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Manifest Intent and Copyrightability: The Destiny of Joint Authorship

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MANIFEST INTENT AND COPYRIGHTABILITY:
THE DESTINY OF JOINT AUTHORESHIP

I. Introduction

'I weep for you,' the Walrus said:
'I deeply sympathize.'
With sobs and tears he sorted out
Those of the largest size,
Holding his pocket-handkerchief
Before his streaming eyes.

'O Oysters,' said the Carpenter,
'You've had a pleasant run!
Shall we be trotting home again?'
But answer came there none—
And this was scarcely odd, because
They'd eaten every one.²

In Lewis Carroll's Through the Looking Glass, it was "scarcely odd" to act contrary to one's subjective intent; after all, even the physical laws were perverse in Alice's dream world. In copyright law, the use of a subjective intent standard in joint authorship is a "curi-ouser" (to quote Mr. Carroll) phenomenon. Joint authors own rights in property,³ not oyster dinners; predicating these property rights on state of mind,⁴ when actions manifest the opposite, deprives authors of constitutional rights.⁵

The 1976 Copyright Act (the 1976 Act)⁶ defines joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a

1. A previous version of this Note won second prize in the 1989 Nathan Burkan Memorial Competition at Fordham University School of Law.
3. See infra notes 18-20 and accompanying text, explaining that joint authors own property rights in the whole work, not merely their contributions to it, because they are tenants-in-common. H.R. REP. No. 1476, 94th Cong., 2d Sess. 121 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5735 [hereinafter H.R. REP.].
5. U.S. CONST. art. I, § 8, cl. 8. "Congress shall have the power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Id.
Due to the ambiguity in the terms “intention” and “authors,” courts and treatises have misinterpreted the statutory definition. Through the subsequent misapplication of the joint authorship doctrine, these ambiguities deny property rights to coauthors.

The House Report accompanying the 1976 Act regards intention as the definition’s “touchstone”—its single most important element. The Second Circuit recently held that this intent element includes a subjective standard. However, both the legislative history of the 1976 Act and common design, the precursor of intent, confirm the objective standard and reject the subjective intent standard in joint authorship.

The joint work definition also requires the participation of “two or more authors.” Whether a prospective joint “author” must provide copyrightable expressions or merely ideas has not been resolved. Additionally, even if the contribution must rise to the level of an expression, the composition of a copyrightable expression in joint authorship remains an unsettled issue.

This Note clarifies the definition of joint authorship. Part II explores the history of the intent element prior to the 1976 Act. Part III traces the discussions and reports submitted to Congress during formation of the 1976 Act definition of joint works. Part IV compares current case law that erroneously applies a subjective standard with case law that correctly extends the objective intent standard of common design. Part V interprets the 1976 Act as requiring copyrightability of all contributions to a joint work. Part V also supports a literal interpretation of the elements of authorship, intent and merger in the statutory definition of joint work. This Note concludes by advocating a continued use of the standard of common design, but under the new term “manifest intent.”

II. Intent: Pre-1976 Act History

The copyright provision of the Constitution “promot[es] the progress of science and the useful arts.” Authors receive rights in their

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8. H.R. Rep., supra note 3, at 120.
10. See infra notes 106-08 and accompanying text.
11. See infra notes 49-83 and accompanying text.
12. See infra notes 24-36, 45-48 and accompanying text.
works to foster these constitutional goals and benefit society.\textsuperscript{15} The 1909 Copyright Act did not directly define the rights of coauthors\textsuperscript{16} and, as a result, joint authorship rights were created through the courts.\textsuperscript{17} Through an analogy between tangible and intangible property,\textsuperscript{18} coauthors receive rights in their work as tenants-in-common.\textsuperscript{19} Each coauthor owns a one-half undivided interest in the whole and can license the whole without the consent of the other.\textsuperscript{20} Without these rights in the whole, less incentive would exist to coauthor a work because parts of a joint work are not often exploitable separately. With less incentive, fewer joint works would be created (especially the more complex and substantial works requiring diverse talents),\textsuperscript{21} and society would be deprived of this resource. In \textit{Edward B. Marks Music Corp. v. Jerry Vogel Music Co.},\textsuperscript{22} Judge Learned Hand reiterated the rationale underlying the unique rights of joint authors: "to allow the author to prevent the composer, or the composer to prevent the author, from exploiting [the work as a whole]... would be to allow him to deprive his fellow contributor of the most valuable part of his contribution; to take away the kernel and leave

\begin{footnotesize}
\begin{enumerate}
\item See supra note 5.
\item See Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640 (S.D.N.Y. 1970), aff'd on other grounds, 457 F.2d 1213 (2d Cir.), cert. denied, 409 U.S. 997 (1972); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co. (the "12th Street Rag" case), 221 F.2d 569 (2d Cir. 1955); "Melancholy Baby," 161 F.2d 406 (2d Cir. 1946); Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266 (2d Cir. 1944); Maurel v. Smith, 220 F. 195 (S.D.N.Y. 1915), aff'd, 271 F. 211 (2d Cir. 1921).
\item See Maurel, 271 F. at 214 ("there is no distinction... between literary property and property of any other description").
\item 1 Nimmer, supra note 16, § 6.09, at 6-21.
\item See H.R. Rep., supra note 3, at 121.
\item There is... no need for a specific statutory provision concerning the rights and duties of the coowners of a work; court-made law on this point is left undisturbed. Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use or license the use of a work, subject to a duty of accounting to the other coowners for any profits. \textit{Id.}; see also A. Latman, \textit{The Copyright Law} 96 (5th ed. 1979) (citations omitted) (indicating that an accounting of profits from the grant of a license to a third party is due a coauthor).
\item For example, complex works such as the detailed research reports in \textit{Weissman}, substantial projects requiring diverse talents such as the sculpture and the special effects in \textit{CCNV}. Weissman v. Freeman, 684 F. Supp. 1248 (S.D.N.Y. 1988), aff'd in part, rev'd in part, 868 F.2d 1313, 1318-20 (2d Cir.), cert. denied, 110 S. Ct. 219 (1989); Community for Creative Non-Violence v. Reid (CCNV), 846 F.2d 1485 (D.C. Cir. 1988), aff'd, 109 S. Ct. 2166 (1989).
\item 140 F.2d 266, 267 (2d Cir. 1944).
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him only the husk.”

A. Common Design: The Objective Standard

“Common design” is the precursor of the objective intent standard of the 1976 Act’s joint work definition. In Maurel v. Smith, Judge Learned Hand adopted the first American definition of joint authorship from the English decision Levy v. Rutley: “to constitute joint authorship there must be a common design.” The creation of a single work through cooperative effort constituted common design. In Maurel, Judge Hand expanded Levy to include authors who did not know each other at the time each part of the whole was created. Construing another early English authority, Hatton v. Keen, Judge Hand indicated:

the [Hatton] case did not turn upon any license given by the plaintiff, but upon whether his music had not gone into the fabric of the presentation in such sense that he lost independent ownership... One who contributes to such a joint production does not retain any several ownership in his contribution, but that it merges into the whole.

Affirming Maurel, the Second Circuit emphasized that the joint effort of the parties indicated their intent to be coauthors.

23. Id.
24. 220 F. 195 (S.D.N.Y. 1915), aff’d, 271 F. 211 (2d Cir. 1921).
25. See Maurel, 220 F. at 199 (Hand, J.): “[t]he only case in the books in which the matter [of joint authorship] seems to have been discussed is Levy v. Rutly (sic); see also Edward B. Marks Corp. v. Jerry Vogel Music Co., 140 F. 2d 266, 267 (2d Cir. 1944).
26. L.R. 6 C.P. 523 (1871) (holding that a subsequent edited version of the original work was not a joint work because joint authorship arises “only when several parties contributed their labor to the production by common and preconcerted design”), cited in Maurel, 220 F. at 199.
27. Levy, L.R. 6 C.P. at 529.
28. Maurel, 220 F. at 199. The scenario for a comic opera was written first with the libretto and lyrics added afterwards. Common design was determined from multiple contributions to a single work intended for operatic performance. The ultimate purpose of the contribution, its scheme in the common design of the unitary whole, determined its status as part of a joint work rather than as an independent work. See generally SUB- COMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS OF SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION, STUDY NO. 12 (Comm. Print 1960) (authored by G. Cary) [hereinafter STUDY NO. 12].
29. Maurel, 220 F. at 199.
31. Maurel, 220 F. at 201.
32. 271 F. 211 (2d Cir. 1921).
In Edward B. Marks Corp. v. Jerry Vogel Music Co., Judge Hand replicated his common design theory from Maurel. He determined that the merger of the author's contribution with those of others into a single work evidenced the intent of the authors to create a joint work. He also expanded common design by requiring that parties stipulate in advance the intent not to create a joint work. Thus, Judge Hand interpreted the tandem creation of a work as manifesting the intent to jointly own it: "when both plan an undivided whole . . . unless they stipulate otherwise in advance, their separate interests will be as inextricably involved, as are the threads out of which they have woven the seamless fabric of the work."

These early decisions established the common design doctrine and laid the foundation for joint authorship. In common design, a contribution is integrated into a single work having no previous existence. This integration operates as an objective standard, not conditioned on the contributing parties' state of mind.

B. "Melancholy Baby": The Subjective Standard

In 1911, a husband and wife song-writing team composed "Melancholy," and registered the song under the Copyright Act of 1909. A year later, the husband consented to have new lyrics added to his music in a song entitled "Melancholy Baby." In "Melancholy Baby," the managers and parties recognized this property right flowing from the collaboration of labor. The result is that there was a joint co-operation in carrying out the effort to complete the opera. It is not essential that the execution of the work should be equally divided; as long as the general design and structure was agreed upon, the parties may divide their parts and work separately. "The pith of joint authorship consists in co-operation, in common design, and whether this common design takes place subsequent to the formation of the design by the one and is varied in conformity with the suggestions and views of the other, it has equally the effect of creating the joint authorship as if the original design had been their joint conception."

*Id.* at 214-15 (emphasis added) (citing W. Copinger, Law of Copyrights 109-10 (4th ed. 1902)).

34. 140 F.2d 266 (2d Cir. 1944).

35. *Id.* at 267. "[I]t makes no difference whether the authors work in concert or even whether they know each other; it is enough that they mean their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such." *Id.* (emphasis added).

36. *Id.*


38. 17 U.S.C.A. §§ 1-216, 11 (1909) (repealed by 17 U.S.C. §§ 101-914 (1982 and Supp. IV 1986)). "Melancholy" was originally registered in Ernie Burnett's name only. See "Melancholy Baby" 161 F.2d at 407. Although the couple divorced, they jointly renewed their copyright registration in the song. See *id.* at 408-09.
the case which determined the authorship rights of the first lyricist, the composer and the second lyricist, a subjective standard replaced the objective standard of common design.39 "Melancholy Baby" relied on Marks as its primary support, using Judge Hand’s rationale that a lyricist and composer who did not collaborate could still coauthor the work.40 The "Melancholy Baby" court distorted the reasoning of Marks, however, by considering only the composer’s subjective intent to create a song and ignoring the vesting of joint authorship in the first lyricist.41 By granting the second lyricist rights in the whole, the court wrongfully diluted the rights of the initial lyricist.42 A state of mind standard, disregarding the ownership rights of the first lyricist, replaced the standard of common design. Despite the appellate court’s holding in this case, "Melancholy" was the joint work; "Melancholy Baby"—merely derivative.43

Through reliance on "Melancholy Baby" and the subjective intent standard, the misappropriation of coauthors’ property rights continues. Although "Melancholy Baby" was clearly rejected by the 1976 Act’s Panel of Consultants (the Panel),44 the case is still cited to explain common design. Yet, in common design, the contributions of the parties, not their state of mind, manifest their ultimate intent.

C. Continuing Validity of Common Design

The studies and panel discussions instrumental in formulating the

39. See Edward B. Marks Music Corp. v. Jerry Vogel Music Co. ("Melancholy Baby"), 42 F. Supp. 859 (S.D.N.Y. 1942), aff’d, 140 F.2d 266 (2d Cir. 1944); Maurel v. Smith, 220 F. 195 (S.D.N.Y. 1915), aff’d, 271 F. 211 (2d Cir. 1921). See supra notes 24-36 and accompanying text for an explanation of the objective standard.


41. The "Melancholy Baby" court hypothesized that if the first lyricist had died or changed her mind before the merger of the music with the lyrics, the composer could have had someone else write the words. Id. at 410. Ignoring the vesting of rights in the first lyricist, the court concluded "it should make no difference that Burnett’s original design to have his music combined with his wife’s words was in fact realized. If the words and music of a song constitute a unitary work as the Marks case held, then [the second version] was a ‘new work’ separately copyrightable from the 1911 version.” Id. This conclusion is clearly incorrect. For critical comments on "Melancholy Baby" see infra notes 63-66 and accompanying text.

42. But see 1 NIMMER, supra note 16, § 6.07 at 6-18 to 19.

43. See 17 U.S.C. § 101 (1982), defining derivative work as based on “pre-existing works”; see also infra note 56 and accompanying text, defining derivative work.

44. See infra notes 63-67 and accompanying text. But see SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS OF SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION STUDY No. 31, at 175 (Comm. Print 1960) (authored by B. Ringer) [hereinafter STUDY No. 31] (stating that although the reasoning of "Melancholy Baby" was erroneous, the result could be justified if the new version was first publication of the work).
definition of joint authorship in the 1976 Act are replete with references to prior case law, due partly to the dearth of statutory authority prior to the 1976 Act and partly to the strongly persuasive nature of this case law. Maurel, Marks, and "Melancholy Baby" are crucial to an understanding of the intent element in the 1976 Act and current copyright doctrine. Although the term "common design" does not appear in the 1976 Act or the House Report accompanying it, the objective standard of common design as expounded by Maurel and Marks can be read into these documents, since the intent on which the statute focuses follows "traditional notions" as established by prior case law. Additionally, the Panel's studies incidental to the 1976 Act unequivocally renounce the "Melancholy Baby" subjective intent rationale.

III. Legislative History of Joint Authorship in the 1976 Copyright Act: Formation of the "Touchstone of Intent"

Under the 1976 Act, intent is the fulcrum of joint authorship;
joint work is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."50 "Intent[ion] at the time the writing is done"51 is the "touchstone"52 of joint authorship. The Panel used the term "intent" to distinguish joint works53 from collective works,54 compilations,55 and derivative works.56 This distinction was crucial because, in a single work, a joint author's rights in the whole as a tenant-in-common are far more valuable than the rights of


52. Id.

Under the definition of § 101, a work is 'joint' if the authors collaborated with each other, or if each prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as 'inseparable or interdependent parts of a unitary whole.' The touchstone here is the intention at the time the writing is done that the parts be absorbed or combined into an integrated unit.

Id. (emphasis added).

53. See Study No. 31, supra note 44, at 176 (discussing the differences between joint works, composite works, collective works and derivative works (new versions); Study No. 12, supra note 28, at 87-88 (discussing the differences between joint and composite works).

54. In collective works, the elements remain "unintegrated and disparate." H.R. Rep., supra note 3, at 122. "A collective work is a work, such as a periodical issue, anthology or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101 (1982) (emphasis added).

55. 17 U.S.C. § 101 (1982). A compilation is a "work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." Id.

A 'composite work,' broadly speaking, is one which puts together the separate and distinct works of different authors. A clear-cut example would be a magazine containing a number of short stories contributed by various independent authors . . . . The magazine as a whole would be a 'composite work,' but neither the magazine nor any of the stories by one author would be a 'joint work.' The rights in each story would be owned by its author alone . . . . the rights in the magazine as a whole . . . . [would be] owned by the magazine publisher alone.

Study No. 12, supra note 28, at 87.

56. Derivative work is a work based upon one or more preexisting works. See 17 U.S.C. § 101 (1982) (emphasis added). A derivative author has rights only in his own contribution. 1 Nimmer, supra note 16, § 6.05, at 6-12.
a derivative author or an author of part of a collective work,\textsuperscript{57} or even a sole author. In a derivative, collective or sole work, an author's rights vest only in his own contribution.\textsuperscript{58}

The legislative history of the 1976 Act demonstrates that the Panel rejected a subjective intent standard in joint authorship.\textsuperscript{59} As of July 1961, in the Report of the Register of Copyrights on the General Revision of the United States Copyright Law (1961 Report),\textsuperscript{60} the definition of joint work recommended by the Panel of Consultants did not include the term "intention," but another analogous term—"object"\textsuperscript{61}—indicating "the purpose, aim or goal of a specific action or effort."\textsuperscript{62}

While recognizing the validity of earlier case law espousing common design,\textsuperscript{63} the 1961 Report unequivocally renounced the subjective standard of "Melancholy Baby"\textsuperscript{64} and "12th Street Rag,"\textsuperscript{65} where a work "complete in itself [becomes] a joint work . . . at the request of the copyright owner [i.e., by his subjective intent]."\textsuperscript{66} However, despite the obvious legislative purpose behind the renunciation of these cases and the subjective standard, courts and treatises continue to cite "Melancholy Baby" to define joint authorship.\textsuperscript{67}

\textsuperscript{57} See 1 NIMMER, supra note 16, § 6.05, at 6-12. Each joint author owns an undivided interest in the work as a whole.

\textsuperscript{58} See id.

\textsuperscript{59} See infra notes 63-82 and accompanying text.

\textsuperscript{60} COPYRIGHT LAW REVISION, 87TH CONG., 1ST SESS. (Comm. Print 1961) [hereinafter 1961 REPORT].

\textsuperscript{61} 3 A. LATMAN & J. LIGHTSTONE, THE KAMINSTEIN LEGISLATIVE PROJECT, COPYRIGHT ACT OF 1976 at 335 (1983) [hereinafter KAMINSTEIN]; 1961 REPORT, supra note 60, at 90 ("a 'work of joint authorship' should be defined in the statute as a work created initially by two or more authors with the object of integrating their contributions into a single work").


\textsuperscript{63} 1961 REPORT, supra note 60, at 90.

We believe the question of what constitutes a work of joint authorship should be clarified in the statute. We would not go as far as the theory of the Twelfth Street Rag decision [as first set forth in "Melancholy Baby"], but would adopt the test laid down by the earlier line of cases—that a joint work is one created by two or more authors who intend to have their contributions joined together as a single work.

\textsuperscript{64} Shapiro, Bernstein & Co. v. Jerry Vogel Music Co. ("12th Street Rag"), 161 F.2d 406 (2d Cir. 1946).

\textsuperscript{65} Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 221 F.2d 569 (2d Cir.), modified on reh'g, 223 F.2d 252 (2d Cir. 1955).

\textsuperscript{66} 1961 REPORT, supra note 60, at 90.

\textsuperscript{67} See infra note 129.
In the Preliminary Draft of 1963, the definition of joint work changed to "with the intention that their contributions be merged into indistinguishable or interdependent parts of a unitary whole." The language of the early reports and the Preliminary Draft originated in two studies submitted by members of the Panel of Consultants from the Copyright Office. One of these studies illustrated the meaning of "intent" through the example in Maurel v. Smith. In Maurel, the word "intent" reflected purpose or aim demonstrated by action ("intend by their combined efforts"), not by state of mind.

The Panel was particularly concerned that the meaning of "intention" might be misconstrued to include state of mind. From the

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68. Kaminstein, supra note 61, at 344 n.10; Preliminary Draft for Revised U.S. Copyright Law, Copyright Law Revision, pt. 3 (1964) [hereinafter Preliminary Draft].

69. Study No. 12, supra note 28, (G. Cary); Study No. 31, supra note 44, (B. Ringer). Kaminstein, the Panel Chairman, was also from the Copyright Office. The Panel of Consultants was comprised of a distinguished cross-section of representatives including, but not limited to, the areas of law, broadcasting, records, publishing and motion pictures. For a list of Panel members, see Preliminary Draft, supra note 68.

70. Study No. 12, supra note 28, at 90 ("[t]he ingredients of joint authorship enumerated in this case are collaboration and common purpose. Joint authorship occurs when two or more authors intend by their combined efforts to create a unitary work" (emphasis added)). The case referred to is Levy v. Rutley, L.R. 6 C.P. 523 (1871), the English authority cited by Judge Hand in Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944).

71. Study No. 12, supra note 28, at 90-91 (construing Maurel v. Smith, 220 F. 195 (S.D.N.Y. 1915), aff'd, 271 F. 211 (2d Cir. 1921)).

Joint authorship occurs when two or more authors intend by their combined efforts to create a unitary work. . . . A wrote a scenario for a comic opera, B the libretto, and C the lyrics. Although A's scenario was written first, the court held A to be joint author with B and C with all the rights and obligations which arise from such an undertaking. . . . One who contributes to such a joint production does not retain any separate ownership in his contribution, but it merges into the whole.

Id.

72. Id.

73. Preliminary Draft, supra note 68, at 265. American Bar Association Committee 302 Chairman Harry R. Olsson, Jr. commented:

I think a 'joint work' should be defined as a work which appears to be a unitary whole, and whether a work is a 'joint work' or not should have nothing to do with the intentions or mental state of the authors who worked on it. If Gilbert did not intend 'The Pirates of Penzance' to be a 'joint work,' I think it should be one nevertheless. Where the defendant in a lawsuit took a license from one of two co-authors of an apparent joint work, the burden of proving what the intentions of the plaintiffs were when they created the work is a very heavy burden to put on him. Appearance, I think it clear, should govern this question.

Id.

Also addressing the uncertainty caused by a state of mind standard, Harold Orenstein, in a letter written in comment on the Preliminary Draft, presaged the problem of forecasting a joint work before its actual creation. Id. at 410.
initial drafting stages, the Panel created a middle ground straddling both close collaboration and the more removed situation where authors, not in direct collaboration, still "intended" their contributions to be merged. Intent expanded joint authorship beyond strict collaboration—the term "collaboration" is conspicuously absent from

The question of whether a work is joint or composite is generally one which only arises after the fact. Generally when writers start to work together they have no idea whether what they are writing together will ultimately be published or produced or whether one or the other will drop out of the collaboration in the middle of it.

Id.

Reacting to concerns about subjective intent, Barbara Ringer defended the use of the term "intention" in the joint work definition: "there really was no intention to change [the definition]s basic substantive meaning [and the changes made] it more precise." COPYRIGHT LAW REVISION, pt. 5, 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS, 89th Cong., 1st Sess. 144 (Comm. Print 1965) [hereinafter 1964 REVISION BILL]. The major change appears to have been the word "intention" as a substitution for the term "object," creating an inference that subjective intent might be an element of the revised definition. Ringer indicated the drafters' purpose was not to change the "substantive meaning" of the definition, but to assure fears that subjective intent might be considered an element of that definition. According to her, the changes protected the substantial tenancy-in-common property rights vesting through joint authorship of a work. Creating such rights "simply from the accident of bringing together two authors' works" would have negated the protective purpose of the Panel's efforts. 1964 REVISION BILL, supra, at 144.

You are dealing here with ownership; and to create a tenancy-in-common situation with all of the consequences that flow from that, simply from the accident of bringing together two authors' works and without regard to the authors' intention that they be merged or anything else, doesn't appear to me to make any practical or theoretical sense.

Id. This clarification of the definition of joint works was apparently an attempt to avoid the "12th Street Rag" situation where an addition is made to work having an independent existence without the author's knowledge. Ringer's presentation was not merely "comment" on the bill. Kaminstein, the chairman of the Panel of Consultants introduced Ringer's presentation as "tie[ing] together [those] sections . . . dealing with ownership."

Id.

74. PRELIMINARY DRAFT, supra note 68, at 271. Panel member Abe Goldman of the Copyright Office, commenting on the inclusion of the "intention" phrase in the statute, indicated the word "or" between the "collaboration" and "intent" phrases in the House Report should be read as disjunctive, i.e., as "either/or." Id.

The reason for stating the second of the possibilities—that is, that they might work with the intention of having their contributions merged—arises from a case or two [i.e., Maurel and Marks] in which the courts have said that, even though an author may work on part of what will be a combined work later, and he doesn't even know who the other author may be, nevertheless, if each author, working separately and without knowledge of the other, knows at the time he is creating his portion that what he's doing will become part of a joint work, then it is to be considered a joint work. Collaboration . . . connotes that the two authors work together each knowing the other, each working with the other. So I think the definition here is disjunctive.

Id.
the statute. Extending common design, the House Report includes a “knowledge” element in its interpretation of the definition of joint work. Knowledge of the contributions of others in a work, however, differs from subjectively intending that others coauthor a work. By allowing authors to work at different times while requiring their awareness of other contributors, the knowledge element achieves the drafters’ purpose to expand joint authorship beyond strict collaboration.

The House Report’s explicit analysis of joint authorship rights in motion pictures responded to reservations of the Motion Picture Association of America concerning imposition of a subjective standard on “intent.” The Motion Picture Association contended that “intent” might “involve the question of the subjective intentions to collaborate... particularly where licensees... may have only objective manifestations on which to rely.” The House Report recognized that authorship of a novel or play might be misconstrued as joint ownership in the subsequent motion picture, and indicated that the independent existence of the initial work supersedes the author’s sub-

75. See 17 U.S.C. § 101 (1982) (definition of joint works). But see A. Latman, supra note 47, at 229. “The new Act’s definition emphasizes the authors’ intent at the time the writing is done and presumably attempts to contract, at least to some extent, the considerable dilution of the collaborative intent requirement for joint works found in some cases within the Second Circuit.” Id. It appears that under Latman, a closer collaboration is required. Yet the Panel did not include the term “collaboration” in the definition of joint works.

76. H.R. Rep., supra note 3, at 120.

77. In CCNV, the sculptor Reid knew the larger work was to include a pedestal, but later claimed he did not have the state of mind that his work be part of a joint work. See infra notes 151-53 and accompanying text. In Easter Seal, the television station and the Easter Seal Society knew they were working together on the videotapes of the parade. See infra notes 148-49 and accompanying text. Even with this knowledge, they claimed to lack the intent to jointly author it. The knowledge element merely requires the awareness of the contributor to a joint work that others are contributing to a work. It does not require that he intend the legal ramifications of his involvement in the creation of the work.

78. The House Report indicates that the statute requires both knowledge and intention. H.R. Rep., supra note 3, at 120. If an author knows he is collaborating on a joint work or knows that his contribution will become part of a joint work, to additionally require that he subjectively intend the unity of the parts when he manifestly allows the merger to occur, is to place too great a burden on future licensees and other joint author(s).


80. Id. at 359, § C (“Coownership and joint ownership - Licenses”) (emphasis added).

81. H.R. Rep., supra note 3, at 120. “The definition of ‘joint works’ has prompted some concern lest it be construed as converting the authors of previously written works,
jective intent to coauthor a derivative work. Additionally, intent must exist at the time "the work is done," not at the time of conception. Thus, the author of a novel or play does not become author of the movie based on his work merely because he subjectively intended to coauthor both.

The genesis of the language in the 1976 Act (and the accompanying House Report) confirms that the "intent" element in the definition of joint work should be interpreted as an objective standard.

### IV. Intent: Post-1976 Act Case Law

#### A. Subjective Standard

The authors' objective contributions to a joint work determine ownership. Yet, in an effort to address the intent element of the statute, such as plays, novels, and music, into coauthors of a motion picture in which their work is incorporated. Id.

82. Id.

[A]lthough a novelist, playwright, or songwriter may write the work with the hope or expectation [i.e., subjective intent] that it will be used in a motion picture, this is clearly a case of separate or independent authorship rather than one where the basic intention behind the writing of the work was for motion picture use. Id. (emphasis added). The status of a work as "previously written" was the focal point of the rights of ownership.

83. Id. “[The author] may write a work with the hope or expectation” [i.e., the author may have the subjective intent] that it will be used in a motion picture, yet refute that subjective intent by evidencing a different intent through his actions of creating the primary work. Id. (emphasis added).

**Query:** How does the House Report contemplate determining whether joint authorship exists in the novel or the motion picture?

**Example:** An author, as an independent contractor, contributes to a story, like Star Wars, with the subjective intent for it to be both a novel and a motion picture screenplay. It is first produced in screenplay form and then as a novel. In which medium is he the joint author? What if the novel was published first?

In the first instance (with the screenplay as the pre-existing work), the screenplay would be the joint work, the novel—the derivative work. It would be vice versa in the second instance.

The House Report recognizes that “[i]t is true that a motion picture would normally be a joint rather than a collective work” if it were not for work for hire. H.R. Rep., supra note 3, at 120.

It is irrelevant that in the 1960s the drafters of House Report may not have contemplated a situation where authors rely on the popularity of the movie to sell the novel or that motion picture screenwriters in the future may not work for hire.

The relevance is the emphasis the Report gives to the “clearly” obvious case where the “pre-existing work” (in the Report’s terminology) in and of itself evidences the author’s intent over any subjective intent he may have had while writing the work. Such emphasis keeps this type of manifest intent squarely within the contemplation of Congress which added the phrase “at the time the work is done” [rather than at the time the work is first conceived] to qualify the intent element.

84. See supra notes 24-36, 45-47 and accompanying text.
courts continue to summarily apply a state of mind standard. These courts decide the issue of authorship through objective factors, and then make a conclusory examination of subjective intent which supports the objectively based holding.

Rather than protecting authors, intent under the subjective standard more often denies ownership to rightful coauthors. After participating in the creation of a joint work, one author can claim he lacked intent to jointly author a work, even though his actions manifest the opposite intent. Alternately, a subsequent contributor to an existing work can claim that the work was subjectively intended to be a joint work. This claim of authorship based on subjective intent can deny rights to a legitimate joint author as well as to assignees and licensees, who must rely on objective means to discern copyright ownership. The subjective intent standard, through the misappropriation of ownership, erodes incentive to create, which is the primary policy of the joint authorship doctrine. The subjective standard is particularly problematic when it is used in determining coauthorship of derivative works and in applying contract principles to joint works.

1. Derivative Works

A common misconception in interpreting the intent element of the joint work definition is that subjective intent transforms the author of a derivative work into a joint author of the initial work. Because a derivative work is based on the initial work, the contribution of a derivative author always follows creation of the initial work. Therefore, adding to a work after its initial existence never vests joint ownership in a later contributor. Additionally, joint ownership of the initial work does not automatically vest coauthorship in a derivative work.

a. Picture Music

The court in Picture Music, Inc. v. Bourne, Inc. mistakenly applied
subjective intent in determining coauthorship of a derivative work. Picture Music correctly found no coauthorship due to lack of collaboration between the initial authors\(^1\) and the derivative author.\(^2\) Yet, in an effort to address the impending 1976 Act, the court summarily injected a subjective intent standard and held that the initial authors did not “intend” to create a joint work with the subsequent author.\(^3\) The initial authors’ subjective intent does not vest coauthorship of a later author in the initial work. A contribution contemporaneous with the creation of the initial work vests coownership in that work. Although not recognized as such, Picture Music stands for the proposition that a work having a previous independent existence cannot qualify as part of a joint work.\(^4\)

b. Weissman

Some authorities have overextended the intent element to allow that subjective intent alone vests joint ownership, even in the absence of a contribution.\(^5\) In Weissman v. Freeman,\(^6\) Dr. Weissman collaborated in scientific studies and reports with her former mentor, Dr. Weissman. The action to determine joint authorship was based on Disney’s modification plus Ronell’s contention that she was owed a one half undivided interest in the song rather than a quarter share of the royalties she had been paid. She also claimed the right as owner to designate the music publisher. Ronell’s rights were subsequently assigned and then re-assigned to Picture Music, plaintiff in this case. Id.

91. See supra notes 29, 74-75 and accompanying text, explaining that strict collaboration is not the only method of coauthoring a work.

92. "The Three Little Pigs," the song whose rights were litigated in Picture Music, had already existed as part of an animated film before the contributions of the subsequent author. This independent pre-existence of the work disqualified the subsequent contributor as author of a joint work. Picture Music, 314 F. Supp. 640.

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Freeman. After their collaboration ended, Dr. Weissman edited one of the reports, and added materials and photos.\textsuperscript{97} The district court ruled that Dr. Freeman co-owned the paper, even though he did not contribute any new material to the edited work.\textsuperscript{98} The district court determined that, because Dr. Freeman jointly owned the initial work, he also jointly owned the derivative work. The Second Circuit disagreed, and reversed.\textsuperscript{99}

The Second Circuit's opinion in \textit{Weissman v. Freeman} supports a new standard to expel the "Melancholy Baby" rationale\textsuperscript{100} from the joint authorship doctrine. Under both the district court opinion in \textit{Weissman} \textsuperscript{101} and the interpretation of "Melancholy Baby" in Nimmer's treatise,\textsuperscript{102} joint authorship rights extend to a derivative version of the work when one initial author contributes to a second work and the non-contributing initial author consents.\textsuperscript{103} The Second Circuit criticized this rationale as based on a "mistaken view that joint authorship of the prior existing works automatically makes the two joint authors coowners of the derivative work."\textsuperscript{104}

In \textit{Weissman}, the Second Circuit correctly determined that the work created by the former medical student was derivative and not joint. The derivative status of the second work was based on the same
analysis of any derivative work—because Dr. Freeman did not contribute to the new work, his rights were in the initial work, not in the derivative work.105

After correctly imposing an objective standard requiring contribution to the new work, the Second Circuit summarily addressed the issue of subjective intent.106 Despite the court’s attention to this issue, however, subjective intent was irrelevant. Dr. Weissman’s byline on the report and Dr. Freeman’s lack of objection to the omission of his name from the report did not create or destroy ownership rights.107 Additionally, the subjective intent factors occurred after the creation

105. Id. at 1318.

Dr. Freeman conceded that he had not participated in drafting the new matter included in P-1, it follows as a logical corollary, therefore, that he acquired no interest in or right to use P-1 beyond those rights which he had as co-author in the prior joint material incorporated into P-1. Even though one co-author has the right to revise a joint work in order to create an individual derivative work, the other co-author acquires no property rights in the newly created work prepared without his involvement.

Id. An analogy can be made to the rights of the author of a novel in the movie based on the novel. The novelist owns only his own contribution in the movie and is not a co-owner of the movie itself.

106. Id. at 1318.

107. The following is a “Looking Glass” analysis of the subjective intent factors considered by the court of appeals in Weissman. First, the events as they occurred and the resulting ownership status of the parties are indicated. The court’s perspective—which was to look at the position of the parties without intent—is then reversed and this hypothetical analysis regards the events of Weissman as though the parties had the requisite state of mind to be coauthors (hypothetical elements are italicized).


2) Same facts as 1), but Freeman forms subjective intent that Freeman is to be joint author in any future work of Weissman’s based on the original work. “He could not have formed intent to contribute to her then non-existent work.” See Weissman, 868 F.2d at 1320.

3) 1985: Weissman edits work, adds new material, rearranges old material. Freeman does not contribute. Weissman subjectively intends Freeman to be a joint author. Weissman’s rights in new work: owner of derivative work. Freeman’s rights in new work: owner (because of Freeman’s prior intent to own Weissman’s future works and Weissman’s present intent to share ownership).

“Had Dr. Weissman... intended the work to be joint—Dr. Freeman could have been deemed a joint author simply by virtue of his contributions to the earlier work.” Id. at 1327 (Pierce, J., concurring). “Yet, there is no evidence that they intended their joint product to be forever indivisible like the finite whole of the completed single song in Marks.” Id. at 1319 “[Weissman’s] use of her own by-line... constitutes prima facia proof that this work was not intended to be joint... In fact, Dr. Freeman lectured at the same meeting at which [the derivative work] was first presented, and made no objection to the omission of his name from it.” Id. at 1320.

4) 1987: Freeman uses the derivative work. Because Freeman is joint author due to his subjective intent and that of Weissman, he needs no permission to use the new work.

This analysis illustrates that the subjective intent standard produces absurd results.
of the work and did not meet the House Report requirement that the
intent exist "at the time the writing is done."108

*Weissman* directly clarifies one widely misunderstood aspect of
copyright law imposed on prospective joint authors, and inadvertently
addresses a second. First, to be a joint author, a party must contrib-
ute to a work not having a prior existence.109 Second, subjective in-
tent does not advance an understanding of who actually authored the
work. A subjective standard only demonstrates the parties' state of
mind regarding the legal consequences of their actions, not the actual
legal consequences.110

The equities concerning coauthors, like Dr. Freeman, who do not
contribute to a derivative work are not skewed by *Weissman*. Often,
the heart of a derivative work is newly updated material or new con-
clusions drawn by the derivative author based on previously written
material. Coauthors still retain full ownership rights in the original
work, and are due an accounting111 for the use of the original in the
derivative version. Therefore, *Weissman* preserves the equities be-
tween the parties and advances Congress's purpose in enacting the
definition of joint works.

2. Contracts: Implied Intent

In his copyright law treatise, Nimmer conditions the creation of a
joint work on the prior existence of an implied agreement.112 While
no implied agreement is necessary for inseparable contributions,
Nimmer requires an implied or express agreement when contributions
are interdependent, if one contribution preceded the other.113 This
agreement criterion apparently evolved from Nimmer's interpreta-
tion of intent. Yet, *Marks*, which Nimmer cites regularly as authority on
common design,114 did not require the first author even know the sec-
ond author.115 The 1976 Act did not allude to agreement—the House
Report merely stated there must be "knowledge . . . [by the first au-

108. H.R. Rep., *supra* note 3, at 120.
109. See *supra* note 94 and accompanying text.
110. See *supra* notes 99-108 and accompanying text. *But see* 1 Nimmer, *supra* note 16,
§ 6.03, at 6-10 ("if intent as to legal consequences is to be the touchstone").
111. H.R. Rep., *supra* note 3, at 121. "Under the bill as under the present law, coown-
ers of a copyright would be treated generally as tenants in common, with each coowner
having an independent right to use or license the use of a work, subject to a duty of
accounting to the other coowners for any profits." *Id.*
112. 1 Nimmer, *supra* note 16, § 6.02, at 6-4 to 6-5.
113. *Id.*
114. See, e.g., 1 Nimmer, *supra* note 16, § 6.03, at 6-6 n.3 (construing Edward B.
Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266 (2d Cir. 1944)).
115. Marks, 140 F.2d 266.
author] that [the work will] be merged with the contributions of other authors." Neither Marks, which formulated the common design precursor of intent, nor the House Report requires a contractual agreement for joint authorship. Thus, Nimmer's criterion appears to be an invention without support in prior case law or statute.

In Boggs v. Japp, the court regarded lack of agreement as evidence negating joint authorship. The plaintiff in Boggs contributed sketches, a recipe and plot suggestions, which other courts considered sufficient for coauthorship. Yet, because the parties reached no contractual agreement prior to creation of the work, the Boggs court denied ownership to the plaintiff. This denial of property rights based solely on the lack of a written instrument does not comply with the language of the statute.

Although the statute explicitly provides for a writing in work for hire situations, the 1976 Act's definition of joint authorship has no provision for a written agreement. Easter Seal Society for Crippled Children & Adults of La., Inc. v. Playboy Enterprises (Easter Seal) and Community For Creative Non-Violence v. Reid (CCNV), while rejecting a work for hire claim because of the lack of a written agreement, regarded joint authorship as an alternative. Both Easter Seal

116. H.R. Rep., supra note 3, at 120.

117. 1988 Copyright L. Rep. (CCH) ¶ 26,347 (E.D.Va. July 20, 1988) (illustrator Boggs submitted sketches and plot ideas for children's storybook about abandoned jam and jelly factory; court held there was no evidence defendant Japp chose Boggs to illustrate the book or that an agreement to create joint work existed between them).

118. Despite the opinion of the court, the statutory definition of joint authorship does not require a written agreement. 17 U.S.C. § 101 (1982); see infra notes 121-28 and accompanying text.


120. Boggs, [1989 Transfer Binder 2] Copyright L. Rep. (CCH) ¶ 26,347, at 26,347, 22,219. "There is no evidence that the parties ever intended that they be co-authors. A contract was never made, agreed upon or entered into and the parties never reached any type of agreement [i.e., there was no meeting of the minds]. Further, Japp [defendant] testified that all she was ever interested in was locating an illustrator." Id.

121. In the definition of work for hire as regarding independent contractors, a writing is required. 17 U.S.C. § 101 (1982). See infra note 166 and accompanying text explaining work for hire.


124. Id. at 1495.
and CCNV disregard Nimmer’s "implied agreement" in interdependent contributions. Easter Seal found coauthorship even though "the parties . . . refused to acknowledge it," thereby regarding the merger of the parties' efforts as sufficient evidence of their intent. CCNV, also finding that work for hire was not implicated, determined that the contribution itself evidenced the intent to create a joint work. Thus, these courts found there was a possibility of joint authorship even where an ownership agreement was absent. A recently proposed Senate bill would require a written contract prior to joint authorship. The Register of Copyrights, however, has expressed reservations that a contract provision would deny authorship to those currently protected by the 1976 Act.

B. Contemporary Common Design: Manifesting Objective Intent Through Contribution

The common design theory established by the pre-1976 Act case law survives in current case law. Although the 1976 Act did not

125. Easter Seal, 815 F.2d at 337.
126. CCNV, 846 F.2d at 1496-97 ("most prominently undercutting Reid's claim of sole authorship [was] that CCNV was the motivating factor . . . conceived the idea . . . directed [Reid's] efforts").

S. 1253 also requires that for all specially ordered or commissioned works, the parties must, before commencement of the work, enter into a signed agreement stating that the work is to be one of joint authorship . . . . I am unsure how it would work in practice. Assume, for example, that the producer of an audiovisual work for elementary schools commissions a friend who is a composer to write some music for the work; the two work closely with the producer giving detailed comments and suggestions for both the original draft and subsequent revisions of the music . . . and the composer giving suggestions for revision of the visual component of the work . . . . The only agreement is an oral one to split the profits 75% - 25%. Under CCNV v. Reid, it is unlikely the music would be deemed made for hire. Under the existing statute, the work would qualify as a joint work. Under S. 1253, though, the work could not be a joint work since no written agreement to that effect was entered into. The question then arises, who owns what rights? The audiovisual work here consists of 'inseparable or interdependent parts' that are useful only as part of a 'unitary whole.' The easy answer is to say each owns rights in his or her contribution, but this answer gets you no place where each contribution is only marketed as part of the unitary whole. I do not see how the work could be anything but a joint work, a result prohibited by S. 1253.

129. See Weissman v. Freeman, 684 F. Supp. 1248, 1259 (S.D.N.Y. 1988), aff'd in
explicitly characterize it as such, common design is the intent element in the definition of joint work. To premise the formidable property rights endowed through joint authorship on an ephemeral state of mind standard deprives authors, assignees and licensees of predictability concerning their rights. The common design standard, in which joint laboring determines ownership, conforms with the protective purpose of Congress in formulating the intent element in the joint work definition.


130. See supra notes 53-58 and accompanying text, explaining that Congress intended to differentiate joint works from derivative and collective works.

131. 1988 Copyright L. Rep. (CCH) ¶ 26,244, 21,712 (S.D.N.Y. Feb. 19, 1988) (photographer claimed Popular Mechanics magazine infringed his copyright in photos of fishing gear, but court determined that the parties were joint authors because they intended a unitary whole by "work[ing] pursuant to a preconcerted common design") (citing 1 Nimmer, supra note 16, § 6.06[A], at 6-14).


Here there is no doubt that Strauss and Popular Mechanics intended that 'their contributions be merged into inseparable or interdependent parts of a unitary whole'. . . . [Strauss] was careful to leave space in the composition of the photograph that would accommodate [any] future additions . . . . Add to those truths the fact that . . . Popular Mechanics' graphic editor designed the layout for the photo . . . that other artists and technicians hired by Popular Mechanics retouched significant portions of the photo, and the conclusion is inescapable that pages 86 and 87 of the April 1985 issue constituted a joint work.

133. Strauss, 1988 Copyright L. Rep. (CCH) ¶ 26,244, at 21,722 (S.D.N.Y. Feb. 19, 1988) (citing 1 Nimmer, supra note 16, § 6.06[A], at 6-14) ("[i]n a joint work . . . where both authors work pursuant to a preconcerted common design") (emphasis added); but see Strauss, 1988 Copyright L. Rep. (CCH) at 21,719 ("Strauss and the magazine never entered into a written contract formalizing their business relationship").
contributions (initial conceptualization, continual supervision and creative input) to a photo layout of fishing equipment merged with Strauss's photograph.\textsuperscript{134} The court in \textit{Strauss} indicated these manifest elements of common design constituted an intent to merge into a unitary whole.\textsuperscript{135}

An emerging trend toward a subjective intent standard was quashed by the \textit{Strauss} court. Although Strauss contended he had no "subjective intent" to create a joint work,\textsuperscript{136} the court decided that he could not avoid the legal consequences of his acts.\textsuperscript{137}

\textit{Strauss} also considered the limitation of a joint author's rights in the work. Prior to \textit{Strauss}, \textit{Gilliam v. American Broadcasting Co.}\textsuperscript{138} held that the reservation of licensing rights evidenced a sole authorship intent.\textsuperscript{139} Refuting this contention, however, the \textit{Strauss} court indicated that given the contributions and other factors that evidence an intent to merge, first publication rights only enumerate subsequent assignment or licensing rights and do not determine initial ownership rights.\textsuperscript{140} In other words, joint authors can subsequently contract away their rights, but a contract will not alter the vesting of the initial tenancy-in-common.\textsuperscript{141}

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\item\textsuperscript{134} Although the factors extracted by the \textit{Strauss} court establish the viability of the common design theory through the requirement of objective contributions by all parties to a joint work, the copyrightability doctrine would not recognize all of the magazine's contributions as such because they do not rise above the level of ideas. See infra notes 247-65 and accompanying text. This Note would bifurcate \textit{Strauss}: recognizing it as support for the demise of a subjective intent element, while criticizing it as allowing less than expressions to qualify as contributions.
\item\textsuperscript{135} \textit{Strauss}, 1988 Copyright L. Rep. (CCH) at 21,722.
\item\textsuperscript{136} \textit{Id.} at 21,722 n.5. The court notes that Strauss denied having an intent to create joint copyright: "such joint ownership was never discussed with me, and I would never have consented to it if it had been." \textit{Id.} (citing Affidavit of Strauss ¶ 5).
\item\textsuperscript{137} \textit{Id.}
\item\textsuperscript{138} Such self-serving proclamations [concerning Strauss's intent not to create a joint copyright] are unavailing. Even though Strauss may not have intended the legal consequences that attach to his actions, he does not deny he that he still had the requisite intent to \textit{participate} in the creation of pages 86 and 87 in the manner described.
\item\textsuperscript{139} \textit{Id.} (emphasis added). This participation element used to be called common design.
\item\textsuperscript{140} As when an author assigns or licenses rights he already has in the work. Strauss \textit{v.} Hearst Corp., 1988 Copyright L. Rep. (CCH) ¶ 26,244, at 21,722 n.5 (S.D.N.Y. Feb. 19, 1988) (construing the words "First Publication Right In U.S. And Foreign" as indicative of "parties’ respective rights as joint copyright holders . . . . Thus it may have been that Hearst by such language did agree to limit its natural rights as a joint holder").
\item\textsuperscript{141} See infra note 147 and accompanying text, indicating that the Easter Seal court
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In *Easter Seal*, the contributions of a television station's personnel qualified the station as coauthor with the Easter Seal Society (the Society) in a videotaped parade scene. The court viewed the effort to create a unitary work as the dispositive factor in that "[they] worked cooperatively . . . to create the field tapes." The *Easter Seal* court decided that the contribution of the broadcasters was not merely fixation—not merely the setting of an expression in a tangible medium. The broadcasters' direction and commentary merged with the efforts of the sports club to constitute joint authorship. *Easter Seal*'s recognition that contracts do not create joint authorship, but establish rights after joint authorship has vested, accords with the recognition in *Strauss* that reservation of rights does not determine initial ownership. In *Easter Seal*, subjective intent was not relevant to coauthorship status. Although the Society considered itself the sole owner of the tapes, and regarded the televised parade as work made an analogous finding regarding vesting of ownership and subsequent or prior limitation of rights.

142. 815 F.2d 323 (5th Cir. 1987), cert. denied, 485 U.S. 981 (1988) (New Orleans television station WYES videotaped parade for use on Easter Seal telethon. Court found work for hire did not exist under literal interpretation of that doctrine's definition in the 1976 Act; in dictum, court determined joint authorship might have existed because WYES contributed work of authorship).


144. *Easter Seal*, 815 F.2d at 337.


146. *Easter Seal*, 815 F.2d at 337 (construing H.R. REP., supra note 3, at 52 and cases cited therein).

When a football game . . . is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes 'authorship.'

Id. (citing H.R. REP., supra note 3, at 52).

147. The Fifth Circuit in *Easter Seal* determined that previous cases involving sports clubs and broadcasters related only to the construction of contracts and did not address the issue of initial coauthorship. *Easter Seal Soci'y v. Playboy Enters.*, 815 F.2d 323, 336-37, cert. denied, 485 U.S. 981 (1988).

The sports cases are not as broad as the Society might wish. They involve disputes over royalties and claims between sports clubs and third parties, not direct copyright disputes between sports clubs and broadcasters. [The *Baltimore Orioles* case does not hold that the clubs are 'authors' of the broadcasts, although, as a practical matter, the bargaining position of a sports team will generally allow it to claim the broadcast copyrights by contract with the radio or television broadcaster.]
sion station as merely the instrumentality of fixation, the court decided joint authorship does not require agreement.

In *CCNV*, the intent of the parties to merge their contributions related not to their state of mind, but to their actual contributions—"labor[ing] to create . . . a unitary whole." By disregarding the subjective intent of the sculptor Reid, the D.C. Circuit indicated that the factors which "most prominently undercut[] Reid's claim of sole authorship" were the contributions of CCNV, the commissioning party. The crucial factor was the merger of the two contributions into an interdependent whole; neither Reid's sculpture nor CCNV's pedestal had an independent existence without the other. The fact that the parties worked apart was not dispositive of the independent existence of the parts.

*CCNV* referred to certain subjective elements of the parties' relations; these elements, however, pertained not to the creation of the work, but to the attitudes of the parties after the work was completed. Therefore, these factors were not dispositive of the authorship status of the parties because, as the House Report indicates, the intent which vests authorship is the intent "at the time the writing is done."

In *Strauss, Easter Seal*, and *CCNV*, the objective standard preserved the equities between the parties. In *Strauss*, the photogra-

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148. *Id.* at 336. The Society contended that "WYES merely provided the mechanical fixation of those works in a 'tangible medium.'" *Id.*

149. *Id.* at 337 ("[a]lthough the parties have refused to acknowledge it . . . it seems clear to us that [their contributions] were interdependent joint works of authorship").


151. *Id.* at 1495. "Reid contends he is the sole author and exclusive owner of the copyright. We now state why the record before us does not establish that contention." *Id.*

152. *Id.* at 1496.

153. *Id.* "Reid [recognized that he did not] solely 'author' the steam grate portion of the sculpture . . . he questions whether CCNV is the author of the base, and whether the base is copyrightable." *Id.*

154. *Id.* at 1496-97. Whether those contributions are merely "ideas" or expressions and therefore rise to a level of copyrightable material would depend not on which party fixed them but on their level of detail.


156. *Id.* at 1496. "CCNV transported the entire work to Reid . . . for the needed repair . . . Reid retained the entire construction, not just the figures he had sculpted." *Id.*


158. *Id.*

159. In *Strauss, Easter Seal*, and *CCNV*, commissioning parties sought to renounce the subjective intent standard. Although the rationale used to support common design appears to support mere supervision as contributing to a joint work, it does not. The indi-
pher's taking of the photograph merged with the magazine's designing of the layout and retouching of the photograph. The photographer alone could not have created the work. Thus, the contributions of the magazine justified its status as coauthor. In Easter Seal, the videotape was created through collaboration, the classic example of joint authorship; to vest authorship in the Society alone would ignore the efforts of the television camera crew and directors. In CCNV, CCNV's pedestal and Reid's sculpture merged into one work: the pedestal's value depended on its use with the sculpture. CCNV clearly manifested the policy behind the joint authorship doctrine; CCNV could not exploit its contribution alone. In Hand's analogy, the pedestal was the "husk" from which the "kernel"—the sculpture—was taken away.

V. Joint Authorship Criteria: Authorship, Intention, Merger

The recent unanimous Supreme Court decision in CCNV embraced a literal interpretation of the 1976 Act's definition of work for individual contributions of the parties must rise to the level of a copyrightable expression for statutory protection to attach. Even those protecting freelance artists' rights reject a subjective standard in the definition of joint work. 1989 Hearings, supra note 28, at 65-66 (statement of Richard Weisgrau, Executive Director, American Society of Magazine Photographers). Weisgrau has stated that:

the definition of joint work is so subjective that it stands as an open invitation to litigants to make a joint work argument in any case in which more than one person had some involvement, no matter how minimal, with the work produced by the freelance artist . . . . Under current law, the client can always make the argument, however specious it may be, that the parties intended to create an interdependent whole and thus that the final product of the photographer's work qualifies as a joint work.

This Note does not advocate a minimal contribution requirement, other than that the contribution be copyrightable. See infra notes 190-228 and accompanying text.

160. The court indicates that the photographer and the magazine were coauthors in pages 86 and 87. Strauss v. Hearst, 1988 Copyright L. Rep. (CCH) ¶ 26,244, at 21,722 (S.D.N.Y. 1988). This would have created joint authorship in the magazine article, rather than in the photo. The court was endeavoring to show that Strauss knew his work would be incorporated into a greater whole, the magazine article. Actually Strauss' efforts in taking the photograph merged with the magazine's efforts in designing and retouching the photograph.


163. 846 F.2d 1485 (D.C. Cir. 1988), aff'd, 109 S. Ct. 2166 (1989). The Second Circuit in CCNV held that sculptor Reid's contribution to the artwork "Third World America," depicting homeless people huddling over a streetside grate, was not work for hire. The court based its holding on a literal interpretation of the definition of work for hire in the 1976 Act. The sculptor's status as an independent contractor, the lack of conformity to the nine categories listed in statutory definition qualifying commissioned
hire\textsuperscript{164} over the erroneous expansions constructed by the lower courts.\textsuperscript{165} Under the statutory definition, the work for hire doctrine confers authorship on employers for employees' creations and on commissioners for nine specific categories of works created by independent contractors under a prior written agreement.\textsuperscript{166} The Court rejected expansion of the work for hire doctrine which granted authorship to commissioners of works not within a strict reading of the statute.\textsuperscript{167}

At the close of the \textit{CCNV} opinion, the Court, allowing that coauthorship could constitute a viable alternate legal theory on remand, quoted the statutory joint work definition verbatim.\textsuperscript{168} This direct quote from the statute mandates a strict application of the statutory definition in joint authorship.\textsuperscript{169} In construing work for hire, the Court reasoned that "strict adherence to the language and structure of the Act is particularly appropriate where, as here, the statute is the result of a series of carefully crafted compromises,"\textsuperscript{170} and that failure to strictly interpret the statute would unravel the "carefully worked out compromise aimed at balancing legitimate interests on both sides."\textsuperscript{171} This rationale has equal force in the joint authorship doctrine. The 1976 Act drafters carefully constructed the joint work definition to "balance" the interests of joint authors, granting them more careful consideration than authors of sole, derivative and collect-

\begin{thebibliography}{99}
\bibitem{footnote164} "Work for hire" is commonly substituted for the longer term, "work made for hire," used in the 1976 Act. \textit{See}, e.g., \textit{CCNV}, 109 S. Ct. 2166 (using both terms).
\bibitem{footnote165} \textit{See id.} at 2178. "Transforming a commissioned work into a work by an employee on the basis of the hiring party's right to control, or actual control of, the work is inconsistent with the language, structure, and legislative history of the work for hire provisions."
\bibitem{footnote167} \textit{CCNV}, 57 U.S.L.W. at 4612. \textit{See supra} note 165 and accompanying text.
\bibitem{footnote168} \textit{Id.} at 4613.
\bibitem{footnote169} However, as the court of appeals made clear, \textit{CCNV} nevertheless may be a joint author of the sculpture if, on remand, the district court so determines that \textit{CCNV} and Reid prepared the work 'with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.' In that case, \textit{CCNV} and Reid would be co-owners of the copyright in the work.
\bibitem{footnote170} \textit{Id.} (citations omitted).
\bibitem{footnote171} \textit{Id.} at 4611 (quoting legislative history of the act) (citations omitted).
\end{thebibliography}
Joint authorship is not the panacea to the problem of the 1976 Act's narrowly drawn work for hire definition. Granting ownership to one who has not authored the work undermines the very core of the joint authorship doctrine. To include commissioning parties as authors in the scope of joint works would expand the definition of "authors" beyond a literal interpretation of the statute. Various

172. See supra notes 53-58 and accompanying text.

173. See 17 U.S.C. § 101 (definition of joint works) (requiring authorship and contribution); see infra notes 181-86 (indicating joint work requires authorship). It has been proposed that the solution to the inapplicability of the work for hire definition to certain commissioned works might be an application of the joint work definition. Joint authorship status would be assured through a prior written agreement. This proposal is flawed in two respects. If a work does not qualify for protection under work for hire—the exception specifically envisioned by Congress—why should it qualify under joint work? To endow ownership rights on a party who is not an author is just work for hire in another guise. In such a scenario, the author is given ownership as well, which puts him in a better position than work for hire. But there still is no basis for bestowing authorship on a commissioning party other than to reward that party for funding the project. Taking the concept of paying for the project to its fullest, even buyers of a finished work could claim they paid for it, they own the copyright. Additionally, as coauthors, independent contractors share in both licensing rights and control over licensing rights, therein leaving commissioning parties with no control over the independent contractor's licensing choices.

Ralph Oman, the Register of Copyrights, has expressed reservations regarding the operation of the writing requirement to establish joint authorship of commissioned works. 1989 Hearings, supra note 128 (comments of Ralph Oman, Register of Copyrights).

S. 1253 also requires that for all specially ordered or commissioned works, the parties must, before commencement of the work, enter into a signed agreement stating that the work is to be one of joint authorship. I am unsure how it would work in practice. Assume, for example, that the producer of an audiovisual work for elementary schools commissions a friend who is a composer to write some music for the work; the two work closely, with the producer giving detailed comments and suggestions for both the original draft and subsequent revisions of the music and the composer giving suggestions for revision of the visual component of the work. The only agreement is an oral one to split the profits 75%-25%. Under CCNV v. Reid, it is unlikely the music would be deemed made for hire. Under the existing statute, the work would qualify as a joint work. Under S. 1253, though, the work could not be a joint work since no written agreement to that effect was entered into. The question then arises, who owns what rights? The audiovisual work here consists of 'inseparable or interdependent parts' that are useful only as part of a 'unitary whole.' The easy answer is to say each owns rights in his or her contribution, but this answer gets you no place where each contribution is only marketed as part of the unitary whole. I do not see how the work could be anything but a joint work, a result prohibited by S.1253.

Id. (footnote omitted). The Register has raised a valid point—a work which would be considered joint under the current statute, simply for lack of a writing, would not be joint under the proposed bill. This would deny rights to authors, by not allowing them to fully utilize their contribution. Furthermore, a mode of endowing rights on commissioning parties already exists. Commissioning parties can license or have rights in the work as-
applications of the joint authorship doctrine ignore the copyrightability doctrine, as though prefixing "co-" on the word "author" changes the components of authorship. Erroneous expansions of authorship within the joint authorship doctrine include: the "de minimis doctrine," the "fixer" qualifying as creator without authoring the expression, and ideas qualifying as contributions in a joint work.

Courts seeking to apply the doctrine of joint authorship have the language of the statute as a guide. The 1976 Act defines joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." The definition clearly requires authorship, intention, and merger.

A. Authorship And Copyrightability

An original work of authorship, fixed in a tangible medium, and embodying an expression rather than an idea, qualifies for protection under copyright law. This is the copyrightability doctrine. A work not fulfilling the requirements of the copyrightability doctrine will not garner protection under the statute.

The natural corollary to the copyrightability doctrine is that an author under the auspices of the statute must create a copyrightable work. The 1976 Act creates the rare exception to copyrightability through the work for hire doctrine; no analogous exception is made signed to them prior to the creation of the work. An axiom of copyright created through the enactment of the 1976 Act is that ownership of the physical work does not confer ownership of the copyright. Conferring ownership in the copyright of a work merely because one has commissioned the work (as in a work of art or a song) is the equivalent of conferring ownership because one has bought the object itself. Through assignment of the work, a system exists for the author to regain ownership through termination after a period of time. Moreover, commissioning parties have strong bargaining power. These provisions allowing for assignment and licensing of rights in the work and termination exhibit the protection Congress sought to endow on authors.

174. For a definition of the components of the copyrightability doctrine, see infra note 181 and accompanying text.

175. See S. 1253, 101st Cong., 1st Sess., 135 CONG. REC. S7343 (daily ed. June 22, 1989) ("Congress never intended to allow one who does not meet the constitutional standard of authorship to become a coowner of all copyright rights in that work").

176. See infra notes 201-16 and accompanying text.

177. See infra notes 229-46 and accompanying text.

178. See infra notes 247-65 and accompanying text.


180. Id. (emphasis added).


182. See 17 U.S.C. § 201(b) (1982) (determining that "[i]n ... work made for hire, the employer or other person for whom the work was prepared is considered the author for
JOINT AUTHORSHIP

for joint authorship. The definition of joint work in the 1976 Act incorporates the term "authors." Therefore, to be a coauthor, a contributor to a joint work must fulfill the requirements of copyrightability.

In CCNV, the D.C. Circuit constructed a format for analyzing authorship of a joint work through elements of the copyrightability. Although CCNV's analysis itself is often problematic, the opinion provides a useful schematic. As recognized in CCNV and in the 1976 Act, the key elements of copyrightability are originality, fixation and expression.

1. Originality

Originality in authorship is "little more than a prohibition [against] actual copying" or an owing of creation to the author. Author has been held to mean "he to whom anything owes its origin, originator, maker."

Though the contribution of a prospective author to a joint work must be original, courts differ as to the requisite degree of original-
ity. Two directions have developed in joint authorship originality: the sole authorship standard and the "de minimis" doctrine.

\textit{a. The Sole Authorship Standard of Originality}

A sole author must fulfill originality standards indicating the work is his own creation. Recognizing that "the standard for determining whether a creation is an ‘original work of authorship’ is not high," \textit{CCNV} adopted the same standard for joint authorship as in sole authorship.\textsuperscript{194} In adopting this standard, \textit{CCNV} indicated that "'[i]t suffices if the author refrains from copying from prior works and contributes more than a minimal amount of creativity.'"\textsuperscript{195} Also adopting the sole authorship standard, the court in \textit{Kenbrooke Fabrics, Inc. v. Material Things,}\textsuperscript{196} found that even the expansion of an original design so as to "permit repetition of the floral design"\textsuperscript{197} was sufficient to fulfill the minimum quantum of originality in the textile field.\textsuperscript{198} Additionally, the court in \textit{Mister B Textiles, Inc. v. Woodcrest Fabrics, Inc.}\textsuperscript{199} concluded that

\begin{quote}
originality means that the work owes its creation to the author and this in turn means that the work must not consist of actual copying . . . . The test of originality is concededly one with a low threshold in that ‘[a]ll that is needed . . . is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’\textsuperscript{200}
\end{quote}

\textsuperscript{194} \textit{CCNV v. Reid}, 846 F.2d at 1485, 1496 (D.C. Cir. 1988), \textit{aff’d}, 109 S. Ct. 2166 (1989) (construing and quoting \textit{LATMAN, supra} note 47, at 29). \textit{CCNV} indicates that the contribution of each author must be more than \textit{de minimus}, but the court appears to interpret a \textit{de minimus} contribution in the same sense as for all copyrightable works, rather than espousing \textit{Picture Music}'s standard which would require more for joint works. \textit{See 1 NIMMER, supra} note 16, § 6.03, at 6-9 to 10; \textit{see also infra} notes 201-16 and accompanying text.

\textsuperscript{195} \textit{CCNV}, 846 F.2d at 1496 (construing \textit{LATMAN, supra} note 47, at 29).

\textsuperscript{196} 223 U.S.P.Q. (BNA) 1039 (S.D.N.Y. 1984) (holding that textile converter, producing printed fabrics for sale to garment manufacturers, was not joint author because it contributed only suggestion and nothing tangible to work).

\textsuperscript{197} \textit{Id.} at 1042-43 (construing Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc., 490 F.2d 1092, 1094 (2d Cir. 1984)).

\textsuperscript{198} \textit{Id.}

\textsuperscript{199} 523 F. Supp. 21 (S.D.N.Y. 1981) (holding that employee's instruction to design firm to make modifications based on unlicensed photograph constituted sufficient contribution for joint authorship of employer with design firm). This Note bifurcates \textit{Mister B} because that case incorrectly elevated supervision to the level of contribution. \textit{See infra} notes 247-65, rejecting supervision as contribution in joint authorship.

\textsuperscript{200} \textit{Id.} at 25 (quoting the standard from L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976) (citations omitted)).
b. Originality And The De Minimis Doctrine: Is One Too Few, Are Two Enough?

A line of cases following the “de minimis” rationale of *Picture Music, Inc. v. Bourne, Inc.*\(^201\) has modified the sole authorship standard of originality and requires a “substantial and significant”\(^202\) contribution, more than the minimal amount of creativity required for sole authorship.\(^203\) In his treatise, Nimmer indicates\(^204\) that

under *Picture Music* something more than the minimal copyright standard of ‘distinguishable variation’ must be added by a later contribution in order to permit a finding that the resulting product constitutes a joint work. How much more is unclear, though the court seems to imply that the later contribution must be so ‘substantial and significant’ as to permit an inference that the parties intended a joint ownership.\(^205\)

In interpreting originality, Nimmer creates a meaning for “de minimis” beyond the Copyright Office Compendium’s definition.\(^206\) Nimmer’s “de minimis” requirement apparently originated as an extension to his questionable theory that uncopyrightable ideas can

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\(^201\) 314 F. Supp. 640 (S.D.N.Y. 1970), aff’d, 457 F.2d 1213 (2d Cir.), cert. denied, 409 U.S. 997 (1972). As a reaction to the fusion of effort standard of “12th Street Rag,” *Picture Music* has been rendered obsolete. Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 221 F.2d 569 (2d Cir.), modified on reh’g, 223 F.2d 252 (2d Cir. 1955) (holding that a piano solo having an independent existence, after being assigned to the music publisher, could be considered a joint work when coupled with lyrics); see 1 NIMMER, supra note 16, § 6.03, at 6-9: “[a] modification of the ‘12th Street Rag’ doctrine was contained in *Picture Music, Inc. v. Bourne, Inc.*, the ‘Three Little Pigs’ case.” This fusion of effort standard vested coauthorship in a subsequent contributor to a work having an independent existence. The House Report accompanying the 1976 Act requires the existence of an intention to create a joint work “at the time the writing is done,” thereby disallowing the creation of joint ownership in a pre-existing independent work and expressly discarding the fusion of effort doctrine espoused by “12th Street Rag.”

\(^202\) See *Picture Music*, 314 F. Supp. at 647. “[A] more substantial and significant contribution was required to reach a finding of joint ownership.” Id.; see H.R. Rep., supra note 3, at 120.

\(^203\) See 1 NIMMER § 6.03, supra note 16, at 6-9 to 10. “[M]ore than the minimal copyright standard of ‘distinguishable variation’ must be added [in joint works] . . . . Thus, under *Picture Music* something more than the minimal copyright standard of ‘distinguishable variation’ must be added by a later contributor in order to permit a finding that the resulting product constitutes a joint work.” Id. (footnote omitted).

\(^204\) Id.

\(^205\) Id.

\(^206\) See Compendium II of Copyright Office Practice § 202.2(a) (1984) (defining de minimus for purposes of original works of authorship). “De minimis. Works that lack even a certain minimum amount of original authorship are not copyrightable. Such works are often described as ‘de minimis,’ in reference to the principle embodied in the Latin maxim ‘de minimis non curat lex.’” Id.
qualify as contributions when interwoven into a joint work.\textsuperscript{207} He concludes that if it is significant, a mere idea can qualify as a contribution to a joint work. Nimmer's contention that ideas can qualify as a contribution for authorship lacks basis in the statute; section 102(b) of the 1976 Act unequivocally excludes ideas from the spectrum of copyrightable material.\textsuperscript{208}

Once Nimmer's theory regarding ideas is discarded, his "de minimus" theory collapses. The additional requirement of "significant and substantial" is unnecessary when both coauthors' contributions are copyrightable.

The most overlooked aspect undermining the precedential value of the "de minimus" doctrine in joint authorship is that \textit{Picture Music} involved a derivative work, not a joint work. Even if a derivative author rewrites half of the existing work, this "substantial" contribution does not qualify him as a joint author, because the contribution is not contemporaneous with the creation of the original work.\textsuperscript{209}

Additionally, the "de minimis" doctrine—requiring a judgment as to the significance of the amount of contribution—flies in the face of the originality standard of authorship as established by Justice Holmes in \textit{Bleistein v. Donaldson Lithographing Co.}.\textsuperscript{210} Justice Holmes found that the courts could not adequately weigh artistic contributions: "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."\textsuperscript{211}

In line with \textit{Bleistein}, the sole authorship standard of originality presents a more equitable standard for joint authorship. Authors have diverse talents, and cooperation among them is the essence of joint authorship. Thus, weighing the artistic value of contributions undermines joint works as well as sole works. The equivocation of courts in applying the \textit{Picture Music} "de minimis" standard emphasizes the preferability of the sole authorship standard. No clear distinguishing factors have been established to assist courts in applying the "de minimus" standard, leading to a plethora of interpretations of what is "substantial and significant."

This lack of a clear standard is apparent in the recent cases of \textit{Eck-}

\begin{footnotesize}
\begin{enumerate}
\item Nimmer, \textit{supra} note 16, § 6.07, at 6-18.
\item 17 U.S.C. § 102(b) (1982).
\item See \textit{supra} notes 90-94 and accompanying text.
\item 188 U.S. 239, 251 (1903).
\item Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).
\end{enumerate}
\end{footnotesize}
ert v. Hurley Chicago Co.\textsuperscript{212} and Grosset & Dunlap, Inc. v. Gulf & Western Corp.,\textsuperscript{213} which applied the Picture Music "de minimis" standard even though neither the 1976 Act nor the House Report ratified this doctrine. Following the Picture Music precedent, Eckert required an examination of the quality and quantity of the parties' contributions to determine intent.\textsuperscript{214} According to Eckert, the examination of the work after its creation for the quality of an author's contribution supports the requirement that coauthors supply copyrightable expressions.\textsuperscript{215} Although Eckert is facially correct about the necessity of copyrightability of all contributions in joint works, the "de minimis" standard is irrelevant once copyrightability is established.\textsuperscript{216}

c. Meltzer/Aitken: Originality Determined By Trade Practices

Meltzer v. Zoller\textsuperscript{217} recognized a homeowner's claim that he originated part of the architectural plans for his home.\textsuperscript{218} Because the overall work was "substantially similar"\textsuperscript{219} to existing plans of the architectural firm, however, the court held that this substantial similarity rebutted the possibility of an original contribution by the homeowner.\textsuperscript{220} Another architectural case, Aitken, Hazen, Hoffman,
Miller, P.C. v. Empire Constr. Co.,\textsuperscript{221} conditioned the originality and copyrightability of a contribution on its fixation by the homeowner.\textsuperscript{222} Both Meltzer and Aitken incorrectly applied the copyrightability doctrine by predetermining originality on trade practices which fail to recognize client contributions in joint works.\textsuperscript{223} The Meltzer/Aitken originality formulation fails because if the homeowner's sketches rose to the level of expressions,\textsuperscript{224} they would cross the threshold of minimal deviation required for originality.\textsuperscript{225} The Meltzer/Aitken originality standard, disallowing client contributions in joint authorship due to trade practices, has directed other courts to misjudge originality.\textsuperscript{226}

A more direct approach to architectural plans would be to determine whether the architectural firm's contribution existed as an independent work prior to the contribution of the homeowner. Then, even if both the architect and homeowner contributed modifications or additions to the existing plans, the resulting work would be derivative, and the homeowner would have rights only in his contribution to the derivative work. Although giving the architectural firm sole authorship of the plans may appear to implement the constitutional purpose of benefiting society\textsuperscript{227} by encouraging the creation of architectural plans, to totally ignore the contribution of the homeowner in the name of trade practices creates an exception to copyright law beyond the 1976 Act. If the homeowner contributes an original expression contemporaneous with the creation of the plans, this effort deserves full authorship protection under the Act. Additionally, consideration of trade practices is a principle of contract law. Determining the vesting of a coauthor's rights through trade practices is inconsistent with copyright law.

d. Originality: Implementing the Constitutional Purpose

The most equitable standard of originality in joint authorship is the
sole authorship standard. Contribution of an expression (one ultimately assimilated into a joint work) should constitute sufficient coauthorship effort. The constitutional purpose of the copyright clause is to provide incentives for authors to create. By requiring more of joint authors than sole authors, less incentive exists to create joint works. In the creation of a joint work, diverse authors contribute diversely—if one author could create the work on his own, he would. Weighing coauthors' contributions undermines the cooperative nature of joint works by assuming those contributions were unnecessary to the creation of the whole.

2. Fixation

Fixation is the setting of an expression in a tangible medium. In the joint authorship pacesetter in fixation is *Meltzer v. Zoller.* In *Meltzer,* “fixation” is equated with “creation” of a work and determines ownership status. The *Meltzer* court conferred authorship of architectural plans on the source of the fixation. The court concluded that the homeowner who contributed “sketches” and “ideas” was not a coauthor because he did not fix those contributions in expressions. The standard espoused by *Meltzer* fails to track the language of the statute and misdirects subsequent case law. For

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228. See infra notes 247-65 and accompanying text, indicating that the contribution of an idea is insufficient to confer authorship in a joint work.

229. 17 U.S.C. § 101 (1982) (definition of ‘fixed’). “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”

230. *Id.*

231. *Id.* at 857.

232. *Id.*

233. *Id.* (“[t]he Chigotis firm, by fixing the ideas for the Meltzer home in a tangible medium, ‘created’ those plans, for pursuant to 17 U.S.C. § 101, a ‘work’ is ‘created’ when ‘it is fixed in a copy . . . for the first time’”).

234. *Id.* at 849. “[Architect] proceeded to prepare some schematic sketches based upon [second architect's] plans previously designed, but adjusted according to the Meltzers' stated requirements.” *Id.* “Plaintiff [homeowner] had prepared ‘thumbnail’ sketches indicating his requirements [but] it is uncertain . . . when [they] were shown to [architect].” *Id.* at n.2. In *Meltzer,* the “previously designed” works, subsequently edited to the homeowner's specifications, were derivative works. Nevertheless, the court discussed the elements of joint work and the *Meltzer* opinion was used as authority regarding joint works in *Eckert.* *Eckert,* 638 F. Supp. 699, 703 (N.D. Ill. 1986) (“'[i]n *Meltzer,* the court explained that [the architectural client contributing drawings and ideas is not a coauthor] because the drawing is not 'created' until it is fixed in copy, and the ideas and sketches contributed by the home buyer do not sufficiently constitute fixed expressions of ideas'”).

235. CCNV v. Reid, 846 F.2d 1485, 1497 (D.C. Cir. 1988), aff'd, 109 S. Ct. 2611
example, following Meltzer, the court in Aitken, Hazen, Hoffman, P.C. v. Empire Construction Co.,236 concluded that because the architect's firm fixed the "idea," the client was not an author.237

Meltzer construes the statutory definition of "created" as conferring authorship on the fixer.238 The 1976 Act definition of creation states that a work is "created" when it is fixed for the first time. The fallacious syllogism in Meltzer is:

Major premise - Fixation equals creation
Minor premise - "A" fixes work
Conclusion - "A" is creator of work.239

Although this conclusion supports Meltzer, it does not conform to (1989) (construing Meltzer, 520 F. Supp. at 857, to hold that client contributions were "insufficient to constitute 'fixed expressions of ideas,' hence [client] could not be considered an 'author' or 'joint author' of the plans"). CCNV used Meltzer to clarify the idea/expression dichotomy and equated fixation with the elevation of an idea to the level of an expression: "'Third World America,' however, was more than CCNV's abstract idea [i.e., it was fixed]." Id. (emphasis added); Eckert v. Hurley Chicago Co., 638 F. Supp. 699, 703 (N.D. Ill. 1986) (construing Meltzer, 520 F. Supp. at 857) ("[i]n Meltzer, the court explained that this is because the drawing is not 'created' until it is fixed in copy, and the ideas and sketches contributed by the home buyer do not sufficiently constitute fixed expressions of ideas (that is, copyrightable work) to make the buyer a 'co-creator' "); Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co., 542 F. Supp. 252, 259 (D. Neb. 1982) ("even as to this design idea, it was plaintiff's employees who . . . incorporat[ed] the idea into the . . . architectural plans").

Other cases misconstrue fixation without directly citing Meltzer for support. See S.O.S. v. Payday, Inc., 886 F.2d 108 (9th Cir. 1989) (construing CCNV, [citation omitted]) ("to be an author, one must . . . 'translate an idea into a fixed, tangible expression.'"); Ashton-Tate Corp. v. Ross, 12 U.S.P.Q. 2d 1734 (N.D. Cal. Apr. 4, 1989); Whelan Assoc. v. Jaslow Dental Lab., 609 F. Supp. 1307, 1318-19 (E.D. Pa. 1985), aff'd on other grounds, 787 F.2d 1222 (3d Cir. 1986) ("[i]t is similar to an owner explaining to an architect the type and functions of a building the architect is to design for the owner. The architectural drawings are not coauthored by the owner, no matter how detailed the ideas and limitations expressed by the owner").


237. Id. at 259.

The only design idea which may be said to have originated in [the client] was the design by which the balconies were to be attached to the exterior walls of the apartment complex. However, even as to this design idea, it was the [architectural firm's] employees who prepared the actual design drawing incorporating the idea.

Id.; cf. 17 U.S.C. § 102(b) (1982) (indicating that an "idea" can never be the subject matter of copyright).

238. See Meltzer v. Zoller, 520 F. Supp. 847, 857 (D.N.J. 1981). "The [architectural] firm, by fixing the ideas for the Meltzer home in a tangible medium, 'created' those plans. It logically follows, then, that the [architectural] firm is the author of these plans for the purpose of copyright interests." Id. (emphasis added). "Ideas" as used here is a misnomer. Ideas are not copyrightable regardless of the form in which they are embodied—only expressions qualify a work for consideration as copyrightable. For further discussion of the term "idea" as a misnomer, see infra notes 243-45 and accompanying text.

239. Id.
the statute. The definition of “created” does not confer authorship on
the fixer; it merely sets the time at which “creation” occurs,240 i.e., the
time at which copyright protection commences. The statutory defini-
tion of “fixed” requires fixation by or under the authority of the au-
thor; therefore, authorship exists prior to fixation. Thus, one cannot
be the “creator” of a work merely by fixing it. A correct syllogism,
consistent with section 101,241 would be:

Major premise - Fixation authorized by author equals commence-
ment of copyright protection

Minor premise - Work is fixed by “A” under authority of author

Conclusion - Copyright protection of work commences.242

An important aspect of this corrected syllogism is the emphasis on the
work rather than on the one who fixes it.

Meltzer protracts the arc of its illogical reasoning to encompass the
faulty conclusion that, because the homeowner’s “ideas and sketches”
were not fixed by him, they were abstract ideas not rising to the level
of copyrightability.243 The statute, however, does not require fixation
in order to make abstract ideas concrete; fixation is required to set
expression in a tangible medium.244 Abstract ideas, in any form, do
not qualify for copyright protection.245

Conferring joint authorship rights on the source of fixation has ob-
vious policy-based origins. By narrowing rights in the work, this pol-

240. 17 U.S.C. § 101 (1982) (definition of created) (“[a] work is ‘created’ when it is
fixed in a copy or phonorecord for the first time”) (emphasis added). The statute uses
“creation” to set the time when copyright protection attaches to the work. A work can
be created, i.e., have an existence, before fixation occurs, as in a live performance that has
not yet been fixed. The term “creation” is also used in 17 U.S.C. § 302 for purposes of
calculating duration of the copyright protection. Id. § 302.

241. “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a
copy or phonorecord, by or under the authority of the author, is sufficiently permanent or
stable to permit it to be perceived, reproduced, or otherwise communicated for a period
of more than transitory duration.” 17 U.S.C. § 101 (1982) (definition of “fixed”) (empha-
sis added). Thus, the statute contemplates that authorship precedes fixation, and there-
fore, fixation does not of itself confer authorship status on the fixer.

242. 17 U.S.C. § 101 (1982). The definition of “created” in § 101 sets the time of
creation at fixation; it does not designate the fixer as creator.

uted by [homeowner] do not sufficiently constitute fixed expressions of ideas; therefore
[homeowner] is not the ‘creator’ of the plans . . . for copyright purposes. Without author-
ship, the sine non que [sic] of copyright, [homeowner] has no cause of action.” Id. This
conclusion is sine ratio, but not without disciples—most notably CCNV v. Reid, 846 F.2d

244. 17 U.S.C. § 102(a) (1982). “Copyright protection subsists, in accordance with
this title, in original works of authorship fixed in any tangible medium of expression
. . . .” Id.

245. 17 U.S.C. § 102(b) (1982); see infra note 255 and accompanying text.
icy protects architectural firms who provide most of the labor on architectural plans. Another way to narrow rights in architectural plans would be through the doctrine of derivative works: if the homeowner's contribution is an addition to a preexisting work by the architectural firm, the homeowner receives rights only in his own contribution, and is not owner of a full undivided interest in the whole.

3. Idea/Expression Dichotomy

The acceptability of ideas as contributions in joint authorship apparently derives authority from Nimmer. In CCNV, the D.C. Circuit equivocated on deciding whether ideas were contributions in joint works. The court qualified its guarded stance with the language “if Nimmer is correct,” and with the characterization of preceding case law addressing the idea/expression dichotomy in joint authorship as “sparse.” CCNV regarded this sparcity of case law as a result of the 1909 Act, which grouped commissioned works under the “broad scope” of the work for hire doctrine.

Under the 1976 Act, however, the scope of the work for hire doctrine is much narrower. In drawing this distinction, the D.C. Circuit acknowledged the disparity between the work for hire exception, which does not require compliance with the copyrightability doctrine, and joint authorship, which requires authorship and, therefore, copyrightability. CCNV recognized that section 102(b) limits copyright protection in joint authorship to expressions, and quoted the statute: “In no case does copyright protection for an original work of authorship extend to an idea . . . regardless of the form in which it is . . . embodied in such work.” Despite recognizing this basic precept of the copyrightability doctrine, CCNV, by acknowledg-

246. See supra note 227 and accompanying text.
247. 1 NIMMER, supra note 16, § 6.07, at 6-18 (indicating plot ideas may suffice as contribution in joint authorship).
249. Id. at 1496 n.15.
250. Id. at 1497 n.17.
251. Id.
252. See id.
255. CCNV, 846 F.2d at 1497 (citing 17 U.S.C. § 102(b) and construing Meltzer, 520 F. Supp. 847, 857 (D.N.J. 1981)). As discussed earlier in this Note, Meltzer’s rationale on fixation does not truly track the statute. See supra notes 229-46 and accompanying text.
ing that the commissioning party's choice of title and legend may bolster its stance as a joint author, appears to adopt Nimmer's theory that ideas can qualify as contributions in joint authorship.

CCNV approaches the idea/expression dichotomy with the erroneous assumption that fixing an idea makes it an expression and, therefore, copyrightable. The idea/expression dichotomy is not contingent on a fixing of the work; making an abstract idea concrete does not convert it into an expression. The statute is plain on this point: "no idea [is copyrightable] regardless of the form in which it is embodied in such work." The fixation requirement is separate and distinct from the idea/expression dichotomy.

In CCNV, the supervision of the commissioning party over the independent contractor would not be sufficient to endow coauthorship.

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256. CCNV, 846 F.2d at 1496 n.15.

If Nimmer is correct on the point that the contribution of a joint author need not be copyrightable 'standing alone,' even CCNV's choice of the title . . . and the legend for the pedestal . . . while not independently [sic] copyrightable . . . may count, along with other CCNV contributions, toward meeting the 'more than de minimis threshold required for joint authorship.'

Id. (citations omitted). In his explanation accompanying S. 1253, Senator Thad Cochran takes specific exception to this footnote as proposing the unconstitutional conferring of authorship on one who is not in fact an author. See S. 1253, 101st Cong., 1st Sess., § II, at 1 (1989) (Amended Definition of "Joint Work"; "Original" Contribution); see also 17 U.S.C. § 101 (1989) (defining "created").

257. See 1989 Hearings, supra note 128 at 19 (statement of Ralph Oman, Register of Copyrights).

The CCNV court indicated that perhaps 'the contribution of a joint author need not be copyrightable 'standing alone,' and thus, the supplying of an uncopyrightable title or legend could count toward meeting the 'more than de minimus threshold required for joint authorship.' While there is some uncertainty about the full thrust of this dictum, I conclude that this uncertainty will likely lead to years of litigation, and, if interpreted to mean that a joint author need not contribute any copyrightable expression, will violate the statute, and arguably the Constitution.

Id. (citations omitted).

258. See supra notes 229-46 and accompanying text.

259. But see CCNV, 846 F.2d at 1497. "'Third World America' . . . was more than CCNV's abstract idea." Id. CCNV appears to indicate that making an abstract idea concrete confers authorship and cites Meltzer as support for this proposition. Id. (citing Meltzer, 520 F. Supp. at 857). For critical comments rebutting the Meltzer theory equating fixation with authorship status, see supra notes 229-46 and accompanying text.


261. The idea/expression dichotomy is explained in Baker v. Selden, 101 U.S. 99 (1879) and Reyher v. Children's Television Workshop, 533 F.2d 87 (2d Cir.), cert. denied, 429 U.S. 980 (1976). In these cases, the determining factor was whether the contribution constituted a system rather than an expression, or whether it was sufficiently detailed to constitute an expression. The issue was not whether an abstract idea was given concrete form.

262. 846 F.2d at 1497. "CCNV . . . monitored the progress of the work." Id. at 1496 n.15 (CCNV chose the title and legend for the pedestal).
ship status; supervision does not rise to the level of expression.\footnote{Supervision is a throwback to work for hire and has no place in joint authorship. Senator Thad Cochran of Mississippi is endeavoring to make inroads on this misconception. Senator Cochran has proposed legislation amending the joint authorship definition. S. 1253, 101st Cong., 1st Sess. (1989). In his comments supporting this bill, the Senator indicates that "'[t]he constitutional imperative [protecting authors] may not be circumvented by describing one as a 'joint' author. One must still be an 'author.'" S. 1253, 101st Cong., 1st Sess., 135 CONG. REC. S7343-44 (daily ed. June 22, 1989).}

CCNV, however, did contribute an expression (the pedestal) to the work. The policy considerations supporting ideas as contributions in a joint work are doctrinally unsound under the constitutional copyright provision. There is no incentive for an author to create a work which will vest coownership in another who has merely contributed ideas to the work. The concept of vesting ownership in one who has merely contributed supervision and control derives its force as a carry-over from the work for hire doctrine.\footnote{See CCNV v. Reid, 846 F.2d 1485 (D.C. Cir. 1988), aff'd, 109 S. Ct. 2166 (1989), which sets forth the requirements for work for hire.} The Supreme Court in CCNV rejected right to control and actual control of the work as vesting authorship in work for hire situations,\footnote{\textit{Id.} at 4612; see supra note 165 and accompanying text.} thereby rejecting "sweat of the brow" policy considerations in favor of an interpretation closer to the statutory purpose of the drafters and Congress. In light of the Supreme Court decision in CCNV, supervision and control must be rejected from consideration as contributions to a joint work—the statutory definition of joint work requires both contributors to be authors. To qualify as an author, one must contribute expressions, not ideas, whether the work is to be solely or jointly owned. CCNV recognized that once work for hire has been discounted, there is still a possibility that joint authorship may exist. But in that case, CCNV contributed the pedestal, a contribution beyond mere ideas. Thus, joint authorship did exist in CCNV because both parties contributed copyrightable expressions which merged into a unitary whole.

The requirement that contributions to a joint work be copyrightable comports with the application of the copyrightability doctrine to solely authored works. The constitutional protections provide powerful incentives, which must not be diluted through extension to non-creators unless, as in work for hire, such non-creators are specifically provided for by Congress.

\section{Intent}

Attempting to create a bright line separating joint works from com-
pilations and derivative works, Congress inadvertently drew a line denying some authors their constitutional rights in property by introducing intent as the most essential element in the definition of joint work. The subjective standard applied to intent in the definition of joint work fails to implement the protective purpose of Congress in enacting the 1976 Act. Therefore, a new standard must be adopted to fulfill the legislative goals of the statute.

The intent element of the joint work definition requires that authors know others will be contributing to the work, and make their contribution with this knowledge. This is the common design standard qualified with a knowledge standard rather than a subjective standard. This is manifest intent.

In CCNV, the sculptor Reid knew the work would include a pedestal, but later claimed he did not have the state of mind to be a joint author. Rather than his subjective intent, this knowledge and his subsequent contribution with this knowledge were the factors which determined his authorship status.

In Easter Seal, the television station and the Easter Seal Society knew they were working together on the videotapes of the parade. Even with this knowledge, they claimed to lack the intent to jointly author the work, but the court refused to permit this self-serving subjective intent to determine their authorship status.

The knowledge element merely requires the coauthor's awareness that others are contributing; it does not require, however, the author's awareness of the legal ramifications of their involvement. This was the standard espoused by the Strauss court, which regarded Strauss's knowledge that the captions would be superimposed on his photograph as meeting the intent element of the statute.

The word "intent" in the definition of joint work was designed to preclude "12th Street Rag" scenarios where the author of a work having an independent pre-existence is unaware of future coauthors. Through the use of a knowledge standard, a "12th Street Rag" situation could never occur, because in that case the composer was not

266. This knowledge corresponds to the awareness of collaborating authors that their contributions will be merged.
269. Strauss v. Hearst Corp., 1988 Copyright L. Rep. (CCH) ¶ 26,244, at 21,722 (S.D.N.Y. Feb. 19, 1988). "It is apparent from Strauss's deposition that he knew captions and other copy would be superimposed upon the photograph when the article was put in its final form." Id.
270. See supra notes 63-67 and accompanying text.
aware his work would subsequently be merged with other works. Congress, therefore, used "intent" to grant authors working at different times rights equal to collaborating authors.

C. Merger

The merger phrase of the statute requires the fusion of two parts into "inseparable or interdependent parts of a unitary whole." Merger results from the common purpose in creating the work as a unity.

In determining whether contributions have merged, two factors distinguish joint works from collective works and derivative works. First, the contribution must have existed only as part of the joint work—it must not have had an independent preexistence. Secondly, the parts must be interdependent or inseparable.

1. Independent Preexistence

The first factor in determining whether merger occurs in a joint work is whether the contributions constitute "parts" of a unitary whole. Contributions cannot be considered parts of a joint work if they had a previous independent existence. For example, a novel can never merge as "part" of a motion picture for joint authorship purposes because the work had a previous independent existence. In close collaboration situations, the preexistence of either part is easily discounted because both parts are generated simultaneously. In situations like Marks, however, where one part is generated first and a second added later, independent preexistence is possible. In these cases, the work in its current form and its history provide the only means of determining whether the work existed in another form. The subjective intent of the author does not determine merger in these cases. Even if the author had the state of mind that he coauthor the motion picture first, if his creation existed as a novel first, the novel's use in the motion picture is derivative.


272. Study No. 31, supra note 44, at 174 (construing Judge Learned Hand's opinion in Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944): "Judge Hand noted that, although the parts were separable and capable of being used separately, this was not their purpose. He distinguished a work of joint authorship from what he called a 'composite work'—a work in which each part is separate and the only unity is the fact that the parts are bound together").

273. H.R. REP., supra note 3, at 120. This can be traced back to the origins of joint authorship, which required collaboration, and only later warranted that two authors could work at separate times to produce a joint work. See supra notes 28-29 and accompanying text.
The preexistence of a part or all of a work is a problematic facet of joint authorship. In "Melancholy Baby," the first version of the song preexisted the final version which the court determined to be a joint work. In "12th Street Rag," the contribution of the first author, a piano solo having a previous independent existence, also qualified as part of a joint work. Both these cases were rejected by the 1976 Act because the preexistence of a contribution as an independent work disqualifies it for joint authorship purposes. The Second Circuit in Weissman upheld this proposition by rejecting the theory that the previous contribution of an author to a work qualified him as a joint author in a derivative work.

Not all cases are as clear cut as "Melancholy Baby" or "12th Street Rag." Many cases involve an author who begins work on a project, drops out in the middle, and whose discarded efforts do not become part of the final product; or, similar to "12th Street Rag," an author creates the musical composition before the lyrics are added. The merger element in these cases is dependent on the the existence of a common design during creation of the work. The manifest intent—the objective creation of the work itself—evidences the merger of the parts. Because the copyrightability doctrine requires only creation of the work and no registration, there are no other objective criteria by which to judge whether a contribution becomes part of the work.

2. Second Merger Factor: Inseparable and Interdependent

At the heart of joint authorship is the interdependence or inseparability of the contributions in the work. The House Report indicates that this merger separates joint works from collective works. One

274. 161 F.2d 406 (2d Cir. 1946), cert. denied, 331 U.S. 820 (1947).
275. 221 F.2d 569 (2d Cir.), modified on reh'g, 223 F.2d 252 (2d Cir. 1955).
276. See supra notes 63-67 and accompanying text.
278. Some cases have held that copyright registration by one author evidences a subjective intent contradicting joint authorship. In Grosset & Dunlap, Inc. v. Gulf & Western Corp., 534 F.Supp 606 (S.D.N.Y. 1982), the court reasoned that registration of the copyright determines the preexisting status of a contribution. In Rodak v. Esprit Racing Team, 1986 Copyright L. Rep. (CCH) ¶ 25,883, at 20,020 (S.D. Ohio Aug. 21, 1985), registration of copyright evidenced an independent pre-existence of the work before the addition of the illustrations to the ads. The registration of a copyright by one coauthor can be considered held in trust for the other author. See Maurel v. Smith, 220 F.195, 201 (S.D.N.Y. 1915), aff'd, 271 F. 211 (2d Cir. 1921). This, plus the fact that it merely represents the subjective intent of one author, negates the validity of registration as determining preexistence of part of a work.
279. H.R. REP., supra note 3, at 120. "The definition of 'joint work' is to be contrasted
study, crucial in formulating the definition in the statute, used a story as an example of a joint work, and a magazine as an example of a collective work. Articles in a magazine do not merge with one another, but the contributions of two authors collaborating on one story in that magazine do merge.

Merger occurs when the work is complete and capable of achieving its ultimate purpose. This principle was articulated in Marks, as construed by the Second Circuit in Weissman: “their individual authorship efforts would have to be combined in order to create the final integrated product—a commercially viable song.”

V. Conclusion

In 1872, only a year after the seminal joint authorship case of Levy v. Rutley, Lewis Carroll revealed a reversed realm where colloquialisms take on a literal interpretation, often with absurd results. Many colloquialisms of the 19th century genre spawning both Through The Looking Glass and Levy v. Rutley have lost meaning in the modern era. Similarly, “common design,” clearly defined at the advent of the century, now is dim and confusing.

The 1976 Act, attempting to clarify the standard of joint authorship, only plunged it deeper into the pitfalls of a modern legal lexicon. Once common design was transformed into “intent,” its infusion with an equivocal state of mind standard was inevitable.

By disregarding established copyright doctrine, the subjective intent standard leads not only to absurd results but also to the deprivation of authors’ rights. The primary considerations in joint authorship should be whether the contribution is copyrightable in and of

with the definition of ‘collective work,’... in which the elements of merger and unity are lacking; there the key elements are assemblage or gathering of 'separate and independent works... into a collective whole.’ Id.

280. Study No. 12, supra note 28, at 87.

In broad terms a ‘joint work’ is a unitary work, the parts of which, although created by several authors, are not considered to be individual works in themselves. A simple example would be a story written by two authors; here the contribution of either one is not separately identifiable or, though identifiable, is not capable of use as a separate work in itself. A ‘composite work,’ broadly speaking, is one which puts together the separate and distinct works of different authors. A clear-cut example would be a magazine containing a number of short stories contributed by various independent authors; here each story is separately identified and capable of separate use as a work itself.

Id.

itself, whether it pre-existed as an independent work, and whether it is “inseparable” or “interdependent” with the contribution of others.

A new standard must be enunciated which allows the courts to apply established precepts of copyrightability to the components of a joint work and still comply with the 1976 Act. Since the statute and the House Report clearly indicate intent is to be the touchstone of joint authorship, this “intent” element should be read as manifest intent, exhibited by the creation of the work as a unitary whole. Once an author is aware his work will be part of a greater whole and his contribution is “inextricably woven . . . [into] the seamless fabric of the work,” no trap door should allow him to escape the consequences of joining his contribution with that of another.

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282. 140 F.2d 266, 267 (2d Cir. 1944).