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THE CONCEPT OF AUTHORSHIP IN COMPARATIVE COPYRIGHT LAW

*Jane C. Ginsburg**

ABSTRACT

In contemporary debates over copyright, the figure of the author is too-often absent. As a result, these discussions tend to lose sight of copyright's role in fostering creativity. I believe that refocussing discussion on authors—the constitutional subjects of copyright—should restore a proper perspective on copyright law, as a system designed to advance the public goal of expanding knowledge, by means of stimulating the efforts and imaginations of private creative actors. Copyright cannot be understood merely as a grudgingly tolerated way station on the road to the public domain. Nor does a view of copyright as a necessary incentive to invest in dissemination of copy-vulnerable productions adequately account for the nature and scope of legal protections. Much of copyright law in the United States and abroad makes sense only if one recognizes the centrality of the author, the human creator of the work. Because copyright arises out of the act of creating a work, authors have moral claims that neither corporate intermediaries nor consumer end-users can (straightfacedly) assert. This makes it all the more important to attempt to discern just what authorship means in today's copyright systems.

This Article endeavors to explore the concept of authorship in both common law and civil law jurisdictions. It considers legislative, judicial and secondary authorities in the United States, the United Kingdom, Canada, and Australia, as well as in the civil law countries of France, Belgium, and the Netherlands. The legal systems here examined appear to agree that an author is a human being who ex-

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ercises subjective judgment in composing the work and who controls its execution. But that description may neither fully capture nor exhaust the category of "authors." Contending additional or alternative authorial characteristics range from sweat of the ordinary brow, to highly skilled labor, to intent to be a creative author, to investment. The under- or over-inclusiveness of the subjective judgment criterion depends on which of these other characteristics national laws credit. Despite these variations, I nonetheless conclude that in copyright law, an author is (or should be) a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work. Because, and to the extent that, she moulds the work to her vision (be it even a myopic one), she is entitled not only to recognition and payment, but to exert some artistic control over it. If copyright laws do not derive their authority from human creativity, but instead seek merely to compensate investment, then the scope of protection should be rethought and perhaps reduced.

INTRODUCTION

Authors are the heart of copyright. The U.S. Constitution empowers Congress to "promote the Progress of Science . . . by securing for limited Times to *Authors* . . . the exclusive Right to their Writings."[1] In 1787, this author-focus was an innovation: only in England, under the 1710 Statute of Anne, did the law then vest authors with a property right in their creations. Elsewhere in Europe, booksellers' printing privileges prevailed: local rulers granted monopolies to those who invested in the publication of works, whether by contemporary or ancient authors. Today, we might call printing privileges a "best exploiter" regime, for the law placed the exclusive rights in the hands not of those who created the works (many of whom had been dead for a millennium or more), but of those who assured their public dissemination. Copyright, by contrast, does not seek merely to promote the distribution of works to the public. It also aims to foster their creation. In the words of the Statute of Anne, copyright is "for the Encouragement of Learned Men to Compose and Write useful Books . . . ."[2] Similarly, the U.S. Constitution recognizes that the "Progress of Science" (or in the Statute of Anne, the "Encouragement of Learning") requires care for authors.

More recently, however, the claims of authorship, indeed the concept of authorship in copyright law, have encountered considerable

1. U.S. CONST. art. 1, § 8, cl. 8 (emphasis supplied).

2. An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, 8 Ann., c. 19, pmbl. (1710) (Eng.) (stating the act is "for the Encouragement of Learned Men to Compose and Write useful Books").

skepticism, not to say hostility, and not only from postmodernist literary critics. Many of the latter contend that copyright, or *droit d'auteur*, obsoletely relies on the Romantic figure—or perhaps fiction—of the genius *auteur*.[3] But we know today, indeed we probably have always known, that this character is neither so virtuosic, nor so individual, as the "Romantic" vision suggests. Artistic merit has never been a prerequisite to copyright (at least not in theory),[4] and authors are not necessarily less creative for being multiple. As a result, the syllogism "the romantic author is dead; copyright is about romantic authorship; copyright must be dead, too" fails.[5]

A more troublesome critique accepts the premise that authors' creativity justifies moral and economic claims to the fruits of their creations, but then debunks it by stressing that real authors rarely in fact benefit from their creativity.[6] Rather, publishers and similar grantees hide behind the claims of the creators they promptly despoil. Copyright thus is merely a pretext for corporate greed. Ultimately, however, this challenge to copyright does not question the *vesting* of exclusive rights in authors; rather, it deplores the *di*vesting of authors by rapacious exploiters. Whether the copyright law should assure that authors retain some share of the fruits of their labors is indeed a con-

3. *See, e.g.*, MARTHA WOODMANSEE & PETER JASZI, THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (1994); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993); Lionel Bently, *Copyright and the Death of the Author in Literature and Law*, 57 MOD. L. REV. 973 (1994); Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain*, 18 COLUM.-VLA J.L. & ARTS 1 (1993); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455. *See also* F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225, 230-31, 277 (2001) (criticizing the Ninth Circuit for "an extreme expression of the romantic authorship concept" in *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000)).

4. *See, e.g.*, Pope v. Curll, 2 Atk. 342 (1741) (holding literary quality of unpublished letters irrelevant to their protection); Bleistein v. Donaldson Lithographing, 188 U.S. 239 (1903) (holding commercial art protectable by copyright despite its low-brow audience and functional aspirations); C. PROP. INT., art. L. § 112-1 (1992) (Fr.) (stating "merit" and "destination" irrelevant to work's protectability).

5. I will forgo further discussion of the extensive post-modernist literature as to who should be considered an "author." My purpose here is not to disinter the allegedly dead author, but to explore the characterization of authorship that emerges from the positive law in various jurisdictions. I acknowledge that, contrary to post modern precept, the normative assumption (and message) that a focus on the human creator is proper and desirable informs the analysis here. *See infra* text accompanying notes 8-15.

6. *See, e.g.*, KEMBREW MCLEAD, OWNING CULTURE: AUTHORSHIP, OWNERSHIP AND INTELLECTUAL PROPERTY LAW 25-26 (2001); Aoki, *supra* note 3, at 53, 66; Neil W. Netanel, *Market Hierarchy and Our System of Free Expression*, 53 VAND. L. REV. 1879, 1904 (2000).

tentious issue,[7] but it is analytically subsequent to the topic I propose to explore.

That topic is: "Who *is* an author in copyright law?" For if authors are as central to copyright as I claim, I must also acknowledge that copyright doctrine on authorship, both here and abroad, is surprisingly sparse. Few judicial decisions address what authorship means, or who is an author. Fewer laws define authorship. In this discussion, therefore, I endeavor to explore the concept of authorship in both common law and civil law jurisdictions. I will consider legislative, judicial and secondary authorities in the United States, the United Kingdom, Canada, and Australia, as well as in the civil law countries of France, Belgium, and the Netherlands.

The results of this inquiry reveal considerable variation, not only in the comparison of common law and civil law systems, but within each legal regime. It is easier to assert that authors are the initial beneficiaries of copyright/*droit d'auteur* than to determine what makes someone an author. The legal systems here examined appear to agree that an author is a human being who exercises subjective judgment in composing the work and who controls its execution. But that description may neither fully capture nor exhaust the category of "authors." Contending additional or alternative authorial characteristics range from sweat of the ordinary brow, to highly skilled labor, to intent to be a creative author, to investment. The under- or over-inclusiveness of the subjective judgment criterion depends on which of these other characteristics national laws credit. Moreover, the assessment of authorial activity also appears to depend both on the number of putative authors, and on the nature of the work. Examples of the latter variable include works derived from earlier works, and those whose creation was machine-assisted.

Some might find this inquiry pernicious and improbable for a confessed copyright enthusiast (or, more accurately, authors' rights enthusiast) like myself. For one might conclude from it that the documented failure within and across national laws to articulate a coherent concept of authorship undermines the author-based premise of copyright and therefore delegitimates the regime of more or less exclusive rights those laws accord to authors.

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7. *See* W.R. Cornish, *The Author as Risk-Sharer*, 26 COLUM.-VLA J.L. & ARTS 1 (2002) (15th Manges Lecture, Columbia Law School, Mar. 26, 2002) (discussing legislative proposals in Europe to mandate royalty sharing). *See also* Freelance Writers and Artists Protection Act of 2002, H.R. 4643, 107th Cong. (2002) (applying antitrust laws to freelance writers or freelance artists "in the same manner as such laws apply to collective bargaining by employees who are members of a bargaining unit recognized under the National Labor Relations Act [citation omitted]").

In fact, I believe analysis of the sources shows that the core concepts of human, subjective creativity in conceiving the work and controlling its execution hold firm. The competing criteria for authorship flow from three different impulses; two of these are not inconsistent with the above characterization of authorship in copyright. Some alternative approaches seek more to refine the concept of human subjective authorship than they endeavor to overturn it. Others appear primarily preoccupied with the *consequences* of authorship attribution. The courts appear to think it through as follows: "Were we to find authorship in this instance, then the consequence would be X, and, as X is an undesirable result, plaintiff cannot be an author." X most often concerns ownership and power over the work's disposition. This is especially true when more than one claimant vies for authorship status,[8] or when courts fear that recognizing authorship in a thinly creative, or derivative work, will curtail access to the subject matter or underlying work. (This is not to suggest that consequentialist reasoning is illegitimate, but rather that in these instances the courts too often are following a misguided consequentialism: their reasoning takes as its premise a wrongly-identified consequence.) By contrast, some systems nonetheless still determine authorship, at least in part, by assigning greater value to economic initiative and control than to creative contribution.

Finally, I should acknowledge an additional motivation for this inquiry. Much of the rhetoric encircling copyright today—much of it (over)heated—excoriates the "copyright machine,"[9] or "copyright cartels,"[10] large unloveable corporations who seek to control every user's access to and consumption of copyrighted works. Corporate copyright owners, in turn, tend to brand as "piracy" all non-paid en-

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8. *See, e.g.*, Roberta Kwall, *Author-Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 57 (2001). Kwall notes that had courts:

> considered the possibility that co-authors do not necessarily have to enjoy equal shares of the work, perhaps their applications of the joint authorship doctrine would have been more satisfying. At the least, this recognition would have enabled these courts to consider the possibility that collaborative efforts should be rewarded under copyright law to the extent of the collaboration.

Id.

9. Steven Levy, *The Great Liberator*, WIRED, Oct. 2002, at 140.

10. Representative F. James Sensenbrenner (R-Wis.), Chair of the House Judiciary Committee and an active force in setting the agenda of the House Subcommittee on Courts, the Internet, and Intellectual Property, has been especially critical of U.S. music industry groups, calling them "copyright cartels" and arguing that consumer access to online content should be "expanded, not restricted." Bill Holland, *Groups Offer Views on Copyright*, BILLBOARD, Apr. 20, 2002, at 3; Bill Holland, *Although Hearing Approaches, Sensenbrenner Keeps Mum*, BILLBOARD, May 12, 2001, at 134.

joyment of those works.[11] The figure of the author is curiously absent from this debate. As a result, contemporary discussions tend to lose sight of copyright's role in fostering creativity. I believe that refocussing discussion on authors—the constitutional subjects of copyright—should restore a proper perspective on copyright law, as a system designed to advance the public goal of expanding knowledge, by means of stimulating the efforts and imaginations of private creative actors.[12] Copyright cannot be understood merely as a grudgingly tolerated way station on the road to the public domain.[13] Nor does a view of copyright as a necessary incentive to invest in dissemination of copy-vulnerable productions[14] adequately account for the nature and scope of legal protections. Much of copyright law in the United States and abroad makes sense only if one recognizes the centrality of the author, the human creator of the work. Because copyright arises out of the act of creating a work,[15] authors have moral claims that neither corporate intermediaries nor consumer end-users can (straightfacedly) assert.[16] This makes it all the more important to endeavor to discern just what authorship means in today's copyright systems.

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11. *See, e.g.*, Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 349 (2002) (describing the expansion of "piracy" to describe "any unlicensed activity," including "things that are unquestionably legal piracy—like making the recordings expressly privileged under §1008 of the Audio Home Recording Act").

12. *See* THE FEDERALIST NO. 43 (James Madison).

13. *See, e.g.*, L. Ray Patterson, *Free Speech, Copyright and Fair Use*, 40 VAND. L. REV. 1, 7 (1987) (characterizing copyright as "an encroachment on the public domain, justified only if it provides the public with some form of compensation"); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 977 (1990) (urging that "a vigorous public domain is a crucial buttress to the copyright system; without the public domain, it might be impossible to tolerate copyright at all"); James Boyle, *Fencing Off Ideas: Enclosure and the Disappearance of the Public Domain*, 2000 DAEDALUS: J. AM. ACAD. ARTS & SCI. 13, 16 (summarizing but not necessarily endorsing the position that "intellectual property rights are necessary evils. They should be strictly limited in both time and extent."). *See also* THOMAS B. MACAULAY, *Speech before the House of Commons* (Feb. 5, 1841), *in* VIII THE WORKS OF LORD MACAULAY 195, 201 (Trevelyan ed., 1879) (warning that copyright is "a tax on readers for the benefit of authors" and therefore "exceedingly bad," that the "inconveniences" of copyright "are neither few nor small" yet acquiescing that "for the sake of the good we must submit to the evil [of a copyright monopoly]").

14. *See, e.g.*, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 327 (1989) (stating as an initial premise that "the work will be created only if the difference between expected revenues and the cost of making copies equals or exceeds the cost of expression").

15. *See, e.g.*, 17 U.S.C. § 102(a) (2002) (copyright "subsists" in fixed original works of authorship); C. PROP. INT., art. L., § 111-1 (1992) (Fr.) (stating exclusive moral and economic rights spring "from the sole fact of the work's creation").

16. These include the non economic "moral rights" of attribution and integrity, well-established in continental European copyright laws, and more recently introduced in the U.K. and Australian copyright acts, as well as the U.S. termination or recapture right entitling the author to terminate contracts of transfer of rights under copyright and to recapture those rights to license them anew. 17 U.S.C. §§ 203(b), 304(c) (2002).

II. LEGAL DEFINITIONS OF AUTHORSHIP

Analysis of the sources begins by inquiring whether national or international copyright laws define authorship. In fact, few laws tell us who is an author, or what authorship is. The Berne Convention, the premier multilateral copyright treaty, largely leaves the issue to Member State determination. Professor Sam Ricketson, the leading authority on the Berne Convention, acknowledges that:

> This means, in turn, that there are different national interpretations as to what is required for "authorship" and as to who is an "author." In this regard, the Berne Convention provides only limited guidance: while it lists a series of works in article 2 that each Union country is to protect, it does not . . . contain any correlative definition of the term "author."[17]

Instead, the Berne Convention, like many national laws, specifies authorship indirectly, by providing that an author is whoever says she is—if her "name appear[s] on the work in the usual manner."[18] But it is not clear that the person whose name appears must be a human being. Professor Ricketson and Dr. Adolf Dietz have argued eloquently that the Berne Convention reserves "authorship" to human beings,[19] and this may be implicit in most national laws, but at least some national laws appear to welcome juridical persons as well.[20]

Some national laws set forth at least some indications of the kinds of activities that make one an "author." But they disappoint upon closer examination. For example, the U.K. Copyright, Design and

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17. SAM RICKETSON, THE BERNE CONVENTION 1886-1986 ¶ 6.4 (1987).

18. The Berne Convention, July 24, 1971, art. 15.1; *see also* Copyright Act of 1912, art. 8 (1912) (Neth.) (the person who presents himself as the author); Copyright, Design and Patent Act, 1988, § 104 (Eng.) (person whose name appears on the work as published shall be presumed to be the author of the work and to have not made it within in the course of employment); Copyright Act, 1968, §§ 127-131 (Austl.) (presumption of authorship of a literary, dramatic, musical or artistic work if true name or commonly known name of the individual appears on the work "when it was made") (applies equally to each individual purporting to be a joint author); C. PROP. INT., art. L., § 113-1 (1992) (Fr.) (authorship status belongs to the person whose name appears on the work made public); Copyright Law of June 30, 1994, art. 6.2 (Belg.) (same).

19. Sam Ricketson, *People or Machines? The Berne Convention and the Changing Concept of Authorship*, 16 COLUM.-VLA J.L. & ARTS 1 (1991); Adolf Dietz, *The Concept of Authorship Under the Berne Convention*, 155 RIDA 3 (1993).

20. *See, e.g.*, CA Brussels, Jan. 28, 1997, AM 1997, 262 (interpreting article 6.2 of the 1996 Belgian copyright law "the term 'whomever' [whose name appears as the author] does not *a priori* exclude juridical persons" from authorship status) (citing FABIENNE BRISON & BENOIT MICHAUX, DE NIEUWE AUTEURSWET 521 (1995-96)). *But see* Copyright Law of June 30, 1994, art. 6.1 (Belg.) ("initial owner of copyright is the physical person who created the work"). Articles 6, 7, and 8 of the Dutch Copyright Law permit the "authorship" of legal entities. *See* JACQUELINE SEIGNETTE, CHALLENGES TO THE CREATOR DOCTRINE: AUTHORSHIP, COPYRIGHT OWNERSHIP AND THE EXPLOITATION OF CREATIVE WORKS IN THE NETHERLANDS, GERMANY, AND THE UNITED STATES 97-101 (1994).

Patent Act of 1988 declares: "Author, in relation to a work, means the person who creates it."[21] But as the law does not also define creation, the author definition does not get us very far.[22] Similarly, the Australian law states, with regard to photographs, that the author is "the person who took the photograph."[23] But who "takes" a photograph? The person who composes the shot, or the person who pushes the button?[24] The U.K. law reveals a similar ambiguity when it provides, with respect to computer-generated works, that the "author" of the work "shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken."[25] What "arrangements" are required? The setting of the instructions under which the computer is to operate? The selection from among the output? The investment in the equipment? In the case of a computer-generated work, the most direct creator is neither a human nor a juridical person, but as machines cannot be right owners, the drafters of the U.K. law apparently perceived a need to identify an appropriate right-owning entity. They designated either a human actor, a juridical person, or a corporation, depending on the circumstances.[26]

It is unfortunate, as well as confusing, that the U.K. law here conflates authorship with vesting of copyright ownership. As we will see, an unrelenting equation of the two leads to considerable incoherence. But it is possible to vest ownership in productions whose human input is uncertain, without tricking out the owner in the garb of an author. For example, the Australian law distinguishes works of authorship (whose creators are, implicitly, human beings) from "subject matter other than works."[27] These include productions that may betray no authorship, such as broadcast signals and sound recordings. Initial ownership of copyright in "subject matter other than works" vests in producers, human or corporate. "Subject matter other than works"

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21. Copyright, Design and Patent Act, 1988, § 9(1) (Eng.).

22. Compare the 1988 Act creation standard with the 1911 Copyright Act, which designated as the "author" of a photograph the person who owned the original negative. *See* Kevin Garnett & Alistair Abbot, *Who is the "Author" of a Photograph?*, 20 EIRR 204 (1988).

23. Copyright Act, 1968, § 10 (Austl.).

24. *Cf.* T.G.I. Paris, July 6, 1970, RIDA 190 (1970) (affaire Paris Match) (author held to be the person who set up the photo, not the one who pushed the button). For a survey of different countries' characterizations of the "author" of a photograph, see Garnett & Abbot, *supra* note 22, at 204, 206.

25. Copyright, Design and Patent Act, 1988, § 9(3) (Eng.); *see also id.* § 9(2) (defining "author" of a sound recording: "in the case of a sound recording or film, the person by whom the arrangements necessary for the making of the recording or film are undertaken").

26. *See* Justine Pila & Andrew Christie, *The Literary Work within Copyright Law: an Analysis of its Present and Future Status*, 13 I.P.J. 133, 156 (1999).

27. Copyright Act, 1968, § 84(b) (Austl.).

also includes cinematographic works,[28] which pose problems not for *lack* of human authorship, but from *too much* of it. In this case, the individual contributors to the film, such as directors and screenwriters, certainly are "authors" (indeed, they now enjoy moral rights in Australia[29]), but the multiplicity of creators makes management of rights in the film unwieldy. Hence the vesting of ownership in the producer. Other national laws marry this kind of pragmatism to formal adherence to author-ownership: copyright vests in the human creators, but then is presumed to be transferred to the film producer.[30] Further along the spectrum sketched by the U.K. law, by contrast, the U.S. and Dutch laws explicitly allow for the authorship status, rather than mere ownership, of employers or certain hiring parties even outside the context of machine-assisted creation.[31] Moreover, they do not limit this "author" category to humans.

Some national laws list as "authors" certain human participants in a multiple-creator enterprise, such as a motion picture.[32] But these are only presumptions; they may be rebutted. Similarly, while the U.S. statute does not contain explicit presumptions of authorship, timely registration with the U.S. Copyright Office confers a rebuttable presumption of the validity of the information contained therein, including the identification of the author.[33] Rebutting the presumption requires determining what acts or contributions make the claimant an "author." But so does establishing authorship in the absence of a presumption.

Inevitably, then, courts must inquire into the nature of the activities that make one an author. In reviewing and attempting to synthesize the authorities from three common law jurisdictions, the United States, United Kingdom, and Australia, and from three civil law jurisdictions, France, Belgium, and Holland, and from one mixed jurisdiction, Canada, I have ascertained Six Principles in Search of an Author.[34] I do not claim, however, that all six apply at once. Rather,

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28. *Id.* § 86.

29. Copyright Amendment (Moral Rights) Act, 2000, § 195AF (2) (Austl.).

30. *See, e.g.*, C. PROP. INT., art. L., § 132-23.1 (1992) (Fr.).

31. 17 U.S.C. §§ 101, 201(b) (2002); Copyright Act of 1912, arts. 6, 8 (1912) (Neth.).

32. *See* C. PROP. INT., art. L., § 113-7 (1992) (Fr.); Copyright Law of June 30, 1994, art. 14 (Belg.). *See also* Copyright Amendment (Moral Rights) Act, 2000, § 195 AF(2) (Austl.).

33. 17 U.S.C. § 410(c) (2002).

34. References in copyright scholarship to Pirandello risk becoming trite. *See, e.g.*, David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 16 (2001) ("Six Case Studies in Search of an Author"). *See also* Massimo Pavolini, *Tutela dei personnagi di fantasia negli Stati Uniti ed in Italia o "Sei personaggi in cerca di diritto d'autore"* [Protection of Fictional Characters in the United States and in Italy or "Six Characters in Search of Author's Rights Law"], *in* LXVI IL DIRITTO DI AUTORE 405 (1995).

although the first three may seem coherent, discrepancies, dissonances, and significant incompatibilities appear not only across the remaining three, but also even within each principle enunciated.

III. SIX PRINCIPLES IN SEARCH OF AN AUTHOR

FIRST, AUTHORSHIP PLACES MIND OVER MUSCLE: the person who conceptualizes and directs the development of the work is the author, rather than the person who simply follows orders to execute the work. Most national copyright laws agree that mere execution does not make one an author. An "author" conceives of the work and supervises or otherwise exercises control over its execution. Thus, for example, a U.S. court has recognized that a printer whose activities gave concrete form to the client's conception, but in no way "intellectually modified or mechanically enhanced the concept articulated by [the client], other than to arrange it in a form that could be photographed as part of the [printing] process," was not an "author" of the resulting work.[35] French courts also distinguish between "authors" and "*simples exécutants*," those who merely carry out others' instructions. Thus, while the French law lists film directors as presumptive authors of audiovisual works, the presumption was successfully rebutted when the producer proved that the directors followed a precise and detailed list of instructions, so that each director's contribution would become integrated into a uniform collection; the court held that under those circumstances, "everything which demarcates creative liberty and the author's personality eluded the directors, who were only the mere executants of the producer's will."[36]

The English tradition is more ambiguous, as some early decisions, interpreting the Copyright Act then in force, may appear to equate mere fixation with authorship. The most notorious decision in this

35. Andrien v. S. Ocean County Chamber of Commerce, 927 F.2d 132 (3d Cir. 1991). *See also* Lindsay v. RMS Titanic, 52 U.S.P.Q.2d 1609 (S.D.N.Y. 1999) (holding director, not camera operators, the "author" of underwater sequences whose filming he meticulously planned).

36. CA Poitiers, 3e ch., Dec. 7, 1999 (SARL Chamelu et SA Editions Atlas c. Cts Chaye) (unpublished opinion) (discussed in *JCP La Semaine Juridique Entreprise et Affaires*, CHRONIQUE, Sept. 7, 2000, at 1375). *See* Cass. 1e civ., Nov. 13, 1973, D. Jur. 1974, 533-36, note Colombet (Cons. Renoir c. Guinot) (upholding co-authorship claim of sculptor hired by Renoir to make sculptures based on Renoir's drawings); T.G.I. Paris, Cass. 3e ch., Jan. 21, 1983, D. 1984, Somm. 286-87 (Valluet c. Vasarely) (painting executed by Vasarely's assistant held to have been entirely the assistant's work, as Vasarely's instructions amounted only to vague indications); Cass. 1e civ., Feb. 22, 2000, JCP 2000 com. 2000, 17-18, note Caron (Hemsi c. Laurin et autres) (researcher for a catalogue raisonné held not a co-author because she neither conceived nor developed the catalogue's organization, nor the selection of works, nor wrote the catalogue's notes).

vein may be *Walter v. Lane*,[37] in which the House of Lords determined that a reporter employed by the *Times* of London was the author of a verbatim account of speeches delivered extemporaneously by Lord Rosebery, because the transcription of the speeches required the exercise of the reporter's "skill and labour" in transcribing rapidly-delivered prose. Rosebery himself could not be a copyright owner because he had not fixed his extemporaneous speeches.[38] Rather, the reporter of the transcription was entitled to his own authorship status, because "an 'author' may come into existence without producing any original matter of his own."[39] Hence the irrelevance of the dissenter's objection that the reports "present the speaker's thoughts untinctured by the slightest trace or colour of the reporter's mind."[40] An earlier English decision also alludes to the significance of the labor of reducing a concept to concrete form: in a case involving a commissioned drawing, the Queen's Bench declared, "the author must mean a person who has at least some substantial share in putting the touches on to paper."[41]

More recently, and with ensuing Copyright Acts, however, a more conceptual approach seems to prevail. Thus, Justice Laddie, in a 1995 controversy involving authorship of building plans, distinguished conception from fixation, to the detriment of the latter:

> In my view, to have regard merely to who pushed the pen is too narrow a view of authorship. What is protected by copyright in a drawing or a literary work is more than just the skill of making marks on paper or some other medium. It is both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words

37. 1900 A.C. 539 (H.L. 1900).

The 1988 U.K. Copyright Designs and Patents Act (CDPA) still requires fixation, but now recognizes copyright in the creator of a fixed work whether or not the creator fixed or authorized the fixation. On the other hand, the CDPA apparently also preserves the result in *Walter v. Lane* as to a separate copyright in the reporter. Article 3 of the CDPA provides:

> (2) Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise; and references in this Part to the time at which such a work is made are to the time at which it is so recorded.
>
> (3) It is immaterial for the purposes of subsection (2) whether the work is recorded by or with the permission of the author; and where it is not recorded by the author, nothing in that subsection affects the question of whether copyright subsists in the record as distinct from the work recorded.

Copyright, Design and Patent Act, 1988, art. 3, §§ 2, 3 (Eng.).

38. See David J. Brennan & Andrew F. Christie, *Spoken Words and Copyright Subsistence in Anglo American Law*, 2000 I.P.Q. 309, 326.

39. *Walter*, 1900 A.C. at 554 (Lord James of Hereford).

40. *Id.* at 560-61 (Lord Robertson, dissenting).

41. Kenrick v. Lawerence, 25 Q.B.D. 99, 106 (1890). In that case, however, the artist's employer's concept for the work, a drawing of a hand pointing to a box, was deemed too commonplace, and the employer's supervision of the artist too scant, for the employer to be considered an "author" in its own right. *Id.*

> or lines have fixed in some tangible form which is protected. It is wrong to think that only the person who carries out the mechanical act of fixation is an author.[42]

We can discern from these rejections of a merely muscular characterization of authorship certain premises concerning the exercise of mind that makes one an author. The intellectual labor, as opposed to the mindless carrying-out, deploys "creative liberty" or autonomy; it involves "creating, selecting or gathering together the detailed concepts, data or emotions." Courts also invoke these criteria to determine whether to attribute the production of a machine-assisted work to a human "author." This brings me to the second principle.

SECOND, AUTHORSHIP VAUNTS MIND OVER MACHINE: the participation of a machine or device, such as a camera or a computer, in the creation of a work need not deprive its creator of authorship status, but the greater the machine's role in the work's production, the more the "author" must show how her role determined the work's form and content.

An initial distinction is warranted between types of machine assistance. Some machines or devices, such as pens, typewriters, and word processing programs, supply the tools for creation, but are not integral to the resulting work. That work remains constant, whether it is expressed in handwriting, or on a computer printout. The only "author" of the work is the creator of the expression, whatever the tools employed to express it. Thus, for example, an English court has acknowledged that grids and sequences of letters prepared by a computer program as part of a contest in which a newspaper invited readers to match patterns on cards to the sequences published in the newspaper, were works of authorship. The judge observed:

> The computer was no more than the tool by which the varying grids of five-letter sequences were produced to the instructions, via the computer programmes . . . . It is as unrealistic as it would be to suggest that, if you write your work with a pen, it is the pen, which is the author of the work rather than the person who drives the pen.[43]

By the same token, a U.S. federal district court has held that scanning a prior work into a computer, without otherwise modifying its content, "confer[s] no authorship" on the person doing the scanning; the work is the same, despite the machine-generated medium change.[44]

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42. Homes v. Homes, 1995 F.S.R. 818 (1995). Courts in both the United Kingdom and United States have touched upon a related question, namely the availability of copyright for unfixed "spoken" works. It seems the trend towards conceptualization has stopped short of explicitly proclaiming copyright for unfixed works. *See* Brennan & Christie, *supra* note 38.

43. Express Newspapers v. Liverpool Daily Post, 1985 F.S.R. 306, 310 (1985).

44. STR Indus. v. Palmer Indus., 1999 WL 258455, at *3-4 (N.D. Ill. Apr. 9, 1999).

Other machines, however, notably cameras and sound recording equipment, participate in the creation of a work that would not exist but for the medium made possible by the machinery. Pictorial images may exist in a variety of media, but photographs require cameras (and developing equipment). A musical composition exists independently of its medium of fixation, but a sound recording must be recorded. Does it therefore follow that one who employs this machinery is not an "author;" that the author, if there is one, is the machine?

Early challenges to the copyrightability of photographs did raise this sort of objection, coupling it with the further claim that not only is a camera a machine, it is a machine that reproduces reality; no one (other than the—capital-C—Creator) can be the "author" of things in nature; therefore, the photographer may be a skilled craftsperson in the manipulation of the machine, but he is no author. In the United States, the Supreme Court, in the celebrated Oscar Wilde Photograph Case,[45] stated that perhaps the "ordinary production of a photograph" mindlessly captured reality, but the photograph at issue showed detailed—even compulsive—composition of light effects, camera angle, costuming and posing of the subject and background. In short, Napoleon Sarony's carefully contrived image dripped Art, and amply met the constitutional standard for the "writing" of an "author," in that it entailed a form in "which the ideas in the mind of the [photographer] are given visible expression."[46]

In France, courts initially looked to similar indicia to discern the photographer's creativity,[47] but the mechanical nature of the production left authorities sufficiently uneasy that the 1957 copyright act imposed the further demonstration that the photograph have an "artistic

45. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

46. *Id.* at 60. *See, e.g.*, Ets-Hokin v. Skyy Spirits, 225 F.3d 1068, 1077 (9th Cir. 2000) (noting photographer's decisions "about lighting, shad[e], angle, background and so forth have been recognized as sufficient to convey copyright protection," even of a "single bottle, shot straight on, centered, with back-lighting"); SHL Imaging v. Artisan House, 117 F. Supp. 2d 301 (S.D.N.Y. 2000) (holding that, although defendants asserted that photographer "merely photographed [the picture frames] one after another, all in the same straightforward manner faithfully to copy them to the medium of film," this did not deprive the photographer of copyright in the photos, which were sufficiently original by virtue of the expressive choices regarding lighting and shadow). *But see* Oriental Printing v. Goldstar Printing, 175 F. Supp. 2d 542 (S.D.N.Y. 2001) (discussed *infra* at note 56 and accompanying text).

In the United Kingdom, photographs have long been protected by statute. *See, e.g., Graves' Case*, 4 Q.B. 715 (1869). Perhaps consistently with the *Walter v. Lane* tradition, the courts appear to have little difficulty protecting even conventional snapshots. *See* Kevin Garnett, *Copyright in Photographs*, 2000 E.I.P.R. 229.

47. *See generally* ISOLDE GENDREAU, LA PROTECTION DES PHOTOGRAPHIES EN DROIT D'AUTEUR (1994).

or documentary character."[48] These requirements contradicted that same law's basic command that a work of authorship be protected "whatever its merit or destination."[49] Not surprisingly, coherent application of the "artistic or documentary" criteria eluded the courts, as many judges appeared arbitrarily to derive their rulings from their personal assessments of aesthetic achievement or newsworthiness.[50] In 1985, the French legislature rescinded the requirements.[51] French decisions since have evoked the photographer's choice and manipulation of angle, lighting, and the placement of the persons or objects photographed.[52] Other European States also manifested discomfort with characterizing photographs as works of *authorship*; Germany, for example, apparently deeming these works less worthy than creations not machine-mediated, accorded photographs only a twenty-five year term of protection, instead of the seventy years *post mortem auctoris* term that it granted other works.[53] In 1993, the European Union harmonized the copyright treatment of photographs, imposing an "author's own intellectual creation" standard, with the pointed coda, "[n]o other criteria shall be applied to determine their eligibility for protection."[54]

If machine-assistance does not disqualify the human agent from being deemed an "author," some courts have nonetheless expressed concern that the less constructed the image, the greater the risk that the photographer might, merely by photographing it, lay claim to the subject matter depicted. Of course, anyone is free to take her own photo-

48. Copyright Law of Mar. 11, 1957, J.O., Mar. 14, 1957, art. 3 (Fr.).

49. *Id.* at art. 2.

50. *See, e.g.*, CAROLINE CARREAU, MÉRITE ET DROIT D'AUTEUR 359-412 (1981).

51. *See, e.g.*, Jane Ginsburg, *Reforms and Innovations Regarding Authors' and Performers' Rights in France: Commentary on the Law of July 3, 1985*,10 COLUM.-VLA J.L. & ARTS, 83, 114-15 (1985).

52. *See, e.g.*, CA Paris, 8e ch., Mar. 9, 1999, D. 1999, inf. rap. 111 (Pierre c. SA Télérama); CA Paris, 4e ch., June 11, 1990, RIDA 293-98 (1990) (Sté Lucie Saint-Clair c. Denis Malerbi).

53. Gesetz uber Urheberrecht und verwandte Schutzrechte, v. 16.9.1965 (BGBl. I S.1283). Photographs considered sufficiently creative such as to constitute a "work" have been brought within the normal term of copyright, namely life of the author plus seventy years. The term of protection for simple photographs has subsequently been extended to fifty years. *See* Gesetz zur A(e)nderung von Vorschriften auf dem Gebiet des Urheberrechts, v. 24.6.1985 (BGBl. I S.1139) (bringing photographic works within the protection of the copyright statute and extending from twenty-five to fifty years the protection of simple photographs with documentary or historical significance, otherwise not protected by copyright); Drittes Gesetz zur A(e)nderung des Urheberrechtsgesetzes, v. 23.6.1995 (BGBl. I S.843) (extending term of protection for simple photographs to fifty years).

54. Council Directive 93/98 of Oct. 29, 1993 on the Duration of Copyright, art. 6, 1993 O.J. (L 290). *See also* WIPO Copyright Treaty, Dec. 20, 1996, art. 6, 36 I.L.M. 65 (1997) [hereinafter WCT] (providing same term of protection to photographs as applies to other copyrighted works).

graph of the subject, but the more straightforward the initial photograph, the more likely is a second banal image to resemble it.[55] Recognizing the authorship of a commonplace photograph thus may lead to *in terrorem* threats by the first photographer against genuine independent creators. Fear of this sort of outcome apparently moved the Southern District of New York recently to hold, with respect to photographs of common Chinese dishes offered on a take-out menu:

> The Court finds that this is the rare case where the photographs contained in plaintiffs' work lack the creative or expressive elements that would render them original . . . . The photographs lack any artistic quality, and neither the nature nor content of such photographs, nor plaintiffs' description of their preparation, give the Court any reason to believe that any "creative spark" was required to produce them.[56]

The court's reference to "artistic quality" betrays an inappropriate analysis, whose motivation the court later revealed: "finding the photographs in question to be copyrightable . . . effectively would permit them to monopolize the market for printing menus that depict certain commonly served Chinese dishes."[57]

The criteria evoked in these decisions, if sometimes overstressed to avoid anticompetitive effects, recall those employed to distinguish authors from amanuenses: mindless implementation of mechanical means of production does not make one an "author," but subjective, or personalized manipulation of those means does.[58] To say that a work's creator exercised choice as to the contents and presentation of the work is another way of saying that the work is original, and in most copyright/authors' rights jurisdictions, originality is the overarching standard of authorship.

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55. *Cf.* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1004-05 (1990) (pointing out that despite Judge Learned Hand's famous hypothetical regarding subsequent independent creation of Keats's *Ode on a Grecian Urn*, the second-comer may have great difficulty proving the independence of her creation).

56. *Oriental Printing*, 175 F. Supp. 2d at 546.

57. *Id.* at 548. Curiously, ordinary photographs of food and other articles of common consumption also appear to attract condemnations in France. See, *e.g.*, decisions cited under "photographies non originales" in EDITIONS TECHNIQUES, JURIS-CLASSEURS, PROPRIETE LITTÉRAIRE ET ARTISTIQUE: *Objet du droit d'auteur, Oeuvres protégées, Règles Générales*, par A. Lucas, Fasc 1135 (May 1994 updated May 2001). *Contra*, Cass. 1e ch., Dec. 10, 1998, AM 1999, 357, 359, 359 n.9, note Alain Strowel (citing unpublished Belgian appellate decisions for the proposition that "the documentary or informational aspect of a photograph does not *a priori* exclude copyright protection. Neither does the banality of the subject influence the protectability of a photography by the copyright law").

58. *See, e.g.*, Antoine Latreille, *L'appropriation des photographies d'oeuvres d'art: éléments d'une réflexion sur un objet de droit d'auteur*, 2002 DALLOZ 299, 300-01 (discussing choices effected by a photographer than can make the resulting image a work of authorship).

This brings us to the THIRD PRINCIPLE of authorship, that "ORIGINALITY" IS SYNONYMOUS WITH AUTHORSHIP. This principle at first seems the most universal and least contested. In fact, however, different countries have developed different concepts of what kind of contribution makes a work "original." Worse, even within a single jurisdiction, the requisite level of originality may vary with the nature of the work.

In *Feist Publications v. Rural Telephone Service Co.*,[59] the U.S. Supreme Court held that originality—a standard it defined to consist of independent creation plus a modicum of creativity—was constitutionally mandated. The concept of authorship the Court perceived in the Constitution requires more than diligent or laborious production: an "author" *creates*; she does not merely expend effort gathering and setting forth information. The Court specifically disavowed the long-standing common law countries' "sweat of the brow" standard of copyrightability. Thus, an author is someone who makes it up. But were independent imagining the only qualifying authorial act, then only works of fancy could claim authors. The Court, however, while stressing (perhaps incorrectly) that a "fact" cannot be *created*, did not further conclude that all fact-based works therefore inevitably flow from inspirationless drones. (Although that may sometimes be the case, as demonstrated by the white pages directory that the Court branded "inevitable" and "so mechanical or routine as to require no creativity whatsoever."[60]) With respect to works incorporating pre-existing material or data, authorship, if any, inheres in the way the compiler has selected or arranged that information. The Court implied that the more subjective the choices as to selection or arrangement, the more authorship would likely be found.

In the context of collections of works, the Berne Convention also identifies selection and arrangement as elements of "intellectual creation," which in turn more broadly characterizes "literary and artistic works" protectable under that multilateral instrument.[61] The Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) annexed to the World Trade Organization Treaty and the 1996 World Intellectual Property Organization Copyright Treaty also adopt the "intellectual creation" standard in connection with compilations,[62] as

59. 499 U.S. 340 (1991).

60. *Id.* at 362, 363.

61. The Berne Convention, July 24, 1971, art. 2.5.

62. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPs]; WCT, *supra* note 54, at art. 10.2.

do several of the European Union's Directives in the copyright field, and not only with respect to databases.[63] The EU texts moreover specify that Member States shall impose "no other criteria" to determine protection with respect to software, databases, and photographs.[64] The French law states that the authors of an audiovisual work are the "natural person or persons who realize the work's intellectual creation."[65] This suggests that "intellectual creation" arising out of selection or arrangement, "originality," and authorship may be coming to mean the same thing. That said, the multilateral texts do not explicitly impose selection or arrangement as a general criterion for authorship. Thus, outside the referenced subject matter, these instruments do not detail what makes an "intellectual creation" sufficiently intellectually creative. That determination remains a matter of national law.

Canada followed a *Feist* approach to "intellectual creation" in *Tele-Direct Publications Inc. v. American Business Information, Inc.*,[66] in which the Federal Court of Appeal held that "the selection or arrangement of data only results in a protected compilation if the end result qualifies as an original intellectual creation." At issue was a Yellow Pages directory. Plaintiff claimed copyright not in the listings (which a third party had in fact supplied), but in its selection and placement of information under the listed headings. The court rejected that claim:

> [Tele-Direct] arranged its information, the vast majority of which is not subject to copyright, according to accepted, commonplace standards of selection in the industry. In doing so, it exercised only a minimal degree of skill, judgment or labour in its overall arrangement which is insufficient to support a claim of originality in the compilation so as to warrant copyright protection . . . . [T]he addition [to the Act in 1993] of the definition of "compilation" in so far as it relates to "a work resulting from the selection or arrangement of data" appears to me to have decided the battle which was shaping up in Canada between partisans of the "creativity" doctrine—according to which compilations must possess at least some minimal degree of creativity—and the partisans of the "industrious collec-

63. *See* Council Directive 91/250 on Protection of Computer Software, 1991 O.J. (L 122) 1.3; Council Directive 93/98 on the Duration of Copyright, 1993 O.J. (L 290) 6 (addressing the originality of photographs); Council Directive 96/9 on the Protection of Databases, 1996 O.J. (L 077) 3.1 [hereinafter Database Directives]. The EU texts refer to the "author's own intellectual creation." The Database Directive further specifies that databases "which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected by copyright." Database Directives, *supra*.

64. *See supra* note 63.

65. C. PROP. INT., art. L., § 113-7 (1992) (Fr.).

66. [1997] 154 D.L.R.4th 328, *leave to appeal refused*, [1998] 228 N.R. 200 (Fed. Ct.) (Can.).

> tion" or "sweat of the brow" doctrine—wherein copyright is a reward for the hard work that goes into compiling facts.[67]

More recently, however, in *CCH Canadian v. Law Society of Upper Canada*,[68] a suit involving compilations of judicial decisions, Canada's Federal Court of Appeal reinterpreted *Tele-Direct* to be consistent with the prior standard of originality, which had required "skill and labour" but not "imagination or creative spark." Reviewing prior English and Canadian case law concerning the originality of compilations, the court declared, "Industriousness ('sweat of the brow') as opposed to creativity is enough to give a work sufficient originality to make it copyrightable."[69]

As we shall see, the "sweat" standard that *Feist* rejected is also alive and well in Australia and the United Kingdom. While these jurisdictions might characterize "originality" as comprehending either original creativity, or original sweat in the sense that the work was "not copied," arguably the persistence of a sweat standard in these jurisdictions has less to do with originality than it does with the absence of an unfair competition remedy against "misappropriation."[70] That is, the solicitude for sweat may seem more to protect investment than creativity. In most other jurisdictions, in any event, originality's primary meaning today seems to designate a minimum of personal creative activity.[71]

The height of that threshold, however, appears to vary by jurisdiction, as well as with the nature of the work. In France and Belgium, courts and commentators regularly incant that a work is original when it bears the "imprint of its author's personality."[72] But courts and

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67. *Id.* at 328, 334.

68. [2002] F.C.A. 187 (Fed. Ct.) (Can.), *available at* http://www.canlii.org/ca/cas/fc_old/2002/2002fca187.html (last visited Feb. 4, 2003).

69. *Id.* at 35.

70. *See* Brennan & Christie, *supra* note 38, at 327 n.5.

71. *See, e.g.*, Daniel Gervais, Feist *Goes Global: A Comparative Analysis of the Notion of Originality In Copyright Law*, 49 J. COPYRIGHT SOC. 949 (2002) (surveying common law and civil law jurisdictions, and finding increasing concurrence in a "creative choices in the making of the work" standard of originality).

72. *See, e.g.*, Cass. 1e civ., Nov. 13, 1973, D. 1974, 533-36, note Colombet (Cons. Renoir c. Guinot) ("empreinte du talent créateur personnel" "imprint of personal creative talent"); T.G.I. Paris, Cass. 3e ch., Jan. 21, 1983, D. 1984, Somm. 286-87 (Valluet c. Vasarely) ("empreinte de la personnalité de l'auteur" "imprint of the author's personality"); CA Paris, Cass. 1e ch., Feb. 1, 1989, RIDA 301 (1989), note Sirinelli (Anne Bragance c. Olivier Orban et Michel de Grèce) ("empreinte créatrice personelle" "personal creative imprint"); CA Versailles, Cass. 13e ch., Dec. 11, 1997, D. 1999, Somm. 63, obs. Colombet (SA SEPIC c. Societé Weber et Broutin) ("originalité de l'oeuvre suppose une creation et une recherche esthétique refletant la personnalité de son auteur" "the originality of the work presumes creativity and an aesthetic endeavor reflecting its author's personality"); Cass., Apr. 27, 1989, Pas 1989, I 908 (De Schuyteneer c. Société Anonyme Etablissements LaChaussée).

commentators rarely give content to this standard. More often, they assert in conclusory fashion that a work does or does not bear this stamp.[73] This may be because the standard makes sense in the context of literary and artistic works that reflect their creators' individual style, but it becomes considerably more elusive the more informational or functional the work becomes. As a result, when works of the latter kind are at issue, the "personal stamp" seems to reduce to selection and arrangement criteria similar to those applied in the post-*Feist* United States. Thus, in an important decision articulating what makes a computer program original, the full assembly of the French Cour de cassation found that standard met when the programmer exercised a minimum of creative choice unconstrained by the demands of the task.[74] In effect, so long as the nature of the work undertaken allows the author to make subjective choices in the work's contents or composition, the impress of the author's personality will be declared present.[75]

Some might call this a double standard, but the French have a more elegant way of putting it. Originality is a "concept of shifting shape," or "*de géométrie variable*,"[76] depending on the kind of work at issue.[77] Lest we in the United States begin to congratulate ourselves on our superior coherence in matters of originality, it suffices to recall our tortured jurisprudence regarding the originality of derivative works.[78] For example, in Judge Posner's deservedly criticized opinion in

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73. *See, e.g.*, CA Paris, Cass. 4e ch., June 11, 1987, D. 1988, Somm. 192, obs. Colombet (Cts Lemaitre c. SA Guerlain et autres); Cass. 1e civ., May 10, 1995, RIDA 291 (1995) (Ste JLRT Rolande Tapiau c. Scte Chanel et autres). *See generally* ANDRÉ LUCAS & HENRI-JACQUES LUCAS, TRAITÉ DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE NO. 78 (2d ed. 2001) ("Entitlement to protection is often justified by the finding of a personal imprint, by which originality is classically defined, but it is difficult to infer a true theory from these affirmations, which often fall into the category of general pronouncements.").

74. Cass. ass. plén., Mar. 17, 1986, RIDA 129, 130 (1986), note André Lucas (S.A. Babolat Maillot Witt v. Pachot).

75. *See, e.g.*, CA Paris, Mar. 17, 1999, RIDA 203-06 (1999), com. Kéréver (Sté Les Muses Productions c. Jean Pierre Duribreux et Sté Le Vieux Logis); T.G.I. Paris, May 10, 2002, D. 2002, 3257, note Perbost (Duchêne c. David La Chapelle Studio); T.D.T. Liège, Oct. 11, 1990, JLMB 264 (1991) (Brouwers c. INASTI).

Arguably, the EU "author's own intellectual creation" standard represents a middle position somewhere between three competing standards: the skill, labor and investment standard; the requirement that the work be the author's "personal expression;" and the further aesthetic criteria over and above personal expression sometimes required by German courts.

76. *See* Lucas, *supra* note 74, at 136-37 (quoting the Report to the Assemblée plénière of the Conseiller Joncquères ¶ 56).

77. *See, e.g.*, LUCAS & LUCAS, *supra* note 73, at 76-97, n.79; A. Strowel, *L'originalité en droit d'auteur: un critère à géometrie variable*, JOURNAL DES TRIBUNAUX, July 9, 1991, at 513-18, n.55988.

78. *See, e.g.*, Durham Indus. v. Tomy Corp., 630 F.2d 905 (2d Cir. 1980); L. Batlin & Son v. Snyder, 536 F.2d 486, 492 (2d Cir. 1976); Hearn v. Meyer, 664 F. Supp. 832 (S.D.N.Y. 1987).

Gracen v. Bradford Exchange Ltd.,[79] the Seventh Circuit appeared to require that a work based on pre-existing works display far *more* originality than a work created "from scratch." As I contended earlier regarding copyright in photographs, holdings of this kind have less to do with authorship than they do with fear of lock-up of the underlying material.

Perhaps because of the volatility of "originality," alternative referents for authorship persist in some countries, most notably, the Commonwealth "skill and labour" standard, formerly known in the United States as "sweat copyright." Sweat then offers a FOURTH PRINCIPLE: THE AUTHOR NEED NOT BE CREATIVE, SO LONG AS SHE PERSPIRES. Here again, however, we discover that both the quantum and the quality of sweat may matter to the determination of authorship. If, according to this precept, effort is rewarded, then that effort should be discernible; as an English judge has stated, there should be "more than negligible skill and labour."[80] Or, in the words of an Australian Federal Court judge, "[A] copyright protection could be claimed by a person who brought out a directory in consequence of an expensive, complicated and well organised venture, even if there was no creativity in the selection or arrangement of the data."[81] It would follow that cheap and facile productions lack sufficient sweat; and indeed, U.K. and Australian courts have held that "slavishly copied" works have no cognizable authors.[82] By contrast, reproductions requiring great talent and technical skill may qualify as protectable works of authorship, even if they are *copies* of pre-existing works. This would be the case for photographic and other high quality replicas of works of art.[83]

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79. 698 F.2d 300 (7th Cir. 1983). *See generally* Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM.-VLA J.L. & ARTS 1 (2002) (discussing *Gracen* and other decisions rejecting originality of derivative works).

80. Ladbroke v. William Hill, [1964] 1 All E.R. 465, 476, 478 (Eng.).

81. Telstra Corp. v. Desktop Mktg. Sys., (2001) F.C.A. 612 (Fed. Ct.), *aff'd*, May 15, 2002, F.C.A.F.C. 112 (Austl.).

82. *See, e.g.*, A-One Accessory Imp. (1996) 34 I.P.R. 332, 334 (Austl.) (completely pirated publication will be denied protection on public policy grounds); Warwick Film Prods. Ltd. v. Eisinger, 1969 Ch. 508; Macmillan & Co. v. K&J Cooper (1923) 93 L.J.P.C. 113, 121 (notes "servilely copied" from first publisher's edition deemed infringing); COPINGER & SKONE JAMES, COPYRIGHT ¶¶ 3-48 (13th ed. 1991). *See also* CCH Canadian Ltd. v. Law Soc'y of Upper Can., [2002] F.C.A. 187, ¶ 33:

> The traditional Canadian standard has been summarized as follows: The requirement of originality means that the *product must originate from the author* in the sense that it is the result of a substantial degree of skill, industry or experience employed by the author . . . . [T]he effective meaning of the requirement of originality is that *the work must not be copied from another* . . . .

Id. (emphasis in original).

83. *See, e.g.*, Alva Studios v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959); Trib. Bologna, Dec. 23, 1992, 1993 Diritto di Autore 489, RIDA 181-82 (1994) (Est. Bruno v. Studio Fenice). Copy-

The proposition that skilled reproductions are works of authorship rests on a straightforward observation: if you or I could not create/execute this reproduction, it must be copyrightable, and its producer therefore must be an "author." But this reasoning suggests its own limits: the more technology makes it possible for us to make quality reproductions, the less the copyist's skill should be equated with authorship even in a Commonwealth jurisdiction. For example, the reporter in *Walter v. Lane* performed a feat of rapid-fire stenographic transcription highly valued at a time before tape recorders, hence one justification for deeming him an "author." But today, it takes neither effort nor skill mindlessly to push a button on a tape recorder, and to transcribe the result at leisure thereafter.

Whether even highly skilled art reproductions have "authors" is in fact increasingly controversial, even in the United Kingdom, where, prodded by a U.S. decision rejecting the originality of photographs of two-dimensional art works,[84] the secondary authorities are debating the existence of authorship in such photographs.[85] Courts and commentators in France and Belgium also divide over the presence of an "authorial stamp" in art reproductions. Some contend that the task of creating a good reproduction may have required technical proficiency, but no authorship, because the goal of faithful realization completely constrains the copy's execution.[86] Others respond that the proficiency is more than a craftsman's; a successful reproduction or restoration requires such a high level of skill and discernment, and such careful

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right protection of photographic reproductions of artworks goes back to the nineteenth-century and was urged in early drafts of the Berne Convention. The Closing Protocol of the 1885 draft provided:

> It is understood that an authorized photograph of a protected work of art shall enjoy legal protection in all countries of the Union, as contemplated by the said Convention, for the same period as the principal right of reproduction of the work itself subsists, and within the limits of private agreements between those who have legal rights.

Actes de le 2me Conférence internationale pour la protection des œuvres littéraires et artistiques réunie à Berne du 7 au 18 Septembre 1885, *in* RICKETSON, *supra* note 17, ¶ 6.33.

84. Bridgeman Art Library v. Corel, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

85. *Compare* Kevin Garnett, *Copyright in Photographs*, [2000] E.I.P.R. 229 (counseling against following *Bridgeman*), *with* Ronan Deazley, *Photographing Paintings in the Public Domain*, [2001] E.I.P.R. 179 (favoring *Bridgeman*).

86. *See, e.g.*, CA Nîmes, July 15, 1997, Juris-Data 030467 (exact scale reproduction of an old fountain); CA Paris, Cass 4e ch., Oct. 5, 1994, D. 1994, 53-56, note Edelman (Cts Champreux c. SA Gaumont et autre) (restoration of motion picture required skill but no personal imprint); Antoine Latreille, *L'appropriation des photographies d'oeuvres d'art: éléments d'une réflexion sur un objet de droit d'auteur*, 2002 DALLOZ 299, 301; CA Antwerp, Jan. 31, 1995, AM 1996, 356, note Alain Strowel (photograph of an artwork).

judgments to make the copy that its executor must be an author.[87] This is what the U.S. courts have called "true artistic skill," apparently in opposition to more pedestrian (and therefore authorless) attempts at copying.[88] As an Italian judge explained:

> It should be recognized that the accomplishment of an art restoration requires, in addition to the knowledge and material execution of technical procedures of a high level of complexity and difficulty, a notable cultural background and artistic sensibility. These elements all may vary, some admittedly depending on different historical moments and different concepts and methods of restoration, but others certainly in relationship to the abilities and gifts of the individual restorer.
>
> Therefore, even if not every restoration may automatically be considered a work of authorship, the subsistence of copyright on the part of the restorer must be recognized when his work manifests itself in a particularly complex activity implicating technical, artistic and cultural knowledge of an innovative and creative character.[89]

Similarly, a French trial court recently ruled in favor of the copyright claim advanced by the heirs of a landscape architect who had restored the gardens of the seventeenth-century designer Le Nôtre at Vaux-le-Vicomte. The court rejected the defense of faithful, and therefore unoriginal, adherence to historical models, holding:

> Whereas the work effected by Achille Duchêne on the flower beds of the gardens of Vaux-le-Vicomte, even if characterized as a "restoration," . . . does not exclude creativity, but on the contrary constitutes the framework within which the landscape architect expressed and poured out all his art, his know-how and his creative imagination, thus giving him the occasion to bring to this work a personal touch worthy of protection . . . . [The work was] admittedly realized in conformity with his task and with the constraint of the historical styles which he had to take into account in order to bring his flower beds as close as possible to those of Le Nôtre . . . but expressing in an incontestable manner the personality of its author and thus conferring on the realized work a certain originality justifying the protection of the copyright law.[90]

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87. *See, e.g.*, CA Dijon, May 7, 1996, D. 1998, Somm. 189, obs. Colombet (photograph of canvas or drawing requires choices regarding lighting and materials); T.G.I. Paris, May 28, 1997, RIDA 329 (1998) (reconstitution of a statue formerly at Versailles).

88. *See* Batlin v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976); *see also* PAUL GOLDSTEIN, COPYRIGHT § 2.11.1.4 (2d ed. 1996) (recognizing two seemingly paradoxical originality standards for art reproductions, the first for "distinguishable variation," and the second for the "absence of any distinguishable variation" in which "the complexity and exactitude going into the production of an exact replica is qualitatively no different than the judgment, sensibility and skill that go into a photograph of a street or desert scene and should be protected no less").

89. Trib. Bologna, Dec. 23, 1992, 1993 IL DIRITTO DI AUTORE 489.

90. T.G.I. Paris, May 10, 2002, D. 2002, 3257, note Perbost.

Is this just snobbery, or do these courts' emphasis on how artistic sensibility, cultural background, and know-how inform the restorer's efforts tell us something useful about the nature of the endeavor that makes one an "author"? I think that the authorities who underscore the artistry of the skill involved are suggesting that the restorer or copyist is exercising a kind of creative autonomy, even in the task of uncovering or popularizing another author's work. Nonetheless, the perceived anomalies of recognizing authorship in works copied from their predecessors have sparked a debate over whether cognizable authorship should depend on the alleged author's *intent to create* a work of her own, as opposed to her intent to emulate a pre-existing work, or to restore a partly lost or damaged prior work.[91]

INTENT TO BE AN AUTHOR thus presents a FIFTH PRINCIPLE. David Nimmer, in his *tour de force* analysis of the authorship of the reconstruction of the Dead Sea Scrolls, has vigorously urged this standard.[92] But this proposition's surface appeal quickly fades. It may seem to make sense to say that only those who (to employ civilian copyright rhetoric) intend to impress the stamp of their own personalities on their literary and artistic efforts should be entitled to authorship status; all the rest are merely craftsmen, not true creators. But if the nature of the task does not ineluctably determine the manner in which the putative author executes the work, then she is making choices that are subjective and most likely minimally creative, even if she intends to enable the first author's vision to direct her own. As in the cases of photographs and derivative works, the denial of authorship appears to spring more from fear that the underlying, often public domain, material will fall into private—and grasping—hands, than from a dispassionate assessment of the nature of the alleged author's contribution. Even where the putative author would satisfy an "intellectual creation" standard, if authorship status is nonetheless rejected, that may betoken a too-facile equation of authorship and full exercise of exclusive rights. For while authorship usually gives rise to exclusive rights,[93] nonetheless in "certain special cases" limitations on those rights, for example, in the form of compulsory licenses or even out-

91. *Compare* Nimmer, *supra* note 34, *with* James L. Oakes, *The Dead Sea Scrolls: A Live Copyright Controversy*, 38 HOUS. L. REV. 219 (2001).

92. Nimmer, *supra* note 34, at 204-10.

93. *See, e.g.*, 17 U.S.C. § 102(a) (2002) (stating copyright "subsists" in original works once created and fixed in a tangible medium of expression); C. PROP. INT., art. L., § 111-1 (1992) (Fr.) (stating exclusive moral and economic rights arise out of the fact of creation).

right exceptions, may be appropriate.[94] Whether the putative author "intends" to let her own creativity shine forth, or to suppress it beneath a prior author's creativity that she endeavors to restore, it makes more sense to reason in terms of intellectual contribution than backwards from possibly misidentified consequences.

Moreover, a requirement that the "author" have intended to create the resulting work does not reflect the positive law. United States case law admits the possibility of what I will call "accidental authorship," creativity stumbled upon rather than summoned as an act of will. Judge Frank's exposition in *Bell v. Catalda*[95] of unintended acts of creation, notably images generated by bad eyesight, claps of thunder, and frustrated flinging of sponges, supplies the most famous example.[96] Admittedly, the author accomplishes an act of will when she "adopts" the accidental effect as her own, but I think a creative act occurs at the image's genesis, not only at its subsequent acceptance.[97] Moreover, were intent to create, even belatedly expressed, the sole keystone for authorship, what should we make of the decisions in both the United States and United Kingdom that hold the "author" of a work purporting to be of divine revelation or to have come from the Great Beyond, is nonetheless the human being to whom the spirits (Supreme or otherwise) allegedly communicated the work?[98] In considering whether "authorship and copyright rest with someone already domiciled on the other side of the inevitable river," the English authorities have found that "authorship rests with this lady [the copyright-claiming medium], to whose gift of extremely rapid writing coupled with a peculiar ability to reproduce in archaic English matter communicated to her in some unknown tongue we owe the production of documents."[99] Arguably, we see here the persistent influence of *Walter v. Lane*; here, the medium, while disclaiming personal crea-

94. "Certain special cases" is the first step of the "three-step test" for exceptions and limitations on copyright allowed by The Berne Convention. Berne Convention, *supra* note 61, at art. 9.2; TRIPs, *supra* note 62, at art. 13; WCT, *supra* note 54, at art. 10.

95. 191 F.2d 99 (2d Cir. 1951).

96. *Id.* at 105 & n.23.

97. Alan L. Durham, *The Random Muse: Authorship and Indeterminancy*, 44 WM. & MARY L. REV. 569, 588 (2002) (interpreting *Bell v. Catalda* in light of *Feist* and suggesting that "[i]n terms of physical causation, if not intellectual planning, the artist could view the inadvertent product of his efforts as 'created' rather than 'discovered'").

98. *See, e.g.*, Penguin Books v. New Christian Church, 55 U.S.P.Q.2d 1680 (S.D.N.Y. 2000); Urantia Found. v. Maaherra, 895 F. Supp. 1337 (D. Ariz. 1995), *aff'd*, 114 F.3d 955 (9th Cir. 1995); Olivier v. Saint Germain Found., 41 F. Supp. 296, 299 (S.D. Cal. 1941); Cummins v. Bond, [1927] 1 Ch. 167 (Eng.); Leah v. Two Worlds Publ'g, [1951] 1 Ch. 393 (Eng.); *see generally* Roger Syn. *Copyright God*, [2001] E.I.P.R. 454, 464 ("When faced with claims of supernatural authorship, courts invariably conclude that humans own the intellectual property.").

99. *Cummins*, [1927] 1 Ch. at 173.

tivity, certainly sweated to give comprehensible English form to the revealed writings. But even in the post-*Feist* United States, the Southern District of New York has denominated as the "author" the transcriber of works allegedly dictated by the "Voice of Jesus." Curiously, in this instance, plaintiff acknowledged an intent to assert copyright, but not to claim authorship: the Voice not only dictated the work, but instructed its scribe to register the work with the Copyright Office(!).[100]

Intent, I suggest, does not make a contributor more or less creative, but it may supply a means to sort out the equities of ownership in cases in which more than one contender is vying for authorship status. There, the problem is not so much whether the contenders intended to be creative, as whether they intended to share the spoils of creativity, that is, whether they intended to be *joint* owners of the copyright. Certainly that is the only way that the intent test, applied to determinations of co-authorship in U.S. case law,[101] can be made coherent.[102]

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100. *Penguin Books*, 55 U.S.P.Q. 2d 1680.

101. *See, e.g.*, Childress v. Taylor, 945 F.2d 500 (2d Cir. 1991); Thomson v. Larson, 147 F.3d 195 (2d Cir. 1998); Aalmuhammed v. Lee, 202 F.3d 1227 (9th Cir. 2000). However, neither in the United Kingdom, nor in Australia do the courts appear to have made intent as much of a touchstone of coauthorship status. *See* Copyright, Design and Patent Act, 1998, § 10(1) (Eng.) (work must be produced by collaboration of two or more co-authors and the contributions must not be distinct from each other). "Co-authorship occurs when collaborators have worked to produce copyright work of a single kind 'in prosecution of a preconcerted joint design.' Each must provide a significant creative input to the expression of the finished work (akin to penmanship), which is not distinct from the contributions of others." W.R. CORNISH, INTELLECTUAL PROPERTY 386 (4th ed. 1999). The cases turn on the significance of the contribution, rather than on subjective intent to share authorship status. *See, e.g.*, Godfrey v. Lees, [1995] E.M.L.R. 307, 325 (Eng.); Prior v. Sheldon, (2000) F.C.A. 438 (Austl.); Colm Kelly, *Works of Joint Authorship*: Beckingham v. Hodges, 13 ENT. L. REV. 158 (2002) (observing that the court in the *Beckingham* case required a "common design to produce the work" but considered that to require further a showing of intent to be joint authors would introduce "undesirable problems of proof").

102. For such an attempt, see, *e.g.*, Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK. L. REV. 123, 142-83 (2002).

Intent also appears to supply a principle for separating the sufficiently artistic (and therefore copyrightable) "works of artistic craftsmanship" from the uncopyrightable useful article. *See, e.g.*, Brandir Intern., Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142 (2d Cir. 1987) (stating that design for bicycle rack held not separable from useful function because artist modified his design in order better to adapt it to bicycles); Hensher v. Restawhile Upholstery, [1974] 2 All E.R. 420, 439-40 (Kilbrandon). Regarding furniture design, the court noted:

> The conscious intention of the craftsman will be the primary test of whether his product is artistic or not; the fact that many of us like looking at a piece of honest work, especially in the traditional trades, is not enough to make it a work of art . . . . During all the hours and weeks of hard work which the witnesses describe there was no suggestion that there was present to their mind any desire to produce a thing of beauty which would have an artistic justification for its own existence.

Id.

Cuisenaire v. Reed, [1962] 5 F.L.R. 180, 195 (stating that rods used for teaching math do not constitute a work of artistic craftsmanship; court looked to "the object of the author in creating

As a principle of authorship decoupled from ownership, however, I believe an intent standard obscures more than it enlightens.

But if authorship is properly detached from ownership, how can one explain the U.S. works made for hire rule, and analogous doctrines abroad, for example in the Netherlands?[103] Under the works made for hire rule, the employer, and certain commissioning parties under certain circumstances, are not merely the presumptive or automatic transferees of some or all of the human creators' rights; they are vested with authorship status. Here we encounter the SIXTH PRINCIPLE: MONEY TALKS; MAYBE IT ALSO WRITES, COMPOSES, PAINTS, ETCETERA. The justification for employer/commissioning party "authorship," is primarily pragmatic: concentration of *authorship* as well as of ownership in employers and commissioning parties certainly facilitates exploitation, by fully alienating potentially pesky creators. Dutch authorities acknowledge that employers and juridical persons "are actually considered authors for reasons of legal efficiency."[104] But additional justifications are ventured as well. For example, "The rationale behind [the vesting of authorship in employers] is the principle that the employer has a right to the fruits of his employee's labor."[105] Or, with respect to "works involving numerous contributors and works which lack an identifiable personal expression," the "person who presents the work as his" becomes the "author" because that person exercises control over the work's exploitation and as a result is the person with whom the public associates with the work.[106] That reasoning, however, risks becoming rather circular, for if public association with the work is all one needs to be an "author," then all one needs is publicly to say one is.

In the United States, the work for hire doctrine rests on the grounds of facilitation of investment and exploitation.[107] Authorship attribu-

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the work, rather than on the reaction of the viewer to the completed work"). *See also* Liu v. Price Waterhouse LLP, 302 F.3d 749, 754-55 (7th Cir. 2002) (finding intent to assign ownership of derivative work to owner of copyright in underlying work).

103. *See also* Council Directive 91/250 on Protection of Computer Software, *supra* note 63, at art. 2.1 (designating as the author of a computer program "the natural person or group of natural persons who has created the program, or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation . . .").

104. JACQUELINE SEIGNETTE, CHALLENGES TO THE CREATOR DOCTRINE: AUTHORSHIP, COPYRIGHT OWNERSHIP AND THE EXPLOITATION OF CREATIVE WORKS IN THE NETHERLANDS, GERMANY AND THE UNITED STATES 99, n.13 (1994).

105. *Id.* at 48 (commenting on article 7 of the Dutch Copyright Act).

106. *Id.* at 100, nn.19-22.

107. Studies prior to the drafting and enactment of the 1976 Act touched upon the consequences of "somewhat artificially" designating the employer as the "author" of works made for hire. Borge Varmer, *Study No. 13, Works Made for Hire and On Commission*, *in* I STUDIES ON COPYRIGHT 717 (Copyright Society of the U.S.A. ed., 1963). Ultimately, however, the 1976 Act

tion appears to have less to do with a philosophical equivalence of employers or commissioners with creators, than it does with a utilitarian centralization of control in the economically dominant party. This in turn may favor more efficient public dissemination of works of authorship.[108] Indeed, a conception of copyright as primarily serving the public's appetite for access to works of authorship would support recharacterization not only of employers, but even of exploiters generally, as "authors." The logic would run as follows: The U.S. Constitution empowers Congress to vest copyright in authors. But the U.S. Constitution also articulates a public interest policy from which some derive an "overriding interest in the 'release to the public of the products of [author's] creative genius.'"[109] If rewarding authors does not promote the goal of increasing the public's access to the works authors create,[110] then perhaps we should define as "authors" those who will best accomplish public dissemination. In that way, Congress will ensure that the "right" persons or entities are the beneficiaries of copyright.

Of course, this argument is only as good as its premise. Certainly, the constitutional copyright clause aims to encourage dissemination of works of authorship, for dissemination "promote[s] the progress of Science."[111] But so does initial creation. Moreover, in justifying the copyright clause, Madison emphasized that "the copyright of authors

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preserved that artificiality. Notes of Committee on the Judiciary, H.R. REP. No. 94-1476 ("Section 201(b) of the bill adopts one of the basic principles of the present [1909] law: that in the case of works made for hire the employer is considered the author of the work."). Although Varmer's study offered a relatively enthusiastic discussion of patent law's shop doctrine, the legislative history of the 1976 Act explicitly rejected application of the shop doctrine to copyright. The Committee concluded that the "uncertainties" arising from such a shift would outweigh any "dubious value to employers and employees.

108. *Cf.* Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co., 145 F.3d 481, 488 n.4 (2d Cir. 1998) (stating that in resolving ambiguity of scope of contractual grant, a default rule under which granting authors retain rights in new exploitations "gives rise to antiprogressive incentives" because grantees will be discouraged from investing in innovative technologies).

109. Eldred v. Ashcroft, 123 S. Ct. 769, 793 (2003) (Stevens, J. dissenting) (quoting United States v. Paramount Pictures, 334 U.S. 131, 158 (1948)) (brackets in opinion); N.Y. Times v. Tasini, 533 U.S. 483, 520 (2001) (Stevens, J., dissenting) (quoting N.Y. Times v. Tasini, 533 U.S. 483, 506 (2001)) (characterizing dissemination as a significant policy consideration and criticizing the majority opinion for "unnecessarily subvert[ing] this fundamental goal of copyright law in favor of a narrow focus on 'authorial rights'").

110. *Tasini*, 533 U.S. at 520 (Stevens, J., dissenting), (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)) (arguing that "[a]lthough the desire to protect such rights [of authors] is certainly a laudable sentiment, copyright law demands that 'private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts'").

111. *Eldred*, 123 S. Ct. at 782 (quoting H.R. Rep. No. 105-452, at 4 (1998)) (providing incentives to "restore older works and further disseminate them to the public" is rationally related to the constitutional goal of the promotion of the progress of science).

has been solemnly adjudged, in Great Britain, to be a right of common law."[112] But common law copyright pertained to *unpublished* works,[113] as well as, for some time, to published ones.[114] In other words, the natural rights-tinged concept of copyright to which Madison appealed vested exclusive rights in authors upon works' creation; public disclosure of the work, while often anticipated, was not a prerequisite.[115] Copyright is both an inducement to publication and a reward for creativity. Thus, the premise fails: the copyright clause does not design authors (creators) as mere, and even suspect, tools in furtherance of dissemination, to be tolerated only so long as that goal is achieved. Whatever the practical merits of the work for hire doctrine, the constitutional text supplies no grounding for it.

Some countries, including France and Belgium, today steadfastly wax their ears against the siren song of easier exploitation: they specify that the creator's employment does not detract from her authorship,[116] although it may lead to some presumptions of transfer. But it is also important to acknowledge that even in these authors' right-sensitive countries this creator-centric approach to authorship is a relatively recent development. Thus, for example, in the *Affaire du Dictionnaire de l'Académie française*, decided by the Tribunal de cassation, 7 prarial year 11, the jurisconsulte Merlin could assert that "the word *authors* does not have, in the statute, as narrow a meaning as some have wished to claim. It designates not only those who themselves created a literary work, but also those who have had the work composed by others, and who undertake to pay for its composition."[117] As late as the mid-nineteenth century, the author of the

112. THE FEDERALIST NO. 43, *supra* note 12.

113. *See, e.g.*, Pope v. Curll, 2 Atk. 341 (Ch. 1741) (enjoining unauthorized publication of unpublished letters of Alexander Pope).

114. *Millar v. Taylor*, 4 Burr. 2303 (K.B. 1769) held for the view that common law copyright applied even to published works, despite the passage of the Statute of Anne, but the House of Lords in *Donaldson v. Becket*, 4 Burr. 2408 (H.L. 1774), ruled that the statute superceded common law copyright; the latter persisted only as to unpublished works.

115. *Cf.* 17 U.S.C. § 102(a) (2002) (copyright "subsists" in works of authorship upon their creation and fixation).

116. *See* C. PROP. INT., art. L., §§ 113-1.9, 132-24, 132-31 (1992) (Fr.) (overall rules for vesting of copyright in authors, and specified rebuttable presumptions of transfer with respect to employee-created software; audiovisual works; commissioned advertisements); *see also* Copyright Law of June 30, 1994, art. 3.3 (Belg.) (providing for possibility of transfer of ownership from employees and commissioned parties to employers and commissioning parties; as ownership initially vests in authors, one may infer from this provision that employers and commissioning parties, as potential transferees, are not "authors" and initial copyright owners).

117. ("Le mot *auteurs* n'a pas, dans la loi, une signification aussi restreinte qu'on a voulu le prétendre. Il désigne, non seulement ceux qui ont composé par eux-mêmes un ouvrage littéraire, mais encore ceux qui l'ont fait composer par d'autres, et qui en ont pris la composition à leur compte.") M. MERLIN, RÉPERTOIRE UNIVERSEL ET RAISONNÉ DE JURISPRUDENCE 300, 314

study *De la propriété littéraire et artistique en Belgique et en France* could closely paraphrase Merlin (without attribution) in declaring the state of the positive law on authorship.[118]

For those who still equate authorship with the economic control that employers and commissioning parties wield, should we conclude that, despite the U.S. constitutional nod to authors, and modern Continental *droit d'auteur*, copyright in essence designs to reward the best exploiter? Or should we maintain that vesting authorship in employers for hire is an aberration whose aspirations to the copyright mainstream we should resist lest copyright lose both its humanist cast and the moral appeal that flows therefrom?[119] Professor William Cornish of Cambridge University, in a recent lecture at Columbia Law School, cautioned:

> We should seek to preserve real benefits from copyright laws for the authors in whose name they are granted. They seek to ensure that copyright laws are not mere pretexts for protecting the investment and entrepreneurial initiative of their exploiting partners. Why after all do we continue to have copyright laws which derive their legal and moral force from the act of creativity? Why do we not just have producers' investment laws?[120]

IV. CONCLUSION

Australian writer Miles Franklin (best known for her novel *My Brilliant Career*) evoked a brave new authorless world in *Bring the Monkey*, her 1932 parody of the English country house murder mystery. She there imagined a conversation among members of Britain's budding motion picture industry:

> [T]hey were generally agreed that the total elimination of the author would be a tremendous advance . . . .
>
> "Authors," said the gentleman, "are the bummest lot of cranks I have ever been up against. Why the heck they aren't content to beat it once they get a price for their stuff, gets my goat."
>
> . . .
>
> There was ready agreement that authors were a wanton tax on any industry, whether publishing, drama or pictures . . . .

("Contrefaçon" II) (1826) (emphasis in original). The decision in the *Affaire du Dictionnaire* is reported at 1 Dev. & Car. 1.806 (Devilleneuve et Carette, Recueil général des lois et des arrêts, 1re série 1791-1830).

118. VICTOR CAPPELLEMANS, DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE EN BELGIQUE ET EN FRANCE 304-05 (1854) ("L'auteur n'est pas seulement celui qui a crée un ouvrage exigeant de la science, de l'esprit, ou simplement du discernement et du goût, mais encore celui qui fait composer un écrit et en prend pour lui la composition à son compte.").

119. *See, e.g.*, Sam Ricketson, *People or Machines? The Berne Convention and the Changing Concept of Authorship*, 16 COLUM.-VLA J.L. & ARTS 1 (1991).

120. Cornish, *supra* note 7, at 12.

> "That is why I want you to see my film—one reason," [the film producer said suavely]. "It has been assembled by experts in the industry, not written by some wayward outsider . . . .
>
> [We have replaced the author with] continuity expert[s] and producer[s]."[121]

A copyright law for "continuity experts," or, as the French might more pithily put it, "*le droit d'auteur sans auteur*," is what generalization of the U.S. doctrine of works made for hire and its foreign law analogues ultimately promises. It is not, I believe, what modern copyright/authors' rights laws were meant to protect. Without belittling the role of investment in common and civil law copyright regimes, those regimes' moral center, their *raison d'être*, remains human creativity. To answer the question I posed at the outset ("Who is an author in copyright law?"), in copyright law, an author is (or should be) a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work. Because, and to the extent that, she moulds the work to her vision (be it even a myopic one), she is entitled not only to recognition and payment, but to exert some artistic control over it. Before the Statute of Anne, the author surrendered his manuscript, and any rights he may have had, to his bookseller. He "got a price for his stuff" and then had to "beat it." With the shift from printing privileges to author-vested copyright, there gradually came an appreciation and an expansion of the rights of ownership that flow from the creative act. If we no longer value creativity, then we shall require another basis for recognizing exclusive rights in works, be they works of authorship or other productions. More importantly, the scope of the rights we then install would have to be rethought and probably drastically reduced.

121. MILES FRANKLIN, BRING THE MONKEY 25-26, 50 (Pandora ed., 1987).