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The Problem of Creative Collaboration

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THE PROBLEM OF CREATIVE COLLABORATION

Anthony J. Casey & Andres Sawicki

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

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The Problem of Creative Collaboration

Anthony J. Casey & Andres Sawicki

In this Article, we explore a central problem facing creative industries: how to organize collaborative creative production? We identify informal rules as a significant and pervasive—but nonetheless overlooked—tool for solving that problem. While existing literature has focused on the role that informal rules play in creating incentives for the production of creative work, we demonstrate how such rules can be even more influential in facilitating and organizing collaboration in the creative space.

We also suggest that informal rules are often a better fit for organization than formal law. Unique features of creativity, especially high uncertainty and low verifiability, create organizational challenges that formal law cannot address, as demonstrated by recent high profile cases like *Garcia v. Google*. But certain informal rules can meet these challenges and facilitate organization where law fails to do so. We explain how informal rules functioning through mechanisms like reputation and trust can sustain an organizational solution without a manager, a hierarchical firm, or formal law allocating control rights. Finally, we sketch out the dynamics in hybrid situations of creative organization where informal rules function alongside formal law.

The Problem of Creative Collaboration

Anthony J. Casey[†] & Andres Sawicki^{††}

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INTRODUCTION

A central problem that faces any creative team is how to organize collaboration. Virtually all of creative production involves the combination of multiple inputs. Some of those inputs are major while others are minor. A film, for example, will include writing, acting, set design, costume production, editing, and the like. These creative inputs must be organized; and part of that organization includes decisions over who controls inputs and the final output.

The complicated nature of these questions has been highlighted in recent high profile cases like *Garcia v. Google*¹ and *16 Casa Duse v. Merkin*.² Both cases grappled with the question of how much control an input provider had over the use of a specific input (and therefore also over the end product which contained the input). The opinions in these cases raised more questions than they answered about what it means to be an author for purposes of copyright law, what it means to control a creative work, and what even qualifies as a creative work.

The hypothesis we explore in this article is that courts struggle to decide these—and many other—disputes in creative industries because the parties never intended for formal law to resolve them. Instead, a complex set of informal rules that only tangentially intersect with formal law regulates the behavior of creative collaborators. Courts are nonetheless confronted with these kinds of disputes (in at least some instances, as in *Garcia*, this can happen when one of the participants is not a member of the creative community). When this happens, courts superimpose rigid concepts from formal copyright law onto the flexible and messy reality of creative collaboration. At best, those courts create elaborate fictions to mimic informal norms; at worst, they get things completely wrong, potentially undermining the informal norms required for creative collaboration to operate in the ordinary course.

While formal copyright law nominally applies to determine who controls the output of creative work, creative production poses organizational problems that formal copyright law simply cannot solve. Instead, informal rules operating through mechanisms like trust and reputation

¹ *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc).

² *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247 (2d Cir. 2015).

regulate collaboration throughout the creative industries. The significant and pervasive role that informal rules play in organizing creative collaboration means that copyright theory must account for the dynamics of informal rules to reach an accurate understanding of how to allocate control of creative production. But it currently does not.

This suggests that informal rules play a more important role than copyright theorists have recognized. Others have suggested that informal rules create incentives for creative production in “negative spaces”—such as cuisine, stand-up comedy, and tattoos—where copyright protection is unavailable.³ But this views the influence of informal rules on creativity too narrowly.

Informal rules in fact cover everything from how producers and directors decide when a film is finished, to how co-authors share ideas, to how musicians choose band mates. In this way, informal rules regulate film, theater, music, television, and publishing. These are not negative spaces on copyright’s periphery.⁴ These are industries at the

³ Copyright may be unavailable for various reasons. Legal doctrine may limit its scope; litigation costs may make enforcement impractical; or community preferences that operate outside of the conventional legal system may dominate behavior. See Emmanuelle Fauchart & Eric von Hippel, *Norm-Based Intellectual Property Systems: The Case of French Chefs*, 19 *ORG. SCI.* 187, 191 (2008) (noting the absence of effective copyright law in the relationships among haute cuisine chefs in France); Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 *VA. L. REV.* 1787, 1790 (2008) (exploring the lack of a “cost-effective way [for comics to] protect[] the essence of their creativity”); Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?*, 24 *CARDOZO ARTS & ENT. L.J.* 1121, 1130-40 (2007) (challenging existing explanations, based on doctrinal limitations, for the lack of protection for novel cuisine); Aaron Perzanowski, *Tattoos & IP Norms*, 98 *MINN. L. REV.* 511 (2013) (setting out the challenges to legal protection for tattoos). The new consensus is that in these marginal “negative spaces” of intellectual property, informal rules operate in place of formal law to prevent freeriding and to encourage creative production. See Elizabeth L. Rosenblatt, *A Theory of IP’s Negative Space*, 34 *COLUM. J.L. & ARTS* 317 (2011); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 *VA. L. REV.* 1687, 1769-75 (2006) (cataloging potential negative spaces).

⁴ See Rosenblatt, *supra* note 3 (defining the idea of negative spaces); see Fauchart & von Hippel, *supra* note 3, at 199 (arguing that norm-based IP systems arise where formal law is “inadequate or unsatisfactory”); Oliar & Sprigman, *supra* note 3, at 1789-90 (arguing that copyright law is inadequate to protect the work of stand-up comics); Perzanowski,

core of copyright's domain. Informal rules are essential to creative production—including activity at the very center of the copyright industries—because they are the key mechanism shaping the organization of collaborative work.

The centrality of informal rules for all kinds of collaborative creative production makes urgent the need to understand how they interact, and potentially conflict, with formal law. Otherwise, statutory grants of ownership or judicial interpretations of formal copyright law can interfere with long established norms of creative collaboration in complex and unforeseen ways. In the best case, norms and informal rules will evolve to work around this interference. In the worst case, the formal law will hinder norms of creative collaboration. Understanding how this interaction plays out is therefore crucial to a coherent theory of copyright law. And cases like *Garcia* and *Merkin* will only make sense once that understanding is in hand.

Our analysis connects an extensive academic literature on organizational theories—with a focus on theories of firms and teams—to an emerging literature on informal rules in intellectual property.⁵ By linking these two literatures, we

supra note 3, at 567 (describing cultural aversion in tattoo to formal law that renders reliance on copyright law unacceptable).

⁵ We forge new ground in revealing the importance of informal rules for organizing collaborative creation in the copyright space. For work exploring adjacent areas involving informal rules and private ordering in the use and production of information, see BRETT M. FRISCHMANN, MICHAEL J. MADISON, & KATHERINE J. STRANDBURG, GOVERNING KNOWLEDGE COMMONS (2015) (exploring the governance of knowledge commons); Michael J. Madison, Brett M. Frischmann, & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010) (same); YOCHAI BENKLER, THE WEALTH OF NETWORKS (2006) (exploring organization of *modular* inputs in creativity); Rochelle Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161 (2000) (applying transaction cost theories to explain how formal law affects private ordering solutions to problems facing creative collaborations); Rebecca S. Eisenberg, *Proprietary Rights and the Norms of Science in Biotechnology Research*, 97 YALE L.J. 177 (1987) (exploring the interaction between the formal law of patents and scientific sharing norms); Robert P. Merges, *From Medieval Guilds to Open Source Software: Informal Norms, Appropriability Institutions, and Innovation*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=661543 (2004) (describing non-state institutional solutions to appropriability problems in the production of technical information); Arti Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77 (1999) (studying the influence of informal rules on inter-team collaboration in the production of science).

develop the novel hypothesis that informal rules are the primary driver behind the organization of collaborative creative production. The IP-and-organizational-theory literature has focused primarily on the influence of *formal law rather than informal rules* on the organization of creative production. The IP-norms literature has focused on the influence of informal rules on *individual incentives rather than organization*. To bridge this divide, we explain how informal rules enforced through mechanisms like reputation and trust directly affect how creators organize their collaborative activity.

The result is a form of network or community governance and control that suggests that copyright law's obsessive attempts at tying together authorship, ownership, and control are futile. For whatever the law will tell us about who owns a copyrighted product, the facts on the ground will tell us something quite different about who controls and creates it. Formal rules might be designed to cleanly allocate ownership on the assumption that control travels with ownership; but informal rules may adapt to frustrate those designs and allocate control wherever the creative community sees fit. And formal law that overrides those norms and forcibly consolidates control (if that is even possible) will have dramatic and unforeseen effects on the network of creative production.

In developing this theory, we also explore the potential downsides to informal rules. For example, informal rules can introduce bias into decisions where formal law might be more even handed. Reputation (intentionally or not) transfers and perpetuates the bias of those who pass that reputation on. More subtly, informal rules and norms can be manipulated to favor certain groups or certain traits over others. And they are amorphous enough to be invoked inconsistently to serve agendas that are less than transparent. These concerns are particularly relevant in light of the recent and well-publicized gender and racial disparities in opportunities and pay in the film, television, and other creative industries.

Finally, we sketch out the landscape of potential interactions among formal law, informal rules, and the organization of creative collaborative production. In some instances, informal rules might substitute for formal law; if copyright law leaves an area largely unregulated (as is the case for improvisational comedy), informal rules may act

alone to support creative collaboration. In other instances, formal law and informal rules may be complements; in television, for example, formal copyright law's derivative work right may grant power to managers sufficient to enable the manager to organize the team, but informal rules governing credit for work may further support these hierarchical collaborations. In still other instances, formal law may crowd out informal rules (and vice versa); non-Western cultural models that import Western copyright law may undermine existing informal rules that are necessary to support particular forms of creative collaboration.⁶

This Article proceeds as follows. Part I reviews the literatures on creative organizations and on norms and customs. We show how these areas of study intersect in creative collaboration to raise important new questions. Part II describes the challenges of creative collaboration and demonstrates that formal law is insufficient to address those challenges. Part III first explores how informal rules enforced through mechanisms like trust and reputation can be the central organizational rules for creative collaboration; it then demonstrates how creative collaboration may be governed by informal rules that exist entirely outside of a firm or management hierarchy. Part IV provides examples of these mechanisms at work and identifies important implications of this analysis, showing how it can be applied to understand challenging questions like those presented in *Garcia and Merkin*.

I. CONNECTING THEORIES OF INFORMAL RULES TO THEORIES OF ORGANIZATION

Classic intellectual property incentives theory holds that creative works are public goods, so only formal rights to exclude others will provide creators sufficient incentives to produce them.⁷ Two separate strands of scholarship have undermined this theory. The first analyzes informal rules⁸

⁶ For example, when the law fails to define authorship in peculiar cases, there is no back up norm to provide any guidance to the parties. See Casey & Sawicki, *Copyright in Teams*, 80 U. CHI. L. REV. 1683, 1713 (2013) (discussing difficult authorship cases where neither law nor custom could cleanly identify the "author").

⁷ See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 293-94 (1970).

⁸ Terms like "custom," "norm," and "informal rule" are used to mean many things. See Jennifer E. Rothman, *The Questionable Use of Custom*

that guide the creation of intellectual property. Building on customs-and-norms work in other fields,⁹ scholars in this tradition have shown that informal rules can also provide the incentives traditionally provided by intellectual property law.¹⁰

The second strand approaches intellectual property problems from the perspective of the theory of the firm, an economic literature devoted to understanding how and why production is organized in a firm rather than a market.¹¹ This work has shown that intellectual property law influences not only creators' motivation to produce, but also the organizational structures in which creators produce.

Both strands of literature address intellectual property generally. For the purposes of this article, we focus more narrowly on copyright. We do so because creative work in the artistic and expressive fields regulated by copyright law

in Intellectual Property, 93 VA. L. REV. 1899, 1900-01 n. 1 (2007) (collecting sources demonstrating the various uses of these terms). And very fine lines can be drawn for any definition. See Robert Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67 (1987) (identifying five types of rules—personal ethics, norms, contract, organizational, and governmental—and five types of sanction—self-sanction, personal self-help, vicarious self-help, organizational, and state). To illustrate our point simply, we will generally divide our analysis into two categories: 1) informal rules—rules enforced through non-state sanction; and 2) formal law—rules enforced by state sanction.

⁹ See, for example, Robert Axelrod, *The Evolution of Cooperation* (1984); Lisa Bernstein, *Opting out of the Legal System, Extralegal Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); ROBERT ELLICKSON, *ORDER WITHOUT LAW* (1991); STEWART MACAULEY, *NON-CONTRACTUAL RELATIONS IN BUSINESS: A PRELIMINARY STUDY* (1963).

¹⁰ Oliar & Sprigman, *supra* note 3; Fauchart & von Hippel, note 3.

¹¹ See generally, R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 389 (1937); Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 *AM. ECON. REV.* 112, 113–14 (1971); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777, 785–95 (1972); Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 *J. POL. ECON.* 1119, 1125–49 (1990); Benjamin Klein, Robert G. Crawford, & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 *J. L. & ECON.* 297 (1978); Sanford J. Grossman and Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 *J. POL. ECON.* 691 (1986); Philippe Aghion & Richard Holden, *Incomplete Contracts and the Theory of the Firm: What Have We Learned over the Past 25 Years?*, 25 *J. ECON. PERSP.* 181, 183 (2011).

may differ from creative work in the technical and scientific fields regulated by patent law.¹²

In this Part, we review the implications of these literatures for copyright law and identify important questions revealed by their nexus.

A. Encouraging Creative Production

The literature on informal rules and creativity has focused either on identifying norms that fill gaps where formal intellectual property law is weak (e.g., the fashion, food, or stand-up comedy industries), or on identifying how the legal system should (or should not) use norms and customs to guide the design of intellectual property law. A particular (though not exclusive) focus of this literature has been on industries (plausibly or not quite) covered by copyright.¹³

These questions have generally been approached with the classic intellectual property story in mind. According to that story, producers have insufficient incentives to produce creative goods unless there are barriers to copying.¹⁴ The traditional policy response to this problem is to create intellectual property laws that impose legal penalties on those who copy creative goods without permission.¹⁵

While this story accurately describes a wide range of creative activity, IP scholars have explored several ways in which it is incomplete. The IP-and-norms literature emphasizes that formal law is not the only mechanism that can prevent copying. Instead, social norms can plausibly do

¹² Research in the interdisciplinary field of creativity studies has suggested that this is the case. See John Baer, *The Case for the Domain Specificity of Creativity*, 2 CREATIVITY RES. J. 173 (1998). For example, perhaps participants in technical or scientific fields can generate predictable and objective criteria to measure whether an input has successfully contributed to the creative process; this would enable a different set of solutions to creative collaborations in those fields than is possible in the artistic and expressive fields regulated by copyright law. We do not here express a view on the particular characteristics that might distinguish the technical and scientific fields; we only note that it is possible that they differ from those in the artistic and expressive fields, and that a full exploration of this issue is beyond the scope of the present Article.

¹³ See *supra* note 3.

¹⁴ Oliar & Sprigman, *supra* note 3, at 1790.

¹⁵ *Id.*

a lot of the same work.¹⁶ Social norms that punish unauthorized imitation might substitute for formal legal barriers to copying, and thereby preserve incentives to produce creative goods.¹⁷

These norms, we are told, spring up in the “negative spaces” where formal protection is weak. They provide a substitute for the incentive-generating force of formal law. Thus, whether legal protection is merely unavailable under prevailing doctrine,¹⁸ impractical or impossible because of specific industry characteristics,¹⁹ or supplanted by other community preferences,²⁰ its weakness creates a vacuum for informal law to fill.

For example, in the world of stand-up comics, formal law does very little to protect jokes.²¹ A stand-up comic who creates a new joke cannot (for doctrinal and social reasons) turn to formal law to prevent another comic from telling the same joke. But that negative space is filled by an informal

¹⁶ Foundational work on social norms can be found in both property literature and contract literature. ROBERT ELLICKSON, *ORDER WITHOUT LAW* (1991) (describing private ordering among ranchers in Shasta County, California that rendered government-provided rules irrelevant); Stewart Macauley, *Non-contractual Relations in Business: A Preliminary Study*, 28 AMER. SOC. REV. 55 (1963) (exploring the informal rules governing business relations in manufacturing); Lisa Bernstein, *Opting out of the Legal System, Extralegal Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001). More recently, others have examined how social norms might affect the structuring of transactions so as to prevent disputes from arising, rather than resolving them after they occur. John F. Coyle & Gregg D. Polsky, *Acqui-hiring*, 63 DUKE L.J. 281 (2013) (describing cooperative norms in Silicon Valley that drive large technology firms to avoid poaching teams of engineers from start-ups and instead to pursue acqui-hires, in which venture capitalists and early investors receive payments when the large firm absorbs all of the start-up’s engineering talent).

¹⁷ See generally Oliar & Sprigman, *supra* note 3 (describing anti-copying norms in stand-up comedy); Fauchart & von Hippel, *supra* note 3 (describing anti-copying norms in French cuisine). It is also possible that industry norms complement or subvert legal rules regarding copying. See, e.g., Lior Strahelivitz, 89 VA. L. REV. 505 (2003) (exploring the emergence of social norms of copying in the file sharing space); Oliar & Sprigman, *supra* note 3; Fauchart & von Hippel, *supra* note 3.

¹⁸ Compare Fauchart & von Hippel, *supra* note 3 at 191, and Buccafusco, *supra* note 3, at 1130-40.

¹⁹ See Oliar & Sprigman, *supra* note 3, at 1790; Perzanowski, *supra* note 3.

²⁰ See generally Raustiala & Sprigman, *supra* note 3.

²¹ Oliar & Sprigman, *supra* note 3, at 1817-18.

rule: comics should not tell jokes previously told by other comics. Those who have been credibly accused of violating this norm incur penalties from the community of stand-up comics.²² These penalties are both non-economic penalties (in the form of reduced social status) and economic penalties (lost bookings).²³

Similarly, French chefs exist in a world of weak formal law. Copyright law does not provide meaningful protection for novel recipes developed by those chefs.²⁴ But the community regulates (mis)appropriation: the chefs understand that members of their community will refuse to engage in mutually beneficial information exchange with chefs who have been credibly accused of copying recipes from other chefs.²⁵

The IP and norms literature both confirms and contradicts the classical theory. On the one hand, it confirms the incentive story that tells us creators need protection from free-riding by rivals to draw them into creative production.²⁶ On the other hand, the literature rejects the suggestions of some classical theories that formal law is the necessary and exclusive means of protection for these industries.

B. Organizing Creative Production

The classic theory of copyright law has another unrelated shortcoming: it generally assumes that a sole creator acts alone to produce creative work.²⁷ This assumption is

²² *Id.*

²³ *Id.* Similar dynamics—though complicated in part by the role of trademark law—may also be at play in the fashion industry. See Raustiala & Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006); Raustiala & Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201 (2009); Hemphill and Suk, *Reply Remix and Cultural Production*, 61 STAN. L. REV. 1227 (2009).

²⁴ Fauchart & von Hippel, *supra* note 3.

²⁵ Fauchart & von Hippel, *supra* note 3. Other areas of creative production may also have similar norms. See, e.g., Perzanowski *supra* note 3.

²⁶ See Breyer, *supra* note 7 at 293-94. That story of the need for incentives (formal or informal) is not without its critics. See *id.* at 294-323 (challenging the empirical underpinnings for the standard justification of copyright law).

²⁷ See BENKLER, *supra* note 5, at 42 (describing the “ideal-type strategy that underlies patents and copyrights” as resting on a conception “of the information producer as a single author or inventor laboring creatively”).

consistent with popular western conceptions of creative production.²⁸ But it is inconsistent with how creativity actually occurs. Virtually all creative work is collaborative or cumulative.²⁹ The collaborative nature of most creative work means that there are crucial organizational issues facing creators that classic theory simply does not address.

This is where the scholarship on the organization of intellectual production comes in. Consider the possibility that two creative inputs must be combined to produce a finished product.³⁰ Formal intellectual property law does not protect creative inputs from appropriation, at least not during the course of much of the production process.³¹ Still, creative goods are commonly produced by a team of people, each of whom provides creative inputs to the joint project. Such a team faces the risk of shirking by teammates because it will often be hard to observe or verify whether each team member is carrying her weight, and because the team members' efforts produce a single inseparable good.³²

²⁸ See *supra* note 5.

²⁹ Rebecca Tushnet notes “The concept of Romantic authorship has come under sustained analytic assault, as scholars have demonstrated that all works derive from other works.” Rebecca Tushnet, *The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity*, (forthcoming); see also sources cited *supra* note 3; Casey & Sawicki, *supra* note 6; Abraham Bell & Gideon Parchomovsky, *Copyright Trust*, CORNELL L. REV. (forthcoming).

³⁰ In the non-creative context, where inputs are tangible assets managed by different people who cannot write perfectly complete contracts, the standard property-rights solution to this sort of problem is integration. Hart & Moore, *supra* note 11, at 1125–49; see also Philippe Aghion & Richard Holden, *Incomplete Contracts and the Theory of the Firm: What Have We Learned over the Past 25 Years?*, 25 J. ECON. PERSP. 181, 183 (2011).

³¹ Copyright protection begins only upon fixation. See generally Casey & Sawicki, *supra* note 6.

³² Additional organizational theories tell us how intellectual property law can affect production that combines creative and non-creative goods. Pioneering research by Robert Merges & Ashish Arora and Dan Burk & Brett McDonnell explores this question. They used the theory of the firm lens to understand formal intellectual property law and provide insights into its influence on market transactions and integration trends in tech industries. See Robert P. Merges, *Intellectual Property Rights, Input Markets, and the Value of Intangible Assets* *5 (unpublished draft, Feb 9, 1999), <http://www.law.berkeley.edu/files/iprights.pdf> (visited June 5, 2013); Ashish Arora & Robert P. Merges, *Specialized Supply Firms, Property Rights and Firm Boundaries*, 13 INDUS. & CORP. CHANGE 451 (2004); Dan L. Burk & Brett H. McDonnell, *The Goldilocks Hypothesis: Balancing Intellectual Property Rights at the Boundary of the Firm*, 2007 U. ILL. L. REV. 575; Dan L. Burk, *Intellectual Property and the Firm*, 71

In many production functions outside the context of creative collaborations, the costs of shirking can be reduced by contract or—where contracts are incomplete—through the imposition of the hierarchical management structure of a firm.³³ These mechanisms are often provided by a particular kind of firm—a hierarchy with a manager at the top.³⁴

Creative collaborators, however, will find firm structures more difficult to design. The problem they face is how to monitor or control teams when the members are providing inseparable contributions that are difficult to observe.³⁵ To solve this problem, creative collaboration requires (more so than other endeavors) either (1) a special monitoring mechanism that can compensate non-verifiable effort or (2) a special enforcement mechanism that can reward or punish entire teams based on output.³⁶ As explained below, this is because the nature of a creative input is that it is hard to define and measure. It is hard to observe—and even harder to verify—whether each writer in a group jointly writing a novel contributed her best ideas and efforts. Or whether a pair of actors put in their best effort rather than hold back because they do not like the director’s style. Or whether the members of a band brought the right energy level to a stage performance.

The organizational solution to these team production problems can take one of two general forms. First, the creative inputs may hire a manager who closely monitors each input to detect shirking.³⁷ Alternatively, where even a monitor cannot observe effort, the creative inputs may hire a

U. CHI. L. REV. 3 (2004); *see also* Oren Bar-Gill & Gideon Parchomovsky, *Law and the Boundaries of Technology-Intensive Firms*, 157 U. PA. L. REV. 1649 (2009); Jonathan M. Barnett, *Intellectual Property as a Law of Organization*, 84 S. CAL. L. REV. 785 (2011); Érica Gorga & Michael Halberstam, *Knowledge Inputs, Legal Institutions and Firm Structure: Towards a Knowledge-Based Theory of the Firm*, 101 Nw. U.L. Rev. 1123 (2007).

³³ Coase, *supra* note 11; Williamson, *supra* note 11.

³⁴ Alchian & Demsetz, *supra* note 11; Coase, *supra* note 11; Williamson *supra* note 11.

³⁵ Casey & Sawicki, *supra* note 6. *See also* Bell & Parchomovsky, *supra* note 29; Shyamkrishna Balganes, *Unplanned Coauthorship*, 100 VA. L. REV. 1683 (2014).

³⁶ Casey & Sawicki, *supra* note 6.

³⁷ Alchian & Demsetz, *supra*, *Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Casey & Sawicki, *supra* note 6.

manager who measures the team's total output, and enforces penalties or rewards depending on whether that output passed some threshold.³⁸

Formal law can, in limited circumstances, facilitate these structures and the creative collaborations they serve to some degree. We have explored this point in prior work.³⁹ But formal law is not the only factor influencing the design of such organizational structures.⁴⁰ Indeed, it is not even the most important. Rather, the limitations on formal law as an organizational device in the production of copyrightable works create a vast organizational negative space where formal law has no (or at most severely limited) influence. The existence of robust collaboration in the creative industries despite this negative space suggests that there are informal rules at work. If that is the case, and we think it is, the next steps are to identify and evaluate those informal rules. We do so in the following parts.

II. THE PROBLEM OF CREATIVE COLLABORATION AND THE SHORTCOMINGS OF FORMAL LAW

In this Part we explore how informal rules can address the organizational challenges of creative collaboration. We first introduce the organizational challenges and then examine potential solutions. We show that while the managerial hierarchy of a firm can sometimes organize creative collaborative activity, in this realm the law necessary to support such organization is significantly limited.

A. *The Challenges of Creative Collaboration*

Suppose that two authors—Jane and Toni—wish to jointly write a novel. Four factors will affect their ability to collaborate: observability, verifiability, allocation, and certainty.⁴¹ The more these factors are present the easier it

³⁸ See Bengt Holmström, *Moral Hazard in Teams*, 13 BELL. J. ECON. 324 (1982); Casey & Sawicki, *supra* note 6.

³⁹ *Id.* at 1721-38 (showing how derivative rights law can create a reward mechanism that facilitates team collaboration and how work-made-for-hire and joint-works doctrine can either facilitate or hinder collaboration depending on specific design).

⁴⁰ Balganesch, *supra* note 29; Bell & Parchomovsky, *supra* note 29..

⁴¹ Casey & Sawicki, *supra* note 6.

will be for the authors to collaborate. But these factors tend to be absent in creative activities.

First, it is difficult for each author to observe the effort of the other. If Jane sees Toni sitting in a coffee shop, she cannot easily know whether Toni is simply daydreaming or, instead, is thinking hard about how to use prose to convey a character's insanity. As a result, Jane cannot effectively punish Toni for failing to put forth the effort she promised to exert.

Second, it is difficult for anyone to verify the level of each author's performance. Jane cannot demonstrate to a court that Toni has been keeping her best prose to herself rather than putting it into their joint novel.⁴²

Third, the result of their collaboration—a novel—will resist attempts to allocate or assign output value to the separate inputs from the respective authors. If a scene in the novel is excellent, it will be difficult to know whether its excellence is attributable to the person who first drafted it, to the one who edited it, to the one who wrote the preceding scene, to the one who thought up the setting for the scene, and so on.

Finally, the potential value of their collaboration is uncertain. Because the work is creative, it will be hard to predict in advance how much it could possibly be worth.⁴³ As a result, the parties cannot simply agree to produce a novel of a given value.⁴⁴

B. The Role of Managers

Because observability, verifiability, allocation, and certainty are lacking, Jane and Toni will find it difficult to collaborate on their own. Instead, they might try to organize their efforts by hiring a manager.⁴⁵ Rather than relying on price signals (or their own good will) to allocate resources, Jane and Toni can create a hierarchy with a manager at the top.⁴⁶ In this hierarchy, perhaps the manager can add to the work's observability or verifiability. The manager can closely monitor Jane and Toni in an attempt to determine whether

⁴² Observability and verifiability are not necessarily coextensive. In some cases, one author may have observed the other's laziness but be unable to verify it to an outsider like a court.

⁴³ Steven J. Horowitz, *Copyright's Asymmetric Uncertainty*, 79 U. CHI. L. REV. 333, 363-64 (2012).

⁴⁴ *Id.*

⁴⁵ Casey & Sawicki, *supra* note 6, at 1701-12.

⁴⁶ Alchian & Demsetz, *supra* note 11.

either is shirking, and to document that shirking.⁴⁷ This can work if the reason that Jane and Toni could not observe was because they were busy creating inputs, or because individuals vary in their skill at observing others.

In many creative endeavors, though, the lack of observability stems not from the limitation on monitoring resources or skill, but from the inherent nature of the creative work itself. Not even the most diligent or skilled monitor can distinguish daydreaming from creative thought.⁴⁸

Where no one—including the manager—can observe or verify the creative inputs, the manager still has a role to play. The manager can enforce penalties (or rewards) on both Jane and Toni if their joint output is below (or above) a threshold. These rewards provide a substitute for monitoring.

If Toni and Jane each benefits from shirking, but a manager cannot observe or verify who shirked, the manager can still punish the entire team whenever the project is unsuccessful. If the entire team is punished when the end product is unsatisfactory, Toni and Jane will have an incentive to perform. The punishment eliminates the value for anyone tempted to shirk.⁴⁹

This role requires some level of certainty about what is a good product and what is a bad product. Importantly, though, that certainty need not exist *ex ante*. The manager may be able to enforce penalties based on a threshold that is only known after production is complete. This avoids the need to spend prohibitive sums predicting and planning for countless contingencies, as would be required of a team relying on formal contract law.

For example, imagine a blockbuster movie is set to release next summer. The threshold for a “good” opening weekend turns on the state of the economy, the state of the movie industry, the weather, and many other factors that cannot be known when the creative inputs are initially contracting to work on the movie, or even during

⁴⁷ *Id.*

⁴⁸ That may one day change. See Siyuan Liu, et al, *Neural Correlates of Lyrical Improvisation: An fMRI Study of Freestyle Rap*, 2 *Scientific Reports* (Nov 15, 2012) (suggesting the possibility of technology to detect brain waves associated with creative activity).

⁴⁹ Holmström, *supra* note 51.

production.⁵⁰ After the opening weekend has passed, many of these factors will become known. The manager can use that knowledge to retroactively reward or punish the team. If the team members know that the manager will use later-revealed information to allocate rewards and enforce penalties, they know that they will be compensated in proportion to the relative success of the team. They will be punished or rewarded based on the value the team added and not based on the fortuities of the weather. The manager can thus effectively elicit effort on the collaborative work.

To summarize the point, creative inputs face a monitoring challenge when collaborating. By organizing into a managerial hierarchy, the inputs can prevent shirking. The manager who can observe will be able to police effort. The manager who can reward will be able to align incentives without observation.⁵¹ The manager retains the residual claim, which grants her the power to reward, punish, and reallocate.⁵²

C. Why Formal Law Is Ineffective in Organizing Collaboration

Managerial oversight is, however, imperfect. Neither contract rights nor property rights can completely allocate control over creative collaboration.⁵³ This is true because the four factors discussed above (observability, verifiability,

⁵⁰ One could imagine a contract that contemplates these possibilities. But a contract covering the infinite possible states of the world would be costly to draft and negotiate. Such negotiation, even if theoretically possible, would be prohibitively expensive. For practical purposes, then, we can assume such a contract cannot be written.

⁵¹ In its pure form, this structure demands that the manager must not be an input provider. Bengt Holmström, *Moral Hazard in Teams*, 13 BELL. J. ECON. 324, 338 (1982). In practice, the level of managerial input is likely a factor that impacts the effectiveness of the manager. In the creative context, it may also be that the manager provides non-creative inputs.

⁵² In the copyright context, this suggests that the law's focus on authorship to determine ownership and control is misguided. It also suggests that post-production rights like derivative works may serve reward functions that can be used to facilitate collaboration on the original work. See generally Casey & Sawicki, *supra* note 6.

⁵³ Casey & Sawicki, *supra* note 6, at 1690-1700; Anthony J. Casey, *Mind Control: Firms and the Production of Ideas*, 35 SEATTLE U. L. REV. (2012).

allocation and certainty) are often scarce in creative collaboration.⁵⁴

With contracts about creativity, for instance, parties will often lack the ability to observe or verify outcomes. When that is true, they will find it difficult to write a contract by which a manager can oversee efforts. A contractual right to require a creative input's best idea is not enforceable when the relative quality of the idea cannot be observed, verified, or predicted. Similarly, a contract term that requires a collaborator to be a "team player" is particularly hard to enforce when the team is engaged in creating things like movie scenes, characters for a story, or character chemistry in a play.⁵⁵

Management through property rights can be even more difficult. Property rights are generally thought to facilitate organization where one input provider or manager can take ownership of the crucial assets.⁵⁶ This gives that person residual control over those assets and, thus over the project. Using that control, the manager can direct other input providers, and then punish and reward collaboration through profits from the project⁵⁷ or through access to the project.⁵⁸

As a preliminary matter, if all inputs in the collaboration are creative ideas, managers may have no property rights to control because copyright does not extend to ideas.⁵⁹ Without property rights, the manager has no access or control rights that she can wield as a carrot or a stick to

⁵⁴ For an interesting analysis of the observability and certainty problems in a creative industry, see Robert R. Faulkner & Andrew B. Anderson, *Short-term Projects and Emergent Careers: Evidence from Hollywood*, 92 AM. J. SOC. 879, 885 (1987) (describing the connection between "means and ends" in film as "obscure and uncertain," comparing the film industry to gambling and wildcat oil drilling, and providing examples of the uncertainty filmmakers face).

⁵⁵ Casey, *supra* note 53.

⁵⁶ Casey & Sawicki, *supra* note 6, at 1690-1700 (summarizing a basic property-rights theory of firms).

⁵⁷ Holmström, *supra* note 51.

⁵⁸ Raghuram G. Rajan & Luigi Zingales, *Power in a Theory of the Firm*, 113 Q. J. ECON. 387 (1998) (presenting an access-based theory of firms and property rights).

⁵⁹ 17 U.S.C. § 102(b) (providing that "[i]n no case does copyright protection for an original work of authorship extend to any idea . . . embodied in such work"); *Baker v. Selden*, 101 U.S. 99 (1879) (holding that copyright law protects expression, not the underlying ideas).

encourage optimal performance.⁶⁰ Moreover, even if the manager possesses some property rights relevant to the creative collaboration (in complementary assets, for example), those rights will provide little protection to a manager-owner who cannot observe inputs, allocate outputs, or predict outcomes. The threat to withhold property or access to property as a punishment for lack of collaborative effort is of little value when the manager cannot observe, verify, or allocate levels of collaborative effort in the first place.

At best, imperfect mechanisms of rewards and punishments can be cobbled together through a combination of contract and property rights. Thus, for example, derivative works rights—if allocated to a team manager—might serve as a reward that can be doled out *ex post* to encourage collaboration.⁶¹ The manager can use the promise of inclusion in future derivative projects as a carrot. But these reward systems will be imprecise and depend on conditions that are not universally present. For example, a reward based on derivative works rights can facilitate collaboration only when a project is likely to produce valuable works “based upon” the original work.⁶² If the project is plainly a one-off collaboration, no such reward is available. Similarly, a team member needs to have a reasonable expectation that she is a plausible participant in future projects in order for access to future projects to serve as a carrot for cooperation on the current project.⁶³

Thus, a large space exists where formal law cannot facilitate collaboration. And yet collaboration flourishes and occupies nearly the whole of the creative market. There will of course be creative activities that are relatively more or less collaborative than others. Movies involve massive collaborations of dozens of people or more. Plays may involve

⁶⁰ See Hart & Moore, *supra* note 11 (developing a theory of the firm that depends on property rights to allocate residual control over assets); Rajan & Zingales, *supra* note 58 (developing a theory of the firm that depends on property rights to control access to assets).

⁶¹ Casey & Sawicki, *supra* note 6.

⁶² See 17 U.S.C. § 101 (defining a derivative work as “a work based upon one or more preexisting works”).

⁶³ For example, an actor playing a character that dies in a movie may have no plausible expectation of being involved in a sequel.

fewer. Books may involve even fewer.⁶⁴ The implication of our analysis is that informal rules will be of greater importance for the more collaborative activities. But the bulk of creativity has a significant direct or indirect collaborative component, suggesting that this role of informal rules will be a central and core feature of most creative activity.

III. MECHANISMS FOR ENFORCING INFORMAL RULES

We suggest that there exists a set of informal rules that facilitates or substitutes for the role of a manager in organizing creative collaboration. At a high level of generality, these informal rules may include imperatives such as (1) do not shirk; (2) do not withhold ideas that could contribute to the project; and (3) do not appropriate to yourself ideas suggested by others.⁶⁵ Mechanisms that punish violations of (or reward compliance with) these rules can make it easier to organize creative collaborations by punishing team members who do not perform or by making it easier for the managers to identify team members who are likely to perform in the first instance.

Informal rules only work if mechanisms exist to ensure that behavior complies with them.⁶⁶ One possible mechanism is internalization, in which an individual ensures her own compliance with the informal rule simply because she prefers to comply.⁶⁷ Of course, the assumption of full internalization is unrealistic and informal rules are generally not entirely self-enforcing. Instead, other mechanisms such as reputation and trust can provide the

⁶⁴ Rare indeed is a truly solo author. Even the solo novelist is collaborating with her community peers, her mentors, her agent, her editors, and those prior artists who influence her work.

⁶⁵ The precise specification of the content of these imperatives must await empirical investigation.

⁶⁶ There is some debate over the terminology to describe the mechanisms that transfer informal rules into behavioral regularity. Compare ERIC POSNER, LAW AND SOCIAL NORMS (2001); with Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 339 (1997); and with Robert Cooter, *Do Good Laws Make Good Citizens: An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1583 (2000). We will simply refer to informal rules as the desired behavior and mechanisms as anything that makes that behavior more likely. We explore now what those mechanisms might be.

⁶⁷ See Cooter, *supra* note 66, at 158 (explaining that individuals may have a taste or preference for complying with a norm, thereby placing intrinsic value on compliance apart from its instrumental value).

avenue for enforcing informal rules.⁶⁸ Trust and reputation are closely related and overlapping but play out in different ways. In this Part, we explore these mechanisms for enforcing informal rules in the context of creative collaboration, and their potential costs.

A. *How Managers Can Use Reputation and Trust*

1. Reputation

We define reputation as information about a person obtained from “the collective experience of others who have previously dealt with [that] person.”⁶⁹ Norms-based systems frequently rely on reputation to enforce rules.⁷⁰ Individuals who violate an informal rule can be subjected to reputational attacks that directly harm them or affect their standing among peers.⁷¹

Reputation has several characteristics that make it particularly valuable for managers facilitating team production. Managers can coordinate creative production if they can effectively provide rewards (or enforce penalties) when a team produces more (or less) than some threshold. Optimally, the manager will have a supply of rewards that is not limited by his project budget.⁷² In most cases that is not

⁶⁸ McAdams, *supra* note 66, at 350.

⁶⁹ Gilson, Sabel, & Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010)

⁷⁰ See, e.g., Oliar & Sprigman, *supra* note 3, at 1815 (describing reputational attacks as punishment for violation of a norm); Fauchart & von Hippel, *supra* note 3, at 193 (describing a famous chef’s attack on a former employee’s reputation in response to the latter’s violation of an attribution norm).

⁷¹ Fauchart & von Hippel, *supra* note 3, at 189.

⁷² The ability to break the budget constraint is important in preventing renegotiation. Holmström, *supra* note 38. For example, there is a project that will produce 39 if three team members perform optimally. Performance costs 10 each. If anyone shirks the project will earn 33 and the shirker will have no cost. The shirker gets 11 surplus from shirking and only 3 surplus from performing. But the other team members get only 1. To solve this problem the manager has to be able to punish the team when it earns only 33. The manager can destroy value and reduce the total payout to 0 when the project earns 33 or less (thus the manager is not constrained by the actual budget). Now the shirking team member gets nothing and has an incentive not to shirk. Or the manager could reward performance by paying out 66 whenever the project produced 39 or more (again the manager is not constrained by the budget). Now the team members get 12 from performing and have no incentive to shirk. In most contexts, it is difficult to break out of the budget constraint. But

possible (budgets constrain most projects). But reputational rewards are different. The value (and cost) for reputational rewards (and penalties) can be drawn from future projects outside of the manager's budget. In essence, reputational rewards can impose no monetary cost on the manager but be translated into money in later projects when the productive team member will be able to command a premium from her future teammates.⁷³

Reputation also has the benefit of being useful even where the performance of team members is observable to the manager, but still unverifiable. The manager can tell the world that the project failed because team members shirked. And, as long as the relevant community has some level of confidence in the manager's judgment, the inability to verify the shirking to a court is unimportant. Put simply, the manager may have to overcome a higher burden of proof and rely on more limited evidence to convince a judge than to convince her close-knit circle of peers. The community may accept the manager's statement that "Anne was a miserable actress and impossible to deal with in my last movie," even when the manager cannot prove any formal breach of Anne's contract. If so, and if Anne is motivated by seeking the renown of her colleagues (or critics or the public at large), then she may not shirk even if she would otherwise have a pecuniary motivation to do so.

Additionally, managers may be able to rely on the reputation mechanism even in the face of low observability (as well as low verifiability, certainty, and allocability). Imagine a project that *ex ante* has an uncertain outcome. The effort of each member is unobservable and unverifiable. Similarly, output value cannot be allocated to inputs. As long as the manager can recognize project failure *ex post*, reputation can still serve to prevent shirking. To see how, suppose a project requires effort from various team members. If any one of them shirks, there will be some amount of failure. Moreover, *ex ante*, the manager has no idea how much a successful project will be worth. But after the fact, the manager can determine whether the project

rewards and penalties enforced through reputation and trust may make it possible to do so in the world of creative collaboration. See Holmström, *supra* note 38, at 338–39.

⁷³ This extends Bengt Holmström's point that moral hazard in teams can be avoided if failure can be punished by precluding future membership in the relationship. See Holmström, *supra* note 38.

was a relative failure because previously unknowable information has become known,⁷⁴ like cultural, political, or other exogenous events that have made the subject matter of a film unappealing. For example, expectations of what constitutes a successful debut weekend for a movie opening next summer might change in response to an exogenous cultural shift (e.g., Donald Trump makes America great again) or a weather event (e.g., a hurricane strikes the northeast). With hindsight, the manager now knows how much a successful project would have produced and can judge the teams' effort based on comparing the outcome to that metric.⁷⁵

If the team performed poorly, the manager can let that be known. This knock to the team members' reputation is a penalty for underperformance. As long as the reputational stain is high enough and the members know that the manager can impose the penalty, it will be effective in discouraging shirking.⁷⁶

For any of this to work, the manager's message to the community must be relevant and credible. The industry need not know what it was that made Anne a bad actress, but it needs to know that there is such a thing as an objectively good actress and an objectively bad actress. Different traits will, therefore, be more or less susceptible to reputational assessment. Several film producers suggested to us that reputation is especially useful for questions about being a good "team player" (which includes things like temperament, cooperation or how the person deals with

⁷⁴ Exogenous shifts could also make a movie's success less impressive. For example, if a particular genre becomes extremely popular then the measure of success for movies in that genre might require better performance than was expected when the project began. We have suggested elsewhere that a scenario like this may be at play in the movie industry and might be a factor in the sequel "reboot" phenomenon. Casey & Sawicki, *supra* note 6, at 1730-31.

⁷⁵ For a recent example, consider *The Interview*, the release of which was limited by Sony in response to North Korea's cyberattack on Sony. In this context, the film may be expected to generate very low revenues, much lower than would have been expected in the absence of North Korea's action.

⁷⁶ Say C was shirking and only provided 5 in work, and was paid 11 of the 33 output. If everyone performed C would have been paid 13 of 39 with an effort of 10. Shirking provides 6 in surplus to C. Not shirking provides 3. As long as the reputation penalty to each team member is more than 3, reputation will be an effective means of overcoming moral hazard. For the full theory behind this outcome, Holmström, *supra* note 51; Casey & Sawicki, *supra* note 6.

creative management and critique).⁷⁷ It appears to be possible to objectively determine whether someone is a team player. A manager may be able to observe that sort of characteristic. Crucially, though she may be unable to correct for it through monitoring. And it can be very difficult to verify. Under these conditions, the reputational messages can be especially important.

All of this suggests that reputation, by creating a mechanism for punishing and rewarding performance when contracts and other legal rights fall short, makes it easier for creators to work in collaborative groups. This, in turn, provides better information to subsequent managers about potential new team members. When a creative community can rely on credible sources of information about an individual's potential value in a collaboration, a manager can more readily make decisions about teammates for future projects even though the manager has never before worked with those individuals, and the individuals may never have worked with each other either. This mixing of teammates has been correlated with higher quality creative output.⁷⁸

2. Trust

Trust⁷⁹ is information obtained by an individual's own experience in prior dealings with a person.⁸⁰ A manager or

⁷⁷ The producers viewed themselves as more capable of independently judging pure talent and relied less on their network for things that might fall under that rubric.

⁷⁸ Brian Uzzi & Jarrett Spiro, *Collaboration and Creativity: The Small World Problem*, 111 AM. J. SOC. 447 (2005) (arguing that the quality of the creative output in Broadway musicals is a function of the mixing of teammates across projects).

⁷⁹ There are of course many ways to define trust. See generally Lisa Bernstein, *Private Ordering, Social Capital, and Network Governance in Procurement Contracts: A Preliminary Exploration* (Feb. 2015) (unpublished manuscript) (examining the various theories on the role of trust and social capital in complex commercial transactions). Common definitions focus on a belief that a counterparty will not intentionally cheat or expectations that involved parties will act to each other's mutual benefit. *Id.* We use the word trust consistently with those definitions but stress the source of the content as the distinguishing factor between reputation and trust.

⁸⁰ The exact causes or origins of trust are hard to pin down. But extensive experimental evidence has established that trust plays an important role in human interactions, including those in markets. Margaret Blair & Lynn Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001) (collecting sources and reviewing the experimental literature);

team member may have first-hand information about another team member, and can then use that information to evaluate the person's suitability for any particular project.

Trust is more effective when you have a limited number of teammates with whom you will engage in repeated collaborations.⁸¹ After an initial investment in developing trust (i.e., getting to know someone), it may be better to capture the return on that investment over several collaborations.⁸²

Like reputation, trust can fill a gap left by a lack of observability, verifiability, certainty, or allocation. If a team of three or more input providers fails, those who performed well distrust other members. This will prevent that team from existing in that form going forward. Just as reputation can tell the market the team is bad and its members should not be hired, a lack of trust can tell the team members themselves that the team is bad and should not be continued. All team members lose out on future membership. If that punishment is strong enough and team members are aware that it will be applied, it will provide an incentive against shirking.

Trust in the sense used here—as information derived from prior interactions with another person—may serve as the basis for continuing collaborative efforts. Consider this description of Harvey Weinstein's strategy when he was running Miramax's negotiations to acquire *Swingers*. The filmmakers were insisting on control over the final cut—the right to determine when the film was complete and ready for distribution.⁸³ This was an unusual demand from the

Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003); Jillian J. Jordan, Alexander Peysakhovich, & David G. Rand, *Why We Cooperate*, in Jean Decety & Thalia Wheatley, eds., *The Moral Brain: Multidisciplinary Perspectives* (MIT Press 2014).

⁸¹ In our discussion of talent agents above, we suggested that the agents were reputation intermediaries. They could of course also be trust intermediaries. A producer may trust an agent or may know that agent to be of good reputation. Our interviews suggest that the network is strong enough that reputation does a lot of work. And thus a producer will be willing to work with an agent who she does not personally know if that agent has a strong reputation.

⁸² Again, our discussions with producers are consistent with this idea. In particular they appear to value repeat interactions with directors after they learn they can trust each other.

⁸³ Interviews with producers have suggested a particularly interesting set of informal rules around final cuts. Producers generally insist on

filmmakers, especially because they had essentially no track record. Yet Weinstein and Miramax agreed to relinquish final cut control over *Swingers*, with an understanding as described by one of the key participants in the film:

But this is where the Weinsteins were so smart. They started getting the idea of “We’re not just buying the movie, we’re buying relationships with the filmmakers. We’re going to be in business with Jon Favreau. We’re going to be in business with Vince Vaughn. We’re going to be in business with Doug Liman. And if we ever want to do anything in the future with these guys, we’ve got this over their heads to say, ‘Hey, we started you out.’” It’s just really, really smart business.⁸⁴

A possible inference from the language “if we ever want to do anything in the future with these guys, we’ve got this over their heads” is that the Weinsteins were signaling their ability and willingness to punish violations of their trust by extracting concessions in future projects.⁸⁵ The flip side of this is that the Weinsteins’ experience with Favreau, Vaughn, and Liman could facilitate future business with them—a good final cut on *Swingers* would make the Weinsteins more likely to allow them similar creative control over future projects. Producers have an interest in developing a relationship with successful filmmakers that can lead to future projects. And the personal connections

retaining final cut rights, but they vary widely in the extent to which they exercise those rights. Production companies with a reputation for heavy-handed final cuts face a challenge in attracting talented writers, directors, and actors. One producer also suggested that this was an area where agents played a strong intermediary role collecting and communicating reputational information about the use of the final cut right. The noteworthy point is that the norms play a much larger role than any contract terms.

⁸⁴ Alex French & Howie Kahn, *So Money: An Oral History of Swingers*, GRANTLAND (Jan. 22, 2014), <http://grantland.com/features/an-oral-history-swingers/>.

⁸⁵ We might wonder how the Weinsteins could extract such concessions; after all, in future deals, the filmmakers would presumably be free to negotiate with any production company. One partial answer to this puzzle may be found in the relationship between trust and reputation.

that might make that relationship strong can be more valuable than specific terms in a contract or even financial compensation on the current project.

The line between trust and reputation is, of course, blurry. For example, the line—“if we ever want to do anything in the future with these guys, we’ve got this over their heads to say, ‘Hey, we started you out’”—could be read not only as an explicit statement regarding the trust the Weinsteins were vesting in the filmmakers, but also as a threat to apply reputational penalties if Favreau, Vaughn, or Liman did not perform on this or future projects. If there is a norm of loyalty, a reputation for shunning the studio that gave you enormous freedom and got you started might hurt a filmmaker’s future prospects. The Weinsteins could talk to other Hollywood producers and tell a plausible story that the filmmakers acted unfairly if, after getting final-cut control on their first film, they later played hardball or shirked on subsequent projects. On the other hand, the statement might be assuming only that individuals simply feel an internal duty of loyalty. For our purposes, the key observation, however, is simply that the bonds of this agreement were informal rules of some form rather than formal legal obligations.

3. The costs associated with reputation and trust

One disadvantage of reputation as a mechanism for enforcing informal rules of collaboration is that its use favors generic projects. An input provider’s reputation for performing idiosyncratic tasks is not valuable. To be useful, reputation must provide information about tasks that will be useful to future projects. Work that does not provide information applicable to other projects does not produce useful reputational information.

This suggests that the more generic a project is, the more future value (in terms of useable reputational information) it will generate. Repeat play and generic projects will be disproportionately favored because the possibility of doling out reputational rewards does not exist to the same extent for one-off and idiosyncratic projects. Thus, a generic project of low value might be favored over a unique project of high value.⁸⁶ Call this the Marvel hypothesis.⁸⁷

⁸⁶ In a sense, reputation produces a contingent future value that can be doled out as a reward to keep the team together. Counterintuitively, the future contingent value of reputation can be more useful than the

We must also consider the possibility that informal rules may be a barrier to entry in a way that strong intellectual property rights are not.⁸⁸ Informal rules may systematically treat new entrants worse than incumbents. Indeed, the fact that informal rules are maintained by incumbents gives us a *prima facie* reason to suspect that they will be designed to protect incumbents' positions against entry.⁸⁹ For example, recall that reputation might be used to inform the selection of members in a team. People working in the field will use information gleaned from a prospective team member's past performances with other teams to guide their decisions whether to add the prospective member to the team for a new project. But a new entrant's reputation will be thin—she will have had no (or few) past performances that others could rely on in deciding whether to add her to their teams. At least until a new entrant is able to build a reputation, she will find it more difficult to find attractive projects to work on than will established players.⁹⁰

These barriers may also reduce movement across sectors of industry creating silos or pockets of production types. Film talent may stay in film, and television talent may stay in television because information about inputs does not easily transfer across different kinds of projects, even when there are surface similarities in the work required (e.g., acting on a television show and acting in film). Moreover, new talent faces an enormous obstacle to entering the industry because it is hard to generate and distribute credible information about them. In many situations, then, we should worry that the best talent for a particular job is

present value of the project itself because the reputation can be used to bind the team in a way that the present value of the project cannot.

⁸⁷ See, e.g., Peter Suderman, *Superhero Movies Have Become Too Formulaic. Deadpool Makes a Case for Breaking the Mold*, VOX (Feb. 17, 2016, 8:30 AM), <http://www.vox.com/2016/2/17/11021144/deadpool-superhero-movies-formulaic>.

⁸⁸ Cf. Perzanowski, *supra* note 3, at 581-84 (explaining how norms against copying custom tattoo designs function as barriers to entry).

⁸⁹ Perzanowski, *supra* note 3, at nn. 596 & 599; Barnett, *Private Protection of Patentable Goods*, 25 CARDOZO L. REV. 1251 (2004).

⁹⁰ There is some data suggesting this barrier is significant in film. See, e.g., Faulkner & Anderson, *supra* note 54 (providing evidence that past credits increase the chances of future work and describing the film industry as a “rich get richer” environment).

passed over simply because managers have better information about other talent.⁹¹

Perhaps the most pernicious risk of informal rules is their power to entrench biases. Formal law can be challenged in courts or through legislation. Informal rules are often self-executing or rely on the collective action of a community as a whole. Where self-executing rules are biased, they will be difficult to dislodge. Similarly, where the rules are enforced through collective action of a community, the existing biases of that community will dictate the manner of enforcement. In either case, the victim of bias cannot appeal to a higher or neutral authority.

Some biases may be benign but others—particularly those based on race, gender, sexual orientation or similar categories—can be harmful to the victims of the bias, to the industry, and to society as a whole. These biases may manifest themselves directly or through more subtle channels.

Direct biases are easy to identify. An industry that compiles its teams based on reputation will perpetuate biased team structures.⁹² For example, some evidence suggests that film crews are overwhelmingly (77.4%) male.⁹³ Thus, the pool of people who have any reputation as film crewmembers is going to be overwhelmingly male. Which will likely lead to a persistent skew toward male talent.

An example of a more subtle indirect bias resulting from informal rules relates to the myth of the sole creator discussed above.⁹⁴ This may seem on its face to be just about the nature of creation and not the identity of the creators. The norm might be an anti-collaboration norm or it might be a means of concentrating control of collaboration. But the bias problem goes deeper. There is significant evidence that this myth contains and enforces gender bias.⁹⁵

⁹¹ See *infra* Part III.A.3 for a discussion of how bias can play into these decisions.

⁹² See DARNELL HUNT & ANA-CHRISTINA RAMON, 2015 HOLLYWOOD DIVERSITY REPORT (2015) (documenting widespread underrepresentation of minorities and women in the entertainment industry).

⁹³ Stephen Follows, *Gender Within Film Crews*, https://stephenfollows.com/reports/Gender_Within_Film_Crews-stephenfollows_com.pdf (July 2014) (providing data on film crews on the 2,000 highest grossing films from 1994 to 2013).

⁹⁴ Others might include norms about the quality of certain types of art such as fan fiction or romance novels. See Tushnet, *supra* note 29, at 5.

⁹⁵ See Tushnet, *supra* note 29, at 5 (collecting sources and noting the existence of gender bias in broader norms within the copyright space).

And the fact has not been lost on those in the creative industries. In the music industry, Taylor Swift, Solange Knowles, and Bjork have all been the targets of one-sided critiques of female artists for not producing their work all on their own.⁹⁶ A recent controversy in the music industry highlighted the pervasive and gendered nature of the sole-creator story. Kanye West challenged Beck to give his 2015 Album of the Year Grammy to Beyoncé because, according to West, Beyoncé possessed more “artistry.” Within a few days, Beck defenders argued that he was more deserving of the award than Beyoncé because “Beyoncé used a team of 25 writers and 16 producers. Beck just one: himself.” Some went on to note that Beck even “sang and played 17 instruments [while] Beyoncé [merely] sang.”⁹⁷ The implication was that Beck was a real artist because he was a sole creator. As this meme spread, a backlash arose that rightly criticized it for misunderstanding the meaning of artistry and importing the sole-creator myth with its sexist undertones.⁹⁸

One final consideration is the effect of reputation penalties on hold up. Threats to breach or terminate a contract can create valuable incentives for parties to perform. On the other hand, they can also create hold-up value if one party threatens to breach after the other has committed time and resources to relationship-specific investments. Reputation is no different. A threat to destroy someone’s reputation is as much a hold-up threat as a threat to terminate a supply contract. This is to say that just as

⁹⁶ See Forrest Wickman, *It’s Not Just Bjork: Women are Tired of Not Getting Credit for Their Own Music*, SLATE (Jan. 21, 2015).

⁹⁷ See, e.g., Peter Vincent, *Grammys 2015 Comment: Beck Trumps Beyoncé for Artistry*, THE SYDNEY MORNING HERALD (Feb. 10, 2015), <http://www.smh.com.au/entertainment/grammys/grammys-2015-comment-beck-trumps-beyonce-for-artistry-20150210-13afqb.html>.

Similarly, BuzzFeed provided five reasons that Beck was better than Beyoncé, including as number three (under the heading “His artistry”) a list of the 25 writers on Beyoncé’s album next to Beck’s name all by itself, and as number four (under the heading “His artistry (again)”) a picture of a fourteen instruments that Beck played on his album next to a lone microphone for Beyoncé. Jack Shepherd, *5 Reasons Why Beck Beat Beyoncé*, BUZZFEED (Feb. 9, 2015), <http://www.buzzfeed.com/expresident/why-beck-beat-beyonce#.xnWKM13v3>.

⁹⁸ See, e.g., Darren Levin, *Stop Questioning Beyoncé’s Artistry to Make a Point about Beck*, FASTER LOUDER, (Feb. 11, 2015) <http://www.fasterlouder.com.au/features/41866/Stop-questioning-Beyonces-artistry-to-make-a-point-about-Beck>.

contracts are incomplete, so too are mechanisms for enforcing informal rules.

B. The Special Case of Creative Collaboration Managed by External Informal Rules

In previous work we demonstrated that ownership and authorship are often conflated in ways that cloud analysis of copyright law.⁹⁹ The key question for the formal law of copyright is who owns the creative products. Doctrines that tie ownership to authorship misunderstand the nature of collaborative creativity and the role that ownership plays in creating a hierarchy to facilitate collaboration.¹⁰⁰ We thus argued that the law ought to emphasize ownership and control, even at the potential expense of traditional notions of authorship.¹⁰¹

Here we go further—even legal ownership and control often cannot be neatly linked. Reputation and trust frequently control creative production regardless of who owns the creative product. Where that is the case, formal law may not be playing much of a role at all in allocating control. Instead, when control cannot be found in hierarchical firms, management is disaggregated such that important managerial functions are found in networks of relationships created and governed by informal rules.¹⁰²

Thus, in addition to offering tools for a manager overseeing a hierarchical creative collaboration, reputation and trust might themselves allow for informal rules to substitute for the role of a manager in collaborative endeavors. While the team production theory of the firm emphasizes the need for a manager to observe inputs or enforce reward and punishment agreements when market contracting is not possible, it is plausible that under certain conditions, a manager is not required at all. Instead, informal rules backed by reputation and trust perform the

⁹⁹ Casey & Sawicki, *supra* note 6.

¹⁰⁰ See Casey & Sawicki, note 6; Bell & Parchomovsky, *supra* note 29; Balganes, *supra* note 35.

¹⁰¹ See Casey & Sawicki, *supra* note 6, at 1713-26.

¹⁰² On network governance theories in general see Bernstein, *supra* note 79; Candace Jones, William S. Hesterly, & Stephen Borgatti, *A General Theory of Network Governance: Exchange Conditions and Social Mechanisms*, 22 ACAD. MGM'T. REV. 911 (1997).

monitoring or enforcement functions ordinarily performed by a manager. This creates a form of network governance.¹⁰³

The mechanism by which informal rules can substitute for a managerial hierarchy is as follows: the reputation of the team as a whole provides the binding mechanism. If a team never works and collapses in bickering, the world is likely to see this. Outsiders may have no way of observing or verifying which team members caused the collapse. But they do know that the team members did not work well together or at least that the team failed to produce. This harms the reputation of all team members, providing an *ex post* penalty to the entire group for failure to perform—the team that produces a bad movie bears a collective reputational hit.¹⁰⁴ In these scenarios, the manager is not necessary—informal rules enforced through reputation by a kind of network governance fill the manager’s role instead.¹⁰⁵

The threat of this industry-imposed reputational penalty may create an *ex ante* incentive for all parties to perform

¹⁰³ Theories of network governance have been explored deeply in the management and sociology disciplines but less so in legal scholarship. Lisa Bernstein has recently provided an analysis of law and network governance in manufacturing industries. Bernstein, *supra* note 79. In part we are making a similar contribution to industries in the copyright space. Worthy of note is that the framework for network governance is dramatically different in the two contexts. Where the creative networks that enforce informal rules are themselves structured and created by informal networks (contracts do not specify how the network will be connected or the rules it will follow), Bernstein finds that some manufacturing industries have complicated contracts that form the framework and reference points for their network governance. The network that enforces the informal rules has behind it detailed formal contracts that provide an idea of what is acceptable behavior. We suspect that the difference lies in the four factors we have identified throughout this article. Where uncertainty, observability, verifiability, and allocation are low (as they are for creative production) it is even difficult to use formal law and contracting as the backbone for creating or guiding a network. The same is not true in the manufacturing industries.

¹⁰⁴ See Jones, Hesterly, & Borgatti, *supra* note 102, at 931-32 (describing collective sanctions that can be imposed industries including film). Jones, Hesterly, and Borgatti describe this phenomenon with an anecdote about the film failure of *Heaven’s Gate*. The movie’s extraordinary failure resulted in a sanction such that virtually the entire team was excluded from the film industry for some period of time. *Id.* Something like this may also explain the career trajectories of some of the participants involved in other notorious flops like *Cutthroat Island* and *Batman Forever*.

¹⁰⁵ A simpler version of this may also encourage positive team behavior without a manager when the team members fear a trust or reputation sanction directly from the other members of the team.

optimally in the collaboration. This can be understood as a form of the group penalty that Holmström identified as a prime facilitator of team production.¹⁰⁶ The penalty would be self-executing and, indeed, may be an example of a penalty enforcement that can exist without an actual manager in place.

We do not suggest that such a phenomenon is unique to copyright.¹⁰⁷ We do, however, suggest that it is particularly widespread throughout industries regulated by copyright law. Informal rules flourish when there are thick relationships with repeated interactions within a given community. Expressive creation is pervasively collaborative—thus requiring such thick relationships with those repeated and close interactions.¹⁰⁸ And formal law is a weak tool for facilitating that collaboration. Because ownership is a construct of formal law that does not track the relationships at the heart of creative collaborations, it cannot provide the control rights that are necessary for organizing productions, even at the core of the copyright space.

What matters in creative production is actual control, which cannot be fully allocated by legal ownership or by contract. Formal law can provide mechanisms that managers use to increase control on the margins.¹⁰⁹ But it cannot sufficiently allocate the core of control rights necessary to create a film, a television show, a play, or communal folklore.

For example, a contract might say that a producer “owns” the rights of final cut. That is, formal law grants the producer the right to decide when the film is done. The truth, though, is more complex. Perhaps in any given

¹⁰⁶ See Holmström, *supra* note 51, at 338–39.

¹⁰⁷ Examples of non-integrated non-contractual relationships that function like a Coasean hierarchy can be found in many industries: MACCAULEY, *supra* note 9; ELLICKSON, *supra* note 9; Bernstein, *supra* note 79; Anthony J. Casey & M. Todd Henderson, *The Boundaries of “Team” Production of Corporate Governance*, 38 SEATTLE L. REV. 365 (2015).

¹⁰⁸ Others have also suggested that uncertainty and volatility leads to repeat interactions. See, e.g., Faulkner & Anderson, *supra* note 54 (providing evidence on the uncertainty of and recurrent relationships in the film industry). Some of the underlying causes of such uncertainty can arise from the creative nature of the projects we discuss in this paper. *Id.*

¹⁰⁹ Casey & Sawicki, *supra* note 6, at 1713 (discussions regarding the derivative works right and work made for hire doctrine).

instance, a producer can in principle exercise final cut however she desires. But it is also true that doing so may be her last act as a producer who has access to any talent in the film industry. It is then just as true as a practical matter to say that the film industry or the Hollywood network as a whole has residual control over the final cut.

This is why a producer who provides creative inputs can be trusted to act appropriately even though that producer ostensibly sits at the top of the hierarchical firm making the film. In reality, the hierarchy has additional levels above and outside of the firm—the managerial function is disaggregated, with some elements remaining within the firm (e.g., allocating revenues generated by the film or deciding when the film is complete) and others distributed throughout the community (e.g., allocating reputational rewards associated with the film or punishing misuse of final cut authority).

IV. PRACTICAL IMPLICATIONS OF FORMAL LAW AND INFORMAL RULES FOR CREATIVE COLLABORATIONS

Informal rules do not, of course, operate in isolation. Even in contexts where informal rules generally facilitate creative collaborations—as we think they do in the American television and film industries—there will nonetheless be particular instances where, for one reason or another, collaborations fail. When they do, formal law and informal rules at the intersection of authorship, ownership, and control may attempt to mediate the conflict. In this Part, we apply our analysis to illustrate the possible interactions between formal law and informal rules, and to identify some tradeoffs involved in regulating the organization of creative collaboration.

A. When Informal Rules Fail: Garcia and Merkin

Copyright law contains two primary mechanisms to deal with creative works that are the product of contributions from multiple creative inputs. The default mechanism is the joint works rule, which applies to works “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹¹⁰ In these instances, each “author” is a co-owner of

¹¹⁰ 17 U.S.C. § 101.

the copyright in the work.¹¹¹ Parties may, however, contract out of this co-ownership default through the work made for hire doctrine, which provides that contributors to a creative collaboration may contractually assign their authorship (and resulting ownership), thus allowing parties to opt into consolidated authorship, ownership, and control.¹¹²

Difficult problems, however, arise when the parties fail to opt into the work made for hire regime, and the joint works rule does not cleanly apply. Among other scenarios, this can occur when creative inputs disagree about what, precisely, the “work” is.¹¹³ The director and producer of a film may, for example, disagree about whether a given scene should be included in the completed version. In such a case, there will be two films, one including the director’s scene and the other including the producer’s scene.

Formal copyright law may have trouble resolving these disagreements in a satisfying way because it is designed on the assumption that the parties agree what the “work” is.¹¹⁴ Formal copyright law permits only the “author” of the work to decide whether a particular scene makes it in. But it determines who is the author by looking to who has the authority to decide whether a particular scene makes it in. The question in the toughest cases is which of two plausible works—each with its own supporters within the collaboration—prevails. Formal law becomes circular when the question of which version prevails is answered by determining who decides which version prevails and the question of who decides which version prevails depends on which version is being assessed.

To see how this problem plays out, consider two recent cases presenting precisely those scenarios. In *Garcia v.*

¹¹¹ 17 U.S.C. § 201.

¹¹² 17 U.S.C. § 101; 17 U.S.C. § 201(b).

¹¹³ For another scenario, see *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000). In that case, the question was not which of two competing versions prevailed, but who was entitled to control the value of an agreed-upon version. *Id.* at 1230. Like *Garcia* and *Merkin*, though, the court dismissed the copyrightable contributions of one of the creative inputs to the collaboration in favor of consolidating control through formal law. *Id.* at 1236. And it similarly implies that the work made for hire doctrine’s requirement of an agreement in the case of non-employee contributors is a dead letter.

¹¹⁴ Defining the “work” for purposes of copyright law is a complex and undertheorized problem. For an interesting analysis revealing the complexities, see Margot Kaminski & Guy Rub, *Framing Copyright* (draft on file with the authors).

Google,¹¹⁵ Cindy Garcia was cast for a cameo in what she thought was an action-adventure film titled *Desert Warrior*; it turned out that the film was “an anti-Islam polemic called *Innocence of Muslims*.”¹¹⁶ Garcia’s lines had been dubbed over so she appeared to say “Is your Mohammed a child molester?”¹¹⁷ When the film was released on YouTube, Garcia received death threats, and she sued the filmmaker and Google for copyright infringement, seeking an injunction preventing the distribution of any version of the film that included her performance.¹¹⁸ Garcia argued that she was the sole author of a standalone copyright in her “performance.” What she sought, in effect, was the ability to define the work as consisting solely of the scene in which she participated; the director, Mark Basseley Youssef, sought to define the work as the larger film *Innocence of Muslims*, including the scene in which Garcia participated.¹¹⁹

The Ninth Circuit en banc sided with Youssef’s definition of the work.¹²⁰ Apparently adopting the Copyright Office’s view that the production of a motion picture results in only one copyrightable work,¹²¹ the court noted first that a “performance” does not fall within the statutory list of examples of “works of authorship.”¹²² Moreover, Garcia did not contribute more than a “minimal level of creativity or originality” when she performed her part.¹²³ As a result, her performance was not a “work of authorship” to which copyright might attach.¹²⁴ And to the extent that anything incorporating her performance was a “work” entitled to copyright protection, she was not its author because she was not the person under whose authority that larger work was fixed.¹²⁵

Note, however, the circularity. The underlying question the court had to resolve was whether Garcia or Youssef had the right to decide whether *Innocence of Muslims* would

¹¹⁵ 786 F.3d 733 (9th Cir. 2015).

¹¹⁶ *Id.* at 737.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 737-38.

¹¹⁹ Youssef himself did not participate in the litigation. But we can take the version of the film he released on YouTube as the version of the work that he deemed final.

¹²⁰ *Id.* at 740.

¹²¹ *Id.* at 741.

¹²² *Id.*; 17 U.S.C. § 102.

¹²³ Garcia, 786 F.3d at 742-43.

¹²⁴ *Id.* at 741-43.

¹²⁵ *Id.* at 743-44.

include Garcia's scene. In order to answer that question, the court had to identify the author of the work. But it could not identify the author without first deciding what was the relevant work.¹²⁶

The *Garcia* court's holding is perhaps sensible in the context of a five-second cameo performance. It seems untenable to conclude, as the dissent apparently implies, that every contributor in a film, no matter how small the contribution, has joint control over the final product.¹²⁷ That would be a strange rule even if it were simply a default where parties can opt out. The more efficient rule is the one we think parties would overwhelmingly adopt: no control to the minor actor who speaks two lines for five seconds.

But the court's reasoning is problematic for at least two reasons. First, as the dissent points out, the court suggests that a filmed scene for a film is not a copyrightable "work."¹²⁸ It does not, however, tell us at what point in filming or editing something transforms from a separate input into the joint output: the ultimate work itself. Does this mean, the dissent asks, that every outtake of a film and every draft chapter of a book are fair game for copying? That cannot be true.¹²⁹

Second, the court's holding that Garcia is not entitled to any copyright interests in her work leaves little room for the work made for hire doctrine.¹³⁰ In the presence of an appropriate agreement, that doctrine would take copyright ownership out of the actor's hands and put it in the

¹²⁶ If the work were a version of *Innocence of Muslims* without Garcia's scene, then Youssef could not have been the author because he wanted that scene in. If the relevant work was – as the court ultimately viewed it – a version of *Innocence of Muslims* including Garcia's scene, Garcia could not be the author—after all, her argument was that she did not want her scene in the film, and her inability to excise it from the work as a whole was what led her to seek relief in court.

¹²⁷ *Id.* at 743.

¹²⁸ *Id.* at 749-50 (Kozinski, J., dissenting)

¹²⁹ *Cf.* 17 U.S.C. § 101 (“[A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.”)

¹³⁰ 786 F.3d at 751 (Kozinski, J., dissenting) (noting that “[a]ctors usually sign away their rights when contracting to do a movie, but Garcia didn't and she wasn't Youssef's employee”).

director's (or producer's).¹³¹ But here there was no work made for hire agreement, and ownership is still being taken out of the actor's hands and put into the director's. The *Garcia* court's analysis thus treats Garcia's work as if it were subject to a work made for hire agreement, even though it plainly was not. What then is the doctrine doing for film actors? Perhaps none. But that would render the statutory requirement of an agreement (for non-employee contributors like Garcia) a dead letter.

The difficulty then is that both the majority and the dissent present untenable options. Formal law gives us two possibilities. First, input providers are not creating copyrightable works, in which case those providers get nothing. Second, every input provider is an author with control over any final product that includes the inputs. Those two possible rules replicate neither the intent of parties involved in most film relationships nor any hypothetical efficient transaction.

The reason for the disconnect is that most relationships in the film industry have deep and nuanced terms that are set by and enforced through informal rules. And the formal law cannot do better than those rules. It can only do worse—which is precisely why the parties opt for informal rules in the first place. Formal contracts are difficult to write and judicial enforcement is insufficient when the contract is about creativity and the key aspects of the performance suffer from an absence of observability, verifiability, allocability, and certainty.

We do not mean to suggest that the arrangements in *Garcia* were part of the normal film industry. Perhaps it is precisely because Garcia and Youssef were operating so far outside the reach of the industry's informal rules that the dispute arose. But the formal law that is developed in the case now nominally applies as the formal law of the normal film industry, and that is what makes the reasoning potentially harmful.

Indeed, the implications of *Garcia* become more difficult to resolve if they are applied to a standard Hollywood

¹³¹ See 17 U.S.C. § 101. The doctrine can also apply in the absence of an agreement to scenarios in which an employee performs work within the scope of employment, but those kinds of scenarios would not apply in the ordinary film context. See *CCNV v. Reid*, 490 U.S. 730 (1989) (limiting the application of the work made for hire doctrine in the absence of an agreement to scenarios in which “a hired party is an employee under the general common law of agency”).

context. After *Garcia v. Google*, the Second Circuit in *16 Casa Duse v. Merkin* faced just such a scenario.¹³² Robert Krakovski, the owner, operator, and principal of 16 Casa Duse LLC, bought the rights to the screenplay *Heads Up*.¹³³ He asked Alex Merkin to direct the film.¹³⁴ Throughout production, Krakovski and Merkin negotiated a work made for hire contract, but they ultimately could not agree.¹³⁵ Krakovski continued pursuing one version of the film, while Merkin had an alternate version.¹³⁶

Krakovski then sued Merkin, seeking a declaratory judgment that 16 Casa Duse was not liable for copyright infringement and that Merkin had no copyright interest in the film.¹³⁷ The parties agreed that Merkin was not a joint author of the Krakovski version and that the work made for hire provision did not apply.¹³⁸ The case thus explicitly posed the question what, precisely, is the work of authorship to which copyright protection attaches?

¹³² 791 F.3d 247 (2d Cir. 2015). Because the informal rules are so pervasive and powerful, few disputes involving major industry participants will reach the point at which a court of appeals issues an opinion. Indeed, most of the disputes will be resolved within the industry itself. Still, in at least some cases, the disputes will at least spill into the public eye, even if they do not reach the courts of appeals. For some recent examples, see Eriq Gardner, *Director of Nina Simone Film Sues over Production Company's Hijacking (Exclusive)*, HOLLYWOOD REPORTER, Mar. 4, 2016, <http://www.hollywoodreporter.com/thresq/director-nina-simone-film-sues-704230> (describing filmmaker's allegations that production company improperly took control of editing film); *London Fields' Premier in Toronto Troubled by Creative Rift*, N.Y. TIMES, Sept. 15, 2015, <http://www.nytimes.com/2015/09/16/business/media/london-fields-premiere-toronto-troubled-by-creative-rift.html> (describing fight between director and producer regarding which version of the film is suited for distribution). For an older example, see the disputes regarding *Blade Runner*. Will McCarthy, *Do Filmgoers Dream of Director's Cuts?*, SCI FI WEEKLY, Oct. 15, 2007, <http://web.archive.org/web/20090319034524/http://www.scifi.com/sfw/column/sfw17153.html>. The judicial resolution of cases like *Garcia* and *Merkin* will be problematic because they will shape how other disputes are resolved by informal rules even when they do not reach the courts.

¹³³ 791 F.3d at 251.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 251-52.

¹³⁷ *Id.* at 253.

¹³⁸ *Id.* at 255-56.

Merkin offered two possibilities: his directorial contributions or the existing film footage.¹³⁹ For our purposes, the second is of particular interest.¹⁴⁰ At the time of the litigation, there were at least two, and perhaps three, versions of the movie: (1) the raw footage shot by Merkin; (2) an edited version completed by an editor retained by Krakovski; (3) and (perhaps) an edited version cut by Merkin.¹⁴¹ The court's analysis appeared to treat the raw footage as the locus of whatever copyright protection arose from Merkin's and Krakovski's collaboration.¹⁴² According to the court, because none of the multiple author scenarios contemplated by the Copyright Act applied, the answer to who owned that copyright in the raw footage turned on who was the "dominant author."¹⁴³

That inquiry, however, would not be answered by investigating which of the putative authors occupied the mastermind role with respect to creative decisions; instead, the *Merkin* court looked for which of the parties could best be understood as the manager in the team production sense. Thus, although "Merkin exercised a significant degree of control over many of the creative decisions" including "decisions related to camera work, lighting, blocking, and actor's wardrobe, makeup, and dialogue delivery," Krakovski prevailed because he "initiated the project; acquired the rights to the screenplay; selected the cast, crew and director; controlled the production schedule; and coordinated (or attempted to coordinate) the film's publicity and release."¹⁴⁴ Krakovski appears to have made none of the creative decisions we typically associate with the author's role in the

¹³⁹ *Id.* at 255.

¹⁴⁰ As to directorial contributions, the *Merkin* court reasoned that individual creative contributions to a collaborative work could not be "works of authorship" entitled to protection. This analysis was based on statutory interpretation that was neither obvious nor inevitable and further reflects courts' tendencies to concentrate authorship, ownership, and control. Because it largely tracks the *Garcia* court's analysis of *Garcia*'s claim to copyright in her performance, we set it aside here.

¹⁴¹ *Id.* at 251-53.

¹⁴² *Id.* at 259 (noting Merkin's contention that "he and not Casa Duse owns all copyright interests in the 'raw film footage'" and recognizing that "the film footage is subject to copyright protection" and reasoning that the "unedited film footage" was the "portion of [the work] that ha[d] been fixed at [this] particular time" and proceeding to evaluate "the ownership of any such copyright").

¹⁴³ *Id.* at 260-61.

¹⁴⁴ *Id.*

production of expressive works—he did not write the story, perform the roles, guide the actors’ in their interpretation of the text, or decide how to frame a shot. Instead, he did what a team production manager would do: decide the scope of the project and determine membership in the team.

The outcome may be a reasonable resolution of the circumstances in this particular case. But the legal doctrines that get the court to its outcome are troubling and may frustrate the parties’ desired relationships if applied in other cases. The court creates the fiction of a dominant author and then that label is bestowed on the party exercising the fewest acts of creative authorship. It must do this to reach the consolidation of formal ownership and authorship that formal law insists on, despite the fact that the parties did not (jointly) desire it nor did they contract for such neat consolidation on their own.

Underlying these cases is the subtle question of competing visions of a work. Both *Garcia* and *Merkin* rejected claims to authorship in part because the claimants did not have the authority to say what the work is. In *Garcia*, Cindy Garcia had no ability to say whether her scene would be part of the film, or even what she would be saying in that scene. In *Merkin*, Casa Duse was the one that determined what story would be told, and that sufficed to establish its claim to authorship status under formal copyright law (as well as the ownership and control that followed).

But this elides the deeper question about what happens when collaborators disagree about which story is going to be told. This question lurks beneath the surface of *Merkin*. If our focus is on the raw footage, it seems plausible if not inevitable to think that Krakovski would be the author. The version edited by Merkin, however, seems of a different sort—in what way can we view Krakovski as the author of a version of the film that he did not approve of? Perhaps Merkin’s version of the film infringes on Krakovski’s, raising again the old *Anderson* question of what happens to the original portions of an unauthorized derivative work.¹⁴⁵ But it is hard to view Krakovski as the author of a version of the film that he does not believe should exist at all. Formal law does not offer a satisfying way out of this puzzle.

B. When Informal Rules Work

¹⁴⁵ *Anderson v. Stallone*, 11 U.S.P.Q.2d 1161 (C.D. Cal. April 25, 1989).

1. Anecdotes from Industry Participants

In most industries where creative collaboration is pervasive, informal rules will usually work well enough. For example, several independent film producers have reported that, at least sometimes, informal rules (and not formal contract terms) regulate the organization of creative collaboration.¹⁴⁶ In these cases, rights to ideas were allocated not by confidentiality agreements and submission releases, but by reputation—often filtered through intermediaries in the form of agents and managers—and by trust. Thus, pitches for proposed films took place informally between filmmakers and producers who either knew each other personally or were introduced to each other by a trusted third party (usually an agent, but sometimes another producer) who could vouch for the behavior of the filmmaker.

Similarly, some producers described a system where performance obligations of actors, writers, and directors were controlled almost exclusively by industry expectations. Bad behavior—rejecting suggested revisions without adequately considering them, allocating insufficient time to the project, storming off the set, and the like—resulted in penalties applied through reputation and trust, rather than through formal legal action. Producers communicated with each other about which actors work well in teams, which writers produce weak drafts, and which directors poison the environment on the set.

Producers themselves were sometimes bound little by their contracts but greatly by community restraints. Thus, producers described arrangements where they had the formal contractual right to final cut (the right to decide which version of a film is released) but felt that informal rules prevented them from exercising those rights in all but the most extreme circumstances. The improper use of final cut would result in severe reputational penalties and a resulting inability to attract new talent.

Importantly, the contracts in these cases did not provide that filmmakers get to decide when a film is done. And they did not provide that the right transfers to the producers only

¹⁴⁶ The description in the following sections is based on conversations we have had with producers in the independent film industry and an editor in the literary incubator industry. Like the reported cases discussed above, these are anecdotal examples to demonstrate how the mechanisms we have discussed might work in practice.

in circumstances involving wrongdoing by the filmmaker.¹⁴⁷ But the relationships functioned as if those terms were included. In this way, an informal rule—and not the formal law of contract—dictated the most central organization for creative control.¹⁴⁸

2. Reputation Networks and Agents as Reputation Intermediaries

The mechanisms we have discussed require strong social networks. Participants in the film industry cannot rely on reputation unless reputational information can be transmitted at a reasonable cost. One producer told us, unsurprisingly, that much of this is facilitated through industry relationships that are developed through social events.¹⁴⁹ We suspect that talent agents are crucial to these networks.

¹⁴⁷ In cases when a very powerful filmmaker obtains final cut rights, those rights are often conditioned on the filmmaker satisfying various obligations; even so, disputes regarding final cut in those instances are rarely resolved by reference to contractual language. See Tatiana Siegel, *Fade-out on final cut privileges?*, VARIETY (Jan. 22, 2010), <http://variety.com/2010/film/news/fade-out-on-final-cut-privileges-1118014187/> (quoting a “studio chief” as saying that “Even if you can find a way that they are in breach (of their contractual delivery terms), you are more than hesitant to take advantage. *Putting aside what the contract says*, you’re not going to take on Baz [Lurhmann] and take on that PR nightmare.” (emphasis added) (internal quotation marks omitted)).

¹⁴⁸ The producers reported similar attributes in the organization of their relationships with writers. Our conversations with participants in the literary-incubator (or book-packaging industry) similarly indicated that informal rules play crucial roles organizing creative collaborations. When a group of authors brainstorms ideas for novels, there is a risk that an author will use the sessions to improve her own ideas and then defect from the group, taking her ideas with her. Instead, an informal rule dictates that any ideas disclosed during a session belong to the group.

¹⁴⁹ As he put it: When you are assessing someone’s potential, first you talk to agents, and then you get on the phone to call your industry friends, “which are different from your real friends.” The information gathered from these networks likely have dramatic effects. One producer told us that a director with whom he worked proved to be extremely difficult in the editing room. When the producer later received a call from a colleague interested in hiring the filmmaker, the producer told him to stay as far away as possible. The filmmaker was not hired. Of course, nothing is absolute. The same producer told us of a filmmaker who effectively walked off the set. Although her prior film was widely lauded, the producer said that this behavior would likely mean that no producer would hire her. He noted, however, that it was a hard case

Talent agents are often viewed with some skepticism. Providing the inspiration for such unlikeable characters as Ari Gold on *Entourage*, the agents nonetheless appear to occupy the central role of reputation repositories or intermediaries. Agents can develop trust with both the talent and the producers who may hire the talent. In this way they can connect two players who would otherwise have no basis for trusting each other.

The intermediary role of the agent can add value in the following way: A producer may want to know if an actor is creatively talented and a team player. Evaluating creative talent depends on accessible information—the actor’s body of work can be viewed and judged (if producers are expert evaluators of talent).¹⁵⁰ But evaluating whether an actor is a team player depends on largely inaccessible information—the actor’s private interactions with other actors, directors, and writers cannot be streamed on Netflix.

An agent, however, may specialize in aggregating information on both characteristics, and for many players. The agent can access private information about whether someone is a team player by serving as a trusted repository for it. An effective agent should be expected to know which producers can work well with which directors; which writers work well with micro-managing producers and which work well when left alone; which directors will work well with which big talent; and which casting specialists know how to fill out the rest of the team. And because the agent will work with an actor (or writer or casting specialist) on all projects, while a producer will work with the actor on only a subset of projects (and perhaps only one), the agent is better able to spread the costs of acquiring information across all of an actor’s projects. Thus, a producer need only keep in mind which agents are known to be good.

On the other side of things, the agents can aggregate information about producers for the talent providers. This provides both information and a bonding mechanism by which producers can commit to good behavior. Mistreatment of talent—even if it is not legally actionable—will lead to a

because the person “might be so good that it is worth taking on the risk in the future.” In that instance, the talent’s misbehavior had reduced her value, but perhaps not to zero.

¹⁵⁰ This is subject to the constraint that for any given film, value cannot be easily allocated to a particular input. That said, producers may be expert allocators, and they may be able to evaluate over an entire body of work what cannot be done for any given work.

report to the agent. The agent can then collect this information, and either pass it on to others in the industry or simply refuse to refer top talent to the producer in the future.

Moreover, the agents can also police the equality of treatment. While any given actor or director may not know how her peers are being treated by producers, the agents have a good sense. If the producer is suggesting conditions or perks that are not commensurate with industry standards, the agent will have a sense of this and can push back on the producers.¹⁵¹

In all of this, one thing will be conspicuously absent: the contract term. An agent who gets it wrong will not be sued for breach. A writer whose draft strikes the wrong tone or who rejects suggestions out of hand will not be taken to court. And a producer who abuses final cut will be (largely) immune from any legal action. But these players all know that there is a code of conduct with which they are expected to comply.

This is consistent with what has been found in other creative industries. Emmanuelle Fauchart and Eric von Hippel, for example, describe an instance in which a former employee of a famous chef “presented one of the chef’s recipes on TV without proper attribution.”¹⁵² This violated an informal rule providing that a chef must acknowledge the original source of a recipe. But the famous chef who created the recipe did not sue his former employee for violating the rule; instead, the famous chef sent a letter admonishing the

¹⁵¹ This looks a lot like network governance and information sharing in other contexts. See Candace Jones, William S. Hesterly, & Stephen Borgatti, *A General Theory of Network Governance: Exchange Conditions and Social Mechanisms*, 22 ACAD. MGMT. REV. 911 (1997). For example, in manufacturing, firms that make large relationship specific investments seek ways to bind each other to good behavior. In some cases, they go to great measures to create vast interconnected networks of valuable business partnerships that create information channels and reciprocal threat points. Misbehavior by any one party can lead to a costly expulsion from the networks. See Lisa Bernstein, *Private Ordering, Social Capital, and Network Governance in Procurement Contracts: A Preliminary Exploration*, (Feb. 2015) (unpublished manuscript) (providing an in depth picture and analysis of this phenomenon). In the film industry, the agent provides the connective tissue for the network. The information resides in the agent and the agent has the power to exclude players on either side from the network. That is not, however, to say that players cannot be excluded in other ways through other non-agent mechanisms.

¹⁵² Fauchart and von Hippel, *supra* note 3, at 193.

former employee. Critically, he sent this “letter to a number of his colleagues, so that the community as a whole would learn of his former employee’s violation.”¹⁵³

The letter—and the reputational implications it carried—enforced the informal rule demanding attribution for creators. In the Fauchart and von Hippel model, the attribution rule ensures that chefs have sufficient incentives to produce new recipes. In the absence of robust protection from formal intellectual property law, chefs who produce new recipes would be unable to capture the pecuniary rewards associated with those recipes because all other chefs could copy the recipes. But an informal rule requiring attribution could permit chefs who produce new recipes to capture non-pecuniary status rewards (and, possibly, subsequent pecuniary rewards associated with increased status) by demanding community recognition for the initial creator of a recipe. In this way, informal rules allocating status rewards to the creators of new works can provide the motivation to produce such works.

While we do not reject their interpretation—indeed, we agree that their model provides at least some explanatory power for their observations—we emphasize a distinct role for these informal rules. In our model, the attribution rule facilitates the head chef’s role in organizing the creative collaboration that occurs in her kitchen. Suppose the recipe is the result of creative inputs from several (not too many) cooks in the kitchen. But it is hard to avoid shirking by the cooks in that kitchen team. The attribution rule might vest the head chef with control over the status rewards associated with a particular recipe—other chefs interested in hiring a cook can seek information from the original chef about the relative contributions of the team members. The attribution rule in effect identifies the repository of information, and the chef then uses her control over the reputational rewards (and punishments) she can apply to elicit collaboration from the cooks in the first instance.

In these examples, the producer and the chef are in positions to dole out reputational rewards and penalties. And, when doing so, they use informal rules to regulate intra-team behavior. If the production of a recipe is a collaborative endeavor, with the head chef at the top of the hierarchy, then this ability to enforce penalties on team members (even after the collaboration is over) is an

¹⁵³ *Id.*

important way in which the chef can manage the creative inputs—the other cooks in the kitchen.

Thus, in the Fauchart and von Hippel model, informal rules provide incentives for creative work by ensuring that the right kitchen is credited with a recipe. Credit then provides non-pecuniary rewards in the form of increased status or pecuniary rewards. In our model, the informal rules allocate control to a head chef who can then ensure that the right cooks within a given kitchen receive rewards for their collaboration (or are punished for failing to collaborate).

C. Conflicts Between Formal Law and Informal Rules

Formal copyright law incorporates a romantic view of the sole author. This creates stark problems when non-Western cultures clash with the sole author myth that drives Western copyright law. In such cases, formal law may be in tension with the work that informal rules do (and vice versa), undermining types of creative collaboration that function well under one regime but poorly under another.

Copyright litigation involving Aboriginal art in Australia provides a salient example of such clashes between formal copyright law's notion of a single author-owner and informal rules of collaboration and communal control.¹⁵⁴ Litigation there has pitted informal rules of Aboriginal communal authorship that evolved over centuries against a superimposed Western copyright law focused entirely on the single author.¹⁵⁵

For example, the notable case of *Bulun Bulun v. R & T Textiles*¹⁵⁶ dealt with ownership and control over a painting derived from the communal folklore of an indigenous group, known as the Ganalbingu. Senior members of the Ganalbingu had, in accordance with their community standards, authorized John Bulun Bulun to paint the artwork using elements of the Ganalbingu's sacred and ritual knowledge. Textile producers then copied the artwork onto fabric patterns. While those producers had admitted to

¹⁵⁴ See *Bulun Bulun v. R & T Textiles Pty.*, 86 F.C.R. 244, 246 (1998) (a leading Aboriginal art case where the court was faced with the question of whether the rights to a painting derived from communal folklore belonged to the community from which the folklore had been developed); see also Daniela Simone, *Dreaming Authorship: Copyright Law and the Protection of Indigenous Cultural Expressions*, (draft).

¹⁵⁵ *Id.* at 246; see also Simone, *supra* note 154.

¹⁵⁶ 86 F.C.R. 244.

infringing Bulun Bulun's rights, the representatives of the Ganalbingu claimed that the rights belonged to the Ganalbingu people in common, not Bulun Bulun in particular, and sued to vindicate those rights.

An ordinary copyright analysis would have attempted to identify an author-owner of the original aesthetic expression in the painting.¹⁵⁷ But there were so many contributors over so many years and with so many variations that it would have been futile in this case. And the informal rules were clear that no single author could control the folklore; instead, these senior members of the Ganalbingu, chosen and acting in accordance with established community standards, had the effective ability to permit or prevent use of the folklore. Western notions of sole author-owners of creative works cannot easily accommodate this type of collaboration.

In the end, the Australian court intuitively recognized that control in this context was different from the Western notion of control. Enforcing legal rules of ownership could not get the control question right—the law on its face prohibited the informal rules from playing any role at all.¹⁵⁸ Recognizing “the inadequacies of statutory remedies under the *Copyright Act* as a means of protecting communal ownership,”¹⁵⁹ the court concluded that while Bulun Bulun—the individual painter who physically fixed the work in its tangible medium—had a copyright (and the concomitant ability to prevent or authorize reproductions of the painting), he also had a fiduciary duty to exercise his rights to the benefit of the Aboriginal community.¹⁶⁰

Thus, while the Aboriginal community did not have a copyright in its folklore, it did retain some formal legal

¹⁵⁷ *Baker v. Selden*, 101 U.S. 99 (1879) (extending copyright protection only to an expression, not to the underlying ideas); *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (requiring that a work be original—that is, contain at least minimal creativity and not be copied—in order to qualify for copyright protection).

¹⁵⁸ As one scholar has pointed out in this context, “copyright law remains committed to a one-size-fits-all model of creativity that does not represent the variety of types of creativity that flourish in the modern world.” Simone, *supra* note 154.

¹⁵⁹ *Bulun Bulun*, 86 F.C.R. at 246.

¹⁶⁰ *Id.* In this particular case, because Bulun Bulun had already sued the infringers, there was nothing left for the court to do. As a practical matter that meant that the Ganalbingu people had no additional legal remedies. *Id.* It did however provide some power for indigenous communities to protect their rights in the future.

power: it could sue to enforce its informal rules against community members who create works based on that folklore. And, of course, the community retained the ability to use its informal rules to determine which of its members could create such works in the first place. Community members who create such works in violation of the informal rules prescribing who may create them can be punished by expulsion from the community or by lowered status within the community. Notably, however, the community appears to have no power over outsiders who might create works based on that folklore.

The outcome of the case leaves many open questions, reflecting the complexities that arise from overlaying rigid formal law on informal creative communities.¹⁶¹ The Australian court refused to grant ownership of communal folklore to any party. It also rejected calls to create a constructive trust that would have allowed the community to control its communal folklore. At the same time, it invented a new fiduciary duty that forced members of the community to protect the value of the communal folklore. The practical difference between creating a trust and creating a fiduciary role is murky, but as a formalist legal matter the fiduciary duty merely defines the relationship between the community and its members while a trust would have required the court to take the radical (from the

¹⁶¹ Similar problems have been identified in other cultures. See David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?*, 25 *Am. Indian L. Rev.* 93, 100 (2001); see also Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 *CARDOZO ARTS & ENT. L.J.* 175 (2000); Daniel J. Gervais, *Spiritual but Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge*, 11 *CARDOZO J. INT'L & COMP. L.* 467 (2003); Rachael Grad, *Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia*, 13 *DUKE J. COMP. & INT'L L.* 203, 225-226 (2003); Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 *AM. U. L. REV.* 769 (1999); Cortelyou C. Kenney, *Reframing Indigenous Cultural Artifacts Disputes: An Intellectual Property-Based Approach*, 28 *CARDOZO ARTS & ENT. L.J.* 501, 526-27 (2011) (“Other countries including Panama, Nigeria, Tunisia, and the Philippines have passed ‘copyright-like’ laws allowing, inter alia, collective ownership of sacred indigenous objects, fee distribution to communities whose folklore serves as a source for creative works, and the criminalization of “intentional distortion” and misuses of folklore.”).

perspective of Western copyright law) step of allowing communal authorship to create a property right in art.¹⁶²

Bulun Bulun is not as far from the core of Western copyright as it might at first seem. Informal rules in the filmmaking community play a similar role to that played by informal rules in Aboriginal communities—the filmmaking community dictates rules of control for the various inputs into a film.

To put the point more radically, Western notions of single authors and corporate legal personhood¹⁶³ establish our formal notion of who owns a film—the output of the creative collaboration. And it thereby (attempts to) influence the inputs to that collaboration.¹⁶⁴ But the community's informal rules have much more to say about who controls the various aspects of that film and its inputs. The formal allocation of property ownership and contract rights is significantly disconnected from the reality of control, and the formal allocation will break down in situations where its assumptions about the creative process are violated, as they (likely) were in *Garcia* and *Merkin*.¹⁶⁵ Moreover, if the formal laws were completely different and vested “ownership” of a film in the hands of the filmmaking community (in Hollywood as a legal person), we doubt the resultant use of those rights would look much different than the status quo.¹⁶⁶

A recent article by Abraham Bell and Gideon Parchomovsky treads territory adjacent to that explored in *Bulun Bulun*.¹⁶⁷ In their provocative and thorough study of the area, Bell and Parchomovsky propose the use of a “Copyright Trust” to deal with some of the thorny issues posed by creative collaborations. The trust mechanism would allow a court to separate ownership and control of

¹⁶² Simone, *supra* note 154 (noting the adaptability of fiduciary duties relative to constructive trusts).

¹⁶³ Cf. Bell & Parchomovsky, *supra* note 29.

¹⁶⁴ See Casey & Sawicki, *supra* note 6.

¹⁶⁵ See *supra* Part IV.A.

¹⁶⁶ Similar community collaboration phenomenon may arise in the context of new Western media that are beyond the scope of this paper. See, e.g., Shun-Ling Chen, *Collaborative Authorship: From Folklore to the Wikiborg*, 2011 U. ILL. J.L. TECH. & POL'Y, 131 (Spring 2011); cf. Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm* 112 YALE L. J. 369 (2002).

¹⁶⁷ Bell & Parchomovsky, *supra* note 29 (citing and critiquing Casey & Sawicki, *supra* note 6).

copyrighted material.¹⁶⁸ The beneficial owners of the copyright would be determined based on contribution, while a trustee would be appointed to exercise complete control over the copyright.¹⁶⁹ One might think of this as forced (or default) firm ownership. The court can create a firm and impose a manager at the top of the hierarchy. This proposal could be viewed as similar to the fiduciary relationship that the Australian court imposed in *Bulun Bulun*.¹⁷⁰

Bell and Parchomovsky noted that while their analysis addressed theoretical problems similar to those addressed in our analysis of formal law and collaboration, their proposed solution “may be viewed as antithetical to those espoused by Casey and Sawicki.”¹⁷¹ We agree with that characterization, and our analysis here of informal law widens the gap further.

To be sure, in a world of pure formal law we see little to object to in the Copyright Trust proposal. But the introduction of informal law and the non-hierarchical governance we have theorized in this Article render a Copyright Trust proposal either destructive of collaborative creation or impossible to implement. Informal law can create a governance or control structure that exists without contract and without integration. It allows for adaptive governance rules to evolve in response to the diverse production inputs and roles that might be necessary for creative collaboration.

A court imposing a Copyright Trust could destroy that governance system. Imagine a court attempting to allocate control over a film to one person and then allocating ownership shares based on creative input. Bell and Parchomovsky suggest that nothing in their proposal denies contractual solutions. But they do not address informal, non-contractual solutions. If the court can allocate control to one person except in the presence of a contractual provision, then that would essentially destroy the role of informal rules altogether.¹⁷² Like the outcome in *Bulun Bulun*, this

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ While the *Bulun Bulun* court did not create a constructive trust, a fiduciary duty, of course, has many of the trappings of a trust relationship.

¹⁷¹ *Id.*

¹⁷² A similar concern in *Bulun Bulun* was that creating a property right owned in constructive trust for the Ganabingu people would hinder rather than enhance communal creativity by placing the control outside

structure places legal constraints on informal mechanisms of control and favors rigid formal mechanisms over the flexible informal ones developed by the creative communities themselves.

In cases like *Merkin*, their trust concept would produce strange results where control is wrested from those intended and understood to possess it by long standing norms and placed in the hands of a trustee who must then adjudicate the proper use of the materials to benefit the interests of all contributors (however broadly the notion of “contributors” is defined). If that power were actually exercised, it could have major adverse effects on the creative collaboration. Either every party would have to negotiate formal control agreements where informal rules have, in the past, sufficed or collaborations would cease.

But that is not likely to happen. In reality, for the same reason that producers do not exercise final cut, we do not think a Trust structure is likely to have much impact. Informal rules are too powerful. The court might allocate control to one trustee, but that control would likely diffuse back out to the market. And contributors would be wary to involve a court for fear of exclusion from future projects in the industry.¹⁷³ This is why we say the Trust might be impossible to implement. Much as a producer cannot freely exercise final cut authority within the bounds of the contractual provision, so too a trustee would not be able to freely distribute proceeds within the bounds of her fiduciary duty, nor would a participant in a creative collaboration be able to freely call upon a court to create a Copyright Trust. At best, the implementation of the Copyright Trust would forcibly allocate beneficial ownership (that is, compensation for contribution) where the contracts are vague while changing little about control. That outcome is not as problematic. But it does not address the key questions of control that are at the heart of the creative collaboration problem—the challenges of coordinating unobservable and uncertain inputs to creative production remain.

of the communal norms. It is not clear that the *Bulun Bulun* court avoided this problem when it created a fiduciary relationship.

¹⁷³ One might alternatively, take this analysis to suggest that the courts’ decisions in the high profile cases discussed above are unlikely to have major impact. The norms will in most cases control. The result is that we need not worry too much about the judicial errors. But we should still worry that we have little real understanding about what is going on in the space regulated by copyright law.

D. Crowding Out and the Cliff of Formal Law

A final observation about the interaction of formal and informal law is important for copyright design. Formal intellectual property law is generally more one-size-fits-all than informal rules, which are created and enforced by the community to which they apply.¹⁷⁴ Informal rules might, then, be better suited to facilitating a diversity of approaches to creative collaboration.

For example, consider a chef who is deciding whether to collaborate on a recipe. If we protect rights in recipes the way we protect literature—according rights in the “fixed” output to someone labeled an “author”—we might see less collaboration.¹⁷⁵ Assume that the law provided solid protection once a recipe was written down. In developing a recipe, a chef might not want to let anyone else know her thoughts until she is ready to transform it into that written form of expression.¹⁷⁶ Pre-expression collaboration undermines protection because it provides others with access to ideas before those ideas are protected by law (just as co-authoring a novel does). The chef in such a world might instead decide to produce new recipes as a sole creator and shun collaborative efforts because collaboration exposes her to the risk that her collaborators will misappropriate her ideas.

Somewhat counterintuitively, in a world with weaker formal protection for recipes, the (relative) cost of pre expression collaboration may be much lower. Once a dish is cooked anyone can copy it. The chef is just as vulnerable to the theft of the final recipe as to idea inputs into the recipe. To be sure, the chefs may not innovate at all if there is no protection. But informal rules have developed to provide that protection. And in contrast to formal protection of a final recipe that begins only when the recipe is complete,

¹⁷⁴ See Perzanowski, *supra* note 3, at 585-87 (arguing that norms may be more responsive than formal copyright law to the incentives required to produce creative work in the tattoo industry); Oliar & Sprigman, *supra* note 3, at 1840-41 (making a similar argument with respect to stand-up comedy). See also Michael Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845, 856-57 (2006) (describing the uniformity cost of copyright law).

¹⁷⁵ See Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007).

¹⁷⁶ *Id.* at 1131-32 (arguing that a dish would satisfy copyright’s fixation requirement once it has been cooked and the recipe written down).

norms enforced through reputation have no cliff effect (or at least a plausibly less dramatic cliff effect because the content and enforcement of the informal rules is fuzzier than that of the formal law) and are as likely to protect against input idea theft as to final recipe theft. In this way, formal law that imposes protections may alter the foundation of collaborative organization in complex and perhaps unpredictable ways.

V. CONCLUSION

Our analysis leads to the conclusion that the influence of informal rules on the production of creative work is far more significant than currently supposed. While the conventional wisdom holds that informal rules dominate primarily in areas like cuisine, stand-up comedy, tattoos, and magic, where copyright's incentive effect is weak or nonexistent, the reality is that informal rules influence all areas of creative activity where there is collaboration; that is, all areas of creative activity. So even when copyright law's incentive effect operates forcefully, as it does in film, music, and literature, informal rules likely have an enormous impact on the production of creative work through their regulation of the collaboration required to produce movies and songs and books. This conclusion significantly increases the scope of influence for informal rules in the creative industries.

Much, of course, remains to be done. We have only begun to outline here the many potential interactions between formal law and informal rules with respect to collaboration. Our hypotheses should be rigorously tested with significant industry-specific exploration of creative work. This Article provides a framework for thinking about informal rules throughout the creative industries. Future work should build on that framework so that scholars and policymakers can obtain a more accurate understanding of copyright law, creativity, and collaboration.