



BEFORE THE UNITED STATES COPYRIGHT OFFICE

LIBRARY COPYRIGHT ALLIANCE COMMENTS ON THE NOTICE OF INQUIRY ON THE MORAL RIGHTS OF ATTRIBUTION AND INTEGRITY

The Library Copyright Alliance (“LCA”) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing more than 350,000 librarians and other personnel. An estimated 200 million Americans use these libraries over two billion times each year. LCA appreciates the opportunity to comment on the Copyright Office’s Notice of Inquiry on the moral rights of attribution and integrity.

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? Is so, what specific changes should be considered by Congress?

In addition to the legal protections described in the Notice of Inquiry, an author’s right of attribution is protected in the United States by the plagiarism policies of educational institutions,¹ professional societies,² and media organizations.³ These policies require attribution not only when an author uses another author’s expression, but also when the second author uses facts and ideas derived from the first author’s work.

¹ See, e.g., Harvard College Writing Program, *Harvard Plagiarism Policy*, <http://isites.harvard.edu/icb/icb.do?keyword=k70847&pageid=icb.page355322>.

² See, e.g., Association of Computing Machinery, *Plagiarism Policy*, <http://www.acm.org/publications/policies/plagiarism>.

³ See, e.g., The Washington Post Standards and Ethics, <http://asne.org/content.asp?contentid=335>.

Although these plagiarism policies are not directly enforceable in a court of law, breach of these policies can result in punishments far more severe than the remedies for copyright infringement. A student can be suspended or expelled for plagiarism, or her degree can be revoked if the plagiarism is detected after graduation. A faculty member or a journalist can be fired for plagiarism, and subsequently may encounter great difficulty getting hired by another organization. As *The Washington Post's* statement of standards and ethics declares, “plagiarism is one of journalism’s unforgivable sins.”⁴

In addition to these formal policies requiring attribution, attribution is a fundamental norm of American society. A public figure’s use of another person’s expression without attribution can lead to public opprobrium, as Melania Trump discovered when her speech at the 2016 Republican National Convention closely tracked Michelle Obama’s speech at the 2008 Democratic National Convention. Similarly, then-Senator Joe Biden’s plagiarism of a speech by British politician Neil Kinnock contributed to his loss of the Democratic Presidential nomination in 1988.

Attribution is such a well-established norm in American society because instructors and librarians teach it repeatedly to students at every level of education, from elementary school to graduate school. The librarians LCA represent deeply believe in the importance of proper attribution to the advancement of knowledge and the informed debate essential to the functioning of a democratic society.

Notwithstanding the value librarians place on providing proper attribution of authorship, LCA does not support additional codification of moral rights at this time for the following reasons:

⁴ *Id.*

- We are not aware of any harm authors currently are suffering in the United States relating to attribution and integrity. The existing legal framework described in the Notice of Inquiry, combined with the widespread plagiarism policies and the stigma attached to plagiarism, appear sufficient to ensure that people provide attribution, and are punished if they do not.
- Creating an additional layer of moral rights that would impede the ability of authors to create new works. For example, a right of integrity would chill criticism and could run afoul of the First Amendment.
- A host of technical issues would have to be addressed either in the legislation or in subsequent litigation. Would every use, regardless how small, require attribution? What form would attribution be required to take? To which authors would attribution have to be given?⁵ How would attribution be provided in visual works? What would be the term of protection?
- Relatedly, although many communities have developed attribution norms, these norms are very context-specific. The attribution norms for legal academics differ from those for practicing lawyers, who routinely copy the form and language of legal instruments without attribution.⁶ Similarly, the attribution norms in

⁵ In *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35 (2003), Justice Scalia noted the difficulty of determining the origin of a copyrighted work. Using a video of the film *Carmen Jones* as an example, Justice Scalia noted that a distributor of the video would have to attribute MGM, the studio that produced the film; Oscar Hammerstein II, who wrote the musical on which MGM based the film; George Bizet, who wrote the opera on which Hammerstein based the musical; and Prosper Merimee, who wrote the novel on which Bizet based the opera. Justice Scalia stated that “in many cases, figuring out who is in the line of ‘origin’ would be no simple task.” *Id.*

⁶ See Jonathan Band and Matthew Schruers, *Dastar, Attribution, and Plagiarism*, 33 AIPLA QUARTERLY JOURNAL 1, 13 (2005). The authors observe that “the legal profession’s norm of copying without attribution is evident in *Dastar* itself,” noting that

historical writing vary depending on the audience. Far more detailed attribution is expected in scholarly writings than in popular writings. Because attribution norms vary widely from one field to another and even within the same field, depending on the intended audience, plagiarism is better addressed by the appropriate community, which is capable of considering the nuances of context, than the far more rigid legal system. Codifying moral rights would necessitate the creation of a species of mutant fair use law, to paraphrase Justice Scalia in *Dastar*.

- Adopting a moral rights regime would move our copyright system even further away from the incentive-based rationale provided in the Constitution’s Intellectual Property Clause. Indeed, the unanimous *Dastar* Court questioned whether Congress even had the authority to create an attribution right.

In sum, because of the absence of any demonstrated need for a new moral rights regime, and the many potential problems with creating one, the Copyright Office should not recommend further consideration of this issue by Congress.

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Justice Scalia copied two metaphors directly from *Dastar*’s briefs without attribution. *Id.* at 15. The authors add, “but lawyers do not view this practice as objectionable: these points were advanced by *Dastar*’s counsel in the very hope that the Court would adopt” them.