

# NAMING RIGHTS: ATTRIBUTION AND LAW

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When I agreed to write a piece on copyright reform for this symposium, I intended to propose an attribution right for authors of copyrighted (or even once-copyrighted) works. As I struggled to define the scope of this right, however, I realized that I was unable to formulate a satisfying legal regime to enforce what I believe are moral requirements of giving credit to authors. Legitimate claims for credit are simply too varied and contextual, and copyright law already too complex and reticulated, for an attribution right to be a valuable addition to copyright's arsenal. This is so even though voluntary attribution is often a viable substitute for more expansive control of uses of copyrighted works.

The reflections that follow therefore make the case against sweeping legislative change, despite the existence of powerful and well-reasoned arguments for a greater legal role for attribution. Fundamentally, American copyright law has enough trouble identifying owners; identifying authors is beyond its grasp. Attribution rights, especially in the absence of comprehensive author-centered reform, would only make the law more complex, not more just. I conclude by examining the role of attribution in more modest proposals to add a new fair use factor and to add protections for uses of "orphan works," works whose owners cannot be found after a reasonable search.

## I. INTRODUCTION: THE CURRENT ROLE OF ATTRIBUTION

### A. *The Absence of Attribution from U.S. Law*

Despite the international obligations of the United States,<sup>1</sup> current copyright law provides only minimal direct protection for authors' rights to be recognized as authors of particular works. The Visual Artists Rights Act (VARA) creates an attribution right for limited-edition works of visual art,<sup>2</sup> but it excludes mass-market visual art, movies, books, music, and other major categories of creative works, and is subject to other important limitations that make it largely irrelevant to the vast majority of creative works.<sup>3</sup> The provisions of the Digital Millennium Copyright Act (DMCA) create some attribution-like rights by providing special

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<sup>1</sup> The Berne Convention, of which the United States is a signatory, provides for attribution rights for authors. *See* Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. TREATY DOC. NO. 99-27 (1986), 1161 U.N.T.S. 30 [hereinafter Berne Convention].

<sup>2</sup> *See* 17 U.S.C. § 106A (2006).

<sup>3</sup> *See* Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1992-93 (2006).

protections for “copyright management information” (CMI), but the legal rules governing CMI are explicitly geared at deterring infringement of the copyright owner’s economic rights, not the creator’s moral rights.<sup>4</sup> Current case law “suggest[s] that the CMI provisions have not been particularly efficacious or well-drafted.”<sup>5</sup>

Generally, authors who want attribution must depend on whatever economic leverage they have or on norms of citation. Where there is no contractual relationship between an author and a user—for example, in cases of fair use, statutory licenses, or statutory exceptions to copyright rights—there is no way for an author to demand a separate attribution right. When the author lacks economic leverage, as individual creators often do when negotiating with large corporations, she is unlikely to be able to retain attribution rights. In many cases, the individual creator’s work may be a work for hire, leaving her with no rights that copyright will recognize.

Though it presents an unusual set of facts, the metamorphosis of O.J. Simpson’s recent autobiography illustrates the significance of the authorship/ownership divide. Simpson, with assistance from another writer, penned *If I Did It* (referring to the double murder of which he was acquitted at a criminal trial, but for which he was held liable at a subsequent civil trial). Because of the outstanding civil judgment against him, he lost control of the rights to the Goldman family, which had the cover redesigned to obscure the *If*; added a subtitle, *Confessions of the Killer*; removed Simpson’s name from the cover; and added disparaging commentary.<sup>6</sup> In a moral rights jurisdiction, this would violate several of Simpson’s inalienable rights, but in the U.S., it was just another example of an owner’s ability to control a work.

The overall American legal landscape, then, is unfavorable to attribution rights in copyright. Attribution is incidental and largely customary. Instead, control over the copyrighted material has primacy of place. Occasionally control is replaced by compensation, a right to be paid for certain uses even when the copyright owner cannot prohibit them, such as the compulsory license for reproductions of musical works or compulsory cable retransmission licenses. Various proposals have been offered for increasing the role of compulsory

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<sup>4</sup> See 17 U.S.C. § 1202. Removal of CMI is only actionable if it facilitates copyright infringement. See *id.* § 1202(b). Altering the name of the author (who need not even be named in the CMI, since the author’s name is only one potential type of CMI) without making infringement more likely does not violate the law. See *id.* § 1202(b)–(c).

<sup>5</sup> Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 70 (2007).

<sup>6</sup> See Timothy Noah, *O.J. Is Still Beating His Wife*, SLATE, Aug. 30, 2007, <http://www.slate.com/id/2173030>. In fact, on Amazon.com, the Goldman Family is listed as the author. See Amazon.com, *If I Did It: Confessions of the Killer*, <http://www.amazon.com> (search “books” for “If I Did It”; then follow “If I Did It” hyperlink) (last visited Nov. 28, 2007).

licenses, shifting the balance from control to compensation.<sup>7</sup> But credit, a term I will use interchangeably with attribution, is still a distant third in law.

### B. Attribution's Proponents

In recent years, attribution has received sustained attention from copyright scholars and activists, in part because of the Supreme Court's 2003 decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*,<sup>8</sup> which sharply limited the ability of authors to use trademark law to control attribution of copyrighted works. *Dastar* held that the Lanham Act's prohibition of false designations of "origin" refers only to the physical origin of a product, not to the origin of the expression or ideas contained therein. Thus, "[t]he right to copy, and to copy without attribution, once a copyright has expired . . . 'passes to the public.'"<sup>9</sup> Before *Dastar*, an author could often assert a right over the use or omission of his name on a copyrighted work, even if he had transferred the copyright, on the ground that the use or omission deceptively allocated credit for the work. After *Dastar*, this control is only possible, if at all, in circumstances where there is a deceptive misrepresentation in advertising or promotion that is material to consumers.<sup>10</sup>

Despite *Dastar* and the absence of robust attribution rights in copyright law, powerful pro-attribution norms exist throughout modern American society. Both authors and audiences generally accept that attribution is important to authors, and that false attribution, especially plagiarism, is a moral wrong.<sup>11</sup> As Jane Ginsburg

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<sup>7</sup> See, e.g., WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 199–258 (2004) (discussing possibilities for expanded compulsory licensing in the digital age); Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 339, 347 (2006) (suggesting that copyright should shift its focus from control to compensation); Mark Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 786 (2007) (arguing that liability or compensation rules should sometimes apply to unauthorized uses of copyrighted works); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 31 (2003) (offering a compulsory licensing proposal somewhat different from Fisher's).

<sup>8</sup> 539 U.S. 23 (2003).

<sup>9</sup> *Id.* at 33 (quoting *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964)).

<sup>10</sup> See *id.* at 38 (stating that false advertising claims for misattribution under § 43(a)(1)(B) remain available). *But see* *Antidote Int'l Films, Inc. v. Bloomsbury Publ'g, PLC*, 467 F. Supp. 2d 394, 398 (S.D.N.Y. 2006) (holding that *Dastar* bars false advertising claims concerning authorship).

<sup>11</sup> See, 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) (discussing attribution norms as moral obligations); Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 155 (Spring 2007).

writes, “few interests seem as fundamentally intuitive as that authorship credit should be given where credit is due.”<sup>12</sup>

To address this mismatch between morality and law, scholars have set forth various proposals for recognizing attribution rights. Roberta Rosenthal Kwall, for example, proposes an attribution right covering (1) actual use or substantial reproduction of an author’s original work without attribution or with false attribution, (2) “modification of an author’s work resulting in a substantially similar version to the original without attribution or with false attribution,” and (3) “false attribution of authorship of a work to an author.”<sup>13</sup> She would also add a limited integrity right in cases of (1) “objectionable modifications” to the work or (2) public use of the original work, or a close copy, “in a context deemed objectionable by the author” when “the work is either expressly attributed to the original author, or absent attribution, still likely to be recognized as the original author’s work.”<sup>14</sup> In such cases, the user would be required to add a disclaimer “adequate to inform the public of the author’s objection to the modification or contextual usage.”<sup>15</sup> Kwall’s recommendation regarding integrity is more of a disclaimer remedy or reverse attribution right rather than a traditional integrity right, as the latter would allow the author to suppress an objectionable use entirely.<sup>16</sup>

Proposals for attribution rights receive support from two often-clashing groups of copyright theorists. First, copyright low-protectionists (like me) think that copyright’s control rights have metastasized, harming creativity and access to creative works. Low-protectionists favor attribution as a substitute for expansive economic rights in copyrighted works.<sup>17</sup> For example, most Creative Commons licenses grant to the world many rights of reuse, but include as the key default term an attribution requirement. The basic presumption is that uncompensated and uncontrolled uses are legitimate as long as credit remains attached. In other countries, fair dealing exceptions to copyright allow certain news and educational

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<sup>12</sup> Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 264 (2004).

<sup>13</sup> Kwall, *supra* note 3, at 2004.

<sup>14</sup> *Id.* at 2006.

<sup>15</sup> *Id.*

<sup>16</sup> I thank Professor Kwall for her discussions with me on this point.

<sup>17</sup> See, e.g., Derek E. Bambauer, *Faulty Math: The Economics of Legalizing the “Grey Album,”* 59 ALA. L. REV. (forthcoming 2007) (manuscript at 53–54) (suggesting attribution rights and disclaimers as replacements for the derivative works right in most cases); Lastowka, *supra* note 5, at 62 (praising the incentive function of attribution); Jessica Litman, *Revising Copyright for the Information Age*, 75 OR. L. REV. 19, 47 (1996) (“[A]ny adaptation, licensed or not, should be accompanied by a truthful disclaimer and a citation or hypertext link to an unaltered copy of the original. That suffices to safeguard the work’s integrity, and protects our cultural heritage, but it gives copyright owners no leverage to restrict access to public domain materials by adding value and claiming copyright protection for the mixture.”); Tushnet, *supra* note 11.

use, conditioned on appropriate attribution.<sup>18</sup> An attribution rule has also been proposed as a quid pro quo for allowing people to copy orphan works. Most proponents of a special rule facilitating use of orphan works accept unhesitatingly that attribution is the least (and often the most) we owe known-but-unreachable authors.<sup>19</sup>

Second, authorial high-protectionists, who believe that authors should in general be able to control most uses of their works, also favor attribution rights, often as part of a greater package of moral rights.<sup>20</sup> These high-protectionists object to the complete commodification of copyrighted works, but not on the same grounds as low-protectionists. Rather, full commodification (including the ultimate in alienability, the work for hire) interferes with the dignity and integrity of the unique relationship between the author and her creations. Attribution rights, in this view, would protect creators from exploitation and bad bargains; they would not necessarily require or facilitate any retrenchment in copyright's control or compensation rights.

The strange bedfellows of this consensus find themselves borrowing from each other's copyright theories. Low-protectionists, who often put the public interest over authors' interests, nevertheless offer attribution rights as a matter of fairness to authors.<sup>21</sup> Meanwhile, a growing literature focuses on a third, consumer-oriented rationale for attribution rights, treating authorship as a type of trademark and thus a consumer-protection device.<sup>22</sup> High-protectionists are often

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<sup>18</sup> The Berne Convention provides for exceptions to copyright for such uses, but requires attribution. *See* Berne Convention, *supra* note 1, arts. 10(2)–(3), 10bis(1).

<sup>19</sup> *See* UNITED STATES COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS 110–11 (2006) [hereinafter REPORT ON ORPHAN WORKS], available at <http://www.copyright.gov/orphan/orphan-report.pdf>.

<sup>20</sup> *See, e.g.*, Roberta Rosenthal Kwall, *Authors in Disguise: Why the Visual Artists Rights Act Got It Wrong*, 2007 UTAH L. REV. 741, 743–44; Kwall, *supra* note 3, at 1972–75.

<sup>21</sup> Jennifer Rothman, for example, though highly critical of the role that custom plays in many areas of intellectual property law, singles out attribution-related customs as legitimate for courts to consider. Attribution customs, she argues, are aspirational and normative claims about justice toward authors, rather than simply adopted to avoid litigation, and thus can properly be accorded legal weight. Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. (forthcoming Dec. 2007) (manuscript at 47–48, 50).

<sup>22</sup> *See, e.g.*, Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377 (2005) [hereinafter Heymann, *Birth of the Authornym*]; Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171 (2005); *cf.* Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 63 (2006) (analyzing attribution as valuable information in employment relationships). Laura Heymann advocates taking attribution rights out of copyright entirely and treating them as trademark claims, with disclaimers being an appropriate remedy, in order to limit copyright to protecting authors' economic interests. Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. 55, 61–62 (2007) [hereinafter Heymann, *Trademark/Copyright*].

willing to sign on to consumer interests as an extra justification for attribution rights, because proper attribution allows readers to identify the types of works in which they would prefer to invest their time, attention, and money.<sup>23</sup> The consumer-protection justification for attribution may be attractive to high-protectionists insofar as it casts readers and viewers as generalized “users” and “consumers,” groups whose moral claims to appropriate and interpret creative works may seem far inferior to those of authors.<sup>24</sup> Trademark-style consumer protectionism differs from low-protectionism in copyright both in the definition of the protected class (consumers making rational choices in a marketplace versus audiences desiring access to works that are important parts of culture) and in the interests to be protected (quality of information about particular works versus quantity, although low-protectionists believe that quantity offers each person an opportunity to satisfy her unique tastes and thus provides quality as well).

The emerging consensus is that attribution serves both authors and audiences, rather than forcing a tradeoff between their interests.<sup>25</sup> In this view, credit, unlike control and compensation, poses no difficulty of balancing incentives for creation versus access to already-created work.

## II. CREDIT IN CONTEXT

Attribution’s proponents make many good points about the important work done by proper credit in rewarding authors and informing consumers. As Catherine Fisk has documented, attribution norms are widespread across many endeavors, from academia to moviemaking to advertising firms, indicating a robust consensus that attribution is an important moral and economic value.<sup>26</sup> Yet, the particulars of how credit is earned vary substantially. The difficult problems arise in integrating a legal attribution right into the existing copyright scheme.<sup>27</sup> Because there are

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<sup>23</sup> See Jane C. Ginsburg, *The Author’s Name as a Trademark: A Perverse Perspective on the Moral Right of “Paternity”?*, 23 CARDOZO ARTS & ENT. L.J. 379, 381–82 (2005); Ginsburg, *supra* note 12, at 269–70. Ginsburg is clear, however, that moral rights trump trademark principles, which might otherwise focus on owners rather than authors. See *id.* at 388–89 (arguing that trademark concepts have to be modified in the authorship context to honor individual creators’ attribution rights, which belong to them as a matter of moral desert); cf. Kwall, *supra* note 20, at 745 (arguing that trademark analogies do not recognize the proper author-centered rationales for attribution rights).

<sup>24</sup> See Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC. U.S.A. 1 (1997). Ginsburg, in the course of arguing for the primacy of authors over users, puts the phrase “user rights” in quotes, “because ‘rights,’ of course, is a loaded term,” *id.* at 2, but she is less concerned with the connotations of “users.”

<sup>25</sup> See Ginsburg, *supra* note 12, at 306–07; Lastowka, *supra* note 5, at 1174.

<sup>26</sup> See Fisk, *supra* note 22, at 76–101.

<sup>27</sup> As explained *supra* note 22, Laura Heymann would convert attribution rights into trademark rights. Many of my objections would apply as readily to credit-as-trademark as to credit-for-copyright. For example, parceling out credit can be extremely contentious with respect to multiply-authored or derivative works. See discussion *infra* Part II.C. Heymann argues that her proposal avoids this problem because trademark is not about

powerful attribution *norms* throughout modern society, rather than a single norm that covers most situations, any attribution law is likely to be extremely vague, which punts the problem of identifying when and what attribution is required to individual cases. This generates legal uncertainty in an area that hardly needs more uncertainty. The following sections explore these problems with moving from norms to legal regulation.

### A. Classification Difficulties

The threshold problem is determining which copyrightable works should be granted attribution rights. Even highly moralistic copyright regimes limit the types of works deemed worthy of moral rights. Computer programs, for example, have so many utilitarian functions that moral rights would be incompatible with general social welfare. As a result, moral-rights theorists are less interested in bringing computer programs within the subject matter of moral rights.<sup>28</sup> Part of the project of defining an attribution right is to identify appropriate subsets of copyrightable works for which attribution rights should be available.<sup>29</sup> Again, there are possible

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identifying the source of individual components of a product. Instead, trademark is a system for attributing responsibility to a particular source, and she would not recognize any attribution right unless there was consumer confusion about who authorized a particular work. See Heymann, *Birth of the Authornym*, *supra* note 22, at 1442–43. But multiple entities can authorize a single product, just as multiple entities can endorse a single political candidate. In my view, credit-as-trademark would increase the pressure on courts to find “trademark uses” and consumer confusion about authorization everywhere, including in cases where an artistic work is in the background of a picture or movie. I will focus here, however, on copyright-oriented attribution proposals. For a discussion of an early version of Heymann’s proposal, see 43(B)log, Works in progress: Laura Heymann, <http://tushnet.blogspot.com/2006/10/works-in-progress-laura-heyman.html> (Oct. 8, 2006, 10:36 EST).

<sup>28</sup> See, e.g., Ian Eagles & Louise Longdin, *Technological Creativity and Moral Rights: A Comparative Perspective*, 12 INT’L J.L. & INFO. TECH. 209 (2004) (discussing and criticizing the exclusion of computer programs and similar works from existing moral rights schemes). The objections to moral rights center on interference with economic exploitation of works that are highly functional or generally require substantial corporate and collective investment. Attribution rights seem easier to extend to such works than rights against distortion, rights of withdrawal, or others that plainly threaten to take a work or a derivative work entirely off the market. See Ginsburg, *supra* note 12, at 301 (an attribution right in the United States should cover all copyrightable works). Notably, open-source licenses generally involve attribution to contributors, suggesting that credit serves important functions for computer programmers, as it does for other types of authors. See Josh Lerner & Jean Tirole, *Some Simple Economics of Open Source*, 52 J. INDUS. ECON. 197, 212–17 (2002) (discussing the economic and reputational benefits for programmers of being identified as participating in open-source projects).

<sup>29</sup> See, e.g., Roberta Rosenthal Kwall, *Originality in Context*, 44 HOUS. L. REV. (forthcoming Dec. 2007) (arguing that only works meeting a heightened standard of originality should be given moral rights; this would involve excluding certain categories of works entirely as well as evaluating specific works within protectable categories).

producer- and consumer-oriented classifications. Taking the author's perspective, we could grant attribution rights where we conclude that attribution is generally an important part of the connection between author and creation.<sup>30</sup> Or, taking the audience's perspective, we could grant attribution rights where attribution is likely to be significant to the audience's perception or valuation of the resulting work. Either way, we would be endorsing particular cultural conceptions about when attribution matters.<sup>31</sup>

This classification project seems to me highly dubious. I can imagine many situations in which attribution is much more important to a computer programmer's life goals and plans than a painter's,<sup>32</sup> and many situations in which audiences care more about the identity of the programmer than the painter. Here, however, I take for granted that an attribution right might be limited to certain categories within copyrightable subject matter, excluding most utilitarian or corporately created works, whether for principled or practical reasons. Even after making this cut, I will argue, attribution rights would have immense difficulty recognizing and conforming to vital contextual differences.

Traditional literary and visual works, for example, would be at the core of any attribution right, yet a legal code of attribution would fit poorly with the practices of reference and quotation that pervade these forms.

A recent work offers an object lesson: Jonathan Lethem's essay *The Ecstasy of Influence: A Plagiarism*.<sup>33</sup> At the end of the piece, he reveals that his words are in fact copied from a variety of other sources, quotations mixed and mashed. He provides sources at the end, but not in a conventional format; it is difficult to tell which words came from where. In the context of a passionate argument against control over creative works, the absence of attribution serves as part of Lethem's

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<sup>30</sup> See Ginsburg, *supra* note 12, at 301–02 (arguing that all human authors and performers should have attribution rights, regardless of work-for-hire status).

<sup>31</sup> The idea of limiting attribution rights to particular authors adopts a culturally specific notion about authorship, and may enhance the problem of disregarding cultural traditions from which individual authors have drawn. See, e.g., Fisk, *supra* note 22, at 55–56 (“Attribution appears to operate quite differently within traditional or indigenous cultures than it does in modern American or European culture. Notions of individual authorship, the status that comes from being perceived as a creator, and the norms that govern attribution vary among cultures . . . . It is interesting to note that as indigenous or non-western cultural practices, information, and artifacts are appropriated by American or European culture, vague attribution is sometimes made (to highlight the exoticness or authenticity of the borrowed bit of culture), but often it is not. The power disparities in such cultural appropriation are enormous . . . .”) (footnote omitted). Gender also plays an important role in determining who is deemed entitled to credit. See *id.* at 58 (“Women have long provided uncredited research, editorial, and technical assistance on creative projects undertaken by the men in their lives. Who can and should be credited with invention is thus culturally specific and wrapped up as much in norms about honor and credit as in the supposedly simple fact of who conceived a new idea.”).

<sup>32</sup> Catherine Fisk points out that open-source programmers have created elaborate schemes for ensuring proper attribution. See Fisk, *supra* note 22, at 88.

<sup>33</sup> HARPER'S MAGAZINE, Feb. 2007, at 61.

claims: We read the essay because of Lethem's reputation as a writer, *Harper's* reputation as a magazine, and Lethem's skill in deploying (others') words. Attribution would destroy the flow of the piece and would also disconnect the words from Lethem's endorsement of them, just as a President's acknowledgment that a speechwriter wrote his addresses would distract audiences from the critical fact that he was speaking in all relevant respects for himself. (One might respond that Lethem's quotations are classic fair use, but attribution rights proposals generally include fair uses.<sup>34</sup>)

Larry Lessig, copyright law's most prominent low-protectionist, was one of the people whose words were appropriated. In a letter to *Harper's*, he praised Lethem's sentiment, but objected to Lethem's unattributed copying of "the only sentence I have ever written that I truly like."<sup>35</sup> Lessig wanted attribution where he would never dream of seeking control—a perfectly consistent position for a Creative Commons supporter. Lethem's response, however, pointed out that nonfiction has citation standards distinct from those of other creative forms:

Artists are, among other things, mischievous, and we should try to remember that we wish them to be. In songs, films, paintings, and much poetry, allusions and even direct quotations . . . are subsumed within the voice of the artist who claims them. Citations come afterward, if at all. There are no quotation marks around the elements in a Robert Rauschenberg collage or around Quentin Tarantino's swipes from lesser-known movies. And T.S. Eliot's "The Waste Land" has only end-notes—which, I suspect, are much less often read than the poem itself.<sup>36</sup>

Or, as a recent Organisation for Economic Co-operation and Development (OECD) report states more dryly, "In a multi-media environment with mixes of text, video, and graphic works, concepts such as 'citation' may be blurry."<sup>37</sup> What works for quotations in standard educational and news reporting uses may not work in other forms of reuse, even within the same medium. The fact that practices surrounding attribution are widely varied even within particular cultures makes an

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<sup>34</sup> See Ginsburg, *supra* note 12, at 303 (stating that "fair use and other statutory exceptions should not supply a defense" to a violation of the attribution right); Lastowka, *supra* note 5 (proposing to make attribution part of the fair use test).

<sup>35</sup> Lawrence Lessig, Letter to the Editor, *Credit Where Credit's Due*, HARPER'S MAGAZINE, Apr. 2007, at 4. Lessig declines to identify the sentence.

<sup>36</sup> Jonathan Lethem, Letter, HARPER'S MAGAZINE, Apr. 2007, at 5. For a recently litigated example of art without quotation marks, see *Blanch v. Koons*, 396 F. Supp. 2d 476 (S.D.N.Y. 2005), *aff'd*, 467 F.3d 244 (2d Cir. 2006). Koons incorporated a portion of Blanch's fashion photograph into a painting, and as part of his successful fair use defense argued that it was important to his artistic message to appropriate the "anonymous" legs in Blanch's photo. *Id.* at 481.

<sup>37</sup> Directorate for Sci., Tech. and Indus., Comm. for Info., Computer and Commc'ns Policy, Working Party on the Info. Econ., DSTI/ICCP/IE(2006)7/FINAL 46 (Apr. 12, 2007), available at <http://www.oecd.org/dataoecd/57/14/38393115.pdf>.

attribution right difficult to define in advance, and thus onerous for compliance purposes.<sup>38</sup>

Consider also relatively recent information about Nabokov's *Lolita*. What good would it do us for Nabokov to interrupt the narrative in order to tell us that he'd been inspired by a short story published in Germany, whose plot and characters have notable similarities to those of his masterpiece?<sup>39</sup> This information is plainly of interest to scholars tracing the anxiety of influence, or perhaps the anxiety of forgetting. That does not mean that the ordinary reader would find her understanding of Nabokov's work enhanced. Nabokov has suffered no diminution in reputation since this revelation, even though he could be judged to have violated both the original author's attribution and integrity rights. Many people think that Nabokov created a work of genius, and this excuses much. When it comes to plagiarism, as opposed to copyright infringement, many readers follow an older rule: improvement on the original is not wrong.<sup>40</sup> Attribution might even muddy the waters, making it more difficult to credit Nabokov for the brilliance he added to an otherwise unremarkable concept.

The broader issue raised by Nabokov's example is the idea/expression distinction. Plagiarism is often charged when a writer, especially a student, fails to attribute the source of her ideas. But copyright does not protect ideas, only original

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<sup>38</sup> Another example: Catherine Fisk describes the rise of attribution norms at newspapers that require not just credit for the main writer of a story, but also for "stringers" who contributed research or parts of the story. This contrasts with the norms of broadcast journalism, where writers, researchers, and others off screen are rarely credited, perhaps because voluminous credits would cut into valuable advertising time. Fisk suggests that the main reason for fewer credits is that viewers' expectations about authorship and credit differ between broadcast and print journalism, expectations that themselves are likely related to the economic structures of the different media. See Fisk, *supra* note 22, at 92-93.

<sup>39</sup> See *Lolita: A tale by Heinz von Lichberg*, [http://www.arlindo-correia.com/lolita\\_de.html](http://www.arlindo-correia.com/lolita_de.html) (July 24, 2004) ("[A]dmirers of Vladimir Nabokov and scholars of modern literature were startled by the revelation that the *Lolita* of Nabokov's great novel was not the first fictional nymphet of that name to have enchanted an older lover: her namesake had appeared in an eighteen-page tale, also called "*Lolita*," by the obscure German author Heinz von Lichberg, published in 1916.").

<sup>40</sup> See generally MARILYN RANDALL, PRAGMATIC PLAGIARISM: AUTHORSHIP, PROFIT, AND POWER 154 (2001) ("All agree, it would seem, that imitation is acceptable if changes, usually deemed 'improvements,' are effected on the original text or idea.")

expression.<sup>41</sup> Proponents of a right to attribution for expression only have already uncoupled law from the norms that supposedly justify a legal remedy.<sup>42</sup>

An obvious defense of attribution rights against this critique is that line-drawing is part of the judicial enterprise, and is certainly familiar in copyright cases. If copyright recognizes “thin” and “thick” variants, and inquires on a case-by-case basis into whether useful articles’ creative features are conceptually separable from their utilitarian functions, it can certainly evaluate particular works for whether attribution is required either to respect an original artist or to accurately inform a potential audience.<sup>43</sup> A court could evaluate the sufficiency of T.S. Eliot’s endnotes, looking for evidence of how readers used them to allocate credit. Another court could mandate that Tarantino add citations to the end credits of his films, preserving their flow but identifying the obscure sources of his inspiration.

This would be a very bad idea. The fact that rights thickets already exist is no reason to make them thicker and pricklier.<sup>44</sup> Moreover, experience with attribution rights in other jurisdictions does not show that they would work well here. This is because the American copyright system is in many ways an outlier and because Americans are often willing to sue when, in other systems, the conflict would be resolved outside the judicial system.<sup>45</sup> I am not aware of a non-U.S. case similar to

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<sup>41</sup> It is also relevant that people often overestimate the originality of their ideas, and believe they deserve credit when they do not, or do not deserve very much—as the source of Nabokov’s inspiration deserves little credit for *Lolita*. Two authors of cookbooks aimed at picky children, for example, are presently involved in a dispute over whether one “stole” the idea from the other—but the idea itself was already known. See Steven A. Shaw, *Not That There’s Anything Wrong With That: Jessica Seinfeld’s Cookbook Is Unoriginal, But It’s Not Plagiarism*, SLATE, Oct. 24, 2007, <http://www.slate.com/id/2176563/>.

<sup>42</sup> See Lastowka, *supra* note 5, at 1233–34 (distinguishing anti-plagiarism norms, which cover ideas and small snippets of verbatim copying, from his proposed attribution right, which would not cover those things).

<sup>43</sup> See Ginsburg, *supra* note 12, at 299, 304 (arguing that an attribution right should follow the example of Australia’s multifactor tests, including reference to industry norms as one among many considerations in evaluating whether omission of attribution was reasonable); Heymann, *Trademark/Copyright*, *supra* note 22, at 60–61 (arguing that the practical difficulties of attribution are similar to other problems in intellectual property law); Kwall, *supra* note 29, manuscript at 21 (accepting the necessity of line-drawing in attribution rights).

<sup>44</sup> No matter how mechanical an attribution regime would be in theory, as long as it did not replace any existing rights, it would necessarily add complexity to the current system. Moreover, even a mechanical, CMI-type attribution right of the kind Ginsburg discusses, see Ginsburg, *supra* note 12, at 304, would be difficult if not impossible for amateur creators to implement. Especially given the vast amount of existing material that is not digitally tagged with appropriate author information, the creator of a mash-up or parody would have a devilish time complying with new attribution rules.

<sup>45</sup> One reason for this, as my colleague Julie Cohen pointed out, is that many other jurisdictions require the losing party to pay the victor’s attorney fees, which makes litigation a riskier prospect than the standard American rule in which each side bears its

*Choe v. Fordham University School of Law*,<sup>46</sup> in which a disgruntled student sued a law journal under the Lanham Act for marring his note with capitalization and typographical errors, erroneous footnote cross-references, and extra words.<sup>47</sup>

Attribution rights may seem easier to manage than other moral rights because all they require is proper disclosure. Thus, rather than suppressing works entirely, attribution rights simply enforce labeling rules. This proposition assumes that authors will never over assert their rights in order to suppress unwanted uses completely, and that users will understand and assert their rights to proceed once they have conformed their attributions to the law. Those assumptions are unwarranted. The most detailed proposals for new attribution rights provide for damages, either generally<sup>48</sup> or at least under some circumstances such as willful misattribution, actual economic harm, or violations that are fully completed so that injunctive relief would be useless.<sup>49</sup> Given the standard practice of sending cease and desist letters phrased in aggressive terms, we can expect that some authors will always claim that those circumstances apply when they allege violation of an attribution right. As a result, users will routinely be threatened with substantial monetary penalties, and legitimate behavior will be chilled.<sup>50</sup>

Yet even setting aside chilling effects, disclosure is an insufficient remedy for misattribution. The next section discusses why the apparently happy compromise of disclosure without suppression will not work.

### B. The Fine Print

Many proponents of an attribution right accept that, in general, it should be limited in the remedies it affords. In particular, attribution rights compatible with both high- and low-protectionist tendencies should not allow an author to suppress another's speech for failure to attribute sources. Instead, the cure should be a reasonable amount of required disclosure, and, when the original author does not

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own costs. American copyright and trademark laws allow fee awards in certain circumstances, but they are far from routine.

<sup>46</sup> 920 F. Supp. 44 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 319 (2d Cir. 1996).

<sup>47</sup> Specifically, Choe sued because of the following problems: "'treaty' was changed improperly to 'FCN Treaty' in 12 places; 'treaty' should have been 'Treaty' in two instances; 'parent's' should have been deleted in three references to the FCN Treaty; five footnote cross-references were misnumbered; two sentences needed rewriting; and numerous typographical errors marred the text." *Id.* at 46.

<sup>48</sup> See Ginsburg, *supra* note 12, at 306 (actual and statutory damages should be available, even in the absence of a timely registration).

<sup>49</sup> See Kwall, *supra* note 3, at 2006.

<sup>50</sup> For purposes of comparison, consider that takedown notices under § 512 of the Copyright Act, which are not threats to sue but simply notifications of claimed infringement, often result in the cessation of the challenged conduct, even when there are legitimate issues of noninfringement or fair use. See Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006).

agree with the use to which her work has been put, a disclaimer indicating her distaste for the use.<sup>51</sup> Digital culture arguably makes this much easier. As Jane Ginsburg explains,

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.<sup>52</sup>

The obvious solution of requiring lots of fine-print credits certainly invites litigation over when such credits are necessary, but it is extremely unlikely to protect either authors or consumers. This is because, English students and law professors aside, people rarely read footnotes, read through the credits of a film, or pay attention to disclosures in general.<sup>53</sup> In other words, most people will not click on a link to read about all the authors and performers of a song. The Federal Trade Commission (FTC) disapproves of internet “click to read” disclosures and disclaimers. In its judgment consumers are unlikely to make the required effort, especially when the “click to read” link does not indicate that it contains information that consumers will find significant.<sup>54</sup> Attribution proponents want audiences to care as much about authorship as the proponents already do. But legal rights provide audiences with no reason to pay attention. Without norm entrepreneurship, the only way to get audiences to pay the “proper” amount of

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<sup>51</sup> See, e.g., Heymann, *Birth of the Authornym*, *supra* note 22; Kwall, *supra* note 3, at 1990–91, 2005–07.

<sup>52</sup> Ginsburg, *supra* note 12, at 304.

<sup>53</sup> The research to date focuses on disclosures in consumer product advertising and labeling, but the findings support the idea that audiences are unlikely to process “fine print” wherever it is encountered, including at the end of films, unless they have special reasons to do so. See, e.g., Alan R. Andreasen, *Consumer Behavior Research and Social Policy*, in HANDBOOK OF CONSUMER BEHAVIOR 459 (Thomas S. Robertson & Harold H. Kassarian eds., 1991) (consumers don’t often use disclaimers in making decisions); Gita Venkataramani Johar & Carolyn J. Simmons, *The Use of Concurrent Disclosures to Correct Invalid Inferences*, 26 J. CONSUMER RES. 307, 320 (2000) (noting that because of cognitive processing limitations, “obviously effective disclosures (e.g., those that are encoded, those that are explicit, etc.) are often ineffective”). Laura Heymann acknowledges that her disclaimer-based attribution right is subject to these criticisms, but contends that disclaimers are better than the alternative of total suppression of unattributed or unwelcome uses. See Heymann, *Trademark/Copyright*, *supra* note 22, at 98 n.205. Her response does not, however, establish that disclaimers are better than the alternative of no attribution right at all.

<sup>54</sup> See FEDERAL TRADE COMMISSION, DOT COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING 9–12, 17 (2000), available at <http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.pdf>.

attention is to jump up and down, blocking their view of something they want to see—and that has obvious costs to the audiences.<sup>55</sup>

Similar issues have arisen with respect to product placement in entertainment. Commercial Alert, a consumer group, petitioned the FCC and the FTC to require pop-up disclaimers during the actual product placement.<sup>56</sup> The petition made the point that disclosure at the beginning or end of the work was likely to be ineffective.<sup>57</sup> The FTC rejected the argument that additional further disclosures were required,<sup>58</sup> no doubt in large part because of the intrusiveness of an effective disclaimer.<sup>59</sup> Pop-ups are amusing in music videos, but they are hardly conducive to maintaining the suspension of disbelief required in a James Bond movie.<sup>60</sup> Effectiveness and artistry are in competition, and the same would be true of attribution disclosures and disclaimers, especially when the artist's interest is in identifying her contribution to a greater whole or her disagreement with a

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<sup>55</sup> Jessica Silbey suggested to me that audiences may not care about credit as much as they are interested in contextualizing a work, which may involve information about individual creators or about a creative community. For example, Annalee Newitz has written about how American audiences react to Japanese anime, perceiving it as reflecting an entire cultural context, which often overwhelms or at least complements the significance of individual authors. See Annalee Newitz, *Anime Otaku: Japanese Animation Fans Outside Japan*, BAD SUBJECTS, Apr. 2004, available at <http://bad.eserver.org/issues/1994/13/newitz.html>.

<sup>56</sup> Letter from Gary Ruskin, Executive Dir., Commercial Alert, to Donald Clark, Sec'y, FTC, at 2 (Sept. 30, 2003), <http://www.commercialalert.org/ftc.pdf>.

<sup>57</sup> See *id.* at 3 (“The impact of the product placement, like that of ordinary ads, occurs at the moment of exposure. For this reason disclosure must occur at that same moment, as it does in print ads. To inform viewers of product placements only at the start or end of a show or segment is not adequate, because they might not be viewing then. Honesty and fair dealing require that the label be attached directly to the thing to which it pertains—in this case, the product placement.”).

<sup>58</sup> See Letter from Mary K. Engle, Assoc. Dir. for Adver. Practices, FTC, to Gary Ruskin, Executive Dir., Commercial Alert (Feb. 10, 2005), <http://www.commercialalert.org/FTCletter2.10.05.pdf>.

<sup>59</sup> See Commercial Alert, News Release, Advertisers Attack Honest Disclosure of Stealth Ads on TV, <http://www.commercialalert.org/issues/culture/product-placement/advertisers-attack-honest-disclosure-of-stealth-ads-on-tv> (Nov. 15, 2003) (discussing the Freedom to Advertise Coalition's argument that Commercial Alert's proposed requirement of on-screen disclaimers during product placements would be “‘impractical,’ ‘dangerous,’ ‘extreme,’ ‘radical,’ and that it ‘borders on the ludicrous,’ and that it would make programming ‘virtually unwatchable’”).

<sup>60</sup> See Cindy Tsai, *Starring Brand X: When the Product Becomes More Important Than the Plot*, 19 LOY. CONSUMER L. REV. 289, 305 (2007) (“The true benefit of product placement[] for the consumer is that it enhances the entertainment experience. It allows consumers to suspend their disbelief and be involved in the film. On-screen notices during the actual placement will ruin the entertainment experience for the consumer. Just like internet pop-up ads, on-screen notices during the actual placement will be distracting and annoying for the viewer. With pop-up notices, consumers will not be able to watch a film without constant distractions.”).

particular alteration. (Recall that many attribution proposals are designed to allow an original author to register disagreement with a permitted subsequent use.)

Just as the FTC has to date accepted small end-credit disclosures with product placement, courts would probably accept footnote, click-to-read, or end-credit solutions. Fact finders are likely to treat such disclosures as “reasonable” forms of attribution in order to preserve the integrity of legitimate works like T.S. Eliot’s *The Waste Land* and Quentin Tarantino’s *Jackie Brown*. But they would be doing so only to support a legal fiction, not a requirement that audiences actually understand who should, in the law’s judgment, get credit for works.<sup>61</sup>

Copyright low-protectionists, who do not highly value authorship, might not care about an ineffective attribution right as long as it reduces control and compensation claims from copyright owners. Still, the ineffectiveness of disclosures should matter both to those who see attribution in consumer protection terms and to authorial high-protectionists. The difficulties failed attributions pose to consumer-oriented theorists are obvious. For high-protectionists, an attribution that goes unnoticed fails to protect the unique relation between author and work because the third party in that relationship is, necessarily, the audience.

Even if we treat the audience as passive and dependent on authors to make meaning, it cannot be ignored in the moral-rights analysis. From an author-centered perspective, attribution is an important component of the artist’s message. If the audience misattributes a work, distortion of the message has occurred regardless of whether formal attribution requirements have been satisfied. To sharpen the point, imagine that a user properly attributed a work, and the author knew that the attribution was present on the work, but the attribution was printed in binary code, or invisible ink. Hardly anyone would say that attribution had really been made, because readers would not know about it. Once we recognize that readers’ understanding is a crucial component of attribution, however, we have to consider whether even explicit attributions in fact become part of their understanding of the work.

Moral-rights proponents rarely discuss the complexities of communication, the irreducible gap between sender and receiver. This may be related to their general expectation that each work contains a proper, intended message or set of messages and their related belief that unintended interpretations are misreadings to be minimized. Because there is a true meaning, it must follow that unintended

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<sup>61</sup> Other countries’ attribution rights require “reasonable” attribution. See Ginsburg, *supra* note 12, at 288–89, 292–93, 294–95 (discussing attribution rights in Commonwealth countries). The Commonwealth countries generally use the clarity and prominence of the attribution as a proxy for effectiveness. However, in the United Kingdom an author is entitled to an attribution that is “likely to bring [the author’s] identity to the attention of a person seeing or hearing the performance, exhibition, showing, broadcast or cable programme in question.” Copyright, Designs and Patents Act, 1988, c. 48, § 77(7)(c) (U.K.) (emphasis added), *quoted in* Ginsburg, *supra* note 12, at 289. As far as I am aware, the meaning of this provision has not been extensively explored, possibly in part because of the significant restrictions the United Kingdom imposes on the assertion of an attribution right. See Ginsburg, *supra* note 12, at 290–92.

interpretations can be minimized. Given that I see meaning as emerging from the interactions between author, text, and audience, I don't accept the initial premises—but even those who do should recognize that there is no syllogism here. Even if there is a true meaning and misreadings ought to be seen as harms, that does not mean they can in practice be stopped or even substantially decreased—especially with the tools available to lawyers, as opposed to literature teachers.<sup>62</sup>

The assumption behind high-protectionists' endorsement of a disclosure remedy is that the audience will in fact perceive an overt attribution, but that is not necessarily true. Audiences, unfortunately, are very bad at interpreting information, even in situations when speakers have every incentive to communicate clearly and effectively.<sup>63</sup> If courts took a reality-based approach, an attribution right would be much closer to an integrity right than many of its supporters want. As the Second Circuit pointed out in the important *Gilliam v. ABC* case involving unauthorized editing of *Monty Python* episodes for American television:

We are doubtful that a few words could erase the indelible impression that is made by a television broadcast, especially since the viewer has no means of comparing the truncated version with the complete work in order to determine for himself the talents of plaintiffs. Furthermore, a disclaimer . . . would go unnoticed by viewers who tuned into the broadcast a few minutes after it began.<sup>64</sup>

Thus, allowing a mutilated version of an original, even a fair use, inherently risks a misallocation of credit and blame between the original artist and a subsequent creator.

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<sup>62</sup> I do believe in misreadings, at the extreme. It would be a misreading of the Constitution to see it "as the story of a small boy growing up in Kansas." Don Herzog, *As Many As Six Impossible Things Before Breakfast*, 75 CAL. L. REV. 609, 629 (1987). But, as the very outrageousness of that example suggests, implausible misreadings rarely cause trouble. Plausible ones, though, often tell us something important even if they are, in the end, wrong.

<sup>63</sup> See *supra* notes 20–25 and accompanying text; see also JACOB JACOBY & WAYNE D. HOYER, *THE COMPREHENSION AND MISCOMPREHENSION OF PRINT COMMUNICATIONS* 110–13 (1987) (finding that an average of 19% of messages in magazine advertisements were affirmatively misunderstood by consumers, while 16% of the messages were not received; no message was correctly conveyed to all readers, and all but 3 of 1,347 respondents misunderstood something about the four advertisements they read); JACOB JACOBY ET AL., *MISCOMPREHENSION OF TELEVISED COMMUNICATIONS* 64–73 (1980) (finding that consumers misunderstood an average of 28.3% of messages in television commercial ads; 81.3% of consumers misunderstood at least some portion); Jacob Jacoby & George J. Szybillo, *Why Disclaimers Fail*, 84 TRADEMARK REP. 224, 226 (1994) (listing reasons why consumers may not receive messages that are directed to them, such as inattention and information overload).

<sup>64</sup> 538 F.2d 14, 25 n.13 (2d Cir. 1976).

In the *Gilliam* situation, perhaps a constant disclaimer on the screen stating “edited by ABC; not approved by Monty Python” would inform most consumers, at the cost of destroying a substantial amount of the show’s visual appeal.<sup>65</sup> However, even if a court were willing to require such drastic measures, how would that solution work with music? What should 2 Live Crew do to indicate that certain portions of their song “Pretty Woman” were taken from Roy Orbison’s “Oh, Pretty Woman,” while others were not?<sup>66</sup>

Again, an attribution right could limit this problem by only requiring attribution where feasible. My argument, however, is that *effective* attribution is rarely feasible. Given audiences’ often low levels of attention, the vast number of works to which we are exposed in the modern environment, and basic cognitive limitations on processing information, even a clearly stated attribution has only a limited chance of informing audiences, and we can expect routine failures. In this, attribution is not much different from other types of information. Often, regulators face a practical choice between (1) allowing a simple statement that will inevitably be misunderstood by some significant percentage of the target audience or (2) suppressing the statement entirely. The middle ground of requiring more nuanced disclosures is comforting, but simply does not work.<sup>67</sup>

Ineffective attribution may often be possible, but the social costs of a legally enforceable right to ineffective attribution seem unjustified. Moreover, a feasibility analysis makes starkly clear how discriminatory an attribution right is across types of artistry, as the next section explores.

### C. Attribution and Multiple-Author Works

Depending on the way in which audiences receive and perceive works, attribution may be relatively simple or prohibitively difficult. The implicit model of the author entitled to an attribution right is a single artist whose name deserves

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<sup>65</sup> This result might satisfy authorial high-protectionists, who would not want ABC to broadcast the mutilated version in any event, and some consumer advocates. Yet, consumers have competing interests, including interests in being entertained. To the extent that disclosures and disclaimers impair the audience’s experience, consumer protection goals may not be furthered, especially if the material affected involves commentary, parody, or other socially beneficial uses. Preventing deception is not the only way to protect consumers, and may even harm them on balance, if it suppresses competition. See Rebecca Tushnet, *Why the Customer Isn’t Always Right: Producer-Based Limits on Rights Accretion in Trademark*, 116 YALE L.J. (POCKET PART) 352, 357 (2007), <http://yalelawjournal.org/2007/04/25/tushnet.html> (arguing that trademark law should rely upon established concepts of free competition and free speech, not “evanescent and irrelevant” consumer confusion).

<sup>66</sup> Cf. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 594 (1994) (finding that 2 Live Crew may have made fair use of Orbison’s song).

<sup>67</sup> See Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. (forthcoming 2007).

to be the only name attached to a single book, sculpture, painting, or similar visual work. In many cases, this model already depends on the erasure of key figures—editors, research assistants, agents, dealers, and others who shaped the works. But since an attribution right would only cement, not cause, their separation from credit, I will not discuss them further. When we move away from that core model—whether by adding authors whose contribution levels may vary or changing the medium from the purely visual—the proper scope of an attribution right becomes unclear at best.<sup>68</sup>

### *1. Joint Authors*

Group authorship creates serious attribution problems, especially when none of the people involved in a creation own the copyright because it is owned by corporate entity instead. Catherine Fisk, writing about multi-participant projects in business contexts, makes observations that apply to many creative endeavors, from software to movies:

Participants in some group projects often do not know exactly what their contributions are. Ex ante, they do not know what the project will entail, how long it will take, who will contribute how much in terms of time, useful ideas or skills along the way, or even whether the project will succeed enough to make it worth thinking about who did what. Ex post, people have a hard time reconstructing what their contribution was, and psychological literature shows a tendency of people to exaggerate (in their own mind) their successful interventions and to forget their failures. Some of the literature even suggests that it is entirely rational for participants to exhibit this form of over-confidence in their abilities and skill.<sup>69</sup>

Disputes over joint authorship illustrate this problem when people who admittedly contributed substantial value to a work claim—usually unsuccessfully—that their contributions rise to the level of “authorship” for copyright purposes.

Courts are generally unwilling to recognize multiple authors even when it is uncontested that multiple people are responsible for a work’s final form.<sup>70</sup> Currently, “authorship” also carries with it initial ownership of the copyright. Thus, litigation that adds a new joint author to a work, such as a film, substantially

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<sup>68</sup> See, e.g., Lastowka, *supra* note 5, at 1232–33 (recognizing this issue and arguing that consumer-protection attribution rights should only apply to works like novels, which have at most a few authors deserving attribution).

<sup>69</sup> Fisk, *supra* note 22, at 105. See generally CORYNNE MCSHERRY, WHO OWNS ACADEMIC WORK? BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY (2001) (discussing variations in credit norms and behaviors across academic disciplines, and persistent tendencies of everyone involved to feel slighted).

<sup>70</sup> See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231–35 (9th Cir. 2000); *Thomson v. Larson*, 147 F.3d 195, 204–05 (2d Cir. 1998).

disrupts the economic expectations of the film's producers, and creates potential licensing problems, since all authors must agree in order to grant exclusive licenses. This is likely an important reason that courts have adopted restrictive definitions of joint authorship, essentially requiring that the "main" author have consciously intended to share the specific legal status of authorship. Many scholars have persuasively criticized the current case law,<sup>71</sup> but as long as it exists, attribution rights will be insufficient for many people who, in lay terms, deserve credit for creative works. If we are interested in properly allocating credit among creative participants, we will have to reconstruct the definition of joint authorship.<sup>72</sup>

If we did create a special type of "attribution authorship" that carried with it no economic rights, legal recognition of multiple contributions might improve. This change would increase the number of line-drawing problems substantially, of course, but authorial high-protectionists might judge it worth the costs, if only to push copyright law to recognize the importance of multiply-authored works.<sup>73</sup> Consumer advocates, likewise, might endorse attribution rights for natural persons, because consumers may be far more interested in the identity of a film's director and cinematographer than in the identity of the studio that owns the copyright. Copyright low-protectionists, by contrast, are unlikely to see much gain from such a rule, because it would add rights without any tradeoff in increased access or freedom of re-use. Attribution would not substitute for compensation and control rights in such cases, because those rights would remain in other hands.

## 2. *Derivative Works*

Multiple authorship exists not just in isolated works, but in the even trickier category of derivative works. The Supreme Court invoked this problem in *Dastar* as one reason for limiting the application of the Lanham Act:

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<sup>71</sup> See, e.g., Roberta Rosenthal Kwall, "Author-Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine," 75 S. CAL. L. REV. 1, 57-58 (2001) (arguing that joint authorship need not imply equal rights, any more than tenancy in common does).

<sup>72</sup> Kwall clearly recognizes this interrelationship between authorship definitions and attribution rights. See 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, 990, 1001-02 (2002).

<sup>73</sup> Fisk points out a related problem: new legal attribution rights could increase perceived unfairness among those who don't qualify for the newly expanded categories. See Fisk, *supra* note 22, at 112 ("Any effort to identify contributors will create a subterranean group whose work goes unrecognized, and those who feel themselves to be closest to the line entitling them to recognition may feel wronged in a way that they would not feel if they were farther from the line and there were a larger group of anonymous contributors. The problem is inescapable in collaborative work because the law asks us to see distinct categories in a world in which people might otherwise see gradations.").

Without a copyrighted work as the basepoint, the word “origin” has no discernable limits. A video of the MGM film *Carmen Jones*, after its copyright has expired, would presumably require attribution not just to MGM, but to Oscar Hammerstein II (who wrote the musical on which the film was based), to Georges Bizet (who wrote the opera on which the musical was based), and to Prosper Mérimée (who wrote the novel on which the opera was based). In many cases, figuring out who is in the line of “origin” would be no simple task.<sup>74</sup>

It is possible that audiences might not care about the antecedents of a derivative work, but they might. Even without consumer confusion, authors are likely to want to control the use or omission of their names on derivative works, especially when those works reach new audiences.<sup>75</sup>

However, initial authors and derivative work audiences are unlikely to agree on what descriptions are truthful and significant. Movies made from comic books provide an easy example where credit will necessarily depend on audience assumptions about the relative contributions of the actors, directors, screenwriters, comic writers, and so on. The audiences for such movies are larger by orders of magnitude than the audiences for the original works. Precise division of credit would require each moviegoer to sit down and compare the comic (or the novel, or play, etc.) to the adaptation. This is not going to happen, because moviegoers want to see a movie, not to read a comic book. They could be informed that the work was changed from the original—but do they need an attribution right to figure that out? And all this merely addresses the relationship between the original author and the audience—the creators whose expression went into the derivative work will have strong opinions of their own about credit and blame, which will likely conflict with the original author’s.

One senses that the practice of licensing someone else to develop a derivative work is itself something that high-protectionist moral-rights proponents find odd and a little distasteful. The widespread practice of surrendering artistic control to another’s judgments—even if the original author exercises supervisory powers, which she often does not—is in tension with the basic moral-rights claim that authors have unique and inviolable connections to their own works. It is therefore no surprise that attribution problems are particularly tricky in such situations.

A related problem raised by derivative works is the problem of blame, which is the flip side of attribution.<sup>76</sup> If an attribution right is applied beyond the copyright owner’s right to control use, the practice of giving credit might lead audiences to assume that the copyright owner endorsed the work at issue. In the orphan-works context, one commentator discussed the example of a song whose

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<sup>74</sup> *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35 (2003).

<sup>75</sup> See *King v. Innovation Books*, 976 F.2d 824 (2d Cir. 1992) (concerning credit for a movie based, at least in theory, on a short story by Stephen King).

<sup>76</sup> Fisk refers to this as the “discipline function” of attribution. See Fisk, *supra* note 22, at 61–62.

creator is known but unfindable. Under an orphan-works regime, the producers of a pornographic film could use the song as long as they gave proper credit—but the songwriter might not appreciate that credit very much.<sup>77</sup> Attribution would disclose one truth, the source of a work, while potentially distorting another—the author's relationship to the use at issue.<sup>78</sup>

Neither authorial high-protectionists nor consumer advocates would see an unqualified good in such cases of undesired attribution. Again, low-protectionists might accept these consequences in order to get more freedom to use orphan works; but that is merely to say that attribution is doing other work for them than vindicating authors' interests in controlling credit.

Most economically significant copyrighted works—the kinds most likely to generate litigation—are the products of multiple creators' efforts, whether jointly (movies), sequentially (derivative works), or both (*Batman Begins*). The more cooks adding ingredients to the recipe, the more difficult it is to identify responsibility for the final result, and the more room there is for disagreement, reasonable and otherwise. Attribution for screenwriters of Hollywood films, for example, is subject to elaborate standards developed by industry experts over decades, yet it still routinely produces disputes requiring arbitration.<sup>79</sup> Screenwriting credits can be significantly removed from responsibility for what actually gets filmed, and industry participants know this. However, credit is still a matter of pride, and screenwriting credit also determines entitlement to residual royalties.<sup>80</sup> Given the high stakes in money and ego, the industry has significant

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<sup>77</sup> See 43(B)log, Orphan Works, Panel 2, part 2, <http://tushnet.blogspot.com/2006/03/orphan-works-panel-2-part-2.html> (Mar. 7, 2006, 14:30 EST) (reporting comments of Jay Rosenthal of the Recording Artists Coalition at *Orphan Works: New Prospects for a Solution*, American University, Washington College of Law, Feb. 24, 2006); see also 43(B)log, Orphan Works Find Home at AU, <http://tushnet.blogspot.com/2006/03/orphan-works-find-home-at-au.html> (Mar. 6, 2006, 22:29 EST) (reporting comments of Mitch Glazer of the Recording Industry Association of America (RIAA) at the same conference; Glazer pointed out that a user of an orphan work might be only fifty percent sure about who the creator was; an unalloyed attribution requirement therefore risks false credit and false blame).

<sup>78</sup> See discussion *infra* Part III.B for one possible response to the problem of undeserved blame.

<sup>79</sup> For a description of the system, see Fisk, *supra* note 22, at 77–80. Fisk notes that in 2002, “67 of 210 feature film writing credits were arbitrated.” *Id.* at 79.

<sup>80</sup> See Kung Fu Monkey, Writing: Arbitration Letters, <http://kfmonkey.blogspot.com/2007/03/writing-arbitration-letters.html> (Mar. 15, 2007 10:14 MST) (“The main reason people want credit on a movie is not for bragging rights or employment; everybody in Hollywood knows what kind of writer you are based on your scripts circulating through the studio system. . . . To be blunt, after reading the shooting script of CATWOMAN, I was pretty dubious about having my name on it . . . . But then . . . I thought about the two odd years of shitty, shitty development, weekly meetings with ungodly notes until finally they asked me to leave because I’d gotten too truculent with my insistence that if we made the movie the way they wanted, *it would suck* . . . and I considered any possible residuals the bonus pay for that experience.”).

incentives to develop a workable credit scheme, but its rules still consistently engender disputes and resentment.<sup>81</sup> As one screenwriter points out, the routine use of arbitration encourages screenwriters to vent, and perhaps fixate on “the various frustrations they’ve felt at the film development process,”<sup>82</sup> which are many. While he finds the results of arbitration generally reasonable, he observes that “every now and then some infamously bizarre decision will come down the pipe that’s so disturbingly arbitrary, it reinforces the sense of panic and helplessness most writers feel . . . well, every day-ish.”<sup>83</sup> It is unlikely that copyright law could succeed where industry experts have repeatedly just muddled through.

Given the difficulty that a highly concentrated industry has with managing attribution, developing new legally enforceable attribution norms in less-well-organized mediums would be a daunting prospect. Right now, these disputes are left to the private realm, resolved (often unsatisfactorily) by moral suasion or contract. Law could not do better.

#### *D. Author's Rights and the Problem of Pseudonymity*

Many of the problems discussed so far can be, if not avoided, rendered less weighty. If one only considers the author’s own interests in attribution, the fact that a literally correct attribution might not succeed in getting audiences to assign proper credit is not the death knell for an attribution right.

Roberta Rosenthal Kwall defends the attribution right as a way to defend the integrity of an author’s work, though not as a traditional “integrity right.”<sup>84</sup> She argues that misattribution distorts the meaning and message of an author’s work. Because preserving the author’s message to his audience is part of her concern, it may be the case that an explicit but ineffective disclaimer would not vindicate the author’s right as she defines it.<sup>85</sup> Yet even if we treated the author’s right as an

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<sup>81</sup> *See id.* (“Now the insane ugly truth here is that trying to turn the difference between “Story by” and “Screenplay by” and “Written by” into solid, actionable guidelines for the arbitrating readers is, well . . . insane. Despite the best efforts of the Guild folk . . . the guidelines somehow manage to be both authoritative and vague. . . . Each screenwriter . . . gets to write a letter . . . in which *we* argue out how *we* interpret these objectively/subjective guidelines applying to the scripts in question, supporting the credits we think are fair. . . . The real thriller is that you have no idea what other writers are claiming. Some guys come on hard on arbitration because *they* got fucked on *their* last project, and now it’s time for the hate to run downhill.”) (first ellipsis in original).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See* Kwall, *supra* note 20, at 743; Kwall, *supra* note 3, at 1972–73.

<sup>85</sup> *See* Kwall, *supra* note 3, at 2008–09 (“The proposed standard . . . is designed to facilitate public knowledge of the original author’s message regarding works possessing these qualities . . . . [A]s an authorship norm dignity demands an external embodiment allowing the inner personality to commodify and explain itself to the outside world. This conception of dignity requires a public linkage between the author’s inner labor and its external embodiment.”) (footnotes omitted); *see also supra* text accompanying notes 62–67

entirely formal one, designed to give him the satisfaction of knowing his message was out there, the author-centered view must be balanced against audience interests. On its own, it fails to justify an attribution right.

The limitations of the author-centered view can be seen in its unqualified endorsement of rights to publish anonymously or to use a pseudonym, including a pseudonym that adopts a particular identity. In some situations, identifying a work with a particular person has profound effects.<sup>86</sup> A Holocaust survivor, for example, may wish to create works using that epithet rather than a personal name in order to universalize her experience; identifying the work with a particular human being could change the artist's relationship to the work as well as the audience's reaction.<sup>87</sup> Or a pamphleteer could use a pseudonym suggesting group authorship in order to give her political opinions the credibility attached to an organized group; forcing her to use her own name would blunt message.<sup>88</sup> Kwall does not explicitly address unauthorized derivative works or uses of excerpts such as those made by Lethem in this context, but Lessig's experience suggests that an unattributed quotation can interfere at least with the author's relationship to his work—his pride in creating a uniquely felicitous expression.<sup>89</sup>

The problem with attribution rights as integrity rights is the problem with traditional integrity rights. That is, there are good reasons to deny authors control over *interpretations* of their works, including interpretations driven by authorial identity. More specifically, the Holocaust survivor, the woman who has had an abortion, and the soldier who has served in Iraq, among others, may understandably want their experiences to be taken to represent the standard, normal, or consensus experience of people in their positions. I have no quarrel with the idea that the First Amendment generally bars government from requiring them to disclose their identities. But if someone else knows and identifies the author of an anonymous or pseudonymous work, that information can also clarify matters for the audience, even if it distorts the author's intended message.<sup>90</sup>

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(arguing that author-focused justifications for attribution rights nonetheless must consider audience perceptions).

<sup>86</sup> For discussion of the ways in which anonymity can change both speakers' expression—their willingness to say particular things—and audiences' reactions, see Lyriisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1550, 1568–69 (2007).

<sup>87</sup> See Kwall, *supra* note 20, at 744 (discussing Heymann, *Birth of the Authornym*, *supra* note 22, at 1406).

<sup>88</sup> See Kwall, *supra* note 20, at 746–47 (discussing Heymann, *Birth of the Authornym*, *supra* note 22, at 1430, and the facts of *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)).

<sup>89</sup> Jessica Silbey suggested to me that Lessig's protest was tongue in cheek. Lethem and I took him seriously; if we were wrong, though, that just adds another strike against the concept of transparent authorial meaning.

<sup>90</sup> Cf. *McConnell v. FEC*, 540 U.S. 93, 128 & n.23, 197 (2003) (decrying misleading use of names in campaign-related advertising); Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 85 (1991) (arguing that a speaker's true identity is important information

Joe Klein published *Primary Colors*, the Bill Clinton campaign *roman à clef*, as a novel by “Anonymous,” but his position in the campaign was quite relevant to many readers’ understanding of the novel.

Likewise, the anonymous pamphleteer wants to seem to represent a mass movement by calling the pamphlet the work of “concerned citizens.” Yet, if she actually represents a movement of one, that is important information for her audience to know, especially insofar as she is relying on apparent popularity as rhetorical technique.<sup>91</sup> Indeed, in commercial contexts, this type of misrepresentation is actionable false advertising.<sup>92</sup> “The public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.”<sup>93</sup>

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for audiences evaluating the persuasiveness of that speaker’s claims); Lidsky & Cotter, *supra* note 86, at 1545, 1559–61 (claiming authorial identity can be a vital component of a message, and anonymity can deprive audiences of key information), 1576 (discussing authors who favorably review their own work anonymously or pseudonymously, attempting to deceive readers).

<sup>91</sup> See Lidsky & Cotter, *supra* note 86, at 1544 (suggesting that the Supreme Court in *McIntyre* “gloss[ed] over the implication that others supported the arguments made in the handbill” (citing *McIntyre*, 514 U.S. at 337)).

<sup>92</sup> See, e.g., *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2d Cir. 1981) (finding that an ad misrepresenting consumer preference survey results was false advertising). Heymann acknowledges that accurate biographical information can be important, but points out that her argument for recognizing rights in invented “authornyms” does not prevent anyone from investigating and publicizing truthful information. See Heymann, *Birth of the Authornym*, *supra* note 22, at 1426. (By contrast, Kwall’s author-centered view of attribution sees unmasking a pseudonym as a moral wrong.) I am unconvinced that Heymann sufficiently addresses the problem of deceptive authornyms. While more speech is sometimes the only available corrective for false speech, in trademark and false advertising law, to which she analogizes authornyms, producers have no right to make false claims about provenance just because someone else could advertise the truth. Indeed, the point of trademark and false advertising law is to provide a legal remedy to stop false claims and obviate the need for counterspeech.

<sup>93</sup> *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 387 (1965) (citation omitted). *Colgate-Palmolive* upheld the FTC’s finding that it was deceptive to show a simulated product test in a television advertisement as if it were a recording of a real test, even though real tests produced the same results, but did not look good on television. *Id.* at 377. The Court analogized to trademark law, which bars passing off even when the defendant’s goods are of equal quality:

[T]he seller has used a misrepresentation to break down what he regards to be an annoying or irrational habit of the buying public—the preference for particular manufacturers or known brands regardless of a product’s actual qualities, the prejudice against reprocessed goods, and the desire for verification of a product claim. In each case the seller reasons that when the habit is broken the buyer will be satisfied with the performance of the product he receives. Yet, a misrepresentation has been used to break the habit and . . . a misrepresentation for such an end is not permitted.

The problem of misrepresentation via pseudonym has arisen most often with authors who write as if they belonged to historically disadvantaged minority groups, but in fact were members of the majority. In such cases, the construction of an authorial identity is linked very closely to the message of the works, but that is precisely what audiences (and minority authors forced to compete with faux-minority authors) find objectionable when the deception is exposed.<sup>94</sup> And deception is the right word, even if the author feels justified in adopting a different identity in order to get her work taken seriously. It may not much matter whether John Grisham is really a lawyer.<sup>95</sup> But it matters a fair amount whether “Justin Anthony Wyrick Jr.,” a top-rated provider of legal advice on the advice website AskMe.com, was “a law expert with two years of formal training in the law” who had been “involved in trials, legal studies and certain forms of jurisprudence” (as he claimed) or whether he was a fifteen-year-old relying on *Law and Order* episodes for his expertise (as he in fact was).<sup>96</sup>

“Wyrick” was never a moral-rights claimant, and his advice, while copyrighted because it was delivered in written form, probably would not qualify for protection in a moral-rights regime that required a heightened originality standard. I use him as an example to show that the source’s identity routinely matters, and that the ways in which it matters will be difficult to define in advance because of the myriad modes of and reasons for human communication.<sup>97</sup>

To take a more literary example, James Frey’s *A Million Little Pieces* became a bestseller largely on the strength of its claims to autobiographical detail. When it

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*Id.* at 389. Similarly, authors may attempt to attract readers by adopting a persona with specific identifying features; if the readers enjoy the story, the impulse is to say that no harm has been done. But the authors of the works the readers would have purchased instead, had they known the truth, would probably disagree. And sometimes, the readers may feel harmed if they attributed special value to works by an author who pretended to come from a particular group.

<sup>94</sup> See Heymann, *Birth of the Authonym*, *supra* note 22, at 1400–01 (noting that audiences often react with anger and accusations of betrayal when the author’s ethnic identity is revealed). For general discussion of creating in another’s voice, see BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 71–136 (Bruce Ziff & Pratima V. Rao eds., 1997); RANDALL, *supra* note 40, at 56; SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 90–102 (2005).

<sup>95</sup> See Heymann, *Birth of the Authonym*, *supra* note 22, at 1422–23 (“So long as the fan of Grisham’s novels can identify those novels branded with Grisham’s authonym and distinguish them from others, he need not know any details of Grisham’s ‘true’ identity—indeed, ‘John Grisham’ can be female or a nonlawyer or a collective authorial endeavor.”).

<sup>96</sup> See Michael Lewis, *Faking It*, N.Y. TIMES, July 15, 2001, § 6 (Magazine), at 32.

<sup>97</sup> Modern audiences may dislike pseudonyms precisely because the cult of the author has had such success. See STEPHEN KING, THE BACHMAN BOOKS: FOUR EARLY NOVELS BY STEPHEN KING ix (1985) (“There is a stigma attached to the idea of the pen name. . . . As respect for the art of the novel rose, things changed. Both critics and general readers became suspicious of work done by men and women who elected to hide their identities. *If it was good*, the unspoken opinion seems to run, *the guy would have put his real name on it.*”).

turned out that his biography differed substantially from the life described in his book, public outrage followed, along with fraud lawsuits and, ultimately, a settlement from the publisher.<sup>98</sup> If Frey had not been found out, however, he and his publisher would have continued to profit. As Lastowka puts it, “[m]isattribution of authorial identity is valuable to those who engage in it precisely *because* it deceives the public.”<sup>99</sup>

Laura Albert’s novel *Sarah* also involved a misrepresentation of identity that resulted in a lawsuit. *Sarah* is about a 12-year-old male prostitute in competition with his mother for tricks, which Albert wrote under the penname J.T. LeRoy.<sup>100</sup> *Sarah* was promoted as a novel with substantial autobiographical elements, but it was not.<sup>101</sup> Because of the apparent realism, LeRoy received a movie deal, but the filmmaker’s financing collapsed when Albert was exposed as an older, female author instead of the young man she had constructed.<sup>102</sup> The film company sued. Its federal false advertising and passing off claims were dismissed based on *Dastar*, but its state-law fraud claim survived,<sup>103</sup> and a jury found in its favor.<sup>104</sup> This incident illustrates the substantial harm that can be done by misrepresentations of identity, mainly because some audiences members resent

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<sup>98</sup> See Samantha J. Katze, *A Million Little Maybes: The James Frey Scandal and Statements on a Book Cover or Jacket as Commercial Speech*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 207, 208, 210–11 (2006); Alex Beam, *A Million Little Lawsuits*, BOSTON GLOBE, May 28, 2007, at 6D; cf. Jessica Silbey, *Criminal Performances: Film, Autobiography, and Confession*, 37 N. MEX. L. REV. 189, 189–93 (2007) (situating the Frey controversy in debates over authenticity and the reconstruction of past events).

<sup>99</sup> Lastowka, *supra* note 5, at 1227; cf. Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 131 (2006) (arguing for mandatory disclosure of commercial intent when advertisers sponsor speech, whether as product placement in media or “astroturf” word-of-mouth endeavors, in order to properly inform audiences who are deceived into thinking that such speech results from the speakers’ independent judgment).

<sup>100</sup> See generally J.T. LEROY, SARAH (2000) (presenting herself as J.T. LeRoy, Laura Albert created an author with a history of prostitution, drug addiction, and vagrancy).

<sup>101</sup> See Alan Feuer, *Going to Court over Fiction by a Fictitious Writer*, N.Y. TIMES, June 15, 2007, at B1 (“Mr. LeRoy seemed at first to be a hot commodity in today’s biography-obsessed literary world, a gifted writer with a grotesquely compelling story that only enhanced the value of the work.”).

<sup>102</sup> See *id.* (stating that the director wanted to “blend elements of J.T. LeRoy’s biography into the narrative of ‘Sarah’ in . . . a film about ‘how art could emerge from a ruined childhood,’” but “[t]he trouble was there was no ruined childhood from which art could actually emerge,” and the commercial prospects of the film were threatened because “[t]he whole autobiographical back story aura that made this so attractive was a sham” (quoting the director’s lawyer)).

<sup>103</sup> See *Antidote Int’l Films, Inc. v. Bloomsbury Publ’g, PLC*, 467 F. Supp. 2d 394, 396–97 (S.D.N.Y. 2006).

<sup>104</sup> See Alan Feuer, *Jury Finds ‘JT LeRoy’ Was Fraud*, N.Y. TIMES, June 23, 2007, at B1.

being asked to give greater credibility to a story based on the storyteller's identity when the storyteller's identity is itself a fiction.<sup>105</sup>

Nonetheless, not all voluntary misattributions should be considered false advertising or trademark misuse. Lastowka considers instances of writing under a real author's "brand name" to be deeply troubling, as when Tom Clancy licensed his name for a line of adventure novels or when V.C. Andrews' estate authorized further "V.C. Andrews" novels featuring Andrews' well-known (one might say "trademark") trope of "troubled young girls surviving perverse torments inflicted by demented adults."<sup>106</sup> He recounts instances in which readers expressed dismay at learning that the named author did not write the books, and others in which readers were apparently confused as to authorship.<sup>107</sup> He asserts that there is little reason to think that ghostwriting of this sort produces any public benefits.<sup>108</sup>

Yet Lastowka's analysis suffers from the general flaw of discussions of attribution: the failure to recognize that information that is confusing and even deceptive to some people is helpful to others. People who want to read stories about troubled young girls surviving perverse torments inflicted by demented adults, for example, can use the V.C. Andrews name/brand as a useful shortcut.<sup>109</sup>

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<sup>105</sup> There are degrees of belief, of course. We do not believe that reality TV or Michael Moore's films are completely unstaged. The question of when law should attempt to create a space in which we can believe certain claims, in the service of preserving mutual trust and respect, is an extremely complicated one. Without denying that audiences can be sophisticated in evaluating the constructedness of a narrative, I would argue that too great a divergence from the conventions of a form such as autobiography or documentary can deceive and harm audiences. Consider, for example, the difference if Michael Moore had hired actors to portray healthcare-seekers in his film *Sicko* and did not disclose that fact, as opposed to shooting hundreds of hours of footage and choosing only that which supported his case. I thank Jessica Silbey for pressing me on this point.

<sup>106</sup> Lastowka, *supra* note 5, at 1225.

<sup>107</sup> *See id.* at 1224 & nn.258–59.

<sup>108</sup> *See id.* at 1227.

<sup>109</sup> Lastowka suggests that the ghostwritten V.C. Andrews novels harm other authors writing under their own names, because readers' money and attention are zero-sum. *See id.* at 1240. However, he does not take into account the efficiency of trademarks as brands. Other authors might be able to cut deals with the V.C. Andrews estate if they could show an ability to satisfy readers' demands for stories about troubled young girls surviving perverse torments inflicted by demented adults. Even if they could not write for the V.C. Andrews brand, it is not clear why those other authors are entitled to get readers instead of the estate-authorized ghostwriter just because they are using their own, non-established names. They might be writing better books (by whatever standard one wants to apply), but readers still face costs in sorting through all the possibilities and finding ones that satisfy their preferences, and the V.C. Andrews estate has centralized and applied its publishing expertise to the problem, which may be the most efficient result. By contrast, when an author pretends to be a member of a minority or historically disadvantaged group, the history of domination, exploitation, and silencing may create a cognizable harm to authors who are truly from that group. *See supra* note 90 and accompanying text. Special concerns arise when a nonmember speaks for, and in the place of, a minority group given that

It is an empirical matter whether the use of a name this way hurts more consumers than it helps.<sup>110</sup> Given the massive sales of multiple ghostwritten V.C. Andrews novels over decades, one could easily argue that the brand is performing its intended function. Those readers who have never learned that Andrew Neiderman is the current ghostwriter behind the novels would be harmed if he was forced to publish only under his name because they would have difficulty finding the new source of the works they desire. Moreover, even the discomfort felt by some readers who discover that Andrew Neiderman is the author of recent V.C. Andrews books has a potential upside: it may demonstrate to them that the author is not always unique or irreplaceable, encouraging them to play with favorite characters and situations themselves.<sup>111</sup>

Thus, I am not advocating a ban on ghostwriting or on adopting another identity, which can have valuable and liberating effects for the author.<sup>112</sup> But considering only the author's interest in controlling attribution discounts the audience's powerful interests in deciding for itself whether the author has the authority to be speaking as she does.

### III. LESSONS FOR LEGISLATION

Adding a new, generalized attribution right to American copyright law would be a mistake at this time, despite the strong moral claims to attribution that authors have in many circumstances. The additional complexity and uncertainty that would be generated would outweigh the benefits to authors. But there are other ways to encourage attribution, for instance through norms and "best practices" such as those set out by documentary filmmakers. The filmmakers have attempted to define when it is fair use to incorporate others' copyrighted works in their films without seeking expensive, and often unavailable consent, and have made attribution a cornerstone of their best practices.<sup>113</sup> There are also smaller reforms

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audiences are likely to confer special authority and credibility on authors who present themselves as minority-group members.

<sup>110</sup> For example, in the Frey and Albert cases discussed above, some readers might have treated the authors' supposed autobiographical information as irrelevant or merely entertaining, regardless of its truth value. *See supra* notes 94–101 and accompanying text. The key issue is whether the harms to those who are deceived outweighs the benefits to those who are not.

<sup>111</sup> *See* Weather Pattern, *The Bourne Redundancy*, <http://www.weatherpattern.com/2007/08/the-bourne-redundancy/> (Aug. 20, 2007, 8:26 PM) ("If [authorized books] are of equal or perhaps even better quality of the original author, readers start asking what makes the original author so special? If the new books are bad, readers start questioning why one author gets the privilege of penning new works and they may be more apt to enter the world of fan fiction. . . . The application and defense of an author's rights extending beyond his death may actually encourage the weakening of those rights.").

<sup>112</sup> *See* Heymann, *Birth of the Authornym*, *supra* note 22, at 1398–99.

<sup>113</sup> *See* ASS'N OF INDEP. VIDEO & FILMMAKERS ET AL., *DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE 3–7* (2005), *available at* <http://www.centerfor>

that, like the addition of VARA and the DMCA's provisions on CMI, could introduce attribution rights in dribs and drabs. This section considers two such proposals.

### A. Attribution and Fair Use

Greg Lastowka, like the filmmakers, considers attribution an important element in establishing fair use. He has proposed amending the Copyright Act to make attribution to the author an explicit fifth factor for courts to consider in assessing fair use defenses.<sup>114</sup> He argues that this would correct the doctrine's current focus on commercial exploitation and compensation, to the exclusion of other incentives for creation.<sup>115</sup> Credit, he argues, is a powerful and increasing motive for creativity, and should be recognized as such in our fair use doctrine.<sup>116</sup>

I have argued in the past that the presence of disclaimers should influence fair use determinations, at least in the context of fan fiction and other unauthorized creative works based on popular media texts.<sup>117</sup> Although I still believe this, I disagree that attribution should be inserted into § 107 for consideration in every case. Whether the statutory factors determine results in litigated cases, or whether courts manipulate them to reach what they deem to be the overall proper result, is a matter of much debate.<sup>118</sup> Assuming that a new factor would influence outcomes, however, Lastowka's proposal raises some of the problems discussed above, albeit in the limited context of fair use.

Will attribution be owed to individual "authors" in the lay sense, or to the entities that are authors for purposes of copyright because they are the proprietors of works for hire? If the former, this will be a significant inroad into the work-for-hire principle, and one that may pose substantial difficulties for would-be fair users who are not in the ideal position to identify the individual author of a work for hire. If the latter, attribution to a corporate owner has less of a moral and practical pull; in Lastowka's terms, corporate owners of works for hire are less likely to be

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[socialmedia.org/files/pdf/fair\\_use\\_final.pdf](http://socialmedia.org/files/pdf/fair_use_final.pdf) (recommending attribution as part of the best case for fair use in documentaries).

<sup>114</sup> See Lastowka, *supra* note 5, at 48–53. Specifically, this fifth factor should be “the provision of attribution, in a manner reasonable under the circumstances, to the author of the work.” *Id.* at 49.

<sup>115</sup> See *id.* at 49.

<sup>116</sup> See *id.* at 48, 53–54.

<sup>117</sup> See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 680 (1997).

<sup>118</sup> See, e.g., David Nimmer, “*Fairest of Them All*” and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 280 (“Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same.”); cf. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 PA. L. REV. (forthcoming 2007) (identifying particular factors and subfactors that appear to be important in driving outcomes, and others that are unimportant).

incentivized by credit than individual authors.<sup>119</sup> Separately, an attribution rule keyed to current ownership would conflict with the norms of attribution, in that users sometimes identify an *auteur* figure such as a director or producer as the person to whom credit is due even when a corporation is the copyright owner and legal author.

Even if we choose individual authors over owners for fair use purposes, lay practices do not generally allocate credit for multiply-authored works. The *auteur* idea is common and convenient even when other creators such as screenwriters are directly responsible for much of the final product. Thus, for example, fan fiction and other unauthorized fan-created works based on the television show *Buffy the Vampire Slayer* often praise creator Joss Whedon, but rarely if ever list all the writers and other creative contributors.<sup>120</sup> Likewise, people citing song lyrics routinely identify the singer or group most strongly associated with the song, rather than the composer. Noncommercial, transformative uses, including quotations, would therefore often lack proper attribution from a strict legal standpoint, even though such uses should be and currently are specially favored in fair use analysis.<sup>121</sup>

Assuming this problem can be solved, or accounted for in the overall fair use analysis, an explicit attribution requirement fails to take into account ways in which the relevant audience's knowledge may itself substitute for attribution.<sup>122</sup> If a work is famous enough, attribution may be distracting or even a bit insulting to the audience's intelligence. Lastowka quotes the important Second Circuit case of *Rogers v. Koons* to show that fair use determinations already take attribution into account. He does not consider, however, the implications of the court's references to the audience's awareness:

[The public must be aware of the original work] to insure that credit is given where credit is due. By requiring that the copied work be an object

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<sup>119</sup> The argument for attribution rights with which Lastowka begins his article, Ralph R. Shaw's *Copyright and the Right to Credit*, even distinguishes an author's interest in credit, which might be maximized by distributing a work for free, from his publisher's interest in compensation, which is necessary for the publisher to survive. See Ralph R. Shaw, *Copyright and the Right to Credit*, 113 SCIENCE 571, 752 (1951), quoted in Lastowka, *supra* note 5, at 1.

<sup>120</sup> See Tushnet, *supra* note 11, at 154; Tushnet, *supra* note 117, at 669 n.84, 679 n.135 (examples of attribution to *auteur*).

<sup>121</sup> The argument for attribution rights with which Lastowka begins his article, Ralph R. Shaw's *Copyright and the Right to Credit*, even distinguishes an author's interest in credit, which might be maximized by distributing a work for free, from his publisher's interest in compensation, which is necessary for the publisher to survive. See Ralph R. Shaw, *Copyright and the Right to Credit*, 113 SCIENCE 571, 752 (1951), quoted in Lastowka, *supra* note 5, at 1.

<sup>122</sup> See Tushnet, *supra* note 11, at 160. Trademark doctrine also holds that context can make proper source attribution clear; explicit disclaimers are not required in order for parodies to be nonconfusing and noninfringing. See, e.g., *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g. Group, Inc.*, 886 F.2d 490, 496 (2d Cir. 1989).

of the parody, *we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist. This awareness may come from the fact that the copied work is publicly known* or because its existence is in some manner acknowledged by the parodist in connection with the parody.<sup>123</sup>

As I have written elsewhere, if I say that life is “a tale/Told by an idiot, full of sound and fury,/Signifying nothing,” I hardly expect readers to think the words are mine,<sup>124</sup> and only a law review would require a citation. So, when the author of a popular series of humorous movie summaries decried plagiarism, she concluded her denunciation with “Do not post it in a box, do not post it on a fox. I do not like creative theft and ham, I do not like it, Jerk I Am.”<sup>125</sup> Then she added a footnote instructing critics not to accuse her of plagiarism because “you know damn well what this is from.”<sup>126</sup>

Perhaps Lastowka’s requirement of reasonable attribution would include attribution that is obvious because of the popularity of the infringed work, but it is hard to imagine copyright plaintiffs conceding that. A fifth fair use factor could easily give them new ammunition to argue that a defendant’s attribution was too limited and the use therefore unfair. Fourteen years after *Koons v. Rogers*, he won a similar fair use case involving uncredited appropriation of a not particularly recognizable fashion photograph, which he combined with other images to comment on the pleasures and dangers of our consumption-oriented society.<sup>127</sup> The Second Circuit’s analysis this time did not mention credit, focusing instead on the transformative nature of the use. Under Lastowka’s proposal, Koons’s use would have had an additional strike against it, despite the relative unimportance of the sources of his borrowed images to his message.

Fair use is already uncertain enough for defendants, and a new variable is likely to worsen matters. Instead, fair use should treat attribution flexibly, taking it into account where appropriate. The current test allows for that already and is not in need of revision. There may, however, be cases in which new user rights can be coupled with attribution requirements in a productive manner.

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<sup>123</sup> *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (emphasis added), *quoted in* Lastowka, *supra* note 5, at 52.

<sup>124</sup> *See* Tushnet, *supra* note 11, at 155; *see also* RANDALL, *supra* note 40, at 5; Posting of Geoffrey K. Pullum, Language Log: Plagiarism and Allusion, (June 12, 2007, 20:16), <http://itre.cis.upenn.edu/~myl/languagelog/archives/004598.html> (“It’s plagiarism if you copy someone’s writing and you don’t want it to be noticed that you were copying; it’s allusion if you do exactly the same but you do want it to be noticed. . . . [In making an uncredited allusion,] I intended there to be not just recognition of the quote but also mutual recognition of our mutual knowledge state.”).

<sup>125</sup> *Movies in Fifteen Minutes*, <http://community.livejournal.com/m15m/4155.html> (July 1, 2004, 13:17:00 EST).

<sup>126</sup> *Id.*

<sup>127</sup> *See* *Blanch v. Koons*, 396 F. Supp. 2d 476 (S.D.N.Y. 2005), *aff’d*, 467 F.3d 244 (2d Cir. 2006).

*B. The Paternity of Orphan Works*

Orphan works offer another area of possible legislative reform. In this case, there is substantial momentum for change, and attribution will likely be part of a solution. The Copyright Office's proposal mentioned above has set the terms for further debate. It provides that if a user made a reasonable search for the copyright owner but failed to locate her, and if the user provided attribution to the author and the copyright owner "if such attribution is possible and as is reasonably appropriate under the circumstances," then significant limitations on remedies would apply in the unlikely event that the copyright owner later resurfaced.<sup>128</sup> The Copyright Office concluded that attribution would facilitate notice to the copyright owner that her work was being used and deter abuse of the orphan works protection, and that attribution is independently valuable to authors even when their works are used without consent.<sup>129</sup>

I am in favor of orphan works legislation, but the Copyright Office's proposal with respect to attribution should be modified. Attribution alone is too subtle a signal if the desire is to encourage copyright owners to come forward. Moreover, as noted above and as Kwall argues, attribution in the context of derivative works may give the appearance of consent, which may be mistaken and even deeply offensive to an author. If it is possible and appropriate to give attribution, it is also possible and appropriate to state that the work is being used as an orphan work.<sup>130</sup> This is not to say that such a designation will always be helpful—it may rarely be

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<sup>128</sup> REPORT ON ORPHAN WORKS, *supra* note 19, at 110. The Office's proposed statutory language incorporates this language, which is designed to be flexible. *See id.* at 127. The Orphan Works Act of 2006, legislation introduced by Representative Lamar Smith, used similar language requiring attribution, "in a manner reasonable under the circumstances, to the author and owner of the copyright, if known with a reasonable degree of certainty based on information obtained in performing the [required] reasonably diligent search." H.R. 5439, 109th Cong. § 514(a)(1)(B) (2006), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.5439>.

<sup>129</sup> REPORT ON ORPHAN WORKS, *supra* note 19, at 111–12.

<sup>130</sup> The reply comments of the Association of American Publishers (AAP) provide an objection to my proposal: The AAP points out that copyright law generally does not require attribution, nor does it require users to identify the particular exceptions they are relying on when they proceed without the copyright owner's consent. Joint Reply Comments Concerning "Orphan Works" from the AAP to Jule L. Sigall, Assoc. Register for Pol'y & Internal Affairs, U.S. Copyright Office 6 (May 6, 2005), <http://www.copyright.gov/orphan/comments/reply/OWR0085-AAP-AAUP-SIIA.pdf>. That is not a huge problem, but the AAP points out that an orphan-works designation might itself be misleading. *See id.*; *cf. id.* at 4 (expressing a concern that "orphan work" not become a status that applies to a work for all time, but rather a designation that applies to a particular use of a work because that specific user's search was reasonable, but failed). The question is, as always, the balance of harms; if, as almost everyone agrees, "parents" essentially never show up to reclaim their orphans, any cost of an explicit designation would be minimal—though perhaps the benefit, too, would be limited, as unknown and unfindable authors/owners would almost never be harmed by false assumptions that they had authorized a particular use.

noticed, much less understood by nonexpert audiences. Yet an explicit designation of orphan work status would be a relatively low-cost way of signaling lack of consent, in the context of a special protection that already requires users to jump through various hoops and include attribution information.<sup>131</sup>

The orphan works proceedings also offer insight into the ways in which attribution rights are deeply linked to author-centered concepts of copyright and to integrity rights. The Copyright Office's report repeatedly emphasizes that the copyright in orphan works is often held by entities other than the individual creators, which is part of what makes the problem so difficult for would-be users.<sup>132</sup> In response to this observation, the Directors Guild of America suggested that film directors, who generally are not authors but rather participants in the creation of works for hire, be given backup rights to authorize uses of orphan works when the copyright owner cannot be found.<sup>133</sup> The Copyright Office rejected this proposal,<sup>134</sup> but its own proposal to require attribution to both author and copyright owner, despite the fact that only the copyright owner has an economic interest in being notified of the use,<sup>135</sup> indicates the kinship between attribution rights and other author-centered rights.

#### IV. CONCLUSION: AUTHORS' RIGHTS IN AN OWNERSHIP SOCIETY

There are powerful arguments that American copyright law should be rebalanced to give more weight to the interests of authors of creative works, rather than the owners of the economic rights in those works. Attribution rights could be a part of a package of authorial rights. On their own, however, they are too alien to our copyright law to work well with the rest of the system, especially given the complexities of credit in context.

I have identified three types of proponents of attribution rights. Authorial high-protectionists seek recognition for the natural rights of creators and their

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<sup>131</sup> Labeling can have epistemic value as a practice even if labels' specific contents are widely ignored. Knowing that labels exist, in other words, has value in assuring audiences that they can trust what they see independent of knowing what the labels say. *Cf.* Goodman, *supra* note 99 (arguing for the merits of a system in which audiences can generally trust speakers). Attribution may also have specific value to certain practice communities that regularly reuse existing work, such as fan fiction writers and fan video creators or documentary filmmakers, as part of their self-definitions. *See* Tushnet, *supra* note 11, at 154–60. But these epistemic values do not justify a legal attribution right, which exists largely to correct mistakes or malfeasance in labels that are, in fact, generally present and thus already conferring their epistemic benefits as signifiers that a citation of a prior work has occurred or that a particular person claims authorship.

<sup>132</sup> *See* REPORT ON ORPHAN WORKS, *supra* note 19, *passim*.

<sup>133</sup> *See id.* at 107 n.365 (proposal of Directors Guild of America).

<sup>134</sup> *See id.* (“[The proposal] go[es] well beyond the scope of this study, and touch[es] upon fundamental issues about how rights and interests in the exploitation of motion pictures are apportioned.”).

<sup>135</sup> *See id.* at 111 (“Attribution will help facilitate the marketplace transactions that are the primary goal of the recommended solution to the orphan works problem.”).

special connections to their works. Copyright law-protectionists favor credit instead of control of downstream uses of copyrighted works. Trademark-style consumer protectionists consider authorship relevant information for audiences to consider. Each set of justifications is directed at different goals and each has somewhat different responses to the problems I have identified. Often, these justifications may even be in tension with one another, compounding the uncertainties involved in framing a legally enforceable attribution right. In the actual legislative process, powerful corporate interests, who have reason to be hostile to the claims of individual authors, would also influence the drafting of an attribution right, and it is unlikely that many of those who support attribution rights in the abstract would be happy with the result.

Attribution remains a powerful incentive for creative production. Moreover, norms of credit, including the ones that produced all the footnotes in this piece, are extremely valuable for particular professions and individuals laboring within those professions. Sometimes, however, law and morality should be left to diverge, when law's tools are too crude to make the fine distinctions that prevail in ethics. Attribution rights provide an example of this situation. "Who steals my purse steals trash,"<sup>136</sup> but should still go to jail; but he that filches from me credit for my creative works deserves condemnation, not injunction.

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<sup>136</sup> WILLIAM SHAKESPEARE, *OTHELLO*, act 3, sc. 3.