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Breakout Session: Getting Moral Rights Right. Presented by Kevin Smith, Dean of Libraries, University of Kansas

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Breakout Session: Getting Moral Rights Right

Dean Kevin Smith began the session by providing some history and background on moral rights in the United States. Moral rights grow out of natural law approaches to copyright that argue that creations are expressions of the author's personality and, therefore, contain a moral bond between the two. United States copyright law is much more utilitarian than other systems. It could be argued that the moral rights protection requirements of the Berne Convention (Article *6bis*) (http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P123_20726) were a major obstacle to the U.S. adoption of Berne for over 60 years. In fact, when the United States did join Berne, it was specifically stipulated that other current provisions of U.S. law (such as defamation) were sufficient to meet the Berne requirements, and no changes to U.S. copyright law would be required for compliance.

Moral rights encompass rights outside of economic rights, typically including the following:

- Attribution: Creators have the right to receive credit for their work, regardless of who owns the work.
- Integrity: Creators have the right to prevent alterations to their work in ways that would be detrimental to the creator's reputation or honor.
- Anonymity: Creators have the right to not be attributed or to be attributed under a different name if they chose.

In 1990, the United States granted specific moral rights under the Visual Artists Rights Act (VARA) (<https://www.law.cornell.edu/uscode/text/17/106A>). VARA provides the right of attribution and integrity to authors of a very narrow and defined set of visual works: namely, paintings, drawings, prints, sculptures, and still photographic images produced as single copies or signed and numbered limited editions of fewer than 200. These rights are held by the creators for their lifetime, and while they cannot be transferred, they can be waived. Further, there are exemptions for natural aging, conservation, and normal museum practices, such as lighting and placement. VARA has generated some litigation. Artists have won VARA cases (see *Martin v. Indianapolis*, <http://openjurist.org/192/f3d/608/jan-randolph-martin-v-city-of-indianapolis>), but most cases tend to narrow the law.

Some of the resistance to moral rights in U.S. copyright stems from the belief that other existing laws provide sufficient protection. Rights holders already control derivative works. Also, the ability to license works means that agreements can be written to protect attribution and the integrity of the creator. Trademark law and prohibitions on “false designation of origin” can also provide protection, though the *Dastar* (<https://supreme.justia.com/cases/federal/us/539/23/>) case provides interesting commentary on how far—or not—this particular argument would apply to copyright.

In 1949, Fox licensed the rights to make a television series based on General Dwight D. Eisenhower’s World War II memoir, *Crusade in Europe*. Fox allowed the copyright to lapse, and the work fell into the public domain. In 1995, *Dastar* used this 1949 series as the basis for its own video series. Fox sued *Dastar* for trademark violation of “reverse passing off” under the Lanham Act because *Dastar* had not attributed the original material to Fox. The Supreme Court ruled for *Dastar*, finding that attribution to works in the public domain is not required. This raises an interesting question of whether the court was simply unwilling to limit the public domain via trademark or if trademark cannot protect attribution at all, thus undercutting some of the moral rights coverage stipulated in the enjoyment of the United States with the Berne Convention? In the Supreme Court opinion written by Judge Antonin Scalia, he specifically argued that allowing a cause of action for lack of attribution to a work in the public domain under the Lanham Act would “create a species of mutant copyright law.”

The Copyright Office has issued a Notice of Inquiry (82 FR 12372) (<https://www.gpo.gov/fdsys/granule/FR-2017-03-02/2017-04061>) indicating that it wants to reconsider moral rights under U.S. copyright law. It is interesting to see who might be pushing this project, as the Motion Picture Association of America and Association of American Publishers both oppose it. Some have speculated that it might be the Author’s Guild. Regardless, the

study (<https://www.regulations.gov/document?D=COLC-2017-0003-0001>) asks very good questions about first amendment implications, exceptions and limitations, and interactions with other provisions, such as §1202 (Title 17, United States Code).

Having provided a solid background to the group, the session opened to a more discussion-based format. This started with some clarification on defamation laws, which are stricter in the US than other countries. In the United States, truth is a complete defense to a claim of defamation. Moral rights, however, might be infringed even by a truthful use, since only reputational harm must be proved. This has the potential to provide an end run around the strict defamation standard.

Parody was raised as a potential issue: What if the original author did not want to be associated with the parody? Would moral rights enable them to prevent another's work, a potential first amendment violation?

The conversation then turned to the importance of context. Not providing attribution may not be against the law, but for academics, plagiarism charges can weigh much more heavily than copyright infringement. The academic community is fierce in its attribution expectations, but others are much less so (Kevin recommended Richard Posner's *The Little Book of Plagiarism*¹). Community and audience expectations currently drive the necessity of attribution, so do we need a blanket rule to cover every context?

The issue of cultural differences in plagiarism and attribution expectations was raised. Kevin noted that this is often couched as "them" not understanding how "we" do intellectual property, but linguistic or mechanical issues of knowing how to cite, how to paraphrase, and so on are often involved. These problems are more likely to require educational solutions than legal ones.

The issue of attribution in art, particularly appropriation art, was also raised. While a moral right requiring attribution might aid in lesser known and/or historically underrepresented artists finding recognition for their work, it could also lead to technical difficulties in how this attribution would be acknowledged and how different works could be separately acknowledged from the new whole. Similarly to parody, questions of original creator anonymity or control with the new work remained. A fair use defense against a claim that moral rights had been infringed might be necessary.

The session ended with a robust discussion of *Fearless Girl* and its implications for moral rights and control. There are indications that *Fearless Girl* was deliberately made to interact with *Charging Bull*, such as its creation from the same materials and the extension of the brick sidewalk under

1. Posner, R. A. (2007). *The Little Book of Plagiarism*. New York: Pantheon.

Charging Bull to include *Fearless Girl*. Does this mean that *Fearless Girl* only “works” with *Charging Bull*? Does the location of *Fearless Girl* change the meaning of *Charging Bull*? These questions could support an argument that *Fearless Girl* is a derivative work of *Charging Bull* and might fall under the economic rights in copyright rather than just moral rights. This also brings up potential issues with moral rights and traditional display practices in museums, which often purposefully group works in themes, seeking to join them in conversation with each other. Is *Fearless Girl* simply an extension of this practice or something different? Questions about how first sale and public display would act in concert with VARA are unclear at this point.

The *Fearless Girl/Charging Bull* controversy provides a real-world example of the tensions and questions that U.S. Copyright Law has historically avoided. Who gets to decide what a work of art means? How much power do we give to authors to control how their work is interpreted? The discussion of moral rights in the United States highlights the various philosophical approaches to copyright and the difficult questions of control, purpose, and power therein.