

2019

## The Right of Attribution in Literary Works in Three Acts, by W. Shakespeare

Daniel J. Gervais

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### Recommended Citation

Daniel J. Gervais, The Right of Attribution in Literary Works in Three Acts, by W. Shakespeare, 22 *Vanderbilt Journal of Entertainment and Technology Law* 39 (2020)  
Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol22/iss1/2>

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# The Right of Attribution in Literary Works in Three Acts, by W. Shakespeare

Daniel J. Gervais\*

## ABSTRACT

*This Article charts the three phases in the evolution of the norm of attribution in literary works: the norm in England before and during Shakespeare's time, the emergence of authorship-based norms in the Romantic period (allowing moral rights to be enshrined in international copyright treaties) and their demise at the hands of postmodernism and New Criticism, and the current norms that aim to protect the integrity of educational processes and to inform readers and other users of books, plays, or other creative works about their "source." It tracks a debate during Shakespeare's lifetime on the difference between nonattribution and false attribution. It suggests that current attribution norms can be put in parallel with trademarks and are meant to protect both authors and the public.*

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## I. INTRODUCTION

This Article illuminates how behavioral patterns of appropriation, attribution, misattribution, and plagiarism changed starting around the time of William Shakespeare and how such changes in norms influenced the emergence of copyright.

A key element of plagiarism is the lack of attribution to the original author of a work.<sup>1</sup> This Article charts the three phases in the evolution of the norm of attribution in literary works. Briefly, the first phase of authorial attribution began in England as a means to trace the author of a work, mostly for the purpose of censorship by or on behalf of the Crown.<sup>2</sup> During the second phase, an attribution norm based on the notion of authors and their authorship—i.e., paternity—emerged. This is often associated with the Romantic notion of the author. Although this change was driven on the European Continent by

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1. See *infra* notes 5–7 and accompanying text.

2. See Catherine M.A. McCauliff, *The Right to Resist the Government: Tyranny, Usurpation, and Regicide in Shakespeare's Plays*, 14 ILSA J. INT'L & COMP. L. 9, 27 (2007) ("Shakespeare juxtaposes the royal family's exclusionary view of government with the claim of the commons of England to have more of a voice in governance. The fictional character of the Queen (Richard II was in fact a widower, engaged to an underage foreign princess) emphasizes the importance to Shakespeare of presenting the different views about which groups might have a voice in governing England, if only to satisfy the demands of censorship by including the royal position.").

There is what may well be a geographically limited emergence of attribution much earlier than Kant and eighteenth-century philosophers—namely, the late fifteenth-century Venice where exclusive printer privileges started to emerge. Though such privileges focused mostly on inventors, not authors, they "released individual initiative from the secretive cocoon of the guild, and rewarded ingenuity with the luster of fame as well as the chance to make a fortune." ELIZABETH EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* 240 (1979).

emerging notions of authorship in works by Kant and others, the norm was adopted in Britain to, for the most part, falsely attribute a work to a famous author for the purpose of selling more copies, also referred to as reverse plagiarism. Finally, the third—and current—phase retains some, but relatively few, of the notions deriving from the Romantic conception of authorship, because most of those notions did not survive postmodernism and New Criticism. Current norms mostly see a lack of attribution or false attribution as a constructive wrong prohibited by law or other forms of regulations (such as university bylaws and codes of honor) with two major societal purposes: to protect the integrity of educational processes and to inform readers and other users of books, plays, or other creative works about their “source.”<sup>3</sup> Attribution has become, in significant part, like a trademark.

First, this Article provides a brief review of earlier forms of attribution norms. Then, it chronologically explores those three phases in the evolution of the norm of attribution.

## II. PLAGIARISM IN CONTEXT

### A. Defining Plagiarism

Plagiarism is not illegal per se.<sup>4</sup> It can take two main forms. *Direct* plagiarism has two components—namely, (a) copying or paraphrasing text or other material (e.g., charts), and (b) lack of attribution to the original author.<sup>5</sup> Plagiarism can also be *indirect*, what

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3. Deborah R. Gerhardt, *Plagiarism in Cyberspace: Learning the Rules of Recycling Content with a View Towards Nurturing Academic Trust in an Electronic World*, 12 RICH. J.L. & TECH. 10, 23 (2006).

4. See Jacqueline D. Lipton, *A Taxonomy of Borrowing*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 951, 967 (2014) (“Because plagiarism is not, strictly speaking, a legal wrong, there is no statutory definition of the term. It appears in a number of institutional honor codes, and is clearly a matter of concern in the commercial publishing world.”).

5. See Jonathan Band & Matt Schruers, *Dastar, Attribution, and Plagiarism*, 33 AIPLA Q.J. 1, 4 (2005) (“The offense lies not in the act of copying, but in the act of copying without attribution.”) Naturally, this isn’t meant as a standard definition applicable in all situations, as each institution, especially in higher education, tends to define plagiarism in a specific way. See Gerhardt, *supra* note 3, at 19 (noting that “[e]ach academic community defines plagiarism for itself”). The term *plagiarism* has been used in other fields, such as music and even semiconductor chips. For music, see Julie Levine, *Lo and Behold!: Does Tolerated Use Give an Incentive to Plagiarize? An Example Through the Music of Bob Dylan*, 32 CARDOZO ARTS & ENT. L.J. 717, 727 (2014); Iyar Stav, *Musical Plagiarism: A True Challenge for the Copyright Law*, 25 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1 (2014) (comparing the law of various jurisdictions and the ties between plagiarism and copyright infringement in the field of music). For semiconductors, see Thomas Hoeren, *The Protection of Pioneer Innovations – Lessons Learnt from the Semiconductor Chip Industry and Its IP Law Framework*, 32 J. MARSHALL J. INFO. TECH. & PRIVACY L. 151, 181 (2016).

US federal policy refers to as “the appropriation of another person’s ideas, processes, results, or words without giving appropriate credit.”<sup>6</sup>

Plagiarism is widely regarded as a wrong in contemporary American society, even beyond educational institutions.<sup>7</sup> Nowadays, the *actus reus* of direct plagiarism (copying and paraphrasing) is subject to computerized detection by systems widely used by schools and universities, such as Turnitin.<sup>8</sup> A harder question is whether a *mens rea* element—that is, intent or knowledge that the act would violate applicable norms—is required?<sup>9</sup> Professor David Nimmer argued that in the field of plagiarism, innocence is “easy to claim and difficult to disprove.”<sup>10</sup> Another scholar noted in the same vein that “[i]ntent elements invite the defense that the student did not understand scholarly procedures or the meaning of plagiarism.”<sup>11</sup> In contrast, Judge

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For semiconductors, see Lee Hsu, *Reverse Engineering Under the Semiconductor Chip Protection Act: Complications for Standard of Infringement*, 5 ALB. L.J. SCI. & TECH. 249, 264 n.114 (1996).

6. Federal Research Misconduct Policy, 65 Fed. Reg. 76260, 76262 (Dec. 6, 2000).

7. See Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 787, 789 (2007) (“[P]owerful pro-attribution norms exist throughout modern American society. Both authors and audiences generally accept that attribution is important to authors, and that false attribution, especially plagiarism, is a moral wrong.”).

8. See Michael G. Bennett, *The Edge of Ethics in iParadigms*, 2009 B.C. INTELL. PROP. & TECH. F. 1, 1 (2009) (“Turnitin™ is widely used for detection of unoriginality in student-produced texts.”).

9. See Gerhardt, *supra* note 3, at 20 (observing that published plagiarism standards “fall into two camps, those with and without intent elements”). The term *mens rea* is neither excessive nor inappropriate in this context, as plagiarism can sometimes interact with criminal law. See Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 181 (2002) (“Perhaps some of the confusion about the moral status of plagiarism can be attributed to a deeper confusion about the mental element, if any, necessary for its commission. Some ethical codes prohibit only ‘intentional’ or ‘knowing’ plagiarism. Others prohibit plagiarism that is either ‘intentional’ or ‘unintentional’—that is, they treat plagiarism as a kind of ‘strict liability’ offense. Finally, a large number of codes (surely, a majority) prohibit unattributed copying without specifying what, if any, form of *mens rea* is required.”).

The need to show intent could be satisfied by a showing of (gross) negligence, recklessness, etc. For example, Duke University states that plagiarism “occurs when a student, *with intent to deceive or with reckless disregard for proper scholarly procedures*, presents any information, ideas, or phrasing of another as if they were his/her own and/or does not give appropriate credit to the original source.” DUKE UNIV., THE DUKE COMMUNITY STANDARD IN PRACTICE: A GUIDE FOR UNDERGRADUATES 2017–2018 16 (2017), <https://registrar.duke.edu/sites/default/files/bulletins/2017-18/DCS%20Guide%202017-18.pdf> [<https://perma.cc/Q4SY-H5DF>] (emphasis added); see also Jennifer Kulynych, *Intent to Deceive: Mental State and Scienter in the New Uniform Federal Definition of Scientific Misconduct*, 1998 STAN. TECH. L. REV. 2, 68 (1998) (proposing a standard for federal research misconduct that “covers knowing, reckless, and grossly negligent fabrication, falsification, and plagiarism”).

10. Gener-Villar v. Adcom Grp., Inc., 509 F. Supp. 2d 117, 125 (D.P.R. 2007) (citing MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.08 (3rd ed. 1994)).

11. Gerhardt, *supra* note 3.

Richard Posner has argued that plagiarism could be defined as *fraudulent* copying, thus presupposing some form of both knowledge and intent.<sup>12</sup>

Whether or not intent is built into the definition of plagiarism, to proscribe it there must be a norm that the *actus reus* labeled as plagiarism violates, such as a university code of honor. As this Article explicates, such a norm either did not exist or was very weak at the beginning of Shakespeare's writing career but grew progressively stronger.

### B. The Emergence of Premodern Attribution Norms

In its early form, what one might call plagiarism resembled a form of theft.<sup>13</sup> Professor Nimmer has found traces of a rule against plagiarism and lack of attribution both in the court of King Cyrus and in ancient Egypt.<sup>14</sup> *Plagium* was also present in the laws of ancient Rome, where it applied to the "theft" of text as well as persons.<sup>15</sup> As Professor Cheryl Swack explained in her study of Roman Empire plagiarism, "[e]pigrammist Marcus Valerius Martialis (40 A.D.–104 A.D.) first used *plagium* to combat thefts of his verses."<sup>16</sup> Yet *plagium* was defined narrowly and not applied uniformly, as copying was sometimes seen as a sign of respect, for example, to a master from whom the work was copied.<sup>17</sup>

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12. RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 49 (2007). See also Kulynych, *supra* note 9, at 91 (observing that the definition of misconduct in federal policy is "rendered uncertain by ambiguities in the wording" and, further, that the "*lack of precise mental state language* in the definitions of scientific misconduct has left the entire scope of sanctionable conduct uncomfortably vague, and has rendered standards inconsistent from one agency to another") (emphasis added).

13. After reviewing this history, Richard Posner noted, rightly, that plagiarism was difficult to define but that a "typical dictionary definition is 'literary theft.' The definition is incomplete because there can be plagiarism of music, pictures, or ideas, as well as of verbal matter . . . . The definition is also inaccurate . . . there can be plagiarism without theft." POSNER, *supra* note 12, at 11–12.

14. David Nimmer, *The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing Off)*, 54 DEPAUL L. REV. 1, 4–5 (2004).

15. See POSNER, *supra* note 12, at 49–50.

16. Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM. J.L. & ARTS 361, 365–66 (1998).

17. See Edward L. Carter, *Copyright Ownership of Online News: Cultivating a Transformation Ethos in America's Emerging Statutory Attribution Right*, 16 COMM. L. & POL'Y 161, 178 (2011) ("Roman authors disliked plagiarism of their works but did not define the term too broadly because the copying of ideas and even exact passages from previous authors was accepted practice and even a sign of respect.").

In the Middle Ages, rules against plagiarism waned in Europe.<sup>18</sup> Much art was created at the behest of the Church and often entirely lacked attribution to the artist. Medieval and premodern writing was often openly derivative, in the form of *compilatio*.<sup>19</sup> *Compilatio*s were often mere juxtapositions of preexisting “content” transitioning from orality to textuality.<sup>20</sup> The notion of attribution was essentially absent in such cases. What mattered was the work, not its authors.

It was in Florence that the modern idea of protecting authors’ rights in their works first developed, though the protection was not for books but rather for works of art. Professor Swack observed a parallel between the rise in attribution to the artists and a shift in patronage patterns from the church to other wealthy private patrons (e.g., the de Medici family).<sup>21</sup> A number of private patrons started hiring “names” to create works of art for them.<sup>22</sup> Some artists—most prominently among them, the Renaissance artist, Michelangelo Buonarroti—played a role by *requesting* attribution as a condition to producing works of art and even what today might be called a right of integrity in their creations:

First, Michelangelo asserted his right of attribution after completing a commission to sculpt a *pietà* to grace the chapel of St. Maria della Febbre in St. Peter’s Cathedral. . . . Second, Michelangelo, protecting his right of disclosure during the painting of the Sistine Chapel, refused to allow Pope Julius II to see his unfinished sketches. . . . [T]hird, within the right of integrity lies an intrinsic presumption that the work an artist creates is his.<sup>23</sup>

A key question to which this Article returns below is whether the notions of attribution and integrity present in sixteenth-century Florence were also present in England then—that is, in Shakespeare’s time. The answer, as to be seen, is a pallid yes, for borrowings were still

18. The discussion in this Article focuses on Europe because its pivot is Shakespeare, but a cultural point should be made, as plagiarism is tied to culture and the norms against it differ in various parts of the world. See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 19–29 (1995); Lise Buranen, “*But I Wasn’t Cheating*”: *Plagiarism and Cross-Cultural Mythology*, in *PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD* 63, 66 (Lise Buranen & Alice M. Roy eds., 1999); Peter K. Yu, *Intellectual Property and Asian Values*, 16 MARQ. INTELL. PROP. L. REV. 329, 399–400 (2012).

19. Max W. Thomas, *Eschewing Credit: Heywood, Shakespeare, and Plagiarism Before Copyright*, 31 NEW LITERARY HIST. 277, 282 (2000).

20. Giancarlo F. Frosio, *Rediscovering Cumulative Creativity from the Oral Formulaic Tradition to Digital Remix: Can I Get a Witness?*, 13 J. MARSHALL REV. INTELL. PROP. L. 341, 346 (2014).

21. Swack, *supra* note 16, at 368–69.

22. See Dan Rosen, *Artists’ Moral Rights: A European Evolution, an American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155, 167 (1983); Harold C. Streibich, *The Moral Right of Ownership to Intellectual Property: Part II from the Age of Printing to the Future*, 7 MEM. ST. U. L. REV. 45, 46 (1976).

23. Swack, *supra* note 16, at 368–369.

very common in both literature (including poetry) and painting, and this remained true for well over a century after Shakespeare's death.<sup>24</sup> Now, let us open the curtain on Shakespearean notions of attribution, or lack thereof.

### III. THE THREE ACTS OF MODERN ATTRIBUTION

#### *A. Act I: Protecting the State*

In Act I, the main actor is the State, acting both as legislator in the public interest and in its own interest. The Crown established a licensing system designed at least as much to control and censor speech as to provide an economic incentive to produce and sell books.<sup>25</sup> The first Act was transformative in that it allowed the emergence in a common-law environment of a legal notion of something like "property" in immaterial objects.

To tell this story, first consider the establishment of the book licensing system granting a *de facto* monopoly to the Stationers' Company (the "Company") and, second, how this system was extended to theater.

#### 1. Book Licensing and the Emergence of Property in Immaterial Objects

The Tudors imposed limits on the printing and circulation of books and plays.<sup>26</sup> The attribution of books and plays to their authors in that context was not primarily linked to a desire to associate an author or "writing self" to the book or play.<sup>27</sup> It derived from a more sinister motivation—namely, the State's desire to control and censor; putting one's name on a work implies potential liability for its contents.<sup>28</sup>

Philip and Mary granted a charter to the Company to control the printing and circulation of books in 1557.<sup>29</sup> It became the main arm of the Crown in regulating printing. Henry VIII had already granted certain publishers a patent—enforced initially by the Privy Council and then by the Star Chamber, the judicial branch of the Privy Council until

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24. POSNER, *supra* note 12, at 61.

25. See FREDERICK SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476–1776: THE RISE AND DECLINE OF GOVERNMENT CONTROL* 72–73 (1965).

26. See *id.* at 56.

27. See *id.* at 46.

28. See *id.*

29. See *id.* at 65.



its abolition in July 1641—with which patentees could ask for protection against piracy.<sup>30</sup> Patents, like personal property, could be transferred.<sup>31</sup>

Licensing by the Stationers' Company became the dominant system to control the publication and circulation of books.<sup>32</sup> The charter of the Company prohibited all printing except by members of the Company or by publishers licensed by the Crown.<sup>33</sup> Indeed, “both Mary and Elizabeth expected them to keep a tight rein on member printers in return for the grant of a royal charter.”<sup>34</sup> The Company had its own court, known as the Court of Assistants or “Table.”<sup>35</sup> During the reign of Elizabeth I (1558–1603), records show that books published without a license could lead to the imposition of fines by the Stationers' Company.<sup>36</sup>

In 1586, a Star Chamber decree became “the most comprehensive regulation of the entire Tudor period, continuing in effect until 1637.”<sup>37</sup> Starting in 1588, the decree required all printed matter be recorded in the Stationers' Register together with the name of one or both wardens (also known as treasurers) of the Company.<sup>38</sup> In addition to the power to “govern” the “art or mistery [trade] of stationery,” the decree also granted search and seizure powers to the Company<sup>39</sup>—the right to seize and burn books “printed contrary to the form of any statute, act, or proclamation.”<sup>40</sup>

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30. See *id.* at 74–75, 166–77.

31. See *id.* at 76.

32. This was combined with control on the use of the number of printing presses. See Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 320 (2008).

33. See SIEBERT, *supra* note 25, at 68; see also D. Victoria Baranetsky, *Encryption and the Press Clause*, 6 N.Y.U. J. INTELL. PROP. & ENT. L. 179, 188–92 (2017) (“During the seventeenth century, the Crown imposed corporal and even capital punishment on those who used new printing technology of their own accord.”).

34. SIEBERT, *supra* note 25, at 71–72.

35. See *id.* at 76, 167. The Court of Assistants was not a real court of law. It tended to impose fines in case of conflict between publishers. See *id.* at 80–81.

36. See *id.* at 55–58. The term *Stationer* was used to distinguish publishers and booksellers from printers. See *id.* at 65; see also Lee, *supra* note 32, at 321 (“Elizabeth I issued the Star Chamber Decree of 1586, which was ‘the most comprehensive regulation of the press of the entire Tudor period.’ The Decree required that all printers register their presses with the Stationers' Company . . . . All presses were subject to warrantless searches by wardens of the Stationers' Company.”) (footnotes omitted).

37. SIEBERT, *supra* note 25, at 61.

38. *Id.* at 63.

39. See *id.* at 62, 69–70, 82–83; L. Ray Patterson, *Copyright and the “Exclusive Right” of Authors*, 1 J. INTELL. PROP. L. 1, 9 (1993).

40. Patterson, *supra* note 39.

Interestingly, the right in “copies” (books) was ordinarily perpetual when entered into the Company’s register, but only while the book was in print.<sup>41</sup> According to a Company order adopted in 1588, if a publisher did not reprint a book that was out of print within six months after being asked to reissue it, it could be reprinted by “any journeyman who was willing to take the original owner into partnership.”<sup>42</sup> The Company thus had a perpetual right to control publication of books—a “private-law copyright” as Professor Ray Patterson termed it—that predated the “public-law” copyright (the Statute of Anne of 1709–1710) by a century and a half.<sup>43</sup> That private law arrangement was in effect for most of Shakespeare’s lifetime.

Patterson has argued that the real motivation for the charter was to “secure the allegiance of the stationers as policemen of the press for the sovereign.”<sup>44</sup> This seems correct, for the Company licensed books but did not require attribution to an author, only the *publisher’s* imprint, and it would take time for this to shift to include authors’ names.<sup>45</sup>

The regime during the Tudor period, which continued well into the seventeenth century, was a mixture of royal privileges granted to certain publishers and the Stationers’ Company’s licensing system.

The early Stuart kings (1603–1714) tried to maintain the Tudor policy of control, despite growing opposition to the restrictions on a free press.<sup>46</sup> They used patents to reserve certain fields to certain printers and to support the Company.<sup>47</sup> However, the system, which was based on the royal prerogative to control printing, started to weaken in 1629 when the legality of an overbroad patent was contested before the courts.<sup>48</sup> Yet the Company managed to maintain its stronghold. Indeed, in 1637, Charles I retained printing squarely in its hands by issuing a new decree.<sup>49</sup>

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41. See *id.*; SIEBERT, *supra* note 25, at 80.

42. See SIEBERT, *supra* note 25, at 80.

43. Statute of Anne 8 Ann., c. 19 (1710) (Eng.); see also Patterson, *supra* note 39, at 10.

44. Patterson, *supra* note 39.

45. See EISENSTEIN, *supra* note 2, at 59 (“As self-serving publicists, early printers . . . put their firm’s name, emblem and shop address on the front page of their books. . . . they put themselves first. Scribal colophons had come last. They also extended their new promotional techniques to the authors and artists whose work they published, thus contributing to the celebration of lay-culture heroes and to their achievement of personal celebrity and eponymous fame.”).

46. See SIEBERT, *supra* note 25, at 128.

47. See *id.* at 129, 245.

48. See *id.* at 133.

49. See *id.* at 134. The decree of 1637 has been described as “the most complete and detailed regulation of the early seventeenth century.” *Id.* at 142.

In Act I, although the purpose of this early attribution norm can be linked to censorship, the notion of “immaterial property”—that is, ownership of the ideas contained in a book—also emerged. Indeed, the ban on printing the “same book” by another member of the Company resembled the exclusive reproduction right that forms part of the modern copyright bundle because this property right—though not authorial in nature—did not attach to a physical “book” but rather to the intangible “work” contained in the book.<sup>50</sup> The term *property* can thus be used here in a broad sense to refer to “behavioral patterns of human beings, typically as prescribed by the text” of a specific law, such as copyright, but also sometimes embodied in social norms supported only by general legal principles.<sup>51</sup> The key point is that the object of this property differentiated between material and immaterial, a book and an intellectual property right, respectively. The *res* that is viewed as property was an abstract concept independent from the materiality of the reifier, such as a tangible book.<sup>52</sup> The book was also, to quote historian Elizabeth Eisenstein, the source of “print-made immortality” that affected the “drive for fame.”<sup>53</sup>

It may strike the reader as anachronistic to speak of immaterial property—as the term is now understood at least—in Shakespeare’s time, because the first statute creating literary property in plays and books was the abovementioned Statute of Anne of 1710, enacted roughly a century after Shakespeare’s death and the end of the House of Tudor in 1603.<sup>54</sup> However, Shakespeare plays abound in anachronisms, like the discussion between Brutus and Cassius about a clock in *Julius Caesar*!<sup>55</sup> Joking aside, the abstract right, combining the publisher’s monopoly and the need to attribute a work to a source, allowed a doctrinal vehicle to emerge that paved the way for modern copyright, both at common law and as a right anchored in statute.

The Company’s monopoly was reinforced by the passage of the Licensing Act of 1643, which followed two years of chaos after the fall of the Star Chamber.<sup>56</sup> The 1643 Act can be seen both as confirming the importance of the emergence of immaterial property as a key doctrinal

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50. See JOSEPH LOEWENSTEIN, *THE AUTHOR’S DUE* 39 (2002).

51. Andreas Rahmatian, *Money as a Normative Text*, 13 J. INT’L BUS. & L. 221, 224. (2014).

52. See *id.*

53. EISENSTEIN, *supra* note 2, at 121.

54. See Patterson, *supra* note 39, at 12.

55. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 2, sc. 1 (“BRUTUS: Peace! count the clock. CASSIUS: The clock hath stricken three.”). There were no such clocks in 44 BC. Many more anachronisms appear in his plays, of course. Aaron’s reference to “popish tricks” in *Titus Andronicus* is another good one. WILLIAM SHAKESPEARE, *TITUS ANDRONICUS* act 5, sc. 1.

56. See SIEBERT, *supra* note 25, at 186–87.

tool, and as creating for the first time the former notion of the owner at common law of the *contents* of a book, instead of the tangible object.<sup>57</sup> Additional legislative acts were adopted in 1649, 1653, and 1662, and the monopoly, though shaken by events at the end of the seventeenth century and the beginning of the eighteenth, finally ended in 1731, but not without major hiccups.<sup>58</sup> The 1662 Act expired in 1694, making it difficult to enforce the “copyright” that followed from entry into the Stationers’ Register.<sup>59</sup> After 1694, printing was “regulated” by the courts applying the law of seditious libel and by imposing a stamp tax.<sup>60</sup> It was only with the passage of the Statute of Anne in 1710 that order was restored.<sup>61</sup>

During this period, rights of authors made a quick appearance on the stage. In January 1641 and 1642, the House of Commons ordered printers to refrain from printing “without the name and consent of the author” in response to complaints by authors whose works were being published without either attribution or consent.<sup>62</sup> As this Article explores, authors would eventually become named rights holders in the Statute of Anne.<sup>63</sup> For now, consider how the licensing of books was applied to theater.

## 2. Licensing of Plays

The Crown extended the censorship of books by introducing a licensing system for *plays* in the 1530s.<sup>64</sup> This licensing system—inaugurated by a proclamation by Henry VIII in 1530—was built on the foundations laid by the “ecclesiastical proscription of particular books during the mid-1520s.”<sup>65</sup> The control of plays was further extended in the three decades or so that followed from London to “places remote from the cities.”<sup>66</sup> This allowed London to achieve a

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57. See LOEWENSTEIN, *supra* note 50.

58. See SIEBERT, *supra* note 25, at 222, 228, 238, 247–49. In 1655, Lord Protector Cromwell established his own system. See *id.* at 229–33.

59. See *id.* at 248.

60. See *id.* at 271, 309. The stamp tax continued to be imposed after the Statute of Anne. See Copyright Act of 1842, 5 & 6 Vict., c.45 (Eng.); Joseph M. Thomas, *Swift and the Stamp Act of 1712*, 31 PMLA 247, 248 (1916).

61. See SIEBERT, *supra* note 25, at 249.

62. *Id.* at 171.

63. See *id.* at 249.

64. E.K. CHAMBERS, *THE ELIZABETHAN STAGE* VOL. I 276 (1923).

65. LOEWENSTEIN, *supra* note 50, at 28.

66. JOSEPH LOEWENSTEIN, *BEN JONSON AND POSSESSIVE AUTHORSHIP* 17 (2002).

“large measure of discursive hegemony” and to ensure that the provinces were, well, “provincialized.”<sup>67</sup>

This licensing system meshed rather well with the consolidation of the Company’s monopoly on book printing, which would later morph into—or at least provide foundations for—the Statute of Anne, the first copyright statute.<sup>68</sup> Indeed, while the early Tudors had tried to suppress “seditious and schismatic works” by granting printing patents, late Elizabethan policy focused instead on licensing and then “transferred the power to license, in practice, to the leadership of the Stationers.”<sup>69</sup>

The attribution of plays to their respective authors was useful in that context. It may have made licensing easier, but the author’s name—say Heywood or Shakespeare—functioned as a reminder to be used against the author in case of “discontent” caused to the Crown if the play was seen as containing “inappropriate” material.<sup>70</sup> Importantly, it also functioned as a way to attract audiences, making the imprint of the author a “crucial element of the dramatic commodity.”<sup>71</sup>

The licensing of plays would open up new regulatory pathways. The initial “copyright” was mostly a system to control the distribution of books by regulating its immaterial content.<sup>72</sup> The licensing of music and plays involved an additional intellectual step—namely, the *performance in public* of the work, which could also be regulated and made subject to a form of exclusive right.<sup>73</sup> Intellectually, it would then be a small step to create an exclusive right, not in the copying of works (such as books or sheet music), but in the public performance of those works as part of the copyright regime. Still today, these two rights—reproduction and public performance—are the basic pillars of copyright law.<sup>74</sup> Although future regulatory expansions would extend the public performance right from performing in front of live audiences

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67. *Id.* at 18.

68. *See* Lee, *supra* note 32, at 323 (“Unlike the Crown, they were not so much concerned about censorship as they were about controlling the entire publishing industry.”).

69. LOEWENSTEIN, *supra* note 50, at 38.

70. *See id.* at 58.

71. *Id.* at 86.

72. *See id.* at 28–29.

73. *See id.* at 58.

74. Though, the US statute contains five “fundamental rights.” *See* H.R. Rep. No. 94-1476, at 61 (1976) (“The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are generally stated in section 106.”).

to new methods of reaching remote audiences such as radio, television, and now the internet, the basic structure has remained.<sup>75</sup>

### *B. Act II: Recognizing the Author*

In Act II, authors take center stage, both as appropriators of existing works and as claimants of a “right” to be recognized as authors. The State’s interest in censorship is no longer the dominant factor.

Ironically perhaps, the authorial right of attribution in Act II emerged mostly as a negative right; that is, it came about as a means of defending famous authors from works *falsely attributed* to them with a simple goal to sell more copies. Act II contains the core of the storyline, in part because it coincides with the birth of modern copyright law.

The Act opens with the emergence of a norm of authorial attribution and turns to the application of that norm to false attributions. It then moves to the international scene and ends with the embedding of author norms in early copyright law.

#### 1. The Emergence of Authorial Attribution Norms During Shakespeare’s Lifetime

To attribute or not to attribute, that is, well, *a* question. Another question arises: To whom? While the Stationers’ Register insisted on making the *publisher’s* name known, not the author’s, the emergence of an authorial attribution norm is visible during Shakespeare’s lifetime. Using the doctrinal vehicle of immaterial property that appeared during Act I, it would eventually allow authors to claim a “right of attribution.”

The authors’ wish to have their works attributed to them took a progressively stronger normative hue precisely during Shakespeare lifetime.<sup>76</sup> For example, Professor Joseph Loewenstein traced two successive publications of *Richard the Second* from 1597 and 1598, the second adding the name of the author on the cover.<sup>77</sup> Loewenstein suggests that the year 1598 marked a “palpable shift” in attribution practices.<sup>78</sup> This matters because that shift happened just four years after Shakespeare’s plays began to be performed almost exclusively by the Lord Chamberlain’s Men, a company co-owned by Shakespeare,

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75. See DANIEL GERVAIS, (RE)STRUCTURING COPYRIGHT: A COMPREHENSIVE PATH TO INTERNATIONAL COPYRIGHT REFORM 38–42 (2017).

76. See LOEWENSTEIN, *supra* note 50, at 40–42.

77. LOEWENSTEIN, *supra* note 66, at 61–62.

78. *Id.* at 61.

which was the leading theater company in London at the time.<sup>79</sup> In other words, this palpable shift in the role of attribution coincided with a time when Shakespeare himself might have seen the use of his name as a matter of some importance.

Was Shakespeare a plagiarist? A simplistic answer to this question would be “of course!” Indeed, by current standards, Shakespeare borrowed much from previous texts without any formal attribution.<sup>80</sup> Yet a better answer to that question should factor in a historical component. This means looking at the matter not just from a twenty-first-century perspective, using a contemporary definition of, for example, the term plagiarism used in an institutional educational context. As discussed in Section II.A, plagiarism means copying or paraphrasing without attribution *when this conflicts with an applicable norm* such as university regulations that students are typically introduced to early in their curriculum.<sup>81</sup> Applicable norms self-evidently vary through time and space.<sup>82</sup>

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79. SAMUEL SCHOENBAUM, *WILLIAM SHAKESPEARE: A COMPACT DOCUMENTARY LIFE* 183–84 (rev. ed. 1987).

80. See DENNIS MCCARTHY & JUNE SCHLUETER, “A BRIEF DISCOURSE OF REBELLION AND REBELS” BY GEORGE NORTH: A NEWLY UNCOVERED MANUSCRIPT SOURCE FOR SHAKESPEARE’S PLAYS 90–94 (2018).

81. See Audrey Wolfson Latourette, *Plagiarism: Legal and Ethical Implications for the University*, 37 J.C. & U.L. 1, 35–37 (2010), who explains:

Colleges and universities have employed a variety of techniques intended to deter students from the practice of plagiarism, to detect its presence, and to apply the appropriate penalties. Those devices include academic honesty or plagiarism policies articulated in college and university handbooks; online workshops or tutorials intended to familiarize students with the forms of plagiarism and aid faculty in fostering academic integrity; traditional honor codes that require a pledged promise both to refrain from acts of academic dishonesty and to inform authorities of students who violate the pledge; modified honor codes that solely require a pledge of academic integrity and which are sometimes coupled with plagiarism-detection devices; integrity codes which may or may not compel a signed pledge of adherence; Internet search engines; techniques faculty can employ when scrutinizing student papers; and plagiarism-detection software. (footnotes omitted).

82. See Michael J. Perry, *The Gospel According to Dworkin*, 11 CONST. COMMENT. 163, 173 n. 32 (1994), finding:

In every human community across time and space, “moral norms are closely linked to beliefs about the facts of human life and the world in which human life is set. . . . [W]hen they formulate moral norms and impose them on themselves and others[, persons] are trying to formulate relationships between realities and human purposes that allow them ‘to live as [they] would in a world that is the way it is.’” (brackets in original) (quoting from Robin W. Lovin & Frank E. Reynolds, *Focus Introduction*, 14 J. RELIGIOUS ETHICS 48, 56–57 (1986)).

Then there is the question of whether the supposed plagiarist knew the applicable norms. *See id.*

Scholars have of course already suggested that “Shakespeare was, in modern terms, a plagiarist on a vast scale.”<sup>83</sup> One study showed that out of “6,033 lines of parts I, II, and III of Henry VI, Shakespeare copied 1,771 [lines] verbatim and paraphrased 2,373” and further that “whole passages of Antony and Cleopatra . . . were line-by-line versifications” of preexisting works.<sup>84</sup>

Accusing Shakespeare of plagiarism today is anachronistic and possibly unfair, even though the ambitious young Shakespeare was accused of plagiarism even in his day.<sup>85</sup> The ethos of the time was quite different, and the term “plagiarism” must be used with extreme caution. The ethos of late sixteenth-century England *allowed* juxtaposition, reuse, and transformation, and, for many people, attribution of material created by others was seen as a simple expedient.<sup>86</sup> This ethos was infused in medieval and premodern writers, and it was likely present in Shakespeare’s mind as well.<sup>87</sup> No efforts were made to conceal borrowings.<sup>88</sup> As Posner noted, “Anyone who knew his Plutarch . . . would have recognized in it the barge scene from Antony and Cleopatra.”<sup>89</sup> The purpose of the appropriation was to add, or perhaps transform, but not steal.<sup>90</sup>

Did Shakespeare borrow because he was lazy? This can be answered firmly in the negative. First, the writer for the Elizabethan stage would likely have seen appropriation as normal, a term used here with two meanings: empirically common and normatively acceptable. Second, it may even have been prudent to borrow from historical sources.<sup>91</sup> One reason Shakespeare did not make up his plays “may have been that the Elizabethan theater was censored, and this may have inclined playwrights to play it safe by working from plots and themes found in earlier work.”<sup>92</sup>

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83. Frosio, *supra* note 20, at 368.

84. *Id.* In this case, as Richard Posner has demonstrated, Sir Anthony’s translation of *Plutarch’s Life*. See POSNER, *supra* note 12, at 51–53.

85. LOEWENSTEIN, *supra* note 50, at 87.

86. See ELIZABETH L. EISENSTEIN, *THE PRINTING REVOLUTION IN EARLY MODERN EUROPE* 85 (2nd ed. 2005). Eisenstein notes, “If authors, editors, and publishers adopted ‘the simple expedient of being honest’ by citing contributors, it was not because they were *unusually* noble but because this simple expedient had become more satisfying to mixed motives.” *Id.* (emphasis added). The term *unusually* denotes the fact that attribution was not yet a broadly compelling norm.

87. *See id.*

88. *See id.*

89. POSNER, *supra* note 12, at 54.

90. *See id.* at 54–55.

91. *See id.* at 65.

92. *Id.*



While these forms of appropriation matter to the literary historian, they are of less import to the legal scholar considering social and legal norms applicable at the time. Hence, the essence of the answer to the question “Was he a plagiarist?” is no; it does not much matter that Shakespeare was a protoplagiarist, from a strictly legal perspective. A historian might want to offer a more nuanced answer, however, and say that it does matter because—as noted above—the late sixteenth century saw the first real signs of a push for attribution. Moreover, if Shakespeare did plagiarize—as the term is understood nowadays—he was also the victim of many false attributions, or reverse plagiarism.<sup>93</sup> As Professor James Boyle noted, there were some “fifty-six claimants to Shakespeare’s throne.”<sup>94</sup>

The crux of the matter, however, is that if young Shakespeare can be seen as having plagiarized when measured against today’s standards, he eventually developed an authorial “proprietary sentiment” in his plays, as did others in his time.<sup>95</sup> This sentiment coalesced around possessiveness in works of the mind and coincides with Loewenstein’s identification of 1598 as a pivotal year.<sup>96</sup> The main issue to surface was not a lack of attribution but rather false attribution to well-known authors. This would affect Shakespeare during the latter part of his playwright career, after he acquired notoriety, and it is the issue to which the Article now turns the spotlight.

## 2. Authorial Attribution Norms and False Attribution (Reverse Plagiarism)

The emerging authorial attribution norm during Shakespeare’s lifetime was not used principally to insist on authorial attribution of otherwise anonymous works; it was mainly used to prevent false attribution.

False attribution of works to Shakespeare—sometimes by using the initials “WS” or “W. Shakespeare”—was so widespread during his lifetime and in the years that followed that many works cannot be securely attributed to him.<sup>97</sup> This had surprising effects, including on those who were less famous and whose works had been published in this fashion. By publishing works that others had written under the WS initials, some authors complained that people would think they had

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93. See James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 627–28 (1988).

94. *Id.* at 627.

95. Ben Jonson comes to mind. See LOEWENSTEIN, *supra* note 50, at 82.

96. See *id.* at 61.

97. *Id.* at 63–64.

“stolen” the work of Shakespeare.<sup>98</sup> Heywood, for example, complained in 1612 when the third edition of *The Passionate Pilgrim or Certain Amorous Sonnets, Between Venus and Adonis* included two of Heywood’s epistles.<sup>99</sup> Heywood complained that, as a professional writer, the inclusion of his work in another book of works attributed to “W. Shakespeare” would make him look like a plagiarist—that is, people would think he had copied from Shakespeare and not the other way around.<sup>100</sup> He has become a *cause célèbre*—or *texte célèbre* to use Max Thomas’s expression—in the annals of plagiarism.<sup>101</sup>

Resistance to reverse plagiarism is not new. Poet Francesco Petrararch, over two centuries earlier, had written the following to a friend who had found texts attributed to Petrarch that were not really his:

I laud your diligence but marvel at your uncertainty. For when I glanced at them, I not only realized that they were not mine, but grieved and blushed, astonished that others could think them mine or that they caused you any doubt. Therefore the people attributing them to me are doubly in the wrong: they rob their author of his work and burden me with what is not mine. If it is asked whom they are treating worse, that is rather difficult to decide. . . . It is one thing to take away from someone’s praise, and quite another to pile dishonor on him. A great man will disdain the first, but hate the second.<sup>102</sup>

Indeed, early comments on plagiarism seem to find false attribution much worse a crime than failure to attribute. Petrarch’s and even Heywood’s concerns were not about authorial attribution per se, or reuse of preexisting content, but rather about loss of honor in being seen as having written texts they had not—or in Heywood’s case as having taken verbatim a text written by another famous author. Around the same time, editor Nicholas Ling published *Helicon* and noted this in the preface:

If any man hath beene defrauded of any thing by him composed, by another mans title put to the same, hee hath this benefit by this collection, freely to challenge his owne in publique, where els he might be robd of his proper due.<sup>103</sup>

The commoditization of culture had started in earnest. To riff off Baudrillard, the work becomes an object because it is attributed (and specifically in the case of art, when it is signed).

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98. See *id.* at 63.

99. See *id.* at 63–64.

100. See *id.* at 64.

101. Thomas, *supra* note 19.

102. FRANCIS PETRARCH, LETTERS OF OLD AGE 65–66 (Aldo S. Bernardo et al. trans., Johns Hopkins Univ. Press, 1992).

103. ENGLAND’S HELICON: A COLLECTION OF LYRICAL AND PASTORAL POEMS: PUBLISHED IN 1600 4 (A.H. Bullen ed., 1899).

The “proper due” notion used here is interesting. It speaks against the notion of separating moral and economic interests of authors, and it provides a justification both to require attribution and to prevent false attribution. Here again, the latter is seen as the worse of the two violations.

Alternatively, one could say that these two forms of violation, nonattribution and false attribution, are two sides of the same normative coin. This is because, in both cases, the *attribution of a subject to the object* is seen as creating value, both culturally and commercially. This is the point at which the modern attribution norm begins to coalesce. Although adding *false value* was initially seen as a worse violation than failing to attribute, the added value of proper attribution rests, in both cases, in the author’s signature, which entrenches the subject and allows the reader or viewer to perceive the object’s “differential value.”<sup>104</sup>

The debate as to whether use of “WS,” or Shakespeare’s name in other guises, was a way to sell or had to be properly authenticated as the real source of the work thus marks a key inflection point in the evolution of authorial attribution norms. Petrarch, Heywood, and Ling share comparable perspectives concerning the risks of plagiarism. Their primary focus is on misattribution, not on lack of attribution. While they do not debate the derivative nature of any of the work at issue or the appropriation, they see misattribution as perilous because it dilutes the author’s name, including in his relations with current and future patrons. As Thomas noted in this context: “The difficulty with plagiarism so-called is not that it takes away any particular property from a particular writer, but rather that it renders it impossible to know what the coin of that writer is made of.”<sup>105</sup>

This insistence on the greater risk of false attribution versus nonattribution is understandable from another, more mundane perspective. The attribution of text has a great impact on the commoditization function and thus a major role in the nomination and circulation of books.<sup>106</sup> Nonattribution is unlikely to drive sales. In contrast, misattribution is, to use Thomas’s metaphor, like counterfeit currency.<sup>107</sup>

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104. JEAN BAUDRILLARD, FOR A CRITIQUE OF THE POLITICAL ECONOMY OF THE SIGN 102–03 (1981).

105. Thomas, *supra* note 19, at 286.

106. John Feather, *From Rights in Copies to Copyright: The Recognition of Authors’ Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries*, 10 CARDOZO ARTS & ENT. L.J. 455, 455 (1992).

107. Thomas, *supra* note 19, at 286.

The commoditization and mass circulation of books, which started with the spread of the printing press in late fifteenth- and early sixteenth-century Europe, freed authors from patrons.<sup>108</sup> When works were created by authors under a patronage system, a patron had a direct relationship with the author.<sup>109</sup> The patron was in charge, and works created under this system often went without attribution or authorized misattribution.<sup>110</sup> Gradually, patrons started to want “names” on the works they were subsidizing because attribution was seen as adding value to the works, for the benefit of the owner of patron first and the author incidentally.<sup>111</sup> That value—for which patrons were paying—required attribution to a named (famous) author. It could, however, be undermined by false attributions. This increased the importance of the author’s name on the works actually created by that author. This in turn may have reduced the importance of the work itself and possibly the room for new, unknown authors to emerge, especially those who initially created in significant part through imitation and appropriation. The insistence on attributing, sometimes falsely, new works to prestigious authors may also have “undermined the durable institution of literary imitation.”<sup>112</sup>

The modern norm is somewhat different. It is reflected in the constructivist rhetoric of “author as source,” a source that needs to be identified as a matter of propriety.<sup>113</sup> Although this rhetoric was present in the debates that led to the adoption of the Statute of Anne, it did not win the day: the statute created a property right in books but without a formal right of attribution.<sup>114</sup> For the bookseller, the key incentive was to sell books, and the risk with false attribution was that the power of attribution to increase a book’s value would be diminished if, like counterfeit currency, there was too much of it in circulation. Still, it is possible to conclude this Section with the observation that, while the plagiarism concerns that ran in the literary streets of Shakespearean times in Stratford and elsewhere had commercially motivated wheels, they were at least cognizant of the propriety of authorial attribution.

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108. See *supra* note 2.

109. POSNER, *supra* note 12, at 68–69.

110. See *id.*

111. See *id.*

112. LOEWENSTEIN, *supra* note 50, at 87.

113. See Thomas, *supra* note 19, at 279; see also Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51, 51 (1988).

114. See Rose, *supra* note 113, at 52.

### 3. The Emergence of an International Right of Authorial Attribution

The English story somewhat parallels efforts on the European Continent to enshrine an authorial attribution norm in national laws and international treaties.

The early insistence on attribution and integrity visible in sixteenth-century Florence is reflected in the modern notion of *droit moral* (also known as moral right), which in its most basic form includes both a right of attribution and a right of integrity that Michelangelo likely would have supported.<sup>115</sup> That being said, legal historians do not typically locate the root of the moral right in the soil of sixteenth-century Florence but rather in the work of Kant and later Hegel.<sup>116</sup> According to this view, a work of art emanates from a unique relationship between an artist and the creative process, and “the resultant art makes an artist unusually vulnerable to certain personal harms.”<sup>117</sup> The art is an extension of herself; the relationship to the art is “more personal and simply qualitatively different from the relationship of most other people to other objects and activities.”<sup>118</sup>

As a legal matter, a moral right reflecting this special relationship between the author and her work only emerged internationally in the eighteenth century. It is observed in its modern instantiation in France after the French Revolution, which may explain the use of the French term even in some English language literature.<sup>119</sup>

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115. See Natalie C. Suhl, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1206 (2002). Suhl notes:

Until the middle of the Renaissance, the Catholic Church and wealthy patrons overarched artists' creativity in Europe and England. As the Church's influence decreased, artistic innovation and expression burgeoned. The expansion of artists' creativity fostered the momentum for the assertion of artists' personal rights. Michelangelo, capitalizing upon his outstanding reputation, first demanded the bundle of rights that now fall under the umbrella of Moral Rights. In a sculpture commissioned for a chapel in St. Peter's Cathedral, Michelangelo, first asserting his right of attribution, secretly chiseled his name into the sculpture after hearing of the sculpture being falsely attributed to his patron.

The emergence of a right of attribution in Florence followed an even earlier emergence of something like an attribution norm in Venice. See *supra* note 3.

116. See Swack, *supra* note 16; Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1541–42 (referring to the personhood theory of property of Hegel and Kant as support for moral rights).

117. Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 43–44 (1998).

118. *Id.*

119. A search on Westlaw in April 2019 found 702 law review articles using the expression in French, including Liemer. *Id.*; Swack, *supra* note 16; Sarah Ann Smith, *The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL

These Franco-German notions of personhood in a literary and artistic work reflected more than propriety; they were based on a natural right—or in modern terms, a human right—of the author to be recognized for the author's works.<sup>120</sup> This right would later be enshrined in the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention" or the "Convention").<sup>121</sup> That Convention, which binds 177 countries as of July 2019, provides that "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."<sup>122</sup>

This evolution differs from the British history. As the above discussion shows, the early norm of attribution as it emerged in Shakespeare's world functioned more as a market regulation tool than as recognition of a Kantian link between the artist and her work. This more commercial purpose may help explain why, as a formal matter, the moral right did not enter British copyright law until the late twentieth century.<sup>123</sup> However, while the modern right of attribution in Britain dates back legislatively to 1988, the focus on *false* attribution can be traced back much earlier to an 1862 statute, which contained a rarely used tort of misattribution and was expanded in section 43 of the Copyright Act 1956.<sup>124</sup>

#### 4. Differences Between Copyright Norms and Attribution Norms

The differences between attribution and copyright are not limited to the differences in the source, scope, and purpose of the attribution right between Britain and the Continent described in the previous Sections. The term of protection is probably the most visible difference. In many countries, copyright ends seventy years after the death of the author, but plagiarizing an old book no longer protected by

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L. REV. 158, 158 (1984); Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 U.N.C. L. REV. 1, 1 (1997); Laura Lee Van Velzen, *Injecting a Dose of Duty into the Doctrine of Droit Moral*, 74 IOWA L. REV. 629, 629 (1989).

120. On the linkages between authors' rights and human rights, see generally Daniel Gervais, *How Intellectual Property and Human Rights Can Live Together: An Updated Perspective*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 3–26 (Paul L.C. Torremans, ed., 3rd ed. 2015).

121. Berne Convention for the Protection of Literary and Artistic Works, Article 6bis(1), Sept. 9, 1886, 123 L.N.T.S. 233 (as revised by Paris Act, July 24, 1971) [hereinafter Berne Convention].

122. See *id.* For a list of member States, see WIPO-Administered Treaties, WORLD INTEL. PROP. ORG., [https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) [https://perma.cc/8HUY-99B8] (last visited May 2, 2019).

123. See LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 233–35 (2001).

124. Fine Arts Copyright Act 1862, s. 7(4) (UK). It is now contained in the Copyright, Designs and Patent Act 1988, c. 48 (UK).

copyright is still plagiarism.<sup>125</sup> Further, there are defenses that one can raise to a charge of copyright infringement, such as fair dealing or fair use, but these defenses are often unavailable to the plagiarist.<sup>126</sup>

Plagiarism and copyright also differ in what one might call the levels of abstraction. The rule enshrined in both US law and international instruments is that copyright protects the expression, not the ideas contained in an author's expression.<sup>127</sup> While copyright infringement is not limited to the taking of exact words only—and admittedly the border between idea and expression can be fuzzy—a charge of plagiarism might survive at a higher level of abstraction than a claim of copyright infringement.<sup>128</sup> Posner gives the example of the famous book *The Da Vinci Code*, which copied many details from an earlier book, *Holy Blood, Holy Grail*, yet the authors of the earlier book lost their copyright infringement suit in England.<sup>129</sup> Finally, a copyright owner might authorize a taking from her work, but that again would not defeat a claim of plagiarism if the source of the taking went unmentioned.<sup>130</sup>

To paraphrase Posner, while plagiarism conceals, copyright infringement can take openly as it does in the case of a parody (indeed, the parodic attempt fails if it doesn't conjure up the parodied work).<sup>131</sup> Plagiarism is fraud on the reader; copyright infringement may be fraud on the author, and possibly the reader, but not necessarily so.<sup>132</sup> The

125. The Berne Convention provides in its article 7 for a minimum of life plus fifty years, but most countries, including the European Union and the United States, have now added twenty years to this term. Berne Convention, *supra* note 121; see William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661, 688–89 (1996) (explaining how both the European Union and the United States extended copyright by twenty years).

126. POSNER, *supra* note 12, at 12–16 (Posner suggests that plagiarism might be used to show that a use was unfair).

127. See 17 U.S.C. § 102(b). This rule is contained, for instance, in article 10(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, (1994) 33 I.L.M. 81.

128. POSNER, *supra* note 12, at 13.

129. See *id.*

130. Plagiarism may thus be viewed from the reader's perspective, and the source is acknowledged for the reader's benefit or to allow the reader to assess the respective contributions of the author of the quoted text(s) and of the text in which the quotes appear.

131. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994) (a parody must “conjure up at least enough of [the] original to make the object of its critical wit recognizable”) (internal quotation marks omitted).

132. For example, a pirate can copy a book, including its cover, with the actual author name on it and sell it, which would amount to copyright infringement but not plagiarism. Interestingly, this is reportedly common, and the pirated editions may contain mistakes that may affect the author's reputation. See David Streitfeld, *What Happens After Amazon's Domination Is Complete?*

normative picture is very different. The function attributed to trademark may be used to distinguish the shift: plagiarism as it is defined nowadays prevents reliance by the reader on the name of the (real) author in the same way a trader cannot rely on the trademark of another to sell her wares.<sup>133</sup> It may invite undue reliance on the plagiarist and correspondingly too little reliance on the original author, as is the case with “passing off.”<sup>134</sup> Hence, plagiarism is not so much about the work being plagiarized as it is about the identity of the author being misused or misappropriated.<sup>135</sup> It is not surprising, therefore, that it is only when the identity of the author started to matter that plagiarism became a *malum in se*.<sup>136</sup> Copyright infringement may perhaps be viewed, in contrast, as a *malum prohibitum*, at least in cases credibly close to the fair dealing-fair use border.<sup>137</sup>

In this Act, the international norms concerning attribution to authors were incorporated in the Berne Convention. Their focus is squarely on the right of the author and reflects in part a continental natural rights perspective on the nature of authorial expression.<sup>138</sup> International norms do not reflect what one might call the “mixed” English norm, with its commercial overtones and its stronger focus on false attribution over lack of attribution.<sup>139</sup>

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*Its Bookstore Offers Clues*, N.Y. TIMES (June 23, 2019), <https://www.nytimes.com/2019/06/23/technology/amazon-domination-bookstore-books.html?login=smartlock&auth=login-smartlock> [https://perma.cc/GTW8-SQT7].

133. See *Trademark Counterfeiting Act of 1982: Hearing on S. 2428 Before the S. Comm. on the Judiciary*, 97th Cong. (1982) (statement of William F. Baxter) (“[T]rademark counterfeiting . . . if freely permitted . . . would eventually destroy the incentive of trademark owners to make the investments in quality control, promotion and other activities necessary to establishing strong marks and brand names.”) (S. 2428 was a proposed amendment to strengthen the laws against counterfeiting of federally registered trademarks) (quoted in J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:3 (5th ed.)).

134. See *Singer Mfg. Co. v. Golden*, 171 F.2d 266, 268 (7th Cir. 1948) (“When one orders parts by name of manufacturer, number and description, he has a right to have his order filled as given, and if substitutions are made in circumstances calculated to lead the purchaser to believe he is getting what he orders when he is not, it is not only a fraud upon the purchaser but also upon the manufacturer of the goods ordered for which the substitution was made.”) (emphasis added).

135. See *id.*

136. *Malum in se* means wrong in itself. By contrast, a *malum prohibitum* is wrong only because it is prohibited. See Richard L. Gray, *Eliminating the (Absurd) Distinction Between Malum in Se and Malum Prohibitum Crimes*, 73 WASH. U. L.Q. 1369, 1370 (1995).

137. This is the traditional distinction between crimes or violations that are “wrong because prohibited” and those that are “wrong by themselves.” See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2196 (2002); see also Sheldon W. Halpern, *Copyright Law in the Digital Age: Malum in Se and Malum Prohibitum*, 4 MARQ. INTELL. PROP. L. REV. 1, 3 (2000) (arguing that an “act of infringement needs to be defined such that it is indeed malum in se rather than simply malum prohibitum”).

138. See Liemer, *supra* note 117, at 41–42.

139. See Swack, *supra* note 16, at 381.



Shakespeare's claim to protect his name thus overlaps normatively with only some aspects of the international moral right norm. The international law norm is more Michelangelo than Shakespeare.

### *C. Act III: Societal Interests*

In Act III, authorial attribution norms undergo a transformation—some might say a death and rebirth in a different guise. The shift is not in the doctrinal vehicle used, for copyright law as it emerged in the early eighteenth century is still largely the same: protecting against reproduction (or copying) and public performance in front of live audiences or at a distance.<sup>140</sup> The very notion of *author* changes in this Act and, with it, the authorial norms to which it can provide normative support, if any.<sup>141</sup>

This Act considers first how authorial norms have given way, at least in part, to norms focused on readers' interest—namely, attribution performs a trademark function to guide the reader's choice. The Act ends with a look at the implications of this shift for the future of authorial attribution norms.

#### 1. Attribution: For Whose Benefit?

Readers of books and plays in Shakespeare's time had an interest both in reading famous authors and in knowing about the authors' personal lives. The lives of famous authors, as well as those of other celebrities, have remained a matter of interest to the public, though not necessarily a matter of public interest.

Even after Barthes, Foucault, and New Criticism declared the author dead, the biographical background of authors has remained important—for example, to perform some of the functions of literary criticism.<sup>142</sup> Moreover, even among postmodern critics of authorship theories, an antiplagiarism norm exists: those scholars may not want to find out the hard way whether their faculty disciplinary committee is aligned with postmodernist views.<sup>143</sup>

Yet the normative foundations of attribution in Act III unmistakably changed when compared to those of the previous Acts.

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140. See GERVAIS, *supra* note 75.

141. Interestingly, the US Constitution is a reflection of its time, as it refers specifically to exclusive rights in the writings of "Authors." U.S. CONST. art. 1, § 1, cl. 8.

142. See Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1184–85 (2005).

143. See *id.*

The current zeitgeist considers the name of the author mostly as an indication of the source of the work.<sup>144</sup> This norm is meant to reflect—and is normatively aligned with—consumers’ and readers’ interests, not those of the author.<sup>145</sup> They thus function like trademarks. Trademarks are not meant primarily to protect producers; they assure consumers of a certain quality.<sup>146</sup> A bottle of Coca-Cola should taste the same anywhere in the world.<sup>147</sup> The consumer need not know exactly which legal entity produced and bottled it, for it may not be the trademark owner.<sup>148</sup> The trademark owner must only provide a “guarantee” of uniform quality, and thus exercise some form of control, of the product’s manufacturing.<sup>149</sup> To that extent, trademarks are often fictions.<sup>150</sup> For example, major pharmacy and supermarket chains in a number of countries sell products under their trademarks, but they do not produce those products.<sup>151</sup>

Like trademarks, the attribution of literary works can also have a fictional character. This is not new. Ghostwriting has been around for centuries or more.<sup>152</sup> Even Rembrandt is said to have signed works by inferior painters, using his “trademark” to sell paintings.<sup>153</sup> Biblical books are attributed to “authors” who did not write them, as many

144. See *id.*

145. See *id.*

146. See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:4 (5th ed.) (“Without marks, a seller’s mistakes or low quality products would be untraceable to their source. Therefore, trademarks create an incentive to keep up a good reputation for a predictable quality of goods.”).

147. Hence a restaurant is not allowed to substitute a different product (e.g., Pepsi-Cola) when the patron orders Coca-Cola, at least not without warning the customer. See *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1252 (9th Cir. 1982) (enjoining a restaurant’s substitution of Pepsi-Cola in response to orders for Coca-Cola).

148. See MCCARTHY, *supra* note 146, § 3:12 (“A trademark identifies a single source. But this does not mean that the buyer must know the identity of that ‘single source’ in the sense that she knows the corporate name of the producer or seller.”).

149. See *id.* § 3:11.

150. See Barbara Thau, *As Power of Name Brands Wanes, CVS Is Betting on Private Labels to Revive Sales*, FORBES (Oct. 12, 2017), <https://www.forbes.com/sites/barbarathau/2017/10/12/as-power-of-name-brands-wanes-cvs-is-betting-on-private-labels-to-revive-sales/#717b81b04ef2> [<https://perma.cc/J77P-3DDD>] (discussing how CVS purchases “private label” products from a variety of sources but noting that “[u]nlike competitors that often outsource these functions, CVS boasts that its in-house quality assurance team sets the standard in the industry for product testing in terms of factory auditing”).

151. See *id.*

152. Without offering a history of ghostwriting, it is widely acknowledged by biblical scholars that the Gospels were ghostwritten. See, e.g., GNOTICA, JUDAICA, CATHOLICA. COLLECTED ESSAYS OF GILLES QUISPÉL 475 (Johannes Van Oort, ed.) (2008); see also JOHN C. KNAPP & AZALEA M. HULBERT, GHOSTWRITING AND THE ETHICS OF AUTHENTICITY 11 (2017) (referring to the “ancient roots” of ghostwriting).

153. See POSNER, *supra* note 12, at 26.

Pauline letters are now thought to have been written by others.<sup>154</sup> In the case of Rembrandt and ghostwritten books, isn't the name of the "author" that appears on the work a mere trademark? That "author" would have agreed to the use of her name and may even have proofread and edited the work. In the case of biblical books, the (unauthorized) attribution may have been a means of increasing the dissemination of the ideas contained in the letter, though there were in some cases other motivations at play.<sup>155</sup> The difference between the two situations, other than the fact that different attribution norms and reader expectations applied in the two contexts, is that biblical letters were not sold for financial compensation.

In Act III, names of authors are perhaps best described as trademarks meant to generate sales. This phenomenon was observed in Shakespeare's time,<sup>156</sup> but there are key differences.

## 2. The Normative Shift

There is a *fil conducteur* that connects all three Acts—namely, that attribution can create value. The difference is in for whom it creates value. In that respect, Act III is fundamentally different. Act I is about attribution to a source with censorship in mind. Act II is about acknowledging the author, with a focus in England more on preventing false attribution than on recognizing a positive right of attribution to authors, although the authorial norm did emerge there as well. Act II also saw an unmistakably author-focused authorial attribution norm be enshrined as an author's right in a number of national laws on the European Continent and in the principal copyright treaty, the Berne Convention.<sup>157</sup> In contrast, Act III is all about the reader or "user" and broader societal interests. Attribution norms still protect the author, but the author is no longer the self-evident normative justification.

An example might help illuminate the shift. Consider plagiarism in the familiar, modern context of higher education.<sup>158</sup> The driving concern there is clearly not nonattribution as authorial practice; it is the integrity and fairness of educational processes and the degrees to

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154. John Dominic Crossan, *The Search for the Historical Paul: Which Letters Did He Really Write?*, HUFFINGTON POST (July 5, 2011), [https://www.huffpost.com/entry/apostle-paul-letters\\_b\\_890387](https://www.huffpost.com/entry/apostle-paul-letters_b_890387) [<https://perma.cc/9KEU-45PM>]; see also EISENSTEIN, *supra* note 2, at 122 ("Who wrote Socrates' lines, Aristotle's works, Sappho's poems, any portion of the scriptures?").

155. See LEWIS R. DONELSON, PSEUDEPIGRAPHY AND ETHICAL ARGUMENTS IN THE PASTORAL EPISTLES 16–18 (explaining that at least some letters were written to denigrate the named author, and others as respect for a great figure).

156. See *supra* Section II.A.2.

157. See Berne Convention, *supra* note 121, at 241–42; Patry, *supra* note 125.

158. See Latourette, *supra* note 81.

which they lead.<sup>159</sup> There is a societal impact of failure to attribute correctly or at all that reaches well beyond any aggrieved author and, indeed, only protects her as a “side effect.”<sup>160</sup> Put differently, although current rules against plagiarism and modern copyright share a similar *doctrinal* vector—namely, the need to attribute correctly—they derive from a different *normative* source. Current plagiarism and attribution rules are meant to allow the reader, including educators, to rely on the source of the material.<sup>161</sup> They thus differ significantly from those born in the font of Renaissance individualism.<sup>162</sup>

From this perspective, attribution nowadays performs a filtering function. Just like the trademarks affixed to commercially sold goods, attribution has value in that it reduces a consumer’s search costs.<sup>163</sup> The reader who likes a certain author—say, Margaret Atwood, Paul Auster, or Antony Trollope—expects at the very least that any book with the author’s name on it was written by the named author. The reader’s expectations might increase in hopes that a “new” book by the same author will have a similar literary taste as other books from the same author that this reader previously read. This is not all that different from the role played by a trademark on a food product for which the consumer may have two similar expectations: that the product is made by or under the control of the trademark owner and that it will taste the same as other products bearing the same mark that the consumer purchased in the past.<sup>164</sup>

Attribution in Acts I and II is also meant to sell books.<sup>165</sup> There is a difference, however. Though in Act I the normative threads are intertwined, in Act II attribution norms are authorial norms with

159. See Samuel J. Horovitz, *Two Wrongs Don't Negate a Copyright: Don't Make Students Turnitin if You Won't Give It Back*, 60 FLA. L. REV. 229, 232, 235 (2008) (“[A]cademic institutions face the daunting challenges of promoting honesty and respect for the work of others and of ensuring the integrity of the learning and grading processes.”); see also Jennifer N. Buchanan & Joseph C. Beckham, *A Comprehensive Academic Honor Policy for Students: Ensuring Due Process, Promoting Academic Integrity, and Involving Faculty*, 33 J.C. & U.L. 97, 104–05 (2006).

160. See Horovitz, *supra* note 159, at 235.

161. *Id.*

162. See *supra* Section III.B.2.

163. See MCCARTHY, *supra* note 147, § 2:5 (“[T]rademarks reduce the buyer’s cost of collecting information about goods and services by narrowing the scope of information into brand segments rather than have the buyer start a new search process with each purchase.”).

164. ADRIAN KUENZLER, *RESTORING CONSUMER SOVEREIGNTY: HOW MARKETS MANIPULATE US AND WHAT THE LAW CAN DO ABOUT IT* 61 (2017) (“Reputations based on consistent past performance economize on the costs of information about the *anticipated* performance of a good. . . . [C]onsumers will sensibly use the brand name or reputation of the maker as a basis of choice.”); see ARMEN A. ALCHIAN & WILLIAM R. ALLEN, *EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION, AND CONTROL* 193 (2nd ed. 1977).

165. See POSNER, *supra* note 12, at 68–69.

commercial effect; in Act III, the norms are commercial norms with authorial effect. This shift is also in line with trademark law, as protection of the interests of trademark owners is sometimes described as a side effect of the protection of consumer interests.<sup>166</sup> In the third Act, the shift of emphasis from author to reader also means that selling by the author is less important. This might explain the ever-greater role played by sharing sites, like YouTube, where many copyrighted works are made available without payment, from texts to photography to music, based on recommendations of other users or preference-based algorithms that can be paid to influence preferences and make “personalized” recommendations, rather than traditional promotion.<sup>167</sup> Because so much content is available free of charge (though often accompanied by advertisement), the user quite often can decide what she wants to pay for, if anything.<sup>168</sup>

This is directly comparable to the traditional function of a trademark. US courts in particular have “gravitate[d] toward viewing the elimination of consumer confusion as the animating purpose of trademark law.”<sup>169</sup> As noted above, the protection of the markholder—or, in our case, the author—is almost a “side effect” of protecting the consumer.<sup>170</sup> This happened fairly surreptitiously, and this normative shift in trademark law has had few perceptible doctrinal effects.<sup>171</sup> US courts have moved from producer- to consumer-animated principles, but in spite of this major shift, in most cases they “reach the same results.”<sup>172</sup>

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166. See Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1840–41 (2007).

167. See Kristelia A. Garcia, *Copyright Arbitrage*, 107 CALIF. L. REV. 199, 248–49 (2019); Ned Snow, *Copytraps*, 84 IND. L.J. 285, 308 n. 159 (2009) (this has been referred to as “consumer-determined value”); see also Rustan Kosenko & R. Krishnan, *Consumer Price Limits and the Brand Effect*, 5 J. BUS. & PSYCHOL. 153, 153–54 (1990) (the idea of “consumer-determined value” may be somewhat misleading because every purchasing decision is theoretically a decision that the price paid is acceptable).

168. This is a process that started with Napster and similar technologies. See Michael D. Scott, *The Ninth Circuit Rules in the Napster Controversy*, 6 CYBERSPACE L. 1, 1 (Mar. 2001) (noting, in a discussion of the US Court of Appeals for the Ninth Circuit decision essentially shutting down Napster, that “it is an important short-term victory for the record industry, and provides an important impetus to Napster and other online music providers to create a new business model where users pay for the music they want. Whether Internet users are willing to pay ANYTHING for music, however, is still an open question.”) As of 2019, that is still a partly open question. See Garcia, *supra* note 167, at 242.

169. William McGeeveran & Mark P. McKenna, *Confusion Isn’t Everything*, 89 NOTRE DAME L. REV. 253, 270–71 (2013).

170. See *id.*

171. See *id.* at 273–74.

172. See *id.*

Whether one uses the doctrines of copyright law or trademark law to enforce attribution norms does not matter much: either one can perform the function of putting the name of the author on copies of her works.<sup>173</sup> Indeed, copyright law has begun to shape itself along trademark lines: US law and international instruments have reinforced attribution by making it illegal to remove the author's name (as part of "rights management information") on digital copies of works.<sup>174</sup> Authors have also embraced the shift, and a number of famous authors have actually begun to register their names as trademarks.<sup>175</sup>

It is worth underscoring a positive political economic impact of this shift towards the "trademarkization" of attribution: it may increase the purchase of attribution norms in the United States. The principal reason that has prevented the United States from recognizing a full attribution right in federal copyright law has arguably been the foreignness of the authorial attribution norms enshrined in international legal instruments.<sup>176</sup> As noted above, international attribution norms are part of what the Berne Convention refers to as the "moral right."<sup>177</sup> This right emerged in Continental Europe and is "said to encompass three major components: the right of disclosure, the right of paternity [attribution], and the right of integrity."<sup>178</sup>

This "European" moral right—and in particular the right to preserve the artistic integrity of a work and the right to prevent first publication (or disclosure)—was established in recognition of the

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173. It is true that the right of attribution also protects the right to publish anonymously and under a pseudonym. In the latter case, whether the name of the author is a pseudonym or not does not change the attribution's role as a trademark. See Peter K. Yu, *Moral Rights 2.0*, 1 TEX. A&M L. REV. 873, 899 (2014); Lyrrisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1537–38, 1563 (2007). An anonymous work bears no trademark and would be an exception, but relatively few works are published anonymously. See Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 U. HOUS. L. REV. 263, 265–66 (2004).

174. See ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 26 (2009); Yu, *supra* note 173.

175. See, e.g., J K ROWLING, Registration No. 4248213 (registered on November 27, 2012, for various goods and services, including "entertainment information specifically related to books and movies in the nature of news, online games that provide entertainment information regarding books and movies").

176. Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 10–12, 17–18 (1985).

177. Berne Convention, *supra* note 121.

178. Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 608 (2001) (the Berne Convention describes it at its minimum level as attribution and integrity only); Kwall, *supra* note 176, at 5; Sidney A. Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244, 249 (1978).

authors' interests discussed in Act II.<sup>179</sup> An author-focused perspective is hard—though not impossible—to reconcile with a reader- or user-focused normative view. One can always argue that a reader may want to know if the work attributed to an author has been altered, for example, but in terms of determining the scope of the right, and exceptions thereto, knowing on which normative foot one must dance (either author or user) seems essential.

In some countries, the moral right goes further still. In France, it includes a right of withdrawal—that is, a right to “recall all existing copies of her work” following publication.<sup>180</sup> This right seems most definitely harder to reconcile with readers' interests in that it allows “substantial scope for artists to behave opportunistically or eccentrically.”<sup>181</sup> In practice, it is seldom used, as the author must compensate those who relied on a license to produce and sell copies of the work.<sup>182</sup>

The United States joined the Berne Convention in 1989, and on that occasion established a limited “moral right” only applicable to works of fine arts in a way that makes the United States' compliance with its international obligations highly dubious.<sup>183</sup> Whether the amendment to the Copyright Act produced its intended effect in securing a functioning moral right *even in the limited area of fine arts* is doubtful to say the least.<sup>184</sup> That said, US compliance with international law in this area is an interesting, yet mostly theoretical, debate, as there is no international dispute-settlement mechanism that

179. See Kwall, *supra* note 176, at 2–3.

180. Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 597 (2006); Gunlicks, *supra* note 178, at 615.

181. Marina Santilli, *United States' Moral Rights Developments in European Perspective*, 1 MARQ. INTELL. PROP. L. REV. 89, 94 (1997).

182. See Piotraut, *supra* note 180, at 608 (“The limitations and obligations arising under droit de retrait in French copyright law are so broad that the right is rarely used.”); see also Rebecca Bolin, *Locking Down the Library: How Copyright, Contract, and Cybertrespass Block Internet Archiving*, 29 HASTINGS COMMUN. & ENT. L.J. 1, 39 (2006) (“The right to withdraw, or *droit de retrait ou de repentir*, is a very rare European moral right, or *droit moral*, and theoretically gives an artist a limited right to reclaim and destroy published work.”).

183. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, Title VI, § 603(a), 104 Stat. 5128, 5128–33 (1990) (codified by 17 U.S.C. § 106A) (the moral right in question was added by the Visual Artists Rights Act of 1990 (VARA)) (VARA was passed on December 1, 1990, and became effective on June 1, 1991); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, Appendix II, n. 2; see also Jane C. Ginsburg, *U.S. Federalism and Intellectual Property*, 2 COLUM. J. EUR. L. 463, 470 (1996); Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM. J.L. & ARTS 477, 481 (1990).

184. See Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 33 (1997).

can be used to bring a case against the United States.<sup>185</sup> The more important aspect for our purposes is whether the United States *should* provide a right of attribution for other reasons, and if so, why.

The United States may need other reasons to justify a right of attribution, because the normative underpinnings of the right of attribution in the Berne Convention discussed in Act II hardly seem compatible with the zeitgeist today. As the ghost of author-centered attribution norms heads backstage and is replaced by reader-centered attribution norms, the protection of the right of attribution should no longer be viewed as a doctrine with foreign normative underpinnings to be painfully squeezed into some corner of US law. A right of attribution on works of fine art is contained in the Visual Artists Rights Act.<sup>186</sup> This Article argues that a much more powerful right of attribution made its way in US law when Congress enacted protections against the removal of “rights management information” on digital copies of copyrighted works in 1998.<sup>187</sup> This strengthened the attribution right, especially vis-à-vis other components of a Berne Convention-compatible “moral right” and the right of integrity not included in the 1998 amendments.<sup>188</sup>

Though Act III’s focus on the readers’ interest militates in favor of a limited moral right not focused on authorial control but rather on *attribution qua attribution*, this could, as noted above, be accompanied by an “integrity mechanism” to inform readers of modifications to a work not made by the author.<sup>189</sup> This arguably would comply with the Berne Convention but for reasons dramatically different from those

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185. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, annex 2, art. 1, 108 stat. 4809, 1869 U.N.T.S. 401; Berne Convention, *supra* note 121, at Article 33(1) 274–75 (providing that disputes under the Berne Convention are to be resolved by the International Court of Justice). There would, in theory, be two options. The first would be the World Trade Organization’s state-to-state dispute-settlement system, but that system is not applicable to a case based on noncompliance with moral rights obligations. Elizabeth Schéré, *Where is the Morality? Moral Rights in International Intellectual Property and Trade Law*, 41 FORDHAM INT’L L. J. 773, 779 (2018). Second, the International Court of Justice technically has jurisdiction under Article 33 of the Berne Convention, but that court’s jurisdiction is “no longer subject to unilateral compulsory ICJ jurisdiction.” George K. Walker, *Sources of International Law and the Restatement (Third), Foreign Relations Law of the United States*, 37 NAVAL L. REV. 1, 32 (1988).

186. See J. Carlos Fernández-Molina & Eduardo Peis, *The Moral Rights of Authors in the Age of Digital Information*, 52 J. AM. SOC’Y FOR INFO. SCI. & TECH. 109, 113 (2001).

187. See *id.* at 115.

188. See *id.*

189. See *id.*



that animated the nineteenth-century Romantics who penned the Convention's draft.<sup>190</sup>

It is worth noting as this Act closes that, after a detailed historical and normative analysis of plagiarism, Nimmer suggested that there should be a moral right against passing off—that is, using someone else's work with one's name on it—but that, “as a general matter, by contrast, the reverse should be limited to specialized settings, such as academia, where attribution lies at the core of the *raison d'être* for the creation of works.”<sup>191</sup> He is suggesting that the distinction between false attribution and nonattribution present on the Elizabethan stage has not been resolved, at least as a matter of US law. He may well be right. Act III's shift towards the reader or user makes reconciling the two easier.

#### IV. EPILOGUE

The three Acts of attribution in literary works show the emergence of an authorial norm of attribution, how it was enshrined in international copyright law, and the subsequent transformation of the authorial norm that supported this enshrinement to a current norm more focused on readers' interests. This transformation does not mean that attribution is dead. Quite the opposite. It should thrive in the current environment. To quote the chorus at the end of *Henry V*, though the story of the right of attribution was perhaps written “with rough and all-unable pen . . . in your fair minds let this acceptance take.”<sup>192</sup>

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190. See Fernández-Molina & Peis, *supra* note 186; Swack *supra* note 16, at 362, 369, 372, 383.

191. Nimmer, *supra* note 14, at 77.

192. WILLIAM SHAKESPEARE, *HENRY THE FIFTH* act 5, sc. 2.