

Copyright Office Issues Notice of Inquiry Regarding Expansion of Moral
Rights
by LaVar Oldham

Moral rights are copyright rights that are generally agreed to include a right of attribution and a right of integrity. That is, an artist or author generally has the right to be recognized as the artist or author of a work and the right to not have their honor or integrity harmed by derogatory treatment of a work.

On the issue of moral rights in the United States, there is often an assumption, or at least an assertion by lay people (and oftentimes even legal practitioners), that no such moral rights are protected. However, this is untrue. Indeed, in addition to other statutory and common law protections effective in the United States, in 1989 the United States acceded to the Berne Convention including article 6bis which assumes that a minimum standard of moral rights are protected. [See e.g., Public Law 100-658, Berne Convention Implementation act of 1988](#). See also [Berne Convention at article 6bis](#). While moral rights are not protected statutorily to the same extent as they are in many countries of the world, they are nonetheless protected to some degree in the United States.

Recent events make the topic of moral rights in the United States, a topic of current relevance. In particular, the United States Copyright Office issued a [Notice of Inquiry](#) on January 23, 2017 requesting public comment. The questions posed by the Notice of Inquiry seem to indicate that the Copyright Office is interested promoting the addition or expansion of moral rights. For example, question 1 of the Notice of Inquiry asks: “Should additional moral rights protections be considered?” None of the questions posed by the Copyright Office suggests that moral rights should be curtailed.

Perhaps there is some desire to move United States moral rights law toward better harmony with the moral rights law common in the rest of the world. However, the United States is not like the rest of the world in many respects, particularly in view of our First Amendment of the Constitution. Indeed the Copyright Office seems to at least acknowledge the potential conflict in question 4, which states: “Would stronger protections for either the right of attribution or the right of integrity implicate the First Amendment?”

In the interest of facilitating answering question 1 (“Should additional moral rights

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protections be considered”) this blog post will identify a number of the existing protections for, and limitations of, moral rights in the United States.

The [Berne Convention Implementation act of 1988](#) did not seem to add any protections for moral rights, and even indicated that it specifically did not expand such rights. In particular the Berne Convention Implementation act of 1988 states at section 3(b): “The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law— (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author’s honor or reputation.”

However, other statutes do provide protection.

In particular, with respect to authors of visual works, the Visual Artists Rights Act of 1990 (VARA), Codified in [17 USC § 106A](#), protects not only traditionally understood moral rights of attribution and integrity for works of visual art, but also allows “the author of a work of visual art...to prevent any destruction of a work of recognized stature...” Note that VARA only protects visual works, which are defined in [17 USC § 101](#) to include “a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.” Visual works do not include “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; any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; ...any work made for hire; any work

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not subject to copyright protection.”

The Lanham Act as codified at [15 USC § 1125\(a\)](#) prohibits a false or misleading representation of fact with respect to origin, sponsorship, or approval of goods. While this can be used to protect some rights of attribution, the Lanham Act is limited in this respect by the Supreme Court’s decision in [Dastar Corp. v. Twentieth Century Fox Film Corp. 539 U.S. 23 \(2003\)](#).

The Digital Millennium Copyright Act (DMCA) as codified in [17 USC § 1201](#) prohibits circumvention of technological measures that control access to certain works. This protection can be used to prevent modifications to works for which the technological measures would need to be circumvented to effect modification. For example, protection has been asserted in cases where individuals have attempted to circumvent the technological measures on DVDs in an attempt to create edited versions of movies on those DVDs.

The Family Entertainment and Copyright Act as codified at [15 USC § 110 \(11\)](#) allows a member of a private household to make imperceptible, limited portions of audio or video content of a motion picture during a performance in or transmitted to that household for private home viewing. In other words, you are legally permitted to use the fast-forward and mute buttons on your remote. Additionally, others, at your request, can push the fast-forward and mute buttons for you (including through the use of computer programs and other technology) so long as they do not make a fixed copy of the altered version. However, this right has been limited recently due to technological changes by one or more streaming services and superseding provisions of the DMCA. In particular, within the last six months of the date of this article, the DMCA and technological changes to digital streaming services [have seemingly been used](#) to prevent modification of streaming movies, which might be viewed as an effort to protect rights of integrity by effectively eliminating the ability of home users to direct others to perform automatic modification of some streamed movies. Home users presumably still have the right to use their fast forward and mute buttons in the privacy of their own homes for streamed movies and movies on disk.

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Moral right can also be protected by license under contract law. However, as might be appreciated, it may be difficult for individual artists and authors to extract agreements from consumers with respect to the moral rights of the artist or author. However, certain organizations have emerged that allow artists and authors to share their works using standardized licenses. For example, Creative Commons of Mountain View, California, allows users to select licensing terms and select distribution networks. Thus, artists and authors have increased ability to generate agreements protecting moral rights.

If you believe moral rights need to be expanded in the United States and want the Copyright Office to know about it, [your comments are due by March 30, 2017](#).