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THE ATTRIBUTION RIGHT IN THE UNITED STATES: CAUGHT IN THE CROSSFIRE BETWEEN COPYRIGHT AND SECTION 43(A)

Roberta Rosenthal Kwall*

Abstract: The human impulse for attribution symbolizes the linkage between an author and her creative work. In many countries, authors are afforded a right of attribution as part of a broader doctrine known as moral rights. The United States, however, does not adequately protect moral rights. This Article focuses exclusively on the right of attribution as one component of the moral rights doctrine. Initially, it examines the connection between copyright law and the right of attribution and establishes the inadequacy of the current copyright law as a means of safeguarding the right of attribution. Next, it addresses why section 43(a) of the Lanham Act, which frequently has been hailed as a viable substitute for the right of attribution, is an inadequate safeguard for the attribution interest. The underlying theme of this Article is that because United States' copyright law and section 43(a) are grounded in objectives other than the personality and non-monetary interests with which the right of attribution is concerned, the federal enactment of a right of attribution applicable to a broad category of copyrightable works is vital. The adoption of this approach is necessary for protecting fully the authorial interests that currently are insufficiently addressed under our legal system. Such explicit recognition for a right of attribution can be accomplished with a relatively minimal degree of controversy and disruption to our current legal fabric.

The right of attribution recognizes a fundamental truth about human nature—people typically desire recognition for their accomplishments. A corollary of this fundamental truth is that people should not receive attribution for something that is not their creation. Both the desire to receive attribution where warranted, and to be free from false attributions, are grounded in the realities of the creation process. Authors¹ draw inspiration for creation from the powerful forces deep within their souls. When this inspiration becomes manifest in the form of

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1. This Article uses the term "authors" in its broadest possible sense to denote those who are involved in the artistic creation of any genre of work presently, or even potentially, within the scope of copyright protection.

a concrete work of authorship, that work reflects the individual spirituality and personality of the author. As such, the work embodies a concrete connection with its author and the human need for attribution symbolizes this linkage.

In many countries, authors are afforded the right of attribution as part of a broader doctrine known as moral rights.² The right of attribution, together with the right of integrity and the right of disclosure, form the backbone of moral rights doctrine in the majority of those countries where this doctrine is viable. These three components of moral rights doctrine reflect the “unmistakable reality that this doctrine is concerned with protecting the author’s personal dignity and the human spirit reflected in her artistic creations.”³ The right of integrity guarantees that the author’s work truly represents her creative personality and thus prohibits misrepresentations of an author’s expression.⁴ The right of disclosure affords the author the ability to determine the timing of a work’s public dissemination.⁵ The right of attribution safeguards to the author the right to be recognized as the author of her work, and to prevent others from being designated as the author.⁶

I have argued elsewhere that the act of creation embodies the author’s personality-based narrative of creation to the extent that the creative process implicates the honor, dignity, and artistic spirit of the author in a fundamentally personal way.⁷ The author’s personality-based narrative of creation emphasizes the infusion of the self into one’s work, and thus provides the framework for moral rights. At bottom, therefore, moral rights are inherent to the extent that they are concerned primarily with safeguarding the author’s dignity as both an individual and as an author.

2. See Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 7 (1985) [hereinafter *American Marriage*].

3. Roberta Rosenthal Kwall, “*Author-Stories*”: *Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 23 (2001) [hereinafter “*Author-Stories*”].

4. *American Marriage*, *supra* note 2, at 7.

5. *Id.*

6. The right of attribution also recognizes that at times authors simply want the flexibility of negative recognition, which means they desire the ability to create anonymously or under a pseudonym. *See id.*; *see also infra* note 254 and accompanying text.

7. “*Author-Stories*”, *supra* note 3, at 23. Renowned artist Marc Chagall spoke of the “spirituality” inherent in the artistic process when he observed: “Painting . . . seemed like a window I could escape out of, to take flight to another world.” NATAILE BOBER, *MARC CHAGALL: PAINTER OF DREAMS* 90 (Jewish Publ’n Soc’y 1991). *See also* Barry Oretsky, *Making the Mystical Transition*, *FARBREGEN* 7 (Winter 2001) (“I find a wonderful spirituality occurs when the creative process is expressed in paint.”).

The interest which moral rights serves essentially is a spiritual one which transcends the author's concern for property or even reputation.⁸

In the United States, adequate protection for authors' moral rights is sorely lacking. To a limited extent, the moral rights of attribution and integrity are incorporated on a federal level in the Visual Artists Rights Act (VARA).⁹ VARA was enacted in 1990, two years after the United States joined the Berne Convention for the Protection of Literary and Artistic Works.¹⁰ VARA affords certain visual artists¹¹ relief against intentional modifications that will prejudice their honor or reputation, as well as the right to prevent the use of their names in conjunction with works that have been changed in a prejudicial manner.¹² More recently, the "copyright management information" provisions of the Digital Millennium Copyright Act (DMCA) appear to require a form of attribution in the Internet environment to the extent that they prohibit the dissemination of false information, and proscribe the removal or alteration of copyright management information.¹³

This Article examines the right of attribution. It demonstrates the need for the explicit adoption of a federal right of attribution applicable to a broad category of copyrightable works. Part I illuminates the connection between copyright law and the right of attribution. Initially, this part illustrates the need for a right of attribution in the United States by highlighting two recent copyright struggles. Part I then focuses on the inadequacy of the current economically-based copyright law as a means

8. "Author-Stories", *supra* note 3, at 24.

9. 17 U.S.C. § 101A (2000).

10. The Berne Convention is the oldest multilateral treaty governing copyright protection.

11. VARA protections are limited to visual artists who create certain categories of works which include paintings, drawings, prints, sculptures, or still photographic images produced for exhibition purposes only. *Id.* § 101A. For a detailed discussion of the various narratives that both shaped, and were rejected, by Congress in enacting VARA, see "Author-Stories", *supra* note 3, at 26-43.

12. 17 U.S.C § 106A(a)(2) (2000).

13. Section 1202 treats maintaining the integrity of copyright management information. Section 1202(a) prohibits the provision or distribution of false copyright management information if done "knowingly and with the intent to induce, enable, facilitate, or conceal infringement." Section 1202(b) prohibits the intentional removal or alteration of copyright management information, and the distribution of such altered works. 17 U.S.C. § 1202 (2000). See also Roberta Rosenthal Kwall, *Moral Rights for University Employees and Students: Can Educational Institutions Do Better than the U.S. Copyright Law?*, 27 J.C. & U.L. 53, 55 n.16 (2000) [hereinafter *Moral Rights for University Employees*]. See Generally Jane Ginsburg, *II. Art and the Law: Suppression and Liberty—Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9 (2000); Justin Hughes, *The Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L.J. 19 (2000).

of safeguarding the personal interests protected by the right of attribution.

Part II examines section 43(a) of the Lanham Act, which frequently has been touted as the one federal enactment capable of safeguarding the right of attribution.¹⁴ By proscribing “false designations of origin” and false descriptions or representations in connection with any goods or services,¹⁵ section 43(a) can be invoked as a basis for relief in reverse passing off cases where copyrightable works are misattributed,¹⁶ or even unattributed.¹⁷ This part reviews the conflicting law on the application of section 43(a) in this context. It demonstrates that in light of section 43(a)’s preoccupation with consumer protection, this provision is of limited utility in safeguarding the right of attribution.

The case law discussed in the first two parts of this Article demonstrates that United States’ copyright law and section 43(a) are grounded in objectives other than the personality and non-monetary interests with which the right of attribution is concerned. Consequently, the adoption of an express right of attribution is the only approach capable of fully protecting the authorial interests that currently are insufficiently addressed under our legal system. Part III argues that the federal enactment of an explicit right of attribution applicable to all copyrightable works can be accomplished with a relatively minimal degree of controversy and disruption to our current legal fabric.

I. THE RIGHT OF ATTRIBUTION AND COPYRIGHT LAW

Moral rights are designed to protect the dignity, self-worth, and autonomy of authors.¹⁸ In many countries, moral rights are viewed as a subset of copyright law, the body of law with specific responsibility for safeguarding authors’ interests.¹⁹ It is generally assumed that moral rights attach only to works that are copyrightable, although this assumption never has been specifically questioned or explored in depth.²⁰ Thus, in

14. See *Final Report of Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, reprinted in 10 COLUM.-VLA J.L. & ARTS, 555 (1986); H.R. REP. NO. 100-609, at 38 (1988).

15. 15 U.S.C. § 1125(a) (2000).

16. See *infra* notes 110, 113 and accompanying text.

17. See *infra* note 115 and accompanying text.

18. “*Author-Stories*,” *supra* note 3, at 23.

19. See *American Marriage*, *supra* note 2, at 97-100 (appendix detailing moral rights protections as part of the copyright law in 35 countries).

20. Of course, the requirements for copyright protection do vary from one country to another. For example, whereas in the United States “fixation” is a statutory requirement for copyright protection,

those countries where the right of attribution applies, it attaches to copyrightable works of authorship.

In the United States, copyright law is concerned almost exclusively with protecting the pecuniary interests of copyright owners rather than the personal interests of author-creators.²¹ Therefore, where authors retain their copyright interests copyright law will afford them economic protection.²² The failure of American copyright law to incorporate moral rights protections precludes authors from relying on copyright's provisions to safeguard key personal interests such as the right of attribution. The following subpart illustrates the connection between the right of attribution and copyright law by recounting the stories of two copyright plaintiffs, both of whom were aggrieved by the defendants' failure to afford them a right of attribution. In one instance, the plaintiff's right of attribution was violated in conjunction with a work whose copyright status was of a questionable nature. In the second case, the plaintiff's independent contribution to a copyrighted work arguably was insufficiently recognized. Both of these situations illustrate how the right of attribution interfaces with copyright law, despite copyright's lack of explicit protection for this right.

A. *Modern Plays and Ancient Scrolls*

The lawsuits initiated by Lynn Thomson, a dramaturg²³ from New York, and Elisha Qimron, an Israeli law professor specializing in Hebrew language, have much in common. Though they involve completely different subject matter, and were litigated in different countries, at bottom both Thomson and Qimron were seeking recognition for their significant contributions to important works.

many countries protect both fixed and unfixed works under their copyright laws without differentiation. See Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 163 (2001).

21. See "*Author-Stories*", *supra* note 3 at 16–22 (providing a detailed treatment of copyright law's submergence of the author's voice, resulting in a legal framework that is insufficiently sensitive to authorial perspectives about the creative process).

22. Although any of the rights protected by copyright law can be assigned in whole, or in part, see 17 U.S.C. § 201(d) (2000), the copyright statute also contemplates that an author who parts with legal title but remains a "beneficial owner" can sue for copyright infringement. See *id.* § 501(b). For a fuller discussion of this issue, see *American Marriage*, *supra* note 2, at 48.

23. According to Thomson, a "dramaturg is a theater artist who brings an expertise in collaborative process, research skills, and critical thinking to the making of theater." See "*Author-Stories*," *supra* note 3 at 45 n.200.

Lynn Thomson, a dramaturg and stage director, was hired by the New York Theater Workshop to assist playwright Jonathan Larson to clarify and transform the story line of what became the award-winning play *Rent*.²⁴ Her complaint alleged that “she developed the plot and theme, contributed extensively to the story, created many character elements, wrote a significant portion of the dialogue and song lyrics, and made other copyrightable contributions to the Work.”²⁵ Larson died suddenly, hours after the final dress rehearsal. Thomson then attempted, unsuccessfully, to negotiate with Larson’s heirs for a percentage of the play’s royalties.²⁶ Ultimately, Thomson sued Larson’s heirs, claiming co-authorship status; in Thomson’s own words, she sought “credit and compensation.”²⁷ Thomson did not prevail.

The right of attribution and copyright’s joint authorship law are linked at a fundamental level. Specifically, a successful suit for joint authorship enables a plaintiff to obtain not only compensation, but also personal recognition from her creative community, including the right to be publicly acknowledged as an author of the work created.²⁸ The district court held that Thomson was not a joint author, and the Second Circuit affirmed this holding on the ground that Larson lacked co-authorship intent.²⁹

Critical to the Second Circuit’s ultimate determination was its application of a test for joint authorship that requires all putative co-authors to establish both independent copyrightability of each contribution and intent by all putative authors, at the time of the collaboration, that they be co-authors.³⁰ This test for joint authorship, emphasizing “intention to be co-authors,” represents a departure from the statutory definition of a joint work which incorporates a test focusing on whether the parties intended to merge their contributions into “inseparable or interdependent parts of a unitary whole.”³¹

24. *Thomson v. Larson*, 147 F.3d 195, 198 n.10 (2d Cir. 1998).

25. *Id.* at 198 n.10.

26. See “*Author-Stories*,” *supra* note 3, at 45 n.200.

27. See *id.*

28. See *id.*

29. *Thomson*, 147 F.3d at 202.

30. In the Second Circuit, this test for joint authorship initially was articulated in *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991).

31. 17 U.S.C. § 101 (2000) (definition of a “joint work”). Interestingly, the legislative history posits yet another interpretative test for joint authorship which focuses on collaboration or intention to merge. H.R. REP. NO. 94-1475, at 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736; S. REP. NO. 94-473, at 103-04 (1975).

Similarly, Professor Elisha Qimron's right of attribution was deemed violated by the Israeli Supreme Court.³² Qimron's case involved the defendants' publication in the United States of the deciphered reconstructed text of a particular Dead Sea Scroll,³³ with the credit for the reconstruction and decipherment being attributed to Harvard professor John Strugnell, working "with a colleague."³⁴ The unnamed colleague was Professor Qimron, who at the time was a junior untenured academic.³⁵

Originally, access to and study of the scrolls found in the Qumran Caves were under the authority of the Jordanian government, pursuant to its jurisdiction over Qumran at the time the scrolls were discovered.³⁶ Following the Six Day War, the scrolls were transferred from the Rockefeller Museum in Jerusalem to the State of Israel, and the Antiquities Authority continued Jordan's policy of exclusivity regarding the number and identity of researchers allowed access to the scrolls.³⁷ Initially, Professor Strugnell attempted to compile the thousands of discovered fragments into one scroll. Although Strugnell was able to identify about a hundred fragments of the scroll and match them into between sixty and seventy fragments, the enormity of the task required an individual with linguistic and Halakhic³⁸ knowledge which Strugnell lacked.³⁹

32. See Unofficial Translation of The Dead Sea Scrolls Case, at 3, August 30, 2000 (Michael Bimhach trans., 2000) [hereinafter Unofficial Translation] (on file with author).

33. The first Dead Sea Scroll was discovered in 1947 by accident. See David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 50 (2001). The scroll in question in this lawsuit was discovered in the 1950's in Cave #4 of Qumran in the Judean Desert. See Unofficial Translation, *supra* note 32, at 3. Six copies of the scroll were contained in Cave #4, although none of them were complete. Professor Qimron named this document "Miqsat Ma'ase ha-Torah" (in English, "Rulings Pertaining to the Torah") (referred to in the court's opinion as MMT). See *id.* at 4; Nimmer, *supra*, at 55). In MMT, the Teacher of Righteousness addresses Jonathan Maccabe, the High Priest. See David L. Cohen, *Copyrighting the Dead Sea Scrolls: Qimron v. Shanks*, 52 ME. L. REV. 379, 384 (2000).

34. See Nimmer, *supra* note 33, at 66.

35. See *id.*

36. Jordan authorized a limited international team of researchers to study the scrolls. For a thorough and insightful commentary of the Dead Sea Scrolls saga, see JOSEPH L. SAX, PLAYING DARTS WITH REMBRANDT—PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 153–64 (Univ. Michigan Press 1999).

37. Unofficial Translation, *supra* note 32, at 10.

38. Halakhah, or Jewish law, denotes the entire subject matter of the Jewish legal system. See Michael J. Brody & Steven Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L. REV. 1685, 1687–88 n.1 (1997).

39. Unofficial Translation, *supra* note 32, at 4.

In 1981, Professor Qimron joined Strugnell, and Qimron subsequently worked for eleven years deciphering the scroll.⁴⁰ From the sixty to seventy fragments Qimron received from Strugnell, Qimron compiled a text of 121 lines, referred to in the court's opinion as "the deciphered text."⁴¹ In 1990, Qimron and Strugnell reached an agreement with the English Oxford Press regarding publication of the deciphered text, along with photographs of the scroll's fragments and interpretation.⁴²

Defendant Hershel Shanks is an attorney and editor of an archaeological review published by the Biblical Archaeological Society (BAS).⁴³ In 1991, prior to the publication of the deciphered text by the English Oxford Press, Shanks and BAS published in the United States the book *Facsimile Edition of the Dead Sea Scrolls*. This book contained the 120-line deciphered reconstructed text of the scroll and a set of nearly 1,800 photos of unpublished scroll fragments.⁴⁴ In his book, Shanks explained his decision to reproduce the 120-line reconstruction, and credited the reconstruction to Strugnell and "a colleague."⁴⁵

Professor Qimron promptly filed a lawsuit in an Israeli court, charging Shanks and BAS with copyright infringement based on the publication of the deciphered text. Qimron also alleged a violation of his moral right of attribution based on Strugnell's failure to mention his name in the BAS publication. The trial court found in favor of Qimron, awarding him 100,000 shekels (about \$25,000), reportedly the largest amount ever awarded in a case of this kind in Israel.⁴⁶ The Israeli Supreme Court subsequently upheld the decision.

The case was decided under Israeli law, even though the infringement occurred in the United States.⁴⁷ Qimron's complaint raises two

40. See *id.* Professor Qimron is a Professor of Hebrew Language at Ben-Gurion University in Be'er Sheeva, where he engages in philological research and specializes in studying the scrolls found in the Qumran Caves.

41. *Id.*

42. *Id.*

43. The review published by Shanks is the BIBLICAL ARCHAEOLOGY REVIEW, which has a circulation of over half a million readers.

44. Nimmer, *supra* note 33, at 66. Many observers believe that Shanks' publication of this work broke the monopoly held by the scholars assigned to publish the scrolls in the 1950's. During the trial in the Israeli district court, Shanks testified that "he has been a voice to all those who remained outside the 'research cartel.'" See Unofficial Translation, *supra* note 32, at 11.

45. Nimmer, *supra* note 33, at 66.

46. *Id.* at 70-71. For a discussion of the Israeli district court opinion, see Cohen, *supra* note 33.

47. The Israeli district court justified its decision to apply Israeli law based on the presumption that the law in the United States is the same as that in Israel. Unofficial Translation, *supra* note 32, at 7; see also Cohen, *supra* note 33, at 388 (explaining the "presumption of equal laws" doctrine). On

fascinating intellectual property issues: first, whether Qimron has a copyright in the deciphered text; and second, whether the defendants violated Qimron's right of attribution by publishing the text without mentioning his name.⁴⁸

In addressing the copyright infringement issue, the Israeli district court concluded that the phases of Qimron's work must be viewed in the aggregate, rather than in isolation:

This process, at the end of which the collection of fragments became a complete text, that bears content and meaning, included several phases of creation: matching the fragments based on their physical compatibility, arranging the matching "islands" of fragments and placing them in the putative place in the scroll, deciphering the written text on the fragments, to the extent that such deciphering is required and filling the gaps between the fragments. In the creation of any of these phases there has been a different level of originality and creativity, but nevertheless, there is no place for examining each phase on its own. In this case, the various phases of the work are tied together, interdependent, and have mutual influence upon each other.⁴⁹

Upon an examination of the work as a whole, the court concluded that it revealed originality and creativity, so that "the additional soul" Qimron poured into the fragments converted them into a living text capable of copyright protection.⁵⁰ Thus, because the defendants engaged in an unauthorized publication of the scroll, they committed copyright infringement under Israeli law.⁵¹

The attribution of authorship issue in *Qimron v. Shanks* reinforces the link between the moral right of attribution and copyright law. In those countries where moral rights exist, such as in Israel, they attach to

appeal, the Supreme Court held that Israeli law applies because three copies of the defendant's work were shipped to Israel by the publisher defendants. See Cohen, *supra* note 33, at 398 ("[T]he fact that a shipment of three books to Israel was sufficient to trigger Israel's long-arm jurisdiction should, in this increasingly globalized world, raise alarm bells in corporate counsel's offices the world over.").

48. For a discussion of how the copyright infringement issue presented in Qimron might have been addressed under United States law, see *infra* note 254.

49. Unofficial Translation, *supra* note 32, at 17–18.

50. *Id.* at 18.

51. *Id.* at 32, at 21–22. This case was "the first case in the world to recognize the copyrightability . . . of a scholarly reconstruction of an ancient text." Cohen, *supra* note 33, at 381.

copyrightable works.⁵² Relying on section 4A of the Israeli Copyright Ordinance, which provides that “[a]n author is entitled that his name be attributed to his work in a reasonable scope and extent,”⁵³ the Israeli Supreme Court observed that “a person is entitled that his name be attributed to the ‘children of his spirit.’”⁵⁴ The court concluded that Shanks’ deliberate omission of Qimron’s name was “contemptuous and mockery.”⁵⁵ Moreover, Shanks’ failure to mention Qimron’s name under the circumstances of the case was, according to the court, “even more insulting than no mentioning at all.” As such, the “with a colleague” designation was insufficient to fulfill the attribution right imposed by Israeli law, as well as the “human-moral duty.”⁵⁶

The significance of the attribution violation to Professor Qimron is evidenced by his admission following the Israeli Supreme Court’s ruling that had Shanks listed his name in the defendants’ publication, Qimron probably would not have initiated the lawsuit.⁵⁷ Qimron’s observation in this regard underscores the reality that for many creators, some qualities, such as professional reputation and artistic dignity, are more important than money.⁵⁸

As discussed earlier, the only explicit federal moral rights protections in the United States derive from VARA’s prohibition of unauthorized modifications and misattributions regarding certain forms of visual art.⁵⁹ Clearly, Professor Qimron’s attribution right would not have been protected under United States’ copyright law because the scroll does not

52. See *supra* note 20 and accompanying text.

53. Israel adopted moral rights in 1981. See Cohen, *supra* note 33, at 386.

54. Unofficial Translation, *supra* note 32, at 29. The Israeli Supreme Court further noted that an author’s spiritual relationship to his works “is akin, almost, to his relationship to his offspring.” *Id.* at 29. For a further discussion of this theme see “*Author-Stories*,” *supra* note 3, at 61–62.

55. Unofficial Translation, *supra* note 32, at 29.

56. *Id.* at 30.

57. Nimmer, *supra* note 33, at 146 n.714. Although not the focus of the court’s opinion, the case also involved the moral right of disclosure. The court concluded that the defendants’ publication of “the deciphered text in its entirety, without mentioning Qimron’s name, . . . infringed his right to be the first to publish the deciphered text.” Unofficial Translation, *supra* note 32, at 25. In fact, the Israeli district court grounded its holding of mental distress based on the pain suffered by Qimron as a result of his being deprived of the opportunity to be the first editor of the scroll, with the benefit of having his ideas shape the future scholarly debate. See Nimmer, *supra* note 33, at 145; Cohen, *supra* note 33, at 395.

58. See “*Author-Stories*,” *supra* note 3, at 22–25.

59. See *supra* notes 10–12 and accompanying text. *But see supra* note 13 and accompanying text (discussing the “copyright management information” provisions of the DMCA); *infra* notes 73–75 and accompanying text.

constitute a work of visual art as defined in VARA.⁶⁰ Therefore, even if a United States court would have been inclined to rule in favor of Professor Qimron on the copyright infringement claim,⁶¹ his right of attribution would not necessarily have been protected. As discussed more fully below, apart from VARA, the United States copyright law does not expressly incorporate protection for a right of attribution. Therefore, any protection for the right of attribution deriving from copyright law's application is merely fortuitous.

B. *Copyright's Failure To Protect Attribution Interests*

The objective of the right of attribution is to insure that the creator of a work receives recognition as the author.⁶² Based on this justification for the right of attribution, it would seem as though the right of attribution shares with copyright law a theoretical basis that incorporates concern for the provision of incentives to authors. Although the United States Supreme Court has stated on numerous occasions that the primary purpose of the copyright monopoly is to promote the arts and sciences, financial rewards to creators clearly is a secondary concern.⁶³ By

60. *See, e.g.*, 17 U.S.C §§ 101, 106(A) (2000).

61. The inquiry here would center on whether Qimron's reconstruction of the Dead Sea Scroll fragments constitutes a sufficiently original work to merit copyright protection. In the actual case, the defendants argued that Qimron's acts of supplementing the text is simply a reconstruction of an existing work, and therefore cannot be protected by copyright law. They also argued that protecting Qimron's reconstruction harms scholarly research, and that according Qimron a copyright amounts to granting him a property right in part of the cultural heritage of the Jewish people. Unofficial Translation, *supra* note 32, at 19. Yet, as discussed in the text, the Israeli courts saw it differently.

The Israeli courts' opinions have been severely criticized by the American legal academy. *See, e.g.*, Nimmer, *supra* note 33, at 1–212; Cohen, *supra* note 33, at 381 (discussing district court opinion). *See also* Martha Woodmansee, *Response to David Nimmer*, 38 HOUS. L. REV. 231, 233 (2001) (criticizing the result from the standpoint of literary theory); Niva Elkin-Koren, *Of Scientific Claims and Proprietary Rights: Lessons from the Dead Sea Scrolls Case*, 38 HOUS. L. REV. 445 (2001) (criticizing the result on the ground that Qimron's work was scientific and therefore incapable of copyright protection). Commentators have pointed out that if all Professor Qimron did in reconstructing the text was to decipher and track with precision a preexisting document, he should not enjoy copyright protection for his final product, because that work would not constitute an original work of authorship. The only originality would be in mistakes. *See, e.g.*, Nimmer, *supra* note 33, at 113, 211. *But see* Michael Birnhack, *The Dead Sea Scrolls Case: Who is an Author*, 2001 E.I.P.R. 23(3), 128–133, at 132 (suggesting an alternative interpretation of the case that represents a shift in the originality requirement from an economic perspective to one based on Lockean theory). *See also infra* note 259.

62. Alternatively, the right of attribution can be construed as a basis for safeguarding the creator's anonymity as an author. *See infra* note 254 and accompanying text.

63. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991). *See also* H.R. REP. NO. 60-2222, at 7 (1909).

affording authors a right to reap the reputational benefits of their works, the right of attribution also is grounded in an incentive-based rationale.⁶⁴

Notwithstanding this similarity, copyright law and the right of attribution are aimed at completely different conduct. Copyright law, as applied in the United States, is designed to provide an economic remedy when a work is copied, or otherwise used, in an unlawful capacity.⁶⁵ The crux of a copyright violation is unlawful copying, not false representations concerning the work's authorship.⁶⁶ If someone copies a copyrighted work without the copyright owner's permission, liability will result even if that person reveals the true author of the work.⁶⁷

In contrast, the right of attribution is concerned with the dignity and personality interests of the author, and the ability of the author to command her reputational due.⁶⁸ However, in many lawsuits the defendant's conduct involves both a failure to attribute authorship as well as a violation of copyright law's prohibition on unauthorized copying.⁶⁹ In these circumstances, attribution violations can become enmeshed with copyright infringement claims. Even so, a plaintiff's ability to recover on an attribution violation does not turn on whether recovery is warranted for copyright infringement.

A review of the 1976 Copyright Act illustrates that violating an author's attribution right does not give rise to liability for copyright infringement. Section 106 of the statute details the rights provided a copyright owner, which include the rights to reproduce, distribute, publicly perform and display, and make a derivative work of the protected work.⁷⁰ The statute does not include an author's ability to

64. See Randolph Stuart Sergeant, *Building Reputational Capital: The Right of Attribution Under Section 43 of the Lanham Act*, 19 COLUM.-VLA J. L. & ARTS 45, 75 (1994-95).

65. See John Cross, *Giving Credit Where Credit is Due: Revisiting the Doctrine of Reverse Passing Off in Trademark Law*, 72 WASH. L. REV. 709, 734 (1997).

66. *Id.* at 734 n.102 (noting the copyright act considers "only whether defendant reproduced the protected work . . . , not whether defendant acknowledged plaintiff as the author"). See also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1280 (11th Cir. 2001) ("[I]t is not copyright's job to 'protect the reputation' of a work or guard it from 'taint' in any sense except an economic one."); *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 781 (2d Cir. 1994) (noting that copyright allows an owner to "control who publishes, sells or otherwise uses a work," whereas the Lanham Act ensures an author "that his or her name is associated with a work when the work is used").

67. Cross, *supra* note 65, at 734.

68. See Kwall, "Author Stories", *supra* note 3.

69. *Id.*

70. 17 U.S.C. § 106(1)-(5) (2000). A derivative work is defined as "a work based upon one or more preexisting work . . . in which a work may be recast, transformed, or adapted." *Id.* § 101

compel recognition for her work among the rights specifically enumerated.⁷¹ Further, if a right of attribution was commonly understood to be included among the specified rights of a copyright owner, Congress would not have deemed it necessary to enact the provision of VARA that explicitly provides a right of attribution for certain types of works of visual art.⁷² Moreover, even though section 1202 of the DMCA has been interpreted as affording a right of attribution in the context of digital works,⁷³ some support exists for the position that the DMCA's provisions codify violations distinct from copyright infringement.

In *Universal City Studios, Inc. v. Reimerdes*,⁷⁴ a district court for the Southern District of New York interpreted section 1201(a)(2) of the DMCA, which prohibits trafficking in access circumvention devices.⁷⁵ The court rejected the fair use defense on the ground that the defendants were not being sued for copyright infringement, but rather access circumvention.⁷⁶ By observing that “[i]f Congress had meant the fair use defense to apply to such actions, it would have said so,”⁷⁷ the court suggested that access circumvention is a separate violation from copyright infringement. By analogy, it can be argued that the copyright management information restrictions contained in section 1202 similarly embody a theory distinct from copyright infringement. More significantly, these restrictions are of limited scope given their exclusive applicability to the digital context.

Thus, on its face the 1976 Act fails to incorporate a right of attribution independent of specific statutory amendments such as VARA and the DMCA. Of course, an author may be able to obtain protection for the

(definition of a “derivative work”). In addition, § 106 provides for public performance of a sound recording by means of a digital audio transmission. *See id.* § 106(6).

71. *See American Marriage, supra* note 2, at 88. In discussing the issue of whether state protections for moral rights would be preempted by the 1976 Act, this pre-VARA article notes that except for the “work for hire” doctrine, nothing in the 1976 Act specifically bears upon a creator’s right of attribution. Therefore, state created rights of attribution would not violate directly the 1976 Act. *See also infra* text following note 220.

72. 17 U.S.C. § 106A(a)(1) (2000). *See supra* notes 10–12 and accompanying text; Cross, *supra* note 65, at 749.

73. *See supra* note 13 and accompanying text.

74. 82 F. Supp. 2d 211 (S.D.N.Y. 2000), *aff’d*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

75. *Id.*

76. *Id.* at 218–19; *see also Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12A.03[D][1] at 12A-33.

77. *Corley*, 82 F. Supp. 2d at 219.

attribution interest pursuant to judicially imposed discretionary injunctive relief. However, in such instances the attribution interest is protected only as a result of the scope of discretion afforded courts in fashioning injunctions under section 502 of the 1976 Act.⁷⁸

Moreover, courts have interpreted the 1976 Act to foreclose its application to remedy attribution violations in the absence of copyright infringement. In *Wolfe v. United Artists Corp.*,⁷⁹ the plaintiff song writer alleged that defendants violated his copyright by omitting his name as the author of the composition and designating another as the copyright owner in the defendants' book in which the composition appeared. The court noted that the case law treats authorship attribution issues as contractual claims because it is not infringement to remove a credit to authorship in publishing a work pursuant to an otherwise valid licensing agreement.⁸⁰ The court thus dismissed the plaintiff's copyright claims since they did not arise under the 1976 Act for purposes of conferring federal subject matter jurisdiction.⁸¹ The implicit rationale of this decision is that the 1976 Act fails to incorporate the moral right of attribution.⁸²

The copyright statute's failure to incorporate explicitly a right of attribution, and the judiciary's failure to protect this right unless its violation coincides with a finding of copyright infringement, results in at least four possible situations in which authors are left without sufficient protections for their attribution interests. As the *Wolfe* case demonstrates, one type of dispute arises when the plaintiff assigns to the defendant one or more of the copyrights and the defendant, in the process of exercising these rights, fails to attribute authorship to the plaintiff. This was also the situation in *Batiste v. Island Records, Inc.*⁸³

The basis for the lawsuit in *Batiste* was that a song written, performed, and recorded by the plaintiffs, the Batiste brothers, was digitally sampled by defendant Cordes, a performer, and included in one of Cordes' musical compositions released by the defendant record companies.⁸⁴ Before the release of Cordes' composition, the defendant record

78. *American Marriage*, *supra* note 2, at 88.

79. 583 F. Supp. 52 (E.D. Pa. 1983).

80. *Id.* at 56 (citing *Richard Wolf v. United Artists Music Co.*, No. 80-6957, slip op. at 8-10 (2d Cir. July 21, 1983)). See also *infra* notes 83-89 and accompanying text.

81. *Wolfe*, 583 F. Supp. at 57.

82. *American Marriage*, *supra* note 2, at 37-38.

83. 179 F.3d 217 (5th Cir. 1999).

84. *Id.* at 219.

company secured the permission to use plaintiffs' song from Bolden, a local music publisher and record producer to whom one of the plaintiffs had assigned the copyright in plaintiffs' song. The defendant record company also paid Bolden a \$15,000 advance against the record royalties.⁸⁵ The liner notes accompanying the defendant's album credited only one of the plaintiff brothers as a co-writer of defendant's song, and stated that the song sampled by the defendant was performed by the plaintiffs' band and used under a license by Bolden.⁸⁶

The *Batiste* court affirmed the lower court's determination that the plaintiffs could assert their copyright infringement claim as beneficial owners of Bolden's registered copyright despite the copyright assignment.⁸⁷ Ultimately, however, the court ruled that in light of the contracts between one of the *Batiste* brothers and Bolden, all of the copyrights were assigned, and that such grants were sufficient to include the licensing of a record containing a digital sample of the plaintiffs' song.⁸⁸ Thus, the copyright law was not a sufficient substitution for the right of attribution in this situation because of the existence of a valid copyright assignment.⁸⁹

A second scenario can arise if a particular work is deemed a work made for hire, resulting in a finding of copyright ownership in someone other than the actual author of the work. Section 201(b) of the 1976 Act provides that in the case of a work made for hire, the employer is considered the author and copyright owner unless the parties expressly agree otherwise in writing.⁹⁰ When this doctrine is applicable, employers and their licensees are not required to attribute authorship of the work for hire to the actual creator of the work.⁹¹ As one court has observed, "because the employer is considered the author of the work, once

85. *Id.* at 220.

86. *Id.*

87. *Id.* at 221 n.2. See also 17 U.S.C. § 501(b) (2000); *American Marriage*, *supra* note 2, at 47–49 (favoring a broad interpretation of "beneficial owner" so that all creators who have transferred their copyrights qualify and therefore have standing to bring infringement actions).

88. *Batiste*, 179 F.3d at 223.

89. See *Natkin v. Winfrey*, 111 F. Supp. 2d 1003, 1012 (N.D. Ill. 2000) (denying defendant's motion for summary judgment on the copyright infringement claim on the ground that a trial is necessary regarding whether the defendant's implied license authorized their publication of the photographs in question); see also *Preta v. Collectibles*, 62 U.S.P.Q.2d 1360 (S.D.N.Y. 2002) (granting defendant's motion for summary judgment claims dismissing musical composer plaintiff's copyright claims in a case involving copyright assignment and subsequent failure to attribute authorship).

90. 17 U.S.C. § 201(b).

91. For a fuller treatment of this issue see *American Marriage*, *supra* note 2, at 57.

authorship rights are relinquished through a work for hire contract provision, the right to attribution is also relinquished unless that right is reserved explicitly in the contract.⁹²

The 1976 Act provides for two alternate categories of works made for hire: works prepared by an employee within the scope of his employment, and works that are commissioned by a written agreement for particular stipulated uses.⁹³ Moreover, VARA expressly excludes works made for hire from its limited coverage.⁹⁴ It is unclear to what extent the work for hire doctrine negatively impacts the exercise of the attribution right. In terms of those works qualifying as works made for hire under the second subpart of the statutory definition, courts have construed the stipulated categories very narrowly,⁹⁵ thus arguably limiting the doctrine's application only to those works specifically enumerated in the statutory definition.⁹⁶ On the other hand, at least one case interpreting "employee" for purposes of applying the first subpart of the statutory definition in the context of VARA shows that courts potentially have an enormous degree of discretion and ability to mold the legal reasoning of the work for hire doctrine.⁹⁷

I have argued elsewhere that VARA mistakenly incorporates the work for hire exclusion on the ground that no compelling reason exists for

92. *Cleary v. News Corp.*, 30 F.3d 1255, 1259–60 (9th Cir. 1994) (holding that when author had agreed to a work for hire arrangement, publisher became author of all materials and was not contractually obligated to provide author with title credit for his work).

93. The statutory definition of a work for hire, contained in 17 U.S.C. § 101 (2000), provides that a "work made for hire" is—

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire

94. The protections afforded by VARA only apply to authors of works of "visual art." That term is defined in § 101 as excluding "any work made for hire."

95. *Cleary*, 30 F.3d at 1259.

96. *Id.* at 1260.

97. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996). In this case, the Second Circuit reversed the district court and held that the VARA work in question was a work for hire, effectively precluding the application of VARA to the plaintiffs' lawsuit. In so holding, the Second Circuit rejected the district court's conclusion that the plaintiffs' ownership of the copyright of the sculpture at issue was a "plus factor," thus refusing to decide "whether copyright ownership is probative of independent contractor status." *Id.* at 87. For a complete critique of this decision, see Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 5–12 (1997) [hereinafter *VARA*].

automatically preventing an employee/author from exercising a right of attribution.⁹⁸ Moreover, VARA's exclusion from coverage of works made for hire is significant in light of the large number of major art works that are, in fact, works made for hire.⁹⁹ Beyond the application of VARA, any author of a work made for hire will be particularly vulnerable to the copyright statute's failure to safeguard the right of attribution.¹⁰⁰

The case involving Lynn Thomson furnishes a third example of how copyright law does not sufficiently protect an author's attribution interest. As discussed, the Second Circuit applied an interpretation of the joint authorship doctrine that requires all putative co-authors to establish intent, at the time of the collaboration, to be co-authors.¹⁰¹ Moreover, the "intent to be joint authors" standard adopted by the Second Circuit is also the law in other influential jurisdictions including the Seventh and Ninth Circuits.¹⁰² This standard makes those who furnish important contributions to works especially vulnerable to being deprived of their attribution interests. By requiring all parties to demonstrate the intent to be co-authors, this standard will favor the story of the dominant contributor disputing joint authorship.¹⁰³

Thomson's story illustrates that given the current application by the judiciary of copyright's joint authorship provision, non-dominant authors have little chance of receiving attribution with concomitant

98. See *VARA*, *supra* note 97, at 10–12 ("It is not self-evident that the best means of resolving a VARA dispute is by invoking a legal framework designed to deal with the ownership question in the completely different context of moral rights."). But see Sheldon Halpern, *Of Moral Right and Moral Righteousness*, 1 MARQ. INTELL. PROP. L. REV. 65, 87 (1997) (questioning whether the moral right question presents a completely different context from the issue of copyright ownership).

99. *VARA*, *supra* note 97, at 11 (noting that the Copyright Office has recognized the quantitative importance of the work for hire doctrine in the context of major art works).

100. See Marina Santilli, *United States' Moral Rights Developments in European Perspective*, 1 MARQ. INTELL. PROP. L. REV. 89, 99 (1997) ("The work made for hire doctrine identifies one of the several areas in which the difference of approach between those jurisdictions that make the right of attribution waivable (like the United States and England) and those which do not (like typical civil law jurisdictions) stands out conspicuously.").

101. See *supra* notes 30–31 and accompanying text.

102. See generally *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994); *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

103. See "*Author-Stories*", *supra* note 3, at 55. See also Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 262 (2001) (criticizing the "intent to be joint authors" test on the ground that it "places one collaborator at the mercy of another's subjective intent, even if that intent is never communicated").

compensation, for their contributions to collective works.¹⁰⁴ Further, the absence of an express right of attribution for most types of copyrightable works diminishes the already minimal bargaining power of non-dominant authors.¹⁰⁵

Finally, situations can occur where a court finds that a particular defendant has infringed the plaintiff's copyright and violated the plaintiff's attribution interest but nevertheless refuses to enjoin the defendant's conduct. For example, in *Abend v. MCA, Inc.*,¹⁰⁶ the Ninth Circuit held that the defendants' exploitation of a derivative work film violated the plaintiff's renewal copyright in the story, but the court refused to enjoin the continued exploitation of the defendants' film in light of the equities involved.¹⁰⁷ Although *Abend* did not involve an attribution deprivation, the case is illustrative of situations where, based on public policy grounds, the alleged infringing activity is allowed to take place subject to the payment of damages. Even if the defendant is required to pay damages for its copyright infringement, a payment to the plaintiff does not necessarily safeguard the authorial interests underlying the attribution right. In other words, where courts invoke a remedy that allows the objectionable conduct subject to the payment of damages, copyright plaintiffs whose attribution interests are violated can be compensated for copyright infringement but are otherwise vulnerable to being denied attribution.

104. A joint authorship issue also existed in *Qimron v. Shanks*. The Israeli Supreme Court apparently believed that Professor Qimron was an author entitled to attribution. See *supra* notes 33–56 and accompanying text. Had this case arisen in the United States, however, it is fair to ask whether Qimron would have been entitled to claim the status of a joint author in light of that doctrine's application in this country.

105. "Author-Stories", *supra* note 3, at 44 ("Unable to negotiate reasonable terms and left with no legal recourse, such authors find themselves in a very disappointing and degrading position."). Significantly, Lynn Thomson failed to require Jonathan Larson to enter into a contract because she did not know he was going to die, and she "trusted his decency." *Id.* at 54 (quoting Lynn Thomson).

106. 863 F.2d 1465 (9th Cir. 1988), *aff'd*, 495 U.S. 207 (1990).

107. Of particular concern to the court were the defendants' contributions in making the derivative work a success. Furthermore, the court was concerned that an injunction would prevent the legitimate use of the "new matter" that the defendants had contributed to the work, and would prevent the public from enjoying a classic film for many years. Because of these concerns as well as the plaintiff's failure to show irreparable injury, the court decided not to grant an injunction as was requested by Abend, noting that section 502(a) makes injunctive relief permissive rather than mandatory upon a finding of infringement. See *Abend*, 863 F.2d at 1479. The U.S. Supreme Court ultimately affirmed the merits of the Ninth Circuit's decision regarding the issue of infringement, but the Court explicitly noted that certiorari was not granted on the issue of relief and it did not discuss the lower court's decision in that regard. See *Stewart v. Abend*, 495 U.S. 207, 216 (1990).

As an alternative to copyright law, plaintiffs have attempted to invoke section 43(a) of the Lanham Act to safeguard their attribution rights. The predicate of a section 43(a) action is that the defendant has misled the public, thereby causing consumer confusion. As will be discussed more fully below, courts differ significantly in their approaches to section 43(a) cases involving false attributions of authorship. This judicial inconsistency, as well as the very limitations inherent in the scope of section 43(a), demonstrate the relative unsuitability of this provision as a substitute for a statute recognizing an explicit right of attribution.

II. THE RIGHT OF ATTRIBUTION AND SECTION 43(A) OF THE LANHAM ACT

Section 43(a) of the Lanham Act provides a federal remedy for the use of either a "false designation of origin" or a false description or representation in connection with any goods or services.¹⁰⁸ Section 43(a) was enacted to codify the common law trademark doctrine of "passing off," the representation of the defendant's goods as those of the plaintiff.¹⁰⁹ However, the common law did not prohibit "reverse passing off," the representation of the plaintiff's goods as those of the defendant.¹¹⁰

Express reverse passing off occurs when the defendant removes the name or trademark on another party's product and sells that product under a name chosen by the defendant.¹¹¹ Reverse passing off also can be implicit in operation, such as when a defendant removes the name of the plaintiff and sells the product in an unbranded state.¹¹² The case law involving reverse passing off shows that considerable conflict exists as to what test should be used for proving a false designation of origin, and whether consumer confusion is a distinct element of reverse passing off.

108. 15 U.S.C. § 1125(a) (2000). I have discussed elsewhere the use of section 43(a) to redress moral rights violations generally, without specific focus on reverse passing off. *See, e.g., "Author-Stories"*, *supra* note 3, at 30–32; *Moral Rights for University Employees*, *supra* note 13.

109. Historically, passing off was essential for proving common law unfair competition. *See generally* *Am. Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281 (6th Cir. 1900). Early interpretations of section 43(a) simply continued this theme. *See generally* *L'Aiglon Apparel v. Lana Lobell, Inc.*, 214 F.2d 649 (3d Cir. 1954) (allowing plaintiff's recovery under section 43(a) where the defendant used a picture of the plaintiff's dress to market its dress of allegedly poorer quality).

110. Lori H. Freedman, *Reverse Passing Off: A Great Deal of Confusion*, 83 TRADEMARK REP. 305, 307 (1993).

111. *Smith v. Montoro*, 648 F.2d 602, 604 (9th Cir. 1981).

112. *Id.* at 605.

In 1976, a federal district court in Pennsylvania became the first to hold that section 43(a) should be applied to reverse passing off in addition to passing off, supporting its reasoning with the argument that a misbranded product always constitutes a false designation of origin.¹¹³ Subsequently, the Ninth Circuit applied section 43(a) to a case involving a mislabeled motion picture,¹¹⁴ rather than the sale of a traditional product or good, and thus paved the way for the application of section 43(a) to reverse passing off cases involving intellectual property. When the product at issue in a particular reverse passing off case constitutes copyrightable subject matter such as art, literature, or music, the inquiry is especially complicated because courts must balance the policies of section 43(a) against those of copyright infringement.¹¹⁵

The discussion below illustrates that the following two factual scenarios can implicate both reverse passing off and copyright infringement: first, when the defendant duplicates completely the plaintiff's material; and second, when the defendant does not replicate the plaintiff's work in its entirety but instead creates a work similar to the plaintiff's.¹¹⁶ Courts are conflicted about the extent to which these scenarios give rise to a claim for violating section 43(a) of the Lanham Act.¹¹⁷

The following sections examine more fully the application of reverse passing off as the doctrine pertains to copyrightable works. The first section analyzes cases in which reverse passing off claims are limited to cases involving bodily appropriation of the plaintiff's material by the defendant. The second section explores cases invoking a less rigorous standard that expressly sanctions reverse passing off when a copied work is "substantially similar" to its source. The third section discusses cases applying a standard similar to that invoked in cases addressing whether a state law should be preempted by section 301(a) of the 1976 Copyright Act. In these cases, the focus is on whether the section 43(a) claim

113. *John Wright Inc. v. Casper Corp.*, 419 F. Supp. 292 (E.D. Pa. 1976) (holding that defendant violated Lanham Act by using a confusingly similar certificate to that of the plaintiff's and by advertising that defendant's good was a copy of the good produced by the plaintiff).

114. *Montoro*, 648 F.2d at 602. See *infra* notes 118–123 and accompanying text.

115. Cf. *Carrol v. Paramount Pictures, Inc.*, 3 F.R.D. 95 (S.D.N.Y. 1942) (pre-Lanham Act case disclosing libel as the basis for plaintiff's suit, a well established producer, against a defendant for producing and exhibiting an inferior movie with authorship attributed to the plaintiff).

116. Freedman, *supra* note 110, at 315.

117. *Id.* See, e.g., notes 140–152 and accompanying text.

explicitly embodies an “extra element” that is qualitatively different from that of copyright law.

A. *The Bodily Appropriation Test*

The law in the Ninth Circuit reflects the most restrictive view regarding whether plaintiffs can rely on section 43(a) to litigate reverse passing off cases involving copyrightable material. In *Smith v. Montoro*,¹¹⁸ the plaintiff actor alleged that defendant film distributors, in the screen credits and film advertising, deleted his name and substituted that of another actor's. Although the plaintiff did not sue for copyright infringement, he did bring several other causes of action, including one predicated on section 43(a).¹¹⁹ Reversing the lower court's dismissal of the section 43(a) claim, the Ninth Circuit rejected the defendants' argument that the Lanham Act's protections are limited to “sales of goods.”¹²⁰ Interestingly, the court justified its ruling with a combination of rationales. The Ninth Circuit emphasized a property-based rationale by noting that express reverse passing off is “wrongful because it involves an attempt to misappropriate or profit from another's talents and workmanship.”¹²¹ The court invoked a related rationale, stressing the economic loss derived from the deprivation of a right to the advertising value of one's name and goodwill.¹²² Additionally, the court utilized a consumer-oriented rationale to the extent it focused on inadequate consumer knowledge, consumer deception, and disappointed expectations.¹²³ Tellingly absent from the Ninth Circuit's calculus was the invocation of a rationale that explicitly recognized the personality and dignity interests of authors.

Although *Smith* was forward-looking in terms of applying section 43(a) in a reverse passing off case concerning unconventional subject matter, *Smith* involved conduct on the part of the defendant that

118. 648 F.2d 602 (9th Cir. 1981).

119. The plaintiff also sued the defendants based on breach of contract, “false light publicity,” and violation of California's statute “regarding commercial appropriation of a person's likeness.” *Id.* at 603.

120. *Id.* at 605.

121. *Id.* at 607.

122. *Id.* (“Since actors' fees for pictures, and indeed, their ability to get any work at all, is often based on the drawing power their name may be expected to have at the box office, being accurately credited for films in which they have played would seem to be of critical importance in enabling actors to sell their ‘services.’”).

123. *Id.*

amounted to relabeling. In contrast, nearly ten years later, the Ninth Circuit in *Shaw v. Lindheim*¹²⁴ was faced with a case in which the defendant television script writer authored a pilot allegedly derived from the plaintiff's, with resulting substantial similarity. The court reversed the lower court's finding that no substantial similarity existed between the two works for purposes of applying copyright infringement law.¹²⁵ Consequently, this conclusion necessitated a determination whether a section 43(a) Lanham Act claim can be sustained when the defendant's work is derived from the plaintiff's, and the two works are deemed "substantially similar." Noting the Lanham Act's objective of preventing individuals from misleading the public "by placing their competitors' work forward as their own," the Ninth Circuit held that minimal likelihood of consumer confusion existed under the facts of the case. Therefore, copyright law served as an adequate remedy, according to the court.¹²⁶

Underlying the Ninth Circuit's reasoning appears to be the view that, in the context of reverse passing off, only those false designations of works that are "bodily appropriations" of the originals cause consumer confusion.¹²⁷ In contrast, as the following subsection demonstrates, the approach taken by the Second and other circuits allows greater latitude in applying section 43(a) to reverse passing off cases involving copyrightable property to the extent that these courts also apply section 43(a) when the works at issue are substantially similar. This subsection discloses, however, that this degree of latitude triggers a much more complicated analysis.

B. *The Substantial Similarity Test*

In *Waldman Publishing Corp. v. Landoll, Inc.*,¹²⁸ the Second Circuit announced its position that section 43(a) can be invoked in actions involving copyrightable property, even where the defendant's materials are "substantially similar" to the plaintiff's rather than "bodily appropriations." The plaintiff in *Waldman* originally did not sue for

124. 919 F.2d 1353 (9th Cir. 1990).

125. *Id.* at 1363-64. Specifically, the court reversed the entry of summary judgment for the defendant on the copyright claim on the ground that the plaintiff produced a triable issue of fact under the extrinsic component of the test for copyright infringement.

126. *Id.* at 1364-65.

127. *See Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 784 (2d Cir. 1994).

128. 43 F.3d 775 (2d Cir. 1994).

copyright infringement because at the time the plaintiff sought preliminary injunctive relief, it had not yet registered its copyright.¹²⁹ In addressing reverse passing off in the context of written works, the court observed that section 43(a) prohibits not only the sale of relabeled works with false information, but also “the *reproduction* of a work with a false representation as to its creator.”¹³⁰ Indeed, the Second Circuit explicitly noted that “[f]alse designation of origin, as applied to written work, deals with false designation of the creator of the work; the “origin” of the work is its author.”¹³¹

The Second Circuit explicitly rejected the Ninth Circuit’s position that only “bodily appropriations” of written works can constitute “false designations of origin,”¹³² because the Ninth Circuit based this view on the faulty assumption that only bodily appropriations are likely to give rise to consumer confusion. According to the *Waldman* court, the issue of whether the defendant’s conduct gives rise to a “false designation of origin” is separate from whether the defendant’s conduct will cause consumer confusion.¹³³ In discussing whether the defendant’s failure to credit the plaintiff constitutes a false designation of origin under section 43(a), the Second Circuit endorsed the district court’s application of the “substantial similarity” standard used in copyright infringement analysis.¹³⁴

Although the Second Circuit in *Waldman* evidenced a greater willingness to vindicate authors’ interests by interpreting section 43(a) more broadly than the Ninth Circuit, ultimately the court based its interpretation of section 43(a) on the need to prevent consumer confusion, rather than the need to safeguard authors’ personality interests.¹³⁵ Subsequently, courts both in and outside¹³⁶ of the Second

129. *Id.* at 781, 785–86 (noting that since the plaintiff subsequently has registered its copyright, it could amend its complaint to include a copyright infringement count, and on remand, the district court could address the copyright issue and decide whether the defendant can reproduce the plaintiffs books “at all”).

130. *Id.* at 781 (emphasis added).

131. *Id.* at 783. In fact, the Second Circuit was unable to discern, from the record, whether the plaintiff should be deemed the author of the books in question as a result of the work for hire doctrine, and therefore remanded this issue to the district court. *Id.* at 784.

132. *Id.* at 781, 784 (“We see no reason for such a bright-line rule.”)

133. *Id.* at 781.

134. *Id.* at 783.

135. *See id.* at 784 (“[C]onsumers are likely to be confused by [defendant’s] misrepresentation as to the source of its books, even though the [defendant’s] books are ‘substantially similar’ to but not ‘bodily appropriations’ of the [plaintiff’s] books.”)

Circuit have embraced *Waldman's* position that section 43(a) should be applied to reverse passing off cases where substantial similarity exists, although many of these cases reveal inconsistencies and difficulties in the application of this theory.¹³⁷ As is explained more fully below, these problematic applications exist because even those courts that are inclined to follow *Waldman* and apply section 43(a) to safeguard authors' attribution interests are invoking section 43(a) in the context of a theoretical framework that is ill-suited for redressing personality, rather than economic, interests.

In those cases involving relabeling, or the direct use of the plaintiff's work without appropriate authorship attribution, courts seem somewhat more inclined, in both theory and practice, to differentiate between copyright and section 43(a) so that both causes of action can be sustained. A particularly straight-forward case from the Sixth Circuit, *Johnson v. Jones*,¹³⁸ involved the direct copying of plaintiff architect's floor plans, and the relabeling of other drawings and site plans. The court affirmed the copyright count¹³⁹ and readily sustained the section 43(a) claim on the ground that the removal of the plaintiff's name and substitution of the defendant's demonstrated an "obvious and imminent likelihood of confusion."¹⁴⁰

In cases where the defendant's work is "derived" from the plaintiff's, as opposed to where the defendant's conduct amounts to relabeling, the analysis typically is more complex. A few years after *Johnson v. Jones*, a district court in the Sixth Circuit grappled with a reverse passing off case based on the defendant's alleged use and misappropriation of plaintiff's poster. In *Dahlen v. Michigan Licensed Beverage Ass'n*,¹⁴¹ the defendant

136. See, e.g., *Dahlen v. Mich. Licensed Beverage Ass'n*, 132 F. Supp. 2d 574 (E.D. Mich. 2001); *Campbell v. Osmond*, 917 F. Supp. 1574 (M.D. Fla. 1996).

137. See *infra* notes 141–165 and accompanying text.

138. 149 F.3d 494 (6th Cir. 1998).

139. It was undisputed that the plaintiff's copyright was valid, and that there was no written instrument transferring ownership. The Sixth Circuit affirmed the lower court's determination that the plaintiff did not grant the defendant an implied non-exclusive license to use the plaintiff's works. *Id.* at 500, 502.

140. *Id.* at 503. In certain instances, though, courts have denied section 43(a) claims when they are convinced there is no basis for consumer confusion. For example, in *Agee v. Paramount Communications, Inc.*, 59 F.3d 317 (2d Cir. 1995), the plaintiff sued Paramount for incorporating a copyrighted sound recording into the soundtrack of a taped television show. The court found that the defendant committed copyright infringement by violating plaintiff's exclusive right of reproduction, but dismissed the section 43(a) because the plaintiff did not allege public confusion deriving from defendant's use of the sound recording without attribution. *Id.* at 319, 327.

141. 132 F. Supp. 2d 574 (E.D. Mich. 2001).

created its own poster for economic reasons, rather than purchase the right to use the plaintiff's. The plaintiff sued for violations of both copyright law and section 43(a). The court noted that although the respective posters contained similar features, they were not identical.¹⁴² In discussing the copyright infringement count in the context of a summary judgment motion, the court declined to rule on the substantial similarity of the works and left this issue for the trier of fact.¹⁴³

Similarly, the *Dahlen* court refused to concede the substantial similarity of the works for purposes of applying the relevant legal standard under section 43(a). The *Dahlen* court invoked the framework for reverse passing off adopted by the Second Circuit in *Waldman Publishing Corp.*,¹⁴⁴ wherein the issues of consumer confusion and false designation are analyzed as separate requirements to sustain the section 43(a) claim.¹⁴⁵ The court in *Dahlen* observed that it will be more difficult for a plaintiff to establish likelihood of confusion where the works in question are substantially similar rather than virtually identical.¹⁴⁶

The *Dahlen* court nevertheless was concerned that in a reverse passing off action involving copyrighted property, a section 43(a) claim might be redundant of a copyright law count. To avoid this possibility, the *Dahlen* court expressly endorsed the Second Circuit's requirement that a plaintiff seeking to rely on section 43(a) must establish an "extra element," that is, "proof of some 'affirmative act' through which the defendant falsely represents itself as the originator of the work in question."¹⁴⁷ In *Dahlen*, the court concluded that the plaintiff produced sufficient evidence of "affirmative acts" of misrepresentation by virtue of the defendant's replacement of plaintiff's copyright notice with its own logo, its statement in its poster that the information contained in the poster was derived from the defendant, and its dissemination of the poster without any attribution of authorship to the plaintiff.¹⁴⁸ Notwithstanding the plaintiff's satisfaction of the false designation of origin requirement, the court declined to grant the plaintiff summary judgment on the section 43(a) claim in light of its prior ruling that it could not determine whether

142. *Id.* at 577.

143. *Id.* at 585.

144. 43 F.3d 775 (2d Cir. 1994). *See supra* notes 128–134 and accompanying text.

145. *See supra* note 133 and accompanying text.

146. 132 F. Supp. 2d at 590.

147. *Id.* *See infra* notes 158–166 and accompanying text.

148. *Dahlen*, 132 F. Supp. at 590. The court also noted that it could be "inferred" that "these actions created consumer confusion." *Id.* at 591.

the plaintiff's and defendants' works were "substantially similar" as a matter of law.¹⁴⁹

The approach used in *Dahlen* is problematic because it requires courts to make a determination as to what types of actions constitute sufficient "additional elements" to meet the false designation of origin requirement. There seems to be much confusion surrounding this issue, particularly in the Second Circuit.¹⁵⁰ This confusion is exacerbated by the fact that many of the cases arise in the context of preliminary injunctions, summary judgment motions, or motions to dismiss, and therefore it is difficult to derive precise guidance on what plaintiffs must prove to prevail ultimately on a section 43(a) claim in these circumstances.¹⁵¹

In one of the earliest derivation cases to support a section 43(a) cause of action in this context, *Eden Toys, Inc. v. Florelee Undergarment Co.*,¹⁵² the Second Circuit sustained the plaintiff's section 43(a) claim based on the defendant's manufacture of a nightshirt featuring a print of a bear found "identical in almost all respects" to one of the plaintiff's drawings of its own bear.¹⁵³ The defendant's nightshirt bore the legend "© Fred Original."¹⁵⁴ In granting summary judgment in the plaintiff's favor on the section 43(a) claim, the district court noted that "[t]here is no doubt about the falsity of Florelee's copyright notice," and that this deception "can mislead consumers into believing that the clothing they purchased is a unique novelty instead of a common copy."¹⁵⁵

The Second Circuit affirmed the judgment based on the consumer deception rationale that false and misleading claims about the defendant's own products are actionable under section 43(a). In this case, Florelee's claim of originality clearly concerned its own product.

149. *Id.* at 591-92.

150. See *infra* discussion of *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27 (2d Cir. 1982) and *Lipton v. Nature Co.*, 71 F.3d 464, 473-74 (2d Cir. 1995).

151. See, e.g., *Lipton*, 71 F.3d at 473-74 (reversing summary judgment for plaintiff on section 43(a) claim); *Dahlen v. Mich. Licensed Beverage Ass'n*, 132 F. Supp. 2d 574, 588-92 (E.D. Mich. 2001) (denying both sides' motion for summary judgment on section 43(a) claim); *Scholastic, Inc. v. Stouffer*, 124 F. Supp. 2d 836, 843-45 (S.D.N.Y. 2000) (concluding that plaintiff's section 43(a) claim survives motion to dismiss); *Campbell v. Osmond*, 917 F. Supp. 1574, 1581-83 (M.D. Fla. 1996) (denying parties' summary judgment motion and holding that the issue of "substantial similarity" should be decided by the trier of fact).

152. 697 F.2d 27 (2d Cir. 1982).

153. *Id.* at 31.

154. *Id.*

155. *Id.* at 37.

Moreover, the plaintiff also sued for copyright infringement,¹⁵⁶ but the Second Circuit failed to address why copyright law does not provide an exclusive, adequate avenue for the plaintiff. Subsequent decisions became more attuned to this question. In general, more recent cases appear to have somewhat greater difficulty sustaining section 43(a) claims in situations where the defendant's product is derived from the plaintiff's, rather than where the defendant merely "relabels" the plaintiff's product.¹⁵⁷

156. The Second Circuit reversed the district court's dismissal of the plaintiff's copyright infringement claim, and remanded this cause of action. *Id.*

157. Consider, for example, *United States Media Corp. v. Edde Entertainment Inc.*, 40 U.S.P.Q.2d 1581 (S.D.N.Y. 1996), a relabeling case in which the defendants had obtained unauthorized copies of plaintiff's films, reproduced them and distributed them to retailers. The court granted the plaintiff a partial summary judgment on its copyright and section 43(a) claims. *Id.* at 1583-84. Noting that although copyright infringement, without more, does not support a false designation of origin, additional acts by the infringer can substantiate a section 43(a) claim. Examples of such additional acts include the infringer's false representation of itself as the owner of the work, or a "significant discrepancy between the contribution of the authors listed and the credit that they are given." *Id.* at 1588. Where such a discrepancy exists, consumer confusion regarding the origin of the work will result in a "false designation of origin" within the meaning of section 43(a). *Id.* at 1589. Some other cases also involving conduct on the part of the defendant amounting to direct use or reproduction of the plaintiff's work absent appropriate attribution also conclude, without much of a struggle, that a section 43(a) claim can be sustained in these circumstances. In *Carrell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236 (S.D.N.Y. 2000), the defendants published press releases and produced a video version of the play *Cats* in which credit for the makeup designs was given to someone other than the plaintiff makeup designer. In sustaining the section 43(a) claim on a motion to dismiss, the court focused on the plaintiff's allegations of affirmative misrepresentations of ownership. According to the court, these allegations precluded the section 43(a) claim from being considered duplicative of her claim for copyright infringement. *Id.* at 262. Similarly, in *Richard Feiner & Co. v. Harmon Pictures Corp.*, 38 F. Supp. 2d 276 (S.D.N.Y. 1999), the owner of the copyrights to Laurel and Hardy motion pictures and the still photographic images derived from them sued the owner of the rights in the personas of Laurel and Hardy. The basis of the suit was the defendant's sale and distribution of Laurel and Hardy's images from the movies, with the copyrights wrongly attributed to the defendant. The court held that the plaintiff had stated claims under both the copyright statute and section 43(a).

In contrast, in *Armstrong v. Virgin Records, Ltd.*, 91 F. Supp. 2d 628 (S.D.N.Y. 2000), the plaintiff alleged that the defendant's recording contained an infringing sample of his composition, and that the defendant failed to give attribution credit to the plaintiff. In dismissing the section 43(a) claim, the court observed that the plaintiff's Lanham Act claim was duplicative of his copyright claim. False originality, according to the court, "does not venture beyond that implicit in any allegedly false copyright." *Id.* at 633. Although *Armstrong* thus would appear to be inconsistent with those relabelling cases that typically sustain a section 43(a) count with the copyright claim, perhaps an argument can be made that the digital sampling process so alters the original work that sampling is more similar to a situation where the defendant's work is "derived" from the plaintiff, rather than one involving "relabeling." See Houle, *Digital Audio Sampling, Copyright Law and The American Music Industry: Piracy or Just a Bad "Rap,"* 37 LOY. L. REV. 879, 880 (1992) ("Digital sound sampling has been used as a technique to isolate distinctive vocal and instrumental sounds. Once isolated, these sounds may be recorded and analyzed. In fact, the process allows the digital sampler

More than ten years after the Second Circuit decided *Eden*, the court issued an opinion declaring that the existence of a false copyright notice, by itself, is insufficient as a matter of law to support a section 43(a) claim based on a false designation of origin. In *Lipton v. Nature Co.*,¹⁵⁸ the defendant Wein allegedly infringed the copyright in a compilation of animal terms that was contained in plaintiff's books. Wein applied for a copyright registration of the compilation, asserting that he was the originator of the work, had manufactured posters of the compilation, and had licensed the right to use the compilation on a variety of products. One of the licensees, defendant Nature, marketed a poster of the compilation with copyright notices in the names of both defendants.¹⁵⁹ The district court found in favor of the plaintiff on both the copyright infringement and section 43(a) counts, holding that the copyright notices on the poster are "false designations of origin," constituting false claims of originality under section 43(a).

The Second Circuit sustained the copyright infringement claim, but reversed on the section 43(a) count, holding that "as a matter of law, a false copyright notice alone cannot constitute a false designation of origin within the meaning of section 43(a)."¹⁶⁰ The court reconciled its decision with *Waldman*¹⁶¹ by indicating that the reproduction of a work with a false representation as to its creator might support a section 43(a) claim, and with *Eden* by indicating that there, the defendant "also made the additional representation that the product was 'original.'"¹⁶²

The Second Circuit in *Lipton* noted that there were "striking similarities" between the plaintiff's compilation and the defendants'

to create a new song. The digital sampler can then play back a song comprised of another artist's sounds but never actually executed by the original musician." See also *Marvullo v. Gruner & Jahr.*, 105 F. Supp. 2d 225, 232-33 (S.D.N.Y. 2000) (holding magazine's publication of photograph without crediting photographer does not amount to false representation by publisher that it was the creator or owner of the photographs; court therefore dismissed section 43(a) claim as legally insufficient because it did nothing more than embody a false claim of originality implicit in any false copyright).

158. 71 F.3d 464 (2d Cir. 1995).

159. *Id.* at 468. Two copyright notices appeared on Nature's poster. One was in Wein's name for the compilation, and the other was in Nature's name. *Id.* at 469.

160. *Id.* at 473.

161. See *supra* notes 128-134 and accompanying text.

162. *Lipton*, 71 F.3d at 473-74. See also *Kregos v. Associated Press*, 937 F.2d 700, 710-711 (2d Cir. 1991) (noting that to the extent a false copyright notice does no more than support a copyright infringement claim, it must be rejected as nothing more than an attempt to convert a copyright infringement action into a Lanham Act violation).

works.¹⁶³ Therefore, perhaps *Lipton* should be viewed as a “bodily appropriation” case rather than one involving “substantial similarity.” If so, the court should have been more, rather than less, likely to sustain the section 43(a) count on the ground that a bodily appropriation is more likely to cause consumer confusion and unjust enrichment.¹⁶⁴ *Lipton*, by distinguishing false copyright notices on the one hand, and false claims of originality and false representations as to the work’s creator on the other, draws an arbitrary and unconvincing distinction.¹⁶⁵ Other cases sustain a false designation of origin claim under section 43(a) when the defendant’s conduct involves a misrepresentation as to the ownership of the copyrighted work in question.¹⁶⁶

In theory, a copyright notice may suggest nothing more than the representation that one in whose name the copyright notice appears has the right to reproduce the copyrighted work. For example, a licensee’s use of a copyright notice, without more, does not necessarily imply that the licensee is the creator, originator, or even the owner of the copyrighted work. The reality, however, is that most lay people do not think about such fine distinctions when confronted with a copyright notice. It is simply natural for people to assume that the purported copyright owner is the same entity as the creator, originator, or owner of the work.

The theory implicit in *Lipton* and those cases invoking its rationale is that a defendant who reproduces the copyrighted work without permission is liable for copyright infringement, but an additional type of misrepresentation is necessary in order to mandate liability under section 43(a) based on a “false designation of origin.”¹⁶⁷ This additional

163. *Lipton*, 71 F.3d at 471–72.

164. See *supra* notes 124–127 and accompanying text

165. Cf. *Montgomery v. Noga*, 168 F.3d 1282, 1298 (11th Cir. 1999) (citing cases critical of *Lipton*’s conclusion that a false copyright notice cannot constitute a false designation of origin under section 43(a)).

166. See *id.* at 1299 (sustaining section 43(a) claim on the ground that defendants also stated a false claim of “ownership” of the work in question); *United States Media Corp. v. Edde Entm’t Inc.*, 40 U.S.P.Q.2d 1581 (S.D.N.Y. 1996), discussed *supra* in note 157.

167. See, e.g., *Banff Ltd. v. Express, Inc.*, 921 F. Supp. 1065 (S.D.N.Y. 1995) (plaintiff did not establish a false designation of origin claim under section 43(a) by proving that defendant retailer placed its label on knockoff of plaintiff’s sweater; court reasoned that the defendant was merely representing that it had the “right to sell” the sweaters, not that it had created the sweaters); *Kerr v. New Yorker Magazine, Inc.*, 63 F. Supp. 2d 320 (S.D.N.Y. 1999) (noting that by itself, a false copyright notice cannot support a false designation claim under section 43(a)). Cf. *Scholastic, Inc., v. Stouffer*, 124 F. Supp. 2d 836, 844–45 (S.D.N.Y. 2000) (holding that section 43(a) claim is not duplicative of copyright claim where pleading includes affirmative misrepresentation of trademark

misrepresentation occurs if the defendant falsely implies that he is the originator, creator, or the owner of the copyrighted work. Whereas *Lipton* implicitly requires an additional type of misrepresentation to sustain liability under section 43(a), other courts explicitly require a showing of additional misrepresentation in this context based on an analogy to the analytical framework invoked under section 301(a), the preemption provision of the 1976 Copyright Act. The following subsection examines this line of cases.

C. *The Section 301(a) Paradigm*

The analysis of courts invoking the “substantial similarity” test under section 43(a) often mirrors, in application, a conventional preemption analysis under section 301(a) of the 1976 Act. As discussed in the foregoing section, courts inclined to sustain a section 43(a) violation in the context of reverse passing off cases involving copyrightable property typically conclude that “an aggrieved author must show more than a violation of the author’s copyright-protected right to credit and profit from a creation.”¹⁶⁸ In fact, at least one district court applying this standard has recognized explicitly that “[t]his rule is analogous to the preemption rule that a state law claim requires an ‘extra element,’ beyond those tracing to any copyright,” so that the nature of the section 43(a) action is “qualitatively different” from a cause of action based on copyright infringement.¹⁶⁹

Section 301 of the Copyright Act sets forth an express test for determining whether a particular state law is preempted by the 1976 Act. The test under section 301 has two parts. The first part of the preemption test focuses on the nature of the work protected by the state law. Specifically, preemption will not occur if the state law does not pertain to “works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright.”¹⁷⁰ The states, in other

ownership, through promotion and sale of various products and services including copyrighted books with allegedly false designations of origin). *But see* *Marling v. Ellison*, 218 U.S.P.Q. 702, 714 (S.D. Fla. 1982) (holding that defendant violated section 43(a) by misappropriating plaintiffs’ copyrighted material without acknowledging plaintiffs’ ownership rights).

168. *Weber v. Geffen Records, Inc.*, 63 F. Supp. 2d 458, 463 (S.D.N.Y. 1999).

169. *Id.* at 464.

170. 17 U.S.C. § 301(a) (2000).

words, are free to regulate all works that are not protected by the copyright law because of their nature or form of expression.¹⁷¹

The second part of the preemption test emphasizes the nature of the rights that the state law attempts to safeguard. If the state seeks to protect rights that are “not equivalent to any of the exclusive rights within the general scope of copyright,” the state’s law will not be preempted by section 301.¹⁷² The application of the equivalency prong of the preemption test thus requires a determination whether a particular state law creates rights that are “equivalent” to any of the rights protected by section 106 of the Act.¹⁷³ The 1976 Act does not define the term “equivalent,” but the legislative history indicates that a state cause of action will not be preempted if it contains elements that are “different in kind” from copyright infringement.¹⁷⁴

In applying this standard, most courts have followed the late Professor Nimmer’s suggestion that an “equivalent” right is one which “is infringed by the mere act of reproduction, performance, distribution or display.”¹⁷⁵ Essentially, this approach requires an analysis of the state law in question to determine what acts will constitute an infringement. If the exercise of one or more of the specific rights protected by federal copyright law is all that is necessary to constitute an infringement of the state law, preemption will occur. If other elements also are required to infringe the state law, no preemption will result.¹⁷⁶

Significantly, Congress confined the preemption application of section 301(a) to state laws. The legislative history clearly states that “there is no intention to deal with the question of whether Congress can or should offer the equivalent of copyright protection under some constitutional provision other than the patent-copyright clause of article I, section 8.”¹⁷⁷

171. “If a particular work is capable of copyright protection but is not fixed in a tangible medium of expression, protection may be obtained under state common law copyright.” ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL KWALL, *INTELLECTUAL PROPERTY CASES AND MATERIALS ON TRADEMARK, COPYRIGHT AND PATENT LAW* 521 (Foundation Press 1996).

172. 17 U.S.C. § 301(b)(3) (2000).

173. *Id.* The rights safeguarded by section 106 under copyright law include the rights to reproduce, distribute, publicly perform, publicly display, and make derivative works of the copyrighted work. *Id.* § 106. Note that preemption of a state law will occur only if both parts of the test in section 301(a) are met. DREYFUSS & KWALL, *supra* note 171, at 521.

174. See H.R. REP. NO. 94-1476, 109, at 132, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748.

175. 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.01[B][1], at 1–12 (2002).

176. DREYFUSS & KWALL, *supra* note 171, at 545.

177. See H.R. REP. NO. 94-1476, at 5746.

Subsection (d) of section 301 expressly states that “nothing contained in [Title 17] annuls or limits any rights or remedies under any other Federal statute.”¹⁷⁸ Thus, by virtue of the statute’s express terms, Congress did not intend the section 301(a) analysis to govern situations where plaintiffs are invoking section 43(a), a federal provision, to obtain a remedy for reverse passing off when the subject matter at issue is copyrightable property. Even so, some courts, particularly district courts in the Seventh Circuit, have expressly relied on the section 301(a) paradigm to decide cases involving this issue.

LaCour v. Time Warner, Inc.,¹⁷⁹ an unpublished opinion, is representative of these district court opinions. *LaCour* involved a song initially recorded by the defendant which became the inspirational theme song for the movie *Space Jam*.¹⁸⁰ Several years after the song’s initial recording by the defendant, plaintiff *LaCour* alleged that he was the song’s sole and original author, and sued the defendant for copyright infringement, and violations of section 43(a) and state unfair competition law. In *LaCour*’s complaint, he alleged that the defendant’s version of the song was derived from, and substantially similar to, the plaintiff’s version, and that the defendant made false and misleading representations to the public by claiming authorship of the song.

LaCour concerns exclusively the question of whether the federal and state unfair competition causes of action are preempted by section 301(a) of the copyright statute. The court noted that in addressing the question of whether copyright law limits a plaintiff’s right to relief under section 43(a); district courts in the Seventh Circuit have not relied on either the “bodily appropriation” or “substantial similarity” tests.¹⁸¹ Instead, the district courts have compared a reverse passing off claim under section 43(a) to a reverse passing off claim under state unfair competition law, based on the theory that the requisite elements for both causes of action are the same.¹⁸² Specifically, both state unfair competition law and section 43(a) causes of action are grounded in the identical objectives of protecting consumers from confusion and deception. Such congruence justifies applying the section 301(a) preemption analysis that governs

178. 17 U.S.C. § 301(d) (2000).

179. 2000 WL 688946 (N.D. Ill. 2000).

180. The title of the song is *I Believe I Can Fly*.

181. 2000 WL 688946 at *5.

182. See, e.g., *Tensor Group, Inc. v. Global Web Sys., Inc.*, 1999 WL 617818, *3 (N.D. Ill. 1999); *Goes Lithography Co. v. Banta Corp.*, 26 F. Supp. 2d 1042, 1047 (N.D. Ill. 1998).

state unfair competition law reverse passing off claims to section 43(a) claims involving reverse passing off.¹⁸³

Thus, as *LaCour* illustrates, district courts in the Seventh Circuit eschew the “bodily appropriation” and “substantial similarity” approaches endorsed elsewhere in favor of an explicit adoption of the section 301(a) framework.¹⁸⁴ Moreover, in determining what types of allegations would render a state law claim “qualitatively different” from one based on copyright infringement, *LaCour* suggests that a plaintiff must allege affirmative misrepresentations about the origin of the work. Such affirmative misrepresentations are in contrast to the inherent misrepresentations that otherwise accompany the unauthorized copying and reproduction of another’s copyrighted work in a reverse passing off case.¹⁸⁵

In *LaCour*, the court held that the plaintiff had not made this showing because the essence of his complaint was the defendant’s sale and representation of the song as his own work. As such, the plaintiff’s complaint amounted to nothing more than an assertion of the defendant’s “violation of the reproduction and derivative rights protected by the copyright law.”¹⁸⁶ Of course, given that *LaCour* involved a motion to dismiss rather than a complete trial on the merits, the case provides little guidance regarding what type of allegations would meet the court’s articulated standard of “affirmative misrepresentations about the origin of the work.”¹⁸⁷ This procedural characteristic and consequent vague direction is representative of most other district court opinions in the Seventh Circuit, both those treating preemption in the context of section 43(a) as well as state unfair competition law. One court, in fact, has gone so far as to broadly suggest that “relief under the Lanham Act is redundant and unnecessary when a product allegedly is copyrighted,”

183. *LaCour*, 2000 WL 688946, at *5. In addition to violation of section 43(a), *LaCour*’s complaint alleged violations of the Consumer Fraud and Deceptive Business Practices Act and the Uniform Deceptive Trade Practices Act.

184. *See also* Natkin v. Winfrey, 111 F. Supp. 2d 1003, 1012–13 (N.D. Ill. 2000). *Cf.* Debs v. Meliopoulos, 1993 WL 566011, *12 (N.D. Ga.) (disputing any requirement of “bodily appropriation” or “substantial similarity” contained in section 43(a) and concluding that “[a] failure to attribute authorship to a person . . . constitutes a violation of section 43(a) so long as findings of falsity and likelihood of confusion are made”).

185. *LaCour*, 2000 WL 688946, at *7.

186. *Id.*

187. *Id.*

although the case dismissing the plaintiff's complaint contains no analysis of this sweeping point.¹⁸⁸

One of the seminal Seventh Circuit district court decisions establishing the preemption analysis relevant for state unfair competition actions involving copyrighted property is *FASA Corp. v. Playmates Toys, Inc.*¹⁸⁹ There, plaintiff FASA, a designer of certain futuristic games, sued a toy manufacturer for copying certain designs elements of its game. In the portion of the opinion discussing the reverse passing off claim based on state unfair competition law, the *FASA* court held that the claim was preempted based, in part, on the reasoning of the district court's decision in *Waldman Publishing Corp. v. Landoll, Inc.*¹⁹⁰ In *Waldman*, the district court held the plaintiff's common law claims were preempted by section 301(a), and this portion of the order was not appealed to the Second Circuit.¹⁹¹ Yet, the Second Circuit in *Waldman*, as discussed in Subsection B, sustained a section 43(a) claim in the context of copyrightable subject matter, concluding that a false designation of written work extends to indicating falsely the "origin" of the work as its author.¹⁹² Thus, *Waldman* implicitly drew a distinction between state unfair competition actions based on reverse passing off, and those predicated on section 43(a). Moreover, the Second Circuit in *Waldman* explicitly recognized that, as applied to a copyrightable work, the "false designation of origin" component of a section 43(a) action "deals with false designation of the creator of the work."¹⁹³

The court in *FASA*, though relying upon the district court decision in *Waldman*, did not have the benefit of the Second Circuit's *Waldman* opinion when it rendered its decision.¹⁹⁴ In *FASA*, the defendant's misrepresentation consisted of selling the allegedly infringing works

188. *Tensor Group, Inc. v. Global Web Systems, Inc.*, 1999 WL 617818, *3 (N.D. Ill.)

189. 869 F. Supp. 1334 (N.D. Ill. 1994).

190. 848 F. Supp. 498 (S.D.N.Y. 1994).

191. *Waldman Publishing Corp. v. Landoll, Inc.*, 43 F.3d 775, 779 n.3 (2d Cir. 1994). Interestingly, prior to the lower court's decision in *Waldman*, at least one district court in the Second Circuit explicitly held that a state law unfair competition claim based on reverse passing off is not equivalent to copyright in light of the additional element of misrepresentation or deception. *Tracy v. Skate Key, Inc.*, 697 F. Supp. 748, 751 (S.D.N.Y. 1988).

192. *Waldman*, 43 F.3d at 783. In fact, the Second Circuit was unable to discern, from the record, whether the plaintiff should be deemed the author of the books in question as a result of the work for hire doctrine, and therefore remanded this issue to the district court. *Id.* at 784.

193. *Id.* at 783.

194. The Second Circuit opinion in *Waldman* was decided on December 22, 1994; *FASA* was decided on December 5, 1994.

under its own label, rather than that of the plaintiff's. In this regard, the court in *FASA* observed: “[V]irtually every copyright infringement claim inherently involves this minimal degree of *misrepresentation as to the creator* of the allegedly infringing work. To permit state law claims to go forward under this theory of misrepresentation would effectively render the Copyright Act’s preemption a nullity.”¹⁹⁵ Yet, only a few weeks after *FASA* was decided, the Second Circuit in *Waldman* explicitly recognized that misrepresentation as to a work’s creator is exactly the sort of conduct that allows a section 43(a) claim to be sustained in the context of copyrightable property.¹⁹⁶

Of course, had the *FASA* court had available to it the Second Circuit’s opinion in *Waldman*, it is possible the *FASA* court would have analogized the state unfair competition claim to a section 43(a) claim and held that the misrepresentation of a work’s creator is an element that renders the state unfair competition action “qualitatively different” from one based on copyright law. In any event, it is clear that none of the subsequent opinions of district courts in the Seventh Circuit treating the issue of whether state unfair competition actions based on reverse passing off are preempted by section 301(a) have focused on this element of *Waldman*.¹⁹⁷ Moreover, those district court opinions that subsequently analogized state unfair competition actions to ones based on section 43(a) for purposes of deciding the preemption issue also failed to address the implications of *FASA*’s interpretation of *Waldman*.¹⁹⁸ Therefore, to the extent district courts in the Seventh Circuit rely on *FASA* in holding that reverse passing off actions based on section 43(a) are duplicative of copyright law, their reasoning is flawed.¹⁹⁹

195. *FASA Corp.*, 869 F. Supp. at 1361 (emphasis added).

196. See *supra* notes 128–134 and accompanying text; note 161 and accompanying text. Cf. *FASA*, 869 F. Supp. at 1361 (“Accordingly, we cannot conclude that an allegation of misrepresentation based solely on an alleged infringer’s act of displaying, selling, or promoting the infringing work as his or her own creation, is sufficient to remove a state based claim from the preemptive reach of 17 U.S.C. § 301(a).”) (emphasis added).

197. See, e.g., *Marobie-FI, Inc. v. Nat’l Ass’n of Fire Equip. Distrib. & NW Nexus, Inc.*, 983 F. Supp. 1167, 1180 (N.D. Ill. 1997); *The Balsamo/Olson Group, Inc. v. Bradley Place Ltd. P’ship*, 950 F. Supp. 896, 898–99 (C.D. Ill. 1997).

198. *Natkin v. Winfrey*, 111 F. Supp. 2d 1003, 1012–14 (N.D. Ill. 2000); *LaCour v. Time Warner, Inc.*, 2000 WL 688946 (N.D. Ill. 2000); *Tensor Group, Inc. v. Global Web Sys., Inc.* 1999 WL 617818 (N.D. Ill. 1999); *Goes Lithography Co. v. Banta Corp.*, 26 F. Supp. 2d 1042, 1046–47 (N.D. Ill. 1998).

199. Interestingly, the Seventh Circuit, in a much earlier opinion, recognized the breadth of section 43(a)’s applicability in a case involving reverse passing off of copyrightable property. In *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 214 U.S.P.Q. 409 (7th Cir. 1982), the

D. Section 43(a)'s Failure To Protect Attribution Interests

As is true of judicial applications of copyright law, courts render section 43(a) determinations quite apart from any consideration of the authorial interests at stake when the right of attribution is at issue. Indeed, one court has expressly declared that the Lanham Act does not create a duty of attribution.²⁰⁰ The foregoing discussion demonstrates that plaintiffs attempting to obtain a remedy for reverse passing off are disserved through their forced reliance on section 43(a) to redress violations that should properly be addressed within the scope of an independent right of attribution. Because the requirements for proving a case under section 43(a) are shaped largely by that doctrine's focus on preventing consumer deception,²⁰¹ courts become preoccupied with different manifestations of "falsity" at the expense of an author's personality and reputational interests.²⁰² An attribution violation harms the author's spirit, and the damage to the author's spiritual interest is the primary focus of the right of attribution.²⁰³

As the law currently stands, this spiritual interest is capable of protection only when damage to consumers is present.²⁰⁴ Even those courts that do find in favor of a plaintiff author based on a section 43(a)

plaintiff music publisher sued the Catholic Bishop of Chicago for copyright infringement and violation of section 43(a) based on the defendant's inserting the plaintiff's copyrighted songs in its hymnals without the plaintiff's permission, and without attribution of authorship or copyright ownership. Regarding the section 43(a) claim, the plaintiff alleged that by applying the name of the parish and omitting the plaintiff's name from the hymnals, the Bishop falsely identified himself or his parishes as the source or owner of the songs. *Id.* at 416. Noting that section 43(a) is a "remedial statute that must be broadly construed," and that the issue of consumer confusion regarding the origin of the songs must be determined at trial, the Seventh Circuit held that resolution of the section 43(a) issue could not be accomplished on a summary judgment motion. *Id.*

200. *Morita v. Omni Publ'ns. Int'l Ltd.*, 741 F. Supp. 1107, 1114 (S.D.N.Y. 1990). *See also* *Cleary v. News Corp.*, 30 F.3d 1255, 1260 (9th Cir. 1994) (suggesting that although the Lanham Act "does not create a duty of express attribution, [it] does protect against misattribution").

201. *Cf. Campbell v. Osmond*, 917 F. Supp. 1574, 1583 (M.D. Fla. 1996) (noting that damages caused as a result of consumer confusion sustain a section 43(a) cause of action separate from copyright infringement).

202. *Cf. Pesina v. Midway Mfg. Co.*, 948 F. Supp. 40, 43 (N.D. Ill. 1996) (holding that alleged use of plaintiff's name, likeness and persona in martial arts video does not violate the Lanham Act, and observing that the plaintiff must show he was a celebrity in order to prove his identity constitutes an "economic interest protectable under the Lanham Act").

203. *Cf. Freedman*, *supra* note 110, at 320-23 (noting that reverse passing off presents different harms when the plaintiff is an actor, artist or writer, as opposed to a manufacturer or producer).

204. "*Author-Stories*", *supra* note 3, at 32 (noting that in § 43(a) cases, "[t]he plaintiffs' narratives of damage to their dignity as authors were not considered by the courts, in large part because under the current legal system no place exists for their inclusion").

violation recognize and safeguard the underlying damage to the author's spirit as a secondary concern—the primary focus always is on whether consumers are deceived through the defendant's false representations.²⁰⁵ As a result of this flawed doctrinal fit between section 43(a) and reverse passing off, only those plaintiffs who are successful in demonstrating a certain type of misrepresentation²⁰⁶ or consumer confusion²⁰⁷ will prevail.²⁰⁸

It is possible to unpack even more completely the ways in which section 43(a)'s requirements of misrepresentation or consumer confusion effectively preclude the assertion of a right of attribution in many instances. Part I.B of this Article discussed four scenarios in which authors were left with inadequate protection for their attribution interests under copyright law.²⁰⁹ By virtue of the theoretical disconnect between the right of attribution and section 43(a), certain situations also arise in which a plaintiff author will not be able to invoke section 43(a) to protect her attribution interest.

Initially, it is important to note that a finding of consumer confusion requires the existence of distinct, recognizable subject matter. Although the Lanham Act is clear that section 43(a) does not require a registered trademark, courts invoke the same standards in determining consumer confusion under section 43(a) that they do for determining whether consumers are confused by a defendant's infringement of a plaintiff's federally registered trademark.²¹⁰ Nevertheless, section 43(a) protects only "qualifying unregistered" subject matter, and "the general principles

205. Cf. *Follett v. New Am. Library, Inc.*, 497 F. Supp. 304, 311 (S.D.N.Y. 1980) ("Even if an attribution of authorship were consistent with industry practices, it would nevertheless be illegal under the Lanham Act if it misrepresented the contribution of the person designated as author.").

206. See *supra* notes 158–167 and accompanying text.

207. Cf. *Batiste v. Island Records, Inc.*, 179 F.3d 217, 225 (5th Cir. 1999) (refusing to sustain a § 43(a) claim for reverse passing off based on defendant's use of digital sample of plaintiff's work on the ground that plaintiffs failed to demonstrate genuine issue of likelihood of confusion); *Debs v. Meliopoulos*, 1993 WL 566011, *15 (N.D. Ga. 1993) (noting that defendant may have technically violated the Lanham Act by virtue of his failure to attribute authorship to plaintiff of a relatively small contribution to his materials, but refusing to award relief due to lack of actual or likelihood of confusion).

208. See *Freedman*, *supra* note 110, at 330 ("The 'likelihood of confusion' test is never appropriate in situations where an actor, artist, or writer is not credited for her work" because "even if there is no consumer confusion, the very fact that the creator is deprived of recognition for her work is a personal affront and thus harmful.").

209. See *supra* notes 83–107 and accompanying text.

210. See *DREYFUSS & KWALL*, *supra* note 171, at 74–75. In proving likelihood of consumer confusion under either section 43(a) or section 1114 (trademark infringement), courts invoke a set of factors that are remarkably consistent among the circuit courts. See *id.* at 75.

qualifying a mark for registration under section 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under section 43(a).²¹¹ To “qualify” for such protection, a mark must be either “inherently distinctive” or have acquired distinctiveness through secondary meaning.²¹²

If a plaintiff author’s work is not sufficiently well-known to trigger public recognition, it is questionable whether a plaintiff’s act of “reverse passing off” will spark the necessary confusion on the part of the consuming public to support relief under section 43(a). Some courts have alleviated this particular concern by refusing to apply the requirements of “distinctiveness” or “secondary meaning” in reverse passing off cases.²¹³ The theory underlying these decisions appears to be that in a reverse passing off case, the very existence of the reverse passing off precludes the true author from developing the consumer association between herself and her work.²¹⁴ As these cases illustrate, courts applying section 43(a) to protect an author’s attribution interest are forced to manipulate the existing commercially based section 43(a) doctrine so that it can be applied to remedy situations where a significant harm to the plaintiff is personal rather than economic.²¹⁵

Partial designations of attribution also can preclude an author from successfully relying on section 43(a) to protect her attribution interest. The situation in *Qimron v. Shanks* is illustrative of this problem. As discussed in Part IA, in that case the defendant Shanks published the deciphered reconstructed text of one of the Dead Sea Scrolls and attributed authorship to a particular professor working “with a

211. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

212. *Id.* at 769 (defining secondary meaning as “acquired distinctiveness”). A term acquires secondary meaning when its *primary* meaning in consumers’ minds is the trademark meaning. DREYFUSS & KWALL, *supra* note 171, at 44.

213. *See, e.g.*, *Johnson v. Jones*, 149 F.3d 494, 503 (6th Cir. 1998); *Dahlen v. Mich. Licensed Beverage Ass’n*, 132 F. Supp. 2d 574, 591 (E.D. Mich. 2001); *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 784 n.7 (2d Cir. 1994); *Blank v. Pollack*, 916 F. Supp. 165, 170 (N.D.N.Y. 1996). *See also* *Dodd v. Fort Smith Special Sch. Dist.*, 666 F. Supp. 1278, 1285 (W.D. Ark. 1987) (noting that the confusion presented in reverse passing off cases “is not caused by a comparison of two products both in the public domain” but rather “is the result of the alleged false representation” of the defendant as the author).

214. *Dahlen*, 132 F. Supp. 2d at 591. *See also* *Blank*, 916 F. Supp. at 170 (noting that in a reverse passing off case, “the *lack* of secondary meaning is exactly what the plaintiff is alleging” because this absence leads consumers of the subject matter in question to believe the defendants were likely to be confused by the misrepresentation regarding the creative source of the product).

215. *See supra* notes 206–208 and accompanying text.

colleague.”²¹⁶ Technically, this situation does not give rise to a “false designation of origin” under section 43(a) because the defendant’s representation was not untrue.²¹⁷

According to one commentator, the essence of a section 43(a) offense is absent under these circumstances because Shanks “fooled no one into thinking that one individual deserved full credit for a work in fact authored by two.”²¹⁸ Instead, Shanks “honestly apprised the world that [the work] . . . had two fathers, although he listed only one by name.”²¹⁹ Moreover, the argument has been made that Shanks’ omission of plaintiff’s name would not give rise to consumer confusion because most purchasers of Shanks’ work would have been aware of Professor Qimron’s role, and therefore the defendant’s omission would not have subjected him to any “sensible diminution of his publicity or notoriety.”²²⁰

The facts of *Qimron* illustrate the disconnect between the attribution interest and section 43(a). Had the case been litigated under American law, it is probable that the plaintiff would have invoked section 43(a) in light of the absence of other alternatives upon which to base an attribution violation. Precedent does exist in this country for concluding that the failure to mention all joint authors to a project can give rise to liability under section 43(a), although those cases involve a complete omission rather than a partially oblique reference to an author’s identity.²²¹ Nevertheless, regardless of whether the oblique reference to Professor Qimron was a sufficient mentioning to escape liability under

216. See *supra* notes 33, 53–56 and accompanying text.

217. Of course, in light of the fact that the case was decided under Israeli law, the application of section 43(a) to the facts of *Qimron v. Shanks* was not at issue.

218. Nimmer, *supra* note 33, at 149.

219. *Id.*

220. *Id.* at 151.

221. See, e.g., *Lamothe v. Atlantic Recording Corp.*, 847 F.2d 1403, 1406–08 (9th Cir. 1988) (omission of plaintiff joint authors names in album and sheet music constitutes false designation of origin under section 43(a)); *Maurizio v. Goldsmith*, 84 F. Supp. 2d 455, 468 (S.D.N.Y. 2000) (noting that plaintiff’s evidence supporting copyright joint authorship claim can be used to support her section 43(a) claim). Cf. *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 781 (2d Cir. 1994) (“Through a Lanham Act action, an author may ensure that his or her name is associated with a work when the work is used.”). But see *Cleary v. News Corporation*, 30 F.3d 1255, 1260 (9th Cir. 1993) (“[T]he case law does suggest that the Lanham Act does not create a duty of express attribution, but does protect against misattribution.”); *Weber v. Geffen Records, Inc.*, 63 F. Supp. 2d 458, 464 (S.D.N.Y. 1999) (dismissing plaintiff’s section 43(a) claim based on defendant’s failure to acknowledge plaintiff as the co-author of copyrighted songs as “duplicative” of the copyright claim); *Morita v. Omni Publ’ns. Int’l, Ltd.*, 741 F. Supp. 1107, 1114 (S.D.N.Y. 1990) (refusing to interpret section 43(a) as mandating a duty of express attribution).

section 43(a), the critical point is that both complete omissions, as well as oblique partial references, violate the inherent right of an author to be recognized as the source of her works. Whether the defendant's incomplete representations are technically true, or whether they will foster consumer confusion in the marketplace, is irrelevant to whether the defendant has failed to recognize the plaintiff's attribution interest.²²²

The interface between section 43(a) and contract law raises yet another obstacle for authors attempting to vindicate their attribution interests through reliance on section 43(a). *Cleary v. News Corp.*²²³ is illustrative of this conflict. In that case, the plaintiff author sued the publisher of *Robert's Rules of Order* for omitting his name on the title page of a revised edition. In arguing that the publisher's conduct constituted reverse passing off under section 43(a), the plaintiff advanced the argument that "the Lanham Act protects an author against an inaccurate designation of authorship despite the fact that the author expressly contracted away the right of attribution" through a work for hire agreement.²²⁴ Ultimately, the court did not decide this particular issue in light of its holding that even if the plaintiff did not relinquish his right to attribution, his right was not violated under the facts of the case.²²⁵ Although *Cleary* illustrates the problem, rather than the solution, to the conflict between section 43(a) and contract law, district courts in other circuits have concluded that actions under section 43(a) cannot be brought when a contractual provision authorizes the defendant's conduct.²²⁶ This interface between section 43(a) and contract law underscores the need for an explicit and non-waivable right of attribution, a point discussed further in the next part.²²⁷

222. Cf. Nimmer, *supra* note 33, at 148 n.728 (noting the distinction between section 43(a) and Israeli moral rights law, which may entitle the author to a right of attribution rather than protection only against misattribution).

223. 30 F.3d 1255 (9th Cir. 1994).

224. *Id.* at 1260. In *Cleary*, the publisher argued that because the plaintiff signed a contract containing a work for hire agreement, it had no duty to provide him with title credit in any edition of the work. *Id.* at 1259.

225. *Id.* at 1261.

226. See, e.g., *Yahway Corp. v. Eur-Control USA Inc.*, 225 U.S.P.Q. 45, 47-48 (N.D. Ga. 1984) (refusing to allow suit under section 43(a) because the license contained express provisions regarding the placement of trademarks); *Wallace Computer Servs. Inc. v. Sun Microsystems Inc.*, 13 U.S.P.Q.2d 1324, 1328 (N.D. Ill. 1989) (denying summary judgment on reverse passing off because there was an issue of fact as to whether a license existed). See also Freedman, *supra* note 110, at 319 n.70 (noting possible reluctance of a federal court to provide a remedy for a matter governed by state contract law).

227. See *supra* notes 250 at 94-95; *American Marriage*, *supra* note 2, at 41.

The foregoing discussion demonstrates the difficulties with reliance on section 43(a) as the legal doctrine through which the attribution interest can be enforced. Similarly, copyright law as it is applied in this country does not serve as the mechanism for safeguarding this interest. Thus, our legal system has failed to protect the attribution interest in an independent, and doctrinally honest, manner. As discussed in the following part, the remedy for this situation is the adoption of an explicit right of attribution as part of federal copyright law.

III. THE CASE FOR AN INDEPENDENT RIGHT OF ATTRIBUTION

The discussion in the foregoing parts of this Article focuses on the applicable case law in the areas of both copyright and section 43(a), and demonstrates the inherent difficulties with applying both the copyright and section 43(a) models to safeguard the interests protected by the right of attribution. An author can be deprived of attribution in a variety of circumstances even though no copyright or section 43(a) violations exist. Based on the foregoing analysis, it is clear that the authorial interests that are the focus of the right of attribution are protected only coincidentally through the invocation of alternate legal theories. Thus, if the United States truly is concerned with protecting authorial interests, it must contemplate enacting an explicit right of attribution.

In many of the cases discussed in the foregoing parts, plaintiffs asserted both copyright infringement and section 43(a) causes of action. *Batiste v. Island Records, Inc.*,²²⁸ discussed in Part IB, is illustrative. There, the plaintiff songwriters could not prevail on their copyright claim because of the existence of a valid copyright assignment, and the defendant had secured the permission of the assignee prior to the release of the infringing album.²²⁹ The plaintiffs in that case also raised a section 43(a) claim, based on the defendant's conduct of digitally sampling the plaintiffs' song and including it in the album, without attributing co-authorship of the defendant's song to all three plaintiffs.²³⁰

The Fifth Circuit denied the application of section 43(a) as a means of enforcing the attribution interest in this instance because there was no evidence that consumers were confused or deceived by either the

228. 179 F.3d 217 (5th Cir. 1999).

229. *Id.* at 220. See also *supra* notes 83–85 and accompanying text.

230. See *supra* note 86 and accompanying text.

defendant's use of plaintiff's work or the incomplete authorship attribution.²³¹ The court further observed that the plaintiffs' claim that two of the brothers were improperly excluded from the liner notes accompanying the defendant's album also failed to suggest consumer confusion, especially because the liner notes did credit the band in which the omitted brothers performed.²³²

The law's failure to provide authors with a right of attribution independent of both copyright infringement and section 43(a) is tellingly illustrated by the facts of *Batiste*. Copyright law in this country safeguards economic interests, rather than the authorial interests protected by the right of attribution. Section 43(a) of the Lanham Act can be used to safeguard the right of attribution in reverse passing off cases only where the court is satisfied that consumer confusion exists. Yet, consumer confusion is a concept totally unrelated to the authorial interests violated by a defendant's failure to attribute authorship. The *Batiste* court frames the attribution inquiry improperly because it is forced to determine attribution rights within legal frameworks ill-suited for the application of this important right.

Whether consumers are confused by the defendant's actions, or whether the defendant has violated the plaintiff's economically based copyrights, are separate inquiries from whether the defendant has failed to attribute authorship of a work to someone entitled to such attribution. Moreover, the question whether the defendant's actual attribution in the liner notes *would* satisfy an independent right of attribution is a separate issue relating to the appropriate scope of the right of attribution.²³³ In light of the current status of the law, this is not an issue the *Batiste* court even could address. Clearly, the crafting and application of an independent right of attribution can only be tackled by Congress or the judiciary, once the need for such an explicit right is accepted.

Legal commentators often manifest skepticism regarding the benefits for the American legal system of adopting moral rights.²³⁴ Of particular concern is the perceived conflict between adequate moral rights protection and the first amendment freedoms of authors desiring to build

231. *Batiste*, 179 F.3d at 225.

232. *Id.*

233. See *supra* note 231 and accompanying text.

234. See, e.g., Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1 (1997); Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421 (1990); Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW U. L. REV. 1011 (1988).

upon, and interpret, the creative works of others.²³⁵ Moreover, powerful entertainment and publishing industries fear that their commercial practices may be disturbed if the United States were to adopt legislation more protective of authorial interests.²³⁶ Notwithstanding these concerns, I have argued elsewhere that the United States' legal system is woefully inadequate in its protections of authors' interests, and that a comprehensive moral rights package is necessary to validate and safeguard authors' personality and spiritually based interests.²³⁷

Relatively little attention has been given to the idea of unpacking the components of moral rights protections and analyzing each strand of this doctrine separately. Most of the legal scholarship, including my own, treats the distinct components of moral rights as a group, and argues for or against their implementation as a unified block.²³⁸ The position advanced in this Article is much more limited in scope. Here, I urge the adoption of a non-waivable, explicit, and broadly defined right of attribution. The first two parts of this Article demonstrate the theoretical need for the recognition of this doctrine. This part addresses the ease with which an explicit right of attribution can be promulgated.

Unlike the adoption of a more comprehensive right of integrity than that which currently exists under VARA,²³⁹ recognition of an express, and wide-ranging, right of attribution can be accomplished without substantial disruption to our existing legal system and to existing commercial practices. Initially, it is important to note that although neither copyright law nor section 43(a) mandate an explicit right of attribution, with one notable exception these doctrines do not preclude such a right. The exception is the work for hire doctrine, discussed earlier in Part 1B. Whereas adopting an explicit right of attribution might necessitate confining the application of the work for hire doctrine to matters involving copyright ownership rather than authorship, no practical obstacles exist to imposing such a limitation on the existing

235. See Geri Yonover, *Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79 (1996); Kathryn Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech?*, 11 U. MIAMI ENT. & SPORTS L. REV. 211 (1994).

236. See Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 810–820 (2001); “*Author-Stories*”, *supra* note 3, at 26–43.

237. “*Author-Stories*”, *supra* note 3; *American Marriage*, *supra* note 2; “*Moral Rights for University Employees*”, *supra* note 13; Kwall, *supra* note 20; VARA, *supra* note 97.

238. One recent exception is Ilhyung Lee’s article advancing the concept of a less comprehensive moral rights package that would still provide meaningful protection. See Lee, *supra* note 236, at 795. The focus of Lee’s article, however, is the right of integrity.

239. See *supra* notes 10–12 and accompanying text.

work for hire law. The American approach of presuming initial ownership in the employer arguably can be justified when economic rights are at issue because it is the employer who bears the financial risk of the project.²⁴⁰ Nevertheless, this same justification does not support the loss of an author's personal right of attribution.

Other legal arguments against the implementation of a more comprehensive moral rights package have centered on doctrines such as fair use²⁴¹ and positions predicated on the First Amendment. These arguments focus on the need to preserve the artistic freedom of those who build upon others' works. Significantly, the right of attribution is less controversial than the right of integrity in that it does not preclude the actual use of an author's work in any particular manner. It simply requires that the user attribute authorship to the original author of any work used. All authors, regardless of whether they have licensed the copyrights to their works,²⁴² or whether they own the objects in which their copyrights are embodied,²⁴³ should have the right to compel recognition for their work and to prevent false designations of authorship. Recognition of an express right of attribution does not pose any significant level of intrusiveness to either users authorized by copyright owners or unlicensed users desiring to use a particular work in their own creative endeavors.²⁴⁴

Similarly, it is difficult to understand how an explicit right of attribution would pose a significant obstacle to copy owners wishing to display publicly works owned by them but authored by others.²⁴⁵ In all

240. See Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1185–87, 1200–04 (2000); Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, U. CHI. L. REV. 590, 596–97 (1987).

241. 17 U.S.C. § 107 (2000).

242. See *id.* § 201(d) (1) (2000) (providing for transfer of ownership of a copyright in whole or part).

243. Section 202 of the 1976 Act provides that the ownership of a copyright is “distinct from ownership of any material object in which the work is embodied.” *Id.* § 202 (2000). Therefore, the transfer of ownership of any material object in which the copyrighted work is fixed does not convey any copyrights in the work.

244. See “*Author-Stories*”, *supra* note 3, at 14 (noting that both authorized and unlicensed users are among the relevant voices in copyright disputes). See also *infra* note 253 and accompanying text.

245. Section 109(c) of the 1976 Copyright Act provides that the owner of a lawfully made copy may, without the authorization of the copyright owner, “display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.” See *American Marriage*, *supra* note 2, at 88–89 (suggesting that although the 1976 Act does not require the owner of the copy to attribute authorship of the displayed work to the creator, a state law conditioning any such public display upon appropriate attribution may be preempted on the

these instances, requiring a right of attribution imposes a fairly insignificant burden while safeguarding important authorial interests,²⁴⁶ and thus the choice to impose the attribution right in these circumstances seems to be an easy one.²⁴⁷

Further, I suggest that the right of attribution should be non-waivable. Many authors lack bargaining power and, due to either ignorance or circumstances beyond their control, fail to protect their interests adequately through contract law.²⁴⁸ I have argued elsewhere that the failure of our law to protect attribution interests further exacerbates the disparity of bargaining power between authors and those with whom they contract.²⁴⁹ Moreover, there are no countervailing reasons supporting a waivable right of attribution. In contrast, concern for preserving the artistic freedom of even licensed copyright users makes a completely non-waivable right of integrity somewhat suspect, even for staunch moral rights advocates.²⁵⁰ Even under VARA, the issue of waiver presented the greatest degree of difficulty, and at the time the statute was enacted, Congress directed the Copyright Office to commission a report on the impact of the statute's waiver provision.²⁵¹

In light of concerns regarding freedom of expression and artistic creativity, the costs of imposing a non-waivable right of integrity are

ground that it would conflict with the spirit of the current public display provision; therefore any right of attribution should be enacted at the federal level).

246. *See id.* at 92 (arguing for the incorporation of a right of attribution into the 1976 Act because such "would foster creativity without unduly burdening the financial incentive underlying the present copyright scheme").

247. During the presentation of an earlier version of this Article, noted first amendment advocate and scholar Diane Zimmerman observed that a positive right of attribution is the easiest of the sticks in the moral rights bundle to justify. DePaul University College of Law Colloquium Series (October, 2001).

248. *See, e.g.*, Lynn Thomson's position on why she failed to obtain a contract, discussed above in *Author-Stories*, *supra* note 3 at 54.

249. *Id.* at 44, 54.

250. *See American Marriage*, *supra* note 2, at 12–13 (discussing the inherent infeasibility of a truly non-waivable moral right).

251. VARA maintains a very limited waiver provision. Section 106A(e) (1) provides that although an author's VARA rights cannot be transferred, they can be waived "if the author expressly agrees to such waiver in a written instrument signed by the author." 17 U.S.C. § 106A(e) (1) (1994). That section also provides that the instrument must "specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified." *Id.* The final report on the impact of this waiver provision was issued by the Copyright Office in March, 1996. This report is discussed in depth in *VARA*, *supra* note 97, at 45–52.

much greater as compared to the right of attribution.²⁵² It is difficult to imagine situations in which a copyright user of an author's work would be significantly burdened by being required to attribute authorship of the work being used.²⁵³ Traditionally the right of attribution also guarantees an author the choice of remaining anonymous or electing attribution under a pseudonym.²⁵⁴ Under a formulation of the right of attribution that protects authors' choices of anonymity and pseudonymity, authors such as ghostwriters who wish to preserve their privacy also could invoke their rights of attribution. Such authors need not fear being forced to waive their right of attribution pursuant to industry custom or practice because this right would encompass more than just the positive right of attribution. Therefore, relatively few if any costs exist with a non-waivable right of attribution defined in this manner.

Given the heightened potential for consensus about the need for recognizing an explicit right of attribution, its adoption may be more realistic in practical terms than the adoption of a more comprehensive moral rights package. When VARA was enacted, those who desired stronger moral rights protections were handicapped by limited financial resources and their inability to unite.²⁵⁵ Although there are indications that moral rights is gaining strength as a political agenda,²⁵⁶ practical considerations suggest that a limited moral rights provision with more widespread acceptance²⁵⁷ has a greater chance of getting through Congress than more controversial measures.

252. See *American Marriage*, *supra* note 2, at 94–95 (discussing the problematic question of whether the right of integrity should be alienable).

253. See *supra* note 244 and accompanying text. Of course, issues can arise regarding the type of contribution qualifying someone as an “author.” See *infra* notes 258–259 and accompanying text.

254. VARA, *supra* note 97, at 1 n.2. It is worth noting that VARA does not guarantee an author the ability to exercise her rights of anonymity or pseudonymity. *Id.* at 2. For an interesting commentary on pseudonymity and the Shakespeare authorship doctrine, see John Paul Stevens, *Section 43(a) of the Shakespeare Canon of Statutory Construction: The Beverly W. Pattishall Inaugural Lecture in Trademark Law*, 1 J. MARSHALL REV. INTELL. PROP. L. 179, 188–90 (2002); see also *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (holding that a state prohibition on the distribution of anonymous campaign literature violates the First Amendment).

255. “*Author-Stories*”, *supra* note 3, at 41.

256. In recent years, the Screen Actors Guild has joined forces with the Motion Pictures Association of America in proposing a treaty as part of WIPO which would afford audiovisual performers both economic and moral rights. This effort represents the initial attempt by the United States to propose a moral rights provision for audiovisual performers on the international front. See “*Author-Stories*”, *supra* note 3, at 42.

257. Cf. Roger Syn, *Copyright G-d: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U. L. REV. 1, 16 (2001-02) (“[A]ll agree it is wrong to declare someone alive today to be the author of Shakespeare’s works.”).

Of course, if Congress were inclined to enact an explicit right of attribution, additional issues would surface immediately. First, what should be the specific statutory vehicle in which such a right should be contained? Second, what should be the scope of the right of attribution and to what types of works should it attach? Regarding the first issue, the easiest and least controversial route undoubtedly would be to amend the copyright statute to incorporate a right of attribution for all works subject to copyright protection. The enactment of a right of attribution outside of VARA avoids the thorny problem of whether VARA's provisions should be broadened to apply to all copyrighted works rather than only the limited types of visual art to which VARA currently applies.²⁵⁸

The questions of the scope of the right and to what works it should attach are more difficult. This difficulty is illustrated by the reality that linking the right of attribution to all works subject to copyright protection would not necessarily have provided any real assistance to either Professor Qimron or Lynn Thomson, although such a right would have benefited many of the other plaintiffs whose cases were discussed throughout this Article. Qimron's situation raises the fascinating question of whether the right of attribution should attach to works that may not be copyrightable in the technical sense because they lack originality.²⁵⁹

258. See *supra* notes 10–12 and accompanying text.

259. See *supra* note 61 and accompanying text. Under United States law, the governing standard for determining whether Qimron's reconstruction of the Dead Sea Scroll fragments is sufficiently original to warrant copyright protection was articulated by the United States Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). In *Feist*, the plaintiff's telephone directory was a compilation, and such works generally are vulnerable to a lack of originality to the extent they largely incorporate material which is factual and hence uncopyrightable. Under *Feist*, the standard for originality, though interpreted as constitutionally mandated, is quite modest. Clearly, Qimron's crafting the reconstructed text seems very different from alphabetizing names in a telephone directory. Some might argue that Qimron's efforts are akin to a translation, and copyright law historically has extended protection to translations. See *Grove Press, Inc. v. Greenleaf Pub. Co.*, 247 F. Supp. 518, 524 (E.D.N.Y. 1965); *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664, 666 (7th Cir. 1950). See also *Follett v. New Am. Library, Inc.*, 497 F. Supp. 304, 311 (S.D.N.Y. 1980) (noting that edited versions of an existing manuscript can be copyrightable). Just as a translator must exercise judgment about word choices in the translation process, so did Qimron make certain judgments regarding the reconstructed fragments. *But see* Elkin-Koren, *supra* note 50, at 445 (suggesting that deciphering and translating represent completely different endeavors and that Qimron's deciphered scroll is not entitled to copyright protection). On the other hand, *Feist* clearly condemns all "sweat of the brow" works as not copyrightable. See Marci A. Hamilton, *Justice O'Connor's Opinion in Feist Publications, Inc. v. Rural Telephone Service Co.: An Uncommon Though Characteristic Approach*, 38 J. COPYRIGHT SOC'Y. 83, 87–88 (1990) (observing that "[c]learly, the Court could have reached the result—that telephone directory white pages are not copyrightable—without condemning all "sweat of the brow" reasoning to purgatory" and explaining the opinion as an example of consensus building). See also Cohen, *supra*

Thomson's situation raises the question of how much of a work one has to "author" to be considered entitled to a positive right of attribution in conjunction with the work as a whole.²⁶⁰ Cases such as *Qimron* and *Thomson* essentially raise the more complicated question of who constitutes an author for purposes of being entitled to a right of attribution,²⁶¹ and in different ways, these two cases push the frontiers of the concept of "authorship."

The fact that these issues are troublesome and likely to cause controversy and debate do not justify Congress' failure to take a first step that is very much needed at this time. As this Article demonstrates, the void left by the absence of an explicit right of attribution in our legal system is not being filled by any other viable doctrine. Admittedly, Congress may not be able to tackle initially all of the difficult issues that might arise in conjunction with the application of an explicit, non-waivable right of attribution. By both design and practice, however, statutes are intended to be interpreted by the courts, and amended by Congress if time proves modifications are necessary.²⁶²

CONCLUSION

Although the federal enactment of an explicit right of attribution represents a relatively modest step as compared with the passage of a more complete, and broadly crafted, moral rights package, such a measure is significant on a number of fronts. The enactment of a right of attribution applicable to any author whose work is subject to copyright protection would allow our legal system to become acclimated to moral rights doctrine in a context that is likely to be relatively uncontroversial.²⁶³ Moreover, an explicit, non-waivable right of

note 25, at 383 (discussing the various types of evidence employed by scholars who engage in reconstructing scroll fragments and the painstaking effort such an endeavor requires).

260. For an in depth treatment of this issue, see "Author-Stories", *supra* note 3, at 43-64. See also David Marchese, *Joint Ownership of Intellectual Property*, 1999 E.I.P.R. 21(7), 364-69 (examining joint ownership and authorship under English law).

261. See *Follett v. New Am. Library, Inc.*, 497 F. Supp. 304, 312 (S.D.N.Y. 1980) ("The concept of authorship is elusive and inexact."). See also Lee, *supra* note 236, at 839 (raising and dismissing the concern that an extensive moral rights system in the United States is not feasible because it would necessitate too much line drawing regarding authorship status).

262. Cf. Lee, *supra* note 236, at 840 (noting that Congress does not necessarily need to be "correct in its first effort" in enacting a right of integrity provision responsive to the dignity of authors).

263. See Lee, *supra* note 236, at 840 ("[T]he limitation to visual artists for the protection of moral rights is an unusually stringent component of American law that continues to draw suspicion, and the

attribution would convey the critical message to authors that this country takes their personality interests seriously. Under the current legal framework, these authorial interests are under-recognized in our legal landscape and therefore are protected sporadically and unpredictably. Copyright law's focus is on economic protection rather than the spiritual side of the creation process. The prime concern of section 43(a) of the Lanham Act is consumer protection. Thus, to the extent authors do receive protection for their personality interests under either of these doctrines, such protection is the result of particular circumstances working in the authors' favor. The adoption of an explicit right of attribution is a measured, but effective, means of recognizing important interests currently lacking protection in the United States.

argument that virtually 'anything under the sun' could receive protection should not so sweepingly deprive all other authors of the personal interests stemming from their work.").

