AUTHORSHIP NONESENSE

by JESSICA LITMAN[1]

Copyright law's primary device for promoting progress is to bestow rights on the authors of works. Rights vest automatically and last for a very long time. Authors' choices to retain, license, or transfer those rights fuel opportunities to communicate the works to their audiences. The copyright system's mechanisms for determining who authored works (and therefore automatically obtained copyright rights) should be both accurate and reliable, since misidentifications will undermine the law's working as intended.

This article examines authors' creation of works and copyright law's handling of authorship disputes. Many works result from creative collaboration. Although the copyright statute incorporates mechanisms for allocating rights among multiple contributors, judges appear to be uncomfortable with severally-authored works. Accordingly, courts have adopted rules that minimize, reallocate, or erase the creative contributions of inconvenient collaborators. These well-settled rules are nonsense, neither well-reasoned nor probative. They complicate and confuse our efforts to identify the author and owner of copyright in a work, and exacerbate power disparities in unbalanced creative ecosystems.

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INTRODUCTION

Copyright law's principal device for promoting progress is to bestow rights on the authors of works. Rights vest automatically and last for an extraordinarily long time.[2] Authors' choices to retain, license, or transfer their rights fuel opportunities to convey the works to their audiences. Title 17 of the United States code provides automatic copyright protection to works of authorship in eight distinct subject matter categories.[3] The copyright statute contains hundreds of pages of detailed subject-matter-specific provisions,[4] but tries to take a one-size-fits-all approach to overarching general questions. Copyright protects "original works of authorship."[5] The standard for originality and the rules about what counts as authorship and who may be deemed a work's author apply across subject matter categories.[6] Neither "original" nor "author" is defined within the four corners of the statute.[7] The House Report accompanying the 1976 Copyright Act claimed that the omission was intentional.[8] The Report suggested

[2] *See* 17 USC §§ 201, 304.
[3] 17 USC § 102(a).
[4] E.g., 17 U.S.C. § 114 ("Scope of exclusive rights in sound recordings"); 17 U.S.C. § 120 (Scope of exclusive rights in architectural works).
[5] 17 U.S.C. § 102(a).
[6] *See, e.g.,* U.S. Copyright Office, Compendium of U.S. Copyright Office Practices §§ 306; 308 (3d ed. 2021)["Compendium (3d)"]. There is a subject-matter specific list of works that may be deemed works made for hire even though the creators of the works were not employees who prepared the works within the scope of their employment. 17 U.S.C. § 101.
[7] The Copyright Office defines an author as "either (i) the person or persons who created the work, or (ii) the employer or other person for whom the work was prepared, if the work was created during the course of employment or commissioned as a work made for hire." Compendium (3d), § 405.
[8] H. R. Rep. No. 1476, 94th Cong. 51 (1976) ("The phrase "original works of authorship," which is purposely left undefined, is intended to incorporate without

that questions of what counts as "original," and what sort of contribution suffices to make one an "author," should be decided with reference to judge-made law.

The question how the law constrains who (or what) may be deemed to be the legal author of a copyright-protected work has attracted tons of attention recently in connection with works created by computer programs.[9] Individuals and businesses working with generative artificial intelligence models have sought to register copyrights in the output of those programs.[10] The U.S. Copyright Office insists that only humans can create copyrightable works of authorship.[11] The Court of Appeals for the D.C. Circuit recently upheld that interpretation.[12] Some copyright scholars agree;[13] others maintain that withholding copyright protection from works created by computer programs will sink the copyright system.[14]

As a matter of copyright policy, the Copyright Office position seems wise. If copyright functions as an incentive to inspire authors to create and distribute new works,[15] computer programs do not need and cannot respond to the

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change the standard of originality established by the courts under the present copyright statute."). *See also* S. Rep. No. 473, 94th Cong. 50 (1975) (same).

[9] *See, e.g.,* Dan Burk, *Thirty Six Views of Copyright Authorship by Jackson Pollock*, 58 Houston L. Rev. (2020); Carys J. Craig, *The AI-Copyright Trap*, 100 Chicago-Kent L. Rev.. 107 (2025); Daniel J. Gervais, *The Machine as Author*, 105 Iowa L. Rev. (2020); Jane C. Ginsburg, *Humanist Copyright*, 6 J. Free Speech L. (2025).

[10] *See* Thaler v Perlmutter, 687 F. Supp. 3d 140 (DDC 2023), aff'd 130 F.4th 1039 (D.C. Cir. 2025); Allen v. Perlmutter, No. 24-cv-2665 (filed Sept. 26, 2024).

[11] *See, e.g., Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, 88 Fed. Reg. 16,190 (Mar. 16, 2023); United States Copyright Office, Copyright and Artificial Intelligence Part 2: Copyrightability 7-11 (2025), online at https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf.

[12] Thaler v Perlmutter, 130 F.4th 1039 (D.C. Cir. 2025).

[13] *See, e.g.,* Carys Craig, *The AI-Copyright Challenge: Tech-Neutrality, Authorship, and the Public Interest in* Research Handbook on Intellectual Property and Artificial Intelligence 134 (Ryan Abbott (ed.) 2022); Daniel Gervais, *The Machine as Author*, 105 Iowa L. Rev. 2053 (2019); *Artificial Intelligence and Intellectual Property: Part III – IP Protection for AI-Assisted Inventions and Creative Works, Hearing Before the Subcomm. on Courts of the House Comm. on the Judiciary* (Apr. 10, 2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/Garcia%20Testimony.pdf (statement of Kristelia García, Georgetown Law School).

[14] *See, e.g.,* Edward Lee, *Prompting Progress: Authorship in the Age of AI*, 76 Fla. L. Rev. 1445 (2024); Kalin Hristov, *Artificial Intelligence and the Copyright Dilemma*, 57 IDEA 431 (2017).

[15] *But see* Jessica Silbey, The Eureka Myth 14-16 (2015) ("no one really believes the incentive story in its pure form"); Mark A. Lemley, *Faith Based Intellectual*

incentive. Meanwhile, if the most salient threat posed by generative artificial intelligence is that computer models will become cheap substitutes for human creators and displace creative labor, declining to extend copyright protection to the output of computer programs will reduce the temptation to use computer programs to replace writers, composers, and illustrators.[16] It is therefore disquieting that the authority that the Copyright Office has been able to marshal in support of its interpretation is both thin and equivocal.[17]

The AI-as-author-or-not conundrum won't, of course, be resolved by close analysis of statutory wording or extant precedents. Congress is taking an interest,[18] and the Supreme Court has made it clear that decisions like this are Congress's to make.[19] Congress is almost never quick, so we have some time while it lines up its ducks to think more generally about how U.S. copyright law treats authors.

This article examines human authors' creation of works and copyright law's handling of authorship disputes. Although the copyright statute appears to envision an author who works alone, many authors in the real world generate new works with the help of other contributors. The statute has devices that allow creative collaborators to divide or share rights. If collaborators don't agree, the statute instructs courts how they should allocate rights among contributors after the fact. Courts, however, have shown a marked preference for finding works to be solely-authored. They have indulged that preference by crafting rules that disregard or reassign the contributions of creators whose claims are inconvenient. Those rules are surprisingly, sometimes shockingly, unconcerned with factual authorship. They also make little sense on their own terms.

Part I of this article describes the copyright statute's express treatment of authors and authorship, with particular attention to collaborative efforts. In part II, I review several genres of authorship to explore genre-specific norms about who is the author of works created in that genre, and note pervasive inconsistencies between those norms and the language of the statute. In part III,

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Property, 62 U.C.L.A. L. Rev. 1328 (2015); Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 Hastings L.J. (2007).

[16] Cory Doctorow, *Penguin Random House, Ai, and Writers' Rights,* Pluralistic (Oct. 19, 2024), https://pluralistic.net/2024/10/19/gander-sauce/#just-because-youre-on-their-side-it-doesnt-mean-theyre-on-your-side.

[17] *See* Brief for Appellee at 20-32, Thaler v. Perlmutter, No. 23-5233 (D.C. Cir. March 6, 2024); United States Copyright Office, Copyright and Artificial Intelligence Part 2: Copyrightability 7-10 (2025), online at https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf.

[18] *See, e.g., Artificial Intelligence and Intellectual Property: Part III – IP Protection for AI-Assisted Inventions and Creative Works, Hearing Before the Subcomm. on Courts of the House Judiciary Comm.*, 118th Cong. (Apr. 10, 2024); *The U.S. Copyright Office: Customers, Communities, and Modernization Efforts, Hearing Before the Committee on House Administration*, 118th Cong. (June 26, 2024).

[19] *See, e.g.,* Golan v. Holder, 565 U.S. 302 (2012).

I examine how courts decide the authorship disputes that come before them. I unearth and critique some well-settled but pernicious rules allowing courts to short-circuit responsible analysis. Part IV then suggests some modest repairs that courts could adopt to solve some of the problems earlier sections have identified.

I. AUTHORSHIP IN THE STATUTE

We have a robust scholarly literature on the question of how much original authorship is necessary to support copyright protection.[20] Courts and scholars agree that copyright will protect a work so long as it embodies a modest amount of original creative expression.[21] In *Community for Creative Non-Violence v. Reid*, a 1989 case construing the statutory definition of "works made for hire," the Supreme Court explained that "As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection."[22]

Copyright in any eligible work vests automatically in the work's author or authors as soon as the work is fixed in tangible form.[23] Once copyright vests, the author is free to transfer ownership of the copyright or any part of it, or to retain ownership and license others to make use of it. No transfer of copyright ownership is effective, however, unless the author signs a written assignment.[24] In general, 35 years after a transfer or license, the author will have an opportunity to rescind the grant by following a complicated statutory procedure to terminate it.[25]

In many genres of creative expression, making a work of authorship is an unavoidably collaborative activity. As often as not, a work of authorship will incorporate creative expression from more than one individual. Theatre, music, and film, for example, commonly combine the expressive efforts of multiple creators.[26] Although the language of the statute appears to envision a sole

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[20] *See, e.g.,* Joe Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451 (2009); Christopher Buccafusco, A *Theory of Copyright Authorship*, 102 VA. L. REV. (2016); Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575 (2005); Joseph P. Fishman, *Originality's Other Path*, 109 CALIF. L. REV. 861 (2021).

[21] *See, e.g.,* Michael A. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 Amer. AMER. U. L. REV. 845, (2006)("[t]he threshold for originality is set as low as the Constitution allows").

[22] Community for Creative Non-Violence v. Reid, 490 US 730, 737 (1989). *See also* Burrow-Giles Lithographic Co. v. Sarony, 111 US 53, 60-61 (1884).

[23] 17 USC §§ 102, 201.

[24] 17 USC § 201(d).

[25] 17 USC § 203. Earlier U.S. copyright statutes incorporated different mechanisms to enable authors to recapture copyright rights that they had conveyed to others. *See infra* note 211 and accompanying text.

[26] *See infra* notes 108-122, 136-137, 155-157 and accompanying text.

author's creating works of authorship without assistance or cooperation,[27] it includes provisions addressing two special cases of works created by more than a single individual: joint works and works made for hire. Both exceptions originated in judge-made law and were later codified in the statute.

A. Joint Works

Section 101 defines a "joint work" as "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."[28] It provides that "[t]he authors of a joint work are co-owners of copyright in the work." The ownership of the copyright in a joint work vests automatically in the joint authors as soon as the work is fixed. [29]

Before 1976, the US copyright statute made no mention of joint authorship.[30] Early cases involved musical or dramatic works created by more than one person.[31] Most courts found joint authorship when two or more creators had collaborated on a project with the intention to generate a unitary work containing expression contributed by both or all of them.[32] Joint authors each owned an undivided interest in the copyright to the entire work. Each of them was entitled to exploit or license the copyright, subject to a duty to account to the other.[33] If one author registered or renewed a copyright in his own, sole name, he nonetheless was deemed to have secured the registration on behalf of both joint authors, and held legal title to the copyright in trust for his coauthor, who was entitled to an accounting.[34] A few outlier courts had found joint authorship when the authors had not worked together but a second author had

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[27] *See* Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319, 342-59 (2008); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L. J. . 293, 314-15 (1992).

[28] 17 USC § 101. *See* Jaszi, *supra* note 27, at 315 ("[t]he Copyright Act and case law thus tend to treat 'joint authorship' as a deviant form of individual 'authorship'").

[29] 17 USC § 201(a).

[30] *See* George D. Cary, *Study No. 12: Joint Ownership of Copyights* 89 (August 1958) *in* Copyright Law Revision: Studies Prepared for the Subcomm. On Patents of the Senate Comm. on the Judiciary, 86th Cong. 83, 89 (1961); Mary LaFrance, *Joint Authorship and Dramatic Works: A Critical History*, 45 COLUM. J. L. & ARTS 411, 436-39 (2022).

[31] Cary, *supra* note 30, at 89-92. *See, e.g.*, Maurel v. Smith, 220 F. 195 (SDNY 1915), aff'd 271 F. 211 (2d Cir. 1921); G.Ricordi & Co. v. Columbia Gramophone Co., 258 F. 72 (SDNY 1919); Edward B. Marks Music Corp. v. Jerry Vogel Music, 42 F. Supp. 859 (SDNY 1942); Herbert v. Fields, 152 N.Y.S. 487 (Sup. Ct. 1915).

[32] Cary, *supra* note 30, at 90-92; LaFrance, *supra* note 30, at 442.

[33] *See* Cary, *supra* note 30, at 92-99; Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 598-601 (2010).

[34] *E.g.,* Richmond v. Weiner, 353 F.2d 41 (9th Cir. 1965); Edward B. Marks Music Corp. v. Jerry Vogel Music, 42 F. Supp. 859 (SDNY 1942). *See* Cary, *supra* note 30, at 99.

adapted an earlier author's pre-existing work.[35] The definition of "joint work" included in the 1976 Act was intended to disapprove those outlier cases, and limit joint works to works whose authors intended that their contributions would be merged into a single work at the time they created them. The House Report explained:

> Under the definition of section 101, a work is "joint" if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as "inseparable or interdependent parts of a unitary whole." The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either "inseparable" (as the case of a novel or painting) or "interdependent" (as in the case of a motion picture, opera, or the words and music of a song).[36]

Thus, the touchstone of joint authorship under the 1976 Act is the collaborators' intent, at the time of their collaboration, to merge their contributions into a single, unitary work of authorship. Nothing in the statutory definition requires joint authors to have considered how they will allocate credit for authoring the work or money earned from exploiting it.

B. Works Made for Hire

The second statutory exception to the sole authorship model is the work made for hire. Section 101 of the statute defines a "work made for hire" as "a work prepared by an employee within the scope of his or her employment."[37]

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[35] Shapiro, Bernstein & Co, 221 F.2d 569 (2d Cir. 1955), modified on rehearing, 223 F.2d 252 (2d Cir. 1955); Donna v. Dodd, Mead & Co., 374 F. Supp. 429 (SDNY 1974). *See* Cary, *supra* note 30, at 92; Van Houweling, *supra* note 33, at 600-01.

[36] House Report No. 1476, 94th Cong. 120 (1976). Accord, La France, *supra* note 30, at 443.

[37] 17 USC § 101. That's an excerpt. The full definition is more complicated:

> A "work made for hire" is—
> (1) a work prepared by an employee within the scope of his or her employment; or
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties ex- pressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work

Section 201 provides that "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."[38] The copyright in a work made for hire vests automatically in the employer (or if the parties have agreed otherwise in a signed writing, in the employee-creator) as soon as the work is fixed.[39]

In the late 1800s, a handful of courts had held that the copyright in a work created by an employee might have been transferred to that employee's employer despite the absence of a written assignment.[40] The legal fiction that an employer should be deemed the author of its employees' works first appeared in court decisions in 1899.[41] Although the idea that an employer should not only own the copyright but should be deemed the author of its employees' works was controversial, Congress incorporated it into the 1909 Act's definition of author.[42] Courts interpreted the definition to establish a rebuttable presumption of employer ownership derived from the presumed intent of the creator and employer.[43]

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prepared for publication and with the purpose of use in systematic instructional activities. In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment—

(A) shall be considered or otherwise given any legal significance, or

(B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination, by the courts or the Copyright Office.

Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made for Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

[38] 17 U.S.C.§ 201(b).

[39] *Id.*

[40] *See, e.g.,* Collier Engineer Co. v. United Correspondence Schools, 94 F. 152 (C.C.S.D.N.Y. 1899); Little v. Gould, 15 F. Cas. 612 (C.C.N.D.N.Y. 1852).

[41] *E.g.,* Colliery Engineer Co. v. United Correspondence Schools Co., 94 F. 152 (C.C. S.D.N.Y. 1899). *See* Catherine L. Fisk, *Authors at Work: The Origins of the Work-For-Hire Doctrine*, 15 Yale J. L. & Hum. 1, 55-622003); Jessica Litman, *What Notice Did*, 96 B.U. L. Rev. 717, 734 (2016).

[42] Section 26 of the statute provided that "the word 'author' shall include an employer in the case of works made for hire." Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1978)["1909 Act"]. Fisk attributes the decision to codify the rule to three concerns, the most important of which was to facilitate copyright renewals by the copyright proprietor after 28 years. *See* Fisk, *supra* note 41, at 63-66.

[43] *See, e.g.,* May v. Morganelli-Heumann & Assocs., 618 F.2d 1363, 1368 (9th Cir. 1980); Sherr v. Universal Match Corp., 417 F. 2d 497, 500 (2d Cir. 1969); Yardley v. Houghton-Mifflin Co, 108 F.2d 28 (2d Cir. 1939). Despite scant case authority, academic scholars were generally believed to have the benefit of a "teacher exception" to the work made for hire doctrine under the 1909 Act. *See* Hayes v. Sony Corp. of America, 847 F.2d

In 1961, the Copyright Office proposed that the new statute should discard the legal fiction of employer authorship.[44] Employers should have the right to secure copyright in such a work but should not be designated the works' authors. The Office also recommended that works made for hire should be defined in the new statute as "works created by an employee within the regular scope of his employment."[45] Lobbyists for publishers and film studios objected. They expressed concern that if they were not the legal authors as well as the owners of the copyrights in their works, they might face a disadvantage under foreign law.[46] They also argued that commissioned works should be works made for hire, even though their creators were not employees. They insisted that they commonly published works created by multiple contributors, and it made no sense to hire all of those contributors under long term employment contracts.[47] In 1965, lobbyists representing authors, composers, publishers and film studios negotiated a new definition of works made for hire, which provided that all works created by employees within the course of their employment would be works made for hire, but the employer and employee could agree in writing that the employee would own the copyright. A subset of commissioned works would also be eligible to be works made for hire, if they were contributions to a collective work, part of a motion picture, a translation or a supplementary work, but only if both the creator and the commissioner agreed in writing that the work would be a work made for hire.[48] Over the next ten years, the list of potential commissioned works made for hire expanded to include audiovisual works,

412, 417 (7th Cir. 1988); Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI L. REV.590, 597-98 (1987) Todd Simon, *Faculty Writings: Are They "Works for Hire" Under the 1976 Copyright Act*?, 9 J.C.U.L. 485, 495-99 (1982).

[44] *See* Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the US Copyright Law, 87th Cong. 87-88 (1961).

[45] *Id.*

[46] *See* Copyright Law Revision Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Cong. 154-55(1962) (remarks of Joseph Dubin, Universal Pictures); *Id.*at 153, 155-56, 159 (remarks of Adolph Schimel, Universal Pictures).

[47] *See* Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussion and Comments on the Draft 259 (1964) (remarks of Horace Manges, American Book Publishers Council); *id.* at 261 (remarks of Bella Linden, American Textbook Publishers Institute); *id.* at 264 (remarks of Theodore Jackson, Gilbert & Gilbert); *Id.* at 272 (remarks of Saul Rittenberg, MGM). The laws of most foreign nations vested copyright as an initial matter in a work's author. *See, e.g, id.* at 263 (remarks of John Schulman, Schulman & Bressler).

[48] *See* Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the US Copyright Law: 1965 Revision Bill 66-67 (1965) [Hereinafter "CLR part 6"].

instructional texts, tests, and atlases, but the definition of work made for hire otherwise stayed the same.[49]

Thus, the 1976 Act replaced the 1909 Act's rebuttable presumption based on intent with a conclusive presumption backed up by a statute of frauds.[50] Employee-created works made for hire required a conventional employment relationship. Commissioned works made for hire were limited to specific categories of works, and required a signed work-made-for-hire agreement.[51] Under the new test, employers and employees who wished to depart from the statutory work made for hire default rules needed to execute a written agreement.

C. Summary: Collaboration under the copyright statute

The current copyright statute is for the most part built on a premise of solo authorship. In the default case, when a work is created by more than one author, each of them will own the copyright to the copyrightable expression that he or she contributed. Joint works and works made for hire represent the current statute's two concessions to collaborative creation.[52] When multiple authors collaborate with the intention that their contributions will be merged in a single unitary work, the statute tells us that the work is a joint work and the authors are joint authors.[53] If a work is joint, the authors jointly own the copyright to the entire work and each of them may independently grant licenses to exploit it.[54] Co-owners of a copyright may not sue one another for infringement.[55]

If a work is created by employees within the course of employment, the work is a work made for hire.[56] In order to protect creators from overreaching claims by putative employers, the statute limits works made for hire to works created by employees and works within enumerated categories that are created by independent contractors and subject to a signed work-made-for-hire agreement.[57] If a work is a work made for hire, the employer is considered to be the author and owns the copyright unless the parties have signed a written agreement vesting copyright in the creator.[58]

There may be significant overlap, though, in the facts tending to prove that a work is either a jointly authored work or a work made for hire.[59] Although the

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[49] Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 867-68 (1987).
[50] *Id.* at 889-91.
[51] Community for Creative Non-Violence v. Reid, 490 US 730, 743 (1989).
[52] 17 U.S.C. § 201.
[53] 17 U.S.C. § 101.
[54] 17 U.S.C. § 201(a); Oddo v. Ries, 743 F.2d 630, 632 (9th Cir. 1984).
[55] *See* Oddo v. Ries, 743 F.2d at 632; Yellowcake v. Morena Music, 522 F. Supp. 3d 747, 764 (E.D. Cal. 2021).
[56] 17 U.S.C. § 101.
[57] 17 U.S.C. § 101.
[58] 17 U.S.C. § 201(b).
[59] In *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991), for example, discussed extensively *infra* text accompanying notes 233-45, playwright Alice Childress wrote a script for actor

statute treats the two exceptions as disjoint, which category a work belongs to is often primarily a matter of characterization.

Finally, although the statute incorporates no mechanism to reassign authorship once the copyright has vested, copyright ownership is readily transferable by means of a signed writing, and copyright permissions may be granted without any documents at all. Indeed, the law encourages copyright owners to chunk up their copyrights and convey them in parts to different recipients.[60] That means that even when a work is solely authored, ownership of the copyright rights may be spread across multiple rights holders.

II. AUTHORSHIP IN THE WORLD

Different genres of creative authorship have evolved genre-specific norms about who is the author of the works that they generate. Let's explore several examples.

A. Scholarship

The author of this article, at least as far as copyright law is concerned, is the Regents of the University of Michigan.[61] That's because I am an employee of the Regents (we know this from the W-2 form they issue at the end of every year) and writing scholarly papers like this one is unquestionably part of my job.[62] The law permits the Regents to convey the ownership of the copyright in

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Clarice Taylor to perform at Taylor's request. Taylor paid Childress $2500 and offered her an additional $2500 as an advance against royalties. She made significant contributions to the conception and structure of the script. In the ensuing infringement litigation, Childress argued both that the script was work made for hire, created at her instance and expense, and, in the alternative, that she had been a joint author.

[60] *See* 17 USC § 201(d).

[61] 17 USC § 201(b). See 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5.71 (2025). *But see* Thaler v. Perlmutter, 2025 U.S. App. LEXIS at *21 (drawing distinction between language specifying that employers "are the author" and language providing that employers "are considered the author").

[62] *See, e.g.*, UNIVERSITY OF MICHIGAN FACULTY HANDBOOK 35-36, 51-53 (2024), https://facultyhandbook.provost.umich.edu/. *But see* American Association of University Professors, Statement on Copyright (1999) at https://www.aaup.org/report/statement-copyright.

this paper to me,[63] and they have done so,[64] but, once copyright vests automatically in the author of a work, the law includes no device for the author to convey authorship to someone else.[65] So, I own the copyright in this article,

[63] *See* 17 USC § 201(d). For different approaches, compare Yale University Copyright Policy (March 13, 2014), https://ventures.yale.edu/yale-university-copyright-policy ("University disclaims ownership") with University of Illinois Urbana-Champaign Office of Technology Management, University Intellectual Property Guidelines (Sept. 15, 2023), https://otm.illinois.edu/disclose-protect/ownership (asserting that the University owns all IP rights in works created by employees but that traditional academic work is treated differently, and that "[c]opyrights in traditional academic works made by faculty and students independently at their own initiative and for traditional academic purposes are owned by the authors"); Brown University Copyright Ownership and Use Policy (Oct. 16, 2020), https://policy.brown.edu/policy/copyright-ownership-and-use-policy ("Ownership of copyright in materials created by an employee, including any student hired as an employee, in performing the employee's duties in the course of employment shall belong to the University as a Work Made for Hire in accordance with the United States Copyright Act subject to the 'academic tradition' exception"); University of Pittsburgh Intellectual Property Policy RI-10 (Apr. 5, 2021), https://policy.brown.edu/policy/copyright-ownership-and-use-policy ("Ownership of copyrightable Scholarly Work, including Software, created by a University Member or University Members in the course of research, scholarship, teaching, and/or other academic and educational responsibilities shall reside with the Creator(s)"). Some court decisions have called into question the effectiveness of these policies to vest copyright in faculty. *See infra* note 64.

[64] *See* University of Michigan Standard Practice Guide § 601.28 (Sept. 21, 2011), https://spg.umich.edu/sites/default/files/601x28.pdf. We hope. Some courts have held that under the express language of section 201, an employer-author cannot transfer ownership of the copyright in a work made for hire to the employee-creator unless the employer and employee agree to the transfer in a written agreement signed by both of them, and that university copyright policies failed to satisfy that requirement. *See* Rahn v. Board of Trustees, 2014 U.S. Dist. LEXIS 186118 (N.D. Ill. 2014) ("Despite the plain language of the policy, it is not a written instrument signed by the parties evidencing an express agreement (nobody has signed it), and thus it is patently inadequate to fulfill the requirements contemplated by Congress to overcome the presumption of the work for hire doctrine codified at Section 201."); Molinelli-Freytes v. University of Puerto Rico, 1012 U.S. Dist. Lexis 143262 (D. P.R. 2012); Foraste v Brown University, 248 F. Supp. 2d 71 (D. R.I. 2003); Manning v Board of Trustees, 109 F. Supp. 2d 976 (C.D. Ill. 2000). Although the courts' reasoning suggests that a university copyright policy may be ineffective in causing the copyright in works made for hire to vest in the employee-creator as an initial matter, SPG § 601.28 is structured as a transfer of ownership of the copyright after it has vested in the university, and should satisfy the requirements for post-vesting transfer under 17 USC § 204.

[65] Accord 2 William F. Patry, Patry on Copyright § 5.47 (2025) ("employers and employees...may not change the authorship status of the works since that determination is made as a matter of law").

but it was authored by the Regents, and we are powerless to change that once the manuscript is fixed and the copyright has vested.[66]

That's not, of course, how anyone in academia thinks about scholarly authorship.[67] The principle that academic faculty are the authors of the scholarship published under their names is fundamental to academic hiring and promotion. Procedures and criteria for assessment of prospective hires and tenure candidates rely pervasively on the premise that the individual faculty member under consideration is deemed responsible for the scholarship published under her name, both in the sense of having generated it and in the sense of vouching for it. Contracts for publication of scholarly works refer to the individual as the "author." University policies on authorship credit uniformly discuss the faculty members who produce scholarly research as its "authors," without any mention of university copyright ownership policy.[68]

Nor are the standards uniform across academic disciplines.[69] Whether a research assistant or a faculty dissertation supervisor receives credit as an author for a given article will depend on the norms of the discipline and the inclination

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[66] *See, e.g.,* Rochelle Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 598 (1987); *But see* Seshradi v. Kasraian, 130 F.3d 798 (7th Cir. 1997) ("This is merely a default rule; by contract the sole creator of a work can transfer 'authorship' in whole or part to another"). In two early 7th Circuit cases decided before *CCNV v. Reid*, Judges Posner and Easterbrook, both of whom were law professors before they were federal judges, suggested in dicta that an exception to the work made for hire rule for works written by teachers recognized under the 1909 Copyright Act might have survived the enactment of the 1976 Act, despite statutory language to the contrary. *See* Hayes v. Sony Corp. of Am., 847 F.2d 412, 416 (7th Cir. 1988) (Posner, J.); Weinstein v. University of Illinois, 811 F.2d 1091, 1093-94 (7th Cir. 1987) (Easterbrook, J.). Later cases have not agreed. *See, e.g.*, Foraste v Brown University, 248 F. Supp. 2d 71 (D. R.I. 2003); Manning v Board of Trustees, 109 F. Supp. 2d 976 (C.D. Ill. 2000).

[67] *See, e.g.*, University of Michigan Guidelines for Authorship Avoiding Authorship Disputes (March 13, 2019), at https://research-compliance.umich.edu/sites/default/files/resource-download/umor_authorship_guidelines.pdf. *See generally* CORYNNE MCSHERRY, WHO OWNS ACADEMIC WORK? BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY (2001).

[68] *See, e.g.,* University of Michigan Authorship Guidelines, *supra* note 67; Yale University Office of the Provost, Guidance on Authorship in Scholarly or Scientific Publications, at https://provost.yale.edu/policies/academic-integrity/guidance-authorship-scholarly-or-scientific-publications (visited August 22, 2024).

[69] *See, e.g.*, David Johann & Sabrina Jasmin Mayer, *The Perception of Scientific Authorship Across Domains*, 57 MINERVA 175, 191 (2019).

of the faculty member involved with the project.[70] In many of the sciences, academics maintain a robust joint authorship expectation under which one can earn co-authorship credit for making a valuable but uncopyrightable contribution.[71] University policies caution faculty to limit authorship credit to individuals who contribute significantly to conceiving, researching and drafting the work, but otherwise advise them to follow the customs of their particular disciplines.[72]

The copyright statute acknowledges that "editorial revisions, annotations, elaborations, or other modifications" may be copyrightable,[73] but neither peer reviewers, who may in some disciplines make important substantive contributions, nor the editorial staff of scholarly publishers, who may in some disciplines make extensive stylistic contributions, are deemed to be authors or co-authors of scholarly works.[74]

Academic scholars and the research institutions that employ them would prefer that their work be read as widely as possible so that they might earn fame and influence.[75] For them, the fact that copyright empowers the copyright owner to restrict dissemination or limit readers is an unfortunate consequence rather than a valued feature of the legal regime. The publication system they have elected to use imposes manufactured scarcity to create the impression of

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[70] *See* Elisabeth Pain, *How to Navigate Authorship of Scientific Manuscripts*, SCIENCE (May 6, 2021), online at https://www.science.org/content/article/how-navigate-authorship-scientific-manuscripts. Both research assistants and faculty dissertation supervisors are typically university employees, so for copyright purposes, both of their contributions would be authored by their university. Students conducting research in pursuit of their degrees, in contrast, are not for those purposes acting as university employees, and, under the copyright statute, they would be deemed the authors of the work they generate. *See, e.g.*, University of Michigan Standard Practice Guide § 601.28 C, *supra* note 64.

[71] *See* Mario Biagioli, *Rights or Rewards? Changing Contexts and Definitions of Scientific Authorship*, 27 J.C.U.L.. 83 (2000); Daniela Simone, *Recalibrating the Joint Authorship Test: Insights from Scientific Collaborations*, 26 I.P. J. 111, 122-23 (2013); U.S. Department of Health and Human Services Office of Research Integrity, Authorship -- Introduction to RCR Chapter 9: Authorship and Publication, ORI Introduction to the Responsible Conduct of Research (Aug. 2007), at https://ori.hhs.gov/content/Chapter-9-Authorship-and-Publication-Authorship. *See generally* Mario Biagioli & Peter Gallison, SCIENTIFIC AUTHORSHIP: CREDIT AND INTELLECTUAL PROPERTY IN SCIENCE (2003).

[72] *See, e.g.,* University of Michigan Authorship Guidelines, *supra* note 67; Yale University Guidance on Authorship, *supra* note 68.

[73] 17 USC § 101: "A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

[74] *Cf.* Seshadri v. Kasraian, 130 F.3d 798, 803(1997)("The assistance that a research assistant or secretary or draftsman or helpfully commenting colleague provides in the preparation of a scholarly paper does not entitle the helper to claim the status of a joint author.").

[75] *See* Authors Alliance, Principles and Proposals for Copyright Reform, online at https://www.authorsalliance.org/principles-and-proposals-for-copyright-reform/ (visited Oct. 4, 2024).

selectivity as a tool to buttress the perception of prestige. The accompanying constraints on access to their scholarship are unwelcome byproducts.

Thus, the copyright system is the "engine" of academic authorship only in the most attenuated sense.[76] Academic authors don't earn money, at least not directly, from the distribution of copies of much of our work.[77] The market for scholarly journal articles clears at zero. In some disciplines, scholarly publishers ask us to pay them to publish our work.[78] They then turn around and charge research institutions exorbitant sums for subscriptions to the publications that contain our scholarship.[79] In addition to paying for expensive subscriptions, universities and other research institutions provide massive subsidies to scholarly publications: they pay salaries to the individuals who produce the

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[76] *See* Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779 (2006)

[77] *See* CORYNNE MCSHERRY, WHO OWNS ACADEMIC WORK? BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY 105 (2001). An exception to this rule is textbooks, which, if widely adopted, can earn significant royalties.

[78] *See, e.g.*, Tulane University Libraries, Transformative Open Access Publisher Agreements, https://libguides.tulane.edu/apc_waivers (visited Feb. 15, 2026). *See generally* Article Processing Charge, Wikipedia, https://en.wikipedia.org/wiki/Article_processing_charge (visited Feb. 15, 2026).

[79] 2 WILLIAM A. KAPLIN, BARBARA A. LEE, NEAL H. HUTCHINS & JACOB H. ROOKSBY, THE LAW OF HIGHER EDUCATION 1742-43 (6th ed. 2019); Deborah Gerhardt & Madelyn Wessel, *Fair Use and Fairness on Campus*, 11 N.C. J. L. & TECH 461, 466-82 (2010). For decades, university libraries have warned that the price of scholarly subscriptions is unsustainable. Universities and other research institutions have the power to solve that problem for themselves. As the statutory authors and initial copyright owners of the research that their employees produce, they are entitled to require that their faculty deposit an archive copy of any scholarship produced within the scope of their employment. They could share their archive copies with other research institutions, by, e.g., making those archives available as an appendage to HathiTrust. Expensive subscriptions would become optional. This is not a novel idea – scholars have been suggesting it for more than 30 years. *Cf., e.g.*, Unbundling Profile: MIT Libraries, https://sparcopen.org/our-work/big-deal-knowledge-base/unbundling-profiles/mit-libraries/ (visited Aug. 16, 2024); Unbundling Profile: Bucknell University, https://sparcopen.org/our-work/big-deal-knowledge-base/unbundling-profiles/bucknell/ (visited Aug. 16 2024); Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 794 (2006).

Some universities have indeed adopted policies requiring their faculty members to deposit pre-prints in the school's open access archive, or otherwise make their scholarship available on an open-access basis. *See, e.g.*, MIT Faculty Open Access Policy, https://libraries.mit.edu/scholarly/mit-open-access/open-access-policy/ (adopted March 18, 009). My sense is that those policies, while common, are not robustly enforced. The fact that universities have so far not seriously explored approaches like this suggests that important university deciders believe that the current expensive system is more effective in buying them prestige than the more efficient alternative of bringing all of the functions in house, despite, or possibly because of, the exorbitant price tag.

scholarship and to the individuals who volunteer as unpaid peer reviewers for the scholarly publications.[80] But academic administrators are wary of asserting the university's legal rights to control scholarly works because it might clash with the shared understanding that faculty are the authors of the scholarship they produce.

What is important to academic author scholars is credit for their work.[81] Credit reflects influence, but it also contributes to promotion, salary, grants, honors, and prizes. Academic scholars believe the term "author" captures their understanding of who should get credit, but the distribution of credit for academic scholarship operates completely independently of the copyright's authorship rules.

I began with academic authorship because most readers of this article will find its contradictions familiar. Academic authors, though, are far from the only creative genre that maintains authorship norms that are inconsistent with the one-size-fits-all copyright authorship rules. Let's explore a few more examples.

B. Sculpture and Painting

Professor Amy Adler has argued that for many visual artists, copyright law is irrelevant.[82] Copyright law gives copyright owners rights to control the creation and distribution of copies of protected works,[83] but for most sculptors and painters, there is no market for the sale of copies – they earn most of what they earn from the sale of original artworks.[84] Adler explains that fine artists and collectors have developed a different system based on shared authenticity norms.[85] As Adler and other scholars describe them, the indicia of authenticity are both variable and complicated (Adler terms them "artificial[,] protean, often arbitrary, and ultimately a mutually agreed upon fiction"[86]), but the most important determinant is the artist's word.[87] Thus, Richard Prince's inkjet

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[80] *See*, *eg.*, Cory Doctorow, Pluralistic: MIT Libraries are Thriving Without Elsevier, https://pluralistic.net/2024/08/16/the-public-sphere/ (Aug. 16, 2024).

[81] *See* Simone, *supra* note 71, at 132 ("[t]he intrinsic value of the label of 'author' is worth more within the scientific community than the possibility of recouping royalties"); Authors Alliance, Authorial Reputation and Integrity, online at https://www.authorsalliance.org/our-issues/reputation-and-integrity/ (visited Oct. 4, 2024).

[82] Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 31, 341 (2018). *See also* Xiyin Tang, *Art After Warhol*, 71 UCLA L. REV. 870, 928 (2024).

[83] 17 USC § 106(1).

[84] *See* Adler, *supra* note 82, at 332-34. *Accord* United States Copyright Office, Resale Royalties: An Updated Analysis 10-12 (2013), at https://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf.

[85] *See* Adler, supra note 82, at 331; Amy Adler, *Artificial Authenticity*, 98 N.Y.U. L. REV. 706, 715-58 (2023). *Accord* Guy A. Rub, *Owning Nothingness: Between the Legal and Social Norms of the Art World*, 2019 B.Y.U. L. REV. 1147,1179-94 (2019).

[86] Adler, *supra* note 85, at 706.

[87] *Id.* at 730; Rub, *supra* note 85, at 1192-99.

printer enlargements of other people's Instagram selfies are accepted as genuine, authentic Richard Prince paintings,[88] because Mr. Prince claims them. A collage that Prince produced in 1975 reflecting on the death of an elephant, however, is not an authentic artwork authored by Richard Prince, despite his having made it, because he has since disclaimed it.[89] The copyright law authorship rules would interpret the facts the opposite way.

The limited usefulness of copyright to works of the fine arts persists despite the fact that copyright law gives visual artists special treatment. The copyright statute grants authors of "works of visual art" (and only authors of works of visual art) additional legal rights to claim authorship of their works and to prevent them from being mutilated or destroyed.[90] Works of visual art are defined narrowly, to include "a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered" but exclude "any work made for hire."[91]

Consider sculpture. Sculptures have been subject to copyright protection in the United States since 1870.[92] Creating sculptures commonly requires collaboration and assistance. When sculptures are life-size or larger, for example, sculptors may require the help of assistants and fabricators to realize their designs. Alexander Calder created small metal maquettes as models for his mobiles and stabiles, [93] and used the Segré Foundry to fashion the full-sized versions.[94] James Earl Reid, who sculpted the work that the US Supreme Court

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[88] *See* Jerry Salz, *Richard Prince's Instagram Paintings Are Genius Trolling*, N.Y. MAG. (Sept. 23, 2014) at https://www.vulture.com/2014/09/richard-prince-instagram-pervert-troll-genius.html

[89] *See* MICHAEL LOBEL, FUGITIVE ART: THE EARLY WORK OF RICHARD PRINCE (2007); Roberta Smith, *Tracing a Radical's Progress, Without Any Help From Him*, N.Y. TIMES (Feb. 9, 2007), at https://www.nytimes.com/2007/02/09/arts/design/09prin.html.

[90] 17 USC § 106A.

[91] "A 'work of visual art' is—(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author . . . . A work of visual art does not include— (B) any work made for hire. . . . "17 USC § 101.

[92] *See* Robert Brauneis, *Understanding Copyright's First Encounter with the Fine Arts*, 71 CASE W. RSRV. L. REV. 585 (2020).

[93] *See* Alexander Calder, WIKIPEDIA, https://en.wikipedia.org/wiki/Alexander_Calder (visited Aug. 29, 2024).

[94] *See* Michael Knight, *Constructing a Calder is a Labor of Love*, N.Y. TIMES (Feb. 9, 1974), at 33. As far as I can tell from Copyright Office records, Calder did not register the copyrights in any of his large sculptures during his lifetime.

held was not a work made for hire in *Community for Creative Non Violence v. Reid*,[95] relied on the work of a dozen different assistants to create the statue.[96]

Dale Chihuly is the most celebrated glass sculptor in the United States.[97] His glass works range from expensive decorative vessels to monumental installations and elaborate (and enormous) chandeliers.[98] Mr. Chihuly does not blow glass himself and has not done so since the late 1970s. Rather, he loosely supervises a group of assistants who craft, and often design, the works.[99] In 2017, Chihuly explained to the *New York Time*s's Ted Loos, "I tell the team what I want to have made, and I select from there what I want to use."[100] Litigation documents suggest that Chihuly is casual in his recruitment of collaborators and assistants; some are employees on the payroll, while others are not.[101] As he has become increasingly successful, Chihuly has branched out into other forms of art: paintings, prints, greeting cards, calendars, and coffee table books. Those works also reflect major contributions by individuals other than Chihuly.[102] Chihuly has registered the copyrights in many of these works and in a small number of his unique glass sculptures. All of the copyright registrations characterize the works as works made for hire.[103]

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[95] Community for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989).
[96] 490 U.S. at 735.
[97] *See* Samantha Baskind, *The Unrivaled Legacy of Dale Chihuly*, SMITHSONIAN *Nov. 23, 2022), at https://www.smithsonianmag.com/smithsonian-institution/unrivaled-legacy-dale-chihuly-180981068/
[98] *See* Timothy Anglin Burgard, *Dale Chihuly: Breathing Life into Glass*, FINE ARTS MUSEUMS OF SAN FRANCISCO, THE ART OF DALE CHIHULY 13 (Elisa Urbaelli, ed. 2008).
[99] *See* Kirk Johnson, *Who Is Really Making 'Chihuly Art'?*, N.Y. TIMES (Aug.21, 2017), at https://www.nytimes.com/2017/08/21/arts/design/chihuly-glass-bipolar-court-moi.html; Jen Graves, *Glass Houses: Dale Chihuly Files a Lawsuit That Raises Big Questions... About Dale Chihuly*, THE STRANGER (Feb 16, 2006), at https://www.thestranger.com/features/2006/02/16/30734/glass-houses.
[100] Ted Loos, *Are there Glass Snakes in Dale Chihuly's Fragile Eden?* N.Y. TIMES (Apr. 26, 2017), at https://www.nytimes.com/2017/04/26/arts/design/are-there-glass-snakes-in-dale-chihulys-fragile-eden.html.
[101] *See* Answer of defendant Bryan Rubino, Chihuly v. Kaindl, No. 2:05-cv-0801 (W.D. Wash.filed May 18, 2006); Moi v Chihuly, No. (W.D. Wash.); Colin Moynihan, *Former Contractor Sues Dale Chihuly, Claiming He Helped Create Artwork*, N.Y. TIMES (June 3, 2017), at https://www.nytimes.com/2017/06/03/arts/dale-chihuly-artwork-lawsuit-michael-moi.html.
[102] *See* Answer of Defendant Bryan Rubino, Chihuly v. Kaindl, No. 2:05-cv-0801 (W.D. Wash.filed May 18, 2006); Moynihan, *supra* note 101.
[103] *See, e.g.*, "The Sun," Registration VA0002143847 (Aug. 20, 2018), at https://publicrecords.copyright.gov/detailed-record/30657502; "Amber and Clear Star Chandelier Installation", Registration VAU001006723 (Dec. 28, 2009), at https://publicrecords.copyright.gov/detailed-record/23239440. In 2005, Chihuly, Inc. registered the copyrights in several blown glass sculptures in connection with a

Sculptures and paintings are not among the work that may be prepared on commission as works made for hire.[104] To the extent that Chihuly's glass creations and painted works are created by collaborators who are not employees, those creations cannot be works made for hire under the statutory definition. Accordingly, Chihuly has faced claims that he is neither the author in fact nor the legal author of the work sold under his signature in at least two copyright lawsuits.[105] That appears not to matter to the art world, to which a genuine Dale Chihuly work is a work to which he has affixed his signature.[106]

By most accounts, Dale Chihuly enjoys the collaborative process. His team includes more than 100 employees, independent contractors, and more casual invitees with no formal relationship to the artist or studio. A work released by the Chihuly studio may have originated with Chihuly or may have been designed by another member of his team. When team members fabricated it, Chihuly may or may not have been present in the studio. If Chihuly selects the finished work and signs it, it will sell for thousands (or hundreds of thousands)

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copyright infringement case he filed against a glass blowing business that sold allegedly infringing blown glass objects created by one of Chihuly's former assistants. *See* Complaint in Chihuly, Inc. v. Kaindl, No. 2:05-cv-0801 (W.D. Wash. Filed Oct. 27, 2005); *See, e.g.*, "Pearlized purple basket with yellow lip wrap," Registration VAu000635050 (Sept. 12, 2005) at https://publicrecords.copyright.gov/detailed-record/18479358. Also, I found a 1982 registration for the copyright in Chihuly's 1979 glass sculpture "Pilchuck basket group" in the name of Indiana University as copyright claimant. *See* Registration VAU000040272, https://publicrecords.copyright.gov/detailed-record/17908828 (visited Aug. 29, 2024).

[104] *See* 17 USC § 101. Chihuly apparently asks his glassworkers to sign both work for hire agreements and non-disclosure agreements. *See* Answer of Bryan Rubino, Chihuly v. Kaindl.

[105] *See* Moi v. Chihuly Studio, 846 Fed. Appx. 49 (9th Cir. 2021); Chihuly v. Kaindl, 2006 U.S. Dist. LEXIS 2420 (WD Wash 2006). In addition, both the Complaint in *Moi* and a press release published by his lawyer referred to other settled lawsuits brought by uncredited collaborators. *See* Calgary Public Relations, *Dale Chihuly Took Sole Credit For Pricey Artwork Created By Others*, EIN Presswire (June 6, 2017), online at https://www.einnews.com/pr_news/384963707/dale-chihuly-took-sole-credit-for-pricey-artwork-created-by-others ("After confidentially settling several similar claims, defense lawyers for the Chihuly Studio revealed a lawsuit claiming that the Studio has earned millions over the past 15 years selling works claimed to have been created by world-renowned artist Dale Chihuly that were actually created primarily or entirely by others.").

[106] *See* Hugh Stephens, *Chihuly and His Art: Who is the True Creator?*, Hugh Stephens Blog (Oct. 18, 2017), at https://hughstephensblog.net/2017/10/18/chihuly-and-his-art-who-is-the-true-creator/. *See also* Chihuly Studio, *Protecting The Chihuly Legacy*, https://www.chihuly.com/protecting-chihuly-legacy (visited Oct. 21, 2024) ("The Chihuly name signifies to the public the distinctive and high quality of artwork sold by Chihuly Studio and Chihuly Workshop.").

of dollars. If it were instead attributed to the artist who actually created it, it would sell, if at all, for much less.[107]

C. Theatre

Theatre is an essentially collaborative pursuit. It begins (usually) with a script, written by a playwright, containing dialogue ("lines") and suggested stage directions.[108] Before the script can realize its artistic or commercial value, it must be transformed into a performance before an audience.[109] Generating the performance will require the creative contributions of actors, designers, and other artists. Mounting a full production of a script is expensive, so there are a variety of intermediate try-out options before a theatre company may commit to producing a completed script. The playwright will commonly seek to arrange for the script to be read aloud by actors in the presence of an audience, so that she can see how the lines play. Both actors and members of the audience may make useful suggestions or raise important questions.[110] After the reading, the playwright will revise the script in response to what she learned. The next draft may be read in a different venue. Commercial and noncommercial theatres have script development workshop programs that allow further work on scripts.[111] Actors Equity, the labor union representing stage actors, has complicated rules and collectively bargained contracts setting conditions for readings and workshops.[112] If the playwright succeeds in interesting a theatre company in producing the play, there may be further rewrites during the rehearsal process. The theatre may engage a dramaturg to help the playwright in

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[107] *See, e.g.*, Regina Hackett, *Chihuly Alleges He's Been Ripped Off `How Can You Copyright Glass?' Target Of Suit Asks*, THE SEATTLE POST INTELLIGENCER(Apr. 17, 2006), at A8 ("[w]hile a Chihuly glass piece might cost $10,000, a Kaindl of similar design might carry a $700 pricesticker.").

[108] Sometimes, the script may be an adaptation of a preexisting work. *See* DONALD C. FARBER, PRODUCING Theatre 9-13 (3d. ed. 2006).

[109] *See* TODD LONDON & BEN PENSER, OUTRAGEOUS FORTUNE: THE LIFE AND TIMES OF THE NEW AMERICAN PLAY 97-117 (2009); BRENT SALTER, NEGOTIATING COPYRIGHT IN THE AMERICAN THEATRE: 1856-1951 7 (2022).

[110] *See, e.g.*, Frederic B Vogel, *Introduction*, COMMERCIAL THEATER INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS 19, 22 (Frederic B. Vovel & Ben Hodges, eds. 2006).

[111] *See, e.g.*, Eugene O'Neill Theatre Center, National Playwrights Conference, https://www.theoneill.org/npc (visited Sept. 5, 2024); Theatre Nova, About the New Play Development Residency, https://www.theatrenova.org/devepment-residency (visited Sept. 5, 2024); George Allison Elmer, *Developing a Theatrical Property*, COMMERCIAL THEATER INSTITUTE GUIDE TO PRODUCING PLAYS AND MUSICALS 203, 204-13 (Frederic B. Vovel & Ben Hodges, eds. 2006).

[112] *See* Actors Equity Assn, Staged Reading Code, at https://www.actorsequity.org/resources/contracts/Staged-Reading/ (visited Aug. 5, 2024); Actors Equity Assn, Staged Reading Guidelines (April 2022), at https://www.actorsequity.org/resources/contracts/Staged-Reading/; Actors Equity Assn, *Press Release: Actors Equity Association Halts Future Development Contracts in the Wake of Stalled Negotiations*, (June 17, 2024) at https://www.actorsequity.org/news/PR/DevelopmentDeadlinePassed2024/.

her rewriting. The final script may accordingly reflect expressive contributions that originated with a host of different collaborators.[113]

Unlike most creators of copyrightable works, playwrights customarily retain ownership of the copyrights in their scripts.[114] Where playwrights have contracts with theatre companies, those contracts will commonly include terms that promise that no changes will be made to the script without the playwright's consent, [115] and may provide that any such changes to the script will become the playwright's property.[116]

The finished script, though, is only one element of the audience experience. The production that audiences see will reflect creative, expressive details contributed by actors, designers, a director, and possibly a choreographer as well as the words in the script. Those contributions will automatically receive copyright protection if they are fixed in tangible form.[117] Stage productions are recorded more often than they used to be to generate YouTube promotions and archival records. The video recording is a fixation of the production, which should be seen as an authorized derivative work based on the underlying script,

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[113] *See* DEREK MILLER, COPYRIGHT AND THE VALUE OF PERFORMANCE 1770-1911 249-50 (2018); see, e.g., ANAIS MITCHELL, WORKING ON A SONG: THE LYRICS OF HADESTOWN 1-6, 16-20, 24-30, 33-39, 43-47,129-33, 153-58 , 254-57 (2020); Ken Cerniglia, Production History *in* RICK ELICE, PETER AND THE STARCATCHER: THE ANNOTATED SCRIPT OF THE BROADWAY PLAY viii-xiii (2012).

[114] *See* Dramatists Guild, DG Bill of Rights, THE DRAMATIST (July 1, 2024), at https://www.dramatistsguild.com/thedramatist/dg-bill-rights; Brent Salter & Catherine L. Fisk, *The Fragility of Labor Relations in the American Theatre*, 83 OHIO ST. L. J. 217, 273 (2022); DONALD C. FARBER, PRODUCING THEATRE23 (3d. ed. 2006).

[115] *See* DONALD C. FARBER, FROM OPTION TO OPENING: A GUIDE TO PRODUCING PLAYS OFF-BROADWAY 21 (5th ed. 2005); *see, e.g.*, June 17, 2019 Theatre Nova Production Contract for *God Kinda Looks Like Tupac*, (document on file with author)(providing that no changes will be made to the dialog without playwright's consent. This contract also gives the theatre company a 1% share of future commercial royalties for a five year period.).

[116] *See, e.g.*, April 18, 2018 Letter Agreement between Theatre Nova and playwright [James ijames] (document on file with author); Dramatist Guild Bill of Rights, 26 *The Dramatist* (July 2024) at https://www.dramatistsguild.com/thedramatist/dg-bill-rights. The UK has a comparable practice based on contracts approved by the Writers Guild of Great Britain. See LUKE MCDONAGH, PERFORMING COPYRIGHT: LAW, THEATRE AND AUTHORSHIP 108-13 (2021).

[117] 17 USC § 102(a). *See, e.g.,* Justin Hughes, Actors as Authors in American Copyright Law, 51 Conn. L. Rev. 1, 30 (2019); Jessica Litman, Note, Copyright in the Stage Direction of a Broadway Musical, 7 Colum.-VLA J. Art & L. 309, 312--17 (1983).

automatically protected by copyright.[118] The ownership of that copyright will depend on where the theatrical production lives on the theatre food chain. If the production uses union labor, as major commercial producers and established professional non-profit theatres do, the contracts will control questions of copyright ownership. Actors who belong to Actors Equity will be employees,[119] and their creative contributions will be works made for hire. Directors and choreographers who are represented by the Stage Directors and Choreographers Society and designers represented by the United Scenic Artists are also at least arguably employees, but their unions have negotiated collective bargaining agreements that reserve copyright ownership in their contributions to them,[120] as

[118] *See* 17 U.S.C. § 103. *See, e.g.*, Douglas M. Nevin, *Comment: No Business Like Show Business: Copyright Law, the Theatre Industry, and the Dilemma of Rewarding Collaboration*, 53 EMORY L. J. 1533, 1560-65 (2004). The copyrightable elements in that work should include the expressive, creative contributions of the actors, *see* Justin Hughes, *Actors as Authors in American Copyright Law*, 51 CONN. L. REV. 1 (2019) director, *see* Margit Livingston, *Inspiration or Imitation: Copyright Protection for Stage Directions*, 50 B.C. L. REV.. 427 (2009); Talia Yellin, *New Directions for Copyright: The Property Rights of Stage Directors*, 24 COLUM.-VLA J. L. & ARTS. 317 (2001), and designers, *see* Mark Baily, *Note: Exit Stage, Enter Streaming: Copyright of the Theatrical Stage Design Elements in a Changing Theater Industry*, 28 J. INTELL. PROP. 365 (2021). *See also* Michael Carroll, *Copyright's Creative Hierarchy in the Performing Arts*, 14 VAND. J. ENT. & TECH. L. 797 (2012). Characterizing a recorded stage production as a copyrightable authorized derivative work of a script should be uncontroversial, but some advocates for playwrights have argued that recognizing copyright protection in the contributions of anyone other than the playwright will cause terrible things to happen. *See, e.g.*, John Weidman, The 7th Annual Media & Society Lecture: Protecting the American Playwright, 72 BROOK. L. REV. 639 (2007); David Leichtman, *Most Unhappy Collaborators: An Argument Against the Recognition of a Property Right in Stage Directions*, 20 COLUM.-VLA J. L. & ARTS 683 (1996); Jessica Talati, *Copyrighting Stage Directions and the Constitutional Mandate to "Promote the progress of Science*," 7 N.W. J. TECH. & INTELL. PROP. 241 (2009). Who those copyrights belong to is a more difficult question. In commercial theatres and established professional theatres, the question is controlled by union contracts. *See infra* notes 123-26 and accompanying text. In more marginal theatres, there may be no written contracts speaking to the question.

[119] *See, e.g.*, Agreement Made Between Actors Equity Association and the League of Resident Theatres, at https://lort.org/assets/documents/2017-22-LORT-AEA-Agreement-Unsigned.pdf.

[120] *See, e.g.,* The Off-Broadway League and Stage Directors and Choreographers Society Collective Bargaining Agreement § XV (Sept. 1 2023- June 30, 2025), at https://sdcweb.org/wp-content/uploads/2024/08/SDC-OB-23-25-FINAL.pdf; League of Resident Theatres and Stage Directors and Choreographers Society Collective Bargaining Agreement § XV (April 15-2017 – April 14, 2022), at https://sdcweb.org/wp-content/uploads/2024/08/2017-2022-LORT-SDC-Agreement.pdf; Collective Bargaining Agreement between United Scenic Artist Local 829 and the League of Resident Theatres XIX (July 1, 2017), at https://www.usa829.org/Portals/0/Theatre,%20Opera,%20Dance/2017-22%20LORT-USA%20Agreement.pdf.

the copyright statute permits.[121] More marginal theatres may work with non-union talent, may or may not hire that talent in an employment relationship, and may have no formal contracts at all. The copyright in protectable expression created by those collaborators will vest in the individuals who create it.[122]

The Dramatists Guild, a trade association for playwrights that has devised model contracts for productions at various levels,[123] recommends that its members insist on a contract term that obliges the producer to convey ownership of any contributions by other participants to the playwright.[124] (That will, of course, only work if the producer's contracts with those participants assign ownership of copyrightable contributions to the producer.) Belt and suspenders, the Guild takes the position that any creative expression outside of the playwright's script is an unprotectable idea.[125] Guild officers assert that recognizing copyright in anything other than the script will profoundly imperil theatre as we know it.[126]

Because playwrights are not employees, the Dramatists Guild cannot act as a labor union for its members, so the terms of its model contracts, while often the subject of negotiation between the Guild and theatre owners and producers, are not mandatory in the way that the terms of a collective bargaining agreement would be.[127] The Guild, though, promises to punish any of its playwright members if they should agree to a contract that fails to meet the Guild's minimum standards.[128] Periodically, tensions between the Guild and the Broadway League, a trade association for theatre owners and producers, boil over, and members of one file an antitrust suit against members of the other.[129] The lawsuits have settled with an agreement on modest revisions to the extant model contract.[130] The Dramatists Guild has urged Congress to enact a law

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[121] *See* 17 U.S.C. § 201(d); *supra notes* 53- 56 and accompanying text.
[122] *See* 17 U.S.C. § 201.
[123] *See* Dramatists Guild of America, *Mission and History*, at https://www.dramatistsguild.com/about-the-guild (visited Sept. 22, 2024).
[124] *See, e.g.*, Ralph Sevush, Esq., Development Hell: The High Cost of New Play Development, 13 The Dramatist #3 at 45, 46-48 (Jan/Feb 2011).
[125] 17 U.S.C.§ 101.
[126] *See, e.g.*, Weidman, *supra* note 118, at 646: "[I]f a director's copyright is ever established, it will drastically limit a playwright's ability to control the work which he creates, it will inevitably undermine the spirit of trust and openness which is essential to the collaborative process that makes theater happen, and it will have a deeply disruptive, potentially paralyzing effect on theatrical production generally."
[127] *See* Doug Wright & Ralph Sevush, *Why Isn't the Guild a Labor Union?*, 21 The Dramatist #1, at 2 (Sept./Oct. 2018).
[128] *See* Bylaws of the Dramatist Guild, art. 9, § 7, https://www.dramatistsguild.com/about-the-guild/bylaws (as amended Jan. 22, 2018).
[129] *See* Brent Salter & Catherine L. Fisk, *The Fragility of Labor Relations in the American Theatre*, 83 OHIO ST. L. J. 217 (2022); *see, e.g.*, Ring. v. Spina, 148 F.2d 647 (2d Cir. 1985); Barr v. Dramatists Guild, 573 F. Supp. 555 (S.D.N.Y. 1983).
[130] *See* Salter & Fisk *supra* note 114, at 255-59, 264-66; Salter, *supra* note 109, at 211-39.

giving playwrights an exemption from the antitrust laws to permit the Guild to engage in collective bargaining on its members' behalf.[131] Members of Congress have introduced bills, none of which passed.[132]

In earlier work, I noted that playwrights claim strong attribution and integrity right for themselves, while denying that their collaborators author contributions. Those positions, I argued, have everything to do with customs and contracts, and very little to do to with copyright law.[133]

D. Screenplays

Film is another realm in which the ultimate work experienced by the audience is the product of different creators. The lay public thinks of movies as

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[131] *See generally* S. 2349: The Playwrights Licensing Antitrust Initiative Act: Safeguarding the Future of American Live Theater: Hearing Before the Senate Comm. on the Judiciary, 108th Cong. (April 28, 2004); *see also* Making Competition Work: Promoting Competition in Labor Markets, letter from coalition of ten organizations to Lina Khan, Chair of the Federal Trade Commission (Dec. 20, 2021), online at https://authorsguild.org/app/uploads/2022/11/CREATORS-COALITION-FTC-DOJ-Labor-and-Antitrust-Comments.final_.pdf (proposing legislation to allow freelance creative professionals to collectively bargain).

[132] Salter & Fisk *supra* note 114, at 268-72; *see* H.R. 532, Playwrights Licensing Antitrust Initiative Act of 2005 (109th Cong.) (Rep. Coble); H.R. 4615, Playwrights Licensing Antitrust Initiative Act of 2004 (108th Cong. (Rep. Coble); S. 2349, Playwrights' Licensing Antitrust Initiative Act of 2004 (108th Cong.)(Sen. Hatch); S. 2082, Playwrights Licensing Relief Act of 2002 (107th Cong.) (Sen. Hatch); H.R. 3543, Fair Play for Playwrights Act of 2001 (107th Cong.) (Rep. Hyde).

[133] Jessica Litman, *The Invention of Common Law Playwright*, 25 BERKLEY TECH L. J. 1381, 1425 (2011).

authored by their directors,[134] but the entity claiming authorship for copyright purposes is typically the company that produces the film.[135]

As in live theatre, most films begin with a script, here called a screenplay, created by a writer.[136] Movies are commonly works made for hire. The producer/employer owns the copyright in the creative expression contributed by writers, director, actors, designers, editors and camera operators, who are hired either as employees or as independent contractors. (Recall that "motion picture" is one of the eight types of work that may be works made for hire even though they are created by independent contractors rather than employees "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[137])

In her book, *Writing for Hire*, Professor Catherine Fisk delves into the history of the Writers Guild of America, the labor organization that represents writers who write scripts for movies, radio, and television.[138] Early screenwriters were salaried staff writers who wrote their scripts in offices located on studio lots.[139] Many of them were also playwrights, intimately familiar with the

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[134] *See* Rebecca Tushnet, *Performance Anxiety: Copyright Embodied and Disembodied*, 60 J. Copyright Soc'y. 209, 224 (2013)("treating a film director as the unitary source of intent and meaning has been an irresistible temptation for many film critics"). Consider the 2024 film *Winner*, a biopic adapted from the true story of Reality Winner. Critics' reviews attributed authorship of the film to its director. *See, e.g.*, Beatrice Loaza, *'Winner' Review: Not Like Other Girls*, N.Y. Times (Sept. 12, 2024) at C5 (online at https://www.nytimes.com/2024/09/12/movies/winner-review.html) (describing movie as "by" its director Susanna Fogel). The corporation "Winner IP LLC" has registered the copyright in the movie, claiming authorship of the movie as a work made for hire, based on a preexisting screenplay. *See* Copyright Registration No. PA0002486804 (Aug. 27, 2024). Kerry Howley, a popular nonfiction author who is credited as the author of the screenplay, registered the copyright in her screenplay in 2022. *See* Copyright Registration PAu004154941 (Oct. 4, 2022). Howley based the screenplay on her 2017 article for New York Magazine, *Who is Reality Winner? The World's Biggest Terrorist has a Pikachu Bedspread*, N.Y. Mag. (Dec. 2017), online at https://nymag.com/intelligencer/2017/12/who-is-reality-winner.html. Howley received a "written by" credit for the film. *See Winner*, IMDB Pro at https://pro.imdb.com/title/tt11433906/ (visited Sept. 23, 2024).

[135] *See, e.g.*, Michael C. Donaldson & Lisa A. Calif, The American Bar Association's Legal Guide to Independent Filmmaking (2010); F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship* of Motion *Pictures Under US Copyright Law,* 49 UCLA L. Rev. 225, 269 (2001).

[136] As in theatre, that screenplay might be adapted from a preexisting work. *See, e.g.*, Winner (Vertical 2024)(Kerry Howley's screenplay based on her 2017 article for New York Magazine).

[137] 17 U.S.C. § 101; *see supra* notes 37-56 and accompanying text.

[138] Catherine L. Fisk, Writing for Hire: Unions, Hollywood, and Madison Avenue (2016).

[139] *See id.* at 53-54.

Dramatist Guild's insistence that playwrights should be considered independent contractors rather than employees, and should always retain copyright ownership of their scripts. Rather than follow a similar strategy in Hollywood, screenwriters bet on collective action to secure enforceable contract rights.[140] Fisk concludes that an important and perhaps the most important motivation for unionizing was to gain leverage over credit and a measure of creative control over their work.[141]

In 1937, the Writers Guild filed petitions with the National Labor Relations Board seeking orders requiring film studios to hold union elections.[142] The studios resisted the unionization efforts, arguing that screenwriters were not employees within the meaning of labor law. Rather, studios argued, screenwriters should be considered independent contractors: they were highly paid professionals who were not required to work regular office hours or produce fixed amounts of work, and who were "free to develop screen material in accord with their own ideas."[143] The NLRB examined three screenwriter employment contracts, and noted that each contract gave the film studio broad powers to control the screenwriter's writing and that each contract provided that all material written by the writer "shall automatically become the property of the producer who, for this purpose, shall be deemed the author thereof." Those provisions persuaded the NLRB that screenwriters were employees within the meaning of the National Labor Relations Act and entitled to unionize.[144]

The initial minimum basic agreement negotiated between the Writers Guild and the studios gave screenwriters a minimum weekly wage and handed the Writers Guild control over screenwriter credit.[145] Over the course of the process of making a film, a screenplay may be written and rewritten by multiple writers. The Guild screen credit rules limit the number of writers who can receive screen credit.[146] If there is a dispute over who receives credit, the Guild resolves the dispute through arbitration.[147] Sometimes, the screen credits are counter-factual.[148] The Guild prohibits its members from claiming credit if the

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[140] *See id.* at 58-70.
[141] *See* Fisk, *supra* note 138, at 31-85.
[142] *See* in re Metro Goldwyn Mayer, 7 N.L.R.B. 662 (1938).
[143] 7 N.L.R.B. at 686-87.
[144] *Id.* at 689-90.
[145] *See* Fisk, *supra* note 138, at 67.
[146] *See* Writers Guild of America West, Screen Credits Manual, online at https://www.wga.org/contracts/credits/manuals/screen-credits-manual (visited Sept. 23, 2024).
[147] *See* Fisk, *supra* note 138, at 70-85; Writers Guild of America West, Credits Survival Guide online at https://www.wga.org/contracts/credits/manuals/survival-guide (visited Sept. 23, 2024).
[148] *See, e.g.*, Michele Willens, How Many Writers Does it Take ...?, N.Y. Times, May 17, 1998, at §2, p. 17, online at https://www.nytimes.com/1998/05/17/movies/film-how-many-writers-does-it-take.html.

arbitration awards it to other writers.[149] The screen credit determination controls which writers are entitled to be paid royalties ("residuals") for later reuse of their work.[150]

Professor Fisk notes the irony: "The lack of creative control that so galled writers — but that seemed to be inevitable in studio-dominated filmmaking and sponsor-dominated radio and television production — became the crucial legal weapon that secured the rights of writers as authors in every respect other than creative control."[151]

E. Songs

The stories I have told so far about faculty scholarship, sculpture, stage plays, and screenplays have featured settled norms that diverge from well-settled law. Songwriting, in contrast, is a field with rapidly evolving norms surrounding who counts as a songwriter and what counts as a song. The copyright statute treats songs and audio recordings as separate works subject to different rules. [152] Let's focus on the songs, which the statute classifies as "musical works."[153]

The US Copyright Office defines "musical works" as "original works of authorship consisting of music and any accompanying words." The definition continues, "Music is a succession of pitches or rhythms, or both, usually in some definite pattern.... The main elements of copyrightable musical work authorship include melody, rhythm, harmony, and lyrics, if any."[154] Most songwriters will

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[149] *See* Fisk, *supra* note 138, at 77.

[150] *See* Fisk, *supra* note 138, at 164-65; Writers Guild of America West, Residuals Survival Guide (March 2022), online at https://www.wga.org/members/finances/residuals/residuals-survival-guide.

[151] Fisk, *supra* note 138, at 213.

[152] From 1831 to 1972, US copyright protected only songs and not audio recordings, and it protected songs as texts written on paper. U.S. Copyright Office, Copyright and the Music Marketplace 16-18 (2015), online at https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf. Between 1790, when Congress enacted the first federal copyright law extending protection to "maps, Charts, And books," and 1831, when Congress first added musical works to the copyright statute, some copyright owners registered musical works as "books." *Id.* at 16. The 1831 Act gave the owners of musical works exclusive rights to print and sell sheet music, but no public performance right. Congress added a public performance right in 1897. *Id.* at 17. In 1971, Congress extended copyright protection to audio recordings but, for historical and political reasons, treated them as a distinct sort of work with its own peculiar set of constraints and limitations. *See* Robert Brauneis, Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance, 17 Tul. J. Tech. & Intell. Prop. 1, 4-5 (2014).

[153] *See* 17 U.S.C. § 102(a)(2).

[154] US Copyright Office, Compendium of Copyright Office Practices §§ 802.1, 802.3 (3d ed. Jan. 28, 2021) at https://copyright.gov/comp3/chap800/ch800-performing-arts.pdf:

create a musical work by performing parts of it before writing the notes on paper[155] or making an audio recording.[156] Writing music is not unavoidably collaborative, but it is often collaborative. The songwriter might perform all the parts herself, or might instead rely on other musicians to play or sing the composition so that she can hear how its sounds.[157]

Until 1978, the owner of a copyright in a musical work could secure copyright protection by publishing a sheet music rendition of the work with copyright notice, or by depositing a sheet music copy of the work in the copyright office.[158] As Olufunmilayo Arewa's work explains, a sheet music copy is not itself a song, but a set of instructions for performing the song.[159] Few composers create music in the first instance by writing notes on paper, but even those who do are seeking to create a work composed of musical sounds rather than images or text. Courts deciding copyright cases for songs that secured copyright through publication or deposit of sheet music, though, have held that copyright protection for the songs is limited to the expressive elements reflected in that copy of sheet music.[160] The Copyright Office agrees.[161]

Since January 1, 1978, a song receives automatic copyright protection as soon as it is fixed in tangible form, whether as an audio recording, as sheet music, or as a digital file.[162] There may never have been a sheet music version. Many contemporary songwriters have never learned to read notated music.[163]

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§ 802.3 (A) Melody
Melody is a linear succession of pitches.
§ 802.3(B)Rhythm
Rhythm is the linear succession of durational sounds and silences.
§ 802.3(C) Harmony
Harmony is the vertical and horizontal combination of pitches resulting in chords and chord progressions. Song
§ 802.3(D) Lyrics
Lyrics are a set of words, sometimes grouped into verses and/or choruses, that are intended to be accompanied by music. Lyrics may consist of conventional words or nonsyntactical words or syllables, and may be spoken or sung.

[155] *See, e.g.*, Woods v. Bourne, 60 F.3d 978 (2d Cir. 1995).
[156] *See, e.g.*, Armes v. Post, 2022 U.S.P.Q. 2d (BNA) 373 (C.D. Cal. 2022).
[157] *See* DAVID BYRNE, HOW MUSIC WORKS 199-221 (2017).
[158] *See* Brauneis, supra note 152, at 11-18. The initial sheet music copy was commonly transcribed by the publisher. *See, e.g.*, Woods v. Bourne, 60 F.3d 978 (2d Cir. 1995).
[159] *See* Olufunmilayo Arewa, *A Musical Work is a Set of Instructions*, 52 HOUSTON L. REV.. 467, 470 (2014) [hereinafter Arewa, Instructions]; Olufunmilayo Arewa, *Copyright and Cognition: Musical Practice and Musical Perception*, 90 ST. JOHN'S L. REV. 565, 574-75 (2016).
[160] *See* Structured Asset Sales, LLC v. Sheeran, 120 F.4th 1066 (2d Cir. 2024); Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020) (en banc); Parker v. Hinton, 2023 U.S. App. LEXIS 1931 (6th Cir. 2023).
[161] *See* Brief for the United States as Amicus Curiae at 10-14, Skidmore v. Led Zeppelin,
[162] 17 U.S.C. § 102(a); *see* Brauneis, supra note 152, at 5.
[163] *See*, e.g., Selle v Gibb, 567 F. Supp. 1173, 1176 (N.D. Ill. 1983), aff'd 741 F.2d 896 (7th Cir. 1984).

The copyright in a recorded song automatically protects expressive musical elements embodied in the recording.[164] Whether those elements would appear in a sheet music version of the song if there were a sheet music version of the song shouldn't matter. Courts deciding copyright cases involving musical works embodied in audio recordings have found it difficult to identify the protected elements of the musical works and separate them the elements that are protected, if at all, by the copyrights in the sound recordings.[165] They have relied on forensic musicologists to generate constructive sheet music versions of the songs in the cases, and have assumed without much reflection that musical elements that don't appear on the sheet music are performance elements protected by the sound recording copyright rather than musical elements protected by the musical work copyright.[166]

Limiting copyright protection for a song to musical elements easily expressed in western staff notation ignores important musical features that are crucial to how the music sounds.[167] There may well be good copyright policy reasons to exclude those features from copyright protection,[168] but courts' analyses haven't engaged with those policy arguments. Rather, their decisions appear to reflect a crabbed idea of what counts as music.

The disconnect between songwriting and musical copyright has gotten more severe in recent years, because the process of writing songs has evolved. In the 21st century, popular songs are often built iteratively from a combination of recorded tracks that are edited, modified, and sequenced over a period of weeks or months.[169] The songwriter's collaborators on any particular song may be a shifting cast of musicians, depending on which tracks make it into the recording in which a particular song is ultimately fixed.[170]

Although the copyright law makes it easy to transfer copyright ownership, it has no mechanism for transferring legal authorship once the copyright has

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[164] 17 U.S.C. § 102(a); *see* Brauneis, *supra* note 152, at 5.

[165] *See* Arewa, Instructions, *supra* note 159, at 496-505; Brauneis, *supra* note 152, at 31-44; Lauren Wilson, *Locating Timbre in the Creative Core of Copyright Law's Modern Musical Work*, 57(3) Conn. L. Rev.. 847 (2025).

[166] *See, e.g.*, Swirskey v. Carey, 376 F.3d 841, 846 (9th Cir. 2004); Newton v. Diamond, 204 F. Supp. 2d 1244 (C.D. Cal 2002), *aff'd* 349 F.3d 591 (9th Cir. 2003).

[167] *See, e.g.*, Arewa, *Instructions*, *supra* note 159, at 482-86; Brauneis, *supra* note 152, at 8-10; Wilson *supra* note 165.

[168] *Compare, e.g.*, Charles Cronin, *Seeing is Believing: The Ongoing Significance of Symbolic Representations of Musical Works in Copyright Infringement Disputes*, 16 Colo. Tech. L.J. 225, 244-46 (2018); Joseph Fishman, *Music as a Matter of Law*, 131 Harvard L. Rev. 1861, 1903-18 (2018); Tushnet, *supra* note 134, at 247 with, e.g., Arewa, Instructions, *supra* note 159, at 527-35; Brauneis, *supra* note 152, at 45-55.

[169] Brauneis, *supra* note 152, at 1-2; Byrne, *supra* note 157, at 131-39. *See* Bobby Borg & Michael Eames, Introduction to Music Publishing for Musicians 12-16 (2021). *See, e.g.*, Elliot v. Cartagena, 2025 U.S.P.Q. 2d (BNA)301(S.D.N.Y. 2025); (Armes v. Post, 2022 U.S.P.Q. 2d (BNA) 373 (C.D. Cal. 2022).

[170] *See, e.g.*, Ulloa v. UMG, 303 F. Supp. 2d 409 (S.D.N.Y. 2004).

vested.[171] It is nonetheless common for songwriters to assign royalties and rights to receive authorship credit to individuals who were not involved in writing the song.[172] In the mid-20th Century, it was not unusual for music publishers, managers, and the owners of record labels to claim to have authored songs written by their artists, and thereby enable themselves to keep the songwriters' royalties for themselves.[173] Today, some songwriters (or the songwriters' publisher) will agree to give authorship credit to a performer as an inducement to persuade the performer to make the recording.[174] Some famous recording artists are said to have demanded songwriting credit as a condition of recording a new song.[175] Sometimes, an assignment of some part of the credit and royalties will settle a copyright infringement dispute.[176]

Authorship credit matters in songwriting because it is the key to collecting "publishing" royalties for recordings, streams, and public performances of a

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[171] *See* 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5.71 (2025); *see supra* text accompanying notes 50, 54-56.

[172] *See* Mark Lemley & Oliver Wendell Holmes Jr, *Authoring While Dead* (July 09, 2024), available at SSRN: https://ssrn.com/abstract=4891021; Emma Perot, *Music Copyright Ownership: Factors Behind the Increase in Writer Credits and Rights Clearance*, BERKLEY J. ENTER. & SPORTS L. 14 (2025).

[173] *See, e.g.*, Merchant v. Levy, 92 F.3d 51 (2d Cir. 1996); RICHARD CARLIN, GODFATHER OF THE MUSIC BUSINESS MORRIS LEVY 57 (2016); FREDERIC DANNEN, HIT MEN 106 (1991); LAURA FLAM & EMILY SIEU LIEBOWITZ, BUT WILL YOU LOVE ME TOMORROW? AN ORAL HISTORY OF THE '60S GIRL GROUPS 15, 59-60 (2023).

[174] *See* Lyndsey Havens, *The Pact speaks out: Why Asks for Songwriters to Give Up Publishing Shares* Have *Gotten 'Particularly Aggressive,'* BILLBOARD PRO, April 1, 2021 at https://www.billboard.com/pro/the-pact-songwriters-publishing-interview/.

[175] *See* Kristelia Garcia, *The Emperor's New Copyright*, 103 B.U. L. REV. 837, 871 (2023); Jen Aswad, Justin Tranter, Emily Warren, *More Songwriters Sign Letter Calling for Artists to Stop Demanding Credit for Songs They Didn't Write*, VARIETY (March 30, 2021), at https://variety.com/2021/music/news/pact-justin-tranter-emily-warren-songwriters-letter-1234940341/; Elias Leight, *Songwriters are Tired of Having their Money Taken – By Artists*, ROLLING STONE (March 31, 2021), at https://www.rollingstone.com/pro/news/songwriters-the-pact-1149427/.

[176] *See* Garcia, *supra* note 175, at 871-72; Lemley & Holmes, *supra* note 172, *See, e.g.*, Vanilla Ice et. al., *Ice Ice Baby* (1990) at https://www.musicnotes.com/sheetmusic/mtd.asp?ppn=MN0065982; Ed Sheeran, Johnny McDaid, Martin Peter Harrington & Tom Leonard, Photograph (2014), at https://shop.usa.yamaha.com/en/p/downloadables/songs/sheet-music/photograph-56; Eriq Gardner, Ed Sheeran Gives Up Part Ownership of 'Photograph' in Settling Copyright Lawsuit, HOLLYWOOD REPORTER (April 10, 2017), at https://www.hollywoodreporter.com/business/business-news/ed-sheeran-settles-copyright-lawsuit-photograph-992354/; Arjumand Syed, Queen & David Bowie v. Vanilla Ice, GW LAW BLOGS Music Copyright and Infringement Resource, https://blogs.law.gwu.edu/mcir/case/queen-david-bowie-v-vanilla-ice/ (visited Oct, 1, 2024); Randy Lewis, After "Blurred Lines" Verdict Brian Wilson Talks Chuck Berry and "Surfin' USA," L.A. TIMES, March 12, 2015, at https://www.latimes.com/entertainment/music/posts/la-et-ms-brian-wilson-talks-blurred-lines-chuck-berry-and-surfin-usa-20150312-story.html.

song.[177] In a typical deal, the songwriter will assign the copyright in a musical work to a music publisher in return for 50% of the proceeds of the song.[178] The publisher will license audio recordings, the use of the song on video or film, and its appearance on streaming services, and will pay the songwriter 50% of receipts after recouping expenses and any advance. Public performances will be licensed by a performing rights society (like ASCAP and BMI), which will pay the songwriter her 50% royalty directly and remit the other 50% to the music publisher. If the songwriter shares authorship credit with individuals who did not, in fact, write the song, the songwriter's compensation will shrink accordingly.[179]

The assignment of authorship credit to individuals who had no part in writing the song is by some accounts pervasive, and occurs with no attention to copyright rules, which don't appear to permit authorship to be assigned this way at all.[180]

F. Comic Book Characters

A final example, this one about comic book heroes. Comic books and graphic novels are commonly coauthored by teams of writers (who create the story and dialogue) and artists (who draw and ink the pictures).

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[177] Publishing royalties are the royalties for a musical composition that composers historically shared with their music publishers. They include royalties paid by the publisher to the composer for printing and selling sheet music, royalties paid by record labels to music publishers for licenses to make and sell copies of an audio recording of the song, and royalties paid to performing rights organizations for public performances of the song.

[178] *See* Casey Rae, Music Copyright: An Essential Guide for the Digital Age 52, 130-38 (2021); Donald Passman, All You Need to Know About the Music Business 235-40 (9th ed. 2018). Music is a deeply consolidated industry. Today, there are three major record labels, which are under common ownership with three major music publishers. Major music publishers and record labels report that they are enjoying record profits in recent years. The largest source of those profits is income from streaming. Streaming companies like Spotify pay approximately 70% of their revenue to rights holders. 80% of that is paid to the entities who own rights in the sound recording, and 20% to all of the owners of rights in the musical works. Those payments will divided among the Performing Rights Organizations (which collect and pay out royalties for public performance of the songs), the Music Licensing Collective (which collects and pays out royalties for the digital copies of the audio recordings of the songs that get made in the course of streaming), and the music publishers, which may have entered into contractual deals with digital services that bypass collecting societies.

[179] *See, e.g.*, Kristin Robinson, *Split Decisions: Olivia Rodrigo Has Given Up Millions in Publishing Royalties*, Billboard (Sept. 1, 2021), at https://www.billboard.com/pro/olivia-rodrigo-royalties-song-credits-sour/.

[180] *See* Garcia, *supra* note 175, at 869-72; Lemley& Holmes, *supra* note 172, at 41-43.

In the 21st Century, by all accounts, creative works featuring the superheroes who populate the DC Universe and the Marvel Comics and Cinematic Universe are works made for hire subject to ironclad written contracts.[181] It wasn't always so. In the 1940s and 1950s, comic book publishers believed that comics and their characters were as ephemeral as the newsprint paper they were printed on.[182] They didn't employ staff artists or writers; instead they purchased finished stories from freelance writers and artists, paying for them by the page. Written contracts were scarce.[183] DC and Marvel currently own the superheroes that underlie their media empires through a combination of assignment,[184] parol transfer,[185] litigation settlement,[186] and adverse possession.[187]

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[181] *See, e.g.*, Aaron Couch, *Marvel and DC's "Shut-Up Money": Comic Creators Go Public Over Pay*, Hollywood Reporter (July 16, 2021), at https://www.hollywoodreporter.com/movies/movie-news/marvel-and-dcs-shut-up-money-comic-creators-go-public-over-pay-1234983043/. Those contracts include NDAs, so I haven't yet read a real one. Smaller comic book publishers have continued to operate without written contracts and therefore run into significant authorship disputes. *See, e.g.*, Gaiman v. McFarlane, 360 F.3d 644 (7th Cir. 2004); Crabtree v. Kirkman, 2023 U.S.P.Q.2D (BNA) 1391 (C.D. Cal. 2023).

[182] *See* Blake Bell & Dr. Michael Vassallo, The Secret History of Marvel Comics 11-60 (2013); Gerard Jones, Men of Tomorrow: The True Story of the Birth of the Superheroes 99-108 (2006); Abraham Reisman, True Believer: The Rise and Fall of Stan Lee 41 (2021).

[183] *See generally* Brief of Amici Curiae Mark Evanier, John Morrow and Pen Center USA In Support Of Petitioners, Kirby v. Marvel Characters, 573 U.S. 998 (2014), No. 13-1178 (June 3, 2014).

[184] *See, e.g.*, Siegel v. Warners Brothers Entertainment, 542 F. Supp. 2d 1098 (C.D. Cal. 2008). Joe Shuster and Jerry Siegel initially assigned all rights to Superman to Detective Comics for $130. 542 F. Supp.2d at 1107; Jones, *supra* note 182, at 125. Detective paid them a per-page fee for subsequent issues. For the next 78 years, Siegel and Shuster (and then their heirs) engaged in multiple rounds of litigation to try to force DC to pay them more money and give them more credit. *See* 542 F. Supp. 2d at 1112-1116; Larson v. Warner Brothers Entertainment, 640 Fed. Appx. 630 (9th Cir. 2016); Peary v. DC Comics, No. 25-cv-910 (S.D.N.Y. April 24, 2025).

[185] The parol transfer doctrine, later known as the *Pushman* doctrine after *Pushman v. New York Graphic Society*, 287 N.Y. 302 (1942), originated in 19th Century cases and was popularized by Eaton Drone's 1879 treatise, *see* Eaton S. Drone, A Treatise On The Law Of Property In Intellectual Productions In Great Britain and The United States 104 (1879). The doctrine provided that even though the copyright statute had always required a signed writing to accompany an assignment of copyright, an author could transfer common law copyright and the right to secure federal copyright in an *unpublished* work by delivering a copy of the work to the assignee. *See* Litman, *supra* note 41, at 737-40.

[186] *See* sources cited *infra* note 218.

[187] *See* Disney Enterprises v. Entertainment Theater Group, 2014 U.S. Dist. LEXIS 153940 (E.D. Pa. 2014). Some courts have analogized the three-year copyright statute of limitations to adverse possession. *See, e.g.*, Zuill v. Shanahan, 80 F.3d 1366, 1370 (9th Cir. 1977). Setting the limitations period aside, the copyright statute gives authors only limited opportunities to reclaim their copyrights from the copyright owners of record, and all of those opportunities come with strict time limits. To the extent that renewal under the 1909 Act or termination under § 304(c) or § 304(d) of

Consider the Batmobile. The Batmobile secured copyright protection as a stand-alone comic book character in 2015 when a poorly-reasoned 9th Circuit opinion announced a new "three-part test for determining whether a character in a comic book ...is entitled to copyright protection."[188] I find the opinion

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the current statute offered authors of comic book heroes the opportunity to recapture their copyright interests, it's worth recalling that the last copyright renewal happened in 2005 and the last § 304(d) termination could have been served no later than 2012. The § 304(c) termination window has already closed for any work first published before 1966.

[188] DC Comics v Towle, 802 F.3d 1012, 1021 (2015):

> First, the character must generally have "physical as well as conceptual qualities." *Air Pirates*, 581 F.2d at 755. Second, the character must be "sufficiently delineated" to be recognizable as the same character whenever it appears. *See* Rice, 330 F.3d at 1175. Considering the character as it has appeared in different productions, it must display consistent, identifiable character traits and attributes, although the character need not have a consistent appearance. *See* Halicki, 547 F.3d at 1224. Third, the character must be "especially distinctive" and "contain some unique elements of expression." Halicki, 547 F.3d at 1224. It cannot be a stock character such as a magician in standard magician garb. Rice, 330 F.3d at 1175. Even when a character lacks sentient attributes and does not speak (like a car), it can be a protectable character if it meets this standard. . . .

The Court concluded that the Batmobile satisfies the test and is therefore a stand-alone character protected by copyright. *Id.* at 1024. That meant that building a replica of the Batmobile that duplicated a design created by a third party and that had been covered by an expired design patent infringed DC's copyright. *Id.* at 1026.

indefensible on multiple grounds,[189] but it is not my goal to critique it in this paper. Instead, I want to focus on what for the court was probably an off-hand remark. In applying the test, Judge Ikuta wrote that "[t]here is no dispute that DC is the original creator of the Batmobile character."[190]

That's not true. Nobody disputes that DC currently owns the IP rights attached to the Batmobile, but it certainly didn't create it. DC purchased the copyright in the pages of the comic from an entrepreneur who had acquired the rights by parol transfer from the ghost writer and ghost artists who had created them. The Batmobile first appeared in *Detective Comics* # 48 in February 1941. DC's predecessor, National Comics, bought the rights to that story by paying a per-page fee to Bob Kane, the person who claimed to have written the story and

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[189] Mark Towle is the star of the Netflix series *Car Masters: Rust to Riches* and the owner of the Gotham Garage, a business that repairs and rebuilds used vehicles, giving them refurbished parts and customized fanciful exteriors. A decade ago, the Gotham Garage specialized in building replicas of cars featured in popular movies. Vehicular cosplay for profit. Its most successful products were replicas of the Batmobiles featured in the 1966 television series *Batman* (20th Century Fox Television 1966-68) and the 1989 motion picture *Batman* (Warner Bros. 1989). Both vehicles had been designed by car designers who modified existing automobiles to create Batmobile look-alikes. Both Batmobiles were the subject of expired design patents. DC Comics sued Towle for copyright and trademark infringement. DC's copyright claim, though ultimately successful, was weak. There is no single version of the Batmobile; rather it has been redesigned dozens of times since it first appeared in 1941 as a red sedan. *See* Comic Book Resources.com presents the Unofficial History of the Batmobille, https://www.cbr.com/brush-up-on-your-bat-history-with-cbrs-batmobile-infographics/ (2015); Aman Singh, A Brief History of the Batmobile,CBR.com, June 30, 2022, at https://www.cbr.com/brief-history-batmobile-dc/. *See generally* Mark Cotta Vaz, Batmobile: The Complete History (2012). Each of the many movie and television adaptations has featured its own distinctive Batmobile design. DC based its copyright claim on its copyrights in comic books featuring Batman and style guides showing Batman and Batmobile images and trademarks. But Towle had not copied any Batmobile depicted in any of DC's comic books. Instead he had based his reproductions on the designs for two actual vehicles created for the 1966 Batman television series and the 1989 Batman movie. Both vehicles had been created by designers who were not employed by DC. Neither vehicle was based on any particular version of the Batmobile from any of the comics. Both designs had been patented by their designers. Both patents had expired before Towle used them as the models for his replicas. Michael Carroll argues that DC Comics lacked standing to sue Towle for copyright infringement for the works he copied because it had licensed away its rights to create the specific versions of the Batmobile that appeared in the 1966 television series and the 1989 film. Claiming a copyright on the comic book character as a freestanding work enabled it to evade the standing problem. *See* Michael W. Carroll, *Copyright in Characters: A Proposal for Reform*, 58 Akron L. Rev. 378 (2025). In addition, the Batmobiles that Towle reproduced were cars. As useful articles, cars are not copyrightable, except to the extent they might have "pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of" the overall shape of the car.

[190] 802 F.2d at 1024.

drawn the art.[191] The Batmobile has had myriad different designs over the years.[192] The version of the vehicle that appeared in *Detective Comics* # 48 was a red sedan, and did not yet evince the characteristics that the 9th Circuit found compelling evidence of copyrightability.[193] Those traits begin to show up a month later. In the March 1941 issue of *Batman,* the vehicle is blue, decorated with a bat head shaped hood ornament, and described as "a super-charged car" that "leaps away and out into the night."[194] National bought that story from Bob Kane, too. Bob Kane was credited as the sole author of both stories.[195]

What Bob Kane didn't tell National was that he had neither written those stories nor created the art. Rather, Kane relied on uncredited ghost writers and artists to create *Batman* comic book stories on his behalf.[196] We now know from data assembled meticulously by comic book fans that the pages that Kane sold to National and that were published in Detective Comics #48 and Batman #5 had been written by Bill Finger and illustrated by Jerry Robinson and George

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[191] *See* 802 F.2d at 1015; Detective Comics # 48, February 1941 at 6-9 (online at https://www.dcuniverseinfinite.com/comics/book/detective-comics-1937-48/0749e7af-f7ed-45e8-85bd-6cf96e5d57a2/c/reader).

[192] *See* Mark Cotta Vaz, Batmobile the Complete History (2012); Comic Book Resources, Comic Book Resources presents the Unofficial History of the Batmobile (March 20, 2015), at https://www.cbr.com/brush-up-on-your-bat-history-with-cbrs-batmobile-infographics.

[193] The opinion mentions these traits in particular:

> [T]he Batmobile has maintained distinct physical and conceptual qualities since its first appearance in the comic books in 1941. In addition to its status as "a highly-interactive vehicle, equipped with high-tech gadgets and weaponry used to aid Batman in fighting crime," the Batmobile is almost always bat-like in appearance, with a bat-themed front end, bat wings extending from the top or back of the car, exaggerated fenders, a curved windshield, and bat emblems on the vehicle. This bat-like appearance has been a consistent theme throughout the comic books, television series, and motion picture, even though the precise nature of the bat-like characteristics have changed from time to time.
>
> The Batmobile also has consistent character traits and attributes. No matter its specific physical appearance, the Batmobile is a "crime-fighting" car with sleek and powerful characteristics that allow Batman to maneuver quickly while he fights villains. In the comic books, the Batmobile is described as waiting "[l]ike an impatient steed straining at the reins . . . shiver[ing] as its super-charged motor throbs with energy" before it "tears after the fleeing hoodlums" an instant later.
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> 802 F.2d at 1074-75.

[194] Batman Comics #5, March 1941, at 6 (online at https://www.dcuniverseinfinite.com/comics/book/batman-1940-5/09d7c763-4351-417a-944e-15f40e68ad82/c/reader).

[195] Detective Comics # 48, *supra* note 191, at 2, 14; Batman Comics #5, *supra* note 194, at 1, 2, 14.

[196] *See* Gerard Jones, Men of Tomorrow: The True Story of the Birth of the Superheroes 149-55 (2006).

Roussos.[197] Kane had no written contract with his ghosts, and he paid them, when he paid them, irregularly.[198]

During the Second World War, Batman became a sufficiently popular superhero that DC hired writers and artists other than Bob Kane to work on Batman comic books. Those writers and artists, though, also worked as independent contractors rather than employees, creating their stories out of their own studios, and delivering them to National in return for a per-page fee.[199] In 1950, *Detective Comics* # 156 featured a story in which the Batmobile was blown up in an explosion, and Bruce Wayne caused it to be rebuilt to be spiffier and more bat-like with even more advanced technical equipment.[200] The artist responsible for the redesign was a freelance illustrator named Dick Sprang.[201] Sprang worked out of a studio that he cofounded with two other illustrators. Like Robinson and Roussos, Sprang received no credit for his illustrations. Bob Kane's deal with DC called for Kane to receive sole credit on Batman comic books whether someone else had done the work or not.[202]

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[197] *See* Fandom, Batman v. 1, #5, DC Comics database, https://dc.fandom.com/wiki/Batman_Vol_1_5 (visited Oct. 6, 2024); Fandom, Detective Comics v.1, # 48, DC Comics Database, https://dc.fandom.com/wiki/Detective_Comics_Vol_1_48 (visited Oct. 6, 2024). Comic book fandom started small in the 1960s with a fanzine and a couple of early cons. *See* Blake Bell, Strange and Stranger: The World of Steve Ditko 125-36 (2008). Fans showed enthusiastic interest in both their favorite superheroes and the actual people who had created them. As comic book fandom grew from a nerdy fanzine or two to a major commercial enterprise, comic readers displayed their interest in learning more about the writers and artists who were behind their favorite superheroes, and comic book publishers discovered that encouraging fan engagement was good for business. Fans' attention put some pressure on publishers to reexamine the ways they treated their writers and artists. *See* Bell, *supra*, at 153-54; Jim Shooter, The Jack Kirby Artwork Return Controversy, April 1, 2011, at http://jimshooter.com/2011/04/jack-kirby-artwork-return-controversy.html/; Jones, *supra* note 196, at 328-30.

[198] *See* Rik Worth, The Creators of Batman: Bob, Bill & The Dark Knight 37-51 (2021). Since DC didn't secure an assignment from the actual creators of the pages, and those creators had no written contract with Kane, that means that DC secured ownership of the right to publish the pages by parol transfer, *see supra* note 170, but didn't obtain rights that would entitle it to apply for copyright renewal.

[199] DC hired Bill Finger, Jerry Robinson, and George Roussos as independent contractors to work on Batman stories and others. Gradually, the fact that they, rather than Bob Kane, had done the writing and art that Kane claimed to have done himself became an open secret, but one that was never officially acknowledged during Kane's lifetime. *See* Marc Tyler Nobleman, Bill: The Boy Wonder (2012); Julius Schwartz, Man of Two Worlds: My Life in Science Fiction and Comics 66-68, 118-19 (2000); Worth, *supra* note 183, at 52, 65-66.

[200] *Detective Comics* # 156

[201] *See* Fandom, Detective Comics v.1, # 156, DC Comics Database, at https://dc.fandom.com/wiki/Detective_Comics_Vol_1_156 (visited Oct. 7, 2024). Sprang drew the story and designed the cover of the issue. Joseph Samachson wrote the story, Charles Paris was the inker, and Jack Schiff was the editor. *Id.*

[202] *See* Worth, *supra* note 198, at 64-66.

The earliest of the copyright registrations DC attached to its complaint in the Batmobile case were for *Batman* # 170 and *Detective Comics* # 337,[203] both from March 1965. *Batman* # 170 features a sporty convertible Batmobile and the caption *"out of the city and into the country speed the two powerful cars! Slowly but steadily the* ***Batmobile*** *takes over its quarry..."*[204] Although the story is credited solely to Kane, fans have reconstructed the issue's authorship and at least one of the story's creators, Julius Schwartz, was a National Comics staff editor.[205] That means that National would have been one of that story's joint authors by virtue of the work made for hire doctrine.[206] To the extent that the copyrightable aspects of the Batmobile character had appeared in issues published before Schwartz became editor of the Batman comic books, however, those aspects were authored by freelance writers and artists who were not DC employees.

In the late 1960s, comic book writers for DC tried to form a union to persuade DC to give them more money, health benefits, and some ownership or royalty interest in the superheroes they created.[207] Editors at DC indicated that they were willing to have a conversation about it, although the fact that many different writers and artists had contributed to the most popular superheroes and villains over the years seemed like an insuperable barrier to giving current

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[203] The Batmobile does not appear in Detective Comics #337. Instead, Batman and Robin "speed to the scene of the disturbance in a Batcopter." Detective Comics # 337, Mar. 3, 1965, at 6, https://www.dcuniverseinfinite.com/comics/book/detective-comics-1937-337/ee27e34d-e894-46ca-aebc-51cf0bc0878b/c/reader. Fans identified the writers and artists of the story as Gardner Fox, Carmine Infantino and Joe Giella. See Fandom, Detective Comics # 337, DC Comics Database, at https://dc.fandom.com/wiki/Detective_Comics_Vol_1_337.

[204] Batman # 170, March 1965, at 5, https://www.dcuniverseinfinite.com/comics/book/batman-1940-170/13a453d3-b34d-4779-bb45-e9a77c3241fa/c/reader (emphasis in original). The DC Comics fan Database reports that the story was written by Gardner Fox, penciled by Sheldon Moldoff, inked by Sid Greene, lettered by Gaspar Saladino, and edited by Julius Schwartz. Fandom, Batman Comics # 170, DC Comics Database at https://dc.fandom.com/wiki/Batman_Vol_1_170 (visited Oct. 8, 2024). Schwartz was a National Comics employee from 1944 to 1986; he oversaw the titles featuring Batman from 1964 to 1978. *See* Schwartz, supra note 199, at 113-31; WORTH, *supra* note 198, at 83-84. Moldoff was another longtime uncredited ghost artist for Bob Kane, who began working for DC directly as an independent contractor after Batman got big. *See id.* at 81-85. Saladino worked at a desk in the DC Comics offices, but was employed and paid as an independent contractor. Fox and Greene were also freelancers.

[205] *See* Schwartz, *supra* note 199, at 115-19; WORTH, *supra* note 198, at 83-85.

[206] The 1965 date also assures that the comic book issue would not have entered the public domain by virtue of renewal in the wrong name. *See infra* footnote 212.

[207] *See* WORTH, *supra* note 198, at 104-07; Mike W. Barr, The Madness & the Girls: The DC Writers Purge of 1968, Comic Book Artists # 5, Summer 1999, at 10 .

writers and artists ownership or royalties.[208] Then, DC simply stopped assigning stories to any of the writers involved in the effort.[209] It wasn't necessary to fire them, since they weren't employees.[210]

The copyright law of the era was hospitable to comic publishing, at least in the short term. Although the copyright statute had since 1790 required copyright assignments to be in writing, courts had recognized a "parol transfer" doctrine that allowed the author of an unpublished work to transfer the right to secure federal statutory copyright through publication with notice, by simply transferring the unpublished manuscript.[211] Even though the creators of Batman and his Batmobile were not National's employees and had signed no written contract, their delivery of the completed pages to Kane, who conveyed them to National, gave the publisher good title to the copyright for the initial 28 year term. Once the initial term expired, however, the right to apply for copyright renewal vested in the original authors, that is, Bill Finger, Jerry Robinson, and George Roussos.[212] Back in the 1940s, when comics seemed unlikely to retain

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[208] *See* Barr, supra *note* 207, at 12.

[209] *See* WORTH, *supra* note 198, at 105-06; Barr, *supra* note 207, at 14.

[210] Efforts since 1968 to unionize comic book writers and artists have been unsuccessful. *See*, *e.g.*, Joe George, *Neal Adams and the Fight to Unionize Comics*, PROGRESSIVE MAG. (May 5, 2022), at https://progressive.org/latest/neal-adams-fight-to-unionize-comics-george-220505/. In 2021, however, staff at Image Comics formed Comic Book Workers United a trade union affiliated with the Communications Workers of America. Image initially declined to recognize the union. *See* Graeme McMillan, *The Comic Book Industry's Next Page Turner: Union Organizing*, HOLLYWOOD REPORTER (Nov. 22, 2021), at https://www.hollywoodreporter.com/business/business-news/the-comic-book-industrys-next-page-turner-union-organizing-1235044157/. After an NLRB supervised vote, Image and the union agreed on the terms of a contract, which was ratified by union vote. *See* Zach Rabiroff, At Image, *Comic Book Workers United Takes Another Step in a Long Union Walk*, COMICS J. (March 13, 2023), at https://www.tcj.com/at-image-comic-book-workers-united-takes-another-step-in-a-long-union-walk/. The path since then has not been smooth. The union has brought multiple unfair labor practice claims against Image; those charges are still pending. *See* Comic Book Workers United, *For Immediate Release* (May 31, 2023), https://www.cbwupdx.com/.

[211] *See* Litman, *supra* note 41, at 737-40; *see, e.g.*, Siegel v. Warner Bros. Entertainment, 658 F. Supp. 2d 1036, 1084-89 (C.D. Cal 2009).

[212] The right to apply for a renewal term could be assigned, but the assignment needed to be in writing. *See* Fisher Music Co. v. M. Witmark & Sons, 318 U. S. 643 (1943). A renewal application filed in the wrong name had no effect. Until 1992, unless the proper renewal claimant applied for renewal, the work entered the public domain at the end of the initial 28-year term. *See, e.g.*, Faulkner v. Nat'l Geographic Soc'y., 211 F. Supp. 2d 450, 463-66 (S.D.N.Y. 2002); International Film Exchange, Ltd., v. Corinth Films, Inc., 625 F. Supp. 431 (S.D.N.Y. 1985). A renewal of a jointly authored work by one of the joint authors would preserve the renewal copyright for all joint authors.

The 1909 Act permitted the current copyright proprietor to apply for the renewal term for works that were periodicals as well as for work made for hire, but also

their value for more than a brief period, the fact that unwritten assignments lasted only through the initial 28-year term didn't seem to be a problem. As it became clear, though, that superheroes remained popular, comic book publishers

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provided that the individual author of a contribution to a periodical was entitled to renew the copyright in that contribution, regardless of whether the contribution had originally been separately registered in the author's name. 1909 Act § 24. That raises the question whether a proprietor's renewal of the copyright in an issue of a periodical preserved rights in the individual contributions to the periodical or only in the compilation and any contributions that had been authored by the publisher of the periodical. In the Copyright Office's 1960 study of copyright renewal, Barbara Ringer noted that courts had not yet resolved that question. *See* Barbara A. Ringer, *Study No. 31: Renewal of Copyright* (1960), *in* Copyright Law Revision: Studies Prepared for the Subcomm. On Patents of the Senate Comm. on the Judiciary, 86th Cong. 136-42 (1961).

The 1984 edition of the Compendium (2d) of Copyright Office Practices noted that where the copyright in an issue of a periodical was renewed by the proprietor but the individual contribution was not renewed by its author, "It is unclear whether the proprietor's claim in the entire work covers everything in the work that is not separately renewed." UNITED STATES COPYRIGHT OFFICE, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES II § 1317.05 at page 1300-24 (1984). In Faulkner v. Nat'l Geographic Soc'y., however, the authors of articles and photographs published in *National Geographic Magazine* sued the magazine for republishing their works in a CD-ROM archive of past magazine issues. One of the plaintiffs had failed to file renewal copyright registrations for his contributions but argued that the National Geographic's renewal of the copyright in the issues in which his works appeared preserved his renewal rights. U.S. District Court Judge Lewis Kaplan disagreed, holding that the magazine's renewal of the copyrights in the issues would not have saved the plaintiff's contributions from entering the public domain at the end of the initial copyright term given plaintiff 's failure to file for renewal on his own behalf. 211 F. Supp. 2d at 464-65. Thus, it's possible that individual stories contained in issues of comic books that were renewed only by Marvel and DC (and not by the writers and artists that authored them) entered the public domain because they were not renewed by the appropriate renewal claimant. That may explain DC's choice of *Batman* # 170 and *Detective Comics* # 337 as the comics on which it filed suit in the Batmobile case, since both were coauthored, in part, by National Comics employees, and could properly have been renewed on the basis of National Comics authorship of the stories as works made for hire. Authors of works initially published before 1964 lost the opportunity for a renewal term if they failed to file a timely renewal application with the copyright office.

In 1992, Congress enacted the Copyright Renewal Act, making future copyright renewals automatic. Works first published after January 1, 1964 have the benefit of automatic renewal, which vests in the person who would be entitled to apply for renewal. *See* Copyright Amendments Act of 1992, Pub. L. 102-307, 106 Stat. 264, codified as amended at 17 USC § 304. Thus, after 1992, even a renewal application filed in the wrong name would still have no effect, but rather than entering the public domain, the copyrighted work would receive a renewal term that would vest in the individual entitled to renew.

sought to claim the renewal term by asserting that the original comic book stories had been created as works made for hire.[213]

Comic book superheroes have characteristics that make them particularly suitable for treatment as works made for hire. Almost all of them were created by teams of different individuals working over a period of years. Each story or issue of a superhero comic book is itself a jointly authored work, and superhero characters develop over many stories and issues. At the time the characters first appeared, the copyright law didn't give copyright protection to characters as freestanding works.[214] Untangling who should be deemed the author or authors of a comic book character is a daunting and perhaps impossible task. Treating the characters as works made for hire would allow court to bypass this difficult inquiry. But the working conditions of comic book authors in the 1940s, 1950s, and early 1960s didn't meet the legal requirements the courts had articulated for employment as an employee, and the publishers had been careless or mistaken about securing copyright assignments.

DC and Marvel sought to persuade authors and artists to sign retroactive work made for hire agreements.[215] They included work made for hire acknowledgements on royalty checks.[216] They filed lawsuits seeking court determinations that their valuable characters should be deemed works made for hire.[217] The conflict between the author-protective policies underlying copyright reversion and the licensing efficiency policies supporting the work made for hire doctrine posed difficult problems for courts tasked with resolving the disputes

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[213] *See, e.g.*, Marvel Characters v. Simon, 310 F.3d at 283; Cadence Industries Corp. v. Ringer, 450 F. Supp. 59 (S.D.N.Y. 1978); Siegel v. National Periodical Publications, 364 F. Supp. 1032, 1035-36 (S.D.N.Y. 1973), aff'd on other grounds, 508 F.2d 909 (2d Cir. 1974). JOE SIMON, MY LIFE IN COMICS 226-28 (2011). In the 1970s, DC and then Marvel adopted a policy of returning artwork to comic book creators, so that they could sell the original pages to collectors. Marvel conditioned the return of original artwork on the artist's signing a release acknowledging that the artwork had been created as a work made for hire and that Marvel retained all rights in the work. *See* in re Marvel Entertainment Group, 254 B.R. 817, 823-24 (D. Del. 2000).

[214] Indeed, the Copyright Office Compendium of Copyright Practices insists that the law still does not protect "characters" as freestanding works of authorship. *See* COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 911 (3d ed. January 2021); but *see id.* at 709 (referring to a "children's book featuring copyrightable characters from a preexisting children's book."). Courts, however, have disagreed. *See, e.g.*, D.C. Comics v Towle, 802 F.3d 1012, 1021 (2015); Enos v. Walt Disney, 2024 U.S.P.Q.2D (BNA) 455 (C.D. Ca. 2024); Moonbug Entm't LTD v. Babybus Fujian Network Tech. Co., 2023 U.S. Dist. LEXIS 129285 (C.D. Cal 2023).

[215] *See, e.g.*, Marvel Worldwide v. Kirby, 777 F. Supp. 720, 724 (2011), aff'd in part, vacated and remanded sub nom. Marvel Characters v Kirby, 726 F.3d 119 (2012).

[216] *See, e.g,* Marvel Worldwide v. Kirby, 777 F.Supp. 2d at 747; In re Marvel Entertainment Group, 254 B.R. 817, 823-24 (D. Del. 2000).

[217] *See, e.g.*, Marvel Worldwide v. Kirby, 756 F. Supp. 2d 461, 465 (2010); Marvel Characters v. Simon, 310 F.3d 280 (2d Cir. 2002).

and led to a raft of inconsistent judicial resolutions.[218] Ultimately, both Marvel and DC comics appear to have reached confidential settlements with many of their writers and artists (or their estates) over the question of who authored the characters that appear in their comics, and what credit and payment terms follow.[219]

Today, DC and Marvel have parleyed their superhero characters into multibillion dollar media empires.[220] Bill Finger receives co-creator credit in Batman comic books and movies. DC and Marvel both print writer and artist credits on the covers of individual issues.[221] Comic book writers and artists are genuine celebrities to comic book readers. Comic conventions and fan creations

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[218] *Compare, e.g.,* Marvel Characters v Kirby, 726 F.3d 119 (2012) *with e.g.,* Marvel Characters v. Simon, 310 F.3d 280 (2d Cir. 2002).

[219] *See* Alisa Perren & Gregory Steirer, The American Comic Book Industry and Hollywood 49 (2021); Simon, *supra* note 213, at 243; Blake Brittain, *Marvel Settles with Four Artists in Superhero Copyright Fight*, reuters (June 9, 2023), https://www.reuters.com/legal/marvel-settles-with-four-artists-superhero-copyright-fight-2023-06-09/; Ashley Cullins, *Marvel Settles Fight Over Spiderman, Dr Strange Rights*, The Hollywood Reporter (Dec. 8, 2023), https://www.hollywoodreporter.com/business/business-news/marvel-settles-lawsuit-over-spider-man-doctor-strange-rights-1235728192/; Eriq Gardner, Marvel, *Jack Kirby Estate Settlement Brings End to High Stakes Battle*, The Hollywood Reporter (Sept. 26, 2014), https://www.hollywoodreporter.com/business/business-news/marvel-jack-kirby-estate-settlement-735921/; Batman and Bill (Hulu 2017). *See also* DC Comics v. Pacific Pictures Corp., 545 Fed. Appxs 648 (9th Cir. 2013)(holding § 304(d) termination of rights in Superman not available to Jerry Schuster's heirs because of 1992 settlement); Larson v. Warner Brothers Entertainment, 504 Fed Appx 586 (9th Cir. 2013)(holding §304(c) termination of rights in Superman not available to Joe Siegel's heirs because of settlements reached in 2001 and 2002).

[220] *See* DC.com: The Official Home of DC, https://www.dc.com/ (visited June 23, 2025); Marvel.com: The Official Site for Marvel movies, characters, comics, TV shows, videos, & more, https://www.marvel.com/ (visited June 23, 2025); *see, e.g.*, Rebecca Rubin, With 'Deadpool & Wolverine,' the Marvel Cinematic Universe Becomes First Film Franchise to Cross $30 Billion at Global Box Office, Variety, July 27 ,2024, at https://variety.com/2024/film/news/marvel-cinematic-universe-30-billion-global-box-office-1236083709/.

[221] Both DC and Marvel gradually added artist and writer credits to the stories and then to the covers of issues. Cover credits had shown up sporadically. Jack Kirby and Joe Simon got one in 1942 for the initial issue of "Boy Commandos." *See* Boy Commandos # 1 (December 1942). Bob Kane received occasional cover credits for Batman as early as 1940. Batman # 1 (March 1940). The transition to regular cover credits was gradual, beginning with a credit for the cover artist, and then credits for the writers and artists. *See, e.g.*, Detective Comics # 354 (Aug. 3, 1966); Detective Comics # 454 (Dec. 7, 1977); Detective Comics #560 (March 5, 1986); Detective Comics # 598 (Feb 7 , 1989); Captain America # 225 (Sept. 1978); Amazing Spiderman # 426 (Sept. 1997).

generate hundreds of millions of dollars. Being a comic creator, though, still doesn't pay very well, and doesn't come with job security or creative control.[222]

G. Summary: One Size Doesn't Fit All

The one-size fits-all rules embodied in the copyright statute are not, in fact, a comfortable fit with the authorship norms, customs and expectations of creators in different subject matter categories. Different creative communities afford different value to the dignitary aspects of authorship (e.g., credit) and the pecuniary aspects (e.g., money and control over exploitation). The copyright statute seeks to treat the pecuniary and dignitary elements as merged, by vesting copyright automatically in the person or entity who is a work's legal author. Copyright discourse often confuses authorship with copyright ownership.[223] Various creative communities have evolved customs that allow them to address the dignitary and pecuniary interests bound up in authorship separately. Those customs are surprisingly varied. Academic authors show unseemly eagerness to part with the ownership of their copyrights to any publisher who promises to convey their work to a wider audience but stubbornly insist on receiving credit as the authors of their works despite the copyright rule to the contrary. Dramatists not only maintain that they own the copyrights in their scripts (and that the world will come to an end if they part with those copyrights) but also claim that nobody else can own a copyright in any part of any production associated with their plays. Screenwriters have reconciled themselves to the fact that motion picture studios are the legal authors of their works but insist on controlling which of them receives writer credit. Songwriters routinely assign rights to be named as the author and collect an author's share of royalties, despite the fact that the copyright statute has no mechanism to convey authorship. These different approaches all seem to work tolerably well on the ground until the sorts of authorship disputes arise that require the assistance of the courts.

Authorial communities' customs diverge from statutory authorship rules in different and distinctive ways. I'm not urging that we should revise the one-size-fits-all statutory rules to incorporate the norms of and expectations of different authorial tribes. Overarching rules have important virtues. They are both more flexible and more durable than rules crafted to satisfy the expectations of specific industry sectors. They can insulate legal outcomes from the power disparities that are baked into many sectors' customary practices. The statutory rule that, in general, the initial power to decide how to exploit a creative work should belong to the individuals who created it has a significant fairness advantage. Our experience with sector-specific provisions in the copyright statute, moreover, has demonstrated that the opportunity to craft tailored rules for particular copyright industry segments presents powerful temptations for those industry groups to engage in self-dealing. Past

[222] *See* PERREN & STEIRER, *supra* note 219, at 50-74.
[223] *See* Jessica Litman, *What We Don't See When We See Copyright as Property*, 77 Cambridge L.J. 536 (2018).

sector-specific provisions have included oppressive details designed to disadvantage both creators and potential competitors.[224]

Even if we don't adjust the statute to reflect different authorial customs, however, those customs should make us aware of the extent to which the rules on the books are not satisfactory to actual creators, and of the things they are willing to settle for instead. To the extent that copyright's rules about authorship purport to incorporate presumptions derived from the contributors' intent, the norms of a particular genre should affect the inferences we draw about what collaborators intended. The different customs should also remind us that, when we speak of copyright as an incentive for creators, that incentive is at best indirect and untethered from the actual legal rules.

A more subtle question is the degree to which the norms and expectations of different authorial tribes have expressly or implicitly bent the courts' construction of the statutory rules to privilege the assumptions and expectations of some collaborators over others. When we look at courts' handling of authorship disputes, we can see the tacit and largely unacknowledged influence of genre-specific norms on court-adopted rules that purport to apply across the board. Courts have embraced rules that at least appear to be rooted in the norms of one genre but have cast them as rules of general application. They have then exported them to disputes arising from the authorship of other categories of works. These rules were not particularly wise to begin with, but when used to resolve disputes across the board seem almost inexplicably foolish.

III. AUTHORSHIP IN THE COURTS

As the previous section discussed, collaboration in the creation of copyrightable works is common. Different creative tribes have evolved different customs about how credit, money, and copyright ownership are divided up among collaborators. Those customs derive from (genre-specific) norms rather than law. Inevitably, though, disputes over authorship arise, and local norms can't resolve them. Sometimes an ambitious outsider will hear a song and form the view that it is so similar to his song that it must have been copied from it.[225] Sometimes, an opportunistic financial backer will expect to be credited as the author of a work because he paid for it.[226] Sometimes a more powerful partner will insist on sole credit or control or all the money because he has the bargaining power to do so.[227] As often though, participants in a completely

[224] *See, e.g.*,17 USC §§ 114, 115, 119; Lydia Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. Rev. (2019). *See generally* Cory Doctorow & Rebecca Giblin, Chokepoint Capitalism (2022).

[225] *See, e.g.*, Payne v. Theory Entertainment, No. 1:22-cv-06308 (S.D.N.Y. filed July 25, 2022); Grigson v. Lopez, No. 2:22-cv-07971 (C.D. Cal. filed Nov. 1, 2022).

[226] *See, e.g.*, Pisciotti v. Brittingham, 2022 U.S. Dist. LEXIS 116951 (W.D. Wash 2022).

[227] *See, e.g.*, Merchant v. Levy, 92 F.3d 51 (2d Cir. 1996).

conventional collaboration will work with each other to create a work but be unable to resolve their differences about how to apportion credit and money. It is, after all, not unusual for each creator to sincerely view the contributions he made as more critical than those of his collaborators.

When disagreements over authorship land in court, courts appear to be reluctant to adjudicate questions of who contributed how much of what to a work, or what we might term "factual authorship." They have devised blunt doctrinal and procedural tools that allow them to avoid doing so. Those tools, though, do a poor job of aligning claims of copyright ownership with actual creative contributions. The tools make little doctrinal or policy sense, provide perverse incentives, and undermine the legitimacy of the copyright system.

Disputes over authorship can come before a court from different routes. First, a person or entity claiming to be the author of a work may register the copyright and sue anyone who is exploiting the work for copyright infringement.[228] Second, a defendant in a copyright infringement suit may raise having authored or coauthored a work as a defense.[229] Third, someone who claims to be the author of a work may file suit for a declaration that she or it is indeed the author or coauthor, and potentially seek an accounting from her alleged coauthor.[230] Finally, someone who claims to have authored a work may seek to take advantage of the statutory opportunities for reversion, relying either on the copyright renewal provisions that apply to works created before January 1, 1978, or the termination of transfers provisions in section 304 and 203.[231] The question who authored a work is one of fact, and is to be decided by a jury if the case gets that far.[232] Most don't. While collaborative creation is commonplace, courts gravitate toward tests that enable them to dismiss authorship claims early in the course of litigation.

As I noted earlier, the facts that are relevant to whether a particular collaboration produced a work of joint authorship also bear on whether the work should be deemed a work made for hire. I focus in the next section primarily on authorship disputes in which one contributor claims to have been a joint author, but some bleed between the categories is unavoidable.

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[228] *See, e.g.*, Pisciotti v. Brittingham, 2022 U.S. Dist. LEXIS 116951 (W.D. Wash 2022); Lewis v. Activision Blizzard, 2013 US Dist LEXIS 71155 (N.D. Cal. 2013), aff*'d*, 634 Fed. Appx 182 (9th Cir. 2015); Tolliver v. McCants, 2009 U.S. Dist. LEXIS 25233 (S.D.N.Y. 2009).

[229] *See, e.g.*, Foster v. Lee, 93 F. Supp. 2d 223 (SDNY 2015); Silva v Sunich, 2006 US Dist LEXIS 98021 (C.D. Cal 2006).

[230] *See, e.g.*, Aalmuhammed v. Lee, 202 F.3d 1227 (9th Cir. 1999).; Merchant v. Levy, 92 F.3d 51 (2d Cir. 1996).; Armes v. Post, 2022 U.S.P.Q.2D (BNA) 373 (C.D. Cal. 2022).

[231] *See, e.g.*, Horror, Inc. v. Miller, 15 F.4th 232 (2d Cir. 2021); Marvel Characters v Kirby, 726 F.3d 119 (2012); Stillwater v. Basilotta, 2020 U.S. Dist. LEXIS 137746 (C.D. Cal. 2020), aff'd 2022 US App LEXIS 12752 (9th Cir. 2022).

[232] *See, e.g.*, Gaiman v. McFarlane, 360 F.3d 644 (7th Cir. 2004); Webber v. Dash, 2021 U.S.P.Q.2D (BNA) 903 (SDNY 2021).

A. Joint Works and Dominant Authors

1. The "dominant author" test

In 1986, Alice Childress and Clarice Taylor collaborated on a play about vaudeville star and stand-up comedian Moms Mabley. Childress was an established playwright;[233] Taylor was a successful actress best known for playing Bill Cosby's mother on the *Cosby Show*.[234] The two were friends and had worked together in the 1950s on Childress's first full-length play, *Trouble in Mind*.[235] Taylor had a collection of Moms Mabley recordings and had wanted to produce and star in a play about Mabley for at least several years. She first asked Childress to write the script in 1982; Childress turned her down. In 1986, she asked again, and this time, Childress agreed.[236] Taylor had already conducted a significant amount of research about Mabley's life and work, including interviews with Mabley's friends and family. She had collected Mabley's jokes. She turned that research over to Childress and conducted additional research at Childress's request. She made suggestions about characters and events to include in the script. As the actress planning to star in the play, she suggested scenes and details. Childress wrote the script; she created the structure and wrote all of the dialogue. Taylor paid Childress $2500.[237] The three-character play was produced in the summer of 1986 and again in February 1987, with Taylor playing the lead role.[238]

Meanwhile, Childress and Taylor failed to agree on contract terms. Taylor proposed that she would pay Childress $5000 as an advance against a 4% royalty and that the two of them would share equal ownership of the rights in the script.[239] Childress, who had registered the copyright in the script as its sole author, refused to consider coownership and objected to the proposed royalty.[240] Other theatre companies expressed interest in producing the script. Childress told her agent to decline any requests that didn't envision Taylor's playing the

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[233] *See* Roundabout Theatre, The Life and Work of Alice Childress, https://www.roundabouttheatre.org/get-tickets/upstage-guides-current/upstage-guide-trouble-in-mind/life-work-alice-childress-trouble-in-mind (visited Feb. 21, 2026).

[234] *Clarice Taylor Dies at 93*, Variety (June 1, 2011), at https://variety.com/2011/scene/news/clarice-taylor-dies-at-93-1118037931/.

[235] *See* Maya Philips, Alice Childress Finally Gets to Make "Trouble" on Broadway, NY Times, Nov. 4, 2021, at https://www.nytimes.com/2021/11/03/theater/alice-childress-trouble-in-mind.html; Roundabout Theatre Company, the Troubled History of Alice Childress's *Trouble in Mind*, Upstage Playgoer's Guide, at https://www.roundabouttheatre.org/get-tickets/upstage-guides-current/upstage-guide-trouble-in-mind/production-history-trouble-in-mind/ (visited Nov. 6, 2024).

[236] *See* Childress v. Talor, 798 F. Supp. 981 (S.D.N.Y. 1992).

[237] Childress v. Taylor, 945 F.2d 500, 501-02 (2d Cir. 1991).

[238] *See* Mel Gussow, The Stage: "Moms", N.Y. Times (Feb. 10, 1987), at C16, online at https://www.nytimes.com/1987/02/10/theater/the-stage-moms.html.

[239] 798 F. Supp. at 986.

[240] *Id.* at 985-86.

lead role. While those discussions continued, Taylor decided to mount a new production of the play and hired playwright Ben Caldwell to rewrite Childress's script. A production based on that script opened in the summer of 1987, and later toured Washington, Atlanta, Cleveland and Philadelphia. It lost money.[241] The program credited Caldwell as the playwright and said the play was "based on a concept by Clarice Taylor." It didn't mention Childress.[242]

Childress sued Taylor, Caldwell, and the company producing the play for copyright infringement. Taylor insisted that she was a joint author of Childress's script, and therefore shared all of the rights conferred by the copyright statute. The district court found that Taylor believed in good faith that she and Childress were coauthors, but that Childress never shared that belief.[243] The court found that most of Taylor's contributions were uncopyrightable research and ideas, and that her expressive contributions to the script were not substantial. The judge therefore ruled that Childress was the sole author of the play. [244] Having determined that Childress was the sole author and copyright owner of the play, the court found the Caldwell script substantially similar and granted Childress summary judgment on the issue of copyright infringement.[245]

On appeal, the Second Circuit articulated the determination of what the law requires of putative joint authors as the task of protecting genuine authors from pretenders. "Care must be taken . . . to guard against the risk that a sole author is denied exclusive authorship status simply because another person rendered some form of assistance."[246] The court viewed the lower court's insistence that joint authorship required the contribution of copyrightable expression as problematic.[247] Authorities were divided. The Copyright Office endorsed the requirement.[248] The Nimmer treatise, in contrast, insisted that copyrightability was not required.[249] The court found the textual argument unpersuasive: "The Act surely does not say that each contribution to a joint work must be copyrightable, and the specification that there be 'authors' does not necessarily

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[241] *Id.* at 987.

[242] 945 F.2d at 503-04. *See* Mel Gussow, *Theatre Colleagues Dispute Authorship of "Moms,"* N.Y. Times (Aug. 18, 1987), at C13, online at https://www.nytimes.com/1987/08/18/theater/theater-colleagues-dispute-authorship-of-moms.html.

[243] Childress v. Taylor, 20 U.S.P.Q.2d (BNA) 1181, 1184-85 (S.D.N.Y. 1990), *aff'd* 945 F.2d 500 (2d Cir. 1991).

[244] 20 U.S.P.Q. 2d at 1183-85. Taylor's backup argument was that the script was a work made for hire, since Childress had written it at Taylor's instance and expense. The court rejected that argument as well, noting that the Supreme Court's decision *in Community for Creative Non-Violence v. Reid* precluded it. 20 U.S.P.Q.2d at 1188.

[245] *Id.* at 1188.

[246] 945 F.2d at 504.

[247] *Id.* at 506-07.

[248] *Id.* at 506.

[249] Melville B Nimmer & David Nimmer, Nimmer on Copyright § 6.07 (1991). The treatise continues to take this position, although it acknowledges that many courts have rejected it. See Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 6.07 (2024).

require a copyrightable contribution."[250] Still, the court was moved to adopt the requirement because "[t]he insistence on copyrightable contributions by all putative joint authors might serve to prevent some spurious claims by those who might otherwise try to share the fruits of the efforts of a sole author of a copyrightable work"[251]

When the court considered the nature of the intent required for joint authorship, it again expressed a worry that the statutory language required too little.[252]

> The wording of the statutory definition appears to make relevant only the state of mind regarding the unitary nature of the finished work -- an intention "that their contributions be merged into inseparable or interdependent parts of a unitary whole." However, an inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress. For example, a writer frequently works with an editor who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet very few editors and even fewer writers would expect the editor to be accorded the status of joint author, enjoying an undivided half interest in the copyright in the published work. Similarly, research assistants may on occasion contribute to an author some protectable expression or merely a sufficiently original selection of factual material as would be entitled to a copyright, yet not be entitled to be regarded as a joint author of the work in which the contributed material appears. What distinguishes the writer-editor relationship and the writer-researcher relationship from the true joint author relationship is the lack of intent of both participants in the venture to regard themselves as joint authors.
>
> Focusing on whether the putative joint authors regarded themselves as joint authors is especially important in circumstances, such as the instant case, where one person (Childress) is indisputably the dominant author of the work and the only issue is whether that person is the sole author or she and another (Taylor) are joint authors.[253]

The record disclosed no evidence that Childress shared Taylor's intent that the two be joint authors. Therefore, they weren't, and the district court properly rejected Taylor's co-authorship claim.[254] Since Childress, as an established playwright, was the dominant author, then even if Taylor's contributions were expressive and copyrightable, they didn't count as authorship and Taylor could not be a joint author.

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[250] 945 F. 2d at 506.
[251] 945 F.2d at 507.
[252] *Id.*
[253] 945 F.2d at 507-08.
[254] 945 F.2d at 508.

Two years later, the Court of Appeals for the 7th Circuit confronted a similar dispute.[255] Karen Erickson earned her masters' degree in theatre from Illinois State University in 1977. In 1981, she co-founded the Trinity Square Ensemble Theatre in Evanston, where she spent a decade as resident playwright, actor, director and artistic director. Trinity produced at least five plays that Erickson wrote or co-wrote, and paid her a per-performance royalty from 1987 to 1990. Some of the plays were scripts she had begun to write outside of her relationship with the company, and others were written during her tenure at Trinity, and were intended to be performed by Trinity's actors. Copious testimony at trial documented Erickson's playwriting process, which involved asking the company's actors to improvise scenes, and Erickson's selecting and editing the actors' contributions. The actors testified that their understanding was that the plays developed through this process belonged to Trinity rather than to any one person. In the case of one play, an actor who participated in the writing process was credited as a coauthor and paid royalties for performances until she left the company. Erickson, in contrast, testified that she had not intended to share authorship of her plays, and that the credit and royalties paid to the actor was an error that she corrected when she discovered it.[256]

Trinity stopped paying royalties to Erickson in November of 1990. She left the company in January of 1991. Her lawyer sent the company a letter demanding that it stop performing the plays, and Trinity refused. Erickson filed a copyright infringement suit seeking an injunction forbidding the company to perform five plays. Trinity agreed that it would no longer stage performances of two of the scripts, in return for Erickson's promise to stop making incendiary comments about her claims to Trinity's customers and patrons. The company insisted, however, that the other three scripts were joint works that it was entitled to continue to exploit.[257]

The Court of Appeals for the 7th Circuit formulated the test for joint authorship to require both that the collaborators intended to be joint authors at the time that the work was created and that they each made independently copyrightable contributions to the work.[258] For two of the scripts, the evidence

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[255] Erickson v. Trinity Theatre, 1992 WL 12561924, *6-*7 (N D Ill 1992), affd, 13 F.3d 1061 (7th Cir. 1994).

[256] 1992 WL 12561924 at *6-*7.

[257] 1992 WL 12561924 at *1-*3. Assuming that it had been right about that, it would still have owed Erickson, as a coauthor, a duty to account for any profits.

The magistrate judge applied the test adopted by the 2d Circuit in *Childress*. She concluded one of the scripts had indeed been a joint effort, and the fact that the actor who worked on the script with Erickson had received both credit and royalties supported a determination that Erickson had intended to share authorship credit for that play. However, the actor who collaborated with Erickson on that script had failed to identify specific copyrightable expression that she had contributed. As far as the other two scripts went, the magistrate found that Erickson had not intended to share authorship credit and that the actors who worked with her believed that the play belonged to the theatre company rather than seeing themselves as her coauthors. *Id* at *12- *15.

[258] 13 F.3d at 1071.

showed that Erickson had completed drafts of the scripts before involving the actors in improvisations, and retained control over which improvisational bits were incorporated into the scripts. The court concluded that Trinity could not show the requisite intent.[259] The third script was more problematic, since the actor who worked on two scenes testified that she considered the dialogue to be hers as well as Erickson's, and the fact that she had received coauthorship credit and royalties supported an inference that Erickson intended her to be a joint author. But because a magistrate judge had found that that actor had failed to identify specific copyrightable expression that she had contributed, the 7th Circuit held that Trinity had failed to show joint authorship.[260]

In *Cabrera v. Teatro del Sesenta*, the judge resolved competing claims to have authored a musical fourteen years earlier by relying on *Childress* and *Erickson.*[261] The Puerto Rican theatre company Teatro del Sesenta had been inspired by Rubén Blades' salsa song *Pedro Navaja* to create a new musical setting the story of Bertold Brecht's *Threepenny Opera* in 1950s Puerto Rico.[262] The company asked Eneida Molina-Casanova to write a script. She completed the first act in 1980. Meanwhile, the company had recruited CUNY Professor Pablo Cabrera to direct the production and sent him a copy of Molina-Casanova's script. Cabrera complained that the script was too similar to Brecht's play. He took the lead in rewriting the script in collaboration with the members of Teatro del Sesenta, who met daily for three months to read and discuss the script and suggest changes. Molina-Casanova participated in earliest meetings but stopped attending because she found the conflicts discouraging. [263]

La Verdadera Historia de Pedro Navaja opened in September 1980. The program credited Cabrera as both director and scriptwriter and credited the other members of Teatro del Sesenta as "script consultants."[264] Fourteen years later, Cabrera filed a lawsuit seeking a declaration that he was the sole author of the play, and an injunction forbidding the theatre company from mounting a revival.[265] The theatre, which said that it had staged the musical 400 times in the intervening years, insisted that its members had been coauthors of the script. The evidence at trial supported the inference that the rewriting process was highly collaborative. The members of the theatre believed that the rewriting process was collective and that decisions were reached by consensus. Even so, Cabrera had decided what suggestions were incorporated into the revised script. The trial judge also concluded that while Cabrera insisted that he had discarded Molina-Casanova's work completely, his final script showed striking similarities

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[259] *Id*. at 1071-72.
[260] 13 F.3d at 1072.
[261] Cabrera v. Teatro del Sersenta, 914 F. Supp. 743 (D. PR. 1995).
[262] 914 F. Supp. at 750-51.
[263] *Id*. at 751-52.
[264] *Id*. at 755-56
[265] Arguably, should a similar case be filed today, the court would dismiss the claim as time-barred because of the 14-year lapse preceding Cabrera's suit. *See infra* notes 339-400 and accompanying text.

to hers, causing the judge to rule that he incorporated much of her first act.[266] The court nonetheless held that Cabrera was the sole author of the script because the test for joint authorship required both the contribution of copyrightable expression and an intent, at the time of collaboration, to be joint authors.[267] Molina-Casanova's initial script had contributed substantial copyrightable expression to the final script, but at the time she wrote her draft, she was not aware that Cabrera would later seek to rewrite it, so she lacked the intent to be a joint author.[268] Cabrera also denied any intent to share authorship credit with Molina-Casanova or with the members of the company. The members of the company, meanwhile, as in *Erickson*, had failed to identify specific copyrightable expression that they had contributed to the final script, so even if they had intended to be joint authors of the script, they failed to meet the independently copyrightable contribution part of the test.[269] The judge expressed some unease that the test required her to reach an "unfair result," but believed that the law required it.

> Although recognizing Teatro's initiative, Molina's substantial copyrightable contribution, and the defendants valuable and dedicated efforts and assistance, this Court cannot attach co-authorship status to the defendants because they either lacked the intent or failed to make a tangible copyrightable contribution.
>
> Accordingly, this court finds that . . .Pablo Cabrera met his burden of proving by a preponderance of the evidence that he is the sole author of the play "La Verdadera Historia de Pedro Navaja."[270]

If the law calls for applying a test that erases one author's "substantial copyrightable contribution," perhaps the law should be rethought.

Back in New York City, the New York Theatre Workshop prepared to mount the world premiere production of *Rent*, a new musical by Jonathan

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[266] *Id.* at 752-60, 766-67.

[267] *Id*. at 767-68.

[268] *Id.* at 768:

> Since at the time [Molina-Casanova] created her contribution, she did not specifically intend to be a joint author with Cabrera, and since she afterwards manifested no intent to participate in a collective work with Cabrera, we lack the requisite intent between these two individuals to make them co-authors.

[269] *Id.* at 766-68. The court found that Molina-Casanova had not assigned her copyright in her script and had not given the company written authorization to use it. While she had intended for the company to use and benefit from her script, she retained ownership of it. *Id.* at 768. Molina-Casanova was one of 16 defendants in Cabrera's lawsuit, and she testified at length about the writing of the script, but she didn't file a counterclaim asserting copyright ownership or infringement. (If Cabrera and the company made use of Molina-Casanova's script with her tacit or explicit permission, the resulting play would not have infringed her copyright. See generally Samuelson, Pamela and Silbey, Jessica M., Preventing Unjust Enrichment and Copyright Opportunism: An Equitable Interpretation of Section 103(a) (January 15, 2025), available at SSRN: https://ssrn.com/abstract=5119701.)

[270] *Id.* at 769.

Larson, loosely based on *La Boheme.* NYTW staged a workshop production, which led to the conclusion that the musical showed great promise but had serious problems. The artistic director of the company tried and failed to persuade Larson to collaborate with a bookwriter, but did secure his agreement for the theatre to hire a dramaturg to help Larson clarify the storyline of the musical. NYTW hired Lynn Thomson, an NYU playwriting professor, to work with Larson on the book of the show, in return for a $2000 flat fee. From August to October of 1995, Thomson and Larson worked intensively on the script. The revisions were extensive, and transformed the book into a coherent and compelling story.[271]

Larson died suddenly before he could complete the revisions that he had planned. Thomson worked with the production's director and musical director and with the NYTW's artistic director to fine-tune the musical. The NYTW asked all four of them to sign a release disclaiming authorship in any material they contributed to *Rent*. Thomson indicated that she was willing to forgo payment or credit for any contributions made after Larson's death, but not willing to disclaim authorship of the contributions that she had made before he died. By her estimate, she had written 9% of the language of the script during her collaboration, and she had contributed song lyrics and substantial plot points. She believed that Larson had intended to give her both credit and a share of his royalties for those contributions.[272] She declined to sign the release unless it was modified to exclude the material she had written during Larson's lifetime.

The musical opened off-Broadway on February 13, 1996 and transferred to Broadway in April. It went on to earn a zillion dollars and win the Pulitzer Prize. Thomson, meanwhile, asked the Broadway producers for title page credit as a dramaturg, a percentage of Larson's royalties, and the right to quote the libretto in a book she planned to write. The producers were supportive but advised her that she needed to secure the agreement of Larson's heirs. Negotiations with Larson's family were unsuccessful, and Thomson filed suit for declaratory relief and an accounting, declaring her a co-author of *Rent* and awarding her 16% of Larson's share of the author's royalties.[273] The district court conducted a bench trial. The judge found that Thomson had made substantial, copyrightable contributions to *Rent*, but that she had failed to prove that Jonathan Larson regarded Thomson as his co-author. Under the two-prong *Childress* test, Thomson had failed to satisfy the second prong.[274]

Thomson appealed, arguing that if she were not a joint author of *Rent*, her contributions to the script were automatically protected by copyright from the moment they were first fixed in tangible form, and they could not lawfully be included in productions of *Rent* without her permission. Requiring the removal

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[271] *See* Thomson v. Larson, 147 F.3d 195 (2d Cir. 1998).
[272] Brief of Plaintiff-Appellant at 1-3, 10-13, 35, Thomson v. Larson, 147 F.3d 195 (2d Cir. 1998); 147 F.3d at 198.
[273] *Id.* at 147 F.3d at 198-99.
[274] 147 F.3d at 199.

of the material she had contributed would be a terrible result.[275] The Second Circuit found the fact that Larson had retained final decisionmaking authority over which of Thomson's contributions to include in the final script supported the conclusion that he lacked the intent to make Thomson a coauthor.[276] The Court of Appeals noted that the Second Circuit had not yet "decided whether a person who makes a non-*de minimis* copyrightable contribution but cannot meet the mutual intent requirement of co-authorship, retains, in the absence of a work-for-hire agreement or of any explicit contractual assignment of the copyright, any rights and interests in his or her own contribution."[277] Since Thomson had sued seeking a declaratory judgment and an accounting but had not sued the Larson family for copyright infringement, the trial court had not addressed her claim for copyright in her contributions as a sole author, so the appeals court did not need to address it either.[278]

At this point, it seems evident that a test initially devised to ensure that a sole author would not be "denied exclusive authorship status simply because another person rendered some form of assistance" has wandered pretty far afield. Asking which collaborator is the "dominant" one, and whether he or she exercised more control over the work or was generous or selfish about credit is not in fact especially probative of which collaborators created what parts of a

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[275] Brief of Plaintiff-Appellant, *supra* note 272, at 17. The Dramatists Guild filed an amicus curiae brief urging the Second Circuit to affirm. Brief of Amicus Curiae Dramatists Guild, Inc., Thomson v. Larson, 147 F.3d 195 (2d Cir. 1998) at 5, 15 ("In *Childress*, this Court recognized that despite the collaborative nature of theater, it is the playwright who is the author. …If the merger of two more than *de minimis* contributions were to be held to create joint authorship, the collaborative process necessary to the development of producible and successful plays would simply break down.").

[276] 147 F.3d at 202-03. In addition, the court cited evidence that Larson credited Thomson as a "dramaturg" on the copyright page of the script rather than as an author, and the contracts he signed with NYTW stated that he should receive billing as sole author and that he had final approval over the script. *Id.* at 203-04. In addition, the appeals court found Larson's general unwillingness, before agreeing to work with Thomson, to collaborate with a bookwriter or playwright on the book of *Rent* to be probative of his unwillingness to share authorship with anyone else. *Id.* at 204-05.

[277] 147 F.3d at 206.

[278] *Id.* After losing before the Second Circuit, Thomson filed a copyright infringement suit seeking injunctive relief against Larson's heirs and the producers of *Rent*, andt that case settled quickly. *See* F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under US Copyright Law*, 49 UCLA L. Rev. 225, 262 (2001); Jesse McKinley, *Family of 'Rent' Creator Settles Suit Over Authorship*, N.Y. TIMES (Sept. 10, 1998), at B3, online at https://www.nytimes.com/1998/09/10/theater/family-of-rent-creator-settles-suit-over-authorship.html.

work.[279] Nor is it plain that where two people each contribute copyrightable expression to a work, their subjective views of their relationship should govern whether copyright law recognizes them as authors. Whatever dignitary interest Jonathan Larson may have had in solo credit and control, moreover, is an interest that he is no longer in a position to enjoy.

The *Childress* "dominant author" test originated in the milieu of theatre, where long tradition has it that only the playwright can be an author.[280] But while the courts initially devised the test in connection with disputes over stage plays, they cast it as a test of general application construing the language of the statutory definition. Unsurprisingly then, the test has spread to other subject matters. Courts have relied on the dominant author test to assess joint authorship claims in connection with novels,[281] non-fiction books,[282] software,[283] songs,[284] a costume,[285] videogames,[286] and films.[287]

A particularly egregious application of the dominant author test is the decision in *16 Casa Duse LLC v. Merkin.*[288] Film producer Robert Krakovski purchased a screenplay and hired a cast and crew to make a 13-minute film titled "Heads Up." Krakovski asked Alex Merkin to direct the film. Merkin agreed, and Krakovski said he would pay him a fee of $1500. Krakovski asked all of the members of the cast and crew to sign independent contractor work made for hire agreements. Everyone except for Merkin signed the contracts. Merkin was apparently willing to assign the copyright in his contributions to Krakovski, but wanted the contractual right to prepare a director's cut and didn't want to sign a work made for hire agreement. Merkin went ahead and directed the film, and Krakovski turned the raw film footage over to Merkin for editing. The two of them continued to negotiate over the terms of Merkin's contract; each of them got more stubborn with every exchange. Merkin registered a copyright in the raw film footage. Krakovski hired a new editor to edit the raw footage and submitted the film to festivals. Merkin warned the festivals that he had secured a

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[279] As Carys Craig has pointed out in a different context, this view of authorship is also deeply gendered. *See* Carys J. Craig, *Copyright and Gender: Feminist Philosophies and the Politics of Proof in* Jessica Lai & Kathy Bowrey, A Research Agenda for Intellectual Property and Gender (forthcoming 2025).

[280] *See* LaFrance, *supra* note 30.

[281] *See* Maurizio v. Goldsmith, 84 F. Supp. 2d 455 (S.D.N.Y. 2000).

[282] *See* Respect, Inc.v. Committee on the Status of Women, 815 F. Supp. 1112 (N.D. Ill. 2015).

[283] *See* CDS, Inc. v. Zetler, 298 F. Supp. 3d 727 (S.D.N.Y. 2018).

[284] *See* BTE v. Bonnecaze, 43 F. Supp. 2d 619 (ED LA 1999).

[285] *See* Phillies v Harrison, 2021 US Dist LEXIS 243554 (S.D.N.Y. 2021).

[286] *See* Bubble Pony, Inc. v. Facepunch Studios ltd., 2015 US Dist LEXIS 163718 (D. Minn 2015).

[287] *See* Brooks v. Damon Anthony Dash & Poppington LLC, 852 Fed. Appx 40 (2d Cir. 2021); 16 Casa Duse v. Merkin, LLC, 791 F.2d 247 (2d Cir. 2015).

[288] 16 Casa Duse v. Merkin, LLC, 2013 WL 5510770 (S.D.N.Y. 2013), *aff'd* in part, *rev'd* in part, 791 F.2d 247 (2d Cir. 2015).

copyright in the raw footage and that Krakovski couldn't exhibit the film without his permission, which he didn't have. Krakovski sued Merkin; Merkin counter-sued Krakovski.[289]

The trial court concluded that Krakovski was either the author or coauthor of the film by virtue of his work-made-for-hire agreements with other members of the cast and crew, so that he was entitled to exploit the film without Merkin's permission. Indeed, if Krakovski was a coauthor, he was "indisputably the dominant author."[290] But, the court found, the parties were not coauthors because they lacked the requisite intent under the *Childress* test. Indeed, Krakovski's repeated insistence that Merkin sign a work for hire contract shows his "steadfast intent to be the Film's sole author."[291] Since the record clearly established that Merkin had made substantial independently copyrightable contributions to *Heads Up*, the court then turned to the issue that the Second Circuit had left unresolved in *Thomson v Larson*:

> The Second Circuit has not explicitly addressed the scenario where, absent a work-for-hire agreement, two parties each made more than a minimal contribution to a work and yet did not mutually intend to be co-authors. . . . Past cases, however, follow a clear pattern. When the Second Circuit finds that there is no mutual intent to be co-authors, it holds that whoever was the "dominant" author is the sole author.[292]

This is crazy talk. If Merkin's directorial contributions were copyrightable at all (and the court had earlier held that the record established beyond dispute that they were[293]), then copyright protection vested as soon as those contributions were fixed in tangible form. If Krakovski had been successful in persuading Merkin to sign a commissioned work-made-for-hire agreement, that copyright protection would have vested in Krakovski as the author of the work made for hire, but he wasn't. Once copyright vested, the statute requires a signed, written assignment to transfer it from Merkin to Krakovski.[294] Merkin said he was willing to execute such an assignment, but Krakovski insisted on a work for hire contract. But, under the district court's analysis, Krakovski doesn't need to persuade Merkin to sign a work-made-for-hire agreement or a copyright assignment. All he needs to do is to stubbornly insist that he and only he is the author of the film, and the copyright to Merkin's work will magically fly into his basket. Not only will he own the copyright, he will be deemed to have authored Merkin's contribution.

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[289] 2013 WL 5510770 at *2-*4.
[290] 2013 WL 5510770 at *8, *10. Judge Sullivan doesn't exactly explain how Krakovski's dominant authorship is indisputable, but he implies that it derives from the sheer number of work made for hire agreements that Krakovski secured from the cast and other members of the crew.
[291] 2013 WL 5510770 at *8.
[292] 2013 WL 5510770 at *9.
[293] *Id.* at *8.
[294] *See* 17 U.S.C. § 204(a).

Nonetheless the Court of Appeals for the Second Circuit affirmed this part of the opinion.[295] Courts within the Second Circuit have since relied on the rule to resolve joint authorship disputes across a variety of copyright subject matters.[296]

2. The "control" test

Over in the Ninth Circuit, the courts take a modestly different approach, initially shaped by the norms of filmmaking rather than stage plays. The leading case is *Aalmuhammed v Lee*.[297] Actor Denzel Washington engaged Jefri Aalmuhammed to help him with his portrayal of Malcom X in the 1992 Warner Bros film directed by Spike Lee. Aalmuhammed had no written contract with Lee or Warner Brothers. He made extensive contributions to the movie in the writing, filming, and post-production processes. He sought screen credit as a co-writer of the film, but Warner Brothers instead credited him only as an "Islamic technical consultant."[298] He filed suit seeking declaratory relief and an accounting. The Ninth Circuit panel agreed that Aalmuhammed had made substantial, independently copyrightable contributions to the film, and that the parties had intended their contributions to be merged into a unitary whole. The court, however, expressed some of the concerns that the Second Circuit articulated to justify its dominant author standard: in particular, the importance

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[295] 791 F.2d at 260-61. The appeals court dressed this up with a little bit more reasoning than appears in the district court opinion, by considering an assortment of factors that supported a conclusion that of the two putative authors, Krakovski was the dominant one. Merkin had a bunch of decisionmaking authority as the film's director, but, as the producer, Krakovski had even more. Krakovski had a bunch of contracts with third parties and Merkin didn't. *See id.* at 260. The decision skips right over any reasoning that would justify a writingless transfer of Merkin's copyright interests to Krakovski on account of his dominance.

[296] *See* Brooks v. Dash, 852 Fed. Appx 40 (2d Cir. 2021)(film); Webber v Dash, 2021 WL 3862704 (S.D.N.Y. 2021)(film); Maurizio v. Goldsmith, 84 F. Supp. 2d 455. (S.D.N.Y. 2000)(novel); CDS, Inc. v. Zetler, 298 F. Supp. 3d 727 (SDNY 2018)(computer software); Smith v Mikki More, 59 F. Supp.3d 595 (SDNY 2014)(graphic designs); Phillies v. Harrison/Erickson, 2021 WL 5936523 (S.D.N.Y. 2021)(mascot costume).

[297] 202 F.3d 1227 (9th Cir. 2000).

[298] Under the terms of the collective bargaining agreement with the Writers Guild, *see* supra notes 141-150 and accompanying text, Warner Brothers would not have been permitted to credit Aalmuhammed as a writer without the Guild's consent. Spike Lee and Arnold Perl received "written by" credits, based on the *Autobiography of Malcolm X* written by Alex Haley and Malcolm X. The movie spent 25 years in development, and the screenplay went through many drafts. According to Wikipedia, the other writers who worked on the screenplay (but did not receive credit) included James Baldwin, David Mamet, David Bradley, Charles Fuller, and Calder Willingham.WIKIPEDIA, Malcolm X (1992 film), https://en.wikipedia.org/wiki/Malcolm_X_(1992_film) (visited November 10, 2024).

of protecting sole authors from the claims of "overreaching contributors."[299] The 9th Circuit panel worried that "Claimjumping by research assistants, editors, and former spouses, lovers and friends would endanger authors who talked with people about what they were doing, if creative copyrightable contribution were all that authorship required."[300]

Rather than following the Second Circuit's dominant author standard, the Ninth Circuit focused on the meaning of the word "author," holding that to be a joint author of a work one must have behaved as an author of that work. To be an author, the court held, is to "superintend" a work, to exercise control over it, to be the "mastermind" who creates it.[301] Aalmuhammed may have acted as the author of his copyrightable contributions, but he didn't show that he acted as an author of the full movie.[302] The court expressed particular concern that Spike Lee, who had superintended the movie, had signed a work-made-for-hire contract but that Jefri Aalmuhammed had not:

> Warner Brothers required Spike Lee to sign a "work for hire" agreement, so that even Lee would not be a co-author and co-owner with Warner Brothers. It would be illogical to conclude that Warner Brothers, while not wanting to permit Lee to own the copyright, intended to share ownership with individuals like Aalmuhammed who worked under Lee's control….[303]

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[299] 202 F.3d at 1235.

[300] *Id.* at 1235-36.

[301] 202 F.3d at 1234. *See* F. Jay Dougherty, *The Misapplication of 'Mastermind': A Mutant Species of Work for Hire and the Mystery of Disappearing Copyrights*, 39 COLUM. J. L. & ARTS 463 (2016). As the 9th Circuit articulated the test in *Aalmuhammed*, control is only one of three factors. Additional considerations are whether the putative coauthors made "objective manifestations of a shared intent to be coauthors," and that the audience appeal of the work turns on both putative coauthors' contributions. 202 F.3d 1234. The court acknowledged that control would normally be the most important of the three factors.

[302] 202 F.3d at 1235. Writing for the panel, Judge Kleinfeld mused:

> Who, in the absence of contract, can be considered an author of a movie? The word is traditionally used to mean the originator or the person who causes something to come into being, or even the first cause, as when Chaucer refers to the "Author of Nature." For a movie, that might be the producer who raises the money. Eisenstein thought the author of a movie was the editor. The "auteur" theory suggests that it might be the director, at least if the director is able to impose his artistic judgments on the film. Traditionally, by analogy to books, the author was regarded as the person who writes the screenplay, but often a movie reflects the work of many screenwriters. . . . Where the visual aspect of the movie is especially important, the chief cinematographer might be regarded as the author. And for, say, a Disney animated movie like "The Jungle Book," it might perhaps be the animators and the composers of the music.
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> . . . .
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> Everyone from the producer and director to casting director, costumer, hairstylist, and "best boy" gets listed in the movie credits because all of their creative contributions really do matter. It is striking in *Malcolm X* how much the person who controlled the hue of the lighting contributed, yet no one would use the word "author" to denote that individual's relationship to the movie. A creative contribution does not suffice to establish authorship of the movie.

Id. at 1232-33.

[303] *Id.* at 1235.

But that's backwards. Warner Brothers could have asked Aalmuhammed to sign a work-made-for-hire contract; apparently it didn't. It could have put him on the payroll as an employee. It didn't do that. Finally, Warner Brothers could have offered to pay Aalmuhammed for his contributions in return for an assignment of his copyright interests. It didn't do that either.[304] Warner Brothers is a sophisticated repeat player assisted by many highly competent lawyers, so its failure to take appropriate legal steps to protect its interest in being the sole author of the film seems like a problem it could have solved without the court's assistance.

Like the Second Circuit, the Ninth Circuit devised a test to protect the individual or business we would like to think of as the author from the inconvenient claims of actual collaborators by focusing on relative power and control. Unlike the Second Circuit, however, the Ninth Circuit's test doesn't erase the copyright protection subsisting in the inconvenient collaborator's contribution. (At least in theory. The Court of Appeals held that the district court had improperly dismissed Aalmuhammed's *quantum meruit* claim for compensation for his substantial contributions.[305] On remand, however, the district court held that Aalmuhammed had already been amply compensated.[306])

Canadian rock musician Tyler Armes appears to have been more successful in asserting rights in his contribution to a work after failing to meet the 9th Circuit's test for proving joint authorship. On April 7, 2020, Armes filed suit against rapper Austin Richard Post (who performs as Post Malone) and his producer Frank Dukes, claiming to be a coauthor of Post Malone's hit song *Circles*. In the summer of 2018, Armes, Post, and Dukes had collaborated during a 7-hour jam session in Dukes's studio. Armes had played bass and keyboards, Post had played drums, and Dukes had played keyboards and guitar and had recorded the session on his laptop. Together they wrote a composition that included chord sequences and a bassline devised by Armes and Dukes, and a drumbeat and two guitar melodies created by Armes and Post. Armes also gave advice about instrumentation and organization. At the end of the jam session, the three of them had created and recorded a rough mix of a new song. Dukes played back the audio track, and Armes recorded a copy using his iPhone. Over the next few months, Post and Dukes, working with other collaborators, wrote lyrics for the song, made a recording, and included the recording on Post's album. Armes was not involved in that activity, and Dukes and Post did not

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[304] *See* Order and Judgment Granting Defendants' Motion for Summary Judgment, Aalmuhammed v. Lee, No. 2:95-cv-07885-JSL (Sept. 17, 2004).

[305] 202 F.3d at 1236-37.

[306] Lee had sent Aalmuhammed a check for $25,000, which he had cashed. Denzel Washington had sent him checks totaling $110,000, $100,00 of which he had declined to cash. On remand, Judge Spencer Letts held that Aalmuhammed had failed to show that the $135,000 in combined payments and the screen credit as an Islamic technical consultant had been insufficient to compensate him for his services. Order and Judgment Granting Defendants' Motion for Summary Judgment, Aalmuhammed v. Lee, No. 2:95-cv-07885-JSL (Sept. 17, 2004).

consult him about it. When the song "Circles" was commercially released in August of 2019, Armes recognized it immediately and sought song-writing and producer credit and a share of the royalties. Post offered him a 5% royalty, which Armes rejected as inadequate. The lawsuit followed.[307]

Post and Dukes argued that Armes's contributions had been unoriginal and therefore not copyrightable. In addition, they argued, Armes could not make the showing required by the 9th Circuit's test for joint authorship, because he had no participation in or control over any of the writing sessions for "Circles" that followed the jam session.[308] The court agreed that Armes had no control over the final version of the song, and granted summary judgment to Post and Dukes on Armes's claim to be a co-author of the commercially released version of "Circles."[309] On the other hand, there were genuinely disputed issues of material fact surrounding the authorship of the song created during the jam session. The commercially released version, the court held, was a derivative work of the initial rough mix. Armes had introduced evidence from which a jury could conclude that he made original, copyrightable contributions to the song written during the session, that the behavior of the three of them during the jam session supported an inference that they intended to jointly create the song, and that Armes had "superintended the creation of the Session Composition by an exercise of control:"

> While Dukes may have controlled the laptop, nothing suggests that he or Post possessed any special veto or decision-making power that Armes did not. Armes's evidence, if credited, supports the finding that the three musicians shared equal control in the session, making nonhierarchical contributions to a "unitary whole."[310]

If Armes were, as he claimed, a joint author of the song written at the jam session, he would be entitled to an accounting of his coauthors' proceeds from their later exploitation of the song in the commercially released derivative work. The court therefore scheduled the case for trial. It settled as the jury was being seated.[311]

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[307] *See* Armes v. Post, 2022 U.S. Dist. LEXIS 71155 (C.D. Cal April 18, 2022).
[308] Defendants' Memorandum of Law in Support of Motion for Summary Judgment, Armes v. Post, No. 2:20-cv-03212 (C.D. Cal. filed Apr. 7, 2020), at 8.
[309] Armes v. Post, 2022 U.S. Dist. LEXIS 71155 (C.D. Cal April 18, 2022), at *29.
[310] 2022 US Dist LEXIS at *43 (quoting McMunigal v. Bloch, 2010 U.S. Dist. LEXIS 136086, 2010 WL 5399219 (N.D. Cal 2020), at *4).
[311] *See* Tomás Mier, *Post Malone Reaches Settlement in 'Circles' Copyright Lawsuit Just Before Trial*, Rolling Stone (Mar. 1, 2023), https://www.rollingstone.com/music/music-news/post-malone-settles-circles-lawsuit-1234701333/.

Dale Chihuly's studio is in Washington State, within the 9th Circuit. Chihuly's copyright disputes have garnered significant media attention,[312] and his team has worked hard to limit that attention, by asking employees and colleagues to sign non-disclosure agreements, by seeking to file litigation documents under seal whenever possible, and by filing motions for court orders to seal other documents that have been publicly filed.[313] In 2006, Chihuly filed a copyright infringement suit against Robert Kaindl and Bryan Rubino, accusing them of infringing the copyrights in Chihuly's blown glass art.[314] Rubino was a glass blower who had worked for Chihuly as an employee from 1988 to 1995 and from 1997 to 1999. In 1995, Rubino opened his own glass studio. After leaving Chihuly's employ, Rubino worked on projects for Chihuly as an independent contractor. In 1999, Chihuly asked Rubino to sign agreements that purported to reserve all proprietary rights in Rubino's work to Chihuly and to bind Rubino to secrecy, but Rubino refused to sign them.[315] Chihuly nonetheless continued to ask Rubino to create glass works for Chihuly's studio until 2004.

Robert Kaindl was a beginning glass artist and businessman who came to glass blowing late in life, and rented use of Rubino's studio. When Kaindl discovered that Rubino had made glass works for Chihuly Studio that were sold under Chihuly's signature, he asked Rubino to create glass sculptures and vessels that he could sign and sell as his own.[316] Chihuly's complaint characterized the Kaindl-signed works as strikingly similar unauthorized reproductions of Chihuly's copyrighted glass sculptures.[317]

Kaindl's answer accused Chihuly of seeking to claim ownership of common glass blowing techniques and forms that had long been in the public domain. It also alleged that many works sold as by Dale Chihuly had in fact been designed,

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[312] *See, e.g.*, Timothy Egan, *Copycats or Inspired by Nature? Glass Artists Face Off in Court*, N.Y. TIMES (June 1, 2006), at A1; Gene Johnson, *Judge declines to toss Chihuly 's Art Lawsuit*, Seattle Post-Intelligencer, AP (Jan. 5. 2006), https://www.seattlepi.com/seattlenews/article/judge-declines-to-toss-chihuly-s-art-lawsuit-1191904.php; Gene Johnson, Judge boots lawyer for former Dale Chihuly worker off case, Associated Press, Oct. 27, 2017; Susan Kelleher & Sheila Farr, Chihuly turns up the heat on competing glass artists, SEATTLE TIMES, April 29, 2010, at https://special.seattletimes.com/o/html/chihulyinc/2003182065_chihuly08.html; Colin Moynihan, Man Says Artist Stole His Labor and Acclaim, N.Y. TIMES, June 4, 2017 at A19; PBS Newshour for September 9, 2017.

[313] *See, e.g.*, Docket in Moi v. Chihuly, No. No. 2:17-cv-00853 (W.D. Wash. Jun 02, 2017); Docket in Chihuly v. Kaindl, No. 2:05-cv-01801 (W.D. Wash. Oct 27, 2005); Moi v. Chihuly Studio, 2019 US Dist LEXIS 197837 (W.D. Wash. Nov. 14, 2019).

[314] Chihuly Inc. v. Kaindl, No. 05-cv-1801 (W.D. Wash. Jan. 11, 2006).

[315] Answer of Bryan Rubino, *supra* note 102, at 27.

[316] *See* Regina Hackett, *Chihuly Alleges He's Been Ripped Off `How Can You Copyright Glass?' Target Of Suit Asks*, THE SEATTLE POST INTELLIGENCERApr. 17, 2006, at A8.

[317] Compl. at 21, 24, Chihuly v. Kaindl; Lennie Bennet, *glasswarfare*, ST. PETERSBURG TIMES, June 11, 2006, at 4E.

created or signed by someone other than Chihuly.[318] Rubino's answer claimed that many of the works in suit had in fact been created or co-created by Rubino during the years when he worked for Chihuly as an independent contractor, most of them without any meaningful input or supervision by Chihuly. He sought a declaratory judgment that he was the author or coauthor of several of the works, and attribution of his sole authorship under the Visual Artists Rights Act.[319]

Rubino's counterclaim posed a serious threat. If Rubino created any of the works in suit as an independent contractor, the statute does not allow them to be treated as works made for hire. Rubino could have executed a written assignment of the copyrights to those works, and could have waived his VARA rights in writing, but his counterclaim denied that he had done either. Unsurprisingly, Chihuly settled his claim against Rubino three months later,[320] and settled his claim against Kaindl four months after that.[321] Both settlements are confidential.

Meanwhile, from 1999 to 2015, Michael Moi helped Dale Chihuly to create paintings.[322] Moi was a contractor hired to replace Chihuly's roof; over the 16 year period, he performed a variety of different discrete construction jobs on Chihuly's property. Early in his relationship with Chihuly, Moi received a telephone call inviting him to an impromptu evening painting session, at which Chihuly, his assistants, and other guests created acrylic paintings on heavy watercolor paper for Chihuly to sign and sell. Moi participated in hundreds of painting sessions between 1999 and 2015, creating paintings on plexiglass as well as paper. Moi used foam mops, a blowtorch, and metallic dust to create the backgrounds of the paintings, and Chihuly or one of his assistants would follow and paint additional features. Chihuly's involvement in the painting process diminished over the years; sometimes he added drips, dots, and brushstrokes to paintings begun by others; other times he merely signed his name to completed paintings. He did not attend every painting session, and occasionally the Chihuly signatures were added by one of his assistants.[323]

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[318] Answer, Affirmative Defenses, and Counterclaims of Defendant of Robert Kaindl 31-35 (May 5, 2006); Associated Press, *Redmond glassblower files counterclaim against Chihuly in court*, (May 6, 2006); Associated Press, *Another Claim Filed in Case over Chihuly Art, The Columbian*, (May 7, 2006), at C8.

[319] Answer, Affirmative Defenses, and Counterclaims of Defendant Bryan Rubino 26-28, 33-34 (May 18, 2006); Susan Kelleher, *Glassblower to Court: Let me Make any Glass Forms I Want*, Seattle Times (May 19, 2006), https://archive.seattletimes.com/archive/20060519/chihuly19m/glass-blower-to-court-let-me-make-any-glass-forms-i-want.

[320] Docket # 103, Chihuly v. Kaindl; Regina Hackett, This Time, Litigation Between Chihuly and Rubino Really is Over, Seattle Post-Intelligencer, August 15, 2006, at E1.

[321] Docket # 113, Chihuly v. Kaindl; Susan Kelleher, Chihuly, Rival Glass Artist Settle Dispute, Seattle Times, Dec. 19, 2006.

[322] Moi v. Chihuly Studio, 2019 U.S.P.Q.2D (BNA) 228406 (W.D. Wa 2019), *aff'd* 2021 U.S.P.Q.2D (BNA) 240 (9th Cir. 2021).

[323] *See* 2019 U.S.P.Q.2D (BNA).

Moi understood that the paintings would be sold as original Dale Chihuly works, and that the involvement of people other than Chihuly needed to be kept secret to preserve the paintings' value. He alleged that Chihuly repeatedly promised him compensation and even credit for his work, and that Chihuly assured him that the studio was keeping careful records of Moi's contributions in order be able to pay him for his paintings. Sometime in 2015, Moi stopped receiving invitations to painting sessions. The following year, he made an impromptu visit to Chihuly's workshop and learned from an employee that the staff members he worked with most often in the painting sessions had been fired. Moi claimed that the employee told him that those staff members had sued the studio and had reached settlements covering their work on Chihuly's paintings. Moi realized that Chihuly might not be planning to keep the promises that he made. He consulted the lawyer that had represented those staff members,[324] and in June of 2017, she filed a lawsuit in Washington state superior court seeking enforcement of Chihuly's oral promises of payment, a declaratory judgment of co-authorship and co-ownership of the paintings as joint works, and attribution under the Visual Artists Rights Act.[325]

Chihuly removed the action to federal court.[326] Over the course of discovery, Moi identified 285 paintings that he claimed to have authored or coauthored.[327] The district court granted Chihuly's motion for summary judgment on all claims.[328] The court emphasized that while Moi had had discretion in painting details, his goal throughout was to paint in the style that Chihuly favored and to create backgrounds that looked like Chihuly's existing

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[324] Chihuly later successfully moved (under seal) to disqualify the lawyer and her firm because in the course of her representation of those staff members, she had learned privileged information. *See* Order granting defendants' 25 Redacted Motion for Disqualification of Counsel, Docket No. 2:17-cv-00853 (W.D. Wash. Oct. 25, 2017).

[325] Complaint in Moi v Chihuly, No. 7-2-14150-0 (King County Super. Ct. June 2, 2017).

[326] Initially, Chihuly's lawyers characterized Moi as a delusional handyman on a mission of extortion, insisting that Moi had never participated in any painting session, but had made up the story in order to blackmail the Chihuly family by threatening to reveal embarrassing personal information. Defendants' Answer and Counterclaim in Moi v Chihuly, No. 2:17-cv-00853 12-13(W.D. Wa. filed June 2, 2017). Moi presented testimony from other participants in the painting sessions confirming his attendance and contributions, and by the time Chihuly' counsel moved for summary judgment, he appeared to concede that Moi had indeed assisted in painting the paintings he claimed to have painted, but that Dale Chihuly had no recollection of his participation. See Chihuly's Motion for Summary Judgment, Moi v Chihuly, No. 2:17-cv-00853 12-13 (W.D. Wa. Filed Feb. 5, 2019), 2019 WL 1417013.

[327] Plaintiff Moi's Response to Defendants' Motion for Summary Judgment, , Moi v Chihuly, No. 2:17-cv-00853 12-13 (W.D. Wa. Filed Feb. 19, 2019), 2019 WL 1417016.

[328] Moi v. Chihuly Studio, 2019 U.S.P.Q.2D (BNA) 228406, 2019 WL 2548511 (W.D. WA 2019).

body of work.[329] The court also found it important that after each painting session, Chihuly would decide which paintings to sign and which ones to discard.[330] Applying the Ninth Circuit's three-factor test for joint authorship, the court held that the control factor strongly favored Chihuly:

> Although plaintiff exercised some control over his initial contribution to the paintings, his goal was to utilize the styles and techniques that Chihuly showed him so that his contribution mimicked what Chihuly would have done. Once the background was laid down, Chihuly utilized it as a backdrop for his artistic vision with no input from plaintiff. Chihuly determined whether the piece was saved or discarded, he registered, sold, copied, exhibited, stored, or destroyed the piece as he saw fit, and he had unilateral control over its publication and commercialization. The ultimate decision as to how or whether to incorporate plaintiff's creations into a signed Chihuly work was left entirely to defendant. Chihuly superintended the production of the works and had unilateral control over the finished products.
>
> Plaintiff asserts that his contributions to the 285 paintings involved artistic expression. As noted above, however, simply making a copyrightable - even substantial - contribution to a work does not make one an author. . . . The evidence in the record establishes as a matter of law that it was defendant who possessed and exercised control over the final product for purposes of the joint work analysis.[331]

The court concluded that because Chihuly exercised control over the final product and behaved as if he were the sole author of every painting, the joint

[329] 2019 U.S.P.Q. 2d 228406 at *4.
[330] 2019 U.S.P.Q. 2d (BNA) 228406 at *4, 2019 WL 2548511 at *3.
[331] *Id.*

authorship claim failed as a matter of law.[332] It awarded Chihuly $1,646,659.68 in attorneys fees.[333]

The Court of Appeals for the 9th Circuit affirmed:[334]

> Chihuly controlled everything from the artistic design to the decision of whether the finished paintings would be signed, marketed, and sold or merely discarded. Moi has, at most, established that "subject to [Chihuly's] authority to accept them, he made very valuable contributions to the [paintings]" which is "not enough for co-authorship of a joint work."[335]

The court also noted that Chihuly consistently represented to the public that he was the sole creator of the paintings. "Even viewing the facts in the light most favorable to Moi, his lack of control coupled with Chihuly's express intent to remain a sole author preclude a finding of co-authorship."[336] The analysis recalls the Second Circuit's indefensible decision in *16 Casa Duse v. Merkin*.[337] Chihuly couldn't meet the statutory work-made-for-hire test because Moi was not his employee and paintings are not within the statutory categories eligible to

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[332] What about the quantum meruit claim for compensation for Moi's copyrightable contributions to those paintings? That claim failed too. The district court ruled that the complaint had not raised any claim for compensation for the independently copyrightable contributions, and that even if it had, the evidence Moi presented wouldn't allow the jury to identify those contributions.

> Even after plaintiff identified 285 works as his own during this litigation, he has been unwilling to specify the contributions he made to those paintings. To the extent the plaintiff was simply copying Chihuly's original artistic expressions, using both his style and technique to create backgrounds just like Chihuly's prior works, his contributions may not be entitled to copyright protection at all. While the Court does not doubt that, in some respects and as to some paintings, plaintiff made original artistic contributions that were independently copyrightable, it is impossible to identify them on the current record.

2019 U.S.P.Q. 2d (BNA) 228406 at *6, 2019 WL 2548511 at *4. As an alternative ground, the court held that for the paintings created before February 21, 2014 (which would be most of them), Moi's claims were barred by the three-year copyright statute of limitations in § 507. I'll have more to say on the statute of limitations defense in the next subsection.

[333] Moi v. Chihuly Studio, 2019 US Dist LEXIS 197837 (W.D. Wash. Nov. 14, 2019).(" Given that plaintiff's claim was patterned on claims previously made by other artists and could be copied by other Chihuly assistants, there is a need to deter the type of unsupported and fatally-flawed copyright claims asserted by plaintiff in this litigation."). Judge Lasnik appears to have concluded that Michael Moi is not fit to kiss the hem of Dale Chihuly's dress, but so much of the record is sealed that it is difficult to figure out what Moi or his counsel did to earn the judge's ill regard.

[334] Moi v Chihuly Studio, 846 Fed. Appx. 497 (9th Cir. 2021).

[335] 846 Fed. Appx at 499 (quoting *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000)).

[336] *Id.*

[337] *See supra* notes 290 - 297 and accompanying text.

be commissioned works made for hire. He apparently wasn't willing to pay Moi to assign his copyright in the "very valuable contributions" that Moi allegedly made. But because Chihuly had the sole authority to decide whether the paintings would be signed, sold, or thrown away, the court deemed him to be the paintings' sole author.

A putative coauthor who brings a lawsuit seeking a declaratory judgment of authorship anticipates that the court will determine who authored the work by examining who made what contributions and assessing whether those contributions are protected by copyright. A test focused on dominance or control won't reveal who created what copyrightable expression in a work. One might as appropriately apportion copyright ownership on the basis of the collaborators' height or weight. If the goal is the decide the dispute in a way least likely to disrupt the chain of title, though, asking who among the putative authors was most powerful will do the trick more often than not.

B. Authorship claims and time bars

As an alternative ground for granting summary judgement in *Moi v. Chihuly*, the district court ruled that Moi's copyright claims were barred by the three-year copyright statute of limitations in section 507 for all paintings created before February 21, 2014 (which was most, but not all of them). Moi was aware that Chihuly asserted sole authorship of the paintings at the time they were made, so his copyright cause of action, if any, would have accrued for each painting at the time it was painted.[338]

The statute of limitations turns out to be a surprisingly frequent ground for dismissing authorship claims.[339] In *Dewan v. Blue Man Group*,[340] for example, Brian Dewan sought a declaration of his co-authorship of the score for Blue Man Group's performance piece *Tubes*. Dewan had composed and performed zither music for the piece in 1991. He repeatedly asked his collaborators to draft an agreement formalizing their rights in the music and to register the copyrights in their compositions, and they promised that they would do so. In 1992, they met and generated an informal chart that memorialized each contributor's share of rights in the score. Over the course of the next year, Blue Man Group urged Dewan to participate in a studio recording of the score, and Dewan repeatedly said that he would not do so until after they had drafted and signed a formal agreement. Negotiations over that agreement, however, petered out before anything was signed. At one point, Blue Man Group offered to buy out Dewan's copyright interest for $10,000. Dewan was paid no royalties for Blue Man Group's ongoing use of the score in performances of *Tubes*, but Blue Man Group continued to refer to him as a co-composer in correspondence and draft contracts. Dewan lost his lawyer because he was unable to pay her fees, and it took him a couple of years to find new legal representation. In 1997, Dewan's new lawyer sought to reopen negotiations, and Blue Man Group replied that the members of the group repudiated Dewan's claim to have composed any of the

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[338] 2019 U.S.P.Q. 2d (BNA) 228406 at *8, 2019 WL 2548511 at *5*-6.

[339] *See, e.g.*, Crabtree v. Kirkman, 2023 USPQ 2d (BNA) 1391 (C. D. Cal. 2023); Johnson v. Berry, 228 F. Supp. 2d 1071 (E.D. Mo. 2002).

[340] 73 F. Supp. 2d 382 (S.D.N.Y. 1999).

music in *Tubes*. They had negotiated with him out of sympathy but never considered him a coauthor.[341] Dewan filed suit in 1998.[342] The court acknowledged that Blue Man Group's "actions have been less than commendable." It nonetheless held that Dewan's reliance on Blue Man Group's assurances of his co-authorship status was unreasonable. He knew that he was not receiving royalties. The group repeatedly failed to follow up on Dewan's requests for a signed agreement. By the end of 1994, Dewan should have known a lawsuit would be necessary to enforce his rights, but he failed to file one until 1998. His claim was thus time-barred.[343]

1. When authorship claims accrue

How did we get here? The copyright statute had no civil statute of limitations until 1958. Public Law 85-313 added a three-year civil limitations period to mirror the extant three-year criminal statute of limitations.[344] Courts have construed the section to embody a separate accrual rule, under which each new act of infringement is a new wrong, with its own three-year limitation period.[345] Congress had no occasion to consider when a cause of action claiming co-authorship, as opposed to infringement, would accrue. At the time Congress enacted the law, courts had uniformly held that federal courts lacked subject matter jurisdiction over claims seeking a declaration that plaintiff was the author or coauthor of a work, because such claims were more akin to contract claims and arose under state law.[346] That changed in 1964, when the Court of Appeals for the Second Circuit decided *TB Harms Co. v. Eliscu*,[347] which adopted a more expansive view of what claims arise under the federal copyright law:

> an action 'arises under' the Copyright Act if and only if the complaint is for a remedy expressly granted by the Act,... or asserts a claim requiring construction of the Act, ... or, at the very least and perhaps more doubtfully,

[341] 73 F. Supp. 2d at 383-85.
[342] *Id.* at 385.
[343] *Id.*
[344] Pub. L. 85-313, 71 Stat. 633 (1957). The House and Senate Reports accompanying the bill noted that "the statute of limitations, contained in this bill, is to extend to the remedy of the person affected thereby, and not to his substantive rights..." S. Rep. 85-1014, p. 1963 (1957).
[345] MGM v. Petrella, 572 US 663, 671 (2014). (" Each time an infringing work is reproduced or distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete 'claim' that 'accrue[s]' at the time the wrong occurs") (quoting 17 USC § 507(b)).
[346] *See, e.g.*, Harrington v. Mure, 186 F.Supp. 655 (S.D.N.Y. 1960); Hoyt v. Bates, 81 F. 641 (CCD Mas 1897).
[347] 339 F.2d 823 (2d Cir. 1964).

> presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim.[348]

At first, courts continued to hold that claims for an accounting, or disputes over copyright ownership that turned on the validity or construction of assignments or contracts, did not belong in federal court.[349] In *Lieberman v. Chayefsky's Estate*, however, plaintiff Jeffrey Lieberman claimed that he and Paddy Chayefsky had coauthored both the 1978 novel *Altered States* and the screenplay for the 1980 movie based on the novel.[350] His lawsuit sought a declaratory judgment that he was a joint author, and an accounting based on his undivided one half interest in both works. The district court held that because resolution of the case required interpretation of the statutory definition of "joint work," the case arose under the copyright law.[351] Five years later, the Court of Appeals for the Fifth Circuit followed *Liberman v. Chayefsky's Estate* in *Goodman v. Lee*, upholding Shirley Goodman's claim to have coauthored "Let the Good Times Roll" with Leonard Lee.[352]

In 1996, the Court of Appeals for the 9th Circuit treated the question when a cause of action claiming copyright co-ownership of a copyright accrues as a matter of first impression.[353] The court concluded that "claims of co-ownership, as distinct from claims of infringement, accrue when plain and express repudiation of co-ownership is communicated to the claimant, and are barred three years from the time of repudiation."[354]

The following year, the Second Circuit considered the question in *Merchant v. Levy.*[355] Jimmy Merchant and Herman Santiago were original members of the

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[348] 339 F.2d at 828. The lawsuit sought to assert the validity of a purported assignment of an interest in the renewal term to the copyright in four songs. The court held that the claims did not meet its test for federal jurisdiction. *Id.*

[349] *See, e.g.*, Iza Music Corp. v. W&K Music Corp., 995 F. Supp. 417 (S.D.N.Y. 1998);Rotardier v. Entertainment Music Group, 518 F. Supp. 919 (S.D.N.Y. 1981); Keith v. Scruggs, 507 F. Supp. 968 (S.D.N.Y. 1981); Newman v. Thomas Y. Crowell, Publishers, 205 U.S.P.Q. 517 (S.D.N.Y. 1979).

[350] 535 F. Supp. 90, 91 (S.D.N.Y. 1982).

[351] 535 F. Supp. at 91-92.

[352] 815 F.2d 1030,1032 (5th Cir. 1987).

[353] Zuill v. Shanahan, 80 F.3d 1366, 1370 (9th Cir. 1996)("There is a surprising lack of precedent on the question of when a cause of action claim accrues").

[354] 80 F.3d at 1369. Plaintiffs were the composers of music for the program that ultimately became "Hooked on Phonics." Defendant designed the program. In 1987, asked plaintiffs to sign an agreement that recited that his company was the sole copyright owner of the program and promised each of them a royalty of 2.5% of profits. Plaintiffs asked instead for 2.5% of gross sales. Defendant said this was a take-or-leave-it offer; plaintiffs refused to sign the agreement. Defendant was not successful in marketing the program until the 1990s. Plaintiffs filed suit in 1991. The court held that the cause of action had accrued in 1987 because defendant had expressly repudiated plaintiff's claim to coauthorship by proffering a take-it-or-leave-it agreement asserting that his company was the sole author. 80 F.3d at 1371.

[355] 92 F.3d 51 (2d Cir. 1996).

group Frankie Lymon and the Teenagers, and co-wrote the song *Why do Fools Fall in Love?* while they were still in high school.[356] In 1956, they recorded the song for Gee Records, owned by George Goldner.[357] The recording was a hit. Goldner told the boys that he would take care of copyright registration and registered the copyright in the song as having been authored by Frankie Lymon and George Goldner.[358] When Morris Levy purchased Gee Records from Goldner, he persuaded Goldner to write a letter to the copyright office asserting that Levy, rather than Goldner, had been Lymon's actual coauthor, and the copyright office amended the registration accordingly.[359]

In 1987, Merchant and Santiago sued for a declaration of co-ownership and the recovery of royalties.[360] A jury found that plaintiffs had coauthored the song and that Goldner and Levy had defrauded them of their ownership in the song's copyright and had deliberately concealed the accrual of royalties.[361] The trial court held that Merchant and Santiago owned half the copyright to the song and were entitled to recover damages that had accrued within three years of their filing suit in 1987.[362] The Court of Appeals for the Second Circuit reversed.[363] The court rejected defendants' argument that a claim for a declaration of co-authorship was not a federal cause of action:

> [C]opyright ownership by reason of one's status as a co-author of a joint work arises directly from the terms of the Copyright Act itself. Because disposition of this case "involves the application and interpretation of the copyright ownership provisions ... federal jurisdiction ...[is] proper."[364]

The court held, however, that the cause of action had accrued as soon as plaintiffs had attained their majority, because "a coauthor knows that he or she jointly created a work from the moment of its creation."[365] Moreover, notwithstanding the usual copyright separate accrual rule that permits copyright owners to file suit for each new infringing act, "plaintiffs claiming to be co-authors are time-barred three years after accrual of their claim from seeking a declaration of copyright co-ownership rights and any remedies that would flow from such a declaration."[366] The court explained that its rule would "promote[]

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[356] 92 F. 3d at 52.
[357] *Id.*
[358] *Id.*
[359] *Id.* at 53.
[360] *Id.*
[361] *Id.*
[362] Merchant v. Lymon, 828 F.Supp. 1048 (1993) rev'd sub nom Merchant v. Levy, 92 F.3d 51 (2d Cir. 1996).
[363] 92 F.3d at 56-57.
[364] 92 F.3d at 55 (quoting Goodman v. Lee, 815 F.2d 1030, 1031–32 (5thCir.1987)).
[365] 92 F.3d at 56.
[366] *Id.* In a footnote, the court added "We note that Plaintiffs' cause of action is not based on copyright infringement, a point Plaintiffs do not contest on appeal. Our

the principles of repose integral to a properly functioning copyright market."[367] The district court should therefore have dismissed the suit as time-barred.

In *Maurizio v. Goldsmith*,[368] plaintiff Cynthia Maurizio had collaborated with Olivia Goldsmith on two chapters and the overall outline of the novel *The First Wives Club*.[369] Maurizio believed that Goldsmith intended to give her co-authorship credit and a share of the royalties. When she tried to work out a formal agreement, Goldsmith refused to promise her any credit and said she was pausing her work on the novel. Instead of putting the manuscript aside, however, Goldsmith asked a different writer to help her finish the book. Maurizio did not discover that Goldsmith had completed the book and sold the movie rights to Paramount until 1991, when she read an article about the sale in the New York Post. She again asked Goldsmith for a co-authorship credit and 25% of Goldsmith's royalties; Goldsmith again refused.[370] In July of 1991, Maurizio filed suit in New York State court for enforcement of her oral co-authorship agreement and for an accounting. Goldsmith moved for summary judgment on the ground that Maurizio's claims were preempted by the federal copyright statute, and the court agreed.[371] After an unsuccessful appeal, Maurizio immediately filed a copyright infringement suit in federal court, seeking a declaration of joint authorship and an accounting.[372] By then, it was June 12, 1996.

Goldsmith moved for summary judgment on statute of limitations grounds. Maurizio had discovered Goldsmith's sale of the novel to Paramount on January 23, 1991, when she read about it in the New York Post. She failed to file her federal suit until more than five years later. Maurizio argued that her suit in New York state court should toll the statute of limitations, but the court disagreed and dismissed her claim for a declaration of co-authorship as time-barred.[373] The court ruled, however, that Maurizio had in the alternative pleaded a copyright infringement claim (i.e., that if Maurizio were not a joint author, then Goldsmith infringed her copyright in the outline and chapters she had written by copying them in her novel). That claim, the court held, was subject to the separate accrual rule and survived.[374] The court held a jury trial on the infringement claim in 2002; the jury awarded Maurizio $ 199,375.00.[375]

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holding here does not disturb our previous rulings that a copyright owner's suit for infringement is timely if instituted within three years of each infringing act for which relief is sought, but recovery is barred for any infringing acts occurring more than three years prior to suit." *Id.* at 57.n.8.

[367] *Id.* at 57.

[368] 84 F. Supp. 2d 455 (S.D.N.Y.), aff'd 230 F.3d 518 (2d Cir. 2000).

[369] 84 F. Supp. 2d at 458-60.

[370] *Id*. at 460-61.

[371] *See* Maurizio v. Rendal, 635 N.Y.S. 2d 33 (App. Div. 1995).

[372] 84 F. Supp. 2d at 461.

[373] *Id.* at 461-64.

[374] 84 F. Supp. 2d at . Accord Carrell v. Shubert Organization, 104 F. Supp. 2d 236 (SDNY 2000).

[375] Civil docket for case #: 1:96-cv-04332-RPP-THK, # 88 (May 8, 2002).

For a time, district courts disagreed about whether, if a co-authorship claim were time-barred, an infringement claim arising from the same facts could go forward.[376] In 2011, however, the Court of Appeals for the Second Circuit decided that the infringement claim should also be time-barred. *Kwan v. Shlein*[377] involved the authorship of a 1999 book titled *Find it Online*.[378] Journalist Alan M. Shlein was the marquee author and wrote the first draft. Editor Shirly Kwan Kisachi heavily revised the draft to the point where she claimed to have ghost-written the entire book. A dispute arose over credit on the book cover. The publisher proposed putting both of their names on the cover. Kwan favored "by Alan Schlein with Shirley Kwan Kisaichi." Schlein insisted on "By Alan M. Schlein Edited by Shirley Kwan Kisaichi." The publisher followed Schein's preferences. It paid Kwan royalties for the first and second editions of the book. As it prepared to bring out a third edition, the publisher notified Kwan that the third edition of the book had been completely rewritten and it would not be paying her any royalties for that or future editions. Kwan sued in 2005, claiming that the 2002 third edition and the 2004 fourth edition infringed her copyright in the original book.[379] The court held that her claim was time-barred because, although styled as an infringement claim, it was in essence an ownership claim. Unlike infringement claims, the court held, an ownership claim only accrues once, when a reasonably diligent plaintiff would have become aware of a dispute regarding her rights. When the first edition of the book was published in 1999 without crediting Kwan as an author, she knew that Schlein and the publisher denied that she had been author of the book, and her claim, if any, had accrued then. Given that her authorship claim was time-barred, any infringement claim that depended on the authorship claim would also be time barred.[380]

Schlein's publisher had had Kwan's permission to publish the first and second editions of *Find it Online*, notwithstanding the dispute over authorship credit. Only when the publisher brought out the third edition without giving

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[376] *Compare, e.g.,* Parks v. ABC, 2007 WL 4800666 (S.D.N.Y. 2007); Ediciones Musicales Y Representaciones Internacionales, S.A. v. San Martin, 582 F.Supp.2d 1358 (S.D.N.Y. 2008); Carrell v. Shubert Organization, 104 F. Supp. 2d 236 (S.D.N.Y 2000), with, e.g. Big East Entertainment, Inc. v. Zomba Enterprises, Inc., 453 F.Supp.2d 788 (S.D.N.Y. 2006); Ortiz v. Guitian Bros. Music, 2008 WL 4449314 (S.D.N.Y. 2008). In the *Hogarth* case, the Hogarth heirs argued that the Burrough corporation's claim that the work was made for hire was barred by the 3-year statute of limitations, because the corporation's authorship claim had accrued upon the registration of the copyright listing Hogarth as the author. The district court judge distinguished the cases on the ground that the registration listing Hogarth as author and the corporation as owner had not damaged the corporation, because it had enjoyed all of the rights afforded to copyright owners. *See* 62 USPQ 2d at 1320.

[377] 634 F.3d 224 (2d Cir. 2011).

[378] ALAN M. SCHEIN, FIND IT ONLINE (1999).

[379] 634 F.3d at 227.

[380] *Id.* at 229-30.

Kwan credit or paying her royalties was there anything to sue over. But the court held that her claims had nonetheless accrued when the first edition was published, because her credit on the book cover had said "edited by" rather than "with."

In *Pisciotti v. Brittingham,* a freelance producer and filmmaker sued a customer who commissioned a project for infringement, alleging that she was exploiting the film he made without paying him the agreed royalties, and that she had removed the copyright notice in his name from copies of the film and substituted her own.[381] The customer filed a counterclaim alleging that she had coauthored the film. The court granted summary judgment to the producer on the counterclaim, holding that there was no evidence that the customer had made any copyrightable contribution to the film, and that there was no written assignment of the producer's copyright. Because the customer claimed to be a coauthor and put her own name in the copyright notice on the DVD jewel cases, however, it held that producer was aware by March of 2015 at the latest that his customer "claimed more rights in the work than he believed she had."[382] That awareness, the court said, started the limitations period running on any dispute over the ownership of the copyright. By the time the producer filed suit for copyright infringement in 2020, a claim based on ownership of the copyright to the film was time-barred. Agreeing with the customer that the essence of the infringement claim was an ownership dispute, the court followed *Kwan v. Shlein* and held that the producer's claim for copyright infringement was also time-barred.[383] That ruling left the producer's customer free to infringe the copyright in the film in myriad new ways without any act of infringement's being actionable.

2. Works made for hire and time bars

In the decade between the grand bargain that settled the statutory definition of works made for hire in the 1976 Act, and Congress's enacting the statute, businesses persuaded courts to broaden the scope of works made for hire under the 1909 Act.[384] By conflating the cases determining authorship in works created by employees with the cases finding that the creator of a work had assigned its copyright by parol transfer, these litigants convinced courts to adopt a rule that the employer of a creator of a work was the work's legal author

[381] 2022 U.S. Dist. LEXIS 116951, 2022 WL 2392198 (W.D. Wash July 1, 2022).
[382] 2022 US Dist. Lexis at *2.
[383] *Id*. at *23.
[384] *See* 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5.45 (2025).

whenever the work had been created at the employer's instance and expense.[385] In the wake of the adoption of the 1976 Act, courts initially maintained that the new statutory definition had not narrowed the scope of works that should be deemed made for hire, and that a party at whose instance and expense a work was created was the author of that work regardless of whether the creators was an employee or an independent contractor.[386] In *CCNV v. Reid*, the Supreme Court held that that interpretation of the 1976 Act was wrong.[387] A creator was not an employee for copyright purposes unless he or she was an employee under the principles of agency law. (Those principles incorporate questions about the tax treatment and employment benefits afforded to the creator.) A work created by an independent contractor could be a work made for hire only if it both fit within the specific statutory categories and was created subject to a signed work-made-for-hire agreement.[388] Courts accordingly discarded the instance and expense rule for works created after 1978, but continued to apply it to works created under the 1909 Act.[389] In 2003, a Second Circuit panel acknowledged that the rule had been based on a misreading of its cases, but concluded that it was nonetheless now binding authority.[390]

In some industries, such as the recording industry, it is conventional to require non-employee creators to sign work-made-for-hire agreements for works that are not included in statutory categories of non-employee works eligible for work made for hire status.[391] When the invalidity of those agreements has been raised in litigation, copyright claimants have argued that creators' authorship and ownership claims are time-barred because they accrued when the creators signed agreements incorporating work made for hire terms. Those contracts, the labels insist, should have put the artists on notice that their record labels claimed

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[385] *See* Brattleboro Publishing Co. v. Windmill Publishing Corp., 369 F.2d 565 (2d Cir. 1966) ("We see no sound reason why these same principles are not applicable when the parties bear the relationship of employer and independent contractor."); Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298 (9th Cir. 1965)("when one person engages another, whether as employee or as an independent contractor, to produce a work of an artistic nature, that in the absence of an express contractual reservation of the copyright in the artist, the presumption arises that the mutual intent of the parties is that the title to the copyright shall be in the person at whose instance and expense the work is done"). According to Bill Patry, Melville Nimmer invented the "instance and expense" test out of whole cloth and courts took his word for it. *See* 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5.45 (2025).

[386] *See, e.g.*, Evans Newton, Inc., v. Chicago Systems Software, 793 F.2d 889, 894 (7th Cir. 1986); Aldon Accessories Ltd. v. Spiegel, 738 F.2d 548, 552 (2d Cir.1984).

[387] Community for Creative Non-Violence v. Reid, 490 US 730, 743 (1989).

[388] *See id*. at 751-53.

[389] *See, e.g.*, Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624 (2d Cir. 2004).

[390] *See* Estate of Burne Hogarth v. Edgar Rice Burroughs, 342 F. 3d 149, 158-62 (2d Cir. 2003).

[391] *See, e.g.*, Waite v. UMG Recordings, 450 F. Supp. 3d 430 (S.D.N.Y. 2020).

authorship of their recordings, and started the limitations period running regardless of whether the work-made-for-hire agreements were invalid.[392]

3. Time bars and copyright policy

None of this makes sense. First, if the separate accrual rule makes legal and policy sense for copyright infringement claims, a dispute over who authored the work or owns its copyright shouldn't make the rule unavailable. Second, the notion that a dispute over authorship, unlike infringement claims, accrues only once, has no support in the language of the statute or the policy that underlies it. When Congress added that statute of limitations to the copyright statute, courts agreed that a claim to have authored or coauthored a work did not arise under the copyright statute *at all*, but must be brought in a state court under state law.[393] Only later did courts hold that an authorship claim might be brought in federal court[394] or must be brought only in federal court.[395] Third, federal courts have recognized that they have jurisdiction over authorship claims because the claims require construction of the copyright statute, but the statute does not give authors of works other than works of visual art any right to be named as a work's author, and failing to give authors appropriate attribution is simply not actionable.[396] Shirley Kwan Kisachi had no claim for copyright infringement until the publisher published the third edition of the book she had worked on, but the court held that that claim had nonetheless accrued six years earlier because she knew that her collaborator wanted more credit than she believed he was due.[397] Fourth, the idea that an employer could evade the limitations Congress incorporated into the statutory work made-for-hire provisions by requiring creators to sign invalid work-made-for-hire agreements in order to start the limitations period running and, thus, block a creator's ownership claim makes nonsense of the guardrails Congress enacted to limit works made for hire.

Finally, the factual bases that courts have relied on for deeming a contributor's authorship claim to have been unequivocally repudiated have been nothing of the sort.[398] Sometimes a finding of repudiation follows from a notice

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[392] *Id.* at 436-37.

[393] *See, e.g.*, Harrington v. Mure, 186 F.Supp. 655 (S.D.N.Y. 1960).

[394] *E.g.*, Goodman v. Lee, 815 F.2d 1030,1032 (5th Cir. 1987).

[395] *E.g.*, Maurizio v Rendall, 635 N.Y.S.2d 33 (App. Div. 1995).

[396] *See* Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 Houston L. Rev. 263, 279-86 (2004); Jane C. Ginsburg, Humanist Copyright, 6 J. Free Speech L. (2025); Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 Utah L. Rev. 781 (2007).

[397] *See* 634 F.3d at 229.

[398] Courts have shown significant variation in defining when a cause of action for a declaration of co-authorship accrues. In *Moi*, the district court held that the claim accrued as soon as Moi painted each painting, because he painted knowing that Chihuly planned to sign and sell the painting as solely authored by Chihuly. 2019 US Dist Lexis at *19-*20. In *Dewan*, the court held that even though the members of Blue Man Group had lulled Dewan into believing that no suit was necessary, by the time a couple of years had elapsed with no agreement and no payment of royalties, Dewan no longer had any basis for relying on their good faith. 73 F. Supp. 2d at 386.

In *Maurizio v. Goldsmith,* 84 F. Supp. 2d 45 (S.D.N.Y.), *aff'd* 230 F.3d 518 (2d Cir. 2000), the court held that the claim accrued when Maurizio discovered that Goldsmith had finished the book and sold it to Paramount without telling her. 84 F. Supp. 2d at 461.

In other cases, the question when the claim accrued was put to a jury. *Gaiman v. McFarlane* involved Neil Gaiman's co-authorship of the comic book *Spawn* issue #9. Gaiman wrote the story and dialogue; Todd McFarlane drew the art, published the comic with a copyright notice in McFarlane's name, and registered the copyright as the sole owner. He paid Gaiman $100,000. Their original agreement was oral, and negotiations to arrive at a written contract stalled. Gaiman claimed to have coauthored three new characters and understood his oral agreement with McFarlane to entitle him to royalties for reprints and merchandise based on those characters. McFarlane sent royalty checks for some period of time, and then, in 1999, sent a letter to Gaiman's lawyer rescinding any previous offers and demanding that Gaiman relinquish all rights to the characters he claimed to have co-created. Gaiman filed suit for a declaration of co-authorship in 2002. McFarlane insisted that the suit was time-barred because Gaiman knew or should have known that McFarlane denied that Gaiman had any copyright interest in the three characters when the issue was published in 1993, or, at the very latest, in 1997 when the contract negotiations stalled. The trial court submitted the question of when Gaiman's cause of action accrued to a jury, which decided that the claim had not accrued until the 1999 letter that purported to rescind all prior offers. That made Gaiman's suit timely. Gaiman v. McvFarlane, 360 F.3d 644 (7th Circ. 2004). McFarlane argued on appeal that no reasonable jury could have found that the claim didn't accrue earlier, but the Court of Appeals for the 7th Circuit affirmed.

Similarly, in *Gary Friedrich Enterprises LLC v. Marvel Characters*, 716 F.3d 302 (2d Cir. 2013), the creator of *Ghost Rider* sought a declaratory judgment that he owned the renewal term in the copyright to the initial 1972 comic book introducing the Ghost Rider character. Marvel filed a counterclaim asserting that the work had been created as a work made for hire, and also claiming that Friedrich's claim was time-barred. The Court of Appeals for the Second Circuit held that genuine disputes of material fact about whether and when Marvel had expressly repudiated Friedrich's claim precluded granting summary judgment to either party. 716 F.3d at 318. Friedrich and Marvel had offered sharply conflicting evidence about the creation of the character and the initial comic book issue in which he appeared. Friedrich's agreement with Marvel had been oral and neither party had mentioned the renewal term. Marvel had argued that the initial publication of the issue with a copyright notice in Marvel's name repudiated Friedrich's claim of authorship, but the court held that the notice was consistent with Marvel's ownership of the initial term of copyright while, Friedrich, as author, retained the right to the renewal term. Marvel also argued that its exploitation of the Ghost Rider character for more than three years after the initial term expired without paying Friedrich royalties should have made Friedrich aware that it repudiated his claim to own the renewal term and caused his claim to accrue. The court held that a jury would need to determine whether that was so, and remanded for trial. Marvel and Friedrich then reached a settlement. *See* Eriq Gardner, *Marvel Settles Lawsuit With 'Ghost Rider' Creator*, The Hollywood Reporter (Sept. 9, 2013), https://www.hollywoodreporter.com/business/business-news/marvel-settles-lawsuit-ghost-rider-624609/.

of copyright that omits the claimant's name.[399] But, since 1978, the wrong name in a copyright notice has no legal effect on the validity or ownership of the copyright.[400] Even when the law required copyright notice to bear the correct name, moreover, that name was the name of the copyright owner, not the work's author.[401] More generally, behavior that asserts copyright ownership doesn't necessarily negative someone else's authorship.

To the extent the courts have articulated a policy rationale for this odd rule, it hearkens back to the desire to protect dominant authors from their less powerful collaborators expressed to justify the dominant author test for joint works. In *Zuill v. Shanahan*, the Court of Appeals for the 9th Circuit put it this way:

> It is inequitable to allow the putative co-owner to lie in the weeds for years after his claim has been repudiated, while large amounts of money are spent developing a market for the copyrighted material, and then pounce on the prize after it has been brought in by another's effort.[402]

It is at least as inequitable to allow an alleged infringer to escape liability for infringement because, on some earlier occasion, he called a collaborator's contributions into dispute, especially if nothing he actually did would have been actionable at the time. It makes no sense to encourage expensive litigation in advance of any actual injury before there is money or credit to fight over. Such a rule just encourages bad behavior and rewards stubbornness and fraud.

IV. AUTHORSHIP SENSE

Copyright's principal mechanism for promoting progress is to give automatic rights to the authors of copyrightable works. The rights vest as soon as a work is created and enable the author to choose how to deploy them to enable the work to reach its audience. Whether you view the rights as an incentive to encourage authorship or a reward for having created a new work, the choice to bestow exclusive rights on the author as an initial matter is fundamental. By causing the rights to spring into being automatically, by requiring a signed writing to transfer ownership, and by enabling the author to recapture ownership after some years have elapsed, the copyright statute seeks to ensure that the author has the opportunity to decide how a work will be exploited. If our devices for figuring out who authored a work and therefore owns the rights in the first instance are broken, the copyright system will fail to work as it is designed to.

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[399] *See, e.g.*, Pisciotti v. Brittingham, 2022 U.S. Dist. LEXIS 116951, *34, 2022 WL 2392198, *12 (WD Wash July 1, 2022).

[400] *See* 17 USC § 406(a).

[401] 1909 Act § 19 ("The notice of copyright . . .shall consist either of the word "Copyright", the abbreviation "Copr.", or the symbol ©, accompanied by the name of the copyright proprietor").

[402] Zuill v. Shanahan, 80 F.3d 1366, 1370, 1371 (9th Cir. 1996). Accord Seven Arts Filmed Entertainment v. Content Media Corp, 733 F.3d 1251, 1255 (9th Cir. 2013).

Copyright scholars and lawyers of different stripes agree that authors are essential characters in the copyright system. We haven't reached a consensus on how important authors are relative to other actors and interests. I've argued in earlier work that a single-minded focus on the interests of authors neglects the crucial interests of readers.[403] But because the way the copyright system operates is to confer rights on authors, it matters who the authors are — they are the individuals who, in the first instance, receive the legal rights. To the extent our tests for identifying the authors of copyrighted works are nonsense tests, that is a problem for the system that we should solve if we can.

Instead of relying on nonsense rules to make cases raising authorship disputes go away, courts can and should try to resolve the disputes by determining who created the copyrightable expression embodied in the works. This may require judges or juries to evaluate the expressive contributions made by putative authors of a work. If some or all parties insist that they did not intend to combine their expression into a unitary or interdependent whole, then the trier of fact will need to ascertain who should be deemed responsible for contributing what. If individual expressive contributions can be isolated and identified separately, then each contributor should be deemed the author of the expression he or she originated. The work will thus be one that contains multiple copyright-protected elements owned by different individuals or entities.[404] To exploit the entire work, the authors will need to work together.[405] Absent an agreement, each of them would be entitled to excise his or her own contribution and license it separately.

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[403] *See* Jessica Litman, *Readers' Copyright*, 58 J. Copyright Society of the USA 325 (2011).; Jessica Litman, *Lawful Personal Use*, 85 Tex L. Rev. 1871, 1879 (2007).

[404] Molly Van Houweling has warned that recognizing multiple authors of a single work poses a risk of fracturing the rights needed to exploit the work and greatly complicating the licensing process. *See* Van Houweling, *supra* note 33. While I agree that that is a real concern, it is a concern that suffuses the current copyright marketplace. Many works are derivative works that incorporate or are based upon independently copyrighted underlying works. Unless the derivative copyright owner has made special arrangements with the owners of any underlying works, exploiting the derivative work will require additional licenses from the owners of any underlying works. *See, e.g.*, Stewart v. Abend, 495 U.S. 207 (1990). Copyright divisibility enables and encourages copyright owners to divide their copyrights into many small packages and assign each package to a different assignee. To secure a license to make use of a work, it may be necessary to seek permission from the assignees of different discreet copyright chunks. ASCAP and BMI insist that notwithstanding the law permitting any joint author to license the use of a jointly authored work, venues seeking a license to perform a song jointly authored by songwriters who belong to different PROs must secure that license from both of them. *See* United States v. Broadcast Music, Inc., 207 F. Supp. 3d 374 (S.D.N.Y. 2016), aff'd 720 Fed. Appx. 14 (2d Cir. 2017).

[405] Copyright laws of other nations commonly require the permission of all joint authors to exploit a joint work. *See, e.g.*, Pascal Kamina, Film Copyright in the European Union 164-65, 170-71, 368-69(2d ed. 2016).

If different collaborators' expressive contributions cannot be disentangled, the work is a joint work under the statutory definition. The individuals who contributed that expression will each own an undivided (but not necessarily equal) interest in the whole.[406] As a legal matter, any of them will be able to exploit the work independently of the others unless they agree otherwise. As a practical matter, extant markets for copyright licensing may impose more discipline, since businesses seeking a license to use copyrighted works will seek to do so through familiar channels.[407]

Even when contributors fail to establish their entitlement to be deemed authors, there may be opportunities to award them credit. In cases in which copyright owners can better satisfy creators' dignitary interests in being credited as a creator without undermining owners' pecuniary interests in exploiting their works, adopting better attribution practices may discourage lawsuits over authorship without damage to copyright owners' bottom line.[408] In part II, I

[406] *See, e.g.*, Hughes, *supra* note 117, at 50-51. Because each joint author will own an undivided fractional interest in the whole, each of them is free to exploit the work subject to a duty to account to his coauthors. The size of the fractional interest will come up, if at all, in the course of an accounting or a lawsuit seeking an accounting. Accounting claims commonly seek less than a pro-rata share of receipts. *See, e.g.*, Thomson v. Larson, 147 F.3d 195, 198 (2d Cir. 1998) (seeking 16% of the author's share). Courts have not resolved whether joint authors' suits seeking an accounting may be brought only in federal court because state law actions are preempted by the copyright statute or may be brought only in state court unless there is diversity jurisdiction. Compare Gaiman v McFarlane, 360 F.3d 644, 652 (7th Cir. 2004)("When co-ownership is conceded and the only issue therefore is ...division of the profits from the copyrighted work, there is no issue of copyright law and the suit for an accounting of profits therefore arises under state rather than federal law") with Elliot v. Cartagena, 2025 U.S.P.Q.2D (BNA) 301, (S.D.N.Y. 2025) (holding putative coauthor's state law claim for an accounting to be preempted by the copyright act). *See also* 2 WILLIAM F.PATRY, PATRY ON COPYRIGHT § 5.09 (2025) (asserting that federal courts have no jurisdiction over claims for accounting unless they are accompanied by a claim for a declaration of joint authorship).

[407] Even if Jefri Aalmuhammed had been successful in his claim to have coauthored *Malcom X,* for example, film distributors and television broadcasters would likely still obtain their licenses to show the movie from Warner Brothers.

[408] To return to DC's copyright in the Batmobile character, DC's ownership claim is impregnable despite the fact that it did not author the character. DC does not need the author label to shore up its legal rights. Indeed, comic book fans' awareness that the authors of the comic book Batmobile were Bill Finger, Jerry Robinson, George Roussos, Dick Sprang, Joseph Samachson, Charles Paris, Jack Schiff, Gardner Fox, Sheldon Moldoff, Sid Greene, Gaspar Saladino and Julius Schwartz delights fans and makes the character more valuable to DC. Relatedly, hard-core fans of the Batman movie version of the Batmobile know that the various movie Batmobiles were designed by Anton Furst, Nathan Crowley, Julian Caldow, Tim Flattery, Harald Belker, Patrick Tatopoulos, and Dennis McCarthy. *See* MARK COTTA VAZ, BATMOBILE: THE COMPLETE HISTORY (2012); Batmobile, WIKIPEDIA , https://en.wikipedia.org/wiki/Batmobile#Appearances_in_live-action_media_and_real-world_vehicles (visited Jan. 13, 2025).

explored several genres of creativity in which creators value authorship credit even though ownership is off the table.

Many of the creators whose stories I've told in this article, though, sought money as well as credit. It's worth recalling that an entitlement to money is not necessarily accompanied by control. Judges who insisted on a stingy definition of joint work or a broad definition of work made for hire appear to have been channeling concern that recognizing a collaborator's authorship claims might inhibit exploitation of a work or allow an undeserving claimant to appropriate an unfairly large portion of the proceeds.[409] Neither result necessarily follows. In many cases, the burden imposed on the person that courts would prefer to think of as the sole author would be a burden of contracting. As scholars have noted, the presumption that joint authors own equal undivided shares of the copyright in a joint work is not required by the statute.[410] Although all joint authors share a right to exploit the work subject to a duty to account to their coauthors, a court that upholds a joint authorship claim and reckons an accounting might nonetheless apportion the shares in proportion to the coauthors' contributions rather than pro-rata.[411] Further, an unwilling joint author, especially a "dominant" one, may be able to persuade her coauthor to assign or license his copyright interest. The same facts that persuade the court that one of the authors dominated, as well as the conventions of the genre, may support an implied-in-fact, nonexclusive license to use the contributions in connection with the work. That license may include limitations and payment terms. It would also be subject to termination after 35 years, but because of the statutory derivative works exception, termination need not prevent the dominant author from continuing to exploit the contribution as part of the work. If all of those options fail, that means only that both joint authors will be entitled to exploit the joint work, with neither able to prevent the other, and both joint authors will owe the other a duty to account.

In a similar vein, there is little reason to maintain the rule that the employer of the creators of a copyrightable work is not only the automatic owner of its copyright, but also the work's author. That rule has proved to be unnecessary to secure the rights of employer-owners. In some fields, like academia, the rule is so counterintuitive that even copyright experts refuse to believe it. Fixing the problem would be straightforward, but would require Congress to enact an amendment to section 201 of the statute.[412] Because the authorship status of owners of copyrights in works made for hire has acquired heroic significance in

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[409] *See, e.g.*, Aalmuhammed v. Lee, 202 F.3d at 1233-36; *supra* notes 227-232, 262-266, 326-328 and accompanying text.

[410] *See, e.g.*, Hughes, *supra* note 117, at 50-51.

[411] *See supra* note 359.

[412] Deleting the phrase "is considered the author for purposes of this title, and" from section 201(b) would accomplish it nicely, although the usual suspects would undoubtedly want to include other clarifying amendments. Since employers' automatic ownership of the copyrights in works made for hire would not be the result of a grant from the author, it should not be subject to termination under the current section 203.

some industry sectors, explaining how and why we could get there from here deserves a paper of its own, and I am writing one now.[413]

For a putative employer-author, the failure to acquire ownership of the copyright on a work-made-for-hire basis can be fixed by securing a copyright assignment. Even absent an assignment or written license agreement, courts have recognized that a collaborator's contributions to a work may be subject to an implied-in-fact nonexclusive license to incorporate them into the work, although the license may involve additional compensation.[414] Both assignments and implied licenses would subject the collaborator's contribution to a risk of termination after 35 years, but the derivative work exception in section 203 would protect the continued use of the contribution in the work.

Finally, the threat that severally-authored and multiply owned works might pose to the copyright system are more modest than courts seem to fear. Divisible copyrights have already resulted in fractured copyright ownership,[415] and while it has certainly been a nuisance, I don't hear authors' or owners' representatives clamoring for a return to the good old days of copyright indivisibility.[416] Both joint works and works incorporating copyright-protected elements controlled by different copyright owners are exceedingly common in copyright world, and standard practices of different genres have devised many ways to handle them. Unduly narrow versions of joint authorship and excessively broad versions of works made for hire significantly distort the working of the copyright system without being necessary measures to preserve copyright owners' ability to exploit and profit from their works. We should discard those versions if we can.

Some of the nonsense doctrines explored earlier resulted from judicial mistakes. Courts misread or misinterpreted the statute or a line of case authority in deriving a new rule; other courts followed them uncritically, and the rule became entrenched before it could be examined.[417] Why were courts so quick to adopt ill-reasoned rules? One possibility is that after devising a rule that seemed congruent with the norms of a particular genre, the courts forgot where it came from and understood it to be an overarching construction of the statutory text. Another is that the rules gave courts a superficially principled basis for avoiding the messy task of examining and evaluating who contributed what to a work.

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[413] Jessica Litman, Works Made for Hire and On Commission (unpublished manuscript) (on file with author).

[414] *See, e.g.*, Aalmuhammed v. Lee, 202 F.3d 1227 (9th Cir. 2000); Effects Associates v. Cohen, 908 F.2d 555 (9th Cir. 1990).

[415] *See, e.g.*, Van Houweling, *supra* note 33, at 625-26. As I explain *supra* note 406, I believe that the incremental additional splintering of copyright rights will be modest.

[416] Under the 1909 Act, a copyright was deemed indivisible and copyright rights could not be separately assigned. *See generally* Abraham L. Kaimstein, Study No. 11: Divisibility of Copyright (1957) in Copyright Law Revision: Studies Prepared for the Subcomm. On Patents of the Senate Comm. on the Judiciary, 86th Cong. (1961). The 1976 Act replaced that rule with a rule permitting copyright rights to be transferred and owned separately. 17 U.S.C. § 201(d).

[417] *See, e.g.,* 5 William F. Patry, Patry on Copyright § 5.45 at 949-58 (describing adoption of instance and expense test).

Finally, some courts appeared to have assumed that recognizing multiple authors of a work might, without more, harm the value of the copyright or undermine opportunities for exploitation.[418] In any event, the rules have proved to be very sticky. Judges in circuits that have adopted one of these rules explain that they lack the authority to diverge from them without taking the issue *en banc*;[419] courts in circuits that have not yet endorsed a rule explain that they really, really don't want to create a circuit split.[420]

Taking these objections at face value, courts can find routes to more reasonable results within the confines of the ill-considered doctrines by which they claim to be bound. Let's start with the tests courts use to dismiss joint authorship claims by privileging the author who is "dominant" or who acted as an author by exercising control. Both of these tests originated as squishy common law tests that purported to assess the collaborators' intent during the process of creation. Both of them, at least in their original incarnation, professed to consider the dominance or control shown by one author as one factor among several. If courts recall that they are free to entertain other evidence of the collaborators' intent, then they need not rule invariably in favor of the purported sole author who is the most powerful, bossy, or stubborn.

But, even where they are confident that the dominant or controlling collaborator is the one who authored the final version of the work, the copyright statute gives them no power to reassign the copyright in contributions of a submissive colleague. If a court finds that the creators did not intend to create a joint work, it follows that each of them owns the copyrightable elements that they originated.

Turning to the statute of limitations, the rule that authorship claims, unlike infringement claims, accrue only once, makes no sense on its own terms. If judges nonetheless feel bound by precedent to follow it, they should recall that *unequivocal* repudiation of an authorship claim ought to require a stiff evidentiary showing. It makes no sense to rule that an authorship claim was unequivocally repudiated when the work was created. Nor is it reasonable that including a non-negotiable work-made-for-hire term in a standard form contract, or that naming someone other than the claimant in a copyright notice should count as unequivocal repudiation. The circumstances underlying a delay in bringing suit might well, however, be probative of the existence and terms of an implied-in-fact license even if they don't support a finding that all claims are time-barred.[421]

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[418] *See generally* Van Houweling, *supra* note 33.

[419] *See, e.g.*, Estate of Burne Hogarth v. Edgar Rice Burroughs, 342 F.3d 149, 162-63 (2d Cir. 2003)

[420] *See, e.g.*, Seven Arts Filmed Entertainment, Ltd., v. Content Media Corp., 733 F.3d 1251, 1256 (9th Cir. 2013).

[421] *See, e.g.*, Griego v. Jackson, No. 2:24-cv-03260, 2025 WL 297150 (CD Cal, Jan. 24, 2025).

Current bad case law may reflect courts' desires to avoid the messy task of examining and evaluating who contributed what to a work. Judges may have indulged a reflexive discomfort with the idea that a valuable work might have more than one author. Courts may have adopted rules that matched the authorial norms of a particular authorial community, but cast them as rules of general application, applying to copyright disputes across the board. Then, they appear to have forgotten where the rules came from, imagining that Congress had designed them that way. Those rules were not particularly wise to begin with, but they generate nonsensical outcomes when applied outside of their original context.

A careful examination of various lines of long-settled doctrine regarding authorship for the purposes of the copyright law reveals a basketful of rules that make little sense on their own terms. We should fix those where we can. In this article, I have sought to untangle the different strands of doctrine that appear to have trapped us where we find ourselves today. I've suggested small but significant changes in courts' approaches to authorship disputes. Those changes would result in rules and tests that both treat authors more fairly and make more sense than the ones in current common use.

CONCLUSION

Authorship is central to copyright law. Yet the concept of authorship embodied in the copyright statute relates only loosely to the ways authorship is understood in the real-world communities subject to copyright law. The customs in one tribe relating to who is an "author," and what authorship means, vary widely from those in others. Some creative communities separate the dignitary aspects of authorship (e.g., credit) from the pecuniary ones (e.g., money and control over exploitation). Some regularly treat as "authors" people who had little or nothing to do with creating the work. Some of them routinely deny authorship to people who made important creative contributions. None of this fits well with the authorship rules embodied in the copyright statute.

In the 20th Century, Congress abandoned the formalities and other devices that made it easy to ascertain the identity of the owner of a work's copyright, in favor of an overarching rule that the powerful and long-lasting rights conferred by the copyright statute vest automatically in a work's author.[422] The author is free to keep those rights, transfer them, or license them, but any assignment requires a signed writing. For the copyright system to operate effectively, we need to be able to identify the authors of works, and we need the tests that resolve authorship disputes to be sensible and reliable. Different copyright interests will want those tests to address different problems, but perhaps the most important criterion is that the tests should identify a work's actual creator or creators. Authors of different genres of work have developed their own ecosystems, with expectations and norms that operate independently of copyright rules and often diverge markedly from the law set forth in the statute. They nonetheless sometimes seek the assistance of the law and the courts when disputes arise over compensation, credit, or control. The legal doctrines the courts rely on to decide authorship disputes are poorly designed to accomplish that goal and make little policy or practical sense on their own terms.

The copyright law is less author-friendly across a wide range of issues than it is advertised to be.[423] The current statute, however, does include provisions meant to buttress authors' bargaining power. When courts decline to recognize that the creators or cocreators of a work are entitled to claim those protections, they further erode the law's support for authors. If you believe the primary purpose of the copyright system is to organize capital, or create jobs, or reduce the trade deficit, none of these criticisms may strike you as salient. If the

[422] *See* Litman, *supra* note 41, at 740-44.

[423] *See* Jane C. Ginsburg, *The Role of the Author in Copyright*, *in* Copyright Law In An Age Of Limitations And Exceptions, Ruth L. Okediji (Ed.), Cambridge University Press 60, 63(2017) available at: https://scholarship.law.columbia.edu/faculty_scholarship/4292 ("Copyright vests in a work's creator as soon as she 'fixes' it in any tangible medium of expression. But for many authors, ownership is quickly divested, and for some, it never attaches at all.")

purpose of copyright is instead to encourage and nurture human creativity, the fact that the courts seem to favor rules and tests that allow them to avoid making waves rather than identify the individuals who authored works should give you pause. The result of those rules has been to minimize, reallocate, and erase the important contributions of many creators in order to avoid calling them authors.