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## Audiovisual Works and the Work for Hire Doctrine in the Internet Age

*John L. Schwab\**

### INTRODUCTION

Chris Carter was one of the most successful writers and creators of television in the 1990s.<sup>1</sup> His works include “Millennium” and, most prominently, “The X-Files.”<sup>2</sup> Mr. Carter created “The X-Files” and was the program’s ‘showrunner,’ meaning he either made or approved every creative decision associated with each episode—including the writing, the direction, the set design, the costuming and the editing.<sup>3</sup> As is common in the world of audiovisual entertainment, Mr. Carter did not own the copyright to “The X-Files.”<sup>4</sup> This created a problem for Mr. Carter, since the commercial success of “The X-Files” made it a prime candidate for syndication. Syndication, also known as second run programming, is the most lucrative aspect of television production.<sup>5</sup> The owner of “The X-Files,” Twentieth Century Fox Television, sold the program’s syndication rights to a separate Fox subsidiary, the FX Network.<sup>6</sup> This original sale led to allegations of self-dealing. Fox subsequently resyndicated the program with a competitor, NBC Universal’s USA Network.<sup>7</sup> When Fox resyndicated, however, the studio claimed that the

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1. See Gina McIntyre, *Chris Carter Gets All Foxy About ‘X-Files’*, L.A. TIMES, July 13, 2008, at E1 (discussing “groundbreaking” nature of the “X-Files”).

2. *Id.*

3. See DAVID WILD, *THE SHOWRUNNERS: A SEASON INSIDE THE BILLION-DOLLAR, DEATH-DEFYING, MADCAP WORLD OF TELEVISION’S REAL STARS 3* (1999) (discussing showrunner’s creative control over all aspects of production).

4. Symposium, *Restoring the Balance: Panel on Contracting and Bargaining*, 28 COLUM. J.L. & ARTS 419, 429 (2005) (“[F]ilm is still a work-for-hire medium. Most agreements have work-for-hire broad language which gives the studio worldwide perpetual rights . . .”).

5. See HAROLD L. VOGEL, *ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS* 197 (7th ed. 2007) (arguing that “the real payoff” in television production is only achieved upon syndication). As an example, it is estimated that a single episode of “The Simpsons” generates four million dollars in syndication fees. See JOSEPH STRAUBHAAR, ROBERT LAROSE & LUCINDA DAVENPORT, *MEDIA NOW: UNDERSTANDING MEDIA, CULTURE AND TECHNOLOGY* 227 (7th ed. 2011).

6. See Second Amended Complaint, *Duchovny v. Fox Entm’t Grp.*, No. SC058329, 2000 WL 35449092, at \*9 (Cal. Super. Ct. Jan. 19, 2000) (detailing license to FX).

7. See *id.* (alleging self-dealing by Fox); Maria Aspan, *‘X-Files’ are Closed; a Lawsuit Opens*, N.Y. TIMES, Jan. 23, 2006, at C6. The resyndication may have been prompted by David Duchovny’s original lawsuit prompting self-dealing. See generally Second Amended Complaint, *Duchovny v. Fox Entm’t Grp.*, No. SC058329, 2000 WL 35449092 (Cal. Super. Ct. Jan. 19, 2000) (detailing license to

agreement with USA was not a new syndication agreement, but, rather, an assignment of the original agreement with FX.<sup>8</sup> This distinction was particularly important for Mr. Carter because his employment agreement guaranteed him a percentage of each syndication agreement entered into by Fox.<sup>9</sup> If the deal with USA was simply an assignment, Mr. Carter was due no portion of a lucrative contract. Mr. Carter promptly filed suit to enforce what he believed were his syndication rights.<sup>10</sup>

Although lawsuits over syndication fees are unusual, Mr. Carter's situation was not uncommon. The modern screenwriter, whether creating works for film or television, does not own her work and is dependent on her employer for remuneration, no matter how commercially successful her creation is or how much creative control she exerted over the work in question.<sup>11</sup> As the ownership of audiovisual works has become increasingly consolidated, issues of self-dealing and other actions harmful to screenwriters have been exacerbated.<sup>12</sup> These issues are not limited to financial concerns: media consolidation has other deleterious effects, including a narrower variety of artistic voices being given the opportunity to tell their stories.<sup>13</sup> While numerous forces contribute to creating this difficult business and creative environment for the screenwriter, one significant factor is the work for hire doctrine.

The work for hire doctrine is a legal mechanism by which the creator of an artistic work's employer is deemed the author of that work.<sup>14</sup> While, historically, such employer ownership schemes were not recognized by courts, today the work for hire doctrine is a firmly embedded part of American copyright law.<sup>15</sup> In particular, work for hire has developed into an essential tool of the audiovisual entertainment industry.<sup>16</sup> As discussed in Part I.B, *infra*, there are a number of reasons that work for hire is a particularly useful ownership allocation scheme for audiovisual works.

Modern technological developments are, however, rapidly altering the nature and form of the entertainment industry. Changes in both costs of and accessibility to production and distribution tools present greater opportunity for audiovisual

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FX). At the time of that lawsuit, a former USA Network executive claimed USA would have outbid FX but was "shut out of the bidding." See Joe Flint, *It's Fox vs. Fox*, ENTERTAINMENT WEEKLY, Sept. 3, 1999, at 15-16.

8. Aspan, *supra* note 7.

9. *Id.*

10. *Id.*

11. See *infra* notes 146-47 and accompanying text (discussing Hollywood's accounting and fee sharing practices).

12. See STRAUBHAAR, *supra* note 5, at 227 ("Many independent producers have been forced out of business or have been gobbled up by the Big Five [studios]."). See also *infra* Part I.B (discussing media consolidation).

13. See *infra* notes 61-66. Similarly, the reduction of potential outlets for audiovisual works has decreased audiovisual artists' already modest bargaining power. *Id.*

14. 17 U.S.C. § 201 (2006) ("In the case of a work made for hire, the employer . . . is considered the author."). See also *id.* § 101 (delineating requirements of works made for hire).

15. See *infra* Part I.A (sketching the historical development of the work for hire doctrine).

16. See *infra* Part I.B (discussing work for hire in the modern entertainment industry).

artists to create and display their work.<sup>17</sup> Theoretically, this increased access could lead to greater creative freedom for audiovisual artists who will no longer be bound by the studio-dominated production and distribution system. This freedom, in turn, could produce public benefits, including exposure to a wider array of artists and to the stories of individuals with diverse backgrounds currently underrepresented in the audiovisual arts.<sup>18</sup> Despite these potential benefits, a number of structural and economic factors make the dissolution of the current studio-based system of audiovisual production highly unlikely in the foreseeable future.<sup>19</sup>

This Note will explore the possibility that altering or replacing the work for hire doctrine could significantly improve the ability of audiovisual artists to take advantage of technological developments in production and distribution. Part I will discuss the history of work for hire, the doctrine's role in allocating ownership of audiovisual works, and the present audiovisual entertainment landscape that has resulted, in part, from application of the doctrine. Part II will first examine technological advances in audiovisual entertainment and how those advances might benefit individual artists, and then point to specific issues particular to live-action audiovisual entertainment that could prevent artists from taking full advantage of these technological opportunities. Part III will suggest modifications to the work for hire doctrine that would allow audiovisual artists to more fully exploit new technologies while still working within the studio system.

## I. WORK FOR HIRE AND THE ENTERTAINMENT INDUSTRY

Today, works for hire are pervasive in American copyright industries and are particularly dominant in audiovisual entertainment. But the work for hire doctrine has not always been a part of the American conception of intellectual property ownership. Before 1909, there was no explicit work for hire doctrine in American copyright law.<sup>20</sup> Early cases held that an artist retained the rights in her work, even if that work had been expressly commissioned.<sup>21</sup> Beginning in the mid-1800s,

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17. See, e.g., LAWRENCE LESSIG, REMIX 34 (2008) [hereinafter LESSIG, REMIX] (arguing that the "future could see the emergence of a form of economic enterprise . . . that promises extraordinary economic opportunity"); YOCHAI BENKLER, THE WEALTH OF NETWORKS 177 (2006) ("The networked public sphere . . . seems to invert the mass-media model in that it is driven heavily by what dense clusters of users find intensely interesting . . .").

18. See *infra* notes 163-67 and accompanying text (discussing the benefits of increased artistic freedom in the digital age).

19. See *infra* Part II.C (discussing the difficulties beyond basic production and distribution costs that weigh heavily in favor of the studio model).

20. For a thorough discussion of the development of the work for hire doctrine before the Copyright Act of 1909, see generally CATHERINE L. FISK, WORKING KNOWLEDGE: EMPLOYEE INNOVATION AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800-1930 (2009). See also Catherine L. Fisk, *Authors at Work: The Origins of the Work for Hire Doctrine*, 15 YALE J. L. & HUMAN. 1 (2003) [hereinafter Fisk, *Origins*].

21. See, e.g., *Atwill v. Ferret*, 2 F. Cas. 195, 197 (C.C. N.Y. 1846) (holding employer only has copyright interest insofar as he has made an *intellectual* contribution to the work); *Pierpont v. Fowle*, 19 F. Cas. 652, 659 (C.C. Mass. 1846) (denying employer's right to claim extension on copyright which he had been assigned).

courts began to recognize that employers could hold rights in the creations of their employees.<sup>22</sup> Early employer rights were often framed as a matter of equity.<sup>23</sup> By the turn of the century, the concept that employers could hold ownership rights in the works of employees had become entrenched. This became clear in the Supreme Court's decision in *Bleistein v. Donaldson Lithographing Co.*, when the Court acknowledged that the advertisements in question "belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things."<sup>24</sup>

The idea of granting an employer rights in the creation of an employee's work was codified in the Copyright Act of 1909. In drafting the Act, Congress went beyond simply assigning copyright to an employer; it turned the employer into the author of the work.<sup>25</sup> There were a number of reasons for the decision, but the most significant was that employers wanted the right of renewal that came with authorship.<sup>26</sup>

Even during the drafting of the 1909 Act, there was concern about the constitutionality of bestowing authorship on entities other than the actual creator of a work.<sup>27</sup> This concern was exacerbated by the expansion of work for hire in the Copyright Act of 1976.<sup>28</sup> Courts have not been presented with the question of

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22. See, e.g., *Root v. Borst*, 36 N.E. 814, 815 (N.Y. 1894) (stating employee retained copyright because work in question was created outside the scope of his employment); *Lawrence v. Dana*, 15 F. Cas. 26, 34 (C.C. Mass. 1869) (differentiating *Atwill* and *Fowle* in holding that a written assignment was not necessary for ownership to vest in an employer).

23. See, e.g., *Keene v. Wheatley*, 14 F. Cas. 180, 185 (C.C. Pa. 1861) (recognizing a theater owner's rights in his employee's production based on equitable theory).

24. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903).

25. Act of March 4, 1909, 35 Stat. 1088 (1909) (current version at 17 U.S.C. § 101 *et. seq.* (2010)) ("[T]he word 'author' shall include an employer in the case of works made for hire.")

26. See Fisk, *Origins*, *supra* note 20, at 6. Congress ensured that the desired outcome was achieved. See *id.* at 62 (arguing there were three primary considerations: (1) ease of drafting, (2) avoiding constitutional conflict regarding the term authors and (3) availability of copyright renewal). It is not at all clear that the drafters really considered the full implications of turning the employer into the 'author' of an employee's work. If such a debate occurred, it was not recorded in the legislative history. See generally LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT (E. Fulton Brylawski & Abe Goldman eds., 1976). See also Act of March 4, 1909, 35 Stat. 1080 ("[I]n the case of . . . any work copyrighted by a corporate body or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension.")

27. See Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L. J. 186, 263 (2008) (discussing "expressed concern[s]" of legislators about constitutionality of "employers as original owners, rather than assignees").

28. 17 U.S.C. § 101 (2006) (defining works made for hire as either works created by traditional employees or as specially commissioned works in limited categories). The constitutionality of the work for hire doctrine and its subsequent expansion has been questioned by scholars examining its application in a number of situations. See Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 600 (1987) (suggesting that, in the context of academic works, the doctrine may violate both the Copyright Clause and the First Amendment); Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1090 (2003) ("Whatever the practical merits of the work for hire doctrine, the constitutional text supplies no grounding for it."); Mark H. Jaffe, *Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC'Y U.S.A. 139, 188 (2006) (arguing that applying work for hire

whether the work for hire doctrine might violate the Constitutional mandate.<sup>29</sup> Some commentary has suggested that the doctrine is not unconstitutional because it is not mandatory—creators and employers may contract around it.<sup>30</sup>

The converse of this argument is also valid: without the work for hire doctrine, employees could still contract away their full bundle of rights to an employer.<sup>31</sup> Since the bargaining position of the creative employee in the audiovisual entertainment industry is generally weak, it might be assumed that contractual arrangements of this kind would proliferate. On the other hand, there is reason to believe that technological developments could markedly increase the creative artist's ability to secure more favorable working terms.<sup>32</sup> It is not so easy, however, to conceive of film and television production without work for hire: the doctrine is both well suited for and deeply ingrained in the entertainment industry.

#### A. THE INTERTWINING OF WORK FOR HIRE AND AUDIOVISUAL ENTERTAINMENT

While work for hire is a significant part of many American intellectual property industries, the doctrine was particularly well suited for adaptation by the audiovisual entertainment industry. Three factors, discussed below, were particularly significant: (1) work for hire 'solved' the difficult issues of copyright ownership in a work with numerous creative contributors; (2) it maintained the historical role of audiovisual artists as mere employees; and (3) it represented a rational economic response to an art form in which production and distribution

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to sound recordings would “fly in the face of the Constitution if it becomes the norm instead of the exception”); Roberta Rosenthal Kwall, *Authors in Disguise: Why the Visual Artists Rights Act Got it Wrong*, 2007 UTAH L. REV. 741, 748-49 (2007) (“[T]he work-for-hire doctrine as applied takes away with one stroke of the pen the constitutional guarantee for the initial and true author.” (internal quotation marks omitted)); John P. Strohm, *Writings in the Margin (of Error): The Authorship Status of Sound Recordings Under United States Copyright Law*, 34 CUMB. L. REV. 127, 133 (2004) (“[E]ven beyond the mythology of authorship, work for hire remains difficult to square with the apparent intentions of the Framers of the Constitution.”).

29. See *Cnty for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (deciding breadth of work for hire doctrine without considering constitutionality). But see *Childress v. Taylor*, 945 F.2d 500, 506 (2d. Cir. 1991) (stating in dicta that “[i]t has not been supposed that the statutory grant of ‘authorship’ status to the employer of a work made for hire exceeds the Constitution, though the employer has shown skill only in selecting employees, not in creating protectable expression”). For instances of courts applying the 1909 Act’s work for hire provision, see *Brown v. Mollé Co.*, 20 F. Supp. 135, 136 (S.D.N.Y. 1937); *Yale Univ. Press v. Row, Peterson & Co.*, 40 F.2d 290, 291 (S.D.N.Y. 1930); *Nat’l Cloak & Suit Co. v. Kaufman*, 189 F. 215, 217 (C.C. Pa. 1911).

30. See 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.06[C] (2011) (arguing work for hire doctrine is constitutional because 17 U.S.C. § 201 allows parties to “agree otherwise” and assign copyright to creator-employee); see also David Nimmer, *Copyright Ownership by the Marital Community: Evaluating Worth*, 36 UCLA L. REV. 383, 405-06 (1998).

31. See generally Judith Beth Prowda, *Work for Hire, Freedom of Contract, and the “Creative Genius” After the Martha Graham Case*, 53 J. COPYRIGHT SOC’Y U.S.A. 645, 672 (discussing “robustly contractarian” nature of American copyright law).

32. See *infra* Part II.A (discussing technological advances in audiovisual production and distribution); see also *infra* notes 163-66 and accompanying text (detailing theoretical improvements in the bargaining power of audiovisual artists).

presented major logistical and financial challenges.

### 1. Issues in Ownership of Audiovisual Works

The determination of copyright ownership in films is rife with complexity. Films are necessarily the product of a large number of creative contributions. At a minimum, both directors and screenwriters can claim creative ownership of a film.<sup>33</sup> Moreover, what could be characterized as creative contributions are made by a number of other individuals, including performers, cinematographers, set designers and editors. The default rule, in the absence of the work for hire doctrine, would likely be that films are joint works.<sup>34</sup> Supporters of work for hire argue that such an arrangement would be impractical at best.<sup>35</sup> The argument is that when a piece of intellectual property requires numerous creative inputs, work for hire facilitates the economic exploitation of the work in question by “consolidat[ing] ownership in a single entity that will . . . pay for the privilege of being the owner of the work for hire, rewarding the creative authors accordingly, enabling consumers to receive entertainment and information goods at the lowest possible cost, and advancing the purpose of the copyright system overall.”<sup>36</sup> It should be noted, however, that “artists’ rights” countries, such as France and Spain, have managed to allocate audiovisual ownership rights without implementing the work for hire doctrine.<sup>37</sup>

### 2. Historical Role of the Screenwriter

The second reason work for hire meshed so readily with audiovisual entertainment is historical. Early motion pictures had little resemblance to the films that have come to play a significant role in American popular culture. These initial forays into motion picture entertainment were extremely brief and related

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33. Film has historically been considered a director’s medium. However, the auteur or “one man, one film” theory of filmmaking is more rightly considered an outgrowth of film criticism techniques and Hollywood marketing than an accurate representation of the director as the sole creative force in the creation of a story told on celluloid. *See, e.g.*, IAN SCOTT, IN *CAPRA’S SHADOW: THE LIFE & CAREER OF SCREENWRITER ROBERT RISKIN* 6–7 (2006) (discussing Writers Guild of America President’s contention that a screenwriter’s contribution was “the centripetal force holding together Capra’s . . . movies”). *See generally* JOSEPH MCBRIDE, *FRANK CAPRA: THE CATASTROPHE OF SUCCESS* (1992) (arguing against director’s “one man, one film” assertion of complete creative control).

34. *See* F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 *UCLA L. REV.* 225, 228 (2001) (discussing potential problems with joint works analysis under existing copyright laws).

35. *See United States Copyright Office and Sound Recordings as Work Made for Hire: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 137 (2000) (statement of Paul Goldstein, Lillick Professor of Law, Stanford Law School), available at [http://commdocs.house.gov/committees/judiciary/hju65223.000/hju65223\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju65223.000/hju65223_of.htm) (arguing that obtaining licenses from joint authors throughout the lifetime of a copyright would present great difficulties).

36. *Id.* Goldstein claims this is “the genius of the work for hire concept.”

37. *See infra* Part III.A for a discussion of ownership schemes in artists’ rights countries.

only the simplest of stories.<sup>38</sup> Storytelling, acting and other hallmarks of modern cinema were considered unimportant: the selling point was the novelty of the technology.<sup>39</sup> Even at this early stage, there were ‘script writers,’ men who would write the interstitial cards that provided the dialogue for silent films. These early writers were often newspapermen or other professionals moonlighting in search of additional wages.<sup>40</sup> They were hired by producers on a project-by-project basis to flesh out the producers’ ideas.<sup>41</sup> Thus, from the beginnings of filmmaking, the producer was pre-eminent; writers and other creative personnel were employees.

While motion pictures evolved rapidly over the subsequent decades, the relationship between the employee-writer and the employer-producer has never been significantly altered. The 1927 release of *The Jazz Singer*, the first feature length film with synchronized dialogue, marked the beginning of the modern audiovisual era.<sup>42</sup> The addition of synchronized dialogue to motion pictures was a creative and technological leap forward. More significantly, the high costs associated with the transition to sound pictures led to the consolidation that resulted in the studio system that dominated Hollywood from the 1930s through the early 1960s.<sup>43</sup> The studio system further entrenched the notion of creative personnel as mere employees: writers, directors and actors were signed to long-term contracts, terminable only at the studios’ discretion.<sup>44</sup>

Even after the dissolution of the studio system, the writer remained an employee.<sup>45</sup> The end of the studio system signaled an end to the long-term contract for creative talent. For the first time, writers and other creative entities were freelance workers who could theoretically create audiovisual works in which they

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38. Examples include “a comic film . . . depict[ing] the experiences of Mr. Cityman . . . in the suburbs” and a “photographic reproduction of various places passed during a trip from Christiana to the North Cape.” BENJAMIN B. HAMPTON, HISTORY OF THE AMERICAN FILM INDUSTRY FROM ITS BEGINNINGS TO 1931 38 (1970).

39. See *id.* at 47 (describing perception of motion picture business as “a cheap, flimsy upstart” that would “sweep[] the country off its feet and [die] just as quickly”). Reinforcing the idea that motion pictures were a product and not art was the fact that distributors described films in terms of how many feet of film stock they used. See *id.* at 38 (noting descriptions of films *The Suburbanites* and *The Lost Child* indicated their respective film stock lengths of 718 feet and 538 feet).

40. *Id.* at 48.

41. *Id.*

42. See generally SCOTT EYMAN, THE SPEED OF SOUND: HOLLYWOOD AND THE TALKIE REVOLUTION, 1926–1930 (1997).

43. See MICHAEL J. HAUPERT, THE ENTERTAINMENT INDUSTRY 106 (2006) (“Only the largest studios could afford the conversion to sound . . . . As a result, mergers occurred or smaller distributors simply went out of business.”).

44. See HAMPTON, *supra* note 38, at 304–17 (discussing attempts to organize studios on factory lines); MCBRIDE, *supra* note 33, at 556 (discussing Frank Capra’s multi-year contract with Paramount Pictures).

45. In 1948, the Supreme Court found that the business model of the “Big Eight” studios violated the Sherman Anti-Trust Act. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 143 (1948). Up until that point, the studios had owned the large “first run” theater chains, completely controlling the market for film exhibition. After *Paramount Pictures*, the studios were forced to divest themselves of the theater chains. Increased opportunity for exhibition led to the creation of numerous independent competitors. See HAUPERT, *supra* note 43, at 168.



retained the copyright.<sup>46</sup> Almost as soon as this possibility arose, writers once again gave up the right to own their creative expression. In 1954, screenwriters formed the Writers Guild of America (WGA).<sup>47</sup> The WGA was, and is, a labor union whose primary function is to represent its membership in collective bargaining agreements with the major Hollywood studios.<sup>48</sup> Of course, membership in a union comes with at least one very specific prerequisite: you must be an employee.<sup>49</sup> In joining a union, screenwriters expressly acknowledged that they were not independent creative entities: they were studio employees whose terms of employment were subject to the collective bargaining agreement reached by their representatives. Moreover, the Writers Guild's original Minimum Basic Agreement (MBA) simply assumed that a film's producer would own both the film and the underlying screenplay.<sup>50</sup> This assumption remains a central part of the WGA's MBA today.<sup>51</sup>

It is important to recognize that a number of factors made the formation of the WGA and acceptance of employee status a positive development for writers. For one, writers at the time were paid and treated extremely poorly.<sup>52</sup> Further, they lacked basic medical and financial protections in the form of employer health and

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46. The 1909 Copyright Act created work for hire for employees. It did not extend to commissioned works in specific categories, as the 1976 Copyright Act did. *See* 17 U.S.C. § 101 (2006) (defining work made for hire as either the work of an employee or as a commissioned work in one of eight specific categories). As discussed in Part II, *infra*, the "commissioned works" clause has been stretched by modern Hollywood studios to cover works created both within and without the studio structure.

47. The WGA was the first creative union that purported to represent all audiovisual writers. However, it was predated by a number of other, smaller labor unions that represented various types of screenwriters. *See generally History*, WRITERS GUILD OF AMERICA, WEST, <http://www.wga.org/history/timeline.html> (last visited Oct. 2, 2011) (providing timeline from earliest attempts at screenwriter unionization through the present day). *See also* Catherine L. Fisk, *Screen Credit and the Writers Guild of America, 1938–2000: A Study in Labor Market and Idea Market Intermediation* 7–12 (August 2010), [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=catherine\\_fisk](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=catherine_fisk) [hereinafter Fisk, *Screen Credit*] (discussing early attempts at unionization).

48. *See Who We Are*, WRITERS GUILD OF AMERICA, WEST, [http://www.wga.org/uploadedFiles/who\\_we\\_are/fyi09.pdf](http://www.wga.org/uploadedFiles/who_we_are/fyi09.pdf) (last visited Sept. 24, 2011) (outlining membership and functions of WGA).

49. *See* Matt Prager, Essay on WGA Strike (on file with author), LESSIG 2.0, *available at* <http://lessig.org/blog/prager.pdf> (decrying writers' acceptance of employee status).

50. *See* Fisk, *Screen Credit*, *supra* note 47, at 13 (noting that the first Minimum Basic Agreement focused on securing writers screen credit and a minimum wage).

51. *See 2008 Theatrical and Television Basic Agreement*, WRITERS GUILD OF AMERICA, 8 (Feb. 13, 2008), *available at* [http://www.wga.org/uploadedFiles/writers\\_resources/contracts/MBA08.pdf](http://www.wga.org/uploadedFiles/writers_resources/contracts/MBA08.pdf) [hereinafter WGA 2008 MBA] (defining "writer" as an individual "employed by the Company to write literary material"). The MBA also acknowledges that screenwriters are not "authors" for the purposes of copyright by refusing to include language about royalties, since that is a term associated with payments made to authors. *See id.* at 197 (discussing residuals protection).

52. *See* NANCY LYNN SCHWARTZ, *THE HOLLYWOOD WRITERS' WARS* 18 (1982) (describing the necessity of labor union protections for screenwriters). A particular concern for writers was receiving proper credit for their work. *Id.* *See also* Fisk, *Screen Credit*, *supra* note 47, at 10–13 (discussing the importance of screen credit in the formation of the Writers Guild). Interestingly, however, today the WGA itself limits the number of writers who may receive onscreen credit for a particular project. *See id.* at 33–34.

pension plans.<sup>53</sup> But perhaps the most important reason that writers were willing to forgo any copyright claim in their works was a basic economic concern: the prohibitive cost of production and distribution meant that individual writers lacked the means to exploit their copyrights, even if they retained full ownership. The economic barrier to both production and distribution of audiovisual works is the third reason that the work for hire doctrine proved a natural fit for the audiovisual entertainment industry.

### 3. Overcoming Logistical and Financial Challenges

The strongest argument for the work for hire doctrine in the audiovisual entertainment industry is that, without it, the studios would not be properly compensated for their massive investment in production and distribution costs. The costs involved in both production and distribution of feature films have traditionally been beyond the resources of individual creative artists.<sup>54</sup> Even when the costs are borne by the studios, there is significant risk that the conglomerate will not recoup its investment.<sup>55</sup> Since the majority of audiovisual works will fail to recover the costs associated with developing, producing and distributing them, the entertainment industry relies on the overwhelming profitability of a small number of successes.<sup>56</sup> As film and television budgets have risen, it has become increasingly difficult to sustain this business model. Modern studios therefore seek to fully exploit their copyrighted works through licensing, exploitation of alternate entertainment mediums such as the DVD, merchandising and the creation of film sequels or television spinoffs.<sup>57</sup> The necessity, at least from the studio's point of view, of full commercial exploitation of the copyrighted work has resulted in a modern entertainment landscape in which virtually no creative artists are allowed to maintain ownership in their creations.

### B. MODERN OWNERSHIP OF AUDIOVISUAL WORKS

The present structure of the audiovisual entertainment industry bears a striking

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53. See SCHWARTZ, *supra* note 52, at 18–20.

54. See SCHUYLER M. MOORE, *THE BIZ: THE BASIC BUSINESS, LEGAL AND FINANCIAL ASPECTS OF THE FILM INDUSTRY* 12 (3d ed. 2007) (stating that “few companies have the financial stamina” to put up the large amount of capital demanded by film production). Moreover, beyond even the economic realities, distribution by an individual artist has long been impossible: studios controlled the major television networks and had long-standing relationships with the theater chains they once owned. This all but precluded an individualized distribution.

55. See TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 219–27 (2011) [hereinafter WU, *MASTER SWITCH*] (discussing the difficulty of predicting commercial success of audiovisual products).

56. See MOORE, *supra* note 54, at 12 (arguing “[t]he film industry is a form of gambling, similar to wildcat oil drilling”).

57. See WU, *MASTER SWITCH*, *supra* note 55, at 228 (“The returns on the film are thereby understood to include not simply the box office receipts, but also both the appreciation in the property value, and its associated licensing revenue—merchandise, from toys to movie tie-in editions and other derivative works.”).

similarity to the studio system of the 1930s through the 1960s. Five corporate entities produce, distribute and control the copyright of the vast majority of commercial audiovisual works created in the United States.<sup>58</sup> In part, the emergence of these mega-companies can be linked to the same factors that gave rise to the original studio system: the high costs and subsequent risks of producing and distributing audiovisual entertainment.<sup>59</sup> However, another significant factor was that the ownership rules in television had changed. The repeal of the Financial Interest / Syndication Act in 1992 marked the first time that entities who owned television networks—and thus controlled product distribution—could also own that product.<sup>60</sup> The network owners moved quickly to take advantage of the new opportunity. In 1992, the networks were responsible for roughly thirty percent of programming; by 2007, they owned nearly three-quarters of all television programming and almost every piece of scripted programming airing on American television.<sup>61</sup> The networks achieved consolidation primarily through two avenues: favoring work produced and owned by the networks themselves, and acquiring independent production companies unable to compete against that preference.<sup>62</sup>

For screenwriters and other audiovisual artists, the reemergence of a consolidated studio structure has meant even greater obstacles to ownership of their creative works.<sup>63</sup> First, the decrease in the number of potential distribution outlets for their work has negatively impacted their potential bargaining power—with fewer options, artists' ability to 'shop' their projects for the best possible deal is significantly decreased. Second, the owners of the distribution networks are now actively incentivized to refuse distribution of independent works since any independent work that a conglomerate chose to distribute would likely take the place of the conglomerate's own intellectual property.

Thus, the ownership environment faced by the modern screenwriter is one in which she is denied ownership by statute, by the economic necessities of production and distribution and by the simple force of tradition.<sup>64</sup> However,

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58. See Mark Cooper, *Study 23: The Impact of the Vertically Integrated Television-Movie Studio Oligopoly on Source Diversity and Independent Production*, in *THE CASE AGAINST MEDIA CONSOLIDATION: EVIDENCE ON CONCENTRATION, LOCALISM AND DIVERSITY* (Mark N. Cooper ed., 2007) [hereinafter Cooper, *Study 23*]. As of this writing, those five corporations are News Corp., Disney, CBS-Viacom, Time Warner and Comcast. Comcast recently acquired NBC Universal Entertainment from General Electric. See Tim Arango, *G.E. Makes It Official: NBC Will Go to Comcast*, N.Y. TIMES, Dec. 4, 2009, at B3 (describing basic agreement for Comcast's acquisition).

59. See WU, *MASTER SWITCH*, *supra* note 55, at 228 (arguing that the primary goal of entertainment conglomerates is to hedge the risk of motion picture production with other businesses that historically show a more consistent return on investment).

60. Christine Becker, *Fin-syn Begin Again? The Rhetoric of Deregulation*, UNIVERSITY OF NOTRE DAME, [http://www2.dse.unibo.it/picci/becker\\_fin\\_syn.pdf](http://www2.dse.unibo.it/picci/becker_fin_syn.pdf) (last visited Nov. 7, 2011) (discussing the effects of Fin-Syn repeal in light of 2003 relaxation of newspaper ownership regulations).

61. Cooper, *Study 23*, *supra* note 58, at 339–40.

62. *Id.*

63. See, e.g., *supra* notes 1–12 and accompanying text.

64. The very idea of a screenwriter retaining ownership of her work is considered anathema in modern Hollywood. See, e.g., STEPHEN F. BREIMER, *CLAUSE BY CLAUSE: THE SCREENWRITER'S LEGAL GUIDE* 7 (1998) (warning aspiring screenwriters to accept the surrender of their intellectual

technological advances, particularly the development of digital video cameras and Internet-embedded video players, raise the possibility that screenwriters can produce and distribute their work outside of the strictures of the modern studio system and, thus, avoid the application of the work for hire doctrine.<sup>65</sup> At the same time, as discussed in Part II.C, *infra*, a number of quasi-legal and economic factors may still force screenwriters to accept studio employment—and submit to the work for hire doctrine—in order to see their visions realized. Therefore, as discussed in Part III, *infra*, if screenwriters are to be afforded the full opportunity to take advantage of technological advances and regain some level of control over their creative works, it may be necessary to replace the work for hire doctrine, or at least revisit the manner in which it is applied.

## II. DIGITAL TECHNOLOGY: OPPORTUNITIES & BARRIERS

The advancement of various digital technologies has the potential to radically alter numerous creative endeavors. In particular, the Internet can potentially act as an efficient, affordable distribution conduit that directly connects the artist to the audience. Some scholars have suggested that the effect of the Internet on creative works will be even more far-reaching—that the future of artistic creation is more likely to be found in the crowd sourcing of thousands than in the industrially financed vision of the individual.<sup>66</sup> In such discussions, American copyright law is often seen as a tool wielded by the entrenched entertainment conglomerates to stave off an Internet-fueled dissolution of their long-standing economic model.<sup>67</sup> A number of alternatives to traditional copyright law, most prominently Creative Commons, have been suggested as a means of allowing Internet-butressed, crowd sourced creativity to flourish.<sup>68</sup> In some ways, these alternative licensing schemes would benefit the audiovisual artist attempting to work outside the studio system. However, there are a number of issues particular to live-action audiovisual production that make traditional copyright protection the optimal legal structure to fully incentivize the creation of television and film.

Section A of Part II will discuss the particular ways in which digital

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property rights lest they be labeled “a whiner” and stating: “[T]he system is the system. It is unlikely to change.”).

65. See Sections II.A and II.B for a discussion of lowered barriers to production and distribution and possible effects of this new level of access for creators.

66. See, e.g., BENKLER, *supra* note 17, at 3 (discussing the emergence of a “networked information economy” typified by “new and important cooperative and coordinate action carried out through radically distributed, nonmarket mechanisms that do not depend on proprietary strategies”).

67. See MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* 109 (2008) (“[I]n a classic case of the tail wagging the dog, the copyright industry manages to threaten our freedom and our culture.”); see also, BENKLER, *supra* note 17, at 37 (arguing that the Internet will allow “some businesses [to] capture the economic value of their information production by means other than exclusive control over their products” and that, therefore, “the justification for regulating access by granting copyrights or patents is weakened.”).

68. See BENKLER, *supra* note 17, at 44–46 (examining wide range of intellectual property rights allocation schemes); cf. LESSIG, *REMIX*, *supra* note 17, at 254–72 (proposing alterations to copyright law to account for technological advancements in digital creation and distribution).

technologies are changing the nature of audiovisual production and distribution, and briefly examine early forays into nonstudio, professional production created specifically for the Internet. Section B will then examine how alternate intellectual property protection schemes, such as Creative Commons, might benefit the audiovisual artist trying to create works outside the studio system. Section C will explore the issues that audiovisual artists would encounter in trying to produce nonstudio works, with a particular focus on the costs associated with the numerous intertwining labor agreements of entertainment industry labor unions.

#### A. DIGITAL TECHNOLOGY, THE INTERNET AND CREATIVE OPPORTUNITY

Digital technology has enhanced the ability of audiovisual artists to create works outside of the studio system by lowering the economic barriers to both distribution and production. Currently, nonstudio supported audiovisual works primarily take the form of Web 2.0 content—‘amateur’ video with comparatively low production values. However, an increasing number of artists are producing high-quality professional works and distributing them directly on the Internet.<sup>69</sup> While a few of these productions have been critical or financial successes, it remains to be seen whether such independent creations can form the basis for an ongoing developmental platform for audiovisual works.<sup>70</sup>

Basic Internet distribution is, by now, commonplace in modern society. The clearest example is, of course, Google’s YouTube, where anyone—amateur or professional—can upload any sort of video he or she wishes.<sup>71</sup> Some individuals have turned this free distribution of their product into financial success.<sup>72</sup> Generally, however, Web 2.0 stars have been the creators of amateur video that cannot be, and was not intended to be, confused with mainstream professional audiovisual productions. An example of this type of creation is the popular YouTube character “Fred,” portrayed by sixteen-year-old Lucas Cruikshank. The “Fred” pieces, short videos shot by Cruikshank and uploaded to the Internet, garnered more than seventy million views on YouTube between 2005 and 2009.<sup>73</sup> But the videos were unquestionably amateur in their production values, and when it came time to create a feature film based on the Fred character, Mr. Cruikshank turned to Hollywood professionals to create the product.<sup>74</sup>

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69. See *infra* notes 82–99 and accompanying text (discussing successes and failures of high-quality professional productions distributed via the Internet).

70. See *infra* notes 88–93 and accompanying text (detailing success of Internet series “Dr. Horrible’s Sing-Along Blog”).

71. There are, in fact, a few restrictions on the sort of content YouTube allows. See *YouTube Community Guidelines*, YOUTUBE, [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited Sept. 22, 2011) (describing content YouTube refuses to host, including adult content, graphic or gratuitous violence and drug use).

72. See William Wei, *Meet the YouTube Stars Making \$100,000 Plus Per Year*, BUSINESS INSIDER (Aug. 19, 2010), <http://www.businessinsider.com/meet-the-richest-independent-youtube-stars-2010-8> (detailing report on income of YouTube stars based on advertising deals).

73. See Brooks Barnes, *Bigger Screen for a High-Pitched Whine*, N.Y. TIMES, Dec. 8, 2009, at C1 (discussing the feature film built around Cruikshank’s “Fred” character).

74. See *id.* (discussing involvement of longtime Hollywood producer/director Brian Robbins and

While Mr. Cruikshank may have decided to work with established Hollywood veterans for any number of reasons, recent developments in digital film technology have made it possible for individuals in his situation to feasibly create their own professional-grade feature film. The use of digital, rather than photographic, film radically reduces the cost of shooting and producing prints of audiovisual works.<sup>75</sup> Moreover, digital film can be professional quality—in fact, many major films, including one that won an Academy Award for Best Cinematography, are now shot digitally.<sup>76</sup> Digital cameras themselves have become significantly more affordable: in 2010, a major network television show was shot on a consumer DSLR camera.<sup>77</sup>

Independent filmmakers have been reaping the benefits of the lower costs associated with digital filmmaking for some time.<sup>78</sup> Few, however, have taken advantage of the ability to self-distribute their works on the Internet.<sup>79</sup> This is, perhaps, due to filmmakers' desire for a theatrical release—to see their works screened in a theater, rather than on a computer screen or home television. Interestingly, an individual operating on a small budget can even achieve limited theatrical distribution for a digital work.<sup>80</sup> As more and more theater chains adopt digital delivery models, in which they can receive a digital print directly over the Internet, the availability of this form of self-distribution will increase.<sup>81</sup>

As of the writing of this Note, prominent filmmaker Kevin Smith is in the midst of an experiment in direct distribution. Smith independently produced his horror-

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writer David A. Goodman). *Fred: The Movie* became a major success when it aired on the Nickelodeon television network. See Press Release, Nickelodeon, Nickelodeon Closes Week as Basic Cable's Top Total Day Network With Kids and Total Viewers (Sept. 21, 2010), <http://biz.viacom.com/sites/nickelodeonpress/NICKELODEON/Pages/default.aspx> (detailing ratings for *Fred: The Movie*, which made the film the top rated basic cable program of the week, with 7.6 million viewers as of its initial airing).

75. For example, *Star Wars: Episode II—Attack of the Clones* producer Rick McCallum estimated that shooting the film digitally saved \$1.8 million in print costs. See Tom Harris, *How Digital Cinema Works*, HOWSTUFFWORKS, <http://entertainment.howstuffworks.com/digital-cinema.htm/printable> (last visited Sept. 22, 2011) (describing advantages and disadvantages of digital film production).

76. Press Release: *Slumdog Millionaire Shot With Innovative SI-2K Digital Cinema Camera*, SILICON IMAGING (Jan. 31, 2009), [http://www.siliconimaging.com/DigitalCinema/News/PR\\_01\\_31\\_09\\_Slumdog.html](http://www.siliconimaging.com/DigitalCinema/News/PR_01_31_09_Slumdog.html).

77. Vlad Savov, *Canon 5D Mark II Used to Shoot Entire House Season Finale, Director Says It's 'The Future'*, ENGADGET (Apr. 13, 2010, 8:02 AM), <http://www.engadget.com/2010/04/13/canon-5d-mark-ii-used-to-shoot-entire-house-season-finale-direc/>. The same camera was used to shoot a feature film. See Charlie Sorrel, *Searching for Sonny—First Feature Shot on DSLR*, WIRED (Apr. 9, 2009), <http://www.wired.com/gadgetlab/2009/04/searching-for-s/>.

78. See, e.g., Tayfun King, *Movie-Makers Go Digital*, BBC NEWS (May 20, 2005), [http://news.bbc.co.uk/2/hi/programmes/click\\_online/4565771.stm](http://news.bbc.co.uk/2/hi/programmes/click_online/4565771.stm) (discussing ultra-low budget digital films entered at prestigious Sundance Film Festival).

79. A notable exception is the Finnish science fiction parody *Star Wreck: In the Pirkinning*. Released for free on the Internet, *Star Wreck* became the most watched Finnish film of all time, with more than eight million views. See Stuart Kemp, *Revolver Takes Aim With "Star Wreck"*, THE HOLLYWOOD REPORTER (Mar. 9, 2009), <http://www.hollywoodreporter.com/news/revolver-takes-aim-star-wreck-80421>.

80. See Richard Corliss, *Can This Man Save The Movies? (Again?)*, TIME, Mar. 20, 2006, at 32, 32–38.

81. See *id.* (predicting the future in which all films are distributed to theaters digitally).

comedy film *Red State* for roughly four million dollars.<sup>82</sup> Rather than sell it to a distributor, Smith decided to take the film “out on the road” on a city-by-city schedule that he analogized to a music tour.<sup>83</sup> His reasoning was straightforward: had he sold the film to a studio, that studio would have spent roughly twenty million dollars on marketing.<sup>84</sup> After accounting for studio overhead and the hefty percentage of the gross paid directly to theaters, Smith estimates the film would have had to earn fifty million dollars to break even.<sup>85</sup> By self-distributing, Smith argues that his film can be financially successful while taking in significantly less gross revenue.<sup>86</sup> Smith may have a point that independent films are poorly served by large studio marketing techniques, but it remains to be seen whether *Red State* will actually succeed outside the studio framework.<sup>87</sup>

While low budget independent movies produced with digital technology are relatively common, nonstudio supported “television” is much rarer.<sup>88</sup> During the 2008 Writers Guild of America labor strike, however, several experienced television producers attempted to create their own programming and distribute it via the Internet.<sup>89</sup> Perhaps the most prominent of these strike-born projects was “Dr. Horrible’s Sing-Along Blog,” a series of live-action shorts written, directed and produced by longtime television producer Joss Whedon and starring Emmy Award winning actor Neal Patrick Harris.<sup>90</sup> Whedon funded production himself,

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82. He was able to limit the film’s budget to such a relatively modest amount by acquiring union waivers and convincing some participants to accept less than their standard work rate. See Kevin Smith, *Sundance 2011 “Red State” Full Speech on Film Distribution*, YOUTUBE (Jan. 24, 2011), <http://www.youtube.com/watch?v=90pcHCF2h44> [hereinafter Smith, *Distribution*].

83. See *id.* (“True independence isn’t making a film and selling it to some jackass. True independence is schlepping [it] to the people yourself, and that’s what I intend to do.”). Smith had originally hoped to secure nationwide distribution, but he quickly abandoned that goal. See *infra* note 87.

84. The \$20 million figure is obviously an estimate, but one very much based in reality. Smith is referring to Lionsgate’s standard policy of spending \$20 million on marketing each and every film it distributes. See Smith, *Distribution*, *supra* note 82 (discussing the “Lionsgate 20”).

85. *Id.* (referring to his hit film *Clerks*, Smith noted that “it took seven years for . . . a movie that cost \$27,575 dollars to go into profit.”)

86. *Id.*

87. While the *Red State* tour was modestly successful through August 2011, Smith has already abandoned the dream of widespread theatrical distribution. See *Red State Makes Green!*, RED STATEMENTS (Aug. 30, 2011), <http://theredstatements.com/2011/08/30/red-state-makes-green-plus-v-o-d-on-91> (detailing city by city ticket sales for *Red State* tour); Robert Fischer, *The GQ&A: Kevin Smith*, GQ (Aug. 30, 2011), <http://www.gq.com/entertainment/movies-and-tv/201108/kevin-smith-interview-red-state> (discussing Smith’s reasons for not continuing pursuit of nationwide distribution). Instead, Smith opted to release the movie as a video on demand offering, via YouTube, iTunes and various cable television and Internet service providers. See *Red State Makes Green!*, *supra* (discussing film’s September 1, 2011 premiere on video on demand).

88. The term “television” here is not used to refer to audiovisual works broadcast on network or basic cable channels but, rather, to episodic audiovisual works featuring a recurring set of characters.

89. Joseph Menn, *Writers Making A Break For Web; At Least Seven Groups of Striking Guild Members are Looking at Internet Alternatives to Bypass the Studio System*, L.A. TIMES, Dec. 17, 2007, at A1 (describing plans to distribute audiovisual works via the Internet during labor strike).

90. See David Sarno, *Whedon Makes Crashing Waves*, L.A. TIMES, July 16, 2008, at E1 (discussing the production of “Dr. Horrible’s Sing-Along Blog”); Yvonne Villarreal, *Creative Arts Emmys March to ‘The Pacific’*, L.A. TIMES, Aug. 23, 2010, at D7 (noting Harris’s two Emmy wins).

for roughly \$200,000.<sup>91</sup> The program was a success: it became the most downloaded show in Apple's iTunes store, spawned a soundtrack and Web comic and was named one of Time Magazine's 50 Best Inventions of 2008.<sup>92</sup> Still, it is not clear that Whedon's model is replicable. Beyond the cost, Whedon acknowledged that "Dr. Horrible" was created with "waivers and favors," meaning that he received waivers from a variety of creative unions to allow their members to work for reduced fees.<sup>93</sup>

Just prior to the strike, Marshall Herskovitz and Ed Zwick, a pair of experienced television producers, experimented with a different approach to Internet television programming. Their creation, "Quarterlife," was a drama series produced specifically for the Internet in conjunction with the social networking site MySpace.<sup>94</sup> Although the producers would not reveal the program's budget, they stated it was significantly more than one for a typical web series.<sup>95</sup> "Quarterlife," too, was an online success—so much so that NBC decided it wanted to broadcast the program on its network. The terms of deal struck by Herskovitz and Zwick with NBC were notable. Under their agreement with MySpace, Herskovitz and Zwick owned the copyright to "Quarterlife." Rather than transfer the copyright to NBC, the producers licensed it, albeit at a lesser fee than that for which typical broadcast-run programs are licensed.<sup>96</sup>

While there are reasons to believe that the "Quarterlife" licensing deal was an isolated agreement brought about by the particular conditions of the 2007–2008 Writers Guild strike, the deal nevertheless shows that, theoretically, professional level, episodic audiovisual storytelling may be achieved without writers surrendering their copyright.<sup>97</sup> "Quarterlife" was not, however, a network television success; in fact, it "bombed," producing the worst ratings for its timeslot on NBC in two decades.<sup>98</sup> Moreover, even if the show had garnered more positive ratings, it isn't clear that the licensing agreement would have provided NBC with anywhere near the profit potential of a program wholly owned by the network,

91. Matt Roush, *Exclusive: First Look at Joss Whedon's "Dr. Horrible"*, TV GUIDE EDITORS' BLOG (June 30, 2008), <http://web.archive.org/web/20080822100528/http://community.tvguide.com/blog-entry/TVGuide-Editors-Blog/Roush-Dispatch/Joss-Whedon-Dr/800042425>.

92. Anita Hamilton et al., *The Best Inventions of 2008: The Direct-to-Web Supervillain Musical*, TIME, Nov. 10, 2008, at 67, 79.

93. Roush, *supra* note 91. For a discussion of why waivers are not commonplace, *see infra* notes 138-140 and accompanying text.

94. *See* Joseph Menn, *TV Pros Plan MySpace Show*, L.A. TIMES, Sept. 13, 2007, at C3 (describing the origins of "Quarterlife").

95. *Id.*

96. *See* Bill Carter, *NBC Acquires "Quarterlife"; Internet Series Will Run First Online*, N.Y. TIMES, Nov. 17, 2007, at C4 (discussing the "revolutionary" licensing deal).

97. Exactly how revolutionary the "Quarterlife" deal was is certainly debatable. NBC made the agreement roughly one month into the 2007-2008 Writers Guild strike. At the time, the network was desperate for programming and, because "Quarterlife" was first produced for the Internet and, thus, not governed by the WGA's Minimum Basic Agreement, production on the program could continue during the strike. *See* Joseph Menn, *Web Series' Timing is Prime*, L.A. TIMES, Nov. 17, 2007, at C1 (describing NBC's need for programming); *see also* Carter, *supra* note 96, at C4 (noting importance of "Quarterlife" continuing production during the strike).

98. *See* NBC Drops, *Bravo Gets "Quarterlife"*, L.A. TIMES, Feb. 29, 2008, at E2.



because NBC would have forgone much of its potential syndication revenues, which form a large part of a television program's long-term earning potential.<sup>99</sup> Thus, absent some unforeseen, disruptive circumstance, it is unlikely that television networks would enter into similar agreements in the future.

### B. LICENSING SCHEMES

While film and television studios are likely to eschew nontraditional ownership schemes, there is some reason to believe they will eventually be forced into new business models by the accessibility of production and distribution tools to the general public. As Yochai Benkler has observed:

A billion people in advanced economies may have between two billion and six billion spare hours among them, every day. In order to harness these billions of hours, it would take the whole workforce of almost 340,000 workers employed by the entire motion picture and recording industries in the United States put together, assuming each worker worked forty-hour weeks without taking a single vacation, for between three and eight and a half years!<sup>100</sup>

Indeed, some studios have already recognized the value of contributions made by the public, albeit only in marketing studio-produced products.<sup>101</sup>

For these independent endeavors to succeed, there must be some determination as to who owns what portions of the finished work. Because of the large number of creative contributors to audiovisual works, such a determination is not simple.<sup>102</sup> In studio productions, this issue is 'solved' by the work for hire doctrine—the studio owns the creative works of all the individual collaborators and, thus, owns the work as a whole. Without work for hire, however, solutions are less clear. While there have been suggestions that audiovisual works would optimally be categorized as joint works, the prevalent view in the United States is that audiovisual ownership issues can best be overcome through licensing.<sup>103</sup>

The licensing model has already proven effective in another intellectual property arena: software development. "Free" or "open source" software employs a variety of licenses to create products that are simultaneously open to the public and commercially exploitable.<sup>104</sup> The licenses allow commercial exploitation while

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99. See VOGEL, *supra* note 5, at 197 (discussing significance of syndication fees).

100. BENKLER, *supra* note 17, at 55.

101. A small step in this direction was Warner Bros. allowing the *Harry Potter* children's fansite "The Daily Prophet" to use copyrighted materials. See LESSIG, REMIX, *supra* note 17, at 205–12.

102. See Dougherty, *supra* note 34, at 267–71 (examining the complexities associated with the authorship of motion pictures).

103. See *id.* at 274–82, 327–34 (examining both joint work and licensing schemes). Some countries, such as Spain, have ownership schemes that treat writers, directors and composers as joint authors of an audiovisual work. See Alberto Bercovitz et al., *Spain*, in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 4(1)(a)(ii), at SPA-30 to SPA-31 (Paul E. Geller ed., 2010) [hereinafter GELLER, INTERNATIONAL COPYRIGHT] (discussing Spanish law vesting initial ownership in an audiovisual work's director, writer and composer).

104. See LESSIG, REMIX, *supra* note 17, at 179–82 (discussing Red Hat, Inc.'s success in combining free software with commercial goals).

preventing companies from turning free software into proprietary code.<sup>105</sup> Most importantly for the purposes of this Note, free software licenses show that community-driven creation can succeed on a large, complex scale.<sup>106</sup>

Software code is, in some ways, akin to other creative endeavors such as fiction writing and filmmaking. It is therefore not surprising that the open source software model was applied to creative works in the form of Creative Commons.<sup>107</sup> Creative Commons offers a series of licenses that can protect varying degrees of an artist's rights.<sup>108</sup> The core idea behind the licenses is that creators can collaborate by allowing others to build on their work without fear of infringing copyright.<sup>109</sup> Theoretically, enough collaborative creators, working as volunteers, could create high-level audiovisual products at very little cost in a manner similar to that achieved by the free software movement.

Of course, while computer code and audiovisual entertainment both involve creation, they are wildly different enterprises. Large-scale collaborative audiovisual production has not been achieved. Still, there is reason to believe it can be done. Perhaps the easiest form of audiovisual creation with which to mimic software production is animation. As with software, animation is created by a large number of individuals, working alone towards a common goal—where a programmer works on a particular subset of code, an animator works on a particular character or individual scene.<sup>110</sup> In many cases, an animator's work, particularly if it is the animation of a character, may have an independent value that a piece of code would not. With properly constructed licenses an animator could retain some portion of his rights in the character while still contributing the character to a collaborative work.<sup>111</sup>

To some degree, creative activity governed by contract is exemplified by another audiovisual art form: the videogame. Videogames are generally created either as work for hire products or as independent works that are later licensed to a larger videogame distributor.<sup>112</sup> Typically, a game is a work for hire if the developer or artist is hired to create a game for a property already owned by the

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105. *Id.*

106. See BENKLER, *supra* note 17, at 66–67 (describing the complexities involved in the creation and evolution of the Linux operating system).

107. See *History*, CREATIVE COMMONS, <http://creativecommons.org/about/history> (last visited Sept. 23, 2011) (discussing open source software as an inspiration for Creative Commons licenses). See also LAWRENCE LESSIG, *CODE: VERSION 2.0* 199 (2006) (describing Creative Commons as an attempt to follow the example of open source software pioneer Richard Stallman).

108. See *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses/> (last visited Oct. 17, 2011).

109. See BENKLER, *supra* note 17, at 455 (arguing that the most important “innovation of Creative Commons is its character as a . . . ‘free culture’ movement”).

110. See Robert P. Merges, Response, *Individual Creators in the Cultural Commons*, 95 CORNELL L. REV. 793, 800 (2010) (discussing the role of an individual animator in the creation of an animated feature film).

111. *Id.* at 799–802 (discussing the potential application of preclearing rules to collaborative animation).

112. See Leena M. Sheet & A. Benjamin Katz, *Protecting Rights in Videogames: Next Generation Licensing*, 6 VA. SPORTS & ENT. L. J. 124, 128–29 (2006).

parent company—these games make up the majority of the prominent ‘name’ titles available on major gaming platforms.<sup>113</sup> Independent videogames tend to be smaller in budget and in scope but ‘indie’ gaming is a thriving industry unto itself.<sup>114</sup> While independently created videogames show that audiovisual works can be created and distributed outside of a studio system, they differ so significantly from live action audiovisual works that it is not clear whether this success can be analogized to the potential success of digital indie films or television programs.

Most obviously, live action audiovisual works present an additional layer of complication in that the actual production of the work must be done in the same place at the same time. While the various pieces of an animated product can be created by different artists, in different locations and at different times, a director, cinematographer and actor must all work together at once to actually shoot a live action film. This type of work method does not, of course, lend itself to the sort of Internet-driven mass collaboration that made free software a success. There is, however, still a place for such collaboration in live action creation. Aspects of both pre- and postproduction could theoretically be effectively crowd-sourced. In preproduction, the creation of storyboards—drawings or animations laying out the individuals shots that will constitute the film—can be produced collaboratively in a manner similar to animation.<sup>115</sup> In postproduction, editing, special effects and sound mixing can be performed by individuals working towards a common goal.<sup>116</sup> Creating licenses to cover these various creative inputs would be a complex undertaking, but it is certainly achievable. There are, however, other significant roadblocks that stand in the way of creating professional-quality audiovisual works through mass collaboration.

### C. POTENTIAL BARRIERS TO PRODUCTION AND DISTRIBUTION OF AUDIOVISUAL WORKS

In the production of audiovisual works, the significant difficulty is not with creating a single work on a limited budget but, rather, with creating a *career’s worth* of works with budgets that allow an individual to continue working entirely

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113. *Id.*

114. Andrew Webster, *Low Prices, Low Expectations? Ars Looks at Indie Game Pricing*, ARS TECHNICA (Dec. 21, 2010, 7:05 AM), <http://arstechnica.com/gaming/news/2010/12/low-prices-low-expectations-ars-looks-at-indie-game-pricing.ars> (“Indie games . . . compete with mainstream titles that have bigger budgets and more resources. . .”). Independent games can be very successful, both critically and financially. See Andrew Webster, *Building a Hit, One Block at a Time: The Creation of Minecraft*, ARS TECHNICA (Sept. 27, 2010, 7:35 PM), <http://arstechnica.com/gaming/news/2010/09/building-a-hit-one-block-at-a-time-the-creation-of-minecraft.ars>. In fact, the success of independent games has convinced some studio developers to “go indie.” Ben Kuchera, *Feral Developers: Why Game Industry Talent is Going Indie*, ARS TECHNICA (Aug. 23, 2011), <http://arstechnica.com/gaming/news/2011/08/experience-going-indie.ars>.

115. BENKLER, *supra* note 17, at 294–97 (“We are seeing the broad emergence of business models that are aimed precisely at providing users with the tools to write, compose, film, and mix existing materials, and to publish, play, render, and distribute what we have made to others, everywhere.”).

116. See *id.* (discussing various production tools already available to the average citizen).

outside the studio system. While an entertainment world in which independent audiovisual works can be produced and distributed affordably is certainly a theoretical possibility, complex issues in both production and distribution would have to be overcome. The major issue in distribution is whether digital distribution across the Internet will continue to be free, or nearly so. This is, of course, the issue of network neutrality.<sup>117</sup> While a full discussion of net neutrality is beyond the scope of this Note, it is worth briefly examining the possibility that the new digital distribution model will wind up looking quite a bit like the old one.

### 1. Barriers to Distribution

While digital distribution currently offers live action audiovisual artists a low-cost method of reaching the public with their creations, it is not at all clear that this access will continue in the future.<sup>118</sup> The major concern for artists is that the small number of Internet Service Providers will employ prioritization schemes whereby different forms of information will be charged different fees for carriage across a digital network.<sup>119</sup> As audiovisual works occupy a significant amount of bandwidth, prioritization would present an economic obstacle for individual artists. Moreover, Internet service may become so “thoroughly managed, monetized, prioritized, filtered, packaged, and non-executable” that it will closely resemble today’s cable television.<sup>120</sup> Indeed, service providers are already moving in this direction by tying an individual’s access to Internet programming directly to that individual’s cable television subscription.<sup>121</sup>

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117. See Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003) (discussing various approaches to network neutrality); see also Rob Frieden, *A Primer On Network Neutrality*, 43 INTERECONOMICS 4 (2008), available at <http://www.intereconomics.eu/archiv/autor/437/> (outlining basics of network neutrality debate).

118. See WU, MASTER SWITCH, *supra* note 55, at 297–98 (“The individual holds more power than at any time in the past century . . . Whether or not he can hold on to it is another matter.”).

119. On Dec. 23, 2010, the Federal Communications Commission took a first step towards, perhaps, preserving some form of network neutrality. See FED. COMM’N COMM’N., FCC 10-201, PRESERVING THE OPEN INTERNET BROADBAND INDUSTRY PRACTICES (Dec. 23, 2010). However, the FCC’s proposed rules lack specificity and it remains to be seen how, and even if, they will be applied. See Tim Wu, *The Art of “Kicking The Can”—Uncertainty Rules When It Comes to Net Neutrality*, TECHCRUNCH (Dec. 23, 2010), <http://techcrunch.com/2010/12/23/net-neutrality-rules-uncertainty/> (discussing the lack of clarity in the potential effects of FCC rules); see also Nate Anderson, *Net Neutrality Fight: GOP Wields Garlic Against FCC “Vampires”*, ARS TECHNICA (Jan. 6, 2010), <http://arstechnica.com/tech-policy/news/2011/01/net-neutrality-fight-gop-wields-garlic-against-fcc-vampires.ars> (discussing legislation introduced in House of Representatives to bar FCC from regulating the Internet).

120. Susan P. Crawford, *The Looming Cable Monopoly*, 29 YALE L. & POL’Y REV. INTER ALIA 34, 38 (Dec. 16, 2010). See also, WU, MASTER SWITCH, *supra* note 55, at 318 (suggesting that the potential for control of information is significantly increased on the Internet).

121. See Parul P. Desai, *The Emerging Online Video Market*, 993 Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, Cable & Broadband Industry Law 2010, PLI Order No. 22634 287, 291-92 (Practising Law Institute, Jan.–March 2010) (discussing new access models employed by major Internet service providers). In one high-profile example, the Fox Network decided to limit next day online access to its programming. Under Fox’s approach, only individuals who subscribe to an authorized cable television provider will be able to view Fox programming online

For individual artists, the implementation of a cable television model for Internet distribution would create the same problems faced today: a lack of distribution outlets for their work would place artists in a difficult bargaining position and likely prevent them from retaining ownership of their works.<sup>122</sup> However, even if the Internet remains a free and accessible form of distribution, audiovisual artists will face considerable difficulties in producing their works outside of the studio system.

## 2. Barriers to Production

Thus far, this Note has discussed ways in which the cost of producing audiovisual works can be lessened with the use of digital camera and film, and mass collaboration on aspects of filmmaking, such as storyboarding and editing.<sup>123</sup> And while it is clear that films and, to a lesser extent, television programs can be produced on limited budgets outside of the studio system, it is not as certain that an individual audiovisual artist can build a career on this sort of production.<sup>124</sup> The reason for this, in large part, is the overwhelming union presence in the entertainment industry. Most Hollywood professions, whether creative or noncreative, are unionized: there are unions for writers,<sup>125</sup> directors,<sup>126</sup> editors,<sup>127</sup> cinematographers,<sup>128</sup> actors<sup>129</sup> and most other members of a film crew.<sup>130</sup> Each of

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the day after it airs on television. All other online viewers will be required to wait eight days. Brian Stelter, *Fox to Limit Next-Day Streaming On Hulu to Paying Cable Customers*, N.Y. TIMES, July 27, 2011, at B3.

122. For a full discussion of the difficulties artists face when negotiating with the oligopoly that controls current content distribution, see *supra* notes 59–64 and accompanying text.

123. See *supra* notes 75–78 and accompanying text (discussing financial savings offered by shooting in digital film). See *supra* notes 113–18 and accompanying text (discussing low budget production opportunities).

124. See *supra* notes 79–93 (discussing prominent nonstudio audiovisual projects).

125. The Writers Guild of America, East and Writers Guild of America, West represent Hollywood screenwriters. See generally WGA 2008 MBA, *supra* note 51.

126. Beyond representing film and television directors, the Directors Guild of America (DGA) represents Unit Production Managers, who are responsible for the physical production of a film or television show, and First and Second Assistant Directors, who are responsible for the day-to-day scheduling and functioning of a shoot. See *Basic Agreement of 2008*, DIRECTORS' GUILD OF AMERICA, INC., 17–20 (2008), available at <http://www.dga.org/Contracts/Creative-Rights/Basic-Agreement-Article-7.aspx> [hereinafter DGA Agreement] (defining individuals covered by DGA jurisdiction).

127. Editors are represented by the Motion Picture Editors Guild—Local 700 of the International Alliance of Theatrical Stage Employees, Motion Picture Technicians, Artists and Allied Crafts (IATSE). See *A Brief History of the Editors Guild: Local 700*, MOTION PICTURE EDITORS GUILD, <https://www.editorsguild.com/Guildshistory.cfm> (last visited Oct. 3, 2011).

128. Cinematographers are represented by the International Cinematographers Guild—Local 600 of IATSE. See *About Local 600*, INTERNATIONAL CINEMATOGRAPHERS GUILD, <https://www.cameraguild.com/AboutUs/aboutus.aspx> (last visited Oct. 3, 2011).

129. The Screen Actors Guild (SAG) represents the majority of film and television actors in the United States and many abroad. See *Membership Overview*, SCREEN ACTORS GUILD, <http://www.sag.org/content/membership> (last visited Oct. 9, 2011) (describing membership as “120,000 talented and accomplished artists worldwide.”). Many television actors are also represented by the American Federation of Television and Radio Artists (AFTRA). See *About Entertainment*, AFTRA (July 20, 2009), <http://www.aftra.org/32CEABDDE9E94150B2ABC4CC4D200AB1.htm> (describing

these unions has an agreement with the Alliance of Motion Picture and Television Producers (AMPTP), the trade association that represents all of the major production companies in the entertainment business.<sup>131</sup> Thus, the films and television shows produced in Hollywood are staffed almost entirely by union workers. Union workers are guaranteed certain minimum fees for their work, as well as pension and health benefits.<sup>132</sup> While these guarantees are undoubtedly a benefit to the unions' members, they also represent a significant financial barrier to an audiovisual artist seeking to produce professional quality work outside of the studio system.

Perhaps the best way to explain the issues faced by an audiovisual artist is with a hypothetical example. An aspiring writer pens a script and decides to direct and produce it on her own. By employing nonunion workers, she can create a professional looking, feature-length, live action film for as little as ten thousand dollars.<sup>133</sup>

The writer now has two distribution options: traditional studio distribution or independent digital distribution. In the traditional scenario, the writer tries to sell her completed film to a studio that will distribute it.<sup>134</sup> If a studio is interested, it will acquire all of the rights in the film and often sign the writer to a development deal—a fixed term contract during which the artist will create new works exclusively for the studio.<sup>135</sup>

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history and scope of television representations).

130. IATSE represents numerous noncreative audiovisual workers, including stagehands and script supervisors. Other workers, involved in aspects of filmmaking such as building and tearing down sets or moving the film company between locations, are represented by other labor unions, such as the Teamsters Local 399 of Hollywood. See *Agreement of August 1, 2007 Between Producer and Studio Transportation Drivers*, LOCAL #399 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS 79–90 (2007), available at [http://entlabor.com/uploads/2007\\_Black\\_Book\\_Agreement\\_1\\_.pdf](http://entlabor.com/uploads/2007_Black_Book_Agreement_1_.pdf) [hereinafter Teamsters Agreement] (detailing daily rates for wide range of covered workers, from drivers to dog trainers to wranglers).

131. See *About Us*, AMPTP, <http://www.amptp.org/aboutus.html> (last visited Oct. 3, 2011).

132. See Teamsters Agreement, *supra* note 130, at 79–90 (listing rates for various jobs). See also WGA 2008 MBA, *supra* note 51, at 303 (detailing minimum compensation for various forms of screenwriting); 2009 Basic Agreement and Television Agreement—Minimum Rates, SCREEN ACTORS GUILD (2009), available at <http://www.sag.org/files/sag/documents/2009%20TV%20Theatrical%20Rates%206%2011%2009%20final.pdf> (detailing rates for actors in various audiovisual productions).

133. A recent example of such a low-budget success was the horror movie *Paranormal Activity*, written and directed by Oren Peli on an \$11,000 budget. See Scott Pierce, *Review: Low-Budget Paranormal Activity Thrills with High-Value Horror*, WIRED (Oct. 8, 2009), <http://www.wired.com/underwire/2009/10/paranormal-activity-review/>. A paradigm example of the arc of a low-budget writer-director's career is that of *Clerks* creator Kevin Smith. See WU, MASTER SWITCH, *supra* note 55, at 234 (discussing the purchase and distribution of *Clerks* by independent film company Miramax).

134. Artists often attract studio attention by entering their films in film festivals. This is how *Paranormal Activity* attracted the interest of Dreamworks's parent company, Paramount Pictures. See Pierce, *supra* note 133 (describing the film's path from obscurity to theatrical release).

135. This is, for example, what happened to *Paranormal Activity* director Peli, who signed a deal to produce further features for Paramount. The studio also convinced Peli to alter his original film's ending before theatrical release. See Ian Crouch, *Boo! Paranormal Activity's Writer-Director on Scaring Everyone at a Theater Near You*, N.Y. OBSERVER, Oct. 23, 2009, <http://www.observer.com/2009/culture/boo-paranormal-activities-scaring-everyone-theater-near-you> (discussing changes to film's

The artist looking to create outside the studio system would take a different approach and attempt to distribute her work digitally, either directly to theaters or over the Internet.<sup>136</sup> Assume the artist is able to succeed in distributing her work without studio assistance and the project gains a level of popularity that allows the artist and others involved in the production to reap some monetary reward.<sup>137</sup> Now, the artist is faced with a choice in determining how to proceed with her second film. If she wants to hire experienced professionals, she will almost certainly have to pay union wages: union agreements with the AMPTP are reciprocal—the producers agree to pay certain wages while the workers agree not to work on non-AMPTP productions.<sup>138</sup> Many unions will allow one-time waivers that permit producers to employ workers without adhering to some or all of its basic agreement rules. No union, however, would continuously grant waivers to the young writer-director: to do so would effectively put her beyond union control, which, if she were successful as posited, would undermine the unions' purpose.<sup>139</sup> Thus, if she wants to employ established, professional talent in making her second film, then the young writer-director will have to pay union rates, health insurance and pension compensation.<sup>140</sup>

Of course, it can be argued that because the writer-director made one successful picture with nonunion workers, she should be able to make another. While this is certainly a possibility, it may not be as simple as the artist continuing to work with

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ending before theatrical release).

136. For a discussion of nontraditional distribution, *see supra* notes 78–87 and accompanying text.

137. While this result is certainly possible, few Internet auteurs have managed to successfully monetize their creations. *But see supra* note 79 (discussing success of Finnish parody film released on the Internet). This is also essentially the route being taken by Kevin Smith in his independent distribution of *Red State*. *See supra* notes 82–87 and accompanying text.

138. *See, e.g., Global Rule One*, SCREEN ACTORS GUILD, <http://www.sag.org/content/global-rule-one> (last visited Sept. 23, 2011) (describing union's primary rule as "a SAG member must . . . NEVER work non-union"); *Code of Working Rules*, WRITERS GUILD OF AMERICA, WEST, <http://www.wga.org/content/default.aspx?id=71> (last visited Sept. 23, 2011) ("No member shall accept employment with, nor option or sell literary material to, any person, firm or corporation who is not signatory to the applicable MBAs."); *Bylaws—2008*, TEAMSTERS LOCAL 399, § 32 (2008), *available at* <http://www.ht399.org/pdf/contracts/by-laws/By-Laws.pdf> (listing offenses leading to fines or expulsion, including working for nonunion Producers or accepting less than union-scale wages); *cf.* Tris Carpenter, *Sounding Off on Non-Union Post Houses*, MOTION PICTURE EDITORS GUILD (Oct. 28, 2008), <https://www.editorsguild.com/FromTheGuild.cfm?FromTheGuildid=22> (discussing the successful movement to force AMPTP film to use IATSE Local 700 Editors).

139. Interestingly, before the 2007–2008 Writers Guild strike, and the subsequent agreements between the AMPTP and 'creative' unions, such as the WGA, DGA and SAG, those unions did not have jurisdiction over Internet productions. *See, e.g., DGA Agreement, supra* note 126, at 479 (stating the new Basic Agreement extends to productions exhibited on the Internet or on mobile devices). Thus, under the old union agreements, waivers for Internet-only productions might not have been necessary.

140. This is one reason why the second feature by an independent director is often significantly more expensive to produce. In the case of *Paranormal Activity*, *see supra* notes 133–35, the sequel cost an estimated \$2.7 million, or nearly 250 times as much as the original. *See* Rafer Guzman, '*Paranormal Activity 2*': *It'd Be One Big Happy Family If Not for the Haunted House*, *NEWSDAY*, Oct. 23, 2010, at B8 (discussing production and estimated budget of sequel). It is also why Kevin Smith's 'independent' production of *Red State* cost \$4 million, despite numerous fee waivers, while his first film, the truly independent *Clerks*, cost \$27,500. *See supra* notes 82–87.

the same crew as she had before. If the first film were a success, it is likely that other members of the production crew would have their own opportunities to work on Hollywood creations. Once any of those individuals agreed to work on an AMPTP film, he or she would be required to join the appropriate union.<sup>141</sup> The young writer-director, too, would be required to join a union or unions if she wished to work on AMPTP projects.<sup>142</sup> Thus, if the young writer-director wanted to make a career's worth of nonunion projects, she would need to either convince her original collaborators to forgo any studio employment or continuously replenish her pool of nonunion individuals who nevertheless possessed professional production ability and experience—a daunting task.<sup>143</sup>

None of this is to argue that entertainment industry unions are a negative force in and of themselves. In fact, the opposite is true: these unions have long protected the rights of workers who were poorly treated in the early Hollywood system.<sup>144</sup> However, the unions' control over the majority of professional, experienced audiovisual production talent means that, in order for an artist to produce multiple projects outside of the studio system, she will need a significant revenue stream which is likely, paradoxically, to come only from the sort of heavily marketed, big budget projects financed by the studios.

### III. WORK FOR HIRE IN THE FUTURE

The concept of audiovisual artists using fees earned from working on studio productions to finance their own independent work is not new.<sup>145</sup> Such an

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141. See, e.g., WGA 2008 MBA, *supra* note 51, at 23–27 (outlining terms by which writer employed on AMPTP production must join the WGA within thirty days); DGA Agreement, *supra* note 126, at 20–21 (discussing requirement that all workers in DGA-covered categories on AMPTP project must join union).

142. See WGA 2008 MBA, *supra* note 51, at 23–27 (stating writers on AMPTP must be union members); DGA Agreement, *supra* note 126, at 20 (stating directors, assistant directors and UPMs on AMPTP projects must be union members).

143. This is a difficult proposition. While prominent actors, writers and directors often command fees far in excess of the minimums required by their guilds, such minimums can represent a significant salary increase for “below the line” workers and for less well-known creative personnel. See *supra* notes 125–32 and accompanying text. It should be noted that there *are* audiovisual artists who manage to create a career outside the studio system: documentary filmmakers. However, documentaries are distinguishable from the majority of audiovisual works in a number of ways. First, documentaries have a distinct public interest angle that informs not only the work itself but also the career choices of documentary artists. See *American Dreams, Not Made in the U.S.A.*, N.Y. TIMES, Mar. 28, 2004, at B32-33 (discussing *Hoop Dreams* director Steve James's commitment to documentary filmmaking because, in his words, “[T]here's nothing quite as thrilling and eye-opening and . . . moving as following people's lives like this.”). Moreover, documentaries require neither writers nor actors, and can be made with significantly smaller production crews. This is especially true because many of the traditional crew staffing requirements of the various unions are *presumptively* relaxed for documentaries. See, e.g., *Documentary Agreements: Key Provisions*, DIRECTORS GUILD OF AMERICA, available at <http://www.dga.org/Contracts/Agreements.aspx> (last visited Sept. 23, 2011) (“[W]aivers of mandatory staffing will be granted if the Director is able to perform all DGA-covered duties.”).

144. See generally SCHWARTZ, *supra* note 52 (discussing the role of the Writers Guild in protecting artists from studio mistreatment).

145. A prime example of this is director John Sayles (*The Secret of Roan Inish*). Sayles worked as



approach is, however, limited by the amount of money an individual can make as a work for hire writer.<sup>146</sup> After all, work for hire employees are paid a flat fee—their profit participation, if any, typically comes after the studio has accounted for all of its costs, including overhead, and taken a substantial distribution fee.<sup>147</sup> In order for audiovisual artists to consistently take advantage of the opportunities to create and distribute their works outside of the studio system, they will need increased remuneration from their studio-controlled work. One method for achieving greater economic rewards for artists is by modifying the work for hire doctrine. To that end, Section A of this part will examine alternatives to work for hire exercised by members of the European Union in determining copyright ownership of audiovisual works, and then suggest adoption of some of these approaches. Section B will then examine the benefits and harms that might be caused by replacing the work for hire doctrine with a different ownership scheme.

#### A. OWNERSHIP OF AUDIOVISUAL WORKS IN “AUTHORS’ RIGHTS” EUROPEAN UNION COUNTRIES

National audiovisual copyright laws may generally be placed in two categories: industrial copyright countries, in which initial ownership often vests in the entity that finances the creation of the work, and artists’ rights countries, in which initial ownership vests in the individual or individuals who actually create the work.<sup>148</sup> In European countries that follow the artists’ rights model, a variety of schemes are used to deal with assigning initial ownership in audiovisual works.<sup>149</sup> When the work is created by employees, many countries provide for an implied presumption

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a high-profile screenwriter for Hollywood productions such as *Apollo 13* and *The Quick and the Dead* in order to finance his low-budget, independent works. Despite his success as a screenwriter, Sayles struggled to consistently fund his films, many of which had to be produced outside the United States. See *Biography of John Sayles*, JOHN SAYLES, <http://www.johnsayles.com/body-bio.html> (last visited Sep. 23, 2011) (quoting Sayles as stating that “[i]t makes no sense for film makers to seize the means of production unless they also seize the means of distribution and exhibition (and get a good cut of the ancillaries.)”).

146. See *id.* (detailing the difficulties in financing even “micro-budget” films).

147. This arrangement, called “gross after break-even,” is the most common profit-sharing benefit offered to audiovisual artists. See VOGEL, *supra* note 5, at 182 (describing profit-sharing arrangements in the entertainment industry). In fact, due to a variety of accounting practices, many ‘successful’ films will never break even. *Id.* at 182–206 (detailing entertainment industry accounting practices); see also Smith, *Distribution*, *supra* note 82 (detailing how, despite enormous box office success of a film with a budget of just \$27,000, it took seven years for the film to “break even”).

148. See PASCAL KAMINA, *FILM COPYRIGHT IN THE EUROPEAN UNION* 170 (2002) (discussing ownership laws in industrial copyright countries, such as the United Kingdom); *id.* at 170–72 (differentiating between ownership laws in industrial copyright countries and artists’ rights countries such as Spain and France). While European countries that follow the industrial model do vest ownership in the audiovisual work’s producer, that producer is not considered the author of the underlying works (such as scripts), as he would be under the work for hire doctrine. See *id.* at 167 (discussing rejection of “[t]he solution of granting *authorship* in contributory works” to film producers in industrial copyright countries). In the U.K., authorship rights are divided between a film’s producer and its director. *Id.* at 170.

149. See, e.g., GELLER, *INTERNATIONAL COPYRIGHT*, *supra* note 103 (discussing Spanish law vesting initial ownership in audiovisual works’ director, writer and composer).

of assignment of rights to the employer—but, significantly, the presumption only applies to rights necessary to economically exploit the work in question.<sup>150</sup>

The key issue in suggesting an alternative to the work for hire doctrine in United States law is whether such an alteration would be unacceptably harmful to the Hollywood entertainment conglomerates.<sup>151</sup> The basic concept of a presumed assignment of rights to the studios, rather than a direct grant of authorship, might be problematic in that the artist could retain reversion rights, potentially preventing the studio from producing future derivative works, a cornerstone of the entertainment industry.<sup>152</sup> While very few copyrights retain value that far into the future, those that do, such as Mickey Mouse, are extremely valuable to the studios that own them.<sup>153</sup>

Another potential issue for entertainment conglomerates would arise if the presumed assignment included only the rights necessary to commercially exploit the audiovisual work in question.<sup>154</sup> The problem with this approach, from Hollywood's point of view, is that it does nothing to secure the conglomerates' rights in two very important areas: merchandising and sequels. French law, for example, provides that the presumptive assignment is for the rights to "all possible means of exploitation" except "graphic" and "theatrical" works.<sup>155</sup> However, it is unclear whether such exploitation of an audiovisual work would cover merchandising and sequels.<sup>156</sup> This question is particularly important as it concerns blockbuster Hollywood films, which are increasingly aimed at enhancing the value of the underlying characters or franchise, rather than on ticket sales at the multiplex.<sup>157</sup>

On the other hand, it is questionable whether the retention of theatrical and graphic rights alone would create a large enough revenue stream to allow artists to

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150. See, e.g., *id.* at BEL-1(2)(a) (discussing presumed transfer of necessary rights in Belgium); see also *id.* at SPA-1(1)(b) (discussing presumed transfers in Spain). Some countries create different presumptions for different creative contributions. See PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 213–14 (2001) [hereinafter GOLDSTEIN, INTERNATIONAL COPYRIGHT] (discussing the differentiation between presumptions "depending on the class of work . . . treating music, say, differently from a scenarios.")

151. Obviously, the major studios would be against any alteration to the work for hire doctrine, since it favors their interests so strongly. The real issue is whether a change would so undermine the conglomerate system that it would no longer be able to function. See LESSIG, REMIX, *supra* note 17, at 291 (arguing that "\$100 million blockbusters" would be impossible without a copyright protected studio system).

152. 17 U.S.C. § 203 (2006) (providing for termination rights for works other than those made for hire). See WU, MASTER SWITCH, *supra* note 55, at 225–35 (examining major studio reliance on films that spawn sequels and other licensing opportunities).

153. See *Eldred v. Ashcroft*, 537 U.S. 186, 268 (2003) (Breyer, J., dissenting) (citing studies showing that fewer than two percent of copyrights retain value after fifty-five years).

154. For examples of limited assignments, see *supra* notes 150–52.

155. See KAMINA, FILM COPYRIGHT, *supra* note 148, at 183–84 (discussing breadth of exploitation rights under French law).

156. *Id.* at 183.

157. See WU, MASTER SWITCH, *supra* note 55, at 227–32 (arguing that the modern studio's goal is to develop valuable properties and make its money from licensing them in as wide a multiplicity of forms as possible).

consistently produce union work outside of the studio system.<sup>158</sup> However, audiovisual artists do not need all merchandising or sequel rights in order to build a successful alternative career.<sup>159</sup> Thus, the most equitable alternative would be a hybrid of the French system. For an original creative work, the work for hire doctrine would be replaced with a presumed assignment system. The assignment to the studios would include all rights necessary to exploit the audiovisual work in question—including merchandising rights, but excluding theatrical and graphic rights.<sup>160</sup> However, those rights would *not* include the right to produce sequels to or remakes of the original works—if those works were, in fact, original. Works based on a previously existing product—for example, films based on the Harry Potter novels—would still be considered traditional work for hire products. In other words, work for hire would continue to apply to individuals hired to create a derivative work based on pre-established intellectual property.<sup>161</sup> This approach would benefit artists, the viewing public and perhaps even the studios themselves.

#### B. BENEFITS AND HARMS OF REPLACING THE WORK FOR HIRE DOCTRINE

There are a number of benefits to be derived from replacing the work for hire doctrine with the implied assignment rule discussed in Part III.A, *supra*. Obvious gains will accrue to individual artists, but there are also potential benefits for the general public and for the entertainment industry as a whole.

The most basic benefit for artists would be a potentially significant increase in profits. Those profits, combined with digital production and distribution, could enable an artist to produce major audiovisual projects outside the studio system. This, in turn, creates further positive outcomes: artists, unfettered by studio

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158. A small number of theatrical productions of audiovisual works, such as *Shrek: The Musical* and *The Addams Family*, have been financially successful, but there is not yet a large market for this sort of adaptation. For example, in the past five years, only ten percent of Broadway musicals have been based on audiovisual works. For the purposes of this Note, “musicals based on audiovisual works” are defined as those based on movies or television shows that were themselves original creations. Original research was conducted through the Internet Broadway Database, which maintains records from the beginning of New York theater through the present. See Advanced Search for Shows, Internet Broadway Database (IBDB), <http://www.ibdb.com/advSearchShows.php>, (to reproduce these results, select “Musical” for show type and select “1/1/2006” to “1/1/2011” as the “Opening Date” range; then follow “Search” hyperlink).

159. One famous writer-director, George Lucas, did manage to secure the merchandising rights to his hit film, *Star Wars*. See DALE POLLOCK, *SKYWALKING: THE LIFE AND FILMS OF GEORGE LUCAS* 174 (updated ed. 1999). Those rights have been worth hundreds of millions of dollars. *Id.* at 287. This bonanza allowed Lucas to produce his *Star Wars* prequels without studio assistance—Twentieth Century Fox’s only participation was to act as the film’s distributor, for which they received a small percentage of the gross. *Id.* at 289.

160. These rights are generally understood to be fairly narrow. Theatrical rights are rights to produce the work in a live theater setting. Graphic rights cover the ability to produce graphic novels, otherwise known as comic books. See GOLDSTEIN, *INTERNATIONAL COPYRIGHT*, *supra* note 150, at 210–14.

161. Of course, this arrangement could create perverse incentives for studios to produce an even greater number of derivative films and thereby stifle, rather than encourage, the independent artist. For a further discussion of this possibility, see *infra* notes 169–70 and accompanying text.

mandates, would have greater freedom to express themselves, whether in the stories they choose to tell or the types of people they choose to tell stories about.<sup>162</sup> Moreover, expanding artists' ownership rights will enhance their bargaining power if they do choose to create projects for the studios: an artist who wanted to could potentially bargain away derivative works rights in exchange for studio support to produce a project with only marginal marketability.<sup>163</sup> This, too, could result in a wider variety of audiovisual art being produced and disseminated to the public.

An increased number of artistic viewpoints also benefits the general public. On the simplest level, more divergent creations have the potential to provide entertainment to a larger number of individuals. More significantly, however, diversity in audiovisual art may also foster diversity of political and racial representation. Under the current entertainment conglomerate system, such representation is often lacking in the audiovisual products distributed to the public.<sup>164</sup> A lack of diverse viewpoints can have an adverse impact on viewers and, therefore, any opportunity to increase the public's exposure to varied stories and perspectives should be welcomed.<sup>165</sup>

The benefit for large studios in replacing the work for hire doctrine with a more nuanced presumptive assignment system is certainly less obvious since the status quo works to their benefit. However, allowing artists to create works on a smaller scale, and with a smaller budget, would not directly compete with the studios' primary products: the blockbuster film or twenty-two episode per season network television program. Moreover, a nonstudio creative environment could provide the studios with an important talent development program: in much the same way that

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162. Studio ownership of creative programming has resulted in a legion of stories about changes made to projects, sometimes without the creator's consent or participation. While these alterations can often be classified as no more than a difference of opinion, sometimes they appear to be actual censorship of an artist's message. That was the case in a recent controversy between the creators of the animated television show, "South Park," and its corporate owners, Viacom International. See Dave Itzkoff, *'South Park' Episode Altered After Muslim Group's Warnings*, N.Y. TIMES, April 23, 2010, at C3 (detailing Viacom's decision to censor episode of popular TV show over objection of show's creators). Moreover, racial minorities have long been underrepresented in Hollywood, both behind and in front of the camera. See, e.g., Don Aucoin, *'Airbender' Reopens Race Debate*, BOSTON GLOBE, July 4, 2010, at N9 (discussing the controversy surrounding the high-profile film's casting of white actors in Asian roles); *Report Says Blacks are Underhired in Hollywood*, N.Y. TIMES, Sept. 24, 1991, at C12 (citing an NAACP study, which found that African-Americans were "underrepresented 'in each and every aspect' of the entertainment industry").

163. Increased bargaining power could also result in more young artists being given opportunities to secure studio financing. Studios might opt to hire more unproven artists willing to cede their ownership rights in exchange for the opportunity to create a high-budget project.

164. Mark Cooper, *Study 18: The Contemporary Terrain of Media and Politics Demands More Concern About Concentration of the Mass Media*, in THE CASE AGAINST MEDIA CONSOLIDATION: EVIDENCE ON CONCENTRATION, LOCALISM AND DIVERSITY (Mark N. Cooper ed. 2007) (discussing the limiting effect media conglomerates have on the expression of political views).

165. See, e.g., Dana E. Mastro et al., *Exposure to Television Portrayals of Latinos: The Implications of Aversive Racism and Social Identity Theory*, 34 HUM. COMM. RES. 1, 19 (2008) ("[V]iewers may derive normative cues from television content and use these to guide their racial expressions."). Interestingly, the authors found that portrayals of Latinos on television affected both Latino self-perception and the perception of Latinos by white viewers. *Id.* For a full discussion of the entertainment conglomerates that currently dominate audiovisual production, see Part I.B, *supra*.

music videos have supplied the film industry with successful directors, nonstudio productions could help the studios identify talented writers, directors, cinematographers and actors.<sup>166</sup> Finally, it is important to note that studios would not be losing control of their most valuable products: films based on intellectual property that is “easily identifiable” based on an “existing reputation.”<sup>167</sup> An environment that supports both individualized, independent creation and large-scale, highly expensive audiovisual productions is not unimaginable: it is, in fact, the environment of videogame production today.<sup>168</sup>

One drawback of this scheme is that providing studios with more complete ownership rights in works based on pre-existing properties incentivizes them to simply recycle intellectual property rather than create truly new artistic works. It is, however, apparent that studios are already primarily in the business of exploiting, rather than creating, intellectual property.<sup>169</sup> Another concern is that there is little question that modifying the work for hire doctrine will harm the economic bottom line of entertainment conglomerates. However, the purpose of the Copyright Clause is not to protect the incomes of a few large corporations; it is to “promote the Progress of Science and Useful Arts” for the benefit of the American people.<sup>170</sup> Modifying the manner in which we allocate rights in audiovisual works would assist in realizing this goal.

#### IV. CONCLUSION

In the American entertainment industry, artists do not own their work. Writers can imagine, create and execute every aspect of an audiovisual work and still have no creative control over its final appearance, and no financial stake in its outcome. The ‘authors’ of American films and television are a handful of large corporations. As a result, the viewing public is denied the variety of artistic, political and racial viewpoints it might otherwise enjoy.

Technological developments offer the possibility that this state of affairs can be altered and artists might be able to create professional audiovisual works outside the studio system. However, professional caliber live-action production is expensive, particularly the set rates demanded by Hollywood unions. An individual artist cannot simply rely on the promise of crowd-sourcing to create an audiovisual work; she needs the capital to employ experienced professionals. That capital can only come with the protection of copyright law—but a copyright law unencumbered by the work for hire doctrine.

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166. Directors who began their careers in music video include David Fincher (*The Social Network*), Spike Jonze (*Being John Malkovich*) and Gore Verbinski (*Pirates of the Caribbean*).

167. See WU, MASTER SWITCH, *supra* note 55, at 228–29 (observing that the most expensive films of the 2000s were all based on preexisting properties).

168. See *supra* notes 112–14 and accompanying text (discussing independent and studio production in the videogame industry).

169. See *supra* notes 61–64 and accompanying text (discussing studio reliance on intellectual property they already own). See also *supra* notes 154–57 and accompanying text (discussing studios’ focus on the licensing of existing properties).

170. U.S. CONST. art. I, § 8, cl. 8.

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