

ARTICLE

THE RIGHT TO CLAIM AUTHORSHIP IN U.S. COPYRIGHT AND TRADEMARKS LAW

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I. INTRODUCTION

If you inquired among the general public, “What does U.S. copyright law protect?” many people might start by grumbling that it overprotects piggish record companies. Calming slightly, they might next reply that copyright protects authors’ rights and that among those is the right to be recognized as the author of the work. Indeed, few interests seem as fundamentally intuitive as that authorship credit should be given where credit is due.¹ For example, in prelapsarian, pre-Napster days, the act of copyright infringement in which a youthful individual most likely engaged was probably plagiarism: there, lifting another author’s text may have been unlawful, but at least as morally (and pedagogically) reprehensible was passing it off as the lifter’s.² Giving credit where it is due, moreover, is instinctively appropriate because it furthers the interests both of authors and of their public. For the public, the author’s name, once known, alerts readers/viewers/listeners to particular characteristics or qualities to expect in the work.³ For authors, name recognition

1. See generally, e.g., Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 175 (2002) (identifying a social “attribution norm” and stating that the relevant community “view[s] attribution as being, or closely akin to being, a moral obligation, rather like showing respect to one’s elders”); Eben Moglen, *The dotCommunist Manifesto*, at <http://moglen.law.columbia.edu/publications/dcm.pdf> (Jan. 22, 2003) (rejecting most of copyright but upholding the protection of the author’s attribution interest).

2. See, e.g., *University Policies*, Columbia University, available at <http://www.college.columbia.edu/bulletin/universitypolicies.php> (last visited Mar. 6, 2004). The section titled “Plagiarism and Acknowledgement of Sources” includes the following statement:

Every year there are instances in which students attempt to submit the work of other people as their own. Because intellectual integrity is the hallmark of educational institutions, academic dishonesty is one of the most serious offenses that a student can commit at Columbia. It is punishable by suspension or dismissal from the College.

Id.

3. This consideration resembles the rationale for trademark protection. Cf. 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:10, at 3-19 to 3-20 (4th ed. 2003) [hereinafter MCCARTHY ON TRADEMARKS] (stating that a “[t]rademark signifies that all goods sold under it are of equal quality,” and that they thus symbolize a consistency of consumer experience with the goods or services).

enhances sales (at least when the work that previously bore the author's name has been well received). As one Federal Court judge aptly put it:

Reputation is critical to a person who follows a vocation dependent on commissions from a variety of clients. Success breeds success, but only if the first success is known to potential clients. To deprive a person of a credit to which he was justly entitled is to do him a great wrong. Not only does he lose the general benefit of being associated with a successful production; he loses the chance of using that work to sell his abilities.⁴

Most national copyright laws guarantee the right of attribution (or "paternity");⁵ the leading international copyright treaty, the Berne Convention, requires that Member States protect other Members' authors' "right to claim authorship."⁶ Yet, perhaps to the surprise of many, no such right exists in U.S. copyright law nor in other U.S. laws.⁷ (The Federal Court judge just quoted sits on the *Australian* Federal Court, not on any U.S. bench.) For a time, it seemed as if the Lanham Federal Trademarks Act provided partial coverage: by making false and confusing designations of origin actionable, the Act—many thought—afforded authors relief against misattributions of authorship.⁸ Even so, the trademarks law would only have

4. *Prior v. Sheldon* (2000) 48 I.P.R. 301 ¶ 87.

5. See, for example, Law No. 92-597 of July 1, 1992, on the Intellectual Property Code, J.O., July 3, 1992, art. L. 121-1 (Fr.), available at <http://www.unesco.org/culture/copy/copyright/france/page1.html>, which recognizes an author's "right to respect for his name, his authorship and his work" and is intended to enable the author to be identified as the author of the work on copies or whenever communicated to the public. In Spain, the rights of "personal character" under the 1987 Copyright Act include the author's "right to demand recognition of his authorship of the work." Law No. 22/1987 on Intellectual Property art. 14(iii) (1987) (Spain), reprinted in 3 COPYRIGHT LAWS AND TREATIES OF THE WORLD, Spain: Item 1, at 5 (UNESCO Supp. 1998).

6. Berne Convention for the Protection of Literary and Artistic Works, art. 6^{bis}, Paris Act, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

7. This statement is made with the exception of the very narrowly defined right set out in the Visual Artists Rights Act of 1990 § 603, 17 U.S.C. § 106A(a)(1)(A) (2000), discussed *infra*.

8. See H.R. REP. NO. 100-609, at 37 (1988) (stressing that the Director General of WIPO endorsed the view that U.S. law already met the article 6^{bis} standard). The Ad Hoc Working Group on U.S. Adherence to the Berne Convention, a group formed at State Department behest whose report was submitted to Congress, also concluded that U.S. law afforded "substantial protection . . . for the real equivalent of [the] moral rights [of attribution and integrity]," particularly by recourse to the Lanham Act. See Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention at 35, 39-42, reprinted in 10 COLUM.-VLA J.L. & ARTS 513, 547, 551-54 (1986) [hereinafter Final Report on U.S. Adherence].

In contrast, U.S. patent law requires that the true and original inventor or

reprimanded giving credit to one to whom credit was *not* due; it would not have afforded an *affirmative* right to claim authorship. In other words, giving incorrect credit may have been actionable; giving no credit was not.⁹

In any event, in June of 2003, the U.S. Supreme Court interpreted the Lanham Act to deny false attribution claims as to the origin of a “communicative product” in *Dastar Corp. v. Twentieth Century Fox Film Corp.*¹⁰ The Court thus drastically limited invocation of the trademarks law to enforce authors’ interests in being recognized as the creators of their works. In the wake of *Dastar*, what recourse do authors have in the U.S. to claim authorship? In Part II, I will address the *Dastar* decision to discern if any residue of attribution rights remains under the Lanham Act. In Part III, I will consider the extent to which the Copyright Act does, or might, afford attribution rights. That inquiry leads to the (despondent) answer that in the United States neither the copyright nor the trademarks laws establish a right of attribution generally applicable to all creators of all types of works of authorship. In Part IV, after examining other common law countries’ recent enactments protecting attribution rights, I will propose an amendment to the U.S. Copyright Act to add a federal right of attribution of authorship.

inventors be named in the application for a patent. See 35 U.S.C. §§ 116–117 (2000); 37 C.F.R. §§ 1.45–.48 (2004). Section 102(f) of the Patent Act expressly states that a person will lose patent rights if “he did not himself invent the subject matter sought to be patented,” and § 101 provides that only “[w]hoever invents or discovers . . . may obtain a patent therefor.” 35 U.S.C. §§ 101, 102(f); see also, e.g., Univ. of Colo. Found., Inc. v. Am. Cyanamid Co., 105 F. Supp. 2d 1164, 1175 (D. Colo. 2000) (“As patents reward inventors for disclosing beneficial technology to the public, a person cannot reap the reward of exclusive rights to an invention without being the true inventor.”).

For a recent, comprehensive review of U.S. attribution right caselaw, see generally Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(a)*, 77 WASH. L. REV. 985 (2002) [hereinafter Kwall, *The Attribution Right*].

9. See, e.g., *Johnson v. Jones*, 149 F.3d 494, 496, 499 (6th Cir. 1998) (claim against an architect who had substituted his name for another’s on architectural plans); *Lamothe v. Atl. Recording Corp.*, 847 F.2d 1403, 1405 (9th Cir. 1988) (claim by co-authors against songwriter who published music under only his name); *Smith v. Montoro*, 648 F.2d 602, 603 (9th Cir. 1981) (claim against film company who substituted one actor’s name for another in the film credits). See generally JANE C. GINSBURG ET AL., TRADEMARK AND UNFAIR COMPETITION LAW 618–42 (3d ed. 2001).

10. 123 S. Ct. 2041, 2047–49 (2003).

II. (DIS)CLAIMING AUTHORSHIP UNDER THE FEDERAL TRADEMARKS LAW

In what some might see as an act of contrition for having upheld copyright term extension in *Eldred v. Ashcroft*,¹¹ the Supreme Court made clear, in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, that a work's entry into the public domain precludes resort to another federal intellectual property statute, the Lanham Trademarks Act, to achieve a de facto prolongation of exclusive copyright-like rights. In so doing, however, the Court appears to have stricken the Lanham Act from the roll of laws authors might invoke in support of attribution rights. The facts of the case had nothing to do with authors, were very unappealing, and were as follows. In 1949, Twentieth Century Fox produced a multipart television series, *Crusade in Europe*, based on then-General Eisenhower's campaign memoirs. In 1977, after Fox failed to renew the copyright registration, the work went into the public domain. In 1995, Dastar released a set of videos, *Campaigns in Europe*, substantially copied from *Crusade*. Dastar listed itself as the producer of *Campaigns*, without reference to *Crusade* or Fox. Fox sued, claiming that Dastar's release of the videos under its own name constituted "reverse passing off" in violation of the Lanham Federal Trademarks Act, section 43(a). Fox contended that substituting Dastar's name for Fox's constituted a "false designation of origin," because Fox, the original producer, was the originator of the *Crusade* television series that *Campaigns* "bodily appropriated." The district court agreed and awarded Fox double Dastar's profits, thus granting Fox perhaps a higher damages award than it would have received for copyright infringement (had Fox's copyright still been in force). The Ninth Circuit affirmed in an unpublished opinion. The Supreme Court reversed, 8-0 (Justice Breyer recused).

The unanimous opinion construed the statute's prohibition on "us[ing] in commerce" (selling) any "false designation of origin . . . which . . . is likely to . . . cause mistake, or to deceive as to the . . . origin . . . of his or her goods . . . by another person."¹² The Court held that "origin" in the sense of the Lanham Act does not mean the original creator of a work of authorship from which copies are made, but rather the source of the particular copies

11. 537 U.S. 186 (2003). The Court granted certiorari in *Dastar* on January 10, 2003, five days before announcing its decision in *Eldred*. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 537 U.S. 1099 (2003); *Eldred*, 537 U.S. 186.

12. See Lanham Trademark Act § 43(a), 15 U.S.C. § 1125(a)(1).

(goods) that are being distributed.¹³ Thus, a reverse passing off claim “would undoubtedly be sustained if [the defendant] had bought some of [the] Crusade videotapes and merely repackaged them as its own.”¹⁴ But the Court rejected the contention that a different concept of “origin” should apply to a “communicative product”—a work of authorship. Arguably, the Court’s refusal to accord authors the status of “originators” of communicative works was limited to works whose copyrights had expired, rather than extending to all communicative works, whatever their copyright status. The Court referred some ten times to the copyright-expired status of Fox’s television series. The Court’s doubts about the validity of an interpretation of “origin” to mean “author” seem closely entwined with its concern to maintain the public domain. For example, the Court objected: “Reading ‘origin’ in [the trademarks act] to require attribution of uncopyrighted materials would pose serious practical problems. Without a copyrighted work as the basepoint, the word ‘origin’ has no discernable limits.”¹⁵

On the other hand, it is not clear why, under the concept of “origin” the Court attributed to the trademarks act, authors would qualify as originators of *copyright-protected* works. If, as the Court stated, “the phrase [‘origin of goods’] 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,”¹⁶ what enables the phrase nonetheless to refer to the author of a still-copyrighted work? Whether or not the work is under copyright, its author remains the same person. The distinction between authors as originators of copyrighted works and nonoriginators of the same works when the works fall out of copyright may seem strained. *Dastar* therefore prompts the concern—reinforced by lower court decisions interpreting *Dastar*—that the Supreme Court may have disqualified authors from pleading the trademarks act’s prohibition on false designation of origin to support a claim to attribution of authorship status.¹⁷

13. *Dastar*, 123 S. Ct. at 2047–48.

14. *Id.* at 2046.

15. *Id.* at 2049.

16. *Id.* at 2050.

17. Federal district court decisions subsequent to *Dastar* have declined to limit that decision’s impact to copyright-expired works. See, e.g., *Carroll v. Kahn*, 68 U.S.P.Q.2d 1357, 1361–62 (N.D.N.Y. 2003) (quoting *Dastar* and *Williams v. UMG Recordings, Inc.* to support dismissal of a “failure to attribute” claim); *Williams v. UMG Recordings, Inc.*, 281 F. Supp. 2d 1177, 1185 (C.D. Cal. 2003) (“[T]he Supreme Court’s holding did not depend on whether the works were copyrighted or not. . . . Rather, . . . the Court noted that protection for communicative products was available through copyright claims.”); see also

Accordingly, it is important to assess the likely impact of the *Dastar* decision on the protection of attribution rights in still-copyrighted works. (The Berne Convention does not require protection of moral rights in works whose copyrights have expired.¹⁸) In addition, one should consider whether other portions of the trademarks act may be successfully invoked to vindicate interests that formerly might have been redressed by claims against “false designation of origin.”

To preserve authors’ claims under the Lanham Act, one might stress the facts of the *Dastar* case. Whatever the broader implications of the Court’s language, the case itself concerned a copyright-expired work. In a common law system, a decision’s authority is bound to what the Court actually decided. As a result, neither the Supreme Court nor lower courts would be precluded from fresh consideration of the application of the Lanham Act’s protection of “designation of origin” in the context of an author who asserts that another person was improperly credited as the author of her still-copyrighted work. Thus, even though the Court’s articulation of its reading of “origin” may not readily yield a distinction between the origin of works still under and no longer under copyright, the facts of the case would support, albeit not compel, that distinction. I acknowledge, however, that lower courts have so far declined to limit *Dastar*’s reach to copyright-expired works.¹⁹

Despite this so-far unflinching application of *Dastar* to still-copyrighted works, one should recognize that the rationale behind the Supreme Court’s rejection of attribution rights in copyright-expired works does not extend to copyright-protected works. The Court placed great emphasis on the unconstrained ability of the public to copy and distribute public domain works. Requiring accurate attribution of creative origin, according to the Court, improperly impedes the public’s entitlement. Where, by contrast, the work is still subject to the author’s exclusive right to make the work available in copies or by transmission, the requirements as to how the copies or transmissions are labeled take nothing from the public.

Even where the work is in the public domain, however, the Court might have recognized that an obligation to credit correctly the author of a copyright-expired work addresses a different

Bretford Mfg., Inc. v. Smith Sys. Mfg. Co., 286 F. Supp. 2d 969, 972 (N.D. Ill. 2003) (holding that *Dastar* was not limited to “communicative products” and that it barred a reverse passing off claim regarding origin of a component of a table because the “goods” are the table, not its various components).

18. See Berne Convention, *supra* note 6, art. 6^{bis}(2).

19. Refer to note 17 *supra*.

concern, one at trademark law's core—accuracy in market information. Advancing this goal need not impede the free use of the work's content. It is not apparent how the public interest in access to public domain works is furthered by permitting a purveyor to sell those works under another author's name. For example, an anonymous seventeenth-century Elizabethan or Jacobean drama is certainly in the public domain and anyone may copy and sell it. But what is the public interest in allowing the seller to pass the work off as Shakespeare's? Yet, if putting Shakespeare's name on the cover is not a "false designation of *origin*," then there may be no violation of that section of the Lanham Act.²⁰ In its zeal to preserve copyright's public domain, the Court has arguably misunderstood the task of trademarks law.

In fairness to the Court, however, the remedy entered by the district court also failed to respect the different goals these two forms of intellectual property serve. By awarding Fox twice Dastar's profits, the district court entered a remedy akin to, if not in fact more generous than, the relief Fox would have received in a copyright infringement action. This does make the trademark claim seem like "a species of mutant copyright law that limits the public's 'federal right to 'copy and to use,'" expired copyrights."²¹ But the trademarks act in fact gives courts considerable discretion in fashioning remedies;²² the district court could have (and the Supreme Court perhaps should have) recognized the claim, but limited relief to accurate labeling of the copies of the videos.

Significantly, examples from copyright law illustrate the distinction between freedom to copy and obligation not to mislabel as to the goods' origin in a way that is likely to cause

20. Passing off the anonymous work as Shakespeare's may, however, be a false statement of fact regarding the work's qualities or characteristics, in violation of section 43(a)(1)(B). Refer to pp. 274–75 *infra*.

21. *Dastar*, 123 S. Ct. at 2048 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989)).

22. See Lanham Trademark Act § 35(a), 15 U.S.C. § 1117(a) (2000) ("If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just . . .").

In addition, the *Dastar* district court entered the remedy without inquiring into whether the public was likely to be confused regarding the origin of the television series; rather, it appears to have assumed that confusion would result from the "bodily appropriation" (very substantial copying) of the Fox series. Because trademarks law protects the public from market confusion, while copyright protects against copying regardless of confusion, short-circuiting the inquiry into confusion may also risk turning trademark claims into a back-up claim for expired copyrights, which was of course the Court's concern.

consumer confusion. Thus, copying of protected material that might otherwise have qualified as an educational fair use may be deemed “unfair” if the copier intentionally removes reference to the copied work’s author and passes it off as his own.²³ The Berne Convention permits free copying for purposes of teaching and news reporting, but requires that the source be credited.²⁴ The distinction that undergirds these examples should be borne in mind lest one be tempted to extend to copyrighted works *Dastar*’s solicitude for untrammelled, uncredited, free copying from public domain works.

The facts of *Dastar* point to an additional distinction that may help preserve some authors’ attribution interests. Fox was the successor in title to Time, Inc., the principal creator of the television series *Crusade in Europe*. Thus, Fox’s own creative contribution was more formal than real. Moreover, even if Fox were the original producer, it did not originate most of the series’ content. As the *Dastar* Court pointed out, most of the series’ film footage was taken by armed services personnel and news reporters. Fox (via Time) may have overseen the assembly of the series’ pregenerated components, but even if Fox was the “originator” of the whole, it was not the “originator” of the parts. Given the many-layered composition of the series,

[i]f anyone has a claim to being the *original* creator of the material used in both the *Crusade* television series and the Campaigns videotapes, it would be those groups, rather than Fox. We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries.²⁵

This objection to recognizing authors as “originators” of copyrighted works does not apply to works whose creation lacks the near-archaeological complexity attributed to *Crusade*, much less to works of music, drama, photography, and literature, many of which are single-authored.²⁶

Finally, the *Dastar* Court left open two avenues within the trademarks act to vindicate creators’ rights. First, the Court recognized reverse passing off claims when the defendant has “merely repackaged . . . as [his] own” goods which the defendant

23. See *Weissmann v. Freeman*, 868 F.2d 1313, 1315–16, 1325 (2d Cir. 1989); see also *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (holding removal of plaintiff photographer’s copyright notice part of a pattern of behavior disqualifying from fair use exception defendant’s unauthorized sculpture based on photograph).

24. Berne Convention, *supra* note 6, arts. 10(2)–(3), 10^{bis}(1).

25. *Dastar*, 123 S. Ct. at 2049.

26. Part IV of this Article will consider attribution rights in connection with multiple-authored works.

has not otherwise altered.²⁷ Second, it preserved claims under a related section of the trademarks act. The Court stated,

If, moreover, the producer of a video that substantially copied the Crusade series were, in advertising or promotion, to give purchasers the impression that the video was quite different from that series, then one or more of the respondents might have a cause of action—not for reverse passing off under the “confusion . . . as to the origin” provision of § 43(a)(1)(A), but for misrepresentation under the “misrepresents the nature, characteristics [or] qualities” provision of § 43(a)(1)(B). For merely saying it is the producer of the video, however, no Lanham Act liability attaches to *Dastar*.²⁸

Let us therefore consider whether authors might still vindicate attribution rights by bringing claims against reverse passing off through “mere repackaging.” I will also assess whether authors would have valid claims against misrepresentations of the nature, characteristics, or qualities of a work of authorship. With respect to what a “mere repackaging” reverse passing off claim would cover, it is important to recognize that, notwithstanding *Dastar*'s emphasis on free copying from the public domain, not every exploitation that the copyright law might permit will escape Lanham Act condemnation. For example, the copyright law “first sale doctrine” entitles purchasers of tangible copies of a work of authorship to resell, rent, or lend those copies without the copyright owner's authorization.²⁹ But, even under *Dastar*, that does not mean that the Lanham Act will allow me to purchase copies of the latest Brad Meltzer or John Grisham legal thrillers and resell them under my own name. In fact, that would seem to be exactly the situation posited in the Court's caveat that a reverse passing off claim “would undoubtedly be sustained if [the defendant] had bought some of [the] Crusade videotapes and merely repackaged them as its own.”³⁰

Nor, despite the Court's linkage of “origin” with physical copies, should the “mere repackaging” claim be limited to communication of physical copies originally manufactured by the

27. *Dastar*, 123 S. Ct. at 2046.

28. *Id.* at 2050 (alterations in original). Lanham Act section 43(a)(2), 15 U.S.C. § 1125(a)(1)(B) (2000), prohibits any “false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities . . . of his or her or another person's goods.”

29. 17 U.S.C. § 109(a) (2000).

30. *Dastar*, 123 S. Ct. at 2046.

trademarks claimant. For one thing, it would be extraordinarily formalistic were the “mere repackaging” claim confined to physical copies that Dastar recycles, thus excluding exact copies that Dastar reproduces. The “goods” at issue should be understood to be any physical reproductions, not only the ones made by the claimant. Otherwise, the statute would reach the soda company that purchased old Coca-Cola bottles (whose vintage design is undoubtedly, as a matter of copyright or design patent law, in the public domain) and refilled them with a substitute cola, but not the soda company who makes new bottles in the shape of the Coca-Cola bottle and fills them with the substitute.³¹

One might further contend that “mere repackaging” should not be limited to physical copies of any kind. If Dastar had broadcast the *Crusades* series in its entirety, changing only the name of the producer, then the public’s receipt of the repackaged in ephemeral rather than tangible form would seem to be a distinction without a difference. The designation is equally false whether the public views the series as a broadcast or on home video. Moreover, the pertinent section of the Lanham Act covers any “false designation of origin” “in connection with any goods *or* services.”³² While copies are “goods,” transmissions are generally considered “services.”³³ A claim of false designation of origin with respect to services cannot be analyzed by reference to the producer of physical copies, because there are none.³⁴ For broadcasts and other transmissions, the “origin” would mean the originator of the content transmitted, that is, the producers and creator(s) of the programming. In this context, “origin” is not properly attributed to the originator of the *transmission*—the transmitting entity—because the transmitting entity is generally not the owner of or symbolized by the service mark for the

31. *Cf. id.* at 2047 (stating that the Lanham Act “forbids, for example, the Coca-Cola Company’s passing off its product as Pepsi-Cola or reverse passing off Pepsi-Cola as its product”).

32. Lanham Trademark Act § 43(a)(1), 15 U.S.C. § 1125(a)(1) (emphasis added).

33. *See, e.g.*, U.S. PATENT AND TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1301.02(d) (3d ed. 2002) (explaining that titles of radio and television programs are service marks).

34. In *Williams*, the district court rejected plaintiff’s claim that defendants’ failure to credit him as a co-author and coproducer of a motion picture released on home video constituted a false designation of the origin of plaintiff’s services as screenwriter and coproducer. *Williams v. UMG Recordings, Inc.*, 281 F. Supp. 2d 1177, 1183–84 (C.D. Cal. 2003). The court stated that the subject matter at issue was the “goods,” the home video copies, not of the services plaintiff allegedly contributed to the creation of the work that defendants distributed in copies. *See id.* The hypothetical in text, however, addresses false designation of origin of the content of a transmission, not of physical copies. *See id.* at 1184–85.

content transmitted. For example, the classic television series *I Love Lucy* may be communicated over many different broadcast and cable stations. The series' name, its service mark, designates the series as created and performed in by Lucille Ball and collaborators; it does not mean the series as transmitted by the stations that are broadcasting or otherwise communicating it. This should be true regardless of whether or not the series is still under copyright.

Exploitations by noncreator copyright owners present another type of copyright-permitted activity that might run afoul of the Lanham Act's prohibition on false designations of origin via "mere repackaging." The Court rather blithely assumed that attribution of copyrighted works was a nonproblem because the author who grants rights in the work will be sure to insist that her licensee gives her appropriate name credit. (Note that this does not make attribution a right under copyright; it makes copyright law the leverage for a contract-based claim to attribution.) But, as we will see when we turn to the discussion of copyright law, not all creators are copyright owners: some never are, and others may transfer their copyrights away without being able to require name credit or without being able to bind downstream licensees to grant credit. Suppose, for example, that an actor's name is removed from film credits and another (fictitious) actor's is put in its place. The actor is not a copyright owner, but his filmed performance has effectively been repackaged under another's name. Does his claim survive? Or suppose I am a novelist; regardless of what my publishing contract says about name credit, the subsidiary rights agreement that my publisher enters into with a paperback publisher does not call for crediting me as the author. If the paperback comes out under another author's name, I have no contract claim against this third-party publisher. But the paperback "merely repackages" my work as someone else's. Do I have a claim against false designation of origin? Do I have a claim if the publisher includes my work together with another author's, then gives credit for the entire work to the other author?³⁵ In the latter case, the publisher may have done more than "merely repackaged"; does that disqualify any claim?

Whether or not the actor or I can still allege false designation of *origin*, the *Dastar* Court's reference to subsisting

35. Cf. *Lamothe v. Atl. Recording Corp.*, 847 F.2d 1403, 1405 (9th Cir. 1988) (examining a case where only one of several co-authors was given authorship credit on a sound recording). According to the *Williams* court, *Dastar* effectively overruled the reverse passing off holding in *Lamothe* and similar Ninth Circuit decisions. See *Williams*, 281 F. Supp. 2d at 1184 n.10.

section 43(a)(1)(B) claims against “false or misleading description of fact, or false or misleading representation of fact, which . . . misrepresent[] the nature, characteristics, [or] qualities . . . of his or her or another person’s goods [or] services” may in some instances preserve a Lanham Act right of action for authors and performers.³⁶ Arguably, removing my or the actor’s name and replacing it with another’s constitutes a false or misleading representation of fact (who is the author of this book; who performed in this film) that misrepresents the nature, characteristics, or qualities (authorship; performance) of the goods (the work). Note that, for purposes of section 43(a)(1)(B), the Court appears to have acknowledged that “goods” can mean a “communicative work,” while, for purposes of section 43(a)(1)(A), “goods” would mean only the physical copies. Query whether it makes sense for “goods” to mean two different things in these adjacent sections. In any event, the potential availability of a section 43(a)(1)(B) claim becomes particularly significant if, after *Dastar*, the “origin” of copyrighted works is falsely designated only when the entire work is misattributed, or worse, only when physical copies are mislabeled as to their manufacture.

Suppose, for example, that a famous novelist grants film rights in his book. Apart from its title, the resulting movie bears only the slightest resemblance to the underlying literary work. But, recognizing the market value of the author’s name, the motion picture company promotes the film (without the author’s permission) as “Stephen King’s *The Lawnmower Man*.”³⁷ Or suppose that a copyright-licensed U.S. broadcaster airs a truncated version of *Monty Python’s Flying Circus*, presenting it as the work of the British comedy troupe even though the troupe did not approve the broadcaster’s removal of approximately one-third of the content.³⁸ In both cases, the attribution to the creators is misleading, not to say, vastly overstated. Presenting the work as “Stephen King’s” when virtually the only thing in the film that is still the writer’s is the title, or as “Monty Python’s” when the editing has garbled it, might falsely describe the nature, characteristics, or qualities of the work. The *Dastar* Court indicated that a claim for false representation of the nature of the work could lie if *Dastar* promoted its modestly altered videos as “quite different” from the Fox originals when they in fact are quite the same; conversely, a claim should remain available if a work is promoted as being “by” an author when its

36. *Dastar*, 123 S. Ct. at 2046 n.4.

37. See *King v. Innovation Books*, 976 F.2d 824, 826–27 (2d Cir. 1992).

38. See *Gilliam v. ABC*, 538 F.2d 14, 17–18 (2d Cir. 1976).

purveyor has in fact made it “quite different” from the work the author created.³⁹

These examples offer variants of traditional “passing off” claims: a version that the author claims is so altered that it no longer represents his work is sold as if it were the real thing. Although the “goods” are a work of authorship, this is analytically akin to passing off a fake Fendi bag as though it were the genuine article. The same is true of the anonymous sixteenth-century poet whom I sell as Shakespeare. Would a “false representation” claim also lie if I engage in “reverse passing off”? Suppose that, rather than purchasing copies of the latest Brad Meltzer legal thriller and affixing my name to them—conduct still actionable under the Lanham Act after *Dastar*—I make new copies and sell them under my name? Under *Dastar*, I am the “origin” of the *copies* (or perhaps my publisher is), so a section 43(a)(1)(A) claim against me fails. But I have also made a “false representation of fact which . . . misrepresents the nature, characteristics [or] qualities,” that is, the authorship, of my literary work (“goods”). If Brad Meltzer can make out the remaining elements of a claim for “misrepresent[ations of] the nature, characteristics, [or] qualities,” then the effects of *Dastar* may not be as disastrous for creators as the Court’s concept of origin might initially portend.

This analysis, however, may suggest too simple a sleight of hand: next time, all an author—or, more significantly, Twentieth Century Fox—need do is plead section 43(a)(1)(B) instead of 43(a)(1)(A). But this critique overlooks the consumer protection focus of section 43(a). Section 43(a), unlike section 32, does not require that the claimant be a trademark registrant. This is because section 43(a) targets a wider range of deceitful marketplace activity, including misleading trade dress imitation and false advertising. The objective is not to create new rights for unregistered merchants, but to protect the public.⁴⁰ This in turn

39. See 4 MCCARTHY ON TRADEMARKS, *supra* note 3, § 27:77.1, at 27-149.

The Court hypothesized that if a producer of a video that substantially copied Fox’s *Crusade* television series were, in advertising or promotion, to give purchasers the impression that the video was “quite different from that series,” then Fox might have a claim for false advertising for misrepresenting the nature, characteristics or qualities of the creative content of the product in violation of § 43(a)(1)(B). That is, in this hypothetical, the defendant would be making a false statement about the content of its communicative product.

Id. (footnote omitted). McCarthy also notes that the false advertising prong contains a restriction that the “trademark prong” does not: the misrepresentation must be “in commercial advertising or promotion.” *Id.* at 27-149 to 27-150 (internal quotation marks omitted). This is “not an insignificant limitation.” *Id.* at 27-150.

40. See *id.* § 27:14, at 27-25 to 27-27.

suggests that the application of section 43(a)(1)(B) to misrepresentations regarding the “nature,” et cetera, of “communicative goods” should be limited to misrepresentations material to the consumer. This standard may also help us avoid the “Nile and all its tributaries” problem: in *Dastar*, Fox was not the actual creator of the World War II film footage, nor is it clear what was Fox’s role in the creation of the television series. In other words, from the consumer’s point of view, accurate information about Fox’s or Dastar’s relationship to the contents of the audiovisual work (as opposed to the production of the physical copies) may not have mattered.

By contrast, knowing who is the actual creator generally is material to the purchasing decision.⁴¹ This observation may also be key to resolving the potential tension in the post-*Dastar* treatment of copyrighted and public domain works. The *Dastar* facts and policies permit a distinction allowing section 43(a) misattribution claims to persist for still-copyrighted works, but the distinction is justified more as damage control than on principle. As the example of the anonymous sixteenth-century poet sold as Shakespeare indicates, the public can be materially misled with regard to the authorship of public domain works, too. Consider another instance of copyright-permissible material deception: copyright does not protect the ideas, information, or processes that a work discloses. As a result, copyright protection for a work such as a cookbook is typically “thin,” covering the chef’s literary flourishes, but not the culinary preparations themselves. As a matter of copyright law, therefore, I am free to

The courts have nearly unanimously held that § 43(a) provides a federal vehicle for assertion of infringement of even *unregistered* marks and names. As the Second Circuit remarked, § 43(a) “is the only provision in the Lanham Act that protects an unregistered mark” and “Its purpose is to prevent consumer confusion regarding a product’s source”

Id. (footnote omitted) (quoting *Centaur Communications, Ltd. v. A/S/M Communications, Inc.*, 830 F.2d 1217, 1220 (2d Cir. 1987)).

41. For example, Amazon.com’s Web site alone contains more than 11,000 usages of the phrase “from the author of.” See <http://www.google.com/search?sourceid=navclient&ie=UTF-8&oe=UTF-8&q=site:www%2Eamazon%2Ecom+%22from+the+author+of%22> (last visited Apr. 16, 2004). By contrast, in the case of movie ads, the “from the director/author of” phrase often does not contain that director/author’s name, but only the name of the previous popular work; one has to search further for the name of that director/author. This suggests that the advertiser—usually the motion picture producer—perceives more commercial value in the name of the previously successful motion picture than in the name(s) of its creator(s). Current film *The Last Samurai* (Warner Brothers Entertainment Inc. 2003) is advertised as “from the director of ‘Legends of the Fall’ and ‘Glory’” (Edward Zwick). See <http://lastsamurai.warnerbros.com/index.php?c=6> (last visited Mar. 17, 2004). The film *The Day After Tomorrow* (Twentieth Century Fox 2004) is being promoted as “from the director of ‘Independence Day’” (Roland Emmerich). See <http://www.apple.com/trailers/fox/dayaftertomorrow> (last visited Mar. 17, 2004) (trailer).

publish my own cookbook appropriating the ingredients and following the steps needed to produce Nigella Lawson's or Emeril Lagasse's latest creations. Moreover, because U.S. copyright law says nothing about how I label the *unprotected* material that I copy, any express or implied fair use obligation to credit one's sources would not extend to mere copying of public domain elements. Nonetheless, copyright's free pass on *copying* should not also mean that no law will prohibit me from *representing* that the gastronomy I describe is of my own devising. Section 43(a)(1)(B), with its focus on consumer protection, should supply that prohibition.

But, even if authorship is or can be a "characteristic" of the work, the section 43(a)(1)(B) violation does not occur unless the misrepresentation takes place in "commercial advertising or promotion."⁴² Simply mislabeling and selling the work without advertising the name substitution may not constitute "promotion"; the statutory text suggests that the mislabeler has called attention to the false information. One might expect that there would be no market for an unpromoted work, so that in most instances the requisite "commercial advertising or promotion" will occur. But the promotion might not always go to the alleged false representation. For example, if the miscredited actor did not perform in a featured role, his (or his false substitute's) name might not appear on posters and advertisements for the film. In those instances, it is not clear that the spurned author or performer will have a claim. (It may also be questionable whether the misrepresentation of a tertiary actor's name is material to consumer choice.)

There is an additional problem: even were the false representation of the fact of authorship to occur in commercial advertising or promotion, the author may not have standing under the Lanham Act to bring the claim. (In fairness, the standing problem also pertained to claims of false designation of origin and may further illustrate the incomplete coverage the Lanham Act afforded authors even before *Dastar*.) The problem is the following: section 43(a) is generally perceived as creating a federal claim against certain kinds of unfair competition;⁴³ in that case, some courts have concluded, the parties to a 43(a) claim should be competitors. In those courts' view, however, authors may not be "in competition" with licensees or others who fail to

42. Lanham Act § 43(a)(2), 15 U.S.C. § 1125(a)(1)(B) (2000).

43. 4 MCCARTHY ON TRADEMARKS, *supra* note 3, § 27.7 (telling the history of Lanham Act section 43(a)).

respect their attribution claims.⁴⁴ Thus, even if a false description claim survives, it is not clear whether an author can bring it.⁴⁵

Ultimately, however, attempts to salvage authors' claims against misattribution under section 43(a) prove strained or insufficient.⁴⁶ More importantly, restoring the pre-*Dastar* status quo at least for copyrighted works will redress only false attributions, not nonattributions, of authorship. And because the Lanham Act, properly understood, is consumer-oriented rather than author-focused, the materiality test implicit in this reading may exclude some authors' claims.

We turn now to copyright law—a law that is, at least in part, author-oriented, though we find that, when it comes to credit, the current act offers even fewer grains than can be gleaned from the trademarks field after *Dastar's* devastating passage.

III. COPYRIGHT: THE U.S. LAW OF AUTHORS' RIGHTS RECOGNIZES FEW AUTHORS

In excluding communicative goods from the reach of false designation of "origin" claims, the *Dastar* Court appears to have assumed that the author who licenses rights in her work would always ensure that she receives authorship credit.⁴⁷ Under the Court's assumption, even if the Copyright Act lacked an explicit provision for attribution rights, the author's control over the reproduction and other exploitation rights would de facto extend to implementing an attribution right. The Court may also have thought it unlikely as a practical matter that a licensee would refuse or neglect to give the author name credit, particularly as

44. See, e.g., *Halicki v. United Artists Communications, Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987).

45. See *Cleary v. News Corp.*, 30 F.3d 1255 (9th Cir. 1994) (holding that creators of works made for hire had contracted away their attribution rights).

46. For an even more aggressively apocalyptic reading, see David A. Gerber, *Copyright Reigns—Supreme: Notes on Dastar Corp. v. Twentieth Century Fox Film Corp.*, 93 TRADEMARK REP. 1029, 1032 (2003) ("[A]lthough *Dastar Corp.* involved reverse passing off, its sweep is much wider. The brightline rule rejecting authorial claims under § 43(a) should lead to the death not only of the droit à la paternité or right of attribution, but other 'moral rights' under § 43(a) as well."). Note, however, that Gerber is not a disinterested commentator: he was *Dastar's* counsel. *Id.* at 1029.

47. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2050 (2003).

The creative talent of the sort that lay behind the Campaigns videos is not left without protection. The original film footage used in the Crusade television series could have been copyrighted . . . as was copyrighted (as a compilation) the Crusade television series, even though it included material from the public domain . . . Had Fox renewed the copyright in the Crusade television series, it would have had an easy claim of copyright infringement.

Id.

the author's name may serve as a selling point for the work. But these assumptions may have been unfounded.

First, under the Copyright Act, not every creator of a work of authorship is a statutory "author" with power to license rights in the work. Creators of "works made for hire"—employees and freelance contributors to specified categories of works—have no copyright rights in the works they write, perform, or otherwise execute.⁴⁸ The Copyright Act vests all economic control in the employer or hiring party. As a result, under that statute, the creator has no copyright rights to leverage into an attribution right.⁴⁹ In some cases, collective bargaining agreements negotiate attribution rights for certain classes of creators.⁵⁰ But, whether by choice or because of lack of organization, many freelance creators are not unionized, and these agreements do not assist nonunion creators. Moreover, even in traditionally unionized sectors, creators may encounter resistance from statutory copyright owners. For example, to an increasing extent, screenwriters and other creative contributors to television programming are facing demands from television producers to cut the "credits" that follow the broadcast.⁵¹

Second, even where the creator is the "author," any attribution right remains purely a creature of contract; if the contract does not specify a right to credit, then no such right exists, because no statute lurks in the background to afford a default right of attribution. Third, because the right is purely contractual, it does not reach third parties, including subsequent licensees.⁵²

48. See 17 U.S.C. § 101 (2000) (defining "work made for hire"); *id.* § 201(b) (explaining that an employer for hire "owns all of the rights comprised in the copyright").

49. The creator may, however (at least in theory), bargain for attribution rights in the employment contract or as a condition of signing a commissioned work made for hire agreement.

50. See, e.g., Article 8 of the Writers Guild of America—East, "Basic Agreement" for Theatrical and Television (effective May 2, 2001 through May 1, 2004), which provides that "The Company" shall give credits for screen authorship "only pursuant to the terms of and in the manner prescribed in the applicable [attached Schedule A]." Theatrical Schedule A contains thirty paragraphs setting forth credit requirements; Television Schedule A contains thirty-one such paragraphs.

51. See, e.g., International Documentary Association, *IDA Responds to Elimination of Credits*, Cinematography.com, at <http://www.cinematography.com/index.asp?newsID=16> (last visited Mar. 17, 2004). Producers express concern that audiences lose attention during the 30-second credit "crawl" and switch to other channels; it is not apparent that the two or more minutes of commercials that typically follow the credit "crawl" have any greater claim on the audiences' loyalty, however. See *id.*

52. A recent controversy in the related area of integrity rights illustrates the problem. Motion picture directors, as employees for hire, are not copyright owners. Collective bargaining agreements, or individual directors' negotiating power, may confer on the director some control over the alterations the motion picture producer seeks to

But is the copyright situation really so dire? After all, when the United States joined the Berne Convention, effective March 1989, we committed to enforce its article 6^{bis} moral rights, including the “right to claim authorship,” at least with respect to foreign Berne Union authors.⁵³ In the Berne Convention Implementation Act of 1988,⁵⁴ however, the United States declined to implement article 6^{bis} on the ground that a patchwork of federal and state claims formed a rough equivalent to the article 6^{bis} guarantees of the rights of integrity and of attribution.⁵⁵ Were we fibbing? Some would say “Yes,” noting that the Berne Convention has no provision against scoff laws⁵⁶ and that the United States made sure that the TRIPS accord—which incorporates Berne but also supplies sanctions for noncompliance—excluded article 6^{bis}.⁵⁷ A less cynical view of Berne adherence would assert that Congress in 1988 made the “rough equivalence” claim in good faith, for it could not have anticipated that the Lanham Act might vanish from the vaunted “patchwork.”⁵⁸

As might be expected given the position taken on Berne adherence, Congress has not subsequently established an explicit

make to the work. But third parties are not bound by these arrangements. As a result, even if the director succeeds in resisting the producer’s demands to remove or shorten portions of the film, a third party entrepreneur who distributes motion pictures sanitized of sex, violence, or vulgarity (and clearly advises consumers of the excisions) has violated no rights of the film director (though the entrepreneur may be violating the derivative works copyright of the motion picture studios). *Cf. Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. filed Aug. 29, 2002).

53. The Berne Convention does not require that Member States apply the conventional minimum rights to their own authors. *See Berne Convention*, *supra* note 6, art. 5(3).

54. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

55. *See Berne Convention Implementation Act of 1988*, S. REP. NO. 100-352, at 9–10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3714–15; *see also Gilliam v. ABC*, 538 F.2d 14, 24–25 (2d Cir. 1976) (applying a Lanham Act section 43(a) false designation of origin claim to a truncated broadcast of *Monty Python* television programs).

56. *See, e.g., A. Dietz, The United States and Moral Rights: Idiosyncrasy or Approximation? Observations on a Problematical Relationship Underlying United States’ Adherence to the Berne Convention*, 142 REVUE INTERNATIONALE DU DROIT D’AUTEUR 222 (Oct. 1989); *see also Tyler T. Ochoa, Introduction: Rights of Attribution, Section 43(a) of the Lanham Act, and the Copyright Public Domain*, 24 WHITTIER L. REV. 911, 925–28 (2003) (stating that without express statutory coverage of the attribution right, the United States is not in compliance with Berne article 6^{bis}).

57. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, arts. 9–14, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Results of the Uruguay Round vol. 31, 33 I.L.M. 1125, 1201 (1994).

58. In most of the other instances in which the United States clearly did not comply with Berne norms, Congress did amend other provisions of the Copyright Act, for example, with respect to the formalities of notice and registration. *See Berne Convention Implementation Act* §§ 7–9.

right of attribution of general application. The enactment in 1990 of the Visual Artists Rights Act (VARA)⁵⁹ did grant limited attribution rights, but only with respect to an extremely narrow class of works. The class of “work[s] of visual art”⁶⁰ is confined to the original work or up to two hundred signed and numbered copies of a painting, drawing, print, sculpture, or a photographic image “produced for exhibition purposes only,” so long as the work is not “made for hire.”⁶¹ VARA affords artists whose works fall within its restrictive definition a kind of private “Landmarks” law to preserve their works against mutilation or destruction. Attribution rights, albeit included, are not the focus of the Act. Indeed, VARA’s restriction to physical originals makes that statute a very feeble measure for enforcing artists’ attribution rights: a “work of visual arts” excludes mass market multiples, and VARA attribution (as well as integrity) rights apply only to “works of visual art.” Thus, there is no VARA right to compel attribution for one’s artwork if the artist’s name has been left off anything more than the original or a signed and numbered limited edition of two hundred. And, of course, VARA does nothing for literary, musical, or most other authors.

Worse, under a truly pernicious reading of VARA, the *Dastar* Court appears to suggest that VARA’s enactment promotes a negative inference that VARA is the *only* federal law locus for attribution rights: if authors already enjoyed attribution rights, VARA would be superfluous, and “[a] statutory interpretation that renders another statute superfluous is of course to be avoided.”⁶² This is both perverse and wrong. It is perverse because, given VARA’s very limited coverage, the result of this reading is to leave most authors with *fewer* attribution rights post-VARA than before. While statutes should be read to avoid superfluity, they should also be read to avoid impairing our treaty obligations.⁶³ A reading that makes our Berne compliance even less plausible than before should not have recommended itself to the Court.

59. Visual Artists Rights Act of 1990 § 603, 17 U.S.C. § 106A (2000).

60. See 17 U.S.C. § 101.

61. *Id.*

62. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2048 (2003).

63. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”); see also *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that statutes should be interpreted consistently with customary international law); see also generally Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990).

Second, the Court's suggestion is wrong because section 43(a) does *not* make VARA superfluous. There may be narrow areas of overlap, but VARA, in its severely constricted zone, affords a significant right that section 43(a) does not: an *affirmative* right to claim authorship, not merely a right to object to misrepresentations of authorship that confuse consumers as to the work's origin. Moreover, VARA's beneficiaries are artists, but section 43(a)'s are the consuming public, and, as discussed earlier, the rationales for the laws are different. Courts addressing overlapping intellectual property claims have acknowledged that differently motivated laws may yield similar results when brought to bear on the same subject matter, yet one does not drive out the other.⁶⁴

If VARA, at best, offers too little in the way of attribution rights, the rest of the Copyright Act and of Title 17 are of no help either. Or, perhaps more accurately, nothing else in the Copyright Act explicitly recognizes attribution rights, and before 1998, nothing in that statute could be construed to afford attribution rights. The much-derided Digital Millennium Copyright Act (DMCA),⁶⁵ however, may contain the seeds of a general attribution right; with sufficient ingenuity and effort, these seeds might be made to germinate. The seeds may be found in the § 1202 provision on "Copyright Management Information." This provision was introduced as part of legislation implementing the 1996 WIPO Copyright Treaty.⁶⁶ Section 1202 prohibits (a) knowingly providing false copyright management information, with the intent to facilitate or conceal infringement. The provision also prohibits (b) knowingly or intentionally altering or removing copyright management information, knowing (or having reasonable grounds to know) that the alteration or removal will facilitate or conceal infringement. Subsection (c) defines copyright management information. The definition includes the name of the author, the name of the

64. See, e.g., *Frederick Warne & Co. v. Book Sales, Inc.*, 481 F. Supp. 1191, 1196–99 (S.D.N.Y. 1979) (stating that a publisher of children's books in the public domain could bring a trademark claim against defendant's copying of particular illustrations from the book, and commenting that "[b]ecause the nature of the property right conferred by copyright is significantly different from that of trademark, trademark protection should be able to co-exist, and possibly to overlap, with copyright protection without posing preemption difficulties"); cf. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (holding that federal design patent law preempts state laws protecting against copying of boat hull designs but does not preempt state laws protecting consumers against misleading presentations of products).

65. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

66. World Intellectual Property Organization: Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997) [hereinafter WIPO Treaty].

copyright owner, and the “[t]erms and conditions for use of the work.”⁶⁷ Inclusion of the author’s name in protected copyright management information suggests that the copyright law finally affords authors of all works, not just “works of visual art,” a right to recognition of their authorial status. Unfortunately, as we shall see, the situation is a little more complicated.

Section 1202 was designed to promote the dissemination of copyrighted works by facilitating the grant or license of rights under copyright (particularly through electronic contracting). Because accurate and reliable information about the work is essential to its lawful distribution (particularly online), § 1202 identifies that information and protects it against falsification, removal, or alteration. There are, however, some respects in which § 1202 ensures the desired reliability and accuracy only imperfectly. Moreover, the text does not fulfill all U.S. obligations under article 12 of the WIPO treaty. Article 12 requires contracting parties to prohibit, *inter alia*, unauthorized removal or alteration of electronic rights management information when the actor knows or has reasonable grounds to know that the removal or alteration “will induce, enable, facilitate or conceal an infringement of *any right covered by this Treaty or [by] the Berne Convention.*”⁶⁸ The “right[s] covered by the Berne Convention” are not only those found within Title 17. Article 6^{bis} of the Berne Convention declares authors’ rights “to claim authorship of the work.”⁶⁹ As mentioned earlier, when the United States adhered to the Berne Convention, Congress announced its position that it was not necessary to incorporate the article 6^{bis} right of attribution into the body of the Copyright Act, because other provisions of United States law, federal and state, adequately assured that right.⁷⁰ This means that misidentifying the author of a copyrighted work might have violated some legal norms in the United States, *but it would not have been copyright infringement.* Thus, § 1202 falls short of the WIPO treaty requirement, because § 1202 concerns only copyright management information whose removal or alteration facilitates or conceals copyright infringement. Removal or alteration of copyright management information identifying the author of the work would violate the WIPO norm, but because it is not copyright infringement even willfully to miscredit the author, there would be no violation of

67. 17 U.S.C. § 1202(c) (2000).

68. WIPO Treaty, *supra* note 66, art. 12 (emphasis added).

69. Berne Convention, *supra* note 6, art. 6^{bis}(1).

70. Refer to notes 55–58 *supra* and accompanying text.

§ 1202, unless it could be shown that miscrediting authorship induces infringement.⁷¹

There is another way in which § 1202 falls short of generalizing a right of attribution to Berne levels. The DMCA does recognize the importance of and public benefit of authorship credit, for § 1202(c)'s definition of copyright management information includes "[t]he name of, and other identifying information about, the author of a work."⁷² But § 1202 does not *oblige* the rights owner to attach copyright management information to distributions of the work. At most, § 1202 instructs the rights owner who does choose to attach copyright management information that the information should include the name of the author.⁷³ Even then, however, § 1202 does not dictate that a copyright owner who chooses to include some of the information listed in § 1202 as "Copyright Management Information" must therefore include *all* of it. As a result, § 1202 gives authors no guarantee that statutory protection of copyright management information will cover their names.

To some extent, the U.S. Copyright Office may fill in the gaps in the copyright management information scheme. Section 1202(c)(8)'s definition of copyright management information provides a residual category of "[s]uch other information as the Register of Copyrights may prescribe by regulation." For example, although the statute lists "[t]he name of, and other identifying information about, the author of a work,"⁷⁴ the statute does not reveal whether "author" in this context means the statutory author/employer for hire, or the actual creator. Thus, it is not clear whether the creator of a work made for hire also should receive authorship credit.⁷⁵ The Copyright Office could write regulations interpreting copyright management information to provide for authorship credit to the contributors to a work made for hire as well as to creators who are initial

71. Arguably, improper authorship credit could complicate or defeat title searching and rights clearance, leading some users to infringe in frustration, but this seems rather attenuated (particularly if other licensing information is not tampered with).

72. 17 U.S.C. § 1202(c)(2).

73. The definition of copyright management information appears to give the rights owner the option of including some, but not all, of the listed elements. *See id.* § 1202(c) ("[T]he term 'copyright management information' means *any* of the following information" (emphasis added)). But the definition also empowers the Copyright Office to "prescribe" other information by regulation. *See id.* § 1202(c)(8). The Copyright Office thus might make inclusion of the author's name a mandatory ingredient of copyright management information.

74. *Id.* § 1202(c)(2).

75. *Cf. id.* § 1202(c)(5) (requiring that the information identify the screenwriter, performers, and director of an audiovisual work). Audiovisual works can be works made for hire under § 101.

copyright holders. Consistent with the earlier discussion of the optional character of the statutory list, however, it is unlikely that the Copyright Office may by regulation *compel* the inclusion of this information.

IV. PUTTING THE RIGHT TO CLAIM AUTHORSHIP INTO THE U.S. COPYRIGHT ACT (WHERE IT BELONGS)

Ultimately, an amendment to the U.S. Copyright Act to provide an explicit and general right of attribution of authorship may be necessary to afford meaningful rights to authors, as well as to preserve Berne compliance. Even before *Dastar*, U.S. law afforded only incomplete coverage of authors' attribution interests.⁷⁶ The absence of general protection in the Copyright Act, and the doubt the Supreme Court has cast on the continuing viability of authors' Lanham Act claims, together could afford the occasion to enact legislation specifically designed to recognize attribution rights. This Part of the Article will imagine what such legislation should say.

An initial question concerns the constitutional basis for a federal attribution right. Does the Copyright Clause's authorization to Congress to secure the exclusive rights of authors in their writings include the power to enact moral as well as economic rights?⁷⁷ The constitutional text hardly compels the interpretation that the "exclusive Right" is exclusively pecuniary. Although the first copyright statute and its successors provided only for the economic rights to print, publish, and vend,⁷⁸ that should not prompt an originalist negative inference that the Constitution restricts Congress's power to the rights (and subject matter) selected for coverage in the first copyright statutes. Such

76. See, e.g., Kwall, *The Attribution Right*, *supra* note 8, at 1020–25 (“[P]laintiffs attempting to obtain a remedy for reverse passing off are disserved through their forced reliance on section 43(a) to redress violations that should properly be addressed within the scope of an independent right of attribution.”); see also Ochoa, *supra* note 56, at 927 (stating that U.S. trade negotiators insisted on excluding moral rights from the scope of the TRIPs agreement “for the obvious reason that U.S. officials knew that we were not in compliance with Article 6bis [of the Berne Convention] and did not want to have our non-compliance officially adjudicated by the WTO, which would result in international embarrassment and possibly severe trade sanctions as well”).

77. The question of its constitutional authority to legislate moral rights appears not to have troubled Congress at the time it enacted VARA. Congress simply assumed it had the requisite power: the House Report confidently asserts that “[a]rtists’ rights are consistent with the purpose behind the copyright laws and the Constitutional provision they implement: ‘To promote the Progress of Science and useful Arts.’” See H.R. REP. NO. 101-514, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915.

78. Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (granting authors of maps, charts, and books the “sole right and liberty of printing, reprinting, publishing and vending” such maps, charts, and books).

an inference would exclude from congressional prerogative not only moral rights, but also the pecuniary rights, such as translation and public performance rights, that Congress later brought within the statutory grant. “Exclusive Right” implies authors’ control over their works; ensuring attribution is one element of that control. In addition, exercise of that kind of control is fully consistent with the constitutional goal of authorizing exclusive rights: to promote the progress of knowledge. In the constitutional scheme, exclusive rights are an impetus to authorship. Name recognition can furnish an important incentive to create and disseminate works: fame may, after all, bring fortune, and if fortune is not forthcoming, glory or notoriety may (at least for a time) console those whom the market has yet to reward.

Any attribution rights statute must address the following issues:

1. Who are the beneficiaries of the attribution right?
2. What acts violate the attribution right?
3. May the right be transferred or waived?

The first question is misleadingly simple: the right is one of attribution of authorship; therefore, authors are the right’s beneficiaries. But who is an “author”? Are employed creators “authors” for this purpose, even if in the United States they are not copyright holders? If many creators contributed to the work, are they *all* entitled to credit? How significant must a creative contribution be before attribution rights attach?

The second question may prove similarly elusive. There may be situations in which omission of credit may be reasonable, but can a statute realistically specify what those situations would be? On the other hand, would an open-ended reasonableness exception end up swallowing the rule?

As to the third question, statutory provision for waivers may better alleviate the problems to which a reasonableness exception seeks to respond, but a waiver option raises similar concerns regarding the effectiveness of the right. On the one hand, in appropriate circumstances, authors and licensees should be able to make private arrangements to blur, blunt, or renounce rights to credit; ghostwriter agreements come to mind in this context. But a general and generous allowance for waivers could lead to boilerplate contracts that gut any meaningful enjoyment of the right regardless of context.

Other common law countries’ legislation might offer helpful examples of implementation of the attribution right. We will look to

the United Kingdom, New Zealand, Canada, and Australia, because similarities in their and our copyright and general legal cultures may make their laws more persuasive points of departure than the continental statutes that some U.S. authorities tend to view with skepticism, if not derision.⁷⁹ Moreover, the Commonwealth legislation, on the whole, is of recent vintage. With the exception of Canada, whose bijuridical tradition may account for its earlier recognition of moral rights, these States did not explicitly incorporate attribution rights into their copyright statutes until 1988 or later.⁸⁰

After surveying these Commonwealth countries' attribution rights, I will address VARA's treatment of infringement and of waivers. I will consider whether these provisions, if applied to a broader range of authors and of subject matter than VARA currently reaches, might, when combined with the best features of the Commonwealth legislation, produce a workable and effective attribution right for U.S. authors and performers.

A. Attribution Rights in Commonwealth Legislation

1. *United Kingdom (and New Zealand)*. The attribution right in the 1988 U.K. Copyright Designs and Patents Act (CDPA), as in its New Zealand echo,⁸¹ is grudgingly given and easily lost.

a. *Beneficiaries*. The beneficiaries of the CDPA's attribution right include authors of literary, dramatic, musical, or artistic works.⁸² But in the U.K. copyright statute, "author" encompasses more than "the person [(or persons)] who creates" a

79. See Jon Baumgarten et al., *Preserving the Genius of the System—A Critical Examination of Moral Rights into United States Law*, 8 COPYRIGHT REP. 1, 1–20 (1990); see also Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U. L. REV. 1011, 1112 (1988) ("[E]nactment of statutes that embody a 'moral right of integrity' for auteurs is an unsound and lamentable step toward the suppression of innovation, artistic and otherwise."); Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421, 421–22 (1990) (arguing that comprehensive moral rights legislation is ill-advised because it conflicts sharply with fundamental United States legal principles and would disrupt longstanding practices in the entertainment and cultural industries).

80. The United Kingdom adopted moral rights in the 1988 Copyright, Designs and Patents Act (CDPA). Copyright, Designs and Patents Act, 1988, ch. 48 (U.K.). The New Zealand Copyright Act 1994 adopts much of the statutory language used in the CDPA, including its provisions on moral rights; the provisions relevant to the attribution right are in Part 4 of the Copyright Act, sections 94–97. Copyright Act 1994, pt. 4, §§ 94–97 (N.Z.). Australia's moral rights amendments were enacted in 2000. Copyright Amendment (Moral Rights) Act 2000 (Austl.). Canada codified Berne Convention article 6^{bis} in 1931, but more recently amended the moral rights provisions, in 1988. Copyright Act, R.S.C., ch. C-42 (1985) (Can.).

81. Refer to note 80 *supra*.

82. Copyright, Designs and Patents Act, 1988, ch. 48, § 77 (U.K.).

work.⁸³ The Act further specifies who “[t]hat person shall be taken to be,”⁸⁴ and this depends on what kind of work is at issue. For example, if the work is a sound recording or a film, the author is “the person by whom the arrangements necessary for the making of the recording or film are undertaken.”⁸⁵ This in turn confers authorship status on producers. However, the moral rights provision specifies that the “director of a copyright film” has a right to be identified as the “director of the work” and creates a distinction between authors and directors.⁸⁶ Creators of computer programs and employees who create works in the course of employment do not enjoy attribution rights.⁸⁷ As in the United States, copyright in a work originally vests in the author’s employer “[w]here . . . [the] work is made by an employee in the course of his employment . . . subject to any agreement to the contrary.”⁸⁸

b. Scope of the Attribution Right. The attribution right entitles its beneficiaries to an identification that is “clear and reasonably prominent.”⁸⁹ The meaning of the right to be identified varies according to the type of work and the circumstances. In most cases, the right is “to be identified in a manner likely to bring his identity to the attention of a person seeing or hearing the performance, exhibition, showing, broadcast or cable programme in question.”⁹⁰ The circumstances that trigger the right also vary according to the type of work. For example, in the case of a literary work, the right is triggered whenever “(a) the work is published commercially, performed in public, broadcast or included in a cable programme service; or (b) copies of a film or sound recording including the work are issued to the public.”⁹¹ Limitations applicable to copyright also apply to the right of attribution, including fair dealing, incidental inclusion in an artistic work, sound recording, film, broadcast, or cable program, and the exclusion and limitation of artistic

83. *See id.* § 9.

84. *Id.* § 9(2).

85. *Id.* § 9(2)(a).

86. *Id.* § 77(1).

87. *Id.* § 79.

88. *Id.* § 11(2); *see also id.* § 79(3)(a).

89. *Id.* § 77(7).

90. *Id.* § 77(7)(c).

91. *Id.* § 77(2). The Act also prohibits false attributions of authorship. *See id.* § 84(5)–(6); Lionel Bently & William R. Cornish, *United Kingdom*, in 2 MELVILLE B. NIMMER & PAUL EDWARD GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 7(1)(b) (2003) [hereinafter INTERNATIONAL COPYRIGHT LAW AND PRACTICE].

copyright in industrial designs.⁹² Several of the fair dealing exceptions, however, require attribution of the copied source.⁹³

Most importantly, to enjoy the attribution right, the author or other designated beneficiary must “assert” it.⁹⁴ Assertion may be made by way of a statement in an instrument assigning copyright, in another instrument in writing signed by the author or director, or by requiring identification on the “original or copy, or on a frame, mount or other thing to which it is attached”⁹⁵ of an artistic work, and binds only those who receive actual or constructive notice of the assertion.⁹⁶ In addition, in an action for

92. See Copyright, Designs and Patents Act, 1988, ch. 48, § 79(4) (U.K.).

93. *Id.* § 30.

94. *Id.* § 77(1) (“[T]he right is not infringed unless it has been asserted in accordance with section 78.”).

95. *Id.* § 78(3)(a).

96. The Act contains “elaborate provisions on the making of effective assertions and the extent to which other persons are bound by them.” Lionel Bently & William R. Cornish, *United Kingdom*, in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 91, § 7(1)(a). CDPA section 78 states the following:

(1) A person does not infringe the right conferred by section 77 (right to be identified as author or director) by doing any of the acts mentioned in that section unless the right has been asserted in accordance with the following provisions so as to bind him in relation to that act.

(2) The right may be asserted generally, or in relation to any specified act or description of acts—

(a) on an assignment of copyright in the work, by including in the instrument effecting the assignment a statement that the author or director asserts in relation to that work his right to be identified, or

(b) by instrument in writing signed by the author or director.

(3) The right may also be asserted in relation to the public exhibition of an artistic work—

(a) by securing that when the author or other first owner of copyright parts with possession of the original, or of a copy made by him or under his direction or control, the author is identified on the original or copy, or on a frame, mount or other thing to which it is attached, or

(b) by including in a licence by which the author or other first owner of copyright authorises the making of copies of the work a statement signed by or on behalf of the person granting the licence that the author asserts his right to be identified in the event of the public exhibition of a copy made in pursuance of the licence.

(4) The persons bound by an assertion of the right under subsection (2) or (3) are—

(a) in the case of an assertion under subsection (2)(a), the assignee and anyone claiming through him, whether or not he has notice of the assertion;

(b) in the case of an assertion under subsection (2)(b), anyone to whose notice the assertion is brought;

(c) in the case of an assertion under subsection (3)(a), anyone into whose hands that original or copy comes, whether or not the identification is still present or visible;

(d) in the case of an assertion under subsection (3)(b), the licensee and anyone into whose hands a copy made in pursuance of the licence comes, whether or not he has notice of the assertion.

infringement the court shall, “in considering remedies, take into account any delay in asserting the right.”⁹⁷

The CDPA’s “assertion” precondition derives from a peculiar, not to say perverse, reading of article 6^{bis} of the Berne Convention. The Berne Convention declares that “the author shall have the right to claim authorship of the work.”⁹⁸ From a provision entitling authors to recognition of their status as creators, the drafters of the CDPA fashioned an *obligation* to assert authorship before the right to be recognized can take effect. Not only does the U.K. text torture the Berne text, but the assertion requirement may well violate the Berne Convention’s rule that “[t]he enjoyment and exercise” of authors’ rights, including moral rights, “shall not be subject to any formality.”⁹⁹

Moreover, one may inquire how the assertion requirement affects third parties. The text of the CDPA appears to leave significant gaps in coverage. The text holds two classes of persons bound by an author’s assertion of attribution rights: (1) assignees and persons “claiming through” them, when the assignment contained an assertion; and (2) anyone to whom notice is brought of an “instrument in writing [containing the assertion] signed by the author or director.”¹⁰⁰ The structure of the statute prompts several questions. For example, what kind of written instrument is contemplated, and how is notice brought to third parties? It appears that identification of the author on the book, on the screen credits, et cetera, does not, standing alone, satisfy the statute, because even though this form of identification gives general notice of who the author is, it is not an “instrument in writing signed” by the author.¹⁰¹ If the publishing contract contained the assertion, then the additional assertion printed in the book would constitute the notice of the assertion in the publishing contract, which in turn would be the signed written instrument. But what if there is a printed assertion, but no contract, or no contract containing the assertion? What if there is a contract, but no printed assertion? These and other difficulties

(5) In an action for infringement of the right the court shall, in considering remedies, take into account any delay in asserting the right.

Copyright, Designs and Patents Act, 1988, ch. 48, § 78 (U.K.).

97. Copyright, Designs and Patents Act, 1988, ch. 48, § 78(5) (U.K.).

98. Berne Convention, *supra* note 6, art. 6^{bis}(1).

99. *Id.* art. 5(2). For a critical analysis of the CDPA, see Shelia J. McCartney, *Moral Rights Under the United Kingdom’s Copyright, Designs and Patents Act of 1988*, 15 COLUM.-VLA J.L. & ARTS 205 (1991).

100. Copyright, Designs and Patents Act, 1988, ch. 48, § 78 (U.K.).

101. *Accord* 493 PARL. DEB., H.L. (5th Ser.) (1988) 1302. Lord Beaverbrook stated that “[t]he presence of a name on a book is no indication of a claim [of authorship, within the meaning of the statute].” *Id.*; see also 491 PARL. DEB., H.L. (5th Ser.) (1987) 362.

(notably, the anomalies respecting the Berne Convention) counsel against adopting the British assertion requirement.

c. **Transfer and Waiver of Right.** The CDPA attribution right is not assignable and passes on death either to the persons to whom copyright is passed or by testamentary disposition.¹⁰² But the Act also includes a broad waiver provision. Moral rights may be waived by an instrument in writing that is signed by the person giving up the right. Unlike the Australian copyright act which, as we will see, requires considerable specificity for effective waiver of attribution rights in nonemployee works, in the United Kingdom a waiver of attribution rights may relate to a specific work, but also more broadly to works of a specified description, or more broadly still, to works in general. The waiver may relate to existing or future works and it may be conditional or unconditional or subject to revocation.¹⁰³ In addition, the same result may be achieved by an informal waiver or any other transaction having effect under the law of contract or estoppel.¹⁰⁴

2. *Canada.* Statutory recognition of attribution rights in Canada dates back to the 1931 Copyright Act, whose text followed article 6^{bis} of the Berne Convention,¹⁰⁵ though some earlier judicial decisions already “echoed the philosophy of moral rights.”¹⁰⁶ The current provisions on attribution rights were, like the U.K. law, enacted in 1988.¹⁰⁷

a. **Beneficiaries.** The 1988 Canadian text confers the moral right of attribution of authorship on authors irrespective of copyright ownership. Although the Act’s distinction between moral rights and copyright ownership suggests that both

102. Copyright, Designs and Patents Act, 1988, ch. 48, § 95(1) (U.K.).

103. *Id.* § 87(1)–(3).

104. *Id.* § 87(4).

105. Compare Copyright Amendment Act, S.C., ch. 8, § 12(7) (1931) (Can.), with Berne Convention, *supra* note 6, art. 6^{bis}.

106. Ysolde Gendreau & David Vaver, *Canada*, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 91, § 7 (citing *Joubert v. Géracimo*, [1916] 35 D.L.R. 683, 694 (“stigmatizing the failure to credit dramatist as author and changing the title of work as ‘intolerable frauds,’ suggesting that punitive damages could be awarded, and stating ‘an author is entitled to have his work credited and his text respected, and also to have the material benefit that may flow from the reputation of his name or the popularity of his works’”)).

107. Dissatisfaction with the old provisions (under which actions asserting moral rights generally failed) led to the enactment of new provisions in 1988. See, e.g., David Vaver, *Author’s Moral Rights in Canada*, 14 INT’L REV. INDUS. PROP. & COPYRIGHT L. 329, 354 (1983). The one exception was a case in which an artist had Christmas wreaths removed from the necks of geese he had sculpted for a department store. *Snow v. Eaton Centre Ltd.*, [1982] 70 C.P.R. (2d) 105 (Ont. H.C.J.).

employee and independent authors enjoy moral rights, the Act does not define “author.”¹⁰⁸ The subject matter of coverage excludes performances, sound recordings, and broadcasts because they are not deemed “works,” and therefore are not considered to have “authors.”¹⁰⁹

b. **Scope of the Attribution Right.** The author has the right to be known as the creator of her own work, either by her own name or under a pseudonym. This right is limited by two conditions. First, it may be asserted only in connection with an act subject to economic rights under copyright, that is, when reproduction, publication, or performance occurs.¹¹⁰ Second, the right may be given effect only to the extent that its exercise is “reasonable” in the circumstances or usages. By contrast, the right to remain anonymous is not subject to any criterion of reasonableness.¹¹¹ However, when the author is an employee or a ghostwriter, the appropriateness of the author’s claim to name credit is to be determined on a case-by-case basis, and is linked to the possibility of waiving moral rights.¹¹²

The caselaw suggests that courts use the reasonableness standard and the waiver provision (which allows for implied waiver) to dismiss claims of infringement of the right of attribution.¹¹³ Even where an act cannot be claimed as reasonable

108. However, one case in which the issue of authorship was raised held that the subject of a photograph could not claim moral rights infringement because he was not the author of the photograph. *Ethier v. Boutique à Coiffer Tonic Inc.*, [1999] R.R.A. 100 (Que. Super. Ct.).

109. Ysolde Gendreau & David Vaver, *Canada*, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 91, § 7(1). Performers’ rights, as enumerated in Part II of the Copyright Act, do not explicitly include the right of attribution, but the exception for fair dealing in the case of criticism or review or news reporting only applies if the source and the name of the author, performer, maker or broadcaster are mentioned. *See* Copyright Act, R.S.C., ch. C-42, §§ 29.1–.2 (1985) (Can.).

110. Copyright Act, R.S.C., ch. C-42, § 14.1(1) (1985) (Can.). *But cf.* *Desputeaux v. Editions Chouette (1987) Inc.*, [2001] R.J.Q. 945 (Que. C.A.) (leave for appeal to the Supreme Court of Canada granted on November 8, 2001) (precluding arbitrator from determining the authorship of a work because it would implicate moral rights), *rev’d*, [2003] S.C.J. 15.

111. Copyright Act, R.S.C., ch. C-42, § 14.1(1) (1985) (Can.). “The author of a work has, . . . in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.” *Id.*

112. Ysolde Gendreau & David Vaver, *Canada*, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 91, § 7(1)(b) (citing *Tat-ha v. Centre Hospitalier de L’Université Laval*, [1999] A.Q. 181 (Que. S.C.)) (discussing a hospital employee who had prepared a report that was modified before publication under the name of other people and who was unsuccessful in her attempt to claim coauthorship because the practice was deemed reasonable and the circumstances probably amounted to an implied waiver of her rights).

113. *Id.*

(such as a clear case of plagiarism or omission of an author's name), the court may dismiss the case if the plaintiff cannot show any loss from the violation.¹¹⁴

c. **Transfer and Waiver of Right.** Attribution rights "subsist for the same term as the copyright in the work" at issue, and they pass with the copyright if bequeathed, or as other property passes in the absence of a will.¹¹⁵ Attribution rights "may not be assigned but may be waived in whole or in part."¹¹⁶ Waivers or consents to particular acts need not be in writing and may be either express or implied. However, "assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights."¹¹⁷ On the other hand, once a waiver is established in favor of the copyright owner or licensee, it runs in favor of persons authorized by them unless the language of the waiver otherwise indicates.¹¹⁸

3. *Australia.* Australia enacted moral rights amendments to its copyright law in 2000, following more than ten years of study and discussion.¹¹⁹ Of the countries examined here, Australia's law appears to be both the most highly elaborated and the most balanced in its approach to the interests of creators and exploiters.

a. **Beneficiaries.** Under the Copyright Amendment (Moral Rights) Act of 2000 (the "Australian Act"), the "author of a work has a right of attribution of authorship in respect of the work."¹²⁰ "[T]he author of a work may be identified by any reasonable form of identification" so long as the identification is "clear and

114. See *Boudreau v. Lin*, [1997] 75 C.P.R. (3d) 1, 14 (Ont.) (dismissing as speculative a student's claim that he had lost employment opportunities through his professor's failure to name him as the author of a paper); *Desmarais v. Editions Fides*, [1999] J.E. 99-1424 (Que.) (dismissing an action by a photographer's estate after a publisher, who had neglected to mention the photographer's name to identify him as the author of the cover photograph, included such a mention in the second printing of the book).

115. Copyright Act, R.S.C., ch. C-42, § 14.2(1)-(2) (1985) (Can.).

116. *Id.* § 14.1(2).

117. *Id.* § 14.1(3).

118. *Id.* § 14.1(4).

119. See Discussion Paper, *Proposed Moral Rights Legislation for Copyright Creators* (1994), available at <http://austlii.edu.au/au/other/media.OLD/1081.html>; Copyright Law Review Committee, *Report on Moral Rights* (Jan. 1988), available at [http://www.ag.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/E12E15ED9F963E4CCA256B4100092DA9/\\$file/Moral%20Rights%20Table.pdf](http://www.ag.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/E12E15ED9F963E4CCA256B4100092DA9/$file/Moral%20Rights%20Table.pdf). See generally MAREE SAINSBURY, MORAL RIGHTS AND THEIR APPLICATION IN AUSTRALIA 31-67 (2003).

120. Copyright Amendment (Moral Rights) Act 2000 § 193(1) (Austl.) (amending Copyright Act 1968); see also Brad Sherman & James Lahore, *Australia*, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 91, § 7(1)(a).

reasonably prominent.”¹²¹ If the author “has made known, either generally or to a person who is required . . . to identify the author, that the author wishes to be identified in a particular way” that is “reasonable in the circumstances[,] the identification is to be made in that way.”¹²² The Act does not define “author,” although it adopts the general presumption that the person named as the author on publicly distributed copies is the work’s author.¹²³ The Act does limit the “author” designation to individuals (thus excluding corporations and other juridical persons).¹²⁴

The Berne Convention also presumes that the author is the person who the divulged copies say is the author,¹²⁵ but the overall context there, as elsewhere in the Australian Act, is economic rights. In the context of attribution rights, the presumption does nothing for the author who complains that her name did *not* appear on the copies of the work. An approach like the U.K. statute’s, defining the “author” as the “creator” of the work,¹²⁶ appears more helpful, although this may merely defer the inquiry to the undefined term “creator.”¹²⁷

The Act distinguishes beneficiaries of the attribution right from owners of economic rights. Employees may not be copyright owners,¹²⁸ but they are vested with moral rights (although, as we shall see, their rights are easily relinquished). Even where, under Australian law, the subject matter is not classed a “work,” as is the case with a “cinematograph film,” the Act confers the attribution right on the “maker” of the film, defined as “the director of the film, the producer of the film and the screenwriter of the film.”¹²⁹

b. Scope of the Attribution Right. The right of attribution applies to “attributable acts.”¹³⁰ The definition of these acts

121. Copyright Amendment (Moral Rights) Act 2000 §§ 195(1)–195AA (Austl.). “[R]easonably prominent identification” is defined in Section 195AB.

122. *Id.* § 195(2).

123. *Id.* § 127(1). This is subject to section 35, which sets forth circumstances under which an employer will be considered the author of an employee’s work. Special rules also apply for ascertaining authorship of a photograph. *See id.* § 127(3).

124. *Id.* § 190.

125. Berne Convention, *supra* note 6, art. 15(1).

126. Copyright, Designs and Patents Act, 1988, ch. 48, § 9(1) (U.K.).

127. *See* Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1069–71 (2003).

128. *See* Copyright Amendment (Moral Rights) Act 2000 § 35(6) (Austl.) (amending Copyright Act 1968) (stating that the employer is owner of the copyright in works created by the employee pursuant to employment).

129. *Id.* § 189.

130. *See id.* § 193(2).

depends on the type of work at issue.¹³¹ The author of a literary, dramatic, or musical work may invoke the right of attribution where the work is reproduced in material form, published, performed in public, transmitted, or adapted.¹³² The author of an artistic work has the right to be identified as the author where the work is reproduced in material form, published, exhibited to the public, or transmitted.¹³³ The designated creators of a film have the right to be named where the film is copied, exhibited in public, or transmitted.¹³⁴

The right of attribution is subject to the limitations of reasonableness, necessity, and other conditions indicated by the 2000 statute. For example, the right is not infringed if it was “reasonable in all the circumstances not to identify the author.”¹³⁵ The factors the Act enumerates to consider in determining reasonable nonattribution of authorship for literary, dramatic, musical, or artistic works¹³⁶ differ slightly from those for film

131. *Id.* “The author’s right is the right to be identified in accordance with this Division as the author of the work if any of the acts (the *attributable acts*) mentioned in section 194 are done in respect of the work.” *Id.*

132. *Id.* § 194(1).

133. *Id.* § 194(2).

134. *Id.* § 194(3). The Act also expanded the duty to the author of a work to refrain from certain acts of misattributing authorship of that work. *See id.* § 195AC. The right precludes inserting or affixing another person’s name in or on the work or film, or in or on a reproduction of the work or film, in such a way as to imply falsely that another person is its author. *Id.* §§ 195AD(a), 195AE(a). In relation to “artistic” works specifically, the right also precludes authorizing the use of a person’s name in connection with the work or with a reproduction of the work. *Id.* § 195AE(2). This right generally precludes the dissemination of the work or film, or any reproduction of the work or film, to the public in a way that implies falsely that another person is the author, if the offender “knows that the person is not the author of the work.” *Id.* The acts that constitute dissemination in violation of this right vary according to the type of work or film at issue. Section 195AD(b)–(d) deals with literary, dramatic, or musical works; section 195AE(2)(b)–(d) deals with artistic works; section 195AF(2)(b)–(c) deals with films.

For literary, dramatic, or musical works and for films, the Act specifies a duty to refrain from knowingly performing the work in public as another author’s. *See id.* §§ 195AD, 195AF. The right also applies to adaptations or alterations of literary, dramatic, or musical works or films, and precludes disseminating to the public, by any of the specified modes, any substantially altered form of the work or film if the offender knows that it has been changed. *See id.* §§ 195AG, 195AH. This right does not apply to artistic works.

135. *Id.* § 195AR(1).

136. *See id.* § 195AR(2)(a)–(i). This section reads as follows:

- (a) the nature of the work;
- (b) the purpose for which the work is used;
- (c) the manner in which the work is used;
- (d) the context in which the work is used;
- (e) any practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
- (f) any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of that work;

works.¹³⁷ In all cases, however, the factors take account of industry practice and give courts considerable discretion in their assessment of reasonableness.

c. Transfer and Waiver of Right. The duration of the attribution right is coterminous with the other rights under copyright (life plus fifty years).¹³⁸ Although an author's moral rights can be exercised postmortem by her legal personal representative, the rights are not transferable by assignment or by will.¹³⁹ Where there is more than one author of a film or a work as included in a film, the Act gives effect to any coauthorship agreement requiring that the rights be exercised jointly.¹⁴⁰ With respect to all other works, the Act also gives effect to coauthorship agreements bearing on the attribution right.¹⁴¹

Waiver of moral rights is permissible under the Act, and consent of the author—or a person representing the author—is a defense to any infringement action. The act or omission must be “within the scope of a written consent [genuinely] given by the

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- (g) any difficulty or expense that would have been incurred as a result of identifying the author;
 - (h) whether the work was made:
 - (i) in the course of the author's employment; or
 - (ii) under a contract for the performance by the author of services for another person;
 - (i) if the work has 2 or more authors—their views about the failure to identify them.

Id.

137. See *id.* § 195AR(3)(a)–(i). This statute lists the following factors to consider when determining “whether it was reasonable in particular circumstances not to identify the maker of a cinematographic film”:

- (a) the nature of the film;
- (b) whether the primary purpose for which the film was made was for exhibition at cinemas, for broadcasting by television or for some other purpose;
- (c) the purpose for which the film is used;
- (d) the manner in which the film is used;
- (e) the context in which the film is used;
- (f) any practice, in the industry in which the film is used, that is relevant to the film or the use of the film;
- (g) any practice contained in a voluntary code of practice, in the industry in which the film is used, that is relevant to the film or the use of the film;
- (h) any difficulty or expense that would have been incurred as a result of identifying the maker;
- (i) whether the film was made in the course of the employment of the director, producer or screenwriter.

Id.

138. *Id.* §§ 33, 195AM(1).

139. *Id.* § 195AN(1)–(3).

140. *Id.* § 195AN(4).

141. *Id.* § 195AN(5).

author.”¹⁴² Consent to be effective must be given “in relation to all or any acts or omissions” and “in relation to a specified work or specified works existing when the consent is given.”¹⁴³ The requirement of specific consent is, however, dramatically relaxed in the case of employee creations: “[C]onsent may be given by an employee for the benefit of his or her employer in relation to all or any acts or omissions . . . and in relation to all works made or to be made by the employee in the course of his or her employment.”¹⁴⁴ For all works, whether or not employee-created, a properly executed consent is presumed to extend to all licensees and successors in title.¹⁴⁵

4. *The Worst and Best of the Commonwealth Acts.* The previous discussion has already underscored some of the weaknesses of the Commonwealth acts, most glaringly the United Kingdom’s “assertion” requirement. The U.K. and Canadian provisions on waiver would similarly seem to offer authors little effective protection, as boilerplate renunciations, even with respect to future works, are enforceable and need not even be in writing. Waiver provisions of some kind are probably consistent with article 6^{bis} of the Berne Convention. Although Berne specifies the independence of moral rights from economic rights and further emphasizes that moral rights persist “even after the transfer of the said [economic] rights,”¹⁴⁶ article 6^{bis} does not clearly prohibit the waiver of moral rights.¹⁴⁷ On the other hand, the independence and persistence of moral and economic rights under Berne also implies that a grant of economic rights does not of itself entail a waiver of moral rights. Rather, respect for the independence of moral rights suggests that any waiver, to be effective, must be stated with sufficient specificity to distinguish the moral rights waiver from affirmative transfers of economic interests. I believe the U.K. and Canadian provisions do not meet this standard. By contrast, the Australian Act offers a better model because it gives exploiters the opportunity to contract out of attribution rights in writing in specific contexts, but (apart from employee works) bars the blunderbuss approach.

142. *Id.* § 195AW(1).

143. *See id.* § 195AW(2)–(3). *See* section 195AW for “Author’s consent to act or omission” for films or works in films and section 195AWA for “Author’s consent to act or omission” for works not included in a film.

144. *Id.* § 195AWA(4); *see also* § 195AW(4).

145. *Id.* §§ 195AW(5), 195AWA(5).

146. Berne Convention, *supra* note 6, art. 6^{bis}.

147. *See, e.g.,* SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986*, at 467 (1987).

With respect to infringement, the countries surveyed also link violation of the attribution right to violation of an economic right under copyright; this means that acts of reproduction, public performance, et cetera which are excused as “fair dealing” or are otherwise noninfringing, do not trigger the attribution right. On the other hand, in certain instances, the “fair dealing” criteria set out in the Australian, Canadian, and U.K. acts already require that the copied source be credited. In other instances, however, particularly regarding audiovisual works and sound recordings, a work may be copied for permissible purposes, but the author may not ensure that her name will appear on those copies.¹⁴⁸

The United Kingdom and Canada provide an open-ended, undefined reasonableness criterion for enforcement of attribution rights. The burden appears to be on the author to demonstrate that her demand for name credit is reasonable. A reasonableness requirement may have the merit of flexibility but the concomitant drawback of unpredictability; given authors’ generally weaker position, the latter feature may prove particularly disadvantageous. By contrast, the Australian Act better reconciles the interests of authors and exploiters in two ways. First, it places the burden on the exploiter to show that the omission of credit was reasonable. Second, the Act articulates factors cabinining “reasonableness.” These not only introduce flexibility, but may also enhance predictability. This is not a paradox; rather, the Australian Act provides an important incentive for interested parties (or their representatives) to anticipate and work through situations in which credit should or should not be required. This is because the Act includes as a reasonableness factor “any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of the work.”¹⁴⁹

148. See, e.g., Copyright Amendment (Moral Rights) Act 2000 § 42 (Austl.) (amending Copyright Act 1968) (requiring “sufficient acknowledgment” for use of literary, dramatic, musical or artistic work for “reporting of news in a newspaper, magazine or similar periodical” but not for “reporting of news by means of a communication or in a cinematograph film”); Copyright, Designs and Patents Act, 1988, ch. 48, § 30(3) (U.K.) (“No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme.”); cf. Copyright Act, R.S.C., ch. C-42, § 29.1-2 (1985) (Can.) (requiring for the purposes of criticism or review and news reporting that “(a) the source; and (b) if given in the source, the name of the (i) author, in the case of a work, (ii) performer, in the case of a performer’s performance, (iii) maker, in the case of a sound recording, or (iv) broadcaster, in the case of a communication signal” be mentioned).

149. Copyright Amendment (Moral Rights) Act 2000 § 195AR(2)(f) (Austl.) (amending Copyright Act 1968).

B. The U.S. Visual Artists Rights Act

Although VARA's coverage is too limited to supply a meaningful source of attribution rights for most authors, the way in which the Act implements the stingy rights it does grant is worth examination. VARA entitles authors "to claim authorship of [their] work[s]." ¹⁵⁰ It does not require "assertion" or other formality to make the right enforceable.

Under VARA, attribution (and integrity) rights are not transferable, but they are waivable.¹⁵¹ Happily, VARA does not allow co-contractants to shake off authors' rights restraints by means of a blanket, boilerplate waiver. Rather, VARA protects artists by permitting waiver only if the author expressly agrees to such waiver in a written instrument signed by the author. That "instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified."¹⁵² This language makes clear that an "all my right, title, and interest" sort of waiver would be void. The law thus denotes sensitivity to the specificity of moral rights, while introducing a degree of flexibility toward art object owners and/or copyright exploiters permissible under Berne. Arguably, the best recognition of moral rights would countenance no waivers. This position, however, is probably too extreme for the United States, and Berne does not require it. As a practical matter, moreover, despite their formal prohibition, *de facto* waivers are likely to occur. The artist may be better protected under a regime requiring specificity of waivers than under one where an ideologically pure "no waiver" law is in fact rarely observed.

Moreover, under VARA, the burden of securing a waiver falls on the party other than the artist. If the art object's owner, or the grantee of the copyright in the artwork, fails to obtain a writing from the artist executing the waiver, then the artist retains all moral rights. It is up to the other party to secure the artist's written agreement to change the initial allocation of moral rights. Absent this legislation, most of an artist's moral rights protections could be obtained, at the artist's initiative, only by contract. Because many artists may be poor negotiators, or may conduct their business rather informally, requiring artists to

150. 17 U.S.C. § 106A(a)(1)(A) (2000). VARA also entitles authors to prevent use of their names on works they did not create, as well as to prevent use of their names on "a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation." *Id.* § 106A(a)(1)-(2).

151. *Id.* § 106A(e)(1).

152. *Id.*

“contract into” moral rights often as a practical matter would deny them the exercise of moral rights. Instead, the very informality of artwork commissions may work to artists’ advantage, for a handshake deal or a vague writing will not effect the waiver. The law’s reversal of the initial position may therefore entail considerable favorable consequences for artists.¹⁵³

At the time of VARA’s enactment, Congress anticipated that the requirement of specific waivers might in the long run simply enhance lawyers’ and word processors’ employment opportunities, for lawyers could be expected to devise language sufficiently comprehensive and detailed to fend off every conceivable exercise of moral rights. This would defeat the purpose of compelling artists and art owners to reflect on and negotiate over the genuine need to forego moral rights. As a result, Congress set an additional safeguard by instructing the United States Copyright Office to conduct a study of the practice developed under the law’s waiver clause.¹⁵⁴ The study, published in 1996, however, uncovered too little data regarding actual waiver practice to permit meaningful assessment of the frequency, content, and impact of waivers of attribution and integrity rights under VARA.¹⁵⁵

C. Outline of a Proposed Statute

This review of the implementation provisions of the Commonwealth acts and of VARA suggests the following outline for an attribution rights amendment to the U.S. Copyright Act.

1. *Beneficiaries.* The right’s beneficiaries should be the human (not juridical) authors and performers, regardless of their employment status. Unlike VARA, an attribution rights amendment should not exclude from its ambit creators of works made for hire. Nor should the law disqualify categories of works: all works of authorship, and all musical, dramatic, choreographic or audiovisual performances should be covered. Similarly, the number of a work’s authors or performers should not of itself disqualify these participants from the right to claim authorship.¹⁵⁶ Although a multiplicity of authors or performers

153. However, the law also provides that one joint author’s waiver of moral rights binds all joint authors. *Id.*

154. See H.R. REP. NO. 101-514, at 22 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6932.

155. See U.S. Copyright Office, *Waiver of Moral Rights in Visual Artworks: Executive Summary* (Mar. 24, 1996), available at <http://www.copyright.gov/reports/exsum.html>.

156. Not all participants in an extensively staffed work such as a motion picture are authors, even though, by contractual arrangement mechanics, hairdressers, et cetera,

might prompt fears that enforcement of an attribution right will be too unwieldy, the implementation problems are better addressed through an infringement standard that incorporates a reasonableness criterion, as well as through carefully devised waiver provisions.

2. *Scope of the Attribution Right.* The duration of the attribution right would be the same as the copyright term. Arguably, the public interest in accurate identification of a work's creators persists beyond the expiration of exclusive economic rights in the work. Indeed, as the earlier discussion of Lanham Act misattribution claims regarding public domain works indicates,¹⁵⁷ I doubt that a healthy public domain demands freedom not only to copy, but also to deny or to falsify authorship credit. Nonetheless, different durational consequences flow from the distinct nature of authors' rights on the one hand, and consumer protection on the other. The interests underlying these regimes may at times converge, hence authors' pre-*Dastar* resort to the Lanham Act, *faute de mieux*. But neither fully captures the other. By placing the attribution right in the U.S. Copyright Act, I am contending that it is an exclusive right like the other rights comprising a copyright—enforceable (for limited times) without proof of economic harm or consumer confusion.¹⁵⁸ The unfair competition-based Lanham Act claim does not confer a property right in gross; it allows injured economic actors (who may not in fact be authors) to act as proxies for the confused consumer, to

may receive name credit. See Randy Kennedy, *Who Was That Food Stylist? Film Credits Roll On*, N.Y. TIMES, Jan. 11, 2004, at A1. I would limit this proposal to authors and performers. Caselaw on joint authorship may afford guidance as to what kinds of contributions make someone an "author." See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000) (stating that concluding who is an "author" is a fact-specific inquiry and that "[p]rogress would be retarded rather than promoted, if an author could not consult with others and adopt their useful suggestions without sacrificing sole ownership of the work"); *Childress v. Taylor*, 945 F.2d 500, 507–08 (2d Cir. 1991) (creating a two-part test for determining coauthorship that requires (1) "all joint authors to make copyrightable contributions" and (2) that "the putative joint authors regarded themselves as joint authors"); see also *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998) (applying the *Childress* test to find lack of coauthorship in the play *Rent*). Several law reviews also address the concept of "authorship." See generally F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225 (2001); Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003); Roberta Rosenthal Kwall, "Author-Stories": *Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1 (2001).

157. Refer to Part II *supra*.

158. Arguably, the incentive rationale for copyright would urge that the right of attribution be perpetual, as the prospect of immortality for her name might prompt some to create. But this would conflict with "limited Times" and is likely to prove unadministrable in practice.

correct the false information the defendant has injected into the marketplace. To each regime its own: to authors, control over the use of their names in connection with their works for so long as economic rights last, and to consumers, protection against false representations of fact in commercial advertising or promotion for so long as those misrepresentations are materially misleading. Respect for the copyright public domain counsels against conflating the two regimes, lest the attribution right be leveraged into control akin to that sought by Twentieth Century Fox in *Dastar*.

The attribution right would be infringed when an author's or performer's name is omitted from publicly distributed copies and phonorecords¹⁵⁹ or from public performances, including transmissions, of the work.¹⁶⁰ Though the statute should distinguish between public and private distributions or communications, with only the public ones triggering the right, fair use and other statutory exceptions should not supply a defense. It is important to recognize the difference between *permissible* copying or communications on the one hand, and *uncredited* copying or communications on the other.¹⁶¹ This does

159. A "phonorecord" is the material object in which a sound recording is fixed. See 17 U.S.C. § 101 (2000).

160. Works incorporating substantial preexisting copyrighted material, such as derivative works, should also credit the authors of the adapted or substantially excerpted work. The obligation to give credit would be subject to a reasonableness standard.

An amendment to the U.S. Copyright Act to establish attribution rights would also require a transitional provision concerning the right's effective date. I would propose that a work first publicly communicated or distributed on or after the amendment's effective date be covered by the attribution right, regardless of when the work was created. With respect to public communications or distributions occurring before the amendment's effective date, the amendment should preserve such state or federal attribution rights as may then have existed. Cf. 17 U.S.C. § 301(f)(2) (preserving state attribution and integrity claims in works created or sold prior to VARA's effective date); see also Copyright Amendment (Moral Rights) Act 2000 § 195AZM (Austl.) (amending Copyright Act 1968) (providing that the 2000 Moral Rights amendments are prospective only). In relation to literary, dramatic, musical, or artistic works, other than those included in a film, the right of attribution applies to works that were made before or after December 21, 2000. *Id.* § 195AZM(2). However, the right only applies to acts carried out after December 21, 2000. *Id.* In relation to films and literary, dramatic, or musical works and works included in films, the right of attribution only applies to films made after December 21, 2000. *Id.* § 195AZM(1).

161. For example, the "fair dealing" exception in the Australian and U.K. copyright statutes requires "sufficient acknowledgement" of the authors of certain works. See Copyright Amendment (Moral Rights) Act 2000 §§ 41–42, 44–45; Copyright, Designs and Patents Act, 1988, ch. 48, § 30(1)–(2) (U.K.).

Section 107 of the U.S. Copyright Act, the fair use exception, provides that it applies to § 106A VARA rights as well as to the economic rights in § 106, even though any application of fair use is likely to be limited. See H.R. REP. NO. 101-514, at 22 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6932 ("[G]iven the limited number of works covered by the Act, and given that the modification of a single copy or limited edition of a work of

not mean that omission of name credit can never be fair and reasonable. Rather, the test of reasonableness in this context is not the same as for fair use. The question is not whether the use should be prevented or paid for, as it is when fair use is at issue, but whether the use, even if free, should acknowledge the user's sources. The manner and medium of the work's dissemination may well affect the reasonableness of nondisclosure of authors' or performers' names. For example, a requirement to identify all authors and performers may unreasonably encumber the radio broadcast of a song, but distributed recordings of the song might more conveniently include the listing. This may be particularly true of digital media, where a mouse click can provide information even more extensive than that available on a printed page.

As for the details of a reasonableness standard, I believe a U.S. statute might profitably emulate the Australian Act, both in its technique, placing on the exploiter the burden of showing reasonableness, and in its articulation of reasonableness factors, including its encouragement to parties to devise voluntary codes for various sectors of creative activities. In fact, the credit agreements negotiated between industry groups such as the several motion picture and television guilds and the studios¹⁶² might inspire similar codes elsewhere.

In light of the uncertain status of creators' Lanham Act false attribution claims post-*Dastar*, the attribution rights amendment to the U.S. Copyright Act should also prohibit false attributions of authorship. These claims are analytically distinct from traditional moral rights, which protect the author's right to claim authorship of her works: these instead assert a right to *disclaim* authorship of a work *not* by the author. Nonetheless, if the Lanham Act cannot redress these claims, for example, because of the "commercial advertising or promotion" prerequisite,¹⁶³ or because of authors' lack of standing, then the Copyright Act should provide a remedy. The proposed amendment would in this respect follow the United Kingdom, New Zealand, and Australia, whose moral rights amendments grant authors rights against both nonattribution and false attribution.¹⁶⁴

visual art has different implications for the fair use doctrine than does an act involving a work reproduced in potentially unlimited copies.").

162. See, e.g., Writers Guild of America—East, "Basic Agreement," *supra* note 50.

163. Lanham Act § 43(a)(2), 15 U.S.C. § 1125(a)(1)(B).

164. See, e.g., Copyright, Designs and Patents Act, 1988, ch. 48, § 84(5)–(6); Copyright Amendment (Moral Rights) Act 2000 §§ 195AD–195AH (Austl.) (amending Copyright Act 1968). Refer to note 134 *supra* (discussing Australian false attribution claims).

3. *Waiver.* Both VARA and, to some extent, the Australian amendments provide an appropriately narrow approach to waivers of attribution rights. To be enforceable, the waiver should be in writing and signed by the author or performer before the work is created or performed,¹⁶⁵ and should specifically identify the works and the kinds of uses to which the waiver applies. As in Australia, the waiver might, unless otherwise specified, pass on to the co-contractant's successors. On the other hand, ambiguities in the scope of the waiver should be construed against the party asserting the waiver (whether or not that party is the original grantee). Unlike the Australian Act, a U.S. attribution rights statute should not allow blanket waivers for present and future works of employees. Employee-executed waivers should meet the same standard as those of authors who are vested with copyright. Because attribution rights are independent of economic rights,¹⁶⁶ an author should not need to be vested with the economic rights in order to qualify as a holder of attribution rights. With respect to works of multiple authorship, my proposal departs from VARA, which allows one joint author to waive all co-authors' rights.¹⁶⁷ I would provide that a waiver is effective only as to the co-author(s) who sign the requisitely specific writing; co-authors who do not sign would retain their attribution rights.¹⁶⁸

165. Formalization of the waiver before creation or performance may be necessary to avoid extortion by transferees who demand the waiver in return for payment for work done. See *Schiller & Schmidt, Inc. v. Nordisco, Corp.*, 969 F.2d 410, 412-13 (7th Cir. 1992) (requiring that writing that makes a commissioned work "for hire" be executed before creation of the work).

166. See, e.g., Berne Convention, *supra* note 6, art. 6^{bis}; 17 U.S.C. § 106A(a)-(b) (stating that authors of works of visual art have attribution and integrity rights "whether or not the author is the copyright owner").

167. 17 U.S.C. § 106A(e)(1).

168. The U.S. Copyright Office Study, noted above, makes a similar recommendation. WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS: FINAL REPORT OF THE REGISTER OF COPYRIGHTS, Mar. 1, 1996, at xvii.

A point of relative consensus voiced in the Office's public proceedings and in academic sources such as *Nimmer on Copyright* was that VARA inappropriately permits one joint author to waive the moral rights of coauthors in a joint work Congress may wish to amend the statute to provide that no joint author may waive another's statutory moral rights without the written consent of each joint author whose rights would be affected.

Id.; see also 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.06[D], at 8D-84 to 8D-85 (2003); Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 45 n.246 (1997) ("[A]llowing one joint author to waive the rights under VARA for all other joint authors significantly undermines the rationale for moral rights protection.").

There may be instances in which the public would retain an interest in knowing who is a work's true author even if that person willingly (and specifically) waived her

4. *Remedies.* Injunctive and monetary relief should be available to redress violations of the attribution right. Although a remedy compelling inclusion of the author's name in subsequent public distributions or communications of the work may be the principal form of relief, modification of existing, undistributed inventory may also be appropriate.¹⁶⁹ Authors should be able to claim damages based on a showing of specific harm. Alternatively,¹⁷⁰ because such a showing may be difficult to demonstrate,¹⁷¹ an attribution rights amendment ought to provide for statutory damages. As is already the case for VARA violations, registration should not be a prerequisite to obtaining statutory damages.¹⁷¹

V. CONCLUSION

The U.S. Constitution authorizes Congress to secure for limited times the exclusive right of authors to their writings.¹⁷² Curiously, those rights, as enacted in our copyright laws, have not included the right to be recognized as the author of one's writings. Yet, the interest in being identified with one's work is fundamental, whatever one's conception of the philosophical or policy basis for copyright. That is, whether one sees copyright as a personality right conferring on the author the ownership of the fruits of her labor, or as an economic incentive scheme to promote the production of works of authorship, or as a public works program designed to fill the public domain (or, most accurately, as a combination of the three), giving credit where it is due is fully compatible with both the author-regarding and the public-

attribution right. This is another reason to maintain the distinction between copyright-based and Lanham Act-based (mis)attribution claims.

169. *Cf.* 17 U.S.C. § 405(a)(2) (discussing the addition of notice to copies distributed to the public after omission of notice is discovered); *see also, e.g.,* Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189, 197 (2d Cir. 1985) (discussing the application of § 405(a)(2)'s notice requirement).

170. *See, e.g.,* Johnson v. Jones, 149 F.3d 494 (6th Cir. 1998). Architect Johnson sued another architect, Jones, who had copied Johnson's plans but put his own name on them. *Id.* at 499. The court of appeals held that Johnson was entitled to recover Jones's gross revenue from the reverse passing off, and that Johnson's "actual damage claims were 'wholly speculative,'" and thus not recoverable. *Id.* at 507; *see also* Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992) (holding that evidence supported a damage award claim of \$200,000 for voice misappropriation under California law for the "shock, anger, and embarrassment" of a performer whose voice was imitated in a radio commercial jingle). For damage awards under VARA, *see Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999). In *Martin*, the City of Indianapolis intentionally destroyed a work of art by Martin, who sued under VARA. *Id.* at 610-11. The court of appeals upheld the trial court's award of \$20,000 in statutory damages, the maximum amount allowed for a nonwillful VARA violation. *See id.* at 610, 614.

171. *See* 17 U.S.C. § 412 (citing § 106A(a)).

172. U.S. CONST. art. I, § 8, cl. 8.

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RIGHT TO CLAIM AUTHORSHIP

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regarding aspects of these goals. But, after *Dastar*, the state of U.S. authors' and performers' entitlement to obtain name credit for their contributions, doubtful before, has been rendered the more precarious. While once authors could seek the partial cover of a "patchwork" of protections,¹⁷³ of which the Lanham Act furnished the strongest cloth, currently they are left in doctrinal tatters. With even the fig leaf of Berne Convention compliance now substantially stripped away (to wear out the sartorial metaphor), it is time to do the right thing and amend the Copyright Act to provide explicitly for attribution rights. This Article proposes the framework and content of such a statute.

173. See H.R. REP. NO. 100-609, at 37 (1988); Final Report on U.S. Adherence, *supra* note 8, at 39.