Piracy of Online News: A "Moral Rights" Approach to Protecting a Journalist's Right of Attribution and Right of Integrity

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PIRACY OF ONLINE NEWS:

A "MORAL RIGHTS" APPROACH TO PROTECTING A JOURNALIST’S RIGHT OF ATTRIBUTION AND RIGHT OF INTEGRITY

I. INTRODUCTION

The Internet threatens to destroy the “print” journalism industry.1 Due to the nature of the Internet, online news articles may be taken and republished by other websites without any formal licensing agreement with the original author.2 When a person or entity takes news content from one website and republishes it on another in absence of a licensing agreement, she has “pirated” the news content.3 In the last ten years, academics,4

1. News agencies that traditionally printed content in physical, tangible newspapers now distribute otherwise printable content on the Internet in the form on online news articles. Although some definitions of “online” journalism may very well encompass broadcast journalism (broadcast connoting transmission of audiovisual content), this Article discusses the problems affecting news agencies that publish printable content online.

2. See Protecting Our Intellectual Property, ASSOCIATED PRESS, http://www.ap.org/company/intellectual-property (last visited Oct. 18, 2012); see also Perez-Pena, infra note 6, at B1. Some news agencies, such as the Associated Press, have licensing agreements with other news agencies. These agreements permit agencies to use the AP’s content “in a specific way.” See id.

3. Piracy takes several forms, which I will explore in depth later. Some news agencies have attempted to use the courts to prevent news pirates from stealing their online content. See, e.g., Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009) (AP brought claims against AHN, which allegedly copied online news stories from AP.com, rewrote and republished them on AHN.com, and passed them off as AHN’s original reporting), discussed infra note 158 and accompanying text. Three of the most common forms of piracy include: (1) outright plagiarism without attributing the original author; (2) taking content, rewriting it while maintaining its basic factual thrust, and republishing it online without attributing the original author; and (3) taking and altering content while still attributing the original author. See infra note 4.

4. See Edward L. Carter, Copyright Ownership of Online News: Cultivating a Transformation Ethos in America’s Emerging Statutory Attribution Right, 16
policymakers, and news agencies have turned their attention towards protecting online news content—content that could be printed in physical form using ink and paper but rather is published on the Internet to accommodate rapid social and technological change. As commentators have noted, the piracy of online news articles poses direct economic challenges to online news agencies. Piracy undercuts the investment that goes into the production of online news, thus negating the efforts of journalists and discouraging investment in journalism.

However, few commentators have addressed the non-economic effects of the piracy of online news on the journalism industry. This is peculiar, considering journalism does not appear to owe its existence or creative impulse solely to the possibility of economic

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5. FED. TRADE COMMISSION, Federal Trade Commission Staff Discussion Draft: Potential Policy Recommendations to Support the Reinvention of Journalism (2010), available at http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf ("Journalism is moving through a significant transition in which business models are crumbling... and consumer news habits are changing rapidly.").


7. Public demand for traditional print-form newspapers has declined with the emergence of the Internet. See FED. TRADE COMMISSION, supra note 5, at 1 (describing the rise of the Internet and decline in demand for traditional "print" news). To accommodate the change in demand, traditional print news agencies, such as the Associated Press and The New York Times, have made their content available on the Internet. Plus, Newsweek recently announced its plan to transition to a completely digital format because it had "struggled to maintain relevance in the Internet era." See David Carr and Christine Haughney, Newsweek Will Cease Print Publication At End of Year, N.Y. TIMES, Oct. 17 2012, available at http://mediadecoder.blogs.nytimes.com/2012/10/18/newsweek-will-cease-print-publication-at-end-of-year/.

8. See Carter, supra note 4, at 164-66; see also FED. TRADE COMMISSION supra note 5.

9. See FED. TRADE COMMISSION supra note 5.
reward. Rather, journalism would seem to exist independent of economic reward; after all, journalists report the news because they desire to find the truth, frame the truth, and communicate it to the public as clearly as possible.\textsuperscript{10} Non-economic dimensions of piracy of online news content include the impact of piracy on journalists' "moral rights"\textsuperscript{11} and the social effects of piracy on the news-reading public. Moral rights, which will be described more fully below, encompass an author's right of attribution and right of integrity in her creative product. In describing moral rights in a different context, Professor Kwall has explained that "[t]he act of creative authorship implicates the honor, dignity, and artistic spirit of the author in a fundamentally personal way, embodying the author's intrinsic dimension of creativity."\textsuperscript{12} Simply stated, an author has at least two substantial non-economic interests in her work: to have her creation attributed to her, and to have her creation persist in its original form, undestroyed and unmodified.

The legal academy's disregard of moral rights in journalism may be motivated in part by American intellectual property law's focus on economic incentives rather than any "intrinsic," non-economic


\textsuperscript{11} See Roberta R. Kwall, \textit{The Soul of Creativity: Forging a Moral Rights Law for the United States} xiii (2010). Professor Kwall did not discuss journalism in particular.

\textsuperscript{12} Id. The term \textit{moral} might confuse the underlying non-economic values associated with an author's creative product. Notions of good and bad or right and wrong do not seem to have direct application in the realm of creativity, aside from the issue of whether it is good or bad, or right or wrong, to violate an author's rights of attribution or integrity. \textit{Cf.} Borden Ice Cream Co v. Borden's Condensed Milk Co., 201 F. 510, 513-14 (7th Cir. 1912) (discussing trademark infringement and finding it "morally wrong" to fail to attribute by passing off another's products as one's own). This Article nonetheless makes use of the terminology in Professor Kwall's \textit{The Soul of Creativity} and uses the phrase "moral rights" to refer to an author's non-economic interests in her work—particularly, her right of attribution and right of integrity.
rights an author may possess in her work. Moreover, Professor Kwall noted that some utilitarian commentators question the existence of moral rights in creative authorship altogether. Accordingly, there is no “explicit” moral rights protection in America today, let alone any legal scheme truly designed to protect online news from being pirated, misattributed, and/or misappropriated. Other scholars question the extension of legal rights, namely “property rights,” to authors of fact-based content because it ostensibly creates legal rights in factual information, which is prohibited by the 1976 Copyright Act.

Nonetheless, moral rights appear to exist independently of other forms of property rights. And recognition of moral rights, rather than purely property or economic rights, in journalistic expression may further the interests of journalism and the public. Although Professor Kwall suggested that the law ought to protect moral rights only in “highly creative works,” misattribution and

13. Id. at 23–25.
14. Id.
15. Id. Some news agencies have attempted to use the courts to prevent news pirates from stealing their online content. See, e.g., Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009), discussed infra note 158 and accompanying text.
17. 17 U.S.C. § 103 (2006); see also Feist Publ’ns v. Rural Tel. Serv., 499 U.S. 340, 350 (1991) (finding that “[f]acts, whether alone or part of a compilation, are not original and therefore may not be copyrighted”).
19. Carter, supra note 4, at 164–66 (“For journalism organizations, which depend on access to information and frequently advocate for free expression-related causes, justifying a pro-ownership stance is more difficult than justifying a pro-attribution stance. Although an attribution right does not directly contribute to the bottom line, it does indirectly benefit a journalist or journalism organization in building a reputation, which ultimately can translate into business success.”) (emphasis added).
misappropriation threaten to undermine the essence of fact-based, journalistic works, too. Moral rights protections could help ensure that a journalist’s creation is attributed to her and that her journalistic work persists in its original form, undestroyed or unmodified. This Article thus borrows moral rights concepts and retrofits them to the realm of online journalism.

The issue is whether moral rights or moral rights impulses are present in online news content, and if so, whether and to what extent the law should recognize and protect those rights. Indeed, an examination of the impact of piracy of online news demonstrates that different types of piracy implicate different moral rights. Moreover, encroachment on a journalist’s moral rights directly affects the news-reading public by creating the potential for “source confusion,” thereby diluting the quality of journalism and diserving the public interest.

Different types of piracy of online news content affect a journalist’s moral rights, or non-economic interests, in her work. For example, a journalist’s right of attribution is violated when her work, originally posted on one news site, ends up on another site that fails to attribute the work to the journalist. This is called misattribution. In addition, a journalist’s right of integrity is violated when one news site takes her work from the site where it originally appeared, alters her work in such a way that affects its “meaning and message,” and reposts it—either with or without

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20. See generally KWALL, supra note 11, at 12-13, 73-74.
21. KWALL, supra note 11, at 3-4.
22. Source confusion, a concept that emanates from trademark law, occurs when the public is confused about the ultimate source of a good sold in commerce. See 15 U.S.C. § 1125(a); William P. McGeeveran, Confusion Isn’t Everything, 89 Notre Dame L. Rev. 253, 258 (2013); see also Borden Ice Cream Co v. Borden’s Condensed Milk Co., 201 F. 510, 513-14 (7th Cir. 1912) (discussing likelihood of confusion analysis). Although this Article focuses on moral rights concepts rather than trademark law, trademark’s underlying principles apply in the context of journalism perhaps with greater force than in the context of more creative works. See infra note 101 and accompanying text.
23. KWALL, supra note 11, at 3-4 (“It is human nature to care about how one’s product is packaged for external consumption. And when the packaging violates the original author’s vision of the work’s meaning and message, there is an assault to the author’s dignity.”); see Carter, supra note 4, at 164-66.
24. See KWALL, supra note 11, at 5-9, 24-26.
attribution. This is called misappropriation. Thus, both “types” of piracy—misattribution and misappropriation—violate the journalist’s moral rights in her work. Ultimately, when journalistic content is misattributed or misappropriated, the public interest in reliable, relevant, and quality journalism is thereby hampered.

Therefore, the emphasis on economic incentives and property rights to save journalists from piracy and facilitate the production and dissemination of quality journalism addresses only part of the problem. In order to adequately address the piracy of online news, the law should recognize and protect journalists’ moral rights in their works. To protect the public interest in reliable, relevant, and quality journalism, America needs a legal regime that discourages misappropriation and misattribution and permits journalists to vindicate their moral rights.

This Article examines the current legal regime surrounding the piracy of online news content, advocates for federal statutory recognition of moral rights in journalism, and addresses the practical difficulties that stand in the way of an effective moral rights scheme in America. While this Article proposes new statutory recognition of moral rights, it does not undertake to address every detail of a potential statutory scheme. Rather, the Article sets the stage for a serious discussion of moral rights in journalism by arguing for the legitimacy of moral rights protection, pointing out the lack of current legal protection, and sketching out a proposed statutory scheme.

Part II explores the role of journalists in society as disseminators of knowledge, examines the Internet’s impact on news agencies, discusses the legal climate surrounding piracy of online news

25. Id.
26. Id.
27. See Carter, supra note 4, at 189.
28. See id. at 165. Professor Carter stated that, while some news organizations are seeking to protect themselves online via the twentieth century common-law doctrine of hot news misappropriation, other industry leaders say journalism’s best hope for a bright online future lies not in pursuits that would lock up facts and ideas but, rather, in ensuring attribution for online news content used by others.

Id.
content, and introduces moral rights. Part III advances and analyzes legal recognition and protection of moral rights in journalism. Finally, Part IV discusses the impact of a moral rights scheme in journalism and the difficulties associated with providing remedies for moral rights violations, and advocates a statutory damages and injunctive relief scheme.

II. BACKGROUND

A healthy democracy requires the dissemination of knowledge and public access to that knowledge. This notion is inherent in the First Amendment of the Constitution, as well as the Copyright Clause. As John Stuart Mill posited in his influential work On Liberty, the free flow of ideas facilitates vigorous public debate. This in turn furthers the public interest in informed decision-making and ultimately in a healthy, effective democracy. American intellectual property law reflects these principles in its general denial of exclusive legal rights in facts, ideas, processes, data, and information. As the theory goes, the grant of monopolies in facts would unduly stifle the spread of ideas, thus hampering public access to ideas and diluting the quality of public debate. The prevailing legal climate emphasizes that disseminators of factual content deserve no legal rights in that content, other than “thin” legal protection in the “artistic

29. See MCNAIR, supra note 10; NEW MEDIA, supra note 10.
30. See U.S. CONST. amend. I; U.S. CONST. art. 1, § 8, cl. 8 (granting Congress authority “to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”) (emphasis added); American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583, 597-601 (7th Cir. 2012) (noting that the First Amendment protects and promotes gathering of information and news); see generally Branzburg v. Hayes, 408 U.S. 665 (1972); Glik v. Cunniffe, 655 F.3d 78, 82-83 (1st Cir. 2011).
31. J.S. MILL, ON LIBERTY (1859).
expression” of facts insofar as the expression embodies a “modicum of creativity.”

Traditionally, journalists have played a critical role in disseminating knowledge to the public. The First Amendment’s grant of freedom of the press ensures that “the press” may spread knowledge to serve the public interest. The dissemination of knowledge in the context of newswriting typically has required journalists to possess a degree of skill and a competitive advantage over others. Historically, newspapers existed because they possessed an economic comparative advantage in two arenas: (1) newspapers possessed pre-publication resources that other organizations and individuals lacked, such as access to channels of information, and access to skillful thinkers and writers (i.e. journalists); and (2) newspapers possessed actual publication resources, in the form of the printing press, which allowed them to control the means by which information was disseminated. Because of these advantages, newspapers like the New York Times, Washington Post, and Wall Street Journal became the staple disseminators of news—until the emergence of the Internet.

Before the Internet, news agencies enjoyed a natural monopoly over the flow of information. Generally, it was practically infeasible and economically inefficient to copy and reprint another agency’s news product for re-distribution. The Internet has made it extremely easy for anyone with Internet access to copy and re-post news product from reputable news agencies. Those agencies are “reputable” because of the goodwill they once established with the public before the Internet age. One hallmark of the pre-Internet print journalism days was that the public could easily

33. See Sherrod, supra note 16; Feist Publ’ns, 499 U.S. at 362; see Kwall, supra note 11, at 3–4.
34. See generally Branzburg, 408 U.S. 665.
35. Id. at 681; see also U.S. CONST. amend. I.
36. See McNAIR, supra note 10; NEW MEDIA, supra note 10.
37. Id.
38. Id.
40. Id. at 1207.
41. Id.
discern where the news product in front of them had originated. This is no longer the case.

Today online news content is frequently pirated,42 and in the Internet context, pirated content is increasingly misattributed or misappropriated.43 The existence of a multitude of online news aggregate sites, which take content from traditional national and local news agencies, means that a significant portion of the news-reading public reads the news outside of the context where it was originally published.44 Moreover, the increased availability of online news content and increased ease with which content can be “borrowed” may encourage cash-strapped news agencies to borrow more frequently from fellow news agencies, rather than expending resources to gather their own news.45 However, the lack of enforceable journalistic rules or ethical codes, in addition to the lack of legal standards, means that journalists’ rights and obligations regarding the appropriation and attribution of news content are ill defined.46

Journalists have always expended professional skill, resources, time, and effort to gather news product to disseminate to the

42. See supra notes 3-6.
43. See, e.g., Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009) (AP alleged that AHN lifted online news stories from AP.com, rewrote and republished them on AHN.com, and passed them off as AHN’s original reporting); see also Kwall, supra note 11.
45. NPR ETHICS HANDBOOK (2012), accessible at http://ethics.npr.org. The “attribution” section provides that, [w]hen in doubt, err on the side of attributing—that is, make it very clear where we’ve gotten our information (or where the organization we give credit to has gotten its information). Every NPR reporter and editor should be able to immediately identify the source of any facts in our stories—and why we consider them credible. And every reader or listener should know where we got our information. ‘Media reports’ or ‘sources say’ is not good enough. Be specific.
Id. (emphasis added).
public. The news product does not merely transpose itself from any journalist’s typewriter into the mind of any reader. Even though the Internet may make it seem so, the news is not simply floating around. Questions such as “where did the news come from?” and “who did the research and writing?” have new meaning in the context of online journalism. The answers to these questions have utmost importance in a democratic society, where we value a free marketplace of ideas to facilitate prudent, informed decision-making. 47

In a large, free, and competitive society with an abundance of newsworthy information and a vast number of news outlets, news agencies understand the importance of branding their news, ensuring that the public knows who put the news product together. Consider the Associated Press (“AP”), which does not merely provide news to other news agencies unconditionally. 48 The AP requires news agencies and aggregates with which it has contractual relations to attribute the content of the article to the AP. 49 This serves three, essentially non-economic purposes: 1) informing the public that the product comes from a reliable source, 2) ensuring the public that the content is relevant, and 3) recognizing the fruits of labor expended by the AP. Attribution ensures that readers know that the product came from the AP, which strengthens the AP’s reputation as a quality news provider.

Today, news agencies struggle to control the dissemination and redistribution of their own content, which has increased the likelihood that their content gets misattributed or mangled beyond its original meaning and message. 50 For the last three years, the AP and other news agencies have been scrambling to define property and legal rights in their content. 51 Part A discusses how copyright law generally provides no rights in journalistic content. Part B then introduces moral rights concepts of misattribution and

47. Id.; see Levine, supra note 10; McNair, supra note 10; New Media, supra note 10.
48. See Perez-Pena, supra note 6; Sanford & Brown, supra note 6.
49. Id.
50. Kwall, supra note 11.
misappropriation, while Part C examines how other sources of IP law fail to adequately protect online news from misattribution and misappropriation.

A. Copyright and Piracy of Online News

Generally, copyright law protects against infringement of written works of authorship. Accordingly, copyright law provides the natural starting point for a discussion of how to stop the pirating, and how to prevent the misattribution and misappropriation, of potentially copyrightable content. Many scholars have demonstrated, however, that copyright law is not the solution to preventing Internet piracy of online news content. And they are correct. Professor Carter suggested that extending copyright protection to news content collides with well-established copyright principles.

Even though the creative expression of factual content is copyrightable, the factual content itself cannot be copyrighted because "facts" are not "original works of authorship." The 1976 Copyright Act does not explicitly forbid news agencies from asserting copyright in journalistic expression, but the Supreme Court has consistently relied on the "fact/expression" dichotomy to find that "facts" are not "original" and thus to limit the scope of copyright to "expression" rather than mere facts. While facts themselves are not copyrightable, the original selection, arrangement, and coordination of facts may be copyrightable. For instance, in Harper & Row Publishers v. Nation Enterprises, the Supreme Court explained that republishing mere facts did not constitute copyright infringement unless the defendant copied the plaintiff's work verbatim.

53. Carter, supra note 4, at 165-66.
55. Feist Publ'ns, 499 U.S. at 350.
56. See id. at 340.
As it relates to the attribution of facts, the Court has seldom discussed whether a copier of factual content owes any legal or ethical duty to attribute those facts to their original source.\textsuperscript{58} Perhaps this is because the Court presumes that facts do not owe their origin to anyone—something the Court noted in \textit{Feist}\textsuperscript{59} and more recently in \textit{Dastar Corp. v. Twentieth Century Fox}.\textsuperscript{60} That said, the Court has suggested that while copyright law does not require the attribution of fact-based, non-creative content to its "original" source, other legal doctrines might require such attribution.\textsuperscript{61} In \textit{International News Service v. Associated Press}, the Supreme Court commented on the propriety of copying fact-based content without attribution in the context of gathering and disseminating news.\textsuperscript{62} There, the AP sued International News Service (INS) for copyright infringement and state-law unfair business competition for copying and reprinting news content that the AP had expended vast resources, time, and effort to produce.\textsuperscript{63} The case made its way to the Supreme Court, where the Court found that the Copyright Act could not prevent INS from reprinting factual content that the AP published first.\textsuperscript{64} Rather, the

\begin{itemize}
\item \textsuperscript{58} But see \textit{Dastar Corp. v. Twentieth Century Fox Film Corp.}, 539 U.S. 23, 32 (2003) (finding Lanham Act did not require attribution of uncopyrightable content), discussed infra at note 101 and accompanying text.
\item \textsuperscript{59} \textit{Feist Publ'ns v. Rural Tel. Serv.}, 499 U.S. 340, 351 (1991).
\item \textsuperscript{60} \textit{Dastar Corp.}, 539 U.S. at 32.
\item \textsuperscript{61} \textit{Id.} (explaining that facts have no "origin"); \textit{Harper & Row Publishers}, 471 U.S. at 547-48 ("[C]opyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original—for example, quotations borrowed under the rubric of fair use from other copyrighted works, facts, or materials in the public domain—as long as such use does not unfairly appropriate the author's original contributions.").
\item \textsuperscript{63} \textit{See generally} \textit{International News Service v. Associated Press}, 248 U.S. 215 (1918).
\item \textsuperscript{64} \textit{Id.} at 234.
\end{itemize}
AP had to use a state-law unfair competition action as a vehicle to prevent INS from pirating its news content. The Court found that INS had undercut AP’s efforts to produce and disseminate news content. It explained:

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

The Court upheld the injunction entered against INS by the lower court, thus affirming the AP’s property right in the factually-based news content it had disseminated. AP could lawfully prevent its competitors from republishing its fact-based content. Since then, the Supreme Court has not heard a case involving the misappropriation of news content.

As Professor Carter argued, the decision sparked the evolution of common-law “hot news misappropriation” actions. INS paved the way for news agencies to redress the misappropriation of their fact-based content by seeking time-specific injunctions barring competitors from republishing particular information.

But as many commentators have argued, these “misappropriation” causes of action do not adequately address the problems associated with piracy of online news for several reasons. First and foremost, by creating property rights in factual

65. Id. at 235.
66. Id. at 242.
67. Int’l News Serv., 248 U.S. at 242; see Carter, supra note 4, at 168–70 (emphasis added).
69. Carter, supra note 4, at 168–70.
70. Sherrod, supra note 15; see also Elaine Stoll, Hot News Misappropriation: More than Nine Decades After INS v. AP, Still an Important Remedy for News Piracy, 79 U. CIN. L. REV. 1239 (2011); John C. McDonnell,
content, the misappropriation action unduly stifles the dissemination of knowledge in contravention of Article I, section 8, clause 8 of the U.S. Constitution and First Amendment principles. The misappropriation tort goes too far in protecting news content because plaintiffs can obtain time-specific injunctions that prevent others from using and redistributing news content within a specific time period after publication. This has the effect of raising a barrier around news content. In other words, placing exclusive rights on “hot news” for a specific duration harms the public interest in the spread of quality, relevant, and reliable news. Furthermore, Professor Carter noted that state-law hot news claims may both help and harm news agencies because news agencies rely heavily on sharing factual content. If factual content distributed by one agency cannot be borrowed and distributed by another, journalists are limited in how they locate, frame, and disseminate knowledge.

Second, not all states provide a misappropriation cause of action, thus leaving room for news pirates in some jurisdictions to steal content without repercussion. This lack of uniformity leaves some journalists without redress, especially when the Internet permits individuals to view and republish content across state and national borders. Moreover, some jurisdictions have found that the Copyright Act preempts misappropriation claims because the common-law scheme covers the same subject matter.

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72. See id.
73. See generally id.
74. See Carter, supra note 4, at 168–70.
75. Id.; see, e.g., Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 459 (S.D.N.Y. 2009). In AP v. AHN, the court noted the existence of a conflict-of-law issue, explaining that the dispute between the parties was related to the laws of several jurisdictions. AP argued that New York law should govern the dispute, while AHN argued that Florida law should govern. Significantly, New York law supplied a “hot news” cause of action for AP, while Florida law did not. Ultimately, the court applied New York law and determined that AP could plead a hot news violation in the Southern District of New York.
as the Copyright Act. Third, courts in jurisdictions with "hot news" actions have not defined exactly what constitutes "hot news." While some courts have defined "hot news" as "time-sensitive factual information," there is no telling whether this definition encompasses journalistic works that convey information that is not necessarily "time-sensitive." Because copyright and state-law misappropriation do not adequately balance journalists' rights against the public interest, some scholars like Professor Carter have suggested that a non-economic, non-property based scheme may best serve the interests of journalists and the public.

While Professor Carter did not use the term "moral rights" in his recent article, there is little doubt that he is talking about "moral rights" when he refers to the right of attribution in news content.

B. Introducing Moral Rights in the Context of Online Journalism

Moral rights encompass an author's rights in the "meaning and message" of her work. Unlike traditional copyright principles, moral rights law focuses on the "intrinsic" value of an author's work rather than the "extrinsic" value it may command in the marketplace of ideas. As Professor Kwall noted, "the right of attribution and the right of integrity" comprise the most essential elements of moral rights law. While the right of attribution "safeguards the author's right to be recognized as the creator of her work," the right of integrity "guarantees that the author's work..."
truly represents her creative personality, and is free of distortions that misrepresent her creative expression.”

Moral rights law differs from traditional copyright principles in two important respects: the subject of legal protection, and the purpose of legal protection. First, according to the 1976 Copyright Act and Article I, section 8, clause 8 of the Constitution, copyright law grants the copyholder, rather than the original author, a set of exclusive rights in original works of authorship. Therefore, the copyholder may not be the original author. Second, copyright serves to incentivize the creation of works by granting a temporary monopoly over the reproduction and distribution of original works of authorship. Copyright’s purpose thus is to ensure financial gain for the copyholder. In general, the Copyright Act has nothing to say about moral rights of attribution or integrity. Moreover, while a news agency can bring a copyright action to redress wholesale copying of journalistic content, copyright law imposes no duty on a news agency, which has lifted and republished the essential thrust or message of another’s journalistic, fact-based work, to attribute to the original source of news content.

83. Id. at 5–6.
84. 17 U.S.C. §§ 101-106 (2006); see also U.S. CONST. ART. I, § 8, CL. 8 (grants Congress authority “to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”) (emphasis added).
85. 17 U.S.C. §§ 101-106 (2006); see also KWALL, supra note 11, at 23 (The Act “affords the copyright owner the exclusive rights to reproduce and distribute the original work, to prepare derivative works, and to perform and display publicly certain types of copyrighted works”).
86. See KWALL, supra note 11.
87. Id. (“Although copyright law would seem to be the most natural avenue for authors seeking to redress violations of the integrity of their texts, such protections historically have been noticeably absent from the statutory scheme.”).
C. Moral Rights Against the Backdrop of Other Sources of IP Law

Even though copyright law fails to “explicitly” provide for rights of attribution or integrity, glimmers of moral rights exist in various forms in both federal and state law. As Professor Kwall explained, the common-law doctrines of defamation, breach of contract, and invasion of privacy are related to the right of attribution and integrity. But in the context of piracy of online news content, these doctrines do not adequately protect a journalist’s article from being misappropriated or misattributed. For example, defamation requires damage to the journalist’s reputation, and thus “will be of no avail for an author who...cannot show damage to her professional reputation” or that the news pirate made some sort of false statement. Breach of contract requires the journalist to stand in privity of contract with the alleged pirate, which is usually not the case. Invasion of privacy often prevents authors from suing those who use their “name, portrait, or picture in connection with any production sold or disposed of by the author.” Thus, once the journalist publishes her article, she loses the requisite privacy to sue on an invasion of privacy theory. Moreover, as mentioned before, the common-law misappropriation claim does not truly implicate moral rights, because it vindicates property rights in content rather than vindicating rights in attribution or integrity.

90. Id. at 32-33.
91. Id. at 33; see, e.g., Solaia Tech., LLC v. Specialty Publ’g Co., 852 N.E.2d 825, 839-40 (Ill. 2006) (reciting elements of common-law defamation claim).
92. Id. at 27-29; see, e.g., Carolina Casualty Insurance Co. v. Merge Healthcare Inc., No. 11 C 3844, 2011 WL 3921412, at *2 (N.D. Ill., Sept. 6, 2011) (collecting cases and explaining that plaintiff bringing breach of contract claim must be a party to the contract).
93. See Perez-Pena, supra note 6 (discussing the unlicensed, unauthorized use of news content by third-party online news outlets, most of which have no contractual relations with the AP); Sanford, supra note 6.
Furthermore, the Visual Artists Rights Act (VARA), Lanham Act, and Digital Millennium Copyright Act (DMCA) provide shaky bases for the recognition of moral rights. The Visual Artists Rights Act of 1990 provides that the author of an artistic work “shall have the right . . . to claim authorship of that work.” Professor Kwall asserted that VARA permits authors of original visual works, such as sculptures, paintings, drawings, and prints, to bring suits to vindicate their rights of attribution and integrity, but only in limited circumstances. Courts have strictly construed the language of the Act. Thus, VARA likely provides no protection to journalists of online news content because online news content does not count as “sculptures, paintings, drawings, or prints” or other creative work within the meaning of the Act.

Additionally, according to Professor Kwall, the Lanham Act “proves strained or insufficient in protecting moral rights, due to a variety of requirements including the need for misrepresentation to occur in commercial advertising or promotion that is connected with the alleged false representation.” Section 43(a) of the Lanham Act “prohibits actions like trademark infringement that deceive consumers and impair a producer’s goodwill.” However, the Lanham Act, or at least its underlying purposes, seems to apply with greater force to online news (which is commercialized by news agencies) than more expressive works, like pieces of art. In discussing the purposes of the Lanham Act, the Supreme Court has noted that “by preventing competitors from copying ‘a source-identifying mark,’ trademark law “reduce[s] the customer’s costs of shopping and making purchasing decisions” and “helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related

95. KWALL, supra note 11, at 27-34.
97. KWALL, supra note 11, at 28-29.
98. Id.
100. KWALL, supra note 11, at 32.
rewards associated with a desirable product.”102 Journalistic content might not be a “good” or product in the traditional sense, but it is most certainly a commercialized product. Garnering goodwill with the public thus is of supreme importance. It is not surprising, therefore, that news agencies use trademarks at the beginning or end of an article to distinguish and reinforce their brand. The source-identifying purpose of trademark is thus consistent with journalists’ moral rights of attribution in their work.103

The Supreme Court’s decision in Dastar, however, suggests that the Lanham Act does not impose a legal duty on pirates of news content to attribute the original author of the news—either by using the original author’s “mark” or some other mode of attribution. In Dastar, the Court found that the Lanham Act did not require a company to attribute the original source of the content contained within a video series, the copyright of which had expired.104 The Court described the meaning of “origin” and “goods” in the Lanham Act in such a way that raises serious questions about the Act’s application to both journalists and online news content.105 Moreover, when interpreted broadly, Dastar

102. Qualitex Co. v. Jacobson Products Co., 514 U. S. 159, 163-164 (1995); see also Dastar Corp., 539 U.S. at 28-29 (noting that the Lanham Act was intended to make “actionable the deceptive and misleading use of marks,” and “to protect persons engaged in . . . commerce against unfair competition”); 15 U.S.C. § 1127 (2009).

103. Qualitex Co. v. Jacobson Products Co., 514 U. S. 159, 163-164 (1995); see also Dastar Corp., 539 U.S. at 28-29 (noting that the Lanham Act was intended to make “actionable the deceptive and misleading use of marks,” and “to protect persons engaged in . . . commerce against unfair competition”); 15 U.S.C. § 1127 (2009).

104. Dastar Corp., 539 U.S. at 28-29, 33. In explaining that the public may copy and decline to attribute expired copyrighted material, the Court analogized to the patent context: “The right to copy, and to copy without attribution, once a copyright has expired, like the right to make [an article whose patent has expired]—including the right to make it in precisely the shape it carried when patented—passes to the public.” Id.

105. See id. at 35 (“Reading ‘origin’ in [the Lanham Act] to require attribution of uncopylefted materials would pose serious practical problems. Without a copyrighted work as the basepoint, the word ‘origin’ has no discernable limits.”) (emphasis added). This point about the limits of the word
probably affects all uncopyrighted works and content—not merely expired copyrights. This means that a journalist may not use the Lanham Act to require attribution of her fact-based (i.e., noncopyrightable) news content. Of course, her content in its full and unmodified form would be copyrighted if it contained some measure of expression or creative value. However, this does not address the more difficult issue: how to protect the journalist’s right of attribution when her content has been altered but her central, factual contentions—which she gathered from carefully-selected sources and synthesized using journalistic technique and skill—go unattributed. The Lanham Act does not supply the answer.

What about the DMCA? Professor Kwall and other commentators have suggested that the DMCA includes “a de facto ‘origin’ has direct application to a discussion of what kind of content deserves attribution in the world of journalism—a point explored infra at note 152 and accompanying text. In regards to “goods,” the Court stated, [w]e think the most natural understanding of the ‘origin’ of ‘goods’—the source of wares—is the producer of the tangible product sold in the marketplace, in this case the physical Campaigns videotape sold by Dastar. The concept might be stretched (as it was under the original version of § 43(a)) to include not only the actual producer, but also the trademark owner who commissioned or assumed responsibility for (‘stood behind’) production of the physical product. But as used in the Lanham Act, the phrase “origin of goods” is in our view incapable of connoting the person or entity that originated the ideas or communications that ‘goods’ embody or contain. Such an extension would not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.

Id. at 31-2 (internal citation omitted).

106. See id. at 35 (‘Reading ‘origin’ in [the Lanham Act] to require attribution of uncopyrighted materials would pose serious practical problems. Without a copyrighted work as the basepoint, the word ‘origin’ has no discernable limits.’) (emphasis added).

107. See id. at 35; id. at 31-32; see, e.g., Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 459 (S.D.N.Y. 2009) (dismissing AP’s trademark claim because AP failed to allege sufficient facts, but not addressing whether claim could have succeeded).

right of attribution through the copyright management information provision." Section 1202 of the Act prevents an individual from removing or modifying certain information, such as the "title of the work, the author, copyright owner, and in certain instances the writer, performer, and director of a work." Professor Carter has argued that section 1202 of the DMCA may provide a vehicle for authors of online news content to redress misattribution. But Professor Carter cautioned: Section 1202's "application by courts is largely unknown. At this stage, several district courts have allowed copyright management information claims to survive motions to dismiss and motions for summary judgment," but these cases did not involve the misattribution or misappropriation of journalists' online news content. Nonetheless, Professor Carter argued that "the DMCA's statutory damage provisions . . . could thwart what have been called 'parasitic' online news aggregators without closing off the ability for news organizations to gather and produce news."

The status of the DMCA as a vehicle for journalists of online news content, however, seems stifled by the fact that the purpose of the DMCA has nothing to do with either moral rights or online news content. Moreover, Professor Kwall noted, "given the need for a plaintiff to prove that the defendant was contemplating copyright infringement in connection with the removal or alteration of the copyright management information, section 1202 is tied to the traditional economic copyright model rather than 'independent authorial interests in proper attribution'."

Although Professor Carter saw potential in the DMCA's ability to provide an effective vehicle for online journalists to vindicate attribution rights, Professor Kwall's argument implied that other

110. Id.
111. Carter, supra note 4, at 183.
112. Id. at 186-88; but see Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009) (finding AP's DMCA claim survived motion to dismiss), discussed infra notes 158-175 and accompanying text.
113. Id.
114. Id.; see All Headline News Corp., 608 F. Supp. 2d at 459.
schemes would better safeguard moral rights in a journalist’s work.

Professor Carter asserted that it remains unclear whether the DMCA can be used to protect attribution rights of journalists. Instead of advocating for a fresh, federal moral rights scheme, Professor Carter argued that authors of online news content should continue to bring suits for misattribution and misappropriation under the DMCA. As shown above, however, the DMCA, Lanham Act, VARA, and common-law doctrines do not provide causes of action for misattribution and misappropriation of online news content. In addition, those statutes and doctrines have goals that differ from the vindication of moral rights of attribution and integrity. Because online news piracy strikes directly at the journalists’ right of attribution and integrity, because there is no adequate legal scheme to vindicate journalists’ moral rights, and because journalism’s professional norms and ethical standards explicitly recognize the importance of attribution and implicitly recognize the importance of integrity, federal law should create a scheme that safeguards the journalist’s moral rights in journalistic works.

III. RECOGNIZING AND VINDICATING THE RIGHT OF ATTRIBUTION AND THE RIGHT OF INTEGRITY IN JOURNALISTIC WORKS

To protect the public interest in reliable, relevant, and quality journalism, America needs a legal regime that discourages misattribution of online news content, protects the integrity of online news, and permits journalists to vindicate their rights of attribution and integrity in such works. Because no law currently is designed to vindicate the right of attribution in news content, America needs a statutory scheme tailored to the news industry, which permits news agencies to sue news aggregators or other news agencies that misattribute or undermine the integrity of their news content.

A moral rights scheme for journalists may function in conjunction with other statutory schemes, because a moral rights

117. 17 U.S.C. § 1202 (2010); see supra Part II.
claim in the journalism context is designed to redress qualitatively different injuries than a copyright, DMCA, or other intellectual property-right claim. Furthermore, unlike the efforts of countless news agencies, a moral rights solution will neither exact a fee from readers, nor erect a barricade around websites to prevent piracy or control/monitor who accesses the news. These economic-based measures would, and in fact do, stifle the flow of information—even if they succeed in raising subscription revenues. This Article’s proposal departs from economic-based models to save journalism. The proposal is designed to recognize rights of attribution and integrity (i.e., moral rights) without stifling the free flow of information, hampering the ability of news agencies to gather news, or undermining the reader’s ability to access news. Part III-A of this Comment examines the nature of moral rights in journalism, looking at professional ethics and norms against the backdrop of Professor Kwall’s proposed

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118. See supra Part II, A and C. As discussed in Part II, although the source-confusion aims of trademark are consistent with the right of attribution, the Dastar case makes it unlikely that trademark law would apply to fact-based news content.

119. In tough economic times, there is little doubt that news agencies are seeking to exact fees from newsreaders, as well as from aggregators and agencies that use their content. For instance, countless online news agencies have literally erected barriers around their news content with pay walls. Pay walls allow an Internet user to view a fixed number of “complimentary” news articles on a given website within a particular period of time, usually one month. This author believes that pay walls hinder the free flow of information, thereby undermining First Amendment principles. See generally Glik v. Cunniffe, 655 F.3d 78, 82-83 (1st Cir. 2011). Furthermore, The Economist recently reported that news agencies in Europe have petitioned national governments to impose a compulsory fee on Google News, which provides the article’s headline and byline, (sometimes) the article’s opening phrase or sentence, and a link to the article as published on the original Internet source. Newspapers versus Google, THE ECONOMIST, Nov. 10, 2012, at 61 (“In Germany politicians are considering a bill to extend copyright protection to excerpts of newspaper articles appearing in search engines’ results, thus enabling publishers to collect payment for them.”).


121. See FED. TRADE COMMISSION, supra note 5.
moral rights framework. Part III-B addresses the scope and form of a moral rights scheme, while Part III-C demonstrates the application of the scheme to the real world context. Finally, Part IV discusses the difficulties associated with crafting proper remedies for moral rights violations and notes the difficulties in characterizing and measuring the value of moral rights.

A. Moral Rights in Journalism: Legal Backbone and "Moral" Impulses in Journalism's Professional Norms and Ethical Standards

In The Soul of Creativity, Professor Kwall outlined several elements of a proposed moral rights statutory scheme to vindicate the right of attribution and right of integrity. Professor Kwall did not address the application of moral rights in the online news context, but her formulation of a moral rights statutory scheme provides the background for recognizing moral rights in online news content. First, with respect to "attribution," Professor Kwall argued that the following conduct should be actionable under a moral rights statute:

(1) [A]ctual uses that are more than de minimis of an author's original work without attribution, or with false attribution; (2) reproductions of an author's work that are more than de minimis without attribution, or with false attribution...and (4)...[designating someone else as the author of a work she did not create].

Unlike economic solutions discussed in Part II, these three violations implicate a journalist's right to have her work attributed—a right that is distinct from a property right. Second, with respect to the right of "integrity," Professor Kwall argued that the right of integrity should be "designed to vindicate the author's

122. Kwall, supra note 11, at 147-49. Professor Kwall noted that VARA is the "logical starting point for designing stronger moral rights protections." Id.
123. Id.
124. Id.
right to inform the public about the original nature of her artistic message and the meaning of her work.\textsuperscript{125} The statute should thus prohibit "objectionable modifications," either directly to the work or by placing the work in a "context deemed objectionable by the author."\textsuperscript{126}

A moral rights statutory scheme for journalists should reflect and comport with journalism's ethical standards regarding attribution and integrity of written news content. Outside of formal licensing agreements, there is no law or professional guideline requiring that one news agency pay (or even ask) another before it lifts and republishes its factual content from the website. Moreover, there is no law or professional rule or regulation requiring that one news agency attribute another, even where the original reporter expended time and energy to discover the fact. For example, if a reporter from the New York Times finds factual content (e.g., the number of prescription pills found in a Missouri state representative's car) on the Columbia Missourian's website and decides to use it in her article, she is not required to ask the Columbia Missourian reporter for permission to use it, nor is she required to attribute the Columbia Missourian reporter.\textsuperscript{127} Moreover, there is no law that obligates the reporter to maintain the integrity of the factual content borrowed, either with or without attribution; and there is no law that requires the reporter to provide

\textsuperscript{125} Id. at 151.

\textsuperscript{126} Id.

\textsuperscript{127} Id. at 147–49. This illustrates that the problem of attribution might pose a greater threat to small, local newspapers rather than large, national ones. A small news website, news aggregator, or news pirate presumably would want to attribute the article to the large news agency in order to draw attention to the article. In this instance, the small agency free rides on the back of the goodwill of the large agency. But the attribution issue seems more serious, and more likely to occur, when the large agency takes content from the small agency—and has no incentive to attribute the content to the small agency. See \textit{Local Papers Shine Light in Society's Dark Corners}, N.Y. TIMES, Feb. 9, 2014, available at \url{http://www.nytimes.com/2014/02/10/business/media/local-papers-shine-light-in-societys-dark-corners.html}. The article examines the role of local papers and journalists in gathering and exposing news, discussing the interplay between large and small news outlets. See \textit{id}. It focuses specifically on how local journalists were among the first to report the Governor Chris Christie-New Jersey Turnpike scandal. See \textit{id}.\textsuperscript{128}
the public with any type of way to view the borrowed content in its original form and in its original online setting. Currently, any issue of attribution or integrity is a matter of professional norms and so-called ethical standards.  

Although no single group or organization claims a monopoly over the creation, maintenance, and enforcement of journalistic ethical standards, several news agencies and professional organizations have promulgated ethical guidelines that explicitly recognize the importance of attribution in journalism and implicitly recognize the importance of maintaining integrity in their work once it is published online. For example, regarding attribution, NPR’s code of ethics provides: “Attribute, attribute and attribute some more. No material from another source should ever be included verbatim, or substantially so, without attribution. This includes material from Associated Press reports…”

The clear import of this statement is that professional journalists recognize that it is appropriate to attribute when you borrow content from another outlet. This is entirely consistent with moral rights concepts regarding attribution: journalists deserve attribution in their works. Furthermore, inherent in these concepts is the idea that the public interest is served when the public can reliably know where the news content originated. If news content is misattributed (or not attributed at all), the public is effectively tricked into thinking news content originated elsewhere, or left not knowing where it originated.

As for the right of “integrity,” there is no explicit recognition of any such right in journalism’s ethical standards. However, these standards emphasize “accurate,” “honest,” and “fair” reporting.

128. See NPR ETHICS HANDBOOK, supra note 45.
130. See NPR ETHICS HANDBOOK, “Attribution,” supra note 45; AMERICAN SOCIETY OF NEWSPAPER EDITORS, supra note 46.
131. Id.
Accurate, honest, and fair reporting implicitly recognizes a journalist’s right to maintain the integrity of her work. Under these guidelines, a journalist would appear to commit an infraction when she takes another’s work, alters it such that it has a “meaning or message” that is different from what the original author envisioned, and reposts it online. This type of conduct strongly implicates the right of integrity as Professor Kwall articulated it: prohibition of “objectionable modifications” to a work, either directly to the work or by placing the work in a “context deemed objectionable by the author.” In sum, Professor Kwall’s general moral rights framework is consistent with journalism’s norms and ethical standards. Together, they support recognizing the right of attribution and the right of integrity in journalistic works.

Although the rights of attribution and integrity are fundamentally non-economic interests, violations of these rights could affect a news agency’s finances by undercutting demand for original news content published in its original context (i.e., the Internet website where it was first published). It is clear that violations of news agencies’ rights of attribution and integrity compounded over time could have substantial detrimental effects on news agencies and the news-reading public. As an initial matter, news agencies, which lose substantial control over their content when they publish online, may not get the credit they deserve for gathering and publishing news content. Of course, their news content will spread throughout the Internet, reposted on numerous sites and reread by millions of persons. But not only will the agency not receive the credit for gathering and publishing the news; the content might get distorted, and the public will not know where the content originated. Thus, the public interest in dissemination of knowledge is furthered only: (1) when the news content’s meaning and message remains intact; (2) when the public knows the original outlet that gathered and reported the particular news content; and (3) as long as the public has an opportunity to access the original outlet’s site.

132. See supra note 122 and accompanying text.
133. Id.
134. See supra notes 1-10 and accompanying text.
135. Id.
content and the context in which it is published further defines the scope and form of a potential statutory moral rights scheme for online journalism.

B. Understanding the Scope of Moral Rights in Journalistic Works: The “Meaning and Message” of an Article on a News Website Encompasses More than the Mere Text of the Article

To borrow from Professor Kwall, the rights of attribution and integrity in a journalistic work comprise the journalist’s “meaning and message.”  

136 Failure to attribute a work or maintain its integrity undermines the meaning and message of the work. A failure to attribute to a news agency that reported certain news content violates that agency’s right of attribution in that work.  

137 Borrowing the basic factual thrust or essence of an online article without attribution undercuts the time, effort, and resources that went into compiling and disseminating the information contained therein. This is so even if the “pirate” did not merely copy the article’s text word-for-word. While broad dissemination of the underlying content—by the original agency and by news pirates—promotes a vigorous, healthy public debate, the pirates’ failure to attribute harms the public interest in knowing the true reporters of the news and undercuts those reporters’ reputational interests.

Interestingly, the meaning and message of news content depends not just on the text of or ideas within the article alone, but also on the article’s placement within the news agency’s website. As an initial matter, online news content is not viewed in total isolation. Readers select which story to read among an array of articles, headlines, photographs, and advertisements. Ostensibly, some time and thought goes in to where and how to display the article on a webpage. Indeed, some of these considerations include where to place articles among headlines, other articles, photographs, and advertisements. Thus, the integrity and the holistic meaning and message of news content are related to the setting or context in

136. See supra notes 80-83 and accompanying text.

137. Kwall, supra note 11, at 147–49; see also NPR ETHICS HANDBOOK, “Attribution,” supra note 45; AMERICAN SOCIETY OF NEWSPAPER EDITORS, supra note 46.
which the article first appears. Therefore, when news content is lifted from its original context and reproduced elsewhere, the news agency has an interest not only in attribution but also in allowing the online reader to see the context in which the article was originally posted. This strikes most closely at the right of integrity—designed to ensure that an author’s content remains intact in its original form.

To vindicate this interest fully, a moral rights scheme would need to impose a duty on news pirates to provide a hyperlink to the original news site so the reader could easily reroute to that page. Allowing a news agency to vindicate this interest would have non-economic effects, but also would have economic effects of increasing Internet traffic on the agency’s website and exposing its content and advertisements to increasing numbers of readers. This counsels in favor of recognizing a particular moral right in a journalists’ ability to present news content in its original context, especially when the reader first sees the content “downstream” on another news agency’s website. In other words, a news agency that lifts and places another’s content in an alternative setting may violate the original journalist’s right of integrity when it fails to link the reader back to the original journalist’s site.

The Proposal: A Statutory Moral Rights Regime

Accordingly, to retrofit Professor Kwall’s moral rights scheme to the context of online journalism, Congress should enact a statute that recognizes that:

A journalist’s moral rights are violated in three circumstances:

(1) When more than a minimal amount of original news content is taken and reproduced by a news agency or news aggregate without attribution to the original news source; (2) when a news agency or aggregate passes off its own content as the content of the plaintiff; or (3) when original content is taken...

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138. Kwall, supra note 11, at 147-49.
by a news agency or news aggregate but no link is provided to the original source’s webpage, regardless of whether the original source is attributed.\textsuperscript{139}

A news agency/journalist plaintiff need only show one of the three to obtain relief.

In each of these circumstances, “original” generally means what it means in the copyright context.\textsuperscript{140} It requires that the news agency independently created, i.e. did not copy, the facts from elsewhere.\textsuperscript{141} However, it does not require the factual content to reflect a copyrightable degree of expressive “creativity.”\textsuperscript{142} The purpose of the attribution and integrity right in online news content is to vindicate the attribution of fact-based, non-expressive content to facilitate the public interest in the dissemination of reliable, relevant, and quality information.\textsuperscript{143} Thus, the statute’s definition of “originality” should depart from the copyright context and encompass the factual content that underlies an author’s creative gloss.

By protecting factual content, the statute’s definition of originality accounts for the time, effort, and resources that go into finding and reporting the news.\textsuperscript{144} While circumstances (1) and (3) above require the news content in question to be “original,” circumstance (2) does not.\textsuperscript{145} This is because anytime a news

\textsuperscript{139} \textit{Id.} The circumstances laid out here, tailored to online news content, track Professor Kwall’s elements.

\textsuperscript{140} \textit{Feist Publ‘ns v. Rural Tel. Serv.}, 499 U.S. 340, 359 (1991). The Court defined originality as being “independently created” and reflecting a “modicum of creativity.” \textit{Id.}

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} \textit{KWALL, supra note 11, at 147-49.}

\textsuperscript{144} \textit{Associated Press v. All Headline News Corp.}, 608 F. Supp. 2d 454, 455 (S.D.N.Y. 2009). The court discussed the substantial effort, time, and resources involved in news-gathering and reporting original news content: “The Associated Press, through its employees, affiliates and subsidiaries, engages in effort and great expense ‘to get access to news and to gather, report, package and transmit news stories from every country in the world’.” \textit{Id.}

agency "intentionally passes off its own content as the content of the plaintiff," it violates the plaintiff's right of attribution and integrity.\textsuperscript{146} In essence, what matters is that the plaintiff did not originate the content yet is being associated with it.\textsuperscript{147} Surely, the news agency has a right to be free from association with content that it did not produce.

Circumstance (3) stands apart from circumstances (1) and (2) because it applies even where a news agency has attributed the content to the original reporting agency. Circumstance (3) is therefore the most sweeping of the three. In vindicating the right of integrity, it is designed to stimulate a culture of hyperlinking in journalism. It permits a news agency to commence litigation where another online agency or aggregate has failed to hyperlink, even if it has attributed the content. This may appear to unduly affect journalistic practices and open the floodgates of litigation. However, the statute provides two important safeguards that prevent unmeritorious claims and lessen potential burdens on news agencies and courts.

First, in order to bring a claim under any of the circumstances listed, the plaintiff must have both a good-faith and reasonable basis for believing that the defendant's conduct fits one of the three circumstances.\textsuperscript{148} This amounts to a heightened pleading standard. A plaintiff may show the good faith and reasonableness of its claim at the pleadings phase by setting forth factual allegations in the complaint (or in an affidavit) that show with greater particularity why and how it believed that the news pirate has committed one of the three violations.

Second, in order to state a cause of action under circumstance (3), the plaintiff must have exhausted reasonable efforts to request that the adverse news agency or aggregate provide a hyperlink to its original content. Reasonable efforts include sending letters or making other formal requests to adverse agencies or aggregates and allowing a reasonable amount of time to pass before bringing

\textsuperscript{146} K\textsc{W}all, \textit{supra} note 11, at 147-49.

\textsuperscript{147} \textit{Id}.

\textsuperscript{148} \textit{See} 17 U.S.C. § 1201. The DMCA requires that plaintiffs have a good-faith and reasonable basis for suspecting infringement before they send infringement notices to allegedly infringing defendants.
suit. This requirement guards against surprise litigation and treats litigation as a last option by promoting a culture of hyperlinking outside of the courts. Additionally, these safeguards serve the dual purpose of preventing undue burdens on the court system. Both of the safeguards directly or indirectly guard against unwarranted, unmeritorious claims, thereby saving judicial resources for more pressing matters.

The nature of fact-based content makes some of these claims difficult to prove. In some scenarios, “independent creation” of factual content may be near impossible to demonstrate. The problems involved with proving whether a journalist created or discovered a fact would seem to include whether the plaintiff was the first to break the story containing the content at issue, and whether the content at issue constitutes something more than a mere generality or already-known/already-publicized fact. To recognize a moral right of attribution in a well-known and/or already-published fact might burden the free flow of that factual content. To recognize rights in that kind of content would not make sense; information so general as to be considered “public knowledge” does not owe its origin to any one source. In this sense, the statute should borrow from the “public domain” rule in the copyright setting, thereby exempting a certain zone of publicly-known factual content from moral rights protection.

149. Id.

150. See id.; Kwall, supra note 11, at 147-49. Kwall argued that the use of cease and desist letters could impact “behavioral norms” regarding attribution, although Kwall did not discuss its use in the context of online journalism; see generally Elizabeth L. Rosenblatt, Fear and Loathing: Shame, Shaming, and Intellectual Property, 63 DePaul L. Rev. 1 (2013) (discussing professional and cultural norms and ethics, particularly with respect to borrowing and stealing creative material, and suggesting that non-legal action often produces more effective results than litigation).


153. Id. The Court asserted that content in the public domain—such as historical facts—is not original. See Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979-80 (2d Cir. 1980) (discussing the public domain in the context of historical-factual works, but not addressing whether original author deserves attribution notwithstanding loss of copyright); see also Dastar Corp. v.
For instance, factual content such as "Barack Obama is married to Michelle Obama" is no longer an original fact that warrants attribution to any source. The New York Times can no longer claim to be the source of that fact, even if it had been the first agency to break the story many years ago. This Article does not explore the intricacies of the proposed statute’s public-domain provision, including the duration of the right of attribution. It strongly cautions, however, against imposing a duty on the world at-large to attribute certain factual content to news agencies in perpetuity or even for durations of longer than one week. There comes a point where a fact is generally accepted and well ingrained in society that no news agency could reasonably require others to attribute that fact, even though the news agency could claim that it independently developed or discovered the fact. In sum, determining which type of news content deserves protection may be a difficult evidentiary assessment for the courts.

Additionally, a litigant may raise several possible defenses to a right of attribution or integrity claim. For one, the defendant in a moral rights action may raise the "reasonable efforts" requirement as an affirmative defense to a claim under circumstance (3). In his motion to dismiss, the defendant may claim that the plaintiff failed to exhaust reasonable efforts to request that the defendant provide a hyperlink relating to particular content. In sum, if the news agency fails to exhaust reasonable efforts, its cause of action will fail as a matter of law at the motion to dismiss phase. Moreover, the defendant can claim that she created or discovered the content first. Alternatively, she can claim that she discovered the content independently without lifting it, or that she obtained already-misattributed content from another news outlet or website.


154. Id. Yet one could also imagine the embarrassment and humiliation a journalist would endure if she were attributed to a fact such as "Barack Obama divorced Michelle" and that fact weren’t actually true. This is a problem that would likely be resolved by defamation laws, not through the moral rights statute. See supra note 91 and accompanying text (on defamation).

155. KWall, supra note 11, at 146–50.
Despite the apparent difficulty in proving such claims, this is not the first time the courts will have to answer difficult evidentiary and legal questions. The courts are capable of handling such determinations, and the public interest in preventing the misattribution and misappropriation of news content counsels in favor of the courts opening their dockets to moral rights claims despite any potential evidentiary challenges.

It becomes necessary to apply the proposed moral rights scheme to an actual lawsuit involving the online news context to better understand how a moral rights scheme could vindicate a journalist’s rights of attribution and integrity. While recognizing a violation of a moral right is in some cases a relatively simple evidentiary endeavor, crafting an appropriate remedial scheme presents a significant challenge to meaningful implementation of a moral rights scheme for online journalism.

C. A Proposed Moral Rights Statutory Scheme Against the Backdrop of Associated Press v. All Headline News

In 2008, the Associated Press ("AP") relied on section 1202 of the DMCA, among other federal statutes, to bring suit against an online news agency, All Headline News Corp. ("AHN"), that had allegedly stolen and republished AP’s online news content and, at times, failed to attribute it to AP. In the absence of any legal vehicle to vindicate AP’s “moral rights,” AP made no mention of them in its pleadings, motions, or briefs. But other factual allegations in the briefs and AP’s reliance on section 1202 of the DMCA demonstrated the AP’s grave concern with the “meaning and message” of its news content, including proper attribution and maintenance of integrity of its news product:

156. *KWALL*, *supra* note 11. Professor Kwall noted that courts must ultimately decide difficult issues of infringement, fair use, and other matters in the copyright context. *Id.*

157. *Id.*

158. *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009). Plaintiff also brought claims under the Lanham Act and Copyright Act. *Id.*

AHN's commercial advertising and promotion falsely and misleadingly represents that AHN reports news stories independently gathered by AHN reporters, when in fact AHN's news reports are copied from AP and other legitimate news services, and that AHN is licensed by AP to redistribute AP news stories, when in fact AHN is not so licensed. As a result of these and other false and misleading statements and concealments of fact in AHN’s commercial advertising and promotion, AHN misrepresents the nature, characteristics, and qualities of its services, to AP's damage.\(^\text{160}\)

Although the AP brought claims under non-moral-rights-based statutes, the AP’s pleadings were full of implicit references to attribution and integrity.\(^\text{161}\) While those rights are not recognized under American law, they bear a tangential relation to intellectual property law and are not adequately vindicated through current IP vehicles. Plus, as explained in Part III-B, rights of attribution and integrity are not only reflected in journalism’s professional ethical standards but also bear a substantial relation to the public interest in reliable journalism.\(^\text{162}\) Thus, where moral rights have been violated, a plaintiff like AP should be able to obtain relief independent of non-moral rights causes of actions.\(^\text{163}\) The question is how that would look in the courts.

In using section 1202 of the DMCA, the AP alleged that AHN had “intentionally altered or removed copyright management information appearing in AP reports.”\(^\text{164}\) In finding the AP had overcome AHN’s motion to dismiss, the court noted that this claim

\(^{160}\) Id. ¶¶ 5–7 (emphasis added).

\(^{161}\) Id. ¶¶ 1–7.

\(^{162}\) See supra notes 129 & 130 and accompanying text; supra notes 29 & 30 and accompanying text.

\(^{163}\) See supra note 89 and accompanying text.

essentially revolved around AHN’s failure to attribute the AP despite using AP’s content. Commentators like Professor Carter might argue that the DMCA provided an effective vehicle for AP in this case because the court ultimately denied AHN’s motion to dismiss; to be sure, AP successfully stated a cause of action under section 1202 of the DMCA, and other news agencies should follow suit.

However, although the AP used the DMCA as a de facto cause of action to vindicate its right of attribution, nothing in the DMCA text or legislative history indicates that Congress intended the DMCA to work in this fashion. Moreover, AP did not win its claim on the merits, but rather succeeded in pleading factual allegations that suggested that AHN plausibly could have removed copyright management information while also contemplating copyright infringement. There is no guarantee that other courts would rule the same way, and no indication that they have done so. Thus, the unreliability of the DMCA to vindicate moral rights counsels in favor of an explicit statutory right of attribution and integrity.

Under the proposed moral rights statute, the AP would have to show a violation of one of the three circumstances to succeed in its claim against AHN: (1) AHN took or reproduced more than a minimal amount of its original news content without attribution; (2) AHN passed off its own content as AP’s content; or (3) AHN took AP’s original content but provided no hyperlink to the original agency’s webpage, regardless of whether the original source was attributed. Regarding element (1), the AP alleged in its complaint:

[AHN] direct[s] [employees] to quickly prepare news stories for AHN’s “news service” by either

165. *All Headline News Corp.*, 608 F. Supp. 2d at 456.
166. *Id.* The court noted that other circuits have declined to extend the DMCA to the online news context because of the lack of support in the legislative history. *Id.*
167. *See supra* notes 46-48 and accompanying text; *supra* note 80 and accompanying text.
168. *See supra* Part III-B.
copying news stories found on the Internet or rewriting such stories...Defendants instruct these individuals to disguise the fact that the rewritten stories are not original to or licensed by AHN by deleting the copyright and other identifying information contained in the original stories...[AHN either resells or reposts these stories on its own website]. 169

Because AP alleged that AHN had reproduced AP’s original news content without attribution, the AP successfully showed a violation of its right of attribution under circumstance (1) of the proposed statute.

In AP v. AHN, AP made an allegation that resembled a claim under circumstance (2). In relying on the Lanham Act, AP alleged that “AHN’s articles misled readers into believing that they are issued by the plaintiff, inasmuch as the text of one AHN article attributed certain facts to Associated Press reporting by using a phrase like “[a]ccording to an AP report.”” 170 In trademark law, this type of business conduct implicates “passing off”—passing off your content as originating from some other source. 171 The common example provided in 1L courses is that of the street vendor who sells cheap, poorly made bags with the “Coach” label attached. 172 The bags are not Coach, and the vendor’s actions threaten to undermine Coach’s reputation and consumer market. 173


170. Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 462-63 (S.D.N.Y. 2009); see also Agence France Presse v. Morel, 769 F. Supp. 2d 295, 300 (S.D.N.Y. 2011) (“[Plaintiff] alleges that in their rush to obtain credit for the photographs, AFP and Getty willfully or recklessly failed to follow standard journalistic practices or use due diligence to verify Suero’s authorship and the photographs’ authenticity.”).


172. See PHILLIP ASHLEY, PROPERTY AND INTELLECTUAL PROPERTY LAW 539-44 (3d ed. 2011).

Ultimately, the district court dismissed AP’s Lanham Act claim on the pleadings because AP alleged mere “conclusory allegations.” The court may have also dismissed the claim because Lanham Act claims are normally limited to consumer confusion in the commercial exchange of goods.

Under the proposed moral rights statute, the AP would meet the threshold showing under circumstance (2) that AHN had passed off its own content as AP’s content. It does not matter that the content is fact-based or that it is not a “good” as traditionally conceived. Nothing in AP v. AHN, however, implicates the third circumstance of the moral rights statute: the failure to provide a hyperlink back to the original site, even if the pirate attributed the content. Here, it seems as though AHN did not provide a hyperlink back to AP.com. If AP could show that AHN used its content and failed to provide a link back to where the original AP story appeared, then the AP would have successfully pleaded a violation of circumstance (3).

An application of the moral rights scheme to AP v. AHN therefore shows that the basic threshold requirements might be relatively simple to show in certain instances. Failure to attribute and failure to link generally are black-and-white issues. The proposed statutory scheme merely recognizes for the first time a set of rights inherent in works of journalism, rooted in professional ethical standards and the journalist’s role as disseminator of knowledge to the public. In the absence of relevant case law, the precise operation of the proposed statute remains unknown until agencies begin to litigate moral rights. Nevertheless, the issue of remedies looms: what should the court do once a plaintiff has proven violation of his rights of attribution and integrity in his work?

174. Id.
175. Id.; see also Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 32 (2003) (finding Lanham Act did not require attribution of uncopyrightable content).
IV. IMPACT OF A MORAL RIGHTS SCHEME: CRAFTING AND IMPLEMENTING REMEDIES TO VINDICATE VIOLATIONS OF MORAL RIGHTS

After a news agency has proven a violation of rights of attribution or integrity in its news content, a court theoretically has many options to vindicate the violation and restore the plaintiff to her rightful position.176 As a matter of basic remedial principles, any compensatory relief should do no more than restore the plaintiff to his rightful position,177 and any equitable relief should be limited to the scope of the alleged violation of the moral right.178

First, the proposed statute is designed to vindicate past violations of moral rights and prevent future violations. The statute thus restores agencies to their rightful position while deterring news pirates from violating moral rights. As a general matter, injunctive relief is the proper remedy to prevent the likelihood of future misattribution or violations of integrity. When a pirate publishes misattributed content, it has an immediate impact on the news-reading public, which is either deceived or ignorant about the original source of the content. Thus, in light of the immediate impact of misattribution and other violations of moral rights, it makes little sense to permit a news pirate to misattribute or misappropriate and simply pay damages later.179 A plaintiff therefore should be able to secure an injunction to prevent news pirates from taking particular news content without attribution and objectionable modification.

Would this form of injunctive relief restrict the plaintiff to injunctions that relate only to the particular factual content contained in the news article at issue? If so, the court's ruling would have no impact on future moral rights violations affecting different factual content distributed by the same news agency and pirated by the same (or a different) pirate. In other words, an

176. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES (2012); see generally United States v. Hathahley, 257 F.2d 920 (10th Cir. 1958).
177. Hathahley, 257 F.2d at 920.
178. Id.
injunction would prevent the pirate from misattributing a particular news story but not a different story to be published in the future. Or with respect to circumstance (3), an injunction would require a news agency to provide a hyperlink for particular news content, but would have no impact on requiring that agency to hyperlink future content. In light of this, the statute must depart from traditional injunctive relief principles and permit the courts to grant broad relief. The courts, however, should be able to exercise this discretion only where the alleged moral rights violation is sufficiently serious. Accordingly, the remedial section of the proposed moral rights regime shall provide that: where plaintiffs can prove willful or continuous violations of any of the three elements, the court may issue a “prophylactic” injunction against the offending news agency to prevent general, future misattribution and violations of integrity. An innocent or merely negligent violation, however, does not implicate a future likelihood of harm warranting broad injunctive relief. In sum, the injunctive relief provision of the proposed statute provides a powerful tool to news agencies, especially those facing willful and continuous piracy.

Furthermore, an injunction that demands compliance with the dictates of circumstance (3) must be designed to vindicate the plaintiff’s right of integrity by permitting the reader to view the original content in its original context. Once the plaintiff has made a showing of a violation of circumstance (3), the court can enter an injunction that mandates hyperlinking to the factual content at issue. If a plaintiff makes a showing of a willful or continuous violation of the hyperlinking requirement, the specter of future likelihood of harm increases, and a broader injunction becomes necessary to ensure the defendant provides a hyperlink to other borrowed news content not at issue in the case. Of course, prior to commencing litigation, the plaintiff must show that it took

180. See Fed. R. Civ. P. 65(d)(1); see generally PepsiCo Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995).
181. The injunction must otherwise comply with Fed. R. Civ. P. 65(d)(1). If a party fails to comply with the injunction, the court may use its contempt powers to compel compliance with the injunction. Id.
182. See Winston Research Corp. 350 F.2d at 143-44.
reasonable efforts to request that the agency provide a hyperlink to the content; as discussed above, the defendant agency may raise as an affirmative defense the plaintiff's failure to exhaust reasonable efforts.

What if, by the time litigation commences, the defendant has stopped violating the plaintiff's moral rights? When there is no likelihood of future harm, should the court place a monetary value on the harm caused by the defendant's past failure to attribute or previous violations of the agency's integrity? Professor Kwall argued that, in general, monetary damages do not comport with the underlying purposes of moral rights, which are fundamentally non-economic. But Professor Kwall carved out exceptions for (1) past violations, (2) violations that resulted in clearly demonstrable economic harm, and (3) "exceptionally willful violations."  

In the context of the proposed statute here, courts should attempt to place a monetary value on past violations of moral rights, insofar as the value is not overly speculative. However, when dealing with intangible, more-or-less unascertainable values such as the value of attributing an author or the value of leaving her work intact, a statutory damages provision may be a more efficient way to remedy a moral rights violation. Such a statutory damages scheme would reflect the Copyright Act's preference for statutory damages "if the court finds that a reasonable, nonspeculative formula cannot be derived, or that the amount of profits a reasonable formula yields is insufficient to serve the purposes underlying the [Act]." 

A preference for statutory damages rather than actual damages still leaves open the question of how to value the right of attribution and the right of integrity in journalistic works.

183. Kwall, supra note 11, at 150–51.
184. Id. at 150.
185. See generally United States v. Hathahley, 257 F.2d 920 (10th Cir. 1958).
186. "Actual damages" refers to the actual monetary value of the plaintiff's loss incurred as a result of the defendant's infringing conduct. 17 U.S.C. § 101(b) (2010); see Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 521 (9th Cir. 1985). The Copyright Act provides statutory damages where actual damages cannot be ascertained.
187. Frank Music Corp., 772 F.2d at 515.
Someone needs to choose the statutory damages amounts. How much is a failure to attribute worth? Does it depend on the quantity and quality of the content taken? Do misattributions of significantly important fact-based content warrant higher damages than misattribution of more trivial content?

Valuations of these types are best suited to professional economists and actuaries, who would ostensibly have some role in Congress’s valuation of moral rights. Currently, the copyright statute provides a “minimum statutory damages” of $200 where “the infringer was not aware and had no reason to believe his or her acts constituted infringement.” Maximum statutory damages for willful infringement have increased from $100,000 to $500,000.” In light of America’s emphasis on economic incentives rather than intrinsic moral rights, one might presume that a moral right is not worth as much as one of copyright’s exclusive rights. Nevertheless, as discussed above, misattribution and misappropriation may have noticeable economic effects on a news agency. When a news aggregate passes off the AP’s content as its own, it undercuts demand for the AP’s product. Although it may be difficult to prove the extent to which misattribution or misappropriation has affected the bottom line, plaintiffs should be allowed to present experts to testify to the extent of the economic injury caused by a moral rights violation. Therefore, while a moral rights scheme would protect seemingly non-economic interests, an effective remedial regime could reflect the fact that moral rights violations result in both non-economic and economic injuries.

Another potential feature of the proposed moral rights scheme would permit the defendant to raise a moral rights defense in the face of a copyright, hot news, DMCA, or other news suit. For example, in a copyright suit, if the plaintiff succeeds in showing that the defendant copied his copyrightable news content, the defendant, in order to lessen potential damages, may present

189. Id.
190. KWALL, supra note 11.
evidence that (a) she attributed the content to the plaintiff, (b) maintained the content’s integrity, and (c) provided a link to the plaintiff’s website, thereby maintaining the overall “meaning and message” of the content and ensuring that readers could trace the content to its original source. Because the defendant protected the plaintiff’s right of attribution and integrity, any damage award—either “actual” or “statutory”—could be lessened. This moral-rights defense thus incorporates moral rights into other statutory schemes; permitting a defendant to raise moral rights as a way to lessen damages encourages news agencies to take notice of the right of attribution and integrity. Where one agency recognizes and protects the moral rights of others, it may not have to pay as much in the event it is found liable for copyright infringement or another piracy claim. However, this issue also runs into valuation problems: by how much should damages be reduced where a defendant can show that, despite wholesale copying of original news content, she attributed and linked?

In sum, the difficulties in valuing moral rights pose challenges to the implementation of an effective moral rights scheme. But problems associated with valuation of intangible rights have not stopped American lawmakers from recognizing new forms of legal rights in the past.192 Thus, any difficulty associated with valuing the right of integrity and right of attribution should not stop Congress from creating a moral rights scheme that provides for injunctive relief (and in some circumstances) actual and statutory damages: (1) when more than a minimal amount of original news content is taken or reproduced by a news agency or news aggregate without attribution to the original news source; (2) when a news agency or aggregate passes off its own content as the content of the plaintiff; or (3) when original content is taken by a news agency or news aggregate but no link is provided to the original source’s webpage, regardless of whether the original source is attributed. In sum, proper attribution of news content, maintenance of news content’s integrity and maintenance of access to the original news source bear heavily on the public interest in reliable, relevant, and quality news.

192. Kwall, supra note 11.
V. CONCLUSION

While this proposed moral rights scheme first and foremost vindicates non-economic rights in journalists’ work, the scheme could have a substantial impact on the demand for and marketability of online news. Ensuring proper attribution of online news content means that readers who view the content know where the content originated. Plus, maintaining the integrity of that content assures readers that the original source indeed wrote the information that now appears on a different website. Thus, attribution and integrity foster the type of clarity and transparency in the marketplace for news that the law has strived to ensure in the marketplace for goods. 193 Moreover, the hyperlinking regime advanced by the proposed statute ensures that information flows freely between news agencies but also that agencies are given due credit for gathering and reporting particular news content. Ultimately, proper attribution of and maintenance of integrity in news content would further the public interest in reliable, relevant, and quality news and “help assure a [news agency] that it and not an imitating competitor will reap the financial [and] reputation-related rewards associated with” distributing a quality news product. 194 In absence of other legal vehicles to vindicate a journalist’s rights of attribution and integrity, Congress should enact a moral rights scheme to protect these rights in the face of piracy.

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194. Id. (internal quotes omitted).

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