

Who Owns The Movies?

Joint Authorship under the Copyright Act of 1976 after *Childress v. Taylor* and *Thomson v. Larson*

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I. INTRODUCTION

A substantial split between the courts of appeals of the United States and substantial confusion among the district courts has developed with respect to the test for determining “joint works” or “co-authorship” under the Copyright Act of 1976.¹ The Supreme Court has not directly addressed the question of the appropriate test for joint authorship. The Copyright Act of 1976 provides that “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” are deemed “joint works” and the authors “co-authors.”²

Although the statutory language appears straightforward and literal, courts are concerned about affording co-authorship rights in film productions to each and every collaborator who did not assign his or her rights to the film or who is not a formal employee of the studio. The implications of co-authorship are profound. A co-author cannot

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¹ 17 U.S.C. § 101 (1976).

² 17 U.S.C. § 101 (1976).

be liable for infringement of the copyright, and each author has the independent right to use or license the copyright subject only to a duty to account for any profits for use of the copyright.³ Moreover, classifying a work as a “joint work” determines not only the initial ownership of the copyright, but also the duration of the copyright under § 302(c),⁴ the owner’s renewal rights under § 304(a), termination rights under § 203(a), and the right to import certain goods bearing the copyright under § 601(b)(1).

The Second Circuit addressed these concerns about affording co-authorship status to lesser contributors in the 1991 case of *Childress v. Taylor*⁵ and revised its approach again in 1998 in *Thomson v. Larson*.⁶ In addition to the statutory elements, the Second Circuit requires “a mutual intent to be joint authors”⁷ rather than the strict statutory test of “intent that their contributions be merged into inseparable or interdependent parts.” Following the Second Circuit’s lead, district courts within the first, second, fifth, and tenth circuits have adopted the *Childress/Thomson* mutual intent test.

The First, Fifth, Seventh, Eighth, Eleventh, and District of Columbia Circuits when addressing joint work arguments have followed the statute without requiring a mutual intent to be joint authors. Likewise, district courts within the Third, Sixth, Eighth, Ninth and Eleventh Circuits have followed the statute and have not required a mutual intent to be co-authors.⁸ The Seventh Circuit is in conflict both at the appellate

³ *Oddo v. Ries*, 743 F.2d 630, 633 (9th Cir. 1984); *Quintanilla v. Texas Television, Inc.*, 139 F.3d 494, 498 (5th Cir. 1998); *Cortner v. Israel*, 732 F.2d 267, 271 (2d Cir. 1984); Melvin B. Nimmer & David Nimmer, 1 NIMMER ON COPYRIGHT § 6.10 (1999).

⁴ Unless otherwise provided, all statutory references are to the Copyright Act of 1976, 17 U.S.C. § 101.

⁵ 945 F.2d 500 (2d Cir. 1991).

⁶ 147 F.3d 195 (2d Cir. 1998).

⁷ *Id.* at 200-03 following *Childress*, 945 F.2d 500.

⁸ As yet, the Third, Fourth, and Sixth Circuits have not determined the issue. Furthermore, when the First, Fifth, Seventh, Eighth, Eleventh, and District of Columbia Circuits analyzed whether works were “joint,” they applied the strict statutory test. These circuits have not specifically addressed or rejected the *Childress* or *Thomson* mutual intent to be co-author formulation. Accordingly, district courts have struggled with the authority and some have applied the *Childress* requirements despite decisions by their respective Circuit courts prior to *Childress* which did not

level and at the district level.

The distinction may seem unsubstantial and unimportant, but in practice, the difference between the approaches is significant. Assume the premise that a movie studio invests \$50 million in a film. Naturally, with such an investment, the studio desires exclusive ownership of the copyright to the production. The movie studio has 499 of the 500 contributors to the production sign a contract that their contributions are “works for hire” prior to their contributions; that they are employees of the movie studio; or that they are assigning their rights to the copyrights. The movie studio neglects to obtain an agreement from an editor, one significant contributor.

Under the Second Circuit approach, the intent to be “joint authors” would bar the editor from joint-authorship, as the studio made evident that it had no intent to share the copyright with anyone, and the editor’s contribution would not entitle the editor to rights to the film under the 1976 Copyright Act. Other circuits would perhaps allow the editor rights to the film as a co-author and afford the editor independent rights to exploit the film, as the film would meet the statutory test of 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.”

This article analyzes the two tests for “joint works” or “co-authorship”, the cases which have employed the alternative approaches, the history behind the 1976 Copyright Act and interpretative cases, and concludes that the test for joint authorship should mirror the statute and not require a “mutual intent” to be co-authors.

The approach taken—the Second Circuit or the strict statutory interpretation—will have profound effects on how business deals are structured in the film industry, affecting artists, writers, photographers, designers, composers, editors, directors, actors, musicians, makeup artists, and the financing of movie productions.

II. JOINT AUTHORSHIP IN THE STATUTORY SCHEME

A. *Joint authorship under the 1976 Copyright Act and the Statutory Scheme.*

Motion picture productions are largely a collaborative effort, with contributions from numerous persons and corporations. Which individuals or entities should be deemed the “author” or authors in this collaborative effort is a difficult question.⁹

In the United States, the problem is solved by the work made for hire provisions of § 101 and the assignment provisions of § 204. A movie studio can obtain the full copyright in a motion picture by contractual agreement with the actual creative contributors by either employing them directly¹⁰ or by obtaining a written independent contractor agreement,¹¹ or a written assignment of rights.¹² Circular #9 of the U.S. Copyright Office, titled “Works-Made-For-Hire Under the 1976 Copyright Act”, explains:

Although the general rule is that the person who creates a work is the author of that work, there is an exception to that principle: the copyright law defines a category of works called “works made for hire.” If a work is “made for hire”, the employer, and not the employee is considered the author.¹³

17 U.S.C. § 101 defines “joint work” as follows: “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.”

The House Report, although it is inconclusive, provides some

⁹ *The Berne Convention for the Protection of Literary and Artistic Works* (Paris Text, July 24, 1971) provides: “Ownership of copyright in a cinematographic work shall be a matter of legislation in the country where protection is claimed.” Art. 14 *bis* (2)(a). Art. 15(2) declares that “[t]he person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the maker of said work.”

¹⁰ 17 U.S.C. § 101(1) (1976).

¹¹ 17 U.S.C. § 101(2) (1976).

¹² 17 U.S.C. § 204(a) (1976).

¹³ U.S. Copyright Office Circular #9, p. 1.

guidance:

[A] work is “joint” if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention 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 was done, that the parts be absorbed or combined into an integrated unit¹⁴

The passage appears to state two alternative tests for “joint authorship”: (1) one focusing on the act of collaboration; and (2) the other focusing on the parties’ intent. The alternate tests appear to mirror the conflict between the circuit and district courts of the country. Accordingly, the legislative history is of marginal assistance in determining the applicable or appropriate test for ascertaining co-authorship under the 1976 Copyright Act.

The House Report on the 1976 Copyright Act regarding “co-authorship” states that “there this . . . no need for a specific statutory provision concerning the rights and duties of the co-owners [sic] of a work; court-made law on this point is left undisturbed.”¹⁵ Accordingly, to understand the meaning of the words selected by Congress when it stated 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,” this article analyzes how the “joint work” doctrine evolved prior to the enactment of the 1976 Copyright Act.

B. Joint Authorship Prior to the 1976 Copyright Act

The doctrine of joint authorship was nowhere referred to in previous Copyright Act.¹⁶ It was a judicial creation imported from English law¹⁷ by Judge Learned Hand in 1915 in *Maurel v. Smith*.¹⁸ In

¹⁴ H. R. REP. NO. 1476, 94TH CONG. reprinted in 1976 U.S.C.C.A.N. 5659, 5756; S. REP. NO. 473, 94TH CONG., 103.

¹⁵ H.R. REP. NO. 94-1476, at 121 (1976); S. REP. NO. 94-473, at 104 (1975).

¹⁶ 17 U.S.C. §§ 1-216 (superceded).

¹⁷ Incidentally, modern cases have deviated from English law regarding the rights of co-owners of literary property. The English doctrine is that no co-owner may exploit his interest, either through use or license without the consent of the other. *Powell v. Head*, 12 Ch. D. 866 (1879); *Cescinsky v. George Routledge & Sons, Ltd.*, 2 K.B. 325 (1916). The early American case of *Carter v. Bailey*, 64 Me.

Maurel,¹⁹ three individuals contributed the scenario, libretto and lyrics, respectively, to a single work, an opera. The contributions of the three individuals were contemporaneous and each agreed about the general design and structure of the opera. The court held that “[w]hen two or more authors pursuing a common design together create a single work, they become joint authors of the work in undivided shares which are owned by each author.”²⁰

The Hand court also held that joint works do not require a mutual intent to be joint authors at the time of creation. *Maurel*, quoting Coppinger, *Law of Copyrights* (4th Ed.) held:

The pith of joint authorship consists in co-operation, in a common design, and whether this co-operation takes place subsequent to the formation of the design by the one, and is varied in conformity with the suggestions and views of the other, it has equally the effect of creating the joint authorship as if the original design had been their joint con-

458 (1874) held that a defendant could reproduce a copyrighted book himself, without the consent of the other co-authors and without an accounting of profits. However, modern cases reject the English rule and require an accounting of profits. See *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 266, 267 (2d Cir. 1944) modified, 140 F.2d 268 (2d Cir. 1944); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569, 570 (2d Cir. 1955), *aff'd on reh'g*, 223 F.2d 252, 253 (2d Cir. 1955); *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 646 (S.D.N.Y. 1970), *aff'd* 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997, 34 L. Ed. 2d 262, 93 S. Ct. 320 (1972); *Oddo v. Ries*, 743 F.2d 630, 633 (9th Cir. 1984); *Batiste v. Island Records, Inc.*, 179 F.3d 217 (5th Cir. 1999); *Quintanilla v. Texas Television, Inc.*, 139 F.3d 494, 498 (5th Cir. 1998); Melvin B. Nimmer & David Nimmer, 1 NIMMER ON COPYRIGHT § 6.10 (1999); *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 522 (9th Cir. 1990).

¹⁸ 220 F. 195 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921), citing *Levy v. Rutley*, L.R. 6 C.P. 523 (1871); Cary, “Joint Ownership of Copyrights”, 1 STUDIES OF COPYRIGHTS 689 (1963).

¹⁹ 220 F. 195.

²⁰ *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 645 (S.D.N.Y. 1970), *aff'd*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997, 93 S. Ct. 320, 34 L. Ed.2d 262 (1972); see also *Maurel v. Smith*, 220 F. at 200; *Edward B. Marks Music Corp.*, 140 F.2d at 267; *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406, 410 (2nd Cir. 1946), *cert. denied*, 331 U.S. 820, 67 S. Ct. 1310, 91 L. Ed. 1837 (1947); *Shapiro, Bernstein & Co.*, 221 F.2d at 570.

ception.²¹

Accordingly, Judge Hand set forth the rule which has survived with little alteration until *Childress*, that a mutual intent to be co-authors is not required at the time of a work's creation.

The next major case on joint authorship came 29 years later with *Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc.*,²² also authored by Judge Hand. In *Edward B. Marks Music Corp.*, again no "mutual intent" was required. In fact, in that case, a lyricist sold lyrics to a publisher who, without the lyricists' knowledge hired someone else to set the words to music. Nevertheless, the Court held the work was joint, finding "a joint laboring in furtherance of a common design."²³ Judge Hand wrote: "[I]t makes no difference whether the authors work in concert, or even whether they know each other; it is enough that they mean their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such."²⁴

In 1947, in *Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co.*,²⁵ often labeled the "Melancholy Baby" case, a husband-wife duo composed music and lyrics, respectively. The publisher rejected the lyrics and engaged a second lyricist to write new lyrics. Despite the earlier collaboration, the court with Judge Hand on the panel, nevertheless held the resulting composition a "joint work" and found "joint authorship."²⁶

Suppose, for example, that after [the composer] had composed the music, expecting his wife to write the words, she had died or changed her mind about writing the lyrics, and [the composer] had then gone to [the publisher] and asked him to find someone to write the words. We submit that no court would hold that the fact that when [the composer] composed the music he expected his wife to write the words, would make the actual song any less a "joint work" of [the composer] and the lyricist found by [the publisher].²⁷

²¹ *Maurel*, 220 F. at 215.

²² 140 F.2d 266 (2d Cir. 1944).

²³ *Id.* at 267.

²⁴ *Id.*

²⁵ 161 F.2d 406 (2d Cir. 1946).

²⁶ *Id.* at 410.

²⁷ *Id.*

What is required to find a “joint work” was relaxed even further in 1955 in *Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co.*,²⁸ better known as the “12th Street Rag” case. In that case, the copyright to an instrumental piano solo piece was assigned by the copyright holder to a music publisher, whereupon, the publisher decided that the instrumental piece should be set to lyrics. The Court held that it was the intent of the assignee, rather than the author, which is at issue in determining intent “to merge the two contributions into a single work to be performed as a unit for the pleasure of the hearers”²⁹ The Court reasoned that treating the work as a “composite work” rather than a “joint work” “would leave one of the authors of the ‘new work’ with but a barren right in the words of a worthless poem, never intended to be used alone” which is a result “not to be favored.”³⁰ Accordingly, prior to the enactment of the 1976 Act, courts found “joint works” when there was an intent to merge contributions into a single unitary work, and did not require a mutual intent to be co-authors.

III. THE SECOND CIRCUIT AND ITS TESTS FOR “JOINT AUTHORSHIP”

In *Childress v. Taylor*,³¹ Clarice Taylor, an actress for over forty years researched comedienne “Moms” Mabley and became interested in developing a play based on Mabley’s life. Taylor began to assemble material about “Moms” Mabley, interviewing her friends and family, collecting her jokes, and reviewing library resources. Taylor contacted playwright Alice Childress about writing the play. Taylor was a natural choice, having written many plays and have also won an “Obie” award. Taylor turned over all of her research material and sifted through facts, selecting pivotal and key elements to include in the play. Taylor also discussed with Childress the inclusion of certain general scenes and characters. Childress wrote the play and designed the structure of the play and its dialogue.

After the first production of the play, Taylor planned a second production. Childress rejected the deal proposed by Taylor. Accordingly, Taylor decided to create the second production without Chil-

²⁸ 221 F.2d 569 (2d Cir. 1955).

²⁹ *Id.* at 570.

³⁰ *Id.*

³¹ 945 F.2d 500 (2d Cir. 1991).

dress, hiring another playwright, Ben Caldwell, to create the play featuring “Moms” Mabley. Taylor gave Caldwell a copy of the *Childress* play and advised him that the elements should be changed. *Childress* then sued Taylor alleging copyright infringement. Taylor contended she was a joint author of the first production and therefore shared the rights to make a derivative work. Both the district court and the Second Circuit rejected Taylor’s claims to joint-authorship.³² “Many people can be said to ‘jointly labor’ toward ‘a common design’ who could not plausibly be considered co-authors.”³³

The *Childress* court discussed the nature of the intent that must be entertained by each putative joint author at the time the contribution is created. It acknowledged that the statutory definition “appears to make relevant only the state of mind regarding the unitary nature of the finished work – an intention ‘that their contributions be merged into inseparable or interdependent parts of a unitary whole.’”³⁴ The Court continued:

However, an inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress. For example, a writer frequently works with an editor who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet very few editors and even fewer writers would expect the editor to be accorded the status of joint author, enjoying an undivided half interest in the copyright in the published work. . . . What distinguishes the writer-editor relationship . . . from the true joint author relationships is the lack of intent of both participants in the venture to regard themselves as joint authors.³⁵

³² 945 F.2d at 509.

³³ *Id.* at 504.

³⁴ *Id.* at 507. The requirement that the work be “unitary” is to ensure that the work is not a composite work like a newspaper or encyclopedia. *Childress* explains:

Parts of a unitary whole are ‘inseparable’ when they have little or no independent meaning standing alone. That would often be true of a work of written text, such as the play that is the subject of the pending litigation. By contrast, parts of a unitary whole are ‘interdependent’ when they have some meaning standing alone but achieve their primary significance because of their combined effect, as in the case of the words and music of a song.

Id. at 505.

³⁵ *Id.* at 507.

And so gave rise to *Childress*' test which requires a mutual intent to be co-authors. The *Childress* court describes this formulation as a "useful test"³⁶ and found that test of co-authorship may vary depending on the specific factual circumstances.³⁷ The Court explains:

Examination of whether the putative co-authors ever shared an intent to be co-authors serves the valuable purpose of appropriately confining the bounds of joint authorship arising by operation of copyright law, while leaving those not in a true joint authorship relationship with an author free to bargain for an arrangement that will be recognized as a matter of both copyright and contract law.³⁸

The court affirmed the conclusions of the trial court that Taylor's contributions were largely the results of research and incidental suggestions of ideas and that there was no evidence that these aspects of Taylor's role ever evolved into more than helpful advice that might come from the cast, the directors, or the producers of any play. "[W]e agree that there is no evidence from which a trier could infer that *Childress* had the state of mind required for joint authorship. As Judge Haight observed, whatever thought of co-authorship might have existed in Taylor's mind 'was emphatically not shared by the purported co-author.'"³⁹

In *Thomson v. Larson*, the Second Circuit followed *Childress* requiring a mutual intent to be co-authors: "*Childress* mandates that the parties 'entertain in their minds the concept of joint authorship.' This requirement of mutual intent recognizes that, since co-authors are afforded equal rights in the co-authorized work, the equal sharing of rights should be reserved for relationships in which all participants fully intend to be joint authors."⁴⁰ However, as discussed below, rather than providing a clarification of *Childress*, the Second Circuit only created more confusion.

³⁶ *Id.* at 508. In many instances, a useful test will be whether, in the absence of contractual agreements concerning listed authorship, each participant intended that all would be identified as co-authors.

³⁷ *Id.* at 508. The issue of co-authorship intent "requires less exacting consideration in the context of traditional forms of collaboration, such as between the creators of the words and music of a song." *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 147 F.3d 195, 201 (2d Cir. 1998)..

In *Thomson*, playwright Jonathan Larson wrote the rock opera *Rent* based on Puccini's opera *La Boheme*. Larson was assisted by Lynn Thomson who was hired by a third party to provide "dramaturgical assistance and research to the playwright and director."⁴¹ Larson "absolutely, vehemently and totally rejected [the theatre]'s suggestion of hiring a bookwriter, was insistent on making *Rent* entirely his own project, [and] adamantly and steadfastly refused, consistently emphasizing his intention to be the only author of *Rent*."⁴² The revisions of the text of *Rent* were made only by Larson, and Thompson made no contemporaneous notes of her specific contributions.⁴³ The contract also stated that Thomson's fee would be "[I]n full consideration of the services to be rendered."⁴⁴

The *Thomson* court, for the most part, paraphrased the more complete descriptions set forth in *Childress*. However, *Thomson* discussed whether the "mutual intent to be co-authors" was a subjective or an objective test. *Thomson* found that the "intention standard is not strictly subjective."⁴⁵ In other words, co-authorship intent does not turn solely on the parties' own words or professed states of mind,⁴⁶ "though joint authorship does not require an understanding by the co-authors of the legal consequences of their relationship, obviously some distinguishing characteristic of the relationship must be understood for it to be the subject of their intent."⁴⁷

Thomson's complaint alleges that Thomson "developed the plot and theme, contributed extensively to the story, created many character elements, wrote a significant portion of the dialogue and song lyrics, and made other copyrightable contributions to the work."⁴⁸

As described above, the Second Circuit stated that it varied from the strict statutory test in order to avoid extending "joint author status

⁴¹ *Id.* at 197.

⁴² *Id.*

⁴³ *Id.* at 197.

⁴⁴ *Id.* This admission could have been deemed an independent ground to deny any compensation to the work. This point was not addressed by the court.

⁴⁵ *Id.* at 201.

⁴⁶ See also, *Childress*, 945 F.2d at 508, "Joint authorship can exist without any explicit discussion of this topic by the parties."

⁴⁷ *Id.* at 202.

⁴⁸ *Thomson*, 147 F.3d at 198, n.10.

to many persons who are not likely to have been within the contemplation of Congress.”⁴⁹ However, the *Thomson* Court neglected to explain how the contributions of Thomson in developing *Rent*'s plot and theme, story, character elements, dialogue and song lyrics, put him in the class of persons “not within the contemplation of Congress.” Yet the contemplation of Congress could not have been clearer that a finding of “authorship” is and should be quite liberal:

When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes “authorship.”⁵⁰

Thomson's contributions arguably were more significant than the above described activities of a cameraman covering a football game. It is the author's contention that Thomson should have been deemed a

⁴⁹ *Childress*, 945 F.2d at 507.

⁵⁰ H.R. REP. NO. 1476, at 52 (1976). See also William Paltry, COPYRIGHT LAW AND PRACTICE, vol. 1, p. 292 n.772 (1994), “Claims to authorship may be made by directors, screen writers, actors and actresses, editors, cinematographers, lighting specialists, soundtrack composers, set and costume designers, authors of preexisting works incorporated in the cinematographic works, among others. See *Technological Alterations to Motion Pictures: A Report of the Register of Copyrights* 20-37, 160-162, 181 (1989).” *Maljack Productions, Inc. v. UAV Corp.*, 964 F. Supp. 1416, 1426 (C.D. Cal. 1997), *aff'd on other grounds, Batjac Production, Inc. v. Goodtimes Home Video Corp.*, 160 F.3d 1223 (9th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 2046, 144 L.Ed.2d 214 (1999) (holding that stereozation of soundtrack and pan and scan versions are copyrightable); *Time Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968) (holding the Zapruder film of the Kennedy assassination copyrightable); *Baltimore Orioles, Inc. v. Major League Baseball Players Assoc.*, 805 F.2d 663, 669 (7th Cir. 1986), *cert. denied*, 480 U.S. 941, 107 S. Ct. 1593, 94 L.Ed.2d 782 (1987) (holding copyrightable the contributions by director and photographer of baseball game); 1 Melvil Nimmer & David Nimmer, NIMMER ON COPYRIGHT (1986), § 6.04-05 “Thus a motion picture is a joint work consisting of a number of contributions by different ‘authors.’ The contributing ‘authors’ include, in addition to the writer of the screenplay, the director, the photographer, the actors, and arguably, other contributors such as the set and costume designers, etc.”; *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Ent.*, 815 F.2d 323, 337 (5th Cir. 1987), *reh'g denied, en banc*, 820 F.2d 1223 (5th Cir. 1987), later proceeding, 484 U.S. 941, 108 S. Ct. 325, 98 L.Ed.2d 353 (1987), *cert. denied*, 485 U.S. 981, 108 S.Ct. 1280, 99 L.Ed.2d 491 (1988) (process of directing and filming of parade copyrightable).

co-author based upon his contributions. *Thomson* describes that the way that the parties bill or credit themselves is an indicia of intent, citing *Weissmann v. Freeman*:⁵¹ a writer's attribution of the work to herself alone "is persuasive proof of the fact that she intended this particular piece to represent her own individual authorship" and is "prima facie proof that [the] work was not intended to be joint." However, "billing" or "credit" is not decisive in all cases.⁵²

IV. THE CASES OF THE FIRST, FIFTH, SEVENTH, EIGHTH, ELEVENTH AND DISTRICT OF COLUMBIA COURTS OF APPEALS AND THEIR TESTS FOR "JOINT AUTHORSHIP"

In ascertaining whether an author's contribution to a work is "joint", such that they are "co-authors" and the work is a "joint work", the First, Fifth, Seventh, Eighth, Eleventh and District of Columbia Circuits have not required a mutual intent to be co-authors. With the exception of the Second Circuit, courts have held that where one party provides significant creative input, the two authors are usually deemed co-authors of a "joint work".⁵³ The significance of the contribution is

⁵¹ Citing *Weissmann*, 868 F.2d 1313, 1320 (2d Cir. 1989); *Thomson*, 147 F.3d at 203. It should be noted that in *Weissmann*, Dr. Freeman conceded that he did not participate in the drafting of any new matter in the work: "As a non-contributing party to [the work], Dr. Freeman's intent regarding his contributions to the underlying preexisting work is not relevant to claimed joint authorship of [the work]." *Id.* at 320. In *Weissmann*, both parties were accomplished scientists. Dr. Weissmann authored an article derived from previous papers jointly written by the parties. The Court held that the derivative article was not a joint work because there was no intent at the time that the work was created to become part of a unitary work to which another will make or has made a contribution.

⁵² The court further stated:

Obviously, consideration of whether the parties contemplated listed co-authorship (or would have accepted such billing had they thought about it) is not a helpful inquiry for works written by an uncredited 'ghost writer,' either as a sole author, as a joint author, or as an employee preparing a work for hire.

Weissmann, 868 F.2d at 1320.

⁵³ See also dicta in *Dumas v. Gommerman*, 865 F.2d 1093, 1105 n.22 (9th Cir. 1989) "In situations where the commissioning party provides significant creative input, the two might be co-authors of a 'joint work' as provided for elsewhere in the Act."; *Community for Creative Non-Violence v. Reid*, 846 F.2d at 1497 (1988), cert. granted without direct analysis of joint authorship, 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989).

usually instructive of the parties' intent.⁵⁴

For example, in *Forward v. Thorogood*, the First Circuit looked at the quality of the contribution to find joint authorship.⁵⁵ In *Forward*, the promoter of the band who played an instrumental role in getting the group signed to a contract, including "finding" the band and paying for the recording sessions, claimed co-authorship of the works by the band. The court held that Forward did not have co-authorship rights in that "'Forward made no musical or artistic contribution' to the tapes, explaining that Forward did not serve as the engineer at the sessions or direct the manner in which the songs were played or sung."⁵⁶

Likewise, when the Fifth Circuit addressed joint authorship in *Easter Seal Society for Crippled Children and Adults, Inc. v. Playboy Enterprises, Inc.*,⁵⁷ it did not require the *Thomson/Childress* non-statutory language. Easter Seal Society entered into a contract with WYES to film a parade and jam session. An agent of Easter Seal Society gave suggestions for the filming of the parade, and WYES filmed and worked cooperatively with the performers to create the field tapes. The Court held that both WYES and the Society were probably co-authors, though it was never argued.⁵⁸

Similarly, the Eleventh Circuit has not required the *Thomson/Childress* non-statutory language.⁵⁹ In *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*,⁶⁰ the Court quoting *Nimmer on Copyright*:

If author B's contribution when combined with author A's contribution results in recasting, transforming or adapting A's contribution, then the two contributions may be said to be inseparable. If the process is simply one of assembling into a collective whole A's and B's respective contributions, without thereby recasting A's contribution, then the two contri-

⁵⁴ See *Seshadri v. Kasraian*, 130 F.3d 798, 803 (7th Cir. 1997).

⁵⁵ See *Forward v. Thorogood*, 985 F.2d 604, 607 (1st Cir. 1993).

⁵⁶ *Id.* at 607.

⁵⁷ 815 F.2d 323 (5th Cir. 1987).

⁵⁸ *Id.* at 336.

⁵⁹ See *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1493 (11th Cir. 1990); *Aerospace Servs. Int'l v. LPA Group, Inc.*, 57 F.3d 1002, 1004 (11th Cir. 1995).

⁶⁰ 903 F.2d 1486 (11th Cir. 1990).

butions may be said to be interdependent.⁶¹

Additionally, the District of Columbia Circuit court in *Community for Creative Non-Violence v. Reid*⁶² did not require “a mutual intent to be co-authors” for the work to be a “joint work”. Community for Creative Non-Violence (CCNV), a non-profit association devoted to the welfare of the homeless, contracted with James Earl Reid to create a statue that would dramatize the plight of the homeless. CCNV members first conceived of the design of the statue, and hired a cabinetmaker to construct part of the display. Even though one of the authors argued that he did not intend to merge his contributions, Justice Ginsberg commented that “this case—once more taking the record in its current state—might qualify as a textbook example of a jointly-authored work in which the joint authors co-own the copyright.”⁶³ Also, when the decision was reviewed by the Supreme Court on other grounds, it discussed joint authorship in dicta, and did not require or describe a non-statutory requirement of “mutual intent to be co-authors.”⁶⁴

Although the Eighth Circuit did not address “joint authorship” in *Siebersma v. VandeBerg*,⁶⁵ it cited without discussion *Words & Data, Inc. v. GTE Communications Services, Inc.*⁶⁶ In *Words & Data*, the court held that the “presence or absence of an express conclusory claim of authorship is not determinative of whether one is, in fact, a joint author of a work.”⁶⁷ In *Words & Data*, at the time the work was made, one of the authors never claimed to be a joint author, nor did he ever do anything even suggesting such an intent.⁶⁸ Nevertheless, because there was collaboration, there was joint authorship. “The legis-

⁶¹ *Id.* at 1493.

⁶² 846 F.2d 1485 (D.C. Cir. 1988).

⁶³ *Id.* at 1497.

⁶⁴ *See* 490 U.S. at 753:

However, as the Court of Appeals made clear, CCNV nevertheless may be a joint author of the sculpture if, on remand, the District Court determines that CCNV and Reid prepared the work ‘with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

⁶⁵ 64 F.3d 448, 449 (8th Cir. 1995).

⁶⁶ 765 F. Supp. 570 (W.D. Mo. 1991).

⁶⁷ *Id.* at 575.

⁶⁸ *Words & Data*, 765 F. Supp. at 574-75.

lative history of the Copyright Act also states that collaboration is an independent ground for finding the necessary intent for joint authorship.”⁶⁹

The Seventh Circuit, the only other Circuit to follow *Thomson/Childress*’s “mutual intent to be co-authors” has apparently changed its position from an earlier case in which the court adopted the *Childress* formulation. The Court now looks to the significance of the copyrightable contribution to determine whether a joint work was created. The earlier Seventh Circuit case, *Erickson v. Trinity Theatre, Inc.*,⁷⁰ following *Childress*’ “intent to be joint authors”, explained:

Focusing solely upon the fact of contemporaneous input by several parties does not satisfy the statutory requirement that the parties intend to merge their contributions into a unified work. In addition, the “collaboration alone” standard would frustrate the goal of the Act “to promote the Progress of Science and the useful Arts.” U.S. CONST., art. I, § 8, cl. 8. Seldom would an author subject his work to pre-registration peer review if this were the applicable test. Those seeking copyrights would not seek further refinement that colleagues may offer if they risked losing their sole authorship.⁷¹

The later case, *Seshadri v. Kasraian*,⁷² did not require a finding of mutual “intent to be joint authors.” The court, speaking through Judge Posner held:

To be a joint author, an assistant or collaborator must contribute significant copyrightable material. This is merely a default rule; by contract the sole creator of a work can transfer “authorship” in whole or part to another. But it is a sensible rule, because ordinarily the person who does not contribute significant copyrightable work does not expect to have a copyright interest, and one who does has that right.⁷³

Kashraian’s contribution of 5 pages of the 13 page article “certainly qualifies as a joint author. His contribution was both copyrightable and significant.”⁷⁴

⁶⁹ *Id.* at 575; but see *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co.*, 542 F. Supp. 252, 258-60 (D. Neb. 1982) (collaboration, but no intent to merge contributions at time of writing).

⁷⁰ 13 F.3d 1061 (7th Cir. 1994).

⁷¹ *Id.* at 1069.

⁷² 130 F.3d 798 (7th Cir. 1997).

⁷³ *Id.* at 803 (citations omitted).

⁷⁴ *Id.*

V. THE CASES OF UNITED STATES DISTRICT COURTS AND THEIR TESTS FOR "JOINT AUTHORSHIP"

In addition to the split between the courts of appeal, there is substantial confusion among the district courts even in districts where their respective circuit courts have analyzed the question of authorship of joint works, as they have not expressly rejected *Childress/Thomson*. For example, the district courts within the Third,⁷⁵ Sixth,⁷⁶ Eighth,⁷⁷ Ninth⁷⁸ and Eleventh⁷⁹ Circuits have not required "mutual intent to be joint authors," whereas district courts within the First,⁸⁰ Second,⁸¹ Fifth,⁸² and Tenth⁸³ Circuits follow *Childress* and *Thomson's* intent test. The Seventh Circuit is in conflict both at the appellate level⁸⁴ and

⁷⁵ See *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 609 F. Supp. 1307, 1319 (E.D. Pa. 1985), *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031, 107 S. Ct. 877, 93 L. Ed. 2d 831 (1987); *Segal v. Paramount Pictures*, 841 F. Supp. 146, 150 (E.D. Pa. 1993), *aff'd without op.*, 37 F.3d 1488 (3d Cir. 1994).

⁷⁶ *Balkin v. Wilson*, 863 F. Supp. 523, 528 (W.D. Mich. 1994); *Words & Data, Inc. v. GTE Communications Servs., Inc.*, 765 F. Supp. 570, 575 (W.D. Mo. 1991).

⁷⁷ *Designer's View, Inc. v. Publix Super Mkts.*, 764 F. Supp. 1473, 1477 (S.D. Fla. 1991), *aff'd without op.*, 961 F.2d 223 (11th Cir. 1992); *Neva, Inc. v. Christian Duplications Int'l, Inc.*, 743 F. Supp. 1533, 1546 (M.D. Fla. 1990).

⁷⁸ *Systems XIX, Inc. v. Parker*, 30 F. Supp. 2d 1228, 1228-29 (N.D. Ca. 1998); *Johannsen v. Brown*, 797 F. Supp. 835, 841-42 (D. Or. 1992); *Moore Publ'g, Inc. v. Big Sky Mktg., Inc.*, 756 F. Supp. 1371, 1377 (D. Idaho 1990); *Sinkler v. Goldsmith*, 623 F. Supp. 727, 731-32 (D. Ariz. 1985).

⁷⁹ *Aitken, Hazen, Hoffman, Miller*, 542 F. Supp. at 258-60.

⁸⁰ *Cabrera v. Teatro Del Sesenta, Inc.*, 914 F. Supp. 743, 763 (D. Puerto Rico 1995).

⁸¹ See *Fisher v. Klein*, 1990 U.S. Dist. LEXIS 19463, 16 U.S.P.Q.2d (BNA) 1795, 1796-99 (S.D.N.Y. 1990); *Merchant v. Lymon*, 828 F. Supp. 1048, 1058 (S.D.N.Y. 1993); *Muller v. Walt Disney Prod.*, 871 F. Supp. 678, 684-5 (S.D.N.Y. 1994); *Papa's-June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1157-58 (S.D.N.Y. 1996); *Kaplan v. Vincent*, 937 F. Supp. 307, 316-17 (S.D.N.Y. 1996); *Design Options, Inc. v. Bellepointe, Inc.*, 940 F. Supp. 86, 90 (S.D.N.Y. 1996).

⁸² See *BTE v. Bonnezaze*, 1998 U.S. Dist. LEXIS 18166, 49 U.S.P.Q.2d (BNA) 1153, 1154-56 (E.D. La. 1998); *Clogston v. American Academy of Orthopaedic Surgeons*, 930 F. Supp. 1156, 1158-59 (W.D. Tx. 1996); *but see Easter Seal Society and Adults of Louisiana, Inc. v. Playboy Enter.*, 815 F.2d 323, 336-37 (5th Cir. 1987).

⁸³ *Fred Riley Home Bldg. Corp. v. Cosgrove*, 864 F. Supp. 1034, 1037 (D. Kan. 1994) (following *Childress*).

⁸⁴ *Seshadri*, 130 F.3d 798, 803; *Erickson*, 13 F.3d 1061, 1067-71.

at the district level.⁸⁵

VI. THE PHILOSOPHY AND RATIONALE IN THE ENACTMENT OF THE 1976 COPYRIGHT ACT AND THE APPROPRIATE TEST FOR "JOINT AUTHORSHIP"

The philosophy and rationale in the enactment of the 1976 Copyright Act is instructive and aids in determining what the appropriate test should be for determining whether a work is a "joint work."

The 1909 Copyright Act favored employers and studios, at the expense of the actual creative collaborators. The 1976 Copyright Act was a radical change, providing more rights to artists. Three provisions of the 1909 Copyright Act and their changes in the 1976 Copyright Act are described below: works for hire, the corporate body doctrine, and the proprietor of a composite work. This section analyzes these radical changes to the 1909 Copyright Act and the balance that was struck between the creative collaborators and the publishers and studios, and contends that the *Childress/Thomson* test would upset this delicate balance.

A. Works for Hire

Cases under the 1909 Copyright Act generously granted employers, rather than the creative collaborators, the copyrights to works. The Copyright Act of 1909 did not define "work for hire" or "author." Section 26 of the 1909 Copyright Act provided: "the word "author" shall include an employer in the case of works for hire." Section 24 of the Copyright Act of 1909 provided that in the case of "any work copyrighted . . . by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal."⁸⁶

⁸⁵ *Eckert v. Hurley Chicago*, 638 F. Supp. 699 (N.D. Ill. 1986) (statutory test); *Respect Inc. v. Committee on the Status of Women*, 815 F. Supp. 1112, 1120-21 (N.D. Ill. 1993) (following *Childress'* test); *Napoli v. Sears, Roebuck and Co.*, 874 F. Supp. 206, 209 (N.D. Ill. 1995).

⁸⁶ The draft bill of March 2, 1906 defined "author" as (1) "Any person who employs a photographer to make a photographic portrait;" and (2) "An employer, in the case of a work produced by an employee during the hours for which his salary is paid, subject to any agreement to the contrary." (Borge Varmer, "Works Made for Hire and on Commission", Study No. 13 (April 1958) STUDIES ON COPYRIGHT,

The Ninth Circuit in *Lin-Brook Builders Hardware v. Gertler*,⁸⁷ explained:

. . . [w]hen one person engages another, whether as employee or as an independent contractor, to produce a work of an artistic nature, that in the absence of an express contractual reservation of the copyright in the artist, the presumption arises that the mutual intent of the parties is that the title to the copyright shall be in their person at whose instance and expense the work is done.⁸⁸

ARTHUR FISHER MEMORIAL EDITION, Vol. I, p. 128). However, the 1909 Act omitted any definition of “work for hire” or “authorship” and the proceedings shed no light on the subject. The corporation is the author of the work created by its employees. *National Cloak & Suit Co. v. Kaufman*, 189 F. 215, 217 (C.C. Pa. 1911); *Brown v. Molle Co.*, 20 F. Supp. 135, 135-36 (S.D.N.Y. 1937) “The case falls within the rule that where an employee creates something as part of his duties under his employment, the thing created is the property of the employer.” If the employee registered the name of the copyright in his name, the copyright is held in trust for the employer, and the employee cannot assign any beneficial interest in the copyright. *Id.* at 136; *see also Tobani v. Carl Fisher, Inc.*, 98 F.2d 57, 60 (2d Cir. 1938) (holding that renewal copyright obtained by son of deceased employee is void; “it cannot be argued that an employee for hire is an author under some provisions of the act while not under others”); *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697, 700 (2d Cir. 1941) (renewal by successor of employer valid). The cases in sum hold that under no circumstances is an individual employee-author entitled to any rights in either the original or the renewal term of the copyright. *See also, Fred Fisher Music Co. v. Leo Feist, Inc.*, 55 F. Supp. 359, 360 (S.D.N.Y. 1944) “Fisher actually worked for the defendant corporation as employee for hire and the defendant, as employer, alone is entitled to the renewal rights whether or not the written contract was assignable or actually assigned.” *Kaufman*, 189 F. 215, at 217, “the employer had the right to the copyright in the literary product of a salaried employee.”

⁸⁷ 352 F.2d 298, 300 (9th Cir. 1965).

⁸⁸ *Id.* at 300; *see also Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686, 60 S.Ct. 891, 84 L.Ed. 1029 (1940); *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965). In the application of section 26 outside the traditional employment relationship treated “work for hire” as a legal conclusion drawn from presumptions about ownership rather than authorship drawn from the common law presumption that customers are the copyright in works they commission. *Easter Seal Soc’y*, 815 F.2d at 325-27. This presumption of authorship can be rebutted by an express or implied agreement that ownership/authorship initially vested in the employee or the independent contractor rather than the employer or customer. *Roth v. Pritikin*, 710 F.2d 934, 937 n.3 (2d Cir. 1983) “The work-for-hire doctrine of the 1909 Act does not foreclose an agreement

This has also been called the “instance and expense” test or when the “motivating factor in producing the work was the employer who induced the creation.”⁸⁹

Under the 1909 Act, Courts gave broad meaning to “instance and expense.” For example, participation in the process of creation was not required to show “instance and expense.”⁹⁰ Independent contractors with no written agreement were held to have created works at the “instance and expense” of another,⁹¹ and the “instance and expense” test was met even when a hiring party simply paid an independent contractor a fixed sum for his work.⁹² So broad was the “work-for-

between the parties that the contractor shall own the copyright, but rather it simply establishes a rebuttable presumption that can be overcome by evidence of a contrary agreement, either written or oral.”; *Murray v. Gelderman*, 566 F.2d 1307, 1309 (5th Cir. 1978); *Donaldson Publ'g Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 642 (2d Cir. 1967); *W.H. Anderson Co. v. Baldwin Law Publ'g Co.*, 27 F.2d 82, 88 (6th Cir. 1928); *Scherr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert denied*, 397 U.S. 936 (1970) “§ 26 merely creates a rebuttable presumption of copyright in the employer, a presumption which can be overcome by evidence of a contrary agreement between the parties.”; *Yardley*, 108 F.2d at 30 (presumption rests upon presumed intention of the parties).

⁸⁹ See *Picture Music, Inc.*, 457 F.2d at 1216; *Scherr*, 417 F.2d at 500-01; *Bratleboro Publ'g Co. v. Winnill Publ'g Co.*, 369 F.2d 565, 567-568; *May v. Morganelli-Heumann & Assoc.*, 618 F.2d 1363, 1368 n.4 (9th Cir. 1980) reaffirms the *Lin-Brook* test: “in the absence of an *express contractual reservation* of a copyright in the artist, the presumption arises that the mutual intent of the parties is that the title to the copyright shall be in the person at whose instance and expense the work is done.” *Id.* at 1369, quoting from *Lin-Brook*, 352 F.2d at 300 (emphasis in original).

⁹⁰ *Scherr*, 417 F.2d at 500.

⁹¹ *R. Dakin & Co. v. Charles Offset Co.*, 441 F. Supp. 434, 438 (S.D.N.Y. 1977).

⁹² *Dumas*, 53 F.3d at 555. Cartoonist Patrick Nagle drew cartoons of his own creation, at his own direction, on his own timeline, without a contract, any apparent guidelines, any agreement for publication, or instructions on the particular drawings. Nevertheless, the “instance and expense” test was satisfied. *Id.* at 556. In the unpublished decision of the Ninth Circuit in *Wilkes v. Rhino Records*, 1997 U.S. App. LEXIS 35721 the “instance and expense” test was also satisfied by a minimal showing. Wilkes created the artwork in his own studio, used his own equipment, controlled when and how long he worked, had discretion on how long he worked, who he hired, and may have even created works while auditioning for the position. Similarly, *Samet & Wells, Inc. v. Shalom Toy Co., Inc.*, 429 F. Supp. 895, 902 (E.D.N.Y. 1977) demonstrates the minimal showing required:

hire” test under the 1909 Act, there was almost an irrebuttable presumption that any person who paid another to create a copyrightable work was the statutory “author” under the “work for hire” doctrine.

In *Easter Seal Society*,⁹³ decided under the 1909 Copyright Act, the Fifth Circuit, discussing the “work for hire” precedent, held:

the class of persons who counted as “employees” under the copyright statute was far greater than the class of regular or formal employees, and well beyond the somewhat extended class of employees – known as “servants” – under agency law.⁹⁴ . . . Whenever one person bought authorship services from another, the seller was a copyright ‘employee’ and the buyer was a statutory “author.”⁹⁵

The 1976 Copyright Act “work-for-hire” doctrine marked a significant change in the law.⁹⁶ Whereas, the 1909 Copyright Act severely favored employers, the 1976 Copyright Act created a delicate balance between producers/publishers and actors/writers.

Dean’s free-lance status does not defeat the application of the work for hire doctrine. The doctrine applies equally as well to an independent contractor as it would to a salaried member of Samet & Wells’ staff. Defendants have submitted no evidence to overcome this presumption or to negate the intent of the parties, as disclosed by the evidence, that title to the copyright should vest in Samet & Wells.

⁹³ 815 F.2d 323 (5th Cir. 1987).

⁹⁴ Rest. (Second) of Agency, § 220(1) (1958) “A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.” *Id.*

⁹⁵ 815 F.2d at 327.

⁹⁶ The 1976 definitions of “works for hire” are not retroactive. See *Roth*, 710 F.2d at 939 (in dicta, a retroactive interpretation of section 301 would “raise a serious issue concerning the Act’s constitutionality.”); *Forward v. Thorogood*, 985 F.2d 604, 606 n.2 (1st Cir. 1993) (1976 Act’s provisions on works for hire operate prospectively); *Sargent v. American Greetings Corp.*, 588 F. Supp. 912, 920 (N.D. Ohio 1984) (“this Court concludes that the Old Act governs the work made for hire issue in this action”); *Everts v. Arkham House Pub’l, Inc.*, 579 F. Supp. 145, 148 (W.D. Wis. 1984) (“the Court believes the law developed under the earlier statute would be applicable to these facts because the work was created before the effective date of the new statute,” *May*, 618 F.2d at 1368 n.4 (Section 101 not retroactive); Boorystyn, BOORYSTYN ON COPYRIGHT, § 7.10[1][d], p. 7-19; Pantry, COPYRIGHT LAW AND PRACTICE, Vol. I, § 4.8.2, p. 465 (1994) (“Section 304(a) governs only works that were created under the 1909 Act.”).

The Copyright Act of 1976 on first blush appears to adopt the “work-for-hire” doctrine from the 1909 Act. Section 201 provides:

(b) Work Made for Hire – In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purpose of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights in the copyright.⁹⁷

Under the 1976 Act, a “work made for hire” is:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire⁹⁸

Yet, on further review, it becomes clear that the 1976 Copyright Act almost completely revised existing copyright law on the subject of works for hire.⁹⁹ The significant change was the product of two decades of negotiation by representatives of creators and publishers and studios, supervised by the Copyright Office.¹⁰⁰ The negotiations began in 1955, when Congress decided to amend the Copyright Act and resolve confusion engendered by a number of its clauses.¹⁰¹

⁹⁷ 17 U.S.C. § 201(a) & (b).

⁹⁸ 17 U.S.C. § 101(1) & (2).

⁹⁹ The Supreme Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) set forth a test for determining “works-for-hire.” However, the test is directive for interpretation of the 1976 Act, but not the 1909 Act. See *Playboy Ent., Inc. v. Dumas*, 53 F.3d at 555 (the district court incorrectly used the *Reid* factors “which may be used to show that an artist worked as an independent contractor and not as a formal employee. The factors have no bearing on whether the work was made at the hiring party’s expense. . . .”); *Roth*, 710 F.2d at 939 (a retroactive interpretation of section 301 would “raise a serious issue concerning the Act’s constitutionality.”); *Forward*, 985 F.2d at 606 n.2 (1976 Act’s provisions on works for hire operate prospectively); *Sargent*, 588 F. Supp. at 920; *Everts*, 579 F. Supp. at 148; see also *May*, 618 F.2d at 1368 n.4 (Section 101 not retroactive); BOORYSTYN ON COPYRIGHT, § 7.10[1][d], p. 7-19; GOLDSTEIN, Vol. I, § 4.8.2, p. 465 (1994).

¹⁰⁰ *Community for Creative Non-Violence*, 490 U.S. at 743.

¹⁰¹ *Id.*

In 1961, the Copyright Office's first proposed overhaul of the work for hire provisions kept the distinction between works by employees and works by independent contractors.¹⁰² The second preliminary draft in 1963 defined "work made for hire" as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission."¹⁰³

Publishers objected to the limitation of "work-for-hire" to "employees." Saul Rittenberg of MGM commented:

[T]he present draft has given more emphasis to formalism than necessary. If I commission a work from a man, ordering a work specially for my purposes, and I pay for it, what difference does it make whether I put him under an employment contract or establish an independent contractor relationship?¹⁰⁴

Accordingly, the 1964 revision bill expanded "work for hire" to include both "employees" and independent contractors "if the parties so agree in writing."¹⁰⁵ Authors objected that the added provision, as described by the Supreme Court, "would allow publishers to use their superior bargaining position to force authors to sign work for hire agreements, thereby relinquishing all copyright rights as a condition of getting their books published."¹⁰⁶

In 1965, publishers and authors reached a compromise. The com-

¹⁰² *Id.* at 744; *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st Sess., *Copyright Law Revision* 86-87 (H.R. Judiciary Comm. Print 1961) ("1961 Draft").

¹⁰³ *Id.* at 744-45; *Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft*, 88th Cong., 2d Sess., *Copyright Law Revision*, Part 3, p. 15, n. 11 (H.R. Judiciary Comm. Print 1964) ("1963 Draft").

¹⁰⁴ 1963 Draft at 272 (statement of Saul N. Rittenberg, MGM); *see also* 1963 Draft at 259 (statement of Horace S. Manges, Joint Committee of the American Book Publishers Council and the American Textbook Publishers Institute).

¹⁰⁵ *Community for Creative Non-Violence*, 490 U.S. at 745; S. 3008, H. R. 11947, H. R. 12354, § 54 (1964), reproduced in 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS, 89th Cong., *Copyright Law Revision*, pt. 5, p.31 (H. R. Judiciary Comm. Print 1965) ("1964 Draft").

¹⁰⁶ *Community for Creative Non-Violence*, 490 U.S. at 745-46; *Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 REVISION BILL*, 89th Cong., reprinted in *Copyright Law Revision*, pt. 6, p. 67 (H.R. Judiciary Comm. Print. 1965) ("1965 Draft").

promise retained as subsection (1) the language referring to “a work prepared by an employee within the scope of his employment.” In exchange for concessions from publishers on provisions relating to the termination of transfer rights, the authors consented to a second subsection which classified four categories of commissioned works as works for hire if the parties expressly agreed in writing,¹⁰⁷ including “motion picture or other audiovisual work[s].”¹⁰⁸

An attempt to add “photographic or other portrait[s]” to the list of commissioned works eligible for work-for-hire status failed on concerns of upsetting the balance between publishers and authors, specifically, artists and photographers.¹⁰⁹ The Register of Copyrights described:

The addition of portraits to the list of commissioned works that can be made into ‘works made for hire’ by agreement of the parties is difficult to justify. Artists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law, and it seems clear that, like serious composers and choreographers, they were not intended to be treated as ‘employees’ under the carefully negotiated definition in section 101.¹¹⁰

Accordingly, the 1976 Copyright Act made a significant modification to the 1909 Copyright Act to provide a balance between creative collaborators and publishers and studios. As discussed below, an interpretation that “joint authorship” requires, in addition to the statutory language, a “mutual intent to be joint authors,” would upset the delicate balance achieved between the creative collaborators and the publishers. Such an interpretation would, in effect, the author contends, rarely, if ever, allow the actual creative collaborators to have rights in the work. The publisher, regardless of the contributions, would not

¹⁰⁷ *Community for Creative Non-Violence*, 490 U.S. at 746 & n.12; *Copyright Law Revision: Hearings on H.R. 4347, 5680, 6835 before Subcommittee No. 3 of the House Committee on the Judiciary*, 89th Cong., at 134 (1965); S. 1006, H.R. 4347, H.R. 5680, H.R. 6835, 89th Cong., 1st Sess., § 101 (1965).

¹⁰⁸ 17 U.S.C. § 101(2) (1976).

¹⁰⁹ *Community for Creative Non-Violence*, 490 U.S. at 747 n.13; S. Rep. No. 94-473, at 4 (1975).

¹¹⁰ *Community for Creative Non-Violence*, 490 U.S. at 747 n.13; Second Supplemental Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill, Chapter XI, at 12-13.

express an intent to share authorship and would insist instead on owning the copyright outright.

B. *Corporate Body Doctrine*

Likewise, the 1909 Copyright Act liberally granted corporations or corporate bodies rights to the copyright at the expense of the actual creative collaborators under the “corporate body” doctrine, a doctrine which was not retained in the 1976 Copyright Act. Section 24 of the 1909 Copyright Act permitted the copyright to be renewed by a corporate body for a second term after the first term expired.

In her report to Congress on revision of the 1909 Copyright Act,¹¹¹ Barbara Ringer, a former Registrar of Copyrights, remarked that the “corporate body” is likely to apply only in a few limited situations:

- (1) A work written by members of a religious order or similar organization where the individual authors were not exactly employees for hire but at the same time had no personal property right in the work.
- (2) A work written by an official or a major stockholder of a corporation, where the work was written directly for the corporation but not as an employee for hire.
- (3) A motion picture produced under an unusual financing arrangement and copyrighted by a corporation that was not the employer for hire.¹¹²

The third example describes an arrangement not so unusual in the film industry. Ringer’s examples have been cited as examples for the application of the “corporate body” doctrine but have never been adopted by any court. Judge Learned Hand attempted to give the corporate body clause some meaning:

Members of a corporation producing a common “work” by mutual contributions, fused so as to be indistinguishable, may conceivably be one example.¹¹³

¹¹¹ Study No. 31.

¹¹² Barbara A. Ringer, *Renewal of Copyright, Study No. 31* (June 1960) STUDIES ON COPYRIGHT, ARTHUR FISHER MEMORIAL EDITION, Vol. 61, at 137, fn. 215 (1963).

¹¹³ *Shapiro, Bernstein & Co., 123 F.2d at 699. Schmid Bros., Inc. v. W. Goebel Porzellanfabrik KG, 589 F. Supp. 497 (1984)* also tried to give the provision some meaning regarding religious organizations per Ringer’s description. *Schmid* involved Sister Hummel’s contracts with Goebel to create figurines. The convent at-

The "corporate body" doctrine appears to be a "catch-all" provision providing corporations the copyrights in the chance that the works slip through the liberal "instance and expense" test. The "corporate body" doctrine was not continued in the 1976 Act.

C. *Proprietor of a Composite Work*

Under the 1909 Act, a copyright for a composite work afforded the proprietor of the composite work the rights to copyrightable components as if the proprietor had separately copyrighted each article or contribution.¹¹⁴ Section 3 of the 1909 Copyright Act provided: "The copyright provided by this title shall protect all copyrightable component parts of the work copyrighted The copyright upon composite works and periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title."

For example, when a columnist submitted an article to a publisher without restricting the publisher's rights in the article, complete transfer of common law copyright to the publisher was presumed.¹¹⁵ Ac-

tempted to gain rights in the figurines by asserting the corporate body doctrine. *Schmid* injected the concept that the corporate body exception may require a minister to possess absolutely no property in his own name (i.e. a solemn vow), citing canon law. However, this is dictum and is questionable precedent. See *Jones v. Wolf*, 443 U.S. 595, 602 (1979) "[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes."

¹¹⁴ *Mail & Express Co. v. Life Publ'g Co.*, 192 F. 899, 900 (2d Cir. 1911); *Williams & Wilkins Co. v. United States*, 172 U.S.P.Q. 670, 674 (Ct. Cl. 1972), *rev'd on other grounds*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

¹¹⁵ See, e.g., *Mail & Express Co.*, 192 F. at 900; *Alexander v. Irving Trust Co.*, 132 Supp. 364, 369 (S.D.N.Y. 1955) "[I]n the absence of any proof to the contrary, it must be presumed that [the author] transferred her work without any reservations whatever and that [the publisher] became the absolute proprietor of the copyright." See also *Van Cleef & Arpels, Inc. v. Schechter*, 308 F. Supp. 674, 677 (S.D. N.Y. 1969); *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F.2d 306 (2d Cir. 1939), *cert. denied*, 308 U.S. 597, 60 S.Ct. 131, 84 L. Ed. 499 (1939); *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159 (2d Cir. 1927). In *Urantia Found. v. Maaheerra*, 114 F.3d 955, 960 (9th Cir. 1997), the Court described, "the mere possession of the printing plates by the Foundation, the purported assignee, may have been suf-

cordingly, for articles not subject to the work for hire or “corporate body” doctrines, under section 24 of the 1909 Act, publisher was entitled to renew the copyright as the proprietor of the periodical.

The doctrine that the proprietor of a composite work is entitled to the underlying copyrights if the proprietor renewed the copyright was superseded by 17 U.S.C. § 201(c):

(c) Contributions to Collective Works. Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that col-

ficient to establish an assignment as against a third party, such as Maaherra, who does not claim any superior copyright interest. There is a presumption that the transfers are assignments rather than licenses. See *Dam v. Kirke La Shelle Co.*, 175 F. 902, 904-905 (2d Cir. 1910); *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 341-342 (S.D.N.Y. 1968); *Best Medium Publishing Co. v. National Insider, Inc.*, 259 F. Supp. 433, 434 (N.D. Ill. 1966, *aff'd* 385 F.2d 384, 386 (7th Cir. 1967)). Thus, the transfer of the articles is presumed to be a transfer of the copyright itself. *Forward*, 985 F.2d at 607; 3 NIMMER, §9.03[B], at 9-44 “it would appear that the proprietor of a composite work is the one who is entitled to claim the renewal in all material the copyright in which was originally secured by the proprietor, and that an individual author (and the successor classes) may claim renewal in their own names only if the author originally secured a separate copyright in the contribution;” Goldstein, COPYRIGHT (2d ed., 1996), § 4.8.2, at 463; Boorstyn, BOORSTYN ON COPYRIGHT (2d ed., 1998), at 7-17 to 7-18. *Applied Innovations, Inc. v. Regents of Univ. of Minn.*, 876 F.2d 626, 630-631 (8th Cir. 1989) describes:

The MMPI articles were first published in the *Journal of Psychology* bearing a copyright notice in the name of the publisher only. There was no separate notice in the names of the authors. Nor was there any evidence that the authors had registered the unpublished manuscripts or that they had reserved all rights other than the right to reproduce the articles in periodical form. Thus, under the 1909 Act, the *Journal Press* was the proprietor of the statutory copyright in the entire *Journal of Psychology* issue, including the individual articles. There was no evidence that the *Journal Press* had assigned the copyright in any component part of that issue of the *Journal of Psychology* to the authors. Under these circumstances, the authors had no copyright in the articles, and publication of the articles with a general copyright notice in the name of the publisher prevented the articles from being thrust into the public domain.

Id. at 631.

lective work, and any later collective work in the same series.¹¹⁶

The net result of the compromises and negotiations between vulnerable authors and powerful studios was that the 1976 Copyright Act narrowed the rights of the publishers to provide a more equitable balance. In the end, the Copyright Act of 1976 provided two ways studios could obtain the copyrights of the creative collaborators: (1) obtain a work-for-hire contract; or (2) secure a written transfer from the author.¹¹⁷ The author contends that these substantial changes to the 1909 Copyright Act would be eliminated by redrafting the joint works provisions to require a “mutual intent to be joint authors.”

VII. REQUIRING A “MUTUAL INTENT TO BE JOINT AUTHORS” WOULD UPSET THE DELICATE BALANCE NEGOTIATED IN THE 1976 COPYRIGHT ACT

Redrafting the statute regarding “joint works” to require a mutual intent to be joint authors would upset the delicate balance negotiated for over two decades in the modification of the 1909 Act. Studios undoubtedly would argue that a work is not “joint” because (1) the individual is not listed in the lead credits; and (2) the executives never told claimant that he or she was a “co-author”. Accordingly, under *Thomson/Childress*, studios would never have to share the copyright even with significant collaborators. Taken to an extreme, the mutual intent requirement would obviate the need for work-for-hire agreements or written transfers.

The Supreme Court discussed a similar battle between the rights of publishers and writers in the context of works for hire. The Supreme Court’s analysis is helpful in determining the proper test for joint authorship and whether a mutual intent to be co-authors is required.

The case was *Community for Creative Non-Violence v. Reid*.¹¹⁸ In

¹¹⁶ 17 U.S.C. § 201(c). See also 17 U.S.C. § 103(b):

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

¹¹⁷ See 17 U.S.C. §§ 101(1) & (2), 204(a).

¹¹⁸ 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989).

Reed, publishers attempted to extend their copyright entitlements in the work for hire context. The publisher argued that it was entitled to the copyrights on the basis that a work-for-hire should be based on a hiring party's right to control, or actual control of, a product versus traditional agency principles of employment. The Court adopted the traditional agency principles for the determination of "a work prepared by an employee within the scope of his or her employment" rather than "a hiring party's right to control."¹¹⁹ The Court explained, "importing a test based on a hiring party's right to control, or actual control of, a product would unravel the 'carefully worked out compromise aimed at balancing legitimate interests on both sides.'"¹²⁰ The Supreme Court continues: "Strict adherence to the language and structure of the Act is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises."¹²¹

Through cases like *Thomson* and *Childress*, studios and publishers argue that they should be entitled to the contributions of the collaborators without having to pay for them—this time attempting to modify the "joint authorship" doctrine. The Court rejected the previous attempt to weaken copyright protection for artists, and should likewise not prevail in the context of "joint works."¹²²

The Ninth Circuit in *Dumas v. Nagel*¹²³ explained the legislative compromises and balancing between the movie studios, publishers, artists, and authors:

¹¹⁹ *Id.* at 748.

¹²⁰ *Id.*; H.R. REP. NO. 2237 at 114; 1965 Draft at 66 quoting Supplemental Report, at 66 (1965).

¹²¹ *Id.* at 748 n.14 citing *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 617 (1981); *United States v. Sisson*, 399 U.S. 267, 291, 298 (1970).

¹²² Similarly, in *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990), *cert. denied*, *Danforth v. Cohen*, 498 U.S. 1103 (1991), the court rejected the argument that was summarized as—"Moviemakers do lunch, not contracts"—and that moviemakers are too absorbed in developing "joint creative endeavors" to "focus upon the legal niceties of copyright licenses." *Id.* at 556-57. In that case it was the writing requirement of §204(a) regarding the writing requirement for assignment or exclusive licenses which had been ignored. The court described that the statutory requirements promote the "predictability and certainty of copyright ownership—'Congress' paramount goal' when it revised the Act in 1976." *Id.* The movie industry could not skirt the requirements of a writing to obtain rights to the copyright.

¹²³ 865 F.2d 1093, 1105 n.22 (9th Cir. 1989).

It can fairly be assumed that the buyer will virtually always be able to contract for ownership of the copyright; what the statute essentially protects is the artist's right to renegotiate the transfer at a later date under § 203(a). By gaining passage of § 101 (2), the movie and publishing industries obtained the power to bargain for 'work for hire' status for certain types of work. . . . 'Section 101(2) is really statutory permission for certain kinds of independent contractors to give 'authorship' to their buyers.'¹²⁴

In *Dumas*, the Ninth Circuit also criticized the Second Circuit's approach in *Aldon Accessories Ltd. v. Spiegel, Inc.*¹²⁵ In *Aldon*, the Second Circuit expanded the statutory language of "a work prepared by an employee within the scope of his or her employment" to include non-regular relationships so long as the employer "caused the work to be made and exercised the right to direct and supervise the creation."¹²⁶ The Ninth Circuit held that the decision "undercuts the intent of the drafters of § 101 to increase certainty over whether a work is made for hire."¹²⁷

Distorting the literal language of § 101's definition of joint-work to graft on non-statutory language would do exactly what *Effects* and *Dumas* cautioned against: adding uncertainty to the question of copyright ownership.¹²⁸ In *Cohen*, the publisher tried to obtain the copyright by avoiding the Copyright Act requirements that a transfer or exclusive license must be writing. In *Dumas*, the party tried to obtain the work by arguing that the work for hire provisions should be broadly interpreted. In both attempts, the courts held that the Copyright Act should not be liberally expanded to provide more rights to the publishers and studios at the expense of the authors and actors.

Under the *Childress/Thomson* formulation, the courts have in effect given the studios the same rights they did not acquire by written assignment, license, or by work-for-hire—i.e. the exclusive right to the creative collaborator's copyrightable contributions. Requiring studios

¹²⁴ *Dumas*, 865 F.2d at 1101, quoting *Easter Seal Soc'y*, 815 F.2d at 323. Section 203 concerns the writing requirement for assignments, and sections 101 sets forth the requirements to effectuate a work for hire either by an employment agreement or a written independent contractor agreement within specified types of works.

¹²⁵ 738 F.2d 548, 552 (2d Cir. 1984).

¹²⁶ *Id.* at 551.

¹²⁷ *Dumas*, 865 F.2d at 1103.

¹²⁸ *Id.*

to comply with the statute and to obtain a work-for-hire agreement under § 201, or a written transfer under § 204(a), is in accord with *Cohen* and *Dumas*, and furthers statutory consistency and certainty between §101 and § 204.¹²⁹

In addition, allowing studios to profit from the creative collaborator's extensive contributions by requiring that the creative collaborator show a "mutual intent to be co-authors" would, in essence, effect a forfeiture of the creative collaborator's copyright¹³⁰ because, as discussed above, studios, in practice, would not claim that they intended to share the copyrights.

VIII. CONCLUSION

Just as the Supreme Court granted certiorari in 1989 to Reid¹³¹ to resolve a conflict among the Courts of Appeals over the proper construction of the "work made for hire" provisions of the 1976 Copyright Act,¹³² a substantial conflict between the Circuits and district courts has arisen over the proper construction of the "joint work" provisions of the 1976 Copyright Act, and review probably will be necessary.

Just as in *Community for Creative Non-Violence*, the contours of the "joint work" doctrine carry profound significance for freelance creators – including artists, writers, photographers, designers, artists, writers, photographers, designers, composers, editors, directors, actors, musicians, makeup artists – and for the structure of movie productions.

¹²⁹ *Dumas*, 865 F.2d at 1097 "[A] statute that 'is part of an organic whole . . . should be viewed in context with the whole of which it is a part.'"

¹³⁰ Courts are guided by the preference to avoid copyright forfeiture. See *Urantia Found. v. Maaherra*, 114 F.3d 955, 960-64 (9th Cir. 1997).

¹³¹ *Community for Creative Non-Violence*, 490 U.S. 730.

¹³² See *Easter Seal Soc'y*, 815 F.2d at 323 (agency law determines who is an employee under § 101); *Brunswick Beacon, Inc. v. Schnock-Hopchas Publ'g Co.*, 810 F.2d 410 (4th Cir. 1987) (supervision and control standard determines who is an employee under § 101); *Evans Netwon, Inc. v. Chicago Sys. Software*, 793 F.2d 889 (7th Cir. 1986), cert. denied, 479 U.S. 949 (1986); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir. 1984), cert. denied, 469 U.S. 982 (1984); *Dumas v. Gommerman*, 865 F.2d 1093 (9th Cir. 1989) (multi factor formal, salaried employee test determines who is an employee under § 101).

Classifying a work as a “joint work” determines not only the initial ownership of the copyright, but also the copyright’s duration under § 302(c), the owner’s renewal rights, § 304(a), termination rights, § 203(a), and the right to import certain goods bearing the copyright, § 601(b)(1). Additionally, a co-author cannot be liable for infringement of the copyright, and each author has the independent right to use or license the copyright subject only to a duty to account for any profits for use of the copyright.¹³³

For the reasons discussed above, the author contends the *Childress/Thomson* expansion of the statutory language improperly muddies the waters of copyright ownership, destroys the delicate balance achieved through two decades of negotiation leading to the Copyright Act, and is inconsistent with the statutory history and precedent. Accordingly, the statute should not be read to include the non-statutory terms of a “mutual intent to be co-authors.” Instead, the statute should be read to give the terms the normal meaning of the words Congress chose: “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.”¹³⁴

¹³³ *Oddo*, 743 F.2d at 633; *Meredith*, 145 F.2d at 621; *Quintanilla*, 139 F.3d at 498; *Cortner*, 732 F.2d at 271; 1 NIMMER ON COPYRIGHT § 6.10; *Danjaq*, 49 U.S.P.Q.2d (BNA).

¹³⁴ 17 U.S.C. § 101 (1976).