
**ANTONIN SCALIA LAW SCHOOL
GEORGE MASON UNIVERSITY
JOURNAL OF INTERNATIONAL
COMMERCIAL LAW**



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

SYMPOSIUM TRANSCRIPT

VOLUME 8

SUMMER ISSUE

NUMBER 1

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SYMPOSIUM TRANSCRIPT¹**AUTHORS, ATTRIBUTION, and INTEGRITY:
Examining Moral Rights in the United States**

United States Copyright Office
Center for Intellectual Property
George Mason University School of Law

101 Independence Avenue, SE
Madison Building, Montpelier Room
Washington, D.C. 20540

Monday, April 18, 2016

The day-long symposium brought together authors, scholars, and other stakeholders for a broad discussion of copyright issues related to moral rights. Topics included the historical development of moral rights and various means for providing them, the value that authors place on moral rights generally and individual moral rights specifically, the various ways these rights are provided for under current law, and new considerations for the digital age. Further study of moral rights under U.S. copyright law was among the recommendations made by the Register of Copyrights in testimony before Congress last spring and was requested by the Ranking Member of the House Judiciary Committee. This symposium will launch the Copyright Office's further analysis on this subject.

INTRODUCTION

Maria A. Pallante, Register of Copyrights and Director of the U.S. Copyright Office

Sandra Aistars, Clinical Professor at the 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

¹ The following is an edited and abridged version of the symposium's transcript. Edits were made by both panelists and journal editors. We would like to thank all the panelists, organizers, and attendees for a successful and insightful symposium.

Register Maria A. Pallante

Good morning, everybody. Good morning, copyright experts and authors. My name is Maria Pallante. I'm the United States Register of Copyrights. It's a great privilege and pleasure to welcome you here today to hear about authors, attribution and integrity. My staff and I have been looking forward to these discussions for a long time. Moral rights are something that we haven't talked a lot about in the United States in recent years. And so today, this symposium marks the beginning of a very important conversation that will eventually extend to a formal public process. I want to extend a very warm welcome to all of our panelists who are here today, including those of you who have come from other cities to be part of this conversation. I'm very pleased that we will be hearing from a wide range of perspectives—legal scholars, industry representatives, and perhaps most importantly, authors, composers and artists. I want to thank my staff for the very hard work that went into pulling this together in the Office of Policy and International Affairs headed by my colleague, Associate Register Karyn Temple Claggett. And I also want to thank Sandra, who's sitting here to my left, and all of her colleagues at George Mason University Law School and the Center for Protection of Intellectual Property not only for collaborating on this particular symposium today, but for being one of our very important academic partners. This is the, I think, third academic partnership we have along with Stanford University Law School and George Washington University Law School. And it means everything to us to be able to collaborate with academia.

As Register, I have advised Congress to undertake a comprehensive review of our copyright law that started in 2013. And I have noted in testimony that, unfortunately, the rights of individual authors have been lost in the conversation while they should really be the focus. Members of the House Judiciary Committee and the witnesses who testified before the committee also identified moral rights issues, including attribution and the ability of creators to refuse certain uses of their works, as some of the most important aspects of a well-functioning copyright system. The United States is, of course, obligated to recognize authors' moral rights under several existing treaties. Some, however, have begun to question the strength of moral rights protection in the United States in light of recent and, perhaps, not-so-recent case law. So today, we will explore a number of questions. We'll take a look at the current state of moral rights protection in the United States. And we'll compare our framework with that of other countries. We'll take a deeper look at attribution rights and how they are covered under U.S. law, and we'll consider whether the law could be amended to better protect authorship attribution. Authors, composers and artists will share how they value and protect moral rights. Issues related to how licensing arrangements and contracts are used to supplement statutory rights will also be raised. And of course, we'll be looking forward to hearing everybody's thoughts in the discussion aspects of today's symposium. Today

marks only the beginning of our conversation. After we reflect on what we hear today, the Copyright Office will issue a notice of inquiry, beginning a more formal process, including written public comments. Although at this time I don't know and won't pre-judge the ultimate outcome of these inquiries to come, I can assure you that, as with all of our work, the process will be very public and very transparent. Finally, moral rights have been addressed by previous Registers of Copyrights. And I am very pleased to recognize my two previous predecessors, the Honorable Marybeth Peters and the Honorable Ralph Oman, both of whom are here today. So thank you very much for coming and I'd like to turn it over to Sandra Aistars.

Professor Sandra Aistars

Good morning, everyone. I am Sandra Aistars. I'm a clinical professor at George Mason University School of Law, and I work with my colleagues at the Center for Protection of Intellectual Property on copyright issues on a day-in-day-out basis. But I'm also the daughter and the granddaughter of artists and authors. My father is a painter and a writer. My grandfather was an author, and my grandmother an opera singer. Among my other relatives and friends, I can count many additional poets and painters and writers and rockers. These people have shaped my view of the world. The relationship that a creator has with his work is profound and personal. I know by firsthand observation from my very earliest days how closely integrated with the artist's personality and identity his creation is. It's not surprising that artists often refer to their works as their "babies."

I grew up in the thick of art. My childhood was permeated by turpentine fumes and the tones of the Metropolitan Saturday afternoon broadcast as my father painted in his studio and I looked on from my playpen. I have later fond memories of participating in naming parties for my father's paintings. He was much influenced by the abstract expressionists. So this was one opportunity to let my creative juices flow with little to stand in the way of my "genius." I was never one for names like *Untitled* or *Abstract Number 5*. Instead, I preferred to name his paintings, among other things, *Green Pizza*. And I don't know if my acumen in naming works, combined with my father's good sense of humor, gave that particular painting a boost, but I can vouch for the fact that it won awards and sold immediately. But I also remember vividly the bonfires that my father would hold to get rid of paintings that he did not feel proud of.

These extremes of christenings and cremations of works are part of my DNA. But I think they're also understandable to all of you, even those who don't make their livelihood in the creative world and those who have not grown up with the same sorts of influences I have. These experiences bring into laser focus the emotional impact creative works have on our lives, whether we're the creators or the beneficiaries of those works.

You would think that all of these influences throughout my life would lead to my having formed very concrete views on moral rights issues, but that's not the case. And perhaps that's because the idea of moral rights has been so foreign to us in the United States.

In preparing for this presentation, I dug into the academic literature on this topic. And I want to quote to you the introduction of an article by Susan Liemer, which aptly illustrates the state of our current understanding of moral rights in the U.S. She writes,

"In 1997, a sculptor named Jan Martin won a lawsuit against the City of Indianapolis using a little-known Federal statute called the Visual Artists Rights Act. The court found the City violated certain rights that the statute granted to Mr. Martin when bulldozers destroyed his sculpture in the name of urban development. During the damages phase of the lawsuit, the court refused to award to Mr. Martin the enhanced damages available under the statute because, after all, the City had been unaware of the statute. The Seventh Circuit had no problem affirming the District Court. How is it possible that ignorance of the law was a valid excuse?"

So much for the principle that we learned in civics class long before some of us went to law school to learn it again that ignorance of the law is no excuse. This is one of the reasons why I'm honored to be partnering with the U.S. Copyright Office and organizing this symposium in order to take what might be the first strides towards a deeper understanding of how we value and how we implement moral rights protections for artists in the U.S. I'm eager to hear the varied perspectives of the speakers and to learn from the diverse sets of experiences across industries and internationally whether there are issues that would benefit from further inquiry.

My initial perspective is that discussions about moral rights encompass many of the most compelling issues that arise concerning creativity in the digital world. Indeed, some scholars have commented that moral rights are really an avatar for discussing basic copyright norms. But I'm particularly excited about today's discussions because, by examining copyright from a moral rights rather than a purely economic perspective, I believe we move towards a fuller understanding of the creator's relationship with his work.

Before we begin today's proceedings, I'd also like to take the opportunity to thank numerous people at George Mason Law School who have contributed to making this event possible. My colleagues at the Center for Protection of Intellectual Property who provided economic, intellectual and moral support for this endeavor, in particular, thanks to Devlin Hartline, Kristina Pietro and Matt Barblan; my students in the Arts & Entertainment Advocacy Clinic, who helped prepare the moderators for these discussions; and the members of the Journal of International Commercial Law, who will

publish these proceedings. Particular thanks go to Gabrielle Peters, the current outreach and symposium editor of the Journal; and Tyler Del Rosario, the incoming outreach and symposium editor; to Taylor Hoverman, the current editor-in-chief; and Tanya Secor, the incoming editor-in-chief; and to Stephen Veit, the incoming managing and publications editor.

I encourage all of you to take a moment today during the breaks to familiarize yourselves with the Journal and introduce yourselves to the students participating today, and to consider submitting an article for publication in the future. Thank you for being here, and thank you for contributing your thoughts and experiences.

SESSION 1: OVERVIEW OF MORAL RIGHTS

This introductory discussion focuses on several topics, including: the historical development of moral rights, including international treaty obligations; how moral rights differ from economic rights—philosophically, legally, and practically for authors; and a brief comparative overview of other countries' frameworks for moral rights and their effectiveness.

Panelists:

June M. Besek, The Kernochan Center for Law, Media and the Arts at Columbia Law School

Professor Daniel J. Gervais, Vanderbilt Law School

Professor Mark Schultz, Center for the Protection of Intellectual Property at the George Mason University School of Law

Eric J. Schwartz, Mitchell Silberberg & Knupp LLP

Karyn Temple Claggett, U.S. Copyright Office (Moderator)

MS. TEMPLE CLAGGETT: Our first panel today is entitled Overview of Moral Rights. I think some might question us in the United States Copyright Office and CPIP focusing a whole day on moral rights and even questioning whether we actually have enough to talk about for a whole day with respect to moral rights in the United States. Because of that, we wanted to start with an overview of moral rights so that everyone can have a kind of a basic understanding of what moral rights are, how different countries have implemented throughout the world, and exactly how the United States has implemented them as well.

I'm not going to go through everyone's bio in much detail. You guys have that in your conference materials. But I'll just briefly mention everyone in terms of their title and where they come from. First, I have June Besek, who is the Executive Director of the Kernochan Center for Law, Media and the Arts, and a lecturer at Columbia Law School in New York where her research and teaching focus on copyright and related rights. Next, I have Daniel Gervais. He is a Professor of Law at Vanderbilt University Law School and Director of the Vanderbilt Intellectual Property Program. He is also Editor-in-Chief of The Journal of the World Intellectual Property and Editor of www.tripsagreement.net. Next, I have Mark Schultz. He is the Director of academic programs and co-founder of the Center for the Protection of Intellectual Property at George Mason University School of Law. He also serves as an associate Professor of Law at Southern Illinois University. And finally, last but not least, I have an alumna of the Copyright Office, Eric Schwartz, who is a partner at Mitchell Silberberg & Knupp. He has over 25 years of experience as a copyright attorney providing

counseling on U.S. and foreign copyright laws, including rights, ownership and enforcement issues.

So we clearly have a very excellent panel today to kind of give you a basic background of moral rights before we go into more detail about how they are actually considered in the United States and what we might need to do to amend or strengthen them here.

I'm going to start off with, first, June. The first question we have for you is just a general basic one. What are moral rights? And can you briefly describe them?

MS. BESEK: I have to say that I love the question about whether we have enough to talk about all day. I mean, we're lawyers. We can talk about –

MS. TEMPLE CLAGGETT: We'll find a way.

MS. BESEK: In this case, we even have something to say all day. Moral rights are rights that an author has in her work that are separate and apart from economic rights. They are accorded to the author because her work is seen as a manifestation of her personality and an expression of her inner self—her baby, as I think the term was that Sandra used. The term “moral rights” comes from the French term *droit moral*. But that term doesn't really translate very well because the word “moral” has a different connotation in English. Some have suggested calling them instead “personality rights” or “spiritual rights.” Moral rights belong to the author, the creator of the work, and not to a licensee or to an employer. They can't be transferred to somebody else, although in some cases they can be waived.

One of the most commonly recognized moral rights in the world is the right of attribution, also known as the right of paternity. But you can see why I prefer not to use that term. This is the author's right to have her name associated with the work she creates—in other words, the right to claim authorship.

The second right is the right of integrity, the author's right to prevent unauthorized changes that would result in distortions, mutilations or other modifications of the work.

The third right, less commonly recognized, is the right of disclosure—also termed the right of divulgation. This is an author's right to determine whether and under what circumstances the work will be introduced to the public. For those of you familiar with *Harper & Row v. the Nation*, that language is reminiscent of how the Supreme Court describes the right of first publication in the United States.

And then finally, there's the right of withdrawal. Some countries, like France, provide authors with the right to withdraw their works from the

public if they feel the works no longer represent their deepest convictions, their deepest beliefs. In essence, this right allows an author to retract economic rights that she's licensed to third parties.

However, it is rarely recognized for a couple of reasons. One is that it really has to be based on a deep-seated conviction, which is probably actually related to the other reason, which is the author has to bear the costs, and it can be very expensive to do this. So it's a rarely exercised right.

Now, I just want to mention that the first two rights are the ones most commonly recognized around the world. The other two certainly exist, but they're not as prevalent, at least not in those precise terms.

MS. TEMPLE CLAGGETT: The next question is, you talked generally about moral rights and what they are. Can you give a little bit of background in terms of how did the concept develop historically? What is the foundation, or basis, for moral rights? Why do people think that those were important to have separate and apart from economic rights?

MS. BESEK: Well, a lot of us think of moral rights as an established body of law. But like many things, they really developed piecemeal, primarily in Europe, until they were codified early in the twentieth century. There were two principal theories on which moral rights were based. The first is called the Monist Theory, which embraces the view that authors' works are an embodiment of their inner selves inextricably interwoven with other rights. And not all of the rights of an author are commercial objects. Under this theory, economic rights are really a subset of moral rights. But as I said, they're deeply intertwined.

Then there's something called the Dualist Theory. These theories proceed from different philosophical lines of thought. Under the Dualist Theory, an author's personal economic interests are separate and distinct and can be protected by different bodies of law. So you can modify a creative work, and you can sell it or transfer it. But the personality rights remain with the author.

Countries took different legal approaches to moral rights—some embodied them in their copyright law, but others embodied them in separate parts of their laws. By the early 1920s, there was sufficient similarity between national laws that countries began to urge that moral rights become part of the Berne Convention, which, as you probably know, is the principal international copyright treaty and provides for minimum rights and national treatment. Essentially, what people wanted was for moral rights to become one of these minimum rights that had to be recognized.

Now, I'm not going to talk a lot about Berne, but I just want to mention that, in order to have moral rights be part of Berne, the member countries had to make compromises. So the ones with the strongest bodies of moral rights law essentially agreed that it would be sufficient if these rights were not in a specific body of law, whether copyright or another body

of law. They didn't have to be codified, and they could be in other places in countries' laws. This was done so that countries like the UK and Australia could join without having to amend their laws if they believed that they had sufficient rights. And this will come up later when we talk about how the U.S. joined.

So the moral rights of attribution and integrity are now embodied in Article *6bis* of the Berne Convention. And I'll leave it up there, but I know that we'll talk about that more. There are other provisions. I've mentioned only Article *6bis*(1).

Just a couple more things I want to mention—how long moral rights last. Well, they last at least as long as the economic rights. But some countries have moral rights that are essentially perpetual. And I guess that leads me to the next point, which I know Daniel is going to discuss, which is that Berne members vary as to the scope and duration of moral rights. And some of the finer points we'll talk about later.

The last thing I want to mention is about one more right, which isn't really a moral right. But it's reminiscent of a moral right. It's an economic right, but it's considered an author-friendly right. And it's something that can't be waived. The *droit de suite* provides that an author has the right to share in the proceeds from the sale of her work even after the first sale. And this is embodied in Article 14*ter* of the Berne Convention. In this country we call it "resale royalties." The Copyright Office recently released a report on resale royalties recommending that they be embodied in U.S. Law.

One last point about resale royalties. It's a little different from other Berne rights because it is not mandatory, but rather it is a right that countries can grant other nationals based on whether the home country of those nationals allow for this right.

So with that, I think I'll end and turn it over for the next question.

MS. TEMPLE CLAGGETT: I'll turn it next to Mark to ask the question about contrasting the difference between moral rights as we've discussed and economic rights, which is what we're more familiar with here in the United States.

PROF. SCHULTZ: Certainly. Thank you. I'll be focusing on how well moral rights fit within the U.S. IP system, based on the moral and philosophical justification for our IP laws.

Moral rights are a somewhat uncomfortable fit within the U.S. system of intellectual property rights. I emphasize uncomfortable, but not impossible. That's because moral rights have evolved from a largely different moral and philosophical ground than traditional American copyright.

I'll frame my discussion by referring to an observation by the legal historian James Willard Hurst that in matters of property, Americans have preferred dynamic rather than static property; property in motion and at risk, rather than property secure and at rest. This preference reflected the values of a country that seeks change and growth over stasis and status.

This preference for property in motion over property at rest was reflected in numerous departures from European property institutions. America abolished primogeniture and entail. It disestablished churches. It forbade titles of nobility, and it certainly never viewed people's status as tied to the land, as Europeans once did. Americans were concerned with protecting private property chiefly for what it could do rather than for a status it conferred or because it was tied to their identity. Instead, Americans were largely concerned with protecting property as a means of securing people's way of making a living or their investments in productive farms or businesses, rather than as a means of securing their status or traditional holdings.

This focus on property for what it can do has led many to contend that the Founders had a utilitarian view of intellectual property. After all, they reason, the Constitution's IP Clause confers the power "to promote the Progress of Science and useful Arts," which appears to indicate an instrumental and thus, in their minds, utilitarian foundation for intellectual property. This understanding is actually an anachronism. While many of the Founders were certainly aware of Jeremy Bentham as a contemporary and his emerging philosophy of utilitarianism, they weren't utilitarians. The Founders' views on property, including intellectual property, were instead fostered in a natural rights philosophy. The utilitarian justification for IP is an early twentieth century development.

The natural rights view sees property as instrumental and essential to a flourishing life because life, liberty and property are inextricably intertwined. A natural rights foundation for property justifies copyright because it enables creators to flourish, to survive and thrive, conditioned on the need of others to survive and thrive. This foundation has led copyright to be institutionalized as a property right that facilitates the ability to make a living and to fully exploit and commercialize creations. Thus, copyright embodies Hurst's description of Americans' preference for property in motion rather than at rest. The reproduction right, the derivative works right, the distribution right and public performance rights all enable creators to secure an economic return on their labors so that they and others may survive and thrive. One way in which they secure a return is by being able to freely alienate their rights to others who similarly employ them to survive and thrive.

The natural rights foundation has led the U.S. system to prefer property rights unencumbered from the ability to easily alienate them because we are focused on the ability to use property to make a living and

to flourish. Anything that encumbers property rights reduces their value and reduces the ability to fully exploit them. Restraints on alienability such as those that come with moral rights thus may be viewed as suspect attempts to keep property "at rest."

The utilitarian foundation for copyright similarly focuses on property in motion. Social utility is maximized when information flows freely. In this view, copyright should efficiently facilitate the production, dissemination, use, and transformation of creative works into new creative works as free from encumbrance as possible. Moral rights fit somewhat uncomfortably in this framework, as they may reduce efficiency and social utility by creating friction in the use of creative works.

Thus, under either the natural rights or utilitarian view, moral rights are a somewhat uncomfortable fit. They appear to represent property at rest rather than property in motion, property based on status rather than property that exists to foster either flourishing or efficiency.

Still, moral rights can be squeezed into traditional American foundations for copyright, albeit with a bit of work. Neither natural rights nor utilitarianism dictates that moral rights *can't* be part of the U.S. system of copyright. For example, one can make a flourishing-based argument for moral rights with respect to attribution. A right of attribution certainly enables creators to make a living by helping them develop a reputation that allows them to flourish and to fully exploit their works. Similarly, within a utilitarian framework, one can tell a just-so story about how attribution maximized social utility because creators will be more likely to create with these rights in mind.

Moreover, one has to concede that American copyright has come far from its foundations in natural rights or even early twentieth century utilitarianism. By adopting the Berne Convention, the U.S. embraced a legal transplant, and that legal transplant has European roots. For example, the current copyright term uses the author and his or her identity as the lodestone. U.S. copyright law thus has features no longer based on a natural rights or utilitarian foundation, but rather depend on Continental justifications.

In conclusion, although moral rights are an uncomfortable fit within a copyright founded on natural right and/or utilitarianism, they can be made to fit. Thank you.

MS. TEMPLE CLAGGETT: Thank you, Professor Schultz. And you alluded to the fact that we have adopted some European roots in terms of our IP system. We've kind of become part of the international discussion in terms of having standards across the board globally. And so my next question is actually to Professor Gervais. What international standards do we have that are governing moral rights now? I think June alluded to one.

PROF. GERVAIS: Yes. Well, the Berne Convention, clearly, is the most important. Article *6bis* that was on the screen earlier has three paragraphs. The first one is the one that has the two moral rights that June identified as the most common and, perhaps most important, attribution and integrity. Beyond that, there are—in the Berne Convention itself—other moral rights. The *droit de suite* that June mentioned is arguably a type of moral right, but there is certainly another one in Article *10bis*, paragraph 3. It's essentially the same nature as *6bis*. So Berne is really about attribution and integrity.

The Berne Convention was last revised on substance in 1967. And then four years later, they added an appendix for developing countries. But in 1971, the Internet wasn't all that developed then, and there were other issues that have changed a little bit since then. One of the things that has changed beyond technology and that I really want to underline is that the performers' protection level has changed. The Berne rights are about authors only. But this morning, Sandra was talking about opera and singers. Performers have acquired internationally the same level of recognition as authors in international treaties. Article 5 of the WIPO Performance and Phonograms Treaty from 1996 has a moral right for, essentially, music performers, which is recognized in many countries, and the U.S. actually is party to that treaty. I just thought I'd mention that. Then there's the Beijing Treaty on Audiovisual Performance, much more recent, 2012, which also in its Article 5 has a moral right for audiovisual performers. I understand that the President has sent the treaty to the Senate. So that's also relevant, I think. So basically, internationally, if you look at standards, those are the ones I would identify as the most important ones.

You notice that I didn't mention the TRIPS Agreement because it does mention moral rights, but essentially to say that they're not enforceable at the WTO. I think a little later we'll hear why from Eric.

MS. TEMPLE CLAGGETT: Yes, and so you mentioned that, essentially, right now we have three different treaties that expressly obligate member countries to recognize moral rights—the Berne Convention, the WPPT and the Beijing Treaty. How have different countries actually implemented those rights in their national laws?

PROF. GERVAIS: That's a great question because when you talk about moral rights—and both June and Mark alluded to this—it's a little bit like the Zika virus. It comes from foreign countries. Ideally, it should be entirely eradicated, but at the very least, it should be kept out of the United States, right? When you look around the world, though, you realize there are many ways of implementing moral rights. It's not like there's one package and you have to buy the one package and say this is the only way.

So first of all, the right of withdrawal that June rightly mentioned is very uncommon in foreign countries. And in countries where it exists, it's very rarely used because, as June mentioned. For example, you're an author,

your book is in the bookstores and you want to take it out. Well, you can in France, but you'll have to compensate the publisher for the losses. So you *really* have to want to get your book out of the bookstores. So that right is really like a good croissant, right? You hear a lot about it, but you never find it.

So that leaves the other three. So the right of attribution is implemented in several different ways. Many common law countries have implemented it. And for example, if you're obligated—like law professors, for example—by rules concerning plagiarism, that, in a way, is a right of attribution. Some countries have used passing off. And many countries that don't have fair use but fair dealing have made fair dealing subject to mentioning the source unless it's not reasonable in the circumstances—for example, Canada.

The right of integrity—here's the interesting thing. If you read the debates on § 106A, which is the Visual Artists Rights Act that Sandra mentioned, there was some concern in Congress about destruction of originals of works of art. And that's the one right that's not in the Berne Convention. So we're very good at protecting that one right that's not in Berne—well, not very good. In fact, that right was specifically discussed at the Berne Convention revision. Countries said it would be nice to have a right against the destruction of originals, but there isn't one.

The right of integrity, was also implemented in several ways. Some countries just state it, and some countries define it. They'll define how an infringement occurs. Canada would be, again, an example, and it's not too far away.

Finally, the right of disclosure—this right of divulgation isn't that different, frankly, from the right of first publication which has existed in common law copyright since, what, early eighteenth century at least.

Finally, a couple more things, if I may. One of the things that differ from one country to another is waivability. Some countries have complete waivability—countries like Germany and Austria that have a Monist system where the right is one package, that is, the economic and moral rights are together. Typically, you can't transfer or waive the whole package. But in countries that separate, like the Berne Convention does, the economic right and moral right, then you have a little bit more leeway as to how you do that. There are many differences, also—so it may be the last point to mention—on enforceability after the death of the author. The Berne Convention says if you join Berne and you don't have a moral right, you can stop at the death of the author, which was introduced for common law countries. But even if you don't and you make them last as long as the economic rights, there are conditions in some countries. It really depends if you look at it as a privacy interest or personality right, I guess, or a property interest. I think Mark was completely on point there.

I said this was my last point, but the last thing is that this perpetual moral right scares people. Well, if you look at the actual cases—first of all, there are very few countries that have perpetual moral right, but let's say France—always comes up—most of the cases fall in the sort on title. The heirs of Bach or Victor Hugo—they just can't prove that they own the right. So the court will very often dismiss the case, not because there's no infringement. They don't get there. They just say we're not sure you're the person to exercise the right. So that's another scarecrow that I think can remain in the field.

MS. TEMPLE CLAGGETT: And I was actually going to follow up on that because that was—it's not really a question we discussed when we were talking about this panel. But you alluded to litigation about moral rights. And I guess one of the questions I would have is those countries that do have stronger moral rights, such as France or other countries, is there a lot of litigation over issues of attribution or integrity. And what type of litigation do you see? What are people arguing when they're trying to actually raise their moral rights in court?

PROF. GERVAIS: Well, there is some litigation. It's a small percentage. I don't have the number, but a small percentage, obviously, of all copyright litigation. If you open a copyright textbook, you won't find that many pages on infringement of moral rights. Very often, it's a licensee making unauthorized changes or a licensee producing a version of the work without the author's name, or the author's name is so small that you can't find it. Those are the kind of cases that you see, and they're easy for a court because those are pretty clear-cut violations.

The one case that, of course, many American law students learn about is the John Huston case where John Huston's heirs (his wife, in fact) was in court in France and said you cannot show the colorized version of my husband's movie because he specifically wanted it in black and white. And the court agreed. And so the colorized version, as I understand it, was not actually shown in France.

As you can see, those cases are not that common. Most publishers have no interest in publishing a book without the author's name on it. Oh, this is a secret Stephen King novel, but no one should know Stephen King has written it—there's really no interest in doing that. It's exactly the opposite. You want to know who wrote the book. If you're the consumer, you want to know who wrote the book. The publisher wants you to know. So there's not that misalignment, usually, between the licensee and an author.

MS. TEMPLE CLAGGETT: And just one follow-up—and anyone from the panel can join in as well. You gave the analogy of moral rights being the Zika virus earlier and that the United States should stay away from it. Following up on your point that there isn't a lot of litigation over moral rights in some of those countries that have stronger or more specific

laws, does that suggest, if the United States were to adopt something along the lines of what France has or what other countries have in terms of more specific moral rights provisions, would you expect to similarly not have a significant amount of additional litigation on those issues?

PROF. GERVAIS: Well, you know, the litigation virus is not the Zika virus. I think there might be some test cases that need to be brought to have a little bit more clarity about U.S. law. But frankly, many other countries have had moral rights for many, many years. And again, you don't see it all that often because that misalignment between the author and the person exploiting the work is rarely obvious, or present, in fact.

If you're in this contract or situation that required, say, not to plagiarize, attribution would come naturally. Most people would find attribution is compatible with fair practice. And integrity—the Berne Convention links it to honor or reputation. The real question is how do you define that. As I recall the Berne debates, someone suggested changing that for “spiritual interest” or something like that. Well, it shows you that countries were not quite sure what they were trying to get at. It's admittedly a fairly fuzzy concept. So I think there's plenty of room for the U.S. to define the law in cases. I believe an author really ought to have an objective case. It's not, “Oh, my feelings are hurt.” It's not that. You need a lot more than that to make the case. That would also be a matter of how the legislation, I suppose, is changed to fully implement the integrity right.

MS. TEMPLE CLAGGETT: I think maybe going back to June and going down the line—and I have a question for Eric. We mentioned that Article *6bis* of the Berne Convention obligates member countries to recognize, essentially, attribution and integrity. But you mentioned that there were other rights that are also considered moral rights. Why weren't those other rights also included in the Berne Convention? Any idea as to kind of why they didn't think that they rose to the level of the type of protection that is now obligated for the rights of attribution and integrity?

MS. BESEK: Well, I'll just start by saying I don't think the right of withdrawal was ever as recognized as widely. So that's probably why that isn't in there. And the same might be true of divulgation, although it also is duplicated, in part, by economic rights. So I think that it wasn't seen as necessary as the other two.

So what happened was a certain number of countries had enough similarities in their laws. And those laws were on the books. And these were the two that were really the ones that prompted people to move forward. And that's why they became part of the Berne Convention back then.

MS. TEMPLE CLAGGETT: So we've talked a lot about, I guess, the European basis in Europe. And now I want to turn a little bit more focus to the United States and ask Eric how has the U.S. considered moral rights.

MR. SCHWARTZ: Thank you. Sandra injected a little bit of a personal story into this morning's discussion. My personal story is that I arrived at the Copyright Office on April 1st, 1988, just in time to work on Berne Implementation Act for the Register (my boss), Ralph Oman, who is here today. My first assignment for the Office was to prepare the first and only study on moral rights in the United States. The completed study was delivered to Congress in March of 1989; one of my next assignments, also moral rights related, was working on and helping to draft the Visual Artists Rights Act.

In preparing for today's program I realized that I had not given a lot of thought to moral rights for some period of time. But, in my tenure at the Copyright Office, there was that flurry of moral rights related activity in the late '80s and early '90s and that was something that I certainly had a front row seat to, along with others in the room. (I am looking at Marybeth Peters also here today.)

I have schemed this 1980s and 1990s history of U.S. moral rights consideration in seven steps. I will be brief because we are limited in time. The first step was what I will call the prequel to the U.S. accession to the Berne Convention. The enactment of the Copyright Act of 1976 was sort of a partial step in the direction of Berne accession, including the adoption of a life plus copyright term and other Berne compatible changes. In 1985, the U.S. State Department convened a group of experts, known as the Ad Hoc Working Group. In the materials (handed out) I have prepared a little chronology—a chronological order of the history here, especially for students and others who may be unfamiliar with it.

The Ad Hoc Working Group was chaired by Irwin Karp and included a group of copyright law experts asked to study fourteen basic subject areas on U.S. law's compatibility with Berne, including moral rights. The final report was issued in April of 1986 and was reprinted in Senate hearings that year. The citations are in the handout materials. The best way to summarize it is to read the conclusion of Chapter 6 of Moral Rights, of the final Ad Hoc Working Group. Remember, their task was to: "Identify those basic provisions of U.S. Law relevant to U.S. adherence to the Berne Convention and to analyze their compatibility with Berne," close quotes.

Here is what they concluded. "Given the substantial protection now available for the real equivalent of moral rights under statutory and common law in the United States, the lack of uniformity in protection of other Berne nations, the absence of moral rights provisions in some of their copyright laws, and the reservation of control over remedies to each Berne country, the protection of moral rights in the United States is compatible with the Berne Convention." So that was the prequel to moral rights consideration, and that was in 1986.

Step two came with the U.S. accession to Berne and the long series of congressional hearings and studies on moral rights. The United States acceded to the Berne Convention effective March 1, 1989. Leading up to accession there were many House and Senate hearings on the subject of moral rights, as well as round table discussions—that Irwin Karp and others at Columbia Law School conducted. I have provided the citations for the roundtable and other hearings and meetings of experts talking about moral rights in the handout. The bottom line was: explicit moral rights under the U.S. system was not necessary to add to the U.S. system, that is, to amend U.S. law, in order to accede to the Berne Convention.

The first bill introduced to implement Berne in the U.S.—H.R. 2400—would have granted explicit moral rights to film directors and screenwriters. The moral rights language was taken for the most part, from the language of Article *6bis* of Berne. It included a right of attribution (Barbara Ringer scolded me to never ever call it the “right of paternity” as it was often called at that time) and a right of integrity. The moral rights provisions were ultimately stripped out of the Berne Implementation Act that was eventually enacted in October 1988.

The Berne implementation legislation was the legislation that was deemed necessary by Congress in order for the U.S. to accede to Berne. The process in the United States for accession was then, as we still do, with most treaties: first, Congress amends our laws, then the U.S. Government accedes to the treaty. So, the 1988 implementation act was the step of amending our law, which was going just ahead of our accession to the treaty.

The House and Senate ultimately concluded after many hearings and extensive consultations with U.S. agencies, meetings in Geneva with WIPO and other governments, and experts, that explicit new moral right legislation was not necessary for Berne implementation. In the handout is the language from the House Judiciary Committee report on Berne implementation as well as the Senate reports from 1988 reaching this conclusion. Here is the House report conclusion: "Based on a comparison of its laws with those of Berne member countries and on current status of Federal and State protections of the rights of paternity and integrity"—they clearly had not been schooled by Barbara—"the Committee finds that current United States law meets the requirements of Article *6bis*."

The Senate Judiciary Committee report, more or less, said the same thing, but the Senate report set out the "common law principles such as libel, defamation, misrepresentation and unfair competition, which have been applied by courts to redress author's invocation of the right to claim authorship or the right to object to distortion," thus concluding the same as the House, that no new rights were necessary. It is also worth noting that the Senate cited Dr. Arpad Bogsch, who was then the Director General of the WIPO, quoting him in a letter, "that the United States may become a

member of the Berne Convention without making any changes to U.S. Law for the purposes of Article *6bis*."

And truth be told, Dr. Bogsch wanted the U.S. so badly to join the Berne Convention he would have pretty much said anything for the U.S. to join. Remember, the U.S. was the 89th member—I believe that is right—of Berne. And there are now close to 170 countries in Berne. So it was really important to the WIPO and for the importance then, and still, preeminence of the Berne Convention as the international copyright treaty, for the U.S. to join that convention.

The House and Senate reports and the eventual legislation also made clear that Berne was not “self-executing” meaning lawsuits could not rest on the language of the Convention (Article *6bis*) alone, notwithstanding Title 17 or other Federal and state laws, where there was no explicit moral right. Doing so meant that a party could not claim that the U.S. was not in compliance with Berne or that there would be redress in federal or state courts based on the actual language of Article *6bis*. To seal that off as a potential avenue of redress, the House and Senate language, and ultimately, the Berne Implementation Act, made very clear that Berne was not self-executing.

In the mid-1980s, changes in the nature and technology for the dissemination of works, especially motion pictures and television programs was taking place. And, there were many of these technologies altering films for post-theatrical uses. It is hard to imagine for students in the room, but there was a time, up until the mid-1980s, when films were mostly only shown in theaters, and only occasionally on television. Beginning in the mid-1980s, there was this explosion of videos, cassettes and other home viewing options. And suddenly, post-theatrical alterations to motion pictures, was a huge issue within the motion picture industry.

The U.S. motion picture industry is mostly a work-for-hire regime. Because the post-theatrical changes to films were being made by the copyright owners (the employers), the creative artists were upset because they did not have rights in the alterations being made post-theatrical for distribution and they were upset with how their names appeared (the attribution) on the altered films. Yes, there are guild agreements. Yes, there are personal contracts—both of which could govern these uses and attribution, but not all. And then, in 1986, a new alteration started: the colorization of black and white movies, which really fanned the fire. Other alterations included: time compression, which is the speeding up of a film to fit it into a broadcast timeslot. You may not notice, but sometimes films are actually sped up and compressed to fit into the broadcast time. Also, there was panning and scanning to make the aspect ratio of the film—that is, a theatrical screen size fit onto a television screen, by mechanically panning the action back and forth when it is broadcast (and different from how the film director moved the camera).

With colorization and these other alterations, a lot of high-profile hearings on the Hill began with witnesses including Steven Spielberg, George Lucas, Sydney Pollack, Woody Allen, dozens of directors and writers. The Copyright Office also testified at many of those hearings. It was a huge high-profile issue at the time. So, the question for Congress was, what to do about it?

My step three in the history: Congress asked the Copyright Office for a study on moral rights. More specifically, they gave the Office one year to study the “technological alterations” to motion pictures in a request from Chairman Bob Kastenmeier and Ranking Republican Carlos Moorhead. The study was prepared by the Register Ralph Oman, Bill Patry, and myself, and delivered to the House Judiciary Committee in March of 1989. That timing is interesting. As I noted, the U.S. had acceded to the Berne Convention on March 1, 1989. So, we had already acceded to Berne, by the time we turned in the study.

Take a look, if you are interested at Chapter 5 of the study, in particular. It is a complete summation of moral rights issues and case law to date.

Part four of the history was, what I would characterize as the “spinoff” of the moral rights issues in the motion picture area. This was the National Film Preservation Act of 1988, which was enacted in late 1988. Notwithstanding that moral rights had been taken out of Berne Implementation Act, directors and writers and other creative artists went to an Appropriations Subcommittee Chairman, Sid Yates (Illinois), and got Mr. Yates to author an amendment to the Interior Department Appropriations law to create a national film preservation board within the Library of Congress. That board was tasked with selecting films to a national registry. And those selected films on that registry could not be altered or colorized. If they were altered or colorized those films had to carry a pejorative label that they were materially altered without the permission of the creative artists—the directors, cinematographers and screenwriters.

That was a brief victory, of sorts, on moral rights, for the creative artists in the film industry. But, the legislation had a three-year sunset and it expired in 1991. Although it was reauthorized the next year (1992), the new legislation focused on film preservation issues and not moral rights. That board still exists to this day. It has been reauthorized each time it expires, and I have been a member of that board, which serves as an advisory board on preservation and access issues to the Librarian of Congress, since 1989.

Step five in my history was the adoption of visual artists legislation. Congress, not wanting necessarily to leave moral rights completely behind in the U.S., decided to enact the Visual Artists Rights Act of 1990 for a subcategory of pictorial, graphic and sculptural works.

They did this while also steadfast in the position that no new explicit moral rights were required for Berne—authors of this subcategory of pictorial, graphic and sculptural works in the Visual Artists Rights Act were granted a right of both attribution and integrity. And, because there was a particular interest on Senator Kennedy for it, it also included a right of destruction.

The Visual Artist bill came after Berne implementation, where the copyright industries—not just motion pictures—but magazine and book publishers and others were asking many questions about potential litigation if moral rights were added to U.S. law. I think a lot of it was the unknowns in the industries especially industries that were very labor-intensive industries with many creators. There was a fear that with deadlines in the publishing industry, what might happen if moral rights issues arose from one of the many writers, creators, photographers or others? What would the publisher do to meet their publication deadlines? And it was just that—a question mark and an unknown.

So VARA was passed for a limited set of works and rights, and with the continuing feeling in Congress and the U.S. Government that Berne implementation and compliance, the U.S. was fine because of all the reasons given.

Then came step six in my history. The courts giveth and the courts taketh away. In 2003—and I am sure the next panel will talk about it—there was the *Dastar* case, which was at the intersection of copyright and trademark. This was a case where the term of copyright had expired. The Supreme Court in *Dastar* ruled that, once copyright had expired, works may be reproduced and disseminated, even without attribution. The Court reasoned that federal and state trademark laws requiring a designation of, quote, unquote, "origin" pertain only to the origin of the physical copy, not to the origin of the intangible subject matter of the copyright.

After that case, whatever Congress and the U.S. Government could point to about the panoply of rights including trademark law and Lanham Act and everything else that combined was “Berne equivalent” moral rights, were significantly scaled back by that case.

Last, was step seven in my history: the final word on moral rights in that period, which was U.S. accession to the WTO TRIPS Agreement. Up to that point, yes, the U.S. government felt somewhat confident in its position on Article 6*bis* of Berne. But the Berne can—

MS. TEMPLE CLAGGETT: Yeah, and that was going to be my question. We talked about the fact that we have these obligations in separate panels. But we didn't talk about the fact that the TRIPS Agreement, for whatever reason, actually does obligate member countries to recognize Articles 1 through 21 of the Berne Convention, but for some reason does not obligate member states to actually recognize Article 6*bis*, which is a question.

MR. SCHWARTZ: Yes. So then in completing my timeline of it all, Berne—excuse me—TRIPS, more or less, was completed in December of 1991, for all intent and purposes. The World Trade Organization Agreement did not go into force until January of 1995 and the TRIPS one year later in January of 1996 (although my friend Jane Ginsburg and I disagreed about that implementation date, as I remember). But, to continue, the U.S. government's position on Berne versus the WTO TRIPS was that the TRIPS Agreement is a trade agreement, not a copyright convention. Berne and these other conventions were and are copyright treaties and conventions. But in a trade agreement involving trade in goods, only economic rights should prevail, not the non-economic, that is, moral rights. And although TRIPS, like all trade agreements, was heavily negotiated—with the U.S., EU, Japan, Australia and many other countries—the U.S. was a newly minted member of Berne by this point. This is now in the early 1990s. But there was another issue: there is no dispute settlement in the Berne Convention, but there clearly is dispute settlement in the TRIPS Agreement. This means that across the goods and services of TRIPS—and we have one of the TRIPS experts in the world, Daniel, here. So he should be answering this, not me.

But, to continue, the insurance policy for the U.S. Government was take Article *6bis* out of TRIPS, so that moral rights would not be the subject of a dispute settlement, that is, if the U.S. was not in compliance with this trade agreement WTO). So, there was a limit in the TRIPS Agreement just to the economic rights. Read Article 9.1 of TRIPS. The rest of Berne was imported by reference. That is, all of Articles 1 through 21 of the Berne Convention were incorporated into Article 9.1 of TRIPS. But “members shall not have rights or obligations under the agreement in respect of the rights conferred under Article *6bis* of that convention or of the rights derived therefrom.” That is from Article 9.1 of the TRIPS Agreement.

Countries can have explicit moral rights in their laws as many countries do. And the U.S., by this time, had enacted § 106A with the Visual Artists Right Act, and the U.S. had the panoply of other rights meant to comply with Berne's Article *6bis* mandate—certainly in the 1990s before *Dastar* in 2003. There was a much more vigorous panoply of rights before *Dastar*, but, regardless, in TRIPS non-compliance with Article *6bis* under Berne would not be subject to trade dispute.

That is the nutshell history of the U.S. consideration of moral rights in the 1980s and 1990s. That is, it was the complete history until, as Daniel and June mentioned, there was also moral rights issues in the digital treaties in 1996, and then the Beijing Treaty (which has not yet been implemented in the U.S.).

MS. TEMPLE CLAGGETT: Thanks, Eric. I do want to save some time to turn it over to the audience to see if we have any audience questions. But Daniel, did you want to add anything on the TRIPS point?

PROF. GERVAIS: Well, no, you got the official version.

MS. TEMPLE CLAGGETT: Oh. Did you want to add an unofficial version, I guess? I'm scared to ask. But...

PROF. GERVAIS: Yes. It may be true that the U.S. government was confident the U.S. was complying with *6bis*, but maybe not all that confident, I suppose. The other argument—I mean, if—to say that these are not trade-related rights when you can pull movies out of theaters, you know, as they did in that one case in France, of course, was the argument used by the Europeans to say, see, it's very trade-related. It was kind of a discussion that made it clear, I think, in the end, that no one was going to die in the trenches for *6bis*. The French government got an earful from many people once they showed the draft. But TRIPS was not negotiated on behalf of Europe by a French negotiator, but by a Danish negotiator. And who knows? Maybe that made a difference.

One thing, though—it's a very small footnote—Eric said there's no dispute settlement in Berne. There is, but no one's ever used it because it's the International Court of Justice in Article 33. And the reason is that, first of all, the U.S. would have to accede to jurisdiction in the case. But also, no one knows what the ICJ would do with an IP case. So no one's ever tried.

MR. SCHWARTZ: For Berne—the U.S. would never concede to the jurisdiction of the International Court of Justice.

PROF. GERVAIS: That's right.

MR. SCHWARTZ: Last, there is the “Asphalt Jungle” case. That happened in France in 1986. It was brought by the John Huston family. In that case there was a contract agreement signed with work-for-hire language in California between the director and the studio. The choice of law in the agreement was California law governing. The facts of this case were this: a French television station was going to do was show—as only the French would do—the John Huston directed film, *Asphalt Jungle* first in black and white, then in color, then have a discussion of the merits, or lack thereof, of the color version and the black-and-white version. The Huston family brought an injunction in French courts to prevent the screening of the colorized version. It was brought by the screenwriter, Ben Maddow, and the family of John Huston even though the film was work for hire and the director and screenwriter signed a contract in California with the choice of law provision being also in California. The French court, as a matter of public order rules, said the moral rights interests overrode all the contractual and choice of law provisions. I think that that case at that time in 1986 added to the studios fears about moral rights that screening a film in color or somehow altered might be a problematic issue for the motion picture producers. It added to the uncertainty about what might happen for works that had been created even as in this case, created under work-for-hire agreements, and even with the choice of law provision in a contract that

said it was clearly a Californian law meant to govern. The case and its treatment in the French courts raised, to some degree, the level of fear about moral rights, in some of the creative industries—not in all, but in some industries.

MS. BESEK: I just wanted to go back to the point about concern about litigation if the U.S. implemented moral rights. Now, among the chief opponents of putting moral rights in the statute when the Berne Convention was passed, were magazine publishers, newspapers and the motion picture people. And during the course of the Berne hearings, a number of international experts said, well, you know, we have magazines and we have newspapers and we have motion pictures in our country, and this has not been a problem, even though we have moral rights.

But the response to that was, yes, but the United States is a much more litigious country. And I think that's true and we have to be realistic about that if we're going to go ahead at some point with moral rights. I mean, this is a country where you can buy a cup of coffee and put it between your legs on the car seat and then sue successfully because you got burned. That does reflect something about our society.

So if we were to go ahead and create moral rights at some point, it's important that they be very specific and circumscribed, as I think can be reasonably said of VARA. It's important to keep in mind, that the particular concerns expressed earlier will not just have gone away by virtue of the time that's passed since the U.S. joined the Berne Convention.

PROF. GERVAIS: Oh, can I do a quick note on that? So actually, I agree with what June said. American film directors and others are, in fact, typically recognized as authors in other countries, even if there's a work for hire here. In other words, a French court typically will not recognize work for hire as creating authorship in the movie studio, it will only recognize first ownership, which means the director still has rights. And some European collectives, actually, that collect money for film that is supposed to be paid to authors have had to make some interesting arrangements to be able to send that money to the U.S.—I don't even know what to call them—beneficiaries.

The point here is that, at least to my knowledge, you don't see a lot of U.S. film directors going around the world saying, “Yay, I can sue for moral rights infringement.”

So there might be more here. And I don't disagree with that. Actually, I think I said something along the same lines.

MS. BESEK: And I will just say that, with some people—and directors are some of them—there is another thing operating, which is “you'll never work in this town again.” So it's not just about legally what you have a right to do.

PROF. GERVAIS: I agree.

MR. SCHWARTZ: And attribution is so well covered by guild agreements. For any filmgoer who stays in a theater until the very end of a movie knows, credits are not an issue in the motion picture industry. Everybody is credited—including the films' caterers.

PROF. GERVAIS: That's true.

MR. SCHWARTZ: But it is the integrity right that is more controversial.

MS. TEMPLE CLAGGETT: So it should be easy then to establish an explicit provision in the United States law for attribution. Is that what the panel has concluded? I probably won't ask for an answer for that now unless we have some additional time. I did want to leave open at least five or six minutes for audience questions. And then if you have any closing remarks, we can do that if we don't have a significant amount of audience questions. But I think we have one there.

MR. TEPP: Thanks very much. Steve Tepp, Sentinel Worldwide on behalf of the Artists Rights Society. June, thank you very much for mentioning the *droit de suite*, the resale royalty. It seems to me that it certainly deserves at least honorable mention at this conference. And of course, for those not familiar with it, it's the right of authors to receive modest commission from sale of their works and resale of their works. It's particularly critical, I think—and I'm asking for the panel's reaction to these observations—to artists whose works are valued for, of course, their artistic merit, but for their relative scarcity as opposed to their ubiquity, which is what the Copyright Act—the latter is what the Copyright Act most often is directed to facilitate. And it seems to me there's a trend towards the resale royalty. The EU has adopted it. Australia has adopted it in recent years. And implementation has gone fairly smoothly. It's now on topic recurring on the Standing Committee of Copyright and Related Rights at WIPO. We have legislation pending in both houses of the U.S. Congress. And of course, the Copyright Office has issued a report, which I think I'll end this with this poignant statement. Without a resale royalty, many, if not most, visual artists will not realize a benefit proportional to the success of their work. So I just offer that up for comment, observation on the importance of resale royalty. Thank you.

MS. TEMPLE CLAGGETT: Does anyone want to briefly discuss resale royalty?

PROF. GERVAIS: The works of art certainly have a special status, right? In music you don't ever want to get to the master or in movies the original copy. So the works of art—you're absolutely right—have this feature that the original—you can make a copy, but it's never the painting on the wall, right? But that being said, again, that's a right that scares some people. And it's implemented so in many different ways. The typical case,

of course, that you hear about is van Gogh, the artist who sells a painting for five bucks and then somebody sells it later for a lot more. But in reality, typically, incremental value changes.

Some countries implement this *droit de suite*—each time that a work sells, the author gets a percentage of the whole price. Some countries consider only the difference between the sale price and the previous sale price. There was a long discussion in the UK about this.

If ever this were to move here, I would certainly recommend that the Copyright Office pay very close attention to the debates in the UK about the *droit de suite*. I think they covered it right, left, up, down, every other way.

MS. TEMPLE CLAGGETT: I would just add that our report did mention the UK and the fact that, in the UK, they were just going through implementation. They had initially just implemented it, I think, for the life of the author. And then they at the time were about to extend it to heirs as well. And so one of our recommendations was to closely follow kind of once it was fully implemented if it actually affected the art market in any negative way.

MR. SCHWARTZ: Yes, it just seems like something that could and should be done. I should caveat that by saying, everything I have spoken to this morning, none of which is very controversial, is me speaking on my own behalf and not for any of my several clients as I am seeing several of them in the room. I think personally, yes, there should be a resale royalty right. Consider that for works of the visual arts, the one-off sales of a canvas or the piece of art should compensate those that created the work, not only those that are good at selling and reselling it, with all due respect, to art galleries. I think at least a small percentage of the resale monies should go to the artists.

MS. TEMPLE CLAGGETT: I think we're right at the end. I want to thank all of the panelists here who have given us a very good overview of moral rights and the basis for our later discussions. Thank you very much.

SESSION 2: THE U.S. PERSPECTIVE

This panel provides an overview of the current state of protection of moral rights in the United States, including discussion of the “patchwork” approach of federal and state laws, as well as judicial opinions.

Panelists:

Allan Adler, Association of American Publishers

Duncan Crabtree-Ireland, SAG-AFTRA

Mickey Osterreicher, National Press Photographers Association

Michael Wolfe, Authors Alliance

Professor Peter K. Yu, Texas A&M University School of Law

Aurelia J. Schultz, U.S. Copyright Office (Moderator)

MISS SCHULTZ: For Session 2 we're covering the U.S. perspective and to quote one of our esteemed panelists, “when the protection of moral rights is brought up in the United States, commentators have always emphasized the differences between continental Europe and the United States.” Our second panel is going to attempt to explore this unique U.S. perspective. We're going to try not to delve too much into the comparative bit that we already covered in the first panel. So I'll take a moment here to introduce our panelists. Allan Adler is General Counsel and Vice President for Government Affairs at the Association of American Publishers. And then, Duncan Crabtree Ireland is Chief Operating Officer and General Counsel for SAG-AFTRA. Mickey Osterreicher serves as General Counsel to the National Press Photographers Association. Then we have Michael Wolfe who is the Executive Director of Authors Alliance, and then Professor Yu who is Professor of Law and Co-director of the Center for Law and Intellectual Property at Texas A&M. And there's more information about their backgrounds in your full program.

So to get started, as we've talked about a little bit earlier, the U.S. approach is generally described, including in our program, as a patchwork or sort of a hodgepodge of state and federal law. So to jump in, if you could each say a little bit about one or two of these kinds of patches and I think, Allan, we can start with you.

MR. ADLER: Thank you. I was very relieved to hear Eric at the very end of the panel issue sort of a half-lawyer's disclaimer. I was rather surprised to see five lawyers on a panel and no opening disclaimer about whether or not they were expressing views on behalf of a client or employer, so I will offer one. And the reason for that is chiefly because, when the House Judiciary Committee's hearing process to comprehensively review copyright law considered the issue of moral rights, it did so in a

hearing in which moral rights was one subject combined with “copyright term” and “termination rights,” which I think led people to look at that hearing as kind of a collective check-off box to make sure that even relatively obscure issues would be addressed in the comprehensive process of review. But I think it was also a signal that these three issues together, despite any other pretense the Committee might offer during the process, are highly unlikely to see any kind of reform legislation proposals as a result of the hearing process. In the case of moral rights, that is in part because I think the issue was largely viewed as having been put to rest during the period in the late 1980s that the previous panel discussed.

For the publishing community at the time, a sufficient amount of fire and brimstone was mustered to help put that issue to rest in terms of legislation. I'll give you just a quick example of the kind of language that was used by the industry at that time. Testimony of the AAP before the Senate Judiciary Committee said that the hearing raises the threshold policy question of “whether to superimpose vague, subjective, and wholly unpredictable new rights upon a longstanding balanced and successful copyright system.” Tell us what you really think publishers!

Moving forward in time, when the hearing was held two years ago by the House Judiciary Committee to look at the issue of moral rights, that view led AAP to make the decision that we were not going to submit a statement for the record because we didn't have anything new to say about the issue. When I say nothing new, it's not to say that we don't have anything to say about the issue at all.

In the 1980s, we said a great deal about the issue, particularly in terms of concerns not only that the United States had bodies of law which addressed the issues of integrity and attribution as they appear in *6bis* of Berne, but also because we have laws that distinguish the United States from the rest of the world, primarily the First Amendment to our Constitution, which broadly protects freedom of speech from prior restraints and certain other forms of censoring regulation. Congress and the Supreme Court have had no difficulty over the years reconciling the First Amendment with U.S. copyright law, notwithstanding the fact that some view the copyright law as basically restricting what people can do when they choose to use someone else's work of original expression as a form of speech.

But, nevertheless, it has played a very important role in shaping the way U.S. copyright law has in fact been implemented and it's also played an important role with respect to the issue of moral rights with respect to the issue of defamation law, which is primarily a creature of state law but is also affected by the First Amendment which makes it to that extent a creature of federal law as well. At least it is when we're talking about public figures or even about private figures, but we're dealing with issues of public concern and public importance.

So in the area of U.S. laws that were supposed to count for representing the principles of *6bis* on moral rights, one looked at the issue of integrity and noticed that it represents the ability 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 the author's honor or reputation.”

The interesting thing about that in terms of U.S. defamation law is that defamation law is probably both broader and narrower than the “integrity” concept in a number of senses. For one thing, the interesting thing about the *6bis* language is that, when we're talking about derogatory action that would be prejudicial to the author's honor or reputation, we're talking about derogatory action in relation to the specific work. We're not talking about general statements that would be viewed as derogatory or defamatory to the reputation of the author. It has to be something that relates to the work that then casts the author in what would be viewed as a disreputable light. That, of course, is not at all true with respect to defamatory law in the United States.

The way the law has grown, both as a matter of common law and in terms of state statutory law, it's a civil wrong. It's a tort. It can be either written in the form of “libel” or it can be spoken which would make it “slander.” It could even be expressed other than by writing or by oral comment. It must be “published” in the sense that a third party must have seen, heard, or read and understood it to be about the subject and to be damaging to the subject's reputation.

If you read the language of *6bis*, it's not at all clear that this might just be a direct discussion between a reviewer, for example, and the author of a work in which the author concludes that the reviewer's comments are derogatory in the sense that is contemplated under that Berne provision. But, most importantly in defamation law in the United States, the issue of the falsity of the facts asserted with respect to the subject individual who believes that his or her reputation has been harmed is an absolutely critical matter.

Even to the extent that the First Amendment provides some breathing room for people to engage in commentary and speech that might be viewed as derogatory to the subject's reputation and honor, unless the subject can point to the falsity of what was said, they really don't have any kind of legal action with respect to slander or libel under U.S. law, whereas the comparative notion to defamation in *6bis* doesn't address the question of whether what is said contains an element of falsehood. We've seen a number of areas where people will engage in what has been referred to as “libel tourism” to avoid bringing libel actions that really belong in the United States courts based upon the subject matter and vehicle that was used to make the statements at issue. They tend to travel to other countries, particularly the U.K., to file libel actions because of the differences in the

coverage of defamation and what has to be proven in order to be able to make a case.

In most areas of the United States, it's also important that a defamatory statement be one that is unprivileged. In other words, if you are in the situation where you are a witness in a trial proceeding, whether it's civil or criminal, your testimony is privileged with respect to any character of it that might be viewed as defamatory because it is part of a process in which what you say is being considered more for its relationship to the particular cause of action or the particular charged offense, than it has to do with the character of the particular individual that matter dealt with. So that's another important element.

And of course as I mentioned earlier, there is this distinction made in U.S. law between how the law treats a public figure and treats a private figure, and generally speaking, as we know under the *N.Y. Times v. Sullivan* doctrine, when we're talking about a public figure, an individual who's an elected official or somebody else who has entered into the public spotlight as far as society is concerned, generally speaking they have a heavier burden of proof with respect to an action for defamation, whether it's libel or slander and have to demonstrate "actual malice," which is not only that the statements involved were false, but that speaker either knew they were false or spoke them in reckless disregard for whether or not they were true or false. None of this is reflected in the language of *6bis* with respect to the idea of harm to reputation or honor. Most importantly, perhaps, in the United States an action for defamation does not survive the death of the subject of the alleged defamation.

So you had a very famous case a number of years ago where the children of the noted actor Errol Flynn attempted to sue for defamation of Flynn's character based upon a book that was written as an unauthorized biography of Flynn that alleged that he was a Nazi sympathizer. And, of course, the court basically said that such an action, had it they been brought by Mr. Flynn during his life, might've had some validity but had no validity being brought by those who were his heirs or executors of his estate.

So that's a fairly substantial way in which, even though the doctrine of defamation law in the United States serves as an analog to the "integrity" right that is protected under *6bis*. The two are really quite different in practice.

MISS SCHULTZ: Thank you, Allan. Duncan, Allan's covered kind of one way that the right of integrity and the author's reputation can be protected, can you tell us a little bit about how publicity rights also work in this area?

MR. CRABTREE-IRELAND: Sure. That'd be great and I'll probably mention the Berne Convention less than anyone in the entire day. If you're thinking, "Well I wonder why that would be," in case you don't know,

SAG-AFTRA is the union that covers performers, actors, broadcasters, recording artists and so as I think was mentioned during the esteemed academic panel before us, largely those individuals have been left out of the Berne Convention, but thankfully there's the WPPT for our recording artists and there is the Beijing Treaty. Hopefully, some day it will enter into force for our audiovisual performers. And so you won't hear a lengthy discussion of Berne from me but I would like to just talk for a minute about the right of publicity and its importance, particularly to performers since that's the perspective that I come from, spending almost 24 hours a day, 7 days a week, 365 days a year around them.

We've had, I think, a very fascinating academic discussion so far about how the various elements of moral rights, the patchwork quilt work in practice. For most performers I think they're more interested in a functional approach to these rights because what they're interested in is really two things as has been stated by several other people.

Number one, the question of how they can protect their non-economic rights, whatever those rights may be, and number two, how they protect their economic rights. And I would say not necessarily in that order. Depending on the performer, the reality, of course is that making a living as a performer is often the number one consideration for most performers. It is a very difficult career to pursue. It is a lifestyle for most performers where fighting for the very basic elements of life can be a real challenge. And so as representatives of performers for those who have not achieved a high degree of career success, the basic elements—and typically compensation—are the number one consideration.

And so the right of publicity as part of a broader moral rights patchwork is really important and, in fact, is utilized in practice (for those who might be paying attention to it). There have been a number of high profile cases, litigations, that have been initiated seeking to enforce rights under the right of publicity.

And I guess I should address what it is or what form it takes at least here in the U.S. Regrettably it's not really a federalized right. This is a right that is a sort of common law right that you see in a number of states, last count I think around twenty-eight or so states have some form of either common law or statutory right of publicity. There are a few states that are known as being very receptive to right of publicity statutes that have really built a strong framework for individuals and performers, in particular from my perspective, New York, California, Indiana, jumped to mind as a few of those.

But I do think that it is more than an academic case. There have been a number of cases in the Ninth Circuit, for example, and in other circuits in the U.S. where various types of performers have sought to pursue economic compensation for violations of their rights of publicity ranging

from commercial advertising types of cases to cases involving particularly video games in recent years.

There is I think sort of a brand integrity element of this, particularly that you see in these cases that have made it into the appellate process, where we've got compensation on the one hand, and where we've got a desire to really use the right of publicity to protect the types of uses that are made of image and likeness of individuals. And that's something that otherwise really you have to rely on a contractual framework to protect outside of that and maybe the Lanham Act, which thankfully I'm not responsible for talking about today. And so I think from a performer's perspective that is a really important option.

We did see recently a very interesting litigation attempting to pursue this type of brand integrity or personal rights protection through a copyright angle, which of course is the *Google* and *Garcia* case and, you know, prompted I think some very interesting writings in the Ninth Circuit level in particular.

So for those who haven't checked out Judge Kozinski's opinion in that case and the subsequent *en banc* review results, you should probably do that, but from my perspective that's the type of case that really never should've been brought in the first place because a better—a lot of us were mystified as to why the plaintiff in that case didn't pursue a right of publicity approach to that issue, rather than the copyright approach that was pursued. And so from a practical point of view, again a functional point of view, that's something that we always try to discuss with our members and our performers, which is to really make sure that they have an understanding of the right of publicity, because it is a patchwork, of the various options for seeking to vindicate your rights and making sure that when you do that you don't create unfortunate or counterproductive precedents or, you know, cause harm to an otherwise precariously balanced system.

I think I couldn't wrap up without talking for a minute about the Beijing Treaty. It's something that's very close to the hearts of our members, particularly our actor performer members. Obviously our recording artist members have enjoyed similar protections under the WPPT for some time and actually when you look at the range of our membership, they speak out very strongly in favor of the Beijing Treaty both from a—both with the knowledge of the specifics of the Treaty, which obviously is complex and takes some time to understand, but also from a more fundamental place which is the really, in some ways, shocking lack of international recognition of performers' rights and the audiovisual space for such a long time and the joy, frankly, that our performers have.

Setting aside the details at the concept of being recognized in a way that they haven't been so far and even our recording artist members have stepped up to speak out and say that it's not fair that our actor brothers

and sisters are not protected in the same way that we as recording artists are at the international level. And so that's something that's really important to us. Of course the implementation—someone mentioned earlier that the President had sent the Treaty to the Senate for ratification and of course the implementation package has also been made public and there are definitely some interesting issues that really relate to primarily the anti-bootlegging area, which is the focus of the implementation package that's going to cause some interesting debates. And I think there is some disagreement about the necessity of the scope of the changes that are proposed in the implementation package, but ultimately it is our hope and desire that moral rights for audiovisual performers get enshrined in international law in a way that's meaningful both on a detailed and functional level, but also from sort of the philosophical and principle level to ensure that we would then finally have a broad range of rights for all types of performers, moral rights and economic rights at the international level.

So I think I'll stop there. Thanks.

MISS SCHULTZ: Thank you. And you mentioned your relief at not discussing the Lanham Act and Eric very helpfully on the last panel summarized *Dastar* for us. So Professor Yu, if I could ask you to kind of pick up that heavy load and tell us a bit about the Lanham Act and using statutes like that that are not copyright law to help protect something like moral rights.

PROF. YU: In terms of unfair competition law, the protection we often rely on is derived from § 43(a) of the Lanham Act. Eric has already mentioned the *Dastar Corp. v. Twentieth Century Fox Film Corp.* case. I suspect Professor Jane Ginsburg will talk a little bit about that case as well.

Section 43(a) offers two different types of protection. The first type protects against the false designation of origin—specifically, a false designation that will cause confusion over the “origin, sponsorship, or approval” of the relevant goods or services. The second type concerns the misrepresentation of “the nature, characteristics, qualities, or geographic origin” of the goods or services. From the standpoint of moral rights protection, § 43(a) will prevent people from attaching your name to other people’s works or the name of others to your work. It will also prevent the nature or quality of your work from being misrepresented.

A good example is the *Gilliam v. American Broadcasting Cos.* case—or what we call the “Monty Python Case” in the classroom. In this case, ABC cut out 24 minutes of 90-minute TV programming to insert commercials. It nonetheless broadcasted the work as Monty Python’s without indicating the unauthorized alteration. When Monty Python saw the recorded version, they were appalled by the disjointed format that was shown on TV. Because they did not want their name attached to the unauthorized edition, Terry Gilliam, their American group member, filed a

copyright infringement lawsuit in the United States. The court found for Gilliam based on both copyright law as well as § 43(a) of the Lanham Act. The § 43(a) claim concerned ABC's passing off of the unauthorized edited version as Monty Python's. So, this case is a very good example of how unfair competition law can be used to protect moral rights.

A lot of you here are probably very concerned about the Supreme Court case *Dastar*. This case is about the TV series *Crusade in Europe*, which Fox put together based on General Eisenhower's war memoirs. The series is no longer protected because Fox failed to renew its copyright. When *Dastar* put together a video set to commemorate the fiftieth anniversary of World War II, it copied and condensed the series, reordered the material and included new opening and closing credits as well as title sequences. *Dastar*, however, mentioned neither Fox nor Eisenhower. Fox filed a copyright infringement lawsuit, and the case was appealed all the way up to the U.S. Supreme Court.

When *Dastar* was before the Court, the big issue was whether Fox could pursue a § 43(a) claim based on misrepresentation. As Eric mentioned earlier, the Court's ultimate focus was on the origin of the physical goods—that is, who manufactured the videotapes? The Court, however, did not look at the origin of the footage or the intellectual material captured on the tapes.

There are generally two very different readings of *Dastar*, causing lawyers and commentators to debate over how broadly the case should be read. A broad reading will prevent us from making "false designation of origin" claims based on the intellectual content inside of the physical goods. I, however, belong to the camp that reads the case more narrowly. Under a narrow reading, this case was mostly about content that had already fallen into the public domain—that is, content no longer protected by copyright.

If you want to go deeper into the facts, you can see that a lot of the war footage in Fox's TV series actually originated from Allied Forces. Such footage did not even belong to Fox. So, there were a lot of facts supporting the Court's conclusion that the Lanham Act did not require *Dastar* to credit Fox for the re-used material, especially when the series has already entered the public domain.

In addition to these two readings, some commentators—most notably, Professor Justin Hughes—have separated the nonattribution issue from the misattribution issue. Nonattribution concerns the failure to include the origin of the footage—in this case, the footage that has already gone into the public domain. By contrast, misattribution relates to situations similar to those in the *Gilliam* case—for example, when a wrong name has been attached or when one has misclaimed altered content as the original.

The *Dastar* case focuses on nonattribution, not misattribution. *Gilliam*, by contrast, focuses on misattribution, not nonattribution. Had the

facts in the *Gilliam* case been brought before the *Dastar* Court, I suspect the outcome might be somewhat different.

After *Dastar*, I think the biggest concern for a lot of lawyers and commentators is that many lower courts have read the case broadly, reasoning that § 43(a), post-*Dastar*, gives very limited protection to the attribution interest in an intellectual work even when that work remains protected by copyright. Such a broad reading has caused major concern among those seeking stronger moral rights protection.

MISS SCHULTZ: Thank you. Keeping in the attribution tract there, earlier in the first panel there was mention of some of the newer WIPO treaties and of course those include protection for rights management information or RMI. So Mickey, could you talk to us a bit about RMI protection as a way for protecting moral rights?

MR. OSTERREICHER: Sure. So with my press background for those of you who are not connected to the Internet, right across the street I'll let you know that the Supreme Court denied cert in the *Google* case, the book case. So I think that's something people will be talking about today in our area, but that breaking news aside, earlier somebody talked about it really wouldn't make any sense to publish a book without somebody's name on it. And yet with hundreds of millions of images being uploaded almost daily we are seeing all those images, for the most part, without somebody's name on it. And the rights management information is critical to at least visual journalists and visual creators in terms of doing that.

So attribution. Attribution information under moral rights, the problem moral rights that they have is that it's very narrow. In terms it's got to be for exhibition. It has to be numbered no more than 200 works—more than 200 copies made and for the most part those visual images in terms of photography will not fall under those protections. So what else can we do?

And then we have a number of—now we get into all the acronyms and again standards for rights management information. There's copyright management information, CMI, and that's codified under § 1202 of the DMCA. And we can talk about that. I'm not sure if you want to talk about that now or when you go to the next question.

Then we have IPTC and EXIF and then PLUS, and we don't really just yet have a standardization in terms of how we are going to allow people that create visual works to have that attribution, whether it's information just about them, and even when there's information there that will help people identify who it is that created that work. Often times that information that is referred to often as metadata is stripped out of that—the visual works and we have pretty much almost instant orphan works, if you will, for an image that could've been created only moments ago when it goes up on the Internet and is seen around the world, somebody may not know who it is

that created it and often times these images are being used without permission or credit or compensation. And that really is a huge problem.

You were talking about performing artists, in terms of visual artists trying to have and earn a living doing what they do in this brave new world of so many millions of images being out there. That's a dilemma that we are truly, truly faced with.

So, you know, under DMCA there's certainly a number of really better protections as far as we're concerned that the real question is going to be then enforcement, and that seems to be a big challenge for everybody in terms of what they're dealing with. Setting standards and then enforcing them. So I think maybe as we get into some more questions, I'll get into more specifics.

MISS SCHULTZ: Okay. Thank you. You mentioned a little bit there how dealing with photographers is different than other types of visual arts and we've talked a little bit about VARA in the first panel as well. Professor Yu, was there anything that you'd like to add on VARA that you feel we haven't covered in either of the panels so far?

PROF. YU: We have touched on VARA quite a bit, and this is a topic with which most of you are already familiar. So, I will be brief.

The Visual Artists Rights Act of 1990 covers three distinct types of rights. The first is the right of attribution. The second is the right of integrity. And the third is the right against the destruction of works of recognized stature.

When you compare VARA with moral rights in other countries—I think Professor Daniel Gervais has already discussed the statute in the context of the Berne Convention—you can see that we actually offer stronger protection than other countries of the right against the destruction of works of recognized stature. This right is closer to the right of destruction or, to some extent, the right of integrity, but it is also analogous to the protection found in state art preservation laws—in California, New York, and other states. So, VARA is more of a hybrid. If I have to describe this protection, I would call it “moral rights with U.S. characteristics.”

Going back to the Berne Convention, I think the main concern for a lot of people is that VARA offers a very narrow scope of protection. Its protection is limited to only specific categories of visual art: paintings, drawings, prints, and sculptures. Even within these categories, there are additional statutory conditions.

A good example concerns still photographs. As we have just heard, VARA has a limit on the number of copies: the protected photograph has to exist in a single copy or a limited edition of up to 200 copies. The author also has to sign and consecutively number all the available photographs. In addition, the protected photograph has to be “produced for exhibition

purposes only.” There is actually case law discussing what this particular phrase means.

In regard to duration, the protection is also more limited than what we have in the Berne Convention. The standard term of protection under the Convention is the life of the author plus fifty years. In the United States, the term has been extended to the life of the author plus seventy years. But in VARA, the term of protection is only the life of the author. So, the protection under VARA is much shorter than the duration of copyright.

What is interesting about VARA is that, when we adopted the statute shortly after joining the Berne Convention, we tried to come up with something that was uniquely tailored to our needs, interests, and conditions, but that was also acceptable to other countries. In the end, the protection under VARA does not fit very well with the Berne Convention. Nor does it match the traditional scope of the rights of attribution and integrity.

MISS SCHULTZ: Thank you. Allan, could you tell us briefly a little bit about how contract law can play into this and then we'll turn to Mike and hear about some specific types of contracts.

MR. ADLER: Yes. Contract law was also one of the reasons why publishers generally objected to the imposition of a layer of moral rights on top of the existing economic rights and property rights framework of U.S. copyright law. They felt that contracts gave the parties both a great degree of flexibility in terms of how to develop and conduct their own relationship with respect to the publication of work, but at the same time, in addition to that flexibility, once a contract was in place and had been fully negotiated, it also added a great deal of certainty and predictability about the way in which the relationship would continue and the work at the center of that relationship would be dealt with.

There is, of course, as has been said, no “attribution” right in U.S. copyright law specifically, but that's an issue that is typically dealt with under contract. Many works in the United States are published either pseudonymously or anonymously, and that's generally dealt with between the author and the publisher as a matter of contract. And the courts, of course, generally tend not to try to read between the lines of a contract, unless it's absolutely necessary to do so, so it's the expressed language of what's within the four corners of a contract that ultimately shapes the relationship of the publisher and the author with respect to a particular work and how copyright law is implemented with respect to that specific work in the context of that relationship.

One of the curious things that we see though, is that sometimes there is a situation where the notion of a contract, at least the way licenses are used today, can put the issues of attribution and integrity in opposition to each other.

I'll give you one example. There is a pending rule making at the Department of Education called the Open Licensing Rule in which the Department of Education is trying to encourage the creation of open educational resources through its Direct Competitive Grant Program. And as a result, what it wants to do with the rule is impose the obligation on any grant recipient that any copyrightable work that they produce with grant funds from the Department, would have to be available publicly as an open educational resource subject to the equivalent of a Creative Commons "attribution-only" license.

The problem with that is this essentially says to the individual that if you receive federal funds to create work, that work not only is going to be subject to adaptation, repurposing and alteration by other parties down the line, but at each instance it requires that attribution to the original author must be made. And what that means is that you're going to have a circumstance where, as a result of that kind of license agreement, and as a result of receiving federal funding and the contract terms for that funding, you're going to have the situation where an individual author continues to be credited as the author of a work after it has been substantially altered, repurposed, or adapted in ways that that author might find absolutely appalling and completely at odds with their original purpose in creating that particular work.

So contracts can do a lot of things. They provide flexibility, they provide certainty, they allow the parties basically to decide their own fates within a particular transaction.

Now we have heard on occasion that one of the reasons why moral rights needs to cut into that kind of flexibility and freedom of contracting is because frequently the bargaining positions of the parties, between an author and a publisher, are unequal.

Well, they can be unequal but in two very different directions. A very well-known author with a very long track record of success in publication typically will have more leverage than the publisher will in determining the transactional terms of the next publication if that publisher wants to become the publisher of the author's next work. Obviously the situation is reversed when you're dealing with an author—either a first-time author or an author who has developed no public reputation or record of success in prior publications.

So, in contrast to the U.S. system, attribution seems to be something that in civil code countries has to be cabined within the terms of civil law. This is one of the reasons why publishers continue to feel that a moral rights regime with that kind of European flavor would be detrimental to the way copyright has served the interests of this country.

MISS SCHULTZ: So, Mike, Allan mentioned Creative Commons licenses and they're something that have sometimes been talked about by

scholars as potentially being America's moral rights. Could you share some of your thoughts on that and then also on the role of extra-legal norms in the area?

MR. WOLFE: Absolutely. So Creative Commons licenses, which I'm sure many or all of you are familiar with, are a suite of public licenses designed to allow the widespread sharing, and in some cases reuse and remix, of creative work. And as Allan just recently mentioned, an essential feature of the contemporary suite of Creative Commons licenses is, in fact, an attribution requirement.

This is to say that, while Creative Commons licenses can have any of a number of features, the attribution requirement is a part of all of their current offerings.¹ The most basic license—the Creative Commons Attribution License, or “CC BY” —allows public sharing and reuse provided that licensees properly identify the author.

This license can be amended by selecting from a menu of options any of a number of different requirements. The licensor can elect to disallow derivative works, or to require that creators of derivative works share those derivative works under the terms of the same license. Finally, licensors can limit licensed sharing and reuse to only noncommercial activity.

And I would like to back up briefly and respond a little bit to one of Allan's comments about open educational resources and the use of a Creative Commons attribution license and its impact on tying authors' identities to downstream derivative works. It is important to note that CC licenses do provide in some measure for a right of disassociation from unwelcome derivatives. When an author's work is modified in such a way that the author no longer feels comfortable having their name associated with it, the license gives authors recourse by requiring that a downstream user remove the attribution on request where reasonably practicable.

Creative Commons licenses are in some sense an interesting and commonly used contractual solution to the lack of a formal American attribution problem. However, I wouldn't call them an *American* solution entirely. While Creative Commons is an American organization and the licenses originated in the United States, the licensing scheme is designed to be global and portable. To that end, Creative Commons licenses are in some sense designed as much as possible to be compatible with formal moral

¹ Interestingly, earlier Creative Commons licenses that did not use the attribution requirement were retired due to lack of demand.

rights regimes and, in fact, all of the licenses have a provision that waive moral rights to the extent necessary to reasonably effectuate their terms, and only where actually waivable in a given jurisdiction.

In a practical sense, it seems to me that Creative Commons licenses are an effective means for authors who want to share their work without price or permissions barriers to receive credit for their work. And for those authors who give their work away freely, credit and stature are likely to be the primary currency of their creative economy.

It is helpful here that the CC licenses also try to tackle some of the fiddlier aspects of what it means to have a functioning attribution regime in an online environment, by taking the technology seriously. In a digital environment, the licenses have a machine-readable layer, encouraging discovery (again, an important consideration for those authors working primarily for credit), and compliance.

Finally, Creative Commons licenses also have the interesting effect of encouraging attribution beyond the scope of what might be required strictly under the terms of the license. So even though the Creative Commons licenses do not purport to restrict behavior otherwise permitted by Copyright Act's exceptions and limitations, they nonetheless encourage attribution in those cases by making permissions easy and costless for many use cases. The result is in some sense over-compliance, helping secure attribution for authors, even where perhaps not absolutely required by the license itself.

Moving on, I'm actually going to segue directly into a topic that's not entirely directly related and that's how extra-legal norms stand in place of moral rights in the United States. So there is, as the panel's discussed, a significant patchwork of rights that to some extent, if not completely, provides something akin to moral rights protection to authors in the United States. But the reality on the ground is substantially more informal, often just grounded in the norms and practices within and across creative and consumer communities. Particularly relevant here are the norms surrounding plagiarism, which are what I'm going to focus on today.

Plagiarism, which as a word interestingly enough comes from the Latin root for "a kidnapping," is an extra legal norm that is independently defined in various communities of practice that cautions against and often provides extra-legal remedies for uses of works that are in some way fraudulent or unauthorized—generally in the sense of not including attribution information so as to suggest that either information or expression originates from the plagiarizer rather than from the author of the plagiarized work. Though it is not identical with either, plagiarism speaks more to the concerns behind the moral right of attribution than it does to those behind copyright infringement. If these three possible areas of wrongdoing—plagiarism, failure to attribute, and copyright infringement—were viewed as a Venn diagram, they would be, mutually, but incompletely, overlapping.

Some plagiarisms are infringements and, where available, moral rights violations. Given that plagiarism norms do not turn on permission, and often extend beyond copyrightable subject matter to ideas, other plagiarisms might stand independent and apart from these other areas of concern. But in general, the question resolves to the same key area of concern that motivates the attribution right: ensuring that the originators of work are credited for their contributions. One of the virtues of having an extra legal norm as opposed to a formal statutory right, although I won't draw any conclusions as to whether this effects the propriety of having a statutory right, is that within various communities of practice there can be, and in fact are, different approaches to the question of plagiarism.

In the case of literary works, academia has very strong, and often enforceable, norms about plagiarism, not all of which are necessarily entirely consistent with formal attribution rights. For instance, if a research assistant provides significant contributions to a paper, the fact that their name does not appear on the text will not generally be considered plagiarism or in violation of the norms of plagiarism, despite the existence of real contributions that might rise to the level of requiring attribution under a statutory model.

Meanwhile, in creative writing, while there are still very strong norms around plagiarism, these might very well fall short of the formal academic approach to providing credit. So rather than footnotes or citations you might have something like Jonathan Letham's excellent essay, *The Ecstasy of Influence*, which is perhaps misleadingly subtitled "A Plagiarism." There, the work is composed entirely of other people's sentences, all the sources of which are credited in a sense by being listed at the end, but not in-line and without the quotation marks, brackets, and ellipses and the way that lawyers are all too familiar with. I would posit that this is an instance where the author has very much complied with his community's norms surrounding credit—and thus avoiding plagiarism *per se*—while also being outside the bounds of what might be considered acceptable elsewhere.

These are only the very tip of the iceberg—there are real and differentiated plagiarism norms in everything from music, to film, to visual art, to comedy. Perhaps this state of affairs suggests that there is a real demand for remedies in cases where work is used without attribution, but it might instead suggest that the communities closest to the behaviors at issue are capable of self-regulating in accordance with their actual needs on the ground. In any case, I think any moral rights reform would do well to remember and respect the different approaches taken by these different communities.

MISS SCHULTZ: Thank you. Thank you, gentlemen. I know there's a lot more to cover. We have just a few minutes left for questions from the audience.

MR. MOPSIK: Great. Thank you. I want to take exception to a comment that my friend Allan Adler made. I don't always disagree with Allan but Allan stated, and good thing I'm paraphrasing, contracts give flexibility and certainty as to how work would be dealt with. Well, in my experience in my previous life at ASMP at the Trade Association, over the years the one thing that we could be certain regarding most textbook publishing licenses and contracts, was that they were being exceeded. There was no certainty that the terms of the contract were being upheld. So—and I agree with you that the leverage issue—I'm not sure that—I think that tilts still more in favor of the publisher than the number of, I guess, authors that have significant leverage over a publisher is significantly less than the number that don't. But as far as contracts were concerned, I don't think they gave any particular certainty as to what was happening with the future of a work.

MR. ADLER: Well, let me try to clarify that, Gene, because what I meant, and I think you've affirmed this, is that the terms of the contract create certainty. Now whether or not the terms are complied with is another question. The fact that you are able to point out in a given situation that the facts of implementation of that contract don't match the terms indicates that there is at least the possibility and the intention of certainty, but it simply isn't followed through in terms of performance.

So I think that you still have the notion that contracts are useful for providing certainly the aspiration toward certainty and predictability, but you're still dealing with the question ultimately of whether or not the performance will be faithful to that aspiration.

MR. MOPSIK: Then we still almost agree.

MISS SCHULTZ: Daniel.

MR. GERVAIS: It's also for Allan and also on contracts. So you underscore the almost sanctity of contract rights so important, yet the United States has something that authors in other countries envy us which is the termination of transfers, which seems to be a little bit of government interference in the contract. And I understand that some of the work-arounds, especially that some lawyers in Nashville have tried for termination of transfers have not all been tested in court but it's a pretty strong, unwaivable, untransferable right. Is that un-American?

MR. ADLER: I think as you probably would agree Daniel, that's the exception by far rather than proving the general rule of the way in which freedom of contract is generally allowed to operate within the copyright system. And more importantly, drives the copyright system increasingly because of the increasingly broad role that licensing now plays in the use of works.

We're seeing within the context of the current copyright review this battle play out with those who are advocating the importance of

continued certainty and definition with respect to ownership of rights in a particular work. But we're also seeing a society that is increasingly content simply to have access to use the work and is not really interested in ownership because of the other attributes that ownership usually carries, which requires maintenance, storage, care, things of that nature, upgrades, whatever.

So I wouldn't point to the exceptional circumstances of termination of rights as generally vitiating the rule, which I think continues to be that contracts play a very important role. One point I would also want to make here is that, with respect to the right to control the production of derivative works, there's always going to be some question of what actually is derivative.

At the far end of the spectrum, I suppose it's possible that using the common understanding of the word "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.

So you have to have a notion of these legal concepts that is susceptible to clear definition. It's always going to be case that we're going to have litigation because, as June mentioned, we are a particularly litigious society and we'll always be trying to game the fringes and the edges of these rights. But today, for example, we're seeing the discussion of whether or not remixes and mash-ups are vitiating the derivative works right. If that's true, I don't know that anybody has related the question of remixes and mash-ups to moral rights at this point, but it certainly seems to be another avenue to be explored.

UNIDENTIFIED SPEAKER: Actually before you go onto the next question just say—I think one of the topics we didn't discuss but are thinking about is the importance of contracts with collaborative works and how the, you know—a lot of challenges would exist in the absence of the prevalence of contracts for collaborative works like in the audiovisual area because how you would coordinate and harmonize different participants, different moral rights, and other rights without contracts would be quite a complicated scenario.

MR. ADLER: Yes, in fact Eric's history of the late 1980s, at the time of Berne implementation and immediately thereafter, left out the fact that, in the hearings that were held about moral rights, the other main issue being discussed was the impact of moral rights on the work-for-hire doctrine, and particularly the then-recent decision of the U.S. Supreme Court in the *Reid* case. At that point, there was a real question as to whether or not it was possible to create a situation in statutory copyright law that would accommodate that notion as the Europeans have it, but still be consistent with the way the Supreme Court interpreted the work-for-hire

doctrine which depends greatly upon the way in which a written contract essentially defines the relationships of the parties.

MISS SCHULTZ: Thank you, gentlemen. I'm afraid that's all the time we have for this session.

SESSION 3: KEYNOTE ADDRESS

**THE MOST MORAL OF RIGHTS:
THE RIGHT TO BE RECOGNIZED AS THE AUTHOR OF ONE'S WORK**

*Professor Jane. C. Ginsburg**

Abstract

The U.S. Constitution authorizes Congress to secure for limited times the exclusive right of authors to their writings. Curiously, those rights, as enacted in our copyright laws, have not included a general right to be recognized as the author of one's writings. Yet, the interest in being identified with one's work is fundamental, whatever the conception of the philosophical or policy basis for copyright. The basic fairness of giving credit where it is due advances both the author-regarding and the public-regarding aspects of copyright.

Most national copyright laws guarantee the right of attribution (or "paternity"); the leading international copyright treaty, the Berne Convention, requires that Member States protect other Members' authors' right to claim authorship. But, apart from an infinitesimal (and badly drafted) recognition of the right in the 1990 Visual Artist's Right Act, and an uncertain and indirect route through protection of copyright management information, the U.S. has not implemented that obligation. Perpetuating that omission not only allows a source of international embarrassment to continue to fester; it also belittles our own creators. Copyright not only protects the economic interests in a work of authorship, it also secures (or should secure) the dignitary interests that for many authors precede monetary gain. Without established and enforceable attribution rights, U.S. copyright neither meets international norms nor fulfills the aspirations of the constitutional Copyright Clause.

This article will analyze the bases and enforceability of attribution rights within international norms. It will review the

* Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia University School of Law. Many thanks for research assistance to Jake Grubman, Columbia Law School class of 2016, to Pam Samuelson for helpful suggestions, to Shira Perlmutter for analysis of free trade agreements, and to Andreas Gebhard, Yoko Miyashita, Jeff Sedlik, Lisa Willmer, and Nancy Wolff for information regarding author-identification data in digital images. (Any factual or analytical errors in that regard are mine alone.)

sources of attribution rights in the current U.S. copyright law, particularly the Visual Artists Rights Act, and § 1202's coverage of copyright management information. It will explore the extent to which removal of author-identifying information might violate § 1202 and/or disqualify an online service provider from the § 512 safe harbors. Finally, it will consider how our law might be interpreted or amended to provide for authorship attribution. Non-legislative measures include making authorship attribution a consideration under the first factor of the fair use defense.

I. INTRODUCTION

The French revolutionary legislator, Le Chapelier, famously declared, “Of all properties, the most sacred, the most legitimate, the least contestable, and if I may say, the most personal, is the right the author has in the fruits of his labor.”¹ Descending from those rhetorical (and foreign) heights, I will affirm that the most moral and the most intuitive author's right is the right to be recognized as the creator of her works. In fact, most non-experts in copyright law—in other words, ordinary folk, and for that matter, authors themselves, as evidenced by various remarks throughout this Symposium—think that authors *do* enjoy the right to be credited for their works. Of all the many counter-intuitive features of US copyright law—and they abound—the lack of an attribution right may present the greatest gap between perceived justice and reality.

Even entities whose relationship to copyright is ambivalent acknowledge the basic fairness of giving credit. For example, Creative Commons has long made attribution a default in its parallel copyright universe.² The Copyright Principles Project, few if any of whose participants could be impugned with authors' rights maximalism, recommended “that Congress give serious consideration to granting authors a right of attribution.”³ Another example of the fundamental nature of authorship attribution: many who lack enthusiasm for paying authors, such as many online platforms, query who needs money when free distribution

¹ Jean Le Chapelier, *Report to the Revolutionary Parliaments of Le Chapelier*, LE MONITEUR UNIVERSEL, Jan. 15, 1791, reprinted in 7 RÉIMPRESSION DE L'ANCIEN MONITEUR 113, 116-18 (1860).

² CREATIVE COMMONS, *About the Licenses*, <http://www.creativecommons.org/licenses/> (last visited June 1, 2016).

³ See Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L. J. 1175, 1188 (2010) (“Because attribution has become a more accepted social norm in the U.S. in recent years, we recommend that Congress give serious consideration to granting authors a right of attribution.”).

gives authors great exposure.⁴ Exposure, however, implies credit for the work. Reputation may eventually lead to revenue, but not if those who might pay the author do not know who she is. Whether one creates for glory or for more material gain, being identified with one's work buttresses creativity.

The importance of attribution in stimulating and supporting creativity underscores its centrality to the broader public interest. We all benefit from the "sacrificial days devoted to . . . creative activities."⁵ Beyond attribution as an incentive to creativity, the public has an interest in knowing who created a work of authorship so that readers, viewers, listeners (etc.), can continue to enjoy past or future works by authors who have earned their approbation. The absence of attribution rights doubly deprives: an author cannot build a "following," and her audience cannot follow her work, without the essential information that ties a work to its author, and to her public.

Last, but not least, we have assumed an international obligation under the Berne Convention to credit at least foreign authors.⁶ The United States, I believe, is the only country, including among common law countries, not to include attribution rights in its copyright law. Whether or not there is any effective international sanction for non-implementation of this particular Berne Convention obligation, it is not a good thing to be an international scofflaw.

Before I address the positive law and future prospects for moral rights in the United States, I'll evoke some arguments against the provision of enforceable attribution rights in U.S. law, and the reasons, one theoretical and two practical, that underlie them. One might classify the theoretical objection under the rubric of post-modernism: Attribution rights overvalue authorship; they are a vestige of the romantic conception of authorship.⁷ If

⁴ See Brendan James, *Unpaid Huffington Post Bloggers Actually Do Want To Get Paid*, INT'L BUS. TIMES (Feb. 18, 2016), <http://www.ibtimes.com/unpaid-huffington-post-bloggers-actually-do-want-get-paid-2313744>.

⁵ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

⁶ See Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886, as revised July 24, 1971 and as amended Sept. 28, 1979, 102 Stat. 2853, 1161 U.N.T.S. 3 (entered into force in the United States Mar. 1, 1989) [hereinafter Berne]. Berne does not require that member States provide Berne-level protection to their own authors. See *id.* art. 5(3); see also *infra* Section II.

⁷ For critiques of author-ownership in general, see, e.g., MICHEL FOUCAULT, *What Is an Author?*, reprinted in MICHEL FOUCAULT: AESTHETICS, METHOD, AND EPISTEMOLOGY 212 (J.D. Faubion ed., 1998); WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 74 (Oxford Univ. Press 2009). On the overvaluation of authorship attribution, see, e.g., Christopher Jon Sprigman, Christopher Buccafusco, & Zachary Burns, *What's a Name*

we no longer subscribe to that view, we shouldn't believe in attribution rights, either. This objection, however, is only as convincing as its premise. If we consider that creativity is not fungible, but rather requires talent, persistence, and individuality to which the resulting work of authorship gives expression, the post-modernist critique holds no purchase.

The second argument I'll call the slippery slope argument. We might be willing to go along with attribution rights, but we fear they will lead us to integrity rights. We don't want integrity rights because they limit other authors' creative reuse of prior works, or for that matter, the leeway that producers enjoy to revise works. What is the path of the slippery slope? It does not in fact lead from the right of attribution, but rather from the right to prevent false attribution. Recall the *Monty Python* case⁸ earlier evoked by Peter Yu.⁹ There, the British comedians successfully invoked under section 43(a) of the Lanham Act a right to prevent association of their name with a broadcast that was so altered it no longer accurately represented *Monty Python's* work.¹⁰ (Today, the Supreme Court's *Dastar* decision¹¹, discussed in more detail by Peter Yu,¹² might change that result.) Analytically, the right to prevent false attribution is not actually a moral right, even though many common law countries include it in their moral rights provisions.¹³ The right to prevent false attribution is the right to prevent the association of your name with a work you didn't create, in other words, to prevent passing off as yours a work that no longer corresponds to the work you created. Moral rights, by contrast, concern the association of your name with a work you did create. Nonetheless, if a moral rights law were to include both the positive and the negative aspects of the right, then one can see how attribution rights (or rights against false

Worth?: Experimental Tests of the Value of Attribution in Intellectual Property, 93 B.U. L. REV. 1389 (2013).

⁸ See generally *Gilliam v. Am. Broad. Cos, Inc.*, 538 F.2d 14 (2d Cir. 1976).

⁹ Peter K. Yu, Remarks at the U.S. Copyright Office's Symposium, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States: The U.S. Perspective* (Apr. 18, 2016), 8 GEO. MASON J. INT'L COM. L. 27, 32-33 (2016); see also Jane C. Ginsburg, *The Right to Claim Authorship in US Trademarks and Copyright Law*, 41 HOUS. L. REV. 263, 274-275 (2004) (analyzing impact of Supreme Court's 2003 decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.* on attribution rights claims).

¹⁰ *Gilliam*, 538 F.2d at 25.

¹¹ See generally *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

¹² Yu, *supra* note 9, at 33-34.

¹³ See, e.g., Copyright, Designs and Patents Act 1988, c. 4, §84 (UK) [hereinafter UK Copyright, Designs and Patents Act]; see generally Copyright Amendment (Moral Rights) Act 2000 (Cth) (Austl.) [hereinafter Australian Moral Rights Act].

attribution) could open a back door to integrity rights. On the other hand, limiting attribution rights to the affirmative right to claim authorship, or restricting remedies for false attributions of authorship to clear labeling would keep that back door closed.

The third argument against attribution rights is the most practical of all. It contends that it's simply too difficult to implement an attribution right in practice. Our caselaw has enough trouble, in the joint works context, identifying who is an author; it is unrealistic to add authorship recognition rights. The task would be even more daunting were the rights to apply to employees for hire, who are not statutory authors, but who nonetheless participate in creating works. The potential plethora of authors would require us to decide which ones should be recognized. If all were entitled to authorship credit, we might end up with tiny print or endless film credits that no one will look at anyway, so even if attribution rights existed they would not in fact advance authors' recognition interests.¹⁴ In rejoinder, while U.S. judges' attempts to identify the kind of creativity that makes one an "author" are not consistently convincing,¹⁵ the point is overstated; difficulties in determining whether a contributor at the fringes of a creative enterprise should be denominated an "author" or "co-author" should not obscure attribution claims where authorship is apparent. Moreover, where the creators are multiple, business practice may assist in identifying those entitled to authorship credit. That the resulting credits may not attract most readers' or viewers' attention does not warrant forgoing them altogether: some credit is better than none, and the fact of formal recognition of authorship may be what matters most.

Having noted and briefly responded to those objections, let's begin with the sources of attribution rights. These include international norms and some provisions of current US copyright law, specifically, the Visual Artists Rights Act and § 1202's coverage of copyright management information (CMI). I will explore the extent to which removal of author-identifying information might violate § 1202 and/or disqualify an online service provider from the § 512 safe harbors. Other panels will address various private ordering solutions. Finally, I will consider how our law might be amended to provide for a right of authorship attribution.

II. INTERNATIONAL NORMS

¹⁴ See, e.g., Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789 (2007).

¹⁵ See, e.g., *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc).

Article *6bis* of the Berne Convention provides, in relevant part: “[i]ndependently 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 . . .”¹⁶ As one of the Berne Convention's substantive minima, the right of attribution applies to member states' treatment of foreign authors; because Berne specifies that “[p]rotection in the country of origin is governed by domestic law,”¹⁷ the U.S. has no international obligation to protect the right of its own authors to claim authorship. As a practical matter, however, Berne member states are not likely to confer on foreign authors more substantive rights than they grant their own; Berne thus tends to harmonize domestic law to the international norm.¹⁸ Nonetheless, technically, the U.S.' failure to protect its own authors does not breach international obligations; its failure to ensure that foreign authors enjoy minimum Berne rights puts us in violation.¹⁹ But, as to article *6bis*, the violation effectively goes unpunished, because the principal mechanism for enforcing Berne obligations, trade sanctions authorized by World Trade Organization dispute resolution panels, is not available for non-compliance with article *6bis*.²⁰

By contrast, there is another, indirect, source of attribution rights in the Berne Convention whose non-respect, I contend, can give rise to WTO enforcement. The quotation right set out in article 10(1) provides:

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.²¹

¹⁶ Berne, *supra* note 6, art. *6bis*(1).

¹⁷ *Id.* art. 5(3).

¹⁸ *Id.* art. 18(3).

¹⁹ *Id.* art. 5.

²⁰ Agreement on Trade Related Aspects of Intellectual Property, art 9(1), 1994, 1869 U.N.T.S. 299 (noting that “[m]embers shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article *6bis* of that Convention or of the rights derived therefrom.”) [hereinafter TRIPS].

²¹ Berne, *supra* note 6, at art. 10(1).

Article 10(3) continues:

Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.²²

Article 10(1) does not afford member states an option to allow for quotation rights²³. It *directs* their allowance, subject to a variety of conditions, including mandatory mention of the source and of the name of the author, if it appears on the work. Article 10(1)'s other conditions (fair practice; proportionality) resemble the second and third of the article 9(2) three-step test, which permits Berne member states to devise exceptions and limitations to the reproduction right (extended through TRIPS article 13 to all exclusive rights).²⁴ Article 9(2), however, does not require that member states make authorship attribution a condition on permissible incursions on the reproduction right. Because it is the later-enacted²⁵ provision, does article 9(2) effectively override 10(3)? As a general matter of interpretation, the specific controls the general, so to the extent articles 10 and 9(2) overlap, article 10 would control. Moreover nothing in the drafting history of article 9(2) indicates an intention to replace the article 10 mandatory quotation right with permissible, but not obligatory, entitlements to reproduce portions of protected works. In addition, the article 10(3) attribution condition is fully compatible with the third step of the three-step test, which allows member states to devise exceptions or limitations that “do[] not unreasonably prejudice the legitimate interests of the author”: being credited as the author of the copied work is a legitimate interest, and failure to credit the author may well unreasonably prejudice that interest.²⁶

Whether authorship attribution is an implicit, or at least compatible, condition on permissible exceptions to exclusive rights, or an explicit predicate to the mandatory quotation right, there remains a significant shortcoming in the construction of a Berne attribution obligation: Berne does not define who is an author. Rather, apart from an implicit expectation that the “author” will be a human being, and not a juridical

²² *Id.* art. 10(3).

²³ *Id.* art. 10(1).

²⁴ Compare *id.* art. 10(1), with *id.* art. 9(2).

²⁵ Current art. 9(2) was promulgated as part of the 1967 Stockholm revision. WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM: VOLUME II, 1146 (1971). Art. 10 was first incorporated in the 1948 Brussels Revision. SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND app. at 24, 262 (2d. ed. 2006).

²⁶ Berne, *supra* note 6, art. 9(2).

person,²⁷ that question seems to be left to member states, whose conferral of authorship status, particularly on employee authors, may differ. Moreover, Berne does not dictate how employee authors are to be credited, if at all, in the work's country of origin. As a result, it is up to the country of origin to determine whether an employee author's name must appear on the work. Appearance of the author's name upon initial publication is a predicate to application of Berne article 10 obligation to identify the source author when authors in other countries quote from the work. In effect, if authorship status is denied in the work's country of origin, Berne does not bar other member States from depriving employee authors of authorship status when third parties quote their works.

On the other hand, if an employee author's name does appear on initial publication, Berne's failure to define who is an author will probably not lead to omission of the employee author's name in the country where the quotation right is exercised. The initial appearance of the author's name will result either from a law in the country of origin that requires authorship credit regardless of employment status, or in countries of origin that do not impose such a requirement, from a decision of the publisher, perhaps under a collective bargaining agreement, to name the employee author nonetheless. The beneficiary of the quotation right in another country under whose law employees are not authors is unlikely to go to the trouble of ascertaining if the named author was an employee in the work's country of origin, in order to deprive that creator of authorship recognition in the country where the quotation right is exercised.

Because, as we have seen, article 10 does not ensure an affirmative attribution right with respect to employee authors (or, for that matter, authors in general) in the work's country of origin, nor, consequently, in the country of quotation, it operates very differently from the moral rights set out in article 6*bis*. The distinction between an attribution condition on the application of a copyright exception on the one hand, and the affirmative article 6*bis* right on the other, however, may work to the benefit of authors seeking international enforceability of their attribution interests. This is because the TRIPS provision that excludes moral rights claims from dispute resolution proceedings concerns "the rights conferred under Article 6*bis* of [the Berne] Convention or of the rights derived therefrom."²⁸ If the article 10(3) attribution condition is not a "right derived from" article 6*bis*, then a member state's failure to condition the quotation right on authorship

²⁷ See, e.g. Sam Ricketson, *People or Machines? The Berne Convention and the Changing Concept of Authorship*, 16 COLUM. J.L. & ARTS 1, 11 (1993).

²⁸ TRIPS, *supra* note 20, at art. 9.

attribution (when the author's name appears on the source work) could subject that state to a dispute resolution procedure for non compliance with enforceable provisions of the Berne Convention.

In addition, the drafting history of article 10(3) indicates that the attribution condition on the quotation right was not considered an incident of the article *6bis* moral right of attribution. First, while article *6bis* was enacted as part of the 1928 Rome revision, article 10(3) came in with the 1948 Brussels revision. If the attribution condition was simply an application of the *6bis* obligation from which it arguably derived, then article 10(3) would have been superfluous. But in 1948 it was:

not clear that the article *6bis* moral rights otherwise applied to lawful quotations, and the conference records indicate considerable disinclination to recognize the integrity right in the context, notably, of edited versions of text for use in schools. If lawful quotations otherwise fell outside the control of article *6bis*, the delegates nonetheless agreed that the author's name should be recognized. Article *6bis* having been sidelined, they therefore established an independent basis for the attribution right. If "derived from" implies "dependent on", then this history suggests that the distinct basis for articles 10 and *10bis* rights of attribution justifies their preservation in the Berne Convention articles that the TRIPs Agreement makes enforceable.²⁹

Under this reasoning, then, the article 10(3) attribution condition is a requirement distinct from the article *6bis* attribution right, and the absence of such a condition on the application of the fair use doctrine or any other exception tantamount to a quotation right with respect to non U.S. Berne or TRIPS works, places the U.S. in violation of an international copyright norm enforceable under the TRIPS Accord.

III. DOMESTIC U.S. LAW

As mentioned earlier, the United States is an outlier not only with respect to the civil law countries whose moral rights regimes arguably reflect a more author-centric copyright regime in general, but also with respect to common law countries. Common law countries other than the U.S. have an attribution obligation in general, and specifically in connection with copyright exceptions such as fair dealing. Fair dealing is narrower

²⁹ RICKETSON & GINSBURG, *supra* note 25, ¶ 10.46; *see also id.* ¶ 13.110 ("No reference is made to 'moral rights' in article 10(3) (by contrast with article *11bis*(2); *see below*), and this appears to stand as a separate requirement, quite apart from article *6bis*.").

than fair use but it bears some similarity, and our common law counterparts make authorship attribution a condition of the exception.³⁰ The European Union has not harmonized moral rights, but in the Orphan Works directive, article 6(3) makes the inclusion of the name of an identified author a requirement under the EU Orphan Works regime.³¹

U.S. copyright law contains three partial sources of attribution rights. The first is the requirement in § 409 that the application for copyright registration name the author.³² The provision does not specify whether “author” means statutory author, or any creator.³³ If the former, then employee authors have no entitlement to be named in the application. Moreover, § 409 applies only to the registration process; it does not require that publicly-distributed or publicly exhibited copies bear the author’s name.³⁴ The second is the Visual Artists Rights Act (VARA), whose scope is extremely limited. The third is the § 1202 protection of copyright management information against knowing removal or alteration. Although its knowledge threshold is very high, this provision could afford a source of attribution rights, especially to authors who embed author-identifying information in digital copies of their works.

³⁰ See *Copyright Act of 1968* ss 41, 42, 44, 45, 103A, 103B (listing exceptions subject to sufficient acknowledgement requirement); see *id.* at s 10 (defining “sufficient acknowledgement”)(Austl.); see *Copyright and Related Rights Act 2000* (Act No. 28/2000) ss 51-54, 57, 90 (Ir.), <http://www.irishstatutebook.ie/eli/2000/act/28/enacted/en/html> (listing exceptions subject to sufficient acknowledgement requirement); see *id.* at s 51(3) (defining “sufficient acknowledgement”); see *Copyright Act 1994*, ss 42, 46, 70 (N.Z.); (listing exceptions subject to sufficient acknowledgement requirement); see *id.* at s 2 (defining “sufficient acknowledgement”); *Copyright, Designs and Patents Act 1988*, §§ 29-32, 36, 59 (listing exceptions subject to sufficient acknowledgement requirement); see *id.* at § 178 (defining “sufficient acknowledgement”) (UK); see *Express Newspapers PLC v. News (UK) LTD* (1990) W.L.R 1320, 1327 (finding that a reproduction of a newspaper interview was not justified as “fair dealing” because acknowledgment, referring to the newspaper as its source, was not sufficient in that it failed to acknowledge the author); see *Copyright Act, R.S.C. 1985*, c C-42 ss 29-30 (listing exceptions subject to authorship acknowledgement requirement) (Can.) [hereinafter *Canada Copyright Act*].

“Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned: (a) the source; and (b) if given in the source, the name of the (i) author, in the case of a work, (ii) performer, in the case of a performer’s performance, (iii) maker, in the case of a sound recording, or (iv) broadcaster, in the case of a communication signal.”

See *id.* at s 29.1.

³¹ Directive 2012/28/EU, of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, art. 6(3), (L.299/5) (EC) (“Member States shall ensure that the organisations referred to in Article 1(1) indicate the name of identified authors and other rightholders in any use of an orphan work.”).

³² 17 U.S.C. § 409(2).

³³ *Id.*

³⁴ *Id.* § 409.

A. VARA

The extremely narrow scope of the 1990 Visual Artists Rights Act renders it of very little assistance to authors in general, and even to visual artists. One problem is the stinging definition of a “work of visual art,” limited to physical originals and up to 200 signed and consecutively numbered copies of a painting, drawing, print or sculpture.³⁵ VARA confines protectable photographs to up to 200 signed and consecutively numbered copies of “a still photographic image produced for exhibition purposes only,” a category that does not in fact exist and that gives rise to many practical difficulties.³⁶ For example, an image created for purposes of publication in a fashion magazine would not qualify; if the photographer subsequently produced a limited edition printing of those images for purposes of exhibition (and sale), it appears that VARA would spurn that printing because the *image* (rather than the particular printed impression) was originally produced for purposes other than exhibition. Worse, suppose the image was originally produced for exhibition purposes only, but subsequently the photographer authorized the production of mass multiples. The subsequent copies in excess of 200 (or any copy not signed and consecutively numbered up to 200), not only fall outside VARA, but also might retroactively disqualify the original limited printing because the *image* (as opposed to the copy) will no longer have been “produced for exhibition purposes only.”

The scope of attribution rights in works that do qualify as “works of visual art” mirrors the miserly coverage of the definition. The acts that infringe the attribution right turn on the definition of work of visual art, which may make sense with respect to the integrity right (whose scope Congress closely cabined), but treating attribution rights in parity with integrity rights fails to think through whether the free speech concerns underlying objections to integrity rights also apply to attribution rights. Consider the following examples of the outcomes of pairing attribution and integrity rights.

VARA enables a visual artist not only to seek attribution for works of visual art that she did create, but also to prevent attribution of her name to works of visual art that she did not create.³⁷ There is no VARA claim for attribution or misattribution of the artist’s name to a work that does not qualify as a “work of visual art.”³⁸ Thus, for example, the artist has no right

³⁵ *Id.* § 101.

³⁶ *Id.*

³⁷ *Id.* § 106(a)(1).

³⁸ *Id.* § 106(a).

to authorship attribution, or against authorship misattribution, with respect to mass-market multiples. If the artist's name falsely appears on a work that does meet the definition of a "work of visual art," for example, on a limited series of signed and numbered prints, the artist still will have no claim unless the works she created also are "works of visual art." Thus, if none of a photographer's works were "produced for exhibition purposes only," then misattributing even photographic prints that meet the VARA definition to that photographer does not violate the VARA attribution right. It would appear that, to enjoy VARA rights against misattribution, a photographer or other artist would have at least once to have created works that meet the VARA definition.

Even if an artist has at some point produced a "work of visual art" and therefore would have standing to advance a VARA misattribution claim, that claim pertains only to misattributions in connection with other works of visual art.³⁹ If our hypothetical print maker produces a run of 201 signed and numbered prints, none of the prints will be "works of visual art" and VARA will provide no remedy for the misattribution. This result might not be too troublesome, were there other legal provisions that might afford a remedy. But the Supreme Court's *Dastar* decision suggests that VARA may afford the only source of attribution rights, and that any Lanham Act protection would be impermissibly superfluous.⁴⁰ Moreover, lower courts have accorded *Dastar* a preemptive effect that precludes not only Lanham Act-related attribution claims, but also claims under state laws.⁴¹ Conferring such broad preemptive reach to VARA claims applies *Dastar* far too zealously: compared to the universe of Lanham Act and state claims, a VARA attribution action looks like a pea alongside a watermelon. Nonetheless this *Dastar*-derived interpretation would award precedence to the pea.

B. Copyright Management Information

1. International norms

Section 1202, protecting copyright management information, implements an international obligation under article 12 of the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT). The international text provides:

³⁹ *Id.*

⁴⁰ See *Dastar, Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003).

⁴¹ See generally Jane C. Ginsburg, *Moral Rights in the US: Still in Need of a Guardian* Ad Litem, 30 CARDOZO ARTS & ENT. L.J. 73, 81-85 (2012) (reviewing cases).

(1) Contracting Parties shall 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 or the Berne Convention*:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.⁴²

The violation consists in the knowing removal or alteration of copyright management information having reasonable grounds to know that the removal or alteration will facilitate “any right covered by this Treaty *or the Berne Convention*.”⁴³ Authorship attribution rights are Berne Convention rights under article *6bis* and indirectly under article 10(3).⁴⁴ As a result, under the international norm, author-identifying information is protected rights management information, and its knowing removal would violate a right covered by the Berne Convention. Because Berne specifies the independence of moral and economic rights, the removal of the author-identifying information by the holder of the economic rights could violate and facilitate the violation of the author’s *6bis* rights.⁴⁵ The U.S. implementation of WCT article 12 departs from the international text in one important way. Section 1202 states:

⁴² World Intellectual Property Organization Copyright Treaty art. 12, Apr. 12, 1997, 2186 U.N.T.S. 121 (emphasis added).

⁴³ *Id.* art. 12(1) (emphasis added).

⁴⁴ Berne, *supra* note 6, art. 10(3).

⁴⁵ At least when the author has not transferred moral rights (and to the extent that the country where the work is exploited permits transfers of moral rights).

(a) False Copyright Management Information. — No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement —

(1) provide copyright management information that is false, or

(2) distribute or import for distribution copyright management information that is false.

(b) Removal or Alteration of Copyright Management Information. — No person shall, without the authority of the copyright owner or the law —

(1) intentionally remove or alter any copyright management information,

(2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or

(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,

knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal *an infringement of any right under this title*.⁴⁶

Apart from the extremely limited coverage of VARA, authorship attribution is not a “right under this title.” Removal of authorship information does not violate § 1202 unless it facilitates infringement of an economic right. If the creator no longer owns, or never did own, exclusive economic rights under copyright, the creator would have no claim. While an authorized exploiter who deleted authorship-identifying information would violate article 12 of the WCT, that text is not self-enforcing in the U.S. The possibility that authorized exploiters would remove or alter author-identifying information is not negligible, but an authorized exploiter is not a copyright infringer, so, unless the author can demonstrate that the absence or alteration of author-identifying information would facilitate infringement by unauthorized downstream users, she would have no §1202 claim.

⁴⁶ 17 U.S.C. § 1202 (emphasis added).

The WCT postdates TRIPS; accordingly violations of the later agreement do not give rise to a WTO dispute resolution procedure. But the US's incomplete implementation of WCT article 12 might nonetheless expose the U.S. to international sanctions. Free Trade Agreements that the U.S. has concluded, for example, the Trans-Pacific Partnership (TPP), oblige signatories to "ratify or accede to" the WIPO Copyright Treaties.⁴⁷ The TPP includes an article on rights management information (RMI), defining a violation as the knowing alteration or removal of RMI "without authority, and knowing, or having reasonable grounds to know, that it would induce, enable, facilitate or conceal an *infringement of the copyright* or related right of authors, performers or producers of phonograms."⁴⁸ Arguably, "copyright" encompasses only the economic rights, though the explicit incorporation of moral rights in most common law jurisdictions belies this claim; moreover, the French and Spanish language versions of the TPP refer to author's rights ("*droit d'auteur*"; "*derecho de autor*"), which certainly cover both moral and economic rights.⁴⁹ Alternatively, perhaps the provision refers to the scope of copyright provided by national law, and therefore would not reach removals or alterations of RMI that induced, enabled, facilitated or concealed a violation of attribution rights if national law excluded attribution rights from the scope of copyright.

But the TPP also requires ratification of the Berne Convention,⁵⁰ and the TPP's provisions on dispute resolution,⁵¹ unlike those of the TRIPS, do not exclude Berne article 6*bis*. The TPP's direction to ratify Berne and other multilateral accords implies a requirement not only to undertake measures for the treaties' entry into force in the ratifying or acceding States, but also in fact to implement those instruments' obligations in good faith.⁵² On the other hand, the TPP also states: "[e]ach party shall be free to determine the appropriate method of implementing the provisions of this

⁴⁷ Trans-Pacific Partnership Agreement art. 18.7(2)(e), signed February 4, 2016 by all parties (not yet in force) <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (last visited June 25, 2016) [hereinafter TPP].

⁴⁸ *Id.* art. 18.69(1)(a) (emphasis added).

⁴⁹ *See, e.g.*, France, CODE DE LA PROPRIETE INTELLECTUELLE (INTELLECTUAL PROPERTY CODE) art. L111-1 (Fr.). The author's property right "includes intellectual and moral as well as economic attributes." *Id.*

⁵⁰ TPP, *supra* note 47, at art. 18.7(1)(c).

⁵¹ *Id.* art. 28. As with WTO dispute resolution, proceedings are between member states. TPP art. 28.21 precludes private rights of action. *Id.* art. 28.21.

⁵² *See, e.g.*, ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 160-62 (3d ed. 2013) (discussing art. 26, Vienna Conv. on the Law of Treaties: "Every treaty in force is binding upon the parties and must be performed in good faith"; the U.S. is not a party to the Vienna Conv., but art. 26 expresses the general public international law principle of *pacta sunt servanda*).

chapter within its own legal system and practice.”⁵³ This provision leaves it up to treaty parties to choose how to implement their obligations under the Berne Convention and the WIPO Copyright Treaties. Thus, it may preclude other treaty parties from initiating a dispute resolution proceeding alleging that the U.S. has “failed to carry out an obligation under this Agreement.”⁵⁴

That said, *how* to implement is not the same as *whether* to implement; “appropriate *method* of implementing” nonetheless implies implementation in fact. This text does not give treaty parties a choice of implementing some obligations but not others. The U.S. may in general implement its Berne and WIPO Treaty obligations by means of copyright law, or through other statutory or judge-made doctrines and remedies,⁵⁵ but one way or another, it must provide the substantive equivalent of the protections those instruments require. U.S. law, particularly after *Dastar*, simply does not afford a substantive equivalent to the Berne Convention’s affirmative attribution rights. At best, VARA grants a very incomplete attribution right; post-*Dastar*, trademark law may still allow an action against passing off, but there is no general right to be recognized as a creator of the work that an author may enforce against non-parties to a contract.

The principal objection to this analysis is pragmatic: the U.S. is very unlikely to have agreed to a text that would subject it to possible liability for non-implementation of Berne article 6*bis*, whether directly or through WCT article 12. From that *realpolitik* perspective, the “infringement of copyright” referred to in TPP article 18.69(1)(a) can only mean rights under copyright as defined in each member State’s national law, independently of international norms, unless the treaty explicitly makes those norms enforceable. For example, TRIPS, article 9(1) states:

Members *shall comply* with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect

⁵³ TPP, *supra* note 47, at art. 18.5.

⁵⁴ *Id.* art. 28.3 provides in relevant part:

1. Unless otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply: . . .

(b) when a Party considers that an actual or proposed measure of another Party is or would be inconsistent with an obligation of this Agreement or that another Party has otherwise failed to carry out an obligation under this Agreement; . . .

⁵⁵ In the case of RMI protection, however, the wording of TPP art. 18:69(1)(a), tying a violation to “infringement of copyright,” would mean that as to this international obligation, the U.S. does *not* have a choice of implementing the obligation through some other legal regime.

of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.⁵⁶

The language excluding Berne article 6*bis* indicates, *a contrario*, that Members *shall* have rights or obligations under TRIPS in respect of Berne rights set out in articles 1-21 other than 6*bis*. Moreover, the TRIPS's "shall comply" more specifically mandates implementation than does the TPP's article 18:55 delegation to treaty parties to determine methods of implementation of international obligations. If the TPP does not command or imply full implementation of every Berne-WIPO Treaties obligation, then there would be no legal basis for an action against the U.S. for insufficient implementation of WCT article 12 (or, for that matter, of Berne article 6*bis*).

Setting aside the tantalizing but perhaps overoptimistic possibility that, with respect to non-domestic works, the TPP obliges member States to prohibit removal or alteration of author-identifying CMI (independently of the relationship of those acts to the infringement of economic rights), and returning to U.S. law, under what circumstances might removal or alteration of authorship-identifying information violate § 1202 of the U.S. Copyright Act? The author will need to demonstrate that the person who removed or altered the author's name both did so knowingly and should have known that the removal or alteration would conceal or facilitate infringement (of an exclusive economic right). The double knowledge standard, as we will see, presents a significant hurdle. But first, two threshold issues: what is "copyright management information"?; where must copyright management information appear in order to be protected under the statute?

2. *What is CMI; How is its protection violated?*

Regarding the first question, U.S. courts initially divided over whether only identifying information that is part of an "automated copyright protection or management system" can be deemed CMI protected under § 1202. While the WCT requires protection only of "electronic rights management information," the text of § 1202 is broader, since it specifies "including in digital form"⁵⁷: the text necessarily covers non-digital form as well. Some courts nonetheless justified their reading of "including" to mean "only if" (and in addition, only if the digital information is part of a rights management system) on the ground that § 1202 was enacted as part of the Digital Millennium Copyright Act; that the title of the chapter to

⁵⁶ TRIPS, *supra* note 20, at art. 9(1) (emphasis added).

⁵⁷ 17 U.S.C. § 1202(c).

which § 1201 and § 1202 belong is “Copyright Protection and Management Systems;” and that Congress’ goal in § 1202 was to foster electronic commerce.⁵⁸ As the Third Circuit recognized, however, that § 1202 emerged from a context of legislative responses to the challenges of digital communications neither precludes a more general role for CMI, nor compels such a substantial rewriting of the definition.⁵⁹ Thus, the statutory text does not justify this judge-made limitation on the application of § 1202 to authors’ attribution interests. Subsequent decisions have followed the Third Circuit’s plain reading.⁶⁰

In providing: “[a]s used in this section, the term ‘copyright management information’ means any of the following information conveyed in connection with [the work],” the statutory definition does not specify who affixes or incorporates CMI.⁶¹ An obvious candidate is the copyright owner (who may also be the author), since the sixth element of information listed in the definition, “[t]erms and conditions for use of the work,”⁶² would pertain most directly to the copyright owner. But the supplier of the CMI could also be an intermediary agent or licensing entity, such as a stock photo house.⁶³

The statutory definition details the protected information. It includes “the name of, and other identifying information about, the author of the work.”⁶⁴ “Author” here could mean any creator, or it might be limited to statutory authors, thus excluding employees for hire. But subsection 8 of the statutory definition allows the Copyright Office to “prescribe by regulation” “other information,” so the Copyright Office could designate the names of employee and commissioned creators as protectable CMI. The statute, however, does not *require* that works

⁵⁸ See, e.g., *Textile Secrets Int’l, Inc. v. Ya-Ya Brand, Inc.*, 524 F. Supp. 2d 1184, 1198-99 (C.D. Cal. 2007); *IQ Group v. Wiesner Pub., LLC*, 409 F. Supp. 2d 587, 596 (D.N.J. 2006).

⁵⁹ See *Murphy v. Millennium Radio Grp., LLC*, 650 F.3d 295, 305 (3d Cir. 2011) (noting that § 1202’s legislative history does not provide “the extraordinary showing of contrary intentions” that would compel disregarding the plain meaning of the statute).

⁶⁰ See, e.g., *Williams v. Cavalli*, 2015 U.S. Dist. LEXIS 34722, at *7-8 (C.D. Cal. Feb. 12, 2015) (murals); *Roof & Rack Prods. v. GYB Inv’r’s, LLC*, 2014 U.S. Dist. LEXIS 92333, at *14 (S.D. Fla. July 8, 2014) (structural drawings); *Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC*, 999 F. Supp. 2d 1098, 1101 (N.D. Ill. 2014) (analog music albums); *Logan Developers, Inc. v. Heritage Bldg.’s, Inc.*, 2013 U.S. Dist. LEXIS 140909, at *25-26 (E.D.N.C. Sept. 30, 2013) (house designs).

⁶¹ 17 U.S.C. § 1202(c).

⁶² *Id.* § 1202(c)(6).

⁶³ See, e.g., GETTY IMAGES, *License Agreements*, <http://www.gettyimages.com/Corporate/LicenseAgreements.aspx> (last visited June 18, 2016).

⁶⁴ 17 U.S.C. § 1202(c)(2).

incorporate CMI, nor, if the work includes CMI, does the statute compel the inclusion of all elements of information listed in the definition of CMI.⁶⁵

Where the author's name does appear, a broad reading of CMI to include author-identifying information on analog as well as digital copies, whether or not in connection with a rights management "system," could mean that removal or alteration of a copyright notice bearing the author's name, or of an author's byline, even from analog copies, establishes one of the elements of a § 1202 violation. Removal or alteration standing alone, however, does not suffice. It is also necessary to consider what "conveyed in connection with copies or phonorecords of a work or performances or displays of a work" means, and, most importantly, whether the complaining author⁶⁶ can surpass the statute's high threshold for proving the requisite intent.

Regarding the location of CMI, in the case of analog copies of works containing other authors' works (principally books incorporating photographs or illustrations), courts have divided over whether a general copyright notice is sufficiently "conveyed in connection with" the work, or whether the author's name must appear in closer proximity to her contribution.⁶⁷ In the digital context, some courts have interpreted "in connection with" to require that the identifying information be embedded in

⁶⁵ See *id.* at § 1202(c) (defining "copyright management information" using the phrase "any of the following information," as opposed to "all of the following information," suggesting that the copyright owner is free to choose which among the elements of information listed in the definition it wishes to incorporate).

⁶⁶ § 1203 grants standing to "any person injured by a violation of section . . . 1202 . . ." See *id.* at § 1203(a); *id.* at § 501(b). If the author is "the legal or beneficial owner of an exclusive right under a copyright" pursuant to § 501(b), she should cross the § 1203 "person injured" threshold. If she has no economic interest in the work, she would contend that the statute's inclusion of author-identifying information within the definition of CMI confers an interest that would make the author a "person injured" under § 1203. She might also urge that the injury to her reputation and economic prospects from removal or alteration of authorship attribution makes her a "person injured."

⁶⁷ Compare *Watson v. Kappa Map Grp., LLC*, 2015 U.S. Dist. LEXIS 82941, at *4-5 (N.D. Ga. June 25, 2015) (ruling that CMI from the inside cover of a map was not "conveyed in connection with" the cover image and therefore could not form the basis for a § 1202(a) claim), and *Drauglis v. Kappa Map Grp., LLC*, 128 F. Supp. 3d 49, 59-60 (D.D.C. 2015) (same), with *Tomelleri v. Zazzle, Inc.*, 2015 U.S. Dist. LEXIS 165007, at *41 (D. Kan. Dec. 9, 2015) (concluding that the author's name on the cover applied to all the illustrations in the book), and *Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC*, 999 F. Supp. 2d 1098, 1102-03 (N.D. Ill. 2014) (concluding that the author's name on the back cover of an album was clear enough to apply to the photo on the cover). Arguably, the third element of § 1202's definition of copyright management information, "[t]he name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright," implies that a copyright notice suffices as CMI. 17 U.S.C. § 1202(c)(3).

the copy or phonorecord of the work,⁶⁸ while others have rejected such a narrow view.⁶⁹ The language of the statute does not command incorporation of the CMI in the copy of the work: “conveyed in connection with” does not mean “on copies,” and if a “performance of a work” is involved, embedding may not be possible.⁷⁰

Finally, the statutory double intent standard may prove a significant impediment to many CMI claims against alteration or removal of authorship attribution. Under § 1202(a), provision of false CMI does not violate the statute unless done with the intent to aid infringement.⁷¹ Under § 1202(b), the wrongful act is not simply removing or altering the attribution or distributing or publicly performing or displaying the work without the attribution. The statute also requires that those who distribute, perform or display the work: (1) have known that the attribution was removed or altered without the copyright owner’s authorization, *and* (2) that those who remove or alter the attribution, or who distribute or perform works whose attribution has been removed or altered, do so “knowing, or . . . having reasonable grounds to know that it will induce, enable, facilitate, or conceal an infringement of any right under this title.”⁷² Thus, even intentional removal or alteration of authorship attribution is not unlawful if the plaintiff cannot show that the person who removed or altered the information, or who performed or distributed the changed work, should have known that the removal or alteration would encourage or facilitate copyright infringement.⁷³

⁶⁸ See *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999), *aff’d*, 336 F.3d 811 (9th Cir. 2003) (noting that information was on photographer’s webpage, not on individual photographs); *Schiffer Pub., Ltd. v. Chronicle Books, LLC*, 2004 U.S. Dist. LEXIS 23052 at *46 (E.D. Pa. Nov. 12, 2004) (holding that § 1202 applies only when CMI is removed “from the “body” of, or area around, plaintiff’s work itself.”).

⁶⁹ See *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 305 (S.D.N.Y. 2014) (*citing* *BanxCorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596, 610-11 (S.D.N.Y. July 14, 2010)); *BanxCorp*, 723 F. Supp. 2d at 610-11.

⁷⁰ The statute contains elaborate provisions regarding CMI and analog and digital transmissions by broadcast and cable systems. See 17 U.S.C. § 1202(e).

⁷¹ Courts have held that simply placing a work on a website without authorization does not convey false CMI because mere posting does not imply assertion of copyright ownership of the posted content. See *Tomelleri*, 2015 U.S. Dist. LEXIS 165007 at *36-37; *Pers. Keepsakes, Inc. v. Personalizationmall.com, Inc.*, 975 F. Supp. 2d 920, 929 (N.D. Ill. 2013). The *Tomelleri* court declined to rule whether the website’s false statement that it had licensed the image constituted false CMI because in any event plaintiff failed to produce evidence that the false statement was made with the intent to aid infringement. See 2015 U.S. Dist. LEXIS 165007 at *37.

⁷² 17 U.S.C. § 1202(b).

⁷³ See, e.g., *Gordon v. Nextel Commc’ns and Mullen Adver., Inc.*, 345 F.3d 922, 925 (6th

The cases suggest that the second level of intent is most likely to be established when the defendant, having removed or altered the CMI, distributes the work without the accompanying information (or with altered information) to third parties, who will in turn make the work available to the public. Thus, in *McClatchey v. Associated Press*,⁷⁴ in rejecting the AP's motion for summary judgment, the court held:

Under Plaintiff's version of the facts, AP intentionally cropped the copyright notice out of the picture before distributing it to subscribers. This appears to be precisely the conduct to which Section 1202(b) is directed. As Plaintiff notes, the nature of APs' business is to provide stories and pictures for use by its members and subscribers. Thus, a reasonable factfinder could conclude that by cropping out the copyright notice, Defendant had the requisite intent to induce, enable, facilitate or conceal infringement.⁷⁵

While *McClatchey* concerned removal of a copyright notice, the decision is relevant to authorship attribution claims because copyright notices often bear the author's name. In addition, even where the work did not include a copyright notice, intentional removal of the author's name and redistribution of the work can facilitate infringement, at least where the work circulates without other information that indicates to subsequent distributors from whom to seek permission to exploit the work.⁷⁶

Cir. 2003); Kelly, 77 F. Supp. 2d at 1122; Schiffer, 2004 U.S. Dist. LEXIS 23052, at *45-46.

⁷⁴ *McClatchey v. Associated Press*, 2007 U.S. Dist. LEXIS 17768, at *1 (W.D. Pa. March 9, 2007).

⁷⁵ *Id.* at *16-17; accord Gardner v. CafePress, Inc., 2014 U.S. Dist. LEXIS 173726, at *10 (S.D. Cal. Dec. 16, 2014); Agence France Presse v. Morel, 2014 U.S. Dist. LEXIS 112436, at * 23 (S.D.N.Y. Aug. 13, 2014). Cf. Meredith v. Chi. Tribune Co., 2014 U.S. Dist. LEXIS 2346, at *9-11 (N.D. Ill. Jan. 9, 2014) (dismissing § 1202(b) claim even if the party reasonably knows that distribution might lead to infringing conduct, plaintiff failed to demonstrate that the distributor also had knowledge that CMI had been improperly removed).

⁷⁶ In *Agence France Presse v. Morel*, AFP initially posted plaintiff's photographs of the 2010 earthquake in Haiti attributed to another author. 2014 U.S. Dist. LEXIS 112436, at * 3-4. AFP subsequently corrected the attribution, but continued to distribute the photographs without Morel's authorization. *Id.* at * 4. The court held that:

the jury could have concluded that in continuing to distribute the photographs with a caption identifying Morel as the photographer, AFP had both altered the 'name of . . . the author' of the photographs, 17 U.S.C. § 1202(c)(2), without the authority of the copyright owner, and had distributed Morel's images while knowing that their CMI had been altered without his authority. And the jury could have concluded that

By contrast, where the person removing the authorship attribution has directly distributed the work to the public, in order to demonstrate that the removal or alteration will facilitate copyright infringement, it may be necessary to show that the defendant knew or should have known that end-consumer recipients would be induced by the absence or alteration of the author's name to infringe the work. Evidence that the distributor expected end-users in turn to redistribute, for example through file-sharing or posting to social media, could meet the statutory standard.

3. *CMI protection and metadata-stripping by social media platforms*

The role of social media platforms not only as hosts of CMI-removed copies, but also in themselves removing authorship-identifying information (and CMI more generally) and making available data-stripped versions of works of authorship, especially photographs, deserves particular consideration. For digital photographs, CMI metadata embedded in the files identifies, among other things, ownership, copyright, and contact information, and information about the contents of the photo. Some metadata is embedded automatically upon the creation of a digital photo, and metadata can also be added in the post-production process, for example, when a photographer uploads to an image site, such as Getty Images.⁷⁷ There are a variety of metadata standards governed by various organizations, including: International Press Telecommunications Council (IPTC) Information Interchange Model (IIM); Extensible Metadata Platform (XMP, standards created by Adobe); and Exchangeable Image File Format (EXIF).⁷⁸ The International Press Telecommunications Council has conducted studies over the last four years assessing the extent to which

AFP knew or had reasonable grounds to know that its alteration of CMI would 'induce, enable, or facilitate infringement' by enabling the continued licensing of Morel's images—which were now credited to Morel but still not AFP's to license—to AFP's customers. *Id.* at * 23.

⁷⁷ See, e.g., *id.* at *24 (referring to Getty's addition of image identifiers).

⁷⁸ See generally INTERNATIONAL PRESS TELECOMMUNICATIONS COUNCIL, *IPTC Photo Metadata Standard*, <http://www.iptc.org/standards/photo-metadata/iptc-standard/> (last visited June 4, 2016); INTERNATIONAL PRESS TELECOMMUNICATIONS COUNCIL, *Information Interchange Model (IIM)*, <https://iptc.org/standards/iim/> (last visited June 4, 2016); ADOBE, *Extensible Metadata Platform (XMP)*, <http://www.adobe.com/products/xmp.html> (last visited June 4, 2016); AV& IT STANDARDIZATION COMMITTEE, *EXCHANGEABLE IMAGE FILE FORMAT FOR DIGITAL STILL CAMERAS: EXIF VERSION 2.3*, (2002) http://www.jeita.or.jp/japanese/standard/book/CP-3451C_E/#page=1 (last visited June 4, 2016).

various websites remove or modify photo files' metadata. The studies focused specifically on various sites' treatment of IPTC/IIM and EXIF information.⁷⁹ IPTC/IIM metadata can include a wide range of information about the photo's creation, including: creator, creator's job title, contact information (address, phone number, email address, and website), date created, credit line, instructions, source, copyright notice, and rights usage terms (among others).⁸⁰

The IPTC study assessed various websites by uploading a photo with metadata and then ascertaining: (1) whether the embedded metadata fields were shown by the web user interface, (2) if so, whether the data displayed included the most relevant metadata fields (the "4 C's": caption, creator, copyright notice, and credit line); (3) whether an image saved (through "Save Image As..." included EXIF information in the EXIF header and IPTC information in the IIM and XMP headers; and (4) whether a downloaded image through the website's user interface (such as a download button) included the same information. The websites tested included Facebook, Instagram, Flickr, Tumblr, Twitter, Pinterest, LinkedIn, Google Photo, Behance.net and others. Of the sites tested, only Behance.net included and displayed all of the rights-relevant fields and preserved that information for saved or downloaded images. Several sites did not display metadata at all, and none but Behance displayed the "4 C's." The "Save As Embedded" and "Download Embedded" results seem to indicate the extent to which metadata is stripped from the file, as opposed to merely hidden from view. The results vary, even for images saved and downloaded from the same site. Google Photo, for example, preserves metadata information when the photo is downloaded using the Google interface but does not preserve IPTC information when the photo is saved using "Save Image As...."⁸¹

⁷⁹ Most digital photos created by smartphones incorporate EXIF, and categories of information cover technical details regarding the camera and image taken, including: camera, date taken, GPS location, create date, modified date, date/time original, image unique ID, exposure time, ISO, aperture value, brightness value, shutter speed value, light source, scene capture type, flash, and white balance. See Mark Milian, *Digital Photos Can Reveal Your Location, Raise Privacy Fears*, CNN (Oct. 15, 2010), <http://www.cnn.com/2010/TECH/web/10/15/photo.gps.privacy/>.

⁸⁰ The IPTC lists more information on its Core Metadata schema. See generally INTERNATIONAL PRESS TELECOMMUNICATIONS COUNCIL, *IPTC Standard: Photo Metadata*, 12 (2010), <https://www.iptc.org/std/photometadata/specification/IPTC-PhotoMetadata-201007.pdf>.

⁸¹ The IPTC study website summarizes the results of the test for each website, with the results listed under the table header "Summary." See IPTC, *Social Media Sites Photo Metadata Test Results*, <http://www.embeddedmetadata.org/social-media-test-results.php> (last visited June 26, 2016); see also IPTC, *Many Social Media Sites Still Remove Image Rights Information*

If the social media platforms are themselves stripping metadata when users post the images, or if the programs they make available to other users to download the images remove the data, would the platforms be violating § 1202? Assuming the metadata qualifies as CMI, do the platforms' acts (1) intentionally remove CMI, (2) having reasonable grounds to know that the removal will induce, enable, facilitate, or conceal copyright infringement? Addressing the second question first, we have posited that actual or constructive knowledge of facilitation (etc.) may be inferred when the person or entity removing CMI⁸² invites or expects downstream recommunication of the work. Since social media platforms exist to make posted content available to other participants in the social network, it is reasonable to conclude that the platforms, and those who post to them, invite or expect downstream recommunication. Nonetheless, the inference of knowledge of facilitation of infringement may require more than knowledge of downstream redistribution of copies with altered or removed CMI. It may also be necessary to establish a nexus between the absence of CMI and consequent facilitation of infringement, for example, that upstream recipients are more likely to engage in unauthorized recommunications of the work if the copies they access lack CMI.⁸³

The next question would be whether the platform's CMI-removal is "intentional." Much metadata-stripping may in fact be unintentional. As the district court in *Stevens v. CoreLogic*, observed:

There are many points throughout the file handling process when metadata can be altered or completely deleted unintentionally from a photograph. Images uploaded to CoreLogic's MLS platforms

From Photos: IPTC Releases Results of 2016 Social Media Sites Photo Metadata Test, <https://iptc.org/news/many-social-media-sites-still-remove-image-rights-information-from-photos> (last visited June 26, 2016).

⁸² If the platform merely conceals the metadata, so that users may, with some effort, retrieve it, that act arguably is not the same as removing the data, and therefore no section 1202 claim would lie.

⁸³ See *Stevens v. CoreLogic, Inc.*, 2016 U.S. Dist. LEXIS 86843 at 15-16 (S.D. Cal. July 1, 2016)(stating:

"There is absolutely no evidence that, had the CMI metadata been embedded in the photographs, this might have prevented infringement, and that CoreLogic knew it would help prevent infringement. Plaintiffs provide no evidence that the absence of metadata led to actual copyright infringement, nor have the named Plaintiffs ever used metadata to track down copyright infringers. Although Plaintiffs need not show actual infringement, the fact that there was none is relevant to Plaintiffs' burden to show that CoreLogic had a reasonable ground to believe it was likely to happen.").

may be manipulated before or after uploading. Manipulations may include resizing, rotating, cropping and adjusting resolution of the image so it can be used in a preconfigured display layout on the web page. All of these manipulations could result in inadvertent removal of the embedded metadata. Embedded metadata can also be removed inadvertently by email programs, opening an image on an iPhone using iOS Safari, or pasting the image in some versions of MS Word.⁸⁴

On the other hand, if the platform processes the uploads through a program that the platform knows will excise CMI-bearing metadata, it should not matter that the removal is automated and indiscriminate; setting the default to eliminate embedded metadata, assuming this is a desired result and not merely an unanticipated by-product of some other function, represents a choice by the platform. Overbreadth of information-removal is not an unanticipated by-product. Suppose the platform chooses to remove metadata in order to reduce file size, and thus speed up the communication of the content. The metadata may include not only authorship and copyright information, but also non-CMI categories of information such as: camera, GPS location, exposure time, ISO, aperture value, brightness value, shutter speed value, light source, scene capture type, flash, and white balance.⁸⁵ Or, in order to protect user privacy, the platform removes metadata regarding location information, such as the GPS coordinates of a house, school, or place of work depicted in the photo.⁸⁶ The presence of lawfully removable non-CMI data such as the elements posited above should not entitle the platform or website to bootstrap the author-identifying information.⁸⁷ Intent need not be manifested as to individual works; it can also be exercised through systems design.⁸⁸

⁸⁴ *Id.* at 4.

⁸⁵ These are all included in EXIF data. Milian, *supra* note 79. Other EXIF data, however, such as the date of creation, may be CMI-relevant.

⁸⁶ Users of smartphones commonly have no knowledge or understanding of the embedded information in a photo they take and then post to social media. Twitter's Safety lead Del Harvey, for example, stated in an interview that she had made the decision to remove location metadata from uploaded images in order to protect users from dangers they did not know about. See Kashmir Hill, *Meet Del Harvey, Twitter's Troll Patrol*, FORBES (July 2, 2014, 9:00 AM), <http://www.forbes.com/sites/kashmirhill/2014/07/02/meet-del-harvey-twiters-troll-patrol>.

⁸⁷ See, e.g., STOYAN STEFANOV & NICOLE SULLIVAN, *EVEN FASTER WEBSITES* 144 (2009) (cautioning: "Warning: Strip meta information only from images you own. By stripping metadata from someone else's JPEG, you might also strip any copyright or authorship data, which is illegal."). The post distinguishes programs that ". . . take an all-or-nothing approach to handling metadata" and points users to a program offering ". . . more fine-grained metadata editing . . ." *Id.* Platforms can in fact design their systems to remove lawfully removable non-

Where the platform does not remove the data from copies residing on its website, but it makes available to its users download programs that strip the data from the downloaded content, one may initially ask whether the person or entity removing the data is the platform or the user. Does the user “make” the copy and remove the data in the process, or does the platform, as part of its distribution of the copy remove the data?⁸⁹ The user may not know, much less intend, that her downloaded copy has been deprived of CMI. The platform, however, through its systems design choices, has effectively imposed CMI-removal, and might be directly or contributorily liable for § 1202 violations.⁹⁰

But would the platform nonetheless avoid § 1202 liability on the ground that, as a host service provider, it enjoys immunity under § 512(c) of the copyright act? At first blush, § 512(c) would not apply, because a § 1202 violation is not quite the same thing as an “infringement of copyright” from which § 512 relieves service providers of liability.⁹¹ § 501 defines “an infringer of copyright” as “[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602.”⁹² Section

CMI data but keep the author-identifying information. Email from Andreas Gebhard, Director of Content Development, Getty Images, Inc. to Lisa Willmer, Vice President, Corporate Counsel, Getty Images, Inc., (May 25, 2016) (on file with author).

⁸⁸ Even if the platform systematically strips CMI, plaintiff cannot prevail in a section 1202 action unless it can show that the works, when sent to the platform, in fact had embedded CMI. See *Stevens v. CoreLogic*, 2016 U.S. Dist. LEXIS 86843 at 12-13 (plaintiffs could not prove that, at the time of upload, photographs had CMI).

⁸⁹ *Compare*, *Cartoon Network v. CSC Holdings*, 536 F.3d 121 (2d Cir. 2008) (denominating the users of a “remote VCR” service offering on-demand storage and access to cable transmissions of copyrighted television programming as the “makers” of copies downloaded to users’ individual digital “storage lockers” on defendant cable transmitter’s servers), *with* *London Sire Records, Inc. v. Doe*, 542 F. Supp. 2d 153 (D. Mass. 2008) (act of distribution committed by operator of P2P source computer that causes a copy to be made in the computer of the user requesting a download from the source computer).

⁹⁰ While liability for contributory infringement generally requires specific knowledge as to which works are infringed—general knowledge that third-party use of the accused device will infringe *some* copyrights therefore does not suffice. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). “All-or-nothing” metadata-stripping programs will systematically remove CMI from *all* downloaded images, thus arguably satisfying the knowledge element.

⁹¹ 17 U.S.C. § 512(c)(1) (“A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright”).

⁹² *Id.* § 501(a).

1203 sets out civil remedies for “a violation of section 1201 or 1202”; while we have seen that § 1202 violations are linked to copyright infringement, in that the knowing removal or alteration of CMI must also be done with actual or constructive knowledge that it will facilitate infringement, the prohibited conduct is not itself infringing, nor does it require that infringement in fact have occurred.⁹³ Under this reading, then, a host service provider finds no shelter under § 512 for direct or contributory violation of § 1202.

Nonetheless, stretching § 512 to cover infringement-related conduct addressed in § 1202, the next question, for the sake of argument, would be whether the platform meets the threshold requirements set out in § 512(i) to qualify for the immunity. The provision makes “accommodation of technology” a “condition of eligibility” and states that “the service provider must accommodate and not interfere with ‘standard technical measures.’”⁹⁴ It defines “standard technical measures” as technical measures that: (1) are “used by copyright owners to identify or protect copyrighted works”; (2) “have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process”; (3) “are available to any person on reasonable and nondiscriminatory terms”; and (4) “do not impose substantial costs on service providers or substantial burdens on their systems or networks.”⁹⁵

If metadata such as IPTC information fits the statutory criteria, then platforms that remove it are not accommodating “standard technical measures” but are instead “interfering with” them, and therefore would be disqualified from claiming safe harbor protection under § 512(c). As for whether metadata regarding copyright information does constitute a “standard technical measure,” the Southern District of California in *Gardner v. Cafepress Inc.*,⁹⁶ ruled that summary judgment could not be granted to the defendant with respect to the second element (plaintiff’s

⁹³ As further indication that a § 1202 violation is not “infringement of copyright,” while § 411(a) requires that United States works be registered prior to initiating an action for infringement of copyright, courts have held that § 411(a) does not apply to actions alleging violations of CMI under § 1202. *See, e.g., Med. Broad. Co. v. Flaiz*, 2003 U.S. Dist. LEXIS 22185 (E.D. Pa. Nov. 25, 2003) (“Nothing in § 1202 of the DMCA suggests that registration is a precondition to a lawsuit. While a copyright registration is a prerequisite under 17 U.S.C. § 411 (a) for an action for copyright infringement, claims under the DMCA, however, are simply not copyright infringement claims and are separate and distinct from the latter.”)

⁹⁴ *Id.* § 512(i)(1)(B).

⁹⁵ *Id.* § 512(i)(2).

⁹⁶ *Gardner v. CafePress Inc.*, 2014 U.S. Dist. LEXIS 25405, *15-16 (S.D. Cal. Feb. 26, 2014), *aff’d*, 2014 U.S. Dist. LEXIS 173726 (S.D. Cal. Dec. 16, 2014).

metadata appeared consistent with the other statutory elements, and defendant did not seek summary judgment on that ground):

at a minimum, Plaintiff has offered sufficient evidence to create a dispute of material fact as to whether CafePress's deletion of metadata when a photo is uploaded constitutes the failure to accommodate and/or interference with "standard technical measures." From a logical perspective, metadata appears to be an easy and economical way to attach copyright information to an image. Thus, a sub-issue is whether this use of metadata has been "developed pursuant to a broad consensus of copyright owners and service providers." Accordingly, the Court cannot conclude, as a matter of law, that CafePress has satisfied the prerequisites of § 512(i).⁹⁷

To date, there appears to be no further judicial assessment of whether author-identifying metadata constitutes a standard technical measure. But the statutory language does not encourage sanguine expectations. Because the participation of service providers in the development of the standard could disqualify them from immunity were the service providers to fail to accommodate the technical measure, service providers have every incentive to abstain from participation. Their abstention defeats the development of a standard that meets statutory requirements, and therefore leaves non-accommodating service providers' statutory shelter undisturbed.

If CMI metadata is not yet a standard technical measure, then the metadata-removing platforms may qualify to invoke the safe harbor of § 512(c), but they next must demonstrate that their activities are consonant with those the statute immunizes. The principal issue would be whether metadata-stripping comes within the scope of "infringement of copyright *by reason of the storage at the direction of a user* of material that resides on a system or network controlled or operated by or for the service provider."⁹⁸ Data-stripping is not "storage"; it alters—at the instance of the host—the file the user directed to be stored on the host's server. Courts have interpreted "by reason of the storage" to encompass a broad range of activities additional to mere storage, for example reasoning that the immunity must also cover the communication of the stored material at the request of other users, otherwise the safe harbor would be ineffective.⁹⁹

⁹⁷ The court gave no shrift to defendant's reliance on the automatic nature of its removal of the metadata during the uploading process. *See id.* at *15-16.

⁹⁸ 17 U.S.C. § 512(c)(1).

⁹⁹ *See, e.g.,* *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 39 (2d Cir. 2012).

More broadly still, the Ninth Circuit has indicated that “a service provider may be exempt from infringement liability for activities that it otherwise could not have undertaken ‘but for’ the storage of the infringing material at the direction of one of its users.”¹⁰⁰ Had the users not uploaded the files to the platform, the service provider could not have removed their metadata. But such a “but for” construction risks bootstrapping a good deal of conduct well in excess of the storage and communication of the user-posted content. As the *Gardner* court observed, “This interpretation does not, however, give a service provider free rein to undertake directly infringing activities merely because it allows users to upload content at will.”¹⁰¹ By the same token, removal of CMI metadata, albeit automated, and perhaps undertaken to enhance the communication speed of the user-posted files or to protect user privacy, nonetheless is an activity the host engages in at its own initiative, that is independent of the user’s “direction” to store and make available the posted content, and that initiative may in turn violate § 1202.

Thus, if author-identifying and other copyright-relevant metadata constitutes statutorily protected CMI, and the platforms intentionally remove or alter it, having reasonable grounds to know that these acts will facilitate infringement by downstream users, then the platforms may be liable under § 1202, and they will not enjoy immunity under § 512(c), either because that provision does not apply to violations that are not “infringement of copyright”, or because metadata-stripping exceeds the immunity accorded for storage and recommunication of user-posted content.

IV. FUTURE PROSPECTS FOR ATTRIBUTION RIGHTS IN THE US

Let’s consider the prospects for U.S. attribution rights from two perspectives: first, the extent to which current U.S. copyright law can accommodate attribution interests; second, were Congress to act, what should the legislation provide?

A. *Attribution rights without legislation*

First, one simple way to bring the U.S. into compliance with international norms under the Berne article 10 quotation right would be for courts to include authorship attribution as a consideration under the first fair use factor: nature and purpose of the use. The “nature of the use” would

¹⁰⁰ *Gardner*, 2014 U.S. Dist. LEXIS 25405, at *18 (quoting UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1018 n.7 (9th Cir. 2013)).

¹⁰¹ *Id.*

take into account whether the defendant credited the source and the author. Authorship attribution has occasionally figured in court's analyses;¹⁰² however, to contend that it has weighed significantly in the balance would overstate. But nothing in the statute or prior caselaw precludes the development of a more vigorous attribution consideration as part of the evaluation of the first factor. That technique would conform to the *Charming Betsy* doctrine – the general principle that domestic statutes should be interpreted in light of the U.S.'s international obligations.¹⁰³

¹⁰² The leading case is *Weissmann v. Freeman*, in which the defendant's failure to credit his erstwhile co-author contributed to the court's holding the use unfair. 868 F.2d 1313, 1324 (2d Cir. 1989) ("In this case, it cannot be ignored that Dr. Freeman not only neglected to credit appellant for her authorship of [the work in question], but actually attempted to pass off the work as his own, substituting his name as author in place of hers."). *See also*, *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983). When defendants did credit the source of the copied material, some courts have found authorship attribution a point in favor of fair use. *See, e.g.*, *Williamson v. Pearson Educ., Inc.*, 2001 WL 1262964, at *5 (S.D.N.Y. Oct. 19, 2001); *Rubin v. Brooks/Cole Pub. Co.*, 836 F. Supp. 909, 918 (D. Mass. 1993); *Maxtone-Graham v. Burchaell*, 803 F.2d 1253, 1256 (2d Cir. 1986).

¹⁰³ *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."); *see also* *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that statutes should be interpreted consistently with customary international law); *see generally* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990). For an in-depth exploration of the role of the *Charming Betsy* canon in US implementation of Berne minimum moral rights, see Graeme Austin, *The Berne Convention as a Canon of Construction: Moral Rights after Dastar*, 61 NYU ANN. SUR. AM. LAW 111, 144-50 (2005).

The *Charming Betsy* doctrine is not inconsistent with sections 2 and 3 of the 1988 Berne Convention Implementation Act, which provide:

Section 2

The Congress makes the following declarations:

(1) The Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto (hereafter in this Act referred to as the "Berne Convention") are not self-executing under the Constitution and laws of the United States.

(2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.

(3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

Section 3

Construction of the Berne Convention.

(a) Relationship with Domestic Law.

—The provisions of the Berne Convention—

(1) shall be given effect under title 17, as amended by this Act, and any other relevant provision of Federal or State law, including the common law; and

Second, the Copyright Office could improve the effectiveness of § 1202 as a source of authorship attribution rights. That provision empowers the Copyright Office to identify additional elements of CMI; the Office could clarify that information about the author includes creators of works made for hire. More importantly, the Office could sponsor the development of best practices for identifying and crediting authors, including adapting author-identification for different types of works and different kinds of media of communication. Many common law countries include a reasonableness condition as part of the author-identification condition on fair dealing¹⁰⁴ as well as in their affirmative protections of attribution rights.¹⁰⁵ Multiple stakeholder consultations convened by the Copyright Office could assist in developing best practices for reasonableness. Australia may serve as an example. Its authorship-attribution obligation lists reasonableness factors; these take account of industry practice and give courts considerable discretion in their assessment of reasonableness.¹⁰⁶

(2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.

(b) Certain Rights Not Affected.

—The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law—

(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.

Berne Convention Implementation Act, § 2, 17 U.S.C. § 101, 102 Stat. 2853 (1988). Section 2 is compatible with *Charming Betsy* because it confines the applicable law to U.S. law, which Congress declares in conformity with the Berne Convention; U.S. courts therefore should interpret U.S. law to ensure the accuracy of that declaration. *Id.* Section 3 directs courts not to rely on the Berne Convention to *expand* rights to claim authorship, but given the declaration that the U.S. *already* conforms to Berne attribution norms, an interpretation of U.S. law that is consistent with Berne would not expand U.S. attribution rights. *Id.* at 3.

¹⁰⁴ See generally *supra* note 30.

¹⁰⁵ See, e.g., Australian Moral Rights Act, *supra* note 13 (amending Copyright Act 1968); Canada Copyright Act, *supra* note 30, at ss 14.1(1) (“The author of a work has, . . . in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.”).

¹⁰⁶ See Australian Moral Rights Act, *supra* note 13, at s § 195AR(2)(a)–(i). This section includes:

“(e) any practice, in the industry in which the work is used, that is relevant to the work or the use of the work;

Another area for Copyright Office intervention would concern waivers of authorship-attribution. VARA includes elaborate provisions on waivers,¹⁰⁷ to which we'll return in the discussion of possible legislative action. At the time of VARA's enactment, Congress anticipated that the statute's requirement of specific waivers might in the long run simply enhance lawyers' and word processors' employment opportunities, for lawyers could be expected to devise language sufficiently comprehensive and detailed to fend off every conceivable exercise of moral rights. This would defeat the purpose of compelling artists and art owners to reflect on and negotiate over the genuine need to forego moral rights. As a result, Congress set an additional safeguard by instructing the United States Copyright Office to conduct a study of the practice developed under the law's waiver clause.¹⁰⁸ The study, published in 1996, however, uncovered too little data regarding actual waiver practice to permit meaningful assessment of the frequency, content, and impact of waivers of attribution and integrity rights under VARA.¹⁰⁹

The Copyright Office might renew this study, in order to ascertain how VARA waiver practices have evolved, and might use those findings to launch a broader study into the waiver of attribution in sectors beyond works of visual art. The legal basis for the study would derive from § 1202(c)(8)'s empowerment of the Copyright Office to prescribe other elements of copyright management information. If, as § 1202(c)(2) provides, "the name of, and other identifying information about, the author of the work," is comprised within CMI, then, arguably, circumstances under which authors relinquish the inclusion of their names as part of the CMI that accompanies the work, comes within a broad ambit of Copyright Office interpretation and implementation of § 1202.

B. Legislating attribution rights

(f) any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of that work;"

¹⁰⁷ 17 U.S.C. §106A(e)(1).

¹⁰⁸ See H.R. REP. NO. 101-514, pt. 3, at 22 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6932-33.

¹⁰⁹ See U.S. Copyright Office, *Waiver of Moral Rights in Visual Artworks: Executive Summary* (Mar. 24, 1996), <http://www.copyright.gov/reports/exsum.html> [hereinafter *Waiver of Moral Rights in Visual Artworks*].

Were Congress at last to implement at least the attribution provision of Berne article *6bis*, what should a statutory attribution right look like? Any statute needs to confront the following issues: who is vested with attribution rights, what violates the rights, and under what circumstances may the rights be waived?

1. *Beneficiaries.*

The right's beneficiaries should be the human (not juridical) authors and performers, regardless of their employment status. Unlike VARA, an attribution rights amendment should not exclude from its ambit creators of works made for hire. Nor should the law disqualify categories of works: all works of authorship, and all musical, dramatic, choreographic or audiovisual performances should be covered. Similarly, the number of a work's authors or performers should not of itself disqualify these participants from the right to claim authorship.¹¹⁰ Although a multiplicity of authors or performers might prompt fears that enforcement of an attribution right will be too unwieldy, the implementation problems are better addressed through an infringement standard that incorporates a reasonableness criterion, as well as through carefully devised waiver provisions.

2. *Scope of the Attribution Right.*

Consistently with Berne article *6bis*, the duration of the attribution right would be the same as the term of economic rights.¹¹¹ The attribution

¹¹⁰ Caselaw on joint authorship may afford guidance as to what kinds of contributions make someone an "author." See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000) (stating that who is an "author" is a fact-specific inquiry and that "[p]rogress would be retarded rather than promoted, if an author could not consult with others and adopt their useful suggestions without sacrificing sole ownership of the work"); *Childress v. Taylor*, 945 F.2d 500, 507-08 (2d Cir. 1991) (creating a two-part test for determining coauthorship that requires (1) "all joint authors to make copyrightable contributions" and (2) that "the putative joint authors regarded themselves as joint authors"); see also *Thomson v. Larson*, 147 F.3d 195, 205 (2d Cir. 1998) (applying the *Childress* test to find lack of coauthorship in the play *Rent*). Several law reviews also address the concept of "authorship." See generally F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225 (2001); Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003); Roberta Rosenthal Kwall, "Author-Stories": *Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1 (2001).

¹¹¹ Berne, *supra* note 6, at art. 6*bis*(2). The minimum Berne term for most works is 50 years *post mortem auctoris*. *Id.* art. 7. If the term of protection in the country of origin is shorter than in the country for which protection is sought (e.g., 50 pma in the former and 70

right would be infringed when an author's or performer's name is omitted from publicly distributed copies and phonorecords or from public performances, including transmissions, of the work.¹¹² Though the statute should distinguish between public and private distributions or communications, with only the public ones triggering the right, fair use and other statutory exceptions should generally be conditioned on providing authorship credit, where reasonable. The test of reasonableness in this context is whether the use, even if free, should acknowledge the user's

pma in the latter), Berne art. 7(8) allows the country of protection to apply the shorter term of the country of origin, and therefore to protect neither moral nor economic rights during the last 20 years of the term in the country of protection. *Id.* art. 7(8). It is not clear if the country of protection could accord economic but not moral rights during the last 20 years.

Arguably, the public interest in accurate identification of a work's creators persists beyond the expiration of exclusive economic rights in the work. I doubt that a healthy public domain demands freedom not only to copy, but also to deny or to falsify authorship credit. Nonetheless, different durational consequences flow from the distinct nature of authors' rights on the one hand, and consumer protection on the other. The interests underlying these regimes may at times converge, hence authors' pre-*Dastar* resort to the Lanham Act, *faute de mieux*. But neither fully captures the other. By placing the attribution right in the U.S. Copyright Act, I am contending that it is an exclusive right like the other rights comprising a copyright—enforceable (for limited times) without proof of economic harm or consumer confusion. The unfair competition-based Lanham Act claim does not confer a property right in gross; it allows injured economic actors (who may not in fact be authors) to act as proxies for the confused consumer, to correct the false information the defendant has injected into the marketplace. To each regime its own: to authors, control over the use of their names in connection with their works for so long as economic rights last, and to consumers, protection against false representations of fact in commercial advertising or promotion for so long as those misrepresentatio are materially misleading.

¹¹² Works incorporating substantial preexisting copyrighted material, such as derivative works, should also credit the authors of the adapted or substantially excerpted work. The obligation to give credit would be subject to a reasonableness standard.

An amendment to the U.S. Copyright Act to establish attribution rights would also require a transitional provision concerning the right's effective date. I would propose that a work first publicly communicated or distributed on or after the amendment's effective date be covered by the attribution right, regardless of when the work was created. With respect to public communications or distributions occurring before the amendment's effective date, the amendment should preserve such state or federal attribution rights as may then have existed. *Cf.* 17 U.S.C. § 301(f)(2) (preserving state attribution and integrity claims in works created or sold prior to VARA's effective date); *see also* Australian Moral Rights Act, *supra* note 13, at ss 195AZM(1)-(2) (Austl.) (amending Copyright Act 1968, providing that the 2000 Moral Rights amendments are prospective only). In relation to literary, dramatic, musical, or artistic works, other than those included in a film, the right of attribution applies to works that were made before or after December 21, 2000. *Id.* at s 195AZM(2). However, the right applies only to acts carried out after December 21, 2000. *See id.* In relation to films and literary, dramatic, or musical works and works included in films, the right of attribution only applies to films made after December 21, 2000. *See id.* s 195AZM(1).

sources. The manner and media of both the source work's and the quoting work's disseminations may well affect the reasonableness of the user's non inclusion of authors' or performers' names. For example, if the author's name is not disclosed on or in connection with the source work, it may not be reasonable to require the user to undertake an extensive search to identify the author (and Berne art, 10(3) does not require it). Or, a requirement that the user identify all authors and performers may unreasonably encumber the radio broadcast of a song, but webcasts of the song might more conveniently include the listing in on-screen credits.

As for the details of a reasonableness standard, as suggested earlier regarding Copyright Office regulations, a U.S. statute might profitably emulate the Australian Act, both in its technique, placing on the exploiter the burden of showing reasonableness, and in its articulation of reasonableness factors, including its encouragement to parties to devise voluntary codes for various sectors of creative activities. In fact, the credit agreements negotiated between industry groups such as the several motion picture and television guilds and the studios¹¹³ might inspire similar codes elsewhere.

In light of the uncertain status of creators' Lanham Act false attribution claims post-*Dastar*, the attribution rights amendment to the U.S. Copyright Act should also prohibit false attributions of authorship. These claims are analytically distinct from traditional moral rights, which protect the author's right to claim authorship of her works: these instead assert a right to *disclaim* authorship of a work *not* by the author. Nonetheless, if the Lanham Act cannot redress these claims, then the Copyright Act should provide a remedy. The proposed amendment would in this respect follow the various common law jurisdictions discussed earlier, whose moral rights amendments grant authors rights against both non-attribution and false attribution.¹¹⁴

3. Waiver

Both VARA and, to some extent, the Australian amendments, provide an appropriately narrow approach to waivers of attribution rights. To be enforceable, the waiver should be in writing and signed by the author

¹¹³ See, e.g., WRITERS GUILD OF AMERICA—EAST, Minimum Basic Agreement: An Overview, <https://www.wgaeast.org/for-members/guild-contracts/minimum-basic-agreement-an-overview/> (last visited June 27, 2016).

¹¹⁴ See, e.g., UK Copyright, Designs and Patents Act, *supra* note 13, at c. 48, §§84(5)–(6); Australian Moral Rights Act, *supra* note 13, at ss 195AD–195AH (amending Copyright Act 1968).

or performer before the work is created or performed,¹¹⁵ and should specifically identify the works and the kinds of uses to which the waiver applies. As in Australia, the waiver might, unless otherwise specified, pass on to the co-contractant's successors. On the other hand, ambiguities in the scope of the waiver should be construed against the party asserting the waiver (whether or not that party is the original grantee). Unlike the Australian Act, a U.S. attribution rights statute should not allow blanket waivers for present and future works of employees. Employee-executed waivers should meet the same standard as those of authors who are vested with copyright. Because attribution rights are independent of economic rights,¹¹⁶ an author should not need to be vested with the economic rights in order to qualify as a holder of attribution rights. With respect to works of multiple authorship, my proposal departs from VARA, which allows one joint author to waive all co-authors' rights.¹¹⁷ I would provide that a waiver is effective only as to the co-author(s) who sign the requisitely specific writing; co-authors who do not sign would retain their attribution rights.¹¹⁸

¹¹⁵ Formalization of the waiver before creation or performance may be necessary to avoid extortion by transferees who demand the waiver in return for payment for work done. *See Schiller & Schmidt, Inc. v. Nordisco, Corp.*, 969 F.2d 410, 412–13 (7th Cir. 1992) (requiring that writing that makes a commissioned work “for hire” be executed before creation of the work).

¹¹⁶ *See, e.g., Berne, supra* note 6, at art. 6*bis*; 17 U.S.C. § 106A(a)–(b) (stating that authors of works of visual art have attribution and integrity rights “whether or not the author is the copyright owner”).

¹¹⁷ 17 U.S.C. § 106A(e)(1).

¹¹⁸ The U.S. Copyright Office Study, noted above, makes a similar recommendation. *Waiver of Moral Rights in Visual Artworks, supra* note 108. A point of relative consensus voiced in the Office's public proceedings and in academic sources such as *Nimmer on Copyright* was that VARA inappropriately permits one joint author to waive the moral rights of coauthors in a joint work. . . . Congress may wish to amend the statute 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. *Id.*; *see also* MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT §§ 8D-84-85 (2003); Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 45 n.246 (1997) (“[A]llowing one joint author to waive the rights under VARA for all other joint authors significantly undermines the rationale for moral rights protection.”).

By contrast, a recent, well-developed proposal for an attribution rights statute partly inspired by sections 106A and 1202, has been proposed. *See* Jennifer Chandler, *The Right to Attribution: Benefitting Authors and Sharing Accurate Content in the Public Domain*, 22 J.L. INF. & SCI. 75, 88–90 (2012). Chandler proposes to avoid the waiver issue altogether, by conditioning the attribution right's existence on its assertion in “attribution management information.” Notwithstanding the elegance of this approach, it is incompatible with the Berne Convention, which prohibits subjecting the existence or enforcement of national and Berne minimum rights (including moral rights) to any formality. An obligation to assert attribution information is a forbidden condition. *See, e.g., Shelia J. McCartney, Moral Rights Under the*

4. Remedies.

Injunctive and monetary relief should be available to redress violations of the attribution right. Although a remedy compelling inclusion of the author's name in subsequent public distributions or communications of the work may be the principal form of relief, modification of existing, undistributed inventory may also be appropriate.¹¹⁹ Authors should be able to claim damages based on a showing of specific harm. Alternatively, because such a showing may be difficult to demonstrate,¹²⁰ an attribution rights amendment ought to provide for statutory damages. As is already the case for VARA violations, registration should not be a prerequisite to obtaining statutory damages, and the range of statutory damages remitted to judicial discretion should be the same as for violations of economic rights.¹²¹ The amount of statutory damages (or, for that matter, actual damages) may depend on the effectiveness of injunctive relief. Finally, the application of the statutory remission of damages for certain non profit entities' good faith, but unsuccessful, invocation of fair use,¹²² warrants consideration in light of my recommendation that courts take authorship

United Kingdom's Copyright, Designs and Patents Act of 1988, 15 COLUM. J.L. & ARTS 205 (1991) (criticizing moral rights assertion obligation in UK CDPA).

Finally, there may be instances in which the public would retain an interest in knowing who is a work's true author even if that person willingly (and specifically) waived her attribution right. This is another reason to maintain the distinction between copyright-based and Lanham Act-based (mis)attribution claims.

¹¹⁹ Cf. 17 U.S.C. § 405(a)(2) (discussing the addition of notice to copies distributed to the public after omission of notice is discovered); see also, e.g., *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 197 (2d Cir. 1985) (discussing the application of § 405(a)(2)'s notice requirement).

¹²⁰ See, e.g., *Johnson v. Jones*, 149 F.3d 494 (6th Cir. 1998). Architect Johnson sued another architect, Jones, who had copied Johnson's plans but put his own name on them. *Id.* at 499. The court of appeals held that Johnson was entitled to recover Jones's gross revenue from the reverse passing off, and that Johnson's "actual damage claims were 'wholly speculative,'" and thus not recoverable. *Id.* at 507; see also *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (holding that evidence supported a damage award claim of \$200,000 for voice misappropriation under California law for the "shock, anger, and embarrassment" of a performer whose voice was imitated in a radio commercial jingle). See *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999) (damage awards under VARA). In *Martin*, the City of Indianapolis intentionally destroyed a work of art by Martin, who sued under VARA. *Id.* at 610–11. The court of appeals upheld the trial court's award of \$20,000 in statutory damages, then the maximum amount allowed for a non-willful VARA violation. See *id.* at 610, 614.

¹²¹ See 17 U.S.C. § 412 (referencing § 106A(a)).

¹²² *Id.* § 504(c)(2) ("The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107. . .").

attribution into account in evaluating the first fair use factor.¹²³ If the defendant did not name the author of a copied work on which the author's name appeared, and the court rejected the fair use defense, one might contend that the omission of the author's name is not consonant with good faith, and accordingly disqualifies remission of statutory damages.

V. CONCLUSION

The U.S. Constitution authorizes Congress to secure for limited times the exclusive right of authors to their writings. Curiously, those rights, as enacted in our copyright laws, have not included a general right to be recognized as the author of one's writings. Yet, the interest in being identified with one's work is fundamental, whatever the conception of the philosophical or policy bases for copyright. The basic fairness of giving credit where it is due advances both the author-regarding and the public-regarding aspects of copyright.

Most national copyright laws guarantee the right of attribution (or "paternity"); the leading international copyright treaty, the Berne Convention, requires that Member States protect other Members' authors' right to claim authorship. But, apart from an infinitesimal (and badly drafted) recognition of the right in the 1990 Visual Artist's Right Act, and an uncertain and indirect route through protection of copyright management information, the U.S. has not implemented that obligation. Perpetuating that omission not only allows a source of international embarrassment to continue to fester; it also belittles our own creators. Copyright not only protects the economic interests in a work of authorship, it also secures (or should secure) the dignitary interests that for many authors precede monetary gain. Without established and enforceable attribution rights, U.S. copyright neither meets international norms nor fulfills the aspirations of the constitutional Copyright Clause.

SESSION 3: KEYNOTE ADDRESS Q&A

¹²³ *Supra*, text accompanying notes 102-103.

MS. TEMPLE CLAGGETT: I want to start off with just a quick question about the *Dastar* case because I think that's something that people have listed as the linchpin of U.S. compliance, in some sense. What would your view be of whether the *Dastar* case actually is a linchpin? So at the time that we actually, you know, complied with the Berne Convention or said that we complied with the Berne Convention, *Dastar* had not actually come down. Would you agree that at that time, our moral rights protections were stronger—would you believe that they were actually still somewhat weak?

PROF. GINSBURG: I think that when we ratified the Berne Convention, it was possible to make a barely plausible argument that our patchwork, which importantly included Lanham Act § 43(a), sufficed. Moreover, I acknowledge that Jack Kernochan and I wrote an article taking the position that the patchwork could be sufficient. I will also point out that we wrote that before the UK and other common law countries added explicit moral rights. At the time, it was argued that the United States did not need to have explicit moral rights in the copyright law, so long as effective protection resulted, whatever the source of the rights. The UK served as an example in support of this proposition; at the time there were no explicit moral rights in UK copyright law, yet the UK was a longstanding member of the Berne Convention. Accordingly, if the UK could be a member, so could the US.

That largely unspoken argument then became somewhat less persuasive when common law countries did start enacting explicit moral rights provisions. So that's another element that perhaps has changed the way one evaluates the question between 1988 and 1989 and post-*Dastar*.

MS. TEMPLE CLAGGETT: And then just to follow up on the post-*Dastar* point, you had mentioned that some district courts are taking a broader reading of the *Dastar* decision. You know, there is a debate among academics as to whether you should construe it broadly or narrowly. Can you kind of give a little bit more detail as to how lower courts are interpreting *Dastar* and whether that affects how we might use the Lanham Act for compliance with moral rights.

PROF. GINSBURG: The first line of defense against a post-*Dastar* collapse of attribution claims (a defense which crumbled quickly) was—and Peter Yu alluded to it—that *Dastar* concerned a work in the public domain. You may recall Justice Scalia's colorful language about a “mutant copyright law,” that the plaintiffs there were end running their failure to renew the copyright in the motion picture. As a result, they should not be allowed to get themselves a kind of *de facto* extended copyright by bringing the Lanham Act into service.

Thus, the narrowest reading of *Dastar* would be that regardless of what the court said, on its facts, this was a case about a work in the public domain; the court's decision did not prejudge or determine the assessment

of a false attribution or maybe even a non-attribution claim with respect to a work that is still under copyright. That reading did not prevail, understandably so in light of the Supreme Court's interpretation of the Lanham Act meaning of "origin" of goods or services. According to the Court, a "false designation of origin" does not mean the intellectual origin of the work. For the Court, "origin" means the physical origin, the producer, distributor of the physical goods. As a result, it matters neither whether the author is alleging a false designation of origin or a non-designation of origin. If "origin" excludes intellectual origin, then that provision of the Lanham Act cannot serve as a source of attribution rights.

Worse, some lower courts have attributed rather broad preemptive effect to *Dastar* to conclude that attribution rights or false attribution claims cannot be advanced under other theories of law either. This very broad interpretation of *Dastar* means that the Lanham Act no longer is a source of attribution rights, nor are other common law theories. As a result, the patchwork of federal and state claims that was evoked in 1988/1989 as cumulatively providing sufficient coverage of moral rights is looking less like a quilt and more like two or three very ragged strips.

MS. TEMPLE CLAGGETT: And with that, I want to turn it over to the audience to see if we have any specific questions to Professor Ginsburg about how we might strengthen moral rights of attribution or whether we need to. Yes?

MR. LEVY: What I didn't hear in your talk about legislation was why we should have legislation implementing a right of attribution. Is it strictly because we agreed to in the Berne Convention, or are there other reasons affecting the public interests why the general public would be benefited by adopting this?

PROF. GINSBURG: First, in assuming an international obligation Congress, we can infer, did take the public interest into account. By ratifying the Berne Convention and passing implementing legislation, Congress determined that membership in the Berne Union was a good thing for the United States. Because the Berne Convention does not allow reservations, the public policy of the United States would have embraced all treaty obligations, not just those obligations minus Article *6bis* (moral rights),

Ratifying the Berne Convention was a good thing not just for authors but for the public and also for the American economy as a whole. Because even back in the 1980s, our economy relied decreasingly on the production of goods such as cars, and steel, and electronics. But the U.S. certainly was creating and exporting a great deal of intellectual content. Thus we had a national interest beyond the perhaps parochial interests of authors in having very good international protection.

Second, attribution rights are in the public interest in part for what some might consider to be consumer protection interest, that the public has an interest in knowing who created this work. The author's interest, moreover, is not simply a vanity interest; her ability to make a living largely turns on reputation, but without name recognition, she has no reputation to exploit.

I think that the Constitution conceives of copyright as creating an environment that will encourage creativity; being recognized for one's creations is very much part of that environment. As James Madison wrote in *Federalist No. 43*, in explaining and supporting the constitution vesting of power in Congress to enact laws concerning copyright and patent: "The public good fully coincides in [the case of copyright] with the claims of individuals."

MS. TEMPLE CLAGGETT: Any other questions? Yes?

MS. DEVORAH: Hi, Carrie Devorah, Center for Copyright Integrity. I was very excited when you were speaking. I'm thinking oh, awesome. How is it nobody has gone after Google for doing exactly the violations you were talking about should not be done? I also wanted to raise a point about David Slater, the monkey photographer. Gotten to know him. I would consider what David did in what he explained to me as set design. He worked for weeks with a monkey to encourage the monkey to become familiar, so just to keep points on—a fact on point. But Google, look what they've done. They have walked away with all of our works. I took a picture of a picture I just did, sent it out to a colleague of mine, but that picture's now been taken from me. I'm not dead yet. I'm not life-plus seventy so how is it that Google has escaped the liability of what you just so wonderfully described a liability existing for?

PROF. GINSBURG: I think that question may go to economic rights as much as to attribution rights. On—

MS. DEVORAH: It removes names all the time.

PROF. GINSBURG: There have been a number of variations of the Monkey Selfie story. Some versions have given the monkey more agency than others under the maximal monkey agency approach.

MS. TEMPLE CLAGGETT: Coined a new term.

PROF. GINSBURG: Up there with the Zika virus, right? In the variations of the story where the photographer set the scene and all the monkey did was click the shutter, there may be sufficient human authorship to justify a copyright. There are in fact cases not only in the U.S. but in other countries, where the dispute concerns exactly that scenario. The photographer has set the scene, and somebody comes along and pushes the button. In those cases, courts generally consider that it is the person who structured the image, not the person who pushed the button, who is the

author of the work. But this kind of dispute gets to the question fairly raised. If we're going to have an attribution right, we had better know who's an author. In many instances, that will not be too difficult to figure out. Moreover, in lots of instances, there are, indeed, conventions about giving credit. Consider the Writers' Guild agreements and such. That, at the margins, it may be difficult to identify who is an author is not an adequate reason to deny attribution rights altogether. On the contrary, I think we need to work on coming up with reasonable and implementable notions of authorship, especially because digital media, in fact, offer a lot of opportunities for robust author-identifying information.

MS. TEMPLE CLAGGETT: Any other questions? Yeah.

UNIDENTIFIED MALE SPEAKER: I was going to circle back to this in RMI, but I'm curious. When you were talking about the *AFP v. Morel* case and the—in connection with the CMI information there, do you favor a more broad interpretation or a more narrow one?

PROF. GINSBURG: I think that the claim could be made out in the *Morel* case because what Agence France Presse did was to make the picture available for other news entities to then reproduce and communicate it. The plaintiff therefore could show that defendants had reasonable grounds to know that there would be a downstream infringement.

But the facts don't always work out with the downstream infringement. Were removal of the attribution itself an infringement, (which is what the WIPO Copyright Act says) then downstream infringement wouldn't be an issue. The question then becomes: Can you fix that gap between the international norm and our implementation of that norm? Is it possible to fix the gap without legislation? I think it would be desirable to come up with a creative way to close the gap without legislation because I'm not so sanguine about legislation. But if we are going to have legislation, revising § 1202 to prohibit the removal of authors' names is a clear candidate. In the interim, I invite people to be creative in thinking about how to interpret § 1202 to make it consistent with our international obligations

MR. KAUFMAN: Yes, I'm Josh Kaufman. Okay, I argued for AFP in the *Morel* case, and my take is a little different on the case. First of all, it was fascinating. The jury had no understanding at all about the DMCA. I mean, that was very clear. At the early part of it, the judge—there was no *Morel* name on any of the artworks. By way of background, he posted these—initial it was thought that it was a citizen journalist. Somebody stole them, a guy name Swarel [ph]. So AFP initially takes them off Swarel's site and lists it and giving Swarel credit. A few hours later, they find out it was *Morel*, and they always gave *Morel* credit. He was always in the tag; it says AFP *Morel* or AFP Getty, *Morel* as part of the distribution.

There was never any time that his name was removed because his name wasn't on anything. It wasn't on the website. It wasn't on his website, either. So there was never any removal. There was never any distribution by AFP, or its subscribers, or Getty, without attribution to Morel.

What the jury seemed to have found, and they—again, it was convoluted because—well, we don't have to get into that into the woods, but what—it was that they associated. It said AFP, Getty, Morel, which is standard media information for a source distributor and photographer. And it was that—since he wasn't affiliated, it seemed that it was that misassociation that was the basis of the very small DMCA award. But there was never—which was kind of odd for us because there was never any distribution. And the court also specifically did not—they ruled against the argument that they originally made was—they originally said this was going to be a \$180 million case because of the DMCA going downstream and the court ruled not, that the downstream users were not going to be counted as part of the DMCA damages.

PROF. GINSBURG: I think that your account of the facts illustrates why it would be a really good idea to develop standards or best practices that the copyright office might endorse for defining what is copyright management information.

MS. TEMPLE CLAGGETT: I think we have time for one last question if we have any—I guess my last question is do you have any predictions? You said you weren't that sanguine about the possibility of legislation.

PROF. GINSBURG: I think some of the possibilities are in your—the Copyright Office's—hands. So I want to be sanguine about what the Copyright Office can do. I think there is in fact quite a lot that the Copyright Office can do, both in terms of articulating enforceable norms and certainly in terms of moral suasion. There are two takeaways from this talk: one is that Article 10(3) of the Berne Convention's condition on the quotation right that the author be credited if her name appears on the source publication imposes a norm enforceable through the WTO. Takeaway number two, much of what we consider fair use would fit within the quotation right, and therefore courts should start developing a reasonable attribution condition as part of its consideration of the first fair use factor under § 107(1). A corollary to this takeaway: the Copyright Office can develop guidelines for what constitutes reasonable author attribution.

MS. TEMPLE CLAGGETT: Well, I want to take this time, once again, to thank Professor Jane Ginsburg for her talk.

SESSION 4: THE IMPORTANCE OF MORAL RIGHTS TO AUTHORS

This panel offers perspectives on why authors value moral rights, which moral rights authors find most valuable, and how they protect these rights. Discussion includes authors' perspectives on whether moral rights have taken on new meaning in the digital environment, and how uses of their creative works are fostered and/or challenged by emerging technologies.

Panelists:

Melvin Gibbs, Musician/composer

David Lowery, Songwriter/recording artist

Yoko Miyashita, Getty Images

Professor Sean O'Connor, University of Washington School of Law

Scott Turow, Author

Kimberley Isbell, U.S. Copyright Office (Moderator)

REGISTER PALLANTE: Good afternoon, everybody. My name is Maria Pallante. I'm the United States Copyright Register. And I want to thank you all for coming. For those of you just joining us, we had an incredibly stimulating morning this morning and a wonderful keynote. And this afternoon, we're going to begin to hear from creators.

And before I say that, I just want to also again thank the Center for the Protection of Intellectual Property. And over here, you'll see very intelligent, energetic-looking students. And I think—if you don't mind, I think they're our future, and I'd like to recognize them for helping us to put this on today.

I also want to make a point to thank John Conyers, who is the ranking member of the House Judiciary Committee. When I testified before the Committee in favor of a comprehensive review of copyright law, the Copyright Office made the point that no such review would be complete without looking at moral rights. And John Conyers, who has been a lifelong advocate of authors and artists, asked us formally to commence such a study. So as we said this morning, this symposium, co-sponsored with George Mason Law School, is the beginning of that public dialogue. And with that, I'd like to turn it over to Kim Isbell, who is senior counsel in our Office of Policy and International Affairs.

MS. ISBELL: Thanks, Maria. As Maria just alluded to, one of the key things about this panel that I think is really interesting is that it's the first opportunity to really hear from the artists themselves. This morning, we heard from a lot of lawyers talking about what moral rights the United

States does or doesn't recognize, how you could assert more rights under various provisions of U.S. law and then the very interesting keynote by Professor Ginsburg talking about what she views as a very important moral right, the right of attribution, and how we could go about codifying it.

But this panel is really focused on what do artists themselves think. How do moral rights impact their day-to-day work? How do they impact them both professionally and personally? Which moral rights do they care about? Which moral rights make their lives easier or more difficult?

And so for that reason, I'm going to take a slightly different approach to this panel than we have in the prior panels. I'm not going to start off asking our panelists a bunch of questions. Instead, I want to give each of them about five minutes to really talk to you from their own perspective as to what moral rights and what this symposium mean to them and what they think should be the key takeaways as the Copyright Office is going into a larger study of the issue of moral rights.

Before I do that, though, I am quickly going to introduce our panel. And then I'm going to turn the microphone over to Melvin. Our first speaker is Melvin Gibbs. He's a musician, bassist, composer, general musical Renaissance man. He's also the president of the Content Creators Coalition, who is out there advocating for artists in the area of copyright and in other areas. And so we're very glad he could come down from New York to join us.

Next to him is David Lowery. He's a songwriter. He's a recording artist. You've probably heard of some of his bands. He was in Cracker and Camper Van Beethoven. And he also helped found Pitch-a-Tent Records. He's been a frequent speaker for artists' rights in many of these discussions that most of us participate in. He's a very strong advocate for the rights of composers and the rights of recording artists in the United States. Next to him is Yoko Miyashita. She's Senior Vice President and General Counsel at Getty Images, came to us all the way from Seattle to join us today. So we're very glad she could be here. Next to her is Professor Sean O'Connor. He is the Boeing International Professor at the University of Washington Law School. We actually have a number of Seattleites on the panel today. And he's done extensive research in the area of moral rights and copyright. And finally, last but definitely not least, is Scott Turow. He is an attorney and an author. He's written nine best-selling books and has also been very active in these issues. And so I personally am really looking forward to hearing from all of our panelists. And so with that, I'm going to turn it over to Melvin.

MR. GIBBS: Good afternoon. As Kimberley said earlier, there was a lot of talk about the law and intricacies of the law. I'm a musician. We think about the law as part of—in more holistic way—if we think about the world. For me personally, in addition to thinking about the law, when I have to think about it I think about what my music means philosophically and what it means economically.

And once I start thinking about music, you know, you have to start thinking about how you translate it. And then it becomes a question of thinking about metaphors. And as musicians, we're basically stuck in two metaphors. We're stuck in a metaphor where we're workers. We're making a musical work. Or we are employees creating a product.

For me, neither one of those things actually works. I actually think of myself as part of a community and creating for a community. And in the context of this society, the goal seems to be dissemination of creativity, getting it out to as many people as possible. And the question becomes, for somebody like me who's a creative, is how am I going to make that process work? Leaving aside the kind of inherent, you know, heteronormative male aspect of the word dissemination, you have the question of—

(Laughter)

—you have the question of what does that mean. It has to be—dissemination is a process that starts from an individual to another individual. So inherently, for the dissemination process to work, the individual has to be recognized.

So how that works in the context of a community is very simple. You know who the guy down the street is who does X, Y or Z. You know, for us as musicians, there might have been—for me, there's literally the man who lived next door who taught me how—who started me off on music.

The question becomes, I needed to know who this person was. In the context of a community, of course you're going to know that. But in the context of 2016 when we have aggregated groups of data, it becomes difficult to impossible to know who these individuals are unless there is some mechanism specifically built to make that happen.

So looking at the idea of moral rights in the context of this society today, I would say, to have this balance between community and an individual, it's actually more important than ever. To have a really large-scale dissemination of creativity, the individual creators have to be recognized, all right?

Somebody asked why is the law necessary in the earlier panel. To answer that, I'll give an experience. I've been consulting at a startup for the past few months, almost a year now. And one of the things that I've learned is that nothing gets built at a startup unless it is absolutely necessary for it to exist. And the reasons that it's necessary to exist are, basically, only two. It has to be a business reason, or it has to be a legal or regulatory reason. It will not get built because I want it to. There has to be some affirmative reason that the tech community has to do this. So that's my short answer to that.

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.

There is a bit of an overlap between economic use and moral, which I guess we'll get into later. But I can speak as somebody who was mentored by a lot of the older jazz musicians in New York City that you cannot really separate them. There are a lot of things that—attribution and integrity are both important; and for us as musicians, a slightly different issue because we are performers. It's not like a book where you have one version of the book. We play a song today. We'll play it again tomorrow. Each performance is unique, and each performance can be disseminated on its own.

So I think there's room for a different way of thinking about this idea that integrity will somehow hinder the process of remix culture. I think that it is something we'll examine further, but I just want to touch on that right now.

MS. ISBELL: Okay. Thank you, Melvin. David Lowery?

MR. LOWERY: Thank you, Melvin. You know, about twenty-three years ago, I had a song released, and it started to become popular on radio. And one day, I get a call from the Senior Vice President of promotions at the record label. And he basically says that song, that song's not about being stoned, right? I'm like, "Of course it's about being stoned, Michael." But he kept saying it to me. And finally, I was like, oh, is there a problem? And he goes, "Yeah, I got this letter I want you to sign, and I need to fax it to a few radio stations."

So despite the fact that I signed a letter that said the song Low is—which has a chorus, "Hey, hey, hey, like being stoned," is about being stoned, despite the fact that I, essentially, signed a letter that said that it did. And it is. And I guess in the world of alternative rock and rock radio, songs about being stoned, there are a couple other people who have a few tracks that, basically, come out and say that. And one of them, of course, is Tom Petty.

So about the time that we were first dealing with digital distribution—at first, involuntarily by the likes of Napster and Kazaa and Grokster and things like that, somebody, probably because they were stoned, mislabeled my song Low as being a Tom Petty song called likebeingstoned.mp3 or tompetty-low-106. It must have been an mp3 disk that they ripped it from. And for the next six or seven years, I had this ongoing battle to kind of correct this misrepresentation that there was—that that was actually a Tom Petty song to the point where—what's the name of

this website— well, I mean, and it's still out there. Like, if you look it up on Last.fm, it says it's a Tom Petty song—a picture of Tom Petty there. There's a wiki called Misattributed. And then—and the wiki for misattributed songs, that's one of the first examples of a song being misattributed to artists. So you've got to think about this.

So my point—and I think there's a lot of people here that feel the same way—is that you can't really separate attribution from the economic rights, right? I mean, it's the same thing. Now, we can decide what we're going to do about that because the last thing I want is a DMCA loophole that can drive, like, a truck or several thousand trucks through. But it is definitely—to look at attribution as separate from an economic right is ridiculous because one, all those people who were freely downloading those songs, well, maybe they would have come to the concert. But they would have gone to a Tom Petty concert.

Also, the fact is, is when you're a performer, you built up a certain brand name on the basis of your previous albums. So even before your album comes out, it gets a value, an economic value, because it's going to be based on the popularity of the songs before that, more people are going to listen to it, maybe buy it, get licensed in films. I mean, it's really silly that it's not an economic right or that we would even think that it's not an economic right.

And I guess the other thing is that, I find there's a lot of—you have this problem built into our system for songwriters. Like, my example is a funny example as a performer. But when you look at songwriters, they're almost never attributed in the digital world. I mean, I guess you can dig around. I was using a popular streaming service, and they do have a lyrics plug-in that you can load into the program and then you click on lyrics for one of my songs. It was being performed by another band, but this is a song I wrote. And I looked at the lyrics and stuff and was like, that's great. There's the lyrics, and that's attributed to the wrong people as a writer. So I guess that's my point. It's an economic issue, very strongly.

MS. ISBELL: Okay. Thank you. Now to go to Yoko to give us the business perspective on this.

MS. MIYASHITA: You know, it's great to follow Melvin and David. Thank you for that context because, definitely, it touches on a number of things that we see in my industry.

So just a little background on Getty Images, we represent close to 200,000 individual photographers as well as having a staff of 150 staff photographers. So we're both stewards and distributors of third-party content as well as owners and generators of our own content. And you know, I was thinking about this as you were talking about these issues. And I've been with Getty for about eleven years, and I would split those years as sort of pre-viral, pre-social, to the current state. And I would look at our

activities, particularly on the enforcement side as seeing instances of uses and policing them and realizing that online platforms with the DMCA loopholes that just simply became untenable.

So Getty really looked at this as a business issue, because when the genie's out of the bottle on social media, it's out. There is no stuffing it back in. And the big issue we encounter here, particularly on images, is when that—it's what I call the right-click-copy-upload paradigm. When that happens, the metadata that we have hired people to apply all of the author's information, the copyright information, all of those attributes that would ordinarily travel with an image gets stripped.

So what happens? That image gets orphaned, that information you would have had about that author. Not only has that been infringed, not only has your economic right there been messed with, it's now been disconnected from the key information that tells you who actually created that image, who is the author behind that.

So it's an issue that we have looked at from a business perspective and said, all right, this is happening. You know, you can send all the takedown notices in the world, and you will never solve this issue.

So what we have done as a company is really looked at ways of distributing content to actually bring attribution back. How do you leverage this innate human need to share images? Well, you do that by offering embed. In May of 2014, we launched an offering through our website for free use—free embed use for noncommercial purposes. We had spent years pursuing these small, non-profit organizations, school projects. And really, that is a terrible PR campaign. Really whacking the schoolteacher over the head with a CD and the lawsuit or demand for payment is really not great for company PR, not great for us.

So what did we say? We opened up 90+ percent of our collections and said, if you want to use our content for non-commercial use, great. Here's our embed. And what does it do? It includes a small watermark as well as attribution—gives the creators credit for what they've done. That also links back to our site. So if someone actually goes to that—likes that picture, they can go through, then make their way back to the Getty Images site, explore more images by a particular photographer.

Soon after embed, we've launched social sharing. So if you now go to the Getty Images Website and see a picture you like, we encourage you to share it. But it will be shared with attribution, a link back wherever those platforms allow us. So you, again, can correlate that back to the person who created it.

I'm not saying this is the ideal solution, but this is the solution that we currently have in the context of where the legal framework stands. If it's going to be shared, we want it to be shared with attribution, with a possibility and potential for people to find more images from these creators.

Let's see. The other thing that—one of our affiliates, Getty Images acquired a technology in 2011. It was the frontrunner in image recognition software. They do digital fingerprinting and, essentially, help you identify images on the Internet. You can see the obvious use cases for pursuing infringements.

But what we've done is really collected one of the largest indices of online imagery. It's a fantastic solution for orphan works, but also just an open API. So the technology is out there to help platforms, to help companies, to help anyone who's looking figure out who actually created an image, who actually owns the copyright, where it's available for licensing.

This technology exists. It's out there. We offer it. But there needs to be an impetus to drive uptake of these kinds of available technologies. We know they exist. They are underutilized across the industry. But again, that is a process—to reattach this attribution, to reattach the metadata, to reattach all of these key attributes that go directly into the economic viability of creative works.

I wanted to touch on a point you made, David, about—it's not just knowing who the author is so you can search. This is all driven in the platform space by algorithms. If your name is not showing up with that song and is not being attributed to you, everything else that's driving the algorithms that will drive traffic back to you or discovery of your content, those connections are being cut off. So I do see these as absolutely interrelated, and you cannot separate the two.

I think that's really it for me.

MR. O'CONNOR: Very good.

MS. MIYASHITA: Thank you.

MR. O'CONNOR: All right. Thanks. Okay. I'm actually going to use a timer because I'll just ramble on too long. First, I want to clarify that I'm not really a moral rights expert. I know that's shocking, and I probably shouldn't be up here. I always joke that I'm jack-of-all-trades, master of none. I was a singer-songwriter for a long time, but not as good as these gentlemen; recorded some stuff, did get some airplay. But I was one of those guys who was better as a bar band performer, you know, not as good in the studio. And it was pretty good in the studio, the stuff I wrote, but not good enough to quite get me there.

So after that, I went and got a Master's in philosophy, was a bartender, parked cars, did every stupid job you could imagine. And then ultimately, I ended up in law school for various reasons. And through the magic of academic tenure, I've held a job for, like, thirteen years now, which is really quite good for me. But—

(Applause)

Thank you. I know. My parents are still shocked that that's happening. I think the only reason I'm here is kind of as, perhaps, a synthesizer, looking on both the creator side (and the law side) because I have experience and I know what it takes not only to write songs, but also to get them into the studio. Again, I wasn't good at it, but I understood the production process. And what I like about what Melvin was saying was distinguishing between musicians in their performance capacity and in their recording capacity.

And so I think with moral rights, and what I just want to address for a couple of minutes here, is that the key thing is when we're focused on musicians and other creators when they're creating what I'll call "artifacts": a particular finished work, okay—a recorded song, a book that's going to be published, an artwork that's going to be released. And then the key is—and it's related to a project I'm working on right now funded by CPIP, actually—looking at arguing that copyright should perhaps be viewed as much as an incentive for publication, for making a public commitment to that particular form of a creative work, as it is an incentive for creativity and the other things we normally say.

Why? Well, because if you talk to a bunch of creators—and now Melvin and David will correct me quickly on this—but you guys don't write songs just because there's copyright. You don't create just because there is copyright. So in other words, did you say, "Oh, my gosh, I am not going to become a songwriter if there were not copyright?"

MR. LOWERY: Yeah, but I don't think you'd do album eight or nine.

MR. O'CONNOR: True. Right. So there's a role for it. Right. Exactly. So, then the question becomes, how do you get it all financed? But the point here that I think a lot of people now realize that the story that copyright is only an incentive to create, probably doesn't tell the whole story. It's a big part of the story, but it's not the complete story. And so if you look at the history of the term publication going back to Roman period, *publicare* meant making a public commitment.

And so what I think has become invisible to us in the social media age, where people blur the line between public and private—we tweet everything out; we Instagram everything out; Snapchat everything out. But think about if you are a creator—and this is as true for creative artists and even for us wonky academics—when you finally say—and looking at the journal students over there—okay, you guys—and I have stuff I've published with them. They always say to me, "Is it final?" You know, "Are you going to give us the sign-off?" "Can we release? Can we publish this now?" That's a fraught moment because if I said something wrong in there—I didn't catch a typo—it comes back to haunt me.

And so now, on the performance side, on the improv side, sometimes the rough edges around it can be exactly what you want. But in the finished artifact side, it's often not what you want. You want—or you're trying to get—a very particular thing.

So what does this mean for moral rights? Well, first, moral rights are important because we angst a lot about, is it good enough to be published, to be publically released? And second, without getting too maudlin, but in the world we live in today, you have a lot of potential risk and liability for things you publically put out there as creators, right? We don't have to give specific examples, but just think about that in the world today.

And so the notion of integrity; what if somebody takes my carefully constructed, here's-what-I-really-meant-to-put-out-there, and they change it and my name is still on it? And now suddenly that could get me not just professional problems, but it could also get me physical harm kinds of problems. Can't I then get my name taken off it? Or can't I just withdraw the work entirely if I realize that's not what I want to publicly commit to anymore?

Okay. So that's my main point. Second point is that I think—and I like that Professor Ginsburg was starting to open up that door and talk about work made for hire—because that's going to be, I think, one of the biggest problems for meshing, you know, bringing in a full moral rights system into the U.S. copyright system. Our work made for hire is based on the economic basis of our copyright system. So it means the economic employer can be the author for purposes of the copyright statute.

But there's another sense of work made for hire where you have—and this goes back, actually, to Continental precedents—going back into the Renaissance period where you have the great *artiste* who directs people in, usually then, his, but it could be her, studio. And they actually implement. They execute on things.

So we know the cases about how you decide who's an author and who's not. But that's going to become, I think, incredibly important as you think about then bringing in a fuller moral right system, if that's something you want to do.

With that, I'll turn it over to Scott.

MR. TUROW: Well, thank you all. My acquaintance with moral rights began in what is now a long time ago when I was thrilled to get a draft of a movie contract for the rights to *Presumed Innocent*. And my life had gone through in an extraordinary transformation. I had written *Presumed Innocent* on the morning commuter train and finished it in my basement. And all of a sudden, literally, I was that proverbial person in the creative world who gets struck by lightning. And in the process, the movie rights to the book were purchased.

Draft contract arrives. And of course, it says that among the rights I am selling are my right to make a claim based on *droit morale* or—and I'm sure people are fainting all over the room, my French accent—or moral rights. And so I called my lawyer, and I said, “Well, what are moral rights?” And he said, “Well, it has nothing to do with you. You're an American.” But I've always been conscious of the concept just because I'd been through law school. I never took a copyright class. But the notion, just because of the term, appealed to me.

We recognize creative work as standing on some kind of different platform than other products in the marketplace because of the intimacy of the creative act. And for lack of any other term, artists traditionally are believed to have put a little bit of their soul into whatever they create, whether it's what they paint or the songs they compose, the sculptures they make or, for artists and authors, the productions that come from them.

And I think we do have the right to assert that there is a kind of specialness in creative work, and that is recognized in terms of moral rights. Everybody here has talked generally about the right of attribution. I sit here on what is a sad day for the Authors Guild, of which I was once president. A long-running fight with Google over the Google Books project is officially over today. The Supreme Court refused to grant cert in the case. And I doubt there are any people in the room who need a long-winded explanation of what was involved in the Google Books case. And it's certainly true that our opposition was fundamentally economic, the notion that a large corporate entity could decide on its own to take and copy an author's work, not change a single word of it, offer no new expression and still make the entire work available through selective display of so-called snippets seemed fundamentally wrong. But you know, we've lost that fight.

But the moral rights issues still remain in that discussion. And just by way of example, at one point, we had reached a settlement with Google, which, you know, was one of those situations where the Justice Department came in and disagreed with both sides. And I still, of course, disagree with the Justice Department about this.

But we found in our own membership substantial opposition to the settlement, not overriding, but—and what were they objecting to? They didn't like the idea of Google coming in and just taking their work. They didn't want it displayed on Google. And even though, you know, we argued that the settlement, in fact, would give them the right to opt out and withdraw their work, they found it fundamentally offensive.

Now, songwriters don't exist in that world. They have a compulsory licensing system. Other people, of course, objected to Google Books because of the right of integrity, that they didn't like the idea that there was this, you know, robot being created that would deal with their books selectively and choose snippets based on certain words. And certainly, the right to control publication of your work is implicated in this

kind of wholesale use and display. Rights of attribution, of course, are important to authors, too. It's rare to steal an entire novel and have somebody put his or her name on it. But poets and essayists are, in this world of rampant plagiarism, of course, often exposed to that. But all of these concepts seem to me to remain very much relevant to the discussion of the author's place in the world, too.

MS. ISBELL: Okay. Thank you. So I think I'm hearing a couple of different themes throughout this panel. One is that it's very hard to separate the concept of moral rights from the concept of economic rights, especially in situations where your reputation has a lot to do with the economic value of what you're producing. And I'm also hearing that there seems to be a lot of consensus here that attribution is a relatively important moral right for creators and for authors.

But what I thought was interesting, and we first started getting into it with Sean's discussion, is sort of the more reputational and other sort of personal importance of moral rights. And so I would like to hear a little bit more from some of the panelists if they'd like to speak about putting aside economic rights, not that you can, you have to eat, obviously, economic rights are important, but how do things, like, for example, Tom Petty being listed as the author of your song impact you on a more reputational or personal level? Anyone want to take that on?

MR. LOWERY: Well, I'll say that a lot of people thought that we were playing a cover after that, which lowered our sort of status in some weird way. So I mean, that was one of the things. But a lot of people object to the uses of their songs in certain kinds of commercials and things like that. I know this is, like, rights of publicity, and they cross into other realms. I'm pretty relaxed about all that. I mean, if the San Francisco Giants started using one of my songs, I'd have a problem with that. But—

MS. ISBELL: What about politicians?

MR. LOWERY: Well, generally, if they stay away from homophobia, racism, certain key things, I actually—we have very diverse political views in both of our bands. So we kind of let more use of that happen than most bands. Am I being neutral enough?

MS. ISBELL: Very middle of—

MR. LOWERY: Yes. So—but that's an issue. I don't know. Maybe we're an odd collective for musicians.

MR. GIBBS: Well, I mean, I can't—I'm more speaking for friends of mine. I mean, as far as going back to—I hate to bring it back to attribution, even though you're trying to take it somewhere else. But a bunch of friends of mine, I mean, have been sampled multiple times.

MR. LOWERY: Mm-hmm.

MR. GIBBS: And it would be very nice for people to know that they are the actual people that are playing on that record, on the original songs. It would be nice for people to know who the people who did the original songs were in a more comprehensive way simply because, thinking of particular of a friend of mine who played on the Edwin Birdsong song that that Daft Punk sampled, those guys are all still around. They could have just as easily have hired those guys to come play the song again, and it would have been better for everybody.

So it leads into the whole, 'what is creative and what isn't,' because, to me, in 2016, it should—a lot of these things that people default to as creativity tactics, they default to because a certain legal mechanism was set up that drove things down a road that was the road it went down because that was the one that was the clear one. I think if some other paths are cleared up, we'll see different kinds of creativity and we'll see different kinds of income generation.

And as far as effect on reputation, yes, it's interesting because now I'm thinking of some other people I know who actually are in position to be able to control their catalogs. And they have been pretty adamant about policing use and making sure that people—you know, hip-hop songs that they don't approve of—their music doesn't get on them. And I can also think of quite a few people, as David alluded, it goes into right of publicity—it starts to bleed into right of publicity. But I know many people who have refused to let their songs be used in commercials, for example. And I know that that's an issue now for some—quite a few friends of mine because of YouTube and because of the fact that they spent their whole career saying no to commercials.

And now, whenever the commercial pops up, they have no control over it, which is off topic to this conversation, but it's the basic idea of, yes, there—you do spend—if your career was built on, okay, you have a certain level of integrity and now everybody's—that's being assaulted, then the reason that people respected you as an artist starts to go away and makes you less valuable. It makes you less valuable to your people and less valuable to yourself.

MR. O'CONNOR: I'm going to add—and again, maybe I'm just off base because, again, I'm not as talented as these guys, so my perspective might be why I never became a famous musician, but so two points. The first one, as a small side note again about knowing where the samples come from—and just to plug a hometown radio station in Seattle, KEXP did a deconstruction of *Paul's Boutique* [Beastie Boys album] where they went through, they took an entire programming day and went through the songs and pulled out and played the original entire song that was sampled and then gave the credit—you know, maybe not to necessarily every musician on it—but they got as close as you could get. So you know, that's incredibly important, and it was cool to happen.

What I think I was trying to get at, though, with this kind of final release of the artifact—and not what I think you both are talking about with integrity, is thinking about using your song for political reasons and things like that—but what I'm really trying to get at is, you're still, I think, perhaps thinking about the final release that you *authorize* and what happens with it after that.

So let me give a hypothetical: You signed over all your rights to a label. Not to make the label the bad guy or anything, but you signed over—no, no. Really, I'm not, I'm really not trying to do that. I'm just saying, for the hypothetical, you gave all your rights away. You had a bunch of stuff that you recorded in the studio, but it wasn't quite up to the par that you would have released. And now they say, you know, the contract—you're doing something else then, and they say, okay, we're going to release things from the archives. And there's a bunch of stuff you're like, "I never would have released that." So that's, in some ways, what I'm trying to get at. What do you think about that?

MR. GIBBS: Well, I mean, just on the never released, I mean, I was known for, back in the day, being the guy who would derail a contract over those kind of things. So for me, I think in my whole career I've definitely done less than five works for hire. I think it's two or three maximum. I just don't do it. That's me personally. But it's interesting because I kind of wanted to leave that alone, but since we're coming back to it, it's the copyright versus moral rights thing.

MR. O'CONNOR: Yeah, good.

MR. GIBBS: I mean, copyright is for everybody else, but moral rights is for us. When I make something, it's mine until you know about it.

MR. O'CONNOR: We would hope.

MR. GIBBS: So from the standpoint of an artist, it's literally a piece of property. I mean, it becomes virtual property once it's printed. But when I'm thinking about it, it's mine.

So it's kind of two different conversations. I mean, to me, when we're talking about copyright, we're talking about, okay, what happens when everybody else starts to know about it. But the real basic thing that is called moral rights, that's, to me, that's kind of intrinsic, and we make an agreement with the rest of you all that we're going to give some of those up so you all can hear it.

But at the end of the day, we try to figure out ways to put it back into the contract. There's some guy like me who just won't do work for hire. Everybody's not as militant about it as I am, and that's one reason I don't work in LA, blah, blah, blah—

(Laughter)

I don't. So—what? It's something that definitely impacts the creativity of this country. I've just got to leave it at that.

MR. O'CONNOR: So one last thing to close loop on that—so that, for me, is the Statute of Anne, and our earlier Copyright Act where, you know, there was the stronger public-private divide. The idea was you create something. You can control it completely until it is ready to be released because—I think you're hearing Melvin, and perhaps David agrees, too—it's very personal. And until that thing is ready, you do not want it getting out there.

MS. ISBELL: So I actually have a question for Yoko. Are these types of issues ones that are important to the photographers that Getty Images works with? Do you help them enforce rights of attribution in addition to, obviously, the initiatives that Getty has come up with to try to embed and provide for social sharing? Do these types of concerns arise, like, you know, “I really don't want my photograph appearing on this type of Web site or in this type of context?”

MS. MIYASHITA: No, the integrity issues are really interesting, particularly, because we really sit and broker the relationship between the artists and, essentially, the people licensing or purchasing content. And we handle it contractually, as you would imagine. But you know, the stock photography industry is built on somebody takes your picture and customizes it and modifies it and uses it in a way that suits their particular need, eliminating the need to shoot custom content.

But, what comes with that is, obviously, these absolutely human personal decisions and opinions and thoughts about what is and is not acceptable. We're pretty clear about those conversations with our contributing photographers around—you know, we asked—you really aren't able to exercise your moral right with respect to particular uses. Yes, we have mechanisms to say, okay, no use in tobacco, no use in alcohol. We have the ability and the means to honor those types of restrictions. But once you really put it out into the distribution sort of ecosystem, there is this understood exchange, a contractual exchange around what you can or can't control.

And notwithstanding sort of an open dialogue and transparency about that, you just never know what's really going to hit you and what's quite personal. And we've seen some really interesting issues come up. And we do have to deal with those on a one-off basis and try to find that middle ground. And sometimes that means that photographer wants to pull content. But if a campaign is run, a campaign is run.

So you do see those, and we do sort of stand in the middle, again, trying to broker what is the best solution for each side here. And I think it's really—people are so creative. You just can never know what they're going

to come out with. And it may be absolutely offensive to some. It may not be. And I mean, it is sort of what makes it interesting.

But again, to that private-public, we just sort of wait in the middle and see what happens. But what I'll go back to is, really, I do think technology has solutions to offer in this case that have yet to be really fully explored. And when we talk about control and when I think about online, it really truly is the reflection of those control mechanisms within the want to know [sic]. So I'm not sure if that answers that question, Kim.

MS. ISBELL: So does anyone else on the panel have thoughts about ways to manage these issues, about solutions? Or is it just a problem that is inherent in the nature of Internet distribution?

MR. LOWERY: Well, I mean, I feel like sometimes we frame the whole question wrong. Like, we're sort of worrying about the rights of, like, a group of consumers or an industry or a preferred technology. But rights only invest in the individual. And I don't think me asserting my rights—if it breaks or wrecks a certain technology, then it wasn't a good enough technology in the first place and it should die. I mean, think about what we lose. I mean, well, how did we get this turned around so backwards that we have to pick winners and losers in the technology world? If the Internet is the most wonderful thing ever, it should be able to withstand me asserting my moral rights, right?

MR. GIBBS: Well, the thing I always say is that this idea that information should be free, theoretically, also applies to your bank information. But nobody has any problem with having their bank information locked down. So it becomes a question of, going back to what I said earlier, what people want to build, what people need to build, and why.

It's not theoretical—as Yoko said earlier—her pictures go up with the metadata on, and then magically the metadata disappears. So the fact that that happens is because there was nothing built—

MS. MIYASHITA: We allowed it to happen.

MR. GIBBS: —to allow it to remain. Or you know, I don't want to put it the other way. But you know, the implication is there. So I think, as I said earlier, there is going to have to be some affirmative forcing of people's hands to enforce this—to enforce community, unfortunately, because people are just going to build according to what they can get away with building.

MS. ISBELL: So Scott, you've been kind of quiet. Do you have any concluding thoughts before we go to audience questions?

MR. TUROW: Again, I'm sitting here thinking about all of these issues as they apply to authors. And of course, you know, our problems have to do with theft, piracy, which is, I'm sure, a problem across the board. And I'm also thinking about the fact that it would probably behoove us,

those who try to be authors' representatives, as well as authors, to explain this in the personal terms, which I think moral rights implicate and the way Melvin's been talking about it, that—yes, it's property. You're stealing property. But it's property plus. Creative work always has been, and moral rights recognizes that plus aspect to creative work.

I think it's important because it's not just being ripped off by the pirate. It's the personal insult that goes with it because look, my books are in the library. People can go read them for free, and I love that. But that's because I chose to participate in that system. And I didn't choose to participate in a system where somebody else is going to take control of my work.

MS. ISBELL: Okay. So we have about ten minutes for audience questions.

PROF. AISTARS: I have a question for Scott. How do you feel about fan fiction?

MR. TUROW: I think it's pretty interesting, personally. And you can't deal with this globally. It depends on exactly what is being done and what exactly is being appropriated, and then what kind of use gets made of it.

What I like about the moral rights discussion is that it involves us in discussing the spiritual element of creative work. I know when I write something that it's going to be meaningful, I hope, to an audience and that they're going to take it in and make use of that imaginative experience in their own way. Fan fiction is part of that process. Again, it's complicated. And it becomes particularly complicated if somebody's trying to make economic use of something that I want to control. But you know, the notion of it actually does appeal to me.

MR. GIBBS: I want to just kind of tag onto Scott's comments a little bit. People have to remember that we all started off learning, and we all started off copying other people. Creative people, in general, are not against emulation. We're not against remix. We're not against any of that. What we're against is this distance that's been put in between us and the community of people who would want to emulate us. It's like the person who taught me how to play bass—I learned by copying him. But then I was going to his house every week. The people that I was listening to their records to, there was a relationship beyond just, okay, there's a website and the website is scraping my data.

And I think to solve that, we kind of have to go backwards. And that's why I think the moral rights conversation is actually applicable in this era.

UNIDENTIFIED MALE SPEAKER 2: A question for David and Melvin. As I'm sure you know, § 115 of the Copyright Act provides for a

compulsory license that, once you've written a song, that anyone else without your permission can go ahead and record a cover version. Do you like that? Does it bother you? Do you think it bothers most songwriters, composers?

MR. GIBBS: So that's—get all Worldwide Wrestling Federation up in here now. It's two things that don't go together. I mean, I'm of two minds of this. I mean, our organization is pro-compulsory license. The reason we are pro-compulsory license—but there is a very strong caveat with that from our end, the issue is that there has to be fair market rate paid when a piece of our creativity is used.

The reason that I can support that is because, as I was saying earlier, you know, we all start off learning from other people. And for me, it balanced in the context of American culture. I hate to bring that up. You know, I hate to separate. I feel that it allows for creativity. Having said that, I 100 percent understand. I am 100 percent for autonomy. And in a perfect universe, I think that I would probably go a different way. But with the laws that we have now and the way this country is structured, our organization feels like compulsory is what we would support.

MR. LOWERY: What was the section of that act? I mean, I feel pretty much the same way Melvin does. I mean, I think people forget, though, you can cover a song in a venue and it's covered by a blanket license. And in theory, that whole process was—until the DOJ stepped in, it largely took place in the private market, right? I see that there are other countries that don't have compulsory licenses but that have private market solutions or free market, more or less, solutions to trying to license compulsories for covers and stuff like that.

The problem with the compulsory license is the economic problem. I think most people don't mind having their songs covered. So I'm against the compulsory license because it's—essentially, it is subsidy for—mostly, because it ends up being a subsidy for winners the government has picked in advance—technology companies, even large media companies previously. So I would rather not have it.

MS. ISBELL: Okay. I think this is going to be our last question.

PROF. GINSBURG: Thanks. I'd like to ask you the question that I was asked at the end of my talk before lunch. You've spoken eloquently about what moral rights mean for you. But how are moral rights in the public interest?

MR. GIBBS: I don't know if I—moral rights? How is it in the public interest?

PROF. GINSBURG: The question that I was asked at the end of my talk inquired how the public would benefit were authors to have a right of attribution. The implication of the question being that there's an opposition

between the interest of the general public and the interest of the author in being recognized for her work, with the economic and psychological benefits that might flow from that recognition. I think the questioner was suggesting that an attribution right might make the dissemination of works of authorship more difficult because third parties could get bogged down in trying to identify the author. This could lead to less dissemination of the work to the public, and any limitation on dissemination is bad for the public. I gave the law professor answer—

(Laughter)

MR. O'CONNOR: Yeah. Okay. Pretty good answer.

UNIDENTIFIED FEMALE SPEAKER 1: What, as authors, can you say about why—recognizing you as the creators of your work, why is that good for the public in general?

MR. TUROW: Can I take a quick swipe at that one? I believe that all of the rules and laws we have are aimed at stimulating creative activity. And if your work can be taken without attribution, it, to some, is going to be a disincentive to doing it. And again, you know, as somebody who's privileged to have wide readership and who doesn't pass a day without getting fan mail, I feel blessed by that, by the relationship that I've entered into with all of those people. And if you told me—leaving aside the, you know, incredible good fortune financially that I've also enjoyed, that that could be taken away from me because attribution would no longer be required, that would be a huge loss. It would change the meaning of authorship, and I'm sure for many author and other creators that's a disincentive.

If you're saying that there are certain mishaps in the Internet world that we all know about where attribution gets lost, that's one thing. But if you're saying that attribution in general is no longer going to be a right that we value, I truly believe that you have diminished the glory of authorship.

MR. O'CONNOR: I'll take a slightly different crack, if I could, at that, which is I agree with that. But also, what it gets you, is it gets you that public sphere, that public discourse. And that's what I was really trying to hone in on today, is that we had at times in the past—Professor Ginsburg knows—that with a lot of scientific societies, going back to the early scientific revolution—and yes, copyright was important on the science side, not just creative arts—it was a lot of manuscript culture, things being circulated privately partly because people weren't ready to take that stand and they needed some other incentives to do it.

So what does moral rights and attribution get you? Well, it's what copyright gets you as well. It gets people putting their stuff out there, publically releasing it—not necessarily free, economically, but putting it out there so it could be part of a robust public discourse.

MR. GIBBS: I would tag onto that. I mean, it's going somewhere that I wouldn't really go in public and going a little Darwinian. I think that if every—in attribution, you might actually have a situation where the best people win. I mean, there are a lot—I mean, I talked to a couple of friends of mine who are professional ghostwriters. Nobody is willing to go—nobody really wanted to share. So I'm just going to have to riff on my own on this. But I mean, ghost writing is not a new thing. I mean, who knows if the person who was actually painting for Rembrandt, maybe that's the person who should have been famous. Because we don't have attribution, we'll never really know.

I think—and in the context of the music business, the way the music business is in 2016, I know that a lot of people go uncredited that are propping up a lot of other people's careers. And I think that it would be better for the people of the world if some of these talented people actually got to get out from under these other people and got known for what they were doing. It would make the music world better. It just would.

MR. LOWERY: You mean the change a third—I mean change a word and earn a third?

MR. GIBBS: Yeah.

MS. ISBELL: Okay. Well, I think that's all the time we have. Thank you so much to all of our panelists.

SESSION 5: THE INTERSECTION OF MORAL RIGHTS AND OTHER LAWS

This panel discusses moral rights in the contexts of licensed and unlicensed uses of copyrighted works (including fair use and orphan works) and how authors use business arrangements and contracts to supplement statutory moral rights, as well as the interplay between moral rights and free speech, including commercial speech and political debate.

Panelists:

Professor Sonya G. Bonneau, Georgetown University Law Center

Paul Alan Levy, Public Citizen Litigation Group

Eugene Mopsik, American Photographic Artists

Katherine C. Spelman, Lane Powell PC

Nancy E. Wolff, Cowan, DeBaets, Abrahams & Sheppard LLP

Brad A. Greenberg, U.S. Copyright Office (Moderator)

MR. GREENBERG: This is the fifth session of the day: This is the Intersection of Moral Rights and Other Laws. As you heard earlier today, the U.S. adopted the patchwork model to providing moral rights upon joining the Berne Convention. In the U.S., our mechanisms for recognizing moral rights come not just from the Copyright Act itself, but also from a variety of other federal and state laws, as well as supplementation from private ordering.

The patchwork, though, isn't just the source of moral rights, it also determines the scope of the rights we have. And that's what we're going to discuss on this panel—not just where those rights come from, but how they're defined and how their definition is shaped by other laws. We'll look at the interactions and intersections within the Copyright Act itself, such as the fair use doctrine and VARA; at free speech considerations that exist outside of fair use as a traditional contour of copyright law; and at business and contractual arrangements that guarantee proxies for moral rights, such as those that Creative Commons created by license.

We have some amazing panelists here to discuss these issues. On my left is Professor Sonya Bonneau of Georgetown University Law Center. To her left is Paul Alan Levy, an attorney with the Public Citizen Litigation Group. To his left is Eugene Mopsik, a retired professional photographer and a long-time advocate for visual artists; then Nancy Wolff, a partner at the IP, media, and entertainment law firm Cowan DeBaets. And on the far end is Kate Spelman, who is here from Seattle where she's a shareholder at the law firm Lane Powell.

So I'm going to turn this over to the panelists for brief remarks to discuss the various aspects of these intersections and then we'll have a number of questions to discuss among ourselves. And then at the end, as you've seen, we'll have about five minutes, hopefully, for audience questions.

So Sonya?

MS. BONNEAU: Okay. Well, I hate to bring up VARA again, but it is one of the few moral rights legislative acts that we have. And I just want to talk about an intersection from a policy standpoint of VARA's place in the Copyright Act and the multiplicitous goals surrounding its enactment. Even though it's this tiny, narrowly circumscribed statute, it purported to do a lot. The legislative history talked about different things. One was a sense that copyright law doesn't help the visual artist who produced unique objects. Everyone else works on a system of number of copies sold, whereas for the visual artist, you sell, it's over.

The other was what you can think of as the true moral right perspective where it's about the individual's connection with their work, although to the extent that's what the Act was supposed to accomplish, there was really no reason to limit it to visual artists. But again, that's part of its incoherence. There's a lot of flowery rhetoric, romantic artist-type rhetoric whenever courts talk about it, regardless of whether they are actually thinking that's important.

And then there was the cultural preservation side to it, which is what I'm going to focus on. As Peter Yu discussed earlier, VARA's right against complete destruction of a work of recognized stature is actually the one aspect of VARA that is not required by Berne. So the U.S., despite its one-hundred years of resistance to Berne, went ahead and enacted something that goes a little bit beyond what was required, but not beyond in a moral rights way.

I think it was part of their idea that this could benefit the public because it assumes that the artist's interest, the artist who is enforcing this right, is directly aligned with the public interest. So art preservation's good. We can get moral rights, and we can also serve the public interest by saving great art.

The problem is, the Copyright Act is based on a progress model in which, as you all know, the author gets a temporary monopoly on their work so that they can profit from the number of copies sold; that's the incentive for creativity. And then eventually, the public gets access to the work. The preservation idea is completely different. It rewards the status quo, and it's animated by an artist when someone wants to destroy their work.

So you've got a very different dynamic, and I think that's partly why it hasn't worked well. And these combinations and intersections

become even more problematic when you consider that VARA's anti-destruction provision is the main provision that gets invoked. Very little of the case law involves attribution because the relevant set of artifacts is limited to unique objects, not copies.

MR. GREENBERG: Thank you, Sonya. Paul, do you want to jump in?

MR. LEVY: Sure. It's awfully hard to come out against moral rights. The catchphrase sounds so good. And there is certainly compelling stories told about abuses directed at works by certain offbeat individuals who are authors. But if moral rights are legislated, they'll be enjoyed equally by the mainstream commercial titans.

From a copyleft perspective, which is mine, I worry about the impact of legislating new rights on the public domain and, more broadly, on what might be described as fair uses and downstream uses. Because even if the newly adopted moral rights have fair use exceptions, you worry about the transaction costs of having to defend lawsuits in which fair use rights, or First Amendment rights, are raised as a defense, not to speak of the intimidating impact of demand letters.

To the extent that the moral rights debate really represents a struggle between individual authors and what might be called the corporate copyright exploiting industries, my sympathies are certainly with the individuals. But it's hard to see moral rights being legislated that give rights only against those exploiters. And moreover, it seems to me that advocates of moral rights for individual creators want to have it both ways. They want to make it easy to make money from expression using the incentives that copyright law fosters by licensing works through a system that facilitates the use for monetary rewards and taking advantage of the ever-increasing remedies that are available to copyright owners, the ridiculous extension of copyrighted terms whenever Disney's right are about to expire, the terrifying levels of statutory damages, advocacy of criminal enforcement programs with federal prosecutors so that rights owners don't have to have the bother of enforcing for themselves, and of course ready awards of attorney fees.

At the same time, some creators want to use moral rights as a club to stop downstream uses that they don't like even though they could've prevented many of those uses through licensing making the kinds of choices that Melvin talked about but that most creators don't want to insert into their contract either because it would make the works much less marketable or because they lack the economic clout to enforce them or to insist on them. So ultimately, despite my sympathies, it seems to me that before we give new rights to creators, we ought to think about cutting back on the rights that they already have.

Rather than talking about moral rights as a bundle moreover, we ought to be thinking about specific moral rights and it seems to me the proponents need to justify the need for a particular moral right to the extent—and this goes to the question that I asked Jane at the end of her talk. Most of what she said about the right to attribution was, well, we agreed to it. And there was a long answer about why we agreed to it and we can debate whether we agreed and exactly what we did agree to.

At the very tail end of her answer, we heard something about the incentive to create. And so what I want to know is do we not have sufficient creation? Do we need to have more moral rights in order to create an incentive to create?

We also talked about the interests of consumers but what evidence is there that consumers care about attribution? Yes, in trademark law the reason why attribution rights are important is because in certain circumstances consumers care about source. And when you're in a circumstance where the consumers don't care about source, you have relatively little trademark rights.

So what's the evidence that we need a right of attribution to serve real interests of consumers who care about source?

MR. GREENBERG: So Paul talked about negotiations and licensing agreements. That sets the next panelist up nicely. Gene, you want to talk about how creators guarantee themselves at least attribution rights and integrity rights through guild agreements, through contract, and how maybe it's a poor fit for some types of creators?

MR. MOPSIK: Well, I'm going to start out. I have to make an observation first. It's a rather strange irony that here we are at an event about author's attribution and integrity, and only one of the images in the program has an actual credit for a creator. We'll go on from there. And then I'm going to make some general comments and then I'll actually make some comments that are on topic.

MR. GREENBERG: To be fair, I think some of the credits are actually at the end of the bios.

MR. MOPSIK: All right. It appears to me that moral rights for all practical purposes are not on the radar of visual artists and photographers. It's not something that they think about in negotiations. They have enough trouble trying to figure out whether their work is published versus unpublished and moral rights just don't exist for all practical purposes. And onto VARA, commercial artists are excluded from any real protection.

I would say that VARA and Berne are both examples of an analog solution to what's now become a digital problem. The works that are protected by VARA are in fact the works that need the least amount of protection today and the commercial works are much more easily separated

from their identifying information than the limited numbers of works of fine art.

The preservation of identifying information such as a rights holder, contact information, and licensing history needs to be easily associated and maintained with images. Ultimately, its attribution is the Holy Grail for photographers. Without that, everything really falls apart. There's no end—there's no means to get to creating an ongoing income stream from works.

While it's trade practice for editorial work to customarily have a creator credit, the truth of the matter is that it's very difficult to enforce. And as Allan pointed out, yeah, you know, the contracts are there but the terms are there but the enforcement of the issue. And in some cases it's not enforcement, it's just the lack of having any leverage in negotiating and frequently when a photographer goes to a publisher, be it for textbook or consumer publication, the contracts they're handed they're told, take it or leave it. This is the contract. You don't like it, you don't work—you can go somewhere else.

And unless you happen to be one of those very rare photographers like Annie Leibovitz or, you know, one of the top of the food chain, you're out of luck. You don't have any leverage. It's move on. And you either accept those terms or not.

So another example. I had a discussion with Yoko at lunch and Getty Images contracts they generally call for a credit that reads the photographer's name, Getty Images. If you watch CNN or almost any other television media and you look for the credit for images that appear, it's almost always simply Getty images without the photographer's name. And why that happens—it can be any number of reasons. It's either it's too difficult for the station or they can't follow it or it's simply that Getty doesn't want to enforce that portion of the agreement.

MR. GREENBERG: Thanks, Gene. Nancy, do you want to jump in?

MS. WOLFF: All right. Well, great. I'm here today with my hat representing a trade association, Digital Media Licensing Association, which is the trade association of stock photo libraries and we had Yoko Miyashita here (from Getty Images), who is a leading member so now I don't need to explain what we do. That's very helpful. And it's good to follow up with Gene. Yes.

There's lots of trade practices and in print editorial you generally always got the credit, the photographer name and then the source, that is used the payment and that was fairly standard. Digital revolution has made it so there's more images being used ever, yet unfortunately, as even Yoko mentioned, often many of them are used just because someone has chosen to right click. And it's interesting because I do lot of education and copyright education as part of my role and most people are amazed that

there really is no attribution and, yes, you know, obviously if we're in the business of licensing, none of these works are subject to any kind of moral rights. But I think attribution goes well beyond moral rights and if you're going to look at a world where images can be licensed and has a future with technology, it's going to be very important that there is attribution and it exists in the form of a persistent identifier that can live with an image. And that that information can be always attainable.

Metadata, unfortunately, is not robust. It gets stripped. Half the software purposely strips it because the Internet wants to have small files and that means a lot of information gets lost.

Orphan Works is a bigger problem with visual images than anything else because they're orphaned from birth. It isn't as if, you know, that photo libraries and photographers want the works out there without information, it's just that the way they get published online that it seems to happen.

The industry looked at this probably since the Orphan Works Act in probably about—it was around 2006 through 2008, has started to consider technology options, which would include image registries. As Yoko mentioned, there's already reverse image search but to really make that happen there needs to be enforcement, whether it's through what the Copyright Office could possibly do through CMI, that that information, you know, can stay with the image and be there. And I think if we're looking at the other laws, I think because image licensing had been one-to-one and perhaps maybe overwhelming and seemed to be too difficult to find ownership, that unfortunately laws in other areas have broadened. For example, it seems like fair use, particularly with, you know, art attribution, expanded to make it easier to use images versus other works.

And then if you look at image search, which a number of years ago you do an image search, you get a little thumbnail and it would drive you to the source so you could actually go and have that image licensed. Now if you look at image search, you get a beautiful large display of an image because the money and the Internet now is keeping you sticky on a page. That's what the advertising dollars are. So there's no incentive to drive you back to the original source (creator). You know, you can see a small line that says, do you want to just look at the image or do you want to see the website? Well, you know, you have the image. That's all you need. So you don't—you're not driven back to the website.

So I think if there was a way to have persistent identifiers that stick and you can then introduce licensing models where it would be easier to license and maybe you wouldn't have, such an overexpansion of fair use, like in Google's books, because it's easier, you know, not to get permission and not to have some kind of licensing mechanism and you won't have technologies being built for the narrow takedown notices.

MR. GREENBERG: Great. Thank you. Kate?

MS. SPELMAN: My part in the choir here is the intersection of moral rights in real estate, physical property. I was a student of VARA. I thought VARA was something I understood. I was also a regular volunteer at California Lawyers for the Arts and if you can imagine on a foggy February of 1993, I alone arrived as the lawyer volunteer in a very abandoned pier warehouse where we welcomed anyone to come and ask copyright questions. And you can imagine that I was a little terrified when the door opened and in walked three giants. Really looking pretty rough with tattoos up their neck and I had never seen that before.

And I thought, “The end is near.” But indeed they walked over and they held up magazines and travel guides to tell me that they were indignant that their murals, which they had carefully painted on Balmy Alley in San Francisco's Mission District, had been reproduced without permission and, most of all, without payment, to be cover articles and to be indeed covers of some of the most famous travel magazines, travel guides for the City of San Francisco. And they were indignant in the sense that they didn't think it was fair. And I had the pleasure of telling them that indeed they were well within something called the Visual Artist Rights Act, the VARA, and we then began working together.

Scott Turow had the experience of his publisher saying, “Oh, that's doesn't apply to you.” I had a very similar experience in that when I contacted the relevant publishers in 1993, their first answer was, “What? What's VARA?” And their second answer was, when I showed them what it was at issue, they said, “That's not art, that's vandalism. That's not art, that's graffiti. That's not art. I don't have to talk to you. Good-bye.” And I had to then explain that the people of Balmy Alley had made their alley, the walls of their alley,—and many of you I'm sure have been to Balmy Alley and seen how fantastic these colorful, vibrant, magnificent murals are—that indeed there was consent and the real estate people were all in cahoots with this, and we pursued what was several very, very productive settlements for the community that had painted these.

Fast-forward to 2013, and I get a call from people in Detroit who tell me they have a mural issue and by now I think I've pretty much got the rhythm of murals. I think I figured out VARA and murals, and I got this square dance and I kind of know the dosey-doe and I think I'm doing all right, at which point we learned that what happened—the facts are so spectacular I have to share them with you.

Dan Gilbert, a Cleveland fellow who owns the Cleveland Cavaliers and is also revitalizing Detroit. He has, you may know, brought lots of street artists to come to Detroit. In one instance he brought six famous street artists to come to Detroit to paint each of the parking levels of the new parking building he had. He brought new, fabulous street artists, including

Banksy, to Detroit to take a floor so you'd always remember where you parked your car.

Well, Banksy finished his day of work for Dan Gilbert, who was very generous as a patron in commissioning this, and they partied all night and it ended up that he ended up in Hamtramck, a little town inside of the town of Detroit, and at the old Packard automotive plant, which as many of you know has been abandoned, literally abandoned, for twenty-six years. Abandoned to the point that no one's paid taxes, no one's done anything. It's just no-man's land.

So Banksy and his team stenciled a giant one of his favorite stencils on it and a gallery owner in Detroit noticed this happening and sent an armed guard down after Banksy and his team were done about dawn. They sent down armed guards until a 16-wheeler could be arranged to come down and they cut the Banksy stencil out of the wall of this building, put it on the 16-wheeler and then welded a frame around it, enjoyed it for a period of time, and then put it up for sale.

The auction was going forward, all was going well, until the owner of the Packard plant thought, "Hey, that's my plant. You took my wall." And so they raised their hands and said, "You can't do that. That's our wall." And it will amuse you to know that the judge in the city and county of Detroit said, "Yes, it is your wall and you haven't paid any taxes for twenty-six years. If you would like standing to bring this dispute in Detroit, you will need to pay back taxes, penalties, and interest, and that comes to X," which was almost three-quarters of a million dollars. And he quickly said, "Oh, I guess I don't have a problem." And the work then was sold at auction by the gallery company for about \$325,000. And when Banksy was contacted, he was like, "I had a good time. I knew what I was doing. Okay by me."

So my intersection is that of an area of law that you don't think of colliding with VARA.

MR. GREENBERG: This is a good way for us to sort of close the book on the VARA discussion, at least for our panel and that is that VARA tries to strike a balance between property rights and moral rights. Here we're talking about personality rights, the infamous property versus personality, but pretty quickly after VARA was enacted we had the *Helmsley-Spear* case in which the court says, well, these weren't absolute rights for creators and we have to assume that traditional property rights values have been left in place. Like in the *Five Points* case, we've seen similar rationale in recent years.

So I'm wondering with the balance that VARA strikes between property and personality rights, who are the winners and losers?

MS. WOLFF: Well, I would say it's pretty obvious that real estate wins over VARA in most situations. It just seems that no matter what, the

courts seem to favor property owners. I remember when I was a baby lawyer and first going to federal court, I loved this arch down in New York. This magnificent arch. And no one else seemed to like it but me, so it was taken down.

MR. GREENBERG: Not a work of recognized stature?

MS. WOLFF: It wasn't a work of recognized stature. It was fabulous, but, yeah. There's so many ways to wiggle out of VARA and artists can waive it so it seems that the property owners and the value of their property, and if it's inconvenient to have the art in the lobby or in the front, the property owners win.

MS. SPELMAN: That assumes someone owns it.

MS. WOLFF: Yeah.

MR. GREENBERG: Yes.

MS. SPELMAN: Other than Banksy.

MS. BONNEAU: Can I just add a quick point, which is that it's not surprising because American law is based on property rights, so VARA creates a dissonance, whereas attribution, as has been obvious throughout the day, is a powerful social norm that most people believe is appropriate to recognize. So, moving forward, I think attribution has a lot more grounding as a legal right in our society.

MR. GREENBERG: So that's a good segue. Jane Ginsburg in her keynote talked about attribution being in some of these cases part of the first factor in fair use. And that courts are looking at, you know, was the work attributed and so we get to the issue of fair use and attribution and appropriation art. Should Richard Prince have to credit—carry that somewhere on that photograph or photographs. Can appropriation artists still do their art and be expected to attribute the source of the work?

MR. MOPSIK: You would think that at the least when Richard Prince took Jim Krantz's Marlboro man, one of these iconic photographs, and basically performed copy work on it, enlarged it, it was then part of a significant exhibition at the Whitney—used on a poster I think to advertise the show at the Whitney, sold for substantial amounts of money, and he makes no identification at all of the underlying work. Nothing? I mean not a handshake, not a, you know—and I contacted Jim Krantz because he was a member of our association and spoke with him.

Unfortunately, he did not own the rights to the image because he shot for a tobacco company who insisted on work-for-hire. So he didn't have the rights to the work and the tobacco company really didn't care what Prince did with it, as long as they spelled Marlboro correctly. So, there was no issue there so Prince couldn't bring any action—I mean Krantz couldn't

bring any action but you would think there would at least be some acknowledgement of the underlying work at the minimum.

MR. GREENBERG: So when Paul was talking, he talked about how he didn't really see how this would benefit the authors and I think that raises a question of whether or not the moral rights would be transferable. If they're transferable, I think you run into maybe the same sort of problem we had with the reversion right before the 1976 Act. If they're not transferable maybe it looks more like the termination right, but they are waivable so maybe you don't get the same value. But the question that was risen by what Gene was saying was is if the owner of the copyright doesn't have the interest in making sure the work is attributed to who did it, who can step in if not the artist?

MR. LEVY: I mean it seems this goes to the question of whose interest is served by the moral rights. If they're freely waivable, then you're not providing any real right against the people whose use is based on permission, you know, traditional copyright exploiting industries, you're only getting rights against downstream users. And so then the question is, is the benefit that's secured by creating the right worth the imposition on the later users? And I think you have to make an argument for why the benefit is needed in order to—

MR. GREENBERG: Nancy has the argument.

MS. WOLFF: I'm thinking, you're putting it in a category where there is again winners and losers, and us and them, but I think the impetus for moral right it's a personal right that doesn't attach to a personal work but it's the right of an artist to always say, you know, that's my work. It belongs to me.

I mean I still remember doing contracts where an illustrator worked for a large animation company and they were told they weren't even allowed to put the work in their portfolio and I said, you know, you have a right to say you did that. But if there was a persistent attribution, you wouldn't worry about the downstream users and that right of the artist to always feel attached and say, you know, I created it. That when an artist creates a piece of work—and I tried Arts Students League so I know the difference between what I can do and my clients—it's a part of them. They are so attached. I mean I have clients that it's almost like their children. I had one of the artists from when Prince did the Instagram one, who contacted me, and his work was shown on art galleries as well.

So I think the benefit to the artist is a benefit of the public as well. There's a sharp divide that somehow if you benefit an artist, you've hurt the public because we're all artists. In this community of Internet, we're users, we're creators, we're a little bit of both and I think making those bright lines we miss having a dialogue.

MR. LEVY: I think that's great but when you create a right that's enforceable in the courts, that means you have the potential for litigation against an individual who doesn't have regular contact with lawyers, for whom if they have to spend \$15,000-\$20,000 to defend themselves for something they put on their Facebook page, they've already lost.

MS. WOLFF: But most artists have never gone to court. They can't. The only one that goes to court is Prince. He sells his work for a million dollars. I mean what the artists are really looking for now is the copyright small claims court where something could be resolved for the actual license where it wouldn't be so burdensome.

MR. MOPSIK: The right's holders are primarily disenfranchised right now. They can't bring a \$150,000-\$200,000 federal copyright case, you know, the average photographer is just unable to do that.

MR. LEVY: You're saying the rights holder or the creator?

MR. MOPSIK: Well, for me, most of my photographer friends are still the rights holder and the creator.

MR. GREENBERG: So if I can turn direction a little to where contract law seems to be doing more work, there are at least two areas. One is—and we can start with—the director who can retain final cut authority because they have the bargaining position or you have the editor who gets credited because it's part of the Guild agreements. The question here isn't, “What is the source of the right,” but “How important are those rights as provided for by contracts in Guild agreement? How important are they to authors?”

MR. MOPSIK: Well, I'll speak as a creator and author, and not as an advocate that from my standpoint and what we heard earlier from creators, I think creators do want to be recognized for the fruits of their labor and they want to see their name associated with their good works, and it's just part of the creative process I think.

MS. WOLFF: I'll speak for the film lawyers in my office who I get to do all of their fair use reviews, but I can tell you that credit is significant and I think it's one of those terms that gets—it's importantly negotiated and where it is and the placement and the size. It matters because it's that your career, that's your portfolio. You get to make your next movie based on the success of the one before and, again, having the acknowledgement for the fruit of your labor is, I think, is significant moral attribute but also financial ends of it.

MR. MOPSIK: Yeah, let me just say—and so I don't know how many of you watch television in December. You know at the end of the year I always seem to have the TV on when the Today—I think it's the “Today Show” they do this year-end photos in the morning and they show ten,

fifteen of what they, you know, say are the most fabulous images from the past year.

Invariably those images have no attribution. They don't tell you who the photographer was who took these fabulous images. And as my mother would say, they all sit there and cavil and this and that about, oh, what a beautiful photograph, how great it is, this and that, but they don't tell you who took the picture. I mean it's incredible. I mean how hard is that?

MR. GREENBERG: Well, what role then, to add to that question, does private ordering then play for these authors? I mean do they look at copyright law and say copyright law doesn't have an attribution right but I know I can get it from contract or do they just not even think in terms of copyright law when it comes to attribution or placement and they're really thinking in terms of deals?

MS. WOLFF: I think it's bargaining power and, yeah, if you're at a certain level you can require attribution. I mean, if we're talking just about photography, typically if it's something in advertising it's never been the norm and, you know, even I think Annie Leibovitz won't get credit in an ad. You know, she'll get it for the cover of *Condé Nast* magazine but not for an advertisement.

MS. SPELMAN: But I would say it's an enfranchisement tool. I say that particularly for those who work on murals that they get it. And they really understand it and it became a civics class now in the Mission District of San Francisco. It's actually in their curriculum. These kids really care about it. They think it's just—so they're really enfranchised because of it.

MR. GREENBERG: So that's really interesting because in 1996 this office did a study looking at VARA and the first I think five years of it, and one of the things I remember from the study was that something like half of—I think half of visual artists didn't know that your rights could be waived and something like a third or another half said that when they had blanché at a waiver provision it killed the whole deal. Has the climate then changed for visual artists? Do they feel like they have more bargaining power now to insist on certain terms or are we in the same place?

MR. MOPSIK: I'd say they have less leverage now than they've ever had in the marketplace because the publishers are scrambling for every dollar they can get out of the proposition and the rights package that photographers have been asked to sign is significantly expanded now because you're asked to give rights not only—I mean it used be twenty, thirty years ago, you know, it was North American onetime first publication print. Now it's, you know, on any platform now known or envisioned, you know, what's the term they use?

MS. WOLFF: Later created.

MR. MOPSIK: Right. Later created. You know, it's all forward thinking and—

MR. GREENBERG: Throughout the universe.

MR. MOPSIK: Right. Throughout the universe and it leaves you—it leaves the creator with nothing. It leaves you with no ancillary rights to market.

MR. GREENBERG: Kate, is the same true from muralists and sculptors?

MS. SPELMAN: No. What I'm seeing is there's this break here that seems pretty clear that those people who are dealing with photography, which is digital *ab initio* is—it's a much more volatile problematic area than what people are doing when they are as a community group painting on walls or as an individual painting on walls, or perhaps in sculpture as well. But I'm seeing a schism and I'm wondering what the other speakers think about this. Nancy?

MS. WOLFF: Well, I think with sculpture, in fact I was helping a UK lawyer look at a commission for a large sculpture agreement for a real property owner in Philadelphia and I was, like, so surprised I didn't see any moral rights clause or any waiver because I think a real estate lawyer did that contract and had no idea. I just could tell the way it's written but I think if you're doing something for a large museum, that you've read all the cases that deal with moral rights and they know how to write contracts that, you know, protects the interest if something needs to be moved or it's not finished or altered.

MS. BONNEAU: MASS MoCA actually did not have a contract with Büchel. The judge was somewhat incredulous.

MS. WOLFF: Right. So I think they learned from the MASS MoCA that museums need contracts and they learned that they should ask for waiver, and I think if you don't agree you might not get a commission.

MR. GREENBERG: So it's not just the type of artist but also the type of contracting party where the schisms are. I think our last question that I'll ask before we open up to the audience is we typically think of these two moral rights—probably because Berne requires attribution and integrity rights—but there are other moral rights. And I think there's an analog maybe in the digital age to the right of withdrawal, which is something like a right to opt out or a right to insist on nonuse. The direction, though, the fair use doctrine has moved against this—and the Google Book Search denial of cert today I think really hammers this home—but this is a question for authors is, how do I opt out of the system? Does that seem like that should be part of a moral right suite? Is this something that authors are thinking of?

MR. LEVY: A right to be forgotten.

MR. GREENBERG: I don't want to use that term because it's not, it's not. Right? This isn't like fully removing your work from the marketplace but it's a right to say, I don't want to be a part of that new distribution system.

MR. MOPSIK: Well, I mean the problem as Yoko pointed out, you know. A company like Getty is able to put certain limitations on works and the most common ones have to do with liquor and smoking, but beyond that, you know, once the work is out there and the identifying information is no longer with it, you have no control. And I've listened to people talk about contracts all day, well, yeah, contracts are great but ultimately you've got to be able to control the distribution of the work.

MR. GREENBERG: And that's a clear threshold problem, but assume that wasn't an issue, just assume in a utopian universe that you always knew where your work ended up and you knew if somebody was using it.

MS. WOLFF: Yeah, well one thing—I see one sort of bump in the road which is, I think, once something is considered or would be considered a fair use, then it's considered an authorized use and I don't know—that there might be a conflict between the right to have a work removed, particularly if someone has added a lot of substantial creativity to it, to the new work. I think there would—that might be difficult. If it was the work unaltered, you know, it's always going to be cached somewhere. I think in that way you can compare it a little bit to the right to be forgotten. In Europe where the original article never disappear but the links to it go down. I think it's very hard to wipe clean the web.

MR. LEVY: It's awfully hard to think of enforcing anything like the right to be forgotten in a country that has a First Amendment. And I think that's the problem with the right to be withdrawn to the extent that it's a fair use or maybe you don't have a fair use provision but you're just going to be litigating the First Amendment issues when you're asking a court to order the removal of something.

MR. GREENBERG: Yeah. I guess we have time for one last follow up to that so, Paul, just to follow up on your First Amendment discussion, some of the—a lot of the patchwork comes from outside of copyright law where the fair use doctrine doesn't necessarily or doesn't apply. What role there does the First Amendment play?

MR. LEVY: Certainly in the right of publicity area you end up applying the right of fair use by analogy and to the extent that you don't the right of fair use or even backing up what there is, the First Amendment has very broad application in right of publicity cases. Certainly outside the purely commercial exploitation situations, but there is a First Amendment right to engage in commercial speech. And then there's the distinction

between having it in an advertisement or having it in a product that's sold, and yet then you have protection for what's considered to be non-commercial speech in a commercially sold work, like the advertisement in the *New York Times* for which the *New York Times* was held not liable in *New York Times v. Sullivan*. This was treated as non-commercial speech even though it was an ad, so the First Amendment has ample role to play in these sorts of situations.

MS. BONNEAU: I think that's why Michael Jordan was successful in one of his lawsuits—he had several—because commercial speech gets less protection under the First Amendment—there's often a question of whether it's commercial speech or not, and courts engage in this type of cultural classification. Is a given work art, or is it advertising?

MR. LEVY: Right.

MR. GREENBERG: Great. Well, I think now we're going to open it up to the floor so if you have questions, just show me a hand and I can tell Donald or someone else to bring you a mic. Yes, Michael Wolfe?

MR. WOLFE: Thanks very much for that. I greatly enjoyed the panel. I'm going to preface this by saying that my organization, Authors Alliance, is in some ways also sympathetic to certain copyleft ideas, and we also endorse the idea of an attribution right. But all the same, I do find Paul's earlier point an important one and I think Daniel made the point before him regarding the real source of attribution controversies seeming to be from downstream, licensed uses.

So I wanted to sharpen that a little bit for the panel and see if we can't all address it and find out whether there's something else there. Assuming a waivable right, is there a practical value for authors from a waivable attribution right if downstream, licensed uses are the real source of the problem? And if it's not—if there's more than downstream licensed uses that are the problem, let's say Richard Prince, for example, although I think he is the exception rather than rule—where will there be an instance of an attribution controversy that is not also an infringement of the rights of copyright and remediable from that avenue?

MR. GREENBERG: Any takers?

MR. LEVY: Certainly to the extent, particularly when you're dealing outside the range of form contract with huge commercial enterprises with which a creator is dealing, are writings requirement and an explicit writings requirement that least provides a point of discussion and sort of conscious giving up or conscious taking, and I think requirements of clear and unmistakable waiver, for example, play a large role in many areas of law and I think they're valuable.

MR. MOPSIK: Just one brief comment. You commented on the difference between or the ability to remedy through something where

copyright infringement that you can in fact bring a case—and I go back to my earlier comment that by and large that's not a remedy. At least not a remedy for a photographer who makes \$30,000 to \$50,000 a year who most probably didn't register his work to begin with. There's no remedy for those myriad of uses that are being made of his work.

MR. WOLFE: That's a fair point from a procedural standpoint but would the moral right be more accessible to the author in that instance? I suppose there will be a follow-up.

MS. WOLFF: Well, I guess it depends on what do you mean by accessible. If an individual author has to try to locate all these downstream users, most of the problem is it's the impossibility of it. They could be anywhere in the world. How do you go after them? I mean think that's been a lot of the problem with anything that goes viral. I mean if you, you know, take something so you've made another copy rather than do what Getty Images does and you embed the image where you go back to the source, it's really, you know, an impossibility to whether it's under moral rights or copyright infringement really to enforce most of those downstream uses.

MR. MOPSIK: And I'll just say about—if in fact the moral right is waivable, I would venture to guess that when it comes to an negotiation with a photographer who's faced with what I call the thirty day horizon which is the next billing cycle and he's got to pay his bills and worried about rent and everything else, he's going to give up that right. No question.

MS. BONNEAU: But if the law gets too complicated, then it can have a chilling effect on, for lack of a better word, amateur users who access the web just like the big commercial players and so we have to think about how accessible the legislation would be to use.

MR. GREENBERG: Jane.

MR. MOPSIK: Yeah, we're not going to chase the amateurs.

PROF. GINSBURG: If it's not inappropriate, I'd like to venture an answer to the question, which is one big difference is between an infringement action and a moral rights action is if the author doesn't have the economic rights any more, the author doesn't have an infringement action, but the author could still have a moral rights action.

MS. WOLFF: Good point.

PROF. GINSBURG: I'd like to make another suggestion regarding downstream uses, which may require legislation (I have to think if it could be done without legislation). As Nancy says, nobody wants to go after downstream users. But what about the platforms? Could there be a 512 type claim based on attribution? In other words, if there's no attribution on the content that has been placed on the platform, that would be the basis to either have it taken down or attribution added. So an additional condition

for availability of the § 512 safe harbors might be a way for rendering enforceable and attribution right, which is distinct from the economic right.

MS. WOLFF: If there were persistent identifiers that readily identified the owner of a work, then maybe the issue of all this red flag knowledge would raise its head again. I mean, you knew what was going uploaded on your platform was not by the same name as who was loading.

PROF. GINSBURG: It would be interesting to construct all of this. I'd also point out, however, that an action against the removal of CMI is brought by the right holder; the right holder is not necessarily the author. There would have to be a legal basis for the author to protect that robust information.

MS. WOLFF: Yeah, the plus system is trying to do that right now.

MR. MOPSIK: It recognizes both the rights holder and the creator and licensors, licensees.

PROF. GINSBURG: Right. But I mean in addition to the technical basis, the legal basis.

MR. MOPSIK: Right.

MR. GREENBERG: Mickey, you got the mic?

MR. OSTERREICHER: Yeah. We've been talking about attribution rights versus economic rights but what we're seeing especially with photography is people see your name and then they contact you and say, well, we don't have a budget but we'll give you a credit. You want to talk about that kind of reverse problem.

MR. MOPSIK: Yeah, that's—you know, the attribution on the one level helps build the brand and so it helps the photographer become identified. At the same time, it certainly doesn't pay the bills directly and there are, as Mickey points out, numerous cases. Many years ago I did photographs of the lighted Ben Franklin Bridge in Philadelphia and the architect calls me up and he had the opportunity to license these images to use for his purposes and when he found—you know, I gave the fees for it and he didn't want to pay. He didn't want to do anything. Well, then two years later I get a call from AIA, they're giving this man some life achievement award and they want to use my photographs as part of the presentation thanking him. And so I said, you know, he had the opportunity to license these images and he turned it down. I said, what do you have in your budget to use this image in your presentation? And they said, well, we don't have any money but we'll give you a credit. And I said to them, look, I have to tell you. I make my money through licensing images and through creating photography, and quite frankly, I'm not an architectural photographer, I did these images of the bridge just because it was something that I happened to like so I did them on spec and then sold them to a

magazine, and I said that credit has no value to me. I said, I'm sorry. We can't eat the portfolio piece, you know. It doesn't work.

MR. GREENBERG: We have time for one more question I think.

UNIDENTIFIED FEMALE SPEAKER 1: I just wondered given how the CMI information is stripped from images do we really want to put an affirmative duty on fair users to be able to have to then find out who the author is in order to give them attribution?

MR. LEVY: Certainly from a litigation standpoint, as somebody who represents individuals, I would worry about that. Also wondering, you know, what are the remedies for having failed to do that. If it's simply injunctive that's one thing. If it's damages and attorney fees, it's very different. And yet if you don't have the monetary remedies, what's the disincentive to do it.

MR. GREENBERG: If I could ask a follow up to just sort of sharpen that question. What though is the real harm to a user in if they're going to use somebody else's photo or someone else's music or someone else's whatever, that they either use something that they know they can identify the author and credit that author or they don't use the work.

MR. LEVY: So I'm putting up a photograph on my Facebook which Facebook requires me to verify but—right, right—that I've got the authority but I think for the small user knowing actually how to stick that stuff in—

MR. GREENBERG: Sure, but that can be the reasonableness requirement, right?

MR. LEVY: Right.

MR. GREENBERG: Similar to—with broadcast where it's not reasonable to include the attribution. Maybe there it's, you know, for the user where it wouldn't make sense or there's nowhere to put it.

MS. WOLFF: There is a free website called TinEye and you can put the URL with an image in and it'll find out all the matches.

MR. GREENBERG: Yeah.

MS. WOLFF: You may not get the one that actually is the owner, but it is really fast and really easy. So I think this question now it might not be reasonable but I can see a future where this could be much easier.

MS. BONNEAU: There'd also be a question of how the secondary user used the work and how much of it. All the questions that come up in fair use cases would come up in asking when the right of attribution is triggered. For example, how much of the original photograph in *Blanch v. Koons* has to be used? So, deciding when you can demand an attribution right and how it would be satisfied could be complicated with remix.

MR. GREENBERG: Sure.

MS. WOLFF: Creative Commons has an attribution right on almost all their licenses, which are non-economic.

MR. GREENBERG: Well, the default used to be no rights reserved but they found that, like, something like, I don't know, ninety-seven percent of people opted for the credit created by.

MR. MOPSIK: They want to be identified.

SESSION 6: NEW WAYS TO DISSEMINATE CONTENT AND THE IMPACT ON MORAL RIGHTS

This panel invites perspectives from representatives from various content sectors regarding how moral rights are addressed in contractual transactions and distribution practices, issues related to licensed and unlicensed use of copyrighted works, and how businesses are addressing moral rights issues when developing new business models to disseminate works. Discussion also includes how authors use new and emerging technologies, platforms, and business arrangements to supplement statutory moral rights via contract and private ordering.

Panelists:

Chris Castle, Christian L. Castle, Attorneys

Alec French, Thorsen French Advocacy, representing Directors Guild of America

Scott Martin, Paramount Pictures Corporation

Stanley Pierre-Louis, Entertainment Software Association

Roxana Robinson, Authors Guild

Maria Strong, U.S. Copyright Office (Moderator)

MS. STRONG: Welcome, everybody. This is Session 6, which is on new ways to disseminate content and the impact of moral rights. My name is Maria Strong. I'm with the Copyright Office. We're joined here today with, to my immediate left, Scott Martin, who's Executive VP of IP for Paramount Pictures, followed by Alec French of Thorsen French Advocacy, representing today the Directors Guild of America. Next to him is Mr. Stan Pierre-Louis, who is Senior Vice President and General Counsel of the Entertainment Software Association. Next is Roxana Robinson, author and President of the Authors Guild. And at the end is Mr. Chris Castle of Christian L. Castle, Attorneys.

Today, as we've heard, as we have the opportunity to sort of wrap up all of the exciting things that we've heard in the panels before us, but also to really hear more about the importance of contractual transactions and distribution practices. On this panel, we have representatives from private corporations, from guilds, from organizations representing individual authors, so this is an opportunity for us to explore with you some of the issues that have been raised today, as well as at the end, we'll maintain some question time for you all to ask us.

So, with that, what I'd like to do is open up with a question for all of them. We'll go down the line and then we'll start up with more individual questions just to get the conversation going. So, for everyone, the question

that they have to consider and answer for you all is what are the most important elements present in your industry that contribute to supporting the concepts of attributing author's interests in the final work and for protecting the integrity of the author's contributions, and what are the biggest challenges that you face in your sector. And with that, we're going to start with Mr. Scott Martin.

MR. MARTIN: I should probably note that Steve Marks, who was supposed to be with us, is under the weather, which is why he's not here. I really wanted to have his placard in front of me because then I'd have complete deniability. Everyone would say, "Did you hear what Steve Marks said today at the Copyright Office?" And they wouldn't blame me.

I want to focus in answering Maria's question on something we haven't really touched on today, which is collective works. We've been talking a lot about individual works: works like books, magazine articles, photographs, sculptures. I come from the world of collective works, which raises a lot of issues that we haven't gotten into today, and so what I wanted to do was look quickly at how some of these issues are dealt with in Europe.

Do European moral rights apply to U.S. citizens? The answer is yes, no, maybe. So even as we go through these grids [referring to projected charts], when you're looking at countries that are the home of hardcore statutory moral rights, there's not a lot of agreement. For foreign work, which country's law defines who is the initial holder of the moral right? In other words, how is choice of law applied? In some countries, it's the local law. In some countries, it's the country of origin. In some countries, it's unresolved.

Who gets the moral rights in a work created by an employee on the job, in other words, a work made for hire? In some countries, it's the employee. In others, it's the employer. In still others, there are no moral rights in a work-for-hire.

Who is the moral rights author of an audiovisual work? It's all over the place. In almost every country, it includes the director. Some countries include the composers; some do not. Some include the producer; some do not. Several include possibly others, including France and Brazil and you can see on the chart. In some countries, it's undefined.

Who has the moral rights in a performance? Some countries, it's the performers—as was mentioned earlier today, I think by Duncan—in some countries, there are no moral rights in a performance.

If there's more than one holder of moral rights, which you'll always have in a collective work, can one holder alone block an act? In some countries, yes. Some countries, no. Some countries, unresolved.

After the holder's death, do moral rights survive? This is an easy one. Yes. In every country that has moral rights, they survive death. But

post-death, if there's more than one successor, can that successor alone block an act? In some countries, yes. Some countries, no. Some countries, not so clear.

Is a contractual agreement to waive moral rights enforceable? Can you waive away your moral rights? In some countries, no. In some countries, yes. Some countries, no... but...

What about limiting it? Can you agree not to waive your moral right but to limit your exercise of them? Again, some countries, no. A few more countries, yes, but with limitations. Usually, where it's a yes, but, it's a yes, but, for a very specific agreement to waive a very specific use.

So what this all highlights is the complicated nature of moral rights when you're talking about film and television collective works. Even in the countries that have these robust, longstanding statutory moral rights regimes, there's not agreement on how these issues are best dealt with.

So what is the best way to deal with it? My view of the solution is—and, again, just talking about film and television, that effective collective bargaining is the best way. And I'll stop there because I think a little later we're going to talk about collective bargaining and how it actually works.

MS. STRONG: Thank you, Scott. Alec?

MR. FRENCH: Sure. Well, the Directors Guild of America has long believed that due to the unique nature of filmmaking, its members deserve recognized statutory moral rights. I think the best way to explain this, actually, or to explain why, is I think a really eloquent letter that the Directors Guild and the Writers Guild submitted to the House Judiciary Committee for a hearing they did in July 2014 on this. I'll just quote from it briefly.

Funding a motion picture is not the same as actually creating it. Holding a copyright does not confer artistic talent on a corporate entity. Rather, it is the writer and director's creativity and vision that is decisive to telling a story. A myriad of intensely personal and visionary creative decisions give life to the motion picture. Creative expression like authorship is a human, not a corporate quality. We believe that authorship has to do with creative vision and that moral rights reside with those who have that vision. That's kind of the starting point for how the Directors Guild looks at these issues.

Then to the second part of the question Maria asked, I think the biggest challenge that writers, excuse me, directors face in asserting moral rights is a combination of two facts. One, there are no meaningful statutory protections for moral rights in the U.S. And two, and this is what Scott pointed out, in the US, motion pictures are considered works made for hire,

and so directors effectively don't have any statutory right to control the motion picture after creation.

MR. MARTIN: Adding to what Alex said, not only do we not have true moral rights legislation in this country, something we haven't talked about today that affects the DG in particular is that we have anti-moral rights legislation. I'm referring to the Family Movie Act of 2005 that creates a right to alter a motion picture to take out the smutty bits.

MR. PIERRE-LOUIS: I hope that wasn't a lead-in. So ESA represents the U.S. interests of video game industry, both for U.S. publishers and game console manufacturers. I'll touch a little bit on international, but will focus on our U.S. policy interests. The interesting thing about the way video game companies are set up is that they are partially like film studios, television studios, record companies, and they are partially like software companies. So on the one hand, there are third-party collaborations that occur where someone's created a particular IP, and that either gets acquired or gets put into a larger work, or maybe it is the work that gets distributed.

On the other hand, many video game companies actually hire everyone, including the composers and other contributors to the game, and so everyone's an employee. And so you've got this dichotomy of both how specific companies are run and how the industry may work in an acquisition phase or otherwise. But under both models, what becomes difficult is distribution if you need to get additional permissions all along the way because, under the U.S. legal construct at least, work-for-hire and licensing of that nature helps in terms of flexibility and setting expectations, assembling the rights.

In other countries, as I talk to some of my colleagues abroad, particularly in France, the key there is to have good relationships with third-party authors because the moral rights regimes are such that you've got to make sure that you're creating strong relationships to ensure that you can keep things moving, and that ends up being the key beyond any contract because if people feel like you're using their work in a positive light, in a way that they intended it to be portrayed, things get approved much more quickly.

With respect to U.S. companies, it would be much harder to assemble those rights in a moral rights regime. Ultimately, I think the challenge really is how do you change all the expectations that have built up over time, particularly if you have a company that hires lots of the collaborators that make up a video game. I think one of the challenges is how you maintain expectations while looking at the way the companies are really set up in the U.S., at least in our industry.

MS. ROBINSON: So I'll talk a little bit about moral rights and also how they affect the public. Somebody raised that question earlier, saying

how does this benefit the public if we're protecting the moral rights of the creators. We've heard that the moral right accrues to a work that's created by a single individual. Only that individual could create this particular piece of work, this book. I'll talk about books.

And as you have heard, the Supreme Court has decided not to hear our case, the case that we brought against Google Books. And I'll talk about that a little bit in terms of the way it affects our authors and their works. So one of the things that we believe should be contained within the idea of moral rights is that you have control over your work. You've created it, and you should be able to control it. At the very least, you should be consulted. Your permission should be asked for if your work is going to be put into an enormous database and disseminated to the public at the will of the aggregator and it will have nothing to do with you. So we feel that is a real problem in terms of the moral right of the creator.

So what has happened is that the moral right and the fair use notions have become sort of blurred. So what Google Books did was to take twenty million texts without the permission of the writers and put them into a database, which is accessible by anybody. So I'll describe a situation in which that usage is made, and how it affects the public, and how it affects the writer.

So we have a student who needs to write a paper on Anna Karenina. She goes to the university, she goes to her computer because it's easier than going to the library, and she types into Google Books "Anna Karenina, Leo Tolstoy, divorce." She only needs to know a little bit. She wants to write in her paper about the fact that Leo Tolstoy's sister had a disastrous affair. She had a child out of wedlock, and she considered suicide. The student wants to know when that happened, when Tolstoy died, and when the book was published.

It's very easy on Google Books. A woman called Rosamund Bartlett wrote a great biography of Tolstoy, and it's there. The student signs in, finds those facts, and signs off. She doesn't need to buy the book. The library doesn't need to buy the book, so it's done. However, Rosamund Bartlett—I don't know her, so I'm assuming this, but I'm assuming that she took at least five years to write this biography. She went to Russia. She interviewed Russians. She might've learned Russian for this biography. She read critical works. She read Tolstoy's works. She created a unique version of Tolstoy's life. She proffered that to a publisher. The publisher gave it peer review. The publisher edited it, copy-edited it, made it into an object, and put it out into the world for sale.

Now as an economic model, the work of those two people cannot be duplicated forever if there are no sales transactions and no revenues from it. Libraries traditionally have been the great financial supporters of nonfiction. So academics have depended enormously on them. People who write books for the academic public have depended on libraries and the

library systems. But Google Books can take the work of anyone they want. They have taken the works of twenty million writers and put it into a database that gives no compensation to the writers or to the publishers. That's a model that cannot be sustained, and that will cause harm to the public if we cannot keep producing excellent works that are created over period of time, through a great deal of research, and intellectual content that are peer reviewed and properly edited.

The student must find the right information. She cannot rely on Wikipedia or somebody's Facebook page. That is not going to do it. So she has to go to a professional source with material that is absolutely reliable. She goes to a book that's been published by a professional publisher.

Interestingly, Chris sent me an article about Google Books that was published in 2009 when they were being accused of doing this with—that was—in a way that was damaging to the writers. And Sergey Brin, who is the co-founder of Google, said ingenuously, “We feel that this Google Books is part of our core mission. There is fantastic information in books. Often when I do research, what is in a book is miles ahead of what I find on a website.” Who knew?

But the point is that books are actually necessary for a society. It is necessary for the culture to have access to them, and in order to keep producing good books, we have to have compensation. That's all.

MS. STRONG: Thanks, Roxana. Chris?

MR. CASTLE: Well, I would just add that one of the things that doesn't get discussed a lot with Google Books as the non-display uses, also known as corpus machine translation, for those of you reading along, which is how they have such a good translation engine. Because when you teach a machine languages—you do it by comparing text strings and one of the ways you get a lot of text strings that are identical phrasing is to have books that've been translated into a variety of languages, which the publisher paid for, which the author—right, so anyway, I can go on for a long time that.

So I wanted to talk a little bit specifically about songwriters and recording artists who are subject, in one way or another, to—some might call it the boot-heel of the government or others might call it compulsory licenses under sections 114 and 115 of the Copyright Act, or what I would call near-compulsory licenses under the ASCAP BMI Consent Degrees.

So while there are reporting requirements for royalty accounting in these compulsory licenses, there's virtually no attribution requirement in them. So for example, if you were to check, I would put even money on this, that the most used artist on Sirius XM is various artists. The reason it's various artists is because Sirius doesn't go out and buy the album for every hit that they want to play on the radio. They go out and they buy a compilation record. And then they rip that compilation record, which they're allowed to do, into their system. And there's someone, usually a minimum

wage employee, who we also used to call a teenager, who is doing data entry, right, in their system. And they come to who's the artist, and they look on the label copy, and it says various artists. So they put in various artists, right? And there's nothing that requires Sirius to do much more than that.

So consequently when that kind of reporting comes to an organization like Sound Exchange or somebody who has to figure out who to pay and how much to pay them, they're looking at various artists, and they're trying to figure out well, what does that mean? And so then they have to go back and take the song title, and so on, and so on, and so on, whereas if there had just been a requirement of proper attribution for the artists in that case in the first place, that wouldn't have been a problem or would've been less of a problem, and it wouldn't have turned so much on how that data entry person was feeling that day.

I would also point out that no digital retailer requires the delivery of songwriter credits, producer credits, or musician credits. So iTunes has no requirement that anybody, any label, that's uploading or as they call it, rather, discomfortably, ingesting music into their system, actually provide them with substantial credits. In fact, there was not even a place for composer credits in the iTunes info section, which you can check when you go home, that even had a slot for composer. Now they have a slot for composer, but that's sort of voluntary on the part of the record company as to whether they're actually going to input any data there, and there's nobody that checks whether it's right or not.

This is really bizarre when you stop and think that record companies have extraordinarily detailed label copy management systems where they keep track of all this. Because when you put out a CD, for example, someone, namely the artist, usually, approves all the credits that go on that CD, and they want to have at least the songwriter names. They may put the publisher names on there, too. That lives in the background in the label copy management system, so if you see songwriter names on the label, on the actual inlay card or the actual credits in the CD, somewhere in the background on the label copy management system, because it feeds into the mechanical royalty system, there's the names of all these publishers that go with those songwriters. There's producer names; there's musician names.

There's a whole generation of people that's growing up not knowing who played on what, you know, and that's mostly because there's really no attribution requirements that are meaningful for any of these digital retailers whereas on the label side, you would tend to have them because they still put out things in physical. There's going to come a day when that's no longer the case, right? So we haven't got there yet. We're not at that inflection point, but that day is coming.

Yet, on the song side, the songwriters can't say no. They have to license. They have to license under those conditions. They have to license

regardless of whether the person has paid their mechanical royalties, knows who they are, knows who to pay. That person can continue getting compulsory licenses. If they've never credited one songwriter, they can continue getting compulsory licenses.

Now you can always sue but as we've heard earlier today, for the individual creator or the individual songwriter, particularly as we go circling down the drain in the declining revenues of the digital reality of the music business, those people aren't going to sue anybody. I just wanted to point out that there would be, I think, a pretty easy fix, although I'm sure the Copyright Office is in full compliance. But it'd be a pretty easy fix to say well, if you're going to get a compulsory license, then here's what else you have to do, too.

MS. STRONG: Thank you, Chris. Thank you all. We've had a lot of conversation today on a couple of issues: contracts, technology, the role of fair use and how it plays into moral rights, questions about commercial speech. So as follow-up on what Scott started, I'd like to follow up with everybody a little bit more on what do you think the key contractual terms or elements that you have in your industry that offer these moral rights type style of elements. I mean, we've heard mentioned already some of the collective bargaining and some guild contracts, but if we can maybe start a little bit that and if you can be specific on what are the elements that support that kind of moral rights-like solution.

MR. MARTIN: Well, in my world, which is governed by collective bargaining, which as I said, is the best solution. It comes out of the Guild agreement. So for example, the WGA agreement, the Writers Guild agreement, specifies who gets the writing credit on our films. We cannot stop ourselves from hiring writers on movies. It's never good enough to have one. We have to have two, or three, or four. And then it becomes an issue over who gets written-by credit, who gets story-by credit, who gets re-write credit. And all of that is governed by the WGA. We submit a notice of proposed credit, but it's the Guild who decides who gets the credit, which is why no matter how powerful Michael Bay is as a producer and director, you will never see him get a writer's credit on a *Transformers* film. The Guild will never give it to him.

By a show of hands, how many people know the difference when you see a writers credit on a film, for two names and there's an and, "A-N-D", between them, or an ampersand between them? How many of you know what the difference is? I see one and a half hands. An ampersand means that they wrote as a team while "and" means they wrote sequentially. Even a moral rights-aware group like this one, doesn't know that distinction. But believe me, the writers know.

Similarly with SAG, with the Screen Actors Guild for performers, we have a long list of credit obligations. For example, on every film there has to be a separate card for the actors. It has to be readable in terms of

color, size, and speed, so it can't fly past. It must be one of the first cards you see in the end titles. We are required to list a minimum of fifty actors. And that's what's called the SAG card. There are significant financial penalties if we either don't do it at all or don't list all fifty. And there is an obligation to correct a print. So if we get it wrong, we have to correct print, even after they're in distribution.

Beyond that, we are required by the collective bargaining agreement with the Screen Actors Guild to obligate exhibitors, distributors, broadcasters not to cut the credits off. So AMC Theaters, in order to squeeze in one more showing a day, can't cut that five minutes of credits off the end of the film based on our contractual obligation with them.

Those are levels of protection that you'll never get from a statute. And that's why direct negotiation is the best route when where it's available, as it is with commercial film and television productions.

Just to add quickly, there's also integrity issues, integrity rights that come out of this. We've been focused a lot on attribution, but the Screen Actors Guild has a reuse clause. We cannot reuse a performance in any other work without the permission of the performer. If we do it without the permission of the performer, there's a financial penalty, which is three times the daily rate for the actor times the number of days it took to film the scene times the number of actors in the scene. So it's a very significant financial deterrent. But at the same time, there's a balancing because I talked about the veto right and how does it work statutorily where you have a collective work and one author says I'm cool with this new use, and another author of the same work says no. Under the Screen Actors Guild, if there's a holdout—all of the actors consent to the new use, consent to the financial terms, but there's one holdout—we can submit it to the SAG board of directors, and the SAG board of directors decides whether or not they can override that one holdout actor. So there's a mechanism, and it's a mechanism that's run by the performers to get around that.

MS. STRONG: Others?

MR. FRENCH: I guess just following up in the movie vein, Scott's absolutely right. Through collective bargaining, some of the talent has managed to secure creative rights. As I've become familiar with over the last couple weeks, it's all right here in the Creative Rights Handbook for Directors. And there are things that are facsimiles of rights of attribution and rights of integrity that you'd find in a moral rights regime.

On the credit side, directed by is, you know, the credit, the attribution that's given to directors. They're very specific rules on the lettering, the size of the lettering. It's either the last credit you see before the movie starts if the credits are at the beginning or the first credit you see at the end if that's where the credits are. So that is a facsimile of a right of attribution, and there's a facsimile on the right of integrity side. There's

something called the director's cut where again, it's through collective bargaining. Directors have the right to present the producer with the version of the movie, their cut, after a set number of actual weeks that they're allowed to prepare that cut, and they're allowed to present that to the person in the production studio who has authority, basically, over the movie, not over someone below him, and no one can cut behind to kind of change it before it goes to the new person.

So there are hard-fought creative rights that are part of the collective bargaining agreement that are similar to what you find in a moral rights regime, but I want to be clear, that still doesn't mean that Directors Guild feels that its complete, that all the rights that they'd like to be protected are protected against all the parties they'd like them to be protected against.

MR. PIERRE-LOUIS: Yeah, in our industry, it can vary widely, depending on the company, how the game is made. Often times there'll be a lead designer who leads the effort. There might be a producer, which I'll talk about in one second but there can be—there have been reports that Grand Theft Auto, one of the big games put out by Take-Two Interactive, took 300 people to put that game together. And they roll these out every few years. And you can imagine trying to figure out all the various credits for someone who came in for this portion or that portion could get complicated. But often times a lead designer or designers will be the ones who get a lot of the credit.

In Japan there's a phenomenon of producers—those of you who have not played modern games probably aren't aware that they feel very much like reality or like movies. They have story lines. They have plots. They change depending on what your character does, and they very much are cinematic.

At last year's E3, which is the most important expo in the video game industry and where many retailers see the new video games coming out, there were lines out the door for a few of the Japanese producers who were visiting because people rarely get to see them here. And so they really are treated like rock stars and the likes of J.J. Abrams kind of comment on their works and play their games. But it's very cinematic, but that's where it becomes complicated. Is it more like a film or is it more like software? And it will be very dependent on the structure of the game and the structure of the company.

MS. ROBINSON: The best protections that authors have traditionally enjoyed have been that of copyright and that has protected the work until we entered into the world of digitalization and electronic publications. So authors have lost a good deal of protection that copyright offered once their books can be taken without permission and put into other people's databases and disseminated. What we would like to do at the Guild

is to create a system that will offer some kind of market-based collective bargaining, collective licensing, and we're working on that.

Other than that we have—there are other issues. Generally speaking, authors do have the rights of integrity, but we're seeing some kind of odd sort of piratical incursions into people's books. And we're seeing people's works translated into foreign countries, and into foreign languages and sold there. Sometimes with a gender reversal, so it will be a romance book heterosexual and it will turn up in Germany being homosexual. Same book, same title, different author, same,—but a pirated version. So these are things that are going to be very complicated to deal with. I don't have a solution right now where every time something new comes up, we have to figure out a different way of dealing with it.

So I think the digital era is just going to keep on offering new possibilities in every direction, directions that we want to go in and directions that we don't want to go in.

MR. CASTLE: I'm going to sort of speak generally about both songwriters and recording artists, because you get at it the same way in their deals. So if a recording artist is signing with a major label in particular but really any label, and if a songwriter is signing a co-publishing and exclusive administration agreement with a music publisher, you typically will ask for something called marketing restrictions. And these are sometimes commercial in nature but more often than not, they are more in the integrity spectrum.

So you would say, for example, you can't license my recording for advertising really of any kind by the time you get through all the different examples. You can't license my recording for a sample. You can't license my recording in certain types of motion pictures or television. You can't release my recording in certain kinds of compilation records. So there will be a number of these exclusions that the record company just is agreeing to up front that they won't do.

Many of those restrictions are included in the first draft as a general rule. There are things that are leverage points that go beyond that and depending on the artist, the artist may have some particular bugaboos, you know, they want to see written in that contract, even though you say to yourself no way the label's ever going to actually do the thing the artist wished to constrain the label from doing, but the artist wants to see it. And some of these are not trivial, either. There was a time before the end of apartheid where it was absolutely standard to have your artist ask to have their records not distributed in South Africa. And the labels would agree to that constraint. No one would argue with you.

The leverage point really comes in more whether it's during or after the term. So I'm not saying there's not a sense of leverage and how bad they want to sign you or if it's a renegotiation, how bad they want to give

you new terms. So realize if you say it's during the term, then that means as long as that artist is a current roster artist, let's say, or is still in contract with a publisher, then these restrictions would apply. If it's after the term, that means forever. Right?

So when you stop and think that record companies and music publishers carry unrecouped balances at historic dollar figures, do not charge interest, and those will never increase based on inflation, telling somebody they can't ever license your recording for something that might be a nice payday that would help you get recouped and help them recover their investment is kind of a tough conversation. But it can be done. Or it can be done in a limited number of circumstances at least.

So that's sort of how it's addressed. Similar to the way the guilds do it, but it's addressed in a one off because featured recording artists don't have their own union. While they may be members of the AFM or they may be members of, say, AFTRA, they don't, in their capacity as featured recording artists, have anybody but their own lawyer negotiating on their behalf in a collective bargaining agreement.

MS. STRONG: Yes, I'd like to follow up on your point there, Chris, about market restrictions. Earlier sessions today have talked about issues involving circumstances where the author may find their work being used in objectionable circumstances, whether it's a commercial speech issue or a political ad. I was curious to know, to those of you who are copyright owners maybe not the original individual artist, but can anyone chime in on your thoughts about how you want to or how do you control or somehow guide uses in those cases where maybe circumstances involve objectionable contents that you might not want to see your work associated with? Your final work product. Anyone can chime in.

MR. CASTLE: I can talk about samples. Right. I used to work at A&M Records in Los Angeles for a number of years. And during sort of the '90s when we had the rise of hip-hop, we began to have a lot of sample requests for new artists to sample recordings in our catalog. And so we had to decide what we were going to do as a label about these sample requests and how we were going to approach it.

So basically what I decided to do was I said okay, I'm going to take my cue from the artist who is being sampled. In other words our artist. And if that artist, regardless of whether they have the right, regardless of whether they were in contract, regardless of anything, if that artist wants to be sampled in this way and have their recording used in the requested way, then I will back them. I will then take over the commercial terms so I'm not completely giving up our control, but I will take my initial cue from our artists. And I don't care how much money they offer. I don't care what it is. If our artist doesn't want to do it, we're going to back our artist. Or alternately, if our artist does want to do it and I don't want to do it, which happened with Sting on "Every Breath You Take" for example, we did it

because Sting wanted to do it and I said okay in for a penny in for a pound. That's how we do things around here.

But we didn't have to. We made a conscious decision that it's more important to us if we ever thought enough of that artist to sign them to A&M Records, you know, if Herb Alpert and Jerry Moss ever wanted to be in business with that artist, then we were going to back the artist in that situation and let them control how they wanted their persona to be replicated.

MS. STRONG: Thanks. Others?

MR. MARTIN: Because of the political season we're in right now you hear some of these claims where works are used in political advertisements. It's more often with music, for example when a candidate uses an iconic song as their anthem at rallies. And you've heard about Bruce Springsteen going after politicians who've done this. Neil Young has gone after some politicians. It occasionally comes up with movies and TV where clips are used in political advertising. I would say most of it is in local campaigns, such as school board campaigns, and mayoral campaigns, campaigns where the candidates are creating the marketing themselves. There's not a big budget, and either they don't have copyright or trademark advice, or they don't think anyone's ever going to notice it.

When we do get complaints in those situations, 99% of the time it's from the opponent in the race, as opposed to from the talent. And for us, it's a little tricky because our works are generally not being used as like a theme of the campaign the way a song might be. So we're not as concerned about passing off. If you're talking strictly about copyright, there might be a potential fair use argument. And of course we also worry about going after somebody who then gets elected to a high office.

I think in the 24 years I've been at Paramount, I remember one instance where we went after a national campaign. And it's because one of the most iconic, famous directors in Hollywood, his granddaughter, who actually moved in with him when she was eight years old because she once told me that he was a lot more interesting than her parents, was very upset during the last elections when the Republicans ran a TV ad against Obama using a clip from one of her grandfather's movies and altering the clip. This individual is a fairly well known life-long Republican, so it wasn't a political thing; she was very upset about her grandfather's work being altered and misused. And we contacted the campaign. At that point we didn't know who was going to win so we were very friendly with them, and they agreed to stop running it. So we do ask.

MS. STRONG: Yes, Alec?

MR. FRENCH: I guess I'm going to come at this a slightly different way because objectionable is in the eye of the beholder and Scott mentioned the Family Entertainment and Copyright Act of 2005, which I had the great

pleasure of working on when I was on the House Judiciary Committee. And there's a case where directors found what this company, ClearPlay, was going to do with DVD movies to be objectionable. They had created software that was going enable the consumer using the software to excise, as you said, all the naughty bits. You know, sex, swear words; could've also in another generation of the technology excised violence or whatever. Whatever was considered objectionable.

Well to a director, obviously you talk about right of integrity and attribution, one, they don't maybe want to be associated with what's presented on the consumers' screen that is not their artistic vision, or two, they don't want to let someone do this, basically destroy their movie and their vision of the movie.

Now the problem is that at that point in time, the studios did not want to take a case against ClearPlay. The copyright case probably wasn't a very good one, and it was also a politically charged time, so going against companies that were trying to clean up movies wasn't the politically smart thing to do.

But that left directors with really no recourse because they don't have statutorily recognized moral rights. And they did bring a Lanham Act claim—they filed a suit. And of course, all of this exploded into legislation that actually, as Scott said, rolled back, you know, made things worse for directors.

But the point—and I heard this brought up. I wasn't able to be here all day, but clearly one thing that's been discussed, and this is the core of the concern is, you know, in a collective bargaining agreement with the studios, directors can secure certain types of rights, attribution, integrity, and have and can potentially even have those rights extend to parties with whom the studios are in privity. And there are areas where we've done that.

But in regards to a third party who has no privity with the copyright owner, directors don't have any ability to protect what they consider to be their rights of attribution and integrity. So there, really when they see something objectionable, there's not much they can do about it.

MR. MARTIN: I always thought that was a very interesting act by Congress to say that you have a right to watch a movie the way you want to watch as opposed to just not watching it at all. When we were making the last *Jackass* movie. I would come home at dinner and talk about the unbelievable things the *Jackass* boys were doing that day. And my boys, who were in elementary school at the time, would say, "Daddy, when do we get to see the movie?" The answer was, "Never." And that's an appropriate answer. Actually, my answer was: "You can watch it when hell freezes over. Or when Mommy goes out of town." About a year later, my wife went out of town, and one of the boys said to me, "Okay, we're watching *Jackass*

tonight,” and I said it was a joke. They said no, it was a contract. Clearly there is a future lawyer in the family.

MS. STRONG: Just to follow up, earlier today, Professor Ginsburg made some interesting observations the possibility of taking a new look at the first prong of the fair use doctrine. What do you guys all think about what she said today, and how might that play into your issues of protecting moral rights for your constituencies to the extent—I'm saying moral rights, moral rights-like.

MR. MARTIN: One thing I think is interesting about that concept is there are a lot of different impediments to getting moral rights legislation in this country, but one of the big ones I think is the one-size-fits-all mentality. And to come up with a statute that works for a photographer, or an individual writer but also works with a collective work or work where there are strong collective bargaining rights.

If you try to have one-size-fits-all, you're not going to satisfy all of those, in Europe, they do not have effective collective bargaining for screenwriters, directors, and actors. That's largely for antitrust reasons. My wife, Katherine Sand, for many, many years, was head of the International Federations of Actors in London that worked on unionizing performers around the world. It's a real challenge for them because of antitrust laws, not to organize but to bargain collectively. One thing I like about the idea of working it into the fair use factor is it's not one-size-fits-all. You would be able to look at things like is there a collective bargaining agreement, or is it a collective work. So I think that's an interesting concept.

MR. PIERRE-LOUIS: I think the other thing there would be what is the scope of what we might call moral rights. So as I said before, in the U.S., it's different than in Europe for our companies where on a moral rights question, if there's someone who's owed the right of attribution or integrity, they confer. In the U.S., the issue doesn't come up as much, but what does come up are right of publicity claims in cases in which real-life people claim to be depicted in games.

And how do you deal with that? Is that something that gets codified in some different way than the way it's been dealt with now? And the way it's being dealt with now is actually rather confusing. There was a cert petition that was denied a few weeks ago in the *Electronic Arts v. Davis* case. But that would've been a nice way to try to figure out which of the five various tests was the one that was the most applicable instead of the current regime that may vary depending on the jurisdiction in which you bring your claim or reside. And so I think scope is going to be very important there, as well, because you're dealing not only with personalities but historical figures and all kinds of depictions that might require the type of licensing that might make certain games not feasible to make.

MS. ROBINSON: I agree with the idea that it's not going to be one-size-fits-all and for writers—I mean, what we're seeing is this gradual dissolution of the notion that writers have control of their work like other creators. And the idea of moral right is an inherent one. It's something that you can't lose. This is something that you have created. It didn't exist before it existed in your mind, and you have a right of intellectual ownership over that property. And we're seeing that right being drained.

So for example, with our authors who—all of whose works were put into this database without permission, the fact that piracy exists so that the onus now, the burden now is on the writer to try to track down the pirates, the pirate sites, over, and over, and over, and request take-downs, and the pirates simply put them back up.

So the idea of moral rights, a kind of moral ownership of your work has sort of vanished. I think we're going to have to see more attention being given to that notion of inherent right that the creator has and which cannot be taken away from him or her, and we have to figure out solutions, collective licensing rights, and situations in which it's not up to the writer to try to track down the pirates all across the world and to issue take-down notices. There has to be a better sense of protection for the created works.

MR. CASTLE: I think you'd have to square the *Lenz* case with Article 27 under the Universal Declaration of Human Rights. Although in the Ninth Circuit, we do a lot of considering, but there's no consideration. David Lowery actually wrote a comment, and I'll speak for him hopefully correctly as he had to leave, wrote a comment on the 512 study that the Copyright Office is doing where he said that the way he reads the *Lenz* case is he will essentially, as an individual copyright owner, have to go out and get a legal opinion every time he sends a take-down notice to make sure he's properly considered fair use aspects of the use by the downstream user.

So you know, how the moral rights would fit in, if that's the law, and if the law is that Google can claim fair use for Google to copy thirty million books, it's really hard to say exactly how moral rights would—of any kind would fit into this. But the reason I mentioned Universal Declaration of Human Rights is because that article essentially acknowledges moral rights, although it's the Universal Declaration of Human Rights, so I don't know how much anybody legally is really empowered by that, although it's certainly a relevant document for the good and evil aspect of this.

Article 27 essentially states that everyone is entitled to the moral and material benefits of their work. So if we're required to explain what the benefit is to the public of moral rights, then let's take Article 27 as evidence, and if not then let's start at Article 1 and kind of work our way down and see how we do.

MS. STRONG: Thanks, Chris. I think we've run out of time for questions here from the dais, but we are going to open it up to the floor, so the mics can get ready. As the mics are coming to you, I just wanted to let you know I received some news that the resale royalty case in California was dismissed this afternoon. It was—apparently the case—it says it was preempted by first-sale, so for those of you who are following resale royalties and related litigation, there's the second interesting piece of litigation news today. So we open this to the floor. We did not get a chance to talk about technology and CMI, so perhaps folks from the floor might have a question. I'm looking. I'm looking. Oh, to Ben, Ben Ivins.

MR. IVINS: Question for Chris—you had, if I understand correctly, noted that neither compulsory licenses nor collective agreements, ASCAP BMI consent agreements address this issue. Do you know if the songwriter community has ever sought either of those to be included? I mean, have they ever said in the ASCAP BMI negotiations, we want to negotiate this? Have they ever talked about, you know, 115 or whatever saying this should be an additional element, or have they not pushed the ball?

MR. CASTLE: I'm not aware of it but then again, the compulsory license rate was two cents for sixty-five years or so, and I don't know why that is either. But I'm sure someone has an answer for it, but it is not me. Given that it would be if you just applied inflation to the 2 cent rate, it wouldn't—I think the compulsory license rate would now be something like 85 cents instead of 9.1.

MS. STRONG: Well, with that, let's stay on tune and let's thank the panel for their participation. Thank you all very much.

SESSION 7: WHERE DO WE GO FROM HERE?

Moderators:

Katie Alvarez, U.S. Copyright Office

Matthew Barblan, Center for the Protection of Intellectual Property at the George Mason University School of Law

MS. ALVAREZ: Hello, everyone. Welcome to the concluding session called Where Do We Go From Here. I'm Katie Alvarez. I'm an attorney with the Copyright Office.

MR. BARBLAN: I'm Matthew Barblan, the Director of the Center for the Protection of Intellectual Property at George Mason Law School.

MS. ALVAREZ: And so as you can see, this panel's a little different. We're the two moderators, and you guys are all the panelists. So Register Pallante had mentioned earlier that moral rights aren't really talked about that much in the United States and that today's symposium is the starting point of that conversation. So now that you've had a whole eight hours to digest everything, we want to turn it over to you and hear what you think. So what's next for moral rights?

Kind of some questions the think about: Is the status quo good enough? Do we need some changes? Is that change legislative? Is there room for any voluntary or non-legislative initiatives? Also, are there any issues that came up today that are especially important to you or issues that came up that sort of raised more questions, since we covered a lot today.

To start off this conversation, Matt's going to go through a few highlights from today's symposium.

MR. BARBLAN: Before we start the open mic session, I think it's helpful to go over a couple of the highlights, some of the things that stuck with me from today's session just to jog people's memories and to give you some ideas for comments and thoughts on these issues.

I also want to say that the things that I mention are neither exhaustive nor particularly well curated. They just happen to be the things that stuck out to me. And I hope that talking through some of the comments that were made and the ideas that were raised will help all of you think of your comments for what we could do going forward or any thoughts or complaints about things that were said today and, of course, your helpful advice about what the Copyright Office should do in the moral rights space.

We heard from a wide variety of viewpoints today. Early on we heard that moral rights are like the Zika virus; ideally we should eradicate them completely, but at a minimum we should keep them outside the U.S. We also heard about some of the philosophical difficulties of wedging moral rights into the United States' dynamic view of property that has

historically favored unencumbered and freely alienable economic rights. Nonetheless, we heard that despite these difficulties, there still is a space for moral rights in American law.

We heard from artists about the difficulty of separating the economic from the moral. Attribution can be key to the development of an artist's brand, and it's something that can help artists put food on the table. And a great example to take away here is that if you write a song about getting stoned, you don't want people to think that it was a Tom Petty song about getting stoned. We heard about how we might convince France to bring a WTO action against the U.S. for failure to comply with Berne's Article 10 permission to quote. We learned about the maximal monkey agency approach to authorship and that if we're going to have a right of attribution, it's important to have a solid understanding of who the author really is and who we're going to attribute to.

We learned that the *Dastar* case took away our already barely plausible argument that we were in compliance with Berne's moral rights requirements. We discussed whether acknowledging moral rights would break the internet, and the takeaway there was David Lowery's quote: "If the internet is the most amazing thing ever, it should be able to withstand artists asserting their moral rights."

We talked about the connection between moral rights and the incentive not just to *create* copyrighted works but also the incentive to *publish* and disseminate those works so that people actually have access to them, whether for free or by paying money.

We talked about the things that can step in to fulfill the role of moral rights in the absence of an actual moral rights regime, things like collective bargaining and contract law. And the last thing I'll leave you with before we open up the floor to your comments and thoughts is that we learned why the most common artists on Sirius radio is "Various Artists" and how a robust moral rights regime could change that.

So with those thoughts in mind, we'd love to just get ideas from people in the audience about steps that could be taken, avenues that could be researched, or things that the Copyright Office could do to delve deeper into the moral rights space.

MS. ALVAREZ: And also I know we didn't have a lot of room for questions and answers during the other sessions, so if someone has something that they wanted to bring up earlier and didn't get a chance, now is your chance.

MR. BARBLAN: And if nobody has thoughts, I'm happy to call on people.

UNIDENTIFIED FEMALE SPEAKER: Hi. So I kind of come from the perspective of the artists and talking to artists about what they know

about their rights. And what's interesting to me and that kind of stuck out to me is when Professor Ginsburg said that most people think that they have the right of attribution when they really don't.

I would say that most artists, they get told, oh, I don't have to respect your copyrights because I gave you attribution. And so artists are extremely confused. They think, oh, do they just need to give me attribution or do I still have a right if they use my image in a way I didn't want to use it, which says to me that there is a big need for education in this field as well.

MR. BARBLAN: I think education is key, and the confusion that can easily develop among the people that stand to benefit both from copyright and from moral rights is something that persists, and at a minimum, even if we're not going to make any changes to the law, it's helpful if people understand what their rights are.

Sandra?

PROF. AISTARS: So I thought I'd maybe make a quick comment about one theme that's kept coming up and that is, "How does the public benefit from moral rights?" And as I listen to people answer the question over the course of the day, a couple of thoughts came to mind. First, I think if you think about what the public benefit of these rights might be, an easy answer to that is the truth, right? We get to know whose work it actually is and how to access that person if we want to interact with him or her, either in the capacity of a fan, (knowing to buy tickets to David Lowery's show rather than to Tom Petty's show if you like the song "Low") or in the capacity of a potential licensor of the work.

But one thing that I kept having in the back of my mind is a conversation that my clinic students and I had with photojournalist Yunghi Kim. She's a Pulitzer Prize finalist and has worked in numerous warzones. This was in the context of comments we submitted to the § 512 study. What she told us was that one of the things that is most troubling to her when infringements of her works occur is that the work is often misrepresented for something that it is not.

So for instance, she has a very famous image of a young boy in Kosovo and that image has been taken by various other groups and used with the image being represented as something else. In one instance she mentioned the image was used on a website and, represented to be a Palestinian boy rather than accurately reflecting the truth of the matter.

You hear about these stories also in other contexts. When the Boko Haram kidnapped the girls in Nigeria, the first thing that popped up on Facebook was an image of a completely different group of girls that was claimed to show the Nigerian kidnappees.

I think the public loses something if you can't rely on a photojournalist's image actually being what it purports to be. And to me, I

wonder which of these rights really addresses this. To some degree, I think it's an integrity issue but, you know, the image isn't necessarily altered. I guess it's put in a different context. And I'm not sure that the attribution right helps us any because just the fact that it's attributed to Yunghi Kim doesn't resolve the problem that the work is being represented in a way that is inaccurate to her subjects.

So I'm curious whether others have thoughts on how this might be addressed.

MR. BARBLAN: And I'd add that that ties back into the point that Professor Ginsburg was making in response to somebody's question. When you're trying to justify potential legislative or other action in the moral rights space, it's not just the fact that we arguably aren't in compliance with the Berne Convention, but also that there is a legitimate public interest, and there are many arguments that you can make to explain the public interest.

UNIDENTIFIED FEMALE SPEAKER 1: I'll speak to that in the context of writers and in terms of the rights of attribution. This is something that I have been aware of during the course of time that I've been a writer. And it addresses the notion of ghostwriting and people who write with other people. And I remember twenty-five or thirty years ago you would see a celebrity biography and it would say, "as told to". It was "Rin Tin Tin as told to David Johnson."

So you knew it was not told by Rin Tin Tin. It was actually written by David Johnson. Then that became blurred and now the celebrity biographies are memoirs or autobiographies all say "by Elizabeth Taylor". And, again, if we're talking about giving the public the truth, everyone knows that this celebrity didn't write the book. That's public knowledge and yet the book is published under that person's name. So the ghostwriter has lost all professional sense, no ownership of the work, no moral right to attribution.

And I've heard—I know of one person who wrote a celebrity biography and he told me until I—every time I'd see him I'd say how's it going and he'd say it's great and I said where is your name going to be and he'd say on the front of the book. It's going to be a joint biography.

It came out without his name anywhere. And it just gradually sort of the tide receded and he just didn't get it. And I know of another one in which the man died, the writer died just before the publication and with only the widow to protest, they just took his name off it altogether. So the public loses there, in terms of the sense of truthfulness and authenticity and why should we be party to a system that just withdraws the sense of truth from the public?

UNIDENTIFIED FEMALE SPEAKER 2: And just to add something to the public benefit of the right of attribution, it has been the common

practice in the publishing industry to provide attribution except for these ghostwritten books in that which is slowly changing.

But most authors write in part for the right of attribution. I think if we were to survey our members, they would say that they probably wouldn't have gone into writing if they hadn't thought that their work could be attributed to them. Now, writers are having a—midlist writers are having a harder and harder time economically and there are just fewer books being published on serious subjects for midlist authors. But so many of our members, particularly members that have written many books in their 50s and 60s are starting to write books without their name being put on the book.

They, you know, they may be—often they're rich people who just want a book written by somebody and they want their name on the book, not the actual author's. And, yes you will find authors willing to do this because they need to pay the mortgage or, in many cases, I have friends who are saying they are doing this because they, you know, while their kids are in college and then I'm going back to writing my own stuff.

So I think an important thing to remember is it's also an incentive. That's my point. It's as much of incentive as the copyright right.

MR. BARBLAN: Gene?

MR. MOPSIK: I think frequently, at least for many commercial artists, we lose sight of what the end game is in all of these discussions and, for me as a commercial artist, copyright and moral rights ultimately are, I guess, a means to allow me to continue to profit and to profit from my creative works. And so there are means to an end and they're not the end.

And I think in that direction, we need to support efforts to, as Nancy spoke about persistent identifiers, and it gets even more cumbersome. It's more like a machine, machine readable, persistent identifier, so they're identifiers that are persistent and can work in the background and don't require human intervention to enforce rights and ultimately are able to manage or at least visual artists would be able to manage a lot of these downstream uses that we were talking about today, the secondary uses of images where right now it's the total wild west and photographs are just being used willy-nilly, so.

UNIDENTIFIED MALE SPEAKER: Looking at it from a slightly different point of view, I'm a litigator and I do this from a more practical point of view than the esoteric. And when you have people having misattribution or non-attribution—*Dastar* killed us on one whole creative set of arguments.

But one of the other problems you have is the preemption. Like when I try to file or if I'm the defendant on my 12(b)(6), when people try to use unfair competition or other kinds of things, I say, hey, it's preemptive

or, you know, it's a problem I have if I want to plead it because this is all subject of the Copyright Act and it is not included, to the various different kind of creative elements or arguments that one might make, I'm not real sure because of the preemption that they would get very far. So just a little practical thing there.

MR. BARBLAN: Someone in the back?

MS. RAJAN: Hi. My name is Mira Sundara Rajan. I'm a professor of intellectual property law at the CREATE Copyright Centre in the U.K. and I've written a not insubstantial book entitled *Moral Rights: Principles, Practice and New Technology*. For that reason, have a number of thoughts, but at least a couple of which I'd like to share in the limited time that we have available.

One of them is that I've been listening with a lot of interest to these comments about what is the public interest in moral rights, an issue I talk quite a bit about in my book and I think it's a key question that we need to be able to answer. You know, we heard from the authors. We know how they feel about it. We know to some extent how our middlemen feel about it, how does the public feel about it. And for me, the important point that we need to remember is that all works eventually end up being owned, in a sense, by the public. They go into the public domain, all copyright works. And that idea was expressed by Victor Hugo who said that the true heir of any writer is ultimately going to be the public.

And I think when we think about the issue of moral rights, it's helpful to keep that in mind, that preserving the attribution of works, preserving historical truth, preserving the integrity of works that are in the cultural domain is something that ultimately is a matter of importance for every citizen of a country.

Another issue here that may be apt as well is that American artists are in a curious position because when you go out of the country with your work—let's say you go to France—your moral rights are recognized. And yet here in the United States, at home, you don't have the same rights that you enjoy in foreign countries. And I'm Canadian. We have moral rights. If I were an American creator, I think I'd be quite upset about that situation. So I do think that there's some national pride, cultural pride involved.

And maybe that goes to a final interesting point, which is what we're talking about here is cultural diversity. Well, let's not forget that cultural diversity also exists in the law and that has been maybe an interesting backhanded development as far as the relative exclusion of moral rights from TRIPS' concern, because countries have adopted moral rights in keeping with Berne and TRIPS but there's tremendous diversity in how different countries have implemented moral rights. I mean, literally it would be difficult to find two countries that have done it the same way. And you have everything from the U.K. situation where you have to assert your

right of attribution before you can expect to have it recognized, to the situation in India where rights of integrity are protected forever.

Why are they protected forever? Well, the Indian copyright registrar told me that amendment was brought in for a specific reason, because the interest of the public and the preservation of the cultural domain was considered to be so important that integrity had to be legislated for time immemorial.

So you have so many different approaches, and I think that at least should be very encouraging here at the United States because there's so much that can be done to recognize moral rights, and yet, to give them a shape that makes sense in the cultural, technological, social, economic context here in the States.

MR. BARBLAN: Thank you, and can you remind us the title of your book?

MS. RAJAN: An easy question to answer. It's called *Moral Rights*. The key words being new technology, and it's published by Oxford University Press. Just about to come out in a second edition, so please don't try to buy it until a few more months go by.

MR. BARBLAN: Any more comments or suggestions?

GABRIELLE PETERS: I just wanted to speak to a form of expression that I hope becomes part of the conversation moving forward, and that's dance. I think the absence of that in the conversation today is probably—it's illustrative of the sort of lesser degree of pervasiveness in culture than something like music or books, but that was, I think, largely an accessibility issue in the past. And with, you know, an increased focus on digitized entertainment and technology and with content hosting sites, I think dance finally has the means and window of opportunity to be able to reach a broader audience and disseminate their work on a greater scale. And in terms of the protecting the rights of music and sound recordings and musicians and performers, I'm hoping that dance will be a consideration so that they can take advantage of this opportunity and finally, you know, have their moment and push their way into society and culture and become more pervasive.

MR. BARBLAN: And Brad, we have a question over here on the left.

UNIDENTIFIED MALE SPEAKER 1: Yeah, just one or two quick thoughts. One is that the discussion has talked about incentives a good bit and interests of various groups, public or other maybe, but the term itself as the moral rights, you know, both of those words are very interesting and useful, too.

And I think, you know, going forward, fuller use could be given to both of those terms. And you know, I think of the, you know, sort of historic and American principle in American law that rights are not only something that government would give or take away on a whim or based on particular interests, but that there are certain rights that—and here I think there was the quote earlier on about, you know, a person being entitled to the fruits of their labor. And so I don't recall exactly the quote.

But then the other point that I was going to raise was that just seems to—that law can have a teaching function also so that even if there's not a very elaborate or complicated system that is put in place right away, I just—giving some protection to moral rights can help to remind people that this is something that is something to be valued, you know, because I think so often if the law doesn't require something, they'll, you know, give a copyright notice or something. But they—someone—they won't give the recognition to the authors because there's no feeling that they should do so.

MR. BARBLAN: Thank you.

MS. ALVAREZ: Anyone else?

MR. GIBBS: It's more of a comment than a question. I was just thinking about the two panels ago contrasting the public art, the mural and the relationship of public art to moral rights as opposed to the relationship to the digital arts. Now, I was thinking that in terms of my own comments about how moral rights relate to communities, and I thought that was a very interesting illustration of the difference between when you have something that's based in the community and how people relate to the rights as opposed to when it's just floating around digitally.

And it's interesting that dance was brought up because dance is in a sort of middle position right now because well, talking about street dance in particular, which is one area I'm interested in. It's still a community, but it's kind of like a worldwide community. And attribution—everybody kind of knows who's making up the steps because they're getting uploaded so quickly, but they're also getting disseminated very quickly at the same time. So I'm wondering, it seems like maybe that's actual beginnings of a solution of crossing those things. Looking at dance might be a way to kind of think through an actual solution there.

MS. ALVAREZ: Any last minute thoughts, comments, questions?

UNIDENTIFIED FEMALE SPEAKER 3: I have just a question for everybody here, and that is after seeing Scott Martin's presentation about all the different laws around the world—at lunch, we were talking about, you know, potential need for unification of IP laws. Is there any interest in an international treaty on moral rights, and has there ever been discussion? And I know there's some people here who might have some thoughts.

MS. ALVAREZ: Other than the one we already actually have—

UNIDENTIFIED FEMALE SPEAKER 3: Oh, that

MS. ALVAREZ: —and comply with.

UNIDENTIFIED FEMALE SPEAKER 3: Oh is it? Okay. Other than the current. Other than—but I mean a treaty specifically on moral rights.

MR. BARBLAN: Allan?

MR. ADLER: This was a question I probably should've asked to Session 5 when they were up there, but it occurred to me. One of the major developments, at least for my industry since moral rights was the source of major discussion here in the United States, is the fact that the Internet has given rise to a new generation of self-publication.

And I'm just wondering in that environment where the author essentially also becomes the publisher and the person chiefly responsible for distribution of their own work, if that makes a difference in the calculations that people would make about—well certainly I think it would with respect to integrity issues. But I'm wondering if it would also make a difference with respect to attribution issues as well.

MS. TEMPLE CLAGGETT: I want to thank the panelists from the last panel and the audience. I also want to thank all of the panelists who've been here throughout the day as well as the audience.

I think as I said when I first started the overview session, I didn't know whether we would actually have enough to discuss for a full day of moral rights in the United States, but it not only showed that we actually have a lot to discuss but a lot of important information. And it really showed how strongly people believe that, especially the moral rights of attribution and integrity are to individual authors.

So you've given us a lot to think about. As I think Register Pallante mentioned at the beginning of the day, this is only the beginning of our conversation. We'll now take some of the things that you guys have said today and use that to actually ask more specific questions in terms of what should we do next as we analyze moral rights in the United States and we consider how best do we actually protect both individual authors as well as the public in terms of wanting to know who creates the work and how the work is being used. So thank you again for participating and thank you all for coming