
**Before the Copyright Office
Library of Congress**

In the Matter of)
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Study on the Moral Rights of Attribution) Docket No. 2017-2
and Integrity)
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Comments of the Authors Guild, Inc.

The Authors Guild submits this statement on behalf of its 9,000 members in response to the United States Copyright Office’s Notice of Inquiry (“NOI”) concerning its study on the Moral Rights of Attribution and Integrity. The Authors Guild and its predecessor organization, the Authors League of America, have been leading advocates for authors in the areas of copyright, contractual fairness, and free speech since its founding in 1912. Our members represent the broad sweep of American authorship; among them are historians, biographers, poets, freelance journalists, ghostwriters, and novelists, bestselling and self-published alike.

The Authors Guild appreciates the opportunity to contribute to the Copyright Office’s Study on the Moral Rights of Attribution and Integrity. The concept of moral rights is important to authors because, as a threshold matter, it validates our recognition that creative work is far more than mere toil. As Authors Guild member Scott Turow said at the recent Copyright Office symposium on moral rights, “artists traditionally are believed to have put a little bit of their soul into whatever they create. . . . And I think we do have the right to assert that there is a kind of specialness in creative work, and that is

recognized in terms of moral rights.”¹ So we thank the Copyright Office for its time and attention to this issue.

We would like to make it clear at the outset that these comments are limited to the right of attribution—and the lack thereof—under U.S. law, and that we’re speaking solely on behalf of authors of literary works. (We believe that the derivative work right largely covers the right of integrity—with some exceptions—and we reserve our comments on the right of integrity for the reply round.)

1. Should additional moral rights be considered? If so, what specific changes should be considered by Congress?

Article *6bis* (1) of the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention,” which the U.S. joined in 1989) states: “Independently of the author’s economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work”²

As a signatory to the Convention, the United States is obliged to provide the right to claim authorship and to be identified as the author of one’s work. When the United States finally joined the Berne Convention in 1989, as described in the NOI, it was decided that we did not have to amend our law to comply with Berne’s moral rights of integrity and attribution because a combination or “patchwork” of U.S. laws cumulatively covered those rights. The law has shifted somewhat in the interim years, most notably in the *Dastar* decision, discussed below, with the result that our law no longer provides a full right of attribution for authors of books and other literary works.

¹ “Authors, Attribution and Integrity: Examining Moral Rights in the United States (Session 4: The Importance of Moral Rights to Authors),” 8 GEO. MASON J. INT’L COM. L. 87, 96 (2016) (remarks of Scott Turow, Author).

² Berne Convention for the Protection of Literary and Artistic Works art. *6bis*(1), Sept. 9, 1886, *as revised* July 24, 1971, *and as amended* Sept. 28, 1979, S. Treaty Doc. No. 99-27 (1986).

To address this, we believe that Congress should remove any question of the United States' compliance with the Berne Convention³ by codifying an express right of attribution, namely the right to be credited as the author.

Mis- and nonattribution occur mostly outside the realm of reputable traditional publishing. With the exception of works made for hire, ghostwritten works, and certain other works, currently it is not a common practice in the publishing industry to distribute written works without attribution. But it does occur, and when it does the effects to the author can be very damaging. As an example, one Authors Guild member recently wrote a book for a not-for-profit with the understanding that her name would be on it, but the not-for-profit now refuses to credit her.

Another area of concern is that, with the increase in online piracy through the sale of pirated e-books as well as pirated hard-copy books, there is a rising practice of the infringer replacing the author's and publisher's names to make it harder to detect the infringement.

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

Section 1202(a) makes it an offense to “knowingly and *with the intent to induce, enable, facilitate, or conceal infringement* . . . provide, distribute or import false copyright management information.”⁴ Copyright information is defined to include the name of the author.⁵

Section 1202(b) makes it an offense to do any of the following with knowledge that it will induce, enable, facilitate, or conceal an infringement: (1) “*intentionally* remove or

³ For a more detailed discussion of Berne compliance, see our response to question 6 below.

⁴ 17 U.S.C. § 1202(a)(1)-(2).

⁵ 17 U.S.C. § 1202(c)(2).

alter any copyright management information,” or (2) “distribute, import or otherwise disseminate copyright management information knowing that the copyright management information has been removed or altered without authority. . . .”⁶

While section 1202 was never intended as a replacement for the attribution right, some observers have speculated that section 1202 does satisfy the right of attribution. We agree that it does—but only in limited circumstances, and with limited utility for authors. To begin with, section 1202 does not provide the right to be credited in the first instance, and it does not cover failure to provide attribution where there is no intent to induce or knowledge that it will induce infringement.⁷ It is expressly limited to instances where attribution is removed or altered in connection with an intent or knowledge to induce infringement. Meeting this high threshold of knowledge or intent is likely to prove extremely difficult for many authors, even the few who can afford to litigate, because—in the instance of a removal of attribution, for example—an author must show that a defendant knew or should have that the removal of attribution itself would induce infringement in those to whom it was distributed.⁸ As a practical matter, then, as Jane Ginsburg has noted, “even intentional removal or alteration of authorship attribution is not unlawful if the copyright owner cannot show that the person who removed or altered the information knew that the removal would encourage or facilitate copyright infringement.”⁹

Further, some courts have limited the application of section 1202 to the removal of attribution that is digital or part of an automated copyright management system,¹⁰ which excludes its application to hard copies of written works. These decisions, as noted in the

⁶ 17 U.S.C. §§ 1202(b).

⁷ 17 U.S.C. § 1202(b)(3).

⁸ See Jane C. Ginsburg, “Moral Rights in the U.S.: Still in Need of a Guardian *ad Litem*,” 30 CARDOZO ARTS & ENT. L. J. 73, 78 (2012).

⁹ See *id.* at 77.

¹⁰ See *Textile Secrets Int’l Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184, 1201 (C.D. Cal. 2007); *IQ Grp., Ltd. v. Weisner Publ’g, LLC*, 409 F. Supp. 2d 587, 597 (D. N.J. 2006).

NOI, contravene the legislative history, which states that “CMI need not be in digital form, but CMI in digital form is expressly included.”¹¹

As noted above, we have recently observed the practice of removing copyright management information in connection with Internet piracy on a more frequent basis. The section 1202 provisions will assist authors who wish to sue for the piracy of their books in these cases, as an adjacent claim. But it is the rare author with the resources to bring a lawsuit. For traditionally published authors, it is generally the publisher that enforces against infringement, and it is not the publisher’s primary concern to defend the author’s right of attribution.

In sum, section 1202 does not provide a full, positive right of attribution. The author is left without claims against those who publish her work without attribution in the first place. Second, it is not clear that section 1202 applies other than to “automated copyright protection or management systems.” Finally, it would be extremely difficult for an author to prove the requisite intent or knowledge—even assuming the author is one of the few with the means to bring the claim.

Section 1202 itself may not be the proper place to provide the kind of full, positive right of attribution contemplated in our response to question 1 above, but Congress could certainly step in to clarify that section 1202’s protections of copyright management information apply to the removal of attribution on hard copy works, as well as digital works or automated copyright management systems.

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

¹¹ S. Rep. No. 105-190, at 16 (1998).

There should be exceptions to the right of attribution where the author publishes, or by written contract authorizes another to publish, a work as anonymous or pseudonymous. But, if the author later publishes or authorizes a version that does credit the author by his or her true name, the right of attribution should attach then. One interesting question that we have not fully explored, but could do so, is whether an author should have an enforceable right to remain anonymous or to use a pseudonym.

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

When the United States joined Berne in 1989, it was suggested that section 43(a) of the Lanham Act,¹² which prohibits false designations of origin of goods and false descriptions, was one of the principal patches in the “patchwork” of U.S. law that was said to provide a right of attribution. Indeed, Lanham Act claims have been called “the keystone of the United States’ claim to provide protection substantively equivalent to Article 6bis’ right of attribution.”¹³ Section 43(a) provides a federal remedy for “any false designation of origin . . . which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.”¹⁴

When the U.S. joined Berne, it was argued that this right would apply to works of authorship as well, so that if a party were to provide a false designation of the origin of a work of authorship, the party could be liable under section 43(a) of the Lanham Act.

In 2003, however, the U.S. Supreme Court found in *Dastar* that “as used in the Lanham Act, the phrase ‘origin of goods’ is in our view incapable of connoting the person or

¹² 15 U.S.C. § 1125(a).

¹³ Justin Hughes, “American Moral Rights and Fixing the *Dastar* ‘Gap,’” 2007 UTAH L. REV. 659, 661 (2007).

¹⁴ 15 U.S.C. § 1125(a)(1)(A).

entity that originated the ideas or communications that ‘goods’ embody.”¹⁵ The Lanham Act protects against confusion as to the source of physical objects, that is, and not creative, copyrightable content.

Though there is some debate regarding the precise scope of the *Dastar* ruling, it is clear from Justice Scalia’s opinion that section 43(a) can no longer be used to prevent others from failing to provide attribution or from providing false attribution for works of authorship. Justice Scalia expressly states that the common-law foundations of the Lanham Act “were not designed to protect originality or creativity,”¹⁶ and concludes that the phrase “origin of goods,” as used in section 43 of the Lanham Act, “refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.”¹⁷ In other words, the expression of a work of authorship is not protected by section 43(a); only the physical good itself is protected—the package or material book it comes in (presumably e-books files would be covered as well). The publisher and printer are protected, not the author (unless also the publisher or printer, and then, only as publisher or printer).

Accordingly, Congress should consider legislation to settle the matter explicitly, providing an express right of attribution, as discussed in response to question 1 above.

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

Book authors and freelance journalists do not have collective bargaining, nor are they likely to in the near future.

¹⁵ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003).

¹⁶ *Id.* at 37.

¹⁷ *Id.*

As for contract law, it is not a solution to moral rights. It is possible for an author to receive a right of attribution under his or her publishing contract, but moral rights are meant to exist outside of contracts—they are natural rights that exist independently of what an author can get licensees or assignees (e.g., publishers) to agree to. This is especially important for book authors when it comes to negotiating contracts with publishers because, as a practical matter, most authors have very little bargaining power.

The fact is that many authors, particularly those publishing outside the Big Five environment, are offered “take-it-or-leave-it” deals and simply don’t have the leverage to change their terms. We have seen numerous instances where Authors Guild members have been told that the contract “boilerplate” cannot be modified—where the so-called boilerplate includes all terms other than those relating to advances, royalties, fees and the grant of rights. More often, they are simply told “no, we are not allowed to make any changes to that clause,” no matter how reasonable the request. Our members have even reported instances where an offer to publish was rescinded after the author asked for changes in the contracts. These issues occur most often with the smaller publishers who do not have legal staff in-house and cannot afford to hire counsel. They feel they do not have the resources to negotiate agreements. But even major publishers are disinclined to change the standard terms in their contracts, and most publishing agreements currently do *not* contain provisions requiring the author’s name to be provided on the book or with the article.

We stress that unattributed publication has not been a major problem faced by book authors to date, since the widespread practice in the publishing industry is to provide the author with attribution unless otherwise agreed (such as for ghostwritten works, or works made for hire). But, in the absence of an explicit right of attribution, there is legally nothing preventing publishers from publishing a work without crediting the author.

Moreover, there are many situations where written contracts are not entered into, or where unsophisticated parties enter into an agreement that does not address attribution. Those are the situations where a right of attribution would have provided a remedy. This

occurs most often in our experience outside of the core publishing industry. For instance, we've seen situations where a corporation or not-for-profit organization hires an author to write a work, or licenses a pre-existing work, and the author understands she or he will be given attribution, but the entity refuses to provide attribution on the finished product.

A final problem with relying on contract law is that contracts assume a contractual relationship, or privity, with the party using an author's work, which will not always be the case. For instance, in the case of unauthorized copies, such as un- or misattributed works in the context of digital piracy, contract law won't help ensure attribution.

With respect to noncommercial uses and other cases where authors wish to provide wide, non-compensated use, the Creative Commons licenses discussed in the NOI can be a good way to require attribution while allowing widespread use. But at the same time, it is not a complete solution, as it has limited application and the same enforceability problems as any contract.

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

The publishing industry is extremely diverse—in terms of types and size of publishers, types of books published, types of authors, readers targeted, and means of distribution. According to the Bureau of Labor Statistics, there are over 136,000 writers and authors working in the United States.¹⁸ Over 200 traditional book publishers are members of the Association of American Publishers, but even that number represents only a portion of the industry. Moreover, publishing companies, for good reason, have antitrust concerns

¹⁸ United States Dept. of Labor, Bureau of Labor Statistics, "Occupational Outlook Handbook: Writers and Authors," available at <https://www.bls.gov/ooh/media-and-communication/writers-and-authors.htm#tab-1>.

about working together on any contract terms. Thus, as a practical matter, it is difficult to imagine how voluntary initiatives would be created and widely adopted.

Even if voluntary initiatives could be developed to provide for a right of attribution, such voluntary arrangements would not be a panacea, for all the same reasons discussed in our response to question 7 above.

To conclude, we believe that the United States currently is not in compliance with its obligation to provide a right of attribution under the Berne Convention, as it does not provide a full right of attribution. Enacting an express right of attribution would help the U.S. comply with its Berne obligations, and it would provide an important, meaningful right to authors. As Jane Ginsburg observed at the Copyright Office's moral rights symposium, "the most moral and the most intuitive author's right is the right to be recognized as the creator of her works."¹⁹

Thank you for your attention to this matter, and we are available for consultation.

¹⁹ Jane C. Ginsburg "The Most Moral of Rights: The Right to Be Recognized as the Author of One's Work," 8 GEO. MASON J. INT'L COM. L. 44, 45 (2016).