (“Neither the Constitution nor the Copyright Act authorizes the Copyright Office or the federal judiciary to serve as arbiters of national taste.”); Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 810–19 (2005) (examining arguments about why judges should not judge art).

³⁸⁸ See *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 140–43 (1st Cir. 2006).

³⁸⁹ *Id.* at 133 (quoting 17 U.S.C. § 106A(c)(2)).

be displayed.”³⁹⁰ The court held that “the plain language of VARA does not protect site-specific art,” but “[i]f such protection is necessary, Congress should do the job.”³⁹¹

The Seventh Circuit in *Kelley v. Chicago Park District* offered a different perspective on the relationship between VARA and site-specific art and warned against the strict interpretation adopted by the *Phillips* court.³⁹² In doing so, it raised three counterarguments, namely: (1) “site-specific art” is not mentioned at all in the statute as being excluded or otherwise, leaving the courts with more flexibility concerning this question; (2) the section 106A(c)(2) public presentation exception does not waive all VARA rights for site-specific art, including the right of attribution, and thus the argument in *Phillips* that the public presentation exception is an indication that site-specific art should not be protected does not hold; and (3) the building exception in section 113(d) seems to indicate that the statute acknowledges potential protection for site-specific art.³⁹³

One commenter called for expanding VARA to explicitly include site-specific works. She argued that the “artist’s ability to articulate the nature and importance of the site-specificity of an artwork” justifies VARA protection.³⁹⁴ She further explained that this proposed expansion of VARA “seems barely more burdensome to property owners, and, appropriately, a good deal more respectful to artists.”³⁹⁵ At this time, the Office agrees with the *Kelley* court that courts have flexibility in applying VARA to works of site-specific art, but finds that the ancillary legal issues relating to site-specific art, such as the rules in section 113(d) regarding a work of visual art that has been incorporated in a building, and the obligations thereto of the building’s owner,³⁹⁶ disfavor a one-size-fits-all statutory change to ensure any meaningful and appropriate expansion of moral rights to these works. Moreover, the overlap between site-specific works and other

³⁹⁰ *Id.* at 143.

³⁹¹ *Id.*

³⁹² *Kelley v. Chi. Park Dist.* 635 F.3d 290, 306–07 (7th Cir. 2011) (analyzing *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006)).

³⁹³ *Id.* Section 113(d), known as “the building exception” states that works “incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work” do not qualify for moral rights protection if the artist (1) consented to the installation of the work in the building (if pre-VARA enactment) or (2) executed a written acknowledgement that removal of the work may subject it to destruction, distortion, mutilation, or modification (if post-VARA enactment). See 17 U.S.C. § 113(d).

³⁹⁴ Sarah Conley Odenkirk, Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 2 (Mar. 19, 2017) (“Odenkirk Initial Comments”).

³⁹⁵ *Id.* at 2.

³⁹⁶ See 17 U.S.C. § 113(d).

categories of visual art may overcome these challenges prompted by the ancillary legal issues and provide sufficient moral rights protection when appropriate.³⁹⁷

b) Actionable Conduct: VARA Rights of Attribution & Integrity

Generally, the courts resolve most VARA cases on the threshold question whether the plaintiff's work is a work of visual art as defined by the statute. Thus, scant case law exists discussing the specific standards, especially for the appropriate remedies, for violations of the right of attribution and right of integrity under VARA.³⁹⁸ The few cases in which the courts substantively discuss the rights of attribution and integrity highlight specific problems in the interpretation and application of the statutory standards relating to both rights.

(1) Right of Attribution

Under VARA, an artist exercising the right of attribution may claim authorship of his or her work of visual art and prevent another party from using the artist's name on works not created by the artist.³⁹⁹ This provision upholds the artist's right to be associated with works that reflect only his or her artistic vision.⁴⁰⁰

VARA also provides the artist with the right to prevent the use of his or her name as author of a work of visual art that has been distorted, mutilated, or modified in a way that would be "prejudicial to his or her honor or reputation."⁴⁰¹ This right blends the objectives of both the attribution and integrity rights as it forbids the combination of alteration of a work together with inaccurate attribution of the altered work to the particular artist.⁴⁰² According to the legislative history, the standard for determining whether an action is "prejudicial" to an artist's reputation is

³⁹⁷ See *Cohen v. G & M Realty L.P.* ("5Pointz"), No. 15-CV-3230, 2018 WL 851374 (E.D.N.Y. Feb. 12, 2018) (awarding damages to the artists for the destruction of site-specific graffiti art).

³⁹⁸ See *Mass. Museum of Contemporary Art Found., Inc. ("MASS MoCA") v. Büchel*, 593 F.3d 38, 53 (1st Cir. 2010) ("[C]ourts avoid construing the extent of VARA protection by finding that works do not meet the threshold requirements for 'visual art' protected by VARA. Unsurprisingly, therefore, we have found no case law discussing a possible difference in the showing required for injunctive relief and damages for right-of-integrity claims.") (cleaned up).

³⁹⁹ 17 U.S.C. § 106A(a)(1)(A)–(B).

⁴⁰⁰ See H.R. REP. NO. 101-514, at 5 (1990) (stating that the attribution right "ensures that artists are correctly identified with the works of art they create, and that they are not identified with works created by others").

⁴⁰¹ 17 U.S.C. § 106A(a)(2).

⁴⁰² See *Mass. Museum of Contemporary Art Found., Inc. ("MASS MoCA") v. Büchel*, 565 F. Supp. 2d 245, 256–57 (D. Mass. 2008) ("This aspect of VARA protection would prevent a third party from taking Artist A's finished sculpture, for example, and chopping pieces off it, or painting it blue, and then exhibiting it as A's work."), *aff'd in part, vacated in part, remanded*, 593 F.3d 38 (1st Cir. 2010).

“flexible” and should “focus on the artistic or professional honor or reputation of the individual.”⁴⁰³

Section 106A(c)(3) provides an exception to the attribution right by immunizing defendants from liability for “any reproduction, depiction, portrayal, or other use of the work” in connection with the types of works listed under subparagraphs (A) and (B) of the definition of a work of visual art, which includes posters, technical drawings, models, books, magazines, newspapers, periodicals, advertising, promotional material, or works made for hire.⁴⁰⁴ Under this exception, a reproduction of an artist’s visual work on a poster or in a magazine need not be accompanied by the artist’s name. Many of the attribution claims brought under VARA focus on a reproduction, not the original, work of visual art. Courts have consistently dismissed these claims under this exception.⁴⁰⁵

Neither the courts nor the study comments have dealt with the substance of VARA’s right of attribution. Any study comments that mentioned the right of attribution under VARA generally advocated for Congress to extend this right to other types of copyrighted works or works of visual art that do not fit under the statutory definition.⁴⁰⁶ As discussed above, extending the right of attribution under VARA to other types of copyrighted works would certainly involve amending the definition of a “work of visual art,”⁴⁰⁷ as well as generally expanding VARA well beyond its current limits. The Office awaits future court decisions that may further illuminate the issue of the attribution right under VARA.

⁴⁰³ H.R. REP. NO. 101-514, at 15 (1990).

⁴⁰⁴ 17 U.S.C. § 106A(c)(3). According to the legislative history, the actions that fall under this exception “do not affect the single or limited edition copy,” and thus “imposing liability in these situations would not further the paramount goal of the legislation: to preserve and protect certain categories of original works of art.” H.R. REP. NO. 101-514, at 18 (1990).

⁴⁰⁵ See, e.g., *Wilson v. New Palace Casino, L.L.C.*, No. 1:11cv447, 2013 WL 870350, at *3–4 (S.D. Miss. Mar. 7, 2013) (dismissing the artist’s attribution claim in relation to reproductions of a feature of his original painting); *Martin v. Walt Disney Internet Grp.*, No. 09CV1601, 2010 WL 2634695, at *5 (S.D. Cal. June 30, 2010) (dismissing the plaintiff’s attribution claim regarding reproductions of her photograph); *Silberman v. Innovation Luggage, Inc.*, No. 01 Civ. 7109, 2003 WL 1787123, at *4–5 (S.D.N.Y. Apr. 3, 2003) (holding that the artist could not assert an attribution claim under VARA in relation to unsigned reproductions of the artist’s original photograph).

⁴⁰⁶ See, e.g., American Society of Journalists and Authors (“ASJA”), Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 5 (Mar. 30, 2017) (“ASJA Initial Comments”) (“It is our understanding that the United States recognizes moral rights (although only attribution and integrity) for visual artists through VARA . . . but not for authors. So we ask, why should one sort of creative work get moral rights protections, but not others?”); CVA Initial Comments at 5 (“The moral right of attribution should include works created by independent creators created under work made for hire contracts.”); Recording Academy Reply Comments at 2 (“The Academy believes that similar protections, with respect to the right of attribution, should be extended to the creators of musical works and sound recordings to ensure that credit is also granted to songwriters, producers, engineers and non-featured artists . . .”).

⁴⁰⁷ See *supra* discussion on pages 64–70.

(2) Right of Integrity

The right of integrity under VARA consists of two parts: (a) the right to prevent any intentional distortion, mutilation, or other modification that would be prejudicial to the artist's honor or reputation;⁴⁰⁸ and (b) the right to prevent any destruction of a work of recognized stature.⁴⁰⁹ Congress intended the right of integrity to further the public interest in preserving and protecting works of visual art and thereby preserving the integrity of our shared culture.⁴¹⁰ The case law and the study comments have highlighted several issues regarding the interpretation and scope of these two rights of integrity.

(a) Prejudicial to Artist's Reputation

As stated above, VARA extends to artists of works of visual art the right to prevent any intentional distortion, mutilation, or other modification of their work that would be prejudicial to the artist's honor or reputation.⁴¹¹ However, VARA limits this right with three exceptions. A work is not distorted, mutilated or otherwise modified for these purposes if the modification is the result of the passage of time or the inherent nature of the materials.⁴¹² Similarly, the modification of a work of visual art resulting from conservation or public presentation (including lighting and placement) does not qualify as destruction, distortion, mutilation, or other modification in this context unless the modification is caused by gross negligence.⁴¹³ Conservation by a person without sufficient training may qualify as gross negligence, but it is not clear whether it would constitute a violation of the VARA right of integrity.⁴¹⁴ In its study comments, the Artists Rights Society argued that gross negligence "is extremely difficult to establish," and poor restoration or conservation may leave the artist "without recourse."⁴¹⁵

While the statute itself does not provide any guidance on the scope of the right of integrity relating to prejudicial harm, the VARA House Report recommended that the courts "focus on the artistic or professional honor or reputation of the individual as embodied in the work that is

⁴⁰⁸ 17 U.S.C. § 106A(a)(3)(A).

⁴⁰⁹ 17 U.S.C. § 106A(a)(3)(B).

⁴¹⁰ See H.R. REP. NO. 101-514, at 5–6 (1990); see also John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1042 (1976) (arguing that the pre-VARA copyright "law provides no way to protect the public interest in preservation of our culture against revision of works of art by unilateral unauthorized action"). But see Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 290–93 (2009) (arguing that the preservation emphasis of VARA is inappropriate for contemporary art—the only type of art that VARA protects).

⁴¹¹ 17 U.S.C. § 106A(a)(3)(A).

⁴¹² 17 U.S.C. § 106A(c)(1).

⁴¹³ 17 U.S.C. § 106A(c)(2).

⁴¹⁴ See *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526, 535 (S.D.N.Y. 2001).

⁴¹⁵ ARS Initial Comments at 2.

protected” and “examine the way in which a work has been modified and the professional reputation of the author of the work.”⁴¹⁶ The appellate court in *MASS MoCA v. Büchel* interpreted this standard to require a showing of prejudicial harm to the artist’s reputation in relation to the alteration of the *specific* work of art at issue in the case in order for the plaintiff to receive damages.⁴¹⁷ In this case, the court considered the prejudicial harm to the plaintiff’s reputation associated with a particular unfinished installation that the museum had modified.⁴¹⁸ The Office agrees with the interpretation of this right by the court in *MASS MoCA*, specifically that the harm to the artist’s reputation should be assessed in the context of the particular work at issue and not the artist’s reputation concerning his or her entire *oeuvre*. Such an interpretation is consistent with VARA’s general focus on particular works.⁴¹⁹

(b) Definition of “Work of Recognized Stature”

As stated above, VARA grants the artist the right to “prevent any destruction of a work of recognized stature.”⁴²⁰ Despite its legal significance, the term “recognized stature” is not defined in the statute. However, the VARA bill as introduced in the House in 1989 addressed the concept of protecting against the destruction of works of recognized stature and included the following language:

In determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, conservators, and other persons involved with the creation, appreciation, history, or marketing of works of visual art. Evidence of commercial exploitation of a work as a whole, or of particular copies, does not preclude a finding that the work is a work of recognized stature.⁴²¹

This language was omitted from the bill during markup, as the House Committee on the Judiciary sought to avoid “a battle of expert witnesses” and increased litigation that they predicted would have resulted from this definition.⁴²² Thus, absent statutory text or direct

⁴¹⁶ H.R. REP. NO. 101-514, at 15–16 (1990).

⁴¹⁷ See *Mass. Museum of Contemporary Art Found., Inc. (“MASS MoCA”) v. Büchel*, 593 F.3d 38, 53–54 (1st Cir. 2010). See also 3 NIMMER ON COPYRIGHT § 8D.06[C][1][c] (noting that “an intentional and prejudicial mutilation is an integrity violation, remediable through not only an injunction, but damages as well”).

⁴¹⁸ See *MASS MoCA*, 593 F.3d at 42–46.

⁴¹⁹ See H.R. REP. NO. 101-514, at 15 (1990) (quoting 1989 VARA Hearing at 106 (written statement of John B. Koegel, Esq.) (“An artist’s professional and personal identity is embodied in each work created by that artist. Each work is a part of his/her reputation. Each work is a form of personal expression . . .”).

⁴²⁰ 17 U.S.C. § 106A(a)(3)(B).

⁴²¹ H.R. 2690, 101st Cong. § 3 (as introduced in the House, Jun. 20, 1989).

⁴²² H.R. REP. NO. 101-514, at 15 (1990).

legislative history, courts were left to develop a workable standard on their own, and despite Congress' intentions, such battles have occurred.

The district court in *Carter v. Helmsley-Spear, Inc.* formulated a test that the art must be (1) meritorious and (2) recognized by art experts and other members of the artistic community as such.⁴²³ The Seventh Circuit in *Martin v. City of Indianapolis* accepted letters, articles, and awards as evidence of recognized stature.⁴²⁴ More recently, in *Cohen v. G & M Realty L.P. ("5Pointz II")*,⁴²⁵ a jury found 45 out of 49 graffiti works to be works of recognized stature based on the artistic recognition of the works outside of the graffiti site, the art world's academic and professional interest in the works, and the skill and craftsmanship inherent in the works.⁴²⁶ The *5Pointz II* court found that the testimony of the defendants' expert was flawed as an "unduly restrictive interpretation of recognized stature that was more akin to a masterpiece standard."⁴²⁷

Generally, the courts have focused their inquiries on whether the work itself, not the artist, has achieved recognized stature.⁴²⁸ In *Scott v. Dixon*, the court found that while the artist had "achieved some level of local notoriety," the work, a swan sculpture installed in the backyard of a property, had not achieved "recognized stature" as it had never been publicly exhibited but only privately displayed.⁴²⁹ Questioning this judicially developed standard, one commenter in the Office study pointed out that the statute does not explicitly require public display in order to achieve "recognized stature."⁴³⁰

One commenter suggested that the "judicial application of the [recognized stature requirement 17 U.S.C. 106A(a)(3)(A)] has been overly restrictive and has thwarted fulfillment of

⁴²³ *Carter I*, 861 F. Supp. at 325 (considering VARA claim for a sculpture installed in the lobby of a commercial building), *aff'd in part, vacated in part, reversed in part on other grounds*, 71 F.3d 77 (2d Cir. 1995).

⁴²⁴ *Martin v. City of Indianapolis*, 982 F. Supp. 625, 630–31 (S.D. Ind. 1997) (considering VARA claims in response to the city destroying a large outdoor stainless steel sculpture).

⁴²⁵ *Cohen v. G & M Realty L.P. ("5Pointz")*, 320 F. Supp. 3d 421 (E.D.N.Y. 2018) ("*5Pointz II*") (holding that aerosol artwork on long-standing walls qualified as works of recognized stature subject to VARA protection).

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 439 (referring to the defendants' expert testimony relying heavily on academic databases and her narrow search on social media that did not include the films, television, newspaper articles, blogs, online videos, and "social media buzz" that featured the 5Pointz works).

⁴²⁸ See, e.g., *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004) ("[I]t is the artwork that is the subject of the litigation that must have acquired this stature."). But see *Cohen v. G & M Realty L.P. ("5Pointz")*, No. 13-CV-5612, 2017 WL 1208416, at *3 (E.D.N.Y. Mar. 31, 2017) (noting a legal basis for focusing on the "recognized stature" of the artist rather than the work itself).

⁴²⁹ *Scott*, 309 F. Supp. 2d at 400–01.

⁴³⁰ See Art Law Committee of the New York City Bar Association, Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 5 (Mar. 27, 2017) ("*NY Bar Association Initial Comments*").

the statute's objectives."⁴³¹ Specifically, this commenter maintained that the recognized stature standard is too narrow, especially in the context of public art (*e.g.*, murals, large-scale sculptures) where the value of the art is rooted in the community where the art resides.⁴³² According to this argument, the less established the artist and less relevant their work is to scholarly research, the more attention should be given to the *community's* opinion and not necessarily the expert's as "the preservative aims of the recognized stature provision should not be undercut by an inflexible dependence on a scholarly consensus of aesthetic importance."⁴³³

The Copyright Office finds that the recent interpretation of "recognized stature" by the court in *5Pointz II* potentially addresses some of these concerns regarding the exclusion of certain types of art.⁴³⁴ Instead of focusing solely on the scholarly merits of the work, the *5Pointz II* court considered the graffiti works at *5Pointz* within the appropriate community and context for that particular medium.⁴³⁵ Moreover, the Office finds persuasive the assessment that the prevailing judicial interpretation of "recognized stature" is too narrow. For example, the court's test for "recognized stature" in *Carter v. Helmsley-Spear, Inc.*, that the art must be "meritorious," appears to contradict the long-standing policy shared by the courts and the Copyright Office to avoid assessing the aesthetic merits of art.⁴³⁶ The *Carter* standard is also susceptible to excluding types of art that may not qualify as traditional fine art or may not have received sufficient scholarly attention and analysis. Similarly, the Office also has concerns with the tendency of some courts to rely solely on scholarly consensus to assess a work's status. The Office, instead, agrees with the proposed standard that the courts should also consider the local community's relationship with the artwork as a determination of the work's "recognized stature." Other factors besides the aesthetic merits or scholarly treatment may be more indicative of a work's "recognized stature," depending on the type of work at issue and the particular community in which it is present. This interpretation reflects the justification the House Committee on the Judiciary provided in the

⁴³¹ *Id.* at 1.

⁴³² *See id.* at 5 ("The recognized stature of such a localized work may not be primarily aesthetic in nature at all; the work may have become iconic for non-aesthetic reasons, or it may reflect the social concerns of the community in a way that an acknowledged masterpiece may not.").

⁴³³ *Id.* at 5.

⁴³⁴ The Office recognizes that the precedential value of this opinion is unclear at this early stage, based on the particular "insolence" of the defendants and whether the recent opinion actually clarifies the statutorily undefined term of "recognized stature" for other types of art. *5Pointz II*, 320 F. Supp. 3d at 447 ("If not for Wolkoll's insolence, these damages would not have been assessed.").

⁴³⁵ *See 5Pointz II*, 320 F. Supp. 3d at 438–39 (referring to the folios of the plaintiffs highlighting their career accomplishments and the placement of works in various media).

⁴³⁶ *See, e.g., Bleistein*, 188 U.S. at 251–52 ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."); *Esquire*, 591 F.2d at 805 ("Neither the Constitution nor the Copyright Act authorizes the Copyright Office or the federal judiciary to serve as arbiters of national taste."); U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 310.2 (3d ed. 2017), available at <http://www.copyright.gov/comp3/docs/compendium.pdf>.

VARA report for not including the definition of “recognized stature” in the final version of the bill. According to the report, the House Committee did not intend to require the artist to “prove a pre-existing standing in the artistic community” as it “appreciate[d] that less well-known or appreciated artists also have honor and reputations worthy of protection.”⁴³⁷ The Copyright Office thus finds that a broader interpretation of “recognized stature” that accounts for the opinions of those beyond the academic community coincides with congressional intent to extend VARA protection to a greater range of artistic works.

The Office recommends that Congress consider a statutory amendment to ensure that the recognized stature provision in section 106A(a)(3)(B) supports the overall goals of VARA of protecting the moral rights of visual artists and in turn, preserving their contributions to culture. Consistent with these goals, the standard of recognized stature should reflect that the recognition of a work of art can originate from outside the “fine arts” academy and instead from the local community where the art resides. The recent case regarding the graffiti art at 5Pointz highlights the significance of assessing the recognition of a work of art within the relevant community for that particular medium.⁴³⁸

Specifically, the Office recommends adding to subsection 106A(3)(B) the following language from the California Art Preservation Act, modified to add reference to the opinions of the relevant community:

⁴³⁷ H.R. REP. NO. 101-514, at 15 (1990). *See also id.* (“The deletion of this language is consistent with the fact that, throughout history, many works now universally acknowledged as masterpieces have been rejected and often misunderstood by the general public at the time they were created.”).

⁴³⁸ *See, e.g.,* Peter A. Berry, *Graffiti Artists Awarded \$6.7 Million for Destruction of 5Pointz Murals in Queens*, XXL (Feb. 14, 2018), <http://www.xlimg.com/news/2018/02/graffiti-artists-6-7-million-dollars-destruction-of-5pointz-murals-queens/> (“A group of New York City-based Graffiti artists have just secured a huge W for the culture.”); Alan Feuer, *Brooklyn Jury Finds 5Pointz Developer Illegally Destroyed Graffiti*, N.Y. TIMES (Nov. 7, 2017), <http://www.nytimes.com/2017/11/07/nyregion/5pointz-graffiti-jury.html> (explaining that the trial “explored the question of whether graffiti, despite its transient nature, should be recognized as art”); Amanda Holpuch, *5 Pointz: New York Graffiti Mecca Calls on Banksy for Help in Fight to Stay Alive*, GUARDIAN (Oct. 18, 2017) (quoting 5Pointz curator Marie Cecile Flageul at the start of the case as saying, “Either way, whatever happens, we’ve given talented artists a platform. We’ve made history.”); Eileen Kinsella, *Decrying Real Estate Developer’s ‘Insolence,’ Judge Awards Street Artists \$6.7 Million in Landmark 5Pointz Case*, ARTNET NEWS (Feb. 12, 2018), <http://news.artnet.com/art-world/judge-awards-6-million-5pointz-lawsuit-1222394> (quoting 5Pointz attorney Eric Baum as saying, “Aerosol art has been recognized as fine art.”); Lastplak Streetart (@lastplak), TWITTER (Feb. 15, 2018, 12:06 PM), <http://twitter.com/lastplak/status/964229447766413314> (Graffiti and street art painters expressing congratulations to the artists in the 5Pointz case for the case outcome); Street Art NYC, *The Institute of Higher Burning*, GOOGLE ARTS & CULTURE (2013), <http://artsandculture.google.com/exhibit/wRU6hVET> (explaining the importance of 5Pointz in the culture of its neighborhood and the street art community). *But see* Cathy Gellis, *Court Destroys Future Public Art Installations by Holding Building Owner Liable for Destroying This One*, TECHDIRT (Feb. 22, 2018, 1:47 PM), <http://www.techdirt.com/articles/20180219/11142039268/court-destroys-future-public-art-installations-holding-building-owner-liable-destroying-this-one.shtml> (arguing that the case is actually not a win for graffiti artists as it may force them to change practices with respect to covering over each other’s work).

In determining whether a work a work of visual art is of recognized stature, the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of art, as well as the opinion of the relevant community”⁴³⁹

Such language may enable artists of public art or non-traditional art to show that their particular work, which may not have qualified under a more academic focus, is of recognized stature within the particular community related to that specific style of art. With this clarifying language, non-traditional art and public art may qualify more easily as a work of “recognized stature.”

c) Duration

The rights granted by VARA belong to the author of the work and not the copyright owner or the owner of the physical art object.⁴⁴⁰ For works made after the effective date of VARA (June 1, 1991), the integrity and attribution rights under VARA endure for the life of the artist.⁴⁴¹ For works created before June 1, 1991, the duration of VARA rights depends upon whether the artist transferred title to the work. If the artist parted with title prior to June 1, 1991, then the author does not have any rights under VARA.⁴⁴² If the artist created the work before June 1, 1991 but did not transfer title to the work prior to that date, then the artist’s VARA rights endure for a term of life plus 70 years.⁴⁴³

This particular provision has created certain inconsistencies regarding duration of rights.⁴⁴⁴ If an artist created a painting in 1985 (for which he did not transfer title before 1991) and dies in 2005, then the copyright term and the artist’s rights of integrity and attribution for that painting will last until 2075. However, if the artist created a painting in 1995 and died in 2005, then the copyright term will last until 2075 but the rights of integrity and attribution would have lasted for a shorter time, until 2005. The legislative history explains that the term of protection for both works created before or after the enactment date “is consistent with current copyright terms for economic rights.”⁴⁴⁵ The drafters of VARA may have configured this inconsistent duration provision in order to render the term for current works coextensive with the term for economic

⁴³⁹ See CAL. CIV. CODE § 987(f).

⁴⁴⁰ 17 U.S.C. § 106A(e)(2).

⁴⁴¹ 17 U.S.C. § 106A(d)(1).

⁴⁴² 17 U.S.C. § 106A(d)(2). See Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 24–26 (1997) (arguing that not applying VARA to previously created works whose titles had been transferred was the result of Congress’ interest in avoiding frustrating the property interests and expectations of those who had bought copies of VARA works prior to the effective date of the statute).

⁴⁴³ 17 U.S.C. § 106A(d)(2) (stating that “the rights conferred by . . . shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106”).

⁴⁴⁴ See 3 NIMMER ON COPYRIGHT § 8D.06[E].

⁴⁴⁵ H.R. REP. NO. 101-514, at 18 (1990).

rights at that time, while maintaining for future works that the moral rights under VARA are personal to the author and thus should endure only for the life of that particular author. It is unclear to the Office why Congress devised this particular inconsistency in duration that favors the estates of artists who created works prior to VARA over the estates of artists who created works since the enactment of VARA. Should Congress decide to take up the substantive VARA recommendations in this Report, the Office also recommends that it address this apparent inconsistency by adopting a uniform term.

d) Waiver

As the rights under VARA are personal rights of the artist, the artist may assert the attribution and integrity rights even after transferring ownership of the copyright or the object. While these rights are not subject to transfer, the artist may waive these rights in a written instrument signed by the author. The instrument must identify the work and the uses of that work to which the waiver applies.⁴⁴⁶ The waiver applies only to the particular work and uses outlined in the instrument. In the case of a joint work prepared by two or more authors, a waiver of rights made by one author waives such rights for all authors.⁴⁴⁷ But one joint author cannot waive the other joint author's VARA rights and thereby take sole credit for their joint work.⁴⁴⁸

VARA directed the Copyright Office to conduct a study on the waiver of rights provision and submit a report to Congress on the findings of the study and any recommendations, no later than five years after the date of enactment.⁴⁴⁹ In 1996, the Copyright Office submitted its final report on the Office's assessment of the impact of the waiver of moral rights provisions as outlined in VARA.⁴⁵⁰ The Copyright Office concluded that, because artists and art consumers are generally unaware of moral rights, it could not make an accurate prediction on the impact of VARA's waiver provisions at that time.⁴⁵¹ However, the 1996 Report did make a number of observations on the language and probable effect of VARA on a range of issues. The Office found that VARA inappropriately permits one joint author to waive the moral rights of coauthors in a joint work;⁴⁵² that VARA should be clarified regarding the specific uses to which waiver might

⁴⁴⁶ 17 U.S.C. § 106A(e)(1).

⁴⁴⁷ *Id.*

⁴⁴⁸ See *Grauer v. Deutsch*, No. 01 CIV. 8672, 2002 WL 31288937, at *1 (S.D.N.Y. Oct. 11, 2002) (holding that an artist's display of copyrighted photographs with a claim of sole authorship did not amount to a waiver of the alleged co-author's right of attribution under VARA).

⁴⁴⁹ See Pub. L. No. 101-650, § 608, 104 Stat. 5128, 5132 (1990).

⁴⁵⁰ U. S. COPYRIGHT OFFICE, WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS (1996) ("WAIVER REPORT"). The Copyright Office also submitted to Congress an Interim Report in 1992 that summarized responses to a Notice of Inquiry. See *id.* at i.

⁴⁵¹ WAIVER REPORT at xiii.

⁴⁵² WAIVER REPORT at xvii, 192.

apply,⁴⁵³ especially since waiver language tends to be quite broad,⁴⁵⁴ and that the public, artists, and art purchasers need further education on VARA.⁴⁵⁵

The study comments in response to the 2017 Notice of Inquiry addressed familiar issues highlighted by the Office's 1996 Report. Some commenters remarked on the general sense of unfairness of one artist impacting the rights of another, particularly in the context of joint authorship.⁴⁵⁶ Specifically, the Kernochan Center stated that "it is unfair for artists of works of visual art to be subject to waiver of their rights by a co-author. Any waiver of moral rights should be effective only with respect to the particular author who signed the waiver."⁴⁵⁷

The Copyright Office finds persuasive the concerns raised in the comments concerning the ability of one author to waive the rights of another joint author. Such a provision contradicts the purpose of VARA to protect *personal* rights and is inconsistent with the statutory prohibition against the transfer of those rights. As in the 1996 Report, the Copyright Office again recommends that Congress amend this provision to provide that no joint author may waive another's statutory moral rights under VARA without the written consent of each joint author whose rights would be affected by the waiver.⁴⁵⁸

3. Section 1202 of Title 17

Section 1202 of title 17—enacted as part of the DMCA—prohibits the removal, alteration, or falsification of certain categories of information regarding a copyrighted work.⁴⁵⁹ Such "copyright management information" ("CMI") is defined in section 1202 to include a work's title, author, copyright owner, and terms and conditions of use; performers in non-audiovisual works;

⁴⁵³ WAIVER REPORT at xviii.

⁴⁵⁴ WAIVER REPORT at 180.

⁴⁵⁵ WAIVER REPORT at 186.

⁴⁵⁶ See Kernochan Center Initial Comments at 7; FMC Reply Comments at 6 ("Authors should be able to opt out of their right of integrity, but not strip other authors of the same right.").

⁴⁵⁷ Kernochan Center Initial Comments at 7.

⁴⁵⁸ See WAIVER REPORT at 192 ("The Office suggests that Congress amend this provision to provide that no joint author may waive another's statutory moral rights without the written consent of each joint author whose rights would be affected.").

⁴⁵⁹ This includes information relating to "[t]he title and other information identifying the work," "[t]he name of, and other identifying information about, the author of a work," "[t]he name of, and other identifying information about, the copyright owner of the work," "the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work," "the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work," "[t]erms and conditions for use of the work," "[i]dentifying numbers or symbols referring to such information or links to such information," and "[s]uch other information as the Register of Copyrights may prescribe by regulation." 17 U.S.C. § 1202(c).

and writers, performers, and directors credited in an audiovisual work.⁴⁶⁰ To qualify as CMI under the statute, the information must be “conveyed in connection with” copies or displays of the work, “including in digital form”; information in a copyright notice can constitute CMI.⁴⁶¹ The Register of Copyrights is authorized to expand section 1202’s CMI definition by regulation.⁴⁶² The statute prohibits the attachment of false CMI, as well as the removal or alteration of CMI.⁴⁶³ Both prohibitions require knowledge and intent in order to constitute a violation.⁴⁶⁴ Specifically, to be liable for providing false CMI or for the distribution or importation for distribution of false CMI, a person must do so “knowingly and with the intent to induce, enable, facilitate, or conceal infringement.”⁴⁶⁵ Similarly, the removal or alteration of CMI and the distribution of works where the CMI has been removed or altered violates section 1202 only if done with knowledge that such action will “induce, enable, facilitate, or conceal” copyright infringement.⁴⁶⁶

Congress noted that CMI aids in “indicating attribution, creation and ownership” of a work, and that CMI plays an important role in “establishing an efficient Internet marketplace” by tracking and monitoring copyright uses and facilitating licensing agreements.⁴⁶⁷ These provisions

⁴⁶⁰ *Id.* The categories for performers, writers, and directors do not apply to public performances of works by radio and television broadcast stations. CMI also includes “other information identifying” all categories as well as identifying numbers or symbols that refer to such information. *Id.*

⁴⁶¹ *Id.*

⁴⁶² 17 U.S.C. § 1202(c)(8). At least one commenter recommended that the Office “prescribe by regulation the inclusion of names of creators—whether or not statutory authors—as CMI that can be protected under section 1202 if conveyed in connection with copies of the work.” Kernochan Center Initial Comments at 8. *Cf.* Recording Academy Reply Comments at 2–3 (suggesting that “[t]he definition of CMI could be expanded in a way that allows for the inclusion of information about additional individuals involved in the making of a sound recording . . . including the songwriters, the non-featured performers, and the producers and engineers”). The Copyright Office agrees that this regulatory path could play an important role in the discussion and use of CMI. The Office may consider its legal authority to initiate and adopt further regulations at a future date.

⁴⁶³ 17 U.S.C. § 1202(a), (b).

⁴⁶⁴ Section 1202’s knowledge and intent requirements mirror those in the WCT and the WPPT. Both treaties require member states to “provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty.” WCT art. 12(1); WPPT art. 19(1). The knowledge conditions ensure that “mere inadvertent acts” are not prohibited. MIHÁLY FISCOR, *THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION* 564 (2002). Congress enacted section 1202 to implement the United States’ WCT and WPPT obligations, including the conditions that prohibited activities are intentional, deliberate, and with the intent to induce, enable, facilitate, or conceal infringement. *See* S. REP. NO. 105-190, at 34 (1998); H. REP. NO. 105-551, pt. 1, at 10–11 (1998).

⁴⁶⁵ 17 U.S.C. § 1202(a).

⁴⁶⁶ 17 U.S.C. § 1202(b).

⁴⁶⁷ S. REP. NO. 105-190, at 16 (1998).

also provide a form of quasi-moral rights protection by effectively preserving the names of authors, owners, and other creators in connection with their works.⁴⁶⁸

The CMI protections in section 1202 implement in U.S. law protections required by in the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonogram Treaty (“WPPT”)—collectively known as the “WIPO Internet Treaties”—which created new obligations concerning protections for what the treaties called “rights management information” or “RMI.”⁴⁶⁹ The concept of RMI is one that was “largely unknown beforehand in national and international law.”⁴⁷⁰ RMI, as defined by the WIPO Internet Treaties, includes information that identifies the work, the author, the owner, and any terms and conditions of the work’s use.⁴⁷¹ Such information serves the purpose of connecting works to their authors; the WIPO Internet Treaties seek to protect such connection against manipulation “by unauthorized third persons through deletion, modification, and otherwise.”⁴⁷² As with CMI in the United States, commentators have noted that the WIPO Internet Treaties’ protection for RMI serves as a potential means of protecting an author’s moral rights, specifically the right of attribution.⁴⁷³

While section 1202 defines the kind of information that qualifies as protected CMI, it does not detail the form that CMI can take. Information that is used to identify works can come in both analog and digital forms, and often takes the form of metadata. Metadata, literally defined as “data about data,” is data created, stored, and shared to describe information, which can include a work’s copyright or attribution information. A variety of organizations and registries have established a range of techniques to attach identifying information to works and have also created different types of metadata to embed information. These methods vary based on the types of works, and authors can voluntarily use these means to connect their information to their work.

⁴⁶⁸ See MIRA T. SUNDARA RAJAN, *MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY* 27 (2011) (noting that digital rights management, which identifies a work’s origin, supports the attribution right. It also “lends indirect support to the integrity principle, by offering a measure of the authenticity of the source”).

⁴⁶⁹ The concept of “RMI” as articulated in the WIPO Internet Treaties is coextensive with the concept of “copyright management information” or “CMI” as codified in section 1202 of the Copyright Act. As used herein, “RMI” refers to the concept as articulated in the Internet Treaties, while “CMI” will be used when referencing the concept as articulated in U.S. law.

⁴⁷⁰ SILKE VON LEWINSKI, *INTERNATIONAL COPYRIGHT LAW AND POLICY* ¶ 17.91, at 462 (2008) (“VON LEWINSKI”). See also WCT art. 12; WPPT art. 19.

⁴⁷¹ WCT art. 12(2); WPPT art. 19(2). While the Internet Treaties do not obligate member states to impose the use of RMI, they do oblige members to “provide adequate and effective legal remedies against” the unauthorized “knowing” removal of RMI and the exploitation of works with altered RMI. See WCT art. 12(1); WPPT art. 19(1).

⁴⁷² VON LEWINSKI ¶ 17.99, at 465.

⁴⁷³ See J. Carlos Fernández-Molina & Eduardo Peis, *The Moral Rights of Authors in the Age of Digital Information*, J. AM. SOC’Y FOR INFO. SCI. & TECH. 109, 112 (2001).

a) Section 1202 Protections vis-à-vis the Right of Attribution

It is common practice in the digital world for CMI to be stripped from works, disconnecting a work from its authorship and ownership information.⁴⁷⁴ Initially, the stripping of metadata from digital works was largely due to the fact that the narrow bandwidth of dial-up connections prioritized smaller files with little or no metadata.⁴⁷⁵ Abetting this tendency was a proliferation of software programs aimed at website managers, such as Rainbow Software's JPG Cleaner, that promised to increase the speed at which a website could be loaded by stripping metadata from JPEGs and other files.⁴⁷⁶ Since the advent of broadband, with its larger bandwidth, the barriers to allowing metadata to travel with a file have fallen. Unfortunately, the habits of the dial-up era die hard, and automatically stripping attribution from works, leaving them un- or mis-attributed, remains the norm.⁴⁷⁷ Additionally, the persistence of metadata can vary greatly depending upon the type of metadata system and online platform used. In one 2015 study of the persistence of specific embedded metadata formats on various platforms it was shown that, while some metadata formats were able to persist on certain social media sites, others were routinely stripped off, depending upon the site.⁴⁷⁸ As new technologies for affixing CMI to works develop, so too do technological means for altering or removing CMI. Unless a highly sophisticated method of attaching or embedding CMI is used, digital CMI and metadata can easily be removed from digital files.⁴⁷⁹

After the DMCA's enactment, American scholars eager for statutory moral rights protections beyond those provided by VARA saw promise in section 1202. The potential for a creator to have a cause of action for the removal or alteration of their identifying information

⁴⁷⁴ See Maria Schneider, Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 2–3 (Mar. 19, 2017).

⁴⁷⁵ See, e.g., *Low-Bandwidth Design*, KNOWLEDGE MGMT. FOR DEV., http://wiki.km4dev.org/Low-Bandwidth_Design (last updated Feb. 18, 2012) (advising that to create a website for low-bandwidth quality, strip the metadata from image files).

⁴⁷⁶ See *JPG Cleaner v2.6*, RAINBOW SOFTWARE PROGRAMS, http://www.rainbowsoftware.org/progr_ams.html#JPG%20Cleaner (promising to remove "Texts such as *File written by Adobe Photoshop, Creator: PolyView® Version 3.32 by Polybytes, LEAD Technologies Inc. V1.01*").

⁴⁷⁷ Cf. *Session 4*, Symposium Transcript, 8 GEO MASON J. INT'L COM. L. at 92 (remarks of Yoko Miyashita, Getty Images) (explaining the "right-click-copy-upload paradigm," through which an image is "disconnected from the key information that tells you who actually created that image").

⁴⁷⁸ See *Social Media Sites Photo Metadata Test Results*, EMBEDDED METADATA MANIFESTO, <http://www.embeddedmetadata.org/social-media-test-results.php> (showing that, while Exif metadata persisted on Pinterest and Tumblr, IIM and XMP metadata was stripped off on Tumblr, and Exif, IIM, and XMP metadata were stripped off on Twitter and Flickr).

⁴⁷⁹ See British Photographic Council, Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015, Notice of Inquiry (Visual Works Letter) at 1 (July 9, 2015); Pat Thomas, Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015, Notice of Inquiry (Visual Works Letter) at 1 (July 9, 2015).

“contain[ed] the seeds of a more general attribution right.”⁴⁸⁰ While VARA does provide an explicit right of attribution, its applicability is “very narrow,”⁴⁸¹ only covering certain visual works authors.⁴⁸² Section 1202, however, is not limited to a specific category of work, therefore creating “better [attribution] protection[.]” for other creators.⁴⁸³ Some commenters noted that section 1202’s provisions “are far more robust than those which exist in countries with national moral rights protections” because violations are subject to actual and statutory damages.⁴⁸⁴ Since section 1202’s enactment in 1998, authors and rightsholders have relied on its benefits when enforcing their attribution rights in court in increasing numbers every year.⁴⁸⁵ Additionally, while the applicability of the provision to analog as well as digital works was initially questioned, such applicability is now well-settled. At the same time, the body of case law interpreting section 1202 remains relatively contained; some of those decisions are discussed below.

b) Applicability to Analog as Well as Digital CMI

From an attribution standpoint, authorship information can be attached to a work in both analog and digital form—from a painter’s hand drawn signature on her mural to a wedding photographer’s watermark on his photographs. However, early courts reviewing the contours of

⁴⁸⁰ Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9, 11 (2001) (“Ginsburg, *(Digital) Age*”) (“Inclusion of the author’s name in protected copyright management information suggests that the copyright law finally affords authors of all works, not just ‘works of visual art,’ a right to recognition of their authorial status.”). See also ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 26 (2010) (“Kwall, *SOUL OF CREATIVITY*”) (pointing out that section 1202’s CMI provisions “included a de facto right of attribution”); Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15, 32 (1997) (noting that a U.S. proposal, predating the DMCA, to introduce statutory CMI provisions “represent[s] an important step toward the recognition of the right of attribution in the United States”).

⁴⁸¹ *Session 2, Symposium Transcript*, 8 GEO. MASON J. INT’L COM. L. AT 34 (remarks of Mickey Osterreicher, National Press Photographers Association).

⁴⁸² VARA’s protections apply to authors of works of visual art, as defined by 17 U.S.C. § 101.

⁴⁸³ *Session 2, Symposium Transcript*, 8 GEO. MASON J. INT’L COM. L. AT 35 (remarks of Mickey Osterreicher, National Press Photographers Association).

⁴⁸⁴ CCA Initial Comments at 2. Title 17’s section 1203 allows actual and statutory damages for section 1202 violations. See 17 U.S.C. § 1203(c).

⁴⁸⁵ When Shepardizing “17 U.S.C. 1202” in Lexis, the number of citing cases was 338 through the end of 2018, with the number of such cases rising each year. See <https://advance.lexis.com/shepards/shepardspreviewpod/?pdmfid=1000516&crd=143007de-6a08-4bb2-96e5-338c578bd5fe&pdshepid=urn%3AcontentItem%3A805F-T9K1-2NSD-P0CK-00000-00&pdshepcat=initial&eomp=v311k&prid=f3eb631e-f07e-4e55-862f-48e6455b2157>. In 2018 there were 53 cases alleging a violation of section 1202; additionally, many of these cases pair section 1202 claims with traditional copyright infringement claims. See <https://advance.lexis.com/shepards/shepardspreviewpod/?pdmfid=1000516&crd=ecb6b79f-4cb8-458c-b258-003abd14a11f&pdshepid=urn%3AcontentItem%3A805F-T9K1-2NSD-P0CK-00000-00&pdshepcat=initial&eomp=v311k&prid=f3eb631e-f07e-4e55-862f-48e6455b2157>.

section 1202 declined to apply it to analog attribution information, instead finding that it only applied to CMI that was digital or part of an “automated copyright protection or management system.” For instance, in 2006, the court in *IQ Group v. Wiesner Publishing, LLC* was tasked with deciding whether the defendant’s removal of plaintiff’s logo and hyperlink in an email advertisement and replacement with information directing users to the defendant’s website was a violation of section 1202.⁴⁸⁶ The court found that there was no violation because the logo and hyperlink were not considered CMI under section 1202. Acknowledging that the statutory text appears to define CMI “quite broadly,” the court nonetheless determined that the section should be read narrowly in light of its legislative history.⁴⁸⁷ The court understood the section to protect “copyright management performed by the technological measures of automated systems,” not “copyright management performed by people.”⁴⁸⁸ As such, it held that to be construed as CMI under section 1202, “the information removed must function as a component of an automated copyright protection or management system.”⁴⁸⁹

Likewise, the court in *Textile Secrets International, Inc. v. Ya-Ya Brand Inc.* held that a non-digital copyright notice and a tag indicating ownership on the plaintiff’s fabric design did not constitute CMI under section 1202.⁴⁹⁰ As the *IQ Group* court did, the court relied on legislative history to determine that the provision applies to circumstances that are related to “the Internet, electronic commerce, automated copyright protections or management systems, public registers, or other technological measures or processes.”⁴⁹¹ Because the plaintiff did not use any technological process to place the notice or tag on the fabric, and because the defendant did not use any technological process to remove the information, section 1202 was not triggered.⁴⁹²

While the *IQ Group* and *Textile Secrets* courts’ section 1202 analyses require a technological or electronic aspect, the more recent judicial trend has been to read the statute more broadly. In fact, many courts have looked to the provision’s plain language to explicitly reject the requirement that CMI include a digital or technological component. While the WIPO Internet

⁴⁸⁶ 409 F. Supp. 2d 587, 591 (D.N.J. 2006).

⁴⁸⁷ *IQ Grp. v. Wiesner Publ’g, LLC*, 409 F. Supp. 2d 587, 597 (D.N.J. 2006). The court examined the evolution of section 1202 through an analysis of the WIPO Internet Treaties, the U.S. Working Group on Intellectual Property Right’s 1995 “White Paper,” and statements given in section 1202’s legislative history. *Id.* at 593-97.

⁴⁸⁸ *Id.* at 597. The court concluded that there was no evidence that plaintiff intended for an automated system to use the logo or hyperlink to manage copyrights, that the logo or hyperlink actually did manage copyrights, nor that defendant’s actions impeded the effective functioning of an automated copyright protection system. *Id.*

⁴⁸⁹ *Id.* at 597.

⁴⁹⁰ 524 F. Supp. 2d 1184, 1202 (C.D. Cal. 2007).

⁴⁹¹ *Textile Secrets Int’l, Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184, 1201 (C.D. Cal. 2007).

⁴⁹² *Id.* at 1201–02. *But see Fox v. Hildebrand*, No. CV 09-2085, 2009 WL 1977996, at *3 (C.D. Cal. July 1, 2009) (a more recent decision from the District Court for the Central District of California, finding “[t]he plain language of the statute indicates that the DMCA provision at issue is not limited to copyright notices that are digitally placed on a work”).

Treaties' protections specifically extend to "electronic rights management information,"⁴⁹³ the language of section 1202 does not so limit its protections. In fact, section 1202's CMI definition notes that it applies to the specified information, "including in digital form."⁴⁹⁴ The "including in digital form" qualifier leads to an understanding that 1202 applies to both digital and non-digital information.⁴⁹⁵ Second, when Congress enacted section 1202, it clarified that although "CMI in digital form is expressly included" in the provision, "CMI need not be in digital form."⁴⁹⁶

This understanding is reflected in *Associated Press v. All Headline News Corp.*, which considered whether the removal of authorship and ownership information from news stories violated section 1202.⁴⁹⁷ Addressing the defendant's reliance on *IQ Group*, the court noted there was "no textual support" for limiting the provision to "technological measures of automated systems" and concluded that section 1202 was not limited to digital information or automated copyright protection.⁴⁹⁸ Similarly, several other courts have criticized the earlier decisions' reliance on legislative history when the statute's plain meaning clearly and unambiguously does not require CMI to "function as a component of an automated copyright protection or management system."⁴⁹⁹ Courts applying this line of reasoning have interpreted section 1202 to protect a copyright notice encoded as a hotlink to a photographer's website, a photographer's name and username on the same webpage as his photographs, and an analog credit line on the back of a record album jacket, among others.⁵⁰⁰ The highest court to consider the scope of section 1202's CMI definition was the Third Circuit in *Murphy v. Millennium Radio Group LLC*.⁵⁰¹ There, the defendant scanned the plaintiff's photograph and cut off the credit identifying the plaintiff as the author.⁵⁰² Once again, the court rejected the defendant's argument that section 1202 applied only to automated copyright protection systems, and held that the literal reading of the statute

⁴⁹³ See WCT art. 12(1); WPPT art. 19(1).

⁴⁹⁴ 17 U.S.C. § 1202(c).

⁴⁹⁵ See Jane C. Ginsburg, *Moral Rights in the U.S.: Still in Need of a Guardian Ad Litem*, 30 CARDOZO ARTS & ENT. L.J. 73, 75 (2012) ("Ginsburg, *Guardian Ad Litem*") ("The specification of 'including in digital form' clearly means that information not in digital form is also covered.").

⁴⁹⁶ S. REP. NO. 105-190, at 16 (1998).

⁴⁹⁷ 608 F. Supp. 2d 454 (S.D.N.Y. 2009).

⁴⁹⁸ *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 462 (S.D.N.Y. 2009).

⁴⁹⁹ *Cable*, 728 F. Supp. 2d at 980.

⁵⁰⁰ See, e.g., *Leveyfilm Inc. v. Fox Sports Interactive Media*, 999 F. Supp. 2d 1098, 1102 (N.D. Ill. 2014); *Morel*, 769 F. Supp. 2d at 304–05; *Cable*, 728 F. Supp. 2d at 981.

⁵⁰¹ Note that the Third Circuit Court of Appeals encompasses the District Court for the District of New Jersey, which decided *IQ Group*.

⁵⁰² See *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d. 295, 299 (3d Cir. 2011).

should control.⁵⁰³ As such, even manual removal of credits that are not digitally embedded in a work would render a defendant liable under section 1202.⁵⁰⁴

c) Challenges Applying Section 1202 to Moral Rights Protections

While section 1202 is increasingly relied upon by litigants trying to protect their attribution rights, some have pointed to its “limited firepower . . . in the moral rights arsenal.”⁵⁰⁵ Although it does establish a cause of action for attachment of false CMI as well as CMI alteration or removal in some situations, it does not create the right to be credited in the first place—something that many creators view as a shortcoming.⁵⁰⁶ Others have pointed out that section 1202’s knowledge requirements, as well as its inapplicability to creators who do not own a copyright in their work, contribute to its weakness.⁵⁰⁷

(1) No Right to Be Credited

Section 1202’s protections extend only to CMI that is already attached to a work. They do not require the inclusion of CMI; in other words, nothing in section 1202 affirmatively requires that an author be credited. Apprehensive about the prospect of a federal attribution right being established through mandated CMI, some in the creative industries have voiced concerns about the burdens such a requirement might create. For example, the Recording Industry Association of America (“RIAA”) suggested that requiring attribution for sound recordings would have “significant unintended consequences” to digital platforms.⁵⁰⁸ According to the RIAA, platforms may need to undertake “costly changes” to their user interface and their metadata feeds in order to provide attribution for the myriad of players involved in creating a sound recording.⁵⁰⁹ Streaming services could encounter difficulties collecting attribution information for “the millions of recordings already in [their] repertoire,” and would have to determine how to provide and display the information “for every contributor to every sample in every recording in [their] catalog[s].”⁵¹⁰

⁵⁰³ See *id.* at 305 (“Defendants are essentially asking us to rewrite § 1202 to insert a term—that is, ‘automated copyright protection or management system’—which appears nowhere in the text of the DMCA and which lacks a clear definition. We would need compelling justification indeed to adopt such a statutorily-unmoored interpretation.”).

⁵⁰⁴ *Id.* at 304–05.

⁵⁰⁵ Ginsburg, *Guardian Ad Litem*, 30 CARDOZO ARTS & ENT. L.J. at 74.

⁵⁰⁶ See *e.g.*, Authors Guild Initial Comments at 4; FMC Reply Comments at 7.

⁵⁰⁷ Authors Guild Initial Comments at 4–5; NWU-SFWA Joint Initial Comments at 6.

⁵⁰⁸ RIAA Reply Comments at 3.

⁵⁰⁹ *Id.* at 4.

⁵¹⁰ *Id.* at 5. Subsequently the RIAA, along with the Artist Rights Alliance, SAG-AFTRA, and A2IM, announced a new collaboration to build “a more robust and effective system of digital attribution and credits.” Press Release, Recording

In response, songwriters criticized the apparent prioritization of “the inconvenience of dealing with accurate metadata over the principle of protection of the rights of the people upon whose work the music business is built.”⁵¹¹ Indeed, three streaming services have subsequently announced intentions to add songwriter, producer, and musician credits as metadata to the songs they stream.⁵¹² Additionally, Google announced in September of 2018 that it will henceforth include creator, credit, and copyright notice metadata to the photographs it displays on Google Images.⁵¹³ Of course, none of these initiatives are mandated by section 1202, but once the musical and photographic metadata is added, section 1202 does protect against its alteration or removal under certain circumstances. Some in the songwriting community have not advocated for mandatory CMI, but instead emphasize section 1202’s role as a “useful, if not indispensable, tool[]” in achieving accountability from the internet.⁵¹⁴ These songwriters argue that the focus should be on encouraging the full music community to “harness and protect” “[a]ccurate metadata.”⁵¹⁵ Other creators have noted that the statutory definition of CMI could benefit from expansion to cover certain types of metadata as well as other creators who are not regularly credited.⁵¹⁶

While the increase in voluntary provision of metadata for sound recordings and photographs on major platforms is a positive development, it is not apparent that making such actions generally mandatory is advisable at this time. Section 1202, along with Chapter 12 in general, is focused on protecting copyright protection and management systems that are attached to works voluntarily, and it is a significant step from protecting such systems to *requiring* their use

Indus. Ass’n of America, Music Community Calls for Building a Better Digital Attribution and Credits System (Mar. 14, 2019), *available at* <https://www.riaa.com/music-community-calls-building-better-digital-attribution-credits-system/>.

⁵¹¹ *Songwriters Protest ‘Moral Rights’ Issue to RIAA*, BRITISH ACAD. SONGWRITERS, COMPOSERS & AUTHORS (Aug. 1, 2017), <http://basca.org.uk/2017/08/16/songwriters-protest-moral-rights-issue-riaa> (“*Songwriters Protest*”).

⁵¹² See Press Release, TIDAL, TIDAL’s Album and Track Info Feature Offers Detailed Artist Credits And Descriptions For Millions of Albums And Tracks (Nov. 3, 2017), *available at* <http://www.prnewswire.com/news-releases/tidals-album-and-track-info-feature-offers-detailed-artist-credits-and-descriptions-for-millions-of-albums-and-tracks-300549024.html>; *Spotify (Finally) Adds Songwriter and Producer Credits*, VARIETY (Feb. 2, 2018), <http://variety.com/2018/digital/news/spotify-adds-songwriter-and-producer-credits-1202684818>; Andy Malt, *YouTube to Launch Music Streaming Service Next Week, Adds Credits to Music Videos*, COMPLETE MUSIC UPDATE (May 17, 2018), <http://www.completemusicupdate.com/article/youtube-to-launch-music-streaming-service-next-week-adds-credits-to-music-videos/>. But see Marc Hogan, *Don’t Give Spotify Too Much Credit for Adding Credits*, PITCHFORK (Feb. 5, 2018), <http://pitchfork.com/thepitch/dont-give-spotify-too-much-credit-for-adding-credits>.

⁵¹³ See Paul Sawers, *Google Images Will Now Display Creator and Copyright Metadata*, VENTUREBEAT (Sept. 27, 2018, 8:21 AM), <https://venturebeat.com/2018/09/27/google-images-will-now-display-creator-and-copyright-metadata>.

⁵¹⁴ *Songwriters Protest*, <http://basca.org.uk/2017/08/16/songwriters-protest-moral-rights-issue-riaa>.

⁵¹⁵ *Id.*

⁵¹⁶ See FMC Reply Comments at 7 (noting that session musicians and sound engineers are not covered by section 1202); see also *Songwriters Protest*, <http://basca.org.uk/2017/08/16/songwriters-protest-moral-rights-issue-riaa> (recommending that the categories in the ID3v2 metadata tag be included in the section 1202 definition of CMI).

in the first place. There are also a number of factors that would have to be thought through, such as the impact on anonymous and pseudonymous works, who would bear the burden of applying such systems (individual authors? distribution platforms?), and how to effectively police the requirement.

That said, the 2018 Orrin G. Hatch-Bob Goodlatte Music Modernization Act (“MMA”) includes many provisions addressing the collection, usage, and sharing of metadata related to digital music, as part of a broad overhaul of the section 115 “mechanical” license. The MMA creates a blanket license available for digital services engaging in the reproduction and distribution of digital phonorecord deliveries (“DPDs”), to be administered by a mechanical licensing collective (“MLC”). To facilitate payment to copyright owners for uses made under the blanket license, the MLC will work to identify musical works embodied in particular sound recordings, and the copyright owners of such musical works.⁵¹⁷ Further, the MLC will establish and maintain a publicly available database containing relevant information related to these musical works, musical work copyright owners, and sound recordings.⁵¹⁸ The MMA details specific information to be included in the database, and vests the Copyright Office with authority to prescribe additional categories by regulation.⁵¹⁹ To populate this database, it requires digital music providers to provide detailed usage reports identifying metadata on the sound recordings and embodied musical works they stream or download.⁵²⁰ As part of this process, these providers must engage in “good-faith, commercially reasonable efforts” to collect a variety of sound recording information, and the Copyright Office may also promulgate regulations related to the information included on these usage reports.⁵²¹ Separately, musical work copyright owners listed in the MLC’s database must engage in commercially reasonable efforts to provided updated sound recording information to improve the database quality.⁵²²

⁵¹⁷ 17 U.S.C. § 115(d)(3)(C)(III).

⁵¹⁸ 17 U.S.C. §§ 115(d)(3)(E); 115(d)(3)(C)(IV).

⁵¹⁹ 17 U.S.C. § 115(d)(3)(E)(III).

⁵²⁰ See 17 U.S.C. § 115(d)(4)(A)(ii)(I)(aa) (requiring digital music providers to provide, as part of their usage reports, “identifying information for the sound recording, including sound recording name, featured artist, and, to the extent acquired by the digital music provider in connection with its use of sound recordings of musical works to engage in covered activities, including pursuant to subparagraph (B), sound recording copyright owner, producer, international standard recording code, and other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody”); see also 17 U.S.C. § 115(d)(4)(A)(ii)(I)(bb) (requiring digital music providers to “provide information concerning authorship and ownership of the applicable rights in the musical work embodied in the sound recording (including each songwriter, publisher name, and respective ownership share) and the international standard musical work code,” “to the extent acquired by the digital music provider in the metadata provided by sound recording copyright owners or other licensors of sound recordings”).

⁵²¹ 17 U.S.C. § 115(d)(4)(A)(ii); (B).

⁵²² 17 U.S.C. 115(d)(3)(E)(IV).

In addition to the attribution aspects of the MMA, the Copyright Office believes it is important for government to encourage voluntary initiatives that work towards full attribution for authors on the internet.

(2) Difficult to Prove Knowledge Requirement

Section 1202 neither mandates the inclusion of CMI on works, nor penalizes the mere removal of attribution information.⁵²³ Instead, the removal, falsification, or alteration of CMI is only actionable under 1202 if a fairly stringent dual intent standard is satisfied. This standard is phrased slightly differently depending upon the action. To be liable for providing, distributing, or importing false CMI, the defendant must know that the CMI is false, and their actions must be done with the “intent to induce, enable, facilitate, or conceal infringement.”⁵²⁴ Liability for the removal or alteration of CMI similarly requires that the actor intentionally remove the information, or distribute or import works knowing that the CMI has been removed or altered without the rightsholder’s authorization.⁵²⁵ However, instead of the “intent” standard for false CMI, these actions must be done with the *knowledge* that the removal or alteration will induce, enable, facilitate, or conceal copyright infringement.⁵²⁶

The purpose of the dual intent standard is to both fulfill the United States’ international obligations and provide a safeguard against inadvertent violations. Initially, in 1995, the United States Government recommended amending the U.S. Copyright Act to protect CMI associated with a work in order to protect the public from false information and to facilitate licensing agreements.⁵²⁷ Its proposal included a knowledge requirement to prevent violations caused by inadvertent falsifications, alterations, or removals, but notably, *it did not* contain the requirements that the action be done with the intent to cause copyright infringement or with the knowledge that it will facilitate infringement.⁵²⁸ Preliminary drafts of the WCT and the WPPT’s RMI provisions were similar to the United States’ proposal in that they only included the single initial knowledge requirement.⁵²⁹ During the course of negotiations, parties raised concerns that the

⁵²³ See S. REP. NO. 105-190, at 16–17 (1998).

⁵²⁴ 17 U.S.C. § 1202(a).

⁵²⁵ 17 U.S.C. § 1202(b).

⁵²⁶ *Id.* With respect to criminal remedies, the requisite standard is “knowledge,” and with respect to civil remedies, the requisite standard is “reasonable grounds to know.” *Id.*

⁵²⁷ See BRUCE A. LEHMAN, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT ON THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 235–36 (1995) (“LEHMAN”).

⁵²⁸ See LEHMAN at 249–50, app. 1 at 6–7. The proposal prohibited the knowing provision, distribution, and importation of false CMI as well as the knowing removal or alteration of CMI, the knowing distribution or importation of false CMI, and the knowing distribution or importation of copies with false CMI. *Id.*

⁵²⁹ See WIPO, Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, Dec. 2 to 20, 1996, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference*, art. 14, at 60, WIPO Doc. CRNR/DC/4 (Aug. 30. 1996),

early RMI provisions' scope was too wide and insufficiently defined.⁵³⁰ They noted that if violations were not linked to infringing acts then correction of inaccurate information, lawful activities, activities concerning materials in the public domain, and authorized acts would be prohibited.⁵³¹ Thus, many parties, including the United States, supported narrowing the two provisions' scope by attaching liability when the actions are done knowingly *and* with the knowledge that they will induce or facilitate copyright infringement,⁵³² proposals that are reflected in the final language of the WCT and the WPPT.

While the WIPO Internet Treaties were being negotiated, similar issues were concurrently being discussed in the U. S. Bills to include a CMI provision in title 17 were introduced before the WCT and the WPPT were concluded. These initial iterations of section 1202, based on the United States government's 1995 recommendation, included the initial knowledge requirement, but the actor's intent to cause or facilitate copyright infringement, or knowledge that their actions will do so was not an element at that time.⁵³³ The U.S. Copyright Office questioned whether this approach was overly broad.⁵³⁴ For example, the Office did not think that *de minimis* alterations, changes that clarified or supplemented information, authorship and ownership disputes in joint work or work made for hire situations, or good faith alterations should constitute violations.⁵³⁵

available at http://www.wipo.int/edocs/mdocs/diplconf/en/crn_r_dc/crn_r_dc_4.pdf; WIPO, Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, Dec. 2 to 20, 1996, *Basic Proposal for the Substantive Provisions of the Treaty for the Protection of the Rights of Performers and Producers of Phonograms to Be Considered by the Diplomatic Conference*, art. 23, at 96, WIPO Doc. CRNR/DC/5 (Aug. 30, 1996), available at http://www.wipo.int/edocs/mdocs/diplconf/en/crn_r_dc/crn_r_dc_5.pdf.

⁵³⁰ See WIPO, Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, Dec. 2 to 20, 1996, *Summary Minutes, Main Committee I*, ¶ 530, at 79, WIPO Doc. CRNR/DC/102, (Aug. 26, 1997), available at http://www.wipo.int/edocs/mdocs/diplconf/en/crn_r_dc/crn_r_dc_102.pdf (statement by the European Communities).

⁵³¹ See *id.* ¶ 525, at 77–78, ¶ 541, at 81 (statements by the United States of America and the Chairman).

⁵³² See *id.* ¶ 516, at 75, ¶ 525, at 77–78, ¶ 528, at 78, ¶ 529, at 79, ¶ 535, at 80, ¶ 536, at 80 (statements by the Chairman, the United States of America, Singapore, the European Communities, the United Kingdom, and Australia).

⁵³³ See NII Copyright Protection Act of 1995, S. 1284, 104th Cong. § 4 (1995); NII Copyright Protection Act of 1995, H.R. 2441, 104th Cong. § 4 (1995). The proposed section 1202 in both bills mirrored the language in the U.S. government's 1995 recommendation. The Administration stressed that the knowledge requirement protected against inadvertent CMI falsification, alteration, and removal. See *NII Copyright Protection Act of 1995: Joint Hearing on H.R. 2441 and S. 1284 Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary and the S. Comm. on the Judiciary*, 104th Cong. 39 (1995) (“NII Joint Hearing”) (statement of Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, U.S. Patent and Trademark Office).

⁵³⁴ See *NII Joint Hearing* at 52 (1995) (statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services).

⁵³⁵ Similar concerns were raised by other stakeholders. See *NII Joint Hearing* at 190 (1996) (written statement of Richard Robinson, Chairman, President, and CEO, Scholastic, Inc., on behalf of the Association of American Publishers) (raising concerns over the potential “misapplication” of section 1202 and disputes over ghost writing, collaborative works, pseudonymous works, as well as legitimate disputes over ownership or the right to exercise one or more exclusive

After the United States signed the WIPO Internet Treaties, the CMI proposal before Congress was revised to reflect the knowledge and intent standards found in the treaties.⁵³⁶ This dual standard satisfied the United States' WCT and WPPT obligations and also resolved Office and stakeholder concerns about section 1202's breadth.⁵³⁷

Some view the dual standard as creating "a significant impediment to many CMI claims" because it can be difficult to prove, thus limiting its usefulness as a means to protect an author's attribution rights.⁵³⁸ Under section 1202, plaintiffs must essentially prove that a defendant was (1) expressly contemplating copyright infringement when (2) knowingly misattributing a work or removing CMI.⁵³⁹ Although a plaintiff is not required to show actual infringement to prove intent, the fact that there is none may be relevant to some courts' intent determination.⁵⁴⁰

In some cases, plaintiffs have failed to prevail on their section 1202 claims because they lacked evidence of the defendant's required mental state.⁵⁴¹ In one recent case, *Stevens v.*

rights); *id.* at 432 (written statement of members of the Digital Future Coalition) (noting concerns that the draft provision's reach was "overly-broad" and would cause hardship and expense to innocent actors, such as a wholesaler who receives a shipment of digital copies and knows that the copyright ownership has been transferred, in which case Digital Future Coalition noted that the wholesaler would be "flatly prohibited" from redistributing the copies unless it changed the CMI.).

⁵³⁶ See WIPO Copyright Treaties Implementation Act, H.R. 2281, 105th Cong. § 3 (1997) (as introduced in the House, July 29, 1997).

⁵³⁷ See WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary, 105th Cong. 51–52 (1997) ("WCT Implementation Hearing") (written statement of Marybeth Peters, Register of Copyrights, Copyright Office of the United States, Library of Congress) ("We believe that the knowledge and intent standards resolve the concerns we expressed in 1995 about the prohibition's scope of coverage. They ensure that no one will be liable who deletes, alters or provides inaccurate information for legitimate reasons, such as technological constraints or a good faith belief that he or she has the right to do so."); *id.* at 221 (written statement of Michael K. Kirk, Executive Director, American Intellectual Property Law Association) (pointing out that the addition of an intent requirement along with the knowledge requirement "adequately addresses the concerns about the possibility of creating liability by innocent distribution of copies containing false copyright management information").

⁵³⁸ Jane C. Ginsburg, Keynote Address, *The Most Moral of Rights: The Right to be Recognized as the Author of One's Work*, 8 GEO. MASON J. INT'L COM. L. 44, 63 (2016). See also Pilch Initial Comments at 3 ("The issue of knowledge, and the advantage of not having knowledge, is problematic.").

⁵³⁹ See Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 73 (2007) ("[T]he burden of showing a culpable mental state on the part of the defendant is a heavy burden for any plaintiff.").

⁵⁴⁰ See *Steele v. Bongiovanni*, 784 F. Supp. 2d 94, 98 (D. Mass. 2011) (finding that since an earlier court did not find copyright infringement, plaintiff "cannot prove that defendants knew the alterations would facilitate copyright infringement [under section 1202(b)]").

⁵⁴¹ See, e.g., *Gordon v. Nextel Commc'ns*, 345 F.3d 922, 923, 926–27 (6th Cir. 2003); *Ward v. Nat'l Geographic Soc'y*, 208 F. Supp. 2d 429, 450 (S.D.N.Y. 2002); *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999). But see *Michael Grecco Prods., Inc. v. Alamy, Inc.*, No. 18-CV-3260, 2019 WL 1129432, at 6 (E.D. N.Y. Mar. 12, 2019) (denying defendant's

CoreLogic, a group of real estate photographers sued a software company for violating section 1202(b).⁵⁴² *CoreLogic*, the software company, provided services to Multiple Listing Services, including preparing real estate photographs for internet searching.⁵⁴³ When preparing photographs, *CoreLogic*'s software automatically deleted background metadata such as EXIF and IPTC in order to reduce storage size.⁵⁴⁴ The Ninth Circuit, affirming the district court, found that there was no evidence that *CoreLogic* possessed the "mental state of knowing, or having reasonable basis to know, that [its] actions will induce, enable, facilitate, or conceal infringement," and thus ruled against the photographers.⁵⁴⁵ Specifically, the court found that the photographers failed to prove that *CoreLogic* demonstrated a "pattern of conduct" or "modus operandi" that indicated that *CoreLogic* knew that the result of its actions would be infringement.⁵⁴⁶ As part of this inquiry, the court found it relevant that the photographers had never sought to use their metadata as a way to police infringement, and that there was never alleged any actual infringement as a result of *CoreLogic*'s distribution of the metadata-less photographs.⁵⁴⁷

The Office finds the Ninth Circuit's *CoreLogic* result troubling. It essentially requires that not only must a section 1202 plaintiff prove intentional removal and distribution and prove that this action was done with the knowledge that it will encourage infringement, but also that this knowledge must be based on a "pattern of conduct" or "modus operandi," a requirement not present in the statute. Admittedly, proving that a defendant knows or has reasonable grounds to know that an action "will"⁵⁴⁸ cause or facilitate infringement is a relatively high bar. However, the *CoreLogic* opinion raises this bar impermissibly high in the Office's view. As the then-Register of Copyrights explained in her testimony on the bill for what would become section 1202,

Some copyright owners have expressed concern that this standard will be too difficult to meet, requiring proof of an ultimate infringement in order to find a violation. The Copyright Office believes that it is important to make clear, possibly in legislative history, the reference to infringement does not mean that

motion to dismiss 1202(a) claim on grounds that plaintiff's allegations that "[d]efendant placed watermarks on the Copyrighted Works in order to facilitate its continued marketing and sale of licenses" are sufficient to survive a motion to dismiss); *Batra v. PopSugar, Inc.*, No. 18-cv-03752, 2019 WL 482492, at *2 (C.D. Cal. Feb. 7, 2019) (denying defendant's motion to dismiss 1202(b) claim on grounds that there is a "plausible inference" that the removal of Instagram sidebars containing identifying information was done "knowing that removing the CMI would help to conceal the alleged infringement").

⁵⁴² 899 F.3d 666 (9th Cir. 2018), *cert denied*, 586 U.S. __ (U.S. Feb. 19, 2019) (No. 18-878).

⁵⁴³ *Id.* at 670–71.

⁵⁴⁴ *Id.* at 671.

⁵⁴⁵ *Id.* at 673.

⁵⁴⁶ *Id.* at 675.

⁵⁴⁷ *Id.* at 676.

⁵⁴⁸ 17 U.S.C. § 1202(b).

the actor must have intended to further any particular act of infringement—just to make infringement generally possible or easier to accomplish.⁵⁴⁹

Note that *CoreLogic* appears to require more than general knowledge that infringement will be “easier to accomplish.”

The specific issues with the *CoreLogic* opinion aside, many creators are frustrated that even the intentional falsification and removal of CMI is not unlawful if they cannot prove that the actions were either intended to encourage copyright infringement or done with the knowledge that they would do so. Because stripping CMI is a regular occurrence, especially over social media,⁵⁵⁰ “it is nearly impossible to prove the intent of an individual social media user.”⁵⁵¹ Meeting the knowledge and intent thresholds can also be especially difficult for individual authors who do not have the resources to engage in lengthy litigation.⁵⁵² As such, several creators groups advocate removing or revising section 1202’s knowledge and intent requirements.⁵⁵³

While the Office is very sympathetic to these legitimate concerns, section 1202’s dual intent standard is necessary, at least in the criminal context, to ensure that innocent actors are not swept up by the provisions of section 1202. The addition of the second intent standard found in the current statutory language, regarding infringement, alleviated concerns that knowingly altering CMI for innocent or good faith purposes—such as the use of a pseudonym or a ghost writer or updating information for a change in ownership—would not lead to civil or criminal penalties. Accordingly, the Office does not recommend any change to section 1202.

At the same time, the Office agrees that the dual intent standard raises a high bar and excludes a large amount of misconduct that should at least raise the potential of civil liability. Therefore, the Office recommends that Congress consider a new section 1202A that would address the difficulty creators face when trying to use section 1202 to protect their attribution

⁵⁴⁹ *WCT Implementation Hearing* at 51 (written statement of Marybeth Peters, Register of Copyrights, Copyright Office of the United States, Library of Congress).

⁵⁵⁰ This is of particular concern for photographers and other visual artists. See Copyright Alliance, Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015, Notice of Inquiry (Visual Works Letter) at 2 (“Visual works are more easily infringed online than any other type of work, due to the ease in which images may be uploaded or downloaded, the ubiquity of services that automatically strip out metadata, and the availability of right-click copy and save functionality.”).

⁵⁵¹ ARS Initial Comments at 3.

⁵⁵² See Authors Guild Initial Comments at 4.

⁵⁵³ See ARS Initial Comments at 3; A2IM Reply Comments at 6; BMI Reply Comments at 3; CVA Initial Comments at 14; NMPA Reply Comment at 9. *But see* OTW Initial Comments at 9 (“[Section 1202] must remain tightly linked to the deliberate enablement of infringement. . . . Congress should leave well enough alone.”).

rights—namely the requirement of intent to encourage infringement or knowledge that one’s actions will induce infringement.⁵⁵⁴

The Office recommends that Congress consider an addition to section 1202 that, while retaining a dual standard, would loosen it slightly to focus on intent to *conceal* rather than to infringe. Our proposed new section 1202A states that the knowing removal or alteration of any copyright management information would be actionable only if it was done with the intent to conceal the author’s attribution information. This would alleviate the burden on creators’ ability to effectively use section 1202 when their identifying information has been altered or removed, while still providing safeguards for those who remove or alter CMI for innocent or good faith purposes. Another safeguard provided is the omission of any criminal penalty. The new provision would retain a dual intent standard, but a plaintiff would no longer be required to prove that the actions were meant to encourage copyright infringement, or indeed relate to it in any way. Instead, 1202A would be much more narrowly tailored to address attribution rights.

Based on the Office’s proposal, section 1202A would read as follows:

§ 1202A Integrity of copyright management information for attribution rights

- (a) REMOVAL OR ALTERATION OF COPYRIGHT MANAGEMENT INFORMATION. – No person shall, without the authority of the author or the law, knowingly remove or alter any copyright management information with the intent to conceal the individual author’s attribution information.
- (b) DEFINITIONS. –
 - (1) As used in this section, the term “copyright management information” has the same meaning as used in section 1202(c).
 - (2) As used in this section, the term “attribution information” means the name of, and other identifying information about, the author of a work.

Technical amendments to section 1202 would read as follows:

§ 1203 Civil remedies

- (a) CIVIL ACTIONS. – Any person injured by a violation of section 1201, 1202, or 1202A may bring a civil action in an appropriate United States district court for such violation.
- (b) . . .

⁵⁵⁴ See *supra* CoreLogic discussion.

- (c) AWARD OF DAMAGES. – Except as otherwise provided in this title, a person committing a violation of section 1201, 1202, or 1202A is liable for either –

Under the Office’s proposal, the following actions could be liable under proposed section 1202A: intentionally stripping authorship metadata from a digital photograph and attaching new metadata for someone who was not the creator; removing the title page of a printed book and replacing it with another title page that falsely names someone else as the author; or removing a painter’s signature from his painting, making copies available for sale, and advertising that the painting was created by someone else. Such offenses are potentially unavailable or too difficult to prove under the current statute. Because this proposal retains an intent standard it does not address automatic stripping of attribution information, unless it can be proven that the automatic system at issue was designed with the intent to conceal the author’s identity. While a court would still have to determine if proposed section 1202A’s dual intent standard is met, the focus on intent to conceal attribution information rather than section 1202’s intent to promote infringement is more closely tied to protecting a creator’s moral right of attribution.

(3) Difficulties for Non-Rightsholder Authors

Under U.S. copyright law, the default rule is that the copyright initially belongs to the author who created (or is treated by law as having created) the work. Nonetheless, there are situations where the creator and copyright owner may not be the same, which has implications for the author/creator’s ability to object to the removal or alteration of CMI identifying him or her. For example, authors may transfer their ownership rights in their creations.⁵⁵⁵ In this situation, removal or alteration of the CMI cannot be done without the consent of the transferee, as the copyright owner, but the author of the work does not retain the right to object to such removal or alteration. Similarly, in a work-made-for-hire situation, the employer (or commissioner in limited circumstances) is considered to be both the author and the copyright owner, even though an employee (or person commissioned) actually created the work. The employer is thus the only entity entitled either to be credited as the author or to object to the removal or alteration of CMI.⁵⁵⁶ Some scholars have pointed out that section 1202 is more concerned with the economic interests of those who exploit a work (*e.g.*, the rightsholder or work-made-for-hire employer) rather than the personality rights of the creator.⁵⁵⁷ Under this view, there is no remedy for an author whose attribution CMI has been altered or removed; instead, a violation is “dependent on the economic rights of infringement that will follow from the omission of the author’s name.”⁵⁵⁸ This is borne out by section 1202, which requires authority from “the copyright owner or the law” for removal

⁵⁵⁵ See 17 U.S.C. § 201(d).

⁵⁵⁶ See 17 U.S.C. § 101, 201(b). In certain specific situations, commissioned works are also considered works made for hire. See 17 U.S.C. § 101.

⁵⁵⁷ See KWALL, SOUL OF CREATIVITY at 26; Severine Dusollier, *Some Reflections on Copyright Management Information and Moral Rights*, 25 COLUM. J.L. & ARTS, 377, 397 (2001); Ginsburg, *(Digital) Age*, 19 CARDOZO ARTS & ENT. L.J. at 13.

⁵⁵⁸ Dusollier, 25 COLUM. J.L. & ARTS at 397.

or alteration of CMI, and does not mention the rights of the author.⁵⁵⁹ Since a non-rightsholder creator has no economic tie to the work, the ability for them to independently prove a section 1202 violation is difficult, if not impossible.⁵⁶⁰

The Office’s proposal for a new section 1202A would, if implemented, go some distance to ameliorating this situation, in that it gives authority to “the author or the law” and not to the copyright owner. Thus, under this proposed section, an author who has granted her rights to another party would retain the ability to bring an action against someone who intentionally removed her CMI with the intent to conceal her authorship of the work in question. Because this proposed section is focused on attribution interests, it makes sense that it gives authority to the party who is most harmed by non-attribution or false attribution—the author herself.

4. Other Title 17 Provisions

When Congress determined that there was “a composite of laws in this country that provides the kind of protection envisioned by Article *6bis*,”⁵⁶¹ it identified a number of legal routes by which an aggrieved author-plaintiff could pursue a moral rights claim under federal, local, and state law. Existing provisions in the Copyright Act were cited as part of the framework, including protection of an author’s exclusive rights in derivatives of his or her works, limits on a mechanical licensee’s rights to arrange an author’s musical composition, and termination of transfers and licenses.⁵⁶²

a) Derivative Works — Section 106(2)

The U.S. Copyright Act grants authors six exclusive rights, one being the section 106(2) right to prepare and to authorize the preparation of “derivative works based upon the copyrighted work.”⁵⁶³ The Act defines a “derivative work” as one “based upon one or more preexisting works” in which the original is “recast, transformed, or adapted.”⁵⁶⁴ An author (who

⁵⁵⁹ 17 U.S.C. § 1202(b).

⁵⁶⁰ See ASJA Initial Comments at 5 (“[T]he [section 1202] attribution of rights is tied to who owns or is licensed to use a particular work. . . ; the moral rights of an author are not tied to money and do not begin or end with a contract.”); NWU-SFWA Joint Initial Comments at 6 (“Section 1202 . . . fails to recognize any right which is independent of economic rights or which survives a transfer or assignment of those rights.”). Some music industry stakeholders have also complained that section 1202(c)’s CMI definition is too narrow because it only identifies the performer’s information as CMI for phonorecords and sound recordings. The definition does not take into account songwriters, non-featured performers, producers, engineers, and session musicians. See FMC Reply Comments at 7; Recording Academy Reply Comments at 2–3.

⁵⁶¹ H.R. REP. NO. 100-609, at 34 (1988).

⁵⁶² See *id.* at 34, 37–38; S. REP. NO. 100-352, at 9–10 (1988); see also 17 U.S.C. §§ 106(2), 115(a)(2), 203.

⁵⁶³ 17 U.S.C. § 106(2).

⁵⁶⁴ 17 U.S.C. § 101. The “derivative works” definition includes, but is not limited to, translations, musical arrangements, dramatizations, fictionalizations, motion picture versions, sound recordings, art reproductions, abridgments, and

is also an owner)⁵⁶⁵ can therefore enforce their integrity interests by bringing an infringement action under section 106(2) against a party making modifications to their work that results in the creation of an unauthorized derivative work.⁵⁶⁶ In fact, the unauthorized derivative work does not even have to be prejudicial to the author's honor or reputation to be infringing.⁵⁶⁷ On the other hand, a work that is prejudicial in this way, but that does not meet the derivative work standard of being "recast, transformed, or adapted" (for example, exhibiting the original work with other works that negatively comment on it), will likely not be considered a "derivative work" at all, and thus there will be no finding of infringement.⁵⁶⁸

Additionally, where the author has authorized the creation of a derivative work (e.g., a film adaptation), but the creator of the derivative work makes changes to which the author objects and that violate the terms of the license, the author may bring suit either under a breach of contract or a copyright infringement claim.⁵⁶⁹ If a party violates the express terms of contract, the other party can usually bring a breach of contract action. The factor determining whether a violation of a license to create a derivative work may also constitute copyright infringement is if the violation is related to the licensor's exclusive rights.⁵⁷⁰ Thus, in a licensed derivative work context, the right of integrity is only enforceable under copyright to the extent it overlaps with the economic derivative work right.

condensations. *Id.* The degree to which the new work must be altered to qualify as a derivative work, and thus trigger a claim of infringement by the author or owner of the original work, is somewhat unclear. Compare *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988) (holding that cutting out illustrations from an art monograph and mounting them on tiles for retail sale infringes the derivative works right), with *Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997) (holding that taking notecards and mounting them on tiles for retail sale does not infringe the derivative works right because the works were not actually "recast, transformed, or adapted").

⁵⁶⁵ Of course, integrity rights are personal to authors, but the derivative works right is not, and, as is demonstrated below, see *infra* notes 572–578 and accompanying text, corporate actors do attempt to enforce what some consider moral rights through derivative works actions.

⁵⁶⁶ See AD HOC WORKING GRP., in 10 COLUM.-VLA J.L. & ARTS at 554.

⁵⁶⁷ See *id.* at 554 (pointing out that commenters have noted that "unauthorized 'distortion, mutilation or other modifications' would be actionable as infringements [under section 106(2)]—whether or not prejudicial to the author's honor or reputation").

⁵⁶⁸ See *A.R.T. Co.*, 125 F.3d at 582–83; see also *id.* at 582 ("If [the mounting of notecards on tiles] counts as a derivative work infringement, then the United States has established through the back door an extraordinarily broad version of authors' moral rights, under which artists may block any modification of their works of which they disapprove. No European version of *droit moral* goes this far.").

⁵⁶⁹ See generally 3 NIMMER ON COPYRIGHT § 10.15[A][1]–[2] (Remedies Arising Out of Violation of the Instrument of Transfer).

⁵⁷⁰ See *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 940 (9th Cir. 2010) ("To recover for copyright infringement based on breach of a license agreement, (1) the copying must exceed the scope of the defendant's license and (2) the copyright owner's complaint must be grounded in an exclusive right of copyright . . .").

Section 106(2) has regularly been cited as providing a right of integrity for copyright owners.⁵⁷¹ For example, some highly publicized court cases have been described as seeking damages for infringements of economic rights as a “backdoor” way of enforcing otherwise unenforceable moral rights.⁵⁷² One commentator views the infringement cases *Dr. Seuss Enterprises v. Penguin Books USA, Inc.* (seeking to enjoin the book *The Cat NOT in the Hat*, a satirically-inclined retelling of the O.J. Simpson trial in the style of the Dr. Seuss children’s books)⁵⁷³ and *Suntrust Bank v. Houghton Mifflin Co.* (objecting to the book *The Wind Done Gone*, a radical retelling of *Gone with the Wind*)⁵⁷⁴ as essentially attempts to protect the integrity of the Dr. Seuss image and the reputation of *Gone with the Wind*, brought to court in the guise of suits alleging infringement of the derivative works right.⁵⁷⁵ While both cases were brought by estates, and not the authors themselves, they do illustrate how moral rights writ large may be protected using the derivative work right.⁵⁷⁶ These two cases also illustrate the interaction between moral rights/derivative works claims and fair use: The court in *Dr. Seuss Enterprises* found that there was no fair use and thus upheld the lower court’s preliminary injunction against the defendant’s

⁵⁷¹ See 1987 BCIA Hearings at 230, 233 (statement of Peter Nolan, Vice President-Counsel, Walt Disney Productions, on behalf of the Motion Picture Association of America); Authors Guild Initial Comments at 2; OTW Initial Comments at 1.

⁵⁷² Erin E. Gallagher, Note, *On the Fair Use Fence Between Derivative Works and Allegedly Infringing Creations: A Proposal for a Middle Ground*, 80 NOTRE DAME L. REV. 759, 771 (2005).

⁵⁷³ 109 F.3d 1394 (9th Cir. 1997).

⁵⁷⁴ 268 F.3d 1257 (11th Cir. 2001).

⁵⁷⁵ See Gallagher, 80 NOTRE DAME L. REV. at 772–73 (“Some sort of an integrity-like claim is involved when a marketer of wholesome family entertainment like Dr. Seuss Enterprises wishes to protect the integrity of that image by suppressing an adaptation of one of its identifying elements to lightheartedly portray a murder trial. Likewise, a desire to protect the image of the characters and story associated with the novel *Gone with the Wind* causes the copyright holders to dislike a new work that casts that story and those characters in a negative light.”).

⁵⁷⁶ See also Deidre A. Keller, *Recognizing the Derivative Works Right as a Moral Right: A Case Comparison and Proposal*, 63 CASE W. RES. L. REV. 511, 515 (2012) (arguing that *The Wind Done Gone* case as well as the litigation against a purported sequel to *The Catcher in the Rye*—*Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009)—sought to “enforce [moral rights] in the guise of enforcing the derivative works right”). A more recent example of a plaintiff seeking to enforce what appears to be a right of integrity through a derivative works suit is that of the creator of Pepe the Frog against those who have repurposed his character to advance hate speech. See Complaint for Copyright Infringement & Demand for Jury Trial, *Furie v. Infowars, LLC*, No. 18-cv-1830 (C.D. Cal. filed Mar. 5, 2018); see also Matthew Gault, *Pepe the Frog’s Creator Goes Legally Nuclear Against the Alt-Right*, MOTHERBOARD (Sept. 18, 2017, 1:43 PM), https://motherboard.vice.com/en_us/article/8x8gaa/pepe-the-frogs-creator-lawsuits-dmca-matt-furie-alt-right.

book as an unauthorized derivative work.⁵⁷⁷ However, the *Suntrust Bank* court found that *The Wind Done Gone* qualified as a parody, and thus upheld the fair use defense.⁵⁷⁸

Some have been more skeptical of the scope of the derivative work right's protections vis-à-vis moral rights, pointing out that it "implies a right against distortion, [but only] to a degree."⁵⁷⁹ Critics also note that determining what exactly constitutes an adaptation can be difficult. For example, if a new work distorts an existing work "so outrageously" that only the original (uncopyrightable) ideas are detectable, then section 106(2) has not been triggered because the original expression was not appropriated.⁵⁸⁰ Furthermore, derivative work rights have been cited as being "essentially economic rights designed to regulate adaptations or arrangements,"⁵⁸¹ making the comparison to Berne 6bis one of "apples to oranges."⁵⁸² However, it is well understood that membership in the Berne Convention gives each nation the flexibility to implement the Berne provisions as appropriate for their national law. This includes, in the instance of the United States, the ability to merge economic rights with moral rights, as with the derivative work right.⁵⁸³ Section 106(2) remains an important piece of the United States' moral rights patchwork.

b) Compulsory Licenses for Nondramatic Musical Works — Section 115(a)(2)

The compulsory licensing provision in section 115(a)(2) of the Copyright Act limits rearrangement—and thus prohibits a certain level of distortion—of non-dramatic musical compositions.⁵⁸⁴ Once a copyright owner has authorized the initial distribution of a non-dramatic

⁵⁷⁷ *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997).

⁵⁷⁸ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1270–71 (11th Cir. 2001); accord *Dr. Seuss Enters., L.P. v. ComicMix LLC*, No. 16-CV-2779, 2019 WL 1323596, at 9, 17 (S.D. Cal. Mar. 12, 2019) (finding that even if a work using elements of Dr. Seuss's *Oh, the Places You'll Go!* was a derivative work, it could also be "highly transformative," and thus a fair use).

⁵⁷⁹ 1987 BCIA Hearings at 681 (statement of Paul Goldstein, Professor of Law, Stanford University).

⁵⁸⁰ See *id.*; cf. Session 2, Symposium Transcript, 8 GEO. MASON J. INT'L COM. L. at 42 (remarks of Allan Adler, Association of American Publishers) ("[T]here's always going to be some question of what actually is derivative. . . . [A] work can steal completely the ideas of a prior author's work but not of course be actionable as copyright infringement because it doesn't take the original expression.").

⁵⁸¹ 1987 BCIA Hearings at 1257–58 (1987–88) (written statement of Arnold P. Lutzker, Attorney, Dow, Lohnes & Albertson).

⁵⁸² Edward J. Damich, *Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 655, 659 (1986) ("Damich, Moral Rights").

⁵⁸³ See, e.g., Berne Convention Rome Text art 36(1) ("Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.").

⁵⁸⁴ See H.R. REP. NO. 100-609, at 34, 37–38 (1988); see also *U.S. Adherence to the Berne Convention: Hearings on the Implications, Both Domestic and International, of U.S. Adherence to the International Union for the Protection of Literary and Artistic Works Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 99th Cong. 685–86

musical composition in the United States, anyone can obtain a compulsory license under section 115 to make and distribute phonorecords, including in digital form, of the work.⁵⁸⁵ These are commonly known as cover versions. Under section 115(a)(2), any musical arrangement made as part of the cover version can only change the original work to the degree necessary to conform to the style or manner of interpretation of the new arrangement.⁵⁸⁶ But the new arrangement must “not change the basic melody or fundamental character of the [original] work, and shall not be subject to protection as a derivative work.”⁵⁸⁷ A licensee’s ability to make more drastic changes or to claim a derivative work copyright require the owner’s “express consent,”⁵⁸⁸ thus protecting the composer’s interests in the integrity of the original musical work.

When it enacted section 115 in the 1976 Copyright Act, Congress recognized the importance of allowing a compulsory license for arrangements “without allowing the music to be perverted, distorted, or travestied.”⁵⁸⁹ While some have identified section 115(a)(2) as the “sole explicit recognition of moral rights in the entire Copyright Act” prior to VARA,⁵⁹⁰ its ability to provide protection for moral rights has not been defined in judicial decisions. Instead, dicta in various decisions focused on the relationship between the compulsory license and the owner’s exclusive right to make derivative works under section 106(2), to the effect that derivative works were said to fall outside the realm of section 115.⁵⁹¹

In a 2006 memorandum opinion, the Copyright Office did consider the parameters of section 115(a)(2), noting that defining these parameters was “difficult because there is no

(1985–86) (“1985 Berne Convention Hearings”) (written statement of the Recording Industry Association of America); Kernochan Center Initial Comments at 2 n.2; Lucille M. Ponte, *Preserving Creativity from Endless Digital Exploitation: Has the Time Come for the New Concept of Copyright Dilution?*, 15 B.U. J. SCI. & TECH. L. 34, 63–65 (2009) (submitted as a comment to this study).

⁵⁸⁵ See 17 U.S.C. § 115(a)(1). The compulsory license is only available for the distribution of phonorecords to the public for private use. See *id.*

⁵⁸⁶ See 17 U.S.C. § 115(a)(2).

⁵⁸⁷ 17 U.S.C. § 115(a)(2).

⁵⁸⁸ 17 U.S.C. § 115(a)(2).

⁵⁸⁹ H.R. REP. NO. 94-1476, at 109 (1976).

⁵⁹⁰ 3 NIMMER ON COPYRIGHT § 8.04[F]. See also AD HOC WORKING GRP., in 10 COLUM.-VLA J.L. & ARTS at 544-45 (stating that section 115 “contains an explicit recognition of the more important more rights”).

⁵⁹¹ See *Campbell*, 510 U.S. at 574 n.4 (noting that the defendant, who parodied plaintiff’s song, “concede[d] that it is not entitled to a compulsory license under § 115 because its arrangement changes ‘the basic melody or fundamental character’ of the original”); *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1199 n.9 (10th Cir. 2005) (noting that although the Copyright Act permits compulsory licenses, section 115(a)(2) makes clear that the copyright owner retains the right to create derivative works); *TeeVee Toons, Inc. v. DM Records, Inc.*, No. 05 Civ. 5602, 2007 WL 2851218, at *8 (S.D.N.Y. Sept. 27, 2007) (stating that the ability to make derivative works is excluded from the section 115 mechanical license).

precedent.”⁵⁹² Upon referral from the Copyright Royalty Board, the Register of Copyrights was asked to resolve whether ringtones were subject to section 115.⁵⁹³ The Office’s discussion of whether a ringtone changed the “fundamental character” of the underlying work focused on a derivative works analysis.⁵⁹⁴ Although the analysis was specific to ringtones, the Office concluded that because the statute “meant to avoid the desecration of the underlying musical work,” ringtones containing additional material could be considered derivative works outside of section 115’s scope.⁵⁹⁵

The brief judicial references and the Office’s 2006 memorandum opinion reinforce the relationship between the section 115 license and the owner’s exclusive right to make derivative works under section 106(2). The provisions work together to assist owners in protecting the integrity of their works. Section 115(a)(2) gives the owner control over how his or her work is used. But if a new arrangement is too dramatically altered to be eligible for the license, then it may be considered an unauthorized derivative work, enabling the owner to enforce his or her exclusive derivative works right—also an element in the U.S. moral rights system.

While section 115(a)(2) is an important part of the moral rights patchwork, critics note that its limited applicability “as to subject matter (nondramatic musical works) and to circumstances (compulsory licenses for phonorecords)” confines its usefulness as a broad moral right.⁵⁹⁶

c) Termination of Transfers — Section 203

The Copyright Act, while granting authors initial ownership in works they have created, also allows them to transfer their exclusive ownership rights in whole or in part.⁵⁹⁷ Termination rights act as a “safety valve[,]” providing authors a means to “regain control and integrity over their artwork.”⁵⁹⁸

Section 203 provides that, under certain circumstances, an author who transferred their rights on or after January 1, 1978, has an opportunity to terminate the grant of those rights and

⁵⁹² Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding: Final Order, 71 Fed. Reg. 64,303, 64,313 (Nov. 1, 2006).

⁵⁹³ *See id.*

⁵⁹⁴ *See id.* at 64,314–15.

⁵⁹⁵ *Id.* at 64,315. The Office also found that ringtones that are excerpts of preexisting sound recordings do fall within the scope of section 115. *See id.* at 64,307.

⁵⁹⁶ Damich, *Moral Rights*, 10 COLUM.-VLA & ARTS at 659.

⁵⁹⁷ *See* 17 U.S.C. §§ 201(a), (d).

⁵⁹⁸ SAG-AFTRA Initial Comments at 6–7.

reclaim ownership.⁵⁹⁹ Authors can terminate transfers during a five-year termination period that begins thirty-five years after the execution of the grant.⁶⁰⁰ Like the moral rights provided for in Berne article 6bis, termination rights cannot be assigned or waived, leading one scholar to refer to them as “effectively the U.S. corollary to moral rights.”⁶⁰¹

When enacting the 1976 Copyright Act, Congress noted that the termination provisions of section 203 served an equitable function by allowing authors, who may assign rights earlier in their career when they are in an inferior bargaining position, or their heirs, a second opportunity to share in the economic success of their works.⁶⁰² At the time of Berne’s implementation, commentators pointed out that section 203 “may serve as a vehicle for [moral rights] protection” by allowing an author to regain control of a transferred work.⁶⁰³ Likewise, courts have stressed that the goal of the provision “is to help authors, not publishers or broadcasters of others who benefit from the work of authors.”⁶⁰⁴ For example, an author may rely on section 203 to reclaim the ability to authorize derivative works, thus preventing any future low quality reproductions.⁶⁰⁵

⁵⁹⁹ See 17 U.S.C. § 203(a). Specifically, the transfer instrument must have been “executed” after January 1, 1978. There is a separate provision—section 304(c)—that provides similar termination rights to authors of works in either their first or renewal term prior to 1978, where the transfer was executed prior to 1978. See 17 U.S.C. § 304(c).

⁶⁰⁰ See 17 U.S.C. § 203(a)(3). However, if the grant conveyed the right of publication, the termination period begins 35 years after the date that the grant was executed or 40 years after the date that the work was published, whichever is earlier. *Id.* The U.S. Copyright Office provides a series of tables so authors can measure the termination period of a grant depending on several factors. U.S. COPYRIGHT OFFICE, *Notices of Termination*, <https://www.copyright.gov/recordation/termination.html>.

⁶⁰¹ Michael H. Davis, *The Screenwriter’s Indestructible Right to Terminate Her Assignment of Copyright: Once a Story is “Pitched,” A Studio Can Never Obtain All Copyrights in the Story*, 18 CARDOZO ARTS & ENT. L.J. 93, 106–07 (2000). See also *id.* (noting that moral rights are defined by their nature as non-economic rights and their inability to be transferred, and that termination is the one right in the United States that an author cannot assign or waive); 17 U.S.C. § 203(a)(5) (“Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”).

⁶⁰² See H.R. REP. NO. 94-1476, at 124 (1976) (“[S]ection 203 safeguard[s] authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”).

⁶⁰³ Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 44 (1988) (“Damich, *Right of Personality*”). See also 1987 BCIA Hearings at 264 (written statement of Kenneth W. Dam, Vice President, International Business Machines); 1985 Berne Convention Hearings at 169–70 (written statement of John M. Kernochan, Nash Professor of Law, Columbia University School of Law).

⁶⁰⁴ *Korman v. HBC Fla., Inc.*, 182 F.3d 1291, 1296 (11th Cir. 1999). Cf. *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 172 (1985) (citing section 203’s legislative history to show that termination rights were “obviously intended to make the rewards for the creativity of authors more substantial”).

⁶⁰⁵ See Damich, *Right of Personality*, 23 GA. L. REV. at 44. However, note that derivative works prepared while a legal transfer is in effect may continue to be exploited after the termination of that transfer. See 17 U.S.C. § 203(b)(1).

Authors who transferred their rights in 1978 became eligible to reclaim their copyrights under section 203 on January 1, 2013. In the first high profile case to rely on the provision, one of the Village People’s lead singers, Victor Willis, won the right to regain control of several songs he had co-written, including “Y.M.C.A.”⁶⁰⁶ Although the court’s discussion did not reference moral rights, the court reiterated section 203’s importance to remedying an author’s unequal bargaining power when making an initial transfer of ownership.⁶⁰⁷ Willis also stressed that termination rights provide an avenue for artists to regain control over “works that a lot of us gave away when we were younger, before we knew what was going on.”⁶⁰⁸

B. State Law

In addition to the federal protections outlined above, Congress also identified protections for moral rights provided by state laws during passage of the BCIA, including state common law principles and state statutory schemes that proved protections for the rights of attribution and integrity.⁶⁰⁹ While state laws have an important role in protecting authors’ moral rights under the United States’ system of federalism, reliance on state laws continues to suffer from many of the same defects noted by commenters at the time of the BCIA’s passage—the lack of clear, uniform standards that are consistent throughout the country.⁶¹⁰

1. Defamation

The first state law identified by Congress to protect the moral rights of authors is the common law tort of defamation.⁶¹¹ Defamation provides redress for certain false statements or assertions—either written (libel) or spoken (slander)—that harm a person’s reputation.⁶¹² Prior to

⁶⁰⁶ See *Scorpio Music S.A. v. Willis*, No. 11cv1557, 2012 WL 1598043, at *5 (S.D. Cal. May 7, 2012). The court found the author’s termination notice to be valid in 2012, but there was subsequent litigation regarding other section issues including section 203 joint ownership claims, statute of limitations, and attorney’s fees. See *Scorpio Music (Black Scorpio) S.A. v. Willis*, No. 11-cv-01557, 2016 WL 7438325 (S.D. Cal. Dec. 27, 2016).

⁶⁰⁷ See *Scorpio Music S.A. v. Willis*, No. 11cv1557, 2012 WL 1598043, at *4 (S.D. Cal. May 7, 2012).

⁶⁰⁸ Larry Rohter, *A Copyright Victory, 35 Years Later*, N.Y. TIMES (Sept. 10, 2013), <http://www.nytimes.com/2013/09/11/arts/music/a-copyright-victory-35-years-later.html>.

⁶⁰⁹ See H.R. REP. NO. 100-609, at 34, 37–38 (1988); S. REP. NO. 100-352, at 9–10 (1988).

⁶¹⁰ See, e.g., 1987 BCIA Hearings at 408 (statement of Sydney Pollack, Directors Guild of America) (“With the exception of extreme cases of blatant and outrageous misrepresentations, there is almost no consistent across the board protection in the United States against the alteration or mutilation of an artists work.”).

⁶¹¹ The tort of defamation is recognized in every state, and has been codified in the Restatement (Second) of Torts. See RESTATEMENT (SECOND) OF TORTS § 558 *et seq.* (AM. LAW INST. 1977).

⁶¹² To state a claim for defamation, a plaintiff must show (1) a statement that is both false and defamatory; (2) publication of the statement to a third party absent some privilege; (3) that the publisher’s actions amounted to negligence or greater fault; and (4) that the statement is actionable without demonstration of special harm (defamation *per se*), or that the publication caused special harm. RESTATEMENT (SECOND) OF TORTS § 558. A defamatory statement

passage of the BCIA, authors had successfully brought claims for defamation based on violations of their right of attribution in a number of cases, including cases where: (i) a publisher continued to identify an individual as an editor of a work he no longer oversaw,⁶¹³ (ii) a movie studio inaccurately identified plaintiff as the producer of a motion picture of inferior quality,⁶¹⁴ and (iii) publishers falsely identified an individual as the author of a published article.⁶¹⁵ Likewise, authors had asserted claims for defamation in cases involving violations of the right of integrity, such as where a defendant made substantial changes and additions to an article submitted by the plaintiff.⁶¹⁶

While one study commenter asserted that violations of the rights of integrity and attribution “are best addressed through well-established defamation doctrines,”⁶¹⁷ defamation law is relevant to only a small sub-set of fact patterns under which an author’s attribution or integrity interests may be impacted. In fact, the Office is aware of only a single case since passage of the BCIA in which an author or performer asserted a defamation claim in an effort to protect his rights of attribution or integrity, and the plaintiff was unsuccessful in that case.⁶¹⁸

must “tend[] to harm a person’s reputation to the extent that it lowers that person in the eyes of the community or deters others from associating with that person.” *Lott v. Levitt*, 556 F.3d 564, 568 (7th Cir. 2009) (internal citation omitted). A closely related tort that is often asserted under similar facts is the “false light” variation of the right of privacy. To state a claim for a false light tort, a plaintiff must show (i) that the publicity places them in a false light that would be highly offensive to a reasonable person, and (ii) the publisher had knowledge of or acted in reckless disregard as to the falsity of the publication and the false light in which the plaintiff would be placed. See RESTATEMENT (SECOND) OF TORTS, § 652E. Although a plaintiff need not show special harm to recover under a false light theory, unlike a claim for defamation, the requirement that such actions be offensive to a reasonable person has the effect in practice of creating significant overlap between the two torts. Accordingly, some courts have allowed claims for misattribution to proceed under the false light theory. See, e.g., *JL Powell Clothing LLC v. Powell*, No. 2:13-CV-00160-NT, 2014 WL 347067, at *4 (D. Me. Jan. 30, 2014); *Dempsey v. National Enquirer*, 702 F. Supp. 934, 936 (D. Me. 1989).

⁶¹³ See *Clevenger v. Baker Voohris & Co.*, 168 N.E.2d 643, 644 (N.Y. 1960) (plaintiff, a well-known expert on New York state law, brought suit against his former publishers for continuing to use his name on a treatise he no longer edited).

⁶¹⁴ See *Carroll v. Paramount Pictures, Inc.*, 3 F.R.D. 95, 96 (S.D.N.Y. 1942).

⁶¹⁵ See *Ben-Oliel v. Press Publ’g Co.*, 167 N.E. 432, 432 (N.Y. 1929) (plaintiff brought a claim against newspaper that falsely identified plaintiff as the author of a published article); *d’Altomonte v. N.Y. Herald Co.*, 139 N.Y.S. 200 (App. Div. 1913), *aff’d on other grounds*, 102 N.E. 1101 (N.Y. 1913) (holding that falsely attributing an article to an author for purposes of subjecting him to ridicule constituted actionable defamation); *Santana v. Item Co.*, 189 So. 442, 446–47 (La. 1939) (recognizing a libel cause of action arising out of the defendant’s misidentification of the plaintiff as the author of a letter published by the defendant); *Gershwin v. Ethical Publ’g Co.*, 1 N.Y.S.2d 904, 905 (N.Y.C. Mun. Ct. 1937).

⁶¹⁶ See *Edison v. Viva Int’l, Ltd.*, 421 N.Y.S.2d 203, 207–08 (App. Div. 1979) (holding that plaintiff may bring a libel action where an author’s article is published in form and content substantially altered from the original if plaintiff can show that the new content was of an inferior writing style or expresses sentiments or opinions that differ from his own).

⁶¹⁷ EFF Initial Comments at 2.

⁶¹⁸ See, e.g., *Rich v. Lorge*, No. 150039/2010, 2011 N.Y. Misc. LEXIS 6781, at *8 (Sup. Ct. July 8, 2011) (plaintiff claimed that an edited version of his article harmed his reputation as a writer). There were also a number of cases asserting claims

There are a number of likely reasons that defamation claims have been asserted in only a limited number of cases to protect authors' and performers' attribution and integrity rights, many of them stemming from attributes inherent in the concept of defamation. One of the most significant hurdles an author must overcome to vindicate her attribution or integrity interests through the assertion of a claim for defamation is the requirement that a plaintiff demonstrate that a particular claim is both false and defamatory. As one academic has noted, defamation claims "will be of no avail to an author who believes the integrity of her work has been impaired but cannot show damages to her professional reputation."⁶¹⁹ For example, while changes or edits to an author's work may violate the author's right of integrity, the mere existence of such changes or edits will not necessarily be sufficient to support a claim for defamation. As one court noted, a mere statement "that the published work was different from the original is not to state that the plaintiff was libeled" because "[t]here is always a possibility that any change in the original work was made for the better rather than the worse."⁶²⁰ For this reason, one court rejected plaintiff's claims for defamation based on unauthorized edits and additions to his article, finding that such changes were "not reasonably susceptible to defamatory connotation as no ordinary reader . . . would regard changes such as using parenthesis, placing a long name in the title, or the use of the phrase 'anyone who's anyone' as libelous."⁶²¹ Similarly, a court rejected plaintiffs' libel claims based on the use of plaintiffs' music in a film with political messages antithetical to the plaintiffs' political beliefs, finding that the mere use of the plaintiffs' music did not give rise to a false or defamatory implication.⁶²²

The requirement to demonstrate harm to the plaintiff's reputation illustrates another limitation of defamation for protecting moral rights: defamation will have little, if anything, to say in cases where the author alleges that her right of attribution has been violated through a lack of attribution. Where a plaintiff's work is used without attribution, there will not be a sufficient "nexus between the work and the identity of the author" to demonstrate injury to the author's reputation.⁶²³

Finally, certain subsets of defamation claims are subject to heightened pleading requirements that may make it difficult for an author or performer to successfully assert a

for defamation arising out of the failure to identify one or more coauthors on published scholarship, but in each of these cases the defamation claims were based on statements contained in related publications, and did not stem from the attribution, or lack thereof, on the publication at issue. See, e.g., *Romero v. Buhimschi*, 396 Fed. App'x. 224 (6th Cir. 2010); *Giordano v. Claudio*, 714 F. Supp. 2d 508 (E.D. Pa. 2010).

⁶¹⁹ KWALL, SOUL OF CREATIVITY at 33 (2010). Of course, some study commenters see this as a feature, not a bug. See, e.g., EFF Initial Comments at 2.

⁶²⁰ *Edison*, 421 N.Y.S.2d at 207.

⁶²¹ *Lorge*, 2011 N.Y. Misc. LEXIS 6781, at *8.

⁶²² See *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575, 578 (Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (App. Div. 1949).

⁶²³ *Damich, Right of Personality*, 23 GA. L. REV. at 65.

defamation claim. One such heightened requirement applies when the author is a public figure, which requires the plaintiff to demonstrate that the defendant's actions were the result of malice, not mere negligence.⁶²⁴ Similarly, when the defamation asserted does not qualify as defamation *per se*, a plaintiff must plead special damages that can be difficult to demonstrate.⁶²⁵

Despite these limitations, the Office does not recommend any changes to state defamation laws, which are far too blunt of an instrument to address authors' legitimate interests in protecting their rights of attribution and integrity. Further, any such changes to defamation law are likely to have unintended consequences for protected speech. For this reason, the Office believes that defamation claims are properly reserved for those narrow situations in which misattribution or violations of the right of integrity are so severe as to imperil the author's reputation.

2. Privacy and Publicity

Another set of state laws that Congress recognized as providing protection for authors' moral rights were the right of publicity and the related tort of misappropriation of a person's name or image under the common law right of privacy.⁶²⁶ Both of these rights provide protection

⁶²⁴ See *Session 2*, Symposium Transcript, 8 GEO. MASON J. INT'L COM. L. at 29 (remarks of Allan Adler, Association of American Publishers). *But see* EFF Initial Comments at 2 (noting that defamation law provides a "better frame" for attribution and integrity claims because "it includes a variety of constitutional safeguards designed to balance the rights of individuals to protect their reputations against the right of the public to speak freely").

⁶²⁵ See, e.g., *Harris v. Twentieth Century Fox Film Corp.*, 43 F. Supp. 119, 122 (S.D.N.Y. 1942) (dismissing for failure to plead special damages a libel claim that was based on defendant's failure to credit plaintiff as providing creative input). See also Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible*, 38 VAND. L. REV. 1, 25, n.91 (1985) ("Kwall, *American Marriage*").

⁶²⁶ Both the right of publicity and the right of privacy have their origins in the common law. The right of privacy was first articulated in 1890 by Samuel Warren and Louis Brandeis in their article "The Right to Privacy," and was thereafter adopted by the Supreme Court of Georgia in 1905. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890) (describing the right as a principle of "an inviolate personality"); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905). The right of privacy later was conceptualized as having four distinct sub-branches: the torts of (i) intrusion upon physical seclusion, (ii) public disclosure of private facts, (iii) false light, and (iv) appropriation of a person's name or likeness to the defendant's benefit (the last of these is hereinafter referred to as the "tort of misappropriation" or the "misappropriation tort"). See RESTATEMENT (SECOND) OF TORTS, § 652A. Some early cases expressed difficulty with allowing celebrities or other public persons to recover for the misappropriation of their names or images under the rubric of a privacy right. See, e.g., *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 170 (5th Cir. 1941); *Pallas v. Crowley-Milner & Co.*, 54 N.W.2d 595, 597 (Mich. 1952). Subsequently, courts recognized a cognizable affirmative property right in the commercial exploitation of an individual's personality, labelled by some courts and commentators as a "right of publicity," in addition to the previously-recognized privacy right to not have one's name or image appropriated for another's benefit. See Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 203-04 (1954). One of the earliest cases adopting a "right of publicity" was the Second Circuit's opinion in *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, which held that "a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture." 202 F.2d 866, 868 (2d Cir. 1953). While some courts have

against the use by a third party of certain aspects of an author’s identity or personality, such as use of their name, image, or signature.

At the time the BCIA was passed, the right of publicity was already well established—a majority of states recognized some form of the right⁶²⁷—and had already been used by courts to vindicate a number of interests analogous to the moral rights of attribution and integrity. For example, the right of publicity had provided authors with causes of action for misattribution of authorship,⁶²⁸ material alterations to the author’s work,⁶²⁹ and distribution of the author’s work in

noted technical differences between the misappropriation tort under the right of privacy and the right of publicity, the analysis under both causes of action are similar in many respects. *See, e.g., Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1449 (11th Cir. 1998) (“Although it does not appear that Alabama courts ever have recognized a right denominated as ‘publicity,’ we conclude that the Alabama right of privacy contains an analogous right.”); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003) (“Though facially similar, the protections afforded by each tort are slightly different: ‘the [misappropriation of name tort] protects against intrusion upon an individual’s private self-esteem and dignity, while the right of publicity protects against commercial loss caused by appropriation of an individual’s identity for commercial exploitation.’”) (internal citations omitted). For ease of reference, both the misappropriation tort under the right of privacy and the right of publicity will be referred to herein as the “right of publicity,” except where the difference is material to the analysis.

⁶²⁷ Only five states—Alaska, Colorado, Minnesota, North Dakota, and Wyoming—had not had occasion to adopt either the right of publicity or the right of privacy in its case law, or had explicitly declined to do so. Another three states—Nevada, New Hampshire, and Vermont—had adopted the right of privacy generally, with citations to the Restatement (Second), but had not yet had occasion to adopt either the right of publicity or the specific tort of misappropriation under the right of privacy. In contrast, thirteen states—California, Florida, Kentucky, Massachusetts, Nebraska, New York, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Virginia, and Wisconsin—had adopted statutory protections for an individual’s name and image (with Nebraska, New York, and Wisconsin styling their statutes as codifications of the right of privacy, including the tort of misappropriation). All other states had adopted a common law claim for the right of publicity, the misappropriation tort under the right of privacy, or both. *See generally* Jennifer E. Rothman, *Rothman’s Roadmap to the Right of Publicity*, <http://www.rightofpublicityroadmap.com> (last visited Mar. 19, 2019).

⁶²⁸ *See, e.g., Kerby v. Hal Roach Studios, Inc.*, 127 P.2d 577, 580 (Cal. Dist. Ct. App. 1942) (finding a violation of plaintiff’s right of privacy when defendant attributed plaintiff’s name to a letter she did not write that “cast doubt on her moral character”); *Eliot v. Jones*, 120 N.Y.S. 989, 990 (Sup. Ct. 1910) (holding that a publication of advertisements using an author’s name in conjunction with an “inferior edition” of books violated his right of privacy under New York law); *cf. Williams v. Weisser*, 78 Cal. Rptr. 542, 551 (Ct. App. 1969) (finding that the publication of notes taken by defendant of plaintiff’s oral lecture violated plaintiff’s right of privacy because the notes were attributed to plaintiff).

⁶²⁹ *See, e.g., Zim v. W. Publ’g Co.*, 573 F.2d 1318, 1326–27 (5th Cir. 1978) (finding that publication of plaintiff’s revised books, with attribution to plaintiff, without his consent violated his right of privacy); *Neyland v. Home Pattern Co.*, 65 F.2d 363, 365 (2d Cir. 1933) (a distorted reproduction of author’s painting as an embroidery pattern, which was attributed to the author, violated New York’s privacy statute); *cf. Drummond v. Altemus*, 60 F. 338, 339 (C.C. Pa. 1894) (plaintiff had the right to prevent being named as the author of published lectures that distorted his lectures and did not present them fully or correctly).

connection with inferior packaging and artwork.⁶³⁰ The right of publicity had likewise been construed to protect something akin to a first publication right.⁶³¹

a) Post-BCIA Case Law

The right of publicity has continued to be an important mechanism for protecting the moral rights of authors and performers. Although the modern formulation of the right of publicity is often economic in nature,⁶³² there is nevertheless a good deal of overlap between the interests that plaintiffs seek to vindicate through the right of publicity and the moral rights of the author.⁶³³ For example, the right of publicity has offered a way for authors to seek damages in some cases where the right of attribution has been violated through misattribution.⁶³⁴ The right of publicity has likewise been asserted to redress specific violations of the right of integrity, such as through the distribution of a distorted version of an author's painting as an embroidery pattern.⁶³⁵ In addition, performers have asserted the right of publicity when their names or likenesses have been used in ways that conflict with their personal beliefs or artistic integrity.⁶³⁶

⁶³⁰ See, e.g., *Big Seven Music Corp. v. Lennon*, 554 F.2d 504, 512 (2d Cir. 1977) (finding that unauthorized distribution of musical recordings with poor production and an unartistic cover design harmed musician's reputation and violated the privacy right).

⁶³¹ See *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 459–60 (Ohio 1976), *rev'd on other grounds*, 433 U.S. 562 (1977) (finding that plaintiff had a cognizable right of publicity).

⁶³² See, e.g., *Christoff v. Nestle USA, Inc.*, 62 Cal. Rptr. 3d 122, 140 (Ct. App. 2007) ("However, section 3344 [the California provision providing a right of publicity] is now understood as securing a proprietary interest. . . . It is an economic right."), *rev'd in part on other grounds*, 213 P.3d 132 (Cal. 2009).

⁶³³ See, e.g., KWALL, SOUL OF CREATIVITY at 34 (noting that many right of publicity judicial decisions focus on addressing an individual's wounded feelings, and that application of the doctrine favors the author's interpretation and presentation of her work over the interpretation of others).

⁶³⁴ *Kerby*, 127 P.2d at 580 (finding a violation of plaintiff's right of privacy when defendant attributed plaintiff's name to a letter she did not write that "cast doubt on her moral character").

⁶³⁵ *Neyland*, 65 F.2d at 365.

⁶³⁶ See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1104 (9th Cir. 1992), *abrogated on other grounds*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) (affirming compensatory damages award for use of voice imitator, noting clear evidence of plaintiff's public stance against doing commercial endorsements); cf. *Garcia v. Google*, 786 F.3d 733, 740–41 (9th Cir. 2015) (noting that while the plaintiff actress did not hold a copyright in her movie performance, the right of publicity and defamation could have been alternative theories used to control the use and editing of her performance in a way she did not agree with). See also SAG-AFTRA Initial Comments at 4–5 ("Our performer members, particularly those who are more well-known and thereby more recognizable, rely on the right of publicity to defend their artistic integrity, career choices, brand, and reputation."). But see 1987 BCIA Hearings at 408 (written statement of Sydney Pollack, Directors' Guild of America, noting that state laws do not adequately protect artists or performers because "there is almost no consistent across-the-board protection").

While the right of publicity is thus a versatile tool for protection of moral rights, there are limits to its usefulness. One limitation has to do with the nature of the right itself—because it seeks to protect the name and likeness of the author or performer, the right cannot address situations where the author’s name or likeness is absent. Thus, the right of publicity can stand as a proxy for the right of attribution against violations resulting from *misattribution*, but has little to say in cases where the author is not credited at all. Similarly, the right of publicity can be invoked to vindicate the right of integrity in situations where the author’s name remains attached to a work following its distortion, but cannot address violations of the right of integrity where the author’s name ceases to be associated with the work, such as through the complete destruction of the work.⁶³⁷

Another limitation of the right of publicity as a vehicle for protecting the moral rights of an author or performer is the specter of federal copyright preemption. When a right of publicity claim rests upon the use of a work or performance that is embodied in a copyrighted work, courts will sometimes find that the right of publicity claim is preempted.

To find preemption, a court must find that two conditions have been met: the subject of the claim is a work fixed in a tangible medium of expression that comes within the subject matter or scope of copyright, and the right asserted under the state law is equivalent to an exclusive right contained in 17 U.S.C. § 106.⁶³⁸ Thus, if the mere fact that a defendant undertook an act covered by section 106—be it an act of reproduction, distribution, or public display or performance—was by itself sufficient to infringe the right of publicity, then the right of publicity claim will be preempted.⁶³⁹ If, however, a plaintiff were required to prove an additional element in order to state a claim for violation of the right of publicity, such a claim would not be preempted.⁶⁴⁰ On this basis, at least one commentator has concluded that there is “no categorical preemption of the general right of publicity,” because someone’s “name and likeness do not become works of authorship simply because they are embodied in a copyrightable work, such as a photograph.”⁶⁴¹ Nonetheless, there is much confusion about the contours of copyright preemption of right of publicity claims in practice, and courts facing fact patterns that appear similar on the surface have reached different conclusions.

⁶³⁷ As one scholar phrased it, the right to privacy “protects the association of the identity of the author with the work, rather than the integrity of the work itself.” Damich, *Right of Personality*, 23 GA. L. REV. at 56.

⁶³⁸ See *KNB Enters. v. Matthews*, 92 Cal. Rptr. 2d 713, 723 (Ct. App. 2000).

⁶³⁹ 1 NIMMER ON COPYRIGHT § 1.14[C]. But Nimmer continues that “[a] persona can hardly be said to constitute a ‘writing’ of an ‘author’ within the meaning of the Copyright Clause of the Constitution. *A fortiori*, it is not a ‘work of authorship’ under the Act. The name and likeness do not become a work of authorship simply because they are embodied in a copyrightable work such as a photograph.” 1 NIMMER ON COPYRIGHT § 1.01[B][1][c].

⁶⁴⁰ *Id.*

⁶⁴¹ 1 NIMMER ON COPYRIGHT § 1.17[A].

One line of California cases can serve to illustrate the confusion. In *Fleet v. CBS, Inc.*, two actors asserted a claim for violation of the California right of publicity statute based on the defendant's distribution of a motion picture containing performances for which they had not been paid.⁶⁴² The California appellate court found this claim to be preempted by the federal copyright laws, reasoning that the plaintiffs' performances were "dramatic works" that were protected by copyright law, and that defendant's distribution of the film was equivalent to one of the exclusive rights under section 106.⁶⁴³ A different California appellate court declined to endorse such a broad interpretation of the preemption doctrine. In *KNB Enterprises v. Matthews*, the court interpreted *Fleet* as standing only "for the solid proposition that performers in a copyrighted film may not use their statutory right of publicity to prevent the *exclusive* copyright holder from distributing the film."⁶⁴⁴ The court held that, "[a]s between the *exclusive* copyright holder and any actor, performer, model, or person who appears in the copyrighted work, the latter may not preclude the former from exercising the rights afforded under the exclusive copyright by claiming a violation of the right of publicity."⁶⁴⁵ Applying this reasoning, the *KNB* court found that the models' right of publicity claims in the case before it were not preempted despite resulting from defendant's unauthorized display and distribution of a copyrighted photograph, stating that "the subjects of the [right of publicity] claims are the models' likenesses, which are not copyrightable even though 'embodied in a copyrightable work such as a photograph.'"⁶⁴⁶ For this reason, the court found that "the rights asserted under the state statute, the right of publicity, does not fall within the subject matter of copyright."⁶⁴⁷ Thereafter, the Ninth Circuit considered the holdings in both *Fleet* and *KNB* and rejected the analysis of the *KNB* court, finding a plaintiff's claim for violation of his right of publicity, based on defendant's sale of counterfeit copies of DVDs embodying his performances, was preempted by the Copyright Act.⁶⁴⁸

Yet another constraint on the utility of right of publicity claims for protection of moral rights is the fact that the right is a creature of state law. Most states recognize some form of a right of publicity: since passage of the BCIA, an additional twelve states have adopted statutory right of publicity laws, bringing the total of states with statutory rights of publicity to twenty-

⁶⁴² See *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645, 647 (Ct. App. 1996).

⁶⁴³ *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645, 650–52 (Ct. App. 1996).

⁶⁴⁴ *KNB*, 92 Cal. Rptr. 2d at 721 (emphasis in original). The *KNB* court likewise expressed muted skepticism of *Fleet's* assertion that the actors had a separate copyright interest in their performances. *Id.*

⁶⁴⁵ *Id.* at 721 (emphasis in original).

⁶⁴⁶ *Id.* at 723.

⁶⁴⁷ *Id. Accord Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 875 (C.D. Cal. 1999) (finding that plaintiff's name, face, and persona as embodied in a still photograph were not "writings," and thus were not within the exclusive subject matter of copyright), *rev'd on other grounds*, 255 F.3d 1180 (9th Cir. 2001).

⁶⁴⁸ See *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1155 (9th Cir. 2010).

five.⁶⁴⁹ The vast majority of the remaining states recognize some form of common law right of publicity.⁶⁵⁰ In fact, there are currently only two states that have not yet explicitly adopted either a statutory or a common law protection for the right of publicity.⁶⁵¹ The appearance of near-uniformity in adoption of some version of the right of publicity belies the degree to which the exact contours of the right differ significantly from jurisdiction to jurisdiction, however.⁶⁵² Even among those states that have adopted statutory protections for the right of publicity, there are significant differences with respect to such issues as:

- What attributes of a person’s persona are protected: Indiana protects an individual’s name, voice, signature, photograph, image, likeness, distinctive appearance, gesture, or mannerisms,⁶⁵³ while Massachusetts protects only a person’s “name, portrait or picture.”⁶⁵⁴
- Whether the plaintiff must demonstrate fame or some form of commercial value inherent in their name or likeness: Arkansas has no such requirement,⁶⁵⁵ while Pennsylvania only provides protection to a “natural person whose name or likeness has commercial value.”⁶⁵⁶
- Whether the right of publicity is available posthumously, and, if so, for how long:

⁶⁴⁹ These include Alabama, Arizona, Arkansas, Hawaii, Illinois, Indiana, Louisiana, Nevada, Ohio, Pennsylvania, South Dakota, and Washington, although the Arizona and Louisiana statutes apply only to soldiers. *See generally* Jennifer E. Rothman, *Rothman’s Roadmap to the Right of Publicity*, <http://www.rightofpublicityroadmap.com> (last visited Mar. 19, 2019); Appendix D.

⁶⁵⁰ *See* Appendix D.

⁶⁵¹ The North Dakota Supreme Court has not adopted the right of publicity, and so far has declined to rule on whether North Dakota recognizes the common law tort of misappropriation under the right of privacy. *See Am. Mut. Life Ins. v. Jordan*, 315 N.W.2d 290 (N.D. 1982). A recent decision of the Supreme Court of Wyoming adopted the intrusion upon seclusion tort under the right of privacy tort as set out in the Restatement (Second) of Torts, but did not address the misappropriation tort. *See Howard v. Aspen Way Enters. Inc.*, 406 P.3d 1271, 1278 (Wyo. 2017).

⁶⁵² *See* Joshua L. Simmons & Miranda D. Means, *Split Personality: Construing a Coherent Right of Publicity Statute*, ABA LANDSLIDE, May/June 2018, at 38 (“In enacting right of publicity statutes, commentators have noted that many states struggled to adopt a strong, consistent theory of why the right exists and what it should be designed to protect. In some states, this failure has resulted in a kind of cognitive dissonance, such as when the right of publicity is called both a ‘privacy right’ . . . and a ‘property right,’ often interchangeably. Other states have avoided planting a flag in one theory or another by defining the right of publicity broadly, and then scaling it back based on various exceptions.”) (citations omitted).

⁶⁵³ *See* IND. CODE § 32-36-1-6 (2002).

⁶⁵⁴ MASS. GEN. LAWS ch. 214, § 3A (1973).

⁶⁵⁵ The statute grants “individual[s]” a property right in their name, voice, signature, photograph, and likeness. ARK. CODE § 4-75-1104 (2016).

⁶⁵⁶ 42 PA. CONS. STAT. § 8316(a) (2002).

Wisconsin provides no posthumous right,⁶⁵⁷ while the Virginia statute provides a posthumous right for 20 years⁶⁵⁸ and the Indiana statute provides protection for 100 years.⁶⁵⁹

- What steps a claimant must take to assert such a claim: Several states, including California,⁶⁶⁰ Nevada,⁶⁶¹ Oklahoma,⁶⁶² and Texas⁶⁶³ require registration with the state to assert a right of publicity posthumously.

Further complicating the issue is the question of which state's right of publicity law will apply to a given claim. While the traditional rule is that an individual has to be domiciled in a state either at the time of the claim or at the time of their death to assert a common law right of publicity claim,⁶⁶⁴ several states have done away with such a requirement in their statutes. For example, the Washington statute explicitly states that the "property right does not expire upon the death of the individual or personality, regardless of whether the law of the domicile, residence, or citizenship of the individual or personality at the time of death or otherwise recognizes a similar or identical property right."⁶⁶⁵ Thus, it may be possible to assert a claim in Washington for a posthumous violation of that state's right of publicity, even if the individual was a resident of a state, such as Wisconsin, that does not recognize such a posthumous right at the time of his or her death.⁶⁶⁶

⁶⁵⁷ See WIS. STAT. § 995.50 (1977).

⁶⁵⁸ VA. CODE § 8.01-40 (1950).

⁶⁵⁹ IND. CODE § 32-36-1-8(a) (1994).

⁶⁶⁰ CAL. CIV. CODE § 3344.1 (West 1971).

⁶⁶¹ NEV. REV. STAT. § 597.800 (1989).

⁶⁶² OKLA. STAT. tit. 12, § 1448 (1985).

⁶⁶³ TEX. PROP. CODE § 26.006 (1987).

⁶⁶⁴ See, e.g., *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1149 (9th Cir. 2002) (applying the law of Great Britain, where the celebrity was domiciled at the time of death); *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538, 1541 (11th Cir. 1983) (applying the law of California, where the celebrity was domiciled at the time of death); Melinda R. Eades, *Choice of Law and the Right of Publicity: Domicile as an Essential First Step*, 66 BROOK. L. REV. 1301, 1310 (2001). But see *Estate of Elvis Presley v. Russen*, 513 F. Supp. 1339, 1353–54 (D.N.J. 1981) (applying New Jersey's posthumous right of publicity even though celebrity was domiciled in Tennessee at the time of his death).

⁶⁶⁵ WASH. REV. CODE § 63.60.010 (1998).

⁶⁶⁶ At least one lower court has held that the Washington statute violates both the Commerce and Full Faith and Credit Clauses of the U.S. Constitution to the extent that it seeks to grant a posthumous right of publicity to individuals that died while domiciled in a state that did not provide for such posthumous rights. See *Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd.*, 766 F. Supp. 2d 1122 (W.D. Wash. 2011). The Ninth Circuit declined to reach this issue on appeal, however, holding that the Washington statute was constitutionally applied to sales of merchandise bearing the deceased celebrity's name and image that occurred within the state of Washington. See *Experience Hendrix L.L.C. v.*

b) Considering a Federal Right of Publicity

As noted above, the right of publicity and the privacy tort of misappropriation of a person's name or image remain important tools for artists to vindicate their moral rights, especially against acts of misattribution or prejudicial distortions of their work.⁶⁶⁷ There are, however, a number of factors that constrain the usefulness of such claims to protect an author's attribution and integrity interests. While some of these constraints, such as its inapplicability to acts of non-attribution, are inherent in the nature of the right of publicity doctrine, other constraints are an outgrowth of the fact that the rights of publicity and privacy are creatures of state, rather than federal, law. As a result, there is significant variability among the protections available to an author depending upon where he or she chooses to live, and the specter of federal copyright preemption looms over many right of publicity claims. This affects not only authors who seek to protect their moral rights, but also potential defendants who must study the nuances of the publicity and privacy statutes and case law of dozens of different states if they wish to create new works that may feature the names or likenesses of large numbers of individuals.

Nor is there likely to be harmonization among state right of publicity laws in the near future. Although the American Law Institute ("ALI") included a section on the right of publicity in its Restatement (Third) of Unfair Competition in 1995,⁶⁶⁸ recent bills seeking to update right of publicity laws in Arkansas,⁶⁶⁹ Louisiana,⁶⁷⁰ Minnesota,⁶⁷¹ and New York⁶⁷² did not follow the ALI's model law. More recently, the Uniform Laws Commission abandoned plans to draft a uniform act on the right of publicity at its annual meeting in July 2018.⁶⁷³

If Congress wished to address some of the uncertainty and ambiguity created by the lack of harmonization among state right of publicity laws, Congress might consider adopting a federal right of publicity law.⁶⁷⁴ Adoption of such a federal right of publicity would be a significant

Hendrixlicensing.com, Ltd., 762 F.3d 829, 837 (9th Cir. 2014). Cf. *Estate of Elvis Presley*, 513 F. Supp. at 1353–54 (applying New Jersey's posthumous right of publicity even though celebrity was domiciled in Tennessee at the time of his death).

⁶⁶⁷ See *supra* Section IV.B.2.

⁶⁶⁸ RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–49 (AM. LAW INST. 1995).

⁶⁶⁹ H.R. 1002, 90th Gen. Assemb., 3d Sess. (Ark. 2016); S. 9, 90th Gen. Assemb., 3d Sess. (Ark. 2016).

⁶⁷⁰ Allen Toussaint Legacy Act, HB276, 2018 Reg. Sess. (La. 2018).

⁶⁷¹ Personal Rights in Names Can Endure ("PRINCE") Act, S.F. 3609, 89th Leg. (Minn. 2016).

⁶⁷² Assemb. 08155, 2017–18 Leg. Sess. (N.Y. 2017); S. 05857, 2017–18 Leg. Sess. (N.Y. 2017).

⁶⁷³ See Minutes, Annual Meeting of the Executive Committee, Uniform Law Commission at 6 (July 23, 2018), available at: <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2986559b-3c7c-658b-06a8-7dfc00bac2d3&forceDialog=0>.

⁶⁷⁴ Several groups and commentators have called for adoption of a federal right of publicity law over the years. See, e.g., Int'l Trademark Ass'n, Resolution on the U.S. Federal Right of Publicity, adopted Mar. 3, 1998, available at <https://www.inta.org/Advocacy/Pages/USFederalRightofPublicity.aspx>; Eric J. Goodman, *A National Identity Crisis: The*

undertaking, implicating additional interests beyond just authors' attribution and integrity interests, and accordingly would require careful study and consultations with stakeholders beyond those that participated in this Study.⁶⁷⁵ For this reason, the Office is not currently recommending statutory text for such a federal right, but will set forth herein various issues Congress may want to consider if it chooses to go down this path.

The first question Congress must consider is whether to adopt a federal law that preempts state right of publicity laws, or instead adopt language that would serve as a "floor" for right of publicity protections, while allowing individual states to adopt more extensive protections in the event they determine that such additional protections would be beneficial.⁶⁷⁶ This approach would be consistent with the approach taken by Congress in passing the Lanham Act and the Defend Trade Secrets Act,⁶⁷⁷ both of which elected not to preempt state law and accordingly allowed for the continued development of state laws in the shadow of the federal statute. In addition, it would avoid upsetting settled economic expectations of authors, performers, and other individuals operating under current state right of publicity regimes.

If Congress instead elects to preempt state legislation on this issue, there are a number of topics on which state legislation differs significantly that Congress would need to resolve: the availability of post-mortem rights, the length of protection, whether such rights are transferable, the scope of protectable "personas," whether the personality right of non-famous individuals

Need for a Federal Right of Publicity Statute, 9 DEPAUL-LCA J. ART. & ENT. L. 227 (1999); Brittany Lee-Richardson, *Multiple Identities: Why the Right of Publicity Should be a Federal Law*, 20 UCLA ENT. L. REV. 189 (2013); Christian B. Ronald, Note, *Burdens of the Dead: Postmortem Right of Publicity Statutes and the Dormant Commerce Clause*, 42 COLUM. J.L. & ARTS 142 (2019) (arguing that state right of publicity laws violate the dormant Commerce Clause and that Congress should remedy this by either creating a federal right of publicity or authorizing states to have their own unique right of publicity laws); Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMM. LAW. 14 (Aug. 2011), available at https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/august2011/why_federal_right_publicity_statute_is_necessary_comm_law_28_2.authcheckdam.pdf.

⁶⁷⁵ Merely by way of example, a decision to adopt a postmortem federal right of publicity could have significant tax and estate planning implications for affected individuals. See Mitchell M. Gans et al., *Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights*, 117 YALE L.J. POCKET PART 203 (Apr. 1, 2008). Some commentators have expressed concern that such consequences "could force heirs to commercialize the deceased person's identity to pay off [estate tax] debt." JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 123 (2018).

⁶⁷⁶ This approach would have the benefit of providing a measure of certainty for authors, performers, and other individuals regarding the minimum level of protection that they could expect in their name and persona, while allowing states to continue to provide additional protections as they see fit. A drawback of such an approach would be that it would not provide certainty for those who wish to utilize the names or personae of others, as they would still have to determine what, if any, additional state protections are applicable.

⁶⁷⁷ Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified in scattered sections of 18 U.S.C.).

should be protected, and the proper scope of any exceptions. The resolution of these questions would have significant follow-on implications for both rightsholders and users.

Whichever path Congress ultimately chooses, any federal law should provide, at a minimum, protection for an individual’s name, signature, image, and voice against commercial exploitation during their lifetime. The Office believes that such a law would further benefit from explicit carve-outs for expressive works and other exceptions for First Amendment-protected activities.⁶⁷⁸

3. Misrepresentation and Unfair Competition

The common law principles of misrepresentation and unfair competition broadly cover a wide range of actions from fraudulent misrepresentations leading to monetary loss to unfair or deceptive business practices.⁶⁷⁹ For example, courts have found that use of an author’s name in association with the advertisement, publication, and sale of books with similar titles to the author’s works violated unfair competition law by “unfairly and fraudulently. . . trad[ing] upon [the author’s] reputation.”⁶⁸⁰ Misrepresentation and unfair competition laws also encompass common law trademark infringement claims, and can arise under either state or federal trademark statutes.⁶⁸¹ While state unfair competition laws often do not contain wording that is identical to the Lanham Act, many federal courts review such claims “congruent with Lanham Act claims.”⁶⁸² As a result, outcomes under state unfair competition law differ little from outcomes under the Supreme Court’s interpretation of the Lanham Act in *Dastar*, even though that case purportedly turned on questions of (Lanham Act) statutory interpretation.⁶⁸³ The question of federal trademark law—the Lanham Act—and its use as a moral rights tool is discussed in detail above.⁶⁸⁴

⁶⁷⁸ See, e.g., ALA. CODE § 6-5-773 (2015) (“Nothing in this article will allow for an abridgement of free speech rights under the First Amendment of the U.S. Constitution. . . .”); ARK. CODE § 4-75-1110 (2016) (“It is not a violation . . . if the name, voice, signature, photograph, or likeness of an individual is used . . . in . . . a play, book, magazine, newspaper, musical composition, visual work, work of art, audiovisual work, radio or television program if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work”); CAL. CIV. CODE § 3344(d) (1971) (“[U]se of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required. . . .”).

⁶⁷⁹ See RESTATEMENT (SECOND) OF TORTS § 525; 1 GILSON ON TRADEMARKS § 1.04[1].

⁶⁸⁰ *Collier v. Jones*, 66 Misc. 97, 100 (N.Y. Sup. Ct. 1910).

⁶⁸¹ See 1 GILSON ON TRADEMARKS § 1.04[1]; 1 MCCARTHY ON TRADEMARKS § 4:6.

⁶⁸² *UMG*, 281 F. Supp. 2d at 1186.

⁶⁸³ See, e.g., *Twentieth Century Fox Film Corp. v. Dastar Corp.*, No. CV98–07189FMC, 2003 WL 22669587, at *4–5 (C.D. Cal. 2003); *Williams*, 281 F. Supp. 2d at 1186.

⁶⁸⁴ See *supra* Section VI.A.1.

4. State Moral Rights Laws

At the time of the BCIA, eight states had recently enacted specific statutes “protecting the rights of integrity and paternity in certain works of art.”⁶⁸⁵ California led the charge by enacting the first state statute that explicitly protected the moral rights of authors of works of fine arts.⁶⁸⁶ Soon after its enactment, the California Art Preservation Act of 1979 was labeled as “a positive step for the protection of some moral rights for some creators.”⁶⁸⁷ Although there was criticism that the statute was narrower than European moral rights statutes and Article *6bis* of the Berne Convention, it was nonetheless heralded by many as a much needed “coherent and comprehensive set of protections for the patchwork relief traditionally provided by the courts.”⁶⁸⁸

Then-Register of Copyrights Ralph Oman noted that three basic models of state moral rights law existed at the time the BCIA was being considered—the preservation model, the moral rights model, and the public works model.⁶⁸⁹ The preservation model sought to provide authors with attribution and integrity rights, while also protecting works from destruction.⁶⁹⁰ The moral rights model provided authors with integrity and attribution rights, without protection against destruction.⁶⁹¹ State statutes falling in the public works category were more related to state police power and were used to protect certain works, such as antiquities and works of historical value,

⁶⁸⁵ H.R. REP. NO. 609, 100th Cong., 2d Sess. 34 (1988) (citing California, Louisiana, Maine, Massachusetts, New Jersey, New York, Pennsylvania, and Rhode Island).

⁶⁸⁶ Jill R. Applebaum, Note, *The Visual Artists Rights Act of 1990: An Analysis Based on the French Droit Moral*, 8 AM. U. J. INT’L L. & POL’Y 183, 200 n.126 (1992).

⁶⁸⁷ Kwall, *American Marriage*, 38 VAND. L. REV. at 33.

⁶⁸⁸ Karen Gantz, *Protecting Artists’ Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 GEO. WASH. L. REV. 873, 901 (1981) (“Gantz”). Gantz criticized the California statute for protecting only works of fine art as opposed to all copyrightable works, for confining its protections to works of “recognized quality,” for having a shorter duration than European counterparts, and for being waivable. *Id.* at 883–84, 886–87.

⁶⁸⁹ See 1989 VARA Hearing at 33 (written statement of Ralph Oman, Register of Copyrights).

⁶⁹⁰ See *id.* at 33–36. For example, Register Oman designated the California Art Preservation Act as a preservation statute that prohibited the intentional destruction of a work of fine art as well as providing a right of attribution. Connecticut, Massachusetts, and Pennsylvania were also cited as part of the preservation model. Note that the Connecticut Art Preservation and Artists’ Rights Act was not cited by Congress as part of the state moral rights patchwork because it became effective after S. REP. NO. 100-352 (1988) and H.R. REP. NO. 100-609 (1988), discussing the existing moral rights framework, were issued. *Id.*

⁶⁹¹ See 1989 VARA Hearing at 36–38 (1989) (written statement of Ralph Oman, Register of Copyrights) (citing Louisiana, Maine, New Jersey, New York, and Rhode Island as states with moral rights statutes that provided the traditional attribution and integrity rights).

from vandalism.⁶⁹² Which model a state employs affects which art and artists are protected, as well as the scope of that protection.

In the years after the BCIA's enactment, several other states enacted moral rights legislation.⁶⁹³ State moral rights still generally fall into the three categories that Oman articulated in 1989. In addition to Oman's three models, states have also enacted legislation establishing minimal attribution rights for authors engaged in transactions with art dealers.⁶⁹⁴ Since the time of the BCIA and VARA, no new state statutes have been enacted that fall under the preservation model. The existing preservation model statutes are unique because they not only recognize an author's personal attribution and integrity interests, but also the importance to the "public interest in preserving the integrity of cultural and artistic creations."⁶⁹⁵ The need to protect the public interest manifests in provisions that prevent the destruction of works.⁶⁹⁶ Similar to preservation model statutes, the list of traditional moral rights statutes has remained the same except for the addition of one new statute.⁶⁹⁷ Accordingly, the majority of new statutes fall under the public works model⁶⁹⁸ as well as the new model covering art sales.

⁶⁹² See 1989 VARA Hearing at 33–34, 38 (written statement of Ralph Oman, Register of Copyrights) (citing New Mexico's Art in Public Buildings law as providing "extensive rights in a very limited area," namely the protection of attribution and integrity rights for works displayed in public buildings, including works of art incorporated in buildings). Note that the New Mexico statute was also enacted after S. REP. NO. 100-352 (1988) and H.R. REP. NO. 100-609 (1988).

⁶⁹³ See e.g., CONN. GEN. STAT. § 42-116s (2015); NEV. REV. STAT. §§ 597.720–740 (2017); N.M. STAT. § 13-4B-3 (2019). In addition, the legislatures in Arizona, Montana, South Dakota, and Utah passed narrowly tailored bills that grant moral rights under certain circumstances. ARIZ. REV. STAT. § 44-1776 (2015) (granting the right of attribution when the user is an art dealer, subject to certain limitations); MONT. CODE § 22-2-407 (2017) (granting the right of attribution when the state acquires the work for display); S.D. CODIFIED LAWS § 1-22-16 (2018) (granting the rights of attribution and integrity to an author whose work has been acquired by the state); UTAH CODE § 9-6-409 (granting the rights of attribution and integrity when the artist was commissioned by the state Arts Development Program to create a work of art).

⁶⁹⁴ See ARIZ. REV. STAT. § 44-1776 (2018); CONN. GEN. STAT. § 42-116m (2015); D.C. CODE § 28-5106 (2019); FLA. STAT. § 686.503 (2018); 815 ILL. COMP. STAT. 320/5 (2018); N.H. REV. STAT. § 352:8 (2018); OHIO REV. CODE § 5815.46 (2018); WASH. REV. CODE § 18.110.030 (2018).

⁶⁹⁵ CAL. CIV. CODE § 989(a) (2019). See also MASS. GEN. LAWS ch. 231, § 85S(a) (2017).

⁶⁹⁶ See CAL. CIV. CODE § 987(a) (2019); MASS. GEN. LAWS ch. 231, § 85S(a) (2017); N.M. STAT. § 13-4B-1 (2018).

⁶⁹⁷ See NEV. REV. STAT. §§ 597.720–760 (2019).

⁶⁹⁸ See GA. CODE §§ 8-5-1 to -9 (2019); MONT. CODE §§ 22-2-401 to -408 (2018); S.D. CODIFIED LAWS §§ 1-22-9 to -17 (2018); UTAH CODE § 9-6-401 to -409 (2019); WIS. STAT. § 41.57 (2019). California and Rhode Island possess general moral rights statutes as well as moral rights statutes related to government acquisitions. See CAL. CIV. CODE § 987–989 (2019); CAL. GOV'T CODE § 15813.3(3)(e) (2019) (stipulating, as part of California's Art in Public Buildings provisions, that the state shall ensure "that each work of art acquired pursuant to this chapter is properly maintained and is not artistically altered in any manner without the consent of the artist"); 5 R.I. GEN. LAWS §§ 5-62-2 to -12 (2018) (providing general integrity and attribution rights); R.I. GEN. LAWS § 42-75.2-8(b)(1)(2) (2018) (stating that the state becomes the sole owner

By their nature, state moral rights statutes are not uniform, but there are certain general provisions that are common amongst many of the statutes. First, the most common theme, and often critique, is that the statutes only apply to works of fine art.⁶⁹⁹ This limitation was first criticized soon after the California Art Preservation Act was passed in 1979; the plethora of statutes enacted since have replicated this limitation.⁷⁰⁰ Second, the rights tend to be waivable.⁷⁰¹ Third, the rights do not usually apply to works created under work made for hire arrangements or works that are created under contract for advertising or commercial use.⁷⁰² The limitation for advertising and commercial uses can often be overcome by contract.⁷⁰³ Fourth, the attribution right is generally accompanied by a right to disclaim authorship, but it must be for a “just and valid reason.”⁷⁰⁴ Fifth, with the exception of some of the statutes, the destruction of a covered

of the art it acquires, but subject to moral rights retained by the artist, such as “the right to have the artist’s name associated with the work” and “the right to prevent degradation, mutilation, or aesthetic ruining of the work”).

⁶⁹⁹ See e.g., ARIZ. REV. STAT. §§ 44-1771 to -1778 (2018) (governing art dealers and defining “a work of fine art” as “a visual rendition, including a painting, drawing, sculpture, mosaic or photograph”); CAL. CIV. CODE §§ 987(a)-(b)(2), 989(1) (2019) (governing destruction of “fine art,” which is defined as “an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, and of substantial public interest”); CONN. GEN. STAT. § 42-116s(2) (2015); N.J. STAT. § 2A:24A-3(e) (2019); 73 PA. CONS. STAT. § 2102 (2018); see also 3 NIMMER ON COPYRIGHT §8D.02[A] (“[B]oth the federal and state laws [expressly covering moral rights of attribution and integrity] relate solely to protection for works of visual art and have no application to other copyrightable subject matter. . . . Moral rights protection for works of visual art follows explicit but circumscribed boundaries, in contrast to the broad but amorphous protection accorded to all other types of copyrightable compositions.”); Edward J. Damich, *State “Moral Rights” Statutes: An Analysis and Critique*, 13 COLUM.-VLA J.L. & ARTS 291, 293 (1989) (“[S]tate statutes do not provide substantial protection of moral rights as measured by article 6bis of the Berne Convention. . . . [T]he state statutes recognize moral rights in a much smaller class of works: in general moral rights are recognized only in the visual and graphic arts.”).

⁷⁰⁰ See Gantz, 49 GEO. WASH. L. REV. at 883.

⁷⁰¹ See, e.g., CAL. CIV. CODE § 987(g)(3) (2019); CONN. GEN. STAT. § 42-116t(d) (2015); MASS. GEN. LAWS ch. 231, § 85S(g) (2017); NEV. REV. STAT. § 597.750 (2017); N.M. STAT. § 13-4B-3(E) (2018); 73 PA. CONS. STAT. § 2107(2) (2018). *But see* ARIZ. REV. STAT. § 44-1777 (2018).

⁷⁰² See, e.g., CAL. CIV. CODE § 987(b), (g) (2019); CONN. GEN. STAT. § 42-116s(2) (2015); ME. REV. STAT. tit. 27, § 303(4)(B) (2018); N.J. STAT. § 2A:24A-7 (2019); N.M. STAT. § 13-4B-2(A) (2018); LA. REV. STAT. § 51:2155(D) (2018); MASS. GEN. LAWS ch. 231, § 85S(b) (2017); NEV. REV. STAT. § 597.720(3) (2017); N.J. STAT. § 2A:24A-7 (2019); N.M. STAT. § 13-4B-2(A) (2018); N.Y. ARTS & CULT. AFF. LAW § 14.03(3)(d) (2018); 73 PA. CONS. STAT. § 2107(3) (2018); 5 R.I. GEN. LAWS § 5-62-5(d) (2018).

⁷⁰³ See, e.g., LA. REV. STAT. § 51:2155(D) (2018); N.J. STAT. § 2A:24A-7 (2019); N.Y. ARTS & CULT. AFF. LAW § 14.03(3)(d) (2018); 73 PA. CONS. STAT. § 2107(3) (2018); 5 R.I. GEN. LAWS § 5-62-5(d) (2018).

⁷⁰⁴ CAL. CIV. CODE § 987(d) (2019); MASS. GEN. LAWS ch. 231, § 85S(d) (2017); N.M. STAT. § 13-4B-3(B) (2018). *See also* 73 PA. CONS. STAT. §§ 2103–2014 (2018) (stating that an author may disclaim ownership for intentional or grossly negligent acts resulting in the “defacement, mutilation, alteration or destruction of a work of fine art”). Some statutes explicitly state what constitutes a just and valid reason. *See* LA. REV. STAT. § 51:2154(C) (2018) (“Just and valid reason for disclaiming authorship shall include that the work of fine art has been altered, defaced, mutilated, or modified without the artist’s consent and damage to the artist’s reputation is reasonably likely to result or has resulted therefrom.”); ME. REV. STAT.

work is generally permissible,⁷⁰⁵ although alteration is prohibited in those states that assign an integrity right.⁷⁰⁶

Despite the above commonalities, state moral rights statutes also vary in many aspects, most notably in the form of protections afforded, when those protections kick in, and the types of works protected. When Congress determined that the United States met its Berne article *6bis* obligations to provide attribution and integrity rights to authors, it cited eight existing state statutes in its rationale.⁷⁰⁷ At the time, those eight statutes all provided some form of attribution and integrity right. State moral rights statutes subsequently enacted have generally provided more limited rights, establishing attribution rights rather than integrity rights. While this is not

tit. 27, § 303(3) (2018); NEV. REV. STAT. § 597.730(2) (2017); N.J. STAT. § 2A:24A-5 (2019); N.Y. ARTS & CULT. AFF. LAW § 14.03 (2)(a) (2018); 5 R.I. GEN. LAWS § 5-62-4(a) (2018).

⁷⁰⁵ See, e.g., LA. REV. STAT. §§ 51:2153, 51:2155(F)(1) (2018) (not prohibiting destruction in general, and waiving the artist's moral rights if removal of a work from a building would result in the work's destruction); ME. REV. STAT. tit. 27, § 303(2) (2018) (not prohibiting destruction); NEV. REV. STAT. § 597.740(1) (2017) (not prohibiting destruction); N.J. STAT. § 2A:24A-4 (2019) (not prohibiting destruction); N.Y. ARTS & CULT. AFF. LAW § 14.03(2)(a) (2018) (not prohibiting destruction); 5 R.I. GEN. LAWS § 5-62-3 (2018) (not prohibiting destruction). *But see* CAL. CIV. CODE § 987(c)(1) (2019) (prohibiting physical defacement, mutilation, alteration, or destruction of a work of fine art); CONN. GEN. STAT. § 42-116t(a) (2015) (prohibiting destruction unless done by the author); MASS. GEN. LAWS ch. 231, § 85S(c) (2017) (prohibiting the physical defacement, mutilation, alteration, or destruction of a work of fine art unless done by the author); N.M. STAT. § 13-4B-3(A) (2018) (prohibiting the intentional physical defacement, mutilation, alteration, or destruction of a work of fine art in public view, but if a work is removed from a building and the alteration is unavoidable, the right is waived); 73 PA. CONS. STAT. §§ 2104, 2108 (2018) (prohibiting the intentional physical defacement, mutilation, alteration, or destruction of a work, but if a work is removed from a building and the alteration is unavoidable, the right is waived); 42 R.I. GEN. LAWS § 42-75.2-8 (2018) (granting author right to prevent degradation, mutilation, or aesthetic ruining of works owned by the state); S.D. CODIFIED LAWS § 1-22-16(3) (1989) (granting the author the right to prevent degradation, mutilation, or aesthetic ruining of works owned by the state).

⁷⁰⁶ See, e.g., CONN. GEN. STAT. § 42-116t(a) (2015) (prohibiting physical defacement or alteration); GA. CODE § 8-5-5(5) (2019) (prohibiting artistic alteration without the artist's consent of art in state buildings); LA. REV. STAT. § 51:2153 (2018) (prohibiting display or publication of a work or a reproduction that has been altered, defaced, mutilated, or modified); ME. REV. STAT. tit. 27, § 303(2) (2018) (prohibiting display or publication of a work or reproduction that has been altered, defaced, mutilated, or modified in a way that would damage the artist's reputation); NEV. REV. STAT. § 597.740(1) (2017) (prohibiting display or publication of a work or a reproduction that has been defaced, mutilated, or altered if damage to the reputation of the artist is reasonably foreseeable); N.J. STAT. § 2A:24A-4 (2019) (prohibiting display, publication, and reproduction of a work that has been altered, defaced, mutilated, or modified in a way that damages the artist's reputation); N.Y. ARTS & CULT. AFF. LAW § 14.03(1)(a) (2018) (prohibiting display or publication of a work or reproduction that has been altered, defaced, mutilated, or modified if harm to the artist's reputation is likely); 5 R.I. GEN. LAWS § 5-62-3 (2018) (prohibiting display or publication of a work or reproduction that has been altered, defaced, mutilated, or modified); 42 R.I. GEN. LAWS § 42-75.2-8(b)(2) (2018) (preventing degradation, mutilation, or aesthetic ruining of works acquired by the state); S.D. CODIFIED LAWS § 1-22-16(3) (2018) (preventing degradation, mutilation, or aesthetic ruining of works acquired by the state).

⁷⁰⁷ See S. REP. NO. 100-352, at 11 (1988).

the case with all post-BCIA statutes, the trend has been to establish only attribution rights for artists in connection with display in public buildings or art sales.⁷⁰⁸ Relatedly, an artist's ability to enforce his or her moral rights varies greatly state by state. For example, some states attach moral rights to artists' works broadly regardless whether the work was created privately by an artist or commissioned by the state.⁷⁰⁹ Others only extend protection to works commissioned by the state or displayed in state buildings⁷¹⁰ or to artwork involved in sales or commissions.⁷¹¹ Lastly, while state moral rights statutes only protect works of visual art, there is no uniform definition of the term. Most of the statutes define covered works as "works of fine art," but the specific definitions vary greatly. Some enumerate long lists of examples⁷¹² and others simply refer to only visual and

⁷⁰⁸ See, e.g., ARIZ. REV. STAT. § 44-1776(A)(1) (2018) (providing attribution in transactions with art dealers); FLA. STAT. § 686.503(4) (2018) (providing attribution in consignment transactions); 815 ILL. COMP. STAT. § 320/5(2) (2018) (providing attribution in transactions with art dealers); MONT. CODE § 22-2-407 (2017) (providing attribution in state-owned works); N.H. REV. STAT. § 352:8 (2018) (providing attribution in transactions with art dealers); OHIO REV. CODE 5815.46 (2018) (providing attribution in transactions with art dealers); WASH. REV. CODE § 18.110.030(2) (2018) (providing attribution in transactions with art dealers). *But see* CONN. GEN. STAT. § 42-116t(a),(b), § 42-116m(d) (2015) (providing general attribution and integrity rights to artists as well as attribution in consignment transactions); GA. CODE §§ 8-5-5(5), § 8-5-7(a) (2019) (providing integrity and attribution for works in state buildings); NEV. REV. STAT. § 597.730 (2017) (providing attribution and integrity rights to artists); N.M. STAT. § 13-4B-3(A), (B) (2018) (providing integrity rights to works in or on state buildings and attribution rights in general); S.D. CODIFIED LAWS § 1-22-16(1) to (3) (2018) (providing attribution and integrity rights to works in public buildings); UTAH CODE § 9-6-409 (2019) (providing attribution in state-commissioned works and a quasi-integrity right by allowing the artist to disclaim authorship if conservation or repair damages the work's integrity); *see also* D.C. CODE § 28-5106(a),(b) (2019) (providing attribution in transactions with art dealers well as compensation for loss or damage to consigned works); WIS. STAT. §§ 41.57, 129.06 (2019) (providing only integrity for art in state public buildings and only attribution in art sales).

⁷⁰⁹ See, e.g., CAL. CIV. CODE §§ 987-989 (2019); N.Y. ARTS & CULT. AFF. LAW § 14.03 (2018).

⁷¹⁰ See, e.g., GA. CODE § 8-5-1 to -9 (2019); MONT. CODE § 22-2-407 (2017); S.D. CODIFIED LAWS § 1-22-16 (2018); UTAH CODE § 9-6-409 (2019).

⁷¹¹ See, e.g., ARIZ. REV. STAT. § 44-1776 (2018); D.C. CODE § 28-5106 (2019); FLA. STAT. § 686.503 (2018); 815 ILL. COMP. STAT. 320/5 (2018); N.H. REV. STAT. § 352:8 (2018); OHIO REV. CODE § 5815.46 (2018); WASH. REV. CODE § 18.110.030 (2018).

⁷¹² See, e.g., CONN. GEN. STAT. § 42-116s(2) (2015) (defining "work of fine art" as "any drawing; painting; sculpture; mosaic; photograph; work of calligraphy; work of graphic art, including any etching, lithograph, offset print, silkscreen or other work of graphic art; craft work in clay, textile, fiber, metal, plastic or other material; art work in mixed media, including any collage, assemblage or other work combining any of the artistic media named in this definition, or combining any of said media with other media; or a master from which copies of an artistic work can be made, such as a mold or a photographic negative, with a market value of at least two thousand five hundred dollars; provided work of fine art shall not include (A) commissioned work prepared under contract for trade or advertising usage, provided the artist, prior to creating the work, has signed an agreement stating that said work shall be a commissioned work which may be altered without consent; (B) work prepared by an employee within the scope of his employment duties").

graphic works including, but not limited to, paintings, drawings, or sculptures.⁷¹³ Some states also expressly exclude works that are included in other jurisdictions, like film and video.⁷¹⁴ Understandably, the variety of state statutes can be difficult to navigate, and this system of inconsistent state laws only protects a thin subset of works.

State moral rights laws provided the most explicit expression of statutory moral rights in the United States until the passage of VARA in 1990. VARA amended the Copyright Act's preemption provision (section 301), providing that this federal statute preempts "all legal or equitable rights that are the equivalent to" the attribution and integrity rights conferred by VARA with respect to "works of visual art to which the rights conferred by section 106A apply."⁷¹⁵ According to the legislative history, "[a] single Federal system is preferable to State statutes or municipal ordinances on moral rights because creativity is stimulated more effectively on a uniform, national basis."⁷¹⁶

Subsection 301(f) outlines several exceptions to VARA's preemption authority including that the provision does not apply to causes of action commenced before the effective date of VARA (June 1, 1991).⁷¹⁷ For example, in *Pavia v. 1120 Avenue of the Americas Associates*, the U.S. District Court for the Southern District of New York found that the plaintiff's claim regarding the display of his work in an altered form under New York's Artists Authorship Rights Act (AARA) was not preempted by VARA because the improper display started in 1988, before the effective date of the federal legislation.⁷¹⁸ VARA also does not preempt any activities that violate legal or equitable rights that are not "equivalent" to any of the rights conferred by VARA with respect to "works of visual art."⁷¹⁹ Activities violating legal or equitable rights that extend beyond the life of

⁷¹³ See, e.g., 73 PA. CONS. STAT. § 2102 (2018) (defining "fine art" as "an original work of visual or graphic art of recognized quality created using any medium. The term shall include, but not be limited to, a painting, drawing or sculpture").

⁷¹⁴ See LA. REV. STAT. § 51:2152(7) (2018) (excluding sequential imagery such as motion pictures); ME. REV. STAT. tit. 27, § 303(1)(D) (2018) (excluding sequential imagery such as motion pictures); N.J. STAT. § 2A:24A-3(e) (2019) (excluding sequential imagery such as motion pictures). But see 815 ILL. COMP. STAT. 320/1(7)(a) (2018) (including videotape); MASS. GEN. LAWS ch. 231, § 85S(b) (2017) (including audio and video tape and film); N.M. STAT. § 13-4B-2(B) (2018) (including audio and videotape and film).

⁷¹⁵ Visual Artists Rights Act of 1990, Pub L. No. 101-650, § 605 (1990) (codified at 17 U.S.C. § 301(f)).

⁷¹⁶ H.R. REP. NO. 101-514, at 21 (1990) (quoting 1989 VARA Hearing at 36 (written statement of Ralph Oman, Register of Copyrights)).

⁷¹⁷ See 17 U.S.C. § 301(f)(2)(A).

⁷¹⁸ 901 F. Supp. 620, 626–27 (S.D.N.Y. 1995).

⁷¹⁹ 17 U.S.C. § 301(f)(2)(B).

the author are also not preempted under this provision.⁷²⁰ Thus, post-mortem rights for artists under state laws that address misattribution, mutilation, or destruction of works of visual art likely remain available to eligible parties.⁷²¹

For determining when VARA preempts a plaintiff's state law claim, the courts follow the standard for determining preemption under the broader Copyright Act. For preemption to occur, the work of authorship in which rights are claimed must fall within the subject matter of copyright; and the state law must create legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright.⁷²² For example, the U.S. District Court for the Southern District of New York in *Board of Managers of Soho International Arts Condominium v. City of New York* held that an artist's claim under New York's AARA regarding the destruction of a mural on a building was preempted by VARA.⁷²³ The court found that the mural falls within the subject matter of copyright and that the integrity rights under AARA are equivalent to those under VARA. While the artist argued that the rights under AARA are not equivalent to VARA's rights as AARA does not limit the right of integrity to "works of recognized stature" as under VARA, the court disagreed stating that preemption can occur even when the state statute is broader.⁷²⁴ The court further emphasized that VARA and AARA have nearly identical provisions regarding the right of integrity; and thus the rights under AARA are "equivalent" to VARA's rights for the purposes of the preemption analysis.⁷²⁵

The limited availability of relevant case law leaves many questions unanswered regarding the drafting and interpretation of VARA's preemption provision. For example, it is unclear whether the phrase "with respect to works of visual art to which the rights conferred by section 106A apply" would permit claims concerning works that do not meet section 101's definition of a "work of visual art" or would preempt any claims relating to "pictorial, graphic, or sculptural" works. The legislative history states that "works that are not covered by the law, such as audiovisual works, photographs produced for non-exhibition purposes" would not be

⁷²⁰ 17 U.S.C. § 301(f)(2)(C).

⁷²¹ See, e.g., CAL. CIV. CODE § 987(g)(1) (2019); MASS. GEN. LAWS ch. 231, § 85S(g) (2017).

⁷²² See H.R. REP. NO. 101-514, at 21 (1990).

⁷²³ No. 01 Civ. 1226, 2003 WL 21403333, at *16 (S.D.N.Y. June 17, 2003), *reheard on other grounds*, No. 01 Civ. 1226, 2005 WL 1153752 (S.D.N.Y. May 13, 2005).

⁷²⁴ See *Bd. of Managers of Soho Int'l Arts Condo. v. City of New York*, No. 01 Civ. 1226, 2003 WL 21403333, at *14 (S.D.N.Y. June 17, 2003), *reheard on other grounds*, No. 01 Civ. 1226, 2005 WL 1153752 (S.D.N.Y. May 13, 2005); see also H.R. REP. NO. 101-514, at 21 (1990) (stating that VARA "will preempt a State law granting the right of integrity in paintings or sculpture, even if the State law is broader than Federal law").

⁷²⁵ *Bd. of Managers of Soho Int'l Arts Condo.*, 2003 WL 21403333.

preempted.⁷²⁶ If claims for these types of works are not preempted, then works that do not meet the limited definition of a “work of visual art” may be able to claim potentially greater remedies under state law.⁷²⁷

5. Contracts and Licenses

Contracts and licenses, which are governed by state law, have been at the forefront of protecting moral rights in the U.S. A tradition of private ordering was an important part of the U.S. patchwork of moral rights when the United States joined the Berne Convention.⁷²⁸ Although the practice of bargaining with the rights of attribution and integrity has its critics, the use remains common. The Office has identified five main types of contracts, the use of which affect authors’ moral rights.

- *Party-Negotiated.* Two-party licenses negotiated between an author and a user (such as a publisher or a recording company) are fundamental to many copyright industries. In such negotiated licenses, authors may include or trade the right of attribution and the right of integrity as desired, based on bargaining power.⁷²⁹ During the hearings leading up to the U.S. joining the Berne Convention, many stakeholders noted the moral rights aspects of such agreements.⁷³⁰

⁷²⁶ H.R. REP. NO. 101-514, at 21 (1990).

⁷²⁷ See *Gegenhuber v. Hystopolis Prods., Inc.*, No. 92 C 1055, 1992 WL 168836 (N.D. Ill. July 13, 1992); see also *Gegenhuber v. Hystopolis Prods., Inc.*, 660 N.E.2d 107 (1995) (holding that attribution claims relating to puppets, costumes, sets, and the performance of a puppet show are not preempted by VARA as the works do not qualify as “works of visual art.”).

⁷²⁸ See H.R. REP. NO. 100-609, at 34 (1988), reprinted in 1987 BCIA Hearings at 1043 (explaining that the hearing testimony support the majority view that “there is a composite of laws in this country that provides the kind of protection envisioned by Article 6bis” and that this composite includes contracts.); see also 1987 BCIA Hearings at 350 (written statement of David Ladd on behalf of the Coalition to Preserve the American Copyright Tradition) (discussing how authors may use contracts to control integrity of their work.); *id.* at 639 (statement of David Lawson) (discussing the use of contracts to secure rights of integrity and attribution in the architecture industry); *id.* at 697 (statement of Barbara A. Ringer) (discussing the patchwork of moral rights and how contracts fit in the patchwork); *id.* at 824 (written statement of the Association of American Publishers) (discussing membership views that contracts and long-established trade practices were in compliance with Berne Article 6bis); *id.* at 970–971 (written statement of the Honorable Carlos J. Moorhead) (explaining that the administration’s proffered Berne Implementation bill “proceeds from the assumption that the totality of U.S. law, including...common law rights of contract...provide protection for the rights of paternity and integrity sufficient to comply with the Berne Convention”).

⁷²⁹ See AAP Initial Comments at 5; CCIA Initial Comments at 5; DGA/WGAW Initial Comments at 4; SAG-AFTRA Initial Comments at 2.

⁷³⁰ See, e.g., 1987 BCIA Hearings at 47 (written statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services, Library of Congress) (“Contracts between authors and publishers may provide [moral rights].”); *id.* at 145 (written statement of Donald J. Quigg, Assistant Secretary and Commissioner of Patents and Trademarks) (“The Administration’s bill reflects the view taken by many copyright experts that the totality of current U.S. law,

- *Industry-Negotiated.* Large, complex, well-established copyright industries such as the American film industry operate under heavily-negotiated employment agreements that govern a myriad of topics including copyright ownership and licensing.⁷³¹ The agreements generally bind large groups as parties with a guild or association on one side and movie studios or production companies on the other.⁷³² Known as collective bargaining agreements, these agreements exist partly to offset the loss of copyright by individual contributors under the work-made-for-hire doctrine.⁷³³
- *Works-made-for-hire.* “Work-made-for-hire” refers to two very specific situations as defined in section 101 of the U.S. Copyright Act. The first situation is when a work is created by an employee in the scope of employment. The second covers works in nine categories created by independent contractors who have a written agreement with the commissioning party confirming the work is intended to be a work-made-for-hire.⁷³⁴ When a work is made for hire, the employer or

including . . . contract rights . . . provides sufficient protection for the rights of paternity and integrity.”); *id.* at 225 (statement of Irwin Karp, Chairman, Ad Hoc Working Group on U.S. Adherence to the Berne Convention) (discussing clauses in motion picture contracts dealing with transfers of rights of integrity).

⁷³¹ See MPAA Initial Comments at 14 (“These CBAs [collective bargaining agreements], negotiated by sophisticated attorneys and business people on both sides, cover in fine detail virtually every conceivable aspect of the relationship between the producer and certain creative talent, including compensation and working conditions. . . . [T]he CBAs also protect individuals’ rights of attribution and integrity by *contract*.”).

⁷³² See, e.g., Directors Guild of America, Inc. Basic Agreement of 2014, at 1–7 (July 1, 2014); 2017 Memorandum of Agreement Between the Screen Actors Guild-Am. Fed’n of Television and Radio Artists and the All. of Motion Picture & Television Producers, at 70–76 (Sept. 29, 2017).

⁷³³ See DGA/WGAW Initial Comments at 1 (noting that because writers’ and directors’ contributions often fall under the work-made-for-hire doctrine, that “statutory provision gives producers a significant power that is taken away from American audiovisual creators (writers and directors)” but that “in the U.S., the Guilds have used the process of collective bargaining to enshrine creative and economic benefits for their members, including provisions that partially address moral rights of writers and directors”).

⁷³⁴ The Copyright Act defines a work made for hire as either:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101.

commissioning party is considered to be the author of the work for copyright purposes.⁷³⁵

- *Author-dictated.* Author-dictated licenses are written by (or at the request of) the author to exactly match their desired terms. Examples of such licenses include shrink-wrap, click-wrap, and other methods of presenting licenses in terms of service. Authors, generally companies in these situations, can choose to require attribution and to prohibit derivative works as they see fit.
- *Author-chosen.* Author-chosen licenses are generally pre-made documents, such as those developed by Creative Commons, that are selected and applied by the author.⁷³⁶

a) The Role of Contracts in Moral Rights

The freedom to include or exclude moral rights from an agreement is a key element of American copyright law that proponents maintain has long provided authors with the credit and control they desire over their works while allowing users to make modifications necessary to the use of the work. Public comments in response to the Office’s Notice of Inquiry reveal that some stakeholders believe contractual agreements effectively protect moral rights⁷³⁷ while others assert that is not the case.⁷³⁸ Those who argue that contractual agreements are an appropriate and

⁷³⁵ See 17 U.S.C. §201(b). This allows a single party to control the rights in works created by many hands. See also MPAA Initial Comments at 7 (explaining the importance of the work-made-for-hire doctrine, “[g]iven the large number of creative contributors to a major motion picture”).

⁷³⁶ Creative Commons offers a suite of licenses, including several open license options as well as more restrictive licenses. All current Creative Commons licenses include an attribution requirement, and authors who wish to preserve their right of integrity can choose licenses that reserve their derivative work rights. There are two license options that reserve the right to make derivative works, a feature referred to as “NoDerivatives.” These licenses are the BY-ND (Attribution NoDerivatives) and BY-NC-ND (Attribution NonCommercial NoDerivatives). See *Licensing Types*, CREATIVE COMMONS, <https://creativecommons.org/share-your-work/licensing-types-examples/> (last visited Mar. 22, 2019). Creative Commons also offers other legal tools related to placing or recognizing works in the public domain. See *CC0 1.0 Universal (CC0 1.0) Public Domain Dedication*, CREATIVE COMMONS, <https://creativecommons.org/publicdomain/zero/1.0/> (last visited Mar. 22, 2019).

⁷³⁷ See, e.g., AAP Initial Comments at 5 (arguing that addressing attribution and integrity as part of contracts “gives authors and publishers the necessary flexibility to agree on how to address these issues as they see fit”); CCIA Initial Comments at 3 (“An author can always choose to license works in a manner to ensure attribution and integrity if they so choose.”); NMPA Reply Comment at 12 (stating that “contractual rights, and the process for adjudicating the problem, can and almost always do offer more comprehensive and efficient solutions than a legislative alternative”); SAG-AFTRA Initial Comments at 2 (“But to the American performer, there are perhaps no greater rights than the ability to enforce contracts. . . . Contracts, whether entered into individually or through union representation, provide performers flexibility to negotiate for fair compensation, the sorts of moral rights articulated in the [WIPO Internet] treaties, and much more.”).

⁷³⁸ See, e.g., Authors Guild Initial Comments at 8 (As for contract law, it is not a solution to moral rights.”); CVA Initial Comments at 9 (“Unfortunately, most artists are lax or ill-informed about creating written contracts for the sale or

effective approach to moral rights cite flexibility, control, and certainty as benefits. For example, the American film industry has been using contracts to address moral rights at least as far back as the 1930s and continues to do so today.⁷³⁹ The music industry has also spoken on the value of contracts as a means of addressing attribution and integrity interests.⁷⁴⁰ The importance of such flexibility in the publishing world has been noted each time the United States has discussed the possibility of statutorily recognizing moral rights.⁷⁴¹ The American Association of Publishers recently noted that contracts give “authors and publishers the necessary flexibility to agree on how to address” attribution and integrity.⁷⁴² Indeed, one authors group pointed out that contracts

licensing of their work); CRA Reply Comments at 3 (“The CRA supports the argument of the Authors Guild, Inc. that contracts provide no solution given the imbalance of negotiating power between authors and publishers.”); IFJ Initial Comments at 9 (Contract provisions cannot substitute for enforceable statutory moral rights.”); SCL Initial Comments at 3 (“The Society of Composers & Lyricists disagrees with the William Strauss report [STUDY NO. 4: THE MORAL RIGHT OF THE AUTHOR (1959)] that states a patchwork of common laws, such as torts and contracts is sufficient to cover moral rights protections for an author.”).

⁷³⁹ See MPAA Initial Comments at 2 (“Through the existing legal framework and myriad contractual agreements, producers obtain the valuable services of individual creators as well as the rights necessary to exploit the finished product in accordance with their business judgment.”); Letter from Wallace McClure, Chairman, Inter-Departmental Comm. on Copyright, to Sen. F. Ryan Duffy (May 18, 1935) (on file with the Wisconsin Historical Society) (explaining that film studios paid for the right to modify a work when licensing the work from author).

⁷⁴⁰ See A2IM Reply Comments at 4 (“Many independent record agreements, in all their different iterations, already incorporate and address attribution and integrity rights.”); RIAA Reply Comments at 2 (“[C]ontracts between artists and record labels routinely include provisions that address attribution.”).

⁷⁴¹ See 1987 BCIA Hearings at 319 (additional material submitted by Kenneth W. Dam, Vice President, Law and External Affairs, IBM) (“Preventing authors from entering binding contractual arrangements . . . could significantly impair commercial flexibility and make publishers unwilling to invest in works which may require modification to be marketed effectively. ‘This would not only have the result of restricting the market for artistic works in general, but would especially harm those authors who are more than willing to allow changes to be made in their work to render them marketable. The consequence to the public at large would be a reduced access to intellectual and artistic works.’”) (quoting Comment, *Protection of Artistic Integrity: Gilliam v. American Broadcasting Companies*, 90 HARV. L. REV. 473, 479 (1976)). In December of 1937, Senator F. Ryan Duffy received at least five letters with identical requests for reservations to the Berne Convention. One of the included requests was for a reservation that would protect the sanctity of contracts with respect to moral rights. Each letter included the same reservation language: “The safeguarding of contractual rights between the producers and users of copyrightable material unfettered by the theory ‘le droit moral.’” Letter from Cass Canfield, President, Harper & Bros. Publishers, to Sen. F. Ryan Duffy (Dec. 15, 1937) (on file with the Wisconsin Historical Society); Letter from Alfred A. Knopf, President, Alfred A. Knopf, Inc., to Sen. F. Ryan Duffy (Dec. 21, 1937) (on file with the Wisconsin Historical Society); Letter from Frank L. Dodd, President, Dodd, Mead & Co., Inc. Publishers, to Sen. F. Ryan Duffy (Dec. 16, 1937) (on file with the Wisconsin Historical Society); Letter from John Macrae, President, E.P. Dutton & Co., Inc. Publishers, to Sen. F. Ryan Duffy, (Dec. 14, 1937) (on file with the Wisconsin Historical Society); Letter from Frederic G. Mulcher, Chairman, Copyright Comm., R. R. Bowker Co. Publishers, to Sen. F. Ryan Duffy, Comm. on Foreign Relations (Dec. 14, 1937) (on file with the Wisconsin Historical Society).

⁷⁴² AAP Initial Comments at 5.

can assist in protecting moral rights.⁷⁴³ A contract concerning a work of authorship may take account of such aspects as how to include attribution in different formats, the author's desires, and, as the RIAA pointed out, "the commercial context in which those works will be distributed, promoted and otherwise exploited."⁷⁴⁴ In some sectors, authors and publishers can also reach agreement after publication or distribution to make changes to previously agreed terms.⁷⁴⁵

Over the past century there have been many examples of contracts allowing authors and users of works to make mutually beneficial arrangements on attribution and modifications. Collective bargaining agreements in the film industry have particularly been highlighted for their role.⁷⁴⁶ When testifying before the House of Representatives in 1936, Edwin P. Kilroe, Chairman of the Copyright Committee of the Hays organization (predecessor to the Motion Picture Association of America ("MPAA")), emphasized both the importance of being able to alter a story on which a film is based and the role contracts play in allowing authors to limit the rights of the studio to alter the underlying work.⁷⁴⁷ Fifty years later, in testimony before the House, the Directors' Guild expressed similar sentiments regarding the importance of contracts in preserving rights against alteration when it discussed its opposition to the practice of colorization without director consent.⁷⁴⁸

The author-dictated and author-chosen contract models have offered additional opportunities for authors to preserve their moral rights. Authors have found value in the ability to use Creative Commons licenses to explicitly require attribution in the manner they desire or to

⁷⁴³ See Authors Alliance Initial Comments at 8 ("Authors can currently realize attribution, integrity, and other non-economic authorial rights by harnessing their copyrights and insisting on license terms that vindicate those rights."). *But see* IFJ Initial Comments at 9 (asserting that moral rights "must be unwaivable to be effective, stating that "larger publishers and broadcasters routinely impose waivers in contracts presented without the possibility of negotiation").

⁷⁴⁴ RIAA Reply Comments at 2–3.

⁷⁴⁵ This includes handling issues such as removing an author's attribution at the request of an author. The Committee on Publication Ethics has published guidelines to help publishers navigate such requests. See *Changes in Authorship – (d) Request for Removal of Author after Publication*, COMM. ON PUBL'N ETHICS, <https://publicationethics.org/files/Autorship%20D.pdf> (note that in this example requested removal is done at discretion of the publisher).

⁷⁴⁶ See DGA/WGAW Initial Comments at 4–6 (noting that directors' attribution and full control of the integrity of the "director's cut" are preserved in collective bargaining agreements, but that it is production companies who "have ultimate authority over the final product of the project"); MPAA Reply Comments at 5–6; SAG-AFTRA Initial Comments at 9–11.

⁷⁴⁷ *Revision of Copyright Laws Hearings* at 1013 (statement of Edwin P. Kilroe, Attorney, Twentieth Century Fox Film Corporation and Movietone, Inc.) (reading a statement by the Board of Trade of England).

⁷⁴⁸ See *1987 BCIA Hearings* at 418–19 (written statement of the Directors Guild of America) (expressing concerns that directors who did not have such provisions in their contracts had no legal means to object to alterations of which they did not approve).

limit modifications of works.⁷⁴⁹ These licenses, which are new since the United States joined the Berne Convention, can protect attribution and integrity interests. Authors can easily choose the license they would like through the Creative Commons license chooser tool without the cost of engaging a lawyer to write a license.⁷⁵⁰ But these pre-made, author-chosen licenses are not appropriate in all instances, limiting their utility as mechanisms for protection of attribution and integrity interests for many artists. For example, almost all of these licenses allow a user to redistribute the original work for noncommercial purposes, and thus use of a Creative Commons license would not be appropriate for an author wishing to maximize compensation for their work.⁷⁵¹ Instead, such licenses are more appropriate for authors who either do not want to monetize their work at all, or who only want to monetize *some* rights in their work, such as the creation of derivative works⁷⁵² or commercial uses of their original work.⁷⁵³ In the latter case, users and authors would still need to negotiate a separate license for the creation of derivative works or for commercial uses of the original work. For this reason, author-chosen licensing

⁷⁴⁹ See Authors Alliance Initial Comments at 8; PK Initial Comments at 1. Creative Commons is an international nonprofit organization founded in 2001 with the goal of creating content licensing options between full copyright and the public domain. See Hal Plotkin, *All Hail Creative Commons / Stanford Professor and Author Lawrence Lessig Plans a Legal Insurrection*, S.F. GATE (Feb. 11, 2002), <https://www.sfgate.com/news/article/All-Hail-Creative-Commons-Stanford-professor-2874018.php>.

⁷⁵⁰ The Creative Commons license chooser is available at <http://creativecommons.org/choose>. It walks licensors through two questions to help them find the appropriate license for how they would like their work to be used: “Allow adaptations of your work to be shared? Allow commercial uses of your work?”

⁷⁵¹ See ASJA Initial Comments at 7; Mira T. Sundara Rajan, Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 12 (May 15, 2017) (“Sundara Rajan Reply Comments”); NWU-SFWA Joint Initial Comments at 9–10.

⁷⁵² The two NoDerivatives licenses allow a licensee to “produce and reproduce, but not Share, Adapted Material.” These two licenses are Attribution-NoDerivatives (BY-ND) and Attribution NonCommercial-NoDerivatives (BY-NC-ND). See *Attribution-NoDerivatives 4.0 International*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nd/4.0/legalcode> (last visited Mar. 22, 2019) (section 2(a)(1)(B) of the license terms lays out this part of the scope); *Attribution-NonCommercial-NoDerivatives 4.0 International*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nc-nd/4.0/legalcode> (last visited Mar. 22, 2019) (section 2(a)(1)(B) of the license terms lays out this part of the scope).

⁷⁵³ The three noncommercial licenses all require attribution and do not allow any uses “primarily intended for or directed towards commercial advantage or monetary compensation.” They are: BY-NC (Attribution NonCommercial); BY-NC-SA (Attribution NonCommercial ShareAlike), which also requires that any derivative works be licensed under the same or a compatible license; and BY-NC-ND (Attribution, NonCommercial NoDerivatives), which prohibits sharing derivative works. See *Attribution-NonCommercial 4.0 International*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nc/4.0/legalcode> (last visited Mar. 22, 2019) (sections 1(i) and 2(a) lay out this information); *Attribution-NonCommercial-ShareAlike 4.0 International*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nc-sa/4.0/legalcode> (last visited Mar. 22, 2019) (sections 1(k) and 2(a) lay out this information); *Attribution-NonCommercial-NoDerivatives 4.0 International*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nc-nd/4.0/legalcode> (last visited Mar. 22, 2019) (sections 1(h) and 2(a) lay out this information).

models such as the Creative Commons licenses are best suited for protecting attribution and integrity interests in connection with non-economically compensated uses

Author-dictated licenses can also preserve the moral right of integrity.⁷⁵⁴ For example, license terms of the Regular License on design platform Envato Market allow waiver of some aspects of the integrity right by allowing licensees to remove unwanted elements from works that they license, but preserve other aspects by prohibiting the extraction and use of a single element of the work for use on its own.⁷⁵⁵ For example, a website template licensee can delete icons from the template, but the icons cannot be removed and used in other templates.⁷⁵⁶ In this way, author-dictated licenses give authors more control over their attribution and integrity interests, but the non-negotiated nature of these licenses means fewer options for authors and users to come to agreement on other potential provisions.

b) Concerns about Protecting Moral Rights Through Contract

Concerns over using contracts and other private agreements to protect moral rights tend to focus on two things: privity and alienability. The privity requirement for contractual relationships affects whether negotiated moral rights protections will be preserved with downstream uses. Alienability affects the waiving of copyright rights that one party to an agreement may require. The concern is that rights may be waived in licensing due to lack of bargaining power rather than true desire to part with such rights. Additionally, of course, private agreements are purely voluntary and do not provide legal baselines that affect all parties regardless of bargaining power, as would statutory moral rights.

(1) Privity

A contract cannot bind anyone who is not a party to the contract. The Creative Commons licenses address this issue by structuring their licenses so that every down-stream user licenses from the original licensor, thus creating new privity between new parties.⁷⁵⁷ But for licenses

⁷⁵⁴ Cf. U.S. COPYRIGHT OFFICE, SOFTWARE-ENABLED CONSUMER PRODUCTS 4 n.26 (2016), available at <https://www.copyright.gov/policy/software/software-full-report.pdf> (discussing the limits that software licensees may encounter, such as how devices with licensed software can be used).

⁷⁵⁵ See *Regular License*, ENVATOMARKET, <http://audiojungle.net/licenses/terms/regular> (last visited Mar. 22, 2019). Envato Market describes itself as “a collection of themed marketplaces, where creatives sell digital assets.” For example, users can purchase Photoshop actions, video footage, WordPress themes, and plugins. See *Envato Market*, ENVATO, <http://envato.com>.

⁷⁵⁶ See *Regular License*, ENVATOMARKET, <http://audiojungle.net/licenses/terms/regular> (last visited Mar. 22, 2019).

⁷⁵⁷ See, e.g., *Attribution-NonCommercial-ShareAlike 4.0 International*, CREATIVE COMMONS, <https://creativecommons.org/licenses/by-nc-sa/4.0/legalcode> (last visited Mar. 22, 2019) (section 2(a)(5)(A) of the license terms states that in terms of downstream recipients “[e]very recipient of the Licensed Material automatically receives an offer from the Licensor to exercise the Licensed Rights under the terms and conditions of this Public License”).

where the terms are negotiated between specific parties, privity remains a concern.⁷⁵⁸ For example, if Party A licenses a work to Party B with a requirement that all uses of the work include attribution, and Party C uses the work without a license, there is no requirement for Party C to obey Party B's promise to attribute the work to Party A. In the publishing world, this can happen when digital pirates circulate misattributed, unauthorized copies of books; the pirates have no contractual obligation to the author that can be enforced.⁷⁵⁹

However, agreements may specify that certain rights carry through to any sublicensees. For example, if Party A licenses a work to Party B with a requirement that all uses of the work include attribution, Party A can also require that any sublicenses issued by Party B also include this term. When Party C sublicenses the work from Party B, Party A's attribution requirement will be preserved. Record labels routinely do this when licensing works to third parties.⁷⁶⁰

(2) Alienability

Attribution and integrity, like the right of reproduction or the ability to exercise a right in a certain jurisdiction, are sticks in the larger bundle of rights that an author can exchange and trade.⁷⁶¹ As traditionally conceptualized in many common law countries, moral rights are alienable in the sense that they are waivable—that is they can be traded away—but not transferable except for devolution to heirs upon death of the author. Authors generally cannot sell the right to sue for lack of attribution or for modifications to which they object. Moral rights may be waived either through non-inclusion or through explicit waiver language.⁷⁶² Making moral rights inalienable would remove them from the contracting process entirely.

On one hand, the ability to waive moral rights is beneficial because it creates market efficiency by allowing each author and user to assign their own value to the rights being

⁷⁵⁸ See, e.g., Authors Guild Initial Comments at 9; CVA Initial Comments at 9; DGA/WGAW Initial Comments at 7.

⁷⁵⁹ See Authors Guild Initial Comments at 9.

⁷⁶⁰ See RIAA Reply Comments at 2.

⁷⁶¹ See, e.g., CCIA Initial Comments at 5 (noting that authors can address contract issues by “seeking greater consideration in exchange for foregoing attribution, or receiving less consideration where the specific use makes attribution desirable”); Kernochan Center Initial Comments at 12 (“[A]n author may have to trade attribution for other payments or protections she might otherwise seek.”).

⁷⁶² ASJA Initial Comments at 2 (“Recently, ASJA members, many of whom write for print and online magazines and other publications on a freelance basis, are noting something new in their contracts with publishers: clauses saying they waive any moral rights claims to their work or the management of it.”).

exchanged.⁷⁶³ On the other hand, proponents of making moral rights inalienable argue that allowing waiver can result in a default status quo of waiver in every agreement.⁷⁶⁴

Proponents of maintaining the alienability of moral rights stress that this keeps current contracts from being disturbed⁷⁶⁵ and allows future agreements to account for differing circumstances.⁷⁶⁶ They point out that prohibiting waiver by making moral rights inalienable impedes the freedom to contract. As both the National Music Publishers' Association and the American Association of Independent Music opine, a clause waiving moral rights "is simply too much of a material term of a contract" for statutory override.⁷⁶⁷ Additionally, authors sometimes want to release their works directly into the public domain or with as few strings as possible.⁷⁶⁸ The ability to waive moral right helps facilitate such action.⁷⁶⁹

⁷⁶³ See, e.g., Christopher Buccafusco & Christopher Jon Sprigman, Joint Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 1 (May 28, 2017) ("Buccafusco-Sprigman Joint Initial Comments") (explaining economic efficiency of contract negotiations and the findings of their empirical research that "[t]he current regime [where the default rule is to not provide attribution] allows authors to request attribution during licensing, and, in doing so, it increases the likelihood that licenses for productive uses of works will take place"); CCIA Initial Comments at 5 (noting that contracting for moral rights in mutual and voluntary agreements "results in optimal outcomes for both parties"); NMPA Reply Comment at 4 (pointing out that the moral rights patchwork, which includes contracts, "forms a healthy moral rights jurisprudence that . . . brings certainty and efficiency to enforcement of these rights in the marketplace").

⁷⁶⁴ See Authors Alliance Initial Comments at 9 (discussing the pros and cons of waiver and pointing out that "easy waivability is also a matter of concern as this may negate or weaken the benefit that statutory recognition of noneconomic authorial rights would otherwise provide authors in their negotiations"); IFJ Initial Comments at 9 (noting that in the United Kingdom and Ireland, jurisdictions that allow waiver of moral rights, "larger publishers and broadcasters routinely impose waivers in contracts presented without the possibility of negotiation").

⁷⁶⁵ See BMI Reply Comments at 2 ("So long as moral rights are waivable, then such rights are not likely to upset current contract practices."); NMPA Reply Comment at 7 (asserting that maintaining contractual moral rights waivers is important because "[a]dopting a moral rights law that would override carefully negotiated contractual terms will cause significant disruption and uncertainty, depriving the publisher of an essential bargained-for term that may severely limit their rights to fully exploit the musical work, engendering a reciprocal negative effect on its songwriter").

⁷⁶⁶ See Sundara Rajan Reply Comments at 13 (discussing how waivability of moral rights can address needs of various industries).

⁷⁶⁷ NMPA Reply Comment at 7; A2IM Reply Comments at 4.

⁷⁶⁸ See, e.g., Authors Alliance Initial Comments at 9 (discussing the pros and cons of waiver and noting that "[o]n the one hand, it is important that these rights be waivable such that authors can dedicate their works to the public domain with 'no strings attached'").

⁷⁶⁹ While the licenses in the Creative Commons license suite preserve moral rights, Creative Commons also has a legal tool designed to place works directly into the public domain. This tool, called CC0 is designed to waive all copyright and related rights. However, as discussed above, moral rights are unwaivable in many foreign jurisdictions—or at least the ability to waive them is unclear. The CC0 tool addresses this issue by with a fallback royalty-free, non-transferable license and an affirmation not to enforce moral rights. See *CC0 1.0 Universal*, CREATIVE COMMONS,

Proponents of making moral rights inalienable explain that when parties have unequal negotiating positions, authors may be forced to trade rights they do not really want to trade in exchange for any exploitation of their work.⁷⁷⁰ For example, the American Society of Journalists & Authors points out that the majority of freelance journalists are required to sign contracts waiving any moral rights as a condition for obtaining a writing job; there is no negotiation on this point.⁷⁷¹ In addition, in the case of joint works, because any single coauthor may wholly license a coauthored work, each coauthor of a work has the power to use as bargaining chips the rights of all the authors.⁷⁷² Some industries have developed norms for addressing situations in which one coauthor may affect the attribution or integrity of other coauthors.⁷⁷³ Proponents of making moral rights explicitly inalienable stress that allowing waiver means that contracts would frequently default to waiver, which would significantly weaken any statutorily granted rights.⁷⁷⁴

<https://creativecommons.org/publicdomain/zero/1.0/legalcode> (last visited Mar. 22, 2019). In addition, Creative Commons has introduced a system for including metadata about the author, title of the work, and the jurisdiction where the work is being offered under CC0. Embedding the information also requires affirmative consent to release the work under CC0. See *CC0 Waiver*, CREATIVE COMMONS, <http://creativecommons.org/choose/zero/waiver> (last visited Mar. 22, 2019).

⁷⁷⁰ Cf. Authors Alliance Initial Comments at 8 (“In practice, however, some authors currently may not feel that they have sufficient bargaining power to insist upon these terms, or may have assigned their copyrights long ago when such practices were not widespread.”); CVA Initial Comments at 2 (Mar. 28, 2017) (“[V]isual artists are at a disadvantage in the negotiation process with a well-armed client.”); SCL Initial Comments at 4 (“[I]n the absence of collective bargaining, the AV composer has limited negotiation power with respect to rights.”); Sundara Rajan Reply Comments at 10 (“The ability to develop provisions on moral rights in copyright contracts is typically limited by the unequal bargaining power of the parties involved.”). But see, NMPA Reply Comment at 6 (“Songwriters gain much more through contractual bargaining . . . than they would through a one size fits all statutory solution.”).

⁷⁷¹ ASJA Initial Comments at 3 (“Since publishers are now inclined to have writers contractually waive moral rights before the fact, and most writers must sign contracts in order to eat, American writers have no moral rights. A right one can’t access is not possessed.”).

⁷⁷² The Copyright Act defines a joint work as one “prepared by two or more authors with the intent that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101. Each contributor of a joint work owns an undivided interest in the entire work, so, while there are nuances, the general rule is that a single contributor may license the work without the authorization of the other contributors. See 1 NIMMER ON COPYRIGHT § 6.10[A][2].

⁷⁷³ For example, the Committee on Publication Ethics has produced a flow chart for providing guidance to academic and scholarly publishers for when a coauthor requests removal of their name from a paper. The actions the publisher should take include checking with all other coauthors that they agree with such removal. See *Changes in Authorship – (d) Request for Removal of Author After Publication*, COMM. ON PUBL’N ETHICS, <https://publicationethics.org/files/Authorship%20D.pdf>.

⁷⁷⁴ See NWU-SFWA Joint Initial Comments at 8 (stating that the “disparity in bargaining power . . . would lead, in practice, to the inclusion of blanket waivers of moral rights”).

Others argue not that moral rights should be inalienable, but that they should be statutory so that their exclusion from a contract must be explicit. One commenter maintains that, were moral rights more explicitly protected in U.S. law, contractual clauses protecting the right of attribution and integrity would be more common.⁷⁷⁵ Empirical research submitted in connection with this study supports this argument, showing that authors place greater value on moral rights, and are thus more likely to want them included in contracts, when they already hold these rights and are negotiating to sell (trade them away) rather than to buy (obtain them).⁷⁷⁶ The study found that affirmative waiver—trading away of rights explicitly granted—has a higher value to artists than waiver by non-inclusion—not requiring the inclusion of rights otherwise not granted.⁷⁷⁷ As discussed above, this affirmative waiver approach is the one taken by VARA.⁷⁷⁸

Given the concerns over both alienability and inalienability of moral rights, and the capability of contracts to address privity issues with restrictions on sublicensing, the Office recommends that any potential changes to the moral rights patchwork not upset the existing contractual order. United States copyright law rarely interferes with private agreements, and this general principle should be maintained with regard to moral rights.

(3) Concerns Unique to Works Made for Hire

Works made for hire present a special set of concerns because under the Copyright Act, a work-made-for-hire relationship does not involve transferring rights in a work; it instead means that the employer or commissioning party is the legal author of the work from its inception.⁷⁷⁹ This brings up two particular issues: whether works-made-for-hire should have explicit statutory moral rights attach to them, and, if so, who should be deemed the author for the purposes of those moral rights.

In the comments received for this study, some argued that moral rights should not attach to works made for hire because the works, no longer having an explicit connection to the creator, do not represent part of the creator's personality.⁷⁸⁰ Others suggested that authorship for the

⁷⁷⁵ Authors Alliance Initial Comments at 4.

⁷⁷⁶ Buccafusco-Sprigman Joint Initial Comments at 2–5 (“photographers valued the same right somewhere between *four or five times more* when they were contemplating selling it versus when they were contemplating buying it”).

⁷⁷⁷ Buccafusco-Sprigman Joint Initial Comments at 5.

⁷⁷⁸ VARA provides for very specific waiver “if the author expressly agrees to such waiver in a written instrument signed by the author.” 17 U.S.C. § 106A(e)(1). That signed instrument must identify the work and its uses, and will only apply to the specified work and uses.

⁷⁷⁹ See 17 U.S.C. § 201(b).

⁷⁸⁰ See BMI Reply Comments at 2 (explaining that “a corporate entity does not have the same personal creative relationship and interest in the work as does the creator of a work”); CVA Initial Comments at 8.

purpose of moral rights should attach to the creator while economic rights continue to the employer or commissioning party under the work-made-for-hire doctrine.⁷⁸¹

Congress has frequently reviewed the work-made-for-hire doctrine since it was first codified in the 1909 Act.⁷⁸² In the ensuing century-plus, it has reviewed comments ranging over the same spectrum as those received for this study, from work-made-for-hire is best as-is, to suggestions for changes to how the doctrine is applied, to overall skepticism of the concept in general.⁷⁸³ Congress has consistently decided that work-made-for-hire is an important element of U.S. copyright law, as evidenced by the 1909 Act and the 1976 Act. As discussed, under the current work made for hire system, moral rights like rights of attribution and control over derivative works can be designated to either the actual creator or the legal author as appropriate. This flexibility is important and should be preserved.

6. Other Forms of Private Ordering

a) Plagiarism

Attribution is a long held fundamental norm in American society, one whose importance is instilled from a young age through an emphasis in education systems on proper attribution and citation.⁷⁸⁴ Some argue that such social and professional norms may do better to regulate attribution than any legal or statutory means, given the highly contextual nature of attribution

⁷⁸¹ See CVA Initial Comments at 5 (“The moral right of attribution should include works created by independent creators created under work made for hire contracts.”); FMC Reply Comments at 4 (“Attribution on works for hire would allow songwriters proper association with their creative endeavors.”); Music Creators Initial Comments at 3 (suggesting “[e]nactment of specific provisions of the US Copyright Act recognizing the right of attribution for the actual creative authors of copyrighted works (including creators of so-called ‘works made for hire’), notwithstanding any waiver of such rights by authors and authors for hire”); NWU-SFWA Joint Initial Comments at 13 (“Legislation is necessary to protect the moral rights of authors of ‘work for hire.’”).

⁷⁸² See, e.g., BORGE VARMER, STUDY NO. 13: WORKS MADE FOR HIRE AND ON COMMISSION (1958), reprinted in STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, U.S. SENATE, STUDIES 11–13, at 127–43 (Comm. Print 1960) (including history of consideration of the issue going back to 1906).

⁷⁸³ See generally *Definition of Work Made for Hire in the Copyright Act of 1976: Hearing on S. 2044 Before the S. Comm. on the Judiciary, 97th Cong.* (1982); *United States Copyright Office and Sound Recordings as Work Made for Hire: Hearing Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary, 106th Cong.* (2000).

⁷⁸⁴ See, e.g., *Academic Integrity Policy*, BROOKLYN TECHNICAL HIGH SCH., available at http://www.bths.edu/School_Policies/PDF_Policies/Academic%20Integrity%20-%20Plagiarism.pdf; *Student Academic Code of Ethics*, MONTGOMERY COUNTY CMTY. COLL., available at <https://www.mc3.edu/about-mccc/policies-and-procedures/student-academic-code-of-ethics>; *Harvard College Handbook for Students: Academic Integrity and Academic Dishonesty*, HARV. UNIV., available at <https://handbook.fas.harvard.edu/book/academic-integrity#two>; *Use of Others' Material*, ASSOCIATED PRESS, <https://www.ap.org/about/news-values-and-principles/telling-the-story/use-of-others-material>.

requirements.⁷⁸⁵ While a norms-based approach to plagiarism may not be legally enforceable, a violation of these norms may carry serious consequences.⁷⁸⁶ An act of plagiarism can result in a range of penalties including suspension or expulsion, firing, loss of tenure or revocation of a license, not to mention the reputational harm that can occur from a mere allegation of plagiarism.⁷⁸⁷

Such policies and norms concerning plagiarism can differ greatly across institutions and types of media. For instance, as discussed above, the film and television industry has a highly structured attribution system whereby guilds representing the various contributors to a work negotiate legally enforceable credit rights with production companies.⁷⁸⁸ Other sectors, such as academia and journalism utilize a less formal, more norms-based approach to attribution.⁷⁸⁹

⁷⁸⁵ See Jonathan Band & Matt Schruers, Dastar, *Attribution, and Plagiarism*, 33 AIPLA Q.J. 1, 11 (2005); see also Organization for Transformative Works (“OTW”), Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 2 (May 15, 2017) (“OTW Reply Comments”). But see National Writers Union (“NWU”) Reply Comments Submitted in Response to U.S. Copyright Office’s Jan. 23, 2017, Notice of Inquiry at 3 (May 15, 2017) (“NWU Reply Comments”) (noting that a norms-based approach has a limited effect as “ethics and professionalism are irrelevant to the activities of for-profit corporations”).

⁷⁸⁶ LCA Initial Comments at 2 (“Although these plagiarism policies are not directly enforceable in a court of law, breach of these policies can result in punishments far more severe than the remedies for copyright infringement.”).

⁷⁸⁷ See Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 174–75 (2002). Some high profile cases of plagiarism have involved severe consequences at academic and media institutions. See Dan Barry et al., *Correcting the Record; Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES (May 11, 2003), <https://www.nytimes.com/2003/05/11/us/correcting-the-record-times-reporter-who-resigned-leaves-long-trail-of-deception.html> (Jayson Blair of the *New York Times* resigned after it was discovered that he committed “frequent acts of journalistic fraud” over the course of several years, including plagiarizing material from other news articles); Marc Santora, *Columbia Professor in Noose Case Is Fired on Plagiarism Charges*, N.Y. TIMES (June 24, 2008), <https://www.nytimes.com/2008/06/24/nyregion/24columbia.html> (Professor Madonna Constantine was sanctioned and later terminated over charges of plagiarizing a former colleague and former students’ works); see also Maggie Haberman, *After Plagiarism Reports, Monica Crowley Won’t Take White House Job*, N.Y. TIMES (Jan. 16, 2017), <https://www.nytimes.com/2017/01/16/us/politics/monica-crowley-plagiarism.html> (detailing how a National Security Council candidate ultimately rejected the position after allegations of plagiarism surfaced).

⁷⁸⁸ See SAG-AFTRA Initial Comments at 10 (discussing SAG-AFTRA’s collective bargaining agreement provision on billing); Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 77 (2006) (“Fisk, *Credit*”).

⁷⁸⁹ Plagiarism policies in these areas can be articulated both by institutions themselves (see, e.g., *Academic Integrity*, COLUM. COLL., <http://www.college.columbia.edu/academics/academicintegrity>) as well as by professional organizations (see, e.g., *Statement on Standards of Professional Conduct (Updated 2019) – Plagiarism*, AM. HIST. ASS’N, <http://www.historians.org/jobs-and-professional-development/statements-standards-and-guidelines-of-the-discipline/statement-on-standards-of-professional-conduct#Plagiarism>; *The Washington Post Standards and Ethics*, AM. SOC’Y OF NEWS EDITORS, <http://asne.org/content.asp?contentid=335>).

Plagiarism policies and norms can also vary within industries. In academia, for example, attribution norms for multi-author works with large-scale collaborations, such as are common in scientific fields, tend to be more formal.⁷⁹⁰ Attribution norms can also vary depending on the medium used. For instance, radio or podcast journalism tend to have less stringent norms governing attribution than print or even television journalism, as giving attribution to every contributor on air may not be practical.⁷⁹¹ Similarly, in the art world, plagiarism and attribution norms can vary greatly depending on the medium and type of work, and these norms continue to evolve as new art forms emerge. While appropriation in art is nothing new,⁷⁹² as more extreme styles of appropriation art, such as those employed by Richard Prince and Jeff Koons, become normalized, perceptions of what it means to plagiarize another artist's work in the context of modern art are shifting.⁷⁹³

Thus, attribution tends to happen in large part due to the professional or societal consequences, rather than any legal consequences, of plagiarism. Norms regarding attribution and what it means to plagiarize have the advantage of being flexible and adaptable as technologies develop and new means of creating and distributing art and media emerge. The downside to such norms-based rules is that their very flexibility can result in inconsistent application, both across time and even within a given field. Still, it is unclear whether institutions or fields lacking more formal and longstanding policies and procedures regarding plagiarism would benefit from a statutory attribution right which could standardize these requirements. Any such right would, of course, need to account for the differences in attribution standards across different industries, professions, and modes of creative expression.

b) Voluntary Initiatives

In conjunction with legal and regulatory means of enforcing the rights to attribution and integrity, voluntary initiatives and private ordering also work to secure these rights for authors. In addition to the systems that have developed around plagiarism, many sectors are developing their own systems of attribution and industry norms that work to ensure proper attribution for creators without the use of formalized legal regimes. Similarly, many sectors are also pursuing

⁷⁹⁰ See Fisk, *Credit*, 95 GEO. L.J. at 83–84.

⁷⁹¹ This may be changing, though, as new technologies in broadcast journalism develop; many podcasts now give on-air credit to producers, editors, engineers, and even interns. See e.g., *Dear Sugars*, WBUR, <http://www.wbur.org/dearsugar> (each podcast concludes with a reading of the credits).

⁷⁹² See generally Timothy Anglin Burgard, *Picasso and Appropriation*, 73 ART BULL., 479 (1991) (discussing Pablo Picasso's use of appropriation).

⁷⁹³ See Jonathan Bailey, *Why So Many Photographers Hate Richard Prince*, PLAGIARISM TODAY (May 21, 2015), <http://www.plagiarismtoday.com/2015/05/21/why-so-many-photographers-hate-richard-prince>; Henri Neuendorf, *Jeff Koons Sued Yet Again Over Copyright Infringement*, ARTNET NEWS (Dec. 15, 2015), <http://news.artnet.com/art-world/jeff-koons-sued-copyright-infringement-392667>; see also Glendon Mellow, *How Plagiarized Art Sells for Millions*, SCI. AM. (Jan. 9, 2014), <http://blogs.scientificamerican.com/symbiartic/how-plagiarized-art-sells-for-millions>.

voluntary initiatives to help fill some of the gaps left by the moral rights patchwork in the United States.

Often, these voluntary initiatives are developed by companies looking to solve problems with content management in their respective industries. Over the past decade, such initiatives have become more common as creative industries grapple with maintaining effective means of providing attribution and preventing unlicensed uses in the digital age. For instance, in 2007, YouTube launched Content ID, one of the first large-scale content management systems.⁷⁹⁴ The Content ID system scans user-uploaded videos on YouTube against a database of files that have been submitted by rights holders participating in the program.⁷⁹⁵ Once a match has been identified, rights holders can then choose to block the video, monetize the video by running ads against it, or track the video's viewership statistics.⁷⁹⁶ Similar digital fingerprinting technologies are being employed by other content platforms, typically in attempts to combat online piracy.⁷⁹⁷ However, these content management technologies also help to combat misattribution, as well as alerting authors to instances where their work is being used without attribution. Additionally, by flagging unlicensed uses, these technologies can allow authors to assert their right of integrity by preventing or disabling uses of their work that modify or distort their original expression.

Several companies have also created their own content management databases in order to effectively match creative works to their author and/or rights holders. In 2016, SoundExchange launched its International Standard Recording Code ("ISRC") Search Site.⁷⁹⁸ Unique ISRC's are used to identify sound recordings.⁷⁹⁹ The ISRC Search Site provides users with access to

⁷⁹⁴ See Liz Gannes, *YouTube Finally Launches Video ID Tool*, GIGAOM (Oct. 15, 2007), <http://gigaom.com/2007/10/15/youtube-finally-launches-video-id-tool>.

⁷⁹⁵ *How Content ID works*, YOUTUBE, <http://support.google.com/youtube/answer/2797370>.

⁷⁹⁶ *Id.*

⁷⁹⁷ Other platforms have developed content matching technology similar to YouTube's. Scribd, a service that provides access to literary works and allows users to self-publish, established BookID to filter uploaded works. The program compares reference samples of works in their database with uploaded materials, and a matched upload is blocked. See *BookID*, SCRIBD, <https://www.scribd.com/copyright/bookid>. Audible Magic created filtering technology that is licensed to social media platforms. Audio and video files uploaded to the platform are matched against files registered with Audible Magic's database. If there is a match, the database relays to the platform ownership information and rules specifying how the owner wants the file to be used. The service is used by SoundCloud, Facebook, Vimeo, Twitch, and Dailymotion, among others. See *Copyright Compliance Service: Compliance Automation for Media Sharing Platforms*, AUDIBLE MAGIC, <http://www.audiblemagic.com/compliance-service/#how-it-works>.

⁷⁹⁸ *SoundExchange Launches Public Search Website with Access to Industry's Best ISRC Data*, SOUNDEXCHANGE (Mar. 8, 2016), <http://www.soundexchange.com/news/soundexchange-launches-public-search-website-with-access-to-industrys-best-isrc-data>.

⁷⁹⁹ See *About: What is an ISRC?*, INT'L STANDARD RECORDING CODE, <https://www.usisrc.org/about/index.html>. ISRCs are also used to identify music video recordings.

SoundExchange’s sound recording metadata linked to the ISRC identifier.⁸⁰⁰ While this data was previously available through other sources, SoundExchange’s creation of a single comprehensive online database allows more accessibility for artists, rights holders, digital music providers, and listeners to accurately identify sound recordings and locate their related metadata.

Similarly, in addition to their “Content ID” management system, YouTube also recently adopted the International Standard Name Identifier (“ISNI”) standard number for artists and songwriters.⁸⁰¹ ISNI’s are unique numbers used to identify the different creators associated with a work.⁸⁰² As a registration agency for ISNI, YouTube will request an identifier be assigned to all creators, including both performers and authors, whose works are uploaded to the platform.⁸⁰³ By adopting ISNI, YouTube is attempting to simplify the often complex process of associating a work with its author or rights owner. The adoption of one standard identifier across the platform will hopefully allow for more accurate attribution for creators.

Another voluntary initiative working towards ensuring proper attribution and permissible uses for authors is the Picture Licensing Universal System (“PLUS”) Registry. The PLUS Registry is run by the non-profit PLUS Coalition whose mission is to “facilitate the communication and management of image rights.”⁸⁰⁴ The Registry currently assigns a unique identifier to each creator, rights holder, distributor, licensor, and licensee, and in the future it will allow users to assign unique identifiers to images and manage the information and metadata associated with each image.⁸⁰⁵ Importantly, the PLUS Registry also tracks and allows users to update the rights information associated with an image, including current contact information for related creators, rightsholders, and institutions.⁸⁰⁶ This allows users to more easily track down rights holders in order to gain permission for a use or to properly attribute a work.

Companies are also utilizing new technologies, such as blockchain, to develop content management systems. Kodak has partnered with WENN Digital to launch KODAKOne, an

⁸⁰⁰ *SoundExchange Launches Public Search Website with Access to Industry’s Best ISRC Data*, SOUNDEXCHANGE (Mar. 8, 2016), <http://www.soundexchange.com/news/soundexchange-launches-public-search-website-with-access-to-industrys-best-isrc-data>.

⁸⁰¹ *YouTube Adopts ISNI ID for Artists & Songwriters*, ISNI (Jan. 22, 2018), <http://www.isni.org/content/youtube-adopts-isni-id-artists-songwriters>.

⁸⁰² *See International Standard Name Identifier (ISO 27729)*, ISNI, <http://www.isni.org/>. ISNIs can be used to identify researchers, investors, writers, artists, visual creators, performers, producers, publisher, and aggregators, among others.

⁸⁰³ *YouTube Adopts ISNI ID for Artists & Songwriters*, ISNI (Jan. 22, 2018), <http://www.isni.org/content/youtube-adopts-isni-id-artists-songwriters>.

⁸⁰⁴ *About: PLUS Coalition*, PLUS REGISTRY, <https://www.plusregistry.org/cgi-bin/WebObjects/PlusDB.woa/2/wo/OhbePL99GXyRRAWaE998dg/0.111.27>.

⁸⁰⁵ *Id.*

⁸⁰⁶ *See id.*

image rights management platform.⁸⁰⁷ KODAKOne is based on an encrypted, digital ledger of rights ownership, which photographers can use to manage rights information, receive payment for licensing their works on the platform, and sell their work on a secure blockchain platform.⁸⁰⁸ Similar to YouTube’s Content ID, KODAKOne also provides continual web crawling to monitor uses of images registered in the KODAKOne system.⁸⁰⁹ When an unlicensed use is detected, KODAKOne will offer infringers an easy payment system to legitimize their uses.⁸¹⁰

Along with voluntary initiatives to develop content management and identification systems, voluntary initiatives can also take the form of licensing agreements. For instance, Getty Images and Google have announced the formation of a multiyear global licensing partnership.⁸¹¹ While the agreement allows for Google to use Getty Images’ content in its products and services, the agreement also requires Google to modify its image search function to improve attribution of works.⁸¹² Other modifications Google will need to implement under this initiative include making copyright disclaimers more prominent and removing “view image” links to the original image URL.⁸¹³

While these types of voluntary initiatives may represent a step forward in filling the gaps left by the existing moral rights landscape in the United States, such initiatives cannot offer a comprehensive solution to the problems with attribution and integrity faced across creative industries. These initiatives are limited in applicability to the specific industry or platform at hand, and without formal legal requirements, enforceability is confined to a platform’s internal policies. Moreover, content management technologies—both voluntary and not—raise concerns about the role of automation in policing content platforms. Digital fingerprinting technologies can be prone to error, and automated matching systems cannot take into account permissible uses of copyrighted material such as fair use. The Office supports the on-going use and development of voluntary initiatives, but recognizes the need for the law to supplement and support these systems.

* * *

⁸⁰⁷ KODAK and WENN Digital Partner to Launch Major Blockchain Initiative and Cryptocurrency, KODAK (Jan. 9, 2018), http://www.kodak.com/US/en/corp/Press_center/KODAK_and_WENN_Digital_Partner_to_Launch_Major_Blockchain_Initiative_and_Cryptocurrency/default.htm.

⁸⁰⁸ *Id.*

⁸⁰⁹ *Id.* Note that, while YouTube’s Content ID only crawls YouTube.com, the KODAKOne system crawls the entire web.

⁸¹⁰ *See id.*

⁸¹¹ *See* Thuy Ong, *Google Will Make Copyright Disclaimers More Prominent in Image Search*, VERGE (Feb. 9, 2018), <http://www.theverge.com/2018/2/9/16994508/google-copyright-disclaimers-getty-images-search>.

⁸¹² *Id.*

⁸¹³ *See id.*

To briefly conclude, the Copyright Office believes that this Report demonstrates that the U.S. moral rights patchwork continues to provide important protections, despite there being room for improvement. The Copyright Act and other federal and state laws, including unfair competition and misappropriation, combined with a robust private ordering landscape, provide authors with a variety of means by which to protect and enforce their attribution and integrity interests. In particular, the Copyright Office believes that some of the voluntary initiatives in this space hold the potential to improve authors' ability to be persistently identified with their works. The Copyright Office believes that there is an important role for government to encourage and foster such voluntary initiatives, and will continue to look for opportunities to do so.

However, should Congress wish to strengthen the U.S. moral rights framework, this Study provides some guidelines for doing so, and the U.S. Copyright Office stands ready to assist Congress with this task. Our recommendations for amending the Lanham Act and VARA to better protect attribution and integrity interests, along with our suggestions regarding a new section 1202A and advice for considering a federal right of publicity, should provide Congress with several options for bolstering moral rights in the United States.

Specifically, the Office believes that the text of the Lanham Act and the reasoning of the *Dastar* decision leave open claims for mis- or non-attribution of creative works in the following cases: (i) claims for passing off or material distortions of a work; (ii) claims under § 43(a)(1)(B), and (iii) claims for repackaging of expressive works in a way that misattributes them. However, Congress may want to consider adopting a narrowly crafted amendment to section 43(a) of the Lanham Act that would expand the unfair competition protections to include false representations regarding authorship of expressive works.

Further, the Office has identified three targeted legislative improvements to the Visual Artists Rights Act, codified in title 17 as section 106A, for consideration by Congress. The first amendment would clarify that the exclusion for "commercial art" is limited to artworks both created pursuant to a contract and intended for commercial use. The second amendment would add language clarifying how courts should interpret the "recognized stature" requirement, requiring courts to consult a broad range of sources. The third amendment would provide that no joint author could waive another joint author's moral rights under VARA without the written consent of each affected author.

Regarding section 1202, Congress may want to consider adding a new cause of action as section 1202A to title 17, which would offer a creator the ability to recover civil damages upon proof that a defendant knowingly removed or altered copyright management information with the intent to conceal an author's attribution information. Such a dual intent standard would, in a manner similar to the existing section 1202, protect against liability for innocent or good faith removal of CMI, while giving creators a new tool to prevent deliberate efforts to conceal their authorship of a work.

Finally, Congress may also wish to consider adoption of a federal right of publicity law as a means to reduce the uncertainty and ambiguity created by the diversity of state right of

publicity laws. A federal right of publicity law, rather than preempting state laws, could serve as a floor for minimum protections for an individual's name, signature, image, and voice against commercial exploitation during their lifetime.

APPENDIX A

**PARTICIPANTS IN THE SYMPOSIUM ON
AUTHORS, ATTRIBUTION, AND INTEGRITY:
EXAMINING MORAL RIGHTS IN THE
UNITED STATES**

APRIL 18, 2016

Appendix A**Participants in the
Authors, Attribution, and Integrity:
Examining Moral Rights in the United States Symposium
April 18, 2016**

Complete Symposium agenda available at
<https://www.copyright.gov/events/moralrights/agenda.pdf>

1. Adler, Allan (Association of American Publishers)
2. Aistars, Sandra (George Mason University School of Law and Senior Scholar and Director of Copyright Research and Policy at the Center for the Protection of Intellectual Property)
3. Barblan, Matthew (Center for the Protection of Intellectual Property at the George Mason University School of Law)
4. Besek, June M. (The Kernochan Center for Law, Media and the Arts at Columbia Law School)
5. Bonneau, Sonya G. (Georgetown University Law Center)
6. Castle, Chris (Christian L. Castle, Attorneys)
7. Crabtree-Ireland, Duncan (SAG-AFTRA)
8. French, Alec (Thorsen French Advocacy, representing Directors Guild of America)
9. Gervais, Daniel J. (Vanderbilt Law School)
10. Gibbs, Melvin (Musician/composer)
11. Ginsburg, Jane C. (Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia University School of Law)
12. Levy, Paul Alan (Public Citizen Litigation Group)
13. Lowery, David (Songwriter/recording artist)
14. Marks, Steven M. (Recording Industry Association of America)
15. Martin, Scott (Paramount Pictures Corporation)

16. Miyashita, Yoko (Getty Images)
17. Mopsik, Eugene (American Photographic Artists)
18. O'Connor, Sean M. (University of Washington School of Law)
19. Osterreicher, Mickey H. (National Press Photographers Association)
20. Pierre-Louis, Stanley (Entertainment Software Association)
21. Robinson, Roxana (Authors Guild)
22. Schultz, Mark (Center for the Protection of Intellectual Property at the George Mason University Law School)
23. Schwartz, Eric J. (Mitchell Silberberg & Knupp LLP)
24. Spelman, Katherine C. (Lane Powell PC)
25. Turow, Scott (Author)
26. Wolfe, Michael (Authors Alliance)
27. Wolff, Nancy E. (Cowan, DeBaets, Abrahams & Sheppard LLP)
28. Yu, Peter K. (Texas A&M University School of Law)

APPENDIX B

**NOTICE OF INQUIRY: STUDY ON THE
MORAL RIGHTS OF ATTRIBUTION AND
INTEGRITY**

SUMMARY: In accordance with the provisions of the Federal Advisory Committee Act (FACA), and after consultation with the General Services Administration, the Secretary of Labor is renewing the charter for the Maritime Advisory Committee for Occupational Safety and Health. The Committee will better enable OSHA to perform its duties under the Occupational Safety and Health Act (the OSH Act) of 1970. The Committee is diverse and balanced, both in terms of segments of the maritime industry represented (*e.g.*, shipyard employment, longshoring, and marine terminal industries), and in the views and interests represented by the members.

FOR FURTHER INFORMATION CONTACT: Amy Wangdahl, Director, Office of Maritime and Agriculture, Directorate of Standards and Guidance, U.S. Department of Labor, Occupational Safety and Health Administration, Room N-3609, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693-2066.

SUPPLEMENTARY INFORMATION: The Committee will advise OSHA on matters relevant to the safety and health of employees in the maritime industry. This includes advice on maritime issues that will result in more effective enforcement, training, and outreach programs, and streamlined regulatory efforts. The maritime industry includes shipyard employment, longshoring, marine terminal, and other related industries, *e.g.*, commercial fishing and shipbreaking. The Committee will function solely as an advisory body in compliance with the provisions of FACA and OSHA's regulations covering advisory committees (29 CFR part 1912).

Authority and Signature

Jordan Barab, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this notice pursuant to Sections 6(b)(1), and 7(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(b)(1), 656(b)), the Federal Advisory Committee Act (5 U.S.C. App. 2), Section 41 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941), Secretary of Labor's Order 1-2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR part 1912.

Signed at Washington, DC, on January 13, 2017.

Jordan Barab,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2017-01407 Filed 1-19-17; 8:45 am]

BILLING CODE 4510-26-P

LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2017-2]

Study on the Moral Rights of Attribution and Integrity

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of inquiry.

SUMMARY: The United States Copyright Office is undertaking a public study to assess the current state of U.S. law recognizing and protecting moral rights for authors, specifically the rights of attribution and integrity. As part of this study, the Office will review existing law on the moral rights of attribution and integrity, including provisions found in title 17 of the U.S. Code as well as other federal and state laws, and whether any additional protection is advisable in this area. To support this effort and provide thorough assistance to Congress, the Office is seeking public input on a number of questions.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on March 9, 2017. Written reply comments must be received no later than 11:59 p.m. Eastern Time on April 24, 2017. The Office may announce one or more public meetings, to take place after written comments are received, by separate notice in the future.

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments must be submitted electronically. Specific instructions for submitting comments will be posted on the Copyright Office Web site at <https://www.copyright.gov/policy/moralrights/comment-submission/>. To meet accessibility standards, all comments must be provided in a single file not to exceed six megabytes (MB) in one of the following formats: Portable Document File (PDF) format containing searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). All comments must include the name of the submitter and

any organization the submitter represents. The Office will post all comments publicly in the form that they are received. If electronic submission of comments is not feasible due to lack of access to a computer and/or the Internet, please contact the Office, using the contact information below, for special instructions.

FOR FURTHER INFORMATION CONTACT: Kimberley Isbell, Senior Counsel for Policy and International Affairs, by email at kisb@loc.gov or by telephone at 202-707-8350; or Maria Strong, Deputy Director for Policy and International Affairs, by email at mstrong@loc.gov or by telephone at 202-707-8350.

SUPPLEMENTARY INFORMATION:

I. Background

The term "moral rights" is taken from the French phrase *droit moral*, and generally refers to certain non-economic rights that are considered personal to an author.¹ Chief among these are the right of an author to be credited as the author of his or her work (the right of attribution), and the right of an author to prevent prejudicial distortions of the work (the right of integrity). These rights have a long history in international copyright law, dating back to the turn of the 20th century when several European countries included provisions on moral rights in their copyright laws.² A provision on moral rights was first adopted at the international level through the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") during its Rome revision in 1928.³ The current text of article 6*bis*(1) of the Berne Convention states: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."⁴

In contrast to the early adoption of strong moral rights protections in

¹ In this Notice, we use the general term "author" to include all creators, including visual artists and performers.

² See Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond* ¶¶ 10.03-.04, at 587-89 (2d ed. 2006).

³ See Mihály Ficsor, *World Intellectual Property Organization, Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* ¶ BC-6*bis*, at 44 (2003).

⁴ Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*(1), Sept. 9, 1886, as revised July 24, 1971, and as amended Sept. 28, 1979, S. Treaty Doc. No. 99-27 (1986).

Europe, the United States' experience with the concept of moral rights is more recent. The United States did not adopt the Berne Convention right away, only joining the Convention in 1989.⁵ At that time, the United States elected not to adopt broad moral rights provisions in its copyright law, but instead relied on a combination of various state and federal statutes to comply with its Berne obligations.⁶

In July 2014, the Subcommittee on Courts, Intellectual Property, and the Internet of the House Judiciary Committee held a hearing that focused in part on moral rights for authors in the United States as part of its broader review of the nation's copyright laws.⁷ At that hearing, the Chairman of the House Judiciary Committee, Representative Bob Goodlatte, noted that "we should consider whether current law is sufficient to satisfy the moral rights of our creators or, whether something more explicit is required."⁸ The Ranking Member of the Subcommittee, Representative Jerrold Nadler, also indicated his interest in a further evaluation of the status of moral rights in the United States, asking "how our current laws are working and what, if any, changes might be necessary and appropriate."⁹ Register of Copyrights Maria Pallante recommended further study of moral rights in her testimony before Congress at the end of the two-year copyright review hearings process,¹⁰ at which time the Ranking Member of the House Judiciary Committee requested that the Office undertake this study.¹¹ As part of the preparation for this study, the Copyright Office co-hosted a day-long symposium on moral rights in April 2016 in order to hear views about current issues in this area. The Office is now commencing a formal study on moral rights and soliciting public input.

⁵ Berne Convention Implementation Act of 1988, Public Law 100-568, 102 Stat. 2853 ("BCIA").

⁶ See discussion on the BCIA *infra* notes 15-23 and accompanying text.

⁷ See *Moral Rights, Termination Rights, Resale Royalty, and Copyright Term: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) ("Moral Rights Hearing").

⁸ *Moral Rights Hearing* at 4.

⁹ *Id.*

¹⁰ *Register's Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 34-35 (2015) (written statement of Maria A. Pallante, Register of Copyrights and Dir., U.S. Copyright Office) ("*Register's Perspective Hearing*").

¹¹ *Register's Perspective Hearing* at 49 (statement of Rep. John Conyers, Ranking Member, H. Comm. on the Judiciary).

A. Moral Rights in the United States Prior to Implementation of the Berne Convention in 1989

In the late 1950s, the Copyright Office and Congress reviewed the issue of moral rights as part of the larger, comprehensive review of the copyright laws leading to a general revision of the 1909 Copyright Act.¹² In support of the review, William Strauss completed a study for the Office entitled "The Moral Right of the Author" in 1959.¹³ The report found that U.S. common law principles, such as those governing tort and contract actions, "afford an adequate basis for protection of [moral] rights" and can provide the same protection given abroad under the doctrine of moral rights.¹⁴

Later, Congress considered the specific question of "whether the current law of the United States is sufficient, or whether additional laws are needed, to satisfy [Berne article 6bis's] requirements."¹⁵ The majority of those who testified before Congress argued against any change to U.S. law concerning an artist's right to control attribution or any alteration to his creation, stating that current U.S. law was sufficient.¹⁶ Indeed, WIPO Director General Dr. Árpád Bogsch explained to Congress that the United States did not need to make any changes to U.S. law to meet the obligations of article 6bis.¹⁷

¹² As part of the consideration for possible accession to the Berne Convention, the general review of the 1909 Act took more than 20 years and resulted in the 1976 Copyright Act.

¹³ See William Strauss, *Study No. 4: The Moral Right of the Author* (1959), in Staff of S. Comm. on the Judiciary, 86th Cong., Copyright Law Revision: Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, United States Senate: Studies 1-4, at 109 (Comm. Print 1960).

¹⁴ Strauss at 142. The report rejected the idea of an "irreconcilable breach between European and American concepts of protection of authors' personal rights," instead concluding that U.S. and European courts generally arrived at the same results in upholding the same rights or limitations on those rights, just in different ways. *Id.* at 141-42.

¹⁵ H.R. Rep. No. 100-609, at 33 (1988).

¹⁶ See S. Rep. No. 100-352, at 6 (1988); H.R. Rep. No. 100-609, at 33 (1988).

¹⁷ See H.R. Rep. No. 100-609, at 37 (1988); S. Rep. No. 100-352, at 10 (1988); see also Letter from Dr. Árpád Bogsch, Dir. Gen., World Intellectual Prop. Org., to Irwin Karp, Esq. (June 16, 1987), reprinted in *Berne Convention Implementation Act of 1987: Hearing on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 100th Cong. 213 (1987) ("In my view, it is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6bis of the Berne Convention. The requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute but also by common law and other statutes.").

Both the House and Senate Judiciary Committees accepted this conclusion,¹⁸ finding that U.S. law met the requirements outlined in the Berne Convention's article 6bis based on the existing patchwork of laws in the United States, including:

- Section 43(a) of the Lanham Act relating to false designations of origin and false descriptions, which could be applied in some instances to attribution of copyright-protected work.¹⁹

- The Copyright Act's provisions regarding protection of an author's exclusive rights in derivatives of his or her works;²⁰ limits on a mechanical licensee's rights to arrange an author's musical composition;²¹ and termination of transfers and licenses.²²

- State and local laws relating to publicity, contractual violations, fraud and misrepresentation, unfair competition, defamation, and invasion of privacy.²³

B. Subsequent Developments After the U.S. Implementation of the Berne Convention

Since the United States' implementation of the Berne Convention over 25 years ago, there have been a number of legal and technological developments affecting the scope and protection of moral rights. In 1990, Congress passed the Visual Artists Rights Act (VARA), codified at section 106A of the Copyright Act,²⁴

¹⁸ See S. Rep. No. 100-352, at 9-10 (1988); H.R. Rep. No. 100-609, at 37-38 (1988); see also S. Exec. Rep. No. 100-17, at 55 (1988) (to accompany S. Treaty Doc. No. 99-27 (1986)) (statement of John K. Uilkema on behalf of Am. Bar Ass'n before the S. Comm. on Foreign Relations) ("Whether greater or lesser moral rights per se should be the subject of legislative consideration in the United States is a question that is separate and apart from the Berne adherence compatibility question.").

¹⁹ See 15 U.S.C. 1125(a).

²⁰ See 17 U.S.C. 106(2).

²¹ See 17 U.S.C. 115(a)(2).

²² See 17 U.S.C. 203.

²³ See H.R. Rep. No. 100-609, at 34 (1988).

Contract law is particularly important for authors to control aspects of their economic and moral rights. For example, the collective bargaining agreements that govern the creation of major motion pictures often contain explicit requirements with regards to attribution for actors, writers, directors, and other guilds. Many copyright sectors that involve numerous authors and participants in the creative process, such as filmed entertainment, business and entertainment software, music production, and book publishing, also rely on both employment agreements and the work-for-hire doctrine to determine ownership issues, which in turn may include elements related to attribution and integrity.

²⁴ Visual Artists Rights Act (VARA) of 1990, Public Law 101-650, 104 Stat. 5128-29 (codified at 17 U.S.C. 106A). In the Report accompanying H.R. 2690 (Visual Artists Rights Act of 1990), the House Judiciary provided background information on the Berne Convention and moral rights, noting that the

which guarantees to authors of works of “visual arts” the right to claim or disclaim authorship in a work and limited rights to prevent distortion, mutilation, or modification of a work.²⁵ In contrast to how moral rights were often adopted elsewhere, with VARA, Congress identified specific instances in which the limited rights could be waived.²⁶ As part of the legislation, Congress also directed the Copyright Office to conduct studies on the VARA waiver provision and also on resale royalties.²⁷

In its 1996 report on the waiver provision, the Office concluded it could not make an accurate assessment of the impact of VARA’s waiver provisions because artists and art consumers were generally unaware of moral rights and recommended that in order for artists to take advantage of their legal rights under VARA, further education about moral rights in the United States would be necessary.²⁸ The Office also made observations about the implementation of moral rights obligations in other countries, finding that, of the laws reviewed by the Office, only the moral

rights laws of the United Kingdom and Canada contained express waiver provisions.²⁹

The Supreme Court’s 2003 Decision in *Dastar*

In 2003, some scholars began to question the strength of the U.S. patchwork of protection as a result of the U.S. Supreme Court’s ruling in *Dastar Corp. v. Twentieth Century Fox Film Corp.* (“*Dastar*”), which foreclosed some attribution claims under section 43(a) of the Lanham Act.³⁰ The Court unanimously rejected an interpretation of section 43(a) that would “require attribution of uncopyrighted materials.”³¹ Citing VARA, the Court said that when Congress has wanted to provide an attribution right under copyright law, “it has done so with much more specificity than the Lanham Act’s ambiguous use of ‘origin.’”³² The Court found that “origin of goods” is most naturally understood as referring to the source of a physical product, not the person or entity that originated the underlying creative content.³³ In a well-known sentence, Justice Scalia, writing for the Court, stated that permitting a section 43(a) claim for such misattribution “would create a species of mutant copyright law that limits the public’s ‘federal right to copy and to use’ expired copyrights.”³⁴

Some lower courts have read *Dastar* as a broad prohibition on applying federal trademark and unfair competition laws in the realm of copyright, regardless of whether the copyrighted work remains under the term of protection or has fallen into the public domain.³⁵ In contrast, some scholars have argued that the Court did not write federal trademark and unfair

competition law out of the patchwork entirely.³⁶

Rights Management Information and Moral Rights for Performers

Since implementation of the Berne Convention, the United States has joined two additional international treaties that address moral rights—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The WCT incorporates the substantive provisions of Berne, including those of article 6bis.³⁷ Article 5 of the WPPT expands the obligations of Contracting Parties to recognize the moral rights of attribution and integrity for performers with respect to their live performances and performances fixed in phonograms.³⁸ Furthermore, both the WCT and the WPPT include new obligations concerning rights management information (RMI).³⁹ These provisions protect new means of identifying and protecting works while also helping protect the rights of attribution and integrity.⁴⁰

The United States implemented its WCT and WPPT obligations via enactment of the 1998 Digital Millennium Copyright Act (“DMCA”),⁴¹ and signed as a contracting party to both treaties in 1999, three years before the

Congress at the time of the BCIA agreed that existing federal and state laws were sufficient to comply with the Berne Convention requirements, but that “adherence to the Berne Convention did not end the debate about whether the United States should adopt artists’ rights laws, and the Subcommittee on Courts, Intellectual Property, and the Administration of Justice continued its review of the issue in [hearings held] in June.” H.R. Rep. No. 101–514, at 8 (1990). Congress cited the “critical factual and legal differences in the way visual arts and audiovisual works are created and disseminated” in support of providing additional protections for visual artists. H.R. Rep. No. 101–514, at 9 (1990).

²⁵ See 17 U.S.C. 101 (definition of a “work of visual art”); § 106A(a)(1) (providing for the right of attribution); § 106A(a)(3) (providing for the right of integrity). Section 604 of VARA, codified at 17 U.S.C. 113, created special rules for removal of works visual art incorporated into buildings. Unlike Berne’s article 6bis, VARA’s protections only apply to works of visual art.

²⁶ See H.R. Rep. No. 101–514, at 18 (1990). VARA permits authors to waive these rights only if expressly agreed in a written instrument signed by the author. See 17 U.S.C. 106A(e).

²⁷ See Visual Artists Rights Act of 1990, Public Law 101–650, 608, 104 Stat. 5128, 5132 (1990). The Copyright Office’s 1992 study concluded there was insufficient economic and copyright policy justification to establish *droit de suite* in the United States. See U.S. Copyright Office, *Droit De Suite: The Artist’s Resale Royalty* xv (1992), http://www.copyright.gov/history/droit_de_suite.pdf. In 2013, the Copyright Office responded to a congressional request and issued a second report which examined the changes in law and practice regarding resale royalties, in both the United States and abroad, since the 1992 report. See U.S. Copyright Office, *Resale Royalties: An Updated Analysis* (2013), <http://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>.

²⁸ See U. S. Copyright Office, *Waiver of Moral Rights in Visual Artworks: Final Report of the Register of Copyrights* xiii, 186 (1996), <https://www.copyright.gov/reports/waiver-moral-rights-visual-artworks.pdf> (“Waiver of Moral Rights”).

²⁹ Waiver of Moral Rights at 183.

³⁰ 539 U.S. 23 (2003). *Dastar* involved the distribution of an edited version of a 1949 broadcast to which Twentieth Century Fox had owned the copyright but which it failed to renew, placing the work in the public domain. *Dastar* distributed copies of the edited series listing *Dastar* and its subsidiary as the producer and distributor of the edited work, rather than Fox. Fox sued for reverse passing off, claiming *Dastar* violated section 43(a) of the Lanham Act’s prohibition against false designation of origin.

³¹ *Id.* at 35.

³² *Id.* at 34.

³³ See *id.* at 31–32.

³⁴ *Id.* at 34 (internal quote marks omitted). The Supreme Court left open the possibility of a Lanham Act claim under section 43(a)(1)(B) where, in advertising for a copied work of authorship, the copier “misrepresents the nature, characteristics [or] qualities” of the work. *Id.* at 38.

³⁵ See, e.g., *Kehoe Component Sales Inc. v. Best Lighting Prods., Inc.*, 796 F.3d 576, 587 (6th Cir. 2015); *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 148–49 (5th Cir. 2004); *Zyla v. Wadsworth*, 360 F.3d 243, 251–52 (1st Cir. 2004); *Carroll v. Kahn*, No. 203–CV–0656, 2003 WL 22327299, at *5–6 (N.D.N.Y. Oct. 9, 2003).

³⁶ See, e.g., Jane C. Ginsburg, *Moral Rights in the U.S.: Still in Need of a Guardian Ad Litem*, 30 *Cardozo Arts & Ent. L.J.* 73, 83–87 (2012); Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap,”* 2007 *Utah L. Rev.* 659 (2007). At least one commenter has argued that not only do section 43(a)(1)(B) claims survive *Dastar*, but so do some section 43(a)(1)(A) claims. See Hughes at 692–95.

³⁷ See WIPO Copyright Treaty art. 1(4), Dec. 20, 1996, 2186 U.N.T.S. 121 (“WCT”); see also *Summary of the WIPO Copyright Treaty (WCT) (1996)*, WIPO, http://www.wipo.int/treaties/en/ip/wct/summary_wct.html.

³⁸ See WIPO Performances and Phonograms Treaty art. 5(1), Dec. 20, 1996, 2186 U.N.T.S. 203 (“WPPT”). Like the Berne Convention, the WPPT provides that the duration of protection shall be at least for the term of economic rights and shall be governed by national law. WPPT arts. 5(2)–(3).

³⁹ See WCT art. 12; WPPT art. 19. WCT article 12 and WPPT article 19 define rights management information to include identification of the author and owner and terms of use of the work or sound recording.

⁴⁰ See J. Carlos Fernández-Molina & Eduardo Peis, *The Moral Rights of Authors in the Age of Digital Information*, 52 *J. Am. Soc’y for Info. Sci. & Tech.* 109, 112 (2001) (explaining how the WIPO Internet Treaties’ rights management information provisions fit within the treaties and also are useful in protecting moral rights).

⁴¹ Digital Millennium Copyright Act (DMCA), Public Law 105–304, 103 Stat. 2860, 2863–76 (1998) (codified as amended at 17 U.S.C. 1201–1205). The WIPO Internet Treaties were submitted to Congress for advice and consent the previous year, and the Senate voted to approve the Treaties shortly before passage of the DMCA. See S. Treaty Doc. No. 105–17 (1997); 105 Cong. Rec. S12,972–73 (daily ed. Oct. 21, 1998).

treaties entered into force.⁴² Congress added a new chapter 12 to title 17, which contained two new provisions to implement the treaties—section 1201, which addresses technological protection measures, and section 1202, which protects rights management information (called copyright management information in U.S. law)⁴³—but did not make any additional changes, finding that “[t]he treaties do not require any change in the substance of copyright rights or exceptions in U.S. law.”⁴⁴

Section 1202 includes prohibitions on both providing false copyright management information (“CMI”), and removing or altering CMI.⁴⁵ In addition to facilitating the administration of an author’s or right holder’s economic rights, the CMI protections afforded by section 1202 may have implications for authors’ protection and enforcement of their moral rights.⁴⁶ However, two aspects of section 1202 may limit its usefulness as a mechanism to protect an author’s moral rights. First, to be liable under section 1202, a person who removes copyright management information must know both that they have caused its removal and that such removal is likely to cause others to infringe the work.⁴⁷ Second, while most

courts recognize section 1202 as protecting against any removal of attribution from works, a minority of courts have limited section 1202 to protect only against removal of attribution that is digital or part of an “automated copyright protection or management system.”⁴⁸

Recent International Developments

There have also been changes to the landscape of moral rights protection internationally since the U.S. acceded to the Berne Convention in 1989. The Copyright Office noted in its 1996 report *Waiver of Moral Rights in Visual Artworks* that, while statutory recognition of the commonly recognized moral rights—i.e., attribution and integrity—is the norm internationally, the strength of the moral rights laws varied among Berne members, even among those with the same basic legal systems.⁴⁹ For example, at the time of the Report the United Kingdom required an author or her heirs, in some cases, to assert the right of paternity and was generally considered to have adopted one of the more restrictive approaches to implementing moral rights.⁵⁰ However, ten years later, in 2006, the United Kingdom amended its moral rights provision by extending to qualifying performances the right to

attribution and the right to object to derogatory treatment of a work.⁵¹

The most recent international development on CMI and moral rights occurred four years ago at a Diplomatic Conference in Beijing where WIPO and its member states concluded a new treaty on audiovisual performances.⁵² Similar to the approach of the WPPT, the Beijing Treaty on Audiovisual Performances also contains provisions on CMI and moral rights for audiovisual performers.⁵³

Availability and Use of Licenses, Contracts, and State Laws

Another part of the patchwork upon which moral rights protection in the United States relies is state contract law, which allows authors to negotiate for protection of their rights of attribution and integrity through private ordering. Since the United States’ accession to the Berne Convention, a major change to this area has been the emergence of Creative Commons and its various licenses that have simplified licensing for all kinds of authors and users, large and small. The CC license suites have served to facilitate private ordering, including for individual authors that would not previously have been able to afford the services of a lawyer to create licenses to govern use of their works.⁵⁴

⁴² See *WCT Notification No. 10: WIPO Copyright Treaty: Ratification by the United States of America*, WIPO (Sept. 14, 1999), available at http://www.wipo.int/treaties/en/notifications/wct/treaty_wct_10.html; *WPPT Notification No. 8: WIPO Performances and Phonograms Treaty: Ratification by the United States of America*, WIPO (Sept. 14, 1999), available at http://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_8.html.

⁴³ The other sections of chapter 12 include sections 1203 and 1204, which set forth available civil remedies and criminal sanctions for violation of sections 1201 and 1202, and section 1205, which explicitly carves out federal and state laws affecting Internet privacy. 17 U.S.C. §§ 1203–1205.

⁴⁴ H.R. Rep. No. 105-551, pt. 1, at 9 (1998).

⁴⁵ The term “copyright management information” in the Copyright Act is seen as a synonymous term for “rights management information” as used in the WCT and WPPT. See S. Rep. No. 105–190, at 11 n.18 (1998) (“Rights management information is more commonly referred to in the U.S. as copyright management information (CMI).”).

⁴⁶ Section 1202 makes it an offense to “intentionally remove or alter any copyright management information,” which includes the name of a work’s author. 17 U.S.C. §§ 1202(b)(1), (c)(2). See Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 *Cardozo Arts & Ent. L.J.* 9, 11 (2001) (“The DMCA may contain the seeds of a more general attribution right. . . .”); see also Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 *B.U. L. Rev.* 41, 69–73 (2007).

⁴⁷ See 17 U.S.C. 1202(a)–(b); see also *Stevens v. Corelogic*, No. 14-cv-1158, 2016 WL 4371549, at *5, 6 (S.D. Cal. July 1, 2016) (“Under § 1202(b)(1), Plaintiffs must present evidence that [defendant] intentionally removed or altered CMI. . . .” and “[a]lthough Plaintiffs need not show actual infringement, the fact that there was none is relevant to Plaintiffs’ burden to show that

[defendant] had a reasonable ground to believe it was likely to happen.”).

⁴⁸ Compare *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 305 (3d Cir. 2011) (rejecting argument that the definition of CMI under section 1202 is “restricted to the context of ‘automated copyright protection or management systems’”), and *Williams v. Cavalli S.p.A.*, No. CV 14–06659–AB (JEMx), 2015 WL 1247065, at *3 (C.D. Cal. Feb. 12, 2015) (holding that “[t]he plain meaning of § 1202 indicates that CMI can include non-digital copyright information”), and *Leveefilm, Inc. v. Fox Sports Interactive Media, LLC*, 999 F. Supp. 2d 1098, 1101–02 (N.D. Ill. 2014) (noting that the majority of courts have rejected a requirement for CMI to be digital under section 1202), and *Fox v. Hildebrand*, No. CV 09–2085 DSF (VBKx), 2009 WL 1977996, at *3 (C.D. Cal. July 1, 2009) (“The plain language of the statute indicates that the DMCA provision at issue is not limited to copyright notices that are digitally placed on a work.”), with *Textile Secrets Int’l Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184, 1201 (C.D. Cal. 2007) (“[T]he Court [] cannot find that the provision was intended to apply to circumstances that have no relation to the Internet, electronic commerce, automated copyright protections or management systems, public registers, or other technological measures or processes as contemplated in the DMCA as a whole.”), and *IQ Grp., Ltd. v. Wiesner Publ’g, LLC*, 409 F. Supp. 2d 587, 597 (D.N.J. 2006) (holding that “[t]o come within § 1202, the information removed must function as a component of an automated copyright protection or management system”). The majority position seems to accord with statements from the legislative history. See, e.g., S. Rep. No. 105–190, at 16 (1998) (“CMI need not be in digital form, but CMI in digital form is expressly included.”).

⁴⁹ See *Waiver of Moral Rights* at 53.

⁵⁰ See *Waiver of Moral Rights* at 47–51, 53.

⁵¹ See *Performances (Moral Rights, etc.) Regulations 2006*, SI 2006/18, arts. 5–6 (UK).

⁵² See *Beijing Treaty on Audiovisual Performances*, June 24, 2012, 51 I.L.M. 1214 (2012) (“Beijing Treaty”).

⁵³ See *Beijing Treaty art. 5 (“Moral Rights”)*, art. 16 (“Obligations Concerning Rights Management Information”). Negotiations to conclude this treaty took more than a decade, with a major point of contention involving the provision on contractual transfers. See *Beijing Treaty art. 12; see also* Press Release, WIPO, *WIPO Diplomatic Conference Opens in Beijing to Conclude Treaty on Performers’ Rights in Audiovisual Productions*, WIPO Press Release PR/2012/713 (June 20, 2012), available at http://www.wipo.int/pressroom/en/articles/2012/article_0012.html (noting that as far back as the year 2000 negotiators could not agree on the issue involving transfer of rights, and a breakthrough compromise occurred in June 2011). This treaty has not yet entered into force, and the United States has not yet ratified it. The Obama Administration has submitted a legislative package to Congress in support of U.S. implementation of the Beijing Treaty. See Letter from Michelle K. Lee, Under Sec’y Commerce for Intellectual Prop. & Dir., U.S. Patent & Trademark Office, to Joseph R. Biden, President of the Senate (Feb. 26, 2016), available at <http://www.uspto.gov/sites/default/files/documents/Beijing-treaty-package.pdf> (treaty implementation package for the Beijing Treaty on Audiovisual Performances which includes a transmittal letter, Beijing Treaty Implementation Act of 2016, and Statement of Purpose and Need and Sectional Analysis).

⁵⁴ Founded in 2001, Creative Commons offers various open source content licenses. *Creative Commons Project*, Cover Pages (Aug. 22, 2008), <http://xml.coverpages.org/creativecommons.html>. These types of licenses were held to be governed by copyright law rather than contract law in

Currently there are over one billion works licensed under Creative Commons licenses, most of which require attribution of the author.⁵⁵

Changes in Technology to Deliver Content and Identify Content

The evolution of technology in the past few decades has also impacted the availability of moral rights protections for modern authors. Technology can facilitate improved identification and licensing of works with persistent identifiers,⁵⁶ while, at the same time, it can also make it easier to remove attribution elements and distribute the unattributed works widely.⁵⁷

II. Congressional Copyright Review and This Study

As part of its effort to begin a dialogue about moral rights protections in the United States, the Copyright Office organized a symposium entitled “Authors, Attribution, and Integrity: Examining Moral Rights in the United States,” which was held on April 18, 2016.⁵⁸ The symposium served as a

Jacobsen v. Katzer, 535 F.3d 1373, 1380–83 (Fed. Cir. 2008).

⁵⁵ Creative Commons, <https://creativecommons.org/> (last visited Jan. 5, 2017) (“1.1 billion works and counting.”).

⁵⁶ For example, the PLUS Coalition has created an image rights language to allow for global communication of image rights information, and it is currently developing an image registry that will function as a hub connecting registries worldwide and providing both literal and image-based searches. PLUS Coalition, Comments Submitted in Response to U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry (Visual Works Study) at 1 (July 22, 2015) (noting that the Coalition’s unique image rights language is meant to address the “challenges [arising] from a present inability to ensure that any person or machine encountering a visual work has ready access to rights information sufficient to allow the work to be identified, and sufficient to facilitate an informed decision regarding the display, reproduction and distribution of the work”).

⁵⁷ Indeed, CMI is of particular interest to visual artists who embed copyright information in their works only to find it unlawfully stripped from digital copies. This makes it difficult for potential users to identify and contact the copyright owner to obtain a license to use a work found online. See Columbia University Libraries, Comments Submitted in Response to U.S. Office’s Apr. 24, 2015 Notice of Inquiry (Visual Works Study) at 2 (July 23, 2015) (“Rights metadata that includes author attribution and source information would [] facilitate subsequent re-uses of visual works while at the same time support the interests of legitimate copyright owners.”).

⁵⁸ The Office co-hosted this symposium with the George Mason University School of Law and its Center for the Protection of Intellectual Property. Videos of the proceedings can be accessed on the U.S. Copyright Office Web site event page at <http://www.copyright.gov/events/moralrights/>. The official transcript has been published by the *George Mason Journal of International Commercial Law*. See Symposium, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, 8 Geo. Mason J. Int’l Com. L. 1 (2016), available at <http://www.georgemasonjicl.org/wp-content/uploads/2016/08/Summer-Issue-2016.pdf>.

launching point for the issuance of this Notice of Inquiry.

Seven sessions covered the historical development of moral rights, the value authors place on moral rights, the various ways current law provides for these rights, and new considerations for the digital age. Participants, including professional authors, artists, musicians, and performers, discussed the importance that copyright law generally, and attribution specifically, plays in supporting their creative process and their livelihood.⁵⁹ Leading academics provided an overview of the scope of moral rights and how countries, including the United States, approach these concepts.⁶⁰

Many participants identified the right of attribution as particularly important to authors, both from a personal and from an economic perspective. For example, participants cited the role of copyright management information for purposes of attribution, and discussed the perceived strengths and limitations of section 1202.⁶¹ Keynote speaker Professor Jane Ginsburg posited ways to strengthen the right of attribution.⁶² Others discussed the possibilities of using non-copyright laws post-*Dastar*,⁶³ as well as expressing concerns about how potential moral rights-like causes of action might interact with First Amendment protections.⁶⁴

Some participants asserted that the current patchwork of laws, particularly the availability of contract law, the work for hire doctrine, and collective bargaining agreements (available in some industry sectors), provides sufficient protection for moral rights concerns.⁶⁵ In contrast, several voices

⁵⁹ See *Session 4: The Importance of Moral Rights to Authors*, 8 Geo. Mason J. Int’l Com. L. 87, 90 (2016).

⁶⁰ See *Session 1: Overview of Moral Rights*, 8 Geo. Mason J. Int’l Com. L. 7 (2016).

⁶¹ See, e.g., Jane C. Ginsburg, Keynote Address, *The Most Moral of Rights: The Right to be Recognized as the Author of One’s Work*, 8 Geo. Mason J. Int’l Com. L. 44, 48, 60–72 (2016); *Session 4: The Importance of Moral Rights to Authors*, 8 Geo. Mason J. Int’l Com. L. 87, 91–93 (2016) (comments of Yoko Miyashita, Getty Images).

⁶² See Jane C. Ginsburg, Keynote Address: *The Most Moral of Rights: The Right to be Recognized as the Author of One’s Work*, 8 Geo. Mason J. Int’l Com. L. 44, 72–81 (2016).

⁶³ See, e.g., *Session 2: The U.S. Perspective*, 8 Geo. Mason J. Int’l Com. L. 26, 30–34 (2016) (remarks of Duncan Crabtree-Ireland, SAG-AFTRA, & Peter K. Yu, Tex. A&M Univ. Sch. of Law); *Session 6: New Ways to Disseminate Content and the Impact on Moral Rights*, 8 Geo. Mason J. Int’l Com. L. 125, 139 (2016) (remarks of Stanley Pierre-Louis, Entm’t Software Ass’n).

⁶⁴ See *Session 5: The Intersection of Moral Rights and Other Laws*, 8 Geo. Mason J. Int’l Com. L. 106, 119–20 (2016) (remarks of Paul Alan Levy, Pub. Citizen).

⁶⁵ See *Session 2: The U.S. Perspective*, 8 Geo. Mason J. Int’l Com. L. 26, 27–29 (2016) (remarks of

criticized the limited scope of existing law, ranging from upset that a right of publicity is not a federal right⁶⁶ to disappointment with VARA’s under-inclusiveness and strict standards.⁶⁷

Discussion also addressed the role of technology, both in creation and in dissemination of authorized and unauthorized works. For example, a photographer noted the importance of attribution that stays with images,⁶⁸ and a photo company described the technology they use to persistently connect authorship information to images.⁶⁹

Looking at what lessons might be gleaned from the experiences of other countries, one panelist commented that there is “tremendous diversity in how different countries have implemented moral rights,”⁷⁰ and another confirmed that moral rights litigation constitutes only a small percentage of the copyright cases on those countries’ litigation documents.⁷¹

III. Subjects of Inquiry

The Copyright Office seeks public comments addressing how existing law, including provisions found in title 17 of the U.S. Code as well as other federal and state laws, affords authors with effective protection of their rights, equivalent to those of moral rights of attribution and integrity.

The Office invites written comments in particular on the subjects below. A party choosing to respond to this Notice of Inquiry need not address every subject, but the Office requests that responding parties clearly identify and

Allan Adler, Ass’n of Am. Publishers (“AAP”)) (noting that the testimony of AAP at the 2014 hearing “raise[d] the threshold policy question of ‘whether to superimpose vague, subjective, and wholly unpredictable new rights upon a longstanding balanced and successful copyright system.’”).

⁶⁶ See *Session 2: The U.S. Perspective*, 8 Geo. Mason J. Int’l Com. L. 26, 30 (2016) (remarks of Duncan Crabtree-Ireland, SAG-AFTRA).

⁶⁷ See, e.g., Jane C. Ginsburg, Keynote Address, *The Most Moral of Rights: The Right to be Recognized as the Author of One’s Work*, 8 Geo. Mason J. Int’l Com. L. 44, 53 (2016); *Session 5: The Intersection of Moral Rights and Other Laws*, 8 Geo. Mason J. Int’l Com. L. 106, 107–10, 113–14 (2016) (remarks of Sonya G. Bonneau, Geo. Univ. Law Ctr.; Eugene Mopsik, Am. Photographic Artists; & Nancy E. Wolff, Cowan, DeBaets, Abrahams & Sheppard LLP).

⁶⁸ See *Session 5: The Intersection of Moral Rights and Other Laws*, 8 Geo. Mason J. Int’l Com. L. 106, 110 (2016) (remarks of Eugene Mopsik, Am. Photographic Artists).

⁶⁹ See *Session 4: The Importance of Moral Rights to Authors*, 8 Geo. Mason J. Int’l Com. L. 87, 92 (2016) (remarks of Yoko Miyashita, Getty Images).

⁷⁰ *Session 7: Where Do We Go From Here?*, 8 Geo. Mason J. Int’l Com. L. 142, 147 (2016) (remarks of Mira Sundara Rajan, Univ. of Glasgow Sch. of Law).

⁷¹ See *Session 1: Overview of Moral Rights*, 8 Geo. Mason J. Int’l Com. L. 7, 15 (2016) (remarks of Daniel Gervais, Vand. Law Sch.).

separately address each numbered subject for which a response is submitted.

General Questions Regarding Availability of Moral Rights in the United States

1. Please comment on the means by which the United States protects the moral rights of authors, specifically the rights of integrity and attribution. Should additional moral rights protection be considered? If so, what specific changes should be considered by Congress?

Title 17

2. How effective has section 106A (VARA) been in promoting and protecting the moral rights of authors of visual works? What, if any, legislative solutions to improve VARA might be advisable?

3. How have section 1202's provisions on copyright management information been used to support authors' moral rights? Should Congress consider updates to section 1202 to strengthen moral rights protections? If so, in what ways?

4. Would stronger protections for either the right of attribution or the right of integrity implicate the First Amendment? If so, how should they be reconciled?

5. If a more explicit provision on moral rights were to be added to the Copyright Act, what exceptions or limitations should be considered? What limitations on remedies should be considered?

Other Federal and State Laws

6. How has the *Dastar* decision affected moral rights protections in the United States? Should Congress consider legislation to address the impact of the *Dastar* decision on moral rights protection? If so, how?

7. What impact has contract law and collective bargaining had on an author's ability to enforce his or her moral rights? How does the issue of waiver of moral rights affect transactions and other commercial, as well as non-commercial, dealings?

Insights From Other Countries' Implementation of Moral Rights Obligations

8. How have foreign countries protected the moral rights of authors, including the rights of attribution and integrity? How well would such an approach to protecting moral rights work in the U.S. context?

Technological Developments

9. How does, or could, technology be used to address, facilitate, or resolve

challenges and problems faced by authors who want to protect the attribution and integrity of their works?

Other Issues

10. Are there any voluntary initiatives that could be developed and taken by interested parties in the private sector to improve authors' means to secure and enforce their rights of attribution and integrity? If so, how could the government facilitate these initiatives?

11. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study

Dated: January 13, 2017.

Karyn Temple Claggett,

Acting Register of Copyrights and Director of the U.S. Copyright Office.

[FR Doc. 2017-01294 Filed 1-19-17; 8:45 am]

BILLING CODE 1410-30-P

LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket Nos. 17-0008-CRB-AU and 17-0009-CRB-AU]

Notice of Intent To Audit

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Public notice.

SUMMARY: The Copyright Royalty Judges announce receipt of two notices of intent to audit the 2013, 2014, and 2015 statements of account submitted by broadcasters Cox Radio (Docket No. 17-CRB-0009-AU) and Hubbard Broadcasting (Docket No. 17-CRB-0008-AU) concerning royalty payments each made pursuant to two statutory licenses.

FOR FURTHER INFORMATION CONTACT:

Anita Brown, Program Specialist, by telephone at (202) 707-7658 or by email at crb@loc.gov.

SUMMARY INFORMATION: The Copyright Act, title 17 of the United States Code, grants to copyright owners of sound recordings the exclusive right to publicly perform sound recordings by means of certain digital audio transmissions, subject to limitations. Specifically, the right is limited by the statutory license in section 114 which allows nonexempt noninteractive digital subscription services, eligible nonsubscription services, and preexisting satellite digital audio radio services to perform publicly sound recordings by means of digital audio transmissions. 17 U.S.C. 114(f). In addition, a statutory license in section 112 allows a service to make necessary

ephemeral reproductions to facilitate the digital transmission of the sound recording. 17 U.S.C. 112(e).

Licenses may operate under these licenses provided they pay the royalty fees and comply with the terms set by the Copyright Royalty Judges. The rates and terms for the section 112 and 114 licenses are set forth in 37 CFR parts 380 and 382-84.

As part of the terms set for these licenses, the Judges designated SoundExchange, Inc., as the Collective, *i.e.*, the organization charged with collecting the royalty payments and statements of account submitted by eligible nonsubscription services such as broadcasters and with distributing the royalties to copyright owners and performers entitled to receive them. See 37 CFR 380.33(b)(1).

As the designated Collective, SoundExchange may, once during a calendar year, conduct an audit of a licensee for any or all of the prior three years in order to verify royalty payments. SoundExchange must first file with the Judges a notice of intent to audit a licensee and deliver the notice to the licensee. See 37 CFR 380.35.

On December 22, 2016, SoundExchange filed with the Judges notices of intent to audit licensee broadcasters Cox Radio, Inc., and Hubbard Broadcasting, Inc., for 2013-15. The Judges must publish notice in the **Federal Register** within 30 days of receipt of a notice announcing the Collective's intent to conduct an audit. See 37 CFR 380.35(c). Today's notice fulfills this requirement with respect to SoundExchange's December 22, 2016 notices of intent to audit.

Dated: January 13, 2017.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

[FR Doc. 2017-01319 Filed 1-19-17; 8:45 am]

BILLING CODE 1410-72-P

LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket No. 17-0004-CRB-AU, 17-0007-CRB-AU, and 17-0010-CRB-AU]

Notice of Intent To Audit

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Public notice.

SUMMARY: The Copyright Royalty Judges announce receipt of three notices of intent to audit the 2013, 2014, and 2015 statements of account submitted by commercial webcasters Radionomy (Docket No. 17-CRB-0004-AU), IMVU, Inc. (Docket No. 17-CRB-0007-AU),

APPENDIX C **PARTIES WHO SUBMITTED COMMENTS
IN RESPONSE TO THE JANUARY 23, 2017
NOTICE OF INQUIRY**

Appendix C**Parties Who Submitted Comments
in Response to the January 23, 2017 Notice of Inquiry****Initial Commenters**

1. American Association of Law Libraries (“AALL”)
2. American Society of Journalists & Authors (“ASJA”)
3. Art Law Committee of the New York City Bar (“NY Bar Association”)
4. Artists Rights Society (“ARS”)
5. Association of American Publishers (“AAP”)
6. Authors Alliance
7. Authors Guild, Inc. (“Authors Guild”)
8. B., Courtney
9. Buccafusco, Christopher and Sprigman, Christopher (“Buccafusco-Sprigman”)
10. Claiborne, Omer
11. Clarke, Glenn
12. Coalition of Visual Artists (“CVA”)
13. Computer & Communications Industry Association (“CCIA”)
14. Creators’ Rights Alliance (“CRA”)
15. Directors Guild of America, Inc. and Writers Guild of America, West
 (“DGA/WAGAW”)
16. Electronic Frontier Foundation (“EFF”)
17. Folkens, Pieter
18. Foss, Lance 1
19. Foss, Lance 2

20. Gonzalez, Israel
21. Gordon, Wendy J
22. International Federation of Journalists (“IFJ”)
23. International Trademark Association (“INTA”)
24. Keller, Jenny
25. Kelley, Chapman
26. Kernochan Center for Law, Media and the Arts, Columbia Law School
 (“Kernochan Center”)
27. Kojreau, AC
28. Kwall, Roberta
29. Lee, Becki
30. Library Copyright Alliance (“LCA”)
31. Liimatainen-Peterson, Donna
32. McCutcheon, Jani
33. Motion Picture Association of America, Inc. (“MPAA”)
34. Music Creators North America (“Music Creators”)
35. National Writers Union and Science Fiction and Fantasy Writers of America
 (“NWU-SFWA”)
36. Nimpagaritse, Awen
37. Odenkirk, Sarah Conley
38. Organization for Transformative Works (“OTW”)
39. Pilch, Janice
40. Ponte, Lucille M.
41. Public Knowledge (“PK”)

42. Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”)
43. Schneider, Maria
44. Society of Composers & Lyricists (“SCL”)
45. Van Norman, John
46. Weiss, Maximilian

Reply Commenters

1. American Association of Independent Music (“A2IM”)
2. Authors Guild, Inc. (“Authors Guild”)
3. Broadcast Music, Inc. (“BMI”)
4. Center for Democracy & Technology (“CDT”)
5. Creators’ Rights Alliance (“CRA”)
6. Future of Music Coalition (“FMC”)
7. Kernochan Center for Law, Media and the Arts, Columbia Law School (“Kernochan Center”)
8. Kubota, Zandra
9. Motion Picture Association of America, Inc. (“MPAA”)
10. National Music Publishers’ Association, Inc. (“NMPA”)
11. National Writers Union (“NWU”)
12. Organization for Transformative Works (“OTW”)
13. Recording Academy
14. Recording Industry Association of America, Inc. (“RIAA”)
15. Sundara Rajan, Mira T.
16. University of Michigan Library

APPENDIX D **RIGHT OF PUBLICITY CHART**

State Right of Publicity Statutes¹

State	Statute	Year	Covers						Post-Mortem (Years)	Registration System	Famous / Commercial Value Required	Common Law Rights Recognized
			Name	Image	Signature	Voice	Likeness	Other ²				
Alabama	ALA. CODE § 6-5-770 <i>et seq.</i>	2015	✓	✓	✓	✓	✓	✓	✓ (55)		○ ³	Unclear ⁴
Alaska	N/A											Right of Privacy — Misappropriation ⁵
Arizona ⁶	ARIZ. REV. STAT. § 12-761	2007	✓	✓					✓ ⁷			Right of Publicity ⁸ Right of Privacy — Misappropriation ⁹
Arkansas	ARK. CODE § 4-75-1101 <i>et seq.</i>	2016	✓	✓	✓	✓	✓		✓ (50)			Unclear ¹⁰
California	CAL. CIV. CODE § 3344	1971	✓	✓	✓	✓	✓					Right of Publicity ¹¹ Right of Privacy — Misappropriation ¹²
California	CAL. CIV. CODE § 3344.1	1984	✓	✓	✓	✓	✓		✓ (70)	✓	✓ ¹³	See above
Colorado	N/A											Right of Privacy — Misappropriation ¹⁴
Connecticut	N/A											Right of Privacy — Misappropriation ¹⁵
Delaware	N/A											Right of Privacy — Misappropriation ¹⁶
District of Columbia	N/A											Right of Privacy — Misappropriation ¹⁷
Florida	FLA. STAT. § 540.08	1967	✓	✓			✓		✓ (40)			Right of Privacy — Misappropriation ¹⁸
Georgia	N/A											Right of Publicity ¹⁹ Right of Privacy — Misappropriation ²⁰

Legend: ✓ Yes ○ Unclear/Mixed

State	Statute	Year	Covers						Post-Mortem (Years)	Registration System	Famous / Commercial Value Required	Common Law Rights Recognized
			Name	Image	Signature	Voice	Likeness	Other ²				
Hawaii ²¹	HAW. REV. STAT. § 482P-1 <i>et seq.</i>	2009	✓	✓	✓	✓	✓	✓	✓ ²²	○ ²³	Right of Privacy — Misappropriation ²⁴	
Idaho	N/A										Right of Privacy — Misappropriation ²⁵	
Illinois	765 ILL. COMP. STAT. § 1075/1 <i>et seq.</i>	1999	✓	✓	✓	✓	✓	✓	✓ ⁽⁵⁰⁾		N/A ²⁶	
Indiana	IND. CODE § 32-36-1-1 <i>et seq.</i>	2002 ²⁷	✓	✓	✓	✓	✓	✓	✓ ⁽¹⁰⁰⁾	✓	Right of Privacy — Misappropriation ²⁸	
Iowa	N/A										Right of Privacy — Misappropriation ²⁹	
Kansas	N/A										Right of Privacy — Misappropriation ³⁰	
Kentucky	KY. REV. STAT. § 391.170	1984	✓				✓		✓ ⁽⁵⁰⁾	✓ ³¹	Unclear ³²	
Louisiana ³³	LA. REV. STAT. § 14:102.21	2006	✓	✓					✓ ³⁴		Right of Privacy — Misappropriation ³⁵	
Maine	N/A										Right of Privacy — Misappropriation ³⁶	
Maryland	N/A										Right of Privacy — Misappropriation ³⁷	
Massachusetts	MASS. GEN. LAWS ch. 214, § 3A	1973	✓	✓					○ ³⁸	○ ³⁹	Unclear ⁴⁰	
Michigan	N/A										Right of Publicity ⁴¹ Right of Privacy — Misappropriation ⁴²	
Minnesota ⁴³	N/A										Right of Publicity ⁴⁴ Right of Privacy — Misappropriation ⁴⁵	
Mississippi	N/A										Right of Privacy — Misappropriation ⁴⁶	

Legend: ✓ Yes ○ Unclear/Mixed

State	Statute	Year	Covers						Post-Mortem (Years)	Registration System	Famous / Commercial Value Required	Common Law Rights Recognized
			Name	Image	Signature	Voice	Likeness	Other ²				
Missouri	N/A										Right of Publicity ⁴⁷ Right of Privacy — Misappropriation ⁴⁸	
Montana	N/A										Right of Privacy — Misappropriation ⁴⁹	
Nebraska ⁵⁰	NEB. REV. STAT. § 20-201 <i>et seq.</i>	1979	✓	✓			✓		✓ ⁵¹		N/A ⁵²	
Nevada	NEV. REV. STAT. § 597.770 <i>et seq.</i>	1989	✓	✓	✓	✓	✓		✓ (50)	✓	Right of Privacy — Misappropriation ⁵³	
New Hampshire	N/A										Right of Privacy — Misappropriation ⁵⁴	
New Jersey	N/A										Right of Privacy — Misappropriation ⁵⁵	
New Mexico	N/A										Right of Publicity ⁵⁶ Right of Privacy — Misappropriation ⁵⁷	
New York ⁵⁸	N.Y. CIV. RIGHTS LAW § 51 ⁵⁹	1909	✓	✓			✓				N/A ⁶⁰	
North Carolina	N/A										Right of Privacy — Misappropriation ⁶¹	
North Dakota	N/A										Unclear ⁶²	
Ohio	OHIO REV. CODE § 2741.01 <i>et seq.</i>	1999	✓	✓	✓	✓	✓	✓	✓ (60)	✓ ⁶³	Right of Publicity ⁶⁴ Right of Privacy — Misappropriation ⁶⁵	
Oklahoma ⁶⁶	OKLA. STAT. tit. 12 § 1448	1985	✓	✓	✓	✓	✓		✓ (100)	✓ ⁶⁷	Unclear	
Oklahoma	OKLA. STAT tit. 12 § 1449	1985	✓	✓	✓	✓	✓				See above	
Oregon	N/A										Right of Publicity ⁶⁸ Right of Privacy — Misappropriation ⁶⁹	

Legend: ✓ Yes ○ Unclear/Mixed

State	Statute	Year	Covers						Post-Mortem (Years)	Registration System	Famous / Commercial Value Required	Common Law Rights Recognized
			Name	Image	Signature	Voice	Likeness	Other ²				
Pennsylvania	42 PA. CONS. STAT. § 8316	2002	✓	✓	✓	✓	✓		✓ (30)		✓	Unclear
Rhode Island	9 R.I. GEN. LAWS § 9-1-28	1972	✓	✓								N/A ⁷⁰
Rhode Island	9 R.I. GEN. LAWS § 9-1-28.1 ⁷¹	1980	✓	✓			✓					N/A ⁷²
South Carolina	N/A											Right of Publicity ⁷³ Right of Privacy — Misappropriation ⁷⁴
South Dakota	S.D. CODIFIED LAWS § 21-64-1 <i>et seq.</i>	2015	✓	✓	✓	✓	✓	✓	✓ (70)	✓	✓	N/A
Tennessee	TENN. CODE § 47-25-1101 <i>et seq.</i>	1984	✓	✓					✓ ⁷⁵			Right of Publicity ⁷⁶ Right of Privacy — Misappropriation ⁷⁷
Texas	TEX. PROP. CODE § 26.001 <i>et seq.</i>	1987	✓	✓	✓	✓	✓		✓ (50)	✓	✓ ⁷⁸	Right of Publicity ⁷⁹ Right of Privacy — Misappropriation ⁸⁰
Utah ⁸¹	UTAH CODE § 45-3-1 <i>et seq.</i>	1981	✓	✓								Right of Privacy — Misappropriation ⁸²
Vermont	N/A											Right of Privacy — Misappropriation ⁸³
Virginia ⁸⁴	VA. CODE § 8.01-40	1950	✓	✓					✓ (20)			N/A ⁸⁵
Washington	WASH. REV. CODE § 63.60.010 <i>et seq.</i>	1998	✓	✓	✓	✓	✓		✓ (10 / 75)			Right of Publicity ⁸⁶ Right of Privacy — Misappropriation ⁸⁷
West Virginia	N/A											Right of Publicity ⁸⁸ Right of Privacy — Misappropriation ⁸⁹

State	Statute	Year	Covers					Post-Mortem (Years)	Registration System	Famous / Commercial Value Required	Common Law Rights Recognized
			Name	Image	Signature	Voice	Likeness				
Wisconsin	Wis. STAT. § 995.50 ⁹⁰	1977	✓	✓						Right of Publicity ⁹¹ Right of Privacy — Misappropriation ⁹²	
Wyoming	N/A									Unclear ⁹³	

Endnotes

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- ¹ Much of the information herein is adapted from Prof. Jennifer E. Rothman's work. See Jennifer E. Rothman, *Rothman's Roadmap to the Right of Publicity*, <https://www.rightofpublicityroadmap.com> (last visited Mar. 4, 2019).
- ² Includes such things as gestures, mannerisms, distinctive appearance, etc.
- ³ While nothing in the statute requires the plaintiff to be famous or to have commercially exploited their name or image, case law from before adoption of the statute required a demonstration of a "unique quality or value in the [plaintiff's] likeness[] . . . that would result in commercial profit to [the defendant]." *Schifano v. Greene Cty. Greyhound Park, Inc.*, 624 So. 2d 178, 181 (Ala. 1993).
- ⁴ Alabama recognized a right of privacy and the tort of misappropriation prior to passage of the statutory right of publicity. There has not yet been any case law on whether these continue to be available in light of the statutory regime. See Jennifer E. Rothman, *Rothman's Roadmap to the Right of Publicity*, <https://www.rightofpublicityroadmap.com/law/alabama> (last visited Mar. 4, 2019).
- ⁵ At least one federal district court has held that Alaska would likely recognize this tort. See *Doyle v. Harper Collins Publishers, Inc.*, No. 3:05-cv-0300, 2006 WL 8438639, at *3 (D. Alaska May 31, 2006) (order on motion to dismiss).
- ⁶ Arizona's statutory right of publicity law protects only soldiers.
- ⁷ Enforceable down to grandchildren.
- ⁸ See, e.g., *In re Estate of Reynolds*, 327 P.3d 213, 216 (Ariz. Ct. App. 2014).
- ⁹ See *Reed v. Real Detective Pub. Co.*, 162 P.2d 133, 137–38 (Ariz. 1945) (adopting Restatement version of right of privacy).
- ¹⁰ Prior to passage of the statute, Arkansas recognized the tort of misappropriation under its right of privacy doctrine. See, e.g., *Olan Mills, Inc. of Tex. v. Dodd*, 353 S.W.2d 22, 24 (Ark. 1962); *Stanley v. Gen. Media Commc'ns, Inc.*, 149 F. Supp. 2d 701, 706 (W.D. Ark. 2001). The statute is silent on whether or not such common law causes of action are preempted, and there is not yet any case law on the matter.
- ¹¹ See, e.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397–99 (9th Cir. 1992).
- ¹² See *KNB Enters. v. Matthews*, 78 Cal. App. 4th 362, 366–67 (Cal. Ct. App. 2000) (noting that Section 3344 "complements the common law tort of appropriation").
- ¹³ Requires that the personality's name, voice, signature, photograph, or likeness have commercial value as measured at the time of his or her death, regardless of exploitation during life.
- ¹⁴ See, e.g., *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 1001 (Colo. 2001).
- ¹⁵ See *Goodrich v. Waterbury Republican-Am., Inc.*, 448 A.2d 1317, 1328 (Conn. 1982). One federal court has indicated that Connecticut might recognize a common law right of publicity, as well. See *Jim Henson Prods., Inc. v. John T. Brady & Assocs.*, 867 F. Supp. 175, 189 (S.D.N.Y. 1994).
- ¹⁶ See *Barbieri v. News-Journal Co.*, 189 A.2d 773, 774 (Del. 1963).
- ¹⁷ See *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 587 (D.C. 1985).
- ¹⁸ The statute expressly states that it does not preempt claims under the common law right of privacy. FLA. STAT. § 540.08(7) (1967). Florida has long recognized the tort of misappropriation under the right of privacy. See, e.g., *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944).
- ¹⁹ See *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 700–03 (Ga. 1982).
- ²⁰ See *Bullard v. MRA Holding, LLC*, 740 S.E.2d 622, 625–26 (Ga. 2013).
- ²¹ Claims to apply to all individuals, regardless of whether or not they ever resided or were domiciled in Hawaii. See HAW. REV. STAT. § 482P-2 (2009).
- ²² Registration of a license or assignment interest can rebut presumption that a living person has the right to license or assign their publicity rights. See HAW. REV. STAT. § 482P-8 (2009).
- ²³ Hawaii provides broader protection for "personalities" than for average individuals. A claim for violation of a "deceased personality" must have demonstrated commercial value at the time of death. See HAW. REV. STAT. § 482P-1 (2009).
- ²⁴ See *Fergerstrom v. Hawaiian Ocean View Estates*, 441 P.2d 141, 143 (Haw. 1968).
- ²⁵ See, e.g., *Hoskins v. Howard*, 971 P.2d 1135, 1140 (Idaho 1998).
- ²⁶ Illinois previously recognized a common law right of privacy—misappropriation. The statutory language explicitly preempts a common law right of publicity, and several appellate courts have held that such preemption likely extends to the common law right of privacy—misappropriation. See, e.g., *Trannel v. Praire Ridge Media, Inc.*, 987 N.E.2d 923, 928 (Ill. App. Ct. 2013); *Blair v. Nev. Landing P'ship*, 859 N.E.2d 1188, 1192 (Ill. App. Ct. 2006); *Maremont v. Susan Fredman Design Grp., Ltd.*, 772 F. Supp.2d 967, 972 (N.D. Ill. 2011). But see *Petty v. Chrysler Corp.*, 799 N.E.2d 432, 441–42 (Ill. App. Ct. 2003).
- ²⁷ Indiana's first right of publicity law was passed in 1994 and codified at IND. CODE § 32-13-1-8. In 2002, Indiana repealed the statute and recodified it at IND. CODE § 32-36-1-1 *et seq.* See 2002 Ind. Acts 595, 672.
- ²⁸ See, e.g., *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 593 (Ind. 2001).
- ²⁹ See, e.g., *Bremmer v. Journal-Tribune Pub. Co.*, 76 N.W.2d 762, 765 (Iowa 1956). At least one federal court has held that Iowa would likely recognize a common law right of publicity. See *Sharp-Richardson v. Boyds Collection, Ltd.*, No. C 96-0334, 1999 WL 33656875, at *15 (N.D. Iowa Sept. 30, 1999).
- ³⁰ See *Kunz v. Allen*, 172 P. 532 (Kan. 1918).
- ³¹ The Kentucky statute requires that the person whose right of publicity is being asserted be a "public figure."

- ³² The Kentucky Supreme Court has implied that the common law right of publicity and common law right of privacy—misappropriation may not be preempted by the statute. See *Montgomery v. Montgomery*, 60 S.W.3d 524 (Ky. 2001). One federal court has found that common law rights remain. See *Thornton v. W. & S. Fin. Grp. Beneflex Plan*, 797 F. Supp. 2d 796, 813-14 (W.D. Ky. 2011).
- ³³ Louisiana’s statutory right of publicity protects only soldiers. A bill to provide a post-mortem right of publicity for commercial uses of an individual’s name, voice, signature, photograph or likeness was introduced in the Louisiana legislature in 2017, but did not pass both houses. See Allen Toussaint Legacy Act, H.B. 415, 2017 Reg. Sess. (La. 2017).
- ³⁴ The Louisiana statute is silent as to duration.
- ³⁵ See, e.g., *Tatum v. New Orleans Aviation Bd.*, 102 So. 3d 144 (La. Ct. App. 2012).
- ³⁶ See, e.g., *Nelson v. Me. Times*, 373 A.2d 1221, 1223 (Me. 1977).
- ³⁷ See *Carr v. Watkins*, 177 A.2d 841 (Md. 1962). Several Maryland cases reject claims for violation of the right of privacy when the plaintiff cannot demonstrate possession of a commercially valuable identity. See, e.g., *Lawrence v. A.S. Abell Co.*, 475 A.2d 448, 453 (Md. 1984).
- ³⁸ A bill was introduced most recently in 2014 to add explicit post-mortem rights. See S. 2022, 188th General Court (Mass. 2014).
- ³⁹ While nothing in the statute requires the plaintiff to be famous or to have commercially exploited their name or image, the Massachusetts Supreme Judicial Court has read such a requirement into the statute. See *Tropeano v. Atl. Monthly, Co.*, 400 N.E.2d, 847, 850 (Mass. 1980).
- ⁴⁰ No court has ruled on whether Massachusetts recognizes either a common law right of publicity nor a common law right of privacy—misappropriation in addition to the statutory protections.
- ⁴¹ See *Rosa and Raymond Parks Inst. for Self-Dev. v. Target Corp.*, 812 F.3d 824, 830 (11th Cir. 2016).
- ⁴² See *Pallas v. Crowley-Milner & Co.*, 54 N.W.2d 595, 596 (Mich. 1952).
- ⁴³ Bills were introduced in the 89th Legislature after the passing of Prince in 2016, but did not clear either chamber of the legislature. See Personal Rights in Names Can Endure (PRINCE) Act, SF 3609, 89th Leg. (Minn. 2016).
- ⁴⁴ See *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 730 (8th Cir. 1995) (“We believe that the Minnesota Supreme Court would recognize the tort of violation of publicity rights.”).
- ⁴⁵ See *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233–35 (Minn. 1998).
- ⁴⁶ See *Candebat v. Flanagan*, 487 So. 2d 207, 209 (Miss. 1986).
- ⁴⁷ See, e.g., *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003).
- ⁴⁸ See *id.* at 368.
- ⁴⁹ See *Welsh v. Pritchard*, 241 P.2d 816, 819 (Mont. 1952).
- ⁵⁰ Note that Nebraska’s statute is styled as a statutory right of privacy, which includes a cause of action for exploitation of a person for advertising or commercial purposes.
- ⁵¹ Only the right of publicity (exploitation of a person’s name or likeness) is posthumous. The statute does not specify the duration of the posthumous right, but states that the right can be asserted by the deceased’s “surviving spouse, if any, or by the personal representative.” See NEB. REV. STAT. § 20-208 (1989).
- ⁵² Prior to enactment of the statute, Nebraska recognized neither a common law right of publicity nor a common law right of privacy—misappropriation. See, e.g., *Carson v. Nat’l Bank of Commerce Trust & Sav.*, 501 F.2d 1082, 1084 (8th Cir. 1974); *Schoneweis v. Dando*, 435 N.W.2d 666, 669 (Neb. 1989).
- ⁵³ See *PETA v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1283 (Nev. 1995), *overruled on other grounds by City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 940 P.2d 134, 138 (Nev. 1997).
- ⁵⁴ See, e.g., *Remsburg v. Docusearch, Inc.*, 816 A.2d 1001, 1009 (N.H. 2003). At least one federal court has styled New Hampshire’s appropriation tort under the right of privacy as a “right of publicity.” *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 303 (D.N.H. 2008).
- ⁵⁵ See *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 459 (N.J. Super. Ct. Ch. Div. 1967). Federal courts have held that New Jersey would recognize a right of publicity. See, e.g., *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 150–51 (3d Cir. 2013); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1354 (D.N.J. 1981).
- ⁵⁶ See, e.g., *Moore v. Sun Publ’g Corp.*, 881 P.2d 735, 743 (N.M. 1994).
- ⁵⁷ See, e.g., *Hubbard v. Journal Publ’g Co.*, 368 P.2d 147, 148 (N.M. 1964).
- ⁵⁸ New York also has a criminal right of privacy statute. See N.Y. CIV. RIGHTS LAW § 50 (1909). Bills were introduced in the 2017–18 session to provide a posthumous right of publicity. See A. 08155, 2017–18 Leg. Sess. (N.Y. 2017) and S. 05857, 2017–18 Leg. Sess. (N.Y. 2017).
- ⁵⁹ The New York statute is styled as a right of privacy statute.
- ⁶⁰ New York courts have held that §§ 50 and 51 provide the sole remedy for right of misappropriation cases, and that claims under the common law rights of privacy and publicity are preempted. See, e.g., *Stephano v. News Grp. Publ’ns, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984); *Messenger ex rel. Messenger v. Gruner & Jahr Printing and Publ’g*, 727 N.E.2d 549, 551 (N.Y. 2000).
- ⁶¹ See, e.g., *Hall v. Post*, 372 S.E.2d 711, 718 (N.C. 1988).
- ⁶² The North Dakota Supreme Court has declined to rule on whether North Dakota recognizes a common law right to privacy. See *Am. Mut. Life Ins. Co. v. Jordan*, 315 N.W.2d 290 (N.D. 1982).
- ⁶³ The statute protects “an individual’s name, voice, signature, photograph, image, likeness, or distinctive appearance, if any of these aspects have commercial value.” OHIO REV. CODE § 2741.01(A) (1999).

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- ⁶⁴ See *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454 (Ohio 1976), *rev'd on other grounds*, 433 U.S. 562 (1977). The statute explicitly does not preempt common law claims. See OHIO REV. CODE § 2741.08 (1999).
- ⁶⁵ See *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454 (Ohio 1976) *rev'd on other grounds*, 433 U.S. 562 (1977).
- ⁶⁶ Oklahoma has separate statutes providing criminal penalties for certain violations of the right of publicity. See OKLA. STAT. tit. 21 §§ 839.1, 839.1A (1985).
- ⁶⁷ Rights are limited to “any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or services.” OKLA. STAT. tit. 12 § 1448(H) (1985).
- ⁶⁸ See *Anderson v. Fisher Broad. Cos.*, 712 P.2d 803, 808–09 (Ore. 1986).
- ⁶⁹ See *id.* at 806–07.
- ⁷⁰ See *Henry v. Cherry & Webb*, 73 A. 97, 109 (R.I. 1909).
- ⁷¹ Section 9-1-28.1 is styled as a codification of the right of privacy, and includes the tort of misappropriation.
- ⁷² See *Henry v. Cherry & Webb*, 73 A. 97, 109 (R.I. 1909).
- ⁷³ See *Gignilliat v. Gignilliat, Savitz & Bettis L.L.P.*, 684 S.E.2d 756, 759 (S.C. 2009).
- ⁷⁴ See *id.* at 759.
- ⁷⁵ The initial term of protection is 10 years after death, and an exclusive right to commercial exploitation survives thereafter until terminated upon proof of two years of non-use. See TENN. CODE § 47-25-1104 (1984).
- ⁷⁶ See *State ex rel. Elvis Presley Intern. Mem'l Found. v. Crowell*, 733 S.W.2d 89, 97 (Tenn. Ct. App. 1987). At least one federal court has found common law right of publicity claims preempted, although the court did not address the effect of TENN. CODE § 47-25-1106(e), which states that the statute’s remedies are cumulative to other remedies available by law. See *Marshall v. ESPN*, 668 Fed. Appx. 155, 157 (6th Cir. 2016).
- ⁷⁷ See *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 645 (Tenn. 2001).
- ⁷⁸ A claim is available where the deceased’s “name, voice, signature, photograph, or likeness has commercial value at the time of his or her death or comes to have commercial value after that time.” TEX. PROP. CODE § 26.003(2) (1987).
- ⁷⁹ See *Kimbrough v. Coca-Cola/USA*, 521 S.W.2d 719, 722 (Tex. Civ. App. 1975).
- ⁸⁰ See *Express One Intern., Inc. v. Steinbeck*, 53 S.W.3d 895, 900 (Tex. App. 2001).
- ⁸¹ Utah also has a criminal right of publicity statute. See UTAH CODE § 76-9-407 (1981).
- ⁸² See *Cox v. Hatch*, 761 P.2d 556, 563 (Utah 1988). At least one federal court has held that Utah would recognize a common law right of publicity, as well. See *Nature’s Way Prods. v. Nature-Pharma, Inc.*, 736 F. Supp. 245, 251 (D. Utah 1990).
- ⁸³ See *Staruski v. Cont’l Tel. Co. of Vt.*, 581 A.2d 266, 268 (Vt. 1990). The court speculated that there might be a separate cause of action under the right of publicity where the plaintiff is famous and has a name or likeness with commercial value. *Id.* at 269.
- ⁸⁴ Virginia also has a criminal right of publicity statute. See VA. CODE § 18.2-216.1 (1950).
- ⁸⁵ While the statute does not expressly preempt common law claims, the Supreme Court of Virginia has found that the statute had the effect of preempting such claims. See *WLJA-TV v. Levin*, 564 S.E.2d 383, 395 (Va. 2002).
- ⁸⁶ See *State ex rel. La Follette v. Hinkle*, 229 P. 317, 319 (Wash. 1924); *Lewis v. Physicians and Dentists Credit Bureau*, 177 P.2d 896, 899 (Wash. 1947).
- ⁸⁷ See, e.g., *Reid v. Pierce Co.*, 961 P.2d 333, 339 (Wash. 1998).
- ⁸⁸ See *Curran v. Amazon.com, Inc.*, No. 2:07–0354, 2008 WL 472433, at *4 (S.D.W. Va. 2008).
- ⁸⁹ See *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 84 (W. Va. 1983).
- ⁹⁰ The Wisconsin statute is styled as a codification of the right of privacy, and includes the tort of misappropriation.
- ⁹¹ See *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137–38 (Wis. 1979).
- ⁹² See *id.* at 133.
- ⁹³ A recent decision of the Supreme Court of Wyoming adopted the right of privacy as set out in the Restatement (Second) of Torts, but the tort at issue was intrusion upon seclusion. See *Howard v. Aspen Way Enters. Inc.*, 406 P.3d 1271, 1273 (Wyo. 2017).

