

# **Crayons, Contests, & Copyright: Contracting to Use a Child’s Creative Work**

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“[A child] is not only an object of care and concern but also a subject whose rights should be respected.”<sup>1</sup>

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<sup>1</sup> OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., LEGIS. HIST. OF THE CONVENTION ON THE RTS. OF THE CHILD, at I-xxxvii, U.N. Doc. ST/HR/PUB/07/1, U.N. Sales No. 07.XIV.3 (2007) [hereinafter U.N. LEGIS. HIST.].

## INTRODUCTION

From crayon drawings on a parent's refrigerator to an award-winning short film by a fourteen-year-old, children and young people under the age of eighteen are constantly creating.<sup>2</sup> Society encourages children to create: there are many programs, including Youth Communication and Kids in the Spotlight, discussed in greater detail below, that encourage and empower youth to express themselves by writing or making films in order to heal, grow, and advocate for themselves.<sup>3</sup> Though children have no affirmative legal "right to create," the United Nation's Convention on the Rights of the Child states that, subject to certain restrictions, children "shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds . . . either orally, in writing or in print, in the form of art, or through any other media of the child's choice."<sup>4</sup> The legislative history behind the Convention suggests that it was intended to recognize a core concept of contemporary childhood—that a child "is not only an object of care and concern but also a subject whose rights should be respected."<sup>5</sup> One member of the committee for the adoption of the Convention on the Rights of the Child noted, "[g]enuine effort should be made to seek out the positive aspects of youthful expression and channel it to useful ends."<sup>6</sup>

Companies and organizations try to "seek out the positive aspects of youthful expression and channel it" through contests or other use of minors' copyrights.<sup>7</sup> For example, as of this writing, Google is holding its fifteenth annual "Doodle for Google" contest, inviting students in kindergarten through twelfth grade to submit artwork using the letters in the Google logo.<sup>8</sup> Google holds the contest as "an opportunity to experience

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<sup>2</sup> See, e.g., Tierra Carpenter, *Teenage Award-Winning Director Kalia Love Jones Signs Deal for Animated Series*, WISHTV (Feb. 22, 2022, 05:25 PM), <https://www.wishtv.com/news/allindiana/teenage-award-winning-director-kalia-love-jones-signs-deal-for-animated-series/> [<https://www.perma.cc/GVW4-F24W>].

<sup>3</sup> See, e.g., Jane M. Spinak, *They Persist: Parent and Youth Voice in the Age of Trump*, 56 FAM. CT. REV. 308, 318–19 (2018). See also *Represent Magazine*, YOUTH COMM'N, <https://youthcomm.org/represent-stories> [<https://perma.cc/BY74-MYGL>]; see also *About KITS, KIDS IN THE SPOTLIGHT*, <https://www.kitsinc.org/about> [<https://perma.cc/UC43-SV34>].

<sup>4</sup> G.A. Res. 44/25 art. 13 (Nov. 20, 1989).

<sup>5</sup> U.N. LEGIS. HIST., *supra* note 1.

<sup>6</sup> *Id.* at 265.

<sup>7</sup> See *id.*

<sup>8</sup> See *How It Works*, DOODLE FOR GOOGLE, <https://doodles.google.com/d4g/how-it-works> [<https://perma.cc/5DC4-ZYFC>].

the creativity, thoughtfulness and talent of younger generations.”<sup>9</sup> However, the “Doodle for Google” contest entry form contract, which the entrant and the parent or guardian must sign, gives Google wide latitude to use and potentially profit from designs made by minor entrants.<sup>10</sup>

The contract states in part: “Entrant grants Google a perpetual, irrevocable, worldwide, transferable, royalty-free, and non-exclusive license to use, reproduce, adapt, modify, publish, distribute, publicly perform, create a derivative work from, and publicly display the doodle for any purpose, including display on the Google website, without any attribution or compensation to Entrant.”<sup>11</sup>

This could produce unfair results for minor creators. Another precarious example of a minor-company interaction is *Cooley v. Target Corp.* (the “*Target Case*”). In that case, a 14-year-old minor diagnosed with autism, N.O.C., had posted several of his multi-color crayon designs on social media.<sup>12</sup> Target employees then reached out to N.O.C. via Instagram to say that his artwork “caught [their] eye.”<sup>13</sup> Target invited N.O.C. to a company workshop aimed at empowering young creative voices.<sup>14</sup> A few months later, Target began selling merchandise bearing designs similar to N.O.C.’s artwork.<sup>15</sup> N.O.C. and his mother sued Target, alleging infringement.<sup>16</sup> Though the court did not find infringement, this case sheds light on the potential issues that arise when minors and companies interact.<sup>17</sup>

When minor creators and companies interact, there is a risk that companies will exploit minors’ creativity, as seen in the *Target Case*. Minors of this generation are “digital natives,” and their online presence makes them more vulnerable to copyright

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<sup>9</sup> See Selly Sallah, *The Doodle for Google Student Contest Turns 15*, GOOGLE (Feb. 28, 2023), <https://blog.google/products/search/the-doodle-for-google-student-contest-turns-15/> [https://perma.cc/J9WA-PVQY].

<sup>10</sup> See *Contest Rules*, DOODLE FOR GOOGLE, [https://doodles.google.com/intl/en\\_us/d4g/rules/](https://doodles.google.com/intl/en_us/d4g/rules/) [https://perma.cc/X5HW-G7H7].

<sup>11</sup> *Id.* at ¶ 29.

<sup>12</sup> See Plaintiff’s First Amended Complaint at 2–3, *Cooley v. Target Corp.*, 2022 U.S. Dist. LEXIS 175623 (D. Minn. Sept. 28, 2022) (No. 8:20-cv-00876-DOC-JDEx).

<sup>13</sup> *Id.* at 3; see also Tiffany Hu, *Target Beats Copyright Suit Over Autistic Teen’s Artwork*, LAW360 (Sept. 29, 2022), <https://www.law360.com/articles/1535082/target-beats-copyright-suit-over-autistic-teen-s-artwork> [https://perma.cc/R4J8-43ZP].

<sup>14</sup> See Plaintiff’s First Amended Complaint, *supra* note 12, at 3.

<sup>15</sup> See *id.* at 4; see also Hu, *supra* note 13.

<sup>16</sup> See Hu, *supra* note 13; see also Plaintiff’s First Amended Complaint, *supra* note 12, at 4.

<sup>17</sup> See Hu, *supra* note 13.

infringement.<sup>18</sup> With technology and the internet, children are creating and disseminating visual and graphic works, often unaware of how to protect their copyright ownership.<sup>19</sup> For example, there are nonprofit programs that prompt children to create stories, art, choreography, and screenplays, but no one to instruct the children (or their parents or guardians) on how to protect these copyrightable works.<sup>20</sup> There are also online classes that teach today's minors how to design websites and create graphic designs, but these classes do not include resources that teach minors how to protect their creations.<sup>21</sup> Additionally, much of the current legislation surrounding children and their internet usage involves protecting their online privacy or preventing commercial sexual exploitation rather than protecting minors' creative works.<sup>22</sup> Compounding this issue is minors', parents', and guardians' lack of copyright knowledge. Minors and those supporting them may not

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<sup>18</sup> See Andrea M. Matwyshyn, *Generation C: Childhood, Code, and Creativity*, 87 NOTRE DAME L. REV. 1979, 1979–81 (2012). Eric Goldman, a professor of internet and intellectual property law, noted that minor “copyright owners need to consider the implications of posting their works online, because they might be unable to show that infringers accessed the [copyrighted work].” Eric Goldman, *When Do Defendants Have Access to Copyrighted Works Posted to the Internet?—Cooley v. Target Corp.*, TECH. & MKTG. LAW BLOG (Oct. 2, 2022), <https://blog.ericgoldman.org/archives/2022/10/when-do-defendants-have-access-to-copyrighted-works-posted-to-the-internet-cooley-v-target-corp.htm> [<https://perma.cc/84WQ-7N6Q>].

<sup>19</sup> See, e.g., Julie Cromer Young, *From the Mouths of Babes: Protecting Child Authors from Themselves*, 112 W. VA. L. REV. 431, 432 (2010) (“[T]he minor author is often all too willing to expose the work to infringement by publishing . . . the copyrightable work online . . .”).

<sup>20</sup> See, e.g., Spinak, *supra* note 3, at 318–19. For example, Youth Communication’s *Represent Magazine* and *YouthComm Magazine* hire teenagers to write articles, blog posts, and poetry about their real-life experiences. *Youth Stories*, YOUTH COMM’N, <https://youthcomm.org/youth-stories/> [<https://perma.cc/7BNZ-TUWN>] (last visited Sept. 14, 2023); see also Telephone Interview with Keith Hefner, Founder and Senior Advisor, Youth Comm’n (Jan. 28, 2023) [hereinafter Hefner Interview]. Additionally, Kids in the Spotlight (KITS) is a Los Angeles-based nonprofit that runs programming for foster youth ages 12–17 to write scripts and make films. Telephone Interview with Tige Charity, CEO, Kids in the Spotlight (Feb. 16, 2023) [hereinafter Charity Interview]. Though Youth Communication and KITS staff informally support program participants, there is no formal legal advising. See Hefner Interview, *supra*; see also Charity Interview, *supra*.

<sup>21</sup> See Matwyshyn, *supra* note 18, at 1979–81; see also Cornell Cooperative Extension for Madison County, *Canva for Kids with Courtney, Episode 1: Making a Poster*, YOUTUBE (Apr. 14, 2020), [https://www.youtube.com/watch?v=Q4\\_RZV0eMo8](https://www.youtube.com/watch?v=Q4_RZV0eMo8) [<https://perma.cc/JL3E-MSNE>]; *Modern Website Design with Wix Class*, CREATE&LEARN, <https://www.create-learn.us/cloud-computing/wix> [<https://perma.cc/6Q2F-L5XD>] (last visited Sept. 14, 2023).

<sup>22</sup> See, e.g., Erin Carpenter, *How Social Media is Affecting the Lives of Minors Including Current Legal Safeguards and Their Weaknesses*, 5 CHILD & FAM. L.J. 75, 77–80 (2017) (exploring minors’ pervasive social media usage and content creation and cautioning the hazards of “pedophiles[] and child pornographers”). See also Emily DiRoma, *Kids Say the Darndest Things: Minors and the Internet*, 2019 CARDOZO L. REV. DE NOVO 43 (2019) (discussing the federal Children’s Online Privacy Act and California’s “Online Eraser Law”).

understand the significance of whether a company licenses or owns a minor's copyright.

These minor-company interactions also present risks for companies. As seen in the *Target Case*, companies wishing to work with minor creators face the potential peril of costly litigation and bad publicity.<sup>23</sup> And while some companies seeking to work with a minor's copyrighted work may require the minor to contractually grant the company an irrevocable license to use the work,<sup>24</sup> making a license contract with a minor remains risky because of the infant contract doctrine.<sup>25</sup> The infant contract doctrine is the common law rule that minors can void a contract for goods or services that are not necessities.<sup>26</sup> The purpose of the doctrine was "the protection of minors from foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace."<sup>27</sup> In many states today, minors can disaffirm, or void, their contracts.<sup>28</sup> Companies have tried to get around this doctrine by having a parent or guardian sign the license contract,<sup>29</sup> or by contractually providing that the artwork is a "work made for hire."<sup>30</sup> Both of these approaches create challenges because neither license contracts nor "work made for hire" contracts are immune to disaffirmance under the infant contract doctrine, and there are inconsistencies in how courts approach cases involving minors and copyright—especially when contracts are involved. Additionally, attempts to circumvent the infant contract doctrine, such as having a parent or guardian co-sign a minor's contract, may prove futile in some states. The variability among courts as to when and how minors are allowed to disaffirm contracts produces inconsistent results in copyright cases

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<sup>23</sup> For example, after Target's run-in with N.O.C., an article was published entitled "Target Beats Copyright Suit Over Autistic Teen's Artwork." See Hu, *supra* note 13.

<sup>24</sup> *Contest Rules*, *supra* note 10.

<sup>25</sup> See, e.g., 1 HENRY CAMPBELL BLACK, TREATISE ON THE RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS § 306 (1916) [hereinafter BLACK ON RESCISSION] ("An adult who enters into a contract with an infant [someone who has not reached the legal age of majority] does so at his own risk and remains bound by the contract unless the infant elects to disaffirm it.").

<sup>26</sup> See Victoria Slade, *The Infancy Defense in the Modern Contract Age: A Useful Vestige*, 34 SEATTLE U. L. REV. 613, 614, 617 (2011); see also RESTATEMENT (SECOND) OF CONTRACTS § 14 (Am. L. Inst. 1981).

<sup>27</sup> *Halbman v. Lemke*, 99 Wis. 2d 241, 245 (Wis. 1980).

<sup>28</sup> See, e.g., CAL. FAM. CODE § 6710 (West).

<sup>29</sup> See, e.g., *Contest Rules*, *supra* note 10 (requiring parent or guardian signature).

<sup>30</sup> See, e.g., *I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196, 207 (S.D.N.Y. 2015).

involving minors. Companies need a workable solution to allow them to control the underlying copyright. Otherwise, the risks associated with working with minors will be too great.

The lack of conversation, law, and policy around potential infringement of minors' works may be because, unlike profitable child actors who receive great legislative attention,<sup>31</sup> there is little money to be made from a youth's writing, artwork, or other tangible artistic expression. "Unless you're Malala [Yousafzai]," said Keith Hefner, founder and senior advisor of the nonprofit Youth Communication, "you're never going to make a penny from IP [intellectual property]."<sup>32</sup> While Hefner's statement may be true for most child authors and artists, companies *have* stood to gain from children's creative expressions, as further discussed below. Though no infringement was proven in the *Target* Case, Target no doubt made money on its merchandise.<sup>33</sup>

Additionally, much of the existing literature focuses on children as copyright infringers, while less focuses on children as those who are being infringed upon.<sup>34</sup> Furthermore, there is little-to-no guidance on how companies can protect themselves while working with minor creators. In a landscape in which children are viewed as copyright infringers or worse—an infant who can void a whole contract—the law needs an approach that honors minor creators' rights, encourages minors' creativity, and provides an effective, mutually beneficial way for companies to work with them. Because of minors' increased presence and autonomy online, analysis of these minor-company interactions and the legal issues they raise is increasingly important.<sup>35</sup> The goal of this Note is to shed light on often-overlooked minors as creators, identify variability in how copyright law and contract law are applied, and lend solutions.

Part I of this Note examines the legal systems undergirding minor-company interactions: copyright and contract law, particularly the infant contract doctrine. Part I also explains the circuit split as to the Copyright Act's preemption of state

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<sup>31</sup> See, e.g., *California Coogan Law*, BIZPARENTZ FOUND. (Mar. 24, 2018), <https://www.bizparentz.org/california-coogan-law/> [<https://perma.cc/5BTX-NWHK>].

<sup>32</sup> Hefner Interview, *supra* note 20.

<sup>33</sup> See Plaintiff's First Amended Complaint, *supra* note 12, at 3–4.

<sup>34</sup> See, e.g., *id.* One article addresses the issue of minors as creators and minors' presence online, but it does not take the company's perspective into account. See Young, *supra* note 19; see also discussion *infra* Part II.A.

<sup>35</sup> See, e.g., Matwyshyn, *supra* note 18, at 1979–81.

contract law and how courts vary in analyzing when a minor can disaffirm a contract.

Accepting the variability of contract claims and copyright preemption, Part II suggests four solutions. First, Part II builds upon a previously proposed solution for Congress to amend the Copyright Act to allow minors to terminate their license agreements sooner.<sup>36</sup> Second, Part II argues “work made for hire” contracts involving minors below working age should be unenforceable.

Third, Part II urges states to independently extend so-called Coogan Laws to cover written and pictorial works or to enact Coogan Laws if no such laws exist. States such as California and New York have Coogan Laws protecting child actors from employers and even from their parents and guardians.<sup>37</sup> Under these laws, courts act as neutral third parties to evaluate the fairness of contracts; once a contract is court-approved, the minor is prevented from disaffirming it.<sup>38</sup> Though Coogan Laws apply to employment contracts for “artistic or creative services,” the laws have not been extended to companies’ contracts for minors’ written or pictorial works.<sup>39</sup> Extending these laws to copyright license contracts would not only allow courts to approve contracts pertaining to other creative works, but it would also protect any financial gains made by the minor creators.<sup>40</sup>

Finally, Part II suggests informal solutions for minors, parents and guardians, and companies. Parents, guardians, educators, and the community can inform themselves about

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<sup>36</sup> See Young, *supra* note 19.

<sup>37</sup> See CAL. FAM. CODE §§ 6750–51(a) (West); see also Danielle Ayalon, *Minor Changes: Altering Current Coogan Law to Better Protect Children Working in Entertainment*, 35 HASTINGS COMM’NS & ENT. L. J. 353, 354 (2013) (“Coogan Law is a popular name for sections 6750 through 6753 of the California Family Code.”); *California Coogan Law*, *supra* note 31 (describing similar laws in other states).

<sup>38</sup> See CAL. FAM. CODE §§ 6750–51(a) (West); see also Warner Bros. Pictures, Inc. v. Brodel, 31 Cal. 2d 766, 774–75 (Cal. 1948) (“The provisions . . . regarding the submission of contracts of minors for court approval are based on a policy different from [the policy] which underlies the right of minors to disaffirm their contracts. In professions in which one frequently begins a career at a tender age, it is to the interest of minors that they be able to make contracts with employers reasonably protecting the interests of both parties. To accomplish this purpose broad discretion has been vested in the court to which such contracts are submitted. The court may consider whether the terms of the contract are reasonable in the light of the then financial and educational interests of the minor as well as the proper development of his talents and his chances for success in the profession. This discretion, . . . has been vested in the court to enable the parties to adjust their contract relations to their needs . . .”).

<sup>39</sup> CAL. FAM. CODE §§ 6750–51(a) (West); see also Ayalon, *supra* note 37, at 358.

<sup>40</sup> Coogan Laws provide for a portion of the child’s earnings to go into a trust to protect against parents embezzling funds from their children. See, e.g., Ayalon, *supra* note 37, at 358–59.

copyright law and teach minors about their rights. Companies can give minors more control over their copyrights than the minors would otherwise have under existing law.

## I. COPYRIGHT AND CONTRACT LAW

### A. Copyright Overview and Registration

Under the Copyright Act, as soon as an idea is fixed in a tangible form of expression, it is subject to copyright protection.<sup>41</sup> The United States Copyright Office, in a pdf written for a child audience, explicitly declares that “even a child’s original fingerprinting” is subject to copyright protection.<sup>42</sup> This makes sense because (1) authorship and ownership of a copyright immediately vest with the creator of the work (unless it is a “work made for hire,” discussed below) whether or not the work is registered and (2) the standards of creativity and originality that are necessary for a work to be copyrightable are very low.<sup>43</sup> Though the Copyright Act does not explicitly state that authors of copyrighted works can be minors, it defines authors as natural persons, and the Copyright Office grants copyright registration to minors.<sup>44</sup> Copyright is accessible to minors in that artistic works need not be registered with the United States Copyright Office to receive protection; however, registration “enhance[s] the protections of copyright.”<sup>45</sup>

A situation in which a person does not own the copyright in a work they have made is when the work is “made for hire.”<sup>46</sup> Under the “work made for hire” doctrine, the authorship of a work (the

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<sup>41</sup> See, e.g., U.S. COPYRIGHT OFF., CIRCULAR 1: COPYRIGHT BASICS, 1 (rev. Sept. 2021) [hereinafter CIRCULAR 1].

<sup>42</sup> See U.S. COPYRIGHT OFF., *Copyright for Kids* (Jan. 2021). See also Nicole Lamberson, *Six Copyright Concepts Your K-12 Students Should Know*, LIBR. OF CONG. BLOGS (Nov. 19, 2020), <https://blogs.loc.gov/copyright/2020/11/six-copyright-concepts-your-k-12-students-should-know> [<https://perma.cc/AQW8-MYA3>].

<sup>43</sup> See CIRCULAR 1, *supra* note 41, at 1; see also *I.C. ex rel. Solovsky v. Delta Galil U.S.A.*, 135 F. Supp. 3d 196, 213–15 (S.D.N.Y. 2015) (holding a second-grader’s simple hi/bye smiley face design was sufficiently original to survive a motion to dismiss).

<sup>44</sup> See 17 U.S.C. § 201(a); see also *Who Can Register?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-who.html> [<https://perma.cc/DVP6-AM3L>] (last visited Sep. 8, 2023). Thus far, only a monkey has been found to be outside the definition of an author for copyright purposes. See Susannah Cullinane, *Monkey Does Not Own Selfie Copyright, Appeals Court Rules*, CNN (Apr. 24, 2018, 9:27 AM), <https://www.cnn.com/2018/04/24/us/monkey-selfie-peta-appeal/index.html> [<https://perma.cc/9M44-3TDB>].

<sup>45</sup> See CIRCULAR 1, *supra* note 41, at 4.

<sup>46</sup> See, e.g., U.S. COPYRIGHT OFF., CIRCULAR 30: WORKS MADE FOR HIRE 1 (rev. Mar. 2021) [hereinafter CIRCULAR 30].

copyright) automatically vests in the employer of the author, if the author (1) created the work during the scope of employment or (2) contractually agreed that the work was “made for hire.”<sup>47</sup> As the Supreme Court has noted, classifying a work as “made for hire” is profoundly significant because it has implications not only for copyright authorship and ownership but also the copyright duration<sup>48</sup> and termination rights, discussed in greater detail below.<sup>49</sup> Under the first category of works created during the scope of employment, Congress envisioned a traditional employer-employee relationship in which the employee surrenders authorship of the work in exchange for a regular salary and other employment benefits.<sup>50</sup> It would be unusual for a minor to be a traditional employee under the first category because of child labor laws.<sup>51</sup> However, it is not uncommon for companies to contractually require minors to agree that their work is “made for hire” under the second category.<sup>52</sup>

Assuming the minor is the copyright owner, defending a copyright is logistically challenging for minors. Registration of a copyright is a prerequisite to suing an alleged copyright infringer.<sup>53</sup> Minors may register their own copyrights, provided they can pay the required filing fee “by credit card, debit card, bank account, or deposit account,” which they may not have

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<sup>47</sup> *Id.*; see also DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 5.03 (2023) [hereinafter 1 NIMMER] (explaining the statutory requirement that a work under category two be “specially ordered or commissioned” and the courts’ abandonment of requiring those “talismanic words” in “work made for hire” contracts).

<sup>48</sup> Compare CIRCULAR 30, *supra* note 46, at 4 (“The term of copyright protection in a “work made for hire” is 95 years from the date of publication or 120 years from the date of creation, whichever expires first.”) with CIRCULAR 1, *supra* note 41, at 4 (“In general . . . the term of copyright is the life of the author plus seventy years after the author’s death.”).

<sup>49</sup> See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

<sup>50</sup> See 133 CONG. REC. 12,957 (1987) (statement of Sen. Cochran). The “work made for hire” doctrine is akin to the “shop right” doctrine for patents: an employee who uses an employer’s resources or is under an employer’s control must give patent ownership to the employer. See H.R. REP. NO. 94-1476, at 5737 (1976); see also 132 A.L.R. Fed. 301 § 2[a] (1996) (“The rationale behind the “work for hire” doctrine is that when an employer hires an employee to create a copyrightable work, the fruits of the employee’s endeavors properly belong to the employer.”).

<sup>51</sup> See, e.g., U.S. DEP’T OF LAB., WAGE AND HOUR DIV., CHILD LAB. BULL. NO. 101, CHILD LABOR PROVISIONS FOR NONAGRICULTURAL OCCUPATIONS UNDER THE FAIR LABOR STANDARDS ACT 3 (2016) [hereinafter CHILD LABOR].

<sup>52</sup> See, e.g., *I.C. ex rel. Solovsky v. Delta Galil U.S.A.*, 135 F. Supp. 3d 196, 207–08 (S.D.N.Y. 2015). See also *Contest Rules*, *supra* note 10.

<sup>53</sup> See 17 U.S.C. § 411.

access,<sup>54</sup> or minors may appoint “a parent, guardian, or other qualified agent” to register the copyright on their behalf.<sup>55</sup> Once a work is registered or in the process of registration, a copyright holder may sue an alleged infringer for an unauthorized exercise of the copyright holder’s right, such as copying, using, or disseminating the copyrighted work.<sup>56</sup> The Federal Rules of Civil Procedure dictate that minors bringing suit must be represented by an adult, so a minor will need a parent, guardian, or other representative to bring the suit on his or her behalf.<sup>57</sup> Thus, unlike an adult copyright holder, a minor whose work has been infringed is at the mercy of caring adults in her life.<sup>58</sup> After meeting these logistical hurdles, minors seeking to defend their copyright must confront differing state laws regarding minors and copyright—and the extent to which the Copyright Act preempts state law.<sup>59</sup>

#### B. Copyright Preemption and Contract Law Gap Fillers

Federal copyright law is a legal scheme, rooted in the United States Constitution, intended to further the arts.<sup>60</sup> Copyright law encourages people to make creative works “by attaching enforceable property rights to them.”<sup>61</sup> The Copyright Act, passed in 1976, is the law in the United States today.<sup>62</sup>

Congress’s overall intent in codifying a federal copyright scheme was to substitute the “anachronistic, uncertain,

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<sup>54</sup> See U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFF. PRACS. § 405.2 (3d ed. 2021) [hereinafter COMPENDIUM]; see also *id.* (“[T]he U.S. Copyright Office will accept applications submitted either by or on behalf of a minor.”); see also CIRCULAR 2: COPYRIGHT REGISTRATION, U.S. COPYRIGHT OFF. 2 (rev. May 2022).

<sup>55</sup> COMPENDIUM, *supra* note 54, at § 405.2.

<sup>56</sup> See 17 U.S.C. § 411.

<sup>57</sup> See FED. R. CIV. P. 17; see also *Cooley v. Target Corp.*, No. 20-2152, 2022 U.S. Dist. LEXIS 175623, at \*2 (D. Minn. Sept. 28, 2022). However, the Copyright Act is clear that the minor, not the adult representative, is the one with standing to sue. See 17 U.S.C. § 501(b).

<sup>58</sup> *But see* FED. R. CIV. P. 17(c)(2) (directing courts to appoint a guardian ad litem to represent a minor who does not have an adult to represent her).

<sup>59</sup> See *Who Can Register?*, *supra* note 44 (“Minors may claim copyright, and the Copyright Office issues registrations to minors, but state laws may regulate the business dealings involving copyrights owned by minors.”).

<sup>60</sup> See, e.g., Alison Hall, *Promoting Progress: Celebrating the Constitution’s Intellectual Property Clause*, LIBR. OF CONG. BLOGS (Sept. 17, 2020), <https://blogs.loc.gov/copyright/2020/09/promoting-progress-celebrating-the-constitutions-intellectual-property-clause/> [https://perma.cc/U9WY-6RVB].

<sup>61</sup> *Diamond v. Am-Law Publ’g Corp.*, 745 F.2d 142, 147 (2d Cir. 1984).

<sup>62</sup> See H.R. REP. NO. 94-1476, at 5660 (1976); see also *id.* at 5660-62 (explaining the technological advances such as radio and television which made necessary numerous amendments to the Copyright Act of 1909).

impractical, and highly complicated” copyright common law for a “single system of Federal statutory copyright” and thereby promote uniformity and predictability.<sup>63</sup> The congressional committee involved in writing the Copyright Act of 1976 noted this intent:

One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison’s comments in *The Federalist*, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author’s rights under the differing laws and in the separate courts of the various States. Today, when the methods for dissemination of an author’s work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent.<sup>64</sup>

By providing uniformity and predictable outcomes, Congress sought to further the aims of the Copyright Act and encourage people to create copyrightable works.<sup>65</sup> Moreover, the plain language of section 301 of the Copyright Act states that “all legal or equitable rights” in a copyrighted work—including rights of a copyright holder against infringers—are “governed exclusively” by the Copyright Act.<sup>66</sup> It asserts that “no person is entitled to any such right or equivalent right in any such [copyrighted] work under the common law or statutes of any State.”<sup>67</sup> Simply stated, one’s rights and infringement claims for copyrighted works are governed by the Copyright Act—not by state law. The legislative history for section 301 unequivocally states that the legislative intent is to preempt state law.<sup>68</sup> Thus, the Copyright Act was intended to preempt state law in regard to copyright claims, including those involving copyright infringement.

However, the Copyright Act does not adequately address copyright infringement cases involving contracts. Various aspects

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<sup>63</sup> H.R. NO. 94–1476, at 5745 (1976). Because the United States Constitution’s Supremacy Clause provides that, in general, federal law preempts or overrides state law, and the Copyright Act is federal law, the Copyright Act should preempt state law. U.S. CONST. ART. VI; *see also* DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 11.07 (2023) [hereinafter 3 NIMMER].

<sup>64</sup> H.R. REP. NO. 94–1476, at 5745 (1976).

<sup>65</sup> *See id.*

<sup>66</sup> 17 U.S.C. § 301 (2018). *See also* H.R. REP. NO. 94–1476, at 5746 (1976), and 17 U.S.C. § 106 (2002), for a list of the “bundle of rights” of a copyright holder.

<sup>67</sup> 17 U.S.C. § 301; *see* H.R. REP. NO. 94–1476, at 5746 (1976).

<sup>68</sup> *See* H.R. REP. NO. 94–1476, at 5746 (1976) (“[S]ection 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.”).

of copyright law interact with contract law, including grants of licenses and contractual “work made for hire.”<sup>69</sup> Additionally, section 201(d) of the Copyright Act provides for partial or complete transfers of copyright ownership,<sup>70</sup> which may be made contractually.<sup>71</sup> Professor David Nimmer explains that because the Copyright Act is silent on contractual issues, “the vast bulk of copyright issues must be resolved under state law.”<sup>72</sup> Accordingly, courts have used state contract law to “fill in the gaps” left by the Copyright Act, as long as the state law does not otherwise conflict with the Copyright Act.<sup>73</sup> Courts use a two-prong test to determine when the Copyright Act preempts state law. First, is the work in question within the scope of the Copyright Act?<sup>74</sup> Second, is there an “extra element that changes the nature of the action so [that] it is qualitatively different from a copyright infringement claim”?<sup>75</sup> Courts generally agree about the works that fall within the scope of the Copyright Act and satisfy the first prong of the test; the second prong is the more controversial one.<sup>76</sup> There is a circuit split as to when the Copyright Act preempts state contract law under the second prong, and there are even varying outcomes within circuits.<sup>77</sup>

Sometimes, courts do not even apply the two-prong test. For example in *I.C. ex rel. Solovsky v. Delta Galil USA*, discussed in

<sup>69</sup> See, e.g., U.S. COPYRIGHT OFF., CIRCULAR 16A: HOW TO OBTAIN PERMISSION 1 (rev. Mar. 2021); see also CIRCULAR 30, *supra* note 46, at 1.

<sup>70</sup> 17 U.S.C. § 201(d).

<sup>71</sup> For example in the T-Shirt Design Case, discussed in Part I.C *infra*, one of the clothing company’s arguments was that by signing the contest entry form, the second-grader assigned, or transferred, the t-shirt design copyright to the company. See *I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196, 202 (S.D.N.Y. 2015).

<sup>72</sup> 3 NIMMER, *supra* note 63, § 10.03 (citation omitted).

[T]he vast bulk of copyright issues must be resolved under state law, given the silence of the Copyright Act in addressing such issues as what persons are competent to enter into binding contracts (minors, the insane, defunct corporations, etc.), how to construe ambiguous contractual language, and what circumstances warrant rescission of a previously entered contract.

*Id.*

<sup>73</sup> See, e.g., *Foad Consulting Grp., Inc. v. Musil Govan Azzalino*, 270 F.3d 821, 827 (9th Cir. 2001).

<sup>74</sup> See Guy A. Rub, *Copyright and Contracts Meet and Conflict: Copyright Preemption of Contracts*, NORTHWESTERN PRITZKER SCH. OF L. at 18, [https://www.law.northwestern.edu/research-faculty/clbe/events/roundtable/documents/rub\\_copyright\\_and\\_contracts\\_meet\\_and\\_conflict.pdf](https://www.law.northwestern.edu/research-faculty/clbe/events/roundtable/documents/rub_copyright_and_contracts_meet_and_conflict.pdf) [<https://perma.cc/PW7E-RJZU>].

<sup>75</sup> See *id.* at 19 (citation omitted).

<sup>76</sup> See *id.* at 18–19.

<sup>77</sup> See also *id.* at 20 (“There are . . . more than 200 reported decisions that applied the extra element test to a contractual cause of action. . . . [T]hose decisions include numerous examples of internally conflicting reasoning or decisions that deviated, typically without notice, from binding precedents . . .”). See generally *id.*

further detail below, the district court analyzed the second-grader's disaffirmance claim, a contract formation issue, before reaching her copyright infringement claim.<sup>78</sup> Furthermore, in *A.V. ex rel. Vanderhyye v. iParadigms, LLC*, discussed in further detail below, a district court within the Fourth Circuit failed to use the two-prong test to determine whether the state's infant contract law was preempted by the Copyright Act; instead, the court simply began its analysis of the state law claims before reaching its copyright analysis.<sup>79</sup> Because of these inconsistencies, the outcomes of copyright cases involving minors hinge not on the Copyright Act, as was intended by Congress, but on states' varying contract laws regarding infants.<sup>80</sup> Despite Congress's intent, cases involving minors and copyright are anything but uniform.

### C. Infant Contract Doctrine

At common law, minors could void contracts for goods or services that were not necessities.<sup>81</sup> The Restatement (Second) of Contracts section 14 takes this approach, citing the age of majority as eighteen.<sup>82</sup> The purpose of the doctrine was "the protection of minors from foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace."<sup>83</sup> Or to put it more delicately, the common law infant contract doctrine developed "to resolve . . . inequities and afford children the protection they require to compensate for their immaturity."<sup>84</sup> The decades-old treatise BLACK ON RESCISSION recognized an unequivocal right of minors to void or disaffirm a contract, and minors could do so quite easily by taking an act consistent with disaffirmance or initiating a lawsuit.<sup>85</sup>

Today, many states allow minor children to disaffirm or void their contracts, but with an important exception.<sup>86</sup> Minors may not

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<sup>78</sup> See *I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196, 207 (S.D.N.Y. 2015).

<sup>79</sup> See *A.V. v. iParadigms Ltd. Liab. Co.*, 544 F. Supp. 2d 473, 480–84 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom. A.V. ex rel. Vanderhyye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

<sup>80</sup> See, e.g., 42 AM. JUR. 2D *Infants* § 45 (2023).

<sup>81</sup> See Slade, *supra* note 26, at 614, 617.

<sup>82</sup> RESTATEMENT (SECOND) OF CONTS. § 14 (Am. L. Inst. 1981).

<sup>83</sup> See *Halbman v. Lemke*, 298 N.W.2d 562, 564 (Wis. 1980).

<sup>84</sup> See *Shields v. Gross*, 448 N.E.2d 108, 113 (N.Y. 1983) (Jasen, J., dissenting).

<sup>85</sup> See BLACK ON RESCISSION, *supra* note 25, § 304.

<sup>86</sup> See CAL. FAM. CODE § 6710 (West 1994); see also 42 AM. JUR. 2D, *supra* note 80, § 45; see also Slade, *supra* note 26, at 617–18 (discussing the benefits exception).

void a contract when they have retained the benefit of the bargain and disaffirmance would put the other party in a worse position than the minor.<sup>87</sup> Another way courts explain this is using “status quo” or “fruit of the contract” language: minors must return the other party to the status quo or return the fruit of the contract in order to disaffirm.<sup>88</sup> In this way, courts are obfuscating the distinction between a minor voiding a contract and an adult voiding a contract.<sup>89</sup> Courts attribute this “benefits exception” to children’s growing sophistication and a need to “ensur[e] fairness to adult parties contracting with minors.”<sup>90</sup> However, some argue that the infant contract doctrine is still necessary and that the so-called “benefits exception” can produce inequitable results for children.<sup>91</sup>

In two cases involving minors and copyright, the courts’ disaffirmance analyses produced differing and inequitable results. First, in *I.C. ex rel. Solovsky v. Delta Galil USA* (the “T-shirt Design Case”), the court did not allow a minor to disaffirm a contract involving copyright. There, a second-grader submitted a t-shirt design to a children’s clothing company as part of a school-sponsored contest.<sup>92</sup> To enter the contest, both the second-grader and her mother signed the clothing company’s entry-form agreement, which provided that the t-shirt design constituted a “work made for hire” (meaning ownership of the copyright would immediately vest with the clothing company rather than with the second-grader)<sup>93</sup> and alternately assigned the second-grader’s

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<sup>87</sup> See Slade, *supra* note 26, at 617–18.

<sup>88</sup> See, e.g., Larry A. DiMatteo, *Deconstructing the Myth of the “Infancy Law Doctrine”: From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 494–95 (1994); see also Francis v. N.Y. & B.E.R. Co., 15 N.E. 192, 193 (N.Y. 1888).

<sup>89</sup> At common law, cases involving an adult’s right to void a contract had a higher bar than cases involving a child’s right to void. See BLACK ON RESCISSION, *supra* note 25, § 197. An adult could not void her contract if she could not restore the other party to the situation it was in prior to the contract. See *id.* For an adult to void a contract, “restoration of the status quo [was] an essential pre-requisite.” *Id.*

<sup>90</sup> See Slade, *supra* note 26, at 617–18.

<sup>91</sup> See, e.g., *id.* (arguing that children are still vulnerable and in need of protection by the doctrine, especially with the rise of companies with great bargaining power and children’s online presence); see also *id.* at 638 (“Without the threat of disaffirmance, there is little reason [for companies] not to entice minors into contracts that are not in their best interests.”). This accords with Supreme Court decisions that have relied on brain development research to find “that the hallmark features of adolescence—including immaturity, a lack of experience, impetuosity, and less ability to weigh risks and consequences, along with young people’s lack of control over their own environment and choices” afford minors different protections than adults. See Spinak, *supra* note 3, at 312.

<sup>92</sup> *I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196, 202–03 (S.D.N.Y. 2015).

<sup>93</sup> See *supra* Part I.A.

copyright to the clothing company.<sup>94</sup> The second-grader's simple "hi/bye" t-shirt design won the contest.<sup>95</sup> The second-grader received a \$100 gift card, but she received none of the profits from national sales of the t-shirts, socks, purses, headphones, and other merchandise bearing the t-shirt design.<sup>96</sup> The court did not allow the second-grader to disaffirm the contract under the infant contract doctrine, reasoning that allowing the second-grader to disaffirm in this case would run counter to the underlying policy of the infant contract doctrine.<sup>97</sup> If the second-grader were allowed to disaffirm and then own the copyright in designs currently printed on hundreds of t-shirts, the second-grader would be in a superior position than she was prior to disaffirmance.<sup>98</sup> She would be impermissibly retaining the "fruit of the contract."<sup>99</sup>

In *A.V. ex rel. Vanderhye v. iParadigms, LLC* (the "Turnitin Case"), the Fourth Circuit barred minors from disaffirming their copyright contract.<sup>100</sup> In that case, a group of minor high school students did not want to agree to the software company Turnitin's license agreement, which allowed Turnitin access to use and archive their essays for its anti-plagiarism software.<sup>101</sup> The agreement granted Turnitin a "non-exclusive, royalty-free, perpetual, world-wide, irrevocable license" to use the essays.<sup>102</sup> But in order to submit their essays and receive a grade from their school, the students had to agree.<sup>103</sup> The students later sued Turnitin for copyright infringement.<sup>104</sup> When Turnitin asserted that the students had agreed to the license agreement, the students unsuccessfully attempted to void the contract under the infant contract doctrine.<sup>105</sup> The court rejected this argument, reasoning that the students retained the benefits of the agreement; they received a grade for their work because it was

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<sup>94</sup> See *I.C. ex rel. Solovsky*, 135 F. Supp. 3d at 207–08.

<sup>95</sup> *Id.* at 203.

<sup>96</sup> *Id.* at 203–04.

<sup>97</sup> See *id.* at 209–10.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 210.

<sup>100</sup> See *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 645 (4th Cir. 2009).

<sup>101</sup> *Id.* at 634–35.

<sup>102</sup> Slade, *supra* note 26, at 620.

<sup>103</sup> *A.V. ex rel. Vanderhye*, 562 F.3d at 635.

<sup>104</sup> *Id.* at 633–34.

<sup>105</sup> *Id.* at 636 n.5; see also *A.V. v. iParadigms Ltd. Liab. Co.*, 544 F. Supp. 2d 473, 480–81 (E.D. Va. 2008), *aff'd in part, rev'd in part sub nom. A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

verified as non-plagiarized by Turnitin.<sup>106</sup> However, as intellectual property law professor and legal scholar Andrea M. Matwyshyn notes, the court's disaffirmance analysis was tenuous: "it is not entirely clear how the company's generating revenue for itself from archiving the children's work benefits these particular children. Requiring that the children grant a perpetual, irrevocable license to use their work against their will seems of dubious benefit to the children."<sup>107</sup> Though the court acknowledged that the essays were "education[al] and creative expression[s]," the court found that Turnitin's use of the essays constituted fair use, rendering Turnitin not liable for copyright infringement.<sup>108</sup>

These two examples show the unpredictable and sometimes inequitable nature of courts' disaffirmance analyses using the benefits exception.<sup>109</sup> Despite the minors' immaturity and the

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<sup>106</sup> *A.V. ex rel. Vanderhye*, 562 F.3d at 636 n.5; *see also A.V.*, 544 F. Supp. 2d at 480–81.

<sup>107</sup> Matwyshyn, *supra* note 18, at 1991; *see also* Michael G. Bennett, *The Edge of Ethics in iParadigms*, B.C. INTELL. PROP. & TECH. F., 2009, at 15 (characterizing the Turnitin Case as promoting a "cynical vision" of youth as "Bad Seed[s]").

<sup>108</sup> *A.V.*, 544 F. Supp. 2d at 482 ("[The students] originally created and produced their works for the purpose of education and creative expression."); *see also A.V. ex rel. Vanderhye*, 562 F.3d at 645. In his comment on this case, Michael G. Bennett notes that in terms of copyright law, the case "represents a profound legal defeat for the student plaintiffs" because the court prioritized protecting educators from plagiarism above protecting minors' creative expression. Bennett, *supra* note 107, at 15.

<sup>109</sup> A further issue in a court's disaffirmance analysis is whether a transfer of copyright should be seen as irrevocable. A comment to the Restatement of Contracts, Second, section 14 states that a minor's "disaffirmance *reverts* in the other party the title to any property received by the infant under the contract." RESTATEMENT (SECOND) OF CONTRS. § 14 cmt. c (AM. L. INST. 1981) (emphasis added). But the comment further provides: "The problems arising when an infant seeks to disaffirm a *conveyance or executed contract* are beyond the scope of the Restatement of this Subject, whether the disaffirmance is attempted before or after he comes of age." *Id.* (emphasis added). In 1966, Charlie Chaplin's 19-year-old son Michael made a contract with a book publisher to write a memoir and received a hefty advance. *See* H. J. Hartwig, *Infants' Contracts in English Law: With Commonwealth and European Comparisons*, 15 INT'L & COMPAR. L.Q. 780, 820 n.188 (1966); *see also* Bob Tarantino, *A Minor Conundrum: Contracting with Minors in Canada for Film and Television Producers*, 29 HASTINGS COMM'NS & ENT. L.J. 45, 60–61 (2006). The age of majority at the time was 21. *Id.* at 60. Later, desiring to shirk his responsibility to write the book, Michael craftily sought to disaffirm the contract. *See* Hartwig, *supra*, at 820 n.188; *see also* Tarantino, *supra*, at 60–61. The court ultimately held that he could not disaffirm the contract. *See* Hartwig, *supra*, at 820. Regardless of whether Michael could disaffirm, the English court reasoned that Michael's transfer of copyright (in this case, the transfer of an exclusive license) to the publisher was irrevocable as if it were a conveyance of real property. *See* Tarantino, *supra*, at 60–61. However, some courts have allowed infants to disaffirm conveyances of real property. *See* 5 TIFFANY REAL PROP. § 1363 (3d ed. 1939). The court also reasoned that even though the book had not yet been published, the copyright had vested with the publishers and could not be revoked. *See* Tarantino, *supra*, at 61. The court in the T-Shirt Design case also implicitly supported this idea of vesting when it cited *Francis v. New York & B.E.R. Co.* *See* I.C. *ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp.

disparities in bargaining power, the infant contract doctrine did not protect the minors. The second-grader lost out on profits from her artwork, and the student essayists were stripped of control of their copyright in exchange for arguably no benefit.

Furthermore, regardless of one's views on the sophistication of minors and whether they should be able to disaffirm contracts, the outcomes of these cases were not ideal for the companies. The clothing company in the T-Shirt Design Case undoubtedly suffered bad publicity. Despite the company in the Turnitin Case requiring students to contractually grant it a license, the court found that the company did not hold a license for the students' work. The use of the essays was simply fair use, meaning the company would have to prove any additional, different uses of the essays were fair use as well.<sup>110</sup> The unpredictable results of the infant contract doctrine and the way courts analyze its exceptions make companies' contracts for minors' copyrights risky.

Because of the uncertain outcomes of the infant contract doctrine, some companies seek protection by having a parent co-sign the minor's contract.<sup>111</sup> The rationale is that a parent or guardian, as an adult, can be bound by the contract. States agree that if a parent co-signs a contract with a minor, the parent's duties will survive the minor's disaffirmance.<sup>112</sup> But because laws differ on whether a parent can bind the child contractually, having a parent sign a minor's contract is not an effective solution. Under common law, a parent's approval of a contract had no effect on whether the minor could disaffirm the contract.<sup>113</sup> For example,

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3d 196, 209–10 (S.D.N.Y. 2015). Interestingly, the *Francis* court held that infants could not disaffirm a contract because restitution was not possible: stocks had already been transferred to the minors, and the stock title had vested. See *Francis v. N.Y. & Brooklyn El. R.R. Co.*, 15 N.E. 192, 193 (N.Y. 1888). In this way, the T-Shirt Design Case court equated a company producing merchandise, or a copyright being exploited, with title to stock ownership vesting.

<sup>110</sup> See *A.V. ex rel. Vanderhuy*, 562 F.3d at 645; see also *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF. (Feb. 2023), <https://www.copyright.gov/fair-use/> [<https://perma.cc/C9RX-VBL7>] (“Courts evaluate fair use claims on a case-by-[ ]case basis, and the outcome of any given case depends on a fact-specific inquiry.”).

<sup>111</sup> See *I.C. ex rel. Solovsky*, 135 F. Supp. 3d at 209 (discussing the clothing company's argument that the second-grader was precluded from disaffirming the contract because her mother signed it).

<sup>112</sup> See, e.g., Bonnie E. Berry, *Practice in a Minor Key*, 25 L.A. LAW. 28, 31 (2002); see also Ayalon, *supra* note 37, at 358–59 (discussing how a child's and parent's interests can be in direct conflict when the child disaffirms the contract but the parent's contractual duties survive).

<sup>113</sup> See E.C.B., Annotation, *Parent's Approval or Sanction of Infant's Contract as Affecting Latter's Liability on, or Right to Disaffirm, It*, 9 A.L.R. 1030 (1920).

in the 1920 case of *Bombardier v. Goodrich*, the court stated that “the assent of the father added nothing to the binding force of the infant’s promise.”<sup>114</sup> Today, state laws differ on whether a parent may contractually bind a child, particularly with respect to releasing an entity from liability for negligence; some courts have reasoned that giving parents this authority furthers public policy.<sup>115</sup> These courts trust that the parent knows how to best protect the interests of the child.<sup>116</sup> But other courts, recognizing that sometimes parents’ interests are at odds with their children’s interests, have held that “a minor is not bound by a release executed by his parent.”<sup>117</sup> New York Court of Appeals Judge Jasen recognized a minor’s broad right to disaffirm a contract—even one signed by a parent—as an act of judicial *parens patriae*<sup>118</sup> to protect minors from their own immaturity and inexperience.<sup>119</sup> He reasoned that allowing a minor to disaffirm was a way for the *state* to “put the interests of minors above that of adults, organizations, or businesses” and “afford an infant protection against exploitation from adults,” even, it would seem, from parents.<sup>120</sup>

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<sup>114</sup> See *id.* (citing *Bombardier v. Goodrich*, 94 Vt. 208 (1920)).

<sup>115</sup> See, e.g., *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 205 (Ohio 1998).

<sup>116</sup> See *id.*

<sup>117</sup> See *Alexander v. Kendall Cent. Sch. Dist.*, 634 N.Y.S.2d 318, 319 (1995) (“[A] minor is not bound by a release [from liability] executed by his parent.”); see also *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 383 (N.J. 2006) (finding a contract signed by a parent on behalf of a minor releasing an entity from prospective negligence was not enforceable).

<sup>118</sup> Latin for “parent of his or her country,” this legal concept involves the state acting “as provider of protection to those unable to care for themselves.” *Parens Patriae*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>119</sup> See *Shields v. Gross*, 448 N.E.2d 108, 113 (N.Y. 1983) (Jasen, J., dissenting); see also *Hojnowski*, 901 A.2d at 383 (discussing the court’s “*parens patriae*” duty to protect the best interests of the child).

<sup>120</sup> See *Shields*, 448 N.E.2d at 113 (Jasen, J., dissenting). The T-Shirt Design Case, decided under New York law, similarly recognized a minor’s right to disaffirm a contract even when the contract was also signed by a parent. See *I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196, 202, 208–09 (S.D.N.Y. 2015). Thus, the second-grader’s mother’s signature was not fatal to the second-grader’s attempt to disaffirm. *Id.* at 207, 209. Later, however, the court factored the mother’s signature into its unconscionability analysis. *Id.* at 211–12. One of the second-grader’s arguments was that the contest contract was unconscionable because it was made between a child who was too young to understand that she was signing away copyright ownership and a “sophisticated business.” *Id.* at 202, 207, 211. If a contract is found to be unconscionable, it can be voided apart from the infant contract doctrine. See, e.g., *id.* at 210. Contract unconscionability is determined under state law, and it often involves a sliding scale of procedural and substantive unconscionability. *Id.* at 210–12. Procedural unconscionability involves the relative bargaining power of the parties and whether there was a “lack of meaningful choice” by the party claiming unconscionability. *Id.* at 211. The T-Shirt Design Case court

New York and California have statutorily determined circumstances in which a parent's signature is binding on the child, but these statutes can leave children without a voice.<sup>121</sup> In *Shields v. Gross*, the court applied New York Civil Rights Law section 51 and held that model Brooke Shields could not disaffirm a prior contract—under which a photographer took nude photos of her as a ten-year-old—because her mother had consented.<sup>122</sup> Shields' mother had provided the photographer broad consent, producing the “unanticipated and untoward” result that 17-year-old Shields was barred from limiting the photographer's use of the photos.<sup>123</sup> A similar case decided under California Civil Code section 3344 involved a parent authorizing nude photographs of her children (ages four and six) that ultimately ended up in the hands of *Hustler Magazine*.<sup>124</sup> The court did not allow the minors in that case to disaffirm that contract because the proper consent had been obtained from the parent, in accordance with the statute.<sup>125</sup> Laws such as these provide greater certainty to companies working with youth in that the contracts, once approved by a parent or guardian, are disaffirmance-proof. However, these laws can be problematic for youth with negligent or unscrupulous parents or guardians and ignore the child's rights and wishes.<sup>126</sup>

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considered the unequal bargaining power of the sophisticated company and a second-grader and the fact that the company “conduct[ed] the contest through the auspices of the [second-grader's] school,” which induced her to participate and found sufficient facts to support procedural unconscionability. *Id.* at 211. The court noted it would consider the fact that the second-grader's mother had “advised and supervised” her daughter, as evidenced by the mother signing the contract, when evaluating procedural unconscionability at trial. *Id.* at 212. The court in the T-Shirt Design Case doubted whether there was substantive unconscionability since no one could have anticipated the merchandise sales at the execution of the contract. *Id.* However, since unconscionability operates on a sliding scale, the court found sufficient facts to let the claim proceed to trial. *Id.*

<sup>121</sup> See, e.g., *Faloona by Fredrickson v. Hustler Mag., Inc.*, 799 F.2d 1000, 1005 (5th Cir. 1986) (applying California Civil Code section 3344); see also CAL. CIV. CODE § 3344 (West 1971).

<sup>122</sup> See *Shields*, 448 N.E.2d at 109.

<sup>123</sup> See *id.* at 112; see *Shields*, 448 N.E.2d at 112 (Jasen, J., dissenting); see also Christopher Turner, *Sugar and Spice and All Things Not So Nice*, THE GUARDIAN (Oct. 2, 2009, 7:05 PM), <https://www.theguardian.com/theguardian/2009/oct/03/brooke-shields-nude-child-photograph> [<https://perma.cc/5WSE-F9ML>] (opining that Shields felt like “a victim of her mother's poor judgment”).

<sup>124</sup> See *Faloona by Fredrickson*, 799 F.2d at 1002–04.

<sup>125</sup> See *id.* at 1005. This horrifying outcome is perhaps why the legislature has proposed 2023 California Assembly Bill No. 1394, an amendment which would limit California Civil Code section 3344 to avoid commercial sexual exploitation of minors. Assemb. B. 1394, 2023 State Assemb., Reg. Sess. (Cal. 2023).

<sup>126</sup> See Marc R. Staenberg & Daniel K. Stuart, *Children as Chattels: The Disturbing Plight of Child Performers*, 32 BEVERLY HILLS BAR ASS'N J. 21, 22–24 (1997).

#### D. State Coogan Laws

Contracts are not subject to a minor's disaffirmance when a court, rather than a parent or guardian, approves the contract.<sup>127</sup> California's Coogan Laws, for example, state that a contract to render "artistic or creative services" that is entered into by a minor cannot be disaffirmed if it has been certified by a county superior court.<sup>128</sup> These laws were passed to protect companies *and* children. Coogan Laws addressed film studios' concerns that child actors would disaffirm their contracts, leaving studios exposed to risk and monetary loss.<sup>129</sup> The laws also protect child actors from unwise or unscrupulous parents who would misappropriate the child's earnings.<sup>130</sup> Coogan Laws apply to minors rendering "services as an actor, actress, dancer, musician, comedian, singer, stuntperson, voice-over artist, or other performer or entertainer, or as a songwriter, musical producer or arranger, writer, director, producer, production executive, choreographer, composer, conductor, or designer."<sup>131</sup> But because the laws only apply to entertainment-related *employment* contracts, the laws do not protect contracts like the ones seen in the T-Shirt Design Case or "Doodle for Google."<sup>132</sup>

#### E. Disaffirmance of a "Work Made for Hire" Contract

Some companies and organizations, such as the clothing company in the T-Shirt Design Case, seek to mitigate the risk of contracting with a minor by specifying that the work is "made for

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<sup>127</sup> See 42 AM. JUR. 2D, *supra* note 80, § 45.

<sup>128</sup> CAL. FAM. CODE §§ 6750–51(a) (West 2020); *see also* Ayalon, *supra* note 37, at 352 ("Coogan Law is a popular name for sections 6750 through 6753 of the California Family Code."); *see also* California Coogan Law, *supra* note 31 (describing similar laws in other states).

<sup>129</sup> See Staenberg & Stuart, *supra* note 126, at 25.

<sup>130</sup> See BURTON, CALIFORNIA BILL ANALYSIS, S. 1999-1162, Reg. Sess. at 3 (1999) (protecting the child's income and explicitly stating that earnings are "the sole property of the minor"). However, some criticize Coogan Laws' inability to adequately protect child performers financially. *See generally* Ayalon, *supra* note 37 (discussing the laws' shortcomings, such as the inadequate requirement that only fifteen percent of gross earnings be placed in the child's trust account).

<sup>131</sup> CAL. FAM. CODE § 6750(a)(1). It is important to note that Coogan Laws seek to protect the parties' finances rather than the child performers' copyrights. *See* Ayalon, *supra* note 37, at 353–57. Actors generally cannot hold a copyright in their performances. *See* Garcia v. Google, Inc., 743 F.3d 1258, 1262–1265 (9th Cir. 2014) (reasoning that an actor's copyright only extends to the minimal creativity she adds to the existing script and that most actors provide services as "works made for hire"). Similarly, photographers, rather than models, hold the copyright in a photograph. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884).

<sup>132</sup> *See* Ayalon, *supra* note 37, at 358.

hire.”<sup>133</sup> However, “work made for hire” contracts are not immune to disaffirmance. Professor Nimmer theorizes that in a “work made for hire” scenario, the authorship of the copyright vests in the employer “not simply by reason of his status as an employer,” but because there is an express or implied agreement between the employer and the employee.<sup>134</sup> Thus, if the employer materially breaches the agreement by, say, failing to pay the employee, the employee is entitled to void the contract and reclaim the copyright.<sup>135</sup> Using this reasoning, a minor could potentially disaffirm a “work made for hire” contract and reclaim their copyright. Though companies seek to protect themselves by using the “work made for hire” doctrine, such use could potentially be fraught with consequences.<sup>136</sup>

#### F. Copyright Act Section 203

To counteract the disparities in bargaining power between creators and publishers, the Copyright Act authorized a copyright holder to recapture her copyright in narrow circumstances.<sup>137</sup> In his treatise on copyright, Professor Nimmer notes: “From its earliest manifestations, copyright law has struggled to deal with the equitable and efficient division of value and control between creators and the enterprises that distribute their works.”<sup>138</sup> Before the advent of the internet, publishers were the only ones who could disseminate copyrighted work.<sup>139</sup> To offset the financial risk of disseminating the work, these publishers would often pay a low fee in exchange for the copyright owner’s full assignment of the copyright to the publishers forever.<sup>140</sup> At the time of assignment,

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<sup>133</sup> See *I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196, 207–08 (S.D.N.Y. 2015); see also Hefner Interview, *supra* note 20.

<sup>134</sup> 1 NIMMER, *supra* note 47, § 5.03.

<sup>135</sup> See *id.*; see also Chau Vo, *Finding a Workable Exception to the Work Made for Hire Presumption of Ownership*, 32 LOY. L.A. L. REV. 611, 636–49 (1999).

<sup>136</sup> The outcome of such a case would be difficult to predict considering varying views on copyright preemption. For example, the Second Circuit has held that cases involving mere copyright ownership are usually not preempted, but copyright infringement claims are preempted. See Vo, *supra* note 135, at 633. If a minor disaffirmed a “work made for hire” contract, it is difficult to predict whether the court would find the case involved mere ownership or ownership and infringement for preemption purposes. See Young, *supra* note 19, at 461.

<sup>137</sup> See S. REP. NO. 94–473, at 108–10 (1975); see also 3 NIMMER, *supra* note 63, § 11.07[A] (“[F]or almost as long as copyright has existed, there has been concern about creators getting the short end of the stick in their dealings with distributors.”); 17 U.S.C. § 203.

<sup>138</sup> 3 NIMMER, *supra* note 63, § 11.07[A].

<sup>139</sup> See *id.*

<sup>140</sup> See *id.*

it was impossible to determine the work's value.<sup>141</sup> But years later, a book manuscript licensed for one dollar could be a bestseller, grossing hundreds or thousands of dollars.<sup>142</sup> For decades, copyright law sought to protect copyright holders by allowing them to recapture their rights after several decades and guard against these “unremunerative” or unprofitable transfers.<sup>143</sup>

Today, this recapture or termination provision is codified in section 203 of the Copyright Act.<sup>144</sup> Essentially, if a copyright owner transfers, assigns, or licenses her copyright, her surviving family member may send notice to the transferee after thirty-five years that they are terminating the copyright.<sup>145</sup> This allows her to make a fairer transfer of the work if she initially received a low license fee.<sup>146</sup> The plain language of section 203 clearly states it cannot be contractually waived at the time the initial license is made; this is significant because every copyright holder was intended to have this section 203 termination right.<sup>147</sup>

Section 203 is even more important for minor creators because of the wide gap in bargaining power between minors and companies. Though the legislative history of section 203 does not expressly contemplate minor creators, this Note argues that the congressional intent to protect against disparities in bargaining power is even stronger when it comes to minor creators.<sup>148</sup> In fact, for minor creators, the section 203 termination right is in addition to the right to disaffirm a contract under the infant contract doctrine; nothing in the section was “intended to change the existing state of the law of contracts concerning the circumstances in which an author may cancel or terminate a license, transfer, or assignment.”<sup>149</sup>

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<sup>141</sup> See H.R. REP. NO. 94-1476, at 124 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5740.

<sup>142</sup> See *id.*

<sup>143</sup> 3 NIMMER, *supra* note 63, § 11.07[B]-[D].

<sup>144</sup> 17 U.S.C. § 203.

<sup>145</sup> *Id.*

<sup>146</sup> See S. REP. NO. 94-473, at 108.

<sup>147</sup> 17 U.S.C. § 203(a)(5) (“Termination of the grant may be effected notwithstanding any agreement to the contrary . . .”); *Notices of Termination*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/recording/termination.html#:~:text=Section%20203%20applies%20to%20grants,before%20or%20after%20that%20date> [https://perma.cc/QD46-M983] (last visited Oct. 26, 2023) (“Section 203 applies to grants executed by the author on or after January 1, 1978, regardless of whether the copyright in the author’s work was secured before or after that date.”).

<sup>148</sup> See Young, *supra* note 19, 459-60.

<sup>149</sup> H.R. REP. NO. 94-1476, at 128 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5743.

However, minors who create “works made for hire” do not have this section 203 termination right. Section 203 only applies to transfers, and “works made for hire” are not transfers.<sup>150</sup> This means minors with work for hire contracts are excluded from Congress’s intended section 203 protection.

## II. SOLUTIONS

Minor creators and companies need clearer, less risky, and more effective outcomes when working together. To that end, Congress and the Supreme Court should resolve the circuit split on what constitutes an extra element for copyright preemption and provide guidance on how to reconcile copyright and contract law claims. In the meantime, accepting this has not yet happened, this Part suggests four solutions. First, Congress should amend section 203 to allow minors to terminate their license agreements sooner than thirty-five years after the transfer. Second, under common law, courts should find most “work made for hire” contracts involving minors unenforceable to ensure the minor’s authorship of the copyright. Third, states can pass Coogan Laws to protect minor creators or—if they have existing Coogan Laws—extend the laws to written and pictorial works. Finally, this Part suggests informal solutions for minors and companies to work together in good faith.

### A. Expand Protection of Minors by Amending Section 203

Section 203 was intended as a “practical compromise . . . recognizing the problems and legitimate needs of all interests involved.”<sup>151</sup> In addition to protecting copyright holders, section 203 protects companies; even if the copyright holder elects to terminate after thirty-five years, the company-transferee retains the right to utilize the work and any derivative works the company produced prior to termination.<sup>152</sup> For example, assume the second-grader in the T-shirt Design Case was the copyright holder and the entry form provided that she contractually assigned her copyright to the clothing company and it was not a “work made for hire.” If the second-grader terminated the license after thirty-five years, the clothing company could argue the t-shirts and

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<sup>150</sup> 17 U.S.C. § 203(a). The “employee” who creates a “work made for hire” is seen as never holding the copyright to begin with, so they cannot have transferred it to someone else. *See supra* Part I.A.

<sup>151</sup> H.R. REP. NO. 94-1476, at 124.

<sup>152</sup> *See id.*

merchandise based on the design were derivative works. The clothing company could not produce any more merchandise, but it could safely sell any previously produced merchandise as lawful derivative works. If the merchandise were still profitable, the clothing company might wish to enter into a new license agreement with the (now-adult) second-grader, and the parties could strike a more fair and remunerative balance. Section 203 is a clear sign of Congress's intent to strike a balance between copyright holders and the distributors of the works, but thirty-five years is too long for a minor to wait.<sup>153</sup>

In her law review article published over a decade ago, Professor Julie Cromer Young suggested that Congress amend section 203 to allow minors to terminate their transfer or license agreements "within a five-year window after the execution of the transfer, if the author has not yet reached the age of majority, or within five years of the author's attaining the age of majority if the author would not in fact attain that age within the five-year period."<sup>154</sup> Professor Young also proposed that when the minor terminates the agreement in this way, the company-transferee must cease using derivative works.<sup>155</sup> There are several issues with this solution. First, this proposal seeks to cut through the confusion of copyright act preemption and state contract law gap fillers by amending the Copyright Act directly.<sup>156</sup> However, courts have still been able to erode the effectiveness of section 203 by allowing state contracts to interfere with termination rights, despite the section's plain language that termination rights exist notwithstanding "any agreement to the contrary."<sup>157</sup> For example, courts have held contract renegotiations extinguish termination rights.<sup>158</sup> Amending section 203 alone will not impact how courts decide

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<sup>153</sup> See, e.g., 3 NIMMER, *supra* note 63, § 11.07.

<sup>154</sup> Young, *supra* note 19, at 459.

<sup>155</sup> *Id.*

<sup>156</sup> See *id.* at 458–59.

<sup>157</sup> 17 U.S.C. § 203(a)(5). See 3 NIMMER, *supra* note 63, § 11.07. The Second Circuit's decision in *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008) imports the different legal regime of state law, such that federal termination becomes inoperative when publishers have engaged in re-granting, rescission, or novation that meet an ill-defined and inherently subjective "fairness test." *Id.* § 11.07[D][3] ("The availability of termination rights, federally granted property interests, is made to turn on whether there has been a superseding agreement under state contract law.")

<sup>158</sup> See 3 NIMMER, *supra* note 63, § 11.07[D][2]–[3] (explaining the circuit split over "whether and in what circumstances a renegotiated grant extinguishes the right to terminate the original transfer").

cases involving termination rights. Second, because section 203 does not apply to “works made for hire,” amending the section would still leave minors with “work made for hire” contracts unprotected.<sup>159</sup> Finally, Professor Young’s solution would make companies even less likely to work with minors. If a minor could not only terminate an agreement with a company *within* five years but also bar a company from using any previously produced derivative works, it would be too risky for companies to invest in working with minors. Companies would be uncertain of how much time they would have under the license or transfer agreement before a minor chose to terminate, and they would not be able to utilize derivative works after termination. Professor Young’s solution is perhaps too favorable to minors.

Consequently, this Note, like Professor Young’s article, would support allowing a minor to terminate a transfer or license sooner than thirty-five years. However, this Note would propose greater certainty for companies by allowing a minor to terminate *after* five years of execution or *after* five years of reaching majority.<sup>160</sup> This would benefit the company-transferee by providing at least five years of certainty in which the license contract could not be disaffirmed. This solution would also allow minors to have more control over their copyrights as well as the opportunity to renegotiate with more bargaining power, just as Congress intended. Additionally, unlike Professor Young’s proposal, this Note would keep section 203(b)(1) undisturbed, allowing a company to continue to utilize previously made derivative works.<sup>161</sup> This would enable companies to safely invest in utilizing minors’ art, which serves the purpose of channeling minors’ creativity. However, it is important to note that Congress has not acted to amend section 203 in the decade since Professor Young suggested her solution. Accordingly, this Note suggests other solutions that can be employed concurrently.

#### B. Do Not Let Second-Graders “Work”

“Work made for hire” contracts involving minors under legal working age should not be enforced because there is no employment *quid pro quo*. As previously discussed, in codifying the “work made for hire” doctrine, Congress intended a *quid pro quo*:

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<sup>159</sup> See 17 U.S.C. § 203(a).

<sup>160</sup> This Note’s proposal assumes that the Supreme Court or Congress resolves the erosion of section 203 discussed above.

<sup>161</sup> See 17 U.S.C. § 203(b)(1).

employers get authorship and ownership in employees' works in exchange for providing a salary and benefits to employees.<sup>162</sup> With an organization like Youth Communication, the "work made for hire" doctrine fits; minors of legal working age are commissioned and paid to write stories for a publication.<sup>163</sup> In cases like this, the "work made for hire" contract should be enforced.<sup>164</sup>

However, in the T-Shirt Design Case, there was no employment *quid pro quo*: the second-grader was obviously not of working age, and in exchange for her design, she received a mere \$100. The second-grader neither had a traditional employment relationship with the company nor did she meet the factors set out in case law to fall within the scope of employment.<sup>165</sup> For example, apart from the second-grader drawing her design on the company's entry form, the company had no right to control the second-grader's work.<sup>166</sup> The court in the T-Shirt Design Case did not consider whether there was an employer-employee relationship to properly support a "work made for hire;" instead, whether the design was a "work made for hire" hinged on contract formation

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<sup>162</sup> See 133 CONG. REC. 12,957–58 (1987) (statement of Sen. Thad Cochran).

<sup>163</sup> See Hefner Interview, *supra* note 20.

<sup>164</sup> On the other hand, with an organization like Kids in the Spotlight (KITS), a Los Angeles-based nonprofit that runs programming for foster youth ages 12–17 to write scripts and make films, "work made for hire" may not serve this legislative intent—or even the intent of KITS leadership. See Charity Interview, *supra* note 20; see also About, KIDS IN THE SPOTLIGHT, <https://www.kitsinc.org/about> [<https://perma.cc/9FNQ-LUAA>] (last visited Oct. 31, 2023). To protect the rights of the minors involved, KITS registers the minors' creative works as "works made for hire" with the United States Copyright Office. *Id.* This means that ownership of the copyright vests in KITS, rather than with the minors. See, e.g., CIRCULAR 30, *supra* note 46, at 1. KITS CEO Tige Charity's intent, however, is for the minors to have control over their copyrighted scripts. See Charity Interview, *supra* note 20. KITS registers the short scripts with the Writer's Guild of America, with the intent to pave a path for a minor who wants to become part of the Guild later in life. See *id.* Charity sees it as her job to counsel the youth in the program and guide them through any potential encounters with movie studios regarding copyrights. *Id.* For Charity, the organization's mission, to encourage minors in foster care to tell their own stories, is important because "they have a voice." *Id.* There are so many stories about youth, especially foster youth, but she wants to encourage them to tell their own stories. *Id.* "[There is] no greater agony than bearing an untold story inside you," Charity said, quoting Maya Angelou. *Id.*

<sup>165</sup> See, e.g., CIRCULAR 30, *supra* note 46, at 3.

<sup>166</sup> See *id.*; see also I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp. 3d 196, 203 (S.D.N.Y. 2015). But unlike in the T-Shirt Design Case, KITS does provide resources for program participants to create their works, so despite the age of some KITS program participants, the relationship might meet some of the statutory factors for "works made for hire." See Charity Interview, *supra* note 20; see also CIRCULAR 30, *supra* note 46, at 3.

issues.<sup>167</sup> It is unfair to ask a minor below working age to make the same cost-benefit analysis a working adult would be asked to make. A second-grader is not equipped to determine whether \$100 is a fair trade for her t-shirt design. It is also logically inconsistent for society to bar some minors from working (e.g., minors under the age of 16 in some states), yet enforce “work made for hire” contracts for those same minors.<sup>168</sup>

The “work made for hire” doctrine is also problematic as applied to minors because of the infant contract doctrine. The issue of whether a minor can disaffirm a “work made for hire” contract and retain the copyright ownership is an open question, and it would be detrimental to companies if a minor could disaffirm a “work made for hire” contract and recapture the copyright.<sup>169</sup> There is too much uncertainty for companies to be contracting with minors for “works made for hire.” Therefore, Congress should amend the Copyright Act to provide that “work made for hire” contracts can only be entered into by individuals of working age. Alternatively, under common law, courts should find unenforceable—or readily allow disaffirmance of—“work made for hire” contracts entered into by minors below working age. These solutions would keep authorship and ownership of the copyright with the minor creator and channel contracts involving such copyright into license or transfer agreements, which allow for a section 203 termination right.<sup>170</sup>

### C. Expand State Coogan Laws

Courts are understandably conflicted when it comes to calculating whether children should be allowed to disaffirm their contracts. On the one hand, minors are vulnerable, and it is crucial to protect them. As the Supreme Court recognized, minors’ mental and social maturity is still developing.<sup>171</sup> At the same time, it is

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<sup>167</sup> See *I.C. ex rel. Solovsky*, 135 F. Supp. 3d at 210–12 (discussing whether the underlying contract was unconscionable and therefore void). The case’s subsequent history is unilluminating. The court held an evidentiary hearing on the issue of unconscionability, but it was cut short when the second-grader argued instead that no contract had ever been formed. *I.C. ex rel. Solovsky v. Delta Galil USA*, 2016 WL 6208561, at \*1 (S.D.N.Y. Oct. 24, 2016) (mem.). The court directed the second-grader to file another amended complaint alleging this new theory. *Id.* at \*3; see also Second Amended Complaint and Jury Demand, *I.C. ex rel. Solovsky v. Delta Galil USA*, 2016 WL 7838530, at \*9 (S.D.N.Y. Oct. 26, 2016) (alleging no contract was formed and copyright infringement).

<sup>168</sup> See, e.g., *CHILD LABOR*, *supra* note 51, at 3.

<sup>169</sup> See *supra* Part I.E.

<sup>170</sup> 17 U.S.C. § 203.

<sup>171</sup> See Spinak, *supra* note 3, at 312.

understandable that a company working with a child to create a product (e.g., a t-shirt design) would want a child to be an adult in the eyes of the law. If a child is seen as an adult, the company would want the child to meet an adult standard for contract disaffirmance: return the company to the status quo. Coogan Laws strike this balance by accommodating vulnerable child actors who work in the realm of adults. Though Coogan Laws seek to protect the parties' finances rather than copyrights,<sup>172</sup> Coogan Laws' court certification framework can help minor creators as well.

Companies that currently wish to work with minors, like the film studios of old, may find more security in Coogan Laws that enable courts to certify a contract and guard against a minor's disaffirmance. Though Coogan Laws apply to employment contracts for "artistic or creative services," the laws have not been extended to companies' contracts for minors' written or pictorial works. The plain language of the law includes "designer" and "writer," leading to an inference that a t-shirt design, screenplay, "Doodle for Google," or an essay could potentially be encompassed by Coogan laws and subject to court certification. Legislatures in states with Coogan Laws can expand the laws to allow for certification of non-employment-related contracts involving "artistic or creative services." This would not only allow courts to approve contracts pertaining to these services, but it would also protect any financial gains made by the minor creators.<sup>173</sup> States without Coogan Laws can add similar laws to their books. After all, a minor need not live in New York or California to create a t-shirt design, write an essay, draw a "Doodle for Google," or design a website.

This Note acknowledges that this proposed solution will require a feasibility study. Under existing Coogan Laws, most child actor contracts are not brought before courts for approval because it is seen as impracticable, especially for short-term projects.<sup>174</sup> Additionally, some courts have reasoned that it does

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<sup>172</sup> See *supra* Part I.D.

<sup>173</sup> See Ayalon, *supra* note 37, at 352.

<sup>174</sup> See *id.* at 355; see also Amanda Bronstad, *Coogan Law Loophole Leaves Child Actors at Financial Risk*, NAT'L L.J., Apr. 18, 2011 (quoting a lawyer who works with child actors as estimating most contracts involving minors are not brought to courts for approval). Instead, many producers prefer to contract with the minor's parents or guardians, perhaps under the mistaken belief that parents contractually bind their children. Compare Ayalon, *supra* note 37, at 358 with Berry, *supra* note 112, at 31 ("[A] parental signature does not validate an entertainment contract with a minor that has not been court approved. If the

not make sense to expend court resources on certification of a child's contract when the child is not an athlete or actor, working for long stretches, and making large sums of money.<sup>175</sup> This Note disagrees with that reasoning. As seen in the T-Shirt Design Case, it is often difficult to predict how profitable a minor's copyright can be.<sup>176</sup> This Note urges that, in expanding Coogan Laws, legislatures should allow all contracts for artistic or creative services to be court-certified, regardless of their monetary value. Expanding court certification to copyright license contracts may place additional burdens on courts. State legislatures (and perhaps film studio legal departments concerned about potential litigation) should consider researching the reasons why approvals are not sought for child actor contracts and study the feasibility of expending judicial resources on certifying copyright license contracts. Expanding Coogan Laws to cover copyright contracts could involve setting up specialized administrative law judges to certify such contracts efficiently.<sup>177</sup>

#### D. Informal Solutions

While minors and companies wait for legislatures and courts to act, they can take steps to work together in good faith. Parents and guardians can empower minors to stand up for their rights, rather than seeking to protect the minors.<sup>178</sup> This Note argues that because children should not merely be protected but rather empowered to enforce their own rights, it is important for

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legislature intended that a parent's signature would serve the same purpose as obtaining court confirmation pursuant to [California] Family Code Section 6751, it is highly unlikely anyone would ever need to petition the court for approval. The intent of the legislature was to allow judicial scrutiny of entertainment agreements involving minors in order to determine the reasonableness and fairness of the provisions contained in each agreement. If a parent's acceptance and execution of the agreement were sufficient, there would be no need for the judicial supervision mandated by the legislature.”).

<sup>175</sup> See *Shields v. Gross*, 58 N.Y.2d 338, 346 (1983). The *Shields* court reasoned that the legislative intent behind New York Civil Rights section 50 (the law barring a child's disaffirmance when a parent signs the contract) was to substitute the parent's judgment for the court certification where the service being rendered was sporadic (one modeling session) and produced a “relatively modest” fee (\$450). *Id.*

<sup>176</sup> See *supra* Part I.C.

<sup>177</sup> See, e.g., Administrative Law Judges, 85 Fed. Reg. 59207 (proposed Sept. 21, 2020) (“ALJs serve as independent impartial triers of fact in formal proceedings requiring a decision on the record after the opportunity for a hearing. . . . ALJs rule on preliminary motions, conduct pre-hearing conferences, issue subpoenas, conduct hearings (which may include written and/or oral testimony and cross-examination), review briefs, and prepare and issue decisions, along with written findings of fact and conclusions of law.”).

<sup>178</sup> See Spinak, *supra* note 3, at 313 (explaining the dangers of “protectionism” of youth).

minors to control, register, and defend their own copyright.<sup>179</sup> To that end, parents, guardians, educators, and the community can inform themselves about copyright law and teach minors about their rights under copyright law.<sup>180</sup> Parents and guardians can show older minors how to register their works with the United States Copyright Office, and parents of younger minors or minors with disabilities can register works on their behalf. Parents and guardians can do their best to remain aware of their minors' engagement with companies, such as by monitoring when their children submit artwork to company-sponsored contests. Because minors will need assistance from an adult representative to sue an infringer, parents, guardians, and other adults in a minor's life can listen to children and be ready to represent them when their rights have been infringed.

As seen in the T-Shirt Design Case, even schools have a role to play.<sup>181</sup> Schools can be wary when a company wants to sponsor a contest that affords a winner little-to-no money and asks them to surrender virtually all their creative rights. Schools and educators can look for programs that empower minors to create while allowing the minors to retain control of their copyright. Finally, educators and school social workers can stand in the gap for youth without access to caring adults in their lives by teaching them about their rights under copyright law.

Companies can compensate minor copyright holders more fairly, give them more control over their copyright, and communicate clearly. For example, the nonprofit Youth Communication shares unanticipated profits with minor writers even though it owns the copyright in the works as "works made for hire."<sup>182</sup> Both Youth Communication and the

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<sup>179</sup> See *supra* Part I.

<sup>180</sup> The United States Copyright Office produces circulars which are accessible for a layperson to read and understand. See generally, CIRCULAR 1, *supra* note 41.

<sup>181</sup> See *supra* Part I.C.

<sup>182</sup> See Hefner Interview, *supra* note 20. About 30–40 times per year, Youth Communication receives requests from outside publications for a license to reprint the stories. *Id.* When that happens, Youth Communication reaches out to the writers and gives the licensing fees to them, even though it (owning the copyright) is not obligated to do so. *Id.* There are other times when Youth Communication compiles stories and uses commercial publishers to print anthologies, in which case it retains the license fees to offset staffing costs incurred by creating the anthologies. *Id.* If a more lucrative licensing opportunity presented itself, Hefner would gather a group of alumni to decide how to handle any money associated with the project. *Id.* "We own [the copyright], but what's the ethical part?" Hefner asked rhetorically. *Id.* For Hefner and Youth

nonprofit Kids in the Spotlight allow minors informal control of their copyright by letting them “shop around” their works or use them in other projects.<sup>183</sup> Finally, both organizations keep an open line of communication with program alumni, which fosters transparency about how the copyrights are used and how potential profits can be shared with the creators.

#### CONCLUSION

Cases involving contracts and minors’ copyrights have varying outcomes in different courts, leaving potential for minors to be creatively and financially exploited, as well as companies to be harmed. These varying results run counter to the legislative intent behind the Copyright Act—to protect creators.<sup>184</sup> Congress and state legislatures can create more certain, fairer outcomes for minors and companies by amending the Copyright Act and enacting comprehensive Coogan protections for minor creators. Companies and organizations can work with parents, guardians, educators, and minor creators to find informal solutions that allow minors more control of their copyright. Consequently, minors and companies will find it more predictable and fairer to work together to channel minors’ creativity and further the business goals of companies.

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Communication, it’s not about the money: it’s about giving minors a chance to tell their stories on their terms. *Id.* He and Youth Communication seek to encourage youth creativity and honor minors’ rights while retaining the copyright to the works. *Id.*

<sup>183</sup> *See id.* Youth Communication encourages writers to license their stories to third parties and can keep the money from doing so, but writers rarely make these licenses. *Id.*

<sup>184</sup> *See supra* Part I.B.

