

NOTES

THE RISE OF THE PRODUCER- NOVELIST: SHIFTING PERCEPTIONS OF AUTHORSHIP IN TRANSMEDIA PUBLISHING

INTRODUCTION

In October 2006, Running Press Kids, an imprint of Perseus Books, published the novel *Cathy's Book: If Found Call 650-266-8233*, written by co-authors Jordan Weisman and Sean Stewart.¹ When confronted with the book's title, the reader may find it necessary to follow the book's instructions and call the telephone number.² Upon dialing the number, the reader is greeted by the following message:

Hey, this is Cathy and I can't come to the phone right now...because cell phones can be traced and not always by the good guys. If this is mom, don't worry: I'm okay. Emma, if this is you, I left my book under your porch. Take a look. I think there's stuff buried there we haven't figured out yet. Okay, leave a message at the beep.³

The number then prompts the reader to enter a four-digit access code to retrieve Cathy's messages; however, because the reader does not have Cathy's access code yet, the reader must proceed to open the

¹ SEAN STEWART & JORDAN WEISMAN, *CATHY'S BOOK: IF FOUND CALL (650) 266-8233* (2006).

² Authors often devote a section of their books to describing the optimal reading experience. *See, e.g.*, ITALO CALVINO, *IF ON A WINTER'S NIGHT A TRAVELER* 3-4 (William Weaver trans., Harcourt Brace & Co.1981) (1979) (Calvino offers a detailed description of the reader's potential experience in the first chapter before launching into the narrative.).

³ DOUBLETALK WIRELESS, http://www.doubletalkwireless.com/enterCode.php?ID=cathy_cell (last visited Feb. 25, 2011) (providing an audio file of Cathy's voicemail recording).

book and discover what might be hidden within the book's pages. A plastic pouch filled with evidence is attached to the inside cover and sealed with a red sticker that reads "Em—Here's the proof. Keep it safe. Cathy."⁴ Inside the "evidence packet" are clues like newspaper scraps, photos, a page from a day planner, and a napkin with a lipstick "kiss" that lead to additional telephone numbers, MySpace profiles, and a variety of websites that extend the story beyond that which is told through the printed word.⁵ The illustrator for *Cathy's Book*, Cathy Briggs, further extends the narrative by liberally littering the book's pages with doodles and sketches made by the fictional Cathy Vickers.⁶

Cathy's Book is an exemplar of a growing trend in publishing in which novels interweave story threads from different media to create a cohesive and interactive storytelling experience for readers. Professor Henry Jenkins refers to these stories as "transmedia storytelling."⁷ But while transmedia storytelling affords authors the flexibility to switch media at will in search of the most appropriate medium of storytelling for each story element, it also poses unique challenges to Romantic views towards the authorship for literary works, a central element of copyright law.⁸ Increasingly, individuals and companies serving in a directorial role assume the mantle of authorship in the transmedia publishing space, in light of the specialized skill sets and resources needed to produce these multimedia works.

Part I of this Note will attempt to define transmedia publishing in the context of digital convergence and competing models of cross-platform story telling. Part II will demonstrate how transmedia producers use a variety of strategies to assert ownership rights over the transmedia novels that emerge from their ministrations. Part III will discuss the interplay between transmedia authorship and copyright law that encourages the shift in authorship from writer to producer.

⁴ STEWART & WEISMAN, *supra* note 1.

⁵ *Id.* Transmedia story telling presents an opportunity for authors to seek out additional partners and revenue streams through product integration, allowing brands to reach audiences in new and unique ways. See Laura Petrecca, *Authors Strike Deals to Squeeze in a Few Brand Names*, USA TODAY, Sept. 11, 2006, at 8B.

⁶ STEWART & WEISMAN, *supra* note 1.

⁷ HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 95-96 (2006) [hereinafter CONVERGENCE CULTURE]. In Chapter 3, *Searching for the Origami Unicorn*, Jenkins defines transmedia storytelling as a story that "unfolds across multiple media platforms, with each new text making a distinctive and valuable contribution to the whole." *Id.*

⁸ See Martha Woodmansee, "Author"/"Pirate": *Literary Theory in the Global Commerce in Ideas*, 30 FOREIGN LITERATURE STUD. 140, 140 (2008) (discussing the interplay between the Romanticism concept of authorship and modern day copyright law).

Part IV will explore the historical context that shapes our understanding of authorship under the existing copyright regime, providing context for the current realignment of incentives. While the shift in authorship contradicts conventional assumptions of authorship, the result offers the best chance for encouraging future innovation in the transmedia publishing space.

I. IN SEARCH OF A DEFINITION FOR TRANSMEDIA STORYTELLING

In order to properly explore the ramifications of transmedia publishing, it is first necessary to properly explore the scope of transmedia storytelling, which exists as part of the larger context of media convergence. For the purposes of this Note, transmedia novels will refer to forms of transmedia storytelling that rely on books as a primary storytelling mechanism whereas transmedia publishing will refer to the process of distributing these works to the public.⁹

A. Enabling Transmedia Storytelling Through Convergence

As David Thorburn and Henry Jenkins note in their introduction to *Rethinking Media Change*, the idea that disparate media could converge to tell a unified story is not a new concept.¹⁰ For instance, “the Bayeux tapestry (c. 1067-1077) combined both text and images, and was explicated in spoken sermons—a multi-media bridge between the oral culture of the peasants and the learned culture of the monasteries.”¹¹ Thus, while the concept of transmedia storytelling may seem novel, it is deeply rooted in a rich history of media convergence. Instances of convergence occur on a regular basis but are “especially likely to occur when an emerging technology has temporarily destabilized the relations among existing media.”¹² Transmedia novels have emerged as a reaction to the destabilizing force of digital convergence, which refers to the process of unifying different types of media

⁹ Although this definition has not been explicitly adopted by the industry, the term has been used in this context. See, e.g., Alison Norrington, *Transmedia Requires New Breed of Writers, Publishers*, DIGITAL BOOK WORLD (Apr. 19, 2010), <http://digitalbookworld.com/2010/transmedia-requires-new-breed-of-writers-publishers/>; Michael Andersen, *Looking Back at Scholastic's Transmedia Efforts for 39 Clues*, ARGNET, (Jan. 31, 2010), http://www.argn.com/2010/01/looking_back_at_scholastics_transmedia_efforts_for_39_clues/.

¹⁰ RETHINKING MEDIA CHANGE: THE AESTHETICS OF TRANSITION 3 (David Thorburn & Henry Jenkins eds., MIT Press 2004).

¹¹ *Id.*

¹² *Id.*

into a single device.¹³ The introduction of the Internet and mobile devices to the media landscape have caused more traditional media like print and television to seek new models of relevance that blend these new technologies into existing models of content creation.

Digital convergence enables transmedia storytelling by making it easier to switch seamlessly from one medium to another, allowing individuals to interact with a variety of texts across platforms. Publishers can also release applications that merge multimedia functionality onto a single device.¹⁴ Thus, a reader of *Cathy's Book* in possession of a cell phone could call the telephone number on the book's cover with relative ease. With a smart phone, the reader could navigate the websites scattered throughout the pages in the book without having to find a computer with Internet access. Alternatively, the reader could download the *Cathy's Book* iPhone app that incorporates the story's audiovisual elements within a single mobile application.¹⁵

B. The Franchise Model of Transmedia Storytelling

Enabled by technology, transmedia storytelling is a story that “unfolds across multiple platforms, with each new text making a distinctive and valuable contribution to the whole.”¹⁶ Henry Jenkins explains that each element of the transmedia franchise must be a self-contained story in and of itself that can serve as “a point of entry into the franchise as a whole.”¹⁷ The Producers Guild of America has embraced this definition of transmedia, defining a Transmedia Narrative product or franchise in its Code of Credits as a story “that consists of three (or

¹³ Typically, digital convergence refers to the unification of the functions of the computer, telephone, and television into one device. See David B. Yoffie, *CHESS and Competing in the Age of Digital Convergence*, in *COMPETING IN THE AGE OF DIGITAL CONVERGENCE* 1, 3-4 (David B. Yoffie ed., 1997).

¹⁴ See Calvin Reid, *Enriched E-Books: Multimedia, Mystery, and 'Cathy's Book'*, PUBLISHERS WEEKLY (May 3, 2010), <http://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/43030-enriched-e-books-multimedia-mystery-and-cathy-s-book-.html>.

¹⁵ *Id.* Anthony Zuiker has created a similar mobile application for his *Level 26* series of books. *Level 26: Dark Origins* integrated Zuiker's video “cyberbridges” into the story's text using an iPhone application. The sequel, *Level 26: Dark Prophecy*, utilized an iPad application to allow readers to watch video cyberbridges as well as “virtually bank evidence in a separate case file, listen to audio files from characters with a fingertap, and interact with the tarot cards.” Michael Andersen, *Anthony Zuiker Takes CSI to the Next Level 26*, ARGNET (Oct. 12, 2010), http://www.argn.com/2010/10/anthony_zuiker_takes_csi_to_the_next_level_26/, reprinted on WIRED.COM (Oct. 14, 2010, 7:31 AM), <http://www.wired.com/magazine/2010/10/anthony-zuiker-takes-csi-to-the-next-level-26/>.

¹⁶ CONVERGENCE CULTURE, *supra* note 7, at 95-96.

¹⁷ *Id.* at 96.

more) narrative storylines existing within the same fictional universe.... These narrative extensions are NOT the same as repurposing material from one platform to be cut or repurposed to different platforms.”¹⁸

Under the franchise definition of transmedia storytelling advanced by Jenkins, transmedia works can be characterized as a series of self-contained, yet related stories that are expressed across different media. Thus, in order to be successful under this model, transmedia franchises should work “to attract multiple constituencies by pitching the content somewhat differently in the different media.”¹⁹ This model, however, does not include transmedia novels like *Cathy’s Book* that rely on discrete cross-platform elements that do not tell a story when isolated from the greater work. Rather, it embraces serialized branded experiences as its vehicle for communication. And while the franchise model is a valid exercise of transmedia storytelling, it does not generate the issues of authorship that are the focus of this paper, since these franchise extensions would fit within the original creator’s derivative work rights.²⁰ Indeed, any derivative work that seeks to extend the narrative beyond the original would likely fall under the franchise model of transmedia storytelling. When viewed in this light, transmedia storytelling focuses on the original authorship of the franchise as a whole rather than any one story told within the story.

C. The Spiderweb Model of Transmedia Storytelling

Monique De Haas articulates an opposing view of transmedia storytelling, describing it as “communication where the storyline will direct the receiver from one medium to the next.”²¹ Rather than focus-

¹⁸ PGA Board of Directors Approves Addition of Transmedia Producer to Guild’s Producers Code of Credits, PRODUCERS GUILD OF AM. (Apr. 6, 2010), <http://www.producersguild.org/news/39637/General-PGA-Board-of-Directors-Approves-Addition-of-Transmedia-Produced.htm>.

¹⁹ CONVERGENCE CULTURE, *supra* note 7, at 96.

²⁰ See 17 U.S.C. § 101 (2006) (defining a derivative work as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”).

²¹ Christy Dena, *Current State of Cross Media Storytelling: Preliminary Observations for Future Design*, presented at, European Information Society Technologies Event 1 (Nov. 15 2004), available at http://www.christydena.com/Docs/DENA_CrossMediaObservations.pdf. While the paper refers to this form of storytelling as “cross media storytelling,” Dena explains that the term is synonymous with transmedia storytelling. She also notes that the term has been described as 360 content, synergistic storytelling, and as networked narrative environments. Christy Dena, *Transmedia Practice: Theorising the Practice of Expressing a Fictional World Across*

ing on the existence of a franchise that transcends a single medium, this definition emphasizes the narrative's transition from one medium to the next to tell a single, unified story. This form of storytelling allows creators to guide readers through the work, capitalizing on differing media to tell each individual story element.

Marshall McLuhan famously theorized that media can be divided into "hot media," which conveys a high definition of data with little actual participation in the process, and "cool media," which conveys a low definition of data paired with more active engagement with the medium.²² Thus, by trading off between hot media storytelling elements that can effectively advance the story's exposition and cool media that actively engage the audience in the storytelling process, transmedia storytelling can create a nuanced experience for the reader. Under the franchise model of transmedia storytelling, these transfers between hot and cool media are temporally separated as consumers proceed from one franchise component to another. However, under the opposing model, consumption with hot and cool media has the potential to exist contemporaneously.

Andrea Phillips, a transmedia writer and game designer, labels this competing model of transmedia storytelling as the spiderweb model, describing it as "one that uses multiple media to tell disparate pieces of a single cohesive narrative."²³ Rather than telling a series of distinct stories that could exist as self-contained stories in their own right, transmedia stories under the spiderweb model compel readers to piece together the story, much as a lawyer would piece together a narrative by assembling pieces of evidence. In some instances, information gleaned from one medium is necessary to proceed with the story in another.

In *Cathy's Book*, for example, a doodle on the inside cover of the book may lead the reader to the DoubleTalk Wireless website, maintained by the main character's best friend Emma.²⁴ The main page offers the reader the chance to access Emma's Private Site by answering the question "[w]hat's 600K in a frame?"²⁵ The answer to this question is revealed in the text of the novel, where a character makes a passing reference to Chagall's *Cemetery Gates*, worth approximately

Distinct Media and Environments 16 (2009) (unpublished Ph.D. dissertation, University of Sidney) (on file with author).

²² MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 22-23 (MIT Press 1994) (1964).

²³ Andrea Phillips, *WTF is Transmedia?*, DEUS EX MACHINATIO (Apr. 6, 2010), <http://www.deusexmachinatio.com/2010/04/wtf-is-transmedia.html>.

²⁴ DOUBLETALK WIRELESS, <http://www.doubletalkwireless.com> (last visited Feb. 26, 2011).

²⁵ *Id.* (prompt located in the lower left corner of the screen).

\$610,000.²⁶ Inputting “cemetery gates” at the prompt leads to Emma’s personal page, which provides hints about how to use the information contained in the book’s evidence pack.²⁷

For the purposes of this Note, transmedia publishing refers to the spiderweb model of transmedia storytelling, supporting a novel as the central storytelling element. While a reader may be capable of enjoying the transmedia publication by merely reading through the novel, it may also be necessary to trace the story through the transmedia elements. This process of interweaving the story’s narrative through different media often requires specialized skill-sets. Because transmedia publications guide readers through multiple touchpoints, potentially drawing upon the expertise of numerous individuals to craft a unified whole, it raises complex questions about authorship in the copyright context.

II. OWNERSHIP MODELS IN THE TRANSMEDIA PUBLISHING SPACE

In the growing field of transmedia publishing, creators have experimented with a number of distinct methods of assembling transmedia narratives. These creators have in turn utilized different ownership structures to reflect their divergent views of authorship for the work. Some book publishers themselves have asserted authorship claims over the resulting transmedia novel. Some creators have opted to recognize ownership by forming companies, while others chose to recognize the interactive involvement through co-author arrangements. The choice between different ownership structures can have important implications because of the rights owed to authors under copyright law.

A. Publishing Companies Claiming Ownership of Transmedia Novels

In July 2007, Scholastic Corporation’s children’s book unit published the final book in author J.K. Rowling’s wildly popular *Harry Potter* series.²⁸ For years, United States publication rights for the Har-

²⁶ STEWART & WEISMAN, *supra* note 1, at 22.

²⁷ DOUBLE TALK WIRELESS, *supra* note 3.

²⁸ See Molly Peterson & Greg Bensinger, *Scholastic Graduates From Harry Potter to Stimulus (Update1)*, BLOOMBERG (Dec. 30, 2009, 2:22 PM), <http://www.bloomberg.com/apps/news?pid=20601109&sid=aK.fRVXPNVaQ>. While the Harry Potter franchise exists across many media, it does not qualify as transmedia storytelling under either of the definitions set forth in Part I of this Note. As Jill Golick explains, “[a]cross media, the Harry Potter stories are all reiteration or retellings of JK Rowling’s original seven book tale. None of the non-book media expand the narrative or add new detail to the world. The only elements in the Harry Potter media-verse that

ry Potter franchise accounted for the majority of Scholastic's sales through its children's book unit's trade division.²⁹ Revenues from the Children's Book Publishing and Distribution segment dropped by almost \$250 million the financial year following the release of the franchise's final installment, *Harry Potter and the Deathly Hallows*.³⁰ Since the Harry Potter franchise continues to generate profits for Rowling as the owner of the copyright for Harry Potter,³¹ Scholastic is limited to profits off its publication rights.

Recognizing the limitation in its ability to profit off books published under a more traditional model, Scholastic's Lab for Informal Learning, a research group within the company, attempted to "create a branded franchise for which it owns all the rights" when it developed the concept for *The 39 Clues*.³² Thus, while each installment in the ten-book series bears a different author's name on the cover, the writers entered into a work-for-hire arrangement,³³ with the original copyright vesting in Scholastic itself.³⁴ Rick Riordan, the author of the first book in the series, created an outline for the overarching story over the course of the books to guide subsequent work-for-hire authors including Gordan Korman, Peter Lerangis, and Jude Watson.³⁵

The *39 Clues* novels themselves tell the story of Dan and Amy Cahill as they travel throughout the world in search of thirty-nine clues that reveal the secret to their family's power.³⁶ Each novel

do are the ones Rowling here creates...." Jill Golick, *Jeff Gomez's Principles of Transmedia Narrative*, RUNNING WITH MY EYES CLOSED (Dec. 5, 2009, 12:55 PM), <http://www.jillgolick.com/2009/12/jeff-gomez-principles-of-transmedia-narrative/>.

²⁹ See Peterson & Bensinger, *supra* note 28.

³⁰ See Scholastic Inc., READING AND LEARNING IN THE 21ST CENTURY: 2008/2009 ANNUAL REPORT 34 (2009), available at <http://investor.scholastic.com/annuals.cfm?Year=2009>. To better reflect the company's financial stability, Scholastic has adopted the practice of tracking its trade sales excluding any Harry Potter-related titles. See Press Release, Scholastic Inc., Scholastic Reports Third Quarter Results for Fiscal 2010 (Apr. 1, 2010), available at <http://investor.scholastic.com/releasedetail.cfm?ReleaseID=456241>.

³¹ See, e.g., U.S. Copyright Registration No. TX0004879549 (filed Aug. 4, 2000) (registration for *Harry Potter and the Sorcerer's Stone*).

³² Motoko Rich, *Scholastic Plans to Put Its Branding Iron on a Successor to Harry Potter*, N.Y. TIMES, Dec. 18, 2007, at E1.

³³ Work-for-hire refers to situations where the employer is the copyright holder as opposed to the individual authors. See 17 U.S.C. § 101 (2006).

³⁴ See U.S. Copyright Registration No. TX0007027893 (filed Dec. 30, 2008) (registration for *The 39 Clues #1: The Maze of Bones*); U.S. Copyright Registration No. TX0007030104 (filed Dec. 30, 2008) (registration for *The 39 Clues #2: One False Note*); U.S. Copyright Registration No. TX0007081310 (filed Oct. 16, 2009) (registration for *The 39 Clues: The Sword Thief*).

³⁵ Rich, *supra* note 32, at E1.

³⁶ *Id.*; see also Andersen, *supra* note 9.

comes with six collectible cards that can be digitized at the story's website at the39clues.com.³⁷ Some of these cards contain puzzles that, when solved, reveal additional details about the series.³⁸ Other cards, when combined, unlock information about the location and nature of the thirty-nine clues not included in the books.³⁹ Readers can extend the experience by completing Missions on the *39 Clues* website that allow players to follow the story, solve puzzles, and play games to expand the narrative.⁴⁰

These different elements frequently intertwine to provide the reader with an interdependent narrative. For example, *The 39 Clues: Maze of Bones* includes six collectible cards.⁴¹ One of these cards is Card #4 – The Titanic, which includes a picture of a passenger list on the Titanic with three names circled.⁴² By unscrambling the names, the reader learns that Titanic passenger Nella Chain's name is an anagram for Anne Cahill, a distant relative of the book's main characters. If the reader then visits the 39 Clues website, inputs the unique code on the bottom of the card, and enters the solution on the virtual card's page, an additional tab marked "Top Secret" appears.⁴³ Clicking on the tab reveals the image of a fictional website, describing a Mr. George McLain's interest in the wreck of the Titanic. Both Anne Cahill and George McLain are featured prominently in the game's first online Mission.⁴⁴ Successfully completing the first mission reveals one of the thirty-nine clues found beneath Loch Ness in Scotland.

Scholastic has pursued an aggressive marketing campaign for the *39 Clues* series by engaging in cross-promotional agreements with Post cereals⁴⁵ and Amtrak,⁴⁶ holding discussions with the book au-

³⁷ Andersen, *supra* note 9.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *The 39 Clues*, SCHOLASTIC INC., <http://www.the39clues.com/game> (last visited Feb. 26, 2011).

⁴¹ RICK RIORDAN, *THE 39 CLUES: THE MAZE OF BONES* (2008).

⁴² *Id.*

⁴³ *The 39 Clues*, *supra* note 40.

⁴⁴ *Mission 1: Titanic-Briefing*, SCHOLASTIC INC., <http://www.the39clues.com/game/mission1/briefing-part1> (last visited Feb. 26, 2011); *Mission 1: Titanic-George McLain*, SCHOLASTIC INC., <http://www.the39clues.com/game/mission1/george-mcclain-part1> (last visited Feb. 26, 2011).

⁴⁵ Press Release, Scholastic Inc., Scholastic Media Joins Post Cereals for the 39 Clues™ "Race to Win" Sweepstakes (Dec. 3, 2009), *available at* <http://mediaroom.scholastic.com/node/271> (Over four million boxes of Post brand cereal bore 39 Clues-based puzzles and messages for the chance to win a trip to New York City to compete in a 39 Clues Scavenger hunt for a "top secret 'bonus' prize.").

⁴⁶ Press Release, Scholastic Inc., Scholastic Media and Amtrak Join the Hunt for the 39 Clues in National Promotion (June 1, 2009), *available at* <http://mediaroom.scholastic.com/node/204> (Amtrak distributed over two million branded ticket jackets,

thors hosted by Whoopi Goldberg,⁴⁷ and releasing a bevy of branded products. The branding strategy sought to extend the narrative with products like an audio book version with bonus features, an iPhone application, collectible card packs, and an online game.⁴⁸ Further expanding the scope of their intellectual property rights, Scholastic licensed movie rights to the series to DreamWorks.⁴⁹ Scholastic Media President Deborah Forte is slated as the producer for the upcoming film,⁵⁰ demonstrating the company's desire to maintain a high level of control over the property. Scholastic's bold move in promoting the series paid off: after the initial ten-book series completed its run, Scholastic opted to extend the series by an additional six books.⁵¹ While many of the initial authors returned to pen these additional books, Scholastic exercised its control to bring on David Baldacci to pen the final installment for the new series.⁵²

B. Claiming Ownership Through Incorporation

Scholastic exerted both its control and reputation as a publishing powerhouse in claiming authorship of the transmedia novels using the work-for-hire doctrine; however, publishing companies are not the only parties attempting to utilize the work-for-hire doctrine to lay claim to the emerging field of transmedia publishing. Recently, a number of transmedia production companies have formed to assert similar claims. These companies have leveraged their employees' varied skill-sets to transform authorship into a branded experience.

dining car placemats, and seatback signage promoting the *39 Clues* brand and advertising the chance to win a trip for four to anywhere in the United States that Amtrak travels.).

⁴⁷ Press Release, Scholastic Inc., Whoopi Goldberg Returns as Host of The 39 Clues™ Live Webcast on November 2, 2009 (Oct. 14, 2009), available at <http://mediaroom.scholastic.com/node/252>.

⁴⁸ See *The 39 Clues Online Press Kit*, SCHOLASTIC INC., <http://mediaroom.scholastic.com/The39Clues> (last visited Feb. 26, 2011).

⁴⁹ Press Release, Scholastic Inc., Jeff Nathanson Signs on to Write "The 39 Clues" for DreamWorks Studios and Scholastic Media (Sept. 2, 2008), available at <http://mediaroom.scholastic.com/node/103> [hereinafter DreamWorks Press Release] (noting that DreamWorks Studios acquired movie rights to *The 39 Clues* series with Steven Spielberg and Jeff Nathanson likely to be attached to the project).

⁵⁰ *Id.*

⁵¹ Press Release, Scholastic Inc., The 39 Clues Bestselling Multi-Media Franchise Breaks New Ground with the Launch of Part Two "The 39 Clues: Cahills vs. Vespers" on April 5, 2011 (Sept. 23, 2010), available at <http://mediaroom.scholastic.com/node/374>. Installments of the *39 Clues* series have consistently appeared on the New York Times Bestseller list and Scholastic has licensed the series for publication in 24 languages. The game's mobile app has ranked in the top "Paid Kids Games" list on iTunes App Store since its release. *Id.*

⁵² *Id.*

Smith & Tinker has gone the furthest in explicitly establishing its brand through this process with its work on *Personal Effects: Dark Art* and the *Nanovor* franchise. *Personal Effects: Dark Art*⁵³ in many ways fits the model of transmedia publishing set forth in *Cathy's Book*.⁵⁴ The novel comes with a plastic evidence pack secured to the inside front cover of the book containing credit cards, business cards and photographs that provide crucial information to advance the story as it proceeds across websites and telephone numbers.⁵⁵ *Personal Effects'* transmedia narrative takes the storytelling process one step further with its inclusion of Rachael Webster, a video game blogger at PixelVixen707.com and the girlfriend to Zach Taylor, the main character of the series.⁵⁶ For over six months prior to the book's release, Rachael Webster blogged and interacted with video game journalists, going so far as to attend the 2009 Game Developer's Conference in San Francisco, handing out business cards with a puzzle hidden within.⁵⁷

J.C. Hutchins and Jordan Weisman are listed as co-authors on the cover of *Personal Effects: Dark Art* and on its copyright registration.⁵⁸ Hutchins and Weisman are listed under the "Authorship on Application" entry as co-employers for hire for the work on the copyright registration form.⁵⁹ However, the author listed as "Copyright Claimant" for the filing is Smith & Tinker, Inc., a company founded by Jordan Weisman.⁶⁰ This overt claim of ownership infers that Hutchins and Weisman were both intended to serve as employees for hire rather than employers for hire as listed on the application. Statements by J.C. Hutchins support this conclusion, as he described the creation process in an interview:

⁵³ J.C. HUTCHINS & JORDAN WEISMAN, *PERSONAL EFFECTS: DARK ART* (2009).

⁵⁴ See *supra* Introduction for discussion on *Cathy's Book's* formula for transmedia storytelling.

⁵⁵ HUTCHINS & WEISMAN, *supra* note 53.

⁵⁶ The true identity of the blogger behind Rachael Webster is still a mystery, with the only attribution stating "[h]osting generously provided by the people who created me" (Smith & Tinker) in the copyright statement at the bottom of the page. *About PixelVixen*, http://www.pixelvixen707.com/?page_id=5 (last visited Feb. 26, 2011).

⁵⁷ See Michael Andersen, *Rachael Webster Is Calling Me a Liar: Meet Her at GDC*, ARGNET (Mar. 19, 2009), http://www.argn.com/2009/03/rachael_webster_is_calling_me_a_liar_meet_her_at_gdc/.

⁵⁸ See HUTCHINS & WEISMAN, *supra* note 53; U.S. Copyright Registration No. TX0007079887 (filed Sept. 2, 2009).

⁵⁹ U.S. Copyright Registration No. TX0007079887.

⁶⁰ *Id.*

Along the way I was approached by Saint Martin's Press...and they said well you know we're in cahoots with this game designer...named Jordan Weisman...and he has pitched us on an idea for a novel called *Personal Effects* that is kind of part novel, part alternate reality game where tangible items actually come with the book...[A]ll of the book was plotted and nearly all of the transmedia experience was also plotted. This was a highly collaborative experience with Jordan and then later on with Jordan's team at Smith & Tinker, the company that he founded that is . . . producing this book.⁶¹

Through this statement, Hutchins both acknowledges Weisman's role as producer of the novel and Smith & Tinker's involvement in the development of the product as part of a collaborative process.

After releasing *Personal Effects: Dark Art*, Smith & Tinker released their *Nanovor* transmedia franchise,⁶² which further demonstrates its interest in securing authorship over transmedia novels. The story is told through an online video game, a series of web videos, novels, and comic books.⁶³ It provides an example of both the franchise model and the spiderweb model of transmedia storytelling coexisting in the same work. While each of the aforementioned media can advance the story as an independent creation in its own right, interweaving media into a unified storytelling experience produces a fuller picture of events. Thus, by solving a series of puzzles and hacking into a number of voicemail accounts using information gleaned from the fictional Hanover High's school website, readers can learn additional background information about the adult figures that exist in the *Nanovor* universe and unlock additional features in the online video game.⁶⁴

Acknowledging that the transmedia elements present in the *Nanovor* series comport more with the franchise model of transmedia storytelling than the company's work with *Personal Effects: Dark Art*,

⁶¹ *This Conference is Being Recorded: J.C. Hutchins—Beyond the Book*, WORKBOOK PROJECT (July 18, 2009), <http://workbookproject.com/blog/2009/07/18/tcibr-podcast-jc-hutchins-beyond-the-book/> [hereinafter Hutchins Podcast].

⁶² *Smith & Tinker, Inc.: Private Company Information*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=62244111> (last visited Feb. 26, 2011).

⁶³ See Michael Andersen, *Sentient Silicon: A Nanovor Primer*, ARGNET (Apr. 6, 2010), http://www.argn.com/2010/04/sentient_silicon_a_nanovor_primer/.

⁶⁴ *Id.*

Smith & Tinker filed separately for the *Nanovor* book elements,⁶⁵ its online video counterparts,⁶⁶ and the *Nanovor* website.⁶⁷ Each of these filings listed Smith & Tinker as the copyright claimant and employer for hire, although the individual works did provide attribution to the authors as employees-for-hire.⁶⁸

Patrick Carman's work on the *Skeleton Creek* transmedia novel series represents another model for transmedia publishing. The *Skeleton Creek* series is part book, part online video series.⁶⁹ The novels are presented as the journal of the main character, Ryan McCray.⁷⁰ Throughout the course of the narrative, Ryan occasionally receives passwords to his best friend Sarah Fincher's website at SarahFincher.com and records them in his journal.⁷¹ Entering the passwords provides the reader with Sarah's perspective of the story through a series of videos that advance the story. The book's narrative relies on the reader to view the video content when prompted because Ryan McCray's journal entries frequently refer to the contents of the videos.⁷²

Patrick Carman is listed as both the copyright claimant and as the author for the series.⁷³ The final page of each novel also includes a list

⁶⁵ See U.S. Copyright Registration No. TX0007102484 (filed Feb. 27, 2010) (registration for *Nanovor: Welcome to the Nanosphere*).

⁶⁶ See U.S. Copyright Registration No. PA0001652673 (filed Oct. 23, 2009) (registration for *Nanovor Episodic Video: They're Alive*); U.S. Copyright Registration No. PA0001652671 (filed Oct. 23, 2009) (registration for *Nanovor Episodic Video: Tell No One*); U.S. Copyright Registration No. PA0001652670 (filed Oct. 23, 2009) (registration for *Nanovor Episodic Video: Live to Fight*).

⁶⁷ See U.S. Copyright Registration No. PA0001625004 (filed Apr. 20, 2009) (registration for www.nanovor.com).

⁶⁸ See, e.g., MUR LAFFERTY & RYAN PAYNE, *NANOVOR: HACKED* (2009); SETH JOHNSON, *NANOVOR: PRANK WEEK* (2010).

⁶⁹ PATRICK CARMAN, *SKELETON CREEK: RYAN'S JOURNAL* (2009) [hereinafter *SKELETON CREEK*]; PATRICK CARMAN, *GHOST IN THE MACHINE: RYAN'S JOURNAL* (2009) [hereinafter *GHOST IN THE MACHINE*]; PATRICK CARMAN, *SKELETON CREEK: THE CROSSBONES* (2010) [hereinafter *THE CROSSBONES*]; PATRICK CARMAN, *SKELETON CREEK: THE RAVEN* (2011) [hereinafter *THE RAVEN*].

⁷⁰ See *SKELETON CREEK*, *supra* note 69; *GHOST IN THE MACHINE*, *supra* note 69; *THE CROSSBONES*, *supra* note 69; *THE RAVEN*, *supra* note 69.

⁷¹ See, *SKELETON CREEK*, *supra* note 69, at 25, 38, 67; *GHOST IN THE MACHINE*, *supra* note 69, at 1, 45, 71; *Sarah Fincher*, <http://sarahfincher.com> (last visited Feb. 26, 2011).

⁷² See, e.g., *SKELETON CREEK*, *supra* note 69, at 40 ("But now I remember something more about that night. I remember what I saw that made me fall. It was there in the camera lens at the end. It was watching me. It's always watching me.") (referring to a ghostly figure passing in front of the camera during the video prompted by the password *THERAVEN*).

⁷³ See U.S. Copyright Registration No. TX0007070826 (filed Oct. 28, 2009) (registration for *Ghost in the Machine*).

of credits, recognizing the production team at Carman's production company, PC Studio.⁷⁴ While PC Studio is not listed as the owner of Carman's novels, Carman is the owner and creative director for the production company.⁷⁵ Thus, by implication PC Studio, similar to Smith & Tinker, has some de facto ownership in the series.

It is exceedingly hard to create transmedia publications without the help of a dedicated team. As J.C. Hutchins explains:

[t]he thing I learned about transmedia storytelling with *Personal Effects: Dark Art* . . . it is a complex beast. There are a lot of moving parts, and it often requires at least a dozen people. Maybe you can pull it off with fewer, but the way we were doing it with *Personal Effects: Dark Art* it was a highly complicated machine.⁷⁶

In some cases, the architect of the novel may retain control of the larger transmedia publishing narrative by obtaining external financing for projects through venture capital,⁷⁷ successfully pitching a story to a major publishing company,⁷⁸ or employing crowd funding efforts.⁷⁹ Alternatively, the publishing company itself can initiate the creation of a project. While it is possible for multiple parties to jointly hold a

⁷⁴ SKELETON CREEK, *supra* note 69, at 188; GHOST IN THE MACHINE, *supra* note 69, at 206. See also Nicholas Wu, *Skeleton Creek: Book? Video? Both!*, SCHOLASTIC INC. (Mar. 25, 2008), <http://www2.scholastic.com/browse/article.jsp?id=3751637> (When asked about the series Carman stated, “[e]verything was created and produced by me and my team at my production company, PC Studios [sic].”).

⁷⁵ *PC Studio*, PATRICK CARMAN, <http://www.patrickcarman.com/pc-studio/> (last visited Feb. 26, 2011).

⁷⁶ Hutchins Podcast, *supra* note 61.

⁷⁷ See Ty McMahan, *After Gaming-Device Failure, Smith & Tinker Turns to Apple*, WALL ST. J. BLOG: VENTURE CAPITAL DISPATCH (Sept. 15, 2010, 5:03 PM), <http://blogs.wsj.com/venturecapital/2010/09/15/after-gaming-device-failure-smith-tinker-turns-to-apple/> (describing how Smith & Tinker raised \$29 million in venture capital funds prior to releasing *Personal Effects* and *Nanovor*).

⁷⁸ See Rachel Deahl, *The New Storytelling: Multimedia Children's Publishing*, PUBLISHERS WEEKLY, Mar. 30, 2009, at 18-19, available at <http://www.publisherweekly.com/pw/by-topic/childrens/childrens-book-news/article/11995-the-new-storytelling-multimedia-children-s-publishing-.html> (explaining that Patrick Carman's contract for *Skeleton Creek* was structured to account for the added cost inherent in Carman's multimedia production).

⁷⁹ See, e.g., *Discover Campaigns*, INDIEGOGO, http://www.indiegogo.com/projects?filter_category=CATE_TRNS (last visited Feb. 26, 2011) (example of a crowd-funding website which has categories for transmedia storytelling fundraising efforts).

copyright under the joint authorship doctrine, the law favors vesting ownership rights in a single entity.⁸⁰

C. Recognizing Ownership Through Joint Authorship

Although the majority of transmedia publishers today are asserting their rights as authors through a combination of companies and the work-for-hire doctrine, a few authors are asserting control via joint ownership agreements under section 201(a) of the Copyright Act, which allows authors of a joint work to claim co-ownership rights.⁸¹ The *Cathy's Book* series provides a case study in the practical application of this method of development.⁸²

Sean Stewart and Jordan Weisman created the *Cathy's Book* series.⁸³ As Stewart recalls, Weisman came up with the original idea for the book and then the two sketched out a broad outline for the story together.⁸⁴ While Stewart focused on the literary elements of the transmedia novel, Weisman created the physical evidence for the series and spearheaded the online presence using 42 Entertainment, where he served as Chief Creative Officer.⁸⁵ Stewart and Weisman are listed as co-authors on the copyright registration filings for *Cathy's Book* and *Cathy's Key*, the first two books in the series.⁸⁶ For *Cathy's Ring*, the final installment in the trilogy, the copyright filing notes that illustrator Cathy Brigg was added as a co-author of the novel, but subsequently transferred her claim to Stewart and Weisman.⁸⁷

While Weisman approached the *Cathy's Book* series as an opportunity to engage in joint authorship, he did not do so with *Personal Effects* or *Nanovor*.⁸⁸ And while some transmedia novels may bear the outward impression of being joint works, the arrangement reached for

⁸⁰ See discussion *infra* Part III (exploring the availability of joint ownership rights and the work-for-hire doctrine).

⁸¹ 17 U.S.C. § 201(a) (2006).

⁸² See discussion *supra* Introduction.

⁸³ STEWART & WEISMAN, *supra* note 1.

⁸⁴ Interview with Sean Stewart, Co-Author, CATHY'S BOOK (Feb. 8, 2010), available at http://www.argn.com/2010/02/interview_with_cathys_book_coauthor_sean_stewart/.

⁸⁵ See Jackie Kerr, *The Hour of Needing a Title for This Article – Cathy's Book Answers Call, Delivers Hot, Extra-large Pizza Pie of Awesome*, ARGNET (Oct. 3, 2006), http://www.argn.com/2006/10/the_hour_of_needing_a_title_for_this_article_-_cathys_book_answers_call_delivers_hot_extralarge_pizza_pie_of_awesome/.

⁸⁶ U.S. Copyright Registration No. TX0006841466 (filed Mar. 28, 2008) (registration for *Cathy's Book*); U.S. Copyright Registration No. TX0006855920 (filed May 12, 2008) (registration for *Cathy's Key*).

⁸⁷ U.S. Copyright Registration No. TX0006998122 (filed Aug. 3, 2009).

⁸⁸ See discussion *supra* Part II.B.

Cathy's Book appears to be the exception rather than the rule. For instance, *CSI* creator Anthony Zuiker teamed up with Duane Swierczynski to produce *Level 26: Dark Origins*, a transmedia novel in the spirit of Patrick Carman's *Skeleton Creek* series.⁸⁹ *Level 26* extends the narrative through the use of "cyber-bridges" that prompt the reader to enter a code on the Level26.com website to view videos.⁹⁰ However, while the relationship was undoubtedly collaborative, it was not a joint work.

Regarding *Level 26*, Swierczynski has noted that he was contacted by his agent regarding the project and informed that Zuiker "was looking for a novelist to collaborate on a series of horror-thrillers."⁹¹ After accepting the project, the two "spent the next nine months writing, editing, discussing, re-writing, re-editing, and revising" the transmedia novel.⁹² However, this relationship, like many of those previously mentioned,⁹³ was treated as a work-for-hire, with Anthony Zuiker listed as the Copyright Claimant and author on the book's filing and Swierczynski listed an employee.⁹⁴ In a separate copyright filing, Zuiker claims sole authorship of the novel's cyberbridges.⁹⁵ Thus, while joint ownership is an option for transmedia publishing, it is rarely utilized.⁹⁶

III. ENABLING THE RISE OF THE TRANSMEDIA PRODUCER-NOVELIST THROUGH COPYRIGHT LAW

Publishers and transmedia producers have been able to secure rights as authors by capitalizing on the low initial bar set by copyright law. Further, the shift towards the recognition of producer-novelists as authors is bolstered when paired with the work-for-hire doctrine and the high burden of proving joint authorship.

The Copyright Act of 1976 provides: "[c]opyright in a work protected under this title vests initially in the author or authors of the

⁸⁹ ANTHONY E. ZUIKER & DUANE SWIERCZYNSKI, *LEVEL 26: DARK ORIGINS* (2009).

⁹⁰ See Bob Minzesheimer, *Anthony Zuiker's 'Level 26' Marks Origin of the 'Digi-Novel*, USA TODAY (May 12, 2009, 9:54 PM), http://www.usatoday.com/life/books/news/2009-05-11-digi-novel_N.htm.

⁹¹ Duane Swierczynski, *Sqweegel & Me: A Love Story*, LEVEL 26 (Sept. 2, 2009), http://www.level26.com/tlc_units/filter/2/325/1.

⁹² *Id.*

⁹³ See discussion *supra* Part II.A-B.

⁹⁴ U.S. Copyright Registration No. TX0007064671 (filed Nov. 9, 2009).

⁹⁵ U.S. Copyright Registration No. TXu001638035 (filed May 19, 2009).

⁹⁶ See discussion *infra* Part III.

work.”⁹⁷ Over the years, the judiciary has established an exceedingly low bar for this initial level of protection by liberally interpreting the statutory requirement that copyright protection is limited to “original works of authorship fixed in any tangible medium of expression.”⁹⁸ Although “[f]amiliar stock scenes and themes that are staples of literature” are not entitled to copyright protection,⁹⁹ only a minimal degree of originality is required to satisfy the statutory requirement. For example, in *Amadasun v. DreamWorks, LLC*, the court noted that an author could secure copyright protection in a five-page outline for a story.¹⁰⁰ Thus, arguably all a publisher or transmedia producer must do to trigger initial copyright protection is to provide basic story guidelines in writing that go beyond stock characters or themes.

Once the claimant satisfies this minimum standard of copyright, the transmedia producer or publisher has a strong argument for sole authorship. Under the Copyright Act’s work-for-hire doctrine, the employer is considered the author of a work¹⁰¹ if: (1) the work was created as a result of an employer/employee relationship or (2) the work was completed as a commission.¹⁰² While book publishers and transmedia novelists cannot invoke the work-for-hire doctrine by merely approaching writers about the possibility of publishing existing works,¹⁰³ a producer could adequately assert control by explicitly

⁹⁷ 17 U.S.C. § 201(a) (2006).

⁹⁸ 17 U.S.C. § 102(a) (2006); see generally Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 457-461 (discussing how many courts interpret the statutory originality requirement as quite low).

⁹⁹ *Cavalier v. Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002) (citation omitted); see also *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930) (stating that “[a] comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of *Romeo and Juliet*”).

¹⁰⁰ 359 F.Supp.2d 1367, 1374-75 (N.D. Ga. 2005) (holding that although the plaintiff had a valid copyright in his five-page outline, he could not prove infringement since he failed to provide a scintilla of evidence supporting access); cf. *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962, 969-70 (9th Cir. 2008) (explaining that although the plaintiff coauthored a fourteen-page treatment for *The Pink Panther* in 1962, the plaintiff was not considered a coauthor of the derivative motion picture because he assigned away his interest in the treatment and its derivative works prior to the writing of the motion picture screenplay).

¹⁰¹ See 17 U.S.C. § 201(b) (ownership of a copyright).

¹⁰² See 17 U.S.C. § 101 (definition of works made for hire).

¹⁰³ See *Everts v. Arkham House Publishers, Inc.*, 579 F.Supp. 145, 149 (W.D. Wisc. 1984) (concluding that “the relationship between the parties was a garden variety publisher-author relationship,” which did not give rise to a work-for-hire situation).

stating the nature of the relationship, exerting control over the creative process, and paying a set fee for the work.¹⁰⁴

In *Community for Creative Non-Violence v. Reid*, the Supreme Court was asked to determine whether a sculpture dramatizing the plight of homelessness fell under the auspices of the work-for-hire doctrine.¹⁰⁵ In providing a framework for cases involving work-for-hire, the Court noted that the first line of inquiry explores whether the work was “prepared by an employee within the scope of his or her employment” under § 101(1).¹⁰⁶ The Court ruled that this determination should be made by applying common-law agency principles to determine the nature and scope of employment.¹⁰⁷

In addition to works within the scope of employment, Section 101(2) enumerates nine categories of collective works that are classified as commissioned works and are subject to a written agreement.¹⁰⁸ Arguably, some transmedia novels may trigger § 101(2) under the audiovisual work category, making it even easier for an employer to secure authorship rights as the employer-for-hire.

The availability of a joint ownership claim is subordinated under the work-for-hire doctrine.¹⁰⁹ However, even assuming a publisher or transmedia producer is unable to call upon the work-for-hire doctrine, joint ownership rights are exceedingly hard to obtain under the standards set forth in *Childress v. Taylor*.¹¹⁰ In *Childress*, Clarice Taylor, the defendant, contacted Alice Childress, a playwright, to make a movie based on the life of the legendary African American comedian”

¹⁰⁴ *Id.* at 148 (“Courts have found that the copyright belonged to the purchaser/employer and not the artist/independent contractor when the artist was paid a sum certain for the creation of a work according to the purchaser’s specifications and the course of dealing between the parties established that the purchaser was buying the work and all the rights to it.”).

¹⁰⁵ 490 U.S. 730, 733 (1989).

¹⁰⁶ *Id.* at 738.

¹⁰⁷ *See id.* at 739-40.

¹⁰⁸ *Id.* at 741; 17 U.S.C. § 101(2) (2006) (defining a “work made for hire” as “a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or 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” upon express written agreement that the work be considered a work-for-hire).

¹⁰⁹ *See* Laura G. Lape, *A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine*, 61 ALB. L. REV. 43, 52 (1997) (“The choice made by courts to subordinate joint work doctrine to work-made-for-hire doctrine represents an avoidance of joint works. Where both doctrines are implicated, courts regularly permit work-made-for-hire doctrine to take priority over joint work doctrine by considering the possibility of a joint work only after having considered and rejected the possibility of a work made for hire.”).

¹¹⁰ 945 F.2d 500 (2d Cir. 1991).

Moms” Mabley.¹¹¹ Childress wrote the play, while Taylor provided research material, sifted through facts, selected “pivotal and key elements to include in a play on ‘Moms’ Mabley’s life,” and suggested numerous characters, scenes and jokes that were used in the final product.¹¹² The Second Circuit applied a two-factor test in evaluating the joint authorship claim, whether (1) each author’s contribution was independently copyrightable; and (2) each party intended that the other be regarded as a joint author.¹¹³

The first prong of the *Childress* analysis investigates whether each author’s work is independently copyrightable. A prospective author has to expend considerably less effort to satisfy the first prong of the *Childress* analysis than is required to qualify as a transmedia work under the franchise model, where each element must be capable of telling a self-contained story absent the greater work.¹¹⁴ Even transmedia elements created under the spiderweb model that do not tell a self-contained story should satisfy the first prong of *Childress*, as transmedia novels are typically composed of a myriad of separable elements such as audio files, artwork, business cards, videos, and the novel itself that, taken in isolation, would meet the minimum bar for copyright.¹¹⁵ It might be possible to imagine an individual contribution that would not meet this minimal threshold,¹¹⁶ but the segmented nature of transmedia novels makes such an eventuality highly unlikely.

The second prong of the *Childress* analysis, requiring that each party regard the other as a joint author, tends to favor the intent of the “dominant” author over that of the “non-dominant” author; however, the court failed to explain who qualifies as dominant.¹¹⁷ In *Thomson v.*

¹¹¹ *Id.* at 502.

¹¹² *Id.*

¹¹³ See *id.* at 506-508; see also Lior Zemer, *Constitutional Challenges to Copyright: Is Intention to Co-Author an “Uncertain Realm of Policy”?*, 30 COLUM. J.L. & ARTS 611, 613 (2007) (analyzing the Second Circuit test used applies in *Childress*).

¹¹⁴ See discussion *supra* Part I.B.

¹¹⁵ See discussion *supra* Part II.

¹¹⁶ See *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004). Judge Posner argues that a *de minimis* test for joint authorship should be used as opposed to *Childress*’ independently copyrightable requirement since: [w]here two or more people set out to create a character jointly in such mixed media as comic books and motion pictures and succeed in creating a copyrightable character, it would be paradoxical if though the result of their joint labors had more than enough originality and creativity to be copyrightable, no one could claim copyright. *Id.* at 658-59.

¹¹⁷ See *Childress*, 945 F.2d at 508 (noting how the second inquiry is “especially important” in cases where one author is dominant over the other, but failing to

Larson, the Second Circuit sought to remedy this confusion by setting forth a standard for determining the identity of the dominant author.¹¹⁸ The case centered around determining authorship for *Rent*, a popular musical based on Puccini's opera *La Boheme*. Billy Aronson and Jonathan Larson collaborated on the work from 1989 to 1991. When Aronson left the project, both parties expressed their mutual intent, in a written agreement, that Aronson would have billing rights but "not...be considered [an] active collaborator or co-author of RENT."¹¹⁹ Larson hired Lynn Thomson to serve as a dramaturg in 1995 in exchange for billing credits and monetary fees.¹²⁰ In finding Larson to be the dominant author of the pair, the court considered who had decision-making authority, billing credit, and written instruments to third parties as evidence thereof.¹²¹ The publisher or transmedia producers are more likely to possess these indices of dominance and control than the typical prospective co-author.¹²² Therefore, any joint authorship rights are likely only presented to prospective authors in these relationships as a bargaining chip with no actual corresponding rights in the copyright context.

IV. PROVIDING HISTORICAL CONTEXT TO THE RELATIONSHIP BETWEEN PRODUCER AND NOVELIST

Against this backdrop, the producer has a distinct advantage in securing authorship rights for transmedia novels.¹²³ Under Romantic notions of authorship, this result may seem offensive, as it diminishes the gravitas of the "endowments and accomplishments of the individual genius" that gave immediate rise to the creative work¹²⁴ in favor of the publisher or producer that affirmatively acted to facilitate creativity. Reflective of this Romantic sentimentality towards authorship, copyright law has traditionally regarded a novelist as the author of a book; a playwright is viewed as the author of a play; and a director as

address what qualifies a party as "dominant"); Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 223-24 (2001) (discussing the lack of clarity in *Childress* in determining who qualifies as a dominant author).

¹¹⁸ 147 F.3d 195 (2d Cir. 1998).

¹¹⁹ *Id.* at 197.

¹²⁰ *Id.*

¹²¹ *Id.* at 202-204.

¹²² See discussion *supra* Part II.

¹²³ See discussion *supra* Part III.

¹²⁴ Woodmansee, *supra* note 8, at 142.

the author of a film.¹²⁵ While some novelists are successful in claiming authorship over works through their dual roles as producer-novelists, the transmedia publishing space is increasingly becoming a proprietary playground for companies, acting as either publisher or producer.¹²⁶

In considering the history of copyright law, the technological constraints to production and publication have served a formative role in the law's development. Prior to the invention of the printing press, there was little need for copyright protection, since the time-intensive and physically demanding process of manually copying an author's manuscript provided a negligible cost advantage to piracy.¹²⁷ However, with the advent of mass-produced literary works, the value of an author's literary expression had the opportunity to surpass the value of a scrivener's labor for arguably the first time in history.¹²⁸

In response to the increased demand for the printed word in Britain, Queen Mary Tudor issued a charter to the Stationers' Company in 1557, giving guild members a monopoly on the printing industry by agreeing to only print books approved by the Crown.¹²⁹ Publishers paid authors professional compensation in exchange for exclusive rights to the manuscripts.¹³⁰ An author's only right was limited to her or her ability to control the right of first publication in selling the initial manuscript.¹³¹ In 1694, the Stationers lost the ability to seize, destroy, and levy fines against works and presses that did not comply with their guidelines, leaving only monetary fines as recompense for offending presses.¹³²

Responding to the threat to their profit model, publishers lobbied for a property right to protect their interest in a work.¹³³ Parliament

¹²⁵ See Christine Alice Corcos, *Legal Fictions: Irony, Storytelling, Truth, and Justice in the Modern Courtroom Drama*, 25 U. ARK. LITTLE ROCK L. REV. 503, 548 (2003); F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225, 287 (2001).

¹²⁶ See discussion *supra* Part II.B-C.

¹²⁷ See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 31 (Stanford Univ. Press rev. ed. 2003) (discussing the impact the printing press had on proprietary rights and piracy).

¹²⁸ *Id.*

¹²⁹ See *id.* at 33 (explaining that the limitation on printing to those works that received the approval of the Crown was governed by the Licensing Acts, which expired in 1694); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 37 (2001) (discussing the charter issued to the Stationers' Company).

¹³⁰ VAIDHYANATHAN, *supra* note 129, at 37.

¹³¹ GOLDSTEIN, *supra* note 127, at 32.

¹³² *Id.* at 33.

¹³³ *Id.* at 33-34.

responded by issuing the Statute of Anne in 1709, entitled “An Act for the Encouragement of Learning, by Vesting the Copies of printed Books in the Authors, or Purchasers, of such Copies, during the Times therein mentioned.”¹³⁴ The statute provided authors with fourteen years of protection with a one-time option of renewal for the same period, while granting the Stationers exclusive rights to previously published works for twenty-one years.¹³⁵ However, as one commentator notes:

The codification of authorship was merely an appeal to a straw man. A manuscript is worth nothing on the market until an author assigns the rights to a publisher. At that point, the publisher is the real player in the legal and commercial game. Mainly, the Statute of Anne was an elaborate attempt to regulate publishers....¹³⁶

The common law courts in Britain entertained the possibility of the existence of a natural property right in literary works that would extend in perpetuity, although the notion was eventually rejected in *Donaldson v. Beckett*.¹³⁷ American copyright law broke from the British focus on both property law and natural rights, instead choosing to “promote the Progress of Science and the useful Arts.”¹³⁸

Since the American copyright tradition is rooted in incentivizing progress, determining who should be entitled to protection must necessarily return to the question of incentives. For a time, Britain found that protecting the interests of publishers through the Stationers’ Guild served its interests in incentivizing creativity. The question thus becomes: does the preferential treatment afforded to publishers and transmedia producers actively seek to incentivize progress in the growing marketplace for transmedia novels? To answer this question, we must turn to the nature of the modern publishing industry.

¹³⁴ VAIDHYANATHAN, *supra* note 129, at 40.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 43. In *Donaldson*, the House of Lords stated:

The notion of a perpetual privilege and monopoly, was within these few years hatched among the booksellers, who now come with glossing colours, and under a pretence of serving the cause of literature, mean only to get the fruits of genius into their own hands for ever. But the consequences of this new doctrine, were it established, would be fatal to the interest of letters, and the fame of every valuable author.

Donaldson v. Beckett, (1774) 1 Eng. Rep. 837, 845.

¹³⁸ U.S. CONST. art. I, § 8, cl. 8; *see* VAIDHYANATHAN, *supra* note 129, at 45 (noting that the Arts and Sciences clause “makes it clear that copyright and patent laws are meant to benefit the public first and foremost...”).

Although the burgeoning self-publishing market is providing an alternative to traditional publishing,¹³⁹ many traditional publishing companies will not accept unsolicited manuscripts and instead rely on literary agents to serve as gatekeepers.¹⁴⁰ These publishing companies possess a competitive advantage in negotiating with major book retailers for advertising and shelf space in both traditional brick-and-mortar retail stores and their virtual counterparts.¹⁴¹ Nevertheless, publishing companies are still leaving most of the promotional efforts to individual authors, which creates a major hurdle for authors to overcome in order to be discovered by new readers.¹⁴² While publishers have incentives to increase sales of their overall product line, the incentive to help first-time authors nurture and develop their reader base is lessened by the increased contract prices of subsequent novels.

CONCLUSION

Allowing publishing companies and transmedia producers to easily obtain ownership rights as authors may offend Romantic notions of the solitary author, but it does help align corporate interests with the discovery process by guaranteeing the companies will enjoy the fruits of their labors. When compared to traditional novels, transmedia novels are relatively expensive endeavors. When asked if he would consider releasing a transmedia novel for his next book, J.C. Hutchins explained that:

going to the editing process for 7th *Son*, I knew I didn't have the resources. I knew that this book didn't have the budget to accommodate any kind of real world tangible items because

¹³⁹ See Motoko Rich, *Self-Publishers Flourish as Writers Pay the Tab*, N.Y. TIMES (Jan 27, 2009), <http://www.nytimes.com/2009/01/28/books/28selfpub.html>.

¹⁴⁰ See, e.g., *How do I submit my manuscript to Houghton Mifflin Harcourt?*, HOUGHTON MIFFLIN HARCOURT, <http://www.houghtonmifflinbooks.com/faq/submission.html> (last visited Feb. 27, 2011) (“Unfortunately, we are unable to accept unsolicited manuscript submissions. If you want to publish a manuscript, a good way to start is by looking for a literary agent in the *Literary Marketplace*.”); *Aspiring Authors Wishing to Submit Manuscripts*, SCHOLASTIC INC., <http://www.scholastic.com/aboutscholastic/contact.htm> (last visited Feb. 27, 2011) (“Scholastic and most other...publishers do not accept unsolicited manuscripts. Most works are submitted by literary agents or are created under a contract.”).

¹⁴¹ See Cecilia Tan, *Discoverability: Still a Book's Biggest Problem*, DIGITAL BOOK WORLD (Apr. 8, 2010), <http://digitalbookworld.com/2010/discoverability-still-a-books-biggest-problem>.

¹⁴² See *id.* (discussing a shift in the promotion of a book where “the author is the one who has to get involved in approaching blogs and websites for mentions and reviews”).

the manufacturing and insertion of these items into *Personal Effects: Dark Art* is expensive, comparatively speaking....¹⁴³

Moreover, publishing companies and transmedia producers may be willing to take greater risks to aggressively invest and promote in their transmedia properties if they are assured that a steady revenue stream from the books and any resulting derivative works will follow. For instance, with regard to the launch of the *39 Clues* franchise, one author notes that the series serves as “Scholastic’s attempt to create a branded franchise for which it owns all the rights.... Ms. Rowling retained the rights to the Harry Potter series, which meant that she could pursue separate deals from film and other licensed products, effectively cutting out Scholastic.”¹⁴⁴ Thus, it is not surprising that Scholastic sold the *39 Clues*’ movie rights to DreamWorks several months before the release of the first installment.¹⁴⁵

That is not to say that unbridled use and abuse of these methods would incentivize progress and development in the literary world. The growing trend towards producers stamping their authorial brand on works, as typified by James Patterson’s practice of hiring ghostwriters to write under his name, may hinder the discovery of new authors.¹⁴⁶ However, the specialized skill-sets and increased expenses involved in crafting compelling transmedia novels, when combined with the alignment of promotional incentives to increase the book’s discoverability, makes the transmedia publishing industry an ideal setting for the growing crop of producer-novelists. In this case, promotion of the Arts and Sciences demands encouraging the development of a new breed of writing by recognizing the authorship of transmedia producers.

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¹⁴³ Hutchins Podcast, *supra* note 61.

¹⁴⁴ Rich, *supra* note 32.

¹⁴⁵ DreamWorks Press Release, *supra* note 49.

¹⁴⁶ Jonathan Mahler, *James Patterson Inc.*, N.Y. TIMES MAGAZINE (Jan. 20, 2010), available at <http://www.nytimes.com/2010/01/24/magazine/24patterson-t.html> (explaining that one out of every seventeen hardcover novels bought in the United States since 2006 was written by James Patterson, who publishes over nine new books a year with the help of his “stable of co-authors”). Interestingly, Patterson has adopted the practice of filing copyright claims under the aptly named corporate name of Sue-Jack, Inc., and has even amended many of his older filings to transfer his copyright interest to the company. *See e.g.*, U.S. Copyright Registration No. TX0005801738 (filed Apr. 24, 2003); U.S. Copyright Registration No. TX0006187370 (filed June 6, 2005).

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