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Work-For-Hire and the Moral Right Dilemma in the European Community: A U.S. Perspective†

*Robert A. Jacobs**

Introduction

For some copyright owners, the 1992 buzz words of "freedom of movement" are a cruel joke. Despite the drive toward a barrier-free common market within the European Community (EC), copyright owners continue to face the unique obstacles created by moral right principles. These principles, in essence, give an author "the right to publish his work as he sees fit, and to prevent its injury or mutilation."[1] Since these rights generally only accrue to the creator of a work,[2] persons who acquire interests in a copyrighted work by means other than creation must consider whether their use of a work could violate its creator's moral right. The burden of assessing potential moral right claims falls particularly on copyright licensees, assignees, and those who own copyright interests in works made for hire. While this class of owners as a whole faces the same moral right dilemma in the EC, recent developments in the work-for-hire context[3] best illustrate the extent to which the international copyright community continues to misconstrue national approaches to copyright ownership and moral right.

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* J.D. (cum laude), Southwestern University School of Law. Mr. Jacobs is currently a law clerk for Judge Gregory Carman of the United States Court of International Trade in New York City.

[1] Marshall Leaffer, Understanding Copyright Law 2 (1st ed. 1989).

[2] *Id.* at 254 (describing moral right as "an inalienable, natural right and an extension of the artist's personality").

[3] During the summer of 1991, John Huston's heirs successfully asserted the director's moral right to enjoin the televised broadcast of a colorized version of the film "Asphalt Jungle." Judgment of May 28, 1991 (Huston v. La Cinq), Cass. civ., 1991 Bull. Civ., No. 89–19.522 (Fr.), *available in* LEXIS, Prive Library, Cassci File. The French Supreme Court granted the injunction despite the fact that M.G.M. had acquired the film's original copyright as a work-for-hire and validly transferred its interest to Turner Broadcasting. *Id.*

The laws of several EC Member States create problems for Americans[4] who wish to exploit works made for hire in the EC.[5] Foremost among these problems is the disparate treatment that Member States accord to authors whose status as author does not stem from creating a copyrighted work, but from the legal fiction supplied by work-for-hire rules.[6] This legal fiction posits that when a creator constructs a copyrightable work in the context of certain employment relationships, authorship vests in the person *for whom* the creator works.[7]

The dilemma posed by these divergent approaches was played out most recently in the French Supreme Court decision, *Huston v. La Cinq*.[8] In *Huston*, John Huston's heirs sought and obtained an injunction barring the broadcast of the colorized version of the film "Asphalt Jungle."[9] Despite the fact that Metro-Goldwyn-Mayer Studios owned the original copyright in the film,[10] the French High Court ruled that under French copyright law the heirs possessed the separate moral rights of paternity[11] and

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[4] For purposes of this article, "Americans" refers to those natural persons, business entities, and foreign copyright registrants that hold a copyright under U.S. law.

[5] 17 U.S.C. § 101 (1988), in relevant part, defines "work made for hire," as:

> (1) a work prepared by an employee within the scope of his or her employment; or
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> (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.

Id.

[6] *Cf.* ADOLF DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY 41–42 (1978)(contrasting the pro-employer work-for-hire rules in the United Kingdom, Ireland, Luxembourg, and the Netherlands with the pro-employee rules in Belgium, Denmark, Germany, France, and Italy).

[7] *Cf.* LEAFFER, *supra* note 1, at 132 (distinguishing between "works created as part of one's job" and "works created by individual authors on their own motivation" to explain the work-for-hire doctrine).

[8] Judgment of May 28, 1991 (Huston v. La Cinq), Cass. civ., 1991 Bull. Civ., No. 89–19.522 (Fr.), *available in* LEXIS, Prive Library, Cassci File.

[9] *Id.*

[10] Under U.S. copyright law, once an author properly "fixes" a work of sufficient creativity, she attains a copyright. "A copyright consists of a bundle of exclusive rights which empowers the copyright owner to exclude others from certain uses of his work." LEAFFER, *supra* note 1, at 203. Therefore, once Huston completed the film and M.G.M. complied with the necessary copyright formalities, the studio acquired the five exclusive rights of reproduction, adaptation, distribution, performance, and display in the film.

[11] The right of paternity enables an author to indicate her position as the author of a work in disseminating that work. Robert Plaisant, *France*, *in* INTERNATIONAL COPYRIGHT

integrity[12] that the colorized film violated.[13] Even assuming Huston purported to transfer or waive his moral right by contract, French law, and the law of eight other EC Member States, would invalidate such contractual efforts.[14] Despite the warm reception Huston's heirs received in France, the United Kingdom, Ireland, and the Netherlands would not recognize their claimed moral right subsequent to a contractual transfer or waiver.[15]

LAW AND PRACTICE 81 (Paul Edward Geller et al. eds., 1991). This article refers to the right of paternity and the right of attribution interchangeably.

[12] In general, the right of integrity gives each author the right to prohibit a copyright transferee and holders of the copyrighted work from modifying the author's work.

[13] Judgment of May 28, 1991 (Huston v. La Cinq), Cass. civ., 1991 Bull. Civ., No. 89–19.522 (Fr.), *available in* LEXIS, Prive Library, Cassci File.

[14] Belgian law categorically forbids alienation of moral right interests. *See* Jan Corbet, *Belgium, in* INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 11, at 16; *see also* Denmark Law No. 158 of 1961 on Copyright in Literary and Artistic Works, ch. 1 § 3 (1977 text), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, at Denmark (U.N. Educ., Scientific, & Cultural Org. et al. eds., 1990) [hereinafter Denmark Copyright Law] (author cannot waive rights of paternity and integrity); France Law No. 57–298 on Literary and Artistic Property, art. 6 (1985 text), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra*, at France [hereinafter French Copyright Law] (describing the moral right of paternity and integrity as "perpetual, inalienable and imprescriptible"); Federal Republic of Germany Act dealing with Copyright and Related Rights (1985 text), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra*, at Germany [herinafter German Copyright Law]; Adolph Dietz, *Germany, in* INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 11, at 91 (German copyright law impliedly recognizes some waiver of moral right but maintains a presumption against it); Greek Law on Literary Property, art. 1 (1944 text), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra*, at Greece [hereinafter Greek Copyright Law]; George Koumantos, *Greece, in* INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 11, at 30 [hereinafter Koumantos] (Greek copyright prohibits authors from transferring moral right but allows for limited waiver); Italy Law No. 633 of Apr. 22, 1941, for the Protection of Copyright and Other Rights Connected with the Exercise Thereof, art. 22 (1981 text), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra*, at Italy [hereinafter Italian Copyright Law] (rights of paternity and integrity are inalienable); Luxembourg Copyright Law of Mar. 29, 1972, art. 9 (1972 text), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra*, at Luxembourg [hereinafter Luxembourg Copyright Law] (author retains right of paternity and integrity after transfer of author's economic rights); Portugal Code of Copyright and Related Rights, art. 56 (1)–(2) (1985 text), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra*, at Portugal [hereinafter Portugal Copyright Law] (characterizing the moral right of paternity and integrity as "perpetual, inalienable and imprescriptible"); Spanish Law on Intellectual Property, art. 14 (1987 text), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra*, at Spain [hereinafter Spanish Copyright Law] (labelling moral rights as "unrenounceable and inalienable").

[15] *See* United Kingdom Copyright, Designs and Patent Act 1988, § 87(2) (1988 text), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra* note 14, at United Kingdom [hereinafter United Kingdom CDPA] (authors may waive their moral right in a signed writing but cannot transfer it); Ireland Act to Make New Provision in Respect of Copyright and Related Matters, in Substitution for the Provisions of Parts VI and VII of the Industrial and Commercial Property (Protection) Act, 1927, and Other Enactments

The conflict *Huston* addressed illustrates a significant inconsistency in EC copyright law, which greatly impacts the U.S. work-for-hire doctrine.[16] Copyright laws in the EC and those of the United States represent two different copyright traditions—the civil law dualistic system and the common law monistic system. The dualistic system consists of "two essential components, each with a different nature: moral right and economic right."[17] On the one hand, "[m]oral right is a right of personality that . . . protect[s] the person of the author."[18] The right enables an author "to maintain respect for his work and, thereby, for his reputation. This right . . . is perpetual [and] inalienable."[19] On the other hand, "[t]he economic component of copyright is the right to exploit a work and draw profits from it . . . [and] is by nature transferable."[20]

Under the monistic system, copyright as a whole safeguards "both the financial and intellectual interests of the author."[21] The monistic structure, unlike the dualistic structure, views authors' financial and intellectual interests as complimentary and therefore permits authors to profit from both.[22] Thus, the United Kingdom, Ireland, and the Netherlands—all of whom adhere to the monistic system—allow authors to transfer or waive their moral right.[23] The dualistic system of all other EC civil law countries affects U.S. work-for-hire owners most severely.

Relating Thereto, and to Provide for Matters Connected With the Matters Aforesaid, § 10 (1963 text), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra*, at Ireland [hereinafter Ireland Copyright Act] (employer and principal acquire copyright works made in the course of employment or under contract and therefore preclude moral right claims by creator; and, moral right is subject to waiver); Netherlands Law Concerning the New Regulation of Copyright, art. 25 (1985 text), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra*, at Netherlands [hereinafter Netherlands Copyright Law] (author may waive right to paternity, integrity, and honor). These rules indicate that British, Irish, and Dutch work-for-hire copyright holders face the same problems as their American counterparts.

[16] In the United States, 17 U.S.C. §§ 101, 201(a)–(b) (1988) govern the work-for-hire doctrine. They set forth, respectively, the statutory definition of the work-for-hire doctrine and guidelines for ownership of works satisfying the statutory definition.

[17] Plaisant, *supra* note 11, at 11–12 (describing the French dualistic system).

[18] *Id.* at 12.

[19] *Id.*

[20] *Id.*

[21] DIETZ, *supra* note 6, at 47.

[22] *Id.* ("The exclusive right of use granted to the author serves his intellectual interests, too, and the personal rights granted to him also serve his financial interests.").

[23] *See supra* note 15 and accompanying text; *see also* discussion *infra* part II.B.2.a–c.

Americans who wish to market a work made for hire in most EC civil law countries must consider the potential problems a moral right challenge would pose to the economic exploitation of the work.[24] When contracting for the work, Americans need to assess the contours of the work-for-hire doctrine within each EC Member State and to account for any limitation a particular Member State's laws may impose. *Huston* suggests moral right is such a limitation because it casts a shadow over future economic exploitation of a work-for-hire.

Whether moral right poses any threat at all depends on how an EC Member State defines authorship for copyright purposes. To the extent a Member State defines "author" in the work-for-hire context in the same manner as U.S. law,[25] U.S. firms can expect the same treatment in that Member State as they would receive in the United States. Because moral rights attach to the author in the EC,[26] if the law of an EC Member State attributes

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[24] This article does not address moral right in the United States. Nonetheless, it should be noted that moral right also creates obstacles in the United States. *See, e.g.,* 17 U.S.C.A. § 106A (Supp. 1991)(creating the moral right of attribution and integrity in authors of works of visual art); Cal. Civ. Code § 987 (West Supp. 1988)(establishing a right of paternity and integrity in authors of works of fine art); *see also* Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976)(holding that defendant's mutilation of plaintiff's work—a classic moral right of integrity violation—infringed plaintiff's copyright since it constituted an unauthorized derivative work). For a more complete discussion of U.S. statutory and common law moral right provisions, see Roberta R. Kwall, *Copyright and Moral Right: Is an American Marriage Possible?,* 38 VAND. L. REV. 1, 10 (1985). *See also* Jack A. Cline, Comment, *Moral Rights: The Long and Winding Road Toward Recognition,* 14 NOVA L. REV. 435 (1990).

[25] 17 U.S.C. § 201(b) (1988) defines "author" in the work-for-hire context as "the employer or other person for whom the work was prepared . . . ." In *Community for Creative Non-Violence (CCNV) v. Reid,* the Supreme Court further refined § 201(b)'s definition when it held that traditional agency principles will determine whether a work is one that an employee prepared in the scope of his or her employment. 490 U.S. 730, 750–51 (1989). The Court indicated a need to focus on "the hiring party's right to control the manner and means by which the product is accomplished." *Id.* at 751. The Court also listed the following factors to guide the inquiry:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 751–52 (footnotes and citations omitted).

[26] The copyright laws of all EC Member States protect the authors of works. DIETZ, *supra* note 6, at 41. In general, the Member States apply the term "author" to the natural

authorship to the employer in an employer-employee relationship or to the principal in a principal-independent contractor relationship, then the creator of the work—the employee or the independent contractor—lacks a legal basis to object to the work's exploitation.[27] The question of authorship, therefore, is central to the work-for-hire quandary.

The purpose of this Article is to examine how each EC Member State defines authorship for work-for-hire purposes and to demonstrate that each State's approach *is* consistent with broader EC and international copyright principles. Part I outlines the international copyright norms that affect the work-for-hire doctrine. Part II addresses the EC policies that impact national copyright law and how each EC Member State approaches the work-for-hire issue. Part III explores the extent to which harmonization or adoption of a private choice of law rule could help resolve the conflict created by the States' divergent approaches. Despite the difficulties EC work-for-hire rules present, this Article concludes that EC rules should remain the same because they reflect substantial cultural values that Member States should not be forced to sacrifice.

I. INTERNATIONAL COPYRIGHT NORMS

The Berne and Universal Copyright Conventions greatly affect the work-for-hire doctrine in the EC. Their impact stems from the reciprocity principle on which they both operate. This principle requires, in part, that all Member States apply their own national copyright law to protect a work that another Member State protects under its own law.[28] Because EC national laws differ with respect to the work-for-hire doctrine,[29] reciprocity between EC Member States can produce anomalous results. The Berne and Universal Copyright Conventions require separate consideration because each plays such an integral role in resolving copyright problems between two or more countries.

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person or persons responsible for creating the work. *Id. But see infra* text accompanying note 243.

[27] *See* discussion *infra* part II.C.

[28] *See infra* notes 35, 69 and accompanying text.

[29] *See* discussion *infra* part II.B.1–2.

A. *The Berne Convention*

1. An Overview

The Berne Convention establishes a Union dedicated to protecting authors' rights in their literary and artistic works.[30] Since its inception in 1886, the Berne Convention has provided the basic framework for international copyright relations.[31] It represents the first broad-based multilateral copyright convention,[32] and a "limited kind of international copyright code."[33]

The Berne Convention applies broadly and grants national legislatures wide latitude to fashion their own protective schemes. It applies to all "'literary and artistic works' . . . includ[ing] every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression."[34] In essence, the Berne Convention requires its signatories to protect the published or unpublished works of an author of another Member State.[35] Member States must also protect works of non-Member State nationals who publish their works first in a Member State or who publish their works simultaneously in a non-Member State and a Member State.[36] The Berne Convention contemplates protection for a minimum term of life plus fifty years,[37] or, in the case of anonymous or pseudonymous works, fifty years from publication.[38] Apart from the moral right provision,[39] the Berne Con-

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[30] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (*revised in* 1908, 1928, 1967, 1971) art. 1 [hereinafter Berne Convention] (Paris text).

[31] Stephen J. Strauss, *Don't Be Burned By Berne: A Guide to the Changes in the Copyright Laws as a Result of the Berne Convention Implementation Act of 1988,* 71 J. PAT. OFF. SOC'Y 374, 374 (1989). For an in-depth discussion of the Berne Convention's historic origins, see generally SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986 (1987).

[32] RICKETSON, *supra* note 31, at 39.

[33] *Id.* at 41.

[34] Berne Convention, *supra* note 30, at art. 2(1).

[35] *Id.* at art. 3(1)(a).

[36] *Id.* at art. 3(1)(b).

[37] *Id.* at art. 7(1).

[38] *Id.* at art. 7(3).

[39] *Id.* at art. 6*bis*. Article 6*bis* of the Berne Convention contains the moral right provision:

> (1) 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 honour or reputation.

vention does not require recognition of rights beyond those already established by U.S. copyright law.[40]

Although the Berne Union has achieved significant success,[41] an ideological debate over the proper scope of author's rights has persisted since the Union's formation.[42] Because the work-for-hire doctrine inverts the concept of "creator as author" to "employer or principal as author," the doctrine is averse to many signatories' notions of author's rights. Those countries who feel that author's rights are strictly personal are offended by the prospect that one who pays for a creator's work in the course of employment or pursuant to contract acquires the copyright in that work. The Berne Convention has approached these authorship issues equivocally and appears to leave them to national legislatures to resolve.

2. Authorship Under the Berne Convention

The Berne Convention does not define the term "author."[43] Instead, the Berne Convention leaves the concept to the ordinary meaning it has in each signatory. In the United States, the law describes "author" as "[o]ne who produces, by his own intellectual

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> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
>
> (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Id.

[40] *Cf.* LEAFFER, *supra* note 1, at 350. "Berne . . . is not as extensive as American law. For example, Berne is silent on distribution and display rights, both of which are specifically provided for under American law." *Id.*

[41] Eighty-four nations have acceded to the Berne Union since its formation in 1886. For a list of nations which were parties to the Berne Convention as of 1990, see generally *Copyright, Monthly Review of the World Intellectual Property Organization*, Jan. 1990 [hereinafter *WIPO*]. The United States joined the Berne Union in 1988. *See* The Berne Convention Implementation Act of 1988, Pub. L. No. 100–568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. §§ 101, 104, 116, 301, 401–02, 404–08, 801 (1988)). For an in-depth discussion of the Berne Convention's effect in the United States, see David Nimmer, *The Impact of Berne on United States Copyright Law*, 8 CARDOZO ARTS & ENT. J. 27 (1989).

[42] One commentator has linked the problem to achieving a consensus between nations about what constitutes "the author's natural right of property in his works." RICKETSON, *supra* note 31, at 40.

[43] *Id.* at 158.

labor applied to the materials of his composition, an arrangement or compilation new in itself."[44] This description confers authorship status on creators of intellectual works. All Berne Union countries accept the "creator as author" equation.[45] Some Berne countries, however, accept the equation for some purposes and reject it for others.[46] In general, countries that unconditionally adhere to the "creator as author" concept do so on the premise that authors can only be natural persons.

Indeed, one commentator has asserted that the Berne Convention intended to adopt the "only natural persons" approach.[47] This commentator bases his argument on four points. First, the reference in the Berne Convention's preamble and article 1, regarding "the need to protect the 'rights of authors in their literary, and artistic works,'" alludes to personal, not corporate, rights.[48] Second, because the Berne Convention makes the general term of protection dependent upon the life of the author plus fifty years, the term could not apply to corporate entities which may have an indeterminate existence.[49] Third, the fact that article 14*bis* makes a special allowance for legal systems that permit the author of cinematographic works to be a corporate person "confirms the existence of the general rule that only natural persons can be authors."[50] Fourth, numerous other conventions specifically address works whose creators are not their authors and whose authors are not natural persons; this is further evidence that the Berne Convention has adopted a general rule that only natural persons can be authors.[51]

Although this argument highlights some important facets of the Berne Convention, it does not persuasively show that the Convention strictly follows the "creator as author" equation.[52]

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[44] BLACK'S LAW DICTIONARY 168 (4th ed. 1968). Of course, for copyright purposes, 17 U.S.C. § 201(b)(1988) transforms this traditional definition. *See supra* note 25.

[45] RICKETSON, *supra* note 31, at 158.

[46] *Compare* United Kingdom CDPA, *supra* note 15, § 9 ("In this Part 'author,' in relation to a work, means the person who creates it") *with id.* §§ 11(1)–(2)("The author of a work is the first owner of any copyright in it, subject to the following provisions. Where a literary, dramatic, musical or artistic work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work. . . .").

[47] *See* RICKETSON, *supra* note 31, at 159.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] In fact, the argument appears to overlook the strongest basis for finding that the

Initially, the mere fact that the Berne Convention refers to "authors' rights"[53] does not necessarily exclude non-natural persons. A brief reference to U.S. copyright law supports this inference. In the United States, the Constitution vests Congress with the authority "[t]o promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."[54] The meaning of "authors" in this context is as open-ended as "authors" in the Berne Convention context. Accordingly, when Congress amended the copyright laws in 1909 and 1976 to codify the work-for-hire doctrine, it interpreted "authors" to include both natural and non-natural persons.[55] This interpretation is as plausible as construing the Berne Convention's "authors" to include *only* natural persons. Thus, the Berne Convention's language may not indicate that it protects only natural persons.

There is no conclusive proof that the Berne Convention applies only to natural persons. Although non-natural persons have indeterminate existences, a potentially indefinite lifespan alone does not preclude non-natural persons from obtaining copyright protection. For example, under the indeterminate existence argument, the Berne Convention would not apply to anonymous or pseudonymous works because by definition these works have no author whose life could measure the term of copyright protection. The Berne Convention itself refutes this position since it fixes the term of protection for anonymous and pseudonymous works to fifty years.[56] Furthermore, like the Berne Convention's scheme for anonymous and pseudonymous works, signatories may establish methods for protecting other kinds of works whose

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Berne Convention generally follows a "creator as author rule" and does not protect non-natural authors. This basis is the character of the Berne Convention's adherents. That is, of the eighty-four nations who had become signatories of the Berne Convention as of 1990, the overwhelming majority follow the civil law tradition of limiting initial copyright ownership to creators. *See WIPO*, *supra* note 41.

[53] *See* Berne Convention, *supra* note 30, at pmbl. (Union countries "animated" by desire to "protect . . . the rights of authors in their literary and artistic works"); *see also id.* at art. 1 ("The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.").

[54] U.S. CONST. art. I, § 8, cl. 1.

[55] *See* 17 U.S.C. § 26 (1909 Act)("the word author shall include an employer in the case of works made for hire"); *see also* 17 U.S.C. § 201(b) (1988) ("[T]he employer or other person for whom the work was prepared is considered the author for purposes of this title. . . .").

[56] Berne Convention, *supra* note 30, at art. 7(3).

authors are non-natural persons. For example, the United States limits copyright protection of works made for hire to a set number of years.[57] The Berne Convention and U.S. provisions demonstrate the potential to protect non-natural persons and more significantly, the proposition that the Berne Convention itself contemplates such protection.

The third point favoring a "natural persons only" interpretation incorrectly assumes that because the Berne Convention relies on national legislation for copyright ownership in cinematographic works, the Berne Convention makes a "special allowance" for corporate ownership.[58] The Berne Convention's willingness to allow national legislatures to define a class of works reflects a policy of deference to national legislatures in particularly complex areas of intellectual creation such as the "general rule" that only natural persons can be authors. Copyright policy decisions are very difficult, given the variety of intellectual contributions a cinematographic work typically contains, and the nature of the cinematographic industry in general. In view of the complexities of this industry, the Berne Convention's special allowance for corporate ownership does no more than leave difficult decisions to the Union Members.

Finally, the fact that other conventions address non-natural creators does not prove that the Berne Convention establishes a general rule that only natural persons can be authors.[59] The Berne Convention represents more than a century of negotiation to develop norms for the international copyright community. During this period various technologies developed which necessitate separate treatment. While the conventions addressing these new technologies may provide for non-natural creators, the Berne Convention's failure to make such provisions does not indicate that the Berne Convention implicitly denies that non-

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[57] For works made for hire created on or after January 1, 1978, the term of protection lasts seventy-five years after publication, or one hundred years after creation, whichever is shorter. 17 U.S.C. § 302(c) (1988). The same duration applies to works made for hire created before January 1, 1978, but not published or registered. 17 U.S.C. § 303 (1988).

[58] Berne Convention, *supra* note 30, at art. 14*bis*(2)(a). Article 14*bis*(2)(a) states: "Ownership of copyright in a cinematographic work shall be a matter for legislation in a country where protection is claimed." *Id.*

[59] To make this point Ricketson refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) 1961 and the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms (Geneva, 1971). RICKETSON, *supra* note 31, at 159 n.7.

natural persons may be creators. Like any international convention, the Berne Convention cannot effectively treat all technologies that implicate copyright. In short, the Berne Convention neither creates a per se rule against non-natural creators nor explicitly grants such creators its protection.[60]

3. Work-for-Hire Under the Berne Convention

Just as the Berne Convention omits any definition of "author," it also does not explicitly address the work-for-hire doctrine.[61] Furthermore, the reasons advanced to explain why the Berne Convention rejects work-for-hire are similar to the reasons why it does not recognize non-natural authors, with one exception.[62]

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[60] Admittedly, the Berne Convention's moral right provisions clouds the authorship issue. *See* Berne Convention, *supra* note 30, at art. 6*bis* (moral right). However, under the law of a few EC Member States and the United States, waiver or transfer of moral right and/or the work-for-hire doctrine obviate the concern that moral right may potentially raise. *See supra* notes 14–15 and accompanying text.

Nonetheless, the questions of who created the work, who a work's author is, and who owns the work's copyright are separate and distinct. For example, a party may own a work's copyright without being the work's author. Under the Berne Convention, the author always retains a moral right in the work and can effectively limit the owner's exercise of her exclusive rights in the work. Alternatively, if the owner were also the author because the law vested the original copyright in her (as under the work-for-hire doctrine), the creator would no longer have any moral right by which she could limit the owner's exclusive rights in the work. These two examples illustrate that whomever the law recognizes as author acquires the original and complete copyright. This copyright includes both moral and economic rights in the work. In the final analysis, moral right is collateral to the issue of authorship since authorship is a condition precedent to acquiring moral right.

[61] However, article 15(2) implicitly recognizes the doctrine since it addresses corporate authorship of a cinematographic work: "The person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the maker of the said work." Berne Convention, *supra* note 30, at art. 15(2). Corporate authorship can only arise by treating the corporation as author. A corporation, in turn, can only be an author through its employees, and only by virtue of work-for-hire principles. Hence, article 15(2) incorporates work-for-hire, albeit implicitly, only in the context of cinematographic works.

[62] *See* RICKETSON, *supra* note 31, at 902–03: "[A]s a general matter, Union countries should not extend the status of 'author' to persons or entities who are clearly not the *real* creators of works." (emphasis added). Granting authorship status to non-creators contravenes the Convention for the following reasons:

> (1) While the term "author" is not defined in the Convention, the requirement of intellectual creation which is implicit in article 2(1) indicates that this must be the person who is the actual creator of a work.
>
> (2) While there is nothing which expressly requires an author to be a natural person, this seems confirmed by the requirements with respect to duration and the protection of moral rights. The fact that there is a special provision dealing with cinematographic works also supports this view.

Id. (footnotes and citations omitted).

This exception embodies a concern shared most frequently in continental Europe that authors occupy weaker bargaining positions vis-à-vis their employers, principals, and the general public.[63] As this article demonstrates,[64] this concern explains the split among EC Member States over adopting a full-fledged work-for-hire rule that vests employers with both economic and moral right copyright protection.

In its broad context, the Berne Convention lends little support to work-for-hire. First, the Berne Convention only implicitly recognizes this doctrine in the context of cinematographic works.[65] Second, the Berne Convention's moral right provision places a significant stumbling block between an employee's work and an employer. Moreover, because the Berne Convention never affirmatively recognizes contractual waiver or transfer of moral right, it creates the same morass the French Supreme Court addressed in *Huston v. La Cinq*.[66] Overall, the Berne Convention furthers the dual copyright notions of separate economic and moral rights, and forgoes committing to the monistic view that copyright should only protect authors' commercial interests "for limited times."[67]

B. *The Universal Copyright Convention*

1. An Overview

The Universal Copyright Convention (UCC), along with the Berne Convention, is one of the principal international treaties

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[63] *Cf.* Eric H. Smith, *Copyright Developments Under European Unification,* Originally presented to AIPLA 1991 Midwinter Institute (Jan. 23–26, 1991), *reprinted in* CREATION, OWNERSHIP AND CONTROL: WHO CALLS THE SHOTS HERE AND ABROAD? at 4, redistributed to University of Southern California Entertainment Law Institute (Apr. 27, 1991) [hereinafter CREATION, OWNERSHIP AND CONTROL]. "[T]he bias toward authors' rights on the Continent reflects itself in a marked mixed tendency of government to want to acknowledge, and correct through legislation, what is perceived as the weaker bargaining power of the author . . . ." *Id.* It is this facet of continental thinking that militates against harmonization of the work-for-hire doctrine in the EC and that supports this article's thesis.

[64] *See* discussion *infra* part III.A–B.

[65] *See supra* note 61 and accompanying text.

[66] Judgment of May 28, 1991 (Huston v. La Cinq), Cass. civ., 1991 Bull. Civ., No. 89–19.522 (Fr.), *available in* LEXIS, Prive Library, Cassci File.

[67] U.S. CONST. art. I, § 8, cl. 1. The monistic view opposes the dualistic view that prevails throughout continental Europe and in virtually all civil law countries. "The dualistic concept of copyright assumes that the moral rights (droits moraux) and the property rights (droits pecuniares) regulated separately in the law are independent of one another, and can therefore also have different legal outcomes." DIETZ, *supra* note 6, at 67. See *id.* at 67–68 for a more complete comparison of the dualistic and monistic copyright systems.

governing international copyright law.[68] Like the Berne Convention, the UCC relies on a policy of reciprocal national treatment.[69] But, unlike the Berne Convention, it focuses on protecting authors' economic rights and does not explicitly address moral right.[70] It does, however, tacitly approve of Contracting States adopting moral right under certain conditions.[71] Undoubtedly, the UCC's most significant departure from the Berne Convention is in the copyright formalities it imposes.

The UCC's formalities arose from the Convention's chief sponsor, the United States. The Convention resulted from the U.S. initiative in response to the Berne Convention.[72] The United

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[68] LEAFFER, *supra* note 1, at 344. This article does not discuss several other international copyright treaties. These other treaties include the following: The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) (1961); The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention) (Geneva, 1971); The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Satellites Convention) (Brussels, 1974); The European Agreement Concerning Programme Exchanges by Means of Television Films (Paris, 1958); The European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories (Strasbourg, 1965); and, The European Agreement and Protocol on the Protection of Television Broadcasts (Strasbourg, 1960 & 1965). While these treaties impact EC copyright law, their specific subject matter focus removes them from the ambit of this article's discussion.

[69] The Universal Copyright Convention (UCC) applies its national protection as follows:

> 1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory, as well as the protection specially granted by this Convention.
>
> 2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals, as well as the protection specially granted by this Convention.
>
> . . . .

Universal Copyright Convention, art. II, Sept. 6, 1952, 6 U.S.T. 2731, *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra* note 14, Supp. 1972, Item B-1, at 1 (Paris text).

[70] *See id.* at art. IV*bis* (authors' rights "include the basic rights ensuring the author's economic interests").

[71] After setting forth specific economic rights that the Convention protects in article IV*bis*(1), article IV*bis*(2) states the following:

> 2. However, any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention, to the rights mentioned in paragraph I of this Article. Any State whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made.

Universal Copyright Convention, *supra* note 69, at art. IV*bis*(2). By juxtaposing the exceptions that paragraph (2) authorizes with the term "[H]owever," the UCC impliedly sanctions moral right so long as it does not hinder exploitation of economic right. In theory, and sometimes in practice (as in *Huston*), this hindrance is inevitable.

[72] LEAFFER, *supra* note 1, at 345.

States would not join the Berne Convention, in part, because its domestic law imposed significant formalities for copyright protection that contravened the Berne Convention's provisions.[73] The UCC incorporates the formalities the United States required prior to its joining the Berne Convention in 1989, which it still requires for causes of action arising prior to March 1, 1989.[74] Because the UCC's formalities create insurmountable barriers for unsophisticated authors, the Berne Convention provides the only assurance of international protection for many unwitting artists.

2. Authorship Under the UCC

Like the Berne Convention, the UCC does not define "author." Several passages in the Convention, however, demonstrate a less strict approach to the "creator as author" rule than appears in the Berne Convention. For example, article IV prescribes the minimum term of protection as the life of the author plus twenty-five years after her death.[75] Following this prescription, the Convention addresses those Contracting States that compute duration "from the first publication of the work,"[76] and authorizes those states that do not use such a durational method to adopt such a method.[77] This broad recognition of a "date of publication" measure[78] diverges from the Berne Convention, which only applied such a measure to anonymous and pseudonymous works.[79] Because work-for-hire is the other primary class of works that uses a "date of publication" measure, and because employers and principals who acquire authorship status in such works are fre-

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[73] *Id.* at 345 n.4.

[74] *See* Universal Copyright Convention, *supra* note 69, at art. III(2). "[A]ll . . . copies of the work published with the authority of the author or other copyright proprietor [must] bear the symbol c accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright." 17 U.S.C.A. § 401 (West Supp. 1991) (Historical and Statutory Notes).

[75] *Id.* at art. IV(2)(a).

[76] *Id.* The Berne Convention, too, bases its duration scheme for anonymous and pseudonymous works on an "after publication" basis rather than on a "life of author" basis. Berne Convention, *supra* note 30, at art. 7(3).

[77] Universal Copyright Convention, *supra* note 69, at art. IV(2)(b).

[78] The UCC's sweeping endorsement of the "date of publication" measure precludes application of the same assertion Ricketson advanced in relation to the Berne Convention that the UCC employs a general rule of author as natural person. *See supra* notes 46, 55–56 and accompanying text.

[79] *See* Berne Convention, *supra* note 30, at art. 7(3) (fifty year term of protection for anonymous and pseudonymous works dates from time work is lawfully made available to the public).

quently corporate entities, the UCC could be read to approve of granting authors' rights to non-natural persons. The fact that the United States was the motivating force for the UCC further supports this suggestion; U.S. copyright law does not distinguish between natural and non-natural persons for authorship purposes[80] and uses the date of publication as the alternative measure for works-for-hire.[81]

3. Work-for-Hire Under the UCC

The UCC does not address the work-for-hire doctrine. The policies it advances, however, are far less hostile to the work-for-hire doctrine than the Berne Convention's policies.[82] For example, the UCC expressly indicates that it protects authors' economic rights[83] and never mentions moral right. The UCC also provides that any exceptions a Contracting State may make to the UCC protective scheme must remain consistent with the "spirit and provisions of" the Convention.[84] This latter provision, in conjunction with the UCC's explicit support of economic rights, suggests that the Convention greatly favors economic rights and is averse to any scheme that could jeopardize these rights. Furthermore, this reading implies that the holder of copyright *economic rights* may receive preferential treatment under the UCC over the holder of moral right in the same work. Therefore, a country that recognizes both work-for-hire and moral right, but that neither employs "deemed authorship" principles[85] nor permits waiver or transfer of moral right, would theoretically contravene the UCC.[86]

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[80] 17 U.S.C. § 201(a), (b) (1988) (author of work made for hire is employer or principal).

[81] *See, e.g.,* 17 U.S.C. § 302(c) (for works made for hire created on or after January 1, 1978, the term of protection lasts seventy-five years after publication, or one hundred years after creation, whichever is shorter); *see also* 17 U.S.C. § 303 (for works made for hire created before January 1, 1978, but not published or registered, the term of protection lasts seventy-five years after publication, or one hundred years after creation, whichever is shorter).

[82] *See supra* notes 47–53 and accompanying text.

[83] *See* Universal Copyright Convention, *supra* note 69, art. IV*bis*(1) (defining the rights that the Convention protects as "the basic rights ensuring the author's economic interests").

[84] *Id.* at art. IV*bis*(2).

[85] "Deemed authorship" is "the device of conferring the status of author on persons who are not the actual intellectual creator." RICKETSON, *supra* note 31, at 902.

[86] Virtually every EC Member State is a party to either the 1952 (Geneva) or 1971 (Paris) text of the UCC. *See* Paul Edward Geller, *International Copyright Law, in* INTERNA-

Nonetheless, two clauses within the UCC could prevent such a violation from occurring. The first of these is the "Berne Safeguard Clause."[87] This clause "prohibits a Berne Convention country from denouncing Berne and relying on the UCC in its copyright relations with members of the Berne Convention."[88] Although this provision affects relations between Berne members, it does not affect copyright within a Berne Convention country; therefore, the clause cannot influence domestic copyright policy.

The second clause, article XVII, does impact domestic copyright policy: "This Convention shall not in any way affect the provisions of the Berne Convention . . . or membership in the Union created by that Convention."[89] Because this article mandates deference to the Berne Convention, it effectively safeguards moral right in Berne Convention countries even where it hinders exploitation of economic rights in contravention of the UCC. Because all EC Member States belong to the Berne Convention and the UCC, the Berne Convention's preeminence undercuts the protection that the UCC theoretically affords to work-for-hire copyright holders. As a result, persons asserting rights as work-for-hire copyright holders in the EC must turn to either EC or national copyright law.

II. EC POLICIES AND NATIONAL COPYRIGHT LAW

A. *The Treaty of Rome*

1. An Overview

The state of EC copyright law depends on the broad EC policy objectives set forth in the Treaty of Rome of 1988 (the Treaty). Although the Treaty itself does not explicitly apply to copyright law, the Court of Justice and the European Commission have interpreted the Treaty to have such an application.[90]

TIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 11, § 6 app. (citing *WIPO*, *supra* note 41).

[87] LEAFFER, *supra* note 1, at 346.

[88] *Id.* at 347 n.18.

[89] Universal Copyright Convention, *supra* note 69, at art. XVII(1).

[90] *See, e.g.,* Case 78/70, Deutsche Grammophon Gesellschaft v. Metro-SB-Grossmarkte, 1971 E.C.R. 487 (Article 36's exceptions for restrictions and prohibitions to protect commercial property apply to copyright)(*cited in* Herman C. Jehoram et al., *The Law of the E.E.C. and Copyright, in* INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 11, at 7; *see also* Green Paper on Copyright and the Challenge of Technology—Copyright

The Treaty, and the European Community it establishes, represent the culmination of efforts by several European countries to confront historical differences and modern economic reality. Article 2 describes the EC's intentions:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.[91]

Article 3 contains the EC's primary strategy for realizing its goals. This article provides, in part, for the following means:

> (a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
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> . . . .
>
> (c) the abolition, as between Member States, of obstacles to the freedom of movement for persons, services and capital;
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> . . . .
>
> (f) the institution of a system ensuring that competition in the common market is not distorted;
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> . . . .
>
> (h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market. . . .[92]

These provisions indicate that the EC's underlying purpose is to create a single, unfettered market in which Member States and their citizens may reap the greatest economic benefit from their goods and services.

2. The Copyright Challenge

Copyright law poses a challenge to the EC's goals.[93] The challenge is how to reconcile the infinite number of monopolies na-

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Issues Requiring Immediate Action, COM(88)172 final at 19 (Treaty provisions on free circulation of goods "apply broadly . . . to goods subject to copyright")[hereinafter Green Paper].

[91] TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 2 (1988 text).

[92] *Id.* at art. 3.

[93] Patent law raises questions similar to copyright. Although this article recognizes such similarities, this article does not consider them.

tional copyright law grants with the EC's essential aim of establishing an unfettered common market. Copyright law potentially conflicts with the EC's notion of a barrier-free market because it permits copyright holders to decide who may use their intellectual property, where they may use it, and for how long. In the event an EC copyright owner attempts to partition markets, for example by licensing a copyrighted work in several EC countries without complying with each country's national copyright laws, the owner may violate article 3(a).[94]

3. The Response

The Treaty bestows privileges on intellectual property that diverge from the Treaty's general policy against quantitative restrictions.[95] Quantitative restrictions may include quotas, tariffs, duties, or any other measures that impede the exchange of goods between EC Member States. Articles 30 to 34 forbid EC Member States from increasing preexisting[96] or establishing new quantitative restrictions among themselves,[97] or on their national exports.[98] Article 36, however, provides a special exemption for quantitative restrictions intended to protect intellectual property:[99] "The provisions of [a]rticles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of . . . the protection of industrial and commercial property."[100] Article 36 only prohibits measures that act "as a means of arbitrary discrimination or a disguised restriction on trade between Member States."[101] In sum, the Treaty

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[94] Copyrights and copyright licenses do not constitute per se quantitative restrictions, but rather "measure[s] having equivalent effect." EEC TREATY art. 3(a) (1988 text). "[R]ecourse to copyright law as a means of artificially partitioning the market is as effectively prohibited, being equivalent in effect to a quantitative restriction, as recourse to patent or trade mark law." Green Paper, *supra* note 90, at 19. Copyright may have an "equivalent effect" because it permits citizens of one country to bar citizens in a second country from freely using property that would otherwise be lawfully available.

[95] Article 30 establishes a general ban on quantitative restrictions within the EC: "Quantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between Member States." EEC TREATY art. 30 (1988 text).

[96] *Id.* at art. 32.

[97] *Id.* at art. 31 (1987 text).

[98] *Id.* at art. 34 (1988 text).

[99] Although Article 36 provides exemptions for "industrial and commercial property," copyright's economic components are comparable to industrial property rights and are, therefore, within Article 36's scope. Jehoram, *supra* note 90, at 8.

[100] EEC TREATY art. 36 (1988 text).

[101] *Id.*

defers to national law, provided the copyright schemes adopted do not create barriers between Member States.

Article 222 also buttresses Member States' ability to develop their own copyright systems. This article states that "[t]his treaty shall in no way prejudice the rules in Member States governing the system of property ownership."[102] The European Commission has interpreted this article to apply to questions of nationalizing or privatizing property ownership.[103] Copyright economic and moral rights are thus property rights, which suggests that copyright law falls under article 222's grant of authority to Member States. Even assuming article 222 applies to copyright, however, the exemption limitation contained in article 36 will bar any national property law that restricts or discriminates against another Member State.[104] Thus, article 222, like article 36, exemplifies the EC policy of deferring to national copyright law, but only to the extent the law does not inhibit the common market.

4. Impact on Work-for-Hire

The Treaty neither inhibits nor promotes the work-for-hire doctrine. In effect, it establishes guidelines by which each EC Member State may develop its own copyright laws. The only real limit arises when a particular copyright scheme constitutes "arbitrary discrimination" or a "disguised trade restriction" in violation of article 36. Though these limitations apply broadly to copyright in general, they do not directly relate to work-for-hire rules.

Nonetheless, the disparity in EC Member States' work-for-hire rules[105] indirectly raises article 36 issues. As this article demonstrates below, two mutually exclusive work-for-hire approaches prevail in the EC.[106] An article 36 violation may exist because

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[102] *Id.* at art. 222.

[103] Green Paper, *supra* note 90, at 24.

[104] *Cf. id.* ("[T]he content of proprietary rights, the scope of protection afforded to them and the limits on their use may be regulated by the Community to the extent required by its objectives, and in particular, to the extent required for the proper functioning of the common market.").

[105] *See* discussion *infra* part II.C.

[106] The division falls between the United Kingdom, Ireland, and the Netherlands on the one hand; and Belgium, Denmark, France, Germany, Italy, Luxembourg, Portugal, and Spain on the other. The former group either adopts the type of work-for-hire scheme used in the United States or recognizes contractual transfer or waiver of moral right that

these rules enable copyright holders of one Member State to exercise rights supra-nationally that can impair the rights conferred by another Member State's copyright scheme.[107] A review of each Member State's work-for-hire rules is necessary to understand the scope of the article 36 issue in EC copyright law.

B. *National Treatment*

The territoriality principle governs the scope of copyright protection in the EC.[108] The principle provides that "intellectual property rights are only effective within each territorially isolated jurisdiction which grants the rights."[109] As a result, each Member State determines the conditions and procedures under which it will grant copyright protection.[110]

National copyright protection is almost divided evenly between a strict author's rights approach and a common law-oriented, economic rights approach. Member States utilizing a strict author's rights approach protect creators through a rigid moral right regime that, by definition, also restricts ownership rights in works made for hire. Member States employing an economics rights approach allow contractual relations to control the extent to which moral right may apply and, consequently, support ownership rights in works-for-hire. The following discussion categorizes each EC Member State and explores the rights and limits each State creates for works made for hire.[111]

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effectively yields a U.S. work-for-hire result. The latter group maintains a moral right regime that essentially precludes complete unconditional exploitation of a work made for hire. *Id.*

[107] *Cf.* Jehoram, *supra* note 90, at 12 (distinguishing inviolable national "grants" of intellectual property rights from the "exercise" of such rights that could be limited to the extent necessary to effectuate EC objectives); *see* discussion *infra* part II.C.

[108] Jehoram, *supra* note 90, at 9.

[109] *Id.*

[110] *See* Case 144/81, Nancy Kean Gifts BV v. Keurkoop BV, 1982 E.C.R. 2853 (in the absence of EC standardization or harmonization, national rules determine the extent of design protection)(*quoted in* Jehoram, *supra* note 90, at 41–42).

[111] This article focuses on the statutory law of each EC Member State. This focus necessarily precludes serious discussion of the judicial interpretation offered by the Member States' courts. However, where applicable, the following sections reference judicial construction that substantially differs from the plain meaning suggested by the statutes themselves.

1. Author's Rights Approach

a. *Belgium*

The Belgian copyright statutes do not expressly address works made for hire. Belgian copyright ownership provisions nonetheless indicate what response Belgian law would have to work-for-hire copyright holders. In contrast to employees in common law countries, Belgian employees who create works in the scope of their employment acquire the copyright in the work.[112] Belgian law regards employees as authors who may then transfer their copyright interest to their employers.[113] Conversely, common law countries' work-for-hire rules treat employers as authors and give them copyright ownership.

Employee-employer transfers, however, do not give employers unfettered discretion in exploiting the work. "Moral right remains vested in each author even after full conveyance of all copyright-based economic interests."[114] To this end, article 8 of the Belgian Law on Copyright states: "The assignee of copyright or the acquirer of the tangible object incorporating a work of literature, music or art may not modify the work in order to sell or exploit it, nor publicly exhibit the modified work, without the consent of the author or his successors in title."[115] Furthermore, the law does not permit authors to transfer or waive the moral right of integrity contained in article 8.[116] Such moral right protection underscores Belgium's adherence to the civil law tradition of vesting creators with an immutable moral right.

b. *Denmark*

Similarly, Denmark maintains a work-for-hire structure. A composite of two statutory provisions suggests that Denmark also adheres to the civil law custom of separating copyright economic and moral rights. First, section 1 employs a strict "creator as author" rule: "The person producing a literary or artistic work shall have copyright therein . . . ."[117] Section 1 is the only attempt

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[112] Corbet, *supra* note 14, at 18.

[113] *Id.*

[114] *Id.* at 27.

[115] Belgium Law on Copyright, art. 8 (1958 text), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra* note 14, at Belgium.

[116] *Id.*

[117] Denmark Copyright Law, *supra* note 14, at ch. 1 § 1.

at defining "author" in the entire statute; the provision, therefore, imposes a burden on employers to contract separately for the copyright in their employees' works. Second, section 3 gives the author several moral right protections:

> Both in copies of the work and when it is made available to the public, the author is entitled to be mentioned by name in accordance with the requirements of proper usage.
>
> The work must not be altered nor made available to the public in a manner or in a context which is prejudicial to the author's literary or artistic reputation, or to his individuality.
>
> The right of the author under this section *cannot be waived* except in respect of a use of the work which is limited in nature and extent.[118]

Because no EC Member State (except Germany)[119] prevents copyright transfers, Danish law would presumably permit an author to transfer her copyright to an employer if she created the work in the scope of employment.

Such a transfer would not, however, create any limit on the employee's moral right. Since section 3 prohibits an author from waiving her moral rights of attribution, paternity, and integrity in most circumstances, it is unlikely that a contractual effort to transfer these rights would succeed. Moral right transfer is precluded both by the absence of any transfer provision, and the fact that, by definition, moral right is personal to the author. Assuming the law prohibits transfers, the author will always retain moral right; the only way an employer can avoid an employee's moral right assertion is by securing the employee's waiver of those rights. Section 3 forecloses on this possibility in almost all circumstances[120] and thereby limits an employer's ability to freely exploit a work-for-hire.

c. *France*

France's copyright law specifically addresses the work-for-hire doctrine. The first article of France's copyright statute establishes rules governing works-for-hire. The first paragraph provides:

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[118] *Id.* § 3 (emphasis added).

[119] *See* discussion *infra* part II.B.1.d.

[120] Because the section only permits waivers for uses "limited in nature and extent," an attempt to waive *all* moral rights or an attempt to waive those rights in perpetuity would necessarily fail. A complete waiver would be overly inclusive and thus would not be "limited in nature," and a permanent waiver would last for too long to be "limited in extent." Denmark Copyright Law, *supra* note 14, at ch.1 § 3.

"The author of an intellectual work, shall, by the mere fact of its creation, enjoy an exclusive incorporeal property right in the work, effective against all persons."[121] It also states in part: "The existence, or the conclusion by the author of an intellectual work, of a contract to make a work, or an employment contract, shall imply no exception to the enjoyment of the right recognized in the first paragraph."[122] In the employer-employee context, French courts have interpreted these provisions to give employers the economic component of copyright and employee-authors the moral right component.[123] The employer need not secure a separate transfer of copyright since she "acquires the economic component of copyright upon execution of the employment contract . . . ."[124] Because the economic component vests in the employer *by virtue of* the employment relationship, French law partially follows U.S. work-for-hire rules.[125]

French copyright law diverges from U.S. law in the principal-independent contractor context. This context usually involves commissioned works or works that will constitute part of a collective whole. In France, authors of commissioned works retain both the economic and moral right components of copyright and transfer the economic rights to the principal.[126] The United States, in contrast, does not require any transfer between the creator and the principal, provided (1) the parties have an express writing describing the work as one for hire, and (2) the work falls into one of nine categories.[127] Once the principal satisfies both these requirements, she acquires the same rights that an employer has over works created in the scope of employment.[128]

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[121] French Copyright Law, *supra* note 14, at art. 1, para. 3.

[122] *Id.* at art. 1, para. 1.

[123] Plaisant, *supra* note 11, at 44.

[124] *Id.*

[125] In the United States, assuming a court makes a threshold determination that the creator is an employee, the employer will acquire the copyright in the work created. *See* 17 U.S.C. § 201(b) (1988) (establishing the presumption that the employer for whom an employee prepares a work is the author of the work and "owns all of the rights comprised in the copyright"). Of course, the question of what indicia establish an employer-employee relationship is a separate question. *See, e.g.,* Community for Creative Non-Violence (CCNV) v. Reid, 490 U.S. 730 (1989) (relying on common law agency principles to decide whether an employment relationship exists); *see also supra* note 25 and accompanying text.

[126] Plaisant, *supra* note 11, at 45.

[127] 17 U.S.C. § 101 (1988); *see supra* note 5.

[128] 17 U.S.C. § 201(b) ("employer or *other person* for whom the work was prepared is considered author . . . and owns all the rights comprised in the copyright") (emphasis added).

A significant exception to general French work-for-hire rules exists for computer software. For these works, French law is entirely consistent with U.S. work-for-hire in that employers acquire both the economic and moral right component of the copyright.[129] By amendment in 1985, French copyright law now provides: "Unless otherwise stipulated, software created by one or more employees in the exercise of their duties shall belong to the employer together with all the rights afforded to other authors."[130] This provision represents a radical departure from France's strict moral right regime.

France's generally uncompromising approach to moral right reflects the importance of moral right in the French conception of copyright law. France categorically prohibits transfer of moral right by providing that "[t]he author shall enjoy the right to respect for his name, his authorship, and his work. This right shall attach to his person. It shall be perpetual, *inalienable* and imprescriptible."[131] In addition to nullifying transfers, this provision effectively proscribes moral right waivers as well. By making moral right "imprescriptible," the law immunizes moral right against any limitation and thereby precludes waiver.[132] These rules against waiver and transfer underscore the centrality of moral right in French law and indicate the structural hurdles owners of economic rights must overcome to successfully exploit works in France.

d. *Germany*

The concept of work-for-hire is entirely absent from German copyright law.[133] German law adheres to the basic principle that only the natural person who creates a work can be the work's author.[134] In the employment context, "[t]he initial owner . . . of

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[129] Plaisant, *supra* note 11, at 46 ("[A]ll rights in specific software created on the job arise presumptively vested in the employer of its author, this without exclusion of moral right.").

[130] Law on Author's Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises, art. 45 (1985), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra* note 14, at France: Item 1A, at 7.

[131] French Copyright Law, *supra* note 14, at art. 6.

[132] *But see* Plaisant, *supra* note 11, at 85–86 (suggesting that an author might be able to legally renounce her right to disclose her work under her own name [the right to paternity] if the renunciation is "clear, precise, and express").

[133] Dietz, *supra* note 14, at 46.

[134] *Id.* at 32.1.

a work made for hire or of a commissioned work is . . . always the author . . . who actually created the work."[135] By vesting ownership in the employee or the independent contractor, the law requires employers to acquire copyright interests by contract.[136]

In addition, the idiosyncracies of German copyright law prevent employers from ever acquiring unlimited copyright interests. For instance, an author can only convey a copyright by "testamentary disposition, or to co-heirs pursuant to the settlement of an estate. Otherwise, it may not be conveyed."[137] Instead, an author must license her work to realize the economic benefits her intellectual efforts have provided.[138] The existence of three moral right provisions—the right of dissemination,[139] the right to attribution,[140] and the right of integrity[141]— also limit the extent to which an employer could ever freely exploit a work-for-hire. Nonetheless, the language the German Copyright Act uses to describe these rights suggests a more flexible moral right approach than that which French copyright law follows.[142]

German moral right provisions imply that an author may waive her moral right.[143] Article 39 of the German Copyright Act states that "[i]n the absence of any contrary agreement, a licensee may not alter the work, its title or the designation of the author. . . ."[144] These alterations concern the moral rights of integrity and attribution. The fact that this article refers to a "contrary agreement" indicates the Copyright Act recognizes contractual waivers of moral right. As one commentator has suggested, however, even though an author can waive her moral right of integrity under article 39, the beneficiary of such a waiver does not have unlimited freedom to alter the work.[145] Alterations are limited to those

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[135] *Id.* at 46.

[136] *See* German Copyright Law, *supra* note 14, at art. 43 (employers and principals must resort to contract to acquire copyright interests in works created in employment context).

[137] *Id.* at art. 29.

[138] *See id.* at arts. 31–44 (detailing the licensing structure through which an author may exploit her work).

[139] *Id.* at art. 12.

[140] *Id.* at art. 13.

[141] *Id.* at art. 14.

[142] *See supra* notes 131–32 and accompanying text.

[143] Dietz, *supra* note 14, at 91.

[144] German Copyright Law, *supra* note 14, at art. 39.

[145] Dietz, *supra* note 14, at 91.

which do not constitute a "gross distortion" of the work.[146] Accordingly, any alteration amounting to a "gross distortion" transcends "the outer limits of the basic core of those moral rights which the author can always claim notwithstanding any agreement to the contrary."[147] While it is unclear what kind of alteration would constitute a "gross distortion," the standard provides the beneficiary of an author's moral right waiver with some latitude to adapt the work. In light of the more stringent moral right standards elsewhere in the EC, this latitude offers some consolation to work-for-hire copyright holders.

e. *Greece*

Work-for-hire rules do not exist under Greek copyright law. Like most civil law countries, Greek law vests initial copyright ownership in the *human being* who actually created the work.[148] Employers cannot alter this principle by contract.[149] Instead, employers must acquire copyright interests in works made in the scope of employment in the same manner as any person or entity would acquire a copyright interest—by transfer from the author.[150]

Employers must also contend with potential moral right claims. The Greek Copyright Act expressly provides for the right of attribution or paternity[151] and the right of integrity.[152] The right of attribution requires the copyright owner to identify the author

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[146] *Id.* at 91–92 (reasoning that the "gross distortion" limit drawn by Article 39 in relation to cinematographic works is the limit of rights that an author can waive for any work).

[147] *Id.* at 92.

[148] Koumantos, *supra* note 14, at 18.

[149] *Id.*

[150] Unlike German law which forbids inter-vivos copyright transfers, Greek copyright law expressly permits transfer of copyright interests:

> Writers, composers, painters, authors of drawings, sculptors, turners and engravers of original works, arrangements, copies or translations, shall have, for life, the exclusive right of publication, multiplication by reproduction, or copying by any means and in any manner . . . ; they shall also have the privilege to transfer these rights to others.

Greek Copyright Law, *supra* note 14, art 1.

[151] *See id.* at art. 13 (republication of materials from periodicals or newspapers in other periodicals or newspapers must indicate the materials' source and author); *see also id.* at art. 14 (copies of photographic and "similar works," and motion pictures must bear names of photographer or publisher, the date of publication, and the names of the creators of their "component artistic parts").

[152] *Id.* at art. 15 ("The assignee of the author's or artist's rights shall not be entitled to alter the work in any manner without the latter's consent.").

whenever the owner publishes the work. The latter right forbids the copyright owner from altering the work without the author's consent. Greek law also generally recognizes two other moral right provisions: the rights of divulgation and access to the author's work.[153] These two rights, respectively, enable the author to determine under what circumstances her work will appear and to gain access to her work, although she no longer owns it. The array of Greek moral rights clearly burdens any interest an employer may acquire in an employee's work.

Furthermore, Greek law only offers limited room to escape moral right assertions. Greece, like Germany, France, Denmark, and Belgium, adheres to the civil law notion that moral right is personal to the author and therefore nontransferable.[154] Yet, despite the nontransferability of moral right, Greek law recognizes a narrow moral right waiver. A waiver could arise in relation to the rights of divulgation and paternity where an author contractually renounces her power to decide when to publish her work and agrees to publish without mentioning her name.[155] A waiver of the right of divulgation would provide some relief to publishing houses that hold copyrights in books and other media and wish to time publication themselves. Similarly, an employer who holds the copyright in a work an employee created and who seeks to label the work as her own may benefit from a right of attribution waiver. In sum, although Greece does not preclude employers from disarming their employees of their moral right, Greek copyright law places significant hurdles in the way of unlimited economic exploitation of works-for-hire.

f. *Italy*

Italian copyright law recognizes the work-for-hire doctrine in limited circumstances.[156] In most employment relationships, work-for-hire does not apply and contract principles alone govern

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[153] Although Greek statutory law only specifies two specific moral rights, Professor Koumantos identifies a total of four moral rights. Koumantos, *supra* note 14, at 28 (citing the rights of divulgation, paternity, integrity, access to material work).

[154] *Id.* at 30.

[155] *Id.* at 29. Professor Koumantos suggests that while such waivers could occur, the law theoretically prohibits them. *Id.* As to the right of paternity, the prohibition stems from the Copyright Act's explicit provisions in articles 13 and 14; *see supra* note 150.

[156] Mario Fabiani, *Italy*, *in* INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 11, at 36.

copyright ownership.[157] Work-for-hire rules apply with varying force to collective works,[158] cinematographic works,[159] and photographs.[160] Even in these contexts, however, general common law countries' work-for-hire regulations do not have full effect since Italy's moral right structure limits employers' discretion in exploiting works-for-hire. Italian copyright law sharply contrasts "rights of economic utilization" which accrue under work-for-hire rules with "moral right of the author" which only vests in persons whom the law recognizes as author.[161] This dichotomy demonstrates that the Italian structure adheres to the general civil law tradition separating copyright's economic interests from personal moral right interests which only authors hold.

Several articles in the Italian Copyright Act vest "rights of economic utilization" in persons other than authors by using work-for-hire notions. First, article 38 grants publishers of collective works economic rights "in the absence of agreement to the contrary."[162] Because publishers are generally not the person or persons who actually select and coordinate collective works, publishers' rights devolve from work-for-hire principles. Article 7 underscores this point since it explicitly recognizes the editor of a collective work, not the publisher, as the author.[163]

Second, article 45 gives economic rights to producers of cinematographic works: "[T]he exercise of the rights of economic utilization of a cinematographic work shall belong to the person who has organized the production of the said work."[164] Like

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[157] *Id.* at 38.

[158] *See* Italian Copyright Law, *supra* note 14, at art. 7; *see also* Fabiani, *supra* note 156, at 36.

[159] Italian Copyright Law, *supra* note 14, at art. 45; *see also* Fabiani, *supra* note 156, at 36.

[160] Italian Copyright Law, *supra* note 14, at art. 88; *see also* Fabiani, *supra* note 156, at 36.

[161] *Compare* Italian Copyright Law, *supra* note 14, at arts. 12–19 (setting forth the exclusive economic rights granted by copyright) *and* arts. 25–32*bis* (establishing the duration of economic rights) *with* arts. 20–24 (describing the author's moral right and its duration).

[162] *Id.* at art. 38. Article 3 defines collective works as works "formed by the assembling of works, or of parts of works, and possessing the character of a self-contained creation resulting from selection and co-ordination for a specific literary, scientific, didactic, religious, political or artistic purpose, such as encyclopedias, dictionaries, anthologies, magazines and newspapers." *Id.* at art. 3.

[163] *Id.* at art. 7. Article 7 states, in part: "In the case of a collective work, the person who organizes and directs its creation shall be deemed to be the author." *Id.*

[164] *Id.* at art. 45. Unlike the publisher's absolute economic rights, article 46 greatly limits a producer's ability to exploit a cinematographic work. Article 46 bars producers from

article 7, article 44 demonstrates that a producer's rights arise from work-for-hire rules since it omits producers from the group of persons who qualify as authors of cinematographic works.[165] Third, under article 88, where an author creates a photographic work pursuant to an employment contract or a commission, the employer or person commissioning the work acquires "[t]he exclusive right of reproduction, diffusion, and circulation."[166] Although no provision defines who the author of a photographic work is, the fact that a photographer provides the creative input into such a work suggests she is the author. Assuming the photographer is the author, the fact that article 88's exclusive rights vest in the person employing or commissioning the photographer indicates that these rights arise by virtue of work-for-hire rules.

The presence of a strong moral right structure in Italian copyright law limits the rights created by work-for-hire principles. In addition, because Italy characterizes moral right as "inalienable,"[167] an employer cannot secure an effective contractual transfer of an employee's moral right. Moreover, "by their very nature as rights of personality, moral rights cannot be waived."[168] The only moral right limitations exist in relation to modifying architectural works for construction purposes[169] and cinematographic works for adaptation purposes.[170] In light of Italy's well-defined moral right structure, employers who hold copyrights in works made for hire must consider the potential limits that Italian law creates.

g. *Luxembourg*

Luxembourg copyright law does not recognize work-for-hire principles. Instead, the law concisely describes authors' economic rights accruing from copyright and authors' personal moral

making or showing "elaborations, transformations or translations of the produced work without the consent of the authors indicated in Article 44." *Id.* at art. 46.

[165] *Id.* at art. 44. Article 44 states: "The author of the subject, the author of the scenario, the composer of the music and the artistic director shall be considered as co-authors of a cinematographic work." *Id.*

[166] *Id.* at art. 88. Where a commissioned photograph is at issue, the photographer is entitled to "equitable remuneration" for any economic use of the work. *Id.*

[167] *Id.* at art. 22.

[168] Fabiani, *supra* note 156, at 65.

[169] Italian Copyright Law, *supra* note 14, at art. 20 ("author may not oppose modifications found necessary in the course of construction" or "completed works").

[170] *Id.* at art. 47.

rights. Article 1 provides the basic rule for authors: "The author of literary or artistic works shall enjoy therein an incorporeal property right which shall be exclusive and exercisable against all persons."[171] Although the copyright statute does not define the term "author," the fact that Luxembourg is a civil law country and civil law countries (except for the Netherlands) uniformly follow the "creator as author" rule[172] would indicate that only creators can secure copyright interests under the statute. By implication, this position precludes employers from acquiring copyright interest *upon creation* as work-for-hire rules generally dictate.[173]

Employers and principals must acquire copyright interests by contractual transfers from employees or independent contractors. The interest that either may acquire is limited to the economic right of exploitation. Article 3 defines this exploitation right and authorizes its assignment and transfer: "The right to reproduce the work or to disclose it in any way to the public, and to authorize the reproduction or disclosure thereof, shall constitute the author's exclusive right of exploitation. The right of exploitation may be assigned or transferred, wholly or partially . . . ."[174] Apart from the exploitation right an employer or principal may secure, article 9 of the Luxembourg Act gives authors a personal moral right of integrity and attribution.[175] The fact that moral right "attaches to the author personally," indicates an author cannot alienate the right through an inter-vivos transfer. Moreover, in view of Luxembourg's overall scheme, the personal nature of moral right also precludes moral right waiver. These

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[171] Luxembourg Copyright Law, *supra* note 14, at art. 1.

[172] *Cf.* Paul Goldstein, *Overview of Legal Considerations Affecting International Copyright Transactions,* Address to the University of Southern California Entertainment Law Institute (Apr. 27, 1991), *in* CREATION, OWNERSHIP AND CONTROL, *supra* note 63, at 685–86 (discussing the civil law tradition which favors protecting author's creations).

[173] *See* 17 U.S.C. § 201(b) (1988). Under this provision, assuming the parties share the requisite employment or commissioning relationship, the employer or commissioning party stands in the shoes of the creator as author and acquires all copyright interests upon creation. *Id.*

[174] Luxembourg Copyright Law, *supra* note 14, at art. 3.

[175] Article 9 provides:

> 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. The right referred to in the preceding paragraph shall be attached to the author personally.

Id. at art. 9.

prohibitions are consistent with most civil law countries and embody the usual limitations on works-for-hire that can potentially impair the economic exploitation of these works.[176]

h. *Portugal*

Portugal offers very limited work-for-hire rights. These rights can only arise by contract. Article 14(1) of the Portugal Copyright Law provides the basis for an employer or independent contractor to acquire a copyright interest upon creation of a work. This article provides: "[O]wnership of copyright in a work carried out on commission or on behalf of another person, either in fulfillment of official duties or under an employment contract, shall be determined in accordance with the *relevant agreement*."[177] The "relevant agreement" clause indicates that the parties may determine copyright ownership by contract prior to creation. Thus, Portugal adopts an approach that is somewhat analogous to the commissioned works category in the U.S. work-for-hire statute.[178] This provision, however, solely addresses copyright ownership and does not derogate from Portugal's strict "creator as author" rule. Because Portuguese copyright law does not change the creator's status even with works-for-hire, creators retain the ability to claim moral right protection.[179]

In Portugal, the economic and moral right dichotomy severely limits exploitation of works-for-hire. Even assuming an employer or independent contractor acquires the economic component of an author's interest, Portuguese copyright law prohibits them

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[176] *See* discussion *supra* parts II.B.1.a–f and discussion *infra* parts II.B.1.h–i.

[177] Portugal Copyright Law, *supra* note 14, at art. 14(1) (emphasis added).

[178] *See* 17 U.S.C. § 101 (1988) (noting that commissioned works are works-for-hire if the work falls into one of nine categories and *the parties have agreed in a signed writing* that the work is one for hire).

[179] *See* Portugal Copyright Law, *supra* note 14, at art. 9. Portuguese copyright law expressly addresses the difference between copyright ownership and authorship rights in article 9:

> (1) Copyright shall include economic rights and personal rights, termed moral rights.
>
> (2) In the exercise of economic rights, the author shall have the exclusive right to dispose of his work, to exploit it and to use it, or to authorize its total or partial exploitation or use by a third party.
>
> (3) Independently of economic rights, and even after their transfer or lapse, the author shall enjoy moral rights in his work, in particular the right to claim authorship and to ensure its authenticity and integrality.

Id.

from securing a transfer or waiver of the author's moral right.[180] This prohibition stems from article 56(2)'s description of moral right as "perpetual, inalienable and imprescriptible."[181] This characterization aligns Portugal with most civil law countries that use moral right to compensate authors for their unfair bargaining position vis-à-vis employers. To the extent economic exploitation of works-for-hire will impair their creators' moral rights of integrity and paternity, copyright holders in such works must consider the limitations they may encounter.

i. *Spain*

Spanish copyright law recognizes the work-for-hire doctrine in two limited contexts.[182] The first is in relation to collective works as described in article 8:

> [A] collective work shall be considered a work which is created on the initiative and under the direction of a person, whether a natural person or legal entity, who edits and publishes it under his name, and which consists of the combination of contributions by various authors whose personal contributions are so integrated in the single, autonomous creation for which they have been made that it is not possible to ascribe to any one of them a separate right in the whole work so made. In the absence of agreement to the contrary, the rights in the collective work shall vest in the person who publishes and discloses it under his name.[183]

This provision creates a rule of "deemed authorship" in favor of publishers of collective works. This means that a publisher acquires authorship status and both the economic and moral right copyright interest that such status provides.[184] With both of these rights, the collective work publisher faces no potential limitations on economic exploitation and therefore holds a work-for-hire interest akin to the interest created under U.S. law.

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[180] Portuguese moral right consists of the rights of paternity and integrity. *See id.* at arts. 9(3), 56(1) (referring to the moral rights of paternity and integrity).

[181] *Id.* at art. 56(2). This language is identical to the language found in France's copyright statute. *See* French Copyright Law, *supra* note 14, at art. 6.

[182] Milagros del Corral refers to four areas in which work-for-hire rules apply: collective works, works made in employment relationships, works made for the press, and works made on commission. Milagros del Corral, *Spain*, *in* INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 11, at 26–28. This article only considers the first two because they subsume the principles governing the latter two.

[183] Spanish Copyright Law, *supra* note 14, at art. 8.

[184] *See supra* note 85 and accompanying text.

In contrast to collective works, the second context does not confer authorship status and therefore does not permit unlimited exploitation. The second context consists of works created in employment relationships as set forth in article 51:

> (1) [The transfer to an employer of rights[185]] to exploit a work created by virtue of employment relations shall be governed by the terms agreed upon in the contract, which shall be made in writing.
>
> (2) In the absence of an agreement in writing, it shall be presumed that the exploitation rights have been assigned exclusively and with the scope necessary for the exercise of the customary activity of the [employer] at the time of the delivery of the work by virtue of the said employment relations.
>
> . . . .
>
> (4) The remaining provisions of this Law shall apply to the aforesaid assignments as appropriate, insofar as the purpose and subject matter of the contract so determine.[186]

Article 51 does not clearly describe the scope of its application.[187] It appears to distinguish employment relationships on the basis of whether an employer has contracted with his or her employees for copyright interests in works they create. On the one hand, article 51(1) implies that employers' copyright interests in their employees' work only exist to the extent determined by contract. This reading assumes that a contract does in fact exist, but does not say whether an employer must contract for a copyright interest. On the other hand, article 51(2) seems to apply where no copyright contract exists, and purports to limit an employer's copyright exploitation to purposes ordinarily related to the employer's business. In sum, under 51(2), an employer can acquire some minimum exploitation right, but only in relation to work-related enterprises. Because 51(2) limits employers so extensively, 51(1) supports a general rule imposing a contractual requirement on employers as a condition to acquiring copyright interests. Such a reading would align Spain with most other civil law countries that require employers to contract for copyright interests in their employees' works.[188]

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[185] del Corral, *supra* note 182, at 26 (translation of article 51).

[186] Spanish Copyright Law, *supra* note 14, at art. 51.

[187] del Corral, *supra* note 182, at 27. Article 51(4) "seems to presuppose the written 'contract' mentioned in [51(1)] but does not make clear how it applies in the event, anticipated in [51(2)], no such 'contract' has been made." *Id.* (footnote omitted).

[188] *See supra* note 177 and accompanying text.

Assuming an employer secures a copyright in work made for hire, Spain's formidable moral right regime raises barriers to unlimited economic exploitation.[189] Most significantly, Spanish copyright law prohibits the transfer and waiver of moral right. Article 14 describes an author's moral right as "unrenounceable and inalienable."[190] This characterization demonstrates fidelity to the civil law tradition that safeguards authors' interests against encroachment by employers and similar persons. Spanish copyright law, as a result, hinders employers' work-for-hire interests to the extent that they do not arise from a written contract and their exploitation violates an author's moral right in the subject work.

2. Economic Rights Approach

a. *Ireland*

Ireland has adopted several work-for-hire provisions in its copyright law. The Irish approach significantly parallels the United States and typifies the approach of common law countries. For example, Ireland follows the basic work-for-hire notion that an employer or principal acquires copyright ownership upon creation by an employee or independent contractor.[191] In addition, Ireland distinguishes between works created within an employer-employee relationship and commissioned works.[192] The commissioned works group is smaller than that found in the

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[189] Spain recognizes seven different moral right interests. *See* Spanish Copyright Law, *supra* note 14, at art. 14 (elaborating the following rights: the right of divulgation; two separate rights of attribution; the right of integrity; the limited right to alter a work after a third party owns the work; the right of withdrawal; and the right of access to a rare copy of the work).

[190] *Id.*

[191] *See* Ireland Copyright Act, *supra* note 15, §§ 10(2)-10(4) (proprietors of newspapers and the like acquire limited copyright in employees' and apprentices' works published; persons commissioning certain works acquire copyright in works; in all other employment contexts, employers acquire copyright in works made by their employees or apprentices).

[192] *Compare id.* § 10(2) (proprietor of newspaper, magazine, or periodical holds copyright in works made by employees for publication under employment or apprenticeship contracts) *and id.* § 10(3) (person who commissions photograph, portrait, or engraving, pays for the work, and the work is made pursuant to commission is entitled to copyright in the work) *and id.* § 10(4) (in cases other than works created for newspapers, periodicals, and commissions, employer acquires copyright interest in works made pursuant to service or apprenticeship contract) *with* 17 U.S.C. § 101 (1988) (identifying two types of works-for-hire: the first arises when an employee creates a work in the scope of her employment; the second arises when a principal commissions a work falling into one of nine categories and the parties have a written agreement denoting the work as a work made for hire).

United States. Unlike the United States, which has nine types of commissioned works subject to work-for-hire rules,[193] Ireland recognizes five: cinematographic films,[194] photographs, portrait drawings, paintings, and engravings.[195]

Under Irish law, once an artist creates one of these works pursuant to a commission and receives consideration therefor, "the person who commissioned the work shall be entitled to any copyright subsisting therein . . . ."[196] In contrast to U.S. law, Irish copyright law does not require the parties to specially designate the commissioned work as one made for hire in order for work-for-hire rules to apply.[197] Ireland's treatment of employer-employee works also differs from the United States. Irish copyright subdivides employer-employee works into two different categories. The first consists of works created by an author "in the course of his employment by the proprietor of a newspaper, magazine, or similar periodical under a contract of service or apprenticeship, and . . . for the purpose of publication in a newspaper, magazine, or similar periodical."[198] In this context, the proprietor acquires the copyright interest in the work, but only "as it relates to publication of the work in a newspaper, magazine, or similar periodical."[199] Thus, for example, if a newspaper proprietor received an offer to adapt a story for a movie screenplay, the proprietor would not own the copyright in the story for screenplay purposes. Only the story's author could authorize the screenplay since the screenplay does not relate to the "publication of the work in a newspaper, magazine, or similar periodical."

The second employer-employee category is a catch-all work-for-hire provision that closely approximates U.S. law. In this subdivision, the copyright in all works created in the course of an author's employment, except those created pursuant to a commission or within the first employer-employee group, vests in the

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[193] *See supra* note 5.

[194] Ireland Copyright Act, *supra* note 15, § 18(b)(3).

[195] *Id.* § 10(3).

[196] *Id.* Substantially similar language applies to cinematographic works as well. *See id.* § 18(b)(3) (person commissioning film who gives consideration therefor is entitled to copyright interest if film made in "pursuance of that commission").

[197] *See* 17 U.S.C. § 101 (1988) (requiring a writing signed by both creator and person commissioning work indicating work is "for hire").

[198] Ireland Copyright Act, *supra* note 15, § 10(2).

[199] *Id.*

employer if the author is working pursuant to a service or apprenticeship contract.[200] Irish law does not define "the course of the author's employment," and therefore, a question could arise as to how to define the extent of an employer-employee relationship. The U.S. Supreme Court squarely addressed this issue in *Community for Creative Non-Violence (CCNV) v. Reid.*[201] The *CCNV* Court resolved the question by using traditional agency principles to determine whether an employer-employee relationship exists.[202] It is uncertain how Ireland would resolve the question. One commentator has suggested, however, that under the former United Kingdom Copyright Act,[203] the service or apprenticeship contract requirement obviates the need to inquire into "the scope of employment" question that *CCNV* addresses.[204] Assuming this rationale would apply in Ireland, employers who have contracts with employees and apprentices will almost always acquire the rights in the copyrightable works they create in their employment capacities.

Despite the strong copyright interest Irish law gives employers, employees retain some authority over the works they produce. This authority resides in section 54 of the 1963 Act, which effectively establishes a limited moral right of attribution.[205] Although this section does not explicitly identify its prohibition against "false attribution" as a moral right, its impact demonstrates such a right. First, the section refers only to "authors" and not to copyright holders or owners.[206] Second, the Irish work-for-hire

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[200] *Id.* § 10(4).

[201] 490 U.S. 730 (1989).

[202] *Id.* at 751; *see supra* note 25 for *CCNV's* determining factors.

[203] The work-for-hire provisions contained in the former United Kingdom Copyright Act mirror Ireland's current scheme. *See* John Richards, *Ownership of copyright: some international thoughts,* 133 SOLIC. J. 1247, 1248 (1989).

[204] *Id.* at 1248–49 (comparing the new 1988 Copyright Act to the British Patents Act of 1977 to show that the language "course of employment" will almost give employers copyright interests in their employees' work). Because the 1988 Act eliminates the contract requirement, Richards' conclusion favoring employers implies that the added presence of an employment contract will conclusively establish an agency relationship by which an employer will gain the copyright interest in her employees' works.

[205] *See* Ireland Copyright Act, *supra* note 15, § 54 (setting forth several actions which constitute "false attribution of authorship").

[206] *See, e.g., id.* §§ 54(2)–54(2)(d), 54(4)–54(4)(b), 54(6)–54(6)(b) (prohibiting the use, trade, sale, distribution, publication, reproduction, or performance of a work that bears the name of an author who has not created the work, and all of the above acts in relation to works bearing the author's name that someone other than the author has modified or altered).

provisions themselves distinguish employees from employers by identifying the former as "authors" and describing the latter as "entitled to the copyright."[207] The failure to treat employers as authors suggests an intention to give employees, rather than employers, the right to object to false attributions under section 54. In sum, by characterizing the employees as authors, the Act gives employees a right independent of copyright to protest an employer's mislabelling of works created by employees.

The ability to contract as a means of avoiding the attribution provision undermines any threat the provision may create. Section 54 conditions false attribution violations on the failure to obtain a license to undertake any of the acts the section prohibits.[208] Because a license to undertake such acts would preclude operation of section 54 prohibitions, an employer could avoid section 54 by obtaining a license from his or her employees as a condition of employment. Toward this end, employers could incorporate such licenses into the actual service or apprenticeship contract and secure themselves complete control over works-for-hire.

b. *The Netherlands*

The Netherlands is the only civil law country that has incorporated the work-for-hire doctrine into its copyright law. Three separate provisions form the basis of the Dutch work-for-hire scheme. First, article 6 provides: "If a work has been produced according to the plan and under the guidance and supervision of another person, that person shall be deemed to be the author of the work."[209] This article would apply if, for example, an artist employs several artists at his or her studio to execute works.[210] Article 7 is the second Dutch work-for-hire provision. In the event another person employs the supervisor and the latter oversees the creation of a work in the course of his or her employment,

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[207] *Id.* §§ 10(2)–10(4) (employer entitled to copyright when an author creates a work "in the course of his employment").

[208] *Id.* § 54(2). Section 54(2) reads as follows: "A person . . . contravenes those restrictions as respects another person if, *without the license of that other person,* he does any of the following acts in the State . . . ." *Id.* (emphasis added).

[209] Netherlands Copyright Law, *supra* note 15, at art. 6.

[210] *See* Herman C. Jehoram, *Netherlands, in* INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 11, at 30 (noting the examples of "auxiliary studio work done for a comic strip artist" and of Peter Paul Reubens overseeing his pupils execute his sketches).

article 7 indicates that the supervisor's employer is the work's author.[211]

Article 7 states: "Where work performed in the service of another consists in the production of certain literary, scientific or artistic works, the person in whose service they were produced shall be deemed to be the author thereof, unless otherwise agreed between the parties."[212] The article applies to employer-employee relationships "characterized by authority and salary," but not to principal-independent contractor relationships.[213] The level of authority sufficient to create an employer-employee relationship raises the issue discussed earlier in relation to deciding the "course of employment" under Irish copyright law.[214] Presumably, the agency guidelines, relied on by the U.S. Supreme Court in *CCNV*,[215] offer a standard by which Americans can judge whether their works-for-hire satisfy the Dutch rule in article 7.

The *CCNV* factors require some qualification under Dutch law. In the Netherlands, employers' work-for-hire rights only arise in instances in which an employer "factually" addresses an employee to produce certain works.[216] Article 7 will "not apply where the employee produces (other) works on his own initiative, whether in the time of his employer or even with the mere consent of his employer."[217] This condition modifies the *CCNV* factor that looks at "whether the work is part of the regular business of the hiring party"[218] to also consider whether the employer actually prompted the work's creation. Therefore, if an employee creates a work on her own initiative, even while using her employer's facilities, receiving payment from her employer, following her employer's instructions, and even if the work is the type of work that the employer generally produces, the employee will be the work's author and will acquire all copyright interest in the work. In the context of universities and professors, the additional "ini-

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[211] *Id.* at 32.

[212] Netherlands Copyright Law, *supra* note 15, at art. 7.

[213] Jehoram, *supra* note 210, at 30. Article 8 of the Netherlands Copyright Law and article 6 of the Uniform Benelux Designs Law govern, respectively, copyright ownership in commissioned works that arise from principal-independent contractor relationships and works of industrial design. *Id.* at 30, 32; *see infra* notes 220–23 and accompanying text.

[214] *See supra* notes 198–202 and accompanying text.

[215] 490 U.S. 730, 751–52 (1989); *see supra* note 25 for the *CCNV* agency factors.

[216] Jehoram, *supra* note 210, at 31.

[217] *Id.*

[218] 490 U.S. at 752.

tiative factor" underlies the Dutch consensus that article 7 does not apply to works by professors and researchers.[219]

Article 8 is the third provision addressing the work-for-hire doctrine. It states: "Any public institution, association, foundation or partnership which makes a work public as its own, without naming any natural person as the author thereof, shall be regarded as the author of the work, unless it is shown that making the work public in such manner was unlawful."[220] This article covers works created in the course of a principal-independent contractor relationship. It also applies to all other works not covered by articles 6 and 7 where an entity has contracted for the right to publish the work as its own.[221] In theory, this provision greatly exceeds the scope of U.S. work-for-hire rules since it permits an entity to acquire authorship status and all appurtenant copyright interests by publishing a work in its own name pursuant to contract. Article 8, unlike U.S. law, does not require an agency relationship[222] nor limits itself to particular categories of works.[223]

Article 8's broad application significantly impacts moral right assertions a creator could otherwise make under Dutch copyright law.[224] For example, under U.S. law, a writer who creates a novel would generally transfer her copyright interest to the publishing house that agreed to publish the novel. The publishing house would control publication, editing, and reprint decisions because a complete copyright transfer would divest an author of his or her copyright authority over such decisions. If a Dutch writer undertook the same transfer and did *not* agree to allow the publisher to publish the work in its name, he or she would retain authorship status and the attendant moral right authority to limit

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[219] Jehoram, *supra* note 210, at 31. "Only where the university indeed has hired personnel with the specific task of writing a certain work can it rely on Article 7." *Id.*

[220] Netherlands Copyright Law, *supra* note 15, at art. 8.

[221] Jehoram, *supra* note 210, at 32.

[222] After *CCNV,* the first work-for-hire category contained in 17 U.S.C. § 101 (1988) only applies to works arising out of an agency relationship. *CCNV,* 490 U.S. at 750–51.

[223] The second work-for-hire category contained in 17 U.S.C. § 101 applies only to commissioned works falling into one of nine categories. *See supra* note 5 and accompanying text (describing these categories). These provisions are somewhat analogous since both require independent contractors to contract for authorship interests. Article 7 requires a contractual agreement allowing an entity to publish the work under its name in order for the entity to acquire authorship status. Similarly, section 101's second category requires that a signed writing identify the work as one for hire in order for independent contractors to acquire authorship status. *See* Netherlands Copyright Law, *supra* note 15, at art. 7.

[224] *See* Netherlands Copyright Law, *supra* note 15, at art. 25. In general, the Netherlands' moral right provisions include paternity, integrity, and honor. *Id.*

the publisher's publication,[225] editing,[226] and reprint decisions. In the rare circumstances a Dutch writer agreed to allow the publisher to publish the book in its name,[227] the publisher would acquire authorship status and both the economic and moral right copyright interest in the work. The writer would no longer have any copyright interest. Notwithstanding two exceptions,[228] U.S. copyright holders in works made for hire can expect the same treatment in the Netherlands as they receive in the United States.

c. *United Kingdom*

The United Kingdom fully recognizes work-for-hire principles. Section 11 sets forth the work-for-hire rules that apply to works created on or after August 1, 1989:[229]

> (1) The author of work is the first owner of any copyright in it, subject to the following provisions.
> (2) Where a literary, dramatic, musical or artistic work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary . . . .[230]

This section gives employers the status of authors and vests initial copyright interests in them absent any contrary agreement. Because employers acquire their interests upon creation and the employment relationship alone determines this interest, the British rule closely resembles the U.S. approach.[231] Similar to the *CCNV* "scope of employment" analysis, British work-for-hire interests depend on whether an employment relationship exists.

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[225] Although Dutch law does not formally recognize the moral right of divulgation, the right of paternity could encompass the right to decide under what conditions a work with an author's name can appear. *See id.* at art. 25(a) (describing the moral right of paternity).

[226] Assuming an author makes a reasonable objection to editing changes, the moral right of integrity gives an author the editing authority. *Id.* at art. 25(b)–(c).

[227] Such a transfer is unlikely because an independent author would probably want the benefit of being acknowleged as the author.

[228] *See supra* notes 216–18, 222–23 and accompanying text.

[229] The 1956 version of the United Kingdom's Copyright Act applies to works created before August 1, 1989. The work-for-hire rules under this earlier act are identical to Ireland's current rules. *See* discussion *supra* part II.B.2.a.

[230] United Kingdom CDPA, *supra* note 15, § 11.

[231] *See* 17 U.S.C. § 201(b) (1988). "In the case of a work made for hire, the employer . . . 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." *Id.*

To determine whether such a relationship exits, the British offer their own version of *CCNV*. They focus on "whether the work forms an integral part of the business."[232] This analysis depends on:

> whether the typical attributes of employment are present: whether regular sums are paid as wage or salary; whether income tax deductions are made on the "pay-as-you-earn" basis used for employees; whether there is a joint contribution to a pension scheme; whether national insurance contributions are paid by both parties as for an employee.[233]

Assuming some or all of these attributes are present, an employer will acquire the copyright interest in the work. Even if the employment relationship does not satisfy this test, an employer could nonetheless acquire a copyright interest unimpaired by moral right.

Unlike most EC countries, the United Kingdom permits moral right waivers. Section 87(1) provides that "[i]t is not an infringement of any of the [moral] rights conferred by this Chapter to do any act to which the person entitled has consented."[234] Waivers remove doubts that can taint exploitation of works that otherwise qualify as works-for-hire, such as commissioned works and works created within an ongoing non-employment relationship.

Waivers are especially useful in relation to commissioned works since such works are not generally within the British concept of an employment relationship. By securing both a copyright transfer and a moral right waiver, a principal could exploit the work without concerns that an independent contractor would assert her moral right in protest. Likewise, because waivers "may relate to existing or future works,"[235] persons in ongoing relationships can negotiate for waivers at the outset. This kind of option produces simplicity in contracting and certainty over the long-run since both the payor and the creator know the limits of their rights from the beginning. In the final analysis, the British moral right waiver is the only way to accomodate the moral right interest the Berne Union compels and the common law tradition of allowing unfettered copyright exploitation. This system also pla-

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[232] William R. Cornish, *United Kingdom, in* INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 11, at 31.

[233] *Id.*

[234] United Kingdom CDPA, *supra* note 15, § 87(1).

[235] *Id.* § 87(2).

cates U.S. work-for-hire holders as it allows them to market their works without fear of limitation.

C. *Analysis*

The above overview of EC Member States' national work-for-hire rules reveals three interrelated problems. The first problem is that the Member States differ over how copyright ownership in works-for-hire may arise. At one extreme, Belgium, Denmark, Germany, Greece, and Luxembourg only allow creators to have the initial ownership interest and require employers to contract for copyright licenses or transfers.[236] Somewhere towards the center, France requires principals to contract with independent contractors, but employers need not contract with employees.[237] Similarly, Italy and Spain permit copyright ownership to flow directly to the employer in some circumstances,[238] but not in others.[239] At the other extreme, Ireland, the Netherlands, and the United Kingdom nearly always vest copyright ownership in employers and principals upon creation.[240] In essence, no single copyright ownership rule prevails in the EC for works-for-hire.

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[236] *See, e.g.*, Corbet, *supra* note 14, at 18 (Belgian law regards employees as authors from whom employers must acquire their copyright interest); Denmark Copyright Law, *supra* note 14, at ch. 1 § 1 (establishing a strict "creator as author" rule and implicitly requiring employers to contract for copyright interest); German Copyright Law, *supra* note 14, at art. 43 (employers and principals must contract to acquire copyright interests); Greek Copyright Law, *supra* note 14, at art. 1 (transfer necessary to obtain copyright interests); Luxembourg Copyright Law, *supra* note 14, at art. 1 (use of "creator as author" rule implicitly requires employers to contract for copyright interest).

[237] Plaisant, *supra* note 11, at 44 (French law gives employers copyright interests in employees' works by virtue of their employment relationship, but principals do not obtain such interests in independent contractors' work; the latter must contract for their own copyright interests).

[238] *See, e.g.*, Italian Copyright Law, *supra* note 14, at arts. 38, 45, 88 (publishers of collective works, producers of cinematographic works, and persons commissioning photographic works all obtain economic copyright interest); Spanish Copyright Law, *supra* note 14, at arts. 8, 51 (publishers of collective works acquire both economic and moral right copyright interest, and employers acquire limited economic interest without contract).

[239] *See* Fabiani, *supra* note 156, at 38 (in most contexts employers and principals must contract for copyright interests); del Corral, *supra* note 182, at 25 ("[s]ince . . . only natural persons can be authors . . . legal entities normally acquire copyright from such persons by contract.").

[240] *See* Ireland Copyright Act, *supra* note 15, §§ 10(2)–10(4) (proprietors of newspapers and the like acquire limited copyright in employees' and apprentices' works published; persons commissioning certain works acquire copyright in works; in all other employment contexts, employers acquire copyright in employees' or apprentices' works); Netherlands Copyright Law, *supra* note 15, at arts. 6–8 (giving authorship status and therefore com-

The second problem is that the Member States disagree over who may be the author of a work-for-hire. This issue is significant since only an author can claim moral right. As a general rule, all EC Member States consider the natural person who created a work as the work's author.[241] In relation to authors of works made for hire, however, two distinct approaches emerge. These approaches break down according to the civil and common law traditions. On the one hand, the civil law countries, except for the Netherlands, adhere to the general rule almost without exception.[242] On the other hand, Ireland, the Netherlands, and the United Kingdom deviate from the general rule and recognize employers and principals as authors of works made for hire.[243]

The third problem arises from the divergent moral right treatments existing within the EC. The discrepancies characterizing moral right proceed directly from the problem of determining authorship in works made for hire. That is, the same civil law countries that strictly follow the "creator as author" rule also forbid moral right transfer and waiver.[244] The identical common law countries (and the Netherlands) that part from the "creator as author" rule also permit moral right transfer or waiver.[245] Because these latter countries' work-for-hire and moral right regimes most closely resemble the U.S. system, U.S. work-for-hire copyright holders can expect the same treatment under these countries' laws as they would receive in the United States.[246]

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plete copyright ownership to persons supervising work, to persons in whose service other persons have created works, and to legal entities publishing works in their own name); United Kingdom CDPA, *supra* note 15, § 11 (employers are authors of works created by employees in the "course of" their employment and employers thereby acquire all copyright interest in such works).

[241] DIETZ, *supra* note 6, at 41–42.

[242] The limited exception in civil law countries gives producers of cinematographic works limited authorship status. In addition, France recently diverged from the general rule to give computer software employers rights of authorship with respect to their employees. *See supra* note 129 and accompanying text.

[243] *See supra* notes 191–204, 209–12, 229–30 and accompanying text.

[244] *See supra* note 14 and accompanying text.

[245] *See supra* note 15 and accompanying text.

[246] Of course this parallel reverberates in contexts other than work-for-hire. Copyright holders in any kind of work would do well to secure a moral right waiver or transfer in a copyright assignment. Insofar as the EC common law countries and the Netherlands are concerned, contracting for a transfer or waiver would relieve doubts as to whether authors could legally object to the contemplated exploitation of their work. Because this article solely addresses works-for-hire, it does not fully explore all of the broader questions raised by moral right transfer and waiver in other kinds of works. *See supra* notes 243–44 and accompanying text.

Similarly, British, Irish, and Dutch copyright holders in works-for-hire can anticipate the same treatment in each other's country.

In theory, British, Irish, and Dutch work-for-hire copyright holders cannot escape the moral right morass in the other EC Member States.[247] These holders face the two-fold problem of overcoming the other Member States' strict "creator as author" rule *and* the moral right transfer and waiver prohibition. To avoid these hurdles, work-for-hire copyright holders must turn to either EC law or the Berne Convention.[248]

The Berne Convention does not offer any authority for setting aside another Member State's "creator as author" or moral right rules. Although the Berne Convention may lean towards a strict "creator as author" rule,[249] it offers no conclusive answer as to how to decide who may claim authorship in a work.[250] As to moral right, the Berne Convention leaves resolution of the question to national legislatures.[251] When a party asserts a moral right claim or, in the alternative, seeks to deny another's moral right claim, the Berne Convention provides that the national law of the country in which the question arises governs the outcome.[252] While the Berne Convention treats the problem as national in scope, broader EC notions militate against such a position because they consider the law of the work's country of origin *and* of the country in which the issue arises.

Nonetheless, current EC law offers work-for-hire copyright holders little guidance. The law does not offer direction due to a conflict between the Treaty's article 36 and the territoriality principle. Article 36 permits Member States to develop whatever copyright scheme they desire so long as it does not create barriers between the Member States.[253] The territoriality principle limits

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[247] The effect of a choice of law clause in other Member States is doubtful. *See* discussion *infra* part III.B. Assuming a choice of law contract provision fails, British, Irish, and Dutch work-for-hire copyright holders have no recourse under current EC law.

[248] The UCC does not provide any solution because its article XVII requires all EC Member States to follow the Berne Convention. *See supra* notes 88–90 and accompanying text.

[249] *See supra* notes 47–51 and accompanying text.

[250] *See* discussion *supra* part I.A.2.

[251] "The means of redress for safeguarding the [moral] rights granted by this Article shall be governed by the legislation of the country where protection is claimed." Berne Convention, *supra* note 30, at art. 6*bis*(3).

[252] *Id.*

[253] *See supra* note 101 and accompanying text.

copyright protection to a particular Member State.[254] Whereas the latter notion places a significant check on the kind of scheme a Member State may create, article 36 grants broad latitude. A Member State's choice to use a strict "creator as author" rule, a work-for-hire rule, or an "imprescriptible" moral right regime, complies with the territoriality principle because it does not extend beyond national boundaries. Such choices, however, could be read to violate article 36 because they limit other Member States' copyright grants.

Problems under current national laws defy simple resolution. British, Irish, and Dutch law divest authors in the other nine Member States of their moral right if their work qualifies as a work-for-hire. Conversely, the other nine Member States divest work-for-hire copyright holders of their authorship status and thereby limit their ability to exploit the subject work because of the creator's moral right. In essence, the dilemma is how to determine whether a Member State's scheme violates article 36. Assuming, for example, an Irish copyright holder sought to market an altered work-for-hire in Italy, the Irish creator of the work could protest under Italy's moral right of integrity.[255] The copyright holder's reliance on Irish law may constitute an "exercise" of Irish national rights that discriminates against Italian national rights in violation of article 36. Alternatively, the creator's reliance on Italian law may constitute an "exercise" of Italian national rights that discriminates against Irish national rights in violation of article 36. Clearly, the exercise of one group of national rights discriminates against the other group of national rights. In the Irish-Italian scenario, whatever choice an Italian court could make would impair the rights granted by either Italy or Ireland. This dilemma highlights the need for the EC to settle the work-for-hire conflict.

III. RESOLVING THE WORK-FOR-HIRE CONFLICT

Two possible solutions to the work-for-hire conflict exist under current EC law. The first solution would require the EC to harmonize work-for-hire rules or, alternatively, moral right rules.

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[254] *See* discussion *supra* part II.B.

[255] This conflict is analogous to the problem addressed in *Huston v. La Cinq.* Judgment of May 28, 1991, Cass. civ., 1991 Bull. Civ., No. 89–19.522 (Fr.), *available in* LEXIS, Prive Library, Cassci File; *see supra* notes 8–13 and accompanying text. Because *Huston* pitted U.S. law against French law, however, article 36 was not at issue.

The second solution would require the EC to recognize community-wide use of a choice of law contract provision to indicate which Member State's law will govern the copyright in a work-for-hire situation. To the extent the Member States would willingly cede their individual cultural interests to the Community, either of these solutions could work.

A. *Harmonization*

Copyright harmonization offers the easiest solution to national law conflicts. Harmonization would ensure uniform treatment throughout the EC and would provide certainty to all parties to a copyright transaction. Uniform rules would ensure that parties know in advance to what extent, if any, Member State laws protect or impede their rights. As a result, parties would have more clearly defined bargaining positions. Consistent laws, therefore, would facilitate contracting since the parties would have a better idea of the value of their interests.

Three articles in the Treaty of Rome (the Treaty) and the Single European Act (the SEA) authorize the European Council to harmonize national copyright laws.[256] First, article 100 of the Treaty gives the Council the authority to issue directives that affect the establishment or functioning of the Common Market.[257] Second, article 100A of the SEA permits the Council to take other measures intended to establish an internal market.[258] Third, article 235 gives the Council "the power and the duty to take the appropriate measures" in situations where the Community must act to attain one of its objectives in the common market's operation and the Treaty has not provided the necessary powers.[259] Although article 235 "would not be appropriate as regards harmonization measures to complete the internal market for which [a]rticle 100A . . . provides a specific legislative basis . . . it could well be one of the powers to be used in dealing with problems

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[256] *See* Green Paper, *supra* note 90, at 20 (discussing articles 100 and 235 of the Treaty and article 100A of the SEA).

[257] *Id.* Prior to the SEA, the Commission described this power as "the most likely basis for action at [the] Community level in the field of copyright law. It is a vital instrument for the harmonization of differing national laws and for creating a standard throughout the Community, even where some Member States have no laws governing the subjects at issue." *Id.*

[258] *Id.* "This provision permits such measures to be adopted by qualified majority." *Id.*

[259] *Id.*

for which harmonization alone may well not provide an adequate solution . . . ."[260] These provisions clearly indicate that harmonization is feasible.[261] However, whether harmonization is desirable is an entirely different question.

The cultural reasons behind the EC Member States' divergent work-for-hire rules undercut harmonization viability. In essence, the conflict pits the Dutch law and common law's economic incentives for public welfare enhancement and against the civil law view that creation alone begets "moral entitlement."[262] On the one hand, the British, Irish, and Dutch approach mirrors "a utilitarian premise, holding out the prospect of economic reward as an incentive to investment in literary, musical and artistic works."[263] On the other hand, the remaining EC countries follow "[t]he author's right tradition, which posits that authors deserve protection for their creation as an inherent natural right [and] centers on the author's right to control the exploitation of her work."[264] A single EC work-for-hire rule implies a choice between these two views; because they are mutually exclusive, adoption of either view precludes adoption of the other. Given the relative merits of each system, it is unclear how the EC will decide the issue of where the burden should fall.

Moreover, the possible benefits resulting from uniform work-for-hire rules do not outweigh the likely costs harmonization would exact. In the work-for-hire context, consistency would require sacrifices by one block of countries or another. Either Britain, Ireland, and the Netherlands must abandon their "creator as author" exceptions, or the other nine Member States must relax their strict "creator as author" approach. A decision favor-

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[260] *Id.* at 22.

[261] Indeed, by December 1992, the Commission will have completed a study focusing on the differences in moral rights protection in the Member States. Smith, *supra* note 63, at 5. The study contemplates the possibility of future harmonization if the Commission believes that these differences distort trade. *Id.* In fact, there is an ongoing effort to harmonize at least minimal copyright protections in the EC in order to promote free trade. *See generally* Commission of the European Communities, *Copyright and Neighboring Rights in the European Community*, European File, Sept. 1991, at 4–5. The impediments on works-for-hire created by the various moral right regimes demonstrate how moral right can distort trade.

[262] LEAFFER, *supra* note 1, at 2.

[263] PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE 685 (Little, Brown & Co. ed. 1989), *reprinted in* CREATION, OWNERSHIP AND CONTROL, *supra* note 63.

[264] *Id.*

ing either approach would require the affected countries to adjust their national laws.

Such an adjustment would face strong opposition in all countries. The French Supreme Court's refusal in *Huston v. La Cinq*[265] to derogate from French moral right exemplifies the extent to which Member States cling to their respective views. The Court stated that "the refusal to recognize, on the basis of a foreign law and on rights acquired in a foreign country, an author's right with respect to her work is manifestly incompatible with the French notion of public international order . . . ."[266] The court's flat rejection of any notion contrary to the civil law concept of author's rights demonstrates a willingness to forego comity in favor of adhering to national cultural policy. Assuming the French position accurately reflects the relative positions of the other EC Member States, harmonization would compel affected countries to sacrifice highly prized national cultural values.[267] It does not appear worthwhile for the EC to demand such a sacrifice.

B. *Choice of Law*

Adopting a Community-wide choice of law rule would also permit the EC to overcome disparate work-for-hire rules. This alternative would make conflict resolution a matter of private law. From the point of view of a work-for-hire copyright holder, a choice of law clause could guarantee unfettered exploitation of the subject work in the civil law countries.

A work-for-hire copyright holder could use a choice of law clause in one of two ways.[268] First, if the work's country of origin

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[265] Judgment of May 28, 1991 (Huston v. La Cinq), Cass. civ., 1991 Bull. Civ., No. 89–19.522 (Fr.), *available in* LEXIS, Prive Library, Cassci File.

[266] *Id.* at *9 (translation by the author).

[267] Because *Huston* involved a conflict between U.S. law and French law, the French Supreme Court did not address an intra-EC problem. However, because harmonization would require France to abandon its strict author's rights regime if it tended toward a common law and Dutch resolution, rigorous opposition would arise. Indeed, this was the scenario that played out in *Huston*. *See id.*

[268] Other contexts exist as well. For example, successors-in-interest of an employer's work-for-hire copyright would be required to contract with the employer for a waiver of moral right and a choice of law provision. This article only addresses the relationship between creators of works and their employers. Because the common law work-for-hire rule vests employers with authorship status by virtue of the employment relationship, a contract is not essential. The choice of law option this article explores, however, requires an employer-employee contract for its application.

follows the common law work-for-hire approach, the employer-copyright holder may contract with the employee-creator to apply the law of the country of origin. Second, if the work's country of origin does not follow the common law work-for-hire approach, the employer-copyright holder may contract with the employee-creator to apply the law of one of the common law countries. While these two choice of law uses protect the copyright holder, other uses could protect the creator by applying the law of a strict civil law country. The ability of either employer or creator to secure a favorable choice of law provision depends on which party has the superior bargaining position.

Because countries use moral right in order to equalize inherently unfair bargaining positions,[269] the choice of law option breaks down at the same point as harmonization. Although the common law countries may be more receptive to private choice of law clauses,[270] civil law courts would most likely rule that such efforts violate public policy.

Again, the *Huston* decision suggests how civil law courts would treat choice of law clauses favoring the common law work-for-hire rule. Despite its recognition that the United States was the country of origin and that U.S. law should apply, the French Supreme Court stated that "only French law . . . is able to determine whether the person claiming moral right is the author."[271] The court went on to reason that "to refuse a creator the exercise of her moral right . . . is a result that contravenes the French conception of public order and of author's rights."[272] Although the *Huston* Court did not address a choice of law clause, it did consider and reject the country of origin theory. The basis of its rejection was French public policy favoring author's rights. Because country of origin law would ordinarily apply, such law is analogous to the law parties to a contract could specify in a choice

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[269] *See supra* note 63 and accompanying text.

[270] In determining the obligation under a contract, English courts apply the "proper law." If the parties state in a contract that the law of a given country will govern the contract or if this can clearly be inferred from the contract itself, the statement or intention will determine the proper law. The same law applies to all obligations under the contract unless specifically stated otherwise. Michael Flint, *European Copyright Law and the Doctrine of Author's Rights,* Address to the University of Southern California Entertainment Law Institute (April 27, 1991), *reprinted in* CREATION, OWNERSHIP AND CONTROL, *supra* note 63, at 25–26.

[271] Judgment of May 28, 1991, 1991 Bull. Civ., No. 89–19.522, available in LEXIS, Prive Library, Cassci File, at *4 (translation by the author).

[272] *Id.* at *4–5 (translation by the author).

of law clause. *Huston*'s rationale, therefore, suggests that no matter what law parties may choose, public policy will ultimately determine whether to accept or reject such a specification. Because each EC Member State's particular work-for-hire rule already reflects the State's public policy regarding moral right, a choice of law clause that contravenes a State's rule will most likely fail.

CONCLUSION

The desire to achieve an EC undivided by national barriers engenders an interest in unifying Member States' copyright laws. However, copyright's unique private and public character significantly hinders any easy solution to aligning national copyright laws. While these laws primarily protect interests private individuals hold in their intellectual creations, they also reflect and further significant national cultural policies. This latter aspect explains the work-for-hire schism between Belgium, Denmark, France, Germany, Greece, Spain, Portugal, Italy and Luxembourg, on the one hand, and the United Kingdom, Ireland, and the Netherlands on the other. The civil law tradition embodies a choice to protect intellectual creators above and beyond the purely economic promise the common law tradition safeguards. In the work-for-hire context, culturally-bound interests drive both traditions, rather than economic schemes. Because these interests are primarily societal rather than economic, and because any resolution by way of harmonization or choice of law will force one group or the other to abandon its historical copyright approach, the EC should accept this conflict as one beyond the scope of its jurisdiction.