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The Most Moral of Rights: the Right to be Recognized as the Author of One's Work

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 sources of attribution rights in the current US 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

* 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.)

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 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.

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.”).

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 *infra* Section II.

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 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 attribution) could open a back door to integrity rights. On the other

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 F. PATRY, MORAL PANICS AND THE COPYRIGHT WARS 74 (2009). On the overvaluation of authorship attribution, see, e.g., Christopher Jon Sprigman, Christopher Buccafusco, Zachary Burns, *What's a Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B.U. L. REV. 1389 (2013).

⁸ See generally *Gilliam v. ABC*, 538 F.2d 14 (2d Cir. 1976).

⁹ Peter K. Yu, Professor, Tex. A&M Univ. Sch. of Law, Remarks at the Copyright Office Symposium on Moral Rights: The U.S. Perspective (Apr. 18, 2016), in XX GEO. MASON J. OF INT'L COMMERCIAL L. XXX, XXX (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 Peter Yu, *supra* note 9, at XX.

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

hand, limiting attribution rights to the affirmative right to claim authorship, or restricting remedies for false attributions of authorship to clear labelling 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*

Article 6*bis* 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

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).

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

¹⁷ *Id.* art. 5(3).

¹⁸ *Id.* art. 18(3).

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

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

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).

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).

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 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 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.

²⁶ Berne, *supra* note 6, art. 9(2).

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.

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 6*bis* moral right of attribution. First, while article 6*bis* 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 6*bis* obligation from which it arguably derived, then article 10(3) would have been superfluous. But in 1948 it was:

not clear that the article 6*bis* 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 6*bis*, the delegates nonetheless agreed that the author's name should be recognized. Article 6*bis* 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 10*bis* 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 6*bis* 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 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

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

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 (U.K.) 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].

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.

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 were 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.”

“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.

³⁵ *Id.* § 101.

³⁶ *Id.*

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 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*

³⁷ *Id.* § 106(a)(1).

³⁸ *Id.* § 106(a).

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).

§ 1202, protecting copyright management information, implements an international obligation under article 12 of the WIPO Copyright Treaty. The international text provides:

(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 6*bis* 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 6*bis* rights.⁴⁵ The U.S. implementation of WCT article 12 departs from the international text in one important way. § 1202 states:

(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.

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).

(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.

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

⁴⁶ H.R. 2281, 105th Cong. § 1202 (1997) (emphasis added).

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).

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 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

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*).

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.

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

The language excluding Berne article 6bis 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 6bis. 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 6bis).

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 section 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 which § 1201 and § 1202 belong is “Copyright Protection and Management Systems;” and that Congress’ goal in

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

⁵⁷ 17 U.S.C. § 1202(c).

§ 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 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

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).

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).

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 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 § 1201(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

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).

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. Aug. 13, 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.

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

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

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 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 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.

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 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

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).

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>.

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

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

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 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.”).

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 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-twitters-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-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).

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 § 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

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 America 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).

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.”)

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 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

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).

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.

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 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 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

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).

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.*

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

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

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. Burtchaell*, 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
- (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.

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

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,

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;

(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*].

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

Were Congress at last to implement at least the attribution provision of Berne article 6*bis*, 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 6*bis*, the duration of the attribution right would be the same as the term of economic rights.¹¹¹ The attribution right would be infringed when an

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 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

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 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.

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 misrepresentations 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).

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).

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 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

¹¹⁴ See, e.g., U.K. 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).

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

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 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

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 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. . .").

¹²³ *Supra*, text accompanying notes 97-98.

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.