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INTENT, ORIGINALITY, CREATIVITY AND JOINT AUTHORSHIP*

Russ VerSteeg[†]

INTRODUCTION

In the 1990s America and the world came to grips with the paramount importance of copyright law. Computer technology advanced to such a degree that we now can store more information in smaller spaces and transmit it more rapidly than would have been imaginable just a few years earlier. Because copyright is one of the principal legal mechanisms for protecting information technology, copyright has, in many respects, leapt to the forefront of legal and social interest. Global information and copyright policy have been the subject of robust debate and are a matter of immediate concern due to their economic and social importance. The development of copyright law is vital to the world's education, entertainment and economy. But in the midst of this dramatic focus on worldwide, macroscopic data policy and planning, courts and commentators have taken steps to radically alter a seemingly small but important element in the copyright calculus, namely the element of intent. These steps need further clarification and explanation. Without a viable framework for dealing with the concept of intent as it relates to originality and joint authorship, many works protected by copyright law will be at risk. In our understandable rush to comprehend and discuss the "big issues," we may have neglected some of the elemental building blocks of the law. International standards and comprehensive information strategies may ultimately be of

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little use if we allow copyright doctrine itself to rot from within. In short, we must be certain that we are minding the health of the individual trees as well as attending to forest management. That is why it is important to understand precisely what we mean when we refer to "intent" as it relates to originality and joint authorship.

This article focuses on three essential copyright issues: (1) defining "intent" as it relates to originality; (2) defining "originality" in terms of distinguishable/meaningful variations on a pre-existing work, rather than the conventional but ambiguous term, "creativity"; and (3) defining "intent" as it relates to joint authorship. In Part I, the article reviews David Nimmer's exploration of "intent" as an element of originality. Nimmer's article, *Copyright in the Dead Sea Scrolls*, posits that an author's intent is paramount in determining originality and copyrightability.¹ This section proposes, to the contrary, that courts ought to evaluate the nature of a putative author's variations as a means of determining originality, rather than invoking the undefined requirement of "creativity." This Part then briefly examines three recent cases that have interpreted the most influential United States Supreme Court case construing the originality requirement, *Feist v. Rural Telephone*.² Part II examines intent in the context of joint authorship. This Part first explores *Childress v. Taylor*,³ the leading case on intent and joint authorship. Then, this Part formulates a contract model of joint authorship, and draws upon recent scholarship and case law to explain the benefits of the model. This contract model relies on objective intent and I generally refer to it as "the contract model." Specifically, this model provides clear directions for apportioning rights and economic benefits in situations involving multiple authors. Finally, the Conclusion synthesizes the framework for establishing originality and the role a putative author's intent plays in copyright law.

¹ David Nimmer, *Copyright in the Dead Sea Scrolls*, 38 HOUS. L. REV. 1 (2001).

² *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991).

³ 945 F.2d 500, 507 (2d Cir. 1991).

I. ORIGINALITY

A. *Intent as an Element of Originality (Nimmer's Approach)*

David Nimmer's treatment of intent and its relationship to authorship is best understood in the context of analyzing originality; it is best to recognize intent and originality as distinct issues. In his epic article, *Copyright in the Dead Sea Scrolls*,⁴ Nimmer examines the Israeli Supreme Court case of *Eisenman v. Qimron*.⁵ Fundamentally, the issue in the case was whether Qimron, the scholar who reconstructed the ancient manuscripts of the Dead Sea Scrolls, was entitled to copyright protection for his reconstruction of those ancient texts. In a remarkable decision, the Supreme Court of Israel ruled that he was.

Nimmer's exhaustive analysis of the case and the issues it presents ultimately concludes that the Court's decision was a poor one.⁶ Nimmer explains that the putative author's intent is the key factor that explains why the reconstruction is not copyrightable.⁷ According to Nimmer, Qimron's work is not copyrightable because he intended to reconstruct a text that had already once existed. He intended to *recreate* something that had been in the public domain for centuries. Nimmer argues that, in order to be original, an author must intend "to produce something personal or subjective," which Qimron did not.⁸

Although a certain element of truth supports Nimmer's position, the meaning of "intent" in this analysis is extraordinarily complicated and subtle, and requires more careful explanation. A putative author's intent can be a useful factor in determining whether a work is original. The "meaningful/distinguishable variation" rule, however, will eliminate a great deal of confusion in the analysis.⁹ Reviewing

⁴ Nimmer, *supra* note 1.

⁵ C.A. 2790/93, 2811/93, *Eisenman v. Qimron*, 54(3) P.D. 817.

⁶ Nimmer, *supra* note 1, at 110-11.

⁷ *Id.* at 159.

⁸ See *id.* ("Copyright protection arises only for works that reflect an intent to produce something personal or subjective. By contrast, works that are objective, whether in fact or as presented, fail to qualify as works of 'authorship' in the copyright sense.").

⁹ See Russ VerSteege, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 843-56 (1993) [hereinafter *Rethinking Originality*].

several of Nimmer's discussions and hypothetical examples clarifies the relationships among originality, meaningful/distinguishable variation and intent.

In what he refers to as "Case 24: The Gourmand,"¹⁰ Nimmer proposes the following hypothetical facts: "Connie Sewer convinces herself that quantity is the best *indiciu*m of quality and that she 'should' prefer restaurants that operate on the highest volume. On that basis, she convinces herself that her 50 favorite restaurants happen to correspond exactly to the list just compiled."¹¹ At this juncture, Nimmer queries whether Sewer has a valid copyright in her list. Arguably, the list is not "original" because, like alphabetical order, an arrangement based upon a descending order of sales volume—quantifiable facts—is nothing more than a trivial variation of the list of restaurants in its raw, unordered state.¹² Sewer, on the other hand, will argue that the list reflects her subjective opinion. She *intended*, she will say, to impose an order on the list that was more than trivial.¹³ Rather than allowing Sewer's testimony regarding her subjective intent to be completely dispositive of the issue, it makes more sense to treat it as one factor in the calculus of "originality" (i.e., determining whether the list is "original"). At trial, a defendant who has copied Sewer's list will have the burden of proving that the list is a reflection of fact rather than a subjective opinion. Subjective opinion, presumably, bestows a variation upon the list. The real issue is whether that variation is meaningful/distinguishable (i.e., because it is subjective) or whether the order of the list is "merely trivial" (i.e., because the

¹⁰ See Nimmer, *supra* note 1, at 41.

¹¹ *Id.* at 40.

¹² See VerSteeg, *Rethinking Originality*, *supra* note 9, at 852 n.221, 863-67.

¹³ See *id.* at 855.

This is, however, certainly not an easy issue. And difficult questions remain as to whether an author's motives can ever be a relevant factor in copyrightability. Clearly, in any originality analysis decision makers should always keep in mind the tenuous nature of considering an author's motives. For example, if an author were to arrange five public domain works of art in a particular order, believing that that order represented a new understanding in the development of art, would the originality of the arrangement be jeopardized if the author's theory later proved incorrect? Suppose someone takes Shakespeare's Sonnets, cuts them out of a book, throws them from the top of a building, and then gathers them in random order on the sidewalk below? Is that ordering more trivial and less distinguishable than if she had arranged the sonnets in the same order after painstaking analysis in an effort to reveal some new correlation theme in the sonnets?

Id. (footnote omitted).

order of the list is dictated by a mathematical, factual reality, to wit sales volume).

Posing a similar hypothetical, Nimmer writes:

It is doubtful in the extreme that a dry cleaning shop could obtain copyright in a list of garments brought from 11:00 a.m. to noon on a given day. On the other hand a novelist could insert a laundry list into a narrative that would reveal a good deal about the protagonist(s)—he is a transvestite, she is a slob, they are tango aficionados, etc. That product of the novelist's invention should obtain copyright. Yet the unprotected and the copyrighted laundry lists might be identical.¹⁴

But a simpler mode of analysis reveals that the actual laundry list is not copyrightable because it is fact. Facts are quintessentially unoriginal because they bear no mark of variation that is beyond the trivial. By definition, facts are unoriginal. Under the doctrine of fact/expression merger the list is an uncopyrightable fact.¹⁵ If a defendant were to copy that list, he would have the burden to prove that the order and content of plaintiff's list reflected factual information, rather than a meaningful/distinguishable variation.

In exploring these concepts, Nimmer posits that the intent of the putative author is paramount. This is especially true in cases where the putative author intends to reconstruct facts and presents his work to the public as such. According to Nimmer, "there is one lesson that applies to archaeologists—works presented to the public as factual enjoy no protection as to elements presented as facts therein, even if those facts in fact emerge from the author's creativity."¹⁶ This reasoning is fundamentally sound, but it requires further explanation and refinement to really be useful.

Suppose, for example, that an Egyptologist writes a book or scholarly article in which he argues that the traditionally accepted order of New Kingdom pharaohs is wrong, and he presents a new, "correct" order. A defendant who copies the revisionist Egyptologist's list would have a relatively easy time proving that the list is not copyrightable. In this hypothetical, the revisionist Egyptologist has proposed his order of pharaohs as fact. Facts are not copyrightable. Given the extreme uncertainty in academic/scholarly historical circles

¹⁴ See Nimmer, *supra* note 1, at 41 n.155.

¹⁵ See, e.g., *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981).

¹⁶ See Nimmer, *supra* note 1, at 42.

(a world where debate is often extremely robust due to sharp differences of opinion), a litigant, a defendant for example, would easily prove by a preponderance of the evidence that a plaintiff's hypothesis (e.g., the revisionist order of New Kingdom pharaohs) is factual. In effect the plaintiff in such an action would be estopped to argue otherwise given that the academic purpose was to create a non-fiction work. Presumably, the revisionist Egyptologist offers his list of pharaohs to the academic world and the general public as accurate, historical, chronological fact. The basic concept of estoppel prevents him from later arguing that his list is not fact.¹⁷

Indeed, a putative author's intent should merely be, at the most, one piece of evidence, a lone factor, if you will, in evaluating whether a work is original, or whether it is an uncopyrightable fact, i.e., already in the public domain. In close cases, certainly, it will make sense to regard the author's intent as having created an estoppel and, therefore, to "defer" to the author's intent to create or recreate facts. An author's intent to reconstruct facts should create either an estoppel, or at the very least, a rebuttable presumption—rebuttable by other scholars who testify, for example, that the work is not historically accurate and therefore does not qualify as a fact work. Even in situations where other scholars convince a trier of fact that the work in question is not accurate as fact, it may be preferable to shield an infringer. As a matter of public policy, an infringer who copied a work under the reasonable but mistaken belief that it was factual would be shielded by a fair use, estoppel or innocent infringer theory.

One may, for example, ask whether Qimron imposed variations on the ancient text that were more than trivial. To the extent that he attempted to reconstruct the ancient text, by definition he cannot have attempted to impose meaningful or subjective variations on it. On the contrary, he was attempting to make it conform precisely to the text as it existed thousands of years ago.¹⁸ Indeed, the same can be said of an archaeologist

¹⁷ Nimmer nibbles around the edges of this same basic conclusion. *See id.* at 81 ("[F]rom a deeper perspective, there is reason to posit that sound copyright doctrine should always doom the claim of any scholar to copyright over the reconstruction of an antecedent manuscript."). *See also id.* at 81 n.395 ("From an even deeper point of view, one may well conclude that, putting aside doctrinal points, the activity of manuscript reconstruction does not even qualify as an act of authorship so as to trigger copyright protection.").

¹⁸ *See id.* at 118. *See also id.* at 101 ("The reconstruction of TR's words do not

who reconstructs an old broken pot that has pieces missing. He fills in the gaps with modern clay reconstructed and molded to fit the shape of the missing fragments. Certainly, the archaeologist cannot claim copyright in his reconstruction because his additions merely recreate and reflect factual information (i.e., the shape of the old pot).¹⁹

The originality inquiry must focus on the nature of the putatively copyrightable work itself. The *process* by which an author creates and his *intent* are, at most, merely factors to consider in determining whether a work is original. A putative author's process and intent may serve as evidence relevant to whether his variations are trivial or meaningful/-distinguishable. Nimmer, for example, criticizes the Qimron opinion because the judge interpreted Qimron's process as virtually dispositive of originality. In particular, Nimmer quotes the court: "These [Qimron's additions, deletions and other reconstructions] were the fruits of a process in which Qimron used his knowledge, expertise and imagination, exercised judgment and chose between different alternatives."²⁰ But when one examines Qimron's work more closely, one realizes that although his variations to the fragmented text which he had in front of him may have been significant, these variations were intended to recreate facts—a document that had existed thousands of years ago. Thus, in a case such as this, his variations must actually be judged in relation to his goal (i.e., recreation of fact) rather than the fragmentary document that he had before him. At one point, Nimmer muses about the possibility of finding originality in Qimron's process.

represent 'approximate statements of opinion' by Qimron. Instead, they represent, to the best of Qimron's ability, what the Teacher of Righteousness actually said. Insofar as Qimron's philological, historical, archaeological and other skills permit, they represent an attempt at objectivity, not simply an 'expression of subjective opinion' as to what TR might have said.") (footnotes omitted).

¹⁹ See *id.* at 105 ("In these and every other instance of manuscript reconstruction, the expression merges with the idea. . . . Qimron's proposed reconstruction, which merges idea with expression, therefore stands outside copyright protection"). Perhaps, though, copyright is the wrong form of protection to seek. Perhaps this is a case for the misappropriation doctrine. This is more like *International News Service v. Associated Press*, 248 U.S. 215 (1918) while the "reconstruction" is "hot" perhaps it should be afforded protection similar to "hot news." Wouldn't this theory work to protect text reconstructions and archaeological publications better and more appropriately? Nimmer indirectly raises this issue when he asks: "So the question remains whether Qimron had the right to control the first publication of the reconstruction of 4QMMT." Nimmer, *supra* note 1 at 153. He then briefly addresses the potential that a copyright owner might have a limited right of divulgation. *Id.* at 154.

²⁰ *Id.* at 119 n.585.

He notes: "On several occasions, Qimron claims that reconstruction 'is no more than an educated guess on the basis of the scholar's knowledge and intuition.' These claims, if credited, would seem to demonstrate original contributions."²¹ Clearly this is not the case. Even if reconstruction is nothing more than "educated guesses," a fact finder in litigation must assume that the reconstructor succeeded in putting together a document that accurately reflected the ancient text. This may simply be a public policy presumption, giving the philologist the benefit of the doubt. Nimmer rightly concludes that "[t]aking Qimron at his word, this example does not deserve copyright protection."²²

The potential copyrightability of Qimron's mistakes is another issue that Nimmer considers. Arguably, a scholar's mistakes in reconstruction, because they fail to correspond to fact, could be subject to copyright protection. Nimmer confronts this issue, noting, "mistakes on Qimron's part are precisely that—mistakes, not copyrightable expression."²³ Indeed, unlike Judge Frank's artist who makes a mistake and adopts it as his own,²⁴ a reconstructor makes a mistake and adopts it unknowingly.

In another hypothetical, Nimmer raises the issue of copyright protection arising from mistakes; but this time the mistakes are of omission rather than commission. Nimmer ponders the copyright status of a new version of Virginia Woolf's book *To the Lighthouse*, from which the publisher unintentionally omitted fifteen adjacent pages.²⁵ Nimmer submits that such a work cannot be original because "the lack

²¹ Nimmer, *supra* note 1 at 120-21.

²² *Id.* at 121. *See also id.* at 123 (quoting scholarly witness, Strungell, who testified that the "object of the reconstruction process" was "to recover a book that otherwise is hopelessly lost"); *id.* at 124 (comparing Qimron's reconstruction to the analogous restoration of classical texts such as Aeschylus or Homer, "still the consensus of scholars is that that is a correct reading, that is a correct emendation . . .").

²³ *See id.* at 126 n.624. Curiously, Nimmer later makes what appears to be an inconsistent statement suggesting that, "it is only over errors that Qimron can claim protection." *Id.* at 141-42 (referencing Judge Frank in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 105 (2d Cir. 1951)). To his credit, however, Nimmer recognizes that "what Qimron did was in no way to adopt mistakes consciously. Instead, he offered to the world his best efforts, painstakingly reconstructing 4QMMT as accurately as scholarship permitted." *Id.* at 142.

²⁴ *See Alfred Bell & Co.*, 191 F.2d at 105; *see also* Nimmer, *supra* note 1, at 141-42, 208 (Nimmer again discusses Judge Frank's theoretical copyist with bad eyesight.).

²⁵ *See* Nimmer, *supra* note 1, at 205.

of intent to abridge the big Woolf (the bad Woolf having sprung adventitiously) prevents a copyrightable abridgement from resulting.²⁶ Rather than delving into murky questions of intent, it will be far easier to adapt Nimmer's reasoning using a slightly different approach. Why not characterize a *mistaken omission* as nothing more than a trivial variation? A mistake that the putative author does not consciously adopt is trivial in a manner analogous to the way that alphabetical or numeric order is trivial. The variation is trivial because it was completely unintentional. The lack of intent, then, does not stand alone as a dispositive criterion. Instead, the lack of intent serves as one factor to show why the putative author's variations are trivial and thus, not copyrightable.

Nimmer presents additional hypothetical scenarios to support his thesis that an author "must intend to author for a work of authorship to emerge."²⁷ A more textured analysis is necessary. Although intent can be a useful factor in determining whether a work is original, it is rarely, if ever, dispositive. In addition, it is also important to consider just what intent means in this context. First, the mere fact that a putative author subjectively intends to effect variations does not necessarily make the resulting work original. Nimmer's hypothetical concerning Sewer's restaurant list illustrates this point.²⁸ A trier of fact must be willing to evaluate all the evidence and, if need be, conclude that the variations effected are merely trivial, and therefore that the work is unoriginal.²⁹

Second, the fact that a putative author subjectively intends to recreate or reconstruct a factual work serves as good evidence that the resulting work is unoriginal. Qimron illustrates this point. A putative author's intent to reconstruct facts is strong evidence that the work is unoriginal. While not dispositive, evidence would have to be strong to overcome this presumption of unoriginality. Third, the fact that a putative author does not intend to effect subjective changes or variations does not necessarily make the resulting work unoriginal. For example, a painter who tosses paint aimlessly at a canvass with no particular intent at all is, nevertheless, ordinarily an author and creates an original work of

²⁶ See *id.*

²⁷ *Id.* at 204-05.

²⁸ See *supra* notes 10-13 and accompanying text.

²⁹ See VerSteeg, *Rethinking Originality*, *supra* note 9, at 854 (discussing the pros and cons of this type of evidence).

authorship. And fourth, the fact that a putative author does not intend to reconstruct a factual work does not necessarily mean that the resulting work is original.

In each case, the putative author demonstrates the intent, or lack thereof, to bring about subjective changes and the intent or lack thereof to reconstruct a factual work. Each is helpful in analyzing whether the variations are merely trivial or whether they become meaningful or significant. In either case, however, intent is not dispositive. The trier of fact is still free, in the end, to disregard the putative author's testimony regarding intent and to decide instead that the variations are either meaningful or trivial, using the putative author's subjective intent simply as one factor in the calculus of originality.

The difference between treating a putative author's subjective intent as entirely dispositive and treating it as a factor in the calculus of originality is subtle but meaningful. To illustrate intent to author as the basis for decision-making, Nimmer offers a hypothetical. First, he proposes an act without original authorship intent: "After her careless brother breaks an old Barbie doll, Little Jane throws it into the garbage heap. There it sits, amidst bananas and other detritus of the household. By no stretch of the imagination has a copyrightable event occurred."³⁰ In contrast, Nimmer offers Christu:

[T]he magnificent performance artist, decides to go the field of readymades one better: he buys a Barbie doll, smashes it with a hammer, perches it amidst banana peels and other household garbage, and displays the product at the newly refurbished Tate Gallery. Has a derivative work been created? It would seem so. The differing intent underlying Little Jane's and Christu's conduct would seem to vouchsafe their completely different treatment.³¹

It is, however, more instructive to consider Christu's intent and little Jane's lack of intent merely as evidence relating to originality rather than as dispositive proof. In the case of Christu, the variations are not trivial. The artist can explain why his variations are significant.³² Little Jane, on the other hand, cannot explain why her variations are anything but trivial.

³⁰ Nimmer, *supra* note 1, at 205.

³¹ *Id.* at 206 (footnotes omitted).

³² See VerSteeg, *Rethinking Originality*, *supra* note 9, at 854.

Nimmer again invokes Judge Frank's theoretical copyist with bad eyesight.³³ First he quotes Frank: "Having hit upon such a variation unintentionally, the 'author' may adopt it as his and copyright it." Indeed, even if Christu's inspiration came from uncopyrightable garbage, his adoption of it imbues it with protection, because of the magical infusion of intent."³⁴ Nimmer's approach places far too much power in the hands of a putative author, who, after the fact, could easily fabricate a tale of subjective intent to prove "authorship." A more sensible alternative would be to consider soberly such self-serving testimony.³⁵ After hearing such testimony, a trier of fact may still deem the intent insufficient to prove originality. For instance, suppose a putative author claimed to choose a list of Boston's 100 best restaurants and, by coincidence, it was also in alphabetical order. The trier of fact could simply say, "I don't believe that intent alone is sufficient to make the list copyrightable because it is unoriginal." On the other hand, presumably, if a person inadvertently switches on his camcorder and records a series of events, without intent to fix a work, let alone "to author," he still owns the copyright to the resulting video. Thus, intent to author neither guarantees nor denies copyright protection.

In sum, a person's intent to copy (like Qimron's intent to copy) should be considered strong evidence that what that person produced is not copyrightable. In such a case, the putative author's errors must be considered as merely trivial in the sense that (1) we do not know which parts are errors and which are not, and (2) on balance any errors that exist are minor compared to the value of the reconstruction. However, an intent to author cannot be dispositive of originality (and, thus, copyrightability) because the trier of fact still must evaluate whether the putative author's efforts are merely trivial or whether, despite an intent to author, the putative author has merely copied.³⁶ Intent may be an important factor, but our analysis must remain cautious. As the above hypotheticals showed, although an intent to copy generally

³³ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 105 (2d Cir. 1951).

³⁴ Nimmer, *supra* note 1, at 208 (footnotes omitted).

³⁵ See VerSteeg, *Rethinking Originality*, *supra* note 9, at 855.

³⁶ Perhaps subconsciously, like George Harrison. See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom. ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983).

indicates that there is no originality, an intent to author does not always prove originality.

B. *Creativity and Variation*

It is now well settled United States law that originality is an essential element of copyright.³⁷ The Copyright Act provides that "copyright . . . subsists in *original* works of authorship"³⁸ In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court established that originality has two sub-elements: in order to be original, a work must have been created independently (i.e., it must not have been copied) and it must contain some minimal degree of creativity.³⁹ Although the Supreme Court used the term "creativity," the word is inappropriate.⁴⁰ Especially given the assiduous manner in which Congress avoided making "creativity" an express element of copyright when writing the 1976 statute, it is preferable to interpret the *Feist* creativity requirement as asking whether the work in question contains some variation that rises above the level of the trivial.⁴¹ And, as the previous section illustrated, an author's intent is merely one factor in assessing whether a variation is trivial. Three recent cases serve as useful illustrations of this point: (1) *Matthew Bender & Co. Inc. & HyperLaw v. West Publishing Co.*,⁴² (2) *Bridgeman Art Library, Ltd. v. Corel Corporation*,⁴³ and (3) *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., Aerostar International, Inc.*⁴⁴

The factual background of *HyperLaw* is familiar to lawyers. West Publishing ("West") publishes the text of state and federal judicial opinions, taken directly from courts, in a series of case reporters. Each case report is enhanced with

³⁷ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991) ("The *sine qua non* of copyright is originality.").

³⁸ 17 U.S.C. § 102 (1990).

³⁹ *Feist*, 499 U.S. at 345. See also Nimmer, *supra* note 1, at 195 (Copyright protection requires only that a work of authorship be *nouveau*, i.e., new to its creator or, in the jargon of the field, "independently created," as opposed to being copied from prior sources. "It is for that reason that Learned Hand conjured up the theoretical possibility of a 'new' *Ode on a Grecian Urn*." (footnotes omitted)).

⁴⁰ See VerSteeg, *Rethinking Originality*, *supra* note 9, at 822-43.

⁴¹ See Russ VerSteeg, *Sparks in the Tinderbox*, 56 U. PITT. L. REV. 549, 558-79 (1995).

⁴² 158 F.3d 674 (2d Cir. 1998).

⁴³ 25 F. Supp. 2d 421 (S.D.N.Y. 1998).

⁴⁴ 122 F.3d 1211 (9th Cir. 1997).

"independently composed features,"⁴⁵ such as a syllabus, headnotes and key numbers. Certain factual data, such as parallel or alternative citations, attorney information and subsequent procedural history, are also added to the text.

HyperLaw published the text of judicial opinions from the United States Supreme Court and the United States Courts of Appeals. HyperLaw then compiled these opinions on two separate CD-ROMs. HyperLaw, in an effort to expand its CD-ROM products, planned to copy West's case reports, minus the independently composed features. HyperLaw sought a declaratory judgment that its "redacted versions of West's case reports contain no copyrightable material and thus may be copied without infringement."⁴⁶

The United States Court of Appeals for the Second Circuit, with Judge Jacobs writing for the Court, framed the issue as "whether West's alterations to the case reports, when considered collectively, demonstrate sufficient originality and creativity to be copyrightable."⁴⁷ Relying heavily on the decision in *Feist*, the court held that the elements of West's case reports which HyperLaw sought to copy were not copyrightable. In reaching its conclusion, the court assessed the originality and creativity underlying the four elements of West's case reports.

First, the court concurred with the district court's finding that West's enhancements to the captions, courts and date information were "insubstantial, unoriginal and uncreative."⁴⁸ According to the court, the "names of the parties, the deciding court and the dates of argument and decision are elementary items, and their inclusion is a function of their importance, not West's judgment."⁴⁹ Second, the court agreed with the district court's finding that West's selection and arrangement of attorney information lacked a "modicum of creativity."⁵⁰ Quoting *Feist*, the court found that the names of attorneys, firms and cities of practice were "entirely 'typical' and 'garden-variety.'"⁵¹ Third, the court again agreed with the district court's finding that West's alteration of opinions to incorporate subsequent procedural history did not "reflect an

⁴⁵ *Matthew Bender*, 158 F.3d. at 676.

⁴⁶ *Id.* at 678.

⁴⁷ *Id.* at 680.

⁴⁸ *Id.* at 684.

⁴⁹ *Id.* at 683.

⁵⁰ *Matthew Bender*, 158 F.3d. at 684.

⁵¹ *Id.*

exercise of originality or creativity," because of the limitations in "West's realistic options."⁵² Finally, the court found that West's parallel or alternate citations, albeit helpful, had the "cumulative effect" of a "piling up of things that are essentially obvious or trivial," and therefore, "cannot be said to be creative."⁵³

Although the Second Circuit used the term "creativity" to explain its finding that West's reports lacked "originality,"⁵⁴ reliance on the undefined term was unnecessary. The first two elements of *HyperLaw* are unprotectable facts (names of parties, court, names of attorneys, location of practice) and therefore are noncopyrightable. And, although West clearly intended to convey factual information, not subjective, distinguishable or meaningful variations, the court did not even broach intent as an issue. Similarly, the inclusion of procedural history could be understood easily as nonprotectable under the merger doctrine as it limited "West's realistic options."⁵⁵ The court itself noted that the parallel citations were "trivial." Thus, the *HyperLaw* court easily could have based its decision on grounds of the idea-expression dichotomy and lack of originality by virtue of "triviality of variation" without any need to resort to the undefined term, "creativity."

Interestingly, in his discussion of "originality," Nimmer, referring to *Feist* and *HyperLaw*, takes the opportunity to consider the copyrightability of telephone numbers.⁵⁶ According to Nimmer, a telephone number that the telephone company assigns to an individual is not copyrightable. Although this is probably true, in his explanation he states: "that phone number, like West's page numbers, is not an 'antecedent fact'; it springs into existence only by virtue of the putative property owner's labor."⁵⁷ He further explains: "A telephone number is not like a mathematical algorithm or law of nature that lies around waiting to be discovered"⁵⁸ Quite to the contrary, the entire universe of 7-digit numbers already exists as fact. Simply because no one has bothered to write all of them down

⁵² *Id.*

⁵³ *Id.* at 688.

⁵⁴ *See, e.g., id.* at 680.

⁵⁵ *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967).

⁵⁶ Nimmer, *supra* note 1, at 97.

⁵⁷ *Id.*

⁵⁸ *Id.* at 97 n.479 (quoting ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION?: FROM PRIVACY TO PUBLIC ACCESS 39 (1994)).

does not transform someone who does write down any one of those numbers (or all of those numbers, for that matter) into an author by virtue of her efforts. That's mathematics (apologies to Tom Leherer).⁵⁹ Because of the laws of mathematics, there is a precise, ascertainable group of 7-digit numbers that exist. Therefore, each and every 7-digit number is a fact that already exists. What the phone company does is to correlate that fact with the name of an individual. Arguably, that random, computer-generated correlation is simply too trivial to qualify for copyright protection. Thus, the 7-digit numbers are not copyrightable because they are pre-existing facts, and the combination, or assignment, of names with numbers is nothing more than a trivial variation of that data.

Another important case construing *Feist* is *Bridgeman Art Library, Ltd. v. Corel Corp.*⁶⁰ Bridgeman, an English company with a New York office, acquired reproductions of public domain works of art owned by museums and other collections. These reproductions were maintained in Bridgeman's library and distributed as high-resolution transparencies and digital files on CD-ROM.⁶¹ The transparencies were provided to clients through licensing agreements, while the CD-ROMs were provided to clients free of charge.⁶² Corel, a Canadian corporation, created and marketed a set of seven CD-ROMs, which contained "seven hundred digital reproductions of well known paintings by European masters."⁶³ Corel asserted that it acquired the reproductions from slides owned by the president of a dissolved California corporation, Off the Wall, Inc.⁶⁴ Bridgeman sought judgment claiming that Corel infringed its copyrights in approximately 120 of its reproductions.⁶⁵ Bridgeman's theory was that:

(1) the owners of the underlying works of art, all of which . . . are in the public domain, strictly limit access to those works, (2) Bridgeman's transparencies . . . are "the only authorized transparencies of some of these works of art," and (3) "[b]y inference and logical conclusion, the images in Corel's CD-ROMs must be

⁵⁹ See TOM LEHRER, THE REMAINS OF TOM LEHRER (Rhino Records 2000).

⁶⁰ *Bridgeman Art Library, Ltd. v. Corel Co.*, 25 F. Supp. 2d 421, 421 (S.D.N.Y. 1998).

⁶¹ *Id.* at 423.

⁶² *Id.* at 424.

⁶³ *Id.*

⁶⁴ *Id.* at 423 n.1.

⁶⁵ *Bridgeman*, 25 F. Supp. 2d at 424.

copies of Bridgeman's transparencies because they have not proved legal [sic] source."⁶⁶

The United States District Court for the Southern District of New York, with Judge Kaplan writing for the court, addressed the applicable choice of law, which it viewed as a "threshold matter."⁶⁷ The court determined that "whether copyright subsists in Bridgeman's transparencies is a question of United Kingdom Law."⁶⁸

The United Kingdom's Copyright, Designs and Patent Act of 1988 ("UK Act") grants copyright protection to "original literary, dramatic, musical or artistic works."⁶⁹ To meet the UK's originality requirement, a work "need not be original or novel in form, but it must originate with the author and not be copied from another work."⁷⁰ A derivative work is protected if "the [author's] skill, judgment and labour transforms the underlying work in a relevant way."⁷¹ In addition, there must "be some element of material alteration or embellishment which suffices to make the totality of the work an original work."⁷² The court concluded that Bridgeman's transparencies lacked "sufficient originality to be copyrightable" under the UK Act.⁷³ In reaching its conclusion, the court reasoned that Bridgeman's transparencies are "substantially exact reproductions of public domain works, albeit in a different medium."⁷⁴ The transparencies were "copied from the

⁶⁶ *Id.*

⁶⁷ *Id.* at 425.

⁶⁸ *Id.* at 426. The court writes:

United States law is persuasive in construing English law for two reasons. First, there is substantial similarity between the originality requirements of the UK Act and the Copyright Act. As does the UK Act, the Copyright Act extends protection only to "original works of authorship". . . . With respect to derivative works, the originality requirement warrants that there be a distinguishable variation between the work in which copyright is sought and the underlying work. . . . Second, the Privy Council itself has looked to American law as persuasive authority with respect to copyright originality.

Id. at 427 n.41.

⁶⁹ *Bridgeman*, 25 F. Supp. 2d at 426 (footnote omitted).

⁷⁰ *Id.* at 426 (footnote omitted).

⁷¹ *Id.* (quoting 2 MELVILLE B. NIMMER AND PAUL E. GELLER, INTERNATIONAL COPYRIGHT LAW & PRACTICE § 2[3][b], at UK-28 (1998) (citations omitted)).

⁷² *Bridgeman*, 25 F. Supp. 2d at 426 (footnote omitted).

⁷³ *Id.* at 427.

⁷⁴ *Id.* at 426.

underlying works without any avoidable addition, alteration or transformation.”⁷⁵

To the extent that Bridgeman’s images differed from works in the public domain, arguably, those variations are so slight that they can be characterized as merely trivial. If one were to examine the nature of Bridgeman’s intent (which the court did not), more than likely it was to recreate public domain works as faithfully as possible. Just like Qimron.

Finally, the facts of *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., Aerostar International, Inc.*⁷⁶ are fairly simple. Entertainment Research Group (“ERG”) designed and manufactured three-dimensional “walk-around” inflatable costumes, which were sold to various companies where they were used as promotional tools at publicity events.⁷⁷ ERG’s costumes were based upon the companies’ cartoon characters.⁷⁸ Throughout its sixteen years in the business, ERG “developed techniques and designs” that “resulted in high-quality, attractive, durable and comfortable inflatable costumes.”⁷⁹ ERG maintained that up until the spring of 1991, it was the “only manufacturer utilizing” such “techniques.”⁸⁰

Defendant Genesis marketed promotional and advertising devices to various companies, such as General Mills and Pillsbury.⁸¹ Defendant Aerostar manufactured hot air balloons, cold air inflatable products and cold air walk-around costumes.⁸² ERG and Genesis entered into a business relationship in which ERG’s costumes were sold as promotional tools to Genesis’s customers.⁸³ ERG alleged that Genesis and Aerostar entered into a secret agreement whereby “Genesis supplied Aerostar with ERG-made costumes and ERG’s proprietary information so that Aerostar could enter into the inflatable costume industry and so that Genesis could get itself a better deal through Aerostar.”⁸⁴ ERG sued Aerostar for copyright infringement.

⁷⁵ *Id.*

⁷⁶ 122 F.3d 1211, 1211 (9th Cir. 1997).

⁷⁷ *Id.* at 1214.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Entm’t Research Group*, 122 F.3d at 1214.

⁸² *Id.* at 1214-15.

⁸³ *Id.* at 1215.

⁸⁴ *Id.*

The United States Court of Appeals for the Ninth Circuit, with District Judge Rea writing for the court, discussed the derivative copyright infringement cause of action. In order to establish copyright infringement the "holder of the copyright must prove both valid ownership of the copyright and infringement of that copyright by the alleged infringer."⁸⁵ ERG received copyright registrations for the specific costumes at issue, thereby establishing prima facie evidence of the validity of its copyright. An alleged infringer may rebut the statutory presumption of copyright validity with evidence that disputes the plaintiff's prima facie case.⁸⁶ In *ERG*, the court determined that when Aerostar "presented photographs and artwork of the original copyrighted figures," it "raised a serious question as to whether ERG's costumes" were "sufficiently 'original' to merit copyright protection."⁸⁷ According to the court, this evidence revealed that the costumes at issue were "quite similar in appearance to the copyrighted characters" on which the costumes were based.⁸⁸ The costumes lacked originality because they were "copied from another's work."⁸⁹

In determining whether the costumes were copyrightable as derivative works, the court applied the Second Circuit's test from *Durham Industries, Inc. v. Tomy Corp.*⁹⁰ The *Durham* test contains two prongs:

First, to support a copyright the original aspects of a derivative work must be more than trivial. Second, the original aspects of a derivative work must reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material.⁹¹

Before addressing the first prong, the court determined that "for copyright purposes, costumes would fall under the category of 'pictorial, graphic and sculptural works' and would

⁸⁵ *Id.* at 1217.

⁸⁶ *Entm't Research Group*, 122 F.3d at 1217.

⁸⁷ *Id.* at 1218.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1219. *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980). ERG argued that the court should apply the *Doran* test, *Doran v. Sunset House Distrib. Corp.*, 197 F. Supp. 940 (S.D. Cal. 1961). The ERG court refused to apply this test. It found that the *Doran* test "completely" failed to "take into account the rights of the holder of the copyright for the underlying work," because under this test "if the form of the underlying work—three-dimensional, two-dimensional, plastic, etc.—are sufficiently different, then the derivative work is original enough to be copyrightable." *Entm't Research Group*, 122 F.3d at 1219.

⁹¹ *Entm't Research Group*, 122 F.3d at 1220 (citing *Durham*, 630 F.2d at 909).

be treated as sculptural works.”⁹² Such works receive copyright protection only “insofar as their form but not their mechanical or utilitarian aspects are concerned . . . and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”⁹³

The court then focused on whether the “non-functional aspects of the ERG costumes were sufficiently original.”⁹⁴ The court determined that “any artistic differences in the costumes” were “merely trivial,” because “decisions that enable one to reproduce or transform an already existing work into another medium or dimension—though perhaps quite difficult and intricate decisions” are not sufficient to “constitute the contribution of something ‘recognizably his own.’”⁹⁵ ERG argued that its contributions were more than trivial since the costumes varied significantly in “proportions and facial expressions from the original characters” and contained several elements, “which were wholly absent” from the originals, such as “the texture of the costumes and the manner” in which they moved.⁹⁶ The court rejected this argument, concluding that the “differences in form, texture and proportionality . . . stemmed from functional considerations.”⁹⁷

Finally, turning to the second prong of the *Durham* test, the court concluded that because the costumes were “so similar to the well-known copyrighted characters” upon which they were based, granting the costumes copyright protection would “have the practical effect of providing ERG with a de facto monopoly on all inflatable costumes depicting the copyrighted characters also in ERG’s costumes.”⁹⁸

In sum, then, the court was not compelled to evaluate originality in terms of “creativity.” Rather, it determined that variations dictated by function were merely trivial and therefore unoriginal. Thus, *ERG* instructs us to examine originality using a standard of “trivial variation” and also recognizes that variations dictated by functional considerations

⁹² *Id.* at 1221.

⁹³ *Id.*

⁹⁴ *Id.* (quoting 17 U.S.C. § 101 (1994)).

⁹⁵ *Id.* at 1222.

⁹⁶ *Entm’t Research Group*, 122 F.3d at 1222-23.

⁹⁷ *Id.* at 1223.

⁹⁸ *Id.* at 1224.

(just as variations dictated by alphabetical, numerical, or chronological order) are trivial and thus not subject to copyright protection. In addition, as was true in *HyperLaw* and *Bridgeman*, the court was not interested in ERG's intent. Presumably, ERG's intent was merely to reproduce the logo characters in a three-dimensional, functional manner. As such, a court is justified in determining that intent to reproduce is not an intent to effect subjective or artistic variations on a preexisting work.

These three cases illustrate that courts need not examine an author's intent in order to determine whether a work is original. At most, the cases show that if courts do consider intent in their analysis of originality, intent may be only one relevant factor. Additionally, these cases illustrate that courts need not resort to evaluating "creativity" in order to determine originality. Only if we define "creativity" as the imposition of a significant, distinguishable or meaningful (i.e., greater than trivial) variation, does the term begin to serve any useful purpose. Preferably, the federal judiciary will completely drop the term "creativity" from its copyright vocabulary and replace it with "distinguishable variation," "meaningful variation," or "more than trivial variation."⁹⁹ This interpretation is essential to avoid the chaos that will result if we allow federal judges to invent their own vague or amorphous definitions of "creativity." The continued use of the undefined term "creativity" is simply too risky.

II. JOINT AUTHORSHIP

A. *Perspective: The Intent Rule of Childress v. Taylor*

Intent is essential to joint authorship. The Copyright Act requires that parties—the joint authors—must intend to merge their contributions into inseparable or interdependent parts of a unitary whole.¹⁰⁰ On the surface, then, an argument can be made that joint authorship could be triggered by nothing more than two parties intending to merge their respective contributions. On its face, the statute requires only an intent to join material (e.g., words and music).¹⁰¹ The statute

⁹⁹ See *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301 (S.D.N.Y. 2000); *Matthew Bender & Co., Inc. v. W. Publ'g Co.*, 158 F.3d 674 (2d Cir. 1998).

¹⁰⁰ 17 U.S.C. § 101 (1994).

¹⁰¹ *Id.*

does not say that the parties must intend to *consider themselves* as “joint authors.”¹⁰² Under a strict reading of the statute, if author A writes nine chapters of a ten-chapter book and author B writes only one chapter, so long as A and B intended to merge those chapters, and so long as those chapters are interdependent (under this hypothetical, the chapters are not inseparable), the authors’ intent to merge should be sufficient to render the resulting book a joint work and to make A and B joint authors. Although this result comports with a strict interpretation of the statute, it is just this type of scenario that has forced judges to invent new rules. Confronted with circumstances where one author is clearly the “dominant” author and the other clearly “subordinate,”¹⁰³ judges resorted to other methods of interpretation and analysis.

Judge Newman of the U.S. Court of Appeals for the Second Circuit broke new ground in *Childress v. Taylor* when he fashioned the requirement that each author must intend to be a joint author in order for joint authorship to arise.¹⁰⁴ He did not state, however, that the authors must intend a legal conclusion.¹⁰⁵ Because *Childress* is the wellspring of the current law on intent and joint authorship, it is necessary, for purposes of the present discussion, to quote a section of Judge Newman’s opinion at length.

There remains for consideration the crucial aspect of joint authorship—the nature of the intent that must be entertained by each putative joint author at the time the contribution of each was created. The wording of the statutory definition appears to make relevant only the state of mind regarding the unitary nature of the finished work—an intention “that their contributions be merged into inseparable or interdependent parts of a unitary whole.” However, an inquiry so limited would extend joint authorship 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

¹⁰² *Id.*

¹⁰³ I use these terms recognizing that in today’s world of political correctness, the literature does not employ the term “subordinate” but uses instead the term “nondominant.”

¹⁰⁴ 945 F.2d 500, 507 (2d Cir. 1991); see Faye Buckalew, *Joint Authorship in the Second Circuit: A Critique of the Law in the Second Circuit Following Childress v. Taylor and as Exemplified in Thomson v. Larson*, 64 BROOK. L. REV. 545, 565 (1998) (“The *Childress* court . . . added an additional . . . intent requirement—the intent on the part of each collaborator to enter into a legal relationship as joint authors.”). See also *Childress*, 945 F.2d at 509 (“[the] sharing of rights should be reserved for relationships in which all participants fully intend to be joint authors.”). The Second, Seventh and Ninth Circuits now follow this discussion.

¹⁰⁵ *Childress*, 945 F.2d at 508.

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. Similarly, research assistants may on occasion contribute to an author some protectable expression or merely a sufficiently original selection of factual material as would be entitled to a copyright, yet not be entitled to be regarded as a joint author of the work in which the contributed material appears. What distinguishes the writer-editor relationship and the writer-researcher relationship from the true joint author relationship is the lack of intent of both participants in the venture to regard themselves as joint authors.¹⁰⁶

Interestingly, the legislative history concerning joint authorship does not lend support to Judge Newman's interpretation:

[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." The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit¹⁰⁷

Judge Leval of the Southern District of New York deserves partial credit (or blame) for establishing the *Childress* rule. In *Fisher v. Klein*,¹⁰⁸ he stated: "It is only where that dominant author intends to be sharing authorship that joint authorship will result."¹⁰⁹

Because the *Childress* rule is central to our current understanding of joint authorship, and because "[t]he *Childress* approach has been endorsed in virtually every subsequent adjudication of a joint authorship dispute,"¹¹⁰ it is important to consider it and to explain it at greater length. The *Childress*

¹⁰⁶ *Id.* at 507.

¹⁰⁷ H.R. REP. NO. 94-1476 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736-37 [hereinafter House Report].

¹⁰⁸ *Fisher v. Klein*, 16 U.S.P.Q.2d (BNA) 1795 (S.D.N.Y. 1990).

¹⁰⁹ *Id.* at 1798. The contract model of objective intent (discussed *infra* Part II.C.) analysis suggests that Leval's approach is supportable, so long as we interpret him to say that joint authorship exists when a reasonable person in the position of the nondominant author would perceive that the dominant author "intends to be sharing authorship."

¹¹⁰ See Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 227 (2001) (footnote omitted).

intent requirement may, in fact, be the most appropriate way to interpret the copyright statute. Indeed, it makes logical and common sense that joint authors should agree to be joint authors at or near the beginning of their collaboration. If the *Childress* approach is correct, then we are really asking a question about contract law. Did the putative joint authors intend to be bound in a relationship? Did they intend to share the ownership of the resulting work? Implicitly, then, each putative author is both offeror and offeree in a bilateral agreement. For instance, it is as if one says to the other: "If I contribute an appreciable amount of material to this work, will you agree to share with me the economic benefits that derive from it?"

The court in *Thomson v. Larson*¹¹¹ addressed joint authorship in similar terms, noting that

each [author] must understand that each one of them has an interest in the joint product, that is to say, a right to share the proceeds, a right to control the work and a right to be recognized as the author. In other words, there must be an intent that there be a sharing of the indicia of ownership and authorship.¹¹²

This description certainly sounds like a contract of joint authorship.

Professor LaFrance criticized Judge Newman's rule in *Childress*:

the opinion proceeds from the unexamined assumption that Congress could not have intended editors and research assistants to qualify as co-authors, and then makes the further assumption that the relationship test is necessary to foreclose this parade of horrors. Unfortunately, Judge Newman never questioned the validity of either assumption, and offered no independent reasoning to bridge this logical gap.¹¹³

Actually, Judge Newman's thesis is nearly self-evident. Western jurisprudence traditionally has taken the view that individuals should be entitled to profits based on, or rationally related to, contributions that they have made to an enterprise. Given this fundamental notion of fairness, it would be surprising indeed if Congress intended a nondominant author

¹¹¹ *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998).

¹¹² See Buckalew, *supra* note 104, at 556 (quoting *Thomson v. Larson*, No. 96-8876, 1997 U.S. Dist. LEXIS 13150 (S.D.N.Y. July 31, 1997) (transcript of unpublished decision)).

¹¹³ *Id.* at 223.

(say, one responsible for 5% of a work) to share equally with a dominant author (say, one who contributed the other 95%).

Copyright law needs to take into account the fact that many if not most works bear the stamp of more than one person. Typically, many contributors are responsible for a work.¹¹⁴ But perhaps we need not concern ourselves with the intent of persons such as editors; instead, perhaps we should presume, based on an originality analysis, that the work of an editor is not copyrightable because an editor's contributions are either "trivial" or merely functional,¹¹⁵ therefore not copyrightable. The insertion and deletion of commas and semicolons, and correction of capitalization, punctuation, spelling and grammar should be regarded as trivial in the copyright sense of the word. Alternatively, editorial contributions should be regarded as relating to the functional aspects of writing and therefore not copyrightable.

B. *Towards a Definition of "Intent"*

We must go further than *Childress* did to fully understand the breadth of the intent rule in the context of joint authorship. Since joint authorship is functionally a contract between joint authors, we must delineate carefully and precisely what we mean by "intent." If we do not define "intent," we run the risk that we will misinterpret "intent" for purposes of joint copyright authorship.

American law deals with the notion of intent in a variety of contexts. For purposes of intent in criminal law, we are often concerned with a subjective standard. For example, for theft, murder and rape, a factfinder is charged with evaluating whether an accused intended certain consequences.

¹¹⁴ See Roberta Rosenthal Kwall, *Author Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 20-21 (2001) ("postmodernists argue that no single work manifests creativity and innovation deriving from a unitary source.") (footnote omitted). In discussing the quandary of joint authorship, Nimmer recognizes that on many occasions, "innumerable editors, friends, colleagues, and kibbitzers contribute to the end product, although the listed author is seldom gracious enough to credit them." Nimmer, *supra* note 1, at 186. Nimmer endorses Judge Newman's approach in *Childress v. Taylor*, noting that "Judge Newman (writing for the Second Circuit) simply devised a new doctrinal ingredient to reject it [i.e., the plaintiffs' claim of joint authorship]: All of the participants in the joint venture must regard themselves as joint authors." *Id.* at 186-87. Nimmer summarizes this to mean, "As a result, researchers, editors and other contributors do not qualify as 'joint author' with the named principal." *Id.* at 187.

¹¹⁵ *Entm't Research Group v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1223 (9th Cir. 1997).

The factfinder must determine whether the accused formed specific mental conceptions. Although the factfinder is often limited to objective or circumstantial evidence of criminal intent, the inquiry actually focuses on discovering what the accused was thinking when she committed the act. Lawyers typically refer to this concept of "intent" as "subjective intent." The Model Penal Code, for example, upon which most substantive American criminal law is now based, identifies four mental states that may be used to define criminality.¹¹⁶ The commentary to this section makes clear the essentially subjective nature of intent analysis in the criminal law.

The Model Code's approach to purpose and knowledge is in fundamental disagreement with the position of the *House of Lords in Director of Public Prosecutions v. Smith*. That case effectively equated "intent to inflict grievous bodily harm" with what the defendant as a reasonable man must be taken to have contemplated, thus erecting an objective instead of a subjective inquiry to determine what the defendant "intended." In the Code's formulation, both "purposely" and "knowingly," as well as "recklessly," are meant to ask what, in fact, the defendant's mental attitude was. It was believed to be unjust to measure liability for serious criminal offenses on the basis of what the defendant should have believed or what most people would have intended.¹¹⁷

The Code's default minimum required mental state heightens this preference for subjective assessment of intent. Unless a crime is defined to require only negligence or is a strict liability offense, the minimum required mental state is "recklessness."¹¹⁸ The goal of the inquiry is to ascertain what the accused was thinking at the time that he or she committed an act. This type of intent is relevant to the inquiry addressed in Part I. In determining whether a work is original, an author's subjective intent is relevant in determining whether his variations are trivial or meaningful/significant.¹¹⁹

On the other hand, in many civil law contexts, contract law, for example, intent is an entirely different matter. In particular, contract doctrine holds that parties to a contract (offeror and offeree) must intend to be bound. Nineteenth century cases are replete with statements requiring a "meeting

¹¹⁶ See MODEL PENAL CODE, § 2.02(2)(a)-(d) (1985).

¹¹⁷ See *id.* § 2.02(2)(a)-(d), cmt.2 at 234-35.

¹¹⁸ *Id.* § 2.02(3)

¹¹⁹ We asked, for example, what Qimron's intent was when he produced his version of the Dead Sea Scrolls.

of the minds" of the parties.¹²⁰ Although Mr. Spock, a Vulcan, was capable of a "mind-meld" on the 1960s television show *Star Trek*, modern American contract doctrine clearly requires no such extraordinary powers on the part of offeror and offeree. Instead, modern contract doctrine considers "intent to be bound" as an objective question. The goal is not to determine whether a party was subjectively—in his own mind—intending to be bound. Rather, the goal is to determine whether his words or conduct are such that a reasonable person in the other party's position would have perceived that he intended to be bound. For example, suppose that an offeror thinks to himself: "I want to sell my car to this guy (the offeree) for \$500. I really, really do. I really do." But if he states his offer in a sarcastic or joking tone of voice, a reasonable person in the position of the putative offeree would perceive an intent to joke rather than an intent to be bound. Thus, although the offeror may have subjectively intended to be bound (to make an offer), the sarcastic or joking tone of his voice (the objective criteria by which the offeree judges an offeror's intent) could easily lead a reasonable person in this situation to perceive that the offeror was merely joking, and not intending to be bound. The fundamental analysis in issues of intent to be bound in contract law depends on whether a reasonable person in the position of the offeree would perceive that the offeror (based on his words and conduct) intended to be bound and whether a reasonable person in the position of the offeror would perceive that the offeree (also, based on his words and conduct) intended to be bound.

Contract law, by definition, requires mutuality of assent. Two or more persons voluntarily acquire rights and assume duties. Because parties are doing both—acquiring rights and assuming duties—contract law is reticent to grant rights and foist duties onto a party unless his words and conduct are such that a reasonable person in the position of the other party would have perceived that he intended to be bound (i.e., that one intended to acquire those rights and assume those duties). The mutuality of assent to contract is key. Because, by definition, contracts contemplate future performance, each party ought to be entitled to rely on the other's promises. Once bound, each party should be able to

¹²⁰ See generally E. Allan Farnsworth, "Meaning" in the Law of Contract, 76 YALE L.J. 939, 943-44 (1967).

change his position or order his affairs with third parties in reliance on the manifest intent to be bound of his fellow contracting party. Each should be entitled to expend time, energy, effort and money on the assumption that the other contracting party will keep his end of the bargain. Such reliance is the principal reason why the objective theory of contract is so dear to modern American contract law.¹²¹ We believe, as is also true in tort law,¹²² that a party ought to be bound, and ought to be legally considered as having intended to be bound, if his words and conduct are such that a reasonable person in the position of the other party would have perceived that he intended to be bound. The objective theory of contract intent protects the perceiving party's interest. If, for example, A's words and conduct are such that a reasonable person in the position of B would perceive that A was making a legitimate offer to sell something, then contract theory validates B's reasonable perception that A intended to be bound. If B then takes steps in reliance on A's words and conduct, contract law protects B by enforcing A's promise to sell. Of course the obverse is equally true. If B's words and conduct are such that a reasonable person in the position of A would perceive that B intended to accept A's offer, then contract law validates and protects A's reasonable perception of B's intent to be bound.

This theory actually operates to protect extremely practical interests. A fundamental tenet at work here is that contract law (American civil law jurisprudence, for that matter) typically only expects people to conform their conduct to that of a reasonable person.¹²³ So, if a reasonable person would perceive that the other intended to be bound, that is all that we care about. We do not ask contracting parties to be mind readers. We merely ask them to act like reasonable people.

Understanding how contract theory treats "intent to be bound" is instructive regarding our understanding of intent in an analysis of joint authorship. As suggested above, joint authorship in copyright is analogous in many respects to forming a contract. Copyright law provides that joint authors acquire certain rights and also that they assume certain duties. For example, each joint author is entitled to an undivided half ownership interest in the copyright. Each joint author may sell

¹²¹ See E. ALLAN FARNSWORTH, *CONTRACTS* §§ 3.6-3.9 (3d ed. 1999).

¹²² For example, tort law infuses the notion of a reasonable person in its analysis of proximate cause.

¹²³ Strict products liability in tort law is a notable exception.

or license the copyright without the permission of his fellow joint authors. Each joint author must, however, account to his fellow joint authors for a pro rata share of any profits (50%-50%, in the case of two joint authors).¹²⁴ Significant and serious legal consequences flow from the characterization of a work as a joint work. Thus, it would be strange, indeed, if one joint author (A) had contributed only 5% of a work and the other (B) had contributed 95%, and yet copyright law bestowed on A—by virtue of his joint authorship—all of the rights and privileges of joint authorship, namely a full one-half interest in all economic proceeds derived from the exploitation of the work in the marketplace. A reasonable person is unlikely to so conclude.

As suggested above,¹²⁵ it is doubtful that Congress intended this result. Presumably, Congress did not mean for the language, to wit, “intending to merge their contributions into inseparable or interdependent parts of a unitary whole” to create a contract of joint authorship in cases where reasonable persons would not have perceived that each other were intending to be bound. Arguably, reasonable persons know that, absent an express agreement to the contrary, they must contribute a sufficient amount or degree to a work in order to be entitled to reap half of the profits from the work.¹²⁶ It is precisely this concern that led Judge Newman to fashion the

¹²⁴ See generally MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.12 (2001). Although the legislative history really does not support the position that joint authors must intend to be joint authors, it does support the theory that joint authors need not be considered, in every case, to own precisely one-half of the copyright as tenants in common. The House Report states that joint authors are “coowners of copyright . . . treated *generally* as tenants in common.” See H.R. REP. NO. 94-1476 (emphasis added). The qualifier “generally” does leave the door open for some flexibility in interpretation. Thus, if a court was to decide to characterize a nondominant author as a “limited joint author” with lesser rights than a “full joint author,” presumably it could do so. An alternative approach to resolve this issue would be to decide that a contributing author does not have to be considered a joint author. Indeed, in many instances of nondominant authors, that will be the case. A contributing author will, under this interpretation, be deemed to have granted a non-exclusive license to the dominant author but he (i.e., the nondominant author) may be entitled to restitution for his contribution. See Kwall, *supra* note 114, at 38 (“The Seventh Circuit observed that the co-author of a copyrighted work can make a unilateral decision to license the work, subject to an accounting to the other co-authors”) (citing *Weinsten v. Univ. of Illinois*, 811 F.2d 1091, 1092 (7th Cir. 1987)). The court also noted that co-authors can make changes in a work and publish the original or the revision.” (citing *Cnty. for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988)).

¹²⁵ See *supra* pp. 142-46.

¹²⁶ The moral of the children’s fable of the Little Red Hen cannot have been lost on Congress.

Childress rule. Arguably, a reasonable person would not interpret another's mere collaboration as acquiescence to a 50-50 contract of joint authorship. If A contributes 5% and B contributes 95%, a reasonable person in A's shoes should not perceive B's conduct (i.e., his mere collaboration and conscious desire to merge his 95% with A's 5%) as evidence of intent on B's part to share ownership of the copyright 50-50 with A.¹²⁷

Thus, although on its face the statute merely states that joint authorship depends on the intent of the parties to merge their contributions into inseparable or interdependent parts of a unitary whole, it strains our imagination to conclude that Congress meant to force parties into a contract of joint authorship/co-ownership absent an objective manifestation of intent to be bound on the part of each putative joint author. Admittedly, an objective inquiry will be more burdensome than merely asking about an intent to merge contributions. But arguably, fairness outweighs efficiency on this matter.¹²⁸

Hence, to supply muscle to the bones of the *Childress* intent requirement, a determination of joint authorship ought to rely on a contract-like interpretation of intent: an objective manifestation of intent to be bound. The question must turn on whether a reasonable person in the position of each putative joint author perceives that the other is intending to be bound by the Copyright Act's terms of joint authorship (i.e., creating co-ownership). Absent express words detailing such an agreement, the conduct of the parties and the surrounding circumstances will be instructive to aid in this inquiry.

C. *A Contract Model of Objective Intent*

1. Initial Perspectives & Illustrative Cases

There is a need to establish an analysis that can offer realistic criteria for determining joint authorship and for allocating rights among contributors who do not rise to the

¹²⁷ See Buckalew, *supra* note 104, at 567 ("In *Childress*, one would probably not expect a reasonable playwright to think that her collaborator was acting as a joint author, nor would one expect Childress reasonably to believe that she was a joint author with Taylor. Childress' contributions were minimal and sketchy at best.")

¹²⁸ LaFrance notes the possibility of adopting "a more flexible rule . . . under which authorship would be allocated according to the relative amount of each party's contribution to the total creative effort. Such a rule, however, would burden the courts with extensive fact-finding and require them to exercise . . . aesthetic judgments" LaFrance, *supra* note 110, at 257 (footnote omitted).

level of "joint authors."¹²⁹ Principles of contract law provide a fairly complete framework for analyzing the existence, nature and the scope of joint authorship. This section examines three post-*Childress* cases which serve as helpful illustrations for the contract model of objective intent: *Thomson v. Larson*,¹³⁰ *Aalmuhammed v. Lee*,¹³¹ and *Morrill v. Smashing Pumpkins*.¹³²

In 1992, Playwright Jonathan Larson was in the process of developing and revising the script for his musical, *Rent*, in hopes that the New York Theatre Workshop ("NYTW") would produce it. On at least two occasions, the artistic director of NYTW urged Larson to "allow NYTW to hire a playwright or a book writer to help revamp the storyline and narrative structure of the play."¹³³ Larson "adamantly and steadfastly" refused on both occasions, while "consistently emphasizing his intention" to be the sole author of *Rent*.¹³⁴

Three years later in May 1995, with Larson's permission, the NYTW hired Lynn Thomson as a dramaturg to assist Larson in "clarifying the storyline of the musical."¹³⁵ Thomson's contract with the NYTW provided that her "responsibilities shall include, but not be limited to: Providing dramaturgical assistance and research to the playwright and director."¹³⁶ As compensation, the NYTW agreed to pay Thomson \$2,000 and credit her as dramaturg.¹³⁷ The contract was silent regarding copyright interests and ownership.¹³⁸

On January 24, 1996, just a few weeks before the play's opening, Larson died from an aortic aneurysm.¹³⁹ *Rent* opened on Broadway in April and was "an astounding critical, artistic

¹²⁹ See Recent Cases, 112 HARV. L. REV. 964, 969 (1999) ("In the absence of congressional guidance, courts should devise a clearer and more comprehensive joint authorship rule in the near future."). The contract model of objective intent is designed to provide just such an analytical framework. See *id.* at 968-69 ("Though contract doubtless plays an important role in allocating copyright interests between collaborators, copyright law must provide a clear default rule.") (footnotes omitted). The contract model of objective intent proposed in this article is an effort to provide such a default rule, actually using contract principles.

¹³⁰ 147 F.3d 195 (2d Cir. 1998).

¹³¹ 202 F.3d 1227 (9th Cir. 1999).

¹³² 157 F. Supp. 2d 1120 (C.D. Cal. 2001).

¹³³ *Thomson*, 147 F.3d at 197.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Thomson*, 147 F.3d at 197.

¹³⁹ *Id.* at 198.

and commercial success.”¹⁴⁰ Later, Thomson filed suit against Larson’s heirs, “claiming that she was a co-author of *Rent* and that she had never assigned, licensed, or otherwise transferred her rights.”¹⁴¹ The United States District Court for the Southern District of New York concluded that “Thomson was not a joint author of *Rent* and dismissed the remainder of Thomson’s complaint.”¹⁴²

On appeal, the Second Circuit, with Judge Calabresi writing for the court, framed the issue as “whether *Rent* qualifies as a statutory ‘joint work,’ co-authored by Thomson.”¹⁴³ Relying heavily on the decision in *Childress v. Taylor*, the court upheld the district court’s ruling that “Larson lacked the requisite intent to accept Lynn Thomson as a co-author of *Rent*.”¹⁴⁴ The Court applied *Childress*’ two-pronged test where “a co-authorship claimant bears the burden of establishing that each of the putative co-authors (1) made independently copyrightable contributions to the work; and (2) fully intended to be co-authors.”¹⁴⁵ The court focused primarily on the second prong.

Under *Childress*, the parties must “entertain in their minds the concept of joint authorship.”¹⁴⁶ Evidence of this necessary mutual intent includes “factual indicia of ownership and authorship, such as how a collaborator” regards oneself “in relation to the work in terms of billing and credit, decisionmaking, and the right to enter contracts.”¹⁴⁷ In its analysis of these factors, the *Thomson* court focused only on evidence of Larson’s intent, when it agreed with the lower court’s determination that Larson “retained and intended to retain at all times sole decision-making authority.”¹⁴⁸ Furthermore, “the November agreement between Larson and the NYTW expressly stated that Larson had final approval over all changes to *Rent* and that all such changes would become Larson’s property.”¹⁴⁹ Finally, as to billing and the right to enter contracts, the court found that the evidence indicated a

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 199.

¹⁴³ *Thomson*, 147 F.3d at 196.

¹⁴⁴ *Id.* at 206-07.

¹⁴⁵ *Id.* at 200.

¹⁴⁶ *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991).

¹⁴⁷ *Thomson*, 147 F.3d at 201.

¹⁴⁸ *Id.* at 203.

¹⁴⁹ *Id.*

"lack of intent on Larson's part to make Thomson a co-author."¹⁵⁰ Larson had sole billing as author, and had "entered into written agreements with third parties as sole author."¹⁵¹

The second case, *Aalmuhammed v. Lee*, addressed similar issues. Jefri Aalmuhammed assisted actor Denzel Washington and director Spike Lee in the filming of *Malcolm X*, which was based on the book, *The Autobiography of Malcolm X*.¹⁵² Aalmuhammed knew a great deal about the life of Malcolm X and Islam, "having previously written, directed, and produced a documentary film about Malcolm X."¹⁵³ He claimed that he "reviewed the shooting script" and "suggested extensive script revisions."¹⁵⁴ Although Lee used some of Aalmuhammed's suggestions in the final version of the film, others were filmed but edited from the film. Furthermore, Aalmuhammed claimed that he

directed Denzel Washington and other actors while on the set, created at least two entire scenes with new characters, translated Arabic into English for subtitles, supplied his own voice for voice-overs, selected the proper prayers and religious practices for the characters, and edited parts of the movie during post production.¹⁵⁵

No contractual relationship existed between the parties, but Aalmuhammed expected compensation for his work. He received \$25,000 from Lee and \$100,000 from Washington.¹⁵⁶

Before the film's November 1992 release, Aalmuhammed requested a writing credit as a co-writer of the film.¹⁵⁷ His request was denied and he was credited "far down the list" as an "Islamic Technical Consultant."¹⁵⁸ Three years later, in November 1995, the U.S. Copyright Office approved Aalmuhammed's application in which he claimed to be a co-creator, co-writer and co-director of the film. He was granted a Certificate of Registration, but the Copyright Office informed him that "his claims conflict with previous registrations of the film."¹⁵⁹ Aalmuhammed then brought suit seeking declaratory

¹⁵⁰ *Id.* at 204.

¹⁵¹ *Id.*

¹⁵² *Aalmuhammed v. Lee*, 202 F.3d 1227, 1229-30 (9th Cir. 1999).

¹⁵³ *Id.* at 1229.

¹⁵⁴ *Id.* at 1229-30.

¹⁵⁵ *Id.* at 1230.

¹⁵⁶ *Id.*

¹⁵⁷ *Lee*, 202 F.3d at 1230.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

relief, an accounting under the Copyright Act, and a claim in quantum meruit.¹⁶⁰ He argued that the film was a joint work of which he was a co-author, making him a co-owner in the copyright. His claim extended to the whole work rather than his own contributions.¹⁶¹

The Ninth Circuit, with Judge Kleinfeld writing for the court, framed the issue as “whether Aalmuhammed was an author of a ‘joint work.’”¹⁶² For a work to qualify as a joint work there “must be (1) a copyrightable work, (2) two or more ‘authors,’ and (3) the authors must intend their contributions to be merged into inseparable or interdependent parts of a unitary whole.”¹⁶³ The court recognized *Malcolm X* as a copyrightable work, which was intended by all to be a unitary whole.¹⁶⁴ Furthermore, the court pointed out that Aalmuhammed

made substantial and valuable contributions to the movie, including technical help, such as speaking Arabic to the persons in charge of the mosque in Egypt, scholarly and creative help, such as teaching the actors how to pray properly as Muslims, and script changes to add verisimilitude to the religious aspects of the movie.¹⁶⁵

However, according to the court, these contributions did not “result in copyrightable contribution.”¹⁶⁶ Aalmuhammed’s evidence that he “rewrote several specific passages of dialogue that appeared in *Malcolm X*, and that he wrote scenes relating to Malcolm X’s Hajj pilgrimage that were enacted in the movie,” presented a “genuine issue of fact as to whether” Aalmuhammed made a “copyrightable contribution.”¹⁶⁷

The court then focused its attention on the element of authorship. Authorship, according to the court, “is not the same thing as making a valuable and copyrightable contribution.”¹⁶⁸ In defining the term “author,” the court turned to the Supreme Court’s definition in *Burrow-Giles Lithographic Co. v.*

¹⁶⁰ The quantum meruit claim was remanded for further proceedings, because the question before this court was limited to which state’s statute of limitations applied. *Id.* at 1237.

¹⁶¹ *Id.* at 1230.

¹⁶² *Lee*, 202 F.3d at 1231.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Lee*, 202 F.3d at 1231-32.

¹⁶⁸ *Id.* at 1232.

Sarony.¹⁶⁹ In *Burrow-Giles*, the term author “involves originating, making, producing, as the inventive or master mind, the thing which is to be protected; the man who really represents, creates, or gives effect to the idea, fancy, or imagination.”¹⁷⁰ According to the *Lee* court, when determining an “author” of a film, “so many people might qualify as an ‘author’ if the question were limited to whether they made a substantial creative contribution that that test would not distinguish one from another.”¹⁷¹ The definition of a film author, absent “a contract to the contrary, would generally limit authorship to someone at the top of the screen credits, sometimes the producer, sometimes the director, possibly the star, or the screenwriter—someone who has artistic control.”¹⁷²

Absent a contract, the court suggested three factors to determine joint authorship. First, “an author ‘superintends’ the work by exercising control . . . a person ‘who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be.’”¹⁷³ This control factor in “many cases will be the most important.”¹⁷⁴ Second, did the “putative coauthors make objective manifestations of a shared intent to be coauthors, as by denoting the authorship[?]”¹⁷⁵ Third, “the audience appeal of the work turns on both contributions and ‘the share of each in its success cannot be appraised.’”¹⁷⁶

In applying the first and second factors to *Lee*, the court found that Aalmuhammed “did not at any time [superintend] the work.”¹⁷⁷ He “was not the person who ‘actually formed the picture by putting the persons in position, and arranging the place.’”¹⁷⁸ While he made “extremely helpful recommendations,” *Lee* “was not bound to accept any of them.”¹⁷⁹ In short, Aalmuhammed “lacked control” over the film, and “absence of control is strong evidence of the absence of co-authorship.”¹⁸⁰

¹⁶⁹ 111 U.S. 53, 61 (1884).

¹⁷⁰ *Lee*, 202 F.3d at 1233 (quotations omitted).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 1234.

¹⁷⁴ *Id.*

¹⁷⁵ *Lee*, 202 F.3d at 1234.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1235.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Lee*, 202 F.3d at 1235.

Also, neither party "made any objective manifestations of an intent to be coauthors."¹⁸¹ The court held there was "no genuine issue of fact as to Aalmuhammed's co-authorship of *Malcolm X* as a joint work."¹⁸²

Finally, *Morrill v. Smashing Pumpkins*¹⁸³ further illustrates joint authorship tests. Jonathan Morrill filmed a music video entitled *Video Marked* for Billy Corgan and his band, The Marked.¹⁸⁴ The promotional video was played at clubs where the band performed. Some years later, Corgan's new band, The Smashing Pumpkins, released a ninety-minute video entitled *Vieuphoria*, which included about forty-five seconds of short clips taken from *Video Marked*.¹⁸⁵ Morrill brought suit alleging that his copyright registration was evidence of his sole ownership of the copyright for *Video Marked*.¹⁸⁶ He further alleged that The Smashing Pumpkins infringed his copyright by using portions of his video in *Vieuphoria*. In response, Corgan contended that he was a joint author of *Video Marked* and was not "liable for infringing the copyright of a work he co-owns."¹⁸⁷

The United States District Court for the Central District of California, with Judge Moreno writing for the Court, followed the *Lee* court's test for joint authorship.¹⁸⁸ The *Smashing Pumpkins* court found that *Video Marked* was a copyrightable work intended to "serve as a unitary whole."¹⁸⁹ Furthermore, Morrill's "filming and editing of the video and Corgan's performance and composition of the songs, satisfy the requisite level of copyrightable expression necessary to support a claim of joint authorship."¹⁹⁰

¹⁸¹ *Id.* The film studio, Warner Brothers, required Lee to sign a "work for hire" agreement, "so that even Lee would not be co-author and co-owner with Warner Brothers." *Id.* The court reasoned that it "would be illogical to conclude that Warner Brothers, while not wanting to permit Lee to own the copyright, intended to share ownership" with Aalmuhammed. *Id.*

¹⁸² *Id.* at 1236.

¹⁸³ 157 F. Supp. 2d 1120 (C.D. Cal. 2001).

¹⁸⁴ *Id.* at 1121.

¹⁸⁵ *Id.*

¹⁸⁶ Morrill did not register until 1998, twelve years after the video's initial publication. Under § 401 of the Copyright Act, registration is prima facie evidence of the validity of the copyright only if it was registered within five years after first publication of the work. 17 U.S.C. § 401 (1996).

¹⁸⁷ *Smashing Pumpkins*, 157 F. Supp. 2d at 1122-23.

¹⁸⁸ *Id.* at 1123.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

The court then focused on the *Lee* factors for determining joint authorship:

- (1) whether the purported author controls the work and is "the inventive or master mind who creates, or gives effect to the idea" . . .
- (2) whether the "putative coauthors make objective manifestations of shared intent to be coauthors," . . . and (3) whether "the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised."¹⁹¹

Applying these factors, the court found that the first factor favored a "finding of joint authorship."¹⁹² Morrill's "filming, editing, and producing may have helped shape and present The Marked's music for its audience," but "without the music itself Video Marked would not exist."¹⁹³ Corgan and his band "wrote and performed the songs filmed by Morrill."¹⁹⁴ Therefore, they had "sole control over the writing and the performing of the video's music."¹⁹⁵

According to the court, the second and third factors also suggested joint authorship. Morrill's "words and behavior" evidenced "an intent to be co-authors."¹⁹⁶ Morrill described the video "as a work 'created with Corgan and his band.'"¹⁹⁷ In his deposition, Morrill referred to the video as a "'collaboration' between himself and Corgan."¹⁹⁸ The third factor, audience appeal, rested "both on the video's visual aspects and on the composition and performance of the music."¹⁹⁹ Therefore, the court held that Corgan was a joint author of the video and could not be "liable for copyright infringement based on his use of Video Marked in The Smashing Pumpkins' video, *Vieuphoria*."²⁰⁰

2. Implied in Fact and Implied in Law Contracts

Contract law distinguishes between an "implied in fact" contract and a contract designated as "implied in law." An implied in fact contract exists when parties intend to be bound

¹⁹¹ *Id.* (internal quotations omitted).

¹⁹² *Smashing Pumpkins*, 157 F. Supp. 2d at 1124.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (quoting *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000)).

¹⁹⁷ *Smashing Pumpkins*, 157 F. Supp. 2d at 1124.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1125.

²⁰⁰ *Id.* at 1126.

but their intent is implied from their conduct or the surrounding circumstances rather than overt words or language. "A contract, implied in fact, is an actual contract which arises where the parties agree upon the obligations to be incurred, but their intention, instead of being expressed in words, is inferred from their acts in light of the surrounding circumstances."²⁰¹ "An implied contract is an agreement which legitimately can be inferred from the intention of the parties as evidenced by the circumstances and 'the ordinary course of dealing and the common understanding of men.'"²⁰² Professor Farnsworth articulated the general rule that a contract "that results from conduct is described as 'implied in fact.'"²⁰³ The *Restatement (Second) of Contracts* provides that "[a] promise . . . may be inferred wholly or partly from conduct."²⁰⁴ Comment A to the *Restatement (Second)* states:

Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.²⁰⁵

It is virtually obvious, then, that absent an express contract of joint authorship, many joint authorship cases may be resolved by simply asking whether the putative joint authors created an implied in fact contract of joint authorship. The objective manifestations of the putative authors' intent are critical to this determination.²⁰⁶

²⁰¹ *In re Home Prot. Bldg. & Loan Ass'n*, 17 A.2d 755, 756 (Pa. Super. Ct. 1941).

²⁰² *Martin v. Little, Brown & Co.*, 450 A.2d 984 (Pa. Super. Ct. 1981) (quoting *Hertzog v. Hertzog*, 29 Pa. 465, 486 (1857)).

²⁰³ FARNSWORTH, *supra* note 121, §§ 3.10.

²⁰⁴ RESTATEMENT (SECOND) OF CONTRACTS § 4 (1979).

²⁰⁵ *Id.* § 4 cmt. a.

²⁰⁶ Professor Kwall criticizes an objective test of joint authorship, saying, "the line between subjective and objective indicia of co-authorship can be unclear in many situations." Kwall, *supra* note 114, at 56. Professor Kwall urges that courts adopt a joint authorship standard of "meaningful collaboration." *Id.* at 64. This "meaningful collaboration" standard is painfully vague. Kwall gives no real guidance, factors, or analytical framework for deciding when an author has made a "meaningful collaboration." She does, however, make two points that actually support the contract model of objective intent more than her own meaningful collaboration: (1) "of course, such an open-ended conception of joint authorship may cause concern that dominant authors will lose ground to contributors who feel a real, yet unreasonable level of investment in the final product." *Id.* at 62. Clearly, under the contract model of

Unlike criminal law, which emphasizes and often relies upon an inquiry into the subjective state of a criminal's mind,²⁰⁷ contract law allows contracting parties to evaluate respective risks and plan their own future conduct, based upon reasonable expectations shaped by the objective manifestations of intent (and the promises implicit in those manifestations) of both parties. The analogy to joint authorship is evident: courts should consider the interaction between collaborators as relevant to the objective manifestations of the parties' intent regarding joint authorship.²⁰⁸ Contracting parties must be able to rely on the objective indicia of intent. An implied in fact contract of joint authorship need be no different.²⁰⁹

Joint authorship is probably best understood as an implied in fact contract. The Copyright Act provides that joint authors must intend to combine their contributions into

objective intent, to the extent that a nondominant author's perceptions regarding the nature of her authorship are "unreasonable," a court would have to dismiss those feelings as irrelevant. Only the reasonable perceptions of the putative joint authors can operate as indicia of joint authorship.

(2) [C]ourts can look to industry customs in determining whether the level of investment of a particular putative joint author feels is reasonable in a given situation. For example, the custom in academia is that contributions of research assistants and the commentary of colleagues are gratefully acknowledged by the author, but joint authorship does not result from these efforts alone.

Id. at 63 (citing *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000)). To be sure, no system is perfect. But there are logical reasons for treating this issue in a manner analogous to a contract issue, requiring the objective manifestations of the parties' intent to be bound.

²⁰⁷ See MODEL PENAL CODE, *supra* note 116.

²⁰⁸ See Buckalew, *supra* note 104, at 577 ("The interaction between collaborators should be factored into a consideration of whether or not they should be regarded as joint authors.").

²⁰⁹ One commentator explains:

The court would next examine the intent of each party, applying the reasonable person standard rather than the purely subjective standard applied in *Thomson*. For example, in addition to the parties' statements of intent, the court would consider, on one side, whether a reasonable person would use the work of another in the manner in which it was used and not expect the other person to receive authorship status for that contribution. On the other side, the court would consider whether a reasonable person making such a contribution would expect to be considered an author. This standard would prevent the granting of joint authorship status when the relationship between the contributors is such that the reasonable person would not expect it, as, for example, in the usual writer-editor or research assistant-author relationship. In addition, this standard would also prevent denial of joint authorship status when one party unreasonably believes herself to be the sole creator of a work or when one party is falsely led to believe it would be accorded joint authorship status when the other party never truly intended to do so.

Id. at 581.

inseparable or interdependent parts of a unitary whole. In many cases where the contributions of each putative joint author are equal or nearly equal (e.g., 50%-50% in the case of two contributors), there is no problem. Problems tend to arise (for example in the instance of two putative joint authors) as one contributor's contribution rises well above 50% and the other's drops to well below 50%. The further away from a 50%-50% split that the contributions go, the more unjust it strikes us (as reasonable persons) to allow the less significant contributor (the nondominant contributor) to share equally as a copyright co-author (sharing an undivided half interest in the entire copyright along with the dominant author). So, the difficult cases often arise when the contributions of the contributors (i.e., the putative joint authors) are disparate or disproportionate.

To take this issue one step further, assume, for purposes of illustration, that two putative joint authors collaborate to write a book. If the contribution of each is roughly equal, a reasonable person in the position of each would probably assume that the other intended joint authorship. As the contribution of each becomes less proportionate, say 60%-40%, reasonable persons might begin to question whether the other was genuinely contemplating joint authorship. As the respective contributions approach 70%-30%, reasonable persons will become even less likely to perceive that the other would acquiesce to sharing equally the copyright as joint authors. The proportionate amount of the contribution of each putative joint author is a significant factor in determining whether reasonable persons would perceive an intent on the part of the other to create joint authorship.

The contract model of objective intent ensures that joint authorship arises if a reasonable person in the position of the nondominant contributor, based on the objective manifestations of intent evinced by the dominant author and the surrounding facts and circumstances, would have perceived the collaboration as joint authorship.²¹⁰ Quite obviously, the more equal the contributions are, the less likely putative joint authors will be to bicker over the apportionment of copyright

²¹⁰ See LaFrance, *supra* note 110, at 224 ("This hierarchy of intent requires the court to deny joint work status even in situations in which both parties make substantial (even if unequal) copyrightable contributions with the intent to merge these contributions into a unitary work, and the nondominant contributor perceives their collaboration as joint authorship.").

ownership and profits.²¹¹ It seems sensible to assume that authors need not make exactly equal contributions in order for them to be joint authors for purposes of copyright law. Reasonable persons often are willing to share equally ownership, risk management and profits in a joint enterprise even if each does not contribute exactly 50%. This statement may reflect human nature, and its truth may be attributed to a number of factors. For example, collaborators may be friends, or may develop a friendship during their collaboration. Thus, the multi-faceted, intangible aspects of friendship may contribute to a dominant author's willingness to share the copyright equally with a nondominant author. A dominant author may feel that a nondominant author's contributions, though small, are so significant in the overall enterprise that the dominant author would be unable to complete the work without the help of the nondominant author. This feeling—"I couldn't have done it without you"—is frequently sufficient to incite emotions of generosity and a willingness to share copyright ownership 50-50. A dominant author may simply not wish to "sweat the details" of apportioning ownership and profits on a mathematical basis. Thus, a dominant author may be flexible enough to allow a nondominant author to share copyright ownership and profits 50-50.

Since joint authors are deemed tenants in common and are entitled to receive half of all profit derived from exploiting the copyright and to grant licenses to the copyrighted work without the permission of fellow joint authors,²¹² at some point along the continuum of relative contributions (60%-40%, 70%-30%, 80%-20%) copyright law must contemplate that reasonable persons simply will not perceive themselves (and one another) as joint authors.²¹³ As the Seventh Circuit noted, "To be a joint author, an assistant or collaborator must contribute significant copyrighable material."²¹⁴ A logical

²¹¹ See Buckalew, *supra* note 104, at 575 ("In a case in which contributions are more equally balanced, . . . reliance upon the distorted subjective belief of one author, without any exploration of the other author's understanding of the relationship, or of that other author's intent, would lead to great inequity.").

²¹² See generally NIMMER & NIMMER, *supra* note 124, §§ 6.08-6.12.

²¹³ For some reason, Buckalew seems to think that "a reasonable person standard" does not also take into account "the relative proportion of their contributions." Buckalew, *supra* note 104, at 581-82. It seems preferable to consider the relative proportions of the parties' contributions as an important factor in determining the objective manifestations of the intent of the parties.

²¹⁴ Seshadri v. Kasraian, 130 F.2d 798, 803 (7th Cir. 1997).

interpretation of this statement is that the “significant” amount of copyrightable material should be enough that a reasonable person would consider herself a joint author. Concomitantly, her fellow authors, or to be precise, reasonable persons in the shoes of her fellow authors, would also perceive her to be a joint author, sharing copyright ownership. Indeed, a contribution’s significance is an entirely logical factor to consider in assessing joint authorship. The more significant the contribution a putative joint author makes, the more likely it is that a reasonable person would consider himself a joint author, and the more likely it is that his fellow co-authors would consider him likewise.²¹⁵ Up to that particular “vanishing point” (i.e., the point where the contributions of putative joint authors are so disproportionate that reasonable persons would be deemed neither to have contemplated nor perceived the other person as having intended joint authorship), contract theory would consider the parties to be joint authors by virtue of an implied in fact contract. In cases where parties make roughly equal contributions, the parties’ conduct implies that they intended to be joint authors. Once the level of disparity between the contributions goes beyond that vanishing point, however, contract law instructs that we no longer have an implied in fact contract, because the conduct of the parties (i.e., the extreme disproportionality of the respective contributions) indicates that there was no implied agreement to be joint authors.

Before proceeding further, we must briefly explore the significance of the qualitative proportions of contributions made by putative joint authors. It is unreasonable to assume that Congress intended to force joint authorship onto a dominant author when the nondominant author’s contribution is so disproportionately small that a reasonable person in the position of the dominant author would not have agreed to share the copyright on a 50-50 basis. For purposes of this preliminary discussion only, let us assume that—in the case of two putative joint authors—we can all agree that, once a nondominant author’s contribution dips to a level below 20%, a reasonable person in the position of the dominant author would not intend to be bound as a 50-50 joint author. This analysis probably leads to the same answer whether we consider the

²¹⁵ See *id.* (“It would be odd for a senior professor to list a graduate student’s name before his own if the student had contributed nothing more to the article than the usual assistance that a research assistant provides.”). See also LaFrance, *supra* note 110, at 234.

dominant author the offeror and the nondominant author the offeree, or vice versa. At the risk of stating the obvious, consider the following. If we agree, merely for the purposes of this preliminary discussion and illustration, that the "vanishing point" is 80%-20%, then the following explanation and argumentation is instructive. Assume A contributes 80% and B contributes 20%. A reasonable person in the position of B would not perceive, in the absence of other facts, that A would offer a 50-50 share of the copyright ownership to B. A reasonable person in the position of A would not perceive that B would actually offer to share the copyright ownership 50-50 (presumably A would laugh in B's face at such a suggestion). Thus, disproportionality of contribution can be a significant, objective factor in assessing whether putative joint authors intend to be joint authors, sharing the copyright ownership 50-50, resulting in an implied in fact contract.

Where no implied in fact contract exists, contract law suggests that we may, nevertheless, treat the apportionment of contributions as having created an *implied in law* contract. Contracts implied *in fact* must be distinguished from contracts implied *in law*. The Restatement (Second) notes: "Quasi-contracts have often been called implied contracts or contracts implied in law; but, unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to undertake the performance in question, nor are they promises. They are obligations created by law for reasons of justice."²¹⁶ The theory of quasi contract—or a contract implied in law—recommends that the nondominant contributor (say, a contributor who has written 15% of a book) will be entitled to restitution on the basis that, if he were denied his 15%, the dominant author would be unjustly enriched by virtue of the nondominant contributor's contribution.

If a nondominant author's contribution is so minor that he is not considered a joint author by means of an implied in fact contract, he may still be entitled to restitution by means of an implied in law contract, under a quasi contract theory, for the value by which the dominant author is enriched by the nondominant author's contribution. A contributor whose contribution is copyrightable but not substantial enough to make him a *joint* author is still, nevertheless, considered an

²¹⁶ RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. b (1997).

author. The term “contributing author” may be appropriate to describe such an author.

Here contract remedial theory rescues copyright law from a dilemma. Justice is preserved on two fronts. First, the dominant author retains control over his work, unimpeded by the nondominant author’s whims and fancy. Second, the nondominant author is compensated for his efforts. Restitution serves a valuable purpose precisely because it prevents unjust enrichment and compensates an author for the value of his contribution.²¹⁷

Taking this concept one step further, it is possible to imagine a situation where the nondominant contributor’s contribution is so minor that the law should treat it as “trivial” and thus, not copyrightable at all.²¹⁸ In that case, arguably, the nondominant contributor should not even be entitled to restitution. Presumably, contributions that are so trivial as to be considered uncopyrightable also are so trivial that the law should not consider it *unjust* for the dominant author to retain their value without compensating the nondominant contributor (in the absence of an express agreement between them for such compensation—as may often be the case between a copy editor and an author). In these instances, trivial contributions properly may be deemed gifts given to the dominant author.

Roman law principles support the view that a nondominant contributing author whose contributions, although copyrightable, are too insignificant to allow him to qualify as a *joint* author, should be entitled to restitution in quantum meruit under the theory of an implied in law contract. The Roman law of *accessio* is instructive. When two properties that were owned by different persons were inseparably merged, Roman law provided that the owner of the

²¹⁷ For example, in *Thomson v. Larson*, Thomson asked for a 16% royalty. According to her, 48% of *Rent* was “new” (i.e., the part that she had worked on). Her theory was that she was entitled to 50% of 48% (by virtue of being joint author—half of 48%), but discounted by 33% because she had contributed to only two of the three components of *Rent* (i.e., she contributed to the words and lyrics but not the music). Thus, her royalty formula was $(.5 \times .48) \times .666 = .16$. *Thomson v. Larson*, 147 F.3d 195, 198 n.11 (2d Cir. 1998). Generally speaking, this is precisely the type of situation that an implied in law contract is designed to resolve. A contract model of objective intent would treat someone like Thomson as a *contributing* author but not as a *joint* author. Thus, she would, presumptively, be entitled to restitution for her 16% (assuming that the court bought into her figures). In Thomson’s case, however, because she contracted to perform her services for separate consideration, arguably, a court should hold that she is only entitled to the amount to which she agreed by contract. This, of course, would be subject to the application of the parol evidence rule.

²¹⁸ See *supra* text accompanying note 115.

principal object was the owner of the merged property, but he (i.e., the principal owner) ordinarily was liable to the owner of the accessory object for its value.²¹⁹ Regarding the principal owner's obligation to compensate the owner of the accessory, one scholar states:

If the owner of the incorporated thing had knowingly effected the incorporation, he was regarded as having made a gift of his material to the other party unless it could be shown that he did it as an act of administration on the other's behalf when he would have an *actio negotiorum gestorum contraria*.²²⁰

The nondominant author, under these principles, would be entitled, through loss of his property by *accessio*, to compensation from the principal/dominant author "for the value of his material."²²¹

This simple analysis only scratches the surface. Clearly, the analysis will become more complex in the case of three, four, or more putative joint authors. Courts will have to determine where the various vanishing points occur or, at the very least, whether the facts of any given case fall on the positive side of the vanishing point (i.e., making the contributor in question a joint author) or the negative side (i.e., making him, potentially, a contributing author, entitled to restitution by virtue of an implied in law contract). For example, in the case of three putative joint authors, as the contribution of one falls to less than 10% (meaning that the others are contributing roughly 45% each) it may be deemed unreasonable for persons to perceive the 10% contributor as a joint author entitled to share profits equally with his two joint authors.

In addition to the problem of multiple putative joint authors making the analysis more difficult, it is important to recognize that the analysis should not rest solely on the quantitative measure of a putative joint author's contribution. A case in point would be the writing of a song. If one putative joint author is responsible for only the chorus of a song (let's assume for purposes of illustration that the chorus only comprises 5% of the totality of the song, quantitatively speaking) and his putative joint author contributed everything

²¹⁹ The owner of the principal thing had to pay "compensation for the owner of what was incorporated for his vanished property." J.A.C. THOMAS, A TEXTBOOK OF ROMAN LAW 171 (1976).

²²⁰ *Id.* (footnote omitted).

²²¹ *Id.* (citing Justinian's *Digest*, D.6.1.23.4).

else (e.g., all other lyrics and music, quantitatively the other 95% of the song), arguably, the person who contributed the chorus still has a legitimate claim of joint authorship. The legitimacy of this claim is based on the fact that the qualitative nature of his contribution is so significant that reasonable persons are likely to perceive that the contribution of the chorus of a song should entitle that contributor to be a joint author, share in half of the profit of the song and exercise ownership of it as well.²²²

D. *Benefits of Applying the Contract Model of Objective Intent to Joint Authorship*

1. A Clear Framework: Not a Subjective Standard

The *Childress* court set the stage for a completely new interpretation of joint authorship, stating that in addition to an intent to merge their contributions, joint authors must intend to "regard themselves as joint authors."²²³ Subsequently, other courts have unhesitatingly followed Judge Newman's lead, requiring an intent to be joint authors as an essential element of the intent requirement for joint authorship.²²⁴ Scholarly criticism of the *Childress* intent rule has been fairly harsh.²²⁵

²²² Professor LaFrance recognizes that a contribution might have significant qualitative aspects. She asks: "should the contribution be evaluated qualitatively, quantitatively, or both?" See LaFrance, *supra* note 110, at 232 (footnote omitted). See also Buckalew, *supra* note 104, at 582.

²²³ *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

²²⁴ See, e.g., *Thomson v. Larson*, 147 F.3d 195, 200-01 (2d Cir. 1998); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071 (7th Cir. 1994).

²²⁵ Professor LaFrance, for one, refers to this requirement as a "relationship test." LaFrance, *supra* note 110, at 200. According to LaFrance, "This 'relationship' test departs from earlier articulations of the joint work analysis by focusing not on the collaborators' intent to undertake a particular type of creative process, but on their intent to enter into a particular relationship with one another." *Id.* LaFrance criticizes the "relationship test," arguing that it "has no foundation in the copyright statutes or their legislative history. In addition courts that have adopted this gloss have failed to provide any useful definition of the requisite intent." *Id.* (footnote omitted). She complains further that this test "results in the denial of authorial status to persons who make significant creative contributions to a work" and that, consequently, it "fails to advance the purpose of the Copyright Act because it will deny these contributors the economic rewards that might encourage them to continue their creative efforts in the future." *Id.* at 201. A three-tiered contract analysis remedies LaFrance's issue. Authors who make significant contributions, such as Lynn Thomson, would be capable of recovering on a quantum meruit theory (implied in law contract) for the value that they confer upon the dominant author. One of LaFrance's most poignant criticisms of the "relationship test" is that, as far as she is able to discern, it uses as its benchmark the subjective intent of the authors. *Id.* at 202 ("the joint work analysis has been distorted from an analysis of the process by which a work is created to an analysis of

As this section will demonstrate, however, when interpreted in light of the objective intent model—using the objective manifestations of the parties as the legal indicia of intent—the *Childress* intent rule can lead to imminently equitable results that promote the goals of copyright law to promote progress through incentives.

Perhaps the most distinct advantage of the objective intent model is that the framework of the approach is straightforward. First, a court uses objective criteria to determine whether the putative joint authors intended to be bound as joint authors. In other words, did the putative joint authors enter an implied in fact contract of joint authorship? If so, then they are joint authors and each should be entitled to an equal share of the copyright. If the court determines that the putative authors are not joint authors, it must determine whether the nondominant author(s) has made, at least, a copyrightable contribution. If so, the court must determine the value of that copyrightable contribution to the collaborative work. That determination will dictate the amount of restitution to which the contributing author is entitled. Put another way, this value represents the amount by which the dominant author has been unjustly enriched by the nondominant contributing author's contribution. The nondominant contributing author is essentially entitled to quantum meruit. Lastly, there is a third category the court should consider whether the nondominant contributor's contribution: (1) is unoriginal (i.e., if the contribution is either trivial or purely functional); (2) is an idea (or ideas) rather than expression; (3) was rendered in circumstances where such a contribution is typically considered gratuitous; or (4) was made in return for separate consideration (i.e., as distinct from joint authorship as consideration). If the contributor's contribution falls into this third category, then the contributor should be entitled neither to a half copyright interest as joint author nor to quantum meruit (i.e., restitution) based on principles of unjust enrichment.

The straightforward framework of the contract model of objective intent contrasts sharply with one of the principal weaknesses of the *Childress* rule, establishing a subjective test

each co-creator's subjective intent to share authorial laurels with one or more of the others. The result has been a troubling array of decisions that appear to be more influenced by the egos of the putative authors than by the objective evidence of how the work was created.") (footnote omitted).

for joint author intent.²²⁶ *Childress* failed to define subjective “intent.”²²⁷ A subjective definition of intent permits one author’s, typically the dominant author’s, subjective state of mind to operate as a dispositive factor in determining sole authorship, as opposed to joint authorship.²²⁸

The *Childress* court forged the subjectivity rule with the unfortunate statement that, in order to be considered joint authors, persons need to “entertain in their minds the concept of joint authorship, whether or not they understood precisely the legal consequences of that relationship.”²²⁹ There at least two problems with this statement of the law of joint authorship. One problem is excusable and the other is, frankly, inexcusable. However, both can be solved through explanation and by applying the contract model of objective intent.

First, by saying that putative joint authors must “entertain in their minds a concept of joint authorship,” the *Childress* court fell prey to the same nineteenth century misconception that once led judges to pronounce that contracting parties had to engage in a “meeting of the minds” in order to have a valid offer and acceptance.²³⁰ Certainly, had the court reflected, it would have reconsidered.²³¹ Such a gross misstatement of the manner in which modern law treats intent on the part of contracting parties—in this case parties tacitly agreeing to share joint ownership of copyright—is inexcusable. The copyright test to determine joint authorship must be the same as it is in modern contract law; namely, the objective manifestations of the parties’ intent must control, not their secretly harbored, undisclosed conceptions entertained in the mind.²³² Thus, realistically, in order to be considered *joint* authors, authors must objectively manifest an intent to share ownership of copyright.

The second problem with the court’s statement is its acknowledgement that the parties may not necessarily comprehend “precisely the legal consequences of that

²²⁶ *Childress*, 945 F.2d at 508.

²²⁷ See LaFrance, *supra* note 110, at 245.

²²⁸ See *id.* at 224, 229 (citing *Erickson v. Trinity Theatre, Inc.*, No. 91 C 1964, 1992 U.S. Dist. LEXIS 2690, at 28 & n.1 (N.D. Ill. Mar. 6, 1992)), 245, 262; see also Kwall, *supra* note 114, at 52; Buckalew, *supra* note 104, at 569, 576.

²²⁹ *Childress*, 945 F.2d at 508.

²³⁰ See generally FARNSWORTH, *supra* note 121.

²³¹ See *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757, 761 (2d Cir. 1946).

²³² *Id.*

relationship.²³³ Although problematic, this statement is excusable. Joint authors are frequently more interested in the artistic and synergistic aspects of their enterprise than the legal ones. We should not expect them all to appreciate the legal significance of joint authorship. Similarly, contract law does not presume that all contracting parties appreciate the sometimes intricate ramifications of entering into a legally recognizable bargain. A seller who breaches his contract may not, for example, understand that he will be liable to his buyer for the difference between the agreed contract price and the price at which his buyer purchased substitute goods. Yet, contract law considers the seller legally bound when his words or conduct objectively manifest an intent to be bound. Similarly, although joint authors may not appreciate all of the finer points regarding the law of joint authorship,²³⁴ it is sufficient if they manifest an intent to share the copyright ownership. Like parties to a contract, a general idea of what joint authorship entails should suffice.

2. Contract Model Provides a Workable Definition of Intent

In addition to providing a macroscopic framework for analyzing questions of joint authorship, the contract model of objective intent defines "intent" using an analysis proven to work in contract law. The failure to define intent is a weakness in the *Childress* formulation. Utilizing an objective approach, the contract model offers a definition of intent that is likely to protect the interests of the parties and yield workable, fair results. The contract model makes it clear that contributors are not required to be mind readers. Contributors should be able to reasonably rely on the objective manifestations of their own intent and those of their co-authors. Thus, the substantiality of their contributions and the objective manifestations of their own intent both to merge those contributions and to share

²³³ *Childress*, 945 F.2d at 508.

²³⁴ See H.R. REP. NO. 94-1476. Joint authors may freely exploit a joint work without the permission of fellow joint authors. But a joint author is required to pay his fellow joint authors a pro rata share of any profits recognized. A work that is the product of joint authorship will have a different duration than otherwise. See 17 U.S.C. § 302(b) (2002). It is possible that the renewal of copyright could be affected if a work is deemed to be a joint work. See 17 U.S.C. § 304(a). A joint work will be subject to special rules regarding the waiver of moral rights. See 17 U.S.C. § 106A(e)(1). And the potentiality for a termination of transfers is unique for a joint work. See 17 U.S.C. §§ 203, 304(c)-(d).

copyright ownership should serve as a factual basis (i.e., evidence) for establishing their rights vel non as joint authors.²³⁵

One commentator expressed concern that objective criteria will not be useful in evaluating intent, noting: "Whereas the intent to merge contributions will often be readily ascertainable from objective evidence, intent to share authorship is ill-defined and may not be reflected in any objective manifestations, thus making it more difficult to establish in most cases."²³⁶ This hypothesis seems entirely unfounded. Determining intent by means of objective manifestations is precisely the manner in which contract law operates. The *Lee* court put this matter in perspective:

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. In the absence of a contract, the inquiry must of necessity focus on the facts. The factors articulated in this decision and the Second and Seventh Circuit decisions cannot be reduced to a rigid formula, because the creative relationships to which they apply vary too much. Different people do creative work together in different ways, and even among the same people working together the relationship may change over time as the work proceeds.²³⁷

The contract model takes this problem out of the realm of the "ill-defined." It is a cop-out, at the very least, to say that intent "may not be reflected in any objective manifestations."²³⁸ Just as intent to be bound in contractual relations is reflected in the outward manifestations of a person's conduct (e.g., words, tone of voice, facial expressions, gestures, surrounding circumstances, prior course of dealing, usage of trade), so too is the intent of joint authors reflected in objective manifestations, including the qualitative and quantitative nature of the parties' contributions, control, express statements, credit/billing, usage of trade and course of dealing. These are multiple indicia of intent to share ownership of copyright. This is what the *Lee* court appreciated when it characterized the Second Circuit's

²³⁵ LaFrance, *supra* note 110, at 245 ("Contributors of copyrightable material will rarely be completely sure of the subjective intent of all the other contributors. Yet, under the relationship test, they cannot rely on the substantiality of their contributions as a sufficient factual basis for establishing their co-authorship rights.").

²³⁶ *Id.*

²³⁷ Aalmuhammed v. Lee, 202 F.3d 1227, 1235 (9th Cir. 1999).

²³⁸ LaFrance, *supra* note 110, at 245.

inquiry as resting on “who has decision making authority, how the parties bill themselves, and other evidence.”²³⁹

As further illustration, consider the *Thomson* case. The *Thomson* court established four factors to be used in determining intent: (1) decisionmaking authority; (2) billing/credits; (3) written agreements with third parties; and (4) other evidence. These factors support the contract model of objective intent because they all relate to the objective manifestations of the intent of the putative joint authors. All are indicative of how reasonable persons would perceive themselves and their co-authors, and they all relate to whether reasonable persons in similar circumstances would perceive themselves and their co-authors as entitled to share the copyright ownership. The *Lee* court articulates three factors: (1) supervision and control; (2) objective manifestations of intent; and (3) audience appeal.²⁴⁰ Upon brief reflection, it seems clear that each of these three factors actually looks to objective criteria/evidence. The *Lee* court used credit/billing as a paradigmatic example of an objective manifestation of intent, but all of the other circumstantial evidence is useful in the inquiry as well. The contract model suggests that credit should still be considered merely as one factor. After all, the significance of a party's contribution arguably can outweigh the amount of credit given, since the party with the greater bargaining power (like Spike Lee) might be able to dictate the amount of credit given. The *Lee* court hits the nail right on the head: “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.”²⁴¹ The contract model of objective intent uses these articulated factors as objective indicia of intent to become joint authors. As such, these factors bear a significant relationship to a determination of joint authorship.²⁴²

²³⁹ *Lee*, 202 F.3d at 1234 (footnote omitted).

²⁴⁰ *Id.* See LaFrance, *supra* note 110, at 248-49 (footnote omitted) (“The third factor, audience appeal, is unique to the Ninth Circuit’s approach, but its significance is unclear. The court may have intended it simply as a proxy for the inseparability or interdependence of the collaborators’ contributions.”).

²⁴¹ *Lee*, 202 F.3d at 1234.

²⁴² LaFrance argues that the *Childress-Thomson* approach is guilty of “introducing factors that bear no relationship to the authorial efforts of the putative co-authors.” See LaFrance, *supra* note 110, at 262.

3. The Dominant Author's Subjective State of Mind Is Not a Controlling Factor

A related benefit of the contract model is that it eliminates the possibility that a dominant author's subjective state of mind (i.e., her subjective intent to be the work's sole author) will be regarded as a dispositive factor.²⁴³ Professor LaFrance criticizes *Childress* because the "approach gives the entire copyright to the dominant author *if that is the result that he or she intends*."²⁴⁴ LaFrance points to *Erickson v. Trinity Theatre*²⁴⁵ as an example of this problem: "The unspoken premise appears to be that Erickson was the dominant author, and thus, under *Childress*, could unilaterally deny joint authorship to all other participants regardless of their intent or contributions."²⁴⁶

The contract model, however, grants copyright ownership to the dominant author only if a reasonable person in the position of the nondominant author would perceive that the dominant author did *not* intend to share the copyright equally. This is not a per se rule. The contract model does not permit one party's subjective state of mind to determine the status of joint authors. The existence vel non of an implied in fact contract depends on many different factors, one of the least of which would be the unexpressed inner thoughts of one of the putative joint authors.²⁴⁷ The essence of the contract model is that joint authorship is determined on the basis of what reasonable persons in the positions of the putative joint authors would perceive. The court's decision in *Smashing Pumpkins* illustrates an application of this principle. Although Morill, apparently the dominant author, may have subjectively believed that he was the sole author of the video, the court

²⁴³ A number of commentators and courts have expressed concern that this could be the case. See, e.g., *id.* at 224, 229, 262; Kwall, *supra* note 114, at 52; *Childress v. Taylor*, 20 U.S.P.Q.2d (BNA) 1181 (S.D.N.Y. 1990); Buckalew, *supra* note 104, at 569, 576.

²⁴⁴ LaFrance, *supra* note 110, at 224 (emphasis added).

²⁴⁵ *Erickson v. Trinity Theatre*, 13 F.3d 1061 (7th Cir. 1994).

²⁴⁶ LaFrance, *supra* note 110, at 229. See also *id.* at 262 ("The relationship test places one collaborator at the mercy of another's subjective intent, even if that intent is never communicated.") (footnote omitted).

²⁴⁷ See *Kabil Devs. Corp. v. Mignot*, 566 P.2d 505 (Or. 1977) (permitting the introduction of testimony regarding the subjective state of mind of a party relating to intent to contract, so long as the jury was properly instructed regarding the rule of objective intent).

determined that the conduct of the parties revealed objective manifestations of intent for joint authorship.

By adding a reasonable person standard to the calculus, the alleged lack of fairness to a nondominant author disappears.²⁴⁸ The contract model of objective intent treats nondominant authors' "stories" as evidence of the objective manifestation of the intent of the parties. As such, the nondominant author's "voice" can be heard and the court can evaluate that voice to determine the manner in which reasonable persons would perceive it.²⁴⁹ Evidence of what the parties said, the manner in which they expressed their thoughts, and the surrounding circumstances are relevant regarding whether reasonable persons would perceive the existence of a tacit joint authorship agreement (i.e., an implied in fact contract). Consider a hypothetical example involving a dominant author who contributes 60% and a nondominant author who contributes 40%. Ordinarily, reasonable persons *are* likely to consider themselves joint authors, given these respective contributions. Thus, even if the dominant (60%) author were to testify that he secretly, subjectively considered himself the sole author (i.e., not party to an implied in fact contract of joint authorship), a court could easily determine that a reasonable person in the position of both the nondominant (40%) author and the dominant (60%) author would have perceived themselves as having offered and accepted a tacit, implied in fact contract of joint authorship. The relative equality of their contributions (60% to 40%) could be sufficient evidence that reasonable persons would consider themselves as joint authors (even if this particular dominant author subjectively did not). In this manner, an objective test protects the reasonable perceptions of nondominant authors

²⁴⁸ Kwall criticizes *Childress* saying:

The aspect of *Childress* requiring that all putative joint authors share a mutual intent to be joint authors is equally problematic. By virtue of its inevitable operation, this standard will always result in privileging the narrative of the dominant author. Indeed, under a subjective standard focusing on what the parties said and thought, the dominant author . . . will always dispute the intent of co-authorship.

Kwall, *supra* note 114, at 55. Kwall's criticism is resolved by application of the objective contract model.

²⁴⁹ *Id.* at 61 ("Stories about the creation of jointly authored works should be a critical, and fundamental, component of the way in which joint authorship disputes are decided. The important question still remains, however, of how courts should assess the impact of these stories in making joint authorship decisions. In other words, how should the joint authorship doctrine be molded to take into account the personality-based narrative of the collaborative creator?").

and imposes on dominant authors a standard of reasonableness as well.

Similarly, "the dominant author might be identified as the party who made the largest contribution to the final work."²⁵⁰ As has been noted, as a matter of pure logic, the "larger" a party's contribution, the more likely it will be that the other putative joint authors will perceive that there is no tacit agreement to share the copyright 50-50. As one person's contribution rises well over 50%, it is correspondingly less likely that his fellow contributors will think it fair for them to share the copyright 50-50, and it seems less likely also that they will perceive that the dominant author intends to share the copyright ownership 50-50.

The District Court opinion in *Childress* actually visited this issue and recognized the importance of relying on an objective rather than subjective definition of intent: "a subjective state of mind cannot of itself satisfy the objective criteria of the copyright law, particularly where that state of mind was emphatically not shared by the purported co-author."²⁵¹ This statement responds to the type of situation where a nondominant author subjectively believes herself to be a joint author but the dominant author "emphatically" does not perceive of the nondominant author as a joint author. The word "emphatically" in this context could mean at least two things. First, it could, in some conceivable scenarios, mean "expressly." When a dominant author expressly states that he does not consider a work to be a joint work, that expression is highly probative of a lack of intent on his part to enter into an implied in fact contract of joint authorship. Second, "emphatically" could mean "overtly." So, if a dominant author's conduct, rather than express words, indicates that he did not intend joint authorship, that too is highly probative of the absence of such intent. In either case, the word "emphatically" in this context, at the very least, implies that the objective manifestations of the dominant author's words and/or conduct do not indicate—to a reasonable person in the position of the nondominant author—an intent to enter into an implied in fact contract of joint authorship.

²⁵⁰ LaFrance, *supra* note 110, at 231.

²⁵¹ *Childress v. Taylor*, No. 87 C 6924, 1990 U.S. Dist. LEXIS 15969 (S.D.N.Y. Nov. 27, 1990).

To be sure, one stubborn collaborator cannot be permitted to wrest ownership from nondominant authors in circumstances where to do so would be unreasonable.²⁵² By the same token, in a case involving a sale of goods where a buyer insists to a seller that there is no contract but the buyer, nevertheless, takes possession of the goods and uses them, commercial law will impose a contract on the buyer. By accepting and using goods in a manner inconsistent with the seller's ownership, the buyer will be bound to pay for the goods. The law of sales stands ready to fill in any additional gaps in the sales agreement that are necessary.²⁵³ By analogy, then, copyright law may borrow a contract-like gap-filling system to impose obligations and an implied in fact contract of joint authorship in circumstances where a joint author unreasonably denies the existence of joint authorship with his fellow joint authors.

Other related contract-like issues may need to be addressed in situations involving an author (again, typically, a dominant author) who insists on denying joint authorship. It will be relevant to determine at what point in the collaborative process the dominant author expressly denies joint authorship. If he makes the denial late in the collaborative process, it may be too late. At some point, a reasonable person in the position of the nondominant author will perceive that the dominant author intends joint authorship. By that point, a reasonable person in the position of the nondominant author may reasonably have begun relying upon the implicit promises of joint authorship and the expectation of joint ownership that comes along with it.

If, on the other hand, the unreasonable dominant author were to express his intent not to be a joint author (but rather, the sole author) at the outset of the collaboration, or so early in the process that a reasonable person in the position of the nondominant author would not yet have begun to rely on any promises implicit in his (i.e., the dominant author's) conduct, arguably such circumstances would make it

²⁵² Buckalew expresses a concern that one party—typically the dominant author—might be capable of stubbornly insisting on sole authorship: “the *Thomson* court paved the way for a collaborator to appropriate for himself all rights to a work of collaboration by simply refusing to acknowledge that the other person collaborating on a copyrightable work is a coauthor. Whether or not they act as coauthors becomes irrelevant.” Buckalew, *supra* note 104, at 576. If this interpretation of *Thomson* is accurate, common sense dictates that it will need to be adjusted.

²⁵³ See U.C.C. §§ 2-305-310 (2002).

unreasonable for the nondominant author to proceed with the collaboration or with any expectation of sharing the authorship or ownership. If a nondominant author were to proceed with a collaboration under these circumstances, a court may wish to interpret that conduct (i.e., continuing with the collaboration in the face of the dominant author expressly denying an intent to share joint authorship) as having created a gift of the work contributed by the nondominant author to the dominant author.²⁵⁴ It would not be *unjust* enrichment where a nondominant author proceeds to contribute to a collaborative effort either knowing or with reason to know that the dominant author does not intend joint authorship. Alternatively, this situation may be appropriate for the application of an implied in law contract. Perhaps the particular facts of any given case would influence a court's decision to treat the nondominant author's contribution, in such circumstances, as either a gift or as providing a basis for restitution.

In sum, then, a contract, even one that is implied in fact, requires mutual intent on the part of both offeror and offeree. One party's subjective state of mind cannot determine the status of joint authorship. Both parties must manifest objective intent to be bound. The circumstances are the same to constitute copyright joint authorship; both dominant and nondominant authors must manifest an intent to be bound in an implied contract of joint authorship. The reasonable perceptions of both parties, not just the dominant author, are pertinent to making that determination.²⁵⁵

4. Persons Who Make Significant Contributions are Ordinarily Entitled to Restitution, at Least, for Their Contributions

One of the criticisms of the *Childress* approach is that it "allows a court to deny joint authorship status even to a contributor who satisfies the Goldstein test [i.e., a contributor who has contributed copyrightable expression, not merely

²⁵⁴ See *supra* text accompanying note 219.

²⁵⁵ Buckalew's criticism of *Thomson* is a fair one: "In examining the parties' intention, the *Thomson* court did not even explore Thomson's intentions or her understandings of Larson's intent in his use of her work; instead, it based its decision solely upon the subjective state of mind of only one of the creators of *Rent*." Buckalew, *supra* note 104, at 569. Using a contractual model to explain situations of joint authorship, the court's error becomes clear.

ideas, facts, or research],²⁵⁶ because it allows a court to deny a joint authorship claim even by one who made a substantial copyrightable contribution to the finished work.”²⁵⁷ The contract model of objective intent dictates that a court *should* deny joint authorship status to such a contributor unless, under the circumstances, the parties have objectively manifested an intent to be bound as joint authors. A person who makes a substantial copyrightable contribution, but a contribution which, under the circumstances, does not make him a *joint* author by virtue of an implied in fact contract, may, nonetheless, be an author, and may be entitled to compensation based upon a contract implied in law.

The example of 95%-5% contributors illustrates this point. Generally, where one party contributes 95% to a work and the other party only contributes 5%, absent extenuating circumstances,²⁵⁸ reasonable persons in the relative positions of these two contributors will not perceive that the other is either offering or accepting an agreement of joint ownership or joint authorship of the copyright; entailing an equal sharing of the ownership and profits. Thus, although the 5% contributor has made a copyrightable contribution, and although the parties intended to merge their respective contributions into inseparable or interdependent parts of a unitary whole, it would be unreasonable, and, therefore, unfair for copyright law to label these two authors as joint authors, each sharing the copyright ownership 50-50. Such a rule would impose an injustice on the 95% contributor. But it would also be unjust to deny the 5% contributor any share of the profit. The 5% contributor is, after all, an author too (by virtue of having contributed copyrightable expression). That is why it is appropriate to consider the 5% contributor an author or a “contributing author.” That is also why it is appropriate to permit him to recover in restitution on the theory of an implied in law contract.

The contract model of objective intent solves this problem by permitting an author who makes a copyrightable contribution which is greater than *de minimis* but who cannot

²⁵⁶ PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE § 4.2.1.2 (1989).

²⁵⁷ LaFrance, *supra* note 110, at 224.

²⁵⁸ For example, a prior course of dealing between the parties, in which they traditionally shared the copyright 50-50; or when the 5% contribution is the catchy, memorable chorus of a song.

meet the implied in fact mutual intent requirement of co-authorship, to recover in quantum meruit, on an unjust enrichment theory (implied in law contract).²⁵⁹ These authors can still receive economic restitution to prevent unjust enrichment.²⁶⁰ There is no need to require a "higher standard of originality" as a prerequisite to joint authorship.²⁶¹ There is a need to characterize someone as an author—a *contributing* author—when he makes a copyrightable contribution to a work. But there is also a need to recognize that every author who makes such a contribution need not be classified as a *joint author*. All joint authors are authors, but not all authors who contribute copyrightable material that is merged with the work of another qualify as *joint authors*. Those authors who contribute copyrightable material to a merged work but fail to qualify as joint authors will ordinarily be entitled to restitution, unless the facts indicate that their contribution was gratuitous or the subject of separate consideration.²⁶²

So long as the nondominant author's contributions are copyrightable, the contract model of objective intent gives the nondominant author a proportionate share of the profits, based on a theory of implied in law contract. Without the contract model, the dominant author is unjustly enriched by the nondominant author's contribution. Of course, circumstances such as industry custom may vitiate a claim of restitution where the nondominant author's contribution is deemed to have been made gratuitously or for separate consideration (e.g., as is the case with research assistants, editors, friends who read and comment on a manuscript, and, perhaps, actors making suggestions during rehearsal).

²⁵⁹ The *Thomson* court also raised another pertinent issue, when it commented: "Our circuit has not decided whether a person who makes a non-de minimis copyrightable contribution but cannot meet the mutual intent requirement of co-authorship retains, in the absence of a work-for-hire agreement or any explicit contractual assignment of the copyright, any rights and interests in his or her own contribution." *Thomson v. Larson*, 147 F.3d 195, 206 (2d Cir. 1998). See also Buckalew, *supra* note 104, at 582 (regarding the possibility of establishing a test that would allow a court to award a remedy, such as restitution, rather than outright ownership as a full-fledged joint author).

²⁶⁰ LaFrance complains: "This restrictive view of joint authorship goes far beyond what is necessary to distinguish works from derivative works, compilations, and collective works, and denies economic rewards to persons whose creative efforts satisfy the constitutional and statutory concepts of authorship." LaFrance, *supra* note 110, at 255.

²⁶¹ See *id.* at 260-61.

²⁶² See *supra* text accompanying note 217.

As one commentator points out, "*Childress* envisioned only two default categories of collaborators: joint authors and nonauthors with no copyright interests. The court left other kinds of collaborators 'to protect their rights through contract.'²⁶³ Because it offers the third option of recognizing a nondominant author as a "contributing author," the contract model of objective intent ameliorates this problem.

5. Although One Author's Dominance Over Another is Relevant in Determining Whether Joint Authorship Exists, it is Not a Dispositive Factor

The contract model of objective intent treats the dominance of one collaborator as relevant because one collaborator's dominance may indicate that he did not manifest an intent to share copyright ownership. So, when A dominates the collaborative process, a reasonable person in the position of the fellow collaborator, B, may be less likely to perceive that A intends to be bound in a joint authorship. Hence, one collaborator's dominance over another should be considered relevant evidence of intent, using an objective theory of intent as a basis for analysis.²⁶⁴

²⁶³ Recent Cases, 112 HARV. L. REV. 964, 968 (1999) (citing *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991)). There are often similar problems inherent in many "all-or-nothing" legal formulae. The lack of justice in all-or-nothing systems is the reason why, for example, in the context of tort law, so many jurisdictions have begun to apply some sort of comparative negligence theory, rather than the old contributory negligence scheme. Moral and ethical teachings for centuries have advocated that rewards ought to be commensurate with the value of one's contributions. The objective theory of joint authorship intent will have the effect of privileging dominant authors only in circumstances where reasonable persons—in the position of the nondominant authors—would not perceive themselves as entitled to share copyright ownership. And in many cases where the nondominant author's contributions are copyrightable, he would, at least, be entitled to compensation for the value of his contribution. See also Kwall, *supra* note 114, at 57. Kwall proposes that courts should find an alternative to dispersing ownership equally and profits equally as tenants in common. She hopes that finding an alternative method could be "more sensitive to the nondominant author's personality-based narrative of creation" *Id.* Kwall articulates the problem itself but fails to offer a practical solution. The contract model of objective intent offers a concrete, workable solution to her issues. See also Buckalew, *supra* note 104, at 574. Buckalew uses the separate contractual arrangement between Larson and his previous collaborator, Aronson, to illustrate the fact "that equitable arrangements can be made other than the all-or-nothing arrangement implied by the *Thomson* court in finding that either a person is a joint author and has an undivided interest or a person is not a joint author and has no interest whatsoever." *Id.*

²⁶⁴ See LaFrance, *supra* note 110, at 224 ("Childress clearly treats one collaborator's dominance over another as relevant in determining the nondominant party's entitlement to co-authorship status."); Kwall, *supra* note 114, at 5 ("In practice, the operation of the joint authorship doctrine privileges the voices of dominant authors

General principles of jurisprudence and fairness indicate, for example, that a person who contributes 95% to another author's 5% is entitled to manifest the logical expectation that he will be unwilling to share copyright ownership 50-50. Indeed, this approach fosters copyright policy by encouraging authorship, and higher quality authorship. An opposite rule would lead to negative results. If, for example, a 95% contributor knows that he will be required to share copyright ownership with a 5% contributor, the 95% contributor will be less likely to seek the assistance of the 5% contributor. Hence, the 95% contributor may become discouraged and never finish the project, or the finished work may be of a lesser quality because it lacks the polish or punch that the 5% contributor might have added.²⁶⁵

At the opposite end of the spectrum, one can imagine an extreme case where one party (say the dominant author) expressly denies the existence of joint authorship but still conducts himself as a joint author. Even express words do not necessarily control a determination of whether joint authorship exists. In circumstances such as these, a court could still find joint authorship, despite an author's words to the contrary. Just as in contract law, the totality of the circumstances may have greater force than the specific language employed by a party.

CONCLUSION

This article has focused primarily on "intent" and its relationship to copyright. In particular, the article has explored two aspects of intent. First, we asked whether intent is an essential element of copyrightability. Nimmer argues that it is. I contend, instead, that a putative author's subjective intent to create variations that are more than trivial should serve as evidence—one factor—in determining whether a work is original. Similarly, I suggest that a putative author's subjective intent to recreate facts also ought to be considered as a factor, tending to indicate that the putative author's resulting work is

over those of nondominant contributors, thereby submerging the voices of those who furnish qualitatively important, though quantitatively less significant, components of a particular work.").

²⁶⁵ See LaFrance, *supra* note 110, at 232 ("Nothing in the statutes, their legislative history, or the underlying purposes of 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.").

unoriginal, therefore not copyrightable. Building on these principles, the article also looked at recent cases that have construed originality. These cases reveal that courts are disinclined to rely on a putative author's intent, and that courts should employ a trivial variation analysis (not an examination of the undefined term "creativity") in order to determine originality. These discussions relating to the roles of "intent" and "trivial variation" in determining originality are intended to assist courts in their determinations of originality.

Second, this article proposed a contract analysis to define "intent" for purposes of joint authorship. This contract model of objective intent borrows standard contract theory and doctrine to establish an analytical framework for decision-making. The contract model suggests that the objective manifestations of intent on the part of the putative joint authors should determine whether an implied in fact contract of joint authorship has been created. This model also recommends that, when an author makes a contribution to a work that is insufficient to elevate him to the level of a joint author by means of an implied in fact contract of joint authorship, he ought still be, in the typical case, entitled to restitution for the value of his contribution (by means of an implied in law contract). I hope that the contract model of objective intent can offer some guidance for courts as they struggle to balance the respective interests of multiple contributors to copyrightable works.

Having in place viable methods for determining what is original versus what is unoriginal (and hence part of the public domain) is vital to protect the interests of authors, publishers and the public. Thus, it is important to know just where a putative author's intent fits into the picture. Similarly, having in place a viable method for determining when contributors are joint authors versus when they are not (and hence not entitled to share a half interest in the copyright) is also vital to protect the interests of authors, publishers and the public. Therefore, it is important to know just how to analyze intent in the context of joint authorship. As I stated at the outset, copyright law has surged to the forefront of social, economic and political debate. Global information policies affect most of us in increasingly important ways. The law must strive to balance the interests of authors, publishers and the public. Given that copyright has become such a critical part of our global economy and information network, it is essential that we occasionally take the time to examine carefully the foundational building blocks

of the law. Intent, originality, creativity, joint authorship and the relationships among them are foundational building blocks that call for careful examination. I hope that this article has helped us take a closer look. And I hope that it has articulated analyses that can prove helpful.

