2005

The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law

Laura A. Heymann
William & Mary Law School, laheym@wm.edu

THE BIRTH OF THE AUTHORNYM: AUTHORSHIP, PSEUDONYMITY, AND TRADEMARK LAW

*Laura A. Heymann**

Consumers in the marketplace of ideas are well acquainted with one aspect of the Foucauldian concept of the "author function": the way in which an author's name serves to organize both producer inputs—the various works the author wishes to have associated with his name—and consumer inputs—the readers' interpretive reactions to any particular body of work. Indeed, choosing to write under a pseudonym or under one's true name is the way in which an author exerts control over this function by grouping certain works (for example, scholarly pieces) under one name and other works (for example, mystery novels) under a different authorial name, thus segregating readers' responses to each of these bodies of work. Readers, in turn, respond to this decision by mirroring the choices made by the author—continuing, for example, to refer to certain works as being authored by "Mark Twain" even when the author's true name of "Samuel Clemens" is known or accepting that the Nancy Drew series was written by "Carolyn Keene" rather than by a series of different writers over time.

Borrowing from postmodern literary theorists Roland Barthes and Michel Foucault, and given that statements of authorship often tell readers very little, if anything, about the identity of the individual who put pen to paper, this Article proposes a separation of statements of authorship—what this Article terms "authornyms"—from facts of authorship. This construct

* Visiting Associate Professor of Law and Administrative Fellow in the Intellectual Property Law Program, The George Washington University Law School. Assistant Professor–elect, William & Mary School of Law. J.D., University of California at Berkeley School of Law (Boalt Hall); B.A., Yale University. Many thanks to Ann Bartow, Barton Beebe, Robert Brauneis, Stacey Dogan, Abner Greene, Trotter Hardy, Roberta Kwall, Glynn Lunney, Michael Madison, Tom Nachbar, Scott Palmer, Joel Reidenberg, Pam Samuelson, Peter Swire, Mark Tushnet, William Van Alstyne, the participants in the First Annual Intellectual Property & Communications Law and Policy Scholars Roundtable at the Michigan State University–DCL College of Law, and the participants in the Boston University School of Law Works-in-Progress Intellectual Property Colloquium for their helpful comments.

leads to the conclusion that all authornyms are essentially branding choices, even if the brand that is chosen is the author's true name, and therefore that the "author function" is really a "trademark function." If this is the case, then—as in trademark law—we should seek to preserve the organizational system of the "authornym function" and to minimize the likelihood of reader confusion that occurs when a work is used unlawfully without attribution—in other words, when an author's choice of authornym is not preserved.

The Supreme Court's 1995 decision in McIntyre v. Ohio Elections Commission, *which granted First Amendment protection to pseudonymous speech, was an inherent acknowledgment of the trademark value that authornyms serve and the importance of controlling the author function by the choice of authornym. But in its decision in* Dastar Corp. v. Twentieth Century Fox Film Corp. *eight years later, the Supreme Court largely denied authors the ability to compel attribution of their works (and thereby preserve their authornymic choice) through the Lanham Act and thus denied readers the accurate attribution required for organized and efficient literary consumption. This Article contends that only by recognizing the essential pseudonymity of all statements of authorship—in other words, by decoupling the copyright-focused concept of authorship from the trademark-focused statement of authorship ("authornyms")—can we create room for the values that trademark law can promote in the marketplace of ideas.*

INTRODUCTION

The traditional explanation of why the law extends protection to trademarks is an economic, market-based one. Trademarks, the accepted story goes, are a shorthand designed to reduce consumers' search costs by ensuring that the goodwill attributable to a mark is not misplaced.[1] A consumer who enjoys the taste of Pepsi and who would like to buy more of the cola need not engage in a time-consuming tasting spree to find the drink that matches the qualities she experienced with her first purchase—she need only look for the Pepsi

---

1 *See, e.g.*, Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163–64 (1995).

> [T]rademark law, by preventing others from copying a source-identifying mark, "reduce[s] the customer's costs of shopping and making purchasing decisions," for it quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past. At the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.

Id. (quoting 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.01[2] (3d ed. 1996)); United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 98 (1918) (describing a trademark as "merely a convenient means for facilitating the protection of one's good-will in trade").

trademark. A competitor who interferes with this search process—who increases consumers' search costs by misleading use of another's trademark—is deemed to have infringed by diverting sales intended for the trademark holder.

While some have examined noneconomic bases for extending legal protection to trademarks,[2] the vast majority of commentators and courts root this protection in the marketplace.[3] It might seem odd, then, to consider trademark-like activity in a principally noneconomic context: the act of authorship. Authorship can, of course, be a commercial activity, although—such as with scholarly writing—the ability to directly monetize one's work is not always the primary goal. Accordingly, the creative endeavor of authorship is typically thought of as a copyright-related activity, where the question is who holds the rights to exploit the text, to what degree, and for how long.[4] Little attention has been paid, however, to a separate and distinct aspect of authorship: its trademark aspect.

Each time an author creates, she must decide what name to give to the author of the text, what name to identify to the public as the "author" of the work. In many, or perhaps most, cases, the author chooses to use her real name as the name of the author. But this is not always the case: An author may write under one or several pseudonyms, whether to hide her identity completely or to experiment with a different writing style from that associated with her real name. Even though there may be a strong bias in favor of using one's real name as a statement of authorship, the author must, consciously or unconsciously, make the choice each time she writes.

When the creation of the text is a corporate endeavor—either the work of more than one author or a work for hire—then the nature of this choice becomes more apparent. Because there is no default statement of authorship in such cases, no "real name" from which a pseudonym would be a deviation, the choice of a statement of authorship is almost certainly a conscious choice, whether preordained by contract or custom or decided after completion of the work.

---

2 *See, e.g.*, Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621 (2004); *see also* Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 799 n.84 (2004) (calling noneconomic justifications for trademark law "rare").

3 *See, e.g.*, Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1689–91 (1999).

4 I focus here on literary authorship (rather than authorship of films or music) because, as I hope to demonstrate, the branding exercise is more immediately apparent for literary texts than for other forms of authorship.

In either case, this choice of an author's name for each created work is a branding choice. To begin with, an author may—like a marketing team devising a brand for a new product—choose a statement of authorship that conveys certain qualities about the work to which it is attached. A writer of romance novels may choose a Victorian-sounding pseudonym; a female author of a war novel may choose a more masculine-sounding pen name to avoid biased readers. More important, however, is that the choice of an author's name, like a trademark, represents an attempt to reduce readers' search costs by ensuring that the goodwill attributable to the writer does not flow to another author. Rather than publishing works anonymously, a writer who chooses a statement of authorship corrals goodwill associated with that name to avoid diversion to competing authors. So, like the cola drinker mentioned above, the reader who enjoyed the first John Grisham novel and would like to read another does not have to spend time poring over books in the bookstore to find the one whose qualities match the first book she enjoyed. She can, rather, simply look to the author's name—the trademark-like "John Grisham"—to find such books instead.

"John Grisham" is, presumably, the writer's real name, but there is no legal imperative that requires the writer to make this choice. Mr. Grisham could have written his courtroom dramas under the name "John Smith," or "Mary Johnson"; he could have chosen "John Grisham" for his novels and another name altogether for his (hypothetical) foray into cookbooks. Because most readers know the name "John Grisham" only as an author and not otherwise, the fact that he has chosen "John Grisham" as his statement of authorship as opposed to "John Smith" is a distinction without a difference. Had he chosen "John Smith" his readers would undoubtedly evaluate his texts no differently; they would simply associate them with a different statement of authorship from the one with which they currently do.[5] The conventions of authorship (and of readership) require the author to make some choice, but they don't require any particular choice. Because an author must make this kind of branding decision each time she creates, and because the word "pseudonym" to describe this decision is too restrictive (in that its conventional meaning does not usu-

5 As I will describe more fully *infra*, we, as readers/consumers of cultural commodities, generally have no problem keeping two such appellations separate in our minds, even as we are fully aware of their genetic connection. For example, most readers of literature are aware of the fact that "Mark Twain" is a pseudonym for "Samuel L. Clemens" and yet feel no compulsion to attribute the works of Twain to Clemens and thereby eliminate the ability of "Mark Twain" to serve as a statement of authorship.

ally include the choice to write under one's real name), I offer here the word "authornym." An authornym, as I use the term, is the statement of authorship offered to the consuming public—in other words, the author's trademark.[6]

Thinking of an authornym as something akin to an author's trademark does not require a complete reinvention of trademark law. Quite the opposite: Just as trademark law is primarily concerned with consumer confusion but is otherwise agnostic as to the producer's choice of mark, trademark law should also be primarily concerned with reader confusion but should care little what authornym the writer chooses. Altria is free to use different brands for its cigarettes ("Marlboro") and macaroni-and-cheese mix ("Kraft") even though neither mark directly identifies the producer; Samuel Clemens is free to write under "Mark Twain" without ever telling the reader his true identity. To use postmodern literary theory terminology, the author statement as signifier is distinct from the writer as signified. To make sure that we get the next John Grisham novel, we need pay attention primarily to the signifier; the signified is largely irrelevant to this search.

The irrelevance comes from the anonymous source doctrine in trademark law, which tells us that so long as a particular trademark is linked to a single source of a good or service, the name of that source can remain unknown to the relevant consumer base.[7] This is what frees producers from the requirement of the single mark from the guild era and permits them to affirmatively choose an identity to be associated with their product. As a result, the mark may well suggest some quality about the product (or suggest a quality the producer wishes to convey about the product, whether or not it is empirically true), but it need not directly convey any information about the identity of the producer itself. So, too, an authornym enables a producer (here, of literary works) to affirmatively choose an identity to be associated with his work product that need not bear any resemblance to his "true" identity. The authornym can be as descriptive ("Dear Abby") or as fanciful ("Saki") as he likes, and can be distinctive

6 Others have used the term "signature." *See, e.g.*, PEGGY KAMUF, SIGNATURE PIECES: ON THE INSTITUTION OF AUTHORSHIP 39 (1988); *see also United Drug Co.*, 248 U.S. at 98 (referring to a trademark as a "commercial signature"); FRANK I. SCHECHTER, THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS 156 (1925) (quoting Hanover Star Milling Co. v. Allen & Wheeler Co., 208 F. 513, 516 (7th Cir. 1913)).

7 *See, e.g.*, Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 844 n.70 (2004) (citing Manhattan Shirt Co. v. Sarnoff-Irving Hat Stores, Inc., 164 A. 246, 250 (Del. Ch. 1933)).

("Mark Twain") or not ("Anonymous"). So long as the chosen authornym serves the primary goal of reducing consumers'/readers' search costs—and, more pointedly, does not increase those costs by misdirecting consumers through misattribution—the law should not much care which authornym is chosen or whether it bears any resemblance to the author's true name.[8]

Although the authornym, like a trademark, carries a primarily economic justification—the aforementioned reduction of search costs—there is a noneconomic justification as well. Authors use particular authornyms not only to ensure that repeat customers can find subsequent works easily, but also to draw lines between canons, including some works and excluding others. The university professor who wants to write mystery novels on the side, for example, may write those novels under a pseudonym so that readers (and her tenure committee) do not think less of her scholarly work for the literary frolic. The well-known magazine writer who wants to write a political novel may refrain from doing so under his real name in the hope that readers will thereby approach the novel free from bias. The authornym is therefore a trademark not only in the marketplace of books, but also, as the literary theorists tell us, in the marketplace of ideas.

In order to acknowledge the trademark work that authornyms do, however, we must first separate the fact of authorship (the author's identity) from the statement of authorship (the author's name). The former is the province of copyright law; the latter is (or should be) the province of trademark law. As I will describe more fully later, the Supreme Court's 2003 decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*[9] is an example of courts' seeming reluctance to recognize this distinction. In *Dastar*, Twentieth Century Fox argued that unfair competition law required Dastar to provide authorial attribution for the work it was distributing but (according to Twentieth Century Fox) did not create. Twentieth Century Fox was not seeking (or, at least, should not have been seeking) to prevent

8 Although this Article is concerned only with literary endeavors as opposed to other forms of "authorship" or creative activity, there are parallels elsewhere in the creative world. Actors' Equity Association, the American actors' union, requires actors whose professional name is identical to that of another Equity member, "or similar enough to cause confusion," to change his or her name or to add a full middle name. Actors' Equity Association, *How Can I/Should I Change My Name?*, *at* http://web.actorsequity.org/faqpublic/QADetails.asp?locator=76 (last visited Feb. 9, 2005). In a similar vein, see Tara Bahrampour, *A Boy Named Yo, Etc.*, N.Y. TIMES, Sept. 25, 2003, at B1 (noting that New York regulations do not allow a resident to legally change his name to that of a public figure if doing so is likely to cause confusion).

9 539 U.S. 23 (2003).

Dastar from copying or distributing the work at issue—because the work was in the public domain, Dastar was free to copy and distribute as much or as little of the work as it desired.[10] Nevertheless, the Court rejected Twentieth Century Fox's attribution claims, characterizing them as an unwarranted expansion of copyright law.[11] But if the work was indeed misattributed, the harm was not a copyright harm but a trademark harm: a harm to the consumers of the creative product through the disruption of the organizational system of attribution that authornyms establish.

My contention in this Article is that once we recognize the essential pseudonymity of all statements of authorship—once we decouple the act of authorship inherent in copyright law from statements of authorship—it should not be difficult to recognize the congruence between authornyms and trademarks. From there, we can recognize the concept that the values that trademark law promotes—"reduc[ing] the customer's costs of shopping and making purchasing decisions" and "help[ing] assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product"[12]—are equally valid goals when the "customer" shops in the marketplace of ideas.[13] Authorship, in other words, has both copyright and trademark components, and the law should take account of both.

Part I of this Article provides a brief overview of the birth and death of the concept of authorship. It describes how the notion of the author-genius was both preceded and followed by periods in which statements of authorship were understood to be suspect or expected to be nonexistent. It continues by positing, in light of this indeterminacy of authorship and borrowing from literary theory, the ways in which all writing is essentially pseudonymous, even when the pseudonym is textually equivalent to the writer's true name, and introduces the term "authornym" to comprise these various nominative choices. Part II provides an analysis of the authornym as trademark. It begins

10 *Id.* at 33–34.

11 *Id.* at 37.

12 Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163–64 (1995) (internal quotation marks and citation omitted).

13 As I describe more fully *infra*, the concept of authornym as trademark seems to have gained currency among literary critics but has fared less well among legal academics. *See, e.g.*, SIMON DURING, FOUCAULT AND LITERATURE: TOWARDS A GENEALOGY OF WRITING 124 (1992) ("In modernity there has been a shift of author function: the authorial name has become a *property* . . . ."); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 1 (1993) ("[T]he name of the author . . . becomes a kind of brand name, a recognizable sign that the cultural commodity will be of a certain kind and quality.").

by considering how the trademark is in fact a form of identity creation. It then builds on this concept by demonstrating how authornyms evince this kind of identity creation, both in the commercial context and, drawing on literary theory, in the literary context. Part II concludes by considering the Supreme Court's primary case addressing the First Amendment right to speak anonymously and demonstrates how this case was not truly about anonymous speech but rather was a validation of the right to make authornymic choices even when the disjuncture between the chosen authornym and the writer's true identity renders the choice a technically false statement. Part III then considers how best to preserve the organizational function of authornyms and explores, in light of the Court's opinion in *Dastar*, the availability of a reverse passing off claim such as that typically brought pursuant to section 43(a) of the Lanham Act. Part III concludes by contending that the Court's decision in *Dastar* resulted from looking at the case through the wrong lens—through an author-centric lens rather than a reader-focused one—and, in so doing, neglecting to consider the primary goal of trademark law: to eliminate the likelihood of consumer (here, reader) confusion. And finally, the Article concludes with some thoughts on how the limited function of the authornym might serve both authorial and reader/consumer goals.

I. AUTHORSHIP AND PSEUDONYMITY

A. *The Birth and Death of the Author*

For some time now in the legal literature, the trope of the Romantic author has held considerable sway. Although it has been subject to critical question over the years, the vision of the solitary genius working alone in the garret, giving birth to literary masterpieces, seems to have retained its place at the core of copyright law and policy.[14] To be sure, this vision has been considerably deconstructed in recent years to the point at which some give it virtually no weight in the formation of copyright law and policy. Nevertheless, when we talk about "the author" of a work, it is, I suspect, some sort of individual creator we have in mind: the person responsible for the words on the page and the person identified at the start of the work.

14 *See, e.g.*, James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1463–69 (1992) (describing the development of the "romantic author" vision of authorship); James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 628–33 (1988) [hereinafter Boyle, *The Search for an Author*] (describing the "romantic vision" of authorship).

But authorship has never been so simple or so solitary. The concept of authorship—particularly the Romantic concept—is a relatively recent development in the history of publication.[15] In times or societies where storytelling was accomplished through oral, rather than written, tradition, the concept of the author as we now know it was virtually nonexistent. Stories resided entirely in the public domain and the storyteller was simply the medium through which they were conveyed to the audience. Hence, the storyteller's talent was measured not by his creativity, but by his lack of creativity—his ability to re-present known texts.[16] Contrary to what U.S. copyright law acknowledges today as "authorship," this tradition recognized mimicry, not originality.

The move to written memorialization, rather than oral presentation, of narrative did not bring with it a determinate sense of authorship. The actual creator of a particular piece of writing was historically not the person identified as the author. Instead, a name was chosen that would lend the work prestige or facilitate distribution and acceptance.[17] Many Biblical scholars believe that the Gospels, for example, were written not by Matthew, Mark, Luke, and John, but in-

---

15 *See, e.g.*, JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 53–54 (1996); Peter Jaszi & Martha Woodmansee, *Introduction* to THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 1, 2–3 (Martha Woodmansee & Peter Jaszi eds., 1994) [hereinafter THE CONSTRUCTION OF AUTHORSHIP]; Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, *in* THE CONSTRUCTION OF AUTHORSHIP, *supra*, at 15, 15.

16 *See, e.g.*, ROLAND BARTHES, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142, 142 (Stephen Heath trans., 1977) ("[I]n ethnographic societies the responsibility for a narrative is never assumed by a person but by a mediator, shaman or relator whose 'performance'—the mastery of the narrative code—may possibly be admired but never his 'genius.'"); ALVIN KERNAN, THE DEATH OF LITERATURE 122 (1990); Donald E. Pease, *Author*, *in* CRITICAL TERMS FOR LITERARY STUDY 105, 105 (Frank Lentricchia & Thomas McLaughlin eds., 2d. ed. 1995) (noting that "auctor," the predecessor term to "author," represented "adherence to the authority of cultural antecedent"); James R. Kincaid, *Purloined Letters: Are We Too Quick to Denounce Plagiarism?*, THE NEW YORKER, Jan. 20, 1997, at 93, 98 ("The idea that words, ideas, texts were originated privately was not honored much in the classical world, and many have said that it was meaningless to the medieval, where writing was connected not to personality but to a total coherence provided by God.").

17 *See* DAVID G. MEADE, PSEUDONYMITY AND CANON: AN INVESTIGATION INTO THE RELATIONSHIP OF AUTHORSHIP AND AUTHORITY IN JEWISH AND EARLIEST CHRISTIAN TRADITION 1–2 (1986); David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, LAW & CONTEMP. PROBS., Spring 1992, at 139, 144 (quoting Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLINE L. REV. 261, 271–73 (1989), who notes that such works are now often cited with the prefix "Pseudo" beside the name of the originally attributed author).

stead by early, and now anonymous, Church teachers and were later ascribed to the saints to gain legitimacy.[18] In the Shakespearean era, pseudonymous authorship was used as a means of suggesting the collaborative forces necessary to create a literary work.[19] In the 1700s and early 1800s, readers did not often expect authorial attribution on the work itself, either because such attribution was deemed unimportant or unseemly or because the author was well known and so needed no explicit mention.[20] And although the development of the printing press made wide distribution of publications logistically and economically feasible, it did not simultaneously engender the birth of the writer as author in the sense that U.S. copyright law assumes today. In early-eighteenth-century England, for example, it was typically the printer or stationer who was deemed the source of the publication and the entity legally responsible for its contents;[21] not surprisingly, it

---

18 MEADE, *supra* note 17, at 13, 207; C. Jan Swearingen, *Originality, Authenticity, Imitation, and Plagiarism: Augustine's Chinese Cousins*, *in* PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD 19, 33 (Lise Buranen & Alice M. Roy eds., 1999).

19 Marcy L. North, *Rehearsing the Absent Name: Reading Shakespeare's Sonnets Through Anonymity*, *in* THE FACES OF ANONYMITY: ANONYMOUS AND PSEUDONYMOUS PUBLICATION FROM THE SIXTEENTH TO THE TWENTIETH CENTURY 19, 23 (Robert J. Griffin ed., 2003) [hereinafter THE FACES OF ANONYMITY].

> In both print and manuscript, book producers and compilers [in Shakespeare's time] utilized a wide variety of conventions to present "authors" to their readers. Among the most popular were extensive prefatory materials, initials instead of full names, subscripts after authorial clusters, anagrams, the practice of attributing a miscellany to one prominent author, and, most important, anonymity. These conventions often obscured the intellectual claim of specific authors and called attention to the collaborative production of the text.

Id.; Peter Beal, Letter to the Editor, *Shall I Die?*, TIMES LITERARY SUPPLEMENT, Jan. 3, 1986, at 13 (describing the association of names with creative works in the Shakespearean era "for a variety of reasons besides simple authorship").

20 GÉRARD GENETTE, PARATEXTS: THRESHOLDS OF INTERPRETATION 43, 45 (Jane E. Lewin trans., 1997); Roger Chartier, *Figures of the Author*, *in* OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW 7, 17 (Brad Sherman & Alain Strowel eds., 1994) [hereinafter OF AUTHORS AND ORIGINS]; *cf.* Michael W. Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1450 (2004) (detailing similar development in attribution of musical compositions). Of course, other authornyms took the place of the author's legal name in this era; Jane Austen ("by the author of *Sense and Sensibility*") and Walter Scott ("by the author of *Waverly*") are among the more well-known examples. Chartier, *supra*, at 17.

21 *See, e.g.*, Mark Rose, *The Author as Proprietor:* Donaldson v. Becket *and the Genealogy of Modern Authorship*, *in* OF AUTHORS AND ORIGINS, *supra* note 20, at 23, 27; David Saunders, *Dropping the Subject: An Argument for a Positive History of Authorship and the Law of Copyright*, *in* OF AUTHORS AND ORIGINS, *supra* note 20, at 93, 96, 107–08.

was also these publishers who were the major driving forces behind a push toward statutory copyright.[22]

Literary and legal historians seem to agree that the birth of the writer as author took place in the eighteenth century, when various historical threads—including the availability of mass distribution through the printing press and the decline of patronage—came together in a single cultural moment in which the author became both a creative and an economic progenitor.[23] With this Romantic vision of the individual author came a transformation of his literary output. Creativity was now valued over mimicry, and the author—no longer simply the medium through which others' tales were delivered—became a part of the work. In this worldview, the work was seen as an expression of the author's personality, and so the more known of the

---

22 *See, e.g.*, Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 296 (1992). As Mark Rose has noted, the parties in the leading English copyright cases of the eighteenth century were booksellers, not writers. Rose, *supra* note 21, at 32 (citing Donaldson v. Becket, 98 Eng. Rep. 257 (K.B. 1774); Millar v. Taylor, 98 Eng. Rep. 201 (K.B. 1769); Tonson v. Collins, 96 Eng. Rep. 169 (K.B. 1760)).

23 *See, e.g.*, Chartier, *supra* note 20, at 17 ("The new place in writing in society supposed the full visibility of the author, the original creator of a work from which he could legitimately expect a profit."); Robert J. Griffin, *Anonymity and Authorship*, 30 NEW LITERARY HIST. 877, 877 (1999); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455; David Saunders & Ian Hunter, *Lessons from the "Literatory": How to Historicise Authorship*, 17 CRITICAL INQUIRY 479, 480 (1991); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425 (1984). *But see* Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777–1793*, 30 REPRESENTATIONS 109, 113–14 (1990) (contending that in late-eighteenth-century France, the creation of the author was a political, rather than economic, act, as it allowed the state to hold the author directly accountable); Peter Lindenbaum, *Milton's Contract*, *in* THE CONSTRUCTION OF AUTHORSHIP, *supra* note 15, at 175, 175 (commenting that the eighteenth-century recognition of the author had its genesis in the introduction of print in Western culture); Marjut Salokannel, *Film Authorship in the Changing Audiovisual Environment*, *in* OF AUTHORS AND ORIGINS, *supra* note 20, at 57, 57 (situating the idea of the modern artist as creative genius in the Italian Renaissance). In *What Is an Author?* Michel Foucault posited a reversal in attributional trends in the seventeenth or eighteenth century, in which scientific texts required no authorial attribution to gain credibility, while more literary writing required attribution, the reverse (claims Foucault) of the attributional trend previous to that time. Michel Foucault, *What Is an Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141, 149–50 (Josué V. Harari ed., 1979). *But see* Chartier, *supra* note 20, at 21 (calling Foucault's hypothesis "fragile" and contending that the distinction is not between scientific and literary texts but between ancient texts (which typically depended on attribution for their authority) and the body of works in the vernacular, from which only a few "authors" (Dante, for example) initially emerged but which gained additional authors with time).

author's biography and intentions, the better the literary interpretation.[24] This Romantic vision of authorship was at some remove from the mechanistic "literatory" represented by the Grub Street press.[25] Here, the author was not simply the scrivener who put pen to paper (or, in later times, set type in rows) but rather the wellspring of intellectual activity from whence the words on the page sprung. The Romantic author thus embodied both aspects of the writing process—the conception of ideas and the evolution of those ideas into written text—even if, as today, the economic realities of the publication process (realities that permitted even the Romantic author to thrive) were far removed from this idealism.[26]

The burgeoning of postmodern literary theory and its cousin deconstructionism in the middle of the twentieth century began to call this image of the author into question.[27] Critics such as Roland Barthes and Michel Foucault took issue with the focus on the author as the source of all interpretive meaning in a text and proposed instead a more reader-focused method of literary interpretation. In the postmodernists' view, the primacy given to the author's interpretation (via biography or otherwise) was misplaced: Each reader brings his or her own meaning to a text, and each of those meanings is as equally valid as the author's, if not more so.[28] As Terry Eagleton has noted, "[f]or literature to happen, the reader is quite as vital as the author."[29] It is therefore not only the writer who has a claim to authorship of a text, but all those who have come before (for whom the writer functioned as reader) and all those who come after.

---

24 *See, e.g.*, Rose, *supra* note 21, at 51.

25 The oral argument in *Dastar*, which suggests a consensus that Dastar's "arguably minor" alterations to the public domain work at issue in that case could be sufficient to constitute a work sufficiently "original" to be subject to its own copyright protection, *see* Transcript of Oral Argument, Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003) (No. 02-428), *available at* 2003 U.S. TRANS LEXIS 35; *see also* Dastar Corp v. Twentieth Century Fox Film Corp., 539 U.S. 23, 31 (2003), may suggest that we are closer to the literatory than to the Romantic ideal. *See also* Jaszi, *supra* note 22, at 300–02.

26 PAUL K. SAINT-AMOUR, THE COPYWRIGHTS: INTELLECTUAL PROPERTY AND THE LITERARY IMAGINATION 31 (2003).

27 TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 74 (1983) ("Indeed one might very roughly periodize the history of modern literary theory in three stages: a preoccupation with the author (Romanticism and the nineteenth century); an exclusive concern with the text (New Criticism); and a marked shift of attention to the reader over recent years.").

28 *See, e.g.*, BARTHES, *supra* note 16, at 142; Foucault, *supra* note 23, at 145; Annabel Patterson, *Intention*, *in* CRITICAL TERMS FOR LITERARY STUDY, *supra* note 16, at 135, 135–36; Pease, *supra* note 16, at 112–16.

29 EAGLETON, *supra* note 27, at 74.

The postmodernists thus returned the concept of authorship to its pre-Romantic origins, in which all writers are readers, all readers are writers, and the "author" is simply the medium by which collective creation is presented. In such a world, where originality is a contested concept and where attribution was not prevalent or was known to be suspect, the savvy reader would have given little weight to the purported authorial biography or intention.[30] Indeed, given the collaborative nature of many writing endeavors, reliance on authorial intent is likely to be even more futile, as it is unclear which "author" we should be endeavoring to discover: for example, the claimed (often celebrity) author whose name is on the title page or the ghostwriter who was responsible for putting pen to paper.[31]

What is now perhaps the primary description of this deconstruction of authorship is Barthes's "death of the author."[32] As Barthes described it, any text "is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation," all centering on the reader, who is "simply that *someone* who holds together in a single field all the traces by which the written text is constituted."[33] In Barthes's view, discovering the identity of the author—and with it his intentions or motivations—does nothing to

---

30 *See* Jeffrey A. Masten, *Beaumont and/or Fletcher: Collaboration and the Interpretation of Renaissance Drama*, *in* THE CONSTRUCTION OF AUTHORSHIP, *supra* note 15, at 361, 362–63 (describing collaborative, "pre-anonymous" works as those works "without ascription of authorship" written at a time "before the word ['anonymous'] itself emerged with the author to describe their condition"); Virginia Woolf, *"Anon" and "The Reader": Virginia Woolf's Last Essays* (Brenda S. Silver ed.), 25 TWENTIETH CENTURY LITERATURE 356, 397 (1997) ("Anonymity was a great possession. It gave the early writing an impersonality, a generality. It gave us the ballads; it gave us the songs. It allowed us to know nothing of the writer: and so concentrate upon his song.").

It might be said that E.M. Forster anticipated the postmodernists by over a generation. In his essay *Anonymity: An Inquiry*, Forster decried the modern tendency to focus on the relation between an author's biography and his work:

> What's so wonderful about great literature is that it transforms the man who reads it toward the condition of the man who wrote, and brings to birth in us also the creative impulse. . . . Literature tries to be unsigned. . . . We are conscious only of the world [such authors] have created, and we are in a sense copartners in it.

E.M. Forster, *Anonymity: An Inquiry*, ATLANTIC MONTHLY, Nov. 1925, at 588, 592–93.

31 *See* Masten, *supra* note 30, at 372 ("A collaborative perspective also forces a reevaluation of (and/or complicates) a repertoire of familiar interpretive methodologies—most prominently, biographical and psychoanalytic approaches—based on the notion of the singular author.").

32 BARTHES, *supra* note 16.

33 *Id.* at 148.

guide the reader to the "true" interpretation of a piece.[34] Rather, the meaning of a text is found in the reader (himself something of a construct), who brings his own experiences and values to the interpretive effort.[35] The end result is that a piece of writing has no single meaning but rather can support different and perhaps even conflicting interpretations.[36] The death-of-the-author theory thus lies in tension with a Romantic view of authorship. If "[t]he author is to his text as God, the *auctor vitae*, is to his world," then the death of the author

---

34 *Id.* at 143 ("The *explanation* of a work is always sought in the man or woman who produced it, as if it were always in the end, through the more or less transparent allegory of the fiction, the voice of a single person, the *author* 'confiding' in us.").

35 *See* Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 736 n.54 (1993) ("Textual identity turns on what the reader brings to the reading process, and because readers differ in their cultural, linguistic, and rhetorical background, texts will differ upon successive readings.").

36 SEÁN BURKE, THE DEATH AND RETURN OF THE AUTHOR: CRITICISM AND SUBJECTIVITY IN BARTHES, FOUCAULT AND DERRIDA 43 (1992). I should note that Burke rejects the death of the author as "a particularly acute form of critical blindness." *Id.* at 154. While Barthes generally decried the search for the author's true identity, that search is, of course, one of the primary goals of readers and critics of pseudonymous works, typically in a mistaken belief that the discovery of this identity will lead the reader further along the path to "true" meaning. *See* BARTHES, *supra* note 16, at 147.

> To give a text an Author is to impose a limit on that text, to furnish it with a final signified, to close the writing. Such a conception suits criticism very well, the latter then allotting itself the important task of discovering the Author . . . beneath the work: when the Author has been found, the text is 'explained'—victory to the critic.

Id.; DON FOSTER, AUTHOR UNKNOWN: ON THE TRAIL OF ANONYMOUS (2000) (describing his research in discovering the authors of pseudonymous or anonymous works); Foucault, *supra* note 23, at 149–50 ("[I]f a text should be discovered in an state of anonymity—whether as a consequence of an accident or the author's explicit wish—the game becomes one of rediscovering the author."); Masten, *supra* note 30, at 361 ("'It were . . . wisdome it selfe, to read all Authors, as *Anonymo's*, looking on the Sence, not *Names* of Books . . . .'" (quoting RICHARD WHITLOCK, ZOOTOMIA, OR, OBSERVATIONS ON THE PRESENT MANNERS OF THE ENGLISH: BRIEFLY ANATOMIZING THE LIVING BY THE DEAD 208 (London, Tho. Roycroft & Humphrey Moseley 1654))). Even in those instances, however, the search for meaning relies on the text. *See* FOSTER, *supra*, at 7.

> When asked, *Who wrote this document?*, I usually begin the inquiry by asking of text databases, *Where else can I find similar language and writing habits?* That question may not lead me to the author, but it's usually good for information about the author's age, religion, education, job, motivation, or ideology.

Id.

represents a "departure of belief in authority, presence, intention, omniscience and creativity."[37]

Barthes was not, of course, the last postmodern word on authorship. Indeed, Michel Foucault's *What Is an Author?*[38] provided a much-needed anchor for Barthes's rather unmoored author by restoring a limited, but important, organizational role for statements of authorship (what he termed a "classificatory function"[39]). But in whatever incarnation, it is fair to say that the fundamental difference between the postmodern view and the Romantic view of authorship is the willingness of the former to divorce the creator from his work. Whereas the Romantic vision of authorship features the solitary author from whom entire works emanate, the postmodern view recognizes the collaborative nature of authorship, both as part of the creative process and as part of the interpretive process. Both authorship and interpretation are indeterminate and variable no matter what name appears on the cover of the book.

This focus on the text rather than on the identity or persona of the author exists in legal as well as literary doctrine.[40] In contract law, for example, the starting interpretive position is the "four corners of the contract," and one moves to parol evidence only when the meaning of the text is ambiguous.[41] (Of course, a contract is only ambigu-

---

37 BURKE, *supra* note 36, at 22–23; *see also* BARTHES, *supra* note 16, at 146–47 ("We know now that a text is not a line of words releasing a single 'theological' meaning (the 'message' of the Author-God) . . . . [T]o refuse to fix meaning is, in the end, to refuse God . . . .").

38 Foucault, *supra* note 23.

39 *Id.* at 147.

40 *See* RICHARD A. POSNER, LAW AND LITERATURE 211 (rev. ed. 1998).

> In the case of documents, whether literary or legal, "interpretation" just means reading to make whatever kind of sense one happens to be interested in. This might coincide with the writer's intended meaning, but equally it might be a sense that the reader wants to impress on the writing for reasons remote from anything the writer had in mind.

Id. As Annabel Patterson points out, legal interpretation, like literary interpretation, has long exhibited a tension between the desire to establish the meaning of a text by attempting to determine authorial intent and the recognition in practice that the meaning of any text can (and should) change over time. Patterson, *supra* note 28, at 135–36.

41 *See* POSNER, *supra* note 40, at 219.

> [The New Critics' approach to text corresponds] to the common practice of interpreting contracts without reference to "extrinsic" evidence such as testimony by the parties as to what they meant by ambiguous terms—that is, evidence other than the document itself and the cultural background necessary to understand the words and sentences in the document and the purposes of contract interpretation.

ous or unambiguous in the eyes of the reader.) Strict constructionists or proponents of the "plain meaning" rule in statutory interpretation[42] take a similar approach to legislation, refusing to resort to legislative history in interpreting the meaning of the text.[43] In determining the "meaning" of a judicial opinion, to take a third example, we typically treat the text of the opinion as sacrosanct. We (and I am including lower courts in this) do not formally inquire of the authoring judge to determine his intentions in writing a particular opinion or even conduct research into the judge's personal background or history or extrajudicial writings to give meaning to the words in the opinion. Rather, we focus solely on the words of the opinion, pondering the turns in the language and attempting to come up with our interpretation of its meaning.[44] The occurrence of circuit splits and the proliferation of law review articles only attest to the truth of the theory: that of multiplicity of meaning, depending on the reader. (And the Supreme Court functions both as the ultimate reader—as Justice Jackson famously noted "not final because [it is] infallible, but . . . infallible only because [it is] final"[45]—and as the ultimate author, engendering in its reading a new text to interpret.)

The one area in which the deconstruction of authorship might expect to find resistance is in copyright law, which centers its entire bundle of rights on a notion of authorship. In order to be protected by copyright, for example, a work must be sufficiently original and

---

Id. Similarly, Robert Rotstein has noted that defamation law "also regards the text as a reader-dependent process" in that whether or not a particular statement is defamatory depends on how it is perceived by the audience deemed to be its recipient. *See* Rotstein, *supra* note 35, at 741 n.73.

42 William N. Eskridge, Jr. & Philip R. Frickey, *Law as Equilibrium*, 108 HARV. L. REV. 26, 97 (1994).

43 *See* STANLEY FISH, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, *in* IS THERE A TEXT IN THIS CLASS: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 268, 280 (1980).

> It is your specification of the makers' intention that tells you what is in the statute, not your literal reading of the statute that informs you as to its makers' intention. This would seem to suggest that one need only recover the makers' intention in order to arrive at the *correct* literal reading; but the documents (including even *verbatim* reports) that would give us that intention are no more available to a literal reading (are no more uninterpreted) than the literal reading it would yield.

Id.

44 *See, e.g.*, Mark Tushnet, *The Death of the Author, by Himself*, 70 CHI.-KENT L. REV. 111, 111 (1994).

45 Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

fixed in a tangible medium of expression,[46] which seems to suggest at least a nod to authorial intent.[47] But U.S. copyright law doesn't require that the creator of a work be the person identified as the work's "author." It is concerned not with identifying the true creator—the person who actually put pen to paper—but merely with the legal fiction of the author,[48] a statement of authorship subject only to ex post challenge and not to ex ante proof. Copyright's view of authorship allows an author to be identified with a pseudonym; it allows a celebrity author to claim authorship credit for a ghostwritten work; it permits works for hire, in which the creator's employer is deemed the legal author;[49] and it allows a writer to assign the copyright in any text he produces.[50] The courts, as Peter Jaszi has noted, comfort themselves that awarding copyright to an employer in a work-for-hire scena-

---

46 *See* 17 U.S.C. § 102(a) (2000); Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 355 (1991) (quoting H.R. REP. NO. 94-1476, at 51 (1976)).

47 *See* Monroe E. Price & Malla Pollack, *The Author in Copyright: Notes for the Literary Critic*, *in* THE CONSTRUCTION OF AUTHORSHIP, *supra* note 15, at 439, 446–48 (contrasting three tests of authorship).

48 ROSE, *supra* note 13, at 136 ("In the discourse of copyright, then, the goal of protecting the rights of the creative author is proudly asserted even as the notion of author is drained of content."); Rose, *supra* note 21, at 46 (noting that the reaction of Lord Hailes to a claim that the Reverend Thomas Stackhouse's *History of the Holy Bible* was protected by common-law copyright was to contend that the claimants "were improperly conferring the name of 'original author' on a mere 'tasteless compiler'" (citing JAMES BOSWELL, THE DECISION OF THE COURT OF SESSION UPON THE QUESTION OF LITERARY PROPERTY 7 (Edinburgh, James Donaldson 1774); Saunders, *supra* note 21, at 96 ("Legal status and cultural standing, it can be said, were separate historical inventions, deriving not from a singular and fundamental process of subject-formation but from the organizational conditions obtaining in separate spheres of existence."); Saunders & Hunter, *supra* note 23, at 493 ("[The Statute of Anne] does not assume or require a necessary equivalence between the person of the copyright owner and the aesthetic persona of the writer, even on those occasions where the *writer* holds copyright.").

49 Dan L. Burk, *Intellectual Property and the Firm*, 71 U. CHI. L. REV. 3, 12 (2004) ("Under this doctrine, individual employees who create copyrightable works while operating within the scope of their employment are not considered to be the authors of those works. Rather, the institution employing the creator becomes the legally recognized author."). For another example of this phenomenon, see *Building Officials and Code Administrators v. Code Technology, Inc.*, 628 F.2d 730, 734 (1st Cir. 1980) ("The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.").

50 *See* 17 U.S.C. § 201(d) (providing for transfer of ownership); Griffin, *supra* note 23, at 889 (noting the lack of a "cause-and-effect relation" between ownership and the presence or absence of the author's name as a historical matter because "[n]aming and copyright protection operate on separate levels of discourse and involve separate sets of decisions on the part of the writer").

rio is consistent with the Romantic vision of authorship because it is the employer who provides the "inspiration" for creation,[51] but this seems entirely contrary to the patronage system against which the idea of the Romantic author developed.[52] U.S. copyright law thus (probably unconsciously) embodies a deconstructed view of authorship in which there is no presumption of unity between the individual or individuals responsible for creation and the person or entity identified to the public as the "author" of the work. Thus, as David Saunders has noted, "in the Romantic historicist model, it was always to be the role of copyright law to support the authorial personality required and enshrined by Romanticism"; in the post-structuralist model, "it was always to be the role of copyright law to support the illusion of the authorial personality, for instance as proprietor of copyright."[53]

B. The Birth of the Authornym

If the Romantic fiction of the author were indeed true, one might expect to see some sort of jealous guardianship of authorial identity. If we should give pride of place to the individual creator, we would want to discourage any identification of that creator that diminished recognition of his creative genius. Pseudonyms would be discouraged as an attempt to attribute the work to a (fictional) individual other than the true author, and corporate writing efforts, in which some other individual or entity is credited with the work of others, would be socially or legally disallowed.

But authorship doesn't function this way. Writers have not historically hesitated to, for example, attribute their work to a patron or other benefactor, or to another author, or to a pen name, or to no

---

51 Jaszi, *supra* note 22, at 298; *see also, e.g.*, Picture Music, Inc. v. Bourne, Inc., 457 F.2d 1213, 1216 (2d Cir. 1972) (describing the employer as the motivating factor for the work).

52 *Cf., e.g.*, Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 882–83 (1997) (book review) (noting the disconnect between the corporation and the individualistic view of romantic authorship).

53 DAVID SAUNDERS, AUTHORSHIP AND COPYRIGHT 216–17 (1992); *see also, e.g.*, ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 284–85 (1998). This may particularly be the case given that legal scholars are, of course, authors, who may well have a vested interest in preserving the Romantic view of authorship. *See, e.g.*, Tushnet, *supra* note 44, at 111 ("To be told that texts 'are'—or at the very least will become—what readers make of them is to deprive Romantic authors of something they believe to be at the core of their activity."). Of course, as Tushnet describes, texts are often taken to "mean" whatever the critical consensus concludes that they mean, notwithstanding authorial intent. *See id.* at 114.

source at all.[54] Ghostwriters do much of the work attributed to more famous "authors," including biographies, speeches, and press release "quotations." Research assistants and editors contribute text to many scholarly works. The benefits flowing from a work made for hire accrue to the corporate author and not to the individual employee who created the work.[55] If it were truly the case that the notion of authorship were as exalted as the Romantic proponents would have us believe, it would seem that the culture would not permit—or, at least, would not implicitly support—such a laxity in attribution values.

But our social and legal norms are based not on the author as a unified being, but rather on something of an accepted falsehood: that the name given as the author of the text is just a name. It may be the author's true name or it may be a pseudonym; it may identify a single author or mask a corporate writing effort. The name may, over time, become invested with biography or meaning, but it has none at its genesis because we cannot presume that it tells us anything factual about the genesis of the work with which it is associated. In this norm, then, the author is not a unified being but a dual one: the creator or creators of the work and the name to which the work is attributed.[56]

The separation between the fact of authorship and a statement of authorship allows authors relatively free choice among various forms

---

54 For a historical view of pseudonymity in political authorship, see, for example, Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2001–2002 CATO SUP. CT. REV. 57, 57–60; Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1084–85 (1961). The literary theorist Gérard Genette describes seven types of historical pseudonymity: (1) complete omission of the name (anonymity); false attribution of the text to another author (apocrypha), either (2) with permission or (3) without permission; false attribution of another's text to oneself either (4) with permission (ghostwriting) or (5) without permission (plagiarism); (6) attributing the text to a fictional author (what Genette calls "imagining the author"); and (7) attributing the text to a name other than one's own (pseudonymity). GENETTE, *supra* note 20, at 47–48.

55 Burk, *supra* note 49, at 14.

> By erasing the identity of the natural creator, work made for hire removes from the natural author a reputational interest that is otherwise specific to the natural person, and not the firm. . . . Thus, an 'asset specificity' approach suggests that authorship and ownership should perhaps be bifurcated under work made for hire, allocating the reputational interest to the natural author even while assigning default ownership of the work to the firm.

Id.

56 And possibly not simply a dual being but a triadic one, if we include the fictional persona of the author to whom the name of the author at least metaphorically attaches. *Cf.* Beebe, *supra* note 2, at 646 (discussing the triadic structuration of the trademark).

of authorial attribution. A writer can write under her own name or under a pseudonym; if she chooses a pseudonym, she can choose one that is plain or exotic, gender neutral or gender suggestive. A group of authors writing collectively can choose to list each participant as an author or to devise a name for the group and attribute authorship to that entity. Samuel L. Clemens can write as "Mark Twain" without being accused of deception or falsehood and indeed, over time, may establish the pseudonym as a more accepted statement of authorship than his real name.

Although "pseudonym" is the word that comes to mind most readily to describe these choices of authorship statement, the word is not particularly apt. Typically when we refer to a "pseudonym" in the authorial context, we mean a pen name—a name under which the writer distributes his work, often sounding very much like a given name, with both first and last name components (or occasionally a single moniker like "Publius"), but that typically bears no resemblance to the author's real name. From the reader's perspective, however, a pseudonym is like any author's name, real or devised: a statement of authorship, the name that the reader is to credit with the work that he or she is reading. Thus, there is no difference in the reader's perception of authorship between "Mark Twain" and "John Grisham," even though the former is a pseudonym for Samuel L. Clemens and the latter is, presumably, the author's true name. In neither instance does the name serve to identify the person who put pen to paper; rather, the name identifies the "author" to whom the text should be attributed. Similarly, there is no significant difference between "Mark Twain" and "Samuel L. Clemens" from an authorship perspective. Except for the fact that the writer's choice between Twain and Clemens represents a conscious decision to associate certain works with the former and certain with the latter, there is no semiotic difference between the two such that, should the decision have been reversed, the reader would have been interpretatively poorer. If the typical reader's interaction with "Mark Twain" is wholly textual[57]—primarily through his work and secondarily through the works of others about him—then it matters not whether the name used to collect the various

57 The same considerations may not inhere in circumstances in which the interaction between writer and reader is both textual and physical. *See, e.g.*, David R. Millen & John F. Patterson, *Identity Disclosure and the Creation of Social Capital*, 2003 CHI NEW HORIZONS 720, 720–21 (describing the "thick trust" that developed on an online site for residents of a small community in which users were required to identify themselves using their real names), *available at* http://delivery.acm.org/10.1145/770000/765950/p720-millen.pdf?key1=765950&key2=3007989011&coll=GUIDE&dl=GUIDE&CFID=39874070&CFTOKEN=42822378.

strands of that interaction is "Mark Twain" or "Samuel Clemens," "John Grisham," or "John Smith."[58] Except in the probably very rare instance of truly anonymous speech—speech that is devoid not only of any label but also of any characteristics that enable us to align it with other instances of speech—the "search for truth" that is often given as the justification for disallowing pseudonymous speech is still achievable through what David Post has called the "reputational capital" that pseudonyms attain.[59] Hence, I introduce here the term "authornym"

---

58 *See* Lee Tien, *Who's Afraid of Anonymous Speech?* McIntyre *and the Internet*, 75 OR. L. REV. 117, 161 (1996).

> Knowing that a message was written by John Smith is pretty meaningless unless you know who John Smith is, what he stands for, and so on. Once you know that a pro-tobacco message was written by a tobacco industry lobbyist, whether he is John Smith or Jane Jones is largely irrelevant.

Id. *But see* Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 74 (1991) ("To the extent First Amendment rights are rooted in the 'marketplace of ideas,' disclosure of information cannot but contribute to the functioning of that marketplace. In a well-functioning market, more information moves the market to truth."); *id.* at 85.

> The identity of the speaker conveys information that improves the quality of discussion. An assertion by Carl Sagan regarding astronomy claims more credence than one by the neighborhood auto mechanic, not by virtue of Sagan's social position, but because of his proven judgment. If we do not know who is making an assertion, we must evaluate it from first principles, a burdensome approach indeed.

Id. Even if Kreimer's point is true as a relative matter, it still seems that, so long as the authornym "Carl Sagan" is used consistently by the same speaker, Kreimer's concerns should be fully addressed. From the perspective of literary criticism, which is concerned more with issues of interpretation than with issues of liability, the pseudonymous authornym and the legal authornym are essentially equivalent from the perspective of the effect each has on the reader. GENETTE, *supra* note 20, at 49.

59 *See* David G. Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. CHI. LEGAL F. 139, 152 (noting that, over time, pseudonyms build up "reputational capital" and that without these associations "there is indeed no meaningful difference between anonymity and pseudonymity"); *see also* JULIAN DIBBELL, MY TINY LIFE: CRIME AND PASSION IN A VIRTUAL WORLD 23 (1998) (noting that first-time "guest" visitors to a virtual world acted more brazenly than those with fixed characters who had made "the critical passage from anonymity to pseudonymity, developing the concern for their character's reputation that marks the attainment of virtual adulthood"); A. Michael Froomkin, *Anonymity and Its Enmities*, 1995 J. ONLINE L. art. 4, par. 35, *at* http://www.wm.edu/law/publications/jol/95_96/froomkin.html; Gary T. Marx, *What's in a Name? Some Reflections on the Sociology of Anonymity*, *at* http://web.mit.edu/gtmarx/www/anon.html (last visited Feb. 27, 2005) ("Persons making anonymous postings to a computer bulletin board may come to be 'known' by others because of the content, tone, or style of their communications."). *But see* Curtis E.A. Karnow, *The Encrypted Self: Fleshing Out the Rights of Electronic Personalities*, 13 J. MARSHALL J. COMPUTER & INFO. L. 1, 13 (1994) (concluding that electronic personae are not in need of free speech rights because "[w]hen we

to avoid the misperception that "pseudonym" causes and to encompass all statements of authorship, whether textually equivalent to the author's true name or invented.

Our experience with authorship reveals three kinds of authornyms. "One-to-many" authornyms are various statements of authorship used by a single individual to explore alternative authorial identities, whether those alternative identities are based in gender, race, sexual orientation, writing style, or some other attribute. Corporate authornyms, by contrast, are "many-to-one" authornyms; they are authornyms used to collate the works of several individuals, whether contemporaneously or over time. Corporate authornyms may take the name of an individual or an entity; in either case, they tend to feature a corporate style that unifies the works distributed under the authornyms. And finally, "one-to-one" authornyms describe what we would typically characterize as the author writing under his "real" name, despite the fact that the name is "real" to us only as a statement of authorship and not otherwise. All three types are in abundance not only in the traditional world of authorship but also online, which, as many have noted,[60] is a realm that fosters identity experimentation and so is a fruitful place to look for examples of authornymous writing.[61]

1. One-to-Many Authornyms

A single individual who chooses various identities through which to express himself or herself may have any one of a number of reasons for doing so. In some instances, the choice is one of gender morphing: the ability of a writer of one gender to brand himself (or, more typically, herself) as a writer assumed to be of the other gender. Sometimes this act of branding is described in heroic terms;[62] in other

---

talk, we generally want to be recognized as the speaker, because we are proud of our thoughts and because others often do not take kindly to anonymous discourse: credibility and the power of the word are still frequently *ad hominem* affairs").

60 *See generally, e.g.*, SHERRY TURKLE, LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET (1995); Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1131 (2000).

61 Indeed, because communication via the Internet often requires a speaker to choose a "screen name" before he can begin speaking, the Internet may yield the clearest example of how a singular authornym is essentially pseudonymous. When there is no presumption that one's authorial identity will be the textual equivalent of one's true name, the choice of the singular authornym can be seen only as a conscious statement of authorship.

62 *See, e.g.*, 1 SANDRA M. GILBERT & SUSAN GUBAR, NO MAN'S LAND: THE PLACE OF THE WOMAN WRITER IN THE TWENTIETH CENTURY 185, 240–42 (1988) (describing shift in pseudonymity of women writers from the late nineteenth century to the early twentieth century as moving from a "mask behind which the female writer could hide her

instances, gender branding is a more defensive measure that allows the female writer to obtain an authorial freedom not available to her under her own name.[63] In still other instances, the choice is less a matter of individual identity fulfillment and more a matter of consumer expectations. As Saul Levmore has suggested, if readers of romance novels expect those novels to be written by female authors, publishers have an economic incentive to fulfill that expectation by creating a feminine sounding authornym for their male authors.[64] And this appears to be historically confirmed: At least one male writer seeking to appeal to a female audience of a certain type in the late seventeenth and early eighteenth centuries published his works under

---

disreputable femininity" to one in which the pseudonym functioned as "the mark of a private christening into a second self, a rebirth into linguistic primacy").

63 *See, e.g.*, VIRGINIA WOOLF, A ROOM OF ONE'S OWN 54 (1929) ("It was the relic of the sense of chastity that dictated anonymity to women even so late as the nineteenth century."). Margaret Ezell questions the conventional wisdom that when early modern women authors engaged in pseudonymous authorship, it was because pseudonymity was "imposed, not selected":

> [I]f cultural sanction against women being on public display in print was so encompassing and if the function of selecting anonymity of a pseudonym was to disguise the gender of the author to permit her speak, what are we to make of the selection of "By a Lady" as being one of the period's more popular solutions, a label which confronts the reader with the writer's gender, often as part of the very title of the work? Why was the choice of women writing during this period not simply "Anon" or the strategy adopted by nineteenth-century women writers, the adoption of male names?
>
> . . . How well did such sobriquets function as a shield for the female author, hiding or disguising her identity and protecting her from acquiring a "reputation"? Could they serve more as a costume rather than as a disguise, a means to signify to the reader that a certain type of role was being performed, a type of personality was being staged, rather than being simply a way to hide the true identity of the individual?

Margaret J.M. Ezell, *"By a Lady": The Mask of the Feminine in Restoration, Early Eighteenth-Century Print Culture*, *in* THE FACES OF ANONYMITY, *supra* note 19, at 63, 64; *see also* Paula R. Feldman, *Women Poets and Anonymity in the Romantic Era*, 33 NEW LITERARY HIST. 279, 279–83 (2002) (contending that women poets during the period from 1770 to 1835 rarely published books of verse anonymously and never published under a male pseudonym). At least one study (albeit one now somewhat dated, given the pace of the online world) suggests that women are more likely than men to adopt cross-gender pseudonyms in the online world; interestingly, the study also found that the communicative equalization that resulted from this adoption occurred not because the pseudonymous "men" spoke in stereotypically male patterns of discourse but because the male participants in the study (using male-gendered pseudonyms) tended to speak in more feminized modes of discourse online. J. Michael Jaffee et al., *Gender, Pseudonyms, and CMC: Masking Identities and Baring Souls* (1995), *at* http://members.iworld.net/yesunny/genderps.html.

64 Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191, 2213–14 (1996).

the feminine authornym of "a Lady" (as in "By a Lady") in order to attract the audience he sought.[65]

In other instances, the authornymous choice is used for a form of racial or ethnic masking, in which the author takes on not only a racialized authorial attribution but a racialized authorial identity in creating his text.[66] As in other instances, such authorial masking is often undertaken in order to permit the author to experiment with other identities,[67] to write in an area presumed to be off-limits,[68] or—in the case of early slave narratives authored by white writers—to gain authenticity for a particular political view that was deemed to be unachievable otherwise.[69] Because this particular choice of authornym inherently involves claimed (or presumed) membership in a racial or ethnic group, the reaction of the readership once the mask of the authornym is removed is sometimes one of betrayal or anger at what appears to be an act of cultural misappropriation. One such example is the novel *The Education of Little Tree*, which purported to be the biography of a Native American youth named Forrest Carter and was later

---

65 Ezell, *supra* note 63, at 74; *see also* James Raven, *The Anonymous Novel in Britain and Ireland, 1750–1830*, *in* THE FACES OF ANONYMITY, *supra* note 19, at 141, 145 (noting that almost a third of all novels published in Britain and Ireland in 1785 and nearly a quarter in 1787 were "by a Lady").

As Susan Lanser has written, the gender implied by a gendered authornym is a "reading effect" that is not "a tautological equivalent to the real author, but an authorial *position* that the text wittingly or unwittingly assumes." Susan S. Lanser, *The Author's Queer Clothes: Anonymity, Sex(uality), and* The Travels and Adventures of Mademoiselle de Richelieu, *in* THE FACES OF ANONYMITY, *supra* note 19, at 81, 97.

66 *See, e.g.*, LAURA BROWDER, SLIPPERY CHARACTERS: ETHNIC IMPERSONATORS AND AMERICAN IDENTITIES (2000). Jerry Kang provides a consideration of this kind of masking in the Internet context and outlines three possibilities for race in cyberspace: abolition (in which race, and therefore racial identification, is nonexistent), integration (in which the geographic and class-straddling nature of the Internet enhances understanding among different racial groups), and transmutation (in which racial identification, and therefore racial characterization, is fluid). Kang, *supra* note 60, at 1154–205; *see also* Margaret Chon, *Erasing Race?: A Critical Race Feminist View of Internet Identity-Shifting*, 3 J. GENDER RACE & JUST. 439 (2000).

67 I thank Kirsten Carlson for inspiring me to note here that this literary device is not always used in support of authorial freedom; some writers have chosen to mask identity in order to create mocking or otherwise harmful caricatures of those in the same group as the new authorial identity.

68 *See, e.g.*, Elaine K. Ginsberg, *Introduction: The Politics of Passing*, *in* PASSING AND THE FICTIONS OF IDENTITY 1, 16 (Elaine K. Ginsberg ed., 1996) ("In its interrogation of the essentialism that is the foundation of identity politics, passing has the potential to create a space for creative self-determination and agency: the opportunity to construct new identities, to experiment with multiple subject positions, and to cross social and economic boundaries that exclude or oppress.").

69 BROWDER, *supra* note 66, at 272.

revealed to be the work of Asa Carter, an avowed segregationist and supporter of George Wallace.[70] When first published, *The Education of Little Tree* was hailed as a masterpiece of Native American literature, selling over half a million copies, and became a necessary inclusion on college reading lists for courses on Native American literature.[71] After the author's "true" identity was revealed, the same text (with nary a word changed) was reviled by many as a sham and a fraud, no longer worth reading except as a curiosity of cultural history.[72] Still another example is that of the award-winning 1983 novel *Famous All Over Town.* Set in a Los Angeles barrio, the novel, purported to be by the young Chicano author Danny Santiago and "hailed by Latino critics for its vibrancy and authenticity," was later revealed to be the work of Daniel L. James, a white, Yale-educated writer in his seventies who had "lost faith in his own ability to write" and had turned to "Danny Santiago" as "the only voice available to him."[73]

Conversely, a writer may choose an authornym to deracialize attribution, to release the text from the burdens of identity and of group membership and allow the text to stand on its own. Robert Post, in discussing the work of Jürgen Habermas, describes this instance of discourse as "functioning as pure communication," noting that in Habermas's ideal "public sphere," discourse is "removed from context of experience and action," leading inevitably to the conclusion that certain traditional criteria of evaluating speech, such as class (and

70 *See, e.g.*, Dan T. Carter, *The Transformation of a Klansman*, N.Y. TIMES, Oct. 4, 1991, at A31; Henry Louis Gates, Jr., *"Authenticity," or the Lesson of Little Tree*, N.Y. TIMES BOOK REV., Nov. 24, 1991, at 1; Allen Barra, *The Education of Little Fraud*, SALON, Dec. 20, 2001, *at* http://dir.salon.com/books/feature/2001/12/20/carter/index.html. This may derive from the modern conception of race (albeit not always a historical one in the United States) as a matter of self-identification, such that an individual's desire to self-identify as a member of a particular race is typically taken at face value.

71 BROWDER, *supra* note 66, at 132; Gates, *supra* note 70.

72 Of course, the emotional context of the Forrest Carter/Asa Carter dichotomy detracts from the more fundamental question of authornymity at its core: whether Carter's efforts should be interpreted as an attempt to perpetuate a fraud on his readership or an attempt to engage his readership on themes he could not otherwise write about without the medium of a separate authornym. *See* Gates, *supra* note 70.

73 *Id.* ("Judging from the testimony of his confidant, John Gregory Dunne, Mr. James may well have felt that the attribution was the only just one; that 'Famous All Over Town' belonged to Danny Santiago before it quite belonged to Daniel James."). For a brief biography of Daniel James and his history as "Danny Santiago," see John Gregory Dunne, *The Secret of Danny Santiago*, N.Y. REV. OF BOOKS, Aug. 16, 1984, at 17; *see also* BROWDER, *supra* note 66, at 231–69.

race and gender, to add but two more categories), must be "bracketed out."[74]

In still other instances, writers may use authornyms to facilitate communication not otherwise possible given the constraints of their environment—a gay or lesbian individual who is not fully out, for example, may use one identity to communicate with those to whom he or she has come out and a separate identity for others. *McVeigh v. Cohen*[75] illustrates one such example. Timothy R. McVeigh—one must undoubtedly still add that he is no relation to the individual who bombed the Oklahoma City federal building—was serving aboard a nuclear submarine in the U.S. Navy.[76] The wife of one of McVeigh's colleagues was coordinating a toy drive for the crew members' children and McVeigh, interested in obtaining further information, sent her an e-mail from his AOL account. The e-mail was sent from the AOL screen name "boysrch," although the text of the e-mail was signed "Tim."[77] Not recognizing the screen name, the wife searched AOL's member profile directory,[78] which stated that "boysrch" was an AOL member named Tim who was in the military and lived in Honolulu, Hawaii. The profile listed the word "gay" in the space provided for the member to list his or her marital status, but it did not contain a name, address, or phone number.[79]

After viewing the AOL member directory entry, the woman forwarded the e-mail and the directory entry to her husband, McVeigh's colleague, who apparently forwarded it up the chain. Someone determined that McVeigh was likely the author of the e-mail (a conclusion bolstered by the Navy's unlawful retrieval of confirming information

---

74 Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 639 (1990) (citing JÜRGEN HABERMAS, LEGITIMATION CRISIS (Thomas McCarthy trans., 1975); 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1987)); *see also id.* at 640 (noting that this ideal is reflected in "the first amendment right to engage in public discourse anonymously, so that speakers can divorce their speech from the social contextualization which knowledge of their identities would necessarily create in the minds of their audience"). *But see* Kreimer, *supra* note 58, at 84 n.233 ("The problem in a less than ideal speech situation, like the political arena, where participants are motivated by considerations other than a search for the truth, is whether abstraction from identity will in fact aggravate the *defects*.").

75 983 F. Supp. 215 (D.D.C. 1998).

76 *Id.* at 217.

77 *Id.*

78 AOL's member profile directory is available to any AOL member and contains information supplied wholly by the member himself in response to certain categories set forth by AOL.

79 *McVeigh*, 983 F. Supp. at 217.

from AOL),[80] and McVeigh was eventually investigated for violation of the U.S. military's "don't ask, don't tell" policy.[81] McVeigh successfully obtained a preliminary injunction barring his discharge, arguing that the Navy had violated federal law in the way it had obtained the information from AOL, and ultimately settled both with the Navy and with the online service.[82]

Because the privacy violations were the cornerstone of McVeigh's challenge to the decision to discharge him, the opinion is largely viewed as reinforcing the right under federal privacy law to require certain legal process before personal online information can be revealed.[83] But during the course of the litigation, McVeigh understandably chose not to take this position. He did not challenge his discharge on the ground that the "don't ask, don't tell" policy was unconstitutional on its face or as applied,[84] nor did he take the position that he was not the writer of the e-mail (in other words, that someone else had used his AOL account to send the correspondence).[85] Instead, McVeigh took the position that he hadn't "told" anything—that the identity he had created under the name (or authornym) "boysrch" was simply a separate identity.[86] In interviews before the litigation concluded, McVeigh told reporters that he had used the word "gay" in the online profile as a signifier of sorts: "I did it basically because I have dedicated so much of my life to the military, I really didn't want to get married and be out to sea all the time. Nor did I want to have children and not be there to see them grow up."[87] In a later interview, McVeigh stated: "You can put in [your profile that you are] male or female, that you are green or blue or purple. That

---

80 *Id.*

81 *Id.*; *see also* 10 U.S.C. § 654 (2000) (setting forth the military's policy).

82 *McVeigh*, 983 F. Supp. at 217–20. The court found McVeigh substantially likely to succeed on the merits of his argument that the government had violated 18 U.S.C. § 2703, part of the Electronic Communications Privacy Act of 1986 (ECPA), in requesting the information from AOL without appropriate process. *Id.* at 219–20.

83 *See, e.g.*, Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1628–29, 1635–36 (1999).

84 As the district court suggested, this position had been taken unsuccessfully a number of times. *See McVeigh*, 983 F. Supp. at 218 (citing cases).

85 *See id.* at 217–18 ("At the hearing, the Plaintiff made an unsworn oral statement that explained the substance of his email to Ms. Hajne, and thus by inference confirmed his authorship of the correspondence.").

86 Plaintiff's Complaint at ¶¶ 64(C), 68(C), *McVeigh* (No. 98-116), *available at* http://dont.stanford.edu/cases/mcveigh/mcveigh.complaint.htm.

87 Gregg K. Kakesako, *Senior Chief Says Navy Wants to Kick Him Out, Saying He's Gay*, HONOLULU STAR BULLETIN, Nov. 26, 1997, at A1.

doesn't make it true."[88] While McVeigh's authornymic claim may have been motivated by litigation strategy, it did not go unnoticed by the court, which noted that "[p]articularly in the context of cyberspace, a medium of 'virtual reality' that invites fantasy and affords anonymity, the comments attributed to McVeigh do not by definition amount to a declaration of homosexuality. At most, they express 'an abstract preference or desire to engage in homosexual acts.'"[89]

A final expansion of identity through authornym is one that is focused solely on authorial identity, as opposed to any "real world" identity. In this technique, an author chooses an authornym not to experiment with gender, race, or sexuality, but rather to experiment with different modes of authorship.[90] Here, too, the decision to write pseudonymously in a different literary style may be motivated in part by a desire to compartmentalize reader reaction.[91] The late Columbia University humanities professor Carolyn G. Heilbrun, for example, published numerous mystery novels under the authornym "Amanda

88 Gregg K. Kakesako, *Navy Insists Pearl Harbor Sailor Is Gay; Discharge Proceedings Are Set for Friday*, HONOLULU STAR BULLETIN, Jan. 14, 1998, at A5; *see also Don't Ask, Don't Tell* (National Public Radio broadcast, Jan. 19, 1998) (airing a statement of Ann Beeson, Staff Attorney, ACLU: "I could say [in an AOL profile] my name is Joe Blow and, you know, that I'm [a] 50-year-old male. And I may not be. That just is my profile on AOL.").

89 *McVeigh*, 983 F. Supp. at 219 (quoting DEP'T OF DEFENSE, GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT, DEPARTMENT OF DEFENSE DIRECTIVE NO. 1332.14 (1993)); *see also* Schwartz, *supra* note 83, at 1657 ("For McVeigh, self-determination involved his finding a path between at least two aspects of his personality, the distinguished military veteran and 'boysrch,' whose AOL profile stated an interest in 'boy watching' and 'collecting pics of other young studs.'"). For a more general discussion of the *McVeigh* case, see Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159 (2003).

90 *See* Joyce Carol Oates, *Success and the Pseudonymous Writer: Turning Over a New Self*, N.Y. TIMES BOOK REV., Dec. 6, 1987, at 12 ("It may be that, after a certain age, our instinct for anonymity is as powerful as that for identity—or, more precisely, for an erasure of the primary self in that another (hitherto undiscovered?) self may be released.").

91 *See, e.g.*, Feldman, *supra* note 63, at 279 (noting that gentry during the late 1700s and early 1800s would publish anonymously so as not to diminish their social status "by appearing to be 'in trade'"); Donald W. Foster, *Commentary: In the Name of the Author*, 33 NEW LITERARY HIST. 375, 379 (2002) ("Anonymous publication was a fundamentally democratic activity that allowed writers from every social rank to publish and to seek recognition for their work, while shielding their dignity, modesty, or privacy from trespass, and their name from being too closely associated with the product of a moment's leisure."); Tien, *supra* note 58, at 133 ("By delinking message from messenger, both are decontextualized. An example might be a creative talent who wishes to experiment in a different genre. By not exhibiting her work under her true name, she risks less of herself.").

Cross" because, in part, she writes: "There was no question in my mind then, nor is there any now, that had those responsible for my promotion to tenure in the English department of the university where I teach known of the novels, they would have counted them heavily against me; I would probably have been rejected."[92] The Victorian novelist Walter Scott, to take another example, did not sign his name to *Waverly* because, he wrote: "In truth, I am not sure it would be considered quite decorous for me as a Clerk of Sessions to write novels. Judges being monks clerks are a sort of lay-brethren from whom some solemnity of walk and conduct may be expected."[93] The *Newsweek* columnist Joe Klein's authorship of *Primary Colors*, a thinly veiled fictionalized account of the presidential campaign of Bill Clinton, under the authornym "Anonymous" is another such example.[94]

---

92 CAROLYN G. HEILBRUN, WRITING A WOMAN'S LIFE 110 (1988). Upon later reflection, Heilbrun expressed her choice in less deferential terms:

> I had a very good reason for secrecy, but as I now perceive, the secrecy itself was wonderfully attractive. Secrecy is power. True, one gives up recognition and publicity and fame, should any be coming one's way, but for me that was not difficult. . . . I think that secrecy gave me a sense of control over my destiny that nothing else in my life, in those pre-tenure, pre-women's-movement days, afforded.

Id. at 116–17.

93 Robert J. Griffin, *Introduction* to THE FACES OF ANONYMITY, *supra* note 19, at 1, 8; *see also* Feldman, *supra* note 63, at 286 (noting that Romantic-era poets would adopt pseudonyms when engaging in controversial subject matter or to distinguish statements of authorship directed at different audiences).

94 Of course, one might argue that "Anonymous" is a statement of anonymity rather than pseudonymity. But that would be wrong. As Klein no doubt intended, "Anonymous" became a persona in his own right, as would-be literary detectives tried to determine his "true" identity by identifying some of his characteristics. Klein himself has noted that he adopted the pseudonym to allow the novel to be judged on its own merits rather than by association with his other work. *See* Michael Cromartie, *Anonymous No More* (Nov. 1, 1996), *at* http://www.eppc.org/publications/pubID.91/pub_detail.asp; *see also* Anne Ferry, Anonymity: *The Literary History of a Word*, 33 NEW LITERARY HIST. 193, 194 (2002) (describing use of "Anon." as a shorthand statement of authorship when the name of the writer was unknown). Doris Lessing took a similar tack in writing *The Diaries of Jane Somers* as "Jane Somers" rather than under her well-known true name. *See* DORIS LESSING, THE DIARIES OF JANE SOMERS, at vii (2d ed. 1984) (stating that she did not want readers' judgment of the work to be tainted with judgments derived from reading the works of "Doris Lessing"); *id.* at viii (noting that as Jane Somers, Lessing "wrote in ways that Doris Lessing cannot"). The phenomenon has even spread to the music industry. *See* Tom Moon, *Welsh Rock Vets Pull a Fast One*, ARIZONA DAILY STAR (Tucson), Mar. 24, 2004, at E3 (describing how a 1980s rock group created a fake band with younger members to serve as the face for a new release so that "people [would get] behind the song on its merits"), *available at* http://www.azstarnet.com/dailystar/printDS/15010.php.

Of course, the foregoing discussion does not include the many other reasons for multiplicity of authorial identity—still others include the desire to subordinate identity to the broader purpose of the text (the Holocaust survivor who wishes his memoir to act as the voice of all victims)[95] or the desire to signal a particular textual interpretation to readers through the choice of authornym.[96] In all these examples, however, the authorial voice is multiplied, or fractured, but it is done with deliberateness. The writer who chooses to express himself through an authornym is making an affirmative, identity-creating decision, a *branding* of identity, in a way that a writer who simply scrawls graffiti on a wall is not: He is indicating his desire to have a particular set of creative expressions associated with a particular identity, albeit not always the one he uses for other pursuits.[97]

2. Many-to-One Authornyms

Besides the expansion of identity, which enables voice experimentation, authornyms also permit the contraction of identity—a "many-to-one" authorial voice, or what is often referred to as "corpo-

---

95 *See* Jeremy D. Popkin, *Ka-Tzetnik 135633: The Survivor as Pseudonym*, 33 NEW LITERARY HIST. 343, 344–46 (2002) (contrasting pseudonymous authorship of Holocaust narrative *Salamandra* (1946) with memoirists who wrote under their proper names as "a proof of endurance"); *see also, e.g.*, Ferry, *supra* note 94, at 197 (describing the use of anonymity by poets to "escape over-personal interpretations of their poems"); Henry Hazlitt, *The Cult of Anonymity*, 131 NATION 350, 350 (1930) (describing a group of writers in Paris who withheld their names from their writings "to curb the exploitation of personalities, and to establish 'the art as an ideal, not the ego'").

96 *See, e.g.*, Griffin, *supra* note 23, at 886 (discussing how author Mary Robinson's use of the pseudonym "Tabitha Bramble," the name of a character in Smollett's *Humphry Clinker*, "functions as a signal to the reader to expect a dramatized, and clearly fictional, point of view").

There are, of course, still other reasons why an author might write under a separate authornym. In the late eighteenth and early nineteenth centuries, some authors chose pseudonyms to "limit the appearance of overproduction." *See, e.g.*, Raven, *supra* note 65, at 158. A version of this effort can be seen today when online speakers in particular create distinct identities in order to present both sides of a debate more effectively and spark discussion in a way that might not be possible were both sides presented by a single "author." *See* Bill Flinn & Hermann Maurer, *Levels of Anonymity*, 1 J. UNIVERSAL COMPUTER SCI. 35, 39 (1995), *available at* http://www.jucs.org/jucs_1_1/levels_of_anonymity; Philip Giordano, *Invoking Law as a Basis for Identity in Cyberspace*, 1998 STAN. TECH. L. REV. 1, ¶ 12.

97 In this respect, the choice of an authornym might have one constant characteristic: the desire to bolster the effectiveness of the speech by presenting that speech under a particular brand (or, put differently, to increase the likelihood that readers/consumers will "buy" what is offered) as opposed to releasing textual product to the market without any indication of source (i.e., truly anonymously).

rate" authorship.[98] In this mode, writers use authornyms to collect the corporate efforts of a body of writers under the name of a single author. Works for hire, in which the corporation is the putative author,[99] are perhaps the most prevalent form, but we also see such corporate writing efforts occurring in popular literature as well:[100] The Nancy Drew series, for example, has been written for years by "Carolyn Keene," whose name masks a stable of authors trained in a corporate fictional style,[101] and the "Abby" of "Dear Abby" fame has been over the years both Abigail Van Buren (itself a pseudonym) and her daughter.[102] In some instances, as Peter Jaszi and Martha Woodmansee have noted, the corporate writing endeavor exists even when the public persona projected is one of the Romantic, solitary au-

---

98 *See, e.g.*, POSNER, *supra* note 40, at 258; Griffin, *supra* note 93, at 10–11; Andrea A. Lunsford & Lisa Ede, *Collaborative Authorship and the Teaching of Writing*, *in* THE CONSTRUCTION OF AUTHORSHIP, supra note 15, at 417, 418. Indeed, as David Post points out, the effort may be truly "corporate." Post, *supra* note 59, at 158.

> [T]hough we do not generally think of corporate speech as an example of pseudonymous speech, it clearly falls within that category. When I receive an advertising flyer from my local McDonald's restaurant, identified only by a prominently placed corporate logo . . . the message is an "anonymous" one, inasmuch as it contains no information at all about the identity of the individual(s) who may have typed it up, reproduced it, or placed it under my door. But it is also clearly within the subset of pseudonymous messages because the presence of the logo provides a great deal of information about the recognizable (corporate) entity responsible for preparing and distributing the flyer.

Id.

99 *See* 17 U.S.C. § 201(b) (2000).

100 Although this Article is focused on literary works, other works subject to copyright (and therefore that have "authors") such as musical works, theater, and films are more obviously examples of corporate authorship. ROSE, *supra* note 13, at viii.

101 The "Stratemeyer Syndicate," a stable of ghostwriters founded by Edward Stratemeyer, was responsible for the Nancy Drew, Bobbsey Twins, and Hardy Boys series, among others. *See* Patricia Leigh Brown, *A Ghostwriter and Her Sleuth: 63 Years of Smarts and Gumption*, N.Y. TIMES, May 9, 1993, at E7; Susan Chira, *Harriet Adams Dies; Nancy Drew Author Wrote 200 Novels*, N.Y. TIMES, Mar. 29, 1982, at A1; Meghan O'Rourke, *Nancy Drew's Father*, THE NEW YORKER, Nov. 8, 2004, at 120.

102 *See, e.g.*, Amy Wilson, *Dear Abby and Daughter: Jeanne Phillips Is Now Co-Writer of Her Mother's Column*, WASH. POST, Aug. 22, 2001, at C11; *cf.* Alex Kuczynski, *"Ann Landers" May Write Again*, N.Y. TIMES, Feb. 2, 2003, § 9, at 7 (discussing the *Chicago Tribune*'s search to find a replacement for Eppie Lederer, who wrote as Ann Landers until her death). Early modern women writers also used this technique, often taking on a joint authornym that comprised some portion of each writer's first or last names. *See, e.g.*, Holly A. Laird, *The Coauthored Pseudonym: Two Women Named Michael Field*, *in* THE FACES OF ANONYMITY, *supra* note 19, at 193, 194–95.

thor.[103] Indeed, this many-into-one form of authornymity occurs frequently in legal writing. A federal judge who employs law clerks to assist him with the drafting of opinions will undoubtedly not be the "true" author of some of the words attributed to him, although each opinion issued out of his chambers bears his name, and each opinion tends to read in the same style (although whether this is due to editing or to law clerks' learning to assume the corporate style is undoubtedly variable in each case).[104] And a court may issue an opinion *per curiam*, without further attribution, even though it is the work of one or more judges on the panel and may bear the stylistic hallmarks of its author or authors such that more accurate attribution could be achieved.[105]

The modern consumer of cultural commodities is undoubtedly well familiar with the concept of corporate authorship. The political speechwriter, for example, is an invisible yet omnipresent author whose pseudonymous existence causes no particular consternation to the readers of his work.[106] The common use of screen names or user

---

103 Jaszi & Woodmansee, *supra* note 15, at 3 (describing William Wordsworth's collaboration with Samuel Taylor Coleridge and reliance on writings of his sister Dorothy despite "the authorial persona he projects publicly—that of the secular prophet with privileged access to experience of the numinous and a unique ability to translate that experience for the masses of less gifted consumers"); Woodmansee, *supra* note 15, at 17 (noting that although history presents Samuel Johnson as "the very archetype of the modern author," most of his writing efforts were collaborative); *see generally* ALEXANDER LINDEY, PLAGIARISM AND ORIGINALITY (1952).

104 POSNER, *supra* note 40, at 258.

> Law clerks often prepare for their job by reading a bunch of their boss's old opinions (sometimes he tells them to do this), and they model their own style on that of the opinions they read. By this process a chambers style, not perhaps *very* distinctive but distinctive enough to be recognizable, evolves. All that this shows is that style, like intention, can be a corporate attribute.

Id.

105 On the use of per curiam opinions, see generally Richard Lowell Nygaard, *The Maligned Per Curiam: A Fresh Look at an Old Colleague*, 5 SCRIBES J. LEGAL WRITING 41 (1994–1995); Laura Krugman Ray, *The Road to* Bush v. Gore*: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517 (2000). And, to take this point one level higher, the opinions of any single judge can also be described as issued under the authornym of the court on which she sits. Except in the case of certain "star" judges—not coincidentally, usually those with distinctive writing styles—most judicial opinions are referred to in common parlance as, for example, a "Ninth Circuit opinion" rather than as a "Judge X opinion."

106 Of course, this may not be true where political actors employ a "one-to-many" form of authorship as opposed to a "many-to-one" form. *See, e.g.*, Foster, *supra* note 91, at 380 (describing the uproar that resulted when the British tabloid *The Sun* published pro-British articles nominally written by the Japanese Prime Minister and Argentinean President that were believed to have been written by British Prime Minister

names in online communications also provides an example of corporate authorship. In any given communication under a screen name, there is no way to tell who is sitting at the keyboard, and so it is therefore possible for an online author's work product to in fact be the work of several individuals. Julian Dibbell, in his well-known piece *A Rape in Cyberspace*, describes one such instance in the context of a linguistic sexual assault of one character by another character in an online world. Although the perpetrator was known in the online community by the authornym "Mr. Bungle" and appeared to write in a consistent, characteristic mode, Dibbell later discovered that at one point in the online conversation (and perhaps at other, or even at all, times), Mr. Bungle's writing was the work of a group of college students gathered around the keyboard and feeding material to a designated typist.[107] More benignly, we see a "many-to-one" mode of online authorship through Wiki, a technology that allows any visitor to a Wiki-enabled webpage to create and edit content, including by deleting or erasing content left by others.[108] Thus, at any given moment, the "authorship" of any particular Wiki page is not only collaborative, but fluid, as text is added and deleted. (Indeed, the writer who deletes a piece of text previously contributed by another writer may have as much a claim to authorship in the entire piece—or even a greater one—as the first writer.)[109]

Tony Blair's press secretary); *id.* at 380–81 (describing Richard Nixon's efforts to place opinion pieces in major newspapers under pseudonyms or under the byline of a columnist "sympathetic to the administration").

107 *See* DIBBELL, *supra* note 59, at 30; *see also* Adam White Scoville, *Text Is Self: The Merger of Property and Identity*, 1999 B.C. INTELL. PROP. & TECH. F. 060507 ("The postmodern notion of communal Internet authorship presented by some on-line personae diverges radically from the romantic notion of authorship embodied in the copyright statute.").

108 *See, e.g.*, Cunningham & Cunningham, Inc., *Wiki Getting Started Faq*, *at* http://c2.com/cgi/wiki?WikiGettingStartedFaq (last edited Feb. 26, 2005); Cunningham & Cunningham, Inc., *Wiki Philosophy Faq*, *at* http://c2.com/cgi/wiki?WikiPhilosophyFaq (last edited Jan. 3, 2005).

109 *See, e.g.*, HARRY MATHEWS, IMMEASURABLE DISTANCES 20 (1991) (describing the process of writing as working "exclusively by what the writer leaves out"). Wiki's "document mode" is particularly designed for this kind of collaborative authorship, in which the text reflects the community consensus of the discussion. *See* Cunningham & Cunningham, Inc., *Document Mode*, *at* http://c2.com/cgi/wiki?DocumentMode (last edited Feb. 18, 2005) ("The piece of text is community property . . . ."). Of course, as the page itself points out (in a note of uncertain origin), so long as the page is hosted on a server controlled by some third-party entity, that entity will always have the ability to exercise ultimate control over the site's content. *Id.*

3. One-to-One Authornyms

The one-to-one authornym is any statement of authorship that is neither expansive nor corporate—in other words, any statement of authorship that purports to be neither the alter ego of an individual nor many individuals under one name. "John Grisham," despite its identity with the name that, we can suppose, appears on the writer's birth certificate, is in fact an authornym for the writer named John Grisham.[110] Just as the authornyms "Carolyn Heilbrun" and "Amanda Cross" tell us who should be attributed with the text they label, "John Grisham" tells readers that the "author" of a particular piece is to be known by "John Grisham," whatever the reality of the writing process. Grisham is choosing to write under "John Grisham" rather than "John Smith," even if that choice is not a conscious one.[111] The fact that

---

110 The concept of separating the function that a name performs when it is the name of the author from the function it performs elsewhere is a mainstay of postmodern literary criticism. Michel Foucault, most famously, has described the nature of the author's name as different from that of a proper name because a proper name's identifying quality does not vary with changes to the identified person's other characteristics. If, as Foucault describes, "Pierre Dupont does not have blue eyes, or was not born in Paris, or is not a doctor, the name Pierre Dupont will still always refer to the same person; such things do not modify the link of designation." Foucault, *supra* note 23, at 146. But authors are different: "[I]f we proved that Shakespeare did not write those sonnets which pass for his, that would constitute a significant change and affect the manner in which the author's name functions. . . . The author's name is not, therefore, just a proper name like the rest." Foucault, *supra* note 23, at 145. I sense in this description, and contend that there is in any event, a distinction between what I am referring to as an authornym and the proper name, even if the two are textually the same (i.e., the author "William Shakespeare" as distinct from the person named William Shakespeare). *See* ROSE, *supra* note 13, at 123 (describing the late-eighteenth-century "further step in the mystification of Shakespeare, the separation of the divine personality of the author of the plays from the human specificity of the actor-playwright-shareholder William Shakespeare"). Gérard Genette has coined the word "onymity" (as part of a troika of "anonymity" and "pseudonymity") to refer to the instance in which the author signs his work with his legal name. GENETTE, *supra* note 20, at 39. Even here, however, Genette acknowledges that "to sign a work with one's real name is a choice like any other, and nothing authorizes us to regard this choice as insignificant." *Id.* at 39–40. Genette further suggests, probably rightly so, that instances of onymity occur more often in historical or documentary works, in which the credibility of the work rests on the identity of the writer. *Id.* at 41.

111 On this point, see Oates, *supra* note 90, at 14.

> [T]he cultivation of a pseudonym might be interpreted as not so very different from the cultivation *in vivo* of the narrative voice that sustains any work of words, making it unique and inimitable. Choosing a pseudonym by which to identify the completed product simply takes the mysterious process a step or two further, officially erasing the author's (social) identity and supplanting it with the (pseudonymous) identity.

there is also an individual named "John Grisham" does not render this choice any more illusory—it simply illustrates the distinction between what Foucault has called the "author function" of a name and the purely nominative function, between "William Shakespeare" the playwright and "William Shakespeare" the man.[112]

The three categories of authornyms described above may overlap to some extent. Because "John Grisham" doesn't tell us whether Mr. Grisham alone is responsible for the text or whether an editor or some other individual contributed some piece of it, "John Grisham" might well be a many-to-one authornym rather than a one-to-one authornym. (Likewise, a judicial authornym may stand for the work of the judge alone or the judge and one or more law clerks.) In any event, the unifying characteristic of all these statements of authorship is that the name situated in the position of "author" is primarily, if not solely, an attributional device: It is the name that has been chosen by the work's writer (or editor, or publisher, or other controller of the publication rights) as the name with which the work in question shall be associated in the minds of its readers, without regard to whether that name has any identity whatsoever with the name of the person or persons responsible for the various stages of the writing process.[113]

The authornym, then, is the result of decoupling statements of authorship from the act of authorship. To reject this decoupling and say that "Amanda Cross" *was* Carolyn Heilbrun because Carolyn Heil-

---

Id.

112 *See supra* note 110; *see also, e.g.*, Griffin, *supra* note 23, at 890.

> We should not assume that the aesthetic identity of the author . . . is a unified entity; rather it is split into multiple entities in the course of individual publications, whose nominal authors may have different names, and is collected together under the name of the empirical writer only after the fact.

Id.

113 My "authornym" is in some sense akin to Barthes's "modern scriptor":

> The [Romantic] Author, when believed in, is always conceived of as the past of his own book: book and author stand automatically on a single line divided into a *before* and *after*. . . . [T]he modern scriptor is born simultaneously with the text, is in no way equipped with a being preceding or exceeding the writing, is not the subject with the book as predicate; there is no other time than that of the enunciation and every text is eternally written *here* and *now*.

BARTHES, *supra* note 16, at 145; *see also* Griffin, *supra* note 23, at 890.

> Authors, in many cases, have had the option of selecting out of all the things they write and publish those which they will sign, and those which they will not sign or will issue under a pseudonym. In this situation, the author's name is another artifact, at a distance from the empirical writer and part of the semiotics of the text, even when the legal name is given.

Id. (footnote omitted).

brun was the name of the individual who put pen to paper is to reject the specific and affirmative choice Professor Heilbrun made in writing under Amanda Cross's name, a choice that purposefully denied authorship to "Carolyn Heilbrun." And even the reader who is aware that "Amanda Cross" and "Carolyn Heilbrun" coalesce in the same physical body will almost certainly continue to keep separate the various reader reactions to the bodies of work of each of these authornyms. The fact that the author of the Amanda Cross mysteries was an English professor at Columbia University is likely to be regarded as a critical curiosity and not as a fact that informs (or, perhaps, should inform) interpretation of either the mysteries or Professor Heilbrun's scholarly works. So, too, with "Mark Twain," "Carolyn Keene," and even "John Grisham"—while speaking in the traditional terminology of Romantic authorship, each is only an attributional device and understood by its relevant readership as such. In the online world, the use of screen names or other online identities to mediate communication is now wholly accepted, as is the idea that an online moniker might well bear no relation to the speaker's "true" identity.[114] Like an offline statement of authorship, a screen name is an organizational label for the various online speech acts that together constitute one's online identity.[115] Thus, the name of the author of a creative work is really a convenient shorthand, what Judge Posner has called a "functional rather than a natural designation";[116] it enables us to categorize other works attributed to that same author, but it is not designed to offer us any truth about the identity of the creator of the work.

II. THE AUTHORNYM AS TRADEMARK

The description offered in the previous Part of an attributional device used to label created product does not, of course, apply only to

114 *See* Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE. L.J. 1639, 1640 (1995); Rob Kling et al., *Assessing Anonymous Communication on the Internet: Policy Deliberations*, 15 INFO. SOC'Y 79 (1999); Marx, *supra* note 59 (contrasting settings in which participants expect the use of pseudonyms with "other contexts of personal relations," in which "embedded 'identity norms' about authenticity in personal interaction" are present).

115 Froomkin, *supra* note 59, par. 35 ("Most people we interact with online are just a name and an e-mail address, plus whatever impression we have formed of them by what they say."); Giordano, *supra* note 96, ¶ 14 ("An individual's online identity is thus the sum of when, where and how she speaks, and what she says.").

116 POSNER, *supra* note 40, at 381 (noting that "the attribution of specific works to specific individuals as authors, with all the ethical, interpretive, and legal implications of that attribution, is . . . a cultural artifact").

what I am calling authornyms. A trademark serves an identical purpose: to convey a designation of source to consumers, even if the actual source of the product remains unknown to any particular consumer. In this Part, I briefly discuss the history of trademarks and their protection and consider how the authornym is, in fact, a literary trademark. I am aided in this endeavor by the work of postmodern literary theorists who, albeit not directly, describe the author in particularly trademark-like terms.

A. Trademarks and Identity

As others have well documented,[117] the trademark was originally a simple, and immediately correlative, statement of product creation. In a world in which goods were traded face to face, trademarks were unnecessary, as the buyer satisfied with a previous purchase could simply return to the seller of those goods to engage in further transactions.[118] Once the sphere of commerce expanded to the point at which face-to-face transactions became impractical, marks of origin—typically identifying a single artisan—were placed on handmade artifacts, such as pottery, and served to identify to the consumer the individual to whom complaints of shoddy handiwork could be directed.[119] As Benjamin Paster notes, the direct correlation between mark and artisan typically prohibited any multiplicity of identity: A master craftsman was required by his guild to "choose a mark . . . to use it on all goods he produced, and to retain it his entire life."[120]

Trademarks were not solely concerned with poor workmanship, however. Producers naturally wanted to encourage repeat purchases and needed a way of enabling consumers who might never meet the manufacturer in person to find the goods they desired. Trademarks facilitate the search of a repeat consumer; in today's parlance, they reduce the search costs for such a consumer by conveying information about the source of a product that is not otherwise easily ascertaina-

117 *See, e.g.*, SCHECHTER, *supra* note 6, at 20–37; Sidney A. Diamond, *The Historical Development of Trademarks*, 65 TRADEMARK REP. 265 (1975); Daniel M. McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TRADEMARK REP. 305 (1979); Benjamin G. Paster, *Trademarks—Their Early History*, 59 TRADEMARK REP. 551, 551–52 (1969).

118 Paster, *supra* note 117, at 551–52.

119 *In re* Wood, 217 U.S.P.Q. (BNA) 1345, 1348–49 (Trademark Tr. & App. Bd. 1983) ("Indeed, it is difficult to draw a distinction from the early marks of identification of potters and other artisans used in connection with their artistic and commercial products and an artist's name affixed to his or her work of art."); Paster, *supra* note 117, at 553.

120 Paster, *supra* note 117, at 556.

ble. A consumer who is satisfied with the fit of Levi's jeans and wishes to buy another pair need not spend the day in the dressing room in search of a pair of jeans exhibiting the same qualities as the first pair; rather, she can rely on the Levi's trademark to direct her to a pair of jeans produced by the same manufacturer. The law grants protection to trademarks to ensure the reliability of these source indicators and, relatedly, to encourage companies to produce goods of consistent quality under a particular mark.[121]

There is no longer any requirement, however, that producers limit themselves to a single mark. As Frank Schechter noted eighty years ago, "[t]he modern manufacturer may use a mark or several marks or no mark just as he pleases."[122] Producers are now free to invent marks that differ from their corporate names and to devise different marks for different products. So long as each mark is correlated with a single producer in a way that is not confusing to the relevant consumer market, the mark need not reflect that producer's corporate name.[123] In trademark law, this is known as the "anonymous source" doctrine, by which we mean that as long as a consumer understands a trademark to convey that the same producer is behind a particular product each time the mark is used in connection with that product, the consumer need not be able to name that producer. To take a modern example, trademarks allow the company now known as Altria to market cigarettes under the brand Marlboro and to market macaroni-and-cheese mix under the brand Kraft. It need not

---

121 Of course, the "source" that is indicated by a trademark is today probably more theoretical than actual, as the actual manufacturer of a particular good may not be the one suggested by the mark. *See, e.g.*, James Brooke, *Factory Jobs Move Overseas as Japan's Troubles Deepen*, N.Y. TIMES, Aug. 31, 2001, at A1 (quoting the chief economist for Merrill Lynch Japan, who referred to the "Nike model," in which "you do the brand management in Seattle and the manufacturing in Indonesia").

122 SCHECHTER, *supra* note 6, at 122. As Schechter points out, some courts were slow to recognize this modern development in trademark law. *See id.* at 147; *see also* Candee, Swan & Co. v. Deere & Co., 54 Ill. 439, 457 (1870).

> A trade mark denotes the origin of the article. No one man can have more than one mark or brand . . . . If the owner could have more than one mark by which to distinguish his property, great confusion and uncertainty would be produced, to such an extent as to defeat the object in view.

Id.

123 This requirement is typically stated as requiring that the trademark "identify" a single source. *See, e.g.*, Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163–64 (1995). But a mark that is not textually equivalent to a producer's corporate name does not "identify" the producer in the way that we usually use the word. The mark DORITOS, for example, does not "identify" Frito-Lay, Inc., but it is uniquely correlated with that company. It is more accurate, therefore, to say that trademarks "distinguish" sources, rather than "identify" them. *See id.* at 164.

use the name Altria for any of its products, and it need not choose a trademark that directly informs consumers that Altria is the source of any particular product.[124]

Thus, whereas the trademark once served to inform the consumer of the name of the producer, the modern trademark serves as a form of identity creation. The goal of the modern trademark is the same—reduction of consumer search costs—but the method has changed. There need no longer be an obvious genealogical line between the name of the mark and the name of the producer; rather, the producer can create as many corporate identities as it has products and name them as it wishes.[125] A producer might choose this multiplicity of identity to avoid spreading a brand too thin or for more strategic reasons, such as to obfuscate the fact that two different types of products share a common source. The modern trademark thus not only enables producers to associate some products with one set of meanings by grouping them under a single brand and thereby to disassociate others, but also enables consumers to more easily channel their goodwill toward particular products from a particular producer without being required to allow that goodwill to spill over to others of that producer's products.[126] To the consumer who takes trademarks at face value, "Marlboro" is a separate identity from "Kraft"; "Altria" is a reinvention of the former "Phillip Morris."[127] Consumers who want to maintain the identity fiction that trademarks enable can thereby safely buy Altria's macaroni-and-cheese mix while they disdain Altria's cigarettes.

---

124 Indeed, "companies have an incentive to maintain the value of their brands, and in a competitive market they are unlikely to expand the reach of a single trademark so far that consumers are confused rather than enlightened by the use of the brand name." Dogan & Lemley, *supra* note 2, at 800.

125 Provided, of course, that the name does not infringe another's trademark or is not otherwise unlawful.

126 In this sense, a mark is a repository for consumer goodwill. *See, e.g.*, Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 854 n.14 (1982) ("By applying a trademark to goods produced by one other than the trademark's owner, the infringer deprives the owner of the goodwill which he spent energy, time, and money to obtain." (citing S. REP. NO. 79-1333, at 3 (1946))).

127 For Altria's own take on its corporate identity, see Altria, Inc., *Corporate Identity*, *at* http://www.altria.com/about_altria/01_01_corpidenchange.asp (last visited Feb. 12, 2005) ("By changing its name, Altria Group will clarify its identity as to what it is: a parent company to both tobacco and food companies that manage some of the world's most successful brands.").

B. The Authornym as Commercial Trademark

As suggested earlier in this Article, authornyms, like trademarks, serve the goal of reducing consumer search costs while also facilitating identity creation. The reader who enjoyed her first John Grisham novel and would like to purchase more from the same author need not spend the day in her local bookstore poring over books to find ones with the same qualities as the first book. As with her Levi's, she can simply look for the name "John Grisham" on the cover of the book and trust that the source of this text is the same as the source of the novel she has already read.[128] This is why particularly famous authornyms are used as promotional tags, often appearing in larger type on the cover than does the title.

The search-facilitating function of an authornym, like that of a trademark, comes about largely because of the authornym's ability to serve as a repository of goodwill. The authornym acts as a signal to the reader to associate particular bodies of work with a particular brand, both in terms of future purchases ("this is another John Grisham novel") and in terms of accretion of quality ("this John Grisham novel will be of the same quality as his previous one").[129] The "Richard Posner" brand likewise identifies certain judicial opinions as emanating from a single source/author (even if to some small degree corporate) and serves as a shorthand for identifying (and encouraging) the quality of the product under that mark. An author who wants to segregate these symbols of goodwill will engage in one-to-many authornymous writing. Just as Altria can, by its selection of different brand names, keep the Marlboro goodwill and the Kraft goodwill separate, the author can, by her selection of different

---

128 Like Levi's, the authornym "John Grisham" may be used for a variety of different products within a single genre. The fact that the product for which the consumer searches may not be identical to the one previously purchased (low-cut jeans instead of baggy, *The Pelican Brief* rather than *The Firm*) does not reduce the source-distinguishing value of either mark.

129 *See* Kreimer, *supra* note 58, at 85.

> In one dimension, the identity of a speaker is a proxy for previous communications. [The astronomer Carl] Sagan *could* preface each remark with an account of his entire previous corpus, but, even in an academic seminar, it seems simpler just to sign his name. Conversely, identification makes other communications available to listeners. When evaluating an argument of Richard Posner regarding 'efficiency,' it is useful to be able to refer to his other work.

Id.

authornyms, keep her scholarly goodwill and her fiction goodwill separate, creating different currencies of intellectual capital in each.[130]

This streamlining of search through symbol does not require direct identification of the producer. The anonymous source doctrine works just as well for authornyms as it does for trademarks. It is not necessary for a consumer to know that Kimberly-Clark makes "Huggies" to evaluate the worth of the diapers and associate them with the brand; similarly, it is not necessary for a reader to know that Amanda Cross mysteries were written by a Columbia humanities professor in order to enjoy the writing (indeed, they may well prefer not to know), or to know that "Dear Abby" is now written by Abigail Van Buren's daughter to trust in her advice (although her daughter would probably be well-advised not to depart from the stylistic characteristics readers have come to associate with the mark). So too online: Because authornymity is one of the organizing principles of Internet communication, the creation of intellectual capital associated with an online pseudonym is particularly important. But it need not be necessary—indeed, it probably happens fairly infrequently—that the reader knows the "true" identity behind any particular pseudonym. In other words, an online participant doesn't have to know that "BusinessGuy@aol.com" is actually John Smith of Akron, Ohio, in order to evaluate the worth of his message board postings and to accord the appropriate amount of trust to future postings based on the worth of his past comments.[131]

---

130 *See, e.g.*, Post, *supra* note 59, at 142 ("Pseudonymous speech is valuable in a way that anonymous speech is not and cannot be, because it permits the accumulation of reputational capital and 'goodwill' over time in the pseudonym itself, while simultaneously serving as a liability limitation insulating the speaker's 'true identity' from exposure.").

131 Some screen names and domain names—like some trademarks—tell us at the very least where in cyberspace the owner of that name "lives." For example, from "BusinessGuy@aol.com," we know that this speaker "lives" at aol.com—that is, he is a subscriber to America Online's service—and from www.genericlawschool.edu, we know that whatever "Generic Law School" is, it is most likely an educational institution, because it resides in the .edu top-level domain (TLD). The second level domain (and probably the TLD as well) is often interpreted in a trademark sense in that certain reputation-enhancing (or reputation-detracting) characteristics are associated with it. *See, e.g.*, Peter Kollock, *The Production of Trust in Online Markets*, *in* 16 ADVANCES IN GROUP PROCESSES 99, 107–11 (E.J. Lawler et al. eds., 1999); Tamarah Belczyk, Note, *Domain Names: The Special Case of Personal Names*, 82 B.U. L. REV. 485, 490 (2002). And in one recent instance, the personal (trademark) is political: Witness the employee of the animal rights group People for the Ethical Treatment of Animals who had her name legally changed to the URL for PETA's website, GoVeg.com. *See* People for the Ethical Treatment of Animals, *Hello. My Name Is . . .*

This concept of the authornym as trademark may not be fully developed in legal doctrine[132] or legal scholarship,[133] but it is one that literary critics have recognized, in various forms, for some time—perhaps not surprising given the received story that "authorship" was birthed from a desire for commercialization. Mark Rose, for example, has noted that the "author-work relation" is "institutionalized in our system of marketing cultural products," in which the name of the au-

---

GoVeg.com!, *at* http://www.goveg.com/feat/l-govegname.html (last visited Feb. 12, 2005).

One aspect that distinguishes online trademarks such as screen names and domain names is their strong functional aspect, quite separate from their source- or quality-indicating aspect. In other words, the screen name "boysrch" not only served as a way for Timothy McVeigh to express a particular personality, it also functioned quite simply as an address—as a way for correspondents to reach him (via boysrch@aol.com). There are, of course, analogues in the offline world: "30 Rockefeller Plaza" is not only an address, but is well known as the headquarters for NBC; "1600 Pennsylvania Avenue" is not only the location of the U.S. President's home, but is also shorthand for the governmental Office of the White House. And yet the trademark quality of an e-mail address is undoubtedly the reason why users are much more loath to give up a particular screen name than they are a telephone number or street address.

132 *See, e.g.*, *In re* Michael S. Sachs, Inc. v. Cordon Art B.V., 56 U.S.P.Q.2d (BNA) 1132 (Trademark Tr. & App. Bd. 2000); *In re* Wood, 217 U.S.P.Q. (BNA) 1345, 1348–49 (Trademark Tr. & App. Bd. 1983) (noting that the name of an artist on a work of art "serves a trademark function in that it identifies the source of the product and distinguishes it from the goods of another . . . [as well as] denotes consistency of the quality of the goods sold under the mark"); *Ex Parte* Grandma Moses Props., Inc., 117 U.S.P.Q. (BNA) 366 (Comm'r Patents & Trademarks 1958) (noting that "Grandma Moses" functioned as a mark for fabric created in the style of her paintings). *But see In re* Chicago Reader Inc., 12 U.S.P.Q.2d (BNA) 1079, 1080 (Trademark Tr. & App. Bd. 1989) ("A nom de plume or pseudonym of a writer is not generally regarded as a trademark for the writing."). In general, the courts have accorded a personal name trademark status only upon a finding of secondary meaning. Once a personal name acquires trademark status, the likelihood of confusion analysis is the same as it would be for any other trademark. *See, e.g.*, Flynn v. AK Peters, Ltd., 377 F.3d 13, 20 (1st Cir. 2004); Peaceable Planet, Inc. v. Ty, Inc., 362 F.3d 986, 989 (7th Cir. 2004); E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1288 (9th Cir. 1992); 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 13:2, 13:12 (4th ed. 2004).

133 Jaszi & Woodmansee, *supra* note 15, at 8. This is not to say that legal scholars have been completely absent from this debate; the work of scholars such as Peter Jaszi, David Lange, and James Boyle, among others, has been seminal. *See, e.g.*, BOYLE, *supra* note 15; Boyle, *The Search for an Author*, *supra* note 14, at 625–27; Jaszi, *supra* note 23, at 456; Lange, *supra* note 17, at 139. The idea also hovers in some of the more doctrinal literature. *See, e.g.*, Diamond, *supra* note 117, at 289; Edward S. Rogers, *The Lanham Act and the Social Function of Trade-Marks*, 14 LAW. & CONTEMP. PROBS. 173, 173–74 (1949) (equating the identification functions of trademarks and personal names).

thor "becomes a kind of brand name, a recognizable sign that the cultural commodity will be of a certain kind and quality."[134] Gérard Genette has described the effect the choice of a particular authornym has on a reader and how the typical reader can quite easily keep the writer's authornym distinct from the writer's legal name as well as the images and reactions associated with each.[135] (To take a familiar example, most readers continue to refer to the author of *The Adventures of Tom Sawyer* as "Mark Twain" long after learning that the author's legal name is Samuel L. Clemens; the same holds true for "Lewis Carroll" and "Charles L. Dodgson," and for many other similar pairs.) Margaret Ezell, to take a third example, cites various examples of seventeenth-century titles ("*Six familiar essays upon marriage, crosses in love, sickness, death, loyalty, and friendship, written by a lady*" (1696)), which, in their obvious prolixity, function as "a promotional advertisement for the volume," an advertisement that typically includes a consistent authornym ("by a lady") as part of the advertisement.[136]

C. *The Authornym as Literary Trademark*

The traditional economic justification for trademark protection—to reduce consumers' search costs—means that the value of a trademark lies in its commerciality. The "search" that we talk about is one that is usually assumed to end with a purchase, a choice between alternatives that is made easier by the information a trademark conveys. But not every search guided by trademarks is commercial in the sense that money flows from the consumer to (ultimately) the producer. The "post-sale confusion" cases are one example, in which the confused consumer is not the purchaser of the product but some third person who sees the misbranded product and thereby forms an opinion of the brand that may or may not guide future purchases.[137] The merchandising cases are another example, where the value of the trademark is in the mark itself, not in the article of clothing to which it is attached.[138] Cybersquatting cases are yet another example, where

134 ROSE, *supra* note 13, at 1. Publishers' names have also historically served this function. *See, e.g.*, Woodmansee, *supra* note 23, at 441.

135 GENETTE, *supra* note 20, at 50.

136 Ezell, *supra* note 63, at 72; *cf.* Griffin, *supra* note 23, at 880 (describing a similar role for the phrase "by the author of"). "By a lady" is in one sense a one-to-many authornym in that it enabled male writers to write in the feminine voice, and in another sense a corporate authornym in that it was shared by many writers over time, each aspiring to a typical "feminine" style.

137 *See, e.g.*, Gucci Am., Inc. v. Daffy's, Inc., 354 F.3d 228, 234–35 (3d Cir. 2003).

138 The most well-known of these cases is probably *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Manufacturing*, 510 F.2d 1004, 1008 (5th Cir. 1975).

the use of a mark is deemed confusing not because it causes consumers to purchase a product they didn't intend to buy, but because it causes web page viewers to associate a particular viewpoint with the trademark holder.[139] In these types of cases, trademark infringement occurs (say the courts) not because the defendant is selling goods misbranded with the plaintiff's trademark, but because the defendant is misattributing a concept (the quality of the post-sale good, the authorization to sell the logo-emblazoned T-shirt, the content of the website) to the plaintiff via use of the plaintiff's mark. Under this theory, the trademark serves not as indication of source of goods so much as it does an indication of sponsorship or authorization.

The authornym serves this function as well. The use of an author's name to brand a particular piece of writing—or, conversely, the attribution of a particular piece of writing to a particular author's name—is a mark of authorization. To say that "John Grisham is the author of this work" is not only to say, "This work emanates from the same source as the last John Grisham work," but is also to say, "This is an authorized John Grisham work." The former statement allows consumers in the economic marketplace to find desired goods more easily; the latter statement allows consumers in the marketplace of ideas to build coherent interpretive structures. This reduction of interpretive costs is what allows "Carolyn Heilbrun" to write simultaneously and yet separately from "Amanda Cross," and why both readers and the law permit her to do so.

Here, again, the literary theorists presage this development. It was Barthes, as I described earlier, who formalized the concept of the "death of the author," under which the author has no claim to primacy in the interpretation of the work but rather must contend with the interpretation each reader brings. The "death of the author" describes not only the state of authorship under U.S. copyright law, where the individual or entity deemed the "author" need not be the creative source of the text, but also the state of authorship under U.S. trademark law, where the anonymous source doctrine pushes the author/producer to the background and focuses attention on the authornym/brand. For example, as the Seventh Circuit famously noted in 1904, the trademark "Baker" used in connection with chocolate products could be maintained even though the court could "safely take it for granted that not one in a thousand knowing of or desiring to purchase 'Baker's Cocoa' or 'Baker's Chocolate' know of

139 *See, e.g.*, People for the Ethical Treatment of Animals v. Doughney, 263 F.3d 359, 362 (4th Cir. 2001).

Walter Baker & Co., Limited."[140] The anonymous source is *l'auteur mort.*

But the death of the author does not require the death of the authornym. As discussed earlier, Michel Foucault, in *What Is an Author?*,[141] picked up where Barthes left off in describing how an author's name "performs a certain role with regard to narrative discourse, assuring a classificatory function" that "permits one to group together a certain number of texts, define them, differentiate them from and contrast them to others"[142]—the very work of trademarks.[143] To Foucault, an authornym's meaning comes not from bi-

---

140 Walter Baker & Co. v. Slack, 130 F. 514, 518 (7th Cir. 1904); *see also* Fleischmann Distilling Corp. v. Maier Brewing Co., 314 F.2d 149, 155 (9th Cir. 1963).

> Of course there may not be one in a hundred buyers of this whisky who knows that it is made by Buchanan or wholesaled by Fleischmann. Probably all that such buyers know is that Black & White Scotch whisky has satisfied them in the past or that they have heard of it. . . . It is not material whether he would think that the makers of the Scotch whisky were actually brewing and bottling this beer, or whether it was being produced under their supervision or pursuant to some other arrangement with them. He would probably not concern himself about any such detail.

Id.; 1 MCCARTHY, *supra* note 132, §§ 3:7, 3:9; Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 814–15 (1927).

141 Foucault, *supra* note 23, at 141–60.

142 *Id.* at 147; *see also* Chartier, *supra* note 20, at 10; Hazlitt, *supra* note 95, at 351 (describing the "practically indispensable advantage of the signature" as allowing readers "to view any artist's work as a unit"); *cf.* Foster, *supra* note 91, at 375 (describing skeptically how through "well-worn" "Foucauldian goggles" the "literary landscape from smallest shrub to mightiest oak looks more or less the same" and "[t]he particular name by which each plant is called hardly matters—except, of course, as a signifier of relative market value").

143 Robert Griffin makes this point more fully:

> [T]he relation of filiation between texts obtains even when the author is a fiction. More than that, filiation exists even when the author remains unknown, as in the example of texts that are signed "by the author of." . . . The phrase "by the author of," it should be noted, refers us not so much to a situated person as to a previous performance and acts as a kind of advertisement. . . . In these cases, a relation is established between two texts according to their authorship and yet the author remains nameless. In fact, a book can have several of the characteristics of the author-function as Foucault defines it—status, copyright, relation to other books by the same author, and so on—and yet not have a named author. This is because the author-function describes precisely a function that may be fulfilled by a name but does not require one. It is first of all an empty function, a structural blank space, which may be signed or unsigned depending on the circumstances. And when signed, of course, the name may just as easily be a pseudonym. . . . The author's name is another artifact, at a distance from the empirical writer, a signifier within the semiotics of the text that can be manipulated strategi-

ography but from the reader, who brings to the text certain cultural assumptions and a reader's history, but does not bring, except in the very rarest of circumstances, knowledge of the author that derives from anything other than a textual relationship.[144] Although Foucault's essay focused on what he termed the "author function," it might alternatively have focused on what one commentator has called the "attribution function"[145] (or, here, an "authornym"). If Barthes called for the disappearance of the author, Foucault restores a limited "author function" that—while not promoting a biographical or intentional approach to interpretation—acknowledges the legal and interpretive utility that authors' names serve.[146] This is not a system in which meaning cannot accumulate (indeed, it accumulates in the authornym itself, the main value of which is as a repository for meaning), but is one in which authorial biography rests in no position of preeminence. Like a trademark, an authornym need only describe a particular, and singular, claim to authorship—whether individual or corporate. So long as the fan of Grisham's novels can identify those novels branded with Grisham's authornym and distinguish them from others, he need not know any details of Grisham's "true" identity—indeed, "John Grisham" can be female or a nonlawyer or a collective

---

> cally. . . . Signing one's legal name is not an automatic choice, but part of a strategy for associating only certain pieces with a projected persona.

Griffin, *supra* note 93, at 9–10; *see also* DURING, *supra* note 13, at 123 ("[For Foucault,] the concept 'author' is a means of grouping and valuing writing: 'Homer' or 'Hippocrates' are authors despite doubts as to their actual existence."); Griffin, *supra* note 23, at 882 (describing how an author's name "operates in discourse independently of its possible reference to an empirical person").

144 *See, e.g.*, Lanser, *supra* note 65, at 83–84, 97 (noting that authorship is "inferred continuously and mostly subliminally as a reader processes a text"). Lanser refers to both the Danny Santiago and the Forrest Carter episodes, discussed *supra* notes 70–73 and accompanying text, as examples of "the potential gap between real and implied authorship" that exploits the reader's expectation of authorship derived from the text. Lanser, *supra* note 65, at 84.

145 Foster, *supra* note 91, at 377 (calling "the attribution function" the "practice of assigning a name, initials, or pseudonym to a circulated text").

146 *See, e.g.*, Pease, *supra* note 16, at 113.

> [In Foucault's view,] [c]ritical language (its vocabulary of accusation, defense, judgment) depends on the legal system (and the cultural systems affiliated with it) for its warrant. . . . The name of the author turns discourse into legal property, and the notion of legal property in turn supports and is supported by related discourses concerning entitlements, liberties, duties, rights, constraints, impediments, obligations, and punishment. . . . [T]he name of the author turns otherwise unrelated discursive practices into a coherent cultural realm over which it maintains jurisdiction.

Id.

authorial endeavor so long as the authornym allows the reader/consumer to locate both the work and his responses to it.

Trademark law reinforces this view not only by pushing the true identity of the source to the background in favor of the trademark, but also by largely devaluing the source's intent as a guide to trademark meaning. While it is certainly true that a producer intends to convey a certain meaning when it selects a trademark for a particular good or service, the producer cannot prevail in a challenge to a mark's status simply by claiming primacy for its intended meaning. Courts do not, for example, inquire as to the company's motivation in selecting a particular trademark or give probative weight to testimony on what the creator intended to convey by the choice of one word over another.[147] Rather, courts act as readers, deriving an interpretation that makes the best sense to them and then imposing that interpretation on the text of the trademark.

In short, a trademark has no meaning on its own. Whatever meaning it does have takes its cues not from authorial intent or biography but rather from the context in which it sits and the interpretation of that mark in context by consumers.[148] The meaning of any trademark depends not on the intent of its creator—although the creator may attempt to guide meaning through investment, both creative

147 *See, e.g.*, Co-Rect Prods., Inc. v. Marvy! Adver. Photography, Inc., 780 F.2d 1324, 1332 (8th Cir. 1985) ("[D]esires or intentions of the creator . . . are irrelevant. Instead, it is the attitude of the consumer that is important."); Seabrook Foods, Inc. v. Bar-Well Foods Ltd., 568 F.2d 1342, 1345 (C.C.P.A. 1977) ("[R]egardless of [the mark owner's] intentions, it is the association, by the *consumer*, of the . . . design with [the mark owner] as the source that is determinative."); Plastilite Corp. v. Kassnar Imps., 508 F.2d 824, 827 (C.C.P.A. 1975) (holding that in determining distinctiveness, "it is the association of the mark with a particular source by the ultimate consumers which is to be measured—not [the applicant's] intent" in adopting the mark). The likelihood-of-confusion test operates in a similar fashion when courts turn to such evidence as consumer surveys, which merely represent the collective "readers'" interpretation of the mark, rather than to any authorial view of the mark's meaning. *Cf.* Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L.J. 1, 10 (1999) ("[T]he public forms an interpretive community whose reading of trademark symbolism casts it in the role of creating authorial-like meanings about the mark itself.").

148 COOMBE, *supra* note 53, at 8; *cf.* Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. (forthcoming Aug. 2005) ("Trademarks exist only to the extent that consumers perceive them as designations of source. Infringement occurs only to the extent that consumers perceive one trademark as referring to the source of another. The most 'intellectual' of the intellectual properties, trademarks are a property purely of consumers' minds."); Foster, *supra* note 91, at 394 ("Though modern writers in a free society . . . can choose how and indeed whether to attribute their own work, it remains the critic's prerogative, not the author's, to determine the meaning of an attribution.").

and financial, in the mark—but on the collective "multiple writings, drawn from many cultures" that Barthes describes as central to literary interpretation.

I do not intend by this to dismiss out of hand the response that there are reasons we might want to limit the reach of the "anonymous source" theory in literary interpretation—that it is, in fact, important to know the source of a piece of written work in order to evaluate its true merit.[149] This may be particularly true when the chosen authornym suggests a racial, gendered, or ethnic claim to the text.[150] We may not much care if, for example, the mystery author "Amanda Cross" turns out to be a professor at Columbia University, but we do care when the young Latino author "Danny Santiago" is revealed to be a white man in his seventies or when Native American author "Forrest Carter" turns out to be a white supremacist because the value of these texts seems to depend in great measure on their "authenticity."[151]

---

149 *See, e.g.*, Foster, *supra* note 91, at 376 ("[O]ne cannot safely construct a reading of the elegy without a coherent, relatively stable, and widely shared notion of the 'W.S.' whose 'I' is referenced on the title-page and dedication, as well as in the first-person text." (describing the contested authorship of "W.S."'s February 1612 *Funerall Elegye*)); *id.* at 382 (describing the outrage of early-eighteenth-century subscribers to Alexander Pope's translation of Homer's *Odyssey* when they discovered that two previously unnamed individuals had collaborated with Pope); Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications*, 1995 J. ONLINE L. art. 2, par. 30, *at* http://www.wm.edu/law/publications/jol/95_96/lemley.html.

> The implications of online impersonation are quite troubling. In a context where communication is still largely verbal, readers have very few cues to the identity or intention of the author of the message except what the author actually posts. If authorial claims of identity are readily hackable and thus untrustworthy, all the social and legal rules that depend on identity—liability for defamation or copyright infringement, the effectiveness of flaming or other forms of social sanctions, etc.—are thrown into doubt.

Id.

150 BROWDER, *supra* note 66, at 3 (noting that the ethnic autobiography "[has] traditionally been written and read as a means of helping frame the complex cultural relationships of a multiethnic society").

151 *See, e.g.*, Foster, *supra* note 91, at 384–85 (suggesting that whether the author of a feminist text is a woman or "a male polemicist who's having a hoot passing himself off as a discontented woman" does indeed "affect the meaning and valuation of the text"); *id.* at 391–92 (suggesting by adopting the pseudonym "Ka-Tzetnik" in writing his Holocaust memoir, the writer Yehiel Feiner "tainted his work with the stigma of fictionalization"); *id.* at 394 (contending that, particularly when the text is part of a racial discourse, knowing when a text is "an exercise in literary artifice" is important). For his part, Daniel James, the alter ego of "Danny Santiago," offered the following response when asked if he thought he had participated in a hoax: "He shrugged and said the book itself was the only answer. If the book were good, it was good under whatever identity the author chose to use . . . ." Dunne, *supra* note 73, at 27. Gilbert

The same is true with trademarks: A consumer may wish to know that the same corporation that makes Kraft macaroni and cheese also makes Marlboro cigarettes in order to make a decision about where her food budget is spent. Thus, the argument goes, there is a significant cost to this kind of experimentation in that it leads readers to assume a greater degree of distrust in identity and reliability than is socially beneficial in community discourse.[152]

Postmodernists would suggest that this concern is inappropriate—that the writing or the product should rise or fall on its own merits, regardless of the intentions, motivations, or characteristics of its source. And there is a risk that in unmasking an authornym, we prevent ourselves from making these sorts of unbiased judgments—precisely the reason why many creators adopt an authornym in the first place.[153] The fact that a newly discovered text thought to be authored by Shakespeare would be regarded differently if its authorial lineage could be confirmed does not undermine a postmodern view of interpretation; rather, the revelation's value is in the ability to add this text to the others attributed to the Shakespearean authornym and evaluate

---

Larochelle provides a stark literary example along these same lines: "For example, had *Mein Kampf* been written by Mother Teresa, rather than Adolf Hitler, the reading of the work would change radically, indeed it would command a closer look at the historical data that could help clarify its meaning." Gilbert Larochelle, *From Kant to Foucault: What Remains of the Author in Postmodernism*, *in* PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD, *supra* note 18, at 121, 129.

152 *See* Levmore, *supra* note 64, at 2208–09.

> The author's defense [to the use of pseudonymity] is that a reader's biases are exposed by the deception, but inasmuch as that is true of many successful deceptions it seems fair to conclude that the cost of deception, in terms of reducing the signal of (all) authorship, is perceived to exceed the gain from testing the value of these signals with false signals.

Id.

153 *See, e.g.*, LESSING, *supra* note 94, at vii (stating that she did not want readers' judgment of the work to be tainted with judgments derived from reading of works of "Doris Lessing"); Cromartie, *supra* note 94 (reporting an interview with Joe Klein, author of *Primary Colors*).

> "But [the anonymity] was necessary. People who have reviewed the book have since said to me, 'If I had known it was you, I never could have reviewed it that way.' I wanted the book to have a clean read, to be judged on its own merits without any baggage."

Id. (quoting Klein); Tien, *supra* note 58, at 145.

> [T]he very utility of reputation as a proxy for judgment also carries costs for speech in the form of bias. If we know that a statement comes from an esteemed scholar, we may overvalue it for that reason and suspend our critical faculties. Conversely, if we know the statement is by a person we don't like, we may ignore it despite its value.

Id.

it against other such texts.[154] Finally, given the common experience of ghostwriters and other corporate writing endeavors, and licensing and outsourced production, it's unclear what value the "identity" of the creator contributes to interpretation or evaluation in any event. Does it help, for example, to know the "true" identity of a pseudonymous writer if he is not actually the person responsible for putting pen to paper, or the identity of a corporate trademark owner whose products are made by an overseas assembly line managed by a foreign corporation?[155]

But none of this should obscure the fact that the anonymous source doctrine simply says we need not know the identity of the "source," not that we are barred from endeavoring to discover it. "John Grisham" is a brand whether or not we know his biography, and we could ultimately assign that same biography to "John Smith" instead. In fact, for readers/consumers who care about source, preservation of authors' branding choices reinforces this consumer preference. The fact that the initial choice of authornym—like all brands—may not be particularly illuminating should be of no moment. Indeed, as noted earlier, consumers of cultural commodities in the modern era are familiar with the indeterminacy of authorship. They are conversant in the taxonomy of pen names and stage names; they know the President hasn't written every word of his speeches; they understand how it is possible that "Abigail Van Buren" still pens "Dear Abby" long after Pauline Phillips has put down her pen.[156] In the same way that books like *Famous All Over Town* "teach[ ] us [the]

---

154 Although I suspect he derives a different conclusion, Seán Burke states likewise when he writes:

> The discovery of a text like Freud's "Project for a Scientific Psychology" will modify psychoanalysis if and only if it is a text by Freud. Over and above the text's contents, the fact of attribution—in and of itself—is the primary factor in establishing its significance for the psychoanalytic field.

BURKE, *supra* note 36, at 93; *see also* Foucault, *supra* note 23, at 157 n.3. Contrary to Burke's implication, there is no disjuncture between according a newly discovered text significance because it can authoritatively be attributed to Freud and maintaining that—as with the works already reposited in the Freudian canon—the addition of this new work does not provide newly discovered justification for retreating to authorial intention in interpretation; it merely reconfirms that texts are interpreted against other texts.

155 Judge Posner raises the same point with respect to judges and their law clerks: "For judges active in the modern era of ghostwriting by law clerks, an attempt must be made to separate the judge's work from that of his ghosts; the polite fiction that all judges are the authors of all their opinions must be dropped, certainly for purposes of scholarly analysis." POSNER, *supra* note 40, at 377.

156 *See* Wilson, *supra* note 102.

futility" of reading ethnic autobiography "to find out the definitive truth of a group's experience,"[157] the Internet has rendered readers more distrustful of claims to authorship—perhaps even in an interpretatively beneficial way—in that it has not only conditioned readers to accept screen names and the like as statements of authorship but also typically provided avenues (i.e., hyperlinks) through which the claims being made can be evaluated.[158]

Those who would still claim that this kind of brand/identity creation is inherently fraudulent need only look to the Supreme Court's decision in *McIntyre v. Ohio Elections Commission*.[159] Although the decision ultimately stands for the First Amendment right against compelled self-identification—the right, in certain circumstances, to speak anonymously—the case is at its core an authornymity case rather than an anonymity case, standing not simply for the right to refrain from any statement of authorship at all but, more important, for the right to prefer one statement of authorship over another.

The case involved Margaret McIntyre, who distributed leaflets opposing a proposed school tax levy in the town of Westerville, Ohio. Some of her leaflets identified her as the author; others carried the pseudonym "Concerned Parents and Tax Payers."[160] The Assistant Superintendent of Elementary Education in the school district saw Mrs. McIntyre distributing her leaflets, and five months after the levy's passage, he filed a complaint and affidavit with the Ohio Elections Commission, alleging that Mrs. McIntyre had violated an Ohio state statute prohibiting any person from, among other things, writing or distributing "any . . . form of general publication" that was designed to "promote the adoption or defeat of any issue, or to influence the voters in any election" unless the name and address of the author were listed on the publication.[161] The Court ultimately found such a ban to be unconstitutional.

The Court's justification for so concluding was more literary than instrumental. After tracing the pseudonymous history of the authors of the *Federalist Papers*, Mark Twain, and O. Henry, the Court concluded that, rather than occupying a special interpretive position, the identity of the author is "no different from other components of the

157 BROWDER, *supra* note 66, at 269.

158 Donald Foster further suggests that the anonymous writing standard on the Internet tends to devalue the need for "writer-recognition" and heighten the value in "eyeballs engaged." Foster, *supra* note 91, at 385.

159 514 U.S. 334 (1995).

160 *Id.* at 337.

161 *Id.* at 338 & n.3 (quoting OHIO REV. CODE ANN. § 3599.09(A) (Anderson 1988)).

document's content that the author is free to include or exclude."[162] The Court was unconcerned with the author's motivation for choosing pseudonymity—although it could conceive of a number of reasons for so doing—noting that whatever the author's motivation, "at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."[163]

As the Court acknowledged, the content of a pseudonymously authored publication could violate the law—by, for example, including libelous material or fraudulently misleading the public. It was for this reason that Ohio had argued that author identification was necessary to enable readers to evaluate the worth of the statement being made.[164] One might therefore argue, as Justice Scalia suggested in dissent, that a disclosure requirement would aid in identification of the alleged malfeasants so that appropriate corrective measures could be enforced.[165] But the majority seemed unconcerned by this prosecution problem, noting that "the absence of the author's name on a

---

162 *Id.* at 348; *see also id.* at 342 ("Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.").

163 *Id.* at 342. While the Court confined this sweeping statement to "the field of literary endeavor," it thereafter noted that the "freedom to publish anonymously extends beyond the literary realm" and that both types of authors could be motivated by the desire to disassociate any bias attributable to their true identity. *See id.* ("Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.").

Justice Scalia, in dissent, took issue with the majority's implicit assertion that greater truth would result where a publication was required to stand or fall on its content alone.

> I am sure, however, that (1) a person who is required to put his name to a document is much less likely to lie than one who can lie anonymously, and (2) the distributor of a leaflet which is unlawful because it is anonymous runs much more risk of immediate detection and punishment than the distributor of a leaflet which is unlawful because it is false. Thus, people will be more likely to observe a signing requirement than a naked "no falsity" requirement; and, having observed that requirement, will then be significantly less likely to lie in what they have signed.

Id. at 382 (Scalia, J., dissenting).

164 *Id.* at 343–44.

165 *Id.* at 385 (Scalia, J., dissenting) ("[Anonymity] facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity."). Justice Clark took a similar view in *Talley v. California*, 362 U.S. 60, 71 (1960) (Clark, J., dissenting) ("All that Los Angeles requires is that one who exercises his right of free speech through writing or distributing handbills identify himself just as does one who speaks

document does not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the Election Code"[166]—suggesting, in essence, that the "identification" of an author on a particular piece of writing is simply text, no more true than not true as to the identity of the true "author."

Granted, the *McIntyre* Court's indifference to authorial identity cannot be taken at pure face value. If, as the *McIntyre* Court says, one's identity truly is "no different from other components of the document's content that the author is free to include or exclude," it would be difficult to imagine many circumstances in which the government, via subpoena or otherwise, could compel disclosure of identity, for the First Amendment "is deeply hostile to content-based regulation."[167] Similarly, it seems difficult to reconcile the *McIntyre* Court's broad approval of authornymous speech with its conciliatory approach, in other cases, to governmental regulation of false speech,[168] which the statement "Concerned Parents and Tax Payers" technically is.

And yet we can take from the case the choice that the Court's decision preserved, even elevated to constitutional status: a choice, not about an omission of authorship, but about a particular statement

---

from the platform. The ordinance makes for the responsibility in writing that is present in public utterance.").

166 *McIntyre*, 514 U.S. at 352; *see also id.* at 352–53 ("Nor has the State explained why it can more easily enforce the direct bans on disseminating false documents against anonymous authors and distributors than against wrongdoers who might use false names and addresses in an attempt to avoid detection."); *id.* at 348–49 ("Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message."); Tr. of Oral Argument, *McIntyre* (No. 93-986), *available at* 1994 WL 665265, at *38–39.

> Well, your argument, basically I guess you make two arguments. One is that you will either deter fraud, or you'll make it easier to detect and prosecute fraud, and you will allow voters to evaluate what is said on the kind of the theory of, from whence it comes. What do you say about the argument that somebody who really wants to thwart those interests is simply not only going to lie once but lie twice, and put down the wrong name and address?

Id.

167 Post, *supra* note 74, at 663 n.314. The impact of the Court's decision in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), on *McIntyre*—at least with respect to election-related speech—remains to be seen.

168 *Cf.* People v. Duryea, 351 N.Y.S.2d 978, 988 (Sup. Ct. 1974) ("Calculated falsehood is never protected by the First Amendment." (citing Time, Inc. v. Hill, 385 U.S. 374, 389–90 (1967))); Post, *supra* note 74, at 663 n.314 ("The Constitution is not hostile to the regulation of false assertions of fact, although such regulation is manifestly content-based.").

of authorship different from the one we might otherwise demand were we concerned about the possibility of audience deception.[169] Thus, as the Court suggests in *McIntyre*, a statement of authorship is an attributional device rather than a conveyer of truth; the author may be given as "Mrs. McIntyre" or as "Concerned Parents and Tax Payers," variably, without changing the meaning of the text of the handbill. Thus, although the statement of pseudonymous authorship in this case can technically be seen as false speech—because no such group existed except in its pseudonymous role as author of the handbills—the Court's privileging of this statement as protected speech under the First Amendment recognizes a value in identity creation, in a particularly Barthesian sense.[170] What motivated Mrs. McIntyre to use an authornym for her handbills was not the fear of retribution but a deliberate construction of identity, a desire to have the viewpoints in her handbill attributable to an identity other than her "true" identity. (Perhaps she hoped to take advantage of what she believed to be a reader's tendency to give greater weight to corporate authorship, even if unknown ("Concerned Parents and Tax Payers"), as opposed to authorship by a little-known individual.)[171] So too with more literary

169 *See* Kreimer, *supra* note 58, at 78 (discussing the school of thought that believes that "[a]nonymity allows a speaker to pretend to be something that she is not, and to convince her interlocutor under false pretenses").

170 To my mind, Justice Holmes's oft-cited theory on the "marketplace of ideas" is a paradigmatic example of judicial Barthesian theory. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); *see also Duryea*, 351 N.Y.S.2d at 996.

> Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is "responsible," what is valuable, and what is truth.

Id.; Kreimer, *supra* note 58, at 69–70.

> [E]xposure as the author of an action or statement links that action to our identity; the broader the exposure, the more indissoluble the link and the harder it is to disavow it. Forcing citizens to publicly link themselves to identities they are constitutionally entitled to eschew is a violation of the constitutionally protected autonomy—their right to define themselves.

Id.; ACLU v. Miller, 997 F. Supp. 1228, 1230–32 (N.D. Ga. 1997) (preliminarily enjoining enforcement of a law criminalizing the knowing transmission of data though a computer network "if such data uses any individual name . . . to falsely identify the person"). For a recent contrary view, see *Majors v. Abell*, 361 F.3d 349, 352 (7th Cir. 2004); *cf. id.* at 357–58 (Easterbrook, J., *dubitante*).

171 On the similar *Talley v. California* case, 362 U.S. 60 (1960), see Post, *supra* note 74, at 640 n.213.

writers: History doesn't suggest that Samuel Langhorne Clemens, for example, chose "Mark Twain" to avoid retribution or that the authors of the *Federalist Papers* intended that readers would never discover their true identities. So if the author who writes under cover of pseudonymity is not typically concerned with preserving true anonymity, then the pseudonym must be doing different work from that which the literature typically describes. I contend here that the choice is motivated not from fear but from a desire to create a brand identity, one that does not rely on biography for meaning but relies instead on reader (or consumer) interpretation.

Barthes describes the reader as the vessel for all these meanings—"that *someone* who holds together in a single field all the traces by which the written text is constituted."[172] The same holds true in trademark law, which focuses on the potentially confused consumer who must similarly hold together the various cultural and commercial meanings associated with a particular trademark; who must, for example, be able to hold separate Continental Airlines and Continental Bank (without any semantic assistance from the marks themselves) and hold together Nike running shoes and Nike apparel.[173] Yet in

---

> The breadth of *Talley*'s holding is therefore better justified by . . . the same principle that causes prestigious scientific journals to circulate proposed articles anonymously for peer review. The hope is that by withholding the identity of the manuscript's author, journals will obtain an impartial evaluation of the contents of the article, rather than a reflection of the status of its author.

Id. Post's justification does not fully describe the import of these cases because neither Mrs. McIntyre nor Mr. Talley circulated the writing at issue anonymously. Thus, rather than endeavoring to eliminate any construction of authorship, both individuals deliberately endeavored to create a new one. *See* ACLU v. Heller, 378 F.3d 979, 994 (9th Cir. 2004).

> [I]n many instances, requiring publishers to include the names of business or social organizations or legal entities responsible for publishing an election-related communication is unlikely to supply much useful information. As the Court noted in *McConnell* [*v. FEC*, 540 U.S. 93 (2003)], individuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but misleading names.

Id.; Yes for Life Political Action Comm. v. Webster, 74 F. Supp. 2d 37, 40 n.6 (D. Me. 1999) ("*McIntyre* would have reached the same conclusion protecting anonymity for Mrs. McIntyre even if the text of the handbills had actually been composed (authored) by, say, Mrs. McIntyre's teenaged son and then distributed by her as (authorized) statements.").

172 BARTHES, *supra* note 16, at 148.

173 Roland Barthes, in *The Death of the Author*, refers to Jean-Pierre Vernant's *Mythe et Tragédie en Grèce Ancienne* (1972) in a similar vein:

> [Vernant] has demonstrated the constitutively ambiguous nature of Greek tragedy, its texts being woven from words with double meanings that each

both fields the reader cannot efficiently serve as vessel without some sort of system with which to organize these "traces."[174] Fortunately, both fields supply a solution to this lacuna: In trademark law, it is the trademark itself that serves as the label; in literature, it is the authornym.

III. AUTHORNYMS AND TRADEMARK LAW

It is not enough simply to conclude that authornyms serve a trademark purpose; we must also consider the legal ramifications of that conclusion. If we have described a world in which the authornym serves two functions, that of organizing producer inputs (particular literary works) and that of organizing consumer inputs (goodwill), then we must then consider the legal mechanism through which the integrity of this bidirectional system can be preserved. The most useful model is, not surprisingly, federal unfair competition law, which has in place well-developed doctrines to address misattribution of source.

A. Authornyms and Passing Off

In the typical trademark case, the trademark holder claims that the defendant has used the plaintiff's trademark on goods not produced by the trademark holder—in other words, that the defendant has "passed off" goods made by the defendant as goods made by the plaintiff.[175] To take a usual example, the street vendor who sells handbags marked GUCCI is likely engaging in the type of trademark infringement known as "passing off."

---

character understands unilaterally (this perpetual misunderstanding is exactly the "tragic"); there is, however, someone who understands each word in its duplicity and who, in addition, hears the very deafness of the characters speaking in front of him—this someone being precisely the reader (or here, the listener).

BARTHES, *supra* note 16, at 148.

174 *Cf., e.g.*, John T. Cross, *Giving Credit Where Credit Is Due: Revisiting the Doctrine of Reverse Passing Off in Trademark Law*, 72 WASH. L. REV. 709, 762 (1997) (contending that the name of the artist is not a useful tool when shopping for art because physical inspection is a better gauge of quality). This view, while somewhat Barthesian in nature, ignores that the value of creative endeavor is not judged in a vacuum but is most usefully judged in comparison to other works by the same artist.

175 This is true whether the plaintiff asserts claims under 15 U.S.C. § 1114 for a registered trademark or under 15 U.S.C. § 1125 for an unregistered trademark (what is usually called an unfair competition claim). I use "trademark" here as a convenient shorthand for both.

While passing off in the authorship context may occur relatively infrequently—a piece of writing branded with the name of a well-known author who was not in fact its source[176]—there is no reason to think that when this does happen an infringement-like action should not be available to the author. A publisher who brands a particular text with the name of an author who has not authorized that branding has probably done so precisely to gain consumers/readers who would not be attracted to the text absent the lure of the well-known author. Such claims can only succeed, however, if the courts are willing to separate out the two aspects of authorship—if, in other words, they can draw a distinction between the copyright aspect of authorship and the trademark aspect. The question of "who is the author?" arises in both contexts, but the answer to that question differs. In the copyright context, the answer tells us who is eligible to claim the bundle of rights afforded under copyright law: the right to copy, to distribute, to make derivative works, and so forth. In the trademark context, the answer tells us the name of the brand: the person or entity identified to the public as the author, regardless of whether that is the same answer to the copyright question.

But the courts have not always drawn this distinction because they tend to think of authorship as solely a creation of copyright law. They are assisted in this viewpoint by the litigation strategies of many plaintiffs ostensibly seeking protection under trademark law whose ultimate goal is to restrain publication of public domain works as opposed to merely obtaining attribution. In the "Mark Twain case" of 1883,[177] Samuel Clemens challenged Belford, Clark & Company's publication of a number of Clemens's works written as "Mark Twain" and in the public domain at the time of publication. In light of the works' public domain status, the court held that the publisher was free to publish the works in any form it chose, including by (accurately) stating the name of the author on the compilation.[178] Likewise, the court rejected Clemens's claim that "Mark Twain" served a function akin to a trademark and that the unauthorized publication of the works under that mark served to dilute the strength of the mark:

176 Relatively infrequently, but not never. *See, e.g.*, George Carlin, *Don't Blame Me, at* http:///www.georgecarlin.com/home/dontblame.html (last visited Feb. 12, 2005) (disavowing authorship of material attributed to "George Carlin" on the Internet); Barbara Mikkelson & David P. Mikkelson, Urban Legends Reference Pages, *Kurt Vonnegut, at* http://www.snopes.com/quotes/Vonnegut.htm (last visited Feb. 12, 2005) (concluding that Kurt Vonnegut was not the author of a commencement speech widely attributed to him).

177 Clemens v. Belford, Clark & Co., 14 F. 728 (C.C.N.D. Ill. 1883).

178 *Id.* at 732.

> [A]n author cannot, by the adoption of a *nom de plume*, be allowed to defeat the well-settled rules of the common law in force in this country, that the "publication of a literary work without copyright is a dedication to the public, after which any one may republish it." No pseudonym, however ingenious, novel, or quaint, can give an author any more rights than he would have under his own name.[179]

As a matter of trademark law, the court would seem to have been only half right: There is no reason why "Mark Twain" should not be considered as serving a trademark function, but it is difficult to conclude how the publication of works truthfully branded with that mark would cause harm to the reading public.[180] If authornyms are essentially trademarks, then there is no reason why these facts shouldn't give rise to a cause of action for infringement.[181] The harder (and probably more frequent) case is one in which a writer's chosen authornym has been discarded by a subsequent writer incorporating his work, and for this we look to the doctrine of "reverse passing off" as found in section 43(a) of the Lanham Act.

B. Authornyms and Reverse Passing Off

A thorough review of the case law in this area both is beyond the scope of this Article and has been ably accomplished by others;[182] hence, only a brief overview is in order. "Reverse passing off" is the

---

179 *Id.*

180 *See* Kohler Co. v. Moen Inc., 12 F.3d 632, 639 n.9 (7th Cir. 1993).

> The [*Clemens*] court did not rule out trademark protection to the author's use of his pen name. Rather, the court simply held that because Twain had not obtained a copyright in his works, his writings had been dedicated to the public and anyone could publish them if they properly identified the writings as Twain's. Twain's trademark infringement claim was a loser because he did not (and could not) allege that the defendants had falsely identified the origin of the published works. There was minimal risk that the public would be confused as to the source because the defendants clearly identified Mark Twain as the author; Twain simply resented that the publisher would profit due to his failure to obtain copyright protection.

Id.

181 Examples of plaintiffs bringing such claims unsuccessfully (i.e., where the court found no likelihood of confusion) include *Chamberlain v. Columbia Pictures Corp.*, 186 F.2d 923, 923–24 (9th Cir. 1951) (ruling against a challenge by heirs of Samuel Clemens to a description of a movie based on a public domain story described, inter alia, as "Mark Twain's Favorite Story"), and *Geisel v. Poynter Products, Inc.*, 295 F. Supp. 331, 333 (S.D.N.Y. 1968) (ruling against a challenge to production of dolls described as "based on" Dr. Seuss cartoons).

182 *See, e.g.*, William M. Borchard, *Reverse Passing Off—Commercial Robbery or Permissible Competition?*, 67 TRADEMARK REP. 1 (1977); Cross, *supra* note 174; Lori H. Freedman, *Reverse Passing Off: A Great Deal of Confusion*, 83 TRADEMARK REP. 305 (1993);

term given when a seller removes the original trademark on a good or service and substitutes its own; as contrasted with "passing off," in which the seller represents that its goods are those of another, the "reverse passing off" seller is representing that another's goods or services are in fact his own.[183]

Reverse passing off is typically further divided into two types of claims: express passing off, in which the defendant removes the trademark on another party's good and sells the good under the defendant's own trademark, and implied passing off, in which the defendant removes the trademark on another party's good and sells the good without any brand at all.[184] Although in the typical reverse passing off case, the plaintiff cannot claim lost sales because consumers are not being led to the defendant's good by the use of the plaintiff's mark (as contrasted with a forward passing off case), the plaintiff usually articulates the harm suffered as a loss of goodwill—that the plaintiff is being deprived of the social capital its product or service would otherwise have engendered but for the defendant's misattribution.[185]

In the field of literary endeavor, this loss of goodwill constitutes the lion's share of the harm. While one commentator has argued that as to reverse passing off claims generally a defendant selling a good

---

Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(a)*, 77 WASH. L. REV. 985 (2002).

183 *See* Cleary v. News Corp., 30 F.3d 1255, 1261–62 (9th Cir. 1994) (declining to find a reverse passing off claim where subsequent work did not constitute a "bodily appropriation" of earlier work); Lamothe v. Atl. Recording Corp., 847 F.2d 1403, 1407–08 (9th Cir. 1988) (finding a reverse passing off claim where the defendant attributed authorship to fewer than all joint authors of a musical composition); Smith v. Montoro, 648 F.2d 602, 605–07 (9th Cir. 1981) (finding the same as to a claim brought by an actor whose work in a film was attributed to another actor); Borchard, *supra* note 182, at 1–2; Freedman, *supra* note 182, at 305. One commentator has cited *Smith v. Montoro* as an "instrumental [factor] in giving life to the cause of action." Cross, *supra* note 174, at 716–17.

184 2 MCCARTHY, *supra* note 132, §§ 25:6, 25:8.

185 *See* Borchard, *supra* note 182, at 18; Cross, *supra* note 174, at 757; Freedman, *supra* note 182, at 321 (describing the harm to the producer as the loss of a head start in the market). Cross argues that this argument "proves too much" because the defendant, who is "engaged in competition with the plaintiff," has not "lied to or coerced customers," but has "merely failed to provide one item of information that customers might find useful." Cross, *supra* note 174, at 757–58. It is difficult to see, however, how a statement of authorship that is untrue is not a form of deception of the relevant reader/consumer base. For a discussion of this point in the Internet context, see Scoville, *supra* note 107 (discussing the possibility of online identity theft as an unfair competition claim). Note, again, that an authornym is not false because it is pseudonymous; it is false only if it represents an act of misbranding.

under its own name is making a false statement "only if consumers perceive it as a representation concerning the actual origin of the product,"[186] it is almost certain that a writer falsely offering a particular piece of writing as his own is likely to be viewed as the author of the piece or, as this commentator continues, "the party most responsible for the ultimate quality of that product."[187]

As in any trademark case, the touchstone of a reverse passing off claim should be whether there is a likelihood of consumer confusion from the misattribution or failure to attribute at issue.[188] But courts considering section 43(a)-type claims as applied to literary works (pre-*Dastar*) have tended to stray from this traditional test of consumer confusion, instead presuming it from the similarity of the works and thus inappropriately muddling trademark and copyright law.[189] The two leading standards to determine whether a failure to credit constituted a false designation of origin under section 43(a) of the Lanham Act emerged from the Second and Ninth Circuits, and both were derived from copyright law principles. The Second Circuit's standard turned on whether the defendant's work was "substantially similar" to the plaintiff's work such that failure to credit the plaintiff constituted a section 43(a) violation.[190] The Ninth Circuit, by contrast, took the view that it was not enough for the misattributed material to be "substantially similar" to the original work; rather, its requirement was that there must be "bodily appropriation."[191] In both cases, however, the touchstone was how much of the work had been copied, not the effect of the misattribution on the reader/consumer. One could conceive, for example, of an argument that wholesale appropriation of William

186 Cross, *supra* note 174, at 753.

187 *Id.* at 754.

188 *Id.* at 722 ("That [consumer] deception cannot exist if customers, knowing all of the facts, would still consider defendant the origin. Therefore, a court must determine origin from the perspective of the customer, not the scientist or engineer."). *But see, e.g.*, Freedman, *supra* note 182, at 312–13, 325–26 (contending that consumer confusion in the reverse passing off situation does not lead to consumer harm because the consumer is not being led to purchase the product at issue based on the use of the plaintiff's mark).

189 I refer here to a "section 43(a)-type claim" because the goal of this Article is merely to suggest that such a claim should be available in the authornym context, as it is for other branding efforts, not to explore every doctrinal issue associated with such a claim.

190 *See, e.g.*, Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775, 783 (2d Cir. 1994). *Waldman* involved two works based on stories in the public domain but, the court found, "[t]he similarities between the books extend beyond the underlying story which is in the public domain." *Id.*

191 *See, e.g.*, Cleary v. News Corp., 30 F.3d 1255, 1261 (9th Cir. 1994).

Shakespeare's *Hamlet*, published under another brand, would not, in fact, cause confusion because the work is so well known that the misbranding would be all but disregarded (i.e., the reader would be in on the joke).

And yet the near unanimity among the lower courts prior to *Dastar* belied a critical flaw in the analysis: a failure to fully recognize that an action for reverse passing off (i.e., trademark infringement) in the creative context is wholly separate from an action for copyright infringement. The author alleging that his work has been published under the moniker of another is not, in that claim, attempting to control the reproduction or distribution of the work qua work; he is, however, challenging the consumer (here, reader) confusion that is likely to result from the failure to credit him as the original author (in other words, the breakdown of the organizational scheme that lets readers associate certain works with a particular authornym).[192] This is where both the Second Circuit and the Ninth Circuit approaches inappropriately diverge from a traditional Lanham Act analysis.[193] While it may be the case that the similarity between the defendant's work and the plaintiff's work—whether "substantial similarity" or "bodily appropriation"—is a factor in determining whether the relevant readership is likely to be confused as to source, that conclusion cannot be reached without a complete analysis as would be done in any trademark case.

Dastar Corp. v. Twentieth Century Fox Film Corp.[194] is another example of this doctrinal conflation. As described in the Court's opinion,

---

192 *See, e.g.*, Cross, *supra* note 174, at 724.

193 In the case often seen as the genesis for misappropriation claims, *International News Service v. Associated Press*, 248 U.S. 215 (1918), the Court made the same mistake, declining to modify a district court injunction that prohibited publication of the work at issue rather than, as Justice Holmes suggested in concurrence, recognizing that the more appropriate remedy would be "stating the truth; and a suitable acknowledgement of the source is all that the plaintiff can require." *Id.* at 248 (Holmes, J., concurring); *see also Waldman Publ'g Corp.*, 43 F.3d at 785 (holding that the remedy for a reverse passing off violation is an injunction against misrepresentation of authorship, not a limitation on the reproduction of the work); Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 628 (2003).

> Justice Holmes was on to something . . . [in *International News Service* because] . . . [i]f AP were properly credited, newspapers would be willing to incur costs to remain members of AP even if they could get INS copies of the news in AP's dispatches for nothing, because their readers would realize they were getting the news from the horse's mouth, as it were, rather than at one remove.

Id.; *id.* at 639 (suggesting that the reverse passing off claim in *International News Service* was "a viable theory of false advertising and one consistent with *Dastar*").

194 539 U.S. 23 (2003).

Twentieth Century Fox had, at one time, the exclusive rights for a television series based on a book by Dwight D. Eisenhower that told the story of the Allied campaign in Europe during World War II. The copyright on the television series that was eventually developed, which included government and pool footage, expired in 1977 when Fox failed to renew it, rendering the television series to the public domain. Dastar then purchased tapes of the television series, copied and edited the source material, added some minimum amount of new material, and sold the new package to the public as its own product, which competed in the market with a re-release of the original series by a licensee of Fox. At issue in the case before the Supreme Court was whether Fox could assert a reverse passing off claim against Dastar for selling its repackaged series without authorial credit to the Fox series.[195]

The case turned on section 43(a)(1)(A) of the Lanham Act, which prohibits the use in commerce of any mark, "false designation or origin, false or misleading description of fact, or false or misleading representation of fact" that is likely to cause confusion as to the "origin" of the goods or services at issue.[196] Fox's claim, in essence, was that in marketing its videotapes without acknowledging "its nearly wholesale reliance on the [Fox] television series," Dastar had misled the buying public as to the "origin" of its goods.[197] The Court concluded, however, that the phrase "origin of goods" referred only to "the producer of the tangible product sold in the marketplace"—here, the physical videotape sold by Dastar—and not "the person or entity that originated the ideas or communications that 'goods' embody or contain."[198] Accordingly, Dastar had not misled the consuming public because it correctly identified itself as the source of the videotapes it sold and, moreover, was not required to provide any credit to the source of the creative content those videotapes contained.[199]

---

195 *Id.* at 25–27. Again, "passing off" occurs when a producer represents that his product has been made by someone else; "reverse passing off" occurs when a producer represents that he has made someone else's product. *Id.* at 27 n.1.

196 15 U.S.C. § 1125(a)(1)(A) (2000).

197 *Dastar*, 539 U.S. at 31. The Ninth Circuit, relying on its "bodily appropriation" theory of reverse passing off, which "subsumes the less demanding consumer confusion standard," affirmed the district court's award of summary judgment on the section 43(a) claim in favor of Fox. Twentieth Century Fox Film Corp. v. Entm't Distrib., 34 Fed. Appx. 312 (9th Cir. 2002) (internal quotation marks omitted).

198 *Dastar*, 539 U.S. at 31–32. In the Court's view, Fox would have had a viable claim if Dastar had purchased tapes of the television series as reissued by Fox's licensee and repackaged those physical tapes as its own. *Id.* at 31.

199 4 MCCARTHY, *supra* note 132, § 27:77.1.

In rejecting Fox's Lanham Act claim, the Court took pains to outline the differences between copyright and patent law, which are designed to encourage creativity and invention, and trademark law, which is designed to eliminate consumer confusion and ensure that a producer reaps the benefit of the seeds of goodwill he has sown. Once the copyright on material has expired and the material is in the public domain, anyone may freely and legally copy that material. This is the crux of the bargain inherent in the Copyright Act. In the Court's view, to permit an author to expand his copyright through trademark law would be a subversion of that bargain.[200] The Court's interpretation of the scope of that bargain, however, included not only the right to copy as much or as little of material in the public domain as desired but also "to copy without attribution."[201] A conclusion, then, that Dastar misrepresented that it was the creative entity behind the videotapes' contents would, in the Court's view, "create a species of mutant copyright law" that would eliminate the very benefits accrued to the public in the copyright bargain.[202]

> This key holding of the *Dastar* case means that Lanham Act § 43(a)(1)(A)'s prohibition on false claims of origin cannot be extended to false claims of the creation of inventive or communicative works. Thus "reverse passing off" claims brought under Lanham Act § 43(a)(1)(A) cannot focus on allegedly false claims of authorship, invention or creation.

Id. (footnote omitted). Lower courts after *Dastar* have taken the Court's holding at face value. *See, e.g.*, Gen. Universal Sys., Inc. v. Lee, 379 F.3d 131 (5th Cir. 2004); Zyla v. Wadsworth, 360 F.3d 243 (1st Cir. 2004); Smith v. New Line Cinema, No. 03 Civ. 5274, 2004 U.S. Dist. LEXIS 18382 (S.D.N.Y. Sept. 13, 2004); Schiffer Publ'g, Ltd. v. Chronicle Books, LLC, No. 03-4962, 2004 U.S. Dist. LEXIS 16180 (E.D. Pa. Aug. 11, 2004); Bob Creeden & Assocs., Ltd. v. Infosoft, Inc., 326 F. Supp. 2d 876 (N.D. Ill. 2004); Larkin Group, Inc. v. Aquatic Design Consultants, Inc., 323 F. Supp. 2d 1121 (D. Kan. 2004); Tao of Sys. Integration, Inc. v. Analytical Servs. & Materials, Inc., 299 F. Supp. 2d 565 (E.D. Va. 2004); Keane v. Fox Television Stations, Inc., 297 F. Supp. 2d 921 (S.D. Tex. 2004); Carroll v. Kahn, No. 03-CV-0656, 2003 U.S. Dist. LEXIS 17902 (N.D.N.Y. Oct. 9, 2003); Bretford Mfg., Inc. v. Smith Sys. Mfg. Co., 286 F. Supp. 2d 969 (N.D. Ill. 2003); Boston Int'l Music, Inc. v. Austin, No. 02-12148-GAO, 2003 U.S. Dist. LEXIS 16240 (D. Mass. Sept. 12, 2003); Williams v. UMG Recordings, Inc., 281 F. Supp. 2d 1177 (C.D. Cal. 2003).

200 *See, e.g., Dastar*, 539 U.S. at 33 ("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." (internal quotation marks and alterations omitted)).

201 *Id.* (citing TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 29 (2001)); *see also* Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230 (1964); Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 121–22 (1938).

202 *Dastar*, 539 U.S. at 34. Section 43(a)(1)(B) of the Lanham Act targets anyone who, "in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services,

Although copyright law renders material in the public domain free for all to copy and use in creating new creative works, Fox's attribution claim did not require Dastar to stop making use of the source materials at issue in the case. Rather, the question was whether, as a matter of *trademark* law, Dastar had confused the consuming public by providing a particular statement of authorship with respect to the *material* on the videotape—the very product it was promoting to the public.[203] (To draw but one analogy, the *New York Times* trademark does

---

or commercial activities." 15 U.S.C. § 1125(a)(1)(B) (2000). The *Dastar* court potentially left one door open when it suggested that a reverse passing off claim for creative works might be viable under section 43(a)(1)(B). *Dastar*, 539 U.S. at 38 (suggesting a cause of action might lie where "the producer of a video that substantially copied the [plaintiff's] series [gave,] . . . in advertising or promotion[,] . . . purchasers the impression that the video was quite different from that series"). But, as J. Thomas McCarthy has noted, "the 'commercial advertising or promotion' requirement is not an insignificant limitation on the application of § 43(a)(1)(B) because some courts define it in a fairly restrictive way." 4 MCCARTHY, *supra* note 132, § 27:77.1 (citing First Health Group Corp. v. BCE Emergis Corp., 269 F.3d 800 (7th Cir. 2001)); *see also* Freedman, *supra* note 182, at 306 (contending that reverse passing off claims should be brought under what is now section 43(a)(1)(B)); Posner, *supra* note 193, at 639 (suggesting that a reverse passing off claim in *International News Service v. Associated Press*, 248 U.S. 215 (1918), was "a viable theory of false advertising and one consistent with *Dastar*"). *But see* Kwall, *supra* note 182, at 1020 (contending that plaintiffs seeking "a remedy for reverse passing off are disserved through their forced reliance on section 43(a) to redress violations that should properly be addressed within the scope of an independent right of attribution"). In its brief to the Supreme Court, Dastar had argued that the 1988 revisions to the Lanham Act eliminated the ability to bring a reverse passing off claim pursuant to either section 43(a)(1)(A) or section 43(a)(1)(B). Brief for Petitioner at 38–40, *Dastar* (No. 02-428); *see also* Cross, *supra* note 174, at 736–42 (making the same contention). No other party took as broad a position. *See, e.g.*, Brief of Amicus Curiae United States at 6, 29, *Dastar* (No. 02-428) (suggesting the availability of relief for reverse passing off under subparagraph (B)); Brief of Amicus Curiae the International Trademark Association at 1, *Dastar* (No. 02-428) (suggesting a claim for reverse passing off under subparagraph (A) requires a finding of likely consumer confusion); Brief of Amicus Curiae the American Intellectual Property Law Association at 2, *Dastar* (No. 02-428) (same). In any event, as Dastar noted in its reply brief, Fox had elected to proceed only under subparagraph (A) and not subparagraph (B), and so the issue of subparagraph (B)'s applicability was not before the Court. Reply Brief for Petitioner at 5 n.2, *Dastar* (No. 02-428).

203 *Cf.* 2 MCCARTHY, *supra* note 132, § 10:26.1.

> In the author's view, preventing . . . false claims [as to the origination of an idea or concept] in no way protects ideas or concepts per se [contrary to copyright law doctrine]. The mere use of another's idea does not trigger the claim. Rather, the trigger is the false representation that B originated A's idea.

2 *id.* (discussing Attia v. Soc'y of N.Y. Hosp., 201 F.3d 50 (2d Cir. 1999)). It is irrelevant to the confusion analysis whether the work in question is under copyright or in the public domain, although the issue is likely to be moot in the former context be-

not convey to its readers the source of the newsprint on which its journalistic efforts are transmitted; it conveys the source of the articles for which its readers presumably pay subscription fees.)[204] *Dastar* involved a trademark dispute, not a copyright one, and so the question was whether Dastar was likely to cause confusion among consumers by appropriating authorial identity to itself rather than to the "true" author of the material on the tape (whether Fox or some other entity).

The *Dastar* Court claimed, however, that determining the "author" to whom attribution was due would pose "serious practical problems," as complicated as a "search for the source of the Nile and all its tributaries."[205] For example, the Court claimed:

> A video of the MGM film *Carmen Jones*, after its copyright has expired, would presumably require attribution not just to MGM, but to Oscar Hammerstein II (who wrote the musical on which the film was based), to Georges Bizet (who wrote the opera on which the musical was based), and to Prosper Mérimée (who wrote the novel on which the opera was based).[206]

---

cause a copyright owner seeking to compel accurate attribution is likely simply to assert a copyright claim to prohibit distribution outright. *See* 4 *id.* § 27:77.1. What is an area of concern is the Court's "heads-I-win, tails-you-lose" dilemma. *See Dastar*, 539 U.S. at 36. Because an author is free to copy any portion of a public domain work he chooses and to make alterations to that work, that author may well become trapped between two attributional choices, both presumably equally unappealing to the plaintiff: publish the work without attribution or attribute a work to the plaintiff that has been altered from the original. While I don't intend to diminish the magnitude of this risk, it seems likely that attributional conventions (such as "based on") would develop to remedy this concern. *See* King v. Innovation Books, 976 F.2d 824, 829–31 (2d Cir. 1992) (considering "based upon" credit as a viable option).

204 Under the Court's reasoning, the viability of a Lanham Act claim depends entirely on how the communicative product is packaged. A defendant who rips the cover off a book and substitutes a cover with his name rather than the original author's is liable; a defendant who retypes the entire book to create a new "good" is not. The distinction becomes even more difficult to puzzle out in the electronic environment, where the "good" that serves as the vehicle for the communicative product is harder to define. *See, e.g.*, Do It Best Corp. v. Passport Software, Inc., No. 01 C 7674, 2004 U.S. Dist. LEXIS 14174 (N.D. Ill. July 28, 2004) (refusing to dismiss a Lanham Act claim, relying on *Dastar*, where defendant substituted its copyright notice for plaintiff's on a splash screen of a software program).

205 *Dastar*, 539 U.S. at 35, 36; *see also* Lisa Samuels, *Relinquish Intellectual Property*, 33 NEW LITERARY HIST. 357, 358 (2002) ("If intellectual property is transhistorical . . . shouldn't we credit all the writers who created the thought conditions for a writer of the present? How can we do that?").

206 *Dastar*, 539 U.S. at 35. The Court's description of multiple claims to authorship is likely to occur more frequently in theatrical works than in literary ones. *See, e.g.*, Aalmuhammed v. Lee, 202 F.3d 1227, 1233 (9th Cir. 2000); Randy Kennedy, *Who Was that Food Stylist? Film Credits Roll On*, N.Y. TIMES, Jan. 11, 2004, at A1.

The Court's emphasis in its example to a time "after [the work's] copyright has expired" seems to suggest a tenuous, yet dependent connection between a statement of authorship and copyright: Once the copyright on *Carmen Jones* expires, MGM no longer has the right to claim to be the author of the film. But while this may be true as a matter of copyright law—in other words, MGM would no longer have the ability to assert the rights granted to an author under copyright law—it is not at all true as a matter of trademark law, in which the authornym attached to a work (i.e., its "source") continues past the point at which the work ceases to be protected by copyright. William Shakespeare does not cease to be the author of *Hamlet* even though the play is in the public domain, and most readers would expect that singular attribution in any published edition of the work.[207]

One might argue, however, that even in a world that looks more like trademark than like copyright, the Court's criticism is still valid: How do we determine the "origin" of a work that has innumerable cultural influences? The authornym demonstrates that this question is a red herring. As has been discussed previously in this Article, trademark law does not concern itself with the actual source of any good or service (or its progenitors). It does not ask the names of the individual artisans who put hand to tool or the name of the advertising agency executive who devised the logo—indeed, the anonymous source doctrine tells us that we need never be concerned with actual source. Rather, trademark law concerns itself with maintaining the integrity of the organizational system, with ensuring that marks affirmatively selected by producers in the marketplace effectively segregate producer and consumer inputs in a way that is not likely to confuse. In authorship (or authornymic) terms, this means that we need not be concerned over whether "Amanda Cross" is really "Carolyn Heilbrun," or whether a particular autobiography is the work of a single individual or a gaggle of ghostwriters, or whether John Grisham the author is coeval with John Grisham the person.[208] We take the authornym-as-

207 Jane Ginsburg makes much the same point in her recent discussion of *Dastar*. Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 270 (2004).

208 *See* JACQUELINE M.B. SEIGNETTE, CHALLENGES TO THE CREATOR DOCTRINE: AUTHORSHIP, COPYRIGHT OWNERSHIP AND THE EXPLOITATION OF CREATIVE WORKS IN THE NETHERLANDS, GERMANY AND THE UNITED STATES 110–12 (1994) (stating that recognition of the right to attribution would not necessarily conflict with the copyright holder's exploitation interests). In trademark law, of course, the corollary to the "anonymous source" principle is that infringement can still take place even if the true identity of the manufacturer is unknown to the consumer: It is the trademark that is infringed, not the corporate or other identity of the underlying company. Schechter, *supra* note 140, at 815 ("A person whose name is not known, but whose mark is imi-

trademark on its face, recognizing the *statement* of authorship for purposes of trademark law and leaving the *fact* of authorship to copyright law.[209]

Thus, because reader-consumer confusion is the touchstone, the parodist need not fear being subject to a reverse passing off claim for failing to provide attribution for his source material. The successful parody, after all, depends on the reader's recognition of the target *without* attribution; the unsuccessful parodist, by contrast, may well be an infringer.[210] Similarly, this would not mean, contrary to the

---

tated, is just as much injured in his trade as if his name was known as well as his mark." (quoting Powell v. Birmingham Vinegar Brewing Co., 13 Rep. Pat. Cas. 235, 250 (1896))).

209 One practical example of this distinction can be seen in the use of the Creative Commons license, which allows authors to cede particular rights available under copyright law (as opposed to an all-or-nothing regime). As Anupam Chander and Madhavi Sunder point out, almost all authors releasing works pursuant to the Creative Commons license—including the ones who have little or no copyright-based restrictions on distribution of their work—require attribution. Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1361 (2004).

210 *See, e.g.*, Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1405 (9th Cir. 1997) ("In a traditional trademark infringement suit founded on the likelihood of confusion rationale, the claim of parody is . . . merely a way of phrasing the traditional response that customers are not likely to be confused as to the source, sponsorship or approval." (citing Mut. of Omaha Ins. Co. v. Novak, 648 F. Supp. 905, 910 (D. Neb. 1986), *aff'd*, 836 F.2d 397 (8th Cir. 1987))); Anheuser-Busch, Inc. v. L & L Wings, Inc., 962 F.2d 316, 321 (4th Cir. 1992) ("[A]lthough parody necessarily evokes the original trademark, effective parody also diminishes any risk of consumer confusion."); Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Group, 886 F.2d 490, 494 (2d Cir. 1989).

> A parody must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is *not* the original and is instead a parody. To the extent that it does only the former but not the latter, it is not only a poor parody but also vulnerable under trademark law, since the customer will be confused.

Id.; 5 MCCARTHY, *supra* note 132, § 31:153 ("A non-infringing parody is merely amusing, not confusing."). This is no less true when the mark the parodist seeks to invoke is one textually equivalent to another's personal name. *See, e.g.*, NYSE, Inc. v. Gahary, 196 F. Supp. 2d 401, 411–13 (S.D.N.Y. 2002) (denying plaintiff's motion for summary judgment where defendant's claimed impersonation of the NYSE Chairman on an Internet message board was a parody). Of course, interpretation in this regard will not always be perfect, thus rendering the line between "parody" and "misappropriation" (or even "hoax") somewhat hazy. *See, e.g.*, David Streitfeld, *Spoof, Hoax or Freudian Slip?*, WASH. POST, Apr. 6, 1989, at B5 (describing outrage among Freud scholars when a purported 1900 review of Freud's *The Interpretation of Dreams* was revealed to have been penned by Peter Gay, the Yale historian who claimed to have discovered it; Gay claimed the review was "a parody"). Moreover, the absence of likelihood of confusion is not limited to parodies. *See, e.g.*, Int'l Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr., 103 F.3d 196 (1st Cir. 1996) (rejecting a Lanham

Court's specter in *Dastar*, that authors would be precluded from borrowing themes, ideas, or even characters from other writers: Leonard Bernstein's *West Side Story* need not credit William Shakespeare and Bizet's *Carmen* need not credit Prosper Mérimée. As with parody, the reader's understanding of thematic continuity is part of the conceit. It is therefore not likely to be confusing for readers and critics to recognize that the film *Clueless* echoes Jane Austen's *Emma* even though the author fails to make this statement directly.[211] But where a subsequent author adopts the work of a previous author wholesale and passes it off as his own, the passing off is almost certainly not part of the conceit, and attribution is warranted to allow readers to appropriately organize their interpretive reactions.[212]

Act claim where recipients of anti-union literature featuring a union logo understood the literature to be propaganda).

Although "plagiarism" may be a useful shorthand to describe the unsuccessful parodist, the roots of this Article's proposal are slightly different from those underlying a ban against plagiarism. Plagiarism, like other offenses against an author's moral rights, is typically seen as an affront to the author—a larceny of the textual property that the author's skills and individualism have created and a conversion to one's own literary purpose. In this respect, plagiarism may be a particularly Western concept, given the more elevated status in other cultures for tradition and replication. *See, e.g.*, Samuels, *supra* note 205, at 359 (describing Islamic devaluing of "original thinking"). And like other violations of moral rights, plagiarism does not depend on whether the plagiarized work is protected by copyright or in the public domain even though the antiplagiarism movement, like copyright, depends for its strength on the concept that an author's creative output has property-like characteristics that lead it to be owned and, subsequently, "stolen." *See* SAINT-AMOUR, *supra* note 26, at 173; SAUNDERS, *supra* note 53, at 81 (describing the seventeenth-century French view of plagiarism as "larceny"); Debora Halbert, *Poaching and Plagiarizing: Property, Plagiarism, and Feminist Futures*, *in* PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD, *supra* note 18, at 111, 111; Swearingen, *supra* note 18, at 21; *Plagiarism—A Symposium*, TIMES LITERARY SUPP., Apr. 9, 1982, at 413. While trademark law has a certain sense of the creator's protecting its goodwill—its own creative (albeit commercial) effort—trademark doctrine still continues to hew to the idea that the focus of the regulatory efforts—and the person whose rights are truly at issue—is the confused consumer. Here, too, the attributional right, while perhaps having the side effect of protecting the author's "good name"—the trademark value in the authornym—is at its core intended to eliminate interpretive confusion in the reader.

211 *Cf.* Paul Edward Geller, *Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms?*, *in* OF AUTHORS AND ORIGINS, *supra* note 20, at 159, 197 (arguing for a "moral *right to reference*" to all authors of a given work as well as to "prior works consciously transformed in generating the overall fabric of a new work").

212 In this sense, it may be the case that the more distinctive an author's work is, the less confusion among the reading public reverse passing off will cause. It is unlikely, for example, that the publisher of "John Smith's *Hamlet*" is likely to confuse many readers into concluding that Shakespeare's tragedy is his own. *See, e.g.*, Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775, 784 n.7 (2d Cir. 1994) (finding that a

CONCLUSION: AUTHORNYMITY, TRADEMARKS, AND MORAL RIGHTS

The call for authorial attribution is, of course, one of the bundle of rights of authorship traditionally termed "moral rights"—the others are typically described as the "right of integrity" (which prohibits alteration of the work that destroys its essential nature), the "right of disclosure" (which vests solely with the author the decision as to whether and when to publish), and the "right of withdrawal" (which permits the author to end the dissemination or display of a published work).[213] As promulgated in French and German law, the right of attribution comprises the right of identification (including the right not to be identified, or to be identified using a pseudonym) and the right against misattribution (which itself comprises both, in trademark terms, passing off and reverse passing off)[214]—or, in more literary terms, a prohibition against piracy and a prohibition against plagiarism.

This Article is not a call for moral rights.[215] If the authornym and its corresponding attributional right are to inhere somewhere in the

---

"secondary meaning" determination is inappropriate in a literary reverse passing off case because the plaintiff's contention is that lack of the work's secondary meaning will lead consumers to believe the work was created by the defendant); *cf.* Kwall, *supra* note 182, at 1022 (positing that if the plaintiff's work "is not sufficiently well-known to trigger public recognition," a reverse passing off act may not cause confusion).

213 *See, e.g.*, Jaszi, *supra* note 23, at 496–97; Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 152–53; Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 24 (1994).

214 *See* Netanel, *supra* note 213, at 34.

215 U.S. copyright law recognizes moral rights only in a very limited sense through the Visual Artists Rights Act of 1990 (VARA). *See* 17 U.S.C. § 106A (2000); *see also* Netanel, *supra* note 213, at 45–48. Despite scholarly calls for expansion of VARA's protections to other creative works, *see, e.g.*, Kwall, *supra* note 213, at 154, no further recognition of moral rights appears to be on the legislative horizon.

The difference in recognition of moral rights between the U.S. copyright system and the Continental copyright system inheres in the core justification for the scope of the author's right: In the U.S. the copyright is based on an economic desire to encourage both creativity and access to that creativity by the public; in France the copyright is based on a concept of creativity as motivated by (and related to) personality. *See, e.g.*, Gilliam v. Am. Broad. Co., 538 F.2d 14, 24 (2d Cir. 1976); Netanel, *supra* note 213, at 7–23; Alfred C. Yen, *The Interdisciplinary Future of Copyright Theory*, 10 CARDOZO ARTS & ENT. L.J. 423, 426–27 & n.14 (1992). Jane Ginsburg has suggested that these approaches are not as historically divergent as traditionally believed. *See, e.g.*, Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, *in* OF AUTHORS AND ORIGINS, *supra* note 20, at 130 (comparing early French and American copyright schemes). *But see, e.g.*, SAUNDERS, *supra* note 53, at 237 (rejecting the denial of a "great divide" between copyright law and moral rights doctrine).

spectrum of U.S. intellectual property rights, the place to which to anchor them lies toward the trademark end of the spectrum, not the copyright end. The concept of moral rights is a copyright concern, arising out of the Romantic notion of authorship and the belief that creative product is an expression of the individual author. Moral rights therefore seek to preserve this genetic bond by prohibiting actions by subsequent authors that deny the Romantic author his prominence.[216] A necessary part of this doctrine—the source of the term "moral" in its name and, as David Saunders and Ian Hunter have described, what distinguishes literary writing "from all those other forms of human labour in which the product has not been classified by the law as part of its producer's person"[217]—would therefore seem to be a belief that there is a singular authorial identity with which one's work is associated. The moral claim would weaken significantly if a single writer were to write under several authornyms.

By contrast, authornymic attribution is not a matter of authorial justice, but rather a matter of organizational integrity. It preserves the organizational framework that authornyms create such that reader responses will be informed and minimizes the likelihood of confusion a consumer of creative commodities might otherwise experience. What I am describing, then, is not quite a doctrine of moral rights for authors so much as it is a doctrine of moral rights for readers—a right that, like trademark law, takes a reader-centered view of authorship as opposed to copyright's writer-centered view.[218] The right does not demand attribution where none existed at the work's genesis—in other words, an author's choice to publish truly anonymously is retained,[219]

---

216 *See, e.g.*, SAUNDERS, *supra* note 53, at 195 (discussing the work of French jurist Bernard Edelman); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 4 (1988); Jaszi, *supra* note 23, at 496, 500; Kwall, *supra* note 182, at 985–86; *see also* Lemley, *supra* note 52, at 894 (suggesting that the "extremely limited success of moral rights theories in the United States" is evidence of the failure of Romantic authorship).

217 Saunders & Hunter, *supra* note 23, at 499.

218 Many commentators who call for explicit recognition of the right of attribution in U.S. law proffer the protection of the creative spirit as a justification. *See, e.g.*, Kwall, *supra* note 182, at 1020–21. My proposal, focused on the needs of the reader in an interpretive and economic guise rather than on the author's desire for acknowledgment, is detached from any such considerations.

219 *See, e.g.*, Damich, *supra* note 216, at 54 (suggesting that an author who wished to remain anonymous but whose work, although published with his consent, contained an unwanted (yet accurate) attribution, "would have causes of action for public disclosure of private facts and appropriation of his name"); Kreimer, *supra* note 58, at 69–70 ("Forcing citizens to publicly link themselves to identities they are constitutionally entitled to eschew is a violation of their constitutionally protected autonomy—their right to define themselves."); *cf.* Cross, *supra* note 174, at 726 (noting that a

just as no producer is forced to brand its goods. Nor is it terribly concerned with identifying the "true" author of a piece so much as it is ensuring that the original attribution survives republication. This is contrary to the Continental view of the right of attribution, which, for example, denies any paternity right to the individual under whose name a ghostwritten book is published and awards the right instead to the writer who put pen to paper, regardless of any ordering of these rights provided by contract.[220]

From a literary theorist's perspective, then, the authornym as trademark mediates between copyright law's Romantic vision of authorship and the poststructuralist's authorless texts. Like the values transmitted by copyright, attribution links a text to an author without prohibiting use of that text once it enters the public domain. And like the poststructuralist's reader's exercise, attribution serves only to preserve an interpretive organizing framework without infusing that exercise with biographical or other Romantic details.[221]

---

reverse passing off claim is not actionable unless the plaintiff can show that absent the defendant's misattribution, credit would have come to plaintiff instead, thus barring such claims for anonymous works).

220 *Cf., e.g.*, Cleary v. News Corp., 30 F.3d 1255, 1259–60 (9th Cir. 1994) ("[B]ecause the employer is considered the author of the work, once authorship rights are relinquished through a work for hire contract provision, the right to attribution is also relinquished unless that right is reserved explicitly in the contract."); Vargas v. Esquire, Inc., 164 F.2d 522, 525–26 (noting that the plaintiff divested himself of any claim to attribution in the work by conferring all rights in the work via contract); Jones v. Am. Law Book Co., 109 N.Y.S. 706 (App. Div. 1908) (same); Roddy-Eden v. Berle, 108 N.Y.S.2d 597 (Sup. Ct. 1951) (holding a ghostwriting agreement void and unenforceable as against public policy); *see also* Netanel, *supra* note 213, at 50. Netanel further notes that although, in a moral rights regime, a ghostwriter may not assign his attributional right to the stated author by contract, he may, in Germany but not in France, explicitly agree to waive his right to attribution. *Id.* at 52–53 & n.273.

221 Susan Lanser describes the mediating effect of attribution as creating a circularity between "the projects of authorial identification and textual interpretation":

> Although *Roxana* was originally an anonymous work called *The Fortunate Mistress*, I approach it today as a metonym of Daniel Defoe, who is already known to me as a set of texts . . . . At the same time that I create *Roxana* through Defoe, I (re)create Defoe through *Roxana*. When I then encounter a possible new 'Defoe'—say, a piece of unattributed journalism—my decision to accept or reject this work as Defoe's is likely, barring external evidence, to be predicated on my existing construction of the author; if the text fits, it gets added to the canon that, in turn, (re)constitutes Defoe. If I determine that Defoe could not have written the piece because he was a Whig or a Dissenter, the work is cast back to the oblivion of anonymity—and deprived of considerable cultural capital.

Lanser, *supra* note 65, at 82.

The authornym's place in the realm of trademark does not necessarily mean that it must lie in tension with copyright law. Opponents of such a right may argue that to require continued attribution past the time when copyright protection expires would be but an albatross around the collective neck of the creative commons, thwarting the effort to mine the public domain for works of new authorship.[222] But the authornym actually embraces the concept of the intergenerational relationship among authors by giving full voice and credence to the fact of borrowing even where (perhaps only where) such borrowing is legally permissible.[223] It does not detract from the volume of material in the public domain but rather requires that the material not be divested from the organizational structure in which it was originally created, and then only in cases in which such divestment is likely to thwart the interpretive effort.[224]

In this respect, this Article is but an additional step on what seems to be an increasingly trodden path away from the Romantic author-genius construct and toward a more complete conception of authorship. For if we are all authors in our fashion, we are undoubtedly readers first, and we cannot hope to be efficient literary consumers (in both senses of the word) without some confidence that the works

---

222 *See, e.g.*, Alfred C. Yen, *The Interdisciplinary Future of Copyright Theory*, *in* THE CONSTRUCTION OF AUTHORSHIP, *supra* note 15, at 159.

223 A less flattering take on this response is to portray it as denying the concept of originality full stop—in other words, conceding that there is indeed "nothing new under the [literary] sun" and that all creative work, even that protected under copyright law, is essentially indebted to what has come before. *See, e.g.*, SAINT-AMOUR, *supra* note 26, at 37 ("The broad project of the defenses of plagiarism was to overhaul the Romantic mythology of original genius, remaking genius as a function of assimilation and recombination rather than a fountainhead of fresh invention."); *see also* RALPH WALDO EMERSON, *Quotation and Originality*, *in* LETTERS AND SOCIAL AIMS 175, 191 (1904).

> If an author give us just distinctions, inspiring lessons, or imaginative poetry, it is not so important to us whose they are. . . . We may like well to know what is Plato's and what is Montesquieu's or Goethe's part, and what thought was always dear to the writer himself; but the worth of the sentences consists in their radiancy and equal aptitude to all intelligence.

Id. It is not my intent in this Article to present an apologia for plagiarism; quite the contrary, in fact.

224 *See, e.g.*, Raven, *supra* note 65, at 144 (describing the use of pseudonymous "By the author of . . ." as an aid to linking works unattributable to a specific individual). An attribution right therefore differs significantly in this respect from proposals for an extended copyright term, which would deplete the public domain by restricting works from being used at all without permission, *see, e.g.*, SAINT-AMOUR, *supra* note 26, at 124, or from a complete extension of moral rights, which amounts to what David Saunders, using a phrase of Robert Gorman's, has termed an "aesthetic veto," *see* SAUNDERS, *supra* note 53, at 208.

that we read—and later draw on for our own creative activity—are situated within a coherent literary structure. The authornym—and, more particularly, the authornym-as-trademark—seems perfectly suited to the task: It maintains the integrity of author and reader inputs, but it rarely purports to represent itself as the gateway to any genetic meaning. That work is left to the reader/consumer of the text. It is only when we recognize this Barthesian/Foucauldian lack of meaning, the essential pseudonymity of all statements of authorship, that we can begin to move to this reader-focused version of authorship and create room for the values that trademark law can efficiently promote in the marketplace of ideas.