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J.D. Candidate, Fordham University School of Law, 2020; B.M., Instrumental Performance & Sociology, New York University, 2016. Thank you to Professor Ron Lazebnik for all of his help, patience, and guidance during this note-writing process. I would also like to thank the IPLJ Editorial Board and staff for their hard work and advice, particularly Senior Research & Writing Editor Sean Corrado. Finally, thank you to my parents and friends for supporting me and allowing me to bore them with conversations about music and law.

Bringing Swirly Music to Life: Why Copyright Law Should Adopt Patent Law Standards for Joint Authorship of Sound Engineers

Andrew Nietes*

Geoff Emerick, acclaimed sound engineer for The Beatles, passed away in October of 2018. Emerick helped shape The Beatles' sound and worked to create many of their most recognized songs, yet, under the current joint authorship standards he likely would not be considered an author of these songs. This Note details the work carried out by sound engineers in the music industry and describes how current joint authorship standards affect them. It then proposes a reinterpretation of joint authorship in the copyright to statute to ease these standards by borrowing from another area of intellectual property law.

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INTRODUCTION

> *What I want . . . is some kind of swirly music, you know?* – John Lennon[1]

George Martin and Geoff Emerick, the producer and sound engineer for The Beatles, contemplated how to achieve this request for the song "Being For The Benefit of Mr. Kite."[2] Lennon suggested a comedic brass band featuring a tuba, and Martin suggested a steam organ, but it was the work of Geoff Emerick that brought Lennon's vision to life.[3] Emerick suggested creating a sonic atmosphere using tapes of sound effects.[4] After sifting through stacks of records, he, George Martin, and Richard Lust found sounds they thought would work.[5] He copied these snippets, two to three seconds-long apiece, of recordings of calliopes and old organs on to two-track tape.[6] Then, in a whimsical and artistic contribution, he tossed them in the air to randomly join them together to create thirty seconds of background to conclude "Being For the Benefit of Mr. Kite."[7] This key part of the song-creation process occurred completely without the band and other songwriters, as they waited restlessly in the studio area outside the control room.[8]

Later, Emerick helped to finish the song by embellishing it with overdubs of half-speed recordings of chromatic organ runs and glockenspiels.[9] All told, the recording process for this single song spanned over many weeks.[10] Geoff Emerick's fingerprints can be seen all over the *Sgt. Pepper Lonely Heart Clubs Band* album.[11] Other than this somewhat unorthodox manner of creating background music, Emerick also performed the typical role of

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1 GEOFF EMERICK & HOWARD MASSEY, HERE, THERE, AND EVERYWHERE 167 (Penguin Group 2006).
2 *See id.*
3 *Id.* at 167–68.
4 *Id.* at 168.
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *See id.* at 167–70.

sound engineer balancing instruments and refining the sound.[12] To create a rich bass sound, he took a less traditional approach to mixing the sound, adding the bass track to the song last to capture the proper balance.[13] When creating the mixes for each song on the album, he would have to constantly change the fader positions and EQ controls.[14] He even crafted separate mixes for stereo and mono speakers adding panning effects, automatic double tracking, and flanging to the stereo versions played by audiophiles and working especially hard for the mono mixes that would be enjoyed by the general public.[15]

When Geoff Emerick died in October of 2018,[16] the creative role of the sound engineer had expanded even further than this creative process, bringing to life ideas and expressions of musicians.[17] Despite how integral sound engineers are to the creation of a song, the current state of copyright law often does not entitle sound engineers to authorship over works to which they have contributed.[18] This Note discusses the current standard for joint authorship and proposes a solution by which standards from patent law are applied to copyright law. Part I discusses the creative contributions of sound engineers, the current state of the music industry, music in copyright law, and the current standards for joint authorship. Part II outlines the conflict caused by the joint authorship standards for sound engineers as well as current solutions. Part III discusses the proposed solution of applying patent law standards of joint inventorship to joint authorship in

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12 *Id.* at 170.

13 *Id.*

14 *Id.* "EQ" refers to audio equalization in which different frequencies in a signal are boosted or reduced. *Audio Equalization*, MEDIA COLLEGE, https://www.mediacollege.com /audio/eq/ [https://perma.cc/9P5K-MMBD] (last visited Jan. 4, 2019). The most commonly known EQ is controlling the treble and bass in home audio equipment. *Id.* Treble frequencies are those in the higher range and bass are those in the lower. *Id.* Equalization is used to correct unnatural sounds. *Id.*

15 EMERICK & MASSEY, *supra* note 1, at 170.

16 Steve Marinucci, *Geoff Emerick, Beatles Chief Recording Engineer, Dies at 72*, VARIETY (Oct. 2, 2018, 8:26 PM), https://variety.com/2018/music/news/geoff-emerick-beatles-engineer-dead-1202966681/ [https://perma.cc/X2KY-PXAM].

17 *See infra* Section I.A.

18 *See infra* Part II.

copyright law, including the basis for the application and how the standard would be applied.

I. BACKGROUND ON SOUND ENGINEERS, MUSIC, AND LEGAL ELEMENTS

A. Current Songwriting and Recording Processes

The role of the sound engineer in the recording process is widely varied.[19] Generally, the engineer will oversee the technical and aesthetic aspects of the recording.[20] When fulfilling this role, they are responsible for the overall sound in all of the tracks.[21] In some situations, such as Geoff Emerick's contributions to The Beatles' sound,[22] the sound engineer is very involved in creation of the final product. On the other hand, sometimes their contributions only amount to operating the soundboard and equipment under complete supervision by a producer.[23] In industry practice, it is not common to list engineers as composers or songwriters, whereas producers are frequently listed as composers.[24]

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[19] *Recording Engineer*, BERKLEE COLL. OF MUSIC, https://www.berklee.edu/careers/roles/recording-engineer [https://perma.cc/3W6X-X3UU] (last visited Nov. 5, 2018); Scott Morgan, *The Difference Between Music Producers & Engineers*, CHRON, https://work.chron.com/differences-between-music-producers-engineers-25047.html [https://perma.cc/4EVR-9DTD] (last visited Nov. 5, 2018).

[20] BERKLEE COLL. OF MUSIC, *supra* note 19.

[21] *Id.*

[22] JASON TOYNBEE, MAKING POPULAR MUSIC 90 (Julie Delf ed., 2000).

[23] Morgan, *supra* note 19.

[24] In Lady Gaga's 2016 release, *Joanne*, none of the engineers received a composer credit in addition to their engineer credit whereas multiple producers received composing credits in addition to their producing credits. *See Joanne*, ALLMUSIC, https://www.allmusic.com/album/joanne-mw0002982993 [https://perma.cc/SE56-F78X] (last visited Nov. 5, 2018). Geoff Emerick on The Beatles' *Sgt. Pepper's Lonely Hearts Club Bands* is listed only as an engineer. *See A Hard Day's Night,* ALLMUSIC, https://www.allmusic.com/album/a-hard-days-night-mw0001948685 [https://perma.cc/4K9H-7ZM3] (last visited Oct. 14, 2018). "[A]rtists, producers, management, and labels are notorious for failing to credit engineers . . . don't even get me started." Benjamin Grotto (bgrotto), GEARSLUTZ.COM (July 16, 2009), https://www.gearslutz.com/board/rap-hip-hop-engineering-and-production/254101-engineering-recording-credits-hip-hop-records.html [https://perma.cc/W7P9-GAVD].

The work done by sound engineers, though, has grown far beyond merely capturing the sound produced by an artist.[25] For example, mixing on studio equipment is a musical process using aural skills to connect emotional concepts to the sound.[26] Engineers are often in charge of controlling the timbre of music, which can impact the musical meaning of a song.[27] In the realm of classical music, they can select the best way to sync different players to create an aesthetic associated with live concert going but captured in a recorded work.[28] The spatial placement of sound in a sonic landscape can transform a song to a different time period and convey narrative, emotion, and emphasize dramatic themes of the lyrics.[29]

These creative contributions show that the recording studio is a musical instrument itself.[30] Engineers will use this instrument and

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[25] *See* Brendan Anthony, *Mixing as a Performance: Creative Approaches to the Music Mix Process*, J. ON ART RECORDED PRODUCTION, July 2017, http://www.arpjournal.com/asarpwp/mixing-as-a-performance-creative-approaches-to-the-popular-music-mix-process/ [https://perma.cc/BK2Y-J7XJ].

[26] *See Id.*

[27] Mikko Ojanen, *Mastering Kurenniemi's Rules (2012): The Role of the Audio Engineer in the Mastering Process*, J. ON ART RECORDED PRODUCTION, July 2015, http://www.arpjournal.com/asarpwp/mastering-kurenniemis-rules-2012-the-role-of-the-audio-engineer-in-the-mastering-process/ [https://perma.cc/4G67-8JWX]. "Timbre" is the tone quality or "color" of a certain sound, instrument, or voice. *Timbre,* ENCYC. BRITANNICA, https://www.britannica.com/science/timbre [https://perma.cc/8FYW-AUEP] (last visited Jan. 5, 2019). It distinguishes different sounds, even if they have the same fundamental pitch and comes from variations in a sound wave's form. *See id.* In music specifically, this differentiation is achieved by emphasizing different overtones in the fundamental pitch. *See id.*

[28] *See* Emilie Capulet & Simon Zagorski-Thomas, *Creating A Rubato Layer Cake: Performing and Producing Overdubs with Expressive Timing on a Classical Recording for 'Solo' Piano*, J. ON ART RECORDED PRODUCTION, Mar. 2017, http://www.arpjournal.com/asarpwp/creating-a-rubato-layer-cake-performing-and-producing-overdubs-with-expressive-timing-on-a-classical-recording-for-solo-piano/ [https://perma.cc/83T6-5LFV].

[29] *See* Emil Kraugerud, *Meanings of Spatial Formation in Recorded Sound*, J. ON ART RECORDED PRODUCTION, Mar. 2017, http://www.arpjournal.com/asarpwp/meanings-of-spatial-formation-in-recorded-sound/ [https://perma.cc/ZF8X-5ABW].

[30] *See* Anthony, *supra* note 25; Doug Bielmeier & Wellington M. Gordon, *A Musician's Engineer: Best Practices For Teaching Music Proficiency at Formal Audio Recording and Production Programs in the USA*, J. ON ART OF RECORDED PRODUCTION, Mar. 2017, http://www.arpjournal.com/asarpwp/a-musicians-engineer-best-practices-for-

their artistic abilities to create aesthetics, using their ears and knowledge of acoustics to bring the recording to exactly the right sound.[31] Geoff Emerick, created the "ultra-smooth" bass sound for *Sgt. Pepper's Lonely Hearts Club Band*, by emptying the studio, moving the bass to be recorded to the center of the room, and then placing the microphone six feet away.[32] Using this process, "you could actually hear a little bit of ambience of the room around the bass, which really helped; it gave a certain roundness and put it in its own space."[33] Sound engineers still contribute this sort of nuance to the sound, training their ears to recreate what music recorded in a studio may sound like in a cathedral or concert hall.[34] They find creative ways to listen to ensure exactly the right balance between the closest of frequencies.[35] Beyond these creative contributions, engineers are an essential part of the recording process often interacting and collaborating with producers, engineers, and other musicians in creating a song.[36]

The songwriting process in general is extremely collaborative.[37] This collaboration manifests itself in a variety of ways ranging from traditional pen and paper writing partners who use minimal technology to writers working completely apart from each other exclusively on a multi-track audio file being passed back and forth online.[38] What is more, though songwriting may be traditionally thought of as sitting down and writing notes on sheet

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teaching-music-proficiency-at-formal-audio-recording-and-production-programs-in-the-usa/ [https://perma.cc/F666-U783].

31 Eliot Bates, *What Studios Do,* J. ON ART RECORDED PRODUCTION, Nov. 2012, http://www.arpjournal.com/asarpwp/what-studios-do/ [https://perma.cc/TX42-6TFB].

32 EMERICK & MASSEY, *supra* note 1, at 170.

33 *Id.*

34 *See* Bates, *supra* note 31.

35 *Id.* (discussing engineer Metin Kalaç who would listen to a mix in a spot outside the control room to ensure the bass and low midrange frequencies were in the correct balance).

36 *See* Bielmeier & Gordon, *supra* note 30.

37 *See generally* Joe Bennett, *Collaborative Songwriting – The Ontology of Negotiated Creativity in Popular Music Studio Practice*, J. ON ART RECORDED PRODUCTION, July 2011, http://www.arpjournal.com/asarpwp/collaborative-songwriting-%E2%80%93-the-ontology-of-negotiated-creativity-in-popular-music-studio-practice/ [https://perma.cc/KU2P-EQT8].

38 *Id.*

music, many of the top artists and songwriters in the world did not even learn how to notate music.[39] Because so many artists are unfamiliar with musical notation, in certain cases the sound engineer's contributions may be key to bringing the song to life.[40] Take, for example, Michael Jackson.[41] When composing a song, he would not write his musical ideas down on paper but instead keep them all in his head and sing them to his engineers and producers in the studio.[42] Engineers, like Rob Hoffman, would then help turn these musical ideas into a recorded song.[43]

A recent example of the collaborative recording process and the creative contributions of engineers at work is Kendrick Lamar's recording, "These Walls."[44] Derek Ali, studio engineer, was Kendrick Lamar's right hand-man on the entire album *To Pimp a Butterfly*.[45] In working on this album, Ali partnered with many artists and producers including James Hunt, Matt Schaeffer, Bilal, Thundercat, Anna Wise, and of course Kendrick Lamar himself.[46] He describes the music he created with Lamar as a collaboration that included Lamar frequently using his sonic ideas for inspiration.[47] As an engineer, Ali reveals the complexity of his work by describing his relationship with Lamar:

> With Kendrick it's all about feeling. If it doesn't feel good, it's not going to work for him. And what a lot of people don't realise [sic] is that you can alter people's emotions with certain frequencies and sonic textures. The fact that I can add delays and

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39 Lucy Jones, *The Incredible Way Michael Jackson Wrote Music*, NME (Aug. 29, 2018, 10:00 AM), https://www.nme.com/blogs/nme-blogs/the-incredible-way-michael-jackson-wrote-music-16799 [https://perma.cc/TC9S-QSE5] (discussing various examples of successful musical acts that did not notate music traditionally including Paul McCartney, John Lennon, Radiohead, OMD, and Michael Jackson).

40 *See id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *See* Paul Tingen, *Inside Track: Kendrick Lamar's To Pimp a Butterfly*, SOUND ON SOUND (2015), https://www.soundonsound.com/people/inside-track-kendrick-lamars-pimp-butterfly [https://perma.cc/4YCQ-FNEW].

45 *Id.*

46 *Id.*

47 *Id.*

> reverbs and other crazy effects to music or vocals and give them extra emotion is amazing to me. That's what I do this for. Kendrick understands this, and he may be midway through recording a verse, and he'll then ask me to try something, like "Can you add some flanging, or some panning, or something else crazy?"[48]

Ali's creativity and expertise is evident in how he discusses his mix of "These Walls."[49] Using digital software, he mixed about ninety tracks including live recordings of musicians.[50] He knows that Lamar's music heavily features bass so he puts the drum tracks next to the bass and vocals so that they "smack and be in your face without overpowering the other elements."[51] Having collaborated frequently with Lamar, he is attuned to his artist's vocal tendencies.[52] Knowing that Lamar's vocals are raspy in the mid-range he uses a Renaissance Compressor to smooth it out, likening the process to untying a knotted blanket to spread over a bed.[53] These processes are a small snippet of Ali's work on the track, but demonstrate the level of sonic expertise and musical creativity he had to possess to ensure that the song sounded perfect and that it met the demands of Kendrick Lamar.[54] One role of the sound engineer is to bring the artist's vision to fruition, however demanding it may be, and Ali's work exemplifies this.[55]

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48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *See id.*

55 *See id.*; *see also* Crank Lucas, *Why I Couldn't Engineer Kendrick Lamar*, YOUTUBE (Apr. 14, 2017), https://www.youtube.com/watch?v=zQZnOmDq_e8 [https://perma.cc/3CDQ-7S97]. Crank Lucas is a YouTube personality whose videos regarding engineering show the demanding nature of studio artists. *See, e.g.*, *id.* This video has over 2 million views as of Dec. 2, 2018. *See id*. In the video, Lucas jokes about the reasons that he would not be able to engineer Kendrick Lamar's music. *See id.* For example, at 1:22, Lucas imitates Lamar, saying, " . . . then you going to put a giraffe sound, then go back to the first beat." This references Mr. Lamar's frequent switching between beats, making the work of sound engineers much more difficult. *See id.*

B. Music Industry Changes

Record labels used to act as gatekeepers to the music industry by getting their artists' music on the radio or paying retailers to prominently feature their CDs.[56] With music streaming and other digital distribution methods largely eclipsing physical sales, the role of the record label has also been diminishing.[57] Mainstream artists now have the capability to sell directly to the fan using the internet and social media.[58] Many artists are taking advantage of this shift by successfully recording and releasing music on their own.[59] Record labels used to wield a tremendous amount of power, including retaining artists' and songwriters' copyrights through assignment in recording deals or work for hire.[60] While many artists still chose to sign to a label because of the label's recording, marketing, and distribution resources,[61] a rise in independent artists, without a label, could mean artists, producers, musicians, and sound engineers working together on a song where all or one of them could be entitled to copyright over the work. Thus, deciding who is entitled to joint authorship may be more important now than ever before in the music industry.

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56 DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 70 (9th ed. 2015).

57 *Id.* at 71.

58 *Id.* at 72.

59 *See* VÉRITÉ, *Spotify Isn't Killing the Music Industry; It's a Tool for Enterprising Indie Artists*, FORBES (Mar. 19, 2018, 11:22 AM), https://www.forbes.com/sites/bizblog/2018/03/19/spotify-isnt-killing-the-music-industry-its-a-tool-for-enterprising-indie-artists/#541ada94476b [https://perma.cc/BMU7-BGC2]; *Chance The Rapper Says Success as an Independent Artist Is Attainable If You're Patient*, BILLBOARD (Dec. 27, 2017), https://www.billboard.com/articles/news/8078732/chance-the-rapper-success-independent-artist [https://perma.cc/F28N-4BJ7]; Daniel Khalili-Tari, *How Independent Artists Have Changed the Music Industry*, INDEPENDENT (Dec. 15, 2017, 9:45 AM) https://www.independent.co.uk/arts-entertainment/music/features/independent-artists-music-industry-stormzy-aj-tracey-stefflon-don-hardy-caprio-major-label-streaming-a8110936.html [https://perma.cc/P2JL-UGQR].

60 *See, e.g.*, Robert Springer, *Commercialism and Exploitation: Copyright in the Blues*, 26 POPULAR MUSIC 33, 35 (2007).

61 PASSMAN, *supra* note 56, at 73.

C. Copyright and Music

1. Musical Works vs. Sound Recordings

The origins of copyright and patent law are found in the U.S. Constitution, with the goal of promoting useful and creative arts.[62] Congress has enacted legislation to protect works, either as useful inventions or creative works of authorship.[63] Eight different types of works are protected by copyright, including musical works and sound recordings.[64] The Copyright Act provides protection for "original works of authorship fixed in any tangible medium of expression," creates two requirements of copyright: (1) originality and (2) fixation.[65] Initially, musical works could only meet the fixation requirement for copyright protection by being written down, usually as sheet music.[66] The Copyright Act was amended in 1976 and altered this by allowing the fixation requirement to be met through "any tangible medium of expression, now known or later developed, from which [a work] can be perceived reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[67] Because of this change in statutory language, courts have recognized that musical works can also be fixed in sound recordings, as popular songs are frequently composed and recorded simultaneously.[68] In *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, elements of music existed in the recorded copy of a work that was allegedly infringed, but those elements were not in the sheet music, including use of the lyric "dog" and a panting sound effect.[69] UMG, who owned the alleged infringing work, argued that the jury should not have been permitted to consider these elements because Bridgeport only had an interest in the composition not the sound recording.[70] However,

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62 U.S. CONST. art. I, § 8, cl. 8.

63 *See* 17 U.S.C. § 102(a) (2018); 35 U.S.C. § 101 (2018).

64 17 U.S.C. § 102(a).

65 *Id.*

66 Copyright Act of 1831, ch. 16, 4 Stat. 436 (amended 1856).

67 17 U.S.C. § 102(a).

68 *See, e.g.*, Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267, 276 (6th Cir. 2009).

69 *Id.*

70 *Id.*

the court held that the composition indeed encompassed these elements, as the recording embodied the composition, not the sheet music, which was actually written after the recording the song.[71]

This approach in *Bridgeport*, though, is infrequently applied.[72] In the highly publicized case *Williams v. Gaye*, the estate of Marvin Gaye alleged infringement of Gaye's song "Got to Give it Up" by Robin Thicke and Pharrell Williams in their song "Blurred Lines."[73] The district court allowed the jury to only hear renditions of the sheet music deposited with the Copyright Office, not the publicly available and released sound recording, which was also deposited.[74] Notably, the sheet music does not contain many elements found in the recording.[75] The Ninth Circuit accepted the district court's ruling on limiting the infringement analysis to the sheet music without deciding the merits of that particular decision, essentially avoiding the issue but allowing the practice to continue.[76] Because of decisions like this, there is still ambiguity as to whether a composition can be fully embodied by a recording.[77]

Though a musical work can now be fixed by using a recording, this is not to be confused with the separate category of copyright protecting sound recordings.[78] Copyright for a sound recording applies only to the aural fixation embodied in a sound recording.[79] It does not protect the underlying material the sound recording is

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71 *Id.* at 272–73, 279. In the case, the songwriters wrote the song "Atomic Dog" in a recording without a written score. *Id.* at 272. Instead, the composition was embedded in the sound recording. *Id.* Later, A&M records released the song "D.O.G. in Me." A&M UMG subsequently acquired A&M Records. *Id.* Bridgeport owned the copyright for the composition of "Atomic Dog" and alleged that "D.O.G. in Me" infringed upon it. *Id.* In a jury trial, Bridgeport prevailed and on appeal, the 6th Circuit affirmed the decision. *Id.* at 273, 279.

72 *See, e.g.*, Williams v. Gaye, 895 F.3d 1106, 1126–27 (9th Cir. 2018).

73 *Id.* at 1116.

74 *Id*. at 1126–27.

75 Oral Argument at 4:06, *Williams*, 895 F.3d 1106 (No. 15-56880), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012297 [https://perma.cc/KB5Z-4DEU].

76 *Williams*, 895 F.3d at 1121.

77 *See id.*; *see also* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05 (2018).

78 NIMMER & NIMMER, *supra* note 77, § 2.10.

79 *Id.*

based on.[80] To see an example of this distinction in a different context, take the Recording Academy Grammy Awards awarding of separate categories for Song of the Year and Record of the Year.[81] The Academy awards Song of the Year to songwriters, paralleling the copyright for musical work in the composition.[82] Record of the Year, on the other hand, recognizes the artist, producers, recording engineers, and mixers that create the recording, similar to the sound recording copyright.[83] Though these categories are distinct, given the current recording process the distinction between these copyrights may not have as much significance in copyright registration.[84] For Kendrick Lamar's Grammy-winning song "These Walls,"[85] copyright registrations only exist for the music, and not for the sound recording.[86]

2. Copyrightable Elements in Music

There is not an established list of elements of what exactly in a musical work or sound recording are on their own sufficient to warrant copyright protection.[87] An analysis of what courts look to in potential infringement cases will shed a light on what would be sufficient to be independently copyrightable. In order to be copyrightable, a work must be both original and creative.[88] Courts have found that musical compositions consist of rhythm, harmony, and melody so the creativity for musical works must be found in one of these three elements.[89] Melody is typically the source of

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80 *Id.*

81 *Voting Process Frequently Asked Questions*, RECORDING ACAD. GRAMMY AWARDS, https://www.grammy.com/grammys/awards/voting-process/voting-process-frequently-asked-questions [https://perma.cc/5DZV-7JSX] (last visited Nov. 5, 2018).

82 *See id.*

83 *See id.*

84 *See, e.g.*, THESE WALLS, Registration No. PA0001987471; THESE WALLS FEAT. ANNA WISE EXPLICT, Registration No. PA0002018670.

85 *Kendrick Lamar*, RECORDING ACAD. GRAMMY AWARDS, https://www.grammy.com/grammys/artists/kendrick-lamar [https://perma.cc/8BVY-6G2S] (last visited Dec. 2, 2018). "These Walls" won the Grammy for Best Rap/Sung Collaboration in 2015. *Id.*

86 *See* THESE WALLS, *supra* note 84; THESE WALLS FEAT. ANNA WISE EXPLICIT, *supra* note 84.

87 *See* Swirsky v. Carey, 376 F.3d 841, 849 (9th Cir. 2004).

88 17 U.S.C. § 102(a) (2018).

89 *See* Bridgeport Music, Inc. v. Still N the Water Publ'g, 327 F.3d 472, 475 n.3 (6th Cir. 2003); NIMMER & NIMMER, *supra* note 77, § 2.05.

copyright protection in music with courts expressing hesitation in finding sufficient originality in either rhythm or harmony.[90] In *Swirksy v. Carey*, though, the Ninth Circuit recognized various elements may be entitled to protection in combination, though they are not individually protectable.[91] These could include but are not limited to "melody, harmony, rhythm, pitch, tempo, phrasing structure, chord, progression, and lyrics," but may also extend to more eclectic elements such as "timbre, tone, spatial organization, consonance, dissonance, accents, note choice, combinations, interplay of instruments, and new technological sounds."[92] Courts have conducted a similar approach in analyzing originality and creativity in sound recordings of musical works.[93] In *Newton v. Diamond*, the alleged infringement included a three-note sample.[94] The court held that these three notes alone were not sufficient to sustain a claim for copyright infringement.[95]

D. Joint Authorship

Both copyright law and patent law provide for multiple people to be eligible for ownership over their work in creating it.[96] In patent law, the statute merely states that "[w]hen an invention is made by two or more persons jointly, they shall apply for patent jointly . . . ."[97] Conversely, the Copyright Act specifically defines a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or independent parts of a unitary whole."[98] The standards required for both areas of law evolved through different tracts of case law, though copyright developed much more stringent standards.[99] Courts have provided a number of different interpretations of the

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90 *See* NIMMER & NIMMER, *supra* note 77, § 2.05.

91 *Swirsky*, 376 F.3d at 848–49.

92 *Id.* at 849.

93 *See generally* Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003).

94 *Id.* at 592. A "sample" in this context is the use of a short segment of an existing sound recording in a new sound recording. *Id.* at 593.

95 *Id.* at 592.

96 17 U.S.C. § 101 (2018); 35 U.S.C. § 116(a) (2018).

97 35 U.S.C. § 116(a).

98 17 U.S.C. § 101.

99 *See infra* Sections I.D.1–I.D.2, and III.A.

joint authorship requirements in the Copyright Act, though have nearly universally required showing two elements: (1) intent that the contributions will be combined into a single work and (2) that each of the contributions are independently copyrightable.[100]

1. The Intent Requirement

Though the statute only references it with regards to the merging of contributions, the intent element has been very broadly construed.[101] Specifically, the putative co-authors must intend for them to be regarded as co-authors.[102] This standard has been applied because a more narrow construction of "intention" in the statute may extend co-authorship to people who Congress did not intend to have authorship.[103] In discussing the intent requirement, courts will frequently refer to the relationship between the authors.[104] The nature of this relationship often factors into whether there was an intention to be co-authors.[105] To explain this, the court in *Childress v. Taylor* gives two examples of relationships that would not qualify for co-authorship: the writer-editor and writer-researcher relationship.[106] An editor may make a number of revisions to the draft and both intend these contributions to be merged into a whole, but a writer and editor hardly ever regard themselves to be joint authors.[107] Similarly, while research assistants sometimes offer protectable contributions to a work, neither the researcher nor the writer would regard each other as joint authors.[108]

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100 *See, e.g.*, Aalmuhammed v. Lee, 202 F.3d 1227, 1231 (9th Cir. 2000); Clogston v. Am. Acad. of Orthopaedic Surgeons, 930 F. Supp. 1156, 1159 (W.D. Tex. 1996); Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1071 (7th Cir. 1994); Childress v. Taylor, 945 F.2d 500, 505–06 (2d Cir. 1991).

101 *Childress*, 945 F.2d at 507.

102 *Id.* at 508.

103 *Id.* at 507.

104 *See id.*

105 *Id.* at 508.

106 *Id*. at 507.

107 *See id.*

108 *See id.*

The courts will also look to objective indications of a mutual intent of co-authorship.[109] These could include, among other factors, who maintains decision-making authority, how the parties bill or credit themselves, and written agreements with third parties that demonstrate how one author regarded himself or herself.[110] The Ninth Circuit has adopted similar factors, including whether an author exercises control over the work and makes objective manifestations of shared intent, such as a billing of both authors together. Even so, a contract expressly stating that the parties intend to be co-authors is regarded as the best objective evidence of a shared intent to be co-authors.[111]

Because of this focus on relationship, courts have looked for a "dominant" author, and this person's intent typically controls the joint authorship determination.[112]

This situation is exemplified in the music industry, specifically, in *Ulloa v. Universal Music & Video Distribution Corp.*.[113] In *Ulloa*, the plaintiff was a vocalist who through happenstance spontaneously composed a brief melody that was then used in a recording by the defendant, Shawn Carter, also known as Jay-Z.[114] The court granted the defendant's motion for summary judgment because the plaintiff could not prove "that Mr. Carter (or the other Defendants) ever intended to *share* authorship with [the] Plaintiff."[115] By using the word "share," the court indicated that Mr. Carter was a dominant author of sorts because it was his decision with whom to "share" authorship.[116]

Though the Second Circuit's construction of the intent requirement in *Childress* has largely been adopted, the requirement has not always been focused on the authors' relationship or their

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109 *See, e.g.*, Thomson v. Larson, 147 F.3d 195, 202–05 (2d Cir. 1998).
110 *Id.*
111 Aalmuhammed v. Lee, 202 F.3d 1227, 1234–35 (9th Cir. 2000).
112 *See, e.g.*, *Childress*, 945 F.2d at 500, 508.
113 *See* 303 F. Supp. 2d 409, 418 (S.D.N.Y. 2004).
114 *Id.* at 411
115 *Id.* at 418 (emphasis added).
116 *See id.*

intent to be regarded as co-authors.[117] In *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, Learned Hand wrote, "it 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."[118]

This interpretation of the intent requirement does not focus on the authors' intent to be co-authors but rather the intent that their contributions be joined.[119] In adopting this interpretation, the court found that separate authors of a musical work, one who worked on lyrics and the other on melody, who had not worked concurrently, and had never met, were nonetheless joint authors of a musical work.[120] Though this precedent is now over half a century old, it shows that the statute does not have to be applied as broadly as it is currently—such an interpretation more closely tracks the statutory language defining joint works, that each author must have "the intention that their contributions be merged . . . ."[121] Nowhere in the statute is there a requirement for authors to intend they be regarded as co-authors.[122]

2. The Independent Copyrightability Requirement

The *Childress* opinion additionally articulated that the contribution by a putative joint author must be independently copyrightable.[123] In order to be copyrightable, the work must meet a minimum level of creativity and must be fixed in any tangible medium of expression, as for any case discussing copyrightability.[124] Though the court expressed some hesitation, it imposed the independent copyrightability requirement because such a requirement served the dual purpose of preventing spurious

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117 *See, e.g.*, Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944).

118 *Id.*

119 *See id.*

120 *Id.*

121 17 U.S.C. § 101 (2018).

122 *See id.*

123 Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991).

124 *See* 17 U.S.C. § 102(a) (2018); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991); *see also supra* Section I.C.1.

claims and maintaining a balance between copyright and contract law.[125] The court posited that a person who makes a non-copyrightable contribution can make a contract to receive assignment of part ownership of the copyright in return for their contribution.[126] In justifying this requirement, the court added it was "consistent with the spirit of copyright law."[127] The independent copyrightability requirement has been further justified by referencing the primary objective of copyrights: to advance creativity in science and art.[128] It is meant to prevent the unauthorized copying of ideas and allow for a certain level of predictability of authorship determinations in contributions to a work.[129] The effect of this requirement on a musical work can be seen in *Merchant v. Lymon*.[130] The contribution at issue here was a saxophone solo in a musical work that was composed during a recording session by a studio musician.[131] The court upheld the jury verdict that the solo was not a substantial contribution to the song and therefore not independently copyrightable.[132]

In adopting this requirement, courts have rejected a de minimis standard suggested by Nimmer.[133] Nimmer writes that contributions by joint authors must be "more than de minimis."[134] The contribution must be more than simply adding a word or line, which is a far lower bar than independent copyrightability.[135] This de minimis standard has received little support amongst the courts.[136] However, some courts have chosen to apply it for various

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125 *Childress*, 945 F.2d at 507.

126 *See id.*

127 *Id.*

128 *See* Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1069 (7th Cir. 1994) (citing U.S. CONST. art. I § 8, cl. 8).

129 *See id.* at 1071.

130 828 F. Supp. 1048, 1058 (S.D.N.Y. 1993).

131 *Id.* at 1055.

132 *Id.* at 1058.

133 *Id.*

134 NIMMER & NIMMER, *supra* note 77, § 6.07.

135 *See id.*

136 *See, e.g.*, Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1070 (7th Cir. 1994) (noting that "[t]his position has not found support in the courts").

reasons.[137] In *Gaiman v. McFarlane*, for example, the court recognized the de minimis standard in a situation where two or more people create a work that as a final product is itself copyrightable, but the contributions of each author were not independently copyrightable.[138] The example used by the *Gaiman* court was the creation of a copyrightable character in mixed media such as comic books and motion pictures, where each joint contribution may not have enough originality and creativity to be copyrightable.[139] For these situations, no one could claim to be an author, defeating the purpose of copyright law.[140] Even in this case, though, it was still held that the rule for joint authorship is independent copyrightability, with the de minimis standard only being applied in the narrow exception described above.[141]

3. Work-for-Hire

The work-for-hire doctrine applies when the author of a copyright is the employer of the person who created the work.[142] In order for the doctrine to apply, the hired party must be an employee under the common law of agency.[143] To determine this, the court has to consider whether the employer has the "right to control the manner and means by which the product is accomplished" by evaluating a number of factors.[144] This test has been applied in many areas of copyright, including joint

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137 *See* Gaiman v. McFarlane, 360 F.3d 644, 659 (7th Cir. 2004); Brown v. Flowers, 297 F. Supp. 2d 846, 852 (M.D.N.C. 2003).

138 *Gaiman*, 360 F.3d at 658–59.

139 *Id.*

140 *See id.* at 659.

141 *See id.*

142 17 U.S.C. § 201(b) (2018); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 738–89 (1989).

143 *Cmty. for Creative Non-Violence*, 490 U.S. at 750–51.

144 *Id.* at 751–52 (discussing factors including "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.").

authorship.[145] In claims for joint authorship, the claimant must prove that his or her contribution is not already covered by the work-for-hire doctrine.[146] In the music industry, an analysis of these factors typically examines the contractual obligations of artists and musicians to the hiring party.[147]

II. THE EFFECT OF JOINT AUTHORSHIP LAW ON SOUND ENGINEERS

Much of sound engineers' work is creative.[148] Much of their work is original.[149] They can transport a song back to a certain location, like a cathedral or concert hall.[150] They use critical listening in an individualized way and treat the studio as an instrument, with which they can express and perform.[151] A mixer can adjust pitch, timbre, and dynamics by adjusting balance, spatiality, and compression.[152] These elements of music are creative[153] and courts have held they should be entitled to protection.[154] Yet, the current joint authorship standards stand in the way of protecting their creative contributions.

Partly because sound engineers have agreed to work-for-hire agreements, there is very little case law that specifically addresses

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145 Garcia v. Google, Inc., 766 F.3d 929, 936–37 (9th Cir. 2014).

146 *Id.* at 933, 936. The court also notes that an analysis of copyright interests in films can become quite convoluted but it rarely comes to teasing out these interests because most films are already covered by the work for hire doctrine or implied licenses. *See id.* at 933–36. Given the ever-expanding and collaborative nature of the recording and writing process in the music industry, it is likely that a similar sentiment will be true for musicians, artists, and writers. However, with the advent of the internet and less artist dependence on labels and publishers, it may also be true that the work-for-hire doctrine will be less prominent in the music industry. For a discussion of the current recording practices in the industry, see *supra* Sections I.A and I.B.

147 Skidmore v. Led Zeppelin, No. CV 15-3462 RGK (AGRx), 2016 U.S. Dist. LEXIS 51006, at *24–27 (C.D. Cal. Apr. 8, 2016); Fifty-Six Hope Rd. Music Ltd. v. UMG Recordings, Inc., 2010 U.S. Dist. LEXIS 94500, at *24–35 (S.D.N.Y. Sept. 10, 2010).

148 *See supra* Section I.A.

149 *See supra* Section I.A.

150 *See supra* Section I.A.

151 *See* Anthony, *supra* note 25.

152 *Id.*

153 *See id.*

154 *See supra* Section I.C.2 (discussing the protectability of "timbre, tone, spatial organization, consonance, dissonance, accents, note choice, combinations, interplay of instruments, and new technological sounds.").

sound engineers' entitlement to authorship. In a recent decision, the Ninth Circuit held that remastering engineers do not meet the minimum originality requirement for copyrightability, though they do note that this is specifically confined to remastering engineers as opposed to studio engineers.[155] The dicta further indicates that studio engineers by contrast may be entitled to copyright.[156] In discussing the roles of studio engineers, the court states that their decisions "almost always contribute to the essential character and identity contained in the original sound recording" whereas the remastering engineer's role is to preserve the original while updating it to meet modern listening needs.[157] By making this distinction, the court indicates sound engineers' contributions may be entitled to copyright protection, though they did not rule on this issue specifically.[158] This trend of referring to the work of engineers in dicta dates back to the early days of capturing sound via a recording.[159] In regards to the recording of an orchestra in the 1930s, the dicta indicates that the manipulation of dials, arranging of microphones, and handling of mechanical devices to capture the recording would not be enough for authorship.[160] Later, again in dicta, a court implied that the acts of preparing microphones, directing how songs were performed, or serving as an engineer may qualify for joint authorship.[161]

In the few cases that do address the contributions of engineers directly, it is not entirely clear whether they are referring specifically to the sound engineer.[162] These cases refer to legislative history that states that authorship occurs in sound

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155 ABS Entm't, Inc. v. CBS Corp., 908 F.3d 405, 421–23 (9th Cir. 2018).

156 *See id.* at 423.

157 *Id.*

158 *See id.*

159 *See* RCA Mfg. Co. v. Whiteman, 28 F. Supp. 787, 792 (S.D.N.Y. 1939), *rev'd on other grounds*, 114 F.2d 86 (2d Cir. 1940).

160 *See id.*

161 *See* Forward v. Thorogood, 758 F. Supp. 782, 784 (D. Mass. 1991). Particularly, the court ruled the defendant was *not* a joint author because he did *not* do any of these things in any combination, with his role being more of a "very interested and supportive observer." *Id.* The court failed to specify whether performing would affirmatively support a claim for joint authorship. *See id.*

162 *See, e.g.*, Sys. XIX, Inc. v. Parker, 30 F. Supp. 2d 1225, 1228 (N.D. Cal. 1998); Shaab v. Kleindienst, 345 F. Supp. 589, 590 (D.D.C. 1972).

recording "'on the part of the *record producer* responsible for setting up the [recording] session, capturing and electronically processing the sounds, and compiling and editing them to make a final sound recording.'"[163] Importantly, while some of these acts would be typically be performed by a sound engineer, the language specifically refers to the acts of a record producer, so it is unclear if a court would be willing to apply this to a sound engineer.[164] Additionally, this legislative history does not address engineers' primary creative contributions like mixing, balancing, and other audio manipulation.[165]

When the addition of sound recordings to the Copyright Act was challenged in court, it was held that sound recording firms providing equipment and organizing arrangers, performers, and technicians qualify for authorship.[166] Again, these acts were not attributed to sound engineers, but rather, to sound recording firms, so it is unclear if this would apply to contributions by sound engineers.[167] What is more, the work of sound engineers, such as mixing and balancing, is once again not addressed in the opinion.[168] In a case that referred specifically to recording engineers, the court held that simply being a recording engineer was not sufficient for authorship and this was even in a rare application of the lower threshold de minimis test suggested by Nimmer.[169]

A. Sound Engineer Authorship in Sound Recordings

The relationship between artists, producers, and engineers often will not meet the intent requirement for joint authorship.[170] Because of the focus on relationship between the parties, the artist or producer will often be seen as the dominant author with whom

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163 *Sys. XIX, Inc.*, 30 F. Supp. at 1228 (quoting H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 56 (1976)).

164 *See id.*

165 *See id.*

166 *See Shaab*, 345 F. Supp at 590.

167 *See id.*

168 *See id.*

169 Brown v. Flowers, 297 F. Supp. 2d 846, 852 (M.D.N.C. 2003).

170 *See infra* Section I.A.

the sound engineer would be subsidiary.[171] For example, the engineer's main job has been described as "bring[ing] the producer's and artist's vision to fruition" [172] and "fulfilling the visions of producers and artists who walk through the doors with musical ideas but not necessarily the know-how to realize them."[173] Furthermore, the engineer is only credited on albums as engineer, instead of also being credited as producer or composer.[174] This is particularly important for the intent requirement, given the weight courts have previously placed on the billing in other works when determining joint authorship.[175] In the sound recording category of copyrights, a producer has been seen as an author so the crediting as an engineer likely will be seen as intent to *not* share authorship with the engineer.[176]

What is more, it is not clear whether engineers' contributions would be independently copyrightable.[177] Even when applying the lower de minimis test, work by a recording engineer was not seen as enough for authorship.[178] Given the sparse case law, that often times only tangentially discusses sound engineers, it is difficult to say whether the current contributions of sound engineers would meet the originality and creativity requirements for independent copyrightability.[179] While *ABS Entertainment, Inc.* specifically decided the law regarding remastering engineers, it does hold that the initial "producer/engineer" contributes to the initial recording in ways that meet the originality requirement.[180] Again, though, the issue is muddied by the inclusion of the word "producer" and not

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171 *Cf.* Thomson v. Larson, 147 F.3d 195, 202–05 (2d Cir. 1998); Childress v. Taylor, 945 F.2d 500, 508 (2d Cir. 1991).

172 Morgan, *supra* note 19.

173 BERKLEE COLL. OF MUSIC, *supra* note 19.

174 *See, e.g.*, *Honey*, ALLMUSIC, https://www.allmusic.com/album/honey-mw0003213084/credits [https://perma.cc/T8KR-7B4M] (last accessed, Nov. 5, 2018); ALLMUSIC, *supra* note 24.

175 *Cf. Thomson*, 147 F. Supp. at 203 (finding that the playwright's decision to list himself as "author/composer" and the plaintiff dramaturg only as "dramaturg" strongly supported that the playwright thought of himself as the sole author).

176 *See* Sys. XIX, Inc. v. Parker, 30 F. Supp. 2d 1225, 1228 (N.D. Cal. 1988).

177 *See, e.g.*, Brown v. Flowers, 297 F. Supp. 2d 846, 852 (M.D.N.C. 2003).

178 *See id.*

179 *See, e.g.*, ABS Entm't, Inc. v. CBS Corp., 908 F.3d 405, 421–23 (9th Cir. 2018).

180 *See id.*

specifically referencing the audio manipulation acts performed by engineers.[181]

Additionally, while it has been acknowledged that "timbre, tone, spatial organization, consonance, dissonance, accents, note choice, combinations, interplay of instruments, and new technological sounds" taken together may be protectable, the court specifically recognized that elements like these would not be entitled to individual protection.[182] Sound engineers' contributions are often limited to these elements individually, working solely on timbre or interplay between instruments, and would not be seen as substantial enough contributions.[183] Because of this, their contributions would likely not meet the independent copyrightability requirement.[184]

B. Sound Engineer Authorship in Musical Works

These considerations of independent copyrightability are reflected in sound engineers' contributions to musical works as well. The joint authorship test, though, even more adversely affects sound engineers of musical works because of the fixation requirement.[185] In *BTE v. Bonnecaze*, the court specifically notes that "[t]he sound recordings of the songs cannot serve as the tangible form required for Bonnecaze to meet the independently copyrightable test required for proving joint authorship."[186] This sentiment is echoed in other opinions focusing on disputes over the fixation requirement.[187] Though the statute seems to indicate that a recording can be used as the basis for a musical work, these cases indicate that courts may confine authorship for musical works to

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181 *See id.*

182 Swirsky v. Carey, 376 F.3d 841, 848–49 (9th Cir. 2004).

183 *See supra* Section I.A.

184 *See, e.g.*, Merchant v. Lymon, 828 F. Supp. 1048, 1058 (S.D.N.Y. 1993).

185 *See* BTE v. Bonnecaze, 43 F. Supp. 2d 619, 628 (E.D. La. 1999).

186 *See id.*

187 *See* Williams v. Gaye, 895 F.3d 1106, 1121 (9th Cir. 2018) (affirming the district court's decision to limit evidence in an infringement trial to only written elements in sheet music). *See generally* Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2003) (discussing that a singer's improvisation embodied only in the sound recording, outside of the score, are not protected as part of the composition).

only the four corners of sheet music.[188] This ignores the creative contributions made by sound engineers in the mixing and mastering stages of the recording process.[189] These contributions are not written down on sheet music but are a part of the musical composition because they help convey the overall creative process and narrative in music.[190] As for the intent requirement, sound engineers run into much of the same issues for musical works that are present in copyrights for sound recordings including lesser crediting and domination by either the artist or producer.[191]

C. Current Judicial Approaches

The current judicial approach to handling joint authorship for the above reasons sets the bar far too high.[192] The intent requirement has been interpreted to mean that the authors intended to be joint authors.[193] However, this extends far beyond the text of the statute, which simply 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."[194] The second requirement for joint authorship set out by the *Childress* court is independent copyrightability.[195] In imposing this requirement, the court expressed hesitation for a number of reasons.[196] First, it references the objective of copyright law to encourage production of creative works and questions how independent copyrightability furthers this objective, since the resulting work would be just as creative even if the idea and expression came from two different people.[197] The opinion goes on to recognize that the text of the statute does not require independent copyrightability.[198] Finally, the court analogizes to the

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188 *See* 17 U.S.C. § 102 (a) (2018); *Williams*, 895 F.3d at 1121; *Newton*, 388 F.3d at 1189.
189 *See supra* Section I.A.
190 *See supra* Section I.A.
191 *See supra* Section I.A.
192 *See supra* Section I.D.
193 Childress v. Taylor, 945 F.2d 500, 508 (2d Cir. 1991).
194 *See* 17 U.S.C. § 101 (2018) (emphasis added).
195 *Childress*, 945 F.2d at 507.
196 *See id.* at 506.
197 *See id.*
198 *See id.*

work for hire doctrine where an employer is regarded as an author but only contributes by selecting employees, which is not protectable expression.[199] The court nevertheless adopts the requirement to prevent spurious claims and strike an appropriate balance in copyright and contract law.[200] In imposing this requirement, however, the court instead stifled the ability of potential authors to lay claim to their work. This reliance on contracts may actually hinder the objective of copyright law because it disadvantages creative parties with potentially less bargaining power, like a sound engineer, who may be unable to negotiate for an assignment of ownership.[201]

In a unique approach to this issue, the Ninth Circuit held that even if a person is not a joint author, he or she may still have a copyright interest in his or her own contribution in the work.[202] While this approach remedies the intent issue, it still fails to address the issues with the mandatory element of independent copyrightability.[203] Many commentators have also expressed frustration with the current joint authorship standards and how they adversely affect other players in the music industry such as featured vocalists, side musicians, record producers, and even Chuck Berry and Johnnie Johnson.[204] Sound engineers face a similar uphill battle with regards to joint authorship.[205]

To see this difficulty in obtaining copyright, Derek Ali can, again, be used as an example. Despite his contributions to both the

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199 *See id.*

200 *See id.* at 507.

201 *See supra* Sections I.B and I.D.3.

202 Garcia v. Google, Inc., 766 F.3d 929, 933 (9th Cir. 2014).

203 *See id.*

204 *See, e.g.*, Tuneen E. Chisolm, *Whose Song Is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J. L. & TECH. 274, 277 (2017); George W. Hutchinson, *Can the Federal Courts Save Rock Music?: Why a Default Joint Authorship Rule Should Be Adopted to Protect Co-Authors Under United States Copyright Law*, 5 TUL. J. TECH. & INTELL. PROP. 77, 79 (2003); Timothy J. McFarlin, *Father(s?) of Rock & Roll: Why the Johnnie Johnson v. Chuck Berry Songwriting Suit Should Change the Way Copyright Law Determines Joint Authorship*, 17 VAND. J. ENT. & TECH. L. 575, 650 (2015); Gabriel Jacob Fleet, *Note, What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235, 1240 (2008).

205 *See supra* Sections II.A and II.B.

song "These Walls" and the entire album *To Pimp a Butterfly*, Derek Ali does not have an authorship credit on either of these works in the copyright registration.[206] *To Pimp a Butterfly* is registered as a sound recording, including "These Walls" in its contents.[207] As discussed above, engineers are more likely to receive authorship over the sound recording.[208] However, because of the work-for-hire doctrine, no actual artists are authors on the *To Pimp a Butterfly* registration.[209] Interscope Records and Aftermath Records are, instead, listed as authors.[210] For both of the "These Walls" registrations, the type of work is listed as "music."[211] The registration lists Kendrick Lamar, Terrace Martin, Rose McKinney, Larrance Dopson, and Anna Wise as authors.[212] On the album, Lamar and Wise are credited as artists, while Martin, McKinney, and Dopson are credited as composers.[213] Conspicuously absent as authors are not only engineer, Derek Ali, but also executive producer Dr. Dre.[214] This shows that both engineers and producers may have difficulty receiving authorship for their work.[215]

D. The Music Modernization Act

The most influential statutory approach to the fair treatment of sound engineers is the recent passage of the Music Modernization Act in October of 2018.[216] This act included the Allocation for

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206 *See* THESE WALLS, *supra* note 84; THESE WALLS FEAT. ANNA WISE EXPLICIT, *supra* note 84; TO PIMP A BUTTERFLY, Registration No. SR0000767371.

207 TO PIMP A BUTTERFLY, *supra* note 206.

208 *See supra* Section II.B.

209 TO PIMP A BUTTERFLY, *supra* note 206.

210 *Id.*

211 *See* THESE WALLS, *supra* note 84; THESE WALLS FEAT. ANNA WISE EXPLICIT, *supra* note 84.

212 THESE WALLS, *supra* note 84; THESE WALLS FEAT. ANNA WISE EXPLICIT, *supra* note 84.

213 *These Walls*, ALLMUSIC, https://www.allmusic.com/album/these-walls-mw0002891930/credits [https://perma.cc/YH2M-LKEU] (last visited Dec. 2, 2018).

214 *See* THESE WALLS, *supra* note 84; THESE WALLS FEAT. ANNA WISE EXPLICIT, *supra* note 84; Tingen, *supra* note 44.

215 *See* THESE WALLS, *supra* note 84; THESE WALLS FEAT. ANNA WISE EXPLICIT, *supra* note 84.

216 Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 115 Pub. L. No. 264, 132 Stat. 3676, (2018).

Music Producers Act.[217] This portion of the act addresses producers' and engineers' rights and abilities to collect royalties by allowing direct payment to them.[218] It does not, however, address their right to authorship.[219] It instead reinforces the idea of artist domination in the relationship in its royalty collection procedures.[220] It requires SoundExchange to receive instructions called "letters of direction" from artists in order to distribute these royalties to producers and engineers.[221] The producer or engineer can only take action on their own to receive these royalties if they first make reasonable attempts to contact and request a letter of direction from the artist.[222] Only after they have done this, and only if SoundExchange receives no objection from the artist within ten business days from the first distribution to the producers, will the payment of royalties continue.[223] Though this approach is helpful, as it codifies a procedure for producers and engineers to collect royalties, it still relies on the artist and does not create a pathway for producers and engineers to assert joint authorship for their creative contributions.[224] This approach does nothing more to improve the negotiating position of engineers, and furthermore re-emphasizes the "dominant" author issue found in the current joint authorship standard.[225]

Given the potential shift away from large record labels and publishers to more artists writing and recording independently in the industry,[226] and the fact that this shift will result in less

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[217] *The AMP Act*, RECORDING ACAD., https://www.grammy.com/advocacy/learn/amp-act [https://perma.cc/GU2U-CH65] (last visited Oct. 14, 2018).

[218] *Id.*

[219] *Id.*

[220] *See The Allocation for Music Producers (AMP) Act*, COPYRIGHT ALLIANCE, https://copyrightalliance.org/wp-content/uploads/2018/03/Summary-of-AMP-Act_Copyright-Alliance.pdf [https://perma.cc/TS5E-69BH] (last accessed Oct. 14, 2018).

[221] 115 Pub. L. 264 §§ 301–03. The act specifies that a nonprofit collective will be designated to distribute these royalties. *See id.* SoundExchange is expected to perform this role. *See* COPYRIGHT ALLIANCE, *supra* note 220.

[222] COPYRIGHT ALLIANCE, *supra* note 220.

[223] *Id.*

[224] *Id.*

[225] *See supra* Section I.D.1.

[226] *See supra* Section I.B.

copyrights governed by the work-for-hire doctrine,[227] it is important for engineers to have a lower bar for authorship so they will have ownership over works they have contributed to creatively and helped to bring to full expression. This is not only to collect streaming revenue, as the Music Modernization Act helps to address, but also to give engineers more agency over their work.

III. APPLICATION FROM PATENT LAW

The proposed solution to these issues is to revise the standards for joint authorship by applying the standards of co-inventorship from patent law to copyright law. Before this solution is discussed in full, it is important to have an understanding of both the current standard for joint inventorship and the precedent for applying patent law to copyright law.

A. Joint Inventorship in Patent Law

Patent law does not include a definition of "joint invention" in the same way copyright does for a "joint work."[228] As previously mentioned, the statute instead states that "[w]hen an invention is made by two or more persons jointly, they shall apply for patent jointly."[229] It goes on to specify that the inventors may apply jointly even if they did not physically work together or simultaneously, did not make the same type or amount of contribution, or did not make a contribution to every claim of the patent.[230] Courts have held that collaboration by inventors produces a joint invention when they are working toward the same end.[231] Each inventor only needs to perform a part of the work, the entire concept does not have to be clear to each inventor, and each inventor does not have to contribute the same type of work or even

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227 *See supra* Section I.D.3.

228 *See* 35 U.S.C. § 116 (a) (2018).

229 *Id.*

230 *Id.*

231 Fina Oil & Chem. Co. v. Ewen, 123 F.3d 1466, 1473 (Fed. Cir. 1997); Kimberly-Clark Corp. v. Procter & Gamble Distrib. Co., 973 F.2d 911, 916 (Fed. Cir. 1992); Monsanto Co. v. Kamp, 269 F. Supp. 818, 824 (D.D.C. 1967); Ethox Chem., LLC v. Coca-Cola Co., Civil Action No. 6:12-1682-KFM, 2015 U.S. Dist. LEXIS 192355, at *26 (D.S.C. Sep. 30, 2015).

the same amount of work.[232] Congress codified this language in the statute.[233]

In interpreting further, courts have found that contribution to conception is the applicable standard in determining joint inventorship.[234] Conception is the most important element in determining inventorship, generally, in patent law.[235] It is defined as the completion of the mental part of an invention when the idea is so clearly defined that a person of ordinary skill in the art would be able to create the invention without further extensive research or experimentation.[236] The idea must be definite, specific, and settled.[237] The inventor must provide corroborating evidence, usually a contemporaneous disclosure, that someone skilled in the art would understand the invention.[238] Each joint inventor must make a significant contribution to this conception.[239]

The determination of joint inventorship is fact specific.[240] One factor in making this determination that courts have applied particular weight to is the relationship of the inventors.[241] Specifically, a relationship in which one person conceived the idea and the other reduced it to practice was shown to be entitled to joint inventorship.[242] In *PerSeptive Biosystems, Inc. v. Pharmacia Biotech, Inc.*, the first set of scientists discovered a 4000 angstrom packing particle that had a particular property producing "terrific separation."[243] These inventors did not understand why this separation occurred and so hired the second set of scientists to research the material.[244] These scientists discovered the reason for

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232 *Monsanto Co.*, 269 F. Supp. at 824.

233 *See* 35 U.S.C. § 116 (a) (2018); *Monsanto Co.*, 269 F. Supp. at 824.

234 BJ Servs. Co. v. Halliburton Energy Servs*.,* 338 F.3d 1368, 1373 (Fed. Cir. 2003).

235 Burroughs Wellcome Co. v. Barr Labs*.,* Inc., 40 F.3d 1223, 1227–28 (Fed. Cir. 1994).

236 *Id.* at 1228

237 *Id.*

238 *Id.*

239 *BJ Servs.*, 338 F.3d at 1373.

240 Fina Oil & Chem. Co. v. Ewen, 123 F.3d 1466, 1473 (Fed. Cir. 1997).

241 *See* PerSeptive Biosystems, Inc. v. Pharmacia Biotech, Inc., 12 F. Supp. 2d 69, 85 (D. Mass. 1998).

242 *Id.*

243 *Id.*

244 *Id.*

the success of the particle and were able to replicate the method, which they then patented.[245] The patent failed to list the first scientists as co-inventors.[246] The court held that the first scientists should have been named as co-inventors, as the second scientists could not have created the patent process without them, so the patent was invalid.[247]

B. Historic Kinship Between Patent and Copyright Law

Both patent law and copyright law find their origin in the Constitution.[248] For both areas of law, the purpose is to promote either creative or useful arts by granting some sort of monopoly over the product.[249] The Supreme Court signaled the sharing of doctrines between these two areas of intellectual property in *Sony Corp. of America v. Universal City Studios, Inc.*[250] The Court decided to import the "staple article of commerce doctrine" from patent law to copyright law stating that so long as a device has a non-infringing use the manufacturer cannot be held liable for contributory infringement.[251] The Court justified this use of patent law because of the "historic kinship" between the two areas of law.[252] This is not the only instance of a sharing of standards between the two.[253] After the United States joined the Berne Convention in 1989, some copyrighted works that had already entered the public domain would return to protection.[254] The Court upheld this provision of the Berne Convention by analogizing to patent statutes from 1808 that similarly restored patents' validity after they have expired.[255] In both of these cases, the application of patent law was a legal fiction done for some sort of policy reason in line with the objectives of copyright law. In *Sony Corp. of*

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245 *Id.*
246 *Id.*
247 *Id.*
248 U.S. CONST. art. I, § 8, cl. 8.
249 *See id.*
250 464 U.S. 417, 439 (1984).
251 *Id.* at 440.
252 *Id.* at 339.
253 *See, e.g.*, Golan v. Holder, 132 S. Ct. 873, 886 (2012).
254 *See id.* at 875.
255 *Id.* at 886.

America, the Court promoted the objectives of copyright law by allowing broadcasters to reach a larger audience, as viewers could now record programs they would have otherwise missed, thus promoting useful art for the wider public.[256] In *Golan*, the Court's application of patent law gave the same level of protection to American authors as to authors in the rest of the world, thus promoting creative works in the United States.[257] Though scholars have criticized this use,[258] in applying patent standards to joint authorship, the objective of copyright law to promote useful art will be furthered.

C. Application of Patent Standards to Copyright Law

PerSeptive Biosystems, Inc. demonstrates the beneficial parallel between joint inventorship and joint authorship to be applied.[259] In this case, the first team of scientists made a discovery then needed the second team of scientists to reduce this idea to practice.[260] The artist/producer and sound engineer relationship functions in much the same way.[261] An artist or producer will have an idea about a how a song should sound and the sound engineer must help reduce this idea to practice, or more properly, reduce this idea to a fixed form of expression.[262] Joint authorship law currently focuses its intent analysis on the relationship between authors and whether the so-called dominant author intends to share authorship with the other.[263] The analysis should instead mirror that used in patent law as seen in *PerSeptive Biosystems, Inc.* where the examination of relationship instead focuses on whether the final product would have been possible without the contributions of both parties.[264] To

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256 *See* 464 U.S. at 446.

257 *See* 132 S. Ct. at 889.

258 *See, e.g.*, Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CALIF. L. REV. 941, 944–45 (2007).

259 *See* PerSeptive Biosystems, Inc. v. Pharmacia Biotech, Inc., 12 F. Supp. 2d 69, 85 (D. Mass. 1998).

260 *Id.*

261 *See supra* Section I.A.

262 *See supra* Section I.A.

263 *See* Childress v. Taylor, 945 F.2d 500, 508 (2d Cir. 1991).

264 *See PerSeptive Biosystems, Inc.*, 12 F. Supp. 2d at 85.

reach this application, the patent standards must be applied to copyright law.

In patent law, the two inquiries that are addressed are: whether the joint inventors collaborated[265] and whether the joint inventors significantly contributed to the conception of the invention.[266] These inquiries can replace the copyright standards of intention to be co-authors and independent copyrightability, respectively. [267] This application is appropriate because these standards more closely track the statutory language defining 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."[268] "Collaborate" is defined as "to work jointly with others or together especially in an intellectual endeavor."[269] Collaboration is defined as a "cooperative arrangement in which two or more parties . . . work jointly towards a common goal."[270] These definitions embody an intention for contribution to be merged together.[271] Because of this, the application of a collaboration standard to copyright law instead of intent to be authors more accurately tracks the statute. For sound engineers, this means that a lower level of crediting on an album does not mean losing an intent battle because their creative contributions to the song may be of a different quality or quantity than the creative contributions of other collaborators. Instead, such a standard may entitle them to copyright so long as they have worked with an artist or producer in creating the song. This would mirror patent law where inventors can contribute different amounts of work, different types of work, and at different times, but can still be entitled to ownership.[272]

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265 Fina Oil & Chem. Co. v. Ewen, 123 F.3d 1466, 1473 (Fed. Cir. 1997).

266 BJ Servs. Co. v. Halliburton Energy Servs., 338 F.3d 1368, 1373 (Fed. Cir. 2003).

267 *Childress*, 945 F.2d at 507–08.

268 17 U.S.C. § 101 (2018).

269 *Collaborate*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/collaborate [https://perma.cc/B9ZV-LKWD] (last visited Nov. 5, 2018).

270 *Collaboration*, BUSINESSDICTIONARY, http://www.businessdictionary.com/definition/collaboration.html [https://perma.cc/HAX3-7EDB] (last visited Nov. 5, 2018).

271 *See* MERRIAM-WEBSTER, *supra* note 269; BUSINESSDICTIONARY, *supra* note 270.

272 *See supra* Section III.A.

A contribution to conception standard in copyright law is a bit trickier. Copyright law is adamant that ideas cannot be copyrighted.[273] However, the goal is to lower the threshold for *joint* authorship so a contribution to conception, again, embodies the statutory language. The language refers to a *unitary* whole for joint works, not multiple unitary "wholes" that then make up a separate copyrighted work, as the independent copyrightability standard implies.[274] A "unitary whole" in copyright law is an original work fixed in any tangible medium of expression.[275] In order to have a copyright, the original idea is inseparable from its fixation.[276] It follows that significant contribution to this, whether it is contributing an idea or fixation, should entitle the contributor to copyright protection to the work as a whole, as the statute states. It is this application that has the potential to allow sound engineers to have a copyright claim in musical works. Given how collaborative the writing and recording process is, a sound engineer may be able to present evidence that they contributed to the conception of a song, even if their contributions were not fixed on the sheet music itself.[277]

Beyond more closely tracking the statutory language, application of the proposed standard restores the objectives of patent and copyright law that are found in the Constitution: promoting science and useful arts.[278] By allowing creative collaborators more opportunity to receive authorship, there is more of an incentive not only to create but to create the best product possible through collaboration. Where an artist has a particular vision for a song but does not have the technical expertise to create exactly the right sound, the engineer can supplement it with his or her own creativity and skills. This sort of collaboration creates a higher standard of creative works rather than each of these people working on their own. Sound engineers, instead of simply doing

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273 17 U.S.C. § 102 (b) (2018).

274 *See id.*

275 17 U.S.C. § 116 (a) (2018).

276 *See id.*

277 *See, e.g.*, Tingen, *supra* note 44 (discussing how Kendrick Lamar used Derek Ali's "sonic ideas" as inspiration).

278 *See* U.S. CONST. art. I, § 8, cl. 8.

what the artist or producer tells them, can contribute full ideas knowing they can have ownership over what they have created. Furthermore, even if the sound engineer has not made a fully creative contribution to the work, oftentimes, the sound engineer is essential for the meeting of the fixation requirement for copyright.[279] They actually record the music and fix it in a tangible form.[280] Because of this, they have contributed to the works' conception.

Courts currently apply the standard for joint authorship far too broadly.[281] The statute simply 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."[282] Instead of taking this statute at its face value, for intention to merge contributions, the standard has become an intent to be co-authors.[283] Independent copyrightability of the contribution has also been imposed, even though the statute does not mention it all.[284] The patent law standards of collaboration and contribution to conception[285] far more closely track the language of the statute and should be applied.[286] Even if they are not applied exactly to copyright law, the patent application of joint inventorship is a near exact textual reading of the Patent Act.[287] This application can be used as rationale to argue a more textual reading of the statute, especially considering that the Supreme Court has previously analogized to patent law as a rationale for editing copyright law.[288] Given the issues with joint authorship both generally and for sound engineers, specifically,[289] this is a solution that could hold immense importance. The changing nature

279 *See supra* Section I.A.
280 *See* U.S. CONST. art. I, § 8, cl. 8.
281 *See supra* Section I.D.
282 17 U.S.C. § 101 (2018).
283 *See supra* Section I.D.1.
284 *See supra* Section I.D.2.
285 *See supra* Section III.A.
286 *See supra* Section III.C.
287 *See supra* Section III.A.
288 *See supra* Section III.B.
289 *See supra* Part II.

of the industry, potentially phasing out the work for hire doctrine with the rise of independent artists, bolsters this importance.[290]

CONCLUSION

When Michael Jackson wrote a song, Rob Hoffman, a sound engineer, played an essential role in fixing his musical composition in a sound recording.[291] Yet no one would suggest that Michael Jackson does not own "Beat It" simply because he did not fix it in its final form.[292] More recently, Derek Ali made key creative contributions recording the seminal album *To Pimp a Butterfly*.[293] The album received an off-the-charts 9.3 rating on Pitchfork, with the review specifically discussing the "live-sounding" mix worked on by Ali.[294] Similarly, in the 1960s, Geoff Emerick helped bring John Lennon's vision of swirly music to life on *Sgt. Pepper's Lonely Hearts Club Band*, literally creating a tangible medium of expression for an idea.[295] Emerick has even been described as the brain behind The Beatles sound.[296] However, under the current standards of joint authorship, it is unlikely that Emerick or any of these engineers would be entitled to authorship[297] over the works they have brought life, or that their creativity made become reality.[298] In applying patent law to copyright, as has been done in the past, they may have a fighting chance.

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290 *See supra* Section I.B.

291 *See supra* Section I.A.

292 *See supra* Section I.A.

293 *See* Tingen, *supra* note 44.

294 Craig Jenkins, *To Pimp a Butterfly*, PITCHFORK (Mar. 19, 2015), https://pitchfork.com/reviews/albums/20390-to-pimp-a-butterfly/ [https://perma.cc/G4D8-X532]; Tingen *supra* note 44.

295 GEOFF & MASSEY, *supra* note 1, at 167–68.

296 Marinucci, *supra* note 16.

297 *See supra* Part II.

298 *See supra* Section I.A.