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Commercializing the Digital Canvas: Renewing Rights of Attribution for Artists, Authors, and Performers

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COMMERCIALIZING THE DIGITAL CANVAS: RENEWING RIGHTS OF ATTRIBUTION FOR ARTISTS, AUTHORS, AND PERFORMERS

By: Jon M. Garon*

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In this country, scant recognition has been given overtly, aside from the copyright law, to the legal problems raised by artistic creativeness.¹

Artists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly.²

I. INTRODUCTION

Over the past two decades, a series of trends in constitutional and intellectual property have significantly reshaped the impact of traditional intellectual property laws for the art community. Attribution of

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1. Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 Harv. L. Rev. 554 (1940).

2. Statement of Representative Edward Markey in support of the Visual Artists Rights Act, H.R. REP. NO. 101-514 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6916.

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a work to the artist and protection of the integrity of a work from alternation are historical bedrocks of artistic protections, but those protections have been diminished for digital artists. The Visual Artists Rights Act excludes digital works from the definition of works of visual art, thus excluding these works from rights of attribution and integrity.³ At the time, rights of attribution and integrity were seen as quasi-trademark rights, and artists were protected under the Lanham Act.⁴ Since then, however, the Supreme Court has extended copyright's preemption over trademark, undermining an artist's ability to have non-contractual protections for the artist's identity and integrity in a work.⁵ In addition, a second trend within the digital environment has created additional tensions for artists whose works include celebrities, athletes, or other members of the public. The Supreme Court has made the clear determination that video games are entitled to complete First Amendment protection, placing those works in the same category as film, publishing, and works of art.⁶ Despite this free speech protection to the medium, a series of inconsistent decisions among state and federal courts have made unclear when the use of a person's likeness in a video game—or video art instillation—would constitute a violation of the person's rights of publicity.⁷

Moreover, the expansion of FTC guidelines to online materials prohibits the false endorsement of commercial products.⁸ Because of the ambiguity in the law of publicity rights, the guidelines may affect the ability of digital artists to exploit images of celebrities, athletes, and other individuals. These changes are stressing the very nature of copyright law and highlight the need for a uniform state right of publicity law or a federal statute to preempt the field.

This Article reviews the need for comprehensive reform and recommends certain protections for digital artists to bring them in line with other artists and authors. The Article proposes that public policies should emphasize the importance of the free speech, attribution, and

3. 17 U.S.C. §§ 101, 106A (2012).

4. *See* 15 U.S.C. § 1125(a) (2012) (providing federal unfair competition protection and protection from false designation of origin of works).

5. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (expressly rejecting the reliance on false designation of origin for copyrighted works).

6. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

7. *See Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (applying the Transformative Use Test and finding violation of a right of publicity for a college athlete); *Kirby v. Sega of America, Inc.*, 50 Cal. Rptr. 3d 607 (Ct. App. 2006) (applying the Transformative Use Test to find no violation of the right of publicity); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (applying the Predominant Use Test in the context of comic book publishing to find liability for selling a comic book containing images of hockey players); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (applying the Rogers Test to Rick Rush's lithographs of his painting entitled "The Master of Augusta" to find Tiger Wood's rights of publicity were not violated by the artwork).

8. FTC Endorsement Guidelines, 74 Fed. Reg. 53,124, 53,125 (Oct. 15, 2009) (Guides Concerning the Use of Endorsements and Testimonials in Advertising).

integrity rights of artists. Foundationally, the law must drop the differentiation between physical and digital media. Moreover, the public is better served with an explicit regime that protects the artist from interference with the artist's human subject, unless the work is used to sell an unrelated product or service. In other words, the rights of the artist are protected when it is the work which is sold, licensed, exhibited, or displayed. Only when an artwork was used to sell or advertise another product or service would the subject of the work have a right to permit or reject the use.

II. WHY ATTRIBUTION MATTERS—AN ARTIST'S PERSPECTIVE

My name, dear saint, is hateful to myself,
Because it is an enemy to thee.⁹

In 1917, Marcel Duchamp, under the pseudonym R. Mutt, entered an artwork entitled "Fountain" into the first exhibition of the American Society of Independent Artists.¹⁰ The work and the \$5.00 entry fee were returned.¹¹ Over time, as the artist became known and the meaning of the work discussed, the importance of the exhibit grew. The exhibited work was a porcelain urinal, placed upside down. The meaning variously includes a visual allusion to male-female relationships given the purpose of the urinal and the vaginal shape of the object when inverted;¹² "an oeuvre of extraordinary visual and intellectual rigor . . . reflective of other art and culture around him";¹³ an attempt to reject aesthetic beauty returning as a value in neo-Dada artforms;¹⁴ or some combination or variation of these themes. Duchamp's work, in general, and this work in particular, is recognized as the forerunner of the intellectual basis for the later Postmodernism and *Avante Garde* art movements.¹⁵

The meaning attributable to "Fountain" derives part of its power from the transition from its pseudonymous origins to its role within

9. WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, ACT II, SCENE II.

10. William A. Camfield, *Marcel Duchamp's Fountain: Its History and Aesthetics in the Context of 1917*, 65–70, in MARCEL DUCHAMP ARTIST OF THE CENTURY (Rudolf E. Kuenzli & Francis M. Naumann, ed., 2005).

11. *Id.* at 68.

12. *Id.* at 83.

13. *Id.* at 81.

14. *Id.* at 80.

15. See, e.g., MOIRA ROTH & JONATHAN D KATZ, *DIFFERENCE / INDIFFERENCE: MUSINGS ON POSTMODERNISM, MARCEL DUCHAMP AND JOHN CAGE* xiii (1999); Jeanne S. M. Willette, *Beginning Postmodernism: Forming the Theory*, ARTHISTORY-UNSTUFFED.COM, <http://www.arthistoryunstuffed.com/tag/marcel-duchamp/> (last visited Nov. 24, 2013) ("Perhaps due to the impact of Marcel Duchamp, postmodern art became more conceptual, exposing the hidden heart of Modernism: representation. The Modernist artist 'represented' humanity by 'representing' individuality, but the postmodern artist, thinking of Duchamp began making art that did not 'represent' but was 'about' an idea.").

the body of work attributed to Duchamp.¹⁶ It reflected the interplay between the identity of the artist and the existence of the work.¹⁷ The work has become famous, well recognized, and entirely outside of copyright.

Copyright law protects original works of authorship fixed in a tangible medium of expression.¹⁸ “[W]hen someone other than the copyright holder seeks to utilize someone else’s protected work in a way which is protected by the copyright law, that person (or entity) must obtain permission or be in violation of the copyright law.”¹⁹ The law, however, excludes both utilitarian aspects²⁰ and short phrases and titles.²¹ Although displayed upside down, “Fountain” was a utilitarian item with “R. Mutt” scrawled on its side as its pseudonymous signature.²² The name on the inverted utilitarian object was likely to be below the required minimum of creativity necessary for copyright pro-

16. See generally, Camfield, *supra* note 9, at 80–83.

17. See Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 497 (1991) (quoting 1 J. MERRYMAN & A. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 145 (2d ed., 1987)) (“The primary justification for the protection of moral rights is the idea that the work of art is an extension of the artist’s personality, an expression of his innermost being. To mistreat the work of art is to mistreat the artist, to invade his area of privacy, to impair his personality.”). See also Lucas S. Osborn, *Of PhDs, Pirates, and the Public: Three-Dimensional Printing Technology and the Arts*, 1 TEX. A&M L. REV. 811, 824 (2014) (discussing the authorship of 3D rendered objects).

18. 17 U.S.C. § 102 (2006).

19. Sydney A. Beckman, *The Copyright Crusher: How Apple’s iTunes Is a Vehicle Designed for Copyright Infringement and Apple’s Legal Liability from Its Creation*, 1 TEX. A&M L. REV. 901, 907 (2014).

20. 17 U.S.C. § 101.

“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

Id. See *Mazer v. Stein*, 347 U.S. 201 (1954) (permitting copyright protection in non-utilitarian aspects of functional items).

21. See *Copyright Protection Not Available for Names, Titles, or Short Phrases*, U.S. COPYRIGHT OFFICE CIRCULAR, at 34, <http://www.copyright.gov/circs/circ34.pdf> (“The Copyright Office cannot register claims to exclusive rights in brief combinations of words such as: . . . Pseudonyms of individuals (including pen or stage names”).

22. See Camfield, *supra* note 9, at 82, 89 (explaining that the pseudonym was likely derived from the following: “Richard” was French slang for money bags, and abbreviated to the initial “R.” while “Mutt” was a play off the popular comic Mutt & Jeff and the manufacturer J. L. Mott Iron Works of Trenton New Jersey).

tection.²³ And of course, it was not Duchamp but the manufacturer, J. L. Mott, which had rights to the urinal's design. As with other found objects (or *Objet Trouvé*), unless the works were incorporated into a larger work, copyright protection would be unavailable.

At the same time, a catalog photograph of the "Fountain" would be protected by copyright, though the protection would not extend to display of the inverted Mott urinal. As a result, copyright would provide no legal protection for the work.

Moreover, were a controversy to erupt today over the provenance of such a work, copyright preemption would preempt trademark law from protecting Duchamp of claiming any rights to recognize that Duchamp was the source of the "Fountain" and messages for which it stands.²⁴ This was not the law at the time the "Fountain" first appeared, and as technology transforms the canvas upon which creative works are displayed, U.S. laws need to return to a system that recognizes the source of creative works.²⁵ There are schools of criticism suggesting that such importance of the author or artist misinterprets the work.²⁶ This literary debate, however, does not focus on whether attri-

23. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) ("Originality remains the *sine qua non* of copyright Others may copy the underlying facts from the publication, but not the precise words used to present them.").

24. See *Dastar Corp. v. Twentieth Cent. Fox Film Corp.*, 539 U.S. 23, 37 (2003).

In sum, reading the phrase "origin of goods" in the Lanham Act in accordance with the [Trademark] Act's common-law foundations (which were not designed to protect originality or creativity), and in light of the copyright and patent laws (which were), we conclude that the phrase refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.

Id.

25. See, e.g., Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 2012 (2006) (calling for expansion of moral rights); see also Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 50–51 (2006) (advocating amendment to copyright act for broader attribution rights); Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 307 (2004) (discussing limitation on *Dastar* ruling).

26. See, e.g., Roland Barthes, *The Death of the Author*, in *IMAGE, MUSIC, TEXT* 142, 142 (Stephen Heath trans., 1977):

To give an Author to a text is to impose upon that text a stop clause, to furnish it with a final signification, to close the writing. This conception perfectly suits criticism, which can then take as its major task the discovery of the Author (or his hypostases: society, history, the psyche, freedom) beneath the work: once the Author is discovered, the text is "explained": the critic has conquered; hence it is scarcely surprising not only that, historically, the reign of the Author should also have been that of the Critic, but that criticism (even "new criticism") should be overthrown along with the Author.

Id. See also Sergio Muñoz Sarmiento and Lauren van Haften-Schick, *Cariou v. Prince: Toward a Theory of Aesthetic-Judicial Judgments*, 1 TEX. A&M L. REV. 941, 951 n.63 (2014) ("Beginning in the mid-to-late 1970s however there emerged an academic discourse of critical theory and visual culture, and with it a generation of artists creating works using familiar images from popular culture and the history of art . . . often to the effect of inserting one's own name"); see also Michael Foucault,

bution should exist, but whether it should be utilized as a tool of literary criticism.²⁷ Moreover, the worlds of literary and art criticism often diverge, making any legal doctrinal distinction based on these mores quite ill placed.²⁸

In addition to attribution providing meaning and context to a work, attribution also provides an important economic reward for its creator. In some cases, this reward is directly tied to resale royalties, or *droit de suite* rights, due to the artist under state laws.²⁹ *Droit de suite* laws emphasize the commonly known injustice that an artist's works may sell for a very small amount when created, earning the artist little, but exploding into exceptionally high-valued cultural icons that earn gallery owners and collectors millions even as the artists languishes in poverty.³⁰

Other resale royalty rationales focus on the difference between copyright's protection of reproduction, distribution, and adaptation rights, while moral rights such as rights of integrity and resale royalty rights focus on the unique value of the original object in which the

What is an Author?, in TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141 (J. Harari ed., 1979).

27. See, e.g., WILLIAM IRWIN, THE DEATH AND RESURRECTION OF THE AUTHOR? (Greenwood Press, 2002). See also Anton Vidokle, *Art Without Artists?*, 16 E-FLUX, May 2010, available at http://worker01.e-flux.com/pdf/article_136.pdf (last visited Nov. 25, 2013) ("If the artist is already expected to question the social, the economic, the cultural, and so forth, then it goes without saying that when a curator supersedes the artist's capacity as a social critic, we abandon the critical function embodied by the role of the artist and reduce the agency of art.").

28. See WENDY LEEDS-HURWITZ, SEMIOTICS AND COMMUNICATION: SIGNS, CODES, CULTURES 36–38 (noting that while art criticism, literary criticism, and behavioral studies, the critic or researcher "interprets what occurs."). Signifiers or polymers can have multiple meanings and each meaning can be communicated through multiple symbols, making criticism and behavior studies acts of interpretation, with inherent subjectivity. *Id.*

29. See, e.g., California Resale Royalties Act, CAL. CIV. CODE § 986 (a) (West 2012) ("Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale."). At least one court has suggested the California version of the law violates the Dormant Commerce Clause and is unconstitutional as presently written. See *Estate of Graham v. Sotheby's Inc.*, 860 F. Supp. 2d 1117, 1119 (C.D. Cal. 2012).

30. See, e.g., Toni Mione, *Resale Royalties for Visual Artists: The United States Taking Cues from Europe*, 21 CARDOZO J. INTL. & COMP. L. 461, 501 (2013) (discussing Robert Rauschenberg's *Thaw*, which he sold for \$900 and confronted the purchaser, Ethel Scull when she sold it at auction for \$85,000); Katreina Eden, *Fine Artists' Resale Royalty Right Should Be Enacted in the United States*, 18 N.Y. INT'L L. REV. 121, 127 (2005) (discussing *Thaw* incident as leading to California Resale Royalties Act); Michael B. Reddy, *The Droit De Suite: Why American Fine Artists Should Have the Right to A Resale Royalty*, 15 LOY. L.A. ENT. L.J. 509 (1995) (quoting Rauschenberg as stating "I've been working my ass off just for you to make that profit!") (with original quote attributed to Roger Ricklefs, *Artists Decide They Should Share Profits on Resale of Paintings*, WALL ST. J., Feb. 11, 1974, at 1; Robert Hughes, *A Modest Proposal: Royalties for Artists*, TIME, Mar. 11, 1974, at 66).

copyright vests.³¹ Rights of attribution are distinct from resale royalties,³² but false attribution could readily undermine the ability of an artist to claim her resale royalties.

Second, the attribution has an economic value related to, but not physically tied to, the work: “The position of an author is somewhat akin to that of an actor. The fact that he is permitted to have his work published under his name, or to perform before the public, necessarily affects his reputation and standing, and thus impairs or increases his future earning capacity.”³³

This can be seen in other artistic fields. Theatrical directors, actors, and other artists believe that credit or attribution is central to their continued professional success:³⁴

Since actors’ fees for pictures, and indeed, their ability to get any work at all, is often based on the drawing power their name may be expected to have at the box office, being accurately credited for films in which they have played would seem to be of critical importance in enabling actors to sell their “services,” i.e., their performances.³⁵

The value of attribution or credit may be difficult to quantify, but it influences the overall value of an artist’s body of work, having a multi-

31. See Channah Farber, *Advancing the Arts Community in New Mexico Through Moral Rights and Droit de Suite: The International Impetus and Implications of Pre-emption Analysis*, 36 N.M. L. REV. 713, 746 (2006) (“Copyright law mainly protects creations capable of being reproduced or “copied” rather than individual objects. A work of art is fundamentally different from the other subject matter of copyright because its ultimate value lies in its unique quality as a one-of-a-kind original, not in its potential for mass reproduction or performance.”); Carole M. Vickers, *The Applicability of the Droit de Suite in the United States*, 3 B.C. INT’L & COMP. L. REV. 433, 434–35 (1980) (“Artists’ rights encompass two other important groups of rights—the *droit morale* or the moral right and the *droit de suite* or the proceeds right.”).

32. See, e.g., N.Y. ARTS & CULT. AFF. L. § 14.03 (2012):

2. (a) . . . [T]he artist shall retain at all times the right to claim authorship, or, for just and valid reason, to disclaim authorship of such work. The right to claim authorship shall include the right of the artist to have his or her name appear on or in connection with such work as the artist. The right to disclaim authorship shall include the right of the artist to prevent his or her name from appearing on or in connection with such work as the artist. Just and valid reason for disclaiming authorship shall include that the work has been altered, defaced, mutilated or modified other than by the artist, without the artist’s consent, and damage to the artist’s reputation is reasonably likely to result or has resulted therefrom.

(b) The rights created by this subdivision shall exist in addition to any other rights and duties which may now or in the future be applicable.

33. *Clemens v. Press Pub. Co.*, 122 N.Y.S. 206, 208 (App. Term. 1910) (Seabury, J., concurring).

34. See Jeannette Gunderson, *An Unaccountable Familiarity: A Dual Solution to the Problem of Theft in Theatrical Productions*, 31 SEATTLE U. L. REV. 667, 696 (2008).

35. See *Smith v. Montoro*, 648 F.2d 602, 607 (9th Cir. 1981).

plying effect over time.³⁶ To illustrate this point, the Producers Guild of America has recently negotiated for a “P.G.A.” designation for those motion picture producers who are guild members and are responsible for undertaking the tasks of producing the motion picture.³⁷ Guild members were concerned about the availability of producer credit being made available to mere investors in film production as devaluing the credit earned.³⁸ The time, effort, and investment needed to create this new Guild designation provides a clear illustration of the importance to creators within an industry, and that value should be recognized by law.³⁹

Attribution and protection from unfair trade practices have their philosophical roots in Immanuel Kant.⁴⁰ He stipulated that “[w]hoever transacts another’s business in his name and yet against his will, is obliged to give up to him . . . all the profits that may arise therefrom, and to repair all the loss, either one or the other.”⁴¹ Kant asserts that “[i]n a book as a writing the author *speaks* to his *reader*.”⁴² Kant focuses on the stripping of the author’s voice, from the author, and the misattribution such theft creates. The sale of artworks would not be limited because the physical copies could be bought and sold. The artist has this right.⁴³ Kant also distinguishes between the artist who can sell to the public and the author who could, at that time, sell only through the editor and thus risk a loss of control over the work, requiring greater legal protections for the author outside of contract.⁴⁴

Kant was not alone in believing authors required protection from contracts, and so attribution nearly made it into the common law of

36. Gunderson, *supra* note 33, at 607 (“While receiving credit for one’s work is often more a matter of recognition than an issue about compensation, one of the main reasons that receiving that credit is so critical is because of the importance of one’s professional reputation in a performance-based industry such as theatre.”).

37. See *PGA Putting its “Mark” on New Releases*, ABOVE & BELOW LINE (May 30, 2013), <http://aboveandbelow.media-services.com/2013/05/30/pga-putting-its-mark-on-new-releases/> (“Producers Guild of America’s ‘Producers Mark’ for inclusion in all its film credits, the PGA is closing in on organizing all the major studio distributors after just two and a half years of campaigning.”).

38. *Id.*

39. See *Clemens v. Press Pub. Co.*, 122 N.Y.S. 206, 208 (N.Y. App. Term. 1910) (Seabury, J., concurring).

40. See Immanuel Kant, *Of the Injustice of Counterfeiting Books*, in 1 *ESSAYS AND TREATISES ON MORAL, POLITICAL, AND VARIOUS PHILOSOPHICAL SUBJECTS* 225, 228–29 (W. Richardson trans. 1798).

41. Compare *id.* at 228, with 17 U.S.C. § 504(b) (2013) (“The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.”).

42. Kant, *supra* note 39, at 229 (emphasis in original).

43. *Id.* at 236–37 (“A drawing, which any one has delineated, or got engraved by another, or executed in stone, in metal, or in stucco, may be copied, and the copies publicly sold; as every thing, that one can perform with his thing *in his own name*, requires not the consent of another.”) (emphasis in original).

44. *Id.* at 236–40.

the United States.⁴⁵ “Historically, moral rights served as a powerful legal device for authors to protect their “children” against what Anthony Trollope called “the book-selling leviathans.”⁴⁶

In *Clemens v. Press Publishing Co.*,⁴⁷ William Clemens, a journalist, sold a newspaper story to the Press Publishing Company for the impressive amount of two hundred dollars. After revising the news story, the journalist learned he would not receive the byline for the article, and objected to publication without the byline. The facts imply the article was never published, though galley proofs of the edition were provided to Clemens. Clemens sued for his payment. In a plurality opinion, the paper was obligated to pay the two hundred dollars.⁴⁸

The concurring opinion held quite clearly that rights of attribution were worthy of judicial attention: “Even the matter of fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider the sale of a barrel of pork.”⁴⁹ The concurrence of Judge Seabury continued to highlight the need for recognizing the economic reality of the attribution rights at stake in the contract:

If the intent of the parties was that the defendant should purchase the rights to the literary property and publish it, the author is entitled, not only to be paid for his work, but [also] to have it published in the manner in which he wrote it. The purchaser cannot garble it, or put it out under another name than the author’s; nor can he omit altogether the name of the author, unless his contract with the latter permits him so to do.⁵⁰

This 1910 New York decision highlighted the understanding that authors, artists, and actors have in their name and in the integrity of their works. Had the judges joined together in the opinion, the New York law on the subject would have become much more protective than that which ultimately occurred.

III. WHY ATTRIBUTION MATTERS—THE CONSUMER’S PERSPECTIVE

In addition to the impact attribution can have on the artist’s message and the economic return to the artist, there is also a concern for the public regarding the legitimacy of the source of a work, whether the work is a painting, film, or other communicative project. In many

45. See Peter K. Yu, *Moral Rights 2.0*, 1 TEX. A&M L. REV. 873, 880 (2014).

46. *Id.* at 886 (quoting ANTHONY TROLLOPE, AN AUTOBIOGRAPHY 308 (Michael Sadleir & Frederick Page eds., 1980)).

Clemens v. Press Pub. Co., 122 N.Y.S. 206, 207 (App. Term. 1910).

47. *Id.*

48. The three-judge panel had three opinions with both Judge Gavegan and Seabury reversing the lower court decision. Judge Lehman dissented. *Id.*

49. *Id.*

50. *Id.* at 208.

ways, this concern parallels unfair competition law or trademark law.⁵¹

Despite the *Clemens v. Press Publishing Co.* recognition of attribution being only a concurrence, courts continued to find for authors, artists, and actors on a variety of analogous grounds. For example, the law of unfair competition has long been part of the history of the performing arts. Charlie Chaplin's success with his *Little Tramp* character led to many imitations and a mixed history of litigation.⁵² Although Chaplin was a performer rather than the author of the short, *The Champion*, he successfully sued the Crystal Palace Theatre over its use.⁵³ Chaplin was able to stop the advertising of an undersea water movie into which scenes from *The Champion* were interspersed.⁵⁴ It was only a partial victory; Chaplin was unable to enjoin the showing of the work itself.⁵⁵

Chaplin was more successful in defending his *Little Tramp* character against Charles Amador to stop a direct imitation.⁵⁶ Although making his own films, Amador closely mimicked both the Chaplin character and the plot of Chaplin's films. The court of appeals addressed the manner of Amador's copying as a form of deception and unfair competition.⁵⁷

Plaintiff is not seeking to prevent the appellant, Charles Amador, from appearing in motion pictures, but only seeks to prevent him from imitating the plaintiff in such a way as to deceive the public and work a fraud upon the public and plaintiff. The case of plaintiff does not depend on his right to the exclusive use of the rôle, garb, and mannerisms, etc.; it is based upon fraud and deception. The right of action in such a case arises from the fraudulent purpose and conduct of appellant and injury caused to the plaintiff thereby, and the deception to the public, and it exists independently of the law regulating trade-marks, or of the ownership of such trade-marks or trade-names by plaintiff. It is plaintiff's right to be protected against those who would injure him by fraudulent means—that is, by counterfeiting his rôle—or, in other words, plaintiff has the right to be protected against “unfair competition in business.”⁵⁸

51. See Laura A. Heymann, *The Birth of the Authonym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1381 (2005) (“Thinking of an authonym as something akin to an author's trademark does not require a complete reinvention of trademark law. Quite the opposite: Just as trademark law is primarily concerned with consumer confusion but is otherwise agnostic as to the producer's choice of mark, trademark law should also be primarily concerned with reader confusion but should care little what authonym the writer chooses.”).

52. See Peter Decherney, *Gag Orders, Comedy Chaplin, and Copyright*, in MODERNISM AND COPYRIGHT 149–50 (Paul K. Saint-Amoured., 2010).

53. *Id.* at 148–49.

54. *Id.*

55. *Id.*

56. *Chaplin v. Amador*, 269 P. 544 (Cal. Dist. Ct. App. 1928).

57. *Id.* at 545.

58. *Id.* at 546.

The distaste evidenced by the court in *Chaplin v. Amador* highlights an uneasy but readily recognized approach to business that while healthy competition is expected, norms of behavior are essential to smoothly operating industry. It might be too much to suggest the public is fully deceived so much as annoyed at the attempt at deceit. In the earlier controversy involving the Crystal Palace, for example, “the Crystal Palace’s attendance dropped by half when it attempted to pass off a Chaplin imitation as original. . . . [D]evoted fans were nonetheless willing to watch imitators’ work in between the star’s sporadic releases.”⁵⁹ The public does not like being deceived.

Despite the legal success achieved by Charlie Chaplin and William Clemens, other plaintiffs did not fare as well. In *Gardella v. Log Cabin Products Co.*, actress Tess Gardella brought an action against the makers of Aunt Jemima Pancake Mix over the use of the pseudonym “Aunt Jemima” when used in musical theatre.⁶⁰ The Italian-American Gardella was a well-recognized vaudeville performer who originated the role of Queenie in the original production of *Show Boat* in 1929 and reprised her role in the 1932 revival.⁶¹ She regularly appeared as Aunt Jemima, using the *non de plum* as her stage name.⁶² Quaker Oats first registered the Aunt Jemima trademark in 1890 for its pancake flour.⁶³ In 1935, Quaker Oats and Log Cabin teamed up for a radio advertising campaign in which the character was brought to life on the radio.⁶⁴

The Second Circuit recognized Gardella’s right to perform under the name, because “in her many stage performances since 1920 she has used that name; sometimes as ‘The Famous Pancake Lady, Aunt

59. Decherney, *supra* note 51, at 149 (citing TERRY RAMSAYE, *A MILLION AND ONE NIGHTS: A HISTORY OF THE MOTION PICTURE THROUGH 1925*, at 732 (New York: Simon and Schuster 1926)).

60. *Gardella v. Log Cabin Products Co.*, 89 F.2d 891 (2d Cir. 1937).

61. FRANK CULLEN, FLORENCE HACKMAN & DONALD MCNEILLY, *VAUDEVILLE, OLD AND NEW: AN ENCYCLOPEDIA OF VARIETY PERFORMERS IN AMERICA* 430 (Taylor & Francis 2006) (Gardella was the only cast member of the 1932 *Showboat* revival to wear blackface and became “[o]ne of the last female [vaudeville] performers to wear blackface.”).

62. The controversy of the 1920s and litigation ending in 1935 did not address the racial implications of Gardella’s portrayal of an African-American stereotype. For an in depth analysis of this topic, see generally SUSAN GUBAR *RACECHANGES: WHITE SKIN, BLACK FACE IN AMERICAN CULTURE* (Oxford Univ. Press 1997). As to Gardella’s portrayal of Aunt Jemima, see DORIS WITT, *BLACK HUNGER: SOUL FOOD AND AMERICA* 34 (U. of Minn. Press 1999) (acknowledging that modern scholars view Gardella a white performer in blackface, but noting that “Gardella’s success was owing not to her perceived ‘whiteness’ but instead to her ethnic position between white and black”).

63. *Gardella*, 89 F.2d at 893.

64. *Id.* (“Log Cabin Syrup was a product of the Log Cabin Products, Inc., a subsidiary of the General Foods, Inc., and the Aunt Jemima Pancake Flour was a product of the Quaker Oats Company. Some 3,000,000 small packages of Aunt Jemima’s Pancake Flour were distributed free through grocery stores as a part of the scheme of advertising.”).

Jemima, and her Syncopated Bakers.’ She appeared in the production ‘Show Boat’ as Aunt Jemima and also on a radio program for ‘Jad Salts.’ She sang for phonograph records.”⁶⁵ As such, the Second Circuit protected her right to use her name and likeness under New York’s publicity rights statute.⁶⁶

Despite Gardella’s ownership of the stage name in Aunt Jemima, the predecessor trademark rights in the name by Quaker Oats took precedence. New York publicity law “protects against the unauthorized use of a name for the purpose of advertising. But the Quaker Oats Company needed no authority from the appellee to use the name ‘Aunt Jemima.’”⁶⁷

The court then discussed the unfair competition claims, separating them into claims for “passing off” and for defamation to professional reputation.⁶⁸ Under both theories, the court suggested a cause of action could exist. “Appellants would have no right to trade upon her reputation or to pass off an imitation of her singing or form of entertainment which either caused deception, or was likely to do so.”⁶⁹ Nonetheless, no such damages to earning power or other evidence of actual damage to reputation could be established, so only nominal damages were appropriate. With regard to Gardella’s professional reputation, the limit of Quaker Oats’ duty was to assure that the public was not misled into believing an inferior performance was presented in the name of Gardella’s Aunt Jemima.⁷⁰ Since both Quaker Oats and Gardella had rights to the Aunt Jemima name, Gardella’s rights “could be impinged upon only in the event that the fictitious Aunt Jemima was so used as to confuse her with [Gardella] as the theatrical Aunt Jemima. To prevent this, identification of the fictitious character was alone necessary.”⁷¹ Gardella may have retained rights to her use of the name, but they meant little to stop Quaker Oats’ use of the name in radio and theatrical productions.

The decision continues to suggest that unfair competition is a viable cause of action to protect a performer’s identity so as to avoid passing off an inferior artist’s work as the author. In heightening the standard

65. *Id.* at 894.

66. *See id.* (“Section 50 makes it a misdemeanor to use the name, portrait, or picture of any living person for advertising purposes without consent. And section 51 gives to any person whose name, portrait, or picture is so used a right to civil remedies, through injunction and damages. The appellee, having adopted the name ‘Aunt Jemima’ for use in her professional career, had acquired certain rights.”).

67. *Id.*

68. *Id.* (“In reality this cause of action divides itself into two theories. One is that the appellee was imitated and that the imitation resulted in deception; the usual form of ‘passing off.’ The second is that the imitation was inferior so that the appellee’s professional reputation was impaired. This contains a claim of defamation.”).

69. *Id.* at 895 (citations omitted).

70. *Id.* at 897.

71. *Id.*

for economic proof of damages, however, the decision places the cause of action out of reach for most plaintiffs.

Ten years later, another well-known case further eroded protections for lack of attribution and unfair passing off. In *Vargas v. Esquire, Inc.*,⁷² famous pin-up artist Alberto Vargas sued *Esquire* magazine for using illustrations he provided to the magazine without the attribution of “Varga” or his signature on the illustrations.⁷³ Although the contract had been cancelled, *Esquire* retained rights to publish those illustration that had already been delivered. The magazine replaced “The Varga Girl” title for the works with “The Esquire Girl.”⁷⁴ The Seventh Circuit rejected an interpretation of the contract under which the transfer of ownership in the name “ ‘Varga,’ ‘Varga Girl,’ ‘Varga, Esq.,’ and any and all other names, designs or material used in connection therewith, shall forever belong exclusively to *Esquire*”⁷⁵ and that there also was a duty to use one of those names in association with the work. The court understood that no such duty was created.

More specifically, the court rejected the concept of rights of attribution and moral rights:

Plaintiff advances another theory[,] which needs little discussion. It is predicated upon the contention that there is a distinction between the economic rights of an author capable of assignment and what are called “moral rights” of the author, said to be those necessary for the protection of his honor and integrity . . . [W]e are not disposed to make any new law in this respect.⁷⁶

The decision disposed of moral rights as alien to U.S. common law. It went on to dismiss claims of unfair competition for sale of the illustrations without their customary signatures and under a different title as factually not relevant. Regarding use of “The Esquire Girl,” as the title, the court explained, “We think the public would readily recognize the word ‘Esquire’ referred to such magazine and not to the name of an artist.”⁷⁷

Under these decisions, rights of attribution were increasingly difficult to defend. Nonetheless, there continued to be some significant decisions that recognized the economic importance of attribution rights. In *Smith v. Montoro*,⁷⁸ the court protected the right to billing under the doctrine of reverse passing off: “Reverse passing off is accomplished ‘expressly’ when the wrongdoer removes the name or

72. *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947).

73. *Id.* at 524.

74. *Id.*

75. *Id.* at 525.

76. *Id.* at 526.

77. *Id.* at 527.

78. *Smith v. Montoro*, 648 F.2d 602, 605 (9th Cir. 1981).

trademark on another party's product and sells that product under a name chosen by the wrongdoer."⁷⁹

Removing the identification of the source of goods results in implied passing off.⁸⁰ The plaintiff, Paul Smith, was able to protect his right to receive the credit he earned under federal trademark law as well as the related, ancillary state law and breach of contract claims. The court noted that performers' names can sometimes be registered as service marks and that Lanham Act unfair competition protection does not require registration, so the claim is not barred.⁸¹

Recognizing the economic value to the actors, the court found the substitution of another actor's name in the credits sufficient to state a claim under section 43(a) of the Lanham Act.⁸² This all changed with *Dastar Corp. v. Twentieth Century Fox Film Corp.*⁸³

In *Dastar*, the Supreme Court was asked to address the conflict between an author's rights to attribution as protected by copyright and those rights as protected by trademark law. The work in question was a television series, which had fallen into the public domain, thus losing all copyright protection. As such, the public domain work was available for use in any manner, and the Court correctly stated that trademark law could not be extended to provide protection for works on which copyright had lapsed.⁸⁴ "The right to copy, and to copy without attribution, once a copyright has expired . . . passes to the public."⁸⁵

The right to make full use of the public domain materials included not just the right to copy and create derivative works but also the right to use the material without regard to any trademark claims for obligations to provide attribution.⁸⁶ "[O]nce the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution."⁸⁷

The *Dastar* opinion, however, spanned well beyond the question before the Court. Ignoring the entire category of service marks, the court placed a narrow definition on origin of goods to include source of manufacture or retail only. It rejected the services nature of performance that go into some goods. "The phrase 'origin of goods' in

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 607 (describing the performer, as "originator of the misidentified product is involuntarily deprived of the advertising value of its name and of the goodwill that otherwise would stem from public knowledge of the true source of the satisfactory product.")

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

84. *Id.*

85. *Id.* (internal quotation omitted).

86. *Id.* at 33-34.

87. *Id.* ("In construing the Lanham Act, we have been 'careful to caution against misuse or over-extension' of trademark and related protections into areas traditionally occupied by patent or copyright.")

the Lanham Act is incapable of connoting the person or entity that originated the ideas that ‘goods’ embody or contain.”⁸⁸

By moving past a discussion of public domain materials and into the broader decision affecting all attribution rights, the Court has overturned *Smith v. Montoro*—a decision it cited favorably in its opinion.⁸⁹ The failure to recognize the difference between service marks and trademarks, the failure to distinguish public domain works from works under copyright protection, and the failure to recognize legitimate state publicity rights and similar causes of action not preempted by copyright result in further distortion under *Dastar*.⁹⁰

Compare *Dastar* with *Shaw v. Lindheim*.⁹¹ Unlike the Supreme Court in *Dastar*, which made a categorical rejection of trademark applicability, the Ninth Circuit in *Shaw* limited reverse passing off to those instances where the defendant sells the plaintiff’s product—essentially unchanged—under a false name.⁹² Where the threshold question is whether copying even exists, the new work cannot be said to be an unchanged version of the plaintiff’s work, so copyright, rather than trademark, is the appropriate tool to balance the interests of the parties. Both copyright and trademark involve a balancing of parties’ interests, so it is appropriate that there are instances when only one of the balancing questions should be addressed. It does not follow, however, that there are not instances where both questions must be addressed.

There was no need to reach beyond public domain works to reach the rights of an author to claim she was the “origin of the goods” embodied in communicative works protected by copyright. Nonetheless, decisions following *Dastar* have not focused on the facts of the decision but rather the sweeping rhetoric, which suggests trademark rights are unavailable to authors.⁹³ Decisions following *Dastar* have embraced its broad, sweeping effect.⁹⁴

88. *Id.* at 32–33 (“The concept might be stretched (as it was under the original version of § 43(a)) to include not only the actual producer, but also the trademark owner who commissioned or assumed responsibility for (“stood behind”) production of the physical product.”).

89. *Id.* at 30.

90. See, e.g., Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 307 (2004).

91. *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir.1990).

92. *Id.* at 1364 (“[*Montoro v. Smith* limited reverse passing off to two situations: ‘Reverse passing off is accomplished “expressly” when the wrongdoer removes the name or trademark on another party’s product and sells *that product* under a name chosen by the wrongdoer.’”) (emphasis in original).

93. E.g., *Williams v. UMG Recordings, Inc.*, 281 F. Supp. 2d 1177, 1185 (C.D. Cal. 2003) (“[T]he Supreme Court’s holding did not depend on whether the works were copyrighted or not. . . . Rather . . . the Court noted that protection for communicative products was available through copyright claims.”).

94. See e.g., *Romero v. Buhimschi*, 396 Fed. App’x 224, 233 (6th Cir. 2010) (unpublished) (“Assuming that a portion of Romero’s pleadings could fall under § 43(a)(1)(B)’s advertising prong, the misconduct alleged in the pleadings would have

Fortunately, not all courts have applied *Dastar* to artists' trademarks. In *Teter v. Glass Onion, Inc.*, the district court applied traditional trademark law for a living artist who objected to a gallery's creation of online thumbnails of the artist's works for promotion.⁹⁵

The evidence demonstrates the LEE TETER mark is associated with Teter's works of fine art, which depict scenes of American frontier life, and has acquired secondary meaning by being distinct in their subject matter, style and quality. The works are distributed nationally, are sought-after by established clients, and have acquired a place in the fine art market.⁹⁶

While Lee Teter received little protection for his trademark, at least the district court understood that the mark was important to the artist and the public.⁹⁷ Ultimately, a cause of action survived the motion for summary judgment as to whether the defendant's "use of Teter's mark may create confusion as to the source and affiliation Teter's works and the [defendant] Gallery"⁹⁸ Unlike *Dastar*, the *Teter* court understood that a mark may be used to indicate more than one type of affiliation in the eyes of the public, and some of those affiliations could generate a likelihood of confusion or other unfair competition.

Despite hope that decisions like *Teter* suggest courts are beginning to move past *Dastar's* formalism, *Dastar* creates a fundamental problem for the United States' adherence to its treaty obligations under article 6bis of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).⁹⁹ Under the treaty obligations of the Berne Convention, U.S. law must afford minimum protections to authors' rights of attribution and integrity.¹⁰⁰ Relying on treaty language that allows "redress for safeguarding the rights granted by this

to relate to the 'nature, characteristics, qualities, or geographic origin' of the manuscript."); see also *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008); *William*, 281 F. Supp. 2d at 1185; LOUIS ALTMAN & MALLA POLLACK, 4 CALLMANN ON UNFAIR COMP., TRADEMARKS & MONOPOLIES § 22:7 (4th ed., 1990) ("The doctrine of reverse passing off is unlikely ever again to provide the creators of intellectual property with a right of attribution under either federal or state law.").

95. *Teter v. Glass Onion, Inc.*, 723 F. Supp. 2d 1138 (W.D. Mo. 2010).

96. *Id.* at 1155 ("Teter has set forth sufficient evidence for the Court to conclude LEE TETER is a sufficiently distinct descriptive mark that has acquired a secondary meaning, and is entitled to protection under the Lanham Act.").

97. *Id.* at 1156 ("GOI's use of the mark was nominative in that it merely identified the Teter works, thus, indicating GOI did not possess an intent to confuse the public. Importantly, Teter produced no evidence of actual confusion by the consuming public.").

98. *Id.*

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

100. *Id.* ("Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.").

Article shall be governed by the legislation of the country where protection is claimed,”¹⁰¹ the United States relied on a mosaic of common law and trademark law protections to provide the equivalent of moral rights protection sufficient to comply with the treaty.¹⁰²

The mosaic of state and federal laws was essential to United States ascension into the Berne Convention because Congress took few steps to amend U.S. law. “Rather, the approach used in all sections of the bill, including the findings and declarations, is the same: to modify American law minimally to place it in compliance with the provisions of the Berne Convention while respecting the constitutional provisions that apply to all such legislative endeavors.”¹⁰³

As Professor Graeme Dinwoodie put it, “the United States could adhere to the Berne Convention and (almost without blushing) claim compliance with the obligation in Article 6bis of Berne . . . based upon a patchwork of state and federal laws.”¹⁰⁴ The House Report identified sections of the Copyright Act, “section 43(a) of the Lanham Act, relating to false designations of origin and false descriptions,” as well as “[s]tate and local laws including those relating to publicity, contractual violations, fraud and misrepresentation, unfair competition, defamation, and invasion of privacy,” as part of the sufficient array of legal protections to comply with article 6bis without new, positive law.¹⁰⁵

The unanimous *Dastar* decision undermines much of the analysis underlying these congressional assertions. By explicitly preempting section 43(a) of the Lanham Act, the Supreme Court eliminated the most significant federal protection outside of the Copyright Act.¹⁰⁶ Moreover, the preemption of federal unfair competition law may also erode state unfair competition law. *Dastar*’s statutory interpretation seems fundamentally at odds with the House Report’s understanding of the interplay between copyright and trademark law.

101. *Id.*

102. See Graeme W. Austin, *The Berne Convention As a Canon of Construction: Moral Rights After Dastar*, 61 N.Y.U. ANN. SURV. AM. L. 111, 116–17 (2005) (“The United States declined to enact a new moral rights statute. Instead, adopting a “minimalist” approach to the need for implementing legislation, the House Committee on the Judiciary . . . emphasized that existing state and federal laws already afforded authors equivalent protections.”) (citations omitted).

103. H.R. Rep. No. 100-609, at 7 (1988), reprinted in 1988 U.S.C.C.A.N. 1037 (“Ideal solutions to issues take much congressional time, require careful examination of often conflicting interest, and generally lead to the legislative processing of a bill designed to solve a carefully defined question. That methodology is not used for the Act.”).

104. Graeme Dinwoodie, *Foreign and International Influences on National Copyright Policy: A Surprisingly Rich Picture* 161, in NEW DIRECTIONS IN COPYRIGHT LAW, Vol. 6 (2007).

105. H.R. Rep. No. 100-609, at 34–35 (1988).

106. *See id.*

IV. PROTECTING THE PUBLIC—THE FTC TAKES ON
CONSUMER PROTECTION

The *Dastar* understanding of “origin” for goods and services also seems oddly out of place with changes to the Federal Trade Commission guidelines for promotion of goods and services.¹⁰⁷ Concerned about the potential for the public to be unaware of the funded promotional efforts of content providers such as blog authors and advertisers, the FTC updated the Guides Concerning the Use of Endorsements and Testimonials in Advertising (FTC Endorsement Guidelines) in 2009.¹⁰⁸ The 2009 FTC Endorsement Guidelines interpret section 5 of the Federal Trade Commission Act (FTC Act).¹⁰⁹ As such, the FTC Endorsement Guidelines offer “guidance [for] the public in conducting its affairs in conformity with legal requirements . . . [regarding] the use of endorsements and testimonials in advertising.”¹¹⁰

The FTC Endorsement Guidelines require “the honest opinions, findings, beliefs, or experience of the endorser.”¹¹¹ They prohibit false commercial speech by declaring that “an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser.”¹¹² Presumably the false identification of an author or artist of a work offered for sale would constitute just such a false, deceptive representation. The FTC made the scope of prohibition quite broad, reaching “any product, service, company or industry.”¹¹³

Undoubtedly, the sale of forged artwork¹¹⁴ or artwork that is falsely numbered constitutes deceptive trade practices.¹¹⁵ The FTC brought a series of high-profile cases against unauthorized art republications between 1991 and 1995, culminating in a series of enforcement actions. “Operation Bogart—for bogus art—was a government probe that un-

107. See Jon M. Garon, *Beyond the First Amendment: Shaping the Contours of Commercial Speech in Video Games, Virtual Worlds, and Social Media*, 2012 UTAH L. REV. 607 (2012).

108. FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,125 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

109. See 15 U.S.C. § 45 (2006).

110. 16 C.F.R. § 255.0(a) (2012).

111. *Id.* § 255.1(a).

112. *Id.*

113. *Id.* § 255.0(d).

114. *F.T.C. v. Renaissance Fine Arts, Ltd.*, No. 1:94-CV-0157, 1995 WL 523619 (N.D. Ohio 1995) (not reported) (“[D]efendants sold counterfeit artworks bearing forged artists’ signatures and false limited edition print numbers or artist proof designations—which items included fraudulent certificates of authentication signed by defendant.”).

115. See H.R. Rep. No. 101-514 (1990), reprinted in 1990 U.S.C.A.N. 6915, 6923 (“Artists creating limited editions in their types of works usually break their molds, strike their plates, or otherwise destroy the materials from which additional original copies of the work may be made. State fraud laws reinforce this practice by generally prohibiting additions to a limited edition.”).

covered an international network of forgers and dealers that flooded the art market with fake prints.¹¹⁶ The action began with a 1986 investigation that led to the 1991 seizure of over 75,000 counterfeit works.¹¹⁷

Operation Bogart established the potential for federal authorities to seize counterfeit works, to bring civil charges, and to prosecute criminal convictions for false attribution. Undoubtedly, the public is harmed when it is sold works with fraudulent provenance. While copyright will preempt those claims that assert an unauthorized party has fraudulently copied the author's work,¹¹⁸ it will not preempt claims of state law fraud when false representations are used to induce the license agreement.¹¹⁹ This has proven to be the case for federal laws enacted under authority outside the Copyright Clause as well.¹²⁰

The actions by federal authorities establish a government interest in protecting the public from false attribution of artwork and other false markings that can affect the value of the artwork.¹²¹ The government has an interest in assuring the public is informed as to the provenance of the goods they are buying. Congress has power under the Commerce Clause to protect this interest, and federal agencies use this power to stop art fraud and other deceptive trade practices.

116. *FTC Wins \$2.3 Million Judgment Against Gallery Owner In Phony Art Scam*, FTC PRESS RELEASE (Aug. 11, 1995), <http://www.ftc.gov/opa/1995/08/gabos3.shtm> (“Operation Bogart was a joint investigation by the Department of Justice, postal inspectors, the FTC and European police working through Interpol.”).

117. *Id.*; see *United States v. Amiel*, 95 F.3d 135, 137 (2d Cir. 1996) (“In July 1991, following an undercover investigation of the Amiels’ sales practices, the government instituted civil forfeiture proceedings against several million dollars worth of the Amiels’ real and personal property, alleging that the property was subject to forfeiture.”); see also *U.S. v. Amiel*, 995 F.2d 367, 371–72 (2d Cir. 1993) (providing additional historical information on the civil action and forfeitures).

118. See, e.g., *Rutledge v. High Point Reg’l Health Sys.*, 558 F. Supp. 2d 611, 623 (M.D.N.C. 2008) (“‘[U]nauthorized’ consists of nothing more than reproduction, distribution and display of materials allegedly protected under the Copyright Act and therefore cannot provide a separate element to avoid preemption.”).

119. E.g., *Shuptrine v. McDougal Littell*, 535 F. Supp. 2d 892, 897 (E.D. Tenn. 2008) (“Defendant entered into a relationship with Shuptrine allegedly under false pretenses designed to lower the cost of obtaining Shuptrine’s paintings. Plaintiff’s fraud allegation is a qualitatively different offense than merely exceeding the licensing agreement.”).

120. *United States v. Martignon*, 492 F.3d 140, 149 (2d Cir. 2007) (“Congress exceeds its power under the Commerce Clause by transgressing limitations of the Copyright Clause only when (1) the law it enacts is an exercise of the power granted Congress by the Copyright Clause and (2) the resulting law violates one or more specific limits of the Copyright Clause.”); see also *United States v. Moghadam*, 175 F.3d 1269, 1280 (11th Cir. 1999).

121. Falsifying the number of copies in a series of lithographs cannot affect the copyright in the work but it can impact the value. A series with fewer copies will generally have more value so falsifying the actual number of copies made can force buyers to pay an unnecessary premium for the work. See TOM BAZLEY, *CRIMES OF THE ART WORLD* 69 (2010).

The FTC Endorsement Guidelines provide a much more specific outline for the expectations of the public. When an opinion, endorsement, picture, name or other form of endorsement is associated with the quality of a work, that endorsement must be accurate. A person making an endorsement without belief in the truth or accuracy of the statement violates the FTC Endorsement Guidelines, so how much greater is the violation made by a third party?¹²² And how much more insidious if there is a financial incentive or reward for that third party to make such false endorsements?¹²³

V. WHY ATTRIBUTION MATTERS—THE VALUES OF PUBLIC ATTRIBUTION

Unfair competition law places the power of enforcement in the hands of the party harmed rather than relying on the FTC or the justice department to seek civil and criminal redress. When an artist's name or signature is used to authenticate a work, the public should be able to rely on that name or signature. And the artist, along with federal and state authorities, should have power to enforce those rights. The public is protected and copyright law is not harmed.

Plagiarism provides such a right. Where they exist, state plagiarism laws afford yet another variation on protection against use of an author's or artist's content without attribution.¹²⁴ "Plagiarism is the borrowing of someone else's work without attribution."¹²⁵ "Plagiarism means intentionally taking the literary property of another without attribution and passing it off as one's own, having failed to add anything of value to the copied material and having reaped from its use an unearned benefit."¹²⁶ It may overlap with copyright, but the tort is independent of copying of another's protected expression and so is distinct from copyright.¹²⁷

For student work, plagiarism remains ubiquitous. "Too many students are lifting ideas, passages—entire papers—and passing the work

122. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 401–02 (1890) (citations omitted).

123. See generally Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927–1963*, 56 FED. COMM. L.J. 329, 331–32 (2004) (discussing payola laws that prohibit radio airplay for musical compositions without disclosure of the payments).

124. See Roger Billings, *Plagiarism in Academia and Beyond: What Is the Role of the Courts?*, 38 U.S.F. L. REV. 391, 392 (2004).

125. *Id.*

126. Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 516–17 (1992).

127. Billings, *supra* note 123, at 392–93 ("Engaging in plagiarism can result in both copyright infringement under the Act and plagiarism, but plagiarism by itself remains subject to state law.").

off as their own.”¹²⁸ Though data is somewhat difficult to assess, in “[w]eb surveys of over forty thousand undergraduates on sixty-eight campuses in the United States and Canada, . . . 51 percent have acknowledged at least one incident of serious cheating on written work.”¹²⁹ Earlier studies, conducted in 1963 and 1993, placed the incidence at 65 percent and 66 percent respectively.¹³⁰ The difference may be a factor of how students self-report their behavior, their understanding of their behavior, or the impact of technology to identify plagiarism and other such conduct.¹³¹ Also unclear is the extent to which plagiarism and cheating are becoming more common and less exceptional as student strategies.¹³²

In the academic, literary and non-commercial circles, plagiarism represents a form of palming off another’s work as one’s own, just as replacing a label on a trademarked product is a form of reverse passing off under trademark law.¹³³ Nonetheless, even plagiarism is impacted by *Dastar*. At least one district court identified *Dastar* as an attempted “plagiarism case” in which “the plaintiffs were attempting to use trademark law to prosecute plagiarism of their creative work.”¹³⁴

Illinois refocused on plagiarism in higher education, making the commercial sale of academic papers subject to civil proceedings and injunctive relief.¹³⁵ Codes of professional responsibility may include

128. Dian Schaffhauser, *Fighting Plagiarism with Technology*, CAMPUS TECH., Mar. 2013, at 12–13 (“It’s much easier for students to cheat than ever before, thanks in large part to technology.”).

129. Donald L. McCabe, *It Takes a Village: Academic Dishonesty and Educational Opportunity*, in ELEMENTS OF ARGUMENT: A TEXT AND READER 627 (Annette T. Rottenberg & Donna Haisty Winchell eds., 2011).

130. *Id.* at 626.

131. *See id.* at 628; *see also* Schaffhauser, *supra* note 127, at 13.

132. *See* Kim Parker, Amanda Lenhart & Kathleen Moore, *The Digital Revolution and Higher Education College Presidents, Public Differ on Value of Online Learning*, PEW INTERNET & AM. LIFE PROJECT, Aug. 28, 2011, at 6 (“Some 55% of college presidents say plagiarism has increased in college students’ papers over the past 10 years Just 2% say it has decreased. Of those who say plagiarism is on the rise, the overwhelming majority (89%) believe that computers and the internet have played a major role”).

133. Stearns, *supra* note 125, at 517 (“In a sense, plagiarism (presenting another’s work as one’s own) is the inverse of forgery (presenting one’s own work as another’s).”).

134. *Bach v. Forever Living Products U.S., Inc.*, 473 F. Supp. 2d 1110, 1118 (W.D. Wash. 2007).

135. 110 ILL. COMP. STAT. 5/1 (2013).

Upon written petition by the chief executive officer of the campus of any accredited institution of higher education in this State, the Attorney General . . . is authorized to institute civil proceedings in the Circuit Court to enjoin the sale, preparation for sale, advertising for sale, or offering for sale of any academic papers. The court may grant the injunction upon finding that (1) the preparer, advertiser or seller has purposely engaged in a course of conduct which he reasonably should have known would result in the submission of such academic papers, substantially unchanged, as original work by any

plagiarism within the conduct deemed unprofessional.¹³⁶ As the Sixth Circuit admonished the bar, “While our legal system stands upon the building blocks of precedent, necessitating some amount of quotation or paraphrasing, citation to authority is absolutely required when language is borrowed.”¹³⁷ In a recent decision involving publicity rights and identity, the Eastern District of New York fined Lindsey Lohan’s counsel for plagiarizing briefs and misrepresenting the efforts to correct the plagiarism.¹³⁸

Plagiarism remains a rather amorphous tort, in part because of the paucity of actual case law outside of academic circles. Nonetheless, it represents the taking of another’s work and passing it off as one’s own that rights of attribution should help address. Plagiarism laws do not provide the alternative regulation needed, but the concepts may provide an outline for what Congress should adopt. Plagiarism provides not the legal rules, but the normative values essential for the future.

It is certainly conceivable that student attitudes toward plagiarism are informed by the law’s attitude towards attribution. If society does not value the right of an artist or author to have her name associated with her work in commercial settings, then why should students worry about the provenance of the content they cut-and-paste from the Internet into the assignment? The behaviors may not have changed, but the consequences may have done so.

More importantly, as the nature of the workforce changes from industrial to informational,¹³⁹ improvement in valuing attribution and

person other than the author in partial or total fulfillment of requirements for academic credit at such accredited institution of higher education. . . . For purposes of this Act, “academic papers” includes any theme, essay, term paper, book report, thesis dissertation, or other academic paper.

Id.

136. *See, e.g., Venesevich v. Leonard*, No. 1:07-CV-211807CV2118, 2008 WL 5340162, at *2 (M.D. Pa. 2008) (“The court is both disappointed and disturbed to conclude that plaintiff’s attorney, Don Bailey . . . has plagiarized a significant portion of plaintiff’s brief in opposition to the motion to dismiss.”); *see also In re Burghoff*, 374 B.R. 681, 683 (Bankr. N.D. Iowa 2007) (lawyer copied an article posted online by another law firm, copying “seventeen of the nineteen total pages in the pre-hearing brief”); *see also United States v. Bowen*, 194 Fed. App’x 393, 402 (6th Cir. 2006) (unpublished) (“In our own research in preparation for oral argument, we discovered this section of Bowen’s brief, close to 20 pages, was copied almost verbatim from a published district court decision, *United States v. Malouf*, 377 F. Supp. 2d 315 (D. Mass. 2005)”); *In re Lamberis*, 443 N.E.2d 549, 550 (Ill. 1982) (attorney censured for plagiarism of masters degree thesis in law, which “constituted ‘conduct involving dishonesty, fraud, deceit, or misrepresentation’ violating the Illinois Code of Professional Responsibility DR 1-102(A)(4) (Illinois State Bar Association 1977).

137. *Bowen*, 194 Fed. App’x at 402.

138. *Lohan v. Perez*, 924 F. Supp. 2d 447, 461 (E.D.N.Y. 2013) (“Attorney Ovadia’s misrepresentation . . . and submission of a plagiarized Opposition constituted an affront to the Court—not to defendants. The victim of the sanctionable misconduct is the justice system itself”).

139. *See John W. Moravec, Rethinking Human Capital Development in Knowmad Society*, in *KNOWMAD SOCIETY* 31, 36–39 (John W. Moravec ed., 2013) (“In the realm of teaching and learning, this means that we are becoming not only co-learners, but

fighting plagiarism will surely become a critical part of the successful post-industrial culture. Attribution should not discourage collaboration; instead, it should create value and reward for the contributions made collaboratively.¹⁴⁰ “The productivity of the worker will depend on his ability to put to work concepts, ideas, theories—that is, things learned in school—rather than skills acquired through experience.”¹⁴¹ If the concepts, ideas, theories, and knowledge have no provenance and society has no respect for source or attribution, the information environment will lag and corrupt. Respect for attribution may help to create a positive trend for collaborative knowledge building in the information economy.¹⁴²

VI. VARA—THE IMPERFECT SOLUTION

Given the tepid compliance with article 6bis of the Berne Convention, generally, the United States at least provides limited rights of attribution to its artists, though not to other authors.¹⁴³ The Visual Artists Rights Act (VARA)¹⁴⁴ provides limited protection to U.S. artists regarding both the right of attribution and the right to integrity in the artists’ work.¹⁴⁵ VARA reflects a poor fit within U.S. copyright law. It adds an additional exclusive right beyond those provided under section 106 of the Copyright Act to claim authorship of a work of visual art and “to prevent the use of his or her name as the author of any work of visual art which he or she did not create”¹⁴⁶ The right of attribution is subject to the fair use limitation to copyright, but not to the other limitations incorporated into sections 108 to 122 of the Copyright Act.¹⁴⁷

The statute highlights the interplay between rights of attribution and rights of integrity by providing the author the right to disclaim a work that has been distorted or mutilated. An artist “shall have the right to prevent the use of his or her name as the author of the work

also co-teachers as we co-constructively produce new knowledge and new applications for our knowledge.”); *see also* PETER DRUCKER, *THE AGE OF DISCONTINUITY* 37 (1969) (“Finally, these new industries differ from the traditional modern industry in that they will employ predominantly knowledge workers rather than manual workers.”).

140. In the realm of teaching and learning, this means that we are becoming not only co-learners, but also co-teachers as we co-constructively produce new knowledge and new applications for our knowledge.

141. DRUCKER, *supra* note 138.

142. Fisk, *supra* note 24, at 53–54 (“[C]redit becomes a form of human capital itself because it translates and signals the existence of a deeper layer of human capital.”); *see also* Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 *HARV. J. SPORTS & ENT. L.* 95, 128 (2010).

143. Berne, *supra* note 99; *see also* Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap,”* 2007 *UTAH L. REV.* 659, 665 (2007).

144. Visual Artists Rights Act of 1990, 17 U.S.C.A. § 101 (1990).

145. *See* 17 U.S.C. § 106A (2002).

146. *Id.*

147. *See id.*

of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.”¹⁴⁸

The addition of VARA to U.S. law was done in recognition of the inadequate compliance U.S. law had with Article 6bis of the Berne Convention, which requires minimum guarantees for rights of attribution and integrity.¹⁴⁹ In entering the Berne Convention, U.S. lawmakers relied more generally on the patchwork approach of unfair competition and other laws to afford the needed protections for attribution and integrity.¹⁵⁰

The law was not without its controversy.¹⁵¹ “When the United States joined Berne in 1988, the entertainment and publishing industries vehemently opposed the adoption of specified moral rights legislation as part of the United States adherence to Berne.”¹⁵² To contain the impact of VARA on the broader media industries, Congress narrowly circumscribed the definition of a work of visual art.¹⁵³

148. *Id.* The right of integrity is related to that of attribution but generally beyond the scope of this Article.

149. See Roberta Rosenthal Kwall, *Narrative’s Implications for Moral Rights in the United States*, in *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: COPYRIGHT AND RELATED RIGHTS*, 95–96 (Peter K. Yu ed., 2006) [hereinafter Kwall].

150. William Strauss, *The Moral Right of the Author*, in 2 *STUDIES ON COPYRIGHT* 963, 965–76 (Arthur Fisher ed., 1963); see also 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, 988 (2002).

151. See Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 *HARV. L. REV.* 554, 557–58 (1940) (“Opposition has been violent and one of the main objections is the inclusion of Article 6bis which, to a limited extent, incorporates the moral right doctrine.”).

152. Kwall, *supra* note 148 at 96.

153. 17 U.S.C. § 101 (2010).

A “work of visual art” is—

(1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

Id.

VARA protection for attribution exists only if a copyrighted work is created that is limited to editions of 200 or fewer copies, provided such copies are individually signed and numbered. VARA categorically excludes advertising and promotional work, work for hire, as well as electronic publications.¹⁵⁴ VARA “has been critiqued as providing too little protection to too few artists.”¹⁵⁵ In sum, VARA does too little, does it poorly, and does it for too few.¹⁵⁶

Because VARA covers such a small subset of works and authors, it cannot serve as an adequate substitute for a true right of attribution. Had VARA been U.S. law throughout the twentieth century, it would not have helped William Clemens, Charlie Chaplin, Tess Gardella, Alberto Vargas, or Paul Smith protect their rights of attribution. Clemens wrote for newspapers, Chaplin and Smith created for motion pictures, Gardella performed on stage, and Vargas drew illustrations. All these artists would find themselves outside of VARA protection.

VARA’s exclusion of electronic publications creates a second gaping lapse in jurisprudential protection. In today’s networked, digital-information ecology it may be increasingly common that copyrighted works, and even works of fine art, exist predominantly in digital form. The phrase “electronic publication” was not defined under the Copyright Act or in the legislative history of VARA.¹⁵⁷ The phrase was not used by the Supreme Court when distinguishing between electronic databases and microfilm reproductions in *New York Times Co., Inc. v. Tasini*.¹⁵⁸ The U.S. Patent and Trademark Office interprets the phrase quite broadly to suggest an “electronic publication” includes an “online database or Internet publication.”¹⁵⁹

Presumably the use of a digital camera does not render a photograph an electronic publication that would strip it of VARA protec-

154. *Id.*

155. Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 408 (2009) (citing Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 300 (2004)); Stuart Rebecca, *A Work of Heart: A Proposal for a Revision of the Visual Artists Rights Act of 1990 to Bring the United States Closer to International Standards*, 47 SANTA CLARA L. REV. 645 (2007).

156. See H.R. Rep. No. 100-609, at 7 (1988), reprinted in 1988 U.S.C.C.A.N. 1037 (“hearings on the specific issue of moral rights and the Berne Convention . . . Peter Nolan, for the Motion Picture Association of America, and Kenneth Dam, representing IBM, both of whom advocated adherence to Berne, but who testified that current U.S. law on moral rights is sufficient for adherence”).

157. See H.R. Rep. No. 101-514 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6924.

158. *N. Y. Times Co. v. Tasini*, 533 U.S. 483, 506 (2001) (“We conclude that the Electronic Publishers infringed the Authors’ copyrights by reproducing and distributing the Articles in a manner not authorized by the Authors and not privileged by § 201(c).”).

159. *Manual of Patent Examining Procedure § 2128*, U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov/web/offices/pac/mpep/s2128.html> (last visited Mar. 14, 2014).

tion.¹⁶⁰ Though the legislative history suggests that negatives are protected, as well as prints and transparencies, the requirement that more than a single copy be signed and sequentially numbered makes compliance unwieldy.¹⁶¹ The print derived from the digital camera becomes a VARA-protected photograph only when physically printed for a non-illustrative use, signed and numbered.¹⁶² Moving images are excluded as audiovisual works.¹⁶³

The digitization of publishing and improvement in the quality of digital displays likely mean that digital screens will increasingly become one of the modern modes of artistic expression for the artist:¹⁶⁴

We lived once in a world where the realm of the imaginary was governed by the mirror, by dividing one into two, by otherness and alienation. Today that realm is the realm of the screen, of interfaces and duplication, of continuity and networks. All our machines are screens and the interactivity of humans has been replaced by the interactivity of screens.¹⁶⁵

The arbitrary, antiquated rules of visual art in VARA serve as a trap for the unwary and do little to protect the values at the heart of attribution. In selecting among media, VARA does not further the economic interests of artists or authors, galleries, publishers, producers, or retailers. Nor do the categories distinguish between works that need authorial context and those for whom the author can be understood as dead or irrelevant.¹⁶⁶ The distinctions were technologically regressive when promulgated and have devolved into a relic, irrelevant to all.

160. *But see* H.R. Rep. No. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921 (“The photographs encompassed by the definition are those still photographic images produced for exhibition purposes. The bill covers both positives (for example, prints, contact sheets, and transparencies such as slides) and negatives (negative photographic images or transparent material used for printing positives) of a photograph.”).

161. *See id.*

162. 17 U.S.C. § 101 (2012).

163. *Id.*

164. *See generally* BRUCE WANDS, *ART OF THE DIGITAL AGE* (Reprinted ed., Thames & Hudson 2006); MELVIN L. ALEXENBERG, *THE FUTURE OF ART IN A DIGITAL AGE: FROM HELLENISTIC TO HEBRAIC CONSCIOUSNESS* 33–34 (Intellect. Ltd. 2006) (“[C]oncept and context rather than visual appearance gives meaning to images and objects was seriously discussed centuries ago by rabbis dealing with idolatry and Greek aesthetics.”).

165. Ted Hiebert, *Behind the Screen: Installations from the Interactive future*, in RANDY ADAMS, STEVE GIBSON, & STEFAN MÜLLER ARISONA, *TRANSDISCIPLINARY DIGITAL ART: SOUND, VISION AND THE NEW SCREEN* 80 (2006/2007).

166. Michel Foucault, *What is an Author?*, in *TWENTIETH CENTURY LITERARY THEORY: AN INTRODUCTORY ANTHOLOGY* 124–42 (Vassilis Lambropoulos & David Neal Miller eds. 1987); *see also* Brent Salter, *Taming the Trojan Horse: An Australian Perspective of Dramatic Authorship*, 56 J. COPYRIGHT SOC'Y. U.S.A. 789, 896 (2009); Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1183 (2005) (“Michel Foucault suggested that authorship acted as an interpretive construct primarily serving to limit the freedom of potential meanings in a text.”).

As digital artwork becomes more significant and the potential for fraudulent transactions in digital art becomes more common, the law will need to move past VARA to provide express protection for these works under copyright and under related doctrines to protect the public and the artists from fraud and abuse. These works demand that a new form of attribution be developed to identify the provenance of the works as they change hands and as they are replicated—both lawfully and unlawfully.

VII. ATTRIBUTION AS A FORM OF NATIONAL RIGHT OF PUBLICITY

A somewhat closer fit to attribution rights can be found in various state laws and common law principles protecting the rights of publicity. “Today it is possible to state with clarity that the right of publicity is simply this: it is the inherent right of every human being to control the commercial use of his or her identity.”¹⁶⁷ Thirty-one states recognize some form of the right of publicity, while the two states that rejected common law protection enacted statutes to provide the right.¹⁶⁸ For example, New York rejected a common law right of publicity in 1902¹⁶⁹ but quickly enacted statutory protection.¹⁷⁰ As those provisions exist today, sections 50 and 51 of the New York Civil Rights Act prohibits the use of a person’s “name, portrait, picture or voice . . . for advertising purposes or for the purposes of trade without the written consent.”¹⁷¹

The New York statute makes very specific references to advertising and trade as conditions necessary to provide protection under the statute.¹⁷² This does not necessarily end all analysis. While the Second Circuit suggests that a T-shirt sold in a magazine would properly be treated as “for purposes of trade,” placing a folded poster in such a magazine would depend on many factors.¹⁷³

167. J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed., 2013).

168. *Id.* § 6:3.

169. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 443 (N.Y. 1902) (“Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus . . . she seeks the aid of the courts to enjoin a further circulation of the lithographic prints containing her portrait . . .”).

170. N.Y. CIV. RIGHTS LAW § 51 (McKinney 2012) (enacted 1903).

171. *See id.*; *see also* *Lohan v. Perez*, 924 F. Supp. 2d 447, 453 (E.D.N.Y. 2013) (dismissing publicity rights claim for use of actress’s name in song lyrics).

172. *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 87 (2d Cir. 1989) (“In order to establish a violation of section 51, a plaintiff must show that the defendant made use, within the state of New York, of plaintiff’s name, portrait, or picture ‘for advertising purposes or for the purposes of trade’ without plaintiff’s written consent.”).

173. *Id.* at 89.

In determining whether [a poster inserted into a magazine] has been a use for the purposes of trade, the fact-finder should consider a variety of factors including, but not limited to the nature of the item, the extent of its relation-

Unlike New York, California utilizes both a statutory formulation and a common law formulation, which are somewhat representative. “A common law cause of action for appropriation of name or likeness may be pleaded by alleging (1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”¹⁷⁴

The statutory construction is similar in many regards. California Civil Code § 3344(a) provides, in relevant part:

Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.¹⁷⁵

Absent limitations, the right of publicity would create a powerful property right inconsistent with free-speech principles.¹⁷⁶ To alleviate this tension, both common law and legislative accommodations abound.¹⁷⁷ In addition to a number of First Amendment limitations on the right of publicity, the statutory right includes a significant statutory limitation, exempting from publicity rights uses “in connection with any news, public affairs, or sports broadcast or account, or any political campaign.”¹⁷⁸ These limitations attempt to keep rights of publicity focused on commercial exploitation of a person’s identity so that there is a fairly bright line between protection of publicity rights involving commercial exploitation of an individual and free speech rights to identify an individual in photographs, by name, or in other

ship to the traditional content of a magazine, the ease with which it may be detached from the magazine, whether it is suitable for use as a separate product once detached, and how the publisher markets the item.

Id.

174. *Eastwood v. Super. Ct.*, 198 Cal. Rptr. 342, 347 (Dist. Ct. App. 1983); *see also* *Hilton v. Hallmark Cards*, 580 F.3d 874, 889 (9th Cir. 2009) (same test); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001) (same test); *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 612 (Dist. Ct. App. 2006) (“The elements of a common law action are the unauthorized use of the plaintiff’s identity to the defendant’s advantage by appropriating the plaintiff’s name, voice, likeness, etc., commercially or otherwise, and resulting injury.”).

175. CAL. CIV. CODE § 3344(a) (West 2013).

176. *See Kirby*, 50 Cal. Rptr. at 615 (“[A] tension frequently exists between the First Amendment’s goal of fostering a marketplace of ideas and respect for individual expression, and a celebrity’s right of publicity.”).

177. *Downing*, 265 F.3d at 1001 (9th Cir. 2001) (“Under both the common law cause of action and the statutory cause of action ‘no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.’”) (quoting *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793 (1995)).

178. *See id.* § 3344(b).

ways outside of direct commercial exploitation.¹⁷⁹ Unfortunately, that is not necessarily how the courts have interpreted the laws.¹⁸⁰

Though not universally adopted, *Rogers v. Grimaldi*¹⁸¹ provides the best balancing of free speech and commercial rights protections.¹⁸² In *Rogers*, the Second Circuit recognized “[p]oetic license is not without limits. The purchaser of a book, like the purchaser of a can of peas, has a right not to be misled as to the source of the product.”¹⁸³ Recognizing the tension between artistic or communicative works and commercial fraud on the public, the court emphasized the need for balance. “We believe that in general the Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.”¹⁸⁴ As such, the use of a celebrity’s name will not be actionable “unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.”¹⁸⁵ This balance assures that the right of attribution remains an interest for the author and artist but not a gag limiting future works.¹⁸⁶

Despite the usefulness of the *Rogers* Test, the California Supreme Court focused instead on the second work by emphasizing the extent to which the use is transformative. In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*¹⁸⁷ and *Winter v. DC Comics*,¹⁸⁸ the California Su-

179. See generally Michael D. Murray, *Reconstructing the Contours of the Copyright Originality and Idea-Expression Doctrines Regarding the Right to Deny Access to Works*, 1 TEX. A&M L. REV. 921, 927 (2014) (discussing the right to access as a copyright interest that militates against over-enforcement. This approach applies with equal vigor to publicity rights in communicative works.)

180. See Jon M. Garon, *Beyond the First Amendment: Shaping the Contours of Commercial Speech in Video Games, Virtual Worlds, and Social Media*, 2012 UTAH L. REV. 607, 651 (2012) (calling for a more narrowly constructed right of publicity involving commercial activities).

181. *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

182. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1279 (9th Cir. 2013) (“*Rogers v. Grimaldi* is a landmark Second Circuit case balancing First Amendment rights against claims under the Lanham Act.”).

183. *Rogers*, 875 F.2d at 997.

184. *Id.* at 999.

185. *Id.* (“A misleading title with no artistic relevance cannot be sufficiently justified by a free expression interest.”).

186. See *Parks v. LaFace Records*, 329 F.3d 437, 448 (6th Cir. 2003); see also *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002); *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 664–65 (5th Cir. 2000); *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 339 (E.D. Pa. 1996); Restatement (Third) of Unfair Competition, § 47, cmt. (c) (“[T]he use of a person’s identity primarily for the purpose of communicating information or expressing ideas is not generally actionable as a violation of the person’s right of publicity,” unless the name or likeness is used solely to attract attention to a work that is not related to the identified person, or if the work contains substantial falsifications.)

187. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001).

188. See generally *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003) (applying the *Comedy III* Transformative Test).

preme Court applied a transformative test, reinterpreting California's rights of publicity laws to provide additional guidance on the protections afforded to speech rights and those provided to individuals who find their identity commercialized without permission.

In *Comedy III*, the Court determined that the unauthorized reproduction of the images of The Three Stooges on T-shirts did not constitute a commercial use because "T-shirts at issue in [the] case did not constitute an advertisement, endorsement, or sponsorship of any product."¹⁸⁹ If T-shirts are considered by the California Supreme Court to be an expressive medium, then canvases, prints, sculptures, and other more expressive media will also fall outside the commercial category.¹⁹⁰

The challenge in California is the additional question of whether an otherwise noncommercial use remains actionable because the use is not transformative. The California Supreme Court has added this question to the analysis, presumably to give more breathing space for the First Amendment.¹⁹¹

Unlike the Transformative Test used by California, the *Rogers* Test provides a useful standard to recognize the right of attribution in the title of a work or when used in association with a work while at the same time limiting the nature of that right to provide significant breathing space for the First Amendment right of future artists and authors. Creators of documentaries, biographies, news reports, and new artistic works do not need the permission of their subjects to incorporate their subjects into new works.

Whereas the Transformative Test engages the court in an aesthetic judgment over the communicative value of the new work,¹⁹² the *Rogers* Test focuses on the commercial nature of the transaction and the

189. *Comedy III*, 21 P.3d at 801.

190. *See, e.g.*, *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (image of Tiger Woods used in lithographs not a violation of Wood's publicity rights because of the transformative nature of the work).

191. *Winter*, 69 P.3d at 477 (quoting *Comedy III*, 21 P.3d at 797).

We developed a test to determine whether a work merely appropriates a celebrity's economic value, and thus is not entitled to First Amendment protection, or has been transformed into a creative product that the First Amendment protects. The "inquiry is whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness. And when we use the word 'expression,' we mean expression of something other than the likeness of the celebrity."

Id.

192. *Comedy III*, 21 P.3d at 808 (showing how the court distinguishes between "good substitutes for conventional depictions" or "when a work contains significant transformative elements" that make such uses "especially worthy of First Amendment protection . . .").

likelihood of confusion involved when selling communicative works.¹⁹³ It accepts that the public should be able to assume the use of attribution on a product or advertisement is an endorsement fully compliant with FTC Endorsement Guidelines for commercial products. It also respects the public, finding us sufficiently sophisticated to understand when a celebrity's name is used to evoke something other than an endorsement by that celebrity. The *Rogers* Test combined with regulations that require public disclosure of hidden endorsements¹⁹⁴ create a framework for appropriate attribution rights and limitations.

The Ninth Circuit, interpreting these tests under California law, highlights their different purposes. "The right of publicity protects the celebrity, not the consumer."¹⁹⁵ But this assumes that the celebrity will not tomorrow be the artist hauled before a judge for violating the publicity rights of yet another celebrity. Like copyright and the First Amendment, these laws favoring individuals are designed to benefit the public as a whole.¹⁹⁶ Creating breathing space for rights of attribution does, in fact, protect celebrities; just as fair use protects artists from undue constraints as to the source of materials.¹⁹⁷

VIII. THE WAY FORWARD

Adopting statutory solutions to the lack of attribution would do much to signal the public importance of attribution and hopefully a renewed public interest in decreasing plagiarism.¹⁹⁸ Ultimately this may be the most important aspect of the expansion of attribution rights. Digital content puts copies of works onto our devices and into the hands of the public in ever-changing ways.¹⁹⁹ By creating renewed protection for rights of attribution, Congress would emphasize the re-

193. *Rogers v. Grimaldi*, 875 F.2d 994, 997–99 (2d Cir. 1989).

194. See text accompanying *supra* note 7.

195. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1281 (9th Cir. 2013).

196. See Murray, *supra* note 178, at __ ("Neither system—copyright or First Amendment—is a reward system, not a quid pro quo system, not directly tied to benefitting speakers, authors, artists, and inventors. Instead, we have one system that indirectly benefits speakers, authors, artists, and inventors as it directly benefits the public.").

197. See *Comedy III*, 21 P.3d at 808–09 (discussing goals of First Amendment and Fair Use).

198. See generally *A.V. v. iParadigms, Ltd. Liab. Co.*, 544 F. Supp. 2d 473, 478 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom. A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009) ("According to school administrators, plagiarism had become a major problem in each school district and Turnitin was employed in an effort to decrease plagiarism in their schools."); David E. Sorkin, *Practicing Plagiarism*, 81 LL. B.J. 487, 487 (1993) ("In journalism, literature, and science, plagiarism is among the greatest sins. In college and law school, it can be a basis for severe disciplinary sanctions, including suspension or expulsion.").

199. See generally PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* (Stanford Univ. Press, rev. ed., 2003); see also LAW-

spect due to the creators of the source material into which new works are developed.²⁰⁰ By treating attribution as more than an international duty or benefit for select artists, Congress would emphasize that the fidelity and provenance of content matters. But by limiting the rights to the solutions suggested in this Article, Congress would avoid creating additional significant barriers to the growing collaborative culture. Precisely for this reason, it is attribution that becomes the predominant moral right to be developed for the digital age.

Although the FTC Endorsement Guidelines recognize the market impact of attribution, they do not create a private cause of action. Combined with the limitations on Lanham Act protections caused by *Dastar*, new legislation is necessary to return to compliance with article 6bis of the Berne Convention for attribution rights, and ideally to vest those rights as federal law rather than as a patchwork of state law.

One possibility is to expand the scope of Section 106A to eliminate the focus on works of visual arts and instead apply the provision across all works protected by copyright. To balance the issues involved in works for hire, this approach should include the ability of the parties to make agreements to waive the rights permissible. While it may be preferable that every contributor to a software project or a public wiki is listed in the credits, the transaction costs may make these attribution rights more of a burden than benefit. Participants in shared creative enterprises should certainly have the ability to waive their right to attribution just as surely as they have a presumptive right to that attribution.²⁰¹

The solution to extend attribution across all copyrighted works would protect Alberto Vargas and many of the artists such as described in this Article, but it would not provide protection for performers such as Charlie Chaplin who worked under work for hire agreements or Tess Gardella who claimed protections as a performer rather than as an author. Expanding Section 106A across all works may provide only a partial solution.

A second approach would focus more directly on *Dastar* itself. The unfair competition analysis of *Rogers* is a trademark analysis that authors now have to distinguish in order to protect their legitimate

RENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE (1999) (renamed CODE 1.0).

200. See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 391–92 (1997) (presenting the theory of esteem-based norms, describing the conditions necessary for their development, and concluding that “an important function of law is to shape or regulate norms”). Cf. Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1255–58 (2000) (discussing literature that suggests the public is not sufficiently aware of laws to have any such effect).

201. See Garon, *supra* note 141, at 111–12 (“Control over attribution plays a number of roles.”).

trademarks.²⁰² The Supreme Court was wrong to suggest that a cause of action for plagiarism cannot be reached by section 43(a) of the Lanham Act for works still under copyright and for performances never protected by copyright.²⁰³ Where the services embodied in a communicative work designate the source of that performance or copyright, such services should be properly attributed unless the service provider has agreed to the contrary.

The codification of such a rule could be placed in either the Copyright Act or the Lanham Act, though incorporation into the Copyright Act would be preferable. The Supreme Court was correct in the outcome of *Dastar* and its position that a copyrighted work no longer protected by copyright should be free for most uses.

Even here, however, the intersection of copyright and trademark law must be more reflective of the distinct purpose of both laws. For example, in *Nike, Inc. v. Just Did It Enterprises*,²⁰⁴ the Seventh Circuit did not address Nike's trademark claim against a parodist because the trademarked Nike swoosh is a geometric shape not protectable by copyright, nor did it focus on the short phrase "just do it" would not be subject to copyright protection.²⁰⁵ Similarly, a company can adopt an image once under copyright but now in the public domain as its trademark, and provided the mark is inherently distinctive or otherwise acquires secondary meaning,²⁰⁶ that mark can be a valid trade-

202. See *Bach v. Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1110, 1116–18 (W.D. Wash. 2007).

Defendants argue that Plaintiffs cannot bring their trademark claims because copyright law provides an adequate remedy.

...

Plaintiffs are seeking remedies for distinct wrongs under each legal framework. Plaintiffs' rights in the name and title of Jonathan Livingston Seagull and the trade dress of the book cover (a white seagull in silhouette against a blue background) are protected under trademark law, not copyright law, because it is the name, title, and trade dress that are the source-identifying marks associated with Plaintiffs. And Plaintiffs' rights in the JLS character, the photograph that FLP used as its logo, and the portions of the copyrighted text used by FLP, are protected under copyright law, not trademark law, because the character, text, and images in Jonathan Livingston Seagull are the artists' creative work.

Id. 1116–18 (emphasis omitted).

203. *C.f.*, *id.* at 1116 ("The Supreme Court held that the 'origin of goods' provision in section 43(a) of the Lanham Act does not contain a cause of action for plagiarism.").

204. *Nike, Inc. v. Just Did It Enterprs.*, 6 F.3d 1225 (7th Cir. 1993).

205. *Id.* at 1226–27 n.2 ("JUST DO IT is not a registered trademark. The district court found that because of its inherently distinctive attributes as applied to NIKE goods, it was entitled to trademark protection under the common law.").

206. 15 U.S.C. § 1052(f) (2012); see *Time, Inc. v. Petersen Publ'g Co.*, 173 F.3d 113, 117 (2d Cir. 1999) ("A mark is entitled to protection when it is inherently distinctive; if the mark is 'merely descriptive,' it qualifies for protection only if it has acquired secondary meaning . . .") (internal citations omitted).

mark for those particular classes of goods or services.²⁰⁷ A particular illustration of Shakespeare or Poe can serve as a trademark for a bookstore using that surname as part of its title without removing the illustration from the public domain.²⁰⁸ So *Dastar* should be properly understood to mean that while a party can never create the likelihood of confusion without violating the Lanham Act, the absence of attribution cannot create such likelihood of confusion in a work that has fallen into the public domain.

This rule can be summarized with two provisions. First, the Copyright Act does not pre-empt the statutory authority in the Lanham Act and applicable state trademark and unfair competition laws. Second, all rights of an author to claim attribution of a work shall be terminated upon the end of copyright protection of such work. Taken together, these two rules will undo the damage caused by *Dastar* and return U.S. law to an improved mosaic of attribution rights.

There is an additional benefit to structuring the solution in this manner. Positioning the right of attribution as an additional right under Section 106 would enable a plaintiff to protect that right using the applicable statutory damages provisions afforded to other exclusive rights.²⁰⁹ Copyright acts as a strict liability tort for which the statutory remedy can be reduced, but not below \$200.00.²¹⁰ By placing the source of rights for attribution outside of the exclusive rights granted to copyright owners in trademark law, the potential for a windfall of statutory damages can be eliminated.

Trademark law does not have a statutory minimum damage award.²¹¹ “Additionally, the court has discretion to shape relief ‘according to the principles of equity and the individual circumstances of

207. See *Frederick Warne & Co. v. Book Sales Inc.*, 481 F. Supp. 1191, 1196 (S.D.N.Y. 1979) (“The fact that a copyrightable character or design has fallen into the public domain should not preclude protection under the trademark laws so long as it is shown to have acquired independent trademark significance, identifying in some way the source or sponsorship of the goods.”).

208. This Article does not explore the appropriate term for rights of publicity rights. At a minimum such rights must not expire for a person when living but the length beyond death is beyond the scope of this Article. As illustrated with the examples of Shakespeare and Poe, these rights should not last in perpetuity. For works under copyright, the attribution should be con-terminus with the copyright so that neither right has the effect of extending or limiting the other right.

209. 17 U.S.C. § 504(c)(1) (2012) (“the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action . . .”).

210. *Id.*; see *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 139 (2d Cir. 2010) (“If the infringer proves that his infringement was innocent, the court may reduce damages to an amount not less than \$200.”).

211. 15 U.S.C.A. § 1117 (West 2009) (Upon a finding of “a violation under section 1125(a) or (d) of this title, or a willful violation under section 1125(c) of this title, . . . the plaintiff shall be entitled, . . . to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.”).

each case.’”²¹² The nature of trademark law remedies may provide a better body of law upon which to develop injunctive relief and economic damages.

The third approach would build upon the second approach and add a new federal law modeled after the California Right of Publicity statute for use of name, likeness, or image in interstate commerce involving a commercial transaction, creating a single federal standard protecting the rights of publicity across the U.S. Congressional hearings could clarify whether the Transformative Test, the *Rogers* Test, or some other fair use accommodation for First Amendment concerns. The enactment should again make clear that the rights to attribution were not preempted by copyright except as to those works that were protected by copyright and which had their copyright term expire.

An even broader approach that would amend the Lanham Act to provide an additional, federal right of attribution for the source of services embodied in any good or service sold in interstate commerce in the United States would go too far. This approach would not be limited to protection from mis-identification but would instead create the right to credit for every worker involved in the manufacture of every product sold. While such a fundamental change in the rights of the United States or global workforce could have interesting social implications, the effect is far beyond the importance of attribution for artists that the recommendations of this Article attempt to address.

Together, these two provisions provide the necessary and sufficient solution to enhance artists, address the expansion of works into digital media, promote a culture of attribution, and maintain a positive, creative, collaborative culture. More can be done, as suggested above, but this minimum will serve society well.

IX. CONCLUSION

The overreaching in *Dastar* and the limitations in the definition of visual artwork enacted as part of VARA combine to create an unfortunate gap in the legal and moral protection of digital artists as well as artists, authors, and performers more generally. The law has long recognized that the work of artists, like Charlie Chaplin, deserve legal protection both for the sake of the artist and for the public they serve.

Eliminating the unnecessary preemption of copyright in certain trademark disputes will help. So will recognizing the public benefit, which accrues when the public knows the source of performances and content in the goods and services they acquire. Taken together, these steps will foster the values of attribution the law has long recognized, encourage an economy that takes plagiarism seriously as a moral fail-

212. *Ptak Bros. Jewelry, Inc. v. Ptak*, No. 06 Civ. 13732(DC), 2009 WL 1514469, at *2 (S.D.N.Y. 2009) (quoting *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 71–72 (2d Cir.1998)).

ure, and promote incentives to create, which have no economic cost but much social benefit.

In areas such as advertising and endorsements, federal regulations highlight the importance of attribution. In a myriad of state publicity laws, states and courts recognize the economic and social importance of attribution. As the existing copyright laws on attribution become outdated though the growth of digital technology, it is time to revisit the issue and provide a reasonable solution that benefits all of society while doing harm to none. The United States should finally meet its obligation to afford the right of attribution to its authors and creators.