

**Before the
U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS
In the matter of Study on the Moral Rights of Attribution and Integrity
Docket No. 2017-02
Comments of Organization for Transformative Works**

The Organization for Transformative Works (OTW) is a nonprofit organization established in 2007 to protect and defend fanworks from commercial exploitation and legal challenge. The OTW’s nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 770,000 registered users and receives over 115 million page views per week. We represent artists who make works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the “villain” to retelling the story as if a woman, instead of a man, were the hero. We appreciate the opportunity to discuss attribution and integrity rights in the U.S. We have provided answers only to questions for which we believe the OTW has insights to offer.¹

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?

In general, integrity and attribution rights are protected by custom and norm, including scholarly anti-plagiarism and related norms of attribution. Substantive copyright law incorporates certain aspects of moral rights protection in several areas, ranging from explicit moral rights protection for certain works of visual art through the Visual Artists’ Rights Act (17 U.S.C. § 106A), to the derivative works right, which provides a right of integrity as part of the general bundle of economic rights afforded to copyright owners, to the flexible fair use standard, which permits but does not require courts to consider whether a user has shown good faith (for example, by abiding by relevant customary attribution norms under the circumstances) in assessing whether a particular use constitutes fair use. Additionally, legal protection for authors’ interests in integrity and attribution is available through contract law, and authors interested in protecting those interests have taken ample advantage of contract law to do so, for example in the form of Creative Commons licenses. Additional legal protections are unlikely to be consistent with the requirements of the First Amendment and the proper functioning of the copyright system, including important limitations such as fair use.

The OTW does not believe that an additional integrity right is justified, given the legitimate interests of other people in commenting on, parodying, criticizing, and otherwise engaging in transformative uses that an integrity right could threaten. The OTW’s comments will focus on attribution, however, because there is more of a consensus about the moral force of attribution and because attribution is often presented as a sort of compromise or simple solution instead of more robust integrity rights. Even so, there are serious practical considerations weighing against

¹ Substantial parts of our submission are based on Rebecca Tushnet, Naming Rights: Attribution and Law, 2007 Utah L. Rev. 789.

attempting to convert a moral duty of attribution, where appropriate, into a legal code. What the Supreme Court said in *Dastar* is just as true for an attribution right located in title 17 as one located in title 15 of the U.S. Code:

In many cases, figuring out who is in the line of “origin” would be no simple task. . . . While Fox might have a claim to being in the line of origin, its involvement with the creation of the television series was limited at best. Time, Inc., was the principal if not the exclusive creator, albeit under arrangement with Fox. And of course it was neither Fox nor Time, Inc., that shot the film used in the Crusade television series. Rather, that footage came from the United States Army, Navy, and Coast Guard, the British Ministry of Information and War Office, the National Film Board of Canada, and unidentified “Newsreel Pool Cameramen.” If anyone has a claim to being the *original* creator of the material used in both the Crusade television series and the Campaigns videotapes, it would be those groups, rather than Fox.²

As the Court concluded, it’s simply not a good idea to force speakers to search for all possibly relevant sources. And this principle is applicable whether the law at issue is denominated copyright or trademark.

Attribution’s proponents make many excellent points about the important work done by proper credit in rewarding authors and informing consumers. As Catherine Fisk has documented, attribution norms are widespread across many endeavors, from academia to moviemaking to advertising firms, indicating a robust consensus that attribution is an important moral and economic value.³ Yet, the particulars of how credit is earned vary substantially. Because there are powerful attribution norms throughout modern society, rather than a single norm that covers most situations, any attribution law would almost certainly have to be extremely vague, which punts the problem of identifying when and what attribution is required to individual cases. This would generate legal uncertainty in an area that does not need it.

Group authorship in particular creates serious attribution problems, especially when none of the people involved in a creation own the copyright because it is owned by corporate entity instead. Catherine Fisk, writing about multi-participant projects in business contexts, makes observations that apply to many creative endeavors, from software to movies:

Participants in some group projects often do not know exactly what their contributions are. Ex ante, they do not know what the project will entail, how long it will take, who will contribute how much in terms of time, useful ideas or skills along the way, or even whether the project will succeed enough to make it worth thinking about who did what. Ex post, people have a hard time reconstructing what their contribution was, and psychological literature shows a tendency of people to exaggerate (in their own mind) their successful interventions and to forget their failures. Some of the literature even

² *Id.* at 35. Commentators have criticized this logic on the ground that trademark law is not generally concerned with the identities of actual contributors to a product; it is instead concerned only with legal source (the entity responsible for quality). While there is something to that criticism, it is unfair on the facts of *Dastar*. See Mark P. McKenna, *Dastar’s Next Stand*, 19 J. Intell. Prop. L. 357, 372-73 (2012).

³ Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, 95 Geo. L.J. 49, 63 (2006).

suggests that it is entirely rational for participants to exhibit this form of over-confidence in their abilities and skill.⁴

Add to this factual uncertainty and conflict the legal construct of authorship: Presently, courts are generally unwilling to recognize multiple authors even when it is uncontested that multiple people are responsible for a work's final form.⁵ If we are interested in properly allocating explicit credit among creative participants, we will have to reconstruct the definition of joint authorship. On the other hand, if we did create a special type of "attribution authorship" that carried with it no economic rights, that would invite endless litigation and increase the number of line-drawing problems substantially. Neither possibility seems worthy of pursuit.

Similarly, initial authors and derivative work creators are unlikely to agree on what descriptions are truthful and significant. Movies made from comic books provide an easy example where credit will necessarily depend on audience assumptions about the relative contributions of the actors, directors, screenwriters, comic writers, and so on. The audiences for such movies are larger by orders of magnitude than the audiences for the original works. Precise division of credit would require each moviegoer to sit down and compare the comic (or the novel, or play, etc.) to the adaptation. This is not going to happen, because moviegoers want to see a movie, not to read a comic book. They could be informed that the work was changed from the original—but do they need an attribution right to figure that out? And all this merely addresses the relationship between the original author and the audience. The creators whose expression went into the derivative work will have strong opinions of their own about credit and blame, which will likely conflict with the original author's.

In fact, most economically significant copyrighted works—the kinds most likely to generate litigation—are the products of multiple creators' efforts, whether jointly (movies), sequentially (derivative works), or both (*Wonder Woman*). The more cooks adding ingredients to the recipe, the more difficult it is to identify responsibility for the final result, and the more room there is for disagreement, reasonable and otherwise. Attribution for screenwriters of Hollywood films, for example, is subject to elaborate standards developed by industry experts over decades, yet it still routinely produces disputes requiring arbitration.⁶ Screenwriting credits can be significantly removed from responsibility for what actually gets filmed, and industry participants know this. However, credit is still a matter of pride, and screenwriting credit also determines entitlement to residual royalties. Given the high stakes in money and ego, the industry has significant incentives to develop a workable credit scheme, but its rules still consistently engender disputes and resentment.

As one screenwriter points out, the routine use of arbitration encourages screenwriters to vent, and perhaps fixate on "the various frustrations they've felt at the film development process,"⁷

⁴ Fisk, *supra*, at 105. See generally Corynne McSherry, *Who Owns Academic Work? Battling for Control of Intellectual Property* (2001) (discussing variations in credit norms and behaviors across academic disciplines, and persistent tendencies of everyone involved to feel slighted).

⁵ See, e.g., *Google v. Garcia*.

⁶ For a description of the system, see Fisk, *supra*, at 77-80. Fisk notes that in 2002, "67 of 210 feature film writing credits were arbitrated." *Id.* at 79.

⁷ See Kung Fu Monkey, *Writing: Arbitration Letters*, <http://kfmonkey.blogspot.com/2007/03/writing-arbitration-letters.html> (Mar. 15, 2007 10:14 MST).

which are many. While he finds the results of arbitration generally reasonable, he observes that “every now and then some infamously bizarre decision will come down the pipe that’s so disturbingly arbitrary, it reinforces the sense of panic and helplessness most writers feel . . . well, every day-ish.” As he explains:

Now the insane ugly truth here is that trying to turn the difference between “Story by” and “Screenplay by” and “Written by” into solid, actionable guidelines for the arbitrating readers is, well ... insane. Despite the best efforts of the Guild folk ... the guidelines somehow manage to be both authoritative and vague.... Each screenwriter ... gets to write a letter ... in which we argue out how we interpret these objectively/ subjective guidelines applying to the scripts in question, supporting the credits we think are fair.... The real thriller is that you have no idea what other writers are claiming. Some guys come on hard on arbitration because they got fucked on their last project, and now it’s time for the hate to run downhill.”⁸

It is unlikely that copyright law could succeed where industry experts have repeatedly just muddled through, leaving everyone unhappy. Given the difficulty that a highly concentrated industry has with managing attribution, developing new legally enforceable attribution rules in less-well-organized mediums would be a daunting prospect. Right now, these disputes are left to the private realm, resolved (often unsatisfactorily) by moral suasion or contract. There is a strong burden of proof for anyone who would argue that law could do better.

Traditional literary and visual works would be at the core of any attribution right, yet a legal code of attribution would also fit poorly with the practices of reference and quotation that pervade these forms. What good would it do most readers for Nabokov to interrupt the narrative of *Lolita* in order to tell us that he’d been inspired by a short story published in Germany, whose plot and characters have notable similarities to those of his masterpiece?⁹ Nabokov has suffered no diminution in reputation since this revelation, even though he could be judged to have violated both the original author’s attribution and integrity rights. Attribution might even muddy the waters, making it more difficult to credit Nabokov for the brilliance he added to an otherwise unremarkable concept.

The broader issue raised by Nabokov’s example is the idea/expression distinction. Plagiarism is often charged when a writer, especially a student, fails to attribute the source of her ideas. But copyright does not protect ideas, only original expression. Proponents of a right to attribution for expression only have already uncoupled law from the norms that supposedly justify a legal remedy. It is also relevant that people often overestimate the originality of their ideas, and believe they deserve credit when they do not, or do not deserve very much--as the source of

⁸ Id. (first ellipsis in original).

⁹ See *Lolita: A tale* by Heinz von Lichberg, http://www.arlindo-correia.com/lolita_de.html (July 24, 2004) (“[A]dmirers of Vladimir Nabokov and scholars of modern literature were startled by the revelation that the *Lolita* of Nabokov’s great novel was not the first fictional nymphet of that name to have enchanted an older lover: her namesake had appeared in an eighteen-page tale, also called “*Lolita*,” by the obscure German author Heinz von Lichberg, published in 1916.”).

Nabokov's inspiration deserves little credit for *Lolita*. Claims for attribution would offer another fertile path to implement the old Hollywood saying, "where there's a hit, there's a writ."¹⁰

Celebrated author Jonathan Lethem's essay *The Ecstasy of Influence: A Plagiarism* offers another useful example of the poor fit of an attribution requirement with the real practices of authorship.¹¹ At the end of the piece, he reveals that his words are in fact copied from a variety of other sources, quotations mixed and mashed. He provides sources at the end, but not in a conventional format; it is difficult to tell which words came from where. In the context of a passionate argument against control over creative works, the absence of attribution serves as part of Lethem's claims: We read the essay because of Lethem's reputation as a writer, Harper's reputation as a magazine, and Lethem's skill in deploying (others') words. Attribution would destroy the flow of the piece and would also disconnect the words from Lethem's endorsement of them, just as a President's acknowledgment that a speechwriter wrote his addresses would distract audiences from the critical fact that he was speaking in all relevant respects for himself.

Lethem pointed out that nonfiction has citation standards distinct from those of other creative forms:

Artists are, among other things, mischievous, and we should try to remember that we wish them to be. In songs, films, paintings, and much poetry, allusions and even direct quotations . . . are subsumed within the voice of the artist who claims them. Citations come afterward, if at all. There are no quotation marks around the elements in a Robert Rauschenberg collage or around Quentin Tarantino's swipes from lesser-known movies. And T.S. Eliot's "The Waste Land" has only end-notes—which, I suspect, are much less often read than the poem itself.¹²

Or, as an Organisation for Economic Co-operation and Development (OECD) report states more dryly, "In a multi-media environment with mixes of text, video, and graphic works, concepts such as 'citation' may be blurry."¹³ What works for quotations in standard educational and news reporting uses may not work in other forms of reuse, even within the same medium. The fact that practices surrounding attribution are widely varied even within particular cultures makes an attribution right difficult to define in advance, and thus onerous for compliance purposes.¹⁴

¹⁰ For example, here are a few of the multiple cases alleging that James Cameron's film *Avatar* infringed the plaintiff's preexisting work: *Scheiban v. Cameron*, 566 Fed.Appx. 616 (9th Cir. 2014); *Dean v. Cameron*, 53 F.Supp.3d 641 (S.D.N.Y. 2014); *Moore v. Lightstorm Entertainment*, 992 F.Supp.2d 543 (D. Md. 2014); *Van v. Cameron*, 2011 WL 13121346 (S.D. Cal. Sept. 26, 2011). See also, e.g., *Lapine v. Seinfeld*, 375 Fed.Appx. 81 (2d Cir. 2010) (cookbook aimed at picky children didn't infringe similar cookbook).

¹¹ Harper's Magazine, Feb. 2007, at 61.

¹² Jonathan Lethem, Letter, Harper's Magazine, Apr. 2007, at 5.

¹³ Directorate for Sci., Tech. and Indus., Comm. for Info., Computer and Commc'ns Policy, Working Party on the Info. Econ., DSTI/ICCP/IE(2006)7/FINAL 46 (Apr. 12, 2007), available at <http://www.oecd.org/dataoecd/57/14/38393115.pdf>.

¹⁴ Catherine Fisk describes the rise of attribution norms at newspapers that require not just credit for the main writer of a story, but also for "stringers" who contributed research or parts of the story. This contrasts with the norms of broadcast journalism, where writers, researchers, and others off screen are rarely credited, perhaps because voluminous credits would cut into valuable advertising time. Fisk suggests that the main reason for fewer credits is that viewers' expectations about authorship and credit differ between broadcast and print journalism, expectations that themselves are likely related to the economic structures of the different media. See Fisk, *supra*, at 92-93.

Relatedly, as Fisk points out, current approaches to attribution rights adopt a culturally specific notion about authorship, and may enhance the problem of disregarding cultural traditions from which individual authors have drawn.¹⁵ The implicit model of the author entitled to an attribution right is a single artist whose name deserves to be the only name attached to a single book, sculpture, painting, or similar visual work. In many cases, this model already depends on the erasure of key figures—editors, research assistants, agents, dealers, and others who shaped the works.

The remedy for infringement is a copyright claim; the remedy for plagiarism or failure to give sufficient credit should be more speech and the judgment of the public, not potential legal claims.

Attribution rights may seem easier to manage than other moral rights because all they require is proper disclosure. Thus, rather than suppressing works entirely, attribution rights simply enforce labeling rules. This proposition assumes that authors will never over-assert their rights in order to suppress unwanted uses completely, and that users will understand and assert their rights to proceed once they have conformed their attributions to the law. Those assumptions are unwarranted. The most detailed proposals for new attribution rights provide for damages, either generally or at least under some circumstances such as willful misattribution, actual economic harm, or violations that are fully completed so that injunctive relief would be useless. Given the standard practice of sending cease and desist letters phrased in aggressive terms, we can expect that some authors will always claim that those circumstances apply when they allege violation of an attribution right. As a result, users will routinely be threatened with substantial monetary penalties, and legitimate behavior will be chilled.

Moreover, it is unlikely that mandatory attribution would achieve the goal of informing audiences about authorship. English students and law professors aside, people rarely read footnotes, read through the credits of a film, or pay attention to disclosures in general. As researchers concluded, because of cognitive processing limitations, “obviously effective disclosures (e.g., those that are encoded, those that are explicit, etc.) are often ineffective.”¹⁶

¹⁵ See, e.g., Fisk, *supra* note 22, at 55-56 (“Attribution appears to operate quite differently within traditional or indigenous cultures than it does in modern American or European culture. Notions of individual authorship, the status that comes from being perceived as a creator, and the norms that govern attribution vary among cultures It is interesting to note that as indigenous or non-western cultural practices, information, and artifacts are appropriated by American or European culture, vague attribution is sometimes made (to highlight the exoticness or authenticity of the borrowed bit of culture), but often it is not. The power disparities in such cultural appropriation are enormous....”) (footnote omitted). Gender also plays an important role in determining who is deemed entitled to credit. See *id.* at 58 (“Women have long provided uncredited research, editorial, and technical assistance on creative projects undertaken by the men in their lives. Who can and should be credited with invention is thus culturally specific and wrapped up as much in norms about honor and credit as in the supposedly simple fact of who conceived a new idea.”).

¹⁶ Gita Venkataramani Johar & Carolyn J. Simmons, *The Use of Concurrent Disclosures to Correct Invalid Inferences*, 26 *J. Consumer Res.* 307, 320 (2000); see also Alan R. Andreasen, *Consumer Behavior Research and Social Policy*, in *Handbook of Consumer Behavior* 459 (Thomas S. Robertson & Harold H. Kassirjian eds., 1991) (consumers don’t often use disclaimers in making decisions).

As the Second Circuit pointed out in the important *Gilliam v. ABC* case involving unauthorized editing of Monty Python episodes for American television:

We are doubtful that a few words could erase the indelible impression that is made by a television broadcast, especially since the viewer has no means of comparing the truncated version with the complete work in order to determine for himself the talents of plaintiffs. Furthermore, a disclaimer . . . would go unnoticed by viewers who tuned into the broadcast a few minutes after it began.¹⁷

Similarly, most people will not click on a link to read about all the authors and performers of a song. To a first approximation, disclosure mandates convey no information at all to audiences.¹⁸ Careful design tailored to the specific psychological circumstances under which audiences encounter the disclosure, where people are already motivated to process the information, can create exceptions—but the OTW has seen no evidence that such rules could be crafted for author attribution.¹⁹ What should 2 Live Crew do to indicate that certain portions of their song “Pretty Woman” were taken from Roy Orbison’s “Oh, Pretty Woman,” while others were not? Effectiveness and artistry are in competition, and the same would be true of attribution disclosures and disclaimers, especially when the artist’s interest is in identifying her contribution to a greater whole or her disagreement with a particular alteration, as many attribution proposals are designed to allow.²⁰

Attribution proponents want audiences to care as much about authorship as the proponents already do. But legal rights provide audiences with no reason to pay attention. Without already-existing consensus about the importance of attribution, the only way to get audiences to pay the “proper” amount of attention is to jump up and down, blocking their view of something they want to see—and that has obvious costs to the audiences.

The ineffectiveness of disclosures should matter both to those who see attribution in consumer protection terms and to authors’ rights adherents. For the latter group, it matters that an attribution that goes unnoticed fails to protect the unique relation between author and work because the third party in that relationship is, necessarily, the audience. Imagine that a user properly attributed a work, and the author knew that the attribution was present on the work, but

¹⁷ 538 F.2d 14, 25 n.13 (2d Cir. 1976).

¹⁸ Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted To Know: The Failure of Mandated Disclosure* (2014) (surveying empirical evidence).

¹⁹ Other countries’ attribution rights require “reasonable” attribution. See, e.g. Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 *Hous. L. Rev.* 263, 288-89, 292-93, 294-95 (2004). The Commonwealth countries generally use the clarity and prominence of the attribution as a proxy for effectiveness. However, in the United Kingdom an author is entitled to an attribution that is “likely to bring [the author’s] identity to the attention of a person seeing or hearing the performance, exhibition, showing, broadcast or cable programme in question.” Copyright, Designs and Patents Act, 1988, c. 48, § 77(7)(c) (U.K.) (emphasis added), quoted in Ginsburg, *supra*, at 289. However, the meaning of this provision has not been extensively explored, possibly in part because of the significant restrictions the United Kingdom imposes on the assertion of an attribution right. See *id.* at 290-92.

²⁰ See Commercial Alert, News Release, *Advertisers Attack Honest Disclosure of Stealth Ads on TV*, <http://www.commercialalert.org/issues/culture/product-placement/advertisers-attack-honest-disclosure-of-stealth-ads-on-tv> (Nov. 15, 2003) (discussing the Freedom to Advertise Coalition’s argument that Commercial Alert’s proposed requirement of on-screen disclaimers during product placements would be “‘impractical,’ ‘dangerous,’ ‘extreme,’ ‘radical,’ and that it ‘borders on the ludicrous,’ and that it would make programming ‘virtually unwatchable’”).

the attribution was printed in binary code, or invisible ink. Hardly anyone would say that attribution had really been made, because *readers* would not know about it. Once we recognize that readers' understanding is a crucial component of attribution, however, we have to consider whether even explicit attributions in fact become part of their understanding of the work.

Moral-rights proponents rarely discuss the irreducible gap between sender and receiver in communication. But even if a work has a true, intended meaning, and even if misreadings ought to be seen as harms, that does not mean they can in practice be stopped or even substantially decreased—especially with the tools available to lawyers, as opposed to literature teachers. The assumption behind a disclosure remedy is that the audience will in fact perceive an overt attribution, but that is not necessarily true. Audiences, unfortunately, are very bad at interpreting information, even in situations when speakers have every incentive to communicate clearly and effectively.²¹

An attribution right could somewhat limit the problem of difficult disclosures by only requiring attribution where feasible. But effective attribution is rarely feasible. Given audiences' often low levels of attention, the vast number of works to which we are exposed in the modern environment, and basic cognitive limitations on processing information, even a clearly stated attribution has only a limited chance of informing audiences, and we can expect routine failures. In this, attribution is not much different from other types of information. Often, the practical choice is between (1) allowing dissemination of a work whose attribution will inevitably be missed or misunderstood by some significant percentage of the target audience or (2) suppressing the dissemination entirely. The middle ground of requiring more disclosures is comforting, but simply does not work.

Separately, an attribution right would conflict with many ordinary practices of citation, and would threaten standard quotations and fair uses. Lay practices do not generally allocate credit for multiply-authored works. The auteur idea is common and convenient even when other creators such as screenwriters are directly responsible for much of the final product. Thus, for example, fan fiction and other unauthorized fan-created works based on the television show *Teen Wolf* often praise creator Jeff Davis, but rarely if ever list all the writers and other creative contributors. Likewise, people citing song lyrics routinely identify the singer or group most strongly associated with the song, rather than the composer. Noncommercial, transformative uses, including quotations, would therefore often lack proper attribution from a strict legal standpoint, even though such uses should be and currently are specially favored in fair use analysis. And this sets aside the questions of commonly shared culture: most people who say that life is “a tale/Told by an idiot, full of sound and fury,/Signifying nothing,” hardly expect their audiences to think the words are theirs. In an increasingly diverse culture, however, figuring out when a reference is so obviously referential that it serves as its own attribution would be extremely difficult, even if the law would accept that idea.

²¹ Jacob Jacoby & Wayne D. Hoyer, *The Comprehension and Miscomprehension of Print Communications* 110-13 (1987) (finding that an average of 19% of messages in magazine advertisements were affirmatively misunderstood by consumers, while 16% of the messages were not received; no message was correctly conveyed to all readers, and all but 3 of 1,347 respondents misunderstood something about the four advertisements they read); Jacob Jacoby et al., *Miscomprehension of Televised Communications* 64-73 (1980) (finding that consumers misunderstood an average of 28.3% of messages in television commercial ads; 81.3% of consumers misunderstood at least some portion)

Attribution norms don't (and shouldn't!) expire for older works, while copyright does; and yet a moral right of attribution (or, heaven forbid, integrity!) that followed that approach would effectively create eternal copyright, which would not only be unconstitutional, but also strongly at odds with progress.

Attribution remains a powerful incentive for creative production. Moreover, norms of credit, including the ones that produced all the footnotes in this submission, are extremely valuable for particular professions and individuals laboring within those professions. Citation and attribution should be taught as part of ordinary reading and writing. Sometimes, however, law and morality should be left to diverge, when law's tools are too crude to make the fine distinctions that prevail in ethics. Attribution rights provide an example of this situation. "Who steals my purse steals trash,"²² but should still go to jail; but he that filches from me credit for my creative works deserves condemnation, not injunction.

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?

The OTW does not believe that any changes are needed.

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?

To the extent that §1202 protects against removal of attribution information in order to facilitate copyright infringement, it is a useful tool. However, it must remain tightly linked to the deliberate enablement of infringement, and courts should continue to require a clear connection to the material at issue.²³ Some have tried to use 1202 as a mere attribution statute outside the context of digital reproduction (see, e.g., *Williams v. Cavalli*, 2015 WL 1247065), and the OTW believes that's inconsistent with the legislative intent, which was clearly intended to focus on copyright management information in the digital reproduction and distribution environment. The OTW believes Congress should leave well enough alone.

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?

²² The full quote, from Shakespeare's *Othello*: "Who steals my purse steals trash; 'tis something, nothing; 'twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed."

²³ See, e.g., *Personal Keepsakes, Inc. v. Personalizationmall.com, Inc.*, 975 F. Supp. 2d 920, 929 (N.D. Ill. 2013) ("[A] defendant must remove the CMI from the 'body' or the 'area around' the work to violate DMCA," because the statutory text requires CMI to be "conveyed" with the copyrighted work; printing a general copyright notice on a website isn't enough; "Such a rule prevents a 'gotcha' system where a picture or piece of text has no CMI near it but the plaintiff relies on a general copyright notice buried elsewhere on the website").

Yes, stronger protections for the right of attribution or integrity would conflict with the First Amendment, going beyond the traditional contours of copyright. As *Dastar* pointed out, where copyright protection ends, the right to copy—and to copy without attribution—begins. To the extent that attribution and integrity rights conflicted with fair use, they would also conflict with the First Amendment.

Statutory rights and the First Amendment are “reconciled” automatically: the First Amendment overrides any statutes to the contrary, though the OTW does not suggest that Congress test this rule.

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?

The OTW does not believe that any additional moral rights are advisable. Consider, for example, a threshold problem in determining which copyrightable works should be granted attribution or integrity rights. Even highly moralistic copyright regimes limit the types of works deemed worthy of moral rights.²⁴ Computer programs, for example, have so many utilitarian functions that moral rights would be incompatible with general social welfare. As a result, many moral-rights theorists argue for subject-matter limitations that would create a new level of complexity in copyright law.²⁵

To the extent that any moral rights exist, they are currently limited by, e.g., copyright duration and fair use, and while the OTW believes that any additional moral rights are inadvisable for the reasons discussed above, any proposed changes should at the very least be limited by those same principles.

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?

Review of *Dastar* and decisions applying it over the past 13 years reveals the wisdom of the Supreme Court’s decision. Authors have not suffered huge losses from the effects of *Dastar*. In point of fact, the standard *Dastar* decision does not involve a traditional creative work or a traditional creative interest. Instead, *Dastar* is regularly employed to prevent businesses, angry that their ideas have been copied, from suing competitors based on the theory that the plaintiff is the “origin” of the ideas or technology embodied in a competing product.²⁶

²⁴ See, e.g., Ian Eagles & Louise Longdin, Technological Creativity and Moral Rights: A Comparative Perspective, 12 Int’l J.L. & Info. Tech. 209 (2004).

²⁵ See, e.g., Roberta Rosenthal Kwall, Originality in Context, 44 Hous. L. Rev. 871 (2007).

²⁶ See, e.g., *Kehoe Component Sales Inc. v. Best Lighting Products, Inc.*, 796 F.3d 576 (6th Cir. 2015); *Baden Sports, Inc., v. Molten USA, Inc.*, 556 F.3d 1300 (Fed. Cir. 2009); *Bretford Manufacturing, Inc. v. Smith System Manufacturing Corp.*, 419 F.3d 576 (7th Cir. 2005); *Stolle Machinery Co., LLC v. RAM Precision Industries*, --- Fed.Appx. ---, 2015 WL 1137429, No. 13–4103 (6th Cir. Mar. 16, 2015) (claims to own machine design); *A.H. Lundberg Associates, Inc. v. TSI, Inc.*, No. C14–1160, 2014 WL 5365514 (W.D. Wash. Oct. 21, 2014) (claims to

When creative works are at issue, and where there is no already-sufficient copyright claim to be made, *Dastar* often prevents evasion of copyright’s limits,²⁷ or of the plaintiff’s apparent lack of any authorial or copyright ownership interest in the content at issue.²⁸ For example, trademark owners—not authors—increasingly attempt to claim that a trademark embedded in a creative work enables them to control the non-copyright-infringing reuse of the creative work, because reproducing or displaying the work also reproduces or displays the embedded mark. That is, they claim that the work itself is a misrepresentation of source. *Dastar* correctly bars any Lanham Act claim in which the alleged confusion could only be the result of use of a mark within the creative content of a work.²⁹

If it were otherwise, Disney could prevent others from selling copies of Steamboat Willie even after its copyright expired by arguing that, because Mickey Mouse is in the movie and is Disney’s trademark, consumers will be confused about the source of physical copies of the movie.³⁰ Under *Dastar*, however, “a movie theater may freely exhibit a copy of Universal Studios’ 1925 silent film, *The Phantom of the Opera*, which is now in the public domain, without fear of committing trademark infringement simply because Universal’s registered trademark will be displayed when the film is played.”³¹ As the Seventh Circuit explained, “The producers of communicative goods often embed their marks not only on the packaging of the good but in its content.” Films have studio marks in their credits, and yet, when the copyright expires, “it is not a trademark violation simply to display the work without first deleting the mark that was inserted into its content.”³²

Where valid copyright claims are available, a *Dastar*-barred failure to attribute claim would have added nothing to the plaintiff’s available remedies, especially given the availability of statutory damages for timely registered works.³³ And where copyright claims are not available because,

own processing equipment design); *ZS Assoc., Inc. v. Synogy, Inc.*, No. 10-4274, 2011 WL 2038513 (E.D. Pa. May 23, 2011) (rejecting plaintiff’s false advertising claims that were based on allegedly false attribution in a press release of the creation of “sales performance management solutions”); *Touchpoint Communications, LLC v. DentalFone, LLC*, No. 15-cv-05240 (W.D. Wash. Oct. 9, 2015) (rejecting claims based on similar app designs); .

²⁷ See *Keel v. Axelrod*, No. 15-1507, 2015 WL 7733973 (E.D. Pa. Dec. 1, 2015) (rejecting plaintiff’s argument that defendant misrepresented his role in a political campaign in the defendant’s book based on First Amendment principles, including *Dastar*).

²⁸ See, e.g., *Slep-Tone Entertainment Corp. v. Wired for Sound Karaoke & DJ Servs., LLC*, No. 14-17229 (9th Cir. Jan. 18, 2017) (per curiam); *Phoenix Entm’t Partners v. Rumsey*, 829 F.3d 817, 821 (7th Cir. 2016).

²⁹ See *Dastar*, 539 U.S. at 33.

³⁰ Cf. *Bretford*, 419 F.3d [] (noting that consumers might see marks embedded in other products, and holding that *Dastar* bars claims based solely on that embedding).

³¹ *Phoenix Entm’t Partners v. Rumsey*, 829 F.3d 817, 829-30 (7th Cir. 2016).

³² *Id.* at 829.

³³ See, e.g., *Barn Light Electric Company, LLC v. Barnlight Originals, Inc.*, 2016 WL 7135076, No.14-cv-1955 (M.D. Fla. Sept. 28, 2016) (allowing copyright claim, but not false designation of origin claim, based on defendant’s use of copies of plaintiff’s photos to sell products); *Masck v. Sports Illustrated*, 5 F. Supp. 3d 881 (E.D. Mich. 2014) (*Dastar* barred false designation of origin claim based on copying of photos); *Nat’l Bus. Dev. Svs., Inc. v. American Credit Educ. & Consulting, Inc.*, 299 Fed.Appx. 509 (6th Cir. 2008) (rejecting plaintiff’s Lanham Act claims for incorporating copyrighted materials into defendant’s own materials); *Zyla v. Wadsworth*, 360 F.3d 243, 251-52 (1st Cir. 2004) (finding Lanham Act claims based on failing to attribute authorship of college textbook barred by *Dastar*); *Dutch Jackson IATG, LLC v. Basketball Mktg. Co.*, 846 F. Supp. 2d 1044 (E.D. Mo. 2012) (barring plaintiff’s claim that was based on defendants’ use of the plaintiff’s musical work as part of the soundtrack).

for example, the plaintiff is not an “author,” the problem (if any) is in the standard for authorship, not in the lack of attribution in itself.³⁴ When affirmative misrepresentations of creative responsibility are made in commercial advertising or promotion and are material, they may be actionable under §43(a)(1)(B).³⁵ No further protection is needed.

For within-copyright works, copyright owners can always use their ability to control copying to impose an attribution requirement, if they want. The universe of creative people who are affected by *Dastar* therefore consists of (a) people who don’t own the copyright but still want attribution and control; and (b) people using trademark law to control creative works that aren’t subject to copyright. Re-enabling lawsuits in category (b) is undesirable, since it’s evading copyright’s limits. It’s unclear how big category (a) really is, and it would be undesirable to open up trademark law in a way that would cause lots of ancillary damage in order to further the interests of a small group.³⁶ At the very least, pre-*Dastar* trademark law is a poor way to serve authors’ interests in attribution.

Indeed, the pre-*Dastar* attribution cases always put defendants in an inescapable bind, as the Supreme Court pointed out. If they made a bodily appropriation without attribution, they got sued. (The Second Circuit even used a substantial similarity test.)³⁷ If they altered the original work and attributed, they’d get sued for “mutilating” the work. If they didn’t alter the original work and attributed, they’d get sued for false endorsement based on the mere attribution of the creative work to its creator, as the plaintiff attempted to do in the *Slep-Tone* cases.³⁸

Re-adding an attribution requirement would reanimate these dilemmas.³⁹ Some have argued that this dilemma can be averted by requiring “proper labeling.” But as pre-*Dastar* cases reflect,

to a basketball DVD); *Dorchen/Martin Assocs., Inc. v. Brook of Cheboygan, Inc.*, 838 F. Supp. 2d 607 (E.D. Mich. 2012) (rejecting plaintiff’s false designation of origin claim where the defendant’s alleged use of a design for an assisted living facility was based on a design the plaintiff had presented to the defendant and which the plaintiff did not authorize the defendant to reuse); cf. *Friedman v. Zimmer*, No. 15-502 (C.D. Cal. Jul. 10, 2015) (barring claim that credit “music by Hans Zimmer” was false designation of origin where plaintiff alleged that Zimmer’s composition infringed his copyright).

³⁴ *Romero v. Buhimschi*, 396 F. App’x. 224, 233 (6th Cir. 2010) (court barred Lanham Act claim based on a research group’s taking full credit for research services to which the plaintiff allegedly contributed).

³⁵ But see *Antidote Int’l Films, Inc. v. Bloomsbury Publ’g, PLC*, 467 F. Supp. 2d 394, 399 (S.D.N.Y. 2006) (holding that *Dastar* bars a false affiliation claim where “one person is the publisher of a novel and the other is the author of the novel, because the holding of *Dastar* would be meaningless if a false authorship claim could be recast in this manner”).

³⁶ For a more extensive discussion of the harms associated with both (a) and (b), and the overlap between them, see Elizabeth L. Rosenblatt, *The Adventure of the Shrinking Public Domain*, 86 Colo. L.R. 562 (2015).

³⁷ *Cleary v. News Corp.*, 30 F.3d 1255, 1261 (9th Cir. 1994); *Summit Mach. Tool Mfg. Corp. v. Victor CNC Systems, Inc.*, 7 F.3d 1434, 1436–37 (9th Cir. 1993); *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 782-84 (2d Cir. 1994) (using the copyright infringement test as the test for determining false designation of origin under the Lanham Act); *Scholastic, Inc. v. Stouffer*, 124 F. Supp. 2d 836 (S.D.N.Y. 2000). Slight modifications to the material were not sufficient to avoid liability. See *Summit Mach. Tool Mfg. Corp.*, 7 F.3d at 1437.

³⁸ Compare *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 781-84 (2d Cir. 1994) (failing to credit original creator of work that is subsequently modified is actionable as reverse passing off) with *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 23-25 (2d Cir. 1976) (crediting original creator of work that is subsequently modified is actionable as passing off).

³⁹ *Dastar*, 539 U.S. 23, 36 (2003) (“On the one hand, [*Dastar*] would face Lanham Act liability for failing to credit the creator of a work on which their lawful copies are based; and on the other hand they could face Lanham Act liability for crediting the creator if that should be regarded as implying the creator’s ‘sponsorship or approval’ of the

“proper” labeling is in the eye of the beholder, and the plaintiff never thinks the labeling was proper.⁴⁰

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?

The U.S. is hard to compare to other countries because of variations in litigiousness; the unusual statutory damages regime; the relative paucity of countries that have moral rights and fair use; and the distinctive American commitment to the First Amendment. The OTW does not think that any other countries’ moral rights regimes offer good models. As an example of distinctive U.S. practices and willingness to litigate in marginal situations, there doesn’t seem to be a non-U.S. case similar to the pre-*Dastar* case *Choe v. Fordham University School of Law*, in which a disgruntled student sued a law journal under the Lanham Act for marring his note with capitalization and typographical errors, erroneous footnote cross-references, and extra words.⁴¹

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?

The OTW urges the government to support the fair use best practices initiatives. Along with Creative Commons, these initiatives can help develop context-sensitive, norm-governed attribution practices without the difficulty entailed by formal legal definitions. Documentary filmmakers, for example, have attempted to define when it is fair use to incorporate others’

copy.”). See also Justin Hughes, American Moral Rights and Fixing the Dastar “Gap,” 2007 UTAH L. REV. 659, 682; Michael Landau, *Dastar v. Twentieth Century Fox: The Need for Stronger Protection of Attribution Rights in the United States*, 61 N.Y.U. Ann. Surv. Am. L. 273, 303 (2005) (“Although it sounds cliché, bad facts do make bad law. In *Dastar*, the facts were terrible; they presented the quintessential ‘damned if you do, damned if you don’t’ conundrum. At first blush, it seems that *Dastar* probably would have been sued for ‘false designation of origin’ under section 43(a) of the Lanham Act whether it gave credit to Twentieth Century Fox or not.”); Graeme B. Dinwoodie, Concurrence and Convergence of Rights: The Concerns of the U.S. Supreme Court 15, in *Crossing Borders: Between Traditional And Actual* (Grosheide & Brinkhof eds., Hart Publ’g 2005) (noting the same “risk of being sued no matter what attribution strategy they followed”).

⁴⁰ Cf. *Dastar*, 539 U.S. at 36 (“it is hard to have confidence in [Fox’s] assurance that they ‘would not be here on a Lanham Act cause of action’” if “*Dastar* had simply ‘copied the television series as *Crusade in Europe* and sold it as *Crusade in Europe*,’ without changing the title or packaging (including the original credits to Fox).”

⁴¹ 920 F. Supp. 44 (S.D.N.Y. 1995), aff’d, 81 F.3d 319 (2d Cir. 1996). Specifically, Choe sued because of the following problems: “‘treaty’ was changed improperly to ‘FCN Treaty’ in 12 places; ‘treaty’ should have been ‘Treaty’ in two instances; ‘parent’s’ should have been deleted in three references to the FCN Treaty; five footnote cross-references were misnumbered; two sentences needed rewriting; and numerous typographical errors marred the text.” *Id.* at 46.

copyrighted works in their films without seeking expensive, and often unavailable consent, and have made attribution a cornerstone of their best practices.⁴²

⁴² See Ass'n of Indep. Video & Filmmakers et al., Documentary Filmmakers' Statement of Best Practices in Fair Use 3-7 (2005), available at http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf (recommending attribution as part of the best case for fair use in documentaries).