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VICARIOUS ARTIFICIAL AUTHORSHIP

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Generative artificial intelligence ("Gen AI") poses a challenge to copyright's central idea: authorship. Efforts to address it in the US have simplistically hidden behind the "human authorship" requirement and thereby overlooked an important source of analytical guidance: the work made for hire doctrine. This essay shows how the work made for hire doctrine in the US is premised on a theory of authorship that is drawn from the construction of causation in the common law's doctrines of vicarious liability. Tracing the history of this idea in the common law of employee authorship, it argues that the doctrine embodies a form of vicarious authorship that is predicated on vicarious causation. It then extends the idea of vicarious authorship to the outputs of Gen AI models, relying on a framework that mimics the way the relationship between principal and agent is seen to be causally related to the production of the work.

I. Introduction

The proliferation of generative artificial intelligence ("Gen AI") models has presented the legal system with a host of novel and seemingly intractable dilemmas—ones that courts, scholars, and policymakers continue to grapple with. Nowhere is this more apparent than in the domain of copyright law.[1] Among the different challenges that Gen AI poses for copyright law, perhaps the most consequential one relates to the ownership and copyrightability of expressive outputs produced by such models. Much of the litigation surrounding copyright and Gen AI has focused on the questions of infringement and fair use, and tried to push courts into developing doctrinal modifications in answer.[2] By contrast, the few decisions and reports that have addressed the issues of copyrightability and authorship in Gen AI outputs have shown a surprising lack of creativity and nuance beyond engaging in a close reading of the copyright statute and its overarching commitment to "*human* authorship".[3]

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1 Pamela Samuelson, "Generative AI Meets Copyright" (2023) 381 Sci 158; Matthew Sag, "Copyright Safety for Generative AI" (2023) 61 Hous L Rev 295.

2 Kate Knibbs, "Every AI Copyright Lawsuit in the US, Visualized", *Wired* <https://www.wired.com/story/ai-copyright-case-tracker/> (19 December 2024).

3 *Thaler v Perlmutter* 130 F 4th 1039 at 1041 (DC Cir, 2025*)* [emphasis added] [*Thaler*]; *Thaler v Perlmutter* 687 F Supp 3d 140 at 142 (DDC, 2023) [emphasis added] [*Thaler* (DDC)].

While it is undoubtedly true that copyright law has remained unflinching in its commitment to human authorship, what this simplistic observation overlooks is the reality that over time (and context) copyright law's very idea of authorship has morphed and expanded. In so doing, the idea of what the *human* in human authorship entails has itself mutated. All the same, this evolution has not been unprincipled or without analytical roots: it has instead occurred incrementally and in a manner that the debate about Gen AI authorship has thus far neglected.

Authorship has long been treated as an unstated, yet crucial, element of copyrightability. Under US copyright law, traced back to the Constitution, copyright protection is only ever available for "works of authorship", the beneficiaries of which are meant to be "authors".[4] Yet, the analytical and normative underpinnings of the author have rarely been explicitly addressed or elaborated on by courts or legislatures, on the assumption that they are somewhat self-evident.[5] Over the course of copyright's history, courts have been forced to confront the question of authorship whenever a new modality of creativity seeks entry into copyright. Photography was first in this sequence, when the argument was made that the camera did little more than capture reality in front of the lens, such that the photographer was hardly an author adding any creativity.[6] Then came the phenomenon of "psychography" or spirit-driven automatic writing, where individuals claimed to transcribe messages communicated to them by a spirit.[7] More recently, the same question came up in relation to the "monkey selfie" photograph, where an animal's operation of a camera that was installed and positioned by a human was seen as failing to meet the requirement of causation.[8]

As early as the photography cases, copyright law came to recognise that authorship needed an analytical basis for its functioning. It chose to locate this analytical anchor in the idea of *causation*, asking whether the putative author was the cause (or put more precisely, "the effective cause") of the creative work seeking protection.[9] To the law at the time, and indeed ever since, answering this question has seemed self-evident given the ubiquity of our intuitive assessments of causation, both in the law and in everyday life.

Every so often, though, copyright law's failure to explicate its conception of causation underlying authorship has posed problems for new subject matter, when

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4 17 United States Code ("USC") s 102 (2020).

5 For critics of the concept of authorship in copyright law, see: Jane C Ginsburg, "The Concept of Authorship in Comparative Copyright Law" (2014) 52 DePaul L Rev 1063; David Nimmer, "Copyright in the Dead Sea Scrolls: Authorship and Originality" (2001) 38 Hous L Rev 1 at 13; Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of 'Authorship'" [1991] Duke LJ 455; Christopher Buccafusco, "A Theory of Copyright Authorship" (2016) 102 Va L Rev 1229.

6 Justin Hughes, "The Photographer's Copyright – Photograph as Art, Photograph as Database" (2012) 25 Harv JL & Tech 339; Christine Haight Farley, "The Lingering Effects of Copyright's Response to the Invention of Photography" (2004) 65 U Pitt L Rev 385.

7 Blewett Lee, "Copyright of Automatic Writing" (1926) 13 Va L Rev 22; *Cummins v Bond* [1927] 1 Ch 167.

8 *Naruto v Slater* 888 F 3d 418 (9th Cir, 2018) [*Naruto*].

9 *Burrow-Giles Lithographic Co v Sarony* 111 US 53 at 61 (Supreme Court of the United States, 1884) [*Burrow-Giles*].

the nature and amount of human control over the creative process have deviated from its baseline conception. Artwork consisting of live plants and flowers,[10] or animal-triggered photographs here represent the most obvious instances.[11] The emergence of Gen AI has brought the issue to the surface once again: forcing the inquiry to ask what it means for the idea of causation underlying authorship when the Gen AI model produces an output, even if triggered by human prompting.

Gen AI, built on the system of machine learning, works by deploying an algorithm that recognises patterns and characteristics in large volumes of data that it analyses. This "model" is therefore predicated on the "ingestion" of large amounts of data and information of various kinds, which it then is programmed to "train" on. Then, when prompted by a human actor, it applies the patterns that it learned from the voluminous data to generate an output that is seemingly responsive to the prompt, an output that largely simulates a likely human response. Despite some variations in the manner of learning/training and of course the type and volume of content used for such training, *all* Gen AI systems follow this same pattern. Where they of course further differ is in the types of adjustments and controls that they allow a human actor to make in the process of generating an output. Whether it be ChatGPT, Claude, DALL-E, Stability AI or Gemini, all of these "foundation models" function in the same way.[12]

While human effort is undoubtedly needed in the development and training of Gen AI models, as well as in prompting them to produce outputs, the nature and content of those outputs are principally a function of the "learning" that the algorithm has internalised through its analysis of data. Put simply, the output of a foundation model is incapable of accurate prediction and is thus in a sense a product of the model and its training. Indeed, it is this unpredictability (to the human) that renders the model "intelligent".[13] Unsurprisingly, this is also where complexities begin to emerge around authorship, since the lack of predictability corresponds to a degree of perceived autonomy in the model.

When a model is prompted to generate an output—such as when ChatGPT is asked to write a short essay about cats and dogs in a garden in New York—neither the prompter nor the trainer of the model knows anything in advance about the specifics of what it will say (beyond the prompt). Indeed, subtle variations in the wording of the prompt elicit differences in responses from the model; as do the same exact prompts at different times. The two related questions that obviously

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10 *Kelley v Chicago Park Dist* 635 F 3d 290 (7th Cir, 2011).

11 *Naruto*, *supra* note 8 at 418.

12 Johannes Schneider *et al*, "Foundation Models: A New Paradigm for Artificial Intelligence" (2024) 66 Business & Information Systems Engineering 221; Pengfei Liu *et al*, "Pre-train, Prompt, and Predict: A Systematic Survey of Prompting Methods in Natural Language Processing" (2023) 55 ACM Computing Surveys 195.

13 Marcus Arvan, "'Interpretability' and 'Alignment' are Fool's Errands: A Proof that Controlling Misaligned Large Language Models is the Best Anyone Can Hope For" (2025) 40 AI & Society 3769; Ignacio de Gregorio, "The One Mistake Everyone Makes in AI", *Medium* <https://medium.com/@ignacio.de.gregorio.noblejas/the-one-mistake-everyone-makes-in-ai-0d5a44df6c74> (27 August 2025).

emerge from this are whether such outputs represent copyrightable authorship, and if so, who the claimant to such authorship is.

Obviously, the unpredictable nature of the output suggests that the human agent involved—either the prompter or the model trainer—has only ever limited control over the creative process that produced the eventual output. This renders their claim to authorship seemingly suspect.[14] The model alone controls the specifics of the output. And as noted previously, copyright law has thus far been singularly unwilling to allow non-human actors to lay claim to copyright protection, either individually or collectively. The result is that such Gen AI-generated works come to be devoid of copyright protection and thus fall into the public domain, with the result that users are often hard-pressed to trace the provenance of these works for use and rights clearance.

This essay analyses the nature of this problem and offers a solution to it that has been hiding in plain sight. For quite some time now, US copyright law has recognised a "work made for hire" doctrine that situates authorship in an actor other than the one who directly produced/created the work, based entirely on the nature of the relationship between the parties (*eg*, employment). The doctrine and its underlying premise are often mistakenly presumed to be entirely based on policy considerations, and without a rational basis. As this essay shows, the work made for hire doctrine is instead rooted in an important analytical principle long known in the common law: vicarious causation, wherein one actor is seen as causally responsible for the behaviour of another and the consequences/results of such behaviour. The work made for hire doctrine, which originated in the common law, merely transplanted this principle to authorship and developed an idea herein described as "vicarious authorship". Vicarious authorship, understood in this way as a simple instantiation of the common law's expansive notion of causation, provides copyright law with a perfect mechanism through which to address the problem of copyrightability involving Gen AI-produced works.

As applied to Gen AI outputs, vicarious authorship would examine the level of engagement between the prompting human actor and the Gen AI model to ask if it crosses a minimal threshold—best described as the "threshold of expectation"—wherein the prompting actor can be seen to have initiated an inquiry through the prompt that triggered the model's output. Such an expectation is far from control or accurate prediction but nevertheless serves to exclude situations where the prompt is sufficiently open-ended to show an inadequate connection between it and the eventual output.

The argument of the essay is divided into four substantive parts. Part II briefly introduces the idea of authorship as causation, drawing on seminal case law on authorship, and the evolution of the doctrine. Part III then looks to the common law of torts to extract the idea of causation underlying vicarious liability, which it describes as the principle of "vicarious causation". Part IV then argues that copyright law's work made for hire doctrine deploys vicarious causation to develop a notion of vicarious authorship. This Part traces the origins of vicarious authorship in the common law, which the US copyright statutes then came to codify over

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[14] *Thaler*, *supra* note 3 at 1039-1040.

time. Finally, Part V takes the idea of vicarious authorship to show how it can be operationalised for Gen AI outputs, examining the level of interaction between the prompting human actor and the Gen AI model.

II. Authorship as Causation

Authorship is a nearly universal requirement of copyright protection. All the same, the concept is notoriously hard to define. At base authorship operates as the principal device through which copyright law connects the work attempting to obtain copyright protection, to the actor seeking such protection.[15] It does so by scrutinising the quality and amount of agency exhibited by the actor claiming copyright. And over time, the principal mechanism that the law has come to deploy in this inquiry—as it does in numerous other domains—is the analysis of *causation*.[16]

In the early English case of *Nottage v Jackson*,[17] the court was forced to confront this very question, when presented with a dispute as to the authorship of a photograph. Conceding that the question was "difficult" and without statutory guidance, the court went on to observe:

> The nearest I can come to is that it is the person who effectively is as near as he can be the cause of the picture which is produced—that is the person who has superintended the arrangement—who has actually formed the picture by putting the people into position, and arranging the place in which the people are to be. Although he may only have done it by standing in the room and giving orders about it, still it is his mind and action, as far as anybody's mind and action are concerned, which is the *effective cause* of the picture, such as it is, when it is produced.[18]

The "effective cause" of the work thus emerged as the principal measure for ascertaining the authorship of a work when authorial claims were contested. The standard soon made its way across the Atlantic, and came to be adopted by the US Supreme Court in its celebrated case of *Burrow-Giles Lithographic Co v Sarony*, where the Court embraced the idea that a photograph could be a work of copyrightable authorship under US law.[19]

All the same, in the years since, few courts (or legislators) have sought to articulate precisely what the causation standard for authorship entailed and required. Ironically, this omission was despite the very idea of causation being known to present complexities and disagreement in other areas of law where it is regularly

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15 The argument here builds on my prior work on this topic: Shyamkrishna Balganesh, "Causing Copyright" (2017) 117 Colum L Rev 1.

16 *Ibid* at 7.

17 *Nottage v Jackson* (1883) 11 QBD 627 at 632 [*Nottage*].

18 *Ibid*.

19 *Burrow-Giles*, *supra* note 9 at 61.

deployed, most prominently tort law.[20] Instead, the causal inquiry came to be masked behind different terms of action that denoted agency.

Of course, merely identifying the authorial inquiry as a causal one hardly solves the problem. Causation in the law is a multi-layered and complex concept.[21] As commonly understood, it is seen to embody two inquiries that are sequenced in order. The first is an epistemic one, sometimes referred to as "factual causation" or the "cause-in-fact" inquiry that asks whether one event/action may be seen as responsible for the production of the other, the one under scrutiny.[22] And the second is variously referred to as "proximate cause" or "legal causation" where the law then requires the decision-maker to ask whether the factual cause so identified ought to form the basis of liability/rights, based on largely normative considerations.[23]

Either unwittingly or implicitly, courts engaging in the authorship inquiry invoke not just the conceptual apparatus of causation, but its two-layered structure as well. Consider in this vein the infamous monkey selfie episode, captured in the decision of the Ninth Circuit in *Naruto v Slater.*[24] The case involved a well-known wildlife photographer, David Slater, who spent a significant amount of time and effort in the jungles of Sulawesi, photographing a family of macaques. On one occasion, he positioned his camera on a tripod in the forest and set it on auto-zoom and auto-focus. A particularly precocious primate (since named Naruto) approached the camera and upon hearing its motor whirring, began pressing the shutter button at close proximity, with the result that the camera captured a series of close-up photographs of the monkey's visage. When Slater sought copyright in the photograph, he was denied protection on the argument that the monkey—and not the human—had created it.[25]

Yet, the decision that the monkey had created the photograph was an unequivocally causal one. That conclusion was not that Slater was not a cause of the photograph, for he clearly was: but for his actions (in bringing, arranging, and setting up the camera), there would be no photograph, and his actions were clearly a necessary part of a set of sufficient conditions to produce the selfie. It was instead that even though he was a factual cause for the photograph, that was insufficient to constitute a legal (or proximate) cause sufficient to trigger protection. In the words of *Nottage*, it was not the "*effective* cause" of the photograph.[26]

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[20] H L A Hart & Tony Honoré, *Causation in the Law*, 2d ed (Oxford: Clarendon Press, 1985) at 130–132 [Hart & Honoré]; Leon Green, "The Causal Relation Issue in Negligence Law" (1962) 60 Mich L Rev 543; Richard W Wright, "Causation in Tort Law" (1985) 73 Cal L Rev 1735 [Wright, "Causation in Tort Law"].

[21] For recent work exploring this, see: Michael S Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford: Oxford University Press, 2009); Sandy Steel, *Proof of Causation in Tort Law* (Cambridge: Cambridge University Press, 2015) [Steel].

[22] Michael S Moore, "Causation in the Law" in Edward N Zalta & Uri Nodelman, eds, *The Stanford Encyclopedia of Philosophy* (Spring 2024 ed) <https://plato.stanford.edu/entries/causation-law/>.

[23] *Ibid s 2.1;* Andrew Summers, "Common-sense Causation in the Law" (2018) 38 Oxford J Leg Stud 793; Wright, "Causation in Tort Law", *supra* note 20.

[24] *Naruto*, *supra* note 8.

[25] It appears that the case did not involve a formal denial, rather a change in the US Copyright Office's practice manual that directly pre-empted the claim by covering it as ineligible. US Copyright Office, *Compendium of US Copyright Office Practices*, 3d ed (2021) s 306 [Compendium].

[26] *Nottage*, *supra* note 17 at 632.

III. Vicarious Causation

Accepting the premise that authorship is at its root about causation, in all its complexity, we now move to unravelling a wrinkle in the working of causation that has potentially far-ranging implications for authorship. Central to the causal inquiry in the law, identified early on by theorists of causation, is the reality that causation in the law is closely tied to its core goal: the attribution of responsibility.[27] Causation, in other words, is more than just a purely descriptive inquiry as it might be in other domains (*eg*, root rot caused the tree to fall over), but is instead motivated by the impetus to affix responsibility for outcomes in the world to human agents. In philosophical terms, outcome-responsibility is thus at the core of causation in the law.[28]

This focus on human agency infuses causation in the law with two inter-related analytical components: one, that the inquiry routinely seeks to trace the causal chain *through* non-human forces when there is a human agent involved; and two, that the chain is considered sufficiently complete when the earliest human agent is identified in the chain.[29] Thus, when thinking about liability for damage caused by a fallen tree, the causal inquiry in the law is never content with the mere identification of a biological cause (*eg*, root rot) for the event. It instead goes deeper and asks whether the human (owner of the tree) knew or should have known of this condition such that they might have taken steps to avoid the outcome—and thus be identified as the cause for the fallen tree. Even if it is not directly driven by the liability calculus, it is predicated on assigning responsibility, in a manner that lends itself usefully to the ultimate legal determination.[30] In other words, the causal chain (and notably, purely factual at this stage) traces itself through the biological cause to finding probable human agency. Relatedly though, it limits itself to the first plausible human agent (the tree owner) and doesn't go further through the human: the law thus does not—as part of the causal investigation—ask who the tree owner purchased the tree from or was relying on for information. The tree owner is seen as the human agent sufficient to complete the causal chain.

Causation in the law is thus fundamentally *anthropocentric*. All the same, there is an important set of situations where the law is willing to relax its focus on finding the first human agent in identifying the cause for an outcome. And this is the domain of vicarious liability, understood as situations where the law seeks to affix responsibility for an outcome that is causally linked to one human agent on to another, on the sole basis of the connection between the two agents. The paradigm situation of vicarious liability is to be seen in situations of *respondeat superior*, where a

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27 For an excellent treatment, see: Michael S Moore, "Causation and Responsibility" (1999) 16 Soc Phil & Pol'y 1.

28 Tony Honoré, *Responsibility and Fault* (Oxford: Hart Publishing, 1999) at 6.

29 Hart & Honoré, *supra* note 20 at 24 (calling such inquiries "attributive"). Hart elaborated on this further independently, and it appears to have originated in his idea of an "ascriptive" statement. H L A Hart, "The Ascription of Responsibility and Rights" (1949) 49 Procs Aristotelian Soc'y 171 [Hart, Ascription].

30 Hart, Ascription, *supra* note 29 at 190.

superior is held responsible for the actions of a subordinate, such as an employer-employee or principal-agent relationship.[31]

Vicarious liability in the law has been justified by scholars using different normative criteria. In each of these situations, the core idea has been that there remains a normatively defensible reason for shifting responsibility for an outcome from one actor to another. These reasons have ranged from the purely instrumental to the deontological/moral.[32] Yet, all of these justifications take for granted the causation question and simply assume that the law's overarching focus on the relevant normative criteria takes it in the direction of relaxing its approach to causation for vicarious liability, or of exempting vicarious liability altogether from a causal inquiry. Only a few have directly addressed the notion of causation at the root of vicarious liability.

The earliest effort to understand vicarious liability in terms of causation was in the work of the noted tort scholar Warren Seavey.[33] Addressing the argument that vicarious liability (more specifically, *respondeat superior*) lacked a clear normative justification, Seavey's argument begins by countering the argument that such liability lacks a causal basis.[34] Through a series of persuasive analogies, Seavey sets out to show that the doctrine can be understood as embodying the idea of the "master as a cause" of the harm.[35] "By entrusting an instrumentality to a servant who causes an injury by its use, a master has caused, in a reasonably direct sense, the resulting harm."[36] This instrumentality or transaction, forming the basis of the employment, links the master-servant relationship in an "intimate" way with the resulting injury.[37] In Seavey's understanding, the key to appreciating the causal connection lies not in constructing the counter-factual inquiry as whether the employee might have caused the specific injury independent of the employment, but instead in recognising that absent the employment, there would be no basis for the employee's commission of an injury, even if the specific injury (and victim) might have been avoided.[38] The difference is therefore seen to lie in the "assumption of control" that the employment relationship triggers in the employer.[39] While Seavey's account sought to mount a causation-based defence of vicarious liability, it in no way sought to extricate a new causal theory for the domain, instead preferring to show how the causal basis for the doctrine closely followed tort law's intuitions in other domains.

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[31] The two are commonly treated as synonymous, even though in principle they are not co-extensive. For the purposes of the present discussion, this taxonomical nicety is ignored.

[32] For examples, see: Harold J Laski, "The Basis of Vicarious Liability" (1916) 26 Yale LJ 105; Phillip Morgan, "Recasting Vicarious Liability" (2012) 71 Cambridge LJ 615 [Morgan]; William O Douglas, "Vicarious Liability and Administration of Risk I" (1929) 38 Yale LJ 584; Gary T Schwartz, "The Hidden and Fundamental Issue of Employer Vicarious Liability" (1996) 69 S Cal L Rev 1739.

[33] Warren A Seavey, "Speculations as to 'Respondeat Superior'" in *Harvard Legal Essays: Written in Honor of and Presented to Joseph Henry Beale and Samuel Williston* (Cambridge, Massachusetts: Harvard University Press, 1934) 433 at 433 [Seavey, "Speculations"].

[34] *Ibid* at 435.

[35] *Ibid* at 435-437.

[36] *Ibid* at 435.

[37] *Ibid* at 436.

[38] *Ibid* at 436-437.

[39] *Ibid* at 437.

The most notable modern effort to address the question of causation within vicarious liability is that of Alan Sykes, whose idea of "enterprise causation" attempts to identify a causal link by connecting the existence of the employer (principal) and the employee's (agent's) actions.[40] In this understanding, the employee's wrongdoing and the employer's existence are linked in a but-for chain by asking whether "the dissolution of the enterprise and subsequent unemployment of the employee would [eliminate] or reduce the probability of the wrong".[41] Given that Sykes's normative commitments are to the idea of economic efficiency and the development of a liability regime that ensures efficient resource allocation, he arrives at the conclusion that it is generally inefficient to impose (vicarious) liability on an employer whose causal connection to the wrong is non-existent.[42] These are situations where the dissolution of the enterprise would not have had any effect on the wrongdoing and no contractual incentive offered by the employer would have eliminated the wrongdoing.

To be sure, enterprise causation is created in the image of efficient resource allocation as its driving normative ideal. All the same, it builds on the idea of the employer (superior) being a but-for cause of the employee's (subordinate's) behaviour and sees that connection as a probabilistic one. But for the employer's existence (and thus the employment of the wrongdoer), would the employee have committed the wrong? Viewed through the lens of enterprise causation, vicarious liability imposes liability on a superior for a subordinate's actions only ever in situations therefore where—as an objective matter—the superior had the structural ability to either prevent the occurrence of the wrong or lower the probability of its occurrence.[43]

Noticeably, Sykes blends the two prongs of the causal inquiry in his idea of enterprise causation.[44] All the same, the key to enterprise causation is tracing the causal chain from the employee to the employer, thus allowing for the first human agent (the subordinate) to be seen as little more than an instrument in the ultimate wrongdoing of the second (the superior). It thus unequivocally breaks the commonly seen unwillingness of causation in the law to look past the first human actor in the chain and forces it to ask what the *real* role of the first human actor was in the ultimate result.

Particularly important in the concept of enterprise causation—as a variant of vicarious causation—is that Sykes conceptualises the true agency, *ie*, the motivational force for the behaviour at issue, to come not from an identifiable human agent, but instead the structural relationship between the actor and his employment.

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[40] Alan O Sykes, "The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines" (1988) 101 Harv L Rev 563 at 571 [Sykes].

[41] *Ibid* at 572.

[42] *Ibid* at 574.

[43] This theory of vicarious liability that focuses on enterprise risk has been adopted by a number of courts in the rest of the common law world, such as in the *United Kingdom and Singapore. Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 (SC, Eng); *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15 (SC, Eng); *Skandinaviska Enskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd and another* [2011] 3 SLR 540 (CA); *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 (CA); David Tan, "Enterprise Risk and Vicarious Liability in Singapore" in Paula Giliker ed, *Vicarious Liability in the Common Law World* (Oxford: Hart Publishing, 2022) 121 [Tan, "Enterprise Risk"]; David Tan, "Internalising Externalities: An Enterprise Risk Approach to Vicarious Liability in the 21st Century" (2015) 27 SAcLJ 822.

[44] Sykes, *supra* note 40 at 572-573.

Hence the focus on the "enterprise". There is thus a clear sense in which the analytical basis of the theory is rooted in de-emphasising the centrality of human agency and instead root the causality (either in part or in whole) in the idea of "employment". In some ways, this undoubtedly tracks the law's own emphasis on limiting such liability to actions committed within the "scope of the employment". In this understanding, the employment is causally responsible for the wrongdoing if the employment provided the employee with a reason—*ie*, motivation—for the wrongful act. The but-for inquiry is thus whether the employee would have committed the same act in the absence of the employment, which is typically answered in the negative when the action is squarely within the scope of the employment.

Greg Keating offers a version of enterprise liability that looks beyond efficiency, and attempts to incorporate considerations of "fairness" into the idea.[45] In his conception, enterprise liability (within which vicarious liability is a category) operates as a form of risk distribution by ensuring that enterprises which benefit from the imposition of risks and harms on society are compelled to bear the burden of those risks (and harms) as a *quid pro quo*.[46] Yet, central to the working of enterprise liability in Keating's reading is a move away from the traditional requirements of tort law, since

> [e]nterprise liability ideas direct courts' attention away from traditional questions about employee intention and employer authorization, and lead courts to ask whether a firm's activities significantly increased the risk of the kind of tortious wrongdoing committed by the employee in the case at hand.[47]

And critical to this move—driven by the idea's commitment to fairness for Keating—is the relaxation of causation. In the place of causation, enterprise liability uses simple outcome luck as the premise for liability. To Keating, this is far from arbitrary since the opposite, *ie*, predicating liability on the luck of actual harm rather than its mere possibility, has "no good reason".[48]

Keating's theory, however, becomes more nuanced when he examines the marriage of enterprise liability with vicarious liability. When the law moves from imposing liability away from the wrong-committing agent to the principal, he sees the causal inquiry being replaced with identifying the action as a "characteristic" of the principal's existence.[49] As he puts it:

> In a doctrine such as vicarious liability… the underlying tort whose imputation to the enterprise is at issue is governed by traditional criteria of causation … [b]ut the imputation of that underlying wrong to the enterprise is determined by asking if the underlying tort is *characteristic* of— rather than *caused* by— the firm's activity.[50]

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[45] Gregory C Keating, "The Theory of Enterprise Liability and Common Law Strict Liability" (2001) 54 Vand L Rev 1285 at 1286.

[46] Gregory C Keating, *Reasonableness and Risk: Right and Responsibility in the Law of Torts* (Oxford: Oxford University Press, 2022) at 271.

[47] *Ibid* at 266.

[48] *Ibid* at 291.

[49] See *ibid* at 272-275.

[50] *Ibid* at 291.

Keating's dichotomy between cause and characteristic is significantly more stark and rigid than it needs to be. Why can a characteristic not qualify as a cause? What the distinction appears to be getting at is the reality that there is a seeming immutability to one (characteristic) that is structural, while the other is capable of rapid alteration. All the same, there is no reason to presuppose that a structural characteristic cannot be seen as a cause since it is equally the product of some agency, even if only over a more extended time period. Thus, if the firm's activity is employment and the wrong is committed within the bounds of the relationship underlying that characteristic feature, the cause/characteristic dichotomy can be conceptualised as breaking down and the employment might well be seen as the cause. Now, to be sure, it is a relaxation of the "strict" causal principles seen in individual liability; but only in the important sense that it is willing to look beyond the first human agent and identify the structural embeddedness of that agency as the true cause. In this sense, Keating's account of causation in enterprise liability tracks Sykes's account even if it deploys different terminology.

While causation in the law therefore typically attempts to locate the relevant agency in the first human actor and thereafter refuses to treat human agents as instruments in the causal chain, vicarious liability remains an important exception. And contrary to common perception, it does indeed embody a causal inquiry: one that is tied to the existence, nature and scope of employment, which could be seen as providing the relevant agent with an incentive (and reason) to act in a manner that produced the relevant outcome.[51] The form of causation underlying vicarious liability is therefore best characterised as vicarious causation.

What is crucial to appreciate about vicarious causation is that it is more than just a basis for instrumentally-driven imputation of liability. In other words, the law does not just affix liability to the principal/employer in order to shift the loss but instead does so through an independent analytical basis for such shifting, which does of course fit its normative goals. And the principal-agent relationship and its contours supply that analytical basis. Further, vicarious causation continues to embody the two components—epistemic and normative—of the traditional causal inquiry in the law, even if they are seldom openly treated as such in its functioning.

At first glance, vicarious causation may seem to be little more than a blunt-edged instrumental for imputing liability. All the same, its structure embodies a nuance that is easy to overlook. The existence of a particular relationship between the parties, wherein one exercises a level of continuing supervision and plausible control over the latter, is an epistemic (or factual) question. The law of vicarious liability targets this question in examining whether there was an employment relationship (or its equivalent) connecting the parties in this supervisory matter. The inquiry is hardly a foregone conclusion in all cases, since the well-known distinction between an

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[51] For similar reasoning in vicarious liability decisions in the United Kingdom, Canada and Singapore, see, *eg*, *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 (SC, Eng); *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11 (SC, Eng) [*Mohamud*]; *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12 (SC, Eng); *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15 (SC, Eng); *Bazley v Curry* [1999] 2 SCR 534 (SC, Can); *Skandinaviska Enskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd and another* [2011] 3 SLR 540 (CA); *BNM (administratrix of the estate of B, deceased) on her own behalf and on behalf of others v National University of Singapore and Others* [2014] 4 SLR 931 (CA); *Ng Huat Seng and another v Munib Mohammad Madni and another* [2017] 2 SLR 1074 (CA).

employment relationship and the actions of an independent contractor are directed at precisely this boundary.[52] Once this threshold is crossed, the inquiry then asks whether the actions that produced the wrong (and its consequent loss) were committed within the bounds of that relationship of authority/supervision, or beyond it. This is the famed "scope of employment" inquiry in vicarious liability.[53]

In a certain sense, therefore, vicarious liability has the law ask whether the relationship (typically of "employment") was a reason for the wrong and harm, and then whether that relationship was sufficiently connected to the actions of the wrong-committing agent for the causal chain to be moved upward through the agent, to the principal. Even if the inquiry is rarely framed as a *causal* one, its embedded causal assumptions remain unmistakable.[54]

At common law, vicarious liability has only ever operated as a basis for independent liability, meaning that once the subordinate is shown to have committed the wrongful act within the course of employment, not only does the superior become liable for the result but the subordinate is also completely absolved of all responsibility at law. In theory, it is possible to combine the idea of vicarious liability along with a version of joint and several liability, through a form of apportionment. Such a regime would ask—tracking Sykes's framework—how much the presence of the employment relationship contributed to the probability of the wrong occurring and apportion liability on that basis. In such a construction, the causation at play would be a combination of vicarious and joint causation, since both superior and subordinate will be seen as contributing to the wrongful act and its consequences.

Two important additional variants on vicarious liability shed additional light on the working of vicarious causation. First, vicarious liability at common law is ordinarily seen as a strict liability doctrine. It therefore matters little what precautions or behaviour the employer exhibited. In these situations, liability performs little more than an indemnity function. We might also consider, though, situations where vicarious liability is made to depend on an employer's behaviour. Thus, if the employer is shown to have been negligent in the hiring decision, or in the provision of precautionary instructions to the employee, liability would hinge on such omissions rather than just the dormant scope of employment. Interestingly, in situations of vicarious liability outside the common law such models have begun to emerge. By focusing on the employer's own (negligent) actions, these doctrines pay less attention to the scope of employment. A good example of this in the US is private municipal liability, *ie*, situations where a municipality or government unit can be held liable for the actions of its employees when related to the employment (*eg*, police misconduct).[55] While the law allows for private claims of action, it limits them to situations where the municipality's conduct was the "moving force" behind the wrongdoing, which is a clear allusion to a causal link that the law demands.[56] And it seeks this link

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[52] Morgan, *supra* note 32 at 642 (describing the divide as a well-known and "binary" one).

[53] Thomas Baty, *Vicarious Liability: A Short History of the Liability of Employers, Principals, Partners, Associations and Trade-Union Members, with a Chapter on the Laws of Scotland and Foreign States* (Oxford: Clarendon Press, 1916) at 128.

[54] For a more recent account along these lines, see: Steel, supra note 21 at 114-115.

[55] Larry Kramer & Alan O Sykes, "Municipal Liability Under §1983: A Legal and Economic Analysis" [1987] Sup Ct Rev 249.

[56] *Monell v Dept of Soc Servs* 436 US 658 at 694 (Supreme Court of the United States, 1978).

by looking for a municipal policy, practice, or custom that the behaviour is rooted in.[57] For our purposes, we might see this as falling within the category of vicarious causation (even if not of vicarious liability in the strict sense of the common law).

Second, and relatedly, vicarious liability and causation do not need to have a strong (or permanent) structural relationship of the kind that enterprise causation looks for. It can additionally cover situations where the relationship is less permanent and more *ad hoc*, such as task-based principal-agent relationships. In these situations, the causal inquiry focuses less on the formal relationship between the superior and subordinate, and instead more on the way the authority came to be delegated, the terms of such delegation, and the way the delegation was exercised. This is often described as the independent contractor exception to vicarious liability; yet the hiring of an independent contractor can trigger liability when the task delegated was itself wrongful (*eg*, hiring a builder to commit a trespass), or where the hiring party's interference with the execution of the delegation compromised the presumptive independence. These too are situations of vicarious causation inasmuch as they treat the first human actor (the agent) as an instrument in the principal's causally significant conduct. The key difference is, of course, that the structure of the relationship is simply more tailored than an ordinary employment situation.

IV. Vicarious Causation in Authorship: Works Made for Hire

Having seen how the authorship inquiry in copyright law is effectively one of causation, and how causation in the law routinely allows for the identification of the behaviour of an actor who was not the first human agent as the real cause of the outcome, we are now in a position to ask whether authorship can accommodate a conception of vicarious causation. This Part answers that question in the affirmative as a descriptive matter. It shows how US copyright law already admits of this idea in its work made for hire doctrine, which is heavily reliant on the concept of vicarious causation to locate authorship in employers. The next Part extends this discussion to the question of authorship involving Gen AI.

The discussion below unfolds in two sections. The first locates the emergence of vicarious authorship—*ie*, the application of vicarious causation to authorship—in the common law of authorship, as developed by courts, independent of the statute. The second examines how the move came to be embodied into the statute's work made for hire doctrine as a seemingly uncontroversial principle. Taken together, the two sections attempt to show that the notion of vicarious authorship embodied in the work made for hire is more than just a statute-driven policy change, but instead one deeply rooted in principle.

A. *Vicarious Authorship at Common Law*

While the work made for hire doctrine is today thought of as a statutory doctrine in copyright law, its origins lie in the common law where it was developed by courts

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[57] *Ibid* at 694.

from the context of individual disputes and from first principles. And in this evolution, we see courts articulating a basis for the doctrine that is closely aligned with (if not directly derivative of) the concept of vicarious causation described previously.

At the risk of oversimplification, the account presented herein attempts to show that the work made for hire doctrine gradually evolved from a mechanism of shifting authorship based on the actual agency/contribution of the employer to one where such authorship came to be imputed based entirely on the relationship between the parties, typically one of employment. Vicarious causation, thus understood as little more than *causation deriving from a relationship*, soon became a staple of authorship embedded within the work made for hire doctrine.

1. *The common law of copyright in employment*

In her work examining the origins of the work made for hire doctrine, Fisk traces early opposition to the idea of employer authorship (and ownership) to the earliest US cases expounding the government edicts doctrine, *ie*, the rule that works created by individuals in their law-making capacity do not qualify as works of authorship.[58] In these cases, all of which examined the copyrightability of judicial reports of opinions, she finds early allusions to the idea that employees who prepared works using their own creative labour were to be identified as authors and owners thereof, rather than the employer.[59] Fisk's reading of these cases is a little speculative, especially in so far as none of them directly addressed the question of authorship in an individual who hadn't produced the work, but instead focused on the copyrightability of the expression as a threshold issue.[60] It is therefore unclear whether they evinced a deliberate commitment to employee authorship.

A pair of 1846 cases instead directly addressed the question, both decided in equity. *Pierpont v Fowle*,[61] decided by a district court in Massachusetts, involved a claim for infringement brought by a plaintiff who had been employed by the defendant to author certain books. The parties conceded that the defendant made minimal, if any, contributions to the book besides making suggestions in the realms of idea and plan. The defendant's principal defence was that copyright had been assigned to him, as a result of which he was entitled to renew the term as its author. Among the arguments advanced by the defendant was the fact that the UK Copyright Act (of 1842) conferred copyright in works on employers—rather than employees—when stipulated and performed for under a contract.[62] Recognising that this statutory position was a deviation from the traditional understanding of authorship, the court chose to treat it as changing the common law and not declaratory of it; demanded by the unique circumstances of certain contractual arrangements. It chose instead

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58 Catherine L Fisk, "Authors at Work: The Origins of the Work-for-Hire Doctrine" (2003) 15 Yale JL & Human 1 at 16-23 [Fisk].

59 *Ibid* at 16-23.

60 Shyamkrishna Balganesh, "Authoring the Law" (2021) 68 J Copyright Soc'y USA 353 at 361-372.

61 *Pierpont v Fowle* 19 F Cas 652 (CCD Mass, 1846).

62 *Ibid* at 660.

to unambiguously reaffirm the centrality of retaining authorship in the individual actually engaged in the production of the work:

> I am inclined to think it is a new provision… If such a mere hirer of another to write or compile was before entitled to the copyright, why was this act of Victoria necessary? And if such a hirer of others was entitled before to take out a copyright, how does this act encourage and aid genius? It rather aids those kinds of patrons, who fatten on the labors of genius.[63]

Copyright was therefore to track agency, and thus vest in the individual responsible for the production of the work.

Barely a few months later, a court in New York addressed the same issue. The case of *Atwill v Ferrett* involved a more straightforward claim of infringement.[64] The defendant opposed the claim by challenging the plaintiff's title to the work, on the basis that the pleading claimed that the work was "arranged, adapted, printed, and published by or for him" rather than being the product of his own labour.[65] The plaintiff's response was twofold: first, to invoke the maxim "*qui facit per alium facit per se*", which translates to "he who acts through another, acts himself", the principle at the root of vicarious liability;[66] and second, to invoke English law for the argument that the law allowed an employer to claim copyright on the basis of the labour of others.[67] The court rejected both arguments, preferring to distinguish the English cases. Yet, in the end it found for the plaintiff since it concluded that on the facts the plaintiff had himself contributed expression to the works at issue.[68] While *Atwill*, much like *Pierpont*, no doubt affirmed the default of employee ownership in US law, the plaintiff's reliance on a theory of causation that directly blurred the agent/instrument distinction is telling and suggestive of the vicarious authorship argument that would eventually emerge.

These cases and a few others affirmed a fairly uniform default commitment to employee retention of copyright.[69] The few cases that found the other way insisted on an express contractual arrangement between the parties before treating the employer as owner.[70] The idea that the employer might be treated as the *author*—let alone owner—based entirely on the employment relationship was thus still a far cry from this limited contractual transfer of ownership.

In Fisk's account, the period between 1860 and 1880 witnessed a change in this default, precipitated by three major cases all involving playwrights.[71] Two of the three involved the same work, *The Octoroon*, where the allegation was that a playwright had written the play when in the employment of a theatre company owned by

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63 *Ibid* at 660.
64 *Atwill v Ferrett* 2 F Cas 195 (CCSDNY, 1846).
65 *Ibid* at 197.
66 *Ibid* at 197.
67 *Ibid* at 197.
68 *Ibid* at 198.
69 See, *eg*, *De Witt v Brooks* 7 F Cas 575 (CCSDNY, 1861).
70 Fisk, *supra* note 58 at 30-32.
71 *Ibid* at 32-43.

the defendant, and thereafter assigned the rights in it to the plaintiff.[72] In *Roberts v Myers*, decided by a district court in Massachusetts, the assignee brought an action seeking to enjoin the defendant from performing the play without authorisation; the defendant responded that it was the owner of the play by virtue of its employment arrangement with the playwright.[73] The court dismissed this argument concluding that the playwright was not "employed as an author" but instead merely as a performer and stage manager, and thus his duties did not extend to the authorship of the play at issue.[74] While the decision preserved the employee's authorship in the play, it left open the door for copyright to vest in an employer in situations where (a) the employment was *for authorship* (*ie*, production of the work); and/or (b) the authoring of the work occurred as part of the employee's responsibilities.[75]

A short while after *Myers*, the playwright in the case brought an action against owners of a theatre company, alleging that the theatre had produced a very similar play that was substantially based on his protected original work, *The Octoroon*.[76] In this action, now for damages and brought in a district court in New York, the court in *Boucicault v Fox* had occasion to again consider the premise of the defendant's principal defence: that the plaintiff was not the owner of the work through the employment contract, and that it instead vested in the employer.[77] The court in *Fox* echoed the observations in *Myers*, noting that the contract was one for services and could "not be construed into a contract, conferring upon [the employer] the legal or equitable title to" the work.[78] Yet, it went on to elaborate on how such a conferral might be effected:

> A man's intellectual productions are peculiarly his own, and, although they may have been brought forth by the author while in the general employment of another, yet he will not be deemed to have parted with his right and transferred it to his employer, unless a valid agreement to that effect is adduced. Publishers, when they employ authors in particular literary enterprises, of course settle, in the terms of their contracts, the rights of each party and the ownership of the copyright. This was not the case of writing a book for publication and general circulation.[79]

Again, the nature and specificity of the employment relationship determined the outcome. All the same, in principle—under a well-drafted employment contract—the copyright could well vest in the employer, following the logic of both *Fox* and *Myers*.

The third case in this evolution emerged from a district court in Pennsylvania: *Keene v Wheatley*.[80] The case involved a claim for copyright infringement brought

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72 *Ibid* at 33.
73 *Roberts v Myers* 20 F Cas 898 (CCD Mass, 1860).
74 *Ibid* at 899.
75 *Ibid* at 899.
76 *Boucicault v Fox* 3 F Cas 977 (CCSDNY, 1862).
77 *Ibid* at 979.
78 *Ibid* at 980.
79 *Ibid* at 980.
80 *Keene v Wheatley* 14 F Cas 180 (CCED Pa, 1861).

by the proprietor of a theatre who had acquired the rights in a play from its creator in England. Thereafter, she used the assistance of one of her employees to make significant modifications to the play, which was later produced and performed without her authorisation by the defendants in their competing theatre.[81] Among the several issues before the court was the question whether the plaintiff could be regarded as the rightful owner of the modified play, since much of the modification was made by her employee, even if under her guidance and supervision.[82]

The court was unequivocal in its conclusion that she was the proprietor of the improvements and accepted the idea that the employment relationship was sufficient to vest the copyright in the employer.[83] Unlike both *Myers* and *Fox*, the court said surprisingly little about the nature of that contract: the level of specificity that it demanded, or indeed the manner in which the employee's responsibilities might need to relate to the production of the work at issue. It simply assumed that the employment was sufficient. And thus emerged a nascent willingness among courts to begin seeing the employment relationship as a basis for vesting copyright in the employer, predicated on an implied intent that the relationship was meant to embody.[84] Indeed, Oren Bracha in his influential history of authorship in American copyright law, observes that this was "[t]he most important doctrinal development in this area."[85]

It is to be noted that despite these early opinions exhibiting a clear willingness to vest copyright in employers, they never quite distinguished between authorship and ownership. Of course, this was understandable given that the principal consequence of authorship was title to the work, and thus a claim to the economic benefits therefrom. All the same, none of these early opinions described the employer's claim in each instance as a claim to authorship, even when they spoke of the employee's rights as emanating from the individual act of authorship. Whether this was deliberate or not, it certainly suggested the existence of a conceptual hurdle that had yet to be overcome.

2. *Drone and the move towards employer authorship*

It was not long before the idea that copyright could vest in an employer by contract took on a life of its own. While courts embraced the idea in dicta, they soon began applying—and extending its logic—to new situations, the most notable of which was the move from an express agreement to an implied (or tacit) one. These expansions were often without much explanation.[86]

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81 *Ibid* at 181.
82 *Ibid* at 186-187.
83 *Ibid* at 187.
84 See Fisk, *supra* note 58 at 43.
85 Oren Bracha, "The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright" (2008) 118 Yale LJ 186 at 253 [Bracha].
86 Fisk, *supra* note 58 at 44.

Against this backdrop of nascent rules, the leading copyright treatise of the nineteenth century, *Drone on Copyright*,[87] sought to extract some definitive guidance from the case law and distil their holdings into clear rules. While acknowledging that early cases found otherwise, Drone nonetheless saw the law as confirming an employer's copyright in situations where "he has employed another to write".[88] All the same, he qualified this general observation with a few additional and interrelated propositions. First, the mere existence of an employment relationship was insufficient to vest copyright; an agreement between them needed to specify or relate to copyright for such vesting to happen by operation of law.[89] This qualification was introduced to avoid employer ownership in situations where the employment was unrelated to the production of the work. Second, such agreement could be either express (and thus specific) or implied from the "terms and conditions of the employment".[90] The agreement therefore did not always need to be independent of the employment relationship: in a situation where an employee was hired to produce a work, even in the absence of specific agreement dealing with copyright the nature of the employment relationship indicated an agreement to cover the production of the work subject to copyright. Third, and finally, despite there being an employment relationship and an agreement, if an employee were to produce the work quite independent of his employment duties, the copyright remained with the employee.[91] Thus, an employee hired to produce a particular work (*eg*, a play) could retain copyright in another work (*eg*, a literary work) prepared completely outside of his employment duties. In many cases, this would of course be a question of degree and entail an explication of the appropriate scope of those duties; yet it represented a limiting principle of consequence.

Both Bracha and Fisk read Drone as confused and incoherent on the question of employer authorship, suggesting that he was unsure of the law.[92] Yet, if Drone's propositions are understood as a set of cascaded principles and limits—as detailed above—they appear workable, and bereft of any ambiguity that might interfere with their workability. Indeed, this reading is more in keeping with Drone's known tendency to overstate the existence of clear guidance in his explication of the common law of copyright.[93]

Perhaps more importantly, though, Drone concluded his discussion of the subject with an observation that was consequential and merits highlighting:

> A case might arise wherein a writer follows so closely the directions given by his employer that the creation of the work may be due to the mind of the latter, and *he may properly be regarded as the author.* But the employer cannot be considered *the author* when he 'merely suggests the subject and has no share in the

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87 Eaton S Drone, *A Treatise on the Law of Property in Intellectual Productions* (Boston: Little, Brown and Company, 1879) at 255-261 [Drone].

88 *Ibid* at 243, 255.

89 *Ibid* at 257.

90 *Ibid* at 258.

91 *Ibid* at 259.

92 Fisk, *supra* note 58 at 50; Bracha, *supra* note 85 at 258.

93 See Jessica Litman, "The Invention of Common Law Play Right" (2010) 25 BTLJ 1381 at 1410.

> design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed.'[94]

Quite telling in this statement is Drone's treatment—perhaps for the first time in the exposition of the topic—of the employment relationship as generative not of copyright, or of ownership therein, but instead of *authorship*. This was no mere accident, as made obvious by his reference to "originality" and the "mind of the person", ideas traditionally associated with the agency seen as essential to authorship.[95] In Drone's telling, an employment relationship might reflect the "mind of the" employer, such that it was sufficient to see the employer as the causal agent of the work, the work being "due to" the employer's mind.[96] And as a corollary, such situations permitted the employee's actions to be treated as mere instrumentalities of the agent's—more significant—causal contribution.

Drone was famous for having articulated an account of copyrightable authorship rooted in Locke's theory of labour.[97] Mental labouring was thus the key to copyright and authorship. Yet, embedded in the idea of such mental labour was the possibility that the moving force behind a creative work—the relevant cause for it—was more the mental than just the labour. Or, put another way, the mere human labour at issue could, even to Drone, be conceived of as a mere instrumentality in the creative process, with the true agency lying beyond it. As he put it, "[t]he produce of labor may become the property of him who has employed and paid the laborer."[98] The test of sufficiency for such cause was to be found in the assessment of the "character of originality" evinced by the work.[99] Whether workable or not, Drone had thus conceived of an unambiguous account of vicarious authorship, one that was tied to the employer's contribution of originality to the creation of the work through the employment relationship.

Drone's framing of the employer's entitlement in terms of authorship was very deliberate. His principal support for it was drawn from the English case of *Shepherd v Conquest*, where the court had found an employer's claim to copyright insufficient since the employer had "no share in the design or execution of the work".[100] Yet, the court in *Shepherd* spoke of the employer's claim (and correlatively of the employee's) as a claim to authorship, rather than just ownership, with the employee in the case arguing that "[t]he author is he who by the power of his mind and the labour of his brain gives form to the work".[101] Drone's account was undoubtedly therefore an account of employer *authorship*, wherein the employment relationship played an unstated—yet crucial—causal role in establishing the authorial claim of the employer.

To be sure, Drone should not be read as suggesting that the mere relationship (of employment) was sufficient to generate authorship, as the law would eventually

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94 Drone, *supra* note 87 at 259.
95 *Ibid* at 259 (quoting *Shepherd v Conquest* (1856) 17 CB 427; 139 ER 1140 [*Shepherd*]).
96 *Ibid* at 259.
97 *Ibid* at 3-8.
98 *Ibid* at 243.
99 *Ibid* at 259.
100 *Shepherd*, *supra* note 95 at 1147.
101 *Ibid* at 1145.

develop. While he can be read as endorsing (with some equivocation, perhaps) the idea of employer authorship, he did not altogether accept the idea of what would become vicarious authorship, *ie*, that authorship could be derived entirely and exclusively from the relationship. He clearly intended there to be some minimal agency on the part of the employer, one derived either contractually or through practice. All the same, by connecting employment to authorship—and not just ownership—he was giving the idea a distinctively causal dimension in a manner that had not been done before.

This shift to authorship in the discussion of employer copyright and its treatment as a causal question ("due to") was no mere coincidence. Around the same time as Drone's writing, English law was grappling with the meaning of authorship when presented with competing claims by different contributors to a protected work. In the famed 1883 case of *Nottage v Jackson*, the court was presented with a dispute involving a photograph of a cricket team, copyright in which was claimed by the plaintiff, a photography firm whose employees had arranged for and taken the photograph.[102] The question was whether the firm's owners—rather than their employees—were the authors of the photograph even though they had no involvement in its creation.[103] The court reasoned its way to answering the question in the negative, concluding that the owners were not "the effective cause of the picture", which was a question of evidence and fact.[104]

Nottage is today remembered for its causation-focused explication of authorship, something that the US Supreme Court came to endorse shortly after. Yet, at the heart of *Nottage*'s reasoning was not just an emphasis on identifying the "cause" of the work at issue but also a willingness to trace that cause through different human instrumentalities so as to identify a situation where the relationship between the actors (*ie*, one where the employer "superintend[s]" the production) may be seen as the effective—*ie,* vicarious—cause of the work, despite there being other human actors involved as instrumentalities.[105] Between Drone and *Nottage*, employer authorship thus emerged as the frame for thinking about employer copyright.

B. *Vicarious Authorship Codified*

While the idea of employer authorship was certainly beginning to take hold in judicial decisions, it was by no means the dominant approach at the turn of the twentieth century. Nevertheless, the 1909 Copyright Act introduced a startling change in the law that cemented the idea of vicarious authorship. The Act stated in no uncertain terms that the "word 'author' shall include an employer in the case of works made for hire".[106] Thus, not only did the Act come to endorse the work made for hire doctrine that rendered an employer the legitimate claimant to copyright in a work produced by an employee in the course of employment, but it did so by treating the

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[102] *Nottage, supra* note 17.
[103] *Ibid* at 630.
[104] *Ibid* at 632.
[105] *Ibid* at 631, 633.
[106] Copyright Act of 1909, ch 320, 35 Stat 1075, 1087 (US), s 62 [1909 Act].

employer not just as the proprietor of the work through an implied assignment, but instead as the very author of the work. In effect, the statute deemed the employer the effective cause of the work, and thus its author, cementing the idea of vicarious authorship and the identification of the employment relationship as the causal basis for the work.

The story behind Congress's introduction of this change reveals no considered endorsement of the new position. Much of the impetus for it appears to have originated in the Act's creation of a renewal term, which was limited only to "authors" or their heirs.[107] Publishers (and other potential assignee "proprietors") worried that they would now be at the mercy of the author's heirs and have to locate them, to effect a renewal. Their solution was to push for the treatment of employers—who would have otherwise had to rely on assignments to become proprietors—as authors of the work.[108] Authors' rights groups obviously objected to this move, and insisted on treating authors and proprietors as different in the statute, a move that Fisk notes was mostly driven by symbolism rather than economic self-interest.[109]

The Copyright Office, which had been spearheading the drafting, attempted a compromise and suggested language that proposed treating the work as "belong[ing] to the employer as if he were the author" absent any written agreement to the contrary.[110] This compromise was seen as unsatisfactory by employers and potential assignees, who saw the "as if" language as requiring judicial interpretation, which would introduce an added element of unpredictability. After some more objections, the Copyright Office introduced a bill that contained the language which would become the relevant provision of the 1909 Act, and somewhat surprisingly the bill came to be enacted into law with little debate or controversy.[111]

In Fisk's reading of the legislative history, this change was little more than a recognition—by both courts and legislators—that a pragmatic reading of the employment contract necessitated treating the employer as author.[112] In this account, the move bore little connection to the meaning of authorship, which was seen as a largely instrumental shift in terminology. What makes this reading somewhat surprising is the reality that the 1909 Act revision came on the heels of the *Burrow-Giles* decision described earlier, wherein the Court adopted a rather capacious conception of the authorship, drawing on the English decision of *Nottage*.[113] And it did so in the context of photography, and (much like in *Nottage*) in a situation where the arranger of the photograph was someone other than the actual photographer. Indeed, a deeper exploration of the drafting history behind the 1909 Act reveals that in 1906, a draft bill was introduced for consideration which sought to define as "author" as "[a]ny person who employs a photographer to make a photographic portrait" and "[a]n employer, in the case of a work produced by an employee during the

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[107] 1909 Act s 23; Seymour M Bricker, "Renewal and Extension of Copyright" (1955) 29 S Cal L Rev 23.
[108] Fisk, *supra* note 58 at 62-64.
[109] *Ibid* at 64.
[110] E Fulton Brylawski & Abe A Goldman eds, *Legislative History of the 1909 Copyright Act* (South Hackensack, NJ: F B Rothman, 1976) vol 2 at xxiv.
[111] Fisk, *supra note* 58 at 66.
[112] *Ibid* at 66-67.
[113] *Burrow-Giles*, *supra* note 9 at 60.

hours for which his salary is paid, subject to any agreement to the contrary."[114] The bill's emphasis on photography was no coincidence, and together with the clause focused on general employment, suggests *some* (even if not significant) advertence to the meaning and idea of authorship as more than just a conduit to protection.

Bracha provides a theoretical justification for this shift from employer authorship, which still involved a minimal commitment to employer agency, to full vicarious authorship which located the default in the employer.[115] He sees it as tied to the rise of the corporation in America, and with it a commitment to collective enterprise, a form of "corporate liberalism".[116] Regardless of reason, though, the truth remains that the 1909 Act moved the law into a full-blooded conception of vicarious authorship.

Following the enactment of the 1909 Act and its express provision treating employers as authors of the work, courts saw the move as wholly unproblematic.[117] Somewhat interestingly, some early decisions interpreting the provision saw it as merely distilling what had always been the law (judge-made) prior to the statute, thus suggesting that employer authorship was hardly a statutory novelty.[118] Yet, for the most part courts applying the doctrine did so in a straightforward manner and with few problems. The idea of vicarious authorship thus came to be cemented in place, especially in situations involving a formalised employment relationship that covered the production of the creative work. Such coverage was crucial, and when an employee produced a creative work at the request of the employer, but beyond the terms of the employment contract (and thus scope), the employee—rather than the employer—was held to be its author.

These early cases also confirmed the idea that the employer (principal) did not have to participate in any way or form in the actual production of the work at issue.[119] Consequently, all that mattered was the relationship between the parties, which was seen as normatively sufficient to remain causally responsible for the creation of the work. In other words, the working of the doctrine under the 1909 Act asked for no independent causation on the part of the employer; any causation was purely vicarious in the sense of deriving from the employment, and no more.

In due course, however, limiting the doctrine to formal employment relationships began presenting challenges. This was especially true in situations involving works produced under stand-alone contracts (commissions) and temporary employment situations that were constructed around the production of a work. The rigid focus on a formal employment contract placed these situations outside the purview of the doctrine, even though the principle underlying the doctrine seemed to demand extension.[120]

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[114] Conference on Copyright, Report, 3d Sess (1906) at 13.

[115] Bracha, *supra* note 85 at 260.

[116] *Ibid* at 260.

[117] *National Cloak & Suit Co v Kaufman* 189 F 215 (CCMD Pa, 1911) [*National Cloak*]; *Yale University Press v Row, Peterson & Co* 40 F 2d 290 (SDNY, 1930) [*Yale University Press*].

[118] *National Cloak, supra* note 117; *Yale University Press, supra* note 117; *Sedley Brown v Molle Co* 20 F Supp 135 (SDNY, 1937).

[119] *Shapiro, Bernstein & Co v Bryan* 123 F 2d 697 at 700 (2d Cir, 1941).

[120] Borge Varmer, "Works Made for Hire and on Commission", Study No 13 (April 1958), reprinted in (US), Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, US Senate, *Copyright Law Revision: Studies* 11–13 (Committee Print, 1960) at 130 [Varmer].

As a direct consequence, courts began interpreting the idea of employment in a more pragmatic fashion, and what emerged was a test that came to be called the "instance and expense" test for a work made for hire.[121] Now, to be sure the test did not play an analytical role in differentiating between authorship and ownership. Yet, it served to emphasise that the crucial anchor underlying the work made for hire doctrine's shift of authorship was a *causal* one.

The "instance and expense" formulation began to take shape in *Yardley v Houghton Mifflin Co*, which involved a dispute over copyright in a mural that had been commissioned.[122] Reasoning by analogy from ordinary and portrait photography, where the latter entailed an individual paying the photographer for the creation while the opposite was true in the former, the court held that the commissioning party had clearly motivated the production of the mural and paid for it on its own.[123] This, to the court, was suggestive of the intent to treat the work as a work made for hire and vest authorship in the commissioning party.[124] A few years later, *Sawyer v Crowell Publishing Co* affirmed this approach, and involved a copyright claim asserted by a government employee who alleged that the work produced bore no connection to his employment duties.[125] The court disagreed and found that even if it wasn't directly so connected, it certainly was driven by the employment since it was done on the employer's time and with the compensation that was part of the employment.[126] Cases soon came to adopt the position of the employer's default, such that unless there was a contrary intention (or agreement) suggesting that an employee was to retain copyright, it would automatically vest in the employer.[127] And in short order, this default morphed into the instance and expense formulation, which stipulated that the "copyright shall be in the person at whose instance and expense the work is done".[128]

The instance and expense formulation did two things at once. First, it reified the default of employer contract, since the test obviously favoured the employer. And second, it allowed for a dilution of the law's need for a formal employment relationship. As long as the creation was induced by a party—such inducement identifiable by a request/duty and compensation—that party was seen as causally responsible for it, to generate a claim of authorship. In *Brattleboro Publishing Co v Winmill Publishing Corp*, the court extended the doctrine to an independent contractor to find that a newspaper could not assert copyright in advertisements placed by local merchants, and which were copied by a competing paper.[129] The court used the doctrine to find that the advertisements were in no way induced by the newspaper, nor were they paid for by it.[130]

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[121] For a clear statement, see: *Siegel v National Periodical Pubs* 508 F 2d 909 at 914 (2d Cir, 1974).
[122] *Yardley v Houghton Mifflin Co* 108 F 2d 28 (2d Cir, 1939).
[123] *Ibid* at 30-31.
[124] *Ibid* at 30-31.
[125] *Sawyer v Crowell Publishing Co* 142 F 2d 497 (2d Cir, 1944).
[126] *Ibid* at 498-499.
[127] See, *eg*, *Grant v Kellogg Co* 58 F Supp 48 at 54 (SDNY, 1944).
[128] *Lin-Brook Builders Hardware v Gertler* 352 F 2d 298 at 300 (9th Cir, 1965).
[129] *Brattleboro Publishing Co v Winmill Publishing Corp* 369 F 2d 565 (2d Cir, 1966).
[130] *Ibid* at 567-568.

In essence then, the "instance and expense" formulation when coupled with the Act's codification of the work made for hire as a rule of authorship, served to operationalise the idea of vicarious authorship. Indeed, courts applying it readily used the language of causation and began treating the employee as causally secondary to the employer. The Second Circuit's decision in *Picture Music, Inc v Bourne, Inc*[131] is quite telling. The case involved a dispute wherein a musician who had been hired to produce an adaptation of an original song asserted a claim to copyright in it. In finding it to be a work made for hire, and therefore authorship to be vested in the hiring party, the court described the rationale for its doctrine as being "that the motivating factor in producing the work was the employer who *induced* the creation".[132] In applying it to the case, the court concluded:

> In short, the "motivating factors" in the composition of the new song… were Disney and Berlin. They controlled the original song, they took the initiative in engaging Miss Ronell to adapt it, and they had the power to accept, reject, or modify her work. She in turn accepted payment for it without protest, except as to the amount, for 27 years. That she acted in the capacity of an independent contractor does not preclude a finding that the song was done for hire.[133]

Indeed, developing the causal dimension of the test even further, one district court opinion applying the test emphasised the causal inquiry as being more nuanced:

> That the commissioning party be the motivating factor is not a 'but for' test — that is, but for the artist's employment the work would not have been created — but instead is a more narrow inquiry focused on the nature and scope of the parties' business relationship.[134]

The motivation was therefore to be understood certainly as a causal inquiry but hardly a true but-for one; and instead as a more complex one where it could be part of a broader set of circumstances that triggered the creativity, akin to what the causation analysis sometimes describes as the Necessary Element of a Sufficient Set ("NESS") test of causation.[135]

C. *Vicarious Authorship Forgotten and Entrenched*

As a precursor to the comprehensive revision of the copyright statute that eventually took shape in 1976, the US Copyright Office commissioned a study to understand the existing state of the law. That study, while concluding that the existing law

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[131] *Picture Music, Inc v Bourne, Inc* 457 F 2d 1213 (2d Cir, 1972).
[132] *Ibid* at 1216 [emphasis added].
[133] *Ibid* at 1217.
[134] *Siegel v Time Warner Inc* 496 F Supp 2d 1111 at 1139 (CD Cal, 2007).
[135] Richard W Wright, "The NESS Account of Natural Causation: A Response to Criticisms" in Benedikt Kahmen & Markus Stepanians, eds, *Critical Essays on "Causation and Responsibility"* (Berlin/Boston: De Gruyter, 2013) at 13.

worked satisfactorily, nevertheless recommended that Congress clarify the doctrine to make clear that it only ever applied to works created during the scope of employment.[136]

Perhaps more importantly, the study appears to have simplistically assumed that the choice of treating the employer as the author was an entirely "artificial" one, driven exclusively by the simplicity and efficiency of avoiding the need to differentiate between ownership and authorship.[137] And while this was undoubtedly true in part, it completely overlooked the reality that the 1909 Act's incorporation of the idea was driven by the existing case law, which as previously described, had come to see the underlying analytical basis of authorship—its causal dimension—as extending to relational causes, an idea that was only buttressed by the "instance and expense" doctrine.

When Congress eventually drafted the work made for hire provisions of the Copyright Act of 1976 ("1976 Act"), it spent little time examining whether continuing to treat employees as authors was analytically defensible. Instead, the statute simplistically provides that "the employer or other person for whom the work was prepared *is considered the author for purposes of this title*" [emphasis added], thus making it seem as though the title of authorship was playing a somewhat artificial role in this domain.[138] The legislative history accompanying the Act is similarly bereft of any engagement of this question, which Congress appears to have seen as merely continuing the prior position. And finally, courts—including the Supreme Court—that have considered the provision, and its nuances have sidestepped almost all discussion of the authorial dimensions of the work made for hire doctrine, preferring instead to develop mechanisms to render the test workable.[139]

Yet, despite this neglect, the analytical roots of the doctrine in authorship, *ie*, vicarious authorship, remain. In some ways, Congress's effort to treat the question as unexceptional (and thus unworthy of direct engagement) suggests something of a clear entrenchment and acceptance of the idea as part of copyright law's working defaults. Consequently, even if Congress did not openly endorse the logic of vicarious authorship in its drafting of the 1976 Act, its acceptance of the authorial logic underlying the provision, coupled with its rich genealogy in the common law, confirm its position as an accepted element in the modern US copyright law landscape.

V. Vicarious Artificial Authorship: The Threshold of Expectation

The work made for hire doctrine, codified as a doctrine of vicarious authorship in the 1976 Act, represents a rich lineage of the idea that can be traced back to judicial decisions pre-dating the Act of 1909. And to reiterate, the logic of such vicarious authorship is seen to lie in treating the agency-relationship at issue as the causal basis for the creativity that eventually forms the basis of protection. The relationship

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136 Varmer, *supra* note 120 at 141.

137 *Ibid* at 139.

138 17 USC s 201(b) (2020) [emphasis added].

139 *Community for Creative Non-Violence v Reid* 490 US 730 (Supreme Court of the United States, 1989) [*Reid*].

(*ie*, employment or commission) is seen as providing the inducement needed for the work and thus its very causal basis, in much the same way that individual human agency is seen as causally responsible for the attribution of individual authorship.

Vicarious authorship thus understood adopts a core precept of causation in the law, while it modifies another. First, it retains the need to locate final agency in a human actor rather than in purely epistemic considerations. This is in keeping with the principal idea that the motivation behind the very causal inquiry is the ascription of responsibility, *ie*, authorship, and thus the accompanying burdens and benefits. Second, it modifies the idea that agency cannot be traced through another human actor, by recognising that the agent/employee is to be treated as an instrument of the relationship in some sense complying with the core limiting and enabling features of the relationship.

This last point bears unpacking, since in this respect the work made for hire doctrine follows the identical pattern of vicarious liability in the law of torts. For the law to be willing to trace causality through a human actor (the agent) and attribute it to the originator of the relationship (the principal), it is crucial that the actor in question acts in the manner contemplated by the relationship and remain within its mandate. Human behaviour, especially in so far as it involves autonomous agents, is often erratic. When this occurs, the law seeks to ensure that the true causal basis for the action was indeed the relationship, rather than an independent basis originating in the human agent. And this is precisely what the "scope of employment" inquiry emphasises, not just in the work made for hire context but indeed well beyond. This Part argues that the logic for extending vicarious authorship to the outputs of Gen AI models derives from the working of the "scope of employment" limit in both the work made for hire doctrine and vicarious liability.

A. *"Scope of Employment" as Expectation*

All forms of vicarious responsibility hinge on the agent (or employee) acting "within the scope" of the agency relationship. Indeed, this has been foundational to the working of vicarious liability, ever since its origins.[140] One historical account of vicarious liability at common law notes how the idea had its origins in the "command" of the employer, and entailed courts asking whether the agent/employee was acting on the command (*ie*, directive) of the employer.[141] In due course, the command requirement came to be replaced by a more expansive one, namely the idea of "authority", which expanded the domain of liability.[142] By the eighteenth century, the common law had replaced both ideas with the "course of employment" inquiry, which is merely a synonym for the modern variant.[143]

In the modern formulation, an employee's actions that are outside the scope of the employee's responsibilities that flow from the employment relationship do not get imputed to the employer. The employee alone remains responsible for these actions and their consequences, whether they be good or bad. For the most part, the

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[140] See Warren Swain, "A Historical Examination of Vicarious Liability" (2019) 78 Cambridge LJ 640.
[141] *Ibid* at 644.
[142] *Ibid* at 644.
[143] *Ibid* at 645.

employment relationship has been seen as a limiting basis for liability in the common law, and little more. In this conception, it plays a role in merely circumscribing the outer bounds of the employer's potential exposure. When a delivery driver for a company decides to take the vehicle on a personal joyride and in that process injures another, the driver alone—and not the company—is seen as liable for the injury since the wrongful behaviour (the negligent driving) was committed outside the scope of the driver's responsibilities. In this example, the driver is seen as an autonomous agent and therefore beyond the control of the principal. This much is unexceptional and taken as accepted wisdom.[144]

The standard analysis of the scope of employment tends to therefore view it in *ex post* terms, as a limit on liability for an injury, once it has occurred.[145] In this analysis, it is seen as a device that does little more than allocate (albeit, in binary terms) responsibility between employer and employee and no more, once the act is committed. All the same, it can be usefully conceptualised in *ex ante* terms that comports with the way vicarious causation analyses the agency relationship.

Recall that the idea of vicarious causation posits that the agency relationship (*ie*, employment) is seen as causally relevant to the effect under scrutiny. That relationship is seen as motivational, or as inducing and driving the behaviour that produces the consequence being allocated. Such motivation/inducement is therefore treated as causally responsible, with the agent being identified as the instrument of the principal's actions in so providing the motivation. In our hypothetical, if the delivery driver had struck someone while making a scheduled delivery then the employment is in this conception seen as having motivated the driver to engage in the behaviour at issue and thus causally linked to it. The driver's autonomy is taken to be overridden by the dictates of the employment, which is treated as causally significant.[146]

The causal significance of the structure (relationship) emerges from the predictable pattern of outcomes (behaviour) that it produces, which in turn requires a degree of delineation. A relationship wherein the "scope of employment" is defined, produces—for the most part—predictable behaviour in the agent (employee) that comports with the dictates of that scope. Behaviour that is predictably traceable to the relationship and its contours as a cause then quite legitimately sets up expectations from an *ex ante* perspective.

Thus, the delivery driver who is employed by a company to make deliveries to customers can be predictably understood to engage in such behaviour on a regular basis, such that the very creation of the relevant relationship (the employment) is taken to generate a legitimate expectation that such behaviour will occur in the future once the relationship and its contours remain in existence. Quite importantly, the expectation of future compliant behaviour is heavily bound up with the scope of employment being sufficiently delineated. The contrast to the illustration above is a situation where the same company merely hires an individual as an employee, without further specification. This situation, by contrast, does not delineate the scope

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144 See *Joel v Morison* (1834) 6 C&P 501 at 503 ("[I]f he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."); see also John W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries*, 4th ed (London: Stevens & Haynes, 1916) at 96.

145 Glanville Williams, "Liability for Independent Contractors" (1956) 14 Cambridge LJ 180 at 194-195.

146 See *Hollis v Vabu Pty Ltd* [2001] HCA 44.

of employment and thus does not generate a legitimate expectation of behaviour as was the case with the driver-employee. In this sense, therefore, the scope of employment is directly tied to the expectation in behaviour that the employment is taken to be causally linked to.[147]

Disputes over the scope of employment in vicarious liability settings are therefore quite legitimately disputes over causality, even if rarely discussed as such. The *Restatement of Agency* (the "*Restatement* formulation") defines the scope of employment in terms of the "employer's control … [over] the course of conduct" and emphasises that it must "serve [the] purpose of the employer".[148] In explaining this emphasis on control, it further notes:

> An employer's ability to exercise control over its employees' work-related conduct enables the employer to take measures to reduce the incidence of tortious conduct. … In contrast, when an employee's tortious conduct is outside the range of activity that an employer may control, subjecting the employer to liability would not provide incentives for the employer to take measures to reduce the incidence of such tortious conduct. Moreover, for an employer to insure against a risk of liability, whether from third-party sources or its own assets, the risk must be at least to some degree ascertainable and quantifiable.[149]

In this understanding, the scope of employment requirement—understood through the measure of control—is entirely about expectations, which the employer can then insure and protect against. Absent such expectation (emanating from control), it would be difficult to see a causal link. The scope of employment therefore anchors an employer's control over the employee by defining the parameters of the activity, which allows for the employer's own agency (in employing the employee) to be seen as causally relevant. As Seavey famously put it, speaking of the scope of employment requirement,

> [I]f there is not this reasonably intimate connection between the employment and the injury to the third person, the master is not liable, a result which, using the language of causation, may be explained on the theory that the employment has so little connection with the final result that it may be disregarded.[150]

Asking whether the employee's actions were committed within the scope of employment is therefore quite centrally an inquiry into an employer's ability to have predicted and expected the behaviour that eventually produced the outcome at issue.

A nearly-identical logic is at play in the work made for hire doctrine, which also involves asking whether the work was produced in the "scope of … employment".[151] In operationalising the requirement here, courts adopt the *Restatement* formulation

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[147] For an early account of this position: Warren A Seavey, *Handbook of the Law of Agency* (St Paul, Minn: West Publishing Co, 1964) at 148 (defining scope of employment as based on the question whether "it can be said rationally that the employment is the primary cause of the tort") [Seavey, Handbook].

[148] *Restatement (Third) of Agency* s 7.07 (2006) [Restatement]. English law adopts a similar formulation. See *Mohamud*, supra note 51.

[149] *Restatement*, *supra* note 148, s 7.07 cmt b.

[150] Seavey, "Speculations", *supra* note 33 at 436.

[151] 17 USC s 101 (2020).

and ask if the work "is of the kind [the employee] is employed to perform, [whether] it occurs substantially within the authorized time and space limits; [and if] it is actuated, at least in part, by a purpose to serve the master".[152] In this framing, works produced as a hobby, outside of working hours, or unrelated to employment responsibilities, have been found to result in authorship remaining with the primary cause: the employee.[153] Only when within the course of employment, evincing employer control and at least a partial motivation to further the employer's purposes, does causality—and authorship—shift to the employer. Here too then, the delineation of the employment, *ie*, its "scope", is crucial to the causality since it is only when the employment is in "course" that the employee is predictably expected to generate creative expression that is ascribed to the employer owing to the relationship. When insufficiently delineated, or outside such delineation, the causality is weak and insufficient to shift authorship in much the same way as it works in vicarious liability.

The scope of employment inquiry therefore operates as an investigation into the extent to which the employer might have been able to predict (and thus expect) the behaviour of the employee at issue that produced the harm/benefit under legal scrutiny, and thus be causally responsible for it.[154] When the behaviour at issue was outside the scope of the employment, the law assumes that both the behaviour and its consequences were beyond the realm of expectation, thus breaking the causal chain. Quite importantly, the expectation relates not to consequences of the behaviour as such (the injury or creative work), but instead the behaviour alone, a point that will become relevant in dealing with Gen AI.

B. *The Threshold of Expectation for* ***Generative Artificial Intelligence Outputs***

As it currently stands, US copyright law insists on a human authorship requirement for works.[155] In the context of Gen AI outputs, this means that the copyright claimant will have to establish that any use of the Gen AI model in the creative process was merely as an "assisting instrument" and not that the model created the original expression in the work.[156] In *Thaler v Perlmutter*, where this standard was used to deny protection to a work that was autonomously produced by a Gen AI model, the court merely relied on the insufficiency of human agency as an explanation for its denial.[157] While the applicability of the work made for hire argument was raised by the claimant, the court simplistically dismissed it by arguing that the creating agent needed to be a "human being", a proposition for which it offered absolutely no support.[158] Applying the logic of vicarious authorship—embedded in the work

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[152] *Roeslin v District of Columbia* 921 F Supp 793 at 798 (DDC, 1995) [*Roeslin*]; *Avtec Systems, Inc v Peiffer* 21 F 3d 568 at 571 (4th Cir, 1994) [*Avtec*].

[153] *Roeslin, supra* note 152 at 798; *Avtec, supra* note 152 at 571.

[154] This appears to be the general position in other common law jurisdictions as well. See also Paula Giliker, "Vicarious Liability in England and Wales" in Paula Giliker ed, *Vicarious Liability in the Common Law World* (Oxford: Hart Publishing, 2022) 47; Tan, "Enterprise Risk", *supra* note 43.

[155] Compendium, *supra* note 25, s 306.

[156] Compendium, *supra* note 25, s 313.2.

[157] *Thaler*, *supra* note 3.

[158] *Ibid* at 1051.

made for hire doctrine—to the outputs of Gen AI models provides the law with a way out of the authorship conundrum.

The answer lies in treating creative works produced by a Gen AI model as a work made for hire, wherein the model is the instrument such that authorship gets vicariously imputed to the individual engaging the model in its production. In some ways, the work made for hire doctrine is a natural fit for thinking about authorship involving Gen AI models, for the principal reason that it remains the one clear domain where copyright law has been willing to relax the human authorship requirement, albeit for corporations.

Recall that the biggest challenge in treating the human initiating a creative work produced by a Gen AI model as its author lies in the sheer unpredictability of the output. Indeed, this is a feature of the model rather than a demerit, since it is in this autonomous unpredictability that makes the model "intelligent". And this autonomy has in turn been traditionally seen to break the chain of causation to trace it back to the human initiating the output. Yet, it is the work made for hire doctrine that has proved to be the basis by which copyright law's idea of causation rather perfectly accommodates (and discounts) the autonomy of the agent acting as the instrument.

Indeed, there is no denying that in a work made for hire situation, the agent involved in producing the work (the employee) is of course in an abstract sense autonomous. Yet, that autonomy is seen as overridden by the employment (or principal-agent) relationship for causal purposes. It is not that the autonomy is presumptively eliminated such that it renders the agent a pure instrument; it is instead that the relationship is seen as replacing the predictability of the outcome with the predictability of behaviour, wherein the relationship merges with (rather than replaces) the agent's autonomy. The key to understanding this lies in seeing that the paradigm case of the work made for hire is the situation where a publisher (*eg,* a magazine) employs staff writers and tasks them with producing articles for the publication on different topics. When the publisher tells a staff writer to produce an article on an identified topic (*eg*, the future of handwriting, or the effect of cell phones on children's reading habits), the publisher has little idea what exactly the staff writer will produce, beyond the broad contours of the idea. The employee-writer is fully expected to utilise his/her creativity and research skills to produce an output (the article) that is compliant with the task. *The writer's autonomy—in the creative process—is hardly eliminated; it is instead blended into the expectation produced by the task that in turn flows from the employment relationship.*

The causal investigation underlying authorship in the work made for hire context is therefore readily detached from the idea of predictability. It is almost never the case that an employer (or hiring party) knows exactly what the employee or hired party will produce upon the instructions. Yet, the law is comfortable with this level of unpredictability, which it sees as an innate reality of the agent's autonomy in a vicarious setting. What the law instead concerns itself with most directly is whether there is a sufficient nexus between the relationship (employment/commission) and the final output, a connection that is not scrutinised for the predictability of its specific content, but instead for whether it was an *expectation* based on the nature and terms of the relationship. And this is precisely what the "scope of employment" or "instance and motivation" inquiries attempt to do.

Thus, when an employee who was hired as an economist, produces a software program at home when away from work, and later uses it for work-related tasks, the law finds the software program to be authored by the employee and not the employer.[159] Since the scope of employment was for work as an economist and not as a programmer, and done outside the employer's business hours, it was reasonable to conclude that the employer had no expectation that an economist-employee would produce software code. At its roots then, the scope of employment inquiry looks at the *ex ante* expectation that the relationship produced, to establish a causal link to the work (or indeed, a lack thereof).

Therein lies the key to the authorship puzzle involving the outputs of Gen AI models, under the rubric of vicarious authorship. In a manner largely tracking the inquiry in the regular work made for hire context, the law should endeavour to examine whether the output at issue might have been legitimately expected based on the interaction between the human and the model. The basis for this engagement is not some abstract relationship, but instead measurable in the "prompt" used to trigger the output. A rather well-established feature of Gen AI model engagement, prompting refers to the process of altering the content, tone, and substance of an inquiry made to a Large Language Model ("LLM"), with the goal of ensuring a certain kind of output from it. Prompting in many ways parallels the working of the employment relationship, in that it directs the agent's autonomy in a certain direction, even while affirming that autonomy and recognising the unpredictability of the specific output. Consider in this respect the nature (and amount) of control an employer/hiring party has over a writer tasked with writing a short story about a specific topic, set in a certain era and time, and no more. Prompting the Gen AI with this inquiry is no more—and certainly no less—determinate and predictable than doing so for a human agent, where the work made for hire doctrine is perfectly comfortable with vicarious authorship.

Assessed through the lens of the human prompts producing it, was the output—in form and kind—generated by the model, to be sufficiently expected? This should form the anchoring analysis for the attribution of authorship to the human principal triggering the model for the output. To be clear, this is not a mechanistic inquiry into simplistically assessing the existence of a human actor prompting the model. It is instead a scrutiny into the level of direction given to the model by the prompt, to examine whether it crosses a minimal threshold (sufficiency) in much the same way that engaging a human agent to produce an output under vicarious authorship would suffice. The key thus lies in accepting the autonomy of the agent (model) but asking whether the channelling of that autonomy in a particular direction renders the joint task sufficient to qualify as a cause of the output—and thus shift authorship to the human actor. In each instance, the inquiry will have to assess whether the agent's autonomy was sufficiently directed to generate a reasonable expectation that mimics one that might be expected from a human. Indeed, in most instances this is likely to be an iterative process where the prompting is sequential and refines an output over an extended set of interactions. Consider in this vein, the following interaction with an actual model:[160]

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[159] *Roeslin*, *supra* note 152 at 799.

[160] Conversation with Gemini Pro, 5 March 2026.

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                                Prompt 1: Write me a 3-line haiku

Response 1
Golden sun descends,
Quiet shadows stretch and grow,
Stars begin to wake.

         Prompt 2: Write me a 3-line haiku about trains in NYC

Response 2
Steel tracks hum below,
Rushing through the dark tunnels,
City pulse beats on.

    Prompt 3: Add some specific references to NYC subway stops

Response 3
Grand Central rush,
Switching to the Four or Five,
Next stop: Union Square.

 Prompt 4: Maybe indicate something about how gritty the trains
                                                              are

Response 4
Rust on iron beams,
Screeching brakes at Canal Street,
Grime masks silver skin.
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Turning back to our anchoring question—centred around the threshold of expectation—and applying it to this interaction, we see that Response 4 very likely meets the threshold. Produced as it was through an iterative interaction between the prompter and the model, the nature and direction of the output was reasonably expected, considering the instructions. The same is likely true of Responses 3 and 2, since the prompting added specific content to the output and in a sense directed it through specific instructions. Response 1 presents a closer case. In one sense, the output (a haiku) was expected, since that was what was asked for. Yet, the expectation does not appear to transcend the level of autonomy that the model continued to have over the output as reflected in what it produced. Sure, the model did not just produce random text; it produced a haiku as instructed. All the same, this illustrates that the expectation is not just a bare one ("write me something") but needs to meet a threshold that is seemingly directed by the prompting. Response 1 and the prompt that generated it do not appear to meet that threshold, especially absent a prior interaction over haikus and what they mean to the prompting human.

These illustrations are meant to reveal a few things about the threshold of expectation as a rubric through which to understand how vicarious authorship might attach to the outputs of Gen AI models. First, that it is a question of judgment since it entails a binary determination (yes/no to human authorship) using a scalar variable (sufficient expectation). Yet, judgments of this kind are hardly new to copyright or the common law, and over time they invariably come to produce a degree of workable regularity that will allow for greater certainty in the working of

the test.[161] Second, and perhaps more importantly, the test will remain a judicially-managed one that can be operationalised through the current statute without a statutory amendment. Indeed, the Supreme Court readily expanded the idea of "employer" in the statute's work made for hire clause to encompass a plethora of principal-agent relationships that go well beyond a formalised employment;[162] and that same logic would now readily allow for the expectation rubric to be used through the idea of employment as well.[163]

While the work made for hire doctrine thus came to embody the idea of vicarious causation in constructing vicarious authorship, the threshold of expectation inquiry would for Gen AI outputs now do no more than extend it to *vicarious artificial authorship*.

VI. Conclusion

The meaning of authorship in copyright law has long remained something of a mystery: signifying a measure of connection between the work and its creator. Over time, that connection has rightly been expanded and come to be anchored in the idea of causation. Yet, causation—as a concept in the law—comes with its own complexities and nuances, not all of which the understanding of authorship has fully grappled with. Vicarious causation, the law's willingness to see causality based on a relationship rather than an action in isolation remains one such nuance. All the same, as argued herein, the work made for hire doctrine (a shortcut for the idea of employer authorship) emerged out of the common law's gradual absorption of the vicarious causation into the concept of authorship.

Vicarious authorship, thus understood as instantiated in the work made for hire doctrine, presents copyright law with an eminently workable vehicle through which to solve the AI authorship conundrum, a debate that has thus far lacked much creative thinking. This solution has the added advantage of requiring minimal change in the existing law, and little more than a willingness among courts to think pragmatically and analytically in applying copyright doctrine. Whether or not they accept the challenge remains to be seen.

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[161] Shyamkrishna Balganesh & Gideon Parchomovsky, "Structure and Value in the Common Law" (2015) 163 U Pa L Rev 1241.

[162] *Reid*, *supra* note 139 at 740.

[163] It is debatable whether and to what extent a court operationalising the test herein will have to see itself as modifying the law, rather than simply extending what exists right now to the context of AI outputs.