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
Reply 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 wish to make several points in reply to the submitted comments.

First, no commenter submitted any evidence that an attribution right *works*—that attribution would be feasible for most kinds of works or, even if feasible, that attribution would communicate anything meaningful to audiences, especially on the screen of a mobile device or on mass-market works. Requiring more unread boilerplate serves no moral or artistic interest, but may well generate more litigation.

Second, in case the Office considers a right not to be identified as the author of a work (also known as a right of disavowal), the Office should consider how, in the digital age, such a right could create a huge new right to be forgotten in the US, covering almost anything a person posted to Instagram, Facebook, Tumblr, etc. This would create significant First Amendment problems as well as problems with services that have saved or even sold the data to third parties. (In many moral rights jurisdictions, waivers can only cover specified uses and cannot be used to provide blanket consent to allow the licensee to make new uses or to sublicense its rights; if the U.S. adopted a similar rule, then terms of service would be insufficient for consent to such treatment.) The debate on the right to be forgotten is important and deserves careful consideration, as do the privacy interests of Americans generally, but privacy reform shouldn't occur as an unintended side effect of copyright law.

Third, the National Writers Union and Science Fiction and Fantasy Writers of America suggest that requiring registration as a prerequisite for specified remedies under copyright, or moral rights, violates the Berne Convention.[1] While the Office of course understands that (1) requiring registration for national works and (2) requiring timely registration for access to statutory damages are both perfectly acceptable under Berne,[2] given that Berne does not govern treatment of national works nor mandate the availability of statutory damages, the OTW wishes to ensure that the record is clear.

Fourth, proponents of moral rights mentioned fan fiction and other fanworks as part of their discussion, and the OTW's expertise in fanworks and fan culture can inform the Office's

[1] Comments of the National Writers Union and Science Fiction and Fantasy Writers of America, at 13.
[2] See, e.g., Football Ass'n Premier League Ltd. v. YouTube, Inc., 633 F. Supp. 2d 159, 164 (S.D.N.Y. 2009).

understanding of their claims. The Kernochan Center, in discussing norms favoring attribution, writes:

> [A]uthors of many works such as fan fiction made available on the internet don't seek direct payment, but do want their names attached to their works. For many beginning authors, especially on the Internet, "exposure" provides the primary reward, but if their authorship goes uncredited, then they are denied even this recompense.[3]

Likewise, the Authors Alliance states:

> [A]uthorial incentives to create new works of authorship are often directly affected by the authors' perception as to whether they will be given credit for their creations and whether their works will be exhibited in the form they authorized for dissemination. This is true for many authors, but especially for some of those for whom the expectation of monetary compensation is not an inducement to creativity, including many academic authors and authors of noncommercial user-generated works.… Without some reassurance that their desire for recognition as authors of their works will be respected and that their works will be available in non-mutilated form, their incentives to create may well diminish. In many creative communities, attribution and integrity interests are respected through authorial and community norms, but incentives to create will be strengthened if the law recognizes and protects those interests as well.[4]

Unfortunately, these arguments for turning credit norms into a legal right are misdirected. Not only would the legal right be subject to problems discussed in the OTW's initial submission, it is particularly unpersuasive to point to fanworks and other forms of user-generated content to argue in favor of such a legal right. First, any corresponding right of integrity would predictably be used to threaten and suppress exactly these works, since they often incorporate parts of existing works.

Second, neither these commenters nor any others submitted evidence of a widespread problem of lack of attribution in user-generated content, meaning that there's no relevant need for legislative action. Independently, there is no shortage of academic or other noncommercial work that needs to be incentivized with new rights. Plagiarism norms do the necessary work within these communities, and existing copyright and contract law (such as Creative Commons licensing) do the necessary work outside them. For example, the OTW has assisted fans who have found their works both plagiarized and infringed—sold without their authorization on websites such as Amazon. In those cases, copyright law works exactly as it should, allowing the fan to get her misattributed work taken down and to prevent her work from being commercialized.

Third, an attribution right is more likely to be used against noncommercial creators than it is to be used by them. Ordinary creators who aren't seeking to make a living from their works have even less access to the legal system than creators who seek commercial benefit from their works. Noncommercial creators, such as fanwork creators, are less likely than commercial copyright owners to be able to devote the financial and practical resources required to pursue claims. For

[3] Comments of Kernochan Center, at 3-4.
[4] Comments of Authors' Alliance, at 4.

that reason, a right that supposedly covered them would be functionally useless. Such a right would more likely be used to challenge or suppress their works, for example if they mistakenly credited a show's auteur or a song's performer rather than its writer/director or composer. An attribution right would therefore give commercial copyright holders an additional tool to silence fanworks they did not approve of, without providing a corresponding benefit to fanwork creators beyond already existing anti-plagiarism norms, copyright, and contract.

Fourth, attribution norms in noncommercial communities are much more complicated than these short comments indicated. For example, almost all modern fanwork communities operate in a regime of pseudonyms, as they have for decades. Norms surrounding fans' identifiers are complicated and extremely context-sensitive.[5] Historical materials can pose special challenges. For example, when the University of Iowa began its fanzine digitization project, it decided to limit the attribution it gave to fan authors in its online records, although the fanzines themselves remain unaltered. It did this not to strip fan authors of desired attribution, but because in the pre-digital age many more fan authors used their "wallet names," but their participation in fannish activities was not easily findable or knowable to outsiders. Some would not appreciate being "outed" through digitization, and thus the University of Iowa chose a context-sensitive response[6]—one that might easily violate the law if an attribution requirement were enacted, forcing the University to choose between preserving history and preserving privacy. This is yet one more example of differences in norms and practices surrounding attribution that law finds much more difficult to navigate than norms do.

[5] See generally Rebecca Tushnet, The Yes Men and The Women Men Don't See, in A World Without Privacy? What Can/Should Law Do (Cambridge University Press, Austin Sarat ed., 2014).

[6] See Fanlore, University of Iowa Fanzine Archives, https://fanlore.org/wiki/University_of_Iowa_Fanzine_Archives ("Due to early fandom's usage of full legal names on many of the fanzines, the Special Collection currently lists only zine titles in its online finding aids.").