



## Wiki Authorship, Social Media, and the Curatorial Audience

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### TABLE OF CONTENTS

I. INTRODUCTION.....	96
II. NORMATIVE WIKIS AND THE INVISIBLE AUTHOR.....	100
III. ROLE OF THE CURATORIAL AUDIENCE.....	102
IV. THE ESSENTIALITY OF ATTRIBUTION.....	107
V. PSEUDONYMOUS ATTRIBUTION AND INTEGRITY OF THE PRIVACY FILTERS.....	111
VI. THE LEGAL REGIME FOR ENFORCEMENT OF THE WIKI'S NORMATIVE EXPECTATIONS.....	115
VII. WIKIFRAUD AND EDITORIAL MISCONDUCT.....	122
VIII. VARYING THE NORMS FOR EMPLOYER-SPONSORED AUTHORSHIP.....	124
IX. INCENTIVIZING COLLABORATIVE SCHOLARSHIP—CREATION AND DISSEMINATION OF KNOWLEDGE.....	127
X. TOWARD A NORM OF ACCOUNTABILITY IN NEW MEDIA—ATTRIBUTION, INTEGRITY, AND SOCIAL MEDIA.....	133
XI. CONCLUSION.....	143

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The instruction we find in books is like fire. We fetch it from our neighbours, kindle it at home, communicate it to others and it becomes the property of all.

–Voltaire

No man but a blockhead ever wrote, except for money.

–Samuel Johnson

## I. INTRODUCTION

“In the beginning was the [w]ord,”<sup>1</sup> and each word was linked via hypertext.<sup>2</sup>

The idea of connecting one document to another using hypertext links motivated Internet founder Tim Berners-Lee and other early innovators to develop the Web so that content could be created, linked and shared.<sup>3</sup> Speaking before the collected faculty and students at the MIT Laboratory for Computer Science, Berners-Lee explained, “[t]he idea was that everybody would be putting their ideas in, as well as taking them out.”<sup>4</sup>

The idea behind Berners-Lee’s Internet embraced the creation and expansion of social capital<sup>5</sup> through technologically mediated communication.<sup>6</sup> While there are many variations on the definition of social capital, one powerful definition focuses on

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<sup>1</sup> John 1:1 (King James).

<sup>2</sup> See Tim Berners-Lee, Talk at the MIT Laboratory for Computer Science (LCS) 35th Anniversary Celebration (April 14, 1999) (transcript available at [www.w3.org/1999/04/13-tbl.html](http://www.w3.org/1999/04/13-tbl.html)):

I wrote the proposal in 1989 and tried to explain that I thought the global hypertext would be a great idea. . . . Vennevor Bush started in 1945 and it was published in the Atlantic Monthly and still nobody developed a global hypertext system. And then Doug Enbgebart actually showed people how to do it two decades later, and still it didn’t happen because he just didn’t happen to be in the right place at the right time. But I was.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* Berners-Lee’s emphasis focused on collaboration rather than passive viewership:

The basic [idea] of the Web is . . . an information space through which people can communicate, but communicate in a special way: communicate by sharing their knowledge in a pool. The idea was not just that it should be a big browsing medium. . . . This is not supposed to be a glorified television channel.

<sup>5</sup> See Anita Blanchard & Tom Horan, *Virtual Communities and Social Capital*, in SOCIAL DIMENSIONS OF INFORMATION TECHNOLOGY: ISSUES FOR THE NEW MILLENNIUM 6–22 (G. David Garson ed., 2000).

<sup>6</sup> *Id.*

“features of social organization such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit.”<sup>7</sup>

Berners-Lee’s vision for the Web was founded on the notion of an interlinked shared experience—an experience intended to build rather than consume social capital. Out of that vision grew a number of extraordinary tools and organizations. CompuServe and America Online originally generated closed communities comprised of millions of users.<sup>8</sup> Those gave way to the open Internet dominated by Yahoo and other Web portals, which cataloged and organized the proliferating content available through the hypertext links.<sup>9</sup> By the end of the 20th century, these hierarchical systems were surpassed by search engines, which created hierarchies on-the-fly in response to users’ search criteria.<sup>10</sup> Software allowed users to connect directly to each other in peer-to-peer networks and to tag information for more contextual retrieval.<sup>11</sup>

The work of Ward Cunningham in 1995 initiated the wiki software and platform for collaboratively authored web pages.<sup>12</sup> Wikis expanded alongside the other innovations on the Internet. Through this format, the vision of Berners-Lee continued to grow, serving as cultural high-point in an increasingly commercialized environment.<sup>13</sup> Using wiki software, users could put information into organized websites, bringing coherence to the information available online.<sup>14</sup>

The term wiki reflects both a software platform and a website format.<sup>15</sup> The salient features for the typical wiki website are pages that can be easily edited using a

<sup>7</sup> *Id.* at 7 (citing Robert D. Putnam, *Bowling Alone: America’s Social Capital*, 6 J. OF DEMOCRACY 65, 66 (1995)). See also Geert Lovink, *The Rise and Fall of the Digital City Metaphor and Community in 1990s Amsterdam*, in THE CYBERCITIES READER 371–77 (Stephen Graham ed., 2004); John Leslie King et al., *The Rise and Fall of Netville: The Saga of a Cyberspace Construction Boomtown in the Great Divide*, 7 ELECTRONIC MARKETS 22, 22–23 (1997), [http://www.electronicmarkets.org/issues/volume-7/volume-7-issue-1/v7n1\\_king0.pdf](http://www.electronicmarkets.org/issues/volume-7/volume-7-issue-1/v7n1_king0.pdf) (last visited Mar. 9, 2010).

<sup>8</sup> JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT 25–29 (R.R. Donnelley 2008); RAVI KALAKOTA & MARCIA ROBINSON, E-BUSINESS 2.0: ROADMAP FOR SUCCESS 9 (2001). See also LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 147 (2001).

<sup>9</sup> KALAKOTA & ROBINSON, *supra* note 8, at 88.

<sup>10</sup> E. Van Couvering, *The History of the Internet Search Engine: Navigational Media and the Traffic Commodity*, in WEB SEARCH: MULTIDISCIPLINARY PERSPECTIVES 177, 177–79 (Amanda Spink & Michael Zimmer eds., 2008).

<sup>11</sup> See Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 319 (1992) (“In many respects, the conditions of the Internet environment today resemble those which prevailed at other moments of polymorphous collaboration, unrestrained plagiarism, and extraordinary cultural productivity—such as the Elizabethan stage or Hollywood before 1915.”).

<sup>12</sup> ANJA EBERSBACH ET AL., WIKI WEB COLLABORATION 10 (2006).

<sup>13</sup> See A. Hess, *Reconsidering the Rhizome: A Textual Analysis of Web Search Engines as Gatekeepers of the Internet*, in WEB SEARCH: MULTIDISCIPLINARY PERSPECTIVES 35 (Amanda Spink & Michael Zimmer eds., 2008).

<sup>14</sup> *Id.*

<sup>15</sup> JANE KLOBAS, WIKIS: TOOLS FOR INFORMATION WORK AND COLLABORATION 3 (2006).

web browser, updated—often in real time—and collectively edited by its reader/participants.<sup>16</sup> Of course, given the fluid nature of the web and the flexibility of the wiki software, these features may vary on particular sites.<sup>17</sup> Increasingly, for example, some public wikis require that some or all pages be subject to editorial preview to make sure that no third party's legal rights have been infringed.<sup>18</sup> In this way material that is defamatory, obscene or likely to be an invasion of privacy can be kept off the wiki site.<sup>19</sup>

Wiki software plays an increasingly important role within corporate, nonprofit and educational institutions.<sup>20</sup> The ability to author documents collectively, track changes to the materials and centrally host the content on institutional servers or the Internet makes wiki software a useful alternative to desktop publishing solutions for jointly authored projects.<sup>21</sup> In many cases, the wiki software is free to use and deploy within organizations, making it a cost effective authoring solution for many projects. "The vast majority of wiki deployments are not intended for public use."<sup>22</sup> As a software platform, therefore, wiki software has provided organizations a useful option in their authoring strategies and encouraged collaborative authorship through the wiki's ease of use. This article does not focus on the role of wikis within organizations. Instead, it looks at the impact of wiki authorship as a form of social media within the context of the new wave of social media dominated by Facebook,<sup>23</sup> MySpace,<sup>24</sup> YouTube<sup>25</sup> and similar Internet portals.

Whether used within closed organizations or deployed in the public Internet space, wikis typically focus on collaborative authorship and incorporate normative expectations that exclude the so-called moral rights of attribution and integrity reflected in international copyright treaties.<sup>26</sup> In contrast, as explored below, the

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<sup>16</sup> *Id.* at 8–9.

<sup>17</sup> Brian Lamb, *Wide Open Spaces: Wikis, Ready or Not*, 39 EDUCAUSE REV. 36, 48 (2004) ("There is no unified set of software characteristics that are shared by all wikis. . . . Technical quirks of wiki systems, indicative of the often anarchic programming communities that have developed them, need to be considered before choosing a system.").

<sup>18</sup> CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 66 (Hyperion, 2008) (describing wiki editors as "curators"); Tania Tudorache et al., *Supporting Collaborative Ontology Development in Protégé*, in *THE SEMANTIC WEB—ISWC 2008: 7TH INTERNATIONAL SEMANTIC WEB CONFERENCE 21* (Amit P. Sheth et al. eds., 2008).

<sup>19</sup> E.g., John Seigenthaler, *A False Wikipedia 'Biography'*, USA TODAY, Nov. 29, 2005, [http://www.usatoday.com/news/opinion/editorials/2005-11-29-wikipedia-edit\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2005-11-29-wikipedia-edit_x.htm) (last visited Mar. 9, 2010).

<sup>20</sup> See VINCE CASAREZ ET AL., *RESHAPING YOUR BUSINESS WITH WEB 2.0* 42 (2009).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> <http://www.Facebook.com>.

<sup>24</sup> <http://www.MySpace.com>.

<sup>25</sup> <http://www.YouTube.com>.

<sup>26</sup> Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. [hereinafter *Berne*]

growth of social media such as Facebook, MySpace and YouTube emphasize the identification of the individual in the Internet. The curatorial audience which has grown up around social media tends to be focused much more heavily on the individual's role in creating and aggregating content.

Equally important, wikis, blogs and social media have the potential to build social capital. "The central idea of social capital is that social networks are a valuable asset ... [enabling] people to cooperate with one another—and not just with people they know directly—for mutual advantage."<sup>27</sup> By expanding opportunity for interaction and fostering behavioral norms of trust among users, these communications tools can expand the reach of social networks for mutual advantage.<sup>28</sup>

The unanswered question is whether the expectations inherent in wiki participation actually build these social networks or whether other models of authorship are more effective. "[E]lectronic technology is playing a crucial role in promoting writing practices in which the identities of individual contributors to shared dynamic texts are deemphasized, and their useful contributions effectively merged."<sup>29</sup> While this accurately describes the wiki authorship experience it does not answer the question whether this form of authorship maximizes participation and engagement. As discussed below, the ability of an author to blog to one's own page seems to attract far more users than formats promoting an author's contribution to a collaborative wiki.

Of course this trend should not discourage the continued participation of those who do value the norms of the wiki. Nonetheless, to the extent that attribution has both a popular role in the present Internet ecology and remains important for the development of high-value publications, an alternative wiki model should be developed that encourages collaboration, but uses the metadata captured by wiki sites to identify the key contributors to those sites. By combining the best of wiki authorship with the normative expectations of traditional authorship, a new form of wiki may develop which contributes in new and important ways to the creation and dissemination of knowledge on the Internet.

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- (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

<sup>27</sup> JOHN FIELD, SOCIAL CAPITAL 14 (2d ed. 2008).

<sup>28</sup> *But see id.* at 105 ("There is no real evidence on the type of social capital that is being produced by networks of online networks.")

<sup>29</sup> Jaszi, *supra* note 11, at 319 (citing Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425, 426 (1984)).

## II. NORMATIVE WIKIS AND THE INVISIBLE AUTHOR

Wiki content should be recognized as a discrete discursive form with its own particular benefits. Two particular advantages of the wiki modality are that “(a) it eliminates the social biases associated with group deliberation, thus contributing to the diversity of opinions and to the collective intelligence of the group, and (b) it directs authors toward group goals, rather than individual benefits.”<sup>30</sup> Wikis maximize the power of collective action while minimizing the transaction costs.<sup>31</sup>

The most salient aspect of wikis flows from their collective authorship. That strength, however, may also be one of the wiki’s most significant limiting factors. The wiki culture does not provide that the individual contributions of the participants be identified.<sup>32</sup> While this is not a legal or software limitation, it remains a powerful normative value that defines most wiki culture.<sup>33</sup> The typical attribution of a wiki author is found, if at all, in the history of the user profile. For participants who register with a wiki, the changes they make to the site are logged under their user names or handles, while anonymous users are logged using the IP address from which they make their edits.<sup>34</sup> As such, an author may be able to follow his or her impact on the site, but architecture of the wiki does not value or promote the significance of the individual author.

At a minimum, the issue of wiki authorship has been described as contentious:

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<sup>30</sup> Ofer Arazy & Eleni Stroulia, *A Utility for Estimating the Relative Contributions of Wiki Authors*, PROC. THIRD INT’L ICWSM CONF. 171, 171 (2009), available at <http://www.aaai.org/ocs/index/php/ICWSM/09/paper/viewFile/157/483>.

<sup>31</sup> See Lamb, *supra* note 17, at 40 (“And as open systems, wikis can extend their reach far beyond departmental or organizational limits, expressing the interests of virtually any community.”).

<sup>32</sup> See Jeff Atwood, *Mixing Oil and Water: Authorship in a Wiki World*, CODING HORROR, <http://www.codinghorror.com/blog/2009/02/mixing-oil-and-water-authorship-in-a-wiki-world.html> (Feb. 2, 2009) (“When you visit Wikipedia’s entry on asphalt, you get some reasonably reliable information about asphalt. What you don’t get, however, is any indication of *who the author is*. That’s because the author is irrelevant.”).

<sup>33</sup> Although Wikipedia is used as a common example by this author and many of the authors cited, it serves merely as an illustration for the practices described herein. For example, wikiHow, <http://wiki.ehow.com>, provides no attribution for its posts, but has a separate post dedicated to authors. See <http://www.wikihow.com/wikiHow:Herald/Meet-The-Author> (last visited Mar. 9, 2010). Other examples of non-attributed wikis include Wikibooks, <http://en.wikibooks.org>; Wikinews, <http://www.wikinews.org>; Wikitravel, <http://wikitravel.org>. In contrast, WikiFAQ, <http://www.wikifaq.com>, uses a page statistics footer that captures the name of the person who originally created the page, the person last modifying a page and a list of all contributors. See, e.g., [http://www.wikifaq.com/American\\_Toad](http://www.wikifaq.com/American_Toad) (last visited Mar. 9, 2010).

<sup>34</sup> Fernanda B. Viégas et al., *Studying Cooperation and Conflict between Authors with History Flow Visualizations*, 6 CONF. HUM. FACTORS COMPUTING SYS. 575, 576 (2004), available at [http://alumni.media.mit.edu/~fviegas/papers/history\\_flow.pdf](http://alumni.media.mit.edu/~fviegas/papers/history_flow.pdf).

Explicit authorship of contributions on wiki pages is an issue of some contention among wiki users; whereas some feel that authorship is an important part of social collaboration in the sense that it adds context to interactions, others feel that authorship data is irrelevant and sometimes even detrimental to the creation of truly communal repositories of knowledge.<sup>35</sup>

In addition, the nature of these logs does not reflect any value assessments of editorial impact. On sites such as Wikipedia the logs are linked to the editorial contributions of the content, allowing a user to read the log in order to approximate an author's resiliency, but these are not the goals of the logs. As IBM research on cooperation and conflict between Wikipedia authors suggests, the task is daunting: "Making sense of the history for even a single entry . . . is not straightforward. The sheer number of versions can be daunting: as of August 2003, the entry for Microsoft had 198 versions comprising 6.2 MB of text . . ." <sup>36</sup>

The normative basis for wikis, known as "[w]ikiquette[.]" refers to the etiquette that Wikipedians follow,<sup>37</sup> and by extrapolation influences the broader wiki movement.<sup>38</sup> Authorship on Wikipedia, for example, is encouraged to a certain degree. "Sign and date your posts to talk pages (not articles!), unless you have some excellent reasons not to do so."<sup>39</sup> By encouraging a community of signed users, the active community develops an appreciation for those participants who are posting useful content. The attributions, however, are left out of the primary areas seen by the general public.

In all likelihood, on most wiki sites the primary reason for encouraging even a modest level of attribution is to provide information about the users posting to the site for purposes of site protection and management. Regular site watchers utilize the signature information as a flag signaling potential vandalism that may occur on a page.<sup>40</sup> "First-time contributors represent a potential threat of vandalism and

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<sup>35</sup> *Id.* at 580. See also KLOBAS, *supra* note 15, at 57 ("Because wikis have multiple authors and the authors are often unknown, it is rarely possible to credit authorship of a wiki.").

<sup>36</sup> Viégas et al., *supra* note 34, at 576.

<sup>37</sup> CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* 155 (2006).

<sup>38</sup> See, e.g., Wikipedia:Etiquette, [http://en.wikipedia.org/wiki/Wiki\\_etiquette](http://en.wikipedia.org/wiki/Wiki_etiquette) (last visited Mar. 9, 2010); Help:Wikiquette, <http://en.wikiversity.org/wiki/Help:Wikiquette> (last visited Mar. 9, 2010); WoWWiki:Wikiquette, <http://www.wowwiki.com/WoWWiki:Wikiquette> (last visited Mar. 9, 2010).

<sup>39</sup> Wikipedia:Etiquette, *supra* note 38. See also Viégas et al., *supra* note 34, at 576.

The Wikipedia community also sets up secondary pages that are devoted to the discussion of issues surrounding the topics on "real" pages; these are sometimes called "talk pages." They represent an attempt to separate what is "real" information from discussions about what should and should not be on the real page.

<sup>40</sup> See Viégas et al., *supra* note 34, at 580.

therefore their edits are closely scrutinized. On the other hand, there is also the possibility that a newcomer is someone who may be unfamiliar with Wikipedia standards. In either case the article merits a second look.”<sup>41</sup> As such, the limited attribution afforded the talk pages on wikis plays a significantly different role than authorship in traditional media.

Professor Rebecca Tushnet summarizes the expectation of attribution in traditional media: “Both authors and audiences generally accept that attribution is important to authors, and that false attribution, especially plagiarism, is a moral wrong.”<sup>42</sup> Professor Jane Ginsburg echoes the statement, recognizing that “few interests seem as fundamentally intuitive as that authorship credit should be given where credit is due.”<sup>43</sup> Both examples, however, presume a normative expectation for authors.<sup>44</sup> For wikis, no such expectation exists and therefore fundamental fairness does not automatically demand wiki attribution. Within the confines of the wiki community, therefore, the normative role of attribution remains relevant only as a part of the methodology for protecting the integrity of the content.

### III. ROLE OF THE CURATORIAL AUDIENCE

The wiki represents only one collaborative content regime amidst a wide range of user generated media. “User-generated content can be found on wikis, blogs, Twitter feeds, YouTube, Facebook, and pirate websites, as well as in virtual worlds, reactions to news stories, reactions to others’ reproductions of news stories, and ratings for products. . . .”<sup>45</sup> Wikis are often compared to professionally created content produced on a one-to-many business model, such as Encyclopedia Britannica, just as open source software is typically compared to software publishers such as

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<sup>41</sup> *Id.*

<sup>42</sup> Rebecca Tushnet, *Naming Rights: Attribution and Law*, UTAH L. REV. 789, 791 (2007).

<sup>43</sup> Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 264 (2004).

<sup>44</sup> *E.g.*, Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 75 (2007).

The patchwork approach to moral rights is similar to the right of personality approach in that it does not view moral rights rules as part of copyright law but dissimilar in the sense that it does not conceptualize these rules as flowing from a single principle or abstract right. Instead, the patchwork theory distributes the various moral rights rules across completely different legal doctrines, such as defamation, passing off, trademark law, the right of privacy, and the law of contracts.

*See also* Ryan M. Seidemann, *Authorship and Control: Ethical and Legal Issues of Student Research in Archaeology*, 14 ALB. L.J. SCI. & TECH. 451 (2004); Raul Jauregui, *Comment, Rembrandt Portraits: Economic Negligence in Art Attribution*, 44 UCLA L. REV. 1947 (1997) (discussing the role of attribution for works of visual arts).

<sup>45</sup> Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 924 (2009).

Microsoft.<sup>46</sup> These successful publishers and software companies compete with collaboratively authored content or open source software, respectively. The benefits to the public from open source, collaborative authorship include content which is robust, highly adaptive and free.<sup>47</sup>

In most media, however, content is generated in a range of forms, not merely the dichotomous choices of commercial publisher or open source community. Journalism today, for example, reflects a range of modalities which—at one extreme—only publish the edited content created by their full-time professional staff and—at the other extreme—utilize citizen journalism with unmediated content generated from unpaid, volunteer investigators and community authors.<sup>48</sup> Freelance journalists, stringers, wire copy, letters to the editor, reader comments, viewer photos, storm-watchers, twitter reports, live-from-the-scene unverified video, and similar news sources illustrate the many ways in which even so-called traditional journalism blends the content provided by full-time professionals with a wide range of other content creators.<sup>49</sup> The label “user generated content,” therefore, creates an artificial dichotomy of publisher/nonpublisher content or one-to-many versus many-to-many content consumption which does not exist in practice.<sup>50</sup> The authorship of distributed content reflects a continuum from the individual to the collective, from a sole scribe to a republic. If wikis represent the paradigmatic example of many-to-many collaborative authorship, the essence of individual, user generated authorship would likely be Internet weblogs<sup>51</sup> or blogs.<sup>52</sup>

[T]he development of blog software contributed to the rise of noninstitutional media. Blog software allows a person with little knowledge of HTML or other Web programming to post news items in a chronological format. Such software, which is as easy to use as word-processing programs, truly made it possible for anyone with a computer and a good Internet connection to publish his or her own content.<sup>53</sup>

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<sup>46</sup> E.g., Philip B. Evans & Thomas S. Wurster, *Strategy and the New Economics of Information*, 75 HARV. BUS. REV. 70, 71 (Sept.–Oct. 1997) (Encyclopedia Britannica to Microsoft Encarta).

<sup>47</sup> See Lamb, *supra* note 17, at 38.

<sup>48</sup> See Marcy Wheeler, *How Noninstitutionalized Media Change the Relationship Between the Public and Media Coverage of Trials*, 71 LAW & CONTEMP. PROBS. 135 (2008). See also *Citizen Journalism Publishing Standards*, HUFFINGTON POST, Apr. 14, 2009, [http://www.huffingtonpost.com/2009/04/07/citizen-journalism-publis\\_n\\_184075.html](http://www.huffingtonpost.com/2009/04/07/citizen-journalism-publis_n_184075.html).

<sup>49</sup> See, e.g., Andrew Lam, *Freelance Journalists Are on Their Own*, NEW AM. MEDIA, Aug. 10, 2009, [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=cea86b411664162bb31dfc63be470826](http://news.newamericamedia.org/news/view_article.html?article_id=cea86b411664162bb31dfc63be470826).

<sup>50</sup> See Wheeler, *supra* note 48, at 137–38.

<sup>51</sup> Rebecca Blood, *Weblogs: A History and Perspective*, [http://www.rebeccablood.net/essays/weblog\\_history.html](http://www.rebeccablood.net/essays/weblog_history.html) (Sept. 7, 2000).

<sup>52</sup> See Halbert, *supra* note 45, at 924–25.

<sup>53</sup> Wheeler, *supra* note 48, at 137–38.

Wikis and blogs share much in common, but are divided by their common language. Both emphasize user generated content and highlight the technology's elimination of barriers to entry for anyone who wishes to share his thoughts, ideas or research with the world. Both wikis and blogs provide free content to the public, but whereas wikis reflect collaborative writing, blogs typically emphasize the writer as well as the community.<sup>54</sup>

Blogs are often identified by the named (and often depicted) individual who provides the content on a regular basis.<sup>55</sup> Readers are typically encouraged to post responses to blogs, and guest writers are typically identified as such.<sup>56</sup> Some blogs aggregate authors who share duties, a format that comes closer to the wiki experience, but blogs still differ from wikis by maintaining an emphasis on the source or attribution of content.<sup>57</sup>

Still, wikis and blogs belong on a common continuum. Both are forms of user generated content that allow for some degree of public participation. Together, these two forms of user generated content coexist on the Internet, providing participants a range of communicative tools.

Wikis and blogs differ most dramatically in their ability to gain adherents. Wikipedia, unquestionably the most successful wiki, boasts a regular contributor base of 91,000 individuals.<sup>58</sup> This is a notable achievement and would be worthy of great accolades if not compared to other Internet activities. Blogging is vastly more common, with 20 million amateur bloggers and 452,000 professional (or at least compensated) bloggers.<sup>59</sup> These bloggers average 900,000 posts daily.<sup>60</sup> Even YouTube, the site for video hosting, has 200,000 contributing video publishers.<sup>61</sup>

The numerical supremacy of blogs, videos, and social media updates certainly suggests that there is something in the normative expectations for those regularly creating content on the Internet that wikis lack.<sup>62</sup> Given the modest technological know-how needed for wikis, the barrier to participation is unlikely to be training, and

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<sup>54</sup> See Wheeler, *supra* note 48, at 135–6 (“Since the advent of the Internet, however, additional media outlets—like blogs and wikis—have begun to change the relationship between media coverage of legal proceedings and the public.”).

<sup>55</sup> Nerino J. Petro, Jr., *Creating a Blog*, 26 GPSOLO, June 2009, at 34 (“Blogs (short for ‘web logs’) are considered by many to be the new personal diaries of the Internet age, except, unlike diaries of old, blogs are very public.”).

<sup>56</sup> *Id.*

<sup>57</sup> Wheeler, *supra* note 48, at 138 (providing “schema that defines institutional and noninstitutional press” that apply to “media outlets increasingly associated with the Internet—particularly blogs, though this holds true for wikis as well . . .”).

<sup>58</sup> Wikipedia: About, <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited Feb. 17, 2010).

<sup>59</sup> Mark Penn & E. Kinney Zalesne, *On the Web, Amateurs Rivaling Professionals*, WALL ST. J., Oct. 28, 2009 available at <http://online.wsj.com/article/SB125668986047512001.html>.

<sup>60</sup> The Future Buzz, <http://thefuturebuzz.com> (Jan. 12, 2009).

<sup>61</sup> *Id.*

<sup>62</sup> *E.g., id.* Facebook has 200,000,000 active users and 100,000,000 daily visitors.

given the similarity of wikis and blogs, the barrier cannot be access to the Internet or other technological concerns.

Moreover, there has been a fundamental shift in the nature of the audience for professionally created content. “Although not producing art themselves, citizens have developed the skills and expertise to be connoisseurs and mavens—seeking out new experiences, learning about them, and sharing that knowledge with friends.”<sup>63</sup> The modern content consumer, then, is as much a participant in the dissemination and characterization of the content as the original publisher. These individuals are active and engaged in the content they consume.

For this modern *audience*—an increasingly archaic characterization—sharing knowledge among friends is an important form of user-generated information. Like wikis and blogs, social media networks rely on the participation of the users to create timely, relevant content.<sup>64</sup> By 2007, the top three social media sites attracted over 153 million unique visitors.<sup>65</sup> This audience is a highly participatory community.

Social media sites differ from both wikis and blogs to the extent the authors are enabled to limit the public access to content on those sites.<sup>66</sup>

According to [MIT Professor Henry] Jenkins, participatory cultures take the form of “affiliations” (i.e., informal and formal memberships built around various forms of media, which include social networking sites, message boards and gaming communities), “expressions” (producing transformative forms of creative expression such as mash-ups and fan fiction), “collaborative problem-solving” (working in teams to complete tasks and contribute to a knowledge base using a wiki or other collaborative

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<sup>63</sup> Bill Ivey & Steven Tepper, *Cultural Renaissance or Cultural Divide?*, CHRON. OF HIGHER EDUC., May 19, 2006, at 85. See also Laura Grindstaff, *Cultural Sociology and Its Diversity*, 619 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 206 (2008).

<sup>64</sup> See Cindy Royal, User-Generated Content: How Social Networking Translates to Social Capital, Ass’n Educ. Journalism and Mass Comm. 2008 Annual Convention, [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/2/7/1/1/9/pages271193/p271193-1.php](http://www.allacademic.com/meta/p_mla_apa_research_citation/2/7/1/1/9/pages271193/p271193-1.php).

<sup>65</sup> *Id.* at 4.

<sup>66</sup> Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 1 (2007), available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>. Boyd & Ellison define social media as:

[W]eb-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system. The nature and nomenclature of these connections may vary from site to site.

environment), and “circulations” (changing the distribution and flow of media through tools like blogging and podcasting).<sup>67</sup>

The affiliations described by Professor Jenkins are the building blocks on which social capital can manifest in the online community. But not all online activities are considered co-equal by the participants. Broadly speaking, Internet users value the participation in the community as more important than the content of the contribution they are making to that community.<sup>68</sup> As a result, the participatory culture has a decidedly curatorial nature. A great deal of the content is not original material but postings, re-postings, commentary and conversation, making the participant a curator of the content with which he or she interacts.<sup>69</sup>

The curatorial audience has become an engaged participant in the creation and dissemination of content. In many ways, however, the traditional functions usurped by the curatorial audience have been the functions of the publisher and distributor more than the author. The relatively modest participation in the wikis and other forms of content creation is dwarfed by the massive participation in the social networks, video-sharing sites and other media that modulate how content is distributed.

Nevertheless, social media’s new content modalities reflect a paradigmatic shift:

The shift from a one-to-many entertainment and information infrastructure to a many-to-many infrastructure has deep consequences on many levels. It has made possible on a massive scale content such as fan fiction, mashups, music remixes, cloud computing, and collages; blogs have transformed access to, and arguably the nature of, information.<sup>70</sup>

But the nature of the traffic strongly suggests that while all new media transformation is possible, it is content distribution where the greatest transformation is taking place. The curatorial audience has wrested control out of the distributors’ hands. Wikis, blogs and video posts now share the same characteristics of television, music, journalism, and academic publishing. All content distribution models incorporate some level of the many-to-many modality. The curatorial audience is a participant in every aspect of content: creation, distribution and consumption.

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<sup>67</sup> Amanda Lenhart, et. al., *Teens and Social Media*, PEW INTERNET & AMERICAN LIFE PROJECT, 3 (2007) (citing Confessions of an Aca-Fan: The Official Weblog of Henry Jenkins, <http://www.henryjenkins.org/> (Oct. 26, 2006)).

<sup>68</sup> See Royal, *supra* note 64.

<sup>69</sup> See Ivey & Tepper, *supra* note 63, at B6.

<sup>70</sup> Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 842–43 (2009).

#### IV. THE ESSENTIALITY OF ATTRIBUTION

Given the wide disparity in modalities of online activity for the curatorial audience, there must be a social reason for the dramatically larger participation in blogs and social media sites than in wikis. There are, of course, significant differences between public platforms such as wikis and blogs when compared to the closed social networks such as Facebook and MySpace.<sup>71</sup> The role of private communications and shared experiences among those friended on a social network may be influenced by significantly different factors than those forces pulling users away from wikis and towards blogs. Generally speaking, wiki authors are collectively writing together for the general public—disseminating the authors' knowledge to a less knowledgeable public. Social network participants, in contrast, are exchanging their personal content with others in their shared community. A person on a trip may post photographs she has taken of interesting locations to a travel wiki while posting family photos to a social networking site. The travel photographs would be of interest to any visitor of that location, while the family photos are intended for only friends and family. For purposes of understanding the need to foster a new norm for wikis, the comparisons to the closed social networks are inapposite.<sup>72</sup> Blogs encompass attributes of both wikis and social networks, with authors using them for a very wide range of purposes.

Attribution is inherent in the personal nature of social networks but is the result of intentional design choice for wikis and blogs. Between wikis and blogs, the central difference remains the direct ability of the author to control the level of attribution and integrity of the work. Wikis, by their structure and wikiqette, sublimate the identity of the contributors to the history pages.<sup>73</sup> While members of the active wiki author community are likely to know the names or handles of the frequent contributors, the general public will not. The wiki authors are essentially anonymous. The much more popular blog format, in stark contrast, tends to emphasize the author and provide that author with much greater control over the content.

Because the Creative Commons provides a very popular standardized copyright licensing scheme for Internet publishers, its practices may be informative regarding

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<sup>71</sup> Facebook and MySpace have as their core purpose to allow individuals to share information in a very personal manner. Facebook Is on Facebook, <http://www.facebook.com/facebook?ref=pf#!/facebook?v=info&ref=pf> (last visited Mar. 9, 2010) (“Facebook's mission is to give people the power to share and make the world more open and connected. Millions of people use Facebook everyday to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet.”); Connect with MySpace, <http://www.myspace.com/getconnected> (last visited Mar. 9, 2010) (“Discover MySpace around the Web. Bring your photos, friends, activities and more with you”).

<sup>72</sup> Cf. Halbert, *supra* note 45; Jane C. Ginsburg, *Separating the Sony Sheep From the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577 (2008). While a further comparison between open and closed content communities is warranted, the normative implications of online social network behavior should be analyzed in a different article.

<sup>73</sup> See KLOBAS, *supra* note 15, at 57.

author and publisher expectations.<sup>74</sup> The Creative Commons itself recognized the dominant trends toward attribution when it revised the licensing scheme in 2004 to make attribution standard:

#### Attribution comes standard

Our web stats indicate that 97–98% of you choose Attribution, so we decided to drop Attribution as a choice from our license menu—it’s now standard. . . . Important to remember: Attribution can always be disavowed upon licensor request, and pseudonymous and anonymous authorship are always options for a licensor, as before.<sup>75</sup>

Popular choice—the normative expectation of the authorial public—is necessarily the first reason to provide attribution. Given the Creative Commons’ adoption of an attribution component to its standard licenses and the usage trends favoring user-generated content formats, it is reasonable to say that the Internet norm emphasizes attribution (or pseudonymous attribution, as will be discussed below) rather than the obscurity engendered in the wiki format.

The second reason to provide attribution stems from non-economic interests in inherent copyright. The combination of attribution and integrity are often referenced as moral rights.<sup>76</sup> “Moral rights are a bundle of rights given to the author of a work, even if another owns the copyright that confers control over the economic exploitation of the work.”<sup>77</sup> Although they are acknowledged to a limited degree under U.S. law for works of visual arts,<sup>78</sup> moral rights are not presently protected by copyright or trademark law for authors.<sup>79</sup>

Under U.S. copyright law, authors do not have legal protections for their rights of attribution and integrity separate from their economic rights, but they nonetheless receive such protections through contract,<sup>80</sup> code,<sup>81</sup> and normative behavior.<sup>82</sup> As

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<sup>74</sup> The Creative Commons was founded in 2002 to provide a set of standardized copyright licenses for free to the public. Fashioned after open source software licenses, Creative Commons licenses provide standardized contract language for authors seeking to license their works for public use. See Creative Commons About History, <http://creativecommons.org/about/history/> (last visited March 18, 2010).

<sup>75</sup> Posting of Glenn Otis Brown to Commons News, <http://creativecommons.org/weblog/entry/4216> (May 25, 2004).

<sup>76</sup> See Berne, *supra* note 26, at art. 6bis.

<sup>77</sup> Orit Fischman Afori, *Reconceptualizing Property in Designs*, 25 CARDOZO ARTS & ENT. L.J. 1105, 1151 (2008).

<sup>78</sup> *E.g.*, Visual Artists Rights Act, 17 U.S.C. §106A (1990).

<sup>79</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 36-37 (2003) (rejecting Lanham Act Section 43(a) as the basis for protecting the attribution or integrity of copyrightable works). *Cf.* Michael Landau, *Dastar v. Twentieth Century Fox: The Need for Stronger Protection of Attribution Rights in the United States*, 61 N.Y.U. ANN. SURV. AM. L. 273 (2005).

<sup>80</sup> *E.g.*, *Gilliam v. Am. Broad. Cos., Inc.*, 538 F.2d 14, 23-25 (2d Cir. 1976) (protecting the contractual rights to integrity). See Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in*

such, publishing and artists contracts universally include clauses granting the author the rights of attribution in his or her work.<sup>83</sup> “Attribution is foundational to the modern economy. . . . Credit is instrumentally beneficial in establishing a reputation and intrinsically valuable simply for the pleasure of being acknowledged. Indeed, credit is itself a form of human capital.”<sup>84</sup>

Contract law generally supplies the missing term of attribution.<sup>85</sup> The rights of attribution are central to the legal protections standard in publishing agreements<sup>86</sup> and talent agreements in media industries.<sup>87</sup> Moreover, until 2003, the unfair competition provision of the U.S. Federal Trademark Act<sup>88</sup> was presumed to provide protection for the falsification or omission of attribution for copyrighted works.<sup>89</sup> In *Dastar Corp. v. Twentieth Century Fox Film Corp.*,<sup>90</sup> the Supreme Court repudiated this use of trademark law as it related to copyrighted works.<sup>91</sup> Nonetheless, despite the broad

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*the United States and the United Kingdom: Challenges and Opportunities under the U.K.’s New Performances Regulations*, 24 B.U. INT’L L.J. 213, 252 n.306 (2006).

<sup>81</sup> See, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 138–41 (1999).

<sup>82</sup> Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1336 (2003).

<sup>83</sup> Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 50–51 (2006).

<sup>84</sup> *Id.* at 50.

<sup>85</sup> *Jacobsen v. Katzer*, 535 F.3d 1373, 1382 n. 5 (Fed. Cir. 2008) (“Copyright law does not automatically protect the rights of authors to credit for copyrighted materials.”); *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) (“American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.”). Even in the arena of open source licensing and Creative Commons Licenses, for example, attribution is included in the standard language, which along with limitations on downstream uses, distinguishes these agreements from dedications to the public domain.

<sup>86</sup> See, RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY 12–13 (1996) (noting that attribution of authors began in sixth century Athens before other norms of copyright were established and that “oral reporters of the Hebrew Talmud were required to identify the contributors of new principles . . . [a] citation in scholarship [that] involves a claim to the authority in spoken word or text”).

<sup>87</sup> See, e.g., Dramatist Guild, *Dramatists Bill of Rights* at §5, *available at* [http://www.dramatistsguild.com/about\\_rights.aspx](http://www.dramatistsguild.com/about_rights.aspx); Writers Guild of America, *Credits Survival Guide*, *available at* [http://www.wga.org/content/subpage\\_writersresources.aspx?id=153](http://www.wga.org/content/subpage_writersresources.aspx?id=153).

<sup>88</sup> 15 U.S.C. § 1125(a) (2009).

<sup>89</sup> *Shaw v. Lindheim*, 919 F.2d 1353, 1364 (9th Cir. 1990) (“Although this court has twice specifically reserved the question whether ‘reverse passing off’ claims may be recognized in situations where works are substantially similar, [the earlier cases] have implicitly limited the ‘reverse passing off’ doctrine to situations of bodily appropriation.”). *Cf.* *Lamothe v. Atlantic Recording Corp.*, 847 F.2d 1403 (9th Cir. 1988) (misattribution of musical compositions); *Smith v. Montoro*, 648 F.2d 602, 607 (9th Cir. 1981) (misattribution of acting credits).

<sup>90</sup> 539 U.S. 23 (2003).

<sup>91</sup> *Id.* at 34. (“That express right of attribution is carefully limited and focused: It attaches only to specified ‘works of visual art,’ . . . . Recognizing in § 43(a) a cause of action for

dismissal of Section 43(a) as the gap-filler for copyright law, “[t]he Court in *Dastar* left open the possibility that some false authorship claims could be vindicated under the auspices of § 43(a)(1)(B)’s prohibition on false advertising.”<sup>92</sup> As such, trademark law continues to provide some ongoing protection of attribution rights for advertising and promotional uses as well as through contractual obligations.<sup>93</sup>

There is a third reason for authorial attribution: the brand expectations of the reader. The name of the author serves as a brand,<sup>94</sup> indicating the source of the content and providing the reader some measure of knowledge regarding the quality or expectation of the content for readers who have experience or knowledge of that brand.<sup>95</sup>

[R]eaders bring at least two distinct but related types of prior inferential knowledge to their construction of an implied author: the assumptions about reliability, credibility, and wisdom that a given culture confers on authorship, and some rudimentary sense of a particular authorial biography, even if “biography” is as limited as a suggestion of the author’s sex or nationality.<sup>96</sup>

This quasi-brand role for attribution combines with the other indicia for the context of written materials. “While authors’ names are not trademarks per se and not all consumers value authorial indicia in all instances, author names can act very much like trademarks by providing useful information to consumers selecting among competing products.”<sup>97</sup> For creative works, it may convey style, tone or subject matter.<sup>98</sup> For authoritative or research tomes (whether physical or virtual), the author’s academic standing and institutional affiliations further identify the work, serving as paratext to validate or undermine the work.

Wikis substitute the publisher and its community as the implied author. The paratext, or grounding contextual materials, that contextualize a wiki are provided by the wiki community rules and the statements of goals and purposes provided by the

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misrepresentation of authorship of noncopyrighted works (visual or otherwise) would render these limitations superfluous.” (*Internal citations omitted*).

<sup>92</sup> *Zyla v. Wadsworth Div. of Thomson Corp.*, 360 F.3d 243, 252 n.8 (1st Cir. 2004) (citing *Dastar Corp.*, 539 U.S. at 38).

<sup>93</sup> 15 U.S.C. § 1125(a)(1)(B) (2006).

<sup>94</sup> See Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U.L. REV. 1171, 1173–75 (2005) [hereinafter Lastowka, *Trademark*].

<sup>95</sup> *Id.* at 1179 (“Authorial attribution furthers the interests of consumers by reducing the costs of searching for creative content . . . it signals a certain predictable quality and type of associated work.”).

<sup>96</sup> Susan S. Lanser, *The Authors’ Queer Clothes: Anonymity, Sex(uality), and The Travels and Adventures of Mademoiselle de Richelieu*, in *THE FACES OF ANONYMITY: ANONYMOUS AND PSEUDONYMOUS PUBLICATION FROM THE SIXTEENTH TO THE TWENTIETH CENTURY* (Robert J. Griffin Ed.) 81, 84 (2003) (describing how readers make assumptions about the nature of authors, credibility and authority through paratext).

<sup>97</sup> See Lastowka, *Trademark*, *supra* note 94, at 1180.

<sup>98</sup> *Id.*

publisher.<sup>99</sup> As a result, the normative expectations of the author may provide the most compelling reason for having no wiki attribution requirement. Since the participants are not seeking to promote themselves through attribution, there is no contractual or quasi-contractual breach when the authorship goes unnoted or acknowledged only on talk pages.<sup>100</sup>

Just as the publishing contracts reflect the expectation of the parties, so too should the terms of use provisions and wikiquote determine the expectations of the wiki community. To the extent, therefore, this article suggests that some wikis should have attribution integrated into their norms and codes, it does not suggest that these changes should be imposed on other authorial communities. The Internet can support multiple community norms and each norm should be respected.

## V. PSEUDONYMOUS ATTRIBUTION AND INTEGRITY OF THE PRIVACY FILTERS

Regardless of the nature of the published work, control over attribution plays a number of roles. Pseudonymity, in particular, is appropriate for collaboratively authored works because it allows joint authors<sup>101</sup> and collective authors to represent their work under a single name.<sup>102</sup> Collective authors may choose to use a single name as a form of anonymity, to integrate otherwise divergent prose and thoughts, or simply out of convenience.<sup>103</sup>

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<sup>99</sup> Cf. Lanser, *supra* note 96, at 84–88.

<sup>100</sup> Wikipedia:Etiquette, *supra* note 38.

<sup>101</sup> See, e.g., John Bainbridge, *Ellery Queen Crime Made Him Famous and His Authors Rich*, LIFE, Nov. 22, 1943 at 70 (discussing the careers of “Frederick Dannay and Manfred B. Lee, the prolific detective-story writers who operate under the pseudonym of Ellery Queen”); Motley Fool, About the Motley Fool, <http://www.fool.com/press/about.htm?source=ifltnvsnv0000001> (last visited Mar. 9, 2010) (discussing the website created and originally written in the name Motley Fool by brothers David and Tom Gardner).

<sup>102</sup> Perhaps the most important such body of works is The Federalist Papers. See, e.g., Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U.L. REV. 801, 811 (2007) (“Hamilton, Madison, and Jay did not sign their names to the Federalist Papers. Instead, they wrote all of them under the pseudonym ‘PUBLIUS.’ They chose the name Publius because it was the first name of Publius Valerius Publicola, an important supporter of the Roman Republic.”).

<sup>103</sup> *Id.*

Why the authors thought that signing their own names would have less political advantage than using a pseudonym remains unclear. Perhaps Hamilton and Madison felt that praising a Constitution that they had helped to write would appear immodest. Maybe they wanted to make arguments that they later could distance themselves from. They might have wanted to avoid accusations that they were violating the confidentiality of the Constitutional Convention. Or they could have decided that their group should use just one name to cover the work of all three authors. But whatever their reason, their use of a pseudonym probably did not stand out

In the dynamic and often confrontational environment of online discourse, control of attribution allows the author to create an online *nom de plume* or pseudonymous identity.<sup>104</sup> Pseudonymity differs fundamentally from anonymity because the pseudonym continues to have the fundamental branding function for the author and reader.<sup>105</sup> The reader generally accepts that all the works from the pseudonymously named author come from a single voice or a tight-knit collaboration.<sup>106</sup> In contrast, an anonymous writing cannot be referenced or identified, except by its publisher, if any.

The choice to create a pseudonym serves as another communicative act of authorship.<sup>107</sup> In some cases, it is used to highlight brand expectations for the public by the author.<sup>108</sup> An author of suspense novels chooses to write mysteries or science fiction under a different name so as to protect the followers of the suspense novels from frustration in inadvertent purchases of books in other genres.<sup>109</sup> Similarly, an author may wish to separate out her academic works from her fictional works, so that the non-academic materials do not detract from the scholarly reputation.

Pseudonymous authorship also allows authors to develop non-mainstream themes and ideas with a lower risk of economic reprisals or social attacks.<sup>110</sup> It serves

as unusual; political writers of the time commonly used pseudonyms in essays published in newspapers.

<sup>104</sup> Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1380 (2005) (“choice of an author’s name for each created work is a branding choice.”).

<sup>105</sup> *Id.* at 1396–98.

<sup>106</sup> *Id.* at 1406–10. Professor Heymann contrasts “one-to-many authornym” in which the author may choose multiple personas with “many-to-one authornyms” in which a group of individuals may write under one name and with one-to-one authornyms which operate as traditional pseudonyms.

<sup>107</sup> MICHEL FOUCAULT, *What is an Author?*, in THE FOUCAULT READER 101, 107 (Paul Rainbow ed., 1984) (“[A]n author’s name is not simply an element in a discourse (capable of being either subject or object . . .) it performs a certain role with regard to narrative discourse, assuring a classificatory function.”).

<sup>108</sup> See, e.g., Lastowka, *Trademark*, *supra* note 94, at 1193–94 (“Just as trademarks familiarize us with words and logos, the packaging and advertising of movies, music, and even learned legal treatises familiarize us with certain words that are the personal names of the authors and artists who created these works.”); Jane C. Ginsburg, *The Author’s Name as a Trademark: A Perverse Perspective on the Moral Right of “Paternalism”?*, 23 CARDOZO ARTS & ENT. L.J. 379, 380 (2005) (exploring how trademark and copyright law might be used to protect rights of attribution); Heymann, *supra* note 104, at 1398–99.

<sup>109</sup> Heymann, *supra* note 104, at 1380.

<sup>110</sup> Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U.J. GENDER SOC. POL’Y & L. 273, 300–303 (2007).

Copyright law operates under the assumption that commercial, profit-seeking uses are the core of creative production, the standard by which the value and effectiveness of copyright law is judged. In fact, noncommercial

to help the author separate the public persona from the private person and protect some sphere of personal space.<sup>111</sup> While this has long been the case,<sup>112</sup> the dark side of social media is the rapidity and cruelty with which commentary can turn to personal attack, particularly against women.<sup>113</sup> As Professor Bartow notes, “[e]fforts to decrease the sexist aspects of online fora have been largely ineffective, and in some instances seemingly counterproductive, in the sense that they have provoked even greater amounts of abuse and harassment with a gendered aspect.”<sup>114</sup> Participants in blogs and social media have limited choices. Maintaining separation between one’s Internet persona and one’s personal life is at least a partial solution.

Concepts of attribution and integrity inform another tool authors may use to control their environments—the potential to limit accessibility in social media sites with privacy filters and distribution controls.<sup>115</sup> Through privacy filters and other controls, the author generating content has the ability to manage the extent to which the content is kept private or made public. A Pew Internet study reflects the significant gender-based trends for such activities.

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production is *also* everywhere, though legal academics are just beginning to theorize its pervasiveness and its relations to commercial production.

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Along with regulating market relations, sex and gender factor into controlling protest, resistance, and disobedience in intellectual property. Fan fiction writers, who are mostly women, are less likely to go public and more likely to accept the idea that they should stay under the radar. When female fans write sexually explicit stories, publicly acknowledging their authorship (and thus, implicitly, their own sexual desires and fantasies) would be embarrassing and, for those with conservative families or communities, potentially devastating. Therefore, they cannot generally afford to risk exposure. They use pseudonyms and restrict access to their web sites so as not to attract too much attention, self-limiting the liberatory possibilities of their work.

(citations omitted).

<sup>111</sup> See Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications*, 1995 J. ONLINE L. ART. 2, par. 2 (1995) available at [http://web.wm.edu/law/publications/jol/95\\_96/lemley.html](http://web.wm.edu/law/publications/jol/95_96/lemley.html) (discussing the fictional use of pseudonymity to affect public perception by characters in Orson Scott Card’s science fiction novel *Ender’s Game*).

<sup>112</sup> Cf. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (“numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”).

<sup>113</sup> See Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 383, 389 (2009) (“Neither civil nor criminal laws offer effective tools to prevent, address, or punish online speech, which is viewed by many as being vested with very broad First Amendment protections.”).

<sup>114</sup> *Id.* at 391.

<sup>115</sup> See Avner Levin & Patricia Sánchez Abril, *Two Notions of Privacy Online*, 11 VAND. J. ENT. & TECH. L. 1001, 1005–06 (2009).

Content creators are more likely to be girls and more likely to be older teens. Fifty-five percent of creators are girls and 45% of creators are boys. Furthermore, 45% of creators are aged 12 to 14 and 55% of creators are aged 15 to 17.

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Older online girls ages 15–17 are more likely to have used social networking sites and have an online profile; 70% of older girls have used an online social network compared with 54% of older boys, and 70% of older girls have created an online profile, while only 57% [of] boys have done so. For nearly half of social networking teens, visiting these sites is at least a daily occurrence.<sup>116</sup>

Another online study reached the conclusion that “online socializers have a penchant for disclosure. However, they are aware of the risks involved in online socialization and cherish the ability to shield their multiple social personae and communicate with only intended audiences.”<sup>117</sup>

Using pseudonymous works, contributors to an online community are more likely to be sure that the other members of a community know each other through their online names, but do not necessarily know each other outside that community. Some members of a community may choose actual names while others utilize *noms de plume*—the choice is personal to the author and often immaterial to the community;<sup>118</sup> the critical aspect of the social community is the ability of its members to identify one another. The use of multiple online communities and the ability to keep ones’ participation in various communities separate through pseudonymous authorship will likely continue to be an important tool to protect privacy online, reflecting an inherent need for attributive online authorship.

As the Internet community grows, the spheres of public and private communities continue to merge and sway. As such, content creators will move between entirely closed communities and wholly public communities as such venues support their activities. The more successful modalities for community building must therefore be those environments that provide authorship attribution. While wiki etiquette may abhor direct attribution, the growth and robustness of the Internet will be in those modalities which embrace it.

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<sup>116</sup> Lenhart et al., *supra* note 67, at 4–5.

<sup>117</sup> Levin & Sánchez Abril, *supra* note 115, at 1045.

<sup>118</sup> The assertion of immateriality does change, however, if a pseudonym is selected in order to deceive the community in a tortious or criminal manner. *Cf. Lori Drew’s Guilty Verdict is Officially Overturned by Judge*, ST. LOUIS POST-DISPATCH, Aug. 31, 2009, at A2 (Drew used false profile to encourage suicide and jury found her guilty of misdemeanor, but court overturned jury decision); Shane Anthony, *Woman Accused of Cyber Bullying St. Peters Suspect is Charged with Felony Under New State Law.*, ST. LOUIS POST-DISPATCH, Aug. 18, 2009, at A1 (discussing the attempt to criminally prosecute a women who created a false craigslist post to harass and bully ex-husband’s girlfriend’s daughter).

For collaborative authorship projects to continue serving a central role in Internet discourse, the organizers of these projects must recognize the participatory nature of the curatorial audience and its expectation of attribution, integrity and control over the scope of its contributions. In other cases, the multiple authors may find value in joining together behind a common pseudonym. The patterns of Internet usage, importance of author as brand and the need for many authors to create multiple online personas all drive a demand for a new form of wiki that embraces, rather than eschews, attribution for its participants, both accurate and pseudonymous.

## VI. THE LEGAL REGIME FOR ENFORCEMENT OF THE WIKI'S NORMATIVE EXPECTATIONS

To enforce the presumptions of the wiki's behavioral and software codes, copyright and contractual rights must protect the rights of the attributive joint author to enforce the author's terms and conditions. Broadly speaking, this is accomplished through the use of the GNU General Public License ("GNU GPL")<sup>119</sup> or a Creative Commons license.<sup>120</sup> The GNU GPL was designed to provide a standardized copyright license for creators of free and open source software, or "FOSS," by which the author of the software granted permission for the reproduction, display and adaptation of the software on condition that the licensee grant identical, reciprocal rights for all of the licensee's works that incorporated any of the software of the licensor.<sup>121</sup> Under the GNU GPL, attribution is a permissive additional provision.<sup>122</sup> Other open source licenses make attribution mandatory.<sup>123</sup>

For works like software or visual art, the GNU GPL provides a concrete conditional license regime. The first party creates an original work of authorship, such as a new computer program or motion picture. The material is posted to a

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<sup>119</sup> Free Software Found., Inc., GNU General Public License, version 2 (1991), <http://www.gnu.org/licenses/old-licenses/gpl-2.0.html> [hereinafter GPL]. See Greg Vetter, *Claiming Copyleft in Open Source Software: What if the Free Software Foundation's General Public License (GPL) had been Patented?*, 2008 MICH. ST. L. REV. 279, 280–81 (2008).

<sup>120</sup> Creative Commons Corp., <http://creativecommons.org/> (last visited Mar. 9 2010). See Jeremy Phillips, *Authorship, Ownership, Wikiship: Copyright in the 21<sup>st</sup> Century*, in RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 193, 211 (Estelle Derclaye ed., 2009).

<sup>121</sup> Vetter, *supra* note 119, at 281–82. See also Jonathan Zittrain, *Normative Principles for Evaluating Free and Proprietary Software*, 71 U. CHI. L. REV. 265, 268–69 (2004).

<sup>122</sup> GPL, *supra* note 119, at 7.

<sup>123</sup> Zittrain, *supra* note 121, at 269.

GPL has been joined by a flotilla of other similar licenses by other authors, all with their own variations. Beyond the universal trait of allowing others to build upon the base code and release the result, some, such as the license for a variant of Unix called BSD, allow others to build upon the underlying software without passing on the accompanying "copyleft" restrictions. The BSD license materially differs from a wholly public domain release only in that it requires a particular kind of credit or attribution for the original author on whose work the new program is based.

website subject to the terms and conditions of the GNU GPL license (which is at least prominently noted on the site, though not necessarily acknowledged through a clickwrap agreement). The second party copies the work and modifies it to create a second, derivative work. The derivative work is posted to the second party's website with the GNU GPL license. The terms of the first license have been met and a third author is bound by the terms of the GNU GPL license with both preceding licensors. If the third author were to sell the software commercially (in violation of the GNU GPL license) she would be potentially liable to both the first and second licensors.

The GNU GPL license has been consistently upheld as enforceable.<sup>124</sup> In *Jacobsen v. Katzer*, the plaintiff managed a software collective called Java Model Railroad Interface ("JMRI") that created model railroad software and computer chips, which were uploaded to the open source software site, SourceForge.<sup>125</sup> The software was subject to the GNU GPL.<sup>126</sup> Initially, the Federal Circuit reviewed the license to determine if there was sufficient consideration to validate its terms. Specifically, the Court focused on the economic relevance of the open source transaction:

Traditionally, copyright owners sold their copyrighted material in exchange for money. The lack of money changing hands in open source licensing should not be presumed to mean that there is no economic consideration, however. There are substantial benefits, including economic benefits, to the creation and distribution of copyrighted works under public licenses that range far beyond traditional license royalties.<sup>127</sup>

As part of this analysis, the Court relied on the Eleventh Circuit in holding that recognition of a programmer's reputation could provide the necessary economic

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<sup>124</sup> See *Wallace v. IBM, Corp.*, 467 F.3d 1104 (7th Cir. 2006); *Computer Associates. Int'l v. Quest Software, Inc.*, 333 F. Supp. 2d 688 (N.D. Ill. 2004). Other courts have upheld alternate open source Artistic Licenses. See *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008). Other courts have assumed the validity of open source licenses without directly litigating the issue. See *Wallace v. Free Software Found., Inc.*, 2006 U.S. Dist. LEXIS 53003, at \*7 (S.D. Ind. Mar. 20, 2006) (discussing antitrust implications of enforcing the GPL license).

<sup>125</sup> *Jacobsen v. Katzer*, 535 F.3d at 1376.

<sup>126</sup> *Id.* The Court also identified the central purpose of the license requirements:

By requiring that users copy and restate the license and attribution information, a copyright holder can ensure that recipients of the redistributed computer code know the identity of the owner as well as the scope of the license granted by the original owner. The Artistic License in this case also requires that changes to the computer code be tracked so that downstream users know what part of the computer code is the original code created by the copyright holder and what part has been newly added or altered by another collaborator.

*Id.* at 1379.

<sup>127</sup> *Id.*

benefit to support the transaction.<sup>128</sup> The Federal Circuit thus enforced the terms of the open source license, finding that “a user who downloads the JMRI copyrighted materials is authorized to make modifications and to distribute the materials ‘provided that’ the user follows the restrictive terms of the Artistic License” and failure to follow those restrictive terms results in a termination of the contract and a violation of copyright for continued distribution following such termination.<sup>129</sup>

Though less focused on the copyright aspects of the GNU GPL, Judge Easterbook, writing for the Seventh Circuit in *Wallace v. IBM*, provided a fairly robust explanation and acknowledgement of the open source license:

Authors who distribute their works under this license, devised by the Free Software Foundation, Inc., authorize not only copying but also the creation of derivative works—and the license prohibits charging for the derivative work. People may make and distribute derivative works if and only if they come under the same license terms as the original work. Thus the GPL propagates from user to user and revision to revision: neither the original author, nor any creator of a revised or improved version, may charge for the software or allow any successor to charge. Copyright law, usually the basis of limiting reproduction in order to collect a fee, ensures that open-source software remains free: any attempt to sell a derivative work will violate the copyright laws, even if the improver has not accepted the GPL. The Free Software Foundation calls the result “copyleft.”<sup>130</sup>

The review of the GNU GPL license reinforces the expectation that the open source and Creative Commons licenses contain all the attributes of enforceable contracts. The rights to use the content licensed under the terms is expressly conditioned on the licensee complying with the license, and as such, any breach of the licensing terms results in a copyright violation, not merely a breach of contract action.

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<sup>128</sup> *Id.* (“Program creator ‘derived value from the distribution [under a public license] because he was able to improve his Software based on suggestions sent by end-users. . . . It is logical that as the Software improved, more end-users used his Software, thereby increasing [the programmer’s] recognition in his profession and the likelihood that the Software would be improved even further.” (quoting *Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1200 (11th Cir. 2001))).

<sup>129</sup> *Id.* at 1382. Given the logic of the decision, the Eleventh Circuit’s apparent dismissal of conditioning a reproduction license on attribution appears misplaced. Attribution rights can have direct economic consequences, certainly more than the affixation of the copyright notice which the Court notes with approval. *Cf. Veith v. MCA Inc.*, 1997 Cal. App. Unpub. LEXIS 1, at \*65–77 (Cal. App. 2d 1997).

<sup>130</sup> *Wallace v. IBM*, 467 F.3d at 1105. Although the focus of the controversy centered on the potential antitrust implications of licensing software for the fixed price of zero, Judge Easterbook’s statement provided broad recognition of open source license validity. Had the open source license not been enforceable, no agreement could have been found upon which an antitrust analysis could be formulated.

In this way the open source and Creative Commons licenses provide the necessary legal protections for meaningful enforcement of the rights provided by the participants in each authoring community.

The license used by Wikipedia illustrates both the benefits and limitations of the open source licensing approach. Wikipedia has adopted the Creative Commons Attribution-Share-Alike 3.0 Unported License, which includes obligations of attribution along with copyright notices.<sup>131</sup> The Creative Commons licenses require attribution for both the author and for any designated parties, such as “a sponsor institute, publishing entity, [or] journal.”<sup>132</sup> So while the GNU GPL has a permissive

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<sup>131</sup> Wikipedia:Text of Creative Commons Attribution-ShareAlike 3.0 Unported License, [http://en.wikipedia.org/wiki/Wikipedia:Text\\_of\\_Creative\\_Commons\\_Attribution-ShareAlike\\_3.0\\_Unported\\_License](http://en.wikipedia.org/wiki/Wikipedia:Text_of_Creative_Commons_Attribution-ShareAlike_3.0_Unported_License) § 4(c) (last visited Mar. 9, 2010).

If You Distribute, or Publicly Perform the Work or any Adaptations or Collections, You must, unless a request has been made pursuant to Section 4(a), keep intact all copyright notices for the Work and provide, reasonable to the medium or means You are utilizing: (i) the name of the Original Author (or pseudonym, if applicable) if supplied, and/or if the Original Author and/or Licensor designate another party or parties (e.g., a sponsor institute, publishing entity, journal) for attribution (“Attribution Parties”) in Licensor’s copyright notice, terms of service or by other reasonable means, the name of such party or parties; (ii) the title of the Work if supplied; (iii) to the extent reasonably practicable, the URI, if any, that Licensor specifies to be associated with the Work, unless such URI does not refer to the copyright notice or licensing information for the Work; and (iv) , consistent with section 3(b), in the case of an Adaptation, a credit identifying the use of the Work in the Adaptation (e.g., “French translation of the Work by Original Author,” or “Screenplay based on original Work by Original Author”). The credit required by this Section 4(c) may be implemented in any reasonable manner; provided, however, that in the case of a Adaptation or Collection, at a minimum such credit will appear, if a credit for all contributing authors of the Adaptation or Collection appears, then as part of these credits and in a manner at least as prominent as the credits for the other contributing authors. For the avoidance of doubt, You may only use the credit required by this Section for the purpose of attribution in the manner set out above and, by exercising Your rights under this License, You may not implicitly or explicitly assert or imply any connection with, sponsorship or endorsement by the Original Author, Licensor and/or Attribution Parties, as appropriate, of You or Your use of the Work, without the separate, express prior written permission of the Original Author, Licensor and/or Attribution Parties.

<sup>132</sup> *Id.* The licensing scheme also requires compliance with the GNU license. “For compatibility reasons, you are also required to license it under the GNU Free Documentation License (unversioned, with no invariant sections, front-cover texts, or back-cover texts). Re-users can choose the license(s) they wish to comply with.” Wikimedia Found., Terms of Use,

authorship requirement for software, the Creative Commons license adopted by Wikipedia has a mandatory provision.

For wikis, however, this creates a problem of identifying what is meant by authorship and a fixed work.<sup>133</sup> A single wiki entry may have dozens of authors and multiple versions, making the identity of the authors—if not the infringed work—difficult to ascertain. As has been criticized elsewhere, “[t]he licensing of works under the Creative Commons scheme is not yet wiki-friendly, in so far as it presupposes the existence of single, static works which can be identified as having their authorship and content which is to all intents and purposes immutable.”<sup>134</sup> Presumptively, the structure of Wikipedia is such that the individuals posting to the site are the authors of the pages. The terms of use reflect this presumption:

To grow the commons of free knowledge and free culture, all users contributing to Wikimedia projects are required to grant broad permissions to the general public to re-distribute and re-use their contributions freely, as long as the use is attributed and the same freedom to re-use and re-distribute applies to any derivative works. Therefore, for any text you hold the copyright to, by submitting it, you agree to license it under the Creative Commons Attribution/Share-Alike License 3.0 (Unported). . . . Please note that these licenses *do* allow commercial uses of your contributions, as long as such uses are compliant with the terms.<sup>135</sup>

As with the GNU GPL, the rights of attribution and re-use/re-distribution are the primary limitations of the Wikipedia license. Copyright law, however, requires that a plaintiff be the holder of an exclusive right to sue under the statute.<sup>136</sup> A collaboratively authored work becomes a *joint work*<sup>137</sup> requiring that all joint authors be joined as plaintiffs or that they have assigned their rights to a single, exclusive rights holder. If a work—even one as small as a single encyclopedia entry—is authored by multiple individuals who retain copyright, then they would all need to be made parties to any enforcement action, effectively undermining the practicality of most litigation.

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[http://wikimediafoundation.org/wiki/Terms\\_of\\_Use](http://wikimediafoundation.org/wiki/Terms_of_Use) (last visited Mar. 9, 2010) [hereinafter Terms of Use].

<sup>133</sup> See 17 U.S.C. § 102 (a) (2010) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . .”).

<sup>134</sup> Phillips, *supra* note 120, at 211. See also Lynn M. Forsythe & Deborah J. Kemp, *Creative Commons: For the Common Good?*, 30 U. LA VERNE L. REV. 346, 364–67 (2009).

<sup>135</sup> Terms of Use, *supra* note 132.

<sup>136</sup> 17 U.S.C. § 501(b) (2010) (“The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.”).

<sup>137</sup> 17 U.S.C. § 101 (2010) (“A ‘joint work’ is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”).

To comply with the express terms of the Wikipedia Creative Commons license, a party copying a Wikipedia page must also reproduce the attribution information in order to identify the authors of that page. But this information is not on the Wikipedia page. Instead, on the citation link, many pages simply list “Wikipedia contributors” as author.<sup>138</sup> A table of individual names, online handles and IP addresses is available only as one of the tables in the revision “history statistics.”<sup>139</sup> The specific terms of the license do not actually identify Wikipedia, nor do they make clear the role of the original author in her capacity as licensor of the content to other editors in the Wikipedia community.<sup>140</sup> Enforcement of the Wikipedia copyright can only be enforced by the copyright holders of the work infringed.<sup>141</sup> Even assuming the work in question is an entry rather than the entire wiki, the precedent remains unclear which contributors would be required to bring an infringement action.<sup>142</sup>

Perhaps a better solution would be the modification of the license to allow the elimination of authorship attribution in favor of publisher attribution or collective attribution. In other words, the preferred wiki license should require that contributors agree that their contributions be published with the publisher identified as the “author” for purposes of republication, with the proviso that “Wiki Contributors” be identified as the author if the latter solution is more consonant with the ethos of the site’s collaborative editorial practice. Either term is better than incorporation of a contract provision that serves only to frustrate those re-publishers who might try to comply with its terms.

The use of the publisher-as-author license would also improve the ability to police the work. The plethora of potential exclusive rights holders under the Wikipedia Creative Commons license makes it impractical to register a work, a precondition of filing an enforcement action in federal court.<sup>143</sup> If instead, all

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<sup>138</sup> See, e.g., Wikipedia, Legal education, [http://en.wikipedia.org/w/index.php?title=Special:Cite&page=Legal\\_education&id=339434493](http://en.wikipedia.org/w/index.php?title=Special:Cite&page=Legal_education&id=339434493) (last visited Mar. 10, 2010).

<sup>139</sup> E.g., <http://vs.aka-online.de/cgi-bin/wppagehiststat.pl?lang=en.wikipedia&page=Legal+education> (revision history statistics page for “Legal Education” from prior example) (last visited Mar. 10, 2010).

<sup>140</sup> Terms of Use, *supra* note 132.

<sup>141</sup> 17 U.S.C. § 501(b) (2010).

<sup>142</sup> See NIMMER, 3–12 NIMMER ON COPYRIGHT § 12.03 (2010).

A number of cases have held that co-owners of a joint work were indispensable parties in an infringement action brought by one such co-owner. Probably, the better view is expressed in *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, [140 F.2d 268 (2d Cir. 1944)] in which it was held that, pursuant to Rule 17(a) of the Federal Rules of Civil Procedure, one co-owner may be regarded as “the real party in interest,” with respect to his particular share of damages or profits accruing from an infringement of a jointly owned work, and accordingly, may sue without joining the other co-owners.

(Internal footnotes omitted).

<sup>143</sup> 17 U.S.C. § 411(a) (2010).

contributors granted the wiki publisher the exclusive rights to the work, and the publisher, in turn, granted non-exclusive re-use rights to the world, then the license could be enforced if necessary. As with other copyright licenses, compliance with the material terms is a precondition for exploitation of any of the exclusive rights protected by copyright. In the event one of these terms is violated, the license terminates and the infringer may be liable for copyright infringement. The ability to enforce the license terms may be highly significant to academic and research wikis designed to collect and disseminate a sophisticated body of knowledge, and as such, an enforceable licensing regime should be adopted.

The same result would be true for others who value aspects of control regarding the downstream use of their work. In the case of open source or crowd source news gathering, for example, the journalists participating in the process may welcome the republication of their efforts on websites across the Internet. Nonetheless, if certain re-publishers were editing the posts in a manner which made the content inaccurate (or worse, libelous to third parties), then the journalists would have a strong interest in enforcing their license to bar derivative works that distorted the content. Provisions in the open source license would need to make explicit that the right to alter the content was conditioned on the creator of the derivative work not making alterations that would materially change the meaning.<sup>144</sup>

If the participants in the wiki have no interest in enforcement of the copyright license, then a much simpler solution would be to have all authors dedicate their contributions to the public domain. While this would allow anyone to use the material—and even to incorporate some of the content into proprietary, copyright-protected works—it would nonetheless serve to maximize the ability of others to fully exploit the materials posted to the wiki. Dedicating a work to the public domain provides the greatest possible opportunity for that content to be disseminated.<sup>145</sup> An open source license that is impractical to enforce may dilute its benefits. Put simply, an unencumbered gift is better than an unenforceable license. The choice of the correct licensing regime, as always, depends on the normative expectations of the participants.

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<sup>144</sup> Such a standard is inherently vague. To overcome this obstacle, such a license could (i) make explicit that the party determining whether an edit “materially changed the meaning of the content” would be determined solely by the licensing party; (ii) force the licensee to agree to take down any content deemed objectionable by the licensor; and (iii) ensure that any licensee who was required to take down content deemed in breach of the license more than three times would thereafter no longer be eligible to republish content under the license. It would also be advisable to include an indemnification provision in the event the licensee’s edits resulted in an action for libel against the licensor. Even generous open source licenses can have teeth.

<sup>145</sup> The open source license has the benefit of leveraging the participation onto others who want the benefits of the unencumbered material. In essence, open source content has a network effect not present in public domain works, while public domain works have even fewer use restrictions. Both models, therefore, provide methods of maximizing public benefit.

## VII. WIKIFRAUD AND EDITORIAL MISCONDUCT

In addition to the difficulty enforcing the Creative Commons license in the context of a large authorship community, wikis tend to suffer from a number of forms of vandalism and other damage. “Most wikis will generate content that needs to be deleted. On public wikis, junk, spam, test edits, and vandalism[] are obvious candidates for deletion . . . .”<sup>146</sup> Such vandalism can take a number of forms, the most obvious being malicious edits.<sup>147</sup> Such malicious edits also vary in form:

**1. Mass deletion[:]** deletion of all contents on a page.

**2. Offensive copy:** insertion of vulgarities or slurs.

**3. Phony copy:** insertion of text unrelated to the page topic. E.g. on the Chemistry page, a user inserted the full text from the “Windows 98 readme” file.

**4. Phony redirection:** Often pages contain only a redirect link to a more precise term (e.g. “IBM” redirects to “International Business Machines[]”), but redirects can also be malicious[], linking to an unrelated or offensive term. “Israel” was at one point redirected to “feces.” Note that a phony redirect implies familiarity with Wikipedia’s editing mechanisms.

**5. Idiosyncratic copy**<sup>148</sup>: adding text that is related to the topic of the page but which is clearly one-sided, not of general interest, or inflammatory; these may be long pieces of text. Examples range from “Islam” where a visitor pasted long prayer passages from the Koran, to “Cat” where a reader posted a lengthy diatribe on the Unix *cat* command.<sup>149</sup>

Vandalism, as the term implies, harms the wiki or attacks the subject matter described in the wiki. In addition to various forms of vandalism, wiki publishers must remain vigilant against “illegal content including copyright violations and libel . . . .”<sup>150</sup> In a wiki system where any user is allowed to make editorial changes, wiki communities and publishers must actively monitor the material to assure a quick response to such vandalism and other inappropriate content.

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<sup>146</sup> KLOBAS, *supra* note 15, at 200–01.

<sup>147</sup> Viégas et al., *supra* note 34, at 578 (“Wikis are vulnerable to malicious edits or ‘vandalism,’ which can take a surprising array of forms”).

<sup>148</sup> This is also sometimes known as “trolling.” KLOBAS, *supra* note 15, at 201–02.

<sup>149</sup> Viégas et al., *supra* note 34, at 578–79 (this study used Wikipedia as its source and the examples derive from that wiki).

<sup>150</sup> KLOBAS, *supra* note 15, at 202.

Another structural concern for wiki publishers stems from temptation to use wikis for self promotion. “Wikipedia jettisons more than 100 entries every day, many of them from people who posted autobiographies after registering on the site. (Writing your own entry . . . is ‘strongly discouraged.’)”<sup>151</sup> Corporate entities also participate. “Search for a company on **Google** and chances are its Wiki entry will be among the first hits. So perhaps it’s no surprise that corporate spinmeisters are closely guarding their Wiki images.”<sup>152</sup> Wikipedia editors have removed changes by employees from many companies, including McDonald’s and Walmart.<sup>153</sup>

Companies such as these may move links from less flattering sites to more flattering resources, or they may sanitize the copy related to their business practices.<sup>154</sup> For example, a person with a McDonald’s corporate IP address replaced the hyperlink for Eric Schlosser’s *Fast Food Nation*, in favor of *McDonald’s: Behind the Arches*, which had a significantly less negative perspective on the fast food business and its impact on public health.<sup>155</sup>

Sue Gardner, executive director of the Wikimedia Foundation, acknowledged the problem of wiki manipulation. “We are vulnerable to exploitation—people want to monetize the traffic that comes to Wikipedia, or pursue a political agenda.”<sup>156</sup> As such, the manipulation of the content may be far more problematic than overt vandalism. In addition to being less obvious, this type of unlabeled marketing can undermine the credibility of the site if such editorial practices are allowed to pass unchecked.

To avoid vandalism, manipulation and self-aggrandizement, some systems require editors or “curators” to control the flow of information into the wiki.<sup>157</sup> In these wikis, the publisher provides only select users the right to approve page changes, assuring that each editorial change has been reviewed by the community of editors.<sup>158</sup> Critics of the curator model, however, suggest that such approaches change the fundamentally egalitarian culture of the wiki.<sup>159</sup> Nonetheless, wiki communities must take steps to discourage vandalism and maintain the integrity of their content.

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<sup>151</sup> David Segal, *Look Me Up Under N For Nobody; On Wikipedia, Deletion Looms for the Patently Non-Notable*, THE WASH. POST, Dec. 3, 2006, at D01.

<sup>152</sup> Evan Hessel, *Shillpedia*, FORBES, June 19, 2006, at 56.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Noam Cohen, *Wikipedia Looks Hard at Its Culture*, N.Y. TIMES, Aug. 31, 2009, at B3.

<sup>157</sup> See, e.g., Physcome Project and cosmass.org Wiki, Annotation Guidelines [https://www.cosmass.org/physcome\\_project/wiki/Annotation\\_guidelines](https://www.cosmass.org/physcome_project/wiki/Annotation_guidelines) (last visited Mar. 31, 2010) (wiki focused on the *Physcomitrella patens* genome) (“Curators can force changes, oversee use annotations, and work on future annotation releases.”); Stack Overflow, <http://stackoverflow.com> (last visited Mar. 31, 2010).

<sup>158</sup> See, e.g., Physcome Project and cosmass.org Wiki, Annotation Guidelines, *supra* note 161; Stack Overflow, *supra* note 161.

<sup>159</sup> See Juan Mateos-Garcia & W. Edward Steinmueller, *Open, But How Much? Growth, Conflict, and Institutional Evolution in Open-Source Communities*, in COMMUNITY, ECONOMIC CREATIVITY, AND ORGANIZATION 269–72 (Ash Amin & Joanne Roberts eds., 2008).

In addition to using editors or curators to approve postings, the active members of wiki communities regularly police the content. They use attribution pages to scan for new users, the people most likely to vandalize sites,<sup>160</sup> as well as to patrol for well known vandals. In this way, the attribution pages provide insiders with the same general type of credibility information that attribution generally provides the public in other publications. Just as “authorship conventionally underwrites readers’ engagements with literary texts,”<sup>161</sup> the attribution information provides similar rules of engagement for the page editors and curators—a form of engagement that is not provided to the casual users of the wikis. The only significant difference between wiki attribution and other forms of authorial attribution, therefore, focuses on who can see the credits. Wiki attribution is buried so that only those in the community’s inner circle are in a position to benefit from it.

More prominent attribution in wikis would offer two potential benefits for improving textual integrity. First, it might enable a broader array of readers to notice and correct wiki vandalism.<sup>162</sup> As regular readers use sites, they are likely to recognize frequent vandals, just as the editors do, and this would enlarge the pool of editors attuned to the need to make simple corrections.<sup>163</sup> An even greater benefit might be felt regarding wikifraud. Authors of self-serving puffery would be far less able to upload self-aggrandizing content if forced to sign their names to it. The public relations staff in most enterprises is sufficiently well known, so that authored articles about the enterprise would become quite visible to others in the organization. The internal response to such puffery would likely dissuade many organizations from participating in such self-serving conduct.

### VIII. VARYING THE NORMS FOR EMPLOYER-SPONSORED AUTHORSHIP

Just as the Internet can support multiple norms for authorship, it is important to recognize that authors receive support from multiple sources. In for-profit publication, copyright policy assumes that the economic incentives for the author come from the sale of his or her work. In traditional employment situations, by contrast, Congress presumes that one’s employment provides the reward for one’s authorship,<sup>164</sup> but recognizes that the parties may appropriately have alternative

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<sup>160</sup> Viégas, et. al, *supra* note 34, at 576.

<sup>161</sup> Lanser, *supra* note 96, at 82.

<sup>162</sup> Admittedly, the downside to attribution is the lure of vandals who wish to see their names on the website. Whether the lure of such fame would outweigh the benefits of greater policing is a matter of speculation.

<sup>163</sup> See, e.g., Stack Overflow, <http://stackoverflow.com> (last visited Mar. 9, 2010); Atwood, *supra* note 32 (“Insiders account for the vast majority of the edits. But it’s the outsiders who provide nearly all of the content. . . . There’s a strong sense of authorship, with a reputation system and a signature block attached to every post, like traditional blogs and forums. [But] once the system learns to trust you, you can edit anything.”).

<sup>164</sup> 17 U.S.C. § 101 (definitions) (“A ‘work made for hire’ is (1) a work prepared by an employee within the scope of his or her employment . . .”).

expectations.<sup>165</sup> In fields of research and academia, a third expectation may exist because the author's work can be funded by research grants and outside support rather than merely the scholar's ordinary income.<sup>166</sup> Work for hire tracked the presumptions related to the financing of the authorship. Whether the work for hire doctrine should have also varied the norms for attribution and integrity has recently come into question.<sup>167</sup>

Duke Professor Catherine Fisk makes a compelling argument that attribution and integrity had historically been integral to U.S. copyright law such that employment law did not divest an employee of the non-economic right of attribution even as it extracted the economic value of the copyright for the benefit of the employer.<sup>168</sup> "Nineteenth century courts believed that actual attributions of authorship were an important reward above and beyond the economic value of the intellectual property rights themselves."<sup>169</sup> The continuing norms in patent law, which vest the attribution of invention solely in the inventor,<sup>170</sup> further suggest that the drafters of the copyright work-for-hire clause swept too broadly when they attempted to clarify the standards.

The line of nineteenth century attribution cases may provide the historical root for the so-called teacher's exception to the work-for-hire doctrine that would exclude academic research from the reach of the 1976 Act's literal text.<sup>171</sup> The 1909 Copyright Act had codified an earlier work-for-hire rule by providing that "the word 'author' shall include an employer in the case of works made for hire."<sup>172</sup> Nonetheless, that doctrine had been interpreted in a flexible, case-specific manner.<sup>173</sup>

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<sup>165</sup> The statutory presumption that vests copyright in the employer can be altered by the parties, provided "the parties have expressly agreed otherwise in a written instrument signed by them . . ." 17 U.S.C. §201 (b) (2010).

<sup>166</sup> Jon M. Garon, *What If DRM Fails?: Seeking Patronage in the iWasteland and the Virtual O*, MICH. ST. L. REV. 103, 131–34 (2008) ("The fourth source of funding is from private patronage. Charitable tax-exempt organizations collect private donations for visual art, theatre, opera, libraries, motion pictures, public broadcasting, and publishing endeavors of various kinds.").

<sup>167</sup> Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49 (2006).

<sup>168</sup> *Id.* at 57.

<sup>169</sup> *Id.* (citing *Boucicault v. Fox*, 3 F. Cas. 977, 980 (C.C.N.Y. 1862)); *Peters v. Borst*, 9 N.Y.S. 789, 790 (N.Y. Sup. Ct. 1889).

<sup>170</sup> See 35 U.S.C. § 116 (2009).

<sup>171</sup> See generally Sunil R. Kulkarni, *All Professors Create Equally: Why Faculty Should Have Complete Control Over the Intellectual Property Rights in Their Creations*, 47 HASTINGS L.J. 221, 223–25 (1995).

<sup>172</sup> 17 U.S.C. § 26 (1909) (internal quotations in original) (current version at 17 U.S.C. 101 (1976)). See *Scherr v. Universal Match Corp.*, 417 F.2d 497, 499 (2d Cir. 1969).

<sup>173</sup> Sean B. Seymore, *How Does My Work Become Our Work? Dilution of Authorship in Scientific Papers, and the Need for the Academy to Obey Copyright Law*, 12 RICH. J.L. & TECH. 11, 10 (2006) ("This 'faculty exception' was rooted in policy, custom, common law copyright, and possibly section 7 of the 1909 Copyright Act."); Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 595–97 (1987).

Judge Posner has forcefully defended the need for retaining the teacher's exception, based, perhaps in part, on this history.<sup>174</sup> As Posner suggests, the relevance of the teacher's exception and the devolution of attribution may reflect the benign neglect of a doctrine so widely accepted as to go unnoted in the economic debates of the 1976 Copyright Act.<sup>175</sup> The more likely target of the copyright policy drafters was the highly flexible and somewhat unpredictable nature of work-for-hire under the 1909 Act which left employers, commissioning parties, authors and artists with much less clarity regarding their expectations of copyright ownership.<sup>176</sup> The 1976 Act replaced flexibility and ambiguity with a clear default rule which can easily be varied by written agreement.<sup>177</sup> In this way the 1976 Act, even though it may have the wrong presumption with regard to academic scholarship, still provides a clear methodology for articulating the rights of the parties.

The reader of the Copyright Act makes a mistake, however, to assume that the default provision is the presumptive or correct normative choice regarding every application of the doctrine.<sup>178</sup> While the default norm for work-for-hire places copyright ownership in the employer's hands when the work is "prepared by an employee within the scope of his or her employment,"<sup>179</sup> the vesting of the copyright will change if the parties so agree in writing.<sup>180</sup> The parties, not the law, determine the norm. Compared to the universe of all employment contracts, those employment agreements which need provisions for academic, scholarly and creative works compose a very modest—even miniscule—subset. The congressional choice to require academics to establish their rights using contract is likely not an unreasonable

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<sup>174</sup> Hays v. Sony Corp. of America, 847 F.2d 412, 416–17 (7th Cir. 1988).

But considering the havoc that such a conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the teacher exception, we might, if forced to decide the issue, conclude that the exception had survived the enactment of the 1976 Act.

<sup>175</sup> *Id.* ("it is widely believed that the 1976 Act abolished the teacher exception . . . though, if so, probably inadvertently, for there is no discussion of the issue in the legislative history, and no political or other reasons come to mind as to why Congress might have wanted to abolish the exception.").

<sup>176</sup> See Thomas G. Field, Jr., *From Custom to Law in Copyright*, 49 IDEA 125, 138–40 (2008); Dreyfuss, *supra* note 173, at 595 ("Starting with the presumption that works prepared in the course of employment were works for hire, 17 courts allowed employees to introduce evidence on a variety of factors to rebut the presumption that their work belonged to the employer.").

<sup>177</sup> 17 U.S.C. § 201(b) (2009).

<sup>178</sup> See Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1909 (2007) (" . . . there has been little acknowledgement of the breadth of the customary practices and norms involved in IP and the vast influence that they wield.").

<sup>179</sup> 17 U.S.C. § 101 (2009).

<sup>180</sup> *Id.* at § 201(b).

one and should not be transformed into a public policy endorsement suggesting that academics lose these rights. It merely means that through collective bargaining and shared governance structures, the written agreements between faculty and universities should be clearly articulated.<sup>181</sup>

The difference between presumptions and norms is also important in the expectation for user generated content on the Internet. Copyright ownership vests in the author in every case. In those communities where the normative expectation is for the author to relinquish the rights provided by copyright, all rights—including those of attribution—can be foresworn. But in the blogs and social media, the authors are not relinquishing all of their ownership interests. For many, the rights to attribution remain the most important; for others it is the right of integrity—at least regarding the original post—that is dearest to the creator. Authors may not be concerned about the re-uses or derivative works that incorporate their posts, but they do not want to see their original posts removed or distorted.<sup>182</sup>

Put in this context, the rights of attribution and integrity play important roles in the new media discourse of the Internet. The concerns underlying the debate over the teacher's exception may serve to highlight the importance of the attribution debate. As Professor Fisk puts it, “[t]he reputation we develop for the work we do proves to the world the nature of our human capital.”<sup>183</sup> For academic research, this is a critical component of authorship. The topic is keenly felt at universities and research facilities. The normative expectation for faculty and researchers remains one of attribution and integrity, with this norm expressed through collective bargaining agreements and faculty handbooks. Unless it is protected on the Internet, such authors will not place their valuable efforts in that medium.

#### IX. INCENTIVIZING COLLABORATIVE SCHOLARSHIP— CREATION AND DISSEMINATION OF KNOWLEDGE

In addition to the curatorial need for participants to collect and imprint their identity through online and other media, an equally significant societal objective may be the usefulness of collaborative, attributed authorship for professional and academic research. As noted earlier, “[r]eputation is critical to a person who follows a vocation dependent on commissions from a variety of clients.”<sup>184</sup> In the fields of

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<sup>181</sup> Jon M. Garon, *The Electronic Jungle: The Application of Intellectual Property Law to Distance Education*, 4 VAND. J. ENT. L. & PRAC. 146, 152–53 (2002). See also Thomas G. Field, Jr., *supra* note 181, at 138–40.

<sup>182</sup> Seen in this light, the myriad of complaints regarding overzealous take-down regimes are really forms of video authors claiming the right of integrity in their posts (whether the clip be decidedly original or have only minimal creative elements).

<sup>183</sup> Fisk, *supra* note 83, at 50.

<sup>184</sup> Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, *supra* note 43, at 265 (quoting *Prior v. Sheldon* (2000) 48 I.P.R. 301 at para. 87 (Austl.)). See also Ginsburg, *The Author's Name as a Trademark: A Perverse Perspective on the Moral Right of Paternity?*, *supra* note 108, at 380.

academic and scientific research, the key resources for empirical research are based on the competence and credibility of the parties generating the information.

In an information economy, especially one characterized by high degrees of labor turnover, human capital is fantastically important to employees and to firms. Particularly in the case of highly-educated or highly-skilled employees or people who possess a great deal of tacit knowledge, assessing the nature and value of human capital is difficult. . . . Thus, credit becomes a form of human capital itself because it translates and signals the existence of a deeper layer of human capital.<sup>185</sup>

Nowhere is this more apparent than in academic institutions. Given the paltry sums generally available to academics for their writings, the emphasis on the teacher's exception to copyright ownership must focus on the moral rights of attribution and integrity. Rather than receive consumer financing for scholarship, university faculty members generally receive institutional support to fund, encourage or reward their efforts. "Hiring, tenure, promotions, grants, and other aspects of the academic reward structure are based on producing peer-reviewed publications."<sup>186</sup> The Dartmouth University Guidelines provide a simple example: "Authorship is important to the reputation, professional advancement, and financial support of individuals, and to the reputation of Dartmouth College."<sup>187</sup>

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<sup>185</sup> Fisk, *supra* note 83, at 53–54.

<sup>186</sup> CHRISTINE L. BORGMAN, SCHOLARSHIP IN THE DIGITAL AGE: INFORMATION, INFRASTRUCTURE, AND THE INTERNET 196 (2007).

The disincentives to share scholarly information can be divided into four categories: (1) rewards for publication rather than for data management; (2) the amount of effort required in documenting data for use by others; (3) concerns for priority, including the rights to control the results or sources until the publication of research; and (4) intellectual property issues, both the control and ownership of one's own data as well as access to data controlled or owned by others.

<sup>187</sup> DARTMOUTH UNIVERSITY, AUTHORSHIP GUIDELINES, [www.dartmouth.edu/~osp/docs/Authorship.pdf](http://www.dartmouth.edu/~osp/docs/Authorship.pdf).

1. An author should have made substantial contributions to the scholarly work and intellectual process. Examples of activities considered to be a substantial contribution may include one or more of the following: creating the original idea, project planning, experimental work, data collection, analysis, interpretation.

2. An author should be able to articulate and defend their contribution to the scholarly work. They should know and be able to explain how their contribution relates to the overall project.

The lack of any meaningful institutional feedback regarding the efficacy of wiki and other online scholarship has constrained the expansion of such academic research in online fora.<sup>188</sup> While better tools for providing online attribution and integrity will not answer all academic concerns regarding open access of research data, a system built on robust moral rights will reduce barriers for faculty participation in such communities.<sup>189</sup> Adding metadata analysis that informs the participants—and their home institutions, when appropriate—of the value of the participant’s contributions can be used as a viable alternative to peer-review as a measure of scholarly efficacy.<sup>190</sup> Taken together, the positive, normative expectation of wiki contribution and the tools available for schools to use the wiki contributions as part of promotion and grant reviews could potentially create a new class of sophisticated, thoughtful and academically rigorous wiki environments supported by academic institutions rather than volunteer efforts.

Such investment in collaborative, knowledge-increasing efforts could answer some of the criticism leveled at the academy that “demands of tenure and professional advancement emphasize publication over practicality, credit over collaboration, footnotes over feasibility, and social science over saving the world.”<sup>191</sup> To the extent that academic scholarship discourages collaboration and progress, an academic wiki may serve as an antidote.

Particularly if the tools can be used to differentiate among the highly inconsistent levels of participation among various wiki participants, they should provide much needed information.<sup>192</sup> From an institutional perspective, the university or academic center expects that the contributions of faculty members are evaluated. Automated reports which provide assessment tools will be warmly welcomed over the time-

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3. As single contributions, the acquisition of funding, the provision of technical services and/or materials, the collection of data, or the general supervision of a research group are generally not adequate to justify authorship.

<sup>188</sup> See generally Susan G. Haag et al., *Faculty Incentives and Development for Online Learning*, in ONLINE PROFESSIONAL DEVELOPMENT FOR TEACHERS 69, 75 (Charalambos Vrasidas & Gene V. Glass eds., 2004).

<sup>189</sup> See Richard N. Katz, *The Gathering Cloud: Is This the End of the Middle?*, in THE TOWER AND THE CLOUD—HIGHER EDUCATION IN THE AGE OF CLOUD COMPUTING 2, 17 (Richard N. Katz ed., 2008).

<sup>190</sup> Arazy & Stroulia, *supra* note 30, at 171 (citing additional studies).

<sup>191</sup> BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL 188 (2009).

<sup>192</sup> See Jeff Stuckman & James Purtilo, *Analyzing the Wikisphere*, WIKISYM 2009 (Oct. 2009), available at <http://www.wikisym.org/ws2009/wiki-index.php?page=Analyzing+the+Wikisphere> (“We . . . studied 151 popular wikis . . . (none of them Wikipedias). We found that our studied wikis displayed signs of collaborative authorship, [and] . . . the relative contribution levels of users in the studied wikis were highly unequal, with a small number of users contributing a disproportionate amount of work.”).

intensive methods used for traditional scholarship, which relies on peer-review for most disciplines<sup>193</sup> (with the notable exception of legal scholarship).<sup>194</sup>

Building on the values of attribution and integrity, an academic collaborative wiki project should incorporate those attributes that are valued by the academic participants, their sponsors and the research community. It would be naïve to think that the pressures of tenure, promotion and incentive do not drive faculty choices regarding the focus of their scholarship.<sup>195</sup> Therefore, the successful academic wiki projects must “count” for institutional purposes of promotion, tenure and research funding.

For the institutions that support the academic endeavors, they want assurances that the work matters. Whatever the merits of peer review and publication acceptances, these external validations continue to play a significant part in legitimizing faculty work product. If wikis are to compete with peer-reviewed journals or their law school counterparts, the institutions need assurance that the faculty participation has merit.

One alternative for establishing the merit of faculty contributions would be to include only those contributions that have already been through a peer-review process. Faculty members could submit their published work to content aggregators. Websites such as the Social Science Research Network,<sup>196</sup> Bepress Legal Repository,<sup>197</sup> NELLCO Legal Scholarship Repository,<sup>198</sup> ERIC, the Educational Resources Information Center,<sup>199</sup> or others. These sites serve to provide greater public access to faculty scholarship, but they do not build knowledge in any coherent, organized fashion. These articles may represent the grist for new knowledge, but they are not the Libraries of Babel<sup>200</sup> or Encyclopedia Galactica<sup>201</sup> that massive collaborative scholarship could develop.

A second alternative for enhancing world knowledge through massive academic collaboration would be direct funding of such a project. This simple solution merely requires an institution or association of institutions who share the vision for such a project—or any lesser project which values open academic collaboration. But even with funding, such a project will face obstacles. As discussed throughout this article, attribution is an essential component of participation. Academic attribution is the

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<sup>193</sup> Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U.L. REV. 67, 72 (2006) (“Peer review thus became the mechanism for a university to monitor employees and make informed hiring and promotion decisions.”). See also GILLIAN ROSEMARY EVANS, CALLING ACADEMIA TO ACCOUNT: RIGHTS AND RESPONSIBILITIES 34 (1999).

<sup>194</sup> See Richard A. Posner, *Against the Law Reviews*, LEGAL AFFAIRS, December 2004, at 57; Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

<sup>195</sup> HAAG ET AL., *supra* note 188, at 75.

<sup>196</sup> <http://ssrn.com>.

<sup>197</sup> <http://law.bepress.com/repository>.

<sup>198</sup> <http://lsl.nellco.org/>.

<sup>199</sup> <http://www.eric.ed.gov/>.

<sup>200</sup> JORGE LUIS BORGES, THE LIBRARY OF BABEL (1941), [http://jubal.westnet.com/hyperdiscordia/library\\_of\\_babel.html](http://jubal.westnet.com/hyperdiscordia/library_of_babel.html) (last visited Mar. 9, 2010); Lamb, *supra* note 17, at 36.

<sup>201</sup> [http://en.wikipedia.org/wiki/Encyclopedia\\_Galactica](http://en.wikipedia.org/wiki/Encyclopedia_Galactica).

coin of the realm. As such, to entice the faculty desired by the project leaders, the project must have the ability to provide academic attribution. Such attribution is certainly possible. Participants on the project can be given credit in a screen-credit page much like actors and crew on a motion picture. The listing in the project credits would serve as validity for faculty members including the project on their résumés.

The limitation on this model is that the awarding of credit comes as part of the agreement to participate, and without more, does not have any evaluative tools to emphasize significant participation or incentivize participants to invest time and effort into the project following the initial award of credit. To the extent that editors are hired to evaluate the submissions of the participating faculty, the project relies less on the communal, non-hierarchical wiki tools and more on a model of traditional editing. While traditional publishing certainly continues to work, it comes with significant costs that are otherwise borne by members of the editorial community and dissipated through its large network.

A better alternative maximizes the efficiency of the communal editing nature of wiki software but explicitly values the components of attribution and integrity. By using the same metadata captured for the wiki history pages, the relative impact of participants' editorial contributions can be measured over time. Under this model, the quantity and quality of each contributor's work would be assessed, and that information could be made available.

For example, hypothesize that the National Endowment for the Humanities ("NEH") wishes to produce a public website dedicated to the history of jazz music. The NEH could launch the project by hosting a website, choosing the authoring tools, and hiring a professional curator to define the parameters of the project and encourage academic participation. Participants in the project—whether initially screened or not—would begin to contribute to the site. Scholars in the field could write (or repurpose prior writings) to increase information on the site, and like any other wiki, the site would grow based on the size and interest of the community.

For faculty, however, the project would look somewhat different than Wikipedia because it could report to that faculty member (or the relevant tenure and promotion committee) the quantitative and qualitative measure of the participation. Each participant would be able to download charts and tables showing a detailed explanation of his or her participation.

First, the report could provide a quantitative analysis of participation: the total volume of content the participant contributed, the percentage of the site based upon that person's contribution, and the relative ranking of that person's quantitative input as compared to the other participants in the project (or even a group of identified comparator wiki projects). Next, the report could provide analysis of the resilience of the content provided by that participant. The presumption is that the information which remains on a site the longest is recognized as inherently more valuable than that content which has been edited heavily or quickly removed.<sup>202</sup> Finally, the report

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<sup>202</sup> A measure of resilience can take into account the difference between minor changes in punctuation and word choice and more significant edits, based on algorithms establishing the

could identify the extent to which the contributions were relevant by measuring both the unique visitors to the pages (or the time spent by each unique visitor on each page, if deemed more significant) as well as the number of links to the particular content by sites outside the project. The link-based relevance could include either a universe of all readers or include only links from users within a subscriber community, if the important readership was deemed to be other academics in the field rather than the lay public.<sup>203</sup>

The NEH could provide incentives to those institutions which encourage the most effective faculty participation and marshal its public resources on those individuals and institutions that provide the greatest impact on the growth of the project. When the project was sufficiently established, the NEH could add to the knowledge of music history with a project on the Delta Blues and other topics, seamlessly linking one hyper-linked knowledge base with the next as it seeded the growth for an American Library of the Arts.

The combination of these three measures—the quantity of material submitted, the resiliency of the material on the site and the relevancy of the material to the users of the site—should provide an effective snapshot of the faculty member's efficacy on the site. The measures may even forestall the need for any vetting process of the volunteers. If participation itself carried some cache, then participating authors could be required to achieve a threshold level of participation to retain their submission rights. If one wishes to continue to be associated with the project and receive attribution for participation, one needs to provide a threshold level of effort; those authors who are more harmful than helpful and have all their posts removed would be flagged by the metadata and lose their credentials.

Undoubtedly, there will be concerns that such measurements will grow to replace traditional forms of peer review and other reward systems. Faculty members may be concerned that such metadata measurements could take away from the academic freedom of individual faculty, encourage more immediately relevant projects over longer-range scholarship and reduce the academic enterprise into too few measurements. While this dystopian outgrowth is theoretically possible, there is nothing in the methodology to suggest that it will replace all other forms of scholarship. Moreover, the collaborative wiki authorship projects are inherently limited to some forms of research. Many other forms of empirical scholarship, criticism and field research will be left unaffected by this model.

In reality, the model may bare little difference from the current standards of peer review and publication for the faculty member seeking tenure, promotion or funding. The quantity of one's writing certainly matters to tenure committees and university

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minimum change in each sentence or paragraph that would constitute a meaningful change for statistical purposes. Arazy & Stroulia, *supra* note 30, at 172–174.

<sup>203</sup> By simply requiring that users register with the site, the publisher could establish a qualitatively superior group of readers that serve as the basis for determining author relevance. A narrower community such as this would increasingly approximate peer review. While merely reading another author may not indicate approval, linking to that scholarship should correlate positively with the quality and usefulness of the content.

administrations (whether focused on the text or the footnotes). The prestige of a particular placement is merely a surrogate for its authoritative impact, and this measure is better assessed by breadth of readership within the field than by the vagaries of publication acceptance. Missing from traditional scholarship methodology is resilience, yet the true value of academic scholarship often comes from those few works which remain current for years rather than weeks. Resilience on the wiki and continued relevance to readers provide a much better tool than anecdote to determine the long-term value of a work of scholarship.

When compared critically to the existing model for academic evaluation, the metadata analysis should provide a more equitable playing field, allowing academics to be judged by the impact of their works, not the status of their institutions. The benefits of incorporating attribution and integrity into academic wikis far exceed any impingement on the academy. It recognizes the valuable role wikis could play in the expansion and access of knowledge.

A variation on this model is applicable to student authorship as well. Rather than limiting student research and writing to term papers and other projects that have little public utility, the metadata analysis provides a faculty member with tools to evaluate the quality of the work contributed by students in a student-edited wiki project. The project would not even need to be limited to a particular course or university. Instead, students in a particular field of study could be expected to grow the base research tools in that field, and their contributions would be judged on the quantity, resilience and relevance of their contributions as compared to their fellow classmates. Moreover, the attribution provided by this form of wiki would enable the students to demonstrate the value of their work for future employers or academic opportunities.

Similar incentives exist in the corporate workplace to utilize these tools for business wikis and other collaborative tools. Employees who contribute quantitatively and qualitatively meaningful content can be identified and rewarded if the wiki tools track quantity, resilience and relevance of the information provided, which may serve to empower the employees to ever higher quality contributions.<sup>204</sup> Taken together, the tools that enhance authorial attribution and integrity will lead to a higher quality and quantity of authorship, enabling collaborative scholarship to fulfill its promise.

#### **X. TOWARD A NORM OF ACCOUNTABILITY IN NEW MEDIA— ATTRIBUTION, INTEGRITY, AND SOCIAL MEDIA**

The implications for a normative expectation of authorial attribution and, in many circumstances, the associated expectation of authorial integrity may play an important role in the development of social media well beyond that of wikis. The public has become increasingly disaffected with traditional media, so to regain public

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<sup>204</sup> See PAMELA S. LEWIS, ET. AL., *MANAGEMENT: CHALLENGES FOR TOMORROW'S LEADERS*, 389 (SOUTH-WESTERN COLLEGE PUB; 5TH ED. 2006) (“When organizations increase the amount of control and discretion workers have over their jobs, they are empowering employees and may improve the motivation of both employees and management.”).

trust there will be an increasing need for more trustworthy content sources in the future—the core benefit of robust attribution and integrity.<sup>205</sup> Studies have shown, for example, that the public’s confidence in sources of media has reached an all-time low.<sup>206</sup> “Just 29% of Americans say that news organizations generally get the facts straight [and] . . . only about a quarter (26%) now say that news organizations are careful that their reporting is not politically biased. . . .”<sup>207</sup> Since television news remains the most common news source, “with 71% saying they get most of their national and international news from television,” the lack of confidence is perhaps most problematic for television news.<sup>208</sup> But according to the Pew study, 42% of the public uses the Internet as its primary news source, making it the second most significant source for news, while newspapers serve 33% of the public and radio only 21%.<sup>209</sup> The Internet has surpassed both radio and newspapers even as public trust has declined, meaning that the lack of confidence in the content may not bode well for the media future.

If the level of confidence has fallen so significantly for branded media outlets on television, how much less confidence does the public have in anonymous blogs, posts and consumer ratings? The answer may not correlate directly. According to Forrester Research, “61% of online retailers use customer ratings and reviews and 71% consider them to be ‘very effective’ tools.”<sup>210</sup> The consumer reviews provide a double benefit for retailers. They provide sales information perceived as neutral and accurate for new consumers, and they create an opportunity for curatorial engagement that improves customer loyalty.<sup>211</sup> “Consumers’ opinions of a brand are improved when they’re given the opportunity to ask questions and when brands are seen to listen to their comments and respond.”<sup>212</sup> Even more effective are word-of-mouth interactions,<sup>213</sup> but online social media can create a virtual word-of-mouth experience that closely mirrors these benefits.<sup>214</sup>

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<sup>205</sup> See, e.g., Marianne M. Jennings, *Where are Our Minds and What Are We Thinking? Virtue Ethics for a “Perfidious” Media*, 19 NOTRE DAME J. L. ETHICS & PUB POL’Y, 637, 651 (2005).

<sup>206</sup> PEW RESEARCH CTR., PUBLIC EVALUATIONS OF THE NEWS MEDIA: 1985–2009, PRESS ACCURACY RATING HITS TWO DECADE LOW (2009), <http://people-press.org/reports/pdf/543.pdf> (last visited Mar. 9, 2010).

<sup>207</sup> *Id.* at 2.

<sup>208</sup> *Id.* at 4.

<sup>209</sup> *Id.* (representing national news; the figures add to more than 100% due to allowance for multiple responses).

<sup>210</sup> Elisabeth Sullivan, *Add Consumer-Generated Reviews To Your Holiday Wish List*, MARKETING NEWS, Dec. 30, 2009 at 24 (citing FORRESTER RESEARCH INC.’S STATE OF RETAILING ONLINE (2009)).

<sup>211</sup> Jon M. Garon, *Reintermediation*, 2 INT. J. PRIVATE LAW 227, 234 (2009). (“Reintermediation relies upon customer affinity and behaviour of repeated reliance on a particular company to the exclusion of all other providers of that good or service.”).

<sup>212</sup> *Social Network Contacts Take on New Role as Recommenders*, NEW MEDIA AGE, July 2, 2009, at 9.

<sup>213</sup> William McGovern, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1110 (2009). (“Most fundamentally, however, word of mouth influences consumers’ decisions because they believe it: a recommendation from a disinterested person

Confidence in consumer reviews and virtual word-of-mouth interactions mirror response to wikis in their reliability. Like wiki authorship, they are the most reliable when the level of public participation is sufficient to outweigh the self-interest of any particular participant.<sup>215</sup> When the group is sufficiently large, the average result should be representative, whereas when there are only a few comments or reviews, the danger exists that the information is idiosyncratic or intentionally misleading. The assumption that large communities are self-correcting, however, should be critically analyzed. Accuracy concerns exist in larger collaborative review sites, if the participants in those sites are atypical of the general public.<sup>216</sup> Some online communities have mechanisms in place to reduce the ability for a small group of voters to over-participate, but all communities are potentially at risk of non-representative distortion.<sup>217</sup>

There is an even greater risk than participation bias. Retailers and manufacturers have manipulated the source of the public content, overwhelming genuine feedback with planted content.<sup>218</sup> If the information is inaccurate because it is procured for the benefit of a commercial transaction, then the false information may result in an unfair trade practice.<sup>219</sup> This concern has led to the revisions of the U.S. Federal Trade Commission's guidelines regarding endorsements.<sup>220</sup> "New media," including blogs

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similar to the consumer is likely to be 'immediate, personal, credible, and relevant.')

(quoting MARIA FLORES LETELIER et al., STRATEGIES FOR VIRAL MARKETING, IN KELLOGG ON INTEGRATED MARKETING 90, 90 (Dawn Iacobucci & Bobby Calder eds., 2003)).

<sup>214</sup> See ERIC GOLDMAN, *Online Word of Mouth and Its Implications for Trademark Law*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 404, 404 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008).

<sup>215</sup> Beth Simone Noveck, "Peer to Patent": *Collective Intelligence, Open Review and Patent Reform*, 20 HARV. J. L. & TECH. 123, 157 (2006) ("The 'wisdom of crowds' is generally more accurate and more objective than the judgment of one uninformed 'expert.'"). See generally JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS, xv (2004).

<sup>216</sup> See Kristina Grifantini, *Can You Trust Crowd Wisdom? Researchers Say Online Recommendation Systems Can Be Distorted by a Minority of Users*, MIT TECHNOLOGY REV., Sept. 16, 2009, <http://www.technologyreview.com/web/23477/?a=f> (last visited Feb. 20, 2010). ("[R]ating systems can tap into the 'wisdom of the crowd' to offer useful insights, but they can also paint a distorted picture of a product if a small number of users do most of the voting. . . . [A] small number of users accounted for a large number of ratings.")

<sup>217</sup> *Id.*

<sup>218</sup> E.g., Jennifer Peltz, *Some Web Sites Feel the Love from Their (Paid) Admirers*, VIRGINIAN-PILOT, Aug. 1, 2009, at Q2 (describing Belkin International paying for positive reviews on Amazon, a false Walmart blog and staff-written testimonials by plastic-surgery firm Lifestyle Lift Inc.).

<sup>219</sup> 15 U.S.C. § 45 (1) (a) (2009) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.")

<sup>220</sup> Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53124, 53124 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

and social networks, are specifically included in the revised regulations.<sup>221</sup> The revised endorsement guidelines include a new example involving blogs which differentiates between a blogger providing her own disinterested opinion and that person receiving free goods to promote her blog activities.<sup>222</sup>

Like the endorsement rules, the rights of attribution and integrity involved focus on the trademark-like role of these interests.<sup>223</sup> They provide the public confidence in the source of the content.<sup>224</sup> This expectation is also implied in another of the endorsement examples:

A film critic's review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement because it is viewed by readers as a statement of the critic's own opinions and not those of the film producer, distributor, or exhibitor. Any alteration in or quotation from the text of the review that does not fairly reflect its substance would be a violation of the

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 53138–39.

Example 8: A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

<sup>223</sup> See Heymann, *supra* note 104, at 1445–46. (“If the authorship and its corresponding attributional right are to inhere somewhere in the 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.”).

<sup>224</sup> See, e.g., *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995). (“In principle, trademark law, by preventing others from copying a source-identifying mark, ‘reduce[s] the customer’s costs of ... making purchasing decisions.’”) (quoting 1 J. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 2.01[2], 2-3 (3d ed. 1994)).

standards set by this part because it would distort the endorser's opinion.<sup>225</sup>

The FTC example highlights the public's reliance on the accuracy of the quotation and the unfair trade implications of alteration of such a quote. Thus, both the attribution and the integrity of the film critic's statement must be protected if the quote can be used by the film distributors to promote the movie. This same expectation of attribution and integrity will flow to other sources of content on the Internet.<sup>226</sup> Only those that support mechanisms of reader confidence will ultimately succeed over the long term. And those sites that best reinforce credibility and reliability will outperform other resources.

For "brand-name" content providers such as the traditional media outlets, the accuracy of source information is critical, and it puts the instantaneous newsgathering potential for social feeds directly at odds with the importance of reflective analysis and fact-checking essential to quality journalism.<sup>227</sup> The use of Twitter, Facebook and other social media tools and information sources creates a system of information dissemination that requires no prior fact-checking and encourages traditional media to lower its own standards.<sup>228</sup> The race to the bottom of fact-checking is likely to have a

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<sup>225</sup> FTC, 16 C.F.R. § 255, Guides Concerning the Use of Endorsements and Testimonials in Advertising, (citing 16 C.F.R. 255.1 (b)), <http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf> (last visited April 1, 2010).

<sup>226</sup> See Lastowka, *Trademark*, *supra* note 94, at 1179–80.

<sup>227</sup> See, e.g., Rex Smith, *Imperfect Sources, Yet Real News*, THE TIMES-UNION (ALBANY), Sept. 19, 2009, at A15 (discussing the hesitancy of legacy news media to run video footage of an investigation into ACORN, which eventually led to the organization being banned from federal contracts—but the most shocking of the content included a discussion of an employee's murder of her husband was easily proven to be a hoax pulled by the employee on the amateur undercover filmmakers); Eric Deggans, *Eager Media Give Lift to High-Flying Hoaxes*, ST. PETERSBURG TIMES, Oct. 21, 2009, at 1A (discussing failure to fact check the boy trapped in Mylar balloon scandal and false press release involving the U.S. Chamber of Commerce).

<sup>228</sup> See Jennifer Armstrong, *Celebrity Death Rumors*, ENT. WEEKLY, Jan. 22, 2010, at 44. Discussing the false murder reports involving fifteen-year-old celebrity Justin Bieber, the magazine explained:

Bieber's nightclub showdown first appeared on CNN's iPreort site, which allows citizen journalists to post content at will. So the site—which prides itself on having brought the world the first cell phone videos of the 2007 Virginia Tech shootings—also occasionally plays host to a wildly inaccurate false death report. The problem? It permits anonymous online gossips to link to what appears to be a credible news source for a few hours before CNN editors can vet the facts. ("We've had very little of that," spokeswoman Jennifer Martin says. "The benefit far outweighs what a few of these mischief makers are doing.")

great deal to do with the loss of confidence by the public in these media outlets.<sup>229</sup> To offset this trend, accuracy, impartiality and integrity will need to be reestablished and improved.<sup>230</sup> This need will be true for collaborative authorship as well as individual authorship, but it will be even more important for branded news sources and collaborative content that does not have the self-correcting scale and level of participation of Wikipedia and other successful wikis.

The influence of non-representative distortion may be more than merely a vague conceptual risk; it may be an essential aspect of these environments. Although wikis may be socially edited, they may well require entrepreneurial zeal to incubate the project to the point where it becomes self-sustaining. The best known of the wiki sites, Wikipedia, has been fiercely championed by its co-founder, Jimmy Wales.<sup>231</sup> His early engagement may explain some of the reason for its singular success. Social chronicler Malcolm Gladwell has identified three members essential to the cast needed for ideas or projects to achieve cultural propagation.<sup>232</sup>

In a social epidemic, Mavens are data banks. They provide the message. Connectors are social glue: they spread it. But there is also a select group of people—Salesmen—with the skills to persuade us when we are unconvinced of what we are hearing, and they are as critical to the tipping of word-of-mouth epidemics as the other two groups.<sup>233</sup>

Jimmy Wales may be the salesman responsible for Wikipedia's growth far outpacing most other wiki projects.<sup>234</sup> Salesmen such as Wales tend to be self-identifying, so that the public knows who is encouraging them to respond, if not by name then by association.<sup>235</sup> The social media and wiki Connectors are the

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<sup>229</sup> See, e.g., Howard Kurtz, *Rather Admits 'Mistake in Judgment'*, WASH. POST, Sept. 21, 2004, at A01 (“Dan Rather apologized yesterday for a ‘mistake in judgment’ in relying on apparently bogus documents for a ‘60 Minutes’ report charging that President Bush received favorable treatment in the National Guard, ending a nearly two-week-long defense of the network’s journalistic conduct that media analysts say has badly hurt its credibility.”).

<sup>230</sup> Among readers who are familiar with its content, *The Wall Street Journal* fared better than *The New York Times* or other media outlets at providing unbiased reporting for both Republicans and Democrats. Pew Research Center, *Public Evaluations of the News Media: 1985-2009, Press Accuracy Rating Hits Two Decade Low*, *supra* note 211, at 4.

<sup>231</sup> See Fiona McCann, *I Wasn't Sure If Anyone Would Use It*, IRISH TIMES, Nov. 27, 2009, at 23.

<sup>232</sup> See MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 34 (LITTLE BROWN & CO. 2000) (discussing “Connectors, Mavens and Salesmen”).

<sup>233</sup> *Id.* at 70.

<sup>234</sup> See BILL TANCER, *CLICK, WHAT MILLIONS OF PEOPLE ARE DOING ONLINE AND WHY IT MATTERS* 121 (Hyperion 2008).

<sup>235</sup> See David A. Hoffman and Salil Mehra, *Wikitruth Through Wikiorde*, 59 EMORY L.J. 151, 165 (2010) (describing Jimmy Wales role in problem solving) (available at: <http://ssrn.com/abstract=1354424>).

individuals who push the invitations and build networks within these sites. But it is the Mavens—the authoritative experts—who distinguish mere promotion from substantive value.<sup>236</sup> Mavens are the early adopters who champion one particular wiki, blog or social network over the others because they perceive greater value in one project or idea than the other projects or ideas competing for attention.<sup>237</sup>

In the context of the online environment, there may be a fourth category—the Activists.<sup>238</sup> These Activists are the individuals most responsible for generating the user generated content, because “90 percent of online users are ‘lurkers,’ or users who visit online communities but don’t contribute; 9 percent contribute from time to time; and only 1 percent of online users are active contributors.”<sup>239</sup> For social media, the Activists create the content vetted by the Mavens, shared by the Connectors and promoted by the Salesmen.

In addition, the online world is shaped by one other feature, the technology itself. Disparate levels of participation and the gate keeping technologies employed by each site operator may both skew crowd wisdom.<sup>240</sup> The nature of the technology used to validate the unique comments or consumer ratings will set the thresholds that determine whether they will participate and affect the extent to which some individuals cheat.<sup>241</sup> As such, the interface and code serve as the stage upon which the cast of Activist, Maven, Connector and Salesman ply their craft. The choices in the technology will play another key role.

For ongoing success of social media, as with wikis, the site must take barriers to entry and user manipulation into account. The project needs to have a sufficient mix of Activists, Mavens, Connectors and Salesmen to make the site successful. Participation by Mavens will improve the overall quality of the information, and their role is critical to ensure the content is “relevant, accurate, and impartial.”<sup>242</sup> Attribution for the Activists or endorsement by the Mavens will help guarantee confidence in the quality of the content, serving as a surrogate accreditation for the

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<sup>236</sup> See GLADWELL, *supra* note 232, at 69–70.

<sup>237</sup> *Id.*

<sup>238</sup> TANCER, *supra* note 234, at 124–125.

<sup>239</sup> *Id.* at 124 (citing Jakob Nielson at *Alertbox*).

<sup>240</sup> Vassilis Kostakos, *Is the Crowd’s Wisdom Biased? A Quantitative Assessment of Three Online Communities*, Adjunct proceedings of IEEE SocialComm, International Symposium on Social Intelligence and Networking (SIN09), August 29–31, 2009, Vancouver, Canada, available at <http://dme.uma.pt/vk/files/voting.pdf> (reviewing IMDb, Amazon and BookCrossings as sample sites, the study found considerable bias. “This paper set out to answer whether the crowd’s wisdom is biased. The answer is yes. . . . It showed considerable bias in users’ voting behavior, and in addition has framed this bias in terms of the voting mechanisms on each website.”).

<sup>241</sup> *Id.*

<sup>242</sup> Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-generated Information Flows*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 741, 754 (2008) (describing the “accreditation” of a social network).

information.<sup>243</sup> Connectors will build the network, and Salesmen will expand the base.

The importance of this information highlights the steps necessary to assure quality discourse in social networking sites and the media more generally. At the same time, a second implication can be drawn regarding the ability of authors to manipulate public discourse. When Activists and Mavens act in concert, they validate information, and if they so choose, they can readily create misinformation.<sup>244</sup> Encouraging attribution will not eliminate this concern, but it provides a minimally intrusive method of identifying sources of information and discouraging false or misleading information from being shared without consequence.

Taken together, the influence of Activists and Mavens may hearken back to the collaborative public advocacy of *The Federalist Papers* as a new form of attributed or pseudonymous citizen journalism.<sup>245</sup> Journalism today faces a multitude of threats.<sup>246</sup> In addition to the loss of consumer confidence, there has been a significant loss of revenue as its advertising-based revenue has dropped or moved to the Internet.<sup>247</sup> “U.S. newspaper circulation dropped 10 percent from April through September [2009], compared to the same period last year.”<sup>248</sup> “Newspapers are also in the throes of long-term, structural changes as readers and advertisers move to the Internet.”<sup>249</sup> In addition, the same technologies that free anyone to participate in online media also provide new tools for censorship or governmental intrusion into newsgathering.<sup>250</sup>

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<sup>243</sup> *Id.*

<sup>244</sup> Exemplary of this are the so-called “death panels” that were falsely supposed to be in the federal health care overhaul legislation. See Angie Drobnic Holan, *Lie of the Year, Death Panels: What Started Out as a Facebook Post Became Part of the National Debate on Health Care Reform*, ST. PETERSBURG TIMES, Dec. 20, 2009 at A1.

<sup>245</sup> See Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, supra note 104 and accompanying text.

<sup>246</sup> See Suzanne M. Kirchhoff, *The U.S. Newspaper Industry in Transition*, CONGRESSIONAL RESEARCH SERVICE, July 8, 2009 at 4–9.

<sup>247</sup> See, e.g., Mathew Flamm, *Daily News Sees Quite a Photo Op; Zuckerman’s Colorful Vision Faces Long Odds in a Newspaper Slump*, CRAIN’S NEW YORK BUS., Dec. 14, 2009 at 1; Holly Sanders Ware, *NY Times Sees Ad Revenue Bouncing Off Bottom*, NY POST, Dec. 9, 2009 at 40.

<sup>248</sup> Kathleen Parker, *Trying to Save the News*, THE VIRGINIAN-PILOT, Nov. 3, 2009 at B11 (“the decline was attributed to the usual—advertising and readership lost to the Web.”).

<sup>249</sup> Kirchhoff, supra note 246, at 5.

<sup>250</sup> See Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 381 (2009) (“Technological censorship by countries worldwide means that how the Net appears depends upon where you access it.”); Gillian Wong, *China Denies Role in Internet Attacks; Spokesman Goes on Offensive*, THE BOSTON GLOBE, Jan. 26, 2010 at B9 (“U.S. Secretary of State Hillary Rodham Clinton has criticized the censorship of cyberspace, drawing a strong counterattack from Beijing. The Foreign Ministry on Friday said her remarks damaged bilateral relations, while a Chinese state newspaper said Washington was imposing ‘information imperialism’ on China.”). See generally, Open Net Initiative, <http://opennet.net/about-filtering> (last visited Feb. 24, 2010).

The number of states that limit access to Internet content has risen rapidly in recent years. Drawing on arguments that are often powerful and

Columbia University President Lee Bollinger recently described the challenge for journalism in the Internet Age as “threefold: overcoming censorship, protecting access for the media and the newsgathering process, and building the capacity of the media to provide us with the professional journalism we need to build a healthy global society.”<sup>251</sup> Focusing on the capacity building aspect of President Bollinger’s statement, collaboratively gathered and edited news reporting is one among many potential new modalities for journalism.<sup>252</sup> More specifically, the problem is not just the variety of news sources, which is growing, but the scale of investigative journalism, which is in decline.<sup>253</sup>

Arguably some examples of new media journalism are already significant. New media sources such as The Huffington Post<sup>254</sup> and Motley Fool<sup>255</sup> tap the social power of the Internet to aggregate and originate content in a format similar to community-based newspapers.<sup>256</sup> The British newspaper, The Guardian, has integrated crowdsourcing for the purpose of data analysis. The paper invited its readers to read and analyze 458,832 pages of documents related to a financial misuse scandal in the British Parliament, leveraging collaborative efforts for the investigation,

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compelling such as “securing intellectual property rights,” “protecting national security,” “preserving cultural norms and religious values,” and “shielding children from pornography and exploitation,” many states are implementing extensive filtering practices to curb the perceived lawlessness of the medium.

<sup>251</sup> Lee Bollinger, *A Free Press for a Global Society*, CHRON. OF HIGHER EDUC., Feb. 26, 2010, at B6.

<sup>252</sup> This is not to suggest that community reporting will or should replace other forms of journalism. Many other changes may improve the outlook for journalism including subscriber news websites, expanded nonprofit journalistic enterprises, partnerships with digital book readers and computer tablet manufacturers, better integration and revenue sharing with online media and a more general economic rebound.

<sup>253</sup> See generally, Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515 (2007). In addition, as reported by propublica.org, for-profit investigative journalism is seriously in decline. <http://www.propublica.org/about/> (last visited Feb. 24, 2010).

According to many news organizations have increasingly come to see investigative journalism as a luxury that can be put aside in tough economic times. Thus, a 2005 survey by Arizona State University of the 100 largest U.S. daily newspapers showed that 37% had no full-time investigative reporters, a majority had two or fewer such reporters, and only 10% had four or more.

<sup>254</sup> <http://www.huffingtonpost.com/>.

<sup>255</sup> <http://www.fool.com>.

<sup>256</sup> See Wheeler, *supra* note 48, at 136 (“The distinction between ‘institutional’ and ‘noninstitutional’ media is a more meaningful one than that between ‘old’ and ‘new’ media. . . .” because repurposing content provides “the same story in fairly static form.”).

if not the written output.<sup>257</sup> AOL has launched Seed.com to create content of interest to the public, or more accurately of interest to advertisers hoping to reach targeted audiences.<sup>258</sup> News sources such as NewWest.net promote “participatory journalism”<sup>259</sup> as does Patch,<sup>260</sup> Brewed Fresh Daily,<sup>261</sup> and the Miami Independent Media Center,<sup>262</sup> among others.<sup>263</sup>

Despite these examples, however, the trend is at its earliest stages.<sup>264</sup> “Citizen news sites remain relatively rare. Among those that do exist, the range of topics is narrower and the sourcing somewhat thinner than on legacy news sites, and the content is generally not updated, even on a daily basis.”<sup>265</sup> As these endeavors continue to mature, issues of attribution may be central to their development. Volunteer journalists will benefit from attribution just as professional researchers do—through recognition for the quality of their efforts and through the growth of a fan base which relies on that quality. Pseudonymity may be even more important to the hyperlocal journalists who need anonymity to conduct unfettered investigations while wishing to have name consistency as part of their public credibility.

The value of a byline has long been recognized. As a New York court explained in 1910, “[t]he position of an author is somewhat akin to that of an actor. The fact that he is permitted to have his work published under his name, or to perform before the public, necessarily affects his reputation and standing and thus impairs or increases his future earning capacity.”<sup>266</sup> The trend in traditional media has been to increase the presence of bylines “as part of a deliberate effort to deter fraud and to focus blame when problems happen anyway.”<sup>267</sup>

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<sup>257</sup> *Investigate Your MP's Expenses*, Guardian.co.uk, <http://mps-expenses.guardian.co.uk/> (last visited Feb. 24, 2010). See also, Cinque Hicks, *EASY: The Guardian's Crowdsourced Game*, Oct. 21, 2009 at <http://jag.lcc.gatech.edu/blog/2009/10/easy-the-guardians-crowdsourced-game.html> (last visited Feb. 24, 2010).

<sup>258</sup> Emily Steel, *AOL to Produce New, Videos by the Numbers*, W. ST. J., Nov. 30, 2009 at B8 (available at <http://online.wsj.com/article/SB10001424052748703300504574565673001918320.html>).

<sup>259</sup> <http://www.newwest.net/plain/entry/13/>.

<sup>260</sup> <http://www.patch.com/>.

<sup>261</sup> <http://www.brewedfreshdaily.com>.

<sup>262</sup> <http://miami.indymedia.org>.

<sup>263</sup> See Wheeler, *supra* note 48, at 137–38 (citing Timothy E. Cook, *Governing with the News* 64 (1998)) (focuses on attributes such as editorial hierarchy, narrative structure, and gatekeeping function of publisher as distinguishing factors between traditional media and the community-based journalism).

<sup>264</sup> *The State of the News Media 2009*, PEW PROJECT FOR EXCELLENCE IN JOURNALISM [http://www.stateofthemediamedia.org/2009/narrative\\_special\\_citizenbasedmedia.php?cat=0&media=12](http://www.stateofthemediamedia.org/2009/narrative_special_citizenbasedmedia.php?cat=0&media=12) (last visited Feb. 24, 2010).

<sup>265</sup> *Id.*

<sup>266</sup> *Clemens v. Press Publ'g Co.*, 122 N.Y.S. 206, 207 (N.Y. App. Term 1910) (“While an author may write to earn his living and may sell his literary productions, yet the purchaser, in the absence of a contract which permits him so to do, cannot make as free a use of them as he could of the pork which he purchased.”).

<sup>267</sup> Fisk, *supra* note 85, at 63.

The ability to deflect blame for misinformation emphasizes another role of attribution that is particularly important for community newspapers—the individual responsibility of the writer. Generally speaking, other common attributes of community news are the modest resources and lack of professional hierarchy. A common consequence of these conditions is meager independent source checking, fact checking and editorial review of each writer’s contribution. A writer may be pleased to have fewer editors looking over her shoulder, but she is also more personally responsible for the work she publishes. Attribution reinforces this responsibility. In the absence of a byline, only the site would bear responsibility for the content. Where the content is published under a byline, the author shares—if not owns—the responsibility for the content.

Whether to promote authors or to shield themselves from responsibility,<sup>268</sup> the norms in the printed press have moved toward providing attribution. The same is true online. Sites such as Huffington Post demonstrate the efficacy of bylined articles, adding significant original content to the material it aggregates from other news sources. New media has followed traditional media’s lead in valuing the individual author as the source of content. To the extent citizen journalism grows in the sphere of investigative reporting, the same values of journalistic integrity that drive professional journalists to seek bylines will likely shape the attributive properties of these new sources of journalism.

## XI. CONCLUSION

Attribution and integrity are essential elements of discourse. The author has not died. Far from it—through social media, blogs and other forms of user generated content, a new authorial, curatorial audience has manifested itself as the voice of this generation.

The public has embraced the quality of Wikipedia and the potential for high quality, relevant and regularly updated user generated content, but it has gravitated to those media that embrace rather than avoid author identification. Even if pseudonymous, author identification serves an important branding function for both the author and the reader.

To embrace the best attributes of collaborative authorship, the metadata gathered by wiki software should be utilized to highlight the identity of site collaborators and to serve as an evaluative mechanism that allows the participants to use their valuable time and effort in pursuit of tenure, promotion, funding and other institutionally significant rewards. Through measures of an author’s quantitative and qualitative contribution to a wiki, each participant can move beyond volunteer status, bringing a critically important part of public knowledge into a more mature, professional environment.

Wikis serve an important role in the growth and development of public knowledge. For some wiki communities, the present norms best achieve their purpose. For many more, however, the wikiquette of anonymity may have stifled the

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<sup>268</sup> *Id.* at 92.

investment of time and effort by those who could contribute the most. Creating tools to align institutional incentives and existing rewards may serve to renew the participation of scholars, researchers and academics in these more public fields of inquiry and discourse.

The recognition of the importance of attribution for the new wave of public discourse need not detract from the alternatives. The choices are infinitely expandable. But an authorship-centric model of collaborative content should take its place alongside existing wikis and traditional publication models to fill the need for better creation and dissemination of public knowledge—the central enterprise of the academic community—and the font of social capital.

And of course, readers are encouraged to add to this post.