
**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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**Reply Comments of the Authors Guild, Inc.
May 15, 2017**

The Authors Guild submits these reply comments on behalf of its 9,000-plus 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.

In our initial comments,¹ we focused on the right of attribution, arguing, among other points, that Congress should remove any question of the United States’ compliance with the Berne Convention by codifying an express right of attribution, namely the right to be credited as an author. We pointed out that in the many situations where a publishing contract either has not been entered into or does not address attribution, an express right of attribution could provide a remedy allowing authors to be recognized for the work they’ve done.

In these reply comments, we’d like to take the opportunity to provide the Copyright Office with a more nuanced understanding of book authors’ thoughts on the importance of moral rights, and where they believe the right of attribution or integrity would prove useful. To that end, we prepared a short survey and sent it to our members. Authors Guild members represent the broad

¹ See U.S. Copyright Office, *Study on the Moral Rights of Attribution and Integrity*, Initial Comments of the Authors Guild, Inc., available at <https://www.regulations.gov/document?D=COLC-2017-0003-0038>.

sweep of American authorship; among them are historians, biographers, poets, freelance journalists, ghostwriters, translators, and novelists—bestselling, midlist and self-published alike. The survey was sent to approximately 8,000 authors and received 420 responses between May 3 and May 12, 2017. We describe some of the responses below. (Please note that quotations from respondents in some cases have been edited for brevity or to preserve anonymity.)

Authors Guild members' interest in this survey, along with the many passionate responses we received, underscores the fact that for many authors their work is not only a source of income, but a source of honor and pride. The respondents in general believe that receiving proper attribution and retaining the integrity of their works is crucial to their long-term economic and reputational value. Authors have a deep interest in having their names associated with their works, and in those works circulating in the form and manner they intended. Writers build careers based on their reputations, and readers often choose books based on the author's standing. Establishing enforceable rights of attribution and integrity would not only bring the United States into compliance with the Berne Convention; it would provide the creative community with the confidence that our laws recognize the fundamental rights of authors to protect their reputations and prevent misattribution of their works. Doing so will also protect readers—consumers of books—in the same way that the Lanham Act protects material goods and services. Every corporation in America has the right to be recognized as the source of their creations; authors should have that right, too.

1. What types of problems have authors had receiving attribution?

Our first question was whether the authors responding had ever had a problem receiving credit for a work they thought they should have received credit for. If so, we asked them to describe the circumstances in which they were denied attribution. Customarily, book publishers do provide attribution, except for ghost-written works, but anecdotally, we have heard that is not always the case. We sought more detailed information on whether and when authors experienced a lack of attribution despite the fact it is customary to provide it. In other words, we sought to discover whether nonattribution and misattribution are real problems for authors.

We were surprised to learn that 30 % of the respondents (124/414) have indeed had a problem receiving credit for work they thought they should have received credit for. Many of these instances arose from co-authorship arrangements, including the situation where a co-authored article was published by one of the co-authors in a collection of his own writings without the permission of or attribution to the other co-author. In another example, a husband-and-wife writing partnership where the wife actually wrote the book but the publisher placed the name of the husband—a better-known writer—first, causing the book to be catalogued under his name, “as if [the writer] had nothing to do with it.” In another case, a publisher released a second edition of a science textbook without consulting the author and “with no discernable changes”—except the addition as co-author of the name of a prominent scientist in the field, presumably to give the book more prestige.

Attribution problems were also reported in what we might think of as “nontraditional uses”—such as the use of an excerpt of an author’s work on the SAT test. Another member was surprised to learn (through WikiLeaks, no less), that a geopolitical intelligence firm had taken one of his books and sold it to clients as “intelligence,” with his name replaced by another’s.

Many non-attribution cases arise when the author’s name is simply left off the work altogether. Our members told us of bylines dropped from periodical contributions at the eleventh hour; a daily columnist complained that when the newspaper she had written for went electronic, they took her name off one of her entries and substituted “Anonymous”; a poet also reported that a copyrighted poem was attributed to “Anonymous” by an internet publication; still others wrote that periodical publishers, when transferring a work from print to online, sometimes neglected to include any byline.

Translators, too, often face the indignity of non-attribution—in fact, it is one of the major issues reported by Authors Guild members who translate. This problem, like that of book authors, could be solved contractually, but the reality is that translators are often in an even worse negotiating position than other authors, and hesitate to ask for boilerplate changes for fear of losing work.

Clearly, the need for an attribution right is strong. While some of these unattributed uses may have been acceptable under the contract governing the work in question (if there was one), that is itself often the result of the weak bargaining position many authors find themselves in vis-à-vis publishers, a position that would be strengthened by a statutory right of attribution.

2. **Non-attribution specifically in the case of electronic editions of literary works.**

Around 11% of respondents (41/362) reported having specifically encountered an electronic edition of their work where their name had been either removed or changed. The survey results demonstrate that this type of mis- or nonattribution occurs largely in two different scenarios. The first is enabled by relative ease of infringing republication on the Internet. An author publishes an article in an online publication only to find it reposted on other websites, blogs, and social media pages, without their byline. Some respondents report having been able to use DMCA takedown notices as an effective remedy in this scenario; others, overwhelmed by how far and fast the infringement spreads, have simply given up on enforcing their rights.

The other scenario in which authors encounter mis- or nonattribution in electronic editions is in connection with commercial piracy, where, as we noted in our initial comments, there is a rising practice of offering pirate copies of books online (often at cheaper prices to attract purchasers) and replacing authors' and publishers' names in an effort to evade detection, or offering titles under an author's name that the purported author never wrote.

In both scenarios, a full, enforceable right of attribution would give authors an additional remedy and allow them to prevent the use their names to sell pirated books. It would also incentivize the adoption of attribution as a common practice when reposting other authors' work online. This would be particularly important in cases where there is no cause of action for copyright infringement, such as where the reposting could be deemed fair use.

3. When should the right of attribution be waivable, if ever?

378 out of 399 or 95% of respondents expressed a belief that authors should always receive credit for the works they write. A large number, nevertheless, strongly supported making the right waivable. Circumstances in which they see a need to waive the rights of attribution and integrity include: where the author desires anonymity, where a work is ghostwritten, or in other contexts where the author is hired to write for another (i.e., an author hired by a corporation to write a company history, or hired by an individual to write a family history) and where a paying contract stipulates the author will not receive author credit. The comments we received collectively make a strong case for allowing the rights of attribution and integrity to be waivable, such as in the Visual Artists Rights Act (VARA): “if the author expressly agrees to such waiver in a written instrument signed by the author.”²

A number of respondents explained that the ability to obtain ghost-written work or other commissioned work is important to their all-around financial well-being as authors. While they want to receive credit for their own literary works, many of the authors who responded rely on the income they receive from writing for hire, and expressed concern that a non-waivable right of attribution would interfere with the markets for such work.

“I see no compelling reason to ban anonymous ghostwriting, as long as the ghost knowingly undertook the assignment,” wrote one respondent. “A legal obligation to credit would likely diminish the number of such works and in many cases reduce the ghostwriter’s fee.” This was a common sentiment among respondents. Another author explained that although she felt bothered by the lack of credit she received from her ghostwriting work, she recognized the necessity of such uncredited work to her career: “In hindsight, I am irritated that a very big-name ‘author’ claims that he writes every word of his books. I feel complicit in that lie. But, on the other hand, one of my marketable skills is being able to write in the voice of the hiring expert. I probably would not have been able to make a career of writing without uncredited ghostwriting.”

² 17 U.S.C. § 106A (e)(1).

Preserving the market for hired writing work, including ghostwriting, is particularly important today, as midlist authors' incomes (representing the 99%) from their own work have been dropping in recent years and more and more writers are turning to ghostwriting. Ghostwriting jobs in both the commercial and private spheres appears to be on the rise as a reliable and important source of income for authors whose advances are being cut or are having a harder time selling books to publishers. Although we believe free-expression is better fostered by a diverse, copyright-driven publishing market that allows authors to write what they want to right, we also support the right of authors to write commissioned works on an anonymous basis, to give expression to the voices of those they are writing on behalf of—stories that might not otherwise see the light of day.

Regarding works written under contract where nonattribution was part of the agreement, respondents' overarching sentiment was that "if a publisher wanted me to write something and was willing to pay me an acceptable fee, then I would have no problem waiving the right because it would be part of the contract." Some respondents, however, did maintain that an author's right of attribution should remain unwaivable. "Every sentence and paragraph I write," one respondent wrote, "every word, as a matter of fact, is carefully crafted. I want the credit as a matter of professional pride."

We also heard from a number of respondents who strongly believe that an author should have a right to remain anonymous and to use pseudonyms, suggesting that an enforceable right to do so would be welcomed, particularly when unmasking an anonymous author would do harm to his or her honor or reputation. "The decision of whether or not to credit the author should belong to the author, not to anyone else," was a typical response. Many respondents expressed the sentiment that "there may be cases in which a writer does not want to be associated with work that they have done strictly for a paycheck," or, put more colorfully, "I'd rather not be identified with work that was trash I wrote for a lot of money." One respondent presented the scenario where an author would want to remain anonymous where she "considered the work to attract danger to her." Others remarked on the desire to use a pseudonym for books in different genres than those they are known for, as a way to protect their primary brand (i.e., their real name), or for

controversial or political works that they did not want traced back to them (for instance, this was not uncommon in the McCarthy era).

4. **Should the law provide a "right of integrity" i.e., a right for authors to prevent modifications of their works that would harm their honor or reputation?**

An overwhelming percentage of the respondents—404/408 or 99%—believe the law should provide a right of integrity. A representative response is that “A person’s ability to make a living in any field, not just writing, can be severely damaged if something harms his or her reputation.” “I wouldn’t want someone changing the language in any of my books,” another author responded. “Some books are banned and I wouldn’t want those books to be changed either. They were written that way for a reason.”

A fair number of respondents, however, expressed concern—as have other observers—about how a right of integrity might affect First Amendment considerations, such as an individual’s ability to use the work in a parody. We’re confident, though, that making any rights of attribution and integrity subject to the fair use provision in section 107—as is VARA—would excuse fair uses, such as parody, from liability. Respondents also noted that an exception to the right of integrity for ghostwritten works would be acceptable, provided the ghostwriter’s name is not attached to the work (pursuant to a contract). Where authors are concerned about integrity, in other words, is where their name is attached to the work.

A number of authors suggested that their desire for a right of integrity arises from having had bad experiences with the editing process. Traditional publishing contracts generally allow an author to approve the publisher’s substantive edits (but not grammar, spelling, etc.) before publication, but if there’s a disagreement between author and publisher, in practice the publisher that has final say. Rarely does the author have the resources to sue to contest publication. Authors’ frustrations often arise when an editor ignores the contractual agreement to inform the author of changes, making changes to the work after the author’s final approval. In each case, the

author wanted at least the right to remove their name from the work before publication. One author describes having work “butchered,” by an editor, but noted that in general editors add great value.

In sum, “legal recourse for unapproved changes would be a change for the better,” as one author wrote. Although we don’t often see reputable publishers edit manuscripts in a way that would amount to a violation of the right of integrity, it can and does happen sometimes, and authors should be protected when it does. A true right of integrity, beyond the derivative work copyright, would help establish a stronger base from which to negotiate.

Accordingly, we support the statement regarding the right of integrity expressed in the Initial Comments of the Kernochan Center for Law, Media and the Arts: “the author shall have the right to prevent any intentional distortion, mutilation or other modification of that work which would be prejudicial to his or her honor or reputation.” We further agree with the Kernochan Center that it would be prudent to include in the legislative history a statement clarifying that “the standard of assessment of prejudice is an objective one, akin to the evaluation of defamation. . . . It is not enough that the author does not like what was done to her work; the action must also reflect badly on her in the public eye.”³ In order to be actionable under the right of integrity, that is, an editing job would have to be so bad as to objectively denigrate the author’s honor or reputation.

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In sum, the responses to our survey show authors’ keen interest in securing the statutory rights of attribution and integrity, provided that they are waivable and subject to the fair use limitation. In addition to providing meaningful rights to authors, the implementation of an attribution and integrity statute for non-visual artists authors would bring the United States into compliance with the Berne Convention and provide readers and other consumers of creative content with increased confidence of the authenticity of the works that contribute so deeply to the economic and cultural wellbeing of our nation.

³ SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 10.29 (2D ED. 2006)

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