

University of Florida Levin College of Law
UF Law Scholarship Repository

UF Law Faculty Publications

Faculty Scholarship

2024

AI, Artists, and Anti-Moral Rights

Derek E. Bambauer

University of Florida Levin College of Law, bambauer@law.ufl.edu

Robert W. Woods

University of Arizona James E. Rogers College of Law, rwoods1@arizona.edu

Follow this and additional works at: <https://scholarship.law.ufl.edu/facultypub>



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

113 Georgetown L.J. Online (forthcoming 2024)

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in UF Law Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact jessicaejoseph@law.ufl.edu.

AI, ARTISTS, AND ANTI-MORAL RIGHTS

113 GEORGETOWN LAW JOURNAL ONLINE (forthcoming 2024)

*Derek E. Bambauer & Robert W. Woods**

Abstract

Generative artificial intelligence (AI) tools are increasingly used to imitate the distinctive characteristics of famous artists, such as their voice, likeness, and style. In response, legislators have introduced bills in Congress that would confer moral rights protections, such as control over attribution and integrity, upon artists. This Essay argues such measures are almost certain to fail because of deep-seated, pervasive hostility to moral rights measures in U.S. intellectual property law. It analyses both legislative measures and judicial decisions that roll back moral rights, and explores how copyright's authorship doctrines manifest a latent hostility to these entitlements. The Essay concludes with two suggestions for reformers: to frame arguments in pecuniary terms rather than personhood ones, and to turn to trademark law instead of copyright.

Table of Contents

INTRODUCTION	2
CONGRESS AND COURTS	5
AUTHORSHIP	7
A. WORKS MADE FOR HIRE	7
B. AUTHORS, DRAMATURGES, AND TECHNICAL CONSULTANTS	10
CONCLUSION	13

* Authors are listed alphabetically. Irving Cypen Professor of Law, University of Florida Levin College of Law; Professor of Practice, University of Arizona James E. Rogers College of Law. We owe thanks for helpful suggestions and discussion to Jane Bambauer, Oren Bracha, Dan Hunter, Gavin Milczarek-Desai, Shefali Milczarek-Desai, Lilla Montagnani, Thinh Nguyen, Sergio Puig, Mark Verstraete, Fred Yen, and Laura Zoboli; the participants in the U.S.-E.U. Cyberlaw Colloquium at Bocconi Law School, Bocconi University; and the participants at the 6th Annual Texas A&M Intellectual Property Scholars Roundtable. We welcome comments at <bambauer@law.ufl.edu> and <rwoods1@arizona.edu>.

INTRODUCTION

The song “Heart On My Sleeve,” released in April 2023, garnered more than 11 million views across streaming platforms such as Spotify and TikTok based on its catchy lyrics and the vocals of popular recording artists Drake and the Weeknd.¹ However, the singers’ record label, Universal Music Group (UMG), rapidly had the song taken down for a simple reason: neither artist actually performed “Heart On My Sleeve.”² Instead, the pseudonymous songwriter-producer Ghostwriter used artificial intelligence (AI) voice filters to imitate Drake and the Weeknd, with great success.³ Although UMG complained that the AI-generated track “den[ied] artists their due compensation,” the primary objection is not financial, but rather ethical: being associated with a song that neither artist created or shaped.⁴ “Heart On My Sleeve” is not an outlier: UMG issued a copyright take-down notice the same month for an AI-generated song mimicking Eminem.⁵

Singers are not the only artists concerned about the effects of AI. In 2023, the WGA (the union for screenwriters) and SAG-AFTRA (the union for film and television actors) went on strike simultaneously for the first time in over sixty years.⁶ The unions shared a deep concern over AI’s risks, especially in threatening artists’ rights to control their work (the right of integrity), receive proper credit for it, and to prevent credit for AI-generated work in which they had no participation (the right to claim and disclaim attribution). Both unions came to agreements with producers⁷ that included some protections for the rights of attribution and integrity for their members, but considerable disquiet remains. In short, celebrities are increasingly the

¹ See Samantha Murphy Kelly, [The viral new ‘Drake’ and ‘Weeknd’ song is not what it seems](#), CNN (Apr. 19, 2023).

² See Joe Coscarelli, [An A.I. Hit of Fake ‘Drake’ and ‘The Weeknd’ Rattles the Music World](#), N.Y. TIMES (Apr. 24, 2023).

³ See Kristin Robinson, [Ghostwriter, The Mastermind Behind the Viral Drake AI Song, Speaks For the First Time](#), BILLBOARD (Oct. 11, 2023).

⁴ See Chloe Veltman, [When you realize your favorite new song was written and performed by ... AI](#), NPR (Apr. 21, 2023).

⁵ *Id.*

⁶ See Chelsey Sanchez, [Everything to Know About the SAG Strike That Shut Down Hollywood](#), BAZAAR (Nov. 9, 2023).

⁷ See Gili Malinsky, [Hollywood’s actors are back to work—here’s what they actually got in SAG-AFTRA’s new contract](#), CNBC (Nov. 17, 2023); Cynthia Littleton, [New WGA Contract Explained: AI Is Not a Writer, Solo Scribe Shows Don’t Need Minimum Staff and More](#), VARIETY (Sept. 26, 2023).

subjects of AI-produced works that look, sound, and act almost exactly as they do, and they are worried.⁸

Regulators respond rapidly to problems affecting celebrities. In September 2023, the DEEPFAKES Accountability Act was re-introduced in the House of Representatives.⁹ This legislation would prohibit technological representations of speech or conduct that involve material activity, which is that causing “perceptible individual or societal harm,” that falsely appears to be by a living or deceased person without their consent (or that of their family for the deceased).¹⁰ One month later, a bipartisan group of Senators introduced the NO FAKES Act.¹¹ That bill protects a person’s image, voice, or visual likeness against the production or dissemination of nearly indistinguishable digitally-generated replicas, whether used commercially or not.¹² States have enacted similar legislation, and more bills have been proposed.¹³ At their core, these legislative initiatives seek to protect two reputational interests—the rights of integrity and attribution—which are within the larger category of moral rights.¹⁴ Moral rights are only one issue raised by AI-created works, which are deeply controversial, raising issues touching upon privacy,¹⁵ defamation,¹⁶ and intellectual property (IP) infringement¹⁷ among many others.

Despite these controversies and the power of Hollywood, though, we expect these attempts to impose moral rights constraints on AI works to fail. The reason is straightforward: through its history, the United States has consistently resisted, and usually rejected, attempts to provide moral rights for artists and other creators.¹⁸ For example, moral rights are a rare exception to American enthusiasm for international treaties governing IP. The Berne

⁸ See Anumita Kaur, [Celebrities warn followers not to be duped by AI deepfakes](#), WASH. POST (Oct. 3, 2023).

⁹ [H.R. 5586](#) (118th Cong. 2023).

¹⁰ *Id.* at § 2(n)(2).

¹¹ See Patrick Coffee, [Can Congress Save MrBeast and Tom Hanks From AI Deepfakes?](#), WALL ST. J. (Nov. 6, 2023).

¹² See Jennifer Rothman, [Summary and Analysis of Proposed NO FAKES Act of 2023, Discussion Draft](#) (Oct. 19, 2023).

¹³ See Geoff Mulvihill, [What to know about how lawmakers are addressing deepfakes like the ones that victimized Taylor Swift](#), AP (Jan. 31, 2024).

¹⁴ See generally Justin Hughes, [American Moral Rights and Fixing the Dastar “Gap”](#), 2007 UTAH L. REV. 659.

¹⁵ See Drew Harwell, [Bobbi Althoff deepfake spotlights X’s role as a top source of AI porn](#), WASH. POST (Feb. 22, 2024).

¹⁶ See Derek E. Bambauer & Mihai Surdeanu, [Authorbots](#), 3 J. FREE SPEECH L. 375 (2023).

¹⁷ See Zachary Small, [Sarah Silverman Sues OpenAI and Meta Over Copyright Infringement](#), N.Y. TIMES (July 10, 2023).

¹⁸ See Cyril P. Rigamonti, [Deconstructing Moral Rights](#), 47 HARV. INT’L L.J. 353, 354 (2006).

Convention, which the U.S. formally joined in 1989, mandates that members adopt moral rights provisions in their laws.¹⁹ Congress initially took the position that it was unnecessary to alter the Copyright Act to implement such moral rights, pointing unconvincingly at an awkward pastiche of trademark law, state laws, and scattered bits of the existing Copyright Act.²⁰ In a rare moment of agreement, both opponents and advocates of joining Berne expressed fervent opposition to the Convention's moral rights provisions.²¹ When that failed to satisfy the Berne Convention's requirements, the U.S. enacted the Visual Artists' Rights Act (VARA), which created an exceedingly narrow set of entitlements limited to works of high art.²² The consensus view is that VARA does not meet America's obligations under the Berne Convention; the U.S. has grudgingly enacted mandatory moral rights entitlements, but in a way that fails even to comply with the letter of the law.

Later, the U.S. Supreme Court undercut the capacity of federal trademark law to enact Berne-style moral rights.²³ American negotiators ensured that the intellectual property rights framework, known as TRIPS, established by the World Trade Organization expressly excluded a requirement to implement the moral rights section of the Berne Convention.²⁴ U.S. negotiators insisted on this exemption as part of the price for supporting the larger TRIPS mandate.²⁵

There are limited exceptions at the state level. Thirty-eight states have some variant of the right of publicity, which confers a set of controls over use (typically use for financial gain, although not all states impose this limitation) of a person's name, image, or likeness.²⁶ The right of publicity evolved from its genesis as a privacy tort to evolve into a quasi-moral right that sometimes is classified under intellectual property. While the original privacy tort was

¹⁹ See [Art. 6bis](#), BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (as amended Sept. 28, 1979).

²⁰ See Berne Convention Implementation Act of 1988, H.R. Rep. No. 609 (100th Cong. 1988) at 33-34.

²¹ See [Kelley v. Chicago Park Dist.](#), 635 F.3d 290, 297-98 (7th Cir. 2011); Roberta Rosenthal Kwall, [How Fine Art Fares Post-VARA](#), 1 MARQ. INTELL. PROP. REV. 1, 3 (1997).

²² § 603A, Pub. L. No. 101-650, 104 STAT. 5128 (101st Cong. 1990) (codified at [17 U.S.C. § 106A](#)).

²³ [Dastar Corp. v. Twentieth Century Fox Film Corp.](#), 540 U.S. 806 (2003).

²⁴ See [Art. 9](#), Part II.1, Annex 1C, MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION (last modified Jan. 23, 2017), ("TRIPS"); Daniel J. Gervais, [Golan v. Holder: A Look at the Constraints Imposed by the Berne Convention](#), 64 VAND. L. REV. 147, 151-52 (2011).

²⁵ See Gervais, *id.*, at 151-52.

²⁶ See Brianne Polito & Matthew Savare, [The No Fakes Act and the Right of Publicity in the Age of Generative AI](#), ANA (Dec. 15, 2023).

clearly focused on rights of attribution and disattribution, its modern variant is used principally for financial gain, not for dignitary ends.²⁷

Overall, the U.S. has doggedly rejected moral rights at every turn. We contend this trend will continue, and that it is likely to block adoption of federal legislation conferring rights of attribution and integrity over AI-generated works. In this Essay, we explore a set of examples from IP law that demonstrate America’s reflexive opposition to moral rights and similar provisions: legislation and judicial decisions reducing moral rights; authorship in copyright law; and inventorship in patent law. Then, we conclude with recommendations for moral rights protections and artificial intelligence.

CONGRESS AND COURTS

In two relatively recent instances, Congress has expressly acted to reduce moral rights protections for copyrightable works, specifically motion pictures. In 1988, it passed the National Film Preservation Act, which enabled the Library of Congress to add 25 “culturally, historically, or aesthetically significant” films per year to a National Film Registry.²⁸ Anyone who distributed a materially altered version of such a film—including by colorizing it—would be required to prominently label the version as such, including a disclaimer that the original director, screenwriter, and other creators were not involved in its creation.²⁹ This statute produced a negative attribution right—giving filmmakers with movies in the Registry the power to prevent distributors of altered versions from trading on the original creators’ names. However, four years later, Congress repealed these provisions,³⁰ despite the recommendation of the Register of Copyrights that moral rights be *expanded* for motion pictures³¹.

Then, in 2005, Congress passed the Family Movie Act, which authorized censored or sanitized performances of a motion picture in a private household, immunizing both household members and developers of technologies that enable blanking out objectionable content from both copyright and trademark liability, provided no fixed copies of the altered movie are created.³² Film directors were furious, having already commenced

²⁷ See [Haelan Labs. v. Topps Chewing Gum](#), 202 F.2d 866 (2d Cir. 1953).

²⁸ [Pub. L. No. 100-446](#), 102 STAT. 1782-87 (Sept. 27, 1988).

²⁹ *Id.* at 102 STAT. 1784-85 (sections 4 & 5).

³⁰ [Pub. L. No. 102-307](#), 106 STAT. 273 (June 26, 1992).

³¹ [Technological Alterations to Motion Pictures and Other Audiovisual Works: Implications for Creators, Copyright Owners, and Consumers](#) 155-163, U.S. COPYRIGHT OFFICE (1989).

³² [Pub. L. No. 109-9](#), 119 STAT. 218, § 201 (Apr. 27, 2005), codified at 17 U.S.C. § [110](#)(11) & 15 U.S.C. § [1114](#)(3).

(and ultimately succeeded with) a lawsuit against a technology firm, Clean Flicks, that provided edited copies of movies, on the theory that the company was passing off the expurgated versions as the directors' creations.³³ The Family Movie Act plainly runs contrary to the right of integrity, since the directors did not approve of the alterations to their films.³⁴ The Family Movie Act also eliminated filmmakers' rights to control derivative works, at least insofar as deleting objectionable content is concerned. That is a critical alteration, because the right to control derivative works can function as a quasi-right of integrity for films that are altered for other purposes, as well as a right of integrity for other copyrightable works.³⁵ For example, in 2022, Lin-Manuel Miranda, the author of the Broadway musical *Hamilton*, protected that work and his reputation against unauthorized edits by a church in Texas, which not only performed the musical without a license, but rewrote lyrics and dialogue to insert Christian themes and anti-LGBTQ comments.³⁶ Asserting his derivative works right over *Hamilton* enabled Miranda to force the church to pay damages and issue a written apology—as well as ending performances, of course.

The courts, including the Supreme Court, have similarly reduced the moral rights effects of trademark law. In 2003, the Court decided *Dastar Corp. v. Twentieth Century Fox Film*, a dispute over repackaged public domain material.³⁷ In brief, Fox released a television series based upon then-General Dwight Eisenhower's memoirs of World War II. Fox allowed copyright in the series to lapse, and it entered the public domain. Dastar edited the footage and sold it under its own label, with nary a mention of Fox. Fox sued on a theory of reverse passing off: Dastar, the studio claimed, had repackaged its goods (the television shows) as its own, in violation of federal trademark law. The Court rejected Fox's theory, ironically because it conflicted with the Copyright Act. Permitting this sort of reverse passing off claim would let trademark override copyright, effectively permitting plaintiffs to extend some rights over works with expired copyrights in perpetuity. And, the Court reasoned, if Congress had intended to create a right of attribution for motion pictures, it could easily have done so in VARA. The *Dastar* case greatly limited the use of trademark law to mandate attribution or disattribution.

³³ [Clean Flicks of Colo. v. Soderbergh](#), 433 F. Supp. 2d 1236 (D. Colo. 2006).

³⁴ Cf. [Gilliam v. Am. Broadcasting Co.](#), 538 F.2d 14 (2d Cir. 1974) (enjoining distribution by ABC of heavily edited Monty Python television programs).

³⁵ *Id.*

³⁶ See Alison Durkee, [Texas Church Will Pay Damages For Illegally Performing "Hamilton" And Adding In Religious Themes](#), (Aug. 23, 2023).

³⁷ [540 U.S. 806](#) (2003).

In short, the U.S. Congress and federal courts are not only generally opposed to expanding moral rights, but stand ready to curtail the limited ones that currently exist.

AUTHORSHIP

U.S. intellectual property law also demonstrates latent hostility to moral rights, even in provisions that are seemingly unrelated. We briefly explore two examples: the denial of authorship to creators of works made for hire, and the challenges imposed by copyright law when more than one person claims authorship of a work.

A. Works Made for Hire

American copyright law rests upon the foundational assumption that rights accrue initially only to a work's author. The author is normally the creator of a work—the “master mind” whose intellectual faculties produced the original expression in it.³⁸ This rule of authorship is embedded in both the Copyright Act³⁹ and the Constitution, which empowers Congress to grant “to Authors...the exclusive Right to their respective Writings.”⁴⁰ Congress is not free to vest copyright in political allies or distributors or museums: copyrights can be granted only to authors. Restrictions on authorship provide incentives to create new works, but also formally link authors to those works, enhancing attribution and conferring significant control over integrity via the derivative works and distribution rights.

However, there is a glaring exception to this straightforward authorship rule that guts creators' control over attribution and integrity: works made for hire, which confer sole authorship upon entities who have made little to no creative contribution. A work made for hire can occur under one of two conditions. First, the work is created by an employee within the scope of their employment.⁴¹ Second, it is one of nine specified types of works, such as a translation or an atlas, which was specially ordered or commissioned and is governed by a signed writing that expressly agrees to treat the new expression as a work made for hire.⁴² The result is that authorship and copyright ownership belong only to the employer or commissioning party.⁴³ The actual

³⁸ 17 U.S.C. § [201\(a\)](#); see [Burrow-Giles Lithographic Co. v. Sarony](#), 111 U.S. 53, 61 (1884) (internal citations omitted).

³⁹ 17 U.S.C. § [201\(a\)](#) (mandating that “[c]opyright in a work protected under this title vests initially in the author or authors”).

⁴⁰ [U.S. CONST., art. I, § 8, cl. 8](#).

⁴¹ 17 U.S.C. § [101](#).

⁴² 17 U.S.C. § [101](#).

⁴³ 17 U.S.C. § [201\(b\)](#).

creator, the master mind, disappears from the copyright perspective. The moral rights provisions of the Visual Artists Rights Act follow suit: they are unavailable to works made for hire.⁴⁴

The works made for hire rules are bluntly utilitarian in orientation: without support from the employer or commissioning party, the work at issue would not be generated at all; thus, rewarding them with authorship creates salutary incentives. They are in a pecuniary sense the prime mover behind the work's creation, and ownership of the copyright in it is justified on both utilitarian incentive-based grounds and labor desert ones. This thesis has historical roots: artists such as William Shakespeare and Claude Monet depended financially on the support of patrons to create their art. Indeed, the "patron" theory of authorship was repeatedly endorsed by court decisions even prior to the enactment of the 1909 Copyright Act, which first codified the works made for hire doctrine.⁴⁵

With specially-commissioned works, at least, the creator has clear notice that they are surrendering copyright—although they may not recognize the subtler moral rights aspects of that decision. However, the utilitarian justification for these works made for hire is badly weakened by the arbitrary set of nine categories to which it applies. These nine categories are included because the interest groups lobbying for them succeeded where others failed. This political economy explanation is confirmed by the 1999 controversy over the little-noticed addition of sound recordings as a tenth category via last-minute inclusion in an unrelated bill. A House of Representatives Committee staffer inserted the language adding sound recordings at the request of the Recording Industry Association of America (RIAA), which represents the music labels who would have thereby gained ownership in many recordings.⁴⁶ That staffer left government service three months later to become first senior vice president for the RIAA and, eventually, its chair and CEO. However, after vocal opposition by recording artists and their fans, Congress passed legislation revoking the change—although it also inserted language ensuring that the RIAA could continue to claim sound recordings fell under one of the nine pre-existing categories.⁴⁷ Specially-commissioned works made for hire exist due to political incentives, not creative ones. Those political considerations jettison moral rights as a side effect.

⁴⁴ 17 U.S.C. §§ [106A](#)(a), (b) (conferring rights upon authors of works of visual art), [101](#) (stating works made for hire are not works of visual art).

⁴⁵ See, e.g., [Dielman v. White](#), 102 F. 892, 894-95 (C.C.D. Mass. 1900) (placing burden of proving retention of copyright for commissioned work on artist); [Yardley v. Houghton Mifflin Co.](#), 108 F.2d 28, 31 (2d Cir. 1939) (stating common law rule that copyright passes to patron unless artist can prove parties intended otherwise).

⁴⁶ See Eric Boehlert, [Four little words](#), SALON (Aug. 28, 2000); [Rule Reversal: Blame It on the RIAA](#), WIRED (Aug. 18, 2000).

⁴⁷ *Id.*

In addition, the nine eligible categories treat similar types of works completely differently. Contributions to a motion picture can be specially-commissioned as works made for hire. During the drafting of the 1976 Copyright Act, motion picture producers argued that work made for hire coverage was necessary to compensate for the financial risk inherent in moviemaking.⁴⁸ They succeeded. Yet that same financial risk applies to producers of stage plays, who similarly provide funding for production and hire all creative contributors, from actors to musicians to stage crew. Stage producers, though, do not automatically own copyright in the creators' expressive output as stage productions are not included in the nine statutory categories. Indeed, stage producers can never even own the rights to the play or musical itself (absent a transfer of copyright) because dramatic works are not included in the nine categories. There is little financial or creative difference between producing movies and producing plays. Yet contributions to motion pictures can be works made for hire, while contributions to stage productions cannot, due to the arbitrary, interest group-driven nature of the nine categories of specially-commissioned works.

Lastly, other nations' copyright systems separate copyright ownership from moral rights with no discernible effect on generativity. For example, in the United Kingdom, the Copyright, Designs and Patents Act 1988 ("CDPA") confers authorship upon non-creators only in limited contexts: for sound recordings, their producers; for films, their producers and principal directors; for computer-generated literary, dramatic, musical, or artistic works, the persons making arrangements necessary for the work's creation.⁴⁹ Aside from those exceptions, though, UK copyright law separates authorship from ownership.⁵⁰ If a literary, dramatic, musical or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.⁵¹ Ownership is unrelated to creators' moral rights. Section 77 of the CDPA creates the right of attribution,⁵² and Section 80 confers the right of integrity.⁵³ Moral rights belong to the author and are not assignable.⁵⁴ Other European countries have similar and often more generous provisions for creators. In France, for example, there are no works made for hire, and only natural

⁴⁸ H.R. Rep. No. 83, 90th Cong., 1st Sess. 86 (1967).

⁴⁹ Copyright, Designs and Patents Act 1988, § [9](#)(1)-(3).

⁵⁰ *Id.*, § [11](#)(1).

⁵¹ *Id.*, § [11](#)(2).

⁵² *Id.*, § [77](#).

⁵³ *Id.*, § [80](#).

⁵⁴ *Id.*, § [94](#).

persons can be authors (except for collective works) for copyright purposes.⁵⁵ Moral rights attach to authors and are both perpetual and inalienable.⁵⁶

The U.S. works made for hire doctrine is an aberration, and one that appears unnecessary: other countries confer authorship and moral rights upon creators even despite concerns about certainty of control by employers or patronage inducement for creation of works.

B. Authors, Dramaturges, and Technical Consultants

The romantic conceit of a lone artist writing in a garret, or painting alongside a river, is increasingly anachronistic: modern works, especially more complex works such as software or motion pictures, result from the creative endeavors of teams of people. American copyright law, though, strongly prefers singular authorship,⁵⁷ consonant with its historical focus on protecting “the exclusive right of a man to the production of his own genius or intellect.”⁵⁸ The principal justification for restricting authorship to one person is transaction costs: recognizing multiple rightsholders would complicate the negotiations and coordination needed to develop creative content such as motion pictures. Formally, the Copyright Act makes provision for multiple creators. Initial ownership of a work’s copyright goes to the “author or authors” of the work.⁵⁹ The several authors of a joint work are co-owners of its copyright.⁶⁰ And a joint work by definition involves co-creation; it is one where multiple authors join their creative efforts intending that these contributions merge into an indivisible whole⁶¹. The joint works possibility seems receptive to recognizing multiple creators: as long as each contributor meets the modest requirement of providing independently copyrightable expression,⁶² and intends to merge their output in a unitary whole,⁶³ each would own an equal, undivided interest in the work.

However: U.S. federal courts have raised the bar for both aspects of joint works significantly, openly expressing fears that having multiple rightsholders would increase transaction costs. For example, in litigation over whether Jefri Aal Muhammed was a joint author of the motion picture *Malcolm X*, the Ninth Circuit went to some lengths to deprecate many of his contributions to the film as uncopyrightable, sometimes with dubious

⁵⁵ [Intellectual Property Code](#), Art. L111-1.

⁵⁶ *Id.* at Art. L121-1.

⁵⁷ See Shyam Balganesh, [Unplanned Coauthorship](#), 100 VA. L. REV. 1683, 1683-84 (2014).

⁵⁸ [Burrow-Giles Lithographic Co. v. Sarony](#), 111 U.S. 53, 58 (1884).

⁵⁹ 17 U.S.C. § 201(a).

⁶⁰ *Id.*

⁶¹ 17 U.S.C. § 101.

⁶² [Childress v. Taylor](#), 945 F.2d at 507.

⁶³ [Thomson v. Larson](#), 147 F.3d 195, 201 (2d Cir. 1998).

reasoning.⁶⁴ The court grudgingly admitted that Aalmuhammed’s original written dialogue qualified as independently copyrightable expression, but rejected joint authorship based upon two non-statutory factors: who “superintended” the work and was thus its master mind, and the degree to which audience appeal flowed from Aalmuhammed’s contributions.

Neither point withstands analysis. First, although the Ninth Circuit pointed to the film’s director, Spike Lee, as its master mind and superintendant, Lee was himself not an author. As the opinion itself points out, Lee directed the movie for the film studio Warner Brothers as a work made for hire.⁶⁵ Second, appraising audience appeal is not a task that courts are supposed to undertake in copyright matters. The Supreme Court clearly rejected allowing copyright eligibility to turn on a judge’s subjective aesthetic appraisal early in the twentieth century.⁶⁶

The real reason for the court’s decision to deny Aalmuhammed authorship can be found in its lengthy search for a single “inventive or master mind” of the film. The Ninth Circuit immediately limited the prospective set of movie contributors who could qualify—“someone at the top of the screen credits, sometimes the producer, sometimes the director, possibly the star, or the screenwriter”—a single individual with creative control.⁶⁷ This methodology, though, tips the court’s hand. It is a mechanism for identifying the single most obvious author, not for evaluating whether those in second place (or lower) also qualify for that status. The court tried to reinforce its holding by highlighting Aalmuhammed’s failure to enter into a contract granting him author status, despite the uncontroverted precedent that parties cannot agree to confer authorship where it does not exist as a matter of substantive copyright law. The Ninth Circuit started with the ending—sole authorship is key, so Aalmuhammed loses—and reworked copyright doctrine to get there. As the Court wrote, “Progress [under the IP Clause of the Constitution] would be retarded rather than promoted, if an author could not consult with others and adopt their useful suggestions without sacrificing sole ownership of the work.”⁶⁸ Ruling for Aalmuhammed risked “[c]laimjumping by research assistants, editors, and former spouses, lovers and friends [that]

⁶⁴ [Aalmuhammed v. Lee](#), 202 F.3d 1227 (9th Cir. 2000). For example, the Ninth Circuit stated that Aalmuhammed’s “[c]oaching of actors, to be copyrightable, must be turned into an expression in a form subject to copyright.” *Id.* at 1231. This ignores the obvious point: Aalmuhammed’s contributions were fixed in just such form *the moment the film was recorded*. See 17 U.S.C. § 102(a).

⁶⁵ 202 F.3d at 1235.

⁶⁶ [Bleistein v. Donaldson Lithographing Co.](#), 188 U.S. 239, 251-252 (1903).

⁶⁷ 202 F.3d at 1232.

⁶⁸ *Id.* at 1235.

would endanger authors who talked with people about what they were doing.”⁶⁹

Expanding on this trend, in litigation over the film *Heads Up*, the Second Circuit held that the director of a motion picture cannot be its author.⁷⁰ The Court first noted that the parties themselves agreed that the director was not a joint author. Next, the Court held that the director’s work was also not a work made for hire because the director was not an employee of the producer, and since there was no written contract, the directing services could not be considered a specially commissioned work. The Court then considered authorship. Despite *Aalmuhammed*’s suggestion that “someone at the top of the screen credits, . . . sometimes the director” could be the author of a film, the Second Circuit ruled definitively to the contrary: no matter how important, “a director’s contribution to an integrated ‘work of authorship’ such as a film is not *itself* a ‘work of authorship’ subject to its own copyright protection.”⁷¹ Again, the Second Circuit showed that its true concern was the economic implications of granting authorship status to directors or other creative contributors, writing, “If copyright subsisted separately in each of their contributions to the completed film, the copyright in the film itself, which is recognized by statute as a work of authorship, could be undermined by any number of individual claims.”⁷²

Yet examining the treatment of motion picture copyright authorship in other countries reveals that the problems imagined by American courts are merely a shibboleth--the result of failing to distinguish authorship from copyright ownership. For example, in the UK, the *authors* of a film are its producer and director,⁷³ yet this does not prevent distribution or economic exploitation because copyright *ownership* is granted to the employer when a film is made by an employee in the course of employment.⁷⁴ In France, the *authors* of an audiovisual work (which includes motion pictures) are the screenwriter, musical composer, and director, but as a collective work, copyright *ownership* belongs to the “natural or legal person who edits it, publishes it and discloses it under his direction and name.”⁷⁵ Authors can enjoy moral rights while copyright owners protect their economic expectations; the two are not mutually exclusive.

⁶⁹ *Id.* at 1235-36.

⁷⁰ [16 Casa Duse, LLC v. Merkin](#), 791 F.3d 247 (2d Cir. 2015).

⁷¹ *Id.* at 259 (italics in original).

⁷² *Id.* at 258.

⁷³ Copyright, Designs and Patents Act 1988, § 9.

⁷⁴ *Id.*, § 11.

⁷⁵ [Intellectual Property Code](#), Arts. L113-2, L113-5, & L113-7.

CONCLUSION

The hostility of American copyright law to moral rights notions runs far deeper than usually acknowledged. It goes beyond an unwillingness to adopt European notions of formal recognition for authorial integrity and attribution to a willingness to jettison authorship whenever it seems expedient. This covert antagonism is a barrier to adoption of moral rights protections for artists in the AI context. There are two important implications for those efforts.

First, proponents of moral rights in AI creations have made poor choices in tactics. Framing moral rights discourse around the natural rights of creators is not effective. A more promising approach would be to ground similar, if not identical, proposals in consequentialist terms.⁷⁶ A right of attribution, for example, likely has important incentive effects for at least some types of creators and creations.⁷⁷ There is evidence that artists in certain fields, such as musical performances and sound recordings, prefer mandatory attribution to greater economic rights, and in fact would swap some of the latter for more of the former.⁷⁸

Second, trademark law offers a more promising route to protect attribution and integrity, as some American federal courts have recognized.⁷⁹ Even after *Dastar*, Section 43(a) enables claims based on false attribution or affiliation, which could enable protection for attribution and disattribution, and based on false descriptions of origin, which could cover integrity for artists.⁸⁰ Proponents of moral rights in AI-created works could bring trademark-based claims in future controversies such as the one over “Heart On Your Sleeve.” If the courts prove resistant, asking Congress for minor adjustment to the Lanham Act is likely an easier political task than seeking entirely new copyright entitlements.

⁷⁶ See Greg Lastowka, [The Trademark Function of Authorship](#), 85 B.U. L. REV. 1171, 1176-78, 1180-85 (2005) (discussing incentives and social value created by attribution right).

⁷⁷ See Derek E. Bambauer, [Faulty Math: The Economics of Legalizing The Grey Album](#), 59 ALA. L. REV. 345, 398-99 (2007).

⁷⁸ *Id.*

⁷⁹ See [Gilliam v. Am. Broadcasting Co.](#), 538 F.2d 14 (2d Cir. 1974)

⁸⁰ 15 U.S.C. § 1125(a)(1).

Works generated using artificial intelligence tools are the latest battleground over moral rights for creators. We argue that the terrain for this battle is even more hostile for moral rights than the conventional wisdom suggests; both the courts and Congress have resisted moral rights proposals when they are presented as such. However, pressing analogous arguments grounded in economic terms, and located in trademark law, is more likely to overcome the anti-moral rights orientation of American intellectual property law.

* * *