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# COPYRIGHT - JOINT AUTHORSHIP: 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*

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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*

INTRODUCTION

In the wake of the New York District Court's *Thomson v. Larson*<sup>1</sup> decision (the "*Rent* decision")—and the Second Circuit Court of Appeals' affirmance of that decision,<sup>2</sup> which denied dramaturg Lynn Thomson's claim to joint authorship status with *Rent* playwright Jonathan Larson and her request for a 16 percent interest in the royalties, questions about the *Childress*<sup>3</sup> test for joint author-

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<sup>1</sup> *Thomson v. Larson*, No. 96 Civ. 8876, 1997 U.S. Dist. LEXIS 13150 (S.D.N.Y. July 31, 1997), *aff'd*, 147 F.3d 195 (2d Cir. 1998). The full district court's decision is not available through either LEXIS or Westlaw. A transcript of Judge Kaplan's full decision can be read at <http://dramaturgy.net/RENT/Decision-Full.html>. The text of the opinion available in LEXIS reads as follows:

The issues in the above entitled action having been brought on for trial before the Honorable Lewis A Kaplan, United States District Judge, without a jury on July 18, 1997, and at the conclusion of the trial the Court having returned a verdict in favor of the Defendants declaring that Ms. Thomson is not a co-author of the show entitled "*Rent*", it is

ORDERED, ADJUDGED AND DECREED: That judgment is hereby entered declaring Ms. Thomson is not a co-author of the copyright for the show entitled "*Rent*" and, insofar as the complaint seeks forms of relief beyond a declaratory judgment, it is dismissed.

1997 U.S. Dist. LEXIS 13150.

<sup>2</sup> The district court opinion was affirmed in the court of appeals decision dated June 19, 1998. In this opinion Judge Calabresi addressed two issues 1) whether Lynn Thomson was a joint author with Jonathan Larson and 2) whether Thomson retained a copyright interest in her contribution to *Rent*. The court declined to rule on the second issue since it had not been raised before the district court. As to the first issue, the court of appeals stated that the application of the two-pronged *Childress* test (discussed *infra* note 3) should be used to determine the issue. The court of appeals then reviewed both *Childress* and the district court's application of *Childress* to the facts of *Thomson v. Larson* and determined that the district court had properly applied the *Childress* test in its examination of the case.

<sup>3</sup> *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991). The *Childress* test consists of a two-pronged inquiry for determining the merits of a claim of joint authorship. The first prong asks whether the putative joint author made a separately copyrightable contribution to the work in question. The second prong asks whether the putative joint authors

ship<sup>4</sup> are once again being raised. This Comment will examine the decision in *Thomson v. Larson* and its adherence to, and application of, the *Childress* test. Part I presents the historical background leading up to *Thomson v. Larson*. Part II sets forth the facts of the *Rent* decision, itself. Part III consists of the historical background leading up to the *Childress v. Taylor* decision, upon which the court in the *Rent* decision based its reasoning. Part IV details the facts of the *Childress* decision, itself. Part V analyzes the two-pronged test for determining joint authorship status set forth in *Childress* and utilized in the *Rent* decision. Part VI analyzes the application of the *Childress* test in the *Rent* decision. Part VII critiques the court's analysis of the evidence of the parties' intentions in the *Rent* decision, and Part VIII presents a proposed test for more equitably determining joint authorship with regard to copyright. This proposed test arguably avoids both the problems the *Childress* court sought to avoid in formulating its test as well as the problems inherent in the *Childress* test, itself.

By recognizing the flaws in the *Childress* test and the difficulties it sought to avoid, a new, more equitable test can be fashioned out of *Childress*, without necessarily requiring *Childress* to be overruled. This test would require a *non de minimus*<sup>5</sup> amount of copy-

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intended to enter into the legal relationship of joint authorship. In *Childress*, inquiry into the intentions of the putative joint authors was made under the second prong, but the the court's decision seemed to turn on the intention of the predominant joint author, dismissing as irrelevant the question of whether the secondary collaborator considered herself to be a joint author. *Id.*

<sup>4</sup> The courts are currently in the process of defining the concept of joint authorship under the Copyright Act of 1976. The Copyright Act never explicitly defines the term "joint author;" rather, it defines joint authorship indirectly by defining a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (1997). Courts are currently wrestling with such questions as whether each person claiming to be a joint author must create an "original work[ ] of authorship fixed in [a] tangible medium," 17 U.S.C. § 102 (1997), (the requirement for a single person to be protected as an author under the Copyright Act) or whether it is sufficient that, working together, the putative joint authors created an "original work[ ] of authorship fixed in [a] tangible medium." *Id.* Under the first scenario, each putative joint author of a book, for example, would have to contribute a portion of the actual wording of the book. Under the second scenario, it would be sufficient if the final result were a book, even if one collaborator supplied the ideas—such as plot lines and characterizations—and the other collaborator contributed the actual expression, or language, of the book.

An additional question is whether the putative joint authors must simply intend their work to be one, inseparable whole or whether they must intend to recognize each other as joint authors of the work. See Scott C. Brophy, *Joint Authorship Under the Copyright Law*, 16 HASTINGS COMM. & ENT. L.J. 451 (1994); see also *supra* note 3.

<sup>5</sup> *Non de minimus* ("not of a minimum") in this context refers to more than a mini-

rightable contributions, an objective inquiry into the intent of all parties involved based upon the reasonable person standard, and

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mum amount of contributions. The idea is derived from Melville Nimmer's discussion on the "Identification of Joint Authors" in which he posits that it is not legislatively necessary to require both collaborators to provide separately copyrightable contributions to a work in order for them to be considered joint authors. See MELVILLE B. NIMMER, 1 NIMMER ON COPYRIGHT § 6.07 (1998) [hereinafter NIMMER]. Nimmer posits that it is possible for two people to be joint authors even if only one provides separately copyrightable material, as long as the other provided some substantial contribution to the work of a creative nature, such as the plot line. See *id.*

There is no simple way to quantify *non de minimus* because when determining whether or not the *de minimus* standard has been met, both the *quantity* of the contributions and the *quality* of the contributions must be taken into consideration. It is perhaps helpful to draw an analogy between the *de minimus* standard and Learned Hand's test for determining whether or not infringement existed in *Nichols v. Universal Pictures Corp.* 45 F.2d 119 (2d Cir. 1930). In this case, a movie which shared some plot themes and lines with the play *Abie's Irish Rose* was released soon after *Abie's Irish Rose* became successful. *Id.* Since there was no direct copying, Judge Hand compared the structural elements of the two works at increasingly narrow abstractions (along a spectrum from ideas to themes to specific plot elements to actual expression) in order to determine whether the similarities were so great as to be infringing. The closer the copying was to expression the more likely it was that the copying crossed the line into infringement. In Judge Hand's words:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

*Id.* at 121. In addition to being applied to instances of plot similarity, the *Nichols* test has been applied to questions of whether or not the use of another person's characters constitutes infringement. See *Anderson v. Stallone*, 11 U.S.P.Q.2d 1161 (C.D. Cal. 1989) (finding infringement by a person who wrote a treatment using the characters from the movie *Rocky*).

In a sense, the *Nichols* test raises the question of what is copyrightable, since the elements examined in the *Nichols* test to determine infringement are arguably not strictly copyrightable since the test does not require that the words of a text be copied in order for there to be infringement. *Nichols* extends copyright protection to the structure which underlies the expression when the specifics of that structure are too closely followed by another work. It can be argued by analogy, therefore, that when the copying of a plot structure becomes infringement, then the plot structure is copyrightable.

By requiring a *non de minimus* contribution of copyrightable material, one should apply the levels of specificity in *Nichols*. That is, if a collaborator's contributions reach a level of specificity which, if that structure were copied by someone else, there would be an infringement of the work under the *Nichols* test, then the collaborator has made a separately copyrightable *non de minimus* contribution.

A level of specificity analysis will not be undertaken in this Comment because the court found that Thomson did in fact provide actual expression, in addition to contributing structural elements and character development.

would allow courts to provide for equitable distribution among joint authors of the interests in copyright when doing so would be more fair than the traditional grant of an undivided interest to each joint author.

## I. THE FACTUAL BACKGROUND OF THE *RENT* DECISION

From the very beginning, the development of the Broadway musical *Rent* relied upon collaboration. Playwright Billy Aronson wished to create an updated version of Puccini's *La Boheme*.<sup>6</sup> The play would be set in New York City and take the format of a modern musical.<sup>7</sup> However, in order to bring his idea to fruition, Aronson needed to find a composer with whom to collaborate.<sup>8</sup> Aronson chose Jonathan Larson, and in 1989, the two began to write the first version of *Rent*.<sup>9</sup>

The Aronson-Larson collaboration lasted until 1991.<sup>10</sup> At this time, Aronson granted Larson permission to continue to develop the play without him.<sup>11</sup> Aronson and Larson memorialized this agreement in a signed writing dated November 23, 1993.<sup>12</sup> The terms of this agreement included a promise by Larson that "the title will always be *RENT*, a rock opera by Jonathan Larson. Original concept and additional lyrics by Billy Aronson."<sup>13</sup> In addition, Aronson "relinquished any claims of 'active' coauthorship."<sup>14</sup> Aronson concluded his involvement with *Rent* at a later date by transferring his copyright interests to Larson's heirs "in exchange for four percent of the authors' share of royalties."<sup>15</sup>

After parting with Aronson, Larson continued to develop *Rent*, and, in 1992, Larson approached the New York Theater Workshop with a then current version of his script.<sup>16</sup> James Nicola, the Workshop's artistic director, was impressed by Larson's songwriting talents; however, "he did not consider Larson to be a [competent]

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<sup>6</sup> Brief for Appellant at 4, *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998).

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Appellant's Brief at 4.

<sup>12</sup> *Id.*

<sup>13</sup> Quoted in *id.*

<sup>14</sup> Appellant's Brief at 4.

<sup>15</sup> *Id.*

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

playwright."<sup>17</sup> Nicola, therefore, suggested that the Workshop hire a playwright or bookwriter to collaborate with Larson on the *Rent* project.<sup>18</sup> While Larson declined to accept the aid of a bookwriter or playwright,<sup>19</sup> he did spend the next two years working with the workshop on the development of *Rent*.<sup>20</sup> During this time, the staff of the New York Theater Workshop, including a hired dramaturg,<sup>21</sup> assisted Larson in rewriting *Rent*.<sup>22</sup> Finally, Larson's work culminated in an intermediate version of *Rent*, dated November 1994, which the Workshop produced in a series "of staged workshop performances . . . directed by Michael Grief."<sup>23</sup>

Professional consensus at the time of the Workshop production was that *Rent* still needed substantial revision in order for it to be a commercially producible play.<sup>24</sup> Morgan Jenness, the former associate artistic director of the New York Theater Workshop and a colleague of Larson's who had supported him in his past efforts with the Workshop during her tenure as director of play development, critiqued the Workshop production of *Rent* saying:

Based upon what I saw of this version, I could tell that it had major problems. Its 'book,' or storyline, to put it bluntly, was a mess. The scenes did not flow naturally from one to another. The script had no narrative drive or engine. There were serious structural defects.<sup>25</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 5.

<sup>19</sup> Appellant's Brief at 5.

<sup>20</sup> *Id.*

<sup>21</sup> The role of dramaturg is relatively new to the United States, although dramaturgs have been a part of the European theatre for many years. Exactly what a dramaturg does varies from work to work and job to job. A dramaturg may research period productions to verify the authenticity of set pieces, props, costumes, mannerisms and similar details. A dramaturg may also be called upon to act as a literary or production critic during the development of a new work or to scout for talented dramatic writers and commission works. Editing works in progress and providing suggestions about the form, content and structure of a work also come within the usual realm of dramaturgical work. Mark Bly, a prominent American dramaturg, has referred to the job as being "the in-house critic before the critics arrive." Michael Philips, *Rent Authorship Dispute Leaves Ashen Taste*, SAN DIEGO UNION TRIB., Aug. 1, 1997, at E8; see also Robert Simonson, "Rent" Dramaturg Sues Larson Estate, BACK STAGE, Dec. 6, 1996, at 1; Jan Stuart, *On Theater: Who Do Ya Call if Turgenev Gets Turgid?*, NEWSDAY (N.Y.), Aug. 3, 1997, at C16.

<sup>22</sup> Appellant's Brief at 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 6.

Jeffrey Seller who produced the Workshop production and director Nicola expressed similar concerns about the play.<sup>26</sup> Additional experts such as Dr. Susan Jonas, a member of the New York Theater Workshop and of the New York State Council for the Arts, and Anne Cataneo, a professional dramaturg for the Lincoln Theater, also agreed that the play was not yet commercially producible.<sup>27</sup>

In order to assist Larson in further development of the play, director Nicola determined that the Workshop's next step would be to hire a new dramaturg.<sup>28</sup> Despite the problems with the book of *Rent*, Larson was apparently still refusing to work with a bookwriter, and Nicola felt that the most efficient way to bring the play to a point at which it would be commercially producible was to hire someone to work with Larson "who was not an *acknowledged* co-author" but whose work with Larson "would include writing."<sup>29</sup> The Workshop's search for a dramaturg ended in May, 1995, when Larson agreed to work with dramaturg Lynn Thomson.<sup>30</sup>

In June of 1995, Thomson entered into a contractual agreement with the New York Theater Workshop to assist Larson in developing *Rent*.<sup>31</sup> At this time, Thomson understood her intended contractual duties to be similar to those she had performed during her 20 years of experience as a professional dramaturg.<sup>32</sup> Thus, Thomson expected that she would be "asking questions and coaxing solutions out of [Larson], but not writing."<sup>33</sup> However the contract was less than specific about the scope of Thomson's work, stating that Thomson's work would "'include, but not be limited to' services as a dramaturg."<sup>34</sup> The contract was silent on the subject of copyright, extended only to the "'production of *RENT* to be performed at New York Theater Workshop, 79 East 4th Street,'" and contained no mention of any other use of the play or its contents.<sup>35</sup> Thomson, however, apparently had no intention of giving up the copyrights to her work at the New York Theater Workshop.<sup>36</sup>

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<sup>26</sup> *Id.* at 5.

<sup>27</sup> Appellant's Brief at 6.

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 7.

<sup>32</sup> Appellant's Brief at 7.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 7.

The Thomson-Larson collaboration began, and, from May through October, 1995, the two rewrote the script of *Rent*.<sup>37</sup> Working closely together, Thomson and Larson did most of the revisions alone in Larson's apartment.<sup>38</sup> In their working relationship, they shared artistic control over the direction the script was to take.<sup>39</sup> Choices about what was to be included in the script were arrived at through agreement.<sup>40</sup> When artistic disputes arose, Thomson at times deferred to Larson's ideas, and at other times Larson deferred to Thomson's.<sup>41</sup> Despite Thomson's previous expectations, her work with Larson began developing into a relationship more akin to that of coauthors than that of dramaturg/playwright.

As their relationship evolved toward coauthorship, Thomson and Larson began to redefine Thomson's role, expressly discussing the question of coauthorship.<sup>42</sup> Testimony before the district court, which the court held to be true, revealed that months before *Rent* opened anywhere, Larson asked Thomson to work with him as a playwright. Moreover, in response to Thomson's statement to Larson that she was flattered by his request that she contribute specific wording to the text, Larson replied, "Of course I want you to do that!"<sup>43</sup> In addition, Larson assured Thomson, "I'll always acknowledge your contribution," . . . "I would never say that I wrote what you did."<sup>44</sup>

Larson's subsequent actions reflected his comments to Thomson regarding their working relationship. For example, Larson gave credit to Thomson on the copyright page of the script just below the credit line Larson and Aronson had agreed would always be included in the *Rent* drafts.<sup>45</sup> Furthermore, Larson never suggested to Thomson that she should agree that her contribution be labelled a "work for hire" or that she should transfer or give up her copyright interest.<sup>46</sup>

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<sup>37</sup> Appellant's Brief at 8.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 8.

<sup>42</sup> Appellant's Brief at 9.

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

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

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 9.



Larson's and Thomson's efforts to improve *Rent* began to pay off materially in September of 1995. At that time, the New York Theater Workshop was re-evaluating its continued support of *Rent*.<sup>47</sup> Nicola was concerned that the play had not developed enough for the Workshop to continue with the project. "I'm not sure we can go ahead with this,"<sup>48</sup> Nicola told Grief; "I need to feel more confidence in where the text is."<sup>49</sup> In a memorandum to Grief, Nicola stated "we won't go ahead with a production without some sort of viewing of this draft well before the first rehearsal."<sup>50</sup> By this time, however, the Larson-Thomson collaboration had wrought a dramatic change to the script of *Rent*. Upon hearing the sing-through of the revised version, Nicola decided to continue the Workshop production of *Rent*.<sup>51</sup> Without the addition of any major revisions, this was the version of *Rent* that went to Broadway.<sup>52</sup>

In drafting this final version, Larson and Thomson "entirely rewrote or substantially altered" an estimated 1,212 of the 2,542 lines in the script.<sup>53</sup> These changes resulted in close to 48 percent of the script being either "totally new or substantially different" as a result of Larson and Thomson working together.<sup>54</sup> Approximately 9 percent of the new script was contributed solely by Thomson.<sup>55</sup> Larson, himself, credited Thomson with "transform[ing] the show."<sup>56</sup>

Both Grief and Seller acknowledged that Thomson's contributions were integral to the success of the new *Rent* script:

Director Grief. . . agreed that she had an 'enormous impact on the script,' and that 'she contributed significantly to the text.' During one of the Broadway rehearsals of the play, at the moment when it was announced that *Rent* had won the 1996 Pulitzer Prize for Drama, Grief took a microphone and immediately stated, to the cheers and applause of those present, that 'now is a good time for all of us to thank Lynn Thomson, who helped make this possible.'<sup>57</sup>

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<sup>47</sup> Appellant's Brief at 12.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

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

<sup>51</sup> *Id.* at 12-13.

<sup>52</sup> Appellant's Brief at 13.

<sup>53</sup> *Id.* at 11-12.

<sup>54</sup> *Id.* at 12.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 10.

<sup>57</sup> Appellant's Brief at 11 (citations to Trial Transcript and Exhibit Volumes omitted).

Seller expressed a similar belief that Thomson's contributions to *Rent* were integral to *Rent* being awarded the Pulitzer.<sup>58</sup>

In addition, experts neither directly associated with the development of the play nor with the New York Theater Workshop marked the profound transformation of the script which grew out of the Larson-Thomson collaboration. Anne Cataneo of Lincoln Center and Susan Jonas of the New York State Council on the Arts characterized the transformation which occurred as one in which an "unproduceable draft" was made into a "major hit."<sup>59</sup> Furthermore, several of Thomson's contributions were singled out by the press when examining the success of *Rent* and its anticipated importance in the development of American musical theater. *The Washington Post* quoted Thomson's lyrics to point out the central theme of the show: "How can you connect in an age / where strangers, landlords, lovers / your own blood cells betray? / What binds the fabric together / when the raging, shifting winds of change / keep ripping away?"<sup>60</sup> *The New York Times* credited *Rent* with taking the rock opera a step beyond *Hair* by taking a format usually lean on plot and character development and adding to it a "character-driven story."<sup>61</sup>

Subsequent to *Rent's* opening, Larson unexpectedly passed away, and negotiations began between Thomson and the Larson heirs over what would be a fair division of *Rent* royalties. When ongoing negotiations broke down, Thomson sued the estate of Larson for 16 percent of Larson's share of the royalties. This amount reflected Thomson's belief that she was entitled to approximately one-half of one-third of the royalties since substantial changes to at least one-third of the script resulted from her collaboration with Larson.

The district court acknowledged the importance of Thomson's contributions both to the script of *Rent* and to the overall success and marketability of the show.<sup>62</sup> In addition, the court found that Thomson had contributed more than a *de minimus* amount of independently copyrightable material to the script of *Rent*.<sup>63</sup> Nonetheless, the court denied Thomson's claim that she should be

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<sup>58</sup> *Id.* at 11.

<sup>59</sup> *Id.* at 12.

<sup>60</sup> *Id.* at 13.

<sup>61</sup> *Id.* at 13.

<sup>62</sup> See Transcript of Decision at 4-5, *Thomson v. Larson*, No. 96 Civ. 8876 (S.D.N.Y. 1997) (unpublished decision, on file with author).

<sup>63</sup> See *id.* at 5.

recognized as a joint author of *Rent*.<sup>64</sup>

## II. THE *RENT* DECISION

The *Rent* decision began its analysis by noting that the common definition of joint author and the legal or statutory definition of joint author may differ.<sup>65</sup> The court stated that the colloquial understanding of what a joint author is would most likely be that of two or more people entering into a working relationship in which "each contributes different chapters to an integrated whole or a book in which there are no separately assignable chapters but in which each contributes language to the overall work in roughly equal proportions."<sup>66</sup> The court then asserted that a legal definition of joint authorship or of what constitutes a joint work may encompass other types of working relationships.<sup>67</sup> Therefore, the court stated that the issue to be resolved was "whether what happened between Lynn Thomson and Jon Larson met the statutory definition as it has been construed by the higher courts of a joint work."<sup>68</sup>

The court then discussed briefly the history of the development of *Rent* from its inception to the final version, including the Thomson-Larson collaboration. In its review, the court stated that it believed the expert testimony supporting the facts that *Rent* underwent a radical change from its original version to its present form, that the change transformed a non-producible work into one fit for production, and that between one-third and one-half of the final draft was different from the New York Theater Workshop production.<sup>69</sup>

The court proceeded to analyze whether or not the Thomson-Larson collaboration attained the legal status of joint authorship. Citing section 101 of the Copyright Act, the court noted that "[t]he words of the statute raise at least two significant issues": whether both authors' contributions must be separately copyrightable, and what the requisite intent of the authors must be.<sup>70</sup> The district

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<sup>64</sup> See *id.* at 10.

<sup>65</sup> See *id.* at 1-2.

<sup>66</sup> *Id.* at 2.

<sup>67</sup> See Transcript of Decision at 2.

<sup>68</sup> *Id.*

<sup>69</sup> See *id.* at 3-4.

<sup>70</sup> *Id.* at 4. The court quotes the following portion of section 101 of the 1976 Copyright Act which defines a "joint work" as "a work prepared by two or more authors

court found that "on any standard of what sort of contribution is copyrightable, whatever specific words [Thomson] contributed meet that standard."<sup>71</sup> Thus, the court based its analysis of Thomson's claim upon the second issue, that of intent.<sup>72</sup> The court determined that the wording of the statute lent itself to two reasonable interpretations: either that each person who claims to be a joint author of a work intends that he or she will be a "co-owner of the work,"<sup>73</sup> or that each intends that his or her work will be "merged into" the final collaborative product.<sup>74</sup>

In trying to determine which interpretation of the definition was correct, the court turned to the Second Circuit's decision in *Childress v. Taylor*.<sup>75</sup> Although the district court's decision in *Childress* turned upon the copyrightability of the contributions of putative authors, the court addressed the question of intent in dicta,<sup>76</sup> and the court of appeals expanded upon this discussion.<sup>77</sup> The *Thomson* court quoted two paragraphs of the court of appeals' discussion in *Childress* about intent. In these paragraphs, the *Childress* court rejected the plain meaning of the statute. Although the *Childress* court noted that "[t]he wording of the statutory definition appears to make relevant only the state of mind regarding the unitary nature of the finished work and intention that their contributions be merged into inseparable or interdependent parts of a unitary whole,"<sup>78</sup> the court suggested that such a reading of the statute seemed to imply that people who traditionally do not expect to be considered joint authors with a primary author and whom a primary author would not consider to be joint authors, such as editors and research assistants, would come within the realm of the statutory definition of joint authorship.<sup>79</sup> The *Thomson* court accepted this suggestion, and, continuing to quote *Childress*, stated that the meaning of intent

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with the intention that their contributions be merged into an inseparable or interdependent parts [sic] of a unitary whole." 17 U.S.C. § 101 (1997).

<sup>71</sup> Transcript of Decision at 5.

<sup>72</sup> See *id.* at 4-5.

<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 5; *Childress* is an earlier case addressing the question of joint authorship. *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991). At issue was the rights of a researcher and idea person against those of a playwright. *Id.*

<sup>76</sup> 1997 Transcript of Decision at 5.

<sup>77</sup> 945 F.2d at 505, 508-09.

<sup>78</sup> *Id.* at 5 (citing *Childress*, 945 F.2d at 507.).

<sup>79</sup> *Id.* at 5-6.

in the statute must then reasonably be that the authors "entertain in their minds the concept of joint authorship, whether or not they underst[an]d precisely the legal consequences of their relationship."<sup>80</sup>

The *Thomson* court acknowledged that the *Childress* court's definition of intent was vague in that it did not define exactly what "concept of joint authorship" the parties must have in their minds.<sup>81</sup> However, the *Thomson* court concluded that the terms of *Childress* require 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 in 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."<sup>82</sup>

The court then moved on to interpret Larson's actions in order to determine his intent about his collaboration with Thomson. The court found six pieces of evidence which it felt led to the conclusion that Larson did not intend to share the indicia of ownership and authorship with Thomson. First, Larson, who typed all of the *Rent* scripts himself, used the billing "*Rent*, by Jonathan Larson." Moreover, in his biography for the January, 1996 playbill, Larson referred to himself as the author of *Rent*.<sup>83</sup> Second, in all of his contractual arrangements, Larson acted as though he were the sole author of *Rent*.<sup>84</sup> Third, the *Thomson* court concluded that "Mr. Larson retained and intended to retain at all times sole decision-making authority as to what went into the play."<sup>85</sup> Fourth, Larson stated in an interview "that he wrote everything that went into *Rent*. . . saying that in the theatre the writer is the king."<sup>86</sup> Fifth, Larson refused the aid of a bookwriter.<sup>87</sup> Sixth, in one of Larson's

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<sup>80</sup> *Id.* at 6.

<sup>81</sup> The definition is made all the more vague since the *Childress* court defined the necessary intent in the negative, without even setting definite parameters for this negative definition.

<sup>82</sup> Transcript of Decision at 7.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 7-8.

<sup>85</sup> *Id.* at 8.

<sup>86</sup> *Id.* at 8.

<sup>87</sup> Transcript of Decision at 8.

earlier collaborations, the copyright had been registered in the names of both collaborators; whereas, here, the copyright was registered only in Larson's name.<sup>88</sup>

Having decided that Larson manifested no intention that Thomson be a joint author with him, the court stated that there was no need to examine Thomson's intent or understanding of the collaborative relationship.<sup>89</sup> The court concluded by stating:

I can only express once again this genuine sorrow that I feel that this case ever came into this court and that the parties have been unable to resolve it. It is I think most unfortunate. And as everyone agreed during the course of the argument this morning, it never would have happened if this young man were here today. I hope some good may come out of it.

By commenting that the lawsuit never would have happened if Larson were here today, the court referred to an exchange between Judge Kaplan and the attorney for Larson's estate, Mr. Parcher, in which Judge Kaplan stated, "It seems equally clear that we wouldn't be here today if he were alive because [Thomson's] name might well be credited on the title page and an economic arrangement arguably more equitable would have been reached." Mr. Parcher replied, "Yes, I think that is possibly right."<sup>90</sup>

### III. THE FACTUAL BACKGROUND OF THE *CHILDRESS V. TAYLOR*<sup>91</sup> DECISION

As evidenced above, the court in *Thomson v. Larson*<sup>92</sup> relied heavily upon the Court of Appeals decision in *Childress v. Taylor*.<sup>93</sup> Even though it was not decided until 1992, *Childress v. Taylor*<sup>94</sup> set the precedent in the Second Circuit regarding the definition of "joint authorship" under the Copyright Act of 1976.<sup>95</sup> Fur-

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<sup>88</sup> *Id.* at 8-9.

<sup>89</sup> *Id.* at 10.

<sup>90</sup> *Id.*

<sup>91</sup> No. 87 Civ. 6924, 1990 WL 196013 (S.D.N.Y. Nov. 28, 1990), *aff'd* 945 F.2d 500 (2d Cir. 1991).

<sup>92</sup> *Thomson v. Larson*, No. 96 Civ. 8876, 1997 U.S. Dist. LEXIS 13150 (S.D.N.Y. July 31, 1997), *aff'd*, 147 F.3d 195 (2d Cir. 1998).

<sup>93</sup> 945 F.2d at 500.

<sup>94</sup> 798 F. Supp. 981 (S.D.N.Y. 1992).

<sup>95</sup> See generally Brophy, *supra* note 4. The only other reported case in the Second Circuit discussing joint authorship after the 1978 enactment of the 1976 Copyright Act and before *Childress* was *Weissman v. Freeman*. 868 F.2d 1313 (1989). This case addressed the question of whether Freeman could consider himself a copyright holder of a

thermore, in the Second Circuit, *Childress* remains the controlling case on "joint authorship." Thus, the full import of *Thomson v. Larson*<sup>96</sup> can best be understood by examining *Childress*.

In *Childress*, Clarice Taylor, an actress who worked in an off-off-Broadway production<sup>97</sup> about the Apollo Theater<sup>98</sup> developed a stage persona based on the performer Jackie "Moms" Mabley.<sup>99</sup> During her preparation for the role, Taylor conducted focused research into the historical Moms Mabley. Taylor's research included "listen[ing] to her collection of Moms Mabley recordings, talk[ing] to anyone who might have met [Mabley] and becom[ing] familiar with Mabley's walk and demeanor."<sup>100</sup> During the run of the show, Taylor's interest in Moms Mabley deepened. Soon, Taylor solicited *Childress* to write a play centered on Mabley utilizing Taylor's ongoing research.<sup>101</sup>

*Childress* initially declined the offer.<sup>102</sup> Undaunted, Taylor pursued her goal of bringing the Moms Mabley story to the stage. Aware of Taylor's desire to bring the Moms Mabley story to life, the producers at the Greens Play Theatre contacted her. The producers asked Taylor if she would be interested in developing a play about Mabley at their theater for production in August, 1986.<sup>103</sup> Soon, *Childress* learned that Taylor had agreed to work with the Greens Play Theatre, and upon hearing that Taylor had secured an actual spot for the show, agreed to write the play.<sup>104</sup>

The Greens Play Theatre presented *Childress* and Taylor with a daunting schedule. In order for rehearsals to start on time, they would have to write the play in six weeks.<sup>105</sup> Taylor and *Childress*

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work written by Weissman, which was based upon a series of collaborative works written jointly by Weissman and Freeman. The court considered both the issue of joint authorship and of derivative works. However, its examination of joint authorship did not examine the definition of joint authorship to the extent the *Childress* court did since Freeman made no contributions to the new work, and there was no evidence that Weissman intended her work to be joined with the work of Freeman. *Id.*

<sup>96</sup> *Thomson v. Larson*, No. 96 Civ. 8876, 1997 U.S. Dist. LEXIS 13150 (S.D.N.Y. July 31, 1997), *aff'd* 147 F.3d 195 (2d Cir. 1998).

<sup>97</sup> See 945 F.2d at 502.

<sup>98</sup> 798 F. Supp. 981, 985 (S.D.N.Y. 1992).

<sup>99</sup> See 945 F.2d at 502.

<sup>100</sup> 798 F. Supp. at 985.

<sup>101</sup> 798 F. Supp. at 985; *Childress v. Taylor*, No. 87 Civ. 6924, 1990 WL 196013, \*2 (S.D.N.Y. Nov. 28, 1990).

<sup>102</sup> 798 F. Supp. at 985; 1990 WL 196013, at \*2.

<sup>103</sup> 798 F. Supp. at 985; 1990 WL 196013, at \*2.

<sup>104</sup> 798 F. Supp. at 985; 1990 WL 196013, at \*2.

<sup>105</sup> *Id.*

were in close communication during the entire time in which they were developing the script.<sup>106</sup> As Childress completed each act of the play, she would submit it to Taylor.<sup>107</sup> They continued to work this way until they had completed the script.<sup>108</sup>

#### IV. THE CHILDRESS DECISION

The court found, and Taylor herself stated, that her relationship with Childress consisted of Taylor "researching while . . . [Childress was] writing."<sup>109</sup> Since Taylor provided Childress with the majority of the background information about the play and much of the framework for the episodes within the play, it could certainly have been argued that Taylor's research and contributions were crucial to Childress' accomplishment of writing the entire play within only six weeks. Facilitating a work and coauthoring a work, however, are not necessarily the same thing.

Taylor's work on the Moms Mabley play never extended beyond facilitating Childress' authoring of the show. Taylor's contributions were limited to suggestions for the setting and action of the scenes, facts about Mabley's life, and similar ideas.<sup>110</sup> Childress, on the other hand, "was responsible for the actual structure of the play and the dialogue."<sup>111</sup> In fact, the court found that only one line out of the entire script was actually written by Taylor.<sup>112</sup>

In light of the nature of Taylor's contributions to the Moms Mabley show, the district court found that Taylor did not contribute copyrightable material. Since most authorities assert that joint authorship under the Copyright Act is predicated upon a person's creation of copyrightable material,<sup>113</sup> and the district court fol-

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<sup>106</sup> 1990 WL 196013; at \*2.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at \*3.

<sup>111</sup> 945 F.2d 500, 502 (2d Cir. 1991).

<sup>112</sup> 1990 WL 196013, at \*3.

<sup>113</sup> See Brophy, *supra* note 4, at 463. Brophy provides an overview of the opinions of academics and the federal courts concerning whether contributions by joint authors must be copyrightable in order to allow that contributor to be considered a joint author. The majority opinion, held by Professor Goldstein, the Second Circuit, the Ninth Circuit, and the Eleventh Circuit is that the contributions must be copyrightable. *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991); *Ashton-Tate Corp. v. Ross*, 916 F.2d 516 (9th Cir. 1990); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990). The minority opinion, held by Professor Nimmer and espoused by the D.C. Circuit,



lowed conventional reasoning on this point, Taylor's claim to joint authorship failed.<sup>114</sup> The court stated that "[t]o the extent that Taylor made creative suggestions to the Play, her efforts fall far short of that 'substantial and significant contribution' which is 'required to reach a finding of joint ownership.'"<sup>115</sup> Although *Childress* ultimately turned upon Taylor's failure to provide separately copyrightable material, both courts, as discussed *supra*, addressed the intent necessary to find joint authorship.<sup>116</sup>

## V. ANALYSIS OF THE *CHILDRESS* TWO-PRONGED TEST

*Childress* provided the Second Circuit with a two-pronged test for determining joint authorship: (1) whether the putative authors' contributions are separately copyrightable and (2) whether the collaborators intend legally to be joint authors.<sup>117</sup> Unfortunately, in its efforts to protect the rights of authors, the *Childress* test that could potentially deny a person the copyright in their own writings. Even if this flaw in the *Childress* test did not exist, however, the dissimilarity of the facts of *Thomson* and *Childress* point out other flaws in the test and raise a question about whether or not the *Childress* test should, in fact, have been applied without modifica-

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finds that the contributions need not be copyrightable. *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1998). The other federal courts have either not addressed the question or have explicitly declined to decide the issue. See Brophy, *supra* note 4, at 463-72.

<sup>114</sup> 1990 WL 196013.

<sup>115</sup> 1990 WL 196013, at \*5 (quoting *Picture Music, Inc. v. Boume, Inc.*, 314 F. Supp. 640, 647 (S.D.N.Y. 1970)).

<sup>116</sup> See *Childress v. Taylor*, No. 87 Civ. 6924, 1990 WL 196013 (S.D.N.Y. Nov. 28, 1990), *aff'd* 945 F.2d 500 (2d Cir. 1991). The district court held that Taylor had not provided separately copyrightable material, and, therefore, could not be *Childress*' coauthor. 1990 WL 196013, at \*4-5. The court then very briefly noted in dicta that Taylor's belief that she was a coauthor, in itself, could not satisfy the requirements for establishing joint authorship, especially when *Childress* did not share that belief. *Id.* at \*5. The court of appeals affirmed by setting out in detail the two-pronged test for joint authorship. 945 F.2d at 504-508. The court stated that it "need not agree with [the] conclusion that Taylor's contributions were not independently copyrightable." *Id.* at 508. The courts' characterization of Taylor's contributions, however, implied that it agreed that they were not copyrightable. *Id.* at 508 (describing Taylor's contributions as "furnishing the results of research," "incidental suggestions," "contributing ideas," and "helpful advice"). Instead, the court ostensibly affirmed on the question of intent, although intent was not the basis of the district court's holding.

<sup>117</sup> 945 F.2d at 504-09.

tion to *Thomson*. Thus, not only the *Childress* test but also the implications of strictly applying it to collaborative relationships must be examined.

### A. *The First Prong—Copyrightability*

Since *Thomson* turns on the second prong of the *Childress* test—intent—the majority of this section will focus on that prong and the requisite intent necessary under *Childress* to form a joint work. However, it is worthwhile to pause briefly to examine the first prong of the *Childress* test—copyrightability—since there is some debate over the validity of the copyrightability requirement. As will be seen, the *Childress* court read extra requirements into the words of the Copyright Act, and it did so consistently in its requirements for both the first and second prong of its test. In addition to assisting to illustrate the consistency with which the *Childress* court chose to read additional requirements into the Copyright Act, a brief discussion of the first prong will help to provide background on the *de minimus* theory of copyright which will be addressed in a modified format at a later point in this Comment.

#### 1. The *De Minimus* Theory<sup>118</sup>

In the years following the adoption of the Copyright Act of 1976, there has been little case law in the federal circuits addressing the question of whether collaborative contributions must be separately copyrightable in order to sustain a claim of joint authorship.<sup>119</sup> While a minority of circuits have declined to adopt the separately copyrightable standard,<sup>120</sup> the majority of those who have considered the standard have adopted it.<sup>121</sup>

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<sup>118</sup> See *supra* note 5.

<sup>119</sup> See Brophy, *supra* note 4, at 462.

<sup>120</sup> The Third Circuit has declined to rule on the question. See *Andrien v. Southern Ocean County Chamber of Commerce*, 927 F.2d 132, 136 (3d Cir. 1991). The D.C. Circuit has indicated that it would not require separate copyrightability. *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1497 (D.C. Cir. 1988). However, the First, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits have yet to rule on the question. See Brophy, *supra* note 4, at 463-72. In addition, the Supreme Court declined to comment on dicta in a District of Columbia's Circuit Court decision, which suggested that the Copyright Act does not require separately copyrightable contributions in order for there to be a joint work. *Reid*, 490 U.S. at 753 n.32.

<sup>121</sup> The Second Circuit decided to require copyrightability in *Childress*. 945 F.2d 500

Despite the practice of the majority, or perhaps because the true majority of the circuits have simply not addressed the question,<sup>122</sup> there is some debate among scholars about the validity of this requirement as it applies to collaborative works.<sup>123</sup> Some argue that a finding of joint authorship should not require that both parties have contributed separately copyrightable material.<sup>124</sup>

Melville Nimmer<sup>125</sup> endorses a theory under which collaborators can be found to be joint authors even though one party never produces a single copyrightable item during a working relationship.<sup>126</sup> Instead, Nimmer suggests that the amount of material contributed by each party should be examined in order to determine whether each party's contributions were *substantial* enough for that person to be considered a coauthor of a work.<sup>127</sup>

Under this theory, collaborators' contributions need not be equal or alike in nature, form, substance, or content; however, the amount contributed by each must be more than *de minimus*.<sup>128</sup> "Thus, if authors A and B work in collaboration, but A's contribution is limited to plot ideas that standing alone would not be copyrightable, and B weaves the ideas into a completed literary expression, it would seem that A and B are joint authors of the resulting work."<sup>129</sup>

Although most courts reject this theory,<sup>130</sup> Nimmer cites to the Copyright Act, itself, and the Act's legislative history for support.<sup>131</sup> Noting that the Act defines a work of joint authorship as a "work prepared by two or more authors with the intention that their

(2d Cir. 1991). The Ninth Circuit and Eleventh Circuit also require copyrightability. See *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1493 (11th Cir. 1990). In addition, in an unpublished opinion, the Sixth Circuit implies a requirement of copyrightability. See *BancTraining Video Sys. v. First Am. Corp.*, 21 U.S.P.Q.2d (BNA) 2014, 2017 (6th Cir. 1992); see also Brophy, *supra* note 4, at 468 n.87.

<sup>122</sup> See *supra* note 121.

<sup>123</sup> See *supra* note 120 and accompanying text; see also 1 PAUL GOLDSTEIN, *COPYRIGHT* § 4.2.1.2. (1996).

<sup>124</sup> See *supra* note 121; see also NIMMER, *supra* note 5, at § 6.07.

<sup>125</sup> Author of the multivolume treatise NIMMER ON COPYRIGHT, *supra* note 5.

<sup>126</sup> NIMMER, *supra* note 5, at § 6.07.

<sup>127</sup> NIMMER, *supra* note 5, at § 6.07; see also *supra* note 121.

<sup>128</sup> NIMMER, *supra* note 5, at § 6.07.

<sup>129</sup> NIMMER, *supra* note 5, at § 6.07.

<sup>130</sup> See, e.g., *Erickson v. Trinity Theatre, Inc.* 13 F.3d 1061, 1071 (7th Cir. 1994); *Napoli v. Sears, Roebuck*, 835 F. Supp. 1053, 1059 n.5 (N.D. Ill. 1993); *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990).

<sup>131</sup> NIMMER, *supra* note 5, at § 6.07.

contributions be merged,"<sup>132</sup> Nimmer states "[t]hat language contains no requirement that each contribute an independently copyrightable component to the joint work."<sup>133</sup> He further notes that the legislative history stresses the intent of the collaborators. Specifically, "the legislative history similarly elevates intention as the touchstone, without placing any further parsing as to the copyrightable status of each individual component that the parties intend to contribute to the work as a whole."<sup>134</sup>

While the *de minimus* argument may have some merit under certain situations,<sup>135</sup> most courts avoid this interpretation of copyright law in an effort to keep copyright manageable, to maintain a degree of certainty in copyright law, and to limit frivolous lawsuits.<sup>136</sup> Courts suggest that the process of weighing contributions absent a copyrightability requirement would be unwieldy since the elements being examined would be even less tangible than those scrutinized with the copyrightability requirement.<sup>137</sup> Hypothetically, without a copyrightability requirement, the balance could depend on one part entirely on the substance and nature of the ideas contributed by one of the parties. Courts further argue that precedents set by the *de minimus* standard would be difficult to follow in that they would lack a tangible line between which contributions are and which contributions are not substantial or sufficient enough to secure the position of joint author.<sup>138</sup> Finally, without a requirement that the contributions of all joint authors be separately copyrightable, courts fear that, once a work becomes profitable, an author would be at risk of being sued by people with whom the author merely interacted if these interactions are in some way reflected in the finished work.<sup>139</sup> That is, courts assert that the inherently

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<sup>132</sup> NIMMER, *supra* note 5, at § 6.07 (quoting 17 U.S.C. § 101 (1997)).

<sup>133</sup> NIMMER, *supra* note 5, at § 6.07.

<sup>134</sup> NIMMER, *supra* note 5, at § 6.07.

<sup>135</sup> For example, Nimmer singles out the motion picture industry as being a collaborative business which would benefit from the use of the *de minimus* theory of joint authorship. NIMMER at § 6.07. Nimmer asserts that rewarding all integral participants in the creative process would serve to forward "copyright's goal of fostering creativity." *Id.* For support, Nimmer cites to an article written by David A. Gerber. See David A. Gerber, *Joint Authorship Requirements Questioned by Courts*, NAT'L L.J., Apr. 30, 1990, at 24.

<sup>136</sup> Cf. *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

<sup>137</sup> See *Erickson v. Trinity Theatre, Inc.* 13 F.3d 1061, 1070 (7th Cir. 1994).

<sup>138</sup> See *id.*

<sup>139</sup> 945 F.2d at 507.

appropriative nature of the artistic process creates too many avenues for suit if there exists no requirement of separate copyrightability to raise the bar.

For now, the question of applying the *de minimus* test to those joint authorship questions in which one partner's contribution is not separately copyrightable need not be examined further when considering the *Thomson* case. However, the theory will be drawn upon in the proposal of a modified *Childress* test at the conclusion of this Comment.

## 2. The Requirement of Copyrightability in *Childress*

Since most courts presently require separately copyrightable contributions to support a claim of joint ownership, the Second Circuit's decision in *Childress* mandating the contribution of copyrightable material<sup>140</sup> is not surprising. In its ruling, the court of appeals expanded upon and further defined the district court's discussion of including a copyrightability requirement for contributors to be eligible as joint authors.<sup>141</sup>

The court of appeals first examined the issue of copyrightability. Examining the Copyright Act's definition of "joint work,"<sup>142</sup> the court of appeals acknowledged that the text of the Act did not require that the contributions of all collaborators be separately copyrightable in order for them to be considered joint authors.<sup>143</sup> However, it then went on to support the ruling of the lower court on the grounds of practicality and equity.<sup>144</sup> Requiring separately copyrightable contributions, the court asserted, helps to guard against frivolous lawsuits by "those who might otherwise try to share the fruits of the efforts of a sole author of a copyrightable work."<sup>145</sup> Furthermore, the court believed that this requirement provided a needed and proper fulcrum in the equitable balance between copyright law and contract law.<sup>146</sup> On the one side of the balance would sit collaborations in which the proprietary interests of those people who mentally and physically "created copy-

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<sup>140</sup> *Id.* at 502.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 504.

<sup>143</sup> *Id.* at 504-06.

<sup>144</sup> 945 F.2d at 507.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

rightable material" would be automatically protected.<sup>147</sup> On the other side would be instances of work for hire or other arrangements in which a contractual agreement would protect the interests of other parties who were crucial to the creation of a copyrightable work.<sup>148</sup> Thus, the court held: "It seems more consistent with the spirit of copyright law to oblige all joint authors to make copyrightable contributions, leaving those with non-copyrightable contributions to protect their rights through contract."<sup>149</sup>

## B. *The Second Prong—Intent to Become Joint Authors*

### 1. The Copyright Act and the House Report

As mentioned, the second prong of the *Childress* test is necessary intent. The nature of the intent required by the legislature in the Copyright Act is arguably broader than that which the court ultimately required in *Childress*. Section 101 of the Copyright Act simply provides that "[a] 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."<sup>150</sup> As defined by the House Report on the Copyright Act, the intent mentioned in section 101 is found:

if each of the authors prepared his or her contributions with the knowledge and intention that it would be merged with the contributions of other authors as 'inseparable or interdependent parts of a unitary whole.' The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit . . . .<sup>151</sup>

Thus, the type of intent required by the legislature in drafting the Copyright Act is simply intent on the part of the collaborators of a copyrightable work to merge their individual works into one unitary work. The *Childress* court, however, added an additional qualifier to this intent requirement—the intent on the part of each collaborator to enter into a legal relationship as joint authors.

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> 945 F.2d at 507.

<sup>150</sup> 17 U.S.C. § 101 (1997).

<sup>151</sup> H.R. REP. NO. 94-1476, at 120 (1976), reprinted in 1976 U.S.C.A.N. 5659, 5736.

## 2. The *Childress* Choice in Defining Intent

The New York District Court observed that, under 17 U.S.C. § 101, "[a] 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."<sup>152</sup> The *Childress* court subsequently interpreted this language to require that both authors must have intended their relationship to be that of coauthors in order for them to be joint authors.<sup>153</sup> Thus, the court implicitly rejected the idea that the plain meaning of the statute was that, if two people worked together with the purpose of creating a single, fully integrated work, if they combined their efforts to create a work of authorship,<sup>154</sup> then a joint work would be created and the authors would be coauthors.<sup>155</sup>

In defining the necessary intent, the *Childress* court relied on the following reasoning:

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. The copyright law protects original creations which find their form and derive their being from the particular expressions of their creator.<sup>156</sup>

This reasoning was subsequently supported by the court of appeals, which stated that "the sharing of rights should be reserved for relationships in which all participants fully intend to be joint authors."<sup>157</sup> Thus, the *Childress* court interpreted statutory wording indicating an intent to create a joint work as indicating an intent to become joint authors.<sup>158</sup>

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<sup>152</sup> *Childress v. Taylor*, No. 87 Civ. 6924, 1990 WL 196013, at \*4 (S.D.N.Y. Nov. 28, 1990), *aff'd* 945 F.2d 500 (2d Cir. 1991).

<sup>153</sup> *Id.* at \*4-6.

<sup>154</sup> For the purposes of the Copyright Act, a work of authorship is "[an] original work[ ] . . . fixed in [a] tangible medium" and include works such as literary, musical, dramatic and choreographic works, pantomimes, "pictorial, graphic, and sculptural works," "motion pictures and other audiovisual works," "sound recordings," and "architectural works." 17 U.S.C. § 102 (1997).

<sup>155</sup> The court observed that case law in the Second Circuit had at one time applied a test which examined whether the parties claiming joint authorship had made a "substantial and significant contribution" to a work. *Childress*, 1990 WL 196013, at \*5. However, it then goes on to state that such decisions were made "before the enactment of the Copyright Act of 1976, with its more restrictive definition of a 'joint work.'" *Id.* at \*5.

<sup>156</sup> 1990 WL 196013, at \*5.

<sup>157</sup> 945 F.2d at 509.

<sup>158</sup> 1990 WL 196013, at \*4-6.

## VI. AN ANALYSIS OF THE APPLICATION OF THE *CHILDRESS* TEST TO *THOMPSON V. LARSON*

### A. *A Comparison of the Childress Decision and the Rent Decision*

While such reasoning as the courts exhibited may be adequate for deciding a case such as *Childress*, in which no significant copyrightable contributions were made, the application of this principle, without further refinement, to the *Rent* case poses problems. In *Childress*, the question of intent did not even need to be reached. Although both *Childress* courts discussed intent, they did so primarily in the context of the collaboration before them, a collaboration in which there was no separately copyrightable contribution made.<sup>159</sup> The reasonable expectations of collaborators as to whether or not they would be joint authors would likely be different in a situation where only one party made copyrightable contributions than those expectations would be if both parties made copyrightable contributions, as in *Thomson*.

In applying the *Childress* test, the *Thomson* court failed to acknowledge the effect of the differing contributions upon the reasonable expectations of either Thomson or Larson. 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. Furthermore, much of what she contributed was anecdotes about Moms Mabley's life which, since Moms was a real person, were already in the public domain. Even under a *Nichols* examination,<sup>160</sup> the level of specificity of *Childress*' contributions probably would not have risen to a level for her reasonably to think that she had become a joint author.

In contrast, Thomson contributed not only elements of structure, plot, and characterization in a work of fiction (which, in itself, would argue at least one step toward authorship and away from a scenario on all fours with the *Childress* collaboration because of the greater level of creativity that adheres in work of fiction) but also actual language. Thomson wrote portions of the script, an act which could reasonably support her belief that she was acting as a coau-

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<sup>159</sup> 945 F.2d at 507-09; 1990 WL 196013, at \*4-6.

<sup>160</sup> See *supra* note 5.



thor and which also could reasonably have caused her collaborator to wonder whether his collaborator was, in fact, his coauthor. However, as did the *Childress* court,<sup>161</sup> the *Thomson* court never even examined Thomson's intent, deferring solely to what it believed to be the intent of the primary author.<sup>162</sup>

While still questionable, the deference afforded to the intent of the primary author by the *Childress* court is more reasonable than that of the *Thomson* court in that only one person, Childress, actually wrote the Mome Mabley play. When two people have been sufficiently involved in determining the expression of a copyrightable work, however, it should become necessary at least to examine the intent of the person claiming secondary authorship. Such an examination would not only protect lesser known authors from more powerful authors but also allow the court to determine if there was a reasonable misunderstanding that led the secondary author to provide work for which he or she deserves adequate protection and remuneration. Such protection would ensure that the purpose of the Copyright Act—to promote the useful arts—would be better furthered.

The Larson-Thomson collaboration presents the perfect scenario under which the need to consider a secondary author's rights to the protection of her work should arise. In *Thomson*, the court was inclined to find that Thomson had indeed contributed copyrightable material to *Rent*.<sup>163</sup> Furthermore, the court gave credence to testimony by witnesses which indicated that Thomson's contributions played a significant role in turning an otherwise unmarketable manuscript into a financial and critical success.<sup>164</sup> The court, however, refused even to inquire as to whether Thomson's expectations of joint authorship were reasonable under the circumstances of her collaborative relationship.

Despite finding that Thomson's collaboration with Larson was a factor in making *Rent* a successful work and that her contributions were not only important but also separately copyrightable, the court did not find that Thomson attained joint authorship status as a result of her contributions to the collaborative *Rent* project.<sup>165</sup> Having

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<sup>161</sup> 945 F.2d at 509.

<sup>162</sup> Transcript of Decision at 10, *Thomson v. Larson*, No. 96 Civ. 8876, (S.D.N.Y. 1997) (unpublished decision, on file with author).

<sup>163</sup> 1997 U.S. Dist. LEXIS 13150.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at \*7-10.

found that Thomson had contributed copyrightable material to the play, the court then denied her joint authorship status based upon a lack of *intent* of the *parties* to create a work of joint authorship.<sup>166</sup>

In fully relying on the court of appeals decision in *Childress*, the *Thomson* court did not properly consider the words of caution espoused by the *Childress* court that "a subjective state of mind cannot of itself satisfy the objective criteria of the copyright law."<sup>167</sup> 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 cocreators of *Rent*. Although Thomson refused repeatedly to assign the rights to her interest in the play, it was Larson's failure during the writing process to accord Thomson status as a coauthor that was dispositive in the court's opinion.<sup>168</sup> Whether he would, in fact, have done so or not once the two had fully completed the script can never be known since Larson passed away<sup>169</sup> before the play

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<sup>166</sup> *Id.* at 4-10.

<sup>167</sup> *Childress v. Taylor*, 1990 WL 196013, at \*5; See also the discussion of intent supporting the district court's assertion in 945 F.2d 500 (2nd Cir. 1991), at 508.

<sup>168</sup> Transcript of Decision at 5, 7-10.

<sup>169</sup> Everyone involved in the case agreed that the revisions made after Larson's death were minor. The point is that no one knows how Larson might have acknowledged Thomson's contributions to the final product because he did not survive to do so. In collaborative efforts, determinations of credit often cannot accurately be made until after the project is completed since the roles played by the individual collaborators. Cf. JACK STILLINGER, *MULTIPLE AUTHORSHIP AND THE MYTH OF SOLITARY GENIUS* 174-75 (1991). Stillinger relates the following tale which provides a classic example of how collaboration tends to be volatile. While his example is one in the film industry, the fluidity it reveals is typical of the collaborative arts:

As a rule, however, the authorship of films is so complicated and diffuse as to be, for all practical purposes, unassignable. Take as a typical case *Yankee Doodle Dandy*, the life story of the Broadway showman George M. Cohan produced for Warner Brothers by Hal B. Wallis in 1942. The first screen writer on the project was Robert Buckner, who dug into clippings, reviews, and profiles of Cohan, as well as Cohan's published autobiography. Cohan himself, then in his sixties, early became a collaborator, specifying a long list of things to be left unmentioned, dictating the story line, and responding with suggestions and revisions to a succession of drafts by Buckner. The writers Julius and Philip Epstein were brought in to enliven Buckner's script, and Edmund Joseph to tinker and add some jokes. Both the leading actor, James Cagney, and the director, Michael Curtiz, rewrote dialogue and improvised stage business during the shooting. At the end, however, only two of these half-dozen or more contributors appeared in the credits, Buckner because he initiated the writing and Joseph reportedly because he needed the credit to boost his career. Not unreasonably, the 1981 edition of the screen

had been entirely revised.<sup>170</sup>

Because it was based on the subjective intent of only one of the collaborators, the *Thomson* decision raises several problems. Misunderstandings can arise between collaborators, and therefore, in reaching an equitable solution, all possible information should be considered. By not considering all of the available information, the possibility arises that, even in a situation in which the collaborative contributions were more equal than they were in *Thomson*, a person could enter into a collaborative relationship believing in good faith that he will be a joint author, only to lose his remunerative and other interests in his works of authorship due to a misunderstanding. In addition, it raises the possibility that a primary author could enter into a collaboration with the intent of never according a secondary author joint authorship status even though it would be reasonable for the secondary author to believe or to understand that he would be accorded such status. Regardless, under the *Thomson* application of *Childress*, the primary author's intent would be the only factor of import.

Moreover, even if a standard of reliance upon the primary author's subjective intent is accepted as proper under normal circumstances, the court's reliance solely upon Larson's intent in the *Thomson* case is infused with another troubling factor: the court simply could not base its decision on Larson's true subjective intent. To do so would have been impossible as Larson passed away prior to Thomson's initiation of the suit;<sup>171</sup> therefore, the court had only

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play issued by the Wisconsin Center for Film and Theater Research carries no author's name on the title page. Librarians catalogue it (as they do screenplays generally) by uniform title rather than by author.

*Id.* (citations omitted).

<sup>170</sup> That Larson's heirs attempted to get Thomson to assign her rights in *Rent* to them, despite her persistent refusals to do so, is some indication that Larson's heirs considered Thomson to have been Larson's coauthor. The Larson heirs did succeed in being granted an assignment by Billy Aronson, the originator of the *Rent* concept and author of some of the lyrics in *Rent*. Thomson brought the suit not because she was seeking a full undivided interest in the show, but rather because she wanted to be compensated in proportion to her contributions to the show. The offers made to her by the Larson heirs were not proportionate to Thomson's contributions. Appellant's Brief at 4, 14; Robert Simonson, "*Rent*" Dramaturg Sues Larson Estate, *BACK STAGE*, December 6, 1996, at 1; see also Anne E. Komblut, *Federal Court Judge Axes 'Rent' Collection*, *DAILY NEWS* (N.Y.), July 24, 1997 at 18.

<sup>171</sup> Transcript of Decision at 4.

shadows of Larson's intent upon which to base its decision. The court looked for indications of Larson's intent in billing, copyright registration, interviews, contracts and other secondary sources.<sup>172</sup>

Judge Kaplan's<sup>173</sup> closing statement in *Thomson* should be cause for some concern in that it reveals the court's discomfort with its own ruling. Judge Kaplan referred to his earlier exchange with Mr. Parcher<sup>174</sup> in which Kaplan stated that were Larson alive today, Thomson's name "might well be credited on the title page and an economic arrangement arguably more equitable would have been reached" and to which Mr. Parcher replied, "Yes, I think that is possibly right."<sup>175</sup>

By following the *Childress* intent discussion without question, if one accepts the court's interpretation of its six pieces of evidence as to Larson's intent, one could conclude that the *Thomson* court had little choice but to find that Thomson should not be granted a joint interest in *Rent*. Nonetheless, the closing statement contains an acknowledgment by the court that, based upon the facts of the case, its ruling may arguably be less equitable than other reasonable arrangements would have allowed.

#### B. *The House Report on the Question of Intent*

If the discussion in *Childress* were the *Thomson* court's only guide to interpreting the meaning of intent in the Copyright Act's clause on joint authorship, the court's rigid adherence to *Childress* would be understandable. However, it is not. The House Report prepared at the time of the 1976 revision of the Copyright Act specifically addresses the meaning of intent regarding works of joint authorship.<sup>176</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> The District Judge presiding over *Thomson v. Larson*.

<sup>174</sup> A member of the counsel for the Estate of Larson in *Thomson v. Larson*.

<sup>175</sup> Transcript of Decision at 10.

<sup>176</sup> H.R. REP. NO. 94-1476, at 180 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736.

House Report 94-1476 discusses the definition of joint works and marks the intention to merge as the definition of intent, not the intention to be joint authors.<sup>177</sup>

Under the definition of section 101, a work is 'joint' if the authors collaborated with each other, or if each of the authors prepared his or her contributions with the knowledge and intention that it would be merged with the contributions of other authors as 'inseparable or interdependent parts of a unitary whole.' The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit . . . .<sup>178</sup>

The House Report does not address the *Childress* court's fear that editors and research assistants might fall under the statutory definition of a joint author if intent is considered to be the intent to merge rather than the intent to be a joint author. However, its discussion of joint authorship nonetheless points out two possible safety valves which could act to limit the effect feared by the *Childress* court. The House Report notes that, in general, collaborators on a motion picture script would not be considered joint authors since their work would fall under the work for hire doctrine.<sup>179</sup> Similarly, much of the work done by editors, research assistants, and similar contributors would likely fall under the work for hire doctrine as work performed by an employee within the scope of his employment.<sup>180</sup>

In those instances in which work by similar people collaborating with an author to produce a work does not fall under the work for hire doctrine, the House Report reveals another possible safety valve. The House Report states that it will not provide a statutory scheme dictating the rights and duties of joint authors.<sup>181</sup> On this issue, the House states that it intends to allow court-made law to stand regarding the rights and duties of joint authors that "coowners of a copyright would be treated *generally* as tenants in common."<sup>182</sup> By deferring to the courts regarding the rights and duties of coowners, the House not only sanctions the courts' past handling

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> 17 U.S.C. § 101 (1997).

<sup>181</sup> H.R. REP. NO. 94-1476, at 180 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736.

<sup>182</sup> *Id.* (emphasis added).

of questions of joint ownership but also provides courts with the opportunity to render other equitable decisions should a unique case arise.

Joint authors are generally to be treated as tenants in common,<sup>183</sup> but this is not a hard and fast rule. If a case arises in which the facts do not fit into precedent, and neither dismissing a claim of joint authorship nor providing the putative joint authors with separate undivided interests in the work seems to be equitable, then the courts have been left with the power to find another equitable arrangement, for example, apportioning royalties equitably.

That a branch of the government should become involved in apportioning royalties is neither a novel nor a controversial idea. The Copyright Royalty Tribunal was created in 1978 to set guidelines for the equitable distribution of blanket royalties and to hear disputes between collective organizations arising from the allocation of royalties under blanket licenses.<sup>184</sup> While the Copyright Royalty Tribunal is a part of the legislative, rather than the judicial branch of the government, its rulings are subject to review by the judiciary.<sup>185</sup> As a result, analyzing royalty divisions to determine whether they are reasonable is a function familiar to the federal courts. Therefore, the suggestion that the courts provide an equitable service similar to that provided by the Copyright Royalty Tribunal, in cases in which the parties have no recourse to the Copyright Royalty Tribunal, is not one that requires the courts to tread unfamiliar ground.

## VII. A CRITIQUE OF THE *RENT* DECISION'S ANALYSIS OF THE EVIDENCE ON INTENT

While the *Thomson* court's analysis of the meaning of intent raises some initial questions, the court's analysis of the putative joint authors' intentions also presents further troubling issues. For example, in the court's conclusion that Larson intended to retain sole decision-making authority concerning what went into the script, the court cited testimony given by Thomson concerning a

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<sup>183</sup> See *id.*

<sup>184</sup> See *Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal*, 662 F.2d 1, 3-7 (D.C. Cir. 1991).

<sup>185</sup> *Id.* at 5, 7 & n.16.

conversation she had had with Larson in which "she told him that she was flattered that he expected her to write."<sup>186</sup> The court held Thomson's reply to be proof that both Thomson and Larson understood Larson to have the final say about the content of the script.

While this may be true, it nonetheless also points out that Larson expected Thomson to write as part of their collaboration. While he may not have expected her to retain a full interest in the work as a joint author for her contributions, he did intend her to write with him and to provide him with written work to be combined with his own in the *Rent* script. Larson's similar, although more formal, arrangements with his other collaborator on *Rent*, Aronson, resulted at the time of their parting in an agreement in which Larson agreed that the play would always be entitled *Rent* and that it would be billed "a rock opera by Jonathan Larson. Original concept and additional lyrics by Billy Aronson."<sup>187</sup> In exchange, Aronson relinquished "any 'active' claims of coauthorship."<sup>188</sup> At a later time, Aronson then transferred his copyright interests in *Rent* "to the Larson heirs in exchange for four per cent of the authors' share of royalties."<sup>189</sup> These exchanges illustrate that both Larson and his heirs had contemplated the consequences of joint authorship upon Larson's work. In addition, such exchanges point out 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.<sup>190</sup>

However, in view of Larson's collaboration with Aronson, it is troubling that the court gave such substantial weight to Larson's statement that he wrote everything in *Rent*.<sup>191</sup> The court found that this statement provided insight into Larson's intent concerning ownership of the play in that it "evidences Mr. Larson's view that *Rent* in all respects was his."<sup>192</sup> Even if Larson had come to view

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<sup>186</sup> Transcript of Decision at 8, No. 96 Civ. 8876 (S.D.N.Y. 1997) (unpublished decision; on file with author).

<sup>187</sup> Appellant's Brief at 4.

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

<sup>189</sup> *Id.*

<sup>190</sup> Transcript of Decision at 1.

<sup>191</sup> *Id.* at 8.

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

*Rent* in its entirety as his, some of it clearly did not originate with him. Larson's misapprehension is understandable since the great majority of the *Rent* script was his work product, and it can be difficult to distance oneself from one's work and to view it objectively. Nonetheless, the court's reliance upon Larson's perception is troubling. If another primary author becomes similarly possessive of the whole of a work that she has lived and breathed for months or years while shaping it into existence but who has a collaborator who has contributed more equally than either Thomson or Aronson did to the creation of *Rent*, that author's perception of herself as the sole author should not be determinable. Yet, the court found that since Larson manifested no intent to consider Thomson a joint author, it did not need to explore her understanding or intent.<sup>193</sup> In a case in which the contributions are more equally balanced, such reliance upon the distorted subjective belief of the 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.

Furthermore, in view of the *Thomson* court's acceptance that Larson did intend for Thomson to write as part of her work with him, the court's reliance upon Larson's refusal to accept the aid of a bookwriter<sup>194</sup> as evidence of "his determination to do it himself"<sup>195</sup> raises some question in that it is based upon a purely syntactical difference. While it may be that Larson accepted the aid of a dramaturg when he would not accept the aid of a bookwriter because he wanted to write the play himself, he nonetheless used his dramaturg as though she were a bookwriter once he asked her to actually write portions of the script.<sup>196</sup> To hold that Larson's refusal to accept the help of a bookwriter illustrates his intent is to emphasize Thomson's title over Thomson's actual work. If Thomson had performed the same work but had been called a bookwriter as opposed to a dramaturg, it seems that the court might have been less inclined to find that Larson did not intend Thomson to be a

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<sup>193</sup> *Id.* at 10.

<sup>194</sup> *Id.* at 8.

<sup>195</sup> Transcript of Decision at 8.

<sup>196</sup> Arguably, some of Thomson's other work on characterization, organization and plot went beyond the normal scope of dramaturgical aid and entered into the realm of bookwriting aid. Here, the line need not be drawn in that gray area, however, since Thomson did provide separately copyrightable material which Larson used in his play. See *supra* note 5.



joint author. Such a result would be ridiculous since the only difference would be an open acknowledgment by Larson that he needed the help that he received rather than his more subdued acknowledgment of that need.

After analyzing the evidence placed before it, the *Thomson* court, in fact, found that both claimants had contributed to the work as authors. Then, in determining whether or not the parties' actions would allow them to be considered statutory coauthors, the *Thomson* court set the subjective intentions of one author against those of the other, thereby turning a determination of the statutory rights of the parties into a power struggle. In doing so, 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.

In *Thomson*, this power struggle was fought and lost before the court.<sup>197</sup> Although Thomson received credit as dramaturg, Larson was always credited as though he were the sole author.<sup>198</sup> Thomson did not argue that Larson did not do the majority of the writing of the script;<sup>199</sup> however, Thomson did assert that her contributions as a dramaturg were not simply mere editorial suggestions but rather entered the realm of coauthorship.<sup>200</sup> Unfortunately, her failure to secure for herself joint authorship status at the start of the working relationship, and her failure to get Larson to credit her as a joint author, resulted in a failure of her claim.

The court's reliance on *Childress* to dismiss Thomson's claim presents a troubling precedent. By examining only the outward manifestations of the collaborators' intentions, the court failed to give any weight to the collaborators' actions within their partnership.<sup>201</sup> The court found that Thomson provided copyrightable material to the play and that Larson incorporated this copyrightable material into the play.<sup>202</sup> While Larson fixed Thomson's contributions by inputting them into his computer with her consent,<sup>203</sup> this

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<sup>197</sup> *Thomson v. Larson*, No. 96 Civ. 8876, 1997 U.S. Dist. LEXIS 13150 (S.D.N.Y. July 31, 1997), *aff'd*, 147 F.3d 195 (2d Cir. 1998).

<sup>198</sup> Transcript of Decision at 7-9.

<sup>199</sup> *Id.* at 5.

<sup>200</sup> Appellant's Brief at 8.

<sup>201</sup> See Transcript of Decision.

<sup>202</sup> *Id.* at 3-5.

<sup>203</sup> See Ralph Blumenthal, *Memory Falters in Lawsuit for 'Rent' Royalties*, N.Y. TIMES,

should not have defeated Thomson's claim. Just because Larson took Thomson's copyrightable material and incorporated it into his show with her consent, should not necessarily divest her of her copyright interest in the play. Rather, these facts buttress Thomson's claim that she and Larson were acting as coauthors because Larson was treating her as though she was his coauthor rather than his dramaturg.

If Larson did not intend to use Thomson's contributions as though they were contributions by a coauthor but rather as though they were suggestions for improvement of a work which he intended to be entirely original to him, he would perhaps have incorporated a few of her suggestions word for word, but most suggestions he would have altered to reflect his own artistic sense and personality. Such was not the case.

The interaction between collaborators should be factored into a consideration of whether or not they should be regarded as joint authors. If the Larson-Thomson collaboration had remained a more traditional playwright-dramaturg relationship, Thomson's contributions would have been limited to those of an objective critic to the development of a work.<sup>204</sup> Had this been the case, then the type of collaboration at issue would have been similar to that presented in *Childress*. In *Childress*, the collaboration consisted of a playwright and a researcher.<sup>205</sup> The playwright contributed the copyrightable material for the script, and the researcher provided background information and guidance concerning character and plot development.<sup>206</sup> In a traditional playwright-dramaturg relationship, the playwright contributes the copyrightable material, and the dramaturg provides guidance in developing the script.<sup>207</sup> If the Larson-Thomson collaboration had followed that mold, then the district court judge would have been unlikely to have expressed the remorse that he had no choice but to find that, under *Childress*, Thomson was not a joint author.

A further problem with the *Childress* test and with its application in the *Thomson* decision is that it takes into consideration only

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July 23, 1997, at B2.

<sup>204</sup> See William Grimes, *A Power Behind the Play Emerges into the Light*, N.Y. TIMES, Feb. 2, 1997, at sec. 2, p. 4.

<sup>205</sup> *Childress v. Taylor*, No. 87 Civ. 6924, 1990 WL 196013 (S.D.N.Y. Nov. 28, 1990), *aff'd*, 945 F.2d 500 (Nov. 28, 1991).

<sup>206</sup> *Id.* at \*2-4, 945 F.2d at 502.

<sup>207</sup> See Grimes, *supra* note 204.

the parties' intentions at the *beginning* of their collaboration.<sup>208</sup> The social nature of collaboration invites role changes of the participants as the need arises, especially if the collaboration is an amicable one. The goal of collaborators is to create a finished product, whatever that product may be—a play, a song, a book, or a video game. In working toward that goal, a collaborator often finds himself taking on tasks that he had not intended to take on at the inception of the collaboration.<sup>209</sup> This is all the more true in the arts since resources are often stretched to the limit, and the only option for the artists may be to expand their duties or to admit defeat.<sup>210</sup>

If Thomson were to have refrained from going beyond the traditional limits of dramaturgy, *Rent* as we know it would not have come into existence. While it is possible that a commercially marketable play would have been produced had Thomson not acted in part as a coauthor, the play might not have been as successful as it is due in part to her contributions of authorship. Furthermore, if the collaboration were to have continued along traditional lines, then the time frame necessary for the revisions to become on par with the final product would most likely have been much longer than it was with Thomson's contributions of authorship, perhaps even longer than the time permitted by the New York Theater Workshop.

While writing pedagogues agree that guiding a young writer by offering suggestions rather than offering exact wordings leads to greater creative development on the part of the young writer, this is a slow process.<sup>211</sup> When deadlines must be met, "the writing pro-

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<sup>208</sup> See *Thomson v. Larson*, No. 96 Civ. 8876, 1997 U.S. Dist. LEXIS 13150 (S.D.N.Y. July 31, 1997), *aff'd*, 147 F.3d 195 (2d Cir. 1998); see also Appellant's Brief at 9 (noting that after Thomson and Larson began to work together Larson "never wrote or signed any document referring to himself as sole author . . . [or] stated, in any context, whether in words or substance, that he was the sole author of *Rent*, or that he had written all of *Rent*").

<sup>209</sup> See STILLINGER, *supra* note 169, at 174-75.

<sup>210</sup> To cite a recent example, from author's own experience as an employee at a performing arts center, a dance/theater troupe, funded in part by the NEA, was in the midst of their national tour when their stage manager left the company. Desperately in need of someone to call the show, since the tour was scheduled to perform at an institution which supplied a substantial portion of their funding, the woman who had been hired as the costume designer and wardrobe mistress took on the additional role of stage manager.

<sup>211</sup> See SUSAN L. LYTLE & MORTON BOTEL, *THE PENNSYLVANIA FRAMEWORK FOR READING, WRITING AND TALKING ACROSS THE CURRICULUM* 53, 70-71, 148-49 (Penn. Dep't of Ed. 4th ed. 1990).

cess" or "process writing" may necessarily be forced to take a back seat to collaborative writing between the more experienced and the less experienced writer.

To penalize the more experienced writer by denying coauthorship benefits simply because the status of the relationship between the two changed during the course of their collaboration would seem to go against the very purpose of copyright protection, "[t]o promote the . . . useful Arts."<sup>212</sup> Collaborative roles often change precisely in order to allow the art upon which people are collaborating to be presented to the public and to be swiftly placed in the market place. To discourage the shifting of roles would effectually discourage the completion of the best artistic product which the member artists are capable of producing because it discourages artists from disclosing to their colleagues their protectable expressions beyond their stated roles. The incentive to keep one's thoughts to oneself and to tuck them away for personal exploitation becomes greater. There is little reason to divulge material now if one will not profit from it now if, by keeping it to oneself, one can profit from it later. Under the *Thomson* reading of *Childress*, the only thing that is certain is that "nice guys finish last."

The question of how to determine the specifics of an agreement and when it was entered into needs to be further examined. Under the *Thomson* reading of *Childress*, there can be only one beginning moment of collaboration, when the partnership is formed, unless a formal contract is entered into at a later date. However, considering the fluid nature of collaborative roles, such a narrow reading of the commencement of a collaboration is reductive. If a collaboration develops into a working relationship which is different from what was originally planned, then at some point, a new collaboration is formed. The participants may disagree as to when, or if, the new collaboration occurred, but courts have been willing to balance factors and make decisions on sliding scales before. Thus, it is not beyond the realm of their capability to do so in a case of determining coauthorship.<sup>213</sup> In fact, considering the ever-increasing tendencies of courts to use flexible tests, it seems remarkable that cases involving copyrights are still being so rigidly and literally decided.

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<sup>212</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>213</sup> See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

Finally, perhaps the most troubling element of the *Rent* decision is that it leaves in doubt Thomson's own right to that part of *Rent* which she contributed. By denying her claim of joint authorship, the court leaves open the question of whether or not the court effectively divested Thomson of her right to copyright in her own material and transferred it to Larson. This is something even Larson would likely have found to be wrong as the court found that Larson stated, "he would never say that he wrote what Ms. Thomson did."<sup>214</sup>

If Thomson is not a joint author of *Rent* and the copyright in *Rent* belongs solely to Larson, then Thomson's contributions to *Rent* seem no longer to be her own. If, for example, Thomson wishes to use the lyrics she contributed to *Rent* in another play or to exploit them in any way, the court's ruling seems to prevent her from doing so without permission of the copyright holder, the Larson estate. Yet, this would go against the very essence of copyright law which provides that transfers of copyright can be made only in a writing signed by the current copyright owner.<sup>215</sup> In addition, it would appear to contravene section 201(e) of the Copyright Act which provides that unless a person has voluntarily transferred her interests in copyright, no governmental body may transfer that person's copyright interests.<sup>216</sup>

#### VIII. A PROPOSED JOINT AUTHORSHIP TEST

In order to avoid the above problems, courts should still apply the *Childress* test but with modifications to make it more equitable. *Childress* need not be overruled in order for joint authorship disputes to follow more closely the spirit of the Copyright Act. The requirement of separately copyrightable contributions should remain the same, but some of the *de minimus* theory should be injected, requiring a *non de minimus* level of copyrightable contributions. The *Childress* requirement of the intent to be joint authors should also remain, tempered, however, by a reasonable person standard

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<sup>214</sup> Transcript of Decision at 10, Thomson v. Larson, No. 96 Civ. 8876, (S.D.N.Y. 1997) (unpublished decision on file with author).

<sup>215</sup> 17 USC § 204(a) (1997).

<sup>216</sup> 17 U.S.C. § 201(e) (1997).

rather than the purely subjective one presently utilized and by the examination of the intentions of both parties, regardless of the relative proportion of their contributions.

Using this modified *Childress* test, a court would begin by examining each author's individual contribution to determine whether or not each putative joint author's contribution is separately copyrightable. Those contributions that meet this standard would then be further examined to determine whether or not they reach a *non de minimus* standard, as the court in *Thomson* found but declined to pursue. By requiring that each author's copyrightable contributions to a joint work be *non de minimus*, courts could avoid feeling that they are unfairly granting joint authorship status to a person whose separately copyrightable contributions are, nonetheless, insubstantial.

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 their 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.<sup>217</sup>

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<sup>217</sup> Scott C. Brophy similarly suggests that an element of rationality should be injected into the inquiry of intent. See Brophy, *supra* note 4, at 478-79. This is an attempt to avoid the injustice that may occur when the collaborators of a project cannot agree whether or not they are joint authors. *Id.* Brophy, however, would accomplish this by shifting the burden of proof to the party denying joint authorship. *Id.* That party would have to prove that the person claiming joint authorship is not a joint author if the person claiming joint authorship could show by a preponderance of the evidence that the parties intended to be joint authors. *Id.* at 479 ("On rebuttal, the denying party must then come forward with evidence that the other party d[id] not deserve authorship status. This would require proof that the person did not contribute copyrightable

Finally, in order to prevent inequity in situations in which a party contributed *non de minimus* material and reasonably believed itself to be a joint author, but for whom the granting of an undivided interest may seem unfair, the court could use its equitable powers to set a fair distribution of the copyright interest. For instance, if one-fifth of the material for a work was provided by one party and four-fifths by another, but the one-fifth was qualitatively the heart of the work, the court might determine that the parties should have an equal interest in the copyright. In other situations, of course, the court would find other suitable solutions.

If these methods were employed, the courts would be better able to tailor their rulings to fit the individual circumstances of the varied field of collaborative arts. While the degree of freedom provided to the courts would still be circumscribed by the Copyright Act, it would be greater than that currently held. Contracts would still be encouraged between collaborators, but those who did not have contracts would be better able to find equitable relief from the courts. Such equitable relief is necessary not only to foster the collaborative arts but also to provide artists with an incentive, rather than a disincentive, to work together to develop our unique national arts.

## CONCLUSION

The collaborative process is an integral part of the development of the arts. From professional ensembles to semi-professional and amateur workshops to local amateur artistic troupes, collaboration gives birth to the art and the artists of tomorrow. The free exchange of ideas among collaborators is integral to the process of developing works of collaborative art, and the Copyright Act should be enforced in such a manner as to encourage rather than to discourage the interchange of ideas at the heart of collaborative art.

The provisions of the Copyright Act concerning joint authorship should be read broadly enough to support and promote collaboration among artists. To deny an artist protection under the Act by not examining a collaboration from all angles, including both how the collaborators portray themselves and how the collaborators actually work together, is to risk denying an artist an economic incentive to

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expression . . . . The expression must go beyond description of an idea and it must be more than *de minimis* as defined by Nimmer.”).

continue to collaborate. In a world in which economic public support for the arts has been diminishing, to simultaneously diminish the economic support of the market place is to do an injustice to the men and women who struggle to make a living in the collaborative arts.

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