

## **Attribution Within Organizations: Crediting Work in the Context of Anonymous Authorship at the J. Walter Thompson Advertising Agency, 1920-1980**

Catherine L. Fisk\*

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In 1957, Howard Kohl, a senior executive of the J. Walter Thompson Company – then the largest advertising agency in the United States – sent a memo to members of the New York office of the firm. The memo was one in a decades-long series of company efforts to bring professionalism and efficiency to the management of the creativity involved in advertising. The J. Walter Thompson Company, or JWT as the firm had come to be known, prided itself on having in the 1920s and 1930s modernized the business of advertising. Company lore claimed that JWT had played a crucial role in transforming nineteenth-century hucksterism into a modern profession through the application of science to marketing and the cultivation of modernism in art and design.<sup>1</sup> Advertising was both an agent and a site of the dramatic twentieth-century changes in the nature of cultural production. Ad agency employees participated in the commercialization and bureaucratization of the creative process even as they created advertisements that defined the popular meaning of creative work. Kohl's memo is quite revealing of how self-described modern managers tried to control the relationship between creative people and their work. The memo's interest is enhanced by the fact that the profound changes in the relationship between copyright proprietors and authors during the twentieth century were brought about in part by the anonymous workers on Madison Avenue whom the memo discussed.

At JWT, an account representative was in charge of relations with the client and was to coordinate the work of the many “creative” specialists – writers, artists, market researchers – to design an overall ad campaign. Kohl's memo took aim at the way that account representatives used “creative” specialists in interacting with clients. “A practice has been growing up in recent years which does not serve the best interests of the client and

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\* Chancellor's Professor of Law, University of California at Irvine. I am grateful to Duke Law students Josh Mayer and Sowmya Krishnamoorthy for superb research assistance, and to the archivists of the Hartman Center for Sales, Marketing, and Advertising in the Perkins Library at Duke University and to the JWT Company for assistance and permission to use materials in the JWT collection. All citations to JWT records are to those in the Perkins Library. Although this is an early draft, I am already indebted to Paul Saint Amour, Nan Goodman, Jane Anderson, Dick Langston, Andy Russell, Ariela Gross, Clyde Spillenger, Hilary Schor, Amy Adler, Nomi Stolzenberg, Jennifer Mnookin, Seana Shiffrin, Susan Sterrett, and Erik Zitser for thoughtful advice and generative conversations. A version of this paper will be published as a chapter of *Modernism and Copyright* (Paul Saint-Amour, ed., forthcoming from Oxford University Press, 2009).

<sup>1</sup> The memo was from Howard Kohl, longtime senior executive of JWT, to Winfield Taylor, a senior executive at the New York Office. Colin Dawkins Papers, Box 2, Howard Kohl File. On the role of JWT in introducing professionalism and “science” into advertising, see Robert Haws interview, Nov. 18, 1964 at pp. 1-2, Bernstein Company History Files, Box 1; Biographical File on Paul T. Cherington, Bernstein Company History Files, Box 4; *JWT News*, Feb. 1984, Bertram Metter Papers, Box 2. *JWT News* was the company's internal newsletter.

ourselves and can be dangerous to the well-being of the company”: namely, “the tendency of Representatives to use creative people and specialists in daily and regular contact work with our clients.” Besides coordination, the Representative’s job was to present to the client “our completely objective viewpoint.” Direct contact between the client and the writers “is certain to have an effect on their objectivity – brings undue subjective pressure upon them. The Representative should be a buffer between client and agency, should serve as a filter of the client’s subjective points of view.” The loss of “objectivity” was not the only hazard: “In addition, the fine work of a creative man or specialist can, on occasion, be rendered ineffective or unusable because of personality problems.” Moreover, there was the loss of efficiency: contact between writers and clients would reduce both “the time creative people and specialists have available for actually producing and working on the problem” and “the number of problems creative people and specialists can work on” which would “obviate their ability to bring a broad experience and the invaluable stimulation that comes from working on a variety of problems.” And, finally, there was the matter of authority: the Representative would “reduce his value to that of a messenger boy if he places on others the major responsibility in presenting the agency’s work.”<sup>2</sup> In advertising – an economic sector in which the firm’s “assets ride down the elevator every night”<sup>3</sup> -- the key to success is the wise management of creativity. Both professionalism (“our completely objective viewpoint”) and efficiency (“the time creative people have available ... for actually producing”) demanded it.

Kohl’s memo reflects three important ways of thinking about the nature of creative work in a commercial and employment context. First, to be a professional, even in the world of writing and design, was to remove the idiosyncrasies of personality and individual point of view from the work process and product; to be a creative professional was to equate the “author” with “the firm” by attributing all individual work to the firm. Second, efficient workplace management demanded a sharp division of labor between creativity and management, an adaptation of Taylorist “scientific management” to creative production. Third, the success of the firm depended upon managers maintaining control over the creative workers. In these three respects, Kohl’s memo articulated the classic management theory of the twentieth-century office or factory; Kohl assimilated the manufacture of ideas, text, images, and sounds into the dominant system for manufacturing cars or managing finance.

Yet, alongside the effort to exert bureaucratic control over the creative process and its products, there was also the fact that talent and creativity in every aspect of advertising – research, conceptualization, writing, layout, photography, and design – were quite personal and not everyone possessed them in same degree. Total bureaucratic control over the creative process and a careful effort by the Representative to be sure that the firm rather than individual “creatives” were seen as authors of creative work affected how creative people felt about themselves. Working in a “storyboard factory” is how one writer described it.<sup>4</sup> Others complained about feeling “lost” in a large firm, and about just

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<sup>2</sup> Memorandum from Howard Kohl to Winfield Taylor, 3/8/1957. Colin Dawkins Papers, Box 2.

<sup>3</sup> *Breaking the Rules at JWT*, p. iii. Bertram Metter Papers, Box 2. *Breaking the Rules at JWT* is a manuscript written by Metter, who was \_\_\_.

<sup>4</sup> Thomas Naegele to Dan Seymour, p. 5, Dan Seymour Papers, Box 2. Dan Seymour was the head of the JWT Los Angeles Office.

churning out ideas, artwork, or texts, sticking them in the out box on their desk each day, and losing all connection with their work.<sup>5</sup> During the same year that Howard Kohl sent his memo urging that creative people be kept away from client meetings, other JWT executives were trying to figure out how to give talented staff more recognition because they were “deserving of greater publicity.” One proposed that more public appearances by creative staff could improve the company’s overall reputation for creativity and could reduce the alienation of some creative staff. Bill Day, a company executive who eventually left to form his own agency, said: “[I]f we become large at the expense of the individual’s pride in himself, in the perfection of his own individual powers, will reach a stage when the individual either is not happy in this organization, or when the organization is unable to attract the kind of individuals necessary to its perfection. It seems to me that if we become larger, we shall have to stress individual progress, individual cultivation of individual talents, very much more than we have been stressing them during the past four or five years.”<sup>6</sup> In this view, creative work could not be assimilated into the model of manufacturing or office work, and Taylorist production ruined the essence of creativity. If professionalism were defined as obscuring the originator of ideas from public view, then creative work could not successfully be professionalized.

These 1957 memos and other office correspondence leave the impression that, in the same firm at the same time, professional writers, artists, and designers should be both more visible and less, more closely identified with their work and less. In short, ad agency writers should be more like a modern author and more like a modern professional. They illustrate the ambiguous position of the author in the world in which creativity increasingly was exercised in paid employment, not an independent expression of individual genius.

In both legal and literary studies, there has been an abundance of work studying the relationship between law (usually copyright law) and the concept of the author of a literary work. Scholars have tended to focus on the relationship between the creator of a work and the ownership of property rights in the work. This scholarly focus has been incommensurate with the relatively small percentage of twentieth century creative people whose efforts were rewarded through copyright ownership. Once we realize that much of modern creativity is exercised in an employment setting in which creators sign away their rights in their work as a condition of hire, we can see that attribution of work, rather than ownership of the intellectual property represented in it, defines the modern connection between most creators and work of all kinds. Modern authorship is a socio-legal concept formed not only, perhaps not even principally, by the actual work of creating or by copyright law’s dubbing some creator as an author. Rather, modern authors (both the literary ones and the quotidian ones who worked at JWT) created themselves through social and legal processes through which individuals and firms were *recognized as being* authors. Like the working class in E.P. Thompson’s description, modernist authors were present at their own creation.<sup>7</sup>

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<sup>5</sup> Memo from Elton to Strouse and other executives, 1957, and “Program for Growth and Development,” JWT Company Policies File, Wallace W. Elton Papers, Box 1.

<sup>6</sup> This quote is drawn from the unpublished manuscript written in the late 1970s and early 1980s by another JWT vice president, Colin Dawkins, *Ain’t It Hell on a Windy Day*, pp. 281-82. The manuscript is found in the Colin Dawkins Papers, Box 22.

<sup>7</sup> E.P. Thompson, *The Making of the English Working Class* (New York: Vintage, 1963) (“The working class did not rise like the sun at an appointed time. It was present at its own making.”)

This paper will use the work relationships of creative employees at the JWT agency to explore the interrelation of dominant features of twentieth-century authorship and the way that law shaped the nature of creative work. First, because law enabled employers to claim ownership of a huge swath of cultural production, those who created work saw attribution of the work, not ownership of it, as the real meaning of authorship. Notwithstanding modernism's insistence on the sharp divide between art and mass culture, the relationship of attribution and authorship sheds light on the meaning of authorship in literary modernism. The equation of attribution and authorship and the other meanings of authorship are described in the first section of the paper. Second, social relations – including economic hierarchy and, interestingly, gender segregation, within the bureaucratic culture of JWT became very important in determining how work was attributed. The cultural practices of attribution within JWT are the subject of the second part of the paper. Third, having traced out the patterns of interference between the modernist notion of authorship and the work practices of Madison Avenue cultural production, the third section of the paper will explore the implications of my description of attribution for some of the late twentieth century debates about the legal meaning of authorship. Finally, I will suggest in the fourth part of the paper that the tendency to propertize authorship – which became a tendency to propertize attribution – led to the late century blurring of the distinction between authorship of art, authorship of persona, and celebrity. In sum, the paper argues that in the world of commercial cultural production, authorship was an unstable blend of individual and collective creation and attribution. What authorship meant was determined largely outside the purview of copyright law, and often outside any other formal law, and it bounced endlessly back and forth between the individual and the corporation.

### **Three Views of Authorship**

In the twentieth century, authorship came to mean three separate things. While it is common and sometimes helpful – for some purposes -- to conflate the three, it is also important to remember the distinctions among them. First, an author is an originator. Second, an author is one who is recognized as being the originator (this is what I call attribution). Third, under the work-for-hire doctrine, an author is the one who owns the copyright on account of having employed the originator. The three meanings often became intertwined in one general concept which eventually became known as celebrity – being well known as a creator, which became a valuable form of social identity and eventually led to an idea that one could own one's own reputation for being creative. The celebrity is recognized as the author of a recognized self. The nature of the creative work often varied in terms of the amount of work and the degree of creativity involved – being the originator of an idea for an advertising campaign is different from writing a novel; composing a jingle is not composing a concerto.

In the early and middle decades of the twentieth century, creative work in the production of texts, images, and sounds – that is, the work of authorship – increasingly occurred as part of a commercial enterprise. While both literary and legal discussions of authorship still imagined the author as a creative genius working alone in a garret, café, or studio – Joyce, Woolf, Picasso, Le Corbusier, Schoenberg – the great bulk of people producing creative works eligible for copyrights were employees working for hire in offices and workshops. By 1909, the law was settled that the employees working for hire were not

“authors” of their works in the legal sense. Their employers were the authors of their work.<sup>8</sup> Of course, if you left the lawyer’s office and asked a person on the street what it means to be an author, she would say it is to create or originate, and that is all. But to those employed by companies, like JWT, who were hired to produce copyrightable works, to be an author was both to be, *and* to be regarded as, the originator of a work. The combined effect of the work for hire doctrine of copyright law and the bureaucratic employment practices in collaborative creative settings like an ad agency transformed authorship into internal corporate recognition.

In the early- and mid-twentieth century, modernism in literature and the arts insisted on a vision of the creative process and on a notion of the author at odds with the increasingly collaborative and commercial nature of the process by which many texts, images, and sounds were being produced. Modernism defined itself as being distinct from Madison Avenue; Andreas Huyssen called it “the Great Divide” in the twentieth century arts. Modernists harbored an “obsessive hostility to mass culture” and “insist[ed] on the autonomy of the art work.”<sup>9</sup> The modernist critic and booster Clement Greenberg’s famous essay, “Avante Garde and Kitsch,” insisted on the separation of Modernism and Madison Avenue and dismissed as kitsch the kinds of collective creation that occurred at JWT, including what he deride as “popular, commercial art and literature with their chromotypes, magazine covers, illustrations, ads, slick and pulp fiction, comics, Tin Pan Alley music, tap dancing, Hollywood movies, etc., etc.”<sup>10</sup> The power of promoters, dealers, publicists, and advertisers to define or, worse, to create great artists or authors seemed a travesty. Art and literature were gravely threatened by capitalism and Madison Avenue. As Huyssen pointed out, modernism defined its identity in relation to modern commercial mass culture, and in that respect it depended on commerce for its identity.<sup>11</sup> But, as I will argue, modernism also depended on the Madison Avenue habit of defining the author by recognition and attribution.

At JWT, as in law and in culture, those who talked about the nature of creativity imagined the relationship between a person and a creative work in two ways that existed in tension. First, there is the modernist ideal of authorship: to be an author is to conjure a work out of imagination and to exercise comprehensive compositional control over it. The work reflects the uniqueness and the individuality of its author, and the individuality of the author is proven by the uniqueness of the work. As Greenberg put it, the “great works” are derivative of nothing, are about nothing – they “maintain the high level of ... art by both narrowing and raising it to the expression of an absolute.”<sup>12</sup> This is the vision of High Modernism as it is conventionally understood – James Joyce is the author of *Ulysses* and *Ulysses* is proof of the individual genius of Joyce. Modernist writers, painters, musicians, photographers, and architects are imagined to have possessed a creative vision that transformed the world’s perception: Picasso and the visual representation of three

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<sup>8</sup> 17 U.S.C. § 201; see Catherine L. Fisk, *The Origin of the Work for Hire Doctrine*, 15 *Yale Journal of Law & Humanities* 1 (2003).

<sup>9</sup> Andreas Huyssen, *After the Great Divide: Modernism, Mass Culture, Postmodernism* (Bloomington: Indiana University Press, 1986), p. vii.

<sup>10</sup> Clement Greenberg, *Avant-Garde and Kitsch*, p. 5.

<sup>11</sup> Huyssen, *After the Great Divide*, p. ix.

<sup>12</sup> Greenberg, *Avant-Garde and Kitsch*, p. 2.

dimensions; Le Corbusier and physical space.<sup>13</sup> Of course, a number of canonical modernist texts borrow conspicuously and were fluent in pastiche and parody; *Ulysses* famously borrowed from classical literature, advertising, and many other sources. But modernist notions of authorship insisted upon the distinction between them and the kind of commercial authorship involved in twentieth century forms of cultural production as exemplified by advertising agency work.

The modernist conception of individuality and creativity existed, as it continues to exist, alongside another. This second version emphasizes not the essential, miraculous, unique genius of the individual's perception and creations and a notion of artistic merit wholly divorced from public acceptance, but instead the mixture of hard work, fortuity, and marketing that enables works to come into existence and those who create them to capture the public eye. This Madison Avenue notion of authorship places primary importance on the *perception* of the relation between an author and her work, and recognizes that the perception is created by the investment of time and resources in marketing. To be an author or inventor is to be a repository of a felicitous mix of inspiration, labor, money, cleverness, and luck that enables a person and her work to seize fifteen minutes of fame. Madison Avenue knows that the genius of the author cannot be divorced from the canniness of the publicist. The Madison Avenue mingling of authorship and attribution may be parasitic upon Modernist and earlier Romantic conceptions of authorship, but it is distinct. Whereas Modernism insisted on the purity of a work, and tended to define purity as the creator's adherence to aesthetics at the expense of commercial appeal,<sup>14</sup> Madison Avenue accepted an interdependence of creativity and commerce in producing all work.

Of course, neither the modernist nor the Madison Avenue view of the nature of authorship is a pure type. The great modernist writers and artists knew they needed to market themselves and their works, just as Madison Avenue agencies knew they needed to cultivate and recognize individual talent.<sup>15</sup> And they knew that great creative accomplishments often reflected the assistance of many besides the named author.<sup>16</sup> The reputations for great genius today of many great modernist writers and artists today are partly a result of successful marketing. As Robert Spoo has pointed out, when James Joyce sought to prevent an American publisher, Samuel Roth, from selling an unauthorized and expurgated edition of *Ulysses*, he could not invoke copyright law because *Ulysses* was not protected by American copyright. Instead, he invoked a state law of unfair competition which prevented the passing off of a product as being something that it was not or as being produced by a person or entity that it was not. Joyce's American lawyer succeeded in getting a New York court to enjoin Roth and his company "from using the name of the plaintiff

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<sup>13</sup> And of course the claim to absolute originality is an overstatement. Rosalind E. Krauss, *The Originality of the Avant-Garde and Other Modernist Myths* (MIT Press 1985).

<sup>14</sup> Clement Greenberg, Modernist Painting, in *Modern Art and Modernism: A Critical Anthology* 5, 6 (Francis Frascina & Charles Harrison, eds., 1982); see Amy Adler, Note, Post-Modern Art and the Death of Obscenity Law, 99 *Yale Law Journal* 1359, 1363-64 (1990).

<sup>15</sup> Kevin J.H. Dettmar & Stephen Watt, eds., *Marketing Modernisms: Self-Promotion, Canonization, and Rereading* (University of Michigan Press, 1996); Andreas Huyssen, *After the Great Divide: Modernism, Mass Culture, Postmodernism* (Indiana University Press, 1986).

<sup>16</sup> Paul Saint-Amour pointed out to me that a draft of Eliot's *The Waste Land* reveals that his wife wrote a couple of lines of the poem and that Ezra Pound's editing was significant enough to make him practically collaborator. Yet the poem appeared, of course, as Eliot's alone.

[Joyce] for advertising purposes or for purposes of trade.”<sup>17</sup> If Joyce could not exercise control over the text itself, at least he could prevent the use of his name in connection with it. Moreover, twentieth-century copyright law embraced both of the Modernist and the Madison Avenue conceptions of authorship. Lawyers seeking to expand property rights in valuable mass culture commodities like movies, photographs, or popular music frequently invoked the creator’s unique and transformative vision the basis in law for protecting property rights in the work.<sup>18</sup>

Conversely, in the heart of Madison Avenue, right alongside the norm of corporate attribution of any JWT ad campaign, there was a deep faith in a credo of the transformative power of fierce originality that sometimes characterized the modernist definition of true art. Both the creative people and the company managers valued some of the same qualities in agency employees that they valued in “non-commercial” writers and artists – creativity, effective use words, compelling visual images or melodies. The talented and highly educated people who worked at the firm esteemed both things that could be described with the adjective modern and modernism as a movement in art and literature, and they sometimes conflated being modern (up-to-date) with being modernist (as an aesthetic style). They deliberately and unconsciously aligned the firm’s work and work practices with all things modern, including the aesthetics of modernism. At times they saw themselves as purveyors of modernism to the world at large; an oft-told company story had it that early in the 1920s Helen Landsdowne Resor, an influential company leader and the wife of the revered and longtime head of the agency, hired Edward Steichen to bring his modernist photographic eye to several ad campaigns.<sup>19</sup> Mrs. Resor was a life-long admirer and collector of modern art and served on the board of the Museum of Modern Art, so she certainly saw the potential to blend “serious” art and commercial art. Edward Steichen may have thought of the commercial work he did for JWT as being a world apart from his art,<sup>20</sup> but both he and JWT may have made money off of agency clients and consumers who recognized the connection.

## Authors on Madison Avenue

The multiple meanings of authorship shaped how advertising agency employees saw themselves and the meaning of their work. They were confronted on a daily basis with the awareness that the social and economic significance of authorship is not fully captured by deciding who owns the copyright in a work. What mattered to consumers, to corporate clients, and to themselves as creators, was whose name was attached to the product as its

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<sup>17</sup> Robert Spoo, Note, Copyright Protection and Its Discontents: The Case of James Joyce’s *Ulysses* in America, *Yale Law Journal* 108: 633-667 (1998), p. 640, quoting *Joyce v. Roth* (N.Y. Sup. Ct. Dec. 27, 1928), in *Letters of James Joyce* [get rest of cite], vol. 3 at p. 185.

<sup>18</sup> As the Supreme Court

<sup>19</sup> Staff Meeting Minutes, October 26, 1932, Box 5. In describing the history of the Jergens Lotion campaign, Ruth Waldo noted the contributions of Miss E. Lewis, whose “copy gives the story an unusually human and moving quality.” Waldo added: “Mr. Steichen, by the way, has taken the photographs almost from the beginning of the [Jergens] Lotion advertising.” Waldo commended those who “worked with Mr. Steichen and succeeded in getting some very charming illustrations on what hands can do in building romance.”

<sup>20</sup> Steichen was thought of a modernist before World War I, when he was taking “painterly” impressionistic photographs. After working as an aerial photographic interpreter during the War, he turned to an aesthetic of sharp-edged accuracy which prepared him for the capitalist realism of Madison Avenue. His reputation, at least to Mrs. Resor, as a modernist thus may have been somewhat out of date by the time of their affiliation. [Check a Steichen bio.]

creator and in what contexts. They recognized the value of authenticity in the claimed connection between creators and works, but what authenticity meant, and what kinds of connections needed to exist between creators and works to satisfy it, was flexible. Like other advertising agencies, JWT competed for clients on its reputation for the creativity and human capital of its employees. It described and marketed itself as the vanguard of mid-century elite professionalism. For many years, Stanley Resor, the firm's longtime leader, preferred to hire Yale men and described the firm as operating like a law firm.<sup>21</sup> Resor was credited by many within the firm, including the longtime personnel director, of having begun "to visualize this thing as a profession."<sup>22</sup> He hired a number of university professors in the 1920s, in what one company executive described as an "unprecedented attempt to bring professionalism and authority to the advertising field."<sup>23</sup> Resor and others believed that professional excellence was always the result of collaboration and insisted that JWT was the author of the advertisements it produced, not the writers, artists, or Representatives.<sup>24</sup> "[H]e would never let anyone have credit for even an ad. It was a 'Company' job. The whole thing was 'Company.' No one person." "The Thompson Company deliberately beclouded the matter as to who was responsible for a particular ad. Mr. Resor believed so firmly in the team idea ... that an individual was never known as the person who wrote such-and-such an ad .... Keep yourself out, if you want to get your idea across, is the cardinal rule in dealing with the Old Gentleman."<sup>25</sup> Excessive attention to individual contributions – indeed, almost any form of obvious self-promotion -- was unprofessional and counterproductive. On Madison Avenue, where everything was a commodity that could be sold, the norms of professionalism at JWT made some people within the firm reluctant to commodify talent or the reputation for talent. Because the name of the firm was valued above the names of those who worked for it, there weren't names on office doors and it was considered gauche for people to claim credit for their work. Senior JWT employees described the corporate form of organization as "a picket fence" rather than a "pyramid": "That's why we depreciated titles – we didn't have labels or titles" and they didn't sign their names individually to projects, they signed their work "J. Walter Thompson."<sup>26</sup>

Others at JWT were not entirely convinced of the wisdom of the "Old Gentleman" Resor's philosophy. The talent for writing, layout, or conceptualization was individual, and the business of managing creative talent required processes for spotting and nurturing talent,

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<sup>21</sup> Colin Dawkins wrote a description of the company during the years when Howard Kohl was a senior executive, and in it described Kohl's account of the early history of JWT after Resor had purchased the firm from J. Walter Thompson himself: "Another vivid memory was of the Saturday morning in 1916 when Stanley Resor took Kohl and six or seven other men from the office on 23<sup>rd</sup> Street to lunch at a nearby hotel. When they were seated, Resor turned to them and said, 'I want to tell you that ... now, J. Walter Thompson Company is ours. He didn't, Howard points out, say 'mine,' although he could have done; because, in fact, it was. But Mr. Resor always thought of the company in terms of a partnership of endeavor. It was never 'I.' It was always 'we.'" "Through the Years with Howard Kohl," p. 13, Howard Kohl File, Colin Dawkins Papers, Box 2.

<sup>22</sup> Robert Haws interview, Nov. 18, 1964 at pp. 1-2, Bernstein Company History Files, Box 1.

<sup>23</sup> Biographical File on Paul T. Cherington, Bernstein Company History Files, Box 4.

<sup>24</sup> Henry Flower Interview, Helen and Stanley Resor File, Colin Dawkins Papers, Box 3. pp. 6-7. "The phrase he said, 'I don't ever want to hear you say that's your account. It belongs to the Company. It belongs to your partners.' He kept emphasizing that over and over again." *Id.*

<sup>25</sup> Walter Lord Interview Transcript, Colin Dawkins Files, Box 17.

<sup>26</sup> Interview with Sam Meek, JWT Bernstein Company History, Box 1

which in turn required the attribution of work to individuals.<sup>27</sup> As noted at the beginning, Bill Day, who eventually left JWT to form his own agency, predicted trouble when a large agency began to submerge individual personalities and talent. “[I]f we become large at the expense of the individual’s pride in himself, in the perfection of his own individual powers, will reach a stage when the individual either is not happy in this organization, or when the organization is unable to attract the kind of individuals necessary to its perfection. It seems to me that if we become larger, we shall have to stress individual progress, individual cultivation of individual talents, very much more than we have been stressing them during the past four or five years.”<sup>28</sup>

In short, at least when it comes to defining authors for purposes of copyright, and perhaps in defining the nature of authorship more generally -- certainly in commercial writing and art and perhaps even in “non-commercial” literature and art – at least insofar as we think about authorship, it may be that modernism is the name we have given to the patterns of interference between the modernist and the Madison Avenue meanings of what it is to be an author.

JWT employed thousands of creative employees to produce a full range of materials that were protected (or protectable) as intellectual property, including photographs, text, symbols, music, film, and radio programs, and also things that were valuable but not protectable as IP, including ideas and ad campaigns. Although the firm did not use written contracts for any of its employees for most of the century, it was generally understood that all the intellectual property the employees generated was the property of the firm, and that ideas they produced were firm property too.<sup>29</sup> JWT sold its employees’ ideas and works to its clients. When possible, JWT also claimed that work the client did not actually publish or broadcast remained agency property. For example, the JWT agreement regarding a print

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<sup>27</sup> Robert Haws, the longtime personnel director of JWT, described the process of finding an account representative as follows: “Is he very exciting from the standpoint of what he *may* be able to do here? Either in the form of talent or your estimate of the way he will grow in a general way.” An account head would come to see the personnel director and suggest names of people working on other accounts whom he would like to have. “So I say, OK, fine. And I look through my list of account representatives and say ‘From your description, I would think you would want to consider this guy too. And maybe this one.’ So we check to see whether it would be possible to swing around. What would be in the company interest: to leave them where they are or ship them over to this. If it turned out that all four shouldn’t be strong then we’d ... be opening ourselves up for the outside. But we keep sort of like an executive recruiting file, internally here, of people that we know. So we immediately call over there for background, on all sorts of fellas. In addition to that, we start an intelligence team working.” Robert Haws Interview, Nov. 1964, pp. 5-7, Bernstein Company History Files, Box 1.

Around 1970 each JWT office was compiling, or at least was directed to compile, a list of its “top ten contributors.” The goal of inventorying the names and qualifications of top contributors was, according to a cable from the company’s general counsel, Edward G. Wilson, to a manager of the London office, so that “we can receive the qualifications of outstanding persons we already have when we are in need of particular talents in another office.” Cable from Wilson to George D. Johnston of JWT London, Jan. 12, 1971, Edward G. Wilson Papers, Box 43.

<sup>28</sup> This quote is drawn from the unpublished manuscript written in the late 1970s and early 1980s by another JWT vice president, Colin Dawkins, *Ain’t It Hell on a Windy Day*, pp. 281-82. The manuscript is found in the Colin Dawkins Papers, Box 22.

<sup>29</sup> William Howard to John Devine, June 16, 1949 (“I emphatically share your views on the lack of desirability of contracts with employees”). Edward Wilson Papers, Box 48. When I say that ideas were firm property, copyright scholars might object that an idea is not copyrightable, only expressions of them. But ideas can be owned, even if they cannot be copyrighted, and JWT insisted that it owned its employees ideas.

advertising campaign for Parker Pens in 1969 provided that all the agency's work product – “sketches, layouts, art work, copy, plans, ideas, trade names and product concepts” – “shall, as between agency and client become client's exclusive property when paid by client.” JWT's general counsel rejected the idea, initially proposed by Parker, that the agency would convey the property to the client when the client *approved* the work. As the JWT general counsel wrote in a memo commenting on the draft contract: “Unless the client actually uses and pays for material which we have shown him, we should not be precluded at a later time from using it for another client.”<sup>30</sup>

There were, however, circumstances in which the agency did not claim ownership of employee-generated intellectual property. In the days when the agency wrote and produced radio programs for its clients to sponsor, the show's writer might own the script even though he or she was technically a JWT employee (they were only sometimes independent contractors).<sup>31</sup> Composers of music for radio programs often owned the rights to the music and JWT licensed the songs under the ASCAP system just as any other broadcaster would. In some of the shows it produced for clients as sponsors in the early days of television, JWT hired writers without a written contract and simply assumed that it owned the scripts as works made for hire. In some cases, the writer owned the script although it had been written for JWT or its clients.<sup>32</sup>

In the early days of JWT's move into radio advertising, the company's handling of credit was consistent with its general culture of anonymity:

As you look back at the credits for writing, directing and producing these and other JWT shows another striking thing stands out. The credits look like a roster of JWT Radio Department talent . . . . In those days, JWT wrote all of the material their stars used on the air. The stars might be getting five thousand to seventy-five hundred dollars a week, and the writers and directors might be getting that much a year, and no credits on the air or in the trades. Ours was an anonymous society, and our only accolade, after a particularly fine show and one which “broke new ground,” was an orchid, which we would find on our desks the morning after – from John Reber.<sup>33</sup>

Later, when JWT began producing television shows for its clients to sponsor, screen credit was handled on the same terms and under the same collective bargaining agreement provisions as screen credit was handled for any other TV program.<sup>34</sup>

Privately, and within the world of ad agencies, JWT did attribute work both to itself collectively (in the case of ads that were nominated for awards) and to individuals within JWT. There was an abiding interest in and willingness to ascribe individual creative talent.

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<sup>30</sup> JWT Edward Wilson Papers, Box 51.

<sup>31</sup> JWT Edward Wilson Papers, Box 48, Box 65

<sup>32</sup> JWT Edward Wilson Papers, Box 65.

<sup>33</sup> *Ain't It Hell on a Windy Day* pp. 335-36, Colin Dawkins Papers, Box 22 (some internal punctuation omitted).

<sup>34</sup> In the lengthy labor negotiations in 1950-52 between television producers and networks on the one hand and the writers guild on the other, the ad agencies (including JWT) attended as observers because ad agencies acted as producers on shows they prepared for clients. It was intended that the agencies would adhere to the collective bargaining agreement for all shows they produced.

People said that Helen Landsdowne Resor “was an A-Number 1 advertising man” because of her uncanny ability to understand what would appeal to the consumer, especially the female consumer.<sup>35</sup> Many attributed to Mrs. Resor both whole concepts (the use of emotion, especially romance or sexuality in advertising), or particular slogans (“The skin you love to touch”), or even managerial strategies (hiring and promoting women into creative and responsible positions within the firm and maintaining a separate women’s department).<sup>36</sup> Apart from the desire to identify authorship or talent for their own sake, the company had instrumental reasons to identify authorship. Obviously, it did so with respect to setting employee salaries: the company claimed its goal was “the distribution, *as nearly as possible in proportion to individual contributions*, of the total available for all compensation payments,” which it did, said the company’s general counsel, because “We have always determined salaries by *periodic reviews of each individual case*.”<sup>37</sup> The company newsletter, which was published weekly or biweekly for decades, routinely profiled individual employees and often attributed slogans, ideas, or other aspects of ad campaigns to them.<sup>38</sup> In addition, the background and development of particularly successful ad campaigns – like the “Uncola” 7-Up campaign of the late 1960s and early 1970s, or the “She’s Lovely, She’s Engaged, She Uses Pond’s” campaign of the 1940s -- were covered in the newsletter and typically credited to a group of people, many of whom were named (and, not surprisingly, the group leaders were always named). The company maintained files of employee accomplishments so that it could match the talents of employees to ad campaigns it might want to launch for other clients whose accounts the employees weren’t currently working on.<sup>39</sup> And, when particular commercials garnered unusual praise, the account representative considered it gracious to pass along the compliments to the head of the group that worked on it.<sup>40</sup>

When credit was acknowledged, there were discussions about how it should be done fairly. The desire that credit be given where it was due, without regard to interpersonal power dynamics, was often cited as a reason why JWT maintained separate men’s and women’s editorial groups. The origin of the separate departments was typically attributed to Helen Landsdowne Resor, who had been employed as a copywriter in 1912 and married Stanley Resor, the head of the company, in 1917. Mrs. Resor insisted, and other senior women agreed, that if women worked with men in gender integrated departments the men

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<sup>35</sup> James W. Young Interview Transcript, Nov. 1963, p. 6.

<sup>36</sup> Client File on Chesebrough-Ponds, Bernstein Company History Files, Box 5 (the Pond’s slogan); Biographical File on Ruth Waldo, Bernstein Company History Files, Box 5 (the gender segregation of departments); Colin Dawkins Papers Box 1, Offers and Staff file on Carroll Carroll (attributing “the skin you love to touch” slogan for Woodbury soap to Landsdowne in 1911).

<sup>37</sup> “Notes on JWT Compensation Policies, Written 1949 by EGW-LL,” JWT Bernstein Company History Box 7 (emphasis in original).

<sup>38</sup> JWT Newsletter Files. See JWT News issue of 11/21/62 (Pan Am ad campaign won awards; firm credited as a whole), JWT Michigan Avenues issue of 5/1/70 (Uncola campaign credited to a group headed by named individuals)

<sup>39</sup> Interview with Robert Haws, JWT Bernstein Company History, Box 1.

<sup>40</sup> Memo from Robert Castle to Peggy King, June 25, 1956, John F. Devine Papers, Box 37 (Personnel): “The favorable reaction to our 1 -1/2 min. Skol commercial has exceeded the usual response. The client has repeatedly spoken of its high quality and has asked me to express their thanks for an excellent job to all concerned. In addition to this, I have heard from several people in the industry already – who have gone out of their way to contact me and comment favorably on this commercial. One of these was a long distance call from Mr. Walter H. Annenberg, owner and Managing Editor of TV GUIDE, who wanted me to know it was the finest commercial he had ever seen on television.”

would get all the credit for the creative ideas, good copy, excellent art work done by women. In an early 1960s interview, retired senior JWT executive Ruth Waldo, who joined JWT in a clerical position in 1915, became the first female Vice President at JWT in 1944, and retired in 1960, explained why she supported the policy even though newer women who joined the firm thought of it as discriminatory:

When a woman works for a man or in a men's group, she becomes less important, her opinion is worth less, her own progress and advancement less rapid. Then she does not have the excitement and incentive to work as hard as she can, nor, in a men's group, does she get the full credit for what she does.

But with the knowledge and confidence of Mrs. Resor's support, a woman at Thompson could advance in her own group without having to compete with *men* for recognition of her ability. She has greater independence and freedom; a woman's ideas could be judged on their value alone. It was one less handicap.<sup>41</sup>

As another woman put it, "I think you cannot have a strong woman's department unless it is separate. . . . [O]f course the men have had women writers, over the years. But no woman writer in the men's department has ever been made group head, for instance."<sup>42</sup>

JWT thus maintained an ambivalent position about credit, and about branding itself through its employees' creativity. Its business was to focus on promotion of the brand. It persuaded its clients of its ability to do so through focus on the abilities of its creative staff. It promoted its own brand of professionalism and polish, and yet it prided itself on a workplace culture in which no person was a brand on his or her own. It was a highly unstable blend of individual and collective authorship, but whatever it was, none of it rested on a creator's copyright in a work. Authorship was determined largely outside the purview of law and bounced endlessly back and forth from the individual to the corporation. As we will see in the pages to come, the equation between authorship, attribution, and branding became pervasive in the later twentieth century and became part of the foundation of celebrity.

### **The Many Facets of Legal Imagination of Authorship**

The three meanings of authorship as experienced by people working at JWT – origination, attribution, and widespread recognition – are reflected in the multiple legal theories that people invoked to assert their claims of authorship. Copyright is only one part of the legal culture that defined and provided the space where modernist authorship was imagined. The essence of authorship in twentieth century work is not captured just by copyright (who owns the work); as illustrated by the Joyce litigation against the enterprising American publisher Roth, it must be described as a sort of trademark too (whose name can

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<sup>41</sup> Ruth Waldo Bio, JWT Bernstein Company History, Box 5 (emphasis in original).

<sup>42</sup> Interview with Margaret King Eddy, JWT Bernstein Company History Box 1.

be associated with the work).<sup>43</sup> Just as we look to the workplace practices at JWT to understand the various ways that authorship of commercial art was understood, we look to many sources of law to understand the various ways in which authorship was understood. We can examine the provision of the Copyright Act that makes the employer the author of any work made for hire. In parts of Europe, the principle of *droit moral* makes attribution of a work a supposedly inalienable right of authors. Trademark and unfair competition laws prohibit passing off a work as being created by a person or entity other than the one which made it. The right of publicity protects the relationship between the self and the persona, both because of the value of creativity *and* because of the value of a reputation for being creative. In law, as in culture, the value of genius is inextricably tangled up with the value of regard.

Technological and cultural changes in the first half of the twentieth century enabled a vast expansion of the ways that people were credited for their work, thus creating an economy of reputation and a notion of human capital that transformed how people thought of the relationship between labor and property. It was the bureaucratic employment practices at places like JWT that provided the justification for and fueled the growth of the work-for-hire doctrine in copyright. The divorce of creation from ownership invited a new form of authorship, and attribution filled that gap. But as attribution became a valuable commodity in itself in a highly mobile labor market and as advertising created awareness of the value of a brand, the temptation grew to treat attribution as a form of property that could be alienated from the labor of creation.

In the popular imagination, authorship has long been distinct from copyright ownership. But the moral force of copyright law, especially in the arena of moral rights, still rests on the equation of authorship and ownership, and debates about authorship in copyright law obscure the fact that authorship and ownership have been divorced. Setting aside poetry, novels, concert hall music, and art gallery art, a huge amount of the creative work of the twentieth century, including much that is an essential part of how we today envision twentieth century culture, was done by employees who did not own the copyrights in their work; typically, the companies that employed them own the intellectual property rights. What defined authorship for those who created the work, and in many cases for those who viewed it, was the attribution of it, not ownership of the copyright. Screen credit, not copyright ownership, is authorship in Hollywood. A leaded glass window or lamp may be more valuable if it is attributed to the Tiffany studio than to another, regardless of who owns the design copyright or trademark. Even deep in the heart of modernism in literature, reputation is as much a part of authorship as is the writer's creation and control of the text. As Robert Spoo showed, James Joyce's claims as the author of *Ulysses* were protected – if at all – by law other than copyright for a very long time. And today, as we know from *Sbloss v. Sweeny (Joyce Estate)*, the ongoing claim of Joyce's literary heir to control access to Joyce's papers rests less on notions of the author's copyright in the text than in the copyright

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<sup>43</sup> Greg Lastowka, The Trademark Function of Authorship, 85 Boston U. L. Rev. 1171 (2005); Greg Lastowka, Digital Attribution: Copyright and the Right to Credit, 87 Boston U. L. Rev. 41 (2007). See also Laura A. Heymann, The Trademark/Copyright Divide, 60 SMU L. Rev. 55 (2007).

owner's right to control how the author, his family and his milieu are portrayed by scholars today.<sup>44</sup>

The legal and cultural status of attribution was very much in flux throughout the twentieth century, and remains so even now.<sup>45</sup> Everyone involved in claims about workplace attribution -- creative employees, corporations, judges, lawyers, celebrities -- tended to reach for intellectual property concepts in articulating the value of attribution. The legal fictions and cultural constructs of intellectual property -- the author as proprietor, the trademark brand as corporate property, workplace knowledge as a trade secret -- were recycled into an all-purpose notion that knowledge, human capital, and persona could be regarded in law and in life as an investment vehicle and an asset to be managed. In economic terms, an innovation or someone's talent or a bit of knowledge could produce two separate revenue streams: one from the intellectual property itself (the copyright, the trademark, the trade secret) and one from the attribution of the intellectual property to a person.<sup>46</sup> As studies of the great modernist icons like James Joyce and Virginia Woolf have pointed out, authors, publishers, lawyers, marketers, and others have long known that there is market value in a marquee name like Virginia Woolf or James Joyce, wholly apart from the value of the books that bear their names.<sup>47</sup> The right of publicity and trademark law, which emerged in the early twentieth century as separate legal categories, began to merge at mid-century into a property right in the manufactured or imagined self.

The right of publicity is the claim that is asserted to protect a person's legal rights in the creation of self. That is, "self" as publicized to others. Like copyright, it embraces both the multiple visions of what it means to be a creator. The modernist conception is reflected in the famous case which prohibited the use of a sound-alike voice in an advertisement. When the Ford Motor Company commissioned an advertisement with a soundtrack featuring a song made famous by Bette Midler sung by a woman who sounded like Bette Midler, the court allowed Midler to sue for misappropriation: "The human voice is one of the most palpable ways identity is manifested. ... The singer manifests herself in the song. To impersonate her voice is to pirate her identity."<sup>48</sup>

The Madison Avenue vision of authorship of the self is similarly reflected in another right of publicity case involving an advertisement imitating certain attributes of a celebrity. Vanna White, an onscreen assistant for the TV game show *Wheel of Fortune*, was permitted to sue a company that commissioned an ad showing a robot in a blond wig and sparkly jewelry turning over letters on a board: "Television and other media create marketable celebrity identity value. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof."<sup>49</sup> There may be no essential genius, no author's transformative vision, but there is a "trademark" wig, gown, smile, and gesture, and law protects those too.

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<sup>44</sup> The Stanford Center for Internet and Society has compilation of writings about the *Shloss v. Estate of Joyce* litigation on its website: <http://cyberlaw.stanford.edu/case/shloss-v-estate-of-joyce>

<sup>45</sup> Jane M. Gaines, *Contested Culture: The Image, the Voice, and the Law* (University of North Carolina Press, 1991).

<sup>46</sup> Catherine L. Fisk, *Credit Where It's Due: the Law and Norms of Attribution*, 95 *Georgetown L.J.* 49 (2006).

<sup>47</sup> Brenda R. Silver, *Virginia Woolf Icon* (University of Chicago Press 1999); see Robert Spoo's work cited above.

<sup>48</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

<sup>49</sup> *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992).

The ability of people to profit from their image became one of the defining ways of thinking about how law defines the value of creativity and even the boundaries of the self.<sup>50</sup> While people may dispute whether Vanna White exercised much creativity, her lawyers argued that she had shown enough to merit some form of ownership of her image as against the claims of those who designed a robot to mimic her. Bela Lugosi became in the eyes of many the image of Count Dracula; Lugosi's heirs claimed that Lugosi's Dracula became Lugosi's property. But in the litigation over it, one justice of the California Supreme Court insisted that the employer owned the image, not Lugosi or his heirs, because Lugosi had created the image while employed by a movie studio.<sup>51</sup> Many creative works, including those that became most likely to capture public attention and define the essence of creativity, are not and never were the intellectual property of their creators. Creators or contributors to Hollywood movies and TV shows, advertisements, newspaper and magazine articles, and most popular songs are the employees of the companies that own the copyrights. All the creative employee has is a reputation as the creator or part of the creative team. That reputation is economically and psychologically valuable to the employee. Reputation was commodified by economists as human capital and by others as celebrity.

As an economy of reputation developed, claimants to the value of attribution and to commodified personas embraced intellectual property concepts. Intellectual property offered an attractive framework for making arguments about the value of attribution, although it was less useful (for authors at least) in explaining why attribution rights should not be alienable as intellectual property rights are. The employee's claim of attribution/authorship – the desire to be credited for the creativity and work she invested in a corporate intellectual property product – is generally not protected by law. A right of attribution is protected when the association between a company and a name, word, or image is a registered trademark (a Chanel suit). A right to be the author of the self as persona, which is part of what attribution protects, is accorded to celebrities, as shown by the Midler and White cases. Yet, there is the possibility that because White and Lugosi were employed by others when they created their onscreen personas, they do not even own that self.

The legal regime under which many creators worked deprived them of the material conditions – the intellectual and financial independence of an idea entrepreneur -- conducive to how creativity was imagined in Modernism. What was left, then, was just the reputation for being innovative, and the ability to market oneself as being a generator of novelty – the Madison Avenue version of authorship. Trademark and the right of publicity are the areas of law that recognize the value of attribution. They became the apogee of modern intellectual property when effective control of texts or images was rendered difficult through technological and cultural changes allowing rapid circulation of pirated works. And yet most creators of most intellectual property cannot trademark themselves nor can they bring a right of publicity claim for a misattribution of their work that results in an enhancement of another person's persona or reputation at the expense of their own. In sum, although law's imagination of authorship has many facets, including copyright, trademark, and publicity, when it comes to employees, it is at best unclear whether the employee is the author of her persona or her works. In many cases, the employee creator is not, in law, an author, even of

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<sup>50</sup> Richard Schickel, *Intimate Strangers: the Culture of Celebrity in America* (Chicago: Ivan R. Dee, 2000).

<sup>51</sup> *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 824-28, 603 P.2d 431-34 (1979) (Mosk, J., concurring).

her persona, which may in some cases feel that she is not the owner of herself. Ironically, the advertising agency employees who enhanced the value of personas like Lugosi's, Midler's, and White's, and those who sought to capitalize on them in ways that courts later found illegal, were not the "authors" (in the ownership or attribution senses) of the works that created or infringed upon that value.

### **Modernism, Branding and the Persistence of Interest in the Author's Labor**

The cycling between individual and collective attribution that so deeply influenced the meaning of authorship of the commercial text and images produced at JWT is not unique to the advertising world. It is an example of a larger phenomenon of creative work in the modern era. It had its antecedents before the period of the early-mid twentieth century that we associate with modernism, and its effects continue through the post-modern period.

It is often said that people are what they do, and that their sense of self is determined, in part, by what they know how to do. This is a very old way of understanding the idea of a self and of the meaning of a life. Marx also recognized the importance of people seeing themselves – or, more specifically, their work -- realized in the world. The alienation of labor that was so core to Marx's theory was the separation of the worker from the recognition of the products of her labor as being hers. In the nineteenth century, the "art" of a worker was the particular skill and learning that defined respectable occupations and the people who performed them. Possessing an "art" conferred worth on the people who labored in those tasks, made them independent and useful, and, therefore, valuable members of society.<sup>52</sup> It was not only to possess an art but to be recognized as possessing it based on the known connection between a person and her works. In the twentieth century, what had formerly been the "art" of the skilled worker became the human capital of the workforce, and, simultaneously, the human assets of the firm. Eventually, aspiring celebrities and corporate managers could read the same how-to manuals on the ins and outs of managing their reputation and "personal branding." What remained constant was the desire to see the products of one's labor as one's own – if not in the ownership of the products, then at least in the entitlement to attribution of them.

In the years just preceding the growth of modernism in the literary, visual, and musical arts, another creative movement similarly struggled with the relationship between individual and collective creativity: the Arts & Crafts Movement. The creative workers at JWT were constrained by the conventions of advertising from making the author's relation to the work the subject of the work. No such taboo on self-reflexiveness constrained the creators of Arts & Crafts. Indeed, to make apparent and immanent the worker in the work was a crucial tenet of the Arts & Crafts philosophy. As the connection between workers and the products of their work was first challenged by the mass production of consumer goods, Arts & Crafts insisted that the connection between the creator and the consumer/user of an item must be apparent and immediate. Arts & Crafts was a rebellion not only against the dehumanizing labor relations of the factory, but also against the anonymity of mass

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<sup>52</sup> Sean Wilentz, *Chants Democratic*; David Montgomery, *Fall of the House of Labor*;

production.<sup>53</sup> The attribution of works to individuals, even if they did not own the works themselves, was an antidote to the labor alienation that resulted from factory production in a capitalist system. Although the work process of the studio or workshop aimed to avoid the sweating and alienation of labor typical of factory mass production, the works were often sold under the name of the founder or the organization. The craftsman ideal persisted with respect to an expectation of high quality and pride in the work, but even these organizations were acutely conscious of the value of the “brands” under which Tiffany glass, Rockwood pottery, and Stickley furniture were sold. Individual creation was celebrated just as much as Romantic authorship, but its products were sold under the brand name that Madison Avenue saw to be crucial. The celebration of the individuality, talent, and unique vision of the artisan in Arts & Crafts was the antecedent of the celebration of the same qualities of the author/artist in modernism. All rested on attribution of the work to the creator, not – as copyright law or most studies of the relationship between copyright and authorship would have it – on the ownership of the intellectual property rights in the work.

An exhibit of Tiffany lamps at the New York Historical Society in 2007 revealed that some of the most prized creations of the glass design studios that bore the name of Louis Tiffany were created by Clara Driscoll, the head of the Women’s Glass Cutting Department, who worked at the Tiffany Studio from 1888 until 1909. For twenty years, Driscoll designed or supervised the creation of most Tiffany lamps, including some of the most prized lamps showing natural motifs like insects and flowers, as well as a number of other decorative objects, including mosaics, windows, inkwells, tea screens, and desk sets. None of this was in the Tiffany Studios publicity.<sup>54</sup> A dragonfly lamp designed by Driscoll won a prize at the 1900 World’s Fair, and a 1904 article about the lamp credited it to her, rather than to Tiffany, which was unusual. Tiffany generally did not publicly disclose the names of designers; his business strategy was to keep the public focus on his own artistic and business talents. Nevertheless, Driscoll had a close working relationship with Tiffany himself. He championed her work within the firm, in the face of significant hostility of male glass designers and cutters.<sup>55</sup> Driscoll and the 35 other women who worked in the Women’s Glass Cutting Department seem to have had a difficult but important role in the Studio. Their department enjoyed considerable autonomy within the firm; they worked on their own projects and made their own designs, and they successfully resisted the various attempts of the Lead Glaziers and Glass Cutters Union to eliminate them or reduce their sphere and influence. Yet, as significant as the women’s role may have been, their names and their significance were largely forgotten over time.

Tiffany knew, as modern art dealers and publishers knew, that attribution creates value both in the work and in the human capital of the person to whom the work is attributed. Colorful leaded glass lamps were, and remain, more valuable if they were attributed to the Tiffany Studios than if they were not. But behind the corporate attribution there remains abiding interest in individual attribution. Those we now know to be Clara

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<sup>53</sup> Eileen Boris, *Art and Labor: Ruskin, Morris and the Craftsman Ideal in America* (Philadelphia: Temple University Press, 1986).

<sup>54</sup> Jeffrey Kastiner, Out of Tiffany’s Shadow, a Woman of Light, *New York Times* (Feb. 25, 2007), at AR33; Martin Eidelberg & Nina Gray, *A New Light on Tiffany: Clara Driscoll and the Tiffany Girls* (New York: New York Historical Society, 2007).

<sup>55</sup> Eidelberg & Gray, *A New Light on Tiffany* at \_\_\_\_.

Driscoll lamps may become more valuable to some because they represent the creative and physical labor of women whose story was long forgotten and who struggled, against significant obstacles, to exhibit their creativity in a world dominated by men. Feminist art historians have enjoyed discovering that many of the late nineteenth and early twentieth century art works sold under the company names of men were in fact executed or designed by women.<sup>56</sup> If Tiffany's artistic vision (as opposed to his general aesthetic sense and business talents) were an important part of the value Tiffany objects, some presumably would find the lamps less appealing because they are not the fruit of Tiffany's own artistic vision, but only of his ability to spot and nurture talent and to enhance the market for decorative objects by attaching his name to them. At the extreme, the attribution of a creative work to one person rather than another would make it no longer an "authentic" item.<sup>57</sup> And to some, who may care less about Tiffany's artistic vision than simply about what collectors think, the value of the lamp will depend on how the market for the products of Tiffany Studio reacts to the news that Tiffany himself didn't design these objects – they care about value not because of the labor relations within the studio, but only from the perspective of the consumer.

The connection between the JWT story and the Tiffany story is more than simply one of antecedence. The work of the advertising agency enabled the creation of value in the Tiffany name by obscuring the attribution of works to Clara Driscoll and her cohort. The creativity of anonymous writers and artists at advertising agencies enabled the creativity of Clara Driscoll and her cohort to be made anonymous by creating value in the brand name under which their products were sold. They very likely expanded the market for their goods far beyond what it would have been without the benefit of advertising and the recognizability of the brand. Companies spent fortunes creating corporate brands and sparking a desire for their brands through advertising. Ironically, in many cases, as the advertising and branding obscured the real people behind the creation, it created a fictional narrative about the relationship between companies and their workers and the story often rested on a legal right of firms to market their products by marketing a story about the company and its people. DuPont's "better living through chemistry" and many other ad campaigns emphasized a "from us to you" narrative. The corporate brand sometimes obscured the role of employees in creating products and sometimes publicized a fictionalized version of it for purposes of convincing consumers of the authenticity of the product and the humanity of the firm.

The valorization of the individual creator, which was an important feature of modernism and Arts & Crafts, contributed to the creation of the later-twentieth-century culture in which consumers seek the talent *behind* the company brand even as they know the value of the brand. It transpired on guitarists' internet discussion groups that many aficionados preferred the electric pickups on Fender guitars that were wound by hand in the 1950s by one Abigail Ybarra. A market grew for vintage guitars with Ybarra pickups. But

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<sup>56</sup> For example, many famous Currier & Ives lithographs were done by Frances Flora Bond Palmer. Ellen Mazur Thomson, *Alms for Oblivion: The History of Women in Early American Graphic Design*, 10 *Design Issues* 27, 29-30 (1994).

<sup>57</sup> Tiffany, widely known as the head of a business more than an artist himself, is probably not an example of this, although he did maintain "an artistic control over production that other art manufacturers rarely achieved." Eileen Boris, *Art and Labor* at 144. See also Robert Koch, *Louis Tiffany: Rebel in Glass* (New York: Crown, 1964); Robert Koch, *Louis Tiffany's Glass-Bronzes-Lamps* (New York: Crown, 1971).

the Madison Avenue view of the value of attribution would win out: the Fender company began marketing vintage guitars by advertising that the pickups were Abigail Ybarra's. The company thus capitalized upon the reputation of Ybarra – who had been entirely anonymous to the world until guitar fans discovered her work – to enhance its own reputation.<sup>58</sup>

The law's commodification of attribution, alongside consumer culture's willingness to pay a premium for attributed works, shaped the ways in which creative influence was understood by the end of the century. Once someone's art, persona, or reputation became a species of marketable property, how people thought about the significance of influence changed. The question of artistic influence – including the influential conceptualization of influence as a source of anxiety<sup>59</sup> -- was an important subject of modernist artistic and literary expression and criticism. It would be a nifty thing to prove that influence studies were coeval with the rise of the right of attribution, although I have no idea whether it was coincidence. What we can say is that the relationship between, as T.S. Eliot put it in his famous essay, "Tradition and the Individual Talent," is one that modernist artists and writers struggled with just as the executives at JWT struggle to reconcile individual talent with collaborative creation.<sup>60</sup> The commercial value of attribution became a subject of artistic work – consider Warhol's famous Campbell's soup can works. The source of artistic creativity, the anxiety about creativity in a work setting became a subject of popular culture. Recall that in the 1960s television show, *Bewitched*, the male lead, Darren, works in advertising. He gets many of his ideas, however, from his wife and muse, Samantha the witch.

Even in the realm of "literature" and "art gallery" (as opposed to commercial) writing and art, marketing mattered; the relationship between the publisher and the author and the dealer and the artist was an important feature of the modernist world long before Andy Warhol famously tried to collapse the distinction between art and commerce by painting soup cans, referring to himself as a brand and his studio as "the Factory," and disclaiming authorship of some of his paintings by deflecting questions about the intent of his work to his assistants who, Warhol said, actually created them.<sup>61</sup> Warhol's merger of artistic talent, transformative vision, and distinctive ability to generate hype does not make sense except against the backdrop of Modernism's insistence on the separation between art and commerce.

Studies of the economics of artistic labor markets identify the crucial importance of reputation in determining the value of creative labor, or at least compensation paid for labor.<sup>62</sup> Law both facilitated and reacted to a modern conceptualization of talent as not merely inhering in a person, nor even being the product of the talented person's effort, but

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<sup>58</sup> I am grateful to Clyde Spillenger for pointing this out to me based on his reading of guitarists' internet discussions.

<sup>59</sup> Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* (New York: Oxford University Press, 1973).

<sup>60</sup> T.S. Eliot, Tradition and the Individual Talent, in *The Sacred Wood: Essays on Poetry and Criticism* (1922).

<sup>61</sup> Amy Adler recounts this incident in Against Moral rights, 97 *California Law Review* 263, 296 (2009): "Boasting his lack of connection with his own objects, addressing a group of admiring interviewers, Warhol said: 'Why don't you ask my assistant Gerry Malanga some questions? He did a lot of my paintings.'" (quoting Caroline A. Jones, *Machine in the Studio* 422 n.35 (1996)).

<sup>62</sup> Pierre-Michel Menger, Artistic Labor Markets and Careers, 25 *Ann. Rev. Sociology* 541 (1999).

as reflecting the investment of the promoter and the impresario, the TV hosts, the DJs, and even the social and serendipitous relation between the artist and the crowd. As the social theorist Pierre-Michel Menger observed, one should understand the value of artistic labor as a matter of reputation as much as talent. “[T]he appraisal of art and artists varies with the organizational traits of each art world, since it reflects the cooperative and competitive activities of the various members. . . . Rather than being a causal factor, talent becomes a dependent variable, socially determined by the behavior of employers on one side of the market and consumers on the other side. This is why talent may be conceived as embodying not only artistic abilities and technical skills, but also behavioral and relational ones.”<sup>63</sup> Attribution was, thus, a function of the labor market and the consumer market, but it was enormously valuable to the creative worker. As with other things of value, people began to think of attribution as a species of property. As intellectual property concepts of authorship permeated legal conceptions of attribution, other areas of law recycled copyright’s established equation of text with property and unoriginality with copyright infringement into a new equation of persona with property and unauthorized representation with theft. Madison Avenue’s marketing of pop songs and pop stars made it possible to say that when someone else on Madison Avenue chose to ask a singer to sing too much like Bette Midler it was an act of “pirat[ing] her identity.”

The dialectic between modernism and Madison Avenue that defined the shadow that modernist author/artist cast over the world of commercial art did not end with it. We can see in contemporary popular music the continuing transformation of all attributes of creative workers into some form of intellectual property right in persona and musical reputation. Hip-hop artists use bits of recordings to create new songs in a quite labor-intensive and creative process. Indeed it is the *labor* in searching for records and in isolating snippets of them, the accumulated *knowledge* about the sounds on thousands of records, and *virtuoso speed* and *cleverness* in combining and playing them on turntables that contributed to hip-hop music’s allure to audiences, musicians, and critics.<sup>64</sup> Threat of copyright infringement litigation prompted musicians to abandon the longstanding musical tradition of borrowing and riffing on melodies, rhythms, and passages from existing music,<sup>65</sup> squelched certain forms of satire and parody, and thus changed the way in which contemporary musicians negotiate their relationship to both the sounds of and the reputation of their forebears. Musicologists and literary scholars have noted, usually with regret or alarm, that the expansive copyright protection enables authors and musicians, their heirs, and their recording or publishing companies, to control the uses to which creative works are put. The control is not merely about how sounds, words, and images will be used, but also how the reputation of a past generation of creative workers will be shaped by the work of a new generation. The dogged efforts of James Joyce’s heir to prevent uses of Joyce’s works and correspondence that might portray the Joyce family in a light not favored by the heir are an effort to blend the copyright of the author as proprietor with the tort that treats the persona

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<sup>63</sup> *Id.* at 557-558 (citation omitted).

<sup>64</sup> The process of record collecting and sampling emphasizing the labor, knowledge, skill and creativity in hip-hop composition (also known as production) is described in a detailed ethnomusicology of the hip-hop artists of Seattle, Washington by Joseph G. Schloss, *Making Beats: The Art of Sample-Based Hip-Hop* (Middletown: Wesleyan University Press, 2004).

<sup>65</sup> James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press 2008); Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity* (Athens: University of Georgia Press, 2006).

as property.<sup>66</sup> It is Modernism harnessing the power of law to fight back against the postmodernist or poststructuralist claim that the reader, not the author, gives meaning to a work.<sup>67</sup>

## Conclusion

From the beginning of the twentieth century to the end, the relationship between creators and law was as much an effort to negotiate the ways they would be credited for their work and whether or how they would be regarded by some vast (or small) public, as it was about whether they would own the copyright in their work. A copyright – a right to (try to) control the sale and duplication of a work – was usually managed if not owned by others, the employer, the publisher, or the forces of the market. But a reputation was something that seemed much more core to the author's very self, and was always at least partly inalienable. Yet it, too, became difficult to control in proportion to the value of controlling it.

I have used Madison Avenue as a metonym for one of two contrasting twentieth century visions of the nature of authorship and the reasons why law should protect it. But Madison Avenue was also, in both a figurative and a literal sense, a place where creators and intellectual property owners worked together and, in so doing, worked out the nature and meaning of modern authorship. It was a place where the meaning of authorship mutated both to emphasize the value of attribution over the value of creation. But by so doing, and by modeling how and why attribution should be alienable, it created the conditions that would give rise to a backlash – the search for Clara Driscoll behind the Tiffany name, the search for Abigail Ybarra behind the Fender name. High Modernism was, in part, an attempt by artists, writers, critics, and friends to shore up the Romantic model of authorship in the face of its increasingly being challenged by the reality that most art, writing, and other copyrighted works were created as works for hire and that attribution of creative work could be as saleable as the work and the copyright in it.

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<sup>66</sup> See, e.g., Samantha Brand, Note, Four Thousand Words on Finnegans Wake: The Misuse of Copyright Doctrine and the Controversy Surrounding the Estate of James Joyce, 25 *Cardozo Arts & Entertainment L.J.* 1229 (2008). The *Shloss v. Joyce Estate* litigation, which involves Joyce's heir's effort to prevent a scholar from including certain materials in a book, is chronicled at <http://cyberlaw.stanford.edu/case/shloss-v-estate-of-joyce>. The controversy is described in D.T. Max, The Injustice Collector: Is James Joyce's Grandson Suppressing Scholarship? *The New Yorker* (June 19, 2006).

<sup>67</sup> Roland Barthes, *The Death of the Author*.