Unauthorized Annexing of an Artist’s World: An Argument for Creator-Assignee Standing to Sue for Copyright Infringement

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I. INTRODUCTION

The thrill of creation which we experience when we see a masterpiece is not unlike the feeling of the artist who created it; such a work is a fragment of the world which he has annexed and which belongs to him alone. 1

Similar to André Malraux, lawmakers acknowledge that a creator’s 2 work is marked with the creator’s personality, 3 but how far should copyright law go to protect a creator’s “fragment of the world”? 


2. For consistency and to avoid confusion with the constitutional and statutory use of the term “author,” the generic term “creator” will be used to refer to the individual who originated the work, from initial idea to final embodiment.

3. See, for example, the statement of Senator Orrin Hatch, “The mark of the artist’s personality is on everything that he or she creates.” David Robb, Hatch Urges Film Rights Talks, HOLLYWOOD REP., Apr. 21, 1997, at 5.
This inquiry raises two questions. First, what rights are protected? Second, whose rights are protected?

The answer to the “what rights” question appears straightforward if one reviews only the Constitution’s Copyright Clause and the current copyright statute. The Copyright Clause of the Constitution empowers Congress “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”4 Thus, the clause grants an “exclusive right” to an author’s “writings.” Additionally, the clause’s language underscores two goals for federal copyright law—promoting progress and protecting creators’ works.5 Underlying these goals are both economic and non-economic justifications.6

In the current copyright statute, Congress has further defined the Constitution’s “exclusive right.” The exclusive right is comprised of five separate rights: (1) the right of reproduction; (2) the right to create derivative works; (3) the right to distribute the work to the public by sale or other transfer of ownership; (4) the right to perform the work publicly; and (5) the right to display the work publicly.7 Each of these rights is transferable and divisible.8

However, United States’ treaty obligations cloud the answer to the “what rights” question. The United States is a signatory to an international copyright treaty, the Berne Convention for Protection of Literary and Artistic Property (Berne Convention).9 Under the Berne Convention, two additional authorial rights are protected: (1) an author’s “right to claim authorship”; and (2) an author’s right of integrity, that is, “to object to any distortion, mutilation or other modification of, or other derogatory action” toward the work that “would be prejudicial to [the author’s] honor or reputation.”10 With few exceptions,11 Congress has not enacted any provisions protecting these authorial rights.

The answer to the “whose rights” question is not straightforward. The Constitution grants Congress the power to give “authors” the

5. See discussion infra Part II.A.
6. See discussion infra Part II.B.
8. Id. § 201(d).
10. Berne Convention, supra note 9, at art. 6bis.
exclusive right to their works for a limited time, and under the statute, initial copyright ownership vests in the "author." The copyright statute, however, never defines who an author is. A common definition of an author would be the individual who originated or created a work. But, under copyright law, "author" is not always synonymous with the human being who created the work. An "author" may be an employer or someone who asks a creator to create a work under the copyright’s "work made for hire" provision. As an "author," the employer or commissioner of the work "owns all of the rights comprised in the copyright."

Thus, the answers to the two initial questions are as follows: (1) under the Constitution and copyright statute, an "author," who may or may not be the individual creator of the work, owns five separate "exclusive rights" that can be freely transferred and divided; and (2) under the Berne Convention, a creator is entitled to protection of his right to claim authorship and right of integrity.

The copyright statute protects authors’ exclusive rights by allowing a potential plaintiff to bring an action for infringement: anyone who "violates any of the exclusive rights of the copyright owner . . . is an infringer" and is subject to an action for infringement. Answering the question of which type of plaintiff can bring an action to redress a violation of one of the rights is complicated. Because federal courts have jurisdiction over infringement claims arising under federal copyright law, a plaintiff must satisfy the real party in interest and standing prerequisites in addition to satisfying the statutory requirements. To satisfy the real party in interest requirement, a plaintiff must be the person "who possesses the right sought to be enforced." An assignee of an accrued cause of action qualifies as the real party in interest.

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14. See id. § 101 ("Definitions" section of current copyright statute); see also discussion infra Part II.C.
17. Id.
18. Id. § 501(a).
19. Id. § 501(b).
21. FED. R. CIV. P. 17(a).
25. Id. at § 1545.
The standing inquiry involves both a constitutional and statutory test. To satisfy the constitutional requirements, a plaintiff must establish that she suffered an injury that was caused by the defendant's conduct and that is likely to be redressed by a favorable decision.26 If the constitutional test is satisfied, a plaintiff must still satisfy the statutory standing requirement by showing that he or she is the "legal or beneficial owner" of any exclusive right or part of an exclusive right.27

A plaintiff qualifies as a legal owner if she owns some portion of one of the exclusive rights. Because of the divisibility of the exclusive rights, the plaintiff in an infringement case is not required to own the entire copyright interest.28 Additionally, a "legal owner" can be an assignee of a copyright interest who also received an assignment of an accrued cause of action for infringement.29

Generally, courts have determined beneficial ownership issues based on whether a plaintiff has an economic interest, such as a royalty arrangement, in the copyright.30 As with the term "author," the statute does not define the term "beneficial owner."31 However, even when a royalty arrangement exists, if a creator created the work as part of a work-made-for-hire relationship, the creator may not qualify as a beneficial owner.32 What if, after an infringement has occurred, a creator receives an assignment of an accrued cause of action without an assignment of any other interest in the copyright?33

This Comment surveys the contemporary status of copyright law regarding a creator-assignee's standing to sue for infringement and the bases for allowing a creator-assignee to bring an infringement action.34 Part II begins the discussion with a review of the general principles of copyright law, including its constitutional and statutory frameworks, its underlying policies, and the moral rights doctrine. Part III continues with an overview of the general constitutional standing principles and real party in interest prerequisites. It then outlines the statutory and judicial limits on standing to sue under copyright law. Part IV discusses the issue of assignee standing in copyright law and then reviews the issue of

26. Laidlaw, 528 U.S. at 180–81; see discussion infra Part III.A.
29. See discussion infra Part IV.
30. See discussion infra Part III.B.
31. See 17 U.S.C. § 101 (2000); see also discussion infra Part III.B.
32. See discussion infra Part III.B.
33. For ease of reference, the term "creator-assignee" will be used to refer to such a party.
34. The focus of this Comment is on copyright law in the United States. Foreign copyright law, when discussed, will be clearly identified as such. Therefore, any reference in this article to "copyright law" refers to U.S. copyright law.
creator-assignee's standing to sue. This discussion focuses on the recent case of Silvers v. Sony Pictures Entertainment, Inc.;\textsuperscript{35} in which the Ninth Circuit Court of Appeals held that a creator-assignee does not have standing to sue.

Finally, Part V sets forth three arguments for granting a creator-assignee standing to sue for copyright infringement. First, granting a creator-assignee standing to sue effectuates Congress's intent that the rights granted under the Copyright Act of 1976\textsuperscript{36} be divisible and alienable. Second, a creator-assignee fulfills the standing and real party in interest prerequisites. Finally, allowing a creator-assignee standing to sue advances the constitutional goals of promoting progress and protecting a creator's rights in her work. The thrust of this argument relies on both the economic and non-economic justifications of copyright law, in particular the right of attribution.

II. GENERAL PRINCIPLES OF COPYRIGHT LAW

To appreciate why a creator-assignee should have standing to sue, one must first understand some general principles of copyright law. This Part provides a summary of these general principles beginning with copyright's constitutional and statutory frameworks and its underlying justifications. It concludes by discussing the limited moral rights protection currently available under U.S. copyright law.

A. The Constitutional Framework

Both the state copyright laws enacted prior to the Constitution and the Constitution's Copyright Clause recognize the close relationship between a creator and his work. Prior to adoption of the Constitution, creators relied on state law for copyright protection.\textsuperscript{37} While the Continental Congress had no power to protect literary property, American creators found a valuable ally in the Continental Congress.\textsuperscript{38} The Continental Congress issued a resolution\textsuperscript{39} encouraging states to provide protection because "nothing is more properly a man's own than the fruit of his study."\textsuperscript{40} While the provisions of each state's statute varied, all of the

\textsuperscript{35} 402 F.3d 881 (9th Cir. 2005), cert. denied, 126 S.Ct. 367 (2005).
\textsuperscript{37} BRUCE W. BUGBEE, THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 106 (1967).
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 73. The Continental Congress issued the resolution on May 2, 1783. Id. The recommended length of protection was fourteen years after publication. Id.
\textsuperscript{40} Id. at 113 (citations omitted). In the three years following this resolution, twelve states enacted copyright statutes; however, it is questionable whether any of the provisions of these statutes
statutes had dual purposes—protecting creator’s rights and promoting the public good by providing an incentive to creators.\textsuperscript{41}

By the time of the Constitutional Convention, the inadequacies of the state systems—lack of uniformity, lack of reciprocity, and insufficient geographic protection—were apparent.\textsuperscript{42} The framers, recognizing these problems and wishing to stimulate a national literature, and the creators, desiring to obtain domestic protection for their works, proposed including copyright protection in the constitution draft.\textsuperscript{43} The proposal was uncontroversial and passed without debate.\textsuperscript{44}

While few writings exist to ascertain the framers’ intent,\textsuperscript{45} those that do exist reflect the framers’ desire to establish a uniform system that recognized a creator’s inherent right to copyright protection.\textsuperscript{46} As James Madison wrote:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of the common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most

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\textsuperscript{41} See \textsc{Walterscheid, supra} note 40, at 74–75. The preambles for many of the statutes reflected a natural law notion of a creator’s rights. \textit{Id.} For example, the preamble to the Massachusetts copyright statute provided:

\begin{quote}
 Whereas the Improvement of Knowledge, the Progress of Civilization, the public Weal of the Community, and the Advancement of Human Happiness, greatly depend on the Efforts of learned and ingenious Persons in the various Arts and Sciences: As the principal Encouragement such Persons can have to make great and beneficial Exertions of this Nature must exist in the legal Security of the Fruits of their Study and Industry to themselves; and as such Security is one of the natural Rights of all Men, there being no Property more peculiarly a Man’s own than that which is produced by the Labour of his mind.
\end{quote}

\textit{Id.} at 75. See also \textsc{Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America}, 64 Tul. L. Rev. 991, 1000–01 (1990).

\textsuperscript{42} \textsc{Walterscheid, supra} note 40, at 76–77.

\textsuperscript{43} \textsc{Bugbee, supra} note 37, at 107.

\textsuperscript{44} \textsc{Walterscheid, supra} note 40, at 110. The clause has even been called an “afterthought.”

\textit{Id.}

\textsuperscript{45} \textsc{Oren Bracha, Owning Ideas} 277 (2005), available at http://www.obracha.net/oi/ OI4.pdf. Because few writings exist, some have argued that the meaning of the constitutional clause cannot be ascertained from these writings. \textit{Id.} According to Bracha, the dialectic of the meaning of the constitutional clause as both the shaper of doctrine and practice and the object shaped by them entails an inversion of the originalist method. If one is to track the meaning of the clause within history, she needs to track the transformation of the conceptual and practical environment within which it was used and elaborated, rather than try to explain an environment on the basis of the stable original meaning of the clause.

\textit{Id.}

\textsuperscript{46} \textsc{Walterscheid, supra} note 40, at 110.
of them have anticipated the decision on this point, by laws passed at the instance of Congress. 47

Thus, like the state statutes that existed at the time, Madison also expressed a desire to promote progress and protect creators. 48

As adopted, the Copyright Clause of the U.S. Constitution empowers Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." 49 Like its precursors, the Clause underscores two goals for federal copyright law—promoting progress and providing protection to creators. 50

B. The Underlying Justifications of Copyright Law

Underlying these constitutional goals lie two competing justifications for copyright law—an economic (or instrumental) justification and a non-economic justification. 51 This section explores these two justifications and the tension that may result when courts attempt to fulfill both.

1. The Economic Justification

Those arguing for a pure economic justification focus on the "promote the progress" language of the Copyright Clause. 52 Under this theory, copyright law exists to protect creators only to the extent necessary "to stimulate the optimal level of innovative production." 53 The Supreme Court has noted this theory aligns with the goal of advancing progress because an "important public purpose of . . . copyright . . . is . . . to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their

47. The Federalist No. 43 (James Madison).
48. Id. However, while Madison referred to copyright as a common law right, the Court in Wheaton v. Peters eschewed any common law right. 33 U.S. (8 Pet.) 591, 663 (1884).
50. Walterscheid, supra note 40, at 150.
52. See Calandrillo, supra note 51, at 310.
genius after the limited period of exclusive control has expired."\(^{54}\) By providing an incentive to create works, copyright law seeks to encourage production of such works.\(^{55}\)

In large part, the instrumental rationale is based on the "public goods" problem that can be associated with copyrightable works.\(^{56}\) A typical public goods problem involves provision of a national defense. Society desires a national defense; however, private citizens lack incentive as individual actors to produce a collective national defense.\(^{57}\) When this occurs, government seeks to modify behavior through individualized incentives.\(^{58}\) The same is true for copyright. The government addresses the free rider problem associated with public goods by providing individuals proprietary rights.\(^{59}\) "[F]ree riders who have not incurred the costs of creation are tempted to imitate inventions after others have developed them. Allowing such imitation obviously would deter future innovators and result in a suboptimal level of innovation."\(^{60}\)

Thus, under the economic justification, while some reward is given to the creator through the grant of the copyright, the provision of the reward is secondary to the provision of incentives.\(^{61}\)

2. Non-Economic Justification: Moral Rights

The non-economic justifications for copyright protection place creators' interests at the forefront.\(^{62}\) Commentators have characterized three different non-economic justifications for copyright protection—a personhood justification, a natural law justification, and a moral rights justification.\(^{63}\) Because one argument in support of creator-assignee


\(^{55}\) Calandrillo, supra note 51, at 310.

\(^{56}\) SCHECHTER & THOMAS, supra note 28, at 7.

\(^{57}\) Id. at 8.

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) Carrier, supra note 51, at 32–33.

\(^{61}\) Mazer v. Stein, 347 U.S. 201, 219 (1954) ("[C]opyright law ... makes reward to the owner a secondary consideration. ... The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors. ..." (citations omitted)).

\(^{62}\) Dreyfuss, supra note 53; see also Carrier, supra note 51 (characterizing this approach as the "moral rights" approach).

\(^{63}\) See Calandrillo, supra note 51. The natural law justification is based on the Lockean "fruits of their labor" theory. See generally Wendy J. Gordon, A Property Right in Self-Expression: Equal-
standing to sue is based on the moral right of attribution, this section focuses on the moral rights doctrine and its role in U.S. copyright law.

a. General Principles

The moral rights justification is grounded in the belief that the creator’s personality pervades any work she creates and that the work, as an embodiment of the creator’s personality, is deserving of protection.\textsuperscript{64} This paradigm perhaps best recognizes what Malraux wrote—that the fragment of the creator’s world that is annexed to the public through her masterpiece belongs to the creator alone. Proponents argue that a focus solely on the remunerative components of copyright ownership, through the provision of incentives, fails to further the constitutional goal of progress.\textsuperscript{65} Rather, to further the constitutional goal of progress, the focus should be on the creator’s nonpecuniary interests in his work.\textsuperscript{66}

While other countries’ recognition of the moral rights doctrine varies, the doctrine generally encompasses three separate “rights.”\textsuperscript{67} First, the “right of disclosure” protects the creator’s right to determine when, if, and how the work will be disclosed.\textsuperscript{68} Second, the “right of integrity” protects the creator by preventing others from making changes to the

\textit{ity and Individualism in the Natural Law of Intellectual Property}, 102 YALE L.J. 1533, 1549–64 (1993). While this theory still has its supporters, others argue that Congress has rejected it as inconsistent with the framers’ intent. See WALTERSCHEID, supra note 40, at 235. The rejection of the natural rights theory is based on language in a House Report from 1894:

The object to be attained and the reason for the constitutional grant of power are imbedded in the right itself. They are to ‘promote the progress of science and the useful arts.’ There is nothing said about any desire or purpose to secure to the author or inventor his ‘natural right to his property.’ . . . The claims made so often, especially in recent years, that the author or inventor has a natural right to the exclusive use of his production, and is therefore entitled, as of course, to legislation securing to him the full enjoyment of this right, does not seem to have been specifically passed upon by the fathers; but one thing is absolutely certain, they did not make this constitutional grant of power upon any such ground.

\textit{Id.} (quoting H.R. REP. NO. 52-1494 (1894)). However, this view conflicts with Madison’s views expressed in Federalist No. 43. See supra text accompanying notes 46–48. An additional justification is that of protecting a creator’s “personhood.” Carrier, supra note 51. The personhood justification is based on a person’s need for “property rights to control resources in their external environment.”

\textit{Id.; see also} Margaret Jane Radin, \textit{Property and Personhood}, 34 STAN. L. REV. 957 (1982).

64. 3 NIMMER & NIMMER, supra note 9, § 8D.02, at 8D–9.


66. \textit{Id.} at 605. The three nonpecuniary interests are the possessory interest, the integrity interest, and a reputational interest. \textit{Id.} The possessory interest “is fulfilled by composing a work that satisfies the creator’s initial vision.” \textit{Id.} The integrity interest “is endangered by the process of compromising that vision with commercial demands.” \textit{Id.} The reputational interest “turns on how the work is presented to the public.” \textit{Id.}


68. \textit{Id.}
work that misrepresent the work’s “spirit and character.” Third, the “right of attribution” protects a creator’s right to demand recognition for his work and to prevent others from attributing the work to someone else.

Of the three moral rights, the right of attribution is most similar to the right to be free from infringement. While as a substantive matter infringement is not synonymous with failure to attribute, the goal of both doctrines is the same. The right of attribution “recognizes a fundamental truth about human nature—people typically desire recognition for their accomplishments. . . . [P]eople should not receive attribution for something that is not their creation.” Copyright infringement is also concerned with improper appropriation of a work. Thus, both theories are concerned with the failure to acknowledge the true creator of a work.

b. The United States’ Participation in the Berne Convention

Unlike most European countries, the United States has not adopted a moral rights regime; however, it began inching toward federal recognition of moral rights when it joined the Berne Convention. The Berne Convention recognizes the right of attribution and right of integrity as independent from the creator’s economic rights and existing even after transfer of the copyright. Article 6bis of the Berne Convention provides as follows:

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

The Berne Convention requires that an action to enforce these rights be governed by the laws of the country where the creator is

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69. Id. at 8.
70. Id. at 7. The right of attribution has also been termed the right of paternity. David Nimmer, The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing Off), 54 DePaul L. Rev. 1, 13 (2004). Nimmer conceptualizes the French right of attribution along five planes, one of which is “the right to prevent others from being named as the author of [the] work.” Id.
72. Schechter & Thomas, supra note 28, at 169.
74. Berne Convention, supra note 9, at art. 6bis.
75. Id.
seeking enforcement.\textsuperscript{76} The Convention presumes that each member country’s laws will protect these rights.\textsuperscript{77}

When Congress decided to join the Berne Convention, it took a minimalist approach. Under the Berne Convention Implementation Act (BCIA), Congress amended federal law only as absolutely required for compliance with the Berne Convention.\textsuperscript{78} Rather than add new protections, Congress intended the BCIA “to preserve the status quo with respect to [moral rights].”\textsuperscript{79} Congress concluded that U.S. law already sufficiently protected moral rights. Specifically, Congress believed existing law protected a creator’s right of attribution and right of integrity through “various provisions of the Copyright Act and Lenham [sic] Act, various state statutes, and common law principles such as libel, defamation, misrepresentation, and unfair competition, which have been applied by courts to redress authors’ invocation of the right to claim authorship or the right to object to distortion.”\textsuperscript{80}

While the World Intellectual Property Organization (WIPO)\textsuperscript{81} agreed with Congress that sufficient moral rights protection existed, WIPO’s strong desire for the United States to join the convention, rather than the sufficiency of the United States’ moral rights protections, stimulated this conclusion.\textsuperscript{82} Dr. Arpad Bogsch, Director General of WIPO, assured Congress that the United States could become a member of the Berne Convention without adding any moral rights protections to its laws.\textsuperscript{83} Commentators have concluded that Dr. Bogsch and the Senate

\textsuperscript{76} Id. at art. 6bis(3).

\textsuperscript{77} Id.

\textsuperscript{78} 1 Nimmer & Nimmer, supra note 9, at OV-5; S. Rep. No. 100-352, at 9 (1988), as reprinted in 1988 U.S.C.C.A.N. 3706, 3714. This approach was not without controversy. Panelists testifying before the subcommittee included publishing representatives arguing against the addition of an artist’s right to control attribution or alteration and movie directors and screenwriters arguing for additional protection of an artist’s right to control alterations to his creation. Id. at 3711. Moreover, several parties testified regarding the insufficiency of other laws to protect the creator’s personality interests and urged for federal recognition of moral rights. See Brown, Adherence to the Berne Copyright Convention: The Moral Rights Issue, 35 J. Copyright Soc’ y U.S.A. 196, 204–05 (1988).


\textsuperscript{80} Id. at 9–10, 1988 U.S.C.C.A.N. at 3715; see also Nimmer, supra note 70, at 19–20 (discussing blue-ribbon commission conclusion that U.S. law at this time was compatible with the Berne Convention).


\textsuperscript{82} Nimmer, supra note 70, at 20.

\textsuperscript{83} S. Rep. No. 100-352, at 10 (1988), as reprinted in 1988 U.S.C.C.A.N. 3715. Indeed, the only changes that WIPO insisted the United States make to comply with the Berne Convention involved the removal of the formalities concerning notice and registration. Id. at 11, 1988 U.S.C.C.A.N. at 3716. The BCIA eliminated the prerequisite that transfers of ownership must be recorded prior to the transferee’s initiation of an infringement action. Berne Convention Implement-
Committee “were inspired by” the member countries’ and American authors’ desire to join the Berne Convention. Indeed, as at least one commentator has noted, “it is a stretch to maintain that the law in the United States as of the enactment of the Berne Convention Implementation Act of 1988 was congruent with Article 6bis of the Berne Convention.”

However, Congress, believing that sufficient protection for moral rights already existed, encouraged courts to continue to apply these principles “as they would be in the absence of United States’ adherence to Berne.” Congress specifically admonished courts not to look to the Berne Convention or the laws of the other signatories to the Berne Convention to try to reduce or expand moral rights protection. Moreover, Congress ensured that the BCIA contained a specific provision expressing that the Berne Convention was not self-executing.

c. Glimmers of Moral Rights Protection

Shortly after passing the BCIA, Congress began to expand its previously minimalist approach to moral rights. In the early 1990s, Congress adopted some Berne Convention standards not previously recognized in the United States when it granted protection to architectural works and adopted the Berne Convention’s standard for such protection.

84. Nimmer, supra note 70, at 23 n.123.
85. Id. at 22 (footnotes omitted); see also Kwall, supra note 67, at 4 (arguing that state statutes and common law principles are ineffective protection for creators’ moral rights).
86. S. Rep. No. 100-352, at 10 (1988), 1998 U.S.C.C.A.N. 3706, 3715 (“Because existing U.S. law satisfies the requirements of Article 6bis of Berne, the committee has decided not to address the question of whether new provisions should be added to the Copyright Act or other statutes with respect to the author’s right of paternity or right of integrity. The committee believes that U.S. adherence to the Berne Convention, and satisfaction of U.S. obligations under that Convention, should not change current law on this subject.”).
Neither Berne adherence, nor the satisfaction of U.S. obligations under Berne, should be used by the courts as a justification either for expanding or reducing the recognition of [the rights of attribution and integrity] under U.S. law. . . . [T]he provisions of Berne itself may not be used as the basis for a decision in cases involving rights of paternity or integrity.
88. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2(1), 102 Stat. 2853. Congress was hesitant about leaving this question to the courts. S. Rep. No. 100-352 at 38, as reprinted in 1988 U.S.C.C.A.N. 3735. “The committee considers it advisable to include these declarations in the legislation in order to make it absolutely clear to the courts that any claim that Berne is self-executing should be rejected. Rights and responsibilities of authors, copyright owners, users or domestic law, are not under Berne itself.” Id.
Congress’s recognition of the need to protect architectural works was significant, Congress took an even bigger step forward when it recognized the need to protect certain moral rights of creators of “works of visual arts” and adopted the Visual Artists Rights Act of 1990 (VARA).  

While VARA provides some moral rights protection, it is extremely limited. First, VARA only applies to a “work of visual art,” which is narrowly defined and which excludes, among other works, literary and musical works. Second, even as to “works of visual art,” VARA only applies to the original work or up to two hundred signed and numbered copies of a painting, drawing, print, sculpture, or photographic image that is “produced for exhibition purposes only.” Third, VARA excludes from protection any works created under a work-made-for-hire arrangement. Finally, VARA allows for waiver of the rights of attribution and integrity.

The limited scope of VARA was tolerable because, at the time, other avenues existed to enforce the right of attribution, such as the Lanham Act and state misappropriation laws. Since that time, the Supreme Court seems to have foreclosed the possibility of a creator maintaining a federal cause of action for lack of attribution under the Lanham Act.  

91. See 17 U.S.C. § 106A (2000). When it considered VARA, Congress protested providing similar moral rights protections to creators who participate in a collaborative effort, such as a motion picture. H.R. Rep. No. 101-514 (1990), as reprinted in 1990 U.S.C.C.A.N. 6915, 6918–19. Congress was concerned about potential conflicts in the distribution and marketing of these works that might arise, especially given that these creators generally do not own the economic rights to their work because the works are created under a work-for-hire relationship. Id.
92. See 17 U.S.C. § 101 (2000). The statute includes as a “work of visual art” a “painting, drawing, print, or sculpture” and a “still photographic image produced for exhibition purposes only.” Id. The statute explicitly excludes from the definition of “work of visual art” the following:
(A)(I) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;
(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
(iii) any portion or part of any item described in clause (I) or (ii);
(B) any work made for hire; or
(C) Any work not subject to copyright protection under this title. Id.
93. See id.
94. Id.
95. Id. § 106A(e)(1). A creator must expressly agree to a waiver in a written instrument that he has signed. Id. Under a true moral rights scheme, waivers would not be recognized. Jane C. Ginsburg, The Right to Claim Authorship in U.S. Copyright and Trademarks Law, 41 HOUS. L. REV. 263, 300 (2004).
Act.\textsuperscript{98} In \textit{Dastar Corp. v. Twentieth Century Fox Film Corp.},\textsuperscript{99} the Court, relying on the dictionary definitions of “origin” and “goods,” held that the Lanham Act did not extend to protect the originator of ideas or communications from false attribution.\textsuperscript{100}

Although there may be, as one court has termed it, “glimmers” of moral rights recognition in the United States,\textsuperscript{101} these glimmers are sporadic and dim. Some courts have shown a willingness to consider creators’ rights and “favorably resolve questions about creators’ interests in attribution and artistic integrity.”\textsuperscript{102} However, Congress has not established an explicit moral rights provision, except in the limited area of the visual arts covered under VARA.\textsuperscript{103} Additionally, in \textit{Dastar}, the Court removed the possibility of trademark law as an avenue for creators to demand attribution for their works.\textsuperscript{104} In short, apart from VARA, no federal law prohibits misattribution or recognizes the creator’s right to attribution.\textsuperscript{105}

\textit{C. The Statutory Framework of Ownership}

As discussed, the focus on an incentive rationale for copyright can limit protection of a creator’s nonpecuniary rights. Current copyright law provisions can also fail to protect a creator’s pecuniary rights. This section examines the relevant statutory provisions concerning copyright ownership, transfer of ownership, and standing to sue as a backdrop for why a creator-assignee should have standing to sue for copyright infringement.

Congress protects the Copyright Clause’s “exclusive right” by granting five exclusive rights to copyright owners.\textsuperscript{106} The copyright owner has the exclusive right to reproduce and authorize reproduction of the work, to produce and authorize production of derivative works, to

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\textsuperscript{99} 539 U.S. 23 (2003).
\textsuperscript{100} Id. at 31–32. Lanham Act protection existed only for the source, that is, the producer of the goods sold in the marketplace. Id.
\textsuperscript{101} Seshadri v. Kasraian, 130 F.3d 798, 803 (7th Cir. 1997).
\textsuperscript{104} Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).
\textsuperscript{105} Greg Lastowka, \textit{The Trademark Function of Authorship}, 85 B.U. L. Rev. 1171, 1211 (2005) (“Yet contrary to the impression one might gain from reading the many judicial opinions that conflate copyright infringement with plagiarism, there is actually no law prohibiting plagiarism and misattribution generally.”).
\textsuperscript{106} 17 U.S.C. § 106 (2000). In contrast to the current statute, in the first copyright statute, Congress granted to authors “the sole right and liberty of printing, reprinting, publishing and vending [the copyrightable work].” Act of May 31, 1790, § 1, 1 Stat. 124.
\end{flushright}
distribute and authorize distribution of the work to the public by sale or other transfer of ownership, to perform or authorize performance of the work publicly, and to display or authorize display of the work publicly.\textsuperscript{107} The exercise of one of these exclusive rights without the permission of the owner of the particular right constitutes infringement.\textsuperscript{108}

This broad grant of exclusive rights is increased further through the current statute’s divisibility provisions.\textsuperscript{109} Under previous copyright statutes, the copyright interest was indivisible.\textsuperscript{110} The indivisibility doctrine served to protect alleged infringers from harassment from multiple suits charging infringement.\textsuperscript{111} However, under the all-or-nothing approach of indivisibility, the creator had no control over the use of his work if the copyright was held by someone else.\textsuperscript{112} To protect their interests, creators lobbied for divisible rights and were successful.\textsuperscript{113}

Because the exclusive rights are now divisible, the copyright owner can transfer\textsuperscript{114} any of the exclusive rights in whole or in part.\textsuperscript{115} The owner of any particular exclusive right, or any part of an exclusive right, is entitled to the protection and remedies provided in the copyright statute, including the right to bring an infringement action.\textsuperscript{116} The statute does not specify any minimal portion of the exclusive right that must be transferred in order to maintain an infringement action.\textsuperscript{117}

Given the broad range of rights, copyright ownership can be very valuable. Ownership “vests initially in the author or authors of the work.”\textsuperscript{118} However, one need not be the creator to be an “author.” While the Copyright Clause refers to an “exclusive right” granted to “[a]uthors,”\textsuperscript{119} the statute does not define the term “author.”\textsuperscript{120} Moreover,

\begin{footnotesize}
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\item \textsuperscript{107} 17 U.S.C. § 106 (2000).
\item \textsuperscript{108} Id. § 501(a).
\item \textsuperscript{110} Schechter & Thomas, supra note 28, at 106.
\item \textsuperscript{111} Craig Joyce et al., Copyright Law 313 (5th ed. 2000).
\item \textsuperscript{113} Id. (noting that the provision of divisibility of copyright had “long been sought by authors and their representatives” and had “attracted wide support from other groups”).
\item \textsuperscript{114} Copyright ownership can be transferred by “assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.” 17 U.S.C. § 101 (2000).
\item \textsuperscript{115} Id. § 201(d)(1). The “doctrine of indivisibility” generally was justified as necessary to protect alleged infringers from harassment from multiple suits charging infringement. Joyce et al., supra note 111.
\item \textsuperscript{116} 17 U.S.C. § 201(d)(2) (2000).
\item \textsuperscript{117} Id. § 201.
\item \textsuperscript{118} Id. § 201(a).
\item \textsuperscript{119} See U.S. CONST. art. I, § 8, cl. 8.
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few judicial decisions define "author." The Supreme Court has given a "general rule" definition of "author" as "the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection." This general rule—that an author is the party who creates the work—is subject to the "work made for hire" exception. The Supreme Court first recognized the principle of the work-made-for-hire doctrine in *Bleistein v. Donaldson Lithographing Co.* In *Bleistein,* the Court held that an employer owned the copyrights of advertisements that an employee created in the scope of employment. The Court stated the employer had the right to sue for infringement of the advertisements because the advertisements had "been produced by persons employed and paid by the plaintiffs in their establishment to make those very things." Congress adopted this expansive view of ownership and revised the statute to grant authorship status to an employer of a creator in work-made-for-hire relationship.

Congress viewed the work-made-for-hire provision as "one of the basic principles of the present law," and it included the provision in the 1976 overhaul of the copyright statute. The current statute provides two alternative definitions for a "work made for hire." First, a work is a work made for hire if it is "prepared by an employee within the scope of his or her employment." Second, a work is a work made for hire if it is "specially ordered or commissioned for use" as one of nine listed types of work "if the parties expressly agree in a written instrument signed by

120. See 17 U.S.C. § 101 (2000) ("Definitions" section of Copyright Act of 1976, which does not include definition for "author"). In 1836, the copyright statute began to refer to grants of copyright to "proprietors" as well as "authors." See Copyright Act of 1856, ch. 169, 11 Stat. 138.
123. Id.
124. 188 U.S. 239 (1903).
125. Id. at 248.
126. Id.
129. Id. The current statute provides:
(b) Works Made for Hire. - - In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.
130. Id. § 101.
131. Id.
them that the work shall be considered a work made for hire."132 Unless the creator and employer agree otherwise in writing, the employer owns the copyright of a work created in a work-made-for-hire relationship.133

III. STANDING TO SUE AND THE LEGAL RIGHT
GRANTED UNDER 17 U.S.C. § 501(b)

This Part begins with a brief overview of the constitutional requirements for standing and discusses the role of standing in private litigation. It continues with a review of the real party in interest requirements of Federal Rule of Civil Procedure 17(a). Finally, it concludes with a review of the copyright statute’s standing provision, 17 U.S.C. § 501(b).

A. The Constitutional Requirements and
Federal Rule of Civil Procedure 17(a)

While the doctrine of standing is generally more tied to “litigation asserting the illegality of governmental action,”134 any discussion of standing should begin with a review of the constitutional prerequisites.135 Standing is a threshold issue and is “the determination of whether a specific person is the proper party to bring a matter to the court for adjudication.”136 The standing doctrine derives from the Court’s interpretation of Article III,137 which limits the scope of federal judicial power to “cases” and “controversies.”138 The impetus behind the doctrine is efficiency. Because of various burdens on the court system, the doctrine serves to avoid unnecessary judicial decisions by limiting the class of plaintiffs allowed to bring a claim.139

The Supreme Court has recognized three constitutional prerequisites for standing: injury, causation, and redressability.140 First, the plaintiff must allege that he suffered an “injury in fact” that is “concrete and

132. Id. The nine named categories are “as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas.” Id.
133. Id. § 201(b).
135. Indeed, commentators have called it “misleading” to call the jurisprudence concerning who is allowed to bring a suit for copyright infringement a “standing” doctrine. See Roger D. Blair & Thomas F. Cotter, The Elusive Logic of Standing Doctrine in Intellectual Property Law, 74 TUL. L. REV. 1323, 1328 (2000).
136. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 60 (2002).
137. Id. at 62.
139. 13 WRIGHT, MILLER & COOPER, supra note 134, § 3531.3, at 407.
particularized” and “actual or imminent.”141 Second, the plaintiff must allege that such injury is “fairly traceable to the challenged action of the defendant.”142 Finally, the plaintiff must allege that the injury is likely to be redressed by a favorable decision.143 In a copyright infringement case, a plaintiff should be able to satisfy the constitutional requirements by alleging the defendant’s unauthorized use of one, or a part of one, of the exclusive rights of the copyright.144

Because copyright infringement cases generally involve private parties, the standing prerequisites are less demanding. This is because “[c]laims of private wrongdoing ordinarily are asserted by persons obviously having the enforceable interest.”145 In such private actions, standing to sue is normally resolved through defining the cause of action or identifying the real party in interest.146 Thus, the Article III requirement can be fulfilled “solely by virtue of statutes creating legal rights, the invasion of which creates standing.”147 In copyright law, the statute that defines the cause of action is 17 U.S.C. § 501(b).148

In addition to the standing requirement, the Federal Rules of Civil Procedure require that the plaintiff be the “real party in interest.”149 This rule provides as follows:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person’s own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.150

This requirement works to “identify the person who possesses the right sought to be enforced.”151 It serves claim preclusion purposes by preventing a defendant from being subject to subsequent similar actions

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141. Id. An injury is “particularized” if the defendant’s action has affected the plaintiff in a “personal and individual way.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992).
142. Laidlaw, 528 U.S. at 180.
143. Id. at 181.
145. 13 WRIGHT, MILLER & COOPER, supra note 134, § 3531, at 341.
146. Id. at 339.
147. Warth v. Seldin, 422 U.S. 490, 500 (1975) (citation omitted).
148. See discussion infra Part III.B.
149. FED. R. CIV. P. 17(a).
150. Id.
151. 6A WRIGHT, MILLER & KANE, supra note 24, at § 1542.
by someone not a party to the original litigation.\textsuperscript{152} While the real party in interest requirement is mandatory, courts have construed it liberally.\textsuperscript{153} To satisfy the requirement, the plaintiff must be the person “who, according to the governing substantive law, is entitled to enforce the right.”\textsuperscript{154} In a copyright infringement action, 17 U.S.C. § 501(b) provides that a “legal or beneficial owner” possesses the enforceable right.

Thus, in copyright infringement cases, the standing and real party in interest requirements are essentially conflated. Both inquiries are concerned with whether a plaintiff has sufficient interest in the action,\textsuperscript{155} and both inquiries are answered by the same underlying provision, 17 U.S.C. § 501(b).

B. The Requirements of 17 U.S.C. § 501(b)

While the 1909 Act allowed only the “proprietor” of a copyright to sue for infringement,\textsuperscript{156} the current copyright statute has expanded the class of plaintiffs. The current copyright act does not use the term “proprietor.” Rather, Congress chose the term “legal or beneficial owner” to establish who could maintain an infringement action.\textsuperscript{157} The statute does not define “beneficial owner.”\textsuperscript{158} The only guidance Congress provided

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\item 152. Pacific Coast Agric. Exp. Ass’n v. Sunkist Growers, Inc., 526 F.2d 1196, 1208 (9th Cir. 1975).
\item 153. 6A \textsc{Wright, Miller & Kane, supra} note 24, at § 1541.
\item 154. \textit{id.} at § 1543.
\item 155. 13 \textsc{Wright, Miller & Cooper, supra} note 134 (standing); 6A \textsc{Wright, Miller & Kane, supra} note 24 (real party in interest). Of course, there are differences. Standing is a limit on the court’s subject matter jurisdiction and, unlike the real party in interest requirement, cannot be waived. \textit{id.}
\item 156. Copyright Act of 1909, ch. 320, 35 Stat. 1075. “If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable . . . to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement . . . .” 17 U.S.C. § 101(b) (1909). A proprietor could include an exclusive licensee. \textit{See, e.g.,} Field v. True Comics, Inc., 89 F. Supp. 611 (D.N.Y. 1950). In interpreting the 1909 Act, the courts also allowed an exclusive licensee and an assignee to sue; however, an exclusive licensee was required to join the copyright owner. Nathan v. Monthly Review Press, Inc., 309 F. Supp. 130 (S.D.N.Y. 1969). Because of the indivisibility doctrine, to be an assignee, one had to receive all of the rights in the copyright. \textit{id.}
\item 157. 17 U.S.C. § 501(b) (2000). This section provides in full:
The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.
\end{enumerate}
for whom would be considered a “beneficial owner” lies in the legislative history.159 According to Congress, a “beneficial owner” would “include, for example, an author who had parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees.”160

Even though Congress provided only an example of whom might be a beneficial owner, the courts have limited the class of beneficial owners to this example. Courts have tied the concept of beneficial ownership to whether the plaintiff has an economic interest in the copyright. For example, in Cortner v. Israel,161 the composers of the theme to ABC’s Monday Night Football assigned the copyright title to ABC in exchange for royalties.162 Because the parties anticipated that ABC would use the theme and would be obligated to pay royalties to the composers, the court found the parties had an equitable trust relationship.163 Due to this equitable trust relationship, the court held that the composers were “beneficial owners” of the copyright with standing to sue for infringement.164

Courts have not strayed from the equitable trust notion of beneficial ownership and have refused to expand beneficial ownership to creators engaged in a work-made-for-hire relationship unless they have a royalty arrangement, separate from their compensation, with the copyright owner. For example, in Moran v. London Records, Ltd., Larry Moran, a professional commercial announcer, brought an infringement action against the musical group Bronski Beat.165 Moran alleged that Bronski Beat incorporated Moran’s recorded performance from a Kibbles ‘N Bits dog food commercial into one of the band’s songs without Moran’s permission.166 While Moran’s contract to create the commercial recording transferred the copyright to his employer, Moran had retained the right to require his employer to bargain and agree with him before allowing another use of the recording.167 Moran argued this retained right made him

160. Id.
161. 732 F.2d 267 (2d Cir. 1984).
162. Id. at 269.
163. Id. at 271.
164. Id. The court was unclear as to whether the 1909 Act or 1976 Act applied to the case. Id. However, the court believed this was immaterial because the 1976 Act “merely codified the case law that had developed under the 1909 Act with respect to the beneficial owner’s standing to sue.” Id. See also Kamakazi Music Corp. v. Robbins Music Corp., 534 F. Supp. 69 (S.D.N.Y. 1982) (songwriter who transferred copyright to music company in exchange for royalties is the beneficial owner).
165. 827 F.2d 180 (7th Cir. 1987).
166. Id. at 181–82.
167. Id. at 181.
a beneficial owner of the copyright.\textsuperscript{168} The court disagreed, basing its
decision on the lack of any case law granting beneficial ownership to a
creator in a work-made-for-hire relationship and the royalty example
provided in the legislative history on beneficial ownership.\textsuperscript{169}

The Ninth Circuit Court of Appeals reached a similar result in
\textit{Warren v. Fox Family Worldwide, Inc.}\textsuperscript{170} In that case, Richard Warren
contracted to compose music for the television series \textit{Remington Steele}.\textsuperscript{171} Under his contract, Warren created the music in exchange for royalty payments representing a percentage of the sales of the broadcast rights.\textsuperscript{172} After finding that the agreement created a work-made-for-hire relationship,\textsuperscript{173} the court held that Warren was not a beneficial owner.\textsuperscript{174} The court relied on the reasoning in \textit{Moran} and the work-made-for-hire provisions.\textsuperscript{175} Specifically, the court noted that a work-made-for-hire relationship did not result in an assignment of ownership to the employer, but an initial vesting of ownership in the employer.\textsuperscript{176} Furthermore, the presence of a royalty arrangement as part of the agreement, "absent an express contractual provision to the contrary," did not create beneficial ownership.\textsuperscript{177} Therefore, absent an express provision granting beneficial ownership to creators, a creator in a work-made-for-hire relationship cannot rely on beneficial ownership to create standing.

\section*{IV. THE ASSIGNEE'S STANDING TO SU\textit{E} IN COPYRIGHT LAW}

Before asserting that a creator-assignee should have standing to sue for copyright infringement, a review of the general rules of assignee standing in copyright law is essential. This section begins with a review of those general rules and then discusses creator-assignee standing using the recent case \textit{Silvers v. Sony Pictures Entertainment, Inc.}\textsuperscript{178}

\begin{itemize}
\item \textsuperscript{168} \textit{Id}. at 182.
\item \textsuperscript{169} \textit{Id}. at 183. According to the court, Given that no case has held an employee in a work made for hire situation to be a beneficial owner, and that Congress merely intended to codify the existing case law, \ldots the fact that Congress did give only the assignment example supports the conclusion that Congress did not intend to extend the concept of beneficial ownership to include an employee in a work made for hire arrangement.
\item \textit{Id}.
\item \textsuperscript{170} 328 F.3d 1136 (9th Cir. 2003).
\item \textsuperscript{171} \textit{Id}. at 1138.
\item \textsuperscript{172} \textit{Id}.
\item \textsuperscript{173} \textit{Id}. at 1140-43.
\item \textsuperscript{174} \textit{Id}. at 1145.
\item \textsuperscript{175} \textit{Id}. at 1144.
\item \textsuperscript{176} \textit{Id}. at 1145.
\item \textsuperscript{177} \textit{Id}.
\item \textsuperscript{178} 402 F.3d 881 (9th Cir. 2005).
\end{itemize}
Courts have generally decided whether an assignee of an accrued cause of action has standing to sue based upon the timing of the assignment. The rule is that only an assignor has standing to sue for infringement that occurred prior to the assignment. However, this rule can be overcome if the right to bring a prior-accrued infringement action is expressly included in the assignment. Additionally, at least one district court has held that an assignment of copyright includes the assignment of any accrued causes of action even in the absence of an express provision regarding the accrued cause of action.

In a case arising under the 1909 Act, *Prather v. Neva Paperbacks, Inc.*, the court granted an assignee standing to sue for infringement that occurred prior to the assignment because the assignment clearly conveyed any accrued causes of action. The assignment provided, “This assignment includes . . . any and all causes of action that may have heretofore accrued in [assignor’s] favor for infringement of said copyright.” In granting standing, the court relied on the clear and precise terms of the assignment, the lack of public policy prohibiting the assignment, and the assignee’s satisfaction of the real party in interest requirements.

The *Prather* court’s holding is significant for several reasons. As discussed, the court did not tie standing to whether the assignee owned any interest in the copyright at the time of the infringement. Further, the court allowed standing even though the copyright owner retained an exclusive license and the case arose under the 1909 Copyright Act. Given the indivisibility provisions of the prior Act and the Act’s requirement that the “proprietor” bring any infringement action, the copyright owner’s retention of an exclusive license should have defeated standing.

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182. 410 F.2d 698 (5th Cir. 1969).
183. Id. at 699 n.1.
184. Id. at 700; see also *ABKCO Music*, 944 F.2d at 980–81 (assignee has standing to bring actions for infringement committed while it was copyright owner and actions for infringements that had been committed before and after transfer of ownership because assignment was express purchase of those rights).
186. *Id.* (because the assignee received assignment of “all choses in action for infringement,” assignee had standing).
The Ninth Circuit recently confronted the issue of whether a creator who receives an assignment of an accrued cause of action without receiving an assignment of any other ownership interest has standing to sue. In *Silvers v. Sony Pictures Entertainment, Inc.* 188 a case of first impression, Nancey Silvers, the screenplay writer for *The Other Woman*, a made-for-television movie, brought an infringement action against Sony Pictures Entertainment. 189 Silvers alleged that Sony’s movie, *Stepmom*, was substantially similar to *The Other Woman*. 190 Silvers had created the screenplay for *The Other Woman* in a work-for-hire relationship. 191 After the alleged infringement, Silvers obtained from her employer an “Assignment of Claims and Causes of Action” that assigned to her “all right, title and interest in and to any claims and causes of action against Sony Pictures Entertainment, Inc., Columbia Tri-Star and any other appropriate persons or entities with respect to the screenplay ‘The Other Woman’ . . . and the motion picture ‘Stepmom.’ ” 192 The assignment did not include any other interest in the copyright. 193

When Silvers brought an action for infringement against Sony, Sony moved to dismiss the action, arguing that Silvers did not have standing. 194 Sony argued that an ownership interest in the copyright was required for standing and that receipt of an assignment of an accrued cause of action for infringement did not vest any ownership interest in the assignee. 195 Although the district court and circuit court panel denied Sony’s motion to dismiss, 196 the Ninth Circuit voted to review the case *en banc* 197 and subsequently reversed. 198 The court held that Silvers did

188. *Id.*
189. *Id.* at 883.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*

196. *Silvers v. Sony Pictures Entm’t, Inc.*, 330 F.3d 1204 (9th Cir. 2003). The panel based its decision on the terms of the assignment; the language of § 501(b); the lack of any prohibition against assignment of causes of action in the copyright statute; the doctrine of divisibility; and the lack of any potential that Sony would be subject to multiple suits. *Id.* at 1206. First, the court noted that the assignment to Ms. Silvers was in clear and precise terms. *Id.* at 1207. Second, the court stated that the language of § 501(b) did not limit the class of plaintiffs in infringement actions only to legal or beneficial owners. *Id.* at 1208. Rather, the court noted that the language of § 501(b) merely indicates that the right accrues, it does not prohibit an assignment of the accrued cause of action. *Id.* Third, the court reasoned that the accrued cause of action was just one of the rights in the bundle of copyright ownership that was divisible and could be owned separately. *Id.* Finally, the court opined that because the assignment included any and all causes of action for infringement, Sony should not be subject to subsequent suits regarding the same claim of infringement. *Id.* at 1209.

not have standing to sue because she did not have an ownership interest in the copyright at the time she filed the lawsuit. 199

The Silvers majority based its ruling on what it perceived to be the unambiguous language of § 501(b), the temporal requirement in § 501(b), and on application of the canon of statutory construction of *expressio unius est exclusio alterius.* 200 First, the court stated that the language of § 501(b) was clear. The statute granted standing to only legal or beneficial owners of one of the exclusive rights (or a divisible part of one of the exclusive rights). 201 Second, the court construed a temporal requirement in the statute, that is, the legal or beneficial owner had to own the copyright at the time of the alleged infringement in order to have standing. 202 Finally, reviewing the exclusive rights enumerated in § 106, the court asserted that the list was exhaustive and the right to bring an action for infringement was not one of the listed rights. 203

Although the majority believed the statutory mandate was clear, it looked outside the statute to bolster its holding. The majority dismissed the idea that a cause of action was separately assignable because of the divisibility doctrine. 204 According to the majority, such a rule was contrary to the legislative intent because it believed Congress intended that only owners of an exclusive right could bring suit. 205 Under the majority's view, an accrued cause of action is not a divisible part of any of the exclusive rights. Furthermore, because of the "strong connection" between copyright and patent law, the court adopted the patent law principle that a bare assignment could not give rise to a patent infringement cause of action. 206

Under the majority's rule, the class of potential plaintiffs permitted to bring a claim for copyright infringement would be limited to parties

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199. Id.
200. Id. at 883–87. The canon of *expressio unius est exclusio alterius* creates a presumption that "when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions." Id. at 885 (quoting Boudette v. Barnett, 923 F.2d 754, 756–57 (9th Cir. 1991)).
201. Id. at 884.
202. Id. at 885.
203. Id. at 886–87. If a right is not "specified," then it is not one of the exclusive rights granted by Congress. Id. at 887 (citing H.R. REP. NO. 94-1476, at 61 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5674).
204. Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 890 (9th Cir. 2005).
205. Id. "Although Congress allowed for divisibility of *ownership* interests under a copyright, it did not alter the requirement that *only owners* of an exclusive right in the copyright could bring suit." Id. at 886.
206. Id. at 887–88 (discussing Crown Die & Tool Co. v. Nye Tool & Machine Works, 261 U.S. 24, 26, 33–35 (1923)). However, at least one commentator has noted that copyright standing rules, since the adoption of the 1976 Act and its divisibility doctrine, allow "option[s] that appear to be impossible in patent law." Blair & Cotter, supra note 135, at 1369.
with an ownership interest in one of the exclusive rights. Under this rule, a creator who owns an assignment of an accrued claim of copyright infringement involving his own work cannot rely on that assignment to grant him standing. Rather, the creator must obtain an express agreement from his employer abrogating the work-made-for-hire relationship and granting the creator ownership of the copyright or one of the exclusive rights as well as the accrued cause of action.

The majority’s reversal of the panel decision was met with two strong dissenting opinions in which four judges objected to the majority’s construction of the statute and its adoption of patent law principles. Additionally, the dissenters discredited the majority’s assertion that a simple reading of § 501(b) resolved the issue because assignment of an infringement cause of action was not addressed in the statute. The dissenters also disagreed with the majority’s reliance on patent law given the doctrinal differences—in particular divisibility of ownership—in these two areas. While both dissenting opinions agreed that the majority’s reliance on the plain meaning of the statutory language and reliance on principles of patent law were misplaced, the two opinions diverged on how far the standing doctrine should be extended. One opinion asserted that any assignee of an accrued cause of action for copyright infringement should be allowed standing, while the other suggested allowing standing for creator-assignees only.

V. A Creator-Acassignee of an Accrued Cause of Action for Copyright Infringement Should Have Standing to Sue

Contrary to the court’s holding in Silvers, a creator-assignee should have standing to sue. This Part presents three arguments to support granting standing to a creator-assignee. First, a creator-assignee should have standing to sue because the legislative intent and statutory language encourage divisibility and alienability of the exclusive rights of copyright. Second, a creator-assignee satisfies the standing and real party in interest prerequisites. Finally, allowing a creator-assignee standing to sue

207. Silvers, 402 F.3d at 890–96, 911.
208. Id. at 894–95, 903–05.
209. Id. at 891, 896.
210. Id. at 894–95, 903–05.
211. Id. at 891 (Berzon, J., dissenting) According to Judge Berzon, I part company with Judge Bea, however, at the point at which he suggests that an entirely free market for accrued causes of action in copyright is the proper antidote to the majority’s preclusion of effective transfer of such accrued causes of action . . . . Instead, I would hold that Silvers, given her status as the original creator of the contested “work-for-hire,” may pursue the accrued claims assigned by Frank & Bob Films, while a complete stranger to the creative process could not.

Id.
advances the economic and non-economic rationales underlying the constitutional goal of copyright protection.

A. Congress Intended the Exclusive Rights of Copyright to be Completely Divisible and Alienable

Allowing a creator-assignee standing to sue effectuates Congress’s intent. First, the statutory language is clear: Congress intended for the exclusive rights of copyright to be fully divisible and transferable. Second, the divisibility doctrine was designed to benefit creators. Third, congressional silence regarding prohibitions on assignability of accrued claims implies support for such a rule. This is particularly true given that courts have treated an assignment of the accrued cause of action as a separate stick in the bundle of rights. Finally, the Silvers court’s reliance on patent law is misplaced.

First, a reading of the plain language of the Copyright Act shows that the exclusive rights of copyright are completely divisible and alienable. In contrast to the 1909 Act, the current Act allows for divisibility of the rights without limitation. The language regarding transfer and divisibility of copyright ownership is plain:

(d) Transfer of Ownership.—

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . . .

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

Thus, a copyright owner is free to transfer any part of any of the exclusive rights. Preventing a copyright owner from transferring an accrued cause of action frustrates the owner’s statutory right to freely contract for transfer of his rights.

Second, the divisibility doctrine serves to protect the bargaining power of creators. Creators fought for divisibility of ownership to

212. See discussion supra Part II.C.
213. See discussion supra Part II.C.
allow more control over the use of their works.\textsuperscript{216} Generally, creators suffer from unequal bargaining power because “aspiring authors are generally impecunious and legally unsophisticated” compared to the “established industry players” who are “secure veterans of the process.”\textsuperscript{217} If the positions of the parties change, then the creator should not be denied the opportunity to purchase any portion of the exclusive rights. If a copyright owner wishes not to pursue a suit for infringement, then the creator, who has annexed a fragment of her world, should be allowed to pursue such an action by purchasing an assignment of the cause of action. If courts allow a creator to purchase the accrued cause of action and grant standing to the creator-assignee, the policy behind the divisibility doctrine is served.

Third, congressional silence may imply that Congress intended for creator-assignees to have standing to sue. Nothing in the current copyright statute forbids assignment of the accrued cause of action.\textsuperscript{218} Ironically, the only restriction on alienability in the copyright statute is contained in VARA’s restriction on transfers and waivers of the rights of attribution and integrity granted to creators of works of visual art.\textsuperscript{219} Congress unequivocally intended that the exclusive rights be completely divisible and alienable.\textsuperscript{220} Because Congress provided no limit on divisibility and transferability of the exclusive rights, courts should not read an exception into the statute.

Finally, as the dissenters in Silvers noted, it is erroneous to import the standing requirement of patent law into copyright law.\textsuperscript{221} Although the Supreme Court has previously applied patent provisions to copyright law, it only has done so when addressing issues concerning the adequate protection of the limited-term monopolies granted through patent and copyright.\textsuperscript{222} Because “there are substantial differences between the patent and copyright laws,”\textsuperscript{223} the Silvers majority’s reliance on patent law is flawed. This is especially true in the standing inquiry. In patent law, the owner of the patent is an indispensable party to an infringement

\textsuperscript{216} See supra text accompanying notes 112–113.
\textsuperscript{217} See Lastowka, supra note 105, at 1217. However, Lastowka argues that the unequal bargaining relationship between creators and the publishers and distributors of works is a reason not to recognize a right of attribution via copyright law. \textit{id}. at 1217–18.
\textsuperscript{218} See Silvers v. Sony Pictures Entm’t, 402 F.3d 881, 902 (9th Cir. 2005) (Bea, J. dissenting).
\textsuperscript{220} See supra text accompanying note 113.
\textsuperscript{221} Silvers, 402 F.3d at 894–95 (Berzon, J. dissenting); \textit{id}. at 904–05 (Bea, J. dissenting).
\textsuperscript{222} See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984) (adopting the patent law’s staple article of commerce doctrine to analyze whether consumers’ use of Betamax equipment constituted contributory infringement).
\textsuperscript{223} \textit{id}.
suit.\textsuperscript{224} Additionally, courts have interpreted patent law to recognize a prudential limitation that an exclusive licensee who does not have all of the substantial patent rights has standing only if the licensee meets the Article III requirements (injury, causation, and redressability) and the licensee sues "in the name of, and jointly with, the patent owner."\textsuperscript{225} These provisions exist because of the concern for potential multiplicity of suits. By contrast, copyright law expressly addresses the potential for multiplicity of suits through joinder and notice requirements.\textsuperscript{226} Third, copyright law recognizes the doctrine of divisibility while patent law does not.\textsuperscript{227} Finally, as a practical matter, in infringement cases, copyrights are invalidated less frequently than patents are—over half of all patents are invalidated in litigation.\textsuperscript{228} Because of these differences, the rules for standing to bring a claim for patent infringement are, and should be, more stringent.

In sum, Congress provided for unlimited divisibility of the exclusive rights of copyright. Not allowing a creator to contract with the copyright owner for an assignment of an accrued cause of action subverts the clear language of the statute and the policies underlying the divisibility doctrine.

\textbf{B. The Creator-Assigned Satisfies the Standing and Real Party in Interest Requirements}

While the infringement action is freely transferable under the statute, it is doubtful that every potential assignee of the cause of action would satisfy the standing and real party in interest prerequisites to bring a suit. However, a creator-assigned would satisfy these prerequisites for four reasons. First, the creator-assigned would satisfy the constitutional requirements for standing. Second, the creator-assigned would qualify as a legal owner thereby fulfilling the statutory standing requirements. Third, limiting standing to a creator-assigned, as opposed to an assignee with no tie to the subject work, addresses the efficiency concerns

\begin{itemize}
\item \textsuperscript{224} Indep. Wireless Tel. Co. v. Radio Corp. of Am., 269 U.S. 459, 468 (1926).
\item \textsuperscript{225} Intellectual Prop. Dev., Inc. v. TCI Cablevision of Cal., Inc., 248 F.3d 1333, 1348 (Fed. Cir. 2001). The court has recognized an exception. Id. When the patent owner is the alleged infringer, then the licensee is not required to sue in the name of the patentee. Id.
\item \textsuperscript{226} 17 U.S.C. § 501(b) (2000) provides, in part:
The court may require [the legal or beneficial] owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.
\item \textsuperscript{227} See id. § 201(d).
\item \textsuperscript{228} Blair & Cotter, supra note 135, at 1381.
\end{itemize}
underlying the standing doctrine. Finally, a creator-assignee meets the procedural requirements to be a real party in interest.

The creator-assignee satisfies the constitutional requirements for standing. The constitutional requirements are injury, causation, and redressability. The alleged infringement would cause the creator-assignee to suffer an injury in fact. The infringer’s unauthorized use of one of, or a part of, the exclusive rights of copyright may damage the creator-assignee’s finances or reputation. Because the creator-assignee is denied credit for her work, her professional reputation is damaged. Additionally, by being denied the opportunity to claim the infringing work as her own, the creator-assignee may lose opportunities for future work. Furthermore, if sales of the creator-assignee’s work are diminished due to the infringing work, she would suffer financial damage. These scenarios represent just a few of the possible injuries a creator-assignee may suffer due to infringement.

The creator-assignee should also be able to satisfy the causation and redressability prongs. To establish causation, the creator-assignee would need to tie the financial and reputation damage to infringement. Based on the injury suffered, the creator-assignee would need to seek the appropriate remedy. Copyright law provides several revenue avenues including injunctive relief, actual damages consisting of lost profits on sales or lost royalties, statutory damages, and impounding and destruction of infringing articles. A creator-assignee would need to tailor the remedy sought to her alleged injury. For example, if the creator-assignee created the work in a work-made-for-hire position and was paid for her work through a royalty arrangement (e.g., the creator in Warren), then the creator should be able to maintain an infringement action and seek lost royalties.

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229. See supra text accompanying notes 140–44.
230. In a patent case, the Federal Circuit opined that the reputational value might satisfy the Article III requirement of injury. Chou v. Univ. of Chi., 254 F.3d 1347, 1359 (Fed. Cir. 2001) Reputational interest alone may be sufficient to satisfy the requirements of Article III standing. That assertion is not implausible. After all, being considered an inventor of important subject matter is a mark of success in one's field, comparable to being an author of an important scientific paper. Pecuniary consequences may well flow from being designated as an inventor.

Id.

232. Id. § 504(b).
233. Id.
234. Id. § 504(c).
235. Id. § 503(a).
236. See discussion supra Part III.B.
Furthermore, the creator-assignee should satisfy the statutory standing provisions. Under 17 U.S.C. § 501(b), a “legal or beneficial owner” is entitled to bring an action for infringement. Because the exclusive rights are freely divisible and an accrued cause of action can be a part of one of the rights, the statutory standing requirements are eased. An assignee of an accrued cause of action would satisfy the requirements of § 501(b). Reading the divisibility and standing provisions together, a creator-assignee should have standing under the statute.

While Congress expanded the class of plaintiffs, limiting standing to only creator-assignees addresses the efficiency concerns underlying the standing doctrine. Considerable debate exists on how restrictive standing to sue should be. Proponents of a liberalized standing doctrine argue that it would “lead to a fuller exposition of all issues,” while those arguing for a more restrictive standing doctrine assert efficiency concerns. By limiting judicial review to cases brought by parties with more than just an ideological stake in the outcome, standing promotes judicial efficiency by reducing judicial workloads and eliminating the potential for unnecessary decisions that might make bad law.

In every case a range of potential plaintiffs exists, from a Hohfeldian plaintiff to a private attorney general. The Hohfeldian plaintiff “has the personal and proprietary interest of the traditional plaintiff.” In contrast to the Hohfeldian plaintiff, a private attorney general seeks to enforce the public interest, not his own interest. Because the creator’s personality marks her work, a creator whose work has been infringed should have the necessary personal and proprietary interest of a Hohfeldian plaintiff. Conversely, a mere purchaser of an accrued cause of action who had no other ties to the underlying work

238. See supra text accompanying notes 109–13, 182–86.
239. 6A WRIGHT, MILLER & KANE, supra note 24, § 1547 (The 1976 Act “greatly eases standing to sue and real party in interest problems in copyright cases by allowing the transfer in whole or in part of an exclusive right and then according the owners of any such rights all the remedies provided for under the Act.”).
241. Id. at 2.
242. See id. at 21 (“[I]f the standing rule allows court access to non-injured parties or parties subject only to injuries from value effects, the rights system that results will be one that creates externalities, closes markets, acts to prevent the elimination of inefficiencies, and reduces aggregate welfare.”).
243. Id. at 6.
244. Id. (quoting Flast v. Cohen, 392 U.S. 83, 119 n.5 (1968) (Harlan, J. dissenting)).
245. Id.; see also Silvers v. Sony Pictures Entm’t, Inc., 402 F.3d 881, 893–94 (9th Cir. 2005) (“Silvers has a significant interest in the infringement as she was the original creator.”).
would be similar to a private attorney general. Such an assignee would not possess sufficient personal stake in the case and should be denied standing.

Finally, the creator-assignee would satisfy the real party in interest requirement. To qualify as a real party in interest, the plaintiff must be the person "who, according to the governing substantive law, is entitled to enforce the right."\(^{246}\) In a copyright infringement action, the governing substantive law, § 501(b), provides that a "legal or beneficial owner" possesses the right to have the copyright enforced.\(^{247}\) Because the exclusive rights are freely divisible and transferable, the real party in interest inquiry, like the statutory standing inquiry, is straightforward and nets the same result.\(^{248}\) A creator-assignee as owner of a divisible part of one of the exclusive rights meets the requirements of § 501(b).\(^ {249}\)

Thus, in copyright infringement cases, the standing and real party in interest requirements are essentially conflated. Both inquiries are concerned with whether a plaintiff has sufficient interest in the action,\(^ {250}\) and both inquiries are answered by the same underlying statute.

**C. Allowing a Creator-Assignee Standing to Sue Advances Constitutional Goals**

Not only does granting standing to a creator-assignee conform with the statute and satisfy the standing and real party in interest requirements, but it also advances constitutional goals. Copyright law exists to fulfill two constitutional goals: promoting progress and protecting a creator's rights.\(^ {251}\) Allowing a creator-assignee standing to sue would fulfill these constitutional goals without undermining the economic and non-economic justifications behind these goals.

To promote progress, copyright law exists, in part, to incentivize the creation of new works through the grant of proprietary rights.\(^ {252}\) Even the current Court's view of copyright primarily as economic regulation\(^ {253}\) implicitly acknowledges the need for a certain degree of financial

\(^{246}\) 6A WRIGHT, MILLER & KANE, supra note 24, § 1543.


\(^{248}\) See supra text accompanying notes 149–155.

\(^{249}\) See supra text accompanying notes 237–239.


\(^{251}\) See discussion supra Part II.B.

\(^{252}\) See discussion supra Part II.B.1. The incentive rationale overlooks the fact that many creators would and do create, even in the absence of incentives.

\(^{253}\) Ruth L. Okediji, Through the Years: The Supreme Court and the Copyright Clause, 30 WM. MITCHELL L. REV. 1633, 1638 (2004).
The law of copyright infringe the right of attribution. The United States has joined the Berne Convention primarily for the sake of moral leadership in the world copyright community. Yet by
its minimalist approach, the United States leaves itself open to the charge that it is failing to comply with some very important Berne provisions. Prudential behavior dictates that, in order to reap the benefits that flow from appearing to be moral, the U.S. must undertake activities that will be perceived as moral.262

The United States has a good faith duty to honor its treaty commitments. If we ignore the requirements of the Berne Convention, it would be hypocritical to fault any other country for doing the same. Unfortunately, whether the United States has taken steps sufficient to be perceived as moral is questionable.

It was a “stretch” to say U.S. laws complied with the Berne Convention when the United States adopted the BCIA and joined the Berne Convention.263 The Berne Convention requires protection of creators’ rights of attribution and integrity even after the creator transfers ownership of his work.264 However, at the time the United States joined the Berne Convention, copyright law did not protect these rights, but a congressional commission assured Congress that other legal provisions, such as federal trademark law, did.265 In any event, to help harmonize U.S. law with the laws of other Berne countries, Congress adopted VARA,266 which provides limited moral rights protection.267

While using trademark law to pursue violations of the creator’s attribution right may not have been the best alternative, prior to the Court’s decision in Dastar Corp. v. Twentieth Century Fox Film Corp.,268 it did afford creators some protection.269 The Dastar decision and the lower courts’ decisions after Dastar have removed this option. In Dastar, the Court overlooked any issues regarding Berne compliance270 and eliminated the possibility of trademark law as an avenue for creators to demand attribution for their works.271 While the work that was the subject of the claim in Dastar had fallen into the public domain, subsequent

262. 3 NIMMER & NIMMER, supra note 9, § 8D.02[D][2] (emphasis in the original) (footnotes omitted).
263. See Nimmer, supra note 70, at 20.
264. Berne Convention, supra note 9, at art. 6bis.
265. Nimmer, supra note 70, at 20; see discussion supra Part II.B.2.b.
266. See H.R. REP. NO. 101-514, tit. III (1990), as reprinted in 1990 U.S.C.C.A.N. 6915, 6920 (The purpose of VARA was to bring United States law “into greater harmony with laws of other Berne countries. . . . Enactment of moral rights legislation serves another important Berne objective—that of harmonizing national copyright laws.”).
267. See discussion supra Part II.B.2.c.
269. See discussion supra Part II.B.2.b.
270. See Schaumann, supra note 260, at 1631 (in Dastar, the “Court was willing . . . to overlook international [Berne] issues.”).
271. Id. at 1630.
courts have expanded *Dastar* to cover copyrighted works. In fact, lower courts have seized upon the language in *Dastar* to find that trademark law is no longer a viable option for redress of attribution claims.\(^{272}\) The effect of *Dastar* has been to license plagiarism.

Despite the adoption of VARA, given the result in *Dastar*, U.S. compliance with the Berne Convention is still questionable.\(^{273}\) With the exception of VARA, no federal law prohibits misattribution and recognizes the creator’s right to attribution.\(^{274}\) Furthermore, both the Court and commentators\(^{276}\) have viewed the VARA limitations as evidence that Congress intended no other moral rights protection.

While adoption of a right of attribution would benefit creators and honor our treaty obligations, it could also be problematic. Adoption of a right of attribution would acknowledge the creator’s value in society and serve to provide an incentive for the creation of new works.\(^{277}\)

However, the main issue to resolve in formulating such a right would be the scope of it. What amount of contribution to a work is required for the right to arise? Trying to craft a law that incorporates every credit requirement necessary would be extremely difficult.\(^{278}\) Would such a right apply in the work-made-for-hire situation?\(^{279}\) Under a true moral rights scheme, the creator would be recognized as the author


\(^{273}\) See discussion supra Part II.B.2.b. Some commentators have argued that the United States may no longer be in compliance with the Berne Convention. See Fries & Remington, supra note 97, at 70; Ginsburg, supra note 95.

\(^{274}\) Lastowka, supra note 105, at 1211.

\(^{275}\) The Court noted that because VARA contained the only recognized right of attribution, no right of attribution existed under other legal schemes. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 35 (2003) ("Recognizing in § 43(a) a cause of action for misrepresentation of authorship of noncopyrighted works (visual or otherwise) would render these limitations superfluous.").

\(^{276}\) See, e.g., Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 407 (2006) (Exclusion of other works of art from moral rights "invites the argument that since Congress intended to limit moral rights protection to a small subset of authors and works, it must have intended not to provide such protection to authors and works not covered by the statute."). See also Ginsburg, supra note 95, at 268 (Court "may have disqualified authors from pleading the trademark act’s prohibition on false designation of origin to support a claim to attribution of authorship status.").


\(^{278}\) Nimmer, supra note 70, at 63.

\(^{279}\) Difficulties in resolving this question prevented Congress from providing moral rights protection to creators who participated in collaborative works. See supra note 91.
regardless of whether a work-made-for-hire relationship was formed. Additionally, such a law will lead to more litigation, and given the litigious nature of the United States, may be "nothing less than a formula for an explosion of dubious claims." Given these concerns, it is doubtful that Congress will expand copyright law to provide for a general right of attribution. Therefore, another method is required to fulfill the constitutional goal of protecting a creator’s interests.

Because no right of attribution exists, nor is ever likely to, creators must resort to other legal theories and maneuvers to protect their rights. One such method is to allow a creator to bargain with the copyright owner for an assignment of the infringement claim and granting the creator-assignee standing to pursue the claim. While courts have prohibited assignments of causes of action, most courts have done so only in two types of claims—personal injury and malpractice—because of concerns regarding champerty and the plaintiff’s lack of a personal stake. Because the creator-assignee is directly tied to the work that is the subject of the infringement action, these concerns are nonexistent.

VI. CONCLUSION

Copyright law has evolved tremendously from its colonial and constitutional beginnings. A system that once included protection of creators’ interests now focuses on an owner’s control. Somehow the constitutional goal of protecting a creator’s rights in her work has been lost. The decision in Silvers v. Sony Pictures Entertainment, Inc. is just another example of the law’s flagrant disregard of a creator’s interest in her work, even a creator’s financial interest.

When it became a signatory to the Berne Convention, the United States agreed to protect creators’ attribution and integrity interests. The United States has yet to fulfill this obligation by enacting comprehensive moral rights legislation. Current copyright law provides little protection of these interests; rather, the law is designed to protect pecuniary interests. To what extent, then, should a creator’s interests be protected?

Many times the creator may not be the owner of the copyright. Absent a written agreement otherwise, authorship, and hence, ownership

282. Champerty is defined as "an agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant’s claim as consideration for receiving part of any judgment proceeds." BLACK’S LAW DICTIONARY 246 (8th ed. 2004).
of copyright vests in an employer under the work-made-for-hire doctrine. Even if the creator does not own the copyright, if the creator is injured through another's infringement of her work, a creator should be able to seek redress. To do this, the creator should be allowed to negotiate with the copyright owner (usually her employer) to receive an assignment of the cause of action. The copyright statute permits this through its divisibility provisions. Nowhere in the statute are assignments of causes of action prohibited. If the creator can satisfy the standing and real party in interest requirements, then the creator should be allowed to bring the infringement action.

Such a rule acknowledges a creator's moral right of attribution as required under the Berne Convention and advances constitutional goals as well. By denying standing to a creator who purchased an assignment of an accrued cause of action for infringement of his creation, the Silvers court forgot that the creator’s work represents a “fragment of the world” which “belongs to him alone.”