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2012

### Speaking of Moral Rights: A Conversation Between Eva E. Subotnik and Jane C. Ginsburg

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#### Recommended Citation

Subotnik, Eva E. and Ginsburg, Jane C., "Speaking of Moral Rights: A Conversation Between Eva E. Subotnik and Jane C. Ginsburg" (2012). *Faculty Publications*. 47.

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# SPEAKING OF MORAL RIGHTS♦

A CONVERSATION BETWEEN

EVA E. SUBOTNIK\* AND JANE C. GINSBURG\*\*

**PROF. EVA SUBOTNIK:** Today we are speaking about moral rights in the digital age—in respect of some of the legal and technological developments that have occurred since your 2001 essay, *Have Moral Rights Come of (Digital) Age in the United States?*<sup>1</sup> Let’s pick up where your piece ended off. Having considered the traditional moral rights of integrity and attribution, you ended with the provocative question of whether, instead of these rights, we could expect a new sort of right in the digital age—a “full disclosure right” is how you referred to it. You asked: “If moral rights have come of digital age, should their realization be achieved by conveying more information about the copy, or by controlling the copy itself?” So I’d like to ask you to answer this question from the vantage point of today, ten years on since you first posed it.

**PROF. JANE GINSBURG:** The luxury of writing the essay was that I didn’t have to answer that question, and now you want me to answer it! I’m somewhat ambivalent regarding integrity rights. By contrast, regarding the attribution right, I think it’s outrageous that our law provides no general right of authorship attribution. The right of the author or the creator to be recognized as “the author” should be part of our general copyright law, and not merely part of a moral rights mini-law. Furthermore, the attribution right is not as difficult as integrity rights to implement. Integrity rights are harder because there are prospectively two different parties wielding the right to control alterations to the work, or to authorize changes, adaptations, and so forth. One is the holder of the derivative work right and the other, the holder

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<sup>1</sup> Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?* 19 CARDOZO ARTS & ENT. L.J. 9 (2001).

of the moral right, is the author. The holder of the derivative work right is not always the author. The author may once have held the rights, but she may have assigned that right, or created the work as a work for hire and therefore never have had derivative work rights in the first place. The potential conflict of interest between holders of different incorporeal rights in the same object would require courts to determine whose rights prevail. In moral rights jurisdictions, the author's integrity right would trump even an authorized adaptation, at least if the modification harmed the author's honor or reputation. Those jurisdictions generally do not have "works made for hire;" the actual creator is at least initially vested with moral and economic rights, regardless of whether she was employed or commissioned to create the work. Whatever the difficulty of recognizing an author's integrity rights against an employer for hire, when it comes to attribution rights, I do not think that work-for-hire status should detract from the actual authorship and recognition of who is the creator, as opposed to who is the statutory author.

**SUBOTNIK:** Fair enough, but I'd like to push you a little further on the "harder" issue of integrity rights. Can you contextualize how a full disclosure right might dovetail with integrity rights?

**GINSBURG:** Yes, back to the question that I keep trying to not answer, which is: what about integrity rights? There is a potential clash between the owner of the economic right to authorize alterations and the author's retention of the moral right. That doesn't mean, even in countries with well-established moral rights systems, that the author in fact retains a veto over adaptations that the author has otherwise authorized. The author doesn't necessarily get to second-guess the exploitation of the work—rather the question is whether the adaptation is, in the sense of the Berne Convention, prejudicial to the honor or reputation of the author. Not every change made to the work is prejudicial to honor or reputation. Individual Berne member countries can have a tougher moral rights standard, which is the case in France, but I'm not suggesting that any U.S. moral right of integrity go further than protecting honor or reputation. That constraint may help to defuse some of the potential conflict between the authorized exploitation of the work and the integrity right. But ultimately, if we have an integrity right in the online context, should that right consist only of the author's right to compel the adaptor or the person who has modified the work to provide the means by which the public can access the work in its "correct" form? This approach would permit readers or viewers to compare the original work and the adaption, but would not necessitate the

expunging of an adaptation that may prejudice the honor or reputation of the author. Or do we also say that the author can have that modified work expunged? The appropriate remedy may depend on the facts: in some instances, the author's integrity interest may be sufficiently secured by a disclosure right; in others, the harm to the author's honor or reputation may warrant curtailing the further dissemination of the altered version.

**SUBOTNIK:** Yes, well I wondered whether there might be circumstances in which, in order to effectuate even a full disclosure version of integrity rights, you might be calling upon the author to acquiesce in the posting of the original work in connection with the adaptor's recapitulation of the work in a way that, ironically, might actually be offensive to the author.

**GINSBURG:** I didn't intend to suggest that the author's right to compel a link-back would give the person altering the work the right to commercialize it in its original form. But you do point out a different problem: if somebody other than the author has the reproduction and public display or communication to the public rights of the work in its original form, then perhaps the link from the offending derivative work to some source that would allow the public to perceive and compare the adaptation and the original could, under some circumstances, conflict with the rights of the holders of those other economic rights. If the author has retained those rights, no problem, but if not, then does a link-back to a source other than one controlled by the relevant economic rightholder create some form of unwarranted competition with that rightholder? Would a link-back in effect compel the rightholder to provide the work in its original form for certain kinds of free access that might not otherwise be within its business plan? That's an excellent point that I had not thought of at the time of the essay. I was probably thinking of a much simpler universe in which there would always be a consultable copy on the author's own web page. But I don't know that I had any basis other than an unsupported assumption for saying that.

**SUBOTNIK:** Another question I'd like to ask relates to visual works. Is there any way in which the Visual Artists Rights Act of 1990 (VARA)<sup>2</sup> could be applied to provide for moral rights in respect of digital works? Specifically, the definition of a "work of visual art" that is covered by VARA includes paintings, drawings, and prints "existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author," and exhibition photographs under similar circumstances. Could we envision a limited, digital edition in which there would

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<sup>2</sup> 17 U.S.C. § 106A.

only be 200 displays such that VARA rights would be triggered?

**GINSBURG:** No. On its own terms, it is totally clear. VARA extends only to hard copies and then only to certain hard copies.

**SUBOTNIK:** Well, the larger issues that I'm trying to get at are the extent to which the statutes and case law deal with, or fail to deal with, the notion that creativity increasingly exists in digital form, and the extent to which moral rights principles should apply equally to those works.

**GINSBURG:** I think you could have a right of integrity in a digitally expressed work, but it is not going to come from VARA. If you couple the right of integrity with the derivative work right so that the work cannot be substantially altered: that exists in the digital realm as much as it does in the hard copy realm. An author who grants the rights to reproduce and distribute digital copies of the work doesn't thereby grant the right to change the work.

**SUBOTNIK:** But of course the drafters and supporters of VARA obviously didn't think that coupling the integrity right with the derivative work right was sufficient for a work that qualified as a "work of visual art."<sup>3</sup>

**GINSBURG:** You're quite right that VARA can, and is intended to, preserve integrity rights even when the author has alienated the derivative works right. But VARA provides no solace to creators of works made for hire, who also lack derivative works rights, because VARA explicitly excludes works made for hire.

**SUBOTNIK:** What about the attribution prong of VARA—what about those types of rights?

**GINSBURG:** I don't think the attribution prong of VARA, which is totally dependent on the definition of a "work of visual art," is all that well thought-through. When Congress adopted that very narrow definition, it was worried about integrity rights but treated attribution rights in parity—without considering either whether the policies underlying attribution rights are distinct from those informing integrity rights, or whether the objections to integrity rights also apply to attribution rights. I'll give an example or two that demonstrate the mindless cut-and-paste quality of VARA's limitation of attribution rights to "work[s] of visual art."

VARA enables a visual artist not only to seek attribution for works of visual art that she did create, but also to prevent attribution of her name to works of visual art that she did not create. But the statute gives these rights only to "the author of a work of visual art." Let's take a photographer: unless one or more of her works were "produced for exhibition purposes only" (and

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<sup>3</sup> 17 U.S.C. § 101.

exist only in 200 or fewer signed and consecutively numbered copies), she is not “the author of a work of visual art.” So if someone affixes her name to a work that does qualify as a “work of visual art,” she has no claim. Perhaps she can remedy this problem by, once in her life, creating a work that comes within VARA’s “work of visual art” definition. If, for example, she paints a one-of-a-kind squiggle, has she now acquired the status of an “author of a work of visual art,” thereby entitling her forever thereafter to prevent the misuse of her name in connection with other works of visual art? If the need to undertake that sort of artificial behavior sounds silly, it’s no more absurd than the statute’s failure to distinguish between the interests underlying the two different moral rights of integrity and attribution.

But note that even if an artist *has* produced a “work of visual art” in the ordinary course of his creative processes, he still may not be out of the woods enough to take full advantage of VARA’s attribution rights. Let’s say I put together a couple of slabs of rusting metal and sign them “Richard Serra.” Serra—and we’ll stipulate that he’s an “author of a work of visual art”—would have a right under VARA to prevent my misattribution. But if I chose to reproduce those slabs in 201 signed copies, Serra would have no VARA claim because the outer limit of VARA-eligible multiples is 200. Or, if I chose to reproduce those slabs in fewer than 200 copies – even as few as two – but did not “consecutively number” them, then no copy would qualify as a “work of visual art” and Serra would have no VARA claim. The upshot is that Serra’s attribution rights are completely dependent not only on what he has undertaken to accomplish (i.e., to create a work and ensure that that work qualifies as “a work of visual art”), but also on the way in which a later-comer has chosen to reproduce her slabs.

In any event, given the narrow definition of a “work of visual art,” and its non-application to mass multiples, whether physical multiples or digital multiples, VARA’s attribution rights are clearly inadequate. This is why I think we should have an attribution right, but it should not emerge as part of some expansion of VARA; it should be a core right of its own.

**SUBOTNIK:** The digital age offers certain advantages for moral rights—the potential conflicts that we might have seen in a bricks and mortar world between attribution rights and integrity rights do not arise. In the digital space, there’s enough room to put your name anywhere you want without distorting the work unnecessarily, so that as much as we are struggling with how to effectuate moral rights principles in our current age, the technology is there to facilitate the rights. Which brings me to a

related topic—in your current piece,<sup>4</sup> which comments on the earlier essay,<sup>5</sup> you discuss certain aspects of the role of copyright management information (CMI), which can include the name of and other identifying information about a work’s author. That piece will speak for itself, but I wonder if you have any thoughts you’d like to share on the way in which the use of CMI is effectuating—successfully, or unsuccessfully—any moral rights goals.

**GINSBURG:** The case law is very inconsistent so it’s a little hard to tell what the current positive law on CMI is. If the author’s name is included in a website to which the public could link to access the work, would CMI protection cover the author’s name? Is the name conveyed “in connection with” the work even though it’s not embedded in the work? Suppose a work has many creative contributors. Those with top billing might be listed on a webpage one click away from the content. Secondary billing, two clicks. Tertiary billing, three clicks. And so on. How many clicks away from the work before the author’s name is no longer supplied “in connection with” the work? It is important to interpret the criteria for CMI in a way that encompasses creative ways of providing for attribution. But I think the biggest problem with the CMI provision is its double knowledge and intent standard. Section 1202 itself makes it really difficult to prove that not only was the information knowingly removed or altered, but further that it was removed or altered knowing that that act would facilitate further infringement.<sup>6</sup>

**SUBOTNIK:** Right. It’s not enough that the steps taken be part of a course of infringement itself. The removal or alteration has to be done with the knowledge that it will induce or facilitate further acts of infringement.

**GINSBURG:** Or with reasonable grounds to know. So there might be a willful blindness variation, but even so, it’s a lot to show. It’s not enough simply to show that somebody knowingly removed the identifying information.

**SUBOTNIK:** One of the suggestions you raise in your new piece is whether placing a copyrighted work into a file sharing environment would be sufficient to show the requisite intent.<sup>7</sup> This suggestion made me think of the ongoing debate, in another copyright policy context, over the “making available right”—essentially, if a tree falls in a forest and nobody hears it, has it

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<sup>4</sup> Jane C. Ginsburg, *Moral Rights in the U.S.: Still in Need of a Guardian Ad Litem*, 30 CARDOZO ARTS & ENT. L.J. 73 (2012).

<sup>5</sup> *Supra* note 1.

<sup>6</sup> 17 U.S.C. § 1202.

<sup>7</sup> *Supra* note 4.

really fallen? Likewise in our case: would releasing the copyrighted work in a file sharing context, without proof of its further dissemination, meet the requisite intent standard under Section 1202?

**GINSBURG:** Step two of the knowledge standard—knowing that it will “induce, enable, facilitate, or conceal an infringement”—maybe that would cover file-sharing networks. If you’re making the work—now deprived of its identifying information—available for others to further circulate, and they will further circulate it without the identifying information, that will facilitate infringement. So maybe file sharing networks are an example of a type of downstream use that might meet the double intent standard. Arguably, it’s the placement of the work in the P2P (peer to peer) network that facilitates infringement, not the removal of identifying information—that is, P2P file “sharers” will infringe whether or not they have access to CMI—but one can at least entertain the (hopeful) possibility that some participants in the P2P network would not further distribute the work, were they aware of the author’s name, terms and conditions for use of the work, etc., and therefore the removal of CMI enhances the likelihood of further infringing downstream distribution.

**SUBOTNIK:** And, in fact, P2P file sharing is a very common mode of distribution in these circumstances.

**GINSBURG:** Right. And indeed, one of the concerns of photographers and illustrators in the context of the debate over orphan works is that their works will be forced into orphanage because people will remove the identifying information and the visual works will be available in various ways over the Internet. Those photographers might have a CMI claim against somebody, but what they mostly want is not to have that identifying information removed in the first place. That observation raises another question about the efficacy of Section 1202: if the objective here is not so much to provide a remedy as to discourage the conduct that would ultimately lead to a remedy, the conduct we want to discourage is not just violations of authors’ moral rights interests. Rather, we want to encourage, as a global matter, the reliability of information about the lawful (and presumably compensated) distribution of works on the Internet. Whether Section 1202 has played any useful role in this regard is a fact question to which I don’t have an answer.

**SUBOTNIK:** Your reference to the integrity of the marketplace for copyrighted works is a perfect jumping off point to talk about one of the other major subjects of your two essays, which is *Dastar*



*Corp. v. Twentieth Century Fox Film Corp.*,<sup>8</sup> and its implications.

**GINSBURG:** The first essay was pre-*Dastar*; that's why it was so comparatively optimistic.<sup>9</sup>

**SUBOTNIK:** You argue in your recent piece that the *Dastar* Court is not entirely clear about whether the "goods" that can be reached by Lanham Act Section 43(a) could ever include intellectual products rather than physical goods in the way that the Court focused in the case.<sup>10</sup> So let me ask if you have any thoughts how *Dastar* might be applied to purely digital works/goods and about whether you see any unique issues that would arise out of such an application.

**GINSBURG:** The Lanham Act applies to goods and services. Services are not physical, tangible goods. So one issue relates to a service like a television broadcast: how do you map the *Dastar* holding onto the "origin" of a television program? To draw on an old example—I think I gave this example in another article—take the show *I Love Lucy*, that was first broadcast on CBS. If the origin of *I Love Lucy* is the network, does that mean that when the show goes into syndication, and so you see it on some local television station rather than on the network station, it now has a different "origin"? Is the "origin" the production company—Desilu Productions? I don't know. It strikes me as difficult to apply to services the apparently bright line that *Dastar* creates with respect to "goods." And if the objective of Section 43(a) is to protect against consumers' receipt of unreliable market information, it would seem to me that you would want to make sure that the most pertinent information is the subject matter of the legally cognizable claim. I don't know that the broadcaster is the most pertinent information, as opposed to the production company. Maybe it's the production company, maybe it's the principal actors or screenwriters, I don't know. But it does become difficult, much more difficult, to identify who has standing in the *Dastar* sense when it comes to services. If you say that *Dastar* on its own terms is incomplete, then maybe that makes it possible to rethink how *Dastar* would properly apply in the digital context. But I think that the way courts have been interpreting *Dastar* is not very encouraging—most courts have read *Dastar* as saying, "Do not run to the Lanham Act for claims arising out of non-attribution or even misattribution!" The attempt to distinguish *Dastar* on a reverse passing off/passing off basis does not seem to me to have been entirely successful.

**SUBOTNIK:** This was Justin Hughes' argument from a 2007

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

<sup>9</sup> *Supra* note 1.

<sup>10</sup> *Supra* note 4.

article he wrote.<sup>11</sup>

**GINSBURG:** And I think that he may be right, but I'm not sure that the courts are agreeing. There's the similar problem with Section 43(a)(1)(B): some courts have said that, having, post-*Dastar*, lost a 43(a)(1)(A) false attribution of origin claim, you cannot then dress up the claim as a misrepresentation of facts claim under (a)(1)(B)—we can see through that, and if you can't do it under (a)(1)(A), then you can't do it under (a)(1)(B) either. That's one problem and of course the other problem is that (a)(1)(B) can be brought only in the context of commercial advertising or promotion. It may be that a lot of mislabeled, misattributed works will have some level of advertising or promotion in order to attract the public, but not necessarily. The third point, which I didn't put in the current article, but which was raised by Davies and Garnett in their *Moral Rights* treatise,<sup>12</sup> is that the materiality requirement would mean that featured authors or featured performers might have a 43(a)(1)(B) claim, but what about all the other participants—what, if any, claim do they have? The answer may be well that they are no worse off than they were before *Dastar*, because if they were non-featured artists, then recognizing them or not recognizing them probably was not very material to the purchasing decision. Thus, even before *Dastar*, Section 43(a) was not a complete answer to the demand, if there is one, for attribution rights. Pre-*Dastar* Section 43(a) cases illustrate how to get the best fit you can with the legal tools you have, but you have to recognize that the legal tool is an approximation, and by its own terms it won't fit every situation, and by its rationale it shouldn't fit every situation.

**SUBOTNIK:** Actually, I'd like to tie this discussion to a line of argument from your earlier piece on the ostensibly unrelated topic of copyright management information (CMI), but there is actually a connection. There, you had mentioned two conceivable ways that CMI could be intentionally altered. One was by changing the text of the information—the CMI—itsself, and the other was more indirect, by changing the work to which the information applies so that the CMI is no longer accurate.

**GINSBURG:** The latter is a *Monty Python*<sup>13</sup> argument, transposed to CMI.

**SUBOTNIK:** Have we seen any case law dealing with CMI play out that interpretation?

**GINSBURG:** Not that I know of. The CMI cases have

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<sup>11</sup> Justin Hughes, *American Moral Rights and Fixing the Dastar Gap*, 2007 UTAH L. REV. 659 (2007).

<sup>12</sup> Gillian Davies & Kevin Garnett, *Moral Rights*, 28-046 (2011).

<sup>13</sup> See *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14 (1976).

concerned only authorship or producer identification, but it is at least plausible as the theory that worked in *Monty Python*—that the violation of Section 43(a)'s prohibition on false attributions of origin consisted of attributing to Monty Python a work that was no longer the work as created by Monty Python. The wrongful act wasn't attributing *Monty Python's Flying Circus* to somebody else, it was attributing to Monty Python a work that wasn't really theirs anymore. Perhaps, through the attribution aspects of CMI, one can get partway toward an integrity right, but it is not an integrity right that is, in the more continental style, grounded in the creation itself. The pertinent question is: has the creation been misrepresented, *not*: has the creation been mangled? It's not the mangling but the misrepresentation that's actionable.

**SUBOTNIK:** So you get at the modification through the misrepresentation.

**GINSBURG:** Yes, absolutely. What makes the conduct actionable is not the modification, it's the attribution of the modification. That's also the underlying argument for the viability of the Section 43(a)(1)(B) claim post-*Dastar*.

**SUBOTNIK:** One last question about *Dastar*. You note that the Court says that the "mere repackag[ing]" of a work as one's own, without substantial change, would still be actionable.<sup>14</sup> Might one say that this acknowledgment that a 43(a) claim would still be viable in such circumstances is a significant limitation on the reach of the decision—in the digital era or otherwise?

**GINSBURG:** It depends on what "mere repackaging" means. Consider plagiarism—I take your article in digital form and I put my name on it and then I circulate it—is that "repackaging" in the *Dastar* sense? I have now misattributed the intellectual origin of the goods. But again, what are the "goods"—I don't think we're talking about the 1's and 0's constituting the digital format of the work. Perhaps *Dastar*, without having anticipated it, excludes claims arising out of purely digital goods because there is no "packaging" in the digital goods context, at least not at first blush.

By contrast, from a technological perspective, one might be optimistic about voluntary attributions, because multiple attributions may be easier to implement in digital formats, allowing inclusion not only of featured authors but even of lesser participants because one no longer encounters the limitations of hard copy real estate on which to put the credits. Authorship information could be available even on a click-through website, but there would be some way of providing for recognition. That doesn't mean that every reader or viewer is forced to click on the

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<sup>14</sup> *Dastar*, 539 U.S. at 31.

website with the attribution information, but at least that information would be accessible and could not be removed without authorization of the copyright owner. If there's a willingness to work toward implementing attribution, as a practical matter, it can be done and done more easily than in the offline world.

Where I'm less optimistic is on the integrity side (although maybe not the integrity-full disclosure side, assuming we don't have the conflicts with other right holders to which you referred earlier. The public could ascertain what the real thing is in the digital communications format much more readily than back in the hard-copy world). My concern goes more to the question of whether there is popular respect for integrity, or whether the "romance of remix" has become such that there is a popular notion that works don't have an integrity to be preserved—that works are simply elements that are out there to be re-manipulated according to the vision of the next comer. Such an outlook might make it difficult, not as a matter of law or a matter of technology, but as a matter of attitude to propagate integrity rights. Having said that, it's also true that on Flickr the dominant Creative Commons license is NCND (NonCommercial-NoDerivatives), so at least the bulk of the creators there think that if they disseminate their work online, it should circulate as-is and shouldn't be altered. Perhaps not everybody is enamored of remix and we'll just have to see. But that's not so much a legal question as a question of, "If you build a moral rights system will anybody care?"

**SUBOTNIK:** I'd like to turn now to the relationship between authors and publishers. Obviously these terms have come to mean different things over time, and especially in the digital age, the Internet age, it may not even be possible to distinguish these roles fully anymore. Nevertheless, I wonder whether you see the trends in the law of moral rights, such as it is, which favor publishers above authors, even though we typically think of moral rights as geared toward the interests of authors. So, for example, in your earlier piece, you raised the point that whether copyright management information (CMI) is provided or not is completely at the discretion of the copyright holder, which may or may not be the author. Further, in your current piece, you describe a model of an "authorship integrity" license and you note that the possibility that publisher and author interests might not always align is a wrinkle that would have to be solved to make that model useful.<sup>15</sup> So, ten years later, are we seeing increased tensions between these two groups and the way in which the law treats

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<sup>15</sup> *Supra* note 4.

them? Does the law need to take better stock of author interests in these areas?

**GINSBURG:** The problem with Creative Commons is that, while it does create a kind of parallel universe for moral rights through viral contracts—specifically attribution and potentially integrity, depending on what combination of icons you choose—it is not designed to assist authors who want to be paid for their creations. And I don't see any prospect of Creative Commons itself combining with a payment mechanism. On the contrary, Creative Commons is very hostile to DRM (digital rights management), and most payment systems imply DRM. I suppose you could have a pass-the-hat payment system compatible with Creative Commons sensibilities, but I'm not sure I would rely on "busker business models" if I was hoping to make a living. I think the fundamental hostility of Creative Commons to DRM means that we're not going to have a professional authors' integrity and attribution regime through Creative Commons. For an equivalent regime, but with payment too, you'd have to start all over again. I don't think it's a question of technological capacity. The viral license would need to catch on, and for that you have to create a movement the way Creative Commons created a movement. I don't know if author groups on their own can create that movement, whether author groups are going to need publishers or commercial intermediaries of various kinds to help get things off the ground. One needs both a critical mass of works and the means to find those works. Creative Commons has bells and whistles that make it easy to find Creative Commons works. How do you create the same or at least aspire to a similar ease of accessing works that have the type of license I have sketched out? Much work has to be done to create a parallel universe that would propagate moral rights through contracts but still pay authors, and that gives rise to the questions of whether publishers are needed for that, of whether publishers have any interest in providing that assistance. The answers may depend a lot on the type of publisher, the type of work, etc. In many cases publishers do have common interests with authors in what I think publishers might call authenticity—maybe they don't want to call it integrity. The way the book is labeled implies not only a proper attribution of the authorship, but also a security that the contents really are the contents. There, thus, can be some convergence between authors and publishers where perhaps once upon a time, the publishers might have been hostile because if anybody was going to be changing the content of their works it was them—not a host of third party outsiders.

**SUBOTNIK:** The model that you're describing, to the extent it

would make use of the help of publishers, sounds an awful lot like the distribution of e-books currently, right? So how does your authorship integrity (AI) license relate to the licenses under which e-books are currently distributed?

**GINSBURG:** The “AI” viral license, unlike an e-book license, anticipates that there will be lots of downstream distribution of further copies; at the moment, the typical e-book license does not have a built-in pass-it-on feature (on the contrary, in fact<sup>16</sup>). The model adds actions to word-of-mouth recommendations—“I read this book, I really liked it, and I’m going to send you a copy too.” If the recommendation recipient wants to read it, then when she opens it up, she gets the access page that says “pay here” and “here are the other terms and conditions.” I can imagine that even for commercial publishers, not just the author, the pass-it-on feature of viral licensing could have some attraction because the user doesn’t always have to go back to the publisher’s web page to acquire and pay for the book. (Or maybe that’s unattractive if the publisher is counting on visits to its website for advertising income and exposing visitors to more of the publisher’s products.) If e-books are on the verge of the same kind of peer-to-peer, illegal dissemination encountered with songs and motion pictures, one might want to have at least the identifying and integrity codes embedded in the work.

**SUBOTNIK:** I’m curious about the relationship between your model and the use of the word “integrity” in the license name. Why style them as “authorship integrity” licenses rather than “authorship integrity and attribution” licenses?

**GINSBURG:** I’m not especially wedded to “authorship integrity.” Originally I was going to call it “creator’s content,” but that I thought was confusing—it’s obviously sort of a parody of Creative Commons, but I thought having two different CC licenses might get confusing. I think I had had something like “authorship authenticity,” but that’s AA and could be confused with Alcoholics Anonymous so maybe we don’t want that. Of course “authorship integrity” could be confused with artificial intelligence, but that’s not so bad. I’m open to suggestions for some other name for this license.

**SUBOTNIK:** The other thought I had, as you were speaking about the need for norm-building—that is, fostering respect for integrity and attribution rights, in a context in which authors are

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<sup>16</sup> See Amazon.com Kindle License Agreement and Terms of Use, at <http://www.amazon.com/gp/help/customer/display.html?nodeId=200506200&#content>; Sony Reader, at <http://ebookstore.sony.com/termservice.html> (see 2.1, 2.2, 7.7); Barnes & Noble.com Terms and Conditions of Use, at [http://www.barnesandnoble.com/include/terms\\_of\\_use.asp](http://www.barnesandnoble.com/include/terms_of_use.asp) (see XII).

paid for their work by downstream readers—was about some of those successful self-published authors, like Amanda Hocking.<sup>17</sup> Before she eventually received a \$2 million advance from one of the major publishers, she seemed to combine appeal to a widespread audience with a lucrative business model based on micro-payments. So, I think focusing on someone like her, and her story, might give rise to the type of movement you're talking about here. In any event, thanks for a lively discussion on this topic, Jane.

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<sup>17</sup> See, e.g., Strawberry Saroyan, *Storyseller*, N.Y. TIMES, June 17, 2011, at MM26.