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ARTICLE

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 would be best realized through an independent requirement—copyrightable causation—that the creator of a work must satisfy in order to qualify as its author for copyright protection. Tracking 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 causation an explicit 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.

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INTRODUCTION

What is the nature and quantum of human agency needed for someone to claim copyright in an original work of expression? At first glance, this question may seem overly 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 In this episode, a wildlife photographer, David Slater,

1. See Danny Cevallos, Opinion, When a Monkey Takes a Selfie . . . , CNN (Aug. 18, 2014), <http://www.cnn.com/2014/08/08/opinion/cevallos-monkey-selfie-copyright/> [<http://perma.cc/A2CQ-EALS>]; Samuel Gibbs, Monkey Business: Macaque Selfie Can't Be Copyrighted, Say US and UK, Guardian (Aug. 22, 2014), <http://www.theguardian.com/technology/2014/aug/22/monkey-business-macaque-selfie-cant-be-copyrighted-say-us-and-uk> [<http://perma.cc/M6HT-VLUZ>]; 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 [<http://perma.cc/G7GK-DQTR>]; Olivier Laurent, Monkey Selfie Lands Photographer in Legal Quagmire, Time (Aug. 6, 2014), <http://time.com/3393645/monkey-selfie-lands-photographer-in-legal-quagmire/> [<http://perma.cc/S34F-FSS4>]; 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> [<http://perma.cc/TD37-YYZR>];

spent several days in Indonesia following a group of macaque monkeys and photographing their behavior.² At one point during the trip, Slater 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.³ Soon enough, a group of monkeys came by and started looking at the reflective lens of the camera.⁴ Unexpectedly, one monkey began pressing the camera's buttons and ended up taking a self-photograph—that is, a “selfie.”⁵ Did Slater *create* the photograph, qualifying him as its author? His general intention was to photograph the monkeys in close proximity.⁶ He certainly provided all the equipment, set it all up appropriately, and anticipated that the monkeys would approach the camera.⁷

Just as Slater was contemplating bringing suit against a website that posted the photograph without his permission, the Copyright Office clarified its rules and eliminated the possibility of protection for the work, concluding that to be eligible for protection, a work “must be created by a human being.”⁸ 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.”⁹ The Copyright Office was

Jordan Weissmann, If a Monkey Takes a Selfie, Who Owns the Copyright?, *Slate: Moneybox* (Aug. 6, 2014, 6:03 PM), http://www.slate.com/blogs/moneybox/2014/08/06/monkey_selfie_who_owns_the_copyright.html [<http://perma.cc/3TGT-DX95>].

2. See *Sulawesi Macaques . . .*, *DJS Photography*, <http://www.djsphotography.co.uk/Tropical%20Forests/Sulawesi%20Macaques.htm> [<http://perma.cc/P2GU-DK9K>] (last visited Sept. 12, 2016).

3. *Id.* 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 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 experiance [sic] lasted about 30 minutes.

Id.

4. *Id.*

5. *Id.*

6. *Id.* (“I now wanted to get right in their faces with a wide angle lens.”).

7. See *id.*

8. U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 313.2 (3d ed. 2014) [hereinafter *U.S. Copyright Office, Compendium*]; see also David McAfee, *Copyright Office Says It Will Not Register ‘Monkey Selfie,’ Law360* (Aug. 22, 2014, 8:15 PM), <http://www.law360.com/articles/570432/copyright-office-says-it-will-not-register-monkey-selfie> [<http://perma.cc/UZA2-G2VN>] (reporting on the new revision to the *Compendium* in the context of Slater's “monkey selfie” controversy).

9. U.S. Copyright Office, *Compendium*, *supra* note 8, § 313.2.

thereby suggesting that while Slater played some role in the creation of the photograph, that role was insufficient to make him its author, since the real creator of the work was the monkey.¹⁰ Even though the work itself met all the formal requirements of copyrightability, the rules presumptively denied Slater and the work protection because Slater's failure to press the shutter button himself rendered him ineligible to be characterized as the author of the photograph.¹¹ In other words, this failure 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 expression."¹² 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 subjects the authorial status of a claimant to examination only when disputed.¹³ 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.¹⁴ Authorship in this stylized conception originates entirely in the formal doctrinal prerequisites that a work needs to satisfy, such as

10. Indeed, this reasoning formed the basis for the court's decision in a lawsuit brought by People for the Ethical Treatment of Animals, which asserted that the macaque was the author of the work and could qualify for copyright ownership under the law. See *Naruto v. Slater*, No. 15-cv-04324-WHO, 2016 WL 362231, at *1 (N.D. Cal. Jan. 28, 2016). The court dismissed the lawsuit, concluding that "works created by animals are not entitled to copyright protection." *Id.* at *4.

11. 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> [<http://perma.cc/S7MV-769P>]; see also 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> [<http://perma.cc/HRN8-AQ8L>].

12. 17 U.S.C. § 102(a) (2012); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 *Stan. L. Rev.* 485, 487–88 (2004) ("Under current law, copyright arises the moment an original piece of expression is fixed . . .").

13. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011) ("In the ordinary copyright case, authorship and fixation are not contested; most works presented for copyright are unambiguously authored and unambiguously fixed."). For examples of this approach, see *Cariou v. Prince*, 714 F.3d 694, 699 (2d Cir. 2013) (presuming without further examination authorship of a book of photographs taken by the plaintiff); *Harney v. Sony Pictures Television, Inc.*, 704 F.3d 173, 176–77 (1st Cir. 2013) (presuming the plaintiff's authorship of a photograph). In the latter of these cases, the court acknowledged that ownership of the copyright was "undisputed," *id.* at 182, suggesting that the same logic extended to the authorship question too.

14. See 17 U.S.C. § 102(a) (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 the conditions of copyrightability came to be, see Russ VerSteeg, *Defining "Author" for Purposes of Copyright*, 45 *Am. U. L. Rev.* 1323, 1326–33 (1996).

the originality requirement¹⁵ and the idea-expression dichotomy.¹⁶ This is true even though the term “authorship” suggests a particular form, type, and amount of agency underlying the creative process that leads to the work’s creation.¹⁷ This endogenous construction of authorship and its fragmented understanding through the individual components of copyrightability collectively disable any direct scrutiny of the causal connection between an individual’s actions and the production of the creative work. The law always presumes a (human) cause for copyright protection once the work itself is found to be protectable, with individualized proof of causation being unnecessary.¹⁸ 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.¹⁹

Despite its growth to encompass a broad array of creative works and processes,²⁰ copyright jurisprudence has failed to develop a mechanism for assessing when someone is 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 the centrality of causation (and causal responsibility) in determining *when* and *how* someone ought to be treated as the author of a particular work of expression already brought into existence.²¹ Not only does this lie in stark

15. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (explaining the originality requirement).

16. See 17 U.S.C. § 102(b) (codifying the idea-expression dichotomy).

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

18. See 17 U.S.C. § 102(a) (offering protection to works of authorship and then categorizing “works of authorship” based on works but not authorship).

19. See U.S. Copyright Office, *Compendium*, supra note 8, § 313.2 (using the phrases “created by,” “produced by,” and “taken by,” which have causal undertones, to describe human authorship).

20. See 17 U.S.C. § 102(a) (listing the multiple categories of works that obtain protection under copyright); H.R. Rep. No. 94-1476, at 52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665 (noting that the categories in § 102(a) are “very broad”).

21. See, e.g., Jaszi, *Toward a Theory of Copyright*, supra note 17, at 456 (attempting to “deconstruct” authorship in copyright law using literary theory); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author,’* 17 *Eighteenth-Century Stud.* 425, 426–48 (1984) (using literary history to explain the emergence of the author in copyright). For two efforts that adopt a more pragmatic focus on the process of authoring a work, see Alan L. Durham, *The Random Muse:*

contrast to other areas of law in which the jurisprudence overtly addresses questions of causation,²² but it also lies in contrast to copyright's own treatment of liability (for infringement), in which courts have come to see causation as an integral element of the analysis.²³ If copyright law and authorship do indeed embody a causal element—as one would expect, given their focus on creative behavior—the element is well hidden behind a cascade of copyright's other intuitions and beliefs.²⁴

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 question of causation only indirectly (and begrudgingly).²⁵ Consider an artist who accidentally knocks over a palette of paints to produce a visually appealing design on a nearby canvas that belongs to someone else,²⁶ or a translator who, while attempting to decipher an ancient text, makes creative choices during the process that render the translation fairly distinct.²⁷ 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

Authorship and Indeterminacy, 44 *Wm. & Mary L. Rev.* 569 (2002); David Nimmer, Copyright in the Dead Sea Scrolls: Authorship and Originality, 38 *Hous. L. Rev.* 1 (2001) [hereinafter Nimmer, *Dead Sea Scrolls*]. Neither, however, appreciates the role or significance of causation in the authorship determination, and they both inevitably revert to understanding authorship in terms of its normative significance for copyright. See *infra* notes 59–63 and accompanying text.

22. See H.L.A. Hart & Tony Honoré, *Causation in the Law* 130–32 (2d ed. 1985) (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* 3 (2009) [hereinafter Moore, *Causation and Responsibility*] (discussing the unifying conception of causation in the areas of tort and criminal law). Tort law is of course the area in which the jurisprudence of causation is best developed today. See, e.g., Leon Green, The Causal Relation Issue in Negligence Law, 60 *Mich. L. Rev.* 543, 545 (1962); Richard W. Wright, Causation in Tort Law, 73 *Calif. L. Rev.* 1735, 1737 (1985).

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

24. See *infra* Parts I–II (describing how courts usually address causal questions only through other copyright doctrines).

25. See *infra* Parts I–II.

26. See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 105 (2d Cir. 1951) (concluding that an “unintentional[]” variation remains copyrightable if subsequently “adopt[ed]” by the author).

27. 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, 128 (2001).

the claimant.²⁸ 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.²⁹ Copyright law treats the author's intentionality—or lack thereof—as irrelevant to the originality determination, which is satisfied as long as the work itself exhibits a “modicum of creativity.”³⁰ By refusing to address the core questions 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.

This Article argues that copyright law embodies a latent theory of causation, seen in early attempts to construct the “author” for specific categories of work³¹ and today hidden behind doctrinal proxies that perform other roles.³² 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 causation's dormant existence. Several of copyright law's modern doctrines embody snippets of this account of causation, but scholars have rarely understood these doctrinal devices as related to causation. Recognizing that the overt acknowledgment of causation's place in copyright law would better serve the law, this Article proposes an independent causation requirement that plaintiffs would have to prove as part of their *prima facie* cases. Here, as elsewhere, the workings of the common law provide important insights into how copyright law might realize this requirement.³³

Ever since the advent of legal realism as the dominant approach to legal analysis,³⁴ scholars have come to see the identification of an act as a

28. 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01[A], LexisNexis (database updated June 2016) (discussing copyright's “originality” requirement). For a general overview of the connection between originality and authorship, see Nimmer, *Dead Sea Scrolls*, *supra* note 21, at 13 (noting authorship has come to be understood as synonymous with origination); see also Ginsburg, *supra* note 17, at 1078 (“[O]riginality’ is synonymous with authorship.”).

29. 1 Nimmer & Nimmer, *supra* note 28, § 2A.08[E][3][a][i] (observing elements of originality must “manifest themselves in the work of expression itself” rather than the “process”).

30. Ginsburg, *supra* note 17, at 1085–88. Professor David Nimmer has argued that intentionality ought to be the basis for authorship. See Nimmer, *Dead Sea Scrolls*, *supra* note 21, at 204–10.

31. See *infra* Part I.

32. See *infra* Part II.

33. It is worth noting at the outset that the argument in this Article concerns itself exclusively with authorship theory and doctrine as understood in U.S. copyright law, leaving for follow-up work the exploration of how authorship in other jurisdictions, especially civil law countries, embodies different ideas of causation.

34. See Joseph William Singer, *Legal Realism Now*, 76 *Calif. L. Rev.* 465, 467 (1988) (reviewing Laura Kalman, *Legal Realism at Yale 1927–1960* (1986)) (“All major current schools of [legal] thought are, in significant ways, products of legal realism.”); see also

“cause” of an event or outcome as intricately connected to the enterprise of regulating the consequences of that determination, rather than as a purely neutral description of reality.³⁵ Causation in the law thus embodies an unquestionably normative dimension, albeit one that is superimposed on factual criteria.³⁶ Identifying an antecedent event as a “cause” of a legally relevant outcome involves a determination that there is both a *factual* connection between that event and the outcome and a normatively desirable reason for recognizing that event as *legally* significant in light of the law’s goals and purposes for the area involved.³⁷

In a similar vein, developing a requirement of “copyrightable causation” as a prerequisite to copyright protection would serve copyright jurisprudence well.³⁸ Copyrightable causation would require determining whether the causal antecedent that the putative author or 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.³⁹ Much like other aspects of copyrightability, copyrightable causation would constitute a part of the plaintiff’s *prima facie* case for a claim of infringement and embody two separate elements. The first element, “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.⁴⁰ The second component, “legal

Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *Tex. L. Rev.* 267, 267 (1997) (recognizing the “enormous influence Legal Realism has exercised upon American law and legal education over the last sixty years” and referring to the statement “we are all realists now” as a “cliché”). Professor Brian Leiter also notes that legal realism is “omnipresent in American law schools and legal culture.” *Id.* at 274. For a general overview of legal realism, see Laura Kalman, *Legal Realism at Yale 1927–1960*, at 3–5 (1986) (describing the belief that abstract rules and concepts do not decide cases as a central feature of the theory); L.L. Fuller, *American Legal Realism*, 82 *U. Pa. L. Rev.* 429, 431–37 (1934) (describing the theory as being about the expansion of legitimate sources for adjudication in the law, among other things).

35. See, e.g., Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 *Stan. L. Rev.* 60, 61–64 (1956) (explaining how a seemingly factual determination as to causation is nevertheless “affected by the purpose” that the fact-finder “seek[s] to serve”); 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) [hereinafter Green, *Dependable Rules*].

36. The best-known exposition of this normative dimension exists in tort law, in which the law distinguishes between cause in fact and 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 generally Leon Green, *Rationale for Proximate Cause* (1924) [hereinafter Green, *Proximate Cause*].

37. See Calabresi, *supra* note 36, at 100–01 (discussing how the mixed goals of tort law can explain different types of causation).

38. See *infra* Part III.

39. See *infra* Part III.

40. See *infra* section III.B.

creation,” would then ask whether 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.⁴¹ The application of this requirement to different areas of creativity should produce varying standards, in turn reflective of copyright’s goals and purposes for those areas.⁴²

Incorporating a copyrightable-causation requirement into copyright law would also add substantive content to copyright’s purported—and constitutionally enshrined⁴³—commitment to authorship. Scholars today understand authorship to be a largely amorphous idea within copyright law—one that plays a symbolic and expressive role rather than an analytical one.⁴⁴ 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 *authoring* a work of expression and enable a more detailed examination of that process.⁴⁵ The requirement 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.”⁴⁶ Authorship would in the process re-emerge not just as a symbolic ideal within the system but also as a substantive feature of copyright doctrine that plays a significant role in determining claimants’ rights.⁴⁷ The copyrightable-causation requirement would thereby emphasize that causation is the *sine qua non* of authorship.

While copyright law is statutory in origin as a purely formal matter, much of the modern American copyright system nonetheless consists of rules and principles developed by courts incrementally and contextually in common law fashion. These rules, best described as the federal common law of copyright, augment the statutory text, a reality that courts

41. See *infra* section III.C.

42. See *infra* section III.C (describing how so-called “midlevel principles” could inform the legal-creation inquiry).

43. See U.S. Const. art. I, § 8, cl. 8 (empowering Congress to grant certain exclusive rights to “Authors”).

44. Bracha, *supra* note 17, at 188–89 & n.4 (describing this trend in American copyright scholarship).

45. See *infra* Part III (proposing a structured framework for courts to examine whether a claimant has satisfied copyrightable causation).

46. See *infra* Part III (recommending a shift toward emphasis on the process that leads to a work’s creation rather than just the product of that process).

47. For a discussion of the current role of authorship—as a symbol—in copyright law, see Shyamkrishna Balganesh, *The Folklore and Symbolism of Authorship in American Copyright Law*, 54 *Hous. L. Rev.* 403 (2016).

and scholars have come to see as uncontroversial.⁴⁸ Indeed, Congress has incorporated large parts of this federal common law into the text of the Copyright Act itself, effectively restating the rules in statutory form.⁴⁹ The copyrightable-causation requirement proposed herein would be a valuable addition to this body of law, and given the requirement's connection to the common law of torts, courts would be best positioned to develop it. Additionally, the requirement would need to work in tandem with the law's existing requirement of originality, an established feature of the common law of copyright,⁵⁰ giving federal courts a logical and prudential reason to develop it without congressional intervention.⁵¹

Parts I and II of this Article unpack copyright's dormant theory of authorial causation. Part I looks to early case law, in which 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 provides an overview of copyright law's modern treatment of authorial causation. It analyzes how courts have routinely deployed several of copyright's current doctrinal devices to mask what are essentially questions of causation, undermining the analytical coherence of copyright doctrine. Part III then moves to the prescriptive and introduces an independent element of copyrightability

48. See Shyamkrishna Balganesh, *Stewarding the Common Law of Copyright*, 60 J. Copyright Soc'y U.S.A. 103, 108–16 (2013) [hereinafter Balganesh, *Stewarding*] (discussing this development within copyright jurisprudence).

49. See, e.g., 17 U.S.C. § 101 (2012) (defining the term “joint work”); *id.* § 102(a) (requiring a work of authorship to be “original”); *id.* § 107 (codifying the “fair use” doctrine).

50. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“The *sine qua non* of copyright is originality.”).

51. Depending on one's view of the role of courts in the U.S. legal system, one might worry that any addition to the federal common law of copyright vests courts with additional discretion and that this discretion may be subject to abuse and inconsistent application. However, this concern overlooks some of the key features of the institutional framework underlying copyright law. In 1976, Congress consciously chose to avoid codifying several copyright doctrines that had been developed in common law style by courts, thereby implicitly recognizing that the Copyright Act was at least in part (and perhaps in significant part) a common law statute. See, e.g., H.R. Rep. No. 94-1476, at 51 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664 (noting how the doctrine of originality was “purposely left undefined . . . [and] intended to incorporate without change the standard of originality established by the courts under the [previous] copyright statute”); Balganesh, *Stewarding*, *supra* note 48, at 108–10; Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 Yale L.J. 1126, 1167–68 (2009) (reviewing Neil Weinstock Netanel, *Copyright's Paradox* (2008)) [hereinafter Balganesh, *Debunking Blackstonian Copyright*] (arguing the Copyright Act is “structured largely as a common law enactment”). Indeed, recent developments, such as the American Law Institute's new project attempting to restate the federal law of copyright, suggest a general willingness to embrace the role of courts in copyright reform. See *Restatement of the Law, Copyright*, Am. Law Inst., <http://www.ali.org/projects/show/copyright/> [<http://perma.cc/V3TQ-STXC>] (last visited Sept. 12, 2016).

that focuses on causation—“copyrightable causation”—and unpacks its elements. Drawing on the understanding of causation 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 considers a few possible extensions and applications of the copyrightable-causation requirement.

A caveat is in order before proceeding further. As should be apparent from the following discussion, the principal impetus for this Article’s proposal for an overt copyrightable-causation requirement is the recognition that the ideas underlying the requirement are already dormant within copyright jurisprudence and thinking. Consequently, the requirement is not designed to exclude some forms of expression from protection or to bring certain others under the umbrella of copyrightability. In actual practice, the requirement is unlikely to alter the boundaries of copyrightability in any significant manner. Rather, a copyrightable-causation requirement would streamline the system’s current rationale and better articulate the myriad ideas that are currently concealed within the concept of authorship.

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. Section I.A first looks to early copyright jurisprudence involving nontraditional settings of creative production, in which courts have grappled with the issue of causation when determining a work’s authorship. Section 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 writings to “Authors.”⁵² 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.⁵³ Over the last several decades, scholars have spent a significant amount of time and effort trying to understand *how*, *why*, and *when* copyright thinking came to embrace this overbearing emphasis on the author, as well as the consequences of this emphasis for copyright jurisprudence. One prominent school of thought locates the origins of this emphasis in

52. U.S. Const. art. I, § 8, cl. 8.

53. Copyright Act 1709 (Statute of Anne), 8 Ann. c. 21 (Gr. Brit.) (repealed 1842).

the seventeenth and eighteenth centuries, by which time scholars believe an enlightenment-driven, individualistic conception of creativity emerged—influencing copyright law and policy for several subsequent decades.⁵⁴ Another more recent school of thought argues that the prior account is largely incomplete with respect to American copyright law and that conceptions of authorship came to be firmly embedded in copyright doctrine only during the late eighteenth and nineteenth centuries.⁵⁵

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.⁵⁶ Scholars have generally taken authorship 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.⁵⁷ Even when they do discuss authorship as a process, they

54. See, e.g., James Boyle, *Shamans, Software, and Spleens: Law and Construction of the Information Society* 58 (1996); Mark Rose, *Authors and Owners: The Invention of Copyright* 1–3 (1993); Boyle, *Shakespeare and the Framers*, *supra* note 17, at 629; Jaszi, *Toward a Theory of Copyright*, *supra* note 17, at 455–56. See generally *The Construction of Authorship: Textual Appropriation in Law and Literature* (Martha Woodmansee & Peter Jaszi eds., 1994) [hereinafter *The Construction of Authorship*] (presenting a collection of essays that explore the social, cultural, and legal construction of authorship); Bracha, *supra* note 17, at 192–97 (discussing U.S. copyright law’s treatment of authorship in the nineteenth century).

55. Bracha, *supra* note 17, at 192 (noting these accounts are “incomplete or even flawed”).

56. But see Dan L. Burk, *Method and Madness in Copyright Law*, 2007 *Utah L. Rev.* 587, 597–602 (discussing the importance of the process of creation in copyright); Nimmer, *Dead Sea Scrolls*, *supra* note 21, at 158–212 (developing a theory of authorship that focuses on intentionality).

In recent times, the issues of computer-generated creativity and artificial intelligence have brought greater attention to the question of what authoring involves. Professor Annemarie Bridy, one of the earliest scholars to examine the deficiencies inherent in American copyright law’s treatment of artificial intelligence, suggested using a dichotomy of “author-in-law” and “author-in-fact” to address the issue. See Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, *Stan. Tech. L. Rev.*, no. 5, 2012, at 1, 24–27, <http://web.law.columbia.edu/sites/default/files/microsites/kernoachan/09.materials-Bridy.pdf> [<http://perma.cc/9L9R-M2HX>]. In her discussion, Bridy notes—in passing—that courts occasionally associate authorship with causation. See *id.* at 5 & n.23. For more recent work examining computer-generated creativity, see James Grimmelmann, *Copyright for Literate Robots*, 101 *Iowa L. Rev.* 657, 661–74 (2016) [hereinafter Grimmelmann, *Copyright for Literate Robots*]; James Grimmelmann, *There’s No Such Thing as a Computer-Authored Work—and It’s a Good Thing, Too*, 39 *Colum. J.L. & Arts* 403, 409–16 (2016) [hereinafter Grimmelmann, *No Such Thing*].

57. See, e.g., Jaszi, *Toward a Theory of Copyright*, *supra* note 17, at 456 (using literary theory to describe the concept of authorship as “ideologically charged”); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, *in The Construction of Authorship*, *supra* note 54, at 15, 15–28 (explaining how popular notions of the author as

invariably treat the question as driven in significant part by normative considerations underlying copyright's construction of authorship, clouding its analytical basis.⁵⁸

Professor Alan Durham, for example, argues that “indeterminate works”—works that are created in some part by forces beyond the will or control of the author—should receive protection because they are just as original as other works.⁵⁹ Building on the idea that authorship in copyright is defined “in terms of originality,”⁶⁰ Durham argues that an indeterminate work merits protection when it is “made” by a human being, “similar in kind” to other protected works, and under the “creative control” of the human.⁶¹ But this account's a priori category of “indeterminate works” assumes away the core of the problem, which its solution then attempts to artificially remedy. This analysis all too readily implies that there is indeed a workable basis for maintaining the determinate–indeterminate distinction, when this distinction is the source of the problem in the first place. Durham does the same with works “made” by someone and works under an individual's “control,” all in an effort to further a particular normative position (associated with originality).⁶² Yet nowhere in this analysis does Durham recognize that the very ideas of determinacy, control, and the like themselves turn on an understanding of causation.⁶³

As a practical matter, there is little need for courts to scrutinize an individual's contribution to the process of creating the work, given that the issue appears to be undisputed in the vast majority of cases.⁶⁴ It is

a solitary individual misunderstand authors' actual creative processes, which are frequently collaborative).

58. See, e.g., Jaszi, *Toward a Theory of Copyright*, supra note 17, at 456–57 (arguing other understandings of authorship have obfuscated “the actual stakes” underlying copyright law).

59. Durham, supra note 21, at 573.

60. *Id.* at 618.

61. *Id.* at 636.

62. See *id.*

63. In contrast to Durham, Nimmer argues that authorship in copyright law should require an intentionality accompanying an author's behavior. See Nimmer, *Dead Sea Scrolls*, supra note 21, at 209–12. Nimmer emphasizes “subjective expression” as critical to authorship. *Id.* at 208–09. Leaving aside the normative desirability of Nimmer's theory, the fact remains that copyright law does not actively police the subjective intentionality of a putative author's actions. See Ginsburg, supra note 17, at 1085. As the rest of this Part will show, courts have historically been willing to (1) attribute authorship when such intentionality remains altogether unproven and (2) deny authorship when intentionality exists but other forms of connection are seen as missing.

64. See *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011) (“In the ordinary copyright case, authorship and fixation are not contested; most works presented for copyright are unambiguously authored and unambiguously fixed.”). The issue is, of course, a central one in joint-authorship cases. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1230–33 (9th Cir. 2000) (addressing the question of the plaintiff's status as a joint author).

only when confronted with the need to identify the author of a work by reference to the author's 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).⁶⁵ The historical jurisprudence that emerged from such situations therefore sheds important light on the theory of authorial causation that copyright came to embrace⁶⁶ and later conceal under various proxies.⁶⁷

1. *Choosing Among Contributors to a Work.* — The earliest situations in which courts confronted the question of authorial causation were cases in which 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 were not instances of joint authorship, with more than one party claiming to be the work's author, but instead situations in which one party claimed to be the author of the work *to the exclusion of all the other contributors*.⁶⁸ These disputes usually followed a common pattern. One party—the conceiver—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.⁶⁹ These executors would no doubt produce expression; yet such expression was decidedly for use in the overall project.⁷⁰ 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 the project's individual components.⁷¹

In an overwhelming majority of these cases, courts recognized the conceiver to be the author of the work, even though significant parts of the

65. See *infra* sections I.A.1–3 (examining courts' historical treatment of authorial causation).

66. See *infra* sections I.A.1–3 (surveying courts' explicit use of causal logic in numerous early authorship cases).

67. See *infra* Part II (discussing the concealment of authorial causation within the originality, joint works, and work for hire doctrines).

68. See, e.g., *Scott v. Stanford* (1867) 3 LR Eq. 718 (Ch) at 718–21 (Eng.).

69. See, e.g., *id.* at 723 (noting the plaintiff may have had assistance from his "clerks").

70. See, e.g., *id.* ("It appears to me quite immaterial whether he has been assisted in the compilation by his own clerks, or by those of the Corporation.").

71. See, e.g., *id.* at 722–23 (examining whether an officer of a corporation could be characterized as an author even if his clerks assisted him); see also *Eaton v. Lake* (1888) 20 QBD 378 at 383–84 (Eng.) (considering whether a musical-composition copyright vested in a composer or his employer); *Hatton v. Kean* (1859) 141 Eng. Rep. 819, 823–24; 7 C.B.N.S. 268, 276–77 (examining the authorship of a musical composition commissioned for a play); *Sweet v. Benning* (1855) 139 Eng. Rep. 838, 847; 16 C.B. 459, 480–81 (assessing the respective rights of a periodical owner and a writer employed by the periodical); *Maclean v. Moody* (1858) 30 Sc. Jur. 693, 695–98 (Scot.); 20 D. 1154 (exploring whether the copyright to a shipping list vested in its publishers).

actual execution came from someone else.⁷² 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.”⁷³ In one often-quoted case, the court observed:

[U]nder the [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.⁷⁴

Central to this conclusion was a finding that the work owed its origins to its conceiver, since it “emanate[d]” from him.⁷⁵ When exactly this connection might be implied was of course far from clear in practice. Consequently, in situations in which the connection between the conceiver and the final work appeared more attenuated, courts did not hesitate to deny authorship status to the conceiver.⁷⁶ Elaborating on this strand of thinking, one treatise noted that “[t]he mere suggestion of a subject or idea which is then entirely designed and executed by another does not constitute the originator of the idea an author.”⁷⁷

Scholars have often cited the mid-nineteenth-century case of *Shepherd v. Conquest*⁷⁸ as an example of such a denial.⁷⁹ The plaintiffs in that case were the proprietors of a theater who had employed a playwright to write and adapt two plays for them.⁸⁰ The proprietors compensated the playwright for his service and paid him a weekly salary,

72. See, e.g., *Scott* 3 LR Eq. at 723 (finding plaintiff’s collection of coal data protected despite assistance from clerks); *Hatton* 141 Eng. Rep. at 824; 7 C.B.N.S. at 279–80 (holding that the play’s creator held the copyrights to compositions commissioned for the play); *Sweet* 139 Eng. Rep. at 847–48; 16 C.B. at 480–81 (ruling that the owners of a periodical, rather than its writers, held the copyrights to articles published in the periodical).

73. E.J. Macgillivray, *A Treatise upon the Law of Copyright* 62 (1902).

74. *Hatton* 141 Eng. Rep. at 823; 7 C.B.N.S. at 277 (internal quotation marks omitted) (quoting *Shepherd v. Conquest* (1856) 139 Eng. Rep. 1140, 1147; 17 C.B. 427, 443).

75. Macgillivray, *supra* note 73, at 62.

76. See, e.g., *Eaton* 20 QBD at 383–84; *Shepherd* 139 Eng. Rep. at 1147; 17 C.B. at 444–45.

77. Macgillivray, *supra* note 73, at 63.

78. 139 Eng. Rep. 1140; 17 C.B. 427.

79. See, e.g., Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* 247 n.1 (Rothman Reprints, Inc. rpt. 1972) (1879); see also *Eaton* 20 QBD at 383.

80. See *Shepherd* 139 Eng. Rep. at 1146; 17 C.B. at 441–42.

and the playwright eventually produced a dramatic work.⁸¹ 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.⁸² The court disagreed, noting that the proprietors had not contributed to the “design or execution of the work.”⁸³

At first glance, one might interpret the case as having premised its conclusion on the idea-expression dichotomy—the principle that the plaintiffs had merely contributed the idea rather than the expression.⁸⁴ However, the idea-expression dichotomy appeared to be largely irrelevant to the court, which faulted the plaintiffs for not having “contributed an idea.”⁸⁵ The decision rested instead on the finding that the plaintiffs had made *no* contribution of significance to the work beyond “suggest[ing]” its subject.⁸⁶

According to this understanding, valid authorial causation therefore required a contribution that was more than a mere suggestion of the idea. All the same, courts did not require the actual execution or design of the expression.⁸⁷ Rather, courts required the contribution to be compositional—that is, related to the content underlying the work rather than its mere physical manifestation.⁸⁸ What made a conceiver an author was thus her contribution to the composition of the content, even if not directly to the content (expression) itself. However, the celebrated case of *Walter v. Lane*,⁸⁹ which added an altogether new twist to courts’ early notion of authorial causation, called this compositional requirement into question.

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.⁹⁰ Several reporters attended these speeches and took handwritten notes of the speeches in shorthand.⁹¹

81. See *id.* at 1141; 17 C.B. at 429.

82. See *id.* at 1141–42; 17 C.B. at 428–30.

83. *Id.* at 1147; 17 C.B. at 445.

84. See 17 U.S.C. § 102(b) (2012) (codifying the idea-expression dichotomy in U.S. copyright law); Julie E. Cohen et al., *Copyright in a Global Information Economy* 90 (4th ed. 2015) (explaining the idea-expression dichotomy generally).

85. *Shepherd* 139 Eng. Rep. at 1147; 17 C.B. at 445.

86. *Id.* at 1147; 17 C.B. at 445 (“[N]o such effect can be produced where the employer merely suggests the subject.”).

87. See *supra* notes 72–74 and accompanying text (noting courts often recognized the work’s “conceiver” as the author “even though significant parts of the actual execution came from someone else”).

88. See *supra* notes 72–86 and accompanying text (discussing courts’ emphasis on a connection between the contribution and the design of the work).

89. [1900] AC 539 (HL) (appeal taken from Eng.).

90. *Id.* at 545.

91. *Id.* at 551.

They thereafter “wrote the descriptive parts of their reports” and “corrected and revised and punctuated” the speech transcriptions for publication in the London newspaper the *Times*, which claimed to carry the verbatim text of the original speeches.⁹² 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.⁹³

The House of Lords found for the plaintiffs, concluding that the reporters were indeed the authors of the work that they had transcribed.⁹⁴ To the court, the work did not have to be an original composition to be eligible for protection.⁹⁵ Since each reporter was crucially responsible for producing the book, this was sufficient for a claim of authorship.⁹⁶ The judges placed great reliance on the fact that absent the “brain and handiwork [of the reporters] the book would never have had existence.”⁹⁷ The book’s reliance merely on prior content (the speech) did not render it any less an act of authorship.⁹⁸

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.⁹⁹ *But for* the speculating conceiver, who was willing to generate the idea, design, and resources necessary to produce the work, there would be no work to speak of;¹⁰⁰ and *but for* the reporter transcribing the orally delivered speech, there would be no record of it to distribute.¹⁰¹ The denial of authorship status to an employer who played no active (and direct) role whatsoever in the production of the work was merely a recognition of an outer boundary in this but-for reasoning—that is, a situation in which the work could have still been produced even without the employer. The logic of causation had begun to take shape within copyright’s conception of authorship.

92. *Id.* at 556.

93. *Id.* at 542.

94. See *id.* at 550.

95. See *id.* at 547–48.

96. *Id.* at 550.

97. *Id.* at 559.

98. *Id.*

99. See, e.g., *Scott v. Stanford* (1867) 3 LR Eq. 718 (Ch) at 723 (Eng.); *Hatton v. Kean* (1859) 141 Eng. Rep. 819, 824; 7 C.B.N.S. 268, 279–80; *Sweet v. Benning* (1855) 139 Eng. Rep. 838, 847–48; 16 C.B. 459, 480–84.

100. See *Hatton* 141 Eng. Rep. at 823–24; 7 C.B.N.S. at 276–77.

101. See *Walter* [1900] AC at 550.

American copyright law around the time appears to have adopted a largely similar position, 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 United States.¹⁰² It also gleans from these cases an additional proposition of causal significance in an effort to reconcile the early cases: “When 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.”¹⁰³ The treatise goes on to observe that a translator is the author 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.¹⁰⁴ This approach to determining authorship is consistent with *Walter v. Lane*, but it also situates the authorship question in the context of the particular act (e.g., translation or composition) that the copyright system is attempting to validate through its grant of exclusive rights. The author, in other words, is the person who originated 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 was not until courts were forced to deal with situations in which 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 in which 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.¹⁰⁵ As noted previously, this was also around the time that copyright law—on both sides of the Atlantic—was grappling with the general question of authorship in situations involving multiple contributors.¹⁰⁶

In the United States, Congress amended the copyright statute to include photographs as copyrightable subject matter in 1865.¹⁰⁷ Consequently, courts had to decide whether photographs created prior to the amendment were at all eligible for protection under the general

102. See Drone, *supra* note 79, at 236.

103. *Id.*

104. *Id.*

105. See Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 *U. Pitt. L. Rev.* 385, 395–96, 413 (2004) (describing the popularity of portrait studios within “just ten years of the invention of photography”).

106. See *supra* section I.A.1 (discussing several English cases involving multiple contributors and a leading American treatise's view of these cases).

107. Copyright Act of 1865, ch. 126, § 1, 13 Stat. 540, 540 (repealed 1870).

principles of copyright. 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, *Wood v. Abbott*, a New York circuit court refused to treat a photograph as a work of authorship, reasoning that in photography, “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.”¹⁰⁸

The *Wood* court appeared conflicted about the proper role of human agency in the creation and production of photographic prints. For methods of imitation known at the time—such as engraving—the court readily recognized that the production of the work involved a “combination” of agency and mechanical processes but acknowledged that this combination satisfied copyright law’s minimum threshold of agency to qualify for protection.¹⁰⁹ For photography, however, the court found that this threshold was not satisfied, instead attributing the production of the photograph in its entirety to “the chemical force of light.”¹¹⁰ The human agency, if any, was in turn seen as limited to the positioning of the plate, paper, frame, and springs—cumulatively beyond the pale of the authorial causation supposedly recognized by the law at the time (i.e., pre-1865).¹¹¹ The reasoning in the case is perfectly consistent with what Professor Christine Farley describes as the conflict between photography as an art and as a science, which characterizes how individuals thought about the process at the time.¹¹²

After the copyright statute was amended (in both England and the United States) to cover photographs as protectable subject matter, the question of determining who might be characterized as the author of a photograph—and under what conditions—remained significant and fell to courts. *Nottage v. Jackson*, decided by the Court of Appeals in England,¹¹³ appears to be among the first cases to consider the question directly. There, the plaintiffs were the owners of a photography firm with several employees.¹¹⁴ On one occasion, the manager of the firm—of his own volition—decided to take a photograph of the Australian cricket team and sent an assistant to physically “take” the photograph, after which the firm processed, mounted, and offered the photograph for sale.¹¹⁵ 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

108. 30 F. Cas. 424, 425 (C.C.S.D.N.Y. 1866) (No. 17,938).

109. *Id.*

110. *Id.*

111. See *id.*

112. See Farley, *supra* note 105, at 389–90.

113. (1883) 11 QBD 627 (Eng.).

114. *Id.* at 627.

115. *Id.* at 627–28.

copyright law.¹¹⁶ The court answered the question in the negative.¹¹⁷ 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 in the idea behind it.¹¹⁸ Further complicating the analysis for the court was the reality that, given the complexity of the equipment involved, the process of taking the photograph itself often involved more than one individual.¹¹⁹ Reasoning through these issues, the court noted that it was ultimately searching for the *cause* of the photograph:

[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.¹²⁰

Here one sees for the first time a court openly acknowledging that the identification of authorship for a work is ultimately a causal question—a question of determining the “effective cause” of the protected work.¹²¹ Notably, the court readily acknowledged that this cause will vary from one setting to another, even for the same category of work.¹²² 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.¹²³ Additionally, the court gave the “cause” an epistemic basis—as something that might be discerned from evidence presented to the court.¹²⁴

116. *Id.* at 630.

117. *Id.* at 633.

118. *Id.* at 632–33.

119. *Id.* at 632 (“But he does not do it all, because I suppose there is another man who gets the plate ready; and there is another man who, when the thing is ready, takes the cap off.”).

120. *Id.* (emphasis added).

121. *Id.*

122. See *id.* (“[I]t will be a question in every case who that man is.”).

123. See *id.*

124. See *id.* (noting the identity of the person who is the work's “effective cause” is “a matter of evidence” and “a matter of fact”).

In short order, the same question arose under U.S. copyright law in the landmark Supreme Court case of *Burrow-Giles Lithographic Co. v. Sarony*.¹²⁵ *Burrow-Giles* involved a photograph of Oscar Wilde, taken by the photographer Napoleon Sarony.¹²⁶ 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.¹²⁷ 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," involving "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."¹²⁸

The Court chose to dodge the question of determining when and how photography was a purely mechanical (as opposed to artistic) process by concluding that an "ordinary production of a photograph" was indeed a purely mechanical process that would not qualify for protection.¹²⁹ Sarony's photograph, however, was not such an ordinary production; instead, it was "an original work of art[] [and] the product of plaintiff's intellectual invention," which rendered it eligible for protection.¹³⁰ The Court then approvingly cited 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."¹³¹ With this, *Burrow-Giles* came to endorse the "effective cause"—based construction of authorship in photographs.¹³²

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 preshutter activities of the photographer rather than in the postshutter—that is, negative development—ones.¹³³ This allowed the conception of authorship to draw a bright line between the human and mechanical aspects of photography, since postshutter activities at the time involved a far more significant reliance on technology.¹³⁴ In other words, the Court's singular focus on the preshutter cause of the photograph allowed authorship to emphasize the human dimension of the creative process involved.

125. 111 U.S. 53 (1884). *Burrow-Giles* now forms part of the copyright law canon. See, e.g., Farley, *supra* note 105, at 386 (describing it as a "well-known case in copyright law").

126. See *Burrow-Giles*, 111 U.S. at 54–55.

127. *Id.* at 55.

128. *Id.* at 59.

129. See *id.*

130. *Id.* at 60.

131. *Id.* at 60–61.

132. See *id.*

133. Farley, *supra* note 105, at 390.

134. See *id.*

Later photography cases generally followed the framework of *Burrow-Giles*, looking for sufficient preshutter agency on the part of a plaintiff-claimant to find authorship.¹³⁵ The “effective cause” idea has in the years since *Burrow-Giles* become the dominant approach to determining the authorship of a photograph, albeit without open acknowledgement.¹³⁶ 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.¹³⁷ Others involved in arranging, posing, or curating the subject matter have, through an application of the effective-cause standard, come to be seen as equally important agents in the overall causal chain that results in the production of the photograph.¹³⁸

Burrow-Giles’s effective-cause framework has had influence beyond photographs as well. For example, one court used the framework to classify the director of a motion picture as the work’s author, even though he played no direct role in its underwater filming, owing to the “control” that the director exercised over the overall process.¹³⁹

On one occasion, the Third Circuit used this idea to underplay the mechanical aspects of fixation in the authorship determination. In *Andrien v. Southern Ocean County Chamber of Commerce*, the court treated a cartographer who had surveyed a geographic area, conceptualized the maps at issue, and directed their production as the author of the maps

135. See, e.g., *Brod v. Gen. Publ’g Grp.*, 32 F. App’x 231, 234 (9th Cir. 2002) (relying on *Burrow-Giles* to find a copyrightable contribution for a joint-authorship claim in a photograph); *Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1074–75 (9th Cir. 2000) (“Courts today continue to hold that such decisions by the photographer [as described in *Burrow-Giles*]—or, more precisely, the elements of photographs that *result* from these decisions—are worthy of copyright protection.”); Farley, *supra* note 105, at 438–46 (discussing several post-*Burrow-Giles* photography cases and noting the similar emphasis on the photographer’s “process”).

136. This dominance is implicit in the reality that copyright law today embeds authorship in the question of originality and then assesses such originality for photographs using “the process that produced the work.” See Justin Hughes, *The Photographer’s Copyright—Photograph as Art, Photograph as Database*, 25 Harv. J.L. & Tech. 339, 396–97 (2012).

137. See, e.g., *Brod*, 32 F. App’x at 235 (finding the photographer to be a coauthor with an individual who played a role in arranging the subject matter); *Robinson v. Buy-Rite Costume Jewelry, Inc.*, No. 03 Civ. 3619(DC), 2004 WL 1878781, at *3–4 (S.D.N.Y. Aug. 23, 2004) (allowing individuals who did not physically take a photograph to be coauthors of the work). But see *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 316 (S.D.N.Y. 2000) (denying the nonphotographing party the status of joint author).

138. See, e.g., *Brod*, 32 F. App’x 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).

139. *Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic*, No. 97 Civ. 9248(HB), 1999 WL 816163, at *4–6 (S.D.N.Y. Oct. 13, 1999).

even though someone else had actually printed them.¹⁴⁰ The court defined the author as “the party who actually creates the work, that is, 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.”¹⁴¹ When the final task of fixation and embodiment might be characterized as purely “rote” or “mechanical,” the court reasoned that the human agency that constitutes authorship—that is, the cause—is to be found earlier in the chain.¹⁴² Distilled down to its basics, this logic 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,¹⁴³ later jurisprudence used terminology that seemed less overtly causal but nonetheless focused on the nature and quantum of human agency involved in bringing the work into existence.¹⁴⁴ More recently, the question has arisen in cases relating to so-called “computational creativity”—situations in which a person creates a computer program that then itself generates creative expression using its artificial intelligence.¹⁴⁵ In these instances, scholars have begun to question the appropriate role of human agency in determining the authorship of what are essentially machine-produced works.¹⁴⁶

3. *Spiritual Authorship*. — A third area in which the questions of human agency and causation became central to determining authorship for copyright purposes is automatic writing, also referred to as “psychography.”¹⁴⁷ Psychography involves an individual who transcribes expression that was supposedly communicated to her by a supernatural

140. See 927 F.2d 132, 133 (3d Cir. 1991).

141. *Id.* at 134.

142. *Id.* at 135.

143. See *supra* notes 113–120 and accompanying text (describing the courts’ search for the “effective cause” in preshutter agency).

144. See *supra* notes 135–142 and accompanying text (discussing the focus on human agency in photography, film, and cartography cases).

145. See Bridy, *supra* note 56, at 9–18 (discussing theories of computational creativity and describing several existing automatic-generating programs).

146. See *id.* at 21 (“Human creativity is necessary for the production of the [procedurally generated] work, but the human creative agent is not the author of the work in the traditional sense.”); see also Grimmelmann, Copyright for Literate Robots, *supra* note 56, at 669–74 (discussing various issues related to the authorship of computer-generated works); Grimmelmann, No Such Thing, *supra* note 56, at 409–14 (discussing the potential allocation of ownership between programmers and users of computer-generated works).

147. See William Stainton Moses, *Psychography: A Treatise on One of the Objective Forms of Psychic or Spiritual Phenomena* 19 (London, W.H. Harrison 1878); J.J. Owen, *Psychography: Marvelous Manifestations of Psychic Power* 14 (S.F., The Hicks Judd Co. 1893).

source.¹⁴⁸ The individual operates as the medium and converts the message of the supernatural source into understandable expression.¹⁴⁹ The early-twentieth-century English case of *Cummins v. Bond*¹⁵⁰ was the first to decide who the author of such expression was for the purposes of copyright law.¹⁵¹

The plaintiff in *Cummins* was a psychic who practiced automatic writing.¹⁵² After covering her eyes with one hand and holding a pencil in the other, she would pass into a state of trance and begin writing rapidly on a sheet of paper, sometimes at the rate of 2,000 words per hour and a half.¹⁵³ On one such occasion, she claimed to have been visited by a spirit and came to produce a work titled *The Chronicle of Cleophas*.¹⁵⁴ The work was authored in an archaic language, which the defendant then copied.¹⁵⁵ In an action for copyright infringement, the court had to confront the question of authorship in the work.¹⁵⁶

The court—somewhat comically—noted that the “true originator of all that is to be found in these 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.”¹⁵⁷ Without disputing the veracity of this claim, the court nonetheless proceeded to find that the plaintiff was indeed the author of the work for copyright purposes:

[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.

148. See Moses, *supra* note 147, at 19 (defining psychography as “writing without the intervention of ordinary human agency”); Owen, *supra* note 147, at 14 (describing psychography as “writing by spirit power”).

149. See Blewett Lee, *Copyright of Automatic Writing*, 13 Va. L. Rev. 22, 23–24 (1926); see also Owen, *supra* note 147, at 16–17 (discussing how a “message would appear” after communication to a “spirit”).

150. (1927) 1 Ch 167.

151. See Lee, *supra* note 149, at 23 (noting *Cummins* was “apparently . . . the earliest appearance in court of those curious writings”).

152. *Cummins* 1 Ch at 168.

153. *Id.*

154. *Id.*

155. *Id.* at 173.

156. See *id.* at 172–75.

157. *Id.* at 172.

... [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.¹⁵⁸

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.¹⁵⁹

Cummins thus articulates 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.¹⁶⁰ Yet there is also a so-far unacknowledged element: the need to identify a *human* cause for the work.¹⁶¹ The precise rationale for this human element remains somewhat unclear. Perhaps it had its origins in the court's inability to countenance the possibility that the work at issue might be rendered authorless 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 appeared to hold sway. In *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*,¹⁶² 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.¹⁶³ She then engaged in “rapid inner dictation,” which produced an elaborate set of notes that she then edited and converted into a published manuscript.¹⁶⁴ During the litigation, the court had to address the question of authorship over the manuscript.¹⁶⁵ Relying on *Cummins*, it concluded that the psychic was indeed the author, since “dictation from a nonhuman source should not be a bar to copyright.”¹⁶⁶ As in *Cummins*, the court relied on but-for causal logic:

158. *Id.* at 173.

159. See *id.*

160. Compare *id.* (reasoning “authorship rests with” the plaintiff because “we owe the production of these documents” to her abilities), with *Walter v. Lane* [1900] AC 539 (HL) at 559 (appeal taken from Eng.) (arguing authorship vested in the plaintiffs because “without [the reporter’s] brain and handiwork the [work] would never have had existence”).

161. See *Cummins* 1 Ch at 172–73 (emphasizing the importance of the role of the human “agent” in producing the work).

162. No. 96 Civ. 4126(RWS), 2000 WL 1028634 (S.D.N.Y. July 25, 2000) (granting preliminary injunction), vacated, No. 96 Civ. 4126(RWS), 2004 WL 906301 (S.D.N.Y. Apr. 27, 2004).

163. *Id.* at *2.

164. *Id.*

165. See *id.* at *9–14.

166. *Id.* at *12.

[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.¹⁶⁷

Similar to *Cummins*, the need to identify a human cause for the human-processed expression was at the root of the *Penguin Books* court's reasoning.

It is, of course, quite plausible that the courts in these cases were implicitly questioning the veracity of the plaintiff's factual claims (i.e., about the true source) and merely articulating a rationale to mask their disbelief. In other words, one might see these courts' reasoning as a form of ex post rationalization, rather than an analytical precursor to their conclusion.¹⁶⁸ Even allowing for that possibility, the courts' decision to connect authorship with human agency is revealing: The effort to distinguish between human and nonhuman agency—whether real or motivated—lends support to the proposition that the courts' conception of authorship was motivated in no small part by what is effectively a causal question (i.e., agency).

The copyright jurisprudence on spiritual authorship introduces a new element into the causation inquiry. On the one hand, it builds on the preexisting case law that looks to the effective cause of the work in a but-for sense.¹⁶⁹ Yet it does so by expressly acknowledging that the effective cause needs to be human,¹⁷⁰ a supposition that the mechanical-intervention cases alluded to but never openly endorsed.¹⁷¹ As previously noted, in the context of mechanical intervention, some courts appeared perfectly willing to deny a work any copyright protection on the basis that it did not involve sufficient authorial creativity.¹⁷² The merger of the concepts of copyrightability, authorship, and originality thereby came to

167. *Id.* at *10.

168. See Felix S. Cohen, *Ethical Systems and Legal Ideals* 237–38 (1959) (discussing the idea of rationalization as a form of artificially providing ex post reasons “wherever specified results are dictated by undisclosed determinants”); Jerome Frank, *Law and the Modern Mind* 130 (1935) (“[O]ne of [the] chief uses [of legal rules and principles] is to enable the judges to give formal justifications . . . of the conclusions at which they otherwise arrive.”).

169. See *supra* section I.A.2 (discussing the effective-cause framework in mechanical-intervention cases); *supra* notes 158–167 and accompanying text (highlighting the role of but-for causation in spiritual-authorship cases).

170. See *supra* notes 161, 166–167 and accompanying text (underscoring the court's search for a “human” cause in *Cummins*).

171. See *supra* section I.A.2 (highlighting several courts' discussions about whether the photographs at issue had mechanical or human causes).

172. See *supra* notes 108–112 and accompanying text (discussing the *Wood v. Abbott* court's doubt as to the human agency involved in photography).

mask the emphasis on humans. With spiritual intervention, the work itself could rarely be classified as uncopyrightable on its face given its prima facie originality (unlike a photograph that could, by contrast, be treated as an “ordinary production”), necessitating an account for preferring the human to the nonhuman actor, even when the human actor openly acknowledged the centrality of the nonhuman element to the creative process. And courts came to develop that account around the idea that the work could not have been brought into “earth[ly]” existence without the psychic’s (i.e., the human’s) role and intervention, short for the logic of but-for causation.¹⁷³

B. *The Search for Human Agency*

As the previous discussions reveal, causation has historically factored into copyright law’s conception of authorship.¹⁷⁴ Courts paid close attention to the form, quality, and quantity of agency involved in the production of the creative work when determining whether a claimant qualifies as an author.¹⁷⁵ 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.¹⁷⁶ Authorship was therefore presumptively a human endeavor, as far as copyright law was concerned. The logic underlying 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 nonhuman authorship. In addition, given the fundamentally instrumental nature of Anglo-American copyright law (“for encouragement of learning”¹⁷⁷), 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 person brought a facially original work of expression into existence, the parameters of the search for

173. E.g., *Cummins v. Bond* (1927) 1 Ch 167 at 175 (Eng.); see also *Leah v. Two Worlds Publ’g Co.* (1951) 1 Ch 393 at 398 (Eng.) (applying *Cummins’s* logic to an artist’s production of a portrait through spiritual intervention).

174. See *supra* section I.A.

175. See *supra* section I.A.

176. See *supra* sections I.A.2–.3 (discussing courts’ efforts to separate human creativity from mechanical processes and to find human agency in cases involving “automatic writing”).

177. Copyright Act 1709 (Statute of Anne), 8 Ann. c. 21 (Gr. Brit.) (repealed 1842); see also U.S. Const. art. I, § 8, cl. 8 (providing the basis for copyright protection under U.S. law).

agency automatically became narrower. When there were competing claimants for authorship status, 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.¹⁷⁸ In other words, the possibility that none of the claimants might satisfy an absolute threshold of agency for the claim to authorship never emerged in these situations because the original work would thereby be rendered unprotected altogether—a result that the work’s facially original or creative nature intuitively militated against.

The same pattern appears in cases involving nonhuman (i.e., mechanical or spiritual) intervention. When some early courts concluded that photographs were more the product of mechanical processes than human creativity and denied plaintiffs’ authorship claims, this had the effect of denying the work any protection under copyright law.¹⁷⁹ However, these courts’ willingness to come to this conclusion was closely tied to findings—seen in these opinions—about the photographs themselves (whether individually or as a class), especially insofar as such photography sought to replicate reality.¹⁸⁰ This lies in contrast to situations in which the work itself was *prima facie* creative, such as with spiritual authorship. In these situations, courts readily disregarded the nonhuman 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.¹⁸¹

One might thus appropriately describe the search for human agency in copyright law as a constrained analysis. When a work is indisputably protectable and the question is merely *who*—among multiple contenders—is to qualify as its author, the inquiry focuses on the precise form

178. See, e.g., *Walter v. Lane* [1900] AC 539 (HL) at 559 (appeal taken from Eng.) (deciding whether the reporters or the public personality were the authors of the transcribed speech); *Shepherd v. Conquest* (1856) 139 Eng. Rep. 1140 (CP) 1147; 17 C.B. 427 (deciding whether the proprietors or the playwright qualified as the author of the work).

179. See, e.g., *Wood v. Abbott*, 30 F. Cas. 424, 425 (C.C.S.D.N.Y. 1866) (No. 17,938) (concluding that while photography may be an “original and independent method of producing” pictures, photographs were outside the domain of what “the law was intended to protect”); *supra* notes 108–111 and accompanying text (discussing *Wood*).

180. See, e.g., *Wood*, 30 F. Cas. at 425 (reasoning photography was not protectable because it did not involve “printing in any sense known to the arts at the time” of the copyright statute’s passage).

181. See, e.g., *Cummins v. Bond* (1927) 1 Ch 167 at 175 (Eng.) (“[T]he conclusion which the 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.”).

and quantum of human agency involved.¹⁸² One might term this the “relative agency determination,” since the court is merely comparing multiple human agencies to select one as authorial. When courts view a work as meriting protection but view such protection as 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.¹⁸³ This variant is best described as the “absolute 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: 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: namely, that it embodies two analytically distinct (albeit functionally overlapping) elements. The first element is principally factual, with the law examining 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 *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.

Courts acknowledge this aspect of the inquiry when they concede that determining the cause of a work is principally a “matter of evidence,” as occurred in *Nottage*.¹⁸⁴ The primary mechanism that they thus employ in this epistemic endeavor is the but-for causation test or the *sine qua non* approach, which is well known in other contexts.¹⁸⁵ This test essentially 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, which helps the court to ascertain the causal nexus in question. Thus the *Nottage* court was essentially concluding that the photograph would have very well come into existence even without the role of the plaintiff-

182. See *supra* section I.A.1 (highlighting courts’ emphasis on the purported authors’ types and amounts of contributions when multiple parties contributed to the creation of the work).

183. See *supra* section I.A.2 (describing courts’ focus in mechanical-intervention cases on determining whether the purported author had exercised a minimum amount of human agency).

184. See *Nottage v. Jackson* (1883) 11 QBD 627 at 632 (Eng.).

185. One can see the idea commonly deployed in tort law and criminal law. See, e.g., Michael S. Moore, *Placing Blame: A Theory of Criminal Law* 52 (1997) (describing the “familiar *sine qua non* test” as the “dominant theory of cause in fact”); Calabresi, *supra* note 36, at 72 (describing the *sine qua non* approach as a “familiar one” and as “common enough” to need “no special discussion”).

proprietors, thereby rendering their intervention causally unrelated to the final work.

All the same, it is critical to appreciate that the epistemic dimension does not exhaust the entire gamut of the causal inquiry. Rather, the causal inquiry also embodies an *evaluative* dimension. This evaluative dimension transcends the more probative dimension—though it still depends on the probative dimension—and examines whether, even if a purely factual basis for a causal attribution exists, this factual basis ought to be sufficient for such an attribution. The evaluative aspect, in other words, asks whether the epistemically defensible cause ought to be enough for authorship purposes given the obvious consequences of an affirmative finding. Instead of relying entirely on the conceptual or analytical for an answer, the evaluative dimension 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 in *Shepherd* that the mere existence of an employment relationship ought not, on its own, produce the status of authorship.¹⁸⁶ In essence, the *Shepherd* court was 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.¹⁸⁷ 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 person who merely suggested the idea and did no more seemed unfair and did not align with copyright's fundamental purpose of "elevat[ing] and protect[ing] literary men."¹⁸⁸ The consequence—"buy[ing] [the author's] brains"—was thus integral to the court's evaluation of causal sufficiency.¹⁸⁹

Much of copyright's account of authorial causation is evaluative in nature and content. Even when the evidence shows an individual to have contributed in some minimal way to the creation of the work—either absolutely or relatively—courts still analyze whether that contribution *should* be the basis for authorship.¹⁹⁰ And in making this determination,

186. See *Shepherd v. Conquest* (1856) 139 Eng. Rep. 1140 (CP) 1147–48; 17 C.B. 427, 443–45.

187. See *id.* at 1147; 17 C.B. at 445 (“It appears to us an abuse of terms to say . . . the employer is the author of a work to which his mind has not contributed an idea . . .”).

188. See *id.* at 1147; 17 C.B. at 444.

189. See *id.* at 1147; 17 C.B. at 443–44 (internal quotation marks omitted).

190. See *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 303 (7th Cir. 2011) (denying authorship even though the plaintiff had contributed significantly in the design and production of the garden); *Toney v. L’Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005) (denying protection to a person's likeness, which obviously derives from a person); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000) (denying authorship status to a

they implicitly turn to normative considerations underlying the institution, often without overt acknowledgment.¹⁹¹ Examining the multiple considerations that courts (implicitly and explicitly) take into account in the evaluative part of the causal inquiry reveals three general principles that motivate courts' analysis, each of which operates as a midlevel constraint rather than as a foundational principle.¹⁹² Despite being analytically distinct, these principles are not always mutually exclusive. Section III.C elucidates on these principles,¹⁹³ but they first deserve mention here.

The first principle is the adequacy of *control* over the creative process.¹⁹⁴ In situations in which the putative author has had insufficient creative control over the process through which the work was created, either absolutely or relatively, courts treat the causal nexus as insufficient to generate authorship.¹⁹⁵ One can see this principle at work in a recent case, *Kelley v. Chicago Park District*, in which 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.¹⁹⁶ The court instead concluded that "gardens are planted and cultivated, not authored," since they emerge from nature rather than human creation.¹⁹⁷

The second principle is that of *disproportionality*.¹⁹⁸ When a court determines that according authorial status to one party is likely to produce an unfair distribution of the entitlement, either by reference to the parties' respective labor, intellectual input, or investment, once again the court may deem the causal chain severed.¹⁹⁹ In the early copyright

historical consultant in a movie during a joint-authorship dispute); *Shepherd* 139 Eng. Rep. at 1148; 17 C.B. at 445 (finding that an employer's mere suggestion that an employee create a work does not establish the employer's authorship).

191. See *Kelley*, 635 F.3d at 303 (concluding gardens should not be the subject of authorship but equivocating on the reasons for this conclusion); *Toney*, 406 F.3d at 910 (concluding a person's likeness is not authored but offering no reasons for this conclusion).

192. For a critical account of midlevel 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.

193. *Infra* section III.C.

194. *Infra* section III.C.1.

195. *Infra* section III.C.1.

196. See 635 F.3d at 292–95, 304–06.

197. *Id.* at 304.

198. *Infra* section III.C.2.

199. *Infra* section III.C.2.

cases, courts invoked this principle in situations that involved multiple contributors.²⁰⁰

The third principle emerges from a desire to avoid a *personality conflation* in identifying the author.²⁰¹ Authorship entails instantiating one's personal choices into the expressive content of a work.²⁰² Courts strive to ensure that the process of delineating the author by reference to causation tracks the creative process.²⁰³ When finding a causal nexus would conflate the salience of these choices, they readily find it to be severed.²⁰⁴ One sees 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 interrelated.²⁰⁵ It is precisely this idea that Eaton Drone captured with his observation that when content can give rise to different works, the author is the person "who has produced that for which the copyright is granted."²⁰⁶ According to this conception of causation, a lawful translation is not legally caused by the author of the original work that was the subject of the translation.²⁰⁷

Each of these principles tracks important normative considerations and precepts underlying the copyright system, many of which remain relevant today. Putting the relative–absolute 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 can 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 absolute setting. They instead mask the causal framework behind copyright's other entry requirements, such as originality.²⁰⁸

200. See *supra* section I.A.1 (describing courts' denial of "author" status to claimants who had contributed relatively little to the works at issue).

201. *Infra* section III.C.3.

202. *Infra* section III.C.3.

203. *Infra* section III.C.3.

204. *Infra* section III.C.3.

205. *Infra* section III.C.3.

206. Drone, *supra* note 79, at 236.

207. *Infra* section III.C.3.

208. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59–60 (1884) (conflating authorship and originality).

TABLE 1: THE DIMENSIONS OF AUTHORIAL CAUSATION

| Inquiry (→) Agency (↓) | Epistemic (<i>But for</i>) | Evaluative (<i>Sufficiency</i>) |
|-----------------------------------|--|---|
| 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> |
| Absolute (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> |

It is especially important to appreciate the epistemic–evaluative distinction. 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.²⁰⁹ Of course, this phenomenon is hardly unique to copyright law.²¹⁰ Yet when coupled with courts' frequent unwillingness to acknowledge the existence of a causal dimension in their copyrightability determinations, the collapse of the evaluative aspects of the inquiry into the epistemic confounds the analysis even further.

Authorship has therefore long embodied a theory of causation, reflected in the institution's search for human agency as the source of

209. See, e.g., *Nottage v. Jackson* (1883) 11 QBD 627 at 632 (Eng.) (noting the “effective cause” question is a “question of fact”).

210. See Shyamkrishna Balganes, *The Constraint of Legal Doctrine*, 163 U. Pa. L. Rev. 1843, 1847–50 (2015) (describing three ways in which legal doctrine can “constrain” judicial decisionmaking and contending that judges' publicly offered justifications can sometimes “mask[] the true grounds of decision”); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 Tex. L. Rev. 267, 275–76 (1997) (noting judges' tendency to decide cases on the basis of the facts and use applicable law primarily as an *ex post* justification); Frederick Schauer, *Legal Realism Untamed*, 91 Tex. L. Rev. 749, 753–54 (2013) (describing legal realism's denial of the traditional view that “legal decision making does not require recourse to the judge's extralegal attitudes or opinions”).

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 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 in the institution's overall framework of copy-rightability. 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

Part I introduced the theory of authorial causation underlying copyright law, principally in situations in which the nature and identity of authorship required a clear determination. This Part moves to the modern context, in which courts have made the causal determination *within* several of copyright's doctrinal mechanisms, each of which exists for reasons unconnected to causation.

During the formative years of copyright law, courts were willing to develop copyright doctrine by reasoning from first principles.²¹¹ As the law evolved, copyright jurisprudence developed a finite set of doctrinal rules and devices that courts could employ.²¹² In the United States, this evolution reached its pinnacle with the Copyright Act of 1976,²¹³ which comprehensively revised the federal copyright law.²¹⁴ In effect, this crystallized copyright's myriad doctrinal mechanisms, even though the statute itself did not purport to restrict judge-made copyright law.²¹⁵ The

211. See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (developing the standard for originality); *Baker v. Selden*, 101 U.S. 99, 103–04 (1879) (deciding that copyright protection does not extend to ideas and methods); *Wheaton v. Peters*, 33 U.S. 591, 667–68 (1834) (denying the existence of copyright in court opinions); *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (No. 4901) (developing the scope of copyright infringement and what would ultimately become the fair use doctrine).

212. For a prescriptive, mid-twentieth-century elaboration of this ideal, see Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 *Colum. L. Rev.* 503, 514–15 (1945) (discussing how copyright's "legal rules" should be "certain, readily understood, not unduly complicated, [and] as easy as possible to apply," which implies a restriction on their fecundity). Specifically, Professor Zechariah Chafee emphasized that leaving questions "unsettled" was a problem. *Id.* at 514.

213. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2012)).

214. U.S. Copyright Office, *Circular 92, Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code*, at v (2011), <http://www.copyright.gov/title17/circ92.pdf> [<http://perma.cc/KK6Q-BTUT>].

215. See Pierre N. Leval, *An Assembly of Idiots?*, 34 *Conn. L. Rev.* 1049, 1061–62 (2002) (lamenting this move away from judge-made law after the 1976 statute); see also Balganesch, *Debunking Blackstonian Copyright*, *supra* note 51, at 1167–68 (arguing 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 instead.²¹⁶

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 became codified. And yet, Congress never once defined “authorship” as part of this codification; nor did Congress make authorship an independent element that a claimant needed to prove to obtain protection.²¹⁷ Consequently, courts confronting questions of authorship—and authorial causation—have had to address them through other doctrinal mechanisms.²¹⁸ This indirect or proxy method of dealing with authorial causation has produced the impression that authorial causation is altogether redundant within modern copyright law's analytical framework.

The remainder of this Part examines the three most prominent copyright doctrines in which questions of authorial causation remain embedded and indirectly addressed, albeit in an *ad hoc* manner.²¹⁹ Section II.A discusses the originality doctrine, which at first seems to embody an overt causal dimension but ultimately does not permit courts to sufficiently scrutinize the process of authoring and its underlying ideas about causation. Section II.B examines the joint works doctrine, which has at times allowed courts to mask their causal intuitions under the doctrine's “mutual intent” requirement. Finally, section II.C turns to the work for hire doctrine, which presumes a causal relationship between two parties without further inquiry, once certain threshold criteria are met.

A. *Originality*

Protection under copyright law exists only in “*original* works of authorship” when “*fixed* in [a] tangible medium of expression.”²²⁰ The legislative history accompanying the Copyright Act describes originality and fixation as the “two fundamental criteria of copyright protection.”²²¹

1976 statute should be understood as a “common law statute” that requires judicial lawmaking).

216. See Christopher S. Yoo, *The Impact of Codification on the Judicial Development of Copyright*, in *Intellectual Property and the Common Law* 177, 178–86 (Shyamkrishna Balganesh ed., 2013).

217. See Ginsburg, *supra* note 17, at 1069–72 (discussing this absence in U.S. copyright law and comparative copyright law more generally).

218. See *infra* sections II.A–C.

219. This is not to suggest that authorial causation does not underlie other areas of copyright law. Rather, this Part focuses on these particular areas because the causation question appears in these three domains with a heightened degree of regularity.

220. 17 U.S.C. § 102(a) (2012) (emphasis added).

221. H.R. Rep. No. 94-1476, at 51 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664.

Originality represents modern copyright law's best-known entry requirement.²²²

The Copyright Act does not define originality; rather, the concept is entirely a creation of courts.²²³ The term's precise meaning has fluctuated over the course of copyright's long history, but the modern understanding—at least in the American context—derives from the Supreme Court's well-known decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*²²⁴ In tracing the originality requirement 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.”²²⁵ The modern requirement of originality therefore embodies two distinct components. First, the work must “owe[] its origin” to the claimant (i.e., the author);²²⁶ and second, it must exhibit a “modicum of creativity,”²²⁷ a requirement that is fairly easy to satisfy in practice even though it appears to connote a higher bar in theory.²²⁸

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.”²²⁹ The emphasis on the work–author connection (“owe”) and a creative contribution appear to corroborate that proposition.²³⁰ Yet closer scrutiny of the modern understanding of the requirement post-*Feist* reveals the causal underpinnings of originality to be largely superficial and perhaps even nonexistent.

While originality does require that the work “owe” its origin to its author²³¹—suggesting scrutiny of how, when, and where the author brought the work into existence—in practice, the *owing* is more of a

222. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“The *sine qua non* of copyright is originality.”).

223. *Id.* (“The phrase . . . is purposely left undefined, [and] intended to incorporate without change the standard of originality established by the courts under the present [1909] copyright statute.” (third alteration in original) (emphasis omitted) (quoting H.R. Rep. No. 94-1476, at 51, reprinted in 1976 U.S.C.C.A.N. at 5664)).

224. 499 U.S. 340.

225. *Id.* at 345.

226. *Id.* at 346–47 (internal quotation marks omitted) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

227. *Id.* at 346.

228. See *id.* at 345 (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily . . .”).

229. Ginsburg, *supra* note 17, at 1078.

230. Cf. *Feist*, 499 U.S. at 346 (reiterating the requirement that a work “owe[] its origin” to the purported author (internal quotation marks omitted) (quoting *Burrow-Giles*, 111 U.S. at 58)).

231. *Id.*

negative requirement. Ultimately, courts have deemed the requirement satisfied whenever the work is “independently created” by its author, which amounts to no more than a requirement that the author not have “copied” the work from any other work or material.²³² The owing requirement is thus a simple noncopying mandate rather than an affirmative requirement of some active contribution on the part of the claimant—something that *Feist* appears to acknowledge.²³³ Once satisfied that the author did not copy the work from other works or materials, and that the author is asserting a claim to the originality manifested in such work or materials, courts almost never scrutinize the creative process itself to ask whether and how the author brought the work into existence. Judge Jerome Frank put this point most starkly 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.”²³⁴ While Judge Frank did later add that the author had to “adopt” the work as his own for this purpose (especially when the originality was “unintentional[]”),²³⁵ this adoption requirement suggests no more than a requirement of affirmative assertion rather than any scrutiny of its underlying basis or legitimacy.²³⁶ The owing element thus performs a largely negative—or exclusionary—function, of denying a work protection when shown to have been copied from another.²³⁷ Authorial causation is thus readily presumed as long as there is no copying.

Additionally, *Feist* explicitly rejected the “sweat of the brow” interpretation of originality, which would have rewarded industriousness

232. *Id.* at 345; *Novelty Textile Mills v. Joan Fabrics Corp.*, 558 F.2d 1090, 1093 n.3 (2d Cir. 1977); 1 *Nimmer & Nimmer*, *supra* note 28, § 2.01[A][1] (“[A] work is original and may command copyright protection even if it is completely identical with a prior work, provided it was not copied from such prior work but is instead a product of the independent efforts of its author.”).

233. See *Feist*, 499 U.S. at 345 (“Original, 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.”).

234. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) (internal quotation marks omitted) (quoting *Hoague-Sprague Corp. v. Frank C. Meyer Co.*, 31 F.2d 583, 586 (E.D.N.Y. 1929)).

235. *Id.* at 105.

236. Indeed, neither Judge Frank nor later copyright jurisprudence on originality has ever given the idea of “adopt[ing]” the work any real meaning or content, nor has either suggested how such adoption is to occur. See *id.* Courts appear to regard his observation about unintentional originality and its subsequent adoption as “dictum.” See *Godinger Silver Art Co. v. Int’l Silver Co.*, No. 95 CIV. 9199 (LMM), 1995 WL 702357, at *2 n.5 (S.D.N.Y. Nov. 28, 1995).

237. See, e.g., *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1267–68 (10th Cir. 2008); *Entm’t Research Grp. v. Genesis Creative Grp.*, 122 F.3d 1211, 1221–24 (9th Cir. 1997); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 910–11 (2d Cir. 1980).

on the part of the author.²³⁸ 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.²³⁹ 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.²⁴⁰ 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.²⁴¹ Yet, in terms of causation, it poses obvious problems. By precluding *any* scrutiny of the creative process involved in the production of a work when that process has no direct embodiment in the final product (i.e., the work), the originality doctrine denies courts the ability to scrutinize the author’s causal contribution to the work.

Originality therefore does very little for authorial causation. Even if originality is “synonymous” with authorship today, its connection to the functional dimension of authorship—as embodying a causal element—is at best superficial. Indeed, one might go further by noting that this superficial connection has been actively detrimental to copyright’s commitment to authorial causation, insofar as the originality requirement falsely suggests that it embodies a scrutiny of causation (“owes”) but all too readily presumes the question away.

The monkey-selfie episode aptly illustrates this superficiality. Recall that the photograph in the monkey-selfie episode was presumptively denied copyright protection on the theory that it was the monkey—rather than the photographer—who had pressed the shutter button.²⁴² 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 satisfied the claim that it “owes” its existence to the photographer.²⁴³ It certainly was not copied from another source (i.e., it was independently created).²⁴⁴ The fact that it owes its existence to the monkey—rather than

238. See *Feist*, 499 U.S. at 352–60.

239. 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.”).

240. 1 *Nimmer & Nimmer*, supra note 28, § 2.01[A].

241. See *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490–92 (2d Cir. 1976) (explaining the requirement that the author must have contributed more than a “trivial variation” and finding a metal “Uncle Sam bank” unprotectable on the basis of that requirement).

242. See supra text accompanying notes 8–11.

243. Cf. *Feist*, 499 U.S. at 346 (discussing this requirement).

244. See supra notes 3–7 and accompanying text (noting the photographer had set up the equipment with which the monkey took the photograph).

the photographer—is of little concern to originality, since the doctrine requires only independent creation in the noncopying sense of the term.²⁴⁵ To use Judge Frank’s words, the photographer’s contribution may have been “poor,” yet it was “his own.”²⁴⁶

Additionally, the requisite “modicum of creativity” was apparent on the face of the photograph, which would satisfy the originality criteria set forth by the various photography cases.²⁴⁷ The photograph was no “ordinary production”;²⁴⁸ it involved specific lighting, zooming, positioning, and timing,²⁴⁹ all of which are inputs that one may glean from the work itself and that operate as indicia of originality for photographs.²⁵⁰ The photographer’s button-pressing activity (or the lack thereof), which was the real basis for the denial,²⁵¹ thus would not have been subject to scrutiny under originality’s minimal-creativity standard, being detached from any outward manifestations in the photograph itself. Indeed, short of the photographer explaining *how* the photograph was produced, copyright law would have provided *no basis whatsoever* to deny the work protection.

Under current originality doctrine, then, the monkey selfie would obtain copyright protection without issue. Assuming that there is some valid basis for the legal conclusion that it ought not to receive protection—such as 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 allows multiple authors to simultaneously qualify as coauthors of a work, even in the absence of an express agreement between them.²⁵² The Copyright Act defines a joint work as

245. See *supra* notes 232–237 and accompanying text (explaining that the “owing requirement” amounts to “a simple noncopying mandate”).

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

247. Cf. *Hughes*, *supra* note 136, at 365–68 & nn.150–151 (providing an exhaustive account of originality criteria in photographs and criticizing these criteria’s utility).

248. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884).

249. See *Sulawesi Macaques . . .*, *supra* note 2 (“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.”).

250. See *Hughes*, *supra* note 136, at 401–19.

251. See U.S. Copyright Office, *Compendium*, *supra* note 8, § 313.2 (emphasizing the fact that the monkey—not the human—had “taken” the photograph).

252. See 17 U.S.C. § 101 (2012) (defining “joint work”). See generally Shyamkrishna Balganes, *Unplanned Coauthorship*, 100 Va. L. Rev. 1683, 1695–99 (2014) [hereinafter Balganes, *Unplanned Coauthorship*] (describing the basics of the joint works doctrine);

one “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”²⁵³ However, courts developed the law relating to joint works almost entirely on their own with very little legislative guidance.²⁵⁴ The sparse 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.”²⁵⁵ Courts have, as a result, come to pay close attention to this requirement in giving effect to the doctrine.²⁵⁶

As should be apparent, the joint works doctrine allows multiple parties to claim the status of author, albeit jointly.²⁵⁷ Consequently, even if modern judges have cared very little about policing authorship in the abstract, in relation to this particular doctrine, copyright law effectively requires that each party independently qualify as an author. The joint works doctrine therefore essentially tests authorship as a precondition to a work being protected as a joint work. Based on copyright jurisprudence’s historic—but hidden—resort to causal principles,²⁵⁸ then, one might legitimately expect courts’ application of the doctrine to incorporate elements of authorial causation as part of their authorship analyses. However, to the extent that causation has factored into courts’ analyses, it has mostly worked beneath the surface.

Parsing the statutory definition of a joint work and its legislative history, courts have understood the joint works doctrine to embody two interrelated requirements. First, each party or claimant must have contributed protectable expression to the final work.²⁵⁹ Since authorship requires the production of expression (as opposed to mere ideas), courts have seen joint authorship—as a category of authorship—as requiring nothing less.²⁶⁰ While the expressive contribution need not be inde-

Laura G. Lape, *A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine*, 61 *Alb. L. Rev.* 43, 51–74 (1997) (discussing the joint works doctrine under the Copyright Act of 1976).

253. 17 U.S.C. § 101.

254. Balganes, *Unplanned Coauthorship*, *supra* note 252, at 1685.

255. H.R. Rep. No. 94-1476, at 120 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736.

256. See, e.g., *Thomson v. Larson*, 147 F.3d 195, 201–02 (2d Cir. 1998) (emphasizing the necessity of “a specific finding of mutual intent”); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068–69 (7th Cir. 1994) (requiring “each author intend that their respective contributions be merged into a unitary whole”); *Childress v. Taylor*, 945 F.2d 500, 507–08 (2d Cir. 1991) (describing the authors’ intent as “the crucial aspect of joint authorship”).

257. See *supra* notes 252–253 and accompanying text.

258. See *supra* Part I.

259. See, e.g., *Thomson*, 147 F.3d at 200; *Seshadri v. Kasraian*, 130 F.3d 798, 803–04 (7th Cir. 1997); *Childress*, 945 F.2d at 505–07.

260. See, e.g., *Childress*, 945 F.2d at 506–07.

pendently copyrightable, it must qualify for protection in principle.²⁶¹ Second, the parties need to have had an intention to be joint authors, a requirement that is often described as that of “mutual intent.”²⁶² Once both elements are satisfied, each joint author obtains an equal ownership stake in the work, regardless of the amount or quality of expressive contribution made to its creation.²⁶³ This last point bears emphasis: A contributor to a 1,000-page original book who contributes a mere page or two of original content automatically obtains a per capita 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.

Unsurprisingly, courts’ preferred mechanism for policing authorship status in joint works is not an independent-contribution requirement. Instead, courts do so through the mutual intent requirement. To give effect to this requirement, courts have developed various “objective indicia” through which to assess the existence of such intent, although in reality, these indicia work as external, objective measures of authorship.²⁶⁴ These indicia include control and decisionmaking authority, the way in which the parties characterize or bill themselves, agreements with third parties, and copyright registration.²⁶⁵ Assuming that each of these indicators provides objective evidence of the parties’ thinking at the time of creation, courts have used them to find either for or against the existence of joint authorship.²⁶⁶

In reality, however, these objective indicia have at best a tangential connection to the parties’ intent accompanying the creation of the work. The element of control, for instance, says very little about the presence or absence of such intent.²⁶⁷ Two or more collaborators may well possess the required intent 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.

261. *Id.* (defining the requirement as that of a “copyrightable contribution”).

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

263. *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962, 968 (9th Cir. 2008); *Comty. for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988); 1 *Nimmer & Nimmer*, *supra* note 28, § 6.08.

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

265. 2 William F. Patry, *Patry on Copyright* § 5:22 (2016).

266. See, e.g., *Thomson*, 147 F.3d at 201–05.

267. *Balganesh, Unplanned Coauthorship*, *supra* note 252, at 1738.

In such situations, the absence of diffuse control over the process (or the presence of unilateral control) says less about intent than it does about the law's (i.e., courts') willingness to accord the noncontrolling party the status of author. In short, control and the other indicia function as proxies not for intent but for the question of whether the creation of the (joint) work ought to be ascribed to a particular party based on that party's role in 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*.²⁶⁸ The primary defendant, Spike Lee, had authored the screenplay and directed and coproduced the movie.²⁶⁹ During production, the lead actor in the movie, Denzel Washington, asked the plaintiff to “assist him in his preparation for the starring role” due to the plaintiff's expertise on *Malcolm X* and Islam.²⁷⁰ Agreeing to Washington's request, the plaintiff “suggested extensive script revisions” to ensure historical and religious accuracy, many of which were included in the final version.²⁷¹ 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.²⁷² The plaintiff had no written agreement with the defendants but received compensation for his efforts.²⁷³ When the producers later credited him merely as an Islamic consultant, he claimed to be a coauthor of the movie and filed an action under the joint works doctrine for an accounting and share of the movie's profits.²⁷⁴

In 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.²⁷⁵ All the same, the court concluded that he did not qualify as an author of the work even though he made “substantial and valuable contributions” and perhaps even a “substantial creative contribution.”²⁷⁶ Relying on *Burrow-Giles* for its understanding of the author as the “effective cause” of the work, the court, placing great emphasis on the requirement of “mutual intent,” concluded that superintendence over the work “by exercising control” over its production was critical to joint

268. 202 F.3d 1227, 1229–30 (9th Cir. 2000).

269. *Id.* at 1229.

270. *Id.*

271. *Id.* at 1230.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* at 1231–32.

276. *Id.* at 1231, 1233.

authorship.²⁷⁷ 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 did not qualify as a (joint) author of the work.²⁷⁸ In essence, the court converted the intent requirement into a proxy for causation—and did so rather explicitly. Control was—the court effectively conceded—central to intent in order to show authorial causation and therefore authorship.²⁷⁹ *Aalmuhammed* is but an extreme—and honest—illustration of what other courts continue to do less overtly.²⁸⁰

Scholars have criticized the *Aalmuhammed* decision on a variety of grounds.²⁸¹ For present purposes, though, the opinion is also troubling because it attempts to mask the causal question that is central to joint authorship behind the idea of mutual intent, a requirement that lawmakers designed to assess the existence of a particular collaborative mindset in the production of the work.²⁸² As should be obvious, of consequence to the court was the fact 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 work as a whole, in light of the obvious consequence at stake—namely, equal ownership.²⁸³ Although the court answered this in the negative, it chose to do so under the garb of mutual intent rather than directly.²⁸⁴

277. *Id.* at 1233–34.

278. *Id.* at 1234–36.

279. *Cf. id.* at 1234 (discussing *Burrow-Giles*’s “effective cause” requirement in the context of the control factor).

280. See, e.g., *Thomson v. Larson*, 147 F.3d 195, 202–03 (2d Cir. 1998) (noting decisionmaking authority is “[a]n important indicator of authorship” and weighing the putative authors’ authority over the work’s content); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071–72 (7th Cir. 1994) (reasoning that an actor’s suggestion to include a passage in a play did not make him a joint author of the play because the ultimate decision laid with the playwright).

281. See, e.g., Balganesch, *Unplanned Coauthorship*, *supra* note 252, at 1748 n.261; 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, 275–76 (2001); Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 *Emory L.J.* 193, 246–55 (2001).

282. See *supra* notes 252–256 and accompanying text (noting the legislative history’s emphasis on the parties’ mutual intent to combine the individual parts into a unified whole).

283. The court’s motivation in this regard is revealed by its description of the plaintiff’s quantum meruit argument. In that discussion, the court concedes that the plaintiff “made a substantial contribution to the film.” *Aalmuhammed*, 202 F.3d at 1236. The court then observed that this claim was different from a joint authorship claim in that the allegation was the nonpayment of “the fair value of his services.” *Id.*

284. *Id.* at 1235.

In this domain, the causal inquiry is principally relative and evaluative, rather than absolute and epistemic. The causal question is clearly imbued with an evaluative dimension. The assessment is not merely whether something can be attributed to a party 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 for the person to qualify as co-responsible for the entire final product.²⁸⁵

The joint works doctrine thus incorporates a distinct causal dimension, 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 each party merits a coequal characterization as 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 is almost never openly addressed as such.

C. *Works Made for Hire*

A third area in which copyright doctrine indirectly engages the question of authorial causation is the work made for hire doctrine. The work made for hire doctrine allows copyright law to accord authorial (and ownership) status to one party when another created the work in its entirety.²⁸⁶ The law allows this imputation in three scenarios: first, when one party has commissioned a work from another and the parties expressly agree to treat the work as a work made for hire; second, when a formal employment arrangement exists and the employee created the work within the scope of the employment; and third, when an employment arrangement may be implied from the nature of the relationship between the parties.²⁸⁷

It is important to appreciate that the doctrine does not 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 and creator of the work from the moment that the work obtains copyright protection.²⁸⁸ And underlying the doctrine's treatment of authorship is a nascent—and undoubtedly controversial—account of

285. See, e.g., *Brod v. Gen. Publ'g Grp.*, 32 F. App'x 231, 234–35 (9th Cir. 2002); *Strauss v. Hearst Corp.*, No. 85 Civ. 10017 (CSH), 1988 WL 18932, at *5–6 (S.D.N.Y. Feb. 19, 1988).

286. See 17 U.S.C. § 101 (2012) (defining “work made for hire”).

287. See *id.*

288. See *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 . . .”).

causation. As noted previously, early copyright law did not recognize an employer as author of a work merely based on the employment relationship.²⁸⁹ This position continued into the late nineteenth century.²⁹⁰ As Professor Catherine Fisk documents in her exhaustive historical analysis of the work made for hire doctrine, it was at this juncture—the late nineteenth and early twentieth centuries—that things began to change.²⁹¹

Changes in the U.S. economy at the time, accompanied by the increasing popularity of the corporate form, produced a gradual willingness among courts to treat corporate employers as authors under copyright law.²⁹² 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.²⁹³ 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.’”²⁹⁴

To be sure, some observers have noted an “artificiality” in the work for hire doctrine’s treatment of the employer as author even when the employer has played no role whatsoever in the actual creative process.²⁹⁵ The doctrine, in this understanding, has more to do with facilitating “investment and exploitation” than any commitment to authorship principles.²⁹⁶ While this characterization may indeed be accurate, this artificiality does not necessarily negate the doctrine’s underlying account of authorial causation. Insofar as such causation is more than just epistemic and embodies normative considerations—that is, the evaluative dimension—one might fairly see the doctrine as specifying a causal nexus. As shall become apparent, this causal nexus forms a symmetrical

289. See *supra* text accompanying notes 76–88 (explaining that English courts required a “compositional” contribution).

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

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

292. See *id.* at 67–68 (noting that principal among these changes was the “rise of the corporation”).

293. *Id.* at 55–59.

294. *Schumacher v. Schwencke*, 25 F. 466, 468 (C.C.S.D.N.Y. 1885).

295. See Borge Varmer, Study No. 13, *Works Made for Hire and on Commission* (Apr. 1958), in Staff of S. Subcomm. on Patents, Trademarks & Copyrights, 86th Cong., Copyright Law Revision 123, 139 (Comm. Print 1960) (“[I]t may be argued that the concept of designating the employer as the author of an intellectual creation of another person is artificial . . .”). The Copyright Office produced this study of the subject in 1958 during the copyright revisions leading up to the 1976 statute. See Copyright Law Revision, *supra*, at v.

296. Ginsburg, *supra* note 17, at 1088–89.

analog to the causal theory underlying tort law's doctrine of vicarious liability.²⁹⁷

In describing the work made for hire doctrine, Professor 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 that work . . . that matters."²⁹⁸ Insofar as authorial causation—embodied in authorship—always entailed an instrumental and evaluative dimension, however, the work made for hire doctrine is hardly an aberration from that framework.

The work made for hire doctrine thus represents an additional domain in which copyright jurisprudence embodies an important causal aspect. Unlike in other areas, however, here the doctrine itself articulates and assumes a specific causal paradigm, wherein the law automatically imputes authorial causation to one actor merely by virtue of a relationship without any need for independent evidence (of causation).²⁹⁹ The doctrine thus renders the epistemic dimension of authorial causation fairly thin (and close to nonexistent, but for the need to show an employment relationship or contract) in the process.

* * *

Authorial causation is hardly alien to modern copyright law. It remains embedded in copyright's various doctrinal devices, in which its role and significance fluctuates with the vagaries of how the particular doctrine (in which it resides) grows and evolves. Given the originality doctrine's modern rejection of "sweat of the brow" and its limited focus on noncopying and independent creation to determine origination, authorial causation has no doctrinal platform to function as a threshold qualification criterion in general copyright law.³⁰⁰ The same is true of the joint works doctrine, in which the law's enduring focus on mutual intent to reconstruct the creative process masks the role of authorial causation, and courts rarely even acknowledge causation as a motivating consideration during their analyses.³⁰¹ Within the work made for hire doctrine,

297. See *infra* notes 423–428 and accompanying text.

298. Peter Jaszi, On the Author Effect: Contemporary Copyright and Collective Creativity, *in* The Construction of Authorship, *supra* note 54, at 29, 34 (quoting *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1214 (2d Cir. 1972)).

299. See *supra* notes 286–288 and accompanying text (describing how the work for hire doctrine automatically vests authorship in employers).

300. See *supra* section II.A (explaining how the originality doctrine as interpreted in *Feist* and its progeny does not facilitate explicit assessment of authorial causation).

301. See *supra* section II.B (arguing that courts rarely acknowledge the causal underpinnings of their mutual intent analyses and citing *Aalmuhammed v. Lee* as a rare exception with more overt reference to causality).

authorial causation plays a principally structural role, insofar as it forms the very foundation for the doctrine and its default of employer ownership, on the assumption that the relevant relationship exists between the parties.³⁰²

Authorial causation, then, in both its epistemic and evaluative aspects, as well as its relative and absolute ones, is hidden within copyright doctrine. Whenever courts need to directly address the causation question—as in the monkey-selfie episode³⁰³ or with machine creation³⁰⁴—they are left without any doctrinal device to aid their analyses, forcing them to fall back on first principles—a move that some observers may in turn see as suspect given the otherwise comprehensive nature of copyright doctrine. An express acknowledgement of authorial causation within copyright jurisprudence—and allowing its various components (epistemic–evaluative, etc.) to work freely within the system—would therefore better serve copyright law. The next Part turns to this ideal.

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 latent theory of authorial causation, this Part 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 Copyright Act (e.g., fixation).³⁰⁵ The inquiry into copyrightability, in other words, is limited to a scrutiny of the four corners of the work and no more. The particulars of the process through

302. See *supra* section II.C (describing how the work for hire doctrine automatically vests authorship status in one party without a probing inquiry into the creative process).

303. See *supra* notes 1–11 and accompanying text (recounting the monkey-selfie episode and the reasoning underlying the Copyright Office’s related decision).

304. See *supra* notes 145–146 and accompanying text (observing that there are outstanding issues related to determining “the appropriate role of human agency” in computer-generated works).

305. See U.S. Copyright Office, *Compendium*, *supra* note 8, § 303; 1 Nimmer & Nimmer, *supra* note 28, § 2.

which the author has created the work are, according to this account of copyrightability, 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.³⁰⁶

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 in which a scrutiny of factors other than the content of the work becomes essential to determine copyrightability. The prime example of this is U.S. government works, which the Copyright Act denies protection altogether.³⁰⁷ 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 a party has produced additional information about the work's creation (e.g., the identity of its author, the circumstances of its creation, etc.) that the exclusion kicks in.³⁰⁸ 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 the author brings the work 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*. For a work to qualify for copyright protection as a work of authorship, the work would 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,³⁰⁹ the burden of establishing copyrightable causation would be on the plaintiff or claimant seeking protection, as part of the plaintiff's *prima facie* case. In an action for copyright infringement, the law places the

306. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 360 (1991) (quoting approvingly a case that focused its originality analysis on "the selection and arrangement of the factual material, rather than on the industriousness of the efforts to develop the information" (internal quotation marks omitted) (quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369–70 (5th Cir. 1981))); 1 *Nimmer & Nimmer*, *supra* note 28, § 2.01[A].

307. See 17 U.S.C. § 105 (2012).

308. See 1 *Nimmer & Nimmer*, *supra* note 28, § 5.13[B] (discussing how the relationship between the author of the work and the government requires scrutiny for the disqualification to apply).

309. 4 *id.* § 13.01[A] (observing that the plaintiff bears the burden of proving ownership and copying in an infringement lawsuit and that ownership involves establishing "copyrightability").

burden of establishing ownership of a “valid copyright” on a plaintiff,³¹⁰ which would now encompass copyrightable causation as an additional facet. 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 in which a court must resolve the issue of causation, copyright jurisprudence would benefit from 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, so as to keep the epistemic and evaluative aspects of the inquiry relatively distinct. The common law’s well-known divide between the “cause in fact” and “proximate causation” inquiries serves as a useful model that courts might adapt to the requirements of copyright law. The remainder of this Part attempts to build on that model and develop a two-step mechanism for copyrightable causation. Section 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. Sections III.B and III.C then attempt to integrate 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.³¹¹

310. *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 & Nimmer, *supra* note 28, § 13.01 (describing and synthesizing these elements).

311. See, e.g., Green, *Proximate Cause*, *supra* note 36, at v; Hart & Honoré, *supra* note 22, at 436; Moore, *Causation and Responsibility*, *supra* note 22, at 3. For a sampling of other pieces that analyze the role of causation in tort law, see generally Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 *Law & Phil.* 1 (1987); Joseph H. Beale, *The Proximate Consequences of an Act*, 33 *Harv. L. Rev.* 633 (1920); J.H. Beale, Jr., *Recovery for Consequences of an Act*, 9 *Harv. L. Rev.* 80 (1895); Charles E. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 *Calif. L. Rev.* 229 (1932); Henry W. Edgerton, *Legal Cause*, 72 *U. Pa. L. Rev.* 211 (1924); Arthur L. Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 *Yale L.J.* 449 (1930); Green, *Dependable Rules*, *supra* note 35; Charles O. Gregory, *Proximate Cause in Negligence—A Retreat from “Rationalization,”* 6 *U. Chi. L. Rev.* 36 (1938); William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 *J. Legal*

Indeed, the literature on the role and test of causation therein is far too extensive to allow for a compact synthesis here. Nonetheless, the structural features of tort (i.e., negligence) law's operationalization of the causal inquiry is of direct relevance for copyright law. The law's efforts to hold an actor *responsible* for a particular consequence (i.e., harm) that deserves rectification is widely accepted to drive tort law's understanding of causation as a component of liability determination.³¹² Causation is therefore indelibly connected to responsibility.³¹³ This connection inflects the causal 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 courts 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 John Stuart Mill.³¹⁴ The causal-selection theory readily acknowledges that this selection process has no universally objective basis but is instead pragmatic in content and situation driven.³¹⁵ Causal selection understands tort law's identification of an act as a cause as driven by the law's attempt to apportion blame for a consequence on a human actor.³¹⁶ Causation in tort law therefore takes shape from a nascent understanding of responsibility or blame-worthiness—ideas that embody an account of moral agency, however deep or shallow that account may be as an independent substantive matter.³¹⁷ Identifying an actor's intervention as a cause in tort law's liability calculus therefore is accompanied and driven by the understand-

Stud. 109 (1983); Albert Levitt, Cause, Legal Cause and Proximate Cause, 21 Mich. L. Rev. 34 (1922); James Angell McLaughlin, Proximate Cause, 39 Harv. L. Rev. 149 (1925); Roscoe Pound, Causation, 67 Yale L.J. 1 (1957); Steven Shavell, An Analysis of Causation and the Scope of Liability in the Law of Torts, 9 J. Legal Stud. 463 (1980); Wright, *supra* note 22.

312. See, e.g., Wright, *supra* note 22, at 1826 ("[S]o long as tort liability continues to be based on individual responsibility, liability will be imposed on a defendant only if it is believed that the tortious aspect of his conduct actually contributed to the specified legal injury . . . [,] [a belief that] is the essence of a causal explanation.").

313. Moore, Causation and Responsibility, *supra* note 22, at 3–19.

314. See John Stuart Mill, *A System of Logic* 198 (N.Y.C., Harper & Bros. 1846) ("Nothing can better show the absence of any scientific ground for the distinction between the cause of a phenomenon and its conditions, than the capricious manner in which we select from among the conditions that which we choose to denominate the cause."); see also Germund Hesslow, The Problem of Causal Selection, *in* *Contemporary Science and Natural Explanation: Commonsense Conceptions of Causality* 11, 14–15, 24 (Denis J. Hilton ed., 1988).

315. See Mill, *supra* note 314, at 198; Hesslow, *supra* note 314, at 11–31.

316. Wright, *supra* note 22, at 1744.

317. See Moore, Causation and Responsibility, *supra* note 22, at 20; Alex Broadbent, Explanation and Responsibility, *in* *Critical Essays on "Causation and Responsibility"* 239, 241 (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).

ing that the actor's rational agency is worthier than the various background conditions of being selected as the cause of the event. This causation–responsibility connection is therefore an enduring feature of tort law's approach to the question of causation.

However, this connection is 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 or condition as a cause. This point is largely unexceptional but rarely acknowledged. In his well-known discussion of factual causation in tort law, Professor 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 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.³¹⁸

Malone went on to illustrate this by showing that for a single occurrence, a physicist's sense of the cause was likely different from an engineer's, which might in turn be different from a lawyer's.³¹⁹ The purpose of the inquiry thus guides the construction of causation.³²⁰

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.³²¹ 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 these epistemic elements 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”).

318. Malone, *supra* note 35, at 62.

319. See *id.*

320. *Id.* at 62–64.

321. *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.”).

Scholars have since come to interpret Malone's observations as being critical of tort law's causal inquiry.³²² Nevertheless, his argument provides strong support for tort law's bifurcation of the causal inquiry: 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.³²³ 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 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. Here, it is critical to note that the evaluative component is analytically different in both steps. In the first, it is merely a suggestion that any analysis of facts is driven by *an end*, while in the latter, it is an overt recognition that the analysis incorporates the *goals* of the system or regime.

Of the various aspects of causation in tort law that have received scholarly attention, proximate cause undoubtedly remains the most controversial.³²⁴ 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 determine proximate causation, they look to the basic normative goals of the system, thereby giving the inquiry an avowedly “policy-oriented” flavor.³²⁵ The specific variables to which courts look range from abstract ideals such as justice and equity to more practical goals such as compensation and deterrence.³²⁶ Courts also look to utilitarian considerations such as risk allocation, as well as deontic

322. See, e.g., Hart & Honoré, *supra* note 22, at 413; Moore, Causation and Responsibility, *supra* note 22, at 91.

323. See Malone, *supra* note 35, at 97–99 (describing the distinction as a matter of degree rather than of kind).

324. See, e.g., Green, Proximate Cause, *supra* note 36, 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.”).

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

326. See Calabresi, *supra* note 36, at 73–108 (discussing the goals of compensation, deterrence, and risk spreading).

ideas such as moral responsibility.³²⁷ 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.³²⁸ 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 need not be seen as a purely objective or scientific inquiry that is true across situation and context. Nor, of course, should courts treat it 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 other areas of law, courts might fruitfully bifurcate copyrightable causation. In the first prong, the epistemic content—driven by the purpose of the inquiry—would dominate, and in the second prong, normative considerations would play a more direct role. Separating the inquiry into two steps allows for full consideration and independent analytical scrutiny of each of the epistemic and evaluative domains, even if one considers their boundaries somewhat porous. The remainder of this Part thus turns 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. In essence, this step would track tort law's cause in fact requirement. Notably, identifying—and selecting—a condition as the “cause” for the work is not a purely objective or universal determination; it is instead driven by the purpose of the inquiry as a whole.

To reiterate, it is important not to confuse “purpose” with policy considerations or normative goals. The reference to purpose is simply an acknowledgement of Mill's unexceptional point that causality can be an unending sequence and that some ultimate purpose always drives even the factual identification of a cause.³²⁹ As an illustration, consider a murder investigation. It would be insufficient to simply conclude that the cause of death was poisoning without going further and identifying the

327. See *id.* at 74–76, 81–84 (discussing the value of risk spreading and deterrence); Christopher H. Schroeder, Causation, Compensation and Moral Responsibility, *in* *Philosophical Foundations of Tort Law* 347, 349 (David G. Owen ed., 1995); Shavell, *supra* note 311, at 465 (arguing proximate cause can be explained in economic terms).

328. See Dan B. Dobbs et al., *The Law of Torts* §§ 198–199 (2d ed. 2015) (describing both “principled” and “practical” justifications for proximate cause limitations on liability).

329. See Mill, *supra* note 314, at 198.

human agent who committed that act. Our very understanding of cause—in relation to a homicide investigation—involves a focus on a human agent, in an effort to hold someone responsible. Identifying a human agent is thus the purpose of the causal inquiry.

So it is with tort law too. Whereas tort law uses causation to affix liability, copyright law's identification of the cause originates in its need to attribute authorship and assign ownership. This purpose would exert an obvious influence on the structure and content of the inquiry. In contrast to tort law, copyright's authorship determination *allocates an exclusive entitlement over expression to the causally responsible individual*.³³⁰ Devoid of such purpose, copyright's creation-in-fact inquiry is likely to be of little utility to authorship.

According to the Supreme Court's current understanding, copyright law grants its exclusionary entitlement to individuals as an inducement for creative activity that results in social-welfare-enhancing output.³³¹ Consequently, the Court's account of incentives is closely tied to an account of human behavior in which individuals are able to respond rationally to the law's "promise" of protection for original expression.³³² This focus on a creator's exercise of rational human agency, both in the lead up to the creation of the work and in the exercise of the exclusionary entitlement once granted, excludes any consideration of non-human factors from the set of conditions that might ever qualify as causes for authorship. 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 account of "outcome responsibility" in tort law, Professor 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.³³³ According to this norm, individuals who "have a

330. See 17 U.S.C. § 106 (2012) (declaring that the owner of copyright has certain exclusive rights to do or authorize specific actions related to the protected expression); id. § 201(a) (vesting ownership of copyright in the author).

331. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (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 (1984) (Blackmun, J., dissenting) (noting copyright's basis in the belief that its grant of exclusive rights gives authors "an incentive to create, and that 'encouragement of individual effort by personal gain is the best way to advance public welfare'" (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954))).

332. Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 *Harv. L. Rev.* 1569, 1573 (2009) [hereinafter Balganes, *Foreseeability*].

333. See Tony Honoré, *Responsibility and Fault* 14–15 (2002) ("Outcome responsibility is . . . inescapable because it is the counterpart and at the same time a constituent of our personal identity and character."). For a set of essays critically

minimum capacity for choosing and acting” receive credit for the “good outcomes of action” and “discredit for bad ones” on an everyday basis as a matter of basic social morality.³³⁴ Tort law builds on this moral account of discredit. Copyright law, symmetrically, constitutes a mechanism for giving credit and according responsibility—through the mechanism of a right—for good outcomes.³³⁵ In assigning authorship, copyright law (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 one accepts this responsibility-centered understanding of authorship, the focus on *human* agency for determining the cause becomes even more obvious. In this account, copyright law can treat neither animals nor machines nor indeed divine spirits as causally responsible for the creation of a work, just as tort law does not hold them causally responsible 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.”³³⁶ In its principal formulation, the test provides that “the defendant’s conduct is a factual cause of the plaintiff’s harm if, but-for the defendant’s conduct, that harm would not have occurred.”³³⁷ 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 in which the plaintiff would likely have suffered the same harm even without the defendant’s conduct.³³⁸

When confronting issues of authorial causation, courts have long attempted to apply a basic but-for approach, albeit sporadically.³³⁹ 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 Article’s proposed 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*

examining the various dimensions of this argument, see *Relating to Responsibility: Essays for Tony Honoré on His Eightieth Birthday* (Peter Cane & John Gardner eds., 2001).

334. Honoré, *supra* note 333, at 14–15.

335. See Shyamkrishna Balganesh, *The Normative Structure of Copyright Law*, in *Intellectual Property and the Common Law*, *supra* note 216, at 313, 326–30 (connecting copyright law with Honoré’s account of outcome responsibility).

336. Dobbs et al., *supra* note 328, § 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 . . .”).

337. *Id.*

338. *Id.*

339. See *supra* section I.A (collecting cases that manifest a but-for approach to authorial causation).

expression in question would not have come into existence. Since this is principally an epistemic question, it bears emphasizing that each individual determination is specific to the particular work at issue. It therefore matters very little if someone else brought a substantially similar, analogous, or identical work into existence.

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

A good example of this is seen in situations in which a work owes its origins to forces of nature. Suppose that 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. Under the but-for test, 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. Because the pattern at issue would have come into existence even without the owner's actions, the but-for-creation test does not award authorship status to the owner. Conversely, consider the monkey-selfie episode 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.³⁴⁰ While the monkey was certainly the most immediate cause of the photograph (because it pressed the button), the photographer's actions clearly meet the but-for-creation test.

In applying the but-for-creation test, courts would usually need to recreate a hypothetical counterfactual situation to assess whether the work would have come into existence even without the claimant's intervention. In most instances, this would likely be relatively uncontroversial—as in the beach-pattern and monkey-selfie scenarios, which entail objective causal determinations involving a single human actor. Once one moves from absolute situations to relative situations, which involve multiple actors, things start becoming more complex. In these situations, one begins to encounter what theorists of causation refer to as overdetermined causation (i.e., situations in which a single

340. See *supra* notes 1–7 and accompanying text.

outcome is in principle determined by multiple causes).³⁴¹ Here, too, copyright law might once again learn from the common law of torts.

2. *Necessary Element of a Sufficient Set (NESS)*. — Scholars have usually divided instances of overdetermined causation into the separate categories of “duplicative causation” and “preemptive causation.”³⁴² Duplicative causation refers to situations in which two or more causes combine together to produce a result.³⁴³ For instance, two individual fires might combine together to produce a large inferno that destroys a house.³⁴⁴ Preemptive causation, on the other hand, arises when one cause follows another to produce a result, with the latter cause usually cutting short the former.³⁴⁵ For example, suppose that one person gives another a lethal dose of poison, which the victim ingests. But just before the poison can take effect, someone else shoots and kills the victim. Here, the second cause (the gunshot) preempts the first (the poison) and cuts it short. In all of these situations, untangling the independent causal significance of each cause becomes complicated under the simple but-for test.

Overdetermined causation arises in copyright principally when multiple contributors produce a single work. It would be most accurate to characterize these multiple-contributor situations as instances of “multiple causation” rather than as duplicative or preemptive causation. Since copyright law provides for careful scrutiny of each individual contribution under the originality doctrine,³⁴⁶ creation in fact can never be truly duplicative, strictly speaking. Additionally, in the creative context, one creator’s contributions cannot preempt another’s; rather, the contributions build on one another, meaning that causation is seldom preempted. Joint works are almost by definition the result of multiple causal influences,³⁴⁷ requiring the law to disaggregate the authorial significance of each of them.

One might further classify instances of multiple causation in copyright into “joint causation” and “sequential causation,” a distinction that roughly tracks the law’s analytical distinction between joint works

341. See Hart & Honoré, *supra* note 22, at xxxix–xlii (describing theories of “causal overdetermination”); Louis E. Loeb, *Causal Theories and Causal Overdetermination*, 71 *J. Phil.* 525, 526 (1974).

342. See, e.g., Wright, *supra* note 22, at 1775.

343. *Id.*

344. For the source of this classic hypothetical, see *Anderson v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 179 N.W. 45, 56 (Minn. 1920).

345. Wright, *supra* note 22, at 1775.

346. Cf. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348–49 (1991) (explaining the limitations the originality doctrine imposes).

347. See 17 U.S.C. § 101 (2012) (defining 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”).

and derivative works.³⁴⁸ 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 just one of their contributions in isolation. In principle, one could argue that neither artist's actions would independently satisfy the but-for-creation standard on their own, since one could counterfactually hypothesize that either 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 artist,³⁴⁹ copies and modifies the first artist's work rather significantly to produce a new, 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.

In the first situation, the but-for test is underinclusive—both authors fail the test—and in the second, it is overinclusive—both authors satisfy the test. How should the creation-in-fact analysis proceed in these situations? Theorists of causation in the law, beginning with Professors H.L.A. Hart and 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 to be known as the Necessary Element of a Sufficient Set (NESS) test.³⁵⁰ The NESS test asks if the condition at issue was a critical element of a set of antecedent actual conditions that was—as a whole—sufficient for the consequence to occur; if answered in the affirmative, the NESS test treats the condition as

348. See Balganesch, *Unplanned Coauthorship*, *supra* note 252, at 1733 (characterizing copyright law's distinction between joint works and derivative works as embodying an intention to distinguish between time-of-creation and postcreation merger of creative contributions). The legislative history accompanying the current copyright statute suggests this distinction as well. See H.R. Rep. No. 94-1476, at 120 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736 (noting that even if an author created a work with the expectation it would be adapted into a motion picture, 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).

349. 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). 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).

350. See Hart & Honoré, *supra* note 22, at 109–29.

a cause.³⁵¹ The most sophisticated treatment of the NESS test can be found in the work of Professor 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.”³⁵²

The NESS test operates to modify the traditional but-for approach. In duplicative causation situations (e.g., the inferno produced by two fires), the NESS test treats both causes as factual causes in the recognition that each is a necessary element of a set of *actual* conditions that includes the other fire.³⁵³ In preemptive causation cases (e.g., the poisoning–shooting situations), the NESS test would find the preemptive cause (the shooting) to be a factual cause while exempting the preempted cause (the poison) since the latter was not a necessary element of a set of actual conditions that produced the result.³⁵⁴

As applied to the overdetermination cases in copyright law (i.e., situations of multiple causation), the NESS test also fares significantly better than but-for 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 lies in contrast to the conclusion under a but-for test. Returning to the earlier example of joint causation involving the two artists, the NESS test would ask if each artist’s contribution was a necessary element of the set of actual antecedent conditions that includes both artists’ contributions in which 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 also 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 as irrelevant to the causal determination since each is a necessary part of the complete actual set.³⁵⁵ The law might more appropriately deal with the consequence of this disparity in actual contribution elsewhere rather than in

351. *Id.*

352. Wright, *supra* note 22, at 1788–1803.

353. See *id.* at 1793–94.

354. *Id.* at 1795.

355. This is consistent with the current functioning of the joint works doctrine. See Balganes, *Unplanned Coauthorship*, *supra* note 252, 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.”).

the causal inquiry.³⁵⁶ For example, courts could pay attention to contribution-related disparities when 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.

Sequential causation presents a more complicated story. Here, both the but-for and NESS tests point in the same direction: Both authors are causally responsible for the creation of the work. Because the derivative author's contributions never 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 product (i.e., the derivative work). If one were to remove the original author's contribution from the set, there would be no work from which to create the derivative work; conversely, if one were to remove the derivative author's contributions, there would be no derivative work at all. Consequently, the NESS test yields the result that *both* the creator of the original work and the creator of the derivative work are creators in fact of the derivative work as a matter of cause in fact. In this regard, the NESS test deals with sequential causation and joint causation in a largely identical fashion.

At first glance, treating both authors' contributions as epistemic causes in sequential-causation situations (i.e., derivative work situations) may seem counterintuitive. On closer scrutiny, however, one realizes that the NESS test tracks copyright law's basic principles about derivative authorship, such as the need to keep the rights in a lawful derivative work distinct from those in the original.³⁵⁷ Copyright scholars have long

356. See Brief of Amici Curiae Professors Shyamkrishna Balganesh, Justin Hughes, Peter Menell, and David Nimmer in Support of Neither Party at 17–21, *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (No. 12-57302) (arguing that “neither Congressional intent nor the common law” supports the idea that each joint author is “necessarily entitled to coequal sharing of the fruits of the collaborative enterprise”).

357. See 17 U.S.C. § 103(b) (2012) (providing that copyright in a derivative work “does not imply any exclusive right in the preexisting material”). Derivative works, by definition, build on “preexisting” works, which may have already obtained copyright protection. In recognizing that the introduction of additional creativity in the transformation, adaptation, or modification of the preexisting work to create a derivative work is worthy of protection, modern copyright law does three things simultaneously. First, it denies protection for a derivative when the use of the preexisting work was unlawful. See *id.* § 103(a); *Anderson v. Stallone*, No. 87–0592 WDKGX, 1989 WL 206431, at *9 (C.D. Cal. Apr. 25, 1989). Second, when a derivative work is lawfully created, the law accords protection only to the original contributions of the derivative author. See 17 U.S.C. § 103(b); *Entm't Research Grp. v. Genesis Creative Grp.*, 122 F.3d 1211, 1218–20 (9th Cir. 1997) (interpreting § 103(b) to extend derivative protection to only “original aspects” of the derivative that are “more than trivial” (internal quotation marks omitted) (quoting *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980))). Third, the law seeks to ensure that the protection so given to the derivative work does not interfere with the protection that the preexisting work receives, either by expanding or diminishing such protection for the preexisting work. See 17 U.S.C. § 103(b).

debated—and tried to understand—why copyright law accords authors of original works the right to control the creation of derivatives even when this creation involves its own element of originality.³⁵⁸ As this Article’s discussion on “legal creation” will make clear, the law does moderate this control in important ways.³⁵⁹ But ultimately, the significant control over downstream derivatives granted to original authors may 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. Of course, it remains an independent question whether this epistemic causality ought to serve as a legal basis for authorship—a question that the next step in the copyrightable-causation test (and indeed, copyright law more generally) addresses.

The NESS test therefore allows for scrutiny under the creation-in-fact inquiry of situations of multiple causation in which 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*

As discussed in the previous section, the creation-in-fact step of the copyrightable-causation requirement would enable 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 would principally be epistemic and premised on the patterns of cause and effect observed in human behavior in various contexts. This section focuses on the next step of the inquiry: “legal creation.” Unlike creation-in-fact, the legal-creation analysis would be largely evaluative. Legal creation asks whether the identified human agency ought to lead to an authorship claim as a matter of copyright’s goals and principles, even after the court has epistemically identified that agency as the cause of the work.

Legal creation would track tort law’s proximate cause requirement, which commentators have understood as an inquiry that determines the appropriate scope of an actor’s liability even when that actor is an

358. See, e.g., Pamela Samuelson, *The Quest for a Sound Conception of Copyright’s Derivative Work Right*, 101 *Geo. L.J.* 1505, 1554–58 (2013). For other prior efforts to develop theoretical justifications for the right, see generally Michael Abramowicz, *A Theory of Copyright’s Derivative Right and Related Doctrines*, 90 *Minn. L. Rev.* 317 (2005) (developing a spatial-competition-based justification for the derivative works right); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 *J. Copyright Soc’y U.S.A.* 209 (1983) (developing an incentive-based justification for the right).

359. See *infra* section III.C.3 (explaining how a “personality-conflation principle” tracks the law’s treatment of derivative works).

epistemic cause for the harm at issue.³⁶⁰ 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.³⁶¹ As an illustration, consider a computer manufacturer whose negligently produced product requires a customer to visit a repair shop. 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 a necessary element of a sufficient set of conditions that produced the injury.³⁶² And yet, in a claim for negligence, a court is likely to conclude that the negligent behavior (of the manufacturer) was not the proximate cause of the injury.³⁶³ Why? Because as a matter of tort law's commonly understood goals—for example, of incentivizing careful behavior or of attributing moral blameworthiness—characterizing the manufacturer as the legal cause for the injury seems incongruous.³⁶⁴

To give effect to these various goals, which are 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.³⁶⁵ Uniquely developed for tort law, foreseeability fits both the instrumental and the moral justifications for the imposition of tort liability.³⁶⁶ Some scholars have described foreseeability as a principle that takes shape and color by reference to certain important normative ideals but allows courts (or other decisionmakers) to avoid direct recourse to those ideals when actually applying the doctrine.³⁶⁷ In this regard, foreseeability prioritizes analytical content over the normative in its application, even though the normative motivates its very existence.

360. See Dobbs et al., *supra* note 328, § 199.

361. *Id.*

362. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 273 (5th ed. 1984).

363. Cf. Dobbs et al., *supra* note 328, § 200 (“If the thief who finds the owner’s keys in the car drives safely away, sells the car to a dealer, who sells it to a retired lawyer, most courts will undoubtedly conclude that the lawyer’s negligence in driving the car . . . is not proximately caused by the [car’s owner].”).

364. Cf. *id.* § 199 (arguing, based on “principled” justifications, that “if the defendant is considered to be negligent only because it makes a vacuum cleaner that does not clean well, it should not be held liable when the purchaser is in an automobile accident while taking the cleaner to be repaired”).

365. *Id.*

366. See, e.g., W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. Rev. 921, 940–59 (2005).

367. See Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 Wake Forest L. Rev. 1247, 1249–51 (2009) (describing how foreseeability is used in one context to give effect to the famous Learned Hand formula for determining negligence). 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).

In a similar vein, courts or lawmakers 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,³⁶⁸ these principles would operate to preclude certain forms of human agency from qualifying as authorial causes. In this respect, legal creation would perform a largely exclusionary role.

An important caveat is in order before identifying the midlevel principles through which legal creation might operate. While these principles—like those in proximate cause—would function to give effect to the institution's fundamental goals and ideals, they would do so only through the epistemic cause identified in the prior step (i.e., creation in fact) and never independently. In this sense, then, legal creation would always be parasitic on the epistemic aspect of copyrightable causation rather than an independent vehicle to give effect to copyright's goals. Just as proximate cause is materially distinct from the question of whether the law ought to identify a duty of care to exist at all for liability purposes,³⁶⁹ one should not view legal creation as just another mechanism by which to calibrate the copyright entitlement. Rather, legal creation would be a device that lays 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.³⁷⁰ Generally speaking, scholars have identified these goals in principally instrumental terms.³⁷¹ By providing creators with a marketable set of exclusive rights in their works, copyright law induces the creation of new works, thereby promoting overall social welfare ("progress").³⁷² Incentives, allocative efficiency, and social-welfare maximization thus lie at the root of this account.³⁷³ The incentives

368. See *Pittway Corp. v. Collins*, 973 A.2d 771, 788 (Md. 2009) ("Legal causation is a policy-oriented doctrine designed to be a method for limiting liability after cause-in-fact has been established.").

369. Dobbs et al., *supra* note 328, § 200.

370. See, e.g., Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* 14–52 (2014); Abraham Drassinower, *What's Wrong with Copying?* 17–53 (2015); Neil Weinstock Netanel, *Copyright's Paradox* 154–68 (2008); Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 *Harv. L. Rev.* 1664, 1677–82 (2012); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 *J. Legal Stud.* 325, 326–33 (1989) [hereinafter *Landes & Posner, Economic Analysis of Copyright Law*]; Balganesh, *Debunking Blackstonian Copyright*, *supra* note 51, at 1132–42.

371. See, e.g., Netanel, *supra* note 370, at 154–68; Landes & Posner, *Economic Analysis of Copyright Law*, *supra* note 370, at 325–26.

372. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

373. See Landes & Posner, *Economic Analysis of Copyright Law*, *supra* note 370, at 325, 332, 339–41.

rationale contrasts with less instrumentally focused rationales, which connect copyright to the morality or intrinsic worth of authorship as an activity.³⁷⁴ Whereas the instrumental conception focuses on the utilitarian benefits of copyright, the deontic conception emphasizes the relationship between author and expression as embodying an inner rationality worthy of protection on its own.³⁷⁵ The author's individual dignity anchors the foundations of this theory.³⁷⁶

Over the years, scholars have tried to offer accounts that reconcile these competing ideas, with varying degrees of success.³⁷⁷ Nonetheless, midlevel principles that inform the application of a doctrine enable courts to avoid choosing between competing normative ideals or reconciling them on an individual basis.³⁷⁸ The very construction of these principles allows them to embrace 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, reveals three general midlevel principles through which the legal-creation prong of copyrightable causation might be operationalized: control,³⁷⁹ disproportionality,³⁸⁰ and personality conflation.³⁸¹ It bears emphasizing that because these principles belong to the exclusionary prong of copyrightable causation, each principle operates in the negative—that is, if applicable, the principle disqualifies a work that has satisfied the creation-in-fact requirement.

1. *Control*. — When a putative creator of a work has exercised insufficient control over the process leading to its creation, courts should deem the contribution 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.³⁸² Given that copyright's principal

374. See Drassinower, *supra* note 370, at 7–9; Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* 1–9 (2010).

375. See Shyamkrishna Balganesh, *The Immanent Rationality of Copyright Law*, 115 *Mich. L. Rev.* (forthcoming 2017) (reviewing Drassinower, *supra* note 370) (manuscript at 4–6) (on file with the *Columbia Law Review*).

376. See *id.* (manuscript at 10–11).

377. See, e.g., Robert P. Merges, *Justifying Intellectual Property* 9–27 (2011); Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 *Duke L.J.* 203, 242–60 (2012); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 *Va. L. Rev.* 1745, 1759–89 (2012).

378. Merges, *supra* note 377, at 146.

379. *Infra* section III.C.1.

380. *Infra* section III.C.2.

381. *Infra* section III.C.3.

382. See, e.g., *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 697–98 (2d Cir. 1992) (discussing the steps involved in creating computer software).

focus is the expression being created, the sufficiency (of control) under scrutiny should be limited to that part of the creative process in which the original expression formed. While obviously a contextual question, it is likely to arise in three scenarios.

The first involves situations in which a nonhuman 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 nonhuman 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 nonhuman element was predictable based on natural or artificial conditions. These kinds of situations arise when the creative process involves undirected natural processes, as was the case in the monkey-selfie episode. There, the photographer was causally responsible as an epistemic matter for the origins of the ultimate expression;³⁸³ yet, in terms of creative process, he relied entirely on the undirected activities of the macaque monkey for the ultimate expression.³⁸⁴ Even if the primate’s actions were completely predictable, courts should treat the photographer as disqualified from protection under this prong. Critically, this conclusion does not simply result from the photographer’s reliance on a monkey. If a trained monkey or some other animal that the photographer had controlled had been responsible for the photograph, then the animal’s involvement would be both predictable and *directed* rather than undirected, which would have in turn potentially qualified the photographer as an author.

A second scenario in which control over the creative process might be lacking arises when an “element of chance” (or luck) plays a major role in the creation of the expression. This would cover situations in which the claimant produced the work by accident, such as when an artist slips and spills a set of colors onto a canvas, thereby generating an aesthetically appealing pattern. Determining when (and how) chance enters the creative process is of course a fact-intensive inquiry, and a putative creator may deny its presence altogether.³⁸⁵ Yet, when shown to exist in significant part, this element of chance reveals the creative process to have been substantially stochastic.

The third possibility arises within relative agency determinations and involves situations in which another human agent (or multiple agents) not under the supervision or direction of the putative claimant produces the expression at issue—appropriately described as a “nonservient

383. See *supra* note 340 and accompanying text (noting the photographer’s actions were necessary before the monkey could take the photograph).

384. See *supra* notes 1–11 and accompanying text (explaining the photographer’s involvement was limited to setting up the equipment).

385. But see *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 104–05 (2d Cir. 1951) (alluding to evidence that the putative creator may have inadvertently produced copyrightable expression).

human influence.” The most common instance of this scenario involves a work commissioned from an independent contractor who is not in a hierarchical relationship with the commissioning party.³⁸⁶ 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.

Of course, situations in which one or more of these categories overlap can arise. For instance, one might explain the monkey-selfie episode³⁸⁷ as involving both a heightened element of chance and a significant undirected influence. But the unifying feature of this category is the claimant’s inability to replicate the outcome of the creative process.³⁸⁸

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.³⁸⁹ When the claimant has exercised very little control over the creative process, one may plausibly infer that the prospect of obtaining copyright protection likely did not influence or induce the claimant’s creative expression in any significant manner, making the claimant undeserving of protection under the inducement account. In other words, when the role of rational agency in the production of the work is limited, one can legitimately call into question copyright’s role in rationally influencing that agency. The inadequacy-of-control principle is thus unquestionably utilitarian in orientation, originating in copyright’s welfarist theory of incentives.

At the same time, it is important to appreciate that *complete* control is not necessary to satisfy the legal-creation test. Many forms of creativity that should legitimately receive protection embody an element of chance within their means of production. The question in each instance is the ratio of control to chance underlying the creative process. An artist’s chance production of an additional lighting effect by mixing two shades of color on a portrait is vastly different from an artist’s accidental, undirected spillage of paint onto a canvas that happens to produce an abstract shape. Both involve chance—and indeed some control—but the

386. See, e.g., *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752–53 (1989) (finding an independent contractor who had contracted with the plaintiff to produce a sculpture to be a nonemployee and therefore outside the plaintiff’s control).

387. See *supra* notes 1–11 and accompanying text.

388. In a sense, there is also a lack of intentionality during the creative process, either consciously or by circumstance. See Nimmer, *Dead Sea Scrolls*, *supra* note 21, at 204–07 (“[I]t would seem that intent is a necessary element of the act of authorship.”).

389. See Balganesch, *Foreseeability*, *supra* note 332, at 1573.

ratio varies. The control principle would merely force courts to grapple with the working of this ratio in individual domains of creativity.

2. *Disproportionality*. — In some situations, the characterization of an individual who plays some epistemically verifiable role in the creation of a work as the work's author is disproportionate to the (1) quality, (2) quantum, or (3) monetary value of that individual's contribution during the creative process. In these situations, the legal-creation prong would weigh against the existence of copyrightable causation on the part of that individual. The primary domain in which one would expect to see this principle at work relates to relative (rather than absolute) agency determinations—situations in which one individual's contribution to the work is assessed against a baseline of other actors' similar contributions.

This principle focuses on the intuitive mismatch between the actor's role in the creation of a work and the final consequences of authorship, which can be monetary, attributional, or distributional. Monetary consequences are the most straightforward and relate to the claimant's ability to lay claim to the market for the work at issue. 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. Frequently, the monetary and attributional consequences will influence the determination in tandem.

Distributional consequences regularly arise when a claimant seeks not exclusive authorship but rather joint authorship. Here, the baseline of comparison—with other contributors to the work—is not 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, in which each author's ownership stake or right is equal to the other's regardless of the precise contribution made to the work, generates the impulse to deny legal creation altogether because of the disproportionality in contribution.³⁹⁰

The monetary and attributional consequences play out in courts' willingness to recognize directors and producers of motion pictures as their authors even when a film involves multiple performers and contributors.³⁹¹ 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 lies in contrast with, say, a cameraman's contribution

390. 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.”).

391. See, e.g., *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) (finding that a motion picture's director qualified as its author even though others operated the cameras).

to a movie or a consultant's contribution to a screenplay.³⁹² Legal creation—as well as current law³⁹³—would find these contributions insufficient to qualify for protection either as exclusive claims or as joint claims. As exclusive claims, they represent rather significant mismatches between the contributions and the consequences (full ownership and sole attribution). As joint claims, the contributions seem significantly less substantial—both quantitatively and qualitatively—than those of the other claimants to authorship (e.g., the director), which renders the authorship claims disproportionate from a distributive standpoint.

As a theoretical matter, considerations of desert motivate the disproportionality principle discussed here. 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.³⁹⁴ Desert considerations are thus infused with a strong ethical claim that can exist independently of consequentialist justifications.³⁹⁵ The argument that a contributor deserves to be classified as the legal creator (i.e., author) of the work by virtue of her contributions may thus serve as a claim about the virtue of that contribution— independently of whether the classification might enhance overall utility, either in the individual case or over the long term.

All the same, as some philosophers have argued, one can understand desert itself as motivated by consequentialist considerations.³⁹⁶ According to this view, the virtue at issue—in the contribution—is beneficial not just for the particular work or for authorship, but instead systemically (i.e., to stimulate further productions of such virtue), and desert begins to partake of a strong consequentialist or utilitarian color. Here the distinction—for the 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 or deontic terms. Whether that deontic logic might itself form 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

392. See *Aalmuhammed*, 202 F.3d at 1233–34.

393. See *id.* at 1233–35.

394. See Owen McLeod, *Desert*, Stan. Encyclopedia of Phil., <http://plato.stanford.edu/archives/win2013/entries/desert/> (on file with the *Columbia Law Review*) (last updated Nov. 12, 2008). 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 (1993).

395. McLeod, *supra* note 394.

396. See Fred Feldman, *Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice*, 55 *Phil. & Phenomenological Res.* 567, 572–85 (1995) (developing a desert-sensitive version of consequentialism).

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 (i.e., author) as causally linked to every work that derives from it, one might consider the causal nexus severed when the importance of those individual creative choices is conflated.

A stylized example helps illustrate the working of this principle. Consider an original work of fiction written by *A* and a sequential series of lawful derivative works³⁹⁷ each produced by a different author. *B* directs and produces a motion picture based on the novel produced by *A*. *C* then writes a children's short story based on the characters and storyline in *B*'s motion picture, which *D* then translates into another language. 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 this sequence, one can thus causally link each creator not only to her individual work but to subsequent derivatives as well. 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 fundamental point that even if *A* contributed causally to each of the works, her contribution was less significant to those subsequent works than each of the others' contributions was. Indeed, continuing to treat *A* as causally responsible conflates the creative choices that *B*, *C*, and *D* each made in producing their works with *A*'s and treats them as coequal 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 regard to the works that *C* and *D* respectively produced.

Indeed, this position appears to track the law's treatment of derivative works. The Copyright Act expressly provides that the copyrightability of a derivative work "is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection

397. The Copyright Act defines a derivative work as a "work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (2012). The term "lawful" tracks the statute's requirement that a derivative not be unlawfully created. *Id.* § 103(a). Examples of circumstances that render such derivative creation lawful include consent from the owner of copyright in the preexisting work and fair use. See H.R. Rep. No. 94-1476, at 58 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5671 (identifying "fair use" as an example of lawful creation); 1 Nimmer & Nimmer, *supra* note 28, § 3.06 (discussing the role of consent in rendering the creation lawful and concluding that such consent is illustrative of lawfulness but not exhaustive of it).

in the preexisting material.”³⁹⁸ While the author of the preexisting work—A, in our example—may claim an ownership interest in portions of her work that were used in the subsequent derivatives, she does not thereby become a coauthor of those subsequent derivatives,³⁹⁹ which tracks the principle articulated here. The legislative history of the Copyright Act explicitly confirms this reading of the Act: Congress chose to deny the status of author (i.e., coauthor) to individual authors whose works were incorporated into lawful derivatives.⁴⁰⁰

The personality-conflation principle is essentially a test of remoteness.⁴⁰¹ When the original author’s individual creative choices are too far removed from the derivative works eventually created, such that continuing to treat the new creator’s choices as causally related to the original creator’s choices clouds the salience of the new creator’s own choices, the principle suggests that courts should deny authorship status to the claimant. This does not necessarily mean that the new creators’ choices are independently worthy of protection under the originality standard. Rather, the originality determination is altogether separate from copyrightable causation. While originality focuses exclusively on the new creator’s choices, copyrightable causation—through the personality-conflation factor—focuses on the distance between the original author’s choices and new work. Note also that the concern about conflation arises only when the derivative works in question are produced lawfully. When the legality of those works is itself at issue, an altogether different set of considerations apply.⁴⁰²

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 author’s individual creative choices during the creative process. While the factor does not treat personality as an independent basis for protection, it would, to the extent that the creation-in-fact inquiry obfuscates authorial personality, militate against a finding of copyrightable causation. In a sense, then, the principle accommodates aspects of deontic (or rights-based) accounts of copyright law, which justify the system by emphasizing the author’s

398. 17 U.S.C. § 103(b).

399. See *id.* (distinguishing the “preexisting material” used in a derivative work from the material contributed by the derivative work’s author and providing that the derivative work’s copyright “does not affect . . . any copyright protection in the preexisting material”).

400. H.R. Rep. No. 94-1476, at 120, reprinted in 1976 U.S.C.C.A.N. at 5736 (rejecting the concern that the definition of joint works would convert “the authors of previously written works, such as plays, novels, and music, into coauthors of a . . . [derivative] in which their work is incorporated”).

401. Cf. Dobbs et al., *supra* note 328, § 208 (describing the term “remote” in tort law as the antonym of “proximate”).

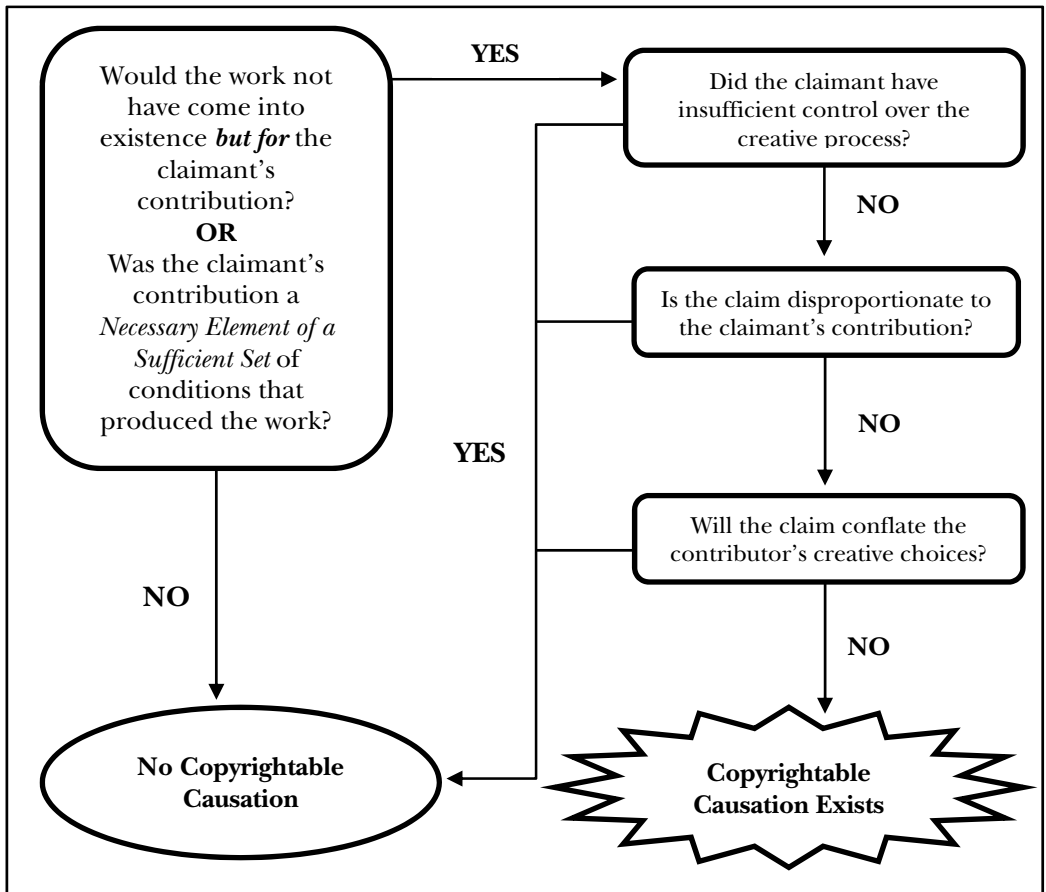
402. See 1 Nimmer & Nimmer, *supra* note 28, § 3.06 (discussing the requirement that the derivative work be produced lawfully and examining the consequences of unlawfully using preexisting work to produce a derivative).

relationship to the work. According to this account, obfuscating the author's personal choices that underlie the work is problematic because it mischaracterizes the work as consisting merely of those choices' results.

* * *

Copyrightable causation should be understood as a two-step inquiry. The first step—creation in fact—would focus on the presence of an epistemic basis for authorial causation, and the second step—legal creation—would examine whether that epistemic basis is normatively sufficient to identify the human agent as causally responsible for the work created. The two steps are sequential in structure. Figure 1 below shows their interaction and operation.

FIGURE 1: 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” in Part III, this Part considers two extensions of the idea beyond a freestanding copyrightable-causation analysis: (1) situations in which authorial causation is presumed as a matter of law and (2) situations in which the law requires causation to be transferred from one party to another.

A. *Presumptive Causation*

The discussion thus far has focused on a freestanding “copyrightable causation” requirement that a plaintiff would need to establish as part of a copyright infringement lawsuit and that a court would have to adjudicate.⁴⁰³ As previously discussed, this determination would ultimately contain both an epistemic⁴⁰⁴ and an evaluative component.⁴⁰⁵ As should be obvious, this framework—much like in tort law—would place the burden principally on courts, requiring them to determine (1) when and how an agent’s actions are epistemically linked to creation and (2) whether that epistemic link is normatively sufficient to constitute authorship.⁴⁰⁶ 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.⁴⁰⁷ For example, Congress could address authorial causation through 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. The U.K. copyright statute follows precisely such an approach by identifying the author for particular categories of works based on the individuals’ respective contributions:

[The author] shall be taken to be—

403. See *supra* Part III (proposing this requirement).

404. See *supra* section III.B (advancing “creation in fact” as the first step in the copyrightable-causation inquiry).

405. See *supra* section III.C (suggesting “legal creation” as the second step in the copyrightable-causation inquiry).

406. See *supra* sections III.B–C (describing the two steps of this test).

407. For useful accounts of how and when federal statutory regimes divide up institutional lawmaking authority between the different branches of government, see 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); Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (1994) (developing an economic framework for institutional choice in lawmaking).

- (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.⁴⁰⁸

In each of these situations, the statute creates a presumption that certain actions during the creative process automatically satisfy authorial causation and qualify the individual as the author of a work.⁴⁰⁹ This approach to authorial causation, best described as *presumptive causation*, has certain obvious advantages when compared with a freestanding requirement.

First, presumptions would introduce a degree of consistency in the authorial determination for certain categories or classes of works. By embedding a sticky default into the determination, presumptions allow the law to accord creators a measure of *ex ante* certainty about their status.⁴¹⁰ For example, the law might—tracking the U.K. approach—automatically presume the producer of a sound recording to have caused its creation and therefore treat the producer as the work’s author even if in that individual case the producer played no role whatsoever in the creation of the recording. Second, and relatedly, presumptions would lower the administrative cost on courts by eliminating the need for a factual and normative determination for certain categories of work.⁴¹¹ A presumptive approach would simply require courts to adjudicate whether an individual falls into the identified status or category when that characterization is unclear. In situations in which 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 would avoid needless litigation on the question of authorial causation in relation to new technologies and creative mechanisms. Computer-generated works are a prime example: While American copyright scholars continue to debate the ideal approach to authorship of computer-generated works,⁴¹² the U.K. statute

408. Copyright, Designs and Patents Act 1988, c. 48, § 9 (UK).

409. See Gerald Dworkin & Richard D. Taylor, *Blackstone’s Guide to the Copyright, Designs and Patents Act 1988*, at 46–47 (1989).

410. Cf. Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 *Yale L.J.* 2032, 2084–96 (2012) (discussing the phenomenon of stickiness relating to default rules); Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 *Fla. St. U. L. Rev.* 651, 651–52 (2006) (same).

411. Cf. Cass R. Sunstein, *Problems with Rules*, 83 *Calif. L. Rev.* 953, 963, 972–74 (1995) (comparing presumptions to rules and discussing the efficiency benefits of rules).

412. See, e.g., Grimmelmann, *Copyright for Literate Robots*, *supra* note 56, at 661–74; Grimmelmann, *No Such Thing*, *supra* note 56, at 408–14; Bridy, *supra* note 56, at 21–27. For an early account of the problems in identifying authorship in computer-generated works, 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*

definitively declares that “the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.”⁴¹³ Notably, this declaration does not 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 in the manner seen in the U.K. statute, given its refusal to even define who an “author” is under the law.⁴¹⁴ Congress instead appears fully content delegating the question to courts, which can develop answers incrementally and contextually as technology and creative mechanisms evolve.⁴¹⁵ This is consistent 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.⁴¹⁶ And at that stage, the trade-off between the certainty of the presumptive approach and the flexibility of the freestanding approach is likely to motivate much of the debate.

All the same, it is possible that Congress will—at some point in the future—choose to adopt a statutory solution to the problem of causation, analogous to the U.K. approach. Indeed, the Copyright Act’s treatment of works that are specially commissioned or ordered for use “as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas” suggests such an approach.⁴¹⁷ For such works, if the parties enter into a written agreement that classifies the work as a “work made for hire,”⁴¹⁸ the law automatically treats the commissioning or ordering party as the author (not just the owner) of the work.⁴¹⁹ Within this narrow domain, American copyright law thus appears to already endorse a rule of presumptive causation in its treatment of authorship.

Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?, 106 Harv. L. Rev. 977, 1042–72 (1993).

413. Copyright, Designs and Patents Act 1988, c. 48, § 9(3); see also Dworkin & Taylor, *supra* note 409, at 47 (discussing the U.K. approach to authorship of computer-generated works).

414. See *supra* note 217 and accompanying text (noting the U.S. Copyright Act does not define “authorship”).

415. See Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 Vand. L. Rev. 1543, 1591–601 (2010).

416. See Balganesh, *Debunking Blackstonian Copyright*, *supra* note 51, at 1162–70.

417. 17 U.S.C. § 101 (2012) (defining the term “work made for hire”).

418. *Id.*

419. *Id.* § 201(b).

B. *Transferred Causation*

There is one important area wherein American copyright law adopts something akin to a presumptive approach to causation: the work made for hire doctrine.⁴²⁰ One might describe the law's approach to the work made for hire doctrine as "transferred causation." Under this doctrine, the law deems one party to be the author of a work, even though another person created it. This occurs most commonly when an employee creates a work during a formal employment relationship and within the scope of the employment.⁴²¹ The formal employment relationship, once shown to exist, results in the presumptive transfer of authorial causation from the employee to the employer. Transferred causation 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* causation is shown to exist.⁴²²

When an employee is causally responsible (epistemically and evaluatively) for a work that she creates during the course of 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.⁴²³ 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 work. However, 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.⁴²⁴ Scholars have attempted to rationalize the doctrine in different ways for some time now,⁴²⁵ and the principal justification that appears to hold

420. *Id.* § 101 (defining the term "work made for hire").

421. See 1 Nimmer & Nimmer, *supra* note 28, § 5.03[B][1][b][I] (noting that "[o]rdinarily" the employer and employee "assume ownership in the employer," although they "do not attempt to define with exact precision" which works will qualify).

422. See 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 . . .").

423. See *id.*

424. For an overview of vicarious liability in tort law, see P.S. Atiyah, *Vicarious Liability in the Law of Torts* (1967); T. Baty, *Vicarious Liability* (1916); J.B. Hodge, *Vicarious Liability* (1986).

425. See Restatement (Third) of Agency § 2.04 cmt. b (Am. Law Inst. 2006) ("Respondeat superior creates an incentive for principals to choose employees and

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.⁴²⁶ Nevertheless, even purely instrumental accounts of vicarious liability readily admit that the doctrine embodies a presumption about causal transfer, which Professor Alan Sykes has described as “enterprise causation.”⁴²⁷ As Sykes describes it, 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 to zero.”⁴²⁸ 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 unlikely to have caused the harm.

It is crucial to recognize that unlike presumed causation, transferred causation does not assume away causation altogether using a proxy. Instead, transferred causation still demands proving that the employee was causally responsible in an epistemic and evaluative manner (i.e., cause in fact and proximate cause) for the injury produced.⁴²⁹ 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 a party shows that the employee was causally responsible for the production of a work in both epistemic and evaluative respects, the 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. After 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

structure work within the organization so as to reduce the incidence of tortious conduct.”); Dobbs et al., *supra* note 328, § 426; Douglas Brodie, *Enterprise Liability: Justifying Vicarious Liability*, 27 *Oxford J. Legal Stud.* 493, 496–508 (2007); William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 *Yale L.J.* 584, 584 (1929); William O. Douglas, *Vicarious Liability and Administration of Risk II*, 38 *Yale L.J.* 720, 720–45 (1929); Howard J. Laski, *The Basis of Vicarious Liability*, 26 *Yale L.J.* 105, 107–35 (1916).

426. See 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, 581–93 (1988) [hereinafter Sykes, *Boundaries of Vicarious Liability*]; Alan O. Sykes, *The Economics of Vicarious Liability*, 93 *Yale L.J.* 1231, 1236–43 (1984).

427. Sykes, *Boundaries of Vicarious Liability*, *supra* note 426, at 571–73.

428. *Id.* at 572.

429. *Cf.*, e.g., *Christus Health Ark-La-Tex v. Curtis*, 412 S.W.3d 44, 48 (Tex. App. 2013) (noting that a plaintiff’s allegations that a hospital employee caused his injuries were sufficient to state a claim against the hospital under a vicarious liability theory).

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—in either 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, one might understand copyright law 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 inevitably 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 noncausal functions, which has allowed copyright jurisprudence to overlook the role and influence of causation in the construction of authorship. 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 lead to 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, one can nonetheless sequence their relative contributions to the analysis in a way that renders one more salient than the other in each step. Such sequencing would also allow copyright law to embrace its normative pluralism through the deployment of suitable midlevel principles during the analysis.

Developing a requirement of copyrightable causation, modeled on tort law's rules about causation, would also affirm the ideas 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 the system is principally statutory in origin. To the extent that the Copyright Act—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 lawmaking role that the system consciously delegates to them. And in so doing, they would do well to look to analogous ideas and concepts that courts have developed and employed with fecundity in other areas. The principles of causation represent one such domain, in which logic, theory, and practice serve as convenient guides.