

## PRACTITIONER’S NOTE

# Can the Federal Courts Save Rock Music?: Why a Default Joint Authorship Rule Should Be Adopted to Protect Co-Authors Under United States Copyright Law

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*Art, like law, begins by drawing the line somewhere.<sup>1</sup>*

### I. INTRODUCTION

Notwithstanding the computer empowered composer, rock music is largely a group phenomenon. A common scenario involves a band that has one member who is the primary songwriter. This primary songwriter might present a rough version of the song to the band at rehearsal, and the other band members would create their instrumental parts and arrangements.

In some circumstances, the contributions of the other band members may be separately copyrightable. Clearly, the band members intend that their contributions be combined to form the resulting song, but it is less clear whether they intend to be joint authors. In situations where no one band member is the primary songwriter, the question of joint authorship becomes even more uncertain.

In the recording industry, a producer directs the recording process. Often this includes collaboration on the songs, especially in cases where

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1. Anonymous.

a producer is also a songwriter. But unlike the band members described herein, a producer's contributions largely result from work for hire contracts, leaving little doubt as to rights and obligations among contributors under copyright law.<sup>2</sup> Similarly, other highly collaborative efforts, like motion pictures and television, employ the work for hire contract.

Work for hire contracts are essential to these industries because they often bring clarity to a dynamic process, thus, freeing the artist to create. Artists employ varied and often ever-changing methods in producing the resultant creative works, even when working together. In light of the uncertainty inherent in the collaborative process, the enormous financial risks associated with such productions are not justifiable without assurances afforded by a work for hire contract. However, many artists do not have the foresight of a record company or film studio and are creating bona fide joint works without work for hire contracts. In the absence of contract, putative co-authors are forced to seek justice from the courts.

Consequently, courts are adjudicating the respective rights of collaborators in joint work disputes at an ever-rising rate. This increase in litigation is due in part to the court-created uncertainty regarding the concept of joint authorship.

In this writer's experience serving as the Volunteer Chair for the Louisiana Volunteer Lawyers for the Arts (LVLA), putative co-authors are at a severe disadvantage when it comes to asserting their rights in a joint work. The courts have subverted their rights by engendering a system that allows the dominant author, who typically has more leverage in the transaction, to dictate the respective rights. Such is often the case with the musicians that request legal assistance through the LVLA.

Though record labels routinely employ work for hire contracts in production settings, in the case of a record label that signs a new act based on preexisting songs, songs that were originally created as joint works, there is little incentive for the label to account to putative co-authors. Why? Because putative co-authors rarely, if ever, have the re-

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2. 17 U.S.C. § 101 (2000):

A "work made for hire" is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a sound recording, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. . . .

sources to pursue such a claim; and even if they do, a court is likely to side with the dominant co-author. Thus, a record label can find a band that has created what the label believes are hit songs and produces a hit record based on those songs without ever having to worry about the rights of legitimate co-authors.

Of course it would be less than fair to suggest that as a matter of practice the recording industry seeks to deny legitimate co-authors of their rights. In fact, most record labels would prefer to compensate the proper parties; it presents less potential for costly litigation and the goal of the record label is to sell records regardless of who wrote them. What occurs in many cases, however, is that the newly signed artist neglects to inform the record label of co-authorial involvement in the production of songs. It is, after all, in his or her interest not to share ownership or jeopardize his or her position with the label.

In such cases, one cannot deny that if and when a putative co-author makes a claim to the work, the record label and the dominant author's interests become aligned. Such an alliance can prove formidable for putative co-authors considering the bargaining positions of the respective parties. Fighting a giant record label in court is not an ideal situation for an artist. Moreover, putative co-authors who wish to continue a career in the music industry are not likely to cause waves for fear of being stereotyped as difficult.

## II. THE NATURE OF JOINT AUTHORSHIP

A recent decision from the United States District Court for the Eastern District of Louisiana involving facts similar to the issue described herein illustrates the difficulty federal courts are having with joint authorship.<sup>3</sup>

In *BTE v. Bonnecaze*, a former member of the rock band, Better Than Ezra, sued the band's primary songwriter, claiming joint authorship of the songs.<sup>4</sup> The court rejected the claim, but did so in a manner that calls into question the joint works analysis as currently applied by federal courts. Similarly, federal courts in other circuits are plagued with the awkward results yielded by the current method. In their efforts to protect the rights of authors, courts strayed far from the legislative history and statutory language of the joint authorship doctrine, thus, creating a system that is ripe for abuse.

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

4. *Id.* at 620.

Under the Copyright Act of 1976, a “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.”<sup>5</sup> Reporting on the Act, the House Committee on the Judiciary stated that “a work is ‘joint’ if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as ‘inseparable or interdependent part of a unitary whole.’”<sup>6</sup> The legislative history refers to the “intent to merge” requirement as a means to distinguish derivative works, compilations, and collective works from joint works.<sup>7</sup> Federal courts, however, have shifted the focus from the intent to merge to the “intent to share ownership.”

The current standard for determining joint works of authorship in most jurisdictions requires each putative co-author to (1) make an independently copyrightable contribution and (2) intend to regard each other as joint authors at the time of creation.<sup>8</sup> Though the first requirement sparks debate, the intent requirement, in its ability to utterly frustrate the joint work concept, is the more controversial.<sup>9</sup>

One particularly troublesome aspect of the intent requirement is that it affords the “dominant” author’s intent more significance.<sup>10</sup> Thus, in the scenario described earlier, the primary songwriter’s intent would likely determine whether a joint work is created. In the case of a band in which no one member is the primary songwriter, the dominant member would have the upper hand.

Courts suggest that narrowing the joint works definition is necessary to prevent unwanted co-authorship claims from arising under circumstances where a contribution is arguably not co-authorial, as in the

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5. 17 U.S.C. § 101. Though the statute does not define the terms inseparable and interdependent, courts understand the former to mean, “little or no meaning when standing alone” and the latter, “some meaning standing alone, but achieved their primary significance because of their combined effect.” See *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991); see also *Erikson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994) (expressing “little or no meaning”); 17 U.S.C. § 201(a) (citing H.R. REP. NO. 94-1476, at 121 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736-37 (“As co-owners of copyright, joint authors are treated as tenants in common, with each having the right to use or license the use of the work, subject to a duty to account to the other co-owners for any profit.”)).

6. H.R. REP. NO. 94-1476, at 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736.

7. *Id.*

8. See, e.g., *Childress*, 945 F.2d at 505-06.

9. See, e.g., *Erikson*, 13 F.3d at 1063; *Childress*, 945 F.2d at 507 (requiring independently copyrightable contributions, rather than contributions that are merely more than de minimus).

10. See, e.g., *Fisher v. Klein*, 16 U.S.P.Q. 2d 1795, 1798 (S.D.N.Y. 1990).

case of a writer and his or her editor.<sup>11</sup> Concerned that authors are less likely to collaborate if they fear having to share ownership, courts rationalize this approach by claiming it prevents a supposed onslaught of co-authorship claims.<sup>12</sup>

Upon evaluating the joint authorship concept under U.S. copyright law and identifying the apparent deficiencies of the current judicial interpretation, this Article will second the proposal that federal courts adopt a default joint authorship rule.<sup>13</sup> Pursuant to such a rule, *any* collaboration would result in a joint work, unless otherwise agreed upon by the co-authors in writing.

### III. A BRIEF HISTORY OF JOINT AUTHORSHIP UNDER U.S. COPYRIGHT LAW

The United States Constitution empowers Congress to enact legislation to promote the progress of arts and science by securing to authors the exclusive right to their writings.<sup>14</sup> The 1909 Copyright Act covered all the writings of an author, but never referred to the concept of joint authors.<sup>15</sup> Consequently, Judge Learned Hand imported the English law definition,<sup>16</sup> which defined joint authorship as a joint laboring in furtherance of a common design.<sup>17</sup> With little guidance as to the nature of the requisite intent, courts broadly applied the definition by requiring only that authors intend to combine their work with another's, even if their works were created separately and at different times.<sup>18</sup>

The overreach of this approach soon became apparent in a series of cases from the United States Court of Appeals for the Second Circuit.<sup>19</sup> In the first case, *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co. (Shapiro I)*, a composer and a lyricist collaborated to create a song

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11. See *Childress*, 945 F.2d at 507.

12. See *Erickson*, 13 F.3d at 1069.

13. See Paulette S. Fox, *Preserving the Collaborative Spirit of American Theater: The Need for a "Joint Authorship Default Rule" in Light of the Rent Decision's Unanswered Question*, 19 CARDOZO ARTS & ENT. L.J. 497, 506 (2001).

14. U.S. CONST. art. I, § 8, cl. 8.

15. 17 U.S.C. § 4 (1909).

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

17. See *Levy v. Rutley*, L.R.—5 C.P. 523, 529 (1871).

18. See *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266, 267 (2d Cir.), *modified*, 140 F.2d 270 (2d Cir. 1944) (holding song was joint work because lyricist intended work to be set to music and composer created music to fit lyrics).

19. See *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406, 409-10 (2d Cir. 1946); *Shapiro, Bernstein & Co. v. Jerry Vogel Music*, 221 F.2d 569, 570 (2d Cir.), *modified on rehearing*, 223 F.2d 252, 254 (2d Cir. 1955) (per curiam).

entitled “Melancholy Baby.”<sup>20</sup> The composer later agreed to the substitution of new lyrics created by another lyricist.<sup>21</sup> The Second Circuit held that the revised work was a joint work and not a composite work, because the composer’s intent was to create a joint work.<sup>22</sup> The court reasoned that the composer’s intent carried over to the second lyricist, despite the first lyricist’s contributions that were later replaced.<sup>23</sup> Later criticized for blurring the distinction between joint and derivative works, *Shapiro* was revisited in a second case with similar results.

In *Shapiro v. Jerry Vogel Music Co. (Shapiro II)*, a composer transferred his rights in an instrumental piano solo entitled, “12th Street Rag,” and the transferee hired a writer to add lyrics.<sup>24</sup> The Second Circuit defined the resulting work as joint, holding that when the original author assigns away his copyright, the focus shifts to the assignee, the copyright owner, and his or her intent to create a joint work.<sup>25</sup> Because the assignee consented to the writer’s contribution, joint work status applied.<sup>26</sup> *Shapiro II* was also criticized for blurring the joint/derivative distinction by effectively creating a joint work out of every work derived from an original work.<sup>27</sup>

In the wake of *Shapiro*, the Second Circuit rejected a joint authorship claim where the author altered the music and lyrics to a pre-existing song.<sup>28</sup> In *Picture Music*, the court concluded that the author of the source work never intended to create a new work, nor did he intend to be a joint author.<sup>29</sup> This signaled the first attempt to narrow the joint work definition by requiring that the collaborators intend to create a joint work. The intent requirement was later incorporated into the Copyright Act of 1976.<sup>30</sup>

Under § 101, a 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.”<sup>31</sup> According to the House Report, “the touchstone . . . is the intention, at the time the

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20. *Shapiro*, 161 F.2d at 407.

21. *Id.* at 408.

22. *Id.* at 409-10.

23. *Id.* at 410.

24. *Shapiro*, 221 F.2d at 570.

25. *Id.*

26. *Id.*

27. *See, e.g.*, *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 646 (S.D.N.Y. 1970), *aff’d on other grounds*, 457 F.2d 1213, 1215 (2d Cir. 1972).

28. *Id.* at 647.

29. *Id.*

30. *See* 17 U.S.C. § 101 (2000).

31. *Id.*

writing is done, that the parts be absorbed or combined into an integrated unit.”<sup>32</sup> “[A] work is ‘joint’ if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as ‘inseparable or interdependent parts of a unitary whole.’”<sup>33</sup>

Though the touchstone may be intent, the language of the statute suggests that the act of collaboration alone is sufficient to create a joint work.<sup>34</sup> Indeed, the legislative history endorses the “collaboration alone” approach.<sup>35</sup> Yet, courts avoided this approach, insisting on some manifestation of intent to merge each artist’s contribution at the time of creation.<sup>36</sup> The courts’ insistence on intent was rationalized by suggesting that unwelcome joint authorship would create a disincentive to collaborate.<sup>37</sup>

The Second Circuit’s opinion in *Weissman v. Freeman* demonstrates the difficulty federal courts encountered in defining co-authorial intent.<sup>38</sup> In *Weissman*, a professor and a research assistant co-authored a series of scholarly papers.<sup>39</sup> Then, acting alone, the assistant wrote another article incorporating material from the earlier papers and adding some original material.<sup>40</sup> The Second Circuit treated the resultant paper as a derivative work rather than part of an evolutionary joint work.<sup>41</sup> Referencing legislative history, the court stated that “one cannot be deemed to be a joint author without actually collaborating in the work’s preparation.”<sup>42</sup>

Instead of resting on this premise, which fails to squarely address the collaboration alone issue, the Second Circuit fashioned another ground for treating the later work as derivative rather than joint. The court held, in pertinent part, that the work was not joint because the research assistant intended to be the sole author of the later work.<sup>43</sup> “The court focused its analysis not on the [research assistant’s] intent to merge her work with another’s, but on her intent to regard herself as co-

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32. H.R. REP. NO. 94-1476, at 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736.

33. *Id.*

34. Fox, *supra* note 13, at 506.

35. *See id.* at 506 n.55.

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

37. *See Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1069 (7th Cir. 1994).

38. *See generally* *Weissman v. Freeman*, 868 F.2d 1313 (2d Cir. 1989).

39. *Id.* at 1315.

40. *Id.* at 1316.

41. *Id.* at 1318.

42. *Id.*

43. *Id.* at 1320-22.

author.”<sup>44</sup> “[This] rationale is a substantial departure from both the language and legislative history of the joint work’s definition,”<sup>45</sup> and yet, it persisted with little scrutiny.

In *Fisher v. Klein*, Judge Leval endorsed the notion that a joint work will not arise from collaboration unless the “dominant” author intends to share authorship.<sup>46</sup> The facts involved two jewelry designers who collaborated on a work.<sup>47</sup> The court found that the party asserting joint authorship made a substantial authorial contribution and that both designers had intended that their contributions be merged into a unitary whole.<sup>48</sup> Nonetheless, the court focused on the dominant author’s intent to share ownership, adding yet another wrinkle not found in the legislative history or statutory language.<sup>49</sup>

Unfortunately, the Second Circuit relied on *Fisher* and *Weissman* in the landmark decision *Childress v. Taylor*.<sup>50</sup>

In *Childress*, an actress sued a playwright claiming to be a joint author of a play because she provided research material and discussed the inclusion of scenes and characters.<sup>51</sup> The court introduced a two-pronged test requiring each author to (1) make an independently copyrightable contribution, and (2) intend to regard each other as joint authors at the time of creation.<sup>52</sup> The court concluded that the plaintiff’s contribution amounted to nothing more than advice; consequently, it failed the first prong of the test.<sup>53</sup> Again, the court could have rested on this finding, but chose not to.

Adopting a stringent approach to the intent requirement, the Second Circuit held that artists must perceive or regard each other as joint authors.<sup>54</sup> They must possess a “mutual intent to share authorship.”<sup>55</sup> The court rejected the notion that the dominant author could have the requisite intent only if he or she “intends the legal consequences” of co-

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44. Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 214 (2000).

45. *See id.*

46. 16 U.S.P.Q. 2d 1795, 1798 (S.D.N.Y. 1990).

47. *Id.* at 1795-96.

48. *Id.* at 1799.

49. *Id.* at 1798.

50. *Childress v. Taylor*, 945 F.2d 500, 502-04 (2d Cir. 1991).

51. *Id.* at 502-04.

52. *Id.* at 507-08.

53. *See id.* at 509.

54. *See id.* at 508.

55. *Id.* Arguably more relevant to the inquiry than a retrospective assessment of the dominant author’s subjective intent, the court suggested that in the absence of a contractual agreement regarding authorship, courts should consider other secondary factors such as decision-making authority, billing, and credit to determine intent.

authorship.<sup>56</sup> Each author must have considered the idea of joint authorship, whether or not they fully appreciated the legal ramifications of the concept.<sup>57</sup>

The court justified narrowing the interpretation by claiming that Congress could never have intended collaborators such as editors and research assistants to qualify as co-authors.<sup>58</sup> Thus, the “relationship test,” as it became known because it focused on how the parties perceived their relationship, was firmly established as the standard for determining joint work status in most jurisdictions, despite a lack of support from the language of the statute or legislative history.<sup>59</sup>

#### IV. JOINT AUTHORSHIP AFTER *CHILDRESS*

“The *Childress* approach has been endorsed in virtually every subsequent adjudication of a joint authorship dispute.”<sup>60</sup>

In *Erikson v. Trinity Theatre, Inc.*, a group of theater actors claimed joint authorship because they made suggestions and improvised during rehearsals for a play written by Erikson.<sup>61</sup> The United States Court of Appeals for the Seventh Circuit denied joint authorship, holding that even though the parties collaborated in some sense, they did not intend to be joint authors at the time the work was created.<sup>62</sup> The court held that Erikson completed the story prior to the cast’s involvement.<sup>63</sup>

This opinion seems to stand for the proposition that collaboration alone will not create a joint work, which contradicts the plain language of § 101, but the issue was never fully explored.<sup>64</sup> Instead, the court focused on Erikson’s intent as the dominant author.<sup>65</sup> The court made clear that this was the deciding factor in the analysis, even suggesting that the degree of creative veto exercised by Erikson indicated that he never intended to create a joint work.<sup>66</sup> Yet again, the court failed to ground this conclusion in law or equity.

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56. *Id.*

57. *Id.*

58. *Id.* at 507.

59. See LaFrance, *supra* note 44, at 223; *cf.* 17 U.S.C. § 101 (2000) (showing no “relationship test” within the text).

60. LaFrance, *supra* note 44, at 227.

61. 13 F.3d 1061, 1064-65 (7th Cir. 1994)

62. *Id.* at 1072.

63. *Id.* at 1071.

64. See *id.* at 1072; see also H.R. REP. NO. 94-1476, at 120 (1976), *reprinted in* 1976 U.S.C.A.N. 5659, 5736 (offering collaboration without intent as sufficient for a joint work).

65. *Erikson*, 13 F.3d at 1072 n.10

66. *Id.* at 1072.

Following *Erikson*, the Seventh Circuit appeared to somewhat depart from the relationship test in *Seshadri v. Kasraian*.<sup>67</sup> *Seshadri* involved a professor and a graduate student who collaborated on an article that the professor initially submitted as a co-authored work, with the student's name listed first.<sup>68</sup> The professor withdrew the piece, and the student subsequently resubmitted it under his own name.<sup>69</sup>

The court held that the work was joint because the student contributed significant copyrightable material and the professor originally submitted the work listing the student's name first.<sup>70</sup> Under the *Childress* and *Erikson* standards, the credits would have been considered evidence of the collaborator's intended relationship.<sup>71</sup> Here, however, the court treated the credits as evidence of the respective contributions of the authors, thus, marking a shift from intent to contribution.<sup>72</sup>

In spite of the apparent shift in focus, federal courts continued to apply the relationship test to deny co-authorship claims, even by collaborators whose contributions were substantial and copyrightable.<sup>73</sup> One of the more problematic applications of the relationship test to a joint authorship dispute involved the acclaimed musical *Rent*.<sup>74</sup> The writer of the play, Larson, agreed to hire Thomson as a dramaturg<sup>75</sup> to assist in clarifying the musical's story line.<sup>76</sup> The two worked together for several months making substantial revisions to the script, developing the plot and theme, and re-working a significant portion of the dialogue and lyrics.<sup>77</sup> Larson suddenly died, and Thomson, along with three other writers, finished the play.<sup>78</sup> Thomson actively collaborated with the author and contributed original dialogue, but the court denied joint authorship, resting its decision solely on the Larson's intent to be the sole author of the work.<sup>79</sup> The court concluded that even a significant

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67. See *Seshadri v. Kasraian*, 130 F.3d 798, 803 (7th Cir. 1997).

68. *Id.* at 800.

69. *Id.* at 802.

70. *Id.* at 804.

71. *Cf. Erikson*, 13 F.3d at 1072; *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991).

72. See *Seshadri*, 130 F.3d at 804.

73. See, e.g., *Thomson v. Larson*, 147 F.3d 195, 202-05 (2d Cir. 1998).

74. See *id.*

75. Definition: A "dramaturg" is a playwright, a specialist in dramaturgy. "Dramaturgy" is defined as the art or technique of dramatic composition and theatrical representation. See WEBSTER'S NEW COLLEGIATE DICTIONARY 381 (9th ed. 1983).

76. *Thomson*, 147 F.3d at 197.

77. *Id.*

78. *Id.* at 198.

79. *Id.* at 206-07.

copyrightable contribution may not meet the relationship test absent a specific finding of mutual intent.<sup>80</sup>

Borrowing from *Childress*, the Second Circuit enumerated four factors for assessing intent to create a joint work: (1) decision-making authority, (2) billing and credits, (3) written agreements with third parties, and (4) other evidence.<sup>81</sup>

In applying the first factor, decision-making authority, the court regarded Larson's complete creative control as an important indicator of intent.<sup>82</sup> The court described the Thomson's role as merely "advisory."<sup>83</sup>

The court viewed the second factor, billing or credit, as indicative of how the parties viewed themselves in relation to the project.<sup>84</sup> Larson listed himself "author/composer" and the plaintiff as "dramaturg."<sup>85</sup> Rejecting the Seventh Circuit's assertion in *Seshadri* that billing and credit serve as evidence of the magnitude of respective contributions, the court viewed them as direct evidence of intent.<sup>86</sup>

Because Larson portrayed himself as the sole author of *Rent* in all contracts with the production company and its commercial producers, the court held that the third factor, written agreements with third parties, weighed against joint work status.<sup>87</sup>

Finally, the court considered other evidence in rejecting co-authorship, most of which focused on Larson's perception of events.<sup>88</sup> The evidence included a comment made by Larson during an interview in which he declared that the writer is the "king" in theater.<sup>89</sup> Also relevant in the court's view was the fact that the author had previously required another contributor to sign a waiver expressly disclaiming co-authorship status.<sup>90</sup> Further, the court referenced a conversation between the parties in which Larson confirmed that he wanted Thomson to contribute actual language to the play and promised not to take credit for what she had written.<sup>91</sup>

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80. *Id.* at 202.

81. *Id.* at 202-04.

82. *See id.* at 202-03.

83. *Id.* at 203.

84. *Id.* (citing *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991)).

85. *Id.* at 203-04.

86. *Id.* at 204.

87. *Id.*

88. *See id.*

89. *Id.* at 203 n.22.

90. *Id.* at 204-05.

91. *Id.* at 205.

The court next recognized a separate question of whether Thomson could assert ownership of her specific contributions.<sup>92</sup> However, the Second Circuit chose not to address the issue claiming that it was not properly before the court since it was not asserted at the trial level.<sup>93</sup> The court offered little advice as to the proper resolution, commenting that the issue was a “conundrum.”<sup>94</sup>

“[U]nder the relationship test, [collaborators] cannot rely on the substantiality of their contributions and their contemporaneous intent to merge those contributions . . . .”<sup>95</sup> Consequently, collaborators must create an evidentiary record proving a mutual intent to share ownership among collaborators.<sup>96</sup> As many have recognized, “[r]equiring such extraordinary measures in the midst of the creative process takes copyright law in a distinctly non-user-friendly direction.”<sup>97</sup>

Even after the *Thomson* decision exposed the intrinsic flaws of the relationship test, courts continue to faithfully apply it. A recent decision by the United States Court of Appeals for the Ninth Circuit illustrates how courts attempting to reconcile the obvious inadequacies of the approach are straying further from the legislative history and language of the statute.<sup>98</sup> In *Aalmuhammed v. Lee*, the Ninth Circuit rejected a co-authorship claim made by a consultant who was hired to assist film director Spike Lee in the making of *Malcolm X*.<sup>99</sup>

One of the factors the court considered was labeled “objective manifestations.”<sup>100</sup> “We say objective manifestations because, were the mutual intent to be determined by subjective intent, it could become an instrument of fraud, were one coauthor to hide from the other an intention to take sole credit for the work.”<sup>101</sup> Ironically, the court seemed to recognize the potential for misuse inherent in the test, but rested its conclusion largely on the control exercised by Lee and Warner Brothers as evidence of intent.<sup>102</sup>

The court’s interpretation confuses “the issue of authorship (a copyright question, pertaining to an unwaivable right) with the issue of proper attribution (a Lanham Act question, pertaining to a waivable

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92. *Id.*

93. *Id.* at 206.

94. *Id.* at 205.

95. *See* LaFrance, *supra* note 44, at 245.

96. *Id.*

97. *Id.* at 245-46.

98. *See generally* Aalmuhammed v. Lee, 202 F.3d 1227 (9th Cir. 2000).

99. *Id.* at 1235.

100. *Id.* at 1234.

101. *Id.*

102. *See id.* at 1235.

right).”<sup>103</sup> A writer might contract to receive no credit whatsoever, but would not cease to be the work’s author for purposes of copyright law.<sup>104</sup> “Even if intent to claim credit were somehow relevant to the authorship determination, subjective intent hardly becomes less ‘subjective’ when the putative sole author succeeds in persuading third parties (such as publishers or film or theatrical producers) to publicize the work as solely authored.”<sup>105</sup>

The second ground on which the court rested its decision, that Aalmuhammed’s contribution was nonauthorial, is equally perplexing. Referencing copyright law, the court stated “[a]uthorship is not the same thing as making a valuable and copyrightable contribution.”<sup>106</sup> Yet, this notion is found nowhere in the Copyright Act.<sup>107</sup>

The court commented that “the best objective manifestation of shared intent, of course, is a contract saying that the parties intend to be or not to be co-authors.”<sup>108</sup> Though this passage alludes to the work made for hire doctrine, the court failed to recognize that the relationship test and the dominant author concept make work for hire contracts largely superfluous in a collaborative setting. The implication is that there is no need to contract, because the dominant author’s intent is dispositive, regardless of who contributes what. Moreover, the court failed to consider that absence of a work for hire contract in the motion picture industry could easily be construed as an invitation to share authorship.<sup>109</sup>

The court conceded that the factors of the relationship test were difficult to uniformly apply, “because the creative relationships to which they apply vary too much.”<sup>110</sup> What the court stopped short of recognizing is that the collaborative process is much too dynamic to fit into such a mold. It does not lend itself to an exacting calculation of copyright ownership.

## V. HOW FEDERAL COURTS IN THE FIFTH CIRCUIT TREAT JOINT AUTHORSHIP

In much the same manner as the rest of the circuits, United States district courts in the United States Court of Appeals for the Fifth Circuit have faithfully, if not blindly, applied the relationship test to joint author-

103. LaFrance, *supra* note 44, at 248 n.230.

104. *Id.* at 248.

105. *Id.*

106. *Aalmuhammed*, 202 F.3d at 1232.

107. *See generally* 17 U.S.C. §§ 101-102, 201 (2000).

108. *See Aalmuhammed*, 202 F.3d at 1235.

109. *See generally id.* (emphasizing the court’s omission of such details).

110. *See id.*

ship disputes.<sup>111</sup> Following the *Thomson, Childress, Erikson* mandate, courts require that putative co-authors prove an independently copyrightable contribution was made with a contemporaneous mutual intent to be co-authors.<sup>112</sup> A series of cases demonstrates how the relationship test, and particularly the dominant author's intent, has established itself as the standard for determining joint authorship disputes in the Fifth Circuit.

First, in *Clogston v. American Academy of Orthopedic Surgeons* (AAOS), the United States District Court for the Western District of Texas rejected co-authorship where a photographer provided photos to a book published by the AAOS.<sup>113</sup> The district court concluded that the photographer failed to show that either he or the author of the text regarded the photographer as a co-author of the book.<sup>114</sup> Further, the credits, which listed the plaintiff as photographer and not author, were considered evidence of intent not to be co-authors rather than evidence of the author's respective contributions.<sup>115</sup> The court went even as far as to state, "the importance of a claimant's contribution is simply not a relevant inquiry" under *Childress*.<sup>116</sup>

Next, the Eastern District of Louisiana encountered *BTE v. Bonnacaze*, a case similar to the band example described herein.<sup>117</sup> In *BTE*, a former member of the rock band, Better Than Ezra, brought an action for accounting, claiming copyright interests in the band's songs.<sup>118</sup> The former member, Cary Bonnacaze, claimed that the band's primary songwriter, Kevin Griffin, introduced "rough drafts" of the songs to the band, who subsequently assisted in the creation of the final fixed composition.<sup>119</sup> Bonnacaze claimed that, "he contributed inseparable and interdependent parts of certain songs, including 'harmony, lyrics, percussion and song rhythms, melody and musical structure.'"<sup>120</sup>

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111. See *Visitor Indus. Publ'ns, Inc. v. NOPG, L.L.C.*, 91 F. Supp. 2d 910, 915 (E.D. La. 2000); *BTE v. Bonnacaze*, 43 F. Supp. 2d 619, 623 (E.D. La. 1999); *Clogston v. Am. Acad. of Orthopaedic Surgeons*, 930 F. Supp. 1156, 1158-59 (W.D. Tex. 1996).

112. See *Visitors Indus. Publ'ns*, 91 F. Supp. at 915; *BTE*, 43 F. Supp. 2d at 623; *Clogston*, 930 F. Supp. at 1158.

113. *Clogston*, 930 F.2d at 1158.

114. See *id.* at 1161.

115. See *id.* at 1160. But cf. *Seshadri v. Kasraian*, 130 F.3d 798, 803 (7th Cir. 1997) (alluding to credits as evidence in showing joint authorship).

116. *Clogston*, 930 F.2d at 1162.

117. See *BTE*, 43 F. Supp. 2d at 619.

118. *Id.* at 621.

119. *Id.*

120. *Id.*

Griffin, also the lead singer of the band, contended that his initial offerings to the band were the basic underlying compositions of the songs and the band's contributions were merely refinements or arrangements of these pre-existing compositions.<sup>121</sup> He claimed "that these initial offerings to the band were sufficient to refute any claims that Bonnezaze may have to joint authorship of the underlying songs."<sup>122</sup>

The Fifth Circuit had yet to define the nature of the intent necessary to create a joint work, so the district court followed *Childress* and its progeny.<sup>123</sup> The court acknowledged, "the Copyright Act states only that co-authors must intend that their contributions 'be merged into . . . a unitary whole . . .'"<sup>124</sup> However, the court endorsed the more stringent *Childress* approach to the intent inquiry, persuaded by the rationale advocated in *Childress*:<sup>125</sup>

[A]n inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress. For example, a writer frequently works with an editor who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet very few editors and even fewer writers would expect the editor to be accorded the status of joint author, enjoying an undivided half interest in the copyright in the published work.<sup>126</sup>

Accepting this rationale as gospel, the court applied the *Childress* two-prong test. These requirements, are an attempt "to strike a balance between 'ensur[ing] that true collaborators in the creative process are accorded the perquisites of co-authorship' . . . while at the same time, 'guard[ing] against the risk that a sole author is denied exclusive authorship status simply because another person render[s] some form of assistance.'"<sup>127</sup>

However, in applying the test, the court did what many courts in prior joint work disputes probably should have done. Rather than force the controversial intent issue, the court rested its decision on grounds that Bonnezaze's contributions failed the independently copyrightable prong of the test.<sup>128</sup> Even though the court applied an arguably erroneous

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121. *Id.*

122. *Id.*

123. *Id.* at 622.

124. *Id.* at 623.

125. *Id.*

126. *Id.*

127. *Id.* (citing *Thomson v. Larson*, 147 F.3d 195, 200 (2d Cir. 1998)).

128. *Id.* at 627.

standard to arrive at this conclusion, the outcome is much more defensible than previous decisions because it avoids the vagueness and subjectivity of the intent requirement.

The court determined that each collaborator's contribution must be a copyrightable "work of authorship" within the meaning of § 102(a); that is, it must be "fixed in a tangible medium of expression."<sup>129</sup> The court held Bonnacaze's contributions were not works of authorship because he never fixed his contributions prior to creating the sound recording.<sup>130</sup>

This standard is erroneous because,

[w]hile there is a distinction between the copyright to a song and the copyright to the recording of that song, a sound recording can serve as the fixation of a song, in order to confer copyright on it, at the same time it is a copyright—protected work in its own right. Many songwriters record their songs to fix them for copyright registration purposes, rather than write notes on paper. This decision unfortunately, incorrectly and unnecessarily calls into question the legal effectiveness of that practice.<sup>131</sup>

Notwithstanding this error, the decision still leaves many other questions unanswered. Assuming, arguendo, an appeal had been taken<sup>132</sup> and Bonnacaze's contributions were found to be independently copyrightable, would the court have rejected his claims on grounds that he failed to prove the intent requirement? Would the court have applied the relationship test and found Griffin's intent tantamount? It seems likely given the current joint work climate and the lengths to which courts will go to justify their conclusions.

Unfortunately, the most recent joint authorship opinion from a Fifth Circuit court does little to clear up the uncertainty. In *Visitor Industries Publications*, the Eastern District of Louisiana was again called upon to settle a joint work dispute.<sup>133</sup> Citing *Childress*, the court dismissed the joint work claim because the defendant failed to provide evidence of any contribution to the work.<sup>134</sup> This decision establishes little more than the court's continued willingness to apply the *Childress* standard.

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129. *Id.*

130. *Id.* at 628.

131. *Id.*; *Former Drummer for "Better Than Ezra" Was Not a Joint Author of Rock Band's Songs, Because His Contributions Were Not Fixed in Tangible Form*, Federal District Court Rules, 21 No. 5 ENT. L. REP. 12 (Oct. 1999).

132. In fact, an appeal was planned, but in order to avoid it, the band settled with Bonnacaze for an undisclosed amount. Interview with Kevin Griffin, Better Than Ezra, in New Orleans, La. (Feb. 14, 2002).

133. *See Visitors Indus. Publ'ns, Inc. v. NOPC, L.L.C.*, 91 F. Supp. 2d 910, 911 (E.D. La. 2000).

134. *Id.* at 915.

## VI. CONCLUSION

The problem with the relationship test as promulgated by *Childress* is that intent to share authorship is a completely different inquiry than intent to collaborate.<sup>135</sup> It does not necessarily follow that just because a co-author decides not to share authorship, that he or she has not created a joint work. As indicated by the plain language of the statute, a joint work is created when two or more authors collaborate or create their contributions with the intention of merging them into a whole.<sup>136</sup>

[N]othing in the statutes, their legislative history, or the underlying purposes of the copyright law suggests that one author's dominance of a collaborative process entitles that author to dictate whether or not the resulting work is joint. . . . [T]he dominant author's subjective perception of the co-creators' relationship has [no] bearing on the other co-creators' authorial status.<sup>137</sup>

Under *Childress* and its progeny, the dominant author has the ability to “unilaterally ‘will away’ joint work status by forming the subjective intent to deny joint authorship to other collaborators . . . who made a substantial and copyrightable contribution to the finished work.”<sup>138</sup>

As demonstrated in the *Thomson* decision, the *Childress* approach fails to provide for situations in which a party might, in the absence of contract, satisfy only the independently copyrightable prong of its test.<sup>139</sup> What this implies is that a putative co-author, who has provided independently copyrightable subject matter to a work, may be denied joint author status, but may not demand that the contribution be removed from the piece. “In its effort to protect the rights of authors, this test has the potential to deny a person the copyright in his/her own artistic contributions.”<sup>140</sup>

Here lies the heart of the problem. Collaboration is a process that is not easily defined. Depending on the discipline, it can denote a multitude of creative processes involving many participants all contributing different degrees of expressions. A system that allows one collaborator to dictate the intent of the parties ex post facto is less than insightful. It blurs the distinction between the intent to share ownership and the intent to create a joint work. Consequently, the rights of certain collaborators inevitably fall through the cracks.

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135. LaFrance, *supra* note 44, at 225.

136. 17 U.S.C. § 101 (2000) (defining “joint work”).

137. LaFrance, *supra* note 44, at 232.

138. *Id.* at 224.

139. *See* *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

140. Fox, *supra* note 34, at 511.

The current approach eviscerates the joint works concept while ignoring the work for hire doctrine. Furthermore, it shifts the onus to the courts to settle issues that would not exist under a default joint authorship system. If a dominant author does not wish to share ownership with a collaborator that will provide independently copyrightable contributions to be merged into a unitary work, the onus should be on that dominant author to designate the respective rights of the parties. This designation of rights should occur prior to collaboration, not after the work is created and according to the dominant author's whim.

Pursuant to a default rule, *any* collaboration would result in a joint work, unless otherwise agreed upon by the co-authors. This would force parties to contemplate the nature of their relationship prior to collaboration.

Opponents argue that forcing parties to contemplate the nature of their relationship prior to collaboration would frustrate the creative process. On the contrary, the clarity afforded by such a system would facilitate rather than frustrate the collaborative process. Indeed, the film industry offers a perfect example of how pre-collaboration contracts serve to free artists from distractions associated with co-authorship rights.

While it is undeniable that co-authors are currently capable of contracting with respect to their rights, the reality is that a dominant author is less likely to contract prior to collaboration, because the ability to dictate the respective rights of co-authors after collaboration exists. In fact, there is nothing preventing a dominant author from soliciting the efforts of a co-author with an informal offer to share ownership, and then claiming after the fact that he or she had no intention of sharing ownership.

The suggestion that a putative co-author should insist on a contract prior to collaboration ignores the dynamic of the collaborative process. The dominant author typically seeks out the assistance of co-authors. What is the incentive for he or she to deal with an artist who demands a pre-collaboration contract, when an artist who fails to demand the same presents an opportunity for the dominant author to maintain all rights in the joint work? There is none.

Opposition to a default rule may also contend that if such a rule were adopted, the litigation floodgates would be opened. While litigation may initially increase after the adoption of the default rule, in the long run, litigation would decrease as a result of the well-defined rights of respective authors afforded by pre-collaboration contracts. Additionally,

the three-year statute of limitations under the Copyright Act would eliminate most stale claims for co-authorship.

Finally, putative co-authors are not likely to make up a powerful lobby. Consequently, the chances of Congress legislating such a rule are unlikely. In the absence of such a force, it is up to courts to initiate the process of reforming the joint work doctrine. Otherwise, dominant authors will continue to exploit works that are not truly their own, at the expense of the less powerful.