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THE CONTRIBUTION REQUIREMENT TO A JOINT WORK UNDER THE COPYRIGHT ACT

I. INTRODUCTION

In any collaboration between two or more people to create a work, there is no guaranty that each contributor will be able to obtain a copyright as a joint author. This is true even if the contribution is so significant that, without it, no copyrightable work would be possible. This problem exists because of a split among federal circuit courts regarding the contribution requirement, or the measure of contribution necessary to qualify someone as a "joint author."

While the outcome of the vast majority of joint authorship cases has hinged on the presence or absence of intent¹ to create a joint work, the contribution requirement is another critical element upon which cases have been decided. Recently, courts have found it more expeditious to dismiss a claim of joint authorship by applying the bright-line rule of "copyrightability" to each putative author's contribution, rather than to take the time to determine the putative authors' intent at the time the work was created.²

This comment examines the current state of uncertainty regarding the level of contribution necessary to be classified as a joint author. It finds that the copyrightability requirement, which has developed in case history since 1981, circumvents the goals of the Copyright Act.³

II. STATEMENT OF THE LAW

Copyright law is governed by the federal Copyright Act ("the Act").⁴ It provides that the exclusive rights of copyright⁵ "vest[] initially in the [statutory] author or authors of the work."⁶ Under the Act, au-

1. *Eckert v. Hurley Chicago Co.*, 638 F. Supp. 699, 702 (N.D. Ill. 1986). See Therese M. Brady, Note, *Manifest Intent and Copyrightability: The Destiny of Joint Authorship*, 17 FORDHAM URB. L.J. 257 (1989).

2. See *Meltzer v. Zoller*, 520 F. Supp. 847, 853 (D.N.J. 1981); *Ashton-Tate Corp. v. Ross*, 728 F. Supp. 597, 602 (N.D. Cal. 1989), *aff'd*, 916 F.2d 516 (9th Cir. 1990).

3. See *infra* notes 134-43 and accompanying text. Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1990).

4. 17 U.S.C. §§ 101-810. This Act accomplished "a fundamental and significant change in the . . . law by adopting a single system of Federal statutory copyright." *Meltzer v. Zoller*, 520 F. Supp. 847, 853 (D.N.J. 1981) (citing H.R. REP. NO. 147, 94th Cong., 2d Sess. 129-30, *reprinted in* 1976 U.S.C.A.N. 5745).

5. 17 U.S.C. §§ 106-18.

6. *Id.* § 201(a).

thorship creates immediate ownership rights.⁷ The author is the person who actually creates the work, the person who translates an idea into a fixed expression entitled to copyright protection.⁸ The Act states that "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . under the authority of the author is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."⁹ Therefore, the determination of authorship requires a judgment as to who "created" the work and whether the finished product qualifies as a statutory "work." Consequently, authorship is a question of fact to be determined by the fact-finder.¹⁰

The sole exception to the rule of authorship is the "work made for hire" doctrine, which the Act codifies.¹¹ This doctrine presumes that the statutory author is the employer of the creator of a work unless the parties have agreed otherwise.¹² It is initially limited by provisions which permit it to be applied only under certain circumstances.¹³ The United States Supreme Court has further limited the doctrine in *Community For Creative Non-Violence v. Reid* ("C.C.N.V. v. Reid"),¹⁴ making it more difficult to achieve the benefits of authorship through the "work for hire"

7. *Id.* While an assignment, which transfers ownership, is possible, an owner of a copyright does not always benefit from the same protections as a statutory author. An assignment may not contain the author's complete bundle of rights. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 5.8 (1989). See also *id.* § 5.7 (the "Pushman Doctrine," sale of material object distinguished from sale of copyright).

8. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

9. 17 U.S.C. § 101.

10. *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1086 (9th Cir. 1989) (citing *Del Madera Properties v. Rhodes and Gardner, Inc.*, 820 F.2d 973, 980 (9th Cir. 1987)).

11. "[T]he employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." 17 U.S.C. § 201(b) (citation omitted).

12. *Id.*

13. A "work made for hire" is:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Id. § 101.

14. 490 U.S. 730, 751-52 (1989) (retention of right to control finished product is not dispositive that hiring party is "employer" under the work for hire doctrine; courts are to first apply common law rules of agency to determine if the creator is an independent contractor or an employee under the work-for-hire doctrine).

doctrine.¹⁵

Melville B. Nimmer has maintained that where the contributions of each co-author are either inseparable or interdependent, "the only workable solution is to regard each author as the joint owner of an undivided interest in the entire work."¹⁶ The difficulty lies in identifying when someone is a co-author or joint author. The Copyright Act does not define a joint author, but it does define a "joint work."¹⁷ "A 'joint work' is 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."¹⁸ When analyzed, this definition requires proof of three factors: (1) that a unitary work exists in which the different parts are inseparable or interdependent; (2) that intent existed on the part of both authors to create a unitary work; and (3) that contributions were made by both individuals.

The "work for hire" doctrine and joint authorship are the only two methods available to determine and protect an author's rights when more than one person could be an author of an original work.¹⁹ The Supreme Court's decision in *C.C.N.V. v. Reid*²⁰ limiting the "work for hire" doctrine has made it even more important that the requirements for joint authorship now be clarified.

A. The Work as a Unitary Whole

A unitary work created by joint authors results from "a joint laboring in furtherance of a common design"²¹ in which the contributions by two or more authors are "merged into inseparable or interdependent parts of a unitary whole."²² Examples of a work made of inseparable parts are a novel and a painting.²³ In contrast, a motion picture, an op-

15. See Alan S. Wernick, *The Work Made For Hire and Joint Work Copyright Doctrines After C.C.N.V. v. Reid: "What! You Mean I Don't Own it Even Though I Paid in Full for It?"*, 13 HAMLINE L. REV. 287 (1990).

16. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.02 (1990) [hereinafter NIMMER].

17. 17 U.S.C. § 101. But cf. NIMMER, *supra* note 16, § 6.01 ("This definition . . . is improperly designated. It is in fact a definition of joint authorship.").

18. 17 U.S.C. § 101.

19. "Original works" as referred to here does not include collective and derivative works. See *infra* notes 122, 123 respectively.

20. 490 U.S. 730 (1989). See *supra* note 14.

21. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266, 267 (2d Cir.) (L. Hand, J., quoting *Levy v. Rutley*, L.R. 6 C.P. 523, 529 (1871)), *modified*, 140 F.2d 268 (2d Cir. 1944).

22. 17 U.S.C. § 101.

23. NIMMER, *supra* note 16, § 6.04 (citing H.R. REP. No. 1476, 94th Cong., 2d Sess. 120 (1976)).

era, and the words and music of a song consist of interdependent parts.²⁴ For purposes of domestic copyright law, no distinction exists between an inseparable and an interdependent work as long as a unitary work results.²⁵

B. Intent

"[T]he touchstone in determining whether a work is of joint authorship is 'the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit.'"²⁶ This requires that each author intend at the moment of the creation that the contribution be part of a work to which another will also make a contribution.²⁷

In *Aitken v. Empire Construction Co.*,²⁸ the court held that intent to create a joint work was lacking at the time a developer of single family residences had first designed a house.²⁹ An architectural firm, Aitken, Hazen, Hoffman, Miller, P.C. ("Aitken"), brought a copyright infringement action against the developer who had hired the architectural firm to design an apartment complex.³⁰ The developer wanted Aitken to incorporate into a new design features similar to those in other buildings already designed and built by the developer.³¹ Later, the developer copied the architectural firm's drawings and used them to construct a second apartment complex on a neighboring property.³² The court concluded that Aitken's architectural drawings could not be deemed a joint work of the developer and the architect, even though previous design elements of the developer had been incorporated, because the developer had lacked the intent at the time he created those design elements to later merge

24. *Id.*

25. *Id.*

26. *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 259 (D. Neb. 1982) (citing H.R. REP. NO. 1476, 94th Cong., 2d Sess. 120, reprinted in 1976 U.S.C.C.A.N. 5659 (committee reports discussing the Copyright Act of 1976)).

27. *Eckert v. Hurley Chicago Co.*, 638 F. Supp. 699, 702 (N.D. Ill. 1986) (citations omitted). One court, using the now superseded "Twelfth Street Rag" doctrine, found that the author's intent need not be at the moment of the contribution's creation, but may arise at another time if the author or the author's assignee then intends that the contribution become an inseparable or interdependent part of a unitary whole. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569 (2d Cir.), modified on reh'g, 223 F.2d 252 (2d Cir.) (the "Twelfth Street Rag" case), superseded by statute as stated in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989); NIMMER, *supra* note 16, § 6.03, at 6-8. See also H.R. REP. NO. 1476, reprinted in 1976 U.S.C.C.A.N. 5736.

28. *Aitken*, 542 F. Supp. 252.

29. *Id.* at 259.

30. *Id.* at 254.

31. *Id.*

32. *Id.* at 255.

them into the design of another.³³ The court found that Aitken was entitled to be the sole copyright holder of the architectural drawings, regardless of the quantity or form of the developer's contribution, because the requisite intent to create a joint work was absent in the developer at the time he had created his contribution.³⁴

C. The Contribution Requirement

All authorities agree that while a joint author's contribution need not equal or approximate that of the other joint author if the intent element is present,³⁵ the contribution must be a creative and an original addition to the work.³⁶ In addition, some courts³⁷ require that each contribution qualify as independently copyrightable.³⁸ Consequently, to prove copyrightability, one must show that the expression is both (1) original or innovative, and (2) "fixed in a tangible medium."³⁹

Other courts⁴⁰ adopt a more flexible view with regard to joint works, requiring that the contribution be both (1) original and (2) "significant,"⁴¹ or at least "more than *de minimis*."⁴² Under these authorities, in order to be protected by the Copyright Act, a fixed expression is required only of the work *as a whole*.⁴³

III. THE QUANDARY: HOW TO AFFORD PRACTICAL PROTECTION?

"The foundation of federal copyright law is that only expressions of

33. *Aitken*, 542 F. Supp. at 259.

34. *Id.* at 259-60.

35. *Eckert v. Hurley Chicago Co.*, 638 F. Supp. 699, 704 (N.D. Ill. 1986).

36. *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 652 (S.D.N.Y. 1970), *aff'd on other grounds*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972); *Eckert*, 638 F. Supp. at 704.

37. *See, e.g., Ashton-Tate Corp. v. Ross*, 728 F. Supp. 597 (N.D. Cal. 1989), *aff'd*, 916 F.2d 516 (9th Cir. 1990); *Meltzer v. Zoller*, 520 F. Supp. 847 (D.N.J. 1981); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990).

38. In order to be copyrightable an expression must be an "original work[] of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a).

39. *Ashton-Tate*, 728 F. Supp. at 601-02.

40. *See, e.g., 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.), *cert. denied*, 409 U.S. 997 (1972). *See also Levy v. Rutley*, L.R. 6 C.P. 523 (1871) (decided on absence of intent, but noting lack of "any cooperation"); *Maurel v. Smith*, 220 F. 195, 200 (S.D.N.Y. 1915) (stressing the impossibility of measuring each person's separate contribution), *aff'd*, 271 F. 211 (2d Cir. 1921).

41. *Picture Music*, 314 F. Supp. at 647; *Eckert*, 638 F. Supp. at 704; *but cf. Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (discussing originality and value of a work).

42. NIMMER, *supra* note 16, § 6.07 (citing *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640 (S.D.N.Y. 1970)).

43. 17 U.S.C. § 102(a).

ideas, not the ideas themselves, give rise to protected interests."⁴⁴ This is the premise upon which the Copyright Act was intended to function. The intention here is to protect the expression. To do so, the Act grants the author a limited monopoly on the work, which in turn encourages the author to produce other useful works. Does it make sense, then, to protect an expression created by two or more authors only if each author first reduced his or her contribution to a writing before it becomes interdependent or inseparable from the whole? The policy behind the Act clearly demonstrates that a unitary work created from the labor of two or more authors deserves equal protection even though one or both of the efforts were not reduced to an expression before being incorporated into the whole, as long as the requisite intent was present at creation.

Viewed from a practical, evidentiary standpoint, however, the requirement that each contribution be reduced to an expression makes perfect sense. Without it, how could a court draw a line? What is to stop anyone from making a spurious claim of a contribution to an author's work? If false claims can easily be made or harassment suits maintained for any period of time, then the author has not been protected. This undercuts the Copyright Act as a whole by allowing the exception to swallow the rule.

Although the problem in proving joint authorship may arise in any situation, the practical difficulties can be illustrated by the following hypothetical. A celebrity asks a well-known writer/ghost author to aid in writing the celebrity's autobiography. Assume that the arrangement between the two individuals precludes the possibility of a "work for hire." The celebrity supplies the material and outlines the structure of the book; the writer handles the finer creative nuances as well as the technicalities. They meet periodically to discuss memorable moments in the celebrity's life. The writer takes notes⁴⁵ and later weaves the celebrity's anecdotes into the overall structure of the book.

Under one set of authorities, the writer would be the sole author and the celebrity would have no rights to her own autobiography.⁴⁶ However, the more flexible *de minimis* approach would allow the celebrity to

44. *Ashton-Tate Corp. v. Ross*, 728 F. Supp. 597, 601 (N.D. Cal. 1989), *aff'd*, 916 F.2d 516, (9th Cir. 1990) (citing *Frybarger v. International Business Machs. Corp.*, 812 F.2d 525, 530 (9th Cir. 1987); *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir. 1983), *cert. denied*, 469 U.S. 1037 (1984); 17 U.S.C. § 102(b) (1977)).

45. For the purposes of this hypothetical case, it is important that the writer is the only person to fix an expression into a permanent copy.

46. *E.g.*, *Meltzer v. Zoller*, 520 F. Supp. 847 (D.N.J. 1981); *Ashton-Tate Corp. v. Ross*, 728 F. Supp. 597, 600 (N.D. Cal. 1989), *aff'd*, 916 F.2d 516 (9th Cir. 1990).

claim joint authorship.⁴⁷ An examination of the history of joint authorship and the contribution requirement reveals how such disparate results are possible.

IV. HISTORY OF THE CONTRIBUTION REQUIREMENT

The United States Constitution gave Congress the power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."⁴⁸ The Act serves to ensure dissemination of creative works and to promote the "harvest of knowledge so necessary to a democratic state."⁴⁹ Congress, through the Act, encourages and rewards creative work by "secur[ing] a fair return for an 'author's' creative labor."⁵⁰ By doing so, the general public benefits from the availability of the work.⁵¹

The current copyright law, enacted in 1976, contains a definition of a "joint work."⁵² It is largely unchanged⁵³ from its predecessor, the Copyright Act of 1909.⁵⁴ Although the 1909 Act did not expressly refer to a joint work, the doctrine of joint authorship had already been established in case law⁵⁵ that developed since the first federal copyright statute in 1790.⁵⁶

*Levy v. Rutley*⁵⁷ is the earliest recorded case discussing the requirements of joint authorship. In England in 1836, Wilks wrote a play for Levy. After receiving partial payment, Wilks promised to assign the rights to Levy upon receipt of the balance.⁵⁸ Levy produced the play after making minor alterations⁵⁹ and adding one new scene.⁶⁰ Wilks died

47. *E.g.*, *Maurel v. Smith*, 220 F. 195, 199 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921).

48. U.S. CONST. art. I, § 8, cl. 8.

49. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 545 (1985) (quoting *Harper & Row, Publishers v. Nation Enters.*, 723 F. 2d 195, 197 (2d Cir. 1983)); *see Stewart v. Abend*, 110 S. Ct. 1750, 1754 (1990).

50. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 431-32 (1984) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

51. *Id.*

52. 17 U.S.C. § 101 (1990).

53. NIMMER, *supra* note 16, § 6.01 n.1.

54. *Id.*

55. *Id.*

56. *Meltzer v. Zoller*, 520 F. Supp. 847, 853 (D.N.J. 1981).

57. *Levy v. Rutley*, L.R. 6 C.P. 523 (1871).

58. *Id.* at 524-25.

59. "The alterations here consisted mainly of some vulgar excrescences to attract the attention of a particular portion of the audience" *Id.* at 526 (Kingdon, Q.C. & Bullen).

60. *Id.* at 524.

before Levy had paid the balance.⁶¹ Subsequently, a third party, the defendant, produced the play and Levy sued for infringement as a joint author.⁶² Levy had to prove joint authorship⁶³ in order to have standing to maintain the action in copyright because the rights had never been assigned to Levy.⁶⁴

In disallowing Levy's action, the English court focused primarily on the absence of the author's intent to create a joint work.⁶⁵ One justice wrote, "I fail to discover any evidence that there was any co-operation of the two [alleged authors] . . . in any improvements either in the plot or the general structure."⁶⁶ At the same time, the court seemed unconcerned about the level of contribution⁶⁷ necessary to be a joint author as long as there was a "joint labouring in furtherance of a common design."⁶⁸ The court held that "[i]f the plaintiff and the author had agreed together to rearrange the plot, . . . possibly that might have made them joint authors of the whole."⁶⁹ As long as the authors intend to work together to create a work and both contribute to it, they are joint authors.⁷⁰ "[I]f two persons agree to write a piece, there being an original joint design, and the co-operation of the two in carrying out that joint design, there can be no difficulty in saying that they are joint authors of the work"⁷¹

In 1915, Judge Learned Hand cited *Levy v. Rutley*⁷² as the authority for his holding in *Maurel v. Smith*.⁷³ In that case, Maurel had written the scenario for an opera, Harry B. Smith had created the libretto, Robert B. Smith had authored the lyrics, and a fourth person had composed the music.⁷⁴ Each intended that his respective contribution would be merged with the contributions of the others to create the final work.⁷⁵ Maurel's scenario was utilized minimally in the creation of the libretto,

61. *Id.* at 525.

62. *Levy v. Rutley*, L.R. 6 C.P. 523, 523-24 (1871).

63. *Id.*

64. *Id.* at 528 (Byles, J.).

65. *Id.* at 529 (Keating, J.).

66. *Id.*

67. "The alterations or additions suggested or made by the plaintiff are not of such a substantial character as to make it a new drama." *Levy*, L.R. 6 C.P. at 526 (Kingdon, Q.C. & Bullen).

68. *Id.* at 529.

69. *Id.*

70. *Id.* at 530 (Monague Smith, J.).

71. *Id.*

72. *Levy*, L.R. 6 C.P. 523 (1871).

73. *Maurel v. Smith*, 220 F. 195, 199 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921).

74. *Id.* at 197-98.

75. *Id.* at 198.

and was not used at all in the development of the lyrics.⁷⁶ Maurel contributed nothing to the dialogue, music or lyrics of the finished work.⁷⁷ Upon completion, Harry B. Smith obtained a copyright to the complete libretto in his name alone and sold the rights to publication representing that the two Smiths were the sole authors.⁷⁸ Maurel brought a copyright infringement action claiming joint authorship rights. In finding that Maurel was entitled to be a joint author, Judge Hand wrote:

I do not think that it is in the least possible to undertake a satisfactory analysis of the extent of the mutual influences between the parts of such a piece. Even if they are not highly organized, at least they are like mosaics from which, though you may lift a stone, it loses the significance of the setting.⁷⁹

The *Maurel* decision established for the first time in the United States the key elements involved in joint authorship: intent, a common design, and an effort by the joint authors to achieve that design.⁸⁰

The balance of early twentieth-century case law provided little development of the contribution requirement. Most cases were decided based on the intention of the authors to create a unitary work, with little or no consideration given to the level of contribution required.⁸¹ In 1970, the "Three Little Pigs" case⁸² could have been decided based on lack of intent alone,⁸³ but the court chose to discuss the level of contribution as well. Walt Disney Productions, Inc. ("Disney") had produced, copyrighted and released a musical cartoon entitled "Three Little Pigs." The cartoon contained a tune written by Disney's employee, Frank E. Churchill, the refrain of which was "Who's Afraid of the Big Bad Wolf?"⁸⁴ Ann Ronell, acting independently, obtained a copy of the Disney score, lengthened the melody and added a few lyrics to make it con-

76. *Id.*

77. *Id.*

78. *Maurel*, 220 F. at 197.

79. *Id.* at 200.

80. *Id.* at 199-201.

81. See *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42 F. Supp. 859 (S.D.N.Y. 1942) (intention of author of lyrics and composer of music to merge contributions into a unitary work), *aff'd*, 140 F.2d 266 (2d Cir. 1944); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569 (2d Cir.), *modified on reh'g*, 223 F.2d 252 (2d Cir. 1955) (the "Twelfth Street Rag" case, extended "author's intent" to include intent of copyright assignee), *superseded by statute as stated in* *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). See also *supra* note 27.

82. *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.), *cert. denied*, 409 U.S. 997 (1972).

83. *Id.* at 647.

84. *Id.* at 642.

form with the customary proportions of popular songs.⁸⁵ The resulting product was submitted to Disney, which agreed to assign its rights to Ronell's publisher, Irving Berlin, Inc., in exchange for royalties.⁸⁶ Disney also agreed to pay Ronell one-fourth of its income from the song.⁸⁷ In her lawsuit, Ronell maintained that she and Disney had jointly authored the popular song.⁸⁸ The court found, however, that Ronell "did not add anything creative, original or substantial to the Disney source material."⁸⁹ It held that even if the intent element had been satisfied by the "Twelfth Street Rag" doctrine,⁹⁰ "a more substantial and significant contribution [is] required."⁹¹ While Ronell could have maintained an action in contract, the court concluded that she did not have standing to sue under the Copyright Act.⁹² She would have had standing under the Act only if her contribution had been something substantial.

Eleven years later, a more stringent standard than that in the "Three Little Pigs" case was applied to the contribution requirement for a joint work in *Meltzer v. Zoller*.⁹³ In *Meltzer*, a homeowner brought a copyright infringement suit against the architect and general contractor he had hired to design and construct a new home.⁹⁴ Meltzer, the homeowner, claimed that his sketches, which were incorporated into the architect's stock plans of a French colonial home, constituted contribution sufficient to qualify him as a joint author of the finished plans.⁹⁵ The court held that Meltzer was not an author because he was not the "creator" of the finished plans.⁹⁶ The statutory definition of "create" requires that the work be "fixed in a copy."⁹⁷ The court found that it was the architect alone who had "fixed" the design of the plans in the blueprints.⁹⁸ Going one step further, the court declared that Meltzer could not be a "joint author" because he was not an "author" under

85. *Id.*

86. *Id.* at 643.

87. Ronell contended that she was to receive one-third. *Picture Music*, 314 F. Supp. at 643.

88. *Id.* at 644.

89. *Id.* at 652.

90. The current Copyright Act expressly overrules the "Twelfth Street Rag" doctrine. *C.C.N.V. v. Reid*, 490 U.S. 730, 737 (1989); *NIMMER*, *supra* note 16, § 6.07, at 6-18 n.3; *see supra* note 27. *See also* "derivative work," 17 U.S.C. § 101.

91. *Picture Music*, 314 F. Supp. at 647; *see also NIMMER*, *supra* note 16, § 6.07, at 6-18 n.3.

92. *See id.* at 653.

93. 520 F. Supp. 847 (D.N.J. 1981).

94. *Id.* at 850-52.

95. *Id.* at 856-57.

96. *Id.* at 857.

97. 17 U.S.C. § 101.

98. *Meltzer*, 520 F. Supp. at 857.

copyright law as he had not fixed any ideas in a copy.⁹⁹ By taking this last step, the court made copyrightability of the contribution a requirement for joint authorship.

The court in *Ashton-Tate Corp. v. Ross*¹⁰⁰ used the same reasoning as the *Meltzer* court, but enunciated it more clearly.¹⁰¹ *Ashton-Tate* involved two computer programmers, Wigginton and Ross, who decided to collaborate on a spreadsheet program.¹⁰² During development the programmers had a difference of opinion regarding the marketing of the product.¹⁰³ Wigginton then merged his contribution with that of the plaintiff, a third party, to form a different spreadsheet program.¹⁰⁴ In the lawsuit, Ross alleged that he was a joint author because he had supplied a handwritten list of user commands to Wigginton, and those commands had been incorporated into the finished product created by Wigginton and the plaintiff.¹⁰⁵ The court held that the list consisted of non-copy-rightable ideas because they were neither innovative nor original, and they had not been reduced to an acceptable "fixed expression."¹⁰⁶ Copyright law is solely intended to protect memorialized expressions.¹⁰⁷ "[W]hen an author contributes only ideas to the development of a work, whether or not it is a 'joint work,' without reducing those ideas to an expression, that author does not obtain an interest in the work."¹⁰⁸

V. ANALYSIS

While intent is still the touchstone in determining whether joint authorship exists, the level of contribution has played a key role in the out-

99. *Id.*

100. 728 F. Supp. 597 (N.D. Cal. 1989), *aff'd*, 916 F.2d 516 (9th Cir. 1990).

101. See *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, 609 F. Supp. 1307 (E.D. Pa.) (In dictum the court adopted without elaboration the *Meltzer* court's requirement of copyrightability for joint authorship), *amended in part*, 609 F. Supp. 1325 (E.D. Pa. 1985), *cert. denied*, 479 U.S. 1031 (1987).

102. *Ashton-Tate Corp. v. Ross*, 728 F. Supp. 597, 600 (N.D. Cal. 1989), *aff'd*, 916 F.2d 516 (9th Cir. 1990).

103. *Id.*

104. *Id.*

105. *Id.* at 601.

106. The court held that a computer program must have been reduced to its source code in order to be a "fixed expression." *Id.* at 601-02 (citing *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984)).

107. *Ashton-Tate*, 728 F. Supp. at 601 (citing *Frybarger v. International Business Machs. Corp.*, 812 F.2d 525, 530 (9th Cir. 1987)); *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 105 S. Ct. 513 (1984). See also 17 U.S.C. § 102(a) & (b) (1977)).

108. *Ashton-Tate*, 728 F. Supp. at 601.

come of cases.¹⁰⁹ These holdings seem to demonstrate two patterns. The most recent pattern is the requirement that each person's contribution must be individually copyrightable before it is merged into the "unitary whole."¹¹⁰ The second pattern in determining joint authorship, which dates back to *Levy v. Rutley*,¹¹¹ requires only that the joint author's contribution be more than *de minimis* as long as the completed work can be copyrighted.¹¹²

Facially, the courts appear to disagree regarding the degree of contribution required, but in actuality they merely differ over the appropriate time to evaluate the sufficiency of a contribution to qualify a person as a joint author under the Copyright Act. Under the copyrightable contribution test, as first outlined in *Meltzer*,¹¹³ a court views the contribution through the eyes of the Act at the stage immediately before each effort is merged into the unitary whole, and again after the whole work has been formed. On the other hand, when using the *de minimis* test, a court views the contribution as an integral part of a completed work; the contribution itself is measured only insofar as it must have constituted something of substance to the completed work. Traditional statutory analysis must determine which of the two standards should be applied when deciding whether a putative joint author's contribution is sufficient.

A. The Policy Behind the Copyright Act

The overall policy behind intellectual property laws is to protect society's access to innovative works.¹¹⁴ The laws are designed to benefit society by broadening the availability to the public of potentially useful works. This is accomplished by creating and protecting rights in the author that allow the author, in turn, to obtain compensation for the effort involved in creating the work.¹¹⁵

To implement this policy, the Copyright Act is "intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; 'to afford greater encouragement to the pro-

109. *E.g.*, *Meltzer v. Zoller*, 520 F. Supp. 847 (D.N.J. 1981); *Ashton-Tate Corp. v. Ross*, 728 F. Supp. 597, 602 (N.D. Cal. 1989), *aff'd*, 916 F.2d 516 (9th Cir. 1990).

110. *See Meltzer*, 520 F. Supp. at 856-57; *Ashton-Tate*, 728 F. Supp. at 602.

111. *Levy v. Rutley*, L.R. 6 C.P. 523 (1871).

112. *See Maurel v. Smith*, 220 F. 195, 199 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921).

113. *Meltzer*, 520 F. Supp. at 853.

114. *Stewart v. Abend*, 110 S. Ct. 1750, 1764 (1990).

115. "[T]he limited monopoly conferred by the Copyright Act 'is intended to motivate creative activity of authors and inventors 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.'" *Id.* (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

duction of literary [or artistic] works of lasting benefit to the world.'"¹¹⁶ The Act attempts to give credit to the person(s) who supplied the "creative spark," without which the work would not exist.¹¹⁷

The United States Supreme Court has elaborated on Congress's method of achieving the policy goals of the Copyright Act:

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this court has said, "lie in the general benefits derived by the public from the labors of authors."¹¹⁸

There are four presumptions inherent in this approach to achieving Congress's policy goals: (1) someone makes the work possible; (2) without that person the work would not exist; (3) the work is likely to benefit society; and (4) the limited monopoly will benefit and encourage the author. It follows that in order to be consistent with the policy and approach of the Act, anyone who makes a work possible should receive credit for that contribution. The difficulty remains in how to give credit to those who have made works possible, without creating an opportunity for spurious claims of contributions that would undercut the benefits of the "limited monopoly" and, in turn, diminish the effectiveness of the Act. While it is not an easy task to find a judicially economical method to give credit to the person behind the "creative spark," the adoption of an underinclusive method of defining joint authorship equally defeats the purpose of the Act.

B. Statutory Interpretation of the Contribution Requirement

"As is true in every case involving the construction of a statute, our starting point must be the language employed by Congress."¹¹⁹ The plain meaning of the language of the Copyright Act is that a joint work is

116. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (citing *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30, 36 (1939)), *superceded by statute on other grounds as stated in* *Fabrica, Inc. v. El Dorado Corp.*, 697 F.2d 890, 893 (9th Cir. 1983) (citing "useful article" limitation to copyright protection).

117. *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 653 (S.D.N.Y. 1970), *aff'd*, 457 F.2d 1213, *cert. denied*, 409 U.S. 997 (1972).

118. *Sony*, 464 U.S. at 431-32 (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

119. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979).

created by merging separate contributions, and that those contributions need not be copyrightable works unto themselves.

1. The Language of the Statute

The Act states that "[a] 'joint work' is 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."¹²⁰ A "unitary whole" or "work" that was created by two or more authors, therefore, consists of less significant parts than the whole. Congress has termed these parts "contributions."¹²¹ However, the fit of these individual parts must be such that the work, original in itself, is viewed as a whole.¹²² If the resulting work is merely a compilation of individual works, it is termed a "collective work."¹²³ If the resulting work is a new one that stemmed from a previously existing work or works, it is a "derivative work."¹²⁴

While the Act does not define "contribution," it does use the word to delineate the parts that must be merged to become a joint work.¹²⁵ The Act provides that a joint work "is prepared by . . . contributions be[ing] merged into . . . a unitary whole."¹²⁶ When defining a collective work and a derivative work, both of which also consist of parts that embody the whole, the Act specifically refers to the parts as works that have already been created.¹²⁷ Because the Act uses two different words—"contribution" and "work"—to define a joint work and a collective or derivative work, respectively, Congress must have intended two different meanings.¹²⁸ "As a rule, [a statutory] definition which declares what a

120. 17 U.S.C. § 101 (1990) (emphasis added).

121. *Id.*

122. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266, 267 (2d Cir. 1944) ("the indivisible product of 'joint authors'").

123. "A 'collective work' is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101.

124. A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work". [sic]

Id. See also NIMMER, *supra* note 16, § 6.05.

125. 17 U.S.C. § 101.

126. *Id.*

127. See *supra* notes 122, 123.

128. *Energy Research Found. v. Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581, 583 (1990) (citing Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*,

term 'means' . . . excludes any meaning that is not stated."¹²⁹ Thus, while a "contribution" may qualify as a "work," it seems equally clear that it need not fulfill the requirements of a "work" in order to be considered a contribution under the Act.

There are two requirements to qualification as a "work" under the Copyright Act: (1) that it be original, and (2) that it meet the statutory definition of having been "created."¹³⁰ Since a contribution need not qualify as a work, a contribution must either lack originality or have yet to be fixed in a tangible medium. The Act's purpose of encouraging the creation of new works would be undercut, however, by interpreting a contribution to not require some originality.¹³¹ It follows that because a contribution may be something less than a work, but should be original, it must only lack being fixed in a tangible medium. The level of contribution to a joint work, then, need only be *de minimis* as long as it is original.

One of the criticisms of the *de minimis* standard may be that it would allow spurious claims of joint authorship that harass the true author, and, if made frequently enough, could defeat the purpose of the Act. This same criticism is made of numerous rules that allow a somewhat flexible judicial standard; it is seldom, if ever, a convincing argument by itself. The practical alternative is to allow plaintiffs to *claim* a contribution to another's work, but to make it difficult to *prove* in court. A higher standard of proof could discourage needless litigation brought by claimants whose contributions were minimal. Unsuccessful spurious claims would discourage unwarranted litigation. The true joint author, however, would seldom be discouraged.

A court that applies the *de minimis* standard in determining the level of contribution to a joint work, as advocated by Nimmer,¹³² evaluates: (1) whether the authors intended to create a unitary work through a joint effort; (2) whether the contributions by each author have reached a *de minimis* level and are creative in nature;¹³³ and (3) whether the sepa-

BENCHMARKS 224 (1967)) ("when Congress employs the same word, it normally means the same thing, when it employs different words, it usually means different things").

129. *Meltzer v. Zoller*, 520 F. Supp. 847, 855 (D.N.J. 1981) (citations omitted).

130. *Weissmann v. Freeman*, 868 F.2d 1313, 1316 (2d Cir. 1989).

131. An exception to this standard occurs when two non-creative parts originating in two or more authors, each of which had the requisite intent, are combined in a creative manner to form a unitary whole that is both original and fixed in a tangible medium. It must be remembered that this hypothetical work is not already protected under the Act as a collective work or a derivative work. See *supra* notes 122, 123 (definitions of collective and derivative works, respectively).

132. NIMMER, *supra* note 16, § 6.07.

133. These contributions may, but need not, individually qualify for copyright.

rate contributions are merged into one work that is copyrightable, the parts of which are either interdependent or indivisible.

2. The Plain Meaning of the Statute as Applied to the Copyrightability Standard

The *Meltzer* requirement that each contribution be copyrightable¹³⁴ viewed the creation of a joint work in the following manner: (1) the authors intend to create a unitary work through a joint effort; (2) they separately create a contribution, each of which must be individually copyrightable; and (3) the separate contributions are then merged into a unitary whole that qualifies for a copyright as a joint work. The copyrightability standard, which is more prevalent in recent case history because of its evidentiary convenience, fails to accomplish the goals of the Copyright Act.¹³⁵

The *Meltzer* court's conclusion that a joint author's contribution must be a created work resulted from a failure to apply the authorities that the court itself cited. As the court stated, "[I]t is a well-known canon of construction that the language of the statute is the best indication of legislative intent."¹³⁶ The court, however, failed to notice the Act's use of different words—"work" and "contribution"—and distinguish between them. By using the statutory definition of when a work has been "created" in defining "contribution," the *Meltzer* court read into the law a requirement that each author's contribution be copyrightable.¹³⁷ Had the *Meltzer* court properly applied the stated rule of law, it would have concluded that the requirement of a "contribution" could not include the statutory definition of a "work."

The copyrightability requirement for joint authorship makes little sense when compared to the requirements for a collective work. In a collective work, each contributed work may be copyrighted as well as the collective work as a whole.¹³⁸ If the copyrightability test is used in determining joint authorship, the differences in requirements for joint works and those for collective works are negligible. The chief differences are the authors' original intent and inseparability or interdependence of the

134. The copyrightability requirement has recently been adopted without critical analysis by one commentator: PAUL GOLDSTEIN, COPYRIGHT PRINCIPLES, LAW AND PRACTICE § 4.2.1.2 (1989).

135. See *infra* notes 146-51 and accompanying text.

136. *Meltzer v. Zoller*, 520 F. Supp. 847, 855 (D.N.J. 1981) (citing C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978)), cited with approval in *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979).

137. *Meltzer*, 520 F. Supp. at 857.

138. NIMMER, *supra* note 16, § 5.02, at 5-8.

individual author's work. The primary gain, then, in being a joint author instead of an author of a collective work is the statistical possibility of retention of the copyright for a longer period of time. The actuarial duration of the copyright for a joint work lasts longer because it is based on two lifetimes instead of one.¹³⁹ In most instances, however, the likelihood of realizing the statistical advantage seems unlikely to outweigh the burdens¹⁴⁰ associated with joint authorship. Consequently, if Congress had envisioned these to be the only differences between a joint and a collective work, it would have had no need to create a different category of work under the Act.

A court must accomplish the impossible in determining whether an individual has made a copyrightable contribution to a joint work. By definition, a joint work consists of parts that are inseparable or interdependent. Yet the application of the copyrightability requirement to each joint author's contribution necessarily entails dissecting the work back into each person's independent contribution. Only after this is done can the court evaluate whether each person's contribution rose to the level of copyrightability.

Because Congress viewed a joint work to consist of inseparable or interdependent parts, it is improbable that it intended a court to dissect a work to classify it under the Act. As the *Maurel* court stated, joint works are like mosaics that cannot be divided into pieces without destroying the work.¹⁴¹ It is more likely that Congress intended to rely primarily on the joint authors' intent, and secondarily on evidence that each author had in fact contributed to the completed work which then qualified for a copyright.

139. The life-plus-50-years term also applies to joint works, but with an important difference. Under § 302(b) copyright is measured from the last surviving author's death plus 50 years. For example, suppose A and B create a joint work in 1980. A dies in 1990 and B dies in 2000. The copyright will enter the public domain after 2050, 50 years after the death of the last surviving author. Because of this provision, joint works have a chance of lasting much longer than works of individual authors, particularly if one of the joint authors is young.

MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 6.3[D] (1989).

140. The burdens referred to are twofold: creative and evidentiary. Certainly, working with someone else with the original intent to make one work would require networking, which in turn would be likely to lead to added stress in the creative process.

From an evidentiary standpoint, the burden is to show that both joint authors had the same intent from the beginning, and, in some cases, to prove that the works were in fact interdependent.

141. *Maurel v. Smith*, 220 F. 195, 200 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921).

3. The Plain Meaning of the Statute as Applied to the *De Minimis* Standard

The *de minimis* standard necessarily shifts more emphasis to the intent of the putative joint authors. The fact-finding involved in revealing intent may be more time-consuming than determining whether a contribution had been "fixed" in a tangible medium, but it is no more difficult than deciding, for example, whether there has been a "delivery" under property law. A review of the *Ashton-Tate* and *Meltzer* cases highlights the possible need for additional findings of fact.

The *Ashton-Tate* case involved two computer programmers, Wigginton and Ross, who collaborated in creating a spreadsheet program.¹⁴² When Wigginton incorporated some of Ross's ideas in a similar program, Ross claimed that he should be a joint author.¹⁴³ Using the copyrightable standard, the court held that Ross could not prevail because his contribution had not been reduced to a "fixed expression" and as a result consisted of non-copyrightable ideas.¹⁴⁴ The court also found that Ross had contributed nothing original.¹⁴⁵ Consequently, the decision of the court would have been no different and required no additional fact finding if the *de minimis* standard had been applied instead of the copyrightable one.

The *Meltzer*¹⁴⁶ case, which involved a homeowner's suit for copyright infringement against the architect and general contractor he had hired to design and construct a home, may have had a different outcome under the *de minimis* standard. Using the copyrightability test, the court reasoned that Meltzer was not entitled to authorship, although his sketches had been incorporated into the design, because he was not the creator of the finished plan.¹⁴⁷ The finished product had been the result of contributions from Meltzer, the contractor, and the architect, but only the architect was held to be an author.¹⁴⁸ Meltzer's contribution may not have even satisfied the *de minimis* requirement; the court's opinion contains little mention of Meltzer's specific contribution to the finished

142. *Ashton-Tate Corp. v. Ross*, 728 F. Supp. 597, 600 (N.D. Cal. 1989), *aff'd*, 916 F.2d 516 (9th Cir. 1990). See *supra* note 102 and accompanying text for details of the case.

143. *Id.* at 601-02.

144. *Id.*

145. *Id.*

146. *Meltzer v. Zoller*, 520 F. Supp. 847, 850 (D.N.J. 1981).

147. *Id.* at 857.

148. "The Chirgotis [architecture] firm, by fixing the ideas for the Meltzer home in a tangible medium, 'created' those plans It logically follows, then, that the Chirgotis firm is the author of these plans for the purpose of copyright interests." *Id.*

product.¹⁴⁹ Even under the *de minimis* test, if the contractor, like the celebrity in the hypothetical, had dictated the substance of the work, the *Meltzer* court would still have found that only the architect was entitled to any rights under the Copyright Act.¹⁵⁰ While the *Meltzer* court's application of the copyrightability requirement for a contribution simplified its decision, its use of that test failed to accomplish the purpose of the Copyright Act.¹⁵¹

C. The Ghost Writer/Celebrity Hypothetical

The copyrightability requirement for joint authorship can be greatly underinclusive. Recall the example of a celebrity who goes to the writer/ghost author for aid in writing the celebrity's biography.¹⁵² Assume that their arrangement precludes the possibility of a "work for hire." The celebrity supplied all of the material and structure for the book, while the writer handled the creative and technical details. The celebrity never "recorded"¹⁵³ any of her contributions to the work.

When the book is completed, should the writer be allowed to claim that he is the sole author of the book? Under the more prevalent copyrightability test, the writer will point out that he alone fixed the material in a permanent copy, that nothing the celebrity contributed had been recorded by the celebrity, and therefore, the celebrity contributed

149. The testimony of the architect referred to Meltzer's contributions as "many specific details," "nooks and crannies that would accommodate specific furniture," and the "location of lighting fixtures." *Id.*

150. Because of the *Meltzer* court's adherence to the copyrightability standard, the only means by which the contractor could acquire rights would be if the court stretched another doctrine beyond all recognition in an attempt to reach an equitable decision. The definition of a derivative work, collective work, a work made for hire, or some contractual action could be used for this purpose. Unfortunately, courts are not adverse to taking this route. Thus results the classical enjoiner: "Hard cases make bad law." *Ex parte Horsley*, 374 So. 2d 375, 377 (Ala. 1979) (crediting Bishop), *vacated by Horsley v. Alabama*, 448 U.S. 903 (1980).

151. This is not to say that the outcome would necessarily have been different. It would seem that in most architect-client relationships a good deal of input is expected, if not required, of the client. The application of the *de minimis* standard would not make it easier for a client to become a joint author of the architect's work. The *de minimis* standard is flexible enough to allow a court sufficient leeway to consider the type of relationship between the two putative joint authors. By contrast, the copyrightability standard has proven quite inflexible and is more likely to result in an injustice in a number of easily foreseeable situations.

152. See *supra* part III.

153. The word "recorded" is used within the context of the Copyright Act. Someone can make a sketch or jot down a note that will not be considered "fixed in a copy." 17 U.S.C. § 101 (definition of "created"). See also *Meltzer v. Zoller*, 520 F. Supp. 847 (D.N.J. 1981) (sketches inadequate to qualify separately for a copyright); *Ashton-Tate Corp. v. Ross*, 728 F. Supp. 597, 601-02 (N.D. Cal. 1989), *aff'd*, 916 F.2d 516 (9th Cir. 1990) (notes of functions to be included in computer program were insufficient).

only non-copyrightable ideas. The writer would prevail. The celebrity's only chance is to bring an action in contract in the hope of being named the "owner" of the work. She will never, however, be an "author."¹⁵⁴

If the *Nimmer de minimis* rule were applied to the same hypothetical, the celebrity would have a chance of being named joint author. Once the celebrity had established the intent element, the remaining issue would be whether her contribution was more than *de minimis*. Since the celebrity supplied the general structure of the book and the substantive content, she would have satisfied the *de minimis* level requirement and could be deemed the author. Using the copyrightability test, by contrast, a court would inquire into what the potential joint author contributed if the threshold requirement of having fixed ideas in a permanent copy has not been satisfied. The application of such a rigid rule as the copyrightability standard is incompatible with the flexible intent and design of the Copyright Act.

VI. CONCLUSION

The standard that is applied to determine if the contribution requirement has been met under joint authorship should be as elastic as the possibilities of contributions are numerous. By way of comparison, the standard applied to determine intent, the touchstone of joint authorship, is flexible enough to be applied to different media as well as various authorship arrangements. A rigid rule would defeat the parties' intent, a result Congress could not have intended. "[A]s long as the general design and structure was agreed upon, the parties may divide their parts and work separately."¹⁵⁵ The copyrightability standard is needlessly uncompromising, while the *de minimis* standard is flexible enough to accommodate differing media and diverse agreements between the parties.

The copyrightability standard is practical only from an evidentiary standpoint. Congress could not have intended that each contribution be measured against a given standard. "[N]o one can hope to measure the degree of contribution which the plaintiff made . . . and no one ought to try."¹⁵⁶ The copyrightability standard protects the final expression at the

154. The Act grants different rights to the "owner" and the "author." If previous versions of the Copyright Act are applicable, the rights will revert to the author, possibly leaving the owner holding the bag — and nothing more. See generally *Stewart v. Abend*, 110 S. Ct. 1750, 1754 (1990) (owner of derivative work retains no rights when author dies and fails to assign renewal rights; all rights of the author revert to the statutory successors).

155. *Maurel v. Smith*, 271 F. 211, 215 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921) (stressing that as long as intent is shown, the degree and method of contribution is unimportant provided it was more than *de minimis*).

156. *Maurel*, 220 F. at 200.

unnecessary expense of one of the true authors—perhaps even the author who supplied the “creative spark.” If this occurs, the copyrightability test will have frustrated the Act’s goal of encouraging useful works.

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