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COPYRIGHT OWNERSHIP OF ONLINE NEWS: CULTIVATING A TRANSFORMATION ETHOS IN AMERICA'S EMERGING STATUTORY ATTRIBUTION RIGHT

EDWARD L. CARTER*

Several federal district courts in 2009 and 2010 interpreted a relatively obscure provision of the Digital Millennium Copyright Act to grant a potentially broad right of attribution to owners of copyright in creative works. The statutory provision prohibits removal or alteration of copyright management information. The law gives reason for both hope and fear for news organizations. On one hand, an attribution requirement is seen by some in the news industry as relief from negative effects of technology, including online news aggregators. On the other hand, news organizations already have been sued under the copyright management provision for their conduct in newsgathering. This article examines the copyright management information provision and concludes that transformation will be a key consideration in balancing the interest in attribution with preservation of newsgathering's reliance on access to and fair use of copyright-protected works.

In a presidential campaign full of historic firsts and powerful symbols, no image was more important to Barack Obama in 2008 than the stylized, red, white and blue Obama “Hope” poster created by Los Angeles guerilla graphic artist Shepard Fairey. *The New York Times* called Fairey’s creation “one of the most highly visible, though unofficial, images of the presidential campaign.”¹ *The Huffington Post* described in detail how Fairey’s work, which he created in a single day in late January 2008, “transcended from mere poster into a cultural phenomenon

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¹*Times Topics: Shepard Fairey*, N.Y. TIMES, at http://topics.nytimes.com/top/reference/timestopics/people/f/shepard_faurey/index.html?scp=1-spot&sq=shepard%20fairey&st=cse (accessed Oct. 7, 2010).

and an important, iconic symbol.”² *Time* magazine chose a version of Fairey’s Obama image for its cover announcing Obama as “Person of the Year,” and Fairey’s image of Obama also appeared on the cover of *Esquire*.

The Los Angeles Times suggested Fairey took inspiration from the ubiquitous March 1960 Alberto Korda photograph of the beret-wearing Argentine revolutionary Ernesto “Che” Guevara:

Fairey’s Obama is not wearing a beret, and he’s looking left instead of right, but his face tilts at the same angle as Che’s. His jaw is set with the same willfulness and strength, and he too is gazing recognizably upward into the future (*hasta la victoria siempre . . .*). Obama’s eyes, though, are filled not with righteous anger but with vague and lofty hope.³

Fairey himself, however, said he modeled the Obama print not on Korda’s photograph of Che, which became widely copied upon Che’s death in 1967, but rather on a news photograph Fairey located while searching Google Images.⁴ It was not until after Obama’s election victory that a photographer at *The Philadelphia Inquirer* identified the source of Fairey’s inspiration: an April 27, 2006, Associated Press photograph of then-Senator Obama with George Clooney at the National Press Club in Washington, D.C.⁵ Even the AP photographer who made the shot, Mannie Garcia, claims not to have recognized that Fairey used Garcia’s image in creating the iconic poster, which was first labeled “Progress” and later “Hope.”⁶ Garcia told National Public Radio’s *Fresh Air* that he made as many as 1,000 photographs on April 27, 2006, and he could not possibly remember them all.⁷ Fairey sold the posters for only \$45, but entrepreneurs resold them online for thousands of dollars each.

²Ben Arnon, *How the Obama “Hope” Poster Reached a Tipping Point and Became a Cultural Phenomenon: An Interview With the Artist Shepard Fairey*, HUFF. POST, Oct. 13, 2008, at <http://www.huffingtonpost.com/ben-arnon/how-the-obama-hope-poster-b-133874.html> (accessed Oct. 7, 2010).

³Ben Ehrenreich, *Capitalizing on Che Guevara’s Image*, L.A. TIMES, June 1, 2008, at http://www.latimes.com/news/custom/topofthetimes/features/la-ig-che1-2008jun01_0,3763354.story (accessed Oct. 7, 2010).

⁴See Noam Cohen, *Viewing Journalism as a Work of Art*, N.Y. TIMES, Mar. 23, 2009, at <http://www.nytimes.com/2009/03/24/arts/design/24photo.html> (accessed Oct. 7, 2010). See also William Booth, *Street Artist Fairey Gives Obama a Line of Cred*, WASH. POST, May 18, 2008, at <http://www.washingtonpost.com/wp-srv/artsandliving/style/features/2008/obama-poster-051808/graphic.html?sid=ST2008051602005> (accessed Oct. 7, 2010).

⁵See Randy Kennedy, *Artist Sues the AP Over Obama Image*, N.Y. TIMES, Feb. 9, 2009, at <http://www.nytimes.com/2009/02/10/arts/design/10fair.html> (accessed Oct. 7, 2010).

⁶See Cohen, *supra* note 4.

⁷See *id.*

After learning Fairey used Garcia's photograph as the basis for the Obama Hope poster, the AP asked Fairey and his company, Obey Giant, to make compensation for copyright infringement. Fairey refused and, instead, launched a preemptive strike on February 9, 2009, by filing a lawsuit seeking a declaratory judgment that he engaged in permissible fair use of the AP photograph of Obama.⁸ The AP responded with the allegation that Fairey was a serial copyright infringer because he regularly used others' images as the basis for his graphic art; the AP also accused Fairey of hypocrisy for accusing others of infringing his copyright-protected works.⁹ Fairey then responded with the allegation that the AP was a habitual copyright infringer, including of Fairey's own artistic works.¹⁰ The various legal filings included as exhibits the original Garcia photo of Clooney and Obama as well as a cropped version of the Garcia photo alongside the Fairey poster. In October 2009, Fairey admitted he misled the AP, his lawyers and the court about which of Mannie Garcia's photos he used;¹¹ the fair use issues at the heart of the lawsuit, though, remained largely unchanged.

The AP and Fairey announced on January 12, 2011, that they had reached a settlement and would seek dismissal of their claims related to the Obama poster, though a related copyright infringement lawsuit between the AP and Fairey's Obey Clothing remained ongoing.¹² Although some of the claims in the lawsuit never reached judicial determination, the case nevertheless raised important questions about originality as well as authorship and ownership of online news. The AP characterized the battle as one for the very soul and survival of journalism itself; AP CEO Tom Curley stated that "news organizations must protect their intellectual property rights as vigorously as they have historically fought to protect the First Amendment."¹³ The case also raised critical questions for artists about the extent to which they may rely on

⁸Complaint for Declaratory Judgment and Injunctive Relief, Fairey et al. v. Associated Press, No. 09-01123 (S.D.N.Y. Feb. 9, 2009).

⁹See Answer, Affirmative Defenses and Counterclaims of Defendant, Fairey et al. v. Associated Press, No. 09-01123 (S.D.N.Y. Mar. 11, 2009).

¹⁰See Answer and Affirmative Defenses of Plaintiffs, Fairey et al. v. Associated Press, No. 09-01123 (S.D.N.Y. Apr. 14, 2009).

¹¹See David Ng, *Shepard Fairey Admits to Wrongdoing in Associated Press Lawsuit*, L.A. TIMES, at <http://latimesblogs.latimes.com/culturemonster/2009/10/shepard-fairey-admits-to-wrongdoing-in-associated-press-lawsuit.html> (accessed Oct. 7, 2010).

¹²See Press Release, Associated Press, AP and Shepard Fairey Announce Agreement in Obama Poster Case (Jan. 12, 2011), at http://www.ap.org/pages/about/pressreleases/pr_011211a.html (accessed Jan. 13, 2011).

¹³See Press Release, Associated Press, Countersuit Defends AP's Intellectual Property Rights (Mar. 11, 2009), at http://www.ap.org/pages/about/pressreleases/pr_031109.html (accessed Oct. 7, 2010).

the copyright fair-use doctrine in transforming news text and images. The case pointed out the developing conflict between American society's longstanding commitment to free speech protections and its increasing protectiveness of intellectual property ownership rights.

In its counterclaims against Fairey, the AP accused the artist of violating a provision of the Digital Millennium Copyright Act titled "Integrity of Copyright Management Information."¹⁴ The statute prohibits the intentional removal or alteration of "copyright management information," defined to include the information in a copyright notice as well as the terms and conditions for use of a copyright-protected work, if there is knowledge that doing so "will induce, enable, facilitate, or conceal an infringement of any right under" the U.S. Copyright Act.¹⁵ The copyright management information claim carries the threat of statutory damages of up to \$25,000 for each violation.¹⁶ The claim, although in existence since the DMCA was adopted in 1998, only recently has been invoked widely in copyright infringement lawsuits by and against news organizations. While the claim may prove beneficial for news organizations in ensuring attribution for their creative works, it could also prove detrimental to legitimate newsgathering. Several questions, including whether the claim must accompany an underlying copyright infringement or can stand alone as a statutory attribution right, remain to be answered in federal court litigation.

The dispute between Fairey and the AP was just one battle in a continuing war over copyright ownership of online news content. Because it depends on subscriptions and licensing fees, the AP leads the charge for news organizations seeking to enforce strict copyright protections. In mid-2009, the AP announced its intent to enclose online news content within a digital wrapper that dictates terms of use and facilitates enforcement of those terms.¹⁷ Other news organizations, too, are focused on online news copyright issues, charging that Google "scraping" of news headlines and links from freely available newspaper Web sites has contributed to the economic struggles of newspapers.¹⁸ YouTube's efforts

¹⁴17 U.S.C. § 1202 (2010).

¹⁵*Id.* at § 1202(b).

¹⁶*Id.* at § 1203(c)(3)(B).

¹⁷Press Release, Associated Press, Associated Press to Build News Registry to Protect Content (July 23, 2009), at http://www.ap.org/pages/about/pressreleases/pr_072309a.html (accessed Oct. 7, 2010).

¹⁸See Brian Stelter, *Now on YouTube, Local News*, N.Y. TIMES, Aug. 2, 2009, at <http://www.nytimes.com/2009/08/03/business/media/03youtube.html?scp=16&sq=news%20copyright&st=cse> (accessed Oct. 7, 2010). "Scraping" involves automated programs — sometimes called "webbots" or "bots" — that "mimic a human user to harvest content for the web" for both legally permitted and legally impermissible uses. *Web Scraping Hits Home*, WASH. BUS. J., July 12, 2010, at <http://www.bizjournals.com/washington/stories/2010/07/12/focus1.html> (accessed Jan. 6, 2011).

to compile local news video have led broadcast journalists to wonder if YouTube is the same kind of “frenemy” to them that Google is to newspapers.¹⁹ The rhetoric reached the point that News Corporation CEO Rupert Murdoch suggested news organizations would fight in the courts to kill the doctrine of fair use before it killed them, even while Murdoch’s Fox News claimed fair use when it was sued for copyright infringement for using a video clip from another broadcaster in a news program.²⁰ All news organizations rely on fair use in producing news, but many are becoming wary about allowing similar uses of their own content.

This article reviews the history of copyright protection for news before discussing the contemporary situation news organizations face with regard to intellectual property protection for today’s online news. The article considers whether strong economic protection for online news under copyright law truly serves the needs of journalism within the technology-driven marketplace of ideas. While some news organizations are seeking to protect themselves online *via* the twentieth century common-law doctrine of hot news misappropriation,²¹ other industry leaders say journalism’s best hope for a bright online future lies not in pursuits that would lock up facts and ideas but, rather, in ensuring attribution for online news content used by others.²² The purpose of this article is to explore the advantages and disadvantages for news organizations of the relatively new statutory right to guard against removal of copyright management information,²³ a U.S. Copyright Act provision now being interpreted by some courts as essentially an attribution right.

This article agrees with an influential early article by Eric B. Easton that overzealous copyright protection for online news could ultimately prove harmful for the industry.²⁴ However, because the statutory provision concerning removal of copyright management information began to be applied in the news context relatively recently, Easton did not discuss it. Other scholars have examined whether the copyright

¹⁹See Stelter, *supra* note 18 (noting that “YouTube’s arms-wide-open approach forces stations to judge whether YouTube is a friend or a foe, echoing a question that newspapers have grappled with for years” and thus suggesting a “frenemy” is one who poses potential for both harm and good).

²⁰See Ted Johnson, “Fair Use” Argument Gets Lost of Use, VARIETY, Sept. 24, 2010, at <http://www.variety.com/article/VR1118024558.html?categoryid=3074&cs=1> (accessed Oct. 7, 2010).

²¹See *infra* notes 80-81 and accompanying text.

²²See Alissa Quart, *Expensive Gifts: What Does Free Culture Cost?*, COLUMBIA JOURNALISM REV., July/August 2009, at http://www.cjr.org/feature/expensive_gifts.php (accessed Oct. 7, 2010).

²³17 U.S.C. § 1202(b) (2010).

²⁴Eric B. Easton, *Who Owns “The First Rough Draft of History”? : Reconsidering Copyright in News*, 27 COLUM. J.L. & ARTS 521 (2004).

management information provision essentially creates a right of attribution for authors,²⁵ though the issue has not yet been examined in the context of online news. Additionally, little or no scholarly analysis has yet been conducted on the growing number of cases interpreting the copyright management information provision, especially in 2009 and 2010. This article builds on prior scholarship by examining an actual vehicle — the copyright management information provision of the Digital Millennium Copyright Act — for enforcing an online news attribution right even though the United States generally lacks the moral rights present in copyright regimes in much of the rest of the world.

It is important to note that the issue of whether the Copyright Act protects an attribution right in connection with news has yet to reach the federal appellate courts. Neither the Supreme Court of the United States nor the federal circuit courts have considered the issue, and the ultimate application of the copyright management information provision to news is unknown. Even the federal district courts that have considered the issue have done so only in the early litigation stages of motions to dismiss complaints or motions for summary judgment. This article serves as an early warning about a looming issue that journalists, scholars and judges will need to follow and develop in coming years. Part of the value of this early warning is the recommendation that consideration of whether a work has been transformed should be part of analysis of copyright management information claims.

HISTORY OF COPYRIGHT PROTECTION FOR NEWS

The first modern copyright law, the Statute of Anne,²⁶ which was adopted by Parliament at the beginning of the eighteenth century, made no mention of copyright protection for news or newspapers and was, in fact, specifically focused on books and the book publishing industry. The discussions leading up to the adoption of the Statute of Anne also focused on booksellers and publishers rather than journalists,²⁷ although

²⁵See, e.g., Séverine Dusollier, *Some Reflections on Copyright Management Information and Moral Rights*, 25 COLUM. J.L. & ARTS 377 (2003); Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L. J. 9 (2001); David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y 401 (1999). See also Bentley J. Olive, *Anti-Circumvention and Copyright Management Information: Analysis of New Chapter 12 of the Copyright Act*, 1 N.C.J.L. & TECH. 2 (2000).

²⁶Statute of Anne (1710), PRIMARY SOURCES ON COPYRIGHT (1450-1900), eds. L. Bently & M. Kretschmer, at http://www.copyrighthistory.org/htdocs/data/useimage/pdf/uk_1710/uk_1710_im_1.1.st.pdf (accessed Dec. 2, 2009).

²⁷See *Reasons Humbly Offer'd for a Bill for the Encouragement of Learning, and Improvement of Printing* (1706), PRIMARY SOURCES ON COPYRIGHT (1450-1900), *id.*

this is not surprising given that newspapers in Britain were in their infancy at the time of the passage of the statute. Built on Enlightenment ideals, the Statute of Anne reflected the tenet that “truth belongs to no man.”²⁸ In the United States, the Copyright Clause in the Constitution references “authors”²⁹ but does not clarify whether journalists are included. Indications, however, are that the framers of the Constitution and early U.S. legislators did not consider news to be a subject of copyright protection; the first copyright law, the Copyright Act of 1790, explicitly protected maps, charts and books, but not news.³⁰

An early twentieth century federal circuit court case³¹ demonstrated the lack of protection for news in the U.S. copyright scheme. The Western Union Telegraph Company transmitted and received news items through a ticker. The ticker printouts were made available in restaurants, hotels and other public gathering places for the public to read. A rival, National Telegraph News Company, employed representatives to read the Western Union ticker tapes and then transmit that information over the National Telegraph News wires and tickers. Western Union sued for copyright infringement, but the United States Court of Appeals for the Seventh Circuit concluded in 1902 the ticker printouts were not the type of literature contemplated for protection under the Copyright Act as it then existed:

It would be both inequitable and impracticable to give copyright to every printed article. Much of current publication — in fact the greater portion — is nothing beyond the mere notation of events transpiring, which, if transpiring at all, are accessible by all. It is inconceivable that the copyright grant of the constitution, and the statutes in pursuance thereof, were meant to give a monopoly of narrative to him, who, putting the bare recital of events in print, went through the routine formulae of the copyright statutes.³²

For the Seventh Circuit, the *sine qua non* of copyrightability was originality, or “something meritorious from the author’s own mind.”³³

²⁸See Kathy Bowrey & Catherine Bond, *Copyright and the Fourth Estate: Does Copyright Support a Sustainable and Reliable Public Domain of News?*, 4 INTELL. PROP. Q. 405 (2009).

²⁹U.S. CONST., art. I, sec. 8, cl. 8.

³⁰Copyright Act (1790), PRIMARY SOURCES ON COPYRIGHT (1450-1900), *supra* note 26.

³¹Nat’l Tel. News Co. v. Western Union Tel. Co., 119 F. 294 (7th Cir. 1902).

³²*Id.* at 297. Outside the context of copyright law, however, the court found it appropriate — as a matter of equity — to affirm an injunction issued by the court below to prevent rivals from appropriating the news on tickers for sixty minutes after publication. *Id.* at 300-01.

³³*Id.* at 297.

Reporting of news, meanwhile, required no originality on the part of the writer, who produced a “mere annal” by recording events in much the same way they would have been recorded by others.³⁴ The court seemed to rely heavily on the fact that the news printed on the ticker was of no independent value to the reader other than for the information it communicated; in other words, no reader would want to save the tape and re-read it later for its literary quality.³⁵ News, the court held, was not “the fruit of intellectual labor,” and “[i]t lasts literally for an hour, and is in the waste basket when the hour has passed.”³⁶

In the 1909 revision of the Copyright Act, however, Congress explicitly provided for news as a subject of copyright protection.³⁷ In a lawsuit brought by the Associated Press against another news service accused of appropriating AP news stories for unauthorized distribution, the Supreme Court noted, “No doubt news articles often possess a literary quality . . . nor do we question that such an article, as a literary production, is the subject of copyright by the terms of the act as it now stands.”³⁸ Still, the Supreme Court very carefully distinguished the copyrightable aspect of news — original expression — from the non-copyrightable aspect — the information and facts themselves.³⁹ Current events, the Court noted, belong to the public domain and cannot be exclusively claimed by any news organization even if that organization first reports the events.⁴⁰ The Supreme Court has steadfastly upheld the fact/expression dichotomy in which reporting of “news of the day,” as well as history, biography and science, is given only a thin copyright protection if given protection at all.⁴¹

However, in the 1918 case of *International News Service v. Associated Press*, the Court acknowledged that a journalism organization could bring an unfair business competition claim against a rival who misappropriated news content.⁴² In other words, the Court held that a news entity should not be allowed to take advantage of a competitor’s time and effort to develop and distribute a news story by free-riding.⁴³ Hence, the Court left in place an injunction that prevented INS from taking AP news stories and distributing them for profit to INS’ own customers.

³⁴*Id.* at 298.

³⁵*Id.*

³⁶*Id.*

³⁷An Act To amend and consolidate the Acts respecting copyright, Mar. 4, 1909, ch. 320, §§ 4-5, 35 Stat. 1075, 1076 (amended 1976).

³⁸*Int’l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

³⁹*Id.*

⁴⁰*Id.*

⁴¹*See Feist Publ’ns, Inc., v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 348 (1991).

⁴²248 U.S. at 239–40.

⁴³*Id.*

Several factors were important in the Court's rationale. First, the case involved a news organization taking entire stories from another news organization, sometimes even before the originating organization had published the stories.⁴⁴ Second, the Court clarified that it was passing judgment only on news organizations' conduct with respect to one another and not commenting on the right of the public to use news content.⁴⁵ Third, the Court considered it important that there was no attribution:

The habitual failure to give credit to complainant for that which is taken is significant. Indeed, the entire system of appropriating complainant's news and transmitting it as a commercial product to defendant's clients and patrons amounts to a false representation to them and to their newspaper readers that the news transmitted is the result of defendant's own investigation in the field.⁴⁶

The case has been recognized as the Supreme Court's stamp of approval on what has come to be known as the "hot news misappropriation" doctrine,⁴⁷ which will be discussed below. Hot news misappropriation is not a federal copyright claim but rather a state-law tort claim. Contemporary questions have focused on whether the hot news doctrine was preempted along with most of the states' common-law copyright doctrines, particularly by changes to the Copyright Act in 1976, but courts generally have concluded that at least portions of the doctrine survived and can exist outside statutory copyright law.⁴⁸

As the law of copyright matured in the twentieth century, fair uses of copyright-protected news and other factual retellings such as memoirs entered the spotlight. In the prominent Supreme Court case of *Harper & Row Publishers v. Nation Enterprises*,⁴⁹ the current events magazine *The Nation* asserted a right of fair use under 17 U.S.C. § 107 to quote and paraphrase a manuscript version of former President Gerald R. Ford's then-unpublished memoir, *A Time to Heal*. *Time* magazine, however, already had reached an exclusive agreement with the book publisher to print prepublication excerpts. The Supreme Court held that *The Nation* did not engage in fair use because (1) the purpose of *The Nation* was to scoop *Time* and deprive *Time* of the benefits of its

⁴⁴*Id.* at 231.

⁴⁵*Id.* at 236.

⁴⁶*Id.* at 242.

⁴⁷See, e.g., VICTORIA SMITH EKSTRAND, NEWS PIRACY AND THE HOT NEWS DOCTRINE 6–8 (2005).

⁴⁸*Id.* at 139–42.

⁴⁹471 U.S. 539 (1985).

exclusivity agreement; (2) President Ford had not merely reported facts but had included his subjective perceptions about various events that made copyright protection stronger and fair use arguments weaker; (3) *The Nation* had reproduced a large portion of the Ford manuscript in qualitative, if not quantitative, terms; and (4) *The Nation* had destroyed the book publisher's ability to capitalize on its economic agreement with *Time*.⁵⁰

But the Supreme Court made it clear that the mere repetition of factual descriptions does not constitute copyright infringement. For example, the Court held that *The Nation*'s use of the phrase "smoking gun" to describe the Nixon White House tapes was clearly permissible even though the phrase was borrowed from Ford's memoirs because it was "perhaps so integral to the idea expressed as to be inseparable from it."⁵¹ This invocation of the idea/expression dichotomy is particularly important in the context of questions about copyright protection of news. Copyright law does not grant ownership of the idea being expressed, such as a news report of an event, but merely the particular expression involved in one's telling of the event. In case of a retelling of fiction, fair use is disfavored but the retelling of facts is actually encouraged — not discouraged — by copyright law and policy.⁵²

In a subsequent case, the Supreme Court elevated transformation as the key inquiry in copyright fair use analysis when it held that a parody of the Roy Orbison song *Oh, Pretty Woman* did not constitute copyright infringement.⁵³ The Court held that transformation was particularly relevant in analyzing the first factor of fair use — the purpose and character of the use — but that in reality transformation could overtake virtually all other considerations in fair use:

The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation . . . ("supplanting" the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." . . . Although such transformative use is not absolutely necessary for a finding of fair use . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . and the more transformative the new work,

⁵⁰*Id.* at 561–69.

⁵¹*Id.* at 563.

⁵²*See, e.g.,* *Stewart v. Abend*, 495 U.S. 207, 237–38 (1990).

⁵³*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.⁵⁴

The interaction between copyright and news has been of some interest to legal scholars, especially with respect to fair use. One scholar noted that journalists must rely on fair use of copyright-protected materials to gather news, but those same journalists balk when their own intellectual property becomes subject to use — sometimes fair use, sometimes not — by others.⁵⁵ With transformation as the key inquiry, news usage of copyright-protected photographs, music recordings and video generally has been held to be permissible fair use because news transforms those materials into a new medium and for a new purpose.⁵⁶ Increasingly, though, the important issues about copyright and news center not on news usage of other material but rather others' use of news in a new context. In the online world, the use of copyright-protected news is viewed as a culprit in the slow death of traditional news organizations such as newspapers.⁵⁷ Given the tendency of online news and information sources to cannibalize each other, it even has been suggested that fair use be curtailed or done away with in the context of news reporting and publishing.⁵⁸

Although there are two Ninth Circuit cases that could be used to argue to the contrary,⁵⁹ commentators contend that online aggregators do not engage in transformation of news content when they merely organize that content into a more conveniently searchable format.⁶⁰ This line of argument holds that online news aggregators do not transform news stories and merely serve the same function as originating news organizations' own Web sites.⁶¹ However, perhaps in part because of the likelihood that courts would conclude a large portion of online aggregators' conduct is fair use of news, there has been a resurgence of interest

⁵⁴*Id.* at 579 (citations omitted).

⁵⁵Matthew D. Bunker, *Transforming the News: Copyright and Fair Use in News-Related Contexts*, 52 J. COPYR. SOC'Y OF U.S.A. 309 (2005).

⁵⁶*See id.* at 310.

⁵⁷*See* Ryan T. Holte, *Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting*, 13 J. TECH. L. & POL'Y 1 (2008).

⁵⁸*Id.* at 32–34.

⁵⁹*See* Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007) (Search engine compilation of photographs in “thumbnail” sizes was fair use.); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003) (same).

⁶⁰*See, e.g.*, Andrew L. Deutsch, *Protecting News in the Digital Era: The Case for a Federalized Hot News Misappropriation Tort*, 1003 PLL/PAT 511 (2010).

⁶¹*See id.* at 537.

in the hot news misappropriation tort as a way for news organizations to protect their online content.⁶²

HOT NEWS MISAPPROPRIATION IN THE INTERNET AGE

The modern definition of hot news misappropriation was largely crafted by the United States Court of Appeals for the Second Circuit in a case involving a claim by the National Basketball Association that it could prevent a pager service from delivering real-time game statistics and information to its customers.⁶³ Although the court held a state law misappropriation claim could survive preemption by the U.S. Copyright Act,⁶⁴ the court ultimately concluded the NBA's claim did not fit within a narrowed definition of hot news misappropriation that has influenced other courts:⁶⁵

(i) [A] plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiff; and (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.⁶⁶

Ultimately, the NBA's hot news misappropriation claim failed because, the court said, the competing pager service did not free-ride on the NBA's own statistics pager service.⁶⁷ The court noted that the information was independently gathered and distributed.⁶⁸ Scholar Victoria Smith Ekstrand, who wrote a book about hot news misappropriation, wrote that the *NBA v. Motorola* case was significant because it was the first time "a court laid out a definitive series of five elements required for a hot news claim."⁶⁹ In addition, she wrote, the case was important

⁶²Jared O. Freedman & Duane C. Pozza, *Renewed Interest in "Hot News" Misappropriation Claims Against Online Aggregators of News and Information*, 22 INTELL. PROP. & TECH. L.J. 1 (2010).

⁶³*Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

⁶⁴*Id.* at 848–52.

⁶⁵See *Barclays Capital, Inc. v. Theflyonthewall.com*, 700 F. Supp. 2d 310 (S.D.N.Y. 2010) (compiling cases approving of the Second Circuit's formulation in federal district courts in New York, Pennsylvania, California and Missouri as well as the U.S. Court of Appeals for the Seventh Circuit based in Chicago).

⁶⁶*NBA*, 105 F.3d at 845.

⁶⁷*Id.* at 854.

⁶⁸*Id.*

⁶⁹EKSTRAND, *supra* note 47, at 142.

because it built on the foundation laid by the Supreme Court in the 1918 *INS* case and because the Second Circuit made all five elements of its test mandatory for a claimant to succeed on a hot news claim. However, Ekstrand also noted that *NBA v. Motorola* left some questions unanswered, such as “how ‘hot’ the time-sensitive information needed to be to qualify for protection.”⁷⁰ Finally, she noted that the issues raised by *NBA v. Motorola* have been slow to be fleshed out because the Second Circuit narrowed the hot news misappropriation tort so far as to render it inapplicable in most cases.⁷¹

Ekstrand wrote that, in cases subsequent to *NBA v. Motorola*, application of the five-factor test did not seem uniform and that the “direct competition” requirement was applied literally.⁷² In other words, the hot news misappropriation tort requires that the creative work in question be used by an unauthorized party in direct business competition with its original creator or owner. For example, a hot news misappropriation claim was brought by a celebrity photo Web site called X17 against Mario Lavandeira’s celebrity blog, perezhilton.com, for republishing without permission “paparazzi-type, candid shots that depict celebrities engaged in their typical day-to-day activities — for example, Heather Locklear leaving a lunch meeting, Nicole Richie grocery shopping, and Britney Spears exposing herself.”⁷³ The U.S. District Court for the Central District of California held in that case that the hot news misappropriation tort was recognized in California and applied to photographs as well as text, though the court expressed some tongue-in-cheek reservation about whether “Ms. Spears’ travails qualify as newsworthy.”⁷⁴ The court emphasized that perezhilton.com competed for the same audience and advertisers as X17 and that perezhilton.com had actually published some of X17’s photographs before X17 did.⁷⁵

In other cases, too, where hot news misappropriation claims have gone forward, the plaintiff and defendant were competing commercial enterprises providing identical or very similar information.⁷⁶ Of course,

⁷⁰*Id.* at 143.

⁷¹*Id.*

⁷²*Id.* at 162.

⁷³X17, Inc. v. Lavandeira, 563 F. Supp. 2d 1102, 1103 (C.D. Cal. 2007).

⁷⁴*Id.* at 1109.

⁷⁵*Id.* at 1103.

⁷⁶See *BanxCorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596 (S.D.N.Y. 2010) (publisher of money market and CD rates and retailer accused of publishing the rates in advertisements and websites); *Morris Comms. Corp. v. PGA Tour, Inc.*, 2002 WL 32151637 (M.D. Fla. 2002) (media organization and professional golf association both providing real-time golf scores); *Pollstar v. Gigmania*, 2000 WL 34016436 (E.D. Cal. 2000) (two commercial Web sites providing concert information).

even direct business competition does not justify a hot news misappropriation claim when there is no free-riding, as was demonstrated by the *NBA v. Motorola* case.⁷⁷ One of the most extensive recent examinations of the direct competition requirement came in a case involving claims by large financial services firms that an online investor news service (referred to as “Fly”) had misappropriated its hot news in the form of research analysts’ investment recommendations.⁷⁸ In that case, the U.S. District Court for the Southern District of New York concluded there was direct competition:

Both the Firms and Fly even use similar, and in some instances identical, channels of distribution. The Firms deliver their research reports directly to their client investors through access-controlled media, and Fly runs a subscription website. The Firms and Fly also license third-party distributors, including several of the same media giants, to provide their content to entitled recipients.

Finally, Fly has taken steps to compete even more directly with the Firms by aligning itself with discount brokerage services such as Cyber Trader, eSignal, and NewsWare. Fly’s efforts, which have met with some success, to link its subscribers to discount brokerage services reflect the final stage in its direct competition with the Firms by leveraging its access to their Recommendations and driving away their commission revenue.⁷⁹

Several current legal disputes have become surrogate battlegrounds between traditional news organizations, including AP, *The New York Times* and *Time Magazine*, and online aggregators including Google, that contend principles of free expression prevent news and information from being controlled under the hot news misappropriation doctrine.⁸⁰ At least one news organization, Dow Jones, has recognized in *amicus* brief filings that it, in a sense, both opposes and supports hot news misappropriation.⁸¹ As a news organization, Dow Jones wants to gather facts and information even if first published by others, but it may want to prevent subsequent aggregators from free-riding on its work.⁸²

Among several proposals for ways to refine the hot news misappropriation doctrine to better serve the needs of news organizations, one

⁷⁷*Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997); *C.B.C. Distr. & Mkt., Inc. v. Major League Baseball Advanced Media*, 443 F. Supp. 2d 1077, 1101–1103 (E.D. Mo. 2006).

⁷⁸*Barclay’s Capital*, 700 F. Supp. 2d 30, 313 (S.D.N.Y. 2010).

⁷⁹*Id.* at 339–40.

⁸⁰*Freedman & Pozza*, *supra* note 62, at 3.

⁸¹*Id.*

⁸²*Id.*

commentator argued for a federal statutory provision.⁸³ An earlier version of essentially the same proposal had predicted correctly, as it turns out, that the common-law misappropriation tort would prove too amorphous in an age of fast-moving technology and statutory intellectual property rights.⁸⁴ Congress, however, has not acted on the recommendations to adopt a hot news statute. A different congressional enactment, the copyright management information provision, does have the potential to provide relief for news organizations seeking to protect their online content by requiring attribution, although the same provision also poses risks for newsgathering. Before exploring the implications of that statutory provision in detail, it is first necessary to review the historical relationship between creative expression, including news, and attribution.

ATTRIBUTION AND NEWS

Beyond the fundamental right itself to create original expression, nothing is more sacred to an artist or author than the connection between the created work and the creator's identity. The right to create expression is recognized by the Universal Declaration of Human Rights,⁸⁵ the United Kingdom Human Rights Act,⁸⁶ the U.S. Constitution,⁸⁷ and American⁸⁸ and European⁸⁹ human rights conventions. Meanwhile, the rights to claim ownership, or be identified as author, and to prevent

⁸³Deutsch, *supra* note 60, at 582–90.

⁸⁴See Rex Y. Fujichaku, Comment, *The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of "Hot News" Information*, 20 U. HAW. L. REV. 421 (1998).

⁸⁵Universal Declaration of Human Rights art. 19, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

⁸⁶Human Rights Act 1998 (UK) c. 42, sch. 1 art. 10 ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.").

⁸⁷U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press.").

⁸⁸American Convention on Human Rights art. 13, Nov. 22, 1969, 1144 U.N.T.S. 123 ("Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.").

⁸⁹European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222 ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information an ideas without interference by public authority and regardless of frontiers.").

derogatory uses of a work were included in the Berne Convention for the Protection of Literary and Artistic Rights.⁹⁰ Although the right of paternity, or attribution, is common in the copyright schemes of many nations, the right exists only in part within the U.S. Copyright Act.⁹¹

The roots of modern concerns with attribution to authors of creative works can be traced back thousands of years. Although copyright law and plagiarism “are usually perceived as two distinct areas of inquiry,”⁹² both concepts address originality and authorship. It is beyond the scope of this article to undertake an extensive examination of plagiarism, but a brief review of some aspects of the concept’s history will shed light on the status of a right of attribution in online news. It has been widely noted that the Internet has significantly altered the landscape for both plagiarism⁹³ and copyright.⁹⁴ With regard to attribution, the Internet and modern economic, educational and legal forces have served to blur the traditional distinction between copyright law and plagiarism.⁹⁵ U.S. jurist and scholar Richard Posner has suggested the concept of plagiarism today primarily serves economic ends of content owners in the modern

⁹⁰Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (revised in Paris July 24, 1971, 1979) (hereinafter Berne Convention).

⁹¹See *infra* note 132 and accompanying text.

⁹²Reginald McGinnis, *Introduction*, in ORIGINALITY AND INTELLECTUAL PROPERTY IN THE FRENCH AND ENGLISH ENLIGHTENMENT xi (Reginald McGinnis ed., 2009).

⁹³See, e.g., BILL MARSH, PLAGIARISM: ALCHEMY AND REMEDY IN HIGHER EDUCATION 12 (2007).

⁹⁴See, e.g., Edward L. Carter & Scott Lunt, *Copyright and Podcasting: The Impact of Regulation on New Communication Technologies*, 22 SANTA CLARA COMP. & HIGH TECH. L. J. 187 (2006).

⁹⁵It is commonly believed the Internet has made plagiarism easier and more widespread, but that view is not universally and unconditionally accepted. See MARSH, *supra* note 93, at 121. Still, according to one measure, contemporary American college students have self-reported an Internet-related plagiarism rate as high as 50%. Darby Dickerson, *Facilitated Plagiarism: The Saga of Term-Paper Mills and the Failure of Legislation and Litigation to Control Them*, 52 VILL. L. REV. 21, 21 (2007). While word processors and the Internet may have made the work of plagiarists easier, those same tools also facilitated plagiarism hunting. A single online plagiarism detection company claims to process more than 200,000 papers per day and says it is used by 6,500 high schools, colleges and universities in more than 100 countries. Turnitin, *Quick Facts*, at http://turnitin.com/resources/documentation/turnitin/sales/turnitin_quick_facts.pdf (last accessed June 22, 2009). The company that operates Turnitin.com purports to help educators in their efforts to teach students about plagiarism, but in reality Turnitin.com serves as an example of how copyright and plagiarism can be confused in the digital communication context. For example, the company’s Web site obscures the line between plagiarism and copyright infringement by suggesting that the use of another person’s idea without citation would not only be plagiarism but also copyright infringement. See Plagiarism.org, *What is Plagiarism?*, at http://www.plagiarism.org/plag_article_what_is_plagiarism.html (last accessed June 22, 2009). This inaccuracy omits mention of the idea-expression dichotomy in copyright law.

capitalist marketplace, a field traditionally occupied by copyright law.⁹⁶ Allegations of plagiarism can serve as a cheap but effective surrogate for a copyright infringement claim, and such charges can squelch creative competition even when a claim of copyright infringement would be defeated by fair use.⁹⁷

Charges of what is today called “plagiarism” have been employed as rhetorical devices in battles with intellectual rivals for at least 2,500 years.⁹⁸ The Roman poet Martial first used the word *plagiarius*, or kidnapping, in conjunction with textual copying nearly 2,000 years ago.⁹⁹ Roman authors wrote their books on papyrus scrolls that were bulky and fragile by modern standards but remarkably effective and enduring.¹⁰⁰ Researchers disagree over whether mass market publishers existed in Rome. One line of thinking holds that an author, such as Cicero, would send one handwritten copy of a work to someone, such as Atticus, who employed a stable of slaves to mass produce additional copies by hand.¹⁰¹ But more recent interpretation of the record left by the Romans suggests that Atticus and others like him were merely booksellers and for-hire copyists who should not be considered publishers at all.¹⁰² Indeed, it appears nothing like copyright existed in Rome; while booksellers and copyists did make money from their trade, authors most likely did not receive a portion of the proceeds in exchange for publication rights.¹⁰³ Authors, though, received financial support from patrons.

The Latin verb *publicare* evokes not modern publication but rather “to make public property” and hence to give up any control of the work.¹⁰⁴ One modern author concluded that Roman writers relinquished ownership rights over literary works once released into the public domain.¹⁰⁵

⁹⁶RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 65–71 (2007).

⁹⁷For example, U.S. writer Megan McCafferty escaped a marketplace challenge from a new authorial rival named Kaavya Viswanathan after discovery of passages in a Viswanathan book that resembled McCafferty’s writing. *Id.* at 3–7, 70–71. Viswanathan eventually lost the backing of her publisher, which recalled the book and canceled her contract, thus obviating the need for McCafferty to file a copyright infringement lawsuit. *Id.* at 5. Such a lawsuit may well have failed because the literal copying was not extensive.

⁹⁸See Marianina Olcott, *Ancient and Modern Notions of Plagiarism: A Study of Concepts of Intellectual Property in Ancient Greece*, 49 J. COPYRIGHT SOC’Y U.S.A. 1047, 1052 (2002).

⁹⁹See HAROLD OGDEN WHITE, *PLAGIARISM AND IMITATION DURING THE ENGLISH RENAISSANCE: A STUDY IN CRITICAL DISTINCTIONS* 16 (1935). See also MARSH, *supra* note 93, at 31.

¹⁰⁰See REX WINSBURY, *THE ROMAN BOOK* 15–16 (2009).

¹⁰¹See *id.* at 54 (internal citations omitted).

¹⁰²See *id.* at 55–56.

¹⁰³See *id.* at 62.

¹⁰⁴See *id.* at 88.

¹⁰⁵*Id.* at 90–91.

At that point a “peer-to-peer circulation” process began “between persons unknown, in places unknown.”¹⁰⁶ In other words, “The author would have had no idea how many copies were ever made of his new work (if any), beyond the first few that he sent out to the dedicatee and to friends.”¹⁰⁷ Perhaps to compensate for this lack of physical and economic control, authors did try to control their own reputations by clarifying which works were theirs and trying to identify unauthorized changes to their works.¹⁰⁸ 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.¹⁰⁹

Toward the end of the Western Roman Empire, the scroll was replaced by the codex even though scrolls themselves continued to be made in Egypt and used until the eleventh century.¹¹⁰ The rise of the codex, however, did not necessitate a copyright law since manuscripts were still copied by hand. It was the advent of the printing press in the fifteenth century that drove the changes leading to modern copyright law. Prior to copyright law, artists who objected to plagiarism of their works sometimes sought legal redress but remedies could be limited to reputation and not economics. For example, in 1504 the Italian Marcantonio Raimondi copied a woodcut titled “Joachim and Anne Meeting at the Golden Gate” by German artist Albrecht Dürer.¹¹¹ Dürer reportedly traveled from Flanders to Venice to pursue a lawsuit, but he “only succeeded in preventing Marcantonio from using his name and monogram on his works.”¹¹²

In Great Britain, the crown asserted early control of printing not for economic reasons but rather out of concern for heresy and constructive treason. The Henrician Proclamation of 1538 decried “sinister opinions” in “naughty printed books.”¹¹³ King Henry VIII mandated that government licenses be acquired before printing, importing or selling books. Commentators have suggested that while Henry was concerned with “the propriety of the written word and not the property therein,” censorship nonetheless “serve[d] as a prelude to the development of

¹⁰⁶*Id.* at 91.

¹⁰⁷*Id.* at 129.

¹⁰⁸*See id.* at 132–33.

¹⁰⁹*See id.* at 133.

¹¹⁰*See id.* at 15–23.

¹¹¹A woodcut by Albrecht Dürer plagiarized by Marcantonio Raimondi (1504), PRIMARY SOURCES ON COPYRIGHT (1450-1900), *supra* note 26.

¹¹²*Id.* (quoting Vasari, *Life of Marcantonio and Other Engravers of Prints* (1568)).

¹¹³Henrician Proclamation (1538), PRIMARY SOURCES ON COPYRIGHT (1450-1900), *supra* note 26.

copyright.”¹¹⁴ In 1557, Mary granted a royal charter to the Company of Stationers, which came to possess and exercise exclusive control over publishing in Britain, sometimes called “stationers’ copyright.”¹¹⁵ In this government-granted monopoly, the censorship interests of the government joined the economic interests of the stationers to set the stage for modern Anglo-American copyright law.¹¹⁶ Meanwhile, sixteenth century English Renaissance writers retained the classical Greek and Roman idea that only word-for-word copying could be considered improper as plagiarism; indeed, at this time “creative imitation” was highly valued as a form of literature.¹¹⁷ This attitude reflected the historical and contemporary reality that most literature is constructed of “allusion, quotation, parody, and pastiche.”¹¹⁸

However, eighteenth century Romantics glorified creative originality and attached a negative connotation to copying that persists in twenty-first century notions of plagiarism.¹¹⁹ A new, industrial-age attitude toward literary copying was reflected in the first copyright law, the Statute of Anne, which took effect in 1710. Reflecting the rise of the publishing industry as an economic force, this Lockean natural rights or “sweat of the brow” attitude was expressed in documents urging Parliament to adopt a copyright law:

[W]hen a gentleman has spent the greatest part of his time and fortune in a liberal education, he should have all the advantages that may possibly be allowed him for his writings, one of which advantages is the sole and undoubted right to the copy of his own book, as being the product of his own labour.¹²⁰

Although those who advocated adoption of the first British copyright statute asserted that authors needed the incentive provided by monopoly intellectual property rights, the interests of the publishing

¹¹⁴Commentary on Henrician Proclamation, PRIMARY SOURCES ON COPYRIGHT (1450-1900), *supra* note 26.

¹¹⁵Stationers’ Charter (1557), PRIMARY SOURCES ON COPYRIGHT (1450-1900), *supra* note 26.

¹¹⁶See Ronan Deazley, Commentary on the Stationers’ Royal Charter 1557, PRIMARY SOURCES ON COPYRIGHT, *supra* note 26.

¹¹⁷See WHITE, *supra* note 99, at 202.

¹¹⁸Robert Macfarlane, Original Copy: Plagiarism and Originality in Nineteenth-Century Literature 3 (2007).

¹¹⁹See *id.* at 1–5.

¹²⁰Reasons Humbly Offer’d for the Bill for the Encouragement of Learning (1706), PRIMARY SOURCES ON COPYRIGHT (1450-1900), *supra* note 26.

industry were probably more important.¹²¹ Indeed, one 1709 justification written to the House of Commons began with the assertion that “printing, binding and selling books is become a considerable manufacture of this kingdom . . . that is worthy of the care of this honorable House, to provide for the improvement of a trade which is of so great importance to the public.”¹²² The Statute of Anne itself mentions both “authors” and “proprietors” of books as requiring protection through copyright law.¹²³ In reality, the Statute of Anne was not intended to grant broad intellectual property rights; instead, it sought to diminish the printing monopoly of the stationers, and ownership rights came along as a byproduct.¹²⁴

Meanwhile, in eighteenth century France the very same creative urges that made plagiarism a crime led to a branch of copyright law — *droit moral*, or moral right — that was ignored in early Anglo-American copyright law.¹²⁵ By the early nineteenth century, French cases protected authors’ right not to create, as well as a right of paternity and a right against deformation of their works.¹²⁶ Lack of conformity with the moral rights requirements in Article 6*bis* for most of the twentieth century prevented the United States from joining the Berne Convention, and scholars long have criticized U.S. emphasis on economics over creativity.¹²⁷ Indeed, the United States succeeded in preventing moral rights provisions like those in Article 6*bis* of the Berne Convention from being incorporated in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹²⁸ when it was adopted

¹²¹*See id.* (discussing the economic ruin that could come to “booksellers,” or publishers, without a copyright law); Reasons Humbly Offer’d for the Bill for the Encouragement of Learning (1709), PRIMARY SOURCES ON COPYRIGHT (1450-1900), *supra* note 26 (stating that authors should be required affirmatively to disclaim assignment of ownership to a publisher if the authors desired to retain any rights in future publication); More Reasons Humbly Offer’d for the Bill for the Encouragement of Learning (1709), PRIMARY SOURCES ON COPYRIGHT (1450-1900), *supra* note 26 (defending the rising cost of books and expressing the need for publishers to be protected from “counterfeiters”).

¹²²Reasons Humbly Offer’d to the Consideration of the Honourable House of Commons (1709), PRIMARY SOURCES ON COPYRIGHT (1450-1900), *supra* note 26 (spelling, punctuation and capitalization modernized).

¹²³Statute of Anne (1710), PRIMARY SOURCES ON COPYRIGHT (1450-1900), *supra* note 26.

¹²⁴*See* Lyman R. Patterson, Copyright in Historical Perspective 4–5, 13 (1968).

¹²⁵*See* Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 555 (1940).

¹²⁶*See id.* at 556.

¹²⁷*See id.* at 557 (“Busy with the economic exploitation of her vast natural wealth, America has, perhaps, neglected the arts . . .”).

¹²⁸Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments — Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1125 (hereinafter TRIPS Agreement).

in 1994.¹²⁹ Article 9 of TRIPS explicitly disclaims any obligation for member nations to grant moral rights in conjunction with Berne Article 6*bis*.¹³⁰

The United States adopted moral rights, including the right of attribution, only for certain works of visual art, in the late twentieth century to minimally comply with the Berne Convention.¹³¹ The Visual Artists Rights Act provides for a right of attribution only for limited edition, consecutively numbered copies of photographs, paintings, drawings, prints or sculptures.¹³² The U.S. attribution right need not be asserted, as in the United Kingdom, but it can be waived in writing. This waiver, however, is narrow because it will apply only to individual works after they are created and it must also specify the uses to which the waiver will apply.¹³³ The U.S. right of attribution may not be transferred, and it lasts only until the death of the author.¹³⁴ There is a separate right for visual artists against false attribution.¹³⁵

Under the United Kingdom Copyright, Designs and Patents Act 1988 (CDPA), certain copyright owners also have the right to be identified as authors of their works in some cases of publication, distribution, performance or display, as long as this right of attribution or paternity is asserted in writing.¹³⁶ The form of attribution must follow that specified in the author's assertion, if any, including use of pseudonyms or initials.¹³⁷ The attribution right lasts as long as copyright, that is, the life of the author plus seventy years.¹³⁸ There is a statutory right against false attribution,¹³⁹ and the common law concept of "passing off" also prevents false attribution.¹⁴⁰ Additionally, the U.K. protects the attribution interests of authors through a requirement of "sufficient acknowledgment" of a source used for fair dealing.¹⁴¹

¹²⁹See Ginsburg, *supra* note 25, at 10.

¹³⁰TRIPS Agreement, *supra* note 128, at art. 9.

¹³¹Visual Artists Rights Act of 1990, codified at 17 U.S.C. § 106A.

¹³²17 U.S.C. §§ 101, 106A(a) (2010).

¹³³*Id.* § 106A(e).

¹³⁴*Id.* §§ 106A(d)-(e).

¹³⁵*Id.* § 106A(a)(1)(B).

¹³⁶Copyright, Designs and Patents Act, 1988 (CDPA), c. 48, §§ 77–78 (2003).

¹³⁷*Id.* § 77(8).

¹³⁸*Id.* § 86(1).

¹³⁹*Id.* § 84.

¹⁴⁰See *Clark v. Associated Newspapers Ltd.*, [1998] 1 W.L.R. 1558 (Chancery Div.). See also John Benjamin, *Case Comment*, 20 EUR. INTEL. PROP. REV. N86–88 (1998); Richard Harrison, Editorial, *Pastiched-off*, 9 ENT. L. REV. 181 (1998); Clive D. Thorne, *The Alan Clark Case — What It Is, What It Is Not*, 20 EUR. INTEL. PROP. REV. 194–96 (1998).

¹⁴¹See, e.g., *Pro Sieben Media A.G. v. Carlton UK Television Ltd.*, [1999] 1 W.L.R. 605 (Ct. App.) (applying CDPA §§ 30, 178).

The U.K. right of attribution, however, does not apply to authors of works contributed to newspapers, magazines, encyclopedias and periodicals.¹⁴² The CDPA excepts from the attribution right those uses considered to be fair dealing in reporting current events on broadcast or film.¹⁴³ Further, the attribution right does not prevent incidental unacknowledged uses of a work in art, sound recordings, films and broadcasts.¹⁴⁴ The right of attribution in U.K. copyright law is in line with the mandate of the Berne Convention:

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 The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights.¹⁴⁵

The Berne Convention prohibits signatory nations from requiring formalities prior to ownership or exercise of copyright, and it has been suggested the U.K.'s assertion requirement for the attribution right may violate this no-formality rule.¹⁴⁶ In practice, the assertion requirement has stung authors who failed to meet it,¹⁴⁷ and it also has vexed courts attempting to determine whether letters and various other vague possible assertions of the right do in fact meet the requirement.¹⁴⁸ Additionally, the right of attribution in the U.K. may be waived, including for yet-to-be-created works.¹⁴⁹

Although it generally has been considered that the United States does not have a broad right of paternity or attribution, a review of recent federal cases reveals that courts are increasingly persuaded that a provision of the Copyright Act at 17 U.S.C. § 1202(b) may effectively function as a statutory attribution requirement. Although these opinions are only in the federal trial courts so far and have not yet reached federal intermediate appellate courts or the Supreme Court, the development represents a remarkable shift for a country which long resisted implementation of moral rights and which, in fact, kept itself out of the Berne Convention — the major international intellectual property

¹⁴²See LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 235 (2004).

¹⁴³See *id.* at 238.

¹⁴⁴See *id.* at 238–39.

¹⁴⁵Berne Convention, *supra* note 90, at art. 6*bis*.

¹⁴⁶See HECTOR MACQUEEN, CHARLOTTE WAELE & GRAEME LAURIE, *CONTEMPORARY INTELLECTUAL PROPERTY: LAW AND POLICY* 100 (2008).

¹⁴⁷See *Christoffer v. Poseidon Film Distributors Ltd.*, [2000] E.C.D.R. 487 (Chancery Div.).

¹⁴⁸See *Beckingham v. Hodgens et al.*, 2002 WL 1310819 (Chancery Div.).

¹⁴⁹CDPA, *supra* note 136, at § 87.

treaty — for a century over the issue. The emerging attribution right may prove helpful for news organizations seeking to protect themselves from wholesale and unattributed copying of news content by others. Still, the right is not without its pitfalls for news organizations, especially with respect to restrictions it might impose on newsgathering.

BAN ON REMOVAL OF COPYRIGHT MANAGEMENT INFORMATION

One of the most profound changes in the history of U.S. copyright law occurred in 1998 when Congress passed, and President Bill Clinton signed, the Digital Millennium Copyright Act (DMCA). The DMCA has been hailed as groundbreaking because it provided a safe harbor for Internet Service Providers from liability for infringement by users. In the long run, though, the more revolutionary and enduring contribution of the DMCA may be its prohibition and even criminalization of the circumvention of technological protection measures for copyright-protected works. Most relevant for news is the DMCA's prohibition of removal of copyright management information in 17 U.S.C. § 1202(b).¹⁵⁰ Violation of the ban opens the door for civil liability, injunctions and award of monetary damages.¹⁵¹

The DMCA itself defines copyright management information to include “[t]he name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.”¹⁵² Notwithstanding this definition, courts have differed in their interpretation of the term copyright management information. Some have concluded that the DMCA penalizes only removal or alteration of “the technological measures of automated systems.”¹⁵³ Other courts, however, have concluded that the DMCA also prohibits something as elementary as the removal or alteration of a reporter's byline, name of employer and the copyright symbol (©).¹⁵⁴ In one recent New

¹⁵⁰The relevant statutory provision reads in full:

No person shall, without the authority of the copyright owner or the law — (1) intentionally remove or alter any copyright management information, (2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or (3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law, knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

17 U.S.C. § 1202(b) (2010).

¹⁵¹*Id.* at § 1203.

¹⁵²*Id.* at § 1202(c)(3).

¹⁵³*IQ Group, Ltd. v. Wiesner Publ'g LLC*, 409 F. Supp. 2d 587, 597 (D.N.J. 2006).

¹⁵⁴*Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 461–62 (S.D.N.Y. 2009).

York case, the Associated Press was allowed to go forward with a copyright infringement lawsuit against a Web site that rewrote or simply copied and pasted AP articles without permission and without including identifying information about AP.¹⁵⁵

But the copyright management information claim can also be used against news organizations. On September 11, 2001, Valencia McClatchey took a photograph of the mushroom cloud caused by the crash of United Airlines Flight 93 near Shanksville, Pennsylvania. McClatchey titled the photograph “End of Serenity” and sold copies locally for \$20, donating most proceeds to the Todd Beamer Foundation.¹⁵⁶ McClatchey also licensed the photo for one-time use to several news organizations. One year later, an Associated Press reporter and photographer visited McClatchey to write about her experience with the photo. The AP photographer represented that he wanted to photograph McClatchey with “End of Serenity” but the photographer also made and distributed a closely cropped shot of “End of Serenity” that omitted both McClatchey and the copyright notice she had printed on it along with her name.

In a copyright infringement lawsuit, McClatchey convinced a federal district court judge — for purposes of summary judgment and where direct infringement also was present — that the AP’s conduct constituted removal of copyright management information in violation of the DMCA.¹⁵⁷ Conclusions like that one pose significant challenges for news organizations because, unlike fair use, the prohibition on removal of copyright management information is inflexible. The prohibition is also very broad. Under the DMCA, copyright management information may include any of the following items:

- (1) The title and other information identifying the work, including the information set forth on a notice of copyright.
- (2) The name of, and other identifying information about, the author of a work.
- (3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.
- (4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.

¹⁵⁵*Id.*

¹⁵⁶McClatchey v. Associated Press, 2007 WL 776103 (W.D. Pa. Mar. 9, 2007).

¹⁵⁷*Id.* at *5–6.

- (5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.
- (6) Terms and conditions for use of the work.
- (7) Identifying numbers or symbols referring to such information or links to such information.
- (8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.¹⁵⁸

One lawsuit interpreting these terms pitted two online advertising firms against each other.¹⁵⁹ One of the firms had created an e-mail ad with its logo (IQ) and a hyperlink to its Web page. The second firm was hired to distribute the ads *via* e-mail, and in distribution the first firm's logo and hyperlink were removed.¹⁶⁰ The firm whose logo and hyperlink were removed argued that doing so constituted a violation of the DMCA's ban on removal of copyright management information because the logo and e-mail constituted material defined in 17 U.S.C. §§ 1202(c)(2), 1202(c)(3), 1202(c)(6) and 1202(c)(7). The federal court for the District of New Jersey, however, concluded that the logo and hyperlink were not copyright management information because they were, instead, primarily created to identify the origin of goods or services, and that was a function of trademark rather than copyright law. "If every removal or alteration of a logo attached to a copy of a work gives rise a cause of action under the DMCA, the DMCA becomes an extension of, and overlaps with, trademark law," the court wrote.¹⁶¹

Rather than interpreting "copyright management information" to apply "wherever any author has affixed anything that might refer to his or her name,"¹⁶² the district court interpreted the term in light of its meaning in the World Intellectual Property Organization Copyright Treaty and the WIPO Performances and Phonograms Treaty, which the DMCA was designed to implement. In those two international agreements, copyright management information was a "technical measure[]" and "component[] of automated copyright protection systems."¹⁶³ The court

¹⁵⁸17 U.S.C. § 1202(c).

¹⁵⁹*IQ Group*, 409 F. Supp. 2d 587 (D.N.J. 2006).

¹⁶⁰*Id.* at 589.

¹⁶¹*Id.* at 592.

¹⁶²*Id.* at 593.

¹⁶³*Id.* at 594.

viewed copyright management information as part and parcel of a digital rights management system and nothing else.¹⁶⁴ Because the firm whose logo and hyperlink were removed had no intention for the logo and hyperlink to serve as part of an “automated system . . . to manage copyrights” — they were instead merely intended to “inform people who would make copyright management decisions” — the DMCA ban on removal of copyright management information was not implicated.¹⁶⁵

Other courts, using a similar legislative history analysis, also have defined copyright management information relatively narrowly, especially in the non-digital context.¹⁶⁶ But the actual circumvention of technological protection measures (TPMs), such as DVD copy protection, that includes removal of copyright management information has led to liability for violation of the DMCA. For example, individuals who downloaded a copy-protected multimedia documentary and then removed the TPMs as well as author and copyright owner identification were held to have violated 17 U.S.C. § 1202.¹⁶⁷ Some courts have interpreted copyright management information relatively broadly. For example, it has been held that mere use of a software program to print a copyright owner’s name and identifying information on a protected work is enough to implicate the DMCA.¹⁶⁸ With respect to news, courts have made it clear that mere republication of the ideas or facts in a news article — even if done without attribution to the original source — does not constitute removal or alteration of copyright management information in violation of the DMCA; such conduct also does not constitute traditional copyright infringement due to the idea/expression dichotomy and fair use.¹⁶⁹

Some federal district courts refuse to delve into legislative history of the DMCA and instead read the plain language of the copyright management information provision to consist of names, titles and copyright symbols. Several such cases arose in 2009 and 2010, and virtually all courts in the new cases have accepted the arguments that copyright

¹⁶⁴*Id.* at 594–97.

¹⁶⁵*Id.* at 597.

¹⁶⁶*See, e.g.,* Gordon v. Nextel Commc’ns and Mullen Adver., Inc., 345 F.3d 922 (6th Cir. 2003) (inclusion of medical illustrations in the background of a television commercial did not constitute violation of DMCA even though copyright identifying information not visible); Textile Secrets Int’l, Inc., v. Ya-Ya Brand Inc., 524 F. Supp. 2d 1184 (C.D. Ca. 2007) (removal of identification of copyright owner from textiles did not violate DMCA).

¹⁶⁷Stockwire Research Group, Inc. v. Lebed, 577 F. Supp. 2d 1262 (S.D. Fla. 2008).

¹⁶⁸*See* Jacobsen v. Katzer, 609 F. Supp. 2d 925 (N.D. Ca. 2009). *See also* Gilbert Architects v. Accent Builders & Developers, 629 F. Supp. 2d 526 (E.D. Va. 2008) (Developer’s removal of copyright identifying information from architectural plans could constitute violation of DMCA.).

¹⁶⁹*See* Silver v. Lavandeira, 2009 WL 513031 (S.D.N.Y. Feb. 26, 2009).

management information means, among other things, author attribution.¹⁷⁰ In this way, courts are essentially allowing plaintiffs, including journalists and news organizations, to enforce a statutory attribution right, something not previously available under U.S. law.

For example, the U.S. District Court for the Northern District of Illinois denied a motion to dismiss filed by Agence France Press in a lawsuit brought by a freelance photographer who claimed the news organization violated the DMCA's copyright management provision when it removed from a photograph the freelancer's name and Web site address.¹⁷¹ The photographer had taken photographs of a house next door to President Barack Obama's house in the Hyde Park neighborhood of Chicago for a real-estate Web site, but Agence France Press was accused of distributing the images on its ImageForum-Diffusion photo database Web site without the photographer's permission. The copyright management information in question consisted of the photographer's name, "Wayne Cable," and hotlink, "selfmadephoto.com."¹⁷² Although Cable brought other claims against Agence France Press, including a substantive copyright infringement claim, the 17 U.S.C. § 1202 claim, which the district court allowed to survive a motion to dismiss, was in effect seeking to hold Agence France Press liable for failing to attribute the photograph to Cable. The court cited two other cases that held similarly with regard to identifying information on digital architectural works.¹⁷³

In another case involving publication of money market and certificate of deposit rates, the federal court for the Southern District of New York held that a licensed republisher of the rates was not entitled to a motion to dismiss on a copyright management information claim where the republisher merely altered the content of the originator's identifying information.¹⁷⁴ In other words, the DMCA's copyright management provision was interpreted to be capable of imposing liability not only for omitting attribution information but also for failing to render it in the form prescribed by the copyright owner. When a defendant in another

¹⁷⁰One case that did not reach such a conclusion was when the federal court for the District of New Jersey held that failure to include information from a photo credit that appeared in the gutter of a magazine next to a photograph did not constitute removal of copyright management information when the photo was posted, altered and parodied on a Web site. *See* *Murphy v. Millennium Radio Group LLC*, 2010 WL 1372408 (D. N.J. Mar. 31, 2010).

¹⁷¹*Cable v. Agence France Press*, 2010 WL 2902074 (N.D. Ill. July 20, 2010).

¹⁷²*Id.* at *4.

¹⁷³The cited cases were *Interplan Architect, Inc. v. C.L. Thomas, Inc.*, 2009 WL 6443117 (S.D. Tex. Nov. 13, 2009) (declining to grant a motion to dismiss because a company's name, logo and other identifying information on electronic copies of architectural drawings constituted copyright management information); *Fox v. Hildebrand*, 2009 WL 1977996 (C.D. Cal. July 1, 2009) (same).

¹⁷⁴*BanxCorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596 (S.D.N.Y. 2010).

case tried to argue that it had not actually removed copyright management information but had reproduced portions of a copyright-protected work by copying and pasting electronic elements which did not include the author's name, address and telephone number, the court held the plaintiff was entitled to get past a motion for summary judgment and take the issue to trial.¹⁷⁵

TOWARD A TRANSFORMATION ETHOS IN THE EMERGING ATTRIBUTION RIGHT FOR ONLINE NEWS

In recent years, scholars have suggested that the news industry's push to enforce its intellectual property rights has been misguided.¹⁷⁶ One problem with increased intellectual property protections for news is that it causes media companies to treat news as a commodity rather than a public service.¹⁷⁷ The effort to protect news through a digital-rights management approach also has been criticized because it sets up an adversarial relationship between news producers and consumers.¹⁷⁸ It has been suggested that instead of strong economic copyright in news, U.S. law and policy should promote a right of attribution that would strengthen the bond between journalists and readers while indirectly promoting the economic viability of news organizations.¹⁷⁹ A more robust attribution right for news offers intriguing possibilities to aid journalism if care is taken not to harm the access to information so vital to newsgathering and reporting. However, creation of a broad attribution right in the Copyright Act seems highly unlikely, given the long and contentious history on the issue.

Still, a statutory attribution right is increasingly emerging from district courts' interpretations of the DMCA, even though Congress may have intended the copyright management information provision merely to enable technological protection measures and not to create a moral right of paternity. The copyright management information provision has been used both by and against online news organizations, and its emergence justifies some discussion. First, the provision has some advantages and disadvantages when compared with hot news misappropriation, an alternative claim available to news organizations who may be victims of digital piracy. Second, the role of transformation — a key

¹⁷⁵Jedson Engineering, Inc. v. Spirit Constr. Services, Inc., 720 F. Supp. 2d 904, 929–31 (S.D. Ohio 2010).

¹⁷⁶See Easton, *supra* note 24, at 521.

¹⁷⁷See *id.* at 553.

¹⁷⁸See Brad King, *Why Digital Rights Management Won't Save the News*, at <http://aejmc.org/topics/2009/11/why-digital-rights-management-wont-save-the-news/> (accessed Dec. 4, 2009).

¹⁷⁹See Easton, *supra* note 24, at 554.

point of analysis in non-legal plagiarism definitions as well as legal determinations of copyright fair use and hot news misappropriation — should be carefully considered by Congress, the courts and news media organizations when determining copyright management information's future application to online news.

The primary advantage of the copyright management information claim over hot news misappropriation may be its statutory nature. Commentators have argued for a statutory hot news provision in federal law because relying on the common law can be “an uncertain weapon.”¹⁸⁰ Not all states have acknowledged the common-law doctrine of hot news misappropriation, and even among those who do, there are differences in application of the required factors.¹⁸¹ This makes it impossible for news organizations distributing their content on the Internet to be assured of a remedy in any state where they might consider they have been harmed by those using their content without authorization. A critical question would be whether a given state would require the direct business competition element stated by the *NBA v. Motorola* court; if not, then a news service such as AP, which primarily distributes its content to subscriber news organizations rather than directly to the public, would have a difficult time prevailing on a hot news claim against an online aggregator, whose primary business is delivering content to the public.¹⁸² It also has been suggested that a statutory right could more carefully balance the public interest in access to information with competing interests in intellectual property ownership.¹⁸³

Fundamentally, the copyright management claim is about attribution while the hot news misappropriation claim is about ownership of information, even if for just a relatively short time. For journalism organizations, which depend on access to information and frequently advocate for free expression-related causes, justifying a pro-ownership stance is more difficult than justifying a pro-attribution stance. Although an attribution right does not directly contribute to the bottom line, it does indirectly benefit a journalist or journalism organization in building a reputation, which ultimately can translate into business success. But the U.S. copyright management information claim is not a true attribution right. Indeed, given its hefty statutory damages provision, the claim seems almost as pro-ownership as hot news misappropriation. In truth, even hot news misappropriation, as described by the Supreme Court in 1918, at least, also concerns itself with attribution; the Supreme Court

¹⁸⁰Deutsch, *supra* note 60, at 580.

¹⁸¹*See id.*

¹⁸²*See id.*

¹⁸³*See* Fujichaku, *supra* note 84, at 471.

noted that part of the problem with INS' conduct was that it failed to attribute the source of its news.¹⁸⁴

Meanwhile, the hot news misappropriation doctrine has some advantages for news organizations when compared with a claim for altering or omitting copyright management information. In states where the hot news doctrine is recognized and does require direct business competition, a hot news claim may be more attractive to a news organization than a copyright management information claim because its establishment poses less threat of coming back to bite the news organization. Given that hot news requires direct business competition, or in essence lack of transformation, as well as free-riding, news organizations themselves might be less likely to be accused of violating the doctrine by their traditional newsgathering process¹⁸⁵ than they might be to suffer an accusation of copyright management information violation. As has been shown, a copyright management information claim currently does not require lack of transformation, and so a news organization could be sued — as happened in the “End of Serenity”¹⁸⁶ and Hyde Park real estate¹⁸⁷ cases — for failing to include attribution information even though the uses themselves might have been transformative and fair.

Additionally, the hot news doctrine, at least as stated by the Second Circuit, requires free-riding and substantial harm or elimination of the incentive to produce and distribute information. These “extra elements” go beyond copyright law and are, in fact, a big part of the reason a hot news misappropriation claim survives preemption by the Copyright Act.¹⁸⁸ These requirements serve to protect the public interest in access to and expression of information. In reality, though, these elements of hot news misappropriation may just be another way of ensuring that uses of old works by creators of new works involve a sufficient level of transformation. Transformation — progress in creative expression — is the very purpose of copyright law as stated in the Constitution.¹⁸⁹ By prohibiting free-riding uses that are in direct competition and destroy incentive, the hot news misappropriation tort is true to the purpose of

¹⁸⁴See *supra* note 46 and accompanying text.

¹⁸⁵This statement assumes that traditional newsgathering does not include taking content from direct news competitors instead of traditional sources through interviews and reviewing of documents. It is conceded that, increasingly, newsgathering involves reviewing and quoting from blogs and other online sources which might be interpreted as direct business competitors of the news organizations themselves. In those cases, the direct business competition requirement in the hot news appropriation claim may not protect the news organizations from liability.

¹⁸⁶See *supra* notes 156–57 and accompanying text.

¹⁸⁷See *supra* notes 171–73 and accompanying text.

¹⁸⁸See *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

¹⁸⁹U.S. CONST., art. I, sec. 8, cl. 8.

copyright law but fills a narrow niche where copyright law does not reach.

Transformation is the key inquiry in modern U.S. fair-use analysis but has long been important in lack-of-attribution examinations in non-legal plagiarism definitions. If plagiarism and the moral right of attribution, as has been suggested, spring from the same well, then the legal attribution right should not ignore the importance of a lack-of-transformation requirement. Although no such requirement exists overtly in the current statutory copyright management information claim, lawmakers, jurists and journalists would do well to consider its inclusion. The current version of the copyright management information claim partly addresses the need for news organizations to obtain relief from the undermining of their business model by online news aggregators and the information-wants-to-be-free culture of the Internet. But without a lack-of-transformation element, the copyright management information claim could undermine newsgathering and harm the public interest in access to information and freedom of expression.

The litigation between Shepard Fairey and the Associated Press is a case in point. The AP was right to be concerned about the issues raised in Fairey's use of Mannie Garcia's photograph, but ultimately the AP needs to be careful about establishing legal precedents that will undermine its own ability, as well as that of other journalism organizations, to gather and produce news. The Fairey case hinged on transformation in a fair-use analysis. Under existing Supreme Court precedent,¹⁹⁰ Fairey's use seemed transformative and fair, though the court never passed judgment on that question. Fairey did not directly engage in competition with AP for a news-consuming market, and his purposes in using the Obama image were very different than AP's. Fairey was a partisan engaged in a political campaign for ideological reasons, whereas the AP was a commercial enterprise engaged in the business of selling news and information, including photographs of then-Senator Obama at a news conference. The purpose and character of Fairey's use, therefore, distinguished him from the AP. Because the AP's photograph was largely factual, notwithstanding a photographer's skill and creativity in composing the shot, and because there was little if any harm to the AP's news-consuming market, Fairey's use appeared fair under the Copyright Act.

However, the case raised several important issues that remain unresolved even after the settlement. What if Fairey's use was fair but the AP nonetheless could succeed on a claim for failure to include copyright management information? A big part of the early stages of the dispute

¹⁹⁰See *supra* notes 53–54 and accompanying text.

involved speculation over the source of Fairey's inspiration. In other words, journalists and others, including the AP, exhibited concern for attribution of the original source. Fairey's equivocation and ultimate deception on the issue seem to have incurred, as much as anything else he did, the wrath of the AP and other observers. The copyright management information claim could be said to allow AP a legal remedy for little more than plagiarism, something traditionally in the ethical rather than legal arena. But the legal requirement of attribution might be preferable for news organizations that do not want to contribute to society's inclinations toward locking up news, information, ideas and expression behind walls of intellectual property ownership.

In its answer and counterclaims, AP alleged that "Fairey stripped away the copyright management information" from the AP photo he downloaded from Google Images.¹⁹¹ However, as an attorney for the Electronic Frontier Foundation noted,¹⁹² Fairey said in at least two broadcast interviews that the process of creating the poster involved illustration by hand, specifically "by cutting away sheets of transparent film placed over the photo with a razor, and after scanning those films, appl[ying] color in Photoshop."¹⁹³ The Electronic Frontier Foundation's Fred von Lohmann said it would have been difficult for AP to prevail on a copyright management information claim, but he suggested the claim was inserted to intimidate Fairey, given the DMCA's provision of statutory damages for up to \$25,000 per poster (von Lohmann says there could be as many as 300,000 copies of the Obama poster in existence).¹⁹⁴

If Fairey had ultimately prevailed in court on the fair-use issue in the copyright infringement dispute, he could well also have disposed of the copyright management information claim because the DMCA purports to require that the copyright management information be removed "for the purpose of inducing, enabling, or facilitating copyright infringement."¹⁹⁵ But the claim's application by courts is largely unknown. At this stage, several district courts have allowed copyright management information claims to survive motions to dismiss and motions for summary judgment even when fair use arguably applied to the underlying reproduction and distribution of the work, including by news organizations. If that trend continues, the best hope for news organizations and

¹⁹¹Fairey et al. v. Associated Press, Answer, Affirmative Defenses and Counterclaims of Defendant, No. 09-01123, ¶ 137 (U.S. District Court for the Southern District of New York).

¹⁹²Fred von Lohmann, *AP Invokes DMCA Against Obama "Hope" Poster Artist*, at <http://www.eff.org/deeplinks/2009/03/ap-uses-dmca-intimidate-hope-artist> (accessed Oct. 21, 2010).

¹⁹³*Id.* See also 17 U.S.C. § 1202(b) (2010).

¹⁹⁴von Lohmann, *supra* note 192.

¹⁹⁵17 U.S.C. § 1202(b).

the public interest generally may be to cultivate a transformation *ethos* within copyright management information claims. Just as a transformation analysis protects certain desirable uses under fair use and hot news misappropriation, so too would a lack-of-transformation requirement within the copyright management information claim. At the same time, the copyright management information claim could prove beneficial for news organizations seeking attribution and credit for their work. The DMCA's statutory damage provisions, coupled with a lack-of-transformation requirement, could thwart what have been called "parasitic" online news aggregators¹⁹⁶ without closing off the ability for news organizations to gather and produce news.

CONCLUSION

In summary, this article arrives at two main conclusions and one primary recommendation. The first conclusion is that the emerging copyright management information claim in the DMCA poses both advantages and disadvantages for news organizations. Journalists and scholars should not uncritically accept that the copyright management information requirement will always benefit them because it also has potential to inhibit newsgathering and distribution of news. The second conclusion is that the copyright management information claim may cause an imbalance in the interests of copyright owners and users unless copyright owners asserting the claim are required to show that the use in question has failed to transform the original copyright-protected work. Some might prefer that the burden be placed on the user, instead, to show transformation. In either case, the introduction of transformation analysis would bring the copyright management information claim in line with the doctrine of fair use as well as hot news misappropriation. This article's primary recommendation is that federal lawmakers in the United States alter the Digital Millennium Copyright Act — specifically 17 U.S.C. § 1202 — to clarify that a transformative use of a copyright-protected work does not constitute infringement even if there is no attribution.

The copyright management information provision of the Digital Millennium Copyright Act is emerging as increasingly important for news organizations to consider, both with respect to their own conduct in gathering news amid copyright-protected material and the conduct of online aggregators and other users of news organizations' electronically published content. The copyright management information claim is not well-developed enough in the courts to make final determinations

¹⁹⁶Deutsch, *supra* note 60, at 566.

about its harm or usefulness to news organizations, but so far the claim presents reasons for both hope and fear by news organizations. Cases interpreting the copyright management information provision are confined to federal district courts, and even those cases have only reached the motion-to-dismiss and summary-judgment stages. It may be too early to say definitively how copyright management information will affect online news, but so far courts have defined the term broadly. As a result, news organizations have been bitten several times by gathering and publishing news involving copyright-protected images whose intellectual property owners later asserted failure to attribute by the news organizations.

As the copyright management information claim develops in the federal courts, transformation should be an increasingly important point of analysis. Without a lack-of-transformation requirement, the copyright management information claim essentially legalizes the ethical notion of plagiarism. Even plagiarism, in its sophisticated iterations, acknowledges that transformation of a creative work by a new author or creator can defeat claims about lack of attribution. The doctrine of copyright management information can benefit, too, from the hot news misappropriation tort. That tort has evolved from its early twentieth-century roots to require direct business competition between an intellectual property owner and subsequent user, meaning that certain uses of information and creative expression will be excused from legal liability when there is public benefit and little or no threat of commercial harm. Fair use, too, offers lessons to copyright management information about the value of a transformation inquiry.

With its emerging attribution right, the United States may be slowly and somewhat unconsciously falling into line with the Berne Convention's requirement of a moral right of paternity or attribution. The Berne Convention asserts that the attribution right must stay with the creator even after the sale of economic rights, but the U.S. copyright management information claim does not address that issue. The U.K.'s version of the attribution right is seemingly more intentional than the U.S. backdoor copyright management information claim, but even the U.K.'s attribution right may not go as far in protecting paternity of creative works as the U.S. copyright management information claim may go. For example, the U.K. attribution right requires assertion in writing by the creator, whereas the DMCA does not require any written assertion of the right prior to its legal enforcement. Additionally, the U.K. right may be waived, raising the possibility of contractual terms requiring waiver for certain content creators. But the U.S. right does not allow for waiver and, in any case, the U.K. provisions for assertion and waiver seem out of line with the spirit, if not the letter, of the Berne Convention. Finally,

the U.K. attribution right explicitly does not apply to news, whereas the U.S. copyright management information claim demonstrably does.

News organizations should pay careful attention to the development of copyright management information claims in the federal courts because that development has the potential to greatly affect the future landscape for online news. Thus far, courts have not weighed in on whether a copyright management information claim could stand alone, and the DMCA itself seems to indicate the claim must accompany a successful claim for an intentional and substantive underlying copyright infringement. Though there is little basis on which to judge, the possibility exists that this requirement of intentional substantive infringement could be marginalized by some courts, given their willingness already to define the copyright management information claim broadly enough to include merely an author's name when, in fact, Congress seems to have intended the provision only to apply to copyright information stored in metadata and embedded in and removed from copyright-protected works through technological processes. If the requirement of an underlying copyright infringement is marginalized, then the United States will have created a full-fledged statutory attribution right, and transformation will have to be considered if newsgathering and the general public interest in access to information are to be protected.