Before the

U.S. Copyright Office

Washington DC

In the Matter of	)	
Moral Rights: Notice and	)	Docket 2017-0003
Request for Public Comment	)	

REPLY COMMENTS OF FUTURE OF MUSIC COALITION

Submitted by Kevin Erickson, National Organizing Director

We appreciate the opportunity to offer reply comments on moral rights. We strongly believe that a form of moral rights implementation in statute would benefit music creators of all kinds as well as the public.

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

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

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

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

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

Article 6bis of the Berne Convention states, "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[1] The U.S. states joined the Berne Convention on March 1st, 1989, ostensibly agreeing to Article 6bis. Since then, the U.S. has made multiple largely unsuccessful attempts to adhere to Article 6bis. The U.S. argues that it fulfills Article 6bis through a "patchwork" of laws, but this piecemeal approach has not fulfilled the commitments to the Berne Convention.

When the U.S. first joined the Berne Convention, they used the ruling in *Gilliam v. American Broadcasting Companies* as proof that section 43(a) of the Lanham Act provided moral rights to artists by providing a remedy to "any false designation of origin, false or misleading description of fact, or false or misleading representation."[23] However, *Gilliam* did not provide a substitute for a few reasons. First, Monty Python retained the copyright in their scripts and claimed the edited

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

versions were derivative works. This negates moral rights as separate from copyright. Second, the 2nd Circuit ruled in favor of the plaintiff based on misrepresentation or mislabeling of the work, primarily focusing on unfair competition and consumer confusion, the principal goal of the Lanham Act, not the personal rights of the artist.[4] Third, the ruling did not address the right of integrity in any form and only vaguely defined a method for exercising the right of attribution. Finally, any resemblance to moral rights protections from section 43(a) were lost by *Dastar*, explained below. The case exemplifies the U.S.'s previous attempts at implementing a form of moral rights; the personal rights of creators are secondary and protection is peripheral.

The TRIPS Agreement (1994) further solidified the U.S.'s combative stance on compliance with moral rights according to the Berne Convention.[5] The U.S. fought to remove the sentiment of article 6bis from the TRIPS Agreements, as the agreement was actually enforceable.[6] The WTO agreed to omit Article 6bis.[7] The U.S. fought and won almost the same fight before signing the WIPO Copyright Treaty in 1996, again indicating they adhered to some form of moral rights, but insisting a formal requirement was not necessary.[8]

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

Moral rights would serve to alleviate the powerlessness faced by creators who often must relinquish their copyright to make a living from their work. These creators should still be provided some right of attribution and integrity as these affect a creator's reputation and ultimately livelihood. It is in our best interest to support the actual creators of works which benefit the public, not just the copyright

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

holders. In the music industry, songwriters rely on their catalog as proof of their craft – their professional reputation. Attribution on works for hire would allow songwriters proper association with their creative endeavors, potentially garnering future work.

Some stakeholders, including the Organization for Transformative Works, argue that any mandate of attribution would not matter because the public has no interest in detailed information about the creators of works. This paternalistic perspective seems to reflect a disdain for both the interest of the public and their reverence for the work of creators. Artists make culture and culture makes society. While interest levels may vary, a significant portion of the public has a great interest in understanding who exactly contributed to the creation works of art which they admire. Avid Beatles fans know who Geoff Emerick was and how he contributed to classic recordings, not just because they are interested, but also because the information is accessible. Music enthusiasts revel in the details of music they adore, but when care is not taken to document and preserve that information, those details can often lost over time and eventually unattainable. This is especially true for works that are not aimed at mass markets, or that serve particular communities or niches. To argue that the public generally has a homogenously disinterested opinion of creators is insulting both to the public and to creators.

Many of the questions posed by the Copyright Office for this docket focus on the numerous attempts at creating substitutes for moral rights. These efforts indicate the underlying belief that some form of moral rights contributes to the public good or at least an adherence to international standards. Many of the comments in the initial round such as the MPAA and the EFF have argued that there is no need for statutory moral rights because the existing set of laws provides moral rights protections already, then proceed to cast moral rights as an impediment to society. The contradiction between the two arguments suggests a conceit that current moral rights protections are not real moral rights. The flaws in these attempts highlight the need for a more robust and explicit solution. The "patchwork" has not worked. It has resulted in a volatile legal environment subject to judicial interpretations often based on unusual cases.

There are many details to iron out when crafting moral rights for the U.S., as each country's moral rights regime varies depending on their existing legal structure. We are comfortable with a time limit on moral rights, unlike many dualist approaches. Moral rights are consistently characterized as personal rights and this might be interpreted to ensure the duration of moral rights should only last through the creator's lifetime. This avoids the difficulties of trying to evaluate hypothetical desires

of creators after they have passed, and allows the public domain to be freely exploited for the public good. For works with multiple authors, the moral rights of any living author should be respected.

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

We encourage the Copyright Office to consider implementation of the rights of attribution and integrity, including works for hire. We strongly agree with the Music Creators of North America that attribution on works made for hire be stringently obligated for music works used via statutory compulsory licenses. A statute including explicit moral rights will finally help the U.S. adhere to international standards while protecting artists, preserving culture, and benefiting the public.

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

While VARA does not apply to the music industry, its exclusionary and capricious defense of visual artists' moral rights provides an example of how not to promote or protect moral rights. VARA's enactment was also a tacit admission that the U.S. was not following the Berne Convention's definition of moral rights, as it attempts to create a very restricted iteration of moral rights. We agree with the Coalition of Visual Artists' comments that the limitations on which visual artists are covered under VARA bars most artists from any protections, allowing only prominent creators of art deemed as having "recognized stature" access to moral rights.[9] For example, artists which create over 200 prints of their work are ineligible for VARA's moral rights protections. This arbitrary divide seems to negate the public good of moral rights, especially regarding attribution. Just as arbitrarily, VARA designated specific mediums as qualifying for protections, excluding set designs, but including painting even though set design often involves painting.[10] Only a handful of cases have found any moral rights infringement under VARA for good reason: almost no one is protected.

[9] Chris Godinez, "Painting over Vara's Mess: Protecting Street Artists' Moral Rights through Eminent Domain Note,"

More profoundly, VARA divorces the artist from the work, instead focusing on two distinct concepts: the reputation of the visual artist and the preservation of great works, with an emphasis on the latter.[1112] Globally, moral rights focuses on the connection between the artist and the work.[13] We believe the reputation of the artist, preservation of important works, and the artist's connection with their work are all important tenets of successful moral rights protections. VARA is not a sufficient substitute for the moral rights of visual artists and would suffer from the same problems if expanded into other mediums.

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

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

3."How have section 1202's provisions on copyright management information been used to support authors' moral rights? Should Congress consider updates to section 1202 to strengthen moral rights protections? If so, in what ways?"

Section 1202 of the Copyright Act, as part of the DMCA, seemingly protects the author's right of attribution by deterring the removal of attribution in a work, but the limited nature of the provision does not adequately protect the moral rights of creators. As Severine Dusollier keenly notes, section 1202 protects the right of authentication, not the right of attribution. The right of authentication concerns who can exploit the work and prevent forgeries, not protect the connection between the author and their work.[14] Further, the practical implementation of the act does not serve as a replacement for a moral rights statute.

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[11] Sonya G. Bonneau, "Honor and Destruction: The Conflicted Object in Moral Rights Law,". *John's L. Rev.* 87 (2013): 60.

[12] stanfordlawschool, *STLR Symposium*.

[13] White, "The Copyright Tree: Using German Moral Rights as the Roots for Enhanced Authorship Protection in the United States," 64

Section 1202 was employed in reaction to the WIPO Treaties of 1996 prohibiting the removal or alteration of content management information.[15] Section 1202 supplements the Audio Home Recording Act (1992) and the Digital Performance Rights in Sound Recordings Act (1995), which previously prevented the removal or inaccurate logging of information in a copied work.[16] These previous acts did not prevent a lack of information, ignoring a crucial aspect of the right of attribution. Section 1202 similarly ignores the absence of information, instead focusing on removal or alteration alone.

A significant modification of the WIPO treaties in Section 1202 complicates the limited protections provided by requiring the author prove intent to wittingly remove attribution from a work. This is difficult to prove, especially if the removal involves the transfer of a work between digital mediums. The right of attribution for artists can be lost in a single exclusion from a digital copy onto a platform, which could then be distributed across other platforms, resulting in what eventually becomes the definitive version of the work, absent attribution of the contributors to the work.[17]

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

Section 1202 also does not set a standard for what constitutes access to attribution data. If attribution data is inaccessible to the public, the requirement is useless.[18] A moral rights statute detailing attribution requirements for every use is unlikely, but a requirement that attribution information be accessible seems justified.

In *Murphy v. Millennium Radio Group, LLC*, Peter Murphy took a photograph of two radio hosts which was then posted on a radio station's website without any attribution.[19] Murphy alleged infringement under section 1202(b). In their ruling, the Third Circuit Court of Appeals found

[15] Eric F. Harbert, "In the Shadow of Mt. Olympus: Could a Revision of 17 U.S.C. Sec. 1202-1204 Bring Them into Daylight Comment," *UCLA Entertainment Law Review* 13 (2006 2005): 134.
[16] 17 U.S.C. §§ 1001-1010.
[17] Dusollier, "Some Reflections on Copyright Management Information and Moral Rights."
[18] Christopher D. Kruger, "Passing the Global Test: DMCA Section 1201 as an International Model for Transitioning

section 1202(c) established cause of action for intentional removal of attribution but did not explicitly require attribution information to be part of an automated copyright management system for infringement to occur. This provides some level of attribution rights for creators, but these protections are not stable; other rulings along the same lines could unravel this argument. Still, the ruling, and section 1202(c) in general brings up a desire for some level of attribution protections and suggests that implementation is not impractical.[20]

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

The balance between copyright and free speech is delicate, but the courts have navigated the two over the last decades by protecting free speech through the idea/expression dichotomy, fair use, the duration of copyright, and the exclusion of facts as copyrightable material.[21] During the 1970s, free speech became a popular defense against copyright infringement claims, prompting codification of fair use, striking down free speech alone as an adequate defense.[22] Weighing moral rights against free speech may involve modifying existing protections to fit accordingly, but we believe it is possible, just as it has been possible with economic copyright. Guiding the courts will be the principle that the First Amendment will receive preferential treatment, as it should.

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

The right of integrity raises more conflicts than attribution, but is best handled in a similar fashion.[23] We agree with the Kernochan Center for Law's assessment that fair use would mitigate unnecessary suits. To ensure free speech protections, the original author should bear the burden of proof when claiming infringement of the right of integrity. This would protect the speech, prevent frivolous

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[20] Jennifer Chandler, "The Right to Attribution: Benefiting Authors and Sharing Accurate Content in the Public Domain," *Journal of Law, Information and Science* 22 (2013 2012): 75–91.

[21] Kathryn A. Kelly, "Moral Rights and the First Amendment: Putting Honor before Free Speech," *University of Miami Entertainment And Sports Law Review* 11 (1994 1993): 211–50.

[22] See Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 559 (1985)

lawsuits, and reduce any chilling effect on further creation while still providing an outlet to exercise moral rights.

To further protect free speech, a reasonableness benchmark could be established to prevent excessive abuse of moral rights claims, though we acknowledge the challenge of defining this benchmark. Australia's reasonableness defense might provide a direction for how a benchmark could be structured.[24]

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

Attribution is not a significant burden, at least regarding music, and there are only limited exceptions in which attribution should be omitted like parodic or satirical works. We discuss Canada's exception to user generated content for non-commercial use below. The visibility and accessibility of attribution information for all creative works needs some clarification as it is not feasible to present complete attribution information for all creative works in all instances, but reasonable efforts to provide access to attribution information should be made.

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

We strongly believe that infringement of a creator's rights of attribution or integrity should merit injunctive relief at a minimum. We also believe providing statutory or actual damages for infringement of attribution would incentivize compliance, but again, limits should be implemented to avoid unreasonable attribution requirements. We similarly believe that statutory or actual damages should be available for infringement of integrity, but again, we suggest placing the burden of proof on the creator. This represents a sensible middle ground. Actual damages are likely to be difficult to define regarding reputational injury.

Reasonableness of attribution requirements could be considered in terms of scale and capacity. If a right of attribution is created for songwriters and composers whose work is used by digital services

under the terms of a statutory license, sensible exemptions could be granted. While all music services should be encouraged to display this data, a volunteer-run college radio station need not be held to the same standard as a platform like YouTube or Pandora. Such carve-outs for non-commercial/educational entities already exist in other areas of music licensing.

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

The *Dastar* decision offers evidence for why case law should not define moral rights protections. While *Gilliam* suggested the importance of moral rights, *Dastar* reduced the means of protecting those rights.[25] First, the case itself was imperfect; it involved a film based on a book, the point of origin of the work in question was difficult to obtain, the original work was already in the public domain at the time of the case, and the defendant was a corporation alleging moral rights infringement.[26] The final point is especially important as moral rights deals with the *human* creators of works, not corporate copyright owners. The decision in *Dastar* stemmed from an uncharacteristic suite of facts which have little relevance to moral rights, recalling the adage, "Bad facts make bad law."

Dastar also succeeds in demonstrating the Lanham Act does not constitute moral rights protections. The purpose of section 43(a) of the Lanham Act is to prevent consumer confusion from false designation, which has been interpreted as a form of moral rights, but the underlying intention is economic. The ruling focused on defending against consumer confusion, not defending the rights of the author, negating the roots of moral rights.[27] Further, we echo the analysis in the comments provided by the International Trademark Association, who notes the court found that the origin of goods in the Lanham Act refers to the owners of the work, not the creators of the work, ignoring the obvious consumer confusion that would occur from omitting attribution information.[28] The ruling did not overtly recognize the differences between protections under the Lanham Act and moral rights, but the court's decision designated attribution rights within current copyright, contradicting the idea that the Lanham Act provided supplementary moral rights. Weighing economic interests,

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[25] Kinmberly Y.W. Holst, "A Case of Bad Credit: The United States and the Protection of Moral Rights in Intellectual Property Law," *Buffalo Intellectual Property Law Journal* 3 (2006 2005): 130.
[26] UChannel, *Moral Rights: The Future of Copyright Law?*, 2009, https://www.youtube.com/watch?v=iRfWcUJbGwo&spfreload=10.
[27] White, "The Copyright Tree: Using German Moral Rights as the Roots for Enhanced Authorship Protection in the

Dastar annulled false-attribution claims based on false origin 43(a)(1)(A), leaving false advertising 43(a)(1)(B) as the only adequate grounds for dispute under the Lanham Act.[29] Subsequently, lower courts have interpreted the ruling across a broad range of cases, effectively nullifying the Lanham Act as a replacement for attribution rights.[30] The courts proved that the Lanham Act, a principal component of the U.S.'s "patchwork" of laws, is not a substitute for moral rights as defined by the Berne Convention.

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

7."What impact has contract law and collective bargaining had on an author's ability to enforce his or her moral rights? How does the issue of waiver of moral rights affect transactions and other commercial, as well as non-commercial, dealings?"

When rights are left to negotiation, different outcomes can be expected for different kinds of creators. As a general rule, we are dissatisfied with outcomes that result in those with the most clout, catalog, or market share having the most rights. This disadvantages small and medium size entities as well as new entrants.

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

[29] Emily (1) Grant, "The Attribution Right, the Misappropriation Theory, and Dastar v. Twentieth Century Fox Developments in Trademark Law: Part Four: Trademark Litigation: Infringement and Dilution." *Journal of*

However, there are aspects of collective bargaining agreements relevant to developing moral rights in statute. The Writer's Guild of America provides an example of a fluid representational system which defines credit requirements. Notification requirements on script rewrites and credit limits have combatted the film industries' habit of mangling the original screenwriter's intentions. However, credit percentage requirements encourage a second writer to change more of the script to be credited.[31] These underlying incentives are important to consider when implementing a moral rights statute through either generality within the statute, or specificity with recurrent refinement of attribution requirements. However, as the Writer's Guild of America notes in their comments, collective bargaining agreements provide *some* "moral rights-like protections," but moral rights of individuals should not be a function of collective bargaining.

Contract law is not limited to imbalanced negotiations and has been successful at mimicking moral rights for creators in some instances. Public Knowledge cites Creative Commons as an example of cultural norms filling the role of moral rights, but underestimates the significant differences between the two. In *Jacobsen v Katzer*, the Creative Commons license was interpreted as a contract which, if violated, copyright infringement could be alleged.[32] The Creative Commons license lets creators define terms of use. Creators can expressly require the right of attribution while in many ways rejecting economic copyright restrictions, but this not a replacement for moral rights because it is tied to copyright.[33] Creative Commons focuses on reputation, ignoring economics, forcing creators to choose between the two. Enforcement of the license is also rooted in existing copyright law as a violation of the license is considered grounds for an infringement claim. Moral rights must be separate from economic copyright. Although Creative Commons fits the needs of some creators, allowing them to share their work while still preserving rights which they define, it is far from a universal solution.

Contract law also does not speak to the concerns of songwriters/composers whose work is used in contexts governed by a compulsory license, because they have no opportunity to negotiate anything. This is another reason why we strongly support creating a right of attribution for songwriters and composers when their work is used in this context by a digital service; this could represent an achievable first step toward a workable US moral rights code.

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[31] Rick Mortensen, "D.I.Y. after Dastar: Protecting Creators' Moral Rights through Creative Lawyering, Individual Contracts and Collectively Bargained Agreements," *Vanderbilt Journal of Entertainment and Technology Law* 8 (2006 2005): 335–64.

[32] 535 F.3d 1373 (Fed. Cir. 2008)

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

Moral rights implementation greatly differs depending on cultural context. We feel it best to review moral rights in countries based on common-law to help determine what best suits the United States. Most common-law countries have adopted the stance that moral rights are inalienable but waivable and, as stated above, we agree the U.S. should do the same.[34] Below are some other notable considerations from international moral rights codes:

Canada

One the most vexing challenges facing copyright in the digital era is user generated content (UGC). Canada's Copyright Modernization Act (2012) placed an exception on UGC, and specifically, user-derived content.[35]

UGC can be divided into three categories: user-authored content, user-copied content, and user-derived content. User-authored content is simply an original work. User-copied content is a direct duplication of content. User-derived content adds substantially to an existing work and is considered by Canada as an exception to copyright law, like transformative works in the United States. This formalized exception provides protection to modern creative arts born from the internet age but also threatens the original creators of the works as their own works and reputations are subdued or distorted by the derivative creators. Economically, these works are not perfect substitutes for the original, but recognition of the original source is often lost in real world cases. Moral rights are a solution to this concern. In Canada, moral rights still exist despite the copyright exception for UGC; the right of attribution offers protections to the original authors and user-derived content creators are incentivized to create, benefiting the public.[36] This brings up subsequent questions about the moral rights of UGC creators who author user-derived work, but these intricacies would be best handled by case law. Still, we believe a framework for handling UGC is necessary considering potential limitations a moral rights statute could place on user-derived content.

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[34] Francina Cantatore and Jane Johnston, "Moral Rights: Exploring the Myths, Meanings and Misunderstandings in Australian Copyright Law," *Deakin Law Review* 21 (2016): 76.

[35] "IP Osgoode » The User-Generated Content Exception: Moving Away from a Non-Commercial Requirement," http://www.iposgoode.ca/2015/11/the-user-generated-content-exception-moving-away-from-a-non-commercial-requirement/

India

India's moral rights statute has been used as a cultural preservation tool. In *Amar Nath Sehgal v. Union of India*, the High Court of Delhi ruled in favor of a sculptor who sold his work to the government that subsequently damaged the work while moving it to a new location decades after the purchase.[37] In some respects, VARA attempts to achieve the same goal, although it fails to fully provide protections for the vast cultural landscape. Moral rights can be used to preserve not only the reputation of the creator, their relationship with their work, but also culture, especially through the right of attribution. Society benefits from the accurate preservation of knowledge, including the musicians, engineers, and writers who participated in the creation of works. Without a mandate to preserve this information, the history of many musical works created in the U.S. will be lost and forgotten, harming the American canon.[38]

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

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

Ideally, attribution of work should be easily accessible to the public and as prominently displayed as possible, but there are circumstances where displaying all attribution information is not feasible. In such circumstances, metadata can retain credit to the artists. We recommend the Copyright Office consider delineating recommendations for attribution information in metadata.

Metadata of this kind is already somewhat available. International Standard Recording Codes (ISRCs) and International Standard Musical Work Codes (ISWCs) are international standards for identifying basic information on recordings and publishing rights, respectively. ISRCs are used by

[37] 117 (2005) DLT 717, 2005 (30) PTC 253 Del

SoundExchange while ISWCs are used by Performance Rights Organizations to determine payout. In the U.S., ISRCs are distributed through the US IRC Agency after a one-time fee of $95, but in practice, most ISRC codes are obtained on behalf of the creator through aggregates or labels. One problem with using ISRCs and ISWCs is that multiple parties control access to the datasets of these codes, creating needless gatekeepers. In practice, ISRC and ISWC codes are not consistently used.[39]

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

Blockchain in music could open up the creation of unique identifiers containing attribution standards without an intermediary, but there are two related concerns: universality and adoption. Currently, there is no standard for how to implement a comprehensive blockchain system and initiatives currently in development include Mediachain, Dotblockchain, Songtrust, Songspace, Revelator, and Stem. The success of blockchain depends on widespread adoption, especially regarding Digital Service Providers (DSP) and major labels with significant catalogs, but their utility also depends on their accessibility to the full range of musical creators. If these blockchain systems take their own portion of the market, it negates the efficiency of blockchain, likely reducing the incentive of DSPs and major labels to adopt the technology.[40].

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

Currently, there is no standard for a universally embedded metadata system and section 1202's attempt to prevent removal does little to stem metadata loss across platforms due to the lack of interoperability.[41] Still, complete attribution data relies on the authors to initially implement this data. Services should not be punished for the negligence of authors, so a singular requirement of data that does not exist seems untenable. The Berne Convention also prohibits a requirement of registration for copyright, so the artist cannot be faulted for omitting attribution data. However, like

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

[40] Bill Rosenblatt, "Blockchain Solutions for Music Rights Processing," *Copyright and Technology*, May 4, 2016

current copyright law, statutory damages could be available only to those who registered works. We recommend the Copyright Office explore options for adopting minimum standards for what information must be preserved if available and provide options for creators to fill out this information.

The requirement of metadata alone does not solve attribution concerns. As discussed previously, credit information must be easily accessible to the public. Accessibility is a small technical hurdle in implementing a pervasive metadata system, but without a requirement that metadata be accessible, any effort to protect the right of attribution is in vain.

10. "**Are there any voluntary initiatives that could be developed and taken by interested parties in the private sector to improve authors' means to secure and enforce their rights of attribution and integrity? If so, how could the government facilitate these initiatives?**"

Some of the biggest barriers to progress with voluntary initatives are debates over control of information, as we have seen with two notable attempts at developing a universal database for music. The Global Repertoire Database (GRD), failed in 2014 due to squabbles over funding and control resulted in major actors backing out of the project. The International Music Registry (IMR) suffered a similar fate, despite the encouragement from WIPO to collaborate with the GRD.[42] Both the GRD and IMR collapsed because of disputes over who would control the global database.

As previously mentioned, Blockchain or other decentralized data solutions could provide a solution by promoting marketplace efficiency while preserving attribution data. Transactional and attribution data can be included and the reading of this data by DSPs could trigger instant payouts to all relevant parties without the need for a centralized database or power struggles over who controls it. Alternatively, making government-run data sets more accessible, robust, and interoperable could be a helpful contribution. Whatever the technical mechanism, government can play a role in helping to align incentives.

Some voluntary initiatives have flourished without statutory regulation. For music, Creative Commons Licenses (CC) allows creators to state permitted uses and attribution requirements for using their work, but as we discussed above, these solutions are problematic because they are inherently bound to existing copyright. It is a contract that rejects copyright in favor of protections

more in line with moral rights, causing creators to choose whether they want a moral rights substitute or more traditional copyright protections. Enforcement of any violation is still under existing copyright, negating the concept of moral rights being separate from economic copyright. These licenses work for circumventing copyright when creators wish to increase the public's access to their work, but would not provide adequate moral rights protections for professional creators, especially in work for hire situations. A songwriter with no ownership of their copyright cannot use a contract to ensure their attribution information is available when the work is performed on a digital service.

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

Consumer Confusion

The right of attribution has an invaluable side effect mentioned above; attribution stops consumer confusion. This is especially important considering the representational packaging of creative works in the digital world. Without proper attribution (or with improper attribution), the public is unable to differentiate between authentic works and forgeries. The ramifications of this confusion extend past the reputation of creators to the trust of the public and preservation of culture.[43]

Blanket Licensing

We find it important to discuss the role of blanket licensing in diminishing the moral rights "patchwork." Section 106 gives creators the ability to license their work, which gives them the ability to demand attribution or integrity, in theory, as part of the terms of their license. Under blanket licensing schemes, exerting these rights is impractical. Instead, performance rights organizations (PROs) collect subscription fees and pay creators an estimated share based on the number of plays and the current rate of royalties. When licensing is handed over to PROs, section 106 gives no control over specifics regarding the rights of attribution or integrity to creators.[44]

Using existing copyright alone to define the rights of creators does not hold up to the spirit of moral rights, especially regarding songwriters and works for hire. While performance rights organizations have rules barring corporate entities from collecting the songwriter's share of royalties, the "author"

[43] Margaret Ann Wilkinson and Natasha Gerolami, "The Author as Agent of Information Policy: The Relationship between Economic and Moral Rights in Copyright," *Government Information Quarterly* 26, no. 2 (April 2009): 321–32

designated by current copyright is often the employer of the creator. This further removes the creator from their ability to exercise personal rights.

The right of attribution in the digital world has a second side effect: increased efficiency in the market. Economically, a standardized metadata system or a statutory requirement that metadata must be complete and correct would make royalty distribution more efficient, timely, and accurate. PROs will hold uncollected royalties for a certain amount of time, then release them to the general pool of royalties. More troublingly, PROs often must rely on imperfect proxies like radio play to determine business use of music and subsequent songwriter payouts. One study found only a fifth of radio stations were able to track airplay digitally and only 20% of the music used by businesses was broadcast on the radio, leaving the other 80% paid out to the wrong creators. This goes against the express purpose of the economic incentive of copyright as the pecuniary beneficiaries of a creative work end up being other creators besides the creator whose work earned royalties. Mitigating this error is by no means the purpose of moral rights, but ubiquitous attribution would likely lead to more royalties paid to those who earned them, and orient all parties toward a healthier licensing ecosystem.

Again, we would like to thank the Copyright Office for their consideration. We believe moving forward with moral rights implementation is a net positive for creators and society. We find the "patchwork" to be an inadequate substitute and these failures to be indicative of a societal desire for a functional moral rights statute. Moral rights would satisfy the U.S.'s international obligations, define protections for authors often disadvantaged by adverse power dynamics, and benefit the public. We look forward to future discussions on the topic.

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