Before the
U.S. Copyright Office
Washington, DC

In re

Study on the Moral Rights of Attribution and Integrity — Docket No. 2017-2

COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to the request for comments published by the Copyright Office in the Federal Register at 82 Fed. Reg. 7,870 (Jan. 23, 2017), the Computer & Communications Industry Association (CCIA)[1] submits the following responses to selected questions regarding the Office's Study on the Moral Rights of Attribution and Integrity.

I. Summary

Expanding moral rights provisions beyond the ample, existing remedies in copyright law is unnecessary and would likely be detrimental to U.S. interests. U.S. law is already compliant with obligations under the Berne Convention to protect moral rights, and provides authors with sufficient remedies for infringement for both economic and non-economic interests.

II. General Questions Regarding Availability of Moral Rights in the United States

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?*

The U.S. sufficiently protects the moral rights of authors, and complies with international obligations under the Berne Convention. As the request for comments notes, while the U.S. was

[1] CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of $540 billion. A list of CCIA members is available at https://www.ccianet.org/members.

considering joining the Berne Convention, then-Director of WIPO General Dr. Árpád Bogsch expressed the view that "it is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6*bis* of the Berne Convention."[2] Several years later Congress nevertheless enacted the Visual Artists Rights Act (VARA) to provide additional protections for artists. Section 106A is not the only protection available to artists. Indeed, the Federal Register notice for this inquiry indicates that numerous other causes of action are available as well, including state unfair competition law, the Lanham Act, and Section 1202 of the DMCA.

In some cases, U.S. law provides more substantial protection than other Berne Convention adherents. Plaintiffs are increasingly making § 1202 claims for non-attributed works as a matter of course of copyright litigation.[3] Because § 1203(c)(3)(B) provides for statutory damages for violations of § 1202, plaintiffs may now obtain remedies under § 1202 that are far more robust than those which exist in countries with national moral rights protections. Moreover, Berne Article 6*bis*(3) specifically provides that the means of redress for violations of "non-economic" rights are a matter for national legislators to determine. Thus, the DMCA provisions implemented pursuant to Article 12 of the WIPO Copyright Treaty (and the parallel Article 19 obligation in the WIPO Performances and Phonograms Treaty) disprove any alleged deficiencies in Berne Convention compliance.

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[2] Letter from Dr. Árpád Bogsch, Dir. Gen., World Intellectual Prop. Org., to Irwin Karp, Esq. (June 16, 1987), reprinted in *Berne Convention Implementation Act of 1987: Hearing on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 100th Cong. 213 (1987); *see also* H.R. Rep. No. 100-609, at 37 (1988); S. Rep. No. 100-352, at 10 (1988).

[3] *See, e.g.*, Timothy Geigner, *Tiffany & Co., Defenders Of Intellectual Property, Sued For Copyright Infringement*, Techdirt, Feb. 26, 2017, https://www.techdirt.com/articles/20170215/10244836722/tiffany-co-defenders-intellectual-property-sued-copyright-infringement.shtml; TFL, *Refinery29 Named in Copyright Infringement Lawsuit*, The Fashion Law, Feb. 21, 2017, http://www.thefashionlaw.com/home/refinery29-named-in-copyright-infringement-lawsuit; Eriq Gardner, *Spike Lee Sued Over 'Oldboy' Movie Posters*, The Hollywood Reporter, May 28, 2014, http://www.hollywoodreporter.com/thr-esq/spike-lee-sued-oldboy-movie-707463.

Insofar as situations might be presented where these statutory remedies are insufficient, private contract enables authors to protect attribution and integrity interests. An author can always choose to license works in a manner to ensure attribution and integrity if they so choose. For example, Creative Commons (CC) licenses nearly unanimously require attribution; statistics in 2004 found that 97-98% of users selected attribution as a term in CC licenses.[4]

In CCIA's view, additional protection is not only unnecessary to meet international obligations; such protections would be imprudent. Codifying a broad right of attribution at the federal level would not serve the needs of the Internet industry or Internet users. For example, mandatory labeling of content which has already been the subject of an agreement between the user or content producer and an online platform would be burdensome to Internet services and likely interfere with users' experience, with no apparent benefit. In particular, due to the rise of mobile devices with small screens, requiring attribution would not only be burdensome to Internet services; it would also do a disservice to users by cluttering screens with unnecessary information.[5] For example, in online publishing or online commerce situations where stock photography is employed to add visual appeal or inform consumers of what they are buying, consumers are likely to place little value in knowing who took the photo. Mandating disclosure of authorship in this context would provide little value to artists and users alike. Moreover, a non-waivable right would also reduce the demand for photography services due to the increased costs and compliance burden associated with providing visual content.

[4] Glenn Otis Brown, *Announcing (and explaining) our new 2.0 licenses*, Creative Commons, May 25, 2004, https://creativecommons.org/2004/05/25/announcingandexplainingournew20licenses/.

[5] Research published in 2016 found that Internet usage on mobile has now surpassed desktop access. *See* Darrell Etherington, *Mobile internet use passes desktop for the first time, study finds*, TechCrunch, Nov. 1, 2016, https://techcrunch.com/2016/11/01/mobile-internet-use-passes-desktop-for-the-first-time-study-finds/.

III. Title 17

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?*

As described above, § 1202's protections for copyright management information already provide significant support to attribution interests in a manner that arguably exceeds any moral rights remedies that may be available. The robust nature and enforcement of § 1202 illustrates that changes to the statute are unnecessary, as are any additional protections for non-economic rights.

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?*

As noted above, CCIA opposes the addition of new exclusive rights to Title 17. Nevertheless, it goes without saying that the existing statutory limitations and exceptions in §§ 107-122, as well as the safe harbors in § 512, are an integral part of copyright law, and should always be considered as a necessary balance to exclusive statutory rights.

IV. Other Federal and State Laws

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?*

Justice Scalia's unanimous *Dastar* opinion makes clear that U.S. law does not subscribe to Continental, non-economic policy rationales for IP, calling this "mutant copyright."[6] U.S. copyright law is based on a constitutional imperative to promote progress, and varies from those nations whose basis for authors' rights may be non-economic.[7] Nevertheless, the U.S. approach

[6] *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003).

[7] *See, e.g.*, *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful

to implementing moral rights obligations has not left authors without remedies; as discussed above, and in the Federal Register notice, current law provides ample remedy to authors.

> 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?*

Authors should have the freedom to address these issues via contract — seeking greater consideration in exchange for foregoing attribution, or receiving less consideration where the specific use makes attribution desirable. Indeed, artists frequently address these issues in contracts, which are mutual and voluntary. This results in optimal outcomes for both parties. At a minimum, any attribution right should certainly be waivable: alienability is an inherent, necessary characteristic of intellectual property rights.

VI. Technological Developments

> 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?*

A variety of technological solutions currently exist in the marketplace that enable authors to protect interests associated with moral rights. Watermarking and metadata, for example, are widely employed in digital content. Rightsholders may also employ even more robust technological protection measures that limit the extent to which works may be altered, and courts have interpreted all of these measures to qualify for §§ 1201-1203 protections.

Arts.'"); Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy?*, 1 U. Ottawa L. & Tech. J. 7 (2004) ("Nations whose legal rules are grounded in the natural right of authors in their works, especially those that affirm that authors have moral rights in their works, have less reason to perceive economics as a useful input in the policymaking process than the U.S., which at least historically conceptualized copyright in utilitarian terms."), *available at* http://www.uoltj.ca/articles/vol1.1-2/2003-2004.1.1-2.uoltj.Samuelson.1-21.pdf.

VII. Other Issues

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

The State of California's experience in resale royalties is an instructive example of the inefficiency associated with attempting to legislate subjective, equitable outcomes around intellectual property transactions. Given the complexity of resale relationships and the interstate nature of art markets, California's statute ran aground against the Dormant Commerce Clause in 2015.[8] Long before that, however, the Copyright Office itself had argued such a statute was inadvisable and bad economic policy.[9] This remains equally true today: mandating resale royalties would be confusing and would burden online marketplaces that typically behave merely as the venue; they are neither seller nor buyer.

The challenges which confronted *droit de suite* apply with equal force in the context of moral rights. In particular, the fact that downstream uses of works are constrained by inalienable entitlements may devalue works in the primary market, because buyers cannot acquire full control to use the work they require.

Respectfully submitted,

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[8] *Sam Francis Foundation v. Christie's, Inc.*, 784 F.3d 1320 (9th Cir. 2015).
[9] U.S. Copyright Office, *Droit de Suite: The Artist's Resale Royalty* (1992), https://www.copyright.gov/history/droit_de_suite.pdf.