AUTHORSHIP, DOMINANCE, AND THE CAPTIVE COLLABORATOR: PRESERVING THE RIGHTS OF JOINT AUTHORS

Mary LaFrance*

INTRODUCTION

For copyright purposes, determining whether a work has a single author or joint authors is important for a variety of reasons. Perhaps the most significant legal consequence of joint authorship is joint ownership, under which the authors enjoy equal and undivided ownership of the copyright, allowing each to exploit the work freely, subject to a duty to account to the others for a ratable share of the exploitation profits.1 Absent an agreement to the contrary, each author of a joint work has an equal claim to those profits and an equal right to exploit the work, even if the authors' contributions were not equal.2

This legal consequence has led most courts to proceed with caution in assessing joint authorship claims by putative co-authors, at least where those claims are disputed by a party asserting sole authorship of the work.3 Although the Copyright Act of 19764 provides a statutory definition of "joint works," federal courts have expressed concern over the breadth of that definition, and

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1 See H.R. Rep. No. 94-1476, at 121 (1976) ("House Report"), reprinted in 1976 U.S.C.C.A.N. 5659, 5736-37. A joint authorship determination also affects the duration of the copyright, see 17 U.S.C. § 302(b) (1994), the exercise of renewal rights, see id. § 304(a), the exercise of termination rights, see id. §§ 203, 304(c)-(d), and the execution of moral rights waivers, see id. § 106A(e)(1).

2 See, e.g., Thomson v. Larson, 147 F.3d 195, 201 (2d Cir. 1998) (relying upon the intent of the parties to determine co-authorship in the absence of a contractual arrangement); Maurel v. Smith, 271 F. 211, 215-16 (2d Cir. 1921) (execution of the work need not be divided equally, as long as there is a common design); Sweet Music, Inc. v. Melrose Music Corp., 189 F. Supp. 655, 659 (S.D. Cal. 1960) (absent an agreement to the contrary, joint authors own equal shares, even if their contributions were unequal); Visitor Indus. Publications, Inc. v. NOPG, L.L.C., 91 F. Supp. 2d 910, 913 (E.D. La. 2000) (joint authors share equal and undivided interests in the work); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 6.03, 6.08 (2000).

3 See infra Parts III-VI.

have created several additional tests for determining which creative contributions rise to the level of joint authorship.\(^5\)

This Article focuses on a particular approach to narrowing the definition of joint works, which has become firmly established as the law of the Second Circuit, and which now appears to have been adopted by the Seventh and (though perhaps to a lesser extent) the Ninth Circuit as well. Because these circuits hear the majority of copyright appeals, and thus are particularly influential in copyright law, their agreement on this standard makes it highly likely that other circuits will follow suit.

Judicial efforts to narrow the definition of joint works have focused on two questions: first, what type and amount of creative contribution is necessary to establish that a particular contributor is an "author"?, and second, what type of subjective intent is necessary to establish a person's co-authorial status? As this Article will show, courts have not taken a sufficiently rigorous approach to the first question, and, as a result, they have found it necessary to answer the second question in a manner that distorts the language and purpose of the joint works definition. The consequence of this error is that the prevailing judicial gloss on the joint works definition leads to uncertainty and unfairness in determining which creative collaborators are entitled to enjoy the economic and moral rights of authorship. This Article critiques the prevailing interpretation of the subjective intent requirement, and proposes an alternative approach that is more consistent with the language and purpose of the copyright law.

I. PRESSURE POINTS IN THE JOINT WORKS DEFINITION

The tendency of federal courts to resist claims of joint authorship became especially pronounced after the concept of a "work made for hire" received a new definition in the 1976 Act.

Under the Copyright Act of 1909,\(^6\) the "work made for hire" concept was limited to traditional employment arrangements,\(^7\) but courts frequently found an implied conveyance of copyright when the party commissioning a work also had

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\(^5\) See infra notes 13-34 and accompanying text.  
\(^7\) Id. § 26.
the power to supervise the creative process.\(^8\) When the 1976 Act rejected the implied conveyance theory,\(^9\) it insured that copyrights would more often vest in the actual creators of a work rather than the parties that hired and supervised them. Once the doctrine of implied conveyance was eliminated, the likelihood increased that any given collaborative work would be deemed to have multiple authors for copyright purposes.\(^10\)

The 1909 Act also lacked any specific reference to joint works or joint authorship. The 1976 Act remedied this defect by introducing a definition of “joint works.” Section 101 of the Act defines a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”\(^11\) Courts interpreting this language have relied heavily on the explanation in the 1976 House Report:

[A] work is “joint” if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as “inseparable or interdependent parts of a unitary whole.” The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either “inseparable” (as the case of a novel or painting) or “interdependent” (as in the case of a motion picture, opera, or the words and music of a song).\(^12\)

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\(^8\) See Community for Creative Non-Violence v. Reid, 490 U.S. 730, 743-44 (1989) (“CCNV II”); Dolman v. Agee, 157 F.3d 708, 712 (9th Cir. 1998) (describing this as a “rebuttable presumption” that the commissioning party owned the copyright).

\(^9\) That theory is rejected in the definition of “joint works,” see 17 U.S.C. § 101 (1994), and in the rule that copyright transfers must be in writing, see id. § 204(a).

\(^10\) See Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1497 n.17 (D.C. Cir. 1988) (“CCNV I”), aff’d, 490 U.S. 730 (1989) (noting that multiple authorship disputes under the 1909 Act were more often litigated under the “work made for hire” doctrine, and predicting that the narrower scope of that doctrine under the 1976 Act would result in more of such disputes being litigated as joint authorship cases).


\(^12\) House Report, supra note 1, at 120, reprinted in 1976 U.S.C.C.A.N. 5659, 5736-37. The Nimmer treatise explains the terms “inseparable” and “interdependent” as follows:

[If] author B’s contribution when combined with author A’s contribution results in recasting, transforming or adopting A’s contribution, then the two contributions may be said to be inseparable. If the process is simply one of assembling into a collective whole A’s and B’s respective contributions, without thereby recasting A’s contribution, then the two contributions may be said to be interdependent.

NIMMER & NIMMER, supra note 2, § 6.04 (quoted in M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1493 (11th Cir. 1990)). This explanation, unfortunately, threatens to blur the distinction between joint works and collective works. See infra notes 25-28, 69-70 and accompanying text.
Even with this gloss, the § 101 definition remains broad, and, as a result, those courts seeking to implement a conservative approach to defining joint work status have introduced a number of non-statutory tests in order to narrow the definition and thereby deny authorship status to certain creative contributors whose contributions are viewed by the courts as falling short of true “authorship.”

Although it does not appear that any of these heightened standards is required by the 1976 Act, or even suggested in its legislative history, almost all courts have adopted one or more of these restrictive definitions for the acknowledged purpose of making multiple authorship difficult to establish.

One set of standards, already well explored in the copyright literature, addresses the nature of each putative co-author’s contribution. Under the test espoused by the late Professor Melville Nimmer, a joint author’s contribution must be more than “de minimis,” although it need not be independently copyrightable; thus, a party that contributes only abstract ideas or information, but not copyrightable expression, may be a joint author. However, courts that favor a restrictive view of joint authorship have criticized Nimmer’s test as impractical and difficult to apply.

In contrast, an alternative test proposed by Professor Paul Goldstein requires each author to make a contribution that would be independently copyrightable. This test has been more favorably received by most courts and commentators.

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13 See infra notes 15-34 and accompanying text.
14 See, e.g., Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1068 (7th Cir. 1994); Childress v. Taylor, 945 F.2d 500, 507-09 (2d Cir. 1991); Respect, Inc. v. Committee on Status of Women, 815 F. Supp. 1112, 1119 (N.D. Ill. 1993). The federal courts’ hostility to joint authorship claims has been noted by a number of scholars. See, e.g., Peter Jaszi, On the Author Effect: Contemporary Copyright and Collective Creativity, 10 CARDOZO ARTS & ENT. L.J. 293, 315-19 (1992) (criticizing both Congress and the courts for their reluctance to recognize the prevalence of “collaborative cultural production”); Laura G. Lape, A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine, 61 ALB. L. REV. 43, 51-52 (1997) (finding hostility manifested in the language used by courts, their subordination of “joint work” doctrine to “work made for hire” doctrine, “conclusory findings” that contributions have not been merged, and narrow judicial definitions of “joint work”).
16 NIMMER & NIMMER, supra note 2, § 6.07.
17 See Erickson, 13 F.3d at 1070; see also Childress, 945 F.2d at 506.
19 See Childress, 945 F.2d at 506 (collecting authorities); Ashton-Tate Corp. v. Ross, 723 F. Supp. 597, 602 (N.D. Cal. 1989), aff’d, 916 F.2d 516, 521 (9th Cir. 1990) (joint authorship did not arise where defendant contributed only ideas to a computer spreadsheet program, rather than copyrightable “expression”); Moral Rights in Our Copyright Laws: Hearings on S. 1198 and S. 1253 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 101st Cong. 210-11 (1989) (statement of Ralph Oman, Register of Copyrights); WILLIAM F. PATRY, LATMAN’S THE COPYRIGHT LAW 116 (6th ed. 1986); Lape, supra note 14, at 66-70; VerSteeg, supra note 15, at 1326-27.
and draws support from the notion that “authorship,” for purposes of copyright law, always requires creation of original expression, as distinct from ideas. Thus, under the Goldstein test, a person can be a joint author only if he or she contributed at least some element of copyrightable creative expression to the putative joint work.\(^\text{20}\) In other words, a collaborator who contributes only ideas or facts cannot use another collaborator’s particularized expression of that material to provide the “work of authorship” necessary to bestow authorship status.\(^\text{21}\) The Goldstein standard therefore holds each co-author to the same criteria that would apply if he or she were working alone.

Most courts have pronounced the Goldstein standard to be the more appropriate test of joint work status, often expressing concern that Nimmer’s de minimis standard would afford joint author status to too many creative contributors.\(^\text{22}\) Thus, the preference for the Goldstein standard reflects a conviction that, in most cases, a copyrighted work should have only one or a very small number of authors. This perception has been criticized by commentators who point out that much—if not most—authorship is essentially collaborative,

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\(^{20}\) The Goldstein test appears to test the copyrightability of each person’s contribution at the moment the individual offers that contribution to the collaborative effort, rather than at the later point when that contribution has actually been incorporated into the collaborative work (because at this point even an uncopyrightable idea may be merged with other copyrightable expression so that the resulting material is copyrightable). This requires, of course, that the entire collaborative work be separable somehow into distinct units of copyrightable expression. Arguably, this approach is in tension with the statutory requirement that the contributions which are merged into a joint work must be either “inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101 (1994) (“joint work” definition). Where elements of a work are truly inseparable, it is difficult—if not impossible—to evaluate each creative participant’s separate contribution for its independent copyrightability. Thus, the very characteristics that identify a joint work under the statutory “inseparability” test might make it difficult for the work to qualify as a joint work under the Goldstein test. One author has suggested that the Goldstein test may be appropriate for “interdependent” joint works, but not for “inseparable” ones. Nancy Perkins Spyke, The Joint Work Dilemma: The Separately Copyrightable Contribution Requirement and Co-Ownership Principle, 11 U. MIAMI ENT. & SPORTS L. REV. 31, 60-63 (1993) (suggesting that different co-ownership rules should apply to each category).

\(^{21}\) In contrast, it should not be necessary for each collaborator to “fix” his or her individual expression separately before those contributions are merged into a fixed work because it is sufficient for purposes of § 101 (defining “fixed”) that a work be fixed “by or under the authority of the author.” 17 U.S.C. § 101 (1994). Where collaborators intend to create a work of authorship together it appears clear that the fixation is authorized by all of them. See Andrien v. Southern Ocean County Chamber of Comm., 927 F.2d 132, 135-36 (3d Cir. 1991) (ruling in favor of authorship claim by one who gave detailed instructions to another who performed the actual fixation); Nimmer & Nimmer, supra note 2, § 1.06 ("the originator, rather than the fixer, should be deemed the 'author'"); VerSteeg, supra note 15, at 1336 (analyzing Andrien). But see Maurizio v. Goldsmith, 84 F. Supp. 2d 455, 466 (S.D.N.Y. 2000) (implying that the Goldstein test requires each contribution to be fixed before they are merged); Lape, supra note 14, at 72 (finding a similar implication in Cabrera v. Teatro del Sesenta, Inc., 914 F. Supp. 743 (D.P.R. 1995)).

\(^{22}\) See Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1069-71 (7th Cir. 1994); Childress v. Taylor, 945 F.2d 500, 506-07 (2d Cir. 1991) (collecting cases).
and question whether any individual deserves monopoly rights in a work that
draws its inspiration from many sources. Such criticism is arguably in tension
with the fundamental, if unproven, premise of federal copyright law—that the
copyright monopoly’s economic incentive fosters creativity.

While the widespread adoption of the Goldstein standard promises to narrow
the concept of a joint work significantly, there exists a second problem in
determining joint work status. This is the problem of differentiating between, on
the one hand, those creative participants whose copyrightable expression inspires
and is incorporated into another participant’s solely-authored (and thus solely-
owned) “derivative” work, and, on the other hand, those creative participants who
jointly undertake to combine their individual copyrightable efforts into a new and
unitary “joint” work of which they are co-authors (and thus co-owners). As
discussed below, Congress and the courts have attempted to distinguish these two
categories of co-creators by focusing on the nature of their subjective intent at the
time they make their respective contributions to the combined work.

23 See, e.g., Margaret Chon, Symposium: Innovation and the Information Environment: New Wine
Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship, 75 OR. L. REV.
257, 264-72 (1996); Wendy J. Gordon, Toward a Jurisprudence of Benefits: The Norms of Copyright and the
Problem of Private Censorship, 57 U. CHI. L. REV. 1009, 1028-32 (1990); Jaszi, supra note 14, at 295; Jessica
Litman, The Public Domain, 39 EMORY L.J. 965, 1007-11 (1990); Martha Woodmansee, On the Author Effect:
of collective authorship have been marginalized by copyright law because they do not fit the widely accepted

More generally, a substantial body of scholarship has critically the concept of authorship both in a literary
context and in a legal context. See, e.g., Michel Foucault, What is an Author?, in TEXTUAL
STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141 (Josué V. Harari ed., 1979); BENJAMIN KAPLAN, AN
UNHURRIED VIEW OF COPYRIGHT 117 (1967); Jaszi, supra note 14, at 293-96; Peter Jaszi, Toward a Theory of
Copyright: The Metamorphoses of “Authorship,” 191 DUKE L.J. 455, 468-91 (tracing history of the
“authorship” concept in Anglo-American copyright); Mark Rose, The Author As Proprietor: Donaldson v.

empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort
by personal gain is the best way to advance public welfare through the talents of authors and inventors in
is intended to motivate the creative activity of authors and inventors by the provision of a special
reward . . . .”).

If the authorship of a particular work must be attributed to every person who in some way inspired its
creation, and if the resulting copyright would have to be shared by all of those creators, then the more
proximate creator—the author who took the last creative step to produce something new—would have no
special legal status and would receive no special economic reward for taking the additional step of compiling
these inspirations. For any given work, a larger number of “authors” means a smaller share of the profits for
each them.
The subjective intent requirement derives from the statutory definition of a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” This language precludes joint work status where the contributors intended merely to compile their individual efforts into a collective work without sacrificing each separate work’s independent character. To satisfy the definition, both putative co-authors must have possessed the requisite intent to merge their contributions at the time they created those contributions. This timing factor distinguishes joint works from derivative works, in which one contributor incorporates some or all of another’s pre-existing work into a new and different work.

These aspects of the intent test, strongly rooted in the language and legislative history of the 1976 Act, have been relatively uncontroversial. Recently, however, judicial interpretations of the joint work definition have given the intent test a new dimension. In the Second and Seventh Circuits, in order to establish that a work is joint, it is now no longer sufficient to show that the co-creators intended, at the time they created their respective contributions, to merge those contributions

26 The legislative history of § 101 notes, “The definition of ‘joint work’ is to be contrasted with the definition of ‘collective work,’” also in section 101, in which the elements of merger and unity are lacking; there the key elements are assemblage or gathering of “separate and independent works * * * into a collective whole.” House Report, supra note 1, at 120, reprinted in 1976 U.S.C.C.A.N. 5659, 5736-37.
27 “The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, . . . .” Id. Under this standard, the creative contributors need not act simultaneously, and need not intend to combine their work with that of any specific co-author(s). It is only necessary to show that, at the time each person makes his or her creative contribution, that person intended the contribution to be merged inseparably or interdependently with the work of another, even if the identity of that second person has not yet been determined. See Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944), modified, 140 F.2d 268 (2d Cir. 1944); Eckert v. Hurley Chicago Co., 638 F. Supp 699, 702 (N.D. Ill 1986); NIMMER & NIMMER, supra note 2, § 6.03.
28 The legislative history notes:

The definition of “joint works” has prompted some concern lest it be construed as converting the authors of previously written works, such as plays, novels, and music, into coauthors of a motion picture in which their work is incorporated . . . . [A]lthough a novelist, playwright, or songwriter may write a work with the hope or expectation that it will be used in a motion picture, this is clearly a case of separate and independent authorship rather than one where the basic intention behind the writing of the work was for motion picture use. In this case, the motion picture is a derivative work within the definition of that term . . . .

House Report, supra note 1, at 120, reprinted in 1976 U.S.C.C.A.N. 5659, 5736-37. See also Gililliam v. American Broad. Cos., 538 F.2d 14, 21-22 (2d Cir. 1976) (reaching similar conclusion under the 1909 Act, reasoning that in such a case the second work would not be joint “unless, at the time of creation by the first author, the second author’s contribution [is envisaged] as an integrated part of a single work,” and the first author intends that the final product be a joint work”) (quoting 1 MELVILLE NIMMER, COPYRIGHT §§ 67-73 (1976)).
inseparably or interdependently into a single work. Under the law of these circuits, it is also necessary to show that both authors intended to “regard themselves as joint authors.”29 In other words, if two persons combine their efforts to produce a a copyrightable work, the result is a joint work only if each of them intended to establish a co-authorial relationship with the other.

This “relationship” test departs from most earlier articulations of the joint work analysis by focusing not on the collaborators’ intent to undertake a particular type of creative process, but on their intent to enter into a particular relationship with one another. As this Article will show, the effect of the relationship test has been to further narrow the definition of joint works, and to do so in a manner that is inconsistent with the language or the legislative history of the joint works definition.

The Ninth Circuit has recently formulated its own approach to the joint work analysis. Its decision in Aalmuhammed v. Lee30 appears to endorse the views of the Second and Seventh Circuits, but also suggests that the copyrightable contribution made by a putative joint author must satisfy a test of “originality” more stringent than the originality test that determines the copyrightability of a work of sole authorship.31

As discussed below, the legislative history of the 1976 Act suggests that the purpose of the joint works definition in § 101 was to distinguish joint works from derivative works, compilations, and collective works.32 There is no evidence that, in establishing and defining the joint works category, Congress intended to impose a more stringent standard of authorship on the authors of joint works than on the authors of other copyrightable works. Yet, as this Article will show, the relationship test for joint authorship has done exactly that.33 This new gloss on the intent requirement has no foundation in the copyright statutes or their legislative history. In addition, courts that have adopted this gloss have failed to provide any useful definition of the requisite intent.34 Not surprisingly, the results in some of the cases applying this standard have been troubling.

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29 Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991); accord Thomp v. Larson, 147 F.3d 195, 200-01 (2d Cir. 1998); Erickson v. Trinity Theatre, 13 F.3d 1061, 1071 (7th Cir. 1994).
30 202 F.3d 1227 (9th Cir. 2000).
31 See infra notes 220-61 and accompanying text.
32 See infra notes 25-28, 68-71 and accompanying text.
33 See infra notes 262-79 and accompanying text.
34 See infra notes 136-39, 184-86 and accompanying text.
Any methodology used to distinguish joint works from other copyrightable works will dictate which creative participants will enjoy the economic rewards and moral rights afforded to authors under federal copyright law. Thus, the methodology chosen should be consistent with the purpose of the Copyright Act, to encourage creation and dissemination of original expression that will ultimately enrich the public domain. A joint authorship test which discourages creative contributions will not advance this purpose. If such a test results in the denial of authorial status to persons who make significant creative contributions to a work, then that test fails to advance the purpose of the Copyright Act because it will deny these contributors the economic rewards that might encourage them to continue their creative efforts in the future. A test of joint work status also fails to

35 This determination may also affect the economic and moral rights of putative joint authors under foreign law in cases in which the work in question originated in the United States and the foreign jurisdiction relies on the law of the country of origin to determine the ownership of the copyright. Cf. Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 84 (2d Cir. 1998) (applying Russian copyright law to determine ownership of work originating in Russia and United States law to determine whether activities taking place in United States infringed copyright in that work).

36 The Supreme Court articulated this premise in Mazer v. Stein:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in “Science and useful Arts.” Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.


Congress announced the same goal in passing the 1909 Act:

The main object to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 163-64 (1975) (quoting H.R. REP. No. 60-2222, at 7 (1909)). See also Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 593 (1994) (“[T]he licensing of derivatives is an important economic incentive to the creation of originals.”); Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (“Copyright is intended to motivate the creative activity of authors...by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); Fox Film Corp. v. Doyal, 286 U.S. 123, 127-28 (1932) (“A copyright, like a patent, is ‘at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects.’”); Kendall v. Winsor, 62 U.S. (21 How.) 322, 327-28 (1858); Grant v. Raymond, 31 U.S. (6 Pet.) 218, 241-42 (1832); H.R. REP. No. 100-609, at 23 (1988) (“The primary objective of our copyright laws is not to reward the author, but rather to secure for the public the benefits from the creations of authors.”). For an excellent discussion of the importance of preserving the public domain, see Jessica Litman, The Public Domain, 39 EMORY L.J. 965 (1990).
advance the purposes of the Copyright Act if it grants economic and moral rights to non-authors, because their exercise of these rights deprives the true author(s) of the exclusivity that accounts for so much of the value of those rights.

Part II discusses the origin of the joint work analysis as a means of distinguishing between joint works and derivative or collective works, rather than as a means of measuring whether a putative co-author’s contribution to a work rose to the level of “authorship” within the meaning of copyright law.\(^{37}\) With the narrowing of the “work made for hire” definition in the 1976 Act,\(^{38}\) however, the existing “joint work” analysis began to be employed for a new purpose—distinguishing between greater and lesser creative contributions by putative co-authors to determine which of them should be rewarded with a share of the copyright in a finished work.\(^{39}\)

In this latter application, the joint work analysis has been distorted from an analysis of the process by which a work is created to an analysis of each co-creator’s subjective intent to share the authorial laurels with one or more of the others.\(^{40}\) The result has been a troubling array of decisions that appear to be more influenced by the egos of the putative authors than by the objective evidence of how the work was created.

If the purpose of the joint work analysis is to differentiate between authors and non-authors—that is, between those whose creative contributions to collaborative unitary works rise to the level of authorship and those whose contributions fall below this standard—then joint author status should be afforded to all collaborators who make legally sufficient contributions, regardless of whether their co-creators acknowledge or even recognize the significance of those contributions.

Parts III through VI of this Article explore how and why courts came to adopt the relationship test, how that test affects joint work status, and what difficulties are involved in its application, concluding that the relationship test does not provide a reliable means of discriminating between authors and non-authors.\(^{41}\)

\(^{37}\) See infra notes 42-67 and accompanying text.

\(^{38}\) See infra notes 68-80 and accompanying text.

\(^{39}\) See infra notes 109-42 and accompanying text.

\(^{40}\) See infra notes 143-219 and accompanying text.

\(^{41}\) Throughout this Article, terms such as “author” and “non-author” are used to distinguish between two categories of creative contributors: authors—those persons who, pursuant to the goal of encouraging creation through incentives, are considered deserving of economic rewards for their contributions to new copyrightable works; and non-authors—those who are considered undeserving of those rewards. The use of these terms is thus
Finally, in an effort to refocus the joint work analysis on the creative process, Part VII suggests an alternative approach to establishing joint work status, under which it is unnecessary to inquire into the creators’ subjective perceptions of their relationship to one another. Instead, the analysis focuses on the nature and significance of each party’s contribution to the finished work. Where that contribution is substantial as well as independently copyrightable, joint authorship should be presumed, and a party seeking to rebut that presumption would be required to show that the contribution in question was incorporated into the finished work under an express or implied derivative work license.

II. ORIGINS OF THE JOINT WORK CONCEPT

Early common law\textsuperscript{42} attempts to identify joint authorship yielded definitions broad enough to encompass almost any copyrightable collaborative effort in which the individuals created their contributions with contemporaneous intent to contribute to a single work.

Joint authorship was described in English law as early as 1871, as “a joint laboring in furtherance of a common design,”\textsuperscript{43} and as an agreement “to write a piece, there being an original joint design.”\textsuperscript{44} Because the 1909 Act was silent on limited to a narrow positive law context, and implies no conclusions about the challenging “authorship” questions addressed in literary theory.

\textsuperscript{42} The term “common law” refers to the law of pre-publication copyright which existed under the common law of the states until preempted by § 301 of the 1976 Act, 17 U.S.C. § 301 (1994).

\textsuperscript{43} Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944) (quoting Levy v. Rutley, L.R., 6 C.P. 523, 529 (1871) (Keating, J.)). In Levy, the plaintiff commissioned a writer to draft a play, and then later modified the script. See Maurel v. Smith, 220 F. 195, 199 (S.D.N.Y. 1915) (Hand, J.) ("Maurel I"), aff’d, 271 F. 211 (2d Cir. 1921). Later, the plaintiff paid the writer for his "share, title, and interest as co-author with [the plaintiff] in the drama." Maurel I, 220 F. at 199. When a third-party defendant subsequently infringed upon the copyright in the revised script after the original writer’s death, the plaintiff was denied standing to sue as a joint author because his contribution was not part of a “common and preconcerted” design shared with the original writer. See id. (citing Levy, 6 C.P. at 529). In dicta, Judge Montague Smith added that, where such a common design existed, joint authorship would exist even if one person’s contribution was greater than the others. See id. (citing Levy, 6 C.P. at 530) (Smith, J.). Under the 1976 Act, of course, this scenario would raise the question whether the plaintiff had standing as the owner of a derivative work copyright. See infra notes 25-28, 68-71 and accompanying text.

\textsuperscript{44} Maurel I, 220 F. at 199 (citing Levy, 6 C.P. at 530). In Maurel v. Smith, the Second Circuit affirmed Judge Hand’s decision, quoting Copinger’s Law of Copyrights:

The pith of joint authorship consists in co-operation, in a common design, and whether this cooperation takes place subsequent to the formation of the design by the one, and is varied in conformity with the suggestions and views of the other, it has equally the effect of creating the joint authorship as if the original design had been their joint conception.
the definition of joint authorship, Judge Learned Hand imported the English standard into American copyright law in the 1915 case of Maurel v. Smith. He elaborated on the concept thirty years later, holding in Edward B. Marks Music Corp. v. Jerry Vogel Music Co. that the “common design” and “joint laboring” requirements could be satisfied even when the joint authors did not labor at the same time and the first author completed his contribution before the identity of the second author had been determined, so long as each created his or her contribution with the intent of combining it with another’s into a single unitary work.46

271 F. 211, 215 (2d Cir. 1921) (“Maurel II”) (quoting WALTER ARTHUR COPINGER, LAW OF COPYRIGHT, 109-10 (J. M. Easton ed., 4th ed. 1904)).

45 220 F. at 195. In Maurel I, the plaintiff agreed to write a scenario for a comic opera with the intent that another party provide the lyrics. Maurel I, 220 F. at 196. When that lyricist was unavailable, the plaintiff agreed to the substitution of another lyricist and continued to work on the scenario. See id. at 197. The plaintiff then consented to the addition of a second lyricist. See id. These two lyricists later took the position that they and the composer were the opera’s sole copyright owners, contending that they had made little use of the plaintiff’s original scenario. Id. The plaintiff brought a bill in equity seeking to be declared a co-owner and to receive an accounting. See id. at 196. Relying on Levy, Judge Hand held that the undertaking between the plaintiff and the first substituted lyricist was the kind of “joint design” which constituted co-authorship. See id. at 199. The plaintiff “intended to collaborate” with a lyricist, and the first substituted lyricist “understood he was to use the scenario of the plaintiff in substitution” for the original lyricist. Id. Although he had made considerable changes to the plaintiff’s scenario, the finished opera incorporated the plaintiff’s original plot, and Judge Hand therefore concluded that the plaintiff was not merely the “suggester of the piece.” Id. Although the words of the second lyricist incorporated little or none of the plaintiff’s scenario, in Judge Hand’s view of joint authorship, those words, even if not derived from the scenario, “became united with dialogue and plot and music into one composition, and whatever their origin, in their presentation the whole was single.” Id. at 200.

Although these cases represent the first attempt to define joint works under United States copyright law, Professor Lape points to several nineteenth century federal court decisions that recognized the existence of joint authorship even though they did not attempt to define it. See Lape, supra note 14, at 45-46 & n.14.

46 140 F.2d at 267. In Marks, a writer sold lyrics to a music publisher who then engaged a composer to add music. See id. at 266. Judge Hand noted that co-authorship existed even though the two authors did not work together and even though the lyricist did not know who the composer would be, because each intended his work to be combined with another’s into a single composition, “[I]t makes no difference whether the authors work in concert, or even whether they know each other; it is enough that they mean their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such.” Id. at 267. Judge Hand then went beyond the Levy/Maurel analysis by distinguishing “composite” works, suggesting that, to achieve joint authorship status, each putative co-author must form the intent to create a joint work before her contribution has been completed:

Marks wrote the words as words for a song; Loraine composed the music as music for that song. It is true that each knew that his part could be used separately; the words, as a “lyric”; the melody, as music. But that was not their purpose; the words and the music were to be enjoyed and performed together; unlike the parts of a “composite work,” each of which is intended to be used separately, and whose only unity is that they are bound together.... If the first part is composed without any common design, its author retains power to forbid publication of the joint work.... Not so, when both plan an undivided whole; in that case unless they stipulate otherwise in advance, their separate interests will be as inextricably involved, as are the threads out of which they have woven the seamless fabric of the work.
The difficulty of distinguishing between joint and derivative works under the 1909 Act became evident in a series of cases beginning in 1946 with Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., (“Melancholy Baby”).\textsuperscript{47} In that case, a song was created as the joint work of its composer and lyricist, after which the composer consented to the substitution of new lyrics by a different lyricist.\textsuperscript{48} The Second Circuit held that the composer and the author of the substituted lyrics were co-authors of the revised version of the song, reasoning that if the original lyricist had been unable to participate in the first place, and had therefore been replaced at the very start of the creative process, the composer’s intent to contribute to a joint work would have carried over to the substituted lyricist.\textsuperscript{49} The court concluded that the same result should follow even though the first lyricist had in fact contributed words which were subsequently replaced by those of another lyricist.\textsuperscript{50}

In the second Shapiro case (“12th Street Rag”), a composer assigned his rights in an instrumental piano solo, and the assignee then hired a writer to add lyrics.\textsuperscript{51} Once again, the Second Circuit treated the resulting work as joint. This time, the court held that the appropriate test should be whether the copyright owner (which in some cases would be the author, but in this case was the assignee) had consented to the second author’s “collaboration.”\textsuperscript{52} 12th Street Rag was sharply criticized for blurring the distinction between joint and derivative works by converting the “common design” test into a less-demanding “fusion of effort” test, thereby making the author of the first work a joint author of every work derived therefrom.\textsuperscript{53}

\textit{Id.: accord Nimmer & Nimmer, supra note 2, §§ 6.02, 6.06.}

\textsuperscript{47} 161 F.2d 406 (2d Cir. 1946).

\textsuperscript{48} See id. at 408.

\textsuperscript{49} See id. at 410.

\textsuperscript{50} See id. (citing Marks, 140 F.2d at 266). The Nimmer treatise interprets Melancholy Baby as holding that one collaborator’s intent to create a joint work should be given effect even if the second collaborator is not the person originally contemplated by the first collaborator, and concludes that this holding was incorporated into the definition of joint works in the 1976 Act. Nimmer & Nimmer, supra note 2, § 6.03. However, Melancholy Baby also appears to hold that one author’s joint work intent with respect to a completed joint work carries over to a derivative work based on that joint work, a proposition that seems to conflict with the terms of the 1976 Act, and that has been rejected in case law interpreting that Act. See infra notes 25-28, 70-71, 83-89 and accompanying text.

\textsuperscript{51} Shapiro, Bernstein & Co. v. Jerry Vogel Music, Inc., 221 F.2d 569 (2d Cir. 1955), modified on rehearing, 223 F.2d 252 (2d Cir. 1955).

\textsuperscript{52} Id. at 570 (“[O]rdinarily we look to the consent of the first author to see whether or not we have a joint work when the first author has assigned away all his rights which he can assign, we look to the intent of the assignee.”).

\textsuperscript{53} This criticism was noted, for example, in Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640 (S.D.N.Y. 1970), aff’d on other grounds, 457 F.2d 1213 (2d Cir. 1972) (“Three Little Pigs”), in which the district court quoted from George D. Cary, Joint Ownership of Copyright, in 1 STUDIES ON COPYRIGHT 689, 696 (1963):
In contrast, in 1970, Picture Music, Inc. v. Bourne, Inc. ("Three Little Pigs") rejected a joint authorship claim where the putative co-author had altered the music and lyrics of a pre-existing song:

No joint ownership arose here. There was no collaboration between Frank E. Churchill, the author of the source material, and Ann Ronell. Neither Churchill nor his employer, Disney, intended to create a new work. Miss Ronell’s contribution to the work which she undertook with Berlin’s employees was not a new version of the music or lyrics. Even if her additions were copyrightable, and this is shrouded in doubt, a more substantial and significant contribution was required to reach a finding of joint authorship. It was not the intention of the parties that Miss Ronell should become a joint author of the source material or of the popular song so closely derived therefrom. The original work was not transferred to her. At most, she provided only certain musical changes in the same musical composition which were not a significant contribution or change, except in musical style, of the original source material; and she added lyrics in the same vein as the original lyrics.\(^{54}\)

\(-\text{footnote}\)

\(^{54}\) No longer does there seem to be required a preconcerted common design or any active collaboration. It is now sufficient if there be any “fusion of effort” in the creation of a revision, adaptation or modification of any existing work. The authors of the original work are not required to have any knowledge of the modification, nor do they have to take part in it. Any action on the part of their transferees which utilizes the preexisting work in the creation of a new version thereof is sufficient to make the original creators joint authors with those who later revise their work. Not only does this extension of the joint author concept do violence to the renewal policy of the law, but it would appear to extend, for an indefinite period, the control of the original author over any subsequent revision of his work.

Three Little Pigs, 314 F. Supp. at 646. The same court also agreed with the late Professor Melville Nimmer that the 12th Street Rag approach was inconsistent with the division of rights in a derivative work required by section 7 of the 1909 Act (which provided that copyright in a derivative work did not “secure or extend copyright” in the underlying work) and produced two “anomalous results”:

(1) the creator of a derivative work obtains the right to exploit such work for the entire term of its copyright even if his license from the owner of the underlying work terminates prior thereto; (2) the owner of the underlying work may claim ownership in the derivative work even after the underlying work has entered the public domain.


\(^{54}\) 314 F. Supp. at 647 (citations omitted). The Three Little Pigs Court did not determine whether Ronell’s revision was a “work made for hire,” concluding instead that:

Miss Ronell conveyed and intended to convey her contribution to the adaptation and arrangement of the original material together with the additional words she supplied, and all her rights, including copyrightable interest, original and renewal, in the song, in exchange for a share of all
This appears to be the first opinion to suggest that joint work status depends on whether one contributor intends the other to become a joint author. Imposing this requirement would have been unnecessary, however, had the Second Circuit not already blurred the distinction between joint and derivative works by suggesting that the joint work character of a completed work could carry over to later works derived therefrom with the consent of the copyright owner. In fact, the Three Little Pigs case compounded the joint work confusion by denying that the later collaborator (Ronell) had an authorship claim even in the revised (derivative) work. 55

The timing of joint authorial intent was addressed in one other pre-1976 Act case, Donna v. Dodd, Mead & Co., in which the plaintiff supplied newly created text, and a collaborator supplied pre-existing photographs, for a children’s book to be published under both of their names. 56 Even though the photographs were created before the parties conceived their common design, 57 the district court nonetheless concluded that the book was a joint work under the liberalized standards of Melancholy Baby and 12th Street Rag. 58

royalties to Disney from copyrights, original and renewal, as well as any royalties accruing thereafter.

Id. at 652.

The court then noted that the “joint work” definition contained in the bill which later became the 1976 Act expressly overruled 12th Street Rag. See id. at 646 (citing Philip Wittenberg, The Protection of Literary Property 67 (1968)).

The Second Circuit affirmed, but on the ground that Ronell’s adaptation was a work made for hire. Three Little Pigs, 457 F.2d at 1217 (applying pre-1976 Act test of “work made for hire” status).

55 The opinion provides insufficient facts to determine whether Ronell added enough original material to the underlying song to create a copyrightable derivative work. Her substitution of new lyrics, however, suggests that she did.


57 See id. at 430.

58 The district court described the traditional “common design” requirement for joint works as having been “considerably eroded” by Melancholy Baby and 12th Street Rag, the first because it recognized that joint authors could be strangers to one another and make their contributions at different times provided that each anticipates merging his work with another’s, and the second because it allowed a co-author or an assignee thereof to form the requisite intent long after that co-author’s contribution had been completed. The court explained:

Although Larsen’s photographs were not taken with Donna’s text specifically in mind, it appears that they may have been intended from the start to become part of a joint work with text from another source. Donna’s own affidavit states that she was informed by Larsen before she worked with him that he had already submitted the photographs to a publisher and been rejected. If so, their subsequent collaboration would fall squarely within the Marks-Melancholy Baby rule. However, even if Larsen had no such intention when he took the photographs, Boy of the Masal is a joint work under the 12th Street Rag approach, because once Larsen and Donna reached agreement on its creation it is evident that Larsen had the intention that his photographs by [sic]
Donna illustrates the confusion that surrounded the joint work definition prior to the 1976 Act. The district court held that the completed book could be a joint work even if the photographer’s contribution was created before he formed joint authorship intent, because he subsequently formed that intent when the parties decided to merge their contributions.\textsuperscript{59} However, the court did not indicate at what point it would have been too late for him to have formed that intent. Was it necessary that he form the intent before the plaintiff began writing the text? Or would it have been sufficient if he had formed the intent before the plaintiff completed the text? Or before they agreed to merge their completed contributions? If the intent merely had to exist by the time the parties agreed to merge their contributions, then the distinction between joint works and derivative works would be largely erased.\textsuperscript{60}

Even before Congress implicitly overruled 12th Street Rag with the 1976 Act,\textsuperscript{61} the Second Circuit began retreating from its broad concept of joint works, holding in Gilliam v. American Broadcasting Cos. that the producer of a television program was not a joint author of the underlying script.\textsuperscript{62} According to Gilliam, incorporating a script into a filmed program did not transform the scriptwriters and the program’s producer into joint authors of a single work.\textsuperscript{63} The Second Circuit noted that the joint work theory proposed in 12th Street Rag had been criticized as “inequitable” unless the first author, at the time of making his or her creative contribution, envisaged the second author’s subsequent contribution as “an integrated part of a single work, and the first author intend[ed] that the final product be a joint work.”\textsuperscript{64} However, the Second Circuit

\textsuperscript{59} See id. at 431.
\textsuperscript{60} The Donna Court compounded the confusion by suggesting the possibility that Donna’s text might be jointly owned even if Larsen’s photos were not. See id. at 430-31. If Larsen made no contribution whatsoever to the text, and did not receive any rights in the text by assignment from Donna, it is difficult to see by what logic Larsen could be considered the joint owner of the text, to which he contributed nothing, if Donna was not also the joint owner of the photos.
\textsuperscript{61} House Report, supra note 1, at 120, reprinted in 1976 U.S.C.C.A.N. 5659, 5736-37; see also NIMMER & NIMMER, supra note 2, § 6.03.
\textsuperscript{62} 538 F.2d 14, 22 (2d Cir. 1976).
\textsuperscript{63} See id.
\textsuperscript{64} Id. at 22 (emphasis added) (citing 1 NIMMER, supra note 28, §§ 67-73).
did not explain why it articulated this conjunctive standard, or what the emphasized language added to its analysis. On the facts of that case, which involved the defendant’s right to exploit its filmed version of the plaintiffs’ script, the most probable import of the emphasized language was that, at the time they wrote their script, the scriptwriters intended it as a completed work to which no one else would contribute, and viewed British Broadcasting Corporation’s (“BBC”) proposed film as a separate derivative work which would incorporate their script pursuant to the terms of their licensing agreement. Because it refused to treat the script and the derivative work as a single jointly authored work, the Second Circuit in effect barred the filmmaker’s intent to merge the script into the completed film from “relating back” to the creation of the underlying script. The Second Circuit’s attempt in Gilliam to restore the distinction between joint and derivative works presaged the 1976 Act’s overruling of 12th Street Rag. Thus, despite its literal language, the Second Circuit may not have intended in Gilliam to articulate a new element of intent; rather, it may simply have intended to address the proper timing of the first author’s intent to combine his or her work with another’s, in order to restore the distinction between joint and derivative works that had been eroded by Melancholy Baby and 12th Street Rag.

Although the specifics of Gilliam hold little significance since the 1976 Act’s overhaul of the joint work concept, the Second Circuit in its recent line of joint work cases has nonetheless relied on this 1909 Act case to develop a narrow interpretation of joint works under the 1976 Act. It has done so by using the literal language of Gilliam to support the proposition that each co-author of a

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65 Gilliam also observed that, in the plaintiffs’ licensing agreement with BBC, they retained significant rights in their script; the court inferred from this “that the parties did not consider themselves joint authors of a single work.” Id. Here, again, the court may have meant only that the contractual reservation of rights was further evidence that the scriptwriters viewed their script, at the time they created it, as a completed copyrightable work that would later become the basis of a derivative work to be created by the defendant/licensee. The contract is further evidence that neither party intended to accept a creative contribution from the other party, as would be required to establish a joint work under § 101. See 17 U.S.C. § 101 (1994). It is significant, though hardly surprising, that neither the BBC nor the plaintiffs ever suggested that the latter were entitled to any additional economic rights (beyond those specified in the licensing agreement) as joint authors of the BBC film.

66 However, the court also observed that “this court appears to have receded from a broad application of the joint work doctrine where the contract which leads to collaboration between authors indicates that one will retain a superior interest.” Gilliam, 538 F.2d at 22 (citing Szekely v. Eagle Lion Films, Inc., 242 F.2d 266 (2d Cir. 1957)). Szekely itself did not endorse a “relationship” test of joint work status; it merely stated the uncontroversial proposition that the adaptation of a screenplay without its author’s consent did not make the adapter a co-author of the original screenplay. See Szekely, 242 F.2d at 268.
putative joint work must intend to form a co-authorial relationship with the other co-authors.\textsuperscript{67}

III. JOINT WORKS IN THE COPYRIGHT ACT OF 1976

The “joint work” definition in § 101 of the 1976 Act resolved some of the confusion that had surrounded joint authorship under prior law.\textsuperscript{68} The House Report suggests that Congress’s main purpose in defining joint works was to distinguish such works from collective works and derivative works by (1) requiring that both parties intend to create a single unified work rather than a collection of independent works, and (2) requiring that this intent exist at the time each person’s separate contribution is created.\textsuperscript{69} The legislative history clearly rejects the argument that a joint author can form the requisite intent after completing his or her contribution.\textsuperscript{70} It appears well settled, therefore, that 12th

\textsuperscript{67}See infra Parts III-V.


\textsuperscript{69}The House Report reads:

Under the definition of section 101, a work is “joint” if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as “inseparable or interdependent parts of a unitary whole.” The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either “inseparable” (as in the case of a novel or painting) or “interdependent” (as in the case of a motion picture, opera, or the words and music of a song). The definition of “joint work” is to be contrasted with the definition of “collective work,” also in section 101, in which the elements of merger and unity are lacking; there the key elements are assemblage or gathering of “separate and independent works” into a collective whole.”

The definition of “joint works” has prompted some concern lest it be construed as converting the authors of previously written works, such as plays, novels, and music, into coauthors of a motion picture in which their work is incorporated. It is true that a motion picture would normally be a joint rather than a collective work with respect to those authors who actually work on the film, although their usual status as employees for hire would keep the question of co-ownership from coming up. On the other hand, although a novelist, playwright, or songwriter may write a work with the hope or expectation that it will be used in a motion picture, this is clearly a case of separate or independent authorship rather than one where the basic intention behind the writing of the work was for motion picture use. In this case, the motion picture is a derivative work within the definition of that term, and section 103 makes plain that copyright in a derivative work is independent of, and does not enlarge the scope of rights in, any pre-existing material incorporated in it. There is thus no need to spell this conclusion out in the definition of “joint work.”


\textsuperscript{70}See id. See also Nimmer & Nimmer, supra note 2, § 6.02. What is less clear, however, is whether a putative joint author must have formed the requisite intent before commencing his or her individual effort, or whether that intent can be formed at a later time while that person’s effort is still in progress. The best answer
Street Rag's extension of joint work status to derivative works adapted from existing joint works was overruled by the 1976 Act.\textsuperscript{71}

In addition to clarifying \textit{when} joint intent must exist, and limiting the effect of that intent so that it does not carry over to derivative works, the 1976 Act introduced one other change which shifted the focus of the joint works analysis. That change was the revised definition of a "work made for hire."\textsuperscript{72} Under the 1909 Act, the term "author" included "an employer in the case of works made for hire,"\textsuperscript{73} but these terms were otherwise undefined. Early case law excluded commissioned works from the definition,\textsuperscript{74} but many courts held that the copyright in such works was implicitly assigned by the creator to the commissioning party.\textsuperscript{75} Eventually, the courts merged this "presumptive assign-
ment" rule into the work made for hire doctrine, and began to treat commissioned works as works made for hire. The 1976 Act adopted a narrower definition, limiting works made for hire to works created by bona fide employees within the scope of their employment and to works of specific types that were created pursuant to written work made for hire agreements. The 1976 Act also required all copyright assignments (other than those occurring by operation of law) to be in writing. As a result, if a commissioned work was created by a non-employee prior to 1978 without any kind of written conveyance, that work might have been the subject of an implied copyright assignment to the commissioning party, whereas copyright in a commissioned work created under identical circumstances after 1977 would vest in the actual creator instead. Thus, parties that initiated and directed the creation of a work by a non-employee after 1977 would not have any ownership rights in that work unless: (1) they had received a signed writing to that effect from the work's creator, or (2) they could demonstrate that they were joint authors.

These changes placed new pressure on the joint work definition. When more than one person made a creative contribution to a work, under the 1909 Act the question of joint work status often did not arise because the copyright was deemed to have been transferred to some commissioning party. After 1977, however, identifying the owner(s) of the copyright in such a work often required determining whether the work was joint and, if so, whether its authors included all of the creative contributors or only a subset thereof. Thus, in spite of the 1976

(2d Cir. 1939); Cory v. Physical Culture Hotel, Inc., 88 F.2d 411 (2d Cir. 1937); Lumiere v. Robertson-Cole Distrib. Corp., 280 F. 550, 552 (2d Cir. 1922); Lumiere v. Pathe Exch., Inc., 275 F. 428, 428 (2d Cir. 1921).

See Easter Seal Society for Crippled Children and Adults, Inc. v. Playboy Enterprises, 815 F.2d 323, 325-27 (5th Cir. 1987) (tracing the evolution of the "presumptive assignment" rule into a broadened "work made for hire" definition). See, e.g., Forward v. Thorogood, 985 F.2d 604, 606 (1st Cir. 1993) (rejecting work made for hire claim, but acknowledging that the doctrine could extend to independent contractor cases under the 1909 Act); Picture Music, Inc. v. Bourne, Inc., 457 F.2d 1213, 1217 (2d Cir. 1972) (song adaptation produced by independent contractor was work made for hire where commissioning party initiated the project and could accept, reject, or modify the song); Brattleboro Pub. Co. v. Winmill Pub. Corp., 369 F.2d 565, 567-68 (2d Cir. 1966) (work produced by independent contractor can be work made for hire if parties so intend). See generally Nimmer & Nimmer, supra note 2, § 5.03 (B)(1)(a).


Id. § 204(a).

See supra notes 75-78 and accompanying text.

This was noted by the court of appeals in "CCNV, Inc."

Case law concerning joint authorship in relation to the idea/expression dichotomy is sparse largely because the broad scope of the work for hire doctrine under the 1909 Act tended to draw disputes in which one party claimed to be the creative motivating force in the production of a copyrightable work into the ambit of that doctrine. With the substantial cutback of the work for hire doctrine
changes, federal courts were not relieved of their role in defining joint works. Instead, the focus of legal disputes gradually shifted from the timing of joint authorial intent to the nature of that intent.

Federal courts have consistently encountered difficulty in defining the nature of co-authorial intent under § 101. As discussed below, the nature of that intent was not even squarely at issue in the earliest of these cases. Yet dicta from these opinions laid the groundwork for the Second Circuit's analysis in later controversies in which intent emerged as a more central issue, including its groundbreaking 1991 decision in Childress v. Taylor.

One of the earliest indications of this definitional problem appears in the Second Circuit's Weissmann v. Freeman opinion. Although the major significance of that case was its confirmation that the 1976 Act rejected the liberalized joint intent standard of 12th Street Rag, the opinion also complicated the joint work analysis by adding a distinct new element of intent.

Weissmann involved a professor and a research assistant who had co-authored a series of scholarly scientific papers. The assistant then wrote another article on her own which incorporated material from these earlier papers, but which also added some original material and organizational changes. The district court found these changes too trivial to be copyrightable, and also concluded that the later work was joint because it was part of a continuing series of co-authored papers constituting "a single evolutionary joint work." The Second Circuit flatly rejected the "evolutionary joint work" concept, treating the paper in question as an individually authored work based on the underlying jointly authored papers, and treating each of the latter as a separately copy-rightable work rather than as a part of one "evolutionary" joint work. Based on the 1976

under the 1976 Act, more cases of this genre can be expected to appear under the joint authorship rubric.

CCNV I, 846 F.2d at 1485 n.17. On appeal, the Supreme Court noted that the federal courts did not begin to sweep commissioned works into this rubric until 1966, after the new "work made for hire" definition had already been drafted. See CCNV II, 490 U.S. 730, 743-44 (1989).

See infra notes 85-102 and accompanying text.

945 F.2d 500 (2d Cir. 1991). See infra notes 109-27 and accompanying text.

869 F.2d 1313 (2d Cir. 1989).

See id. at 1317-19; supra notes 68-71 and accompanying text.

86 See Weissmann, 868 F.2d at 1315.

87 See id. at 1315-16.

88 Id. at 1316.

89 Id. at 1317. On the question of joint authorship, the appellate court recited the rule that each author must "contribute" to the work, and that each author must intend to create a joint work at the time his or her
House Report’s discussion of the "joint work" definition, the court concluded that "one cannot be deemed to be a joint author without actually collaborating in the work’s preparation," and that the intent to contribute to an "integrated" work must exist "with respect to the work in which a copyright is claimed, not with respect to the prior works from which it is derived." 89

Although the Second Circuit could have rested its decision solely on the fact that Freeman did not participate in the authorship of the second work (apart from contributing to the underlying work that it incorporated), the court went on to state a second, and apparently independent, ground for treating the later work as derivative rather than joint, holding that Weissmann lacked joint work intent because she intended to be the sole author of the later work. 90

The court’s second rationale is a substantial departure from both the language and legislative history of the joint works definition. It was undisputed that, when Weissmann was creating her contribution to the derivative work, she intended to merge that contribution with the material Freeman had contributed to their previous joint work, and she in fact carried out this intent. 91 However, the court focused its analysis not on Weissmann’s contemporaneous intent to merge her work with another’s, but on her intent to regard herself as the sole author. 92

This second rationale in Weissmann was unnecessary to support the court’s holding. Once the court had determined that Freeman’s joint work intent did not meet the statutory timing requirement—that is, his intent with respect to the underlying joint work did not carry over to a later derivative work prepared solely by Weissmann—it could have concluded that the later work was not joint simply because Freeman had not made his original contribution with the intent of

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89 Id. (citing MCA, Inc. v. Wilson, 425 F. Supp. 443, 455 (S.D.N.Y. 1976), aff’d, 677 F.2d 180 (2d Cir. 1981)). Because Freeman did not participate in drafting the new paper, he had no rights in that paper “beyond those rights which he had as co-author in the prior joint material incorporated” into it. Id. “Even though one co-author has the right to revise a joint work in order to create an individual derivative work, the other co-author acquires no property rights in the newly created work prepared without his involvement.” Id. (citing Weinstein v. University of Illinois, 811 F.2d 1091, 1095 (7th Cir. 1987)); Dynamic Solutions, Inc. v. Planning and Control, Inc., 646 F. Supp. 1329, 1338-39 (S.D.N.Y. 1986); House Report, supra note 1, at 120, reprinted in 1976 U.S.C.C.A.N. 5659, 5736-37.

90 See Weissmann, 868 F.2d at 1319-20.
91 See id. at 1316.
92 See id. at 1319-20.
creating a second joint work.93 Indeed, once Freeman was disqualified as a joint author of the later work, any discussion of Weissmann’s intent to share authorship was not only unnecessary but meaningless, because even if Weissmann had intended to share authorship of the second work with Freeman, as a matter of law she could not have done so unless Freeman had created some new material specifically for that work (and with the contemporaneous intent to merge his contribution with hers). Thus, joint work status was impossible on these facts, regardless of Weissmann’s intent.

The evidence cited by the Second Circuit to support its conclusion that Weissmann lacked joint work intent in fact does not support that finding at all; rather, it established that Weissmann intended to claim sole credit for the work at issue, possibly even with Freeman’s consent.94 The facts made it quite clear that, at the time Weissmann made her contribution to the derivative work, she intended to combine Freeman’s copyrightable work with her own, and that she ultimately did so. While she may not have wished to share credit with Freeman, and may not have perceived him as her co-author, she indisputably wanted to merge his work with her own, just as they had done in their underlying joint work. The only

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93 The Second Circuit also found it “irrelevant” that Weissmann’s paper included material that had been authored solely by Freeman one year earlier: “Appellant correctly points out that the inclusion of . . . [this] section is not proof of any intention on Dr. Freeman’s part to make a contribution to . . . Weissmann’s paper because, prior to 1985, he could not have formed an intent to contribute his efforts to her then nonexistent work.” Id. at 1320. The court’s last statement is inconsistent with Edward B. Marks Music Corp. v. Jerry Vogel Music Co.’s holding that joint authorship intent can exist even if the authors do not prepare their contributions at the same time, and even if the identities of all the joint authors have not yet been determined, a holding which, unlike the expansion of that doctrine in 12th Street Rag, appears to have survived the 1976 revision of the joint work doctrine. See Nimmo & Nimmo, supra note 2, § 6.03 (suggesting that both the Marks and Melancholy Baby holdings are incorporated in the 1976 Act, while 12th Street Rag is overruled); House Report, supra note 1, at 120, reprinted in 1976 U.S.C.C.A.N. 5659, 5736-37 (work is joint if each author “prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors,” rather than a mere “hope or expectation” that it will be used in a derivative work). On these facts, it would certainly have been possible for Weissmann to have prepared the earlier paper with the intention of combining it with Freeman’s work (or with the work of some other yet-undetermined collaborator) at a later date, to produce another jointly authored work. The relevant inquiry would be Weissmann’s actual subjective intent at the time he wrote his paper.

94 The court found that there was “substantial and uncontroverted evidence that Dr. Weissmann intended [her paper] . . . to be her own individual work.” Weissmann, 868 P.2d at 1319-20. This evidence included the use of her name, without adding Freeman’s name, on the article’s by-line; the court described this as “prima facie proof that this work was not intended to be joint.” Id. at 1320. The court found that Freeman had failed to rebut this evidence, having, for example, raised no objection to the by-line when the paper was first presented to an audience in his presence. Id. Finally, the court noted that while Weissmann had been the principal drafter of all their previous jointly authored papers, she had always given Freeman drafts of those papers in order to obtain his comments. Observing that she did not do so in this case, the court interpreted her departure from past practice as further evidence of her intent to be the sole author of the disputed paper. See id.
difference this time was that Freeman’s contribution was pre-existing, so that he could not satisfy the timing requirement for joint work intent.

Weissmann’s unnecessary introduction of a new intent requirement introduced an unfortunate sleight-of-hand into the joint work analysis. As discussed in Parts IV through VI below, this questionable analysis has now been applied in a series of cases that have interpreted § 101 to require that both authors share not only a contemporaneous intent to merge their creative efforts, but also a contemporaneous intent to create a joint authorship relationship with one another.

A second important precursor to the Second Circuit’s landmark decision in Childress v. Taylor was the district court opinion in Fisher v. Klein. The holding of that case is unremarkable, but a brief passage in Judge Leval’s explanation was treated as highly persuasive in Childress. Fisher involved a joint authorship dispute between two jewelry designers. The district court found: (1) that the party asserting joint authorship had indeed made a significant authorial contribution (although less substantial than that of the party claiming sole authorship), and (2) that both designers had intended “that their contributions be merged into inseparable or interdependent parts of a unitary whole.”

95 945 F.2d 500 (2d Cir. 1991).
97 See Childress, 945 F.2d at 508 (citing Fisher v. Klein, 16 U.S.P.Q.2d (BNA) 1795, 1798 (S.D.N.Y. 1990)).
99 Id. at 1796. According to Judge Leval, the evidence made it “clear” that the plaintiff “was the dominant creative force in the making of the various pieces of jewelry . . .” Id. The court defined the issue as whether the defendant “contributed to the creation of the piece in a manner that would be recognized as joint preparation, in the words of Section 101, and whether there was an intent on the part of both of them that the contributions would be merged into a unitary whole.” Id.

While acknowledging the difficulty of distinguishing a contribution of expression from a contribution of uncopyrightable ideas, Judge Leval concluded that the evidence supported the defendant’s co-authorship claim:

Recognizing that the plaintiff Obie Fisher was unquestionably the dominant creator in the making of the Roots pendant and the other works in the surrounding period, I have nonetheless found that the elements of the statute of joint authorship are satisfied. I have found that the shared intention of merged contributions was present and that the defendant Susan Klein did in fact participate in the preparation and execution of these works by giving suggestions in discussions in the carrying out of the particular execution of the works.

I do not think her contributions were major, nor do I think they were so insignificant that they cannot constitute joint authorship.

It is very difficult based on the testimony going back more than 10 years to reconstruct exactly what was involved in the creative process. I say repeatedly and without question that the vast majority of what was done in the creation was done by the plaintiff, Obadiah Fisher. But the law
than end the analysis there, however, Judge Leval went on to distinguish two prior cases each of which had denied joint work status to a building plan created by an architect who had incorporated certain ideas provided by a client. Although in each of those cases the district court decision rested largely on the de minimis nature of the client’s contributions, Judge Leval suggested another ground on which they could be distinguished:

Now, I have looked at the cases cited to me and it seems quite clear that this case is distinguishable from cases like Aitken and Meltzer. I certainly do not imply that any time a person makes suggestions to an artist or author, and those suggestions are adopted, that joint authorship results. That obviously is not the case. These cases of Aitken and Meltzer are cases that involve architects and architecture. In many forms of art, and very characteristically in architecture, the client of the architect makes suggestions to the architect about how architectural plans should be modified: “Let’s add a window here. Let’s change this this way.” And characteristically architects adopt their client’s suggestions. The same can happen in many other forms of authorship and art.

An artist who paints a picture can show it to a friend as critic and the friend can say, “I think it would be better if you made certain changes,” and the artist can make those changes. It does not follow that because suggestions are made and adopted that a joint copyright has been created, because there is this additional requirement of the shared intention that the contributions be merged into a unitary whole, that is to say, into a work of joint authorship. It is only where that dominant author intends to be sharing authorship that joint authorship will result. It is not, as I said previously, every time a sculptor, author, painter, composer, architect, writer, whatever, it is not every time one of those accepts suggestions from some other person that joint authorship has resulted. But if the shared intention

does not require for a joint work that the participation be equal or even roughly equal so long as there is some significant participation, in the context of this necessary shared intention that their contributions be merged.

Id. at 1796-97.


101 See Meltzer, 520 F. Supp. at 857 ("The ideas and sketches contributed by plaintiff do not sufficiently constitute fixed expressions of ideas... [P]laintiff’s failure to have ‘created’ or ‘prepared’ the work within the meaning of the statute bars his asserting a copyright interest even as a joint author of the plans."); Aitken, 542 F. Supp. at 259 (stating that plaintiff’s “overall contribution to the plans cannot be said to be more than de minimus in nature”). In addition, Aitken notes that many aspects of the architect’s plan in that case were designed for a previous project not involving the plaintiff, and thus could not have been created with the specific intent of merging them with the plaintiff’s contributions. Id.
of merged contributions exists, and there is in fact a contribution by the second person to the work, then joint authorship has resulted.

And it is on this basis that the case is clearly distinguishable from cases like Atiken and Meltzer, which have been cited by the plaintiff. The basis being that I find at the time of the creation of these works Mr. Fisher saw this as a creative collaboration, notwithstanding that he was, far away, the dominant contributor to the creative collaboration.\textsuperscript{102}

In this passage, Judge Leval articulated two new concepts. First, he introduced the idea of the “dominant” author, without defining that term or identifying the characteristics that might distinguish a dominant author from the other contributors to a collaborative work. Second, he appeared to suggest that a joint work will not arise from a collaboration unless the dominant author intends to “share” authorship. Here again, however, the opinion leaves a crucial term undefined, offering no explanation of what “intent to share authorship” means. Additionally, the opinion does not indicate whether the existence of intent to share authorship confers joint authorship status on all parties that meet the contribution threshold (under the Nimmer or Goldstein standards) and the “intent

\textsuperscript{102} 16 U.S.P.Q.2d (BNA) at 1798 (emphasis added) (citations omitted). Although, as noted above, Judge Leval’s analysis of the architecture cases fails to note that the putative co-authors’ contributions in both of those cases were de minimis, and that the architect’s plans in Atiken were prepared largely without the requisite “common design,” there is language in Atiken which suggests that the court’s finding of a lack of joint authorship intent was partly influenced by the conventional perception of the architect/client relationship:

It is true that throughout the evolution of the 1820-22 architectural plans [the client] Belmont contributed ideas, directed certain changes be made, and exercised approval power at the completion of each stage of development of the plans. Such involvement by a client in the preparation of architectural plans is normally expected. See Meltzer v. Zoller, supra. Such involvement does not, however, ordinarily render the client an “author” of the architectural plans

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\ldots [I]t was intended that the “general client and engineer relationship” exist between the plaintiff and Belmont. In this relationship, it is quite normal for the client to supply the engineer or architect with general design features which the client expects to be incorporated into the architectural plans and for the professional then to create the design drawings incorporating those features.

\textit{Atiken}, 542 F. Supp. at 259. Indeed, a district court later cited \textit{Atiken} for the extraordinary proposition that “architectural drawings are not co-authored by the owner, no matter how detailed the ideas and limitations expressed by the owner.” \textit{Wheelan Assocs. v. Jaslow Dental Lab., Inc.}, 609 F. Supp. 1307, 1319 (E.D. Pa. 1985) (dicta), aff’d, 797 F.2d 1222 (3d Cir. 1986). Note, however, that both passages in \textit{Atiken} could also be read simply as elaborating on the “de minimis” or non-copyrightable nature of the client’s contribution (general design features which arguably were more like “ideas” than copyrightable expression); indeed, the first passage appeared within a paragraph discussing “authorship,” and only the second passage appeared in the discussion labeled “intention.”
to merge" requirement, or whether the dominant author can selectively confer joint author status on some of these collaborators while denying it to others.

Thus, *Fisher* appeared to introduce an element of intent—at least on the part of the dominant author—beyond the statutorily required intent to merge his or her contribution with another’s to produce a unitary whole. However, it is not clear that Judge Leval intended anything so radical. Nothing else in the opinion suggests that Leval intended to *redefine* the statutory standard rather than simply *restate* it. Indeed, “intent to share authorship” might reasonably be construed as requiring merely that the “dominant” author intend to merge his or her contribution with that of the other contributor to create a unitary work. Had the court intended to heighten the statutory intent standard, one might have expected to see some invocation of authorities, policy, and/or logical analysis justifying such a change.\(^\text{103}\) The absence of any such argumentation leaves it unclear whether Leval intended to introduce a new interpretation of § 101.\(^\text{104}\)

Although *Fisher* notes that, during the creation of the design at issue, “the plaintiff and the defendant did have a shared intention that their contributions would be merged in the sense of co-authorship, even though the plaintiff’s contribution was far and away the dominant one,”\(^\text{105}\) the opinion is ambiguous on the question whether the parties’ relationship to one another played a role in determining the work’s status:

[I]t is my finding that over this period when the plaintiff and the defendant were *friends, partners and co-authors*, that the defendant on repeated occasions made suggestions that were in the nature of co-authorship and which were adopted by the plaintiff in the sense

\(^{103}\) Professor Lape reads the case less sympathetically, in light of the Second Circuit’s subsequent reliance on *Fisher* in its *Childress* opinion. Lape, supra note 14, at 58-59.

\(^{104}\) Judge Leval was equally ambiguous in another joint work decision issued the same year. In *Briley v. Blackford*, No. Civ. 8365 (PNL), 1990 WL 124341, at *1 (S.D.N.Y. Aug. 21, 1990) (unpublished), he cited both Weissmann and the pre-1976 Act decision in *Three Little Pigs* for the following proposition:

In order to be deemed a joint author of a copyrightable work, two requirements must be satisfied. First, the joint authors must in fact collaborate in the work’s preparation, and second, both authors must intend, at the time the writing is done, that the parts be “absorbed or combined into one integrated unit.”

Id. at *23* (citing Weissmann v. Freeman, 868 F.2d 1313, 1318 (2d Cir. 1989); *Three Little Pigs*, 314 F. Supp. 640 (S.D.N.Y. 1970), aff’d on other grounds, 457 F.2d 1213 (2d Cir. 1972); quoting House Report, supra note 1, at 120, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736). Although this passage does not, by itself, suggest any new gloss on the statutory language, Judge Leval also added a parenthetical to *Three Little Pigs*, describing that case as holding that “contributing to lyrics and music of a song, where there was no direct collaboration and no intent to create joint ownership, did not create joint ownership.” *Id.*

\(^{105}\) 16 U.S.P.Q.2d (BNA) at 1799.
intended by the co-authorship joint work statute. That is to say, that their ideas became pooled together, their ideas for manner of execution became pooled together into an inseparable unity, inseparable, although dominated by the plaintiff's artistic contributions.\footnote{Id. (emphasis added).}

Thus, while this opinion may literally have offered one of the first articulations of the relationship test, it is not clear whether Judge Leval actually meant to prescribe such a test. Unfortunately, as discussed in Part IV, the Second Circuit's influential decision in Childress v. Taylor relied heavily on Fisher (as well as Weissmann) to support its adoption of the relationship test, and this new gloss has led the federal courts to confuse evidence of intent to share credit with evidence of intent to create a joint work.\footnote{See infra notes 136-39, 194-99 and accompanying text.} In so doing, courts have, in effect, endorsed misattribution as a device by which one author can obtain sole copyright in a collaborative work.\footnote{See supra note 14, at 61-62 (criticizing Weissmann's emphasis on intent to claim sole authorship).}

IV. CHILDRESS V. TAYLOR: A NEW TEST OF INTENT

In Childress v. Taylor, the Second Circuit explicitly held that mutual intent to share authorship is a prerequisite to joint work status.\footnote{945 F.2d 500, 509 (2d Cir. 1991).} By relying heavily on brief passages in the Gilliam, Weissmann, and Fisher opinions without sufficiently examining their substance or context, the Second Circuit converted the relationship test into a new rule of law after subjecting it to only a minimal level of scrutiny.\footnote{See id. at 508.}

Childress rejected a joint authorship claim by a collaborator who had contributed research and ideas for a play.\footnote{See id. at 509.} Criticizing Judge Learned Hand's definition of joint authorship\footnote{See supra notes 45-46 and accompanying text.} as overbroad,\footnote{"Many people can be said to 'jointly labor' toward a 'common design' who could not plausibly be considered co-authors." Childress, 945 F.2d at 504 (citing Meltzer v. Zoller, 520 F. Supp. 847 (D.N.J. 1981); Ashton-Tate Corp. v. Ross, 728 F. Supp. 597 (N.D. Cal. 1989), aff'd, 916 F.2d 516 (2d Cir. 1990)).} Judge Newman adopted two narrowing interpretations of that concept, first applying the Goldstein standard in order to rule out joint authorship claims that were based on contributions of mere...
ideas, and then narrowing the definition still further by requiring the parties to perceive one another as joint authors:

There remains for consideration the crucial aspect of joint authorship—the nature of the intent that must be entertained by each putative joint author at the time the contribution of each was created. The wording of the statutory definition appears to make relevant only the state of mind regarding the unitary nature of the finished work—an intention "that their contributions be merged into inseparable or interdependent parts of a unitary whole." However, an inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress. For example, a writer frequently works with an editor who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet very few editors and even fewer writers would expect the editor to be accorded the status of joint author, enjoying an undivided half interest in the copyright in the published work. Similarly, research assistants may on occasion contribute to an author some protectable expression or merely a sufficiently original selection of factual material as would be entitled to a copyright, yet not be entitled to be regarded as a joint author of the work in which the contributed material appears. What distinguishes the writer—editor relationship and the writer—researcher relationship from the true joint author relationship is the lack of intent of both participants in the venture to regard themselves as joint authors.

Focusing on whether the putative joint authors regarded themselves as joint authors is especially important in circumstances, such as the instant case, where one person (Childress) is indisputably the dominant author of the work and the only issue is whether that person is the sole author or she and another (Taylor) are joint authors. This concern requires less exacting consideration in the context of traditional forms of collaboration, such as between the creators of the words and music of a song.

Newman purported to derive this theory of intent largely from the district court opinions in Fisher v. Klein and Three Little Pigs. As noted earlier, however, neither of these opinions offers a persuasive argument for the relationship test.

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114 Id. at 506-07.
115 Id. at 507-08 (footnote and citations omitted) (emphasis added).
First, *Three Little Pigs* denied a putative co-author’s claim where she had been the sole creator of a musical adaptation, the very copyrightability of which the court questioned on de minimis grounds.\(^{118}\) If the resulting work itself was not copyrightable, then her contribution to it could not make her the author of anything—joint or derivative—regardless of the parties’ intentions.\(^ {119}\) Second, the *Fisher* opinion offered no rationale for suggesting that joint work status should be limited to joint efforts in which the “dominant author intends to be sharing authorship,”\(^ {120}\) and it could easily have rested its finding of joint work status on the fact that both of the collaborators in that case had made substantial copyrightable contributions with the intent of merging them into a finished design.\(^ {121}\)

The *Childress* Court also relied on specific language from *Gilliam, Maurel,* and *Weissmann,* but its interpretation of the relevant passages in each case is questionable. For example, the court emphasized *Gilliam*’s observation that the screenwriters and producer in that case “did not consider themselves joint authors of a single work.”\(^ {122}\) However, as discussed in Part II, this passage suggests only that the screenwriters in *Gilliam* intended to create a script, which would be their finished creative product, and which would then be incorporated into a separate, licensed, derivative work—the television program.\(^ {123}\) Thus, each party—the screenwriters on one hand, and the television producers on the other—intended to create a separate work rather than a single merged work.\(^ {124}\) Likewise,

\(^{118}\) *Three Little Pigs,* 314 F. Supp. at 647, 652-53.

\(^{119}\) See *supra* notes 53-55 and accompanying text (discussing *Three Little Pigs*). If the *Three Little Pigs* facts had arisen under the 1976 Act, of course, the issue of copyrightability would still have presented itself, but the claimant would have been a putative sole author (of a derivative work) rather than a putative joint author. The difference is that *Three Little Pigs* was decided under the 1909 Act and against the backdrop of the *Melancholy Baby* and *12th Street Rag* cases which had blurred the distinction between derivative works and joint works by treating co-authors of an underlying work as co-authors of the derivative work in which it was incorporated.

The underlying work in *Three Little Pigs* had been completed and publicly distributed (in a motion picture) long before the putative co-author in that case attempted to create a new version of that work. 314 F. Supp. at 642. The two creators never worked together, nor did the creator of the underlying work (or his employer, Disney) create it with the idea of merging it with the work of the second creator in order to create a unified whole. *Id.* at 642-43. Thus, the court could easily have found that intent to create a joint work was absent simply by looking at the nature of the work that each of the creators intended to produce; there was thus no need to explore the creators’ relationship to one another.

\(^{120}\) *Fisher,* 16 U.S.P.Q.2d (BNA) at 1798.

\(^{121}\) See *supra* notes 96-99 and accompanying text.

\(^{122}\) *Childress,* 945 F.2d at 508.

\(^{123}\) See *supra* notes 62-65 and accompanying text.

\(^{124}\) The producer of the television program was therefore the sole author of the derivative work rather than a co-author of a single “evolutionary” work, and accordingly was not a co-author of the underlying script (to which the producer had contributed nothing). *See id.*
although *Childress* correctly noted that the parties in *Maurel* had “agreed to a joint authorship in the piece, and that they accepted whatever the law implied as to the rights and obligations which arose from such an undertaking,” the only conclusion *Maurel* drew from this was that the parties understood they “were contributing to a single joint operatic performance and assented to the work on those terms” —in other words, the parties in *Maurel* agreed to merge their contributions into a single work. Finally, the only other authority from which *Childress* purported to draw support, *Weissmann*, simply applied the requirement that each putative author “must intend to contribute to a joint work,” as the language of § 101 demands, without requiring any particular intent regarding the parties’ relationship to one another.

Thus, *Childress* introduced a new and unprecedented gloss on the joint work definition without any support from the language or legislative history of that provision. Unfortunately, because Judge Newman purported to derive this standard from existing case law, he made little effort to determine whether the relationship test would advance or impede the purposes of copyright law. As the quoted passage reflects, the opinion proceeds from the unexamined assumption that Congress could not have intended editors and research assistants to qualify as co-authors, and then makes the further assumption that the relationship test is necessary to foreclose this parade of horribles. Unfortunately, Judge Newman never questioned the validity of either assumption, and offered no independent reasoning to bridge this logical gap.

Another important but ill-defined concept embraced by *Childress* is the notion of a “dominant author.” Although Judge Newman described Childress as “indisputably the dominant author of the work,” he neither defined “dominant author” nor explained the need for, or relevance of, such a concept in identifying a joint work. The notion of a dominant author does not appear anywhere in the 1976 Act or its legislative history.

Even apart from this definitional problem, treating “dominant authorship” as relevant to the joint work analysis implies that the dominant author’s intent is

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125 Maurel v. Smith, 220 F. 195, 198 (1915), aff’d 271 F. 211 (2d Cir. 1921) (“Maurel I”).
126 *Id.*
127 *See Weissmann*, 868 F.2d at 1318. Notably, of all the cases *Childress* cited to support its interpretation of § 101, only *Fisher* and *Weissmann* were decided under the 1976 Act.
128 This phrase was introduced in the *Fisher* dicta, where it was used without definition or explanation. *See supra* text accompanying note 102.
129 *Childress*, 945 F.2d at 508.
130 It appears to be absent from pre-1976 Act copyright law as well.
more important than that of the “nondominant” author. Childress clearly treats one collaborator’s dominance over another as relevant to determining the nondominant party’s entitlement to co-authorship status.131 This hierarchy of intent requires the court to deny joint work status even in situations in which both parties make substantial (even if unequal) copyrightable contributions with the intent to merge those contributions into a unitary work, and the nondominant contributor perceives their collaboration as joint authorship. Because Childress lacked intent to share authorship, the finding that Childress was the dominant author gave her sole ownership of the play’s copyright, regardless of the nature of Taylor’s contribution or intent.132 Thus, by dominating the creative process, one collaborator acquired the power to unilaterally “will away” joint work status by forming the subjective intent to deny joint authorship to other collaborators.133

Not only is the concept of a dominant author utterly absent from the 1976 Act and its legislative history, but is inconsistent with both. Under the common law rules expressly endorsed in the 1976 House Report, the authors of a joint work share copyright ownership equally even if their contributions are unequal,134 but the Childress approach gives the entire copyright to the dominant author if that is the result that he or she intends. This rule allows a court to deny joint authorship status even to a contributor who satisfies the Goldstein test, because it allows a court to deny a joint authorship claim even by one who made a substantial and copyrightable contribution to the finished work.

The literal language of the joint works definition describes only the intent to be an author, because the definition uses each party’s “intent” simply as a means.

131 Childress, 945 F.2d at 508-09.
132 Id. It is less clear, however, whether Taylor still owned the rights to any copyrightable material she had contributed to the play, because the court did not rule on whether Taylor’s contribution was copyrightable, and apparently Taylor did not counterclaim against Childress for the unauthorized use of Taylor’s copyrighted material. Because copyright law does not recognize implied assignments or implied exclusive licenses, 17 U.S.C. § 204(a) (1994), it would appear that Childress could not claim exclusive rights in Taylor’s contributions. At most, she would have permission to exploit them in the course of exploiting the play, leaving Taylor free to exploit her own contributions but not the rest of the play.
133 Had the roles in Childress been reversed, so that the dominant party intended to share authorship while the nondominant party intended to be the sole author, it is not clear whether Judge Newman would have found joint authorship by deferring to the dominant author’s intent. Even though Childress purported to derive its mutual intent requirement from Fisher, the standards articulated by the two courts may not be the same. Childress requires that both parties intend to share authorship. Fisher, however, requires only that the dominant party intend to share authorship. Thus, under Fisher, if the dominant party intended to share, but the nondominant party did not, the work would apparently still be joint. Under Childress, the answer is less clear, because mutual intent would be lacking. The Second Circuit did not acknowledge this discrepancy when it relied heavily on Fisher to support its adoption of the mutual intent requirement.
to identify what kind of work that person intends to author—collective, derivative, or joint. As used in Childress, however, intent to co-author implies an *intent to share authorship* with one or several collaborators, an interpretation which the Second Circuit has since reaffirmed.\(^{135}\) Intent to *share* authorship of a work is thus entirely different from intent merely to *be* an author of that work, and constitutes a type of intent that is not even mentioned, much less defined, in the language or legislative history of § 101.

Although Childress firmly established “intent to share authorship” as a prerequisite to joint work status, the court explicitly rejected the suggestion that the dominant author could have the requisite intent only if she “intended the legal consequences” of co-authorship—that is, the sharing among co-authors of equal undivided interests in the work.\(^{136}\) Rather, all of the putative co-authors must have “entertain[ed] in their minds the concept of joint authorship, whether or not they understood precisely the legal consequences of that relationship.”\(^{137}\) The court did not explain what it would mean for a co-creator to “entertain” the joint authorship “concept.” On the facts before it, the closest proxy the court could find was the intent to share *credit* for the work:

Though joint authorship does not require an understanding by the co-authors of the legal consequences of their relationship, obviously some distinguishing characteristic of the relationship must be understood in order for it to be the subject of their intent. In many instances, a useful test will be whether, in the absence of contractual agreements concerning listed authorship, each participant intended that all would be identified as co-authors. Though “billing” or “credit” is not decisive in all cases and joint authorship can exist without any explicit discussion of this topic by the parties, consideration of the topic helpfully serves to focus the fact-finder’s attention on how the parties implicitly regarded their undertaking.\(^{138}\)

Judge Newman made little attempt to defend the relationship test on policy grounds, noting only that the test:

\(^{135}\) See infra notes 175-219 and accompanying text.

\(^{136}\) Childress, 945 F.2d at 508. Despite the Second Circuit’s protestations, Professor Lape has suggested that the Childress and Erickson Courts in fact did equate the intent to create a joint work with the intent to share ownership of the work. Lape, supra note 14, at 59. It is difficult to argue with her conclusion, because neither court offered any alternative explanation. One could quibble, perhaps, that the courts were thinking more of the intent to share credit for the work than the intent to share profits. However, Childress itself noted that the parties’ intent regarding shared credit was not necessarily a “decisive” factor. See infra note 138 and accompanying text.

\(^{137}\) Childress, 945 F.2d at 508.

\(^{138}\) Id. (footnote omitted).
serves the valuable purpose of appropriately confining the bounds of joint authorship arising by operation of copyright law, while leaving those not in a true joint authorship relationship with an author free to bargain for an arrangement that will be recognized as a matter of both copyright and contract law.\textsuperscript{139}

This explanation begs the ultimate question whether the relationship test "appropriately confines" the bounds of joint authorship.

Ironically, the court might have reached the same result simply by applying the Goldstein test—that is, by evaluating the copyrightability of Taylor's contribution, which the opinion describes as "assistance" consisting primarily of research, with "some incidental suggestions" regarding "ideas about the presentation of the play's subject and possibly some minor bits of expression," amounting to nothing "more than the helpful advice that might come from the cast, the directors, or the producers of any play."\textsuperscript{140} The court could therefore have concluded that Taylor's contribution consisted mostly of uncopyrightable research ideas, with de minimis copyrightable expression, and thus could have rejected her co-authorship claim on the ground that she had simply not made a legally sufficient contribution.\textsuperscript{141}

By choosing instead to decide the case on the basis of the dominant author's subjective perception of her collaborator, Childress decisively shifted the focus of the joint work analysis to the parties' intent with respect to their relationship, whereas the 1976 Act and its legislative history, as well as most of the pre-Childress case law, all focused on the parties' intent with respect to their work product.\textsuperscript{142} In announcing this dramatic shift in the analytical framework, the Second Circuit did not explain why the collaborators' perceptions of one another, and their intentions with regard to their continuing relationship, should dictate

\begin{itemize}
\item \textsuperscript{139} Id. at 508 (citations omitted) (citing \textit{CCNV I}, 846 F.2d 1485, 1498 (D.C. Cir. 1988)).
\item \textsuperscript{140} Id. at 509.
\item \textsuperscript{141} When it tested the parties' intent under the relationship test, the Second Circuit found it unnecessary to consider whether Taylor's contributions were "independently copyrightable," because:

\begin{quote}
[Even if they were protectable as expression or as an original selection of facts, . . . we agree that there is no evidence from which a trier could infer that Childress had the state of mind required for joint authorship. As Judge Haight observed, whatever thought of co-authorship might have existed in Taylor's mind "was emphatically not shared by the purported co-author." There is no evidence that Childress ever contemplated, much less would have accepted, crediting the play as "written by Alice Childress and Clarice Taylor."
\end{quote}

\textit{Id.}
\item \textsuperscript{142} 17 U.S.C. § 101 (1994) ("joint work" definition); House Report, \textit{supra} note 1, at 120; \textit{Weissmann}, 868 F.2d at 1318.
\end{itemize}
their respective entitlements to authorship status at the moment of creation. The implications of the court’s underdeveloped analysis became clear in the series of cases which followed.

V. THE RELATIONSHIP TEST AFTER CHILDRESS

The Childress approach has been endorsed in virtually every subsequent adjudication of a joint authorship dispute.\(^{143}\) Like Childress, not one of these

\(^{143}\) Not surprisingly, many of these decisions have come out of the Southern District of New York. In Design Options, Inc. v. Bellepointe, Inc., 940 F. Supp. 86 (S.D.N.Y. 1996), the district court interpreted Childress as requiring that each putative joint author intend "at the time of creation, that the work be jointly owned." \emph{Id.} at 90. Here, too, application of a "relationship" test was unnecessary to resolving the dispute, because the court also found that the putative author had not made an independently copyrightable contribution to the work. \emph{Id.} In Papa’s-June Music, Inc. v. MeLean, 921 F. Supp. 1154 (S.D.N.Y. 1996), the same court held: "The requisite intent to create a joint work exists when the putative joint authors intend to regard themselves as joint authors. It is not enough that they intend to merge their contributions into one unitary work." \emph{Id.} at 1157 (citing Childress, 945 F.2d at 507-08). The court also held that a transfer of ownership between joint authors must be in writing under § 204(a) of the 1976 Act, 17 U.S.C. § 204(a) (1994)). 921 F. Supp. at 1158.

In SHL Imaging, Inc. v. Artisan House Inc., No. 98 Civ. 1708, 2000 U.S. Dist. LEXIS 14179, at *43-44 (S.D.N.Y. Sept. 28, 2000), the district court followed Childress and Thompson, and held that, in the absence of a contract concerning authorship, the defendants’ failure to register their copyright, failure to affix copyright notice to the work, and failure to produce evidence that they intended to share credit for the work defeated their joint authorship claim. More recently, in Gillespie v. AST Sportswear, Inc., No. 97 Civ-1911 (PKL) 2001 WL 180147 (S.D.N.Y. Feb. 22, 2001), the same court considered a joint authorship dispute between fashion photographers and the designed who participated in the photo shoot, and found genuine issues of fact under both the Goldstein and the Childress tests.

Even prior to the Erickson decision (discussed in this section of the text), the Childress standard had already been embraced by a federal district court in the Seventh Circuit. \emph{See} Respect, Inc. v. Committee on Status of Women, 815 F. Supp. 1112, 1120-21 (N.D. Ill. 1993) (following Childress and holding that no joint work exists where the “dominant” author does not intend to share authorship).

District court opinions in the Fifth and First Circuits have adopted the relationship test as well. \emph{BTE v. Bonnecaze}, 43 F. Supp. 2d 619, 624 (E.D. La. 1999) held that the party claiming co-authorship must establish that each putative co-author made independently copyrightable contributions and fully intended to be a co-author. \emph{See also} Visitor Indus. Publications, Inc. v. NOPG, L.L.C., 91 F. Supp. 2d 910, 914-15 (E.D. La. 2000) (endorsing Childress).

\emph{Cabrera v. Teatro Del Sesenta, Inc.}, 914 F. Supp. 743 (D.P.R. 1995), rejected the joint authorship claim of a writer whose script was “substantially utilized and incorporated in the final version of the play” with respect to which the plaintiff claimed sole authorship. \emph{Id.} at 752-53, 755. It also rejected the joint authorship claims of other defendants even though their “participation was real, effective, and crucial throughout the writing of the script.” \emph{Id.} at 754. Prior to the litigation, the plaintiff himself had described the play as “the result of a ‘collective work,’ where the dialogue was written, the situation or scenes were then discussed among the members, and his work was that of guiding or structuring the working sessions . . . .” \emph{Id.} at 755. The court itself concluded that:

[defendant] Molina's work provided the basis for the final version of the script, that the task of rewriting, editing and completing the script was given to [plaintiff] Cabrera as it was once given to Molina, and that it was Cabrera who undertook and completed the task with defendants' continued
decisions has supplied a convincing rationale for the relationship test, and not one has defined the crucial concept of a "dominant author" or persuasively grounded that concept in the language or purposes of federal copyright law.

The Seventh Circuit embraced the Second Circuit's approach in *Erickson v. Trinity Theatre, Inc.*, by refusing to treat the plaintiff's three plays as joint works, even though they incorporated suggestions made by actors during rehearsals, because the putative co-authors failed to show that "the parties intended to be

full support and collaboration. It is also evident that the defendants and Cabrera had the common and joint intent to stage an attractive musical play . . . .

*Id.* at 756. However, the court distinguished the "joint intent to stage a production" from "the joint intent to become co-authors under the provisions of the Copyright Act." *Id.* at 756 n.30. Specifically, the court noted that "none of the defendants, except Molina, was able to identify any relevant fragment of the play as something they had actually written. Instead, all co-defendants provided Cabrera with information, ideas, materials and expert assistance that was necessary, but not identifiable in the final version of the play." *Id.; see also id.* at 759-60. The court also found that the other collaborators deferred to Cabrera's expertise and guidance, and that he made the "essential decisions" throughout the project. *Id.* at 756-57.

In contrast to its detailed analyses of the "intent to merge" requirement, the Nimmer "de minimis" test, and the Goldstein copyrightability test, the *Cabrera* Court did not attempt to explain its holding that joint authorship cannot be found unless "the parties intended at the time of creation to regard themselves as joint authors," beyond merely citing *Childress* and *Erickson*. *Id.* at 765-66. With respect to all but one of the defendants, the court did not even determine whether this test was satisfied, because it found that those defendants had contributed merely ideas rather than copyrightable expression. *Id.* at 766.

The remaining *Cabrera* defendant, Molina, made contributions that clearly satisfied the Goldstein test, including dialogue that remained "virtually intact" in the finished script. *Id.* at 767 n.49. Yet the court found that she could not be a co-author because she lacked co-authorial intent, having written the play's first act with the intent of being the play's sole author, and having then abandoned the project with the intent of allowing the other collaborators to use her work even though that consent was never reduced to writing. *Id.* at 768. Without explicitly saying so, the court treated the finished play as a solely-authored derivative work based in part on the original writer's solely-authored draft of the first act. Although it acknowledged that the original writer still retained sole rights to the material she had contributed, the court inferred that she intended to allow the theatre company to make use of it, thus implicitly finding an implied license. *Id.* The court did not identify the evidence supporting that inference, and did not discuss the possibility that the plaintiff's use of her material might infringe Molina's copyright, and that his rights in the derivative work might therefore be limited to the material he himself had contributed. Because of the posture of the case, in which the plaintiff alleged that a subsequent staging of the play by the putative co-authors infringed his exclusive copyright in the script, the court was able to limit its inquiry to determining whether any of the co-creators who consented to the restaging were co-authors of the finished script. *Id.* at 768-69. Because the restaging was a performance of the *entire* script, it included all of the material contributed by plaintiff Cabrera, and thus the court did not have to determine whether the Cabrera's copyright extended to all portions of the script, or merely to those portions he had contributed.

The *Cabrera* Court might have ended its analysis at this point, by concluding that the finished play was a derivative work solely authored by the plaintiff. There was in fact no need to examine whether the plaintiff and the author of the underlying work perceived one another as joint authors. Nonetheless, the court made the additional finding that the plaintiff lacked co-authorial intent, citing as evidence: (1) the fact that while he was working on the script he did not communicate with the original writer (Molina) at any point, and (2) the fact that, at trial, he "emphatically" denied any intent to co-author with her. *Id.*
joint authors at the time the work was created." The court made no attempt to ground this requirement in logic or policy.

Erickson concluded that none of the actors’ contributions amounted to joint authorship. With respect to two of the three plays, the court concluded that even though the parties “had collaborated in some sense,” they did not “intend[] to be joint authors at the time the work was created.” The court’s explanation, however, touches on a variety of factors without indicating how they relate to one another or why they are indicative of sole authorship:

Much Ado is based on a work that Ms. Erickson had largely completed before Trinity actors improvised based on Ms. Erickson’s creation. The fact that one actor, Michael Osborne, suggested that Ms. Erickson include a passage from Macbeth and an introduction to the play does not make him a joint author. He conceded that whether his contributions were included and where they went into the compilation were entirely Ms. Erickson’s decisions. Furthermore, neither Ms. Erickson nor Trinity considered any of the actors to be co-authors with her in Much Ado, as is evidenced by the licensing agreement. Similarly with Prairie Voices, Ms. Erickson provided the stories on which the play was based, and she decided which of the actors’ suggestions were incorporated into the script. The actors did not consider themselves to be joint authors with Ms. Erickson, and there is no evidence that Ms. Erickson considered the actors as co-authors of the script. Because Trinity cannot establish the requisite intent for Much Ado or Prairie Voices, the actors cannot be considered joint authors for the purposes of copyright protection.

Although this passage makes clear that Erickson’s subjective intent was the deciding factor in the analysis, it does not explain why. The unspoken premise appears to be that Erickson was the dominant author, and thus, under Childress, could unilaterally deny joint authorship to all other participants regardless of their intent or contributions. In awarding this legal power to Erickson, the quoted passage seems to focus on two factors: (1) the degree of creative control exercised

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144  13 F.3d 1061, 1071 (7th Cir. 1994).
145  See id. at 1072.
146  Id. at 1068.
147  Id. at 1071.
148  *Id.* at 1071-72 (footnote omitted). The licensing agreement between Erickson and Trinity Theatre identified Erickson as the “playwright” entitled to performance royalties for the plays Much Ado and Time Machine. The individual actors were apparently not parties to this agreement. *Id.* at 1064.
by each collaborator, and (2) the magnitude of their respective contributions. Either or both of these may represent an attempt by the Seventh Circuit to identify the dominant author, but it is not clear whether the court meant to treat one factor as decisive, or whether both factors should be weighed together.

Under a test focused purely on creative control, the contributor who has a "veto" power over the suggestions of another could elect to be the sole author of the work. This result would follow even if the controlling author did not actually use this veto power, and regardless of how much of the noncontrolling party's work was actually incorporated into the finished work. If the noncontrolling party originated most of the copyrightable expression in the finished work, the selection and arrangement of that expression by the party in control might or might not be sufficient to qualify the latter as a joint author, but it is difficult to see by what logic it could negate the authorship status of the noncontrolling party whose creative expression was thereby incorporated. At the extreme, such a test would allow sole authorship to be claimed by a controlling party who elected to include all of a collaborator's contribution, even if the controlling party contributed only a small amount of the total copyrightable expression in the work. Allowing this veto power to supersede most other indicia of authorship seems inconsistent with the goal of rewarding and encouraging creative production. The co-authorship rights of substantial contributors would be in jeopardy unless they took affirmative steps to document their entitlements before or during the creative process. Where a nondominant participant makes significant creative choices but is subject to another's final creative control, whichever creative choices ultimately survive that veto constitute the aspects of the project over which the nondominant participant in fact exercised control, and it is the substantiality of these creative choices that should determine the validity of that participant's authorship.

A control-based test of dominant authorship would also further complicate the fact-finding process. Not only would a court have to determine what material each party contributed to the work (which would be required under virtually any test of joint authorship), as well as the dominant author's intent regarding co-authorship, but in determining which author was dominant under the control test, the court would presumably have to determine how the parties resolved each of their creative differences, and what rights and/or obligations each possessed with respect to the creative process.

Finally, the "joint work" definition in § 101 says nothing about control, and the legislative history contains no suggestion that control should be a factor in
determining joint authorship. In *CCNV II*, the Supreme Court refused to infer such a test from congressional silence in the context of works made for hire;\textsuperscript{150} inferring such a test from congressional silence seems equally inappropriate in the joint work context.\textsuperscript{151}

Alternatively, the dominant author might be identified as the party who made the largest contribution to the final work. This approach may be implicit in the Seventh Circuit’s observation that Erickson’s script was “largely completed before Trinity actors improvised . . . .”\textsuperscript{152} However, this rule would be flatly inconsistent with the long-standing judge-made rule that joint authors who make unequal contributions to a work are nonetheless equal co-owners of the copyright in that joint work, absent an assignment of the copyright.\textsuperscript{153} It would also present significant proof problems, and would require courts to make fine distinctions in quantifying the relative amounts contributed by each party.\textsuperscript{154}

\textsuperscript{150} Community for Creative Non-Violence, 490 U.S. 730, 742 (1989) (“*CCNV II*”).

\textsuperscript{151} While the Supreme Court refused to make control a dispositive test of work made for hire status in *CCNV II*, control was not irrelevant to the analysis, because it functioned as an important element in the Court’s articulation of the multi-factor common law test of agency. *Id.* at 751.

Similarly, control is not entirely irrelevant to the joint works analysis. The Supreme Court has consistently held that authorship requires originality, and originality requires creative decisionmaking. *See*, e.g., Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991); Goldstein v. California, 412 U.S. 546, 561 (1973). A collaborator who makes no creative decisions, or one whose creative choices are all rejected by the other collaborators, or one who merely records the other collaborators’ contributions, has in fact authored no part of the finished work. Thus, a collaborator who has no significant control over any portion of the project cannot be one of its authors in the copyright sense. This result would also follow under the Goldstein requirement of a copyrightable contribution. *See supra* notes 18-24 and accompanying text. However, it is one thing to say that a joint author must have some control over the project; it is quite another to say that the party with the greatest control over the project has the power to deny authorship rights to all the other participants.

\textsuperscript{152} Erickson, 13 F.3d at 1071. Alternatively, the court might have viewed this fact as further support for the inference that Erickson was the dominant author because she had sole control over the content of the final script.

\textsuperscript{153} *See supra* note 2 and accompanying text.

\textsuperscript{154} A rule allowing the greater contributor to claim sole authorship would require courts to engage in post hoc assessments of the parties’ relative contributions. Such judgments would often be difficult to make, because the magnitude of a particular creative contribution can be assessed either quantitatively or qualitatively. Any such attempt to “measure” contributions would inject a high degree of uncertainty into the joint work analysis, especially in a close case. Such uncertainty is illustrated in case law applying the third prong of the “fair use” analysis under § 107. *See*, e.g., Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985). The problem would be exacerbated in the joint work context, where determinations as to relative magnitude would often have to be made many years—even decades—after a work’s creation, and would almost always be impaired by a lack of evidence. The overwhelming uncertainty created by a test requiring such exacting assessments would make such a magnitude-based test virtually useless. In contrast, the Nimmer and Goldstein tests of a contribution’s magnitude require only a threshold determination (whether the contribution rises to a legally sufficient level) rather than a comparative determination (which is the “bigger” contribution)—and accordingly inject a much lower degree of uncertainty. *See supra* notes 15-24 and accompanying text. In general, authorship tests which provide greater predictability are preferred over
A test of dominant authorship that considered both control and the amount contributed, while more comprehensive, would also be difficult to apply. One creative participant might have greater creative control, while another provided a larger amount of creative expression. In addition, determining the magnitude of each contribution could be problematic; for example, should the contribution be evaluated qualitatively, quantitatively, or both?\textsuperscript{155} The more complex the legal test for determining joint authorship, and the more elements of proof required to apply that test, the more difficult it will be for interested parties to predict how a particular authorship issue will be resolved, especially if a dispute arises long after the work’s completion.

Finally, this more comprehensive test also suffers from the same defect as the other tests of dominant authorship, a defect that is inherent in the concept of dominant authorship itself: nothing in the statutes, their legislative history, or the underlying purposes of the copyright law suggests that one author’s dominance of a collaborative process entitles that author to dictate whether or not the resulting work is joint.

Thus, the language and purpose of the 1976 Act, as well as logic and practicality, fail to support any of the tests of dominant authorship that might be derived from \textit{Erickson}, just as they fail to support the idea that the dominant author’s subjective perception of the co-creators’ relationship has any bearing on the other co-creators’ authorial status.

If Erickson supplied most of the copyrightable content of the script and exercised most, if not all, of the creative control, then there might have been a better argument for treating Erickson as the sole author. Disregarding entirely the participants’ subjective perceptions of themselves and one another, as well as their respective degrees of creative control, the case might have been resolved simply by asking whether each party made a substantial enough copyrightable

\textsuperscript{155} The same issue arises under the § 107 fair use analysis, 17 U.S.C. § 107 (1994), in which both quantitative and qualitative measures are used to determine the amount taken. \textit{See e.g., Harper & Row, Publishers, Inc.}, 471 U.S. at 564-65 (finding that while quantitatively small, the copied material was qualitatively significant).
contribution to be counted as an author. Because Erickson found that the actors did not, joint work status could have been denied on this basis alone.

The extent to which the Seventh Circuit is committed to the relationship test is questionable in light of its post-Erickson decision in Seshadri v. Kasraian. In Seshadri, the court appeared to depart from the Childress standard even while purporting to apply it. In this case, the Seventh Circuit found joint authorship where a professor and a graduate student had collaborated on an article that the professor had initially submitted for publication as a co-authored piece, with the student’s name listed first. After the professor withdrew the piece, the student resubmitted it and eventually published it under his own name. Citing Childress, the court observed that:

The assistance that a research assistant or secretary or draftsman or helpfully commenting colleague provides in the preparation of a scholarly paper does not entitle the helper to claim the status of a

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156 With respect to the third play at issue, the court found evidence that Erickson and one of the actors did intend to form a co-authorial relationship:

[Actor] Paddy Lynn testified that at least two scenes from Time Machine were developed through a collaborative process. Ms. Lynn considered the created dialogue to be hers as well as Ms. Erickson’s. Furthermore, there is evidence that Ms. Erickson, too, intended at the time to create a joint work because she initially attributed the script to both Ms. Lynn and herself. Consequently, Trinity has produced some evidence that there was the requisite intent for joint authorship with regard to Time Machine. In Childress, the Second Circuit specifically acknowledged that “‘billing’ or ‘credit’” may be evidence of intent to create a joint work. Here there is evidence that Ms. Lynn was credited with authorship of Time Machine.

Erickson, 13 F.3d at 1072 (citations omitted). However, the court still declined to find joint authorship, on the ground that the Goldstein test had not been satisfied with respect to any of the three plays at issue:

The actors, on the whole, could not identify specific contributions that they had made to Ms. Erickson’s works. Even when Michael Osborne was able to do so, the contributions that he identified were not independently copyrightable. Ideas, refinements, and suggestions, standing alone, are not the subjects of copyrights. Consequently, Trinity cannot establish the two necessary elements of the copyrightability test and its claims must fail.

Id. Of course, if none of the actors’ contributions satisfied the Goldstein test, there was no need for the court to explore the parties’ intent in the first place. Furthermore, as Professor Lape has noted, Erickson’s requirement that the actors identify their specific contributions “conflicts with the Copyright Act, which explicitly contemplates the possibility of inseparable contributions.” Lape, supra note 14, at 71.

157 130 F.3d 798 (7th Cir. 1997).
158 Id. at 803.
159 Id.
160 Id. at 802.
joint author. To be a joint author, an assistant or collaborator must contribute significant copyrightable material.\textsuperscript{161}

Because the student's contribution satisfied this standard, the court concluded that the work was joint.\textsuperscript{162}

The \textit{Seshadri} Court found it significant that, at the time the professor submitted the original manuscript for publication, he had listed the student not only as the article's co-author, but as its lead author.\textsuperscript{163} Unlike \textit{Erickson} and \textit{Childress}, however, the \textit{Seshadri} Court appeared to treat the authorship credits not as evidence of the collaborators' intended relationship, but as indirect evidence of the substantiality of their respective contributions: "[I]t would be odd for a senior professor to list a graduate student's name before his own if the student had contributed nothing more to the article than the usual assistance that a research assistant provides."\textsuperscript{164} Treating credits as evidence of what the parties contributed, rather than as evidence of their intent to share authorship with one another, is a significant departure from \textit{Childress} and avoids the problems inherent in the relationship test. Thus, even though \textit{Seshadri} invoked \textit{Childress}, the court focused only on the substantiality of each person's contribution.

Whether the Seventh Circuit really intended to retreat from the relationship standard is unclear, not only because of \textit{Seshadri}'s purported reliance on \textit{Childress}, but also because the court would almost certainly have reached the same result under the relationship test. The parties' history of having written and

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\item[161] \textit{Id.} at 803 (citation omitted) (citing \textit{Erickson}, 13 F.3d at 1070-71; \textit{Childress}, 945 F.2d at 506; M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1493 (11th Cir. 1990)). Notably, while the first sentence appears to state a per se rule that joint author status cannot apply to any of these four categories of authors' assistants, in an appropriate case the contributions of such an assistant could satisfy the substantive standard set forth in the second sentence. The court later describes the rule set forth in this passage as "sensible," because "ordinarily the person who does not contribute significant copyrightable work does not expect to have a copyright interest, and one who does does." \textit{Id.} Yet the person who fails to contribute significant copyrightable work may fail to be a co-author for that reason alone, in which case the second step of inquiring into that person's expectations becomes superfluous.
\item[162] \textit{Id.}
\item[163] Although the professor's subsequent affidavits asserted that he had written every word of the article himself, and made the same assertion about four previous published articles in which he had listed Kasrulan as the lead author, the court questioned the veracity of these statements, noting that it would be unusual for a professor to list as the lead author of five articles a student who had written no part of the articles and had done nothing more than provide ordinary research assistance. \textit{Id.} at 803-04 (also noting that the names were listed alphabetically, but implying that this was probably mere coincidence).
\item[164] \textit{Id.} at 803; see \textit{Childress}, 945 F.2d at 508 (treating billing or credit as one indication of how the parties regarded their relationship).
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published several co-authored articles together strongly implied that they viewed one another as co-authors of the entire series of works.\textsuperscript{165}

In contrast to \textit{Seshadri}, recent cases in federal district courts have applied the relationship test to reject co-authorship claims by collaborators whose contributions were substantial and copyrightable. Particularly illustrative is \textit{Clogston v. American Academy of Orthopaedic Surgeons}, in which the plaintiff, a photographer who had provided color photographs for a new edition of a book published by the American Academy of Orthopedic Surgeons ("AAOS"), contended that his contribution made him a joint author of the book.\textsuperscript{166} Although the parties disputed the extent to which the AAOS had given him specific directions on the subject matter of the photographs, the copyrightability of the photographs was never in question. Nonetheless, the district court rejected the photographer’s co-authorship claim because he had failed to show that either he or the author of the text had regarded him as a co-author of the book.\textsuperscript{167} Although the court reiterated that co-authors need not intend or be aware of the legal ramifications of joint authorship, it did not explain further what type of intent or awareness was necessary or sufficient to satisfy the relationship test, beyond noting that "[i]t is sufficient if the parties intended to both be authors as that term is commonly understood."\textsuperscript{168}

In concluding that both parties intended the AAOS to be the sole author, \textit{Clogston} emphasized the following factors:

(1) The plaintiff asked the AAOS to give him a photography credit at the beginning of the text, and suggested a format for that credit, but never suggested that he be listed as an author.\textsuperscript{169}

(2) The actual credits in the front of the book listed the plaintiff as the first of six photographers on one page, and listed the name of the editorial board chairman on a separate page, in "significantly larger type."\textsuperscript{170}

\textsuperscript{165} Seshadri, 130 F.3d at 802. The professor’s decision not to be named as co-author of the particular article at issue took place only after the work had been completed. \textit{Id.} Under the relationship test, the intent to form a co-authorial relationship, like the intent to merge contributions, would have to be tested at the time each party made his creative contribution, not at some later date.

\textsuperscript{166} 930 F. Supp. 1156, 1159 (W.D. Tex. 1996).

\textsuperscript{167} \textit{Id.} at 1160-61 (citing Erickson, 13 F.3d at 1068; Childress, 945 F.2d at 507).

\textsuperscript{168} \textit{Id.} at 1159 n.2.

\textsuperscript{169} \textit{See id.} at 1159-60.

\textsuperscript{170} \textit{Id.} at 1160. The separation of these credits persuaded the court that, at the time the book was published, the AAOS intended to be its sole author. \textit{Id.} at 1160. The court did not, however, find it significant that the actual credits listed the plaintiff as a "photographer" rather than as an "author," noting that "[h]ad the Fourth Edition been
(3) The nature of the plaintiff's work relationship with the AAOS editorial board chairman indicated the latter's intent for the AAOS to be the sole author;\(^{171}\) and

(4) The plaintiff admitted that he did not himself know whether he was a co-author, and that he had no particular intent regarding co-authorship at the time he consented to the use of his photos.\(^{172}\)

Although these factors persuaded the court that even the plaintiff did not consider himself a co-author at the time the book was created,\(^{173}\) the court described as "paramount" its finding that the defendant never considered the plaintiff a co-author, thus implying that the defendant's intent alone was a legally sufficient bar to joint work status.\(^{174}\)

credited to "The American Academy of Orthopaedic Surgeons—Text, Curtis P. Clogston—Photographs" the Court's decision might well have been different." Id. at n.5.

\(^{171}\) The plaintiff testified that when he and the chairman discussed the content of the chapters they "would . . . try to come to a consensus," but acknowledged that the chairman "probably had the ultimate say-so about changes that were made [to the text and] had the ultimate approval authority over the photographs." Id. at 1160. Although the court acknowledged that a reasonable jury could find this relationship "consistent" with joint authorship, "no reasonable jury could find that this behavior, without more, manifested [the chairman] Dr. Heckman's or the AAOS's intent that Clogston co-author the Fourth Edition." Id. (citing Erickson, 13 F.3d at 1068, for the principle that suggestions for inclusion do not in themselves result in co-authorship because the statute requires not only collaboration but also intent to create a joint work).

\(^{172}\) When asked whether he was a co-author of the Fourth Edition, Clogston answered that he did not know whether allowing the AAOS to include his photographs in the book made him a co-author, that at the time he drafted his letter to the AAOS suggesting the format for his credits he "didn't have an intent as far as co-authorship," that he never suggested to anyone at the AAOS (prior to the litigation) that he was a co-author of the book, and that no one at the AAOS indicated to him that he would be a co-author. Id. at 1160-61.

\(^{173}\) Id. at 1161.

\(^{174}\) Id. at 1161 \& n5. The court cited Childress both for the proposition that the putative co-authors need not intend the legal consequences of co-authorship, Childress, 945 F.2d at 507, and for the proposition that the subjective intent of the party asserting sole authorship is "paramount." Id. at 509.

Even though Clogston had provided about 90% of the photographs in the book, the court held that the magnitude of Clogston's contribution was simply irrelevant: "While the AAOS agreed to the magnitude of Clogston's contribution, that contribution alone cannot support a finding that the AAOS agreed that Clogston should be a co-author of the book . . . . [T]he importance of the contribution is simply not a relevant inquiry. Clogston, 930 F. Supp. at 1162 (citing Childress, 945 F.2d at 508-09) (citations omitted). Although this extreme position has not been adopted by any other courts, the Clogston Court purported to derive it from the well-settled principle that "the respective contributions of several authors to a single work need not be equal either qualitatively or quantitatively in order to constitute such contributors as joint authors." Id. That principle, however, simply lowers the floor for a putative co-author by rejecting the unworkable requirement of strict equality of contributions. The Clogston Court erroneously interpreted it as a statement that, unless both collaborators subjectively intend to share authorship status, the amount contributed by the person who does intend co-authorship is irrelevant to determining whether co-authorship has occurred.

Clogston's disregard for the substantiality of the plaintiff's contribution is inconsistent with either the Goldstein or the Nimmer standards for determining whether a contribution is significant enough to support a claim of joint authorship. Under Nimmer's test, the intent of one collaborator to share authorship with a de
In one of the most troubling of the joint work cases to date, the Second Circuit in 1998 used the relationship test to reject a dramaturg’s claim that the musical Rent was a joint work. Because dramaturg Lynn Thomson’s contributions to the musical were both substantial and copyrightable, the decision in Thomson v. Larson rested squarely on defendant John Larson’s intent to be the sole author of the work.

Thomson was hired by the New York Theatre Workshop (“NYTW”) to assist author Jonathan Larson in clarifying the musical’s story line. Larson agreed to Thomson’s hiring, even though he had rejected NYTW’s previous suggestions

\[\text{minimis contributor should not be sufficient to convey authorship status on the latter. If that intent were communicated to the de minimis contributor, however, it could be interpreted as giving rise to an implied royalty-free nonexclusive license permitting the de minimis contributor to exploit the work with no obligation to account for the profits (thus resembling the implied license in Cabrera), because such a license would not have to be in writing. See also Effects Assoc. v. Cohen, 908 F.2d 555 (9th Cir. 1990) (implied license to use special effects footage); Oddo v. Ries, 743 F.2d 630 (9th Cir. 1984) (implied license to publish portions of pre-existing articles included in manuscript supplied by plaintiff to defendant for purpose of publication).}

\[\text{By treating the substantiality of a contribution as irrelevant, Clogston implies that intent to form a co-authorial relationship is the sole test of joint work status. If a person makes a significant copyrightable contribution to a collaborative work, and both parties intend the result to be a single work, according to this view they could still fail to produce a joint work if one of them did not consent to the other’s co-authorial status.}

\[\text{In some circumstances, the combination of text and illustrations might constitute a compilation rather than a joint work. In Grosset & Dunlap, Inc. v. Gulf & Western Corp., 534 F. Supp. 606, 608-09 (S.D.N.Y. 1982), the district court held that an illustrated book of children’s stories involved a compilation of illustrations and text, rather than a joint work of the writer and illustrator, because the stories (unlike music and lyrics) could be enjoyed on their own without the illustrations. Thus, the text and pictures were neither inseparable nor independent. However, that court distinguished the scenario in Donna v. Dodd, Mead & Co., 374 F. Supp. 429 (S.D.N.Y. 1974), which, like Clogston, involved “photographs and explanatory text, which must be published between the same covers for a picture book to convey its message,” 534 F. Supp. at 609, thus satisfying the interdependence requirement. See text accompanying notes 56-60 (discussing Donna).}

\[\text{Thomson v. Larson, 147 F.3d 195, 206 (2d Cir. 1998).}

\[\text{A previous collaborator on Rent, Billy Aronson, had executed a written agreement with Jonathan Larson in which Aronson contractually waived any right to “be considered [an] active collaborator or co-author of RENT.” Id. at 197 (internal quotations marks omitted) (footnote omitted). The legal significance of such a waiver is unclear; it may amount only to a waiver of attribution rights under the Lanham Act, 15 U.S.C. § 43(a) (1994), and the common law of unfair competition. The Second Circuit opinion notes that Aronson later “transferred his copyrights” to Larson’s heirs in exchange for a share of the royalties. Thomson, 147 F.3d at 197 n.3. If Aronson assigned whatever co-authorial rights he had in the collaborative work, then Aronson’s share of the copyright would have vested in Larson’s heirs regardless of whether Aronson’s initial waiver constituted an assignment of those rights. However, if the later assignment to Larson’s heirs had not taken place, it would be essential to determine whether the waiver constituted an assignment of copyright. The language of the waiver does not expressly assign Aronson’s share of the copyright, and thus could be interpreted as nothing more than an agreement to be left out of the credits and/or to surrender creative control.}

\[\text{Thomson’s contract with NYTW provided that she would receive a fee and billing as “Dramaturg,” but it was silent on copyright ownership. See id. at 197.} \]
that he work with another writer to revise the script.178 Thomson and Larson worked together for several months making substantial revisions, and when Larson died suddenly, Thomson and three other participants in the production worked together to complete the script.179 All four agreed not to claim ownership in any of the material created during their four-way collaboration, and all except Thomson later executed waivers disclaiming any copyright interest in the material they contributed.180

In evaluating Thomson’s joint work claim,181 the Second Circuit accepted the district court’s findings that she had “made at least some non-de minimis copyrightable contribution,” and that some of the dialogue had “originated verbatim” with her.182 The appellate court nonetheless upheld the district court’s determination that the work was not joint because Larson had never intended Thomson to be his co-author.183

While conceding that Childress did not explicitly define the nature of the required mutual intent,184 the Second Circuit reaffirmed its previous mandate that the putative co-authors must “entertain in their minds the concept of joint authorship.”185 Although the dramaturg argued that the magnitude of her

178 See id. at 204.
179 See id. at 197-98.
180 See id. at 198 n.7.
181 Thomson sought a declaratory judgment of co-authorship, as well as an accounting of 16% of the “author’s share” of the play’s royalties and the right to “quote freely” from the play in a book she was planning to write. See id. at 198 & n.11. Although copyright law entitles each co-author to an equal profit share (as well as the right to exploit the work freely), Thomson based her 16% request on an estimate of her pro rata contribution to the final version. See id. at 198 n.11. If the court had found her to be a co-author, the copyright statutes would not seem to permit the court to award her an accounting that was less than her statutory entitlement; such a non-statutory accounting might have to take the form of a settlement in which she waived her right to the balance of her co-author’s share (just as any contract among co-authors can alter their respective economic rights).
182 Id. at 200 & n.14 (internal quotation marks omitted). The Second Circuit noted that, although the district judge did not make any more specific findings as to Thomson’s contributions to the script, experts described the version which incorporated her contributions as “a radical transformation of the show.” Id. at 198 (internal quotation marks omitted). Also, Thomson alleged that “she developed the plot and theme, contributed extensively to the story, created many character elements, wrote a significant portion of the dialogue and song lyrics, and made other copyrightable contributions to the Work.” Id. at 198 n.10 (internal quotation marks omitted). The Second Circuit rejected the Clogston Court’s suggestion that the amount of the putative co-author’s contribution was irrelevant. Id. at 202 n.19.
183 Id. at 205.
184 Id. at 201.
185 Id. Thomson acknowledged several precedents in which courts found objective evidence of co-authorial intent even though both putative co-authors denied having such intent. Id. at 201-02 n.17. In CCNV II, for example, the Supreme Court suggested in dicta that the parties might have had the requisite intent to be joint authors of a sculpture even though each had vigorously claimed to be the sole author. Community for Creative Non-Violence v. Reid, 490 U.S. 730, 753 (1989) (“CCNV II”). In Easter Seal Society for Crippled Children & Adultis of Louisiana,
contribution could itself serve as evidence of the defendant’s subjective intent to share authorship with her—and that, in fact, it was sufficient in itself to give the parties’ relationship the “distinguishing characteristics” of co-authorship—the appellate court responded that “the contribution of even significant language” would not suffice under Childress absent “a specific finding of mutual intent.” Accordingly, the court refused the plaintiff’s invitation to limit the relationship test to cases in which the claimant has “made ‘minimal contribution[s] to the writing of a work.’”

Thomson added a new layer to Childress by applying a four-factor test, comprised of the factors discussed below, to determine whether Larson intended co-authorship.

(1) “Decisionmaking Authority”

The court treated creative control as “[a]n important indicator” of sole authorship. Larson apparently retained sole authority to determine what changes were made to the work, and the agreement between NYT and

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*Inc. v. Playboy Enterprises*, 815 F.2d 323, 337 (5th Cir. 1987), the Fifth Circuit found that joint authorship of audiovisual recordings was “clear” in light of the parties’ merged contributions, even though both parties disavowed any intent to co-author. Similarly, in *Strauss v. Hearst Corp.*, 8 U.S.P.Q.2d (BNA) 1832, 1837 & n.5 (S.D.N.Y. 1988), the district court reached the “inescapable” conclusion that the litigants created a joint work by acting with a “preconcerted common design,” even though the plaintiff asserted that he never intended to share authorship.

In each of these cases, the determinative intent was the intent expressly required by § 101—the collaborators’ intent to combine their contributions into a single work—rather than the intent to “share authorship.” Thomson distinguished these cases on the ground that each of them contained objective indicia of co-authorial intent. Thomson, 147 F.3d at 201 n.17. In fact, those cases mentioned no evidence of the parties’ intent to share authorship with one another; rather, they discussed only the nature of each party’s contribution to the finished work.

Thomson, 147 F.3d at 202. The Childress intent requirement, the court observed, was justified by “[t]he potential danger of allowing anyone who makes even a minimal contribution to the writing of a work to be deemed a statutory co-author . . . .” Id. at 200. This statement completely ignores the role of the Goldstein test in weeding out such “minimal” contributions.

Id. at 202 (quoting Brief for Appellant at 30).

Id. at 202-05. The same test was later adopted in *BTE v. Bonncaze*, 43 F. Supp. 2d 619, 622, 624-25 (E.D. La. 1999) (expressly following Thomson). The Ninth Circuit used three of these four factors in *Almuhamed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000). See infra notes 227-29 and accompanying text.

The court’s analysis of those factors focused solely on Larson’s intent rather than Thomson’s. Neither the district court nor the appellate court found it necessary to address Thomson’s intent, once it had determined that Larson did not perceive her as a co-author. Id. at 202 n.20.

Id. at 202-03 (citing Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1071-72 (7th Cir. 1994); Maurel v. Smith, 271 F. 211, 214-15 (2d Cir. 1921)).

There was evidence that Thomson understood and accepted his authority and had even professed to be “flattered that [Larson] was asking [her] to contribute actual language to the text.” Id. at 203. This evidence included the language that Thomson had used in presenting her suggestions to Larson. This language might fairly be
Larson gave Larson final approval over changes to the script and specified that “all such changes would become Larson’s property.”\(^{192}\) The court described Thomson’s role as merely “advisory,” based in large part on the deferential language she employed in communicating with Larson and the later collaborators.\(^{193}\)

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described as respectful, deferential, and at times, even obsequious. However, the court may have given too much weight to this evidence. Thomson’s fear of offending Larson by her suggestions may say more about her personality (or Larson’s) than about her co-authorship status. It would be sad indeed if co-authorship status were categorically unavailable to the non-assertive.

Also disturbing is the Second Circuit’s approval of the district court’s reliance on self-serving statements by Larson in which he told a high school student that he “wrote everything in Rent.” \(^{1}\) Id. at 203 n.22. The court found this significant as an indication of Larson’s “view” that he was the sole author, \(^{1}\) id., apparently disregarding the fact that, based on the district court’s own finding that Thomson made “verbatim” contributions to the text, \(^{1}\) id. at 201 n.14, and the undisputed evidence that collaborator Billy Aronson had made substantial contributions to the earlier version, \(^{1}\) supra note 176, Larson’s assertion was patent false.

\(^{192}\) Id. at 203. Such an agreement would not bind Thomson, a stranger to the contract, because she did not render her services under a work-made-for-hire arrangement with NYT/W and did not assign her interest in the work to NYT/W or Larson. Thus, if she qualified as a joint author, she would be free to alter the joint work. \(^{1}\) See supra note 1.

\(^{193}\) Thomson, 147 F.3d at 203 n.21. In support of this characterization, the court pointed to the highly deferential language Thomson employed in her communications with Larson and two of the other collaborators during their joint effort to revise the play, for example:

[To Larson:] “Please know that everything is intended as a question but might sound differently in the shorthand of the writing.” [To the other collaborators:] “Usual disclaimer; the following is meant to generate discussion. Even when I offer ‘solutions’ what I mean is only to communicate a response by example . . . .”

\(^{1}\) Id. Both the district and appellate courts held that it was unnecessary to determine Thomson’s intent. \(^{1}\) See id. at 202 n.20. The appellate court, however, apparently found Thomson’s deferential speech relevant to the determination of Larson’s subjective intent, because of the impression it might have given him as to Thomson’s intent. \(^{1}\) See id. (explaining court’s decision to “refrain from addressing Ms. Thomson’s intent, except as it may seem to bear on Larson’s”).

A number of scholars have suggested that women tend to speak in more deferential, hedging, and powerless language than men do. \(^{1}\) See, e.g., Mary Crawford, Talking Difference: On Gender & Language 23-26 (1995); Robin Lakoff, Language and Woman’s Place 53-56, 66 (1975); Deborah Tannen, Ph.D., You Just Don’t Understand: Women & Men in Conversation 26, 42-43 (1990); Nancy M. Henley & Cheris Kramarae, Gender, Power and Miscommunication, in The Women and Language Debate 383-406 (Camille Roman et al. eds., 1994). Some have noted, in particular, that women tend to express themselves in ways that suggest connection or collaboration, while men’s speech patterns tend to express independence. \(^{1}\) See e.g., Deborah Tannen, supra, at 42 (“[W]omen speak and hear a language of connection and intimacy, while men speak and hear a language of status and independence . . . .”); Barrie Thorne et al., Language, Gender and Society: Opening a Second Decade of Research, in LANGUAGE, GENDER AND SOCIETY 18 (Barrie Thorne et al. eds., 1983) (discussing “the collaborative patterns which are central to talk among women”) (emphasis added).

If these scholars are correct, then Thomson’s deferential speech toward Larson may have failed to reflect the实质性 of her contribution to Rent. In addition, it may have reinforced Larson’s subjective perception of his “status and independence” as sole author—or, to use his own words, “king”—of his script. \(^{1}\) Thomson, 147 F.3d at 203 n.22.
(2) Billing/Credits

The court described billing or credit as a “significant” indicator of “how parties viewed themselves in relation to a work,” and endorsed Weissmann’s statement that “a writer’s attribution of the work to herself alone is ‘persuasive proof ... that she intended this particular piece to represent her own individual authorship’ and ‘is prima facie proof that [the] work was not intended to be joint.’”

Both on the script itself and in the material he submitted for the playbill before his death, Larson had listed himself as “author/composer” and listed Thomson as “dramaturg.” Thomson never sought equal billing with Larson, and it was Larson who dictated how the credits would read.

The Second Circuit’s reliance on billing and credit as direct evidence of intent stands in sharp contrast to the Seventh Circuit’s more modest (although possibly inadvertent) suggestion in Seshadri that billing and credit serve as evidence of the substantiality of each party’s contribution. Once the “dramaturg” label had been applied to Thomson, her chances of persuading the Second Circuit to view her as an author became poor indeed.

(3) Written Agreements with Third Parties

Even after working with Thomson for several months, Larson still portrayed himself as the sole author of Rent in his contracts with NYTW and the play’s commercial producers, reserving to himself all rights in the play not granted to NYTW. Thomson made no attempt to enter into any contracts with the producers which would have identified her as a co-

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Such patterns of speech, whether gender-based or simply a reflection of a particular individual’s personality or self-perception, should hardly be determinative of authorship rights. Even if Thomson’s deferential language did reflect her contemporaneous perception of herself as something less than a co-author, that perception should itself be irrelevant in an objective analysis if her contribution is significant and copyrightable and if both parties intended to merge their contributions at the time of creation.

194 Thomson, 147 F.3d at 203 (citing Childress v. Taylor, 945 F.2d 500, 508 (2d Cir. 1991)).
195 Id. (quoting Weissmann v. Freeman, 868 F.2d 1313, 1320 (2d Cir. 1989)).
196 Id. at 203-04.
197 Id.
198 Id.
199 See supra note 164 and accompanying text.
200 Thomson, 147 F.3d at 203-04 nn.24-45.
author. In the district and appellate courts’ view, this confirmed her acquiescence in Larson’s subjective intent to be “sole author.”

(4) Other Evidence

Also probative, in the court’s view, was a telephone interview in which Larson told a high school student “in substance, that he wrote everything in Rent and distinguished writers in the theater from writers in the other media by saying that in the theater the writer is the king.” The district court had viewed this statement as “significant” because it “evidence[d] Mr. Larson’s view that Rent in all respects was his, he was the king.”

Other relevant factors considered as evidence of Larson’s lack of intent to make Thomson a co-author included: (a) Larson’s prior refusal to work with any other writers in revising Rent, (b) his failure to conclude with Thomson a contract similar to that in which he had required Billy Aronson, his original collaborator on Rent, to expressly disclaim co-authorship status, and (c) a conversation between Thomson and Larson in which he confirmed that he wanted her to contribute “actual language” to the play and promised to acknowledge her contribution and not to take credit for

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201 Id. at 204 & n. 26.
202 Id. at 204 (citing Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1072 (7th Cir. 1994); Gilliam v. American Broad. Cos., Inc., 538 F.2d 14, 22 (2d Cir. 1976); Maurel v. Smith, 271 F. 211, 214-15 (2d Cir. 1921) (“Maurel II”).
203 Id. at 203 n.22.
204 Id.
205 Id. at 204-05. Under the relationship test, one might think that the execution of such a disclaimer would serve as evidence that the parties (here, Larson and Aronson) did not intend to be co-authors. Ironically, Thomson treats the absence of such a disclaimer by Thomson as evidence that no co-authorship was intended. Id. at 205 (treating Larson/Aronson contract as evidence that Larson understood that co-authorship had legal significance). Presumably, the reasoning is that a disclaimer is necessary only if the parties think that their relationship is co-authorial in the first place, and they seek to avoid entering such a relationship. If the Thomson Court meant to suggest that joint work status can be altered by contract, that position is entirely without support in the 1976 Act, because the “work made for hire” provisions of the Act establish the only circumstances under which authorship can be determined by contract. See 17 U.S.C.S. §§ 101, 201(b) (Law. Co-op. 1994 & Supp. 2001) (definition of “work made for hire”). No other provision in the 1976 Act allows authorship to be established or disclaimed by contract. Neither the joint work provisions of the copyright statutes nor their legislative history so much as hint that joint work status can be established or avoided through a contract other than a work-made-for hire contract. A written “disclaimer” of joint authorship, if given any legal effect at all, would only serve to assign copyright ownership, 17 U.S.C. § 204(a) (1994), and/or to waive the Lanham Act right to receive credit for the work, 15 U.S.C. § 1125(a) (1994).
what she had written.\footnote{206} In the Second Circuit’s view, all of this evidence indicated that Larson did not perceive Thomson as his co-author.\footnote{207}

Once it was determined that Thomson was not a co-author of Rent, the question arose whether she was the sole author of her contributions to the work, and should, in the absence of any contractual assignment of those contributions, be allowed to assert sole ownership of the copyright in those contributions.\footnote{208} This would have permitted her to withdraw her contributions, or to enjoin or collect royalties for their use.\footnote{209}

Although the Second Circuit labeled this issue a “conundrum,”\footnote{210} it was a conundrum of the court’s own making. The Larson heirs presented the remarkable contention that “[u]nder Childress, copyrightable contributions by an

\footnote{206} Thomson, 147 F.3d at 204-05. Notably, neither the district court nor the appellate court commented on the discrepancy between Larson’s promise to Thomson and his assertion in the 1995 telephone interview that “he wrote everything in Rent.” See supra notes 191, 203-04 and accompanying text.

In addition to the underlying question of what intent is relevant to joint work status, Thomson raises serious issues about the type and weight of evidence that should be considered in establishing the presence or absence of that intent. For example, Thomson’s deferential language may say less about her intent to co-author than it does about her personality or certain gender-specific linguistic patterns. See supra note 193. And the court’s reliance on Larson’s assertions of sole authorship in the telephone interview are particularly puzzling, as they are flatly inconsistent with the court’s acknowledgement that Thomson had made copyrightable, even verbatim, contributions to the script, see supra note 182 and accompanying text, and that Larson had also collaborated with Billy Aronson earlier in the writing process. 147 F.3d at 197; see supra note 176.

The fundamental question at the root of these evidentiary problems, however, is whether the parties’ perception of their relationship should be relevant at all to the determination of joint work status. If the only relevant intent under the statutes is the parties’ intent, at the time of creation, to merge their contributions into a single unitary work, then evidence of how they perceived their roles is relevant—if at all—only insofar as it may indirectly reflect the extent of their respective contributions.

\footnote{207} Thomson, 147 F.3d at 205.

\footnote{208} Id. The issue is further complicated by the contract between Thomson and NYTW, under which Thomson might have been either an employee or an independent contractor commissioned by NYTW. In the former case, Thomson’s work would probably be a work-made-for-hire, and any claim of co-authorship would not be hers to make, because the “author” of her contributions would be NYTW, which would then have the option of asserting co-authorship status if it so chose. If, however, the contract created an independent contractor relationship, then the absence of a work-made-for-hire provision in the Thomson/NYTW contract (and the fact that the subject matter—a musical play—does not fit any of the specific work-made-for-hire categories listed in the § 101 definition) would have been made Thomson the sole owner of her contributions.

In a jointly filed brief, the National Writers Union and the Literary Managers and Dramaturgs of the Americas, Inc. argued that if Thomson were not a co-author but made copyrightable contributions in which she retained the copyright ownership, then if she were to file a copyright infringement suit against Larson’s heirs or any party exploiting Rent under their authority, their only defense—ironically—would be to assert that Thomson and Larson were co-authors. See id. at 206. This assertion overlooks the possibility of an implied license. See infra notes 212, 217 and accompanying text.

\footnote{209} Thomson, 147 F.3d at 205-06.

\footnote{210} Id. at 205.
editor or other person retained to assist an author belong to the author, absent mutual co-authorship intent," as well as the more reasonable suggestion that Thomson might be found to have granted Larson an implied license to use her work. Although it did not address these arguments, the court of appeals observed that:

Our circuit has not decided whether a person who makes a non-de minimis copyrightable contribution but cannot meet the mutual intent requirement of co-authorship retains, in the absence of a work-for-hire agreement or of any explicit contractual assignment of the copyright, any rights and interests in his or her own contribution.

This statement is remarkable in its failure to acknowledge the substantial body of authority addressing the ownership of copyright in compilations, including (but not limited to) collective works, as well as the ownership of copyright in any underlying work incorporated into a derivative work. Nothing in copyright law permits—much less requires—a court to deny the author of copyrightable expression the right to a copyright in that expression. At most a court could find an implied non-exclusive license to use the expression.

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211 Id.
212 See id.; cf. Effects Assoc., Inc. v. Cohen, 908 F.2d 555 (9th Cir. 1990) (finding implied license to use special effects footage created by independent contractor for a motion picture).
213 Thomson had apparently not presented her sole authorship claim in the district court. Thomson, 147 F.3d at 206.
214 Id.
215 For example, § 201(c) of the copyright statutes provides that “[c]opyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution.” 17 U.S.C. § 201(c) (1994). Section 103 provides that “[t]he copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.” Id. § 103(b).
216 Although courts have occasionally suggested that the availability of injunctive relief might be limited in certain cases where the infringed work has been inextricably incorporated in a highly original derivative work, see, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 n.10 (1994); Abend v. MCA, Inc., 863 F.2d 1465, 1478-79 (9th Cir. 1988), aff'd sub nom. Stewart v. Abend, 495 U.S. 207 (1990); Universal City Studios v. Sony Corp., 659 F.2d 963, 976 (9th Cir. 1981), rev'd, 464 U.S. 417 (1984), these authorities uniformly recognize that the owner of the copyright in the underlying work is entitled to some remedy for the infringement.

Another rare instance in which a copyright may be unenforceable involves copyright misuse, which has increasingly been recognized as a valid defense to an infringement action. However, this defense has been recognized only in certain cases where the copyright owner has improperly extended the scope of the copyright monopoly, typically (although not necessarily) through antitrust violations. See generally Nimmer & Nimmer, supra note 2, § 13.09[A]. Because copyright misuse arises only where there is improper conduct by a copyright owner (or exclusive licensee), seeking to enforce its exclusivity, id., this doctrine does not limit the right of a joint author to exercise his or her nonexclusive right to exploit the work and/or share in the proceeds of the other joint author's exploitation of that work. Moreover, even where a copyright is rendered unenforceable by copyright misuse, the copyright itself remains valid and thus potentially enforceable once the
The Second Circuit’s conundrum, therefore, was the direct consequence of its conclusion that a joint work did not exist even though each party had supplied a copyrightable contribution with the intent of merging their contributions into a single unitary work.\textsuperscript{218} This dilemma seems inevitable under the relationship test, which gives rise to complications at least as troubling as those which arise from a more faithful application of the language of the joint works definition. Contributors of copyrightable material will rarely be completely sure of the subjective intent of all the other collaborators. Yet, under the relationship test, they cannot rely on the substantiality of their contributions and their contemporaneous intent to merge those contributions as a sufficient factual basis for establishing their co-authorship rights. They must always consider the possibility that subsequent repudiation of co-authorial intent by a “dominant” author will eliminate those rights. Whereas the intent to merge contributions will often be readily ascertainable from objective evidence, intent to share authorship is ill-defined and may not be reflected in any objective manifestations, thus making it more difficult to establish in most cases. The consequence is that any collaborator seeking to protect his or her joint authorship rights must create an evidentiary record proving that all of the other collaborators intended co-authorship at the time the work was created, and documenting that his or her copyrightable contribution has not implicitly been licensed to the others. Requiring such

\textsuperscript{217} Copyright law does not recognize implied assignments or implied exclusive licenses; both assignments and exclusive licenses must be embodied in signed written instruments to be valid. 17 U.S.C. §§ 101, 204(a) (1994). To adopt a contrary rule for “failed co-authorship” claims would be inconsistent with both the current statutes and the policy behind them—that of protecting authors against fraudulent claims or inadvertent loss of their statutory rights. See, e.g., Magnuson v. Video Yesteryear, 85 F.3d 1424, 1428 (9th Cir. 1996); Konigsberg Int'l, Inc. v. Rice, 16 F.3d 355, 357 (9th Cir. 1994); Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 557 (9th Cir. 1990); Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27, 36 (2d Cir. 1982); Arthur A. Kaplan Co. v. Panavia Int'l, Inc., 48 U.S.P.Q.2d (BNA) 1315 (S.D.N.Y. 1998); Papa's-June Music, Inc. v. McLean, 921 F. Supp. 1154, 1158 (S.D.N.Y. 1996); cf. Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 412 (7th Cir. 1992) (construing the writing requirement for works made for hire). The “nondominant author” is precisely the kind of party whom the written instrument requirement should protect against the inadvertent loss of rights. If nondominant authors can only protect themselves by preserving their rights through contracts, then federal copyright law has reverted to the pre-Berne era in which failure to understand and comply with the formalities of federal copyright law could irrevocably divest authors of their rights. See generally Nimmer & Nimmer, supra note 2, § 5.05 [B][2][d][ii].

\textsuperscript{218} See supra notes 182-87 and accompanying text.
extraordinary measures in the midst of the creative process takes copyright law in a distinctly non-user-friendly direction.  

VI. THE NINTH CIRCUIT ADDS A NEW TWIST

In the most recent chapter in the joint work saga, the Ninth Circuit appears to have endorsed the relationship test, but at the same time suggested an alternative analysis based on assigning dual meanings to the term "author."

In Aalmuhammed v. Lee, the Ninth Circuit adopted Thomson’s reasoning to reject the joint authorship claim of a consultant who, the court agreed, had made significant creative contributions to Spike Lee’s film Malcolm X. He had requested a film credit as co-writer, but was turned down and given a "technical consultant" credit.

There was no doubt that the intent-to-merge requirement was satisfied. However, even though the court found a genuine issue of fact as to whether Aalmuhammed’s contributions satisfied the Goldstein test, it upheld the district court’s summary judgment for the defendants. The court stated two grounds for this decision, without indicating whether they were independent or somehow related: (1) Spike Lee and Warner Brothers did not intend to share authorship with the plaintiff, and (2) the plaintiff’s contribution, even if copyrightable, was non-authorial.

Relying on the Childress/Erickson/Thomson trilogy, the court held “that contribution of independently copyrightable material to a work intended to be an inseparable whole will not suffice to establish authorship of a joint

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219 Professor Rochelle Cooper Dreyfus has been highly critical of the Thomson Court’s interpretation of the “intent” requirement. See Rochelle Cooper Dreyfuss, Collaborative Research: Conflicts on Authorship, Ownership, and Accountability, 53 VAND. L. REV. 1162, 1204-09 (2000) (preferring an approach more favorable to joint authorship claims).
220 202 F.3d 1227 (9th Cir. 2000).
221 Id. at 1230-31 (“It is also undisputed that Aalmuhammed made substantial and valuable contributions to the movie . . . .”).
222 Id. Although Aalmuhammed had worked without a written contract, he accepted payment from Lee, and also received a check from the film’s lead actor, which he apparently did not cash. Id.
223 “All persons involved [in the film] intended that Aalmuhammed’s contributions would be merged into interdependent parts of the movie as a unitary whole.” Id. at 1232 (citing Ashton-Tate Corp. v. Ross, 916 F.2d 516, 521 (9th Cir. 1990)).
224 Id. at 1232.
225 Id. at 1235.
work,” and that determinations of co-authorial intent should focus on “who has decision making authority, how the parties bill themselves, and other evidence” of “intent to be joint authors.”

First, an author “superintend[s]” the work by exercising control. This will likely be a person “who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be—the man who is the effective cause of that,” or “the inventive or master mind” who “creates, or gives effect to the idea.” Second, putative coauthors make objective manifestations of a shared intent to be coauthors, as by denoting the authorship of The Pirates of Penzance as “Gilbert and Sullivan.” We say objective manifestations because, were the mutual intent to be determined by subjective intent, it could become an instrument of fraud, were one coauthor to hide from the other an intention to take sole credit for the work. Third, the audience appeal of the work turns on both contributions and “the share of each in its success cannot be appraised.” Control in many cases will be the most important factor.

The best objective manifestation of a shared intent, of course, is a contract saying that the parties intend to be or not to be co-authors. In the absence of a contract, the inquiry must of necessity focus on the facts. The factors articulated in this decision and the Second and Seventh Circuit decisions cannot be reduced to a rigid formula, because the creative relationships to which they apply vary too much. Different people do creative work together in different ways, and even among the same people working together the relationship may change over time as the work proceeds.

Aalmuhammed did not at any time have superintendence of the work. Warner Brothers and Spike Lee controlled it. Aalmuhammed was not the person “who has actually formed the picture by putting the persons in position, and arranging the place . . . .” Spike Lee was, so far as we can tell from the record. Aalmuhammed, like Larson’s dramaturg, could make extremely helpful recommendations, but Spike Lee was not bound to accept any of them, and the work would not benefit in the slightest unless Spike Lee chose to accept them. Aalmuhammed lacked control over the work, and absence of control is strong evidence of the absence of co-authorship.

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226 Id. at 1233.
227 Id. at 1234. The Ninth Circuit’s analysis thus addressed three of the four Thomson factors. See supra notes 189-207 and accompanying text.
228 Id. at 1234-35 (citation omitted). Aalmuhammed prefaces this discussion by noting that these factors are relevant to joint authorship determinations, “in the absence of contract.” Id. at 1232. The vague suggestion that a contract could change the authorship determination is troubling, because it does not seem to
Applying these factors, the court found no evidence that Warner Brothers intended to share authorship of the film with the plaintiff, "What Aalmuhammed’s evidence showed, and all it showed, was that, subject to Spike Lee’s authority to accept them, he made very valuable contributions to the movie. That is not enough for co-authorship of a joint work."\textsuperscript{229}

The Ninth Circuit’s explication of these three factors is somewhat different from the Second Circuit’s explication in \textit{Thomson}, but it is no less problematic. First, the “control” factor raises the same questions in this context as it does in the “dominant author” analysis: How far must this control extend? To the content of the entire work? Or merely to the content of this putative author’s individual contribution? If party A makes a substantial creative contribution, but party B has the power to decide how much (if any) of A’s contribution to include in the finished work, does this deprive A of co-authorship? Does it matter whether B decides to use some, most, or all of A’s work? The second factor, “objective manifestations,” follows the Second Circuit’s lead in \textit{Thomson} by confusing the issue of authorship (a copyright question, pertaining to an unwaivable right)\textsuperscript{230} with the issue of proper attribution (a Lanham Act\textsuperscript{231} question, pertaining to a waivable right). A writer might agree to have her work published under another person’s name, receiving no credit whatsoever, but would not thereby cease to be the work’s “author” for purposes of copyright law. Even if intent to claim credit were somehow relevant to the authorship determination, subjective intent hardly becomes less “subjective” when the putative sole author succeeds in persuading third parties (such as publishers or film or theatrical producers) to publicize the work as solely authored.\textsuperscript{232} The third factor, audience appeal, is unique to the Ninth Circuit’s

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\textsuperscript{229} Aalmuhammed, 202 F.3d at 1235.


\textsuperscript{232} \textit{Thomson}’s requirement of “objective manifestations” of intent, see supra text accompanying note 228, also rings hollow for a second reason. While the court suggests that this requirement will preclude fraud on the part of putative sole authors, the court is not very diligent in applying its own test. After all, Lee never communicated to Aalmuhammed his intent to deny joint authorship to the latter. Indeed, Lee’s failure to
approach, but its significance is unclear. The court may have intended it simply as a proxy for the inseparability or interdependence of the collaborators’ contributions.\textsuperscript{233}

More intriguing than its endorsement of the relationship test, however, was the Ninth Circuit’s second rationale for rejecting the joint work claim—the proposition that, regardless of whether the plaintiff’s contribution to the film could satisfy the Goldstein standard, that contribution was insufficient as a matter of law.\textsuperscript{234} Starting from the premise that “authorship is not the same thing as making a valuable and copyrightable contribution,”\textsuperscript{235} the court asserted that “authorship” in copyright law means two different things, depending on whether the question presented is the copyrightability of a work (that is, whether it is an “original work of authorship”) or the authorial status of a particular creative contributor to such a work.\textsuperscript{236} However, in the latter context, the court’s concept of authorship was distinctly romantic:

The word “author” is taken from the traditional activity of one person sitting at a desk with a pen and writing something for publication. It is relatively easy to apply the word “author” to a novel. It is also easy to apply the word to two people who work together in a fairly traditional pen-and-ink way, like, perhaps, Gilbert and Sullivan. . . . But as the number of contributors grows and the work itself becomes less the product of one or two individuals who create it without much help, the word is harder to apply.\textsuperscript{237}

If the same quantum of “authorship” that satisfies the Supreme Court’s threshold test for copyrightability were also applied to identify the joint authors of a single collaborative work, the court warned, the result would be recognition of too many joint authors:

[T]he Supreme Court held in \textit{Feist Publications} that “some minimal level of [sic] creativity” or “originality” suffices. But that measure of a “work” would be too broad and indeterminate to be useful if applied to determine who are “authors” of a movie. So many people

\textsuperscript{233} Strangely, after enumerating this factor, the court did not analyze it further. For the distinction between inseparable and interdependent works, see supra text accompanying note 12.
\textsuperscript{234} \textit{Aalmuhammed}, 202 F.3d at 1235.
\textsuperscript{235} \textit{Id.} at 1232.
\textsuperscript{236} \textit{Id.}
\textsuperscript{237} \textit{Id.} For an excellent discussion of the “romantic” view of authorship in copyright law, see Peter Jaszi, \textit{Toward a Theory of Copyright: The Metamorphosis of “Authorship,”} 1991 DUKE L.J. 455.
might qualify as an "author" if the question were limited to whether they made a substantial creative contribution that that test would not distinguish one from another. Everyone from the producer and director to casting director, costumer, hairstylist, and "best boy" gets listed in the movie credits because all of their creative contributions really do matter. It is striking in Malcolm X how much the person who controlled the hue of the lighting contributed, yet no one would use the word "author" to denote that individual's relationship to the movie.\textsuperscript{238}

The suggestion that certain categories of professionals are categorically incapable of motion picture authorship is every bit as puzzling as the court's rationale for excluding them. As discussed below, the court's explanation reflects a fundamental misunderstanding of authorship.

The Ninth Circuit based its analysis on a comparison of the Supreme Court's 1884 decision in Burrow-Giles Lithographic Co. v. Sarony,\textsuperscript{239} which held that a photograph of Oscar Wilde qualified as the "writing" of an "author" within the meaning of the Intellectual Property Clause,\textsuperscript{240} with the Court's 1991 decision in Feist Publications, Inc. v. Rural Telephone Service Co.,\textsuperscript{241} which held that for a work to be copyrightable, it must possess at least a "minimal" level of creativity.\textsuperscript{242} Both of these cases articulate a standard for determining which works embody sufficient "authorship" to be copyrightable.\textsuperscript{243}

The Aalmuhammed Court interpreted Burrow-Giles not as a decision on copyrightable subject matter, but as a pronouncement on the appropriate standard for determining whether a particular person's contribution to a copyrightable collaborative work is sufficient to accord that person any authorship rights.\textsuperscript{244} This interpretation, however, finds no support in either the Supreme Court opinion or the underlying circuit court decision.\textsuperscript{245} The sole issue in Burrow-Giles was whether the plaintiff's photograph of Oscar

\textsuperscript{238} Id. at 1233 (citing Feist Publications, Inc. v. Rural Tel. Serv. Co, 499 U.S. 340, 345 (1991) (footnote omitted)).

\textsuperscript{239} 111 U.S. 53 (1884).

\textsuperscript{240} U.S. CONST., art. 1, § 8, cl. 8.


\textsuperscript{242} Id. at 345.

\textsuperscript{243} Burrow-Giles addressed the scope of Congress's constitutional authority to protect "writings" of "authors," 111 U.S. at 56, whereas Feist construed the statutory term "original work of authorship" as used in § 101 of the 1976 Act, 17 U.S.C. § 101 (1994) (defining a "compilation"), 499 U.S. at 356-60.

\textsuperscript{244} Aalmuhammed, 202 F.3d at 1233.

\textsuperscript{245} Sarony v. Burrow-Giles Lithographic Co., 17 F. 591 (2d Cir. 1883), aff'd, 111 U.S. 53 (1884).
Wilde was *copyrightable subject matter*. The identity of the author(s) was never in dispute; the opinion does not suggest that the defendant lithographer was claiming authorship of the original photograph, and the authorship of any derivative works was simply not addressed. Rather, the lithographer was defending against the photographer's claim that the former had reproduced the latter's photograph (or, perhaps more accurately, his photographic plate) without permission. The Supreme Court rejected the lithographer's challenge to the validity of the plaintiff's copyright, holding that the plaintiff's photograph was a "writing" of an "author" to which Congress could constitutionally extend copyright protection.

In support of its holding in *Burrow-Giles*, the Supreme Court had relied in part on several passages from the English case of *Nottage v. Jackson*, which upheld a photographer's authorship claim against the competing claim of his employer, who had not participated in the creation of the work:

BRETT, M.R., said, in regard to who was the author: "The nearest I can come to is that it is the person who effectively is, as near as he can be, the cause of the picture which is produced—that is, the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position, and arranging the place in which the people are to be—the man who is the effective cause of that." Lord Justice COTTON said: "In my opinion, 'author' involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph;" and Lord Justice BOWEN says that photography is to be treated for the purposes of the act as an art, and the author is the man who really represents, creates, or gives effect to the idea, fancy, or imagination.

Relying on these same passages, the *Aalmuhammed* Court interpreted the Supreme Court's reliance on *Nottage* as a suggestion that authorship status is reserved for the "master mind" behind a work:

*Burrow-Giles* and *Feist Publications* answer two distinct questions; who is an author, and what is a copyrightable work. *Burrow-Giles* defines author as the person to whom the work owes its origin and who superintended the whole work, the "master mind." In a movie

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246 111 U.S. at 55.
247 Id. at 54.
248 Id. at 60.
249 11 Q.B. Div. 627 (1883).
250 *Burrow-Giles*, 111 U.S. at 61 (quoting *Nottage*, 11 Q.B. Div. 627 (1883)).
this definition, in the absence of a contract to the contrary, would generally limit authorship to someone at the top of the screen credits, sometimes the producer, sometimes the director, possibly the star, or the screenwriter—someone who has artistic control. After all, in Burrow-Giles the lithographer made a substantial copyrightable creative contribution, and so did the person who posed, Oscar Wilde, but the court held that the photographer was the author.251

Contrary to this last statement, nothing in Burrow-Giles indicates that the defendant lithographer made a substantial creative contribution to the copyrighted work at issue.252 And nothing in the opinion forecloses the possibility that Oscar Wilde was a joint author.253 Thus, contrary to the Ninth Circuit’s reading of the case, Burrow-Giles did not involve an authorship dispute at all, only a dispute over whether a photograph could, as a matter of law, be a “writing” by an “author.” The Supreme Court quoted from Nottage simply to demonstrate that it was possible for a photograph to have at least one author, and thus to be copyrightable subject matter under the Intellectual Property Clause.254 Thus, the Ninth Circuit seriously misinterpreted Burrow-Giles when it suggested that this case attempted to distinguish between authorial and non-authorial contributions to a concededly copyrightable work.

Aalmuhammed’s concept of authorship was thus derived from passages in Burrow-Giles and Nottage which described the very specific authorial activity of still photography; they did not purport to define the entire range of activities

251 Aalmuhammed, 202 F.3d at 1233 (citing Burrow-Giles, 111 U.S. at 61).
252 Although the defendant might well have made such a contribution, his contribution is not discussed anywhere in Burrow-Giles, nor does the Supreme Court even mention the possibility of such a contribution. The circuit court opinion is silent as well. Thus, the question whether the defendant authored anything at all was simply irrelevant in Burrow-Giles.
253 Indeed, as a photographic subject who posed voluntarily, he would have had a very colorable joint authorship claim in the resulting photo. The circuit court opinion is silent on this point as well.
254 U.S. CONST., art. I, § 8, cl. 8. Nottage itself involved an authorship dispute. See Burrow-Giles, 111 U.S. at 60-61. In that case, the court denied the authorship claims of an employer, finding that the actual photographers hired by that employer were the authors of the photographs they produced. Id. at 61. That the Burrow-Giles Court was fully aware of this is evident from the Court’s own description of Nottage:

The plaintiffs in that case . . . had arranged with the captain of the Australian cricketers to take a photograph of the whole team in a group, and they sent one of the artists in their employ from London to some country town to do it. The question in the case was whether the plaintiffs, who owned the establishment in London, where the photographs were made from the negative, and were sold, and who had the negative taken by one of their men, were the authors, or the man who, for their benefit, took the negative. It was held that the latter was the author . . . .

Id. at 60-61. Burrow-Giles removed the Nottage opinions from their original context of resolving an employer/employee authorship dispute and used them instead to support the conclusion that a photographer can author a copyrightable work. Id. at 58.
that might constitute authorship. Tested against this absurdly narrow standard of authorship, Aalmuhammed's contribution could fall short even if it were substantial and copyrightable. Using the same standard, it could be said that writers would not be authors of a film because they are subject to the creative control of the producer and/or director, the "master minds" of the project; according to the Ninth Circuit's line-drawing, a screenplay would be no more than a set of "extremely helpful recommendations" which a director or producer is "not bound to accept."\textsuperscript{255} Because ordinarily the terms of the contract between a producer and a screenwriter allow the former to depart from the script even over the objections of the writer.\textsuperscript{256} If authorship of a film required either physical manipulation of the actors (as in Nottage) or ultimate creative control of the entire production (as in Aalmuhammed), then screenwriters would be presumptively ineligible for film authorship (even in the absence of a work made for hire contract). This result seems clearly inconsistent with the language and legislative history of the joint work provisions, as well as the widely-shared perception that the screenplay is often a highly significant creative component of a motion picture.\textsuperscript{257} In addition, the Ninth Circuit's analysis implies that any individual film is likely to have only one author, because it is likely to have only one "master mind," even if a great many people make substantial creative contributions.\textsuperscript{258} In effect, the Ninth Circuit's approach—denying authorship to anyone except the person with ultimate creative control—suggests that joint authorship of a motion picture should be the exception rather than the rule.

\textsuperscript{255} Aalmuhammed, 202 F.3d at 1235; see supra note 228 and accompanying text.

\textsuperscript{256} Even where the screenplay is not prepared as a work made for hire, a producer who obtains permission to film a writer's screenplay will ordinarily insist on ultimate creative control over the finished film. The same arrangement is likely any time one party assumes most or all of the financial risk of creating a copyrightable work.

\textsuperscript{257} Numerous authorities recognize that a motion picture is the product of many acts of authorship. See, e.g., House Report, supra note 1, at 52, reprinte in 1976 U.S.C.C.A.N. 5659, 5665 (contributions of director and camera crew filming sporting event constitute "authorship"); Quintanilla v. Texas Television, Inc., 139 F.3d 494, 499 & n.24 (5th Cir. 1998) (dicta) (following Easter Seal, and treating director of musical performance as joint author of that performance); Easter Seal Soc'y for Crippled Children and Adults v. Playboy Enters., 815 F.2d 323, 337 (5th Cir. 1987) (videotape of musical performance could be jointly authored by television station and musical performer where both performance and recording process were original and creative) (citing House Report, supra note 1, reprinte in 1976 U.S.C.C.A.N. 5659, 5736-37; Nimmer & Nimmer, supra note 2, § 6.05 (film is joint work whose authors include writer, director, photographer, actors, and arguably others such as set and costume designers)).

\textsuperscript{258} To the extent that the "master mind" is the person with ultimate creative control, in the case of motion pictures such control would normally vest in one person, typically the producer, who acts on behalf of a corporate employer.
The absurdity of this approach is apparent. It would make work made for hire contracts largely superfluous in the motion picture industry, where ultimate creative control typically vests in a party (typically the producer) who contributes little or none of the detailed creative expression. In addition, the suggestion that control indicates sole authorship invites an end-run around the Supreme Court’s holding in *CCNV II* that neither actual control nor the right to control the content of a collaborative work is itself sufficient to shift authorship to the controlling party.259

*Aalmuhammed*’s false equating of creative control with sole authorship means that the most collaborative works—such as sound recordings, motion pictures, computer software, and other works that require creative input from many persons—are the least likely to qualify as joint works. Typically, as the number of creative participants in a project increases, it is more likely that ultimate creative control will be vested in one party, usually one who is accountable to the persons who have invested in the project.260

The Ninth Circuit suggested that its narrow interpretation of authorship gave proper effect to the purposes of copyright protection:

The Constitution establishes the social policy that our construction of the statutory term “authors” carries out. The Founding Fathers gave Congress the power to give authors copyrights in order “[t]o promote the progress of Science and useful arts.” Progress would be retarded rather than promoted, if an author could not consult with others and adopt their useful suggestions without sacrificing sole ownership of the work. Too open a definition of author would compel authors to insulate themselves and maintain ignorance of the contributions others might make. Spike Lee could not consult a scholarly Muslim to make a movie about a religious conversion to Islam, and the arts would be the poorer for that.261

The last assertion is, of course, a gross overstatement. Like the Second and Seventh Circuits before it, the Ninth Circuit disregarded the impact of the Goldstein joint authorship test; many scholarly contributions to a creative work will consist largely of uncopyrightable ideas and information rather than

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260 Even *Notage* itself did not suggest that a work can have only one "master mind" and thus only one author. In the passages quoted in *Burrow-Giles*, see *supra* text accompanying note 250, the court used many different terms to describe the authorship process, giving no special importance to the "master mind" phrase.
261 *Aalmuhammed*, 202 F.3d at 1235.
substantial copyrightable expression, and thus will not give rise to colorable claims of joint authorship regardless of the parties’ subjective intent.

VII. FREEING THE CAPTIVE CO-AUTHOR

By adopting a test of joint work intent which focuses on the intended or perceived relationship between putative co-authors rather than on each party’s intent with respect to the creative work itself, the Second, Seventh, and Ninth Circuits have strayed from the purpose of the 1976 joint work provisions. The relationship test has allowed joint work status to be denied even when several collaborators have made substantial copyrightable contributions with the contemporaneous intent to merge those contributions inseparably or interdependently into a unitary work. This restrictive view of joint authorship goes far beyond what is necessary to distinguish joint works from derivative works, compilations, and collective works, and denies economic rewards to persons whose creative efforts satisfy the constitutional and statutory concepts of authorship.

The relationship test is also difficult to apply in practice. By requiring an assessment of subjective intent, it will in many cases significantly increase the trial court’s fact-finding burden. In addition, even in a case in which each party’s intent is relatively clear, the logic of the test becomes difficult to apply whenever a work has more than two significant creative contributors. For example, if four parties make substantial copyrightable contributions to a work, but only three of them intend to share authorship, is the fourth co-creator not a co-author? Does it matter if these three have agreed among themselves to exclude the fourth? What if each contributor has a slightly different intention as to which of the four should be the co-authors? Consider this example:

A intends to co-author with B and C, but not D.
B intends to co-author with A and D, but not C.
C and D intend to co-author with each other, but not with A or B.

If A is the only “dominant” author, then the relationship test dictates that A’s intent must govern. This appears to make A, B, and C co-authors, except for the complicating fact that C does not share this intent. Is C therefore excluded from

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263 See supra notes 131-33, 166-217 and accompanying text.
the authorship group, or is C's intent irrelevant because C is not dominant? Alternatively, suppose that A and C are equally dominant; because each of them has a different intent regarding co-authors, whose intent governs? Obviously, many other permutations of this problem are possible, but all present similar issues. If a single integrated work is produced by this group of four creators, the relationship test makes a determination of authorship extremely difficult.

Even if a work has only two creators, the relationship test can lead to conundrums. Suppose each makes a substantial copyrightable contribution, and each intends to be the sole author of the resulting work. If the intent of the dominant author governs, then a court would apparently be forced to grant sole authorship to whichever party made the greater contribution, in terms of control and/or quantity of material provided. This result is flatly inconsistent with the rule that joint authors need not make equal contributions.

It might be reasonable to believe, as the Second Circuit suggested in *Childress*, that Congress intended to exclude from the joint work definition many works that reflect the traditional contributions of editors and collegial critics, or at least that Congress would have endorsed such an exclusion if it had ever considered the question. But, in many cases, the effect of the relationship test will be to categorically exclude such a work from the joint work category even where the editor or colleague has made a significant copyrightable contribution, because a "dominant" author may nonetheless regard the contributor as a non-author. Yet the mere fact that a particular creative contributor may accurately be described as an editor, a colleague, a co-worker, a dramaturg, a consultant, or even a research assistant should not mean that such a person cannot, under appropriate circumstances, be found have made a contribution sufficient to qualify as a joint author. On some occasions, persons acting in these capacities may very well contribute large amounts of copyrightable expression to the finished work. Even if a line must be drawn somewhere to distinguish helpful commentary from joint authorship, in selecting a method for carrying out such line-drawing the *Childress* Court offered no reasoned justification for the test that it chose.

Courts have been reluctant to entertain joint authorship claims because the legal consequence of establishing such a claim may afford even a very minor

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264 *See supra* note 115 and accompanying text.
265 *See Lape, supra* note 14, at 63-64 (observing a "bias" in some courts against recognizing joint author status of certain professionals, such as architects).
contributor of copyrightable material an equal level of ownership in the work.\textsuperscript{266} This concern might be allayed somewhat if a more flexible rule were adopted under which authorship would be allocated according to the relative amount of each party's contribution to the total creative effort.\textsuperscript{267} Such a rule, however, would burden courts with extensive fact-finding and require them to exercise the kind of aesthetic judgments (with regard to qualitative assessments of each party's contribution) which courts have wisely avoided in copyright disputes,\textsuperscript{268} but which would be unavoidable if the court were required to determine, for example, whether someone was a twenty percent or thirty percent co-author. In addition, while altering the percentages of ownership would change the way profits and termination rights were allocated among the joint owners, it would not alter the legal right of each owner independently to grant nonexclusive licenses, or the legal inability of each owner independently to grant exclusive licenses or assignments. Thus, abandoning the default rule of equal and undivided ownership would add complexity to the analysis while failing to address some of the most significant legal consequences of joint work status.

The circuit courts, which have so uncritically accepted the relationship test as a necessary means to limit joint authorship claims, have failed to consider alternative approaches which might achieve the same goal more fairly and effectively by reducing the likelihood that a substantial minority contributor will be denied co-authorship rights. The approach proposed here returns the focus of the analysis to the nature of each putative author's contribution to the merged work, and creates a rebuttable presumption that each party that produces substantial copyrightable expression with the intent to merge it inseparably or interdependently with another's is a joint author of the resulting work.

In several of the cases which have employed the relationship test to deny joint authorship, courts have given insufficient attention to the magnitude of the putative co-author's contribution. In \textit{Childress} and \textit{Aalmuhammed}, the contribution made by the party claiming joint authorship was probably not independently copyrightable under the Goldstein test, because it appeared to consist almost entirely of general ideas and research. Similarly, the Seventh Circuit's reasoning in \textit{Erickson} ignored the dispositive effect of the Goldstein

\textsuperscript{266} See supra notes 1-2, 136 and accompanying text.
\textsuperscript{267} Such an allocation is illustrated by the plaintiff's request for 16% of the royalties generated by \textit{Rent} in \textit{Thomson}. See supra note 181.
\textsuperscript{268} See, e.g., \textit{Beinstein v. Donaldson Lithographing Co.}, 188 U.S. 239, 252 (1903); House Report, supra note 1, at 54; H.R. REP. NO. 101-735, at 21 (1990) (originality is to be determined without reference to "subjective determinations of artistic or aesthetic merit").
copyrightability test, even while purporting to apply it.\textsuperscript{269} Thus, each of those joint authorship claims might have been rejected without resort to the relationship test.

Most concerns about peer reviewers or other helpful critics claiming co-authorship\textsuperscript{270} could be alleviated under the alternative analysis proposed here. Many, if not most, contributions by peer reviewers or other critics would probably not be separately copyrightable, because they consist of ideas rather than copyrightable expressions of those ideas. In other cases, a more rigorous application of the Goldstein standard (one that demands greater originality than is called for under \textit{Feist}), such as that suggested by the Ninth Circuit in \textit{Aalmuhammed}, would eliminate joint work claims that might arise when someone makes a relatively minor contribution of copyrightable expression.\textsuperscript{271}

Where a peer reviewer or critic makes a more substantial offering of copyrightable expression, the author who is concerned about potential joint authorship claims by peer reviewers or helpful critics always has the power to avoid joint authorship claims (or, alternatively, infringing derivative work claims) by choosing not to incorporate any substantial copyrightable expression supplied by another, or by seeking a waiver from the other party \textit{after} receiving her suggestions but prior to incorporating any of this copyrightable material.\textsuperscript{272} Thus,

\begin{itemize}
\item \textsuperscript{269} See Erickson v Trinity Theatre, Inc., 13 F.3d 1061, 1071 (7th Cir. 1994). \textit{See supra} note 156 and accompanying text.
\item \textsuperscript{270} See \textit{supra} notes 115, 161, 261 and accompanying text.
\item \textsuperscript{271} See \textit{supra} notes 234-36 and accompanying text. If the reviewer were to suggest a minor organizational change, that idea would probably fail a more rigorous Goldstein test. However, if the reviewer made extensive organizational suggestions, such a contribution might constitute substantial copyrightable expression. (At the extreme, a total rewrite is simply a massive organizational change.) An author who incorporates such extensive organizational suggestions could seek a waiver from the reviewer and thereby acquire a license rather than a co-author.
\item \textsuperscript{272} It might be argued that peer reviewers should be presumed to grant a royalty-free implied license to incorporate their suggestions into the reviewed work (perhaps on the ground that this is so customary that it would be within the reasonable expectations of both parties), in which case the burden would fall on the peer reviewer to rebut this presumption by making clear his or her contrary intent. \textit{Cf.} Oddo v. Ries, 743 F.2d 630, 634 (9th Cir. 1984) (finding that partnership had implied license to use author’s pre-existing writings insofar as they were incorporated in manuscript contributed by that author to the partnership); Effects Assoc., Inc. v. Cohen, 908 F.2d 555, 558-59 (9th Cir. 1990) (finding that filmmaker had implied license to use special effects footage created and prepared by plaintiff at filmmaker’s request, even though contract was silent regarding copyright ownership) (quoting \textit{Nimmer & Nimmer}, \textit{supra} note 2, § 10.03[A] (“[a] nonexclusive license may be granted orally, or may even be implied from conduct”)).
\end{itemize}

Such a categorical implied waiver would be unnecessary and inappropriate under a more rigorous application of the \textit{Goldstein} test. Joint authorship would arise under this standard only if there were a \textit{substantial} appropriation of another’s copyrightable material. If, for example, the reviewer enclosed an excerpt from her own work in progress, suggesting that the writer might benefit from these perspectives, it would not be reasonable to infer that the reviewer was thereby granting permission to reproduce portions of that manuscript.
one of the fears so often articulated by courts as a justification for the relationship test turns out to be exaggerated: no author is compelled to incorporate the copyrightable work of a peer reviewer, and adoption of a more rigorous approach to the Goldstein test will eliminate much uncertainty.

In contrast to the cases that might have rejected joint authorship claims simply by undertaking a more diligent Goldstein analysis (and not even necessarily a more rigorous one) in place of the relationship test, the plaintiffs in Thomson and Clogston might have fared better under the approach proposed here. Because the plaintiff dramaturg may well have contributed substantial copyrightable material to Rent, her contribution might have entitled her to the presumption of joint authorship, in which case she would prevail unless Larson's heirs could establish that she had granted him an express or implied license to use her work. If they could not meet this burden, Thomson would have been recognized as a joint author. Similarly, in Clogston, the substantiality of the photographer's contributions to the medical text might have been sufficient to shift the burden to the AAOS to establish the existence of an implied license.

Abandonment of the relationship test will put increased pressure on the distinction between copyrightable and uncopyrightable contributions in those circuits that have already adopted the Goldstein test. In other circuits, it will make adoption of the Goldstein test more likely. In either case, courts will need to examine the content of a putative co-author's contribution more carefully, because a dominant author's subjective intent will no longer render such an examination superfluous. Much of the problem might be solved by heightening the originality requirement under the Goldstein standard in order to disregard or give less weight to those contributions which, by themselves, would warrant only a low level of copyright protection.\textsuperscript{273} This more rigorous standard for co-authorial contributions might aptly be described as "originality with teeth." By analogy to the fair use analysis, when some copyrightable

\begin{footnotesize}
\begin{enumerate}
\item Similarly, if one playwright asks another for help, and incorporates dialogue or scenes written by the other, the intent to commingle combined with the substantiality and copyrightability of each contribution should be conclusive as to joint work status, absent evidence of a license.
\item A stronger case for an implied license could arise when the reasonable expectations of the two parties are clearly established by trade or custom; for example, when a newspaper or journal editor suggests (or requires) changes to be made in a free-lancer's article, the customary relationship between editors and writers will often, though not always, support the inference of a license.
\item For example, a minor organizational change might satisfy Feist's minimal creativity requirement, see supra text accompanying notes 241-42, but might still warrant only a weak copyright because of its low level of creativity.
\end{enumerate}
\end{footnotesize}
contributions to a work are significantly more creative than others, in many cases granting an economic reward only to the authors of the more creative materials may better advance the goals of copyright law than diluting the impact of that economic reward by splitting it among a larger number of minor contributors.\textsuperscript{274}

The question whether joint authorship claims should be held to a higher standard of authorship than the \textit{Feist} requirement of originality and minimal creativity is an interesting one. The widely-endorsed Goldstein test, which requires joint authors to contribute copyrightable expression rather than mere ideas, arguably incorporates nothing more demanding than the \textit{Feist} standard of copyrightable authorship. However, neither the Goldstein test nor the Nimmer de minimis test forecloses adopting a higher standard, and there is precedent in copyright law for imposing a higher standard of originality in some contexts than in others.\textsuperscript{275} Thus, although \textit{Aalmuhammed} was unpersuasive in its attempt to

\textsuperscript{274} The distinction between strong and weak copyrights has been used in applying the fair use analysis, under which more creative works, which have stronger copyrights, receive a higher degree of protection. \textit{See}, e.g., \textit{Campbell v. Acuff-Rose Music, Inc.}, 510 U.S. 569, 586 (1994) ("[S]ome works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."). \textit{See generally 17 U.S.C. § 107} (1994) (listing fair use factors).

\textsuperscript{275} In \textit{Gracen v. Bradford Exchange}, 698 F.2d 300 (7th Cir. 1983), for example, the Seventh Circuit endorsed a higher originality standard for copyright in paintings which are derivative works than for copyright in paintings created "from life." An exact photographic likeness of a subject painted from life, the court observed, would be copyrightable, while a greater difference between an underlying work and a derivative work would be required for the latter to be copyrightable as a derivative work. \textit{Id.} at 305. The higher originality standard for derivative works was necessary, Judge Posner believed, "to avoid entangling subsequent artists depicting the underlying work in copyright problems." \textit{Id.} (adding that if the originality requirement were interpreted "too liberally" with respect to derivative works, "it would paradoxically inhibit rather than promote the creation of such works by giving the first creator a considerable power to interfere with the creation of subsequent derivative works from the same underlying work").

Interestingly, however, post-\textit{Feist} decisions (even in the Seventh Circuit) have applied the \textit{Feist} standard of copyrightability regardless of whether the work in question is derivative. \textit{See}, e.g., \textit{Pickett v. Prince}, 207 F.3d 402, 405 (7th Cir. 2000); \textit{Matthew Bender & Co. v. West Publ'g Co.}, 158 F.3d 674, 680 (2d Cir. 1998), \textit{cert. denied}, 526 U.S. 1154 (1999). Furthermore, at least one court has assumed, without discussion, that the \textit{Feist} standard of authorship applies even when the question at issue is the identity of the author rather than the copyrightability of the work. \textit{See}, e.g., \textit{Quintanilla v. Texas Television, Inc.}, 139 F.3d 494, 499 (5th Cir. 1998) (dicta) (indicating that the \textit{Feist} standard would determine whether concert director's "contributions were so minimal that he is not entitled to joint authorship status").

Although the merits of \textit{Gracen}'s dual originality test are debatable, such a test may be more appropriate in the joint authorship analysis than in the derivative work analysis. In the latter application, \textit{Gracen}'s heightened originality standard determines whether a given work is copyrightable at all, and to the extent the \textit{Gracen} standard is more demanding than the \textit{Feist} standard, \textit{Gracen}'s heightened originality requirement may be an invalid interpretation of § 102 of the Copyright Act, 17 U.S.C. § 102 (1994). However, applying a heightened originality standard in the joint works analysis does not have the effect of denying copyright to a work that meets the \textit{Feist} standard of originality. Instead, it merely determines the identity of the author(s) of
ground its dual definition of authorship in *Feist* and *Burrow-Giles*, and failed to offer any other justification for adopting this distinction, a more demanding version of the Goldstein test for joint authorship could probably be justified on the ground that it would lead to more predictable and fairer joint work determinations.

Under the approach proposed here, putative co-authors initially will bear a significant burden in establishing what they contributed to the merged work. Even without a significant heightening of the Goldstein standard, this required showing is likely to be more demanding than the showing that has been required by the Second, Seventh, and Ninth Circuits in their rather casual applications of the Goldstein test. Those courts have given short shrift to this part of the analysis, preferring to ground their denials of joint work status on the dominant author’s lack of co-authorial intent. Under a heightened version of the Goldstein standard, the question will be not whether a putative co-author has made a *copyrightable* contribution, but whether he or she has made a *substantial copyrightable* contribution. If a putative co-author satisfies the burden of demonstrating a substantial copyrightable contribution, then the litigant seeking to deny the co-authorship status of this collaborator will bear the burden of demonstrating that the putative co-author’s contribution was used under an express or implied license.277

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276 Professor Lape has suggested that, if two collaborators meet the copyrightability and intent-to-merge requirements for joint authorship, rather than permitting the dominant author unilaterally to deny joint work status, such status should be denied only if *neither* collaborator intends to have a co-author. Lape, *supra* note 14, at 63 (describing this as a “safer basis” for excluding certain contributors such as “typical editors”). In the same situation, the approach suggested here would grant joint work status unless one of the contributors granted a license, express or implied, to the other contributor. The burden of establishing that such a license was granted would fall on the contributor seeking to claim sole authorship status.

277 *Cf.* Tasini v. New York Times Co., 206 F.3d 161, 171 (2d Cir. 2000) (in copyright infringement case where alleged infringer raises license defense, burden is on alleged infringer to prove existence of license), *cert. granted*, 121 S. Ct. 425 (2000). A “sliding scale” approach might be appropriate, under which an implied license would be more readily inferred when only a weak copyright is at stake, based on the rationale that the party contributing the weakly copyrightable material will suffer only minor injury if the court erroneously concludes that an implied license was granted. However, in some cases a collaborator’s contribution might be subject to a weak copyright and yet still be quantitatively substantial; perhaps the sliding scale should take account of the quantity of copyrightable expression which is contributed as well as the strength or weakness of its copyright.

Any contributor of copyrightable material who fails to qualify as a co-author would retain ownership of his or her contribution, subject to any express or implied license to the authorial collaborators. In no event could an implied *transfer* of copyright be recognized, because this is foreclosed by statute. 17 U.S.C. § 204(a) (1994). As used here, the term “transfer” includes assignments as well as exclusive licenses. *Id.* § 101 (defining “transfer of copyright ownership” to include assignments and exclusive licenses).
The relationship test places one collaborator at the mercy of another’s subjective intent, even if that intent is never communicated.\textsuperscript{278} The approach proposed here, in contrast, allows each party to be fully aware of the relevant facts at the same time their collaboration is taking place. If one collaborator creates substantial copyrightable expression for inclusion in a merged work, the other collaborator’s acceptance of that material is the affirmative act that completes the act of co-authorship. Avoiding the affirmative act of acceptance precludes joint work status; obtaining a license or assignment achieves the same legal result while still allowing the sole author to use the other’s copyrightable material.\textsuperscript{279}

Testing authorship status by examining the perceived relationship between co-creators has complicated, rather than simplified, the joint authorship analysis by introducing factors that bear no relationship to the authorial efforts of the putative co-authors. Greater complexity in the definition of authorship reduces rather than enhances the economic incentive to produce works of authorship. Wherever the line is drawn between authorial and non-authorial contributions—whether the existing Goldstein standard is heightened, or simply applied more diligently than it has been thus far—replacing the relationship test with the test proposed here will reduce this complexity and, more importantly, will refocus the

\textsuperscript{278} As in the case of any copyright grant, an implied license is subject to termination under § 203(a) of the Copyright Act. 17 U.S.C. § 203(a) (1994). This termination right, however, is subject to a derivative works exception, \textit{id.} § 203(b)(1), which permits the continued exploitation of any derivative works lawfully created prior to termination. Thus, regardless of whether the burden of proof regarding an implied copyright license falls on the putative sole author or the putative joint author, the derivative works exception will permit the copyright owner to continue exploiting those works which incorporate the licensed material, although creation of new derivative works would require a new license. \textit{Id.}

The more challenging question, under current law, is whether copyright licenses are revocable, and if so, whether a comparable exception for pre-revocation derivative works should be imposed. Without such an exception, a strong argument can be made that revocation should be preempted by federal copyright law, but there is no clear authority on this point. \textit{See} Korman v. HBC Fla., Inc., 182 F.3d 1291, 1296-97 (11th Cir. 1999) (allowing revocation, but not addressing derivative works exception); Walthal v. Rusk, 172 F.3d 481, 484-85 (7th Cir. 1999) (similar); Ran o v. Sipa Press, Inc., 987 F.2d 580, 586 (9th Cir. 1993) (holding that revocation was preempted by § 203); \textit{see also} Nimmer & Nimmer, \textit{supra} note 2, §§ 10.02[B], 13.07 n.18. This issue is certainly ripe for Supreme Court review.

\textsuperscript{279} An express license or assignment should include, and an implied license would probably be deemed to include, a waiver of the co-author’s attribution rights under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1994). This would permit the grantee to present the work to the public as solely-authored. \textit{See}, \textit{e.g.}, Smith v. Montoro, 648 F.2d 602, 606-08 (9th Cir. 1981) (replacing actor’s real name with false name in film credits, without his consent, is actionable as false designation of origin under section 43(a) of Lanham Act); \textit{cf.} King v. Innovation Books, 976 F.2d 824, 828-29 (2d Cir. 1992) (applying section 43(a) to uphold preliminary injunction against unauthorized “possessor credit” on motion picture where credit falsely suggested close connection between film and author of short story on which it was based); Gilliam v. American Broad. Cos., Inc., 538 F.2d 14, 24-25 (2d Cir. 1976) (granting preliminary injunction against distribution of television programs altered without consent of authors identified in credits).
joint work analysis squarely on the nature of each putative author’s contribution to the finished work. The result should be a test that leads to greater predictability and a more efficient allocation of the economic rewards that are intended to stimulate creative effort.