

would be entitled to "unlimited" section 706 review. If the court should find in the underlying statute a congressional intent to preclude review under section 701(a)(1), a result which is becoming increasingly rare, the plaintiff would be reduced to arguing the unconstitutionality of such an enactment. If section 701(a)(2) of the APA applies, the plaintiff should argue that the result is not automatic nonreviewability. The plaintiff should point out that under the current interpretation of section 701(a)(2), the court may separate the discretionary action into reviewable and nonreviewable elements. Alternatively, the plaintiff could argue that section 701(a)(2)'s immediate effect is only to remove the action from the APA and that once outside the APA, the action is still reviewable under common law. While *Bachowski* might hinder such a claim, its treatment of the scope of review issue tends to support the existence of common law review. If the court adopts either the extent or common law approach to section 701(a)(2), the plaintiff should urge the court to adopt a scope of review that includes the abuse of discretion standard. *Bachowski* supports such a claim because it allows the court to review even highly discretionary actions for an abuse of discretion, provided the evidentiary base is limited to something less than the whole administrative record.

DENNIS LAFIURA

Copyright — Validity of Copyright Renewal — Evidentiary Effect of Renewal Certificate — *Epoch Producing Corp. v. Killiam Shows, Inc.*¹ — David W. Griffith produced and directed the motion picture classic *The Birth of a Nation* in 1914.² The David W. Griffith Corporation [hereinafter DWG], a corporation personally controlled by Griffith, copyrighted *The Birth* as an unpublished work in 1915, and in the same year acquired a copyright in the published work by exhibiting the film with notice of copyright.³ Two months later DWG assigned both copyrights to Epoch Producing Corporation [hereinafter Epoch] and Thomas Dixon, author of the novel on which *The Birth* was

¹ 522 F.2d 737 (2d Cir. 1975).

² *Id.* at 740.

³ *Id.* Statutory copyright in an unpublished work is acquired by depositing a copy and registering the work with the Copyright Office. 17 U.S.C. § 12 (1970). Statutory copyright in the published work is acquired by publication of the work with notice of copyright. 17 U.S.C. § 10 (1970); *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 35-42 (1939). Although copyright in the published work is thus acquired without registration with the Copyright Office, the proprietor is not entitled to bring an infringement action unless the copyright in the work has been so registered. 17 U.S.C. § 13 (1970). See 522 F.2d at 740-41 n.2. When copyright in the published work has been registered, the Copyright Office issues a certificate of registration. 17 U.S.C. § 11 (1970). The contents of the certificate of registration are designated in 17 U.S.C. § 209 (1970).

based.⁴ Epoch and Dixon thereafter obtained a certificate of copyright registration in the published work from the Copyright Office.⁵ In 1942, Epoch applied for renewal of its copyright, describing itself as the original claimant, the author,⁶ and the proprietor of copyright in a work made for hire.⁷ The Copyright Office issued a renewal certificate to Epoch on the basis of its third asserted status: the proprietor of copyright in a work made for hire.⁸

In 1959, Killiam Shows, Inc. acquired by quitclaim deed any interest owned by the estate of David W. Griffith in the right to a statutory renewal copyright in *The Birth*. Killiam Shows thereafter distributed the film to various theatrical and television outlets.⁹ Asserting its renewal copyright, Epoch brought suit in federal district court against Killiam Shows and related corporations in 1969 for infringement of its copyright in *The Birth*.¹⁰ Killiam answered, *inter alia*, that Epoch's renewal copyright was invalid because Epoch had no legal right to the renewal.¹¹ Thus, Killiam contended, *The Birth* had passed into the public domain upon the termination of the original copyright term in 1943.¹²

The question of Epoch's status as a corporation entitled to the renewal copyright was submitted to a jury after Killiam's motion for a

⁴ 522 F.2d at 741.

⁵ *Id.* DWG did not register the copyright it had acquired by publishing the film with notice. *Id.* at 740-41. When Epoch and Dixon applied for registration of copyright, the Copyright Office issued Epoch and Dixon certificates that listed them as the registered claimants of the original-term copyright. *Id.* at 741. The copyrights were assigned in 1915 but the assignment of copyright in the published work was not filed with the Copyright Office until 1916, after the registration certificate had been issued to Epoch and Dixon. Early Copyright Office practice permitted the assignee of an unregistered statutory copyright to supply his own name as claimant of the original-term copyright. B. KAPLAN, *THE REGISTRATION OF COPYRIGHT* 32 (General Revision of the Copyright Law, Study No. 17, 1958), in *COPYRIGHT SOC'Y. OF THE U.S.A., 1 STUDIES ON COPYRIGHT* 358 (1963).

⁶ *Id.* at 741. By naming itself as "author" in the application for renewal of copyright, Epoch was asserting that it had been Griffith's employer when the film was made. *Id.* Section 26 of the Copyright Act provides that in the interpretation of the Act, "the word 'author' shall include an employer in the case of works made for hire." In this note, the term "individual author" will be used to designate a creative author, as distinguished from an employer.

⁷ 522 F.2d at 741. In contrast to its claim to renewal as "author," Epoch's claim as proprietor of copyright in a work made for hire was not in itself an assertion that Epoch had been Griffith's employer. For instance, an employer's assignee is a proprietor of copyright in a work made for hire. 1 M. NIMMER, *NIMMER ON COPYRIGHT* § 61.3 at 237; 2 M. NIMMER, *NIMMER ON COPYRIGHT* § 114 at 463 (1975).

⁸ 522 F.2d at 741.

⁹ *Id.* at 742.

¹⁰ *Id.* at 739. The district court opinion is unreported.

¹¹ *Id.* Killiam also contended that its purchase from Griffith's estate by quitclaim deed in 1959 of the estate's copyright interest in *The Birth* had given Killiam a property interest in the copyright. Killiam did not present this argument on appeal. *Id.* at 742 n.5.

¹² *Id.* at 739. A copyrighted work passes into the public domain if the copyright is not renewed within the year prior to its expiration. See 17 U.S.C. § 24 (1970) set out in note 26 *infra*.

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directed verdict was denied.¹³ The district court specifically instructed the jury that Epoch's renewal certificate created a presumption that the renewal copyright was valid.¹⁴ The jury found that Killiam had failed to overcome that presumption and it held Killiam liable for infringement.¹⁵

On appeal, Killiam argued that Epoch had had no legal right in 1942 to renew the copyright because Epoch's status was not one which entitled it to renew as a matter of right under the Copyright Act.¹⁶ Killiam also asserted that the certificate of copyright renewal granted to Epoch did not create a presumption of validity, and that absent this presumption Epoch had the burden of establishing that it was legally entitled to the copyright renewal, a burden which it had failed to meet.¹⁷ Finally, Killiam argued that because Epoch was not within the specified classes of original-term copyright proprietors who are legally entitled to renew in their own right, the renewal rights had reverted to the individual author since they were never specifically assigned by him in conjunction with his assignment of the original-term copyright.¹⁸

The United States Court of Appeals for the Second Circuit, reversing the denial of Killiam's motion for a directed verdict, HELD: Under section 24 of the Copyright Act, (1) the proprietor of a copyright in a work made for hire is entitled to renewal only upon a showing of the alleged employer's "requisite power to control or supervise" the work of the author;¹⁹ (2) the right to renew a copyright reverts to the individual author if it was not specifically assigned by him when he assigned his original copyright;²⁰ (3) the issuance of a renewal certificate does not create a presumption that the underlying

¹³ *Id.* at 740.

¹⁴ The trial court's charge to the jury included the following statement:

A Certificate of Renewal of copyright registration carries with it the same presumptions as to the facts stated therein, the truth of them and the validity of the renewal and the administrative regularity comprised within its issuance, and here again the passage of time may tend to strengthen the force of these presumptions, but all presumptions I may mention to you may be rebutted by you, if you, the jury, find there is adequate evidence to convince you the presumptions are inapplicable, and you must decide the case on the evidence and not the presumptions, but the burden is on a party who attacks or challenges the validity of a certificate of copyright or of a certificate of copyright renewal to overcome the presumption that the facts are as stated in the certificate and to overcome the presumption of validity of the certificate.

Brief for Appellee at 25, *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975) [hereinafter cited as Brief for Appellee].

¹⁵ 522 F.2d at 740.

¹⁶ *Id.* at 739. See 17 U.S.C. § 24 (1970).

¹⁷ Brief for Appellants at 46-50, *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975).

¹⁸ *Id.* at 27-46.

¹⁹ 522 F.2d at 744.

²⁰ *Id.* at 746-47.

copyright renewal is valid;²¹ and (4) the proprietor of a copyright in a work copyrighted by a corporate body is not entitled to renewal if the work was created by one identifiable person as either an employee or an independent author.²² The court then concluded that Epoch had failed to meet its burden of establishing the validity of its renewal copyright and remanded the case to the district court with instructions to dismiss Epoch's complaint.²³

The significance of *Epoch* lies primarily in the court's holding that a renewal certificate does not create a presumption of the validity of a copyright renewal. That ruling is the first appellate-level judicial determination which directly confronts the issue of the evidentiary weight of a renewal certificate.²⁴ The court's holding that the corporate-body provision does not apply to works authored and produced by one identifiable person, as either an employee or an independent author, is also significant in that the court's language severely limits the type of works to which the provision applies. However, the court's rulings with respect to the prerequisites to finding an employer-employee relationship under the work-for-hire provision and with respect to the specificity with which an individual author's renewal rights must be assigned were based upon earlier decisions and add little to the corpus of the law of copyright.

This casenote will first briefly examine the court's rulings on the issues of the work-for-hire provision of section 24 and the assignment of renewal rights by an individual author. Next, the court's holding on the corporate-body provision will be analyzed and it will be suggested that through its refusal to adopt an expansive reading of the terms of this provision, the court has adhered to established public policy and the implications of the legislative history of the provision. Finally, the note will analyze the rationale used by the court to support its holding on the evidentiary weight of renewal certificates; consider that holding in light of the policies of the Copyright Act and the public policy against the extension of what is already a statutory monopoly; attempt to show that the court's holding is consistent with and advances those policies; and attempt to discern the effect of this holding on future infringement litigation.

I. SECTION 24 OF THE COPYRIGHT ACT OF 1909

Under the general scheme of section 24 of the Copyright Act,

²¹ *Id.* at 745-46.

²² *Id.* at 748.

²³ *Id.* at 748-49.

²⁴ In at least three previous cases in the Second Circuit, the court was called upon to determine renewal rights where both parties had obtained renewal certificates. *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1214 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972); *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F.2d 949, 950 (2d Cir. 1942); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191, 193 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F.2d 516 (2d Cir. 1946). The Court did not refer to the evidentiary weight of renewal certificates in deciding these cases.

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which was intended primarily to protect authors,²⁵ renewal rights revert to the author who created the work or, if he is deceased, to his family, executor, or next of kin, subject to certain exceptions. A proprietor of the original copyright who is not the author of the work may renew the copyright only if his copyright is on a work which falls within one of three specified categories: (1) works made for hire and originally copyrighted by the employer for whom the work was made; (2) works copyrighted by a corporate body in some capacity other than as the individual author's assignee or licensee; or (3) posthumous works or periodical, cyclopedic, or other composite works originally copyrighted by the proprietor. If the copyright is not renewed by the author or one of the proprietors specified in section 24 within the year prior to the copyright's expiration, the work passes into the public domain.²⁶ Epoch contended that its renewal was valid under both the work-for-hire and the corporate-body provisions.

Epoch first argued that it was entitled to renew under the work-for-hire provision because Griffith had made the film as an employee and Epoch's registration of its assignments in 1915 had been the securing of copyright by an employer.²⁷ Epoch's rather convoluted ar-

²⁵ See *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 653-54 (1954). The purpose of the renewal provisions of the copyright statutes since 1831 has been "to give the reward to the author rather than the bookseller." *Miller Music Corp. v. Charles N. Daniels, Inc.*, 158 F. Supp. 188, 194 (S.D.N.Y. 1957), *aff'd.*, 265 F.2d 925 (1959), *aff'd.*, 362 U.S. 373 (1960).

²⁶ Section 24 provides:

The copyright secured by this title shall endure for twenty-eight years from the date of first publication . . . *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

17 U.S.C. § 24 (1970).

²⁷ 522 F.2d at 743-45.

gument pointed to its assignments from Majestic Corporation²⁸ and DWG, both of whom it characterized as employers,²⁹ and then asserted that Epoch had obtained the original copyright in 1915 as an employer because it stood in the shoes of Majestic and DWG by virtue of the assignments.³⁰ Thus, because the copyright had been secured by an employer as required by section 24, Epoch was entitled to renew as the proprietor of copyright in a work made for hire.³¹ Epoch's argument thus presupposed an employer-employee relationship between the assignor corporations and Griffith.

Epoch's argument was rejected by the court, since Epoch had failed to prove that Griffith was the employee of either of the assignor corporations or of Epoch itself.³² The court first concluded that Epoch could not be considered an employer of Griffith on the basis of the assignments from the corporations since these corporations were not shown to have exercised control and supervision over Griffith's work.³³ Epoch itself could not have been Griffith's employer because it did not incorporate until after *The Birth* was completed.³⁴

The fact that Griffith had not created *The Birth* as an employee also defeated Epoch's contention that it had received the renewal rights by assignment from DWG. Since Griffith had created the work as an independent author, DWG was not an employer and thus had no independent right to the original copyright. Therefore, when DWG obtained statutory copyright by publishing *The Birth* with notice of copyright in DWG's name, it could only have done so as the assignee of Griffith's common law copyright.³⁵ Since there was no proof that Griffith intended to assign the *renewal* term to DWG as well, a finding that DWG received such an interest was precluded as a matter of law.³⁶

The policy of the Copyright Act is to protect individual authors by preventing inadvertent transfers of renewal rights.³⁷ Pursuant to this policy, the *Epoch* court relied upon the well-settled principle that an individual author's assignment of common law copyright conveys only *initial-term* copyright;³⁸ the *renewal* term is a new grant³⁹ and is

²⁸ *Id.* at 744; Brief for Appellee, *supra* n.14, at 27-30.

²⁹ Brief for Appellee, *supra* n.14, at 29.

³⁰ *Id.* at 28.

³¹ *Id.* at 27-29.

³² 522 F.2d at 744-45.

³³ *Id.* at 744, citing *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216-17, *cert. denied*, 409 U.S. 997 (1972).

³⁴ 522 F.2d at 745.

³⁵ *Id.* at 747 & n.8.

³⁶ *Id.* at 747.

³⁷ *Id.*, citing *Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.*, 255 F.2d 518, 521 (2d Cir.), *cert. denied*, 358 U.S. 831 (1958).

³⁸ Griffith himself had not obtained *statutory* copyright, because he had neither registered the film as an unpublished work nor published the work with notice of copyright. 522 F.2d at 747 n.8, citing *Austin v. Steiner*, 207 F. Supp. 776 (N.D. Ill. 1962).

³⁹ See *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469, 471 (2d Cir. 1951).

not conveyed by a general assignment unless there is proof of a contrary intention.⁴⁰ Thus, DWG Corporation had not owned any interest in the renewal term which it could have assigned to Epoch.

Epoch attempted to avoid the application of this principle by noting that the assignment was from DWG, a corporation, and not from the individual author. The protection afforded individual authors should not be applicable, Epoch argued, to assignments by corporations.⁴¹ The court similarly rejected this argument, reasoning that since DWG had been Griffith's "alter ego," its assignment to Epoch was equivalent to an assignment from the individual author himself.⁴²

Epoch also asserted that its renewal was valid under the corporate-body provision of section 24. This provision grants the right to renew to the proprietor of the original copyright "in the case . . . of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author)."⁴³ Although the provision appears to grant corporations a special status by allowing them to renew unless they are the author's assignee or licensee,⁴⁴ its rather obscure origins indicate that it was intended to limit the rights of corporations by preserving renewal rights for authors who assigned their work to corporate publishers.⁴⁵ It should be noted that such a limitation would appear to be unnecessary, since renewal rights would revert to an author-assignor under section 24 without the provision.

The provision is one of limited applicability.⁴⁶ Clearly, if an individual author simply assigns his right to obtain copyright to a corporate body, the exclusion of corporate assignees from this renewal provision operates to reserve the right to renew to the author.⁴⁷ If, on the other hand, the corporation secures original copyright as the employer of the individual author, the corporation's right to renew is expressly provided under the more specific work-for-hire provision.⁴⁸

⁴⁰ 522 F.2d at 747.

⁴¹ *Id.* See *Rohauer v. Friedman*, 306 F.2d 933 (9th Cir. 1962), where the court found the policy of protecting the interests of individual authors by preventing inadvertent transfers inapplicable where none of the parties litigating the assignment of renewal rights was within the class given special statutory protection. *Id.* at 935-36.

⁴² 522 F.2d at 747.

⁴³ 17 U.S.C. § 24 (1970).

⁴⁴ Neither initial-term nor renewal copyright may be obtained by a licensee. 2 M. NIMMER, *NIMMER ON COPYRIGHT* § 114.3 at 469 n.55 (1975).

⁴⁵ See B. RINGER, *RENEWAL OF COPYRIGHT*, (General Revision of the Copyright Law, Preliminary Study No. 24, 1960).

⁴⁶ Judge Hand's description of the clause as "not entirely plain," *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697, 699 (2d Cir. 1941), would seem to be based on judicial self-restraint. Barbara Ringer, Register of Copyrights, has stated that the provision "appears to be a dead letter" and is "practically meaningless." B. RINGER, *RENEWAL OF COPYRIGHT*, 107, 137 (General Revision of the Copyright Law Study No. 31, 1960), in *COPYRIGHT SOCY OF U.S.A., 1 STUDIES ON COPYRIGHT* 503, 533 (1963); B. RINGER & P. GITLIN, *COPYRIGHTS* 59 n.42 (1965).

⁴⁷ *Austin v. Steiner*, 207 F. Supp. 776, 778 (N.D. Ill. 1962). See text at notes 36-39 *supra*.

⁴⁸ 2 M. NIMMER, *NIMMER ON COPYRIGHT* § 114.3 at 468 (1975).

Moreover, the provision has been held not to grant renewal rights where a corporation obtained original copyright on a work authored by a dominant member of the corporation.⁴⁹ Since the provision does not authorize renewal by a corporate assignee of the individual author, a corporate employer, or a corporate proprietor of copyright on works created by a dominant member of the corporation, only a narrow category of author-corporation relationships remains as a basis for renewal under the provision.

Judge Learned Hand, in *Shapiro, Bernstein & Co. v. Bryan*,⁵⁰ interpreted the provision by way of dicta as applying only to works produced by the fusion of common, indistinguishable contributions by the members of a corporation.⁵¹ This interpretation is buttressed somewhat by statements of the Register of Copyrights, soon after the renewal provision came into effect, that the legislative history of the clause suggests that it was meant to apply only to impersonal works like digests and dictionaries.⁵²

In contrast to these narrow interpretations of the provision is the potentially expansive reading suggested by Professor Nimmer, a leading authority in the field of copyright law. Professor Nimmer suggested that although the provision precludes renewal by the proprietor where a corporate assignee of an individual *author* first obtained copyright, the provision might be read to allow renewal if the corporate assignee were the assignee of an *employer*.⁵³ If renewal were thus available on copyrights first obtained by an employer's assignee, "some meaning for an otherwise meaningless provision might be found."⁵⁴ Under this construction, renewals would be allowed under the corporate-body provision on original copyrights obtained under two widespread practices in the movie industry: (a) where the employer of a scriptwriter assigns the employer's right to obtain copyright to the corporation which will produce the motion picture;⁵⁵

⁴⁹ *Donald Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 643 (2d Cir. 1967). As is pointed out in *Epoch*, 522 F.2d at 747 a corporation's obtaining copyright under these circumstances amounts to the securing of copyright as the assignee of the author. See text at note 40 *supra*.

⁵⁰ 123 F.2d 697 (2d Cir. 1941).

⁵¹ *Id.* at 699. Works composed of distinguishable parts, for instance the text and illustrations in a book, are renewable under the "composite works" provision of § 24. *Harris v. Coca-Cola Co.*, 73 F.2d 370 (5th Cir. 1934) (by implication), *cert. denied*, 294 U.S. 709 (1935).

⁵² Bouve, Letter to the Librarian of Congress Concerning Certain Aspects of the Copyright Act of March 4, 1909, (1938) at 43-44, quoted in B. RINGER, RENEWAL OF COPYRIGHT (General Revision of the Copyright Law: Preliminary Study No. 24, 1960) at 23.

⁵³ 2 M. NIMMER, NIMMER ON COPYRIGHT § 114.4 at 471 (1975).

⁵⁴ *Id.*

⁵⁵ The size of the industry involving the employment of scriptwriters is indicated by the fact that in 1954 at least \$25 million was paid to writers under employment contracts with motion picture companies. W. BLAISDALE, SIZE OF THE COPYRIGHT INDUSTRIES, (General Revision of the Copyright Law, Preliminary Study B, 1960) at 12. In the same year, the motion picture copyright industry generated a national income of \$917 mil-

and (b) where a company which produced a motion picture assigns its right to obtain copyright to a corporate distributor.⁵⁶ In both cases, the corporate assignee obtains copyright by publishing the motion picture with notice of copyright, and under each practice the corporation obtaining copyright is the assignee of the employer, not of the author. In both cases, it is doubtful that renewals could be upheld under the work-for-hire provision, since the works were not copyrighted by "an employer for whom" the works were made.⁵⁷ Therefore, in the absence of Professor Nimmer's suggested interpretation of the corporate-body provision, it appears that the corporate assignee in these two situations would be denied renewal of its copyright if ever challenged in judicial proceedings.

Arguing as amicus curiae, Columbia Pictures Industries⁵⁸ attempted to apply the analysis posited by Nimmer to the facts of *Epoch* so as to bring the case within the ambit of the corporate-body provision.⁵⁹ Columbia argued that because Epoch had obtained copyright as the assignee of an employer (or a "purported" employer) and not as the assignee of an individual author, the renewal should be upheld under the corporate-body provision.⁶⁰ The court rejected this argument, because Epoch had failed to prove that Griffith had created the work as an employee of either of the assignor corporations, DWG and Majestic.⁶¹ Therefore, when DWG obtained statutory copyright by publication with notice, it could have done so not as an employer, but only as the assignee of the common law copyright held by Griffith.⁶² "The clause cannot apply in these circumstances," the court concluded.⁶³

This view of the transaction between Griffith and DWG flowed from previous case law in the same circuit implying that where the creative author is the dominant member of a corporation and the corporation obtains original copyright, it secures copyright as the as-

lion. *Id.* at 30. All copyright industries generated a national income of \$6.1 billion. *Id.* at 2.

⁵⁶ This practice is described in *Rohauer v. Friedman*, 306 F.2d 933, 934 (9th Cir. 1962).

⁵⁷ 17 U.S.C. § 24 (1970) (emphasis added). Most of the amicus curiae brief in *Epoch* was devoted to the argument that the work-for-hire provision should not be strictly construed. Columbia argued that copyright should be renewable under the work-for-hire provision where the work was first copyrighted by the employer's assignee, rather than the employer himself. See Brief for Columbia as Amicus Curiae at 6-32, *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975) [hereinafter cited as Brief for Columbia as Amicus Curiae].

⁵⁸ The amicus curiae parties, Columbia Pictures Industries, Metro-Goldwyn-Mayer, Inc., Paramount Pictures Corp., Twentieth-Century-Fox Film Corp., United Artists Corp., and Universal Pictures, were represented by M. Nimmer and G. Meyer.

⁵⁹ See Brief for Columbia as Amicus Curiae, *supra* n.57, at 32-34.

⁶⁰ *Id.* at 34.

⁶¹ 522 F.2d at 746, 748.

⁶² *Id.* at 748.

⁶³ *Id.*

signee of the author, not as his employer.⁶⁴ Thus, since the work had been originally copyrighted by a corporate assignee of the individual author, Epoch as the proprietor of the original copyright was not entitled to renew under the corporate-body clause.

After rejecting Columbia Pictures' argument as inapplicable to the facts presented, the court elucidated the circumstances under which a copyright could be renewed under the corporate-body provision.⁶⁵ Although the court did not explicitly reject the interpretation argued for by Columbia Pictures, the court's delineation of the applicability of the provision would seem to preclude nearly all circumstances in which the proprietor could defend a renewal copyright by asserting that a corporate assignee of the employer first copyrighted the work:

[W]hat authoritative commentary exists concerning the . . . provision . . . indicates that it has no application to works of this type which are authored and produced by one identifiable person either as an employee for hire or as an independent author. For instance, Judge Learned Hand in dictum interpreted the clause as applying only to works composed by persons related to a corporation, but not as employees for hire, assignors or licensors. . . . The only other interpretation of note would apply the clause only to works of an impersonal nature composed by a staff or others whose individual work is merged into the whole and incapable of separate identification.⁶⁶

The court's first sentence would appear to foreclose the application of the provision where one identifiable employee produced the work, even though the work may have been initially copyrighted by a corporate assignee of the employer, for example, where the assignee of a scriptwriter's employer obtains original copyright. The court's statement that the provision has "no application to works of *this type*"⁶⁷ clearly imposes an additional requirement that the work not be produced by one identifiable employee. This additional requirement would seem to foreshadow the failure of any argument that the provision applies simply because the employer, rather than the author, assigned the right to obtain copyright.

The court's reference to Judge Hand's statement⁶⁸ seems to preclude reliance on the provision unless the work was composed by persons related to the corporation which obtained original copyright. This requirement would also appear to reject Columbia Pictures' ar-

⁶⁴ *Donaldson Publishing Corp. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 643 (2d Cir.), *cert. denied*, 389 U.S. 1036 (1967) (by implication); 2 M. NIMMER, NIMMER ON COPYRIGHT § 114.3 at 469 (1975).

⁶⁵ 522 F.2d at 748.

⁶⁶ *Id.*

⁶⁷ *Id.* (emphasis added).

⁶⁸ *Id.*, citing *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697, 699 (2d Cir. 1941).

gument because the employee who composed the work for the assignor corporation would not, under Judge Hand's interpretation, be "related" to the assignee corporation. Thus the work would not have been composed by persons related to the corporation that obtained copyright.

The last sentence of the court's description of the applicability of the provision would seem to complete the process of narrowly circumscribing its utility. The court referred to an interpretation limiting the application of the clause to "works of an impersonal nature composed by a staff or others whose individual work is merged . . . and incapable of separate identification."⁶⁹ It is difficult to imagine examples of such works other than the digests and dictionaries to which the clause had previously been thought to apply.⁷⁰ In sum, it seems clear that the argument advanced by Columbia Pictures would have little chance of success, even if it were squarely presented to the court, given the court's narrow description of copyrights which are renewable under the corporate-body provision.

By so narrowly interpreting the provision, the court has so limited its applicability that it seems unlikely the provision will be utilized to support renewals in future litigation. The result will be that proprietors of renewal copyrights originally obtained by corporate assignees of employers will be forced to rely on the work-for-hire provision of section 24 when asserting the validity of their renewal copyrights in infringement actions. In relying on this provision, such proprietors will be confronted with additional difficulties.⁷¹ It is nevertheless submitted that the court was amply justified in its actions. Limiting the applicability of the provision is consistent with both public policy and the legislative history of the provision itself. The limitation serves the public policy of strictly construing a statutory grant of monopoly.⁷² Moreover, there is no indication in the legislative history of the provision that it was intended to be construed expansively. On

⁶⁹ 522 F.2d at 748. Composite works made up of identifiable parts are renewable under the first proviso of § 24. See note 51 *supra*.

⁷⁰ B. RINGER, RENEWAL OF COPYRIGHT, (General Revision of the Copyright Law, Preliminary Study No. 24, 1960) at 23.

⁷¹ Asserting the validity of a renewal copyright under this provision may well present both practical and legal difficulties. In addition to the problems involving proof of entitlement of renewal, see text at notes 126-34 *infra*, the pre-copyright assignee faces an issue which the court in *Epoch* did not resolve. Section 24 makes work-for-hire copyrights renewable if the copyright was originally secured by "an employer for whom such work is made for hire." 17 U.S.C. § 24 (1970) (emphasis added). If this phrasing means the employer himself must have obtained original copyright, renewals of copyrights where the assignee obtained original copyright will not be valid. See note 57 *supra*.

⁷² The policy which limits monopoly strictly to the terms of the statutory grant should preclude any attempt to extend copyright monopoly, whatever "the particular form or method by which the monopoly is sought to be extended . . ." *United States v. Univis Lens Co.*, 316 U.S. 241, 251-52 (1942) (patents).

the contrary, it was intended by Congress to limit the protection given corporations.⁷³

To accept Columbia Pictures' expansive interpretation would also be inconsistent with both the constitutional underpinning of the Copyright Act and the policy of the Act itself. Granting automatic renewal rights where a corporate assignee first purchases an employer's rights to copyright and thereafter copyrights the work would constitute a direct grant of the renewal copyright to the corporation simply because it is a corporation, not because it is an assignee of any renewal rights. This is so because such an employer has no renewal rights to assign: the renewal, which is a separate grant,⁷⁴ is not available in this situation because the work was not copyrighted by the employer.⁷⁵ Since the employer has no renewal rights to assign, a corporate body in this situation is not claiming through succession to the rights of the employer, but in its own right as a corporate proprietor of the original copyright.

To grant renewal in such cases seems to violate the constitutional foundation of the Copyright Act. A claim to copyright must be based on authorship or succession to the author's rights.⁷⁶ Indeed, the Constitution specifically authorizes Congress to secure the exclusive "Right" only to authors.⁷⁷ Although by the enactment of section 26 Congress has included employers in the definition of "authors," neither the Constitution nor section 26 grants the right to claim copyright to a party who does not claim through the author.⁷⁸

In addition, the policy of the Copyright Act to reward the creative efforts of individual authors would not be served by Columbia Pictures' expansive interpretation. Employers are permitted to claim directly the benefit of the full 56-year copyright monopoly because they play a part in the creative process: they induce the author's creative efforts,⁷⁹ and they direct and supervise such efforts.⁸⁰ "Sacrificial days devoted to such creative activities deserve rewards commensurate

⁷³ See B. Ringer, *supra* note 70 at 22-24.

⁷⁴ E.g., *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469, 471 (2d Cir.), *cert. denied*, 342 U.S. 849 (1951).

⁷⁵ 17 U.S.C. § 24 (1970). For the text of section 24, see note 26 *supra*.

⁷⁶ 1 M. NIMMER, NIMMER ON COPYRIGHT §§ 60 at 233, 61 at 234, 61.2 at 235-37 (1975).

⁷⁷ The Constitution provides in Article 1 Section 8 that "the Congress shall have Power . . . [to secure] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"

⁷⁸ "[T]he Constitution empowers Congress to create a copyright monopoly for the benefit of authors, and in interpreting the Act every attempt should be made to conform to the constitutional purpose for which this monopoly exists." Note, 44 COLUM. L. REV. 712, 724 (1944).

⁷⁹ *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972).

⁸⁰ *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 643 (2d Cir.), *cert. denied*, 389 U.S. 1036 (1967); see also 2 M. NIMMER, NIMMER ON COPYRIGHT § 114.4 n.62c at 470-70.1 (1975).

NOTES

with the services rendered."⁸¹ Since corporate assignees who purchase the right to obtain copyright from employers after the creative process is complete play no part in the creative process, they do not deserve the same reward.

Finally, to accept Columbia Pictures' interpretation would be to favor corporations over individuals. As was pointed out by Killiam, under this interpretation, a corporation that secures initial-term copyright as the assignee of an employer would automatically receive renewal rights upon registration of the original copyright,⁸² but an individual who secures copyright under the same circumstances would not receive renewal rights.⁸³ It is interesting to note that Professor Nimmer, who had recognized this result in his treatise,⁸⁴ nevertheless argued for the interpretation as counsel for Columbia Pictures.⁸⁵ Nothing in the history or interpretation of either the renewal clause specifically, or of the Copyright Act generally, indicates that Congress intended to favor corporations over individuals. In short, although the court did not refer to these arguments based on legislative, constitutional, and public policies, such policies fully justify the court's rejection of Columbia Pictures' attempted expansion of the corporate-body provision.

II. THE SECTION 209 PRESUMPTION

Section 209 of the Copyright Act provides that a copyright certificate of registration is *prima facie* evidence of the facts stated in the certificate. That section states:

In the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office. . . . Said certificate shall be admitted in any court as *prima facie* evidence of the facts stated therein.⁸⁶

Epoch sought to uphold the validity of its renewal copyright on the ground that the renewal certificate itself was *prima facie* proof both of the validity of the renewal copyright and also of the facts stated in the certificate (that *The Birth* was a work for hire).⁸⁷

It is well settled that under section 209 a certificate of original copyright registration creates, at the least, a presumption that all of the facts stated in the certificate are true.⁸⁸ Courts have also held that

⁸¹ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

⁸² See Brief for Appellants in Response to Brief of Amicus Curiae at 47-48, *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975).

⁸³ 2 M. NIMMER, NIMMER ON COPYRIGHT § 114.4 at 470.3-471 (1975).

⁸⁴ *Id.*

⁸⁵ See Brief for Columbia Pictures as Amicus Curiae, *supra* n.57, at 32-34.

⁸⁶ 17 U.S.C. § 209 (1970).

⁸⁷ 522 F.2d at 746.

⁸⁸ *E.g.*, *Jerry Vogel Music Co. v. Forster Music Publisher*, 147 F.2d 614, 615 (2d Cir. 1945).

the certificate creates a presumption that the original copyright itself is valid.⁸⁹ However, the question of whether section 209 applies to *renewal* certificates to create either of the above-stated presumptions has been considered in only one other case.⁹⁰ The *Epoch* court expressly rejected the reasoning of that case and held that section 209 refers only to certificates of registration of the original copyright, not to renewal certificates.⁹¹ In so holding, the court reasoned that the evidentiary-weight provision of the section was meant to apply only to *original* certificates, since the language of section 209 refers only to the contents of the original certificate of registration.⁹² The court's reasoning is both accurate and sound.

The certificate of *original* registration recites facts referred to in section 209 which are pertinent only to the original copyright, for example, the name of the country of which the author is a citizen, the domicile of the author, and information concerning deposit of copies.⁹³ The certificate of *renewal* registration states facts that are not referred to in section 209. That certificate sets forth the status under which the proprietor has claimed copyright, the renewable matter, the original registration number of the copyright, and the original claimant.⁹⁴ Clearly, these are not the facts which section 209 states shall be given prima facie evidentiary weight in judicial proceedings.

An examination of the purpose to be served by the original certificate of registration issued pursuant to section 209 strongly supports this conclusion. The purpose of the certificate is to show that the proprietor is entitled to the protection given statutory copyright — the right to bring an action for infringement — because all the provisions of the Copyright Act have been satisfied.⁹⁵ Section 11 provides that the claimant may obtain a certificate pursuant to section 209 when the requirements of the Act, including deposit of copies, have been satisfied.⁹⁶ The copies demonstrate that statutory copyright has

⁸⁹ E.g., *Stuff v. E.C. Publications, Inc.*, 342 F.2d 143, 144 (2d Cir. 1965). Professor Nimmer suggests that the latter conclusion is unwarranted because the certificate does not show that certain notice requirements have continuously been met, a defect which could have invalidated the copyright. 2 M. NIMMER, NIMMER ON COPYRIGHT § 139.2 at 603-04 (1975).

⁹⁰ *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723, 733-34 (S.D.N.Y. 1974). At the time of the *Epoch* decision, *Rohauer* was still subject to review by the Second Circuit. See 522 F.2d at 746, n.6. The Southern District of New York had earlier extended the presumption to a renewal certificate. In *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331 (S.D.N.Y. 1968), the court assumed without discussion that a presumption of validity applies to a renewal certificate. *Id.* at 338. The validity of the renewal was not an issue in the case. The district court in *Rohauer v. Killiam Shows, Inc.*, *supra*, relied on this case, among others, to reach its holding that § 209 refers to renewal certificates. *Id.* at 734.

⁹¹ 522 F.2d at 746, n.6.

⁹² *Id.* at 745.

⁹³ See Certificate: Registration of a Claim to Copyright in a Motion Picture, Form L-M, lines 3(b), (c), 4 (U.S. Gov't. Printing Office: 1970-0-407-239).

⁹⁴ See Certificate of Registration of a Claim to Renewal Copyright, Form R, lines 1, 2(b), 4. (U.S. Gov't. Printing Office: 1970-0-409-555).

⁹⁵ 17 U.S.C. §§ 10, 11, 13 (1970). See note 3 *supra*.

⁹⁶ 17 U.S.C. § 11 (1970).

been secured through publication with notice, pursuant to section 10.⁹⁷ Section 13 of the Act provides that an infringement action may be brought only if (1) the work has been published with notice and (2) copies have been deposited with the Copyright Office.⁹⁸ The section 209 certificate states that the claimant has published the work with notice of copyright and has deposited copies of the work.⁹⁹ Thus the certificate of registration demonstrates that the claimant has complied with the statutory requirements for obtaining original copyright and has demonstrated that compliance by depositing copies of the work containing such notice.

However, the facts given *prima facie* evidentiary weight by section 209 are not the facts which show the requirements for obtaining a *renewal* copyright have been satisfied. Those requirements relate to the type of work upon which the original copyright is held and are set forth in section 24.¹⁰⁰ Certainly the *prima facie* weight which the certificate affords to the satisfaction of requirements for registering an original copyright pursuant to sections 10, 11, and 13 should not establish that the proprietor who has obtained a renewal certificate has met the requirements of section 24 and may bring an action for infringement.

The court reinforced its view that the section 209 presumption of validity does not apply to renewals by noting that the Copyright Office registers conflicting claims to the same renewal copyright.¹⁰¹ To give *prima facie* evidentiary weight to certificates issued under such circumstances would seem contradictory since the presumption would be meaningless in a case where each of the adverse parties presented such a certificate.¹⁰²

The court also supported its holding that the section 209 presumption does not apply to renewal certificates by referring to disparities in the verification of original and renewal claims and to congressional intent.¹⁰³ It is submitted, however, that the factual assumptions upon which the first rationale is based are inaccurate and that the reasoning based on congressional intent is strained.

The court referred to Copyright Office regulations¹⁰⁴ to demonstrate that the Copyright Office requires at least "minimal verifica-

⁹⁷ 17 U.S.C. § 10 (1970).

⁹⁸ 17 U.S.C. § 13 (1970).

⁹⁹ 17 U.S.C. § 209 (1970).

¹⁰⁰ 17 U.S.C. § 24 (1970). See note 26 *supra*.

¹⁰¹ 522 F.2d at 745. The practice of registering conflicting claims to the same copyright is based on Opinions of the Attorney General stating the Register of Copyrights has no duty to deny claims that may be illegal. Ironically, the Copyright Office sought an opinion of the Attorney General because it assumed renewal certificates were deemed *prima facie* evidence of the facts stated therein. See Op. Att'y. Gen. 183 U.S.P.Q. 624, 625-26 (1974). The opinion of the Attorney General also assumed the § 209 presumption applied to renewal certificates. *Id.* at 628.

¹⁰² See note 24 *supra*.

¹⁰³ 522 F.2d at 745-46.

¹⁰⁴ 37 C.F.R. § 202.3(b)(3) (1975).

tion" of facts for an original registration, but requires no verification for a renewal copyright. "The Copyright Office directs in its regulations that the application for original registration accurately reflect 'the facts existing at the time of first publication.' . . . No such admonition is applied to applications for renewal copyright."¹⁰⁵ This difference in the verification of facts between original and renewal copyright applications was deemed to justify different treatment of the section 209 presumption in renewal cases.¹⁰⁶

The court's finding of a difference in verification between original and renewal applications, however, is subject to question. As partially quoted by the court, the regulation appears to be an admonition to applicants to be accurate in their statements. However, a reading of the entire regulation reveals that its purpose is rather to direct applicants to provide information pertinent to the first publication of the work, rather than information concerning later developments. The entire regulation provides:

Applications for copyright registration covering published works should reflect the facts existing *at the time of first publication*, and should not include information concerning changes that have occurred between the time of publication and registration. The name given as copyright claimant in the application should agree with the name appearing in the copyright notice.¹⁰⁷

To find on the basis of this regulation that claimants to original certificates are required to state facts accurately but claimants to renewals are not would seem to lead to the undesirable and inaccurate conclusion that applicants for renewal are free to misrepresent facts when they apply for registration. In fact, applications for *both* original-term and renewal certificates are not accepted by the Copyright Office unless the claimant has certified that the statements made on the application are correct to the best of his knowledge. The application for registration of a claim to copyright in a motion picture requires the claimant or his agent to sign the following statement: "I CERTIFY that the statements made by me in this application are correct to the best of my knowledge."¹⁰⁸ The application for renewal requires precisely the same statement.¹⁰⁹ Both applications state that the

¹⁰⁵ 522 F.2d at 745.

¹⁰⁶ *Id.*

¹⁰⁷ 37 C.F.R. § 202.3(b)(3) (1975) (emphasis added). Had this regulation been in effect when Epoch and Dixon applied for registration of the original copyright in 1915, the inconsistency of their claim to be the original claimant of copyright, where the published work bore notice of copyright in the name of DWG Corp., would have been readily apparent. See note 5 *supra*.

¹⁰⁸ Application for Registration of a Claim to Copyright, Form L-M, line 10 (U.S. Gov't. Printing Office: 1970-0-407-239) (emphasis in original) [hereinafter cited as Application for Copyright].

¹⁰⁹ Application for Registration of a Claim to Renewal Copyright, Form R, line 8 (U.S. Gov't. Printing Office: 1970-0-409-555) [hereinafter cited as Application for

application is not acceptable unless the certification is signed.¹¹⁰

In addition, both the original-term and renewal applications require the same facts concerning the original copyright. The applicant for renewal is informed that these facts must agree with those of the Copyright Office records,¹¹¹ and the Copyright Office verifies the facts asserted in the renewal application by comparing them to the facts of the original registration.¹¹² Therefore, contrary to the court's conclusion, it appears that there is no difference in the verification of facts between original and renewal applications: in both cases the applicant must verify that the facts stated on the application are true.

Assuming *arguendo* that the court was correct in all of its statements concerning differences between applications for original and renewal certificates, such differences would not appear to support the conclusion arrived at by the court concerning the congressional intent behind section 209. The court concluded its interpretation of section 209 by noting that the Copyright Office's disparate treatment of original and renewal applications — the differences in verification and the issuance of conflicting renewal certificates — leads to the conclusion that "Congress surely did not intend" that the weight of the section 209 presumption attach to renewal certificates.¹¹³ This reasoning seems to combine a questionable reading of the Copyright Office regulations with an equally questionable leap in logic: the court in effect assumed that Congress knew in 1909, when it approved section 209, what the Copyright Office regulation would provide when promulgated in 1956.¹¹⁴

A more appropriate method for discerning whether Congress intended renewal certificates to carry evidentiary weight under section 209 would have been to examine the policy underlying the Copyright Act and the general public policy against the extension of a statutory monopoly, which is reflected by the renewal provision. The policy of

Renewal]. The Copyright Office does not attempt to determine the truth or falsity of statements of fact in either the original or the renewal application. C. BERGER, AUTHORITY OF THE REGISTER OF COPYRIGHTS TO REJECT APPLICANTS FOR REGISTRATION 85, 94 (Copyright Law Revision Study No. 18, 1959), in COPYRIGHT SOC'Y OF U.S.A., 1 STUDIES ON COPYRIGHT 393, 403-04 (1963) (original application); B. RINGER, RENEWAL OF COPYRIGHT 167, 183-84 (General Revision of the Copyright Law, Study No. 31, 1960) in COPYRIGHT SOC'Y OF U.S.A., 1 STUDIES ON COPYRIGHT 503, 579-80 (1963) (renewals). An interesting discussion of the contrast between the verification procedures of the Patent Office and those of the Copyright Office may be found in Goldberg & Dannay, *Fraud on the Copyright Office: Its Use and Misuse as a Defense in Copyright Infringement Actions*, 44 N.Y.U.L. REV. 540 (1969).

¹¹⁰ Application for Copyright, *supra* note 108, line 10; Application for Renewal, *supra* note 109, line 8.

¹¹¹ See Application for Copyright, *supra* note 108, lines 1, 5, 6; Application for Renewal, *supra* note 109, line 4.

¹¹² B. RINGER, RENEWAL OF COPYRIGHT 107, 183-84 (General Revision of the Copyright Law, Study No. 31, 1960), in COPYRIGHT SOC'Y OF U.S.A., 1 STUDIES ON COPYRIGHT 503, 579-80 (1963).

¹¹³ 522 F.2d at 746.

¹¹⁴ 21 Fed. Reg. 6023 (1956).

the Copyright Act is to benefit the public by encouraging individual creative efforts.¹¹⁵ This encouragement is provided by the financial incentive of a statutorily created monopoly in the copyrighted work.¹¹⁶ Such a monopoly, however, concentrates the dissemination of ideas in a few hands and is counter to the public interest in free access to ideas and creative works.¹¹⁷ Congress reconciled these conflicting interests by providing that the monopoly be limited in time.¹¹⁸ By thus limiting the monopoly, Congress effectuated the basic purpose of the Act by balancing the competing interests of the author and the public.

This balancing of interests is reflected in section 24, the renewal provision. That provision takes special steps to protect the individual author,¹¹⁹ and, in cases where the protection of the author is not effected by renewal of the copyright, ensures that the work passes into the public domain. Section 24 protects the author by providing for a reversion of the right to obtain copyright renewals.¹²⁰ As noted above,¹²¹ there are three exceptions to this general rule. However, in all cases except those involving the three exceptions, only the individual author, certain members of his family, or his executor may renew.¹²²

The proprietors who may renew under the three exceptions are less favored than the individual author. For example, if the employer obtains original copyright, he and his family do not receive the protection of a reversion of renewal rights; that is, if the employer has assigned the original-term copyright, the assignee rather than the employer becomes the proprietor who may renew under the work-for-hire provision.¹²³ Corporate assignees of the author who obtain original copyright are even less favored than employers, for they not only

¹¹⁵ *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-28 (1932).

¹¹⁶ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

¹¹⁷ Warren, *Foreword* to B. KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* at vii, viii-ix (1967).

¹¹⁸ *Id.*; 1 M. NIMMER, *NIMMER ON COPYRIGHT* § 5.4 at 10.1 (1975).

¹¹⁹ See note 25 *supra* & cases cited therein.

¹²⁰ See note 26 *supra* and accompanying text.

¹²¹ *Id.*

¹²² This conclusion assumes, of course, that the individual author has not specifically assigned his renewal interest. However, even if the individual author has assigned his renewal rights, the renewal must still be obtained in his name. *White-Smith Music Publishing Co. v. Goff*, 187 F. 247, 249 (1st Cir. 1911); 28 OP. ATTY GEN. 162, 164 (1910). The individual author then holds the renewal in trust for his assignee. 28 OP. ATTY GEN. 169 (1910). Thus if the author dies before the period during which the renewal may be obtained, the right to renew reverts to the statutory beneficiaries. *M. Witmark & Sons v. Fisher Music Co.*, 125 F.2d 949, 950 (2d Cir. 1942), *aff'd* 38 F. Supp. 72 (S.D.N.Y. 1941); 2 M. NIMMER, *NIMMER ON COPYRIGHT* § 117.3 at 503 (1975). An example of an assignee's taking careful steps to protect his renewal interest may be seen in *Selwyn Co. v. Veiller*, 43 F. Supp. 491 (S.D.N.Y. 1942), where the renewal proprietor had purchased the renewal rights from the author's assignee, then purchased any existing rights from the author, his wife and his son. *Id.* at 492.

¹²³ *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697, 699-700 (2d Cir. 1941) (rejecting the applicability of § 26 to § 24).

do not acquire renewal rights when they obtain original copyright,¹²⁴ but they also are specifically barred from renewing by the corporate-body provision.¹²⁵ By thus limiting the copyrights which may be renewed by parties other than the author, the renewal provision serves the public interest in three ways: (1) the public interest in encouraging creativity is effected by mandating the reversion of rights to the author; (2) the public interest in free access to creative works is furthered by passing the work into the public domain in most cases where the author does not renew; and (3) the public policy against unwarranted extensions of the statutorily created monopoly is served by the narrowness of the exceptions whereby non-authors may renew copyright.

These policy considerations and the intent of Congress to give the benefit of the renewal monopoly to individual authors over all others dictate that those persons other than authors who seek to invoke the protection of the Copyright Act for a copyright renewal be prepared to demonstrate that they were in fact entitled to receive the renewal monopoly.¹²⁶ The *Epoch* court's holding that such renewal proprietors may not utilize a renewal certificate to establish that theirs was a status entitling them to renew achieves this result.¹²⁷ The court's decision will require the renewal proprietor who is not the individual author clearly to establish by means other than the renewal certificate that, at the time of renewal, his status was one entitling him to renew.¹²⁸ Thus, such a proprietor will be required to show not only that he held title to the initial-term copyright,¹²⁹ but also that he was

¹²⁴ *Austin v. Steiner*, 207 F. Supp. 776 (N.D. Ill. 1962).

¹²⁵ *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 643 (2d Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968).

¹²⁶ It was suggested in the early period of renewal litigation that renewal recipients clearly establish their status at the time they apply so as to avoid confusion as to whose position the renewal purchaser had assumed.

To avoid any doubt as to whose position the purchaser undertakes to stand in, the renewal should be in the name of the person entitled under the statute. . . . In any subsequent action involving the copyright, the recipient of the renewal has the burden of showing who was properly entitled under the statutory schedule, the absence of any prior statutory designees, and the capacity of the person under whom the purchaser claims. The groundwork should be laid at the administrative stage.

Note, 44 COLUM. L. REV. 712, 731 (1944). See *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 47 F. Supp. 490, 492 (1942), *modified on other grounds*, 140 F.2d 268 (1944).

¹²⁷ 522 F.2d at 745-46.

¹²⁸ The court's holding imposes no new burden on the individual author. His right to obtain renewal is based on his authorship of the work. He is designated as the author on the original certificate of registration, even if he assigned the right to obtain copyright. The original certificate is still *prima facie* evidence of the facts stated in the certificate. Thus the court's holding that the renewal certificate may not be used to establish the validity of a renewal does not burden the individual author, who may establish the status entitling him to renew simply by means of the original certificate.

¹²⁹ *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 113 F.2d 627 (2d Cir. 1940); 2 M. NIMMER, NIMMER ON COPYRIGHT § 141.1 at 611-13 (1975).

in fact entitled to renew because the work was originally either a work for hire,¹³⁰ copyrighted by a corporation that was not an assignee or licensee of the individual author,¹³¹ or a composite or posthumous work copyrighted by the proprietor.¹³²

If the increased burden of clearly demonstrating the proprietor's status to renew cannot be met by evidence other than the renewal certificate, a greater number of artistic creations will, *a fortiori*, pass into the public domain.¹³³ This result is consistent with the policy of the renewal provision that the public should have free access to the work after those entitled to benefit from the monopoly have been rewarded for their efforts.

It is upon this basis, which reflects congressional intent at the time the Copyright Act was enacted, and not upon the basis of subsequently promulgated Copyright Office regulations, that the *Epoch* court should have ascertained a congressional intent not to afford prima facie evidentiary weight to the contents of the renewal certificate. This congressional intent, together with not only the different purposes and contents of original and renewal certificates, but also the possibility of two adverse parties presenting renewal certificates in the same case, clearly supports the court's conclusion that a renewal certificate is not entitled to prima facie evidentiary weight under section 209.

CONCLUSION

In ruling that a renewal certificate of copyright does not carry evidentiary weight, the *Epoch* court has imposed several perhaps unforeseen requirements on the renewal proprietor who brings an infringement action in the Second Circuit. The proprietor must show by proof other than his renewal certificate that at the time of renewal, he was the proprietor of one of the types of copyright designated as renewable in section 24. If he asserts that the copyright was renewable under the work-for-hire provision, he will be required to show that

¹³⁰ The initial-term registration certificate does not show a work was a "work for hire." Thus the proprietor litigating a renewal faces the burden of showing that the work was created "for hire" more than twenty-eight years before.

¹³¹ For the reasons discussed in the text of this note at notes 65-70, it is doubtful that proprietors will assert this provision to establish the validity of a renewal.

¹³² 2 M. NIMMER, NIMMER ON COPYRIGHT § 114.2 at 468 (1975). It may be anticipated that the proprietor's status to renew under this provision of § 24 could be shown simply by producing the initial-term registration certificate, which would be prima facie evidence of the proprietor's status to renew and of the fact that the work was posthumous, periodical, cyclopedic, or composite.

¹³³ It should be noted that at the time of the court's decision, *The Birth* had been under the monopoly of copyright for sixty years. *Epoch* had held the renewal copyright for thirty-two years. Although the Copyright Act provides only twenty-eight years for the original copyright and twenty-eight years for the renewal, Congress has enacted special legislation periodically for the last thirteen years extending renewal copyrights. 522 F.2d at 741 n.3; *e.g.*, Act of Dec. 19, 1974, Pub. L. No. 93-573, § 104, 88 Stat. 1873.

the work was originally created as a work for hire and that the putative employer "could have exercised the requisite power to control or supervise" the author-employee.¹³⁴ If a renewal proprietor asserts that the copyright was renewable under the corporate-body provision, he faces three tasks. He must establish that the work was not authored by one identifiable person. He must show that the persons who composed the work were related to the corporation which obtained original copyright, but related in some way other than as employees or assignors. Furthermore, he must show that their contributions to the work are merged and "incapable of separate identification." These requirements would seem to foreclose the utilization of the corporate-body provision as a basis for upholding a renewal for all but an extremely limited type of work.

ANNE ELIZABETH ROGERS

Securities Law—Insider Liability Under Section 16(b) of The Securities Exchange Act of 1934—*Whiting v. Dow Chemical Co.*¹—In September and October of 1973, Helen Dow Whiting sold 29,770 shares of Dow Chemical Company (Dow), which she had acquired by gift and inheritance.² In December of 1973, her husband Macauley Whiting, a director of Dow, exercised his executive stock option and purchased 21,420 shares of Dow.³ To finance his purchase, Mr. Whiting borrowed some of the funds which Mrs. Whiting had received from her earlier sales.⁴ The sales and purchase were made pursuant to a joint long-term investment plan which the Whitings had devised with their financial adviser.⁵ Although the Whitings maintained separate investment accounts,⁶ they filed a joint income tax return and combined their individual funds to meet the family's living expenses.⁷ Mr. Whiting contributed nearly his entire salary towards those expenses.⁸ Mrs. Whiting contributed an even larger sum, primarily derived from dividends and capital gains on her Dow holdings.⁹

When Dow informed Mr. Whiting of its intention to recover the profits realized as a result of matching Mrs. Whiting's sales with Mr.

¹³⁴ 522 F.2d at 744.

¹ 523 F.2d 680 (2d Cir. 1975).

² *Id.* at 682. At the time of her sales, Mrs. Whiting owned less than 10% of the outstanding shares of Dow common. *Whiting v. Dow Chem. Co.*, 386 F. Supp. 1130, 1131 (S.D.N.Y. 1974).

³ 523 F.2d at 682.

⁴ *Id.*

⁵ *Id.* at 684.

⁶ *Id.* at 683.

⁷ *Id.* at 682.

⁸ *Id.*

⁹ *Id.*