WHAT IF EMPLOYEES OWNED THEIR COPYRIGHTS?

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INTRODUCTION

The mere asking of the question in the title implies—correctly—that employees usually do not own the copyrights in works they create for their employers. Under the provisions of the work for hire doctrine, the employer is the "author" as well as the copyright owner of works produced by its employees and by independent contractors it hires for special commissions or projects.[1] Thus, employees of most of the major collaborative copyright industries[2] seldom own copyrights in the many valuable works they create. The doctrine creates a legal fiction through which corporate employers take the place of the individual author usually envisioned by

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1. The doctrine contains a number of qualifications and requirements. For example, the doctrine applies to independent contractors only with respect to certain enumerated categories of works. *See* 17 U.S.C. §§ 101, 201(b) (2006). I will not review the requirements of the doctrine in detail herein. For a more comprehensive review of the doctrine, see Deborah Tussey, *Employers as Authors: Copyrights in Works Made for Hire, in* 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 71, 71-91 (Peter K. Yu ed., 2007).

2. Collaborative copyright industries include any industry in which many employees or independent contractors contribute to the production of particular copyrighted works. The description covers most of the major copyright industries, including film and music recording studios, newspapers and magazines, and television and radio broadcasting.

copyright law.[3] For example, the "author" of a film produced in the United States is usually not the director or the screenwriter, but the studio that finances the making of the movie. The director and screenwriter are merely independent contractors hired under work for hire agreements. Any full-time studio employees are also covered by the doctrine, and copyrights in any creative contributions they may make to films will vest in the studio.[4]

The consequences of this transfer affect more than copyright ownership. Since the employer becomes the author, its nationality and corporate nature may affect copyrightability.[5] The duration of copyright protection for works for hire differs from the general copyright duration.[6] Neither the renewal provisions of the 1909 Act nor the termination provisions of the current Copyright Act apply to works for hire.[7]

The work for hire doctrine first appeared in a handful of cases near the end of the nineteenth century as a judicial response to the rapid growth of corporate copyright industries.[8] It was written into the 1909 Copyright Act,[9] revised in the 1976 Copyright Act,[10] and has accumulated substantial interpretative case law over the past century.[11] What if Congress had not acted to divest employees of their copyrights? I suggest in this Article that the development of the copyright industries would not have been impacted by the absence of the work for hire doctrine, but that public access to copyrighted works might have been adversely affected. In Part I, I assess the traditional copyright story that adoption of the doctrine was necessary to

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3. *See* Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 34 (Martha Woodmansee & Peter Jaszi eds., 1994).

4. *See, e.g.*, Aalmuhammed v. Lee, 202 F.3d 1227, 1235 (9th Cir. 2000) (involving a claim of joint authorship by a technical consultant on the film *Malcolm X*. Spike Lee co-wrote, co-produced, and directed the film. However, the court noted that Warner Brothers, not Spike Lee, was the author of the film, since the studio hired Lee under a work for hire agreement). Under 17 U.S.C. § 201(b), the studio also gets the copyright in any works produced by its employees acting within the scope of their employment.

5. If the employer is a foreign corporation, its nationality may affect copyrightability in the United States. 17 U.S.C. § 104. If the employer is the federal government, the works may be exempt from copyright under 17 U.S.C. § 105 as government works.

6. The duration of copyright for works by individuals is the life of the author plus seventy years. Work for hire copyrights endure for a term of 95 years from first publication or 120 years from creation, whichever expires first. 17 U.S.C. § 302.

7. *See* 17 U.S.C. §§ 203, 304. The 1909 Act remains relevant to a substantial number of works—the periodic, retroactive lengthening of the copyright term has assured that many works published under the 1909 Act still remain in copyright.

8. *See* Catherine Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 32-45 (2003).

9. 17 U.S.C. § 62 (1909) (current version at 17 U.S.C. §§ 101, 201(b)).

10. 17 U.S.C. §§ 101, 201(b).

11. *See, e.g.*, Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 731 (1989) (agency law determines meaning of "employee").

provide incentives for copyright industries. That story proves unconvincing in light of the history of the copyright industries and the ready availability of contractual assignments. In Part II, I posit an alternative story in which the doctrine was never adopted and industries were forced to rely entirely on copyright assignments. Exploration of that scenario suggests that, while failure to adopt the work for hire doctrine would have had little impact on incentives for creation of works, it would have posed serious barriers to the licensing of works in the later years of their copyright terms, thereby limiting public access to such works.

I. THE INCENTIVES STORY

The traditional copyright story offers the standard utilitarian argument for adoption of the work for hire doctrine: Congress must transfer copyrights to employers in order to provide the necessary incentives for the copyright industries to produce valuable works and make them accessible to the public.[12] The traditional argument is buttressed by a corollary derived from economic analysis: the doctrine efficiently avoids the transaction costs that employers would otherwise incur if they were required to negotiate copyright assignments from employees and independent contractors. It may also prevent holdout problems with respect to collective works.[13] Neither of these arguments withstands close scrutiny with respect to the initial creation of copyrightable works.

The incentives story implies, by extension, that the protection of the work for hire doctrine is essential to encourage the establishment and good health of collaborative copyright industries. This implication is historically counterfactual. Many of the industries that benefit most significantly from the doctrine, including publishers of newspapers, magazines, and legal information, were well-established and profitable for decades before the doctrine emerged in the courts or was written into the Copyright Act.[14] In fact,

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12. *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 302-05 (1988) (discussing this instrumental view of copyright in the context of Locke's labor theory of property); ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS § 1.31 (2003).

13. *See* ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 453 (rev. 4th ed. 2007). For example, there are a large number of creative contributors to a movie. If assignments had to be negotiated separately for all of them, some contributors might demand a premium for their assignments and could hold up the entire project if their demands were not met.

14. For example, the *New York Times* was founded in 1851. *See* The N.Y. Times Co., New York Times Timeline 1851–1880, http://www.nytco.com/company/milestones/timeline_1851.html (last visited Mar. 12, 2008). HarperCollins Publishers (formerly Harper and Row) was founded in 1817. *See* HarperCollins Publishers, Company Profile, http://www.harpercollins.com/footer/companyProfile.aspx (last visited Mar. 12, 2008). West Publishing Company (the preeminent law publisher, now owned by Thomson Corporation)

these industries were represented at the negotiations over the 1909 Act,[15] which first incorporated the doctrine in the form of a single sentence providing that "the word 'author' shall include an employer in the case of works made for hire."[16] The adoption of the doctrine appeared to be a reward for the investment and political influence of established industries, rather than an essential incentive to their development. It mirrors the "sweat of the brow" doctrine, prevalent in the lower courts until 1991, which awarded copyrights to compilations such as catalogs and telephone directories because of the money invested in their creation by their corporate creators.[17] In *Feist Publications, Inc. v. Rural Telephone Service Co. Inc.*,[18] the Supreme Court decisively rejected the sweat of the brow doctrine as incongruent with copyright's originality requirement,[19] but the sentiment favoring copyright as a reward for investment lives on to some extent in the work for hire doctrine.

In the interim between the 1909 Act and the 1976 revision, several new collaborative copyright industries, including radio and television broadcasting, appeared and prospered even though the entitlement of their broadcasts to copyright protection, much less work for hire status, was entirely uncertain for a time.[20] Again, the industries developed before any copyright protections were in place to provide them with incentives. Representatives of those industries were participants in the negotiations over the 1976 revision, which produced the current work for hire provisions.[21] Under these provisions,[22] the employer is the author of works produced by em-

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was founded in 1872. *See* Thomson-West, Company Overview, http://west.thomson.com-/overview/ (last visited Mar. 12, 2008).

15. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 39 (2001).

16. 17 U.S.C. § 62 (1909).

17. *See, e.g.*, West Publ'g. Co. v. Mead Data Cent., Inc., 799 F.2d 1219, 1229 (8th Cir. 1986) (arrangement and pagination of case reporters held copyrightable); Leon v. Pac. Tel. & Tel. Co., 91 F.2d 484, 486 (9th Cir. 1937) (telephone directory held copyrightable); Jeweler's Circular Publ'g. Co. v. Keystone Publ'g. Co., 281 F. 83, 85 (2d Cir. 1922) (compilation of trademarks held copyrightable).

18. 499 U.S. 340, 340 (1991) (holding white page entries in telephone directory insufficiently original to receive copyright protection).

19. Copyrights are granted only to "original works of authorship." 17 U.S.C. § 102(a) (2006).

20. *See* Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 289-94 (1989).

21. *See* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 889-91 (1987).

22. Section 101 of the Act [17 U.S.C. § 101 (2006)] defines a "work made for hire" as:

> (1) a work prepared by an employee within the scope of his or her employment; or
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as an-

ployees in the scope of their employment.[23] The employer may also be the author of specially commissioned works created by independent contractors if the parties expressly agree in a writing signed by both parties that the work is made for hire and if the work falls within one of the nine categories of works listed in the statute.[24]

The sound recording industry, which did not participate in the negotiations over the 1976 revision,[25] provides the most glaring example of the lack of connection between copyright protection and industry development. The industry was barely nascent when the 1909 Act adopted the first work for hire provision. Sound recordings received no federal copyright protection at all until 1972.[26] For reasons that remain the subject of dispute, the industry was not invited to the negotiations over the 1976 revision[27] and is still not included in the categories enumerated in the independent contractor provi-

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> swer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Section 201 [17 U.S.C. § 201] governing ownership of copyright provides, in pertinent part:

> (b) WORKS MADE FOR HIRE.— In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

23. Both the word "employee" and the phrase "scope of employment" take their meaning from agency law and have been applied in dozens of cases that address many variations in employment relationships. *See, e.g.*, Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989) (agency law determines meaning of "employee"); Quinn v. City of Detroit, 988 F. Supp. 1044, 1049 (E.D. Mich. 1997) (agency law determines meaning of "scope of employment").

24. Under the language of 17 U.S.C. § 101, both of these requirements must be met. An explicit contract stating that a work is for hire cannot make it so unless the work falls within one of the designated categories. A work falling within one of those categories is not a work for hire unless the writing requirement is fulfilled. 17 U.S.C. § 101. The 1976 Act introduced the distinction between employees in the scope of employment and independent contractors hired for particular projects, setting a higher standard for divestment of the copyrights of independent contractors. This revision of the doctrine was a compromise resolving the competing concerns of author groups, publishers, and the movie industry. *See* Litman, *supra* note 21, at 890-91.

25. Litman, *supra* note 21, at 889-90 (enumerating the parties involved in negotiations over the work for hire provisions and the compromises they crafted). *See also* Corey Field, *Their Master's Voice? Recording Artists, Bright Lines, and Bowie Bonds: The Debate Over Sound Recordings as Works Made for Hire*, 48 J. COPYRIGHT SOC'Y U.S.A. 145, 177 (2000) (noting that the negotiations over the provision were concluded before sound recordings were granted federal copyright protection).

26. SCHECTER & THOMAS, *supra* note 12, § 4.7.

27. Some have argued that the omission was intentional. Others suggest that the omission was a mere oversight—the industry was very young (and received no federal protection) when the twenty-year revision process began, and the negotiators simply neglected to invite them in after 1972. *See* MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 5.03[B][2][a][ii], nn.121.2, 121.3 (2007); *see also* Field, *supra* note 25.

sion.[28] Consequently, recording artists are not workers for hire for the studios, and studios must negotiate assignments of performers' copyrights rather than obtaining them *ab initio* by operation of the work for hire provisions.[29]

Despite the nearly complete absence of copyright incentives, the recording industry grew prosperous, spinning out thousands of hits, supporting huge production and distribution chains, and making billions of dollars—at least until the recent unpleasantness with file sharing began to deflate its profits.[30] The history of the industry suggests that the market alone provided more than adequate incentives for development and expansion. Moreover, once federal copyright protection was conferred on sound recordings, the industry simply took advantage of a contractual alternative to the work for hire doctrine: copyright assignments. The ease with which it did so casts doubt on the argument that the work for hire doctrine is essential to avoid high transaction costs incident to the initial creation of works.

Recording contracts routinely include an assignment of copyright from the artists to the studio.[31] The necessity of negotiating such assignments clearly did not impose insupportable transaction costs on the recording industry, probably because of the frequent imbalance of power between the studio and the artists. If the artist wants the recording contract, and the undoubted benefits the contract confers with respect to marketing and distribution of her work, she signs away her copyrights. The same imbalance of power exists in most copyright industries. If the employee wants the job, or the contractor wants the commission, the employer can simply demand an assignment of copyright. Employers in other copyright industries could, and would, have obtained such assignments if they had not benefited from the automatic transfer of copyright imposed by the work for hire doctrine. As in the recording industry, such provisions would simply have become boilerplate language in the contract, imposing little or no additional transaction cost. In the case of independent contractors, the current statute implies that a negotiation of some sort is necessary to produce the writing signed by

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28. For a brief moment in copyright history, the industry was stealthily written into the provision, setting off an enormous media controversy. Congress quickly amended the Act to re-exclude the industry. For a detailed discussion of this brouhaha, see NIMMER & NIMMER, *supra* note 27, § 5.03[B][2][a][ii].

29. *Id*.

30. The industry reported revenues in excess of $11 billion in 2006, though revenues declined from 2005. *See* RECORDING INDUS. ASS'N OF AM., 2006 YEAR END SHIPMENT STATISTICS (2006), http://76.74.24.142/6BC7251F-5E09-5359-8EBD-948C37FB6AE8.pdf. The history of copyright industries generally suggests that entrepreneurs identify potential new markets and move to take advantage of them with little regard for copyright entitlements. The push for copyright protection comes later, as the new industries lobby Congress to protect their dominance of the markets they have entered.

31. *See* NIMMER & NIMMER, *supra* note 27, at n.121.14.

both parties affirming that a particular project is a work for hire.[32] Given the ready availability of copyright assignments, the transaction costs justification for the work for hire doctrine carries little weight with respect to the initial production of collaborative copyright works.

From the employer's perspective, there *is* one significant drawback to contractual copyright assignments as compared to the work for hire doctrine. Under the work for hire doctrine, the employer is the author and owns the copyright for its entire duration. If an employee merely assigned his copyright to the employer, on the other hand, the employer might not control the copyright for its entire duration. The employee would retain a renewal right, for works published under the 1909 Act,[33] or a termination right under the current Act.[34] Congress enacted renewal and termination rights in order to give authors, or their families, a second chance to benefit from their copyrights by rectifying assignment decisions made when the true value of the work was unknown.[35] Thus, absent the work for hire doctrine, employees could recapture their copyrights at certain points during the life of the copyright.

Renewal and termination rights notwithstanding, an assignment would still give the employer control of the copyright for a substantial period of time. Under the 1909 Act, the employer would control the copyright for a minimum of twenty-eight years, the duration of the initial copyright term.[36] Moreover, courts interpreting the 1909 Act routinely enforced contracts in which authors pre-assigned their rights to renew the copyright for an additional twenty-eight years.[37] An employer could simply demand assignment of both the initial and renewal terms at the time an employee was hired. The employer would thereby obtain control of the copyright for its entire fifty-six year duration unless the employee died during the initial term, in which case the assignment of the renewal would be void and the employee's heirs could recapture the copyright.[38] Twenty-eight years, much less fifty-six, seems more than long enough for the employer to recoup its investment and make a profit.

Under the current Act, authors' termination rights cannot be assigned away in advance. Absent the work for hire doctrine, an employee-author would be able to recapture her copyright during a period from 35-40 years

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32. 17 U.S.C. § 101 (2006).

33. *Id.* § 304.

34. *Id.* § 203.

35. *See* Stewart v. Abend, 495 U.S. 207, 218-19 (1990) (dealing with effectiveness of assignment of derivative works right where author died prior to commencement of renewal period).

36. 17 U.S.C. § 304(a)(1)(a). Subsequent amendments to the current Act have substantially extended the renewal term.

37. *See Stewart*, 495 U.S. at 219-21.

38. *Id.*

after the assignment.[39] Nonetheless, employers would still have a minimum of 35-40 years to recoup their investments and make a profit. The only foreseeable impact on the development of the industries might have occurred if industries relied very heavily on their backlists to finance new development, since their rights to the backlist material would have expired more quickly. However, the major collaborative industries developed and prospered before they possessed such backlists.

In light of the historical record and the readily available contractual alternative, neither the incentives story nor its transaction costs corollary is particularly convincing. It seems more than likely that, even without the work for hire doctrine, the copyright industries that exist today would have developed to fill new market niches and would simply have used contractual copyright assignments to secure control over their works. The impact on industry incentives would have been negligible. However, exclusive reliance on assignments might have caused considerable adverse impact on public access to works. To understand why, we must consider the access consequences of the contractual alternative. In particular, we must reimagine the impact of renewal and termination rights on access—not when works are first created, but years later, after the employer lost its initial control of the copyright.

II. THE CONTRACTUAL ALTERNATIVE

First, imagine that the work for hire doctrine was never adopted and that, under the current Copyright Act, all employees who make copyrightable contributions to a collaborative work own their copyrights. Employers routinely get contractual assignments of those copyrights at the inception of each collaborative project, such as a movie. Those assignments are subject to the termination provisions of the statute. Then apply these rules to the 1980 film *Raging Bull*, now generally conceded to be a classic work of director Martin Scorsese.[40]

In the absence of the work for hire doctrine, Scorsese, the screenwriters, the cinematographer, the film editor, and possibly others who made creative contributions to *Raging Bull*, might be entitled to copyrights in their respective contributions. The studio, United Artists, would undoubtedly have demanded that they assign those copyrights to it before agreeing to finance the film. However, by the year 2015, the contributors could ter-

39. 17 U.S.C. § 203(3) provides that a copyright grant may be terminated during a period of five years beginning 35 years from execution of the grant. If the grant includes the right of publication, it may be terminated 35 years from publication or 40 years from execution of the grant, whichever term ends earlier.

40. *See* LEONARD MALTIN, LEONARD MALTIN'S MOVIE & VIDEO GUIDE 1127 (2000 ed., 1999).

minate their assignments to the studio and take back the copyrights in their contributions to the movie. If the studio wanted to continue to exercise rights with respect to the film, it would have to renegotiate copyright assignments from all of those contributors. Without such assignments, the studio could no longer reproduce and distribute the film on DVD, through online services, or in any other medium. It could not license derivative works, public displays, or performances of the film. Given the lucrative returns from many of those activities, the contributors might well demand high prices for their copyrights, and one can easily imagine significant difficulties with holdouts—in short, prohibitive transaction costs.

By 2015, the studio will have had at least thirty-five years of exclusive control in which to turn a profit on the film, so its financial health will not be at risk. However, unless the studio, or some other party, can negotiate the necessary rights, consumers are likely to lose access to the work. If, for example, the Turner Classic Movies (TCM) channel wants to obtain a license to broadcast *Raging Bull* as part of its series "The Essentials," it will face a very substantial transaction cost problem. If negotiations for the license fall through, TCM's viewers will not be able to see the film. A museum might not be able to negotiate all the necessary licenses to perform *Raging Bull* during a Scorsese retrospective. Likewise, an educational institution might find it impossible to negotiate the rights to perform the movie in a class on the history of film. Needless to say, if the studio cannot reproduce or distribute copies of the film, consumers will not be able to buy them.

As this example shows, at later stages in the life of a copyright, the transaction costs argument really does have some bite—it affects public access to works after their creation, not the incentives needed to create them in the first place. The necessity of negotiating new assignments from multiple copyright holders could significantly impede access to many collaborative works. In addition to the inherent difficulties of conducting negotiations with multiple contributors, it might be difficult or impossible to locate some contributors in order to conduct negotiations at all. After the contributors reclaimed their copyrights, some of them might move without leaving forwarding addresses, reassign their rights to third parties, or die leaving their rights to their heirs. The orphan works problem, which already exists with respect to many copyrighted works, would be substantially greater without the work for hire doctrine.[41] Established business entities, while they may also disappear over time, are likely to be easier to locate than individual authors and, perhaps, more likely to manage their copyrights and keep their filings current.

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41. Orphan works are works that are still in copyright but for whom the copyright holder cannot be identified and located. *See* REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 1 (Jan. 2006), http://www.copyright.gov/orphan/orphan-report-full.pdf.

Copyright owners, potential licensees, and, by extension, consumers, might also face problems resulting from sloppy contracting, sheer failure to negotiate assignments, or inability to foresee and contract with respect to the development of new markets. Disputes are currently raging, for example, over the ownership of copyrights in recordings of live television and radio broadcasts of musical performances. A particularly interesting clash concerns control over the copyrights in concert promoter Bill Graham's tapes of live concert performances by well-known rock performers. At the time of the performances, Graham and the performers made no contractual agreements regarding ownership of copyrights in the recordings. Those recordings are now valuable for purposes ranging from online downloads to cell phone ring tones.[42] Complete reliance on the contractual alternative requires a degree of planning and foresight not always practiced, or even possible, in rapidly changing industries.

All of these issues could make it extremely difficult to license legitimate uses of copyrighted works produced by collaborative copyright industries in the absence of the work for hire doctrine. The operation of renewal and termination rights would likely produce a transactional nightmare for licensees and, in the end, restrict public access to the works from the time those rights went into effect until the works finally fell into the public domain. We will get some additional insight into exactly how difficult such negotiations can become as early as 2013, when performers on sound recordings will first be able to exercise termination rights with respect to their contributions[43]—and recording studios will have to start renegotiating rights for their backlists.

In short, if Congress had not adopted the work for hire doctrine during the early years of corporatization of the copyright industries, it probably would have had to invent an alternative legal structure to handle the licensing of collaborative works in the later years of the copyright terms of those works. In order to do so, it would have had to address an even thornier set of issues regarding which employees are actually entitled to copyrights in their contributions. The discussion thus far has assumed that all employees contributing to copyrightable works might have some copyright claim, but that is obviously not the case. An employee's particular contribution would have to meet the originality requirement for copyright protection, a test that some contributions would pass, but others would not.[44] For example, the

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42. *See* Robert Levine, *Who Owns the Live Music of Days Gone By?*, N.Y. TIMES, Mar. 12, 2007, at C1.

43. *See* NIMMER & NIMMER, *supra* note 27, § 5.03[B][2][a][ii].

44. 17 U.S.C. § 102(a) confers copyright protection only on "original works of authorship." The exact contours of the originality requirement have been the subject of innumerable judicial decisions. *See, e.g.*, Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S.

contributions made by the director of a film might qualify, but contributions made by the film's editor might not.[45] Questions would arise about the copyright treatment of contributions to different kinds of works. The contributions of the editor of a case reporter might be insufficiently original to warrant a copyright,[46] but what about significant alterations made by the editor of a novel? Should the law treat the contributions made by the director of a film the same way it treats contributions made by a freelance journalist who contributes to a newspaper, or a writer on the staff of a national magazine? Such determinations would have necessitated a serious discussion of the nature of collaborative works, which never occurred in this country because of the early default to the work for hire doctrine. Countries like France, with strong authors' rights traditions, make distinctions about the copyrightability of contributions to collaborative works, that are simply absent from American copyright jurisprudence.[47]

Without the work for hire doctrine, courts would also have faced significant questions concerning the application of contract principles in the copyright context. These questions might range from the form and sufficiency of copyright assignments to issues of breach, estoppel, reliance, and restitution with respect to assignments by employees to employers.

Thus, the alternative contractual story indicates that, despite the lack of convincing linkage to traditional incentives justifications, the work for hire doctrine has actually produced some significant benefits. One real, though probably unintended, benefit of the work for hire doctrine is that it provides a single, locatable owner of the copyright for purposes of licensing uses of the work in the later stages of its copyright term, thereby keeping the work accessible to the public. Moreover, the doctrine simplifies the copyright treatment of collaborative works, avoiding the necessity of distinguishing among the rights of the many contributors to such works.

CONCLUSION

In answer to the question posed in the title of this Article, I have suggested that employee ownership of copyrights in works produced for em-

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340 (1991) (holding white page entries in telephone directory insufficiently original to receive copyright protection).

45. French law, for example, recognizes the director and the authors of the screenplay, adaptation, dialogue, and original musical compositions for the soundtrack as co-authors of audiovisual works, but does not recognize the film editor as an author. *See* André Lucas & Pascal Kamina, *France*, *in* INTERNATIONAL COPYRIGHT LAW AND PRACTICE, § 4 [1][a][ii], at FRA-1 (Paul Edward Geller ed., 2006).

46. *See* Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 674, 683-89 (2d Cir. 1998) (denying copyright protection to editorial "enhancements" in the text of court opinions).

47. *See* Lucas & Kamina, *supra* note 45.

ployers would have produced little discernable impact on the development of the collaborative copyright industries. The traditional argument that the work for hire doctrine is necessary to provide incentives for creation of collaborative works runs counter to the history of collaborative copyright industries and ignores the ready availability of contractual copyright assignments at the time such projects are initiated. However, sole reliance on assignments would have had a major adverse impact on public access by imposing significant transaction costs on licensing the use of collaborative works in the later years of the copyright term, after employees exercised their renewal or termination rights. Moreover, in the absence of the work for hire doctrine, courts would have been required to develop a significant body of law governing the copyrightability of particular contributions to different kinds of collaborative works. The simplification imposed by the doctrine may, therefore, be efficient though not necessarily fair to the more creative contributors to collaborative works.