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The Right to Say, "I Didn't Write That": Creating a Cause of Action to Combat False Attribution of Authorship on the Internet

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NOTES

THE RIGHT TO SAY, “I DIDN’T WRITE THAT”: CREATING A CAUSE OF ACTION TO COMBAT FALSE ATTRIBUTION OF AUTHORSHIP ON THE INTERNET

*Kathleen Brennan Hicks**

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I. INTRODUCTION

Kurt Vonnegut never advised the class of 1997 to wear sunscreen.¹ Bill Gates may have a list of "Eleven Things You Won't Learn in School," but has not shared it with the world.² Thomas Sowell disagrees with President Barack Obama's policies, but does not dispute his American citizenship.³ And neither David Kaiser, Massachusetts Institute of Technology physics and history of science professor, nor David Kaiser, retired Naval War College professor, ever wrote an essay comparing President Obama to Adolf Hitler.⁴

All, save Mr. Gates, have gone on the record denying authorship of each piece wrongly attributed to them.⁵ The "sunscreen" essay, a piece by *Chicago Tribune* columnist Mary Schmich, spread online billed as a commencement address Vonnegut gave at the Massachusetts Institute of Technology.⁶ The "eleven rules" originated in a column, written by education reformer Charles J. Sykes, which ran in the *San Diego Union-Tribune* in 1996.⁷ An essay alleging that Barack Obama was not an American citizen, and therefore ineligible to run for president, circulated via email with Thomas Sowell's name attached.⁸ Both

¹ Massachusetts Institute of Technology News, *Vonnegut Gives Commencement Address – But Not at MIT* (June 3, 1998), <http://newsoffice.mit.edu/1998/vonnegut-0603> [hereinafter MIT News].

² Carole Fader, *Fact Check: Rules Might Be Cool, But They're Not from Bill Gates*, FLA. TIMES-UNION (June 24, 2012), <http://members.jacksonville.com/news/metro/2012-06-24/story/fact-check-rules-might-be-cool-theyre-not-bill-gates>.

³ Thomas Sowell, *An Internet Fraud*, JEWISH WORLD REV. (July 10, 2008), <http://jewishworldreview.com/cols/sowell071008.php3>.

⁴ David Kaiser, *I Didn't Write That*, N.Y. TIMES, Nov. 4, 2012, at SR11, http://www.nytimes.com/2012/11/04/opinion/sunday/i-didnt-write-that.html?_r=0 [hereinafter Kaiser, *I Didn't Write That*]. Professor Kaiser of the Naval War College detailed his experience with the essay on his personal blog. David Kaiser, *Life in the Blogosphere*, HISTORY UNFOLDING (Apr. 11, 2009, 8:17 AM), <http://historyunfolding.blogspot.com> [hereinafter Kaiser, *Life in the Blogosphere*].

⁵ See MIT News, *supra* note 1 ("I think it was a darling column she wrote, but I would never do that to MIT," said Mr. Vonnegut."); Sowell, *supra* note 3 ("Letters, phone calls and e-mails from readers around the country have asked me if I wrote a column saying that Barack Obama is not an American citizen. The answer is 'No.'"); Kaiser, *I Didn't Write That*, *supra* note 4 ("The essay, which has been promoted on blogs across the Internet, is attributed to a person named David Kaiser. As it happens, my name is David Kaiser. We are not the same person."); Kaiser, *Life in the Blogosphere*, *supra* note 4 ("The email circulating widely attributed to me comparing President Obama to Adolf Hitler is a forgery. . .").

⁶ See Mary Schmich, *Advice, Like Youth, Probably Just Wasted on the Young*, CHI. TRIB. (June 1, 1997), <http://www.chicagotribune.com/news/columnists/chi-schmich-sunscreen-column-column.html>.

⁷ San Diego Union Tribute archives, <http://www.newslibrary.com/sites/sdub/> (click "search by date," enter 9/19/1996 into both date fields, and search keywords "Some Rules Kids Won't Learn in School") [hereinafter UTSD Archives].

⁸ See the full text of the essay at: <http://www.snopes.com/politics/obama/citizen.asp>.

Kaiser of MIT and Kaiser of the Naval War College learned that the essay had been circulating, bearing their shared name and the Naval College professor's curriculum vitae. The professors were able to trace the essay to a comment from a blog, but neither knows who attached their names, nor when.⁹

In several of these cases, a simple Google search reveals the real author and original source of the falsely attributed work.¹⁰ Yet, despite the readily available Snopes.com articles¹¹ or public statements to that effect, these works continue to circulate across cyberspace, bearing the wrong name.¹²

The Internet facilitates episodes of false attribution such as these with greater ease and speed than print ever could. Victims of false attribution—that is, “non-authors”—have limited, if any redress, and currently none at law. Professors Kaiser and Kaiser exhibit the best course of action available: when individual readers of the falsely attributed work contact each alleged author with feedback, the “non-authors” respond with a form email denying authorship.¹³

Yet this approach hardly provides a cure for the unknown number of less proactive readers—those not moved to contact either professor. For every one who emails or calls, far more passively encounter the work and do nothing besides associate the information with the alleged author's name.

This Note outlines a neglected problem—that of non-commercial, Internet-spread, falsely attributed authorship—and proposes a solution. When these works persist, bearing the falsely attributed names, those non-authors—who are often actually authors, albeit of other texts¹⁴—have pieces wrongly added to their canons. Furthermore, the alleged author may not know his or her name has been attached to a work until long after the attribution has gained

⁹ Kaiser, *I Didn't Write That*, *supra* note 9; Kaiser, *Life in the Blogosphere*, *supra* note 9.

¹⁰ For instance, the second, third, and fourth results presented after searching for “Kurt Vonnegut sunscreen” reveal that he is not the author. Notably, however, the first and fifth results listed do still falsely attribute the essay to him.

¹¹ See Snopes, *supra* note 8 for Thomas Sowell; <http://www.snopes.com/politics/soapbox/sc-hoolrules.asp> for Bill Gates; <http://www.snopes.com/politics/soapbox/proportions.asp> for both David Kaisers.

¹² As of the 2012 election cycle, both David Kaisers continued to receive correspondence from readers believing either of them had authored the anti-Obama piece. See Kaiser, *I Didn't Write That*, *supra* note 4; Kaiser, *Life in the Blogosphere*, *supra* note 4.

¹³ See Kaiser, *I Didn't Write That*, *supra* note 4; Kaiser, *Life in the Blogosphere*, *supra* note 4.

¹⁴ Kurt Vonnegut has written a number of acclaimed novels, such as *Slaughterhouse Five*; the “eleven rules” column attributed to Bill Gates allegedly came from a book he did actually write: “Business @ The Speed of Thought,” see Fader, *supra* note 2; Thomas Sowell is a well-known columnist; David Kaiser of MIT has written several books, including *How the Hippies Saved Physics: Science, Counterculture, and the Quantum Revival*. See Kaiser, *I Didn't Write That*, *supra* note 4.

prominence, and the damage has been done.¹⁵ Yet the originator of the false attribution is nowhere to be found.

Additionally, the alleged authors suffer definable harm, analogous to that recognized in other realms of law. This form of false attribution implicates reputation, a legally cognizable interest domestically, as well as the right to define one's creative persona, which underscores moral rights, a legal regime prevalent abroad and partially adopted in the United States.¹⁶

This Note proposes that the U.S. recognize an individual's interest in preventing false attribution online, and adapt some existing legal protections to ameliorate the harm it causes. Part II expounds on the problem further, examines the relevant laws and policies, and explains how they fail to address this specific problem. Part III will advocate for the creation of a new notice-and-takedown regime, such as the one codified in the Digital Millennium Copyright Act, arguing that it would provide an expeditious, minimally burdensome solution to the problem for both author and unintentional (i.e., not the unknown original) false attributor. Further, Part III will address potential drawbacks to the proposed solution. Finally, Part IV concludes by reiterating the benefits of an anti-false attribution law, and noting that such a law does not conflict with the larger aims at the heart of U.S. intellectual property law.

II. BACKGROUND

This section addresses the problem, the current state of the law, and the policies that support protecting authors from online false attribution. Part A explains the online problem in greater detail, outlining what harm befalls an author whose name attaches to something he did not write. Part B discusses moral rights protections, and illustrates how online false attribution directly implicates their underlying policies. Additionally, it considers the arguments for and against moral rights regimes. Part C examines the existing relevant laws that protect authors' attribution rights, explains how, independently, each falls short of ameliorating the problem, but that each offers a piece of the solution. Finally, Part D discusses the Digital Millennium Copyright Act's notice-and-takedown provision, and how, despite its faults, it could adapt to the problem of online false attribution.

¹⁵ See Sowell, *supra* note 3.

¹⁶ See Visual Artists Rights Act, 17 U.S.C. § 106A (1990) [hereinafter VARA], and Part II.C, *infra*.

A. THE PROBLEM: ANONYMOUS, ONLINE FALSE ATTRIBUTION

The four episodes of false attribution described above share roughly the same five characteristics, which trace the scope of the problem herein addressed. First, the work at issue is written and found on the Internet. Second, its source of origin may be known, such as the “sunscreens” and “eleven rules” articles,¹⁷ or unknown, as with the two works disparaging President Obama. Third, the falsely attributed work has permeated the public conscience through rapid spread on the Internet, thereby obscuring the original source of the false attribution.¹⁸ Online written works “go viral” organically; it is all but impossible to find the starting point.¹⁹ Unlike false attribution in other contexts, then, the false attributor does not seek commercial gain from attaching the name of another to the work.²⁰ Most often, there is no clearly identifiable reason for the false attribution, largely because the originator cannot be found.²¹ Fourth, because the party responsible for the false attribution is not identifiable, this is an asymmetrical issue: the alleged author cannot point to a single person or entity to take to court for false attribution.²²

Finally, the work continues to exist and spread online, through e-mail, blogs, or other forms of social media, even after third-party debunking or the non-author’s denial.²³ Furthermore, the work, with its non-author’s name attached,

¹⁷ See Schmich, *supra* note 6; UTSD Archives *supra* note 7.

¹⁸ A New York Times piece written in the aftermath of the Vonnegut/sunscreens flap noted that “[t]here is no way to trace exactly what happened since the column appeared,” and interviewed a reader who said, “I have to say that I tend to get rid of those kinds of things really fast. . . . [but] [i]n this particular case, I thought it was poignant enough to forward to, I don’t know, a whole lot of friends whom I believed would appreciate it.” Ian Fisher, *It’s All the Talk of the Internet’s Gossip Underground*, N.Y. TIMES (Aug. 6, 1997), <http://www.nytimes.com/1997/08/06/nyregion/it-s-all-the-talk-of-the-internet-s-gossip-underground.html>.

¹⁹ See Kaiser, *Life in the Blogosphere*, *supra* note 4, noting that any efforts to find the original false attributor have proven fruitless. See also Michelle B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 1 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 664–65 (2001) (“[C]omputer technology has freed expression from form. The author’s expression is no longer trapped and tangible; it is fluid and malleable in cyber-space. These changes make it possible for anyone — not just publishers — to reproduce a work with a false attribution . . .”).

²⁰ Compare *Dastar Corp. v. Twentieth Century Fox Film Inc.*, 539 U.S. 23 (2003), discussed below.

²¹ See, e.g., Fader, *supra* note 2 (“There’s no indication why Gates’ name was attached to the rules.”).

²² See Kaiser, *Life in the Blogosphere*, *supra* note 4 (noting that Professor Kaiser is unable to find the original perpetrator).

²³ See Kaiser, *I Didn’t Write That*, *supra* note 4 (“After three and a half years of trying to debunk it, however, the Obama-Hitler essay still haunts the Internet (and my in-box).”).

continues to spread, even after authorship has been disclaimed. Readers genuinely believe it originated from the alleged author.²⁴ As a corollary matter, the work need not have any *harmful* effect on the author's reputation. Indeed, Vonnegut's name attached to a wildly popular essay, which arguably enhanced his reputation and recognition with many readers.²⁵

B. MORAL RIGHTS: THE FOUNDATIONAL ISSUE

American intellectual property law tends to grant protections safeguarding the economic aspects of an individual's creative contributions to society.²⁶ For protection for instance, copyright exists to protect an author's economic interest²⁷ in his works.²⁸ By contrast, moral rights recognize the intrinsic, non-economic value that a work provides to its author; it represents the author's expression, and so moral rights regimes seek to protect both that creative process, as well as the resulting product.²⁹

Jurisdictions that recognize moral rights vary in the protections they offer, with rights of integrity and attribution generally serving as the cornerstone rights. The right of attribution—that is, an author's right to receive credit for his or her work—typically enjoys the most attention of all the moral rights. The

²⁴ See *id.* (noting that despite a Snopes.com post debunking his authorship, he receives reader feedback, largely positive, on politically significant occasions, such as elections or during public uproar over the stimulus bill in 2009).

²⁵ This speaks to the need to incorporate protections afforded by moral rights, discussed below, which recognize that an author may still have a right that needs vindicating, even if he seemingly has not been harmed. See Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U.L. REV. 945, 950 (1990) ("Note that article 6bis [of the Berne Convention, discussed below] does not protect only reputation; the inclusion of 'honor' as well as reputation supports the conclusion that the author's moral rights could be violated even if the act enhanced his reputation."); see also 17 U.S.C. § 106A (1990).

²⁶ See Jean-Luc Piotraut, *An Author's Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 555–56 (2006) (noting that American copyright law, while criticized for its economics-centric, rather than natural law, approach, does have its foundation in concepts of morality, such as administering justice).

²⁷ Rebecca Tushnet, Symposium, *Fixing Copyright: Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789, 790 ("[T]he legal rules governing [the DMCA] are explicitly geared at deterring infringement of the copyright owner's economic rights, not the creator's moral rights.").

²⁸ Later discussion will address the fact that this protection also only applies to actual authors, and therefore does not extend to victims of false attribution in the first place.

²⁹ ROBERTA KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 5–6 ("Central to moral rights is the idea of respect for the author's meaning and message as embodied in a tangible commodity because these elements reflect the intrinsic creative process."); see also VARA, 17 U.S.C. § 106A.

United States, as a party to the Berne Convention, ostensibly must offer protection for this right.³⁰ Article 6*bis* states,

independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.³¹

However, moral rights law in the U.S. only exists in limited capacity.³² It has been described as a “patchwork”; no single comprehensive law governs or protects these rights, but artists have at their disposal several avenues by which they might attempt to vindicate these rights when violated.³³ Further, as of now, no such protection exists in the context of written works, or anything besides visual works.³⁴

The sub-right against false attribution exists implicitly in the attribution right,³⁵ and it dovetails with the right of integrity, which protects the author's right for his or her work to exist as created. The right of integrity

³⁰ Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*(1), Sept. 9, 1886, S. TREATY DOC. NO. 99-27 (1986) [hereinafter Berne Convention]. See generally Deborah Ross, Comment, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights?*, 68 N.C. L. REV. 363 (1990).

³¹ Berne Convention, *supra* note 30, art. 6*bis*.

³² See VARA, *supra* note 16. VARA only protects visual works, so no explicit moral rights protection exists for other types of works.

³³ This Note will discuss several of these avenues as they apply to the problem of online false attribution. See Justin Hughes, Symposium, *Fixing Copyright: American Moral Rights and Fixing the Dastar “Gap,”* 2007 UTAH L. REV. 659, 666 (explaining the ten-element “patchwork,” including both federal causes of action under copyright and trademark, state causes of action under tort, contract, and moral rights regimes, and connecting the existence of this “patchwork” to Congress's conclusion that it had no need to enact a comprehensive federal moral rights scheme in order to ensure U.S. compliance with the Berne Convention).

³⁴ See generally Ross, *supra* note 30 (proposing and advocating for an authorial moral rights regime in the United States); Tushnet, *supra* note 27 (arguing against such a regime in the United States, owing to the difficulties of defining its limits, and the hardships it would impose on future artists' ability to borrow influences from other creators).

³⁵ See Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 230 (1995) (“In addition to the rights of paternity (attribution) and integrity . . . many jurisdictions expressly include often moral rights: for example, a right against false attribution.”); Roberta Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 2004 (2006) (recognizing false attribution as an actionable component of an attribution right).

guarantees that the author's work truly represents her creative personality, and is free of distortions that misrepresent her creative expression. . . . Objectionable distortions, modifications, presentations, and even destruction of an author's work damage authorship dignity because the author's external embodiment of her meaning and message no longer represents her intrinsic creative process. The resulting damage is particularly acute when the modified work is linked to the author through specific attribution or widespread public recognition.³⁶

Falsely attributing a work to an individual that he or she did not write thus magnifies this damage. Indeed, attaching a false name imputes to that "non-author" a creative process that never took place. Quite literally, false attribution puts thoughts into an author's head, and words into his or her mouth. The attribution and integrity rights protect the author's ability to have sole control over that internal process, an interest that exceeds pecuniary and even reputational damage. The author damaged by false attribution simply does not want to bear responsibility for, or claim ownership of, words he or she did not write.³⁷

For example, Vonnegut was falsely alleged to have given a commencement address to graduates of an eminently respected institution of higher learning.³⁸ Despite the essay's enormous popularity,³⁹ Vonnegut had not written it, and presumably disclaimed it, in part, because he did not wish for the public to consider it part of his body of work.⁴⁰ More insidiously, the essay attributed to Thomas Sowell exploited his criticism of and disagreements with President Obama. Beyond attaching Sowell's name to a fringe political movement—alone a reason for him to disclaim authorship—the essay's style did not match Sowell's, thereby taking liberties with both his worldview and his means of creative expression.⁴¹

³⁶ KWALL, *supra* note 29, at 5–7.

³⁷ Kaiser, *I Didn't Write That*, *supra* note 4.

³⁸ MIT News, *supra* note 1.

³⁹ See Justin Alvarez, *Wear Sunscreen: The Story Behind the Commencement Speech That Kurt Vonnegut Never Gave*, OPEN CULTURE (Nov. 11, 2013), <http://www.openculture.com/2013/11/wear-sunscreen-the-story-behind-the-commencement-speech-that-kurt-vonnegut-never-wrote.html> (noting that, in addition to its proliferation through e-mail forwarding, the essay became a Billboard Top 100 hit, after acclaimed filmmaker Baz Luhrmann turned it into a spoken-word song).

⁴⁰ Indeed, the style seemed so similar to Vonnegut's that his own wife sent it to friends and family, expressing her pride and delight at her husband's alleged work. See Fisher, *supra* note 18.

⁴¹ Sowell, *supra* note 3 ("Many of my readers have been savvy enough to tell that the style of the phony column is not mine, but checked with me just to be sure.").

These authors did not seek economically based remedies. Neither author, in each statement disclaiming authorship, expressed an interest in finding the party responsible for the false attribution, nor for seeking fiscal redress.⁴² Both merely wished that the public would acknowledge they had not authored the respective pieces and discontinue attributing the works to their names.

C. AGGREGATING A CAUSE OF ACTION: THE BASES FOR RELIEF ELSEWHERE AT LAW

1. *The Visual Artists Rights Act: Moral Rights in American Law.* Congress has afforded moral rights to certain classes of artists, by enacting the Visual Artists Rights Act⁴³ (VARA) in response to the U.S.'s accession to the Berne Convention. Consequently, this law represents the best, and only, approximation of directly conferred moral rights protection in U.S. law.

Congress expressed a willingness to recognize that creators have an interest in maintaining their artistic integrity, separate from reputational, property, or economic interests.⁴⁴ Indeed, although technically part of the Copyright Act, VARA recognizes rights apart from those protected by copyright law.⁴⁵

However, Congress intended only to provide scant moral rights protection, as expressed in VARA's legislative history, where one representative noted, "I would like to stress that *we have gone to extreme lengths to very narrowly define the works of art* that will be covered . . . [T]his legislation covers only a very select group of artists."⁴⁶ By all accounts, Congress succeeded. First, VARA only protects a

⁴² See *id.*; MIT News, *supra* note 1. While both statements disclaim authorship of the respective pieces, neither expresses any desire to discover or recover damages from the source of the initial false attribution.

⁴³ 17 U.S.C. § 106A

(a) Rights of attribution and integrity. Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create. . . .

⁴⁴ 3-8D NIMMER ON COPYRIGHT § 8D.06 ("In recognition of their link more to the author's personality than pocketbook, moral rights stand in contrast to economic rights. Accordingly, the newly created artists' rights are independent of copyright ownership rights.")

⁴⁵ *Id.* ("[T]his new genus does not set forth a [protectable] 'work of authorship,' instead, it carves out certain already protected works to confer on them, and on them alone, a new species of rights involving attribution and integrity.")

⁴⁶ David E. Shipley, *The Empty Promise of VARA: The Restrictive Application of a Narrow Statute*, 83 MISS. L.J. 985, 994–95 (2014) (citing HOUSE REPORT ON THE VISUAL ARTISTS RIGHTS ACT OF 1990, H.R. REP. NO. 101-514, at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6920–21, testimony of Rep. Markey) ("There is no doubt that Congress's intent was to limit VARA's

narrow class of creations.⁴⁷ It does not apply to authors of literary works, who continue to have no moral rights protections in the U.S.⁴⁸ Besides only protecting rights of attribution and integrity,⁴⁹ some have argued that the *Dastar* decision some have argued that the Supreme Court's *Dastar* decision, discussed below, "appears to suggest that VARA's enactment promotes a negative inference that VARA is the only federal law locus for attribution rights: if authors already enjoyed attribution rights, VARA would be superfluous," a statutory interpretation that the Court always seeks to avoid.⁵⁰ Further, the rights granted in VARA exist only for the duration of the author is life.⁵¹ This means that even if Congress simply extended VARA to cover written works on the Internet, no remedy would exist for Vonnegut, who passed away in 2007. Vindicating the attribution rights VARA affords also requires using the expensive, highly formalized court system, and seeking an injunction, as opposed to less formalized mechanisms of extra judicial relief.⁵² Finally, as

application. . . . The definition of a work of visual art is a critical underpinning of the *limited scope of the bill*." (emphasis added)).

⁴⁷ 17 U.S.C. § 101 defines "visual art" as:

- (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
- (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

⁴⁸ VARA explicitly excludes:

- (A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication. . . .

Id.

⁴⁹ VARA, 17 U.S.C. § 10A.

⁵⁰ Jane C. Ginsberg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 282 (2004) ("This is both perverse and wrong. It is perverse because, given VARA's very limited coverage, the result of this reading is to leave most authors with *fewer* attribution rights post-VARA than before.").

⁵¹ 17 U.S.C. § 106A(d)(1) ("With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990 [note to this section], the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.").

⁵² See *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 55, 56 (2010) ("The right of attribution under VARA thus gives an artist a claim for injunctive relief to, inter alia, assert or disclaim authorship of a work In failing to provide a damages remedy for any type of violation of the moral right of attribution, Congress may have concluded that artists could obtain adequate relief for the harms of false attribution by resorting to the Copyright Act and other traditional claims."). Cf. Digital Millennium Copyright, 17 U.S.C. § 512(c).

narrow as VARA's protections are, courts' interpretation of them has been narrower still, and those artists who do bring claims rarely succeed.⁵³ The relief afforded thus does not lend itself well to mass episodes of false attribution, and the limited right granted renders successful claims few and far between.

2. *Defamation: Indirect State Law Protection of Moral Rights.* Although not explicitly intended to protect an author's moral rights, the common law tort of defamation⁵⁴ can sometimes serve as a proxy for moral rights legislation in cases of false attribution.⁵⁵ A successful defamation claim requires that the plaintiff prove injury to his or her reputation from the defendant's false statements to another person.⁵⁶ Thus, on its face, defamation law does provide some relief to falsely attributed authors.

Indeed, some authors have successfully pursued defamation claims in order to vindicate their right against false attribution.⁵⁷ These cases may seem to obviate the need for any more comprehensive scheme of moral rights legislation. After all, "various state-law doctrines [including defamation] . . . have provided more comprehensive moral-rights protection, albeit indirect protection."⁵⁸ On its face, defamation offers authors the protection they seek when their names have been attached to something they did not write.

⁵³ Shipley, *supra* note 46, at 988–89 (noting that courts have taken seriously Congress's expressed intent that VARA encompass a limited scope, and thus claims artists bring under VARA rarely succeed); see also Patricia Alexander, *Moral Rights in the VARA Era*, 36 ARIZ. ST. L.J. 1471, 1477 (2004) ("[VARA] is so tightly defined that only a single damaged artist — a sculptor — has received satisfaction in the courts. The rest have all fallen victim to the many ways in which the language of VARA has excluded their claims.").

⁵⁴ For a discussion of other state law tort claims, such as the rights to privacy and of publicity, see Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 3 (1985).

⁵⁵ Edward J. Damich, *Moral Rights Protection and Resale Royalties for Visual Artists in the United States: Development and Current Status*, 12 CARDOZO ARTS & ENT. L.J. 387, 391 (1994); Kwall, *supra* note 54, at 18 (referring to defamation as one of the "principal doctrines" employed to protect moral rights in America).

⁵⁶ RESTATEMENT (SECOND) OF TORTS § 559 (1976).

⁵⁷ *Clevenger v. Baker Voorhis & Co.*, 168 N.E.2d 643, 645 (1960) (permitting an author to recover against his former publisher for falsely attributing his authorship to a mistake-laden edition of his book, for which the publisher was responsible); *Ben-Oliel v. Press Pub. Co.*, 167 N.E. 432, 434 (1929) (holding that publishing a well-known author's name on a work that would damage her reputation was libel, and thus a newspaper was liable when it published an article falsely attributed to the plaintiff); *D'Altomonte v. New York Herald Co.*, 154 A.D. 453, 455 (1913) (holding that falsely attributing an article to an author for purposes of subjecting him to ridicule constituted actionable defamation).

⁵⁸ Dane S. Ciolino, *Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors' Moral Rights*, 69 TUL. L. REV. 935, 950 (1995).

Yet despite successful defamation claims, its limits have rendered it a poor substitute for false attribution as a whole.⁵⁹ First, it requires some harm to reputation—thus, an author whose reputation has not suffered as a result of the attribution cannot bring such a claim.⁶⁰ Second, it is axiomatic that one cannot defame the dead, and so only those living victims of false attribution may pursue a defamation action.⁶¹ Third, and most problematic, courts typically will not grant injunctions as relief in defamation cases—the very sort of relief a falsely attributed author would wish to seek.⁶² Fourth, an author wishing to successfully levy a defamation claim must have a specific defendant in mind in order to recover⁶³—and in the case of online false attribution, the source of the false attribution often cannot be found.

Thus, although authors do have defamation at their disposal to attempt to recover for false attribution, it provides incomplete relief—and in the case of online false attribution, likely none at all.

3. *The Lanham Act § 43: Trademark as a Back Door to Attribution Rights.*

a. *Section 43(a) Confusion as to Source: Closing the Back Door to Attribution Rights.* For a time, § 43(a) of the Lanham Act⁶⁴ seemed to function as a form of

⁵⁹ *Id.* at 952 (“[D]efamation offers more limited protection than traditional moral-rights doctrine.”); see also Kwall, *supra* note 54, at 23 (noting the difficulty that American authors face when attempting to vindicate their moral rights, because they must retrofit their claims to existing causes of action).

⁶⁰ Ciolino, *supra* note 58; see also Kwall, *supra* note 54, at 22–23, 25 (noting that authors must show some injury to their professional reputations, or exposure to contempt or public ridicule which has injured the author’s professional standing, and that moral rights encompass more than simply damage to an author’s professional standing).

⁶¹ Damich, *supra* note 55, at 391.

⁶² *Shostakovich v. Twentieth Century-Fox Film Corp.*, 196 Misc. 67, 70 (1948) (refusing to grant injunctive relief absent “a clear showing of the existence of libel”); see also Kwall, *supra* note 54, at 25 n.91 (noting the courts’ reluctance to provide injunctive relief for defamation actions alleging false attribution).

⁶³ See RESTATEMENT (SECOND) OF TORTS § 559, illus. 1–3, all of which describe instances of defamation as whether “A” has defamed “B” or “C” by making certain statements to others such as advertising in a newspaper or writing a letter. In cases of online false attribution, “B” and “C” do not know “A’s” identity. See also Kaiser, *Life in the Blogosphere*, *supra* note 4.

⁶⁴ Specifically, under the heading, “False designations of origin, false description, and dilution forbidden” 15 U.S.C. § 1125 (2006), provides:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or

moral rights protection, especially in the context of false or misattribution.⁶⁵ This provision forbids use of another's trademark so as to indicate a false designation of origin, thereby creating confusion about the source of the "thing" at issue. Although the statute refers to "goods or services," for a time, artists could attempt to use this provision to bring false attribution claims in the context of communicative works. The Second Circuit's 1976 *Gilliam v. American Broadcasting Cos.*⁶⁶ decision represents the high watermark of this trend. The Supreme Court's 2003 *Dastar Corp. v. Twentieth Century Fox Film Corp.*⁶⁷ decision, however, curtailed § 43(a)'s use in this context, leaving artists with less legal protection for their works and their names.

Gilliam concerned ABC's airing of a television program created by Monty Python, the well-known British comedy group. In a contract with BBC, the Pythons agreed to write and perform a series of comedy shows for television broadcast, over which they retained extensive creative control, especially concerning any alterations to their scripts.⁶⁸ BBC could license the program to other networks overseas, however, and reached such an agreement with Time-Life Films.⁶⁹

ABC acquired the broadcasting rights, and assured BBC and Monty Python that any edits it made would not mar the programs beyond making room for commercial breaks.⁷⁰ However, when Monty Python eventually saw the tape of what had aired in the U.S., they were "appalled" by the editing job, which cut about twenty-seven percent of the content.⁷¹ The comedy troupe then took ABC to court, seeking to enjoin the broadcast of a second, similar program.⁷²

In overturning the district court's denial of an injunction, the Second Circuit noted the damage that broadcasting these poorly edited renditions of Monty

as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person. . . .

⁶⁵ This Note will only address § 43(a)(1)(A), the "false association" prong. For a discussion of § 43(a)(1)(B), the false advertising prong, see Clint A. Carpenter, *Stepmother, May I?: Moral Rights, Dastar, and the False Advertising Prong of Lanham Act Section 43(a)*, 63 WASH. & LEE L. REV. 1601 (2006).

⁶⁶ 538 F.2d 14 (1976).

⁶⁷ 539 U.S. 23 (2003).

⁶⁸ *Gilliam*, 538 F.2d at 17. The agreement gave BBC ultimate authority over any changes to the writing, but required the network to consult with Monty Python on anything substantial. Importantly, the contract did not authorize BBC to alter the program once the Pythons had recorded it.

⁶⁹ *Id.* Time-Life could only edit the programs to comply with U.S. broadcasting standards, and to fit in commercial breaks. Notably, BBC rejected a direct agreement with ABC.

⁷⁰ *Id.* at 18.

⁷¹ *Id.*

⁷² *Id.*

Python's work would have on their ability to attract an American fan base.⁷³ The court rested its reasoning in part on § 43(a), which it said an entity violates when it makes a technically true representation of a product that creates a false impression of its origins.⁷⁴ The court found that ABC's representations that Monty Python had created, much less sanctioned, the badly edited program constituted such a violation, as the program "depart[ed] substantially from the original work."⁷⁵ Reasoning that the Lanham Act intends to protect against false designations of origin that would harm a plaintiff's professional reputation, and that airing the program at all—even with a disclaimer making clear that Time-Life had heavily edited it—would cause such harm to Monty Python, the court granted the injunction.⁷⁶

The *Gilliam* court treated § 43(a) as a protection for an author's right of integrity,⁷⁷ noting that, "to deform his work is to present him to the public as the creator of a work not his own, and thus makes him subject to criticism for work he has not done."⁷⁸ Importantly, however, the court still rested its reasoning on the economic rationale that underpins copyright and trademark law: "the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent."⁷⁹

This would seem to constitute an opening for an author seeking to have her name removed from a falsely attributed work, given the close relationship between the harm wrought by false attribution and attribution to a distorted work. Indeed, for a time, artists moved under § 43(a) as a way to vindicate moral rights,⁸⁰ so long as they met certain factual constraints.⁸¹ However, the courts' concern about using trademark law—aimed chiefly at protecting

⁷³ *Id.* at 19 ("Such an injury to professional reputation cannot be measured in monetary terms or recompensed by other relief.").

⁷⁴ *Id.* at 24.

⁷⁵ *Id.*

⁷⁶ *Id.* at 24, 25.

⁷⁷ Carpenter, *supra* note 65, at 1621.

⁷⁸ *Gilliam*, 538 F.2d at 24 (internal quotations omitted).

⁷⁹ *Id.*

⁸⁰ See *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981) (allowing a § 43(a) claim against a movie studio for crediting someone for another actor's work); *Waldman Publishing Corp. v. Landoll, Inc.*, 43 F.3d 775 (2d Cir. 1994) (characterizing false designation of origin of a written work as actionable under § 43(a) because the author is the "origin").

⁸¹ A plaintiff wishing to use § 43(a) to vindicate a claim must establish both "extreme mutilation" of the work in question, as well as "financial or professional loss" in order to succeed. Brooke Bove, Note and Comment, *Moral Rights: The Moral of the Story Both for Authors and Publishers*, 32 WHITTIER L. REV. 335, 349–50 (2011).

consumers from confusion about the origin of goods and services—to protect copyrightable material limited the factual scenarios in which an artist could bring a § 43(a) claim.⁸² That overlap came to a head in *Dastar*, in which the Supreme Court severely limited the cause of action under § 43(a).⁸³

In the *Dastar* case, Twentieth Century Fox sued Dastar, using § 43(a), after it sold a minimally edited version of a World War II television special that Twentieth Century Fox had produced.⁸⁴ Twentieth Century Fox's copyright had expired, so rather than pursuing a copyright infringement claim, it filed suit against Dastar using § 43(a)'s false association prong.⁸⁵ In denying this cause of action to Twentieth Century Fox, the Supreme Court's unanimous opinion found that it had to define the term "origin" as used in § 43(a).⁸⁶ If "origin" referred to the actual goods themselves—here, the videotapes—then Dastar was the origin. If, however, "origin" encompassed the underlying source that had been copied, then Fox could rightly be considered the origin.⁸⁷

The Court concluded that "as used in the Lanham Act, the phrase 'origin of goods' is . . . incapable of connoting the person or entity that originated the ideas or communications that 'goods' embody or contain."⁸⁸ Trademark's consumer protection-oriented, rather than producer-oriented purpose controlled the Court's reading of "origin."

The consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for

⁸² Rebecca Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(a)*, 77 WASH. L. REV. 985 (2002) ("When the product at issue in a particular reverse passing off case constitutes copyrightable subject matter such as art, literature, or music, the inquiry is especially complicated because courts must balance the policies of section 43(a) against those of copyright infringement.").

⁸³ Such a result is not totally unforeseen. Judge Murray Gurfein's *Gilliam* concurrence cautioned artists and authors against relying too heavily on § 43(a), noting that it does not substitute for moral rights. *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 27 (2d Cir. 1976) (Gurfein, J., concurring). See generally NIMMER ON COPYRIGHT, *supra* note 44, § 8D.04.

⁸⁴ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 25–27 (2003). Fox's video series, titled "Crusade in Europe," was based on a book of the same name by Gen. Dwight D. Eisenhower, which recounted his experience leading the American World War II effort in Europe. The series combined images and video from various public sources with narration based on the book. The series was broadcast on television for the first time in 1949, and after Fox failed to renew the copyright, the series fell into the public domain in 1977. In 1995, Dastar edited down the series, made slight modifications to the series' structure, and added different end credits. It then sold its remixed version of "Crusades" as "World War II Campaigns in Europe," and attributed production credits to itself.

⁸⁵ *Id.* at 26.

⁸⁶ *Id.* at 31.

⁸⁷ *Id.*

⁸⁸ *Id.* at 32.

the product, or designed the product—and typically does not care whether it is. “The words of the Lanham Act should not be stretched to cover matters that are typically of no consequence to purchasers.”⁸⁹

The Court then rejected the contention that communicative products, or tangible goods that convey stories and information, deserve special recognition as to their “origin” under § 43(a). To do so would conflict with copyright law, the legal regime set in place to protect creators and their rights to their works.⁹⁰

Furthermore, the Court identified several practical problems that would arise, should it permit attribution claims under § 43(a) in the context of uncopyrighted works. First, the Court could find no limiting principle when considering the “origin” of an uncopyrighted work.⁹¹ The “origin” of a work such as the “Crusades in Europe” series could be the entities that supplied the video, the company that supplied the editing work, or Fox, the distributor and original copyright holder.⁹² As the Court interpreted it, “we do not think the Lanham Act requires this search for the source of the Nile and all its tributaries.”⁹³ Additionally, the Court feared the burden a broader interpretation of “origin” would place on manufacturers. Suddenly, they could simultaneously face liability for *failing* to credit the “origin” of the source material, as well as for creating the impression that the origin had endorsed the new product *by* crediting it.⁹⁴

Ultimately, the Court found no liability for Dastar’s having labeled itself the producer of the series.⁹⁵ Fox’s video series had passed into the public domain, and “origin” referred to the origin of the actual physical good, not the underlying source material it contains, meaning that Dastar had technically “produced” the series.⁹⁶

⁸⁹ *Id.* at 32–33. Notably, this statement stands in direct contravention to the purpose of having moral rights, which allow the author to vindicate distortions or uncredited uses of his or her creative process.

⁹⁰ *Id.* at 33–34 (“The Lanham Act . . . does not exist to reward manufacturers for their innovation in creating a particular device; that is the purpose of the patent law and its period of exclusivity.” (internal citations omitted)).

⁹¹ *Id.* at 35.

⁹² *Id.* at 35–36.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 38. The Court did note, however, that Fox and its fellow respondents had other, live claims to prevent Dastar from marketing its series, including copyright claims over the source material from Gen. Eisenhower’s still-protected book.

⁹⁶ *Id.*

Dastar has received a round of criticism for its broad rejection of protection for the creative work contained in the good sold.⁹⁷ Most notably, former Register of Copyrights Marybeth Peters called the decision “ill-considered,” having “weakened the protection for moral rights that our laws offer.”⁹⁸ She further urged Congress to amend § 43(a) “to reflect what was the long[time] understanding prior to *Dastar*—that section § 43(a) is an important means for protecting the moral rights of attribution and integrity.”⁹⁹ *Dastar* severely curtailed one of the major sources of moral rights protection in U.S. law, thereby seriously undermining the “patchwork.”¹⁰⁰

Even if the Court had not so limited the use of § 43(a), it nevertheless would not serve the aims of “authors” harmed by anonymous online false attribution. First, as with VARA and defamation, the “non-author” of each piece must individually go to court and seek an injunction against the individual posting the falsely attributed work, as did the *Gilliam* plaintiffs. This inefficient, costly, and antagonistic option does not provide an effective solution to mass instances of widely disseminated false attribution. Second, even assuming a non-author wishing to disclaim foist-upon attribution desires to reduce consumer confusion, and thus may more exactly match § 43(a)’s goals, this is not the non-author’s sole or even primary objective. Indeed, § 43(a)’s commercial roots do not typically apply to a non-author in this context, who may not experience any economic harm. Nor does the source of the false attribution reap any commercial gain. Third, that source is anonymous, meaning that the entity with any possible motivation for the false attribution cannot be found. This fact poses problems of proof for pursuing a § 43(a) action against ancillary false attributors, who merely passed on the work as it came to them.

b. Section 43(c) Dilution: Recognition of an Attribution-Like Interest in a Mark. U.S. trademark law also provides remedies for harm done to the mark itself, and not simply to the consumer base, which source confusion addresses. The dilution doctrine, contained in § 43(c), protects famous, distinctive marks from use by others if that use should result in dilution by either blurring or

⁹⁷ Carpenter, *supra* note 65, at 1628–29 (noting that the decision has received criticism for pushing the U.S. out of compliance with the Berne Convention, as well as for creating an overly broad rule inconsistent with Congress’s intent that § 43(a) serve this function).

⁹⁸ *Family Movie Act of 2004: Hearing on H.R. 4586 Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th CONG. REC. 10 (2004) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

⁹⁹ *Id.* at n.2.

¹⁰⁰ See Carpenter, *supra* note 65, at 1644–45 (naming § 43(a)(1)(A) as the “keystone” component of Congress’s patchwork compliance with the Berne Convention, and noting that it no longer serves this purpose, post-*Dastar*).

tarnishment. No actual, or indeed even likelihood, of confusion need result from the use.

Dilution by blurring results when the junior, less famous “copycat” mark creates an association with and “impairs the distinctiveness” of the famous mark.¹⁰¹ In other words, “dilution by blurring consists of a single mark identified by consumers with two different sources.”¹⁰² When examining whether dilution by blurring has occurred, the Act directs courts to consider a non-exhaustive list of factors. Factors to consider include the degrees of similarity, distinctiveness, and recognition of the famous mark, exclusivity of use by the famous mark owner, intent to create an association between the two by the junior user, and any evidence of actual association.¹⁰³ This theory does not apply in the context of consumer confusion, since “dilution is a name for a kind of erosion of the strength of a mark that could occur in the *absence* of consumer confusion.”¹⁰⁴

Dilution by tarnishment, by contrast, occurs when the less famous mark denotes a service or good that harms the reputation of the famous mark.¹⁰⁵ Typically, the products or services denoted by the latter have an offensive connotation or purpose. Alternatively, the junior mark may have the effect of degrading goodwill toward the famous mark.¹⁰⁶ This less common action does not succeed as often as dilution by blurring, owing to conflicts with speech rights.¹⁰⁷

Unlike traditional trademark law, anti-dilution law focuses on harm done to the mark, with no concern for whether consumers are harmed.¹⁰⁸ This arm of trademark law functions like a property law, where the famous mark holder’s in the power of the mark is at stake, rather than the consumer’s interest in its reliability.¹⁰⁹ This speaks to the same interest at stake in cases of false

¹⁰¹ 15 U.S.C. § 1125(c)(2)(B).

¹⁰² 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARK AND UNFAIR COMPETITION § 24:69 (2014).

¹⁰³ 15 U.S.C. § 1125(c)(2)(B)(i)–(vi).

¹⁰⁴ MCCARTHY, *supra* note 102, § 24:69.

¹⁰⁵ 15 U.S.C. § 1125(c)(2)(C).

¹⁰⁶ MCCARTHY, *supra* note 102, § 24:70.

¹⁰⁷ *Id.*

¹⁰⁸ *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 429 (2003) (“Unlike traditional infringement law, the prohibitions against trademark dilution are not the product of common-law development, and are not motivated by an interest in protecting consumers.”).

¹⁰⁹ MCCARTHY, *supra* note 102, § 24:72; *see also* Kenneth L. Port, *The Expansion Trajectory: Trademark Jurisprudence in the Modern Age*, 92 J. PAT. & TRADEMARK OFF. SOC’Y 474, 495–96 (2010) (arguing that trademark law has evolved into a form of moral rights law, protecting the markholder’s attribution right and the mark’s integrity).

attribution: the author's desire to preserve the goodwill associated with his name. Reader confusion is not the problem. In Vonnegut's case, no reader mistook the attributed author for some other Kurt Vonnegut. Yet the association of his name with something he did not write "diluted" his "brand" as an author. Similarly, the association of Thomas Sowell's name with an offensive "hit piece" about President Obama—moreover, a poorly written hit piece—tarnished his "brand," as well, without any confusion as to alleged source.

Once again, however, an exact comparison fails. Section 43(c) specifically prohibits the use of the dilution doctrine for noncommercial uses of the mark.¹¹⁰ Thus, treating authors' names as a "mark" under this section would not provide a remedy, as the use in cases of false attribution is noncommercial. Further, dilution exists for an entirely different purpose than one served by a remedy for false attribution. Dilution focuses on the use of a mark similar to a famous one in order to denote a good or service coming from another source. The mark may be the same, but it denotes a different source. Dilution seeks to obviate the need for a famous mark holder to qualify his goods or services (e.g., the classic Kodak camera/Kodak piano example). False attribution, by contrast, uses the author's name *to identify the author*. The only qualification that may occur might happen when the author shares a name, as with the case of the two David Kaisers. However, given the facts that the other "author" by the same name also did not write the piece, and that one cannot stop another from using his own name, dilution theory likewise would provide no remedy.

c. *Section 43(d) Cybersquatting: Protecting Trademarks Online*. Recognizing the unique challenges the Internet poses, and seeking to address those that arise in the trademark context, Congress in 1999 enacted the Anti-cybersquatting Consumer Protection Act (ACPA).¹¹¹ Codified in § 43(d) of the Lanham Act, the ACPA outlaws "registering, with the bad faith intent to profit, a domain name that is confusingly similar to a registered or unregistered mark or dilutive of a famous mark."¹¹² Most often, this occurs when a bad faith actor registers a domain name and then offers to sell it to the "rightful" holder, analogous to a "land grab."¹¹³ Furthermore, "[c]ybersquatting is considered wrong because a person can reap windfall profits by laying claim to a domain name that he has no legitimate interest in or relationship to."¹¹⁴ The law addresses the problem

¹¹⁰ § 43(c)(3)(C).

¹¹¹ 15 U.S.C. § 1125(d)(1).

¹¹² MCCARTHY, *supra* note 102, § 25A:49.

¹¹³ *Id.* § 25A:49 (internal citation omitted).

¹¹⁴ Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 238 (4th Cir. 2002).

of enterprising individuals essentially extorting mark holders who were too slow in claiming their domain names.

Another of ACPA's arms addresses the specific problem of cybersquatting on non-trademarked personal names.¹¹⁵ To recover, a plaintiff must prove (1) that the defendant has registered a domain name (2) that is, or is confusingly similar to, the plaintiff's name, (3) without his or her consent, and (4) with the specific intent to profit off the name by selling it.¹¹⁶ Unlike general trademark cybersquatting protection, there is no bad faith requirement; the plaintiff must show only that the cybersquatter intends to sell the domain name for commercial gain.¹¹⁷ A prevailing plaintiff wins an injunction, and possibly a transfer of the domain name.¹¹⁸ The court has further discretion to award fees and costs.¹¹⁹ This provision represents an occasion where Congress manifested an intent to allow people to control their own names. Indeed, misappropriation of full names, parts of names, nicknames, and derivatives are all actionable.¹²⁰

Remedies for cybersquatting exist outside of American trademark law, as well. The Internet Corporation for Assigned Names and Numbers (ICANN) provides a mechanism whereby an aggrieved markholder may seek redress against a cybersquatter: the Uniform Domain Name Dispute Resolution Policy (UDRP).¹²¹ The UDRP "is designed to be a simple, quick and inexpensive method of determining if a domain name has been the subject of cybersquatting . . . [I]t is intended only for clear cases of bad faith misuse of domain names of the type commonly known as "cybersquatting."¹²² Similarly to the APCA, the registrant must have a bad faith intent to register the holder's

¹¹⁵ 15 U.S.C. § 8131.

(A) Civil liability: Any person who registers a domain name that consists of the name of another living person, or a name substantially and confusingly similar thereto, without that person's consent, with the specific intent to profit from such name by selling the domain name for financial gain to that person or any third party, shall be liable in a civil action by such person.

¹¹⁶ *Id.*

¹¹⁷ MCCARTHY, *supra* note 102, § 25A:81.

¹¹⁸ 15 U.S.C. § 8131(2) ("Remedies. In any civil action brought under paragraph (1), a court may award injunctive relief, including the forfeiture or cancellation of the domain name or the transfer of the domain name to the plaintiff. The court may also, in its discretion, award costs and attorneys fees to the prevailing party.").

¹¹⁹ *Id.*

¹²⁰ MCCARTHY, *supra* note 102, § 25A:81.

¹²¹ ICANN, Uniform Domain Name Dispute Resolution Policy (1999), available at <https://www.icann.org/resources/pages/policy-2012-02-es-en>.

¹²² MCCARTHY, *supra* note 102, § 25A:21. For a more exhaustive discussion of this policy, see Zorik Pesochinsky, *Almost Famous: Preventing Username-Squatting on Social Networking Websites*, 28 CARDOZO ARTS & ENT. L.J. 223, 232 (2010).

trademark as a domain name with intent to profit commercially, as well as no legitimate interest in the domain name.¹²³ That Congress has sanctioned the use of the UDRP speaks to its desire that some cases of cybersquatting be resolved without taxing the court system.

However, UDRP relief is not as widely available in the context of personal names; indeed, because it is intended for use only by actual trademark holders, an individual seeking to stop a cybersquatter from using a personal name must prove secondary meaning to the name. That is, the plaintiff must establish that his or her name is a common law trademark.¹²⁴ Even celebrities have had mixed results in achieving successful transfer of domain names to them from the abusive registrants.¹²⁵ However, like the APCA, the UDRP requires a finding that the domain name registrant has no legitimate interest in the domain name, beyond extortionary purposes. This speaks to the balancing of interests that occurs in the false attribution context. In cases of true false attribution, the one posting the false attribution has no legitimate interest in naming the non-author; the non-author, by contrast, has every reason to want his or her name removed. In both cases, the “bad actor’s” ability to prove a legitimate interest—one in owning the domain name, another in keeping the author’s name on the piece—may counteract liability. Proof of a legitimate interest in either using the domain name or attributing the piece to the author eradicates the plaintiff’s claim, in the latter case, because the defendant has some proof of the plaintiff’s authorship.

Although cybersquatting regimes mark Congress’s demonstrated intent to allow individuals—even private non-celebrities—to protect their names, the protection offered does not provide a remedy to false attribution. Most obviously, false attribution does not involve registering a domain name using the author’s name. Congress has expressed its intent that the cybersquatting protection should only apply narrowly, especially in the context of personal names.¹²⁶ The protection provided is tailored to this purpose, and not easily

¹²³ MCCARTHY, *supra* note 102, § 25A:21.

¹²⁴ *Id.* § 25A:31.

¹²⁵ Compare *Julia Fiona Roberts v. Russell Boyd*, WIPO D2000-0210 (2000) (ordering the transfer of the domain name juliaroberts.com to Julia Roberts), with *Janine Turner v. Mercedita Kyamko*, WIPO D2004-1036 (2005) (refusing a transfer of the domain name janineturner.com to the actress Janine Turner, and finding that the UDRP does not protect personal names in most cases, regardless of celebrity status).

¹²⁶ Pesochinsky, *supra* note 122 (quoting 145 CONG. REC. S14696-03, at S14715 (daily ed. Nov. 17, 1999) (“In sum, this subsection is a narrow provision intended to curtail one form of ‘cybersquatting’ — the act of registering someone else’s name as a domain name for the purpose of demanding remuneration from the person in exchange for the domain name.”)).

amended to include within its purview the use of a name online for attribution purposes.

Nonetheless, expanding the cause of action to cover misappropriation of the name online would not ameliorate the issue, either. The requirement of intent to profit is often not present in cases of false attribution; in no case does anyone seek to extort or profit from the author's name. Much of the time, the name spreads because of a good-faith belief in authorship. Furthermore, in all likelihood the plaintiff would have to prove that the cybersquatter intended to target that plaintiff specifically. In the false attribution context, this would deny David Kaiser of MIT the opportunity to seek removal of attribution to David Kaiser of the Naval War College, although the former may receive fan mail intended for the latter.

D. THE ENFORCEMENT MECHANISM: THE DIGITAL MILLENNIUM COPYRIGHT ACT'S NOTICE-AND-TAKEDOWN SCHEME

In order to accommodate the vast amounts of copyright infringement the Internet facilitates, Congress included in the Digital Millennium Copyright Act a quasi-judicial mechanism that allows copyright holders to seek removal of infringing material.¹²⁷ This notice and takedown system is part of a statutory scheme that shields Internet service providers (ISPs) from liability that meet certain criteria.¹²⁸ Notice and takedown allows for efficient resolution of infringing uses of copyrighted material, by eliminating the need for copyright holders to take each individual infringer to court.¹²⁹

Under 17 U.S.C. § 512(c), an ISP may avoid liability for user-posted infringing content if the ISP does not have actual or constructive knowledge of the infringement, and upon learning of it, promptly removes or disables the infringing material.¹³⁰ The ISP must also have a "designated agent" to receive these "takedown notices," which trigger the removal.¹³¹ Section 512(c)(3)(A) then sets forth the elements a copyright holder must include in the removal: (i) a signature of the right holder or its agent; (ii) identification of the alleged infringed work; (iii) identification of the infringing material to be removed; (iv)

¹²⁷ Digital Millennium Copyright Act, 17 U.S.C. § 512 (2012).

¹²⁸ *Id.* § 512(c).

¹²⁹ Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 631 (2005) ("In part, this was precisely the point behind 512: the efficient removal of infringing materials from the Internet in a fair process, with (in most cases) no need for court review.").

¹³⁰ 17 U.S.C. § 512(c)(1)(A)(i)–(iii).

¹³¹ *Id.* § 512(c)(2)(A).

the complainants' contact information; (v) a statement of the complainant's good faith belief that the material was used in an unauthorized way; and (vi) a statement verifying accuracy of the foregoing information, and that the complaining party has a right to act on the right holder's behalf.¹³² If the ISP acts promptly in response to such notice, it does not face liability to the right holder.¹³³

For its part, the party alleged to have infringed may issue a counter notice to the ISP, asserting that its use of the material was proper. The general rule does not hold ISPs liable to users whose material was removed improperly, so long as the ISP meets three criteria.¹³⁴ It must inform the user that the material has been removed, provide the original complainant with the counter notice, and replace the material within ten to fourteen business days from receiving the counter notice, unless the complainant files a court action against the user.¹³⁵ A counter notice must include the user's signature, identification of the removed material and its former location, a statement under penalty of perjury of the user's good faith belief that the material was removed by mistake, the user's contact information, and a statement consenting to federal jurisdiction.¹³⁶

Critics decry the potential unfairness and chilling effect on free speech that the notice and takedown system creates.¹³⁷ The fear is that "if notices are sent when copyright infringement is alleged but unclear, or defective notices are the norm . . . Section 512 may represent a wolf in sheep's clothing, allowing First Amendment-protected expression to be removed from the Internet cheaply, expeditiously, and without check."¹³⁸ Further, some question the fairness of extra-judicial removal of material from users' websites. The efficiency afforded to copyright holders may not be worth the damage done to the individuals whose material is wrongly removed.¹³⁹

Anonymous online false attribution is a relatively new challenge, having increased both in prominence and frequency throughout roughly the last two

¹³² *Id.* § 512(c)(3)(A)(i)–(vi).

¹³³ *Id.* § 512(c)(1)(A)(iii).

¹³⁴ *Id.* § 512(g)(1).

¹³⁵ *Id.* § 512(g)(2)(A)–(C).

¹³⁶ *Id.* § 512(g)(3)(A)–(D).

¹³⁷ See generally Wendy Selzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171 (2010) (arguing that notice and takedown functions as a "sword" against the general public, chilling free expression on the Internet, even as it wrongfully and mistakenly removes lawful speech). See also <http://www.chillingeffects.org>, where Prof. Selzer and others catalogue cease and desist letters and DMCA notices, so as to study who sends them and what effect they have on online content.

¹³⁸ Urban & Quilter, *supra* note 129, at 641.

¹³⁹ *Id.* at 637.

decades. It causes recognizable harm to the affected non-author, yet none of the laws currently in effect provide any redress. This unique and new problem requires a tailored solution, and as this section has detailed, the underlying policy basis, as well as the actual enforcement mechanism for it, already exist elsewhere at law.

III. ANALYSIS

The inherent limitations of the foregoing legal protections, as well as courts' unwillingness to expand existing laws too far beyond their four corners, means that the task of crafting a solution for the cognizable harm of false attribution falls to Congress. By adopting a new cause of action for claims of false attribution, enforced by a DMCA-like notice and takedown regime, Congress could effectively cure a harm that occurs with ease and frequency. The limited protection herein proposed would serve the problem at hand, without bringing to fruition the concerns that more comprehensive moral rights regimes engender in their opponents.

This section begins by proposing the cause of action under which an author could move to seek relief, one that fuses elements of the causes of action described in Part II. Next, this part establishes the legal basis for a relationship between the "author" and the attributor, derived from principles of agency law. Finally, this part proposes adapting the DMCA's notice and takedown provision to the false attribution problem, while also addressing and quelling concerns about adverse effects on free speech.

A. THE CAUSE OF ACTION: FORMAL LEGAL ACKNOWLEDGEMENT OF THE RIGHT AGAINST FALSE ATTRIBUTION

Adopting direct protection against false attribution would not require too great an expansion of existing legal protections, and can be justified in light of the close relationship between an author's reputation and creative persona. Further, the practical problems that may ensue from codifying attribution rights do not obtain in the context of protection against false attribution. Thus, although enacting this proposed protection would require acknowledging a policy that the law has not yet explicitly recognized, it does not concern the level of alternative solutions that triggered skepticism among scholars and even some courts.

The existing causes of action described above each speak to aspects of online false attribution, but nevertheless fail to adequately compensate for the harm. VARA represents the only formal federal codification of moral rights

legislation.¹⁴⁰ However, its limited scope of recognized injuries excludes authors who fall victim to false attribution, and its narrow terms have resulted in few successes to vindicate the right it protects.¹⁴¹ Defamation recognizes the harm done by the spread of false information about an individual, and can provide an author with a cause of action in certain situations of false attribution.¹⁴² Yet, because a defamation cause of action requires proof that the defendant knew the information he spread was false, defamation does not apply to the majority of online false attributors, who republish the “author’s” name honestly believing he wrote the work.¹⁴³ Finally, trademark law does not help to solve the problem, either. The Supreme Court has limited the cause of action for source confusion to tangible goods.¹⁴⁴ Dilution protects a markholder from competitors in the commercial sphere from using the same or too similar of a mark to denote a different source,¹⁴⁵ while false attribution harms the author because the wrongly used “mark” denotes the exact intended source. Cybersquatting is expressly limited to use in the context of domain names, when the offending party has sought to profit off of the use of a mark in which he has no interest, and to which he has no right.¹⁴⁶

Attempting to fit a false attribution claim under one of those existing causes of action likely would not work, in light of the attitude the Supreme Court expressed in *Dastar*. That decision represents the Court’s unwillingness to extrapolate broader protections for moral rights under existing law.¹⁴⁷ When it construed § 43(a), the *Dastar* Court focused on a narrow, rather literal conception of “origin,” one tightly bound to the overarching policies underlying trademark.¹⁴⁸ The Court pointed creators back toward copyright, repositioning § 43(a) as more of a consumer protection law than a creator protection law.¹⁴⁹ This close adherence to the aims underlying the law suggests that attempts to bootstrap moral rights protection to other sources of law may likewise receive

¹⁴⁰ NIMMER, *supra* note 44.

¹⁴¹ Ginsberg, *supra* note 50, at 282.

¹⁴² See, e.g., Clevenger v. Baker Voorhis & Co., 168 N.E.2d 643, 645 (1960) (ultimately rejecting the claim in that particular case).

¹⁴³ RESTATEMENT (SECOND) OF TORTS § 559.

¹⁴⁴ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 32 (2003).

¹⁴⁵ 15 U.S.C. § 1125(c)(3)(B)–(C) (2012).

¹⁴⁶ *Id.* § 1125(d)(1). See also MCCARTHY, *supra* note 102, § 25A:49.

¹⁴⁷ Carpenter, *supra* note 65, at 1628 (“*Dastar* stands for the broad, bright-line proposition that ‘reverse passing off’ claims brought under Lanham Act § 43(a)(1)(A) cannot focus on allegedly false claims of authorship, invention, or creation.” (internal citation omitted)).

¹⁴⁸ *Id.* at 1627.

¹⁴⁹ *Id.*

the same treatment. Plaintiffs' goals must align with those of the statute, now more than ever.

Thus, falsely attributed authors have no legal recourse, as the existing laws do not consider the correct values at stake in the authors' predicaments.¹⁵⁰ The author does not chiefly suffer economic or reputational damage, which the existing laws of copyright and defamation seek to remedy.¹⁵¹ At times, the attribution could affect the author positively—consider Vonnegut, who was lauded by many, including his wife, for the falsely attributed “sunscreen” essay. It is conceivable that false attribution of a popular work could raise public awareness about the author, and even result in economic gains, such as increased sales of works the author did actually pen. Yet the author has experienced some harm in the midst of these gains, as he has had words put in his mouth, so to speak.¹⁵²

Despite these shortcomings, however, each of these existing laws provides a stepping-stone to a cause of action specifically targeting false attribution. These laws demonstrate that Congress has previously recognized and remedied elements of the false attribution problem, although it has never tackled it outright.

An anti-false attribution act would make actionable an author's right to control his own name. The recognized harm occurs when an individual attributes a work to an author that the alleged author has not written. The reasons for affording legal relief exist outside of economic and reputational realms, and instead rest on the author's right against having work he did not do foist upon his name. The remedy would be a limited injunction, allowing the author to seek removal of his name—but not the work itself, to which he has no rights—from the Internet.

Such a law first has its basis in the United States' obligations under the Berne Convention, which requires that signatory nations protect an author's right to claim his work (and thus, disclaim work that does not belong to him).¹⁵³ False attribution speaks directly to the harm to the author's “honor,” which the Berne Convention explicitly cites as a recognized injury.¹⁵⁴ Enacting a law offering redress for false attribution is directly in line with the Berne Convention's goals, and would thus better align the U.S. with its terms.¹⁵⁵

¹⁵⁰ See generally Ross, *supra* note 30.

¹⁵¹ See Tushnet, *supra* note 27, at 790; Piotraut, *supra* note 26, at 555.

¹⁵² See KWALL, *supra* note 29, at 6; Damich, *supra* note 25, at 950.

¹⁵³ Berne Convention, *supra* note 30, art. 6*bis*.

¹⁵⁴ *Id.*; see also Damich, *supra* note 25, at 950.

¹⁵⁵ See Ross, *supra* note 30.

Congress has already demonstrated a willingness to grant legal vindication of moral rights for visual artists, and specifically against false attribution, through VARA.¹⁵⁶ A law addressing online false attribution of authorship would likewise function narrowly. This law would give authors control of their own names. It simply recognizes an author's right to say, "I did not write that." Indeed, such a law requires a moral rights justification precisely *to* maintain its narrowness. Affording a property or trademark-style interest in a name would grant more legal power than required to address false attribution. By contrast, giving legal force to a disclaimer of authorship merely allows the author to prevent the use of his name—not the use of the work—in the absence of proof to the contrary of his assertion.

Viewed in light of the existing protections trademark offers, this solution does not represent a far-flung extension of current law in other areas, either. Laws remedying source confusion, dilution, and cybersquatting all recognize a markholder's right to self-identify, and to control the use of his identity.¹⁵⁷ False attribution represents the ultimate form of source confusion: an author is named as the originator of a work in which he had no involvement.¹⁵⁸ Likewise, these wrongful additions to an author's canon can blur the author's distinctive voice, or tarnish his name—the very injuries against which dilution protects.¹⁵⁹ At base, laws against cybersquatting permit markholders to enjoin the use of their marks by uninterested parties.¹⁶⁰ In such cases, the using party's only "interest" at stake is that of profiting off of the markholder's name; at most, individuals who falsely attribute an author's name seek to capitalize on the author's "goodwill" to legitimize a particular point of view. A law against false attribution borrows these principles and permits an individual who has been similarly harmed to prevent the use of his name any further.

Some have expressed concerns about codifying the attribution right.¹⁶¹ For example, one commentator identifies problems of categorizing which works deserve attribution protection, and the burden attribution would have on authors' latitude to borrow in their new creations from past works, as prohibitively high prices to pay for protecting an author's right to attribution.¹⁶² Further, forcing authors to cite all the works that influence their own harms

¹⁵⁶ 17 U.S.C. § 106A(a)(1)(B).

¹⁵⁷ See Port, *supra* note 109, at 495–96.

¹⁵⁸ Compare *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 24 (2d Cir. 1976).

¹⁵⁹ 15 U.S.C. § 1125(c)(2)(B)–(C) (2012).

¹⁶⁰ See *MCCARTHY*, *supra* note 102, § 25A:49; *Harrods, Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 238 (4th Cir. 2006).

¹⁶¹ E.g., Tushnet, *supra* note 27.

¹⁶² *Id.* at 795–96, 800.

audiences, who then must sort through notations of attribution.¹⁶³ These do constitute legitimate concerns with respect to an attribution right, and help to justify why the U.S.—a nation renowned for innovation—may wish to avoid adopting such a protection wholesale.

These problems, however, do not obtain in the context of online false attribution. This commentator speaks of situations where new artists' interests in having latitude to create, and the public's interest in consuming these creations, outweigh the "borrowed-from" artists' rights to attribution.¹⁶⁴ This imbalance speaks to the fact that affording proper attribution places affirmative burdens on creators and consumers: for the former to attribute, and the latter to acknowledge the attribution.

In scenarios like the four featured in this Note, the author's interest is in *not* having his name attached to a work.¹⁶⁵ Removing that name poses no difficulty for anyone seeking to use the falsely attributed source in creation of a new work, nor would its removal disrupt an audience's experience of the work. The author's interest in protecting his creative persona here outweighs the other interests at stake. Indeed, at best, that author's interest may be in affording greater legitimacy to the work by misappropriating the non-author's name, and at worst, the false attribution may have been perpetrated to actually damage the author's standing. Even the work associated with removing the attribution cannot be said to outweigh the non-author's desire to disclaim work he or she did not produce. The practical difficulties associated with an attribution right thus do not exist in the context of disclaiming attribution. The legal basis for this protection does exist, however, and supports the creation of a new cause of action, one that grants authors control over their own name.

B. DEFINING THE PARTIES: AUTHORS AS PRINCIPALS, ATTRIBUTORS AS AGENTS

Designing a scheme of relief for online false attribution also requires establishing the relationship between the parties—that is, the author and the attributors. Agency law serves as an imperfect proxy for the author-attributor

¹⁶³ *Id.* at 801–02 (“Attribution proponents want audiences to care as much about authorship as the proponents already do. But legal rights provide audiences with no reason to pay attention. . . . [T]he only way to get audiences to pay the ‘proper’ amount of attention is to jump up and down, blocking their view of something they want to see — and that has obvious costs to the audiences.”).

¹⁶⁴ *Id.* at 798, 801.

¹⁶⁵ MIT News, *supra* note 1; Sowell, *supra* note 3; Kaiser, *I Didn't Write That*, *supra* note 4; Kaiser, *Life in the Blogosphere*, *supra* note 4.

relationship, and provides a conceptual framework on which to base a cause of action.

Consider the falsely attributed author the principal. By publishing various works under his own name, he grants others permission to attribute his own works to him. It is with, and ostensibly in, his name that the attributors act; they, then, function as the agents. The misalignment of interests that occurs when an individual falsely attributes a work to an author is analogous to the agent acting contrary to the principal's wishes. Correcting this misalignment forms the basis of relief.

The *Restatement (Second) of Agency* states, "[a] principal has the right to control the conduct of the agent with respect to matters entrusted to him."¹⁶⁶ In this analogy, the "matter entrusted" to the attributor is to correctly attribute the work—or rather, *not* to attribute it to the "author" incorrectly. The Second Restatement further states, "an agent is subject to a duty to the principal not to act in the principal's affairs except in accordance with the principal's manifestation of assent."¹⁶⁷ Falsely attributing a work thus functions like an agent making an unauthorized representation on behalf of the principal. Finally, an agent has a "duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform,"¹⁶⁸ and the agent must not act contrary to the principal's directions.¹⁶⁹ In this analogy, the "author's" stated disclaimer of authorship would function as the direction, and those who do not remove the false attribution accordingly have violated this "duty to obey."

Restatement (Third) of Agency also notes that the basis of an agency relationship is the principal's *consent*, not his benefit.¹⁷⁰ To apply this concept in the false attribution context, the goodwill Kurt Vonnegut experienced after attribution of the "wear sunscreen" essay would not excuse his "agents" for acting outside the scope of their duty to properly attribute his name.

Agency law speaks also to the conflicting interests underlying a case of false attribution. Because the attributor himself has no real interest in attributing a work to the wrong author, nothing but his own conscientiousness would drive him to verify the authorship. Likewise, "where an agency is involved, the

¹⁶⁶ RESTATEMENT (SECOND) OF AGENCY § 14(A).

¹⁶⁷ *Id.* § 383.

¹⁶⁸ *Id.* § 385(1). Given the lack of a contractual relationship between an author and a reader/attributor, this analogy is inexact.

¹⁶⁹ *Id.* § 385(2).

¹⁷⁰ *Id.* § 8.09 cmt. b ("Moreover, the underlying premise of a relationship of agency is action by the agent that is consistent with the principal's manifestation of assent, not whether an agent's action is in fact beneficial to the principal.").

speaker is merely representative of the principal sought to be bound by the admission. He has no direct pecuniary interest impelling him to guard against misstatements.”¹⁷¹ This concept legitimizes giving primacy to the author’s interests over those of the attributors; the author—the principal—has much to lose, and his loss must precede the agent/attributors’.¹⁷²

Generally, a principal whose agent has violated or acted outside the scope of his duties may seek appropriate relief, including an injunction.¹⁷³ In the specific context of the principal’s property—with the author’s name functioning as the “property”—an agent may be liable for either the value of the property or damages resulting from misuse.¹⁷⁴ Stipulated forms of misuse include “unreasonably refus[ing] to surrender it on demand,”¹⁷⁵ and “mak[ing] delivery of it to a person to whom [the agent] is not authorized to deliver it.”¹⁷⁶ Both of these offenses have analogs in false attribution: the former occurs when the author requests the removal of the attribution and the attributor refuses, and the latter as publishing or sharing the false attribution.

Treating the author/attributor relationship as a kind of implicit, informal agency relationship thus provides a basic framework from which to work when considering a scheme of relief for false attribution. Treating the act of false attribution as an agent’s deviation from the principal’s interests allows for the establishment of a new cause of action based on a familiar legal relationship.

C. THE ENFORCEMENT MECHANISM: MODIFIED NOTICE AND TAKEDOWN

Because the primary harm suffered is neither economic nor purely reputational in nature, the false attribution law would relieve authors by preventing further misuse of their names. Rather than attempting to bring every individual attributor to court, however, Congress could easily retrofit the DMCA notice and takedown mechanism to the problem of false attribution.

The system as it exists needs only slight adjustment. Using the same format as DMCA notice and takedown, the author notifies the ISP of the places where

¹⁷¹ *Reynolds v. W.T. Grant Co.*, 186 S.E. 603, 606 (W. Va. 1936) (noting also that “in many instances, the temptation to subvert the truth against his merely representative interest as agent in favor of some larger interest against his principal would give rise to fabrications, falsehood and fraud”).

¹⁷² In the case of false attribution, removing the non-author’s name from the falsely attributed work functions as the attributor’s “loss” or burden.

¹⁷³ RESTATEMENT (SECOND) OF AGENCY § 399(f).

¹⁷⁴ *Id.* § 402(1).

¹⁷⁵ *Id.* § 402(1)(c).

¹⁷⁶ *Id.* § 402(1)(e).

the false attribution exists online.¹⁷⁷ On receipt, the ISP disables access to the page, at which point the attributor may either agree to remove the attribution and have the page reinstated, or send counter notice that the user believes the attribution is correct.¹⁷⁸ As in the original statute, the author will have the opportunity to respond to counter notice by filing suit against the user.¹⁷⁹ Likewise, to disincentivize abusive takedown notices, an author who files suit in response to a counter notice and who loses that suit—owing to evidence of authorship—will be liable for the user's attorney's fees and other costs of defending the suit.¹⁸⁰

This system may raise concerns about placing the burden of proving authorship on the attributor. The author is vindicating a negative right, and thus will have no evidence beyond his own word that he did not write the work at issue. Including the option for the user to provide counter notice grants him an opportunity to provide evidence of authorship. If none exists, then the user strengthens the author's case for removal. If evidence does exist, then including a punitive element to combat wrongfully filed suits ought to result in judicious use of the takedown notice mechanism. An author who merely regrets what he has written cannot therefore employ legal measures to scrub the Internet of his foolish words.

Further, because the alleged author has no copyright in the work at issue, he cannot demand the work remain offline altogether. After the false attribution has been removed, the user may have the original work reinstated (barring further action from the actual copyright holder). This solution represents a fair compromise between the author's and user's respective interests. The author's, as established, is that of controlling his own name, and preventing its use where it does not belong. The attributor, by contrast, has no legitimate interest in misusing the author's name.

The DMCA has many critics calling for its reform, but their concerns do not obtain in the false attribution context. The law has engendered fear that aggressive takedown notices chill speech, and therefore that this system conflicts with the First Amendment.¹⁸¹ These critics argue that the DMCA's extrajudicial remedy authorizes private citizens to carry out a task that would

¹⁷⁷ See 17 U.S.C. § 512(c)(3)(A)(i)–(iv).

¹⁷⁸ See *id.* § 512(g)(1), (g)(3)(A)–(D).

¹⁷⁹ See *id.* § 512(g)(2)(C).

¹⁸⁰ See *id.* § 512(f).

¹⁸¹ See Selzer, *supra* note 137, at 176 (“I add to prior scholarly analysis of the conflict between copyright and the First Amendment by showing how the copyright notice-and-takedown regime operates in the shadow of the law, silencing speech indirectly through private intermediaries where the government could not do so directly.”).

surely violate speech rights if the government undertook it: removal of lawful speech from the Internet.¹⁸² The DMCA, the argument goes, operates a form of prior restraint, limiting speech before it has been adjudicated on the merits.¹⁸³ It “flips the defaults on speech”: when the ISP receives notice from a rights holder, the presumption is that the speech is unlawful, and the party who posted it must then fight to prove its lawfulness.¹⁸⁴ Additionally, the cost of pursuing a suit for reinstatement of the speech discourages users from posting content in the first place, thus suppressing lawful speech.¹⁸⁵ Critics decry the DMCA as contrary to the prevailing principles in speech law, which treat false positives as the greater evil, and therefore allow greater leeway for free expression.¹⁸⁶

Yet the crucial differences between notice and takedown in the copyright and false attribution contexts render these concerns moot in the latter. Most notably, unlike in copyright, the user in the false attribution context may repost the original work. The falsely attributed author has no right to suppress the work itself, but merely the use of his name. Thus, the only speech chilling that may result from this enforcement scheme would affect users’ attribution of the piece to the wrong author. Therefore, the cost this enforcement mechanism imposes on attributors are low; authors, however, benefit greatly by regaining control of their names and, by extension, their bodies of work.

Further, the haziness that can accompany a regular copyright takedown notice—namely, determining whether the content is subject to a fair use defense¹⁸⁷—does not exist with false attribution. When a copyright owner asserts that his work has been misappropriated, a host of questions arise as to what the alleged infringer used and how he used it. The line in false attribution cases, by contrast, is much brighter. Only one question needs answering: who wrote the work? If the author’s answer is, “not me,” and there is no proof of his authorship, then the case is closed. The user may repost the work, without the non-author’s name (indeed, without any name at all), and neither party is greatly harmed.¹⁸⁸ The balance weighs heavily in favor of the authors, as the remedy is tailored specifically to the harm they suffer.

¹⁸² *Id.*

¹⁸³ *Id.* at 190.

¹⁸⁴ *Id.* at 177.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 194 (“Typically, the chilling effect doctrine is concerned with excessive promotion of self-censorship.”).

¹⁸⁷ *Id.* at 178.

¹⁸⁸ Anecdotal experience suggests that users, for the most part, do not mind acquiescing to authors’ requests for attribution removal. See Kaiser, *I Didn’t Write That*, *supra* note 4. Thus, this system simply expedites the process for authors, allowing them to scrub their names from all

In addition, no legal protection currently exists for this problem, a factor that proves material when considering possible sources of redress for it. Some took issue with the DMCA because it reduced judicial oversight of one aspect of copyright law. By contrast, instituting *any* legal protection for authors' names represents a step closer to individualized scrutiny of such misuses. While the DMCA may functionally close a door to full court protection, a false attribution law opens that door.

The individual components of a false attribution legal regime exist. The cause of action amalgamates principles from copyright, trademark, and defamation law, the parties' relationship functions as an offshoot of agency law, and the DMCA's notice and takedown provision can adapt easily to the false attribution context. Borrowing and combining these concepts to create a new law gives authors control of their own names at little expense to the attributors or society as a whole. A false attribution regime would offer protection for an increasingly widespread problem, one that will continue to grow in magnitude as technology continues to develop.

IV. CONCLUSION

False online attribution has existed almost as long as the Internet has, and as written works become increasingly digitized, the problem has grown. One misplaced name can spread like wildfire, and suddenly, the wrongly attributed author must defend his artistic honor from undeserved praise or disparagement.

Currently the author's only recourse is self-help: blog posts disclaiming authorship, or form e-mails correcting misguided readers. No legal protection against false attribution currently exists; the basis for one, however, does.

Such a law would fall under the umbrella of moral rights, which protect an author's creative process and artistic identity. The United States has already explicitly recognized these rights in the context of visual artists, and thus a false attribution law would function as an extension of an existing, albeit limited, regime. Defamation offers limited protection for an author's reputational interest, but only in the context of harmful, false publications about him. The concepts of source confusion and tarnishment from trademark law allow mark holders to protect the power of their brand from people who would borrow or destroy the goodwill those marks generate. Each of these causes of action speaks to an element of false attribution, and combining those individual pieces

reference to works they did not write without having to contact the owner of each individual posting.

into a single cause of action would allow authors to protect their names—conceived of as a “brand,” or artistic reputation.

This law avoids the problems that attach to its proactive cousin, attribution law. Rather than requiring positive attribution, this law simply prohibits false attribution. The practical difficulties associated with attribution law—especially the disruptive nature of repeated sourcing in artistic words—do not apply in the context of false attribution.

The Digital Millennium Copyright Act’s notice and takedown regime provides the enforcement mechanism for this cause of action. In the copyright context, the DMCA allows the right holder to alert an ISP when a webpage has infringed on copyrighted material, and the ISP removes the infringing content. If the alleged infringer has done nothing wrong, he may issue counter notice, and the dispute may proceed to court. However, the DMCA initially offers a streamlined solution to a widespread problem. This same tool can help the victim of a false attribution protect his name by alerting ISPs when his name has been wrongly attached to a work he did not write. The ISP then takes down the page featuring the false attribution.

Some have expressed concerns that notice and takedown conflicts with the First Amendment. However, as applied to false attribution, these effects fall away: the author in the false attribution context has no right to the work to which his name has been attached. Thus, he cannot demand that the attributor take down the work altogether; the author only has a right to control his name, and not the work at issue. The attributors retain the right to repost the work, and do not face the same speech chilling effects that accompany notice and takedown in the copyright context.

Providing relief to authors aggrieved by false attributions requires minimal extension of current laws, yet ameliorates real harm to the author’s identity. Making this harm legally remediable acknowledges the effort, creativity, and considerable time an author pours into his own work, by excluding from its body that for which he is not responsible. Such a regime rewards innovation—a theme reiterated throughout intellectual property jurisprudence and scholarship—by giving an author some control over his name, and ensuring that he can distance himself from work that does not represent his contribution to society.

