

WHOSE BRATZ IS IT? THE INTEGRATION OF COPYRIGHT AND EMPLOYMENT LAW

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INTRODUCTION	2
I. THE ALLOCATION SPECTRUM	7
A. MODES OF PRODUCTION AND EMPLOYMENT.....	8
B. THE ALLOCATION SPECTRUM	11
C. THE LAW: TWO MODELS.....	15
1. U.S: Initial Allocation.....	16
2. Agency Law in Copyright Law	17
3. Independent Contractors.....	19
4. The German Model.....	20
D. FREELANCERS	22
II. COPYRIGHT LAW: RISKS AND INCENTIVES	25
A. IDENTIFYING THE RISK-BEARER	26
1. Copyright Incentives.....	26
2. Copyright Risks	27
3. Shifting Risks in the Workplace.....	28
B. A COASEAN ANALYSIS AND PENALTY DEFAULT RULES	30
C. TYPICAL CASES	35
1. The Work.....	36
2. The Employer	37
3. The Employee.....	37
4. The Scope of Employment	37

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III. EMPLOYMENT LAW	41
A. SETTING THE STAGE.....	41
1. Fairness and Efficiency	41
2. Methodology.....	43
B. FAIRNESS IN EMPLOYMENT	44
1. Fairness.....	44
2. Information Deficiencies	45
3. External Factors.....	47
4. Trading Risks.....	47
C. RESPONDING TO INEQUALITY.....	48
1. Informed Consent	49
2. Group Negotiations.....	51
CONCLUSION.....	53

INTRODUCTION

Designer Carter Bryant was under a contract with Mattel, Inc., manufacturer and owner of the Barbie doll, when he produced some drawings and came up with the characteristics of what became the Bratz doll.¹ Bryant then moved to MGA Entertainment, Inc., producer of Bratz, which since her market debut in 2001 posed serious competition to the Barbie doll. Law suits followed. In 2008, a federal jury in California found in favor of Mattel and ordered a total of \$100 million for several causes, one of which was copyright infringement.² The court then issued an injunction against MGA.³ Bryant himself settled with Mattel.⁴

¹ See a summary of the findings of a federal jury cited in a subsequent decision, *Bryant v. Mattel, Inc.* 2008 U.S. Dist. Lexis 63391 (C.D. Cal. 2008) and in news reports: Reuters, *Jury Rules for Mattel in Bratz Doll Case*, NEW YORK TIMES C5 (July 18, 2008); David Colker, *Mattel Gets Control of Bratz Dolls*, LOS ANGELES TIMES C1 (Dec. 1, 2008).

² *Mattel, Inc. v. MGA Entertainment, Inc.* Case No. 04-9049, Phase B verdict (Aug. 28, 2008) available at http://www.lawupdates.com/pdf/resources/copyright/Jury_Verdict-08-26-2008-Bryant_v._Mattel,_Inc..pdf. Other causes of action were intentional interference with contractual relations; aiding and abetting breach of fiduciary duty; and aiding and abetting breach of the duty of loyalty. One commentator argued that "copyright infringement is an indirect and inefficient way to stop a direct competitor from using trade secrets misappropriated by a former employee of a competitor." See Jane Osborne McKnight, *Disloyal Employees and Trade Secrets: What We Can Learn from Barbies and Bratz* 34-Fall VT. B.J. 38, 42 (2008).

³ *Bryant v. Mattel*, Case No. 04-9049 (Dec. 3, 2008), available at http://www.lawupdates.com/pdf/postings/copyright/Order-Bryant_v._Mattel.pdf.

David Miller was employed as the supervisor of the quality control laboratory at CP Chemicals, Inc. His tasks included computerization of analytical data generated in the lab. At his home, Miller wrote a computer program that assisted him in the calculations, with the knowledge of his employer. In 1993 a district court in South Carolina ruled that the copyright in the program belongs to the employer.⁵

Who should own Bratz? Who should own Miller-like software? Put more generally, who should be the copyright owner of creative works made by employees? Should we treat the Bryants and the Millers alike? This article argues that current legal doctrine requires a more solid basis for dealing with the issue of ownership of employees' creative works. The article suggests that we address the allocation of copyright in the workplace by conceptualizing the issue under a dual, integrated perspective of both copyright law and employment law.⁶ Surprisingly, such integration is absent from current legal discourse. The discussion here focuses on material rights and leaves moral rights for a separate discussion.

Copyright law addresses this allocation via the work-made-for-hire doctrine.⁷ The doctrine provides quite a bright line: works made by

⁴ See Colker, *Mattel*, *supra* note 1.

⁵ *Miller v. CP Chemicals, Inc.*, 808 F. Supp. 1238 (D. SC 1993).

⁶ Dan Burk addressed the allocation rule from a corporate law point of view, arguing that different kinds of intellectual property play a role in demarcating the boundaries of property within the firm. His application of this theory to ownership of copyrighted works suggests that authorship and ownership be bifurcated so to protect the reputational interests of the employees. See Dan L. Burk, *Intellectual Property and the Firm*, 71 U. CHI. L. REV. 3, 11-14 (2004); Dan L. Burk & Brett H. McDonnell, *The Goldilocks Hypothesis: Balancing Intellectual Property Rights at the Boundary of the Firm*, 2007 U. ILL. L. REV. 575, 635 (pointing to the option of assigning initial ownership to employees.)

⁷ See definition of "work made for hire" at 17 U.S.C. §101:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as

employees within the scope of their employment belong to the employer; commissioned works in specific enumerated categories are also considered works made for hire and belong to the commissioning party. All other works belong to the author. In either case, initial ownership can be transferred to another party.⁸ The current work-made-for-hire is based on a rather narrow, textual interpretation of the law. In interpreting the legal concepts of *employee* ("employment element") and the *scope of employment* ("scope element"), courts turned to agency law.⁹ Employment law is strikingly absent from this discourse as well as the economic understanding of copyright law.¹⁰

Changing modes of production and changing modes of employment call for a re-examination of the work-made-for-hire doctrine and a better understanding of its theoretical underpinnings. The meeting

forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities. ...

And 17 U.S.C. §201(b):

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.

See also discussion *infra*, part I.C.

⁸ See 17 U.S.C. §201(d).

⁹ See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). Agency law developed in the context of tort law, which does not necessarily fit the copyright context. A district court dared to comment on the matter, after CCNV was decided, stating that its principles "are difficult to utilize in determining the issue of copyright ownership." See *Avtec Systems, Inc. v. Peiffer*, 1994 U.S. Dist. Lexis 16946 (E.D. Va., 1994), at n. 6. For criticism on the importation of agency law into copyright law, see Assaf Jacob, *Tort Made for Hire – Reconsidering the CCNV Case*, 11 YALE J.L. TECH. 96 (2008). Burk and McDonnell argue that agency law generally resembles intellectual property law in the way each field divides rights to copyrighted works made within the firm. See Burk & McDonnell, *The Goldilocks Hypothesis*, *supra* note 6, at 597 (suggesting that this resemblance is either the result of both legal fields tracking the most efficient legal rule, or that intellectual property law simply drew upon agency law.)

¹⁰ Also absent are antitrust considerations, which otherwise might have been relevant in some cases. For example, the result of the Barbie-Bratz legal dispute is strengthening the power of one dominant player.

point of copyright law and employment law reflects a deeper underlying conflict, between efficiency and fairness. Each body of law struggles with reconciling the two principles and the intersection of the two fields enhances the conflict.

Part I draws an allocation spectrum and maps current legal models on it, ranging from full allocation to the employer/commissioning party on the one hand if some criteria are met, to unwaivable rights allocated to the employee/commissioned party on the other hand. American law provides an example of the former and German law provides an example of the latter. In between there are several other options which will be addressed. Part I also draws lessons from the Supreme Court's 2001 decision in *New York Times v. Tasini* and its aftermath.¹¹ The Court ruled that the republication of freelance journalists' works in digital media infringed their rights, a decision which resulted in a sweeping change in contracts between commissioning parties and independent authors. Surprisingly, the case deserved little scholarly attention, with a few notable exceptions.¹²

The article then proceeds to examine copyright law and employment law, with the aim of deducing lessons as to the best possible initial allocation. There are several conceptions of each of these fields, and thus any attempt to integrate them necessarily has to choose which of these conceptions to juxtapose.

As for copyright law, Part II proceeds within the instrumental, incentive-based theory of copyright law, based on by-now familiar economic analysis.¹³ Previous economic analysis addressed the allocation

¹¹ See *New York Times v. Tasini*, 533 U.S. 483 (2001) and discussion *infra*, part I.D. See also a similar case in Canada: *Robertson v. The Thomson Corp.* [2006] 2 S.C.R. 363. For the case's aftermath, see Douglas P. Bickham, *Extra! Can't Read All About It: Articles Disappear After High Court Rules Freelance Writers Taken Out of Context in New York Times Co. v. Tasini*, 29 W. ST. U. L. REV. 85 (2001); Andrew Snyder, Comment, *Pulling the Plug: Ignoring the Rights of the Public in Interpreting Copyright Law*, 41 WASHBURN L.J. 365 (2002); Amy Terry, *Tasini Aftermath: The Consequences of the Freelancers' Victory*, 14 DEPAUL-LCA J. ART & ENT. L. 231 (2004).

¹² See Wendy J. Gordon, *Fine-Tuning Tasini: Privileges of Electronic Distribution and Reproduction*, 66 BROOK. L. REV. 473 (2000); Francesco Parisi & Catherine Ševčenko, *Lessons from the Anticommons: The Economics of New York Times Co. v. Tasini*, 90 KY. L.J. 295 (2002); Robert A. Gorman & Jane C. Ginsburg, *Authors and Publishers: Adversaries or Collaborators in Copyright Law?* in BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT REPUBLISHED (AND WITH CONTRIBUTIONS FROM FRIENDS) GORGIN-9 (Iris C. Geik, Michael L. Rustad, Jerry Cohen, Andrew Beckerman-Rodau & Henry Hobaczewski, eds., 2005).

¹³ William M. Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); Stanley M. Besen & Leo J. Raskind, *An*

of ownership within the workplace only in passing, or focused on *ex post* allocations, *i.e.*, after the copyrighted work had already been made.¹⁴ Under the incentive view, I argue that the incentives should aim at the *risk* associated with some aspects of creating the work and with the optimal use of the work, for the benefit of both the owners and the public. The public's interest—lest we forget—is the goal of copyright law, whereas the rights awarded to the author are the means to achieve the public interest in promoting the creative process.¹⁵ Accordingly, one criterion for allocating ownership is identifying the party who bears the risks associated with the production of the work. Wishing to avoid a case-by-case solution and uncertainty, the task is to identify typical situations. The economic analysis of *Tasini* warns against allocations which are to be instantly corrected. Thus, we should add the temporal axis and evaluate different "Coasean moments"¹⁶ when querying the possibility of a corrective transaction.¹⁷

Shaping the allocation default rule is thus crucial.¹⁸ An economic intuition would be to design a penalty default rule that would allocate initial ownership to the employee, expecting the employer to contract around this default rule. This expected response would act as a signal to the employee

Introduction to the Law and Economics of Intellectual Property, 5 J. OF ECON. PERS. 3, 11-18 (1991); Wendy J. Gordon & Robert G. Bone, *Copyright*, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 189 (Boudewijn Bouckaert & Gerrit De Geest, eds., 2000). These discussions emphasize the need to provide authors with incentives to make works in the first place, given the likelihood that without legal protection and subject to the costs of copying the work, the work would be copied. A different point of view focuses on the need to internalize the positive externalities created by a work of authorship. For a critical analysis, see Brett M. Frischmann & Mark A. Lemley, *Spillovers* 107 COLUM. L. REV. 257, 285-90 (2007).

¹⁴ I.T. Hardy, *An Economic Analysis of Copyright Law's Work-Made-for-Hire Doctrine*, 12 COLUMBIA-VLA J. OF L. & THE ARTS 181 (1988); Parisi & Ševčenko, *Lessons from the Anticommons*, *supra* note 12.

¹⁵ See *e.g.*, *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'")

¹⁶ I borrow the term from Rochelle Cooper Dreyfuss, *Commodifying Collaborative Research*, in *THE COMMODIFICATION OF INFORMATION* 397, 405 (Niva Elkin-Koren & Neil Weinstock Netanel, eds., 2002).

¹⁷ See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

¹⁸ See Ian Ayers & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (introducing the idea of penalty default rule.)

that ownership is at stake. I argue that where the unequal power of the parties extends beyond information deficiencies, which is the typical situation in the employment context, a penalty default rule is likely to fail. Moreover, it would cause unnecessary transaction and demoralization costs.

As for employment law, part III builds on previous literature to unpack the conventional description of the employment relationship as one of unequal bargaining power. Factors internal to the employment relationship (bounded rationality, asymmetry of information) and external thereto (lock-in costs, hold-out problems, the employment market) are identified. Insights borrowed from game theory about the difference between one-shot games and repeat games add to the understanding of the relationship.

The integrated copyright-employment analysis concludes that the law should search for typical cases, in which we can identify *ex ante* the party who bears the risks associated with making the work in the first place, usually the employer/commissioning party, while assuring informed consent on behalf of the other party, usually the employee-author, and avoiding allocations which are likely to be instantly corrected by the market without compensation. This general framework is then further fine-tuned, arguing that the law should take into consideration the kind of the employer (whether it is a cultural industry,¹⁹ whether its business model is centralized, *e.g.*, a music label, or decentralized, *e.g.*, an independent film producer) and the kind of employee (whether they are "Bryants" or "Millers", *i.e.*, were they hired to make works of authorship or not).

The conclusion offers moderate support for the current work-made-for-hire doctrine, with some proposed modifications to the interpretation of the *scope* element of the doctrine. It also advocates greater use of written job descriptions in the creative employment market. Thus, the article offers a more solid explanation for current law with some interpretive proposals. Under this analysis, Mattel should indeed own Bratz, but Miller should have owned the software he wrote.

I. THE ALLOCATION SPECTRUM

Current legal doctrine contains hidden assumptions about the creative process, about cultural markets, about the workplace and about the relationship between employers and employees. The two elements of the work-made-for-hire doctrine, employment and scope, assume a

¹⁹ The term 'culture industry' originates from THEODORE W. ADORNO, *THE CULTURE INDUSTRY: SELECTED ESSAYS ON MASS CULTURE* (2001), who used it in the critique of what cultural critics would later call the consumerist society, or the society of spectacle, applying the term offered by GUY DEBORD, *SOCIETY OF THE SPECTACLE* (Kenn Knabb, translator, New ed. 2006).

dichotomous world, in which an author is either an employee or an independent contractor; in which a work of authorship can be created either within the scope of the workplace or outside it. The result, not surprisingly, is also dichotomous; ownership belongs to one party alone. However, each of these factors is more complex and dynamic and the overall interaction is in a constant change. Advanced technology, new business models, economic developments, globalization and changing social norms all impact the production of creative works. This part briefly comments on these changes (I.A), and instead of a binary allocation, offers a spectrum of legal choices (I.B).²⁰ It then adds a legal layer on top of this spectrum (I.C). I discuss the U.S. doctrine and the German approach, which is the most elaborated existing alternative. Another layer of this discussion is the way the market responds to the legal layer. The 2001 *Tasini* case and its aftermath serve as an important lesson for policy makers (I.D).

A. Modes of Production and Employment

There are many modes of cultural production. Patronage represents a European medieval form of sponsored creativity.²¹ Modern copyright law, dated to the English Statute of Anne of 1709,²² replaced the patronage system with economic incentives for creativity. The eighteenth and nineteenth centuries witnessed the birth of the romantic author, who is apparent in the text and sub-text of much of copyright law as we know it.²³ This is *Author's Copyright*. The twentieth century saw the rise of the *Corporate Copyright*,²⁴ i.e., works of authorship created within the

²⁰ For criticism of the binary effect of the work-made-for-hire doctrine, see Nancy S. Kim, *Martha Graham, Professor Miller and the 'Work for Hire' Doctrine: Undoing the Judicial Bind Created by the Legislature*, 13 J. INTELL. PROP. L. 337 (2006) (proposing a particularized analysis that emphasizes the expectations of the parties.)

²¹ See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 16-17 (1993).

²² 8 Ann. c. 19 (1709).

²³ See Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author*, 17 EIGHTEENTH CENTURY STUDIES 425 (1984) (arguing that the romantic author is a social construction); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphosis of "Authorship,"* 1991 DUKE L.J. 455 (discussing the romantic author and the law). For a different account, see Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets and Liberal Virtues in Early American Copyright*, 118 YALE L.J. 186 (2008).

²⁴ Corporate copyright entered copyright law with the introduction of the work made for hire doctrine in the Copyright Act of 1909, an amendment which is said to have been added "in a most casual manner." See L. RAY PATTERSON & STANLEY

hierarchical setting of a firm, or more generally, the workplace, governed by the doctrine of work-made-for-hire.²⁵ Catherine Fisk aptly noted that "[t]he author isn't dead; he just got a job."²⁶ The employed author did not replace the independent author and many authors are independent contractors, rather than salaried employees.²⁷ The law now treats all workplaces in a unified manner, but one size does not fit all. A privately owned firm is different from the government as an employer, research universities are different from a commercial publisher and a giant software firm is different from the local architecture studio. The focus here will be on private firms, leaving aside unique considerations that are relevant to particular workplaces.²⁸

W. LINDBERG, *THE NATURE OF COPYRIGHT – A LAW OF USERS' RIGHTS* 85-88 (1991); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 101-03 (2001); Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 *YALE J.L. & HUMAN.* 1, 55-56 (2003) (providing the history of the doctrine and describing corporate copyright as "the ultimate legal fiction underlying modern copyright law.") and at 62-67 (discussing the enactment of the doctrine in the 1909 Copyright Act.)

²⁵ See 17 U.S.C. §§101, 201(b).

²⁶ Fisk, *Authors at Work*, *supra* note 24, at 1.

²⁷ Ruth Towse reports several surveys of artists in several developed countries, all show that "artists are mostly self-employed, work long hours on short term contracts, and experience higher than average unemployment... they receive below national average earnings..." See Ruth Towse, *Copyright Policy, Cultural Policy and Support for Artists*, in *THE ECONOMICS OF COPYRIGHT – DEVELOPMENTS IN RESEARCH AND ANALYSIS* 66, 68 (Wendy J. Gordon & Richard Watt eds., 2003).

²⁸ An important consideration in the university context, for example, is academic freedom, which is irrelevant to other workplaces. In *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416 (7th Cir. 1988) Judge Posner noted that if the issue had to be decided, he might have concluded that the teacher's exception survived the 1976 Act. See also Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 *U. CHI. L. REV.* 590 (1987); Kim, *Martha Graham*, *supra* note 20, at 357-62; Gregory Kent Laughlin, *Who Owns Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine's Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses*, 41 *B.C. L. REV.* 549 (2000); Georgia Holmes & Daniel A. Levin, *Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age*, 2000 *BYU EDU. & L.J.* 165 (2000). Works prepared by university professors might differ from a school teacher's preparation of tests, see *Shaul v. Cherry Valley-Springfield Cent. School Dist.* 363 F.3d 177, 186 (2d Cir. 2004) (finding that a teacher's preparation of tests falls within the scope of employment, hence copyright belongs to the employer.)

Today, in post-modern times, copyright scholars are growingly aware of other forms of creative production such as non-western communal authorship²⁹ and collaborative research.³⁰ As our lives go digital, more attention is devoted to various forms of peer production, such as open source projects and wikis.³¹ Nonetheless, corporate copyright, despite the rise of peer production, still accounts for a vast amount of works.

Working patterns also change. Technology enables working outside the office in many sectors; broadband internet connection and wireless access allow employees to work from the home, internet café or nearby park. Work occurs outside the physical location of the workplace and outside the usual working hours.³² The ubiquity of personal computers further blurs the traditional image of the workplace towards a more flexible environment. The result is that it is no longer easy to rely on clear evidence as to the time, place and manner of making the work of authorship (the traditional scope element of the work made for hire doctrine) to determine whether it was made within the scope of employment or not.

Globalization further changes the modes of production. Local firms are more active in the global market; firms become multinational, spreading production and management in various locations around the world and relocating them according to their needs. Furthermore, firms experience changes in their identity, due to bankruptcy, mergers and acquisitions. The absence of a unified global rule regarding ownership of creative works made within the context of the workplace,³³ together with different legal models applied in various places, require global employees and the cosmopolitan authors to figure out the issue themselves.

²⁹ See JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996); Madhavi Sunder, *IP³*, 59 STAN. L. REV. 258 (2006).

³⁰ See Dreyfuss, *Commodifying Collaborative Research*, *supra* note 16.

³¹ See YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006); Lior Jacob Strahilevitz, *Wealth Without Markets?*, 116 YALE L.J. 1472 (2007).

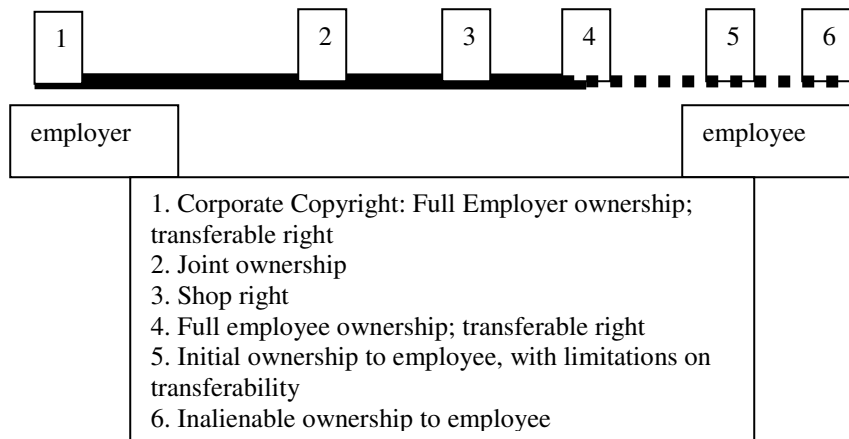
³² See United States Department of Labor, Bureau of Labor Statistics, *Work at Home Summary: Work at Home in 2004* (2005) available at <http://www.bls.gov/news.release/homey.nr0.htm> (reporting that in May 2004, 20.7 million Americans worked at home; 13.7 million of them were wage and salary employees.)

³³ See MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT §5.03[B][1][c].

B. The Allocation Spectrum

The law has a wide range of options to choose from regarding the initial allocation of ownership of copyrighted works in the workplace. Legislatures face the task of choosing the best point on this allocation spectrum and courts face the task of implementing the legislative choice of allocation. The variables that form the allocation spectrum are the first owner of the copyrighted work (the employer or the employee) and the transferability of the right (ranging from a fully transferable right to an inalienable right). Different jurisdictions chose different points on this allocation spectrum, the American model and the recently amended German model represent and illustrate the width of the allocation spectrum.

Table 1



On one end of the allocation spectrum [1] lays the corporate copyright. The law may award the ownership in the copyrighted work to the employer if two conditions are met, which compose the work-made-for-hire doctrine: that the work was created by an employee and that the work was made within the scope of employment.³⁴ Once these conditions are fulfilled, the employer is free to transfer the rights to whomever he or she wishes, whether it is a third party or the employee, or to license the use of the work. The employer is free to apply an internal compensation scheme, whether it is part of the employment contract or a unilateral measure. In other words, the employer enjoys full ownership, unbounded by the fact

³⁴ The other option under U.S. law is that the parties to the transaction agree that the work will be considered as a work-made-for-hire, an option which is limited to specific categories of works. See 17 U.S.C. §101(2).

that the author was an employee. If the conditions are not met, then the ownership vests with the author alone, no strings attached [point [4]].

A second possible point, [2], would be to award the initial ownership of the work to both parties, *i.e.*, joint ownership of the employee and the employer. Note that this would be a statutory allocation, which differs from the current joint ownership rule found in the Copyright Act.³⁵ This might seem fair and just and hence an attractive solution, but would often be an inefficient allocation. The parties might disagree about how to utilize the work, resulting in either overuse by one party, which would be a situation of a "tragedy of the commons",³⁶ or hold-outs by employees or inaction by the employer, which would be a situation of the tragedy of the anti-commons.³⁷

Allocation [3] would award the ownership to the employee, but with acknowledging the employer's non-exclusive non-transferable right to use the work for free.³⁸ The property rule is shifted into a liability rule.³⁹

³⁵ See 17 U.S.C. §101 ("A 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole") and §201(a). Joint owners are treated as tenants in common, *i.e.*, each of the owners has an independent right to use or license the work, though he or she should account to the joint owners for any profits. See *Davis v. Blige*, 505 F.3d 90, 97 (2d Cir. 2007). To reach a conclusion about joint ownership, a court should find that each author made an independently copyrightable contribution to the work (see *e.g.*, *Ashton-Tate Corp. v. Ross*, 916 F.2d 516 (9th Cir. 1990)) and that at the time of making the contribution the authors intended it to be merged. See *Aalmuhammed v. Lee* 202 F.3d 1227 (9th Cir. 2000). Applying as-is the doctrine to a work made by an employee is unlikely to yield a conclusion about joint ownership, as the employer's contribution might be a general instruction to the employee, *i.e.*, an idea how to make a certain work, but not an independently copyrightable contribution. Intention is also unlikely to be shared in the way required by the joint ownership rule.

³⁶ See Garret Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

³⁷ See Michael A. Heller, *The Tragedy of the Anti-Commons: Property in the Transition from Marx to Markets*, 111 *HARV. L. REV.* 621 (1998) (arguing that multiple ownerships might result in a deadlock.)

³⁸ One scholar proposed that in such cases the hiring party might enjoy an implied license to use the work. See Scott J. Burnham, *The Interstices of Copyright Law and Contract Law: Finding the Terms of an Implied Nonexclusive License in a Failed Work for Hire*, 46 *J. COPYR. SOC'Y* 333 (1999). This view inserts contract law principles into the copyright law context.

³⁹ For the distinction between property rules and liability rules see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972).

This model is borrowed from patent law.⁴⁰ Patent law does not include a statutory work-made-for-hire doctrine, but does acknowledge an equitable doctrine called *shop right*.⁴¹ In the absence of a contract between the employee who reached an invention using the employer's facilities, courts base the employer's right to use the invention on implied contract or on principles of equity and fairness.⁴² The right is limited in its scope, but allows the use of the invention by the employer without transferring it to third parties. Incorporating the patent shop right in copyright law, would result in employee ownership that is subject to the employer's right to use the work.⁴³ The parallel entitlement of the employee and the employer is likely to result in a problematic commercial management of the work.

⁴⁰ For discussion of ownership of patents within the workplace, see Robert P. Merges, *The Law and Economics of Employee Inventions*, 13 HARV. J.L. & TECH. 1 (1999). Comparison between copyright and patent in this area should be attentive to crucial differences between the law, economics and business practices of the creative process resulting in a copyrighted work of authorship and the innovation process, resulting in a patented invention. *First*, the financial and legal risks involved in creating copyrighted works or patentable inventions are sharply different. Inventions take place mostly within industries and firms. *Second*, copyright subsists in an original work once it is created. No registration or publication are required. Hence, enjoying legal protection is immediate and cheap. Patents, by contrast, require a lengthy and expensive process of registration with the Patent Office, and there is no guarantee that the PTO will award the patent. *Third*, the patent registration process requires that the owner of the invention is asserted. See 35 U.S.C. §111(a)(1). Thus, the issue of ownership arises in a relatively early point in the relationship between the employer and the inventor/employee. For the differences between copyrighted works and patented inventions in this context, see also Burk & McDonnell, *The Goldilocks Hypothesis*, *supra* note 9, at 594.

⁴¹ See Restatement (First) of Agency §397 (1933) (comment b); *McElmurry v. Arkansas Power & Light Co.* 995 F.2d 1576, 1580-82 (Fed. Cir. 1993) (discussing the normative basis of the doctrine and instructing that acknowledging the right should be the result of considering the totality of the circumstances on a case by case basis.) This rule developed in the common law in the 19th Century. It was initially based on the employee's consent and later the theoretical basis shifted to the employment contract. For discussion of the roots of the doctrine, see Catherine L. Fisk, *Removing the 'Fuel of Interest' from the 'Fire of Genius': Law and the Employee-Inventor*, 65 U. CHI. L. REV. 1127, 1151-64 (1998).

⁴² See Burk, *Intellectual Property*, *supra* note 6, at 15-16 (explaining the legal basis of the doctrine and suggesting that the absence of a work made for hire doctrine might be the result of a notion of the romantic inventor.)

⁴³ Congress refused to incorporate patent shop right in the Copyright Act. See Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CAL. L. REV. 941, 991 (2007).

Allocation [4] awards the right to the author-employee with no limitations attached so that the employee can do with the work whatever he or she wishes, including transferring it to third parties or to the employer. This situation mirrors the allocation to the employer [1]. Hence, the points to its right lie beyond the original spectrum, or put differently, beyond the Anglo-American spectrum. This is where Continental law enters.

Allocation [5], which does not have a parallel on the employer's side of the spectrum, would be initial allocation to the author, but with some limitations attached to the ownership, or more precisely, on the transferability thereof. For example, the law could award the employee the initial ownership and allow her to transfer the right but only for a limited time, whereas at the end of the limited period, full ownership of the employee would resume. Alternatively, the law could allow the author to terminate the transfer under some circumstance, such as if the employer fails to utilize the work.

Allocation [6] awards inalienable ownership to the employee. Such a (hypothetical) right would not enable the author-employee-owner to transfer his or her rights to any party. However, in order to enable some efficiency it should allow the author to grant a non-exclusive license to use the work. Such a limited right would be, on this theoretical account, accompanied with limitations on waiving the rights. This is an overly paternalistic and extreme option, which runs afoul of fundamental principles of the free market and of property rights as we know them.⁴⁴ However, in some jurisdictions the case of moral rights does not fall far from this option. Moral rights are often inalienable and some jurisdictions prohibit waiving them.⁴⁵ Unwaiveable rights are not a foreign concept in employment law.⁴⁶

More points could be added to the allocation spectrum. Indeed, the choice of the point of allocation differs among different jurisdictions. Thus far we have seen the range of options. Before we turn to a normative analysis, I would like to super-impose the legal layer on top of the spectrum.

⁴⁴ For a similar point regarding real property, see RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 81 (7th ed. 2007).

⁴⁵ Inalienability of moral rights is mostly a European Continental phenomenon, though there is no uniformity among countries such as Germany, France, Italy, Spain and the Netherlands. See Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199 (1995).

⁴⁶ See e.g. Fair Labor Standards Act, 29 U.S.C. §§201-219 (setting minimum wages, maximum hours and child labor provisions).

C. The Law: Two Models

Several current legal models illustrate the allocation spectrum, roughly divided into two main manifestations, the first is the Anglo-American model, namely the U.S. model and the UK model,⁴⁷ which is found also in other jurisdictions where the legal system was affected by English law,⁴⁸ and the second is the Civil Law model.⁴⁹ The general rule under both models vests the initial ownership with the author,⁵⁰ but diverges after this

⁴⁷ See UK: Copyright, Designs and Patent Act 1988 ("CDPA") (c. 48), s. 11(2):

(2) Where a literary, dramatic, musical or artistic work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.

⁴⁸ See for example in Canada, Copyright Act (R.S., 1985, c. C-42), based on the English Act of 1911 (Copyright Act, 1911, 1 & 2 Geo. 5, c. 46). Section 13(3):

Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright...

See also a case recently decided by the South African Supreme Court of Appeals, *King v. SA Weather Service* (716/07)[2008] ZASCA 143 (27 Nov. 2008).

⁴⁹ This is an admitted generalization for the clarity of the discussion. For a survey of copyright law in several Civil Law jurisdictions, see KENNETH D. CREWS & JACQUE RAMOS, *COMPARATIVE ANALYSIS OF WORLD INTELLECTUAL PROPERTY LAW: ISSUES FOR UNIVERSITY SCHOLARSHIP* (2005), available at http://copyright.surf.nl/copyrightk/files/International_Comparative_Chart_Zwolle_III_rev071306.pdf; J.A.L. STERLING, *WORLD COPYRIGHT LAW 200-01* (2003) (discussing French, German, Greek and Dutch law); SANNA WOLK (ED.), CHRISTINE KIRCHBERGER, ULRICA NYH, SILVANA PENALOZA, HANNA SEPPÄNEN AND KERLI TULTS, *OWNERSHIP OF THE COPYRIGHT IN WORKS AND THE PATENT RIGHT IN INVENTIONS CREATED BY EMPLOYEES IN FINLAND, SWEDEN, GERMANY, AUSTRIA, THE UNITED KINGDOM, ESTONIA AND ARGENTINA* (2002) available at <http://www.juridicum.su.se/user/sawo/Publikationer/Wolk%20nr%20120.pdf>; *INTELLECTUAL PROPERTY LAWS OF EUROPE* (George Metaxas-Maranghidis ed., 1995), discussing the ownership of works created by employees in Belgium (62); Denmark (103); Iceland (221); Italy (270); Norway (335); Portugal (356); Spain (373); Switzerland (423).

⁵⁰ U.S.: 17 U.S.C. §201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work..."); UK: CDPA, s. 11(1) ("The author of a work is the first owner of any copyright in it..."); Germany: *Law dealing with Copyright and Related Rights (Copyright Law)* (Text of September 9, 1965, as last amended by the Law of July 16, 1998), art. 11. For an English translation see

first step. Common law jurisdictions accompany the initial allocation to the author with an explicit or implicit permission to transfer the (material) rights,⁵¹ and with rules addressing works made for hire. If the statutory conditions are met, then the initial allocation lies not with the author but with the employer. In such a case, the employer is considered to be the legal author. In contrast, the German model allows the author to grant the right to use the work ("exploitation right"), but the ownership remains with the author, even if the work was created by an employee within the scope of the employment.⁵²

1. U.S: Initial Allocation

Under the U.S. model there are two situations in which a work might be considered a work-made-for-hire. The first refers to works made by employees and by implication leaves independent contractors outside, subject to the general rule that an author is the owner the original work he or she made.⁵³ The second situation refers to commissioned works, and will be discussed shortly.

For the employer to own the work, the work-made-for-hire doctrine requires proving two elements: employment, and a causal connection between the work and the employment, *i.e.*, that it was made within the scope of employment. If these elements are met, the employer is considered the first owner of the copyright, even though the employee was the author. On the allocation spectrum this would be point [1]. Initial allocation means there is no transfer of the copyright from the author-employee to the employer, but rather that the employer is the first owner. If the author is not an employee or the work was made outside the scope of employment then the initial ownership vests with the author [point [4] of the allocation spectrum].⁵⁴ In either case, there is no legal barrier prohibiting the parties to

http://www.wipo.int/clea/docs_new/pdf/en/de/de080en.pdf (hereafter: German Copyright Act).

⁵¹ U.S.: 17 U.S.C. §201(d); UK: CDPA, s. 90.

⁵² German Copyright Act, art. 31.

⁵³ See 17 U.S.C. §101(1).

⁵⁴ Such post-allocation would be a transfer of the copyright and should not be confused with the initial allocation. The distinction matters. Some rules that apply to a work-made-for-hire do not apply to other works. For example, a work of visual art that enjoys some moral rights under 17 U.S.C. §106A does not apply to a work made for hire. See 17 U.S.C. §101(B). Another difference is the duration of a work made for hire. See 17 U.S.C. §302(c). A third important difference is that while ordinary transfers of copyright ownership can be terminated under some conditions, a work made for hire is ineligible for such termination. See 17 U.S.C. §203(a)(3). For discussion, see David Nimmer, Peter S. Menell & Diane

contract around the initial allocation as they see fit, be it before or after the work is made.

2. Agency Law in Copyright Law

The statute is silent as to the details of either element of the work-made-for-hire, leaving their interpretation to the courts. Initially, courts turned to various tests found in employment law to determine who is an employee and to determine the scope of employment: (1) a "control test", *i.e.*, whether the hiring party retained the right to control the product, or (2) whether the hiring party actually had such control, or (3) a formal test, acknowledging employment only when the other party was a salaried employee,⁵⁵ or (4) an interpretation borrowed from agency law.⁵⁶ However, the Supreme Court opted for an agency law test. The Court adopted a rather formalistic and conservative interpretation, deferring to Congress, and relying on the text and structure of the Copyright Act.⁵⁷ The legislative history, as analyzed by the Court supported this interpretation.⁵⁸

The agency tests provided a list of inconclusive factors to be considered on an *ad hoc* basis.⁵⁹ While it might have clarified which legal standard should be applied, the test itself remains foggy and difficult to

McGimsey, *Pre-Existing Confusion in Copyright's Work-for-Hire Doctrine*, 50 J. COPYR. SOC'Y 399 (2003). For a full discussion of the implications of treating a work as made for hire, see NIMMER ON COPYRIGHT §5.03[A]. Moreover, transactions done after initial allocation might have tax implications.

⁵⁵ The distinction between salaried employees (those who are under a contract *of* service) and independent contractors who provide their services to a hiring party (those under a contract *for* service) is a bedrock principle of the Common Law and is reflected in the language of the Canadian model, which is based on the old English model. See *supra* note 48.

⁵⁶ See discussion of the various tests in CCNV, 490 U.S. at 738 and in NIMMER ON COPYRIGHT, at §5.03[B][1][a].

⁵⁷ CCNV, 490 U.S. at 739-40. For discussion, see Jacob, *Tort Made for Hire*; *supra* note 9. Nimmer explains that the Court's standard focuses on the right to control the manner and means of production rather than the product itself. See NIMMER ON COPYRIGHT, at §5.03[B][1][a][iii].

⁵⁸ CCNV, 490 U.S. at 743-49. One scholar argued that the Court misinterpreted the legislative history and created an uncertain test. See Michael B. Landau, "Works Made For Hire" *after Community for Creative Non-Violence v. Reid: The Need for Statutory Reform and the Importance of Contract*, 9 CARDOZO ARTS & ENT. L.J. 107 (1990) (advocating the amendment of the Copyright Act to incorporate the formal "salaried employee" test.)

⁵⁹ CCNV, 490 U.S. at 751.

anticipate or to apply.⁶⁰ Uncertainty affects the parties' behavior, to the extent that they are aware of it. Those who learned about the test applied by courts might opt for contracts, pre-assigning the ownership.

In interpreting the scope element, courts again turned to agency law and applied a three-prong test.⁶¹ Accordingly, a work is considered to have been made within the scope of employment if (1) it is of the kind for which the employee was hired; and (2) the work was made substantially within the time and space limits, and (3) that the work was made, at least in part, with a purpose to serve the employer's interests.⁶² Later on we shall return to the agency test.⁶³

Importantly, as noted by Assaf Jacob, the agency law tests are derived from tort law, rather than from an independent analysis of employment law.⁶⁴

⁶⁰ The Court of Appeals in the Second Circuit, applying the *CCNV v. Reid* tests, noted that "The Reid test is a list of factors not all of which may come into play in a given case. . . . the Reid test is therefore easily misapplied." – *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85 (2d Cir. 1996), *cert. denied*, 517 U.S. 1208 (1996) (internal citation omitted). Ironically, the Supreme Court in *CCNV* pointed to predictability and certainty as Congress' paramount goal in enacting the 1976 Copyright Act. See *CCNV*, 490 U.S. at 749. See also NIMMER ON COPYRIGHT, at §5.03[B][1][a][iii].

⁶¹ See Restatement (Second) of Agency §§228-229; 236. Applying the agency test to the scope element was advocated by one commentator shortly after *CCNV* was decided. See Robert A. Kreiss, *Scope of Employment and Being an Employee under the Work-Made-for-Hire Provision of the Copyright Law: Applying the Common-Law Agency Tests*, 40 U. KAN. L. REV. 119 (1991). The justifications provided for this approach are canons of statutory interpretation and the convenience of providing a developed framework. *Ibid.*, at 132-32. I find both reasons unconvincing, as the statute is silent about the meaning of the elements of the work-made-for-hire doctrine and the need for a framework does not in itself justify the particular choice. Kreiss himself struggled with applying doctrines admittedly taken from the context of tort law; see *e.g.*, *ibid.*, at 129-30 (speculating about the third test of the agency element of the scope element); and at 139 (trying to justify the arbitrary effect of borrowing tort law concepts and inserting them in the copyright law context.)

⁶² See *e.g.*, *Avtec Systems, Inc. v. Peiffer*, 21 F.3d 568, 571-72 (4th Cir. 1994); *Avtec Systems, Inc. v. Peiffer*, 67 F.3d 293, at *5 (4th Cir. 1995) (applying the Agency test and noting that the all three elements must be considered).

⁶³ See *infra* notes 137-149.

⁶⁴ Jacob, *Tort Made for Hire*; *supra* note 9.

3. Independent Contractors

An important difference between the U.S. and UK models is found in the situation of a commissioned work. Current UK law is silent about commissioned works, subjecting them to the general rule that the author is the copyright owner and leaving any subsequent transfers entirely to the market.⁶⁵ the author can transfer his or her rights to the commissioner of the work.⁶⁶ U.S. law treats commissioned works as works made for hire only if three conditions are met:⁶⁷ first, that the work was specially ordered or commissioned; second, that the work is to be used for at least one of nine listed statutory categories, such as a contribution to a collective work, a motion picture or an instructional text;⁶⁸ and third, that the parties expressly agreed in a written and signed instrument that the work shall be considered a work made for hire. This means that works commissioned for other purposes or works commissioned with no specific written agreement remain the author's. The author is free to license or transfer the copyright as

⁶⁵ The UK Copyright Act, 1911 addressed commissioned works of a particular kind:

Where, in the case of an engraving, photograph or portrait, the plate or other original was ordered by some other person and was made for valuable consideration, in pursuance of that order, in the absence of any agreement to the contrary, the person by whom the plate or other original was ordered shall be the first owner of the copyright.

This special treatment was eliminated in subsequent Acts. See 1 COPINGER AND SKONE JAMES ON COPYRIGHT §5-32 (Garnett, James & Davies eds., 15th ed. 2005).

⁶⁶ In the UK, the transfer can be explicit, *i.e.*, in a written contract, or implicit. Indeed, courts found that there was an equitable transfer of rights in some circumstances. See discussion in SIMON STOKES, ART AND COPYRIGHT 156-59 (2001); WILLIAM R. CORNISH & DAVID LLEWELYN, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS 472 (5th ed. 2003).

⁶⁷ See 17 U.S.C. §101(2) (definition of "work made for hire", quoted *supra* note 7). For the legislative history of this prong of the doctrine, see Nimmer, Menell & McGimsey, *Pre-Existing Confusion*, *supra* note 54.

⁶⁸ The enumerated categories require explanation for their inclusion in the statute, as well as the categories missing from the list. One possible answer is political, and suggests that the categories are the result of successful political pressure by interested groups. A second explanation suggests that the enumerated categories are works which require multi-party coordination. For both explanations, see Burk, *Intellectual Property*, *supra* note 6, at 13. For the first explanation, see the rather curious case of sound recordings which were added to the list of enumerated categories and then eliminated. For discussion, see Matt Stahl, *Recording Artists, Work for Hire, Employment and Appropriation* (October 23, 2008), available at SSRN: <http://ssrn.com/abstract=1288831>.

he or she see fit. Accordingly, the question which may arise is whether the work falls within this category to begin with and if the answer is positive, then disputes might evolve around the interpretation of the contract.

4. The German Model

Civil Law provides a different model for ownership of employees' works.⁶⁹ The general approach is that the author is the initial owner if the work is made within the scope of the employment, as in points [4], [5] or [6]. Civil law jurisdictions differ on their choice among these points. Interestingly, even when the choice is [4], in which the employee can freely transfer his or her rights to anyone, the law sets some boundaries to this transfer or grant of exploitation rights, namely the transfer is subject to a principle of "limited purpose:" This limitation means that the transfer of rights or the license granted are interpreted narrowly, to cover only those rights that are related to the employment and leaving any residual rights to the author.

The German Copyright Act provides an elaborate scheme of ownership or more precisely, a detailed regulation of copyright contracts. The Act was amended in 2002⁷⁰ and again in 2007.⁷¹ Under current

⁶⁹ An important exception to the Civil law model instructs that material rights in software prepared by employees belong to the employer. See art. 2(3) of the Council Directive 91/250/EEC on the legal Protection of Computer Programs of 1991 ("Software Directive"). The Directive was implemented throughout the EU. See Wolk et al, OWNERSHIP, *supra* note 49, at 7-8.

⁷⁰ See Act on Strengthening the Contractual Position of Authors and Performers of March 22, 2002. For a summary of the 2002 amendment and its legislative history, see Bettina C. Goldmann, *New Law on Copyright Contracts in Germany*, 9 COMPUTER AND INTERNET LAWYER 17 (2002); for analysis, see Reto M. Hilty & Alexander Peukert, "Equitable Remuneration" in *Copyright Law: The Amended German Copyright Act as a Trap for the Entertainment Industry in the U.S.?*, 22 CARDOZO ARTS & ENT. L.J. 401, 416-21 (2004); Gerhard Schrickler, *Efforts for a Better Law on Copyright Contracts in Germany – A Never-Ending Story?*, 35 IIC 850 (2004).

⁷¹ The 2007 amendment, popularly referred to as the "second basket" of amendments of the copyright act for the information society, deals with various other aspects, which are not discussed in this article, such as compensation for owners for private copying and uses of public libraries. The amendment is available at <http://www.bgblportal.de/BGBL/bgb11f/bgb1107s2513.pdf> (German). The amendment entered into force on January 1, 2008. For commentary, see Heise Online, <http://www.heise.de/english/newsticker/news/92318> (July 6, 2007). I am indebted to Zohar Efroni and Clemens Kochinke for their assistance with German copyright law.

German law the ownership is allocated to the author,⁷² who cannot transfer the rights. However, the author can allow other parties, including the employer,⁷³ to use the work. This is the *exploitation right*, which was described by a leading German copyright scholar as a "sort of surrogate for the assignment of copyright."⁷⁴

The law imposes further limitations on the author's power to make transactions and provides her with a set of (protective) rights, as well as supportive background rules. Located on the allocation spectrum, the German model is best understood to be in between points [5] and [6]. Several rules in the German Copyright Act empower the employee-author vis-à-vis the employer. *First*, any grant of exploitation rights is interpreted according to the purpose of the grant.⁷⁵ However, it is reported that this limitation on the transferability is bypassed by contracts which attempt to detail every possible use.⁷⁶ *Second*, unbargained-for uses of the work are not granted automatically to the employer, but are to be determined. Until the 2007 amendment came into force in 2008, the law voided the grant of unforeseen uses.⁷⁷ For example, a contract regarding an analogue work created at a time that no digitization technology was available could not address (then) future digital uses, but if it nevertheless did attempt to allow such future uses, the contractual clause was considered void. The 2007 amendment allows copyright owners to grant licenses to use their works in yet unknown ways.⁷⁸ However, the permission is accompanied by a detailed mechanism, under which the user should notify the author (who is the copyright owner) of the new intended use, the author then has a window of three months to revoke the right and is entitled to a reasonable

⁷² German Copyright Act, art. 11 ("Copyright shall protect the author... with respect to utilization of his work.")

⁷³ Art. 43 applies the articles dealing with the exploitation rights to an author who has "created the work in execution of his duties under a contract of employment or service provided nothing to the contrary transpires from the terms or nature of the contract of employment or service." For discussion of the German legal framework, see Wolk, OWNERSHIP, *supra* note 49, at 13-15.

⁷⁴ See Schricker, *Efforts for a Better Law*, *supra* note 70, at 852.

⁷⁵ German Copyright Act, art. 31(5).

⁷⁶ See Schricker, *Efforts for a Better Law*, *supra* note 70, at 853.

⁷⁷ German Copyright Act, art. 31(4) of the Copyright Act before the 2007 amendment. Schricker noted in 2004 that "Amazingly, the courts show a tendency to restrict the range of application of Sec. 31(4)." See Schricker, *Efforts for a Better Law*, *supra* note 70, at 854.

⁷⁸ German Copyright Act, art. 31(4) was stricken out and replaced with new art. 31a-31c.

remuneration. The author's right to withdraw the grant of exploitation rights of the new uses is also limited and expires upon the death of the author. *Third*, the employee has some control over subsequent transfers of the exploitation rights.⁷⁹ *Fourth*, the 2002 amendment allowed the author to renegotiate the terms of the contract if the compensation is inequitable.⁸⁰ The amendment lists some conditions and specifies various standards for such equity. The right is operative if the difference between the reward to the author and the proceeds is "conspicuous."⁸¹ The right to modify the contract is limited when a collective labor agreement applies.⁸² *Fifth*, the law instructs that the grants of exploitation rights are to be interpreted narrowly, so whenever in doubt, the disputed uses of the work remain the author's.⁸³ *Sixth*, the law allows agreements regarding future works, but the author has an unwaivable right to terminate the grant after five years.⁸⁴ *Seventh*, the employee-author has an unwaivable right of revoking the exploitation right, in some circumstances.⁸⁵

The complex German model illustrates that there are alternatives to the binary allocation rule that attempt to balance the commercial needs with the authors' interests. The different choices reflect the underlying rationales of copyright law and employment law.

D. Freelancers

Freelancers are independent contractors that remain the owners of the rights in the works they made, unless they transfer the rights. Freelancers grant a

⁷⁹ German Copyright Act, art. 34(1) states that "An exploitation right may be transferred only with the author's consent", though it goes on to limit the power of the author, stating that "The author may not unreasonably refuse his consent." See also art. 35, regarding the grant of non-exclusive exploitation rights by the holder of an exclusive right.

⁸⁰ See German Copyright Act, art. 32a, enacted in 2002, which replaced art. 36.

⁸¹ See Karsten M. Gutsche, *Equitable Remuneration for Authors in Germany – How the German Copyright Act Secures Their Rewards*, 50 J. COPYR. SOC'Y 257, 264-65 (2003) (proposing an escalating royalties' rates scheme instead of lump-sum remunerations.)

⁸² Goldmann, *New Law*, *supra* note 70. Collective labor agreements might play an important role in evening the unequal bargaining power of the parties. See *infra* note 92.

⁸³ German Copyright Act, art. 37. This rule has an exception in cases of collective works, see art. 38.

⁸⁴ German Copyright Act, art. 40.

⁸⁵ German Copyright Act, art. 41 (revocation for non-use) and art. 42 (revocation for changed conviction).

license to use their work under conditions agreed upon. The common copyright disputes turn on interpreting the scope of the license granted by the freelancer, usually a journalist, to the corporate user, usually a newspaper. More concretely, disputes emerge when the contract mentions a specific use but the commissioning party uses the work for other uses. The question is then whether the new use (*e.g.*, online publication) is similar to the agreed upon use (*e.g.*, print publication).

In *Tasini*, the defendant newspapers, used articles written by freelance journalists not only in the original agreed-upon use, namely the print newspaper, but also in digital databases (CDs and online services) of third parties. The suit was based on section 201(c) of the Copyright Act, which allows the owner of the copyright in a collective work to reproduce the separate contributions to the collection, only as part of the collection or as a revision of the collection.⁸⁶ The Supreme Court ruled in a 7:2 decision in favor of the journalists, finding that the digital republication was *not* a revision of the original collective work and accordingly, that the publishers were not authorized to use the articles in the way they did.⁸⁷ Leaving aside the comparison of different media and whether this technological/legal interpretation is correct or not,⁸⁸ *Tasini's* main lesson for our inquiry lies not in the judicial decision itself, but in the aftermath of the case.⁸⁹

⁸⁶ 17 U.S.C. §201(c): “Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.”

⁸⁷ Following the decision, a district court allowed a class action suit by the freelancers and later approved a settlement of a total of 18 million dollars. However, the Court of Appeals voided the settlement, finding that the District Court lacked jurisdiction to certify a class which included works that were not registered. See *In re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 116 (2d Cir. 2007), *cert. granted* *Reed Elsevier, Inc. v. Muchnick*, 2009 WL 498165 (U.S. Mar 02, 2009).

⁸⁸ For a discussion of the fate of revisions of collective works, *i.e.*, republications of works in a different format, usually a digital format, see Lateef Mtima, *Tasini and its Progeny: The New Exclusive Right or Fair Use on the Electronic Publishing Frontier?*, 14 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 369 (2004).

⁸⁹ For a combined economic-ethical discussion of the case, written before the Supreme Court's decision, see Gordon, *Fine-Tuning Tasini*, *supra* note 12, at 493-98 (arguing that the long-term impact of favoring the freelancers exceeds the short-term result of the risk of deleting some material from archives.)

Following the decision, the newspapers changed their contractual relationship with the freelancer journalists, so that the latter were required to transfer *all* possible rights to the newspapers and in some cases, they were required to do so retroactively.⁹⁰ Furthermore, the newspapers deleted thousands of articles from various databases.⁹¹ Thus, one of the challenges freelancers face in the post-*Tasini* era is how to compensate for their low bargaining power.⁹²

The case of freelancers highlights the core of the problem, which is shared by the work-made-for-hire doctrine: occasionally a work turns out to have new, previously unforeseen uses. When neither party expected this happy outcome, the unforeseen use was not bargained for. The binary legal doctrine results in a *winner take all* situation—either the employee owns the work or the employer—much to the dismay of the other party, who feels that he or she were tricked or that the initial deal was unfair. We shall return to fairness later on.

Parisi and Ševčenko portray the freelancer-publishers relationship as an anti-commons situation.⁹³ They note that the easiest solution in the case would have been to compensate the freelance authors and transfer the digital publication rights to the publishers. However, they point to the asymmetric transaction costs involved in such a corrective transaction.⁹⁴ While it is easy and cheap to split the bundle of rights which constitutes the copyright, it is expensive to reverse the division and reunify the fragmented

⁹⁰ This retroactive transfer of rights was challenged in *Marx v. Globe Newspaper Co., Inc.*, 15 Mass. L. Rptr. 400 (Mass. Super. 2002), where the court found in favor of the newspaper. The new freelancer agreement read in relevant part that the freelancer grants the Globe for no additional fee, "a non-exclusive, fully-paid up, worldwide license to use all of the Works that The Globe has previously accepted from [the freelancer], if any." – quoted in Marx, *ibid.*

⁹¹ See Terry, *Tasini Aftermath*, *supra* note 11; Snyder, *Pulling the Plug*, *supra* note 11; Bickham, *Extra!*, *supra* note 11; Gorman & Ginsburg, *Authors and Publishers*, *supra* note 12, at 9 (writing that "In this tug-of-war between author and publisher, the former won the litigation battle but not necessarily the economic war.") Landes and Posner describe the decision as unfortunate from an economic standpoint, since it increases transaction costs without enhancing the incentives to create. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 273-74 (2003).

⁹² Interesting options are to unionize or create a collective rights organization. See Maureen A. O'Rourke, *Bargaining in the Shadow of Copyright Law After Tasini*, 53 CASE W. RES. L. REV. 605, 626-34 (2003).

⁹³ Parisi & Ševčenko, *Lessons from the Anticommons*, *supra* note 12.

⁹⁴ *Ibid.*, at 302-03; see also Landes & Posner, *THE ECONOMIC STRUCTURE*, *supra* note 91, at 273-74.

copyrights. The high costs are a combination of tracing all freelance authors affected by the decision, negotiating with them and overcoming attempts by some freelancers to hold-out for higher compensation.⁹⁵ This analysis refers to the allocation of copyright that takes place *after* the initial relationship between the parties was established, when no pre-assignment was agreed upon.

The case of freelance authors conveys us some lessons which can be carried to the employment context. First, we should not limit our discussion to works that have already been created, but extend our inquiry to previous points on the timeline. Particularly we should notice the pre-employment phase. Second, both employers and employees adjust their behavior to the law and continue to do so when the law changes. A legal rule that seems to empower the weaker party might turn out to be more damaging. In Coasean terms, this is a corrective transaction. The Coase theorem states that when transaction costs are negligible, the initial allocation does not matter since the parties will reallocate the resources at stake.⁹⁶ Of course, the distribution of wealth among the parties matters to the parties and in the case of copyright it might matter to the public at large. In shaping the legal rule of first allocation, we should hypothesize whether the rule is likely to be corrected by the market, and if so, would that be a positive correction. In terms of overall welfare, a corrective transaction is efficient, but we should explore its distributive effect. In the aftermath of *Tasini*, the publishers improved their situation at the expense of the journalists and the public at large.

* * *

Having in mind the multiplicity of modes of creative production, the changing conditions of the workplace, replacing the binary option that current law offers with a spectrum of allocation possibilities, having mapped current legal models on this spectrum and equipped with some lessons from the freelancers' cases, we can turn to the theoretical underpinnings of copyright law, to search for guidance.

II. COPYRIGHT LAW: RISKS AND INCENTIVES

Under the economic analysis of copyright law, the rights accorded to authors serve as incentives to make works of authorship, which otherwise might not have been made. The discussion in this part follows this

⁹⁵ A possible solution offered by Parisi and Ševčenko turns to the fair use defense, *ibid*, at 323, and more broadly, they suggest that the choice of remedy can solve *Tasini's* anti-commons problem by shifting from a property rule to a liability rule.

⁹⁶ See Coase, *supra* note 17.

economic logic. Applying this understanding to the employment context instructs us to search for the party who bears the risk associated with making the work.⁹⁷ In most cases, this would be the employer.

Whatever the law's initial allocation might be, under an economic analysis the law should enable the parties to contract around the initial allocation, either *ex ante*, *i.e.*, before the employment relationship is established and before the work is made, or *ex post*. Setting the allocation as a default rule rather than an inalienable allocation reflects the importance of facilitating a free market and our commitment to freedom of contract. It also enables the market to correct inefficient allocations. Accordingly, after searching for the best risk-bearer (II.A), this part inserts Coasean analysis to the copyright-employment context, arguing that we should contemplate not only the initial legal allocation, but consider, to the extent possible, the option that the parties will change the initial allocation. This discussion leads us to search for the best default rule (II.B). The economic analysis and the interest to avoid a case-by-case finding, instruct us to identify typical situations (II.C). Accordingly, I suggest that we search for relevant criteria to shape these categories. The work, the kind of employer and the kind of employee are the three main criteria suggested.

A. Identifying the Risk-Bearer

1. Copyright Incentives

Under an instrumental conception, copyright law is a means to an end rather than an end in itself. The goal of copyright law is described in general terms, such as "the encouragement of learning" (in the words of the 1709 English Statute of Anne), or "to promote the progress of science" (in the words of the U.S. Constitution).⁹⁸ The goal is attributed to the public and the right accorded to the author is a tool to achieve that goal. Copyright is understood as an incentive to the would-be author in that it prohibits most unlicensed uses of his or her copyrighted work by others.⁹⁹

The protection against unlicensed uses is needed due to the economic features of intangible works as public goods. Absent a law prohibiting the copying of the work, it is likely to be copied and a market

⁹⁷ Jacob, *Torts Made for Hire*, *supra* note 9, proposes that the work made for hire doctrine is interpreted so to achieve the constitutional goals of copyright law, of providing incentives to create works and public access to such works. Note that the argument made here need not contradict Jacob's argument.

⁹⁸ See respectively, 8 Anne, c. 19 (1709); U.S. Const. art. I, §8, cl. 8.

⁹⁹ See Landes & Posner, *An Economic Analysis*, *supra* note 13; Gordon & Bone, *Copyright*, *supra* note 13.

failure is likely to occur. The law intervenes so to restore the functionality of the market, by prohibiting the use of the work (unless the owner consents to the use), imposing sanctions on the infringer and providing the owner with a set of remedies. The law thus creates a legal fence around the intangible work and raises the costs of copying, which include not only the actual costs of copying (such as obtaining access and paying for the use of a photocopy machine) but now also the legal risks. The higher cost of copying affects its feasibility and profitability.

2. Copyright Risks

Thus understood, copyright clears some obstacles and risks from the author's path. But copyright does not clear all potential hurdles and does not guarantee success in the market. It does not carry any promise to the owners that they will recoup their initial investment. An author might invest time and effort worth ten thousand dollars to write a book; a music company might invest hundred thousand dollars in producing a CD; a studio might invest a hundred million dollars in producing a movie.

Copyright law will provide the owner with tools to prevent others from copying the works without permission. The absence of free copies—assuming enforcement is effective—might influence the price and the sales. The copyright owner might charge a higher price and so recover some of the expenses. Copyright further enables the owner to rely on some distribution avenues. For example, music producers can rely on online distribution of the music, since the law treats the work as copyrighted and since the copyright provides the rights of distribution and public performance, self-help mechanisms such as Digital Rights Management (DRM) and para-copyright legal protections such as the anti-circumvention rules of the Digital Millennium Copyright Act (DMCA) ensure that it is a (legally speaking) safe avenue.¹⁰⁰ Of course, enforcement has its own costs.

But copyright has nothing to do with the total revenue. The book might be a best seller, earning millions for the author. The CD or movie might turn out to be a complete failure in the market. What does it take to turn a book into a best seller and a movie into a blockbuster? This is a multi-million question, but the answer is not found in the realm of copyright. Moreover, copyright is a necessary tool for some authors and owners, but not for all. Some dedicate their work to the public domain or allow various uses of the code they composed or the books they wrote and

¹⁰⁰ See 17 U.S.C. §§106, 1201.

nevertheless make money.¹⁰¹ Copyright law is not in itself akin to winning a lottery ticket; it just assures that no one takes your ticket.

Thus, marketing cultural products requires two kinds of costs. First is the cost of expression, *i.e.*, the costs related to the actual production, such as time, effort, labor, payments to other copyright owners for using their content as raw material. Second is the cost of producing copies, marketing and handling the sales and managing the business, or more generally, the cost of commercializing the work. This can be rephrased as the costs of achieving optimal exploitation of the work.¹⁰²

The risks, accordingly, correspond to two stages in the life-cycle of the work: first it's initial making and then it's commercializing. Copyright law lowers the risk in regard of the first stage by offering the owner some guarantee that the initial costs will not be rendered irrelevant by unwanted third parties, but it does not obliterate the second risk. The author might invest a substantial amount in making the work and nevertheless might lose the entire investment without any right being infringed.

3. Shifting Risks in the Workplace

How should the law consider the various costs and risks described above in devising the rule of initial allocation of ownership between the employer and the employee? Rephrased in the incentive theory's terms, the question is who needs the incentive? Is it the employee or the employer? The risks associated with making the work in the first place are a strong proxy for locating the incentives. There should be a correlation between the party who bears the costs and the risks and the copyright, *i.e.*, the tool that allows the owner to exclude potential infringers. In other words, the *risk bearer* should enjoy the copyright, unless we have a strong reason not to allocate the right to her. The right should be accorded to the party who undertakes the costs and the financial risks.¹⁰³ Had the law awarded its prize to a party who did not bear the costs and the risks associated with making the work and commercializing it, it would not only have failed in its mission to provide incentives for making the work, but it would have provided disincentives for so doing.

¹⁰¹ The Open Source GNU/Linux license or Creative Commons license offer ready mechanisms to allow certain uses in a cheaper way than individually-tailored licenses.

¹⁰² Writing about real property, Posner notes that the law should allocate the resource to the party who can best use it productively and can incur the costs. See POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 44, at 81.

¹⁰³ Other risks are more difficult to quantify, *e.g.*, a risk to the author's reputation. These are addressed by moral rights, to the extent they are recognized by the law.

An initial common sense observation is that the typical risk-bearer in the workplace is the employer. This is a broad statement, which will be refined later on. But, beforehand, we need to point to the advantages of the employer as a risk bearer, compared to the employee and realize that the basic bargain of the employment relationship between some employers and some employees is a shift of risks.

Most employers have more resources and familiarity with the market than their employees. The typical employee is risk averse and relies on his or her salary for a living. The employers (and later I will refine this statement and narrow it to employers in the content industries) are in the business of marketing their products. The employer has established marketing avenues. The employer invested in the commercialization of the work and bears the commercialization risks. The employer has better data than the employee about market behavior and has better experience with the market. Employees, especially those whose work is to make works of authorship are less familiar with the market; they work in the creative department rather than in the marketing division. Furthermore, employers (and once again, especially those in the content industry) produce and/or market many works and thus can cross-subsidize between them by pooling the risks¹⁰⁴ together and diluting each separate risk. It might be that nine out of ten books will fail in the market, but the tenth book will be a best seller, the sales of which will easily cover the costs of the nine books. A publisher, who owns all ten books can dilute the risk in each book, whereas an employee, had she owned only the copyright to her book, would be unable to do so. Hence, the author (whether employee or not) is likely to transfer the rights to the publisher (whether employer or not).

The problem, once again, is that when that single book turns to be a best seller, then in hindsight, the pre-assignment of the rights seems unfair. Perhaps, one might argue, in such happy occasions, the author should be compensated. A response is found in an argument advanced by Landes and Posner, in their influential economic analysis of copyright law, where they treated the author and publisher (though not in the employment context) as one unit.¹⁰⁵ Addressing the author-publisher relationship, they noted: "A publisher (say) who must share any future speculative gains with the author will pay the author less for the work, so the risky component of the author's expected remuneration will increase relative to the certain component."¹⁰⁶ In a later work, Landes and Posner addressed the work-made-for-hire

¹⁰⁴ See Towse, *Copyright Policy*, *supra* note 27, at 69.

¹⁰⁵ Landes & Posner, *An Economic Analysis*, *supra* note 13.

¹⁰⁶ Landes & Posner, *An Economic Analysis*, *supra* note 13, at 327.

doctrine directly, arguing, *inter alia*, that paying wages shifts the risk from the employee to the employer.¹⁰⁷

A similar point was made by Robert Merges in the context of ownership of employee inventions.¹⁰⁸ He pointed that the law enables pre-assignment contracts between the employers and the employees, transferring the rights *ex ante*.¹⁰⁹ Merges explained the pre-assignment contract as a trade of risks: "...it is arguable that current salaries for R&D employees are a precise measure of the expected, risk-adjusted present value of all future employee inventions."¹¹⁰ He further points to various internal incentives, such as employee reward plans and to a "simple risk analysis." Merges referred to the employee's consent to a low-risk award in the form of a salary, whereas the employer undertakes the risk and investment.¹¹¹

To summarize, the employer is better situated than the employee to market the work more efficiently and bears most of the costs associated with marketing it. The employment relationships can be viewed as a shift of risks from the employee to the employer. Should the law imitate this typical behavior and allocate the initial ownership to the employer?

B. A Coasean Analysis and Penalty Default Rules

In a legal environment which celebrates the freedom to contract and aims to facilitate a functioning free market, one might ask whether the initial allocation matters at all, given the parties' ability to contract around it. An initial allocation which can be changed by the parties means that the allocation is only a default rule. However, changing a default requires

¹⁰⁷ LANDES & POSNER, *THE ECONOMIC STRUCTURE*, *supra* note 91, at 272.

¹⁰⁸ Merges, *supra* note 40. Merges integrates patent law and employment law, via a careful understanding of the complex context of the workplace. He supports the current default rules set by patent law, according to which the employer is the owner of the patent. The comparison of copyright to patent should be aware of the differences between the two fields. See *supra* note 40.

¹⁰⁹ Merges explains how the pre-assignment contracts preempt the anti-commons problem and the need to gather dispersed property rights *ex post*. *Ibid*, at 4. Thus, the invention exploiters can avoid the asymmetric transactions costs.

¹¹⁰ Merges, *The Law and Economics*, *supra* note 108, at 16. Merges also discusses team production theory, which points to the difficulty to determine the individual contribution of each employee to the final product, *ibid*, at 20-26. This point is acute in the patent field and is equally applicable to some modes of creative production in the copyright field, such as in large content industries, software companies, Hollywood studios, research institutes issuing public reports or law firms composing a legal document.

¹¹¹ Merges, *The Law and Economics*, *supra* note 108, at 30-31.

information, awareness and understanding of the situation and the ability to evaluate it. Phrased in the economic terms offered by Ronald Coase, the question is about the likelihood of a corrective transaction.¹¹² Coase famously pointed to transaction costs as a factor that might fail corrective transactions. Accordingly, where transaction costs are not negligible or when there are other reasons for which a corrective transaction is unlikely to occur, the initial allocation does matter.

Hence, the question is what should be the default rule of initial allocation? Transaction costs might mean that the initial allocation is likely to stay. From an efficiency point of view we should search for a rule that maximizes efficiency. According to one view, the default rule should imitate the parties' anticipated behavior and thus save negotiation costs. The rule should be designed according to what the parties would have agreed upon.¹¹³ A second view would opt for the opposite, counter-intuitive default rule. This is the penalty default rule.

Discussing contract law, Ayers and Gertner suggested that in some situations the default rule should not imitate the parties' anticipated negotiations and be exactly opposite thereto.¹¹⁴ Such rules are appropriate when there are information asymmetries between the parties. The default rule should favor the less-informed party. Thus, if the better informed party wishes to flip the default rule, it would have to raise the issue during negotiations. The result is that the information would be revealed and known to both parties. The penalty default rule thus serves as an informing mechanism. Ayers and Gertner explained: "Penalty defaults, by definition, give at least one party to the contract an incentive to contract around the default. From an efficiency perspective, penalty default rules can be justified as a way to encourage the production of information."¹¹⁵

Applying the analysis of Coase theorem and of default rules to the employment context indicates that the chances of a corrective transaction are asymmetric: employers are more likely to change the initial allocation in their favor and employees are less likely to be able to do so.¹¹⁶ Thus,

¹¹² See Coase, *supra* note 17.

¹¹³ See FRANCK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 15 (1991) (writing, in the context of corporate law, that "corporate law should contain terms people would have negotiated, were the costs of negotiating at arm's length for every contingency sufficiently low.")

¹¹⁴ See Ayers & Gertner, *Filling Gaps*, *supra* note 18.

¹¹⁵ Ayers & Gertner, *Filling Gaps*, *supra* note 18, at 97.

¹¹⁶ For a similar argument, see Landes & Posner, *THE ECONOMIC STRUCTURE*, *supra* note 91, at 272 (arguing that an allocation to the employee would result in a

although the penalty default rule might serve its informative function, this would be of no avail to employees. If the default rule awards the employee the initial ownership, the employer would insist that the allocation is changed. Given the superior power of the employer over the employee in a market where there is competition among the employees over jobs, the default rule would be flipped. Changing the default rule would raise awareness, but the employee will be unable to sustain the allocation in her favor or extract any other benefits. If the default rule were the opposite, awarding initial ownership to the employer, it would be more likely to stay. In a market where there is competition among employers over employees, the latter's bargaining power might suffice to protect their rights and interests.

A 1988 law review article by Professor Hardy provides an elaborate economic analysis of copyright in the workplace and serves as a convenient baseline for the discussion here.¹¹⁷ Interestingly, Hardy assumed that the work-made-for-hire doctrine does not raise particular difficulties with salaried employees and thus focused on freelancers and independent contractors and more specifically on the ownership of unforeseen and unbargained for uses of the copyrighted work.¹¹⁸ Applying the Coase theorem, Hardy noted that in the regular course of events, authors and publishers negotiate all the time and hence the transaction costs are low. He concluded that the initial allocation in these cases does not matter from the public's point of view.¹¹⁹ Focusing on the unforeseen uses, he concluded that bargaining over the rights for such uses have infinite transaction costs.¹²⁰ Hardy then explored two possible criteria for allocating the rights of these uses. One is the "best exploiter" test: which party is in a better position to exploit the work, in terms of resources, experience and market position. He evaluated "better exploitation" according to what can be understood as a Constitutional standard that the works should benefit the public, rather than the copyright owner (or author).¹²¹

A second possible criterion Hardy discussed is the "cheaper estimator": "who is better placed to estimate the value of unforeseen

transfer of the rights to the employer); LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 123 (2 Rev. ed. 2004).

¹¹⁷ Hardy, *An Economic Analysis*, *supra* note 14.

¹¹⁸ Hardy, *An Economic Analysis*, *ibid*, at 185.

¹¹⁹ Hardy, *An Economic Analysis*, *ibid*, at 191.

¹²⁰ Hardy, *An Economic Analysis*, *ibid*, at 191.

¹²¹ Hardy, *ibid*, emphasized the public, but did not directly attribute this emphasis to the Constitution. His careful study of numerous cases found that courts followed this "better exploiter" rule in most cases.

uses"?¹²² If we accord the rights to this party, it would profit alone from the unforeseen uses. If we accord the rights in the unforeseen uses to the party who could not estimate them cheaply, the rule would result in the cheaper estimator raising the issue during negotiations and contracting for any such uses. Accordingly, Hardy concluded that the rights for any unforeseen uses should vest with the party who cannot estimate the unforeseen uses cheaply.¹²³ Rephrased in terms offered later by Ayers and Gertner, Hardy took into account the asymmetric power and searched for a mechanism that would solve the information gap. The "cheaper estimator" test can be rephrased as a penalty default rule, which forces the more sophisticated party to reveal its estimations. But Hardy then backed off, noting that this is a difficult assessment to make and should be done on a case by case analysis. He thus abandoned this criterion and remained with the best exploiter criterion alone.¹²⁴

This is a very helpful analysis, but we need to draw its contours. It limits itself to situations where there is no contract, or that the contract is silent about some uses of the work, as in the case of unforeseen uses. Foreseeing the unforeseen is indeed an impossible task, but as Ruth Towse notes, the practice is that publishers frequently require the author to assign all future rights, including unknown uses.¹²⁵ The publishers simply have more experience and have realized more than once that unforeseen uses do occur. The digitization of every kind of work, which characterized the 1990s provides one example, and broadcasting video over mobile phones in the 2000s is another. In other words, the fact that there are unforeseen uses is itself foreseen and can be addressed by the parties *ex ante*.¹²⁶ Thus, the experienced publisher (or employer), who is usually the cheaper estimator, is likely to raise the issue of unforeseen uses during negotiations with the author (employee). Given the unknown probability of such unforeseen uses and their inherent speculative nature, the price the author might ask for is likely to be low, if anything.

Cognitive psychology teaches us that many prefer the concrete, solid and positive present value, rather than the probable future gain with

¹²² Hardy, *An Economic Analysis*, *ibid*, at 185, 192-94. Note, that Hardy assumes that known uses are disclosed, *ibid*, at 191, note 23.

¹²³ Hardy, *An Economic Analysis*, *ibid*, at 194.

¹²⁴ Hardy, *An Economic Analysis*, *ibid*, at 194.

¹²⁵ RUTH TOWSE, *CREATIVITY, INCENTIVE AND REWARDS: AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE* 17 (2001).

¹²⁶ Unless the law interferes and prohibits transactions as to future works or future uses, as did the German Copyright Act until the 2007 amendment. See *supra* notes 77-78.

similar expectancy.¹²⁷ In the context of creative employees, the future gains and their probability are unknown in advance. Faced with the option of receiving a reasonable payment now or a large share of the gains in the future, but under an assumption of low probability, most people would prefer the former option.¹²⁸ Adding that we can safely assume that most employees are risk-averse and that most employers can more easily bear the risk by spreading it over their entire activity and taking into consideration that sharing the gains with the authors is likely to reduce the authors' salary and shift back part of the risk to them,¹²⁹ the practice of requiring that all rights are transferred is more efficient and Hardy's "cheapest estimator" rule collapses. Given the unequal bargaining power of the employee and the employer, we should not be surprised to see that where a written contract exists, the employee will transfer all uses, known and present as well as unknown and future, to the employer.¹³⁰

This analysis instructs us that in some cases, even where there are information asymmetries, a penalty default rule would not be effective. Indeed, it might draw the attention of the uninformed employee, who will now be informed. However, information in itself is insufficient to be able to change the default rule. In an employee's market, *i.e.*, where there is competition among employees over jobs, the average employee is unable to

¹²⁷ See *e.g.* Amos Tversky & Craig R. Fox, *Weighing Risk and Uncertainty*, in PREFERENCES, BELIEF AND SIMILARITY: SELECTED WRITINGS 747 (Eldar Shafir ed., 2003). There are two preferences: one for the certain rather than the probable and one for the present rather than the future. For example, most of us would rather receive \$100 than a 20% chance that we would receive \$500. Most of us would rather receive it now than later. When the present offer is concrete and certain and the future offer is uncertain it is an easy choice, unless the expected benefit (the probability of profits) in the latter case is much higher than the current offer.

¹²⁸ See discussion of the "certainty effect" and related effects in Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, in PREFERENCES, BELIEF AND SIMILARITY, *ibid* at 593, 606-11; Paul Slovic, Baruch Fischhoff & Sara Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 463, 480-81 (Daniel Kahneman, Paul Slovic, Amos Tversky, eds., 1982).

¹²⁹ See Landes & Posner, THE ECONOMIC STRUCTURE, *supra* note 91, at 272.

¹³⁰ Once again, the aftermath of *Tasini*, where newspapers insisted that freelancers agree to an "all rights transferred" contract with no further compensation illustrates this point. Hardy's analysis is also limited in that he focused on works that have already been made. He assumed that the works came into being and discussed the post-creation phase. Hence, it is not surprising that his main criterion is the better exploiter of the work. However, the economic view of copyright law taught us that the law needs to provide incentives to make works in the first place. We should query how does considering the *ex ante* incentives affect his analysis.

shift the default rule in his or her favor. The result of a penalty default rule would be that it would easily be contracted around without a penalty to the employer. Moreover, the employee would suffer demoralization costs. Learning about a right one has, only to realize that it is easily taken away without any ability to affect the transfer or without any compensation might cause loss of trust. Such an employee might feel he or she were tricked. The demoralization costs of an easily-contracted-around penalty default rule (or better: a non-penalty default rule) can be rephrased as an endowment effect, *i.e.*, the bias of property holders as to its value. Owners tend to value their property at a higher price than they themselves would have been willing to pay to buy the same property.¹³¹ If the default rule accords the employee with the copyright subject to the option to change the default rule and given the typical lack of power by the individual employee, the allocation would be changed and the employee would feel the grater loss caused by the endowment effect.

Thus, a penalty default rule awarding initial ownership to the employee would have unnecessary costs of the corrective transactions and additional demoralization costs. The information deficiencies should be taken care of, but not by a penalty default rule.¹³²

The interim conclusion is that allocating the initial rights to the employee is likely to be corrected immediately by the employer at almost no cost, but a contrary allocation is likely to stay. The author/employee is compensated by receiving a steady salary and ridding herself from the risks associated with making and commercializing the work, as well as enforcing the rights. This conclusion will be subject to an inspection under employment law, but beforehand, we need to fine-tune the general statement made earlier, that the employer is the best risk-bearer.

C. Typical Cases

A general rule based on typical cases is more efficient than a case-by-case rule as it enhances foreseeability, but given that there are various kinds of transaction costs that might fail efficient corrective transactions, I believe it is better to calibrate the scales and zoom-in into the workplace, so to differentiate between various kinds of situations. This will enable us to fine-tune the general allocation rule.¹³³ Accordingly, we should ask the following question: in the workplace, who is the party that typically

¹³¹ See Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106 (2002) (discussing the endowment effect in the context of employment.)

¹³² See *infra* part III.C.

¹³³ Of course, defining sub-categories has some costs of its own, as parties are likely to disagree as to the applicable category, a dispute resulting in uncertainty and further costs.

undertakes the risks associated with creating the copyrighted work? Three criteria lend themselves to this discussion: the kind of work, the kind of employer and the kind of employee. I discuss them briefly and then turn to the scope element of the work-made-for-hire doctrine to evaluate it on the background of this discussion.

1. The Work

Some products require pooling together several works of different authors. A movie combines a literary work (the script), musical works, photography, acting, directing and many other works. Landes and Posner noted that it is efficient to vest copyright of an integrated expressive work in the hands of one person so to avoid multiple ownerships.¹³⁴ Parisi and Ševčenko elaborated on this point and argued that creative works are often the result of many people each contributing a piece of the work, which needs to be assembled together.¹³⁵ Complex software is an example. In order to be able to commercialize the aggregated work, the bits and bytes need to be accumulated. The various authors can attempt to negotiate a joint venture, but given the well-known problems of common action such as negotiation costs and hold-outs, the split of rights is likely to result in an anti-commons problem and nothing at all but frustration.¹³⁶ Allocating the rights to one entity in the first place is far more efficient than pooling them together later. Thus, in the case of integrated expressive works, to use Landes and Posner's term, there is yet another reason to allocate the rights to the employer.

¹³⁴ See Landes & Posner, *THE ECONOMIC STRUCTURE*, *supra* note 91, at 272. For the perils of multiple ownerships, see Heller, *The Tragedy of the Anti-Commons*, *supra* note 36.

¹³⁵ Parisi & Ševčenko, *Lessons from the Anticommons*, *supra* note 12. See also Merges, *The Law and Economics*, *supra* note 108 (discussing "team production theory", in the context of patent law.)

¹³⁶ A shared ideology can provide a powerful motivation to overcome the common-action problem. For example, the Open Source movement provides numerous illustrations of joint ventures, where those who participate forego any veto rights they might have had, thus, mitigating the anti-commons problem. For a discussion of the process in which open source software is achieved see R. VAN WENDEL DE JOODE, J.A. DE BRUIJN & M.J.G. VAN EETEN, *PROTECTING THE VIRTUAL COMMONS – SELF ORGANIZING OPEN SOURCE AND FREE SOFTWARE COMMUNITIES AND INNOVATIVE INTELLECTUAL PROPERTY REGIMES* 13-23 (2003) (describing models of open source and the way to coordinate distributed ownership.)

2. The Employer

The employer's business model matters. We should differentiate a content business from a non-content business. In workplaces such as a music label, a Hollywood studio, a software company or a publishing house, the employer is in a better position to undertake the risks associated with producing and commercializing the work, since the typical production firm does not invest in one work only, but simultaneously, in several works. This enables to spread the risk over the several works and cross-subsidize them. The employer whose incentive is to market such works has better familiarity with the market and its workings. Thus, the employer is in a better position to market the work efficiently and successfully.

In a non-content industry, where the employee is hired to do a non-creative (in the copyright sense) job, but nevertheless makes a work of authorship, the employer is not usually involved in the risk taken in making the work, nor does the employer have unique knowledge about the market of the unexpected work. In such cases, there is no *ex ante* reason to allocate the copyright to the employer.

3. The Employee

As the previous criterion illustrates, some employees are hired to make a creative work, such as an architect hired to work in an architecture firm, a doll designer or a musician hired to compose music for an advertising firm. Some employees are not hired to make creative works, whether they work for a content industry or not: a secretary, a laboratory supervisor, or a recruitment officer. These employees might nevertheless make works of authorship, perhaps to the pleasant surprise of all. In some cases, these works might turn out to be profitable. A lecture prepared by an employee can be published and sold to a publisher, a guide written for internal purposes can turn out to be useful to other firms, software written to improve office work might be commercialized. In such cases we are unlikely to find pre-assignment contracts, neither side is especially suited to market the work, so it is unclear *ex ante* who is the best risk-bearer. Given that the work was created after the commencement of the employment relationship, the likelihood of a corrective transaction is minimized. The parties might decide to engage in a joint venture and will then formalize their relationship regarding the work.

4. The Scope of Employment

Under the second element of the work-made-for-hire doctrine, a court (or the parties themselves) should decide whether the work was made within the scope of employment. Recall that courts apply a triple test borrowed from agency law, examining whether the work is of the kind for which the employer was employed to perform, whether the work was made within the

authorized time and space limits and whether it was made with the purpose that it serves the employer's interests.¹³⁷

The first test (kind of work) requires that we ask the question just proposed: what was the employee hired to do? Assessing whether the employee was hired to make creative works requires that we interpret the employment contract, whether written or oral and take into account the dynamic nature of such contracts.

The second test (time and space) is rather objective, but is irrelevant to many new forms of employment¹³⁸ and in any case can be easily bypassed by an employee who wishes to distance the employer from the (later to be disputed) work. In a world of changing working conditions, with ubiquitous computing and universal communication access, the physical place and the time of the making of the work are obsolete factors. Whether the work was created during the duration of employment remains relevant, but is more of an indicator as to the first element of the work-made-or-hire doctrine, *i.e.*, whether the author was an employee at all.

The third test (purpose) is difficult to evaluate and would often require evidence and testimonies, thus rendering it unpredictable in many cases and expensive (and risky) to find out.¹³⁹ Some courts seem to transform the rather subjective inquiry of the employee's purpose to a more objective inquiry about the connection between the work and the employment.¹⁴⁰ To the extent that this test is so interpreted, then it is no more than another indication for the first test: while the first test compares the general tasks of the employee and his or her actual activity in making the disputed work, the third test asks about the fit between the employer's activity and the specific work.¹⁴¹

¹³⁷ See *supra* note 62.

¹³⁸ Thus, for example, a court found that a research fellow works either in the employer's institution or elsewhere, *e.g.*, in the library. See *Genzmer v. Public Health Trust of Miami-Dade County*, 219 F. Supp. 2d 1275, 1282 (S.D. Fla. 2002). A more decisive factor was that the work at stake in that dispute—a computer program—was made while the research fellow was an employee.

¹³⁹ Indeed, courts seem to struggle with this test. See *Avtec*, 67 F.3d at 5. Kreiss pointed to the subjective nature of the third test. See Kreiss, *Scope of Employment*, *supra* note 61, at 129.

¹⁴⁰ See *e.g.* *Miller*, 808 F. Supp. at 1244 (finding that the "ultimate purpose of the development of the [work] was to benefit [employer] by maximizing the efficiency of the operation of the quality control lab.")

¹⁴¹ *Cf.* Kreiss, *Scope of Employment*, *supra* note 61, at 130 (proposing that when the first two tests are met, there is a presumption that the employee acted by a desire to serve the employer, the burden to rebut the presumption is with the employee.)

Following the analysis offered here, the better question should be the following: which party undertook, or is better situated to undertake, the risks associated with making the work and commercializing it? The first test, asking whether the employee was hired to make creative works like the work at stake is thus the most important of the three agency tests, while the second should no longer be an indication for this purpose and the third is at most, an indication of the first test.

The Miller case provides a helpful illustration.¹⁴² As mentioned above, Miller, a former employee argued that he owned the copyright in a computer program he developed while being an employee at CP Chemicals. Miller was the laboratory's supervisor, a job which included computerization of analytical data generated in the lab. The court found that Miller became concerned about the efficiency of manual calculations in the quality control of one of the products. He then wrote a computer program to assist in the matter. The development was done at home on his own time without further payment. CP managers knew about the program and requested Miller to write further programs for other products, which he did. After the employment was terminated, the parties disputed the ownership of the first program.¹⁴³

Following CCNV, the court applied agency tests.¹⁴⁴ On the first test, the court found that "the development of the computer program was at least incidental to his job responsibilities,"¹⁴⁵ despite the fact the job description did not mention computer programming.¹⁴⁶ On the second test, the court found that the work was done during the time period of employment, though from the home, on Miller's time and with no additional pay.¹⁴⁷ The third test was decisive. The court found a fit between the disputed work (the computer program) and the employer's interests, in that it was directly related to a specific product, for the primary benefit of the employer.¹⁴⁸

This reasoning fails to take into account both copyright law and employment law perspectives. The risk that the time and effort invested in the making of the work might turn out to be a waste, was borne solely by

¹⁴² Miller, 808 F.Supp. 1238. See also the case recently decided in South Africa, King v. SA Weather Service, *supra* note 48.

¹⁴³ Miller, 808 F.Supp. at 1240.

¹⁴⁴ Miller, 808 F.Supp. at 1243.

¹⁴⁵ Miller, 808 F.Supp. at 1244.

¹⁴⁶ Miller, 808 F.Supp. at 1244.

¹⁴⁷ Miller, 808 F.Supp. at 1244.

¹⁴⁸ Miller 808 F.Supp. at 1244 and at n. 7.

the employee. Had the program not succeeded, Miller would have borne the costs. The costs and the risks at stake are those associated with the making of the work and with utilizing it. The fact that the work was product-specific and hence less likely to be commercialized is less relevant. Consider, for example, an independent contractor who approaches a firm, saying that she has studied their business and thinks they can improve their production by applying a device (or software) she designed for their particular use. The risk is borne only by her: if she fails to sell, she will be left with a useless product. In other words, the Miller court made too much of the fit between the software and the employer's business. The focus should have remained on the fit between the job description, interpreted in a pro-employee manner, as discussed in the next part, and the actual work done, asking about the location and placement of the risks.¹⁴⁹ Awarding the copyright to the employer lessens the incentives of the employees to think outside the box, initiate new tools and develop software which benefits all.

* * *

To summarize, under a copyright law perspective the initial allocation of copyright should correspond to the risks taken in producing the work in the first place and in commercializing it later on. In designing allocation rules, the legislature or the courts should consider the uneven chances of a corrective transaction. The typical situation is that the employer is the best risk-bearer. Nevertheless, instead of one scenario, the law should address several typical situations and shape legal categories accordingly. The kind of work, the business model of the employer, the kind of employee—are all factors to be considered. A penalty default rule may convey information but it will be ineffective and cause other unnecessary costs. The information gaps should be addressed in a different manner.

This analysis supports the second element in the work-made-for-hire doctrine, *i.e.*, whether the work was created within the scope of the employment, with a proposal to interpret it with an emphasis on the question of risk, instead of the current three-prong test borrowed from agency law. A second leg of the allocation rule looks not only at the work at stake and the risk bearer, but at the relationship between the parties, and here is where employment law enters.

¹⁴⁹ The court was aware that a contract could have solved the uncertainty, but failed to take into account the unequal bargaining power of the employee vis-à-vis the employer. The court admitted that the work-made-for-hire doctrine might create harsh results, but placed the burden on the employee to obtain a written agreement. See Miller, 808 F.Supp. at 1245.

III. EMPLOYMENT LAW

Thus far, we discussed the question of ownership of works created by employees from a copyright law perspective under its economic conception. Courts supplement copyright law with tests borrowed from agency law, which in turn derives from tort law.¹⁵⁰ Relationships between a hiring party and a hired party, whether employees or not, might also be subject to principles of contract law.¹⁵¹ The absence of employment law within this legal construction is striking. This part suggests that we insert and integrate principles of employment law into the copyright law analysis. The integration is important in the particular case but it also serves a broader argument, that copyright law should not be isolated from other legal fields.

This part first presents the dilemma arising from the legal setting and briefly draws the contours of the discussion by explaining the methodology undertaken here (III.A). Second, this part unpacks the notion of unfairness in the employment context (III.B) and then discusses concrete legal mechanisms that correspond to the unpacked meaning of fairness (III.C).

A. Setting the Stage

1. Fairness and Efficiency

Instincts of justice (and more often, of injustice) often tilt us towards the weaker party in a legal conflict. We wish to assist the poor in her struggle with the rich or the citizen struggling to find his way through the corridors of the bureaucratic state. We wish to lend a supporting hand to the person in need. However, these are just instincts, perhaps not shared by all. Instincts are a good reason to question and revisit current norms, deliberate and think of improvements to the existing order, but they are insufficient grounds in themselves for legal reasoning. Instincts cannot substitute rational logic, though the latter can and should reflect considerations of justice, even of compassion. The question of initial ownership reflects a tension between instincts of justice or fairness and efficiency. This is not to say that efficiency is by nature unjust, or that justice and fairness are by nature inefficient. However, in the context of the discussion here, the efficient solution in many cases is to award ownership to the employer, an allocation which at first sight might not seem fair to many observers. Here,

¹⁵⁰ See CCNV, 490 U.S. 730; Jacob, *Tort Made for Hire*, *supra* note 9.

¹⁵¹ See Burnham, *The Interstices*, *supra* note 38; Guy Mundlak, *Generic or Sui-Generis Law of Employment Contracts?* 16 INT'L J. OF COMP. LAB. L. & INDUSTRIAL RELATIONS 309 (2000).

I try to breakdown this intuitive dichotomy, show its complexity and fine-tune the legal rules accordingly.

The unfairness instincts play an active role in both the popular¹⁵² and legislative forums.¹⁵³ The instincts arise when the employer earns much from a work made by the employee while the employee does not share the gains. Bluntly speaking, the (un)fairness instinct is that the weak employee is ripped-off his or her creative works and of the revenues. It is especially acute in situations where there are "unbargained for or unforeseen uses, [in which] one party will gain what the other loses",¹⁵⁴ *i.e.*, when "unforeseen uses... bring windfall profits to the hiring party",¹⁵⁵ or put differently, "an ex ante 'fair' bargain can turn into an ex post rip-off."¹⁵⁶ The complaint about unfairness can be read as a merger of two narratives—that of the romantic author prevalent in copyright law¹⁵⁷ with that of the exploited, weak employee, in employment law. Of course, "weak" and "powerful" are relative and fuzzy terms. Is the employee so weak vis-à-vis the employer? Is the unfairness instinct valid? If so, how should the law account for it?

The tension appears in the legal layer of the allocation spectrum, discussed above.¹⁵⁸ The American model seems at first sight to prefer efficiency to fairness, whereas the German model seems at first sight to focus almost entirely on the author and prefer fairness to efficiency. The tension between justice/fairness instincts and efficiency surfaces also within each model, the focus here is on the American model. Both elements of the work-made-for-hire doctrine reflect the conflict between efficiency and fairness. A broad interpretation of the scope element, *i.e.*, a low threshold that easily recognizes works as made within the scope of employment, supports the employers, whereas a narrower interpretation would support the employees. The previous part addressed the side of

¹⁵² See Courtney Love, *Courtney Love Does the Math*, SALON MAGAZINE (June 14, 2000), available at <http://archive.salon.com/tech/feature/2000/06/14/love/> (criticizing the record industry's pressure to include sound recordings in the "work for hire" doctrine in the U.S.)

¹⁵³ See testimonies before Congress, while it debated the 1976 Copyright Act, as discussed in Hardy, *An Economic Analysis*, *supra* note 14, at 183-85.

¹⁵⁴ Hardy, *An Economic Analysis*, *supra* note 14, at 185.

¹⁵⁵ Hardy, *ibid*, at 190.

¹⁵⁶ TOWSE, CREATIVITY, INCENTIVE AND REWARDS, *supra* note 125, at 17.

¹⁵⁷ See Woodmansee, *The Genius and the Copyright*, *supra* note 23; Jaszi, *Toward a Theory of Copyright*, *supra* note 23. Others doubted the influence of the romantic author on the law. See Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 882-88 (1997).

¹⁵⁸ See *supra* part I.C.

efficiency in this tension. Now we need to unpack the "fairness" part of this juxtaposition. Beforehand, a short methodological comment is due.

2. Methodology

Studying the intersection of two separate legal fields can be conducted in several ways. One is doctrinal and searches for a rather technical way to coordinate between the two bodies of law so to minimize friction in their application. A second, deeper level of inquiry, asks whether the two fields are compatible, by turning to the underlying theories of each. The second track requires that we first explore each field of law separately and then examine the match of the principles, rather than examining the rules which are supposed to execute the principles.¹⁵⁹ The theoretical inquiry is complicated when each body of law has several underlying theories, which might not be in harmony.

Several theories explain copyright law, ranging from an instrumental conception under which copyright is a means to serve the public, to a competing conception, which views copyright as a means to serve the authors' proprietary rights.¹⁶⁰ Employment law as well can be read under several views, emphasizing equity (fairness) or efficiency and various attempts to reconcile the two.¹⁶¹ Thus, in examining the relationship between copyright law and employment law we can either map all possible theories of each field of law and inquire all possible pairs of the theories' interrelationships, or, choose in advance our preferable theory of each field. Here I undertake the latter approach and juxtapose copyright law under its economic theory, with employment law, under its fairness conception.

This pair of rival principles chosen for examination is probably the most intriguing one, as the principles on the table are efficiency and fairness. In this sense, I believe the gap between copyright law and employment law is much wider than had we examined copyright law under a non-utilitarian, *droit d'auteur* view and compared it with employment law, with a fairness-reading in mind. The latter option is materialized in the

¹⁵⁹ For an application of the second, theoretical track, in the context of the relationship between copyright law and free speech jurisprudence, see Michael D. Birnhack, *More or Better? Shaping the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN – IDENTIFYING THE COMMONS IN INFORMATION LAW* 59 (Lucie Guibault & P. Bernt Hugenholtz, eds., 2006).

¹⁶⁰ For theories of copyright law, see Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 296 (1988); Edwin C. Hettinger, *Justifying Intellectual Property*, 18 *PHIL. & PUB. AFF'S* 31, 38 (1989).

¹⁶¹ See Guy Davidov, *The (Changing?) Idea of Labour Law*, 146 *INTERN'L LAB. REV.* 311 (2007).

German law, discussed above,¹⁶² which strives to protect the individual author/employee more than the hiring party. Equally, had we examined copyright law under a strict economic reading and treat the employment relationship as a labor market, similar to other free markets, there would not be much of a conflict (and authors/employees would not fair very well).

B. Fairness in Employment

This section unpacks the meaning of fairness in the context of employee's copyrighted works. The discussion identifies information deficiencies and external factors as causes of unfairness, but then examines the employment relationship as a shift of risks.

1. Fairness

Fairness is a moral principle which cannot be resisted, but in itself, it does not say much. Often, fairness is an *ex post* conclusion or observation, but does not include *ex ante* guidance. In order to render this principle helpful, we need to unpack the meaning of fairness in the employment context, a rather daunting task. I will narrow down the task to ownership in works made in the workplace context.

What does fairness mean in the context of employment law? The crux of the fairness argument is a well-known lesson of employment law, that the employer and the employee have unequal bargaining power.¹⁶³ The employee is often much weaker than the employer. Absent legal rules or social norms to limit the employer's power, the employer could exploit the employee; mistreat him or her, with the ultimate power of firing the employee looming in the background of the employment relationship but at the forefront of the employee's concerns.

However, much like "fairness", unequal bargaining power is a description of a particular employment context or even of general modes of employment, but it is not instructive in itself. Finding that there is unequal bargaining power is too general an observation, which in itself only directs us to search for ways to correct the inequality. Hence, this much-used term, too, needs to be unpacked. Of course, some argue that there is no inherent unfairness in the employment context and that it is just a matter of demand and supply. However, even those who hold such a market-based view would agree that market failures should be identified and corrected.¹⁶⁴

¹⁶² See *supra* part I.C.4.

¹⁶³ See discussion in Davidov, *The (Changing?) Idea*, *supra* note 161.

¹⁶⁴ For a justification of employment law as a social means to correct market failures, see Alan Hyde, *What is Labour Law?* in BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 37 (Guy

Several scholars attempted to do exactly this. Hugh Collins, for example, pointed to three main reasons for market failures, which in turn justify regulation of the employment relationship: inadequate information, the use of monopoly power in the market and high transaction costs.¹⁶⁵ Guy Davidov suggests that inequality of bargaining power exists when market failures enable the employer to influence the terms of the contract more than the employee can.¹⁶⁶ Put differently, various failures of the employment market are often conceived and rephrased as unequal bargaining power.

These failures can be grouped into factors *internal* to the relationship between the employer and employee and those *external* to the particular relationship, which the parties cannot control but may use or abuse within the relationship. The first group includes information deficiencies of various kinds, bounded rationality and lock-in costs. The second group includes market conditions, such as the level of unemployment, whether the employer enjoys a monopolistic status etc.

2. Information Deficiencies

Information deficiencies play a crucial role: without knowledge about the rule of allocation of the copyright work, one cannot plan his or her steps, is unlikely to raise the issue of ownership in negotiations and in fact, the entire incentives-talk of copyright law becomes shallow and empty. How many authors are familiar with copyright law principles, *i.e.*, which works are protected and which are not? How would an author respond to the work-made-for-hire doctrine, had she known about it? Perhaps she would prefer to remain an independent contractor, or, if she is an employee, she would try to "work around" the doctrine and make the work outside the scope of employment, or perhaps discuss the issue with the employer before engaging in the costly making of the work. Information about the

Davidov & Brian Langille, eds., 2006) (arguing that "Labour and employment law is the collection of regulatory techniques and values that are properly applied to any market that, if left unregulated, will reach socially sub-optimal outcomes because economic actors are individuated and cannot overcome collective action problems.", *id.* at 49, and that "On this view, labour law is not the set, in theory infinite, of human values that might rationally be imposed by societies on markets. Rather, labour law is the much narrower set of values that correct market failures through particular legal techniques," *id.* at 53.)

¹⁶⁵ See Hugh Collins, *Justifications and Techniques of Legal Regulation of the Employment Relation*, in *LEGAL REGULATION OF THE EMPLOYMENT RELATION* 3, 7-11 (Hugh Collins, Paul Davies, Roger Rideout, eds., 2000).

¹⁶⁶ Guy Davidov, *The Reports of My Death are Greatly Exaggerated: 'Employee' as a Viable (Though Overly-Used) Legal Concept*, in *BOUNDARIES AND FRONTIERS supra* note 164, at 133, 138-40.

law, about the status of the author as an employee and about the circumstances of making the work—is crucial.

Unlike the employee, the employer usually is more knowledgeable about copyright law, especially an employer in the content industry. There is an asymmetry of information between the parties. Dealing with copyright law might be central to the employer's business, but even if this is not the case, the employer typically enjoys ongoing legal services. The employer in the content business is a repeat player, has better (institutional) memory than the hired, creative party.

On the other hand, the employee has better knowledge regarding his or her ability to perform the expected job and make the works which he or she were hired to make.¹⁶⁷ The employee usually knows, or at least knows better than the new employer, her abilities, how she manages her time, works under pressure and the like circumstances. The employer also bears related costs, such as monitoring the employees once hired, and is subject to employees' strategic behavior.¹⁶⁸

However, the dual asymmetries do not negate each other. The employer has some information about the employee's abilities, based on prior works, recommendations and the employer's experience in hiring new employees. In as much as ownership is concerned, the employer is on the stronger side of this asymmetry of information and in the typical case is in a better position to plan and affect ownership. When the employee has experience in similar dealings, he or she are likely to raise the issue of ownership and place it on the negotiations table, or accept the default rules offered by the law.

Bounded rationality, *i.e.*, various factors which cause human decision making to be imperfect and not fully rational further enhance the inferiority of the employee *vis-à-vis* the employer. The employer is better positioned to assess the likelihood of success of the work in the market; the employer can more easily survey and study the market to assess whether there is, or is expected to be, competition. The employer has better access to marketing channels and more resources to market the work. Employees, on the other hand, and this is an admitted gross generalization, are less informative about the above but nevertheless tend to overestimate the potential commercial success of the work. Reality is often harsh. Add to

¹⁶⁷ Collins points out, in the general context of employment, to a dual informational asymmetry about the quality of the proposed employment relationship. See Collins, *Justifications and Techniques*, *supra* note 165, at 8.

¹⁶⁸ See Simon Deakin & Frank Wilkinson, *Labour Law and Economic Theory: A Reappraisal*, in LEGAL REGULATION OF EMPLOYMENT RELATION, *supra* note 165, 29, at 43.

this optimism bias the instincts of ownership (I made it, its mine!), and the endowment effect is in play.¹⁶⁹

The interim conclusion is that the employee is disadvantaged vis-à-vis the employer.

3. External Factors

External factors lend further power to the employer at the expense of the employee. A young musician is thrilled to be offered "a contract" to produce a record; an author is tremendously excited about a publisher's offer to publish a book, and an academic is interested in publication, not necessarily in the money and ownership of the work, which is often perceived as technical legalities, else (academic) perishing might be real. While the musician, author and academic are often freelancers rather than employees, the analysis is similar in the case of those authors who opt for an employment relation rather than remaining independent contractors. In some cases, the employment market and the strength of the particular employer in the market create an *ex ante* power advantage to the employer: if 86% of the U.S. music market is in the hands of the "big four" labels, then a junior musician does not have much choice.¹⁷⁰ Going "indie" (independent) is a costly, risky avenue.¹⁷¹ While superstars are not powerless and perhaps even more powerful than the industry player, they are, by definition, very few. The vast majority of authors seem, at first sight, to be trapped in an unpleasant situation.

4. Trading Risks

An intermediate conclusion would be rather dim: authors are powerless and alternative routes are few. However, we should take into account not only the point of view of the author, but rather zoom-out and examine the deal between the employee-author and the employer as a whole. Presenting the deal as a rip-off ignores the transfer of risks between the parties.

The discussion here merges with the previous discussion of risks in the workplace, conducted under a copyright prism.¹⁷² In most cases, the

¹⁶⁹ See Sunstein, *Switching the Default Rule*, *supra* note 131.

¹⁷⁰ This figure is dated to 2005. See Patrick Burkart, *Loose Integration in the Popular Music Industry*, 28(4) POPULAR MUSIC AND SOCIETY 489 (2005) (discussing the market share of the majors and arguing that the music industry operates as a rent-seeking cartel.)

¹⁷¹ Technology enables young artists direct publication avenues, such as by uploading their music to p2p sharing programs, or to a personal web site, or a social network.

¹⁷² See Part II.A.3.

employment relationship reflects a trade-off of risks and benefits between the parties.¹⁷³ The employee is hired to create works. She provides her time and work power in exchange for security. The risk-averse author who lacks the knowledge, funds or will to run her own business would turn to the salaried employment option. Her option to do so is dependent, of course, on the availability of an employer who is willing to hire employees rather than to commission an independent contractor, assuming that the market of employees is competitive and that the employee has several potential employers to choose from. The author would receive a stable salary, other benefits such as pension and paid vacations and not be subject to various risks associated with making the work and commercializing it or risks such as liability for torts (assuming that the vicarious liability doctrine applies.) The author would also not need to engage in managing the business, searching for clients, dealing with regulators etc.

These benefits do not come without a price. The author loses ownership. Moreover, she is limited in her creativity. She needs to follow the instructions of her employer (as is the situation of the independent contractor who needs to follow the instructions of the commissioner of her work, but has the choice not to take the job in the first place) and is limited in her artistic and creative freedom, at least in the workplace. The alternative is undertaking the costs of expression and the risk herself and when these are too high, the alternative is not engaging in any creative work at all.

* * *

Viewing the employment relationship in the content business as a trade of risks is attractive as it coincides with the copyright analysis. However, the information deficiencies and external factors are not obliterated just because there is a deal and a contract between the parties. We need to search for responses for the difficulties discussed here.

C. Responding to Inequality

The legal solutions we need to search for should fit as much as possible both our conception of copyright law under the incentives theory and our conception of employment law as fairness. Operating within a general free-market paradigm and having pointed to some of the market's deficiencies, we need to address them. This sub-section points to two possible non-exclusive mechanisms. First, informed consent narrows the claim of unfairness regarding ownership of copyrighted works made in the

¹⁷³ See Ann-Sophie Vandenberghe, *Labour Contracts*, in 3 *ENCYCLOPEDIA OF LAW AND ECONOMICS*, at 541, 550 (writing that "At the heart of the principal-agent problem lies the inevitable trade-off between the provision of incentives to work hard and the sharing of risks.")

workplace. Explicit contracts and job descriptions are suggested as tools to address such deficiencies, accompanied with appropriate interpretative instructions. These mechanisms solve the problem that penalty default rules wish to address, without changing the initial allocation. Second, mechanisms of group negotiations might ease our instincts of unfairness.

1. Informed Consent

Information about the commercial-legal options and ownership of copyright can reduce much of the initial observation of unfairness. If an author understands her options, roughly being (1) establishing her own business, undertaking the risks and maintaining ownership; (2) providing a work as an independent contractor, without transferring the rights but for a license to use the work in agreed-upon circumstances, and thus shifting only some of the risks; (3) shifting the entire risk to the hiring party, in exchange for a risk-free salary and giving up ownership, then she can better decide which avenue to choose. With more information, surprises might be minimized and the author might be able to leverage the elements she gives up or retains (risk, ownership, management hassle) to receive better terms (payment, internal incentives like a bonus, control over uses of the work.)

How can informed consent be achieved? One kind of information-enhancing tools lies in the market itself. The factors mentioned in the previous part, of the work at stake, the kind of employer and the kind of employee are useful here too. These factors create a matrix of options.¹⁷⁴ The more creative the work is (a photograph, painting, musical work), the more we can classify the employer as being in the content/cultural industry, and the more the author conceives of herself as a creative author, the situation creates awareness of all parties. When a doll producer firm offers a designer a job as a doll designer, the issue of ownership is not, or rather should not, be a surprise. This is the "Bryant" case.

The digitization of many kinds of works that began in the 1990s teaches us, authors included, that old works do have a potential for new commercial uses, *e.g.*, a song written for one purpose can later serve as a ring-tone on a cellular phone or for a television advertisement. None of this is a secret. This is the *Tasini* case.

On the other hand, when an employee who did not perceive himself as a creative author, works in a non-creative industry, performs a routine task, and suddenly it is apparent that there is a work of authorship there, *e.g.*, a computer program worthy of commercialization, then we could say

¹⁷⁴ In each parameter it is better to think of a spectrum of options rather than a binary form, hence I resist the temptation to add a table which offers only binary options.

that the circumstance did not carry an indication or information with them. This is the "Miller" case.

In other words, the circumstances of employment themselves serve as a rather strong signal about the importance of ownership.

The latter discussion indicates that the temporal dimension is crucial here. Information that is gained after the employment contract was struck is not of much use. Hence, the focus should be on *ex ante* consent, and more specifically, informed consent.

There are further mechanisms to inform the parties of their rights. A written contract is an obvious mechanism to clarify the two sides of the deal, now shaped as an ongoing employment relationship. However, contracts are often incomprehensible or indeterminate and require *ex post* interpretation. Moreover, employment contracts are dynamic and change in the course of employment.¹⁷⁵ Changes in the patterns of employment do occur in the course of employment, even if they do not find an explicit anchoring in a written document. A written contract in long term employments is inherently incomplete, in that it does not address every single possible event that might occur during the relationship.¹⁷⁶ Repeat actions which are not objected to by the other party become part of the contract. Thus, initial information and consent might change; they might be blurred or diluted and no longer serve the informing function.

The employer, knowing that current doctrine operates in his or her favor (if the author is an employee under agency law and if the work was made within the scope of the employment relationship, once again, under agency law tests) might not be meticulous in authoring the contract, perhaps deliberately so. Thus, the informing function of the contract is likely to be lost.

One possible solution would be a penalty default rule, but for reasons discussed above, it is likely to be counter-productive.¹⁷⁷ The dynamic nature of employment contracts is yet another reason why penalty default rules are ineffective in their intended purpose of informing the weaker party of the stakes.

A second solution to the information deficiencies would be for courts to adopt an interpretive rule, under which vague terms and other interpretive doubts operate in favor of the employee. Such an interpretive rule would provide an incentive to the employers to be more precise in the contracts they author.

Another carrier of information is the job description, which is relevant in deciding the second ("scope") element of the work-made-for-

¹⁷⁵ See Mundlak, *Generic or Sui-Generis*, *supra* note 151, at 313-14.

¹⁷⁶ See Vandenberghe, *Labour Contracts*, *supra* note 173, at 552.

¹⁷⁷ See *supra* part II.B.

hire doctrine. Instead of turning to the rather vague triple test borrowed from agency law,¹⁷⁸ a job description may provide a clearer point of reference: if the work made by the employee falls within the listed tasks, then it is safe to determine that it was made within the scope of employment and if it does not fall within the description, then the author remains the owner. Job descriptions are not obligatory, but where they do exist, they have been used as important interpretive sources about the parties' expectations and actual behavior, including in the context of the current discussion.¹⁷⁹

Employers are likely to attempt broad and vague definitions of the job descriptions, so they can later claim that a certain task, or a certain work, were within the scope of employment. Hence, and given the dynamic nature of the employment relationship, once again, the interpretive mode adopted by the courts is crucial. An interpretive rule operating in favor of the employee will serve as an *ex post* incentive to the employers, to be more precise in the next case, *ex ante*. Thus, the job description should be interpreted narrowly.

However, informed consent is no magic cure to all problems, as authors might misunderstand and subsequently misjudge their options; understanding the options might be costly, as legal advice might be needed and other factors, such as cognitive biases might divert their judgment. The market and the law can respond with various background structures to minimize the biases, one of them is group negotiations.

2. Group Negotiations

Singling out a specific employment relationship and observing inequality of power between the parties might miss the larger picture. A possible way to figure out this complex field is framing the relationship in terms borrowed from game theory, as a repeat game or a one-shot game between the parties, followed by some distinctions. Common action of authors-employees can shift a one-shot game into a more efficient repeat game. The Hollywood screenwriters' strike in late 2007 provides an example of a

¹⁷⁸ See *supra* note 62.

¹⁷⁹ One court noted that "Courts deciding whether an employee's project was the 'kind of work' the employee was hired to perform rely heavily on the employee's job description." - *City of Newark v. Beasley*, 883 F.Supp. 3, 8 (D.N.J. 1995). Other cases that referred to job descriptions, though they do not seem to have followed the interpretive approach advocated here, are *Miller*, 808 F. Supp. at 1245; *Avtec Systems, Inc.*, 21 F.3d at 569; *Genzmer*, 219 F. Supp. 2d. at 1276; *Gilpin v. Siebert*, 419 F. Supp. 2d 1288, 1296 (D. Or. 2006).

successful common action.¹⁸⁰ The screenwriters could have chosen the legal avenue and rely on *Tasini*, but given *Tasini's* aftermath, it seems that the screenwriters achieved more by striking.

In a one-shot game, the parties are focused on the gains and losses from that specific interaction and each party attempts to maximize its gains. If one party in a one-shot game is stronger than the other and absent a legal rule to the contrary, the stronger party is likely to take advantage of its power at the expense of the other party. This is often the situation of independent contractors. To prevent this, all legal models assist the weaker side in various ways. The U.S. model leaves the copyright with the independent contractor, unless several conditions are met. These limit the situations in which the relationship can be deemed as a work made for hire to specific kinds of works, when the work is commissioned and most importantly in my view is the requirement that the parties formalize their relationship and explicitly specify that the work is to be considered a work made for hire.¹⁸¹ These requirements, once fulfilled, contain a clear signal to the parties about the kind of transaction they are entering, including the issue of copyright ownership. The required formalities inform both parties and each side can now assess its situation and decide whether to enter the transaction or not.

Unlike independent contractors, the employee and the employer are engaged in a repeat game. In a content industry context, the employer is interested in the employee creating more works of quality and the employee knows that. The employer who is interested in a steady stream of works realizes that it will be counter-productive to treat the employee in an unfair manner, all other factors being equal.¹⁸² In the normal course of the employment relationship and under the assumptions of no other market failures, these considerations mean that the salary will be reasonable and/or that the employer will search for ways to create incentives for the employees where there are unexpected, unforeseen gains. Internal incentives can take the form of bonuses or a more direct sharing of the

¹⁸⁰ See press release, Writers' Guild of America, *Writers Guild Members Overwhelmingly Ratify New Contract*, Feb. 26, 2008, available at http://www.wga.org/subpage_newsevents.aspx?id=2780.

¹⁸¹ 17 U.S.C. §101(2).

¹⁸² Other factors that might disturb this scenario are the market power of the employer. If the employer has a monopolistic power in the field and the employee's skills are not easily applicable in other industries, then the employer is likely to be able to extract more from the employees.

revenues, such as an escalating scheme: After covering the expenses, the more revenue the work produces, the higher will be the employee's share.¹⁸³

The result of the dynamics described here can be achieved by forming a union. Once the employees act together, they are no longer in a continuous one-shot game subject to the arbitrary will of the employer, but rather, they are part of a multiple repeat game between two parties whose power is on a par, or at least not as unequal as before unionizing.

The assumptions underlying this analysis should be underlined, so we know the limits thereof and address other situations accordingly. The above applies to the content industry, where employees are hired to make creative works. A content industry, by definition, engages in the continuous production of creative works, hence the game is a repeat one. Both parties are aware (or should be) of the trade-off of risks. The consideration takes place *ex ante*, when the author still has the choice of working as an individual, independent contractor or as an employee. The author engages in the transaction at free will and has been informed, thus the requirement of informed consent is satisfied and asymmetries of information are narrowed. When these assumptions do not apply, such as in a non-content industry where an employee unexpectedly makes a work of authorship, the ownership was not discussed and was not traded-off, it would not make sense to talk about a repeat game.

CONCLUSION

This article searched for the most efficient and fair rule of initial allocation of copyright in works created by authors in the workplace. Applying a dual perspective of both copyright law and employment law results in several lessons. *First*, we should recognize typical cases, in which we can identify the risk-bearer (a lesson from copyright law). *Second*, the law should allocate the rights to the best risk-bearer (a lesson from copyright law), while searching for potential instances of unequal bargaining power such as information deficiencies and addressing them (a lesson from employment law). *Third*, the law should avoid allocations which the market is likely to instantly correct in a costless manner (a lesson from the Coasean analysis and *Tasini's* aftermath). Possible criteria for devising such typical cases are the kind of work, the kind of employee and the business of the employer. These criteria serve as proxies for the allocation of risks and fairness and were helpful under both the copyright and the employment law analysis, thus providing convenient common grounds to integrate the two bodies of

¹⁸³ The sharing of gains should not be at the expense of the steady salary, otherwise the risk component of the salary increases and the employer is likely to reduce the basic salary. See Landes & Posner, *THE ECONOMIC STRUCTURE*, *supra* note 91. A salary based solely on a pay for performance principle runs into many difficulties. See Vandenberghe, *Labour Contracts*, *supra* note 173, at 550.

law and diffuse the tension between efficiency and fairness. *Fourth*, from an employment law perspective, the article suggested that we should search for mechanisms that correct information deficiencies. These led us to distinguish between different factual situations, which fit the typical cases proposed under the copyright law analysis. Furthermore, the article suggested the enhanced use of written job descriptions, accompanied by pro-author interpretive rules. *Fifth*, we realized that penalty default rules would not be an efficient tool to overcome information deficiencies in the employment context, due to the nature of the employment relationship and their subsequent demoralization costs.

Thus, the article largely supports the current legal model, with some proposed modifications regarding the interpretation of the work-made-for-hire doctrine. However, it is based on a joint copyright-employment analysis, rather than an agency/tort shaky basis.

The result of this analysis seems to be counterintuitive, or at least contrary to some intuitions. At first sight, it might seem that creative employees (the "Bryants") are less protected under the above analysis than those who happen to make a creative work by chance (The "Millers"). However, the analysis showed that the trade of risks and the informed consent satisfactorily responds to the unfairness instincts.