The Future of Music Coalition - Moral Rights Docket Filing

Harrison Speck, 05/15/2017

Background and Motivation

The concept of *droit moral* dates back centuries, but was first implemented into law in nineteenth-century France to preserve artists' connection with their creative output once their work was out of their possession. Underlying French law is the belief that the work of an artist is reflective of their soul and should not be modified in any fashion to which the artist objects.[1] France has the most robust moral rights protections of any nation, uniquely binding the artist with their creation through a set of controls on whether and how a creation can be displayed, modified, or destroyed. In turn, France grants perpetual moral rights to all creations even after the author's death, when the author's heirs are the "natural warden of [their] memory."[2] The creator's personality is forever tied to their creation.

Continental European countries developed some form of moral rights protections through the 19th and early 20th centuries and moral rights was codified internationally through the Berne Convention during the Rome Revision Conference in 1928.[3] However, the U.S. did not join the Berne Convention until 1989, in part because the requirement of moral rights did not fit within the U.S.'s registration-based system of copyright.[4]

Moral rights, an awkward translation from *droit moral*, might more accurately be called personality rights.[5] Moral rights encompasses a suite of four rights to the author, varying dependent on how moral rights are enacted. The two most common rights are the rights of attribution and integrity. The right of attribution protects the author's relationship to their work by requiring the author be recognized for the work. The

[1] Eric B. Hiatt, "The 'Dirt' on Digital 'Sanitizing': Droit Moral, Artistic Integrity and the Directors Guild of America v. CleanFlicks et Al," *Rutgers Computer & Technology Law Journal* 30, no. 2 (June 22, 2004): 375–98.
[2] Galia Aharoni, "You Can't Take It with You When You Die - Or Can You: A Comparative Study of Post-Mortem Moral Rights Statutes from Israel, France, and the United States," *University of Baltimore Intellectual Property Law Journal* 17 (2009 2008): 103–38.
[3] Peter K. Yu, "Moral Rights 2.0 2013 Fall Intellectual Property Symposium," *Texas A&M Law Review* 1 (2014 2013): 874.
[4] Mira T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford University Press, 2011), 242.
[5] MICHAEL RUSHTON, "The Moral Rights of Artists: Droit Moral Ou Droit Pécuniaire?," *Journal of Cultural Economics* 22, no. 1 (1998): 15–32.

right of integrity allows the author to protect the original intention or form of the work. Two less implemented rights include the rights of disclosure and withdrawal, or retraction, which protect the creator's power over when a work is released to the public and allows the creator to remove the work from the public sphere.[6] France stands as one of the few nations to implement the latter two rights, which have very little chance of codification into U.S. law and, especially regarding withdrawal, would directly contradict economic copyright practices.[7] The Berne Convention does not recognize the rights of disclosure or withdrawal. As a result, the Copyright Office focuses on the rights of attribution and integrity during their discussion of moral rights.

European civil law tends toward a monist view of copyright which couples economic and moral rights together. As a result, many copyright practices and underlying incentives in U.S. law, such as work-for-hire contracts which bestow copyright to the employer of the creator, contradict moral rights implementation in much of Europe. German law, for example, does not allow any contractual agreement which strips copyright from the creator because works are inherently bound to their creator. Common law countries tend toward a dualist approach, opting for a separation of economic copyright and moral rights. Creators can give their economic copyright away, but still preserve certain rights found inalienable to the author, like the right to preserve the work as originally intended.[8]

*Shostakovich v. Twentieth Century-Fox Film Corp* stands as the hallmark case delineating the position of American courts on moral rights in the early 20th century.[9] Four Russian composers sought control over what became a public work used in the anti-Soviet film "The Iron Curtain" in 1948. The composers cited the use of their music as a violation of their moral rights because their connection with the music implied

[6] Aaron White, "The Copyright Tree: Using German Moral Rights as the Roots for Enhanced Authorship Protection in the United States," *Loyola Law and Technology Annual* 9, no. 1 (Winter 2010): 31–90.
[7] Aharoni, "You Can't Take It with You When You Die - Or Can You."
[8] Lindsey A. Mills, "Moral Rights: Well-Intentioned Protection and Its Unintended Consequences*," *Texas Law Review; Austin* 90, no. 2 (2011).
[9] Shostakovich et al. v. Twentieth Century-Fox Film Corp, No. 80 N.Y.S.2d 575 (1948).

disloyalty to their country. The court dismissed these claims because the works were not distorted in any way and only the reputation of the artists were at stake. The court further questioned whether moral rights focused on the artist or the art, citing international questions about what constitutes moral rights.[10] A decade later, French courts concluded the opposite and ordered remedies for the Russian composers.[11] Despite the ruling, *Shostakovich* marked the first discussion of moral rights in the U.S. courts and indicated a willingness to consider moral rights further.

Over the course of the following decades, courts grappled with various incarnations of moral rights through the application of, most notably, the Lanham Act, section 1202 of the DMCA, and Visual Artists Rights Act. These applications hint at the desire for moral rights, either as a justification for its absence in the face of the Berne Convention or as an indication of a void within the U.S. copyright scheme.

The Copyright Office asks if the protections of the Lanham Act are a sufficient replacement for some moral rights protections after the ruling in *Dastar Corp. v. Twentieth Century Fox Film Corp.* The case is particularly important after *Gilliam v. ABC, Inc.*'s ruling (detailed in the comment below) because *Gilliam* used false designation to rule against misattribution of an altered work, or in some sense, the right of integrity. *Dastar*'s ruling rendered this argument moot. The work in question was a television series produced in the 1940s owned by Twentieth Century Fox until it lapsed into public domain in 1977. Fox relicensed the rights to a book in 1988, which presumed regaining the copyright control for nontransformative reproduction. In 1995, Dastar rereleased the original film, now in the public domain, with new titles and opening sequence, and most notably, without any reference to Fox or the 1988 book. Fox sued Dastar over infringement of the book by distributing the television series, then in public domain. The Ninth Circuit did not agree with any copyright infringement, but argued that Fox did have a claim regarding consumer confusion because their

[10] Sarah C. Anderson, "Decontextualization of Musical Works: Should the Doctrine of Moral Rights Be Extended," *Fordham Intell. Prop. Media & Ent. LJ* 16 (2005): 869.
[11] Rajan, *Moral Rights*.

brand would be associated with the work.[12] In their decision, they question what 'origin' means within the Lanham Act, debating whether it aims to protect the original creator or the producer and copyright holder. If origin is the creator, then the public domain work would not be infringement, but if it is the producer, then Dastar would be in violation. The case raised concerns about the Lanham Act's vagaries and ultimately centered on an interpretation of trademark law as a version of copyright. Fox's argument prevailed through either interpretation of the Lanham Act; if the creator of the work was the origin, then attributing the work to Fox would have been infringement, but if the work originated with the producer, then not attributing the work to Fox would infringe upon protections under the Lanham Act. The court rejected the argument entirely because it would chill use of the public domain, but in their decision noted that the Lanham Act was to protect goods and the 'origin' was the manufacturer of those goods.[13] Consequently, the Lanham Act no longer applied to creators, stripping the possibility of creators using it to protect their moral rights. FMC argues the ruling in *Dastar* not only resulted in the loss of an avenue for protection moral rights, but also exemplified the ways in which case law is not suitable for establishing moral rights protections without a more overt statute.

The Digital Millennium Copyright Act (DMCA) of 1998 added section 1202 to align with the WIPO copyright treaty of 1996 which required a prohibition on the removal or alteration of electronic rights management information. Section 1202 provides protections outside of the copyright holder, but issues regarding proving removal or alteration make protections flimsy. The Visual Artists Rights Act (VARA) of 1994 suffers from the same devil in the details concerns. It provides explicit moral rights to a select group of artists, but the limited scope of protections leaves most creators without recourse and the exclusivity of these rights

[12] Clint A. Carpenter, "Stepmother, May I?: Moral Rights, Dastar, and the False Advertising Prong of Lanham Act Section 43(A)," *Washington and Lee Law Review; Lexington* 63, no. 4 (Fall 2006): 1601–48.
[13] Justin Hughes, "American Moral Rights and Fixing the Dastar Gap Symposium: Fixing Copyright," *Utah Law Review* 2007 (2007): 659–714.

goes against the nature of moral rights. FMC's comment articulates why both VARA and section 1202 of the DMCA do not adequately protect moral rights more fully below.

The Copyright Office addresses many of the measures which the U.S. has used to argue adherence to the Berne Convention through their line of questioning. The purpose of these questions is to determine if the existing protections are enough to qualify as moral rights. Tort law, contract law, trademark law, unfair competition, and defamation have all been used as a proxy for moral rights protections, although none of these afford protections aligned with the spirit of moral rights. Most comments on the docket which dismiss any explicit moral rights implementations cite these existing protections as evidence that the U.S. legal framework has fulfilled its obligation to Berne. In the comment below, FMC aims to poke holes in purported existing protections and offer reasons for moral rights codification outside of adherence to Berne.

The Future of Music Coalition (FMC) considers moral rights implementation a chance to empower creators who are often unable to keep their copyright in the music industry. Songwriters are usually hired to create works for corporations and retain no portion of the copyright. Session musicians are similarly removed from the works which they help create. Sound engineers, whose role has become increasingly creative over the last decades, have only rarely been given rights over works which would not be the same without their artistic input. These creators deserve recognition of their creation (attribution) and rights associated with control of their work (integrity). Regarding attribution, it seems logical that those who created a work would be noted as creators and FMC feels this is the most critical right within the suite. While there are complications involved in developing a robust system of attribution, technologically, it is already possible. Within the industry, major changes would need to occur to adequately account for the right of attribution, such as better record keeping even among individual creators. The politics of attribution will also likely raise a flurry of lawsuits between creators, but case law will likely stabilize this initial turbulence. On the other hand, the right of integrity is much more complicated. Discerning what rights work-for-hire creators would

be given brings up practical limitations and unanswered questions. Would the drummer be able to stop the license of a song because of their stance against licensing music for advertising? If a song is written by three songwriters and edited again before recording, who must consent to a derivative music work? If the right of integrity persists throughout an artist's life regardless of registration (as moral rights is innate), can they then file suit against what they consider an inappropriate use if that use is ultimately a public benefit?

Both rights also have concerns of scope. Would moral rights mirror the low bar of copyright protection in the U.S.? Would everyone who touched the mixing board, even for an instant, need credit on a recording? These concerns strike at the heart of the absurdity in copyright law; copyright law extends protections to every doodle or note in existence, which means violations occur constantly. A moral rights statute threatens to expand the number of violations. While these concerns are valid, copyright laws have not imploded and there is reason to believe that moral rights would not add considerably to the burden especially given the potential advantages.

There are potential economic benefits as well; moral rights might spur the creation of a more efficient and effective royalty distribution system. Currently, many intermediaries stand between musicians and money they have earned, each with privately held data stores to keep relevant. If a comprehensive database is formed to fulfill requirements of the right of attribution, this database could be utilized to pay artists more directly. Even more crucial, if the database was decentralized, as is the case with technologies like blockchain, the average musician would be free to register their own works and retain more control over how they are paid.

FMC does not wish to upend existing copyright as, even if it would be preferable, altering the system is unlikely. Instead, FMC sees an opportunity to rebalance the currently exploitative nature of copyright in the music industry. Creators are divorced from their creations, both in the absence of moral rights and through copyright. Works-for-hire aside, musicians often bargain with their copyright for better backing from major

labels. FMC's position in this discussion, as in most discussions pertaining to copyright, is as a *reasonable* advocate for musicians. The position is reasonable because FMC attempts to balance the desires of creators with the realities of the current system. FMC knows that compromise will be the only path to moral rights implementation and proposes a primarily realistic, but slightly optimistic option for feasible codification of moral rights into law. Other organizations take more divisive stances on copyright issues, creating two often diametrically opposed sides, and FMC views themselves as a bridge between them.

Comment:

*We would like to thank the Copyright Office for allowing us the opportunity to weigh in on moral rights. We strongly believe that a form of moral rights implementation in statute would benefit music creators of all kinds as well as the public.*

*The Future of Music Coalition works to ensure that musicians have a voice in the issues that affect their livelihood. Our activities are rooted in the real-world experiences and ambitions of working musicians, whose perspectives are often overlooked in policy debates. Over the years, we have provided an important forum for discussion about issues at the intersection of music, technology, policy and law. Guided by a firm conviction that public policy has a real impact on the lives of both musicians and fans, we advocate for a balanced approach to music in the digital age — one that reflects the interests of all stakeholders, and not just the powerful few. This conviction compels us to respond to the Copyright Office's request because moral rights protect the heart of creative industries — the actual creators.*

*Implementation of moral rights will require careful crafting to fit within the U.S.'s copyright regime, but we believe it is not only possible but crucial for protecting the rights of many creative professionals in and outside of the music industry. Through our answers below, we provide a well-rounded assessment of moral rights, offering insight into what effect moral rights would have on creators, the industries built on creative works, and the public. We argue that past attempts at developing a substitute for moral rights in the U.S.*

*have largely failed, but these attempts alone are telling of a greater desire to fulfill the obligations of the Berne Convention and, more importantly, mend the disconnect between the creator and their work. Copyright is an incentive structure to promote the useful arts and sciences through economic exploitation, but often leaves creators of these useful arts without any control over their work. Moral rights implementation would serve to correct this imbalance of power and remedy the broken relationship between artist and their art.*

*We offer suggestions below on what should be considered when implementing moral rights and examples of international moral rights schemes from which to draw. We do not pretend to speak for all mediums, instead focusing on music, but draw from the experiences of creative industries to craft our suggestions. Finally, we try to honestly explain potential hurdles for which we have no solid solutions, only guidance.*

**1."Please comment on the means by which the United States protects the moral rights of authors, specifically the rights of integrity and attribution. Should additional moral rights protection be considered? If so, what specific changes should be considered by Congress?"**

Article 6bis of the Berne Convention states, "Independently 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 and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[14] The U.S. states joined the Berne Convention on March 1st, 1989, ostensibly agreeing to Article 6bis. Since then, the U.S. has made multiple largely unsuccessful attempts to adhere to Article 6bis. The U.S. argues that it fulfills Article 6bis through a

[14] "WIPO-Administered Treaties," accessed April 21, 2017, /treaties/en/text.jsp.

"patchwork" of laws, but this piecemeal approach has not fulfilled the commitments to the Berne Convention.

When the U.S. first joined the Berne Convention, they used the ruling in *Gilliam v. American Broadcasting Companies* as proof that section 43(a) of the Lanham Act provided moral rights to artists by providing a remedy to "any false designation of origin, false or misleading description of fact, or false or misleading representation."[15][16] However, *Gilliam* did not provide a substitute for a few reasons. First, Monty Python retained the copyright in their scripts and claimed the edited versions were derivative works. This negates moral rights as separate from copyright. Second, the 2nd Circuit ruled in favor of the plaintiff based on misrepresentation or mislabeling of the work, primarily focusing on unfair competition and consumer confusion, the principal goal of the Lanham Act, not the personal rights of the artist.[17] Third, the ruling did not address the right of integrity in any form and only vaguely defined a method for exercising the right of attribution. Finally, any resemblance to moral rights protections from section 43(a) were lost by *Dastar*, explained below. The case exemplifies the U.S.'s previous attempts at implementing a form of moral rights; the personal rights of creators are secondary and protection is peripheral.

The TRIPS Agreement (1994) further solidified the U.S.'s combative stance on compliance with moral rights according to the Berne Convention.[18] The U.S. fought to remove the sentiment of article 6bis from the TRIPS Agreements, as the agreement was actually enforceable.[19] The WTO agreed to omit Article 6bis.[20] The U.S. fought and won almost the same fight before signing the WIPO Copyright Treaty in 1996, again

[15] 538 F.2d 14 (2d Cir. 1976).
[16] Lanham Trade-Mark Act of 1946, Ch. 540, 60 Stat. 427.
[17] Richard Fine, "American Authorship and the Ghost of Moral Rights," *Book History* 13 (2010): 230.
[18] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).
[19] Ruth Rikowski, "Tripping over TRIPS? An Assessment of the World Trade Organization Agreement on Trade RelatedAspects of Intellectual Property Rights, Focusing in Particular on Trade, Moral and Information Issues," *Business Information Review* 20, no. 3 (2003): 152.
[20] Hannibal Travis, "WIPO and the American Constitution: Thoughts on a New Treaty Relating to Actors and Musicians," *Vanderbilt Journal of Entertainment and Technology Law* 16, no. 1 (September 22, 2013): 69–103.

indicating they adhered to some form of moral rights, but insisting a formal requirement was not necessary.[21]

Almost two decades later, the U.S. has not implemented any form of moral rights aligning with the definition provided by the Berne Convention. However, adherence to Berne is only one of the pressing reasons to develop explicitly defined moral rights in statute. The digital landscape offers significant challenges for copyright law. Moral rights, particularly the right of attribution, offers solutions to a few of these challenges. For the music industry, implementation of moral rights would not only empower the creators and contributors of musical works but also help solve deep rooted issues with royalty collections, both domestically and internationally.

Moral rights would serve to alleviate the powerlessness faced by creators who often must relinquish their copyright to make a living from their work. These creators should still be provided some right of attribution and integrity as these affect a creator's reputation and ultimately livelihood. It is in our best interest to support the actual creators of works which benefit the public, not just the copyright holders. In the music industry, songwriters rely on their catalog as proof of their craft – their professional reputation. Attribution on works for hire would allow songwriters proper association with their creative endeavors, potentially garnering future work.

Other submissions to the docket, namely from the Organization for Transformative Works, argue that any mandate of attribution would not matter because the public has no interest in detailed information about the creators of works. This paternalistic perspective implies a disdain for both the interest of the public and their reverence for the work of creators. Creative arts make culture and culture makes society. A portion of the public has a great interest in understanding who exactly helped create works of art which they admire. Avid Beatles fans know Geoff Emerick was the assistant engineer who worked on the first ever recordings

[21] Stanford Law School, *STLR Symposium: Digital Copyright | Moral Rights*, 2013, https://www.youtube.com/watch?v=pkCY4-YefFc.

because they are interested, but also because the information is accessible. Music enthusiasts revel in the details of music they adore, but aside from widely recognizable bands with countless historical records, those details are often lost over time and eventually unattainable. To argue the public has a homogenous opinion of creative works, and that opinion is couched in disinterest toward creators, is insulting to the public and creators.

Many of the questions posed by the Copyright Office for this docket focus on the numerous attempts at creating substitutes for moral rights. These efforts indicate the underlying belief that some form of moral rights contributes to the public good or at least an adherence to international standards. The flaws in these attempts highlight the need for a more robust and explicit solution. The "patchwork" has not worked. It has resulted in a volatile legal environment subject to judicial interpretations often based on uncharacteristic cases.

There are many details to iron out when crafting moral rights for the U.S., as each country's moral rights regime varies depending on their existing legal structure. We advocate for a time limit on moral rights, unlike many dualist approaches. Moral rights are consistently characterized as personal rights and we think this is best interpreted to ensure the duration of moral rights should only last through the creator's lifetime. This avoids complications of hypothetical desires of creators and allows the public domain to be freely exploited for the public good. If there are multiple authors, the moral rights of any living author should be respected.

The principal burden of attribution lies with the creator, but to what extent? How does a creator properly exert their right of attribution? We believe the intricacies of each medium could not be covered by statute, but the ability to exert attribution should be protected from distortion by larger external forces. We also contend that the creator's ability to exercise their right of attribution should extend throughout the creator's life unless the creator has waived their rights.

We encourage the Copyright Office to consider implementation of the rights of attribution and integrity, including works for hire. A statute including explicit moral rights will finally help the U.S. adhere to international standards while protecting artists, preserving culture, and benefiting the public.

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

While VARA does not apply to the music industry, its exclusionary and capricious defense of visual artists' moral rights provides an example of how not to promote or protect moral rights. VARA's enactment was also a tacit admission that the U.S. was not following the Berne Convention's definition of moral rights, as it attempts to create a very restricted iteration of moral rights. The limitations on which visual artists are covered under VARA bars most artists from any protections, allowing only prominent creators of art deemed as having "recognized stature" access to moral rights.[22] For example, artists which create over 200 prints of their work are ineligible for VARA's moral rights protections. This arbitrary divide seems to negate the public good of moral rights, especially regarding attribution. Just as arbitrarily, VARA designated specific mediums as qualifying for protections, excluding set designs, but including painting even though set design often involves painting.[23] Only a handful of cases have found any moral rights infringement under VARA for good reason: almost no one is protected.

More profoundly, VARA divorces the artist from the work, instead focusing on two distinct concepts: the reputation of the visual artist and the preservation of great works, with an emphasis on the latter.[24][25] Globally, moral rights focuses on the connection between the artist and the work.[26] We believe the

[22] Chris Godinez, "Painting over Vara's Mess: Protecting Street Artists' Moral Rights through Eminent Domain Note," *Thomas Jefferson Law Review* 37 (2015 2014): 199.
[23] Patricia Alexander, "Moral Rights in the VARA Era Comment," *Arizona State Law Journal* 36 (2004): 1477.
[24] Sonya G. Bonneau, "Honor and Destruction: The Conflicted Object in Moral Rights Law,". *John's L. Rev.* 87 (2013): 60.
[25] stanfordlawschool, *STLR Symposium*.
[26] White, "The Copyright Tree: Using German Moral Rights as the Roots for Enhanced Authorship Protection in the United States," 64.

reputation of the artist, preservation of important works, and the artist's connection with their work are all important tenets of successful moral rights protections. VARA is not a sufficient substitute for the moral rights of visual artists and would suffer from the same problems if expanded into other mediums.

VARA also provides dissolution of moral rights by one author in a collectively created work, which seems to be a clumsy solution to a nuanced problem. Authors should be able to opt out of their right of integrity, but not strip other authors of the same right.

These flaws should be viewed as cautionary tales when crafting moral rights protections. We believe in more general moral rights eligibility, few specific exclusions (software being a popular one among other countries), and, most importantly, consideration for the relationship between the creator and their creation.

**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 of the Copyright Act, as part of the DMCA, seemingly protects the author's right of attribution by deterring the removal of attribution in a work, but the limited nature of the provision does not adequately protect the moral rights of creators. As Severine Dusollier keenly notes, section 1202 protects the right of authentication, not the right of attribution. The right of authentication concerns who can exploit the work and prevent forgeries, not protect the connection between the author and their work.[27] Further, the practical implementation of the act does not serve as a replacement for a moral rights statute.

[27] Severine Dusollier, "Some Reflections on Copyright Management Information and Moral Rights," *Columbia Journal of Law & the Arts* 25 (2002 2001): 377–400.

Section 1202 was employed in reaction to the WIPO Treaties of 1996 prohibiting the removal or alteration of content management information.[28] Section 1202 supplements the Audio Home Recording Act (1992) and the Digital Performance Rights in Sound Recordings Act (1995), which previously prevented the removal or inaccurate logging of information in a copied work.[29] These previous acts did not prevent a lack of information, ignoring a crucial aspect of the right of attribution. Section 1202 similarly ignores the absence of information, instead focusing on removal or alteration alone.

A significant modification of the WIPO treaties in Section 1202 complicates the limited protections provided by requiring the author prove intent to wittingly remove attribution from a work. This is difficult to prove, especially if the removal involves the transfer of a work between digital mediums. The right of attribution for artists can be lost in a single exclusion from a digital copy onto a platform, which could then be distributed across other platforms, resulting in what eventually becomes the definitive version of the work, absent attribution of the contributors to the work.[30]

Aside from the technical complexities of proving intent, attribution data is commonly not fully documented and currently, there is no requirement to do so. Section 1202 only requires the performer be credited for the work, ignoring the considerable contributions of everyone involved in creating a musical work. Work for hire creators like songwriters, session musicians, and sound engineers are ignored in the original credits and, more frequently, excluded from digital copies. These omissions are not prevented by section 1202 and the moral rights of these creators are not protected.

Section 1202 also does not set a standard for what constitutes access to attribution data. If attribution data is inaccessible to the public, the requirement is useless.[31] A moral rights statute detailing attribution

[28] Eric F. Harbert, "In the Shadow of Mt. Olympus: Could a Revision of 17 U.S.C. Sec. 1202-1204 Bring Them into Daylight Comment," *UCLA Entertainment Law Review* 13 (2006 2005): 134.
[29] 17 U.S.C. §§ 1001-1010.
[30] Dusollier, "Some Reflections on Copyright Management Information and Moral Rights."
[31] Christopher D. Kruger, "Passing the Global Test: DMCA Section 1201 as an International Model for Transitioning Copyright Law into the Digital Age," *Houston Journal of International Law* 28, no. 1 (September 22, 2005): 281–323.

requirements for every use is unlikely, but a requirement that attribution information be accessible seems justified.

In *Murphy v. Millennium Radio Group, LLC*, Peter Murphy took a photograph of two radio hosts which was then posted on a radio station's website without any attribution.[32] Murphy alleged infringement under section 1202(b). In their ruling, the Third Circuit Court of Appeals found section 1202(c) established cause of action for intentional removal of attribution but did not explicitly require attribution information to be part of an automated copyright management system for infringement to occur. This provides some level of attribution rights for creators, but these protections are not stable; other rulings along the same lines could unravel this argument. Still, the ruling, and section 1202(c) in general brings up a desire for some level of attribution protections and suggests that implementation is not impractical.[33]

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

The balance between copyright and free speech is delicate, but the courts have navigated the two over the last decades by protecting free speech through the idea/expression dichotomy, fair use, the duration of copyright, and the exclusion of facts as copyrightable material.[34] During the 1970s, free speech became a popular defense against copyright infringement claims, prompting codification of fair use, striking down free speech alone as an adequate defense.[35] Weighing moral rights against free speech will likely involve modifying existing protections to fit accordingly, but we believe it is possible, just as it has been possible

[32] 650 F 3d 295 (2011).
[33] Jennifer Chandler, "The Right to Attribution: Benefiting Authors and Sharing Accurate Content in the Public Domain," *Journal of Law, Information and Science* 22 (2013 2012): 75–91.
[34] Kathryn A. Kelly, "Moral Rights and the First Amendment: Putting Honor before Free Speech," *University of Miami Entertainment And Sports Law Review* 11 (1994 1993): 211–50.
[35] See Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 559 (1985).

with economic copyright. Guiding the courts will be the principle that the First Amendment will receive preferential treatment, as it should.

Given reasonable guidelines for the display of attribution information, the right of attribution would not inhibit the First Amendment in any way. There will be instances when an overt display of the right of attribution would interfere with the message of a new work, but in most instances, attribution information can be provided in some form. This balance will likely be played out in court cases and exemptions will be carved out.

The right of integrity raises more conflicts than attribution, but is best handled in a similar fashion. How about the right of integrity with the burden of proof on the author?[36] To ensure free speech protections, the original author should bear the burden of proof when claiming infringement of the right of integrity. This would protect the speech, prevent frivolous lawsuits, and reduce any chilling effect on further creation while still providing an outlet to exercise moral rights.

To further protect free speech, a reasonableness benchmark could be established to prevent excessive abuse of moral rights claims, but we do not feel comfortable providing a definition of this benchmark as it is outside of our expertise. Australia's reasonableness defense might provide a direction for how a benchmark could be structured.[37]

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

Attribution is not a significant burden, at least regarding music, and there are only limited exceptions in which attribution should be omitted like parodic or satirical works. We discuss Canada's exception to user generated content for non-commercial use below. The visibility and accessibility of attribution information

[36] Hughes, "American Moral Rights and Fixing the Dastar Gap Symposium."
[37] Copyright Act 1968 (Cth) s 195AS(2).

for all creative works needs some clarification as it is not feasible to present complete attribution information for all creative works in all instances, but reasonable efforts to provide access to attribution information should be made.

There are creative fields that might be excluded from moral rights protections. As we previously mentioned, software is excluded in many other countries. We feel it is not in our expertise to suggest which mediums should be excluded, but note that there might be reasons for excluding certain creative professions.

We strongly believe that infringement of a creator's rights of attribution or integrity should merit injunctive relief at a minimum. We also believe providing statutory or actual damages for infringement of attribution would incentivize compliance, but again, limits should be implemented to avoid unreasonable attribution requirements. We similarly believe that statutory or actual damages should be available for infringement of integrity, but again, we suggest placing the burden of proof on the creator. This offers a compromise in which both parties might not entirely agree. Actual damages are likely to be difficult to define regarding reputational injury. Regarding amounts, we would suggest reviewing remedies of section 1203 of DMCA and modifying as needed.

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

The *Dastar* decision offers evidence for why case law should not define moral rights protections. While *Gilliam* suggested the importance of moral rights, *Dastar* reduced the means of protecting those rights.[38] First, the case itself was imperfect; it involved a film based on a book, the point of origin of the work in question was difficult to obtain, the original work was already in the public domain at the time of the case,

[38] Kinmberly Y.W. Holst, "A Case of Bad Credit: The United States and the Protection of Moral Rights in Intellectual Property Law," *Buffalo Intellectual Property Law Journal* 3 (2006 2005): 130.

and the defendant was a corporation alleging moral rights infringement.[39] The final point is especially important as moral rights deals with the *human* creators of works, not corporate copyright owners. The decision in *Dastar* stemmed from an uncharacteristic suite of facts which have little relevance to moral rights, recalling the adage, "Bad facts make bad law."

*Dastar* also succeeds in demonstrating the Lanham Act does not constitute moral rights protections. The purpose of section 43(a) of the Lanham Act is to prevent consumer confusion from false designation, which has been interpreted as a form of moral rights, but the underlying intention is economic. The ruling focused on protecting consumer confusion, not the rights of the author, negating the roots of moral rights.[40] Still, the court found that the origin of goods in the Lanham Act refers to the owners of the work, not the creators of the work, ignoring the obvious consumer confusion that would occur from omitting attribution information.[41] The ruling did not overtly recognize the differences between protections under the Lanham Act and moral rights, but the court's decision designated attribution rights within current copyright, contradicting the idea that the Lanham Act provided supplementary moral rights. Weighing economic interests, *Dastar* annulled false-attribution claims based on false origin 43(a)(1)(A), leaving false advertising 43(a)(1)(B) as the only adequate grounds for dispute under the Lanham Act.[42] Subsequently, lower courts have interpreted the ruling across a broad range of cases, effectively nullifying the Lanham Act as a replacement for attribution rights.[43] The courts proved that the Lanham Act, a principal component of the U.S.'s "patchwork" of laws, is not a substitute for moral rights as defined by the Berne Convention.

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[39] UChannel, *Moral Rights: The Future of Copyright Law?*, 2009, https://www.youtube.com/watch?v=iRfWcUJbGwo&spfreload=10.
[40] White, "The Copyright Tree: Using German Moral Rights as the Roots for Enhanced Authorship Protection in the United States."
[41] Chandler, "The Right to Attribution."
[42] Emily (1) Grant, "The Attribution Right, the Misappropriation Theory, and Dastar v. Twentieth Century Fox Developments in Trademark Law: Part Four: Trademark Litigation: Infringement and Dilution," *Journal of Contemporary Legal Issues* 19 (2010): 287–95.
[43] Stanford Law School, *STLR Symposium*.

While the Lanham Act does not serve as a replacement for moral rights, we believe that moral rights implementation would largely reduce consumer confusion, but this would be a side effect, not the central intention. We explain this in more depth below.

**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 waiver of moral rights affect transactions and other commercial, as well as non-commercial, dealings?"**

While some creative industries like film and television have successfully achieved some of the goals of moral rights through collective bargaining, the music industry has not. Freelance musicians and songwriters make up a substantial portion of the sector and generally have little contract negotiating power. Similar to freelance authors, asking for attribution requires conceding on other contractual matters and requesting protections like the right of integrity is laughable in practice. Even in situations where the influence of a musician gives them enough bargaining power to achieve a semblance of moral rights, the negotiation itself goes against the core of moral rights; the inherent link between creator and creation. In short, moral rights should not be used a bargaining chip in contract negotiation. While creators should not be able to transfer their moral rights, they should be allowed to waive them, although contractual agreements forcing creators to waive moral rights should be mitigated. If waiving moral rights can be traded, imbalanced negotiations will exploit it.

However, there are aspects of collective bargaining agreements relevant to developing moral rights in statute. The Writer's Guild of America provides an example of a fluid representational system which defines credit requirements. Notification requirements on script rewrites and credit limits have combatted the film industries' habit of mangling the original screenwriter's intentions. However, credit percentage

requirements encourage a second writer to change more of the script to be credited.[44] These underlying incentives are important to consider when implementing a moral rights statute through either generality within the statute, or specificity with recurrent refinement of attribution requirements.

Contract law is not limited to imbalanced negotiations and has been successful at mimicking moral rights for creators in some instances. In *Jacobsen v Katzer*, the Creative Commons license was interpreted as a contract which, if violated, copyright infringement could be alleged.[45] The Creative Commons license lets creators define terms of use. Creators can expressly require the right of attribution while in many ways rejecting economic copyright restrictions, but this not a replacement for moral rights because it is tied to copyright.[46] Creative Commons focuses on reputation, ignoring economics, forcing creators to choose between the two. Enforcement of the license is also rooted in existing copyright law as a violation of the license is considered grounds for an infringement claim. Moral rights must be separate from economic copyright. Although Creative Commons fits the needs of some creators, allowing them to share their work while still preserving rights which they define, it is not a universal solution. We discuss Creative Commons licenses further when detailing voluntary initiatives below.

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

Moral rights implementation greatly differs depending on cultural context. We feel it best to review moral rights in countries based on common-law to help determine what best suits the United States. Most common-law countries have adopted the stance that moral rights are inalienable but waivable and, as

[44] Rick Mortensen, "D.I.Y. after Dastar: Protecting Creators' Moral Rights through Creative Lawyering, Individual Contracts and Collectively Bargained Agreements," *Vanderbilt Journal of Entertainment and Technology Law* 8 (2006 2005): 335–64.
[45] 535 F.3d 1373 (Fed. Cir. 2008).
[46] Mira T. Sundara Rajan, "Creative Commons: America's Moral Rights," *Fordham Intellectual Property, Media & Entertainment Law Journal* 21 (2011 2010): 905–70.

stated above, we agree the U.S. should do the same.[47] Below are some other notable considerations from international moral rights codes:

Canada

One the most difficult problems facing copyright in the digital era is user generated content (UGC). Canada's Copyright Modernization Act (2012) placed an exception on UGC, and specifically, user-derived content.[48]

UGC can be divided into three categories: user-authored content, user-copied content, and user-derived content. User-authored content is simply an original work. User-copied content is a direct duplication of content. User-derived content adds substantially to an existing work and is considered by Canada as an exception to copyright law, like transformative works in the United States. This formalized exception provides protection to modern creative arts born from the internet age but also threatens the original creators of the works as their own works and reputations are subdued or distorted by the derivative creators. Economically, these works are not perfect substitutes for the original, but recognition of the original source is often lost in real world cases. Moral rights are a solution to this concern. In Canada, moral rights still exist despite the copyright exception for UGC; the right of attribution offers protections to the original authors and user-derived content creators are incentivized to create, benefiting the public.[49] This brings up subsequent questions about the moral rights of UGC creators who author user-derived work, but these intricacies would be best handled by case law. Still, we believe a framework for handling UGC is necessary considering potential limitations a moral rights statute could place on user-derived content.

[47] Francina Cantatore and Jane Johnston, "Moral Rights: Exploring the Myths, Meanings and Misunderstandings in Australian Copyright Law," *Deakin Law Review* 21 (2016): 76.
[48] "IP Osgoode » The User-Generated Content Exception: Moving Away from a Non-Commercial Requirement," http://www.iposgoode.ca/2015/11/the-user-generated-content-exception-moving-away-from-a-non-commercial-requirement/.
[49] Fraser Turnbull, "The Morality of Mash-Ups: Moral Rights and Canada's Non-Commercial User-Generated Content Exception," *Intellectual Property Journal; Scarborough* 26, no. 2 (July 2014): 217–36.

India

India's moral rights statute has been used as a cultural preservation tool. In *Amar Nath Sehgal v. Union of India*, the High Court of Delhi ruled in favor of a sculptor who sold his work to the government that subsequently damaged the work while moving it to a new location decades after the purchase.[50] In some respects, VARA attempts to achieve the same goal, although it fails to fully provide protections for the vast cultural landscape. Moral rights can be used to preserve not only the reputation of the creator, their relationship with their work, but also culture, especially through the right of attribution. Society benefits from the accurate preservation of knowledge, including the musicians, engineers, and writers who participated in the creation of works. Without a mandate to preserve this information, the history of many musical works created in the U.S. will be lost and forgotten, harming the American canon.[51]

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

Without the implementation of the right of attribution, technological solutions alone are unlikely to suffice because there is no impetus to thoroughly attribute all authors in a musical work. However, the increasing use and efficiency of metadata affords an avenue for successfully implementing attribution without substantial cost to the distributor. The requirement to include attribution information of authors, musicians, and sound engineers of a work would be relatively unobtrusive and easy to employ using metadata, especially regarding the administrative difficulty of locating all authors, which would likely be significantly simplified through widespread adoption of attribution metadata.

Ideally, attribution of work should be easily accessible to the public and as prominently displayed as possible, but there are circumstances where displaying all attribution information is not feasible. In such

[50] 117 (2005) DLT 717, 2005 (30) PTC 253 Del.
[51] M Sundara Rajan, "Case Note. Moral Rights and the Protection of Cultural Heritage: Amar Nath Sehgal v. Union of India.," *International Journal of Cultural Property* 10, no. 1 (2001): 79–94.

circumstances, metadata can retain credit to the artists. We recommend the Copyright Office consider delineating recommendations for attribution information in metadata.

Metadata of this kind is already somewhat available. International Standard Recording Codes (ISRCs) and International Standard Musical Work Codes (ISWCs) are international standards for identifying basic information on recordings and publishing rights, respectively. ISRCs are used by SoundExchange while ISWCs are used by Performance Rights Organizations to determine payout. In the U.S., ISRCs are distributed through the US IRC Agency after a one-time fee of $95, but in practice, most ISRC codes are obtained on behalf of the creator through aggregates or labels. One problem with using ISRCs and ISWCs is that multiple parties control access to the datasets of these codes, creating needless gatekeepers. In practice, ISRC and ISWC codes are not consistently used.[52]

Blockchain serves as the best example of how technology could store metadata covering attribution of authors in a decentralized system. Originally devised for Bitcoin, blockchain encodes a unique hash into a file which cannot be removed. For music files, this could include information on the songwriters, performers, the publisher, and the record label.

Blockchain in music could open the creation of unique identifiers containing attribution standards without an intermediary, but there are two related concerns: universality and adoption. Currently, there is no standard for how to implement a comprehensive blockchain system and initiatives currently in development include Mediachain, Dotblockchain, Songtrust, Songspace, Revelator, and Stem. The success of blockchain depends on widespread adoption, especially regarding Digital Service Providers (DSP) and major labels with significant catalogs. If these blockchain systems take their own portion of the market, it negates the efficiency of blockchain, likely reducing the incentive of DSPs and major labels to adopt the

[52] Bill Rosenblatt, "Get Ready for the Blockchain Tsunami," *Copyright and Technology*, April 4, 2016, https://copyrightandtechnology.com/2016/04/03/get-ready-for-the-blockchain-tsunami/.

technology.[53] We feel that blockchain represents the best bet for developing a ubiquitous and decentralized database and the Copyright Office should encourage the technology without directly influencing which blockchain format prevails.

Blockchain does not solve the significant hurdle of attribution in legacy works. Much of the music created before the digital era (and even after) does not have complete attribution information. We recommend that attribution information on legacy works have different standards as a practicality.

Currently, there is no standard for a universally embedded metadata system and section 1202's attempt to prevent removal does little to stem metadata loss across platforms due to technical infrastructure.[54] Still, complete attribution data relies on the artist to initially implement this data. Services should not be punished for the negligence of creators, so a singular requirement of data that does not exist seems untenable. The Berne Convention also prohibits a requirement of registration for copyright, so the artist cannot be faulted for omitting attribution data. However, like current copyright law, statutory damages could be available only to those who registered works. We recommend the Copyright Office explore options for adopting minimum standards for what information must be preserved if available and provide options for creators to fill out this information.

The requirement of metadata alone does not solve attribution concerns. As discussed previously, credit information must be easily accessible to the public. Accessibility is a small technical hurdle in implementing a pervasive metadata system, but without a requirement that metadata be accessible, any effort to protect the right of attribution is in vain. Blockchain hashes would not offer any recognizable information to the listener, but the metadata within a hash could be easily translated. We do not believe the Copyright Office

[53] Bill Rosenblatt, "Blockchain Solutions for Music Rights Processing," *Copyright and Technology*, May 4, 2016, https://copyrightandtechnology.com/2016/05/03/blockchain-solutions-for-music-rights-procesing/.
[54] Stanford Law School, *STLR Symposium*.

should go into specifics of how attribution information should be displayed for each medium, but the statute should include the stipulation that information must be reasonably accessible on any medium.

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?"**

Some voluntary initiatives have flourished without statutory regulation. For music, Creative Commons Licenses (CC) allow creators to state permitted uses and attribution requirements for using their work, but as we discussed above, these solutions are problematic because they are inherently bound to existing copyright. It is a contract that rejects copyright in favor of protections more in line with moral rights, causing creators to choose whether they want a moral rights substitute or more traditional copyright protections. Enforcement of any violation is still under existing copyright, negating the concept of moral rights being separate from economic copyright. These licenses work for circumventing copyright when creators wish to increase the public's access to their work, but would not provide adequate moral rights protections for professional creators, especially in work for hire situations. A songwriter with no ownership of their copyright cannot use a contract to ensure their attribution information is included in a work.

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

Consumer Confusion

The right of attribution has an invaluable side effect mentioned above; attribution stops consumer confusion. This is especially important considering the representational packaging of creative works in the digital world. Without proper attribution (or with improper attribution), the public is unable to determine

what is authentic from forgery. The ramifications of this confusion extend past the reputation of creators to the trust of the public and preservation of culture.[55]

Compulsory Licensing and Blockchain, Continued

We find it important to discuss the role of compulsory licensing in diminishing the moral rights "patchwork." Section 106 gives creators the ability to license their work, which gives them the ability to demand attribution or integrity, in theory. Under the current compulsory licensing scheme, exerting these rights is impractical. Instead, performance rights organizations (PROs) collect subscription fees and pay creators an estimated share based on the number of plays and the current rate of royalties. When licensing is handed over to PROs, section 106 gives no control over specifics regarding the rights of attribution or integrity to creators.[56]

Using existing copyright alone to define the rights of creators does not hold up to the spirit of moral rights, especially regarding songwriters and works for hire. While performance rights organizations have rules barring corporate entities from collecting the songwriter's share of royalties, the "author" designated by current copyright is often the employer of the creator. This further removes the creator from their ability to exercise personal rights.

The right of attribution in the digital world has a second side effect: increased efficiency in the market. Economically, a standardized metadata system or a statutory requirement that metadata must be complete and correct would make royalty distribution more efficient, timely, and accurate. PROs will hold uncollected royalties for a certain amount of time, then release them to the general pool of royalties. More troubling, PROs use proxies like radio play to determine business use of music and subsequent songwriter payouts.

[55] Margaret Ann Wilkinson and Natasha Gerolami, "The Author as Agent of Information Policy: The Relationship between Economic and Moral Rights in Copyright," *Government Information Quarterly* 26, no. 2 (April 2009): 321–32, doi:10.1016/j.giq.2008.12.002.
[56] Mortensen, "D.I.Y. after Dastar."

One study found only a fifth of radio stations were able to track airplay digitally and only 20% of the music used by businesses was broadcast on the radio, leaving the other 80% paid out to the wrong creators. This goes against the express purpose of the economic incentive of copyright as the pecuniary beneficiaries of a creative work end up being other creators besides the creator whose work earned royalties. Lessening this inefficiency is by no means the purpose of moral rights, but ubiquitous attribution would likely lead to more royalties paid to those who earned them.

Two notable attempts at developing a universal database for music. The Global Repertoire Database (GRD), failed in 2014 due to squabbles over funding and control resulted in major actors backing out of the project. The International Music Registry (IMR) suffered a similar fate, despite the encouragement from WIPO to collaborate with the GRD.[57] Both the GRD and IMR collapsed because of disputes over who would control the global database.

As previously mentioned, Blockchain might provide a solution as it promotes marketplace efficiency while preserving attribution data and would be decentralized. Transactional and attribution data can be included and the reading of this data by DSPs could trigger instant payouts to all relevant parties without the need for a centralized database or power struggles over who controls it. Again, this would serve as a solution for transmitting attribution data while making markets more efficient through technological solutions. It is a win-win.

*Again, we would like to thank the Copyright Office for their consideration. We believe moving forward with moral rights implementation is a net positive for creators and society. We find the "patchwork" to be an inadequate substitute and these failures to be indicative of a societal desire for a functional moral rights*

[57] "Toward Global Rights | Music Business Journal | Berklee College of Music," accessed May 13, 2017, http://www.thembj.org/2011/12/toward-global-rights/.

*statute. Moral rights would satisfy the U.S.'s international obligations, define protections for authors often disadvantaged by adverse power dynamics, and benefit the public. We look forward to future discussions on the subject and are available for any further questions.*