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Law and Informal Rules of Collaborative Creation

Anthony J. Casey & Andres Sawicki

The relationships among law, organizational theory, and collaborative creation have been largely overlooked. In previous work, we introduced a new analysis of how formal intellectual property law can facilitate collaborative creation.[1] We turn now to the role that informal rules play. We will use the term informal rules to refer to rules that are enforced through non-government sanctions and formal law to refer to rules that can be enforced through state sanctions.[2]

To do so, we connect two emerging strands of literature. The first explores the organization of intellectual production. The second analyzes informal rules that guide the creation of intellectual property.

The work on the organization of intellectual production, pioneered by Robert Merges and Dan Burk & Brett McDonnell,[3]

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[1] Anthony J. Casey & Andres Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. 1683 (2013).

[2] This is a rough cut. Terms like "custom," "norm," and "informal rule" are used to mean many things. See Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property,* 93 Va. L. Rev. 1899, 1900-01 n. 1 (2007) (collecting sources demonstrating the various uses of these terms). And very fine lines can be drawn for any definition. For example, Ellickson identifies five types of rules: personal ethics, norms, contract, organizational, and governmental. He then identifies five types of sanction: self-sanction, personal self-help, vicarious self-help, organizational, and state. See Robert Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. Legal Stud. 67 (1987). These rules and sanctions can be mixed and matched. So a contract rule may be enforced through self-help or through state sanction. To simplify our discussion, we will generally divide our analysis into two categories: 1) informal rules – rules enforced through non-state sanction; and 2) formal law – rules enforced by state sanction.

[3] See Robert P. Merges, *Intellectual Property Rights, Input Markets, and the Value of Intangible Assets* *5 (unpublished draft, Feb 9, 1999), online at http://www.law.berkeley.edu/files/iprights.pdf (visited June 5, 2013); Ashish Arora and Robert P. Merges, *Specialized Supply Firms,*

has provided insights into how intellectual property can facilitate market transactions and impact integration trends in tech industries. In our recent paper, we added to this literature, exploring how copyright law can facilitate collaborative creation in teams.[4] The nature of creative collaboration is such that it can be difficult to organize these teams purely by contractual promises. Creative inputs are difficult to observe, verify, or allocate to outputs; the output of these collaborations is also highly uncertain. Thus, creative collaboration requires (more than other endeavors generally) a special monitoring relationship that can compensate non-verifiable effort; or can reward and punish entire teams based on output.[5] Such a relationship requires a firm hierarchy with a manager at the top. This facilitates the team. Instead of promising to give a team her best idea, a team member agrees to be rewarded when the ideas come together to produce sufficient value. This reward structure can be tricky to design.

The question we addressed in our prior work was how the law of intellectual property can advance or obstruct that design.[6] But formal law is not the only tool available. Over the last six or seven years, several scholars have begun exploring how customs and norms impact the production of intellectual property. Building on customs-and-norms work in other

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Property Rights and Firm Boundaries, 13 Indus. & Corp. Change 451 (2004); Dan L. Burk and Brett H. McDonnell, *The Goldilocks Hypothesis: Balancing Intellectual Property Rights at the Boundary of the Firm*, 2007 U. Ill. L. Rev. 575; Dan L. Burk, *Intellectual Property and the Firm*, 71 U. Chi. L. Rev. 3 (2004). See also Oren Bar-Gill and Gideon Parchomovsky, *Law and the Boundaries of Technology-Intensive Firms*, 157 U. Pa. L. Rev. 1649 (2009); Jonathan M. Barnett, *Intellectual Property as a Law of Organization*, 84 S. Cal. L. Rev. 785 (2011); Érica Gorga and Michael Halberstam, *Knowledge Inputs, Legal Institutions and Firm Structure: Towards a Knowledge-Based Theory of the Firm*, 101 Nw. U.L. Rev. 1123 (2007).

[4] Anthony J. Casey & Andres Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. 1683 (2013).

[5] *Id.*

[6] *Id.* at 1729-39 (showing how the derivate works right can create a reward mechanism that facilitates team collaboration).

fields,[7] this literature has explored how norms can substitute for intellectual property rights and how the rights governed by informal rules should (or should not) be incorporated into theories on the development of IP's formal law.

We explore here how informal rules can substitute for formal law in the context of creative collaboration. If, as we suggested, creative input providers can be punished or rewarded to facilitate collaboration, those punishments and rewards can be created and enforced as much by informal rules and sanctions as by formal law. Thus we synthesize a theory to show how informal rules and formal law intersect in this context.

To do so, we look at different creative industries to see how the formal and informal rights are allocated and exchanged among creative collaborators. Some industries are dominated by formal law providing for strong intellectual property rights. Others are almost entirely norm based. The differentiation may also occur across different functions in an industry.

For example, norms of ownership in completed literary works are weak, while copyright is strong. But in collaborative authorship, ideas are not protected by formal copyright law. There we see norms dominate. In this way, if a manager wants to reward input providers with rights in the final product that will be dealt with through formal rights of property and contract. Rewards based on interim products will be enforced by norms. The same is true in film. Informal rules that allocate reputational rewards can play a large role in facilitating team collaboration among a team of actors. But ownership of the screenplay will be determined by formal law. The takeaway is that the currency the manager uses to facilitate collaboration may be regulated by formal law, informal rules, or some combination. Critically, in some cases the norms may be self-enforcing and thereby obviate the need for a manager in the first place.

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[7] See, for example, Robert Axelrod, *The Evolution of Cooperation* (1984); Lisa Bernstein, *Opting out of the Legal System, Extralegal Relations in the Diamond Industry*, 21 J. Legal Stud. 115; Robert Ellickson, *Order Without Law* (1991); Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study* (1963).

Not surprisingly, there appears a rough correlation: norms are often strong and important where IP rights are weaker; and vice-versa. Causal conclusions, as usual, are harder to make: it may be that norms fill the space of weak IP rights, IP law steps in to fill the space of weak norms, or both. Or perhaps IP law crowds out norm creation.[8]

Our preliminary conclusion is that all of these factors are at play, but that the crowding out effect has been underappreciated here and has the most potentially undesirable results. Recent works comparing creative norms across cultures reveal important trends that suggest that strong IP rights may inhibit the development of norms facilitating collaborative creation. In a system where the IP rights are not specifically designed to addresses collaboration, the result is that IP rights may be worse at fostering collaboration than no rights. To be clear, crowding out is not a binary phenomenon. It is not simply that any formal law will crowd out informal rules. It has long been understood that formal and informal sanctions can be complementary. But some formal laws may fill a space where informal rules might act or the law may even work against existing informal rules. Those are the interactions with which we are most concerned.

On the other hand, we also recognize and describe instances in which existing norms make collaboration more difficult. For example, informal rules in an industry may make it difficult for those who didn't contribute to a work to appropriate its value. Those rules may be enforced by informal norms like an ethic of individual originality in order to simplify detection of improper appropriation.[9] This originality ethic may, in turn,

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[8] For example, when the law fails to define authorship in peculiar cases, there is no back up norm to provide any guidance to the parties. See Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. at 1716-26 (discussing difficult authorship cases where neither law nor custom could cleanly identify the "author").

[9] Suppose an industry had a strong originality ethic, such that proper conduct meant that each actor produced her own work alone. This would imply that similarities in product between two different works should be rare, and makes the observation of two different actors using similar work a relatively reliable signal of improper conduct. If the industry did not have a strong originality ethic, such

make collaboration difficult because participants will be discouraged from recognizing the contributions of potential collaborators. Formal law may make collaboration easier than informal rules would when formal law provides an enforcement mechanism without collateral impact on collaboration.

We first briefly review the literature on creative organizations and the literature on norms and customs. From there we suggest how these areas of study intersect in creative collaboration. We examine the roles of trust and reputation in creative industries. We explore how these factors can facilitate team creation and contrast that mechanism with the impact of formal legal rules. We compare the effects that the different mechanisms have both on horizontal collaboration and the role of a vertical hierarchy under a manager. Finally, we identify important implications of this analysis. Most important, perhaps, is the potential crowding out effect. Where IP laws are strong, norms may tend to be weak. While causal links are very hard to test, the contrast between the creative norms across cultures with different property rights suggests a significant possibility that norms of collaboration are crowded out—or at least prevented from developing—where IP rights are strong.[10]

I. Current Theories of Norms and Intellectual Property

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that proper conduct meant that multiple actors could work together to produce a product that they all could use, then the observation of two different actors using similar work could mean that one is engaged in improper conduct (i.e., use without permission) or proper conduct (i.e., use of work she had a hand in producing as part of a collaboration). See Oliar & Sprigman, *No Free Laugh*, 94 Va. L. Rev. at 1864-65 (describing this dynamic in the context of stand-up comedy).

[10] Our analysis for now rests on existing literature and informal conversations with industry participants. We intend to conduct fieldwork that will provide more concrete empirical grounding for this project.

The emerging literature on norms and creativity[11] has focused either on identifying norms that fill gaps where intellectual property is weak (e.g., fashion, food, or comedy) or on identifying how the legal system should (or should not) use norms and customs to guide the design of intellectual property law.

These questions have generally been approached with the classic intellectual property story in mind. According to that story, producers will have insufficient incentives to produce creative goods[12]—things like songs, books, or inventions—unless there are barriers to copying.[13] Such items are public goods; that is, they are non-excludable and non-rival. Because songs, books, inventions, and the like are non-excludable, a person deciding whether to produce such goods runs the risk that her rivals will copy them. And because the producer incurs the costs of creating the goods but her rivals do not, the producer will be at a systematic cost disadvantage. Foreseeing

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[11] See Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 Va. L. Rev. 1899, 1901 (2007) ("Despite all this talk of custom in other areas of law, there has been relatively little theoretical discussion of how custom is and should be treated in the context of intellectual property."). The field has grown since Rothman's analysis. See, e.g., Aaron Perzanowski, *Tattoos & IP Norms*, 98 Minn. L. Rev. 511 (2013); David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 Tex. L. Rev. 1093 (2012); Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law* in Law and Magic: A Collection of Essays (2010); Emmanuelle Fauchart & Eric von Hippel, *Norm-Based Intellectual Property Systems: The Case of French Chefs*, 19 Org. Sci. 187 (2008); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 Va. L. Rev. 1790 (2008).

[12] We use "creative goods" as an umbrella term for the subject matters covered by copyright and patent law. Also, we use "intellectual property" to refer to copyright and patent law, but not trademark law. Although norms-based trademark systems exist, see Fagundes, *Talk Derby to Me*, 90 Tex, L. Rev. 1093, and trademark law surely has a role to play in the organization of creative production, we leave these issues for another day.

[13] Oliar & Sprigman, *There's No Free Laugh*, 94 Va. L. Rev. at 1790.

this problem, the producer will decline to create in the first instance.

Intellectual property laws impose legal penalties on those who copy creative goods without permission. These legal penalties render excludable otherwise non-excludable goods. Because the producer of the creative goods will now be the only one able to sell them, she will no longer be at a systematic cost disadvantage to her rivals. Those rivals will be forced to produce their own creative goods—and incur the corresponding costs of creation—if they wish to compete. As a result, the producer chooses to create.

While the classic story accurately describes a wide range of creative activity, IP scholars have explored several ways in which it is incomplete. One strand of the literature emphasizes that formal law is not the only mechanism that can transform creative goods from non-excludable public goods into (largely) excludable normal ones. Instead, social norms can plausibly do a lot of the same work.[14] Social norms that punish unauthorized

[14] Foundational work on social norms can be found in both the property literature and the contract literature. In the property literature, Robert Ellickson described how ranchers in Shasta County, California devised their own rules for deciding how to allocate the costs of building fences between neighbors; those rules governed behavior in Shasta County, rendering government-provided rules irrelevant in a number of interactions that those rules nominally regulated. Robert Ellickson, *Order Without Law* (1991). Seminal works in the contracting literature include Stewart Macauley, *Non-contractual Relations in Business: A Preliminary Study* (1963); Lisa Bernstein, *Opting out of the Legal System: Extralegal Relations in the Diamond Industry*, 21 J. Legal Stud. 115; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724 (2001). More recently, others have examined how social norms might affect the structuring of transactions so as to prevent disputes from arising, rather than resolving them after they occur. John F. Coyle & Gregg D. Polsky, *Acqui-hiring*, 63 Duke L.J. 281 (2013) (describing cooperative norms in Silicon Valley that drive large technology firms to avoid poaching teams of engineers from start-ups and instead to pursue acqui-hires, in which venture capitalists and early investors receive payments when the large firm absorbs all of the start-up's engineering talent).

imitation might substitute for formal legal barriers to copying, and thereby preserve incentives to produce creative goods.[15] For example, stand-up comics apply reputational penalties and refuse to share a bill with comics who have been credibly accused of telling jokes previously told by others.[16] French chefs similarly refuse to engage in mutually beneficial information exchange with chefs who have been credibly accused of copying recipes from other chefs.[17]

Another way in which the classic story does not accurately capture creative activity is that it assumes a sole creator acts alone to produce and market the creative work. But much creative work is collaborative or cumulative.[18] Consider then the possibility that two inputs—one a creative good and the other a normal good—must be combined to produce a finished product. Each input producer must tailor her work to the joint project; that is, she must make investments that render her product more valuable when combined with her counterparty's input than in any other use. Those relationship-specific investments expose the first input producer to ex post hold

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[15] *See generally* Oliar & Sprigman, *No Free Laugh*, 94 Va. L. Rev. 1787 (anti-copying norms in stand-up comedy); Emmanuelle Fauchart & Eric von Hippel, *Norm-Based Intellectual Property Systems: The Case of French Chefs*, 19 Org. Sci. 187 (2008) (anti-copying norms in French cuisine).

[16] Oliar & Sprigman, *No Free Laugh*, 94 Va. L. Rev. at 1817-18.

[17] Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of Chefs*, MIT Sloan School Working Paper # 4576, 19-21 (2006). Other areas of creative production may also have similar norms. See, for example, Aaron Perzanowski, *Tattoos & IP Norms*, 98 Minn. L. Rev. 511 (2013) (tattoo industry); Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law* in Law and Magic: A Collection of Essays (2010) (magic industry); C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 Stan. L. Rev. 1147 (2009) (fashion industry); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in the Fashion Industry*, 92 Va. L. Rev. 1687 (2006) (fashion industry).

[18] *See, e.g.*, Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. 1683 (2013); Mark Lemley, *The Myth of the Sole Inventor*, 110 Mich. L. Rev. 709 (2012).

up—her counterparty might threaten to withdraw from their joint project unless the producer agrees to hand over the surplus she generated. Because the producer cannot credibly threaten to deal with another party (at least not without giving up the relationship-specific surplus her investment created), she will be forced to renegotiate and share at least some of the surplus with her counterparty. In this case, at least one party (and potentially both) will invest insufficiently in relationship-specific investments because she recognizes that the other party will be able to appropriate the surplus.

Where inputs are tangible assets managed by different people who cannot write perfectly complete contracts,[19] the standard solution to this sort of problem is that the party with the more important investment should retain residual control rights in all assets including the output.[20] Residual control rights allow the holder to decide what to do with a resource; they capture something of what Blackstone meant when he referred to the "sole and despotic dominion" that an owner has over her property.[21] Integration is defined here as the bundling of residual control rights over several assets.[22] When relationship-specific investments are important, then, the property rights theory states that ownership of residual control rights over the assets produced by those investments should vest in a single entity: the firm.[23]

In the intellectual property context, stronger property rights in the creative good may reduce the need for integration, and lead firms to buy the input on the market, rather than integrate

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[19] Philippe Aghion & Richard Holden, *Incomplete Contracts and the Theory of the Firm: What Have We Learned over the Past 25 Years?*, 25 J Econ Persp 181 (Spring 2011).

[20] Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J Pol Econ 1119, 1125–49 (1990); see also Aghion & Holden, *Incomplete Contracts and the Theory of the Firm*, 25 J Econ Persp at 183.

[21] William Blackstone, 1 *Commentaries on the Laws of England, in Four Books* 393 (J.B. Lippincott 1886).

[22] See Hart & Moore, *Property Rights and the Nature of the Firm*, 98 J. Pol. Econ. 1119.

[23] *Id.*

in the sense of the property rights theory.[24] The intuition here is that problems associated with Arrow's information paradox that would be solved by integration in the property-rights theory of the firm sense can also be solved by strong intellectual property rights that facilitate trade. The information paradox holds that the seller of an invention will be unwilling to disclose it without property rights protection; the buyer, in turn, will be unwilling to buy it without disclosure. Thus, weaker rights in information may lead firms to make the inputs themselves in order to avoid this paradox—when the producer of the information and its consumer are a single entity, then the paradox does not arise. The property rights theory suggests that the more important input provider own complementary assets and output.[25] Stronger rights in information permit firms to specialize in information production and sell the rights to them in ordinary market transactions. Because the production of creative goods is often combined with non-creative goods, firms wishing to sell goods that incorporate both creative and non-creative elements must therefore frequently make organizational decisions affected by intellectual property law.[26]

These theories have less to say about the integration of collaborative creative inputs with other collaborative creative inputs because those are not protected by intellectual property rights, at least during the course of much of the production process.[27] Still, the production of the creative good itself also entails organizational decisions influenced by the formal dictates of intellectual property law.[28] Creative goods are commonly produced by teams of people working together.

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[24] See Barnett, *Law of Organization*, 84 S. Cal. L. Rev. at 808-11; Merges *Intellectual Property Rights* at *17-19.

[25] See sources cited supra note 3.

[26] See generally, Dan L. Burk & Brett H. McDonnell, *The Goldilocks Hypothesis: Balancing Intellectual Property Rights at the Boundary of the Firm*, 2007 U. Ill. L. Rev. 575; see also Anthony J. Casey & Andres Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. 1683, 1687 n.14 (2013) (citing sources).

[27] See generally Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. 1683.

[28] See generally Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. 1683.

These teams face the risk of shirking by teammates. It will often be hard to tell whether each team member is carrying her weight, and the team members' combined efforts produce a single inseparable good. In these instances, the team will devise an organizational solution to reduce the risk of shirking.

That solution can take one of two forms. First, the creative inputs may hire a manager who closely monitors each input to detect shirking.[29] Alternatively, the creative inputs may hire a manager who measures the team's total output, and enforces penalties or rewards depending on whether that output passed some threshold.[30] Both of these organizational solutions will be shaped by intellectual property rules, such as those governing ownership of output (e.g., the work-made-for-hire and joint-works doctrines) and rights to subsequent related works (e.g., the derivative works right).

That story is, however, incomplete. Managerial hierarchy can be shaped and facilitated by formal law, but it will also be shaped and facilitated by informal rules. The manager's ability to monitor and enforce penalties and rewards may be entirely dependent on the informal rules of the relevant industry or community. Moreover, where informal rules directly influence collaborative behavior, they may be substitutes for hierarchy altogether. That is, if informal rules cause collaborative creators to perform without shirking, a manager may not be necessary. The informal rules substitute for the monitoring and the manager's role in allocating rewards and penalties. In this way, informal rules might facilitate creative cooperation among teammates just as they prevent creative theft by rivals.

We turn to identifying the relevant norms and exploring their role in organizing creative collaboration in the next section.

II. Mechanisms for Creative Collaboration

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[29] Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 Am. Econ. Rev. 777 (1972); Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. 1683.

[30] See Bengt Holmström, *Moral Hazard in Teams*, 13 Bell J. Econ. 324 (1982); Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. 1683.

As we demonstrate in previous work, creative collaboration poses organization challenges. In this section we introduce the general concept and then show how informal rules can address some of those challenges.

A. Organizational challenges

Suppose that two authors—William and Scott—wish to jointly write a novel. Four factors will affect their ability to collaborate: observability, verifiability, allocation, and certainty.[31]

First, neither author can observe the effort of the other. If Scott sees William sitting in a coffee shop, he cannot easily know whether William is simply daydreaming or, instead, is thinking hard about how to use prose to convey a character's insanity. As a result, Scott cannot effectively punish William for failing to put forth the effort he promised to exert.

Second, each author's performance is not verifiable. Just as Scott cannot himself determine whether William has complied with their agreement, so too Scott cannot demonstrate to a court that William has been keeping his best prose to himself rather than putting it into their joint novel.[32]

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

Finally, the potential value of their collaboration is uncertain. Because the work is creative, it will be hard to predict in advance how much it could possibly be worth. As a

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[31] Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. 1683.

[32] Observability and verifiability are not necessarily coextensive. In some cases, Scott may have observed William's undeniable laziness but be unable to verify it to an outsider like a court.

result, the parties cannot simply agree to produce a novel of a given value.[33]

To reduce the impact of these four factors—observability, verifiability, allocation, and certainty—on their collaboration, William and Scott might try to organize their efforts by hiring a manager.[34] Rather than relying on price signals (or their own good will) to allocate resources, William and Scott can create a hierarchy with a manager at the top. In this hierarchy, the manager can closely monitor William and Scott in an attempt to determine whether either is shirking. Or the manager can enforce penalties (or rewards) on both William and Scott if their joint output is below (or above) a threshold.

To summarize the point, creative inputs face a monitoring challenge when collaborating. By organizing into a managerial hierarchy, the inputs can prevent shirking. The manager who can observe will be able to police effort. The manager who can reward will be able to align incentives without observation. Key to this function is that the manager must not be an input provider. The manager retains the residual control which grants her the power to reward, punish, and reallocate. In the copyright context, this suggests that the law's focus on authorship as determining ownership is misguided. It also suggests that post-production rights like derivative works may serve reward functions that can be used to facilitate collaboration in the original work. We discuss all of this at length in our previous paper.[35]

While that work focused on the impact of legal rules, here we move deeper to show that there exist some informal rules that may facilitate or substitute for the roles of a manager in organizing collaborative creation. Norms may include imperatives such as (1) do not shirk; (2) do not withhold ideas that could contribute to the project; and (3) do not appropriate to yourself ideas suggested by others. To the extent collaborators fully internalize these norms, the challenges of

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[33] *Id.*

[34] Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. at 1701-12.

[35] See generally Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. 1683.

creative collaboration disappear. When no one shirks or otherwise cheats, factors like observability become irrelevant.

Of course, the assumption of full internalization is unrealistic and norms are not entirely self-enforcing. Instead, mechanisms such as trust and reputation can provide the avenue for enforcing norms. One might then expect that where the formal law is weak, norms will play a large role in facilitating collaboration. In turn, reputation and trust should be very important in those contexts.

While direct interviews with individuals in those fields would be helpful[36] in establishing the prominence of norms in certain industries, we find at least suggestive evidence for them in existing fieldwork analyzing norms regarding appropriation of creative work. We also find suggestive evidence of mechanisms for enforcing these norms: reputation and trust. Without such mechanisms, the norm is merely a behavioral regularity (assuming that it even exists).[37] In fields in which these norms exist and are enforced, we expect that creative production will more commonly and more successfully be organized in forms that allow for collaboration. As noted above, the causal link may run either way: 1) where norms are strong, collaboration springs up because it is relatively inexpensive; or 2) where collaboration is particularly valuable, norms will evolve to facilitate the creation of that value.

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[36] In talking with people involved in the literary-incubator (or book-packaging) industry, we were told that norms play a large role where the legal protection is weak. For example, when a group of writers within a firm are collaborating on a novel, they will have brainstorming sessions in which authors throw out ideas and collectively build on them. An informal rule (with no contractual or legal backing) dictates that any idea brought up at the meeting belongs to the group or the firm. This prevents an author from using the meetings to improve her individual ideas at the cost of the other participants. If the author wants to keep her own ideas for her individual projects, she is free to do so as long as she never brings them up at a team meeting. See Interview with Lexa Hillyer (cofounder of Paper Lantern Lit). The rights in the end product, however, are controlled by enforceable contract rights—the firm owns the copyright regardless of inputs by the various authors.

[37] Eric A. Posner, Law and Social Norms 8 (2000).

In the next two parts we examine the reputation and trust mechanisms.

B. Reputation

We define reputation as information about a person obtained from "the collective experience of others who have previously dealt with [that] person."[38] The information could relate to the person's talent, perseverance, congeniality, honesty, or anything else relevant to her potential productivity in a collaborative creative project. Norms-based systems frequently rely on reputation to enforce rules.[39] Individuals who violate a norm are the subject of gossip and other attacks on their reputation.[40] Reputational attacks can be directly harmful to individuals who value their standing among peers.[41] They can also be indirectly harmful by, for example, decreasing the likelihood that others will want to engage in trade with the individual.[42] Reputation likely plays an important role in the organization of team production of creative goods.

Notably, reputation can take two forms in collaborative endeavors. First, team members may develop views of each other and share those views with the world. Thus, an outsider may hear from Scott that William is not a team player – that William shirks. If the outsider trusts the source of information, this will result in harm to William. This provides a penalty to William for shirking in a world where verifiability is weak. But crucially, this form of reputation penalty requires observability or perhaps allocation. If Scott cannot observe William's effort or

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[38] Ronald F. Gilson, Charles F. Sabel, & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 Colum. L. Rev. 1377 (2010).

[39] Oliar & Sprigman, *No Free Laugh*, 94 Va. L. Rev. at 1815 (describing reputational attacks as punishment for violation of a norm).

[40] See Fauchart & von Hippel, *The Case of French Chefs*, MIT Working Paper at *19-20 (describing a famous chef's attack on a former employee's reputation in response to the latter's violation of an attribution norm).

[41] *Id.* at *5.

[42] *Id.*

skill or allocate failure of the project to Scott's role, then Scott has no credible information to provide to the outsiders.[43]

That is where the second form of the reputation mechanism comes in: the reputation of the team as a whole. If a team never works and collapses in bickering, the world is likely to see this. Outsiders may have no way of observing or verifying which team members caused the collapse. But they do know that the team members did not work well together or at least that the team failed to produce. This harms the reputation of all team members. In this case, reputation provides an ex post penalty on the entire group for failure to perform. The threat of this penalty may create an ex ante incentive for all parties to perform. This is a new form of the group penalty that Holmstrom identified as a prime facilitator of team production.[44] Notably, this penalty may be self executing and, indeed, may be a rare example of a penalty enforcement that can exist without an actual manager in place.

One example of this mechanism in action might be the notorious flop, *Batman & Robin*.[45] Although the film turned a profit, its financial performance was far below studio expectations, and its critical reception was abysmal. All of the major contributors to the film suffered significant reputational penalties. The director, Joel Schumacher, had previously directed several major films including *Batman Forever* and the John Grisham adaptations *The Client* and *A Time to Kill*. Following *Batman & Robin*, Schumacher waited four years before directing another major Hollywood movie, the (also not very good) *Bad Company*; he has since focused on lower-budget fare. Chris O'Donnnell, who played Robin and was thought of at the time as a potential star on the strength of his work in *School Ties*, *Scent of a Woman* (for which he received a Golden

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[43] Similarly, if Scott and William had hired a manager to oversee their collaboration, that manager would have to be a credible source of information for outsiders.

[44] See Bengt Holmström, *Moral Hazard in Teams*, 13 Bell J. Econ. 324, 338–39 (1982).

[45] Another example may be *Cutthroat Island*, which effectively ended the Hollywood film careers of director Renny Harlin and actors Geena Davis and Matthew Modine.

Globe acting nomination), and *Batman Forever*, has since obtained only one other major role in a major Hollywood movie (as a supporting actor in *Kinsey*). Alicia Silverstone suffered a similar fate, going from rising star to just one major role post-*Batman & Robin*. Arnold Schwarzenegger, a much bigger star at the time than O'Donnell and Silverstone, still went through several years of subpar work until his last film success before entering politics: *Terminator 3*.[46] In short, all of the participants of the *Batman & Robin* team appear to have suffered reputational penalties that made it harder for them to obtain desirable employment opportunities after that film.

How exactly does reputation function? Reputation has a few characteristics that make it particularly valuable in facilitating team production. First, reputation as a reward for effective collaboration can help overcome the budget constraint. Managers can coordinate creative production if they can effectively provide rewards (or enforce penalties) when a team produces more (or less) than some threshold. For these rewards (and penalties) to be effective, the manager must (among other things) not be budget-constrained.[47] Reputation provides a mechanism for doing so because it allows the manager to pay productive team members from a pot that is not limited by the output of the current collaboration. The reputational rewards can be translated into money in later projects where the productive team member will be able to command a premium from her future team mates. This follows Bengt Holmstrom's point that moral hazard in teams can be avoided by punishing failure by precluding future membership in the relationship. Reputation goes further and potentially precludes future membership in other relationships or in a community as a whole. Alternatively, the reputational rewards

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[46] George Clooney, who starred as Batman, and Uma Thurman, who starred as Poison Ivy, have both found substantial success in Hollywood films after *Batman & Robin*. Intriguingly, both appear to have been able to rely on trust to do so. *See infra*, text accompanying notes __.

[47] See Bengt Holmström, *Moral Hazard in Teams*, 13 Bell J Econ 324, 338–39 (1982).

can simply be non-pecuniary compensation in the form of valuable higher social status or the like.

This function of reputation can be utilized even in the face of low observability, verifiability, certainty, and allocability. Imagine a project that ex ante has an uncertain outcome. The effort of each member is unobservable and unverifiable. Similarly, output value cannot be allocated to inputs. As long as the manager can recognize ex post project failure, reputation can still serve to prevent shirking. For example, a project requires effort of 10 from A, B, and C. If A, B, and C all perform 10, there will be success. If any one of them shirks there will be some level of failure. The manager cannot observe or verify that effort. Moreover, ex ante, the manager has no idea how much a successful project will be worth. But after the fact the manager can recognize if the project was a relative failure.[48] If the project produces 33 in value, but should have produced 39, the manager now knows that someone shirked. When reputation is a strong factor, a manager can simply declare to the community that the team was bad. As long as that reputational stain costs each member more than the net value they got from shirking, it will be effective in discouraging any member to shirk.[49] This sends a message to the market that there is significant probability that any given team member is not a good team player. That knock to the team members' reputation is a penalty for underperformance. In some cases, the manager may not even need to announce anything if the industry can infer the reputational message from the end product. A team that produces a bad movie may collectively bear the reputational hit. In this way the manager may not be

[48] We have suggested elsewhere that a scenario like this may be at play in the movie industry and might be a factor in the sequel "reboot" phenomenon. Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. 1683.

[49] Say C was shirking and only provided 5 in work, and was paid 11 of the 33 output. As long as the reputation penalty is more than 3, reputation will be an effective means of overcoming moral hazard. For the full theory behind this outcome, see Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. 1683.

necessary as the industry reputation fills the manager's role instead.

On the other hand, where observability is high but verifiability is low, reputation can be an independent motivator for an input's effort in a collaborative production. If a team member shirks, that reduces the pecuniary returns to the collaboration but there may be no legal recourse against that team member. For example, say the bad performance of one team member is devastating to the group. The manager and the group are aware of this. But it is difficult to verify to a court. Thus, no contractual penalty can punish the shirking team member.

Still, although the lack of verifiability precludes recourse to legal remedies, the presence of observability may permit recourse to informal remedies: reputational penalties. Reputation here is like a self-help remedy.[50] The manager can tell the world that the project failed because of William and not Scott. As long as the relevant community has some level of confidence in the manager's judgment, the verification of the shirking is unnecessary. Put simply, a court might place a higher burden of proof on the manager than her close-knit circle of peers would. The manager might be able to say "Anne was a miserable actress in my last movie" without being able to prove any actual breach of Anne's contract. If so, and if Anne is motivated by seeking the renown of her colleagues (or critics or the public at large), then she may not shirk even if she has a pecuniary motivation to do so.

For any of this to work, the manager's message to the community must be credible and useful. The industry need not know what it was that made Anne a bad actress, but it needs to know that there is such a thing as an objectively good actress and an objectively bad actress. And it needs to know that the manager has some expertise in differentiating the two. Thus, Anne's talent or effort must be observable to the manager even if not verifiable. And the industry must trust the manager. This

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[50] The concept of self-help remedies in the face of incomplete contracts or verifiability problems is explored in the literature on informal rules and contracts. See Adam B. Badawi, *Self-Help and the Rules of Engagement*, 29 Yale J. Reg. (2012).

renders meaningful information from third parties about a potential teammate's skill. If the question what constitutes a high-quality creative input were answered in an idiosyncratic way, then potential collaborators cannot rely on information from third-parties to estimate the value of their collaboration.

Reputation has some appealing features as a mechanism for enforcing norms in organizing collaborative creativity. Foremost among these is that reputation creates a mechanism for punishing and rewarding performance when contracts and other legal rights fall short. This makes it easier to work in collaborative groups where verifiability or observability is low. This, of course, also provides a benefit to subsequent managers who have better information about potential new team members. When a creative community can rely on trusted sources of information about an individual's potential value in a collaboration, a manager can more readily make decisions about teammates for future projects even though the manager has never before worked with those individuals, and the individuals may never have worked with each other either. This mixing of teammates has been correlated with increased collaborative creative output.[51]

The costs of reputation as a collaborative-norm enforcer is that unique work that does not provide information about other projects will be relatively more costly and, thus, discouraged. The more idiosyncratic a particular collaboration, the less likely its success or failure will provide insight into the potential productivity of the team members in other collaborations; conversely, collaborations that produce outputs that are roughly similar to other collaborations will more likely provide useful information about team members' potential productivity. In other words, a team's performance on a superhero movie is reasonably likely to provide information about team members' potential performance in other superhero movies. Repeat play projects will be disproportionally favored

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

because the standards for doling out reputational rewards cannot as easily accommodate one-off projects.

To see a concrete example of reputational penalties being used in the world of collaborative creativity, consider the case of French chefs. Facuhart and von Hippel describe an instance in which a former employee of a famous chef "presented one of the chef's recipes on TV without proper attribution."[52] The famous chef then sent a letter admonishing the former employee for his violation of an attribution norm; critically, he sent this "letter to a number of his colleagues, so that the community as a whole would learn of his former employee's violation."[53] This example illustrates that the community has and enforces a norm relating to protecting creative work from misappropriation (i.e., the attribution norm helps ensure that creators of recipes receive rewards). It also, however, illustrates that a famous chef is in a position to dole out reputational penalties. And, perhaps more intriguingly, it shows the use of informal rules to regulate intra-team behavior—the famous chef is responding to wrongdoing by someone who potentially had a hand in the development of the recipe—rather than simply regulating behavior between those who produced a given creative good and those who did not. If the production of a recipe is a collaborative endeavor in a restaurant kitchen, with the head chef at the top of the hierarchy, then this ability to enforce penalties on team members (even after the collaboration is over) could be an important way in which the chef can manage the creative inputs—the other cooks in the kitchen.

C. Trust

In contrast, trust is information obtained by an individual's own experience in prior dealings with a person.[54] The exact

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[52] Fauchart & von Hippel, MIT Working Paper at *19-20.

[53] Fauchart & von Hippel, MIT Working Paper at *19.

[54] There are of course many ways to define trust. Common definitions focus on a belief that a counter-party will not intentionally cheat. We focus on the source of information, rather than its content, to distinguish between reputation and trust.

causes or origins of trust are hard to pin down. But extensive experimental evidence has established that trust plays a role in human interactions – even those in markets.[55] Some have noted that it should play the largest role where objective market factors are opaque.[56]

Trust and reputation are closely related and overlapping. The difference is in the source of the information. Trust is an implicit expectation between parties developed during their interactions. Reputation is information supplied by or to a third party. The underlying information can cover the same substantive characteristics: both reputation and trust can convey whether a potential counterparty is likely to be honest, or to put forth maximal effort, or to be skilled at writing dialogue for children.

A breach of trust will often result in a reputational penalty. And the same things that cause one to have a bad reputation will cause that person not to be trusted.

Trust in this sense is used as the basis for repeated interactions between parties. Consider this description of Harvey Weinstein's strategy when Miramax agreed to relinquish final cut control over *Swingers*:

> But this is where the Weinsteins were so smart. They started getting the idea of "We're not just buying the movie, we're buying relationships with the filmmakers. We're going to be in business with Jon Favreau. We're going to be in business with Vince Vaughn. We're going to be in business with Doug Liman. And if we ever want to do anything in the future with these guys, we've got this over their heads

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[55] Margaret Blair & Lynn Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. Penn. L. Rev. 1735 (2001) (collecting sources and reviewing the experimental literature); see also Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 Mich. L. Rev. 71 (2003).

[56] Blair & Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. Penn. L. Rev. 1735.

> to say, 'Hey, we started you out.'" It's just really, really smart business.[57]

The Weinsteins' own experience with Favreau, Vaughn, and Liman would inform their future business with them—a good final cut on *Swingers* would make the Weinsteins more likely to allow them similar creative control over future projects. Moreover, if the Weinsteins had a subsequent dispute with Favreau, Vaughn, or Liman, they could rely on the latters' initial experience with the Weinsteins to persuade them to resolve the dispute in a manner favorable to the Weinsteins.

Note also the potential interaction between trust and reputation. The line—"if we ever want to do anything in the future with these guys, we've got this over their heads to say, 'Hey, we started you out'"—could also be read as a threat to apply reputational penalties if Favreau, Vaughn, or Liman did not perform on this or future projects. If there is a norm of loyalty, a reputation for shunning the studio that gave you enormous freedom and got you started might hurt a filmmaker's future prospects. The Weinsteins could talk to other Hollywood producers and tell a plausible story that the filmmakers acted unfairly if, after getting final-cut control on their first film, they later played hardball or shirked on subsequent projects.[58] And, as with Fauchart and von Hippel's example of a chef using reputation as a mechanism to punish bad behavior by a (former) team member, the Weinsteins here appear to be using trust and reputation to regulate the behavior of a team.

For another example, return to *Batman & Robin*, of which only George Clooney and Uma Thurman appear to have emerged from the significant reputational penalties Hollywood imposed on the members of that team. Both Clooney and Thurman seem to have been able to avoid the fate of their teammates largely on the basis of trust. Clooney was working

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[57] Ron Livingston, "So Money: An Oral History of Swingers," available at http://grantland.com/features/an-oral-history-swingers/ (last visited Jan. 28, 2014).

[58] On the other hand, the statement might be assuming that individuals simply feel an internal duty of loyalty.

with Stephen Soderbergh on *Out of Sight* when *Batman & Robin* bombed; Clooney and Soderbergh have since collaborated on several successful projects, most notably the *Ocean's* trilogy (*Ocean's Eleven* is Clooney's most financially successful film to date), that have been critical to Clooney's career trajectory. Thurman, in turn, saw her post-*Batman & Robin* career resurrected when she starred in Quentin Tarantino's *Kill Bill*. Tarantino, of course, directed Thurman in her most successful pre-*Batman & Robin* film: *Pulp Fiction*. It thus appears that both Clooney and Thurman were able to overcome the reputational penalties imposed on the *Batman & Robin* team because of the trust they had built up with other directors (who, in turn, relied on their own information of Clooney's and Thurman's abilities, rather than on the information circulated among Hollywood players).

One collaboration problem is the risk that your teammates will put in suboptimal effort. Trust tells you that you don't need to worry about that risk because your teammate is unlikely to put in suboptimal effort or otherwise be a bad team player. Trust is more effective when you have a limited number of teammates with whom you will engage in repeated collaborations. After an initial investment in developing trust (i.e., getting to know someone), it may be better to spread out the cost of that investment over several collaborations.

Like reputation, trust may not need complete observability, verifiability, certainty, or allocation. If a team of three or more input providers fail, those who performed will distrust all other members. This will prevent that team from existing in that form going forward. Just as reputation can tell the market the team is bad and its members should not be hired, a lack of trust can tell the team members themselves that it is bad and should not be continued. All team members lose out on future membership. If that punishment is strong enough, it will provide an incentive against shirking. Of course the cost is likely to be less than reputation as the scope of its effect will be contained.

The good news about trust is that it can lead to production of newer work because standards for evaluating success can be more flexible. The value of reputation information may be limited to certain types of projects whereas trust might provide the manager a broader confidence across new types of projects.

The bad news about trust is that it limits potential teammates to those you know well.

This all demonstrates an important difference between trust and reputation. Reputation facilitates collaboration in two ways. First, it can serve as a reward or penalty for shirking when one or more of the four factors for collaboration—observability, verifiability, allocation, and certainty—are deficient. This creates incentives for full performance by team members. Second, reputation provides some ex ante assurance to the manager that she need not worry about the four factors. The team member has been identified by managers who observed quality inputs in the past or the team member has consistently been a member of teams that have produced quality outputs. Thus, even where the manager cannot monitor well, she may count on the team member to be consistent with her reputation.[59]

Trust, on the other hand, only provides the first mechanism if the input provider expects to work with that particular team or manager again. The loss of trust punishes the team member by excluding her from that specific team. The loss of reputation has more widespread effects. On the second mechanism (providing ex ante assurance) trust and reputation work in the

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[59] To be clear, this is a nuanced point that cannot be captured by a stripped down rational actor model. See, for example, Blair & Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. Penn. L. Rev. 1735. The idea is that someone will perform a project consistently with past trustworthy behavior even when their behavior on this project cannot be observed or punished. If we simply ascribe pecuniary motives to the individual, this behavior would seem irrational. But that is just because we are defining welfare and profit too narrowly. The real basis for the reputation is that this is a person who performs out of some internal duty to perform. In other words, you want to hire someone who gets intrinsic welfare from not shirking. Reputation (or trust) helps you identify those people. Everyday life is full of examples of trust and reputation performing this function. It is, however, also full of examples of misplaced trust when it turns out people do not act consistently with their reputation. Nothing in our analysis requires that reputation or trust be perfectly accurate, only that it provides better information about likely performance than a random draw.

same way.[60] One might, however, think that a manager will feel more secure when she trusts the team member directly than when she is basing her confidence on the reports from others.

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

D. Revisiting the Case of Stand-Up Comedy

To illustrate the implications of our analysis, we revisit here Dotan Oliar and Christopher Sprigman's fascinating study of the relationship between norms and intellectual property in stand-up comedy. Jokes are plausibly covered by copyright—so long as the joke is fixed in a tangible medium (e.g., written down, recorded on tape, filmed), copyright inheres in the expression.[61] Still, copyright law is unlikely to effectively protect comedians. First, the idea-expression doctrine limits copyright protection to particular expressions, not underlying ideas.[62] Copyright in jokes is therefore likely to be thin because many different words can be used to express the same joke, and copyright only protects the particular words (and substantially similar variations thereof), not the underlying joke.[63] Second, the costs of pursuing a copyright claim are likely to outweigh the value of a joke, rendering legal protection

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[60] The analysis in note 59 applies equally to trust.

[61] Oliar & Sprigman, *No Free Laugh*, 94 Va. L. Rev. at 1798.

[62] *Id.* at 1802-03.

[63] Jokes that rely heavily on wordplay may fall on the right side of the idea-expression boundary, but may nonetheless run afoul of the merger doctrine, which prohibits copyright protection when there are limited ways to express a particular idea.

irrelevant for most instances of potential copyright infringement.[64]

As Oliar and Sprigman describe, though, the inefficacy of copyright law for stand-up comedy has not prevented the production of the kinds of things we think we need copyright to get: new expressive works.[65] Instead, norms against appropriation have done for stand-up comedy much of what copyright law does for other creative industries. Stand-up comics invest in the production of expressive works because industry norms assure them that rival comics will not be able to freely appropriate their creations.

This reliance on industry norms interacted in a complex way with the nature of live comedy.[66] Emerging norms against appropriation may have induced the development of modern stand-up comedy—with its emphasis on personal, narrative, point-of-view driven humor—because those norms limited rivals' ability to free-ride on the substantial investments involved in producing such comedy.[67] Modern stand-up, in turn, helped the emerging norms develop—because modern jokes are closely associated with the personality of a particular comic, it is easier to detect copying than it would be if jokes were generic, thus making implementation of the norms-based regulatory system cheaper than it would be if detecting copying were difficult.[68] As each of these factors jointly influenced the development of the other, they were also influenced by other trends, including technological developments like the growth of broadcast media (which increased demand for novel jokes) and cultural trends (which increased demand for unusual or subversive comedy).[69] All of these factors jointly produced a shift from the post-vaudeville

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[64] Oliar & Sprigman, *No Free Laugh*, 94 Va. L. Rev. at 1799-1801.

[65] *Id.* at 1831-34.

[66] *Id.* at 1859-63.

[67] *Id.* at 1854.

[68] The existence of two very similar generic jokes is more plausibly the result of independent creation than the existence of two very similar jokes that are closely associated with the persona of a single comic. *Id.* at 1860-62.

[69] *Id.* at 1855.

era of generic comedy—exemplified by comics like Milton Berle and Phyllis Diller—to the modern era of personal, point-of-view comedy—exemplified by comics like Jerry Seinfeld, Dave Chappelle, Louis C.K., and Sarah Silverman.[70]

This story, then, emphasizes that norms may substitute for formal law designed to limit free-riding by strangers and thereby encourage the creation of new expressive works by individuals. Oliar and Sprigman further note the existence of some norms regulating ownership and transfer of informal rights to jokes.[71] They further recognize that these informal rules may implicate the way in which jokes are produced: the narrative, persona-driven nature of modern stand-up rendered the post-vaudeville model of joke tellers and joke writers difficult to sustain because it would have required relationship-specific investments on the part of the writers.[72]

It is here that we pick up. The fact that writers would now be forced to make relationship-specific investments, and that team output would be inseparable, merely poses the team production question. To answer it, we retell the story of the development of comedy in the twentieth century as a story that reveals the diversity of organizational responses to changing conditions in the production of creative goods, including especially the rules that dictate who controls the value associated with new works, and how that value might be distributed by those who contribute to the creation of those works.[73]

1. Organization without team production problems

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[70] *Id.* at 1855.

[71] *Id.* at 1825-28.

[72] *Id.* at 1854-55.

[73] As Oliar and Sprigman caution, the causal relationships are likely interdependent—law, norms, and shifts in supply and demand curves all interact to produce changes in each other. For now, we simply aim to describe how production is organized in different circumstances, without staking a position as to whether the organizational innovations drive shifts in circumstances or, instead, changing circumstances induce changes in organizational form.

First, it is possible that the production of particular kinds of creative goods does not present team production problems. If output value can be allocated to individual inputs, then parties can contract for individual production by tying compensation to revealed value ex post.[74] Similarly, if the value of the output is relatively predictable, parties can contract ex ante for individual production by conditioning compensation on an output meeting some threshold (or simply paying a salary and firing employees who do not produce the expected value). In these instances, several creative inputs can work independently of each other; the output of each can then be combined by someone who specializes in the selection and arrangement of the combined work. If the transaction costs of repeated haggling over each output can be avoided with a formal employment relationship, production may be organized in a Coasean firm in which the creative inputs are paid a salary in return for ownership of all of their output. Where formal copyright law effectively governs the output, this organizational form will be facilitated by copyright's collective work ownership rules: each creative input owns a copyright in her work, and the person who selects and arranges the combination owns a separate copyright in the combination.[75]

These conditions—ease of allocation, relative certainty, and distinct ownership rules for individual contributions as compared to the combined contributions—were present in the post-vaudeville era. At that time, most jokes were generic and short. Stand-up routines consisted of dozens of jokes told in rapid succession.[76] In this environment, the value of an individual joke was likely not difficult to ascertain—it was some small number that didn't vary much by joke. Valuation was plausibly facilitated by commodification of the creative output. Any joke could be told by any comedian, so joke writers could shop around for the price they wanted. Once told, informal rules largely permitted widespread use of a joke, even by those who did not participate in its creation.[77] But

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[74] Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. at 1716.

[75] *Id.* at 1716.

[76] Oliar & Sprigman, *No Free Laugh*, 94 Va. L. Rev. at 1847.

[77] *Id.* at 1849-50.

because most of the value of a stand-up routine was in the presentation,[78] the person who selected and arranged the combination of jokes (i.e., the comedian) retained most of the value of the combined work, whether in the presentation itself or in a compiled archive of jokes.

The organizational form here appears to have been as described above: celebrated stand-up comics hired groups of writers who produced jokes.[79] The comics themselves specialized in the selection and arrangement (and presentation) of large archives of jokes.[80] Each joke archive was itself treated as valuable property, kept secret by the comic who compiled it, and occasionally sold upon retirement.[81] Oliar and Sprigman express surprise that Milton Berle, who had an unabashed habit of stealing individual jokes, registered a copyright for his joke archive.[82] But we find it unremarkable that in these circumstances—easy allocation and relative certainty—individual elements of a compilation would be treated differently from the compilation as a whole.[83]

The late-night TV talk show monologue might be viewed as a remnant of the post-vaudeville era, featuring relatively short, generic jokes. And its organizational structure is similar to that of the post-vaudeville era. Here, again, the comedian (or a head

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[78] *Id.* at 1853.

[79] *Id.* at 1848.

[80] *Id.* at 1848 ("Participants in this seminal [post-vaudeville] era of stand-up functioned largely as joke compilers.").

[81] *Id.* at 1848 & nn.125, 126.

[82] *Id.* at 1848 n.126 (noting Milton Berle's "chutzpah" in copyrighting two published volumes of jokes while at the same time "justifying his joke stealing habit by arguing that jokes are public property").

[83] We do not mean to suggest that Berle's treatment of individual jokes was necessarily appropriate given existing industry norms; only that differential treatment of individual jokes and compilations is unsurprising. Joke writers may have been paid in a non-IP manner, receiving a salary in exchange for some expected number of jokes. Joke compilations, which incorporated the value of the selection and arrangement of plausibly public domain jokes, may have been protected by ordinary formal intellectual property law, or informal rules that roughly aligned with that law.

writer employed by the comedian) compiles jokes written by a group of writers, some of whom work full-time in what looks like a Coasean firm, and others who work as independent contractors. Contracting is relatively straightforward because the value of an individual joke is standardized. Full-time writers are paid salaries for a regular stream of jokes. Independent writers are paid per joke that makes it on the air.[84]

2. Organizing in the face of team production problems

Second, it is possible that the creative output presents the four factors we identified as posing team-production problems. This will be the case when multiple inputs produce "inseparable and interdependent parts of a unitary whole."[85] In order to effectively organize such production, a manager must either (1) be able to observe inputs or (2) be able to reward or penalize inputs based on ex post revealed value. In either instance, the manager must not herself be an input provider. She must have the right to the residual claim—all the value left after compensating the inputs. And rewards or penalties must not be constrained by the value of the team's output. Formal law and informal rules will heavily influence the ease of so organizing.

In modern stand-up comedy, the production of jokes poses team-production problems because the narrative, point-of-view style makes it hard to allocate value to the contributions of particular inputs. If a particular joke is funny, it is hard to know the relative contributions of that joke as compared to all the other jokes that comic has told in creating her persona—a Sarah Silverman joke is funny in some part because the joke itself is

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[84] Oliar & Sprigman, *No Free Laugh*, 94 Va. L. Rev. at 1827 n.85; see also "Former Autoworker Gets Gig Writing Jay Leno Monologue Jokes," available at http://detroit.cbslocal.com/2013/11/01/former-autoworker-gets-gig-writing-jay-leno-monologue-jokes/ (describing a Leno writer's contract as requiring the submission of "three jokes a day," paying "an undisclosed amount per joke that makes it on air").

[85] Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. at 1717 (explaining why joint works pose team production problems); 17 U.S.C. § 101 (defining joint works).

funny and in some part because it is Sarah Silverman telling it. This makes it hard to know how much of the value of a joke is attributable to any given joke relative to the sum total of jokes she has told (and relative to her performance in telling it).

In this particular context, formal law and informal rules render organization of creative production difficult. Consider first the manager's ability to retain the right to the residual claim. Legal protection for jokes is ineffective, so the manager cannot rely on formal law to organize production.[86] Still, extant norms against appropriation could grant the manager control over the residual claim by preventing those who did not contribute to the production of a joke from capturing the value it creates.

Assuming the informal rules of stand-up comedy permit a manager to control the residual claim, the manager could attempt to perform one of two roles: monitoring team members, or rewarding and punishing team members based on the team's observed output. But the nature of the work—writing—is especially resistant to observation. This means that a hierarchy organized by a monitoring manager would be difficult to sustain.

That leaves the reward-and-punish organizational structure. However, informal rules make such an organization difficult. Recall that the reward or punishment must come from a pot not limited by the value of the team's work. Reputation is one such source of non-budget-constrained rewards. Indeed, other sources might be hard to identify in this context. However, the nature of the comic business and the informal rules of the community complicate the use of reputation as a reward for the contribution of multiple inputs to a single creative work. This may be true for several reasons.

First, it may connect with the Western view of the singe author. Today's comic is a single personality, the individual celebrity. Like the singer-songwriter, the entertainment value is in part derived from the fact that it is one individual who is entertaining the audience, and that the content of the entertainment gives special insight into that individual's personality. This notion of a single creator may be strong

[86] Oliar & Sprigman, *No Free Laugh*, 94 Va. L. Rev. at 1795-1805.

enough in our culture to push out norms that cut the other way. This is in contrast to the post-vaudeville era, where the comic was skilled at the craft of delivery – akin to the pop star. Contract law and reputation were effective mechanisms for allocating value. But for today's comic, awarding reputation credit for collaboration would destroy the mystique of the comic as a single author.

Individual originality is part of the myth of the comic and is highly valued in the field.[87] Stand-up comedy norms hold that individuals who contribute to a joke cannot be credited for their work.[88] The stand-up comics who could plausibly dole out reputational rewards to productive team members (and enforce reputational penalties against unproductive ones) will therefore refuse to do so, denying even the fact of a contribution, let alone its value.[89]

Things may, however, be more functional than simply the audience's taste for a single personality. One could imagine a team of writers behind the scenes writing jokes for a stand up comic, with acknowledgement of the team's contributions—and associated reputational rewards and penalties—revealed only to industry insiders and hidden from consumers and industry outsiders. If inside-industry reputation could reward them without taking away from the audience experience, why not have a team? The norm of originality may have developed as a mechanism to police appropriation of material. The audience is relied upon—and does—discredit comics who tell other people's jokes. No copyright can be asserted, but reputation can punish the copier. Key to this is that the jokes are distinguishable—the audience knows when it is hearing a Louis C.K. joke rather than a Seinfeld joke. That being the case, things would be very complicated if a writer worked for a Louis C.K. team some days and a Seinfeld team on other days. The metric for identifying copying would become fuzzy. The result is that any team would have to be fully integrated and committed to one comic. The problem with a dedicated team is the high level of relationship-specific investment relative to the

[87] *Id.* at 1823.

[88] *Id.* at 1790.

[89] *Id.* at 1828.

payout. If a writer is writing jokes for a particular personality, the skills obtained may not be cheaply transferable to another job. And few comics will have the scope of operation to fully and exclusively employ a team of writers. All of these factors combine to make collaborative production exceedingly difficult, such that the costs of joint work usually outweigh the potential benefits.

Note here the trade-off between formal law and informal rules in facilitating creative production. We could imagine an informal rule that recognizes the contributions of team members and in that way makes creative collaboration possible (indeed, as we explain below, such a system exists in the television context). But the informal rules limiting appropriation in stand-up comedy depend in part on an ethic or myth of individual originality. Originality, and the accompanying norms against joint authorship and against recognizing the work of collaborators, facilitate enforcement of the anti-appropriation norm because it allows audience members to rely on a simple signal to detect copying—is the comic telling a joke that another comic has told before? In the absence of such informal rules, the fact that two comedians tell substantially similar jokes may be an indication of improper appropriation or it may be an indication that the two comedians jointly produced and jointly own the joke or that the joke was produced by a writer who works for both of them.[90] While these norms thus have benefits with respect to enforcement of anti-appropriation rules, they also make it difficult to organize production in teams. If a non-reputational mechanism could be successfully adopted, there might arise the potential for more collaboration.

Despite these problems with reputation-based informal rules, trust may function as a substitute for hierarchy in organizing creative collaboration. If one individual knows from experience that her counter-party is unlikely to shirk—or that her counter-party is likely to later repay her contributions in kind—then collaboration is possible. Modern stand-up appears to rely on this mechanism to organize small collaborations: comics collaborate with friends during tours to try out

[90] Oliar & Sprigman, *No Free Laugh*, 94 Va. L. Rev. at 1864-65.

premises and punchlines.[91] When a friend makes a valuable contribution, the comic who generated the premise keeps all the value, and the contributor gets nothing. This may work if the comics trust that they will each make such uncompensated contributions to the others' jokes, such that in a long-term relationship, the respective contributions even out. Once again we see membership in a team (or exclusion from it) as the reward (or penalty) that can facilitate collaboration. But as this phenomenon is based on trust, it functions only in very small communities.

The shift from the generic jokes of the post-vaudeville era to the narrative, persona-driven comedy of the modern era thus changed the organization of the production of stand-up comedy. Whereas in the early era, production was organized with famous comics overseeing groups of joke writers paid for the quantity of their contributions, the modern era is characterized by individual or small collaborative production. Oliar and Sprigman contend that the narrative, persona-driven nature of modern stand-up is largely responsible for rendering collaboration infeasible, notwithstanding the potential efficiency gains from "more division of labor between writing and performance of comedic material."[92] A closer look, though, reveals that formal law and informal rules in related fields continue to make relatively large collaborative production of persona-driven comedy possible.

In television, formal law facilitates large collaborative productions. Copyright law's derivative works right grants the owner of a copyright in an original work the exclusive right to produce works "based upon" that original work. This right allows the manager of a creative team to reward (or punish) team members by permitting them to participate (or prohibiting them from participating) in works based upon the team's original contributions. Because the value of participation in the derivative work is not limited by the value of the original work, this allows the manager to escape the budget constraint.

In the television context, each season (or perhaps even each episode) might be a derivative work with respect to preceding

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[91] Oliar & Sprigman, *No Free Laugh*, 94 Va. L. Rev. at 1825-26.

[92] *Id.* at 1855.

seasons (or perhaps even preceding episodes).[93] Characters on shows may become sufficiently well-defined such that copyright law will prevent others from too close imitations of their personas. This allows the holder of the copyright in the show to determine participation in subsequent episodes—that participation veto is a budget-breaking reward or punishment that the manager can use to induce collaboration on the original episodes. Teams of writers can therefore jointly work to develop the personas and stories in a show. The derivative works right would prevent individuals who have worked on a show to use material developed for that show on another one (at least unless it has been sufficiently reworked from its original form such that it would no longer appear to be "based upon" the original).

As a result, even though the informal rules governing stand-up comedy make it hard for its stars to have large teams of writers generating material for their routines, those same stars regularly work with large teams of writers to generate material for their narrative, persona-driven televised comedy. *Seinfeld*, *Louis C.K.*, *Everybody Loves Raymond*, and *Cosby* all illustrate the possibility that the same persona that can only be produced by an individual (or a very small group of trusted friends) in the stand-up context can be produced by a relatively large team in the television context. The difference is partly due to the work being done by formal copyright law—through the derivative works right, as well as other doctrines—in facilitating hierarchical organization of television production.

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[93] This depends on the extent to which there are copyrightable elements of the show. Shows that consist largely of elements that are common to the genre might receive little protection as a result of the scenes a faire doctrine; shows that consist largely of facts might receive little protection as a result of copyright law's exclusion of facts from the scope of protection. The few copyrightable elements that remain would be protected by copyright law, including the derivative works right, but that protection might be so thin as to provide little effective protection against someone producing another, similar show. In other words, a nightly local news show might not have much of a derivative works right over subsequent seasons to facilitate production of the initial season.

Moreover, television also has informal rules that work in concert with formal law to facilitate hierarchical production. Contra the norms against recognizing writers' contributions in stand-up, writers in television receive credits through a system regulated by the Writers Guild of America ("WGA"). Separate credits may be awarded for screenplays, stories, and characters.[94] This system facilitates the use of reputation as a reward or penalty for contributions to personas developed on television shows. Only those who make substantial contributions to the concept, story, or script can receive credit under WGA rules—the presence of a writer on the credits for an episode thus sends a signal to outsiders about that writer's responsibility for the output.[95] Writers who are part of a team that produces exceptional television will be recognized for those contributions and rewarded with work on other shows; those who are part of a team that produces terrible television will likely suffer concomitant reputational penalties.

Note here the contrast between the uses of reputation in television compared to its use in stand-up comedy. Stand-up comedy has a strong originality ethic in order to enforce its anti-appropriation norms. But television does not have nearly as strong an originality ethic. Although that difference is attributable to many factors, at least one of them may be that television has an effective anti-appropriation rule through the formal law of copyright, which requires a bare modicum of originality in order to obtain protection for a creative work.

Finally, even if formal law does not provide mechanisms to facilitate collaborative creation in a particular industry, informal rules may do so instead. Modern live sketch comedy plausibly stands as an example of such a case. Formal copyright law will offer inadequate protection because the form depends heavily on improvisation—the fixation requirement will be hard to meet.[96] And the value of any given scene is probably too low to make a lawsuit over unauthorized copying of that scene worthwhile.

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[94] Writers Guild of America, *Television Credits Manual*.

[95] *Id.*

[96] 17 U.S.C. 102(a).

Informal rules, though, may be adequate substitutes. Reputation is important currency in this context, with successful members of live sketch comedy groups frequently parlaying the reputation built there into television careers: Amy Poehler, Tina Fey, Bill Murray, and Stephen Colbert are examples. And the field is dominated by just three institutions: Second City, The Upright Citizens Brigade, and The Groundlings. This suggests that norms of collaboration at those institutions facilitate team production in a way that is difficult to replicate at other institutions.

III. The Interaction of Norms and Law: The Single Author

Up to this point we have focused on identifying the informal rules that can facilitate collaborative creation. In this section we discuss the interaction between formal law, informal rules, and collaboration. Intellectual property rights vary dramatically across different creative industries. Film and literature have many and strong formal protections, while fashion and food have few and weak protections. Music and comedy fall somewhere in the middle.

But that is just within some legal systems. Property-rights laws and norms vary across legal jurisdictions and cultures. Similarly, the extent of collaboration in different types of creative work varies across cultures. For example, the strong property rights in literature are not universal in all systems. It may be that they stem from a uniquely western view of romantic authorship that developed in 17th and 18th century Europe.[97] These differences and the resulting effects may provide some insight into the importance of the interactions between laws, norms, and creative collaboration.

A. Crowding out

One crucial issue in the interaction between formal law and informal rules is the potential crowding out effect. Where

[97] Martha Woodmansee & Peter Jaszi, eds., The Construction of Authorship: Textual Appropriation in Law and Literature (1994).

intellectual property rights are strong, norms tend to be weak. In the literary incubating industry, norms about idea ownership are strong while norms about authorship in the final product are not. Indeed, the lack of norms of authorship has led to some of the more difficult and vexing problems in copyright law when joint authorship cases have been litigated.[98] Similarly, in other industries and cultures where property rights in a creative project are weak, norms play a large role.[99] While causal links are very hard to test, the contrast between the creative norms across cultures with different property rights suggests a significant possibility that norms of collaboration are crowded out – or at least prevented from developing – where IP rights are strong. It may, however, be that cultures and not IP rights drive the difference. Thus, the same cultural ideas of Western authorship may be driving the strong IP rights and the weak norms. But regardless of the source, our analysis suggests that strong IP rights that are not designed to complement collaborative norms may prevent those norms from developing in the first place. Thus, we should expect to see collaboration develop more robustly in industries like fashion and food and not in writing.

To be sure, IP rights can foster collaboration. If strong identifiable rights could allocate ownership of creative inputs and their direct proceeds, collaborative creativity could be achieved by contract. But that is rarely possible. As an alternative, the law often grants strong rights in the final product to one party. That is the way copyright works. It looks to identify the single author and grant the rights to that person. The problem is that the single author is in some sense a modern fiction. This legal fiction gets it wrong—the focus should be on

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[98] Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev at 1716-26.

[99] Daniela Simone, *Dreaming Authorship: Copyright Law and the Protection of Indigenous Cultural Expressions* (draft) (describing norms in the production of Australian indigenous art); Oliar & Sprigman, *No Free Laugh*, 94 Va. L. Rev. 1787 (describing norms regulating the production of stand-up comedy, for which IP law offers ineffective protection).

managers and owners, not on the fiction of an author.[100] Moreover, legal entrenchment of that mistaken fiction may prohibit the evolution of new norms to facilitate collaboration. It may fill the space a norm would fill. In that case, the IP right may be hindering creative collaboration.

Studies on the history of authorship support this view. Western law has developed around the assumption of the single author.[101] The notion of romantic authorship did not exist before the Renaissance. The concept seems to have developed as a confluence of factors—including at least printers' lobbying, philosophical developments, and the self-image and strong personalities of particular authors.[102] As these notions developed they came to be embodied in the Statute of Anne of 1710, the first English copyright law.[103] Ultimately, it appears that the norms and law converged over time. The problem is that the law here has staying power. Thus, while the idea of the Romantic author has proved problematic in many inquiries, it

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[100] Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev at 1716-26.

[101] See Simone, *Dreaming Authorship* (identifying "the influence of historically-located and culturally specific understandings of authorship in the application of copyright law."); Lucy M. Moran, *Intellectual Property Law Protection for Traditional and Sacred "Folklife Expressions" - Will Remedies Become Available to Cultural Authors and Communities?*, 6 U. Balt. Intell. Prop. L.J. 99, 103 (1998); Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 Am. U. J. Gender Soc. Pol'y & L. 207, 227 (2007); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 Eighteenth-Century Stud. 425, 434 (1984); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of 'Authorship,'* 1991 Duke L.J. 455 (1991).

[102] Woodmansee & Jaszi, Construction of Authorship. Woodmansee and Jaszi note the role that Daniel Dafoe and later William Wordsworth played in the rise of the author. Interestingly, and not unlike some of our more contemporary examples, Wordsworth was a strong advocate of the idea of the creative process "as a solitary, originary one"—this despite his own collaboration with Coleridge and his "extensive reliance on the writing of his sister Dorothy." *Id.* at 3. Dafoe, in 1704, may have been the first to suggest the right of an author to prosecute book piracy. *Id.* at 7.

[103] *Id.* at 4.

is entrenched in law.[104] The result is that there is little room for a norm of collaborative authorship. Indeed, the idea is foreign to us.[105] This may explain the negative response that the new burgeoning industry of firms as authors has received from some critics.

Other cultures have norms and laws that are built around communal authorship. The current state of Western law makes it difficult for new norms of authorship to develop. Even as movies, books, comic book characters, and the like are created by collaborative teams, the law tries to identify something it calls "the author." As we pointed out in our previous work, this has led to a conception of works made for hire and joint authorship that has little connection to facilitating collaboration.[106]

Given the lack of attention in the law and scholarship to the role of law in creative collaboration, we should be especially concerned that IP laws that have been developed without awareness of their effect on collaboration may have displaced collaborative norms. Moreover, there may be existing IP laws that did not impact collaboration when adopted but are now filling a space where new collaborative norms would otherwise spring up.

Aboriginal copyright litigation in Australia provides a salient example of the two norms clashing and of the way that intellectual property law can prevent norms from shifting.[107] A leading case in that area is *Bulun Bulun v. R & T Textiles.* R & T sold a fabric with prints of a painting by Bulun Bulun. Bulun Bulun plainly had rights under copyright law. The painting, however, was created with the permission of Bulun Bulun's indigenous community, the Ganalbingu People, and was

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[104] As Jaszi has noted, "the law often proves ungenerous to non-individualistic cultural productions, like folkloric works, which cannot be reimagined as products of solitary, original 'authorship.'" *Id.* at 38.

[105] *Id.* (noting the laws' inability to comprehend works that do not fit the Romantic idea of authorship).

[106] Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev at 1716-26.

[107] *Bulun Bulun v. R & T Textiles* (1998) 86 FCR 244, 246; see also Simone, *Dreaming Authorship*.

derivative of a corpus of ritual knowledge of the people. The question in the case was whether the Ganalbingu People had ownership rights in the artwork. By custom, the work belonged to the Ganalbingu people as a product and manifestation of their cultural history. Such works cannot be created without permission of the indigenous community.[108] The custom and norms were clear that the work was a product of knowledge that was collected and developed in the hands of the community. This is the type of serial collaboration that copyright laws built on Western notions of authorship cannot easily comprehend.

The court noted that copyright law did not provide for communal ownership in the absence of a claim of joint authorship. But joint authorship did not cover this serial collaboration. Thus, we find a Western legal system based on the underlying concept of the single author overlaid on the aboriginal cultural to which the concept was foreign. The court intuitively recognized that authorship there was different from the Western concept. But it also saw that the law had no mechanism for dealing with that. In fact, the law on its face prohibited the norms from playing their role at all. As one scholar has pointed out in this context, "copyright law remains committed to a one-size-fits-all model of creativity that does not represent the variety of types of creativity that flourish in the modern world."[109]

The Australian court was, thus, faced with the choice of ignoring the customs that allowed for the creativity in question to exist in the first place or ignoring the law.[110] The court navigated a middle ground. It noted "the inadequacies of statutory remedies under the *Copyright Act* as a means of protecting communal ownership"[111] and decided the case on other equitable grounds. It held that Bulun Bulun had a fiduciary duty to the Ganalbingu people, but that the people

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[108] *Bulun Bulun v. R & T Textiles* (1998) 86 FCR 244, 246; see also Simone, *Dreaming Authorship*.

[109] Simone, *Dreaming Authorship*.

[110] *Bulun Bulun v R & T Textiles* (1998) 86 FCR 244, 246; see also Simone, *Dreaming Authorship*.

[111] *Bulun Bulun v R & T Textiles* (1998) 86 FCR 244, 246.

did not own the copyright directly. Thus, they had the power to compel Bulun Bulun to exercise his copyright against the textile manufacturer. The result was that the community does not have a copyright but can still bring suit to enforce the right in some cases.

We should not think this phenomenon will be isolated. Similar problems have been identified in other cultures.[112] And we suspect similar questions will arise as innovations in collaboration evolve faster than the law of copyright.

Thus, Western cultures with no laws or norms to deal with communal creation have little to no experience to draw from in dealing with vast new areas of collaborative creation like Wikipedia.[113] The cultural norms developed in non-Western cultures for communal authorship would perhaps be more effective here in developing new techniques to deal with the new communal authorship that has arisen through vast information networks.

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[112] David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?*, 25 Am. Indian L. Rev. 93, 100 (2001). See also Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 Cardozo Arts & Ent. L.J. 175 (2000); Daniel J. Gervais, *Spiritual but Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge*, 11 Cardozo J. Int'l & Comp. L. 467 (2003); Rachael Grad, *Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia*, 13 Duke J. Comp. & Int'l L. 203, 225-26 (2003); Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 Am. U. L. Rev. 769 (1999); Cortelyou C. Kenney, *Reframing Indigenous Cultural Artifacts Disputes: An Intellectual Property-Based Approach*, 28 Cardozo Arts & Ent. L.J. 501, 526-27 (2011) ("Other countries including Panama, Nigeria, Tunisia, and the Philippines have passed 'copyright-like' laws allowing, inter alia, collective ownership of sacred indigenous objects, fee distribution to communities whose folklore serves as a source for creative works, and the criminalization of "intentional distortion" and misuses of folklore.").

[113] Shun-Ling Chen, *Collaborative Authorship: From Folklore to the Wikiborg*, 2011 U. Ill. J.L. Tech. & Pol'y 131 (Spring 2011).

The response to all of this may be that if we want to encourage creative collaboration we should weaken intellectual property laws to make room for norm development. The lack of protection may be better than protection that disproportionately favors one type of creativity.

For example, if we protected rights in recipes the way we protect literature—according rights in the "fixed" output to someone labeled an "author"—we might see less collaboration.[114] In developing a recipe, a chef might not want to let anyone else know his thoughts until he was ready to transform it into expression (let's assume the law only protects it once he has cooked the final dish once). Collaboration would provide access to ideas to outsiders before the ideas were protected, just as co-authoring a novel would. The chef might then become a sole creator in all instances and shun all collaboration. In a world with weaker protection, the chef is more likely to collaborate but then develop norms to punish those who shirk or steal ideas.

The counterfactual may be that without strong copyright law we would have created high-quality literary collaborations—the way other cultures have communal art, folklore and the like. But things are probably not that simple. There is an interesting tension here. Strong property rights in individual inputs (if possible) would likely foster collaboration. Those are quite difficult to design. So the law instead provides strong property rights in the end product. That solution, however, cuts against the norms of collaborative creation. Whatever informal rules may govern the creative process, if the law looks simply to the Western notion of authorship to determine rights (and it does),[115] collaboration will be stifled.

These observations are of course tentative. The primary takeaway again is the inquiries here should not just be how the industries evolve to encourage innovation but also to encourage collaboration; innovation is almost inevitably

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[114] See Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes be* Per Se *Copyrightable?*, 24 Cardozo Arts & Ent. L.J. 1121 (2007).

[115] See cases cited and discussed in Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. at 1716-26.

collaborative, so efforts to promote innovation without corresponding efforts to facilitate collaboration are likely doomed. And in the end, even intellectual property laws that facilitate collaboration may be suboptimal to norms. Intellectual property rights limit effective use of creative products to encourage creation. Moreover, by protecting some rights more strongly than others, IP rights will distort the content of creativity. If we can avoiding using such a mechanism and still obtain the creative work, then we might have a lower-cost solution. Suppose, for example, the derivative-works right is the legal mechanism for allowing managers to break the budget constraint to encourage collaboration.[116] The downside is that we are limiting access to derivative works. And we are encouraging works that lend themselves to creating derivative works. So if managers can effectively reward and punish with reputational norms instead of using participation in derivative works as the reward/punishment mechanism, then we may want to construe the derivative works right narrowly so that the loss from restricting use of derivative works is lower. Norms can also have ancillary effects.

The main point is that unanswered empirical questions about collaboration must be resolved before any conclusion on the appropriate set of intellectual property rules (formal or informal) can be found. Recognizing the role of the manager in facilitating collaboration through monitoring or enforcement of reward and penalty leads us to the important starting point that formal law and informal rules that are aimed at increasing the production of collaborative creative work should be aimed at providing the tools necessary for that manager to fulfill her task, or at rendering the manager obsolete by using other mechanisms (like reputation) to do what a manager otherwise would.

B. Informal law as a barrier to entry

[116] Casey & Sawicki, *Copyright in Teams*, 80 U. Chi. L. Rev. at 1726-34.

In making trade-offs between formal law and informal rules, we must also consider the possibility that informal rules may be a barrier to entry in a way that strong intellectual property rights are not. Where intellectual property rights are strong, new entrants can just as readily protect their investments in the production of creative goods as incumbents. In the absence of strong IP laws (and contrary to the classic IP story of information as a public good), other mechanisms may enable producers to appropriate the value of their creative goods. The efficacy of such mechanisms may vary as a function of a firm's market position. For example, an incumbent's ability to rely on first-mover advantages may be superior to that of a new entrant's because the incumbent has existing relationships with suppliers or customers for its current products that it can quickly leverage for new products while the new entrant must build such relationships from scratch, all while its rivals are catching up. But with strong IP laws, the market position of the owner of the IP rights is minimized as a factor in the efficacy of those rights—all patents carry the same kinds of legal rights, and last for the same amount of time, regardless of who owns them.[117]

Informal rules, however, may systematically treat new entrants worse than incumbents. Indeed, the fact that informal rules are maintained by incumbents gives us a prima facie reason to suspect that will be designed to protect incumbents' positions against entry. For example, recall that reputation might be used to inform team formation. People working in the field will use information gleaned from a prospective team member's past performances with other teams to guide their decision whether to add the prospective member to the team for a new project. But a new entrant's reputation will be thin—she will have had no (or few) past performances that others could rely on in deciding whether to add her to their teams. At least until a new entrant is able to build a reputation, she will

[117] Of course, a firm's ability to leverage those rights will likely be a function of market position—IP rights do not perfectly protect products, and an incumbent that has, say, stronger distribution networks than a new entrant will be able to more effectively sell products protected by patents.

find it more difficult to find attractive projects to work on than established players.

Moreover, reputational sanctions as a penalty for poor performance may be less effective for well-established individuals than for new entrants. To the extent well-established individuals can rely on trust in order to obtain opportunities in spite of reputational penalties, then their reputations will be relatively less important than for new entrants who have fewer trusted relationships on which to rely.

Still, it is hard to know which way trust cuts. On the one hand, if people need personal interaction to inform their decisions, they will likely have more of it with incumbents than with new entrants. On the other hand, if there is very little mixing of team members across projects (as may be the case for popular music), then a new entrant must simply form her own team with people she trusts; it's not clear that the new team would be at a disadvantage to existing ones.

IV. Conclusion

The classic justificatory story for intellectual property law is appealingly simple: artists and innovators will not create unless the law gives them an easy way to capture the value of their creations. But the real world has proven immeasurably more interesting than this simple story would have it. As we have explained here, formal law and informal rules interact in complex ways to facilitate or impede collaborative creation across a range of creative endeavors and throughout the world's cultures. We have only begun to scratch the surface; we expect that further analyses will shed light on some of the more intractable questions touched upon here, including what causal mechanisms are responsible for the development of systems of informal rules, and how can formal law best coexist with the informal rules suited to any given endeavor.