The Kernochan Center for Law, Media and the Arts appreciates the opportunity to provide reply comments in connection with 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.

In these reply comments, we summarize the principal contentions made by commenters who argue against strengthening moral rights in the United States, and respond to each.

A. Contention: The United States is already in compliance with Berne article 6bis.

Many commenters who opposed moral rights legislation argued that it was unnecessary, since U.S. law, industry practices and/or the ability to use technological tools to achieve attribution and preserve integrity in their view already put the United States in compliance with its
obligations under the Berne Convention and other international instruments.\textsuperscript{1} They raise one or more of the following points.

1. **Contention: The United States was in compliance with the moral rights provisions of the Berne Convention when we joined.**

This argument maintains that the United States was in compliance with the moral rights provisions of the Berne Convention when we joined, as evidenced by statements of Congress and then Director-General of WIPO that the United States could join Berne without making further alterations to its law concerning moral rights.\textsuperscript{2}

We take at face value the statements that the United States complied with the moral rights requirements of Berne when it joined. The statements of Congress and many U.S. experts, as well as that of Árpád Bogsch, support that conclusion.\textsuperscript{3} U.S. law has not been static, however, so even if this country was in compliance with article 6bis when we joined the Berne Convention, it does not necessarily follow that we are now. Some commenters even suggest that the United States now has more protection for moral rights than it did at the time of Berne accession, citing the Visual Artists Rights Act (VARA), codified in 17 U.S.C. section 106A, and protection for copyright management information, codified at 17 U.S.C. section 1202.\textsuperscript{4} The U.S. Supreme Court’s decision in \textit{Dastar Corp. v. Twentieth Century Fox Film Corp.},\textsuperscript{5} and subsequent lower court decisions,\textsuperscript{6} however, very substantially undermine U.S. claims to Berne compliance since

\textsuperscript{1} See, \textit{e.g.}, Comments of Motion Picture Association of America, Inc. (MPAA) at 3-6; Comments of Computer & Communications Industry Association (CCIA) at 1. References to “Comments” herein refer to comments submitted in response to U.S. Copyright Office’s January 23, 2017 Notice of Inquiry on Moral Rights of Attribution and Integrity, available at https://www.regulations.gov/docketBrowser?rpp=25&so=ASC&sb=title&po=0&dct=PS&D=COLC-2017-0003.

\textsuperscript{2} See S. Rep. No. 100-352, at 9-10 (1988); H.R. Rep. No. 100-609, at 37-38 (1988); \textit{see also} Letter from Dr. Árpád Bogsch, Dir. Gen., World Intellectual Prop. Org., to Irwin Karp, Esq. (June 16, 1987), \textit{reprinted in Berne Convention Implementation Act of 1987: Hearing on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary, 100th Cong. 213 (1987)} (‘‘In my view, it is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6bis of the Berne Convention. The requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute but also by common law and other statutes.’’).

\textsuperscript{3} We observe, however, that these conclusions may owe as much to political expediency as to legal analysis.

\textsuperscript{4} See, \textit{e.g.}, Comments of CCIA at 2.

\textsuperscript{5} 539 U.S. 23 (2003).

\textsuperscript{6} See cases cited \textit{infra} note [13].
2003. Moreover, as we explain below, neither VARA nor section 1202 even remotely approach full coverage of Berne Convention minimum rights.

VARA provides protection for the rights of attribution and integrity to authors of a very limited category of “works of visual art.” The nature of the protection it provides demonstrates how lacking such protection is for other types of authors. Those who create literary works, musical works, dramatic works, and even those who create pictorial, graphic or sculptural works that don’t meet VARA’s narrow definition of “works of visual art” are left out. Not only does VARA severely constrict the class of protected works and authors, it also defines an extremely narrow range of infringing acts. For example, only destruction or distortion of the original (or one of a limited edition of 200 or fewer signed and numbered copies) will violate VARA’s right of integrity: deleterious alterations to any other copy of the work fall outside VARA’s scope. Similarly, VARA does not prohibit omitting the author’s name, or substituting another author’s name, on any other copy of the work.

Some commenters describe section 1202 as a useful tool to achieve attribution; they do not, however, acknowledge the specific terms of section 1202 that limit its effect. For example, inclusion of the name of the author of a work as part of copyright management information is not mandatory. If the author retains the rights to her work, then section 1202 can provide her with a limited right of attribution, since she can attach her name to copies of the work and the law may prohibit its removal. But if the author transfers her economic interest to another, then the decision whether to include the author’s name as part of “copyright management information” (CMI) no longer remains with the author. Unless there is a specific contractual provision otherwise, the law does not compel the right holder to include any particular copyright management information.

As we pointed out in our initial comments, even if the author’s name is part of the CMI included with copies of her work, the obstacles to using section 1202 to enforce attribution rights are considerable. One cannot succeed in an action under section 1202 for omission of CMI without proving that the party alleged to have provided false CMI or to have removed or changed CMI did so knowingly. Then, the right holder must establish that the party 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 is not an easy standard to meet.

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7 See Jane C. Ginsburg, Keynote Address: The Most Moral of Rights: The Right to be Recognized as the Author of One’s Work, 8 GEO. MASON INT’L COM. L. 44, 54 (2016) (“Ginsburg”) (“The extremely narrow scope of [VARA] renders it of very little assistance to authors in general, and even to visual artists.”)
8 See, e.g., Comments of CCIA at 2,4.
9 See Ginsburg, supra note 7, at 61-62, n. 65.
10 17 U.S.C. § 1202 (a), (b) (emphasis supplied).
Finally, even if U.S. law did comply with Berne’s moral rights provisions back in 1988, the Supreme Court’s decision in *Dastar* has undermined that law. Some of the comments contended that *Dastar* did not significantly diminish the protection that trademark and unfair competition law afford authors’ attribution rights. For example, some argue that because *Dastar* dealt with a copyrighted work that had fallen into the public domain, little has changed with respect to works still in copyright. There are two problems with this argument. First, the Court’s interpretation of the “origin” of a work (the producer of its physical manifestation, rather the author of the incorporeal work) does not distinguish between in-copyright works and public domain works. There is no basis for assuming that the Court would embrace a different definition of “origin” for an in-copyright work. Indeed, no post-*Dastar* decision has so cabined the Supreme Court’s reasoning. Rather, the case law since *Dastar* has consistently applied *Dastar*’s holding to in-copyright works.  


12 See, e.g., Williams v. UMG, 281 F.Supp.2d 1177 (C.D.Cal. 2003) (rejecting “reverse passing off” claim when film writer and director’s name was left off the credits of a documentary on which he collaborated; court acknowledged that Ninth Circuit precedent had recognized such claims in similar contexts, but that *Dastar* now “precludes plaintiff’s Lanham Act claim” in still-copyrighted as well as public domain works); Hustlers v. Thomasson, 73 U.S.P.Q.2d 1923 (N.D.Ga. 2004) (holding that *Dastar*’s limitation of false designation of origin claims to the producer of physical copies bars not only claims by authors, but also by publishers); Mays & Assoc. v. Euler, 370 F.Supp.2d 362 (D.Md. 2005) (after *Dastar*, no Lanham Act claim for non-attribution of authorship of web design portfolio); JB Oxford & Co. v. First Tenn. Bank Nat’l Ass’n., 427 F.Supp.2d 784 (M.D.Tenn. 2006) (no § 43(a) claim against advertiser who allegedly copied plaintiff’s advertisement and substituted its name for plaintiff’s); Chivalry Film Prods. v. NBC Universal, Inc., 2006 WL 89944 (S.D.N.Y. 2006) (screenwriter claimed producer of “Meet the Parents” copied his script and misattributed screenplay to third parties; court held *Dastar* required dismissal of misattribution claim); A Slice of Pie Prods. v. Wayans Bros. Entm’t, 392 F.Supp.2d 297 (D.Conn. 2006) (same, regarding film “White Chicks”); Beckwith Builders v. DePietri, 81 U.S.P.Q.2d 1430 (D.N.H. 2006) (dismissing claim that crediting building to another architect violated the Lanham Act, “Beckwith’s complaint asserts that the Clark Road home was labeled with a designation of origin—via the signs placed near it. But, because the signs in front of that house accurately identified those who physically produced that tangible object [built the house, as opposed to designed it], the facts alleged by Beckwith fail to state a claim of false designation of origin under the Lanham Act.”); Vogel v. Wouters Kluwer, 630 F.Supp.2d 585 (M.D.N.C. 2008) (author of contributions to first three editions of textbook alleges fourth and fifth editions incorporated his contributions but without authorship credit to him; claim dismissed on the ground that a false designation of origin under the Lanham Act concerns only the provenance of the physical copies of the books, not authorship; state law unfair competition claims held preempted by the Copyright Act); Rudovsky v. West (E.D.Pa. 2011) (Lanham Act did not apply to claims of misattribution of authorship of a pocket part update of a legal treatise prepared by publisher’s staff but partly credited to authors of treatise); Logan Developers, Inc. v. Heritage Bldgs, Inc., 108 U.S.P.Q.2d 1523 (E.D.N.C. 2013) (*Dastar* forecloses false designation claim based on blueprints allegedly copied from protected building designs).
The MPAA appears to argue that *Dastar* did not impact the ability to bring claims under section 43(a)(1)(B) of the Lanham Act. While it is true that this provision prohibits the misrepresentation of “the nature, characteristics, qualities, or geographic origin of . . . goods, services, or commercial activities,” it applies only in the context of “commercial advertising or promotion” and thus does not offer a cause of action in many cases. More significantly, section 43(a)(1)(B) is directed at preventing the nature or quality of one’s work from being “misrepresented”: it does not offer any affirmative right for an author to have her name attached to her work.

Accordingly, unless and until the courts change their interpretation of *Dastar*, it appears that claims for false designation of origin for falsely attributed copyrighted works are not viable. And it remains the case that there is no claim (nor was there even before *Dastar*) to compel attribution of the author’s name when there is no designation (as opposed to a false designation) of authorship.

In short, the law has changed since the United States joined the Berne Convention: *Dastar* has undermined one of the bases for claiming the United States effectively provides moral rights, even without an express provision in the Copyright Act.

2. Contention: There already exist norms for appropriate attribution

A number of commenters argued that other societal norms or obligations protect moral rights.14

*Plagiarism.* – Some commenters, such as the Library Copyright Alliance and the American Association of Law Libraries, wrote that plagiarism policies of educational institutions, professional societies and media organizations protect the rights of attribution and integrity.

Plagiarism is the practice of taking someone else’s work or ideas and passing them off as one's own.15 As LCA and AALL observe, norms concerning plagiarism generally operate in the

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13 See, e.g., Romero v. Buhimschi, 396 Fed.Appx. 224 (6th Cir. 2010) (rejecting § 43(a)(1)(A) claim concerning the alleged denial of coauthorship credit to fellow medical researcher; the court also rejected the § 43(a)(1)(B) claim that false authorship credit falsely represented the “nature, characteristics, [or] qualities”, because these elements “refer[ ] to the characteristics of the good itself, rather than authorship designation”); Zyla v. Wadsworth, 360 F.3d 243, 241–51, 252 n. 8 (1st Cir. 2004) (professor who allegedly collaborated on a college textbook brought suit against a publisher for failing to attribute her authorship properly when she dropped out of the editing process; court read *Dastar* as foreclosing a Lanham Act claim based on the professor’s contributions to a copyrighted textbook; omission of author’s name did not occur as part of “commercial advertising or promotion” for the book.)

14 See Comments of Association of American Publishers (AAP) at 5; Comments of Electronic Frontier Foundation (EFF) at 2; Comments of MPAA at 2, 14; Comments of Organization for Transformative Works (OTW) at 1.
context of educational institutions, professional societies and media organizations. Rules against plagiarism are generally enforced by sanctions of these organizations or institutions. There is often no penalty for plagiarism absent an infrastructure to support norms and rules that prohibit it. In short, rules against plagiarism assist authors to obtain attribution in certain contexts, but the applicability of plagiarism norms is far from universal. Plagiarism does not provide the author with any legal redress. As Black’s Dictionary asserts, “Generally, plagiarism is immoral, but not illegal.”

Custom and Norms. – The Organization for Transformative Works (OTW) argues that moral rights are protected by “custom and norms” (of which plagiarism is one). OTW argues that attribution norms are “widespread across many endeavors” but “the particulars of how credit is earned vary substantially.” We do not understand OTW’s comments to argue that custom and norms effectively protect moral rights in all contexts, but rather that trying to provide such protection in areas where attribution norms don’t currently prevail introduces unnecessary complications. We discuss some of OTW’s specific points in Section B, below. In any event, customs and norms are not the equivalent of legal rights that an author can rely on to protect her rights.

Collective Bargaining Agreements. – The MPAA argues that moral rights issues are addressed in the collective bargaining agreements of the various guilds with which its members deal. That may be true with respect to motion pictures and other audiovisual works. But many types of copyrighted works are not created pursuant to an extensive network of collective bargaining agreements, so the MPAA’s argument would not justify refraining from strengthening moral rights protection for other authors. It may be that in the motion picture industry “reasonable” attribution could be deemed that which is required by the contracts and underlying Guild agreements.

3. Contention: Authors can contract for moral rights

Some commenters point out that contract law allows authors to negotiate for the right of attribution. They contend that if the issue is important to an individual author, she will ensure attribution is included in her agreement with her publisher or other transferee.

16 Id.
17 Comments of OTW at 1.
18 Id. at 2.
20 Comments of Authors Alliance at 8; Comments of CCIA at 5.
This assumes, however, that each party has equal bargaining power in the drafting process, which is rarely the case. More often than not, it is the author who must accept standardized terms which favor the other party. If attribution or integrity rights are ultimately included in the contract, it may be at the expense of other consideration that the author might seek. Moreover, contract-based rights are not enforceable against third parties. Thus, even if the author successfully negotiates for attribution, her grantee’s subsequent grantees or licensees are not bound by the initial author-grantee agreement. And of course contracts afford no rights against non-licensee infringers. Legislation to strengthen moral rights would create true rights that can be enforced by the author against the world.

4. Contention: Authors can use technical means to ensure attribution.

The comments indicate that many right holders support using technical means of affixing attribution and other information to copies of their works, and are working towards that goal. But without a legal means to ensure that attribution information is included, and may not be removed, the availability of technical means cannot substitute for an attribution right. As we discuss in section A.1, above, flaws in section 1202 have so far prevented it from serving to protect authors’ attribution rights. Moreover, section 1201’s prohibitions against circumventing technological protections apply only to “works protected under this title”: the author’s name is not a “work.”

5. Contention: Defamation and other laws protect moral rights.

EFF argues that defamation law provides “adequate relief” for violations of integrity and attribution rights. But defamation has limited effect in this area. For example, in New York, to succeed in a defamation case the plaintiff must prove that the alleged defamatory statement or act was false, was published to a third party with fault amounting to at least a standard of negligence, and resulted in injury to her reputation. This standard has many shortcomings as applied to creative authors who seek attribution. If a work is distributed without credit to the author, this remedy is useless; imposed anonymity is not defamatory. Defamation might provide a remedy for misattribution, but the plaintiff, i.e., the actual author, would need to prove that the misattribution was caused by the negligence of the distributor and that her reputation was harmed by that act. Furthermore, the statute of limitations on defamation claims is only one year from publication of the alleged defamatory statement, and it does not survive death, two limitations that might make it difficult for some authors to avail themselves of a defamation claim.

21 See e.g., Comments of Authors Guild at 7.
22 Comments of EFF at 2.
23 Dillon v. City of N.Y., 261 A.D.2d 34, 704 N.Y.S.2d 1 (App. Div. 1999). This definition reflects that in the RESTATEMENT (SECOND) OF TORTS §558 (AM. LAW INST. 1977). See also CAL. CIV. CODE §§44, 45, 45a, 46 (Deering 2017), also reflecting the RESTATEMENT definition.
B. Contention: Moral rights would be too difficult to implement and would result in increased costs.

A number of commenters argued that the adoption of additional moral rights would be too difficult, confusing and costly.

For example:

- Public Knowledge argues that “extending additional statutory protection to include rights of attribution and integrity would be difficult to define with sufficient precision and predictability, and may have little benefit.”24

- AAP argues that “the day-to-day business practices of each creative industry that relies significantly on copyright protection vary greatly, making the prospect of a new imposition of statutory “moral rights” daunting to implement….”25

- CCIA asserts that a broad right of attribution would be “burdensome to Internet services and likely interfere with users’ experience,” and would result in “cluttering screens with unnecessary information.”26

- LCA maintains that “[a] host of technical issues would have to be addressed either in the legislation or in subsequent litigation. Would every use, regardless how small, require attribution? What form would attribution be required to take? To which authors would attribution have to be given? . . . .”27

- OTW raises “serious practical considerations” that would be involved in adopting stronger moral rights protection, e.g., forcing speakers to search for all possibly relevant sources, determining appropriate attribution in the case of group authorship, and achieving agreement between initial authors and derivative work creators on descriptions that are truthful and significant.28

The comments cited above raise some legitimate questions. The adoption of stronger moral rights would change the status quo, and may require adaptation of business practices in many

24 Comments of Public Knowledge (PK) at 1.  
25 Comments of AAP at 2.  
26 Comments of CCIA at 3.  
27 Comments of LCA at 3.  
28 Comments of OTW at 1-3.
industries. Professor Ginsburg in her keynote address argued that the difficulty in practical implementation of the attribution right is likely overstated:

[D]ifficulties in determining whether a contributor at the fringes of a creative enterprise should be denominated an “author” or a “co-author” should not obscure attribution claims where authorship is apparent. Moreover, where creators are multiple, business practices 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.  

The implementation of moral rights should balance the concerns of authors with those of publishers and distributors. There should be mechanisms for balancing the respective rights so that all of the issues likely to arise won’t have to be resolved through litigation. One might, for example, look to “business practices that may assist in identifying those entitled to authorship credit,” that other common law countries have developed. It bears emphasis that at this point the U.S. is an outlier even among countries that both share a common law tradition and boast vibrant cultural industries. In these countries, the horribles paraded by many NOI commenters have simply failed to transpire notwithstanding those countries’ adoption of moral rights.

In our initial comments, we recommended that the Copyright Office be empowered to issue regulations on appropriate attribution in various situations. We continue to believe that the Copyright Office can play a very constructive role in implementing statutory moral rights, including by articulating circumstances under which waivers of moral rights would be permitted. The statute itself might emulate the approach adopted in Australia, providing a defense to failure to attribute or for violation of integrity rights by showing that the act or omission was “reasonable under the circumstances.”  

We can suggest the additional balancing measure of delaying the effective date of any moral rights legislation by a year or two in order to give authors and exploiters an opportunity to identify and work through some of the implementation issues that would arise.

C. Contention: Adoption of moral rights would inhibit free expression

Some commenters claimed that the right of integrity would deter creation of new works. They also argue that fair use would provide insufficient protection for users. For example:

EFF argues that it is “misguided” to assume “the fair use doctrine will offer adequate protection for free speech,” because the fair use doctrine is “over-taxed” and “under threat,” given the

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29 Ginsburg, supra note 7 at 48.
30 Copyright Act 1968 §195AS (Australia).
expansion of copyright’s scope in recent decades. It also cites the availability of “potentially ruinous statutory damages (even without proof of actual harm) and attorneys’ fees,” as contributing to the “chilling effect of copyright’s prohibitions.” It fears that “[c]reating a new right could cause courts to restrict the scope of fair use to give the integrity right meaning.”

Public Knowledge asserts that it is “most concerned about how an extension of the copyright law to encompass moral rights will affect the rich culture of follow-on creators and fair use in the United States. Increasing the burden on users of copyright protected works through an expansion of moral rights may have the unintended consequence of burdening and limiting creativity and expression, rather than encouraging it.”

MPAA argues that

[S]tatutory recognition of moral rights could interfere with the ability to make appropriate fair use of others’ material, including in parodies and critical commentary. Depending on the scope of such statutory recognition, authors asserting the moral rights of integrity could object that such uses impinge on their “honor or reputation,” potentially leading to extensive litigation of uncertain outcome, thus chilling filmmakers’ exercise of their own rights. Similarly, a demand for recognition under the right of attribution might conflict with the ability to make fair use of certain material that is incorporated into a larger work, where prominent display of the underlying author’s name would be impractical or would detract from the fair user’s critical or parodic message.

The MPAA goes on to state that

Depending on the scope of such rights [of integrity or attribution], the MPAA is concerned that they could impinge on First Amendment rights in at least two ways. First, individuals could potentially invoke the right of integrity to block uses of their works for purposes they consider a “distortion, mutilation or other modification of” their work which is “prejudicial to [their] honor or reputation,” yet which are nonetheless protected by the First Amendment and the fair use doctrine.

We take seriously the suggestion that additional moral rights could impinge on First Amendment freedoms or fair use. However, moral rights are not inconsistent with these bedrock principles, and we believe an appropriate statute could be developed. The mere fact

31 Comments of EFF at 3.
32 Comments of PK at 3.
33 Comments of MPAA at 8.
34 Id. at 10.
that an act may be fair use should not necessarily absolve the user from complying with the attribution right. For example, at the level of international norms, the Berne Convention art. 10 quotation right in many ways resembles the U.S. doctrine, but it is conditioned on the attribution of the source and of the author’s name if it appears thereon. (Note that, contrary to the fears evoked by some NOI commenters, the Berne limitation on the author-attribution obligation effectively acknowledges that it may not be reasonable to require those who make follow-on uses of extracts of works – or perhaps even of whole works, depending on the meaning of “quotation” – to track down the author’s name if it does not appear on the source.) By the same token, how would fair use be compromised if attribution were required on “multiple copies for classroom use” or copies of scholarly articles provided by libraries to researchers? This is likely consonant with existing practices.

Similarly, the right of integrity is not inherently in tension with free expression. Parody, for example, is a well-established exception in EU countries, yet all these countries also recognize the integrity right. The Berne Convention standard for integrity right violations is harm to the author’s honor or reputation: this is a far narrower standard than author unhappiness with alterations made to her work. We believe it is unlikely that many cases in which courts found expressive uses to be fair uses would come out differently were Berne-level integrity interests taken into account. For example, if altering a work is found “fair” because the change gives the work “new meaning or message,” as the Second Circuit found in some art appropriation cases, the first author’s “honor or reputation” remain unscathed precisely because the point is that the new message is not the first author’s message. To the extent the new message casts the original message in an unflattering light, that consequence would be no more actionable than would be the fallout from an unkind book review.

In any event, it is apparent to us from reading the comments and considering the issues that attribution rights pose fewer concerns than integrity rights. The Copyright Office may wish to recommend that Congress approach moral rights incrementally, and focus first on the attribution right.

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

Respectfully submitted,

35 See e.g., Blanch v. Koons, 467 F.3d 244,253 (2d Cir. 2006); Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013) (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).
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