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Notice of Inquiry: Study on the Moral Rights of Attribution and Integrity (FR Doc. 2017–01294; Copyright Office Docket Number 2017-2)	**COMMENTS OF THE NATIONAL WRITERS UNION AND SCIENCE FICTION AND FANTASY WRITERS OF AMERICA**

National Writers Union

(UAW Local 1981, AFL-CIO)

<http://www.nwu.org>

Science Fiction and Fantasy Writers of America, Inc.

<http://www.sfwa.org>

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1. About the commenters and our interest in this proceeding

The National Writers Union (UAW Local 1981, AFL-CIO) and the Science Fiction and Fantasy Writers of America, Inc. (SFWA) welcome this inquiry and the opportunity to submit these comments in response to the Notice of Inquiry by the U.S. Copyright Office, "Study on the Moral Rights of Attribution and Integrity," FR Doc. 017–01294, Copyright Office Docket Number 2017-2, 82 *Federal Register* 7870-7875 (January 23, 2017).

The National Writers Union (NWU) is a national labor union that advocates for freelance and contract writers. The NWU includes local chapters as well as at-large members nationwide and abroad. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, fiction and nonfiction book authors, journalists, business and technical writers, Web site and e-mail newsletter content providers, bloggers, poets, novelists, playwrights, editors, and academic writers. The NWU is a national amalgamated union (Local 1981) of the United Auto Workers, AFL-CIO, and is one of the U.S. affiliates of the International Federation of Journalists (IFJ), the International Authors Forum (IAF), and the International Federation of Reproduction Rights Organizations (IFRRO).

The Science Fiction and Fantasy Writers of America, Inc. (SFWA) is a membership organization of over 1,800 commercially published writers of science fiction, fantasy, and related works. Its membership includes writers of both stand-alone works and short fiction published in periodicals, anthologies, and other collations. Of particular note, SFWA's membership includes a significant number of authors' estates, and SFWA has a long-standing record of advocating for the interests of authors' estates against those who would infringe on those estates' rights for their own profit. SFWA is not a subsidiary of any other entity, and is entirely owned by its

membership. SFWA has no subsidiaries or other ownership interest in any other organization that may be affected by this rulemaking.

2. Introduction and overview

As a party to the Berne Convention and the WIPO Copyright Treaty, the United States is obligated to guarantee the inalienable moral rights of authors with respect to attribution of authorship and protection of the integrity of their work, independently of authors' economic rights and even after any transfer of those rights[1]; to enact laws providing adequate and effective means of redress for violations of these rights[2], without requiring any formalities or evidence of pecuniary damages as a prerequisite to adequate and effective redress[3]; and to require mention of the source and name of the author whenever "fair use" is made of a written work[4].

The U.S. has failed to enact laws protecting these rights at all, much less providing the "adequate" and "effective" remedies, not dependent on formalities of a claim of monetary damage, surviving any transfer or assignment of economic rights, and applicable to "fair use" and other exceptions to economic rights, to which the U.S. has committed itself by treaty.

Defenders of the U.S. failure to effectuate its treaty obligation to protect the moral rights of authors have pointed to a variety of U.S. statutes and largely untested (because prohibitively expensive to test) legal theories which might, in certain limited circumstances (but not in most circumstances), provide some (but not all) writers with some (but not all) theoretical (but in

1 Berne Convention for the Protection of Literary and Artistic Works, as amended, Article 6*bis*
2 WIPO Copyright Treaty, Article 14
3 Berne Convention, Article 5(2)
4 Berne Convention, Article 10(3)

practice typically unavailable) means of enforcing some (but not all) of these rights. These failings are discussed further below in response to specific questions in the Notice of Inquiry.

Rather than seeing these failings as gaps in a legal framework that generally protects the moral rights of authors, these situations in which writers lack legal redress should be seen as the norm under current U.S. law. Situations in which it is feasible for an author to enforce any of her moral rights in the U.S. are the rare exceptions.

As discussed further below, none of the patchwork of laws mentioned in the Notice of Inquiry as potentially providing a substitute for straightforward moral rights legislation actually serves to provide meaningful protection for writers' moral rights. Most of these laws are, in most cases, irrelevant, ineffective, unavailable, and/or prohibitively expensive for writers to use to provide redress for typical violations of writers' moral rights.

To fulfill U.S. treaty commitments, and to protect the human rights of writers, new U.S. legislation is needed to recognize the inalienable moral rights of writers, even when economic rights have been transferred and in cases of "fair use" or other exceptions to economic rights, and to establish effective means of enforcing these rights that do not depend on formalities.

3. Specific questions in the Notice of Inquiry

1. **"Please comment on the means by which the United States protects the moral rights of authors, specifically the rights of integrity and attribution. Should additional moral rights protection be considered? If so, what specific changes should be considered by Congress?"**

It is impossible to comment on "the means by which the United States protects the moral rights of authors," since in most circumstances there are no such means in U.S. law.

2. **"How effective has section 106A (VARA) been in promoting and protecting the moral rights of authors of visual works? What, if any, legislative solutions to improve VARA might be advisable?"**

Many of our members are creators of visual as well as written works. It is increasingly common, for example, for a single journalist or freelance creator of a work published in print or online to be expected to provide both text and photographs and/or illustrations, where in the past illustrations or photographs might have been commissioned separately.

However, as an organization of writers, we will not presume to speak for visual artists on this question. The business models of visual artists and writers, and the markets for visual and written work, are significantly different. As writers, we will note with respect to VARA only that (A) writers are at least as deserving and as much in need of protection for our moral rights as ore visual artists, and (B) VARA does nothing to protect the moral rights of writers.

3. **"How have section 1202's provisions on copyright management information been used to support authors' moral rights? Should Congress consider updates to section 1202 to strengthen moral rights protections? If so, in what ways?"**

We are not aware of any case in which section 1202 of the Copyright Act has successfully been used by a writer to obtain redress for violations of her moral rights.

Nor do we believe that section 1202 provides a useful or appropriate starting point for attempting to craft new statutory protections that would genuinely protect writers' moral rights.

Regardless of whether attribution can or should be considered to be "copyright management information," any rights under section 1202 belong to the holder of economic rights, and depend on the inclusion of attribution information in CMI by a publisher, over which the writer typically has no control. Section 1202 provides no redress by an author for a publisher's failure to include author attribution in CMI, and fails to recognize any right which is independent of economic rights or which survives transfer or assignment of those rights.

4. **"Would stronger protections for either the right of attribution or the right of integrity implicate the First Amendment? If so, how should they be reconciled?"**

Pursuant to the U.S. Constitution, treaties to which the U.S. is a party, including the Berne Convention and the WIPO Copyright Treaty, are the highest law of the land. Whenever possible, they should be interpreted consistently with all other provisions of the Constitution.

Courts already have extensive experience in reconciling prohibitions on infringement of economic rights in copyrighted works with the First Amendment. In practice, we do not believe that there should be any greater difficulty interpreting the Berne Convention and its protections for authors' moral rights in a manner consistent with the First Amendment than there is in interpreting any other human rights treaties in a manner consistent with the First Amendment.

We recognize that conflicts may arise between Article 6*bis* of the Berne Convention and some current U.S. law regarding parody and satire. As is always the case with the interpretation and application of Constitutional and treaty provisions, these are questions for the courts and not

the Copyright Office. Any conflict between provisions of the Berne Convention or implementing legislation and then-prevailing First Amendment law should be resolved judicially, without reliance on or deference to any statement or interpretation by administrative agencies.

5. **"If a more explicit provision on moral rights were to be added to the Copyright Act, what exceptions or limitations should be considered? What limitations on remedies should be considered?"**

Moral rights are inalienable personal rights of the creator. The Berne Convention does not provide for exceptions or limitations to moral rights. In particular, Article 10(3) of the Berne Convention could scarcely be more explicit that the author retains her moral right to attribution even when a work is used pursuant to an exception such as that in U.S. copyright law for "fair use."

With respect to remedies, it would need to be made explicit in the statute that a cause of action by the author exists for a violation of moral rights even if no pecuniary damages are alleged. Remedies would need to be effective and available without formalities such as registration and irregardless of any transfer or assignment of some or all economic rights in the work.

6. **"How has the *Dastar* decision affected moral rights protections in the United States? Should Congress consider legislation to address the impact of the Dastar decision on moral rights protection? If so, how?"**

Dastar Corp. v. Twentieth Century Fox Film Corp. ("Dastar") was an action brought in Federal court under the Lanham Act by one corporation against another corporation, at a cost of at least hundreds of thousands of dollars and more likely millions of dollars in legal fees for each party. Such an action is almost never a feasible option for an individual writer, especially for non-attribution or violation of the integrity of a single work. Moreover, the writers of the works at issue in *Dastar* would have had no standing to bring such an action, since they had assigned their (economic) rights in the work either under the "work for hire" doctrine or by other contracts. And even the corporate plaintiff had to plead economic damages to establish standing.

In almost all real-world situations, regardless of the *Dastar* decision, the Lanham Act neither protects nor provides effective remedies for violations of authors' moral rights. The Lanham Act does not provide a useful starting point for legislation to protect those rights.

7. **"What impact has contract law and collective bargaining had on an author's ability to enforce his or her moral rights? How does the issue of waiver of moral rights affect transactions and other commercial, as well as non-commercial, dealings?"**

Collective bargaining as a means to protect moral or economic rights is unavailable to freelance writers in the U.S. because it could be held to violate antitrust law.

If waiver of moral rights were permitted as an ordinary matter of contract, the disparity in bargaining power between publishers and writers would likely lead, in practice, to the inclusion of blanket waivers of moral rights in almost all employment or licensing agreements. This would defeat both the letter and the spirit of the Berne Convention, which requires that the author of a work maintains her moral rights "even after the transfer of [economic] rights."

The main use of contract law by writers to attempt to protect their moral rights is the offering of written work for copying and/or other use pursuant to Creative Commons licenses.[5]

Creative Commons licenses are a family of standardized licenses. Notably, no remuneration is required for any use or reproduction permitted by any Creative Commons license. Creative Commons licenses are not used to enforce economic rights.

On the other hand, any work offered under a Creative Commons license could have been placed into the public domain and thereby made available for reproduction without restriction.

The only reason to offer work under a Creative Commons license, rather than placing it into the public domain, is to enforce noneconomic restrictions on its use, i.e., moral rights.

The standard restrictions on use for which Creative Commons licensing is used in an attempt to enforce correspond closely to the moral rights of attribution and integrity.

The first set of Creative Commons licenses included versions that did not require attribution, but they were so little used that they were eliminated from all subsequent versions.[6] "Our web stats indicate that 97-98% of you choose Attribution, so we decided to drop Attribution as a choice from our license menu — it's now standard."[7] In all versions of Creative Commons licenses since version 1.0, "One condition of all CC licenses is attribution."[8]

Another of the most common (although, unlike attribution, not universal) conditions of Creative Commons licenses is a restriction on the distribution of derivative works. In effect, a Creative Commons "No Derivatives" license is a way to try to protect the integrity of the work.

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5 <https://creativecommons.org/licenses/>

6 "All of the CC licenses require attribution where 'BY' is a license element, which is all but five of the eleven version 1.0 licenses." <https://wiki.creativecommons.org/wiki/License Versions>

7 "Announcing (and explaining) our new 2.0 licenses", by Glenn, Creative Commons blog, May 25, 2004, <https://creativecommons.org/2004/05/25/announcingandexplainingournew20licenses/>

8 "Use & remix", Creative Commons Corp., <https://creativecommons.org/use-remix/>

The widespread use of Creative Commons licensing reflects the widespread desire of writers to protect their moral rights, even with respect to uses of their work for which they are not seeking remuneration, and the primacy of attribution and integrity among those moral rights.

Unfortunately, whether the conditions of use imposed by a Creative Commons license, including attribution, can be enforced against a user in the absence of any claim of economic damages remains an open question. Any enforcement of Creative Commons licensing terms would require Federal litigation, legal fees for which could not be recovered unless copyright in the work had been timely registered. And, of course, the conditions of use under a Creative Common license cannot be enforced against unlicensed copying or other use of a work pursuant to "fair use" or other exceptions to copyright.

Creative Commons licensing is indicative of writers' desire to protect their moral rights, but it is not effective or adequate as a means of doing so. New legislation is called for.

8. **"How have foreign countries protected the moral rights of authors, including the rights of attribution and integrity? How well would such an approach to protecting moral rights work in the U.S. context?"**

Most other parties to the Berne Convention fulfill their treaty obligations with respect to the moral rights of creators of written work through explicit statutory protections and legal mechanisms for enforcement of those rights without formalities. We see no reason to think that this approach would not work in the U.S. In particular, we see no reason to think that the sky would fall if U.S. law were brought into compliance with the Berne Convention through the elimination of copyright registration formalities as a prerequisite for some or all remedies. We

encourage the U.S. to learn from these foreign examples and to enact explicit statutory protections and redress mechanisms for violations of the the moral rights of writers.

We expect that the Copyright Office will receive comments from foreign authors and organizations representing them, including the International Federation of Journalists (IFJ), in response to its Notice of Inquiry. We urge the Copyright Office and Congress to take into consideration the submissions of those organizations in response to the Notice of Inquiry.

9. **"How does, or could, technology be used to address, facilitate, or resolve challenges and problems faced by authors who want to protect the attribution and integrity of their works?"**

The absence of statutory recognition of writers' moral rights, or of effective provisions to enforce those rights, is a legal and not a technological problem. It will not be solved by some magic bullet of new technology. It requires Congressional action.

10. **"Are there any voluntary initiatives that could be developed and taken by interested parties in the private sector to improve authors' means to secure and enforce their rights of attribution and integrity? If so, how could the government facilitate these initiatives?"**

As an interested party in the private sector, the NWU and SFWA have undertaken a variety of voluntary initiatives, such as filing these comments and educating our members about them, to make our members and other writers aware of their rights, including their moral rights, and to assist them in collective action to urge Congress to incorporate those rights into U.S. law.

The government could best facilitate these initiatives by enacting moral rights legislation.

Writers' ability to defend our rights through private initiatives is deterred by the threat of antitrust action against freelancers who attempt to organize for collective action. The U.S. government could facilitate our efforts to defend our rights through legislation explicitly exempting organizing and collective action by all types of freelance workers, including writers, from antitrust sanctions.

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

(a) Fair use and other exceptions to economic rights

Contract law cannot protect writers' moral rights with respect to "fair use" and unlicensed copying or other use pursuant to exceptions or limitations to copyright, where there is no contract. But Article 10(3) of the Berne Convention makes clear that writers retain, and are entitled to enforce, moral rights and specifically the right of attribution with respect to such uses.

Some commentators have suggested that U.S. courts could have chosen to incorporate a requirement to respect moral rights in the case law defining criteria for "fair use."

But whether or not U.S. courts could have done so, they have not. We know of no case in which a U.S. court has included considerations of moral rights in its assessment of "fair use."

As the experience with Creative Commons licenses discussed above suggests, writers want to protecting their moral rights, even with respect to unremunerated copying. Legislation is necessary to protect the moral rights of authors when their work is copied or used as "fair use."

(b) Works made for hire

The moral rights of authors are human rights: personal rights of individual creators. U.S. law allows the transfer of all economic rights to an employer or publisher through a contract designating certain works as "works made for hire". But Article 6*bis*(1) of the Berne Convention requires that the author retains moral rights "even after the transfer of the [economic] rights" to the work. Legislation is necessary to protect the moral rights of authors of "work for hire."

(c) Copyright registration formalities

The provision of Article 5 of the Berne Convention that "The enjoyment and the exercise of these rights shall not be subject to any formality" applies to moral as much as to economic rights. The requirement for registration of copyright as a prerequisite to certain remedies under U.S. law imposes a formality prohibited by the Berne Convention.

The consequences of prohibited formalities may be even more invidious for moral rights than for economic rights. As we have noted in our previous submissions to the Copyright Office, registration of certain types of works is prohibitively burdensome and expensive.[9] But as noted above, authors are often interested in protecting their moral rights, even with respect to works for which they are seeking no remuneration. And it is these works for which authors are receiving little or no remuneration that they are least likely to be able to afford to take the time and spend the money to register.

9 "Group Registration of Contributions to Periodicals: Comments and Petition For Rulemaking of the National Writers Union, American Society of Journalists and Authors, Science Fiction And Fantasy Writers of America, and Horror Writers Association" (January 30, 2017), available at <https://nwu.org/wp-content/uploads/2017/02/NWU-registration-30JAN2017.pdf>

Meaningful protection of moral rights for all works, even works with little monetary value, and effective and accessible remedies for violation of those rights require repeal of the registration requirements in section 411 and 412 of the Copyright Act.

(d) Works with multiple authors

One of the major difficulties with both Article 6*bis* of the Berne Convention and most national legislation based upon it is failure to consider works with multiple and joint authors. For example, what moral rights should Frederick Dannay and Manfred Lee (who wrote jointly as "Ellery Queen") have had during their lives, or should their heirs now have? What about during the life of one author after another has passed, or when multiple authors are formally credited, such as or Carl Bernstein and Bob Woodward, who were credited as joint authors of the book *All the President's Men* and later involved in a dispute over screenplay credit? There are also works made for hire involving multiple authors. Who controls the moral rights for the "Darth Vader Theme" music from Star Wars, for example? Although it was composed as a work made for hire, to become part of a motion picture, it is also performed separately from the film itself. Leaving aside the Lanham Act issues that this raises, does the composer and/or scriptwriter have any moral rights over individually copyrightable works embedded in that film?

We do not now suggest answers to these questions. However, we believe that considering these questions and providing at least preliminary answers will be necessary to any effective legislation on moral rights, or indeed any other attempt at a solution that covers these cases.

4. Conclusions and recommendations

The moral rights of authors are, as the term itself suggests, a matter of morality and fairness. Having recognized the ethical imperative of respect for the human rights of writers, and having committed itself by treaty to enact laws recognizing these rights and providing adequate and effective remedies for violations of these rights – without formalities, independently of writers' economic rights, and even after any transfer or assignment of economic rights or when a work is used as "fair use" -- the U.S. should fulfill its commitment to writers and to the other parties to these treaties by enacting explicit Federal statutes to recognize and protect these rights.

Respectfully submitted,

/s/

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