

CAUSING COPYRIGHT

Shyamkrishna Balganesh[†]

Copyright protection attaches to an original work of expression the moment it is created and fixed in a tangible medium. Yet, modern copyright law contains no viable mechanism by which to examine whether someone is causally responsible for the creation and fixation of the work. Whenever the issue of causation arises, copyright law relies on its preexisting doctrinal devices to resolve the issue, in the process cloaking its intuitions about causation in altogether extraneous considerations. This Article argues that copyright law embodies an unstated, yet distinct theory of authorial causation, which connects the element of human agency to a work of expression using the myriad goals and objectives of the copyright system. This theory of causation is best realized through an independent requirement—of copyrightable causation—that the creator of a work will need to satisfy in order to qualify as its author for copyright protection. Much like copyright’s theory of authorial causation, the requirement would embody both a factual dimension (creation in fact) and a normative component (legal creation). The former would examine the connection between the work and the putative author as a purely epistemic matter, while the latter would do so through an evaluative understanding of copyright’s myriad goals and policies. The Article unpacks the structural and substantive foundations of authorial causation in copyright law, and argues that making it a new requirement for protection would introduce a measure of coherence and rationality into the question of copyrightability, while simultaneously allowing copyright law to overtly affirm and promote its various institutional ideals.

INTRODUCTION.....	2
I. AUTHORSHIP AS CAUSATION	8
A. <i>The Author as Cause</i>	8
1. Choosing Among Contributors to a Work	9
2. Mechanical Intervention in the Creative Process	14
3. Spiritual Authorship	20
B. <i>The Search for Human Agency</i>	23
II. MODERN PROXIES FOR CAUSATION	28
A. <i>Originality</i>	29
B. <i>Joint Works</i>	33
C. <i>Work Made for Hire</i>	37
III. COPYRIGHTABLE CAUSATION.....	40
A. <i>Basic Structure: The Tort Law Analogy</i>	42
B. <i>Creation-in-Fact</i>	46
1. But-For Creation.....	47
2. NESS	49

[†] Professor of Law, University of Pennsylvania Law School.

CAUSING COPYRIGHT

C. *Legal Creation* 53

 1. Control 55

 2. Disproportionality 57

 3. Personality Conflation 59

IV. EXTENSIONS 62

 A. *Presumptive Causation* 62

 B. *Transferred Causation* 65

CONCLUSION 67

INTRODUCTION

What is the nature and quantum of human agency needed for someone to claim copyright in an original work of expression? On the face of things and in the abstract, the question may seem indelibly metaphysical; yet in reality, it represents one of modern copyright law’s enduring anomalies. Consider the controversy involving the photograph commonly described as *The Monkey Selfie*.¹ David Slater is a wildlife photographer who went on a trip through Indonesia and spent several days following a group of macaque monkeys, photographing their behavior. At one point during the trip, he left his camera on its tripod, set the lens to autofocus and moved away hoping that the monkeys would approach it and give him a close up view.² Soon

¹ See, e.g., Samuel Gibbs, *Monkey Business: Macaque Selfie Can’t be Copyrighted, Says US and UK*, THE GUARDIAN, Aug. 22, 2014, <http://www.theguardian.com/technology/2014/aug/22/monkey-business-macaque-selfie-cant-be-copyrighted-say-us-and-uk>; Danny Cevallos, *When a Monkey Takes a Selfie*, CNN, Aug. 18, 2014, <http://www.cnn.com/2014/08/08/opinion/cevallos-monkey-selfie-copyright/>; Louise Stewart, *Wikimedia Says When a Monkey Takes a Selfie, No One Owns It*, NEWSWEEK, Aug. 21, 2014, <http://www.newsweek.com/lawyers-dispute-wikimedias-claims-about-monkey-selfie-copyright-265961>; Olivier Laurent, *Monkey Selfie Lands Photographer in Legal Quagmire*, Aug. 6, 2014, <http://time.com/3393645/monkey-selfie-lands-photographer-in-legal-quagmire/>; Jordan Weissman, *If a Monkey Takes a Selfie, Who Owns the Copyright?*, Slate.com, Aug. 6, 2014, http://www.slate.com/blogs/moneybox/2014/08/06/monkey_selfie_who_owns_the_copyright.html; Alexis Kleinman, *Wikipedia is in a Pretty Weird Battle Over a Monkey Selfie*, HUFFINGTON POST Aug. 6, 2014, http://www.huffingtonpost.com/2014/08/06/monkey-selfie_n_5654752.html.

² David Slater, *Sulawesi Macaques*, DJS Photography, <http://www.djsphotography.co.uk/Tropical%20Forests/Sulawesi%20Macaques.htm> (last visited Nov. 2 2015). As Slater described the episode:

I wanted to keep my new found friends happy and with me. I now wanted to get right in their faces with a wide angle lens, but that was proving too difficult as they were nervous of something - I couldn't tell what. So I put my camera on a tripod with a very wide angle lens, settings configured such as predictive autofocus, motorwind, even a flashgun, to give me a chance of a facial close up if they were to approach again for a play. I duly moved away and bingo, they moved in, fingering the toy, pressing the buttons and fingering the

CAUSING COPYRIGHT

enough, a group of monkeys came by and started looking at the reflective lens of the camera. Unexpectedly one of them began pressing the camera's buttons and ended up taking a self-photograph, i.e., a "selfie."³ Did Slater *create* the photograph, qualifying him as its author? His general intention was to photograph the monkeys in close proximity. He certainly provided all the equipment, set it all up appropriately, and anticipated that the monkeys would approach the camera.

Just as Slater contemplated obtaining a copyright registration for the photograph, the Copyright Office clarified its rules and eliminated the possibility of protection for the work, concluding that to be eligible for protection the work "must be created by a human being."⁴ In what appeared to be a direct rebuke to Slater's claim, it further clarified that a photograph "lack[ed] human authorship" when it was "taken by a monkey."⁵ The Copyright Office was thereby suggesting that while Slater certainly played some role in the creation of the photograph, that role was insufficient to turn him into its author, since the real creator of the work was the monkey.⁶ Even though the work itself met all the formal requirements of copyrightability, Slater and the work were both presumptively denied protection by the rules.⁷ Slater's failure to press the shutter button himself was deemed to have rendered him ineligible to be characterized as the author of the photograph. In other words, this failure—to press the shutter button—was treated as having broken his causal connection to the work.

Modern copyright law accords protection to a work automatically, from the instant that the work is created and fixed in a tangible medium of

lens...They played with the camera until of course some images were inevitably taken! I had one hand on the tripod when this was going on, but I was being prodded and poked by would be groomers and a few playful juveniles who nibbled at my arms. ...The whole experience lasted about 30 minutes.

³ *Id.*

⁴ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §313.2, at 22 (3d ed. 2014).

⁵ *Id.*

⁶ Indeed, this formed the basis of another lawsuit brought by PETA, asserting that the macaque was the author of the work and could qualify for copyright ownership under the law. The court dismissed the lawsuit, concluding that "works created by animals are not entitled to copyright protection." *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231, at *4 (N.D. Cal. Jan. 28, 2016).

⁷ See James Eng, *Monkey Selfie Can't Be Copyrighted, U.S. Regulators Confirm*, NBC NEWS, Aug. 21, 2014, <http://www.nbcnews.com/tech/social-media/monkey-selfie-cant-be-copyrighted-u-s-regulators-confirm-n186296>; Jason Abbruzzese, *U.S. Copyright Office: Photos Taken By a Monkey Can't be Copyrighted*, MASHABLE, Aug. 21, 2014, <http://mashable.com/2014/08/21/no-copyright-for-monkey-god-photos/#KGj1dd9wqqq7>.

CAUSING COPYRIGHT

expression.⁸ In the absence of any formal scrutiny of the work prior to its obtaining protection, copyright law all too readily presumes authorship of the work, and thereafter chooses to examine the authorial status of a claimant only when disputed. When copyright law chooses to address the question of authorship, it focuses on whether the expression at issue qualifies as a “work of authorship” rather than on the process of authoring the work.⁹ Authorship in this stylized conception originates entirely in the formal doctrinal prerequisites that a work needs to satisfy—such as the originality requirement and the idea/expression dichotomy—even though the term itself suggests a peculiar form, type, and amount of agency underlying the creative process that form a logical precursor to the work itself coming into existence.¹⁰ This endogenous construction of authorship, and its fragmented understanding through the individual components of copyrightability altogether disables any direct scrutiny of the causal connection between an individual’s actions and the production of the creative work. The (human) cause for copyright protection is always presumed, once the work itself is found to be protectable, and never individually proven. What made *The Monkey Selfie* episode controversial then, was the Copyright Office’s overt recognition that authorship was more than just a formal matter, and that it embodied an important causal dimension.

Despite having been in existence for over three centuries now, and grown to encompass a broad array of creative works and processes, copyright jurisprudence has failed to develop a mechanism for assessing when someone is to be deemed causally responsible for the creative expression that is to be protected. Modern efforts to understand copyright’s commitment to the ideal of authorship invariably border on the metaphysical in their attempts to understand the construct of the “author” in the abstract, and thereby routinely elide over the centrality of causation (and causal responsibility) in determining *when* and how someone ought to be treated as the author of a

⁸ 17 U.S.C. §102(a) (2010); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 487-88 (“Under current law, copyright arises the moment an original piece of expression is fixed.”).

⁹ 17 U.S.C. 102(a) (2010) (using the phrase “work[] of authorship” to describe expression that is eligible for copyright protection). For a useful discussion of how this emphasis on authorship through the work, and conditions of copyrightability, came to be, see: Russ VerSteeg, *Defining “Author” for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1326-33 (1996).

¹⁰ For an overview of the authorship discourse in copyright law and its inadequacies, see: Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455; Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008); James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625 (1988).

CAUSING COPYRIGHT

particular work of expression already brought into existence. Not only is this in stark contrast to other areas of law where questions of causation are addressed overtly in the jurisprudence;¹¹ but it is also in contrast to copyright's own treatment of liability (for infringement), where causation has come to be seen as an integral element of the analysis.¹² If copyright law and authorship do indeed embody a causal element—as one would expect them to, given their focus on creative behavior—it is today well hidden behind a cascade of copyright's other intuitions and beliefs.

Everyday scenarios of creative production that routinely give rise to potential claims of authorship embody important questions of causation. And yet, copyright law chooses to address the issue of causation only ever indirectly (and begrudgingly). Consider an artist who accidentally spills over a palette of paints to produce a visually appealing design on a nearby canvas that belongs to someone else,¹³ or indeed a translator who in attempting to decipher an ancient text makes creative choices during the process, which render it fairly unique.¹⁴ Should the artist or the translator—in either instance—be treated as the author of the resulting work, rendering it eligible for protection? In the normal course of things, copyright law attempts to analyze the issue through the doctrine of “originality,” which asks whether the work was independently created and embodies a minimal amount of creativity that derives from the claimant.¹⁵ Originality however, remains a rather poor fit for the causal question, given that it focuses almost entirely on the work itself rather than on the process of creation. The author's intentionality—or lack thereof—is treated as orthogonal to the originality determination, which is deemed satisfied as long as the work itself exhibits a

¹¹ See generally H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW* (2d ed. 2002) (discussing the ubiquity of causal ideas in tort law, contract law, and criminal law); MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS* (2009) (discussing the unifying conception of causation in different areas of the law). Tort law is of course the area where the jurisprudence of causation is today best developed. See, e.g., Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962); Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735 (1985).

¹² *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004).

¹³ *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 105 (2d Cir. 1951) (concluding that an “unintentional” variation remains copyrightable);

¹⁴ These were the facts of the well-known *Dead Sea Scrolls Case*. See Michael D. Birnhack, *The Dead Sea Scrolls Case: Who Is an Author*, 23 EUR. INTELL. PROP. REV. 128 (2001).

¹⁵ 1 MELVILLE B. NIMMER AND DAVID NIMMER, *NIMMER ON COPYRIGHT* §2.01 (2015) (discussing copyright's “originality” requirement). For a general overview of the connection between originality and authorship, see: David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1 (2001). See also Ginsburg, *supra* note __, at 1078 (“[O]riginality’ is synonymous with authorship.”).

CAUSING COPYRIGHT

“modicum of creativity”.¹⁶ By refusing to address the core question at issue in these scenarios for what they really are—questions of causal responsibility—copyright law in effect conceals its account of causation and presumes it to be altogether uncontroversial.

In this Article I argue that copyright law does indeed embody a latent theory of causation, seen in early attempts to construct the “author” for specific categories of work and today hidden behind doctrinal proxies that perform other roles. Unsurprisingly, copyright’s account of causation embodies an important normative dimension, intricately connected to the various contested goals and objectives of copyright protection, which is perhaps responsible for its dormant existence. Several of copyright law’s modern doctrines embody snippets of this account of causation, but are rarely ever understood as such. Instead of allowing this to continue, I argue that modern copyright jurisprudence would be best served by confronting the question of causation directly through an independent requirement of protection. Here, as elsewhere, looking to the working of the common law provides important insights into how this might be realized.

Ever since the advent of Legal Realism as the dominant approach to legal analysis, the identification of an act as a “cause” of an event/outcome has come to be seen as intricately connected to the enterprise of regulating the consequences of that determination, rather than as a purely neutral description of reality.¹⁷ Causation in the law is thus today recognized to embody an unquestionably normative dimension, one that is of course superimposed on factual criteria.¹⁸ Identifying an antecedent event as a “cause” of a legally relevant outcome involves *both* a determination that there is some *factual connection* between that event and the outcome as well as a normatively desirable reason for recognizing that event as *legally significant* in light of the law’s goals and purposes for the area involved.¹⁹

In a similar vein, copyright law would be well served by a requirement of “copyrightable causation” as a pre-requisite to protection.

¹⁶ David Nimmer has argued that intentionality ought to be the basis for authorship, *see* Nimmer, *Dead Sea Scrolls*, *supra* note __, at 204-10. Current law does not appear to support this view. Ginsburg, *supra* note __, at 1085-88.

¹⁷ For the leading (and perhaps most cynical) account of the connection, see: Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956). *See also* Leon Green, *Are There Dependable Rules of Causation?*, 77 U. PA. L. REV. 601, 604-06 (1929) (describing a similar conflation of fact and policy).

¹⁸ The best known exposition of this is seen in tort law, where the law distinguishes between a “cause-in-fact” and a “proximate cause”. *See* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 71-73 (1975). For a broader overview of proximate cause, see: LEON GREEN, *THE RATIONALE FOR PROXIMATE CAUSE* (1924).

¹⁹ *See* Calabresi, *supra* note __, at 100-01.

CAUSING COPYRIGHT

Copyrightable causation would require determining whether the causal antecedent that the putative author/claimant is relying on as the act of creation represents the precise type, form, and quantum of creative input that copyright law should—as a factual and normative matter—deem significant for entry into its system of exclusive rights. Much like other aspects of copyrightability, it would constitute a part of the plaintiff’s prima facie case when a claim of infringement is brought. It would embody two interdependent components in the analysis. The first, *creation in fact*, would examine whether an actor’s participation in the creative process contributed as a factual matter to the production of the creative expression. The second component, *legal creation*, would then ask if the contribution—so proven to exist—is significant enough, when viewed in light of copyright’s purposes (i.e., normatively), to generate protection and authorship. The application of this requirement to different areas of creativity is certain to produce varying standards, in turn reflective of copyright’s goals and purposes for those areas.

Incorporating a copyrightable causation requirement into copyright law would also add substantive content to copyright’s purported—and constitutionally enshrined—commitment to authorship. Authorship is today taken to be a largely amorphous ideal within copyright law, one that plays a symbolic and expressive role rather than an analytical one.²⁰ This reality is confirmed by the surprising absence of any meaningful discussion of the idea within copyright case-law. A copyrightable causation requirement would allow copyright doctrine to disaggregate the idea of author-*ing* a work of expression, and examine the myriad manifestations of that process. It would thereby bring into sharp focus, the *act*—rather than just the result—of authorship, and move copyright doctrine and thinking away from its singular emphasis on the “work.” Authorship would in the process re-emerge not just as a symbolic ideal within the system, but instead as a substantive one that copyright doctrine is seen to care about in its everyday functioning. The copyrightable causation requirement would thereby emphasize that causation is the *sine qua non* of authorship.

Parts I and II of the Article unpack copyright’s dormant theory of authorial causation. Part I looks to early case law where courts grappled with the nature and quantum of human agency required for classification as an author of a work, and argues that this early jurisprudence reveals an unacknowledged commitment to understanding authorship in causal terms. Part II then provides an overview of copyright law’s modern treatment of authorial causation. It analyzes how several of copyright’s current doctrinal devices are routinely deployed to mask what are essentially questions of

²⁰ Bracha, *supra* note ___, at 188 & n.4 (describing this trend in American copyright scholarship).

CAUSING COPYRIGHT

causation, undermining the analytical coherence of copyright doctrine. Part III then moves to the prescriptive and introduces an independent element of copyrightability that focuses on causation—“copyrightable causation”—and unpacks its elements. Drawing on the working of the causal inquiry in tort law, this Part shows how copyrightable causation should be seen as embodying both a descriptive and a normative dimension in its application to individual cases. Part IV then considers a few possible extensions and applications of the copyrightable causation requirement.

I. AUTHORSHIP AS CAUSATION

Copyright’s construction of authorship has long embodied an important causal element. This Part attempts to trace the contours of copyright’s dormant theory of authorial causation. Part I.A first looks to early copyright jurisprudence involving non-traditional settings of creative production, where we see courts grappling with the issue of causation in the production of the work. Part I.B. then discusses how this jurisprudence strove to articulate a focus on the nature and quantum of human agency needed for authorship.

A. *The Author as Cause*

The *author* has always been the principal subject of copyright protection. The Intellectual Property Clause of the U.S. Constitution enables Congress to enact a copyright law to secure exclusive rights in their writings to “[a]uthors”.²¹ Similarly, the Statute of Anne, the first modern copyright statute vested in “the author of any book...the sole right and liberty” of printing and distributing the book and its contents.²² Over the last several decades, scholars have spent a significant amount of time and effort trying to understand *how*, *why*, and *when* it was that copyright thinking came to embrace this overbearing emphasis on the author, as well as its consequences for copyright jurisprudence. One prominent school of thought locates its origins in the seventeenth and eighteenth centuries, by which time an enlightenment-driven individualistic conception of creativity is believed to have emerged, which in turn came to influence copyright law and policy for several decades to come.²³ Another, more recent, school argues that the prior

²¹ U.S. CONST., Art. I, § 8, Cl. 8.

²² 8 Anne, c. 19 (1710) (“An act for the encouragement of learning, by vesting the copies of printed books in the *authors* or purchasers of such copies, during the times therein mentioned.”).

²³ See, e.g., JAMES BOYLE, *SHAMANS, SOFTWARE AND SPLEENS: LAW AND CONSTRUCTION OF INFORMATION SOCIETY* (1996); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF*

CAUSING COPYRIGHT

account is largely incomplete in the American context, and that it was in reality during the late-eighteenth and nineteenth centuries that conceptions of authorship came to be firmly embedded within copyright doctrine.²⁴

While a good amount of scholarship has focused on unpacking the construct of the “author” in copyright law, there appears to be surprisingly little discussion of what the process of *authoring* entails conceptually, as a matter of copyright law, theory and policy. *Authorship* is thus taken to be about understanding the structure, motivation, status, and ideological currency of the author rather than as an effort to understand and unpack the particular process through which the author generates the work that eventually becomes the object of the protection.

As a general matter, copyright decisions have little need to scrutinize an individual’s contribution to the process of creating the work, especially since in a vast majority of cases the issue is never really in dispute. It is only when confronted with the need to identify the author of a work by reference to his/her actions in bringing the work into existence that courts become compelled to articulate a theory of authorial causation—one that links a claimant’s process of creation with the ultimate product of that process, i.e., the work. The historical jurisprudence that emerged from such situations therefore sheds important light on the theory of authorial causation that copyright came to embrace, and later conceal under a variety of different proxies.

1. Choosing Among Contributors to a Work

The earliest situations where courts confronted the question of authorial causation were cases where a claimant (i.e., a putative author) had interacted with others in the production and creation of the work at issue, and sought to be characterized as its sole author upon completion. These weren’t instances of joint authorship, where more than one party was claiming to be its author, but instead situations where one party was claiming to be the author of the work, *to the exclusion of all the other contributors*. These disputes usually followed a common pattern. One party—the conceiver—

COPYRIGHT (1993); THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455; James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625 (1988). For an excellent overview of this literature, see: Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 192-97 (2008).

²⁴ Bracha, *supra* note __, at 192, 192-263 (noting that these accounts are “incomplete or even flawed” and offering an alternative).

CAUSING COPYRIGHT

would conceive of the project and its design, and thereafter utilize the services of one or more others to execute specific components of the project under direction. These executors would no doubt produce expression; yet such expression was decidedly for use in the overall project. The overarching question that courts confronted was whether the conceiver who designed the project and was responsible for it could be characterized as its author under copyright law, despite the fact that others had actually created its individual components.²⁵

In an overwhelming majority of these cases over time, courts recognized the conceiver to be the author of the work, even though the actual execution came from someone else.²⁶ One prominent nineteenth century treatise on English copyright law synthesized the rule to recognize that “the author is the man from whom emanates the general conception and design...although much of the detail may have been the work of subordinate brains and hands.”²⁷ In one often quoted case, the court observed:

Under that statute [of Anne], the person who forms the plan, and who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements,—that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection who upon certain conditions contribute to it, is the author and proprietor of the work, if not within the literal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally.²⁸

Central to this conclusion was a finding that the work owed its origins to its conceiver, since it “emanate[d]” from him.²⁹ When exactly this connection might be implied was of course far from clear in practice. Consequently, in situations where the connection between the conceiver and the final work appeared more attenuated, courts did not hesitate to deny authorship status to the conceiver. Elaborating on this strand of thinking, one treatise write therefore notes that “[t]he mere suggestion of a subject or idea which is then

²⁵ See, e.g., *Scott v. Stanford*, (1866-67) L.R. 3 Eq. 718 (U.K.); *Barfield v. Nicholson*, 57 Eng. Rep. 663 (1827) (U.K.); *Maclean v. Moody*, (1858) 20 D. 1154 (U.K.); *Hatton v. Kean*, 141 Eng. Rep. 819 (1859) (U.K.); *Wallerstein v. Herbert*, 16 L.T. 453 (1867) (U.K.).

²⁶ *Id.*

²⁷ E.J. MACGILLIVRAY, A TREATISE UPON THE LAW OF COPYRIGHT 62 (1902).

²⁸ *Hatton v. Kean*, 141 Eng. Rep. at 823 (quoting *Barfield v. Nicholson*).

²⁹ MACGILLIVRAY, *supra* note __, at 62.

CAUSING COPYRIGHT

entirely designed and executed by another does not constitute the originator of the idea an author.”³⁰

The mid-century case of *Shepherd v. Conquest* is often cited as an example of such a denial.³¹ The plaintiffs in that case were the proprietors of a theatre who had employed a playwright to write and adapt two plays for them. That playwright was compensated for his service and paid a weekly salary, and eventually produced a dramatic work. When the playwright later assigned the work to the defendant, the plaintiffs claimed to be authors of the work by virtue of having commissioned it and having specified the general direction it was to take.³² The court disagreed:

[I]n the present case...no such effect [of authorship] can be produced where the employer merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed. It appears to us an abuse of terms to say, that, in such a case, the employer is the author of a work to which his mind has not contributed an idea: and it is upon the author in the first instance that the right is conferred by the statute which creates it.³³

At first glance, the case might be thought to have premised its conclusion on the idea-expression dichotomy, and the principle that the plaintiffs had merely contributed the idea rather than expression. The idea-expression dichotomy was however largely irrelevant to the court, which would have been content if the plaintiffs had even “contributed an idea.”³⁴ The decision rested instead on the finding that the plaintiffs had made *no* contribution of significance to the work beyond “suggest[ing]” its subject.³⁵

Valid authorial causation in this understanding therefore required a contribution that was more than a mere suggestion of the idea. All the same, it did not require the actual execution or design of the expression. In this thinking, the contribution was also required to be compositional—i.e., related to the content underlying the work, rather than its mere physical manifestation. What made a conceiver an author was thus his contribution to the composition of the content, even if not directly to the content (expression)

³⁰ *Id.* at 63.

³¹ 139 Eng. Rep. 1140 (U.K.).

³² *Id.* at 1141-42.

³³ *Id.* at 1147.

³⁴ *Id.*

³⁵ *Id.* (“[N]o such effect can be produced where the employer merely suggests the subject.”).

CAUSING COPYRIGHT

itself. This compositional requirement was however called into question in the celebrated case of *Walter v. Lane*,³⁶ which added an altogether new twist to copyright's early theory of authorial causation.

Walter v. Lane brought the question of authorial causation to the forefront in determining authorship. The case involved a series of speeches given by a public personality. Several reporters attended these speeches and took handwritten notes of the speech in shorthand. They thereafter "wrote out their notes, corrected, revised and punctuated their reports for publication" in a newspaper, which claimed to carry the verbatim text of the original speeches.³⁷ The defendant later copied these speeches, and disputed the authorial status of the reporters arguing that the reporters had not produced an "original composition," given that they had transcribed "verbatim reports" of the speech.³⁸

The House of Lords found for the plaintiffs, concluding that the reporters were indeed the authors of the work that they had transcribed.³⁹ To the court, the work did not have to be an original composition, to be eligible for protection. The "first producer of a book"—in this case, the reporter—was its true author; which could of course produce a situation where each reporter became an author of his individual report, even when the reports were themselves identical in composition and content.⁴⁰ As long as each reporter had produced it, the status of author would rightly attach. The compositional content—of the speech—was to the court outside the domain of the reporter's entitlement. As one judge put it:

Each reporter is entitled to report, and each undoubtedly would have a copyright in his own published report; but where is the difficulty? Suppose a favourite view—a dozen artists take, each independently, his own representation of it.... There is of course no copyright in the view itself, but in the supposed picture of photograph there is.⁴¹

Another judge put the point more bluntly, observing that "the reporter is the author of his own report" since "it was [he] who brought it into existence in the form of a writing."⁴² This position was furthered by the fact that the "materials for his composition were his notes, which were his own property,

³⁶ (1900) A.C. 539 (U.K.)

³⁷ *Id.*

³⁸ *Id.* at 542.

³⁹ *Id.* at 550.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 552.

CAUSING COPYRIGHT

aided to some extent by his memory and trained judgment.”⁴³ Central to the court’s conclusion was thus the recognition that a “reporter’s art represents more than mere transcribing of writing from dictation.”⁴⁴ While it certainly relied on pre-existing content (i.e., the speech), it owed its existence to the reporter:

True it is that the reporter was not the author of the speech; but he was the composer and author of the book [i.e., the writing]. *Without his brain and handiwork the book would never have had existence.*⁴⁵

Walter v. Lane is in important ways consistent with the general approach to authorship seen in the other early cases. All of these nineteenth century cases involved selecting one among several contributors to the work of expression as its sole—rather than joint—author, and in each instance the court chose to do so by focusing on a conception of authorship that examined the ultimate responsibility for the work’s existence, in a but-for sense of the term. *But for* the speculating conceiver, willing to generate the idea, design, and resources for the production of the work there would be no work to speak of; and *but for* the reporter transcribing the orally delivered speech, there would be no record of it to distribute. The denial of authorship status to a mere employer who played no active (and direct) role whatsoever in the production of the work was, by similar accounts, a recognition of an outer boundary in this but-for reasoning, i.e., a situation where even without the employer, the work could have been produced. The logic of causation had begun to take shape within copyright’s conception of authorship.

American copyright law around the time appears to have adopted a largely similar position, even though case law directly addressing the question of authorial causation is more limited. The leading copyright treatise of the time readily endorses the early English position as good law in the U.S.⁴⁶ Somewhat interestingly, it also gleans from these cases an additional proposition of causal significance, in an effort to reconcile the early cases: “[w]hen the same work is the basis of two or more different copyrights, he is the author, within the meaning of the statute, who has produced that for which the copyright is granted.”⁴⁷ It goes on to observe that a translator is the author

⁴³ *Id.*

⁴⁴ *Id.* at 554.

⁴⁵ *Id.* at 559 (emphasis supplied).

⁴⁶ See EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 236 (1879).

⁴⁷ *Id.*

CAUSING COPYRIGHT

of the translation, even if not of the original work; and the person who arranges music becomes the author of the arrangement even if not of the composition itself.⁴⁸ This approach to determining authorship is obviously consistent with *Walter v. Lane*, but in addition it also contextualizes the authorship question to the particular act (e.g., translation, composition) that the copyright system is attempting to validate through its grant of exclusive rights. The author, in other words, is the person who authored the legally-defined object of protection rather than the work as a whole (e.g., the translation rather than the original book, or the arrangement rather than the original score). By recognizing an identifiable basis for the connection (between author and work), this construction throws the causal question into sharp relief.

2. Mechanical Intervention in the Creative Process

It wasn't until courts were forced to deal with situations where creators had relied extensively on mechanical methods and processes to create the work that the causal question emerged as an overt consideration in copyright jurisprudence. Somewhat interestingly, the primary area where this arose was in relation to photographs and their copyrightability. Photography was invented in the first half of the nineteenth century and started gaining popularity as an artistic practice a decade or so after.⁴⁹ As noted previously, this was also around the time period that copyright law—on both sides of the Atlantic—was grappling with the general question of authorship in situations involving multiple contributors.

In the U.S., Congress amended the copyright statute to include photographs as copyrightable subject matter in 1865.⁵⁰ Consequently, for photographs created prior to the amendment, courts had to decide whether their creators qualified as authors under the law. This in turn forced them to grapple with the process through which photographs were created, and the role of human agency therein. In an 1866 decision, a New York district court explained its understanding of the process in the following terms:⁵¹

This new art of photography, and all its kindred processes, is an entirely original and independent mode of taking pictures of material objects, and multiplying copies of such pictures at

⁴⁸ *Id.*

⁴⁹ Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 392 (2004).

⁵⁰ Copyright Act of 1865, ch. 126, 13 Stat. 540, § 1.

⁵¹ *Wood v. Abbott*, 30 F. Cas. 424, 425 (C.C.S.D.N.Y. 1866).

CAUSING COPYRIGHT

pleasure. That combination of creative or imitative power and mechanical skill by which the artist works out his own conception, on the embodied conception of another, in a fixed form, the fruits of which the law was intended to protect, is not brought into play.

...

The image thrown by light reflected from the original and passed through a camera produces a negative, and, when the light passes through the transparent negative on to paper held in contact with glass, it produces a positive. The image is no more formed by pressure when the positive is made on the paper held in contact with the glass plate, than when the negative is made on the glass by rays reflected from the original at a distance. In both cases, the only force that contributes to the formation of the image is the chemical force of light, operating on a surface made sensitive to its power.

This description is quite revealing. The court appears conflicted about the proper role of human agency in the creation and production of photographic prints. In relation to methods of imitation known at the time—such as engraving—the court recognizes that the production of the work involves a “combination” of agency and mechanical processes, but acknowledges that this combination satisfies copyright law’s minimum threshold of agency to qualify for protection. For photography however, the court sees this threshold as not being satisfied, instead attributing the production of the photograph in its entirety to “the chemical force of light.” The human agency, if any, is in turn seen as limited to the positioning of the plate, paper, frame and springs—cumulatively beyond the pale of authorial causation supposedly recognized by the law at the time (i.e., pre-1865). The reasoning in the case is perfectly consistent with what Christine Farley describes as the conflict between photography as an art and as a science, which characterized thinking about the process at the time.⁵²

Even after the copyright statute was amended (in both England and the U.S.) to cover photographs as protectable subject matter, the question of determining who—and under what conditions—a person might be characterized as the author of a photograph remained of significance, and fell to courts. The case of *Nottage v. Jackson*,⁵³ decided by the Court of Appeals in England appears to be one of the first to consider the question directly, obviously under English law. The plaintiffs in the case were the owners of a

⁵² See Farley, *supra* note __, at 389.

⁵³ (1882-83) L.R. 11 Q.B.D. 627 (U.K.).

CAUSING COPYRIGHT

photography firm with several employees.⁵⁴ On one occasion, the manager of the firm—of his own volition—appears to have decided to take a photograph of the Australian cricket team, and sent an assistant to physically “take” the photograph, after which it was processed, mounted, and offered for sale.⁵⁵ The question before the court was whether the plaintiffs, who had no role in the taking of the photograph could qualify as its author, under copyright law. The court answered the question in the negative. Central to its reasoning was the fact that the plaintiffs had not been physically present during the taking of the photograph, nor had they played a supervisory role in its production, or indeed in the idea behind it.⁵⁶ Further complicating the analysis for the court was the reality that the process of taking the photograph itself, often involved more than one individual, given the complexity of the equipment involved. Working its way through a reasoned approach to the matter, the court inevitably fell back on the reality that what it was in the end searching for, was the *cause* of the photograph here. Its observations in this regard are particularly noteworthy:

[A]ll I can do is to see who is the nearest person—the nearest like the author of a painting or the author of a drawing. Certainly it is not the man who simply gives the idea of a picture.... He may have the idea, but still he is not there. ... The nearest I can come to is that it is the person who effectively is, as near as he can be, *the cause of the picture* which is produced—that is, the person who has superintended the arrangement, who has actually formed the picture by putting the people into position, and arranging the place in which the people are to be—the man who is the *effective cause* of that. Although he may only have done it by standing in the room and giving orders about it, still it is his mind and act, as far as anybody's mind and act are concerned, which is the effective cause of the picture such as it is when it is produced. Therefore it will be a question in every case who that man is. That will be a matter of evidence. That will be a question of fact.⁵⁷

Here we see for the first time, a court openly acknowledging that the identification of authorship for a work is indelibly a causal question, of determining the “effective cause” of the work being protected. It is worthwhile noting that the court readily acknowledges that this cause will

⁵⁴ *Id.* at 627.

⁵⁵ *Id.* at 628.

⁵⁶ *Id.* at 632-33.

⁵⁷ *Id.* at 632 (emphasis supplied).

CAUSING COPYRIGHT

vary from one setting to another, even for the same category of work. It might thus be someone's superintendence over the process in one instance, the arrangement of the subjects in another, or the physical taking of the picture in yet others. The "cause" is, in addition, given a clear epistemic basis in the court's construction, as something that might be discerned from evidence presented to the court.

In short order, the same question came up for consideration under U.S. copyright law, in the now infamous Supreme Court case of *Burrow-Giles Lithographic Co. v. Sarony*,⁵⁸ a case that is today part of the copyright law canon.⁵⁹ As is well known, the case involved a photograph of Oscar Wilde, taken by the photographer Napoleon Sarony. Sarony had posed Wilde in a particular way, played a role in Wilde's choice of attire, and then directed the taking of the photograph.⁶⁰ Yet, the defendant argued that the photograph could not be protected as a matter of copyright and constitutional law, since there was no identifiable author and its production was "merely mechanical" and involved "the manual operation, by the use of these instruments and preparations, of transferring to the plate the visible representation of some existing object, the accuracy of this representation being its highest merit."⁶¹

The Court chose to dodge the question by concluding that an "ordinary production of a photograph" was indeed a purely mechanical process that would be disqualified from obtaining protection.⁶² Sarony's photograph in question however, was not such an ordinary production, but instead "an original work of art [and] the product of plaintiff's intellectual invention," which rendered it eligible for protection.⁶³ The Court then cited with approval, the English decision in *Nottage*, specifically the language about the author being the effective cause of the work, and noted that the author of a photograph was "the man who really represents, creates, or gives effect to the idea, fancy, or imagination."⁶⁴ With this, *Burrow-Giles* came to endorse the "effective cause" based construction of authorship in photographs.

As Farley notes, the Court's focus on the cause of the photograph arose as a result of its attempt to locate authorship in the pre-shutter activities of the photographer rather than in the post-shutter—i.e., negative

⁵⁸ 111 U.S. 53 (1884).

⁵⁹ Farley, *supra* note __, at 386 (describing it as a "well-known case in copyright law").

⁶⁰ 111 U.S. at 53-54.

⁶¹ *Id.* at 59.

⁶² *Id.*

⁶³ *Id.* at 60.

⁶⁴ *Id.* at 61.

CAUSING COPYRIGHT

development—ones.⁶⁵ This allowed the conception of authorship to draw a bright-line between the human and mechanical aspects of photography, since post-shutter activities at the time involved a far more significant reliance on technology. The Court's singular focus on the pre-shutter cause of the photograph allowed authorship to emphasize the human dimension of the creative process involved.

Later photography cases generally followed the framework of *Burrow-Giles*, looking for sufficient pre-shutter agency on the part of a plaintiff-claimant to find authorship.⁶⁶ The 'effective cause' idea has in the years become the dominant approach to determining the authorship of a photograph. Indeed, it is precisely because of the open-ended epistemic nature of this standard that courts have on multiple occasions been able to locate the authorship of photographs in individuals other than the photographer who presses the shutter button.⁶⁷ Others involved in arranging, posing, or curating the subject matter have as a result come to be seen as equally important agents in the overall causal chain that results in the production of the photograph.⁶⁸

Burrow-Giles's effective cause framework has had influence even beyond the immediate realm of photographs. It has, for instance, been used to classify the director of a motion picture, who played no direct role in the underwater filming of the movie itself, as the author of the motion picture.⁶⁹ In that case, the court treated effective cause as synonymous with *control* and noted that:

All else being equal, where a plaintiff alleges that he exercised such a high degree of control over a film operation—including the type and amount of lighting used, the specific camera angles to be employed, and other detail-intensive artistic elements of a film—such that the final product duplicates his conceptions and visions of what the film should look like, the plaintiff may be said to be an “author” within the meaning of the Copyright Act.⁷⁰

⁶⁵ Farley, *supra* note __, at 390.

⁶⁶ For an excellent discussion and analysis of these cases, see *id.* at 438-46.

⁶⁷ See, e.g., *Brod v. General Pub. Group, Inc.*, 32 Fed. Appx. 231 (9th Cir. 2002); *Robinson v. Buy-Rite Costume Jewelry, Inc.*, 2004 WL 1878781 (S.D.N.Y. 2004). *But see* *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301 (S.D.N.Y. 2000).

⁶⁸ *Brod*, 32 Fed. Appx. at 231 (finding that a book author who hired a photographer to take photographs for the book was a joint author of the photographs); *Robinson*, 2004 WL 1878781 at *3-4 (finding the hiring party to be a joint author of the photograph).

⁶⁹ *Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic*, No. 97 CIV. 9248 (HB), 1999 WL 816163, at *1-3 (S.D.N.Y. Oct. 13, 1999).

⁷⁰ *Id.* at *5.

CAUSING COPYRIGHT

On one occasion, the Third Circuit used this idea to underplay the mechanical aspects of fixation in the authorship determination. The court in *Andrien v. Southern Ocean County Chamber of Commerce* treated a cartographer, who had surveyed a geographic area, conceptualized of the maps at issue, and directed its production, as the author of the maps even though the actual printing of the maps was done by someone else.⁷¹ The court defined the author as “the party who actually creates the work... the person who translates an idea into an expression that is embodied in a copy by himself or herself, or who authorizes another to embody the expression in a copy.”⁷² When the final task of fixation and embodiment might be characterized as purely “rote” or “mechanical,” the human agency that constitutes authorship—i.e., the cause—is to be found earlier in the chain:

Poets, essayists, novelists, and the like may have copyrights even if they do not run the printing presses or process the photographic plates necessary to fix the writings into book form. These writers are entitled to copyright protection even if they do not perform with their own hands the mechanical tasks of putting the material into the form distributed to the public.⁷³

Distilled down to its basics, this observation is but a reaffirmation of the standard developed in *Burrow-Giles*.

The mechanical intervention cases thus brought the causal dimension of authorship to the forefront in copyright jurisprudence. While early cases—culminating in *Burrow-Giles*—articulated the idea in avowedly causal terms, later jurisprudence continued the tradition through the use of terminology that seemed less overtly causal, but nonetheless focused on the nature and quantum of human agency involved in the act of bringing the work into existence. The question has arisen again most recently, in instances of what is described as “computational creativity,” situations where a computer program is created that then itself generates creative expression using its artificial intelligence.⁷⁴ In these instances, scholars have begun to question

⁷¹ *Andrien v. S. Ocean City Chamber of Commerce*, 927 F.2d 132 (3d Cir. 1991).

⁷² *Id.* at 134.

⁷³ *Id.* at 135.

⁷⁴ See Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 2012 STAN. TECH. L. REV. 5, 1, at 9-18 (2012).

CAUSING COPYRIGHT

the appropriate role of human agency in determining the authorship of what are essentially machine-produced works.⁷⁵

3. Spiritual Authorship

A third area where the questions of human agency and causation became central to determining authorship for copyright purposes is the area of automatic writing, also referred to as “psychography.”⁷⁶ Psychography involves an individual transcribing expression that was supposedly communicated to him or her by a supernatural source.⁷⁷ The individual operates as the medium and converts the message of the supernatural source into understandable expression. The early twentieth century English case of *Cummins v. Bond* was the first to decide who the author of such expression was for the purposes of copyright law.⁷⁸

The plaintiff in the case was a psychic, who practiced automatic writing. The process entailed her covering her eyes with one hand, and holding a pencil in the other hand over paper. She would then pass into a state of trance, and her hand would commence writing rapidly, sometimes at the rate of two thousand words an hour.⁷⁹ On one such occasion, she claimed to have been visited by a spirit and came to produce a work titled *The Chronicle of Cleophas*.⁸⁰ The work was authored in an archaic language, which the defendant then copied. In an action for copyright infringement, the court had to confront the question of authorship in the work.

The court’s observations about the origins of the work are somewhat comical. It notes that the “true originator of all that is to be found in the documents is some being no longer inhabiting this world, and who has been out of it for a length of time sufficient to justify the hope that he has no reason for wishing to return to it.”⁸¹ Without disputing the veracity of this claim, the

⁷⁵ *Id.* See also James Grimmelmann, *Copyright for Literate Robots*, 102 IOWA L. REV. (forthcoming 2016); James Grimmelmann, *There’s No Such Thing as a Computer-Authored Work – And It’s a Good Thing, Too*, 39 COLUM. J.L. & ARTS (forthcoming 2016).

⁷⁶ For early accounts of this process, see: JAMES J. OWEN, *PSYCHOGRAPHY: MARVELOUS MANIFESTATIONS OF PSYCHIC POWER* (1893); WILLIAM STANTON MOSES, *PSYCHOGRAPHY: A TREATISE ON ONE OF THE OBJECTIVE FORMS OF PSYCHIC OF SPIRITUAL PHENOMENA* (2D ED. 1882).

⁷⁷ One early author defined it as “writing without the intervention of ordinary human agency.” MOSES, *supra* note __, at 9. Another describes it as “writing by spirit power.” OWEN, *supra* note __, at 14.

⁷⁸ (1927) 1 Ch. 167 (U.K.). For an early account of the case on this side of the Atlantic, see: Blewett Lee, *Copyright of Automatic Writing*, 13 VA. L. REV. 22 (1926).

⁷⁹ *Id.* at 168-69.

⁸⁰ *Id.* at 168.

⁸¹ *Id.* at 172.

CAUSING COPYRIGHT

court nonetheless proceeded to find that the plaintiff was indeed the author of the work for copyright purposes. Its reasoning was simple:

[T]he communications ... could not have reached us in this form without the active co-operation of some agent competent to translate them from the language in which they were communicated to her into something more intelligible to persons of the present day. The plaintiff claims to be this agent and to possess, and the defendant admits that she does possess, some qualification enabling her, when in a more or less unconscious condition, to reproduce in language understandable by those who have the time and inclination to read it, information supplied to her from the source referred to in language with which the plaintiff has no acquaintance when fully awake.

...

[I]t would seem to be clear that the authorship rests with this lady, to whose gift of extremely rapid writing coupled with a peculiar ability to reproduce in archaic English matter communicated to her in some unknown tongue we owe the production of these documents.⁸²

In short, the court needed to identify a human agent responsible for the production of the particular expression, for which protection was being sought under copyright.

In *Cummins*, we thus see an articulation of the logic first put forth in *Walter v. Lane*, namely that the author is the individual *but for* whose actions the work—in its protectable form—would not be in existence at all. Yet, we also come across an element hitherto not expressly articulated: the need to identify a *human* cause for the work. The precise rationale for this human element remains somewhat unclear. It appears to have its origins in the court's inability to countenance the possibility that the work at issue might be rendered author-less altogether if a human source for the creativity were not identified.

As recently as 2000, the logic of *Cummins* in identifying the first human actor who transcribes a psychographic work as its author appears to hold sway. In *Penguin Books v. New Christian Church of Full Endeavor*,⁸³ the court was presented with facts very similar to those of *Cummins*. A psychic had experienced a series of dreams and heard an inner voice, which requested her to transcribe its message into writing. She thus began a process

⁸² *Id.* at 173.

⁸³ *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, No. 96 CIV. 4126 (RWS), 2000 WL 1028634 (S.D.N.Y. July 25, 2000).

CAUSING COPYRIGHT

of “rapid inner dictation,” which produced an elaborate set of notes that she then edited and converted into a published manuscript. During the litigation, the court had to address the question of authorship over the manuscript.⁸⁴ And relying on *Cummins*, it concluded that the psychic was indeed the author, since “dictation from a non-human source should not be a bar to copyright.” It relied again, on the but-for causal logic:

[I]f indeed it was Jesus who spoke to [the psychic], it was only because she had opened herself up to the possibility of receiving this vision. ... Again, even if the [work] came from Jesus, significant aspects of it are the direct result of it having come *through* [the psychic]. In this way, [the psychic] is ... an author ..., since even Defendants in this action have essentially conceded that had the [work] been channeled through any other individual, its form would have been different.⁸⁵

The need to identify a human cause for the expression that is itself meant to be humanly processed is thus evidently at the root of the court’s reasoning in the case.

Copyright jurisprudence on spiritual authorship introduces a new element into the inquiry on causation. On the one hand it builds on the pre-existing case-law that looks to the effective cause of the work in a but-for sense. Yet, it does so by expressly acknowledging that the effective cause needs to be human, a supposition that the mechanical intervention cases alluded to but never openly endorsed. In the context of mechanical intervention, as noted previously some courts appeared perfectly willing to deny a work any copyright protection on the basis that it did not involve sufficient authorial creativity. The merger of the concepts of copyrightability, authorship, and originality thus masked the human-emphasis. With spiritual intervention, the work itself could rarely be classified as uncopyrightable on its face (unlike a photograph that could, by contrast, be treated as an “ordinary production”), necessitating an account for preferring the human to the non-human actor, even when the human actor openly acknowledged the centrality of the non-human element to the creative process. And courts came to develop that account around the idea that the work could not have been

⁸⁴ *Id.* at 9-14.

⁸⁵ *Id.* at 10.

CAUSING COPYRIGHT

brought into “earth[ly]⁸⁶” existence without the psychic’s (i.e., the human’s) role and intervention, short for the logic of but-for causation.

B. The Search for Human Agency

As revealed in the previously discussed areas of copyright jurisprudence, copyright law’s conception of authorship has historically embodied an account of causation. Courts paid close attention to the form, quality and quantity of agency involved in the production of the creative work, in ascribing the status of author to a claimant. An identification of the right kind of human agency—that caused the work to be brought into existence—was thus integral to the construction of authorship.

It is important to appreciate a crucial baseline that played an implicit role in copyright’s early account of causation. In searching for the agency at the root of a work, early copyright jurisprudence focused entirely on the *human* agency that might be properly characterized as causally responsible for the work. Authorship was presumptively a human endeavor, as far as copyright law was concerned. The logic for this proposition was somewhat obvious. Given that authorship was invariably tied to ownership and the assertion of legal rights, it made little sense to speak of non-human authorship. In addition, given the fundamentally instrumental nature of Anglo-American copyright law (“to encourage learning”⁸⁷), relating it to human intervention seemed but essential.

All the same, this seemingly unobjectionable precept had a less than subtle effect on the analysis. Once a work of expression was brought into existence and seen to evince an element of originality on its face, the parameters of the search for agency was automatically narrowed. In situations where there were competing claimants (for the status of author), courts merely had to examine whose particular agency was more directly connected to the existence of the work—rather than whether any of their agencies was objectively sufficient on its own. In other words, the possibility that none of the claimants might satisfy an objective threshold of agency for the claim to authorship, never emerged in these situations since the original work would thereby be denied *all* protection, a result that the work’s facially original/creative nature intuitively militated against.

The same pattern appears in cases involving non-human (i.e., mechanical or spiritual) intervention. When some early courts concluded that

⁸⁶ *Cummins*, (1927) 1 Ch. At 175. For a case that directly applied the logic of *Cummins* to a similar situation where a plaintiff had produced a portrait through spiritual intervention, see: *Leah v. Two Worlds Pub. Co. Ltd.*, [1951] Ch. 393, 395 (U.K.).

⁸⁷ 8 Anne, c. 19 (1710).

CAUSING COPYRIGHT

photographs were more the product of mechanical processes rather than human creativity and denied plaintiffs' authorship claims, they were of course denying the work any protection under copyright law.⁸⁸ Their willingness to do so however was closely allied to the finding—seen in these opinions—that the photographs (individually at issue, or as a whole class) lacked originality altogether, especially in so far as photography sought to replicate reality.⁸⁹ This is in contrast to situations where the work itself was *prima facie* creative, such as it is with spiritual authorship. In these situations, courts readily disregarded the non-human element in the creative process, in order to credit the human actor as the author of the work based on a minimal level of agency, often with the explicit recognition that to do otherwise would be to exclude a facially original creation from the realm of copyright altogether.⁹⁰

The search for human agency in copyright law might thus be aptly described as a constrained one. When a work is indisputably to be protected and the question is merely *who*—among multiple contenders—is to qualify as its author, the inquiry focuses on the precise form and quantum of human agency involved. We might term this the *relative agency determination*, since the court is merely comparing multiple human agencies to select one as authorial. When the work is seen to merit protection but such protection is contingent on identifying *an* author without which the work would fall into the public domain, the inquiry instead focuses on locating and identifying the minimum agency required for authorship. This variant is best described as the *objective agency determination* since the court is attempting to construct an account of authorial agency to establish copyright protection. Both variants are undoubtedly questions of causation, but each is influenced by the precise framing and context of what the causal inquiry is seeking to achieve in each context: protection or allocation.

Recognizing the constrained nature of the search for human agency in the authorship analysis also produces another, perhaps more important, insight about the causal inquiry in copyright law. And this is the reality that it embodies two analytically distinct (albeit functionally overlapping) elements. The first is a principally factual one, where the law examines whether and how an individual put into motion the set of acts that eventually resulted in the production of the work under scrutiny. This constitutes the

⁸⁸ See, e.g., *Wood v. Abbott*, 30 F. Cas. at 425 (concluding that photographs were outside the domain of the what “the law was intended to protect”).

⁸⁹ *Id.*

⁹⁰ *Cummins*, (1927) 1 Ch. at 175 (“[T]he defendant invites me to come to in this submission involves the expression of an opinion I am not prepared to make, that the authorship and copyright rest with some one already domiciled on the other side of the inevitable river.”).

CAUSING COPYRIGHT

epistemic dimension of the causal inquiry in the authorship determination, since it focuses on the sufficiency and significance of the evidence available to determine that an individual did actually produce the work in a purely metaphysical sense.

We see courts acknowledging this aspect of the inquiry when they concede that determining the cause of a work (e.g., in *Nottage*) is principally a “matter of evidence”⁹¹. The primary mechanism that they then employ in this epistemic endeavor is the test of but-for causation or the *sine qua non* approach, well-known in other contexts. The test in essence involves determining whether—as a counterfactual—the outcome that did occur (i.e., the creation of the work) would have occurred even without the intervention of the actor in question in order to ascertain the causal nexus in question. Thus in *Nottage* the court was essentially concluding that the photograph would have very well come into existence even without the role of the plaintiff-proprietors, thereby rendering their intervention not causally related to the final work.

All the same, it is critical to appreciate that the epistemic dimension hardly exhausts the entire gamut of the causal inquiry. It embodies, in addition, an *evaluative* dimension. This evaluative dimension transcends the probative—though parasitic on it—and examines whether, even if a purely factual basis for a causal attribution exists, it ought to form the basis for such an attribution. The evaluative aspect, in other words, asks whether the epistemically defensible cause ought to constitute a sufficient cause for authorship purposes given the obvious consequences of an affirmative finding. Instead of relying entirely on the conceptual/analytical for an answer, it looks to the implications of the determination and approaches the causal analysis pragmatically.

A good example of this evaluative dimension at work is the court’s conclusion that the mere existence of an employment relationship ought not, on its own, produce the statute of authorship (*Shepherd*).⁹² The court was in essence suggesting that even if an employer might have played a role in initiating the production of the work, that connection was insufficient in the case at hand—for authorship purposes—to qualify as the normatively relevant cause of the work. Even if the court was not explicit about it, the fact that one individual’s creative labor might produce ownership rights (and exclusivity) in another who merely suggested the idea and did no more seemed unfair, and not in keeping with copyright’s fundamental purpose of

⁹¹ *Nottage*, (1882-83) L.R. 11 Q.B.D. at 632.

⁹² 139 Eng. Rep. 1140 (U.K.).

CAUSING COPYRIGHT

“elevat[ing] and protect[ing] literary men.”⁹³ The consequence—“buy[ing] the author’s] brains”—was thus integral to the court’s evaluation of causal sufficiency.⁹⁴

Much of copyright’s account of authorial causation is evaluative in nature and content. Even when an individual is shown to have contributed in some minimal way to the creation of the work—either objectively or relatively—courts still analyze whether that contribution *should* be the basis for authorship. And in making this determination, they implicitly turn to normative considerations underlying the institution, often without overt acknowledgment. Examining the multiple considerations that courts (implicitly and explicitly) take into account in the evaluative part of the causal inquiry reveals there to be three general principles that motivate courts’ analysis, which operate as mid-level constraints rather than as foundational principles.⁹⁵ Despite being analytically distinct, these principles are not always mutually exclusive. They are each elucidated in greater detail in the reconstruction offered in Part III, but deserve mention here.

The first principle is the adequacy of *control* over the creative process. In situations where the putative author is shown to have had insufficient creative control over the process through which the work was created, either objectively or relatively, courts treat the causal nexus as insufficient to generate authorship. We see this principle at work in a recent case where the court denied protection to an artist who had created an aesthetically pleasing arrangement of live plants in a garden, and sought to copyright the product as a form of conceptual art.⁹⁶ The court instead concluded that “gardens are planted and cultivated, not authored” since they emerge from nature rather than human creation.⁹⁷ A second principle is that of *disproportionality*. When a court determines that according the status of author to one party is likely to produce an unfair distribution of the entitlement, either by reference to their respective labor, intellectual input, or investment, once again we see the causal chain being deemed severed. In the early copyright cases, we see this principle being invoked in situations that involved multiple contributors.

The third principle emerges from a desire to avoid a *personality conflation* in identifying the author. Authorship entails instantiating one’s

⁹³ *Id.* at 1148.

⁹⁴ *Id.* at 1147.

⁹⁵ For an excellent account of mid-level principles within intellectual property, see: David H. Blankfein-Tabachnick, *Intellectual Property Doctrine and Midlevel Principles*, 101 CALIF. L. REV. 1315 (2013). The discussion returns to the distinction between midlevel and foundational principles in Part III.

⁹⁶ *Kelley v. Chicago Park District*, 635 F. 3d 290 (7th Cir. 2011).

⁹⁷ *Id.* at 304.

CAUSING COPYRIGHT

personal choices into the expressive content of a work. Courts strive to ensure that the process of delineating the author by reference to causation tracks the creative process. When finding a causal nexus would conflate the salience of these choices, they readily find it to be severed. We see this logic at play in the law’s efforts to demarcate the boundaries of different works based on different authors’ contributions, especially when those works themselves appear inter-related. It is precisely this idea that Drone captures with his observation that when content can give rise different works, the author is the person “who has produced that for which the copyright is granted.”⁹⁸ A lawful translation is in this conception not legally caused by the author of the original work that was the subject of the translation.

Each of these principles tracks important normative considerations and precepts underlying the copyright system, many of which remain relevant today, and are discussed later. Putting the relative/objective and epistemic/evaluative elements of the causal inquiry together thus yields four variants of the causal question in the authorship determination. All four variants of the causal inquiry are to be found in copyright jurisprudence, even though courts rarely acknowledge the precise analytical nature of the investigation that they are undertaking. In particular, courts hesitate to admit to the evaluative nature of the inquiry in certain situations, especially in the objective setting. They instead mask the causal framework behind copyright’s other entry requirements such as originality.

Inquiry (→) Agency (↓)	Epistemic (But for)	Evaluative (Sufficiency)
Relative (Allocation)	Treating the first person to physically fix a work and render it protectable as its author. <i>(Walter v. Lane)</i>	Treating an employer’s contribution to the organization of the work as insufficient to merit authorship. <i>(Shepherd v. Conquest)</i>
Objective (Protection)	Treating the first human transcriber of a spiritual work as its author. <i>(Cummins v. Bond)</i>	Finding a gardener’s arrangement of live plants in an aesthetically pleasing manner insufficient to merit authorship <i>(Kelley v. Chicago Park District)</i>

⁹⁸ DRONE, *supra* note ___, at 236.

CAUSING COPYRIGHT

This epistemic/evaluative distinction within the causal inquiry in authorship is especially important to appreciate. While courts readily acknowledge the epistemic part of the question in their reasoning, they are far less willing to admit the existence of the evaluative, instead preferring to couch the evaluative aspects of the inquiry in probative terms as well. This phenomenon is of course hardly unique to copyright law.⁹⁹ Yet, when coupled with copyright law's utter unwillingness to even acknowledge the existence of a causal dimension in its copyrightability determinations, courts' collapse of the evaluative aspects of the inquiry into the epistemic confounds the analysis even further.

Authorship—in copyright law—has therefore for long embodied a theory of causation, reflected in the institution's search for human agency as the source of protectable expression. A notable feature of this causal theory is that it embodies important normative elements, requiring courts to exercise their judgment over the form and sufficiency of the agency at issue in each instance. Motivated by copyright's desire to retain its emphasis on human creativity as a foundational ideal, and informed by the institution's additional commitments, copyright's search for causation in determining authorship is functionally embedded within the institution's overall framework of copyrightability. All the same, it remains analytically and conceptually distinct; a reality that is often forgotten when it is hidden behind copyright's other doctrinal devices.

II. MODERN PROXIES FOR CAUSATION

In the previous Part, we saw how copyright law developed an account of authorial causation, principally in situations where the nature and identity of authorship required a clear determination. This Part moves to the modern context, where the causal determination is made *within* several of copyright's doctrinal mechanisms, each of which exists for reasons unconnected to the question of causation.

During the formative years of copyright law, courts were willing to develop their reasoning from first principles associated with the institution, multiple examples of which we encountered in the previous Part. As the institution evolved, copyright jurisprudence came to develop a finite set of doctrinal rules and devices that could be employed by courts. In the U.S., this

⁹⁹ This formed the basis of the Legal Realist critique of Legal Formalism. See generally Shyamkrishna Balganesh, *The Constraint of Legal Doctrine*, 163 U. PA. L. REV. 1843, 1847-50 (2015); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 275 (1997); Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 753 (2013).

CAUSING COPYRIGHT

evolution reached its pinnacle with the 1976 codification, where copyright law was codified comprehensibly for the first time.¹⁰⁰ This, in effect, crystallized copyright's myriad doctrinal mechanisms, even though the statute itself said nothing about restricting judge-made copyright law.¹⁰¹ The net result was that courts became far less willing to rely on first principles in their decisions, preferring to rely on copyright's statutorily validated mechanisms for their reasoning instead.¹⁰²

Authorial causation fell victim to this development. The tasks of independently determining whether something was a "work of authorship" and whether an actor was an "author" began to recede in importance, as more and more of copyright doctrine came to be codified. And yet, during this codification, authorship was never once defined, nor was it made an independent element that needed to be proven for protection.¹⁰³ Consequently, courts confronting questions of authorship—and authorial causation—were forced to address them through other doctrinal mechanisms. This indirect/proxy method of dealing with the question of authorial causation has produced the impression that it is altogether redundant within modern copyright law's analytical framework.

The remainder of this Part examines the three most prominent copyright doctrines wherein questions of authorial causation remain embedded and indirectly addressed, albeit in an altogether ad hoc manner. This is not to suggest that the question does not arise in other areas of copyright law; merely that it is seen in these three domains with a heightened degree of regularity.

A. Originality

Protection under copyright law subsists only in "*original* works of authorship" when "*fixed* in a tangible medium of expression."¹⁰⁴ The

¹⁰⁰ For a general account of the comprehensive nature of the current Act, see: David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233 (2004).

¹⁰¹ See Pierre N. Leval, *An Assembly of Idiots?*, 34 CONN. L. REV. 1049, 1061-62 (2002) (lamenting this move away from judge-made law in the post-1976 Act); Shyamkrishna Balganes, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1167 (2009) (arguing that the Act of 1976 should be understood as a "common law statute" that requires judicial law-making).

¹⁰² For a general account, see: Christopher S. Yoo, *The Impact of Codification on the Judicial Development of Copyright*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 177 (Shyamkrishna Balganes ed., 2013).

¹⁰³ See generally Ginsburg, *supra* note ___, at 1069-72 (discussing this absence in U.S. copyright law and comparative copyright law more generally).

¹⁰⁴ 17 U.S.C. §102(a) (2011).

CAUSING COPYRIGHT

legislative history accompanying the current Act, i.e., the Copyright Act of 1976, describes originality and fixation as the “two fundamental criteria of copyright protection.”¹⁰⁵ Originality today represents modern copyright law’s best known entry requirement.

Originality is nowhere defined in the copyright statute and the concept is entirely a creation of courts.¹⁰⁶ Its precise meaning has fluctuated over the course of copyright’s long history, but its modern understanding—at least in the American context—derives from the Supreme Court’s well-known decision in *Feist v. Rural Telephone Services Co.*¹⁰⁷ In tracing the requirement of originality back to the Copyright Clause of the U.S. Constitution, the Court observed that “[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”¹⁰⁸ The modern requirement of originality therefore embodies two distinct components. First, the work must “owe” its origin to the claimant, i.e., the author; and second, it must exhibit a modicum of creativity, a requirement that is fairly easy to satisfy in practice even though it appears to connote a higher bar in theory.

On the face of things, originality thus appears to directly—and overtly—embody a dimension of authorial causation. Indeed, in the modern context some scholars argue that originality is “synonymous with authorship.”¹⁰⁹ The emphasis on the work-author connection (“owe”) and a creative contribution appear to corroborate that proposition. Yet, a closer scrutiny of the modern understanding of the requirement post-*Feist* reveals the causal underpinnings of originality to be largely superficial, and perhaps even non-existent.

While originality does require that the work “owe” its origin to the author, suggesting a scrutiny of how, when, and where the author brought the work into existence, in practice the *owing* is more of a negative requirement. The law deems the requirement satisfied whenever the work is “independently created” by the author, which in turn merely implies that the work not be “copied” from any other work or material.¹¹⁰ The owing

¹⁰⁵ H.R. Rep. 94-1476, 51, 1976 U.S.C.C.A.N. 5659, 5664.

¹⁰⁶ *Id.* (“The phrase ... is purposely left undefined, [and] intended to incorporate without change the standard of originality established by the courts under the present copyright statute.”).

¹⁰⁷ 499 U.S. 340 (1991).

¹⁰⁸ *Id.* at 345.

¹⁰⁹ Ginsburg, *supra* note ___, at 1078.

¹¹⁰ *Feist*, 340 U.S. at 345; *Novelty Textile Mills v. Joan Fabrics Corp.*, 558 F.2d 1090, 1093 n.3 (2d Cir. 1977); 1 NIMMER, *supra* note ___, at §2.01[A] (“[A] work is original and may command

CAUSING COPYRIGHT

requirement is thus no more than a non-copying mandate rather than an affirmative requirement of some active contribution on the part of the claimant. Courts almost never scrutinize the creative process itself to ask whether and how the author brought the work into existence, once satisfied that the work was not copied from other works/materials. Judge Jerome Frank put this point most starkly in one case when he noted that the requirement is “little more than a prohibition of actual copying” and that “[n]o matter how poor the ‘author’s’ addition, it is enough if it be his own.”¹¹¹ The owing element thus performs a largely negative—or exclusionary—function, of denying a work protection when shown to have been copied from another.¹¹² Authorial causation is thus readily presumed as long as there is no copying.

Additionally, the *Feist* decision is taken to have rejected an interpretation of originality that rewarded industriousness on the part of the author, known as the “sweat of the brow” theory of originality.¹¹³ Instead, the court emphasized that the creativity—mandated by the originality requirement—had to be found in the choices and decisions made by the author, *manifested in the work itself* rather than in the creative process.¹¹⁴ The creativity is thus measured by its manifestation as an act of authorship, which in turn precludes any reliance on “skill, training, knowledge, and judgment” that cannot be discerned from the work itself.¹¹⁵ This approach has obvious benefits, especially as a probative matter, in keeping indistinguishable variations of a work that may have been produced through purely creative means out of the realm of protection.¹¹⁶ Yet, in terms of causation it poses obvious problems. By precluding *any* scrutiny of the process of creativity involved in the production of the work as part of the originality analysis, when the process has no direct embodiment in the work itself, it denies courts the ability to scrutinize the author’s causal contribution to the work.

Originality therefore does very little for authorial causation, despite allusions to the contrary. Even if originality is “synonymous” with authorship

copyright protection, even if it is completely identical with a prior work, provided it was not copied from such prior work but is rather a product of the independent efforts of its author.”).

¹¹¹ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951).

¹¹² *See, e.g., Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1267 (10th Cir. 2008); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 910 (2d Cir. 1980); *Entm’t Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1221-24 (9th Cir. 1997).

¹¹³ *Feist*, 340 U.S. at 352-60 (discussing and rejecting the “sweat of the brow” theory).

¹¹⁴ *See id.; Meshwerks*, 528 F. 3d at 1268 (“[I]n assessing the originality of a work for which copyright protection is sought, we look only at the final *product*, not the process.”) (emphasis in original).

¹¹⁵ 1 NIMMER, *supra* note ___, at §2.01[A].

¹¹⁶ *See L. Batlin & Son, Inc. v. Snyder*, 536 F. 2d 486, 487 (2d Cir. 1976).

CAUSING COPYRIGHT

today, its connection to the functional dimension of authorship—as embodying a causal element—is at best superficial. Indeed, one might go further and note that this superficial connection has been actively detrimental to copyright’s commitment to authorial causation, in so far as the originality requirement falsely suggests that it embodies a scrutiny of causation (“owes”), when it all too readily presumes the question away. This superficiality is nicely illustrated by returning to our example of the monkey selfie, discussed previously.

Recall that the photograph in the monkey selfie episode was denied copyright protection on the theory that it was the monkey—rather than the photographer—who had pressed the shutter button.¹¹⁷ Given the absence of an “authorship” doctrine in copyright, one might believe that originality provided the system with a basis for the denial. On further consideration however, originality would have had little to say about the photograph. To begin with, the photograph clearly satisfies the claim that it “owes” its existence to the photographer. It certainly wasn’t copied from another source, i.e., it was independently created. The fact that it owes its existence to the monkey—rather than the photographer—is of little concern to originality, since the doctrine only cares about independent creation in the non-copying sense of the term. To use Judge Frank’s words, the photographer’s contribution may have been “poor,” yet it was “his own.”¹¹⁸

Additionally, the photograph was the product of sufficiently creative choices that are apparent on its face, as originality is commonly understood for photographs.¹¹⁹ The photograph was no “ordinary production”¹²⁰; it involved specific lighting, zooming, positioning, and timing, all of which are inputs that may be gleaned from the work itself and are considered originality-related creative choices for photographs. The photographer’s button-pressing activity—or the lack thereof (!)—which was the real basis for the denial, then has no basis for scrutiny under originality’s minimal creativity standard, being detached from any outward manifestations in the photograph itself. Indeed, short of the photographer David Slater explaining *how* the photograph was produced, copyright law would have had *no basis whatsoever* to deny the work protection.

Under current originality doctrine then, the monkey selfie would unquestionably obtain copyright protection without any problems. Assuming

¹¹⁷ See *supra* text accompanying notes __ - __.

¹¹⁸ *Alfred Bell*, 199 F. 2d at 103.

¹¹⁹ For an exhaustive account of originality criteria in photographs, and a criticism of their utility, see: Justin Hughes, *The Photographer’s Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 327, 352-54 & nn. 147-151 (2012).

¹²⁰ *Burrow-Giles*, 111 U.S. at 59.

CAUSING COPYRIGHT

there to be some valid basis for the legal conclusion that it ought not to receive protection—i.e., a concern with authorial causation—originality simply does not provide the law with any way to address that concern. Even if originality is otherwise a notional stand-in for authorship in the modern context, it does so through the “work of authorship” construct and not as authorship *qua* act of authoring.

B. Joint Works

The joint works doctrine represents copyright law’s mechanism of allowing multiple authors to simultaneously qualify as co-authors and co-owners of a work, even in the absence of an express agreement between them.¹²¹ The statute defines a joint work as one “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹²² The law relating to joint works was developed almost entirely by courts with very little legislative guidance.¹²³ The legislative history accompanying the statutory definition emphasizes that the defining feature of joint authorship is the relevant parties’ “intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit.”¹²⁴ Courts have, as a result, come to pay close attention to this requirement in giving effect to the doctrine.

As should be apparent, the joint works doctrine allows multiple parties to claim the status of author, albeit jointly. Consequently, even though modern copyright law cares very little about policing authorship in the abstract, in relation to this particular doctrine copyright law seeks to ensure that each party independently qualifies as an author. The doctrine therefore tests authorship as a precondition to protection as a joint work. On the face of things then, one might legitimately expect the functioning of the doctrine to incorporate elements of authorial causation, as part of its authorship analysis. The reality of the matter is sadly enough, quite the opposite.

Parsing the statutory definition of a joint work and its legislative history, courts have understood it to embody two interrelated requirements. First, each party/claimant must have contributed protectable expression to the

¹²¹ For a general overview, see: Shyamkrishna Balganesh, *Unplanned Coauthorship*, 100 VA. L. REV. 1683 (2014); Laura G. Lape, *A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine*, 61 ALB. L. REV. 43 (1997).

¹²² 17 U.S.C. 101 (2010) (definition of “joint work”).

¹²³ Balganesh, *supra* note __, at 1685.

¹²⁴ H.R. REP. 94-1476, 120, 1976 U.S.C.C.A.N. 5659, 5736.

CAUSING COPYRIGHT

final work.¹²⁵ Since authorship requires the production of expression (as opposed to mere ideas), joint authorship—as a category of authorship—is seen to require nothing less. While the expressive contribution need not be independently copyrightable, it needs to qualify for protection in principle. Second, the parties need to have had an intention to be joint authors, a requirement that is often described as that of “mutual intent.”¹²⁶ Once both elements are satisfied, each joint author obtains an equal ownership stake in the work, regardless of the amount/quality of expressive contribution made to its creation.¹²⁷ This last point bears emphasis: a contributor to a 1000-page original book who contributes a mere page or two of original content, automatically obtains a fifty percent share in the ownership of the copyright in the book, if the creation of the work evinces the requisite mutual intent. This consequential reality of the doctrine may seem innocuous at first. Yet in practice, it exerts a potentially enormous influence on courts’ willingness to qualify an unequal contributor as a joint author, even when in principle the doctrine necessitates according the contributor such status.

Not surprisingly, courts’ preferred mechanism of policing the authorship status isn’t through an independent contribution requirement. It is instead through the idea of mutual intent. To give effect to this requirement, courts have over the years developed various “objective indicia” through which to assess the existence of such intent, which, in reality work as external, objective measures of authorship.¹²⁸ These indicia include: control and decisionmaking authority, the way in which the parties characterize/bill themselves, agreements with third parties, and copyright registration.¹²⁹ Each of these indicators is meant to provide objective evidence of the parties’ thinking at the time of creation, which is then used to either find for/against the existence of joint authorship.

In reality however, the objective indicia seem to have at best a tangential connection to the question of intention accompanying the creation of the work. The element of control, for instance, says very little about the

¹²⁵ For a useful discussion, see: *Childress v. Taylor*, 945 F. 2d 500, 505-07 (2d Cir. 1991); *Thomson v. Larson*, 147 F. 3d 195, 200 (2d Cir. 1998); *Seshadri v. Kasraian*, 130 F. 3d 798, 803-04 (1997).

¹²⁶ *Childress*, 945 F. 2d at 507; *Thomson*, 147 F. 3d at 201; *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994); *Brown v. Flowers*, 196 F. App’x 178, 186 (4th Cir. 2006).

¹²⁷ 1 NIMMER, *supra* note __, at §6.08; *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F. 3d 962, 968 (9th Cir. 2008); *Community for Creative Non-Violence v. Reid*, 846 F. 2d 1485, 1498 (D.C. Cir. 1988).

¹²⁸ *Thomson*, 147 F. 3d at 201; *Tang v. Putruss*, 521 F. Supp. 2d 600, 607 (E.D. Mich. 2007).

¹²⁹ 2 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 5:22 (2015).

CAUSING COPYRIGHT

presence/absence of such intent.¹³⁰ Two or more collaborators may well possess the required intention to be joint authors, while nonetheless agreeing that one of them—for reasons of expertise or expediency—is to exercise sole control or decisionmaking authority during the production of the work. In such situations, the absence of diffuse control over the process (or the presence of unilateral control) says less about intention than it does about the law’s (i.e., courts’) willingness to accord the non-controlling party the status of author. In short, control—and the other indicia—function as proxies not for intention but for the question of whether the creation (joint) work ought to be ascribed to a particular party based on the creative process, a question of causation. A prominent case applying the indicia illustrates this well.

In *Aalmuhammed v. Lee*, the defendants were the director and producers of the well-known motion picture *Malcolm X*.¹³¹ The primary defendant (Spike Lee) had authored the screenplay, and directed and co-produced the movie.¹³² During the production, the lead actor in the movie (Denzel Washington) asked the plaintiff to “assist him in his preparation for the starring role” owing to his expertise on Malcolm X and Islam.¹³³ During the production, the plaintiff “suggested extensive script revisions” to ensure historical and religious accuracy, many of which were included in the final version.¹³⁴ He also presented uncontroverted evidence that he created two entirely new scenes, translated Arabic into English, supplied voice-overs for several scenes, selected “proper prayers” for some scenes, and even edited portions of the motion picture following production.¹³⁵ The plaintiff had no written agreement with the defendants, but was compensated for his efforts.¹³⁶ When he was later merely credited as an Islamic consultant, he claimed to be a co-author of the movie and filed an action under the joint works doctrine for an accounting and share of the movie’s profits.¹³⁷

On reviewing the matter, the Ninth Circuit conceded that the plaintiff had presented sufficient evidence to establish an expressive contribution to the work, satisfying the first prong of the joint works doctrine.¹³⁸ All the same, it concluded that he did not qualify as an author of the work even

¹³⁰ Balganesch, *supra* note __, at 1738.

¹³¹ 202 F. 3d 1227 (9th Cir. 2000).

¹³² *Id.* at 1229.

¹³³ *Id.*

¹³⁴ *Id.* at 1230.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 1231-32.

CAUSING COPYRIGHT

though he made a “valuable and copyrightable contribution” or even a “substantial creative contribution” to it.¹³⁹ Relying on *Burrow-Giles* for its understanding of the author as the “effective cause” of the work, the court placed great emphasis on the requirement of “mutual intent” to emphasize that superintendence over the work “by exercising control” over its production was critical to joint authorship.¹⁴⁰ Control, to the court, was “the most important factor” and since the plaintiff did not have superintendence or control of the work, or indeed any other evidence of mutual intent, he was found not to be a (joint) author of the work.¹⁴¹ The requirement of intent was effectively converted into a proxy for causation by the court, and rather explicitly so. Control was—it conceded—central to intent, in order to show authorial causation, and therefore authorship. *Aalmuhammed* is but an extreme—and honest—illustration of what other courts continue to do less overtly.¹⁴²

Scholars have criticized the *Aalmuhammed* decision on a variety of different grounds.¹⁴³ From our present perspective though, the opinion is additionally troubling because it attempts to mask the causal question that is central to joint authorship behind the idea of mutual intent, a requirement that was designed to assess the existence of a particular collaborative mindset in the production of the work. As should be obvious, it played no small part in the court’s decision that even though the plaintiff had made some contribution to the work, that contribution was negligible compared to that of the defendants and yet the joint works doctrine would have entitled the plaintiff to an equal ownership share in the work. What the court was really asking then was whether the plaintiff’s contribution should be treated as *a cause* for the the work as a whole, in light of the obvious consequence at stake, namely, equal ownership. The court obviously answered this in the negative, but chose to do so under the garb of mutual intent rather than directly.

As used in this domain, the causal inquiry being undertaken by a court is thus principally relative and evaluative, rather than objective and epistemic. The causal question is clearly imbued with an evaluative dimension, where the assessment is not merely whether something can be attributed to a party

¹³⁹ *Id.* at 1231, 1233.

¹⁴⁰ *Id.* at 1233.

¹⁴¹ *Id.* at 1235.

¹⁴² *See, e.g., Thomson*, 147 F. 3d at 202-03; *Erickson*, 13 F. 3d at 1071-72.

¹⁴³ *See* F. Jay Dougherty, *Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225 (2001); Balganes, *supra* note __, at 1748; Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 246-56 (2001).

CAUSING COPYRIGHT

as a factual matter but instead whether it *should* be so attributed in light of the consequences that follow. Other courts have in similar fashion employed the mutual intent analysis to arrive at a different outcome when satisfied that a party's contributions were sufficiently causal to be seen as responsible for the entire final product.¹⁴⁴

The joint works doctrine thus incorporates a distinct causal dimension in its functioning, which courts only ever operationalize through the mutual intent analysis. In scrutinizing the process of creation in some detail, copyright law here is in effect examining the causal sufficiency of each party's contribution to the final work to see if it merits a co-equal characterization as the author of the work. While authorial causation is therefore a core component of the inquiry, it remains well-hidden underneath the metaphysics of mutual intent and almost never openly addressed as such.

C. *Work Made for Hire*

A third area where we see copyright doctrine indirectly engaging the question of authorial causation is the work made for hire doctrine. The work made for hire doctrine allows copyright law to accord the status of author (and owner) of a work to one party when another created it in its entirety. The law allows such an imputation in three scenarios: when one party has commissioned a work from another and the parties expressly agree to treat the work as a work made for hire, when a formal employment arrangement exists and the work was created within the scope of the employment, and when an employment arrangement may be implied from the nature of the relationship between the parties.¹⁴⁵

What is important to appreciate is that the doctrine doesn't merely effect an implied transfer of ownership. It is instead a doctrine of first authorship, under which the employer (or commissioning party) is treated as the author/creator of the work from the moment that it obtains protection under copyright.¹⁴⁶ And underlying the doctrine's treatment of authorship is a nascent—and undoubtedly controversial—account of causation. As noted previously, early copyright law remained unwilling to recognize an employer as author of a work merely by reason of the employment relationship.¹⁴⁷ This

¹⁴⁴ See, e.g., *Brod v. Gen. Pub. Grp., Inc.*, 32 F. App'x 231 (9th Cir. 2002); *Strauss v. Hearst Corp.*, No. 85 CIV 10017 (CSH), 1988 WL 18932, at *1 (S.D.N.Y. Feb. 19, 1988).

¹⁴⁵ 17 U.S.C. §101 (2011) (definition of “work made for hire”).

¹⁴⁶ *Id.* §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.”).

¹⁴⁷ See *supra* text accompanying notes __--__.

CAUSING COPYRIGHT

position continued into the late nineteenth century.¹⁴⁸ As Catherine Fisk documents in her exhaustive historical analysis of the work made for hire doctrine, it was at this juncture—the late nineteenth/early twentieth century—that things began to change.¹⁴⁹

Changes in the U.S. economy at the time, accompanied by the emergence of corporate form in other areas, produced a gradual willingness among courts to treat corporate employers as authors under copyright law.¹⁵⁰ These cases all seemed to commit to a rather fundamental idea, namely, that because the employer had invested monetarily in the production of the work by hiring employees who actually executed the project, that investment was sufficient to generate a claim of authorship.¹⁵¹ The monetary investment, in other words, was deemed causally relevant and sufficient to produce the status of author. One early court put the point most starkly:

The complainant's [i.e., employer's] money paid for the painting; its artist colored it; its president designed it, his was the “originating, inventive, and master mind.”¹⁵²

To be sure, some have noted an “artificiality” in the doctrine’s treatment of the employer as author, when the employer plays no role whatsoever in the actual creative process.¹⁵³ The doctrine, in this understanding, is seen to have more to do with facilitating “investment and exploitation” rather than any commitment to authorship principles.¹⁵⁴ While this may indeed be true, this artificiality need not be seen to negate the doctrine’s underlying account of authorial causation. In so far as such causation is more than just epistemic, and embodies normative considerations—i.e., the evaluative dimension—the doctrine might be fairly seen to specify a causal nexus. As we shall see, this causal nexus forms a

¹⁴⁸ Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUM. 1, 55 (2003).

¹⁴⁹ *Id.* (“This shift began gradually after 1860 and rapidly accelerated after 1900.”).

¹⁵⁰ For a summary, see: *id.* at 67-68 (noting that principal among these changes was the “rise of the corporation”).

¹⁵¹ Fisk, *supra* note __, at 55-59.

¹⁵² *Schumacher v. Schwencke*, 25 F. 466, 467-68 (C.C.S.D.N.Y. 1885).

¹⁵³ As an example, consider a Copyright Office study of the subject produced in 1958, during the copyright revisions leading up to the 1976 Act: Borge Varmer, *Study No. 13: Works Made for Hire and on Commission*, in COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS 123, 139 (1958) (“[I]t may be argued that the concept of designating the employer as the author of an intellectual creation of another person is artificial.”).

¹⁵⁴ Ginsburg, *supra* note __, at 1088-89.

CAUSING COPYRIGHT

symmetrical analog to the causal theory underlying tort law's doctrine of vicarious liability.

In describing the work made for hire doctrine, Peter Jaszi argues that it takes copyright's concept of authorship to its instrumental extreme and adopts the logic that "[i]f the essence of 'authorship' is inspiration, then it is the 'employer's' contribution as the 'motivating factor' behind the work... that matter."¹⁵⁵ In so far as authorial causation—embodied in authorship—always entailed an instrumental and evaluative dimension however, the work made for hire doctrine is hardly an aberration of that framework.

The work made for hire doctrine thus represents an additional domain where copyright jurisprudence embodies an important causal aspect. Unlike in others areas however, here the doctrine itself articulates and assumes a specific causal paradigm, wherein authorial causation is automatically imputed to one actor merely by virtue of a relationship, without any need for independent evidence (of causation). The doctrine thus seems to render the epistemic dimension of authorial causation fairly thin (and close to non-existent, but for the need to show an employment relationship/contract) in the process.

* * *

Authorial causation is hardly alien to modern copyright law. It remains embedded within copyright's various doctrinal devices, where its role and significance fluctuates with the vagaries of how the particular doctrine (where it resides) grows and evolves. Given the originality doctrine's modern rejection of "sweat of the brow" and its limited focus on non-copying/independent to determine origination, authorial causation today has no real doctrinal platform for its functioning in general copyright law. The same is true of the joint works doctrine, where it is masked by the law's enduring focus on mutual intent to reconstruct the creative process, and rarely even acknowledged as a motivating consideration during the analysis. Within the work made for hire doctrine, authorial causation plays a principally structural role, in so far as it forms the very foundation for the doctrine and its default of employer-ownership, once the relevant relationship is shown to exist between the parties.

Authorial causation then, in both its epistemic and evaluative aspects, as well as its relative and objective ones, is hidden away within copyright doctrine. Whenever copyright law needs to directly address the question—as

¹⁵⁵ Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *The CONSTRUCTION OF AUTHORSHIP* 29, 34 (Marth Woodmansee & Peter Jaszi eds., 1994).

CAUSING COPYRIGHT

in the monkey selfie episode, or with machine-creation—it is left without any doctrinal device for the analysis, forcing it to fall back on first principles, a move that is in turn seen as suspect given the otherwise comprehensive nature of copyright doctrine. Authorial causation would therefore be better served through an express acknowledgement of its independent role in copyright jurisprudence, and by allowing its various components (epistemic/evaluative, etc.) to be given free play within the working of the system. And it is to this ideal that the next Part turns.

III. COPYRIGHTABLE CAUSATION

Having seen how copyright jurisprudence embodies a commitment to identifying the appropriate human cause for the creation of a work, and the ways in which modern copyright doctrine prevents that causal inquiry from rising to the surface, this Part moves to the prescriptive and advances a proposal to remedy this anomaly. Building on copyright’s nascent theory of authorial causation, it suggests a mechanism by which copyright analysis and reasoning might fruitfully make authorial causation—in both its epistemic and evaluative aspects—a part of the copyrightability analysis for original works of expression.

Determining whether a work of expression is eligible for copyright protection today, otherwise known as the question of “copyrightability,” entails examining the work to ensure that it contains protectable expression (as opposed to ideas and other excluded content), that it meets the originality requirement, and that it otherwise complies with the requirements of the statute (e.g., fixation).¹⁵⁶ The inquiry into “copyrightability” in other words, is seen as limited to a scrutiny of the four corners of the work and no more. The particulars of the process through which the work was created are, in this account of copyrightability, treated as largely irrelevant. Much of this myopia very likely derives from modern copyright law’s conception of originality, which forces courts to ignore the creative process and limit themselves to expressive manifestations *within* the work.¹⁵⁷

While this limit may make sense for originality after *Feist*, it is hardly a limiting principle that demands adherence across all of copyright’s eligibility criteria. Indeed, copyright doctrine itself contemplates situations where a scrutiny of factors other than the content of the work becomes essential, to determine copyrightability. The prime example of this is U.S.

¹⁵⁶ See generally 1 NIMMER, *supra* note __, at §2; U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §303, at 6 (3d ed. 2014).

¹⁵⁷ *Feist*, 499 U.S. at 360; 1 NIMMER, *supra* note __, at §2.01[A].

CAUSING COPYRIGHT

government works, which are denied protection altogether under the statute.¹⁵⁸ A bare scrutiny of the work itself is likely to yield little information about its eligibility for protection, which instead relates to the identity of its author. It is only when additional information about its creation (e.g., the identity of its author, the circumstances of its creation, etc.) is produced that the exclusion kicks in.¹⁵⁹ Consequently, it is no major analytical stretch to require that a condition of copyrightability originate outside the contours of the work itself, specifically in the process through which it is brought into existence. This is precisely how copyright doctrine ought to address authorial causation.

Authorial causation is therefore best addressed within copyright jurisprudence as an independent condition of eligibility for protection: *copyrightable causation*. A work seeking to obtain copyright protection as a work of authorship would thus have to be the result of human agency that is treated as causally relevant to, and sufficient for, copyright law. Much like copyright's several other conditions for copyrightability, the burden of establishing copyrightable causation would be on the plaintiff/claimant seeking protection, as part of its *prima facie* case. In an action for copyright infringement, the law places the the burden of establishing ownership of a "valid copyright" on a plaintiff, which would now encompass copyrightable causation as an additional facet.¹⁶⁰ And much like the law's other copyrightability requirements (e.g. originality, or subject matter), copyrightable causation is unlikely to be a contested issue in an overwhelming majority of cases. Only when the matter is contested, or when presented with evidence that calls the existence of such causation into question, would a court be required to resolve the matter as a precursor to the infringement inquiry. This would in turn allow the law to retain its *de facto* assumption of copyrightability by default, which in turn sustains copyright's system of automatic protection.

In situations when a court is indeed called upon to resolve the issue of causation, copyright jurisprudence would do well to develop a framework for giving effect to the copyrightable causation requirement. In developing this framework, negligence law sheds important light on how the causal inquiry might be bifurcated into two steps, so as to keep the epistemic and evaluative aspects of the inquiry relatively distinct. The common law's well-

¹⁵⁸ 17 U.S.C. §105 (2011).

¹⁵⁹ See 1 NIMMER, *supra* note __, at §5.13[B] (discussing how the relationship between the author of the work and the government requires scrutiny for the disqualification to apply).

¹⁶⁰ *Feist*, 499 U.S. at 361 (describing the elements that the plaintiff must prove and identifying ownership of a "valid copyright" as an integral component); 4 NIMMER, *supra* note __, at §13.01 (describing and synthesizing these elements).

CAUSING COPYRIGHT

know divide between the “cause-in-fact” inquiry and that of “proximate causation” serves as a useful model that might be adapted to the requirements of copyright law. The remainder of this Part attempts to build on that model and develop a two-step mechanism for the copyrightable causation. III.A. begins by looking to the basic structural ideas behind tort law’s approach to causation, to show how it embodies important symmetries for the working of copyrightable causation. III.B and III.C. then attempt to instantiate the equivalents of the cause-in-fact and proximate cause steps into the working of copyrightable causation in order to give effect to copyright’s theory of authorial causation.

A. Basic Structure: The Tort Law Analogy

The question of causation has been a source of much disagreement and theorizing in the world of tort law for nearly a century now.¹⁶¹ Indeed, the literature on the role and test of causation therein is far too extensive to allow for a compact synthesis here.¹⁶² Nonetheless, the structural features of tort (i.e., negligence) law’s operationalization of the causal inquiry is of direct relevance for copyright law. Tort law’s understanding of causation—as a component of liability determination—is widely accepted to be driven by the law’s efforts to hold an actor *responsible* for a particular consequence, i.e., harm, that deserves rectification. Causation is therefore indelibly connected to the principle of responsibility.¹⁶³ This connection inflects the causal

¹⁶¹ For a sample of this literature, see: LEON GREEN, *THE RATIONALE OF PROXIMATE CAUSE* (1927); H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* (2d ed. 1984); MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY* (2009); Leon Green, *Are there Dependable Rules of Causation?*, 77 U. PA. L. REV. 601 (1929); Joseph H. Beale, Jr., *Recovery for Consequences of an Act*, 9 HARV. L. REV. 80 (1895); Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211 (1924); Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925); Albert Levitt, *Cause, Legal Cause and Proximate Cause*, 21 MICH. L. REV. 34 (1922); Charles E. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229 (1932); Charles O. Gregory, *Proximate Cause in Negligence: A Retreat from Rationalization*, 6 U. CHI. L. REV. 36 (1938); Arthur L. Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 YALE L.J. 449 (1930); Roscoe Pound, *Causation*, 67 YALE L.J. 1 (1957); Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735 (1985); William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109 (1983); Steven Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463 (1980); Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 LAW & PHIL. 1 (1987).

¹⁶² See *id.*

¹⁶³ MOORE, *supra* note __, at 3-19.

CAUSING COPYRIGHT

determination with points of emphasis that an abstract (purely scientific) conception of the idea might otherwise lack.

It is indeed the centrality of this connection that forces the determination to look for, and classify, a *human* act as the cause of relevance, from a host of background conditions. Some scholars refer to this as the idea of “causal selection,” a view that is traced back to J.S. Mill and readily acknowledges that this process of selection has no universally objective basis, but is instead pragmatic in content and situation-driven.¹⁶⁴ In this understanding, tort law’s identification of an act as a cause is driven by its attempt to apportion blame for a consequence on a human actor. Causation in tort law therefore takes shape from a nascent understanding of responsibility or blameworthiness, ideas that embody an account of moral agency, however deep or shallow that may be as an independent substantive matter.¹⁶⁵ Identifying an actor’s intervention as a cause in tort law’s liability calculus therefore carries with—and is driven by—the understanding that the actor’s rational agency is more worthy of being selected as the cause of the event, over the various background conditions in place. This causation-responsibility connection is therefore an enduring feature of tort law’s approach to the question of causation.

The connection is however far more important as a phenomenological observation about the nature of the causal inquiry. Most fundamentally, it reveals that the question of causation—regardless of the particular setting within which it is employed—is indelibly *purposive* in content and operation. The ultimate purpose of the inquiry motivates and informs the identification and selection of a factor/condition as a cause. This point is largely unexceptional, but rarely acknowledged. In his well-known discussion of factual causation in tort law Wex Malone thus made the following observation:

[T]he evaluation which the trier will make of the new fact data will necessarily be affected by the purpose he is seeking to serve. This

¹⁶⁴ J.S. MILL, A SYSTEM OF LOGIC 198 (1846) (“Nothing can better show the absence of any scientific ground for the distinction between the cause of a phenomena and its conditions, than the capricious manner in which we select from among the conditions that which we choose to denominate the cause.”); Germund Hesslow, *Causal Selection*, in CONTEMPORARY SCIENCE AND NATURAL EXPLANATION: COMMONSENSE CONCEPTIONS OF CAUSALITY 11-31 (D.J. Hilton ed. 1988).

¹⁶⁵ For an overview of what such an account requires and disagreement over it, see: MOORE, *supra* note __, at 20; Alex Broadbent, *Explanation and Responsibility*, in CRITICAL ESSAYS ON “CAUSATION AND RESPONSIBILITY” 239 (Benedikt Kahmen & Markus Stepanians eds. 2013). For a deeper substantive account, see: Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987).

CAUSING COPYRIGHT

is particularly true of cause, which, as we have seen, is merely an acceptable deduction from evidential facts. All deductions are drawn purposively—that is to say, they are drawn for a reason.¹⁶⁶

Malone went on to illustrate this by showing that for a single occurrence, a physicist's sense of the cause was likely different from the engineer's, which might in turn be different from the lawyer's. The purpose of the inquiry thus guides the construction of causation.¹⁶⁷

From this, Malone—a Legal Realist—readily inferred that the factual aspect of causation inevitably masked policy decisions, and that fact and policy were inextricably linked even in the supposedly factual elements of causation.¹⁶⁸ Yet, acknowledging the purposive nature of the inquiry need not negate the existence of a factual basis for it. What Malone's analysis does reveal is that even the principally epistemic aspects of the causal inquiry are hardly objective in the sense of being universalizable across different contexts, and embody some evaluative content that is driven by the reason for the inquiry. The “cause-in-fact” aspect of causation in tort law is therefore hardly a search for some objectively verifiable truth (e.g., was the defendant's car green in color?), but is instead an attempt to select from among a finite set of epistemically verifiable conditions in an effort to affix responsibility for a negative outcome (i.e., the “reason”).

Malone's observations have since come to be interpreted as being critical of tort law's causal inquiry.¹⁶⁹ All the same his argument provides strong support for tort law's bifurcation of the causal inquiry into two steps: cause-in-fact and proximate cause. Owing to the purposive nature of the determination, each step certainly involves an epistemic and evaluative component. As Malone himself acknowledged, the degree and nature of evaluation that accompanies each step varies rather significantly.¹⁷⁰ In the first, the purposiveness injects an evaluative component into what appears to be a purely factual determination. But it does so in the construction of the inquiry and by altering the salience of particular factual conditions over others; thereby operating as a structural influence. In the second, by contrast, the question of ideal tort policy builds on the conclusion of the first step, but

¹⁶⁶ Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 62 (1956).

¹⁶⁷ *Id.* at 62-64.

¹⁶⁸ *Id.* at 64 (“It is through the process of selecting what is to be regarded as a cause for the purpose of resolving a legal dispute that considerations of policy exert their influence in deciding an issue of cause-in-fact.”).

¹⁶⁹ MOORE, *supra* note __, at 91; HART & HONORÉ, *supra* note __, at 413.

¹⁷⁰ See Malone, *supra* note __, at 97-99 (describing the distinction as a matter of degree rather than of kind).

CAUSING COPYRIGHT

individualizes the evaluative component to the facts and circumstances of the case at hand. The proximate cause inquiry is thus less about the abstract purpose of tort law than it is about whether the tort defendant in a given case should—as a matter of tort policy—be deemed causally responsible as a legal matter.

Of the various aspects of causation in tort law that have received scholarly attention, proximate cause undoubtedly remains the most controversial.¹⁷¹ While related to the factual causation question, in reality it operates as a doctrine that courts use to limit a defendant's liability under certain circumstances, by determining that the defendant's actions—even if causally related to the harm—should not be the basis for imposing liability. And to answer the question, they look to the basic normative goals of the system, thereby giving the inquiry an avowedly “policy-oriented” flavor.¹⁷² The specific variables that courts look to include ideals ranging from ideas such as justice and equity, to the more practical ones such as compensation, and deterrence. They also partake of utilitarian considerations such as risk-allocation, and of deontic ideas such as moral responsibility. All in all, the determination is heavily driven by a subjective judgment that the courts make of whether a defendant should be found responsible for the harm in light of tort law's myriad goals.¹⁷³ Here too then, the purpose of responsibility-affixation motivates the causal investigation—of whether an identified factual cause is proximate enough to engender liability—but manifests itself in a determination that is specific to the defendant.

These basic structural ideas are illuminating for copyright law. Copyrightable causation in copyright law need not be seen as a purely objective/scientific inquiry that is true across situation and context. Nor of course should it be treated as an entirely vacuous concept that is devoid of all verifiable analytical content and subject to covert manipulation. Building on the insights that Legal Realism has brought to bear on the understanding of causation in the law, copyrightable causation might be fruitfully bifurcated into two prongs; one where the epistemic content—driven by the purpose of the inquiry—dominates; and the other that more directly addresses the normative issue of authorship through the epistemic conclusion. Separating the inquiry into two steps allows for the epistemic and evaluative domains to

¹⁷¹ See generally GREEN, *supra* note __, at v (“It is no doubt generally felt that the whole subject of ‘proximate causation’ is a bogey, the sort of thing found only in children’s story books—a sort of child’s mind creation.”).

¹⁷² *Pittway Corp. v. Collins*, 973 A.2d 771, 787 (2009) (“Legal causation is a policy-oriented doctrine designed to be a method for limiting liability after cause-in-fact has been established.”).

¹⁷³ See DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, *DOBBS’ LAW OF TORTS* §198-99 (2d ed. 2015).

CAUSING COPYRIGHT

each be considered fully and given independent analytical scrutiny during the discussion, even if we consider their boundaries somewhat porous. We thus turn to constructing this bifurcated inquiry, building on the architecture of the causal determination in tort law.

B. Creation-in-Fact

The first step of the copyrightable causation requirement would look for an epistemic basis to causally relate the work in question to an actor's creative actions. It would in essence track tort law's cause-in-fact requirement. Identifying—and selecting—a condition as the 'cause' for the work is hardly a purely objective/universal determination; it is instead driven by the purpose of the inquiry as a whole. And whereas tort law uses it to affix liability, copyright law's identification of the cause originates in its need to attribute authorship and assign ownership. This purpose exerts an obvious influence on the structure and content of the inquiry. In contrast to what tort law seeks to achieve in its functioning then, copyright's authorship determination *allocates an exclusionary entitlement over expression to the causally responsible individual*.

Copyright's exclusionary entitlement is granted to individuals, at least in the modern understanding, as an inducement for creative activity that results in social welfare enhancing output.¹⁷⁴ As such, copyright's account of incentives is therefore closely tied to an account of human behavior and the ability of individuals to respond rationally to the law's "promis[e]" of protection for original expression once brought into existence.¹⁷⁵ The exercise of rational agency, both in the lead up to the creation of the work and in the exercise of the exclusionary entitlement once granted, is forced to exclude non-human factors that may have a bearing on the causal question from the set of conditions that might ever qualify as causes for authorship.

¹⁷⁴ Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558, 105 S. Ct. 2218, 2229, 85 L. Ed. 2d 588 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477, 104 S. Ct. 774, 806, 78 L. Ed. 2d 574 (1984) ("Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create, and 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 the useful Arts.'").

¹⁷⁵ Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1573 (2009); Seana Valentina Shiffrin, *The Incentives Argument for Intellectual Property Protection*, in INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE 94, 94 (Axel Gosseries, Alain Marciano and Alain Strowel eds. 2008) ("In theory, that incentive operates to stimulate creation of some work by promising the power to prevent other, similar works from being produced or distributed.").

CAUSING COPYRIGHT

Creation-in-fact is therefore about epistemically identifying the responsible human agency.

Responsibility—for outcomes—can produce liability, as it does in tort law. Such responsibility can also produce rights, when the outcome is positive. In his well-known account of “outcome responsibility” in tort law Tony Honoré famously defended forms of liability that are based on actual outcomes as representing a social norm that the law incorporates into its functioning.¹⁷⁶ Under this social norm, individuals who “have a minimum capacity for choosing and acting” are allocated credit for the “good outcomes of action” and “discredit for bad ones,” on an everyday basis as a matter of basic social morality.¹⁷⁷ Tort law builds on this moral account of discredit. Copyright law, symmetrically, represents one of the law’s mechanisms of giving credit and according responsibility—through the mechanism of a right—for good outcomes.¹⁷⁸ Copyright law in assigning authorship (much like tort law) is therefore about allocating responsibility for an outcome, except that the allocation is of a positive one rather than a negative one. Once we accept this responsibility-centered understanding of authorship, the focus on *human* agency for determining the cause becomes even more obvious. In this account, neither animals nor machines or indeed divine spirits can be treated as causally responsible for the creation of a work, just as they bear no causal responsibility in tort law for any real world harms. Whenever they enter the fray, the question must invariably turn on whether there is a human agent that might be responsible for the output that comes from such sources. The domain of authorial causality is, in short, limited to that of human agency: a *causally responsible individual*.

1. But-For Creation

The principal test that courts use for factual causation in tort law is the “but-for test.”¹⁷⁹ In its principal formulation, the test asks whether the “the defendant’s conduct is a factual cause of the plaintiff’s harm if, but for the

¹⁷⁶ TONY HONORÉ, RESPONSIBILITY AND FAULT 14 (1999). For a set of essays critically examining the various dimensions of the argument, see: RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ ON HIS EIGHTIETH BIRTHDAY (Peter Cane & John Gardner eds. 2001).

¹⁷⁷ *Id.* at 14-15.

¹⁷⁸ For an argument building this out further, see: Shyamkrishna Balganes, *The Normative Structure of Copyright Law*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 313 (Shyamkrishna Balganes ed. 2013).

¹⁷⁹ DOBBS, *supra* note __, at §186 (“In the great mass of cases, courts apply a but-for test to determine whether the defendant’s conduct was a factual cause of the plaintiff’s harm.”).

CAUSING COPYRIGHT

defendant's conduct, that harm would not have occurred."¹⁸⁰ As a leading treatise on the subject further notes, this formulation of the test also embodies a negative: the absence of a causal connection in situations where the plaintiff would likely have suffered the same harm even without the defendant's conduct.¹⁸¹

Copyright's nascent theory of authorial causation has long attempted to apply a basic but-for approach to the causal question, albeit sporadically. The basic framework of tort law would now enable copyright to develop a more refined application of the but-for test for authorial causation. Under this formulation, an individual claimant should be treated as having caused the creation of the work—as a matter of authorship—*if, but-for that individual's actions, the particular work of expression in question would not have come into existence*. Since this is principally an epistemic question, it bears emphasizing that the determination in each instance is specific to the particular work at issue. It therefore matters very little if a substantially similar/analogous/identical would have been (or actually was) brought into existence by someone else.

In a vast majority of cases, but-for creation promises to be an entirely straightforward question. When an individual acting in isolation writes a poem, paints a picture, produces software code, or composes music, it is abundantly clear that work so produced would not have come into existence *but for* that individual's actions. Conversely, in situations where the work would have come into existence even without the individual's actions, or despite the individual's minimal assistance therein, the test suggests the absence of a causal link.

A good example of this is seen in situations where a work owes its origins to forces of nature. Consider a situation where the owner of a private beach, who maintains the beach and cleans it on a regular basis, discovers an aesthetically appealing sand pattern produced by the waves one morning. If another individual likes that pattern and decides to replicate it, the beach owner cannot thereafter claim authorship in the design as a work of art. The pattern at issue here would have come into existence even without the owner's actions, and therefore does not satisfy the but-for creation prong. Conversely, consider the monkey selfie situation discussed previously. Without the photographer's positioning of the camera and his adjustment of the various lens and shutter settings, the monkey would likely not have pressed the shutter button, which in turn resulted in the production of the final photograph. While the monkey was certainly the most immediate cause of

¹⁸⁰ *Id.*

¹⁸¹ *Id.* ("The but-for test also implies a negative.").

CAUSING COPYRIGHT

the photograph (by pressing the button), the photographer's actions clearly meet the but-for creation test.

In applying the but-for creation test, courts usually need to recreate a hypothetical counter-factual situation to assess whether the work would have come into existence even without the claimant's intervention. In most instances this is likely to be relatively uncontroversial, as in the beach pattern and monkey selfie situations, which entail objective causal determinations involving a single human actor. Once we move from objective situations to the relative, which involve multiple actors, things start becoming more complex. In these situations, the inquiry begins to encounter what theorists of causation refer to as overdetermined causation, i.e., situations where a single outcome is in principle determined by multiple causes.¹⁸² In these situations, copyright law might once again learn from what common law courts have done in the tort setting.

2. NESS

Instances of overdetermined causation are usually divided into the separate categories of "duplicative causation" and "preemptive causation."¹⁸³ Duplicative causation refers to situations where two or more causes combine together to produce a result.¹⁸⁴ Preemptive causation arises in situations where one cause is followed by another to produce a result, with the latter usually cutting short the former.¹⁸⁵ In all of these situations, untangling the causal significance of each cause independently becomes complicated under the simple but-for test.

The principal situations where we see overdetermined causation arising in copyright relate to works produced by multiple contributors. These are best characterized as situations of "multiple causation" rather than as duplicative or preemptive causation. Since copyright law pays particularly close attention to the uniqueness of each individual contribution (under the originality doctrine), creation-in-fact can never be truly duplicative, strictly speaking. Additionally, in the creative context, one creator's contributions do not ever preempt another's, but rather build on it, meaning that causation is seldom ever preempted. By contrast in copyright one (human) causal

¹⁸² For the leading account in philosophy, see: Louis E. Loeb, *Causal Theories and Causal Overdetermination*, 71 J. PHIL. 525 (1974). See also HART & HONORÉ, *supra* note __, at xxxix-xliii.

¹⁸³ Wright, *supra* note __, at 1775.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

CAUSING COPYRIGHT

influence commonly combines with another/others to produce the work, requiring the law to disaggregate the authorial significance for each of them.

Instances of multiple causation in copyright might be further classified into “joint causation” and “sequential causation,” a distinction that roughly tracks the law’s analytical distinction between joint works and derivative works.¹⁸⁶ The gravamen of the distinction lies in the manner in which the contributors to the work interact.

Consider the following illustration of joint causation. Two artists work together on creating a painting on canvas. They work in tandem, each contributing various colored shapes and lines to the work during the process. In the final work, their individual contributions remain interrelated and indistinguishable, both in quality and quantity. The final work is clearly a product of both of their contributions. Here it is impossible—applying the simple but-for creation test—to say if the work of art would have come into being with *either* of their contributions in isolation. In principle, one could argue that neither artist’s actions would independently satisfy the but-for creation standard on its own, since one could counter-factually hypothesize that each of the other artist’s contribution might have produced the work.

Next, consider a situation of sequential causation. One artist creates a work of modern art on her own. Some time thereafter, another artist comes along, and with permission from the first artist¹⁸⁷ copies and modifies it rather significantly to produce an altogether original work of modern art, i.e., a derivative work. The new work is clearly a product of both artists’ contributions. But-for either artist’s contribution, it would simply not exist.

How should the creation-in-fact analysis proceed in these situations? Theorists of causation in the law, beginning with H.L.A. Hart and Tony Honoré in their classic work on the subject, have developed an alternative to the but-for test in situations of causal overdetermination that has since come

¹⁸⁶ Copyright law’s distinction between joint works and derivative works is somewhat complicated, and taken to subsist in the former embodying an intention to have the contributions be merged into a single whole when the creative contributions were being made. For a discussion, see: Shyamkrishna Balganesh, *Unplanned Coauthorship*, 100 VA. L. REV. 1684, 1733 (2014). The legislative history accompanying the current copyright statute suggests this distinction as well. H.R. Rep. No. 94-1476, at 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5734 (noting that even if the pre-existing work were created with an expectation that it would be transformed or adapted into another work, the lack of a “basic intention behind the writing of the work” for it to be integrated renders it a derivative as opposed to joint work).

¹⁸⁷ The hypothetical above uses permission as a stand-in for the critical requirement that the derivative not be “unlawfully” created under the statute. 17 U.S.C. §103(a) (2011). If this requirement is not met, the question of infringing the original creator’s exclusive right to produce a derivative enters the picture. *Id.* §106(2).

CAUSING COPYRIGHT

to be known as the NESS (Necessary Element of a Sufficient Set) test.¹⁸⁸ The test asks if the condition at issue was a necessary element of a set of antecedent actual conditions that was—as a set—sufficient for the consequence to occur; and if answered in the affirmative, treats the condition as a cause.¹⁸⁹ The most sophisticated treatment of the NESS test is to be found in the work of Richard Wright, who argues that its virtue lies in the fact that it “incorporates the indispensable notion of necessity, but subordinates it to the notion of sufficiency.”¹⁹⁰ The NESS test operates as a modification to the traditional but-for approach.

As applied to the overdetermination cases, the NESS test fares significantly better than but-for, even for copyrightable causation. In instances of joint causation, it produces affirmative answers for both actors’ involvement thereby treating them each as a cause of the consequence under study. This is in contrast to what a but-for test would have concluded. Going back to our scenario of joint causation involving the two artists, the NESS test would ask if each of the artists’ contribution was a necessary element of the set of actual antecedent conditions which includes both artists’ contributions, where that set was sufficient for the creation of the *particular* final work that emerged. Even if each artist’s contribution to the work may not have been independently necessary for the final work (something that is impossible to discern *ex post*), each was certainly necessary for the sufficiency of the actual set of antecedent conditions that did produce the work.

The NESS test would thus treat both contributions as causally related to the work, not just individually but jointly. Consequently, the NESS test would attribute causality to each contribution *regardless* of its precise magnitude or importance. Thus, if one contributor made a fairly minimal contribution and the other conversely did most of the work; the test would treat the quantum of the contribution irrelevant to the causal determination since each is seen as a necessary part of the complete actual set.¹⁹¹ The consequence of this disparity in actual contribution is something that the

¹⁸⁸ HART & HONORÉ, *supra* note __, at 109-29.

¹⁸⁹ *Id.*

¹⁹⁰ Wright, *supra* note __, at 1788-1812.

¹⁹¹ Which is in keeping with how the current joint works doctrine works in copyright law. Balganes, *Unplanned Coauthorship*, *supra* note __, at 1703 (“[C]opyright law pays no attention to the relative contributions of the parties, and as a result recognizes each coauthor to have an equal ownership stake in the work in question.”).

CAUSING COPYRIGHT

system might more appropriately deal with elsewhere rather than in the causal inquiry.¹⁹²

Sequential causation presents a more complicated story. Here, both the but-for and NESS tests point in the same direction: that both authors are causally responsible for the creation of the work. Since the derivative author's contributions doesn't ever preempt the original author's contribution, the two overlap and fall back into the broad category of duplicative causation. And here, each author's agency is indelibly a necessary part of the set of actual conditions that resulted in the production of the final (i.e., derivative work). Remove the original author's contribution from the set and there would be no work to create the derivative from; conversely, remove the derivative author's contributions from it and there would be no derivative at all! Consequently, the NESS test yields the result that *both* the creator of the original and the creative of the derivative—are creators-in-fact of the derivative work, as a causal matter. In this regard, the NESS test deals with sequential causation and joint causation in a largely identical fashion.

At first glance, the idea of treating both authors' contributions as epistemic causes in situations of sequential causation (i.e., derivative works) may seem counter-intuitive. On closer scrutiny though, one realizes that the NESS test tracks copyright law's basic intuitions about derivative authorship.¹⁹³ Copyright scholars have long debated—and tried to understand—why it is that copyright law chooses to accord authors of original works the right to control the creation of derivatives from it, even in situations where such creation itself involves an element of originality.¹⁹⁴ As we shall see when we move to legal creation, the law does moderate this control in important ways.¹⁹⁵ Yet, the persistence of copyright law's basic desire to accord original authors significant control—as a default—over downstream derivatives, may be seen to derive from the recognition that as a purely epistemic matter the original author plays a crucial role in *causing* the derivative to come into existence. Whether this epistemic causality ought to

¹⁹² This would be in determining the parties' respective ownership shares, which would in turn translate into a division of any revenues (or damages) along the lines of those shares. For an argument along these lines, see: Brief of *Amici Curiae* Professors Shyamkrishna Balganesh, Justin Hughes, Peter Menell, and David Nimmer In Support Of Neither Party, *Garcia v. Google*, No. 12-57302 (9th Cir. Nov. 25, 2014), at 17.

¹⁹³ Such as the need to keep the rights in the lawful derivative work distinct from those of the original. 17 U.S.C. §103 (2011).

¹⁹⁴ See, e.g., Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505 (2013); Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317 (2005); Paul Goldsein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209 (1982).

¹⁹⁵ See *infra* III.C.3.

CAUSING COPYRIGHT

be translated into a legal basis for authorship remains an independent question, which the next step (and indeed, copyright law too) addresses.

The NESS test therefore allows the creation-in-fact inquiry to scrutinize situations of multiple causation, where the but-for test is overdeterminative in identifying the cause of a work. It bears emphasis that that the answer to the creation-in-fact step remains defeasible as a matter of copyright policy, a scrutiny that will take place under the rubric of legal creation.

C. Legal Creation

The creation-in-fact step of the copyrightable causation requirement enables a court to choose one among the various conditions and influences that contributed to the final creation of the work as the relevant human agency of authorial significance. Its focus is principally epistemic and premised on patterns of cause and effect seen in human behavior in various contexts. The next step of the inquiry, the “legal creation” step is, by contrast, largely evaluative. It asks whether the identified human agency ought to lead to an authorship claim as a matter of copyright’s goals and principles, even when that agency is epistemically identified as the cause of the work.

Legal creation tracks tort law’s proximate cause requirement, which is understood as an inquiry that determines the appropriate scope of an actor’s liability even when that actor is an epistemic cause for the harm at issue. Proximate cause tries to ensure that the defendant’s liability in tort law bears a connection to the harm that is justifiable as a matter of tort law’s understood goals and objectives.¹⁹⁶ As an illustration consider a computer manufacturer whose negligently produced product requires a customer to visit a repair shop to have it serviced. En route to the repair shop, the customer is seriously injured in an automobile accident. The manufacturer is clearly an epistemic cause for the injury; but-for the faulty product the trip would have never occurred, and the manufacturer’s faulty production is clearly a necessary element of a sufficient set of conditions that produced the injury.¹⁹⁷ And yet, tort law concludes that the negligent behavior (of the manufacturer) was not the proximate cause of the injury. Why? Because as a matter of tort law’s commonly understood goals—of incentivizing careful behavior, or of attributing moral blameworthiness—characterizing the manufacturer as the legal cause for the injury seems incongruous.

¹⁹⁶ DOBBS, *supra* note __, at §199.

¹⁹⁷ W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 273 (5th ed. 1984) (describing it as an inquiry into “whether the policy of [tort] law will extend the responsibility for the conduct to the consequences which have in fact occurred”).

CAUSING COPYRIGHT

To give effect to these various goals, which are of course a source of some contention among tort scholars, tort law has developed a variety of tests for proximate cause, the most prominent of which is the foreseeability test.¹⁹⁸ Uniquely developed for tort law, foreseeability fits both the instrumental and moral justifications for the imposition of tort liability. It is best described as a midlevel principle in that it takes shape and color by reference to certain important normative ideals, and yet in its functioning and application it allows courts (or other decision-makers) to avoid direct recourse to those ideals.¹⁹⁹ It thus prioritizes analytical content over the normative in its application, even though the normative motivates its very existence. In a similar vein, we might identify a set of midlevel principles for the legal creation inquiry to give effect to copyright's goals and ideals during the assessment of copyrightable causation. Much as the proximate cause inquiry introduces a set of criteria to *exclude* otherwise epistemically viable causes from the legal assessment, these principles would operate to eliminate certain forms of human agency from the category of authorial cause during the determination. In this respect legal creation would perform a largely exclusionary role.

An important caveat is in order here before identifying the mid-level principles through which legal creation might operate. While these principles—as seen in proximate cause—function to give effect to the institution's fundamental goals and ideas, they only ever seek to do so through the epistemic cause identified in the prior step (i.e., creation-in-fact) and never independently. In this sense then, legal creation is always parasitic on the epistemic aspect of copyrightable causation rather than an independent vehicle to give effect to copyright's goals. Proximate cause is thus materially distinct from the question of whether the law ought to identify a duty of care to exist at all for liability purposes.²⁰⁰ Similarly, legal creation should not be seen as just another mechanism by which to calibrate the copyright entitlement; it should instead be seen as a device that overlays copyright's normative considerations over the epistemic cause for the work at issue.

Identifying copyright's normative objectives remains a source of deep disagreement among scholars.²⁰¹ Generally speaking, U.S. copyright law

¹⁹⁸ DOBBS, *supra* note __, at §199.

¹⁹⁹ For a general account connecting these ideas, see: Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247 (2009). For a fuller connection between foreseeability and moral accounts of tort law, see: Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 505 (1992).

²⁰⁰ DOBBS, *supra* note __, at §200.

²⁰¹ See, e.g., PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* (2014); ABRAHAM DRASSINOWER, *WHAT'S WRONG WITH COPYING?* (2015); NEIL

CAUSING COPYRIGHT

identifies these goals in principally instrumental terms.²⁰² By providing creators with a marketable set of exclusive rights in their works, copyright law is taken to induce the creation of new works, thereby promoting overall social welfare (“progress”). Incentives, allocative efficiency, and social welfare maximization thus lie at the root of this account.²⁰³ The incentives rationale is in contrast to a less instrumentally-focused one, wherein copyright is seen as committed to the morality (and/or intrinsic worth) of authorship as an activity.²⁰⁴ Whereas the instrumental conception focuses on the utilitarian benefits of copyright, the deontic conception emphasizes the relationship between an author and his/her expression as embodying an inner rationality worthy of protection on its own. The author’s individual dignity and personality anchor the foundations of this theory.

Over the years scholars have tried to offer accounts that reconcile these competing ideas, with varying degrees of success.²⁰⁵ Nonetheless, midlevel principles that inform the application of a doctrine enable courts to avoid having to choose between competing normative ideals or reconcile them on an individual basis. The very construction of these principles allows them to embrace a an institution’s goals to different extents without necessitating a direct trade-off except in very rare instances. Looking back to the ways in which copyright jurisprudence has attempted to address the causal question in the past (both directly and through its other doctrines) as well as copyright’s normative commitments detailed above, we can discern three general mid-level principles through which the legal creation prong of copyrightable causation might be operationalized. It bears emphasizing that as the exclusionary prong of copyrightable causation, each of these principles operates in the negative, i.e., as attempting to disqualify a work that has satisfied the creation-in-fact prong from protection, if brought under its rubric.

WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 154–68 (2008); Shyamkrishna Balganes, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1132–42 (2009); Shyamkrishna Balganes, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664 (2012); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

²⁰² See *supra* note ___ and sources therein.

²⁰³ Landes & Posner, *Copyright Law*, *supra* note ___.

²⁰⁴ For exemplars of this approach, see: DRASSINOWER, *supra* note ___; ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2010).

²⁰⁵ See, e.g., ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011); Shyamkrishna Balganes, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203 (2012); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012).

CAUSING COPYRIGHT

1. Control

In situations where the putative creator of the work is shown to have had insufficient control over the process through which the work was created, the contribution should be deemed insufficient to satisfy the legal creation prong of copyrightable causation. Creating a work usually entails numerous steps beginning with the conception of the underlying idea and ending with the fixation of specific expression.²⁰⁶ Given that copyright's principal focus is with the *expression* being created, the sufficiency (of control) under scrutiny is to be limited to that part of the creative process wherein the original expression was created. While obviously a contextual question, it is likely to arise in three scenarios.

The first involves situations where a non-human influence that is not under the direction of the human agent played a substantial role in the production of the expression, best described as instances of *undirected non-human influence*. The crucial element here is the inability of the human agent under the circumstances to direct (and control) the production of the expression, even if the non-human element was predictable based on natural or artificial conditions. We see situations of this kind arising when the creative process makes use of natural processes without direction, such as the monkey selfie episode. The photographer in that instance was casually responsible as an epistemic matter for the origins of the ultimate expression; yet, the creative process itself revealed his extensive reliance on the undirected activities of the macaque monkey for the ultimate expression. While the primate's actions may have been perfectly predictable, it should be treated as disqualified from protection under this prong. Very importantly, it isn't just the photographer's reliance on a monkey that generates this result. If the work at issue had been created by say, a trained monkey instead, the primate's involvement would be both predictable and *directed* rather than undirected, which would have potentially qualified it for protection.

A second scenario where control over the creative process might be seen as lacking arises when the *element of chance* (or luck) plays a major role in the creation of the expression. This would cover situations where the work is produced through accident, such as when an artist slips and spills a set of colors onto a canvas to generate an aesthetically appealing pattern. Determining when (and how) chance enters the creative process is of course a fact-intensive inquiry, which a putative creator is likely to deny

²⁰⁶ For a useful discussion, albeit within the context of computer software, see: *Comp. Assocs. Int'l, Inc. v. Altai*, 982 F. 2d 693, 697-99 (2d Cir. 1992).

CAUSING COPYRIGHT

altogether.²⁰⁷ Yet, when shown to exist in significant part, it reveals the creative process to have been substantially stochastic.

The third possibility arises within relative agency determinations and involves situations where another human agent (or agents) not under the supervision or direction of the putative claimant, produces the expression at issue; appropriately described as a *non-servient human influence*. The most common instances of this scenario is seen when a work is commissioned from an independent contractor who is not in a hierarchical relationship with the commissioning party.²⁰⁸ If the relationship is such that the independent contractor has sufficient independent agency in producing the work, the commissioning party's claim to authorship is appropriately defeated.

Situations will of course arise where one or more of these categories overlap. For instance, the monkey selfie episode might be equally explained as involving a heightened element of chance, in addition to the involvement of a significant undirected influence. What unifies this category however is the common feature that the scenarios each evince a significant inability on the part of the claimant to replicate the outcome of the creative process again. In a sense, they also suggest a lack of intentionality during the creative process, either consciously or by circumstance.²⁰⁹

Denying the status of authorship to works produced under these circumstances tests copyright law's commitment to enhancing social welfare by *inducing* the production of creative expression. A central premise of this inducement-account involves the law's ability to rationally influence future actors to produce creative works through its set of incentives. When the creative process evinces a significant lack of control on the part of the claimant in producing the expression, it generates a plausible inference that the creative process was unlikely to have been influenced in any significant part by the law's inducement and is therefore undeserving of protection under this account. In other words, when the role of rational agency in the production of the work is itself seen to be limited, copyright's role in rationally influencing that agency may in turn be legitimately called into question. The inadequacy of control principle is thus unquestionably

²⁰⁷ *But see* Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc., 191 F. 2d 99, 105 (2d Cir. 1951) (recognizing variations caused by chance as sufficient to trigger the originality threshold).

²⁰⁸ *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989) (finding an independent contractor who had been contracted with by the plaintiff to produce a sculpture to be a non-employee and therefore outside the control of the plaintiff).

²⁰⁹ *See* David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 204-08 (2001) (“[I]t would seem that intent is a necessary element of the act of authorship.”).

CAUSING COPYRIGHT

utilitarian in orientation, originating in copyright's welfarist theory of incentives.

2. Disproportionality

In some situations, the characterization of an individual, who plays some epistemically verifiable role in the creation of the work, as its author is disproportionate to the (i) quality, (ii) quantum or (iii) monetary value, of that individual's contribution during the creative process. In these situations, the legal creation prong would find against the existence of copyrightable causation on the part of that individual. The primary domain where we would expect to see this principle at work is in relation to relative (rather than absolute) agency determinations, which are situations where one individual's contribution to the work is assessed against a baseline of other actors' similar contributions.

What this principle focuses on is the intuitive mismatch between the actor's role in the creation of the work and the final consequences of authorship in it. And these consequences in turn can be monetary, attributional, or distributional. The monetary consequences are the most straightforward and relate to the claimant's ability to lay claim to the market for the work at issue. The attributional consequences, by contrast, are less overtly instrumental and instead derive from the perceived unfairness of allowing the claimant to obtain exclusive credit as responsible for the creation of the work. This credit routinely carries significant reputational advantages (for the claimant) and disadvantages (for those excluded). Very frequently the monetary and attributional consequences will influence the determination in tandem.

The distributional consequences are routinely seen in situations where a claimant isn't seeking exclusive authorship but rather joint authorship. And here, the baseline of comparison—with other contributors to the work—isn't just about choosing *one among them* as the work's author, but instead determining whether *more than one* merits the status equally. The law's treatment of joint authors as equal co-owners, where each of the author's ownership stake/right is deemed equal in all respects to the others' regardless of the precise contribution made to the work, generates the impulse to allow the disproportionality (in contribution) to deny legal creation altogether.²¹⁰

An illustration of the monetary (and attributional) consequences at play might be seen in copyright law's willingness to recognize the

²¹⁰ See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (“A creative contribution does not suffice to establish authorship of the movie.”).

CAUSING COPYRIGHT

director/producer of a motion picture as its author even though it involves multiple performers and contributors.²¹¹ The implicit rationale here is that the director has made the most significant contribution to the creative process. The director's contribution is therefore taken as fair and proportional to the exclusivity being granted. This is in contrast to, say, a cameraman's contribution to the movie, or the contributions of a consultant on the screenplay.²¹² Legal creation—as well as current law—would find these contributions insufficient to qualify for protection either as exclusive claims or as joint claims. As exclusive claims, they represent a rather significant mismatch between the contribution and the consequence (full ownership and sole attribution). As joint claims, the contribution seems significantly less – both quantitatively and qualitatively – than that of the other claimants to authorship (e.g., the director), which renders it disproportionate from a distributive standpoint.

As a theoretical matter, the disproportionality principle discussed here is motivated by considerations of desert. As an *ex post* consideration, legal claims based on desert recognize that by virtue of someone's actions at a certain point in time, the law ought to do something beneficial for them on that basis.²¹³ It might be seen as infused with a strong ethical claim that can exist independent of consequentialist justifications.²¹⁴ The argument that a contributor deserves to be classified as the legal creator (i.e., author) of the work by virtue of his contributions may thus be seen as a claim about the virtue of that contribution (to the work/authorship), independent of whether such a classification might enhance overall utility either in the individual case or over the long-term.

All the same, as some philosophers have argued, desert itself can be understood as motivated by consequentialist considerations.²¹⁵ Thus, in so far as the claim sees the virtue at issue—in the contribution—as beneficial not just for the particular work or for authorship, but instead systemically, i.e., to stimulate further productions of such virtue, desert begins to partake of a

²¹¹ *Lindsay v. Wrecked & Abandoned Vessel R.M.S. TITANIC*, No. 97 CIV. 9248 (HB), 1999 WL 816163, at *5 (S.D.N.Y. Oct. 13, 1999).

²¹² *Aalmuhammed*, 202 F.3d at 1233-34.

²¹³ For a useful overview, see: Owen McLeod, *Desert*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed. 2013), <http://plato.stanford.edu/archives/win2013/entries/desert/> (last visited January 31, 2016). For a general application of desert principles to intellectual property, see: Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609 (1992).

²¹⁴ McLeod, *supra* note __.

²¹⁵ See generally Fred Feldman, *Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice*, 55 PHIL. & PHENOM. RES. 567 (1995) (developing a desert-sensitive version of consequentialism).

CAUSING COPYRIGHT

strong consequentialist/utilitarian color. Here, the distinction—for the principle of causal principle of disproportionality—between desert and reward begins to collapse. Yet, the fact of the matter remains that the principle at issue here is capable of being understood in principally ethical/deontic terms. Whether that deontic logic might itself be seen as part of an overall consequentialist system remains a separate issue.

3. Personality Conflation

A third principle undergirding legal creation would focus on copyright law's need to identify and distinguish one author's individual creative choices from those of another (or others) when the works that embody these choices are themselves interrelated. In these situations, even though it might be epistemically defensible to identify one creator (author) as causally linked to every work, the causal nexus is treated as severed beyond a point when it is likely to conflate the importance of those individual choices to the delineation of the work.

A stylized example helps illustrate the working of this principle. Consider an original work created by an author *A*, and a sequential series of lawful²¹⁶ derivative works each produced by a different author *B*, *C*, and *D*. In producing his work, *B* modifies and adapts *A*'s work, *C* similarly does so with *B*'s work, and *D* with *C*'s work. Now as a purely epistemic matter, *A* is causally responsible for all four works, *B* for three of them, and *C* for two. In the sequence then, each creator can be causally linked not just to his individual work, but to subsequent derivatives as well. Thus for instance, without *A*'s contribution, none of the works—however original and creative they may each be—would be in existence. All the same, treating *A* as the legal creator—i.e., author—of all subsequent works merely because of this causal connection seems absurd. It elides the altogether fundamental point that even if *A* contributed causally to each of the works, his contribution was less significant to those subsequent works than each of the other contributors' was. Indeed, continuing to treat *A* as causally responsible conflates the creative choices that each of *B*, *C*, and *D* made in producing their works with *A*'s, and treats them as co-equal analytically. In these situations, legal creation treats *A*'s causal link to the work as broken; and does the same for *B* and *C* with the works produced by *C* and *D* respectively.

²¹⁶ The term "lawful" here tracks the statute's requirement that a derivative not be unlawfully created. 17 U.S.C. §103 (2011). The most common modalities of understanding this requirement is either the existence of permission from the owner of the original, or fair use.

CAUSING COPYRIGHT

The principle of personality conflation is in essence a test of remoteness.²¹⁷ The original author's individual creative choices are seen as too far removed from the derivative works eventually created such that continuing to treat those choices as causally related—from a legal standpoint—to the final works, clouds the salience of the new creators' own choices. This is hardly to suggest that the new creators' choices are independently worthy of protection (under the originality standard). That determination is altogether separate from copyrightable causation.²¹⁸ Yet, it is those choices that copyright law focuses on for the new works, which is the principal purpose behind disentangling them from the original author's choices. Note also that the concern about conflation arises only when the derivative works in question are produced lawfully. When the legality of those works are themselves at issue, an altogether different set of considerations apply.²¹⁹

Personality conflation gives limited effect to the idea that authorship—and authorial causation—involves infusing a work with an author's personality, manifested in the individual creative choices made by the author in the process of creating that particular work. While it isn't treating such personality as an independent basis for protection, in situations where the creation-in-fact inquiry risks obfuscating such personality, it would find against the existence of copyrightable causation. In an important sense then, the principle accommodates aspects of copyright law's deontic (or rights-based) accounts, which place primary emphasis on the author's relationship to the work to justify the system. Obfuscating an author's personal choices underlying the work is taken as problematic because it serves to mischaracterize the work as such.

* * *

Copyrightable causation can thus be understood as a two-step inquiry where the first step—*creation-in-fact*—focuses on the presence of an epistemic basis for authorial causation and the second step—*legal creation*—then examines whether that epistemic basis is normatively sufficient to

²¹⁷ The term remote is ordinarily used in tort law as the antonym of proximate. DOBBS, *supra* note __, at §208.

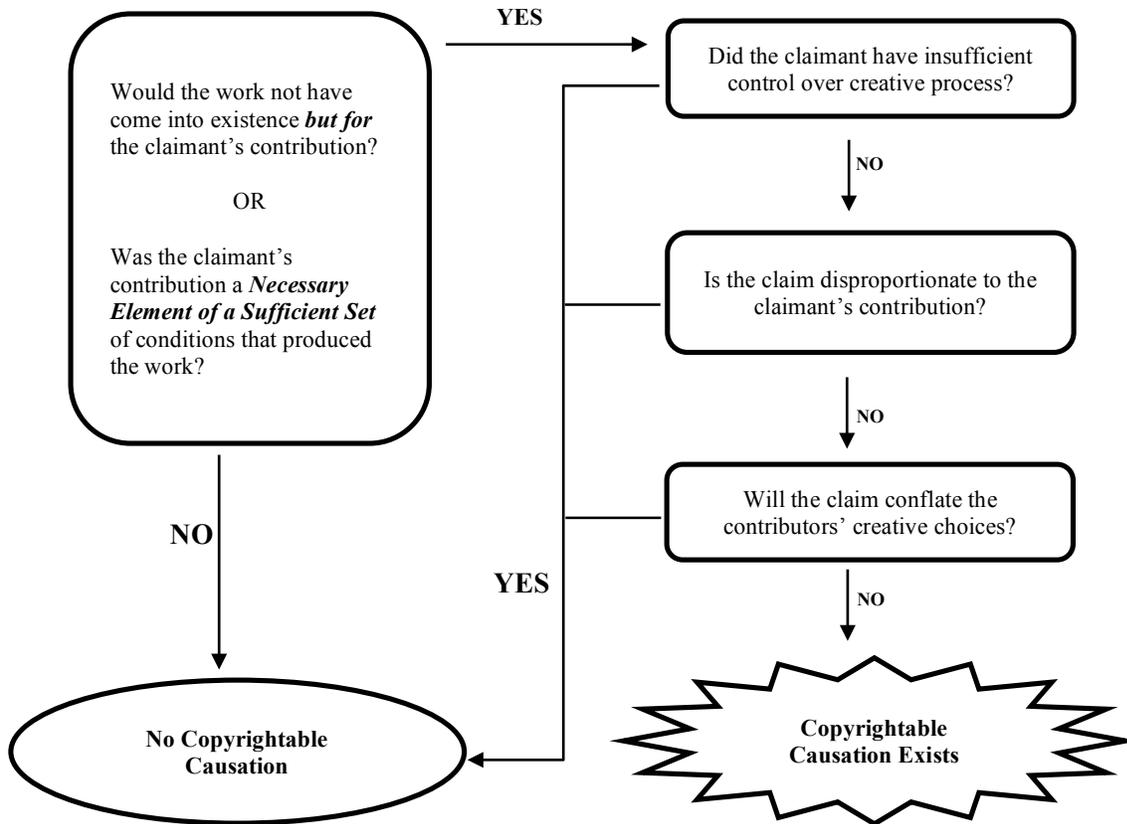
²¹⁸ It occurs under the rubric of originality. The standard for originality in a derivative work has been the subject of some controversy among courts, but it is today generally understood to be largely identical to the standard that prevails for non-derivative works as well. *See* 1 NIMMER, *supra* note __, at §3.03[A].

²¹⁹ Including the existence of an authorization, and whether the transformation—even when without authorization—was sufficiently transformative so as to constitute fair use. For an overview of this defense, see: R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 101 (2008).

CAUSING COPYRIGHT

identify the human agent as causally responsible for the work created. The two steps are sequential in structure. Their interaction and operation is best represented in the Table below.

Table: The Copyrightable Causation Analysis



IV. EXTENSIONS

Having examined how authorial causation might be made an independent component of the copyrightability analysis through a requirement of "copyrightable causation," it remains to be seen how the idea may be extended analytically. This Part considers two such extensions beyond a freestanding copyrightable causation analysis: (i) situations where authorial causation is presumed as a matter of law, and (ii) situations where the law requires the causation to be transferred from one party to another.

CAUSING COPYRIGHT

A. Presumptive Causation

The discussion thus far has focused on a freestanding “copyrightable causation” requirement that a plaintiff will need to establish as part of a copyright infringement lawsuit, and which a court will have to adjudicate. And as shown, this determination will indelibly contain both an epistemic and an evaluative component. As should be obvious, this framework—much like in tort law—places the burden principally on courts, to determine (i) when and how an agent’s actions are epistemically linked to the creation, and (ii) whether that epistemic link is normatively sufficient to constitute authorship.²²⁰ The framework therefore presumes an implicit—or explicit—Congressional delegation of the causal question in copyright law to courts.

All the same, copyright law might choose a different locus of institutional authority for the question, rather than depending entirely on courts.²²¹ Indeed, it is quite possible for the question of authorial causation to be determined by statute, through Congress’ use of statutory presumptions. These presumptions would attribute the status of ‘author’ to individuals who perform a pre-identified task during the creative process that produced the work. We see the copyright statute in the U.K. following precisely such an approach, by identifying the author for particular categories of works, based on the individuals’ respective contributions. It thus provides:

[The author] shall be taken to be—
(aa) in the case of a sound recording, the producer;
(ab) in the case of a film, the producer and the principal director;
(b) in the case of a broadcast, the person making the broadcast...
(d) in the case of the typographical arrangement of a published edition,
the publisher.²²²

In each of these situations, the statute creates a presumption that certain actions during the creative process automatically satisfy authorial

²²⁰ See *supra* Part III.B.

²²¹ For useful accounts of how and when federal statutory regimes divide up institutional law-making authority between the different branches of government, see: NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1997) (developing an economic framework for institutional choice in lawmaking); SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010) (developing an account of the Congress-Judiciary relationship in the federal context).

²²² Copyright, Designs and Patents Act 1988, c. 48, (Eng.), s. 9.

CAUSING COPYRIGHT

causation and qualify the individual as the author of a work.²²³ This approach to authorial causation, best described as *presumptive causation*, has certain obvious advantages when compared with a freestanding requirement.

First, it introduces a degree of consistency in the authorial determination for certain categories/classes of works. By embedding a sticky default into the determination, it allows the law to accord creators a measure of *ex ante* certainty about their status.²²⁴ Thus, the producer of a sound recording is automatically presumed to have caused its creation and is therefore treated as its author even if in that individual case the producer played no role whatsoever in the creation of the recording. Second, and relatedly, it lowers the administrative cost on courts by eliminating the need for a factual and normative determination for certain categories of work. All that a presumptive approach would require them to adjudicate is whether an individual falls into the identified status or category, when that characterization is unclear in any individual case. In situations when that classification (e.g., as a producer, or principal director) is unambiguously clear, the causal determination becomes somewhat mechanical. Third, a nimble and adaptable presumption-based approach avoids needless litigation on the question of authorial causation in relation to new technologies and creative mechanisms. Computer-generated works are a prime example, where American copyright law continues to debate the ideal approach to authorial causation.²²⁵ The U.K. statute, by contrast, declares that for computer-generated works “the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.”²²⁶ It is worth noting that this declaration doesn’t identify the authorial cause by status or category, as it does for other types of creative works. Instead, it effectively articulates a test—of authorial causation—to be applied, which is then presumed to yield a determinate answer to the question.

The U.S. Copyright Act obviously does not adopt the ‘presumptive causation’ approach to authorial causation, given its refusal to even define

²²³ For a discussion, see: GERALD DWORKIN & RICHARD D. TAYLOR, *BLACKSTONE’S GUIDE TO THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988* 46-47 (1989).

²²⁴ For an overview of the phenomenon of stickiness relating to default rules, see: Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 *YALE L.J.* 2032, 2084-96 (2012); Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 *FLA. ST. U.L. REV.* 651 (2006).

²²⁵ For an early account of the problems, see: Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 *U. PITT. L. REV.* 1185 (1986). See also Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 *HARV. L. REV.* 977, 1042-72 (1993).

²²⁶ Copyright, Designs and Patents Act 1988, c. 48, (Eng.), s. 9(2). See also Dworkin & Taylor, *supra* note __, at 47.

CAUSING COPYRIGHT

who an “author” is under the law. The law instead appears fully content delegating the question to courts, to develop answers incrementally and contextually, as technology and creative mechanisms evolve.²²⁷ This is in keeping with the general willingness of American copyright law and jurisprudence to embrace the common law method of rule development in a variety of important—and controversial—domains. All the same, it is well possible that Congress will—at some point in the future—choose to adopt a statutory solution to the problem of causation, analogous to what the U.K. has chosen to do. And at that stage, the trade-off between the certainty of the presumptive approach and the flexibility of the freestanding one, is likely to motivate much of the debate.

B. Transferred Causation

There is however one important area wherein American copyright jurisprudence adopts something akin to a presumptive approach to causation: the work made for hire doctrine.²²⁸ Its approach here might be best described as “transferred causation.” Recall that under the doctrine, one party is deemed to be the author of a work, even though it was created by another. This occurs most commonly when the work was created during a formal employment relationship and within the scope of the employment.²²⁹ The formal employment relationship, once shown to exist, results in the authorial causation being presumptively transferred from the employee to the employer. It thus operates like a presumption, but instead of presuming causation from either status or individual acts, it merely transfers the causation from one party to another *if* shown to exist.²³⁰

When an employee is causally responsible for a work (epistemically and evaluatively) that is created during the course of his/her employment, and such creation falls within the scope of the employment, the employer—and not the employee (the actual creator)—is treated as the author of the work as a matter of law. While one might posit a variety of different causal explanations for this presumption, such as: the possibility that the conditions and terms of employment were the real cause for the work, that it was the employment relationship that motivated the creation of the work, or that the employer’s choice of the particular employee was the real *sine qua non* of the

²²⁷ For an account of the virtues underlying this process, see: Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543 (2010).

²²⁸ 17 U.S.C. §101 (2011) (definition of a “work made for hire”).

²²⁹ See 4 NIMMER, *supra* note __, at § 5.03[B][1][b][I].

²³⁰ 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.”).

CAUSING COPYRIGHT

work, the analytical structure of the transfer tracks a largely analogous mechanism in the law of torts: vicarious liability.

Premised on the principle of *respondeat superior*, vicarious liability holds an employer (or principal) legally responsible for the actions of an employee (or agent) when the act in question was committed during the subsistence of the relevant legal relationship between the parties.²³¹ Scholars have attempted to rationalize the doctrine in different ways for some time now,²³² and the principal justification that appears to hold sway is the argument that vicarious liability—at least in its core form—operates as a risk-spreading mechanism, even if certain aspects of the doctrine are hard to explain using this economic theory.²³³ Nevertheless, even purely instrumental accounts of vicarious liability readily admit that the doctrine embodies a presumption about causal transfer, what Alan Sykes describes as the idea of “enterprise causation.”²³⁴ In this idea, the enterprise (employer) is causally related to the harm caused by an employee under the theory that the “dissolution of the enterprise and the subsequent unemployment of the employee would reduce the probability of the wrong.”²³⁵ The employer’s actions—of employing the specific employee—are thus treated as a but-for cause of the employee’s behavior, which in turn caused the wrong at issue. But for the employment relationship, the employee is seen to have been unlikely to have caused the harm.

It is crucial to recognize that this account of causation, i.e., enterprise causation, doesn’t altogether assume away the entire question of causation using a proxy (like presumed causation does). Instead, it still demands proving that the employee was causally responsible as an epistemic and evaluative manner (i.e., cause in fact and proximate cause) for the injury

²³¹ For an overview, see: T. BATY, *VICARIOUS LIABILITY* (1916); P.S. ATIYAH, *VICARIOUS LIABILITY IN THE LAW OF TORTS* (1967); J.B. HODGE, *VICARIOUS LIABILITY, OR, LIABILITY FOR THE ACTS OF OTHERS* (1986).

²³² See, e.g., DOBBS, *supra* note ___, at §426; Howard J. Laski, *The Basis of Vicarious Liability*, 26 *YALE L.J.* 105 (1916); William O. Douglas, *Vicarious Liability: Administration of Risk-I*, 38 *YALE L.J.* 584 (1929); William O. Douglas, *Vicarious Liability: Administration of Risk-II*, 38 *YALE L.J.* 720 (1929); Douglas Brodie, *Enterprise Liability: Justifying Vicarious Liability*, 27 *OXFORD J. LEGAL STUD.* 493 (2007); Clarence Morris, *The Torts of an Independent Contractor*, 29 *ILL. L. REV.* 339 (1935); Restatement Third of Agency § 2.04, cmt. b (2006) (“Respondeat superior creates an incentive for principals to choose employees and structure work within the organization so as to reduce the incidence of tortious conduct.”).

²³³ See Alan O. Sykes, *The Economics of Vicarious Liability*, 93 *YALE L.J.* 1231 (1984); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 *HARV. L. REV.* 563 (1988).

²³⁴ Sykes, *The Boundaries of Vicarious Liability*, *supra* note ___, at 572-73.

²³⁵ *Id.*

CAUSING COPYRIGHT

produced.²³⁶ But when these elements are satisfied—as they relate to the employee—causal responsibility is automatically transferred to the employer. So it is with the work made for hire doctrine as well. Once the employee is shown to have been causally responsible for the production of a work in both epistemic and evaluative respects, that causation—and not just ownership of the work—moves from the employee to the employer. The first step of the analysis requires ascertaining whether the employee was the authorial cause of the work, for which the standard framework of copyrightable causation might be fruitfully employed. Once this threshold is crossed, the next step is to determine if that causation occurred during the subsistence of the employment relationship and whether it was within the scope of the employment. When both are answered in the affirmative, the causation is transferred to the employer.

Much like with vicarious liability, the logic for transferred causation in copyright appears to have little to do with causation itself in the strict sense—either in epistemic or evaluative terms. It instead derives from considerations that are largely symmetrical to those within tort law. Whereas tort law focuses on risk-spreading and distributed deterrence in its use of vicarious liability, copyright law might be understood as encouraging greater risk-taking and expanding its set of creator incentives through the work made for hire doctrine, by offering to treat employers as authors. Neither doctrine has a real *causal* basis for its functioning; yet both presumptively transfer causal responsibility from one actor to another after its subsistence is proven.

CONCLUSION

Causation has always been an integral part of copyright law’s basic entitlement structure, even if only rarely acknowledged as such. The institution’s constitutional commitment to authorship—as both a *status* (“author”) and a *process* (“authoring”)—requires paying close attention to the way in which a work is created and then ascribed to an identified human agent. Causal intuitions therefore indelibly influence the way in which courts and scholars choose to identify the author of a work, intuitions that are capable of being systematized under the rubric of “authorial causation.” Nonetheless, the reality remains that causal principles rarely ever rise to the surface as an overt part of copyright reasoning. They instead lurk in the shadows of copyright law’s various other doctrines that purport to perform principally non-causal functions, thereby allowing copyright jurisprudence to overlook the role and influence of causation in the construction of authorship.

²³⁶ See, e.g., *Christus Health Ark-La-Tex v. Curtis*, 412 S.W.3d 44, 48 (Tex. App. 2013).

CAUSING COPYRIGHT

Copyright jurisprudence would therefore benefit significantly from a direct engagement with authorial causation, an engagement that would inject a measure of analytical coherence and normative consistency into important aspects of copyright doctrine. An independent requirement of “copyrightable causation” that a plaintiff would need to establish, as part of the copyrightability determination, would go a long way in realizing this.

Tracking copyright’s basic intuitions about authorial causation, the requirement of copyrightable causation would consist of two elements. The first, which would focus on the epistemic dimension of causation and rely principally on fact-finding, would seek to identify the human agent responsible for bringing the work into existence. Once the human agency is identified in the first step, the second step would then evaluate whether that agency was normatively sufficient to merit legal characterization as the authorial cause and thereby produce the status of “author” for the identified agent. Built on the analytical logic of tort law’s causal inquiry, copyrightable causation would thus recognize that authorial causation involves both descriptive and evaluative dimensions and that while the two cannot be completely disentangled, their relative contributions to the analysis can nonetheless be sequenced in a way that renders one more salient than the other in each step. In so doing, it would also allow copyright law to embrace its normative pluralism through the deployment of suitable mid-level principles during the analysis.

Developing a requirement of copyrightable causation, modelled on tort law’s rules about causation, will also affirm the idea that copyright law and policy can benefit from looking to different areas of the common law for its functioning, and that courts have an important role to play in reforming aspects of the copyright system even if it seen as principally statutory in origin. To the extent that the copyright statute—and the Constitution—confirm the centrality of “authorship” to copyright law, but then leave it up to the courts to ultimately determine the precise contours of that idea, courts should be willing to embrace the law-making role that the system consciously delegates to them. And in so doing they would do well to look to analogous ideas and concepts that have been developed and employed with fecundity in other areas. The principles of causation represent one such domain, where logic, theory and practice serve as convenient guides.