

## Copyright Trust

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# COPYRIGHT TRUST

Abraham Bell<sup>†</sup> & Gideon Parchomovsky<sup>††</sup>

*Collaborative production of expressive content accounts for an ever-growing number of copyrighted works. Indeed, in the age of content sharing and peer production, collaborative efforts may have become the paradigmatic form of authorship. Surprisingly, though, copyright law continues to view the single-author model as the dominant model of peer production. Copyright law's approach to authorship is currently based on a hodgepodge of rigid doctrines that conflate ownership and control. The result is a binary system under which a contributor to a collaborative work is either recognized as an author with full control and management rights or a person who is deemed a nonauthor with no rights whatsoever. We argue that the doctrines and judicial precedents that govern the all-important issue of authorship are out of step with authorial reality. And the cost to the copyright system is enormous. As we show in this Article, the misalignment between copyright law and authorial reality is both inefficient and unfair: it harms incentives to create, it denies reward to contributors, it leads to underutilization of content, and it creates excessive litigation.*

*To remedy this state of affairs, we propose a new legal construct, which we call "copyright trust." In designing this new tool we draw on insights from property and corporate theory—two areas of research that have long dealt with the challenges of collaborative enterprises and coownerships. The doctrine of copyright trust is predicated on the insight of decoupling ownership from control. Essentially, it would empower courts to appoint one contributor as an "owner-trustee" with full managerial rights and the exclusive power to control the use of the work, while recognizing all other contributors as "owner-beneficiaries," who would be entitled to receive a certain percentage of the proceeds from the work. Copyright trusts would enable courts to retain the benefits of having a single owner without sacrificing the rightful claims of other contributors who would be entitled to receive a just reward for their efforts. The proposed doctrine of copyright trust would supplement, not replace, current doctrine. It is designed to enrich the menu of options available to courts in deciding authorship issues. The addition of our solution to the*

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*judicial toolbox would not only make it richer but would also infuse current law with much-needed flexibility that is sorely missing from other authorship doctrines.*

INTRODUCTION .....	1016
I DOCTRINE.....	1022
A. The Copyright Act of 1976 .....	1022
1. <i>Ownership</i> .....	1023
a. Work Made for Hire.....	1023
b. Joint Authorship.....	1025
c. Collective Work.....	1028
d. Combining the Tools .....	1031
2. <i>Transfer</i> .....	1032
B. Judicial Doctrines.....	1035
1. <i>Authorship</i> .....	1035
2. <i>Implied License</i> .....	1037
II WHAT COPYRIGHT LAW CAN LEARN FROM PROPERTY AND CORPORATE LAW .....	1040
A. Property .....	1040
1. <i>Commons and Anticommons</i> .....	1040
2. <i>Three Dimensions of Property</i> .....	1042
3. <i>Trusts</i> .....	1049
B. Corporate Law .....	1050
C. Copyright Trusts.....	1054
III OBJECTIONS .....	1059
A. The Contractual Perspective .....	1059
B. Comparative Merit.....	1062
C. Doctrine.....	1064
D. An Incomplete Remedy.....	1065
CONCLUSION .....	1068

## INTRODUCTION

The sole author is an important analytical benchmark for copyright law and policy.<sup>1</sup> But in the real world, many copyright assets—and perhaps the vast majority of the commercially valuable ones—result from the efforts of more than one contributor. Indeed, in certain copyright domains, such as cinema, software, and games, all works emanate from the labor of multiple individuals as a matter of course. Dozens contribute to the making of a computer game. A movie is made by hundreds, perhaps thousands. Yet the law has, to

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<sup>1</sup> See Lionel Bently, R. v The Author: *From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1, 17–18 (2008); Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1206–07 (2000).

date, found only imperfect formulas for allocating rights among contributors, despite numerous rulings<sup>2</sup> and contributions by theorists.<sup>3</sup>

Disputes among collaborators in creative works are legion. Just consider a few of the prominent recent cases involving ownership disputes among contributors to copyrighted works. In *Garcia v. Google, Inc.*,<sup>4</sup> an actress in a controversial movie about the life of Muhammad, the founder of Islam, won a claim of separate ownership of her performance, thereby blocking distribution of the movie through popular outlets like YouTube.<sup>5</sup> In *Aalmuhammed v. Lee*,<sup>6</sup> the writer of several pieces of dialogue and scenes in Spike Lee's biographical film about Malcolm X saw the court reject his claim of a share of ownership in the film.<sup>7</sup> In *Thomson v. Larson*,<sup>8</sup> the court rejected a dramaturg's claim of joint authorship of the play "Rent" even though she had worked face-to-face with the screenwriter in altering the story and rewriting the script.<sup>9</sup>

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<sup>2</sup> See generally *Janky v. Lake Cnty. Convention & Visitors Bureau*, 576 F.3d 356 (7th Cir. 2009) (finding a joint copyright between composer and songwriter); *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962 (9th Cir. 2008) (affirming district court's finding that plaintiffs did not have a copyright interest in the treatment rights that their ancestor assigned to the defendant motion picture company); *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000) (finding that creative contributions did not suffice to establish coauthorship); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994) (rejecting the collaboration alone test for copyright interests); *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) (affirming that joint authorship requires intent by the parties to establish coauthorship copyright interests); *Maxwood Music Ltd. v. Malakian*, 713 F. Supp. 2d 327 (S.D.N.Y. 2010) (finding that reserving the right to make final decisions does not indicate an intent to be a joint author); *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409 (S.D.N.Y. 2004) (refusing to find copyright interest when there was no understanding between parties that song would be used, and thus no joint authorship).

<sup>3</sup> Two excellent recent examples are Shyamkrishna Balganes, *Unplanned Coauthorship*, 100 VA. L. REV. 1683 (2014) and Anthony J. Casey & Andres Sawicki, *Copyright in Teams*, 80 U. CHI. L. REV. 1683 (2013). Other works include Benjamin E. Jaffe, *Rebutting the Equality Principle: Adapting the Co-tenancy Law Model to Enhance the Remedies Available to Joint Copyright Owners*, 32 CARDOZO L. REV. 1549 (2011); Susan Keller, *Collaboration in Theater: Problems and Copyright Solutions*, 33 UCLA L. REV. 891 (1986); Michael Landau, *Joint Works Under United States Copyright Law: Judicial Legislation Through Statutory Misinterpretation*, 54 IDEA 157 (2014); Robert P. Merges, *Locke for Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179 (2008); J. David Yarbrough, Jr., Comment, *What's Mine Might Be Yours: Why We Should Rethink the Default Rule for Copyright Co-ownership in Joint Works*, 76 TUL. L. REV. 493 (2001).

<sup>4</sup> 766 F.3d 929 (9th Cir. 2014), *reh'g on banc granted*, 771 F.3d 647 (9th Cir. 2014).

<sup>5</sup> Adi Robertson, *YouTube Must Take Down Explosive 'Innocence of Muslims' Video in Copyright Suit*, VERGE (Feb. 26, 2014, 1:03 PM), <http://www.theverge.com/2014/2/26/5449826/google-youtube-must-remove-innocence-of-muslims-video-in-copyright-suit>; Eugene Volokh, *Copyright Meets "Innocence of Muslims": Ninth Circuit Orders Removal of Movie from YouTube, on Copyright Grounds*, WASH. POST (Feb. 26, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/26/copyright-meets-innocence-of-muslims-ninth-circuit-orders-removal-of-movie-from-youtube-on-copyright-grounds/>.

<sup>6</sup> 202 F.3d 1227 (9th Cir. 2000).

<sup>7</sup> See *id.* at 1229, 1238.

<sup>8</sup> 147 F.3d 195 (2d Cir. 1998).

<sup>9</sup> See *id.* at 205.

Despite the frequency of disputes among collaborators, the law has yet to produce a satisfactory formulation for allocating rights. No less than a half-dozen legal doctrines potentially affect the rights of multiple contributors to copyrighted works.<sup>10</sup> Yet, the current legal tools have proved irremediably ill suited for tackling the intricate yet crucially important topic of works arising from multiple contributions. Not only do the doctrines lead to inconsistent results, they also fail to offer legal structures that reflect the true interests of the multiple contributors and the societal interest in optimizing the utilization of works of intellectual property.<sup>11</sup>

The adverse effects of unsatisfactory resolutions of collaborators' rights go well beyond questions of distributive justice among the litigants. How copyright law treats collaborators' rights affects two other crucial interests: the incentive to create and the efficiency of use.

Consider, first, incentives to create. The law's treatment of multiple contributors greatly affects the likelihood that certain works will be created at all. The promises made by the law to potential contributors affect their incentives to join in the creation of future works. Potential contributors will be reluctant to take part in creating a work if they fear that they will not receive adequate compensation. As a result, if the law errs in its distribution of rights, works that can only be produced with the contribution of many individuals might never be created, to the detriment of society as a whole.

Now consider the efficiency of use. The law's allocation of the rights to manage copyrighted works potentially plays a decisive role in determining the likelihood that copyrighted works will be efficiently exploited by society. The number of authors recognized by law is of vital importance to future uses of copyrighted works. An excess of authors with full rights to license copyrighted works would essentially eviscerate the value of copyright by ending the monopoly protection it gives to creators. To take an extreme example, imagine that every one of the tens of thousands of employees of Microsoft enjoyed the rights of joint authors in a popular program like Microsoft Word. A license from any of these joint authors could give the licensee full rights in the word processing program. No other author could block such licensing deals. The competition of the thousands of authors to sell licenses would tend to drive the price of the work down to the marginal cost of the license, i.e., zero. On the other hand, an excess of authors with veto rights would essentially guarantee nonuse of the

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<sup>10</sup> As we discuss *infra* Part I, these doctrines include such doctrines of authorship as work-made-for-hire, joint authorship, and, for lack of a better term, authorship; doctrines for compound works such as derivative works and compilations; and doctrines for transferring rights, such as implied license.

<sup>11</sup> See *infra* Part I.

work. Consider again the example of Microsoft Word, but this time imagine that each of the tens of thousands of employees had a separate copyright interest in the few lines of code she or he contributed and that the program could only be licensed when all contributors agreed. No one could license use of the program as a whole without the consent of tens of thousands of people, some of whom might be on vacation, and others of whom might be irrational, spiteful, or just plain disagreeable.

Unfortunately, given the way copyright law currently treats questions of ownership, resolutions that encourage efficient use of copyrighted works tend to undermine incentives to create. Conversely, judgments that best protect incentives to create copyrighted works lower the likelihood that the works will be efficiently managed. The reason for this is straightforward. Granting collaborators a share in the rights of ownership incentivizes their participation in creating the work. However, it also reduces the likelihood that the work will be well managed. As we explore in greater detail in Part I, under current doctrine more owners almost certainly means either dissipation of the value of copyright or underuse of the copyrighted work. Shutting collaborators out of an ownership interest preserves good management of the copyrighted work but reduces the likelihood that potential future collaborators will want to contribute their share to creating works.

This Article offers a novel approach to allocating rights among collaborators; it proposes an entirely new doctrine that recognizes a new form of ownership in copyright assets.

Our proposal is based on two central insights. First, the problems copyright encounters in coupling ownership with management are not unique to the law of copyright. Other fields of law—most notably property law—have encountered similar dilemmas,<sup>12</sup> and resolved them by decoupling ownership and management.<sup>13</sup> As we will show, the doctrines used in other fields of law can be adapted to copyright.<sup>14</sup>

Second, long before questions about collaboration took center stage in copyright law, the field of property confronted and analyzed the question of how allocating and dividing property rights affects the management of assets.<sup>15</sup> Several property theorists have shown how excessive divisions of property rights can create an “anticommons”

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<sup>12</sup> See Merges, *supra* note 3, at 1187 (noting that the challenge of multiple rightsholders exists in many legal areas, including intellectual property, and that one solution is to construct “a single focal point entity to represent the larger group”).

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See *infra* Part II.A.

<sup>15</sup> See *infra* Part II.A.1.

that paralyzes the use of assets.<sup>16</sup> Others have shown how denying individuals the right to veto uses of an asset—essentially permitting almost anyone to use the asset without penalty—can create a “commons” that leads to excessive exploitation of the asset.<sup>17</sup> We show that property analyses of commons and anticommons can be applied to copyright (with some adaptation), and that they can point the way to solutions that improve management of copyright assets.

Drawing on the laws of property and copyright, we propose a form of “copyright trust” that concentrates the power of management in a single individual while diffusing the benefits of ownership among many contributors. This decoupling of ownership and management, we show, overcomes the dilemma posed by the competition between the incentives to create and the efficiency of use. We show that when our proposed copyright trusts are in place, collaborators are still incentivized to contribute to creating works because they are guaranteed a fair share of the profits. At the same time, our proposed copyright trusts streamline management of copyrighted works by keeping control of the work in the hands of a single person, ensuring that the copyrighted work will be used efficiently. Thus, our proposed doctrine promotes the competing goals of reducing disputes among contributors, encouraging the collaborative creation of works and incentivizing the optimal management of existing works.<sup>18</sup>

To illustrate how our new doctrine would work in practice, consider how it might affect the outcome of two recent authorship disputes.

In *Aalmuhammed v. Lee*,<sup>19</sup> Jefri Aalmuhammed, who had written several pieces of dialogue and scenes in Spike Lee’s biographical film about Malcolm X, claimed a share of the film as a joint author.<sup>20</sup> The Ninth Circuit Court of Appeals rejected the plaintiff’s claims of copyright on the grounds that Aalmuhammed was neither a joint author of the entire film, nor the author of the scenes he wrote.<sup>21</sup> Thus, the *Aalmuhammed* court protected efficiency of use at the expense of the incentive to create; it ensured the studio could manage the film with-

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<sup>16</sup> See MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 2 (2008); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 677 (1998) [hereinafter Heller, *Tragedy of the Anticommons*]; Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698, 698 (1998); Frank I. Michelman, *Ethics, Economics and the Law of Property*, in *ETHICS, ECONOMICS, AND THE LAW* 3, 6 (J. Roland Pennock & John W. Chapman eds., 1982).

<sup>17</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968).

<sup>18</sup> See *infra* Part II.C.

<sup>19</sup> 202 F.3d 1227 (9th Cir. 2000).

<sup>20</sup> *Id.* at 1229–30.

<sup>21</sup> *Id.* at 1236.

out interference, but it disincentived future contributions to film like Aalmuhammed's. Our proposed doctrine would have allowed the court to protect efficiency of future uses of the film while still incentivizing future screenwriters by guaranteeing remuneration. Specifically, the court could have made the movie studio an "owner-trustee" with all the rights and powers of control, while recognizing Aalmhuammed as an "owner-beneficiary" with a right to receive compensation from the proceeds of the movie.

In *New York Times Co. v. Tasini*,<sup>22</sup> by contrast, Jonathan Tasini, a freelance author, claimed separate ownership in an article he had contributed to the *New York Times*.<sup>23</sup> The Supreme Court ruled that Tasini retained ownership of his article and the *Times's* license to print the article in its daily newspaper did not allow it to include the article in an electronic database.<sup>24</sup> Thus, the Court chose to protect incentives to create at the expense of the efficient use of the work. The majority elected to honor the rights of the freelance journalists even though the decision ran the risk that the digital editions of the *New York Times* would be offered sans the contributions of the freelance journalists. Under our solution, the Court would have been spared the "Solomonic choice." It could have declared the *New York Times* owner-trustee with full managerial prerogatives over the content of the newspaper while bestowing on the freelance journalists the status of owner-beneficiaries who have an entitlement to a certain prorated percentage of the royalties the *New York Times* received in exchange for its decision to license content to computerized databases.

It should be emphasized that the proposed doctrine of "copyright trust" is intended to supplement, not replace, current doctrine. It is designed to enrich the menu of options available to courts in deciding authorship issues. The addition of our solution to the judicial toolbox would not only make it richer, however; it would infuse current law with much needed flexibility that is sorely missing from other authorship doctrines. We are therefore confident that our proposal can dramatically improve the management of copyright disputes among collaborators.

Structurally, our Article unfolds divided into three parts. Part I lays out the intricacies of current doctrines concerning multiple contributions to copyrighted works. In it, we discuss the various methods by which lawmakers and courts have sought to deal with the challenge presented by works comprised of multiple contributions. We show that the doctrinal tools provided by extant copyright law are ill suited for the task assigned to them and that consequently our law falls short

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<sup>22</sup> 533 U.S. 483 (2001).

<sup>23</sup> See *id.* at 488, 491.

<sup>24</sup> See *id.* at 506.



of promoting the goals that underlie our copyright system. In Part II, we offer our proposed doctrinal solution. We explain how existing organizational tools in the world of property, as well as corporate law, can be imported into copyright law in order to better achieve the normative goals of copyright regarding collaborative works. Additionally, we provide examples of how our proposal could be used to resolve many of the shortcomings of current law. Finally, in Part III, we address potential objections to our proposal, both practical and theoretical.

## I DOCTRINE

Collaborative production of expressive works plays an ever-increasing role in the domain of copyright law.<sup>25</sup> If in the past, collaborative production characterized limited categories of expressive works, such as movies and software, in the present, collaborative production has permeated many creative sectors that were traditionally bastions of sole authorship thanks to the availability of new technology that facilitates cooperation among creators.<sup>26</sup> Many literary works, pictorial works, and games, especially in digital media, owe their origin to the labors of more than one creator.<sup>27</sup> One might have thought that centuries after its birth, copyright law would be well equipped to handle the challenge of collaborative works, but the truth is disappointing. The law is a hodgepodge of intricate and inconsistent doctrines that provides, at best, very partial and tenuous solutions to the challenge of collaborative authorship.

### A. The Copyright Act of 1976

We begin by examining the explicit statutory tools for dealing with collaborations. The Copyright Act directly addresses issues concerning collaboration in copyrighted works in several places. Unfortunately, as we shall see, the different legislative schemes do not add up to a uniform or comprehensive approach.

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<sup>25</sup> 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 (2001); Paulette S. Fox, Note, *Preserving the Collaborative Spirit of American Theater: The Need for a “Joint Authorship Default Rule” in Light of the Rent Decision’s Unanswered Question*, 19 CARDOZO ARTS & ENT. L.J. 497, 498–500 (2001).

<sup>26</sup> See Fox, *supra* note 25, at 498–99.

<sup>27</sup> See Mark Cooper, *From Wifi to Wikis and Open Source: The Political Economy of Collaborative Production in the Digital Information Age*, 5 J. ON TELECOMM. & HIGH TECH. L. 125, 126–27 (2006); Ira V. Heffan, Note, *Copyleft: Licensing Collaborative Works in the Digital Age*, 49 STAN. L. REV. 1487, 1488–89 (1997).

## 1. *Ownership*

The most important statutory tool for handling collaboration is ownership. The basic rules of ownership of copyrighted works are found in section 201 of the Act.<sup>28</sup> The basic rule for noncollaborative works is simple: the author owns copyright in works she creates.<sup>29</sup> Unfortunately, the simplicity ends there. The Copyright Act creates no less than three different (and not entirely consistent) doctrines for dealing with collaborative works.<sup>30</sup>

### a. *Work Made for Hire*

The “work-made-for-hire” doctrine allocates ownership of copyrighted works made by an employee to an employer.<sup>31</sup> When this doctrine fully applies to all contributions to a work, only the employer owns a copyright in the result.<sup>32</sup> The doctrine might appear to lend needed clarity to nearly all questions regarding ownership where a corporation or other organization is involved. Unfortunately, it does not. The doctrine fails to resolve many important questions regarding copyrighted works even when produced within a corporate environment.

The work-made-for-hire doctrine is frightfully complicated. To begin with, the doctrine requires a specific employer-employee relationship within the bounds of agency law.<sup>33</sup> This means, for example, that where a programming company outsources writing of a particular module to an outside contractor, the work-made-for-hire doctrine does not apply.<sup>34</sup> Additionally, even for regular employees, the doctrine only applies to work done within the “scope of [an employee’s] employment.”<sup>35</sup> Thus, for example, in the case of *Roeslin III v. District of Columbia*, the court denied work-made-for-hire status to a computer program for handling survey data written by a labor economist whose duties included collecting and evaluating the data.<sup>36</sup> The court reasoned that programming was outside the scope of the economist’s employment.<sup>37</sup> Similarly, in *Avtec Systems, Inc. v. Peiffer*, a case involving a dispute over the rights in a computer program pertaining to satellite

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<sup>28</sup> 17 U.S.C. § 201 (2012).

<sup>29</sup> *See id.* § 201(a).

<sup>30</sup> *See id.* § 201(a)–(c).

<sup>31</sup> *Id.* § 201(b).

<sup>32</sup> *See id.*; Casey & Sawicki, *supra* note 3, at 1724.

<sup>33</sup> *See* Cmty. for Creative Non-violence v. Reid, 490 U.S. 730, 739–41 (1989); Casey & Sawicki, *supra* note 3, at 1724–25.

<sup>34</sup> *Aymes v. Bonelli*, 980 F.2d 857, 864 (2d Cir. 1992).

<sup>35</sup> *Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568, 571 (4th Cir. 1994).

<sup>36</sup> 921 F. Supp. 793, 797–98 (D.D.C. 1995) (citing RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

<sup>37</sup> *See id.*

orbits, the Fourth Circuit Court of Appeals ruled that even though the defendant was an employee of the plaintiff and the program came within the type of work he was hired to perform, it was not a work made for hire since it was written outside the time and space limitations of the employment and the employee was not “motivated by a desire to further [Avtec’s] corporate goals.”<sup>38</sup>

The law permits clarifications of work-made-for-hire status by special agreement,<sup>39</sup> but this, too, can only be done within certain bounds. For instance, while an agreement may extend work-made-for-hire status to work done by an independent contractor, the law will only recognize the validity of such agreements if the work is of a specified kind, such as a part of a motion picture, or a translation.<sup>40</sup> Section 101 of the Copyright Act gives a list of ten kinds of works for which the law will recognize the validity of agreements to grant work-made-for-hire status to “specially ordered or commissioned” works.<sup>41</sup> The list of ten works ranges from the specific, such as an “instructional text,” to the general, such as a “compilation.”<sup>42</sup> Adding to the confusion, some of the listed types of works are defined by the Copyright Act (e.g., “compilation”), while others are not (e.g., “answer material for a test”).<sup>43</sup> Worse yet, some of the terms are defined for the entire Copyright Act, while others are defined only for purposes of work-made-for-hire.<sup>44</sup>

Needless to say, the doctrine leaves many disputes regarding collaborative works without clear answers. Even if a work is commissioned in advance by a corporation, and the corporation’s management signs work-made-for-hire agreements with everyone who labors in producing the work, the work-made-for-hire doctrine may still fail to guarantee the corporation’s ownership of the resulting rights in the copyrighted work.<sup>45</sup> At the same time, the work-made-for-hire doctrine may capture the rights resulting from an artist’s creative output and reassign them to the artist’s employer, even though neither artist nor employer contemplated that result.<sup>46</sup>

It should be noted that where the work-made-for-hire doctrine does apply, the results are drastic. The employee enjoys no rights

<sup>38</sup> 21 F.3d at 572.

<sup>39</sup> 17 U.S.C. § 101 (2012) (“work made for hire” includes a commissioned work in certain situations where there is an express written agreement providing so).

<sup>40</sup> *Id.*

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

<sup>42</sup> *Id.*

<sup>43</sup> *See id.*

<sup>44</sup> For example, “supplementary works” and “instructional texts” are defined specifically for the purpose of the work-made-for-hire scenario, but other terms such as “collective works” and “motion pictures” are terms defined with respect to all copyrighted works. *Id.*

<sup>45</sup> *See supra* notes 38–43 and accompanying text.

<sup>46</sup> *See Dougherty, supra* note 25, at 239.

whatsoever in the resulting work; all rights belong to the employer.<sup>47</sup> The rights denied to the employee include even some items that would belong to an author that had voluntarily sold all copyright to the employer. For instance, an ordinary author may terminate a transfer of copyright after the fact, even if the contract had specified otherwise.<sup>48</sup> (The Copyright Act specifies that such terminations can only be done within a certain time period, several decades after the transfer.)<sup>49</sup> However, an employee has no right to terminate the transfer of rights to an employer.<sup>50</sup>

b. *Joint Authorship*

Where the work-made-for-hire doctrine aims to simplify rights by concentrating ownership in a single person or entity (the employer), the joint authorship doctrine aims to achieve equity by splitting rights among all joint authors.

According to the Copyright Act, the “authors of a joint work are coowners of copyright in the work.”<sup>51</sup> The Copyright Act defines a joint work as one “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”<sup>52</sup>

While the law defines the contributors’ intentions as the key feature in identifying joint works, courts have often sought to avoid the difficult questions concerning the parties’ mental states by searching for other potential limitations on joint authorship. Thus, for example, several cases would deny contributors to a work the status of joint author on the grounds that the contributions, when considered separately, would not themselves have constituted a copyrighted work.<sup>53</sup> Ultimately, however, questions of intent are unavoidable. Thus, for example, in *Childress v. Taylor*, the Second Circuit Court of Appeals denied the status of a joint work to a play written by Alice Childress.<sup>54</sup> The court acknowledged that Childress had written the play at the suggestion and with the considerable assistance of Clarice Taylor.<sup>55</sup>

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<sup>47</sup> 17 U.S.C. § 201(b) (2012).

<sup>48</sup> *See id.* § 203.

<sup>49</sup> *See id.*

<sup>50</sup> *See id.* § 203(a).

<sup>51</sup> *Id.* § 201(a).

<sup>52</sup> *Id.* § 101.

<sup>53</sup> *Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc.*, 290 F.3d 98, 114–15 (2d Cir. 2002); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071–73 (7th Cir. 1994); *Childress v. Taylor*, 945 F.2d 500, 506–07 (2d Cir. 1991); *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1493 (11th Cir. 1990); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1086–87 (9th Cir. 1989).

<sup>54</sup> *Childress*, 945 F.2d at 509.

<sup>55</sup> *See id.*

However, the court ruled that only Taylor, but not Childress, had intended for the two to share the status of “joint authors.”<sup>56</sup> Nonetheless, courts have favored objective criteria for determining intent.<sup>57</sup> For instance, in adjudicating Jefri Aalmuhammed’s claim of joint authorship of the film *Malcolm X* in *Aalmuhammed v. Lee*,<sup>58</sup> the Ninth Circuit Court of Appeals offered a variety of indicators for determining contributors’ intent, including manifestations of joint authorship such as a cowriting credit.<sup>59</sup>

As scholars have noted, many aspects of joint authorship remain controversial and unclear.<sup>60</sup> Indeed, even items that are generally thought to be clear are quite hazy upon closer review. For instance, it is generally agreed that collaborators may resolve many issues related to their rights if they voluntarily agree on joint authorship.<sup>61</sup> However, there are surprisingly few cases on the subject. The case authority, such as it is, tells a more complex story.<sup>62</sup> Advance agreement can establish the existence of a joint authorship.<sup>63</sup> However, if the agreement varies the terms of the joint authorship, for example by varying the percentage ownership from the default 50%-50% to a 90%-10% split that better reflects the parties’ actual contributions, the courts will view the relevant parts of the agreement as a transfer of ownership, and thus subject to all the rules of transfer, rather than an intrinsic part of the joint ownership.<sup>64</sup>

More broadly, the law has little to say about the meaning of joint authorship for the joint authors. The law suffices with the laconic instruction that “[t]he authors of a joint work are coowners of copyright in the work.”<sup>65</sup> The omission of more specific instruction is apparently deliberate. As the house report for the 1976 Copyright Act tells us,

[t]here is . . . no need for a specific statutory provision concerning the rights and duties of the coowners of a work; court-made law on

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

<sup>57</sup> See Balganesch, *supra* note 3, at 1737.

<sup>58</sup> 202 F.3d 1227.

<sup>59</sup> *Id.* at 1234.

<sup>60</sup> See Balganesch, *supra* note 3; George W. Hutchinson, *Can the Federal Courts Save Rock Music?: Why a Default Joint Authorship Rule Should Be Adopted to Protect Co-authors Under United States Copyright Law*, 5 TUL. J. TECH. & INTELL. PROP. 77, 81–89 (2003); Steven S. Kan, *Court Standards on Joint Inventorship & Authorship*, 19 DEPAUL J. ART TECH. & INTELL. PROP. L. 267, 297–300 (2009); Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 213–20 (2001); Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK L. REV. 123, 125–34 (2002).

<sup>61</sup> *Childress*, 945 F.2d at 507; see 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5:7 (2014).

<sup>62</sup> See VerSteeg, *supra* note 60, at 151–58.

<sup>63</sup> *Childress*, 945 F.2d at 507.

<sup>64</sup> See *Papa’s-June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1157–58 (S.D.N.Y. 1996); Keller, *supra* note 3, at 912–14.

<sup>65</sup> 17 U.S.C. § 201(a) (2012).

this point is left undisturbed. Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use of license the use of a work, subject to a duty of accounting to the other coowners for any profits.<sup>66</sup>

Thus, joint authorship is an incomplete remedy for the dilemmas of contributors for several reasons. First of all, contributors may not have the presence of mind to reach agreement in advance of their work or to record sufficient evidence of their work to prove that they have an agreement. In many cases, negotiations are costly, and it is only after the fact that revenues prove sufficient to have invested in contracting. Of course, after the fact is too late; joint authorship depends on the principals' intent during creation of the work, not afterward.

Second, even if the parties reach an agreement in advance, the nature of joint authorship is partially fixed by law, meaning that even if the joint authors agree in advance to divide their rights, only certain divisions are possible. The historic approach to joint authorship dictates that joint authors have undivided rights in the whole of ownership (like tenants in common).<sup>67</sup> Joint authors may agree to vary their respective shares (for instance, two joint authors may agree in advance that they will split their ownership 90%-10%)<sup>68</sup> or to deny themselves one or more of the exclusive rights that would otherwise inhere in copyright ownership (for example, authors may deny themselves the right to make derivative works without one another's consent),<sup>69</sup> but such agreements will likely be viewed as transfers of ownership. Apparently this means, inter alia, that some aspects of the agreement are subject to termination. In addition, authors may not deny one another the right to convey nonexclusive licenses because such licenses do not diminish the value of the copyrighted work.<sup>70</sup> Conversely, only by acting in concert can joint authors grant an exclusive license.<sup>71</sup> Likewise, even where owners have different percentages of ownership, they are still viewed as tenants in common with all the attendant rights of coownership.<sup>72</sup>

Third, joint authorship often gives too much to junior contributors. The default rules of joint authorship give each joint author an

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<sup>66</sup> H.R. REP. NO. 94-1476, at 121 (1976).

<sup>67</sup> See *Childress*, 945 F.2d at 508.

<sup>68</sup> See *Papa's-June Music*, 921 F. Supp. at 1158.

<sup>69</sup> See *id.*

<sup>70</sup> See *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007).

<sup>71</sup> See *id.* at 101. The rules of licensing naturally imply one another. Unless all the authors agree, any remaining joint author can convey a nonexclusive license without the consent of the remaining authors. Thus, a license can only be exclusive if all joint authors act together.

<sup>72</sup> See *Yarbrough, Jr.*, *supra* note 3, at 496.

equal share of the rights in the work, including the rights to reproduce, display, perform, adapt and distribute, as well as the all-important rights to issue nonexclusive licenses and veto the conveyance of exclusive licenses.<sup>73</sup> This is a formidable package to give each and every junior collaborator. It would obviously be quite problematic for every one of the hundreds of contributors to a film or a computer program to enjoy each of these rights. Stated otherwise, joint authorship—at least in the default form employed today—is not a realistic legal form for copyrighted works with many contributors. As we discuss *infra*, the result would certainly be the intellectual property equivalent of a commons, which property theory shows leads to excessive exploitation of the asset.<sup>74</sup> With each of the many contributors able to sell a license to the work, the price of using the work would decline toward zero, and all profit would be dissipated.<sup>75</sup>

### c. *Collective Work*

The law of collective works and compilations adds yet a further complication to the doctrinal puzzle.

To understand why, it is important to draw attention to a peculiar but important feature of copyright law. Copyright law does not just protect discrete works, like books. It also protects component parts of works, like chapters or paragraphs within books.<sup>76</sup> It also protects hard-to-define component aspects like plot lines,<sup>77</sup> characters,<sup>78</sup> or even the “look and feel” of works.<sup>79</sup> Of course, at some point, the components are no longer protected. One cannot copyright a common single word, for example, even if it plays an extremely important role in a novel (like “clues” or “detective”).<sup>80</sup>

Just as we can disaggregate works into many component parts—some copyrighted, some not—items can be aggregated to make copyrighted works. A collection of uncopyrightable numbers can nevertheless together become a copyrighted database due to the original arrangement and selection of the numbers.<sup>81</sup> More importantly for

<sup>73</sup> 17 U.S.C. § 106 (2012).

<sup>74</sup> See Floris Kreiken & David Koepsell, *Coase and Copyright*, 2013 U. ILL. J.L. TECH. & POL'Y 1, 10–12 (2013); *infra* Part II.A.1.

<sup>75</sup> Kreiken & Koepsell, *supra* note 74, at 10–12; Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1037–38 (2005).

<sup>76</sup> Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565–66 (1985).

<sup>77</sup> Shaw v. Lindheim, 919 F.2d 1353, 1362–63 (9th Cir. 1990); Shipman v. R.K.O. Radio Pictures, Inc., 100 F.2d 533, 536–37 (2d Cir. 1938).

<sup>78</sup> WILLIAM F. PATRY, 2 PATRY ON COPYRIGHT § 3:164 (2014).

<sup>79</sup> Jack Russo & Jamie Nafziger, *Software “Look and Feel” Protection in the 1990s*, 15 HASTINGS COMM. & ENT. L.J. 571, 572 (1993).

<sup>80</sup> 2 PATRY ON COPYRIGHT, *supra* note 78, § 4.2.

<sup>81</sup> Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters., Inc., 945 F.2d 509, 515 (2d Cir. 1991).

our purposes, a copyrighted work may be an aggregation of copyrighted components. For instance, in copyright law, it is possible for there to be 100 copyrights to each of 100 pieces of art on 100 jigsaw pieces and an entirely different copyright for the completed jigsaw puzzle. In copyright terminology, a work that is an aggregation of components is called a “compilation.”<sup>82</sup> If the components of the compilation are themselves copyrighted works (like our hypothetical jigsaw puzzle), the compilation is called a “collective work.”<sup>83</sup>

Copyright law does not automatically allocate all the ownership interests in collective works to a single person. It is possible for 100 different people to own each of the 100 copyrights in the jigsaw piece art, and for a 101st person to own the copyright in the jigsaw puzzle as a whole. The copyright in the work as a whole is distinct and limited.<sup>84</sup> In the words of the Copyright Act, the copyright in a compilation “extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.”<sup>85</sup>

It should be evident why this feature of the law carries the potential for dividing up ownership rights in a way that would render works unusable. As property theory shows, excessive fragmentation of ownership rights in an asset leads to an “anticommons” in which the asset is underutilized.<sup>86</sup> In an extreme case, the copyright in the collective work might end up being worthless because any exercise of rights regarding the collective work as a whole would necessarily involve potentially forbidden actions toward the component parts.

The law partially resolves this problem by granting a statutory default license for the owner of the collective work regarding the component works. Under the law, “the owner of copyright in the collective work is presumed to have . . . the privilege of reproducing and distributing [any component] contribution [but only] as part of that . . . collective work, [or a] revision of that collective work, [or a] later collective work in the same series.”<sup>87</sup> This statutory license is extremely narrow. In *New York Times Co. v. Tasini*, the Supreme Court illustrated just how narrow the license is by ruling that the *New York Times* could not use its “collective work” copyright in its own newspaper to publish a database of all of its earlier published articles<sup>88</sup> because the *Times* did not own the separate copyrights in articles

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<sup>82</sup> 17 U.S.C. § 101 (2012).

<sup>83</sup> *Id.*

<sup>84</sup> *See id.* § 103(b).

<sup>85</sup> *Id.*

<sup>86</sup> *See supra* note 16 and accompanying text; *infra* Part II.A.1.

<sup>87</sup> 17 U.S.C. § 201(c).

<sup>88</sup> 533 U.S. 483, 488 (2001).



written by freelance journalists<sup>89</sup> and the database was not a “revision” of the published newspapers.<sup>90</sup>

Thus, the danger that collective works will be underutilized because they fall into the dynamics of anticommons is a real one. And collective works are ubiquitous in copyright. Although the Copyright Act refers to law review (and other periodical) issues, anthologies, and encyclopedias as examples of collective works,<sup>91</sup> many more works—such as collaboratively produced films, computer programs, and murals—are potentially collective works under the definition of the act. Indeed, every time a work results from multiple contributions that are not otherwise covered by the work-made-for-hire and joint authorship doctrines, the work is *prima facie* a collective work, covered by many copyrights, with only a limited copyright for the organizer.<sup>92</sup>

If this weren't enough, the law adds a further complication with the category of “derivative works.” A copyrighted work that contains parts of an earlier work is a derivative work, according to the Copyright Act.<sup>93</sup> A compilation may be a derivative work, but a derivative work need not be a compilation.<sup>94</sup> The statutory definition of derivative works is extremely broad, encompassing all works “based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”<sup>95</sup> The statute adds that a “work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship” is also a derivative work.<sup>96</sup>

For the most part, the rules of compilations and derivative works are identical as far as collaborators are concerned. Whether we call the subsequent work a derivative work or a compilation, it has a copyright that is separate from the component or base parts that covers only the new contributions. Yet, there are some interesting distinctions between the statutory treatments of derivative works and compilations (and other collective works). For instance, as we have seen, the statute grants the author of a collective work a limited license regarding contributions;<sup>97</sup> the statute does not expressly create any simi-

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<sup>89</sup> *Id.* at 493–94.

<sup>90</sup> *Id.* at 504.

<sup>91</sup> 17 U.S.C. § 101.

<sup>92</sup> *See id.* §§ 101, 106A.

<sup>93</sup> *Id.* § 101.

<sup>94</sup> *See id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* § 201(c).

lar license for the authors of derivative works.<sup>98</sup> At the same time, the statute does create several narrow but special rights for owners of derivative works.<sup>99</sup>

These slight differences in treatment of derivative works, collective works, and compilations, have the potential to create unnecessary confusion.

d. *Combining the Tools*

It should be clear that the aforementioned ownership doctrines are not airtight categories. Owners—and courts—can mix and match. A single work can be a joint work with joint authors, one or more of whom may be an employer who owns others' work by virtue of the work-made-for-hire doctrine, while the single work is also a part of a larger collective work. Thus, when a court arrives at the decision that one of the doctrines applies to ownership of a given work, it cannot rest easy. Another doctrine or two may also apply. Worse, courts will have to figure out how the doctrines interact with one another.

As well, courts are acutely aware of the problems presented by each of the doctrines. This can, and does, affect their readiness to apply them to given cases. Consider, for example, the case of *Thomson v. Larson*.<sup>100</sup> Plaintiff Lynn Thomson had claimed the right of joint authorship together with Jonathan Larson in a new version of the Broadway musical *Rent*.<sup>101</sup> Larson was the playwright and Thomson a “dramaturg” hired by Larson to help “clarify[ ] the storyline of the musical” by working face-to-face with Larson in changing the script.<sup>102</sup> The court rejected Thomson’s claim of joint authorship on the grounds that “Mr. Larson never regarded himself as a joint author with Ms. Thomson,”<sup>103</sup> but then observed that this still left open the question of whether Thomson “automatically retain[ed] exclusive copyright interests in the material she contributed to the [collective] work.”<sup>104</sup> The court confessed that this presented the court with “somewhat of a conundrum.”<sup>105</sup> The court acknowledged a genuine legal difficulty in determining whether “a person who makes a . . . copyrightable contribution but cannot meet the mutual intent

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<sup>98</sup> See *id.* § 201.

<sup>99</sup> *Id.* § 104A(d)(3) (reliance placed on restored works for creating derivative works, protected against infringement action); *id.* § 203(b)(1) (termination of license shall not affect derivative works created prior to such termination); *id.* § 304(a)(4)(A) (derivative works unaffected if application for renewal or extension of copyright in the original work not made within one year before the expiration of copyright).

<sup>100</sup> 147 F.3d 195 (2d Cir. 1998).

<sup>101</sup> *Id.* at 198.

<sup>102</sup> *Id.* at 197.

<sup>103</sup> *Id.* at 202 n.20, 205.

<sup>104</sup> *Id.* at 196.

<sup>105</sup> *Id.* at 205.

requirement of coauthorship, retains, in the absence of a work-for-hire agreement or of any explicit contractual assignment of the copyright, any rights and interests in his or her own contribution.”<sup>106</sup> The court admitted as well its great reluctance in awarding Thomson “rights which she never imagined, much less sought, and which she would be loathe to enforce,” and it therefore dismissed the potential claim on procedural grounds while refusing to express any opinion on its merits.<sup>107</sup>

*Thomson*, sadly, is not atypical in demonstrating the problems posed by the interacting doctrines as currently understood. The logic of the statute seems inexorably to lead to anticommons or commons problems. Courts naturally use procedural or other escape routes to try to avoid the anticipated problems.

## 2. *Transfer*

Before moving from the statutory tools for dealing with collaborators to judicially-created tools, it is important to take account of one final statutory doctrine.

The initial allocation of rights according to the statute is not necessarily the final allocation. Authors are the initial owners of copyrights, but, for the most part, the statute permits the author to transfer the rights to a new owner.<sup>108</sup> Section 201(d) permits free transfer of copyright rights and portions thereof by means of inter vivos transfers or inheritance.<sup>109</sup> If the transfer of a right is exclusive, the transferee becomes an “owner” entitled to enforce the right in question.<sup>110</sup> On its face, the possibility of contracting can solve disputes among collaborators in a creative work. Upon closer examination, however, it becomes clear that transfers of rights are not a panacea. Transfers have both practical and legal limitations.

From a practical standpoint, there is a big gap between the ability of the relevant parties to execute transfers *ex ante*, before a work is created, and *ex post*, after it came into being. *Ex ante*, the respective bargaining positions of the parties are determined predominantly by their expected contribution to the work product and by the availability of alternatives. *Ex post*, the bargaining powers of the parties are determined mostly by the law. If the law vests in a certain party a copyright in the work product, she gets the power to use the work and license it to others (subject to other rightsholders’ ability to do the same) irrespective of the magnitude of her contribution. A party who

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<sup>106</sup> *Id.* at 206.

<sup>107</sup> *Id.*

<sup>108</sup> 17 U.S.C. § 201(d)(1) (2012).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* § 201(d)(2).

contributed very little to the final product, barely enough to receive a copyright, can demand an amount far in excess of her creative contribution in exchange for agreeing to transfer her rights in the work. Such demands, whether strategic or not, are likely to be perceived as extortionary by the other contributors and are certainly likely to increase transaction costs. As Robert Cooter famously pointed out, many contractual negotiations fail for distributional reasons—namely, the inability of the parties to divide the contractual surplus between them.<sup>111</sup> Ex post negotiations among contributors to copyrighted content provide a prime example of this dynamic. For this reason, many legal doctrines adopt an entirely different approach to questions that arise ex post from those that arise ex ante.<sup>112</sup>

From a legal standpoint, transfers do not provide a fool-proof solution because the law limits authors' rights of transfer. In earlier versions of the Copyright Act, copyright protection was divided temporally into two terms, and, in many cases, authors could not transfer in advance their rights to the second term.<sup>113</sup> Several high-profile cases, such as *Stewart v. Abend*,<sup>114</sup> highlighted how this limitation on transfers can tie up copyrighted works and make exploitation more costly and difficult. *Stewart* concerned the copyright in a short story published in 1942, on which the famous 1954 Alfred Hitchcock film *Rear Window* was based.<sup>115</sup> The copyright in the short story was set to expire in 2037; however, the initial term of protection expired in 1970.<sup>116</sup> Since it is a derivative work, the film *Rear Window* cannot legally be used without a valid license to the short story on which it is based.<sup>117</sup> In *Stewart*, Sheldon Abend, who had succeeded to the copyright in the short story, successfully blocked broadcast of *Rear Window* on television on the theory that the movie studio's license had expired at the end of the initial term, requiring the studio to purchase a new license for any post-1970 use of the film.<sup>118</sup>

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<sup>111</sup> Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 28 (1982).

<sup>112</sup> These include doctrines such as mistaken improver doctrines, the doctrine of necessity, and the doctrine of accretion.

<sup>113</sup> *Stewart v. Abend*, 495 U.S. 207, 215 (1990).

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

<sup>115</sup> *Id.* at 211–12.

<sup>116</sup> *See id.* at 212.

<sup>117</sup> *Id.* at 223.

<sup>118</sup> Interestingly, after the litigation, Abend sold a license to the studio. Joy Newborg, *Is Universal Regretting Disturbia?*, DUETS BLOG (Nov. 11, 2010), <http://www.duetsblog.com/2010/11/articles/idea-protection/is-universal-regretting-disturbia/>. But Abend's successor, the Stuart Abend Revocable Trust, found itself back in court recently when it sued the makers of the 2007 film *Disturbia*, described by one critic as “a limp teenage by-the-numbers version of *Rear Window*.” Eriq Gardner, *Exclusive: Decades-Old Legal Battle Over ‘Rear Window’ Is Back On*, HOLLYWOOD REP. (Oct. 29, 2010, 10:25 AM), <http://www.hollywoodreporter.com/blogs/thr-esq/exclusive-decades-old-legal-battle-33649>.

Transfers made after the effective date of the 1976 Copyright Act are subject to the termination provisions in the Act.<sup>119</sup> In an attempt to give authors a second bite of the apple, Congress empowered owners of the initial copyright to terminate transfers they executed in a five-year period beginning in the thirty-fifth year after the execution of the transfer and ending in the fortieth year after its execution.<sup>120</sup> The termination rights established by Congress have proven to be of great value to contributors to collaborative works that remained valuable thirty-five years after their creation. Not surprisingly, creators started filing lawsuits to regain the rights in their valuable creations; in turn, this has led to a spate of new litigation. In one celebrated case, Victor Willis, the lead singer of the Village People, successfully exercised the termination right to regain the copyrights in the Village People's successful songs.<sup>121</sup> In another case, the estate of the animator Jack Kirby sought to take advantage of the termination right to recapture the copyrights to many of the works in the repertoire of Marvel Comics (that have since been acquired by Disney).<sup>122</sup> In this case, however, the court determined that Kirby was an employee of Marvel Comics, whose expressive output was a work made for hire.<sup>123</sup> As of April 2013, 534 termination notices have been filed with the copyright office,<sup>124</sup> including notices by the heirs of Jerry Siegel and Joseph Shuster (the creators of Superman),<sup>125</sup> the Eagles<sup>126</sup> and the children of the late Ray Charles.<sup>127</sup>

Additionally, the Copyright Act creates a limited set of "moral rights" that cannot be transferred at all.<sup>128</sup> The moral rights, which apply only to works of visual art, are granted to the author, and can be waived but not sold.<sup>129</sup> These moral rights include the rights of attribution (the right to have one's authorship properly attributed)<sup>130</sup> and

<sup>119</sup> 17 U.S.C. §§ 203, 304(c) (2012).

<sup>120</sup> *Id.* § 203(a)(3).

<sup>121</sup> *Scorpio Music S.A. v. Willis*, No. 11-cv-1557 (BTM), 2012 WL 1598043 (S.D. Cal. May 7, 2012).

<sup>122</sup> *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119 (2d Cir. 2013).

<sup>123</sup> *Id.* at 143.

<sup>124</sup> See Ted Johnson, *Legal Landmark: Artists Start to Reclaim Rights to Their Music*, VARIETY (Apr. 16, 2013, 4:00 AM), <http://variety.com/2013/biz/features/artists-reclaim-rights-to-music-1200334132/>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Dori Ann Hanswirth, *"I'll Be Back": Termination Rights Under Section 203 of the Copyright Act*, INTELL. PROP. MAG. (2012), available at <http://m.hoganlovells.com/files/Publication/e83ef548-c381-47ec-beaf-55427153237e/Presentation/PublicationAttachment/61434785-e4e8-4757-8b0a-58b0b20a8914/Termination%20Rights.pdf>.

<sup>128</sup> Laura Lee Van Velzen, *Injecting a Dose of Duty into the Doctrines of Droit Moral*, 74 IOWA L. REV. 629, 630 (1989).

<sup>129</sup> 17 U.S.C. § 106A(e)(1) (2012).

<sup>130</sup> *Id.* § 106A(a)(1).

integrity (the right to protect the work from “distortion”).<sup>131</sup> Curiously, these moral rights do not apply at all in the case of works made for hire.<sup>132</sup> The result is that for a certain class of works, subsequent agreements are unable to resolve certain kinds of disputes among collaborators.

## B. Judicial Doctrines

Given the inadequacy of the statutory tools for resolving disputes about collaboration in the creation of copyrighted works, it is unsurprising that courts have taken to fashioning judge-made law in order to resolve the cases. Two legal concepts, in particular, have played an important role: judicial interpretations of the concept of authorship and implied license.

### 1. *Authorship*

Judicial interpretations of authorship as a method of resolving disputes about collaborations are perhaps best seen in the case of *Aal-muhammed*.<sup>133</sup> The *Aal-muhammed* case, as we noted above, involved scenes and dialogue penned by Aal-muhammed for inclusion in a Spike Lee-directed biographic film of Malcolm X.<sup>134</sup> In the absence of writing showing a work-made-for-hire relationship or a transfer of rights by Aal-muhammed, the two statutory tools left to the court in vindicating Aal-muhammed’s claims were the doctrines of joint authorship and collective works.<sup>135</sup> Neither option was particularly attractive to the court. Finding Aal-muhammed to be a joint author would have given Aal-muhammed a share in decision-making power, including, most importantly, the right to grant licenses; finding Aal-muhammed to be the author of a separate work incorporated within the larger collective work of the film would have given Aal-muhammed veto power over most future uses of the work.<sup>136</sup> In any event, the court chose an entirely different way of disposing of the case.

Acknowledging that some of the facts favored an interpretation of Aal-muhammed as a joint author (such as the copyrightability of Aal-muhammed’s contribution and the clear joint intent that Aal-muhammed’s work would become a part of the larger whole), the

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<sup>131</sup> *Id.* § 106A(a)(3).

<sup>132</sup> *Id.* § 101 (definition of a “work of visual art” expressly excludes works made for hire).

<sup>133</sup> *Aal-muhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

<sup>134</sup> *Id.* at 1229–30.

<sup>135</sup> See *supra* Part I.A.1 (listing and discussing these three different statutory tools for dealing with collaborations).

<sup>136</sup> Interestingly, while the opinion considers at length the possibility of joint authorship, it does not mention that the film might be a collective work. The reason for the omission is not clear.

court ruled that Aalmuhammed could not claim rights because he was not an author at all.<sup>137</sup> Reaching beyond the statute, the court ruled “that authorship is not the same thing as making a valuable and copyrightable contribution.”<sup>138</sup> According to the court, “as the number of contributors grows and the work itself becomes less the product of one or two individuals who create it without much help, the word [authorship] is harder to apply.”<sup>139</sup> Turning back to a nineteenth-century Supreme Court decision,<sup>140</sup> the court ruled that an author is the “master mind,” or “the person to whom the work owes its origin and who superintended the whole work.”<sup>141</sup> Thus, ruled the court, even if everything else about Aalmuhammed’s work appeared to enjoy the statutory protection of the Copyright Act, Aalmuhammed could claim no rights in the work, since he was not its author.<sup>142</sup>

*Aalmuhammed* is far from the only case to employ the strategy of denying rights on the grounds of lack of authorship. For instance, in *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*,<sup>143</sup> a court in the Southern District of New York upheld the rights of Alexander Lindsay, the director of a documentary film about salvaging the Titanic, against the claims of the actual photographers to the copyrighted footage of the salvage operation.<sup>144</sup> The court acknowledged that only the actual photographers were on the scene; Lindsay sat in a ship safely away from the wreck.<sup>145</sup> However, said the court, Lindsay “exercised such a high degree of control over a film operation—including the type and amount of lighting used, the specific camera angles to be employed, and other detail-intensive artistic elements of a film—such that the final product duplicates his conceptions and visions of what the film should look like,” and therefore he, and he alone was the “author.”<sup>146</sup>

These cases illustrate a judicial doctrine of authorship that potentially denies many contributors to a copyrighted work any share in the resulting rights. The doctrine denies rights as an author to anyone but the “auteur” or “master mind,” reserving for that one person all the rights of those working under him or her, even in the absence of a work-made-for-hire relationship. The doctrine is thus potentially

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<sup>137</sup> *Aalmuhammed*, 202 F.3d at 1236.

<sup>138</sup> *Id.* at 1232.

<sup>139</sup> *Id.*

<sup>140</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

<sup>141</sup> *Aalmuhammed*, 202 F.3d at 1233.

<sup>142</sup> *Id.* at 1231.

<sup>143</sup> No. 97-cv-9248 (HB), 1999 WL 816163 (S.D.N.Y. Oct. 13, 1999).

<sup>144</sup> *Id.* at \*7.

<sup>145</sup> *Id.* at \*5.

<sup>146</sup> *Id.*

extremely harsh in its results, denying any legal rights whatsoever even to very significant contributors like Aalmuhammed.

Perhaps due to the harshness of the result, the “master mind” theory of authorship is not universally accepted. In *Garcia v. Google, Inc.*, for example, the court rejected the applicability of the doctrine in determining whether Cindy Lee Garcia, an actress, could claim rights in her performance in the controversial film *Innocence of Muslims*.<sup>147</sup> Garcia had an extremely small role in the film, and her dialogue was redubbed in the final film.<sup>148</sup> Indeed, she objected to the inclusion of her performance in the film on the grounds that she was led to believe that she was acting for a different film themed on a desert adventure.<sup>149</sup> There can be little question that Garcia was not the “master mind” of the film. However, the court linked the authorship doctrine exclusively to the question of joint authorship, suggesting that where a contributor claimed ownership of a separate component within the larger work, the contributor need not be a master mind at all.<sup>150</sup> The dissent correctly observed that this interpretation was a novel reinterpretation of the judicial doctrine of authorship.<sup>151</sup>

## 2. *Implied License*

An entirely different judicial doctrine for dealing with problems of collaboration utilizes the concept of transfer, rather than authorship.<sup>152</sup> The strategy behind the judicial doctrine is to recognize separate copyrights in the separate contributions, but then find that the collaborators have granted permission (in the form of an implied license) to use their separately copyrighted contribution.<sup>153</sup>

To understand the way courts use implied licenses, it is valuable to look at the way the Copyright Act treats licenses more generally. Licenses under the Copyright Act come in two varieties: exclusive and nonexclusive. Exclusive licenses must be executed in a written instrument signed by the grantor.<sup>154</sup> Nonexclusive licenses, by contrast, do not require an agreement in writing.<sup>155</sup> Courts, therefore, can find that a nonexclusive license was created by the conduct of parties, even

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<sup>147</sup> 766 F.3d 929, 932 (9th Cir. 2014), *reh'g on banc granted*, 771 F.3d 647 (9th Cir. 2014).

<sup>148</sup> *Id.* at 932.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 933–34.

<sup>151</sup> *Id.* at 943–44 (Smith, J., dissenting).

<sup>152</sup> *See, e.g.,* *Effects Assocs. v. Cohen*, 908 F.2d 555, 555 (9th Cir. 1990) (considering “a transfer of copyright without a written agreement, an arrangement apparently not uncommon in the motion picture industry”).

<sup>153</sup> *See id.* at 558.

<sup>154</sup> 17 U.S.C. § 204(a) (2012).

<sup>155</sup> *Id.* § 101.



though no formal agreement was ever reached. Specifically, courts can interpret the parties' conduct to imply that they intended to create a license.<sup>156</sup> Implied nonexclusive licenses constitute a powerful tool in the hands of the courts. Courts have strong discretion when deciding whether to imply a license. They are not subject to any formal restrictions, and the consequences of implying a license are less drastic for the contributor than a finding of a complete transfer or assignment.<sup>157</sup> Since all implied licenses are nonexclusive by definition, the judicial recognition of an implied license in a particular dispute does not dramatically compromise the panoply of rights of the owner-grantor, who remains in possession of all the exclusive rights under the act sans the power to grant an *exclusive* license to another party.<sup>158</sup> Hence, implying a license provides courts with an attractive way to resolve difficult copyright cases.

As an illustration, consider the case of *Effects Associates, Inc. v. Cohen*.<sup>159</sup> Cohen, "a low-budget horror movie mogul," commissioned Effects Associates, a special effects studio, to produce special effects footage for the movie *The Stuff*.<sup>160</sup> The studio produced the footage as promised, but Cohen failed to pay the agreed upon consideration despite repeated demands from the studio.<sup>161</sup> At that point, Effect Associates rescinded the contract. Undeterred, Cohen used the footage in the movie.<sup>162</sup> Effect Associates sued for copyright infringement and breach of contract.<sup>163</sup> In a surprising decision, Judge Kozinski ruled that there was no copyright infringement since Cohen had an implied nonexclusive license to use the disputed footage in his movie.<sup>164</sup> This entitled Effects Associates to payment, but did not give Effects Associates the right to complain about past performances of the movie.<sup>165</sup>

Implied licenses can resolve some but not all of the problems of disputes among collaborators. Implied licenses are transfers just as surely as express licenses and are thus subject to all of the limitations of transfers, discussed *supra*. Some rights cannot be transferred at all, and some transfers are revocable.<sup>166</sup>

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<sup>156</sup> See *Effects Assocs.*, 908 F.2d at 555.

<sup>157</sup> See *id.* at 559 (noting that "[c]opyright ownership is comprised of a bundle of rights; in granting a nonexclusive license . . . [plaintiff] has given up only one stick from that bundle . . .").

<sup>158</sup> By definition, once a nonexclusive license is granted to some party, no one else can be given an exclusive license.

<sup>159</sup> 908 F.2d 555 (9th Cir. 1990).

<sup>160</sup> *Id.* at 555.

<sup>161</sup> *Id.* at 556.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 559.

<sup>165</sup> *Id.*

<sup>166</sup> See *supra* Part I.A.2.

Implied licenses also come with many question marks. The flexibility of implied licenses comes with a great deal of uncertainty. It is impossible to know in advance whether a court will imply a license or not or what its terms will be. For example, it is unclear why the court in *Effects Associates* decided to imply a license in favor of Cohen but refused to do the same in many other cases where a contractual relationship went sour.<sup>167</sup> Courts have been wary to find implied licenses, and they have used the doctrine infrequently.<sup>168</sup> Consequently, the precise conditions under which the doctrine applies are unknown.

The difficulty of determining whether an implied license exists is exceeded by the difficulty in determining the scope of the license once the court implies its existence. In *Effects Associates*, the court determined that the license was broad enough to cover incorporation of the footage in the movie and the movie's subsequent distribution.<sup>169</sup> But the court's opinion said little else about the implied license. How long would it last? How could it be terminated? Did it cover production of derivative works, such as distribution with a soundtrack dubbed in other languages? The key to this question should be interpreting the parties' behavior, but that is no easy task. Indeed, Judge Kozinski's finding that *Effects Associates* granted Cohen an implied nonexclusive license largely defies logic. Who else would want to license the special effects footage that was produced for Cohen's horror movie? In this case, the footage was tailor-made for Cohen's movie.<sup>170</sup> There is no general demand for this footage, and it cannot be used for any other film or audio-visual work. The footage was produced *exclusively* for Cohen's movie and has no use outside of it. It would have made a lot more sense to find an implied *exclusive* license in this case. But this option is barred by the Copyright Act.<sup>171</sup> Hence, the court, in its desire to find a way to allow Cohen to use the footage and not let the entire movie go to waste, had to force a square peg into a round doctrinal hole.

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<sup>167</sup> John G. Danielson, Inc. v. Winchester-Conant Props., Inc., 322 F.3d 26, 40–42 (1st Cir. 2003); Nelson-Salabes, Inc. v. Morningside Dev., LLC, 284 F.3d 505, 516–17 (4th Cir. 2002); Johnson v. Jones, 149 F.3d 494, 499–502 (6th Cir. 1998); Viacom Int'l Inc. v. Fanzine Int'l Inc., No. 98-CIV-7448 (KMW), 2000 WL 1854903, at \*3–5 (S.D.N.Y. July 12, 2000).

<sup>168</sup> Orit Fischman Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 275, 287 (2009).

<sup>169</sup> *Effects Assocs.*, 908 F.2d at 559.

<sup>170</sup> *See id.* at 556.

<sup>171</sup> *See* 17 U.S.C. § 204(a) (2012).

## II

WHAT COPYRIGHT LAW CAN LEARN FROM PROPERTY AND  
CORPORATE LAW

The problem of multiple potential stakeholders in a single asset is not exclusive to copyright law. Several legal areas have had to deal with the question of how to satisfy the claims of multiple contributors to a single venture. In fact, the default regime that applies to joint works under the Copyright Act is not original to copyright law. It was imported from the law of property. Property law has an extensive set of rules that apply to owners who simultaneously hold ownership shares in the same asset.<sup>172</sup> Copyright law borrows from these rules in viewing joint authors as tenants in common whose rights and obligations are largely similar to those tenants in common in real estate or chattels.<sup>173</sup>

Another legal area that routinely deals with multiple stakeholders is corporate law.<sup>174</sup> Although not much utilized by copyright law, corporate law doctrines provide a particularly fertile ground for finding solutions to the challenges presented by collaborative creation, as they regularly deal with the allocation of rights and powers among multiple collaborators in complex projects.<sup>175</sup>

In the discussion that follows, we will draw on insights from the theoretical literatures on both property law and corporate law, as well as on actual doctrines from both areas to propose a new legal approach to collaborative works.

## A. Property

1. *Commons and Anticommons*

A natural starting point for our theoretical foray into property is the body of scholarship concerning multiple potential claimants to a single asset.

Perhaps the most famous problem of multiple claimants arises in the context of the “commons.” The commons problem arises when there are many users of a single asset with unlimited rights to exploit it.<sup>176</sup> As property theorists such as Harold Demsetz and, subsequently, Garrett Hardin famously pointed out, assets with multiple owners will

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<sup>172</sup> Jaffe, *supra* note 3, at 1552–53.

<sup>173</sup> See H.R. REP. NO. 94-1476, at 121 (1976); Roberta Rosenthal Kwall, “*Author-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*,” 75 S. CAL. L. REV. 1, 57 (2001).

<sup>174</sup> See *infra* notes 265–270 and accompanying text.

<sup>175</sup> See Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1045–46 (2008) [hereinafter Bell & Parchomovsky I].

<sup>176</sup> Hardin, *supra* note 17, at 1244.

be subject to overuse and ultimately to “ruin.”<sup>177</sup> If everyone can fish in a lake without limit, there will soon be no fish. Intellectual property goods are as liable to commons problems as any other property, though the problems manifest themselves differently. Recognizing a copyright in every contributor would allow each to utilize the work as she saw fit, subject only to the rights of the other contributors to do the same. If everyone could license and use the copyrighted work without limit, the copyrighted asset would still be there after everyone’s use, but it would be worthless. Stated more generally, where intangible goods are prone neither to exhaustion nor to overuse, the commons problem takes the form of value dissipation.<sup>178</sup> If every individual who contributed to a film could use it however she wanted and license it to others, the studio would not be able to recoup its investment in the enterprise.

Yet, at the opposite end of commons lies a different problem. If lawmakers were to grant every contributor a veto power to block uses of the work, they would create an anticommons problem. As Frank Michelman initially noted,<sup>179</sup> and Michael Heller developed and demonstrated in a series of works,<sup>180</sup> a legal regime that recognizes blocking rights in multiple individuals invariably engenders an anticommons problem that leads to underutilization of assets—another form of value destruction.<sup>181</sup> Heller’s examples include the management of department stores in Russia after the collapse of communism.<sup>182</sup> Ownership and management of the stores were divided among thousands of worker-owners, who proved unable to make joint decisions.<sup>183</sup> The result, Heller shows, is the opposite of commons property; instead of excessive use rights leading to excessive use, excessive veto rights lead to excessive idleness of the asset.<sup>184</sup> As Heller and others note, particularly in the context of patents,<sup>185</sup> intellectual property rights are vulnerable to anticommons just like other property

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177 *Id.*

178 *See id.*

179 Michelman, *supra* note 16, at 6.

180 HELLER, *THE GRIDLOCK ECONOMY*, *supra* note 16, at 2; Heller, *Tragedy of the Anticommons*, *supra* note 16, at 624; Heller & Eisenberg, *supra* note 16, at 698.

181 Heller, *Tragedy of the Anticommons*, *supra* note 16, at 624.

182 *Id.* at 622–23.

183 *Id.* at 636–37.

184 *Id.* at 639–40.

185 Rebecca S. Eisenberg, *Noncompliance, Nonenforcement, Nonproblem? Rethinking the Anticommons in Biomedical Research*, 45 *HOUS. L. REV.* 1059, 1060–63 (2008); Heller & Eisenberg, *supra* note 16, at 698; Robert P. Merges, *A New Dynamism in the Public Domain*, 71 *U. CHI. L. REV.* 183, 186–87 (2004); Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting*, in 1 *INNOVATION POLICY AND THE ECONOMY* 119, 121 (Adam B. Jaffe et al. eds., 2001); Lisa Larrimore Ouellette, Note, *Access to Bio-Knowledge: From Gene Patents to Biomedical Materials*, 2010 *STAN. TECH. L. REV.* 1, 27 (2010).

rights.<sup>186</sup> Consider, for instance, a legal rule that gives each contributor an exclusive right in her contribution to the work, making that part her “sole and despotic dominion,” pace Blackstone.<sup>187</sup> Such a rule would make works wholly unusable on account of high transaction costs and strategic coordination problems.<sup>188</sup>

## 2. *Three Dimensions of Property*

How can lawmakers navigate this treacherous course between competing threats to the use of copyrighted assets? In a past work, we observed that property policymaking necessarily involves choices along three different dimensions: (1) number of owners, (2) the configuration of the asset, and (3) the scope of rights.<sup>189</sup>

Property law always involves defining some right or set of rights belonging to one or more owners in a given asset. We will show that our three-dimensional analysis is extremely useful for resolving problems raised by collaboration in copyright. Specifically, we will show that while collaborations are naturally conceived of as a challenge along the axis of owners, a solution can be found along the axis of rights.

Let us begin by describing the three dimensions of property more carefully. We start with the dimension of owners.<sup>190</sup> The number of owners can vary from one to infinity, and indeed many real-world assets are owned by multiple owners. Nonetheless, property luminaries such as William Blackstone,<sup>191</sup> and years later Harold Demsetz,<sup>192</sup> built their understandings of property on simplified single owner models, and for good reason.<sup>193</sup> When an asset has only one owner, the owner bears and receives, for the most part, the full marginal costs and benefits of her decisions concerning the asset’s management and

<sup>186</sup> Heller & Eisenberg, *supra* note 16, at 698.

<sup>187</sup> Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1129 (2009) (citations omitted).

<sup>188</sup> *See id.* at 1137–38.

<sup>189</sup> Bell & Parchomovsky I, *supra* note 175, at 1015.

<sup>190</sup> *See id.* at 1022 (stating the three dimensions of property as owner, asset, and dominion).

<sup>191</sup> *See id.* at 1015; Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 877 (2013) (“Blackstone’s widely cited assertion that property is ‘that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe’ brought [the ownership] model to fame.”).

<sup>192</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

<sup>193</sup> *See* Bell & Parchomovsky I, *supra* note 175, at 1015 (stating that Blackstone described the ideal number of owners in the optimal dominion as one); Demsetz, *supra* note 192, at 350, 354–56 (proposing that property rights develop to internalize externalities and that between the two idealized forms of ownership, communal ownership and private ownership, private ownership of land will internalize many of the external costs associated with communal ownership).

sale.<sup>194</sup> Consequently, a single owner is often motivated to make optimal decisions where multiple owners may not.<sup>195</sup> Why, then, do assets often have multiple owners?<sup>196</sup> Scholars such as Francesco Parisi<sup>197</sup> and Ben Depoorter<sup>198</sup> have powerfully demonstrated that over time property rights tend to fragment.<sup>199</sup> The most basic mechanism by which fragmentation occurs is inheritance.<sup>200</sup> Alice may own Blackacre as a single owner for her entire life. Upon her death, however, it is likely that her right will pass to more than one heir or devisee. As the number of transfers grows, the number of rightsholders increases as well, and with it the potential for conflicts. The same is true, of course, of expressive works. As we explained above,<sup>201</sup> copyright law recognizes the possibility of more than one owner.<sup>202</sup> Furthermore, since copyright protection lasts for seventy years past the life of the author, ownership in copyrights is almost certain to pass through several generations, leading to a high likelihood of fragmentation.<sup>203</sup>

The second dimension of property policy is assets, and, more specifically, the configuration of assets.<sup>204</sup> Consider tangible assets first. The physical dimensions of assets can be modified in response to changing social preferences. For example, a large tract of land may be repeatedly subdivided or combined with neighboring parcels. Naturally, the optimal size varies over time as the land is put to different uses. In an agricultural society the optimal tract size is likely larger

<sup>194</sup> See Demsetz, *supra* note 192, at 356 (asserting that private ownership concentrates the benefits and costs onto the private owner).

<sup>195</sup> See *id.* at 356–57 (contrasting the communal owners and private owners' incentives to economic externalities).

<sup>196</sup> Barzel takes the position that assets often have multiple owners. See YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 6 (2d ed. 1997). This is due to Barzel's economic, rather than legal, definition of ownership as the ability to extract value from an asset. See *id.* at 4–5.

<sup>197</sup> Francesco Parisi, *Entropy in Property*, 50 *AM. J. COMP. L.* 595 (2002); Francesco Parisi, *The Fall and Rise of Functional Property* 1, 10–11 (George Mason Univ. Sch. of Law, Law & Econ., Working Paper No. 05-38, 2005), available at [http://ssrn.com/abstract\\_id=850565](http://ssrn.com/abstract_id=850565).

<sup>198</sup> Ben W.F. Depoorter & Francesco Parisi, *Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes* 1, 18–20 (John M. Olin Ctr. for Studies in Law, Econ., & Pub. Policy, Working Paper No. 284, 2003), available at [http://digitalcommons.law.yale.edu/lepp\\_papers/284](http://digitalcommons.law.yale.edu/lepp_papers/284).

<sup>199</sup> See *id.* at 18 (explaining how the free creation of servitudes leads to the partitioning of property rights).

<sup>200</sup> See *id.*

<sup>201</sup> *Supra* Part I.A.

<sup>202</sup> *Supra* Part I.A.1.b–c.

<sup>203</sup> See Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law*, 9 *VA. J.L. & TECH.* 4, 44, 55 (2004). Indeed, the statute actually requires passing along certain rights to successors in interest in ways that are certain to lead to fragmentation. Consider, for example, the law's treatment of termination. In this context, see Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 *HARV. J.L. & TECH.* 49, 74–75 (2013).

<sup>204</sup> See Bell & Parchomovsky I, *supra* note 175, at 1022.

than in an urban society.<sup>205</sup> But size is not the only facet of an asset subject to change: there are other asset characteristics that can be bundled together or kept separate. Common interest communities are a case in point. Common interest communities offer a mix of private residential units and shared amenities.<sup>206</sup> By bundling together private units and shared amenities, common interest communities offer dwellers an especially attractive combination of asset traits as is evidenced by the growing popularity of this property form.<sup>207</sup> In a similar vein, buildings in large metropolitan areas often combine residential and commercial uses in order to maximize the value of the asset. Asset configuration plays an even bigger role in the case of chatels. Compare older generation cellular phones to more modern smart phones. Originally, cellular phones were a single-purpose communication device. Today, they are much closer to personal portable computers with multiple communication capabilities.<sup>208</sup>

Intangible goods, such as copyrights and patents, can be even more readily reconfigured. At present the underlying asset protected by copyright law is an original expression.<sup>209</sup> Protection does not extend to the ideas.<sup>210</sup> One could easily imagine, however, a legal system that affords protection to ideas, either on a stand-alone basis<sup>211</sup> or when they are coupled with original expression.<sup>212</sup> Moreover, as we noted earlier, copyright protection applies to the components of a copyrighted work, even when the work is a seamless whole.<sup>213</sup> For instance, a single photograph or greeting card may have various pro-

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<sup>205</sup> Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1332 (1993) (suggesting that bigger land parcels can minimize cost for grazing livestock on expansive group-owned pastures).

<sup>206</sup> See THOMAS W. MERRILL & HENRY E. SMITH, *THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY* 146 (2010).

<sup>207</sup> See *id.* at 150 (“[I]n many states today, more than one-half of new residential construction is organized in [common interest communities].”); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1183 (1999) (“Common-interest communities . . . are perhaps the most significant form of social reorganization of late twentieth-century America.”).

<sup>208</sup> Jennifer Lynn, *The Growing Smartphone Popularity Among Retail Consumers*, DROID REP. (May 15, 2014, 11:59 AM), <http://www.droidreport.com/growing-smartphone-popularity-among-retail-consumers-9654>.

<sup>209</sup> See Depoorter, *supra* note 203, at 53 (“Copyright law protects the expression of ideas.”).

<sup>210</sup> See *id.*

<sup>211</sup> See Oren Bar-Gill & Gideon Parchomovsky, *A Marketplace for Ideas?*, 84 TEX. L. REV. 395, 396 (2005) (suggesting that since inventions embody ideas, millions of ideas have indirectly become the subject of private property).

<sup>212</sup> See Abraham Bell & Gideon Parchomovsky, *The Evolution of Private and Open Access Property*, 10 THEORETICAL INQUIRIES L. 77, 93–95 (2009) [hereinafter Bell & Parchomovsky II] (recognizing the weaknesses of exclusion-based development of property rights over expressive content and introducing the open source movement as an attempt to preserve private rights with greatly diluted owner dominion).

<sup>213</sup> *Supra* Part I.A.1.c.

tected component elements, such as an overall “look and feel.”<sup>214</sup> The divisibility of copyrighted works is particularly striking when the expressive goods consist of multiple contributions, such as software, films, or even literary works. The law can grant protection to each contribution in its own right or only to the combined product of all the different combinations.<sup>215</sup> And, of course, the law may protect both the components and the work as a whole.<sup>216</sup>

The third and final dimension of property is rights, or dominion.<sup>217</sup> The scope of rights that attend property runs the gamut from a mere license to use an asset in a particular way all the way to full unfettered ownership of the asset with all relevant attendant powers.<sup>218</sup> In an oft-cited statement, William Blackstone famously described property as “the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”<sup>219</sup> But as many modern property rights theorists have shown, nothing in the definition of property rights implies full exclusion of others.<sup>220</sup> In reality, property regimes vacillate between the diodes of exclusion and management.<sup>221</sup> Some property doctrines, such as trespass, focus on exclusion, whereas others, such as nuisance, are designed around management regimes that do not involve exclusionary powers.<sup>222</sup> Management regimes typically confer upon the relevant rightsholders

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<sup>214</sup> See, e.g., *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (“total concept and feel” protected); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 454 (S.D.N.Y. 2005) (“creation of the subject” protectable).

<sup>215</sup> *Supra* Part I.A.1.b–c.

<sup>216</sup> *Supra* Part I.A.1.b–c.

<sup>217</sup> See Bell & Parchomovsky I, *supra* note 175, at 1022.

<sup>218</sup> See *id.* at 1030–31 (discussing property rights as a function of the three dimensions of ownership, asset configuration, and owner dominion which can be redefined at the request of property consumers, including constituents and lobbyists).

<sup>219</sup> *Id.* at 1015.

<sup>220</sup> See *id.* at 1015, 1023 (explaining that the Blackstonian ideal which includes total exclusion rights serves as the idealized goal of property definition but has proved an inaccurate reference point for property theorists).

<sup>221</sup> See Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853, 1855–56 (2012); Hanoeh Dagan & Michael Heller, *Conflicts in Property*, 6 THEORETICAL INQUIRIES L. 37, 41 (2005); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 974–75 (2004) [hereinafter *Exclusion and Property Rules*]; Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453, 454–55 (2002) [hereinafter *Exclusion Versus Governance*] (“[R]ights fall on a spectrum between the poles of exclusion and governance.”).

<sup>222</sup> See Dagan & Heller, *supra* note 221, at 40–41 (asserting that although the doctrinal home for property conflicts is trespass law if property is about exclusion, governance typifies property at least as much as exclusion does); *Exclusion and Property Rules*, *supra* note 221, at 992–93 (asserting that trespass is an exclusion regime while nuisance partakes both of an exclusionary and governance-like aspect); *Exclusion Versus Governance*, *supra* note 221, at 455 (asserting that nuisance law reflects governance strategy compared to trespass and property law).



various use rights that may be exercised subject to the rights of others, without granting any party full dominion over the relevant asset.<sup>223</sup> Other property regimes, such as time shares, involve partial exclusion powers, allowing each rightsholder to have full dominion of the asset, but only for a limited time.<sup>224</sup>

Insofar as dominion, or scope of rights, is concerned, intellectual property law offers an especially impressive range of permutations. Although the statutory default is to grant owners the full panoply of rights, owners have the power to reduce the scope of protection.<sup>225</sup> Organizations such as the Creative Commons offer copyright owners a menu of default settings that allows them to choose different packages of protection, all of which represent less protection relative to the scope of rights granted to them under the Copyright Act.<sup>226</sup> Similarly, in the patent context, scholars have proposed various alternative formulations of patent grants, proposing the enactment of “quasi-patents” that would avail only against direct competitors,<sup>227</sup> “research patents” for incomplete inventions,<sup>228</sup> and “null patents” for failed inventions.<sup>229</sup> In a recent paper, we offered a detailed blueprint for a bottom-up design of copyright and patent protection that allows rightsholders to tailor the level of protection to their individual needs.<sup>230</sup>

It should be evident that copyright is as open to three-dimensional solutions as any other field of property. Given the great amount of flexibility in shaping owner, asset, and dominion, lawmakers and judges can resolve problems along any of the three axes. Yet, in the case of multiple contributions to copyrighted works,

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<sup>223</sup> See *Exclusion and Property Rules*, *supra* note 221, at 979 (characterizing the governance strategy as one in which rights are delineated using signals that pick out and protect individual uses and user behavior).

<sup>224</sup> See Bell & Parchomovsky I, *supra* note 175, at 1022 n.31.

<sup>225</sup> Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1302–03 (1996) (suggesting that the property rule entitlements granted at the outset actually lead to a liability rule-like regime because members, and not the government, determine the menu of terms).

<sup>226</sup> See Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 296–97 (2007) (describing how a copyright owner could opt to retain all private rights that the Copyright Act grants him, dedicate his work to the public domain, or place his work within the semicommons provided by the Creative Commons); Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 199 (2004) (“The various Creative Commons licenses can thus be seen as a menu of waiver options from which creators themselves can select.”).

<sup>227</sup> Gideon Parchomovsky & Michael Mattioli, *Partial Patents*, 111 COLUM. L. REV. 207, 208 (2011).

<sup>228</sup> Dmitry Karshedt, *The Completeness Requirement in Patent Law*, 56 B.C. L. REV. (forthcoming 2015).

<sup>229</sup> Sean B. Seymore, *The Null Patent*, 53 WM. & MARY L. REV. 2041, 2062 (2012).

<sup>230</sup> Abraham Bell & Gideon Parchomovsky, *Reinventing Copyright and Patent*, 113 MICH. L. REV. 231 (2014).

legislators and judges to date have focused their efforts on only two of the three dimensions: the number of owners and the configuration of the asset.<sup>231</sup> The third dimension—the scope of rights—has been completely neglected.

The two cases of *Aalmuhammed*<sup>232</sup> and *Tasini*<sup>233</sup> provide a perfect illustration. In *Aalmuhammed*, the Ninth Circuit Court of Appeals viewed the case through the narrow prism of number of owners.<sup>234</sup> The issue at hand was whether to recognize *Aalmuhammed* as a coowner of the copyright in the film and thereby increase the number of owners from one to two.<sup>235</sup> Adhering to the default preference for a single owner, the court denied *Aalmuhammed*'s claim to a copyright in the film, even though it was agreed by all parties that he met the prerequisites of copyrightable contribution and intent.<sup>236</sup>

In *Tasini*, the court took a different route. The *Tasini* decision is all about asset configuration.<sup>237</sup> Instead of treating the digitized content of the *New York Times* daily editions as a unified collective work, the Court agreed that the contributions of the appellants, freelance journalists who wrote articles for the newspaper, should be spliced off from the rest of the paper content and accorded independent copyright protection on a free-standing basis.<sup>238</sup> In our terminology, the majority in *Tasini* redefined the asset by breaking up the digitized versions of the *Times* into two categories of independently copyrightable modules: content produced by employees of the *New York Times* and the content produced by freelance journalists. The copyright in the former was held by the *New York Times* based on the work-made-for-hire doctrine, whereas the copyright in the latter was held by the individual contributors, and could only be used by the *Times* in accordance with a restrictive license.<sup>239</sup>

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<sup>231</sup> See *infra* notes 232–245 and accompanying text.

<sup>232</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

<sup>233</sup> *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001).

<sup>234</sup> See *Aalmuhammed*, 202 F.3d at 1232 (analyzing whether *Aalmuhammed* qualifies as a coauthor).

<sup>235</sup> See *id.* at 1230.

<sup>236</sup> See *id.* at 1235 (concluding that although *Aalmuhammed* made very valuable contributions to the movie, that was not enough for coauthorship of a joint work).

<sup>237</sup> See *Tasini*, 533 U.S. at 487–88 (discussing the distinction between copyright in each separate contribution to a collective work and copyright in the collective work as a whole).

<sup>238</sup> See *id.* at 488 (holding that the print publishers and the electronic publishers infringed the copyrights of the freelance authors because the databases in question did not reproduce and distribute articles standing alone in context, as part of a collective work to which the author contributed, as part of any revision thereof, or as part of any later collective work in the same series).

<sup>239</sup> See *id.* at 498 & n.7 (holding that the freelance authors hold undisputed copyrights in the articles, and that the publishers would not have qualified as authors under the works-made-for-hire doctrine because the freelance authors were neither “employees” nor “commissioned” by the publishers through “a written instrument signed by both parties” indicating that the articles shall be considered “works made for hire”).

Both the *Aalmuhammed* court and the *Tasini* court appealed to property theory for help with the challenge at hand. Unfortunately, neither court saw the full picture. The *Aalmuhammed* court was worried in part that raising the number of owners above one would create a commons problem that may lead to value dissipation.<sup>240</sup> The court feared that giving *Aalmuhammed* a copyright in the movie would turn him into a coequal owner with the movie studio with the same use rights and exclusionary powers.<sup>241</sup> It therefore decided to deny his ownership claim.<sup>242</sup>

The *Tasini* court faced an opposite challenge. It sought a way to give the free-lance journalists who made contributions to the *New York Times* a second bite of the apple. The Court vindicated their separate copyrights and imposed a restrictive interpretation on the mandatory collective work license that accompanied the publication of their articles in a newspaper.<sup>243</sup> The Court was clearly of the opinion that this result is desirable from a distributive standpoint and would reinforce initial incentives to create.<sup>244</sup> Hence, the Court separated the freelancers' contributions from the rest of the journalistic content, bestowing a sole-owner status on each of the freelancers with respect to subsequent uses of the contributions outside of the print edition of the *New York Times*.<sup>245</sup> Unfortunately, the decision opened a Pandora's box by giving contributors to collective works the ability to block subsequent uses of the content contemplated by the compiler of the collective content. From a property perspective, the *Tasini* court created an anticommons problem that property policymakers typically strive to avoid.

Both courts erred in overlooking the third dimension of scope of rights in forming their decisions. The *Aalmuhammed* court could have recognized a more limited set of rights than a full-fledged set of copyright rights described in section 106 of the Copyright Act.<sup>246</sup> The court did not have to give *Aalmuhammed* the power to authorize distribution of the film or the right to make derivative works. Instead, it could have given him a right to a certain percentage of the proceeds from the movie. Similarly, the *Tasini* court did not have to give such a narrow interpretation to the collective work license as to effectively splice off the freelancers' parts from the journalistic content as a whole. Rather, the Court could have granted the freelancers a limited right to royalties, which was precisely what they sought.

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<sup>240</sup> *Aalmuhammed*, 202 F.3d at 1235.

<sup>241</sup> *See id.*

<sup>242</sup> *Id.* at 1236.

<sup>243</sup> *Tasini*, 533 U.S. at 488.

<sup>244</sup> *See id.* at 501–03.

<sup>245</sup> *See id.* at 504–06.

<sup>246</sup> 17 U.S.C. § 106 (2012).

Copyright law's conception of the rights of joint authors is taken directly from property law's rules on tenancy in common.<sup>247</sup> Each owner has an undivided right in the whole that can be transferred and otherwise exercised without limitation, subject only to the duty to account for profits to other owners.<sup>248</sup> But this allocation of rights among owners is just one of many possible ways to define property rights. There are many property forms that allocate rights unequally among owners. For instance, where ownership of an asset is divided among present and future interest holders, only the present interest owners have a current right of possession,<sup>249</sup> while future interest owners must suffice with exercising their rights to block "waste" of the asset.<sup>250</sup>

### 3. Trusts

Of particular interest to us is the instrument of trust. The creation of a trust results in the bifurcation of ownership into a legal interest and an equitable interest.<sup>251</sup> The creator, or settlor, of the trust transfers her title to a trustee, who thereupon becomes the owner of the legal title.<sup>252</sup> At the same time, however, the creator appoints beneficiaries, vesting in them an equitable title to the benefits to be accrued from the assets or money that were put in trust.<sup>253</sup> The settlor may spell out the rights of the beneficiaries and duties of the trustees in an instrument of trust.<sup>254</sup> However, the law also imposes a mandatory relationship between trustee and beneficiary: trustees owe a fiduciary duty to manage the trust assets for the benefit of the beneficiaries with a high degree of fidelity.<sup>255</sup> One of the primary purposes of the unique ownership structure engendered by trusts is to ensure superior management of assets by concentrating all management decisions in the hands of managers who possess the requisite expertise for the task, while, at the same time, securing the benefit of that expertise for the individuals or entities whom the settlor of the trust held

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<sup>247</sup> H.R. REP. NO. 94-1476, at 121 (1976); Kwall, *supra* note 173, at 57.

<sup>248</sup> Julie Katzman, Note, *Joint Authorship of Commissioned Works*, 89 COLUM. L. REV. 867, 875 (1989).

<sup>249</sup> See Gideon Parchomovsky & Peter Siegelman, *Cities, Property, and Positive Externalities*, 54 WM. & MARY L. REV. 211, 226 (2012).

<sup>250</sup> See Lydia Pallas Loren, *Abandoning the Orphans: An Open Access Approach to Hostage Works*, 27 BERKELEY TECH. L.J. 1431, 1449–50 (2012); Parchomovsky & Siegelman, *supra* note 249, at 226; Deepa Varadarajan, *Improvement Doctrines*, 21 GEO. MASON L. REV. 657, 671 (2014).

<sup>251</sup> Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 653 (2014).

<sup>252</sup> *Id.* at 658.

<sup>253</sup> *Id.* at 653–54.

<sup>254</sup> See *id.*

<sup>255</sup> GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES, § 543 (2014).

dear.<sup>256</sup> The beneficiaries, in other words, are entitled to receive the residual benefit arising from the trust.<sup>257</sup>

The separation of legal and equitable ownership has many advantages—it concentrates all assets in the hands of a single owner, it guarantees superior management of the trust funds, it carries out the will of the settlor, and guarantees a stream of income to the beneficiaries—but it also has an obvious downside: it gives rise to an agency problem. Although the trustee is remunerated for her labor, there is always a risk that she might try to increase her reward at the expense of the beneficiaries, either by shirking on her duties or by diverting funds from the beneficiaries to herself. To address this problem, the law imposes a fiduciary duty on the trustee to act in good faith to further the interests of the beneficiaries in accordance with the terms of the trust instrument.<sup>258</sup> Breach of the duty allows the settlor and the beneficiary to seek redress against the trustee.<sup>259</sup>

As we shall show, adapting the trust to the needs of collaborative copyright works can provide an alternative ownership structure that better meets the needs of contributors to collaborative works as well as the interests of society in production and exploitation of creative works of expression.<sup>260</sup>

## B. Corporate Law

A second source of guidance for our proposal comes from corporate law.

Corporations, by their very design, embody the ideal of separation of ownership and control. By recognizing corporations as legal entities, corporate law enables the concentration of all corporate assets in the hands of a fictional single owner, namely the corporation itself.<sup>261</sup> The corporation, in turn, may be owned by one or multiple owners who receive shares of the enterprise.<sup>262</sup> The shareholders, qua shareholders, do not run the daily operations of the corporate entity.<sup>263</sup> Rather, they appoint a board of directors that, in turn, elects a

<sup>256</sup> John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 637–38 (1995); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 633–34 (2004).

<sup>257</sup> Sitkoff, *supra* note 256, at 646–47.

<sup>258</sup> GEORGE GLEASON BOGERT ET AL., *supra* note 255, § 543.

<sup>259</sup> Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 776–77 (2000); Sitkoff, *supra* note 256, at 679–80; Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565, 572–73 (2003).

<sup>260</sup> *Infra* Part II.C.

<sup>261</sup> John Armour et al., *The Essential Elements of Corporate Law: What Is Corporate Law?*, 6 (Discussion Paper No. 643, 2009), available at [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Kraakman\\_643.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_643.pdf).

<sup>262</sup> *Id.* at 11.

<sup>263</sup> *Id.* at 12.

management for the corporation.<sup>264</sup> The board of directors not only selects the officers of the corporation but also determines their compensation.<sup>265</sup> The shareholders' ownership is thus reduced, in practice, to a right to profits from the enterprise while control is shared among directors and managers.<sup>266</sup>

The structure of corporations gives rise to several conflicts of interest, or agency costs. The first, and most famous one, is between the management and the shareholders.<sup>267</sup> The division of management and control raises the specter that the management might act to enhance its narrow self-interests at the expense of the shareholders.<sup>268</sup> For example, the management can increase its compensation, hire friends and relatives, shirk on the job, or engage in "empire building"—practices that increase the size of the corporation, as opposed to its profits.<sup>269</sup> The second conflict of interest in this is between bondholders and shareholders. Both groups have a claim to the corporate profits, but while the claim of the bondholders is fixed (or invariant) and is determined in advance, the payoff to the shareholders depends on the amount of the corporate profits.<sup>270</sup> Thus, shareholders typically prefer to see the corporation take on more risk that bondholders would rather avoid.<sup>271</sup> Finally, there is a conflict of interest between controlling shareholders and minority shareholders. The concern, in this case, is that the controlling shareholders may take advantage of their power to obtain private benefits from the corporation through self-dealing. For example, the controllers may direct the corporation to sell corporate assets below market price to other companies the controllers own.<sup>272</sup>

Corporate law employs a wide array of strategies to minimize those costs. The officers of the corporation owe a duty of care and a duty of loyalty to the corporation, which puts them under a legal obligation to do the best they can to further the interests of the shareholders.<sup>273</sup> Furthermore, the management is subject to constant

<sup>264</sup> *Id.*

<sup>265</sup> Matthew Farrell, Note, *A Role for the Judiciary in Reforming Executive Compensation: The Implications of Securities and Exchange Commission v. Bank of America Corp.*, 96 CORNELL L. REV. 169, 173 (2010).

<sup>266</sup> Bell & Parchomovsky I, *supra* note 175, at 1045–46.

<sup>267</sup> See Lucian Arye Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSP. 71, 71–72 (2003).

<sup>268</sup> *See id.*

<sup>269</sup> *See id.* at 72.

<sup>270</sup> Clifford W. Smith, Jr. & Jerold B. Warner, *On Financial Contracting: An Analysis of Bond Covenants*, 7 J. FIN. ECON. 117, 118–19 (1979).

<sup>271</sup> *Id.*

<sup>272</sup> David M.W. Harvey, *Bondholders' Rights and the Case for a Fiduciary Duty*, 65 ST. JOHN'S L. REV. 1023, 1031 (1991).

<sup>273</sup> *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009).

monitoring from the board of directors.<sup>274</sup> The directors, too, owe a fiduciary duty to the shareholders (or, more precisely, to the corporation).<sup>275</sup> Furthermore, the shareholders can appoint their representation on the board of directors.<sup>276</sup> Of course, shareholders can also protect themselves from managerial abuse in any single corporation by diversifying their portfolio of investments.<sup>277</sup>

To secure bondholders (and other creditors) against excessive risk, a wide array of contractual measures is employed to constrain the ability of the shareholders to engage in risky investments.<sup>278</sup> Finally, the law imposes various restrictions on self-dealing and incorporates various protections of minority shareholders to address the potential for abuse by controlling shareholders.<sup>279</sup>

Despite the various agency costs inherent to corporate structures, the separation of management and ownership in corporations gives rise to important advantages. First of all, by separating capital from management, it allows individuals with strong managerial skills to put their talents at the service of capital owners.<sup>280</sup> In addition, corporations enable capital owners with different risk preferences to take different stakes in corporations in accordance with their risk preferences.<sup>281</sup> For example, risk-seeking individuals can invest in shares and even options, while risk-averse individuals can become bondholders. Finally, as Ronald Coase famously pointed out, corporations offer a superior alternative to market transactions when transaction costs are high.<sup>282</sup> Coase observed that production of goods or services falls into one of two paradigms: markets and corporations.<sup>283</sup> Markets operate on the basis of voluntary exchange via contracts.<sup>284</sup> They can allocate resources to their highest-value users when transaction costs are sufficiently low.<sup>285</sup> When transaction costs are high,

<sup>274</sup> James D. Cox & Nis Jul Clausen, *The Monitoring Duties of Directors Under the EC Directives: A View from the United States Experience*, 2 DUKE J. COMP. & INT'L L. 29, 31 (1992); George W. Dent, Jr., *The Revolution in Corporate Governance, the Monitoring Board, and the Director's Duty of Care*, 61 B.U. L. REV. 623, 623 (1981).

<sup>275</sup> Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 464 (2009); Claire A. Hill & Brett H. McDonnell, *Disney, Good Faith, and Structural Bias*, 32 J. CORP. L. 833, 835 (2007).

<sup>276</sup> Lawrence A. Hamermesh, *Director Nominations*, 39 DEL. J. CORP. L. 117, 118 (2014).

<sup>277</sup> Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 108, 111–12 (1989).

<sup>278</sup> Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 302–03 (1983).

<sup>279</sup> See Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CALIF. L. REV. 393, 401–08 (2003).

<sup>280</sup> Fama & Jensen, *supra* note 278, at 315.

<sup>281</sup> *Kusner v. First Pa. Corp.*, 395 F. Supp. 276, 282 (E.D. Pa. 1975).

<sup>282</sup> R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390–92 (1937).

<sup>283</sup> *See id.* at 387–89.

<sup>284</sup> *See id.* at 390–91.

<sup>285</sup> *Id.* at 389.

however, markets will not operate optimally as a mechanism for resource allocation.<sup>286</sup> Corporations, on the other hand, are hierarchical structures where decisions are made by managerial fiat.<sup>287</sup> In other words, production and allocation decisions within corporations do not require consent, and hence, they are not affected by market transaction costs.<sup>288</sup>

As a rule, decisions within corporations are made by the management and do not require approval from the board or the general assembly of shareholders.<sup>289</sup> In fact, shareholders are not involved in the day-to-day management of the corporation. Their input is required only in exceptional cases, such as amendment of the corporate articles or bylaws, approval of mergers and acquisitions, and the sale of assets.<sup>290</sup> Typically, decisions are made by a simple majority.<sup>291</sup> However, in special cases, such as sale of assets, the law imposes a super-majority requirement.<sup>292</sup> In even more extreme cases in which self-dealing is involved, the law imposes a requirement for a majority-of-a-minority approval.<sup>293</sup> The structures and rules of corporate law inform our proposal for reforming copyright law.<sup>294</sup>

Before moving on to our own proposal, we should take notice of a different perspective on the insights corporations can give us into collaborative production of copyrighted works. In a recent important contribution,<sup>295</sup> Anthony Casey and Andreas Sawicki look to the theoretical literature on industrial organization and on the allocation of rights within firms, pioneered by Ronald Coase<sup>296</sup> and developed by Oliver Williamson,<sup>297</sup> Oliver Hart,<sup>298</sup> and Armen Alchian and Harold Demsetz,<sup>299</sup> to explain and criticize current law regarding copyright

<sup>286</sup> *Id.* at 390–91.

<sup>287</sup> *See id.*

<sup>288</sup> *Id.* at 391.

<sup>289</sup> *See generally* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 251 (1999) (describing management's virtually absolute control over a corporation's internal matters).

<sup>290</sup> *See id.* at 311; Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 418 (2006).

<sup>291</sup> *See* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 400 (1983).

<sup>292</sup> *See id.* at 399.

<sup>293</sup> Goshen, *supra* note 279, at 402.

<sup>294</sup> *See generally* Zohar Goshen, *Controlling Strategic Voting: Property Rule or Liability Rule?*, 70 S. CAL. L. REV. 741, 748 n.20 (1997) (explaining the various majority requirements in corporate law within the Calabresi-Melamedian property-liability rules framework).

<sup>295</sup> *See* Casey & Sawicki, *supra* note 3, at 1687.

<sup>296</sup> *See* Coase, *supra* note 282, at 389.

<sup>297</sup> Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112, 113–14 (1971).

<sup>298</sup> OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE 56–61 (1995).

<sup>299</sup> Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 785–95 (1972).



ownership. Casey and Sawicki do not focus on doctrines in corporate law.<sup>300</sup> Rather, they aim to utilize the theoretical insights in other fields to devise a framework for determining how copyright doctrines affect the organizational framework in which copyrighted works are produced.<sup>301</sup>

Beginning with the observation that firms are hierarchical organizations, Casey and Sawicki note that production within firms predominantly relies on managerial command and control.<sup>302</sup> The decision-making power in firms is held by the management.<sup>303</sup> The management is charged with allocating tasks among employees, assessing and monitoring their performance, and rewarding and penalizing performance.<sup>304</sup> Building on the firm analogy, Casey and Sawicki argue for the importance of concentrating ownership and control in the hands of the single person or entity that can best supervise the creative process and its inputs.<sup>305</sup> While Casey and Sawicki acknowledge that different ownership regimes are appropriate for different modes of production of intellectual products, they call for the use of broad, derivative works rights and the work-made-for-hire doctrine when the law wishes to encourage collaborative cooperation.<sup>306</sup> Noting that both doctrines concentrate ownership and control in the hands of a single person or entity, Casey and Sawicki argue that wider use of the doctrines would improve *ex ante* incentives to create and minimize strategic problems *ex post*.<sup>307</sup>

Although we share Casey and Sawicki's concerns and we draw inspiration from many of the same theoretical sources, we arrive at a radically different conclusion. We propose a policy solution that, to a large degree, may be viewed as antithetical to those espoused by Casey and Sawicki.

### C. Copyright Trusts

In this subpart, we propose a new copyright structure that courts would be able to apply, at their discretion, to resolve disputes concerning works consisting of multiple contributions. Before delving into the details of our proposal, it is important to emphasize two things. First, the regime we propose would be judicially administered and not reliant upon statutory amendments. It therefore would add to, rather than replace, the existing regimes. Courts would be at liberty in

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<sup>300</sup> See Casey & Sawicki, *supra* note 3, at 1690.

<sup>301</sup> See *id.*

<sup>302</sup> See *id.* at 1695–99.

<sup>303</sup> See *id.* at 1708–09.

<sup>304</sup> See *id.* at 1695–96.

<sup>305</sup> See *id.* at 1702.

<sup>306</sup> See *id.* at 1721–22, 1727.

<sup>307</sup> See *id.* at 1693, 1723–26, 1729–35.

appropriate cases to apply the doctrines of work made for hire, implied license, joint ownership, and the other rules we discussed earlier.<sup>308</sup> Our goal is to add another instrument to the toolkit of copyright lawmakers—one which, we argue, provides an ownership structure that better meets the needs of incentivizing production and promoting optimal exploitation of creative works. Second, and relatedly, our proposed framework is open to contributors as a contractual choice. Collaborators could choose to contract in advance into our proposed structure; after the fact, of course, courts could still impose the structure by judicial decision in the absence of a contractual arrangement.

Our framework is designed to allow courts to achieve a more equitable and efficient resolution of disputes concerning rights in works resulting from multiple contributions. As in trust and corporate structures, at the core of our proposal lies the idea of separation between ownership and control. In our view, a work may have multiple owners, but only one among them should have the power to make decisions about its economic exploitation.<sup>309</sup> All other owners would be entitled to monetary remuneration but would lack managerial power. The owner with the decision-making power would be called “owner-trustee.” The other owners would be termed “owner-beneficiaries.” The chosen terminology is not accidental. Similar to trust structures, the owner-trustee would owe a fiduciary duty to the owner-beneficiaries and would have to act in good faith to further their interests. Furthermore, our proposal incorporates various mechanisms to prevent the owner-trustee from enriching herself at the expense of the beneficiary-owners. Some of the protections we provide are taken from standard property law. For instance, owner beneficiaries would have the power to bring an action for accounting against the owner-trustee, as well as sue for waste.<sup>310</sup> Other defenses are taken from corporate law and include restrictions on self-dealing and on other forms of “tunneling” (i.e., transactions intended to transfer wealth from the owner-beneficiaries to the owner-trustee or her relatives).<sup>311</sup>

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<sup>308</sup> See *supra* Part I.

<sup>309</sup> Our view echoes what Robert Merges wrote about how to approach useful knowledge held by traditional communities. Merges noted that in such cases, the traditional leaders of the group represent the entire community and protect the interests of its individual members. Merges suggests that “[w]hat is needed in cases of dispersed creativity is to identify similar representative people or entities.” Merges, *supra* note 3, at 1190.

<sup>310</sup> For descriptions of the accounting and waste remedies, see GEORGE GLEASON BOGERT ET AL., *supra* note 255, §§ 861, 967.

<sup>311</sup> For a description of laws of self-dealing and “tunneling,” see Vladimir Atanasov et al., *Law and Tunneling*, 37 J. CORP. L. 1, 2–3 (2011); Charles Bryan Baron, *Self-Dealing Trustees and the Exoneration Clause: Can Trustees Ever Profit from Transactions Involving Trust Property?*, 72 ST. JOHN’S L. REV. 43, 45–57 (1998).

Interestingly, the Copyright Act already contains a reference to “beneficial ownership.” According to section 501 of the Copyright Act, the “beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right . . . .”<sup>312</sup> While “beneficial owner” is not defined by the Act, Nimmer’s treatise acknowledges that “[p]resumably, reference is intended to the general law of trusts.”<sup>313</sup> Courts have utilized the concept of “beneficial ownership” in relation to the narrow question addressed by section 501, namely when nonowners have the right to bring suit. In particular, courts have generally held that “an author who assigns his legal rights to a work in exchange for royalties from its exploitation has a beneficial interest sufficient for statutory standing under § 501(b).”<sup>314</sup> Our proposal would take the concept of beneficial ownership and apply it more generally to questions of copyright ownership.

To operationalize our proposal, a court would have to make two decisions. First, it would have to decide whom, among the various contributors, to appoint an owner-trustee. As a rule, the owner-trustee should be the individual or entity that added the most value to the work and therefore has the highest economic stake in the success of the work. In some special cases, the court may assign the role of an owner-trustee to a smaller contributor if she has special managerial skills or is uniquely positioned to exploit the work commercially. Often, the decision whom to appoint an owner-trustee would be rather straightforward. In a case like *Aalmuhammed*,<sup>315</sup> for example, it is clear that the movie studio should be considered the owner-trustee. The movie studio, Warner Brothers, not only made a much greater investment in the work, but also has vastly superior experience than Aalmuhammed in the promotion of movies. At other times, though, the choice may be more difficult. But our framework is flexible enough to accommodate even those cases.

The second decision a court would have to make is how to divide ownership shares among the various contributors involved. The ownership shares (whether trustee-owner or beneficial-owner), in turn, would determine the financial rewards of each contributor. For example, if the court were to decide that a certain contributor is entitled to a thirty percent ownership share, she would be entitled to receive thirty percent of the proceeds generated by the work. In determining the ownership share, the court would take into account the relative

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<sup>312</sup> 17 U.S.C. § 501(b) (2012).

<sup>313</sup> 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.02 (rev. ed. 2012).

<sup>314</sup> *Smith v. Casey*, 741 F.3d 1236, 1241 (11th Cir. 2014).

<sup>315</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

contribution of each of the parties to the final product. Once again we will use the facts of *Aalmuhammed* to illustrate how this should work. Although Aalmuhammed clearly contributed to the movie, his contribution was a small part of the final product. Aalmuhammed made a few small conceptual contributions to the movie—for example, he introduced several small changes to the script to make depictions of Muslim prayer more authentic.<sup>316</sup> Yet, it is clear that Aalmuhammed was not the mastermind of the movie. He did not contribute to the overall plot or to many other aspects of the movie as a whole. Given that Aalmuhammed did not come up with the concept of the movie, did not direct it or produce it, and that his contributions were relatively minor both in terms of importance and scope, his ownership stake should probably be less than one percent. While a fraction of a percent is a relatively small ownership stake, it must be kept in mind that the movie grossed nearly \$50 million.<sup>317</sup>

Once a court selected the owner-trustee and assigns ownership shares to all the parties involved, the owner-trustee would have sole discretion as to how to manage the work in order to maximize its value for all the owners. The main right of the beneficiary-owners would be to receive a prorated share, commensurate with their ownership interests from the proceeds generated from the work. Nonetheless, if the owner-trustee failed to act in good faith to further this goal, the owner-beneficiaries would have the power to commence legal action to compel the owner-trustee to undertake different courses of action. For instance, the owner-beneficiaries would be able to sue the owner-trustee for waste if she were to destroy the work (or copies thereof) or engage in other practices that depleted the value of the work. To prevent frivolous suits, we propose that courts adopt the business judgment rule in adjudicating suits against owner-trustees.<sup>318</sup> The business judgment rule, while respecting decisionmakers' fiduciary duties, also grants decisionmakers a high degree of deference in exercising their judgment regarding commercial matters.<sup>319</sup> This standard of review would strike the right balance between the interests of the parties. On the one hand, it would give the owner-trustee sufficient elbow room to operate. On the other hand, it would provide the

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<sup>316</sup> See *id.* at 1230.

<sup>317</sup> *Malcolm X*, BOX OFF. MOJO, <http://www.boxofficemojo.com/movies/?id=malcolmx.htm> (last visited Apr. 15, 2015).

<sup>318</sup> See Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 88 (2004).

<sup>319</sup> See *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 n.17 (Del. 1994) (stating that the business judgment rule permits the court to accord "great deference to the substance of the directors' decision" and "not invalidate the decision [or] examine its reasonableness"); Ralph A. Peeples, *The Use and Misuse of the Business Judgment Rule in the Close Corporation*, 60 NOTRE DAME L. REV. 456, 457 (1985).

owner-beneficiaries protection against bad faith acts of mismanagement and intentional abuse.

As in the context of trusts and corporations, the owner-trustee's fiduciary duties would give owner-beneficiaries legal causes of action. The owner-beneficiaries would be able to block the owner-trustee from engaging in self-dealing, for example.<sup>320</sup> To illustrate, owner-beneficiaries would be able to obtain an injunction against the owner-trustee should she attempt to license the work to another company she owns at a submarket price. However, they would not be able to block standard licensing transactions and would not have the right to file for partition of the work—either by sale or in kind.<sup>321</sup>

Our proposal offers several important advantages relative to the existing doctrine. First, in keeping with the constitutional ambition to encourage the production of original works,<sup>322</sup> our proposal guarantees that each contributor would be rewarded proportionately to her contribution unless the parties contractually agreed otherwise. The implementation of our proposal preserves the contractual baseline that characterizes current doctrines, while providing assurance to authors, for whom complete contracting is impractical or inefficient, that their labor would not go unremunerated. By giving authors an ownership stake that is commensurate with their contribution, our proposal enhances both productive efficiency and fairness. As far as productive efficiency is concerned, our proposal would have a salutary effect on the creation of expressive works in high transaction cost environments and especially in cases of amateur authors who are not familiar with the legal intricacies of the Copyright Act.

The second advantage of our proposal is that it improves the use and commercial exploitation of collaborative works after their creation. Our proposal largely takes away the power of individual contributors to veto uses of collaborative works or to deplete works of all commercial value by splicing off their contribution from the rest of the work.<sup>323</sup> Relative to its doctrinal alternatives, our framework only minimally relies on property rule protections in the form of injunctions and employs instead, liability rule protection in the form of

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<sup>320</sup> Baron, *supra* note 311, at 43.

<sup>321</sup> For descriptions of owners' rights to partition, see *Flood v. Kalinyaprak*, 2004 MT 15, 84 P.3d 27, 32 (Mont. 2004); Jaffe, *supra* note 3, at 1564 n.99. Functionally, the court's ruling in *Garcia v. Google, Inc.* gave Garcia a right to partition the film in kind. 766 F.3d 929 (9th Cir. 2014), *reh'g on banc granted*, 771 F.3d 647 (9th Cir. 2014). This would not be possible under our proposal.

<sup>322</sup> Michael B. Gerdes, Comment, *Getting Beyond Constitutionally Mandated Originality as a Prerequisite for Federal Copyright Protection*, 24 ARIZ. ST. L.J. 1461, 1462 (1992).

<sup>323</sup> As we noted *supra* Part II.A.1, separating works into component parts essentially creates anticommmons likely to undermine productive use of the work.

monetary payment to be decided by the court.<sup>324</sup> An important beneficiary from our proposal is the general public who will not be adversely affected by conflicts among authors.

Third, and finally, our proposal has the potential to reduce adjudicative costs. Admittedly, the implementation of our proposal requires judicial action. We are also cognizant of the fact that the two determinations courts would need to make—appointing an owner-trustee and determining the ownership stakes of all contributors—may not always be straightforward. That said, it must be borne in mind that our proposal is meant as a supplement, not a replacement, to existing doctrines. We do *not* argue that it should be administered in all cases. Quite the contrary, we contend that our solution should be reserved to those cases in which it can be administered at a sufficiently low cost. Specifically, courts should turn to our solution when the owner-trustee is easily identifiable and the ownership stakes of the parties can be cheaply determined. When these conditions obtain, our proposal holds the promise of economizing on judicial resources. Obviously, this is also an important limitation on our proposal: when the twin determinations necessary to operationalize our proposal cannot be made cost effectively, courts would be well advised to turn to other alternatives.

### III

#### OBJECTIONS

In this Part we anticipate and address four potential objections to our proposal. The first one consists of the argument that all rights (and disagreements) concerning the allocation of rights in collaborative works should be resolved contractually. The second objection is that courts are ill fitted to assess the relative contributions of contributors to collaborative works. The third objection is that current doctrine cannot accommodate our proposal and therefore it cannot be implemented without legislative reform. The fourth and final objection is that our proposal is incomplete and cannot resolve all collaboration problems. We address each of the four objections in turn and show that none of them presents an insurmountable challenge to our proposal.

#### A. The Contractual Perspective

At the heart of the contractual objection lies the idea that private ordering via contracts should control the allocation of rights in

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<sup>324</sup> For a discussion of the distinction between property-rule and liability-rule protection, see Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 715–16 (1996).

collaborative works. The theoretical foundation of this idea can be traced back to the Coase theorem. In his seminal, *The Problem of Social Cost*, Roland Coase demonstrated that in a world without transaction costs, contracts would lead to allocative efficiency irrespective of the law.<sup>325</sup> Subsequent law and economics writers have pushed Coase's core insight further and argued for the primacy of contracts (or markets) as the policy instrument of choice as long as transaction costs are not prohibitive.<sup>326</sup> Several contract theorists have even called for the adoption of penalty defaults—i.e., statutory gap-fillers that diverge the arrangements the parties would have selected for themselves had they contracted—in order to encourage parties to reach ex ante agreements that determine their rights and duties vis-à-vis one another.<sup>327</sup> In keeping with this approach, one may argue that because our framework would allow courts to reach efficient and equitable results, ex post, it would undermine the incentive of creators to determine their rights ex ante.

Our first response to this argument is to remind our readers that nothing in our proposal denies creators the opportunity to determine their respective rights contractually. Indeed, as we emphasized,<sup>328</sup> courts should defer to the contractual arrangements reached by the parties and will only be able to use our framework when there is no agreement among the relevant parties. Second, contracts can only be relied upon to achieve an efficient allocation of resources when transaction costs are sufficiently low.<sup>329</sup> In the case at hand, this condition does not obtain: transaction costs are often high. To begin with, collaborative works are often created by multiple parties. Multiparty agreements typically involve higher coordination costs and as the number of parties grows, so does the likelihood of an impasse. Moreover, contributors to collaborative works are often not familiar with the intricacies of copyright law and find it prohibitively costly to learn the doctrinal details. As Professor Robert Ellickson famously established,<sup>330</sup> when the cost of learning is high, members of various com-

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<sup>325</sup> R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15–17 (1960).

<sup>326</sup> ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 93 (6th ed. 2012); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 90–93 (1991); William Barnett II et al., *The Paradox of Coase as a Defender of Free Markets*, 1 N.Y.U. J.L. & LIBERTY 1075, 1078 (2005).

<sup>327</sup> Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 624 (1990).

<sup>328</sup> *Supra* Part II.C.

<sup>329</sup> Eirik G. Furubotn, *General Equilibrium Models, Transaction Costs, and the Concept of Efficient Allocation in a Capitalist Economy*, 147 J. INSTITUTIONAL & THEORETICAL ECON. 662, 683–84 (1991).

<sup>330</sup> Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 685–86 (1986).

munities tend to fall back on social norms and shared understandings.<sup>331</sup> A similar dynamic can be discerned in various creative communities<sup>332</sup> where creative processes are governed by what Ellickson calls a “live and let live” norm.<sup>333</sup> In the realm of copyright law, ignorance of the law runs even deeper than in other fields as rights in chattels are distinct from the rights in the expressive content embedded in them.<sup>334</sup> For example, when a corporation pays an independent programmer to upgrade a software application for it, the corporation will typically receive only a license to use the upgraded version.<sup>335</sup> In the absence of an explicit transfer of rights in a written document, the copyright in the new code will remain the property of the programmer even though the corporation paid the programmer for her labor.<sup>336</sup> Because they fail to appreciate the nuances of copyright law,<sup>337</sup> many creators simply do not know how to craft agreements that govern the production of copyrighted content.

Furthermore, contracts are of limited utility when the subject of the agreement is nonobservable. As Professor Yochai Benkler<sup>338</sup> and others<sup>339</sup> have noted, creative input is a classic example.<sup>340</sup> Since creative effort is nonobservable to other parties, it is difficult to draft a contract that would determine the reward of the creator.<sup>341</sup> Where the reward is determined in advance, creators have an incentive to shirk.<sup>342</sup> Hence, *ex ante* contracting regarding rights in expressive content presents a real challenge to the contracting parties and typically involves high transaction costs.<sup>343</sup>

For all these reasons, private ordering of the regulation of rights in copyrighted content will almost certainly be incomplete. That said, we are cognizant of the fact that the adoption of our proposal would affect *ex ante* contracting. Empowering courts to determine the

331 *Id.*

332 YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 115–16 (2006).

333 Ellickson, *supra* note 330, at 682.

334 Shyamkrishna Balganes, *Alienability and Copyright Law*, in *CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW* 161, 170–73 (Helena R. Howe & Jonathan Griffiths eds., 2013).

335 Elizabeth I. Winston, *Why Sell What You Can License? Contracting Around Statutory Protection of Intellectual Property*, 14 *GEO. MASON L. REV.* 93, 100–02 (2006).

336 *Id.* at 104–07.

337 Stella Brown, Note, *It Takes a Village to Make a Difference: Continuing the Spirit of Copyright*, 12 *NW. J. TECH. & INTELL. PROP.* 129, 147 (2014).

338 Yochai Benkler & Helen Nissenbaum, *Commons-Based Peer Production and Virtue*, 14 *J. POL. PHIL.* 394, 402–03 (2006).

339 Casey & Sawicki, *supra* note 3, at 1701–02.

340 Benkler & Nissenbaum, *supra* note 338, at 402–03; Casey & Sawicki, *supra* note 3, at 1701–02.

341 Casey & Sawicki, *supra* note 3, at 1701–02.

342 *Id.* at 1700 n.64.

343 *Id.* at 1689, 1695.



rights of the parties, ex post, would invariably affect bargaining positions of the relevant parties vis-à-vis one another and therefore their incentives to contract.<sup>344</sup> Specifically, contributors who believe they get greater rights in court, under our proposed system, would likely be more reluctant to determine their rights contractually. Contrariwise, contributors who believe they would do better at the negotiation table would try harder to settle the allocation of rights contractually and avoid litigation. But all this is true only of the actors who go through the trouble of educating themselves about the law. The behavior of contributors who don't know the law and find it prohibitively expensive to educate themselves about it will not modify their behavior. Their ex ante behavior will not be affected by our proposal.

At the end of the day, then, we recognize that the implementation of our proposal will have an effect on ex ante contracting, but it is difficult to say, in the abstract, whether it would lead to more or less contracting and, in any case, we are of the view that the ex post gains in terms of stronger incentives to create, improved use of collaborative works, and reduction in administrative costs would outweigh the losses from a possible marginal drop in ex ante contracting.

## B. Comparative Merit

A different objection to our proposal targets the core mission we assign the courts, namely, the need to assess the relative contribution of the parties to the productive output. One might argue that courts are ill equipped to determine the respective contributions of the parties and therefore would not be able to decide with sufficient accuracy their ownership stakes. We believe that this objection is overblown and therefore should not bar the implementation of our proposal. The comparative fault revolution in tort law<sup>345</sup> proves that courts can adequately determine contributions to adverse outcomes. There is no a fortiori reason to think that courts would do worse in determining contributions to positive outcomes.

This point warrants elaboration. For many centuries the tort system had a binary design.<sup>346</sup> Actors were either fully liable for harm they inflicted on others or fully relieved of responsibility.<sup>347</sup> A finding of no responsibility implied that the loss lied where it fell, or, in other words, that it was borne by the victim.<sup>348</sup> Historically, the option of apportioning responsibility between the injurer and the victim was not

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<sup>344</sup> Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 571 (1992).

<sup>345</sup> Mary J. Davis, *Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability*, 39 VILL. L. REV. 281, 294 (1994).

<sup>346</sup> *Id.* at 284–86.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

available to courts.<sup>349</sup> Over time, however, policymakers introduced comparative fault into the tort system.<sup>350</sup> Apportioning the blame among the parties was thought to lead to more equitable results, *ex post*,<sup>351</sup> without harming *ex ante* incentives to take care.<sup>352</sup> Although determining the blame of each party can prove tricky at times, comparative fault has become part and parcel of the modern law of tort and no one seriously calls for its abolition.<sup>353</sup>

The successful implementation of comparative fault is a good omen for our proposal. In the typical case, courts will find the task of determining parties' contributions to expressive products easier than determining their comparative fault. Unlike accidents or behaviors that lead to adverse results, creative processes are usually well documented. This is so for several reasons. First, when parties engage in harmful activities that are likely to harm others they have an incentive to destroy evidence that implicates them in such behavior.<sup>354</sup> By contrast, when parties produce socially desirable results, as they do when they create works of authorship, they often may want to make their contribution known, so they can receive the social recognition they deserve.<sup>355</sup> Second, as far as creative processes are concerned, the documentation often arises automatically, thanks to modern technology that frequently documents and saves each incremental contribution to the creative process.<sup>356</sup> Accordingly, authors have a built-in incentive to document their artistic achievements in a stable and durable fashion—characteristically, via the creation of copies of their contributions to later be distributed to the public. Third, copyright law itself requires authors to fix their works in a tangible medium in order for them to receive copyright protection.<sup>357</sup> Hence there is ample reason to believe that courts would be able to rely on a much better evidentiary basis when determining ownership shares in collaborative work than when apportioning responsibility for harm in tort cases.

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<sup>349</sup> *Id.* at 293.

<sup>350</sup> *Id.* at 294.

<sup>351</sup> Daniel L. Rubinfeld, *The Efficiency of Comparative Negligence*, 16 J. LEGAL STUD. 375, 379–82 (1987).

<sup>352</sup> *Id.* at 382–83.

<sup>353</sup> Davis, *supra* note 345, at 351–52.

<sup>354</sup> John Leubsdorf, *Evidence Law as a System of Incentives*, 95 IOWA L. REV. 1621, 1651 (2010).

<sup>355</sup> See Heller & Eisenberg, *supra* note 16, at 700 (noting that authors have varied, “heterogeneous interests,” including at times just wanting “the credit”).

<sup>356</sup> See, e.g., Declaration of W. Curtis Preston at 6–7, *PB&J Software, LLC v. Code 42 Software, Inc.*, No. 09-CV-00206, 2011 WL 8333129 (D. Minn. Sept. 29, 2011) (noting that modern software makes documentation of successive drafts much easier: in “[m]odern backup systems . . . there are multiple versions of a file, each non-identical version . . . backed-up in its entirety as a separate file,” whereas in the past only one final file would be saved).

<sup>357</sup> 17 U.S.C. § 102(a) (2012).

Moreover, it bears emphasis that courts are already assessing comparative merit (or contributions) in other legal domains. For example, in cases of dissolution of marriage, a large group of states, including New York and Florida, follows an equitable distribution model that requires courts to determine, inter alia, the respective contributions of each of the spouses to the acquisition of marital property.<sup>358</sup> This determination is far more complex than the one we expect courts to perform in establishing copyright trusts, as there are no clear definitions as to what counts as a contribution to married life. Yet, equitable distribution systems have been at work for several decades.<sup>359</sup> Another domain in which courts are required to compare contributions is that of employee inventions. The laws of several countries empower courts to allocate rights to inventions developed in the workplace based on the relative contributions of the employee and the employer to the patented product or process.<sup>360</sup> Obviously this example is very close to the kinds of tasks courts would have to undertake to allocate copyright trust rights.

### C. Doctrine

A third potential objection to our proposal stems from a more technical problem. Copyright trusts are not currently employed by the courts. It might be argued that courts cannot begin creating copyright trusts without new statutory authority.

Of course, we have no objection to lawmakers amending the Copyright Act in order to adopt copyright trusts explicitly within the statute. At the same time, we contend that courts may already adopt our proposal without any further statutory authority. As we noted,<sup>361</sup> the actual statutory language in the Copyright Act concerning joint authorships is quite limited. The courts, rather than Congress, decided to adopt the model of tenancy in common for all joint authorships.<sup>362</sup> No statute requires using the model in all cases. Likewise, it is the courts, rather than Congress, that decided how to interpret the term “author.”<sup>363</sup> Case law, not statutory language, imposed the “master

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<sup>358</sup> Carmen Valle Patel, Note, *Treating Professional Goodwill as Marital Property in Equitable Distribution States*, 58 N.Y.U. L. REV. 554, 557 (1983).

<sup>359</sup> Elizabeth A. Cheadle, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269, 1279 (1981).

<sup>360</sup> Robert P. Merges, *The Law and Economics of Employee Inventions*, 13 HARV. J.L. & TECH. 1, 4–6 (1999); see also Vai Io Lo, *Employee Inventions and Works for Hire in Japan: A Comparative Study Against the U.S., Chinese, and German Systems*, 16 TEMP. INT'L & COMP. L.J. 279 (2002) (discussing several nation-state examples of these court-empowerment laws).

<sup>361</sup> *Supra* Part I.A.1.b.

<sup>362</sup> See *Kwall*, *supra* note 173, at 57 (discussing how, like general property, copyright law tenancy in common doctrine stemmed from judge-made law).

<sup>363</sup> See *generally id.* at 57–59 (discussing the predominant role of courts given that the 1976 Copyright Act does not specify the meaning of “an author”).

mind” requirement on authorship.<sup>364</sup> Judicial action to create a new model of shared ownership among collaborating authors—and an attendant expanded understanding of the meaning of authorship for purposes of earning a beneficial share of a copyright trust—falls within the authority that courts already exercise.

Indeed, there are a number of cases indicating that our proposed remedy is already within the scope of judicial powers. Perhaps the outstanding example is provided by *Rodrigue v. Rodrigue*,<sup>365</sup> where the court dealt with a divorcing spouse’s claim to a share of ownership in a copyrighted work. The court awarded the nonauthor spouse “an undivided one-half interest in the net economic benefits generated by or resulting from copyrighted works,” while awarding the author spouse “continued entitlement to the exclusive control and management” of the works.<sup>366</sup> Although the court based its decision on Louisiana community property law rather than general copyright law, it clearly found the division of ownership interests between a legal and beneficial owner to be within the scope of judicial powers permitted by the Copyright Act.

Additionally, as we have noted, the Copyright Act already recognizes a concept of “beneficial ownership,” albeit for the limited purpose of establishing standing to sue.<sup>367</sup> In short, there is little reason to believe that our proposal is beyond judicial powers under the law.

#### D. An Incomplete Remedy

A final objection relates to the utility of our proposed doctrine. Specifically, it might be argued that there may be cases where our doctrine does not help resolve the tensions among collaborators. The recent case of *Garcia v. Google, Inc.*<sup>368</sup> may best illustrate the objection. In *Garcia*, the plaintiff, an actress named Cindy Lee Garcia, sought to enjoin the distribution of a controversial movie about the life of Muhammad, the founder of Islam, on the grounds that she did not consent to the inclusion of the relatively small part in which she appeared in the film.<sup>369</sup> She asserted—and the court vindicated her claim—that she owned a separate copyright in her performance that allowed her to block any showings of the film that included her performance.<sup>370</sup> Garcia’s motivation was not profit. She had received death threats in relation to her performance in the film.<sup>371</sup> In any

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<sup>364</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000).

<sup>365</sup> 218 F.3d 432 (5th Cir. 2000).

<sup>366</sup> *Id.* at 443.

<sup>367</sup> *Supra* Part II.C.

<sup>368</sup> 766 F.3d 929 (9th Cir. 2014), *reh’g on banc granted*, 771 F.3d 647 (9th Cir. 2014).

<sup>369</sup> *Id.* at 932.

<sup>370</sup> *Id.* at 935.

<sup>371</sup> *Id.* at 932.

event, the film was apparently intended for limited distribution through YouTube and would certainly never turn a profit.<sup>372</sup> Thus, it is evident that Garcia's interests in blocking use of her performance in the film could never be vindicated through a copyright trust.

We readily acknowledge that our proposed doctrine cannot provide a universal remedy for all potential disputes among collaborators regarding copyrighted works. It is for this reason that we propose that the copyright trust supplement, rather than replace, existing legal remedies. The copyright trust can resolve the adverse effects created by the unity of ownership and control when there are many contributors to a single work of authorship. The copyright trust cannot universally resolve every potential point of contention among collaborators.

At the same time, it is important not to exaggerate the importance of outlying cases like *Garcia*. In most cases, a copyright trust can provide a good resolution of collaborator disputes. *Garcia* is a highly unusual case; it is the exception that proves the rule. The facts of *Garcia* reveal a truly anomalous situation where copyright law ended up providing a legal remedy for a dispute that primarily concerned speech issues unrelated to the core of copyright.

The film in controversy in *Garcia*, entitled *The Innocence of Muslims*, was not one intended for mass distribution or profit. *The Innocence of Muslims* was intended to be a highly inflammatory depiction of Muhammad that would cast the religion of Islam in an uncomplimentary light.<sup>373</sup> There is little doubt that the film's producer intended to create great offense and that he expected a strong negative reaction to his film. Indeed, the film's producer systematically misinformed people about the film, apparently in order to avoid being personally tied to the backlash he was certain would ensue.<sup>374</sup> The producer lied to actors and other participants about the nature of the film; he assured them it was a "desert adventure" and he had them read dialogue for the "adventure" that he subsequently overdubbed.<sup>375</sup> The producer lied about his identity to the media, attempting to mislead the

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<sup>372</sup> See Aly Weisman, *The Insulting, Anti-Muslim, Low-Budget Film that Provoked the Attacks on American Embassies*, BUS. INSIDER (Sept. 12, 2012, 11:21 AM), <http://www.businessinsider.com/heres-the-low-budget-american-film-that-was-being-proteted-during-the-libya-attacks-2012-9> (discussing many aspects of the film, including its inability, and indeed lack of an intention, to raise money for profit).

<sup>373</sup> Peter Rudegeair, *I Have No Regrets for Portraying Mohammad as a Womanizer and Pedophile: Innocence of Muslims Filmmaker*, NAT'L POST (Nov. 26, 2012, 3:23 PM), <http://news.nationalpost.com/2012/11/26/i-have-no-regrets-for-portraying-mohammad-as-a-womanizer-and-pedophile-innocence-of-muslims-filmmaker/>.

<sup>374</sup> *Id.*

<sup>375</sup> *Innocence of Muslims: How Bad? How Cheap? How Wrong?*, WEEK (last updated Sept. 14, 2012, 4:37 PM), <http://www.theweek.co.uk/middle-east/islam-film-row/49036/innocence-muslims-how-bad-how-cheap-how-wrong>.

public into believing the film had come from another source.<sup>376</sup> Unsurprisingly, the film did produce a backlash. The film prompted protests, many violent, in a number of Muslim countries.<sup>377</sup> The White House denounced the film,<sup>378</sup> and the film's producer was soon arrested on the grounds that some aspects of his involvement violated an earlier parole agreement.<sup>379</sup> Several people associated with the film were threatened with violence or death for the "negative portrayal of the Prophet."<sup>380</sup>

There are numerous aspects of the film that raise difficult legal questions. What bounds may the state place on speech that gravely insults religious figures? May the state take into account the threat of violence by adherents to the religion in defining those bounds? Should private individuals have the right to curtail the speech of others where third parties view the speech as motivation for acts of violence? How should legal rights regarding such speech be altered in the face of apparent fraud by someone who has organized the speech of others? The answers to these questions are not obvious.

It should be noted, however, that none of these questions lie at the core of copyright, which is a body of law that protects legal rights in creative works in order to create pecuniary incentives for creation.<sup>381</sup> Although Cindy Lee Garcia used the law of copyright to protect herself, she sought to vindicate interests that are rarely implicated in copyright disputes. Indeed, the criticism<sup>382</sup> that has been leveled against the Ninth Circuit Court of Appeals' decision in *Garcia* has seemingly proved, once again, that hard cases make bad law. The decision in *Garcia* was apparently motivated by the larger concerns raised by the film, but the ruling cannot easily be reconciled with the extant law of copyright.<sup>383</sup> For the ordinary copyright case, copyright trusts

<sup>376</sup> *Id.*

<sup>377</sup> Liz Goodwin, 'Innocence of Muslims': The Film That May Have Sparked U.S. Embassy Protests, YAHOO! NEWS (Sept. 12, 2012, 10:21 AM), <http://news.yahoo.com/blogs/the-look-out/innocence-muslims-film-sparked-deadly-u-embassy-attacks-142118931.html>.

<sup>378</sup> *Id.*

<sup>379</sup> Brooks Barnes, *Man Behind Anti-Islam Video Gets Prison Term*, N.Y. TIMES, Nov. 7, 2012, at A12, available at <http://www.nytimes.com/2012/11/08/us/maker-of-anti-islam-video-gets-prison-term.html>.

<sup>380</sup> *Court Orders Anti-Muslim Film Offline*, AL JAZEERA AM. (Feb. 27, 2014, 1:39 AM), <http://america.aljazeera.com/articles/2014/2/27/court-orders-takedownofantimuslim-video.html>.

<sup>381</sup> See generally Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012) (asserting that this pecuniary reward for creativity is the very reason for copyright at all).

<sup>382</sup> See Clark D. Asay, *Ex Post Incentives and IP in Garcia v. Google and Beyond*, 67 STAN. L. REV. ONLINE 37, 38 (2014); Jesse Woo, *Garcia v. Google: Copyright Is Not Always the Answer*, WASH. LAW. FOR ARTS BLOG (Apr. 18, 2014), <http://thewla.org/garcia-v-google-copy-right-is-not-always-the-answer/> (providing another example of criticism).

<sup>383</sup> Woo, *supra* note 382.

should remain a valuable option for courts and a tool that reduces disputes.

#### CONCLUSION

As expressive works become increasingly collaborative in nature, the problem of allocating rights to a commonly produced work has become paramount. We showed that the existing doctrines employed by copyright law to address this challenge are inadequate for the task. In its current form, copyright law simply does not provide the courts with the tools they need to resolve disputes concerning right allocation and management in collaborative expressive works. Some of the doctrines are too coarse, while others are too vague and malleable. As we demonstrated, the lack of a precise legal mechanism has an adverse effect on the production and use of collaborative works. Furthermore, it consumes judicial resources that could have been put to more productive uses.

In response to these problems, we developed a new ownership model that is uniquely designed to address collaborative creative works, termed “copyright trusts.” In our model, courts, when dealing with collaborative works, would have the option of appointing one of the contributors as an “owner-trustee,” who would have managerial powers, and the other contributors as “owner-beneficiaries,” who would be entitled to a predetermined share of the proceeds. To prevent abuse of power by the owner-trustee, she would owe a fiduciary duty to the owner-beneficiaries. The proposed ownership structure would concentrate all decision-making powers in the hands of a single owner (the owner-trustee), whom the court considers best suited for the task. At the same time, it would allow all other contributors (the owner-beneficiaries) to receive financial remuneration for their labor. Importantly, under our system the court will have the power to give owner-beneficiaries different ownership stakes commensurate with their contribution to the creative enterprise. Our model is therefore capable of producing more efficient and more equitable outcomes than current law.

Importantly, we do not wish to abrogate existing copyright doctrine and replace it with our proposal. Quite the contrary, our goal is to add another tool to the toolkit of the courts and allow courts to use it in appropriate cases. Analytically, ownership and control are two distinct concepts. Yet, copyright law, in its current form, has elided the two, vesting in copyright owners all the prerogatives of control. Corporate law, by contrast, has kept the two separate. It is time that copyright law departed from the old paradigm to find inspiration in other legal domains.