

2021

## The Author and the Other: Reexamining the Doctrine of Joint Authorship in Copyright Law

Tehila Rozencwaig-Feldman

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Intellectual Property Law Commons](#)

---

### Recommended Citation

Tehila Rozencwaig-Feldman, *The Author and the Other: Reexamining the Doctrine of Joint Authorship in Copyright Law*, 32 Fordham Intell. Prop. Media & Ent. L.J. 172 (2021).

Available at: <https://ir.lawnet.fordham.edu/iplj/vol32/iss1/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## The Author and the Other: Reexamining the Doctrine of Joint Authorship in Copyright Law

### Cover Page Footnote

Post-Doctoral Fellow, Faculty of Law, Bar Ilan University. This article is part of a dissertation submitted to Bar Ilan University, Faculty of Law. The author wishes to thank Prof. Miriam Marcowitz-Bitton, Prof. Yuval Feldman, Prof. Lior Zemer, and Dr. Yifat Nahmias for very helpful comments. The author also wishes to thank conferences participants at the IPRE - IP Researchers Europe Conference organized by WIPO, WTO, and UNIGE, Switzerland, Geneva (2018); Michigan Law 2018 Junior Scholars' Conference (2018); The Israeli Academic Forum for Intellectual Property, the Hebrew University of Jerusalem, Israel (2016); Workshop on Institutional Analysis - The Ronald Coase Institute, University de los Andes, Bogota, Colombia (2017), and ATLAS Agora Conference (Association of Transnational Law Schools), Queen Mary University, London, England (2017).

# The Author and the Other: Reexamining the Doctrine of Joint Authorship in Copyright Law

Tehila Rozencwaig-Feldman\*

*Over the years, there has been an increase in the importance and prevalence of the joint authorship doctrine resulting from the internet evolution and globalization processes which allow quick sharing of content and information among various creators from around the world. The collaborations that increased and intensified during the COVID-19 pandemic occurred across a wide variety of creative areas. Today, many types of works such as songs, movies, software, and computer games are created regularly through joint authorship. However, current copyright law regimes relate to this complex and fascinating phenomenon in a limited way, leading to courts' inconsistent interpretation of the doctrine's tests.*

*The joint authorship doctrine relies on one primary collaborative model, the "all-or-nothing" model, which conditions the granting of joint authorship on authors making similar contributions to a work. In the beginning of the twenty-first century, the English legal system began recognizing asymmetrical contributions of joint*

---

\* Post-Doctoral Fellow, Faculty of Law, Bar Ilan University. This article is part of a dissertation submitted to Bar Ilan University, Faculty of Law. The author wishes to thank Prof. Miriam Marcowitz-Bitton, Prof. Yuval Feldman, Prof. Lior Zemer, and Dr. Yifat Nahmias for very helpful comments. The author also wishes to thank conferences participants at the IPRE - IP Researchers Europe Conference organized by WIPO, WTO, and UNIGE, Switzerland, Geneva (2018); Michigan Law 2018 Junior Scholars' Conference (2018); The Israeli Academic Forum for Intellectual Property, the Hebrew University of Jerusalem, Israel (2016); Workshop on Institutional Analysis - The Ronald Coase Institute, University de los Andes, Bogota, Colombia (2017), and ATLAS Agora Conference (Association of Transnational Law Schools), Queen Mary University, London, England (2017).

*authors and responded by rewarding them proportionally on the basis of each author's contribution to the work. However, both models ignore other types of contributions, such as those of ideas, participation in mass collaborative models, and the contribution of experts' technical knowledge. Disregarding these types of contributions may reduce the incentive of creators to collaborate—one of the central challenges of the joint authorship doctrine. This disincentive to collaborate requires reexamination of the joint authorship doctrine. Despite the extensive legal literature suggesting it is essential to comprehensively modify the joint authorship doctrine, there is a great need to introduce a better model for determining joint authorship.*

*This article introduces a new approach to joint authorship, employing theoretical and empirical tools, in an attempt to better address the joint authors' expectations from the collaborative process and the allocation of rights. The theoretical discussion will include a doctrinal analysis of joint authorship and the different requirements necessary to recognize this doctrine in the English and US legal systems. The empirical portion will explore individuals' perceptions regarding joint authorship using quantitative tools. For the first time, the empirical research will test the allocation of rights in the "all-or-nothing" model as compared to the "proportional" model. The results demonstrate that a proportional allocation of rights, as sorted by the English legal system, will grant economic rights to joint authors in a greater number of cases. Additionally, the empirical research will show that, in some cases, remuneration should be divided proportionally between joint authors, even when the contribution is not copyrightable, such as with ideas or technical assistance.*

*The primary goal of this Article is to suggest an innovative model that provides a comprehensive normative solution to the challenges raised by existing models of the joint authorship doctrine. In addition, this Article seeks to provide greater certainty regarding the reward distribution among authors within the joint authorship context. Grounded in theoretical and empirical results, this model aspires to provide joint authors with rights and royalties in a proportionate and just manner—namely, by accurately accounting for each author's contributions to the final work.*

*This model, which is based on a structured scale, will assist courts and joint authors in accurately assigning the relative portion of the work that each author contributed. In general, this scale helps to divide the joint authors' world into three main categories: the "primary joint author," the "secondary joint author," and the "de minimis contributor." The primary joint author appears at the top of the scale and would be entitled to an equal share of the rights in the joint work. The secondary joint author, whose contribution is copyrightable yet relatively smaller than that of the primary joint authors, should be entitled to a relative share of the rights. Finally, the de minimis contributor, whose contribution is not copyrightable, may be granted only a moral right (credit or acknowledgment) in the joint work.*

*In summary, by focusing on preserving the incentive of joint authors to create collaborative works, this Article aspires to propose a new, innovative model that promotes a distinct and feasible way to allocate joint authorship rights to better reward such authors.*

INTRODUCTION.....	175
I. THE THREE DOCTRINAL REQUIREMENTS TO ESTABLISH JOINT AUTHORSHIP .....	179
A. <i>The Copyrightable Contribution Test</i> .....	180
B. <i>The Mutual Intention Test</i> .....	186
C. <i>The "Master Mind" Test</i> .....	188
II. THE CURRENT JOINT AUTHORSHIP MODELS.....	191
A. <i>The All-or-Nothing Model</i> .....	194
B. <i>The Proportional Model</i> .....	196
III. EMPIRICAL RESEARCH.....	199
A. <i>Methodology</i> .....	199
B. <i>Sample (Data Set)</i> .....	201
C. <i>Results</i> .....	202
D. <i>Discussion</i> .....	205
IV. THE PROPOSED MODEL .....	206
A. <i>"De Minimis Contributor" Justifications</i> .....	209
1. <i>Promoting Creativity</i> .....	209
2. <i>Acknowledging Moral Rights</i> .....	210
3. <i>Recognizing Ideas in a Joint Work</i> .....	212
4. <i>Where Does an Idea Begin and End?</i>	

Distinguishing Between Different	
Types of Ideas .....	214
a) Simple v. Complex.....	214
b) General v. Specific.....	216
c) Qualitative Characteristic.....	217
B. <i>Applying the Model</i> .....	219
1. The <i>Thomson Case</i> .....	219
2. The <i>Ulloa Case</i> .....	220
3. The <i>Aalmuhammed Case</i> .....	221
CONCLUSION .....	222

## INTRODUCTION

Over the years, there has been an increase in the importance and prevalence of the joint authorship doctrine. This is due to the internet’s evolution and globalization processes which allow creators to share content and information throughout the world, both quickly and easily. These collaborations, which have recently increased and intensified during the COVID-19 pandemic, occur constantly in a wide variety of creative areas.<sup>1</sup> Today, many types of works, such as songs, movies, software, and computer games are created on a regular basis through joint authorship.<sup>2</sup> However, current copyright law regimes relate to this complex and fascinating phenomenon in a

---

<sup>1</sup> Brenda Maher & Richard Van Noorden, *The Challenges Facing Research Collaborations*, 594 NATURE 316 (2021), <https://media.nature.com/original/magazine-assets/d41586-021-01570-2/d41586-021-01570-2.pdf> [<https://perma.cc/W4V6-9E88>]; *Standing on the Shoulders of Crowds*, 594 NATURE 301 (2021), <https://media.nature.com/original/magazine-assets/d41586-021-01581-z/d41586-021-01581-z.pdf> [<https://perma.cc/D5GJ-Q6BC>]; E. Sachini et al., *COVID-19 Enabled Co-authoring Networks: A Country-case Analysis*, 126 SCIENTOMETRICS 5225, 5233 (2021) (“While science has been a global collaborative endeavour, COVID-19 only increased this trend.”).

<sup>2</sup> Abraham Bell & Gideon Parchomovsky, *Copyright Trust*, 100 CORNELL L. REV. 1015, 1016 (2014) (“But in the real world, many copyright assets—and perhaps the vast majority of the commercially valuable ones—result from the efforts of more than one contributor. Indeed, in certain copyright domains, such as cinema, software, and games, all works emanate from the labor of multiple individuals as a matter of course.”).

limited way, leading to inconsistent interpretations of the doctrine's tests among courts.<sup>3</sup>

The joint authorship doctrine relies on one main collaborative model, the “all-or-nothing” model, which conditions joint authorship on the authors' similar contributions to a work.<sup>4</sup> In the early twenty-first century, the English legal system began to recognize asymmetrical contributions of joint authors and rewarded them proportionally based on their contribution to the work.<sup>5</sup> However, both models ignore other types of contributions, such as the contribution of ideas and the contribution of technical knowledge of experts.<sup>6</sup> Disregarding these contributions may reduce creators' incentive to collaborate—a central challenge in the joint authorship context. Therefore, this challenge prompts a reexamination of the joint authorship doctrine. Despite the extensive legal literature suggesting the benefits of comprehensively modifying the doctrine, there

---

<sup>3</sup> Lior Zemer, *Contribution and Collaboration in Joint Authorship: Too Many Misconceptions*, 1 J. INTELL. PROP. L & PRAC. 283, 285 (2006) (“What exactly constitutes sufficient contribution is a complex issue, fraught with conflicting interpretations.”); see also Shyamkrishna Balganesh, *Unplanned Coauthorship*, 100 VA. L. REV. 1683, 1700 (2014) (“Yet in one form or the other, courts across the country have eliminated all three options as viable candidates in understanding the nature of the intention required for unplanned coauthorship.”).

<sup>4</sup> Benjamin E. Jaffe, *Rebutting the Equality Principle: Adapting the Co-Tenancy Law Model to Enhance the Remedies Available to Joint Copyright Owners*, 32 CARDOZO L. REV. 1549, 1550 (2011) (“[I]t creates an “on-off” switch that places significant weight on the determination of joint authorship. A party who has made contributions to a work but who has failed to contract is either deemed a joint author with a one-half interest in the work, or is left without any ownership interest and is limited to unjust enrichment remedies.”).

<sup>5</sup> See, e.g., *Martin v. Kogan* [2019] EWCA (Civ) 1645, [53] (Eng.); *Fisher v. Brooker* [2006] EWHC (Ch) 3239, [98] (Eng.)

<sup>6</sup> 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). See, e.g., *Martin v. Kogan* [2017] EWHC (IPEC) 2927, [78] (UK) (“I find that Ms. Kogan's contributions as sole writer of the text of the Screenplay were limited to suggestions of technical musical language, with which she was undoubtedly more familiar than was Mr. Martin.”); *Fylde Microsystems Ltd v. Key Radio Systems Ltd* [1998] FSR 449 (Ch) at 450 (“Although the contributions made by the defendant's employees were extensive and technically sophisticated and had involved the expenditure of considerable time and effort they did not amount to contributions to the authoring of the software and the defendant's assertion of joint authorship failed.”).

remains a great need for a better model for determining joint authorship.

This Article introduces a new approach to joint authorship, employing theoretical and empirical tools to better address joint authors' expectations from the collaborative process and the allocation of rights. The theoretical discussion in Part I will include a doctrinal analysis of joint authorship. Part II will discuss the different requirements in the U.S. and English legal systems.

After the theoretical discussion, Part III will present the results of quantitative research, consisting of a questionnaire distributed to 219 law students portraying a joint play written by two authors (one is a dominant author, whereas the other is a secondary author whose input to the work is relatively minor). Participants decided the rate of reward granted to the secondary author in correspondence with various contribution types (e.g., minor contribution, idea contribution, and a contribution pertaining to historical background of the work's plot). The empirical study has two goals. The first examines the relationship between the legal principle (the number of reward alternatives) and the mode in which the joint authors' copyrights are divided. The second examines whether the participants decided to recognize joint authorship for contributions otherwise unprotected by copyright law and to evaluate what corresponding rewards ought to be granted for such contributions.

These research results clearly demonstrate that the legal principle at the core of the judicial method relates to the way in which copyrights are divided between joint authors. The research findings may imply that proportional allocation of rights, as sorted by the English legal system, will grant economic rights to joint authors in a greater number of cases compared to the United States' "all-or-nothing" model.

As for the second research goal, it was revealed that nearly half of the participants chose to reward the secondary author in cases where the contribution was not protected by copyright. For example, this occurred where a secondary author contributed an idea or



historical background, a contrary result to recent court decisions.<sup>7</sup> In addition, the research findings imply that participants were granted a relatively low-rate reward—an average of approximately eight percent—for an original idea contribution, and an average reward of approximately fifteen percent for historical background contribution assimilated into the joint work.

Upon examining the theoretical and empirical inputs, and based on the findings and conclusions derived therein, this Article seeks to propose an innovative, practical model that will address the ambiguous question: who is a joint author?

One goal of the model is to grant the “secondary joint author” rights and royalties in a fair and just manner—commensurate to the scope of his or her individual contribution to the final work—while maintaining the public’s right to know a work’s source and the authors who contributed to it. The proposed model establishes a *default principle*—a presumption of sharing—from which a joint work’s ownership would be divided into equal parts, unless the involved parties have agreed otherwise. This presumption of sharing incentivizes parties to establish their ownership relationship through a contractual agreement. Additionally, through redivision of the author’s image and scope of contribution, this model seeks to characterize the joint author’s identity into three groups.

The first group is the *primary joint author* (the so-called “typical author”), who appears at the top of the hierarchy and is entitled to ownership and control over the joint work. The primary joint author significantly and essentially contributes to the joint work, makes contributions that are original and copyrightable, and works in full collaboration with the other authors.

The second group is made up of *secondary joint authors*, whose contributions to a joint work are significant and copyrightable, despite being relatively smaller than that of other authors. Under the proposed model, the secondary author is entitled to rights proportional to the scope of the contribution.

---

<sup>7</sup> See, e.g., *Ray v. Classic FM Plc* [1998] FSR 622 (Ch) (Eng.); *Stuart v. Barrett* [1994] EMLR 448 (Ch).

The third group is the *de minimis contributors*, whose contributions are neither copyrightable nor made with the intent to create a joint work. This would include, for instance, contributing technological and scientific knowledge, providing criticism, or arranging and editing materials assimilated into a work. The “de minimis contributor” appears at the bottom of the hierarchy, and the contribution will not entitle him or her to any ownership within the joint work. However, the “de minimis contributor” should receive acknowledgment with a mention by name (credit or moral right).

Currently, no academic study has empirically demonstrated the effect of the legal principle and the remuneration rate allocated to secondary authors. This model’s chief purpose is to fill this gap and encourage appropriate allocation of rights in a more distinct, efficient, and fair manner. Primarily, this model seeks to provide a categorical division of authors according to the type and scope of contributions. Finally, this model aims to promote judicial certainty in the context of joint authorship, using fair compensation to incentivize authors to create.

#### I. THE THREE DOCTRINAL REQUIREMENTS TO ESTABLISH JOINT AUTHORSHIP

Current copyright law regimes address the joint authorship doctrine in an extremely limited way.<sup>8</sup> As a result, the court system is

---

<sup>8</sup> The English copyright law defines “joint authorship” in Section 10(1) of the Copyright, Designs, and Patents Act 1988, c. 48, § 10 (UK) (“[A] work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other authors.”). Comparison with other legal systems shows that the contribution test is the main test in relation to the joint authorship doctrine. For example, Canadian copyright law defines joint work as “[a] work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from that of the other author or authors.” Copyright Act, R.S.C. 1952, c. C-42 (Can.). The German copyright law defines joint work as, “[i]f several authors have combined their works for exploitation in common, each of them may require from the others their consent to the publication, exploitation or alteration of the compound works, if such consent may be reasonably demanded of them.” Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz][UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, BUNDESGESETZBLATT, Teil I [BGBL I] at 1273, art. 9 (Ger.). Chinese copyright law defines joint work, “[w]here a work is created jointly by two or more authors, the copyright in the work shall be enjoyed jointly by the co-authors. No co-authorship may be claimed by

left to settle joint authorship disputes, especially when parties did not address their relationship contractually. Examination of the English and American copyright regimes suggests three major preconditions to establishing joint authorship: (1) each author's level of contribution; (2) the parties' intention to create a joint work of authorship; and (3) the degree of control each author exercises in creating the work. This Article argues that the requirements for establishing joint authorship are vague, inconsistent, and poorly defined by existing copyright regimes.

#### A. *The Copyrightable Contribution Test*

Most legal systems consider the "contribution test" the primary test for determining the existence of joint authorship.<sup>9</sup> However, the degree of contribution required to prove joint authorship varies across legal systems. In the English legal system, the contribution test requires a significant and original contribution from each joint author that is indistinguishable from the contributions of the other joint authors.<sup>10</sup> Each author's contribution must add significant and original creative input to the protectable, expressive parts of the joint work.<sup>11</sup> Significance and originality are questions of fact and degree, yet each author's contribution needs not be equal to the contribution of the other authors' contributions.<sup>12</sup> This requirement presents the challenge of precisely defining what constitutes a sufficient contribution.<sup>13</sup>

---

anyone who has not participated in the creation of the work." Zhonghua RenMing GongHe Guo ZhuZuoQuan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by Decree of the President of People's Republic of China, Sept. 7, 1990, effective June 1, 1991), art. 13 (China).

<sup>9</sup> See *id.* and accompanying text.

<sup>10</sup> See Zemer, *supra* note 3, at 285 ("The contribution of each must not be distinct from that of the other and each must significantly add original creative input to the protectable expressive form of the creation.").

<sup>11</sup> See KEVIN GARNETT ET AL., *COPINGER AND SKONE JAMES ON COPYRIGHT* 333 (Sweet & Maxwell eds., Thompson Reuters 16th ed. 2011).

<sup>12</sup> LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* 191 (2007) ("The contribution should not be separable or distinct from the contribution of any other collaborator and it has to be substantial, but not necessarily equal.").

<sup>13</sup> See, e.g., *Stuart v. Barrett* [1994] EMLR 448 (Ch); *Fylde Microsystems Ltd v. Key Radio Systems Ltd* [1998] FSR 449 (Ch); *Brighton v. Jones* [2004] EWHC (Ch) 1157.

The following three cases demonstrate that English courts measure what constitutes a “significant contribution” by considering subjective and objective factors to determine whether a contributor’s work falls within the category of “joint work.” A major English case, *Beckingham v. Hodgens*, discussed the essence of joint authorship.<sup>14</sup> In this case, a musician wrote a violin solo used in the famous song, “Young at Heart.”<sup>15</sup> The violinist requested recognition as a joint author and to receive an equal share of royalties.<sup>16</sup> Relying on the aid of music specialists’ opinions, the court concluded that the contribution of the violin solo was sufficiently “significant and original,” granting the plaintiff half of the rights in the song.<sup>17</sup>

In another case, *Fisher v. Brooker*, the court recognized an organ soloist as a joint author for his contribution to the famous 1967 song “A Whiter Shade of Pale.”<sup>18</sup> However, the court decided that he would only be entitled to a proportional forty percent of authorship rights.<sup>19</sup> In a third case, *Hadley v. Kemp*, the Spandau Ballet band members wanted to be recognized as joint authors with the primary songwriter, Gary Kemp.<sup>20</sup> The court based its decision on a quantitative assessment of the contribution each member added to the songs.<sup>21</sup> In the court’s opinion, the band members’ contributions were insignificant and amounted to a mere “polishing” of the song’s final version.<sup>22</sup> They examined the musicians’ contributions and

---

<sup>14</sup> *Beckingham v. Hodgens* [2003] EWCA (Civ) 143, [49]–[51] (Eng.); *Bamgboye v. Reed* [2002] EWHC (QB) 2922 [40]–[41] (Eng.).

<sup>15</sup> *Beckingham*, [2003] EWCA (Civ) 143, [49]–[51].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at [12] (“Having heard the piece played, and reflected on the evidence given, I conclude that the violin part does make a significant and original contribution of the right kind of skill and labour to the Bluebells’ version of the song.”) (internal quotations omitted).

<sup>18</sup> *Fisher v. Brooker*, [2006] EWHC (Ch) 3239 (Eng.).

<sup>19</sup> *See id.* at [98]; *see also* Luke McDonagh, *Rearranging the Roles of the Performer and the Composer in the Music Industry—the Potential Significance of Fisher v. Brooker*, 1 INTELL. PROP. Q. 64 (2012).

<sup>20</sup> *Hadley v. Kemp* [1999] EMLR 589 (Ch) (Eng.).

<sup>21</sup> *Id.* at 592 (“Even in the case of ‘True,’ which contained the third plaintiff’s most memorable improvisation, the saxophone solo was only 16 bars in length and occupied under 9 per cent of the duration of the recording. Accordingly the third plaintiff was not a joint author even of ‘True.’”).

<sup>22</sup> *Id.* at 646–47 (“The members of the band...did what any good musician does: they performed the songs to the best of their considerable abilities, injecting elements of

determined that the saxophone player's sixteen-bar solo, making up only nine percent of the entire piece, was not sufficient for the player to be considered a joint author.<sup>23</sup>

Due to the vagueness of “meaningful and original contributions,” many contrasting rulings can be found in English courts.<sup>24</sup> For example, *Cala v. Alfred* addressed the issue of joint ownership in architectural house sketches.<sup>25</sup> The court decided that ideas can be regarded as essential and significant contributions to a collaborative work because the perception of who “pushed the pen” is too narrow of a view of authorship.<sup>26</sup> However, several years later in *Ray v. Classic FM*, the court held that ideas alone could not be regarded as sufficient contributions to a joint work.<sup>27</sup> In 2019, at the appeal of *Martin v. Kogan*, the court preferred the *Cala* approach, noting that “[t]oo much focus on who pushed the pen is likely to detract attention from what it is that is protected, and thus from who the authors are. . . . The statutory test does not go any further than asking who contributed to the creation of the work.”<sup>28</sup>

Indeed, although the distinction between a joint author and a non-joint author (secondary contributor) is not clear-cut, the English

individuality and artistry into their performances. That did not make them joint authors of the songs. In my judgment that remains so even if there were some elements of improvisation in their performances.”)

<sup>23</sup> See *id.* at 592.

<sup>24</sup> See *Cala Homes (S.) Ltd. v. Alfred McAlpine Homes E. Ltd.* [1995] FSR 818 (Ch) (Eng.). But see *Ray v. Classic FM Plc* [1998] FSR 622 (Ch) (Eng.). For an excellent discussion concerning the difference between the cases, see ZEMER, *supra* note 12, at 192 (“The answer to the question of what exactly constitutes sufficient contribution is complex and is fraught with conflicting interpretations.”).

<sup>25</sup> *Cala Homes (S.) Ltd. v. Alfred McAlpine Homes E. Ltd.* [1995] FSR 818 (Ch) (Eng.).

<sup>26</sup> “[T]o have regard merely to who pushed the pen is too narrow a view of authorship. What is protected by copyright in a drawing or a literary work is more than just the skill of making marks on paper or some other medium. It is both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words or lines have fixed in some tangible form which is protected. It is wrong to think that only the person who carries out the mechanical act of fixation is an author. There may well be skill and expertise in drawing clearly and well but that does not mean that it is only that skill and expertise which is relevant.” *Homes*, [1995] FSR at 835.

<sup>27</sup> See *Classic FM Plc*, [1998] FSR at 636–37.

<sup>28</sup> *Martin v. Kogan* [2019] EWCA (Civ) 1645, [35] (Eng.) (“In deciding whether there was a collaboration, it can never be enough simply to ask who did the writing.”).

courts have tried to characterize the meaning of “significant and original contribution.”<sup>29</sup> In one of the first cases dealing with this matter, *Levy v. Rutley*, Justice Smith attempted to distinguish between a meaningful contribution and a secondary contribution to a joint work.<sup>30</sup> According to Justice Smith, “[i]t is, no doubt, difficult to draw the line: but it never could be suggested that, when an author submits his manuscript to a friend, and the friend makes alterations and improvements, the latter would thereby become a joint author of the work.”<sup>31</sup>

Even today, 150 years since the *Rutley* ruling, it seems that English courts have yet to define what constitutes a sufficient contribution required for joint authorship.<sup>32</sup> In November 2017, the English court decided to reject a claim of joint authorship in *Martin v. Kogan*.<sup>33</sup> At issue was the rights in the screenplay of the movie *Florence Foster Jenkins*.<sup>34</sup> Two years later, the Court of Appeal reversed the decision.<sup>35</sup> Judge Floyd analyzed Section 10(1) of the English Copyright, Designs and Patent Act, which provides four elements for joint authorship: (1) collaboration; (2) authorship; (3) contribution; and (4) non-distinctness of contribution.<sup>36</sup> In doing so, the English courts exemplified an important attempt to conceptualize the contribution requirement by including different kinds of contributions, such as ideas, to the definition of joint work.<sup>37</sup>

---

<sup>29</sup> In the case of *Ray v. Classic FM*, the court stated that “[a] joint author must participate in the writing and share responsibility for the form of expression in the literary work. He must accordingly do more than contribute ideas to an author: he must be an author (or creator) of the work in question.” [1998] FSR at 636; see, e.g., *Tate v. Thomas*, [1921] 1 Ch 503 at 506; *Ashmore v. Douglas-Home* [1987] FSR 553 (Ch) at 563 (Eng.); *Wiseman v. George Weidenfeld & Nicholson Ltd.* [1985] FSR 525 (Ch) at 531 (Eng.) (“Mr. Wiseman...was a useful critic, able to say pertinent things about how plays should be written; but, says Mr. Donaldson, he certainly did not write the play.”).

<sup>30</sup> See *Levy v. Rutley* [1871] 6 LRPC 523 (Eng.).

<sup>31</sup> *Id.* at 530.

<sup>32</sup> See generally *id.*; see also *Zemer*, *supra* note 3, at 285.

<sup>33</sup> *Martin v. Kogan* [2017] EWHC (IPEC) 2927, [78], [85] (UK).

<sup>34</sup> *Id.* at [1].

<sup>35</sup> *Martin v. Kogan* [2019] EWCA (Civ) 1645, [35] (UK).

<sup>36</sup> See *id.* at [35]–[50].

<sup>37</sup> *Id.* at [11] (“Ms[.] Kogan alleged in her defense that...on 17 February 2014 Mr. Martin asked her what proportion of the screenplay she thought she owned, and that Mr[.] Martin had volunteered that it was 15%.”). For discussion on the contributions of ideas, see *id.* at [35]–[37] (“A collaborative work may thus come into existence if, in the context

The American legal system has two leading approaches to the interpretation of the contribution test.<sup>38</sup> The first guiding and stern approach—the Goldstein approach—was adopted by U.S. courts, providing that the standard for joint authorship requires contributing creative expression to the work by each contributor.<sup>39</sup> In Goldstein’s words, “[c]ollaborative contribution will not produce a joint work, and a contributor will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright.”<sup>40</sup> This means that the contribution needs to be fixed in a tangible medium of expression into the copyrightable joint work and cannot only be an idea, refinement, or suggestion that stands alone and is not subject to copyright protection.<sup>41</sup>

The second approach, the Nimmer approach, was widely rejected by U.S. courts.<sup>42</sup> It requires only a minimal contribution to the joint work. According to this approach, every contribution that adds to the copyrighted work will be considered a sufficient contribution to the establishment of a joint work.<sup>43</sup> According to Nimmer, “[c]opyright’s goal of fostering creativity is best served...by rewarding all parties who labor together to unite idea with form, and

---

of a particular joint project, one person decides on the plot and the other writes the words to give effect to the plot. There will be a panoply of other ways of working as well, for example the labour of writing may be shared, or the labour of working out the plot, scenes and characters may be shared...Here again it is wrong to focus exclusively on the person who does the writing. There is a further important distinction to bear in mind, which is that between the making of the work and its reduction to material form (or fixation). The work may exist before its reduction to material form.”)

<sup>38</sup> The American copyright law defines “joint work” in the US Copyright Act of 1976 as a “work prepared by two or more authors with the intention that their contribution be merged into inseparable or interdependent unitary whole.” 17 U.S.C. § 101. It appears that American law mirrors English law but with two main differences: (1) the requirement of intention, and (2) the component of interdependency. 17 U.S.C. §101.

<sup>39</sup> See PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 232–33 (4th ed. 2019).

<sup>40</sup> PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 4.2.1.2 (3d ed. 2005).

<sup>41</sup> See *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1069–71 (7th Cir. 1994).

<sup>42</sup> MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 6.07[A][3][a] (Matthew Bender ed., 2021).

<sup>43</sup> *Id.*

that copyright protection should extend both to the contributor of the skeletal ideas and the contributor who fleshes out the project.”<sup>44</sup>

Despite the American courts’ support of the Goldstein approach, some interesting cases have arisen in which the courts have adopted a more lenient one. For instance, in *Gaiman v. McFarlane*, the plaintiff provided the attributes of three comic book characters, whereas the defendant provided their visual dimensions.<sup>45</sup> The court stated that although each author’s contribution was not independently copyrightable, the sum of their contributions led to recognition of their work as a joint work.<sup>46</sup> Justice Posner reasoned:

But where two or more people set out to create a character jointly in such mixed media as comic books and motion pictures and succeed in creating a copyrightable character, it would be paradoxical if though the result of their joint labors had more than enough originality and creativity to be copyrightable, no one could claim copyright. That would be peeling the onion until it disappeared. The decisions that say, rightly in the generality of cases, that each contributor to a joint work must make a contribution that if it stood alone would be copyrightable weren’t thinking of the case in which it *couldn’t* stand alone because of the nature of the particular creative process that had produced it.<sup>47</sup>

---

<sup>44</sup> *Id.*

<sup>45</sup> *Gaiman v. McFarlane*, 360 F.3d 644, 650 (7th Cir. 2004); see also Teresa Huang, *Gaiman v. McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material*, 20 BERKELEY TECH. L.J. 673, 696–67 (2005).

<sup>46</sup> See *Gaiman*, 360 F.3d at 659.

<sup>47</sup> *Id.* at 658–59 (“The contents of a comic book are typically the joint work of four artists— the writer, the penciler who creates the artwork (McFarlane), the inker (also McFarlane, in the case of *Spawn* No. 9, but it would often be a different person from the penciler) who makes a black and white plate of the artwork, and the colorist who colors it. The finished product is copyrightable, yet one can imagine cases in which none of the separate contributions of the four collaborating artists would be. The writer might have contributed merely a stock character (not copyrightable, as we’re about to see) that achieved the distinctiveness required for copyrightability only by the combined contributions of the penciler, the inker, and the colorist, with each contributing too little to have by his contribution alone carried the stock character over the line into copyright land.”).



In *Brown v. Flowers*, an American court supported the minimal contribution approach.<sup>48</sup> In *Brown*, a claim was brought by a music producer who requested recognition as a joint author of songs he recorded.<sup>49</sup> The court examined the nature of the relationship between the parties and, despite its fundamental support of the “minimal contribution test,” decided that the producer’s specific contribution was too minimal to suffice, even under the more lenient test.<sup>50</sup> In general, the challenge of defining what constitutes a sufficient contribution remains a complex issue, fraught with conflicting interpretations from legal systems.

### B. *The Mutual Intention Test*

Only the American legal system requires the “mutual intention test.”<sup>51</sup> American courts’ decisions show that their interpretation of the intention requirement is inconsistent and has become stricter over the years.<sup>52</sup> Previously, authors were required to prove intention to combine their contributions into a joint work.<sup>53</sup> Since the leading case of *Childress v. Taylor*,<sup>54</sup> the requirement has become more stringent. Now authors must not only prove an intent to combine their contributions, but also that each intended to create a joint work throughout the creation process.<sup>55</sup> Similar to the contribution

---

<sup>48</sup> *Brown v. Flowers*, 297 F. Supp. 2d 846, 852 (M.D.N.C. 2003).

<sup>49</sup> *Id.* at 851–52.

<sup>50</sup> *Id.* at 852.

<sup>51</sup> See *Beckingham v. Hodgins* [2003] EWCA (Civ) 143, [49]–[53]; *Martin v. Kogan* [2019] EWCA (Civ) 1645, [53] (Eng.) (“There is no further requirement that the authors must have subjectively intended to create a work of joint authorship.”).

<sup>52</sup> See *Balganesh*, *supra* note 3, at 1699; see also H.R. REP. NO. 94-1476, at 120 (1976) (“The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit....”).

<sup>53</sup> H.R. REP. NO. 94-1476 (1976) at 120 (“The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either ‘inseparable’ (as the case of a novel or painting) or ‘interdependent’ (as in the case of a motion picture, opera, or the words and music of a song).”).

<sup>54</sup> 945 F.2d 500 (2d Cir. 1991).

<sup>55</sup> *Id.* at 507 (“The wording of the statutory definition appears to make relevant only the state of mind regarding the unitary nature of the finished work—an intention ‘that their contributions be merged into inseparable or interdependent parts of a unitary whole.’ However, an inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress.”).

test, the main problem with the intention test is the inconsistency in courts' decisions and the wide range of interpretations of "intention."<sup>56</sup>

American courts' inconsistent interpretation of the intention test leaves the test vague and undefined.<sup>57</sup> Notably, Shyamkrishna Balganesch critiqued the perceived centrality of the intention test, noting how American courts provide divergent interpretations and have yet to define it properly:

It is therefore somewhat surprising that despite their insistence that mutual intention remain the "touchstone" of unplanned coauthorship, and their continuing emphasis on discerning parties' intentions whenever presented with claims of unplanned coauthorship, courts have found little common ground in unraveling the precise nature and analytical content of this intention.<sup>58</sup>

As a result, several crucial problems can be found in the intention test. First, the test is ambiguous and does not provide a practical solution to define a joint collaborative work.<sup>59</sup> Second, the intention test may be abused by secondary authors to make frivolous claims about the existence of a joint intention in order to gain

---

<sup>56</sup> See *id.* at 505–09; *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068–69 (7th Cir. 1994); *Thomson v. Larson*, 147 F.3d 195, 201–05 (2d Cir. 1998); *Weissmann v. Freeman*, 868 F.2d 1315, 1319 (2d Cir. 1989); *Maxwood Music Ltd. v. Malakian*, 713 F. Supp. 2d 327, 345–46 (S.D.N.Y. 2010); *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 956 (11th Cir. 2009); *Corwin v. Quinonez*, 858 F. Supp. 2d 903, 910 (N.D. Ohio 2012).

<sup>57</sup> Thomas Margoni & Mark Perry, *Ownership in Complex Authorship: A Comparative Study of Joint Works in Copyright Law*, 34 EUR. INTELL. PROP. REV. 22, 28 (2012) (speaking to the intention requirement, "case law shows a long list of different interpretations and variations of this theme."); Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK. L. REV. 123, 170 (2002) ("The failure to define intent is a weakness in the *Childress* formulation.").

<sup>58</sup> Balganesch, *supra* note 3, at 1702. Another important critique can be found in the words of ZEMER, *supra* note 12, at 202 ("A more critical consequence where no protection is secured for nondominant contributors is their inability to protect their moral rights. Honour and dignity, and other personal interests are likely to be affected.").

<sup>59</sup> See Gilad Vekesselman, *The Joint Work in Copyrights* 102–04 (Nov. 14, 2007) (Ph.D. dissertation, Tel Aviv University) (on file with author).

recognition as a joint author.<sup>60</sup> Third, the test may be abused to make a claim for lack of joint intention that will confer too much control to the dominant authors of a work.<sup>61</sup>

### C. The “Master Mind” Test

The third test is the “master mind”—or “control”—test adopted primarily by the American court in *Aalmuhammed v. Lee*.<sup>62</sup> Courts have considered this test as the most important of the three.<sup>63</sup> According to this test, a joint author must prove an element of control over the work, making him the “master mind.”<sup>64</sup> Under this test, the author must control the work’s creation or, alternatively, be the dominant author making decisions about the joint work.<sup>65</sup>

The control test leaves several issues unresolved. First, it limits ownership of jointly authored works to the person or persons who “masterminded” or “superintended” the creation of the work.<sup>66</sup>

---

<sup>60</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (“[P]utative coauthors make objective manifestations of a shared intent to be coauthors....We say objective manifestations because, were the mutual intent to be determined by subjective intent, it could become an instrument of fraud, were one coauthor to hide from the other an intention to take sole credit for the work.”).

<sup>61</sup> Rochelle Cooper Dreyfuss, *Commodifying Collaborative Research*, in *THE COMMODIFICATION OF INFORMATION* 397, 407–08 (Niva Elkin-Koren & Neil W. Netanel eds., 2002) (“Since that interpretation [of the intent requirement] permits any single member of the collaborative team to veto the full participation of all other members...participants who lack bargaining power can be in a worse position under the joint authorship provision than under the work for hire doctrine....That [the copyrightable contribution requirement] eliminates the possibility that certain contributors—for example, statisticians who contribute only factual material—will be protected by the statute.”). *But see* David M. Liston, Note, *Songwriter, Side Musician, or Sucker?: The Challenge of Distinguishing Composers from Contributors Under U.S. Copyright Law and the Lessons of a Famous British Case*, 65 *RUTGERS L. REV.* 891, 914–17 (2013).

<sup>62</sup> *Aalmuhammed*, 202 F.3d at 1234.

<sup>63</sup> *Id.* (“Control in many cases will be the most important factor.”).

<sup>64</sup> *Id.* at 1233 (defining “author” as the “inventive or master mind” who “creates, or gives effect to the idea”).

<sup>65</sup> *Id.* at 1234 (“This will likely be a person ‘who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be—the man who is the effective cause of that,’ or ‘the inventive or master mind’ who ‘creates, or gives effect to the idea.’”) (internal citations omitted).

<sup>66</sup> *See* Brief of Amici Curiae Professors Shyamkrishna Balganeshe et al. in Support of Neither Party at 13, *Garcia v. Google Inc.*, 786 F.3d 733 (9th Cir. 2015) (No. 12-57302) (“The master-mind concept narrows the range of joint authors down to one or a few

Second, it increases uncertainty among authors who cannot know in advance whether their contributions are sufficient to confer copyright ownership in the joint work.<sup>67</sup> Third, adopting this test may lead to a reduction in the number of recognized joint authors, as many might not meet the test's requirements. Fourth, the control test can lead to absurd outcomes where a joint work has no owner because there is no author who can meet the "control" requirements.<sup>68</sup>

Accordingly, all three joint authorship tests are vague and lead to inconsistent interpretations and results. This reality creates absurd cases whereby two or more authors work together and contribute to the final work, but copyright law does not acknowledge the joint authorship. Unfortunately, this situation occurs quite frequently and, as a result, courts may deny economic rewards to one or more of the authors. As Abraham Bell & Gideon Parchomovsky describe, "[t]he adverse effects of unsatisfactory resolutions of collaborators' rights go well beyond questions of distributive justice among the litigants. How copyright law treats collaborators' rights affects two other crucial interests: the incentive to create and the efficiency of use."<sup>69</sup>

To incentivize creation, courts should ensure that the incentive for authors to work together is not negatively affected by the lack of reward for their contributions (e.g., their financial and moral rights). If future authors believe their contributions to a joint work will not yield proportional financial profit, they will lack motivation to collaborate.<sup>70</sup> Alternatively, recognition of various types of

---

individuals for administrative convenience or to avoid unjustified windfalls, not out of fidelity to legislative intent.").

<sup>67</sup> See *id.* at 14 ("[U]nder the control standard, it is impossible for contributing authors to know in advance whether they are exercising sufficient control over the unitary work while making their individual contributions.").

<sup>68</sup> *Id.* at 15 ("Finally and perhaps most importantly, thoughtful application of the control test raises the absurd possibility that, in some situations, none of the contributors to the work will qualify as an author. This possibility is especially likely with motion pictures, where the person exercising control over the final work (e.g., the producer) often makes little copyrightable contribution to it, whereas the individual contributors of expression exercise no *ultimate* control over the movie as a whole.").

<sup>69</sup> Bell & Parchomovsky, *supra* note 2, at 1018.

<sup>70</sup> See ZEMER, *supra* note 12, at 188 ("[T]he vague formulation of the conditions for joint authorship creates absurd situations in which, although two or more individuals contribute to the creation of a product meriting joint entitlement, copyright 'refuses to acknowledge the existence of 'joint authorship,' or does so grudgingly. The consequences from this

contributions—like ideas or secondary contributions—could reduce future incentives for primary joint authors to produce due to the concern that profits would inevitably be shared with secondary authors whose contribution is comparatively insignificant.

As to promoting joint works' use efficiency, courts should avoid negatively affecting exploitation of existing joint authorship works resulting from lacking principles and regulations necessary to control and use these works.<sup>71</sup> In the English and American legal systems, the conditions for exploiting joint works are based on different use principles. The American legal system follows the freedom of use principle.<sup>72</sup> Each joint author has the right to use, reproduce, create derivative works, distribute copies, and license the work as he or she wishes, subject only to the obligation of accounting earned profits to the other joint owners.<sup>73</sup> A joint author can transfer his or her undivided ownership shares without approval from the other joint authors.<sup>74</sup> However, all of the authors must consent to granting an exclusive license to use the joint work and filing a claim against a third party for infringement of the joint work.<sup>75</sup> In contrast, under the English legal system, joint authors cannot use, reproduce, create derivative works, distribute copies, or grant non-exclusive use licenses to third parties without the consent of all owners.<sup>76</sup>

---

practice are manifold and include: denial of 'economic rewards to persons whose creative efforts satisfy the constitutional and statutory concepts of authorship'; [and] destabilization of the economic incentive-based rationale to the ownership of intellectual products....").

<sup>71</sup> See *id.* at 188; Bell & Parchomovsky, *supra* note 2, at 1026 ("As scholars have noted, many aspects of joint authorship remain controversial and unclear."); Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 194, 255 (2001).

<sup>72</sup> 17 U.S.C. § 201(a) ("The authors of a joint work are coowners of copyright in the work.").

<sup>73</sup> *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998); see *Batiste v. Island Records, Inc.*, 179 F.3d 217, 223 (5th Cir. 1999); *Diplomatic Man, Inc. v. Nike, Inc.*, No. 08 Civ. 139, 2009 WL 935674, at \*4 (S.D.N.Y. Apr. 7, 2009).

<sup>74</sup> 17 U.S.C. §§ 201, 203; see Jaffe, *supra* note 4, at 1555.

<sup>75</sup> 17 U.S.C. § 201; Jaffe, *supra* note 4, at 1555.

<sup>76</sup> See Copyright, Designs and Patents Act 1988, c. 48, § 173(2) (UK) ("Where copyright (or any aspect of copyright) is owned by more than one person jointly, references in this Part to the copyright owner are to all the owners, so that, in particular, any requirement of the license of the copyright owner requires the license of all of them."); see also *Powell v. Head* [1879] 12 Ch. D. 686 (Eng.); *Godfrey v. Lees* [1995] EMLR 307 (Ch) at 333 (UK).

## II. THE CURRENT JOINT AUTHORSHIP MODELS

The joint authorship doctrine has become more significant over the last several years. In many cases, collaborations are not temporary or singular events that cease after the achievement of a single product, but rather become fertile ground for successful, ongoing, future collaborations (e.g., the Open Source platform).<sup>77</sup> Two essential advantages promote and encourage joint works. The first is specialization. A joint work created by many authors may yield unique creations that could not have been achieved by a sole author.<sup>78</sup> Thus, in this current global age, many collaborations are formed among people from a variety of fields in different parts of the world, with each person contributing his or her own expertise to the joint work. For example, if several authors write an article together, it may be possible that one of them is talented in devising ideas, the second may be a talented writer, and the third may contribute an empirical model for examining an idea.

Second, a collaborative work among many authors most likely leads to *mutual inspiration and brainstorming* (“spillover”), whereby every author shares and inspires the others with knowledge and talent, thereby enhancing the joint project.<sup>79</sup> For instance, behavioral economics refers to the collaboration among authors from different fields of knowledge, working together and inspiring each

---

<sup>77</sup> DANIELA SIMONE, COPYRIGHT AND COLLECTIVE AUTHORSHIP: LOCATING THE AUTHORS OF COLLABORATIVE WORK 1–2 (2019). For further information about Open Source platform, see *What Is Open Source?*, OPEN SOURCE, <https://opensource.com/resources/what-open-source> [<https://perma.cc/2RC4-9JY4>].

<sup>78</sup> See Bell & Parchomovsky, *supra* note 2, at 1016.

<sup>79</sup> For nearly fifty years, credit for the song “Imagine” was granted solely to one writer, John Lennon. See Elias Leight, *Yoko Ono Will Receive Songwriting Credit on John Lennon’s ‘Imagine,’* ROLLING STONE (June 15, 2017, 3:17 PM), <https://www.rollingstone.com/music/music-news/yoko-ono-will-receive-songwriting-credit-on-john-lennons-imagine-195957/> [<https://perma.cc/ZQG9-DVUA>]. This changed in June 2017 when the National Music Publishers Association announced that Yoko Ono would be credited as a joint songwriter. *Id.* Lennon provided the rationale for this in 1980 during a joint interview with Yoko Ono on BBC Radio 1. *Id.* In the interview Lennon said “[t]hat [‘Imagine’] should be credited as a Lennon-Ono song because a lot of it—the lyric and the concept—came from Yoko. But those days I was a bit more selfish, a bit more macho, and I sort of omitted to mention her contribution.” *Id.*

other.<sup>80</sup> According to Gregory Mandel, collaboration promotes creativity, and intellectual property law should therefore promote collaboration.<sup>81</sup>

These essential advantages make the joint authorship doctrine one that influences creative individuals and enriches the intellectual resources of society as a whole. Further, it is worth noting the doctrine's unique characteristics. Each author owns the work as a whole and not just the part he or she contributed—a characteristic of American law known as “tenancy in common.”<sup>82</sup> Namely, whether there are two, three, or ten authors, each is perceived as the author of the joint work as a whole and not just the owner of the specific part he or she contributed.

In addition, the authors' contributions do not need to be equal in terms of quantity, quality, or originality—it must only be significant.<sup>83</sup> However, in cases where there is no agreement regarding the allocation of rights between joint authors, it seems that the American legal system will only recognize joint authorship if the authors' contributions are similar in scope.<sup>84</sup> In cases where there is a dominant

---

<sup>80</sup> According to Mandel, “[t]he entire field of nanotechnology, for example, involves advanced aspects of physics, chemistry, and biology such that multidisciplinary collaboration is essential for most work. Collaboration is also increasing in the arts, for instance, to produce more complex works or works that will appeal to individuals across a wide range of cultures.” Gregory N. Mandel, *Left-Brain versus Right-Brain: Competing Conceptions of Creativity in Intellectual Property Law*, 44 U.C. DAVIS L. REV. 283, 350 (2010).

<sup>81</sup> See *id.* at 352.

<sup>82</sup> See Brief of Amici Curiae Professors Shyamkrishna Balganeshe et al. in Support of Neither Party at 18, *Garcia v. Google Inc.*, 786 F.3d 733 (9th Cir. 2015) (No. 12-57302).

<sup>83</sup> *Hadley v. Kemp* [1999] EMLR 589 (Ch) at 642–43.

<sup>84</sup> See Brief of Amici Curiae Professors Shyamkrishna Balganeshe et al. in Support of Neither Party at 20 (“While joint authorship thus creates a tenancy in common it does not mandate equal ownership shares, especially when parties have made unequal contributions to the work. A court may therefore presume equal ownership shares in a joint work only when each author has made an equal contribution.”); see also Roberta Rosenthal Kwall, “*Author-Stories: Narrative’s Implications for Moral Right and Copyright’s Joint Authorship Doctrine*,” 75 S. CAL. L. REV. 1, 52 (2001) (“The underlying concern voiced by both the *Childress* and *Thomson* courts is that a sole author will be denied exclusive authorship status simply because another contributor provides some form of assistance. Therefore, these courts interpreted the joint authorship doctrine to de-emphasize collaboration at the expense of independent copyrightability and mutual intent. These requirements, when applied together, effectively ignore the nondominant author’s personality-based narrative of creation.”).

author and a secondary author, American courts are more likely to deny the secondary author's claim and grant full authorship to the dominant author.<sup>85</sup> In contrast, since the beginning of the twenty-first century, there has been a shift in English courts' approach, assigning ownership proportionally based on each individual's contribution.<sup>86</sup> In other words, the respective shares of joint authors are not required to be equal, but can reflect, pro rata, the relative amounts of their contributions.<sup>87</sup>

Another unique characteristic of the joint authorship doctrine is the duration of protection for the joint work. Under copyright law, protection granted to a joint work lasts up to seventy years after the death of the last surviving joint author.<sup>88</sup> This means that the validity of jointly authored works could have a longer duration as compared with that of a solo creation.<sup>89</sup> To delay the expiration of copyright—at which point the work falls into the public domain—authors may attempt to extend copyright protection of their works by manipulatively adding a “young” joint author.<sup>90</sup> While this feature encapsulates a counterargument to recognition of joint authorship, this concern is not a valid reason to deny copyright protection to a joint work. When raised before the court, the court should examine the significance of each joint author's contribution and determine whether the work qualifies as a joint work.<sup>91</sup>

---

<sup>85</sup> See, e.g., *Childress v. Taylor*, 945 F.2d 500, 509 (2d Cir. 1991); *Thomson v. Larson*, 147 F.3d 195, 202, 205 (2d Cir. 1998).

<sup>86</sup> See, e.g., *Fisher v. Brooker* [2006] EWHC (Ch) 3239, [55] (Eng.).

<sup>87</sup> *Martin v. Kogan* [2019] EWCA (Civ) 1645, [53] (Eng.).

<sup>88</sup> 17 U.S.C. § 302(b) (“In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.”).

<sup>89</sup> *Id.*

<sup>90</sup> GOLDSTEIN, *supra* note 40.

<sup>91</sup> See Timothy J. McFarlin, *An Idea of Authorship: Orson Welles, The War of the Worlds Copyright, and Why We Should Recognize Idea-Contributors as Joint Authors*, 66 CASE W. RES. L. REV. 701, 766 (2016) (“I agree with Professor Goldstein that it's an important goal to reserve joint authorship for those who we believe really deserve it, and that the impact joint authorship rules have on the length of copyright is another good reason we should care about them. I disagree, however, with the premise that we need the artificial construct of independent copyrightability in joint authorship to accomplish this goal.”).



### A. *The All-or-Nothing Model*

Recognizing creators as joint authors is an arduous task for courts where such authors did not initially settle their rights by contract. Despite that joint works do not necessarily require an equal contribution from each author, it is apparent that courts seek equal contribution from every author, especially in American courts.<sup>92</sup> In cases where the contribution is not equal, courts tend to disregard the secondary author's contributions in favor of the dominant author's interest.<sup>93</sup> This likely results from the common perception that a joint work, by definition, must lead to an equal distribution of rights among joint authors and to equal use and management of a joint work.<sup>94</sup>

The leading model in the American legal system is the "all-or-nothing model," whereby only a contribution equal in quality and quantity will grant an author recognition as a joint author.<sup>95</sup> Accordingly, equal rights will stem from the joint work.<sup>96</sup> The primary criticism of this model is that it prevents additional types of contributions from being recognized as helpful to the joint work.<sup>97</sup> *Childress v. Taylor* illustrates both the lack of flexibility and the vague requirements that characterize the American legal system.<sup>98</sup> In this case, the Second Circuit stated:

Care must be taken to ensure that true collaborators in the creative process are accorded the perquisites of co-authorship and to guard against the risk that a sole author is denied exclusive authorship status because another person rendered some form of assistance. Copyright law best serves the interests of creativity

---

<sup>92</sup> See e.g., *Childress v. Taylor*, 945 F.2d 500, 508–09 (2d Cir. 1991); *Thomson v. Larson*, 147 F.3d 195, 200 (2d Cir. 1998).

<sup>93</sup> See, e.g., *Childress*, 945 F.2d at 508–09; *Thomson* 147 F.3d at 202, 205.

<sup>94</sup> See *Bell & Parchomovsky*, *supra* note 2, at 1064 ("The courts, rather than Congress, decided to adopt the model of tenancy in common for all joint authorships. No statute requires using the model in all cases.").

<sup>95</sup> See, e.g., *Childress*, 945 F.2d at 508–09; *Jaffe*, *supra* note 4, at 1550.

<sup>96</sup> *Jaffe*, *supra* note 4, at 1555 ("[U]nless there is an agreement to the contrary, courts invoke a conclusive presumption that all co-authors share in the profits equally, regardless of whether their contributions to the work were equal.").

<sup>97</sup> *ZEMER*, *supra* note 12, at 201–02.

<sup>98</sup> *Childress*, 945 F.2d at 508–09.

when it carefully draws the bounds of “joint authorship” so as to protect the legitimate claims of both sole authors and co-authors.<sup>99</sup>

As a direct result of the all-or-nothing model, the American system supports a dichotomist remuneration model.<sup>100</sup> Under this model, the court has two alternatives. The first recognizes the authors as joint authors and, as a result, dividing rights equally among them.<sup>101</sup> Alternatively, if the court decides the authors’ contributions are not equal in quantity or quality, it will deny the claim for joint authorship and grant ownership of the work to the dominant author.<sup>102</sup> In *Thomson v. Larson*, the plaintiff claimed a sixteen percent share of the profits from the Broadway musical *Rent* for her contributions to the play’s script.<sup>103</sup> The Second Circuit rejected the claim that the musical was a joint work since Thomson did not contribute the same “amount” as Larson and the parties lacked a joint intention.<sup>104</sup>

Criticism against this perception was raised by various scholars.<sup>105</sup> Some note that courts added the mastermind test due to a wrongful interpretation that joint authors must receive equal rights in a joint work.<sup>106</sup> However, neither legislative history nor common

---

<sup>99</sup> *Id.* at 504.

<sup>100</sup> Jaffe, *supra* note 4, at 1550.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1557–58 (“If the court grants him joint authorship status, the equality principle entitles him to fifty percent ownership in the work. If the court does not consider him a joint author he is left without any ownership interest and is limited to unjust enrichment remedies...[T]he equality principle incentivizes and creates an inordinate amount of litigation because the large difference between a fifty percent ownership interest versus zero ownership interest makes many cases worth litigating.”).

<sup>103</sup> *Thomson v. Larson*, 147 F.3d 195, 198 (2d Cir. 1998) (“[Thomson] asked that the court declare her a ‘co-author’ of *Rent* and grant her 16% of the author’s share of the royalties.”).

<sup>104</sup> *Id.* at 206–07.

<sup>105</sup> See Brief of Amici Curiae Professors Shyamkrishna Balganeshe et al. in Support of Neither Party at 18, *Garcia v. Google Inc.*, 786 F.3d 733 (9th Cir. 2015) (No. 12-57302)

<sup>106</sup> H.R. REP. NO. 94-1476, at 121 (1976) (“[C]o-owners of copyright would be treated generally as tenants in common...”); see also Brief of Amici Curiae Professors Shyamkrishna Balganeshe et al. in Support of Neither Party at 38 (“Part of the reason that the *Aalmuhammed* panel may have opted for its narrow conception of joint authorship was a mistaken concern that all joint owners are necessarily entitled to coequal sharing of the fruits of the collaborative enterprise.”).

law principles indicate that Congress' understanding of a joint work requires this.<sup>107</sup> Some scholars have emphasized:

While joint authorship thus creates a tenancy in common, it does not mandate equal ownership shares, especially when parties have made unequal contributions to the work. A court may therefore presume equal ownership shares in a joint work only when each author has made an equal contribution. In cases where the authors have each made disparate copyrightable contributions to the work, the authors' ownership shares should be determined in relative proportion to their individual contributions, as dictated by the common law.<sup>108</sup>

### B. *The Proportional Model*

In contrast to the American model, in the early twenty-first century, the English legal system shifted from an "all-or-nothing" model to a proportional contribution model.<sup>109</sup> This required courts to acknowledge an author's ownership share relative to his contribution to the work as a whole.<sup>110</sup>

One of the first cases in the English legal system to establish the proportional allocation of rights was *Hadley v. Kemp*.<sup>111</sup> The court's opinion provided that equal assignment of rights among joint authors should not be the default and may vary according to a case's

---

<sup>107</sup> Brief of Amici Curiae Professors Shyamkrishna Balganeshe et al. in Support of Neither Party at 18.

<sup>108</sup> *See id.* at 20–21 ("And if Mr. Aalmuhammed were deemed a joint author, then his contribution of a few lines of dialog used without permission might reasonably have entitled him to a similar tiny fraction of the proceeds of *Malcolm X*, rather than the massive share that his overreaching complaint demanded or the 0% that this court actually awarded him.").

<sup>109</sup> *Martin v. Kogan* [2019] EWCA (Civ) 1645, [53] (Eng.) ("[T]he respective shares of joint authors are not required to be equal, but can reflect, pro rata, the relative amounts of their contributions."); *Bamgboye v. Reed* [2002] EWHC (QB) 2922, [42] (Eng.); *Fisher v. Brooker* [2006] EWHC (Ch) 3239.

<sup>110</sup> *Martin v. Kogan* [2019] EWCA (Civ) 1645, [53] (Eng.) ("[T]he respective shares of joint authors are not required to be equal, but can reflect, pro rata, the relative amounts of their contributions."); *Bamgboye v. Reed* [2002] EWHC (QB) 2922, [42] (Eng.); *Fisher v. Brooker* [2006] EWHC (Ch) 3239.

<sup>111</sup> *Hadley v. Kemp* [1999] EMLR 589 (Ch) (UK).

specific circumstances.<sup>112</sup> Several years later, in *Bamgboye v. Reed*, the Court of Appeal in England restated this recognition based on the author's relative contribution.<sup>113</sup> According to the Court, "[t]here is no requirement that joint authorship necessarily involves equality on a 50:50 basis. It would be possible for there to be, as it were, a joint ownership in unequal shares in principle."<sup>114</sup> The Court found that the plaintiff's contribution did not amount to fifty percent of the joint work's rights because he was not "the mastermind behind the joint work," and Mr. Reed made the arrangements himself. However, it stated that lack of control would not automatically bar the plaintiff's claim.<sup>115</sup> Rather, the court granted the plaintiff reduced rights to the creation, specifically thirty-three percent of the joint work's rights.<sup>116</sup> The court stated the following:

I therefore find that [plaintiff] did contribute the melody, and I also find that he contributed significantly to the drum pattern and crashes, as he said . . . He, therefore, did have significant creative input into the making of the musical piece that was recorded as "Bouncing Flow." *However, I do not find that this creative input is as great as the 50%, which he claims.* He has more musical and original creative talent in this regard than he has been given credit for . . . [Plaintiff] also acknowledged that ideas only stayed in if [defendant] liked them and not if he did not . . . [the defendant's] contribution was, therefore, greater. In the end, I have come to the conclusion on the evidence that their respective contributions are

---

<sup>112</sup> *Id.* at 643 ("[A]ll the cases . . . agree that, if two or more persons are joint authors, they own the copyright in equal shares . . . It would be surprising if a slight contribution was enough to make a person a joint author and thereby make him an equal owner with another or others who had contributed far more than he had.").

<sup>113</sup> *See* *Bamgboye v. Reed* [2002] EWHC (QB) 2922, [42] (Eng.).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at [77] ("In the end, I have come to the conclusion on the evidence that their respective contributions are fairly represented as one third on the part of Mr. Bamgboye and two-thirds on the part of Mr. Reed.").

<sup>116</sup> *Id.*

fairly represented as one-third on the part of [plaintiff] and two-thirds on the part of [defendant].<sup>117</sup>

In 2006, the English court returned to the proportionate contribution model in *Fisher v. Brooker*.<sup>118</sup> There, the court granted a solo musician forty percent of ownership interest in a song written in 1967.<sup>119</sup> In doing so, the court acknowledged the musician's proportional contribution in a claim filed nearly forty years after the song was composed.<sup>120</sup> Again, the Court of Appeal and House of Lords approved.<sup>121</sup> Further, the court emphasized that the English legal system is not obligated to apply the one-size-fits-all model.<sup>122</sup> Rather, the court is entitled to divide joint authors' rights proportionally, based on individual contributions.<sup>123</sup> The proportional contribution model was affirmed again in the last decade.<sup>124</sup>

In *Minder v. Sharples*, a music producer claimed joint authorship of the song "Touch Sensitive," alleging that his original contribution, although minor to the work, should have conferred him a twenty-percent ownership interest in the joint work's rights.<sup>125</sup> Similarly, in *Martin v. Kogan*, the Court of Appeal retried the decision

<sup>117</sup> See *id.* at [76]–[77] (emphasis added).

<sup>118</sup> *Fisher v. Brooker* [2006] EWHC (Ch) 3239.

<sup>119</sup> *Id.* at [98] ("The question ultimately is a highly subjective one. Doing the best I can I have come to the view that Mr[.] Fisher's interest in the Work should be reflected by according him a 40 per cent share in the musical copyright.").

<sup>120</sup> *Id.* at [51] ("[T]he arrangement was exploited for nearly 40 years without objection from Mr[.] Fisher.").

<sup>121</sup> See *Fisher v. Brooker* [2008] EWCA (Civ) 287, [140]; *Fisher v. Brooker* [2009] UKHL 41, [80] ("In these circumstances, essentially for the reasons given at first instance by Blackburne J. and in the Court of Appeal by David Richards J., I would reject all the respondents' arguments based on equitable principles.").

<sup>122</sup> *Fisher v. Brooker* [2006] EWHC (Ch) 3239, [96] ("I see no reason in principle why Mr. Fisher's share in the work should not be something less than an equal undivided share if the circumstances justify that result.").

<sup>123</sup> *Id.*

<sup>124</sup> *Minder Music Ltd. v. Sharples*, [2015] EWHC (IPEC) 1454, [71], [82]; *Martin v. Kogan* [2017] EWHC (IPEC) 2927, [85]; *Martin v. Kogan* [2019] EWCA (Civ) 1645, [43].

<sup>125</sup> See *Minder Music Ltd. v. Sharples*, [2015] EWHC (IPEC) 1454, at [90] ("[Since] his contribution to the Album Version was relatively small, I do not accept that his share of the copyright would have been as great as one-third. In my view, his contribution as co-author would have been properly reflected by a 20 per cent share of the copyright in the music of the Album Version.").

by the Intellectual Property Enterprise Court.<sup>126</sup> It rejected the claim of joint authorship over a script due to one partner's minimal and insignificant contribution.<sup>127</sup> There, the Court recognized that being joint authors does not automatically confer equal rights among them.<sup>128</sup> According to the Court, “[i]t is common ground that the shares of two joint authors are not required to be equal. If Ms. Kogan and Mr. Martin are joint authors, the court will have to go on and apportion the ownership according to their respective overall contributions.”<sup>129</sup>

### III. EMPIRICAL RESEARCH

#### A. Methodology

The following quantitative research examines whether the distribution of rights across various legal systems affects the allocation of compensation between joint authors. Put more precisely, how does the allocation of rights affect the percentage of remunerations awarded to a secondary author? This research also considers whether a secondary author should receive a reward for uncopyrightable contributions, such as the addition of an idea or historical background, contrary to present-day courts' decisions.<sup>130</sup>

To answer these questions, this Article details a quantitative survey based on a questionnaire divided into three versions and distributed to 219 law students. Each questionnaire contains two parts. The first part describes a situation in which two authors meet to write a play and their contributions are asymmetric, resulting in a

---

<sup>126</sup> *Martin v. Kogan* [2017] EWHC (IPEC) 2927; *Martin v. Kogan* [2019] EWCA (Civ) 1645.

<sup>127</sup> *Martin v. Kogan* [2017] EWHC (IPEC) 2927, at [85] (“In my judgment the textual and non-textual contributions made by Ms[.] Kogan never rose above the level of providing useful jargon, along with helpful criticism and some minor plot suggestions. Taken together they were not sufficient to qualify Ms[.] Kogan as a joint author of the Screenplay, even had those contributions all been made in the course of a collaboration to create the Screenplay. Mr[.] Martin was the sole author.”).

<sup>128</sup> *Martin v. Kogan* [2019] EWCA (Civ) 1645, at [52].

<sup>129</sup> *Id.*

<sup>130</sup> *See, e.g., Ray v. Classic FM Plc* [1998] FSR 622 (Ch) (Eng.); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071 (7th Cir. 1994).

dominant and secondary author. The scenario provides as follows:<sup>131</sup>

Joseph is a famous and well-known author who has written dozens of plays and books that have become bestsellers. Over the past year, Joseph began writing a musical with the hope it would eventually be produced and performed on Broadway stages. After writing a large part of the script of the musical, Joseph turned to Adam, a well-known theater producer, and asked for his help in producing the musical in light of his experience and successes in producing musicals that yielded him great wealth. No agreement was signed between the two regarding the copyright of the parties participating in creating the musical.

Joseph and Adam began working intensely to finish writing the musical's plot in a creative process that lasted approximately six months. Adam's contribution was considerable and appreciated by Joseph. Adam was responsible for thickening the plot, creating sub-characters, and writing a number of scenes for the musical's theme song. The relationship between the two was good, and the parties worked together in close cooperation. Despite the collaboration, it was clear to Adam that Joseph determines which changes will be implemented to the plot of the musical, although most of the changes Adam made were added to the final work.

After the two completed the writing and production of the musical, it became a Broadway success. Five years later, the musical's theme song appeared in an advertisement that made it an instant hit

---

<sup>131</sup> The students who participated were first given a short explanation in writing about the joint authorship doctrine and Israeli copyright law (which does not cover ideas, procedures and methods of operation, mathematical concepts, facts or data, or news of the day, etc.).

and grossed Joseph a whopping \$300,000. Adam, who felt that his contribution to the musical and to the theme song was significant, asked Joseph to recognize him as a joint author in the musical and theme song. After Joseph refused this request, Adam filed a lawsuit against Joseph for recognition as a joint author of the musical and theme song.

The participants answered questions relating to the situation described above to decide what percent of remuneration the secondary author should be granted. Each participant was presented with one of the following three methods of rights distribution:

A binary decision: either recognize the secondary author as joint author and divide the rights equally between them (50%–50%) or completely deny the secondary author's authorship claim and grant full rights to the dominant author (similar to the current American legal system's method).

A decision between six linear alternatives for remunerations to the secondary author: 0%, 10%, 20%, 30%, 40%, and 50% (0% means complete denial of the secondary author's claim, and 50% is to grant equal joint authorship rights to both authors).

An open-ended questionnaire: the participants could distribute remuneration between the two authors without any limitations (between 0% and 50%, according to a participant's freely made choice).

The second part of the questionnaire aimed to analyze participants' positions on a presented situation to determine whether uncopyrightable contributions are perceived as eligible for joint authorship status. This was assessed by asking participants to determine what rate of reward should be granted for uncopyrightable contributions, such as an original idea raised in a meeting between two creators or an extended amount of work providing non-copyrightable historical research.

### *B. Sample (Data Set)*

219 participants answered the research questionnaires. About two-thirds (63.3%) of participants were law students holding



bachelor's degrees (LLB), and the rest (about 28%) were students earning their Master's Degree in Law (LLM).<sup>132</sup> Only 1.4% of the participants were qualified attorneys. The participants did not necessarily have any background knowledge in copyright law. However, the questionnaire provided a short primer on copyright law and the joint authorship doctrine. Because the study dealt with copyright, participants were asked whether they were engaged in any artistic field. A small proportion of the participants (about 9%) engaged in the arts (e.g., poetry, theater, writing, and acting). The age of participants ranged from twenty to sixty-three, with the average age being twenty-nine. Finally, 61% of participants were women.<sup>133</sup>

### C. Results

Table 1, below, presents an analysis of the judicial rule regarding the percentage of remuneration awarded to a secondary author:

<b>Table 1.</b> The effect of judicial rule on the percentage (%) of remuneration awarded to a secondary author	
<b>Variables</b>	<b>Average (%)</b> (Standard Deviation)
Remuneration to secondary author (all participants in three groups)	0.91 (0.28)
Group A – Binary choice	0.81 (0.39)
Group B – Linear choice	0.93 (0.25)

<sup>132</sup> In this research, law students were chosen as participants for the empirical study rather than judges. This is due to the difficulty of accessing and distributing questionnaires among judges and constitutes a certain limitation to the findings of the empirical survey. For more information concerning research showing similar biases in judges compared with students, see SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 258 (Christopher Rogers & James R. Belser eds., 1993).

<sup>133</sup> The questionnaires were distributed to students in 2018. Forty-nine participants were given a binary choice between two alternatives (“all or nothing”), forty-six participants were given a linear choice between a number of alternatives (0%, 10%, 20%, 30%, 40%, and 50%), and 124 participants were given an open-ended choice (no limit to their options).

Group C – Open-ended choice	0.94 (0.23)
Remuneration rate to secondary author (Group B and C)	32.43 (13.52)

Table 1 shows that, on average, more than 90% of participants in the three groups decided to reward the secondary author for his or her contribution to the joint work. In Group A – binary choice, 81% of participants decided to reward the secondary author. By comparison, Groups B and C—which have larger choice options—over 93% of participants decided to reward the secondary author with some or equal rights. This difference is statistically significant.<sup>134</sup>

Furthermore, the average remuneration rate granted to the secondary author by participants who were faced with choice options (linear or open choice in Groups B and C) was approximately 32%. This rate of remuneration reflects the contribution made by the secondary author in the eyes of the participants: significant enough to receive recognition, yet much less substantial than that of the dominant author's contribution. These findings illustrate a connection between the judicial rule and the way participants intuitively allocate the remunerations to the secondary author.

These results also show that when participants face a variety of alternatives to allocate remuneration, more than 93% chose to reward the secondary author proportionally to their assessment of his contribution. However, when faced with more limited choices, as in Group A, a lower percentage (81%) decided to grant equal rights to both authors. In other words, in Group A, 19% discriminated against the secondary author by completely rejecting his claim as compared to only 7% in Groups B and C.

Table 2, below, presents the analysis of the reward granted for non-copyrightable contributions:

---

<sup>134</sup>  $F = 3.838, p < 0.05$ .

<b>Table 2.</b> The percentage (%) of remunerations awarded to the secondary author for non-copyrightable contributions (in all three groups together)	
<b>Variables</b>	<b>Average (%)</b> (Standard Deviation)
Remuneration for contribution of idea	0.49 (0.50)
Remuneration for contribution of technical knowledge	0.57 (0.50)
Remuneration rate – contribution of idea	8.36 (13.37)
Remuneration rate – contribution of technical knowledge	14.57 (16.46)

Table 2 shows that about half of the participants decided to grant remunerations for non-copyrightable contributions to the joint work, such as ideas (49%) and historical background (57%). The average remuneration rate awarded for a historical background contribution was almost twice the rate offered for contributing ideas (about 15% compared to 8%).<sup>135</sup> This difference is also statistically significant.<sup>136</sup>

It is surprising that the remuneration rate for an idea is lower than the remuneration rate for supplying historical background. This is because in the field of copyright law, there is an emphasis on the creativity and the originality of ideas that form a copyrightable work's foundation.<sup>137</sup> It is possible that the idea contribution was

---

<sup>135</sup> Participants were asked to determine what rate of reward should be granted for the contribution of an original idea raised in a half-hour meeting between two authors. Subsequently, participants were required to determine the rate of remuneration to be awarded for providing a non-copyrightable historical background study completed over approximately twenty-one days of work (a contribution that implied significant investment of time and effort).

<sup>136</sup>  $t = 4.732, p < 0.001$ .

<sup>137</sup> NIMMER & NIMMER, *supra* note 42.

presented in a limited fashion in contrast to the historical background study, which was presented as an extensive three-week effort. Therefore, these findings show that a high proportion of participants chose to reward compensation for traditionally non-copy-rightable contributions, such as ideas and historical background.

#### *D. Discussion*

The empirical study had two main objectives. The first was examining the relationship between the judicial rule (the number of remuneration alternatives) and the remuneration rate allocated to the secondary author. The second was to examine whether participants perceived a secondary author's non-copyrightable contributions as eligible to receive recognition and remunerations in a joint work. The first part of the study revealed that more than 90% of participants decided to pay remunerations to a secondary joint author rather than reject the claim outright.<sup>138</sup> In other words, most participants preferred to grant remuneration to a secondary author rather than leave him without any economic or moral rights. Comparing the three groups revealed that, of the participants in the binary choice group, only 81% decided to reward the secondary author.<sup>139</sup> In contrast, in the two groups with multiple choices, over 93% of participants decided to reward the secondary author with some or equal rights.<sup>140</sup> Thus, when faced with a binary legal rule system, fewer secondary authors are likely to receive compensation for their work. Consequently, these findings may indicate that participants deciding between two options were more cautious in awarding an equal remuneration rate (50% each) to both the secondary author and the dominant author. This may be perceived as too high in comparison to the contribution made by the dominant author. Furthermore, participants with a binary choice, as compared to multiple choices, granted secondary authors higher average remunerations, likely due to the lack of alternatives for providing lower rewards.

The results clearly demonstrate that the core principle of the judiciary's method is related to the system of allocation in which

---

<sup>138</sup> *Supra* Part III.C., at tbl.1.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

copyrights are divided between the dominant and secondary author. The research may imply that, according to the “all-or-nothing” model (as implemented in the United States),<sup>141</sup> fewer secondary authors will receive any reward for their contributions to a work. This is so even when the court believes a secondary author is entitled to some reward. Courts applying the “all-or-nothing” model seem disinterested in granting a secondary author a fifty percent reward, viewing the share as relatively high in comparison to the dominant author’s contribution.

The research regarding the second goal—the status of non-copyrightable contributions in joint works—implies that judicial systems should consider proportionally recognizing and rewarding the secondary author.

In conclusion, this empirical study shows that limiting courts to a binary legal rule and using the all-or-nothing method that occurs in the U.S. legal system damages the fair allocation of rights between joint authors. By contrast, a relative and proportional remuneration regime that matches each author’s contribution is a fairer and more equitable alternative. Importantly, it is one that recognizes the relative significance of each author’s contribution. Further, recognizing non-copyrightable contributions may lead to more effective allocation of joint author’s copyrights, encouraging cooperation and creation of new works.

#### IV. THE PROPOSED MODEL

This Article’s main goal is to suggest an innovative model that provides a comprehensive, normative solution to the challenges raised by existing models of the joint authorship doctrine. Further, this Article seeks to provide greater certainty regarding reward distribution between joint authors. Finally, this Article puts forth a solution grounded in the theoretical and empirical research described above.<sup>142</sup> The proposed model has two primary parts.

First, the proposed model establishes a default principle with a presumption of sharing that divides ownership interests in a joint

---

<sup>141</sup> *Supra* Part II.A.

<sup>142</sup> *See supra* Part III.

work into equal parts, unless otherwise agreed contractually by the parties.<sup>143</sup> A presumption of sharing is designed to incentivize parties to arrange their relations through a mutual agreement. In addition, default principles will lower transaction costs for joint authors if the parties did not enter into an agreement. Default principles will also minimize information gaps between joint authors regarding their rights. Based on the first part of the proposed model, the following clause should be added to the Copyright Act: “In a joint work with two or more authors, such authors’ rights shall be divided equally, unless otherwise agreed upon by the parties involved.”

The second part will present the proposed model, dividing joint authors’ contributions into three main categories: the “primary joint author,” the “secondary joint author,” and the “de minimis contributor.” This division aspires to give joint authors rights and royalties in a proportional and just manner, namely, by accurately accounting for each author’s contributions to the final work. This model, which is based on a structured scale, will help courts and joint authors accurately assign each author’s portionate contributions through fixed and cumulative criteria. For example, the model would consider factors such as the originality, quality, and importance of an author’s contribution to the joint work.

In general, this scale will help divide joint authors into three main categories. First, “primary joint authors” will appear at the top of the scale and are entitled to control and own an equal share of rights in a joint work. Second are “secondary joint authors” whose contributions to a joint work are less than that of the other authors, yet still significant and copyrightable. Here, the secondary author will be entitled to relative rights within the work, proportional to his or her contribution. Further, this will be determined by auxiliary tests at the court’s disposal. Lastly, there are “de minimis contributors,” whose contributions are not protected by copyright. For instance, contributing technological or scientific knowledge, providing criticism, or arranging and editing materials assimilated into a work would fall within the “de minimis contributor” category. The de minimis contributor will appear at the bottom of the hierarchy,

---

<sup>143</sup> A different approach that used the equality principle is presented in Jaffe, *supra* note 4, at 1571–80.

and his contribution will not entitle him to any ownership over the joint work. Rather, the de minimis contributor will only receive credit and, in rare circumstances, a certain percentage of royalties.

The division of contributors into three main categories and the recognition of uncopyrightable contributions provide a central innovation.<sup>144</sup> If courts deny rights to authors for uncopyrightable contributions, then according to the proposed model, such contributions will still grant credit or, in rare cases, minor rights to the “de minimis contributor.” This recognition is consistent with the Copyright Act, which protects the *expression* of ideas or technical knowledge.<sup>145</sup> Further, protecting the rights of those who contribute uncopyrightable contributions to joint works is fair and just.<sup>146</sup> Nimmer states that copyright’s goal of fostering creativity is best served by rewarding all parties who work together to unite idea with form, and that copyright protection should extend both to the contributor of ideas and the contributor who fixed the idea into the joint work.<sup>147</sup> Kwall similarly added:

The right of attribution and copyright’s joint authorship law are linked at a fundamental level. Specifically, a successful suit for joint authorship enables a plaintiff to obtain not only compensation, but also personal recognition from her creative community,

---

<sup>144</sup> Scholar Vaver suggested that contributors who did not “push the pen onto paper” should be rewarded. See DAVID VAVER, INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENT, TRADE-MARKS 121 (2d ed. 2011) (“This collaboration [between A and B] has sometimes not counted as joint authorship unless A’s ideas were independently copyrightable—a result that promotes certainty but seems harsh. There would have been no play at all without A’s input. To elevate B’s contribution and entirely discount A’s may discourage some fruitful collaborations....Any substantial intellectual contribution to a work’s composition pursuant to a common design...should, in principle, count as joint authorship.”).

<sup>145</sup> 17 U.S.C. § 102(b); see also *supra* note 6 and accompanying text.

<sup>146</sup> See McFarlin, *supra* note 91, at 741 (“[W]e are not giving the idea-contributor ownership of her idea. We are simply giving her joint authorship—and thus co-ownership—of the writing that owes part of its existence to her.”).

<sup>147</sup> NIMMER & NIMMER, *supra* note 42. In addition, Hugh Laddie wrote, “[t]he law does not protect a general idea or concept which underlines the work, nor any one fact or piece of information contained therein. However, a more detailed *collection* of ideas, or pattern of incidents, or compilation of information may amount to” a copyrighted work. 1 HUGH LADDIE ET AL., THE MODERN LAW OF COPYRIGHT AND DESIGN 100 (3d ed. 2000).

including the right to be publicly acknowledged as an author of the work created.<sup>148</sup>

In other words, an author who contributes uncopyrightable elements will not be granted ownership of his or her contribution. Rather, such an author will simply receive recognition for expending effort toward her “de minimis contribution.” Accordingly, the empirical results of the research show that more than fifty percent of the participants decided to grant a small share of rights for contributions of ideas and of historical knowledge.

#### A. “De Minimis Contributor” Justifications

The following section will discuss the principal justifications for recognizing a “de minimis contributor”—promoting creativity and acknowledging the moral right of each contributor. This Article will then discuss the justification for recognizing and distinguishing between different types of ideas.

##### 1. Promoting Creativity

American scholar Melville Nimmer was the first to put forth the idea of recognizing a minimal contribution as a sufficiently copyrightable contribution to a joint work.<sup>149</sup> According to Nimmer, the goal of copyright law is to promote creativity by realizing the rights of all who contributed to a work.<sup>150</sup> This even includes respecting a contribution of a word or sentence.<sup>151</sup>

In the U.S., Nimmer’s model is not the prevailing approach.<sup>152</sup> In fact, most courts have rejected it and instead adopted Goldstein’s more rigid approach.<sup>153</sup> Despite the supremacy of the Goldstein approach, courts in the U.S. have repeatedly discussed Nimmer’s model in cases where joint authorship issues arise.<sup>154</sup> One notable

---

<sup>148</sup> Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire between Copyright and Section 43(A)*, 77 WASH. L. REV. 985, 990 (2002).

<sup>149</sup> NIMMER & NIMMER, *supra* note 42.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* (“[A] person must add more than a word or a line to qualify as a joint author.”).

<sup>152</sup> Huang, *supra* note 45, at 677 (“The Goldstein approach is currently the dominant rule of joint authorship.”).

<sup>153</sup> *See, e.g.*, Thomson v. Larson, 147 F.3d 195, 200 (2d Cir. 1998).

<sup>154</sup> *See, e.g.*, Gaiman v. McFarlane, 360 F.3d 644, 659 (7th Cir. 2004).



case wherein the American court adopted Nimmer's "minimal" approach is *Gaiman v. McFarlane*, which concerned joint authorship of comic book characters.<sup>155</sup> There, the court ruled that requiring independently copyrightable contributions in the case of certain art forms might lead to an absurd result in which none of the authors who contributed to the joint work could be considered the author, as neither contribution was copyrightable on its own.<sup>156</sup> The court accepted Nimmer's approach and recognized the authors as joint authors even though each separate contribution was not copyrightable.<sup>157</sup>

## 2. Acknowledging Moral Rights

Preserving moral rights provides another justification for recognizing "de minimis contributors." It seems likely that contributors to a joint work would enjoy public recognition for their contributions. Kwall emphasizes the importance of the right to parenthood as part of a moral right.<sup>158</sup> She states that this right is closely related to the doctrine of joint authorship, especially in the context of attributing joint works to authors who made contributions.<sup>159</sup> According to Kwall, "[t]he right of attribution and copyright's joint authorship law are linked at a fundamental level. Specifically, a successful suit for joint authorship enables a plaintiff to obtain not only compensation, but also personal recognition from her creative community, including the right to be publicly acknowledged as an author of the work created."<sup>160</sup>

*Eisenman v. Qimron*—commonly known as the Dead Sea Scrolls Case<sup>161</sup>—offers one of the most famous and interesting cases

---

<sup>155</sup> *Id.* at 650.

<sup>156</sup> *Id.* at 661.

<sup>157</sup> *Id.* at 658–59.

<sup>158</sup> Kwall, *supra* note 148, at 986–87.

<sup>159</sup> *Id.* at 990.

<sup>160</sup> *Id.*

<sup>161</sup> Civ A 2790/93, 2811/93 *Eisenman v. Qimron*, 54(3) PD 817 (2000) (Isr.) (translation is available at <https://www.tau.ac.il/law/members/birnhack/DSSstransaltion.pdf> [<https://perma.cc/8BF7-9H2P>]). In this case, Prof. Elisha Qimron joined Prof. John Strugeneel for the purpose of deciphering the scrolls found in the Qumran caves in the early 1950s. *Id.* at 3. For eleven consecutive years, Qimron was engaged in deciphering the scrolls, and in that time, he managed to put together a 121-line text in which about forty

addressing moral rights.<sup>162</sup> There, the Israeli Supreme Court granted copyright protection to Qimron, the researcher who deciphered ancient Qimron scrolls. The Court stated the following:

A person is entitled that his name be attributed to the “children of his spirit.” His spiritual relationship to these is akin, almost, to his relationship to his offspring. Publication of a work without bearing his name in ‘the reasonable scope and to the extent’ infringes the moral right of the author.<sup>163</sup>

In special circumstances, a contribution of technical skill, such as decipherment or reproduction, may indicate effort, time, knowledge, talent, and originality as protected expressions of creativity sufficient to confer rights to the contributor.<sup>164</sup> *Qimron* emphasizes the importance of preserving authors’ moral rights, even in cases where technical contributions include merely arranging and deciphering, and where there is only a low threshold of creativity

---

percent of the text was a completion of missing words not written on the fragments of the scroll. *Id.* Before Qimron published the deciphered text, his colleague, Shanks, deliberately published the findings, without Qimron’s consent. *Id.* The Supreme Court examined Qimron’s “decipherment work” using the romantic description of the connection between Qimron and the deciphered text. *Id.* at 8. Moreover, the Court held that the physical arrangement of the scroll fragments, the decipherment of the writing, and the completion of the gaps in the scrolls by Qimron made the collection of scroll fragments a deciphered text that constitutes a protected copyright work. *Id.* at 13. The Court’s verdict did not refer to Qimron’s deciphering work as a simple technical craft but as an original work that had turned the ancient fragments of the scrolls into a living text. *Id.* The Court rejected Shanks’s legal claim that the publication was protected under the fair use claim (research or criticism) in light of the infringement of moral right of Qimron’s work (who was also denied the right to be the first to publish the deciphering of the scrolls). *Id.* at 15–17. The Court’s verdict criticized the behavior of Shanks and his colleagues who knowingly violated the moral right of Qimron who had labored for many years and invested a great deal of talent and effort in deciphering them. *Id.* at 19–21.

<sup>162</sup> For more information, see generally Niva Elkin-Korn, Commentary, *Of Scientific Claims and Proprietary Rights: Lessons from the Dead Sea Scrolls Case*, 38 HOUS. L. REV. 445 (2001); David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1 (2001); Michael D. Birnhack, Commentary, *The Dead Sea Scrolls Case: Who Is an Author?*, 23 EUR. INTEL. PROP. REV. 128 (2001).

<sup>163</sup> Qimron, 54(3) PD 817, at 20.

<sup>164</sup> *Martin v. Kogan* [2019] EWCA (Civ) 1645, [41] (Eng.) (“It is the skill and effort involved in creating, selecting or gathering together the detailed concepts or emotions which the words have fixed in writing which is protected in the case of a literary or dramatic work, whether the work is one of sole or joint authorship.”).

and originality.<sup>165</sup> Thus, moral rights serve yet another justification for crediting a *de minimis* contributor.

### 3. Recognizing Ideas in a Joint Work

Copyright protection does not extend to ideas or procedures for doing, making, or building things; scientific or technical methods or discoveries; business operations or procedures; mathematical principles; formulas or algorithms; or any other concept, process, or method of operation.<sup>166</sup> Although ideas are not eligible for copyright protection, the expression of an idea may be protected by copyright.<sup>167</sup> This is so even though the distinction between an idea and an expression in copyright law is “notoriously slippery,” meaning it is a complicated, vague, and complex distinction.<sup>168</sup>

Ideas are perceived as “necessary building blocks” for the development of human knowledge and, therefore, must remain free as “breathable air.”<sup>169</sup> These perceptions correspond to the utilitarian approach to copyright law.<sup>170</sup> According to this approach, to increase social wealth in the expressive and creative fields, an author’s reward must be balanced so that he is motivated to continue creating original expressions, while simultaneously avoiding monopolistic rights that cause a chilling effect on future authors.<sup>171</sup>

---

<sup>165</sup> Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519, 1529–30 (2011); ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* XV (2010).

<sup>166</sup> 17 U.S.C. § 102(b).

<sup>167</sup> *Martin v. Kogan* [2019] EWCA (Civ) 1645, at [34] (“Copyright, of course, does not subsist in mere ideas, but in their expression.”)

<sup>168</sup> DANIELA SIMONE, *COPYRIGHT AND COLLECTIVE AUTHORSHIP: LOCATING THE AUTHORS OF COLLABORATIVE WORK* 41 (2019).

<sup>169</sup> ZEMER, *supra* note 12, at 47 (“Ideas, no matter how valuable or creative, are excluded from the scope of copyright protection.”).

<sup>170</sup> See Lior Zemer, *On the Value of Copyright Theory*, 2006 INTELL. PROP. Q., no. 1, at 55, 57 (“Utilitarian theorists endorse the creation of intellectual property rights in order to induce innovation and intellectual productivity. They limit conferment of rights in order to strike a balance between the economic interests of rightholders claiming exclusive rights, and the greater interest of the public.”).

<sup>171</sup> Mandel, *supra* note 80, at 342 (“Bare ideas are off-limits to intellectual property protection because it is crucial that ideas remain available in the public domain for future inventors and authors to build upon.”).

In the current legal regime, a joint author who contributes an idea, no matter how central and original, will not be recognized as a joint author if his idea is not fixed or expressed in the work, as required by copyright law.<sup>172</sup> The Goldstein approach, adopted in the U.S., supports the view that a contribution to a joint work should be independent and copyrightable.<sup>173</sup> This approach does not protect ideas, central as they may be, that an author contributed to a joint work.<sup>174</sup> Contrary to American law, English copyright law does not require fixation by the author himself or by someone on the author's behalf.<sup>175</sup> That is, the fixation requirement can also be fulfilled where another person fixes the work.<sup>176</sup> As English scholar Walter Copinger wrote:

There is no reason of principle why the person who creates the work and the person who fixes the work should be the same. The function of creation and fixation are distinct. Copyright protects the effort of the author, and once he has created and expressed his work, it is immaterial how his work came to be fixed.<sup>177</sup>

Although the prevailing approach in the English courts does not recognize idea contribution as a sufficient contribution to a joint work,<sup>178</sup> the *Cala* case serves as an exception.<sup>179</sup> As discussed above, the court held that creative ideas in architectural drawings of houses contributed significantly to the outcome.<sup>180</sup> Therefore, the

---

<sup>172</sup> 17 U.S.C. § 102(b).

<sup>173</sup> GOLDSTEIN, *supra* note 40; *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1070–71 (7th Cir. 1994).

<sup>174</sup> This perception may affect future creators' incentive to collaborate. *See* McFarlin, *supra* note 91, at 706, 747.

<sup>175</sup> *See, e.g.*, *Martin v. Kogan* [2019] EWCA (Civ) 1645, [53] (Eng.).

<sup>176</sup> *Compare* Copyright, Designs and Patents Act 1988, c. 48, § 3(3), with 17 U.S.C. § 101 (“by or under the authority of the author”).

<sup>177</sup> GARNETT, *supra* note 11, at 102–03.

<sup>178</sup> *Martin v. Kogan* [2019] EWCA (Civ) 1645 at [34]–[35] (“A mere idea, stripped of any context, is of course not the subject of copyright.”)

<sup>179</sup> *Cala Homes (S.) Ltd. v. Alfred McAlpine Homes E. Ltd.* [1995] FSR 818 (Ch) at 835–36 (Eng.); *Zemer*, *supra* note 3, at 286 (2006) (“This strict approach to contribution is in contrast with an earlier judgment by Laddie J in *Cala Homes v. Alfred McAlpine*.”).

<sup>180</sup> *Cala Homes (S.) Ltd. v. Alfred McAlpine Homes E. Ltd.* [1995] FSR 818 (Ch) at 835–36 (Eng.).

court conferred joint ownership status in the work.<sup>181</sup> The English court recognized the individual who conceived the work as a joint author and criticized the prevailing view that only those who “pushed the pen” should be considered a joint author.<sup>182</sup>

#### 4. Where Does an Idea Begin and End? Distinguishing Between Different Types of Ideas

In her article, “Speaking to the Ghost,” scholar Leslie Kurtz sought to define the types of ideas protected by copyright.<sup>183</sup> She discovered a more accurate distinction between ideas entitled to copyright protection and ideas that remain in the public domain.<sup>184</sup> According to Kurtz, despite the difficulty of identifying a single way to accurately distinguish between ideas, it is necessary that the courts enumerate criteria for distinguishing between abstract ideas and more complex, specific ideas (which may be protected by copyright law). Kurtz proposes three factors.<sup>185</sup>

##### a) Simple v. Complex

According to Kurtz’s approach, general ideas are similar to primary building blocks that are free for general use and not copyrightable.<sup>186</sup> Further protection for the way in which these elements are combined and arranged may be provided.<sup>187</sup> In her view, an idea is “an atom of meaning.”<sup>188</sup> Kurtz notes that the difference between two people coming up with an idea lies in the way each fills the idea

---

<sup>181</sup> *Id.* at 836.

<sup>182</sup> *Id.* at 835. *See also* McFarlin, *supra* note 91, at 706 (“I believe that this rule—collaborators who contribute ideas, and ideas alone, cannot be joint authors of copyrightable works—reflects a fundamentally flawed conception of authorship, one which ignores the reality of the creative process and prevents artists like Welles from obtaining the credit and compensation they deserve.”).

<sup>183</sup> *See generally* Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIA. L. REV. 1221 (1993).

<sup>184</sup> *Id.* at 1225; *see* Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321 (1989).

<sup>185</sup> Kurtz, *supra* note 183, at 1252–53.

<sup>186</sup> *Id.* at 1253.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

with details.<sup>189</sup> The more details that exist within an idea, the more that idea should be granted protection under copyright law.<sup>190</sup> Under her approach, although simple ideas are unprotectable, Kurtz believes combining such ideas may render them sufficiently complex and thus worthy of copyright protection.<sup>191</sup>

Kurtz claims that protecting simple, basic ideas will harm works in the public domain and reduce the accessibility of diverse ideas.<sup>192</sup> In contrast, a complex idea that contains several simple ideas will be protected only to the extent to which the simple ideas overlap.<sup>193</sup> In other words, copyright protection will not be granted to each basic idea individually. Rather, protection will only be granted to the “integration” of ideas.<sup>194</sup>

John Locke’s labor theory of property also supports distinguishing between basic and complex ideas.<sup>195</sup> According to this theory, an author should be granted property rights for the effort and resources invested into a work.<sup>196</sup> Therefore, every person would have property rights over the fruits of his labor, provided this right does not harm the general good (“no harm principle”)<sup>197</sup> and leaves enough abundance for the welfare of others (“enough and as good”).<sup>198</sup> Thus, the property right is subject to various considerations and interests, including public interest.<sup>199</sup> Accordingly,

---

<sup>189</sup> *Id.* (“The similarity between the plaintiff’s and defendant’s works is more or less saturated with detail. The greater that saturation, the more appropriate a finding of infringement.”)

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 1254.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 1253–54. According to Kurtz, “[g]ranting exclusive rights to a basic, single, simple idea removes something of size from the public domain. If an author obtains exclusive rights to a more complex idea, far less is denied to later authors. A complex idea, which combines a number of simple ideas, takes from the public domain only the small area in which the simple ideas intersect, and only when this intersection is ordered in a particular way.” *Id.*

<sup>195</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 303–20 (Peter Laslett ed., Cambridge Univ. Press 1967) (1689).

<sup>196</sup> 1 JOHN LOCKE, *An Essay Concerning Human Understanding*, in *THE WORKS OF JOHN LOCKE* 62 (London, C. & J. Rivington & Partners 1824); *id.*

<sup>197</sup> LOCKE, *supra* note 195, at 305–07.

<sup>198</sup> *Id.* at 309.

<sup>199</sup> *Id.*

granting protection to simple ideas that serve as a work's cornerstones is inappropriate and would be detrimental to the art world. However, granting protection to works that contain complex ideas will not prevent other producers from using the work or accessing simple ideas. According to Locke, complex ideas are part of an author's work.<sup>200</sup> Therefore, an author may use simple ideas to create complex ones in infinite variety.<sup>201</sup> As Locke states:

Repeat, compare, and unite them, even to an almost infinite variety, and so can make a pleasure new complex ideas....[The human mind] has great power in varying and multiplying the objects of its thoughts infinitely, beyond what sensation or reflection furnishes it with; . . . it can . . . put together those ideas it has, and make new complex ones, which it never received so united.<sup>202</sup>

Thus, under the labor theory, simple ideas remain in the public domain because they are part of the natural world.<sup>203</sup> On the other hand, complex ideas created through expending sufficient effort and labor receive proprietary protection under copyright law.

#### b) General v. Specific

General ideas tend to be abstract and incomplete compared to specific ideas that have mental integrity and contain many details.<sup>204</sup> Further, general ideas may constitute components of more complex ideas.<sup>205</sup> According to Kurtz, ideas should not be protected if they do not contain a certain level of specificity.<sup>206</sup> In *Ibcos Computers v. Barclays Finance*, the court described general ideas:

The true position is that where an "idea" is sufficiently general, then even if an original work embodies it, the mere taking of that idea will not infringe. But if the "idea" is detailed, then there may be

---

<sup>200</sup> See LOCKE, *supra* note 196, at 94.

<sup>201</sup> *See id.*

<sup>202</sup> *See id.*

<sup>203</sup> *See id.*

<sup>204</sup> Kurtz, *supra* note 183, at 1256.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

infringement. It is a question of degree. The same applies whether the work is functional or not, and whether visual or literary. In the latter field the taking of a plot (i.e., the “idea”) of a novel or play can certainly infringe – if that plot is a substantial part of the copyright work.<sup>207</sup>

Therefore, specific ideas that are rich in detail should receive copyright protection, whereas general ideas should remain in the public domain for the benefit of future creations.<sup>208</sup>

### c) Qualitative Characteristic

The third criterion asks whether a qualitative characteristic distinguishes between types of ideas.<sup>209</sup> According to this criterion, determining whether it is necessary for an idea to remain publicly accessible—rather than receive copyright protection—depends on the idea’s level of uniqueness and quality.<sup>210</sup> As Kurtz put it:

If an author’s way of looking at things deviates from the standard, if she chooses an unusual, nonobvious, abnormal, extraordinary, unnatural way to express her ideas, she can expect to be protected against a wider array of imitators and more abstract forms of copying.<sup>211</sup>

Like the idea-expression distinction, differentiating between types of ideas is complex.<sup>212</sup> Despite this difficulty, it is possible to set criteria governing which ideas can remain uncopyrightable and in the public—they are the general, simple, abstract ideas lacking a high degree of uniqueness. Such ideas are the building blocks of works that should remain free for future use. In contrast, ideas that are detailed, complex, unusual, and unique, are likely protectable

---

<sup>207</sup> *IBCOS Computs. Ltd. v. Barclays Mercantile Highland Fin. Ltd.* [1994] FSR 269 (Ch) at 291 (UK).

<sup>208</sup> Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1011 (1990) (“All works of authorship, even the most creative, include some elements adapted from raw material that the author first encountered in someone else’s works.”).

<sup>209</sup> Kurtz, *supra* note 183, at 1260.

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

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*



under copyright law.<sup>213</sup> In this regard, Lior Zemer provides support for the protection of complex, detailed, and developed ideas:

Despite the vagueness and difficulties in drawing a clear line between the protectable components and the non-protectable components in a copyrighted entity, it seems that there exists a division between what is capable of being protected and what is not. A general idea can still be separated from a more complex, detailed, and more developed idea.<sup>214</sup>

Canadian scholar David Vaver also supports the recognition of complex and specific ideas in the joint authorship context.<sup>215</sup> According to Vaver, if person A provides person B with full ideas for a play's plot and person B turns those ideas into a perfect play, the two authors should be recognized as joint authors.<sup>216</sup> In his view, ignoring the contributor of the idea may prevent future collaborations.<sup>217</sup> Vaver argues that an individual who makes a substantial intellectual contribution to a work's composition pursuant to a common design should, in principle, count as a joint author.<sup>218</sup>

Accordingly, the contribution of one author's idea is no longer an amorphous idea that infringes third parties' freedom of expression, but rather an expression that is integrated into the joint work.<sup>219</sup>

---

<sup>213</sup> Reinforcement of this conclusion is also found in Locke's labor theory, according to which a detailed and complex idea in which an author invests enough thought should receive protection, while leaving general and abstract ideas for general use. LOCKE, *supra* note 195, at 306–07.

<sup>214</sup> ZEMER, *supra* note 12, at 48.

<sup>215</sup> VAVER, *supra* note 144, at 121

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Scholars such as McFarlin and Tomkowicz also support the recognition of ideas in a joint work. See McFarlin, *supra* note 91, at 741. However, unlike this Article's proposed model, they deviate from the recognition that only substantial ideas constitute the core of a work. McFarlin proposes to grant recognition in accordance with the "substantiality" of the idea. See *id.* at 754–60. Tomkowicz, on the other hand, proposes integrating the laws of equity into copyright law to recognize ideas. See Robert Tomkowicz, *Copyright in Ideas: Equitable Ownership of Copyright*, 29 CANADIAN INTELL. PROP. REV., no. 1, 2013, at 75, 77. The problematic nature of their proposals stems from the lack of clear boundaries that will distinguish between a substantive idea contribution and a non-substantive idea contribution. This ambiguity regarding the "materiality of the idea" may lead to variable interpretation and many legal disputes.

The model proposed in this Article seeks to recognize contributions of ideas that have been integrated into joint works (expressed as “collaborations”) and should not remain in the public domain. Even when they do not form the heart of a joint work, contributions of expressive ideas deserve to be recognized in a proportional manner.<sup>220</sup>

### B. Applying the Model

Application of this model in court decisions indicates its importance and ability to promote the joint authorship doctrine. In the following three cases, the U.S. courts decided to accept a dominant author’s claim and reject the other contributors’ claims to a joint work, even though the secondary authors’ contributions were significant in relation to the final work.

#### 1. The Thomson Case

*Thomson v. Larson* is one of the most famous cases addressing the joint authorship doctrine.<sup>221</sup> There, the court denied plaintiff Thomson economic and moral recognition for her work despite Thomson’s significant and original contributions to the well-known musical, *Rent*.<sup>222</sup> This case demonstrates that the American legal system operates in an unbalanced manner.

Applying the proposed model to the facts in *Thomson* would lead to a different, more balanced, and just result. Thomson’s contributions demonstrate that she greatly influenced the play with her significant and original commentary, rewriting of dialogue, advice regarding the plot, and additions of original elements such as inventing sub-characters that caused a fundamental and radical change in the plot.<sup>223</sup> However, since Thomson did not contribute the same

---

<sup>220</sup> The findings of the empirical study also support the recognition of ideas integrated into the joint work. Further, the results demonstrate that participants granted an average reward of about eight percent to the person who had put forth the idea central to the joint work.

<sup>221</sup> *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998).

<sup>222</sup> *Id.* at 205.

<sup>223</sup> *Id.* at 198 (“That new version was characterized by experts as ‘a radical transformation of the show.’”).

“amount” as Larson, and there was no joint intention, she was not considered a primary author entitled to half the rights of the work.<sup>224</sup>

Under the proposed model, Thomson would be a secondary author, entitled to relative rights in the joint work for her significant and original contribution to the play. In addition to economic rights, she would also be granted moral rights in the play. Further, the relative percentage of rights the court should grant Thomson would be proportional to the extent of her contribution to the work. This amounted to rewriting 1,212 out of 2,542 lines in the play, nine percent of which was original text Thomson added alone.<sup>225</sup>

## 2. The *Ulloa* Case

*Ulloa v. Universal Music and Video Distribution* is another exemplary case that undermines the foundations of the current joint authorship doctrine.<sup>226</sup> Similar to *Thomson*, the U.S. court rejected the claim of a composer who had collaborated with another singer in creating a song.<sup>227</sup> In this case, singer Demme Ulloa was present at a recording studio as a guest of one of the studio’s producers.<sup>228</sup> At the time, famous recording artist Jay-Z was working in the studio to record what would ultimately become a hit song, titled “Izzo (H.O.V.A.),” from his record, *Blueprint*.<sup>229</sup>

Ulloa listened to an unfinished version of the song and began improvising a central part of the song—the vocal countermelody.<sup>230</sup> Jay-Z liked Ulloa’s improvisational addition and asked Ulloa to record it for “possible” use in the final version.<sup>231</sup> Because Ulloa did not sign an agreement formalizing her rights in the song, she filed a claim for recognition as one of the song’s joint authors, alongside

---

<sup>224</sup> *Id.* at 204–05.

<sup>225</sup> ZEMER, *supra* note 12, at 214 (“The Court...held that modifications of nearly half of the lines of the original play including [nine] percent exclusive contribution are not sufficient to credit a dramaturge for her contribution.”).

<sup>226</sup> *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409 (S.D.N.Y. 2004).

<sup>227</sup> *Id.* at 419.

<sup>228</sup> *Id.* at 411.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

Jay-Z.<sup>232</sup> The court recognized Ulloa's significant contribution to the song but rejected her lawsuit, finding no joint intention to create the song.<sup>233</sup> Again, this decision demonstrates an unrealistic picture whereby a creator who contributes talent that significantly influences a work, is left without any economic rights and, even worse, without recognition for her work. Attributing her name as one of the composers of the song would have likely contributed greatly to Ulloa's status and success as a musician.

In contrast to *Ulloa*, application of this Article's proposed model would result in a different, more just decision where Ulloa would be considered a secondary author and granted relative economic and moral rights. Ulloa's voice accompaniment provided an integral and significant part of the song, fulfilling the required factual basis—a significant and copyrightable addition. The fact that Jay-Z chose to use her voice rather than the voice of another singer suggests Ulloa's unique and original contribution to the song.<sup>234</sup>

Ulloa contributed to the song spontaneously; she improvised the vocal accompaniment during her visit to the recording studio.<sup>235</sup> Ulloa's significant contribution stemming from her unique talent and voice should not have been ignored and left unrewarded. Thus, in accordance with the proposed model, Ulloa, as a secondary author, would be entitled to fair economic and moral rights based on her contribution.

### 3. The *Aalmuhammed* Case

*Aalmuhammed v. Lee* is another example of the foundational issues existing within the joint authorship doctrine.<sup>236</sup> In this case, the Ninth Circuit rejected plaintiff Aalmuhammed's claim that he should be considered a co-producer in the famous film, *Malcolm X*.<sup>237</sup> The court acknowledged that Aalmuhammed contributed to the Hollywood film's production, but decided that despite his contributions, he was not entitled to any economic or moral rights as a joint

---

<sup>232</sup> *Id.* at 412.

<sup>233</sup> *Id.* at 418.

<sup>234</sup> *Id.* at 413.

<sup>235</sup> *Id.* at 411.

<sup>236</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

<sup>237</sup> *Id.* at 1236.

producer.<sup>238</sup> The court tightened the requirements for joint authorship.<sup>239</sup> It added that, to be a joint author, one must exercise “creative control,” specifying that a true joint author is the “mastermind” who makes decisions regarding the work’s creation.<sup>240</sup> Since Aalmuhammed was not one of the film’s main producers, the court held that he was not a joint author and would not receive economic rights or credit as co-writer of the film.<sup>241</sup>

Applying the proposed model to this case, Aalmuhammed would have been recognized as a *de minimis* contributor due to his contributions to the film, including adding sentences from the Qur’an and assisting in the correct pronunciation of Arabic words.<sup>242</sup> Therefore, under the proposed model, Aalmuhammed would be entitled to credit or relative and limited remuneration for his contributions.

The proposed model will incentivize authors to collaborate with colleagues, knowing that even minimal, uncopyrightable contributions will receive credit. At the same time, the proposed model will also increase certainty among dominant authors who would no longer fear litigation or need to demand equal rights to a work. Moreover, adopting the proposed model will motivate creators to regulate relationships *ex ante* through contractual agreements.

#### CONCLUSION

This Article expands joint authorship debate in copyright law. This research analyzes the collaborative model (all-or-nothing) at the core of the joint authorship doctrine and the inconsistent interpretation of the doctrine’s tests to establish that the current joint authorship doctrine does not serve the appropriate balance between the varying interests that copyright law seeks to achieve.

---

<sup>238</sup> *Id.* at 1235.

<sup>239</sup> *See id.*

<sup>240</sup> *Id.* at 1232–33.

<sup>241</sup> *Id.* at 1230 (“During the summer before Malcolm X ‘s November 1992 release, Aalmuhammed asked for a writing credit as a co-writer of the film, but was turned down. When the film was released, it credited Aalmuhammed only as an ‘Islamic Technical Consultant,’ far down the list.”).

<sup>242</sup> *Id.* at 1230–31.

This research presents a comprehensive theoretical analysis of the law and the theoretical literature regarding the joint authorship doctrine in copyright law. An in-depth analysis of the existing American and English legal systems shows that reference to the joint authorship doctrine is not clear-cut, but rather complex and vague. Courts and legal literature often focus on the question of whether the author is a joint author, ignoring the widespread intermediate cases where there are secondary and minimal creators who contribute labor, efforts, energy, and talent to the joint work. Ignoring these contributions undermines the status of the joint authorship doctrine and the goals and justifications that copyright law seeks to promote.

One of the core problems stems from cases in which there are power gaps and even a hierarchy of authors. In these cases, a dominant author may take advantage of that position and avoid granting rights or credit to secondary authors. This occurs particularly in cases where the parties have not signed an agreement to settle their relationship. This leads to a phenomenon of unlawful enrichment, benefitting the dominant author at the expense of the “other” author—one whose contributions are secondary or minor but, at the same time, may be significant and original.

On the basis of this theoretical analysis and the empirical findings, the proposed model seeks to produce a fairer and more balanced legal outcome in relation to the joint authorship doctrine. According to this model, a default rule will stipulate that a joint author of a work will hold rights in equal parts unless otherwise agreed. The purpose of these default rules is to encourage authors to sign agreements and to firmly settle their relationships, thus avoiding future litigation from arising. In addition, the proposed model divides contributors to joint works into three distinct categories: the primary author, the secondary author, and the *de minimis* contributor. This unique and innovative model will provide an optimal and comprehensive solution to the current failures of the present doctrine, contribute to legal certainty, and encourage joint works.

This Article argues that joint authors should receive proportional recognition for their contributions under the joint authorship doctrine and avoid situations whereby contributions may be entirely dismissed, as in the current joint authorship doctrine. This innovative model, predicated on the above study’s empirical results,

aspires to advance and promote a more distinctive, efficient, and feasible way to allocate joint authorship rights—by preserving the incentive for joint authors to create collaborative works and, at the same time, better reward these authors.