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Pre-existing Confusion in Copyright's Work-for-Hire Doctrine^{*}

by David Nimmer,[‡] Peter S. Menell,[‡] and Diane McGimsey[♫]

Abstract

In order to protect authors and artists from unremunerative transfers of copyright, Congress for the first time created, in the Copyright Act of 1976, an inalienable right to terminate transfers of copyrights during a five-year window beginning 35 years from the date of the transfer. Such inalienability, however, posed substantial uncertainty to the exploitation of many works of authorship. In particular, works combining multiple copyrighted elements — such as collective works and motion pictures — could become unavailable due to the difficulty of relicensing all of the constituent components. For that reason, Congress provided a mechanism for precluding termination of at least some transfers. In the case of a “work made for hire,” the hiring party acquires ownership of the copyright upon a work’s creation, thereby dispensing with any transfer from the author and hence obviating any termination of such transfer 35 years later. To avoid the exception swallowing the rule, Congress circumscribed the situations under which a work qualifies for treatment as a “work made for hire.” It must either be prepared by a true employee or specially ordered or commissioned and fall within one of nine categories, such as “contribution to a collective work” and “part of a motion picture or other audiovisual work.”

This article examines a potentially significant and heretofore unrecognized conundrum of the 1976 Copyright Act relating to the “contribution to a collective work” category. Congress defined “collective works” as comprised

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of “preexisting materials.” Yet the work made for hire provision contemplates “contributions to collective works” being specially ordered or commissioned. How is it possible for a publisher or record label to specially order or commission contributions that already exist? The authors’ journey into the complex evolution of the 1976 Copyright Act reveals that Congress did not intend that “contributions to collective works” preexist their commissioning, even though the inartful drafting of some of the Section 101 definitions suggest otherwise. For purposes of applying the work for hire doctrine, courts should either ignore the use of the term “preexisting” in the definition of “collective work,” or interpret the term “contribution to collective work” to include “contribution to yet-to-be-assembled collective work” in the definition of “work made for hire.” The article also elucidates the legislative history underlying the right to terminate transfers, a right which will have justiciable implications beginning in 2003.

I. Copyright 101

Section 101 defines at the outset of the Copyright Act the various terms on which subsequent sections build. Some subtleties of those definitions do not internally cohere. The matter has not yet risen to litigation; indeed, it may have lain dormant indefinitely, were it not at the center of a brewing controversy over termination of transfers.

That controversy boils down to a dispute over whether sound recordings qualify as “compilations” or “collective works” (terms defined in Section 101). If so, then they fit into the definition of works made for hire (also defined in Section 101) and, as such, are not subject to termination of transfers. If not, notices of termination for grants of rights in such sound recordings can be served, starting in 2003.¹

It thus becomes not only timely, but vitally important, for an entire industry, to determine whether the definition of those terms is broad enough to embrace sound recordings. But their definitions soon leads into a Moebius strip of statutory interpretation: Peculiar wording of a key definition renders the term “contribution to a collective work,” a critical category of works eligible for work-made-for-hire status, impossible to interpret based solely upon the wording of the statute. Divining Congress’ true intent requires an archaeological expedition into the arcane process by which the 1976 Act evolved.

This article chronicles that journey. Building upon the authors’ previous foray charting dangers in this realm,² it posits that in order to make sense of the overall scheme,

¹ See 17 U.S.C. § 203. See generally David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC’Y 387 (2001).

² *Id.*

the party commissioning contributions to a collective work needs to make a creative contribution to the project (whether through the selection or arrangements of topics or authors chosen) in order to merit treatment as a copyright owner under the commissioned work prong of the work made for hire doctrine. The present article also sets the stage for the authors' attempt to defuse the termination of transfer time bomb that may soon explode in the sound recording industry.³

II. Statutory Definitions

To interpret a statute, the starting point is the text itself.⁴ Section 101 defines the various terms on which analysis hinges. As already noted, the fit of these various pieces of the puzzle fails to yield a cohesive whole.

A. Specially Commissioned Works

Section 101 of the Copyright Act of 1976⁵ allows parties to create specially commissioned works for hire, *inter alia*, in the case of “a compilation” and “a contribution to a collective work.”⁶ As we have previously explored, if sound recordings are to qualify as works made for hire (and thereby avoid termination of transfers therein starting in 2003),

³ See Peter Menell & David Nimmer, *Defusing the Termination-of-Transfers Time Bomb* (forthcoming).

⁴ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989).

⁵ 17 U.S.C. § 101.

⁶ *Id.* (definition of “work made for hire”), ¶ 2. As we earlier recounted, an ill-fated “technical amendment” to the Copyright Act previously provided a short-lived addition to this definition:

The alteration itself betrays its haste. Technical amendments exist to eliminate drafting errors, and make the Copyright Act read well. The instant amendment, by contrast, does the opposite: It adds additional language to the enumeration of eligible works made for hire those produced “as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work,” producing the following: “as a part of a motion picture or other audiovisual work as a sound recording,, as a translation, as a supplementary work.” The initial lack of comma, followed later by double commas, would itself have required a later technical amendment to correct, if not for the subsequent repeal of the entire amendment.

Nimmer & Menell, *supra* n.1, at 391 (hence rendering the published version nonsensical). [Ed. Note: When publishing the authors' previous article, we inadvertently eliminated the double commas; we apologize for the error and offer the excuse that we must have been commatose.]

it must be because those sound recordings qualify under one or both of those two categories.⁷

B. Compilations and Collective Works

Section 101 also defines those two referenced terms:

A “collective work” is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.⁸

The plain meaning of “collective” is the aggregation of a number of items; something formed by the process of collecting.⁹ But it turns out that this category is a subset of a larger grouping:

A “compilation” is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works.¹⁰

That last sentence is key: Because “collective works” form part of the larger category of “compilations,” it is impossible to have an exemplar of the former that does not qualify as the latter. Accordingly, the definition of the latter also governs the former.

Without looking any further than the statutory definitions, one can therefore sketch certain prerequisites simply from the foregoing juxtaposition. In order for something to qualify as a “collective work,”

- it must consist of numerous contributions (multiple works);
- those contributions must be separate and independent, meaning separately copyrightable;

⁷ *Id.* at 401-03. Other exotic possibilities exist, such as a “supplementary work.” *Id.* at 398-99 (positing audioguide to children’s book series).

⁸ 17 U.S.C. § 101(definition of “collective work”).

⁹ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 444 (1986).

¹⁰ 17 U.S.C. § 101 (definition of “compilation”).

- there must be some creativity involved in the collection and assembling¹¹ of those contributions; and
- the contributions involved in the assembly must be “preexisting.”¹²

To summon up an example, Joyce Antler could form a “collective work” entitled AMERICA AND I consisting of 23 short stories by Jewish women writers of U.S. nationality, such as Gloria Goldreich’s *Z’mira* and *The Shawl* by Cynthia Ozick, culminating in *A Letter to Harvey Milk* by Lesléa Newman. Those contributions are numerous; each is separately copyrightable; Antler acted creatively in selecting those and omitting others, and in compiling them in a given order; and each of those 23 short stories was preexisting.

C. Challenges in Application

In like measure, it is not hard to imagine a record album qualifying as a collective work. If Revelation Records decides to put out an album entitled GREATEST YULETIDE MELODIES (2002) by collecting thirteen prior recordings, beginning with Bing Crosby’s classic rendition of *White Christmas*, then moving on to Pat Boone warbling *Silent Night*, followed by Eminem’s 2001 soulful delivery of *O Little Town of Bethlehem, etc.*, culminating in Leontyne Price’s full coloratura in *Grandma Got Run Over by a Reindeer*, then the product is a “collective work.”¹³

But before concluding that that album therefore could qualify as a specially commissioned works for hire, more steps are required. For the statutory list of items eligible for that status actually does not include “collective work.” Rather, the subtly different language of the statute envisions either a “compilation” or “a *contribution* to a collective work.”¹⁴

The easy solution to that last wrinkle is to avoid it. To the extent GREATEST YULETIDE MELODIES is a “collective work,” then it definitionally qualifies as a “compilation.”¹⁵ It follows that, given a signed writing by all parties so acknowledging, the work qualifies as one made for hire based on the latter status.

Yet it remains to give content to the other statutory category. When is a work specially commissioned by virtue of qualifying as a *contribution* to a collective work? Here, another difficulty intrudes. The usage in GREATEST YULETIDE MELODIES of such previous

¹¹ The Supreme Court refers to “selection, coordination, or arrangement” of components. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 357 (1991).

¹² *See supra* Section A.

¹³ *United States Copyright Office and Sound Recordings as Work Made for Hire, Hearing Before the Subcomm. on Courts and Intellectual Property*, Ser. No. 145 at 68 (May 25, 2000) (statement of Marci Hamilton).

¹⁴ *See* § II.B *supra*.

¹⁵ *See* § II.B *supra*.

numbers as Bing Crosby's *White Christmas* made the album as a whole eligible to be a collective work. But the *White Christmas* single, standing alone, did not facially qualify as a collective work. Yet that song (and its companions) are themselves the "contributions" to the collective work. Given that Section 101 makes eligible as specially commissioned works only those *contributions* to a collective work rather than the collective works themselves, what sense does the statute make?

The problem actually runs deeper. It should be recalled that Section 101 requires that the materials out of which a compilation are constructed be "preexisting." That same section also makes a collective work one type of compilation. It follows that the contributions to a collective work must themselves be preexisting (such as *White Christmas* in GREATEST YULETIDE MELODIES). Section 101 also allows commissioned status to pertain to "a contribution to a collective work." Juxtaposing those two predicates of a contribution to a collective work (CCW), it follows that one can commission the future creation of a CCW as a work made for hire, provided that the CCW is preexisting. Help!¹⁶

To avoid absurdity, we must exit the perimeters of Section 101 as currently worded. Our next foray attempts archaeological excavation into how its terms came to be.

III. Historical Illumination

A. Group Works

We have seen above that the current Act contains definitions for "compilations" generally and for one type of compilation, namely "collective works." Prior law, in turn, used the terms "compilations" and "composite works." Our diggings begin with an attempt to extract gold from the mother lode of terms defining group works.

¹⁶ HELP! is the name of a celebrated movie starring the Beatles. This juncture accordingly serves as a useful place to differentiate a record album of songs from songs on the soundtrack of a motion picture. It is as to the former category that the termination time bomb is ticking. *See* Nimmer & Menell, *supra* n.1. By contrast, material on the soundtrack of a motion picture occupies an entirely different niche: It is protected as part of the copyright of the motion picture. *See* 17 U.S.C. § 101 (definition of "motion pictures"). Given that motion pictures have always been facially eligible to constitute specially commissioned work under the 1976 Act, there is no question but that they lie beyond the possibility of termination, assuming compliance with the requisite formalities. Accordingly, one strategy that record companies could pursue to avoid termination of post-1978 record albums is to attempt to shoulder the burden of proving that the various components were actually commissioned for the purpose of, for example, a music video rather than for the purposes of a record album.

1. Compilations

Usage of the term “compilation” to describe a type of copyrightable work goes back to the nineteenth century.¹⁷ Though the 1909 Act likewise contains that term,¹⁸ nowhere does it define the intended meaning. Instead, the first formal definition for the term stems from the Copyright Office’s 1964 draft revision to the copyright law:

A “compilation” is a work formed by the collection and assembling of works, parts of works, or material not subject to copyright in such a way that, as the result of selection, systematization, coordination, arrangement, or rearrangement, it represents an independent creation.¹⁹

As this definition merely codified the existing understanding of “compilations,” it produced little comment or criticism.²⁰ The key to copyright in a “compilation” is the authorship (creativity) involved in the selection, coordination, or arrangement of the materials compiled in the work.²¹ The only major comment concerned what can constitute authorship:

In the most extensive comment it was urged that, if the law make clear that the elements of compilation, adaptation, or added material must constitute original work of authorship in themselves, then it should go further and make clear that

¹⁷ See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 347 (D. Mass. 1841) (“It would be strange to say, that a compilation involving so much expense, and so much labor to the editor, in collecting and arranging the materials, might be pirated and republished by another bookseller”); *Egbert v. Greenberg*, 100 F. 447, 450 (N.D. Ca. 1900) (“A mere compilation of facts is protected by the copyright law There are numerous cases which hold that any compilation or any table of statistics which are the result of the author’s industry, and which are gathered at his expense, cannot be bodily used by an infringer.”) (internal quotations omitted).

¹⁸ The term “compilation” appears twice. See 17 U.S.C. §§ 5(a), 7 (1909 Act).

¹⁹ *Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft*, 88th Cong., 2d Sess., Copyright Law Revision Part 3 at 2 (Comm. Print 1964) [hereinafter *Preliminary Draft*].

²⁰ *Preliminary Draft*, *supra* n.19, at 65 (comments of Barbara Ringer, Copyright Office).

²¹ *Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill*, 89th Cong., 1st Sess., Copyright Law Revision Part 6 at 6 (Comm. Print 1965) (“‘Compilation’ covers the authorship involved in choosing, gathering together, and arranging any kind of material or data, whether copyrightable subject matter or not.”) [hereinafter *Supplementary Report*].

‘original, creative authorship’ *can result* from a mere arrangement or rearrangement of pre-existing materials.²²

The Copyright Office addressed this concern in the 1965 Revision Bill:

A “compilation” is a work formed by the collection and assembling of *preexisting materials* or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works.²³

“Preexisting” generally means “to exist before; to exist in a former state or previous to something else.”²⁴ To “exist” means “to step forth, emerge, come into being.”²⁵ Obviously for an author to compile a group of materials or data, the materials/data must first exist in the sense that they have emerged from the mere conception or idea to tangible fruition. But it hardly seems that this is a point requiring explanation. Thus, the concern over “preexisting” materials in the Section 101 “compilation” definition must have been intended to make a greater point.

In order for copyright protection to attach to a work, the work must constitute an “original work of authorship.”²⁶ One notion of authorship brings to mind creating something from scratch — starting with an idea and nothing else. The addition of “preexisting” to the definition of “compilation,” then, merely makes clear that such selection, coordination, and arrangement of materials that were not created by the compiler *could still amount* to an original work of authorship — even if the compiler never himself took a pen to paper in order to contribute new materials to the “compilation.”²⁷ Thus, the term “preexisting” serves to distinguish between the material already in existence created by

²² *Preliminary Draft, supra* n.19, at 65 (comments of Barbara Ringer, Copyright Office) (emphasis added).

²³ *Supplementary Report, supra* n.21, at 168 (emphasis added). This definition was later adopted in the 1976 Act. 17 U.S.C. § 101 (2002).

²⁴ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1787 (Philip Babcock Gove ed., 1986).

²⁵ *Id.* at 796.

²⁶ 17 U.S.C. § 102.

²⁷ The authorship lies in the compiling itself. “As recommended in the *Report*, it [Section 103, which provides that “[t]he copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work”] is intended to make clear that the standards of copyrightability set forth in section 102 apply equally to works that are wholly original and those that employ preexisting material.” *Supplementary Report, supra* n.21, at 6.

others and the new and creative effort of the compiler in selecting and arranging such material.²⁸

Still, the comment that spurred the addition of “preexisting” to the “compilations” definition does not suggest that *all of the materials must* be “preexisting” — instead, it is most reasonably read to make clear that *one possible method* of creating a “compilation” is to merely rearrange “preexisting” materials. In other words, even if the compiler does not add any new materials that he has created, he can still create a “compilation” in another way — using only preexisting materials — because the key element of “compilations” is the authorship involved in compiling the materials or data, and that authorship alone is what attracts copyright protection. The definition, however, does not fully reflect this point.

Though the addition of “preexisting” into the definition, in a commonsense way, seemed to add nothing, when paired with the comment that prompted its inclusion, it gives the category greater context — albeit greater confusion because of the way in which the drafters addressed this “preexisting” concern. To retrace the journey: First, the Copyright Office prepared a definition of “compilations” extending copyright to the selection, coordination, or arrangement of material not subject to copyright. Next, one of the participants expressed concern with the authorship requirement. In order to make sure that the definition did not imply that there was a requirement that the compiler personally author new material, the participant suggested that the definition make clear that authorship can come from simply rearranging “preexisting” materials. Instead of making that point, however, the Copyright Office inserted “preexisting” as an element into the definition. The question remains whether the intention was to limit the category to only “preexisting” materials, thus narrowing the category from its originally proposed definition, or if the drafters simply did not recognize the change.²⁹

2. Composite Works

Besides referring to “compilations,” the 1909 Act also contained the term “composite works.”³⁰ That latter term recurs in the 1976 Act limited to copyrights subsisting before the Act took effect on January 1, 1978.³¹

Neither the 1909 Act nor the 1976 Act defines “composite works.” Nonetheless, some important characteristics of that category have developed. First, as in the case of a “compilation,”³² there is an emphasis on the authorship involved in compiling and editing

²⁸ See *Preliminary Draft, supra* n.19, at 66 (“it is worth noting that this draft . . . attempt[s] to draw a clear-cut line between pre-existing material and material that is being added . . .”).

²⁹ See § IV *infra*.

³⁰ 17 U.S.C. §§ 3, 5, 24 (1909 Act).

³¹ 17 U.S.C. § 304(a) (2002).

³² See § III.A.1 *supra*.

the individual works.³³ Second, as will be seen arising in the context of “collective works,”³⁴ a “composite work” generally consists of *multiple authors* contributing copyrightable matter to a single work³⁵ (as in the example cited above, Joyce Antler’s AMERICA AND I).³⁶ As Learned Hand defines the term, it refers to works “to which a *number of authors* have contributed distinguishable parts, which they have not however, ‘separately registered.’”³⁷ The Copyright Office pronounces likewise: “Generally, a composite work is an original publication relating to a variety of subjects, to which a *number of different authors* have contributed distinguishable selections.”³⁸

3. Collective Works

The term “collective work” appears numerous times throughout the 1976 Copyright Act.³⁹ Any statutory analysis should consider the term in the context of the whole statute.⁴⁰ But despite its frequent appearances and formal definition, delineating the parameters of the “collective works” category proves more troublesome than at first glance. A look into its genesis exposes the imprecision that marked its formulation: casual references to “collective works” as a category without definition or explanation, the confusion of terms among its likely predecessor (“composite works” under the 1909 Act) and its all-encompassing parent (“compilations”), and a disconnect between the presumptions (albeit not necessarily prerequisites) that underlay its enactment and the actual enacted definition.

³³ *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st Sess., Copyright Law Revision Part 1 at 87 (Comm. Print 1961) (“In the case of a composite work — such as a periodical, encyclopedia, dictionary, or symposium — authorship of the work as a whole consists of compilation and editing.”) [hereinafter *Register’s Report*].

³⁴ *See* § III.A.3 *infra*. As set forth therein, the ultimate result largely dispenses with that requirement in the context of “collective works.”

³⁵ Barbara A. Ringer, *Renewal of Copyright*, in STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, Study No. 31, 86th Cong., 2d Sess., 129 (Comm. Print 1961) [hereinafter *Ringer Study No. 31*].

³⁶ *See* § II.B *supra*.

³⁷ *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697, 699 (2d Cir. 1941) (emphasis added).

³⁸ COMPENDIUM OF COPYRIGHT OFFICE PRACTICES §11.8.3 (emphasis added). *See* *Cadence Indus. Corp. v. Ringer*, 450 F. Supp. 59, 63 (S.D.N.Y. 1978); *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1327 (9th Cir. 2000), *cert. denied*, 531 U.S. 1126 (2001).

³⁹ 17 U.S.C. §§ 101, 201, 404, 408 (2002).

⁴⁰ William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 355 (1990).

The primary operative impact of “collective works” occurs in the ownership and notice provisions of the 1976 Act. The former provides: “Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution”⁴¹ The notice provision, in turn, reads: “A separate contribution to a collective work may bear its own notice of copyright, as provided by the [general notice provisions of the Act]. However, a single notice applicable to the collective work as a whole is sufficient to invoke the [general notice provisions of the Act].”⁴² Neither of those provisions sheds much light on the Section 101 definition of “collective works,” beyond recognizing the requirement of multiple copyrightable works.

Although some might finish their inquiry at the plain text of the statute, courts generally take into account other considerations, even after having established a presumption about the interpretation of a provision.⁴³ The legislative history of the 1976 Act is especially relevant to interpreting the statutory provisions because of the way that the 1976 Act was formulated. Insofar as it worked a major revision of copyright law, the 1976 Act was the product of two decades of discussions and negotiations by representatives of interested parties and the Copyright Office.⁴⁴ Thus, discerning a single legislative intent can be illusory,⁴⁵ as its various provisions gain much of their content from the discussions that occurred between the interested parties.

Given the roots of “collective works” as a distinct category of works in the context of the proposed notice and ownership provisions quoted above, as well as in the “composite works” category of prior law,⁴⁶ two underlying presumptions surface as to the types of “collective works” that the parties were contemplating: (1) works with multiple authors; and (2) works utilizing “preexisting” contributions in the sense discussed above. The problem with these presumptions, however, is that the legislative history also contains unrectified comments that refute those presumptions.

a) Multiple Authors

In the *Preliminary Draft* a work had to include contributions from multiple authors to qualify as a “collective work,”⁴⁷ paralleling interpretations of “composite works” under

⁴¹ 17 U.S.C. § 201(c).

⁴² *Id.* § 404.

⁴³ Eskridge & Frickey, *supra* n.40, at 355-56.

⁴⁴ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989).

⁴⁵ Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 863 (1987).

⁴⁶ *See* § III.A.2 *supra*.

⁴⁷ *Preliminary Draft*, *supra* n.19, at 15 n.12 (“A ‘collective work’ would be defined elsewhere as a work, such as a periodical issue or encyclopedia, combining the separate contributions of various authors into a collective whole.”).

the 1909 Act.⁴⁸ During the revision process, however, witness Theodore Jackson commented that “some very good collections are the collections of the works of a single author.”⁴⁹ No other participants commented on or responded to Jackson’s observation about the multiple authorship requirement; nonetheless, the subsequent draft omitted “various authors” from the “collective works” definition.⁵⁰ Furthermore, the House Report accompanying the 1976 Act made explicit that multiple authors are not required, noting that the category of “collective works” includes “the discrete writings of the same authors.”⁵¹

It is clear from the legislative history of the Act that a “collective work” can consist of the writings of a single author. What is not clear, however, is the source of that removal of the multiple author requirement, and thus how it interacts with the other requirements of the provision. The lack of further commentary on the point might mean that Jackson had made such an obvious point that nobody even bothered to elaborate on it. On the other hand, it could also indicate that the case of a “collective work” consisting of the works of a single author was, in the participants’ minds, such a rarity that they saw no need to debate the issue. After all, the discussions took place with multiple authors in mind. As noted, “collective works” is an outgrowth of “composite works,” which required multiple authors.⁵² Moreover, the precise types of works that the parties had in mind when discussing the “collective works” provisions — periodical issues and encyclopedias — typically had multiple authors.⁵³

Though the drafters omitted the multiple author requirement in the Revision Bill, there is no indication that this omission stemmed from a shift in focus from periodical issues and encyclopedias to a type of “collective work” that involves only a single author. Rather, taken in context, the lack of discussion regarding a lone commentator’s remark that there *might* be a case in which a “collective work” involves the works of only one author suggests that such a case would be the exception rather than the rule. In turn, the possibility arises that in determining whether a work qualifies as a “collective work,” the analysis may differ depending on whether the work includes contributions from multiple authors.

When the contributions to a “collective work” come from multiple authors, there is a guarantee that the creator of the “collective work” contributed some minimal amount of creativity, at least in selecting the authors from whom to take contributions. When the

⁴⁸ *Ringer Study No. 31, supra* n.35, at 129. See § III.A.2 *supra*.

⁴⁹ *Preliminary Draft, supra* n.19, at 265 (comments of Theodore R. Jackson).

⁵⁰ *1964 Revision Bill with Discussions and Comments*, 89th Cong., 1st Sess., Copyright Law Revision Part 5 at 30 (Comm. Print 1965) (“‘Collective work’ is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.”) [hereinafter *Revision Bill*].

⁵¹ H.R. Rep. 94-476, 94th Cong., 2d Sess. at 122 (1976).

⁵² See § III.A.2 *supra*.

⁵³ *Preliminary Draft, supra* n.19, at 15 n.12.

“collective work” involves only a single author, that guarantee wanes — although it remains possible that the author of the individual contributions also contributed sufficient creativity in selecting and ordering the included works. Thus, when multiple authors are involved, the term “collective work” applies to a category of works, such as encyclopedias or periodical issues, that automatically involved choices as to selection, without requiring a court to dig into the specific facts behind that particular work’s creation.⁵⁴ In contrast, when a single author is involved, the collector might leave it up to the author to pick the contributions, order, *etc.*, meaning that a court must look at the specific facts behind that work’s creation to determine if the so-called “collector” truly qualifies as the author of the “collective work.”

b) Preexisting

Because of the context in which the discussions took place, there seemed to be no problem with the inclusion of a “preexisting” requirement in the “collective works” category. When read in relation to the notice provisions, the preexisting requirement conveys the same presumption as it does for “compilations”: something that is truly preexisting (in a tangible sense) and subsequently gathered by the collector. One participant expressed concerns about the preexisting requirement in the context of collective works, but those comments went unaddressed.⁵⁵ Nonetheless, with regard to the notice provisions,⁵⁶ the participants’ concerns demonstrated that they likely had on their minds previously published components, truly preexisting (meaning in existence at least before the idea to create the “collective work”).

⁵⁴ For instance, in the case of a Christmas music album including recordings from various artists, the collector, at the least, had to decide which artists to include on the album. *See* § II.C *supra*. Even if the artists had complete creative control beyond that point in picking and ordering the songs, the collector contributed some creativity to the collective work.

⁵⁵ In the definition of “compilation” . . . there is a reference to “pre-existing materials.” Since at the tail end of the definition of “compilation” it states that the term “compilation” includes “collective works,” it seems to me that this raises the question of whether a “collective work” must be a collection of “pre-existing materials.” Apparently there is a specific significance which is being given to “pre-existing materials” here. I don’t know what the significance of that phrase is, and I think that, whatever it is, it raises a problem in connection with the definition of “collective works.”

Revision Bill, supra n.50, at 216 (comments of Morton David Goldberg). With respect to that concern, the subject components might have been previously published or unpublished. *See Preliminary Draft, supra* n.19, at 23 n.23 (“A ‘contribution’ would be defined elsewhere as any component part of a collective work constituting a separable work, whether or not previously published . . .”). By contrast, the next comment arose in the context solely of previously published components.

⁵⁶ *See* § III.A.3 *supra*.

[I]f there's only one copyright notice, and it's a notice covering the entire work, you may have pieces in that composite or collection of works that may be 50 years old. In fact, the single notice on a composite work can mislead the public to the extent that nine-tenths of it might be in the public domain.⁵⁷

Accordingly, the “preexisting” requirement caused no concern.

As previously discussed, the “preexisting” requirement, which seems unnecessary, was likely included to demonstrate what *can qualify* as a “compilation” rather than to demonstrate what is *necessary* to constitute a “compilation.” Furthermore, given the seemingly haphazard way in which “compilations” and “collective works” came to their final definitions, it is possible that the drafters, though they noted that “compilations” includes “collective works,” did not intend all of the elements of “compilations,” including “preexisting,” to so extend. But regardless of whether Congress intended the “preexisting” requirement in “compilations” to extend to “collective works,” it would take interpretive gymnastics to read the “preexisting” requirement out of the “collective works” definition, given that the provisions explicitly provide that a “collective work” is a type of “compilation.”

4. Conclusion

If it is accurate that the drafters merely tinkered with the multiple author component of “composite works” in order to create the new “collective works” category in its place, the dearth of commentary or explanation surrounding this change is confusing. First, the *Register's Report* treated “composite works” as a category under the ownership provisions in almost exactly the same way as “collective works” would later be treated under the ownership provisions.⁵⁸ If the principal difference amounted to merely a name change for the category, it is surprising that the comments surrounding the provisions do not simply point this out. Second, if “composite works” and “collective works” are basically synonymous, it is curious that they have been referred to separately within the same discussion, suggesting either that they are different or that one reference is superfluous.⁵⁹

⁵⁷ *Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 88th Cong., 1st Sess., Copyright Law Revision Part 2 at 114 (Comm. Print 1963) (comments of Irwin Karp) [hereinafter *Comments on Register's Report*]; see also *id.* at 125, 208 (comments of Harriet Pilpel, echoing Mr. Karp's comments).

⁵⁸ *Register's Report*, *supra* n.33, at 87; *Preliminary Draft* *supra* n.19, at 15.

⁵⁹ See *Ringer Study No. 31*, *supra* n.35, at 129 (“The same factor — multiplicity of authors — led to a recognition that the term of copyright in composite and collective works could not be based on the life of an author . . .”). The *Register's Report* also, at times, refers to one category without the other. For instance, it discusses “collective works” in the

The real problem here, however, is the assumption that serious thought and precision can be ascribed to the use of the terms “compilations,” “composite works,” and “collective works” when the evidence suggests the opposite: Because the terms did not have precise definitions to begin with, they were thrown around haphazardly, sometimes with the intention that they be synonymous, other times not.⁶⁰ For instance, the *Register’s Report* does not refer to “compilations” as a category but discusses “composite works” in terms that come from the principles underlying “compilations.” In discussing ownership, the *Report* notes that “[i]n the case of a composite work — such as a periodical, encyclopedia, dictionary, or symposium — authorship of the work as a whole consists of compilation and editing.”⁶¹ This statement, if made in the context of the 1976 Act, could be referring to both “compilations” and its subcategory, “collective works.” However, the *Report* goes on to talk about “ownership of component parts,” excluding some “compilations” that are made up of uncopyrightable elements.⁶² That perspective leads back to viewing “composite works” as akin to “collective works.” But, alas, it could not be that easy — the *Discussion and Comments on the Report of the Register of Copyrights* states, “Of course, the term ‘composite works’ includes periodicals and the whole area of collective works; we’re just using that term for convenience.”⁶³ With similar imprecision, the *Register’s Report* refers to the “special problem” presented by “notice in collective works,”⁶⁴ an oddity given that the case law under the 1909 Act does not treat “collective works” as a category as it does “compilations” and “composite works.”⁶⁵

In sum, examination of the statute and its legislative history leaves one with explicit elements from the definitions of “compilations” and “collective works,” legislative history that suggests the drafters had something different in mind than the definitions require, and unrectified comments in the legislative history that attempt to clarify the definitions, but instead create more confusion when read with the legislative history of the provisions as a whole. Unfortunately, it can be most difficult for interpreters today to reconstruct the likely intent of the participants and drafters in crafting the provisions. This imprecision, especially

notice provisions but then switches to “composite works” in the ownership provisions. *Register’s Report*, *supra* n.33, at 87.

⁶⁰ The initial proposals regarding the ownership provisions referred to the authors of “each contribution to a composite work.” *Comments on Register’s Report*, *supra* n.57, at 260-61 (Comments from Author’s League of America) (“The author of each contribution to a composite work should own the copyright on his contribution . . .”). The *Preliminary Draft* adopted this proposal to grant copyright to the author of each contribution.

⁶¹ *Register’s Report*, *supra* n.33, at 87.

⁶² *Id.*

⁶³ *Comments on Register’s Report*, *supra* n.57, at 144.

⁶⁴ *Register’s Report*, *supra* n.33, at 65.

⁶⁵ A 1970 case discussed “collective works” as a category, but it did so only in reference to the proposed revisions that later became the 1976 Act. *Goodis v. UA TV, Inc.*, 425 F.2d 397, 402-03 (2d Cir. 1970) (referring to “collective works” as a category under the proposed drafts for copyright law revision).

when coupled with the explicit requirements in the statute, renders nearly impossible the task of applying the statutory language in a way that carries out the compromises and purposes underlying the provisions. Though this imprecision begins to appear in numerous places, its true consequences only come to light in the context of the “works made for hire” provisions.

B. Works Made for Hire

The final and most important piece of the puzzle is the meaning of a “contribution to a collective work” in the context of the “works made for hire” (WFH) provision.⁶⁶ Because the termination-of-transfers provision does not cover works made for hire,⁶⁷ the scope of the WFH category was the subject of serious debate by the interested parties. The House Report for the 1976 Act makes clear that the resulting provision is the product of much deliberation:

The work-made-for-hire provisions of this bill represent a carefully balanced compromise The status of works prepared on special order or commission was a major issue in the development of “works made for hire” in section 101 The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as “works made for hire” and those that should not. The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered “works made for hire” under certain circumstances.⁶⁸

Representatives of authors and publishers each made concessions. Publishers conceded to enlarge authors’ rights by affording them an inalienable right to terminate transfers 35 to 40 years after the initial grant of rights, while authors agreed to various categorical exceptions to this termination right in circumstances where a termination right might hinder exploitation of a work.⁶⁹

The initial WFH definition did not include a commissioned works prong. Instead, it covered only traditional employment relationships.⁷⁰ Thus, the debate over the scope of the

⁶⁶ 17 U.S.C. § 101 (2002).

⁶⁷ *Id.* §§ 203, 304(a).

⁶⁸ H.R. Rep. 94-1476, 94th Cong., 2d Sess. at 121 (1976).

⁶⁹ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 746 (1989); *Revision Bill*, *supra* n.50, at 149-50.

⁷⁰ *Preliminary Draft*, *supra* n.19, at 15 n.11 (“A ‘work made for hire’ would be defined elsewhere as a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission.”). Note that the language of the 1909 Act also specifically referred only to “employers,” albeit a trend inaugurated in 1966 broadened its interpretation to embrace commissioned works as well. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989).

WFH definition centered on whether to include the commissioned works prong at all, rather than on what specific types of works should be included under the prong. Still, two distinct rationales emerged to support the inclusion of a commissioned works prong that, in turn, inform the specific categories that appear in the final definition.

First, there is the problem of numerous authors. Both the motion picture industry and the publishing industry noted that certain works include contributions from many authors. Publishing industry representatives pointed out the difficulties that might accompany both the publication and continued exploitation of certain types of works, as the publishers would potentially have to negotiate with thousands of different authors who did not qualify as traditional employees but whom the publishers had commissioned to submit works for inclusion in a “collective work,” such as an encyclopedia:

To talk about employment for hire while excluding therefrom the concepts of special order or commission creates an illusory employment-for-hire situation, and would result in negotiations for reversion with respect to anywhere from five to seven to eight to ten thousand individual contributors to the kinds of composite works and collective works to which I made reference. I submit that it would not be feasible for those works to be published under the kind of system of reversion which . . . would include special order or commission.⁷¹

Moreover, even aside from the difficulties that would ensue if the termination-of-transfers provisions applied to works with potentially thousands of authors, there might be problems exploiting the work in the first instance. If each contributor had copyright in the work as a joint author, then third parties wishing to use the work would have to go through the “cumbersome” process of dealing with each individual contributor.⁷²

Second, and more importantly, the publishing and motion picture industries argued that although a typical employment relationship does not exist, there are some situations in which the commissioning party is essentially akin to the author because the work is created at the instance, direction, and risk of the commissioner.

The suggested definition of “employment-for-hire” has caused considerable concern to publishers of maps, atlases, encyclopedias and similar reference and collective works. All of these works are years in preparation. They are typically the

⁷¹ *Revision Bill*, *supra* n.50, at 150 (comments of Bella L. Linden, American Textbook Publishers Institute).

⁷² Borge Varmer, *Works Made for Hire and on Commission*, in STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, *Study No. 13*, 86th Cong., 2d Sess., 141 (Comm. Print 1960) [hereinafter *Varmer Study No. 13*].

collective efforts of many individuals whose individual contributions are not readily susceptible of segregation and identification. The publisher is in reality the creator of such works, and hire individuals to prepare segments of it under its supervision and control (very similar to the creation of a motion picture).⁷³

A study prepared for the revision of the WFH provision supported the publishing and motion picture industries' comments. The study noted that a special case exists when the employer makes a contribution in assembling the contributors and directing the undertaking. Regardless of whether the WFH provision vested the copyright originally in the employer or provided for some sort of transfer, the study suggested that certain types of works such as "motion pictures, newspapers and other periodicals, and cyclopedic works" deserved special treatment.⁷⁴

The drafters of the *Revision Bill* took these arguments into account in molding the commissioned works prong of the WFH definition. First, the drafters included a statute-of-frauds component in the WFH commissioned works provision, requiring that the commissioning and commissioned parties expressly agree in writing that the work is a WFH. Still, the authors argued that the writing requirement was not enough protection because authors, often finding themselves in a position with lesser bargaining power, might be at the mercy of commissioning parties and induced to sign WFH contracts.⁷⁵ Thus, as a final compromise, the drafters specifically enumerated categories of works that can qualify as WFH under the commissioned works prong.⁷⁶

The publishing and motion picture industries argued that certain types of works, such as translations, maps and illustrations in books, front matter and appendices, contributions to dictionaries and encyclopedias, and parts of motion pictures should fall under the commissioned works prong in order to avoid serious "economic dislocation" in the publishing and movie industries.⁷⁷ Still, authors inveighed and publishers eventually acceded that there were certain works that, although commissioned by a party (and therefore at the instance of, and possibly even at the expense of the commissioning party) should not qualify as WFH. Such works included serious music, choreography, novels, and paintings.⁷⁸

⁷³ *Preliminary Draft*, *supra* n.19, at 340-41 (comments of the American Textbook Publishers Institute); *see also Varmer Study No. 13*, *supra* n.72, at 141.

⁷⁴ *Varmer Study No. 13*, *supra* n.72, at 141.

⁷⁵ *Supplementary Report*, *supra* n.21, at 67.

⁷⁶ *Id.* at 67.

⁷⁷ *Supplementary Report*, *supra* n.21, at 67; *Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law*, 88th Cong., 2d Sess., Copyright Law Revision Part 4 at 274 (Comm. Print 1964) (comments of American Book Publishers Council, Inc. and American Textbook Publishers Institute).

⁷⁸ *Revision Bill*, *supra* n.50, at 145; *Supplementary Report*, *supra* n.21, at 67.

Neither the Copyright Office nor the other participants commented further on this distinction between what should be included and excluded under the commissioned works prong. But because the specifically enumerated categories first appeared in the final draft of the *Revision Bill*, there was little discussion or further explanation as to why *those specific categories* were included, beyond the instance, direction, and risk rationales.⁷⁹ The problem, however, is that while the “compilations” and “collective works” definitions were already effectively in place when the WFH commissioned works categories were crafted, the drafters’ focus seems to have been misplaced: they apparently tried to create categories, such as “contribution to a collective work,” that would specifically address the concerns of the interested parties, for instance encyclopedia publishers, who argued that contributions to dictionaries and encyclopedias should be covered.⁸⁰ But, they did not take the definitions of “compilations” and “collective works” into account when crafting those categories. In other words, they did not examine how those definitions would interact with the specific types of works they were addressing in the context of commissioned works. Thus, the drafters crafted a category, “contribution to a collective work,” that was supposed to specifically address the concerns of encyclopedia publishers (and other similar works), but that instead, if the “compilations” and “collective works” definitions are taken literally, do not cover those types of works at all.⁸¹

IV. Lessening Confusion In Copyright’s Work-for-Hire Doctrine

A. Scenarios

With that history in mind, how are the provisions of Section 101 to be interpreted in actual situations? Consider some practical ramifications.

- *Scenario 1:* The editors of ENCYCLOPEDIA BRITANNICA decide in 2002 to produce a new edition, for which a thousand contributors will be asked to update that venerable work to the age of the Internet. Given that the previous edition of ENCYCLOPEDIA BRITANNICA qualifies as a collective work, each of the thousand will be adding thereto. We have here, therefore, both multiple authorship and a collective work. Accordingly, the editors can obtain a signed agreement from each contributor that her contribution will constitute a specially commissioned work for hire: It will constitute a “contribution” to a “collective work.” Section 101 does not specifically define the terms “contribution” or “contribution to a collective work.” It would make most sense to interpret “contribution” in this context as any work, whether preexisting or yet to be created, that will form part of a “collective work.” Therefore, all of the statutory prerequisites for that status are satisfied — ENCYCLOPEDIA BRITANNICA is a collective work and the authors selected would be making contributions to this collective work.

⁷⁹ *Creative Community for Non-Violence v. Reid*, 490 U.S. 730, 746 (1989).

⁸⁰ *Supplementary Report*, *supra* n.21, at 67.

⁸¹ *See* § III.A *supra*.

- *Scenario 2*: WIRED Magazine decides to produce online a brand new work: the ENCYCLOPEDIA CYBERIA, which will be updated hourly (until the technology improves, and more frequent revisions will be permitted, in keeping with the *zeitgeist* of the new era). The thousand entries will span the gamut from *applets* to *Z-buffer*.⁸² The editors get each contributor to sign the same agreement as above. Yet here, it is more difficult to conclude that the resulting entries each acquire WFH status. For there is no pre-existing product to qualify as a collective work (a subspecies of “compilation,” which requires that the components have such antecedent existence). Due to the peculiar requirement that a collective work comprise *preexisting* materials, ENCYCLOPEDIA CYBERIA would not qualify as a collective work until *after* the contributions exist. Therefore, at the time of the agreement commissioning contributions for this *prospective* encyclopedia, it would appear that the requirements for WFH status could not be established. The agreement would commission a “contribution to a *prospective* collective work,” not a “contribution to a collective work.”

It makes little sense to distinguish between these two scenarios — if the thousand contributions to the latest edition of the ENCYCLOPEDIA BRITANICA can qualify as WFH, then the identical submissions to a newly formed ENCYCLOPEDIA CYBERIA should be eligible for the same status.

B. Preexisting Components

Yet the statute as drafted appears to dictate contrary results.⁸³ But when the historical context is factored in, perhaps a new sensibility emerges: The participants in crafting the 1976 Act initially seemed to have in mind two scenarios: one in which a compiler creates a “compilation” including materials that he has contributed, and one in which a compiler creates a “compilation” including only materials previously created by others.⁸⁴ The first scenario drops out as a result of the final “compilations” definition requiring pre-existing components. Yet it is doubtful that the drafters or participants intended that effect. Furthermore, the drafters and participants apparently did not consider the other contexts in which the “preexisting” requirement might pop up. They likely did not consider the implications of the “preexisting” requirement in the context of one commissioning someone else to create new materials specifically for a “compilation.” The 1909 Act “works for hire” provision did not have an explicit “commissioned works”

⁸² Of course, even before *applet* will come *abend*, short for “abnormal end,” or a *crash* in other words. See <http://www.whatis.com>. See also David Nimmer, *Refracting the Window’s Light: Stewart v. Abend in Myth and in Fact*, 39 J. COPYRIGHT SOC’Y 18, 36 (1991) (“One need not say *Gute Nacht* to all those old films so much as *Guten Abend*.”).

⁸³ See § III.A *supra*.

⁸⁴ See § III.A.1 *supra*.

prong,⁸⁵ and what was on the drafters' minds in that context was primarily photographs or group portraits.⁸⁶

Nonetheless, by the end of the revision process the complications surrounding this oversight swelled, as the preexisting requirement applied not only to “compilations,” but also to its subset of “collective works,” and hence to the commissioned works-made-for-hire categories. One solution would be to recognize that the incoherence of the statute necessitates reference to the legislative history⁸⁷ and to interpret the statute accordingly. Each of the Section 101 definitions explored above — “collective work” and “work made for hire” — can be interpreted coherently in isolation. But when one tries to read “work made for hire” and “collective work” together, the absurdity of the text becomes apparent.⁸⁸ According to Section 101, a “collective work,” as a subcategory of “compilation,” must be formed from “preexisting materials.” Hence, a contribution to a new collective work must preexist at the time that the collective work is assembled. The definition of “work made for hire” refers to “specially order[ing]” or commission[ing]” a “contribution to a collective work.” It is simply not possible to specially order or commission something that preexists. Looking beneath the text to the legislative history, it is abundantly clear that Congress intended that publishers of encyclopedias and other collective works could commission the “creation” of the underlying works and become the copyright owners *ab initio* through the vehicle of the WFH doctrine, so long as they comply with statutory formalities. Therefore, in applying the

⁸⁵ See *supra* n.70.

⁸⁶ *Varmer Study No. 13, supra* n.72, at 129-30 (commissioned works arose under the case law mostly in those contexts).

⁸⁷ The modern sirens of textualism resist such an approach, see Eskridge & Frickey, *supra* n. 38, at 340-45, but as Judge Newman poignantly observes,

We have been wisely cautioned by Learned Hand that “[t]here is no surer way to misread a document than to read it literally.” *Guisseppi v. Walling*, 144 F.2d 608, 624 (2d Cir.1944) (concurring opinion), *aff’d sub nom. Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945). That aphorism is not always true with respect to statutes, whose text is always the starting point for analysis and sometimes the ending point. But literalism is not always the appropriate approach even with statutes, as the Supreme Court long ago recognized: “It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intent of its makers.” *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

See *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1105-06 (1988) (Newman, J., dissenting).

⁸⁸ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment) (“if the language of a statute is clear, that language must be given effect at least in the absence of a patent absurdity”).

WFH doctrine, courts should either ignore use of the term “preexisting” in the definition of “compilation,” and hence “collective work,” or interpret the term “contribution to collective work” to include “contribution to a *yet to be assembled* collective work” in the definition of “work made for hire.”⁸⁹ Just as the contributions in Scenario 1 can qualify as WFH, so those in Scenario 2 should attract the same legal result.⁹⁰ Fidelity to the text of the act is sacrificed, but with arguable gains to following the drafters’ intent.⁹¹

Reverting to the development of the commissioned branch of the WFH statutory definition, it should be recalled that Congress narrowed the categories of works eligible for that status.⁹² A reasonable inference is that some works may concededly be produced on commission, yet still not fall under the same rationales as the other WFH categories because they either do not involve the works of multiple authors or because they are not done at the direction of the commissioning party.⁹³ So why, then, did Congress include compilations and CCW in the eligible category? As we have seen, the copyright in “collective works” and “compilations” stems from the creativity involved in compiling them. Moreover, the instance, direction, and risk rationale likely also suggests that the key component is the level

⁸⁹ As we noted earlier, encyclopedias were the quintessential example of the problems the publishing industry argued must be addressed with the commissioned works prong of the WFH provision. It is a reasonable inference that the “contribution to a collective work” prong is a direct response to encyclopedia publishers’ arguments. Despite the fact that the legislative history of the 1976 Act demonstrates that works such as commissioned contributions to encyclopedias are exactly what the drafters had in mind when they determined that there are certain kinds of works done at the instance, direction, and risk of the commissioner, that should therefore be considered WFH, these commissioned contributions get hung up on the “preexisting” requirement. To put it another way, unless there is already a “collective work” and the commissioner merely decides to add another work to the “collective work,” the CCW category cannot provide the ownership structure that Congress intended. The commissioner must argue that he satisfies the “preexisting” requirement by proving that the works were created at Time 1 and then he collected them into a “collective work” at Time 2. But, that would mean that at the time they were commissioned and created (Time 1), there was no “collective work” for which the contributions could be commissioned.

⁹⁰ As noted above, the drafters included the “preexisting” requirement in the “compilations” (and therefore “collective works”) definitions without a complete examination of its implications. *See* § III.A.3.b *supra*. The problem is that the drafters never revealed why the “preexisting” requirement is important in the first place, and especially not with regard to the WFH provisions.

⁹¹ “[S]tatutory interpreters should be more willing to err by construing statutes too narrowly than too broadly.” William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1103 (2001).

⁹² *See* § III.B *supra*.

⁹³ Photographs, which were on the minds of the drafters, would be a likely candidate here. *See* n.86 *infra*.

of creative input of the commissioning party.⁹⁴ Another reasonable inference is that because of the delicate balancing of competing interests leading to the passage of the 1976 Act, the commissioned works categories were intended to directly respond to the types of works that the interested parties were most concerned about.⁹⁵

How will these considerations reverberate in the upcoming time bomb affecting termination of transfers relating to sound recordings? Let us expand our horizons.

- *Scenario 3:* Record Company (RC) signs a deal with Newcomer; RC supplies its top producer to supervise sessions at its studio. After Newcomer has recorded 20 numbers, RC accepts and orders 12, rejects the remainder, and submits a list of additional songs for which it wants Newcomer to perform cover recordings. At the end of the process, RC compiles 16 songs in an order of its choosing into a CD, that becomes a runaway hit.
- *Scenario 4:* RC signs a five-album contract with Group. A year later, Group delivers a 15-song album, which RC puts out, on a CD, which likewise becomes a hit.

Technically, neither of those scenarios can qualify as WFH, inasmuch both lack pre-existing recordings to be ordered before the subject “collective work” (or “compilation”) is assembled. But if that requirement can be discarded from Scenario 2, then the same logic applies here.

Subject to that interpretation, it would seem that Scenario 3 could meet the statutory definition of WFH as a compilation to which RC made copyrightable contributions in the manner of selecting and arranging materials. Subject to all the other requisites of the statute,⁹⁶ that work might therefore stand outside of the termination framework.

As to Scenario 4, by contrast, its differences from the preceding scenario import different consequences. Here, RC has engaged neither in the primary act of authorship of recording the various tracks, nor of arranging and compiling them into a whole.⁹⁷ Instead, it

⁹⁴ See § III.B *supra*.

⁹⁵ A review of the 1976 Copyright Act’s legislative history demonstrates that Congress and the Registers of Copyrights actively sought compromises negotiated among those with economic interests in copyright and purposefully incorporated those compromises into the copyright revision bill, even when they disagreed with their substance.

Litman, *supra* n.45, at 879

⁹⁶ See § II.A *supra*.

⁹⁷ It may be that the album produced in Scenario 4 is itself a collective work. But in this instance, the author of both the individual CCWs, and of the album as a whole, would appear to be Group, rather than RC.

is the marketer of a product wholly authored by another. For those reasons, this type of work would seem ineligible for WFH status. It both lacks creative input of the commissioning party and falls outside the category of directly responding to the types of works that the interested parties were most concerned about at the time that the 1976 Act was assembled. For these various reasons, Scenario 4 should not qualify as a WFH.

C. Multiple Authors

It should be recalled that, as drafted, not only does the category of compilations (and hence collective works) require preexisting components, but typically also collective works contemplate multiple authorship. That criterion, by itself, inclines in favor of WFH status for the album produced in Scenario 4. After all it may reflect contributions not only of the members of Group, but also of sound engineers, producers, backup vocalists and instrumentalists. In that circumstance, the type of multiple authorship underlying Congressional intent in this realm is satisfied.

Nonetheless, on deeper examination, that criterion might not be satisfied. Let us revert to Scenario 2 regarding an encyclopedia. There, notwithstanding any pre-existent work, it is essentially certain that, when produced, the anticipated *ENCYCLOPEDIA CYBERIA* will itself qualify as a collective work as to which there will be multiple authors. In that context, it will be equally certain that *WIRED Magazine* will itself have devoted authorship to the compilation of that encyclopedia⁹⁸ — selecting entries for, and individual authors to contribute pieces about @ and *avatar* through *zombie* and *zaplet*.⁹⁹ As such, it will, at a minimum, own the copyright in the compilation as a whole, if not in each CCW.

By contrast, there is no such guarantee as to Scenario 4. The resulting album may itself be of a unified character, more akin to a writer’s novel than to an anthology of short stories, and hence not qualify as a collective work.¹⁰⁰ By the same token, the Record Company may have engaged in no creativity of shuffling the pieces, discarding some and adding others, rearranging the components, such as would qualify it as an author of a compilation. Nor can it advance any argument to qualify as the author of each CCW. Instead, the only creativity that RC expended was to sign a contract with Group — hardly the type of authorship minimally necessary for copyright subsistence.

Conclusion

This article has resolved a curious, potentially significant, and heretofore unrecognized conundrum of the 1976 Copyright Act. On the one hand, Congress defined “collective works” to be comprised of “preexisting materials.” Yet the work made for hire

⁹⁸ As previously noted, the presence of multiple authors guarantees some creativity on the part of the collector, because it at least had to select the authors and coordinate/put together the works. *Varmer Study No. 13, supra* n.72, at 141.

⁹⁹ Credit for terminological assistance goes to Nicola Bird, Robert Popa, and Sarah Szalavitz.

¹⁰⁰ *Nimmer & Menell, supra* n.1, at 402-03.

provision contemplates “contributions to collective works” being specially ordered or commissioned. How is it possible for a publisher or record label to specially order or commission contributions that already exist? Our journey into the complex evolution of the 1976 Copyright Act confirms that Congress did not intend that “contributions to collective works” preexist their commissioning, even though the inartful drafting of some of the Section 101 definitions suggest otherwise. For purposes of applying the work for hire doctrine, courts should either ignore the use of the term “preexisting” in the definition of “compilation,” and hence “collective work,” or interpret the term “contribution to collective work” to include “contribution to *yet to be assembled* collective work” in the definition of “work made for hire.” Either approach carries out Congress’ intention to allow those who contribute sufficient creativity in the hiring of authors and/or selection and arrangement of constituent elements of a collective work to be treated as the copyright owner *ab initio*. Resolving this puzzle, however, does not resolve the larger question of whether record albums produced since January 1, 1978 (as well as other “commissioned” works) qualify as works made for hire. That ultimate determination revolves around a variety of other interpretations of copyright law, contract issues, as well as the creative environment in which the sound recordings were produced. We explore that broader domain in the next installment of this intricate drama.¹⁰¹

¹⁰¹ See *Defusing the Termination of Transfers Time Bomb*, *supra* n.3.