

Digital Attribution: Copyright and the Right to Credit

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Digital Attribution: Copyright and the Right to Credit

Greg Lastowka*

If [a publisher] does not sell copies at a profit, he will soon be an ex-publisher. The author, however, may be interested in the widest possible dissemination of his writings, and if someone were willing to reprint 10,000 copies of his articles for free distribution, that would provide a great additional profit to the author in terms of professional credit.

-- Ralph R. Shaw¹

Introduction: Ralph Shaw

The above quote is taken from a May 1951 article in the magazine *Science* entitled “Copyright and the Right to Credit.”² In the article, Ralph Shaw argued that copyright law paid insufficient attention to the attribution interests of authors. Shaw observed that the straightforward pecuniary interests of publishers diverged from the more complex reputation-based interests of authors. He noted how authors and publishers might have differing views regarding the benefits of providing thousands of copies of a work for “free distribution.” Of course, since he had just pointed out that no sensible publisher would be interested in giving away free works, the example he used to demonstrate these divergent motivations was fanciful.

Ralph Shaw was a librarian, not a lawyer.³ He was interested in information science, of course, but he also pursued various other projects. One of those projects

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¹ Ralph R. Shaw, *Copyright and the Right to Credit*, 113 *SCIENCE* 571, 572 (1951).

² *Id.* Shaw’s article about credit was an excerpt from his book, which was published the small press that he founded. See RALPH SHAW, *LITERARY PROPERTY IN THE UNITED STATES* (Scarecrow Press 1950).

³ Shaw had a prominent career as a librarian. He served as the Dean of the Library and Information Sciences Department at Rutgers University and as the chief librarian at the United States

was advancing the technologies of information storage and retrieval. Notably, Shaw was instrumental in funding one prototype version of Vannevar Bush's "Memex" machine, often referenced today as the conceptual predecessor of the World Wide Web.⁴ The "Rapid Selector" that Shaw and Bush developed together was a mix of circuitry and microfilm that was about the size of a car. It reportedly scanned 10,000 frames of text each minute in search of bits of information.⁵ The unveiling of this "electronic marvel" was reportedly attended with substantial publicity.⁶

But both of Shaw's projects described here—his attempt to get copyright to incorporate a right to credit and his attempt to revolutionize information dissemination and retrieval practices with new technology—did not pan out very well. The logic of copyright law continued to be guided by the interests of publishers, not authors. And the Rapid Selector project was largely a failure due to technical problems.⁷ As it turned out, the future of access to information lay not with microfilm, but with a candidate that must have seemed highly unlikely in 1951: the behemoth calculator ENIAC, a \$500,000 monstrosity that had the primary task of working on firing tables for U.S. artillery shells. ENIAC was obviously not part of a network and its information storage capacity was limited to a miniscule (by today's standards) 16K of memory.⁸

Department of Agriculture. Dean Eugene Garfield, *To Remember Ralph Shaw*, 23 CURRENT CONTENTS 5-11 (June 5, 1978), available online at <<http://www.garfield.library.upenn.edu/essays/v3p504y1977-78.pdf>>.

⁴ See Vannevar Bush, *As We May Think*, ATLANTIC MONTHLY, July 1945, at 101.

⁵ Some of those who have studied the history of the Memex are a bit critical of the popular credit given to Bush for both its conception and implementation. Michael K. Buckland, *Emanuel Goldberg, electronic document retrieval, and Vannevar Bush's Memex*, 43 J. AM. SOC'Y INFO. SCI. 284 (1992) (suggesting Bush's contemporaries were more inventive and had more imaginative understandings of the potentials of information technology); Colin Burke, *The other Memex: The tangled career of Vannevar Bush's Information Machine, The Rapid Selector*, 43 J. AM. SOC'Y INFO. SCI. 648 (1992) (suggesting that Bush's work on practical versions of the Memex was a history of avoidable design failures).

⁶ Dean Eugene Garfield, *To Remember Ralph Shaw*, 23 CURRENT CONTENTS 5-11 (June 5, 1978), available online at <<http://www.garfield.library.upenn.edu/essays/v3p504y1977-78.pdf>>.

⁷ Colin Burke, *The other Memex: The tangled career of Vannevar Bush's Information Machine, The Rapid Selector*, 43 J. AM. SOC'Y INFO. SCI. 648 (1992).

⁸ Those excited about digital computers did see their potential as information retrieval devices. Like all visionaries, though, they were slightly off:

You will be able to dial into the catalogue machine 'making biscuit.' There will be a flutter of movie film in the machine. Soon it will stop, and, in front of you on the screen will be projected the part of the catalogue which shows the names of three or four books containing recipes for biscuits.

EDMUND C. BERKELEY, GIANT BRAINS: OR MACHINES THAT THINK 181 (1949) (quoted in Michael K. Buckland, *Emanuel Goldberg, electronic document retrieval, and Vannevar Bush's Memex*, 43 J. AM. SOC'Y INFO. SCI. 284, 286 (1992)). Edmund Berkeley, who wrote this, was the founder of the

However, the Memex that Shaw and Bush sought to create turned out to be ENIAC's descendant: the World Wide Web delivers a hyperlinked high-speed information environment that Shaw and Bush could not have imagined. Most importantly for the purposes of this paper, with the advent of the World Wide Web, just as Shaw predicted, authors are now giving away thousands—even millions—of free “reprints” and realizing “a great additional profit... in terms of professional credit.”⁹

However, copyright law has largely ignored this fact. Shaw's “right to credit” is still as much a fantasy as the World Wide Web was half a century ago. This article takes up Ralph Shaw's call for a right to credit in a new era of networked information systems. Copyright law should be adjusted to take into account the growing importance of open access forms of copyright creation—a term I'll shorten here to “open copyright”¹⁰—and reputation economies. Prioritizing the legal importance of attribution in copyright is a change that is long overdue. The contemporary digital environment provides an opportunity and an important additional reason to revisit Shaw's salient distinction between the motivations of authors and publisher.

This article proceeds in three sections. In the first section, I describe the ways in which copyright has so far responded to the “digital dilemma.” I point out that the dilemma is often overlaid in Washington and conceived of in the wrong terms. Despite the fact that open copyright has played a key part in the social utility of the World Wide Web, the law has largely ignored its impact, focusing instead on the perspective of publishers. I explain why the phenomenon of open copyright is not primarily an ideological agenda, but a market transformation. Attribution and social reputation markets are essential to many who create in this environment.

In the second part, I look at how intellectual property law addresses authorial attribution interests. I begin with an extended discussion of advertising and law, drawing parallels between open copyright and advertising. I then move on to copyright and trademark law, noting that protections for authorial attribution are as sorely lacking today as they were in Shaw's day. I conclude by noting how, despite the formal deficit in statutory intellectual property law, there are hopeful signs that a new interest in authorial attribution is emerging.

Association of Computing Machinery and has also been described sometimes as the creator of the first “personal computer,” Simon. Peter J. Denning, *Edmund C. Berkeley—ACM founder*, 31 COMM. OF THE ACM 781-82 (June 1988).

⁹ Ralph R. Shaw, *Copyright and the Right to Credit*, 113 SCIENCE 571, 572 (1951).

¹⁰ For a description of what “open access” means, see Peter Suber's overview of the term: <<http://www.earlham.edu/~peters/fos/overview.htm>>. I use the term “open copyright” to emphasize that the material at issue here is formally subject to copyright control and not material that is in the public domain.

Finally, in a third part, I suggest one concrete proposal for adapting copyright to better fit online reputation economies. I propose formally including attribution as a fifth factor in the statutory fair use analysis under 17 U.S.C. §107. There are a handful of cases that consider attribution and fair use, but I argue that attribution deserves specific mention in the statutory language regarding fair use.

I. Copyright & Digital Networks

A. The Digital Dilemma & Legal Responses

During the last decade the costs of information capture, replication, manipulation, and distribution have been reduced dramatically by widespread digital tools and networks. Yet in copyright policy circles, this change has (perhaps strangely) been framed not as a social boon, but as a “digital dilemma” facing the law of copyright.¹¹ The perceived problem is that with more powerful and less expensive technologies, the public has greater power to infringe copyrights by reproducing and disseminating works. Even highly dense and complex audiovisual information objects such as Hollywood films are now being subject to unauthorized transmission and replication through digital networks. Many of those in the copyright industries regularly express dismay at the extent to which their enforcement efforts are failing to prevent rampant digital piracy. Reports of copyright piracy can be found practically every day in the news media.¹²

Copyright holders have attempted to respond to the “digital dilemma” in several ways. First, they have lobbied for and obtained stronger copyright laws. These laws are intended to send stronger deterrent signals to potential infringers. Criminal penalties for copyright infringement have been increased. The No Electronic Theft Act is one prominent example.¹³ A second response has been the employment of extra-legal technologies and contractually-based practices to achieve copyright-related outcomes that cannot be achieved through the law of copyright.¹⁴

¹¹ See COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS, COMPUTER SCIENCE & TELECOMMUNICATIONS BOARD, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (National Academy of Sciences Press 2000).

¹² To get a contemporary snapshot of the latest new articles on piracy, see <<http://news.google.com/nwshp?hl=en&tab=wn&q=piracy>>.

¹³ See generally Eric Goldman, *A Road to No Warex: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 OREGON L. REV. 369 (2003).

¹⁴ As Jessica Litman has noted, attempts to achieve functional as well as legal control over reproduction are nothing new. Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 34 (1996).

The popular use of “digital rights management” (“DRM”) today often constitutes an attempt to achieve practical results through technology that effectively mirror or extend the proprietary rights envisioned by copyright law.¹⁵

Additionally, new laws have been created to respond directly to the digital environment.¹⁶ The Digital Millennium Copyright Act (“DMCA”) is probably the most well-known example a law that creates a new breed of para-copyright entitlements.¹⁷ The anti-circumvention provisions of the DMCA effectively combine with the DRM controls described above to create a “technological” system of copyright.¹⁸ Rather than protecting works, in other words, the DMCA’s anti-circumvention provisions protect the integrity of the digital protections that enclose and encode works.¹⁹ Many legal scholars and public interest groups have criticized these technological protections as operating in ways that are contrary to the public interest.²⁰

During the last two decades, the success of digital copyright reforms has been debatable. The new technological wave of copyright has generally been popular and resilient in legislatures and courtrooms.²¹ Yet news stories suggest no abatement in digital piracy—things are said to be getting constantly worse for the copyright industries. Academic commentary, on the other hand, has become increasingly

¹⁵ See Dan L. Burk, *Legal and Technical Standards in Digital Rights Management Technology*, 74 FORDHAM L. REV. 537, 538, 548, 557 (2005).

¹⁶ See Dan L. Burk, *Legal and Technical Standards in Digital Rights Management Technology*, 74 FORDHAM L. REV. 537, 548, 557 (2005); Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L.J. 174-78 (1998); Pamela Samuelson, *Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999).

¹⁷ See Digital Millennium Copyright Act, 17 U.S.C. § 1201 *et seq.*; *Medical Broadcasting Co. v. Flaiz*, Civ. No. 2003 U.S. Dist. LEXIS 22185 at *8 (E.D. Pa. Nov. 25, 2003) (“[C]laims under the DMCA, however, are simply not copyright infringement claims and are separate and distinct from the latter.”); 3 M. & D. Nimmer, NIMMER ON COPYRIGHT, § 12A.18[B] (2003).

¹⁸ See James Gibson, *Re-Reifying Data*, 80 NOTRE DAME L. REV. 163, 167-70 (2004).

¹⁹ These provisions of the DMCA have been widely criticized. See, e.g., Lawrence Lessig, *Law Regulating Code Regulating Law*, 35 LOY. U. CHI. L.J. 1, 7 (2003); Timothy B. Lee, *Circumventing Competition: The Perverse Consequences of the Digital Millennium Copyright Act*, CATO Policy Analysis No. 564 (Mar. 21, 2006), available online at: http://www.cato.org/pub_display.php?pub_id=6025.

²⁰ See, e.g., LAWRENCE LESSIG, FREE CULTURE (2004); LAWRENCE LESSIG, THE FUTURE OF IDEAS 187-190 (2001); JESSICA LITMAN, DIGITAL COPYRIGHT 151-165 (2001); Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337 (2002).

²¹ *Universal City Studios v. Corely*, 273 F.3d 429 (2d Cir. 2001).

critical of expansions in the strength of copyright law and has pointed out how the public interest in copyright law has been largely ignored by lawmakers.²²

B. The Growth of Open Copyright

The “digital dilemma” story—a story of piracy and legal response—takes the forefront in media stories about copyright today. A lesser appearance is sometimes made by stories that criticize the overextension of intellectual property laws. Yet perhaps the most important story to be told about digital networks and copyright goes untold because it is so commonplace and is perceived as generally good news. The last ten years has brought society an incredible wealth of access to copyright-protected content that is made freely available online, with the permission of copyright holders.²³

The creators of much of the popular content on the Wide Wide Web do not seek payment in return for access to their work. Much of the essential content on the World Wide Web is “posted” so that it is freely accessible to anyone with an Internet connection. Creating such a universally accessible sea of interlinked information had long been a dream of technologists,²⁴ and the drive to share useful information resources with distance locales through electronic networks was one of the primary reasons for the original creation of the Internet.²⁵

The realm of “open access”²⁶ materials made publicly available on the Web is essentially a realm of “open copyright.” I use the term “open copyright” rather than “open access” here to point up the fact that much of the universally accessible information we rely upon today is protected by copyright law. The creators of Web-posted copyright-qualifying information goods are generally copyright proprietors, having rights no different than any other copyright proprietors. The creator of an original story posted on a Web page has a standing under copyright law that is essentially no different than the author of a New York Times bestseller.

²² See, e.g., LAWRENCE LESSIG, *FREE CULTURE* (2004); LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 187-190 (2001); JESSICA LITMAN, *DIGITAL COPYRIGHT* 151-165 (2001); Jessica Litman, *War Stories*, 20 *CARDOZO ARTS & ENT. L.J.* 337 (2002).

²³ See F. Gregory Lastowka, *Free Access and the Future of Copyright*, 27 *RUTGERS COMP. & TECH. L.J.* 293 (2001); David G. Post, *His Napster's Voice*, 20 *TEMP. ENVTL. L. & TECH. J.* 35, 43 (2001) (reflecting upon the unprecedented and unpredicted vitality and diversity of Internet-based content).

²⁴ See Vannevar Bush, *As We May Think*, *THE ATLANTIC MONTHLY*, at 101-08 (July 1945), at <http://www.theatlantic.com/unbound/flashbks/computer/bushf.htm> (last visited Aug. 1, 2001).

²⁵ KATIE HAFNER & MATTHEW LYON, *WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET* 38 (1996) (describing J.C.R. Licklider's “Intergalactic Computer Network”).

²⁶ See *supra* note ___ (regarding Peter Suber's overview of “open access”).

One of the most interesting features of open copyright today is that it is dominated by amateurs.²⁷ Dan Hunter and I have used the term “amateurs” to describe most open copyright creators not because their work is of low quality, but because it is shared outside of the traditional profit-oriented chains of copyright production. There are numerous examples of major genres of amateur-dominated open copyright today: *e.g.*, blogs posted to the servers of Blogger.com and Typepad,²⁸ encyclopedia entries posted to the servers owned by Wikipedia,²⁹ brief films posted to the servers owned by YouTube,³⁰ digital photos posted to servers of Flickr,³¹ personal profiles, images, and audio posted on MySpace, group discussions, fan fiction, and fan art posted to Yahoo Groups or AOL,³² open source software projects, and, of course, the traditional Web page.

The size of open copyright is staggering. The precise extent of the World Wide Web is unclear, but recent estimates suggest the Web now contains roughly 12 billion web pages.³³ Assuming the average web page is a 25 kilobyte textual file (which is likely a substantial underestimate), that means the World Wide Web holds roughly 30 terabytes of information. As a point of comparison, one expert’s calculation puts the size of the textual information in the Library of Congress at about that same size: 26 terabytes.³⁴ These estimates may be off (it is not clear in which direction) but if the sheer weight of information on the World Wide Web today has not yet exceeded the size of the equivalent information in the Library of Congress, it will do so within the next few years.

The sphere of open copyright, in other words, is probably not much smaller—and may even be greater—than the sphere of material flowing through traditional copyright channels. For better or for worse, it appears that open copyright forms of

²⁷ See Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 956 (2004); YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 53-55 (2006).

²⁸ See, *e.g.*, Technorati, at <http://www.technorati.com/>.

²⁹ See, *e.g.*, Wikipedia, at http://en.wikipedia.org/wiki/Main_Page..

³⁰ See You Tube, at <http://www.youtube.com/>.

³¹ See, *e.g.*, Flickr, at <http://www.flickr.com/>.

³² See Rebecca Tushnet, *Legal Fictions, Copyright, Fan Fiction, and a New Common Law*, 17 LOY. LA ENT. L.J. 651 (1997).

³³ See John Markoff, *In Silicon Valley, a Debate Over the Size of the Web*, N.Y. TIMES, Aug. 15, 2005, <http://www.nytimes.com/2005/08/15/technology/15search.html> (estimating the size of the Web at between 8 billion and 19 billion pages); Antonio Gulli & Alessio Signorini, *The Indexable Web is more than 11.5 billion pages*, <http://www.cs.uiowa.edu/~asignori/web-size/> (May 2005).

³⁴ The rough calculation was made by Brewster Kahle, and notably was based on textual coding, not images. See Brewster Kahle, *Universal Access to All Human Knowledge* (Nov. 20, 2002), <http://www.loc.gov/rr/program/lectures/kahle.html>.

information are rapidly becoming at least as influential in modern society as information flowing through the traditional copyright channels. This is due, at least in part, to the fact that open copyright information is so easy to access. For many information needs, most people may lack the inclination to seek out the best source held at the Library of Congress or in a physical media store or in a paid database. The open copyright information on the Web may suffer in terms of a quality comparison,³⁵ but it can be summoned freely in an instant to the average computer screen. This is a powerful marketplace advantage, to say the least.

Open copyright practices (including free software) are now a meaningful part of the contemporary information economy.³⁶ Most of us are now reliant upon a Web of online open copyright content for discovering useful information, participating in communities, entertaining ourselves, and expressing ideas.³⁷ From the standpoint of consumer/creators, access to open copyright information and the ability to contribute to the open copyright sphere is providing ever-increasing social benefits. We might expect that the copyright law would be paying attention to the causes, effects, and broader implications of open copyright. So far it has not.

C. Explaining the Lack of Legal Responses to Open Copyright

The sphere of open copyright has so far had very little impact on the law of intellectual property. There are many possible reasons for this. One obvious reason is that open copyright is essentially extra-legal in the commercial information marketplace, making it therefore invisible to a copyright law designed to order that marketplace.³⁸

³⁵ The recent quality comparisons between the open copyright Wikipedia and the Encyclopedia Britannica are one example of the debates that are taking place. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 70-74 (2006). My personal view is that Wikipedia and Encyclopedia Britannica are simply two very different things—but I will not launch on an extended digression here.

³⁶ Hal R. Varian, *The Internet carries profound implications for providers of information*, *NEW YORK TIMES*, Jul. 27, 2000 (“Today, tens of thousands of musicians, amateur and professional, freely distribute their music over the Internet. Fee-to-listen music will have to compete with this free-to-listen music...”).

³⁷ Various studies concerning the use of the Web in the daily activities of the average U.S. citizen can be found at the website of the Pew Internet & American Life Project. See <<http://www.pewinternet.org/>>. According to the Pew surveys, more than 50 million Americans rely on the Internet for daily news, more than 40 million surf the Internet for pleasure, and more than 53 million have created content online.

³⁸ Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 *YALE L. J.* ____ (2006) (“Lawyers and legal scholars understandably focus mostly on domains of life where

Open copyright amateurs have, quite understandably, done little to remedy the situation. Though, in the aggregate, amateurs make very important contributions to the public wealth of information, they generally lack the funds, the skills, and the interest to participate in the complicated machinations of intellectual property legislation that occur in Washington. Unlike the entertainment industries, they do not employ lobbyists or make targeted contributions to key political leaders. They are also less likely to press their concern before courts: when one's method of operation is to provide one's copyright-protected work to the public without remuneration, it is not always sensible to front the costs of hiring an attorney when an exclusive right is violated.

The voices of open copyright are spread diffusely ways across the population, whereas the firms who profit from copyright entitlements are organized, funded, and capable of pooling resources for focused political action. Commercially motivated industries can and do pay to have their positions on the laws of copyright brought to the attention of Washington legislators. Public choice theory explains that in such a situation, regulation will tend toward industry capture and away from the optimal protection of the more diffuse and disaggregated public interest.³⁹

The entertainment and publishing industries also have strategic reasons to persuade lawmakers to ignore the importance of open copyright practices. The stronger property protections that stand to increase their profits can often be rhetorically justified by claims that society is suffering because traditional laws are no longer working effectively to create incentives for the production of new works. Keeping Congress and the public focused on a story of rampant digital piracy and economic loss accomplishes their objectives—it justifies calls for stronger digital copyright laws. Drawing attention to the contemporary spread of open copyright practices, on the other hand, produces cognitive dissonance. When open copyright is mentioned, the preferred rhetorical strategy used by the copyright industry is often dismissal: open copyright is framed as either poor in quality, economically inconsequential,⁴⁰ and/or anti-capitalist in sentiment.⁴¹

law is central.”).

³⁹ See Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 531-32 (2000) (noting that the problems predicted by public choice theory are particularly acute in the content of intellectual property law); Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT L.J. 567, 568 (2006) (“As a result of special-interest capture, the Copyright Act confers overly broad rights to copyright owners at the expense of the public interest in having access to creative works.”); Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 375 (2005) (describing Creative Commons as a response to the problems caused by industry capture of copyright).

⁴⁰ Just to take one random example, Patrick Ross of the Progress & Freedom Foundation recently posted a weblog criticism of a presentation by Yochai Benkler, and stated that “Wikipedia

Oddly enough, many legal academic observers have also been somewhat indifferent to the upside of the digital information revolution. One reason for this may be that they are convinced, like some of those in the entertainment industry, that open copyright is not “quality” copyright. They might also have little to say about it because it produces little in the way of case law, for reasons noted above. Even if they value open copyright, those sympathetic to the “copyleft” may feel a need to stay on the frontlines of a culture war.⁴² Because open copyright actually embodies the ideal of the goals of promoting public access, the sphere of open copyright is generally left unattended and energy is devoted to solving perceived problems created by the efforts of copyright industries. When open copyright practices are invoked, they are often drafted, rhetorically, to serve in copyleft agendas. For instance, Lawrence Lessig and others tend to use rhetoric that implicitly frames amateur creativity on the World Web Web as evidence of a larger grassroots political process.⁴³

D. The Motivations of Open Copyright

Within some circles of open copyright production, a quasi-political reading of open copyright practices seems perfectly appropriate: open copyright practices are, in some cases, clearly motivated by counter-copyright ideological agendas. With regard to free and open source software, for instance, the community of hackers tends to be both articulate about copyright and culturally productive.⁴⁴ Resistance among that community to the perceived harms that flow from copyright in computer software is well-documented.⁴⁵ Within communities of individuals who contribute to “open

[doesn't] contribute in any meaningful way to the US economy.” See <http://weblog.ipcentral.info/archives/2006/05/benkler_and_the.html>. If one requires the exchange of dollars for information, this is a correct appraisal of Wikipedia's contributions to the economy—but the economics of information are considerably more complex than that.

⁴¹ See, e.g., Andrew Keen, *Web 2.0: The second generation of the Internet has arrived. It's worse than you think*, THE DAILY STANDARD, Feb. 13, 2006. As explained *infra*, I believe some of this is half-true.

⁴² Dan Hunter, *Culture War*, 83 TEXAS L. REV. 1105, 1117, 1130 (2005).

⁴³ Dan Hunter, *Culture War*, 83 TEXAS L. REV. 1105, 1117, 1130 (2005); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1334 (2004).

⁴⁴ E. Gabriella Coleman, *The Social Construction of Freedom in Free and Open Source Software: Hackers, Ethics, and the Liberal Tradition* (August 2005) (unpublished Ph.D. dissertation, University of Chicago) (on file with author); DOUGLAS THOMAS, HACKER CULTURE 10-11 (University of Minnesota Press 2002).

⁴⁵ For excellent discussion of the legal issues raised by “open source” and “copyleft” software, see Greg R. Vetter, *“Infectious” Open Source Software: Spreading Incentives or Promoting Resistance?*, 36 RUTGERS L. J. 53 (2004) (critiquing open source licensing practices); Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2 UTAH L. REV. 563 (2004) (arguing for a stripe of “moral rights” protection for open source software).

source” software projects, the moral and ethical dimensions of intellectual property are constantly being debated and re-articulated.⁴⁶

The issue of software has, due to its peculiar nature, been on the frontline of challenges to copyright policy. For decades, copyright law has had to struggle with the protection of computer programs. In 1974, Congress established the National Commission on New Technological Uses of Copyrighted Works (“CONTU”) largely because it was uncertain that software was a proper subject for copyright protection.⁴⁷ CONTU’s 1978 Final Report concluded that it was.⁴⁸ Yet there have always been those, including many computer programmers, who steadfastly resisted this conclusion, arguing that software and copyright do not make a good match.⁴⁹ For instance, a 1994 manifesto by Professor Pamela Samuelson and others argued in favor of a *sui generis* regime of software protection.⁵⁰

Perhaps the most well-known opponent of software copyright is Richard Stallman, who founded the Free Software Movement in 1984. Stallman has long expressed his opposition to proprietary software, and is often described as a “pioneer” and “visionary”⁵¹ who has built a popular movement around his beliefs. The General Counsel of Stallman’s Free Software Foundation is Columbia law professor Eben Moglen. Moglen has also spoken out publicly against the “proPERTIZATION” of software.⁵² In 1999, he wrote an article in an online journal that

⁴⁶ Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1528-1529 (2004) (discussing the relevance of ethical “sharing” to copyright).

⁴⁷ Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 114-16 (2004).

⁴⁸ See generally Pamela Samuelson et al., *CONTU Revisited: The Case Against Copyright Protection For Computer Programs In Machine-Readable Form*, 1984 DUKE L.J. 663, 665 (1984); Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 114-16 (2004). Some legal commentators, like Arthur Miller, wrote important articles agreeing with this conclusion. Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977 (1993).

⁴⁹ Pamela Samuelson et al., *CONTU Revisited: The Case Against Copyright Protection For Computer Programs In Machine-Readable Form*, 1984 DUKE L.J. 663, 665 (1984).

⁵⁰ Pamela Samuelson, Randall Davis, Mitchell D. Kapur, & J.H. Reichman, *A Manifesto Concerning The Legal Protection Of Computer Programs*, 94 COLUM. L. REV. 2308, 2312-13 & n.6 (1994) (citing to “voluminous” literature on the question). The joint manifesto noted that it was written in reaction to a more dominant trend. *Id.* (“[T]he idea of *sui generis* protection for software has generally fallen out of favor since the United States, Japan, and the European Union, among others, decided to use copyright to protect programs.”)

⁵¹ Greg R. Vetter, *“Infectious” Open Source Software: Spreading Incentives or Promoting Resistance?*, 36 RUTGERS L. J. 53, 83 (2004).

⁵² Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, 4 FIRST MONDAY 8 (Aug. 2, 1999), at http://www.firstmonday.dk/issues/issue4_8/moglen/. See also Dan Hunter, *Culture War*, 83 TEXAS L. REV. 1105 (2005) (discussing Moglen’s “dotCommunist” theories).

attacked copyright and patent protections for software.⁵³ Moglen argued that intellectual property laws would soon be rendered insignificant by the triumph of free software and anarchic modes of information production.⁵⁴ The normative beliefs and philosophies of Stallman and Moglen are in obvious conflict with the companies that make money from software licensing.⁵⁵

For instance, Microsoft, probably the greatest financial beneficiary of the CONTU-endorsed regime of proprietary software, has understandably never expressed much enthusiasm for the development of non-proprietary software.⁵⁶ According to Bill Gates, progress in the software industry is dependent upon the promise to developers of proprietary rights.⁵⁷ The Free Software Foundation, for its part, is less than enthusiastic about the practices of Microsoft. It features a webpage that asks and answers the question “Is Microsoft the Great Satan?” The page emphasizes that Microsoft is only one of many companies who improperly attempt to turn software into legal property.⁵⁸

These ongoing debates over copyright and software are worth careful attention. Understanding them is essential to those who are making copyright policy for software. But it may be equally important to get past them in order to understand the broader picture of open copyright practices today. The ideological fervor and pitched rhetoric that often characterizes debates among free software cognoscenti do not seem to be characteristic of the viewpoints of many amateurs engaging in other forms of open copyright practices.

Most individuals who create blogs, post photos online, or contribute to Wikipedia seem only vaguely aware of current debates over intellectual property. If the average proprietor of an open copyright work knows what a copyright is, he probably lacks any clear notions of where he stands on copyright reform. And in

⁵³ See Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, FIRST MONDAY (1999) <http://emoglen.law.columbia.edu/my_pubs/anarchism.html>.

⁵⁴ *Id.*

⁵⁵ It is worth clarifying that the Free Software Foundation is not opposed to those who charge for the delivery of software on media—the enemy in their view is not the business of software, but the legal regime that makes code proprietary.

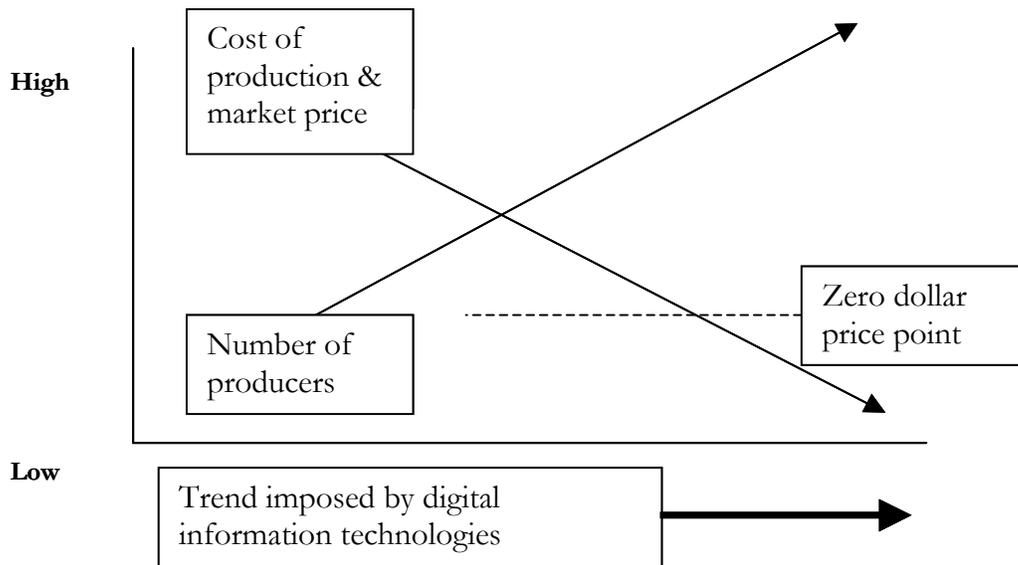
⁵⁶ This has been true of Gates’ position since at least 1976, when he published an “Open Letter to Hobbyists” that claimed piracy and lack of payments for software prevented good software from being written. See Amy Harmon, *The Rebel Code*, NEW YORK TIMES, Feb. 21, 1999 at F34; Open Letter to Hobbyists, <http://www.digibarn.com/collections/newsletters/homebrew/V2_01/homebrew_V2_01_p2.jpg>

⁵⁷ *Id.*

⁵⁸ See *Is Microsoft the Great Satan*, <<http://www.gnu.org/philosophy/microsoft.html>>.

fact, it is not uncommon for those who provide open copyright content on the Web to make highly aggressive claims of copyright ownership. In other words, while some degree of ideological awareness may be important in some domains of open copyright creativity, a more persuasive explanation for the flowering of open copyright today may be a new kind of economic model enabled by technological progress.

Because the costs of copyright-relevant technology have dropped in recent years, the costs of entry into the copyright game have dropped. In this situation, it is predictable that given some modicum of competition among information producers, the costs of copyright-protected works would drop and the savings in production costs would be passed along to consumers. This is a very simple concept, displayed graphically below.



With practically *any* form of technological progress, decreased production costs leads to reduced prices and greater consumer wealth. There are only two things about this graph that are somewhat peculiar to open copyright. First, the number of copyright producers is increasing.⁵⁹ Second, the trend in open copyright is toward a

⁵⁹ In many cases, reduced production costs might lead to a smaller number of producers as easily as a larger number. The growth of copyright producers today is largely due to the fact that copyright creation is intimately intertwined with technologies of fixation. For many people, traditional practices of “communication” are now being labeled “production” due to their fixation. The conversational blog is a copyright-protected work—the morning conversation at the bus stop is not. See generally Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951,

price point of zero. The second trend may seem puzzling.⁶⁰ As Bill Gates asked computer hobbyists in 1976: “Who can afford to do professional work for nothing?”⁶¹

Even open copyright “amateurs” must make investments in order to produce and distribute their creations. Weblogs, digital photos, fan fiction, and other forms of popularly generated Web-based open copyright content are not costless. They all require, at a minimum, investments of time. The costs of relevant technologies of production and distribution may have dropped in recent years, but they are still above zero. Yet many open copyright producers do not have clear business strategies and do not seem to profit from open copyright in any monetary sense. Given the apparent irrationality of the production, some ideological motivation (like altruism or commitment to the copyleft agenda) may seem to provide the best answer to the puzzle.

Unraveling what Yochai Benkler has termed “non-market” production is a complex matter.⁶² The adjective “amateur,” which generally denotes non-market forms of work, has mixed connotations. In one sense, it signals a failure to obtain the status of “professional,” which is generally considered prestigious. Amateurs are those who do not do things properly, seriously, and “professionally.” To suggest, as Dan Hunter and I have, that copyright law is being overrun by a bunch of amateurs may seem like a way of criticizing, not celebrating, that phenomenon.⁶³ On the other hand, calling attention to the lack of a profit motive can signal a form of approval. There is a long (if not uniform) history within many communities of artistic

959 (2004) (“Technologically fixed copies have been removed from their privileged status and have become part of the processes of conversation.”).

⁶⁰ YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 5 (2006) (suggesting that “free” information production “run[s] against the grain of some of our most basic Economics 101 intuitions”).

⁶¹ See Open Letter to Hobbyists, <http://www.digibarn.com/collections/newsletters/homebrew/V2_01/homebrew_V2_01_p2.jpg>. Gates further noted that he would be able to create jobs if a more proprietary approach to software was accepted: “Nothing would please me more than being able to hire ten programmers and deluge the hobby market with good software.” *Id.* Cf. Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15 (1997) (“[M]any predict that intellectual property creators will be reluctant to create works for the Internet environment since creators will be unable to protect their copyright interests”).

⁶² See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 43 (2006) (chart contrasting “market” and “nonmarket” “information production strategies”); Richard A. Lanham, *Barbie and the Teacher of Righteousness: Two Lessons in the Economics of Attention*, 38 HOUS. L. REV. 499, 523 (2001) (suggesting that in an “attention economy,” copyright utility is derived from the extreme polarities of “fame” and “play”).

⁶³ See Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 956 (2004).

production of viewing financial gain as a contaminant to artistic integrity—to work only for financial gain is viewed as a type of corruption.⁶⁴ Amateurs are characterized by the virtue of being “uncorrupted” by the influence of money on their work. They have access to a potentially superior status, in the eyes of some, because they have clearly not “sold out.”

As Viviana Zelizer and Margaret Radin have noted, the presence or absence of direct economic exchanges can have complex social and legal framings: the various systems of social currency we use are not fully commensurable.⁶⁵ Consider wine and flowers. Obviously, one cannot obtain these at most wineries or florists with “payments” of gratitude. But neither can money be substituted for those products in other circumstances. A gift of wine to a friend providing dinner or a gift of flowers following a romantic rendezvous might be considered an appropriate expression of gratitude, whereas a direct monetary payment would be offensive.⁶⁶

Comparable social norms can and do exist against the appropriation and monetization of creative production in some contexts.⁶⁷ Indeed, the arguments of Yochai Benkler and Lawrence Lessig often seem to draw importantly upon the rhetoric of non-market virtues. Zero-price information practices are translated into expressions of communitarian populism resisting intellectual property laws as the instrumental expressions of corporate greed. Within histories of software development, one can often find the rhetoric of bands of wily and wooly “hackers” challenging and toppling impersonal profit-focused corporate giants. A mythology of

⁶⁴ See Marc Perlman, *Art, Commerce, and Ambivalence in the Moral Psychology of File-Sharing* (working draft of 17-20 November 2005) (investigating the interplay of commercial motivations and the ethics of artistic production); *Donaldson v. Becket* _____ (“Glory is the reward of science, and those who deserve it scorn all meaner views.”).

⁶⁵ VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* (1994); MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); Viviana A. Zelizer, *The Purchase of Intimacy*, 25 *LAW & SOC. INQUIRY* 817 (2000); see also Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 *HARV. L. REV.* 491, 493 (2005) (noting that the “legal connection between intimate relationships and economic exchange is... subtle and complex.”).

⁶⁶ Neil Duxbury and Yochai Benkler have used these same examples, pointing out the apparent incommensurability of friendship and cash. Neil Duxbury, *Law, Markets and Valuation*, 61 *BROOKLYN L. REV.* 657, 675-77 (1995); *id.* at 676 (“cash valuations—irrespective of how high or low such valuations may be—are inconsistent with the manner in which we value friends, and thus we treat the two goods as incommensurable”); YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 92-99 (2006) (discussing the social meaning of monetary exchange and its role in motivation).

⁶⁷ See R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 *FORDHAM L. REV.* 423, 432 (2005). See generally *CODE: COLLABORATIVE OWNERSHIP AND THE DIGITAL ECONOMY* 1-108 (MIT Press 2005) (offering anthropological and sociological perspectives on various cultural property economics).

counter-cultural ascendancy runs deep among the digerati and has carried over to the current day debates over digital copyright.⁶⁸ It is fair to say that for some of those who identify with and participate in Lessig's "free culture" movement, the trend toward mass amateurization in digital copyright is understood as tantamount to a progressive political revolution.⁶⁹

I do not wish to disparage or underplay the importance of progressive social consciousness in some forms of open copyright production. However, ideological motivations surely do not characterize much of open copyright. The recognition of the creator's self-interest still has a role to play in copyright law, even in the absence of the assertion of proprietary rights. Even though an amateur creator may not realize a pecuniary gain from open copyright practices, this does not mean that they fail to produce economically real returns. Even while open copyright production is, in some sense, a "non-market" form of production (it does not produce financial compensation) it produces a private return: enhanced personal reputation within a particular community that is often highly relevant to the copyright producer in question. This was Ralph Shaw's whole point half a century ago: authors often create not in pursuit of money, but in pursuit of attention and recognition.⁷⁰

Promoting personal reputation within a particular community is certainly not the sole motivator for open copyright production, but I would wager it is among the top two.⁷¹ The motivational role of reputation can be identified in the histories of

⁶⁸ STEVEN LEVY, HACKERS: HEROES OF THE COMPUTER REVOLUTION 23-35 (1984); Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 *Cardozo Arts & Ent. L.J.* 9, 11 (2001) ("The prevailing rhetoric in academe and in the press tends to portray those who seek to protect their works against unauthorized copying (never mind alteration) as Goliath copyright owners who strain to preserve their mastodontic business models against the happy hacking Davids who only want free speech on the Net.").

⁶⁹ See LAWRENCE LESSIG, FREE CULTURE (2004); Dan Hunter, *Culture War*, 83 *TEXAS L. REV.* 1105, 1117, 1130 (2005).

⁷⁰ Ralph R. Shaw, *Copyright and the Right to Credit*, 113 *SCIENCE* 571, 572 (1951). The claim that artistic creativity can be motivated largely by the pursuit of "fame" is not uncommon. See, e.g. John T. Cross, *Giving Credit Where Credit Is Due: Revisiting the Doctrine of Reverse Passing Off in Trademark Law*, 72 *WASH. L. REV.* 709, 764-66 (1997) ("[M]any artists are unique in that they want recognition for recognition's sake... [F]ame itself provides part, or maybe even all, of the motivation for creative activity..."); Roberta Rosenthal Kwall, *Fame*, 73 *IND. L.J.* 1 (1997); Richard A. Lanham, *Barbie and the Teacher of Righteousness: Two Lessons in the Economics of Attention*, 38 *HOUS. L. REV.* 499, 523 (2001).

⁷¹ Indeed, Yochai Benkler suggests the pursuit of reputation benefits is perhaps the primary motivational engine of both his types of "non-exclusionary" (open) copyright creation. YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 43 (suggesting that "non-exclusion, market" production is motivated by writing "to get clients" and to "advertise" while "non-exclusion, non-market" production is motivated by writing "in return for status, benefits to reputation.").

In addition to reputation, I think Richard Lanham's suggestion that an impulse toward "play" lies

various forms of creative production. Open-source pundit Eric Raymond suggested in his book *The Cathedral and the Bazaar*: “The ‘utility function’ Linux hackers are maximizing is not classically economic, but is the intangible of their own ego satisfaction and reputation among other hackers.”⁷² As evidence of this, it might be noted that free and open source software (“F/OSS”) is often characterized by a trade of copyright protections for the requirement of attribution.⁷³ One of the most open source software projects, the Apache server software, imposes only one requirement: the provision of attribution to its creators.⁷⁴

A recent study by Professor Randal Davis of the Computer Science and Engineering at the Massachusetts Institute of Technology also provides evidence of the importance of attribution and reputation in open copyright practices.⁷⁵ Professor Davis’s study reported on an informal survey used to assess the attitudes of his computer science department toward intellectual property. According to Davis, the majority of his survey participants behaved according to Ralph Shaw’s prediction. They opted for the price that would best maximize their reputation gains: zero. Davis concluded that the researchers and hackers he surveyed “work for reputation, the recognition of their expertise, accomplishments, and contributions.”⁷⁶

The same information practices are common among law professors with regard to their primary intellectual product: the law review article. Many law professors engage in the labor required to post their principal intellectual property on their web pages and elsewhere for free. They even spend research budgets on distributing reprints of their work. Some law professors are additionally devoting significant amounts of time to writing weblogs, another laborious activity dominated

behind many forms of authorial creativity is an idea that is worth more careful investigation. Richard A. Lanham, *Barbie and the Teacher of Righteousness: Two Lessons in the Economics of Attention*, 38 HOUS. L. REV. 499, 523 (2001). See also JULIAN DIBBELL, *PLAY MONEY* (2006) (describing how play and work are interrelated in complex ways); JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE* (1938) (describing how a student of play informs understandings of cultural practices); Greg Lastowka, *Law and Games Studies*, 1 GAMES & CULTURE 25 (2005).

⁷² ERIC S. RAYMOND, *THE CATHEDRAL AND THE BAZAAR* __ (1999).

⁷³ Greg R. Vetter, “*Infectious*” *Open Source Software: Spreading Incentives or Promoting Resistance?*, 36 RUTGERS L. J. 53, 57 (2004); Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2 UTAH L. REV. 563, 672-75 (2004) (noting the role that attribution plays in motivating open source software creation).

⁷⁴ Greg R. Vetter, “*Infectious*” *Open Source Software: Spreading Incentives or Promoting Resistance?*, 36 RUTGERS L. J. 53, 74 (2004).

⁷⁵ Professor Davis was the principal author of *THE DIGITAL DILEMMA*, *supra* note 1.

⁷⁶ See Randall Davis, *Dilemmas Faced by Creative People in IT*, Position paper for Princeton University - Microsoft Intellectual Property Conference, May 12, 2005 at 1, available online at: <http://people.csail.mit.edu/davis/Dilemma.pdf>.

by open copyright practices.⁷⁷ While there may be motivations of altruism among law professor bloggers, I think we can presume that law professors are, at least as much as the average person, rational economic actors.⁷⁸ Like the hackers described by Davis, law professors are probably blogging—at least in part—for community reputation and recognition.

The pursuit of reputational standing creates incentives for information sharing in realms outside the scope of copyright law. An interesting recent survey by Emmanuelle Fauchart and Eric von Hippel suggests that within the community of French chefs, recipes are generally guarded as trade secrets.⁷⁹ Techniques of culinary production, while not typically policed by intellectual property laws, constitute a valuable form of knowledge. However, according to Fauchart and von Hippel, some chefs will select “their more important and interesting recipes to reveal [to the public], reasoning that their reputation will be more effectively enhanced by revealing major rather than minor innovations.”⁸⁰ The most important norm that Fauchart and von Hippel identified with regard to this type of information sharing was the expectation of proper attribution.⁸¹

The close relation of such reputation economies to pecuniary markets is important to see. The pursuit of reputation and economic reward may be in tension in some cases, yet they are much more often complimentary pursuits. Among the hackers described by Raymond, the demonstration of proficiency in coding will quite often lead to better employment prospects (for volunteer contributions to coding projects) and within professional communities of computer scientists, reputation benefits can be difficult to disentangle from professional advancement.⁸² Fauchart and von Hippel note the same connection with regard to French chefs, who, when

⁷⁷ Professor Dan Solove has posted a regular (informal) census of law professors who blog. See http://www.concurringopinions.com/archives/2005/11/law_professor_b_1.html

⁷⁸ Lest there be any doubt about the economic rationality of blogging, it should be observed that several members of the faculty at the University of Chicago Law School have a blog, as does Judge Richard Posner. See <http://uchicagolaw.typepad.com/>, <http://www.becker-posner-blog.com/>.

⁷⁹ Emmanuelle Fauchart & Eric von Hippel, *Norms-based intellectual property systems: the case of French chefs*, MIT Sloan School of Management Working Paper 4576-06 (Jan. 2006).

⁸⁰ *Id.* at ____.

⁸¹ *Id.* at ____.

⁸² Catherine Fisk’s work is particularly perceptive and noteworthy in this regard: it links the right of attribution, often framed as a matter of intellectual property law, to the law of employment. See Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, forthcoming ____.

they bolster their popular reputations, also tend to attract patrons, their primary source of income.⁸³

Obtaining enhanced standing within a community may also serve as an “intrinsic” motivator.⁸⁴ In other words, popular attention can be, and is, often pursued for its own sake. My claim here is not that basic monetary goals lurk behind the pursuit of reputation—in some cases they may, but the matter is more complex than that. My point is that while the pursuit of reputation may be a different kind of incentive than the incentive of monetary payments, exchanges between these two currencies are common. As Thorstein Veblen observed many years ago, even those who pursue monetary wealth may be ultimately in pursuit of the reputational good of social stature within a particular community.⁸⁵ Reputational incentives are deeply intertwined with the workings of market economies and market economies are deeply intertwined with the dynamics of reputation—for many, these motivations may be flip sides of the same coin.

One might object that hackers, computer scientists, French chefs, and law professors are idiosyncratic data points in the information economy. However, many “professional” creators are also now participating in open copyright practices. For profit-driven firms, zero-price copyright production is not beyond the pale where it can be justified by some other important benefit. Advertising, which I mention in the next section, is proof of this. Other forms of zero-price output may be cross-subsidized by advertising (this has long been the case with over-the-air broadcasts of radio and television), sales of associated goods and services, or alternative business strategies.⁸⁶ There are many examples of such models today—for instance, the online version of *The New York Times* and *The Washington Post* have largely abandoned price-

⁸³ Emmanuelle Fauchart & Eric von Hippel, *Norms-based intellectual property systems: the case of French chefs*, MIT Sloan School of Management Working Paper 4576-06 at ____ (Jan. 2006).

⁸⁴ YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 94 (2006).

⁸⁵ THORSTEIN VEBLLEN, *THE THEORY OF THE LEISURE CLASS* (1899) ____ (“Conspicuous consumption of valuable goods is a means of reputability to the gentleman of leisure.”); Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 *YALE L.J.* 273, 325 (2004).

⁸⁶ Eric Goldman noted this almost a decade ago. See Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could be Unimportant on the Internet*, 12 *BERKELEY TECH. L.J.* 15 (1997):

[T]he profit-maximizing price on the Internet may be where marginal revenue equals marginal cost [i.e. zero cost & price] because intellectual property will be cross-subsidized by other products in a manner sufficient to cover the fixed costs associated with intellectual property creation and distribution. If this is true, a market price of zero for intellectual property can still create long-term economic profits attributable to intellectual property creation.

based sales models for their information and follow an online variant of the broadcast television model, where advertising provides the primary source of revenue.

The primary lesson here is that while open copyright practices do have some involvement with particular ideologies about the propriety of monetary exchange for creative work, their current prominence can be rationalized by models based upon the maximization of community reputation. Those who set a price of zero for their creative output have always been capable of realizing important non-monetary returns. They are simply now able, via network technologies, to respond to very old incentives. The cost-benefit analysis that Ralph Shaw recognized many years ago is playing out on a new stage: many forms of copyright production are drifting toward a zero price strategy and the maximization of reputational currency. The key question is: how should copyright law respond? The next section answers that question with Shaw's prescription. Attribution must become more central to copyright law.

II. Laws of Credit & Attribution

A. The “Law of Advertising”

The relevance of advertising to open copyright is obvious: as mentioned above, advertising has proved to be one of the key cross-subsidizing techniques used to sustain “professional” open copyright business models.⁸⁷ Yet it should also be understood that advertisements themselves fall within the definition of open copyright. Understanding the dynamics and the policy concerns of advertising may be helpful in understanding how law should respond to open copyright.

It may seem harsh or heretical to suggest that open copyright and advertising are closely related. The normative valences here are obviously different. Yet there are many similarities between advertising and open copyright.⁸⁸ This is not a new idea:

⁸⁷ Advertising is, of course, the primary source of revenue for Google. Advertising also supports many of the “free” hosting services for blogs and online communities. The major newspaper companies that provide open copyright content over the Web are also primarily reliant on advertising to finance their businesses.

⁸⁸ There are many differences as well—primarily the “commercial” valence of advertising that becomes such an important normative and political issue for those who see open copyright as an ideological practice and advertising as a commercial plague. Open copyright will likely not provoke acts of principled resistance by Adbusters or the Billboard Liberation Front. See NAOMI KLEIN, *NO LOGO* xxi-xxii (2000) (describing instances of anti-branding activism); Rosemary Coombe & Andrew Herman, *Trademarks, Property, And Propriety: The Moral Economy Of Consumer Politics And Corporate Accountability On The World Wide Web*, 50 DEPAUL L. REV. 597, 599 (2000) (describing the Billboard

In 1951, Ralph Shaw stated that: “Publication of contributions to knowledge is the only form of advertising considered ethical among the professions.”⁸⁹ Open copyright’s reputation dynamics and zero-price model do seem to place it, as a formal matter, somewhere between the much-maligned cultural form of (zero-priced) consumer advertising and the much more respectable (positive-priced) creative works such as books, music, and films. This suggests that, in seeking to adapt copyright law to open copyright practices, the “law of advertising” might provide some guidance.

Advertisements are creative forms of information. Like paintings, novels, and software, advertisements take creativity and labor to produce, and are legally protected by copyright as forms of original expression.⁹⁰ Television advertisements, to take one example, employ many of the same creative techniques (*e.g.* narrative, orchestrated scores, special effects, and celebrities) that are found in popular films. Successful advertising is perhaps just as formally challenging as any other creative genre because the advertiser must engage and amuse viewers (sometimes against their will) while conveying a particular message that encourages a particular activity (generally the purchase of goods and services).

Advertising is, by definition, distributed at zero price. As discussed in the prior section, setting a zero price for laborious creation seems like an economic puzzle. The advertiser (generally speaking, the business financing the creation and distribution of the advertisement, not the creative team) fails to recoup the costs of production via the sale of the creative product. Yet few would deny that advertising makes business sense for the firm in much the same way that open copyright does for the individual: when the potential positive reputation and attention benefits that flow from creating and distributing information to the public exceed the cost of investment requirements, there can be a positive return on a zero price.

Like the computer scientists in Davis’s survey, advertisers attempt to build reputation capital. Just as some open source software creators seek to extend the social penetration of their practices through practices of “viral licensing,”⁹¹ so many

Liberation Front); ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES* 73-76 (1998) (describing “activist appropriations”); Sonia Katyal, *Semiotic Disobedience*, forthcoming

⁸⁹ Ralph R. Shaw, *Copyright and the Right to Credit*, 113 *SCIENCE* 571, 572 (1951).

⁹⁰ The seminal case is Justice Holmes’ opinion in *Bleistein v. Donaldson Lithographic Co.*, 188 US 239, 251 (1903) (Holmes, J.) (“[T]he special adaptation of these pictures to the advertisement of the Wallace shows does not prevent a copyright.”). That has been the law ever since. See, *e.g.*, *Leibovitz v. Paramount Pictures Corporation*, 137 F.3d 109 (2d Cir. 1998) (copyright infringement action based on a picture used as a magazine cover); 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* 2.08[G][4] (2005); 119 *HARV. L. REV.* at 2487.

⁹¹ Greg R. Vetter, *“Infectious” Open Source Software: Spreading Incentives or Promoting Resistance?*, 36 *RUTGERS L. J.* 53, 81-82 (2004)

advertisers are currently exploring the use of so-called “viral” mechanisms designed to “infect” the creative work of others, harnessing the energy of the public to promote their brand messages beyond their direct creative control or financing.⁹²

For corporations, while advertising is primarily about driving the sales of products and services, it can also serve some of the intrinsic functions that were discussed with regard to open copyright. Ad campaigns help to build positive reputations around a business name, help to improve employee morale, and perhaps even provide some rough corporate analogue to the “egoboo” coveted by open source programmers.⁹³

Yet, much like open copyright, advertising is generally ignored in discussions of copyright law—a recent student note in the *Harvard Law Review* even suggests that copyright law should jettison protection for advertising.⁹⁴ Reciprocally, one can find treatises on the “law of advertising” that generally ignore the issue of copyright.⁹⁵

⁹² Chris Gaither, *A Web Contagion: ‘Viral’ ads gives companies an unconventional method of spreading a message online*, L.A. TIMES, Aug. 28, 2005, at C1 (“Viral ads -- also called pass-along ads -- spread by word of mouse: The goal is to make the ads so funny, charming, sexy, or controversial that viewers e-mail them to friends or post them on websites.”); Pia Sarkar, *A different way of selling clothes: Gap’s animated online stripper latest viral ad to get attention as firms seek new ways to reach buyers*, SAN FRANCISCO CHRONICLE, Aug. 27, 2005, at C1 (“Companies have increasingly turned to viral ads -- ads that spread like viruses through word of mouth or e-mail forwards -- as television and radio continue to lose their audiences to TiVo and iPods.”).

This footnote will now become a vehicle for viral marketing by way of a personal anecdote about viral marketing (that is relevant, I hope, to the substance of the footnote). I recently received a new “beta” model multi-media cell phone as part of the “Sprint Ambassador Program.” See <http://ambassador.sprint.com/Faq.aspx>. Pursuant to my agreement with Sprint, I had no obligation to do anything and I received a very fancy new cell phone with service for six months. Apparently this offer was extended to me because Sprint believed I just *might* tell some other people about the phone—which I have now done.

⁹³ See DAVID OGILVY, OGILVY ON ADVERTISING 117 (1983) (Corporate advertising can improve the morale of your employees... It can also make it easier to recruit better people, at all levels.”)

⁹⁴ For a recent argument that advertisements should not be protected by copyright law, see Note: *Rethinking Copyright for Advertisements*, 119 HARV. L. REV. 2486, 2487 (2006):

Because granting copyright protection to advertisements appears unnecessary to induce the creation and dissemination of ads, and because it is not clear that copyright protection provides the public with a meaningful net benefit... presuming advertisements to be copyrightable subject matter - and thus treating them as commensurate with other copyrightable works - is unjustified.

While I deeply appreciate the student editor’s point about the lack of fiscal incentives necessary for advertising, I am not sure I can agree with the student editor that “a judge can make reasoned decisions regarding what constitutes art.” *Id.* at 2506. This will be explored a bit *infra*.

⁹⁵ See generally GEORGE E. ROSDEN & PETER E. ROSDEN, THE LAW OF ADVERTISING

The “law of advertising” is generally thought to be synonymous with the law of trademark and unfair competition.⁹⁶

This is curious. What it might suggest is that our legal attitude toward information goods distributed at zero-price to promote reputations is substantially different than our attitude toward traditionally information goods distributed for sale. When law confronts advertising works, its role shifts from the copyright model of creating property-based creation incentives to the communication model of protecting reputation and preventing deception.

It should be noted, however, that describing advertising as a zero-price information form is more a matter of tradition than any careful analysis of what role advertising plays in society. Increasingly, the thing that we have called “advertising” in the past plays a substantial role in “professional” copyright production—in other words, advertising can be found in copyright markets that are *not* characterized by zero prices.⁹⁷ Promoting reputations and brands, sending persuasive rhetorical messages, and attempting to influence popular opinion are all things we can find in information that is sold today under the copyright model.

Consider contemporary children’s entertainment offerings.⁹⁸ Popular children’s cartoons like Pokemon,[®] Clifford,[®] Rescue Heroes,[®] Winne-the Pooh,[®] and Bratz,[®] are all undeniably copyright-protected works, sold on VHS and DVD as well as in traditional book forms. They are also (effectively) advertisements for extensive lines of affiliated toys, games, bedsheets, backpacks, and other products. Children watching these programs are, in a sense, watching very well-made advertisements that are additionally cross-subsidized by advertising.

The Harry Potter[®] franchise epitomizes the impossibility of drawing bright lines today between content and advertising. Harry Potter[®] is, unquestionably, the protagonist in an award-winning series of literary stories. Harry does double duty, however, as a brand-licensing juggernaut for all manner of commercial flotsam and jetsam that bear his extremely valuable trademark. One simply cannot escape from Harry Potter’s fame. He is even a font of legal wisdom.⁹⁹ As Jessica Litman has

(Matthew Bender 2004).

⁹⁶ *Id.*

⁹⁷ For a thorough treatment of the permeation of advertising messages into copyright markets, see Ellen Goodman, *Stealth Marketing*, forthcoming - _____.

⁹⁸ Recent films like *Fahrenheit 9/11* or *The Passion of the Christ* might also be used as examples of ideological and persuasive entertainment offerings, but the apparent indifference of most adults to children’s programming has made it an ideal playground for advertainers.

⁹⁹ Seriously. See, e.g., Jeff Thomas, Danaya Wright, James Charles Smith, Aaron Schwabach, Joel Fishman, Daniel Austin Green, Timothy S. Hall, and Andrew P. Morriss, *Harry Potter and the Law*, _____ TEXAS WESLEYAN L. REV. _____ (forthcoming 2006); Susan Hall, *Harry Potter and the Rule of Law*:

observed, popular content blurs into advertising and advertising blurs into cultural vocabulary.¹⁰⁰ In those areas of academia that operate outside the discourse of law (especially within cultural studies), it is generally recognized that the texts of advertising and the texts of Hollywood (whose purveyors have driven major copyright reforms in the past decades) are not all that different.¹⁰¹

Seeing the connection between open copyright practices and advertising may help advance the scholarly discourse over digital copyright in constructive ways. If open copyright indeed reflects some familiar dynamics of advertising, open copyright's legal rules might be structured in ways that draw upon advertising's legal rules. Most importantly, copyright might be restructured in ways that recognize the importance of attribution, which is at the heart of advertising.¹⁰²

the Central Weakness of Legal Concepts in the Wizard World, in READING HARRY POTTER: CRITICAL ESSAYS at 147-62 (Giselle Liza Anatol, ed. 2003); Paul R. Joseph & Lynn E. Wolf, *The Law in Harry Potter: A System Not Even a Muggle Could Love*, 34 U. TOL. L. REV. 193 (2003); William P MacNeil, "Kidlit" as "Law-and-Lit": *Harry Potter and the Scales of Justice*, 14 L. & LIT. 545 (2002). (In fact, I should probably face up to the fact that Harry Potter® will likely have a greater influence on legal scholarship than I will have, based on the number of law review articles where his name appears in the title.)

¹⁰⁰ Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, ____ (1999).

The film "Time to Dream" by M. Night Shyamalan is an interesting example of this confusion. The Shyamalan video can easily be found online by searching online for the director's name and "Time to Dream." See Barbara Lippert, *Awakening The Senses: M. Night Shyamalan stays true to his life, vision in AmEx ad*, ADWEEK.COM, March 13, 2006 (predicting that the advertisement "will have a big viral presence on the Web.>"). It might be worth noting that Shyamalan gave the money he made from doing the spot to school scholarship and did not permit the advertisement to be aired in theaters by American Express. *Id.*

¹⁰¹ See generally ROLAND BARTHES, MYTHOLOGIES 36-38 (1972) (Annette Lavers, trans.) (discussing the different advertising methods used for brands of detergent); GRANT MCCrackEN, CULTURE & CONSUMPTION 77-79 (1990) (discussing advertising as a method of the cultural construction of meaning); JACKSON LEARS, FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA 1 (1994) ("[Advertisements] urge people to buy goods, but they also signify a certain vision of the good life; they validate a way of being in the world. They focus private fantasy; they sanction or subvert existing structures of economic and political power."); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES 172-73 (1998) (explaining how advertising messages enable the construction of personal and national identity); Michael E. Zega, *Advertising the Southwest*, 43 JOURNAL OF THE SOUTHWEST 281(2001) (explaining the role that advertising played in the cultural construction of the Southwest and its population expansion); Marsha Bryant, *Plath, Domesticity, and the Art of Advertising*, 29 COLLEGE LITERATURE 17 (2002) (explaining how the advertising of domesticity in the 1950's permeates the work of the American poet Sylvia Plath); Carol J. Singley, *From Women's Movement to Momentum: Where Are We Going, Where Have We Been, and Do We Need Nikes to Get There?*, 25 JOURNAL OF AMERICAN & COMPARATIVE CULTURES 455 (2002) (discussing the issues raised by Nike® feminists).

¹⁰² See Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15 (1997) ("[F]or cross-subsidization to work,

Where a provider of information can obtain essentially no market benefit other than popular attention, proper attribution of the information to the source of production is essential.¹⁰³ The law is capable of providing this type of attribution protection for authors of creative works, ensuring that those who invest in creating new information products will reap the consumer goodwill that flow from those investments.¹⁰⁴

In the digital environment, protections for reliable authorial attribution should be, to borrow Julie Cohen’s phrase, “one cornerstone of a well-balanced copyright edifice.”¹⁰⁵ As will be explained in the next section, however—attribution protections in the realm of intellectual property law are in a sorry state, little improved (and perhaps worse) than the state that Ralph Shaw criticized in 1951.

B. Copyright: VARA and the CMI Provisions of the DMCA

Generally speaking, copyright law in the United States provides few significant protections for authorial attribution.¹⁰⁶ European copyright systems do provide protections for authorial attribution under the rubric of so-called “moral rights,”¹⁰⁷ the personality-based rights of an artist that reflect a unique—perhaps spiritual—connection between an individual artist and a work of art. Moral rights generally cannot be alienated. Among the moral rights is the right of paternity, which carries the connotation of a genetic connection between the author and the work. In

buyers impressed with product X (freely given away) must be led to product Y (for sale). In most cases, this will mean that product X must give proper attribution to the seller of product Y so that buyers can make the connection.”)

¹⁰³ Ralph R. Shaw, *Copyright and the Right to Credit*, 113 SCIENCE 2942 at 572 (May 18, 1951) (“If [a scientific author’s] name need not be included, the incentive for publishing scientific literature would be greatly reduced.”).

¹⁰⁴ William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 268-73 (1987)

¹⁰⁵ See Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 348 (2005).

¹⁰⁶ See Natalie C. Suhl, *Note: Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1203-15 (2002); Karen L. Gulick, *Creative Control, Attribution and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry*, 27 CONN. L. REV. 53, 91-92 (1994); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 2 (1994).

¹⁰⁷ The phrase “moral rights” is an unfortunate accident of translation, especially given the disdain shown by legal pragmatists for the utility of “moral” discourse. See, e.g., Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1639 (1998) (“[E]ven if moral theory can provide a solid basis for some moral judgments, it should not be used as a basis for legal judgments.”). A better translation would probably be “personality rights.”

practice, the right of paternity functions as a right to credit—the author has the right to be publicly acknowledged as a work’s creator.

In the United States, however, the moral right of paternity is generally not recognized. A right of attribution is specifically mentioned in the copyright law only as part of the Visual Artist Rights Act (“VARA”), codified at 17 U.S.C. §106A.¹⁰⁸ VARA was enacted in order for the United States to meet its new international obligations pursuant to the most important international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works.¹⁰⁹ Pursuant to amendments to Berne, signatories were required to recognize and implement a legal order where the law would protect an author’s “right to claim authorship of the work” independently of the author’s economic rights.¹¹⁰ VARA, however, was limited to the protection of a very tiny subset of copyright-protected works: namely, the works of visual artists who produce single works or editions of works numbering fewer than 200.¹¹¹ VARA essentially protects only “fine artists.”¹¹² Because of this, it has negligible impact on the economic engines of the copyright industries—which are, as stated above, the core concern of United States copyright law.

Outside the limited context of VARA works, it is difficult to spot references to attribution in the copyright statute. The only other clearly attribution-related provisions in copyright law can be found as part of the 1998 Digital Millennium Copyright Act (“DMCA”).¹¹³ The DMCA protects attribution interests (in a fashion) by outlawing the alteration and removal of “copyright management information” (“CMI”) that is conveyed in connection with a work.¹¹⁴ However, the potential attribution rights found in the CMI provisions of the DMCA have been underused, difficult to employ, and have presented interpretive challenges.

¹⁰⁸ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, ___ (2003) (Scalia, J.) (noting that the copyright act, in this portion, speaks to rights of attribution specifically).

¹⁰⁹ Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, Sept. 9, 1886, revised at Paris July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 (mandating rights of attribution). It took the United States over a century to sign the treaty. See Susan P. Liemer, *How We Lost our Moral Rights, and the Door Closed on Non-Economic Value in Copyright*, 5 J. MARSHALL REV. INT. PROP. L. 1 (2005) (discussing the history of the Berne Convention).

¹¹⁰ *Id.* at 6*bis*.

¹¹¹ See 17 U.S.C. § 101 (defining “work of visual art”); 17 U.S.C. § 106A (providing special protections for such works).

¹¹² See 17 U.S.C. § 106A.

¹¹³ Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9, 11 (2001).

¹¹⁴ See 17 U.S.C. § 1202.

The CMI provisions in the DMCA were enacted pursuant to obligations under two 1998 World Intellectual Property Organization (“WIPO”) treaties. However, versions of the United States CMI provisions (and other key provisions of the DMCA) were actually first drafted in the United States in 1995 under the direction of President Clinton.¹¹⁵ The purpose of these provisions was to prospectively re-tool copyright for the anticipated online economy. According to the Copyright Office Report on the DMCA, both the anti-circumvention provisions under 17 U.S.C. §1201 and the CMI statutes in 17 U.S.C. §1202 “serve as technological adjuncts to the exclusive rights granted by copyright law.”¹¹⁶ While the anti-circumvention provisions of the DMCA have received considerable (and largely negative) attention, courts and commentators have noted that there has been a relative “dearth of caselaw” on the CMI provisions.¹¹⁷ This is no longer true—there are actually now several reported district court cases interpreting the CMI provisions.¹¹⁸ But the early returns suggest that the CMI provisions have not been particularly efficacious or well-drafted.¹¹⁹

According to the Senate Report on the CMI provisions, they are intended to assist in the “licensing of rights and indication of attribution, creation, and ownership.”¹²⁰ Any attempt to quickly summarize the CMI provisions is doomed to be imprecise, but they generally prohibit the knowing distribution of false copyright management information that enables copyright infringement, as well as the

¹¹⁵ See *IQ Group v. Wiesner Publishing*, 409 F. Supp. 2d 587, 593-94 (D.N.J. 2006) (describing the history of the language in the CMI provisions).

¹¹⁶ [Copyright Office Report on DMCA.]

¹¹⁷ *Schiffer Publ. Ltd. v. Chronicle Books, LLC*, 73 U.S.P.Q. 2d (BNA) 1090 (E.D.Pa. Nov. 12, 2004); *Gordon v. Nextel Communs.*, 345 F.3d 922, 926 (6th Cir. 2003) (noting “the very few reported cases”).

¹¹⁸ See, e.g., *Schiffer Publ. Ltd. v. Chronicle Books, LLC*, 73 U.S.P.Q. 2d (BNA) 1090 (E.D.Pa. Nov. 12, 2004); *Gordon v. Nextel Communs.*, 345 F.3d 922 (6th Cir. 2003); *Med. Broadcasting Co. v. Flaiz*, Civ. No. 02-8554, 2003 U.S. Dist. LEXIS 22185 (E.D. Pa. November 25, 2003); *Learn2.com v. Bell*, Civ. No. 3:00-CV-812-R, 2000 U.S. Dist. LEXIS 14283 (N.D. Tex. July 20, 2000); *IQ Group v. Wiesner Publishing*, 409 F. Supp. 2d 587, 593-94 (D.N.J. 2006); *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999) *aff’d in part, rev’d in part Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002); *Ward v. National Geographic Soc’y*, 208 F. Supp. 2d 429, 450 (S.D.N.Y. 2002); *Thron v. HarperCollins Publ.*, 64 U.S.P.Q.2D (BNA) 1221 (S.D.N.Y. July 26, 2002).

¹¹⁹ Only a handful of plaintiffs have successfully invoked the CMI provisions. See, e.g., *Med. Broadcasting Co. v. Flaiz*, Civ. No. 02-8554, 2003 U.S. Dist. LEXIS 22185 (E.D. Pa. November 25, 2003) (suit against a former employee for unauthorized appropriation of computer files); *Learn2.com v. Bell*, Civ. No. 3:00-CV-812-R, 2000 U.S. Dist. LEXIS 14283 (N.D. Tex. July 20, 2000) (suit against a former employee for unauthorized appropriation of computer files).

¹²⁰ S. Rep. No. 105-190 (1998).

intentional removal and alternation of CMI with knowledge that this will facilitate copyright infringement.¹²¹

There are significant outstanding questions about the scope of the CMI provisions. For instance, courts have had differing opinions as to whether they are specifically targeted at digital information or they should apply to non-digital works. The legislative history of these changes to the language of the CMI provisions simply clouds the issue.¹²² The language used in the WIPO treaties took the narrower approach, requiring member states to implement the protection of “electronic rights management information.” However, the CMI provisions enacted in the United States do not use any “digital” or “electronic” modifier, but simply protect “copyright management information.”

¹²¹ See 17 U.S.C. § 1202(a) & (b). The exact language (currently) is as follows:

(a) False copyright management information. No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement--

(1) provide copyright management information that is false, or

(2) distribute or import for distribution copyright management information that is false.

(b) Removal or alteration of copyright management information. No person shall, without the authority of the copyright owner or the law--

(1) intentionally remove or alter any copyright management information,

(2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or

(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,

knowing, or, with respect to civil remedies under section 1203 [17 USCS § 1203], having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

¹²² See Severine Dusollier, *Some Reflections on Copyright management information and Moral Rights*, 25 COLUM. J.L. & ARTS 377 (2003). David Nimmer has written extensively about the DMCA and its CMI provisions. See, e.g., David Nimmer, *Aus Der Neuen Welt*, 93 NW. U.L. REV. 195 (1998) (explaining the adoption of the CMI provisions); David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y 401, 418 (1999) (discussing the broad definition of CMI and the problems it presents); David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909, 929 (2002) (“In contrast to Section 1201, the provision mandating respect for copyright management information changed little during the course of congressional deliberations.”).

CMI, by statutory definition, includes several types of information that could be presented in digital or analog form, including: the title of the work; the names of the work’s author, copyright owner, performer, writer, and/or director; the terms and conditions regarding use; and “numbers,” “symbols,” or “links,” referring to terms of use.¹²³ Most courts have, at least in dicta, have interpreted the definition of CMI broadly,¹²⁴ incorporating analog forms of copyright within its scope. But at least one district court has opined that CMI should be “limited to components of... technological measures.”¹²⁵

Another significant ambiguity concerning the definition of CMI provisions has been whether information that is conveyed with the work, but not is not proximate to the work, qualifies for protection. The well-known case of *Kelly v. Arriba Soft* is often cited with regard to this issue. The *Kelly* case involved a claim made by a photographer whose work was re-displayed by an image search engine outside of the context of the plaintiff’s website. The district court noted that the CMI was not present in the image files that were displayed, but was present as part of the surrounding website. The court stated that the CMI provisions applied “only to the removal of copyright management information on a plaintiff’s product or original work.”¹²⁶

The district court in *Kelly* clearly regarded the information surrounding the images on the original website as a form of CMI.¹²⁷ However, subsequent district courts have used the above-quoted language from *Kelly* to support the proposition that CMI must be found somewhere spatially proximate to the work. For instance, in the case of *Schiffer Publishing v. Chronicle Books*, the district court cited *Kelly* for the proposition that to fall afoul of § 1202(b), “a defendant must remove copyright

¹²³ 17 U.S.C. § 1202 (c).

¹²⁴ The statutory language cited in the prior footnote, as well as the legislative history, makes this interpretation very defensible. See S. Rep. No. 105-190 (1998) (“CMI need not be in digital form”).

¹²⁵ *IQ Group v. Wiesner Publishing*, 409 F. Supp. 2d 587, 593-94 (D.N.J. 2006) (“[The CMI provisions] should not be construed to cover copyright management performed by people, which is covered by the Copyright Act, as it preceded the DMCA; it should be construed to protect copyright management performed by the technological measures of automated systems.”; citing Julie E. Cohen, *Copyright and The Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998)).

¹²⁶ *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999) *aff’d in part, rev’d in part* *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002).

¹²⁷ *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999) *aff’d in part, rev’d in part* *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002) (“There is no dispute the Ditto crawler removed Plaintiff’s images from the context of Plaintiff’s Web sites where their copyright management information was located, and converted them to thumbnails in Defendant’s index. There is also no dispute the Arriba Vista search engine allowed full-size images to be viewed without their copyright management information.”).

management information from the ‘body’ of, or area around, plaintiff’s work itself.” In *Schiffer*, the copyright-protected photographs were present in a book that did not display any CMI on the same page as the pictures. Hence, the court concluded the copyright information in other areas of the book was not properly viewed as CMI in relation to the infringing pictures.¹²⁸

With regard to the removal of CMI, plaintiffs often fail because these claims are not independent of their economic rights.¹²⁹ In order to prove liability under the CMI provisions in 1202(b), a plaintiff must essentially prove a defendant was expressly contemplating copyright infringement when removing or distributing the information without the required CMI.¹³⁰ This tightly binds the CMI removal provisions to traditional economic rights and divorces them from any true concern about authorial interests in proper attribution.

For instance, in a hypothetical situation where an author’s publisher wished to remove, without permission, the author’s attribution, the author would lack a cause of action against the publisher if this would not result in an infringement of copyright.¹³¹ In most cases, it would not, because the author would have transferred copyright or licensed the publisher to reproduce the work without specifically requiring attribution. Additionally, even where infringement could be found to exist, the burden of showing a culpable mental state on the part of the defendant is a heavy burden for any plaintiff. Rights-owning plaintiffs in several cases have failed to prevail on their CMI claims because they lacked admissible evidence of the requisite mental states of the infringing defendants.¹³²

¹²⁸ *Schiffer Publ. Ltd. v. Chronicle Books, LLC*, 73 U.S.P.Q. 2d (BNA) 1090 (E.D.Pa. Nov. 12, 2004).

¹²⁹ See Severine Dusollier, *Some Reflections on Copyright management information and Moral Rights*, 25 COLUM. J.L. & ARTS 377, 397 (2003); Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 Cardozo Arts & Ent. L.J. 9, 13 (2001).

¹³⁰ See 17 U.S.C. § 1202(b).

¹³¹ Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9, 13 (2001) (“[S]ince it is not copyright infringement even willfully to miscredit the author, there would be no violation of section 1202 unless it could be shown that miscrediting authorship induces infringement.”).

¹³² *Schiffer Publ. Ltd. v. Chronicle Books, LLC*, 73 U.S.P.Q. 2d (BNA) 1090 (E.D.Pa. Nov. 12, 2004) (“[B]ecause Defendants did not believe Plaintiffs had a copyright in their individual photographs, they could not have committed knowing misconduct as required by the DMCA.”); *Gordon v. Nextel Communs.*, 345 F.3d 922, 923, 927 (6th Cir. 2003) (“Gordon failed to introduce sufficient evidence that the copyright notice was removed with the requisite intent; we therefore affirm the summary judgment with respect to Gordon’s § 1202 claims.”); *Ward v. National Geographic Soc’y*, 208 F. Supp. 2d 429, 450 (S.D.N.Y. 2002) (stating that the “facts are too murky”

Of course, authors seeking significant attribution rights from publishers and users of their works are free to exchange their proprietary rights in order to obtaining affirmative attribution protections. In exchange for surrendering all or part of their proprietary rights, authors are free to demand attribution in return by standard contractual mechanisms. Yet as discussed in this section, in the absence of such private ordering, copyright provides few or no mechanisms for asserting a right to attribution.

Even where authors attempt to rely on contractual forms of private ordering to resolve the conflicts and social harms that flow from the misattribution of authorship, the fact is that, in the aggregate and from the perspective of the interests of a larger society, this does not work effectively.¹³³ An unregulated market in sales of property that relies on private parties to protect attribution rights in a collateral manner leads to a particular type of market failure. Trademark law is based upon that proposition.

C. Trademark: Attribution Rights after *Dastar*

If we were to have full faith in property and contract, we might just let producers of tangible products in the market place “fix” the absence of legal trademark rights through contract. Producers might demand the recognition of attribution rights from those who purchase their goods, using contractual mechanisms to secure the integrity of their business reputations. However, the law provides businesses with a more efficient solution via trademark protections. Trademark law allows the providers of good and services the right to secure accurate attribution and to prevent misattribution. It also serves the public by creating private causes of action to prevent deceptive and misleading speech.

There is a fairly clean fit, at least from a theoretical perspective, between authorial attribution rights and the law of trademark.¹³⁴ Many cases, prior to 2003, recognized the ability of authors to bring suits where their attributions of authorship

and that “[defendants] cannot be deemed to have known that plaintiff owned [the copyrights] for the simple reason that the evidence is not clear cut.”); *Thron v. HarperCollins Publ.*, 64 U.S.P.Q.2D (BNA) 1221 (S.D.N.Y. July 26, 2002) (“plaintiff has offered no competent, admissible evidence to support any finding that defendants removed or altered [CMI] ‘intentionally,’ as required by the statute”); *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999) (“Defendant did not have ‘reasonable grounds to know’ it would cause its users to infringe Plaintiff’s copyrights.”)

¹³³ Greg Lastowka, *The Trademark Function of Authorship*, 85 BOSTON U. L. REV. 1171, 1221-1228 (discussing the various ways that misattribution can thrive in the publishing industry).

¹³⁴ Greg Lastowka, *The Trademark Function of Authorship*, 85 BOSTON U. L. REV. 1171, 1194-2000 (2005).

were removed or their works were misattributed.¹³⁵ However, the United State Supreme Court, in the 2003 case of *Dastar Corp. v. Twentieth Century Fox Film Corp.*, held that trademark law did not extend to the protection of authorial attributions, overturning a long history of lower court doctrine.¹³⁶

At issue in *Dastar* was an expired copyright for a television version of General and President Dwight Eisenhower’s book *Crusade in Europe*.¹³⁷ Fox held the copyright and brought suit against a small company, Dastar. Dastar had obtained original copies of the video, stripped out the original indications of authorship and references to the book, and then re-released the films as with a new credit sequence, which was limited to the names of the Dastar editors.¹³⁸ While Fox prevailed on its claims of misattribution at the district court level and on Dastar’s initial appeal to the Ninth Circuit, it lost before the Supreme Court.

The Supreme Court’s opinion, authored by Justice Scalia, essentially eviscerated trademark-based protections for authorial attribution. Scalia drew a bright, broad line between the laws of copyright and trademark. According to the *Dastar* opinion, trademark law was never intended to reach authorial attribution, because authors could not be understood as “origins” of goods:

[A]s used in the Lanham Act, the phrase “origin of goods” is in our view incapable of connoting the person or entity that originated the ideas or communications that ‘goods’ embody or contain. Such an extension would not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.¹³⁹

¹³⁵ See *id.*; *Smith v. Montoro*, 648 F.2d 602, 608 (9th Cir. 1981) (finding Lanham Act cause of action where the plaintiff actor’s name was omitted and his role attributed to another in film credits); *Follett v. New American Library*, 497 F. Supp. 304, 313 (S.D.N.Y. 1974) (granting plaintiffs’ motion because “the Lanham Act was designed to prevent the presentation of an author’s work to the public in a distorted form and to protect the public and artist from misrepresentations of the artist’s contribution to a finished work”); *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 15 (2d Cir. 1976). See generally Lauren Wise, *King v. Innovation Books: An Analysis of Credit Attribution with Respect to the Lanham Act*, 1 VILL. SPORTS & ENT. L.J. 147, 147 (1994) (stating that “[a]uthors may sue under [the Lanham Act] when an erroneous credit is issued”).

¹³⁶ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 30 (2003).

¹³⁷ DWIGHT D. EISENHOWER, *CRUSADE IN EUROPE* (1948).

¹³⁸ *Id.*

¹³⁹ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 30 (2003).

While *Dastar* received a substantial amount of praise from some academic commentators, it has received substantial criticism as well.¹⁴⁰ Those who have praised *Dastar* have argued it was correct because it prevented Fox from exerting intellectual property rights relative to a work that had fallen into the public domain.¹⁴¹ (The scope of *Dastar* has not been limited, by subsequent courts, to public domain works.¹⁴²) Those who criticize the *Dastar* case argue that by removing trademark law as a vehicle for addressing authorial attribution, the Supreme Court has essentially licensed plagiarism.¹⁴³

Following *Dastar*, several courts have felt a new need to place further distance between copyright and trademark laws, keeping the regimes of intellectual property neatly separated as Justice Scalia purported to do. If copyright and trademark come near each other, the story seems to go, they will create a dangerous alchemy producing some monstrous “mutant,” as David Nimmer and Justice Scalia have described it.¹⁴⁴ Judge Guido Calabresi, citing *Dastar*, has recently taken up the torch,

¹⁴⁰ See, e.g., Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 Hous. L. Rev. 263 (2004); Michael Landau, *Dastar v. Twentieth Century Fox: The Need for Stronger Protection of Attribution Rights in the United States*, 61 N.Y.U. ANN. SURV. AM. L. 273 (2005); Jane C. Ginsburg, *The Author's Name as a Trademark: A Perverse Perspective on the Moral Right of Paternity?*, 23 CARDOZO ARTS & ENT. L.J. 379 (2005); Susan P. Liemer, *How We Lost our Moral Rights, and the Door Closed on Non-Economic Value in Copyright*, 5 J. MARSHALL REV. INT. PROP. L. 1 (2005) (discussing the history of the Berne Convention); Laura A. Heymann, *The Birth of the Authonym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377 (2005).

¹⁴¹ See, e.g., Jessica Bohrer, *Strengthening the Distinction Between Copyright and Trademark: The Supreme Court Takes a Stand*, 2003 DUKE L. & TECH. REV. 23, 27-28 (“The Court . . . was rightfully concerned that allowing the line to blur in a case such as this would create a state of ‘perpetual copyright protection’ that could nullify the intent and effect of copyright and trademark law.”); Lynn McLain, *Thoughts On Dastar From a Copyright Perspective: A Welcome Step Toward Respite for the Public Domain*, 11 U. BALT. INTELL. PROP. J. 71, 91 (2003) (“It is to be hoped that the Court will continue the work that it has begun. The public domain’s borders . . . must not be permitted to be truncated by other bodies of law”); Richard Ronald, *Note, Dastar Corp. v. Twentieth Century Fox Film Corp.*, 19 BERKELEY TECH. L.J. 243 (2004) (“[T]he *Dastar* Court frees manufactures [sic] to use public domain works without fear of a burdensome attribution requirement.”).

¹⁴² Greg Lastowka, *The Trademark Function of Authorship*, 85 BOSTON U. L. REV. 1171, 1214 & n. 168 (2005).

¹⁴³ See, e.g., Michael Landau, *Dastar v. Twentieth Century Fox: The Need for Stronger Protection of Attribution Rights in the United States*, 61 N.Y.U. ANN. SURV. AM. L. 273, 298 (2005) (“Copying a work without giving attribution is plagiarism, and the Court . . . is giving its blessings to the practice.”).

¹⁴⁴ *Dastar*, 539 U.S. at 34 (speaking of a “mutant copyright law”); David Nimmer, *The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing Off)*, 54 DEPAUL L. REV. 1, 60 (2004) (claiming credit for coining the phrase).

opining that “intellectual property owners should not be permitted to recategorize one form of intellectual property as another.”¹⁴⁵

This urge to establish some kind of legal “buffer zone” between the regimes of trademark and copyright is extremely odd and dangerous. Obviously, courts should not confuse copyright and trademark laws and their respective animating theories with each other. When they blur the doctrines into a single type of property right, this can create problems. Rights of publicity and what Justin Hughes has recently termed “micro-works” are examples, I think, of the dangerous mutants that can spring from the interstices of copyright and trademark.¹⁴⁶ But if we have learned anything from Hollywood’s *X-Men* trilogy, it is that not all mutants are evil—some varieties of mutation are actually essential to legal evolution.¹⁴⁷ *Dastar’s* attempt to keep copyright and trademark separate is misguided, since the formal purity of separateness that the Court seeks to maintain results in a decision that denies the animating logic of both copyright and trademark.

This separatist logic has even found its way into cases involving the CMI provisions of the DMCA. In the case of *IQ Group v. Wiesner Publishing*, the plaintiff advertising company brought suit against a defendant advertising company that had taken the plaintiff’s work, stripped out the plaintiff’s logo and hyperlink, and continued to distribute the advertisements without the marks of authorship.¹⁴⁸ The court failed to find a violation of the DMCA’s CMI provisions, in part because the logo was too clearly “a trademark.” It stated:

[A] logo in an email, to the extent that it operates as a trademark or service mark, could communicate information that indicates the source of the email... The problem is that this construction allows a trademark to invoke DMCA protection of copyrights, eliminating the differentiation of trademark from copyright that is fundamental to the statutory schemes. If every removal or alteration of a logo attached to a copy of a work gives rise a cause of action under the

¹⁴⁵ See *Chosun International, Inc. v. Chrisha Creations*, 413 F.3d 324, 327 (2d Cir 2005) (Calabresi, J.) (noting the principle that and citing *Dastar*).

¹⁴⁶ See Justin Hughes, *Size Matters: Or Should in Copyright Law*, 74 FORDHAM L. REV. 575, 585-86 (2005); Stacey Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161 (2006).

¹⁴⁷ See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (Yale University Press 1921).

¹⁴⁸ *The IQ Group v. Wiesner Publishing*, 409 F. Supp. 2d 587, 592 (D.N.J. 2006) (“[T]he differentiation of trademark from copyright... is fundamental to the statutory schemes.”).

DMCA, the DMCA becomes an extension of, and overlaps with, trademark law.

The court rejected the CMI-based claims, citing to *Dastar* for support.¹⁴⁹

Thus, after reviewing the status of trademark and copyright, we are left with a dilemma: Copyright law generally fails to provide any significant protections for authorial attribution, forcing copyright proprietors to rely on their legal entitlements to control reproduction, dissemination, and other exclusive rights in order to secure the protection of authorial attribution.¹⁵⁰ And, as discussed in this section, the law understands that leaving the matter of attribution and reputation protections to simple private ordering does not work. Trademark law, after *Dastar*, is legally hobbled from providing a remedy for misattribution. Additionally, *Dastar* seems to foster, among lower courts, open antagonism toward arguments that authorial attribution and reputation protection has any place in either body of law.

Yet Ralph Shaw's arguments for a right to credit are, if anything, more compelling today than they were half a century ago. Giving legal valence to authorial attribution would legally acknowledge the fundamentally different dynamics of open copyright practices and promote the smooth functioning of reputation economies. In the next section, I discuss two indications that, despite the current status of intellectual property law, an increased role for attribution in copyright may be on the way.

D. Two Signs of an Attribution Shift

i) The Experience of Creative Commons

The Creative Commons project was founded in 2001 and is chaired by Professor Lawrence Lessig of Stanford Law School.¹⁵¹ As Niva Elkin-Koren

¹⁴⁹ *Id.*

¹⁵⁰ Greg Lastowka, *The Trademark Function of Authorship*, 85 BOSTON U. L. REV. 1171, 1217-18 (2005) (discussing the mismatch between copyright's proprietary incentives and private forms of ordering and the legal interest in regulating misattribution); Rick Mortensen, *D.I.Y. After Dastar: Protecting Creators' Moral Rights Through Creative Lawyering, Individual Contracts and Collectively Bargained Agreements*, 8 VAND. J. ENT. & TECH. L. 335 (2006) (proposing ways that authors can attempt to protect their attribution interests subsequent to *Dastar*).

¹⁵¹ See Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 388 (2005) (suggesting the principles of Creative Commons flow from Lessig's publications).

suggests, it is probably best understood as a social movement.¹⁵² Its Board of Directors includes several other prominent law professors who write in the area of intellectual property and copyright.¹⁵³ The most prominent mission of Creative Commons has been the promotion of a set of licenses designed to enable creators to selectively reserve some rights.¹⁵⁴

In its online mission statement, Creative Commons makes clear that it sees its work as analogous to the work of the free software and open-source movements with regard to software. It states “our ends are cooperative and community-minded” and that it helps people “dedicate their creative works to the public domain—or retain their copyright while licensing them as free for certain uses, on certain conditions.”¹⁵⁵ Like the Free Software movement that it invokes in its mission statement, Creative Commons is typically associated with the “copyleft” principles of resistance to intellectual property law. Yet, also like the Free Software Movement, Creative Commons does not simply add to the public domain—it uses the licensing of copyright entitlements as a tool to advance its goals.

When Creative Commons released its first group of licenses in 2002, it offered a menu of eleven license choices that mixed and matched four different requirements made of those wishing to make use of the licensed works: a requirement that authorial attribution should be provided (“by”), a requirement that use of the work should be non-commercial (“nc”), a requirement that no derivative works should be

¹⁵² Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 388 (2005).

¹⁵³ Professors James Boyle, Michael Carroll, and Molly Shaffer Van Houweling are also on the board of Creative Commons.

¹⁵⁴ As I indicated in an article prior to the establishment of the Creative Commons, I believe the development of such simple licensing options for content creators is a very good idea, though I believe metadata solutions might be preferable and more effective in a digital environment. *See* F. Gregory Lastowka, *Free Access and the Future of Copyright*, 27 *RUTGERS COMPUTER & TECH. L.J.* 293, 323 & fn. 108 (2001):

[O]ptions could permit “copyleft” advocates to check a box when creating a file, to specify in the code, that the content of that file could be freely distributed or integrated into new works... If feasible, two or three copyleft options would be desirable, given the variety of options that have developed in the area of free software. For instance, while one musician might wish to permit her digital files to be freely copied, altered, or even integrated into other songs without attribution, another might wish to allow his work to be freely copied as long as the work was not altered and proper attribution was given at the time the work was played.

¹⁵⁵ Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 377 (2005).

created utilizing the original work (“nd”), and a “viral” requirement that any derivative works created should be licensed under terms identical to the original license (“sa”).¹⁵⁶ The original Creative Commons (“CC”) licenses allowed individuals to pick and choose combinations of these options. Given this “menu” approach, Creative Commons can be aptly described as incorporating a certain degree of “ideological fuzziness” into its core mission from the outset.¹⁵⁷

In June of 2006, Creative Commons Chief Technology Officer Mike Linksvayer estimated that over 140 million web pages had included CC licenses.¹⁵⁸ If this is accurate,¹⁵⁹ it is a tremendous figure—though it pales beside the size of the open copyright realm generally. Comparing Creative Commons’s estimate of 140 licensed web pages with the estimate cited above that there are 10 billion web pages currently in existence, this means that approximately 0.14% (over 1 in 1000) Web pages link to a CC license of some form.¹⁶⁰ Creative Commons licenses are also used in relation to content that is not hosted on individual web pages. For instance, over 14 million digital photographs on the Web-based photo-sharing site Flickr are reportedly licensed under Creative Commons licenses.¹⁶¹

A cynic might argue that simply pasting a Creative Commons logo on a blog, Web page, or a public Flickr photo is a somewhat redundant—perhaps it is even an act that might be seen as an assertion of ownership rights rather than sharing.¹⁶² By definition, the average Web page or publicly posted digital photo on Flickr *is* shared with the public in the same way that all open copyright content is shared. The Creative Commons licenses operate, in part, as demands upon the public. They assert the owner prohibits derivative works (“nd”) or prohibits commercial exploitation of the content (“nc”). There is nothing legally wrong with this, of course—these are both rights inherent in the copyright entitlement. As Niva Elkin-Koren suggests, however, there is a possibility that by making claims of copyright ownership explicit, creative commons may be reifying norms of authorial

¹⁵⁶ See <http://creativecommons.org/licenses/>

¹⁵⁷ Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 377, 388-89 (2005).

¹⁵⁸ <http://creativecommons.org/weblog/entry/5937>

¹⁵⁹ Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 401n. 85 (2005) (noting that the data about the numbers is somewhat unclear and suggesting it might be an overestimate).

¹⁶⁰ By analogy, if the document present on the Web were analogized to a population the size of the United States, a population the size of Omaha, Nebraska would be linking to CC licenses.

¹⁶¹ <http://creativecommons.org/weblog/entry/5936>

¹⁶² Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 378, 390 (2005)

ownership that did not characterize the early Web.¹⁶³ The CC licenses are effective in the mission of increasing the sharing of content, however, insofar as they enable those who access the content to repurpose it: all CC licenses make some forms of “non-commercial” uses of licensed works legal, and thus they all encourage non-commercial distribution of the author’s creative content. Thus, in some ways, the intent of creative commons is not exactly to encourage public access to works, but to encourage derivative “viral” repurposing of works.

From the standpoint of attribution and law, Creative Commons is remarkable, if perhaps accidentally so. Though it did not strongly encourage the adoption of any particular type of license from its menu, Creative Commons has reported that over 97% of websites that use Creative Commons Licenses (over 13 million websites) have chosen some variety of license that requires attribution. In 2004, responding to this, Creative Commons removed the attribution “option” from its new licenses and made attribution a default part of its licenses menu. There are now six possible CC “Version 2.5” licenses. All six require authorial attribution.

The formal announcement that accompanied this change indicated that it was not motivated by any particular ideological commitment to attribution, but was simply a pragmatic decision motivated by popular demand:

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. This reduces the number of licenses from eleven possible to six and makes the license selection user interface that much simpler.

For those that believe *Dastar* was a boon for the public domain, making attribution a default requirement may seem inconsistent with the mission of an organization devoted to the “commons.” A handful of commenters on the Creative Commons mailing list made this exact charge, arguing that Creative Commons was no longer enabling “free” content.¹⁶⁴ A summary of the licenses by advisers at the Debian project (an open source operating system) was highly critical of an early

¹⁶³ Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 400 (2005).

¹⁶⁴ See, e.g., Comment of Rob Meyer, at <http://lists.ibiblio.org/pipermail/cc-licenses/2004-August/001059.html> (“The work isn’t “Free,” you’re paying for it with attribution.”); Comment of “Toddd”, at <http://lists.ibiblio.org/pipermail/cc-licenses/2004-August/001075.html> (“Currently, there is not a single free CC 2.0 license. They are ALL non-free. The current CC is a smack in the face of the free software movement...”).

version of the new CC licenses, suggesting they were incompatible with the principles of free software.¹⁶⁵

Even Creative Commons did not seem overly enthusiastic about the modification, suggesting in its own announcement of the new licenses that “If we see a huge uprising against the attribution-as-stock-feature, we’ll certainly consider bringing it back as an option.”¹⁶⁶ In all likelihood, when it came up with its original “menu,” Creative Commons did not intend to act as a vehicle for popularizing attribution rights. Yet its experience has shown the popularity of authorial attribution rights among open copyright creators. At least in one substantial corner of the online content universe, information as *commodity* protections are being discarded in favor of *reputation* protections.

ii) The Copyright Office’s Orphan Works Proposal

A second example of a shift toward attribution protections in copyright law can be found in the Copyright Office’s proposed legislation on “orphan works.” “Orphan works” are works that are still protected by copyright but where the copyright holders are difficult or impossible to find. The concern with regard to orphan works is that, in the absence of any means to obtain a license from the copyright proprietor, the work is neglected and underused. Thus, the fear of liability for copyright infringement becomes an insurmountable transaction cost preventing the work from being repurposed in any way.

Following the Supreme Court’s landmark pro-copyright decision in *Eldred v. Ashcroft*,¹⁶⁷ and reportedly “at the urging of prominent legal scholars, academic-library organizations, technology companies such as Google and Microsoft,”¹⁶⁸ Congress began to consider the issue of orphan works. In January of 2005, Senators Orrin Hatch and Patrick Leahy wrote to the Copyright Office, urging it on behalf of Congress to study and propose a solution to the problem of “orphan works.” House Intellectual Property Subcommittee Chairman Lamar Smith and Ranking Member Rick Berman also wrote to express their support for the effort.¹⁶⁹

¹⁶⁵ <http://people.debian.org/~evan/ccsummary.html>

¹⁶⁶ <http://creativecommons.org/weblog/entry/4216>.

¹⁶⁷ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

¹⁶⁸ Scott Carlson, *Whose Work Is It, Anyway?*, THE CHRONICLE OF HIGHER EDUCATION, July 29, 2005.

¹⁶⁹ The letters are reprinted in the Copyright Office’s full report. U.S. Copyright Office, Report on Orphan Works (2006) [hereinafter “Report on Orphan Works”], available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

On January 26, 2005, The Copyright Office issued a Federal Register Notice summarizing the issues raised by orphan works and soliciting written comments from all interested parties. The request for comments asked the public what type of solution would be most effective to deal with the problem. The Copyright Office received over 850 written comments, from brief email messages to extensive legal briefs.¹⁷⁰ The Copyright Office also hosted public roundtable discussions on orphan works in Washington, D.C. and in Berkeley, California. At the end of this process, on January 31, 2006, the Copyright Office submitted its Report to Congress. The Report contained a proposal to amend 17 U.S.C. § 514 of the copyright law to limit available remedies.

From the standpoint of authorial attribution rights, the most interesting thing about the Copyright Office’s proposed statutory amendment is that it explicitly incorporates a requirement of attribution in order to take advantage of the limited remedy provisions:

- (a) Notwithstanding sections 502 through 505, where the infringer:
 - (1) prior to the commencement of the infringement, performed a good faith, reasonably diligent search to locate the owner of the infringed copyright and the infringer did not locate that owner, and
 - (2) throughout the course of the infringement, provided attribution to the author and copyright owner of the work, if possible and as appropriate under the circumstances, the remedies for the infringement shall be limited as set forth in subsection (b).

This attribution requirement, with slight revisions, was adopted in the version of the bill introduced by Congressman Lamar Smith before the House of Representatives. The introduced legislation provided limited remedies in the event that:¹⁷¹

...the infringing use of the work provided attribution, in a manner reasonable under the circumstances, to the author and owner of the copyright, if known with a reasonable degree of certainty based on information obtained in performing the reasonably diligent search.

Since neither copyright law nor trademark law speak to attribution, it may seem strange that the Copyright Office gave attribution a prominent role in Section 514. According to the Copyright Office, the attribution requirement was not the result of any strong outside campaign—“only a handful of commenters proposed a

¹⁷⁰ Report on Orphan Works at 1.

¹⁷¹ Orphan Works Act of 2006, H.R. 5439, 109th Cong. (May 22, 2006), available at http://www.gag.org/activities/advocacy_materials/HR_Orphan_Works_Act_2006.pdf.

requirement along these lines.”¹⁷² Nonetheless, echoing Ralph Shaw, the Copyright Office “found several good reasons to support this requirement... including the notion that attribution is critically important to authors, even those who consent to free use of their works.”¹⁷³

The link to the experience of Creative Commons was made explicit when the attribution requirements were being discussed:

[A]ttribution is a critically important aspect of copyright for authors and owners, particularly individual authors. From our discussions with various stakeholders, in the situation where an author is found after a search prior to use, many times the author consents to a royalty-free use, provided that the user provides proper attribution. Indeed, the Creative Commons has published information that for those authors who adopt one of the many forms of Creative Commons licenses, about 94% of them opt for a license that requires attribution. Thus, even among a group of creators that are willing to permit wide dissemination and re-use of their works, attribution is an essential and important part of preserving the author’s interests in the work.¹⁷⁴

The comments of the Copyright Office draw the right lesson from the experience of Creative Commons. They point out the way in which open copyright economies, in the so-called Digital Millennium, are increasingly relying upon the dynamics of reputation and attribution as incentives for creation. These are incentives that intellectual property law is, at the present moment ill-tuned to protect. Hopefully, the Orphans Work draft legislation and the comments on attribution by the Copyright Office offer a sign that this might change in the future.

III. A Modest Proposal for Modifying Fair Use

I have argued up to this point that attribution should play a larger role in copyright law, given the importance of reputation-based incentives to open copyright incentives and markets. In this last part, I would like to very briefly suggest one modest proposal that would formally recognize the importance of attribution in the doctrine of copyright law. Namely, I propose that the “fair use” provisions in 17

¹⁷² Report on Orphan Works at 110-11.

¹⁷³ *Id.*

¹⁷⁴ *Id.* The report listed additional reasons that attribution seemed like a good idea, *e.g.* 1) attribution would facilitate market transactions, 2) attribution would avoid improper claiming of credit by the putative infringer, and 3) attribution would be a non-burdensome requirement. *Id.*

U.S.C. § 107 should be amended to include a fifth factor: the provision of attribution. This proposal is simply one very small step in the direction of adapting copyright law to the reputation economy. Reforming copyright law to respect the importance of authorial credit should not end with such a small adjustment, but it might start with a series of piecemeal modifications such as this.

“Fair use” is the defensive mechanism in copyright law by which an alleged infringer can escape liability for copyright infringement. It originated in the United States as a judicial doctrine, but became fixed by statute in the Copyright Act of 1976.¹⁷⁵ Currently, the four well-known statutory factors that must be included in any determination of fair use are as follows:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

My proposal is to add an additional fifth fair use factor, modeled on the language used in the proposed Orphan Work legislation:

- (5) the provision of attribution, in a manner reasonable under the circumstances, to the author of the work

This amendment is advisable because the existing fair use factors fail to take into account the importance of credit and attribution. To the contrary, the first and fourth factors,¹⁷⁶ clearly have an approach toward copyright that prioritizes the centrality of commercial markets and the marginality of the “non-commercial” sector.¹⁷⁷ According to the first and fourth factors, if a use participates in or

¹⁷⁵ Pub. L. No. 94-553, 90 Stat. 2541 (1976).

¹⁷⁶ I do not have much to say about the second and third fair use factors. The second factor, by prioritizing the creative works that are seen as at the core of copyright’s concern, essentially gives a more nuanced voice to the idea/expression dichotomy. The third fair use factor is also essentially a statement about copyright law’s logic: it points to the fact that slight “borrowing” is more permissible than wholesale appropriation. While these factors can be criticized, they seem largely neutral with respect to open copyright.

¹⁷⁷ R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 FORDHAM L. REV.

interferes with existing pecuniary markets, it is presumed unfair. If a use occurs outside existing pecuniary markets, it is presumed fair.

Open copyright practices, however, operate outside pecuniary markets and place high value on practices of attribution. When fair use law is applied to open copyright practices, it would be decidedly unfair not to take into account the manner in which attribution has been provided to an author. Reputation is, after all, the primary market value that the open copyright author is seeking to maximize. Adding a requirement that courts should consider attribution when weighing the factors of fair use would not bind courts in any significant way. Fair use is a notoriously fuzzy test, which in the eyes of some, is impossible to damage further.¹⁷⁸ It would lead them to consider the relevance of attribution in the particular circumstances.¹⁷⁹

Before the creation of the four factors in the 1976 Act, cases can be found that explicitly taken into account the interplay of attribution and fair use. For instance, in the 1941 case of *Karll v. Curtis Pub. Co.*,¹⁸⁰ a district court stated that the reprinting of partial song lyrics by the *Saturday Evening Post* with authorial attribution served only to add to the reputation capital of the copyright owner. In light of all the circumstances, the court found that the use was fair:

It will be noted that the author of the article in question acknowledged the authorship of the song, and in fact paid a tribute to him. No question of the originality of the song is here involved... Undoubtedly many thousands who read the article became aware for the first time of the existence of a musical composer by the name of Eric Karll.¹⁸¹

Though today's four factors do not include attribution, this does not mean that attribution has not worked its way into fair use cases. While some secondary sources downplay the relevance of attribution,¹⁸² there are a substantial number of

423, 425 (2005).

¹⁷⁸ See Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 114-16 (2004); R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 FORDHAM L. REV. 423, 426-27 (2005).

¹⁷⁹ See Patrick Zabatta, *Note, Moral Rights and Musical Works: Are Composers Getting Berned?*, 43 SYRACUSE L. REV. 1095, 1134-35 (1992) ("Though the criteria suggested by the Copyright Act are not intended to be exclusive, the absence of moral rights as an enumerated consideration could lead courts to overlook these important interests... By specifically mentioning attribution and integrity, Congress will focus the courts' attention to this matter without materially altering the fair use doctrine.").

¹⁸⁰ 39 F. Supp. 836, 838-39 (E.D. Wis. 1941)

¹⁸¹ *Id.*

¹⁸² See Kenneth Crews, *Harmonization and the Goals of Copyright: Property Rights or Cultural Progress?*, 6 IND. J. GLOBAL LEGAL STUD. 117, 131 n.87 (1998) ("[P]ublishers generally have insisted that

cases that support the relevance of attribution to fair use. These cases usually manage to fit the question of attribution into the first factor.¹⁸³ The Nimmer treatise notes very briefly that the “propriety” of a defendant’s conduct is relevant to the “purpose and character of the use” and that under the rubric of equitable considerations, the provision of attribution can contribute to a finding of fair use.¹⁸⁴

Several cases explicitly address fair use and attribution. One of the first post-1976 Act cases to address the issue was *Marcus v. Rowley*,¹⁸⁵ decided in the Ninth Circuit. The plaintiff was a home economics teacher who brought suit against another home economics teacher for the unauthorized copying and sale of portions of a book on cake decorating. In considering the first factor, the court noted that “there was no attempt by defendant to secure plaintiff’s permission to copy the contents of her booklet or to credit plaintiff for the use of her material... Rowley’s conduct in this respect weighs against a finding of fair use.”¹⁸⁶

educators and librarians include formal notices on any "fair use" copies, even though nothing in the "fair use" law requires attribution.”); Otto Konrad, *A Federal Recognition of Performance Art Author Moral Rights*, 48 WASH. & LEE L. REV. 1579, 1627-1628 (1991) (stating that fair use allows use of a work without attribution.). The Nimmer treatise sends somewhat mixed messages about the relevance of attribution. *See* Nimmer on Copyright]. § 13.05 (noting that while attribution is not an excuse for infringement, the failure of a copyist to credit an author can cut against a finding of fair use “Moreover, the fact that a copier acknowledges the source of the copied material does not make a fair use of what is otherwise a substantial taking.”).

The pre-1976 Act case of *Henry Holt & Co. v. Liggett & M. Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938), is sometimes cited for the indifference of fair use doctrine to attribution practices. *See id.* at 304 (“The fact that the defendant acknowledged the source from which this matter was taken does excuse the infringement. While the acknowledgment indicates that it did not intend unfair.”)

¹⁸³ Professor Rebecca Tushnet has suggested that in the case of fan fiction, attribution “bears an indirect relation to the fourth fair use factor” because, by minimizing confusion as to source, it “preserves the market for the original product.” Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 680 (1997).

¹⁸⁴ 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 8B.03[C][1] (1997) [hereinafter Nimmer on Copyright]. § 13.05 [1][d] (“At least one additional factor relevant to the ‘character’ of the use is the propriety of the defendant’s conduct. Characterizing the fair use doctrine as ‘equitable,’ it has been held that defendant’s unjustified denial of its use of the plaintiff’s work is a factor militating against permitting defendant to claim a fair use defense. Correlatively, attributing a usage of plaintiff’s work to plaintiff can increase the fairness of defendant’s utilization.”)

Often cited with regard to the lack of relevance of attribution is the case of *Henry Holt & Co. v. Liggett & M. Tobacco Co.* In that case, the court found that a cigarette manufacturer’s quotation from a scientific research and proper authorial attribution was relevant to unfair competition claims, but was not relevant to its copyright infringement analysis

¹⁸⁵ 695 F.2d 1171, 1176 (9th Cir. 1983).

¹⁸⁶ *Id.*

Three years later, the Second Circuit took up the relation of attribution and fair use in the case of *Maxtone-Graham v. Burtchaell*.¹⁸⁷ The defendant had printed quotations (consisting of over 7,000 words, or about 4% of the book) and provided attribution to Matone-Graham. Though the opinion of the court did not focus specifically on attribution in the fair use analysis, it did note that the defendant had credited the plaintiff as the source of the quotes and had not sought to displace the market for the original work. The court ultimately concluded that the use in question was fair.

In the case of *Weissman v. Freeman*,¹⁸⁸ the Second Circuit addressed the issue of attribution and fair use more squarely. Judge Richard J. Cardamone, focusing on the equities of the case before proceeding to the statutory factors, found that a failure to attribute authorship worked against the defendant's claim of fair use. At issue, as the court described it, was "the paradigm of the problems that arise when a long relationship between accomplished professor and brilliant assistant comes to an end...In this case... Dr. Freeman not only neglected to credit appellant for her authorship of P-1, but actually attempted to pass off the work as his own, substituting his name as author in place of hers."¹⁸⁹ According to Judge Cardamone, "Dr. Freeman's conduct severely undermines his right to claim the equitable defense of fair use. No case was cited—and we found none—that sustained such defense under circumstances where copying involved total deletion of the original author's name and substitution of the copier's."

Judge Cardamone once again discussed attribution and fair use in the well-known case of *Rogers v. Koons*,¹⁹⁰ In his analysis of the first fair use factor, that the "Puppies" statute of Jeff Koons was not a transformative work of parody because Koons had not made the public aware of the original work:

The rule's function is to insure that credit is given where credit is due. By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist. This awareness may come from the fact that the

¹⁸⁷ 803 F.2d 1253 (2d Cir. 1986). The plaintiff was Katrina Maxtone-Graham, who had published a book *Pregnant by Mistake*, that contained interviews with a number of women who had experienced unwanted pregnancies. The defendant was James Burtchaell, a Catholic priest and a professor of theology at Notre Dame. Burtchaell had sought permission to use quotations from the interviews in his book, *Rachel Weeping*, but Maxtone-Graham had denied permission.

¹⁸⁸ 868 F.2d 1313, 1324 (2d Cir.), cert. denied, 493 U.S. 883 (1989).

¹⁸⁹ *Id.*

¹⁹⁰ 960 F.2d 301 (2nd Cir.1992).

copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody.¹⁹¹

As in the *Weissman* case, Judge Cardamone’s understandings about the importance of proper credit were clearly playing a significant role in the ruling against the defendant.

Two recent district court cases in the Second Circuit have also incorporated the issue of attribution into discussions of fair use. In *Williamson v. Pearson Educ., Inc.*,¹⁹² the court favored a finding of fair use under the first factor where the defendant had included the plaintiff’s book as “Recommended Reading” and given credit to the plaintiff as a source of the borrowed material.¹⁹³ In *Richard Feiner & Co. v. H.R. Industries*,¹⁹⁴ the court found that a failure to attribute was relevant to the fourth fair use factor.¹⁹⁵

What these cases demonstrate is not that attribution is regularly considered by courts as a factor in the fair use analysis. This is most certainly not the case. The cases merely illustrate that in certain cases, plaintiffs and defendants have been successful in leading courts to incorporate evidence about attribution into a fair use analysis. Despite the absence of any explicit attribution consideration in the factors, some judges have seen fit to incorporate finding and consideration about attribution in their opinions, finding it to be an equitable consideration guiding fair use analysis.

The task of reforming copyright law to take open copyright practices into account will be a long and complicated struggle. My proposal here is just one possible way to start this process. In light of the shift described in this paper toward open copyright and reputation-based production markets, adding a fifth “attribution” factor to the fair use factors would be a very small step in the right direction.

¹⁹¹ Rogers, 960 F.2d at 310.

¹⁹² 2001 WL 1262964, at *5 (S.D.N.Y. 2001).

¹⁹³ *Id.*

¹⁹⁴ 10 F.Supp.2d 310, 314 (S.D.N.Y. 1998), *rev'd on other grounds*, No. 98-9390, 1999 WL 385763 (2d Cir. 1999).

¹⁹⁵ *Id.* (“Feiner also observes that by holding out the photograph to the world without attribution to Feiner, HRI has impacted Feiner’s market by creating the impression that the photograph is now in the public domain. Given that HRI’s use was directed at the film industry, the very market available to Feiner for exploitation of its rights, I agree with Feiner.”)