The Conceits of Our Legal Imagination: Legal Fictions and the Concept of Deemed Authorship

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ABSTRACT

Describing legal fictions as embedded nuggets of information about social reality in the law is not as contradictory as it may sound. Legal fictions reveal important aspects of human society that may not be understood but for the curious metaphors that these fictions portray. The use of legal fictions may, however, obscure important information or fundamental questions about law and its society as it commits legal institutions to set outcomes. These fictions become institutionalized without clear understanding of their function. When that happens, fallacious assumptions about human behavior and social relationships transform into binding principles that set the course for future legal development, potentially resulting in legal rules that are completely dissociated from the actuality of social, historical, or cultural facts. This article explores the concept of deemed authorship as a legal fiction in copyright law and describes how the fiction obscures the truth about authorship and creativity and complicates copyright jurisprudence, preventing the right legal questions about creativity and its impact on the progress of science from being asked. This article argues that the institutionalization of this legal fiction separates an author from the defining attributes of personhood and contradicts our basic understanding about human creativity. As the fiction of deemed authorship presents an inaccurate imagery of who we are as human creators, it isolates rather than socializes legal language. Since this fiction and other fiction that contradict our experiences of reality may cause more harm than benefit to our understanding of the law, they must be used with caution so that legal rules that are more consistent with institutional aspirations, individual and communal expectations, and the rule of law may develop.
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I. Introduction

Legal fictions propagate so many untruths in the practice of law that Jeremy Bentham once quipped, “legal fictions is to the law what fraud is to trade.”¹ But “these conceits of the legal imagination”² as Lon Fuller called them - fraudulent as they may be - are actually important nuggets of information about our society that are embedded in the law. Saying that legal fictions contain information about social reality sounds like a complete oxymoron but this description may not be as contradictory as one would initially think. Paradoxically, these imaginary metaphors used by courts or the legislature to attain justice³, set bright line rules⁴, or establish normative standards⁵ also reveal special characteristics about the society in which we live. The glaring contrast between a fact and a legal fiction used to tweak it should be incisive in showing that legal rules are often limited in their capacity to address the realities of human interaction. Legal foresight stretches only as far the mind may predict but humans often interact in ways that cannot possibly be ex ante anticipated by the law. Legal fictions prove to be indispensable in connecting the law’s familiar experiences and its conventional knowledge with these unanticipated human events to attain an outcome that is most congruent with what society understands its legal system to be.

Yet, casual uses of fictions may defeat these very reasons for why legal fictions exist. When used without a clear understanding of their purpose, legal fictions can potentially

¹ RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 202 (2012).
² LON L. FULLER, LEGAL FICTIONS 1 (1967).
³ Porter v. Earthman, 12 Tenn. 358, 367 (1833) (Catron Ch. J. stating that the legal fiction that judgements in favor of different lien holders were all made on the first date of the term in which the judgement was rendered irrespective of when the judgement was actually rendered “was adopted to attain the ends of justice”).
⁴ For example, a child as treated as an adult when he reaches the age of majority; this is a legal fiction that creates a bright line rule because in reality, “children do not magically become adults when they turn eighteen”). See, Seema K. Shah & Franklin G. Miller, Can We Handle the Truth? Legal Fictions in the Determination of Death, 36 Am. J. L. AND MED. 540, 560 (2010).
transform metaphors about social behavior and human truths into binding legal principles that set
the trajectory of legal development in stone - all inconspicuously and without our realization of
the transformation in the law that has happened.\textsuperscript{6} This becomes especially troubling since
fundamental questions about human ontology can never come to light when they remain
shrouded beneath a cloak of falsity. We may miss seeing the truly important questions for our
single minded concentration on a practical - but untrue - fiction. Law can be powerfully
conceptualized as type of human language, communicating certain intentionality held by legal
institutions to members of their society.\textsuperscript{7} And fictions in the law play the important role of
providing us in society with analogies, metaphors, and categories to help our minds find meaning
in - and hopefully understand - the language of the law.\textsuperscript{8} We should thus be vigilant in the use of
legal fictions to avoid thinking that fictions in the law actually represent truths about our society
and us as human beings.

This article explores the concept of deemed authorship as a legal fiction in copyright law
and describes the analytical difficulties that follows its application. Contemporary copyright
jurisprudence treats the fiction of deemed authorship as an institutionalized norm.\textsuperscript{9} And unless
we remember why the fiction of deemed authorship is used, it becomes impossible to address
some of the more fundamental questions about human creativity and the act of authorship. This
article argues that the institutionalization of this legal fiction alienates the person of the author
from the defining attributes of authorship and personhood. As a result, it contradicts our basic
understanding about who authors are and what the creative process entails. But this legal fiction
is also so well integrated into copyright law that its primary purpose has faded into the backdrop
of the law’s tapestry. Now it is taken as representing certain truths about our society despite it’s

\textsuperscript{7} John R. Searle, \textit{What is language: some preliminary remarks in John Searle’s Philosophy of Language: Force, Meaning and Mind} 43 (Savas L. Tsohatzidis, ed., 2007) (Searle describes human language to represent and create “a deontology of rights, duties, commitments [that] can be extended to create a social and institutional reality...”).
\textsuperscript{9} See, for example, Rodrigue v. Rodrigue, 55 F. Supp. 2d 534, 543 (1999) (describing a work-made-for-hire
situation, wherein an employer is deemed the author of the employee’s work, and where the law treats the issue as
“one of authorship and not of transfer of rights; the employer is presumed to be the author initially and not by virtue
of a post-creation transfer”).
inaccurate representation of human authors and creativity. This particular conceit of our legal imagination has sadly obscured rather than revealed the truth about human authorship.

To proceed with the analysis, I discuss the role of legal fictions in Part II. In this part of the paper, I describe the function of legal fictions in attaining justice, creating certainty, and establishing standards in the law, recognizing that these are important functions in facilitating legal thought about difficult and untried social issues. The use of fictions in the law - and in many other disciplines as Hans Vaihinger noted\(^\text{10}\) - helps in developing our naturally limited understanding of the world. Legal fictions also convey information about the law in images and similes that socialize legal language, which would in turn engenders social respect for the law and encourages general obedience towards legal rules.\(^\text{11}\) When the law makes good sense, a more productive society is created as a consequence. But instead of socializing legal language, some legal fictions dissociate the law from social and moral norms because they institutionalize false ideas that lead to incorrect legal - and sometimes immoral - conclusions. These fictions are troublesome fictions in the law because they prevent us from seeing more important issues, pursuing answers to difficult questions, and developing a fuller understanding of the law by their illustrious and beneficent facade.

Part III of this paper turns to a legal fiction in copyright law - the doctrine of deemed authorship - and classifies it as a troublesome fiction because it blurs the distinction between the reality of human creativity and the falsity of imputed authorship. The work for hire doctrine in copyright allocates initial authorship and ownership of a work with the employer or other person for whom the work was prepared.\(^\text{12}\) This doctrine is troublesome because it imputes authorship

\(^\text{11}\) One of the basic objective in legal philosophy is the study of law and legal systems and the authority of human language to demand individual obedience to particular codes of conduct. For natural lawyers, human laws expressed in human language is capable of demanding obedience because they are a manifestation of the divine will. More secularized theories of law, such as analytical jurisprudence, theorize that human language command obedience and create order because certain social conditions exist to support the law’s authority. *See*, Randall E. Auxier, *Order, in THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA*, VOL. II, 620 (Christopher Gray *ed.*) (2000). Unless the will of the law-maker is communicated in a language that makes sense to those it binds and becomes, in that respect, socialized, laws cannot not have binding authority because they cannot be understood by their subjects.
\(^\text{12}\) The Copyright Act provides that “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the *author* for purposes of this title, and, unless the parties have expressly agreed
on an entity other than the actual creator of the work and divests the actual creator of his identity as the true author, an identity, which this article argues, is an essential attribute of personhood.\textsuperscript{13} As a person’s identity as the author of his work is so essential to personhood, divesting the true creator of his identity of the author and imputing that identity on someone else would seem to violate human dignity and the ability to flourish as a creator. Whether a person’s identity as an author should even be inalienable is a serious question; one’s identity would appear to be a personal non-interchangeable aspect of the individual person.\textsuperscript{14} Though the work for hire doctrine may have been constructed by copyright laws out of necessity - the law had to deal with the rise of corporate America\textsuperscript{15} and the inevitable pressure to allocate initial ownership of the work in the corporate employer as a matter of economic exigency\textsuperscript{16} - the reality remains that authorship is predicated on intellectual creativity and individual expression that is factually

\textsuperscript{13} Margaret Jane Radin, \textit{Property and Personhood in Reinterpreting Property}, 35, 57 (1993). The idea of personhood in Professor Radin’s work is encapsulated as a moral ideal that an individual can only achieve proper self-development and become a complete person when he is able to control resources in his external environment. Some of these external resources are personal and inextricably bound to the individual that its loss would cause the individual pain. Radin argues that the law should provide greater protection to property claims over such resources they are personal to the individual and constitute part of his personhood. In this light, creative expressions may also be subject to property rights because their creator created them; but the author’s identity as the true author of the work - while not the subject of property - is even more personal to the author than the work itself that the author’s identity should be protected by a rule against divestment. Since authorship draws from so much of the author’s identity - which we may think of as his “history and future” and “life and growth” that he poured into the work - the law should protect a creator’s identity as the true author with a strict property-type rule.

\textsuperscript{14} Margaret Jane Radin, \textit{Market-Inalienability}, 100 Harv. L. Rev. 1849 (1987). Professor Radin developed a theory of market inalienability and argued that some market discourses are harmful to personhood. Personal attributes such as bodily integrity are not fungible objects that can “pass in and out of a person without effect on the person.” Such attributes cannot be commodified and alienated because they are important and essential to the ideal of personhood). I argue in this paper that authorship is a personal attribute to the author. As the identity of an author as the creator of the work connotes that a person had invested a certain amount of labor, imagination, personality, and individual experience all mixed together to create an authentic work, the identity is essential to how one perceives himself as a person.

\textsuperscript{15} Oren Bracha, \textit{The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright}, 118 Yale L.J. 186, 260 (2008) (Justifying corporate ownership on the intellectual labor of employees in the second half of the nineteenth century “was part of a general move in the period’s legal thinking - a move to adjust traditional legal doctrines and categories to the new environment of corporate liberalism”).

\textsuperscript{16} R.H. Coase, \textit{The Nature of the Firm}, in \textit{The Firm, The Market, and the Law} 38-40 (1988). In his theory of the firm, Ronald Coase pointed out that firms exist mainly because it is sometimes costly to depend on prices to coordinate market activity. One of the costs of using prices to negotiate transfer of resources is the cost of negotiating and entering numerous individualized contracts along one production line. When one works with a firm, this serious of contracts is no longer necessary. One only enters into a single contract with the firm. “For this series of contract is substituted one.” Id. at 39. The work-for-hire doctrine allowed authorial rights stemming from multiple creators in the production of a work, such as a cinematographic work, to be consolidated in the employer of these individual talents such as a movie studio. See, \textit{United States Copyright Office and Sound Recordings as Work Made for Hire: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary infra note 140}. 
dependent on a human creator producing creative works. This article concludes with a caveat: the concept of deemed authorship is an expedient legal fiction that may be necessary but it’s expediency must not be traded for the more fundamental questions about the author, the notion of authorship, and the goal of scientific progress through the copyright system. We should not pretend that these pressing questions do not exist just because a fiction in the law hints that they don’t.


A. HOW LEGAL FICTIONS WORK

Fictions in the law abound and scholars who have thought about them have written extensively about the use of legal fictions and their purpose. These legal scholars have arrived at different conclusions about their utility. Jeremy Bentham and Roscoe Pound have been somewhat critical in their writings about legal fictions, which they viewed as cloaks that hid the judiciary’s attempt to usurp legislative functions. More recently, Professor Peter J. Smith argued that false suppositions offered by the courts as grounds for creating or modifying legal rules today amounted to a new form of legal fiction, one which allowed judges to make legal


18 Bentham, Theory of Legislation, id. at 72 (criticizing the use of fictions in legal reasoning and stating that fictions “only serve to dazzle, to mislead, and to give to reality itself an air of fable and of prodigy”), Bentham, A Fragment of Government, id. at 64 (describing Thomas Hobbes’s political theory of the social contract justifying the establishment of sovereign governments as an “audacious tissue of legal fiction combined to show that total subjection is perfect freedom”), and Pound, The Spirit of the Common-Law, id. at 173 (describing how law grows “surreptitiously under the cloak of fictions” and without anyone being aware that a change in the law has occurred).
decisions based on their own normative views. Other writers, including John Austin, John Chipman Gray, and Lon Fuller, have shown greater tolerance for legal fictions, viewing them, not as creations intended to deceive, but as intellectual tools to help facilitate and support legal reasoning. Whether good or bad and whether used to rectify problems in the law or extend the law surreptitiously, legal fictions do set norms which manage human behavior and social conduct. While scholars have focused on the use of legal fictions on the law itself, there seems to be a paucity of scholarly literature on the norm-defining function of legal fictions - a function that seems integral to the smooth operation of the legal system. As the law is communicative in nature, in that it tells us what our rights and duties are as we relate to each other, it is - not just a social language lacking “internal and controllable structures in [the maker’s] thought processes” - but a human language with meaning in expression that raises many ontological questions about the truth of human nature. Legal fictions provide answers to - or if they don’t, they help us understand - these ontological questions.

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19 Smith, New Legal Fictions, supra note 17 at 1441.
20 John Austin, Lecture on Jurisprudence or the Philosophy of Law 308 (1874). As Austin saw it, a fiction “commonly consisted in feigning or assuming, ‘that something which obviously was, was not; or that something which obviously was not, was.’ It is ridiculous to suppose that such fictions could deceive, or were intended to deceive: or that the authors of such innovations has the purpose of introducing them covertly.”
21 John Chipman Gray, The Nature and Sources of the Law 30-37 (1921). Gray relied on Ihering’s classification of legal fictions into historical (fictions that add “new law to old without changing the form of the old law”) and dogmatic fictions (fictions that “arrange recognized and established doctrines under the most convenient forms”). Gray was critical of the historical fiction though he was cautiously supportive of the dogmatic fiction. Quoting Sir Henry Maine in his book, Ancient Law, Gray stated that historical fictions are “scaffolding, - useful almost necessary in construction, - but, after the building is erected, serving only to obscure it.” Id. at 35. Of the dogmatic fictions, Gray had this to say: “Fictions of the dogmatic kind are compatible with the most refined and most highly developed systems of Law. Instead of being blameworthy, they are to be praised when skillfully and wisely used ... They should never be used, as the historic fictions were used, to change the Law, but only for the purpose of classifying established rules, and one should always be ready to recognize that the fictions are fictions, and be able to state the real doctrine for which they stand.” Id. at 36.
22 Fuller, Legal Fictions, supra note 17 at 136. Fuller sees legal fictions as a linguistic necessity. He does not view the generalization or conceptualization of the law as much as a problem as the fact that we have sometimes categorized legal concepts inaccurately “and put the “lumps” in the wrong places.”
23 See for example Binion v. Evans, infra note 24, where the courts used the fiction of the constructive trust to prevent unjust enrichment at the expense of a widow promised a life-long tenancy on the property.
24 Searle, What is language, supra note 7 at 24.
25 The reason the practice of law raises ontological questions may be because law is in itself conceptually imperfect and always evolving. Law must, Professor David Dow states, “scavenge” from other academic disciplines to bolster its own language. For that reason, Dow states that “our legal system is not analogous to Gödel’s mathematical system precisely because what we call "the law" consists of entirely distinct ontological systems.” David R. Dow, Godel and Langdell - A Reply to Brown and Greenberg’s Use of Mathematics in Legal Theory, 44 Hastings L. J. 707, 717 (1993).
26 Thus, Fuller calls the fiction, a “linguistic phenomenon” presenting “an illustration of the all-pervading power of the word.” Fuller, Legal Fictions, supra note 17 at 11.
Common-law courts have traditionally used legal fictions to serve justice when the strict application of the law produced unfair results. Day to day human interaction sometimes unfold where the stronger party takes unfair advantage of the weaker part and real world transactions do not always pan out as planned or hoped. The seventy-nine year old widow in Binions v. Evans, who was promised a right to live on the property where her deceased husband and several generations before him worked until his death, was not expecting new purchasers of the property to serve her with a notice to quit and to leave the property soon after the purchase. Especially when she was tending to the property after her husband’s death. Since Mrs. Evans had a mere promise (in the form of a contractual license instead of a property right) to occupy the property, she had to leave the property when Mr. and Mrs. Binions, the new owners, asked her to. Despite that rule that a mere licensee did not have the right to remain on the property when asked to leave, the Court of Appeal nonetheless decided for Mrs. Evans because Mr. and Mrs. Binions’s purchase contract expressly subjected them to Mrs. Evans’s occupancy. And as a result, Mr. and Mrs. Binions paid less for the property than they would have paid. To reach what it saw as an equitable outcome for Mrs. Evans, the court here used the fiction of the constructive trust to make the new property owners trustees of Mrs. Evans’s beneficial interest.

27 Parker v. Ellis, 362 U.S. 574, 596 (1960) (“fictions were often expedients to further the end of justice”). Sir William Blackstone, writing in his Commentaries, saw the “proper operation” of legal fictions as “being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.” See, SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 44 (S. Sweet 1829). See also Sidney T. Miller, The Reasons for Some Legal Fictions, 8 MICH. L. REV. 623 (1910) (A legal fiction is a “legal assumption that something is true, which is, or maybe false - being an assumption of an innocent and beneficial character, made to advance the interest of justice”).

28 In fact, economic theory teaches that the rational man, to the extent that he himself is non-fictional, makes decisions that maximize his own benefit and self-interest. In some situations, however, a party to a bargain may not be able to make choices maximizing his own welfare because of imperfect information or costly communication. Avery Katz, The Strategic Structure of Offer and Acceptance: Game Theory and The Law of Contract Formation, 89 MICH. L. REV. 215, 219 (1990) (“Most formal economic accounts of bargaining conclude that when information is imperfect or communication costly, self-interested parties generally will fail to realize the full potential surplus from exchange”).


30 King v David Allen & Sons Billposting Ltd, [1916] 2 A.C. 54, 61 (The court described a contract to affix posters and advertisements on property as “a contract between the appellant and the respondents which creates nothing but a personal obligation. It is a licence given for good and valuable consideration and to endure for a certain time. But ... there is [no] authority for saying that any such document creates rights ... [arising from a] relationship of landlord and tenant or grantor and grantee ... it [cannot] be reasonably urged that anything beyond personal rights was ever contemplated by the parties.”); see also Binions v. Evans, id. at 367 (Mrs. Evans had “a licence, and no tenancy. It is a privilege which is personal to her ... [the promise to Mrs. Evans] ranks as a contractual licence, and not a tenancy”).

31 Binions v. Evans, id. at 365.
The court’s reliance on the fiction of constructive trust in *Binions v. Evans* served a moral purpose and furthered the interest of justice. As a constructive trust can be imposed *in invitum* or against the will of the parties, it is an exception to the legal rule in trust and estate planning that trusts of real property must be created in writing so that the intention to create the trust, establish a trustee-beneficiary relationship, and subject the property to beneficial ownership is evident. Other types of trusts may not be in writing but “result” from the circumstances of a case and presumed intention of the parties, such as when the incomplete transfer of a beneficial interest produces part of an estate that has no takers and a reversionary interest is implied back to the grantor.\(^\text{32}\) In both express and resulting trusts, a fiduciary relationship may be established from the real or presumed intention of the parties to create a trust. The trust acknowledged by the courts in both cases of express and resulting trusts is overtly or impliedly created by the parties.\(^\text{33}\) Constructive trusts, on the other hand, are not the product of the parties’ actual or presumed intention and are instead fictional artifacts used by the courts to achieve an equitable result. As Lord Denning M.R. stated in *Binion v. Evans*, the constructive trust was imposed simply because it was inequitable for Mr. and Mrs. Evans to turn Mrs. Evans out:

> “Suppose, however, that the defendant did not have an equitable interest at the outset, nevertheless it is quite plain that she obtained one afterwards when the Tredegar Estate sold the cottage. They stipulated with the plaintiffs that they were to take the house “subject to” the defendant's rights under the agreement. They supplied the plaintiffs with a copy of the contract: and the plaintiffs paid less because of her right to stay there. In these circumstances, this court will impose on the plaintiffs a constructive trust for her benefit: for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject to which they took the premises ... *This imposing of a constructive trust is entirely in accord with the precepts of equity.*”\(^\text{34}\) (emphasis added)

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\(^{\text{32}}\) George P. Costigan, Jr., *The Classification of Trusts as Express, Resulting, and Constructive*, 27 HARV. L. REV. 437, 446-7 (1914).

\(^{\text{33}}\) *Id.* at 448 (“Express trusts and resulting trusts are trusts by the real or the presumed intention of the parties”).

\(^{\text{34}}\) *Binions v. Evans*, supra note 29 at 368.
Although Lord Denning’s broad application of the constructive trust to situations where one party acts inequitably to harm another has not been widely adopted in English law\textsuperscript{35}, the fiction of the constructive trust in the United States has been widely used to provide remedies in situations where one party benefits unfairly at the expense of another. The constructive trust is not only used by American courts as a shield to protect an innocent party from harm as in \textit{Binion v. Evans}\textsuperscript{36} but is also commonly used as a sword in a restitution claim against to a party who has unjustly profited from their wrong.\textsuperscript{37} The constructive trust is thus a “device used by equity to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs.”\textsuperscript{38} While constructive trusts function to prevent actions by legal title holders of property that deprive its true beneficiaries of their expected gains, they also allow courts to achieve fairer decisions in specific cases where the desired outcome is irreconcilable with the case’s legal rule. The constructive trust bridges aspired legal outcomes, such as just results, with a more fundamental goal in law - that free, willing, and able parties to a given transaction conduct themselves in good faith.\textsuperscript{39} It is an artificial device - a conceit of the legal imagination - which facilitates smooth and effective application of legal rules to achieve specific aims of the legal system like an “awkward patch applied to a rent in the law’s fabric of theory.”\textsuperscript{40}

\textsuperscript{35} \textit{Sarah Wilson, Todd and Wilson’s Textbook on Trust} 261(2007).

\textsuperscript{36} Dominick v. Rhodes, 24 S.E.2d 168, 172-3 (1943) (the court imposed a constructive trust on a father who took his son’s property and treated the property as his own, stating that an express or conventional trust relationship between the parties was not necessary for the courts to impose a constructive trust if “the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title, as against another, provided some confidential relation exists between the two, and provided the raising of a trust is necessary to prevent a failure of justice”; the court went on to state that “the forms and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, whenever necessary to prevent injustice”).

\textsuperscript{37} American Family Care, Inc. v. Irwin, 571 So.2d 1053,1058-9 (Ala. 1990): “A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee”; quoting Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 380 (N.Y. 1919).

\textsuperscript{38} Schaffer v. Schaffer, 17 Misc.2d 592, 593 (1959).

\textsuperscript{39} See for e.g., Cenac v. Murry, 609 So.2d 1257, 1272 (1992) (“All contracts contain an implied covenant of good faith and fair dealing in performance and enforcement ...”); Wilson v. Amereda Hess Corp., 168 N.J. 236, 244 (2001) (“A covenant of good faith and fair dealing is implied in every contract in New Jersey ...”); Seidenberg v. Summit Bank, 348 N.J.Super. 243, 259 (2002) (“The guiding principle in the application of the implied covenant of good faith and fair dealing emanates from the fundamental notion that a party to a contract may not unreasonably frustrate its purpose ...”). See also Restatement (Second) of Contracts § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement”).

\textsuperscript{40} Lon Fuller used this phrase to describe how legal fictions cover tensions between social realities and the limitations of the law like a patch sewn on a torn cloth. To Fuller, Seeing legal fictions for what they are - ad hoc attempts to make law work for human life - and removing them to study the parts of the law that were previously obscured may produce new insights “into the problems involved in subjecting the recalcitrant realities of human life
But legal fictions have not only been used to achieve justice when legal rules are harsh. At times, legal fictions have also been used to simplify laws and create bright line rules to ease their application. The constructive trust or similar corrective fictions such as the quasi-contract - a fictional agreement binding parties to an imagined bargain even when an actual agreement was neither reached nor entered into\textsuperscript{41} - may be imposed in varying and unrelated factual situations, resulting in some degree of uncertainty in the law.\textsuperscript{42} Other legal fictions, however, produce certainty and clarity in the law. The Rule Against Perpetuities, which invalidates contingent future interests that are too remote for example, is characterized as a rule that ensures the alienability of property. It was historically adopted to support the development of a mercantile middle class by ensuring that property entered “the stream of commerce” and did not stay within the landowner’s control.\textsuperscript{43} But even if the historical rationale for the rule has become obsolete today, other contemporary rationales for the rule exist, such as to strike a fair balance between property rights of present and future generations, advance the socially desirable policy that property be freely circulating among the living, and limit the control of property by those who have passed on.\textsuperscript{44}

Since property is only valuable when it is in free and active circulation, a variety of legal fictions - some bordering on absurdity - have been adopted to support a policy that gifts of property vesting too remotely should be void. Legal fictions of the “fertile octogenarian,” the “unborn widow,” and the “precocious toddlers” serve to invalidate gifts that could potentially vest in individuals twenty-one years after the death of a person alive when the interest was created. These fictions allowed the courts to presume that the fertile octogenarian or precocious to the constraints of a legal order striving toward unity and systematic structure.” \textit{Lon Fuller, Legal Fictions, supra} note 2 at viii-ix (1967).

\textsuperscript{41} Callano v. Oakwood Park Homes Corp., 219 A. 2d 332, 334 (1966).

\textsuperscript{42} Darryn Jensen, for example, criticizes the lack of uniformity when imposing constructive trusts and calls for the development of a unifying normative theory that would justify the consequences of trusteeship. He states that “the extension of constructive trusteeship to novel situations, if it is to occur at all, must occur on the basis of factual analogy.” Darryn Jensen, \textit{Reigning in the Constructive Trust}, 32 \textit{Sydney L. Rev.} 87, 90 (2010).


toddler could have a child eligible take the gift after the perpetuities period. Although these fictions may be preposterous - especially in light of medical and physiological realities of the time - their bright line assumptions provided certainty in the law by eliminating the need for medical testimony on a person’s ability to father or bear a child. The conclusive presumption that a person may have a child throughout his or her lifetime frees the law from depending on professional claims to make determinations about the validity of posthumous gifts. Professional mistakes sometimes happen. And adducing medical evidence of infertility, as Professor Barton Leach pointed out, may be difficult.

Such conclusive presumptions, while fictional, achieve certainty in the law and are efficient. The fiction that people can have children throughout their life invalidates gifts that could vest too remotely. It frees property from dead hand control without making complex, expensive, and inconclusive inquiries about individual fertility. Similarly, the fiction of corporate personhood creates a legal entity with its own powers and rights as well as duties and liabilities. It allows the corporation to exist independently of its shareholders and directors as a separate legal person.

Under the rule against perpetuities, all future interest (particularly contingent remainders and executory interests) must vest within 21 years after the death of a life-in-being living at the time the interest is created. The rule works on the assumption that a person is fertile from the time of birth right until death. Hence an interest will fail if there is the possibility that a 2 year-old boy or an 80 year-old woman might bear a child after the perpetuities period. An interest would also fail if it is given to someone who might marry a woman yet to be born at the creation of the interest. For a discussion of the fertile octogenarian and the unborn widow, see W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 643-644 (1938). Professor Leach envisions the Case of the Precocious Toddler inadvertently arising by a drafting mistake since the presumption of fertility regardless of age and physical condition appears to be firmly established in the law. For this discussion, see W. Barton Leach, *Perpetuities in Perspective: Ending the Rules Reign of Terror*, 65 HARV. L. REV. 721, 731-732 (1952).

Although it will be noted that the possibility of a toddler or an octogenarian having a child is no longer a hypothetical in this age. In fact, science and medicine have advanced to a point where these theoretical possibilities have become factually plausible. See Sharona Hoffman and Andrew P. Morriss, *Birth after Death: Perpetuities and the New Reproductive Technologies*, 38 GA. L. REV. 575 (2004) (describing scenarios where pregnancies (or reproductions) could occur among infants and octogenarians through new reproductive technologies). See also DUKEMINIER, KRIER, ALEXANDER, AND SCHILL, PROPERTY 247 n. 22 (discussing a woman who gave birth to twins at 67 years of age and a young girl who gave birth to a baby boy at the age of 5).


Id. at 281-82.
Id. at 282-83.

Justice Story in Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 667-8 (1819) (a corporation is “an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. Hence, such a corporation may sue and be sued by its own members, and may contract with them in the same manner, as with any strangers”).
and allowed company resources to be used more efficiently.\textsuperscript{51} And a single corporation that vertically integrated its production and marketing functions would be able to reduce business expenses through the internalization of previously external market transactions.\textsuperscript{52} The fiction of corporate personhood supports the integration of corporate functions while separating members of the corporation from the corporation’s legal identity by establishing a bright line rule that a corporation is an independent legal entity.

The third reason legal fictions are used in law seems to be to set normative standards against which social activity can be judged. The “reasonable man”, the hypothetical person in tort and criminal law, is used to establish the standard for reasonable conduct that individuals in society are expected to meet. The normative standard established by the care the hypothetical reasonable man is expected to take would be a standard of “ordinary care,” which “the great mass of mankind would ordinarily exercise” under similar circumstances.\textsuperscript{53} In other areas of the law, such as patent law, the “person skilled in the art” establishes the baseline for inventiveness before an invention will be considered sufficiently inventive to justify the grant of a monopoly over the invention for twenty years.\textsuperscript{54} The “person skilled in the art”, like other hypothetical individuals used by the law to establish acceptable standards of conduct, requires the court to go back in time to the point the inventor invented the invention and putting itself in the shoes of this hypothetical person, determine if he would have seen the invention as obvious.\textsuperscript{55} The fictional attributes of the person skilled in the art, however, make it difficult to accurately determine what cognitive abilities he would have\textsuperscript{56} and scholars more generally have criticized the reasonable person standard as being susceptible to circular reasoning, in that the normative standard established by what a reasonable person would have done is in itself determined by who the

\textsuperscript{53} Osborne v. Montgomery, 234 N.W. 372, 375-6 (1931).
\textsuperscript{54} 35 U.S.C. §103 (“[a] patent for a claimed invention may not be obtained ... if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains”). \textit{See also} 35 U.S.C. §154(a)(2) (setting the patent term as twenty years from the date on which the patent was filed).
court sees as the reasonable person.\(^{57}\) Despite these shortcomings of the reasonable person standard, the fiction of the hypothetical reasonable man in society remains a useful normative measure, which allows the courts to reconcile the conflicting social interests of a legal actor with the rest of society.\(^{58}\)

**B. FICTIONS IN HUMAN THOUGHT**

While legal fictions are an integral part of the law, fictions on a broader scale appear to be an equally important component in human thought. German philosopher Hans Vaihinger, who scholars writing on legal fictions sometimes refer to\(^ {59}\), helps us see that the nature of legal inquiries is often ontological by showing how human beings construct artificial realities of the world - and fictionalize actual facts - in their mind and in commonly shared languages to broaden their naturally limited understanding of the world. In his work *The Philosophy of ‘As if’*, Vaihinger argues that a complete understanding of the world’s reality will always elude men because men are incapable of knowing their objective truth absolutely. According to Vaihinger, man’s objective reality can only be inferred through logical structures created by the mind.\(^ {60}\) These constructed systems of thought allow men to assume that the imagined fictions of their mind actually match up with objective reality. As Vaihinger explains:

“... the object of the world of ideas as a whole is not the portrayal of reality - this would be an utterly impossible task - but rather to provide us with an *instrument for finding our way about more easily in this world*. Subjective processes of thought inhere in the entire structure of cosmic phenomena. They represent the highest and ultimate results of organic development, and the world of ideas is the fine flower of the whole cosmic process; but for that reason it is not a copy of it in the ordinary sense. Logical processes are part of the cosmic process and have as their more immediate object the preservation and enrichment of the

\(^{57}\) *Id.* at 1605-06.

\(^{58}\) *Peter M. Gerhart, Tort and Social Morality* 25 (2010).


\(^{60}\) *Hans Vaihinger, The Philosophy of ‘As if’: A System of the Theoretical, Practical and Religious Fictions of Mankind* 3 (C.K. Ogden *trans.*).
life of organisms ... The world of ideas is an edifice well calculated to fulfill this purpose; but to regard it for that reason as a copy is to indulge in a hasty and unjustifiable comparison. Not even elementary sensations are a copy of reality; they are rather mere gauges for measuring the changes in reality."  

Thus, according to Vaihinger, our constructed systems of thought allow us to behave "as if" the real world matches our thought models. Vaihinger uses examples across the disciplines from the physical sciences to philosophy to demonstrate how much we develop mental constructs to make sense of and understand our world. Scientific classification of matter into elemental particles such as protons, electrons, and electromagnetic waves, for example, allow scientists to pretend that these phenomena exists even though none of these phenomena has ever been observed by the human eye or experienced by other types of perception. With these observations though, science may rely on these assumptions to create new and better intellectual constructs for future work and advancement in the field. To Vaihinger, most disciplines owe its advance to the use of "appropriate fictions and to the ingenious methods based upon them." Treating a fictional construct - such as the atom or motion or the center of gravity - as if these constructs were actual reality and proceeding on that basis was necessary in facilitating new understanding in the field.

Vaihinger identifies two unrelated fields - mathematics and law - as disciplines where fictions are extensively used to further understanding in the field despite their deviation from reality and their extrapolation from apparently concocted notions. In mathematics, fictions are essential because the field’s very ontology is built on a reality that is difficult, if not impossible,
Many concepts in mathematics such as the perfect circle, the absolutely straight line, constant velocity, infinity, and absolute value are mental constructs mathematicians and scientists adopted to help them understand the realities of the physical and metaphysical world and establish a foundation upon which mathematics as a field may operate. Thus, a curved line is subsumed under a straight line as if it comprised an infinite number of straight lines, a circle considered as if it were a polygon consisting of an infinite number of sides, and infinitely small divisions of space and time embraced as if such packets could exist in reality, to help facilitate study and enable practical calculation in the field by logical observers. Fictions such as empty space and atoms, to Vaihinger, help us understand the world and our surroundings in a more complete sense by reducing spatial material to an imaginary and fictitious foundation and providing prototypes through which scientific enterprise may unfold.

In law, legal fictions work the same way to produce logical synergies between abstract legal realities, such as achieving justice or arriving at the right decision, and practical understanding in the field. To Vaihinger, jurisprudence is a logical field where analogies between imperceptible truths with observable occurrences are made to form the basis for cognitive processes about human relationships and the regulation of these relationships. As most laws are naturally limited in their coverage of every eventuality or situation that may arise because of the imprecision of language and the finite number of words at disposal, unforeseen factual scenarios and legal problems would have to be subsumed within existing legal rules for there to be a solution. After all, language is an imperfect and many times inadequate fit for the capture of all variances of human interaction in society. As mathematicians relate curved lines to straight lines to study and understand two and three dimensional objects with negligible width and depth, so too do family lawyers treat adopted children as real children to develop the law on inheritance and succession by allowing adopted children as the heir and next of kin to inherit

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65 The philosophical reality upon which mathematics is based is controversial among mathematicians and philosophers and it suffices to note that there is a general acceptance that there is a relationship between mathematics (however one defines it) and science (however one defines it). See, Stewart Shapiro, Mathematics and Reality, PHILOSOPHY OF SCIENCE 523-48, Vol. 50, No. 4 (Dec., 1983) (proposing that mathematics apply to reality through the discovery of mathematical structures underlying the non mathematical universe).


67 Id. at 52-3 (“Empty space, and atoms interpreted in a material sense, seem to be [ideational] constructs, but in actual fact they are only fictions. If, however, we succeed in reducing everything to these fictions then the world seems to be understood”).

68 Id. at 33.
their adoptive patents real and personal estate. Because law and mathematics work on inferences drawn from premises that are known or assumed to be true to proceed with deeper analyses, Vaihinger views these two fields as fertile fields for the utilization of fictions, stating that “[a]part from mathematics, there is hardly any domain more suitable than law for the deduction of logical laws and their illustration, or the discovery of logical methods.”

Vaihinger makes it clear that fictionalized analogies used in these fields must not be confused with - and substituted for - reality because errors in analysis occur when the lines between what is true and what is imagined are not clearly drawn. For legal fictions, “something that has not happened is regarded as having happened, or vice versa, or an individual case is brought under an analogous relationship violently in contradiction with reality.” Thus, a landlord pursuing an action for rent will be treated as if he evicted his tenant if he makes the property inhabitable; whether the landlord actually evicted the tenant is irrelevant because the deprivation of the tenant’s right to quiet enjoyment and habitation of the property destroys the economic value of a leasehold completely. Likewise, for the purposes of inheritance, an eighty year old woman is treated in the same way as a twenty year old woman because children borne by either one of them could affect the vesting of a gift, making it vest outside the period specified by the law on perpetuities - even if the chances of an eighty year old woman having a child may be in violent contradiction with physiological reality. The utility of these fictions lie in their fictitiousness. When a statement is so blatantly false, it makes it clear to the practitioner or student of law that the law has to work in a particular way for society to function well - the landlord must comply with reasonable obligations of a lessor towards the lessee and property must be freely alienable without dead-hand control.

To illustrate the importance of realizing how fictionalized mental constructs work to allow one to make sense of one’s external surroundings and further understanding in the field,

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69 Id. at 50.
70 Id. at 33.
71 Id. at 32 (“The logicians of the eighteenth century always regarded it as their duty to include error in in a general way within their logical systems. We must therefore, as we have already stated, distinguish between real analogies, where discovery is the work of induction and hypothesis, and purely fictional analogies due merely to subjective method”).
72 Id. at 34.
73 See Blackett v. Olanoff, 358 N.E.2d 817 (1977) for the fiction of constructive eviction.
Vaihinger distinguishes legal fictions and their role in jurisprudence from legal presumptions. While fictions are subjective contraptions of the intellect, presumptions are hypotheses against which the objective truths of one’s surroundings may be verified. The fiction is an intentional and conscious invention; the presumption a mere conjecture.\textsuperscript{74} Thus, while legal presumptions, such as the presumptions that all offsprings of a married woman are the issue of her husband and that an accused is presumed innocent until proven guilty are used for the sake of simplicity and to lower social costs by avoiding proof of a more difficult fact\textsuperscript{75}, they ultimately reveal the truth of the situation. Evidence may be adduced to show that the child of a married woman is indeed not the child of her husband and that the accused is indeed guilty of the crime. Presumptions allow the truth of the matter to be verified. But not so for fictions. Fictions are a deliberate deviation from reality and rather than offer a theory or a thesis about the truth of the situation, they allow mental processes to manipulate and elaborate on a given set of facts so that particular intellectual goals - deeper understanding, development of the field, facilitation of human relationships, for example - may be attained. As Vaihinger points out, there is tremendous difference between “formal processes of thought and the objective reality of external events.”\textsuperscript{76}

Although Vaihinger has been criticized for proving too much with his theory\textsuperscript{77}, he is right in observing that fictions permeate much of human thought. Sometimes, discerned facts or principles are disconnected from one’s grasp of the world around and cannot be encapsulated by language known to man. The atom, representing the most basic unit of matter, and infinity, describing something that does not have any limit, are scientific or mathematical principles that must be imagined (or fictionalized) because their existence is so far removed from what we know - and have come to understand - about our world. But the utility of these imagined principles is that they also help us understand practical things like space, energy, and the

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\textsuperscript{74} VAIHINGER, THE PHILOSOPHY OF ‘AS IF’, supra note 60 at 34.  
\textsuperscript{75} Eben Moglen, Legal Fictions and Common Law Legal Theory: Some Historical Reflections, 10 Tel Aviv U. Stud. L. 33, 37 (1990) (“The presumption that an offspring of a married woman are the issue of her husband arose ... from an argument of policy: that the law presumes legitimacy in order to avoid the high social costs of permitting parties to attempt proof of bastardy”). It is also cheaper and easier for a person who accuses to prove guilt than it is for a person who denies the accusation to prove innocence. The presumption of innocence is embodied in the maxim \textit{ei incumbit probatio, qui dicit, non qui negat: cum per rerum naturam factum negantis probatio nulla sit} (the proof lies upon him who affirms, not upon him who denies; since, by the nature of things, he who denies a fact cannot produce any proof”). See WHARTON'S POCKET LAW DICTIONARY 265 (2010).  
\textsuperscript{76} VAIHINGER, THE PHILOSOPHY OF ‘AS IF’, supra note 60 at 35.  
\textsuperscript{77} See Samek, supra note 17 at 301. See also FULLER, LEGAL FICTIONS, supra note 2 at 123.
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composition matter, which we would have difficulty studying without having the basic unit of matter and the concept of boundlessness as intellectual tools. Thinkers in various other fields have also depended on fictions to describe phenomena or principles that remain outside the realm of human perception yet are essential to aid human understanding in the field. Adam Smith imagined the self-regulating force of the free market as being guided by invisible hand, Thomas Hobbes the coming together of individuals to form a society with a sovereign ruler for security and peace as a social contract, and John Rawls the safeguard from personal interests entering personal discourse and political decisions the veil of ignorance. Fictions abound in human thought. And there does not appear to be anything wrong with depending on fictions to deepen or further understanding about particular issues to the field.

As we may think about the law as a form of language expressing human thought about rules that govern social activity, the use of legal fictions to further one’s understanding about socially acceptable and socially unacceptable conventions can be expected. Man’s ability to foresee and anticipate all contingencies that could arise from social activity is limited by what is perceivable and observable by the senses. As society develops, courts depend on legal fictions to extend the law to unanticipated changes in society, which were not conceivable and captured by legal rules when those rules were created and avoid being obligated to particular legal outcomes that may be inconsistent with what would be desirable and necessary for social life as norms governing society change. Legal fictions bridge legal rules with social norms and thus, support the normative functions of the law in a positive way if used without injuring the parties to whom they were applied.

78 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 186 (1817).
81 This idea originates from John Searle’s seminal contributions to the philosophy of language, where he suggests that language introduces a commitment on the part of its conveyor to convey the truth through his communication. This, in turn, grants the conveyor the capacity to create new phenomena such as rights, duties, government, private property etc. Although Searle does not expressly state so, a corollary that follows his thesis is that one social and institutional reality created by the use of language would be a society’s legal system. John R. Searle, What is language: some preliminary remarks in JOHN SEARLE’S PHILOSOPHY OF LANGUAGE; FORCE, MEANING AND MIND 37-41 (Savas L. Tsohatzidis, ed., 2007).
82 Blackstone, supra note 22 (legal fictions are “highly beneficial and useful ... [and] shall [not] extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law”).
The fictions of the fertile octogenarian and the precocious toddler, for example, allow the
courts to invalidate gifts to descendants too far removed from the testator and ease the testator’s
control of asset distribution long after he has died. These fictions support property exchange and
social transactions by ensuring that valuable resources remain alienable and are not controlled by
a remote testator who may no longer be alive.\(^3\) Such fictions are beneficial to property law
because they facilitate social interactions and economic engagement by signaling fundamental
conventions about the law. Their blatant falsity about human physiology reveal a somewhat
obscured reality about the property system, \textit{i.e.} that the alienability of property and free market
exchange are essential to a fully functioning society. The subjective lie here was necessary to
expose the objective truth.

C. TROUBLESOME FICTIONS

So, legal fictions benefit the legal system. They allow the law to subsume fictional
propositions into broad categorical spaces as if they represented the truth of the matter. The
obvious fictitiousness of the proposition allows the law to communicate a more precise point \textit{e.g.}
that justice must be done in a particular case, that private property must move freely on the
market, and that a wrong cannot be condoned even though the express provision of the law does
not sanction the act. But we also have to be clear about why we rely on legal fictions. Vaihinger
seemed to think that legal fictions help us think about the law logically and by extension,
perhaps, to help us think about human interactions more broadly in a more systematic way.
Professor Lon Fuller thought that some fictions, which he called “historical fictions,” are used by
the courts to subtly introduce changes in the law; to “introduce new law in the guise of old” in
his words.\(^4\) And the reliance on legal fictions to achieve these subtle changes could be for
various reasons - to bring about policy changes, achieve stability in the law, avoid the
inconvenience and expense of changing the law, and state a new principle in the simplest of

(assuming that the rule against perpetuities was actually a compromise between the landed class generally hostile
toward capitalist ideas and judges in seventeenth century England struggling to define the perpetuity period where a
testator could reach beyond the grave and assert dead hand control over the distribution of property).

\(^4\) FULLER, \textit{LEGAL FICTIONS}, supra note 21 at 56.
But the benefits of legal fictions to the law must not obscure the potential trouble these fictions may cause to some areas of the law, in particular areas of the law that do not avail themselves to logical inquiry. Troublesome fictions have the capacity to trap the law into a tight logic that, paradoxically, makes the law illogical with the preclusion of broader sociological and historical inquiries about what law is. The trouble with tight logical analyses of laws is encapsulated by Oliver Wendall Holmes, in *The Common Law*:

“The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.”

As fictions are able to both clarify and obscure thinking about our reality, it may be useful for jurists and academics to engage in more robust conversations about the proper rationale for legal fictions and how they are used to facilitate the application of legal rules so that clearer and more precise thinking about the law may take place. As is appears, legal fictions are not discussed as much today as they once were. But more recent scholarship by academics,

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85 Id. at 56-64 (Fuller distinguishes these reasons by terming them “the conservation of policy, emotional conservatism, conservatism of convenience, and intellectual conservatism”).
87 See Harmon, *Falling off the Vine*, supra note 17 at 1 (“The legal fiction used to be a hot topic on the jurisprudential agenda. It was written and talked about passionately by those who wrote and talked about such things in the nineteenth and early twentieth centuries. Then interest in the subject withered and died, and virtually fell off...**)
such as Peter J. Smith and Nancy J. Knauer, have discussed the emergence of newer types of legal fictions in the practice of law. These commentaries indicate that there is much more to be said about legal fictions and the legal institution’s dependency on these fictions to support the smooth operation of the law. And continuous discussion and acute awareness of how fictions work and impact the law is important because fictions can potentially become troublesome when they hide, rather than reveal, truths about the world we live in. By representing themselves as truth, fictions obscure reality. As Fuller pointed out, legal fictions can lose their usefulness and may even pose a danger to the legal system when they are used without the full realization or acknowledgement of their falsity because one can fail to see them for what they are - mere tools used as aids in legal reasoning. Vaihinger was also keen to emphasize the point that subjective fictions do not have a corresponding objective reality.

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the vine”); See also, Aviam Soifer, Reviewing Legal Fictions, 20 GA. L. REV. 871, 874 (1986) (“Hardly anybody in the United States talks much about legal fictions these days”).

88 Smith, New Legal Fictions, supra note 17 (exploring six reasons why judges rely on new legal fictions – legal fictions that “a judge deploys … in crafting a legal rule on a factual premise that is false or inaccurate” – and suggesting that although judges may have great reasons to rely on new legal fictions, judges also do not generally acknowledge the falsity of their premises. For this reason, new legal fictions may deceive the public and hide the normative choices that judges make).

89 Nancy J. Knauer, Legal Fictions and Juristic Truth, supra note 17 (describing the use of new legal fictions in the areas of empirical legal studies, law and literature, and complex statutory schemes and distinguishing these new fictions from classical fictions, which are transparently and demonstrably false; Knauer argues that more recent scholarship on new legal fictions change – rather than add on to – conversations about the law because these scholarship involve analyses of fictions that are assumed to be (but cannot be proven to be) false).

90 FULLER, LEGAL FICTIONS, supra note 21 at 9 (“In practice, it is precisely those false statements that are realized as being false that have utility”).

91 VAIHINGER, THE PHILOSOPHY OF ‘AS IF’, supra note 42 at 49. Commenting on the use of fictions in the field of moral philosophy, Vaihinger states:

“the real principle of Kantian ethics [is] that true morality must always rest upon a fictional basis. All the hypothetical basis, God, immortality, reward, punishment, etc. destroy its ethical character, i.e., we must act with the same seriousness and the same scruples as if the duty were imposed by God, as if we would be judged thereof, as if we would be punished for immorality. But as soon as this as if is transformed into a because, its purely ethical character vanishes and it becomes simply a matter of our lower interests, mere egoism.”

Vaihinger also cautions against mistaking a familiarity with the fiction for the truth of the matter when he, in describing “space” as a mathematical fiction, states:

“space is a subjective construct because it is full of contradictions. It is a character of all true fictions that they contain contradictions and the concept of space is simply riddled with them. The conceptual construct of space has been invented and given form by the psyche with a view to bringing order into the events which it encounters - the chaotic and contradictory mass of sensations. Space is a construct with which we have become gradually familiar, and which on account of its familiarity appears to be real and entirely harmless.”

Id. at 53.
When legal fictions are embraced as if they are true representations of reality, instead of mere mental constructs that are necessary to lead one to the truth, they cease to be that useful tool upon which legal institutions can depend to ensure that “the conscience of equity find[s] expression.” Fictions lose their utility as an aid in legal analyses when one uses them without full consciousness of their fictitiousness or recognition of their purpose as an intellectual link to a more fundamental but less understood reality. The recognition of a legal rule as fictitious keeps that rule in the service of the legal system; its use helps more fundamental legal principles become discernible. However, when a legal fiction is taken seriously or used without conscious awareness of its false premises, the fiction transforms into a legal rule that controls the workings of the legal system rigidly. Rather than serve the legal system, such fictions cause trouble as more fundamental truths in the field are blurred by these conceits of the human mind. If not clearly seen to be fictitious, fictions may be taken to be lawfully, philosophically, and morally instructive.

Legal fictions have the potential to be particularly troublesome because they work as support structures to the law. Though there are many diverging views - and continuous disagreement among legal theorists - about what the law is, law is generally considered a command imposing obligations. Legal rules have a veneer of legitimate authority surrounding them and as Joseph Raz asserted, “it is an essential feature of law that it claims legitimate authority.” The promulgation of law can be taken by the public to be also conclusive in stating

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93 FULLER, LEGAL FICTIONS, supra note 2 at 9-10 (“A fiction taken seriously, i.e., “believed” becomes dangerous and uses its utility. It ceases to be a fiction in that a fiction must either be (1) “a statement propounded with a complete or partial consciousness of its falsity” or (2) “a false statement recognized as having utility”).
94 H.L.A. HART, THE CONCEPT OF LAW 1 (1961). As one of the most influential positivists, Professor Hart states the devotion given to the question of what is law in the following terms: “Even if we confine our attention to the legal theory of the last 150 years and neglect classical and medieval speculation about the ‘nature’ of law, we shall find a situation not paralleled in any other subject systematically studied as a separate academic discipline. No vast literature is dedicated to answering the question ‘What is chemistry?’ or ‘What is medicine?’, as it is to the question ‘What is law?’”
95 Id. at 6 (“The most prominent feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in some sense obligatory.”)
96 Most people believe that the governing person or institution has legitimate authority for a variety of reasons. It suffices for a person or institution to claim effective authority as long as some part of the relevant population believes that the person or institution has legitimate authority. See, JOSEPH RAZ, AUTHORITY OF THE LAW: ESSAYS ON LAW AND MORALITY 28-30 (1979).
the truth of the matter. But since human language is limited in its range of expressions and the use of fictions is sometimes necessary to ease communication or to convey a message, legal fictions are essential in the law. For legal fictions that are not evidently false or explicitly acknowledged by the law to be false statements, it may become easy for the public to think that false legal statements are indeed true. When fictions in the law transform into binding legal principles and as public acceptance of law as legitimate authority causes individuals to be desensitized to the fallacies of legal fictions, important evidence and logical arguments about fundamental legal, historical, and sociological truths about human ontology may be ignored or dismissed as irrelevant and self-deception occurs.

This self-deception defeats the very purposes for which fictions are employed. Since the benefits of fictions are the furthering of understanding in the field, aiding with the conceptualization of reality, and establishing common-ground for conversation and intellectual exchange, development in a field will be hindered when the use of fictions results in this type of self-deception. As the challenge of grappling with the more difficult reality in a field is diverted by the fallacy that one believes is true, the need to pursue deeper inquiries about the field is lost. One’s actual blindness to the truth or one’s choice to ignore it effectively prevents further inquiry into other evidence and information that might lead to different and contradictory conclusions. The fiction, which was actually a figment of the intellect, appears to be a genuine and neat condition of the field. Ignoring the deeper truth of the matter in consideration through use of the

97 A speech is essentially a public act, which conveys to its recipient a message of how the maker of that speech sees and understands the world. There is a component of truth in what the speaker is saying because a speaker who intends to convey information to a hearer with socially accepted language structures will be committed to the truth of his beliefs and his expressions. Searle calls a speech act a “public performance” that communicates “something about the world represented by [one’s] beliefs and intentions.” John R. Searle, What is Language, supra note 7 at 37-9. Thus, when the law makes a statement, it would seem reasonable for the public to rely on the law’s belief that the statement is true.

98 While the psychology and philosophy of self-deception is beyond the scope of this article, Daniel Goleman offers a compelling account of how self-deception works, the reasons the mind concocts self-deceits, and the effects of self-deception on the human psyche. See DANIEL GOLEMAN, VITAL LIES, SIMPLE TRUTHS: THE PSYCHOLOGY OF SELF DECEPTION (1996). An interesting story of self-deception is the mind’s ability to numb pain in situations of extreme anxiety. Goleman cites the “curious detachment” David Livingston felt when a lion attacked him and shook him vigorously and quotes Livingston as stating that when the lion shook him, “[i]t caused a sense of dreaminess in which there was no sense of pain nor feeling of terror, though [I was] quite conscious of all that was happening.” Id. at 29.
fiction may keep the conversation within familiar grounds but that also blurs the pertinent - and often messier - questions and issues which need to be openly discussed.99

Thus, one may speculate that Professor Louise Harmon’s real concern with the importation of the doctrine of substituted judgement as applied by Lord Eldon in *Ex parte Whitbread*100 into the law of informed consent in medical cases, is less with the importation of the legal fiction itself than with the law’s pretense that the mental states and intentionality of the incompetent can be objectively accessed and determined.101 In her article, Professor Harmon describes the importation of the doctrine of substituted judgement from the law of estate administration of lunatics - a lunatic being someone who has been legally adjudicated as being of unsound mind and no longer capable of managing his or her own financial affairs102 - into the law of informed consent in medical intervention cases. The doctrine that was developed to manage the property of a lunatic has now been used for completely unrelated and essentially mismatched situations from “the removal of vital tissues to the termination of life-support systems, from the sterilization of the mentally retarded to the forced medication of the mentally ill.”103 To Harmon, the importation of the doctrine of substituted judgement into the law of informed consent allowed the state to “invade the bodily integrity of the incompetent without having to justify the invasion.”104 By relying on the doctrine of substituted judgement, the courts are able to quietly make normative decisions where there greater utility is chosen for “others [who] are going to benefit from the use of the incompetent’s body, by taking parts of the body, by relieving them of the presence of the body, be ensuring the barrenness of that body, or by restraining the body through chemistry.”105

99 GOLEMAN, id. at 197-201 (describing how humans see what they want to see and hear what they want to hear by constructing their own social reality within “frames” as a commonly shared understanding of social activity, the individual’s role in that activity, and how that activity should play out according to an expected and assumed sequence of events called “scripts.” These frames with scripts tell us what to focus our attention on and to ignore everything else outside that frame and script. The frame therefore “directs attention away from all the simultaneous activities that are out of that frame” and “defines a narrow focus where the relevant schemas direct attention, and a broad, ignored area of irrelevance.” Id. at 201.

100 Ex parte Whitbread, 2 Meriv. 99, 35 Eng. Rep. 878 (Ch. 1816).

101 Harmon, *Falling off the Vine, supra* note 17.

102 Id. at 16.

103 Id. at 54.

104 Id. at 61.

105 Id. at 61-2.
Reliance on the fiction of substituted judgement and the fallacy that the mind and intent of an incompetent patient is somehow accessible by the court from a reasonably objective rather than a individually subjective view point had allowed the courts in some cases to ignore factual evidence of the patient’s actual intentionality\textsuperscript{106} or other indication that a chosen course of action may not be in the patient’s best interest.\textsuperscript{107} The doctrine of substituted judgement however did not further understanding about the law of informed consent by offering more practical understanding of the role of law in cases where a person who is not able to make decisions for his or health comes before the court; what would the right thing be for the law when family members make petitions to the court to substitute judgement for the patient and it violates the bodily integrity of the incompetent? Conceivably, an examination of the doctrine of substituted judgement as applied to the law of informed consent should say something about the fundamental nature of the law. Good legal fictions should reveal fundamental things about the law, such as its intrinsic values, its priorities, or its foundational principles, that will help one understand the law better. For example, the fiction of the constructive trust reveals that one of the law’s purposes is to promote justice especially when one party is unjustly enriched at the expense of another; the fictions of the fertile octogenarian and precocious toddler reveals that one of the law’s goals is to ensure that private property can be exchanged freely on the market; and the fictions of constructive notice and constructive eviction reveal that the law will not protect a person who relies on an omission, oversight, or negligence to escape legal obligations after causing harm others who depend on the law for protection.

By Harmon’s account, the fiction of substituted judgement as used in the law of informed consent does not seem do this. The doctrine hasn’t told us what the law’s priorities are when it comes to protecting an incompetent person from decisions that others believe to be best for him or her.\textsuperscript{108} Neither has it told us what the law’s values are. Is it freedom and if it is, whose

\textsuperscript{106} Id. at 30 (citing \textit{Sheneman v. Manring}, 107 P.2d 741 (Kan. 1940), where evidence indicated that Mr. Dautschmann did not have a relationship with his daughter and could possibly not have given her money even if she was destitute was not considered by the courts).

\textsuperscript{107} Id. at 53-4 (citing \textit{In re Byrant}, 542 A.2d 1216 (D.C. 1988), where the trial court ignored the possible harm to the patient’s health from the administration of psychotropic drugs and substituted its judgement for the patient’s to give her the drug because a “reasonable, competent person in the incompetent’s situation would have” chosen to take the medication).

\textsuperscript{108} According to Harmon, the doctrine of substituted judgement has been used to terminate life-support systems and authorize the sterilization of incompetent women at the request of the incompetent’s family members although in
freedom is the law concerned with? Is that value justice, and if it is, justice for whom? The doctrine of substituted judgement does not seem to provide any answer to these questions and clarify our understanding of the law.¹⁰⁹ Instead, the doctrine of substituted judgement seems to have let the law avoid more challenging and pressing questions about the morality of utility-based decisions that impacts the dignity of an individual by focussing on the fallacy that judgement for the incompetent person can be reasonably substituted. But that may be the wrong focus. The focus may have to be on whether granting someone else’s request for substituted judgement allowed someone else’s personal interest to prevail over what was best for the incompetent person just because that person does not have a voice. The fallacy that judgement can be substituted by objective means obscured a more important ethical and moral issue that should be discussed openly. As Harmon points out, “taking organs from incompetents, terminating their life-support systems, sterilizing them, and forcing psychotropic medication upon [incompetent individuals] all raise deeply disturbing moral issues. And those deeply moral issues should be examined by the light of day, not hidden in the dark.”¹¹⁰ An examination of these moral issues may help us arrive at a more fundamental truth about some of the most important values of the law or at least, challenge us to figure out what those values are. If it is generally accepted that the law has legitimate authority over its people¹¹¹, one would hope that the law would look out for the people it has authority over and place value in the lives of human beings as ends in themselves. The fallacy that judgement for an incompetent can be substituted should only be used with the full awareness that it was necessary to arrive at a just and fair outcome for the incompetent and his or her caregivers.

The doctrine of substituted judgement is but one example of a troublesome fiction. Thus far, we have discussed the nature of legal fictions, why they exist in the law, and when they can potentially become troublesome. Fictions become troublesome because we do not see them for their falsity and believe that they are accurate statements of reality. As troublesome fictions may be taken as a statement about reality, they must be treated with caution and we must question our

¹⁰⁹ Harmon believes that the doctrine of substituted judgement will evolve into other areas of the law but it is unclear which area of the law will borrow the doctrine to make decisions for incompetent people. Id. at 54-5
¹¹⁰ Id. at 62.
¹¹¹ RAZ, supra note 75.
reasons for relying on them. Otherwise, they may obscure more important legal questions tucked beneath the austerity of the fiction. The remaining parts of this paper examines a fiction in the copyright system that is potentially troublesome - the doctrine of deemed authorship - and applies the analysis about legal fictions developed in the preceding parts. The doctrine of deemed authorship, which attributes the status of an author to the employer who engages creative talent to produce works for hire, is a difficult concept because it allows an employer to claim to be the “author” of the work despite the fact that the work was actually created by someone else. The concept is particularly troublesome as a legal fiction because it puts the employer in the same category as the author or creator of the work without making finer distinctions about their role and contribution to the final product. The fiction of the employer-author obscures important constitutional questions left unanswered about who an author is and what the law expects of a person designated as an “author.”

Although legal fictions are in themselves benign and even essential to maintaining the law’s integrity, they can also be harmful to legal analysis and critical thinking about legal principles. It will become more difficult to think clearly about what a law ought to achieve and make sense of it when legal institutions replace social and economic realities with fictionalized suppositions about people, norms, and beliefs. The essence or core morality of the law to preserve human dignity and the common good will be lost should legal fictions be used carelessly to a point where they conceal underlying truths about an injustice or inequity and prevent remedial measures from being taken.112 In hiding normative choices that courts make, legal fictions may also produce the very unfairness that they were intended to prevent.113 That “[s]omething hidden, something potentially dangerous or brutal [that] can go beneath the surface

112 This idea that the essence of the law is the preservation of human dignity and the common good stems from the writings of classical natural lawyers. Aristotle, for example, claimed that there is a “natural” way to govern people and protect the community’s interest in what is just. ARISTOTLE, NICOMACHEAN ETHICS 92-93 (Roger Crisp. ed., 2011). See also ST. THOMAS AQUINAS ON POLITICS AND ETHICS 44 (Paul E. Sigmund trans. & ed., 1988) (“law must concern itself ... with the happiness of the community”). In a recent article, Leslie Meltzer Henry documented the frequency in which the ideal of dignity is evoked in Supreme Court decisions, noting that more judges are depending on the concept of dignity to reach hard constitutional decisions. Leslie Meltzer Henry, The Jurisprudence of Dignity, 160 U. PA. L. REV. 169, 178-81 (2011).
113 Smith, New Legal Fictions, supra note 17 at 1349 (“judges’ purported factual suppositions sometimes are devices, conscious or not, for concealing the fact that the judges are making normative choices in making legal rules”).
of a legal fiction”\textsuperscript{114} is perhaps the unfairness, the iniquity, and the immorality that would likely result from the irresponsible use of legal fictions. We, as jurists and scholars, must see the unfairness, the iniquity, and the immorality that can sometimes be hidden beneath a legal fiction and deal with unfairness, iniquity, or immorality appropriately by recognizing the reality that is concealed by the fiction.

To analyze the potentially troublesome effects of the fictionalized employer-author and discuss the analytical difficulties in the concept of deemed authorship, the remaining portions of this paper will examine the concept of deemed authorship and its rationale, history, and institutionalization in copyright law. This part of the article juxtaposes the rational, history, and institutionalization of the fiction against more fundamental questions about originality, authorship, and the role of markets in promoting the progress of science permeating throughout copyright law and theory. What follows will be a discussion of how to engage with the legal fiction and recognize its falsity in order to initiate a conversation about the more difficult questions in copyright law. As a final observation on the doctrine of deemed authorship, this paper contemplates the benefits for the legal system when a legal fiction does not deceive but rather illuminates the law and makes the law a more effective language that communicates conventional behavioral expectations between a legal institution and its subjects.

III. ANALYTICAL DIFFICULTIES IN THE CONCEPT OF DEEMED AUTHORSHIP

It may be fitting to start the discussion on deemed authorship by noting that central to the copyright system is the rule on originality, which requires a literary or artistic work to originate from and be original to an “author.”\textsuperscript{115} Before copyright law will consider a literary and artistic work sufficiently creative to be eligible for copyright protection, the work must be conceived by an author, who for all intents and purposes, is the actual creator of the work.\textsuperscript{116} An author must write his book, a composer must compose his music, and an artist must paint his picture for

\textsuperscript{114} Harmon, \textit{Falling Off the Vine}, supra note 17 at 70.
\textsuperscript{116} Id. at 345 (“The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means that the work was independently created by the author ... and that it possesses some minimal degree of creativity.” The court goes on to say that “[o]riginality is a constitutional requirement” and that it is “unmistakably clear” that the terms “authors” and “writings” “presuppose a degree of originality”).
copyright law to apply. This rule on originality precludes works that are mere copies of another work from copyright protection; copies being unoriginal works and therefore non-attributable to an “author.”\textsuperscript{117} A pirate is not an author because he copied the work and did not create it; the work did not originate from him. The author therefore, being the person from whom the work originated, is pivotal to copyright. An unauthorized use of a work will never be an infringement of copyright if the individual asserting infringement is unable to prove that the work was a product of original thought, conception, and intellectual production. The work must owe its origins to an author.\textsuperscript{118}

The concept of deemed authorship is the notable exception to this rule on originality. It modifies the rule that a work must be original to the author to be classified as a “work of authorship” by allowing someone other than the real creator of the work to be deemed the author and first owner of copyright.\textsuperscript{119} The legal practice of deeming authorship on someone other than the work’s actual author appears to be initially contemplated by the courts between 1860-1869. In this period, the courts were trying to manage assignments of copyright between an employer and its employee and default rules for the initial allocation of ownership rights in creative works had to be established.\textsuperscript{120} In 1885, the Court of Appeals in New York decided that a corporation owned the copyright in an employee’s work because the corporation’s president, himself a respectable artist, was personally involved with and had supervised the design and production of

\textsuperscript{117} The rule is now codified in Section 102 of the Copyright Act 1976, which states that “[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression...” (emphasis added). 17 U.S.C.A. §102 (2013).
\textsuperscript{118} Burrow-Giles v. Sarony, 111 U.S. 53, 59-60 (1884) (copyright is limited only to works that “embody the intellectual conceptions of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the Constitution in securing its exclusive use or sale to its author.” To prove infringement, “the existence of those facts of originality, of intellectual production, of thought, and conception” must be shown). See L. Baitlin & Son, Inc. Snyder, 536 F.2d 486 (2d Cir.) (here the court sustained a preliminary injunction restraining the enforcement of copyright because the work was essentially a copy of a design patent in the public domain and therefore lacked originality).
\textsuperscript{119} Usually, the actual author is considered the first owner of copyright. Section 201(a) of the 1976 Copyright Act states: “Copyright in a work protected under this title vests initially in the author or authors of the work.” See, 17 U.S.C.A. §201(a) (2013).
\textsuperscript{120} Catherine Fisk, Authors at Work: The Origins of the Work-For-Hire Doctrine, 15 YALE J. L. & HUMAN. 1, 33-43 (2003) (describing the law’s transition from favoring the author to favoring the employer by basing their decisions on other factors besides originality in a copyrightable work e.g. making adaptations to the work and owning workplace knowledge). The default rule at that time was however pro-employee. A principle that favored employer ownership of copyright was only mentioned in dicta. Id. at 44.
the employee’s creative work.\textsuperscript{121} Eighteen years later, in \textit{Bleistein v. Donaldson Lithographic Co.}, a more explicit statement that employers could be authors of their employee’s work was made when the Supreme Court permitted an inference that the employer owned copyrights to works designed by “persons employed and paid by the [employers] in their establishment to make those very things.”\textsuperscript{122} The concept of deemed authorship was codified into Section 26 of the 1909 Copyright Act\textsuperscript{123} and later into Section 201(b) of the current Copyright Act of 1976\textsuperscript{124} as the work-for-hire doctrine.\textsuperscript{125} The codification of the fiction of the employer-author into these copyright statutes entrenched the legal fiction into the law. The fiction of the employer-author is, however, an analytically difficult concept that challenges understanding about notions of the author and authorship, market functions and how markets encourage creative production, and what the progress of science means. The fiction also obscures answers to persistent questions in copyright law.

\begin{itemize}
\item \textsuperscript{121} Schumacher v. Schwencke, 25 F. 466 (C.C.S.D.N.Y. 1885). \textit{See also} Mutual Advertising Co. v. Refo, 76 F. 961 (1896).
\item \textsuperscript{122} Bleistein v. Donaldson Lithographing Co. 188 U.S. 239, 248-9 (1903).
\item \textsuperscript{123} Section 26 states: “the word “author” shall include an employer in the case of works made for hire.”
\item \textsuperscript{124} Section 201(b) states: In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” \textit{See}, 17 U.S.C.A. §201(b) (2013).
\item \textsuperscript{125} The work-for-hire doctrine in copyright law is the embodiment of the fiction of the employer author. The doctrine treats an employer, who employs a creator who produces literary and artistic works, as the author of the work and not merely the owner of copyright. The idea of attributing authorship status to someone other than the author was not employed by the courts as rhetoric to remedy an injustice or adjust laws to evolving social conditions. Instead, the concept of deemed authorship was used to assure the transferability of authorial status (and with it the initial allocation of copyright) and grant property rights in creative works to the party who employed the creator. In allocating authorial rights over the work to an employer, copyright law chose to protect the work’s economic value but by doing so, compromised on protecting the creator’s human dignity and minimized any personal connection that the creator may have with to the work.
\end{itemize}

In the two cases before the work-for-hire doctrine was codified into the 1909 Act, the courts held that the employer and the commissioner of a work owned the copyright to it. \textit{See} Collier Engineer Co. v. United Correspondence Schools, 94 F. 152 (C.C.S.D.N.Y. 1899) and Dielman v. White, 102 F. 892 (C.C.D. Mass. 1900). In Dielman v. White, the court stated that:

\begin{quote}
“In general, when an artist is commissioned to execute a work of art not in existence at the time the commission is given, the burden of proving that he retains a copyright in the work of art executed, sold, and delivered under the commissions rests heavily upon the artist himself. If a patron gives a commission to an artist, there appears to be a very strong implication that the work of art commissioned is to belong unreservedly and without limitation to the patron.” (emphasis added). Dielman v. White, \textit{id.} at 894.
\end{quote}

The work-for-hire doctrine is reminiscences of the patronage system of the pre-literary market place of the late seventeenth and eighteenth centuries where authors provided literary services for wages and certain state privileges. At that time, “the concept of an author owing a work did not quite fit the circumstances of literary production in the traditional patronage system.” \textsc{Mark Rose}, \textsc{Authors and Owners: The Invention of Copyright} 16-7 (1993).
Some scholars have asked for studies to be conducted to evaluate the implications of the work for hire doctrine\textsuperscript{126} and such studies may ultimately reveal that deeming authorship on someone other than the actual creator compromises the authenticity and quality of the work produced.\textsuperscript{127} Since the fiction of the employer-author is a concept that contradicts what is socially and perhaps intuitively known of a human creator and author of a creative work\textsuperscript{128}, a study of its implication on creative output may help us understand how pecuniary and non-pecuniary rewards affect the production of creative works in terms of their value to progress. Contextualizing the fiction of the employer-author would allow for conversations about other under-conceptualized but important areas of copyright law, such as the role of the author in promoting progress together with the notions of authorship, originality, and authenticity and what they actually mean or should mean in the law, to begin earnestly.

Analytical difficulties with the concept of deemed authorship may exist because copyright law has a very nebulous idea of the author. It would matter less if the law were to deem authorship on someone other than the true author in specifically defined situations if the understanding of who the author is and what authorship actually means in the law was sound. But we don’t have a clear understanding of the author or authorship. As the author is considered by law to be the person from whom a work originates and is important in determining consequential issues in copyright law such as the durational span of the copyright term\textsuperscript{129}, claims

\textsuperscript{126} Richard Colby, \textit{Works Made for Hire in International Copyright Law}, 3 LOY. L.A. ENT. L. REV. 87 (1983) (noting that Professor Mario Fabiani of Rome University has suggested that scholars initiate studies on the problems related to the protection of “salaried authors”). See also Rochelle Cooper Dreyfuss, \textit{The Creative Employee and the Copyright Act of 1976}, 54 U. CHI. L. REV. 590, 638 (1987) (suggesting that studies should be done for institutions that try to assert authorship over academic writings).

\textsuperscript{127} Dreyfuss \textit{id.} at 591 (arguing that the progress of science is dependent not only on the quantity of creative works produced but also on the quality of these works).

\textsuperscript{128} Normally, the author is someone who is somehow connected personally to the work because he or she created it. See Burrow-Giles Lithographic Co. v. Sarony, \textit{supra} note 117 at 58 (1884). In \textit{Burrow-Giles}, the court defined an author as “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.” In Bleistein v. Donaldson Lithographic Co., \textit{supra} note 121 at 250 (1903), the court decided that chromolithographs used to advertise a traveling circus may be copyrightable because, though they were intended to reproduce actual things, they were also the “personal reaction of an individual upon nature.” Justice Holmes, who wrote the decision went on to state: “Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone.”

\textsuperscript{129} Generally, the copyright duration for works is measured against the life of the author. Under section 301(a) of the 1976 Copyright Act, a copyright shall endure for a term “consisting of the life of the author and 70 years after the author’s death.” 17 U.S.C.A. §301(a) (2013).
to moral rights, and termination or renewal of copyright, it is ironic that the author is not explicitly defined in the law. Section 102 of the 1976 Copyright Act does defines a work of authorship with more precision to include works of a literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, or audiovisual nature. And from that, one may presume that these works must be created by a natural person - a human author, artist, composer, playwright, photographer, designer or other creator. But neither statutory law nor case-law in the United States has confined the definition of the “author” of a literary and artistic work to natural persons. The author does not have to be someone who manages to translate their intellectual idea or mental imagery into literary, musical, or artistic expressions. It has also not helped that the

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130 Moral rights are the non-assignable non-waivable personal and creative rights of the author that protect the author’s integrity and personality. They are conceptually different from the author’s economic rights, which are transferrable and waivable under the law. Under Section 106A(a), the author of a work of visual arts is entitled to claim authorship or deny authorship to a work that has been distorted, mutilated, or modified in a manner that would be prejudicial to the author’s honor or reputation. The author also has the right to prevent the distortion, mutilation, or modification of a work that would be prejudicial to his honor or reputation and also prevent the destruction of a work of recognized stature. Section 106A(b) of the Copyright Act 1976 states that only the author of the work has these rights. 17 U.S.C.A. §106A(a) and (b)(2013) (emphasis added).

131 Under Section 24 of the 1909 Act, the copyright term was divided into two separate terms of 28 years each. The renewal right to the second copyright term belonged to the author of the work and his spouse and/or children if the author is no longer alive at the time of copyright renewal. This durational division of copyright term was brought under the 1976 Act for works that were still protected by copyright as of January 1, 1978 and provided authors with an additional right to terminate license grants for the second copyright term. Under Section 304(c) of the Copyright Act 1976, the author of the work created before January 1, 1978 is entitled to terminate licenses granted over the renewal copyright or any right under it. Section 304(c) expressly excludes works for hire. 17 U.S.C.A. §304(c) (2013).

The 1909 Act with two copyright terms applies to works published in compliance with copyright formalities before January 1, 1978 and the 1976 Act with a single copyright term applies to works fixed in a tangible medium of expression after January 1, 1978.

132 “Works of authorship” is defined as including literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works. 17 U.S.C.A. §102(a) (1)-(8) (2013).

133 The Court of Appeals in the Ninth Circuit seemed to suggest just that when it stated that the word “author” in the copyright statute “is taken from the traditional activity of one person sitting at a desk with a pen and writing something for publication.” The court goes on to state that “[t]he word is traditionally used to mean the originator or the person who causes something to come into being, or even the first cause, as when Chaucer refers to the “Author of Nature.”” Aalmuhammed v. Lee, 202 F.3d 1227, 1232 (2000).

134 The Copyright Act 1976 does not define who an author is under its definitions section, Section 101. Neither does the Copyright Act 1909 in its own definitions section, Section 26. Other than the statements that the author is the creator of an expressive work, very little else has been said of the author in case law. See, Burrow-Giles Lithographic Co. v. Sarony, supra note 117. It is also worthy to note that while the court in Aalmuhammed v. Lee, id., indicated that an author should be a human person who creates a work, the issue the case centered on the ownership rights of a subject matter expert, who made creative contributions to a movie and attempted to claim joint ownership for his contributions to the script as a co-author. Since Warner Brothers as the producer of the movie made everyone who worked on the movie sign work-for-hire agreements, it - a movie studio - was considered the actual author of the work. For a discussion of the issues in this case and the special problems with authorship in the
main international convention on copyright law, the Berne Convention for the Protection of Literary and Artistic Works, aiming to protect the “rights of authors in their literary and artistic works”\(^{135}\), has also been silent on the definition of an author. This has inevitably caused uncertainty about who an author should be among different copyright jurisdictions.\(^{136}\) It is noted, however, that countries, which view copyright as an author’s personal right, have copyright laws that reserve authorial status only to natural and not juridical persons or corporations.\(^{137}\)

Recognizing that individual authors may have personal connections with the work may be important to encourage artistic and authorial commitment to producing authentic expressions for the progress of science.\(^{138}\) Given that the law’s goal to promote progress of science is attained through the writings of authors\(^{139}\), the law encourages authors to create through exclusive rights granted over creative expressions.\(^{140}\) The grant of these rights presuppose that economic incentives are the primary motivation for creativity - as the theory goes, the assignment and transfer of these rights allow authors to capture the economic value of the work from the market, which in turn encourages creativity.\(^{141}\) There is nothing objectionable with the author being able

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\(^{135}\) Berne Convention on the Protection of Literary and Artistic Works, Jul. 24, 1971, art. 1 states: “The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.”

\(^{136}\) See PASCAL KAMINA, FILM COPYRIGHT IN THE EUROPEAN UNION 131 (2002) (“There is no definition of the term “author” in the Convention, and its usual meaning is still the subject of controversy’). Although from the inception of the Berne Convention, the term “author” has been understood to mean a natural person and not a legal or juristic person. See David Vaver, The National Treatment Requirement of the Berne and Universal Copyright Conventions (Part One), 17 IIC 577, 593 (1986).

\(^{137}\) Cass. 1e civ, Mar. 17, 1982, 42 J.C.P. 1983, 20054, note Plaisant (a juridical person cannot be recognized as an “author” under French copyright law); under art. 7 of the German Copyright Law of 1965, the author is the creator of the work, however, the law excludes juridical persons from the definition of “the creator of the work.” Only natural persons can be considered the author of the work. See also GRAHAM DUTFIELD AND UMA SUTHERSANEN, GLOBAL INTELLECTUAL PROPERTY LAW 86 (2008) (discussing both French and German laws).

\(^{138}\) Mazer v. Stein, 347 U.S. 201, 219 (1954) (noting that the main goal of the copyright system is to “advance public welfare through the talents of authors and inventors”).

\(^{139}\) The Constitution of the United States empowers Congress to “promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their respective Writings ...” Article 1, Section 8, Clause 8 U.S. Constitution.

\(^{140}\) These rights are the rights to reproduce the work, prepare derivative works based on the work, distribute the work, perform the work publicly, display the work publicly, and in the case of sound recordings, perform the work by means of a digital audio transmission. 17 U.S.C.A. §106 (2013).

\(^{141}\) Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. ‘The sole interest of the United States and the primary object in conferring the monopoly,’ this Court has said, ‘lie in the general benefits derived by the public from the labors of authors.’”). See also, Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).
to assign and transfer economic rights. The Constitution itself contemplates the alienation of ownership of specific rights granted under the law. But whether the Constitution contemplated the alienation of authorship through the fiction that another person, including a non-natural person, could be considered the author of a work (and not just the owner of the copyright assigned or transferred to it by the true author) - is a completely different matter. Would authors still create works that are authentic and true to their experience and reality if their identity as the author can be disassociated from them? Would works that are less authentic but more “marketable” have as great an impact on the progress of science as more authentic works?142

In his dissent in Scherr v. Universal Match Corp.143, Judge Friendly seemed to recognize the problem with the fiction of deemed authorship when he noted that the Constitution “authorized only the enactment of legislation securing ‘authors’ the exclusive right of their writings” and that it “would thus be quite doubtful that Congress could grant employers the exclusive right to the writing of employees regardless of the circumstances.”144 Some copyright scholars have also wondered if the work-for-hire doctrine is indeed constitutional and have expressed similar concerns about the work for hire doctrine’s constitutionality.145 The authors of a leading copyright textbook also pointed out the problem with deeming authorship on the employer is that:

142 Universities, for example, for more authentic expressions because of the academic freedom guaranteed to its teachers. Creative works from universities have a different impact on progress than creative works from economic-driven organizations. See e.g., Roberta Rosenthal Kwall, Moral Rights for University Employees and Students: Can Educational Institutions Do Better Than The U.S. Copyright Law?, 27 J.C. & U.L. 53, 79 (2000).


144 The drafters of the 1909 Act appeared to have thought that the Constitution intended to limit the word “author” to the original author of the word and “possibly ... frustrating the attempt to vest ownership in employers.” It is speculated that the drafters provided a statutory definition of the author to include an employer to circumvent the Constitutional limitation. By so doing, “[a]uthorship, as a constitutional requirement, was simultaneously accorded due respect and defined out of existence.” Bracha, The Ideology of Authorship Revisited, supra note 15 at 263.

145 Jane C. Ginsburg, The Concept of Authorship in Comparative Copyright Law, 52 DePAUL L. REV. 1063, 1090 (2003) (“Whatever the practical merits of the work for hire doctrine, the constitutional text supplies no grounding for it.”); Mark H. Jaffe, Defusing the Time Bomb Once Again - Determining Authorship in a Sound Recording, 53 J. COPYRIGHT SOC’Y. U.S.A. 139, 197 (2006) (“The Constitution provided Congress with the power to grants rights to those who create original works of expression. If those rights are denied to those who ought to be entitled, the validity of Congress to enact and enforce laws under the Copyright Act is undermined.”); Roberta Rosenthal Kwall, Authors in Disguise: Why the Visual Artist Rights Act Got It Wrong, 2007 UTAH. L. REV. 741, 749-50 (2007) (“By simply positing that the employer becomes the author, the work-for-hire doctrine gives no consideration to the consequences of deeming the employer to be the physical source of the creation”).
“an employer qua employer cannot by definition be regarded as an “author” and therefore in the absence of an assignment from his author-employee may not constitutionally be entitled to claim copyright ... A constitutional defense of Sec. 201(b) of the current Act, and of Sec. 26 of the 1909 Act merely on the basis that Congress has created a sort of legal fiction in regarding an employer as the author renders meaningless the Copyright Clause’s use of the term. If Congress may “deem” an employer to be the author, is there any limit to the other classes of persons (besides the true author) who may be the recipient of Congressional beneficence in this manner?”

Deeming authorship on someone other than the true author of the work may also run counter to human logic and experience with significant effects on social and cultural norms. Logic seems to infer that creativity and authorship are intellectual activities that are innately human and cannot be divested because cognitive processes and expressions are as unique to an individual as his or her thumb print. Furthermore, experience seems to support a view that many authors identify with their work as their personal creation and expression, which communicates who they are, what they think, and how they feel to the rest of the world. However, when corporate employers and commissioners of creative individuals are recognized as the actual author of the work and initial owner of copyright, the law deprives the real creator of his identity as the author of the work. And if the identity of an individual as the author qua author can be isolated and deemed on another, who an author is has no legal significance. By deeming an employer or a commissioner of creative works as the author of a work, the actual

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146 MELVILLE B. NIMMER ET. AL., CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF ENTERTAINMENT LITIGATION INCLUDING UNFAIR COMPETITION, DEFAMATION, PRIVACY 373 (2005) (citing Bailey v. Alabama, 219 U.S. 219, 239 (1911), for the authority that the “power to create presumptions is not a means of escape from constitutional restrictions”).

147 Tom Cochrane, Expression and Extended Cognition, 66 THE JOURNAL OF AESTHETICS AND ART CRITICISM 329 (2008) (arguing that there is an “extremely intimate connection between the emotional content of the music and the emotional state of the person who produced that music”).

148 John T. Cross, An Attribution Right for Patented Inventions, 37 U. DAYTON L. REV. 139, 146 (2012) (“Creating a work of art or literature can be an intensely personal process. In many cases, the author creates because of a desire to express her own observations about the world around her”).
This does not mean that the fiction of deemed authorship does not have its practical utility. The fiction allows the law to treat a single person or entity as the author and first owner of copyright in situations where many individuals collaborate to produce creative works. In such cases, one person or entity, whose name is used to disclose the work to the public, is represented to the world as the author of the collective work. Peer production over the Internet age also involve many individuals who collaborate in a decentralized way by relying on social - rather than economic - incentives to produce new forms of information, knowledge, and cultural materials on a massive scale. Deemed authorship is a useful tool to mobilize millions of individuals to collaborate with a designated “author” on a creative project in which they believe in and support - even when not remunerated financially. The “author” in this case has strong mobilizing power. Deemed authorship is also useful in designating a single party as the initial owner of copyright for works that are an accumulation of different creative components. Cinematographic works are a prime example. As cinematographic works require creative input from multiple sources, a cinematographic work would most likely be a joint work with multiple copyright owners but for the work-for-hire doctrine. By deeming authorship on a single entity, author easily becomes disenfranchised from the role he or she has in promoting progress through creative expression.

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149 An example of the true creator of the work being disenfranchised is when he is deprived of moral rights protection. In Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 87-8 (1995), the court denied three professional sculptures injunctive relief sought to prevent the modification or destruction of their walk-through sculpture located in the building lobby of the defendants, who were the owners of the building that contained the sculpture. The court held that since the artists were employed by the previous building owner to design, create, and install the sculptures in the building, the sculpture was a work for hire. As the moral right to prevent the destruction of a creative work is only provided to works of visual art under the Visual Arts Rights Act, and as Section 101 excludes a work for hire from the definition of a “work of visual art,” the court denied the sculptors relief. See also infra note 159 for a discussion of employer-employee relationship and the work-for-hire doctrine in this case.


152 Many of these non-commercial projects involve pursuits that are scientific and involve inquiries for the common good of society. Individuals participate to contribute to a worthy goal. For example, the SETI@home project involves the search for extraterrestrial intelligence; Folding@home is a protein folding stimulation aimed at curing Alzheimer’s, Huntington’s, Parkinson’s, and many other cancers; Fightaids@home runs drug design software to evaluate the right candidate for drug discovery; and Genome@home models artificial genes that can be used to generate useful proteins. See id. at 82-3.

153 Section 101 of the 1976 Copyright Act defines a work for hire as:

(1) a work prepared by an employee within the scope of his or her employment; or
transaction costs of seeking multiple licenses from various contributors to a cinematographic
work would be significantly reduced.\footnote{\textit{\textsuperscript{154}}} Deeming authorship on the employer or commissioner
of a work may also allow a work to be distributed to the public more cheaply.\footnote{\textit{\textsuperscript{155}}}

The fiction of the deemed author may be efficient. It may also be equitable in some
situations to grant initial ownership of copyright to the author’s employer or commissioner of the
work. Through the work-for-hire doctrine, initial ownership of copyright may be allocated to a
single entity who may present the work to the public as it’s author and owner. The fiction creates
a bright line rule that is easy to apply. It makes the licensing of creative works easier with just
one instead of multiple authors; it encourages employers, commissioners, and connoisseurs of art
to invest in creative talent; and it allows creative works to be more efficiently distributed to the
public. There is no doubt that the fiction is useful in copyright law as most fictions of the law
are.

But Fuller’s\footnote{\textit{\textsuperscript{156}}} and Vaihinger’s\footnote{\textit{\textsuperscript{157}}} caution that fictions be only used with full awareness
of its falsity must be borne in mind. A fiction is neither truth nor reality. It is mere conceptual
construct invented to give substantive form to legal analyses. This cautionary approach to
fictions must be kept in mind to avoid analytical difficulties, which arise when the use of a
fiction is not accompanied by the explicit acknowledgement of its falsity. The recognition that
the real purpose for deeming authorship on someone other than the author in copyright law is to

\footnote{(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion
picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an
instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written
instrument signed by them that the work shall be considered a work made for hire.}

\footnote{17 U.S.C.A. §101 (2013).}
\footnote{\textsuperscript{154} John L. Schwab, \textit{Audiovisual Works and the Work-For-Hire Doctrine in the Internet Age}, 35 \textit{COLUM. J.L. 
& ARTS} 141, 146 (2011).}
\footnote{\textsuperscript{155} Trotter Hardy, \textit{An Economic Understanding of Copyright Law’s Work-Made-For-Hire Doctrine}, 12 \textit{COLUM. 
& VLA J. L. & ARTS} 181 (1987-1988) (arguing that the work-for-hire doctrine allocates copyright with the person most
able to exploit the work and bring it to the attention of the public because they have “greater resources, experience,
or better market position”).}
\footnote{\textsuperscript{156} FULLER, \textit{LEGAL FICTIONS}, supra note 70.}
\footnote{\textsuperscript{157} VAIHINGER, \textit{THE PHILOSOPHY OF ‘AS IF’}, supra note 71.}
consolidate ownership of copyright into a single entity must be clear.\textsuperscript{158} The fiction becomes troublesome when one forgets this reason and sees the fiction as truly divesting the real author of his or her rights. This will have the effect of obscuring the person of the author, alienating authorship, and devaluing the requirement of originality as the cornerstone of the copyright system. Each of these consequences are discussed in turn.

A. The Mystification of the Author

One of the more difficult feature of the concept of deemed authorship and the work for hire doctrine is that they obscure and mystify an already nebulous idea of the author. Since who an author is has never been explicitly defined in international or national copyright laws even though the author - being the creator of the work - is central to our understanding of the law\textsuperscript{159}, it is vital that the legal fiction, which recognizes someone other than the true creator of the work as its author, be used carefully to avoid the conclusion and mistaken belief that individual human


“\textsuperscript{159} The economic rationale for the 1976 Copyright Act's work for hire provisions is rooted in the well-documented problem of transaction costs. Clause (1) of the Act's work for hire definition resolves one aspect of this problem. If it were necessary for an employer to negotiate an assignment of copyright with each of dozens, or even hundreds, of employees each time they joined to create a copyrighted work, time and energy that could be better spent on creating new works would instead be devoted to the wasteful task of negotiating, drafting and executing contracts. When taken together with section 201(b), Clause (1)'s solution is to vest copyright initially in the employer; as stated in section 201(b), however, this is only a default solution, and in the relatively unusual case where the parties agree that the employee should own the rights in the work, they may transfer the rights accordingly.

Clause (2) of the 1976 Act's work for hire definition addresses an even more vexing problem of transaction costs: the problem of identifying ownership in collaborative works. With the possible exception of translations, each of the ten categories listed in Clause (2), including sound recordings, characteristically involves collaborative contributions among a large number of authors. Without the agreement contemplated by Clause (2), some of these contributions could take the form of joint works, some could be individual works - and some might even be works for hire under Clause (1). The ownership interests in such contributions would be speculative as well as multifarious, for it would rarely be clear what legal status - joint work, individual work, work for hire - attached to each contribution. By allowing the parties to definitively confer for-hire status on these works, Clause (2) promotes marketability by making it possible for parties to eliminate an otherwise chaotic state of copyright title, centering full ownership in a single individual or entity and thus facilitating the secure and fluent transfer of ownership interests over the life of the copyright.”

See, Burrow-Giles Lithographic Co. v. Sarony, supra note 117 and Aalmuhammed v. Lee, 202 F.3d 1227, supra note 132. See also Bracha, The Ideology of Authorship Revisited, supra note 17 at 188 (“The author plays an important role in popular understanding of copyright law”).


159 See, Burrow-Giles Lithographic Co. v. Sarony, supra note 117 and Aalmuhammed v. Lee, 202 F.3d 1227, supra note 132. See also Bracha, The Ideology of Authorship Revisited, supra note 17 at 188 (“The author plays an important role in popular understanding of copyright law”).
producers of creative works can easily have their rights divested by the law or that the creative contributions of these individual creators do not matter and are not significant to the progress of science. When the law designates an employer or a commissioner for whom the work was prepared as the author, especially when the law does not require the employer or commissioner to make any form of creative contribution to the work, the view that it does not matter who the actual author or creator of a work is becomes a foregone conclusion.

It certainly does not help that academic literature has not bolstered nor augmented this scant image of the author in copyright law. Well known scholars have promoted the idea that the author is barely more than a socially constructed metaphor developed to convince the public that creative works are a valuable market commodity. For example, in *The Author, Art, and The Market*, Professor Martha Woodmansee asserted that the author as original creator only emerged

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160 The Supreme Court has held that the hiring party need only have a “right to control the manner and means by which the product is accomplished”, as is defined in the general common law of agency, for a hired party to be considered an employee. If an employer has the right to control how the work is produced and its employee produces a work during the course of his or her employment, the work will be considered a work-for-hire and the employer will be considered the author of that work. Some factors that the court thought were relevant to the inquiry of whether an employment relationship existed between the hiring and hired parties are the level of skill required of the hired party to produce the work; the source of the hired party’s instrumentalities and tools; where the work was located; the length of the relationship between the hiring and hired parties; whether the hiring party has the right to assign additional projects to the hired party; how much discretion the hired party had over when and how long to work; how the hired party was paid; whether the hired party had a role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is running a business; whether the hiring party provides employee benefits to the hired party, and the tax treatment of the hired party.

See, Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-2 (1989). The Reid test was applied by the Second Circuit in Carter v. Helmsley-Spear, Inc., *supra* note 148, where the courts decided that the sculptors were employees even though they had “full authority in design, color and style,” and the employer only retained the “authority to direct the location and installation of the artwork within the building.” *Id.* at 80. The court seemed swayed by the other factors in the Reid test: The employers had also assigned additional projects to the sculptors and had “paid payroll and social security taxes, provided employee benefits such as life, health, and liability insurance and paid vacations, and contributed to unemployment insurance and workers' compensation funds on plaintiffs' behalf.” *Id.* at 86-7.

161 *See e.g.*, Fifty-Six Hope Road Music v. UMG Recordings, Inc. No. 08 Civ. 6143, 2010 WL 343490 (Feb. 1, 2010). This case involved the ownership of the renewal term of copyrights in certain sound recordings created by the singer-song writer Bob Marley before January 1, 1978. UMG’s successors-in-interest entered into a series of exclusive recording agreements with Marley, where Marley would be paid certain advances against his royalties for the creation of the sound recordings. The recording company registered itself as the author of sound recordings when it registered the recordings with the Copyright Office. After Marley’s death and when the copyright in the recordings came up for renewal, his widow, Rita sought a declaratory judgement that they were the owners of the renewal term for copyright in the sound recordings pursuant to Section 24 of the 1909 Act, *see supra* note 108. Cote, J. held that the sound recordings were works for hire, which made UMG the “statutory author” of the work, even if in the “common dictionary sense, Marley is the “creator or source of the Sound Recordings.” *Id.* at 18. He goes on to say that “[t]he fact that Marley may have exercised artistic control over the recording process ... is legally irrelevant; what is dispositive is that [the recording company] had the contractual right to accept, reject, modify, and otherwise control the creation of the Sound Recording.” *Id.* at 25-6.
when professional writers, seeking to earn their livelihood by writing for a burgeoning literary market in the 18th century, tried to redefine their roles in the production of literary works.\textsuperscript{162} According to Woodmansee, the repackaging of the writer as an author conjured up the image of an original and inspired genius; because an author’s inspiration emanated from within, his work was distinctly his product and thus his property.\textsuperscript{163} He was no longer a mere craftsman or writer. The idea of the “author” and the “original genius” allowed writers to justify earning their living through the commodification and commercialization of literary works. These ideas also convinced the reading public of the intrinsic value of their work.\textsuperscript{164} Thus, in this spirit, when \textit{Lyrical Ballads} was first received unfavorably by the public, Wordsworth quipped that any work of original genius including his own had the task of enlightening its readers by “widening the sphere of human sensibility, for the delight, honor, and benefit of human nature.”\textsuperscript{165}

Scholars who have studied copyright history in England and the United States have made analogous claims about the author in their writings. In his book \textit{Copyright in Historical Perspective}, Lyman Ray Patterson documented the tensions between state censorship and the stationer’s monopoly over the printing press, which culminated in the Statute of Anne as the first copyright law to protect authors by vesting in them rights to their books.\textsuperscript{166} Patterson however argues that the Statute of Anne was never intended to benefit authors and was instead a trade regulation statute to manage the book trade.\textsuperscript{167} Even with express statutory language protecting the author, the author still had not gain credence as an individual with rights in his creation. As Patterson claims, the monopolies in the book trade were so entrenched that the only way to break them up was to introduce the author as an independent right holder into the Statute of Anne; “the

\textsuperscript{162} \textsc{Martha Woodmansee}, \textit{The Author, Art, and The Market: Rereading the History of Aesthetics} 36 (1994).

\textsuperscript{163} \textit{Id.} at 37.

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Id.} at 39.

\textsuperscript{166} \textsc{The Statute of Anne} (8 Anne, c. 19 (1709)) states that:

“Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books ... the author of any book or books printed ... or bookseller ... printer ... or other person who hath purchased or acquired the copy or copies of any book or books in order to print or reprint [them], shall have the sole right and liberty of printing such book and books for the term of one and twenty years ...” (emphasis added).

\textsuperscript{167} \textsc{Lyman Ray Patterson}, \textit{Copyright in Historical Perspective} 143 (1968).
author was used as the weapon against monopoly.”

English scholar Mark Rose tells a slightly different story in *Authors and Owners: The Invention of Copyright*. There Rose observes a number of influential writers, such as Locke, Defoe and Addison, making claims to authorial rights in their works and gaining parliamentary prominence before the Statute of Anne. But Rose acknowledges that even while the drafters of the Statute of Anne were “sympathetic” to these claims, “the legislature drew back from making any statement about authors having an “undoubted property” in their writings.” As it is unclear if Parliament included authors in the Statute of Anne to implicitly recognize a fundamental authorial right or to grant them newly recognized legal rights in their work, history is no more instructive in providing shape to the notion of the author.

Other scholars have argued that the author is a mere “ideologically charged concept,” used in copyright law to mediate the “tension between access and ownership” that arise through the use of creative works or support the economic stakes that “copyright proprietors” have in the distribution of the work as “commodities.” The author provided these copyright proprietors some justification for ownership and the right to control the work exclusively. Literary critics have also contributed commentary to these amorphous statements about the author and what he is or is not. To Roland Barthes, the author is also a product of society. The author “is always conceived of as the past of his own book” and is in “the same relation of antecedence to his work as a father to his child.” But Barthes urges the literary critic to discard the view of the author as the person from whom the work originated to properly understand written text because to Barthes, a written work can only be properly understood when it comes together for the

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168 *Id.* at 147.
169 *Id.* at 48.
170 *Id.*
171 *Id.*
173 *Id.* at 500-01.
174 Proponents of a perpetual copyright after the Statute of Anne, particularly booksellers who were used to having perpetual rights until the statute reduced the term to twenty-one years, relied on the author’s common-law right to argue that it was an underlying right that was supplemented, rather than created, by statute. See PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE, supra note 166 at 152-79; ROSE, AUTHORS AND OWNERS, supra note 168 at 67-91. See also Millar v. Taylor, 4 Burr. 2303 (1769), and Donaldson v. Beckett, 1 Eng. Rep. 837 (1774) (the booksellers in both cases attempted to rely on the author’s right to claim perpetual copyright outside the Statute of Anne; they succeeded in Millar v. Taylor but did not in Donaldson v. Beckett).
175 Roland Barthes, *The Death of the Author*, in IMAGE-MUSIC-TEXT 145 (Stephen Heath trans., 1977)
176 *Id.*
reader, the work’s final destination. Hence, Barthes famously argues that “the birth of the reader must be at the cost of the death of the Author.” Michel Foucault had also assumed that the person of the author was not relevant to literary criticism - “the author had disappeared” he says. And instead of individualizing the author and linking him with his text, Foucault saw the author as a function of discourse. To the question, “what is an author?”, Foucault simply states that the author’s function is to “characterize the existence, circulation, and operation of certain discourses within a society.” Barthes’s and Foucault’s work have been influential in spreading the postmodernist view among copyright scholars that the author is a socially constructed metaphor that supported individualism, the privatization of creative production, and the commercialization of literary and artistic works, making the notion of the author only that more ambiguous in copyright law.

By designating the employer or the commissioner of a work as the author through the work for hire doctrine, any tangible conception of the author is diminished further. If the author is a mere social construct as these postmodern theories suggest, the persona of the author carries very little meaning and need not attach to the actual creator of the work nor to any real or natural

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177 Id. at 148 (observing that “a text is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is one place where this multiplicity is focused and that place is the reader, not, as was hitherto said, the author ... a text’s unity lies not in its origins but in its destination”).
178 Id.
179 Michel Foucault, What is an Author, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 121 (Donald F. Bouchard, ed., 1977).
180 Id. at 121-24
181 Id. at 124
182 Laura A. Heymann, The Birth of the Authority: Authorship, Pseudonymity, and Trademark Law, 80 NOTRE DAME L. REV. 1377 (2005) (borrows from Foucault and Barthes to argue that the author’s chosen identity serves as a trademark to prevent consumer confusion); Lior Zemer, The Copyright Moment, 43 SAN DIEGO L. REV. 247 (2006) (uses scholarship on authorial constructionism to argue that copyright law should protect all actors in the creative process); Lionel Bently, R. v The Author: From Death Penalty to Community Service, 32 COLUM. J.L. & ARTS 1, 15-6 (2008) (arguing that the works of Woodmansee, Rose, and others, led some “to argue that it is the mythical figure of the romantic author that has driven copyright expansion”); Olufunmilayo B. Arewa, The Freedom to Copy: Copyright, Creation, and Context, 41 U. C. DAVIS L. REV. 477, 506 (2007) (arguing that current copyright laws are unable to accommodate the practices of borrowing, copying and reuse of creative materials in the act of creativity because of “views of cultural production that derive from Romantic author conceptions”); Carys J. Craig, Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law, 15 AM. U. J. GENDER SOC. POL’Y & L. 207 (2007) (refers to the works of Foucault, Woodmansee and Rose to argue that copyright law’s emphasis on the author obscures the “communicative function of authorship”); ROSEMARY COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES 284 (1998) (“Rather than the Romantic expression of an author - the literary work that embodies his unique personality - the post(modern) text has no other origin than language itself.” (quoting Roland Barthes, The Death of the Author, supra note 150 at 146)); Coombe goes on to argue that the proliferation of information and communication technology has resulted in “a steady expansion of the fields in which authorship and new forms of cultural authority are claimed.” Id. at 285.
person; it may be deemed on any entity the law deems appropriate. A corporation, which has employees working to produce creative works such as movies, software, or music, is not the actual creator of the work. However, by satisfying the right conditions for employment which generates employee creativity, the law treats the employer as the author of the work. It would seem therefore that if the law is able to deem someone other than the true creator as the author of a work, then the author is indeed nothing more than a social construct in the postmodernist sense. But that view cannot be true. Author-publisher relations throughout history has shown that authors persist to be the supplier of creative works that publishers purchase and distribute to the public. The author as the creator of the work is not always the entrepreneur; sometimes the author is just the author, whose interest in the publication and distribution of authentic expression can easily become subsumed for the economic interest of his employer or publisher/distributor. Without clearly realizing that deeming authorship through the work for hire doctrine is useful only to circumvent the problem of transaction costs, the important role of the author in launching and supporting “lively cultural expressions” through authentic expressions for society will be surely missed.

B. THE ALIENATION OF AUTHORSHIP

Deeming authorship on the an author’s employer or a commissioner of a creative work also raises a fundamental question about whether a creator’s status as the author of a work can be alienated. Could the work for hire doctrine be based on a morally dubious supposition that authors can reasonably be expected to contract out their status as a work’s creator as easily as one could contract out the provision of creative services to another? Article 6bis of the Berne

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183 Even as author’s rights were not explicitly recognized, publishers still sought authors out and asked them for permission to publish their work. While publishers paid for the right to print and distribute the work, the author still retained rights to control any modifications to the work. Maureen A. O’Rourke, A Brief History of Author-Publisher Relations and the Outlook for the 21st Century, 50 J. COPYRIGHT SOC’Y U.S.A. 425, 429-30 (2003). See also, Alina Ng, Literary Property and Copyright, 10 NW. J. TECH. & INTELL. PROP. 531 (2012) (reviewing historical evidence showing that author’s retained rights in their works after publication and distribution rights have been assigned to the publisher).

184 William Cornish, The Author as Risk-Sharer, 26 COLUM. J.L. & ARTS 1, 12 (2002) (noting that authors’ rights jurisdictions such as Germany and France do not have copyright laws which are “mere pretexts for protecting the investment and entrepreneurial initiative of authors’ exploiting partners” and pointing out that copyright laws “which derive their legal and moral force from the act of creativity” and which protect an author’s rights are not the same as producers investment laws, which protect commercial investments in merchandise production).

185 Id. (suggesting that author have a large role to play in literary and artistic creativity).
The Convention separates an author’s moral rights from their economic rights and provides for the retention of an author’s moral rights even after the economic rights have been transferred to someone else.\footnote{186} The article actually treats the moral rights protecting the identity and integrity of the author as being inalienable of the author even while the rights to reproduce and distribute the work are transferrable and alienable. Some authors’ rights jurisdictions parallel Berne’s vision of the author’s copyright as twofold, comprising economic rights to profit from the sale of rights to commercially exploit the work on the market, which are are separable from the more basic authorial rights of integrity and paternity stemming from one’s status as the author and creator of the work. These moral rights are still retained by the author even after the economic rights to exploit the work have been transferred to another.\footnote{187}

Berne’s approach to the retention of moral rights even after economic rights have been transferred speaks to the normative value of protecting the personality of the author. As the creator of the work, the author has personal prerogative in deciding how the work will be received and perceived by society.\footnote{188} The separation of economic and moral rights and the retention of moral rights after the transfer of economic rights reveals a normative stance that the author’s personality and integrity should not be compromised just because he chooses to exploit the work by assigning various exclusive rights away. If moral rights are intended to protect the author’s “freedom, honor, and reputation,” these rights - like the rights to life or liberty - should also be inalienable as a matter of moral, ethical, and practical propriety.\footnote{189} Since history indicates that the right of an author to control the manner in which his work was published and publicly distributed was seen as a type of civil liberty, which protected an author’s personality in the way

\footnote{186} Article 6bis(1) of the Berne Convention states that:

“Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”


\footnote{188} Moral rights are concerned essentially with the author’s public reputation. Goldstein, *id.* at 285.

\footnote{189} Strauss, *The Moral Right of the Author*, *supra* note 162 at 515. Note however that many authors’ rights jurisdiction allow moral rights to be expressly waived by the author even though the law may state that they are inalienable i.e., non-transferrable. See Goldstein, *id.* at 291-2.
a person’s life or freedom would be protected\textsuperscript{190}, it seems fair to wonder if the author’s status as “author of a work” can be alienated from his person and deemed on another.

Legal scholars have intimated that some individual rights cannot be alienated. Calebresi and Melamed’s well known categorization of rules regulating and protecting entitlements into property, liability, and inalienable rules carves out a category of entitlements that may be justifiably forbidden from market transfer, such as when a transfer could produce greater inefficiencies affecting third parties or when a transfer may amount to an affront to social morality.\textsuperscript{191} An “author” may be one’s identity - an integral part of who someone is - that the cannot be separable from a person. The word “author” may be more than just a label the law puts on a designated entity; the word “author” may be so constitutive of who a person is - such as the words “mother,” “husband,” “man” or “woman” are constitutive of one’s identity as a human person - that alienating that identity and putting it on another person would make one less of a person.\textsuperscript{192} The separation of two doctrinally distinct rights of an author in Article 6bis of Berne may reflect an unspoken but general belief that the personal rights of a human author support his human flourishing on a fundamental level and should not be detached from his person for the sake of easing the commercialization of the work.\textsuperscript{193} By deeming authorship on someone other than the author without the realization and express acknowledgement that the reason for doing so is to concentrate \textit{ownership} rights to facilitate the licensing of creative works, copyright law may have made the mistake of concluding that a person’s identity as an author can be alienated without engaging in the more fundamental inquiry of whether it can - and should be - be at all.

C. THE DIMINISHMENT OF COPYRIGHT’S SINE QUA NON

\textsuperscript{190} Andreas Rahmatian, \textit{Non-Assignability of Authors’ Rights in Austria and Germany and its Relation to the Concept of Creativity in Civil Law Jurisdictions Generally: A Comparison with U.K. Copyright Law,} 5 ENT. L. R. 95, 97 (2000).


\textsuperscript{192} Thus a person’s character, moral beliefs, and personal experiences cannot be extracted from one’s personality, commodified, and sold in the market. To think that “the ‘same’ person remains when her moral commitments are subtracted—is to do violence to our deepest understanding of what it is to be human.” \textit{See} Margaret Jane Radin, \textit{Market-Inalienability,} 100 HARV. L. REV. 1849, 1906 (1987).

\textsuperscript{193} For this reason, authors’ rights jurisdiction protect the author of works that are able to bear the personality of the author such as intellectual works in the areas of literature, music, the fine arts, and film. \textit{See} Rahmatian, \textit{Non-Assignability of Authors’ Rights, supra} note 189 at 97.
Though it may be instinctive to think about the author as a natural person and the human genesis for a literary or artistic work, the work for hire doctrine undermines that instinct in copyright law by establishing that the author of the work need not be the person who created it. Granted, the copyright clause in the Constitution empowers Congress to promote the progress of science by securing exclusive rights to the writings of authors. \footnote{194}{U.S. Constitution Article I, section I, clause 8, \textit{supra} note 138.} But the copyright statute does not limit its definition of an author, as someone capable of possessing first ownership rights in creative works, to a natural person. Corporations will be considered authors under the work for hire doctrine as and when they meet certain legal criteria, such as employing creative individuals who produce creative works within the scope of their employment or specially ordering or commissioning the production of certain creative works. \footnote{195}{See 17 U.S.C.A. §201(b), \textit{supra} note 123 and §101, \textit{supra} note 152.} The actual work need not originate from the corporation or the deemed author in that the employer or deemed author need not be “he to whom [the work] owes its origins.” \footnote{196}{Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884), \textit{supra} note 117.} Furthermore, the person to whom the work owes its actual origin may not be its legal author who will possess first ownership rights in the work. The person to whom the work owes its origins may be the employee or commissioned author or artist and not the initial owner of legally allocated rights in the work necessarily.

As the concept of deemed authorship allows someone other than the actual author to be the first owner of copyright, the normative value of the requirement of originality in the law becomes questionable and the Supreme Court’s proclamation that “the sine qua non of copyright is originality” \footnote{197}{Feist Publication, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991), \textit{supra} note 114.} therefore becomes moot. Copyright law requires works to be original so that first ownership rights in the work can be firmly established and copyright allocated to secure the exclusive rights to exploit the work granted to authors under the Constitution. \footnote{198}{Burrow-Giles, 111 U.S. at 59 (The Supreme Court observed that some intellectual creations such as engravings, paintings, and printings “embody the intellectual conception of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the constitution in securing its exclusive use or sale to its author”).} While it must be noted that the law does not have high expectations of the author in terms of the level of creativity that the author should put into producing the work \footnote{199}{Feist, 499 U.S. at 345 (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark “no matter how...” \textit{supra} note 114.}} nor does it require the author to match the
“etchings of Goya or the paintings of Manet” for his work to be considered original, originality still sets an appropriate benchmark for which property rights may be first recognized in intellectual creations that are vulnerable to free-riding once distributed to the public. The rule that a work must be original to an author to be eligible for copyright protection also serves a practical authentication function in the copyright market. By emphasizing the relationship between author (as the person to whom the work owes its origin) and the work (as the product of the author’s creativity) and denying copyright protection to works that are unoriginal or mere copies of another work, the law is able to manage the circulation of original and counterfeit, forged, or unauthentic works in the market and provide the public with a legal criterion to authenticate the work, recognize its worth, and attach the appropriate market value to it.

Severing the link between a work and its original creator through the concept of deemed authorship without acknowledging its purpose however, may lessen the significance of the rule on originality in authenticating creative works. As the standard for originality is already low, a producer of essentially similar works may obtain their own copyright when there is a variation - however slight - in the final product. Some copiers may therefore be able to obtain new copyrights for themselves by simply making minor, even inadvertent, changes to their copy. Other copiers may copy originals and have reputations so acclaimed they command significantly high prices for their replicas because of their name alone. The idea that authors are original creators have also come under attack by literary scholars who have argued that creators of literary works are seldom original; authors and poets imitate nature and other literary works all the time. As most literary and artistic works are an imitation of things surrounding their

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200 Bleistein v. Donaldson Lithographing Co. 188 U.S. 239, 251 (1903).
201 See Deborah M. Hussey, The Sine Qua Non of Copyright, 51 J. COPYRIGHT SOC’Y U.S.A. 763, 786-89 (2003-2004) (for example, authentic Rodin sculptures that are cast under Rodin’s authority or the authority of his heir, the Musée Rodin, are valued more in the international art market. In 1999, an authentic Rodin Eve sculpture whose provenance can be verified was sold for $4.8 million at Christie’s New York but the same piece without a similar provenance may have only fetched $500,000. Bronzes made closer to the artist’s lifetime are also worth more on the art market).
203 Id.
204 Hussey, The Sine Qua Non of Copyright at 790 (noting the high price the Rockefeller Collection commands for exact replicas of Rodin pieces because of the “aura, or at least the spell, of Rockefeller’s personality”).
205 NORTHROP FRYE, ANATOMY OF CRITICISM 95-6 (1990) (“any poem may be examined, not only as an imitation of nature, but as an imitation of other poems).
creator, the “‘creative’ poet who sits down with a pencil and some blank paper and eventually produces a new poem in a special act of creation ex nihilo’ just does not exist; “[h]uman beings do not create in that way” Northrop Frye says. Copyright scholars have made a similar argument about literary and artistic production. As creators are seldom original, these scholars argue, copyright’s insistence on originality as the benchmark for allocating first ownership rights may be misplaced.

Deeming authorship on someone other than the true creator of the work diminishes the value of originality in the copyright system further as the law sends a public message that the provenance of a work is irrelevant in how first ownership rights are allocated. But the reality of the market for literary and artistic works is that a work’s provenance often matters to the purchasing public, who may be willing to pay a much higher price for a work that is the original work of a particular author or artist. An authentic Rothko painting is capable of fetching $8.3 million and the liability art galleries face for selling forgeries to art collectors have involved millions of dollars. Conversely, the value of other artwork has been known to increase over 200 times after its pedigree has been authenticated. The origins of a work and its connection to its human creator is sometimes a significant determinant of a work’s commercial value. The law’s requirement that works be original for copyright protection would appear to be consistent with this market reality.

Frye thus wrote to dispel the conception of the romantic author who produced works ex nihilo; the idea that one could create a work without drawing from sources around him was unacceptable. Just as discoveries in science attest to things that were already “latent in the order of nature,” poems attest to things that were already “latent in the order of words.” Id. at 97


Gideon Parchomovsky & Alex Stein, Originality, 95 VA. L. REV. 1505 (2009) (proposing that an author’s level of protection in copyright law be calibrated to the level of originality in his works); Ryan Litterell, Toward A Stricter Originality Standard for Copyright Law, 43 B.C.L. REV. 193 (2002) (calling for a stricter standard of originality to maintain a robust public domain for future creativity); Russ VerSteeg, Rethinking Originality, 34 WM. & MARY L. REV. 801 (1993) (proposing principles to analyze whether a work is original).


Douglas Birch, $40 Sketch Could Be a $9,000 Utrillo Did Baltimorean Hit the Jackpot?, BALT. SUN., July 27, 1992, at 1A, available at 1992 WLN 778866 (a painting bought for $40 was valued at between $7,000 and $9,000 once a drawing specialist declared it to be an authentic sketch of the French artist Maurice Utrillo).
Furthermore, the law’s emphasis on originality need not necessarily be an embrace of romanticism and acceptance of the idea that original authors only produce works from thin air. What appears to be implicit in the law’s requirement of originality is that the work be authentic to its creator i.e., that it really and truly proceeds from its identified authorial or artistic source.\textsuperscript{211} This implicit meaning of originality does not fault authors for borrowing or imitating others but realizes that what is more important for the requirement of originality is the practical realization that the work be authentically the author’s.\textsuperscript{212} The work-for-hire doctrine has the potential to obscure a reality that the law’s requirement of originality not only allocates first ownership rights through an appropriate benchmark; originality also allows the law to conform to social expectations that authentic works would be more valuable on the market. Without the realization that some legal fictions may be necessary to ease the application of the law, this reality that authenticated works are commercially more valuable on the market may be concealed by the fiction that a work’s provenance and true origins can be set aside for the entity deemed into the place of the true author or artist.

\textbf{IV. CONCLUSION}

The human creator of literary and artistic works is the moral force and the ethical foundation of the copyright system. As individuals, authors and artists make the most important contributions to the global repository of human knowledge. Elie Maynard Adams pointed out that our culture is a product of human activity and developed by human effort.\textsuperscript{213} So too is our experience of the world. Human creators of creative works contribute to that experience. The copyright system must protect the human creator in his unique role in advancing society, art, and culture through his works. The copyright system may then effectively promote the progress of science through the authentic writings of authors. But the irony of copyright law is that it

\textsuperscript{211} Hussey, \textit{The Sine Qua Non of Copyright, supra} note 176 at 770 (defining originality as proceeding immediately from its source and authenticity as really proceeding from its source).

\textsuperscript{212} Frye acknowledges that a poet may not be original but the value of his work lies not in what he added on to his source but rather in what the poet passes on to his readers. Thus Milton’s Paradise Regained as a poem may not have been original in that much of its prose was borrowed from the Bible. But it was definitely authentic to Milton, who passed on his own rhetorics to his readers. \textit{Frye, Anatomy of Criticism, supra} note 180 at 95.

sometimes devalues the very individual who is capable of making the most significant contributions towards its institutional aim without realizing it. Through the concept of deemed authorship, the law mystifies the person of the author, alienates his identity, and diminishes his importance as the person from whom the work originates. The law has yet to recognize that each creator has a personal connection with their creations that can be used to authenticate works in public circulation and encourage more authentic forms of authorship, which may then support the advancement of knowledge and the progress of science over a prolonged period.

A more specific definition of originality may be timely in the United States to avoid the confusion that deemed authors are considered true authors in the eyes of the law even when the work originated from an employee or a commissioned author or artist. In the European Union today, a work is considered original only if it is “the author’s own intellectual creation.”\(^{214}\) This is a significantly different definition from the definition in *Fiest Publication v. Rural Telephone Service* that a work is original if its components “are original to the author”\(^ {215}\), which protects a wide variety of works as long as they originate - or come - from an “author” even if that “author” did not create the work intellectually. The current definition of originality allows employers and commissioners of works to step into the shoes of the author and hold themselves out as the true creator of the work because the work *originated* from them even if they were not the person who intellectually created the works. The *Infopaq* definition of originality would allow employers and commissioners to be owners of copyright acquired from the true author and not “authors” possessing initial ownership rights in the work because they - by definition - did not create the work with their own intellect.

But allocating first ownership with the employer or commissioner has its utility. The truth about legal fictions is that they are sometimes indispensable to legal thinking. At least the good ones - the ones that facilitate understanding about the law and what the law is about - are. The work for hire doctrine and the concept of deemed authorship may be useful if they are used with the full realization that prohibitively high transaction costs could prevent the transfer of rights in


The views scholars have about legal fictions and whether they consider legal fictions to be beneficial or harmful have ultimately depended on whether they saw legal fictions as support structures that make the language of the law more logical and accessible or as blindfolds that deprive the scholar, the practitioner, and the public from truly understanding the law and what it stands or should rightfully stand for. The problems that come with the use of legal fictions are real and Vaihinger reminds us that one must always recognize that the fiction is a deviation from reality, even when many of us are so quick to attribute objective truth to that fiction - a mere intellectual construct that allows thought to “manipulate and elaborate what is given.” The “formal process of thought” and the “objective reality of external events” are not the same thing. Fuller says it differently but makes the same point: forgetting that legal fictions are false pretenses will cause problems to arise when we think that these fictions are real and forget that they are actually “the creation of our own minds.”

Not all legal fictions are indispensable. These conceits of our legal imagination are only indispensable when they act as a stepping block towards a value that the law cannot easily attain – such as justice, fairness, and due process – without relying on a metaphor to help connect what we hope to achieve through the law with our known experiences. The doctrine of constructive trust bridges our knowledge and experience of fiduciary duties in ordinary trust cases with a moral expectation that no person should be allowed to unjustly profit from a wrong. These fictions are necessary and indispensable because there are no other alternatives available that may help us achieve the morally right decision through laws. And when we admit that our assumptions are false, the presence of the artifice becomes obvious and the truth about the issue is revealed. Laws may then develop as necessary to match social expectations and fundamental reality. With deemed authorship, the legal fiction may be necessary - even indispensable - to

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218 Id.
219 FULLER, LEGAL FICTIONS, supra note 21 at 136.
220 More rules consistent with donative intent, for example, developed to limit or avoid the Rule Against Perpetuities and to effectuate the true intent of the donor despite the invalidating fictions of lifetime fertility. Some states have relaxed the constraints of the Rule for perpetual trusts to allow donors of gift to asset some control over the future. See Robert H. Sitkoff and Max M. Schanzenbach, Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes, 115 YALE L.J. 356 (2005). See also W. Barton Leach, Perpetuities in Perspective, supra note 45 at 730 (advocating a “wait-and-see” approach before invalidating a gift).
avoid the high transaction costs of acquiring copyright from the many creators that contribute towards the production of a literary or artistic work. But the necessity of realizing that the concept of deemed authorship serves the function of consolidating first ownership rights is more urgent because it makes us see that a legal fiction is only a bridge in the law to make the law functional. The fiction must not be used to a point where the greater need to understand who the author is, the role he plays, and the meaning of authorship in the copyright system is obscured. As long as this fiction of the corporate or deemed author is used with caution, there should be no fear of the danger Fuller warned us of.