

May 15, 2017

Karyn Temple Claggett
Acting Register of Copyrights and Director of the U.S. Copyright Office
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000

**Re: Reply to Comments of the Kernochan Center for Law, Media and the Arts,
Columbia Law School**

Dear Register Claggett:

The University of Michigan Library's mission is "to support, enhance, and collaborate in the instructional, research, and service activities of the faculty, students, and staff, and contribute to the common good by collecting, organizing, preserving, communicating, and sharing the record of human knowledge."¹ We at the U-M Library Copyright Office advance that mission by providing copyright-related support to our library colleagues and information about copyright to the university community.

Like the Kernochan Center, we are sensitive to the international obligations of the United States. However, we stand with other commenters who have argued that it is unnecessary to add new moral rights legislation to the Copyright Act. We also believe that, when combined with other features of U.S. law, new moral rights legislation threatens to create a toxic mix, one that would poison creativity and scholarship, confuse and further complicate the exercise of user's rights, and erode the ability of libraries and other memory institutions to serve our communities.

To start, we remain unconvinced that the patchwork of laws, which were viewed as sufficient when the United States acceded to Berne, has unraveled following *Dastar*. The excessive focus on *Dastar* does a disservice to a patchwork that has always been far more extensive than the Lanham Act; there are many other ways the United States protects moral rights of authors, including: the 17 U.S.C. § 106 right to prepare derivative works; 17 U.S.C. § 115(a)(2) as it relates to compulsory licenses and changes to the basic melody and fundamental character of musical works; the 17 U.S.C. § 203 provision for termination of licenses and transfers; state right of publicity laws; state unfair competition laws; state contract laws; state fraud and misrepresentation laws; state defamation laws; state moral rights legislation; rights recognized under the Visual Artists Rights Act (VARA); and the 17 U.S.C. § 1202

¹ *About the Library*, University of Michigan Library, <http://www.lib.umich.edu/about-library> (last visited May 12, 2017).

protection of copyright management information against knowing removal or alteration.² To focus on *Dastar* is to lose sight of the whole.

The Kernochan Center's proposed moral rights regime is also dangerously broad. Features of the Kernochan Center's ideal moral rights legislation include a term that would extend well beyond the life of the author, onerous waiver provisions,³ recognition of new groups of rights holders,⁴ and statutory damages. The Kernochan Center does not adequately grapple with the problems that would be created by the ideal they forward, instead recommending that the U.S. Copyright Office address problems through additional regulation.⁵

The potential problems are very easy to see and include issues libraries face every day. A few examples: (1) metadata about a work is frequently uncoupled from the work over time; this problem is exacerbated greatly by a term of copyright that exceeds the life of the author by 70 years; (2) "attribution stacking" can cause confusion with multi-layered attributions, and this can easily become a great burden even to the most well intentioned users; (3) onerous restrictions for waiver would cause a proliferation of documentation problems that would weigh most heavily on those with the fewest resources; (4) the chilling effect of a moral rights statute should not be underestimated, particularly for those works where it is difficult or impossible to identify or locate an author of the work (or where the author does not want to be known, even pseudonymously); and (5) like others, we are concerned that new moral rights legislation would upset the balance between the Copyright Act and the First Amendment, undermining speech and corroding fundamental freedoms.

As many other commenters have noted, the United States is a leader in creative and scholarly fields. We see the peril in adding unnecessary layers of complexity to an already complex system of law, and we would encourage great caution whenever major expansions of the law are contemplated. Here, again, we believe that the moral rights statute described in the Kernochan Center's comment is both unnecessary and carelessly expansive. It would cause significant problems if adopted. At the barest minimum, this vision for a moral rights statute should be scrutinized intensely with a keen eye towards its practical, day-to-day implications.

² See Justin Hughes, *American Moral Rights and Fixing the Dastar "Gap"*, 2007 UTAH L. REV. 666, 695-696; Jane C. Ginsburg, *Keynote Address: The Most Moral of Rights: The Right to be Recognized as the Author of One's Work*, 8 GEO. MASON INT'L COM. L. 48, 44-81 (2016).

³ Kernochan Center comment, <https://www.regulations.gov/document?D=COLC-2017-0003-0042>, at 5 ("The waiver should be in writing and signed by all of the right holders before the work is created or performed, specifically identifying the uses for which the right is being waived; one right holder should not be permitted to waive the rights of all, and any waivers should be effective only with respect to signatories.").

⁴ Kernochan Center comment, at 4 ("The right should be enjoyed by authors and performers, and ideally, also by human creators who don't qualify as authors because their work is a work made for hire.").

⁵ Kernochan Center comment, at 10 ("We recognize that requiring strict adherence to the moral rights provisions we have suggested may not always be reasonable in particular contexts. We suggest that the Copyright Office be empowered to develop regulations as to recommended practices concerning moral rights in particular circumstances, which if adhered to, would satisfy moral rights obligations.").

Respectfully submitted,

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