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2016

Session 2: The U.S. Perspective

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Recommended Citation

Peter K. Yu, Allan Adler, Duncan Crabtree-Ireland, Mickey Osterreicher, Michael Wolfe & Aurelia J. Schultz, *Session 2: The U.S. Perspective*, 8 *Geo. Mason J. Int'l Com. L.* 26 (2016).

Available at: <https://scholarship.law.tamu.edu/facscholar/1268>

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**ANTONIN SCALIA LAW SCHOOL
GEORGE MASON UNIVERSITY
JOURNAL OF INTERNATIONAL
COMMERCIAL LAW**



**AUTHORS, ATTRIBUTION, AND
INTEGRITY:
EXAMINING MORAL RIGHTS IN THE
UNITED STATES**

SYMPOSIUM TRANSCRIPT

VOLUME 8

SUMMER ISSUE

NUMBER 1

SESSION 2: THE U.S. PERSPECTIVE

This panel provides an overview of the current state of protection of moral rights in the United States, including discussion of the “patchwork” approach of federal and state laws, as well as judicial opinions.

Panelists:

Allan Adler, Association of American Publishers

Duncan Crabtree-Ireland, SAG-AFTRA

Mickey Osterreicher, National Press Photographers Association

Michael Wolfe, Authors Alliance

Professor Peter K. Yu, Texas A&M University School of Law

Aurelia J. Schultz, U.S. Copyright Office (Moderator)

MISS SCHULTZ: For Session 2 we're covering the U.S. perspective and to quote one of our esteemed panelists, “when the protection of moral rights is brought up in the United States, commentators have always emphasized the differences between continental Europe and the United States.” Our second panel is going to attempt to explore this unique U.S. perspective. We're going to try not to delve too much into the comparative bit that we already covered in the first panel. So I'll take a moment here to introduce our panelists. Allan Adler is General Counsel and Vice President for Government Affairs at the Association of American Publishers. And then, Duncan Crabtree Ireland is Chief Operating Officer and General Counsel for SAG-AFTRA. Mickey Osterreicher serves as General Counsel to the National Press Photographers Association. Then we have Michael Wolfe who is the Executive Director of Authors Alliance, and then Professor Yu who is Professor of Law and Co-director of the Center for Law and Intellectual Property at Texas A&M. And there's more information about their backgrounds in your full program.

So to get started, as we've talked about a little bit earlier, the U.S. approach is generally described, including in our program, as a patchwork or sort of a hodgepodge of state and federal law. So to jump in, if you could each say a little bit about one or two of these kinds of patches and I think, Allan, we can start with you.

MR. ADLER: Thank you. I was very relieved to hear Eric at the very end of the panel issue sort of a half-lawyer's disclaimer. I was rather surprised to see five lawyers on a panel and no opening disclaimer about whether or not they were expressing views on behalf of a client or employer, so I will offer one. And the reason for that is chiefly because, when the House Judiciary Committee's hearing process to comprehensively review copyright law considered the issue of moral rights, it did so in a

hearing in which moral rights was one subject combined with “copyright term” and “termination rights,” which I think led people to look at that hearing as kind of a collective check-off box to make sure that even relatively obscure issues would be addressed in the comprehensive process of review. But I think it was also a signal that these three issues together, despite any other pretense the Committee might offer during the process, are highly unlikely to see any kind of reform legislation proposals as a result of the hearing process. In the case of moral rights, that is in part because I think the issue was largely viewed as having been put to rest during the period in the late 1980s that the previous panel discussed.

For the publishing community at the time, a sufficient amount of fire and brimstone was mustered to help put that issue to rest in terms of legislation. I'll give you just a quick example of the kind of language that was used by the industry at that time. Testimony of the AAP before the Senate Judiciary Committee said that the hearing raises the threshold policy question of “whether to superimpose vague, subjective, and wholly unpredictable new rights upon a longstanding balanced and successful copyright system.” Tell us what you really think publishers!

Moving forward in time, when the hearing was held two years ago by the House Judiciary Committee to look at the issue of moral rights, that view led AAP to make the decision that we were not going to submit a statement for the record because we didn't have anything new to say about the issue. When I say nothing new, it's not to say that we don't have anything to say about the issue at all.

In the 1980s, we said a great deal about the issue, particularly in terms of concerns not only that the United States had bodies of law which addressed the issues of integrity and attribution as they appear in *6bis* of Berne, but also because we have laws that distinguish the United States from the rest of the world, primarily the First Amendment to our Constitution, which broadly protects freedom of speech from prior restraints and certain other forms of censoring regulation. Congress and the Supreme Court have had no difficulty over the years reconciling the First Amendment with U.S. copyright law, notwithstanding the fact that some view the copyright law as basically restricting what people can do when they choose to use someone else's work of original expression as a form of speech.

But, nevertheless, it has played a very important role in shaping the way U.S. copyright law has in fact been implemented and it's also played an important role with respect to the issue of moral rights with respect to the issue of defamation law, which is primarily a creature of state law but is also affected by the First Amendment which makes it to that extent a creature of federal law as well. At least it is when we're talking about public figures or even about private figures, but we're dealing with issues of public concern and public importance.

So in the area of U.S. laws that were supposed to count for representing the principles of *6bis* on moral rights, one looked at the issue of integrity and noticed that it represents the ability 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 the author's honor or reputation.”

The interesting thing about that in terms of U.S. defamation law is that defamation law is probably both broader and narrower than the “integrity” concept in a number of senses. For one thing, the interesting thing about the *6bis* language is that, when we're talking about derogatory action that would be prejudicial to the author's honor or reputation, we're talking about derogatory action in relation to the specific work. We're not talking about general statements that would be viewed as derogatory or defamatory to the reputation of the author. It has to be something that relates to the work that then casts the author in what would be viewed as a disreputable light. That, of course, is not at all true with respect to defamatory law in the United States.

The way the law has grown, both as a matter of common law and in terms of state statutory law, it's a civil wrong. It's a tort. It can be either written in the form of “libel” or it can be spoken which would make it “slander.” It could even be expressed other than by writing or by oral comment. It must be “published” in the sense that a third party must have seen, heard, or read and understood it to be about the subject and to be damaging to the subject's reputation.

If you read the language of *6bis*, it's not at all clear that this might just be a direct discussion between a reviewer, for example, and the author of a work in which the author concludes that the reviewer's comments are derogatory in the sense that is contemplated under that Berne provision. But, most importantly in defamation law in the United States, the issue of the falsity of the facts asserted with respect to the subject individual who believes that his or her reputation has been harmed is an absolutely critical matter.

Even to the extent that the First Amendment provides some breathing room for people to engage in commentary and speech that might be viewed as derogatory to the subject's reputation and honor, unless the subject can point to the falsity of what was said, they really don't have any kind of legal action with respect to slander or libel under U.S. law, whereas the comparative notion to defamation in *6bis* doesn't address the question of whether what is said contains an element of falsehood. We've seen a number of areas where people will engage in what has been referred to as “libel tourism” to avoid bringing libel actions that really belong in the United States courts based upon the subject matter and vehicle that was used to make the statements at issue. They tend to travel to other countries, particularly the U.K., to file libel actions because of the differences in the

coverage of defamation and what has to be proven in order to be able to make a case.

In most areas of the United States, it's also important that a defamatory statement be one that is unprivileged. In other words, if you are in the situation where you are a witness in a trial proceeding, whether it's civil or criminal, your testimony is privileged with respect to any character of it that might be viewed as defamatory because it is part of a process in which what you say is being considered more for its relationship to the particular cause of action or the particular charged offense, than it has to do with the character of the particular individual that matter dealt with. So that's another important element.

And of course as I mentioned earlier, there is this distinction made in U.S. law between how the law treats a public figure and treats a private figure, and generally speaking, as we know under the *N.Y. Times v. Sullivan* doctrine, when we're talking about a public figure, an individual who's an elected official or somebody else who has entered into the public spotlight as far as society is concerned, generally speaking they have a heavier burden of proof with respect to an action for defamation, whether it's libel or slander and have to demonstrate "actual malice," which is not only that the statements involved were false, but that speaker either knew they were false or spoke them in reckless disregard for whether or not they were true or false. None of this is reflected in the language of *6bis* with respect to the idea of harm to reputation or honor. Most importantly, perhaps, in the United States an action for defamation does not survive the death of the subject of the alleged defamation.

So you had a very famous case a number of years ago where the children of the noted actor Errol Flynn attempted to sue for defamation of Flynn's character based upon a book that was written as an unauthorized biography of Flynn that alleged that he was a Nazi sympathizer. And, of course, the court basically said that such an action, had it they been brought by Mr. Flynn during his life, might've had some validity but had no validity being brought by those who were his heirs or executors of his estate.

So that's a fairly substantial way in which, even though the doctrine of defamation law in the United States serves as an analog to the "integrity" right that is protected under *6bis*. The two are really quite different in practice.

MISS SCHULTZ: Thank you, Allan. Duncan, Allan's covered kind of one way that the right of integrity and the author's reputation can be protected, can you tell us a little bit about how publicity rights also work in this area?

MR. CRABTREE-IRELAND: Sure. That'd be great and I'll probably mention the Berne Convention less than anyone in the entire day. If you're thinking, "Well I wonder why that would be," in case you don't know,

SAG-AFTRA is the union that covers performers, actors, broadcasters, recording artists and so as I think was mentioned during the esteemed academic panel before us, largely those individuals have been left out of the Berne Convention, but thankfully there's the WPPT for our recording artists and there is the Beijing Treaty. Hopefully, some day it will enter into force for our audiovisual performers. And so you won't hear a lengthy discussion of Berne from me but I would like to just talk for a minute about the right of publicity and its importance, particularly to performers since that's the perspective that I come from, spending almost 24 hours a day, 7 days a week, 365 days a year around them.

We've had, I think, a very fascinating academic discussion so far about how the various elements of moral rights, the patchwork quilt work in practice. For most performers I think they're more interested in a functional approach to these rights because what they're interested in is really two things as has been stated by several other people.

Number one, the question of how they can protect their non-economic rights, whatever those rights may be, and number two, how they protect their economic rights. And I would say not necessarily in that order. Depending on the performer, the reality, of course is that making a living as a performer is often the number one consideration for most performers. It is a very difficult career to pursue. It is a lifestyle for most performers where fighting for the very basic elements of life can be a real challenge. And so as representatives of performers for those who have not achieved a high degree of career success, the basic elements—and typically compensation—are the number one consideration.

And so the right of publicity as part of a broader moral rights patchwork is really important and, in fact, is utilized in practice (for those who might be paying attention to it). There have been a number of high profile cases, litigations, that have been initiated seeking to enforce rights under the right of publicity.

And I guess I should address what it is or what form it takes at least here in the U.S. Regrettably it's not really a federalized right. This is a right that is a sort of common law right that you see in a number of states, last count I think around twenty-eight or so states have some form of either common law or statutory right of publicity. There are a few states that are known as being very receptive to right of publicity statutes that have really built a strong framework for individuals and performers, in particular from my perspective, New York, California, Indiana, jumped to mind as a few of those.

But I do think that it is more than an academic case. There have been a number of cases in the Ninth Circuit, for example, and in other circuits in the U.S. where various types of performers have sought to pursue economic compensation for violations of their rights of publicity ranging

from commercial advertising types of cases to cases involving particularly video games in recent years.

There is I think sort of a brand integrity element of this, particularly that you see in these cases that have made it into the appellate process, where we've got compensation on the one hand, and where we've got a desire to really use the right of publicity to protect the types of uses that are made of image and likeness of individuals. And that's something that otherwise really you have to rely on a contractual framework to protect outside of that and maybe the Lanham Act, which thankfully I'm not responsible for talking about today. And so I think from a performer's perspective that is a really important option.

We did see recently a very interesting litigation attempting to pursue this type of brand integrity or personal rights protection through a copyright angle, which of course is the *Google* and *Garcia* case and, you know, prompted I think some very interesting writings in the Ninth Circuit level in particular.

So for those who haven't checked out Judge Kozinski's opinion in that case and the subsequent *en banc* review results, you should probably do that, but from my perspective that's the type of case that really never should've been brought in the first place because a better—a lot of us were mystified as to why the plaintiff in that case didn't pursue a right of publicity approach to that issue, rather than the copyright approach that was pursued. And so from a practical point of view, again a functional point of view, that's something that we always try to discuss with our members and our performers, which is to really make sure that they have an understanding of the right of publicity, because it is a patchwork, of the various options for seeking to vindicate your rights and making sure that when you do that you don't create unfortunate or counterproductive precedents or, you know, cause harm to an otherwise precariously balanced system.

I think I couldn't wrap up without talking for a minute about the Beijing Treaty. It's something that's very close to the hearts of our members, particularly our actor performer members. Obviously our recording artist members have enjoyed similar protections under the WPPT for some time and actually when you look at the range of our membership, they speak out very strongly in favor of the Beijing Treaty both from a—both with the knowledge of the specifics of the Treaty, which obviously is complex and takes some time to understand, but also from a more fundamental place which is the really, in some ways, shocking lack of international recognition of performers' rights and the audiovisual space for such a long time and the joy, frankly, that our performers have.

Setting aside the details at the concept of being recognized in a way that they haven't been so far and even our recording artist members have stepped up to speak out and say that it's not fair that our actor brothers

and sisters are not protected in the same way that we as recording artists are at the international level. And so that's something that's really important to us. Of course the implementation—someone mentioned earlier that the President had sent the Treaty to the Senate for ratification and of course the implementation package has also been made public and there are definitely some interesting issues that really relate to primarily the anti-bootlegging area, which is the focus of the implementation package that's going to cause some interesting debates. And I think there is some disagreement about the necessity of the scope of the changes that are proposed in the implementation package, but ultimately it is our hope and desire that moral rights for audiovisual performers get enshrined in international law in a way that's meaningful both on a detailed and functional level, but also from sort of the philosophical and principle level to ensure that we would then finally have a broad range of rights for all types of performers, moral rights and economic rights at the international level.

So I think I'll stop there. Thanks.

MISS SCHULTZ: Thank you. And you mentioned your relief at not discussing the Lanham Act and Eric very helpfully on the last panel summarized *Dastar* for us. So Professor Yu, if I could ask you to kind of pick up that heavy load and tell us a bit about the Lanham Act and using statutes like that that are not copyright law to help protect something like moral rights.

PROF. YU: In terms of unfair competition law, the protection we often rely on is derived from § 43(a) of the Lanham Act. Eric has already mentioned the *Dastar Corp. v. Twentieth Century Fox Film Corp.* case. I suspect Professor Jane Ginsburg will talk a little bit about that case as well.

Section 43(a) offers two different types of protection. The first type protects against the false designation of origin—specifically, a false designation that will cause confusion over the “origin, sponsorship, or approval” of the relevant goods or services. The second type concerns the misrepresentation of “the nature, characteristics, qualities, or geographic origin” of the goods or services. From the standpoint of moral rights protection, § 43(a) will prevent people from attaching your name to other people’s works or the name of others to your work. It will also prevent the nature or quality of your work from being misrepresented.

A good example is the *Gilliam v. American Broadcasting Cos.* case—or what we call the “Monty Python Case” in the classroom. In this case, ABC cut out 24 minutes of 90-minute TV programming to insert commercials. It nonetheless broadcasted the work as Monty Python’s without indicating the unauthorized alteration. When Monty Python saw the recorded version, they were appalled by the disjointed format that was shown on TV. Because they did not want their name attached to the unauthorized edition, Terry Gilliam, their American group member, filed a

copyright infringement lawsuit in the United States. The court found for Gilliam based on both copyright law as well as § 43(a) of the Lanham Act. The § 43(a) claim concerned ABC's passing off of the unauthorized edited version as Monty Python's. So, this case is a very good example of how unfair competition law can be used to protect moral rights.

A lot of you here are probably very concerned about the Supreme Court case *Dastar*. This case is about the TV series *Crusade in Europe*, which Fox put together based on General Eisenhower's war memoirs. The series is no longer protected because Fox failed to renew its copyright. When *Dastar* put together a video set to commemorate the fiftieth anniversary of World War II, it copied and condensed the series, reordered the material and included new opening and closing credits as well as title sequences. *Dastar*, however, mentioned neither Fox nor Eisenhower. Fox filed a copyright infringement lawsuit, and the case was appealed all the way up to the U.S. Supreme Court.

When *Dastar* was before the Court, the big issue was whether Fox could pursue a § 43(a) claim based on misrepresentation. As Eric mentioned earlier, the Court's ultimate focus was on the origin of the physical goods—that is, who manufactured the videotapes? The Court, however, did not look at the origin of the footage or the intellectual material captured on the tapes.

There are generally two very different readings of *Dastar*, causing lawyers and commentators to debate over how broadly the case should be read. A broad reading will prevent us from making "false designation of origin" claims based on the intellectual content inside of the physical goods. I, however, belong to the camp that reads the case more narrowly. Under a narrow reading, this case was mostly about content that had already fallen into the public domain—that is, content no longer protected by copyright.

If you want to go deeper into the facts, you can see that a lot of the war footage in Fox's TV series actually originated from Allied Forces. Such footage did not even belong to Fox. So, there were a lot of facts supporting the Court's conclusion that the Lanham Act did not require *Dastar* to credit Fox for the re-used material, especially when the series has already entered the public domain.

In addition to these two readings, some commentators—most notably, Professor Justin Hughes—have separated the nonattribution issue from the misattribution issue. Nonattribution concerns the failure to include the origin of the footage—in this case, the footage that has already gone into the public domain. By contrast, misattribution relates to situations similar to those in the *Gilliam* case—for example, when a wrong name has been attached or when one has misclaimed altered content as the original.

The *Dastar* case focuses on nonattribution, not misattribution. *Gilliam*, by contrast, focuses on misattribution, not nonattribution. Had the

facts in the *Gilliam* case been brought before the *Dastar* Court, I suspect the outcome might be somewhat different.

After *Dastar*, I think the biggest concern for a lot of lawyers and commentators is that many lower courts have read the case broadly, reasoning that § 43(a), post-*Dastar*, gives very limited protection to the attribution interest in an intellectual work even when that work remains protected by copyright. Such a broad reading has caused major concern among those seeking stronger moral rights protection.

MISS SCHULTZ: Thank you. Keeping in the attribution tract there, earlier in the first panel there was mention of some of the newer WIPO treaties and of course those include protection for rights management information or RMI. So Mickey, could you talk to us a bit about RMI protection as a way for protecting moral rights?

MR. OSTERREICHER: Sure. So with my press background for those of you who are not connected to the Internet, right across the street I'll let you know that the Supreme Court denied cert in the *Google* case, the book case. So I think that's something people will be talking about today in our area, but that breaking news aside, earlier somebody talked about it really wouldn't make any sense to publish a book without somebody's name on it. And yet with hundreds of millions of images being uploaded almost daily we are seeing all those images, for the most part, without somebody's name on it. And the rights management information is critical to at least visual journalists and visual creators in terms of doing that.

So attribution. Attribution information under moral rights, the problem moral rights that they have is that it's very narrow. In terms it's got to be for exhibition. It has to be numbered no more than 200 works—more than 200 copies made and for the most part those visual images in terms of photography will not fall under those protections. So what else can we do?

And then we have a number of—now we get into all the acronyms and again standards for rights management information. There's copyright management information, CMI, and that's codified under § 1202 of the DMCA. And we can talk about that. I'm not sure if you want to talk about that now or when you go to the next question.

Then we have IPTC and EXIF and then PLUS, and we don't really just yet have a standardization in terms of how we are going to allow people that create visual works to have that attribution, whether it's information just about them, and even when there's information there that will help people identify who it is that created that work. Often times that information that is referred to often as metadata is stripped out of that—the visual works and we have pretty much almost instant orphan works, if you will, for an image that could've been created only moments ago when it goes up on the Internet and is seen around the world, somebody may not know who it is

that created it and often times these images are being used without permission or credit or compensation. And that really is a huge problem.

You were talking about performing artists, in terms of visual artists trying to have and earn a living doing what they do in this brave new world of so many millions of images being out there. That's a dilemma that we are truly, truly faced with.

So, you know, under DMCA there's certainly a number of really better protections as far as we're concerned that the real question is going to be then enforcement, and that seems to be a big challenge for everybody in terms of what they're dealing with. Setting standards and then enforcing them. So I think maybe as we get into some more questions, I'll get into more specifics.

MISS SCHULTZ: Okay. Thank you. You mentioned a little bit there how dealing with photographers is different than other types of visual arts and we've talked a little bit about VARA in the first panel as well. Professor Yu, was there anything that you'd like to add on VARA that you feel we haven't covered in either of the panels so far?

PROF. YU: We have touched on VARA quite a bit, and this is a topic with which most of you are already familiar. So, I will be brief.

The Visual Artists Rights Act of 1990 covers three distinct types of rights. The first is the right of attribution. The second is the right of integrity. And the third is the right against the destruction of works of recognized stature.

When you compare VARA with moral rights in other countries—I think Professor Daniel Gervais has already discussed the statute in the context of the Berne Convention—you can see that we actually offer stronger protection than other countries of the right against the destruction of works of recognized stature. This right is closer to the right of destruction or, to some extent, the right of integrity, but it is also analogous to the protection found in state art preservation laws—in California, New York, and other states. So, VARA is more of a hybrid. If I have to describe this protection, I would call it “moral rights with U.S. characteristics.”

Going back to the Berne Convention, I think the main concern for a lot of people is that VARA offers a very narrow scope of protection. Its protection is limited to only specific categories of visual art: paintings, drawings, prints, and sculptures. Even within these categories, there are additional statutory conditions.

A good example concerns still photographs. As we have just heard, VARA has a limit on the number of copies: the protected photograph has to exist in a single copy or a limited edition of up to 200 copies. The author also has to sign and consecutively number all the available photographs. In addition, the protected photograph has to be “produced for exhibition

purposes only.” There is actually case law discussing what this particular phrase means.

In regard to duration, the protection is also more limited than what we have in the Berne Convention. The standard term of protection under the Convention is the life of the author plus fifty years. In the United States, the term has been extended to the life of the author plus seventy years. But in VARA, the term of protection is only the life of the author. So, the protection under VARA is much shorter than the duration of copyright.

What is interesting about VARA is that, when we adopted the statute shortly after joining the Berne Convention, we tried to come up with something that was uniquely tailored to our needs, interests, and conditions, but that was also acceptable to other countries. In the end, the protection under VARA does not fit very well with the Berne Convention. Nor does it match the traditional scope of the rights of attribution and integrity.

MISS SCHULTZ: Thank you. Allan, could you tell us briefly a little bit about how contract law can play into this and then we'll turn to Mike and hear about some specific types of contracts.

MR. ADLER: Yes. Contract law was also one of the reasons why publishers generally objected to the imposition of a layer of moral rights on top of the existing economic rights and property rights framework of U.S. copyright law. They felt that contracts gave the parties both a great degree of flexibility in terms of how to develop and conduct their own relationship with respect to the publication of work, but at the same time, in addition to that flexibility, once a contract was in place and had been fully negotiated, it also added a great deal of certainty and predictability about the way in which the relationship would continue and the work at the center of that relationship would be dealt with.

There is, of course, as has been said, no “attribution” right in U.S. copyright law specifically, but that's an issue that is typically dealt with under contract. Many works in the United States are published either pseudonymously or anonymously, and that's generally dealt with between the author and the publisher as a matter of contract. And the courts, of course, generally tend not to try to read between the lines of a contract, unless it's absolutely necessary to do so, so it's the expressed language of what's within the four corners of a contract that ultimately shapes the relationship of the publisher and the author with respect to a particular work and how copyright law is implemented with respect to that specific work in the context of that relationship.

One of the curious things that we see though, is that sometimes there is a situation where the notion of a contract, at least the way licenses are used today, can put the issues of attribution and integrity in opposition to each other.

I'll give you one example. There is a pending rule making at the Department of Education called the Open Licensing Rule in which the Department of Education is trying to encourage the creation of open educational resources through its Direct Competitive Grant Program. And as a result, what it wants to do with the rule is impose the obligation on any grant recipient that any copyrightable work that they produce with grant funds from the Department, would have to be available publicly as an open educational resource subject to the equivalent of a Creative Commons "attribution-only" license.

The problem with that is this essentially says to the individual that if you receive federal funds to create work, that work not only is going to be subject to adaptation, repurposing and alteration by other parties down the line, but at each instance it requires that attribution to the original author must be made. And what that means is that you're going to have a circumstance where, as a result of that kind of license agreement, and as a result of receiving federal funding and the contract terms for that funding, you're going to have the situation where an individual author continues to be credited as the author of a work after it has been substantially altered, repurposed, or adapted in ways that that author might find absolutely appalling and completely at odds with their original purpose in creating that particular work.

So contracts can do a lot of things. They provide flexibility, they provide certainty, they allow the parties basically to decide their own fates within a particular transaction.

Now we have heard on occasion that one of the reasons why moral rights needs to cut into that kind of flexibility and freedom of contracting is because frequently the bargaining positions of the parties, between an author and a publisher, are unequal.

Well, they can be unequal but in two very different directions. A very well-known author with a very long track record of success in publication typically will have more leverage than the publisher will in determining the transactional terms of the next publication if that publisher wants to become the publisher of the author's next work. Obviously the situation is reversed when you're dealing with an author—either a first-time author or an author who has developed no public reputation or record of success in prior publications.

So, in contrast to the U.S. system, attribution seems to be something that in civil code countries has to be cabined within the terms of civil law. This is one of the reasons why publishers continue to feel that a moral rights regime with that kind of European flavor would be detrimental to the way copyright has served the interests of this country.

MISS SCHULTZ: So, Mike, Allan mentioned Creative Commons licenses and they're something that have sometimes been talked about by

scholars as potentially being America's moral rights. Could you share some of your thoughts on that and then also on the role of extra-legal norms in the area?

MR. WOLFE: Absolutely. So Creative Commons licenses, which I'm sure many or all of you are familiar with, are a suite of public licenses designed to allow the widespread sharing, and in some cases reuse and remix, of creative work. And as Allan just recently mentioned, an essential feature of the contemporary suite of Creative Commons licenses is, in fact, an attribution requirement.

This is to say that, while Creative Commons licenses can have any of a number of features, the attribution requirement is a part of all of their current offerings.¹ The most basic license—the Creative Commons Attribution License, or “CC BY” —allows public sharing and reuse provided that licensees properly identify the author.

This license can be amended by selecting from a menu of options any of a number of different requirements. The licensor can elect to disallow derivative works, or to require that creators of derivative works share those derivative works under the terms of the same license. Finally, licensors can limit licensed sharing and reuse to only noncommercial activity.

And I would like to back up briefly and respond a little bit to one of Allan's comments about open educational resources and the use of a Creative Commons attribution license and its impact on tying authors' identities to downstream derivative works. It is important to note that CC licenses do provide in some measure for a right of disassociation from unwelcome derivatives. When an author's work is modified in such a way that the author no longer feels comfortable having their name associated with it, the license gives authors recourse by requiring that a downstream user remove the attribution on request where reasonably practicable.

Creative Commons licenses are in some sense an interesting and commonly used contractual solution to the lack of a formal American attribution problem. However, I wouldn't call them an *American* solution entirely. While Creative Commons is an American organization and the licenses originated in the United States, the licensing scheme is designed to be global and portable. To that end, Creative Commons licenses are in some sense designed as much as possible to be compatible with formal moral

¹ Interestingly, earlier Creative Commons licenses that did not use the attribution requirement were retired due to lack of demand.

rights regimes and, in fact, all of the licenses have a provision that waive moral rights to the extent necessary to reasonably effectuate their terms, and only where actually waivable in a given jurisdiction.

In a practical sense, it seems to me that Creative Commons licenses are an effective means for authors who want to share their work without price or permissions barriers to receive credit for their work. And for those authors who give their work away freely, credit and stature are likely to be the primary currency of their creative economy.

It is helpful here that the CC licenses also try to tackle some of the fiddlier aspects of what it means to have a functioning attribution regime in an online environment, by taking the technology seriously. In a digital environment, the licenses have a machine-readable layer, encouraging discovery (again, an important consideration for those authors working primarily for credit), and compliance.

Finally, Creative Commons licenses also have the interesting effect of encouraging attribution beyond the scope of what might be required strictly under the terms of the license. So even though the Creative Commons licenses do not purport to restrict behavior otherwise permitted by Copyright Act's exceptions and limitations, they nonetheless encourage attribution in those cases by making permissions easy and costless for many use cases. The result is in some sense over-compliance, helping secure attribution for authors, even where perhaps not absolutely required by the license itself.

Moving on, I'm actually going to segue directly into a topic that's not entirely directly related and that's how extra-legal norms stand in place of moral rights in the United States. So there is, as the panel's discussed, a significant patchwork of rights that to some extent, if not completely, provides something akin to moral rights protection to authors in the United States. But the reality on the ground is substantially more informal, often just grounded in the norms and practices within and across creative and consumer communities. Particularly relevant here are the norms surrounding plagiarism, which are what I'm going to focus on today.

Plagiarism, which as a word interestingly enough comes from the Latin root for "a kidnapping," is an extra legal norm that is independently defined in various communities of practice that cautions against and often provides extra-legal remedies for uses of works that are in some way fraudulent or unauthorized—generally in the sense of not including attribution information so as to suggest that either information or expression originates from the plagiarizer rather than from the author of the plagiarized work. Though it is not identical with either, plagiarism speaks more to the concerns behind the moral right of attribution than it does to those behind copyright infringement. If these three possible areas of wrongdoing—plagiarism, failure to attribute, and copyright infringement—were viewed as a Venn diagram, they would be, mutually, but incompletely, overlapping.

Some plagiarisms are infringements and, where available, moral rights violations. Given that plagiarism norms do not turn on permission, and often extend beyond copyrightable subject matter to ideas, other plagiarisms might stand independent and apart from these other areas of concern. But in general, the question resolves to the same key area of concern that motivates the attribution right: ensuring that the originators of work are credited for their contributions. One of the virtues of having an extra legal norm as opposed to a formal statutory right, although I won't draw any conclusions as to whether this effects the propriety of having a statutory right, is that within various communities of practice there can be, and in fact are, different approaches to the question of plagiarism.

In the case of literary works, academia has very strong, and often enforceable, norms about plagiarism, not all of which are necessarily entirely consistent with formal attribution rights. For instance, if a research assistant provides significant contributions to a paper, the fact that their name does not appear on the text will not generally be considered plagiarism or in violation of the norms of plagiarism, despite the existence of real contributions that might rise to the level of requiring attribution under a statutory model.

Meanwhile, in creative writing, while there are still very strong norms around plagiarism, these might very well fall short of the formal academic approach to providing credit. So rather than footnotes or citations you might have something like Jonathan Letham's excellent essay, *The Ecstasy of Influence*, which is perhaps misleadingly subtitled "A Plagiarism." There, the work is composed entirely of other people's sentences, all the sources of which are credited in a sense by being listed at the end, but not in-line and without the quotation marks, brackets, and ellipses and the way that lawyers are all too familiar with. I would posit that this is an instance where the author has very much complied with his community's norms surrounding credit—and thus avoiding plagiarism *per se*—while also being outside the bounds of what might be considered acceptable elsewhere.

These are only the very tip of the iceberg—there are real and differentiated plagiarism norms in everything from music, to film, to visual art, to comedy. Perhaps this state of affairs suggests that there is a real demand for remedies in cases where work is used without attribution, but it might instead suggest that the communities closest to the behaviors at issue are capable of self-regulating in accordance with their actual needs on the ground. In any case, I think any moral rights reform would do well to remember and respect the different approaches taken by these different communities.

MISS SCHULTZ: Thank you. Thank you, gentlemen. I know there's a lot more to cover. We have just a few minutes left for questions from the audience.

MR. MOPSIK: Great. Thank you. I want to take exception to a comment that my friend Allan Adler made. I don't always disagree with Allan but Allan stated, and good thing I'm paraphrasing, contracts give flexibility and certainty as to how work would be dealt with. Well, in my experience in my previous life at ASMP at the Trade Association, over the years the one thing that we could be certain regarding most textbook publishing licenses and contracts, was that they were being exceeded. There was no certainty that the terms of the contract were being upheld. So—and I agree with you that the leverage issue—I'm not sure that—I think that tilts still more in favor of the publisher than the number of, I guess, authors that have significant leverage over a publisher is significantly less than the number that don't. But as far as contracts were concerned, I don't think they gave any particular certainty as to what was happening with the future of a work.

MR. ADLER: Well, let me try to clarify that, Gene, because what I meant, and I think you've affirmed this, is that the terms of the contract create certainty. Now whether or not the terms are complied with is another question. The fact that you are able to point out in a given situation that the facts of implementation of that contract don't match the terms indicates that there is at least the possibility and the intention of certainty, but it simply isn't followed through in terms of performance.

So I think that you still have the notion that contracts are useful for providing certainly the aspiration toward certainty and predictability, but you're still dealing with the question ultimately of whether or not the performance will be faithful to that aspiration.

MR. MOPSIK: Then we still almost agree.

MISS SCHULTZ: Daniel.

MR. GERVAIS: It's also for Allan and also on contracts. So you underscore the almost sanctity of contract rights so important, yet the United States has something that authors in other countries envy us which is the termination of transfers, which seems to be a little bit of government interference in the contract. And I understand that some of the work-arounds, especially that some lawyers in Nashville have tried for termination of transfers have not all been tested in court but it's a pretty strong, unwaivable, untransferable right. Is that un-American?

MR. ADLER: I think as you probably would agree Daniel, that's the exception by far rather than proving the general rule of the way in which freedom of contract is generally allowed to operate within the copyright system. And more importantly, drives the copyright system increasingly because of the increasingly broad role that licensing now plays in the use of works.

We're seeing within the context of the current copyright review this battle play out with those who are advocating the importance of

continued certainty and definition with respect to ownership of rights in a particular work. But we're also seeing a society that is increasingly content simply to have access to use the work and is not really interested in ownership because of the other attributes that ownership usually carries, which requires maintenance, storage, care, things of that nature, upgrades, whatever.

So I wouldn't point to the exceptional circumstances of termination of rights as generally vitiating the rule, which I think continues to be that contracts play a very important role. One point I would also want to make here is that, with respect to the right to control the production of derivative works, there's always going to be some question of what actually is derivative.

At the far end of the spectrum, I suppose it's possible that using the common understanding of the word "derivative," a work can steal completely the ideas of a prior author's work but not of course be actionable as copyright infringement because it doesn't take the original expression.

So you have to have a notion of these legal concepts that is susceptible to clear definition. It's always going to be case that we're going to have litigation because, as June mentioned, we are a particularly litigious society and we'll always be trying to game the fringes and the edges of these rights. But today, for example, we're seeing the discussion of whether or not remixes and mash-ups are vitiating the derivative works right. If that's true, I don't know that anybody has related the question of remixes and mash-ups to moral rights at this point, but it certainly seems to be another avenue to be explored.

UNIDENTIFIED SPEAKER: Actually before you go onto the next question just say—I think one of the topics we didn't discuss but are thinking about is the importance of contracts with collaborative works and how the, you know—a lot of challenges would exist in the absence of the prevalence of contracts for collaborative works like in the audiovisual area because how you would coordinate and harmonize different participants, different moral rights, and other rights without contracts would be quite a complicated scenario.

MR. ADLER: Yes, in fact Eric's history of the late 1980s, at the time of Berne implementation and immediately thereafter, left out the fact that, in the hearings that were held about moral rights, the other main issue being discussed was the impact of moral rights on the work-for-hire doctrine, and particularly the then-recent decision of the U.S. Supreme Court in the *Reid* case. At that point, there was a real question as to whether or not it was possible to create a situation in statutory copyright law that would accommodate that notion as the Europeans have it, but still be consistent with the way the Supreme Court interpreted the work-for-hire

doctrine which depends greatly upon the way in which a written contract essentially defines the relationships of the parties.

MISS SCHULTZ: Thank you, gentlemen. I'm afraid that's all the time we have for this session.