Comments of the Kernochan Center for Law, Media and the Arts

Columbia Law School

The Kernochan Center for Law, Media and the Arts appreciates the opportunity to respond to the Notice of Inquiry concerning the Study on the Moral Rights of Attribution and Integrity published by the U.S. Copyright Office, 82 Fed. Reg. 7870 (Jan. 23, 2017).

The Kernochan Center for Law, Media, and the Arts at Columbia Law School is one of the leading centers for intellectual property research in the United States. Its faculty and staff dedicate their research and writing to copyright, trademarks, and related areas as they concern traditional and emerging media, entertainment and the arts. The Center offers students an in-depth program of instruction, lectures, internships and externships while providing symposia, lectures, research studies and publications to the broader legal community. Founded as the Center for Law and the Arts, it was renamed in 1999 to honor Professor John M. Kernochan, its founder and a pioneer in teaching copyright in American law schools.

Below are our responses to the questions posed by the Notice of Inquiry.

General Questions Regarding Availability of Moral Rights in the United States

1. Please comment on the means by which the United States protects the moral rights of authors, specifically the rights of integrity and attribution. Should additional moral rights protection be considered? If so, what specific changes should be considered by Congress?
The Berne Convention requires member countries to provide foreign authors the moral rights of attribution and integrity.\(^1\) When the United States joined the Berne Convention, it declined to amend Title 17 to provide specific protection for moral rights. Instead, it concluded that protection for these rights was provided under existing US law, including “various provisions of the Copyright Act and the Lanham Act, various state statutes, and common law principles such as libel, defamation, misrepresentation and unfair competition, which have been applied by courts to redress authors’ invocation of the right to claim authorship or the right to object to distortion.”\(^2\) The Berne Convention Implementation Act specifically provided that “[t]he Amendments made by this Act, together with law existing on the date of 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.”\(^3\)

Although the United States had relatively weak moral rights at the time, at least two factors supported its conclusion that various state and federal laws, taken together, were sufficient to satisfy the Berne requirement. First, there were other common law countries – most notably, the UK – that relied on common law to meet Berne article 6bis obligations. Second, Dr. Arpad Bogsch, WIPO’s Director General, had provided his opinion that the United States could join Berne without changing its law in respect of Berne article 6bis.\(^4\)

Since Berne adherence, there have been three significant developments in the laws protecting moral rights in the United States. First, the United States passed the Visual Artists Rights Act (VARA), codified at 17 U.S.C. section 106A. While this law expressly provides the rights of attribution and integrity to “works of visual art,” its narrow definition of that term, and its many exclusions, make the law inapplicable to most copyright-protected works, and to many uses of the works that it does cover. This will be discussed further in our response to question 2, below.

Second, in 1998 the United States adopted 17 U.S.C. section 1202 concerning the protection of “copyright management information” (CMI), as part of the DMCA. CMI includes, inter alia, the name of the author, but there is no affirmative obligation to affix any CMI to a work, and the

\(^1\) Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1886, S. Treaty Doc. No. 99-27 (revised on July 24, 1971, and amended on Sept. 28, 1979) (“Berne Convention” or “Berne”). Article 6bis states that “the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”

\(^2\) S. Rep. No. 100-352, 100th Cong., 2d Sess. (1988) at 9-10 (“Senate Report”). The principal provisions of the Copyright Act that the United States relied on in support of Berne adherence were §106(2) (right to create derivative works) and §115(a) (2) (providing that phonorecords made under the §115 statutory license “shall not change the basic melody or fundamental character of the work.”).


\(^4\) Senate Report, supra note 2 at 10.
double intent standard of section 1202 makes it difficult to establish violations. This will be explored further in our response to question 3, below.

Third, the Supreme Court in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), held that the term “origin of goods” in section 43(a) of the Lanham Act refers to the source of the physical product and not to the person who created the underlying content. *Dastar* has, accordingly, undermined much of the law under section 43(a) on which the United States’ claimed right of attribution rested at the time of Berne adherence. The *Dastar* decision and its effects are discussed more thoroughly in our response to question 6, below.

US law should grant the rights of attribution and integrity to all authors. The United States is required by the Berne Convention to provide those rights to foreign nationals (Berne art. 5(1)), and there is no defensible reason to refrain from providing them to US nationals as well. The fact that obligations under article 6bis of Berne may not be the basis of a dispute settlement proceeding under TRIPS does not relieve the United States of its obligation to provide moral rights. Moreover, as Professor Ginsburg has observed, the right to make quotations in Berne article 10(1) is conditioned on indicating the source of the work and the name of the author if it appears on the work (art. 10(3)), so that article provides a source of attribution rights independent of article 6bis. TRIPS refers only to article 6bis, so presumably violations of article 10(1) are cognizable under TRIPS dispute resolution. The United States should expand moral rights protection not only because it’s the right thing to do, but also because the United States is vulnerable to retaliation if we do not.

The right of an author to have her name attached to her work is fundamental. Even authors who write and distribute their works without expectation of payment want credit for their work. For example, so many users of Creative Commons licenses insisted on attribution that it has become a standard license term. Similarly, authors of many works such as fan fiction made available on

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5 In apparent recognition of the questionable status of its moral rights law, the United States sought and was successful in negotiating a provision in TRIPS excluding violations of Berne Art. 6bis from the TRIPS dispute resolution process. Agreement on Trade-Related Aspects of Intellectual Property, art. 9(1), 1994, 1869 U.N.T.S. 299 (“TRIPS”).


7 Creative Commons, Frequently Asked Questions, How do Creative Commons licenses affect my moral rights, if at all?, [https://creativecommons.org/faq/#how-do-creative-commons-licenses-affect-my-moral-rights-if-at-all](https://creativecommons.org/faq/#how-do-creative-commons-licenses-affect-my-moral-rights-if-at-all)
the internet don’t seek direct payment, but do want their names attached to their works. For many beginning authors, especially on the Internet, “exposure” provides the primary reward, but if their authorship goes uncredited, then they are denied even this recompense.

The right of integrity protects authors from having their works altered or distorted in a manner “prejudicial to their honor or reputation.” Authors should have protection against mutilation and distortion of their works that harms their reputations. This is a prospect that some find concerning, and was the basis for much of the opposition to US adherence to Berne in the 1980s. But authors’ moral rights, just like their economic rights, can be limited as necessary to accommodate First Amendment and similar considerations.

None of the sources of US law, separately or together, provides adequate protection for authors’ rights of attribution and integrity. For that reason we recommend the adoption of a new comprehensive moral rights statute in the Copyright Act to protect the moral rights of attribution and integrity. Professor Ginsburg has outlined a new statute to protect the right of attribution in her article “The Most Moral of Rights: The Right to be Recognized as the Author of One’s Work,” based on her keynote address at the April 18, 2016 symposium organized by the Copyright Office. We recommend building on that proposal to create a comprehensive statute that would provide protection for the moral right of integrity as well as that of attribution. We will not repeat her entire proposal here, but we will go through the principal aspects of the attribution right she suggests and indicate how it would apply in the context of the right of integrity.

We believe the statement of the right of integrity should be as follows: “the author [or “creator,” see our discussion re beneficiaries] shall have the right to prevent any intentional distortion, mutilation or other modification of that work which would be prejudicial to his or her honor or reputation.”

Beneficiaries. – The right should be enjoyed by authors and performers, and ideally, also by human creators who don’t qualify as authors because their work is a work made for hire. The right should extend to all categories of works.

Scope of Right of Integrity. – This right should have the same duration as economic rights. Whether a use is “prejudicial to . . . honor or reputation” should be assessed using an objective standard, so users will not be liable to unreasonable objections from particularly sensitive (or particularly calculating) authors. According to a leading treatise on the Berne Convention,

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8 Ginsburg, *supra* note 6 at 49-52.
9 See Ginsburg, *supra* note 6 at 76.
The standard of assessment of prejudice is an objective one, akin to the evaluation of defamation. This is an important safeguard against overreaching by oversensitive authors, particularly in the context of licensed, or lawfully permitted, adaptations. It is not enough that the author does not like what was done to her work; the action must also reflect badly on her in the public eye.\textsuperscript{10}

We recommend that considerations relevant to this standard be included in the legislative history (as was done with VARA) to minimize confusion about how the standard should be applied.

Waiver. – Right holders (i.e., holders of moral rights) should not be able to transfer moral rights (except possibly to a CMO for purposes of enforcement), but they should be able to waive them, under the narrow approach to waivers provided in section 106A(e)(1). The waiver should be in writing and signed by all of the right holders before the work is created or performed, specifically identifying the uses for which the right is being waived; one right holder should not be permitted to waive the rights of all, and any waivers should be effective only with respect to signatories.\textsuperscript{11}

Remedies. – Injunctive and monetary relief should be available for violations of the right of integrity. If the right holder can demonstrate specific harm, then he or she may opt for actual damages, but statutory damages should also be available.\textsuperscript{12}

Exceptions and limitations to moral rights are examined below in our response to Question 5.

\textit{Title 17}

2. \textit{How effective has section 106A (VARA) been in promoting and protecting the moral rights of authors of visual works? What, if any, legislative solutions to improve VARA might be advisable?}

The Visual Artists Rights Act, codified in section 106A of the Copyright Act, was passed in 1990 to grant moral rights in works of visual art. VARA “enhance[d] the U.S.’ compliance with Berne,”\textsuperscript{13} but only with respect to particular works and uses. VARA applies only to statutorily defined works of visual art,\textsuperscript{14} granting two primary moral rights. The first is the right to claim

\textsuperscript{10} Ricketson & Ginsburg, \textit{supra} note 6 at ¶10.29.
\textsuperscript{11} See Ginsburg, \textit{supra} note 6 at 78-79.
\textsuperscript{12} See Ginsburg, \textit{supra} note 6 at 80.
\textsuperscript{14} Section 101 defines a “work of visual art” as:
authorship and to prevent the author’s name from being attributed to a work of visual art he or she did not create.\textsuperscript{15} The second moral right VARA provides is the right of integrity; subject to limitations for visual art incorporated into a building, the author of a work of visual art can “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation”\textsuperscript{16} and “prevent any destruction of a work of recognized stature.”\textsuperscript{17}

Setting aside its narrow scope, VARA has some shortcomings that should be corrected. For example, only the “author of a work of visual art” has the right to prevent use of his or her name as the author of any work of visual art that he or she did not create.”\textsuperscript{18} It’s not clear to us why someone who is not the author of a work of visual art does not have that right. For example, what if an artist invariably creates lithographs, posters or other forms of art that are not limited to 200 or fewer copies? Or what if the author creates audiovisual works? In both cases, the author’s output fails to qualify as works of visual art under the definition, yet surely the author should be entitled to prevent the use of her name in connection with a work of visual art she did not create. There is no public interest in denying the author a remedy against art forgery.

Section 106A provides no protection for anonymous authors or pseudonymous authors. Authors who use pseudonyms should have the benefit of moral rights protection. They should still, for

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

A work of visual art does not include–
\begin{itemize}
\item[(A)](i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;
(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
\item[(iii)] any portion or part of any item described in clause (i) or (ii);
\item[(B)] any work made for hire; or
\item[(C)] any work not subject to copyright protection under this title.
\end{itemize}

\textsuperscript{15} § 106A(a)(1).
\textsuperscript{16} § 106A(a)(3)(A).
\textsuperscript{17} § 106A(a)(3)(B).
\textsuperscript{18} § 106A(a)(1)(B).
example, retain the right to object to distortions or mutilations prejudicial to their honor or reputation. Similarly, they should have the right to prevent use of their pseudonym on works they didn’t create. An author’s pseudonym may be discovered or an author may choose to come forward, and without these protections, she may be associated with distorted versions of her works.

VARA excludes works made for hire from its ambit, so it’s clear that a creator who contributes to a work made for hire cannot have rights under the statute. But we would recommend including works for hire under the VARA statute, and extending to them VARA’s rights of attribution and integrity. 19

Currently, VARA rights can be waived in a written instrument signed by the author that specifically identifies the work and the use for which moral rights are being waived. In the case of two or more joint authors, waiver by one is sufficient to waive rights for all authors. We believe it is unfair for artists of works of visual art to be subject to waiver of their rights by a co-author. Any waiver of moral rights should be effective only with respect to the particular author who signed the waiver.

3. How have section 1202’s provisions on copyright management information been used to support authors’ moral rights? Should Congress consider updates to section 1202 to strengthen moral rights protections? If so, in what ways?

Section 1202 can in some cases serve to support the right of attribution, but it has certain flaws that have so far prevented it from serving as a general right of attribution. Section 1202, in broad brush, prohibits providing false copyright management information (CMI)20 or removing or changing CMI.

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19 We observe that the number of works for hire that would otherwise qualify as “works of visual art” is likely to be relatively small. Most commissioned artworks do not fit within the nine statutory categories of “specially ordered or commissioned works” that are capable of being works made for hire. As a result, only employee-created works are at issue. Moreover, most employee-created artworks (such as greeting cards and comic books) are not likely to be produced as single originals or only as limited editions of under 200 copies signed and numbered.

20 Copyright management information includes any of the following information “conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, . . .:

(1) The title and other information identifying the work, including the information set forth on a notice of copyright.
(2) The name of, and other identifying information about, the author of a work.
(3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.
Section 1202 has, in effect, a double intent standard that makes it difficult to establish a violation. The right holder must establish that the party alleged to have provided false CMI or removed or changed CMI did so knowing or with reasonable grounds to know that the actions “will induce, enable, facilitate or conceal an infringement of any right under [Title 17].” This standard creates a significant hurdle for a right holder seeking relief under section 1202. Relatedly, the alteration or omission of CMI is not a violation unless it facilitates infringement of an economic right (“any right under [Title 17]”), so right holders have little recourse for omission or alteration of attribution information if it can’t be linked to infringement. In other words, the act of alteration or omission of CMI is not wrong in itself.

Moreover, while section 1202 provides protection for CMI, it does not require that CMI be used in connection with a copy of a work, so an author who is not the copyright owner has no affirmative right to have his name attached to his work.

The double intent standard – and in particular, how one satisfies the second prong – may be clarified as courts grapple with what it means to know or have reasonable grounds to know that removal or alteration of CMI “will induce, enable, facilitate, or conceal” infringement.

We have two recommendations for changes to section 1202. First, we suggest that the Copyright Office, pursuant to section 1202(c)(8), prescribe by regulation the inclusion of names of creators – whether or not statutory authors – as CMI that can be protected under section 1202 if conveyed in connection with copies of the work.

Second, we recommend that section 1202 be amended to provide that if any CMI is conveyed in connection with the work, then information about authors/creators must also be conveyed. In other words, there is no obligation to include any CMI, but if CMI is used, it must include authorship information.

(4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.
(5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.
(6) Terms and conditions for use of the work.
(7) Identifying numbers or symbols referring to such information or links to such information.
(8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.
17 U.S.C. §1202(c).
21 17 U.S.C. § 1202 (a), (b) (emphasis supplied).
22 See Ginsburg, supra note 6, at 64-72.
We are aware that some courts have limited section 1202 to CMI conveyed in connection with use in an automated system, and we debated whether to recommend clarification of the statute. However, the law seems clear on its face (“. . . conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form. . .”). This formulation indicates to us that digital form is one among other ways in which copies may be protected. The conclusion that the protections of section 1202 aren’t limited to automated or digital systems is bolstered by the definition of “including” in the Copyright Act: “The terms ‘including’ and ‘such as’ are illustrative and not limitative.” Consistent with this view, the Third Circuit in Murphy v. Millennium Radio Group LLC, 650 F.3d 295 (3d Cir. 2011), held that protection for copyright management information as defined in section 1202 (c) is not limited to automated copyright protection or management systems. Accordingly, we do not believe any clarification of section 1202 is necessary in this regard.

4. Would stronger protections for either the right of attribution or the right of integrity implicate the First Amendment? If so, how should they be reconciled?

Generally speaking, the limited monopolies that copyright law conveys have been consistently upheld by the Supreme Court as being reconcilable with the First Amendment through the fair use doctrine. For instance, under the Copyright Act, VARA’s protections remain subject to the fair use doctrine and, if applicable, a fair use defense could excuse one from liability under 106A.

The right of integrity admittedly might have more bearing on concerns about First Amendment rights than the right of attribution, but we are confident that they can be addressed by the established fair use doctrine. There may be fewer conceivable situations where one could claim that removal of identifying information about an author is protected by the First Amendment, but we don’t dismiss the possibility, and fair use would be available in appropriate circumstances.

Finally, if one instead considers the First Amendment rights of original authors, it is worth noting that VARA does not protect the ability of an author to remain anonymous or pseudonymous. We believe that should be changed so that someone who wishes to write under a pseudonym should not thereby give up moral rights.

5. If a more explicit provision on moral rights were to be added to the Copyright Act, what exceptions or limitations should be considered? What limitations on remedies should be considered?

Not all exceptions to economic rights are equally applicable to moral rights. For example, section 108 describes circumstances in which libraries and archives may provide copies for users, but we see no reason not to require attribution on those copies. (In fact, under current law, if libraries and archives make and distribute copies, they are required to reproduce the copyright notice. 17 U.S.C. section 108 (a).) The same is true of section 121, concerning reproduction of works for the blind or other people with disabilities. (Under current law, including a copyright notice in the copyright owner’s name is a condition of the exception. Id. section 121(b)(1)(C).) One would have to consider carefully all of the existing exceptions for economic rights and how relevant they are for moral rights. Fair use should be available to excuse failure to comply with moral rights where appropriate, as discussed above.

We recognize that requiring strict adherence to the moral rights provisions we have suggested may not always be reasonable in particular contexts. We suggest that the Copyright Office be empowered to develop regulations as to recommended practices concerning moral rights in particular circumstances, which if adhered to, would satisfy moral rights obligations.

Other Federal and State Laws

6. How has the Dastar decision affected moral rights protections in the United States? Should Congress consider legislation to address the impact of the Dastar decision on moral rights protection? If so, how?

As we discussed in our response to Question 1, the legislative history of the Berne Convention Implementation Act indicates that Congress relied in part on the Lanham Act’s protections in its determination that existing US law satisfied Berne’s moral rights requirements. However, the Supreme Court’s decision in Dastar established that the Lanham Act couldn’t offer protection against copying of a work without attribution.26 In the wake of Dastar, it seems the only remaining claim under the Lanham Act with respect to moral rights protections exists solely in situations where a seller “in commercial advertising or promotion” “misrepresents the nature, characteristics [or] qualities” of a work.27

In Dastar, the Supreme Court considered the scope of section 43(a) of the Lanham Act. Plaintiff Twentieth Century Fox (“Fox”) had failed to renew the copyright for a television series and the

27 Id. at 38 (quoting § 43(a)(1)(A) of the Lanham Act).
series fell into the public domain. Subsequently, defendant Dastar created a new television series that incorporated the footage from Fox’s show without crediting or referencing Fox. Fox sued in part under section 43(a) of the Lanham Act, claiming that the failure to attribute the footage to Fox constituted reverse passing off, or a “false designation of origin.” The Court rejected this argument, holding that “the phrase [‘origin of goods’] refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.” Thus, Fox’s claim failed because, according to the Court, the Lanham Act’s protection extended only to labeling of the origin of the physical product.

The Court’s opinion pointed to VARA as evidence that Congress didn’t intend section 43(a) to protect the right of attribution, as section 106A was “carefully limited and focused.” Moreover, the Court’s reasoning largely reflected concerns about over-expanding the reach of the Lanham Act and stifling the public’s right to use and copy public domain works. Although Dastar involved a work that had fallen into the public domain, lower courts have widely applied the decision to cases involving works still in copyright. In addition, lower courts generally have interpreted Dastar as preempting state law reverse passing off claims.

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28 Id. at 25-26.
29 Id.
30 Dastar, 539 U.S. at 31 (quoting § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)).
31 Id. at 37.
32 Id. at 31-32, 37.
33 Id. at 34.
34 Id. at 33-37 (“To hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do.”) Id. at 37.
35 See, e.g., Williams v. UMG Recordings, Inc., 281 F. Supp. 2d 1177, 1185 (C.D. Cal. 2003) (“[T]he Supreme Court’s holding did not depend on whether the works were copyrighted or not.”); see also Bob Creeden & Assocs., Ltd. v. Infosoft, Inc., 326 F. Supp. 2d 876, 878-80 (N.D. Ill. 2004); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1116-17 (W.D. Wash. 2004); Zyla v. Wadsworth, 360 F.3d 243, 251-52 (1st Cir. 2004).
In short, it appears that the Dastar decision has had the effect of leading courts to expansively reject right of attribution claims even beyond those brought under the Lanham Act unless they fall under the specifically enumerated provisions of VARA or section 1202.  

We do not advocate legislation to alter the holding of Dastar or of cases that have extended it. In our view, a new comprehensive moral rights statute is preferable, and less likely to result in unintended effects on trademark and unfair competition laws.

7. What impact has contract law and collective bargaining had on author’s ability to enforce his or her moral rights? How does the issue of waiver of moral rights affect transactions and other commercial, as well as non-commercial, dealings?

Contract law is perhaps the most effective means an author has of getting another party to credit her. Many authors in the United States rely on contractual arrangements in order to protect their moral rights. One difficulty, however, is that in order to get such an undertaking from the other party, an author may have to trade attribution for other payments or protections she might otherwise seek. And authors without significant bargaining power may not be able to get attribution, particularly if such attribution is not consistent with industry practice. Moreover, contracts bind only parties in privity. The attribution obligation could be extended if the agreement also provided that any copies of the work will be accompanied by CMI including the author’s name.

One mechanism by which attribution is widely achieved is through Creative Commons, which offers “off-the-shelf” licenses for authors who want to allow their works to be used without payment, but subject to conditions. Generally these contracts provide for the right for the author to be credited for her work. Creative Commons offers “no derivatives” license options to preserve some element of the right of integrity. Of course, Creative Commons licenses usually apply only to works licensed without a fee.

Collective bargaining through unions and guilds undoubtedly strengthens authors’ ability to get attribution. Within the film and television industry, the Writers’ Guild publishes manuals for television credits and screen credits which lay out requirements for writer attribution. The

38 See Creative Commons, Licensing Considerations, https://creativecommons.org/share-your-work/licensing-considerations/.
39 See Creative Commons, License Conditions, https://creativecommons.org/share-your-work/licensing-types-examples/.
40 Credits, Writers Guild of America, available at https://www.wgaeast.org/resources/credits/.
Director’s Guild of America’s Basic Agreement of 2014 additionally sets minimum standards for contracts between member directors and the film and television studios.41 These standards provide heavily detailed and specific provisions prescribing how, when, and where the director’s name must appear and be identified on the work.42 Many actors are members of the Screen Actors Guild – American Federation of Television and Radio Artists, which creates standard contracts describing requisite screen credit attributions.43

Authors also possess derivative work rights through section 106(2) of the Copyright Act, which could potentially allow them to reserve via contract certain restrictions such as the right to final approval. In many fields, only authors with significant bargaining power are likely to be able to get final approval rights.

Under VARA, the protected moral rights can be waived only “if the author expressly agrees to such waiver in a written instrument signed by the author.”44 In this sense, it seems apparent that authors do possess some ability to maintain control of their moral rights by way of contractual negotiations. Nevertheless, the results from a 1996 study conducted by the Copyright Office indicate that there is lacking widespread understanding about waiver of moral rights under VARA.45 Specifically, “[f]ewer than half knew that moral rights could be waived.”46 Moreover, VARA covers only a narrow category of works, as discussed above, and authors may in some circumstances be required to waive moral rights in order to sell their works.

Insights from Other Countries’ Implementation of Moral Rights Obligations

8. How have foreign countries protected the moral rights of authors, including the rights of attribution and integrity? How well would such an approach to protecting moral rights work in the U.S. context?

International approaches to moral rights vary across countries. For example, France is widely considered to be a leader in the area of moral rights, offering comprehensive codified protection

41 DGA Basic Agreement of 2014, available at https://www.dga.org/Contracts/~link.aspx?_id=6B7DE45B1B574AB1899BA5389970BE10&z=z
42 Id. art. 8.
46 Id.
to the rights of both attribution and integrity. Under French copyright law, moral rights are considered to be perpetual and inalienable, with a few limited exceptions. Notably, complete waivers of the right of integrity are unenforceable. There are some explicit exceptions to these broad rights, however, such as for parodies, press releases, and private home performances.

We would recommend consulting the moral rights laws of common law countries in considering the terms of a proposed US moral rights statute. Australian moral rights laws might provide a useful model in some respects. For example, in Australia parties charged with omitting the required attribution have the opportunity to establish that the omission was reasonable under the circumstances. The law sets out various factors to be considered in determining whether the failure to identify the author was reasonable. The same is true with respect to the right of integrity; the law sets out factors to be considered in determining whether the derogatory action with respect to a protected work was reasonable.

**Technological Developments**

9. *How does, or could, technology be used to address, facilitate, or resolve challenges and problems faced by authors who want to protect the attribution and integrity of their works?*

One of the difficulties authors face in trying to protect the attribution of their works is that licensees and others may claim that including or retaining attribution information is not commercially reasonable. The decision whether or not to include the information in the first instance is usually consciously made; reluctance to include such information may be a result of the manner in which the work is used (e.g., where a sound recording is played on terrestrial radio), packaged or displayed. With respect to electronic copies of works, it is often possible to include attribution information in metadata, where it can be found if someone is searching for it but may not be readily apparent to the casual user. Still, some licensees or other users may

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48 Id. at 228-229.

49 Id. at 229.

50 Id. at 229-230.

51 Section 195AR Australian Copyright Amendment (Moral Rights) Act 2000.

52 Id. § 195 AS. A similar “reasonableness” scheme also exists in Israel, with courts considering a variety of factors in making this determination. Galia Aharoni, *You Can’t Take it With You When You Die... Or Can You?: A Comparative Study of Post-Mortem Moral Rights Statutes From Israel, France, and the United States*, 17 U. BALT. INT’L PROP. L.J. 103, 113 (Spring 2009).
nevertheless be reluctant to include such data if in the aggregate it diminishes the speed or efficiency of online systems. Even when such information is included with an electronic copy, it may be deleted in whole or in part by websites as the copy is uploaded. Over time, we expect that technology will develop to reduce any inefficiency inherent in including attribution information in metadata. Another approach being used is to insert an identifier in the copy of the work at issue which will link to a registry that will contain information about the author, licensing terms, etc. Still, there will have to be legal force to ensure such identifiers are not removed, either pursuant to section 1202 (assuming the identifier counts as CMI), section 512 (c) (assuming the identifier counts as a “standard technical measure”), an agreement among the relevant parties, or new legislation.

**Other Issues**

10. *Are there any voluntary initiatives that could be developed and taken by interested parties in the private sector to improve authors’ means to secure and enforce their rights of attribution and integrity? If so, how could the government facilitate these initiatives?*

As we indicated above, moral rights should be subject to a “reasonable under the circumstances” standard. The Copyright Office could play a useful role in defining that standard in areas where the obligations under moral rights can be difficult to comply with. We envision that this would be done through regulations issued after consultation with all of the stakeholders.

11. *Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.*

We have nothing further to add at this time but look forward to reviewing the comments submitted by others in this proceeding.

Thank you for the opportunity to submit these comments. We would be happy to provide any further input requested.

Respectfully submitted,

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54 See Ginsburg, *supra* note 6, at 66-69.
June M. Besek  
Executive Director

Jane C. Ginsburg  
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Philippa S. Loengard  
Deputy Director