

## Joint Authorship and Dramatic Works: A Critical History

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### INTRODUCTION

Dramatic works have played a central role in the evolution of joint authorship doctrine in copyright law. Ironically, a genre that began as a highly collaborative enterprise has since become the focal point for increasingly narrow interpretations of joint authorship. Indeed, the origins of today's problematic joint authorship standard can best be understood through the lens of dramatic writing, as most of the leading cases on collaborative authorship have involved disputes over the authorship of plays.

The Anglo-American theater tradition is rooted in sixteenth-century England. The explosive growth of professional theater in the sixteenth and early seventeenth centuries took place at a time when collaboration was ubiquitous, even among some of the most famous playwrights. As the industry changed, however, a cultural preference for romantic authorship took hold. In the centuries that followed, disputes involving dramatic works had a major impact on the development of concepts relating to collaborative authorship. Dramatic works continued to play an outsized role in the leading cases on joint authorship under the Copyright Act of 1976. By this time, however, the collaborative origins of Anglo-American theater were largely forgotten and a judicial bias in favor of romantic authorship led courts to disregard the statutory language in favor of judicially-imposed tests designed to defeat the claims of joint authors.

This Article examines the evolution of copyright law pertaining to collaborative authorship and finds that much of the core legal doctrine in this area arose from

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disputes involving dramatic works. This fresh look at theatrical collaborations reveals a rich history that calls into question the modern judicial presumption that dramatic writing is the product of individual genius. Examining the history of Anglo-American law's response to collaboration in dramatic works offers valuable insight into the development of multiple concepts related to authorship—in particular, the rules governing derivative works, works made for hire, and joint works. It also demonstrates that the jurisprudence of collaborative playwriting has led courts to develop an unduly narrow judicial interpretation of joint authorship.

Part I examines the ubiquity of collaborative writing in the Elizabethan theater and traces its decline during the English Civil Wars (1642–51) and the Restoration, accompanied by a contemporaneous shift in cultural preference toward sole authorship that was fueled by the concept of the romantic author. Part II demonstrates the role that dramatic works played in the jurisprudence of authorship in English and American courts during the nineteenth century. Part III addresses the role of dramatic works in shaping the federal courts' attempts to resolve competing authorship claims under the Copyright Act of 1909 in the absence of clear legislative guidance for distinguishing among joint works, derivative works, and works made for hire. Part IV examines the federal courts' restrictive interpretations of joint authorship under the Copyright Act of 1976 in the specific context of dramatic works and the courts' reluctance, in many cases, to extend those interpretations to other categories of works. Part V suggests that the persistent influence of romantic authorship has led federal courts to favor sole authorship over collaborations, and draws a contrast with contemporary English courts' refusal to embrace this trend, concluding that the American courts' preference for solitary authorship of dramatic works conflicts not only with the federal statutes, but with the history of dramatic writing as well.

## **I. THE COLLABORATIVE ORIGINS OF ANGLO-AMERICAN DRAMA**

Dramatic writing in the Anglo-American tradition is deeply rooted in collaboration. As this discussion will reveal, however, the collaborative origins of English drama have been largely obscured, for two reasons: First, the low status and relative anonymity of the Elizabethan playwrights meant that these collaborations were largely hidden from view. Second, the revisionist perspective of eighteenth-century literary criticism, which venerated the “romantic” author and dismissed collaborative writing as inherently inferior, created an expectation that literary works of any value had to be the work of a solitary genius.

### **A. THE ENGLISH RENAISSANCE**

From a contemporary perspective, it is easy to overlook the predominance of collaborative authorship in the early days of English theater. As discussed below, despite the explosive growth of theater during the English Renaissance, writing plays was not considered a serious literary endeavor. Playwrights had no property rights in their creative efforts, their plays were rarely published, and, in most cases,

audiences neither knew nor cared who wrote them. History reveals, however, that for even the most prolific playwrights of this period—including Shakespeare—collaboration was the norm rather than the exception.

In the early Elizabethan period, most theatrical works were collaborations written and performed by amateurs, with an emphasis on spectacle rather than text.<sup>1</sup> However, Elizabeth's affinity for realism and dialogue—as well as her passion for budget-cutting—drove English theater toward greater emphasis on the written word, leading to an increased need for “the poet or dramatist.”<sup>2</sup> By 1584, the first professional playwrights began to emerge.<sup>3</sup>

Although the English Renaissance is credited with “the rise of the professional playwright,”<sup>4</sup> surprisingly little is known of these playwrights' identities.<sup>5</sup> The dramatists owned no property rights in their plays,<sup>6</sup> and, with a few exceptions, their names were rarely attached to their works.<sup>7</sup> Except for a few freelancers and writer-managers, the professional playwrights of the Renaissance were simply employees of the theater companies,<sup>8</sup> receiving compensation for writing and revising an agreed-upon number of plays, as well as adding prologues, epilogues, and other new material to existing plays, with some writers earning a weekly wage.<sup>9</sup> Once the writer delivered the manuscript, the play became the property of the company, which

1. GERALD EADES BENTLEY, *PROFESSION OF DRAMATIST IN SHAKESPEARE'S TIME, 1590–1642*, at 3–4, 198 (1984); CHARLES WILLIAM WALLACE, *THE EVOLUTION OF THE ENGLISH DRAMA UP TO SHAKESPEARE, WITH A HISTORY OF THE FIRST BLACKFRIARS THEATRE 122* (1968); JANETTE DILLON, *THE CAMBRIDGE INTRODUCTION TO EARLY ENGLISH THEATRE 127, 142–44* (2006).

2. WALLACE, *supra* note 1, at 122, 125 (1968); *see also* DILLON, *supra* note 1, at 127–28.

3. WALLACE, *supra* note 1, at 184; *see also* DILLON, *supra* note 1, at 110 (noting that playwrights first began to be perceived as “authors” in the 1590s).

4. PAULINA KEWES, *AUTHORSHIP AND APPROPRIATION: WRITING FOR THE STAGE IN ENGLAND, 1660–1710*, at 12 (1998).

5. DILLON, *supra* note 1, at 109.

6. KEWES, *supra* note 4, at 1, 15–16. At most, they owned their physical manuscripts until they conveyed them to a theater company or publisher. Jessica Litman, *The Invention of Common Law Play Right*, 25 *BERKELEY TECH. L.J.* 1381, 1390 (2010); *see also* Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 *REPRESENTATIONS* 51, 55 (1988).

7. KEWES, *supra* note 4, at 1. For example, the extensive records of plays performed at Court between 1558 and 1585 identify the company and sometimes the company manager (“payee”), but they make no mention of the writers, and in most instances they omit the name of the play itself. WALLACE, *supra* note 1, at 199–225. This practice continued well into the seventeenth century: The records of the Master of the Revels from 1623–1673 include each play's title and theater company but not its author. KEWES, *supra* note 4, at 1 n.1 (1998) (citing N.W. BAWCUTT, *THE CONTROL AND CENSORSHIP OF CAROLINE DRAMA: THE RECORDS OF SIR HENRY HERBERT, MASTER OF THE REVELS 1623–1673* (1996)).

8. BENTLEY, *supra* note 1, at 48–49, 62, 67, 88, 99, 101 (1984); *see also* Litman, *supra* note 6, at 1389–91. Freelancing became somewhat more common after the end of Elizabeth's reign; these writers received a flat fee upon delivering their work to the company. KEWES, *supra* note 4, at 17–18. Of the best-known Renaissance dramatists, only Ben Jonson was a freelancer. BENTLEY, *supra* note 1, at 264.

9. BENTLEY, *supra* note 1, at 134–43, 268; KEWES, *supra* note 4, at 17; DILLON, *supra* note 1, at 112; David Scott Kastan, *Shakespeare Didn't Write Alone*, *ATLANTIC* (June 8, 2019), <https://perma.cc/X83E-8BRX>. Later in this period, it became customary for playwrights to receive, as additional compensation, the net profits from one night's “benefit” performance (typically the second or third night). KEWES, *supra* note 4, at 15–16; BENTLEY, *supra* note 1, at 129–33; DILLON, *supra* note 1, at 111–12.

then had the exclusive right to perform the play and to decide whether to publish it.<sup>10</sup> Many playwrights were bound to their companies by exclusive contracts<sup>11</sup> and minimum output agreements,<sup>12</sup> and were contractually prohibited from publishing their plays.<sup>13</sup> Even those not prohibited from publishing generally refrained from doing so without the theater company's consent; because England did not enact an exclusive public performance right for plays until 1833,<sup>14</sup> publication would have enabled a theater company to perform any other company's plays without compensating the writers or the originating company, in competition with the very theaters that employed the writers.<sup>15</sup> Therefore, to prevent competition from their rivals, most theater companies chose not to publish their plays.<sup>16</sup> Control over the play's performance and publication belonged to the theater company and the publisher, respectively.<sup>17</sup>

On the rare occasions that plays were published, the playwrights' names were typically omitted.<sup>18</sup> One of Shakespeare's most famous and prolific contemporaries, Christopher Marlowe, never had his name published on a single play during his lifetime, even though his plays were widely produced.<sup>19</sup> Even Shakespeare's name did not appear on the earliest printed versions of his plays.<sup>20</sup>

Despite the theater industry's growth during the Renaissance, both the profession and its writers were viewed with moral disapprobation, often with strong religious overtones.<sup>21</sup> As a result, contemporaneous literary critics and archivists largely ignored plays, contributing to the paucity of the record.<sup>22</sup>

10. KEWES, *supra* note 4, at 15–16, 20; DILLON, *supra* note 1, at 111.

11. BENTLEY, *supra* note 1, at 114–20, 268.

12. *Id.* at 120–21.

13. *Id.* at 143–44, 266–70, 273–75, 279–80, 282, 292. In a notable exception, freelance playwright Ben Jonson published most of his plays soon after they were produced, never omitting his name from the printed volumes. *Id.* at 290.

14. Dramatic Literary Property Act, 1833, 3 & 4 Will.IV., c. 15.

15. BENTLEY, *supra* note 1, at 264–65; Litman, *supra* note 6, at 1390–91.

16. KEWES, *supra* note 4, at 3, 20–24. They may also have sought to ensure that the public had to buy tickets in order to enjoy the plays. *Id.*; E.K. CHAMBERS, 3 THE ELIZABETHAN STAGE 183–84 (1923).

17. KEWES, *supra* note 4, at 1 n.2; Litman, *supra* note 6, at 1390.

18. KEWES, *supra* note 4, at 176; BENTLEY, *supra* note 1, at 275–76; Alex Knapp, *Yes, Shakespeare Really Did Write Shakespeare*, FORBES (Oct. 19, 2011), <https://perma.cc/HCW9-M5N6>. Between 1580 and 1642, the title pages of plays published as quartos identified the theater company that owned the play and authorized its publication, and sometimes the theater where the company performed (e.g., the Globe), but “[t]he playwright's name was an optional extra, and was often not divulged.” BRIAN VICKERS, SHAKESPEARE, CO-AUTHOR: A HISTORICAL STUDY OF FIVE COLLABORATIVE PLAYS 10 (2004). As a result, collaborations are generally not reflected in the published plays. *Id.*

19. Knapp, *supra* note 18.

20. DILLON, *supra* note 1, at 109; *Publishing Shakespeare*, FOLGER SHAKESPEARE LIBRARY, <https://perma.cc/F9V7-WXJT> (last visited Jan. 20, 2022).

21. BENTLEY, *supra* note 1, at 43–49, 57, 58–59, 88; DILLON, *supra* note 1, at 113–17, 189. “Dramatists had low status because plays and players did.” *Id.* at 113. Shakespeare notwithstanding, it appears that most publicly-performed works in the Elizabethan era were undistinguished, and their audiences indiscriminating. WALLACE, *supra* note 1, at 125, 178–79, 182–83.

22. BENTLEY, *supra* note 1, at 50–53. While some educated persons reportedly collected plays at the time, DILLON, *supra* note 1, at 112 n.11 (citing LUKAS ERNE, SHAKESPEARE AS LITERARY DRAMATIST 13 (2003)), in 1612 Sir Thomas Bodley pointedly excluded plays from his new library at Oxford, dismissing them as “riff-raffs,” of which “hardly one in forty” were “worthy the keeping.” DILLON, *supra*

The low status and relative anonymity of Elizabethan playwrights largely masks the fact that collaboration, including the appropriation of earlier works, was “the Renaissance English theatre’s dominant mode of textual production,”<sup>23</sup> and continued to be commonplace until the mid-seventeenth century.<sup>24</sup> It was common for plays to have two to four authors<sup>25</sup>—sometimes as many as five<sup>26</sup>—and many plays went through later revisions by different authors.<sup>27</sup> According to one estimate, roughly half of the plays written for commercial theater between 1590 and 1642 involved multiple writers.<sup>28</sup> Collaborations involved such famous names as Ben Jonson, Francis Beaumont, and Thomas Dekker.<sup>29</sup> Playwright Thomas Heywood claimed to have had “an entire hand, or at least a main finger” in 220 plays.<sup>30</sup>

Although the idea that Shakespeare himself had collaborators sparked outrage as recently as 1986,<sup>31</sup> that fact is widely accepted today; the lengthy list is said to include John Fletcher, Ben Jonson, Thomas Kyd, George Peele, Christopher Marlowe, George Wilkins, Thomas Nashe, Thomas Heywood, and Thomas

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note 1, at 112 (citing LETTERS OF SIR THOMAS BODLEY TO THOMAS JAMES 219 (G.W. Wheeler ed., 1926)).

23. Jeffrey A. Masten, *Beaumont and/or Fletcher: Collaboration and the Interpretation of Renaissance Drama*, 59 ENG. LITERARY HIST., 337, 339 (1992); see also VICKERS, *supra* note 18; WILLIAM SHAKESPEARE AND OTHERS: COLLABORATIVE PLAYS (Eric Rasmussen & Jonathan Bate eds., 2013); Mike Llewellyn, *Collaboration*, Paper Presented at the Shakespearean Authorship Trust Conference (July 9, 2005), transcript available at <https://perma.cc/XD25-RYPL>.

24. Playwriting went on hiatus when the English Civil War shut down the London theaters in 1642. KEWES, *supra* note 4, at 32, 130.

25. DILLON, *supra* note 1, at 110.

26. KEWES, *supra* note 4, at 133; BENTLEY, *supra* note 1, at 126.

27. DILLON, *supra* note 1, at 110.

28. KEWES, *supra* note 4, at 133; BENTLEY, *supra* note 1, at 199, 204–06, 227. The authorship of these plays is not always reflected in the official records or on the title pages of the scripts. *Id.* at 199, 205, 209, 234. According to Paulina Kewes, collaborations comprised eighty-two percent of plays written in early 1598, and sixty percent of those written in late 1598. KEWES, *supra* note 4, at 134 (citing NEIL CARSON, *A COMPANION TO HENSLOWE’S DIARY* 57 (1988)). From 1600 to 1610, she estimates that about thirty percent were collaborations. *Id.* Almost two-thirds of the plays noted in theater manager Philip Henslowe’s records (covering the years 1592–1609) are collaborations. Kasten, *supra* note 9.

29. BENTLEY, *supra* note 1, at 206–11, 234, 271.

30. THOMAS HEYWOOD, *Epistle to the Reader*, in THE ENGLISH TRAVELLER (1633), quoted in DILLON, *supra* note 1, at 111; accord, Chambers, *supra* note 16, at 182; BENTLEY, *supra* note 1, at 126. There is even some direct evidence of collaboration: Of the few plays that were contemporaneously published with authorial attribution, several included two writers’ names on the title page. Llewellyn, *supra* note 23.

31. Dalya Alberge, *Christopher Marlowe Credited as One of Shakespeare’s Co-Writers*, GUARDIAN, Oct. 23, 2016 (noting that “some people were outraged” when the 1986 *Oxford Shakespeare* first proposed that eight of Shakespeare’s plays involved collaborators); Christopher Hooton, *Christopher Marlowe to Receive Co-Author Credit for William Shakespeare Plays*, INDEPENDENT (Oct. 24, 2016), <https://perma.cc/333R-T555>.

Middleton.<sup>32</sup> The editors of *The New Oxford Shakespeare* concluded in 2016 that seventeen of Shakespeare's plays were collaborations.<sup>33</sup>

Collaborative playwriting in Elizabethan times did not necessarily involve what we think of as a typical collaboration today—that is, several writers working in close consultation with one another. Between 1566 and 1642, it was common for writers to author separate acts of a play.<sup>34</sup> Even after a play's initial production, a new writer might be brought in to revise it.<sup>35</sup> Some writers may also have specialized in certain types of content, such as comic scenes or musical interludes.<sup>36</sup> Much like today's screenplays, many plays in that period were commissioned works; the theater company paid one writer to create an outline, then commissioned other writers to write individual scenes or other discrete elements of the script, including music.<sup>37</sup> In some cases, it is difficult to determine whether the multiple authors who worked on a play were collaborators in the temporal sense, or whether a later author (often anonymous) revised the work of the earlier author, since both practices were common.<sup>38</sup>

The extent of collaborative playwriting during the English Renaissance was strongly linked to the demand for new works. This mirrors the collaboration that is commonplace in film, television, and popular music today—three areas of the entertainment industry where there is constant demand for new material. Collaborative writing in the Elizabethan era was driven, at least in part, by the rapid proliferation of theater companies and their continuing need for new scripts.<sup>39</sup> For

32. VICKERS, *supra* note 18, at 6, 9; Daniel Pollack-Pelzner, *The Radical Argument of the New Oxford Shakespeare*, NEW YORKER, Feb. 19, 2017. The title page of *Two Noble Kinsman* names Shakespeare and John Fletcher as authors. Kastan, *supra* note 9. Fletcher is also believed to be the co-author of *Henry VIII*. *Id.* Scholars believe that two of Shakespeare's early plays—*Henry VI* and *Titus Andronicus*—were co-authored with more experienced playwrights, including Thomas Kyd, George Peele, and Christopher Marlowe. *Id.* Thomas Middleton is believed to have contributed to *Macbeth*, *Timon of Athens*, *Measure for Measure*, and *All's Well That Ends Well*. *Id.* When *The New Oxford Shakespeare* was published in 2016, three plays that had previously been credited to Shakespeare alone—*Henry IV: Part One*, *Part Two*, and *Part Three*—were now credited as jointly authored by Shakespeare and Christopher Marlowe. Pollack-Pelzner, *supra* (discussing THE NEW OXFORD SHAKESPEARE: THE COMPLETE WORKS: MODERN CRITICAL EDITION (2016)).

33. Pollack-Pelzner, *supra* note 32.

34. VICKERS, *supra* note 18, at 27; BENTLEY, *supra* note 1, at 228–34; Kastan, *supra* note 9. One company's records show that it initially paid one or two writers for their work on a play, then paid different writers at later times for completing the play. BENTLEY, *supra* note 1, at 228. The title page of one published play not only identified its two authors, but specified how many acts each of them wrote. Llewellyn, *supra* note 23, at 5.

35. BENTLEY, *supra* note 1, at 235–45; Kastan, *supra* note 9.

36. BENTLEY, *supra* note 1, at 228. The latter approach would correspond most closely to the creation of musical theater today, where the script, music, and/or lyrics frequently have separate creators. Another copyrightable element of modern musical theater is the choreography, which is typically authored by someone who does not participate at all in writing the book, music, or lyrics.

37. Travis M. Andrews, *Big Debate About Shakespeare Finally Settled by Big Data: Marlowe Gets His Due*, WASH. POST: MORNING MIX (Oct. 15, 2016), <https://perma.cc/8VES-GUAA>.

38. BENTLEY, *supra* note 1, at 235, 240–63. For example, several printed plays identify the revisers simply as members of the theater company that produced the play. *Id.* at 242.

39. KEWES, *supra* note 4, at 133. There were at least 150 English companies during Elizabeth's reign; in the first twenty years alone there were ninety companies, a significant increase over her predecessor's reign. WALLACE, *supra* note 1, at 120. Between 1590 and 1642, there were fifteen to

example, from roughly 1590 to 1610, there was a large demand for new plays, occasioned by the relative dearth of good material in the early years of professional theater.<sup>40</sup> The constant pressure to produce new material encouraged writers to work together in order to accelerate their output and reap the commercial rewards.<sup>41</sup>

It is hardly surprising, then, that collaborations began to decline when there was a reduced demand for new plays.<sup>42</sup> Between 1631 and 1642, only six percent of plays had multiple authors.<sup>43</sup> The decline in demand was occasioned by the large number of plays that were written in the previous decades and still available for production.<sup>44</sup> As a final blow, the closing of the theaters in 1642 due to the English Civil Wars wiped out any remaining demand for new plays.

### B. THE RESTORATION THROUGH THE EIGHTEENTH CENTURY

Ironically, it took a downturn in the theater industry as a whole for playwriting to gain a modicum of respectability. In the late seventeenth century, the public finally began to perceive playwrights as creative artists capable of true “authorship,” and the conceit of the romantic playwright—a solitary genius—began to emerge. This, in turn, led to a new fastidiousness as to the authorship of dramatic works.<sup>45</sup> This change in perception coincided with, and may have been caused by, the public’s newly discovered interest in *reading* plays as opposed to *watching* them.

Even though the closing of the London theaters during the English Civil Wars eliminated the demand for new plays, the publication and reading of plays became more common during the same period.<sup>46</sup> Essentially, the consumption of theater went “underground.” With the theaters closed, the companies that had once prohibited publication of their scripts no longer had the resources or motivation to enforce those prohibitions.<sup>47</sup> At the same time, the public, unable to attend plays, turned to reading them, creating opportunities for both playwrights and printers to generate new revenues.<sup>48</sup>

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twenty companies operating in London alone. BENTLEY, *supra* note 1, at 65. The most famous Elizabethan plays were written before 1626. *Id.* at 221.

40. BENTLEY, *supra* note 1, at 223.

41. Llewellyn, *supra* note 23, at 11.

42. See BENTLEY, *supra* note 1, at 15, 220–21.

43. KEWES, *supra* note 4, at 134. This period of decline roughly corresponds to the reign of Charles I (1625–49).

44. The London companies commissioned fewer new plays during this period, and most plays performed at Court were revivals rather than new works. BENTLEY, *supra* note 1, at 221–22.

45. KEWES, *supra* note 4, at 176.

46. *Id.* at 3.

47. BENTLEY, *supra* note 1, at 265. There had also been a notable increase in play publication during the earlier period of 1636–37, when theaters were shut down because of the plague, and continuing for several years thereafter. *Id.*

48. KEWES, *supra* note 4, at 3, 100, 109. For a successful play, however, the writers’ receipts from benefit night performances could be almost ten times the amount received from the publisher. Shirley Strum Kenny, *The Publication of Plays, in THE LONDON THEATRE WORLD 1660–1800*, at 310 (Robert D. Hume ed., 1980). During this time, playwrights also began to have more control over the production process, including casting, scenery, and rehearsals. KEWES, *supra* note 4, at 19. Sometimes they acted as directors and marketing agents. *Id.* This level of involvement was important to maximizing their earnings

When the English theaters finally reopened in 1660, their numbers and level of activity were greatly reduced. The Crown authorized only two theater companies to perform in London.<sup>49</sup> As a result, while there was a renewed interest in plays and the public had an appetite for new material, the shortage of venues created a bottleneck, meaning that fewer new works could actually be staged.<sup>50</sup> In addition, the law gave each company exclusive rights in its scripts.<sup>51</sup> These combined circumstances had three significant effects. First, because there was no danger that their plays would be “poached” by the competition, the surviving companies were more willing than their Elizabethan predecessors to permit playwrights to publish their scripts, and indeed viewed publication as valuable publicity for their respective repertoires;<sup>52</sup> indeed, the publication of plays became much more common after 1660.<sup>53</sup> Second, because the demand for new plays was reduced, there was no longer the pressure to produce new works rapidly that there had been during the Elizabethan era; thus, one major motive for collaboration disappeared.<sup>54</sup> Third, because playwrights were no longer firmly bound to particular companies,<sup>55</sup> they were much freer to cultivate their own identities as authors and to pursue recognition, patronage, and economic rewards by being publicly connected to their works.

During this time, playwrights derived many benefits from publication. Their names began to appear on the title pages of their published scripts,<sup>56</sup> although they were still noticeably absent from the playbills advertising a production.<sup>57</sup> With the public’s newfound interest in plays as literature, publication of a play with the writer’s name prominently attached enhanced the playwright’s literary status, and this allowed the playwright to attract wealthy patrons;<sup>58</sup> a sole author did not have to share the glory with a collaborator. As publication revenues increased in importance, sole authorship also offered an economic advantage over collaboration.<sup>59</sup>

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from the benefit night performances; if a play was poorly received, it would close too soon for the writer to receive the benefit. *Id.* By the end of the seventeenth century, the third-night benefit performance had been extended to the sixth and ninth evenings. *Id.* at 19–20.

49. KEWES, *supra* note 4, at 3, 12–13, 17–18, 134; Litman, *supra* note 6, at 1391. For one twelve-year period, only a single company was operating. J. LESLIE HOTSON, *THE COMMONWEALTH AND RESTORATION STAGE* 277 (1928).

50. KEWES, *supra* note 4, at 134.

51. *Id.* at 3, 13.

52. *Id.* at 3, 23.

53. See Kenny, *supra* note 48, at 309–11.

54. KEWES, *supra* note 4, at 134.

55. *Id.* at 18.

56. *Id.* at 3, 13. Publishers’ catalogs also began to include the names of playwrights along with the titles of their plays. *Id.* at 100.

57. Indeed, on the occasion of a rare exception to this practice in 1699, John Dryden commented: “[T]he printing an Authours name, in a Play bill, is a new manner of proceeding, at least in England.” *Id.* at 19 (quoting *THE LETTERS OF JOHN DRYDEN WITH LETTERS ADDRESSED TO HIM* 113 (Charles E. Ward ed., 1942)).

58. Kenny, *supra* note 48, at 312. Some writers earned additional sums by adding dedications that flattered real or potential patrons. *Id.* at 311.

59. KEWES, *supra* note 4, at 134. Nonetheless, once the writers sold their manuscripts to a printer (for a lump sum), they no longer owned any interest in their plays. *Id.* at 30. Although the 1710 Statute of Anne vested copyright ownership for a certain number of years in authors for works published on or



Once plays began to be perceived as literature suitable for reading, critics began to place a higher value on their originality, and the appropriation of earlier works that was commonplace in the Renaissance theater began to be vilified as plagiarism.<sup>60</sup> By the early eighteenth century, playwrights were expected to acknowledge their sources.<sup>61</sup> The proliferation of printed scripts contributed to the elevation of originality by making it easier to compare later plays with the earlier works from which they were derived.<sup>62</sup>

Critical norms also turned against collaboration. Oxford scholar Paulina Kewes writes, “By the end of the seventeenth century, . . . collaborative playwriting came to be almost universally condemned on both artistic and ethical grounds.”<sup>63</sup> From an artistic perspective, collaboration was thought “to jeopardize the integrity and textual unity of the play.”<sup>64</sup> Professional playwrights who collaborated were viewed as inadequate and uncreative.<sup>65</sup> Collaboration came to be viewed as a close relative of literary theft;<sup>66</sup> Kewes writes, “[L]ike appropriation, it undermined the emerging ethos of singular authorship.”<sup>67</sup> Kewes also contends that collaboration was frowned upon even more than appropriation.<sup>68</sup>

As a result of these economic and cultural changes, the practice of collaboration between professional playwrights that was so common in the sixteenth and early seventeenth centuries came to be largely abandoned.<sup>69</sup> Kewes describes the practice of collaborative playwriting as “virtually defunct” by the late seventeenth century.<sup>70</sup> Out of more than 400 new plays written between 1660 and the 1710 enactment of England’s first copyright law, the Statute of Anne, Kewes identifies only two as

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after its enactment date, in practice playwrights were still required to assign their copyrights to the publisher in order to be published. Kenny, *supra* note 48, at 312.

60. KEWES, *supra* note 4, at 3–5, 32–34, 64. Even John Dryden was not unscathed. At one point he responded to charges of plagiarism with an argument that foreshadows the idea-expression dichotomy of modern copyright law, asserting that while it was improper to appropriate a predecessor’s language, the borrowing of plots was inconsequential. *Id.* at 57. By the 1690s, others had adopted the same defense. *Id.* at 79.

61. *Id.* at 95. Works appearing in print began to distinguish appropriated language with typographical markers such as italics. *Id.* at 93–94; see, e.g., MICHAEL DOBSON, THE MAKING OF THE NATIONAL POET: SHAKESPEARE, ADAPTATION AND AUTHORSHIP, 1660–1769, at 99–100, 100 n.3 (1992) (quoting the preface to Colley Cibber’s adaptation of *Richard III*, published in 1700, wherein Cibber notes that he has demarcated not only Shakespeare’s words, but also his ideas, by using various typographical devices).

62. KEWES, *supra* note 4, at 109. One writer’s commission to adapt an existing play into operatic form led to a dispute when the same company that commissioned the work refused to pay him the third night benefit, on the ground that his contributions were too minor. *Id.* at 106–07.

63. *Id.* at 131.

64. *Id.*

65. *Id.* at 142–43, 178.

66. *Id.* at 143–44.

67. *Id.* at 146.

68. *Id.* at 130. “By the 1680s, collaboration implied inadequacy and failure.” *Id.* at 179.

69. *Id.* at 8. Although English literary critics also began showing serious interest in the concept of intellectual property after the Glorious Revolution of 1688–89, DOBSON, *supra* note 61, at 101, Paulina Kewes argues that “the fairly abrupt change in common views of authorship between 1660 and 1710 resulted from a particular configuration of economic, political, social and cultural factors.” KEWES, *supra* note 4, at 11; see also *id.* at 130–31, 149.

70. KEWES, *supra* note 4, at 20.

collaborations between professional playwrights.<sup>71</sup> From the late seventeenth century onward, sole authorship of plays became the new normal.<sup>72</sup>

Despite the prevailing trend toward sole authorship, one collaboration during this period gave rise to what is apparently the first English lawsuit between joint authors. In 1687, actress Elizabeth Leigh sued professional playwright Elkanah Settle for failing to pay her the agreed-upon fee for her contribution to a play titled *The Ambitious Slave, or A Generous Revenge*.<sup>73</sup> The parties agreed that the actress, who supplied the idea and wrote portions of the script, was entitled to the same share of the proceeds as the playwright who wrote the lion's share of the script.<sup>74</sup> The actress may have cared more about compensation than credit; when the play was produced and published, the professional playwright received sole credit.<sup>75</sup> This, it appears, was the first English legal dispute involving joint authors.

By the end of the seventeenth century, playwrights had begun to scrupulously credit any contributions made to their works by others, including specific actors in the company, pointing out with particularity the components each had contributed.<sup>76</sup> This practice reflected the increasing pressure to attribute authorship precisely.<sup>77</sup> Authorship of dramatic works had begun to evolve into a claim of property ownership, with respect to which appropriation and collaboration were inconvenient complications.<sup>78</sup> For example, one of the two known professional collaborations during this period was John Dryden and Nathaniel Lee's *Oedipus* (1678).<sup>79</sup> Although the play was successful and critically acclaimed,<sup>80</sup> it was criticized both as a collaboration and as an adaptation of Sophocles; many of the detractors obsessed over which writer was responsible for which portions of the script.<sup>81</sup> Some critics cited the play as proof that collaborative drama was inherently inferior.<sup>82</sup>

As this history reveals, in the case of dramatic writing, the concept of romantic authorship began to take hold in the mid-to-late seventeenth century, and was already

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71. *Id.* at 154–55. Dramatic collaborations during this period were generally limited to the leisure-time efforts of “genteel amateurs,” either working together or with the assistance of professionals, typically uncredited, who were likely to receive all of the profits (if any) and also stood to gain through patronage. *Id.* at 134–39, 141.

72. *Id.* at 3. At the same time, however, the growing demand for reading material led to an increase in collective authorship of other kinds of literary works, including translations, periodicals, and collections of poetry, essays, and letters. *Id.* at 134.

73. *Id.* at 140; HOTSON, *supra* note 49, at 274–76.

74. KEWES, *supra* note 4, at 140–41; HOTSON, *supra* note 49, at 274–76.

75. KEWES, *supra* note 4, at 141. It probably did little to advance his standing, however, as the play was a flop. HOTSON, *supra* note 49, at 276.

76. KEWES, *supra* note 4, at 141.

77. *Id.* at 141–42.

78. *Id.* at 143, 147.

79. *Id.* at 155.

80. *Id.* at 157.

81. *Id.* at 155–62. The other known professional collaboration was *The Duke of Guise* (1682), by the same authors. *Id.* at 162. The play's controversial politics led many observers to attribute its objectionable content to Dryden. *Id.* at 167.

82. *See id.* at 160.

firmly established by the start of the eighteenth century.<sup>83</sup> In contrast, the conventional view of romantic authorship posits that the concept did not emerge until the mid-to-late eighteenth century, when the demand for books became sufficient to support a publishing industry.<sup>84</sup> At that time, legal recognition of authors' rights was largely a byproduct of Parliament's restriction of publishers' monopolies in the 1710 Statute of Anne,<sup>85</sup> followed by the London publishers' attempts to overcome those restrictions in *Millar v. Taylor*<sup>86</sup> and *Donaldson v. Beckett*<sup>87</sup> by persuading courts that authors owned common-law copyrights in their creations.<sup>88</sup> However, this conventional view is based largely on the history of books, not plays. For playwrights, the shift to publishing as an important exploitation mode came about much earlier, spurred by the suppression of theatrical performances that began in 1642 and the resulting decline in demand for new plays. The attachment of the playwright's name to the work became increasingly common from that point forward, as the public began to view plays as literature suitable for reading and worthy of literary criticism, and as playwrights discovered that publishing their plays could draw favorable attention and patronage. Respect for collaborative writing declined, and authorial egos began to emerge. The results of this cultural and economic shift eventually found their way into the jurisprudence of joint authorship, where they persist today.

83. Romantic authorship refers to the perception of the author as a solitary genius whose work is entirely original. See Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain (Part I)*, 18 COLUM.-VLA J.L. & ARTS 1, 28 (1993). Kewes refers to this as "proprietary authorship," KEWES, *supra* note 4, at 2, adding that, by the late seventeenth century, sole authorship had become "an essential qualification of literary respectability," *id.* at 3.

84. See Rose, *supra* note 6, at 55–56 (citing RICHARD D. ALTICK, *THE ENGLISH COMMON READER* 30–66) (1957)); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH CENTURY STUD. 426 (1984); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values*, 118 YALE L.J. 186, 192–94 (2008).

85. Statute of Anne (Copyright Act 1709), 8 Ann. c. 21.

86. *Millar v. Taylor* [1769] 98 Eng. Rep. 201.

87. *Donaldson v. Beckett* [1774] 1 Eng. Rep. 837. See Rose, *supra* note 6, at 55–59; LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 147 (1968). In contrast to the extensive scholarly attention devoted to *Millar* and *Donaldson*, copyright cases involving plays during this same period have been largely overlooked. For example, the lesser-known case of *Macklin v. Richardson* involved the unauthorized publication of a play which had been transcribed by a spectator without the consent of the playwright or the company. *Macklin v. Richardson* [1770] 27 Eng. Rep. 451 [Amb. 694]. The court relied on the common law to enjoin publication of the transcript, rejecting the defendant's argument that publicly performing a play gave the audience an implied license to use the play, and that the unauthorized publication caused no harm; the court took particular notice of the playwright's potential revenues from authorized publication. Ronan Deazley, *Commentary on Dramatic Literary Copyright Act 1833*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (Lionel Bentley & Martin Kretschmer eds., 2008) (citing *Macklin*, Amb. at 696), <https://perma.cc/D3D7-9NB7>. Also, a series of cases in the late eighteenth and early nineteenth century addressed, but did not fully resolve, the question whether the playwright could prevent unauthorized performances of a play. *Id.* (discussing *Coleman v. Wathen* [1793] 101 Eng. Rep. 137; *Morris v. Kelly* [1820] 37 Eng. Rep. 451; *Murray v. Elliston* [1822] 106 Eng. Rep. 1331); see also Litman, *supra* note 6, at 1399 n.109 (noting uncertainty regarding copyright protection for unpublished plays during this period).

88. Rose, *supra* note 6, at 66–69.

## II. LEGISLATION AND LITIGATION IN THE NINETEENTH CENTURY

In 1833, the Dramatic Copyright Act amended England's copyright law to recognize, for the first time, an author's exclusive public performance right in dramatic works.<sup>89</sup> Prior to this enactment, playwrights only had the right to prevent unauthorized copying of their works; anyone was free to perform them.<sup>90</sup> It was another two decades before the United States first recognized a public performance right in dramatic works in 1856.<sup>91</sup> The additional revenue derived from a performance right no doubt increased the importance of identifying the play's author(s) and rights holders.

In the mid-nineteenth century, dramatic collaborations began to play a significant role in the development of joint authorship doctrine in Anglo-American law. Courts of that period were still exploring the uncertain boundaries between joint authorship and other forms of multiple authorship in the contexts of both books and plays. The principles discussed by these courts include the antecedents of today's concepts of derivative works, joint works, and works made for hire. Several of these cases had a significant influence on judicial interpretations of the joint works doctrine under U.S. copyright law more than a century later. Remarkably, every one of these influential cases involved contributions to dramatic works.

Early cases wrestled with the problem of commissioned works, establishing a concept that was a precursor of today's work-made-for-hire doctrine.<sup>92</sup> As discussed below, a party who conceived the overall design of a work but commissioned others to create the individual components was considered the sole author of the resulting work, but this principle did not apply if the commissioning party supplied only the general idea of the work, leaving the details to those he employed. These cases were resolved on a "winner-take-all" basis. Only later in the century did courts begin to explore joint authorship.

The 1856 case of *Shepherd v. Conquest* was decided roughly two decades after England first enacted a public performance right for plays.<sup>93</sup> The plaintiffs, proprietors of a theater, commissioned a playwright, Courtney, to create an English adaptation of a French play.<sup>94</sup> There was no written contract, and no assignment or registration of copyright—only a verbal understanding that the plaintiffs would have the exclusive right to perform the play in London, and that Courtney would have the exclusive right to perform it elsewhere in the country.<sup>95</sup> Pursuant to this agreement, the plaintiffs produced the play at the Surrey Theatre in London.<sup>96</sup> Courtney later assigned his interest to the defendant, another producer, who staged a production at

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89. Dramatic Copyright Act, 3 & 4 Will. 4, c. 15.

90. Edward S. Rogers, *The Law of Dramatic Copyright*, 1 MICH. L. REV. 102, 106–08 (1902).

91. Act of Aug. 18, 1856, 11 Stat. 139.

92. See 17 U.S.C. §§ 101 (definition of "work made for hire"), 201(b) (addressing authorship of works made for hire).

93. *Shepherd v. Conquest* [1856] 17 C.B. 427.

94. *Id.* at 441.

95. *Id.*

96. *Id.*

a different theater in London.<sup>97</sup> When the plaintiffs sued the defendant for performing the play in London without their consent, the defendant responded that the plaintiffs did not own the exclusive performance right in London. Under the 1833 Act—as is true under U.S. copyright law today—the exclusive right to perform a play could be assigned only in writing.<sup>98</sup> Because the plaintiffs had not obtained a written assignment from Courtney, they could prevail only if they could establish that they, and not Courtney, were the authors of the play.<sup>99</sup>

The court gave lengthy consideration to arguments in favor of treating the plaintiff producers as the authors of the play they had commissioned, including an analogy to the law of inventions, which at that time was subject to a work-made-for-hire principle.<sup>100</sup> In the end, however, the court rejected the producers' authorship claim, refusing to apply the work-made-for-hire concept:

It is enough to say, in the present case, that no such effect can be produced where the employer merely suggests the subject, and has no share in the design or execution of the work, the whole of which, as far as any character of originality belongs to it, flows from the mind of the person employed. It appears to us an abuse of terms to say, that, in such a case, the employer is the author of a work to which his mind has not contributed an idea: and it is upon the author in the first instance that the right is conferred by the statute which creates it.<sup>101</sup>

The court expressly reserved the question of whether, on a stronger set of facts, a copyright could become vested *ab initio* in someone other than the actual writer.<sup>102</sup>

The reserved question was presented just three years later, but in a significantly different context. The 1859 case of *Hatton v. Kean*, in the Court of Common Pleas, involved the ownership of music that was composed to accompany the performance of a pre-existing play.<sup>103</sup> The defendant producer had hired the plaintiff specifically to compose music for use in productions of three Shakespeare plays.<sup>104</sup> When the composer later asserted that he owned the exclusive right to perform the music, the court rejected his claim, holding that the producer, and not the composer, was the author.<sup>105</sup> The opinions in the case do not directly address joint authorship, but they do introduce the idea that an implied assignment may cause a creative contributor to lose ownership of his or her copyrightable content—an idea that later played a significant role in the modern judicial analysis of joint authorship claims.<sup>106</sup>

Chief Justice Erle wrote the most detailed opinion in the case:

[T]he defendant was the author and designer of an entire dramatic representation or entertainment, with respect to part of which, a small accessory, viz. the music, he

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97. *Id.*

98. *Id.* at 442–43; see 17 U.S.C. § 204(a) (requiring that transfer of copyright be in writing).

99. *Shepherd*, 17 C.B. at 443.

100. *Id.* at 433–34, 443.

101. *Id.* at 444–45.

102. *Id.*

103. *Hatton v. Kean* [1859] 7 C.B. (N.S.) [268].

104. *Id.* at 268.

105. *Id.* at 280.

106. See *infra* Parts III and IV.

employed the plaintiff, because the latter composed the music on the specific understanding that the music should become part of such dramatic piece as designed and adapted for representation by the defendant, and that the defendant should have the sole liberty of representing and performing . . . the said musical composition with the said dramatic piece, and as an accessory thereto, and as part thereof.<sup>107</sup>

Therefore, the Chief Justice concluded, “the music so composed by the direction and under the superintendence of the defendant, and as part of the general plan of the spectacle, must, as between him and the plaintiff, become the property of the defendant. . . .”<sup>108</sup> The other three judges concurred,<sup>109</sup> with Judge Crowder emphasizing that the plaintiff composed the music “under an express engagement with the defendant.”<sup>110</sup>

Several aspects of the court’s reasoning invite scrutiny. First, Chief Justice Erle’s description of the producer as the “author and designer” of “an entire dramatic representation”<sup>111</sup> raises the question of what, exactly, the producer authored. He certainly did not write Shakespeare’s plays. Nothing in the opinion indicates that the producer had revised the plays, or had employed a writer to do so. Other than the music composed by the plaintiff, the Chief Justice did not identify any other copyrightable creative elements that the producer had added. While the statement of facts refers to Shakespeare’s works as the “plays,”<sup>112</sup> Chief Justice Erle refers to the producer’s work variously as a “dramatic piece,” a “representation,” a “spectacle,” and “an entire dramatic representation or entertainment.”<sup>113</sup> His opinion is expressly based on the defendant’s uncontested statement of facts,<sup>114</sup> which states that

the alleged musical composition was part of a dramatic piece, to wit, Shakespeare’s play of “Much Ado About Nothing,” adapted to the stage by the defendant, with the aid of scenery, dresses, the alleged composition, and other music and accompaniments, the general design of which representation was formed by the defendant.<sup>115</sup>

This terminology suggests that the court differentiated between the underlying play and the producer’s particular production of it. Thus, even though the Chief Justice refers to the producer as the “author or designer” of “an entire dramatic representation or entertainment,”<sup>116</sup> he did not analyze whether and to what extent the combination of elements produced a new copyrightable work. For example, elements such as “scenery” and “dresses” might be a part of the performance or “spectacle” without necessarily becoming part of an underlying copyrightable work. If the music was an “accessory” to an entertainment that was not itself a

107. *Hatton*, 7 C.B. (N.S.) at 280. The court accepted the defendant’s statement of facts, *id.* at 268, because the composer did not dispute them, *id.* at 279.

108. *Id.* at 280.

109. *Id.* at 280–81.

110. *Id.* at 281.

111. *Id.* at 271.

112. *Id.* at 268.

113. *Id.* at 280.

114. *Id.* at 279.

115. *Id.* at 269.

116. *Id.* at 271.

copyrightable work, then it would not be possible for the music to actually merge into a copyrightable work.

It is possible, however, that the plays were combined with the music more closely, yielding new works that would be considered derivative works under modern law.<sup>117</sup> Beginning in the Restoration, it was not unusual to modify Shakespeare's plays by adding sequences of music and dance—making them early predecessors of today's Broadway musicals.<sup>118</sup> In such a case, the music could indeed merge with the text to create a single copyrightable work; the producer's authorship claim would presumably be based on making the creative decision to combine these elements.<sup>119</sup> Had this been the court's understanding, however, one would expect that the opinions would have expressed the thought more clearly—for example, by describing the resulting plays as new versions or adaptations of Shakespeare's scripts. The court's description of the music as a “mere accessory”<sup>120</sup> to the entertainment suggests the opposite—that the music was not incorporated into the play's action as it would be in a modern musical. This is consistent with another source that described the defendant's music as an “entr'acte and melo-dramatic music.”<sup>121</sup> Thus, it is more likely that the music was performed between scenes, or perhaps as background music to enhance the mood of certain scenes.

The judges' opinions also fail to address who owned the right to exploit the musical composition *outside* the context of the play. Although Chief Justice Erle stated at one point that the music “became the property of the defendant [producer],” elsewhere in the opinion he described the defendant's exclusive right to perform the music in much narrower terms, amounting to a mere license (possibly exclusive) to perform the music in conjunction with the play:

[T]he defendant should have the sole liberty of representing and performing, and causing and permitting to be represented and performed, the said musical composition with the said dramatic piece, and as an accessory thereto, and as part thereof.<sup>122</sup>

Because of this ambiguity, Chief Justice Erle's opinion could be interpreted as finding either an implied assignment (somewhat analogous to the modern work-made-for-hire doctrine for employees),<sup>123</sup> giving the producer the exclusive right to exploit the music in all contexts, or merely an implied license, under which the plaintiff would be the author and owner of the music, and the producer would have a limited right to exploit the music—perhaps only in connection with these particular

117. See 17 U.S.C. § 101 (definition of “derivative work”). To be copyrightable as a derivative work under current federal law, however, the work would have to be fixed in a tangible medium of expression. 17 U.S.C. § 102(a). Thus, the live, unrecorded elements of a performance would not qualify.

118. See AMANDA EUBANKS WINKLER, *MUSIC FOR MACBETH*, at vii–viii (2004).

119. Apparently neither party in *Hatton v. Kean* suggested that the producer and composer might be joint authors of the combined work.

120. *Hatton*, 7 C.B. at 268.

121. *Music and Drama*, BUFFALO COM. ADVERTISER, Feb. 7, 1867, at 1.

122. *Hatton*, 7 C.B. at 280.

123. Under current law, an employer is considered the author of works created by employees within the scope of their employment, even without an express agreement or a signed writing. 17 U.S.C. § 101 (definition of “work made for hire”).

productions.<sup>124</sup> The nineteenth-century treatise writer Walter Arthur Copinger appears to have adopted the implied assignment interpretation.<sup>125</sup>

Perhaps the most interesting aspect of the *Hatton* opinion is Chief Justice Erle's explanation of the policy concern that influenced his judgment:

One cannot but perceive that, if the plaintiff were right in his contention, the labour and skill and capital bestowed by the defendant upon the preparation of the entertainment might all be thrown away, and the entire object of it frustrated, and the speculation defeated, by any one contributor withdrawing his portion.<sup>126</sup>

Chief Justice Erle did not expand on this right to withdraw, nor did he consider whether his withdrawal concerns could be answered by anything less than an implied assignment of copyright—for example, an implied license<sup>127</sup> or joint authorship. *Hatton* in many ways anticipates the reasoning that some federal courts have employed in rejecting joint authorship claims under the 1976 Act.<sup>128</sup>

Several contemporaneous treatise authors criticized the analysis in *Hatton*. Evan James MacGillivray argued that the producer was not an author:

It seems a strange thing to say that the arranger of a play becomes the author of, *inter alia*, the musical accompaniment of which, perhaps, he could not have composed a single bar. Would, for instance, the author of a book be also the author of illustrations which he had procured another to draw for him?<sup>129</sup>

124. For an example of a modern implied license, see *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 558–59, 558 n.6 (9th Cir. 1990) (holding that creating footage at another's request and delivering it with intent that recipient copy and distribute it gave rise to implied nonexclusive license).

125. WALTER ARTHUR COPINGER, *THE LAW OF COPYRIGHT* 108 (4th ed. 1904). Note, however, that Copinger's account of *Hatton* also reports an additional fact not referenced in the other accounts, asserting that there was "an agreement to the effect that the music should be the property of the employer," which would be further evidence of an implied *assignment* rather than a license, leaving the composer with no ownership rights at all. *Id.*

126. *Hatton*, 7 C.B. at 280.

127. Under today's federal copyright law, in the absence of a written agreement, Chief Justice Erle's concerns over withdrawal could be addressed through finding an implied irrevocable license or, alternatively, joint authorship. Under current law, the question of whether, and under what circumstances, an implied copyright license can be irrevocable remains unsettled, but several courts have held that such a license is irrevocable once consideration has been paid. See, e.g., *LimeCoral Ltd. v. CareerBuilder, LLC*, 889 F.3d 847, 851 (7th Cir. 2018) (payment of consideration made implied license irrevocable); *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224 (11th Cir. 2010) (similar); see also Dave Fagundes & Aaron Perzanowski, *Abandoning Copyright*, 62 WM. & MARY L. REV. 487, 516–17, 517 n.174 (2020); Christopher M. Newman, "What Exactly Are You Implying?": *The Elusive Nature of the Implied Copyright License*, 32 CARDOZO ARTS & ENT. L.J. 501, 539 (2014); Christopher M. Newman, *A License Is Not a "Contract Not to Sue": Disentangling Property and Contract in the Law of Copyright Licenses*, 98 IOWA L. REV. 1101, 1160 (2013). Although today even a license that purports to be irrevocable would be terminable, 17 U.S.C. §§ 203, 304, terminating a license for the creation of a derivative work would not prevent continued exploitation of any derivative works that were created in accordance with the license before the effective date of termination. 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A).

128. See *infra* Part IV.

129. EVAN JAMES MACGILLIVRAY, *A TREATISE UPON THE LAW OF COPYRIGHT IN THE UNITED KINGDOM AND THE DOMINIONS OF THE CROWN, AND IN THE UNITED STATES* 63 (1902). MacGillivray's book hypothetical was not merely hypothetical, since it was based on the post-*Hatton* case of *Petty v.*



In MacGillivray's view, the court reached the correct result, but it "should have been on the ground that the plaintiff was the employer or assignee of the defendant and not that he was the author."<sup>130</sup> Eaton Sylvester Drone also criticized the decision, stating that the designer of the presentation was not the author of the music, and the music did not merge with the drama:

Nor does music become a mere accessory or inseparable part of a drama merely because it is specially composed for such a drama. It may have an independent existence and a value apart from the literary composition, as in the case of Locke's music to *Macbeth*, and Mendelssohn's music to the *Midsummer Night's Dream*.<sup>131</sup>

Drone's reference to Mendelssohn's music is useful in understanding his critique. At age seventeen, Mendelssohn wrote his *Overture to Midsummer Night's Dream* as a free-standing composition, which he performed in concert.<sup>132</sup> Sixteen years later, he incorporated it into a complete score that he created to accompany a performance of the play.<sup>133</sup> Therefore, the *Overture* was clearly created as a separate copyrightable work. The remainder of his score is a mix of incidental music, performed before and after the various acts of the play, and music that is actually incorporated into the dramatic action.<sup>134</sup> Because of these latter passages, in modern copyright terms Mendelssohn could be considered the author of a musical adaptation of Shakespeare's play—that is, a derivative work—or perhaps a joint author of the adaptation if another person contributed lyrics or revised the play's text.

Despite its analytical flaws, *Hatton v. Kean* had an immediate impact on English jurisprudence with respect to theater collaborations. In 1866, *Hatton's* reasoning was applied to superficially similar facts in *Wallenstein v. Herbert*.<sup>135</sup> Wallenstein, the musical director at London's St. James Theatre, had composed music to accompany theater operator Matthews' production of a play based on the novel *Lady Audley's*

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*Taylor* [1897] 1 Ch. 465. In that case, addressing the ownership of copyright in drawings that had been prepared for inclusion in a book, Judge Kekewich observed:

I cannot see my way to saying that in such a case the man who is the author of the letterpress becomes the author of the book, including the illustrations. . . . I cannot see why the contention should not be reversed, and the author of the illustrations should not equally claim protection for them, and through them for the letterpress of which he never wrote a word.

*Id.* at 475–76.

130. MACGILLIVRAY, *supra* note 129, at 63 n.5.

131. EATON SYLVESTER DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 250 (1879). The reference to Matthew Locke's music is probably inaccurate. The most famous music composed for *Macbeth*, that of Richard Leveridge, was used in productions from the 1700s through the nineteenth century. Leveridge's score was mistakenly attributed to Locke until the 1960s. Therefore, Leveridge's score is almost certainly the music that MacGillivray was referring to. WINKLER, *supra* note 118, at ix.

132. Marin Alsop, *Marin Alsop's Guide to Mendelssohn's "A Midsummer Night's Dream,"* NPR (May 24, 2014), <https://perma.cc/5LBD-V7R5>.

133. *Id.*

134. John Mangum, *About This Piece: A Midsummer Night's Dream*, L.A. PHILHARMONIC ASS'N, <https://perma.cc/TE28-JSE2> (last visited Feb. 3, 2022).

135. *Wallenstein v. Herbert* [1866] 15 LT 364 (QB), *aff'd*, [1867] 16 LT 453 (QB).

*Secret*.<sup>136</sup> After the London production, Matthews left the St. James, but obtained Wallenstein's permission to use the music in a touring production of the play.<sup>137</sup> At some point after the initial St. James production, Matthews acquired the copyright in the play.<sup>138</sup> After Wallenstein himself left the St. James, a subsequent operator of the theater—the defendant Herbert—staged the play for a second time (with Matthews' consent), using the same music but without securing Wallenstein's consent.<sup>139</sup> Wallenstein sued for infringement of the exclusive public performance right in his music, but lost.<sup>140</sup>

In the absence of a written agreement, the trial judge, Chief Justice Cockburn, characterized the issue as “a pure question of law.”<sup>141</sup> Specifically, he framed the question as whether Wallenstein had composed the music “as an ordinary musical composer” or, alternatively, “by virtue of some duty arising from his employment at the theatre.”<sup>142</sup> The former would correspond to today's concept of an independent contractor, while the latter would correspond to an employee-created work made for hire.<sup>143</sup> The defendant's lawyer argued at length that *Hatton v. Kean* was controlling.<sup>144</sup> Justice Cockburn ruled in the defendant's favor, citing the rule “as to an employer having an exclusive right in the productions of the employed.”<sup>145</sup> Because there had been an employment contract between Matthews and Wallenstein, Matthews had an unlimited right to use the music, and to license others to do so; just as in *Hatton*, the music became inseparable from the drama.<sup>146</sup> As Matthews' licensee, therefore, Herbert had the right to use the arrangements in any licensed production of the play.<sup>147</sup>

The Queen's Bench unanimously upheld this decision, agreeing that *Hatton v. Kean* controlled.<sup>148</sup> However, the separate opinions of the three judges (again including Chief Justice Cockburn) reflect two distinct rationales.

All three judges agreed that Wallenstein composed the music while serving as an employee of Matthews, using a concept analogous to the work-made-for-hire doctrine, even though there was no specific contract for the composition.<sup>149</sup> Two of

136. *Id.* at 364; *see also* DRONE, *supra* note 131, at 251. A dramatist named Walters had adapted the play from Mary Elizabeth Braddon's 1862 novel. *Wallenstein*, 15 LT at 366.

137. *Wallenstein*, 15 LT at 364; DRONE, *supra* note 131, at 251.

138. *Wallenstein*, 15 LT at 366; DRONE, *supra* note 131, at 251.

139. *Wallenstein*, 15 LT at 365; DRONE, *supra* note 131, at 251.

140. *Wallenstein*, 15 LT at 364–65.

141. *Id.* at 366.

142. *Id.* at 365.

143. An independent contractor is always considered the author of his or her own work in the absence of a written work-made-for-hire agreement, while an employee's work created within the scope of his employment is automatically considered a work made for hire authored by the employer. 17 U.S.C. § 101 (definition of “work made for hire”).

144. *Wallenstein*, 15 LT at 365–66.

145. *Id.* at 366.

146. *Id.*

147. *Id.*

148. *Wallenstein v. Herbert* [1867] 16 LT 453, 454 (QB).

149. *Id.* This is the equivalent of an implied assignment.

the judges also held that the music became a part of the play itself,<sup>150</sup> in which case, presumably, Matthews would own its copyright by assignment from Walters, the playwright. This meant that the defendant Herbert acquired the right to perform the music in her production of the play when she obtained Matthews' consent as the assignee of the play's copyright.<sup>151</sup>

Justice Mellor, in contrast, did not agree that the music was included in the play's copyright and therefore owned by Matthews. Instead, he acknowledged "some difficulty, perhaps, in whom the copyright exists, because Mr. Matthews was not the owner of the drama" at the time the music was composed.<sup>152</sup> Rather than describing the music as "part and parcel" of the play, Justice Mellor stated that Wallenstein "assist[ed] Mr. Matthews in bringing out the drama by putting music to certain parts so as to give additional effect," and that Wallenstein had "no such copyright as will enable him to maintain this action" to prevent Herbert from publicly performing the music in her own production.<sup>153</sup> Thus, while Justice Mellor believed that Wallenstein's employee status precluded his attempt to assert exclusive rights, the Justice was unable to say who actually owned the copyright, and was apparently unwilling to hold that the music's copyright merged with the copyright of the play. His opinion implies that the music copyright was separate from that of the underlying play, since it was composed merely to assist in "bringing out the drama" by giving "additional effect"—that is, to enhance the staging of the play. This would put Wallenstein's music in the same position as set or costume designs—potentially copyrightable, but not "part and parcel" of the underlying script. Justice Mellor thereby left the ownership of the music copyright in a strange kind of limbo—a free-standing work of authorship, with no identifiable copyright owner.

The *Wallenstein* decision was roundly criticized by Walter Arthur Copinger and Eaton Sylvester Drone, the authors of England's leading copyright treatises. Both argued that Wallenstein was the author of the music, and that the *Hatton* case was distinguishable.<sup>154</sup>

150. Chief Justice Cockburn held that "it became a part and parcel of the drama, and was not an independent composition." *Id.* Judge Shee held that "the music was merely accessory to the drama and was really incorporated with it." *Id.*

151. See *supra* note 139 and accompanying text.

152. *Wallenstein*, 16 LT at 454.

153. *Id.*

154. Copinger found *Hatton* distinguishable because the composer in that case expressly assigned his copyright, whereas no such agreement existed in *Wallenstein*. COPINGER, *supra* note 125, at 108. In a more detailed critique, Drone argued that *Wallenstein* "misunderstood and misapplied" *Hatton*, calling the facts of the cases "vitaly different." DRONE, *supra* note 131, at 251. The producer in *Hatton* had hired the composer for the express purpose of creating music that would, under the terms of their agreement, become the property of the producer. *Id.* at 252. Chief Justice Erle expressly held in *Hatton* that the producer was the author of the music he commissioned another to compose. See *supra* note 108 and accompanying text. *Wallenstein*, in contrast, had composed music for Matthews in the course of his general duties as musical director, without any specific understanding as to who would own the music. DRONE, *supra* note 131, at 252. His duties were to supply and conduct music for Matthews' productions; it was left to Wallenstein's discretion to decide whether to compose new music or acquire an existing composition, at his own expense. *Id.* at 253. Whereas Judge Shee placed the burden on Wallenstein to prove that he owned the music, Drone believed that the music should presumptively belong to its creator, thus placing on Matthews the burden of proving otherwise. *Id.* In *Wallenstein*, Drone noted, "[i]t was not

Meanwhile, in the United States, the Southern District of New York applied a very different analysis to a dispute involving an actor-playwright who was commissioned to write a play. In the 1862 case of *Boucicault v. Fox*,<sup>155</sup> a New York theater operator had commissioned the plaintiff to write a play to be performed at the Winter Garden Theatre, and also to act in the play.<sup>156</sup> After a week of performances, however, the plaintiff quit his acting role, registered the play's copyright, and filed a lawsuit to enjoin the production. While the suit was still pending, the theater operator closed the show and, representing himself to be the owner of the play, purported to grant the defendants the right to stage the play at another theater. When they did so, the plaintiff sued them for copyright infringement. The defendants argued that the plaintiff did not own the play's copyright because he had written the play as a work made for hire. Although the court found that the plaintiff had agreed to write the play, to allow the Winter Garden to stage it, and to provide his acting services, all in exchange for half of the profits, the court held that this agreement did not confer ownership of the "literary property" itself.<sup>157</sup> At most, the court held, the theater operator had acquired only the right to produce the play for an open-ended run at the Winter Garden; absent an agreement to the contrary, ownership of the play remained with its author:

A man's intellectual productions are peculiarly his own, and, although they may have been brought forth by the author while in the general employment of another, yet he will not be deemed to have parted with his right and transferred it to his employer, unless a valid agreement to that effect is adduced.<sup>158</sup>

The court contrasted the parties' arrangement in this case with the contracts typically used in the publishing industry:

Publishers, when they employ authors in particular literary enterprises, of course settle, in the terms of their contracts, the rights of each party and the ownership of the copyright. This was not the case of writing a book for publication and general circulation.<sup>159</sup>

The federal court's refusal to apply a broad interpretation of the work-made-for-hire concept—in contrast to the earlier English precedents—is especially striking in this case, where the playwright was hired for the express purpose of writing the play

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seriously claimed that Matthews was the author of the music." *Id.* at 252. Matthews merely had the right to use the music that Wallenstein created or procured for his productions at the St. James; he was neither the author nor the owner. Drone also dismissed the idea that Wallenstein's music became a part of the play itself: "[T]he judgment of the court cannot be defended on the ground that the music became an inseparable part of the play, and could have no independent existence. Music and literature cannot be so closely blended but that the former may exist and have a value independently of the latter." *Id.* Finally, Drone compared *Wallenstein* unfavorably to the American case of *Boucicault v. Fox*, 3 F. Cas. 977 (S.D.N.Y. 1862) (No. 1,691). DRONE, *supra* note 131, at 253–54, 257–58. For a discussion of *Boucicault*, see *infra* notes 155–163 and accompanying text.

155. *Boucicault v. Fox*, 3 F. Cas. 977 (S.D.N.Y. 1862) (No. 1,691).

156. *Id.* at 978.

157. *Id.* at 980.

158. *Id.*

159. *Id.*

as well as performing in it. By all rights, this opinion should have amounted to a definitive rejection of the “implied assignment” theory in American copyright law. And yet, despite being cited with approval in a prominent nineteenth-century treatise,<sup>160</sup> the court’s analysis has been largely overlooked.<sup>161</sup> As discussed in Part IV below, even after the 1976 Act expressly required copyright assignments to be in writing, the implied assignment theory had a profound impact on joint authorship disputes.

It is worth noting that the plaintiff in this case—the Irish playwright Dion Boucicault—was an acclaimed and successful playwright and actor who was already well known in both England and the United States at the time he accepted the commission for the Winter Garden.<sup>162</sup> It is entirely possible that his renown in the theater world may have influenced the district court in his favor; at the time, he epitomized the “romantic author,” the solitary genius.<sup>163</sup> One can only speculate whether the court would have reached the same conclusion if the plaintiff had been a lesser-known writer or—worse yet—a mere actor undertaking his first writing project.

As these cases demonstrate, up to this point in the nineteenth century, litigants had not framed their disputes as questions of joint authorship. Instead, their arguments focused on such concepts as works made for hire, insubstantial contributions, implied licenses, and implied assignments—all concepts that supported a “winner-take-all” resolution of the authorship dispute, rather than a sharing of the rewards of collaboration.

The first case to squarely address joint authorship in England or America was yet another case involving dramatic works. In the 1871 case of *Levy v. Rutley*,<sup>164</sup> the English Court of Common Pleas addressed a theatrical producer’s claim to joint authorship of a play.<sup>165</sup> This decision had a great influence on the development of joint authorship jurisprudence in the United States; many decades later, Judge

160. DRONE, *supra* note 131, at 253–54, 257–58 (arguing that *Boucicault*’s analysis was correct, and criticizing the conflicting analysis in *Wallenstein*).

161. In 1882, a different judge in the Southern District of New York erroneously cited *Boucicault* as *permitting* implied assignments. See *Yuengling v. Schile*, 12 F. 97, 106 (S.D.N.Y. 1882). Only one court—a New York state court—has ever cited *Boucicault* for *rejecting* implied assignments. See *O’Neill v. Gen. Film Co.*, 157 N.Y.S. 1028, 1036 (App. Div. 1916).

162. Of Boucicault’s many successful plays, perhaps the best known is *London Assurance*, a comedy that premiered in 1841 and is still popular today. The commissioned play at issue in this litigation was *The Octoroon* (1859), a well-received melodrama which, 150 years later, enjoyed renewed fame when Brandon Jacobs-Jenkins wrote a modern and critically acclaimed adaptation under the title *An Octoroon* (2010).

163. Some twenty years after winning his suit over *The Octoroon*, however, Boucicault’s reputation was tainted by accusations of plagiarism. See Litman, *supra* note 6, at 1404 n.118; Sarah Meer, *Adaptation, Originality and Law: Dion Boucicault and Charles Reade*, 42 NINETEENTH CENTURY THEATER & FILM 22 (2015).

164. *Levy v. Rutley* [1871] L.R. 6 C.P. 523. See generally Shyamkrishna Balganes, *Unplanned Coauthorship*, 100 VA. L. REV. 1683, 1693 (2014) (noting that *Levy v. Rutley* marked the first judicial attempt to identify joint authorship).

165. The play was titled *The King’s Wager; or The Camp, the Cottage, and the Court*.

Learned Hand credited two of the judges in this case—Judges Keating and Montague Smith—with formulating the very first definition of joint authorship.<sup>166</sup>

In *Levy*, the head of a theater company—the plaintiff Levy—commissioned a playwright named Wilks to write a play on a particular subject chosen by Levy. After Wilks submitted his manuscript, and apparently with Wilks’ consent,<sup>167</sup> Levy and members of his company made various changes to the plot and dialogue, including the addition of a new and allegedly “important” scene.<sup>168</sup> However, Wilks did not assign his rights to Levy.<sup>169</sup> After Wilks’ death, Levy sued another producer—defendant Rutley—for performing the play without permission. Levy asserted copyright ownership as the surviving joint author.<sup>170</sup> Rutley challenged both claims.<sup>171</sup>

All three judges agreed that Levy was not a joint author, although they differed slightly in their reasoning. Judge Byles considered three factors: (1) the small amount of material that Levy contributed to the play; (2) the absence of a preconcerted design; and (3) the lack of notice to potential infringers that they might be sued by multiple authors:

The plaintiff was . . . a contributor of a very small part of the entire piece at a subsequent time. If the piece had been originally written by the plaintiff and Wilks jointly, in prosecution of a preconcerted joint design, the two might have been said to be co-authors of the whole play, notwithstanding that different portions were respectively the sole productions of either. But the consequence of holding this action . . . to be maintainable, would be that so many persons as may have contributed separate scenes or portions of a dramatic piece might each have separate and concurrent actions for penalties against a person who may have represented the whole or particular parts of it, without any means on his part of knowing that there was a plurality of authors, or who they were.<sup>172</sup>

Judge Keating’s opinion placed greater emphasis on the lack of a common design, in language that has been repeatedly quoted by subsequent courts: “[T]hough it may not be necessary that each should contribute the same amount of labour, there must be a joint labouring in furtherance of a common design.”<sup>173</sup> He explained:

If the plaintiff and the author had agreed together to rearrange the plot, and so to produce a more attractive piece out of the original materials, possibly that might have made them joint authors of the whole. So, if two persons undertake jointly to write a play, agreeing

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166. Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944).

167. *Levy*, L.R. 6 C.P. at 527.

168. *Id.* at 524, 526, 528.

169. According to a written receipt signed by Wilks, Levy made a partial payment for the work, and was to pay the balance after Wilks assigned “his share, title, and interest as co-author with him in the drama.” However, Wilks never executed the assignment, and Levy never paid the balance. All three judges agreed that Levy was not an assignee. *Id.* at 527–31. According to Copinger’s account, Levy had asked Wilks to make changes to the play before it was staged, and Wilks did not comply. COPINGER, *supra* note 125, at 110. However, the published opinion does not mention this incident.

170. *Levy*, L.R. 6 C.P. at 525.

171. *Id.* at 523.

172. *Id.* at 528 (Byles, J.)

173. *Id.* at 529 (Keating, J.).

in the general outline and design, and sharing the labour of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it. But, to constitute joint authorship, there must be a common design. Nothing of the sort appears here. The plaintiff made additions to a complete piece, which did not in themselves amount to a dramatic piece, but were intended merely to make the play more attractive to an audience.<sup>174</sup>

Judge Montague Smith's opinion is the only one that directly refutes Levy's claim to be the "author or proprietor" simply by virtue of employing Wilks to write the play. For authority, he cites *Shepherd v. Conquest*.<sup>175</sup> Although he was also the only judge to acknowledge that "[t]here may be a difficulty in some cases in determining who are joint authors,"<sup>176</sup> his test for joint authorship was unequivocal:

[I]f two persons agree to write a piece, there being an original joint design, and the co-operation of the two in carrying out that joint design, there can be no difficulty in saying that they are joint authors of the work, though one may do a larger share of the work.<sup>177</sup>

Here we see a clear statement that the relative amount of each person's contribution does not matter. However, Montague Smith did leave open the possibility that a joint authorship claim might be affected by the *nature* of each person's contribution:

The plot remains. The additions do not disturb the drama composed by Wilks: they were made for the mere purpose of improving or touching up some of its parts. It would be strange indeed, if not unjust, if the author's rights could thus be merged into a joint-authorship with another. There are probably very few instances—at least in modern times—of a play being put upon the stage without some alteration by the manager.<sup>178</sup>

This suggests that he believed the plot to be the most important copyrightable component of a play—or, at least, this particular play—and that other components such as dialogue and comical or musical elements were of lesser value.

Montague Smith also believed that Levy could not be a joint author because his alterations: (1) were unsolicited (even though Wilks consented to them); and (2) were made after Wilks had completed his own work on the play:

[I]t never could be suggested that, when an author submits his manuscript to a friend, and the friend makes alterations and improvements, the latter would thereby become a joint author of the work. If, when the piece was brought to the plaintiff, he had said to

174. *Id.*

175. *Id.* at 530 (Montague Smith, J.); see *supra* notes 93–102 and accompanying text (discussing *Shepherd*). He also rejected the argument that Wilks conceded Levy's joint authorship in the receipt, where Wilks referred to himself as "co-author with him in the drama." *Levy*, L.R. 6 C.P. at 525. Treating the receipt as a binding admission of joint authorship could, in his view, lead to duplicative suits against infringers: "If the rights of the author may be affected by such a document as this, the consequence might be an inconvenient multiplication of rights and remedies, which never could have been contemplated." *Id.* at 531. Whatever the legitimacy of the judge's concern about duplicative suits, it would have arisen equally in any situation where parties were found to be joint authors; it would not have been unique to joint authorship determinations based on written admissions.

176. *Levy*, L.R. 6 C.P. at 530.

177. *Id.*

178. *Id.*

Wilks, “This thing requires to be remodeled, and you and I will do it together,” and Wilks had assented, possibly a case of joint authorship might have been set up.<sup>179</sup>

He did not explain why joint authorship “never could” arise from the first scenario. It appears, however, that the missing element is the “common design”: If the original author and the friend did not plan their collaboration before the work began, joint authorship did not arise. The mere adoption of the friend’s unsolicited alterations after receiving them did not, in his view, satisfy the requirement of common design. In modern terms, Wilks essentially consented to Levy’s creation of a derivative work. Ironically, if this modern analysis were applied to the facts of *Levy v. Rutley*, a court could find Levy to be the *sole* author of the revised play, and thus entitled to sue Rutley for performing the revised play without a license—precisely the opposite of the court’s holding.<sup>180</sup> Instead, through another instance of implied assignment, Levy lost whatever value might have attached to his contributions.

In contrast to the renown of *Levy v. Rutley*, courts and scholars have paid less attention to *Shelley v. Ross*, another joint authorship dispute involving a dramatic work decided in the same year.<sup>181</sup> According to the most detailed account of the case,<sup>182</sup> while the plaintiff Shelley was employed at a magazine where the defendant Ross was an editor, Shelley learned that the Royal Albert theater was seeking a drama. Shelley showed Ross a script he had written, but Ross responded by giving him the “plot” of a different play, titled *Clam*, which Ross considered more suitable for the Royal Albert, and suggesting that Shelley “make such alterations in it as he thought proper.”<sup>183</sup> After Shelley revised the script, the resulting play was produced.<sup>184</sup> Later, Shelley asserted joint authorship of the play, while Ross claimed

179. *Id.* at 530–31.

180. In most courts, the outcome would depend on whether Levy’s alterations were more than trivial. If so, Levy would be the sole author of a derivative work; if not, he would have no authorship claim at all. *See, e.g.,* *Woods v. Bourne Co.*, 60 F.3d 978 (2d Cir. 1995) (finding some musical arrangements insufficiently original to be copyrightable as derivative works distinct from the underlying works); *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) (derivative work must be more than a “merely trivial” variation of the underlying work to be copyrightable). Assuming that the alterations met this test, unauthorized performance of the revised play would infringe the rights of the author of the revisions (Levy) as well as the author of the underlying work (Wilks). *See* *Russell v. Price*, 612 F.2d 1123 (9th Cir. 1980) (unauthorized distribution of film *Pygmalion* infringed rights in underlying play); 17 U.S.C. § 103(b) (copyright in derivative work extends only to the new material and does not affect copyright in underlying work).

181. *Shelley v. Ross* (1870–71) L.R. 6 C.P. 531, was decided by the English Bail Court. *Bail Court June 7*, *TIMES* (London), June 8, 1871, at 11. For other reports on the case, *see* *Bail Court June 6 and 7*, *LAW TIMES* (London), June 10, 1871, at 104; *MECHANICS’ MAG. & J. SCI., ARTS & MANUFACTURES*, June 8, 1871, at 17; *COPINGER, supra* note 125, at 112 n.(a).

182. *Bail Court—Saturday*, *MORNING POST* (London), June 5, 1871, at 7. The actual opinion is unpublished, and the contemporaneous reports are not entirely consistent in their facts, which may explain its relative obscurity.

183. *Id.*

184. Although the Royal Albert agreed to purchase the play, due to a management shake-up it did not follow through, and *Clam* was instead produced at the Surrey Theatre. Accounts differ as to whether Shelley was credited as a co-author of the Surrey production. The *Morning Post* reported that it was presented “as the joint production of Shelley and Ross.” *Id. Public Opinion* reported that the Surrey produced it “as the work of Mr. C.H. Ross.” *PUB. OP.* (London), June 10, 1871, at 722.



to be the sole author.<sup>185</sup> Upon reviewing the manuscripts, Justice Hannen ruled for Ross.<sup>186</sup> Although the *Times* report of the opinion is less than clear, it appears that Justice Hannen viewed Shelley's alterations as insufficiently substantial to make him a joint author of the play:

[T]he alterations and additions by the plaintiff to the play were only such as made it an acting drama, and that the stage carpenter might claim as joint author if the plaintiff's claim were admitted. . . . [T]he original manuscript drama handed by the defendant to the plaintiff was substantially unaltered by the defendant; that all the incidents were the same in the acted drama as in the original manuscript; and that the alterations made in the latter by the defendant were only such as would make the drama more capable of being acted.<sup>187</sup>

A different report states the holding thus: “[A]lterations in a dramatic piece, for the purpose of rendering it more attractive or better adapted for stage representation, did not constitute the person making them a ‘joint author.’”<sup>188</sup>

Without more details on the changes Shelley made, it is impossible to draw conclusions about whether, under modern law, Shelley's revisions would be sufficient to support a joint authorship claim. Because Justice Hannen viewed Shelley's contributions as so minimal, it seems unlikely that Ross had created nothing more than a bare plot. It is more likely that he had completed a script, but one which needed improvement in order to be ready for the stage. Based on the various accounts of the case, Ross may have created the story and characters, but his work might not yet have been stage-worthy, just as a novel or short story requires significant adaptation in order to be dramatized. Notably, none of the reports indicate that Justice Hannen entertained any theories of implied license or implied assignment, or that he would have rejected Shelley's joint authorship claim merely because, rather than working simultaneously with Ross, he made after-the-fact changes to Ross's manuscript that were solicited and accepted by Ross. Justice Hannen may have had no need to reach that issue because he found Shelley's contributions insubstantial. Had Ross written a complete play, so that Shelley's

185. *Bail Court—Saturday*, *supra* note 182, at 7.

186. *Bail Court June 6 and 7*, *supra* note 181, at 104. According to the *Morning Post*, Ross produced as evidence a manuscript of the play he had written “three or four years” earlier, as well as portions of the work, including the title character, which he had published in the *London Herald* in 1868 under a different title. *Bail Court—Saturday*, *supra* note 182, at 7. According to a different source, however, Ross's publication of “part of the plot and dialogue” in the *London Herald* is what precipitated the authorship dispute. *Bail Court June 6 and 7*, *supra* note 181, at 104. Sources conflict as to whether the title was “The White House,” *see id.*, or “The White Hand,” *see Bail Court—Saturday*, *supra* note 182, at 7. This case was said to be one of the first English cases tried without a jury. *Bail Court June 6 and 7*, *supra* note 181, at 104.

187. *Bail Court June 7*, *supra* note 181, at 11. The report in *Public Opinion* was similar:

His lordship . . . held that the work done by Mr. Shelley, though no doubt valuable, was such technical knowledge of putting a piece on the stage as an author would be likely to require. The stage carpenter making and suggesting alterations for the more effectual production of the piece might as well claim to be joint author as the plaintiff.

PUB. OP. (London), June 10, 1871, at 722.

188. *Levy v. Rutley* [1871] L.R. 6 C.P. 523, 531 n.1.

improvements—if substantial—amounted to a derivative work? Or did Ross have only the shell of a play, which he invited Shelley to complete as a joint author? *Shelley v. Ross* simply provided no answer to the question of whether joint authorship can arise when an author of an unfinished work invites, and adopts, substantial contributions provided by another.

In these nineteenth-century opinions, we can see the early roots of many considerations that influenced later jurisprudence on joint authorship: the existence of shared intent to labor together on a common design; the nature, amount, and timing of each person's contribution; the relevance of employment agreements and commissions; implied versus express agreements; and the risk that multiple authorship will create uncertainty for potential exploiters of the work. Under a "winner-take-all" approach, courts tended to disparage small contributions as insufficient to give rise to joint authorship, and creators of derivative works often lost any ownership claims to the material they had contributed. Every one of these cases involved dramatic works. And not one of them recognized a work as jointly authored.

### III. THE COPYRIGHT ACT OF 1909

When American courts first began to address the meaning of joint authorship in the early twentieth century, the leading cases involved the authorship of dramatic works, musical works, and, in the most influential case of all, a dramatico-musical work. Because the Copyright Act of 1909 did not expressly recognize joint authorship, it fell to the courts to derive the doctrine from the common law.<sup>189</sup> Their efforts were further hampered by the 1909 Act's failure to address rights in derivative works, as well as its failure to distinguish these from joint and collective works. Not surprisingly, the courts turned to the nineteenth-century case law for guidance. Their efforts were a partial success: While they developed a workable definition for joint works, they struggled to distinguish among derivative works, collective works, and works made for hire, leaving some creative contributors with no rights at all in the works they helped to create.

The first reported joint authorship dispute in the federal courts, and the most influential, was the 1915 case of *Maurel v. Smith*, which concerned a dramatico-musical work: the comic opera *Sweethearts*.<sup>190</sup> The plaintiff Maurel undertook to

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189. The 1909 Act did not even mention joint works. It did reference "composite works," but failed to define that term. 17 U.S.C. § 3 (repealed 1976). In contrast, the general concept of a work made for hire that the nineteenth-century English courts applied in *Hatton and Wallenstein*—but rejected in *Shepherd*—was codified in the 1909 Act, which stated that the term "author" included "an employer in the case of works made for hire," but failed to define "employer." 17 U.S.C. § 26 (repealed 1976). Using a theory of implied assignment similar to that employed in *Hatton and Wallenstein*, see *supra* notes 103–154 and accompanying text, American courts gradually expanded the concept of employment to include all situations in which a copyrightable work was commissioned, regardless of whether there was a true employment relationship. See *Easter Seal Soc'y v. Playboy Enters.*, 815 F.2d 323, 325–27 (5th Cir. 1987); Mary LaFrance, *Authorship, Dominance and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 211–12 (2001).

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

write the “scenario” for the opera, and agreed to collaborate with Henry Blossom, who would write the dialogue and lyrics.<sup>191</sup> When Blossom dropped out, Maurel accepted defendant Harry Smith as his replacement.<sup>192</sup> Harry Smith later brought in his brother Robert to write the lyrics.<sup>193</sup> The court was asked to decide which of three parties—Maurel and the Smith brothers—were joint authors.<sup>194</sup>

District Judge Learned Hand relied primarily on *Levy v. Rutley*—in particular, the language of Judges Keating and Montague Smith requiring a “joint” or “common” design—in finding that Maurel and the Smith brothers performed their creative work in pursuit of a common design.<sup>195</sup> In addition, their respective contributions formed a unitary work, even though the music and lyrics did not necessarily reflect the scenario, and could also be enjoyed on their own:

[N]o one can hope to measure the degree of contribution which the plaintiff made to their production or selection, and no one ought to try. Moreover, it is not necessary to hold that the “lyrics” have any relation whatever to the plot, or owe any suggestion to it in the mind of their composer, because they became united with dialogue and plot and music into one composition, and whatever their origin, in their presentation the whole was single.<sup>196</sup>

Hand also relied on two of *Levy*’s predecessor cases: *Hatton v. Keen* and *Wallenstein v. Herbert*. With respect to *Hatton*, where the plaintiff had composed music for a production of three plays by Shakespeare, Hand observed that “[t]he case was much stronger for the separability of the part from the whole than the case at bar, because the music was merely incidental to the plays, which were themselves, of course, not musical.”<sup>197</sup> Both of the older cases, Hand observed, “must be taken as declaring, even if it was not essential to the decision, that one who contributes to such a joint production does not retain any several ownership in his contribution, but that it merges into the whole.”<sup>198</sup>

Hand’s finding of joint authorship in *Maurel* is all the more remarkable because he relied on three precedents—*Levy*, *Hatton*, and *Wallenstein*—all of which had *rejected* the authorship claims of creative contributors. In each of those cases, a court found a merger of contributions, but held that the effect of the merger was to *divest* one contributor of his authorship claim, through an unacknowledged application of

191. *Id.* at 195, 197.

192. *Id.*

193. *Id.*

194. The composer, Victor Herbert, was not a party to the dispute. *Id.* at 202–03.

195. *Id.* at 198–99. He also relied on *Shepherd v. Conquest* to distinguish between a party that merely suggests the subject matter of a work and one that contributes the plot. *Id.*

196. *Id.* at 200.

197. *Id.* at 201.

198. *Id.* As joint authors, Hand ruled, the plaintiff and the Smith brothers were entitled to equal shares of the opera unless they had agreed to a different apportionment: “When several collaborators knowingly engage in the production of a piece which is to be presented originally as a whole only, they adopt that common design, mentioned in *Levy v. Rutley*, and unless they undertake expressly to apportion their contributions, they must share alike.” *Id.* Because all parties had agreed to pay half the royalties to the composer, Hand ruled that the plaintiff and the two defendants should split the remaining half three ways. *Id.* at 203.

the implied assignment theory. In contrast, Hand's analysis in *Maurel* found that the merger of contributions *supported* a joint authorship claim.

The Second Circuit affirmed Hand's decision, finding that "there was a joint co-operation in carrying out the effort to complete the opera."<sup>199</sup> *Maurel* and each of the Smiths owned equal thirds of their jointly-owned share of the copyright, even if their contributions were not equal: "It is not essential that the execution of the work should be equally divided; as long as the general design and structure was agreed upon, the parties may divide their parts and work separately."<sup>200</sup> The appellate court also suggested—on authority of *Copinger*—that sufficient intent to collaborate could exist even if the common design originated with a single author before any other author had made a contribution, and even if that design was altered by a later contributor:

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 conception.<sup>201</sup>

In this case, *Maurel* created her scenario (the first part of it, at least) with the intent of finding a composer and/or librettist to complete the opera. Even though the librettists (and possibly the composer) made their contributions after she had formed this intent—and even though the identity of the librettists changed from the original plan—under the court's reasoning, all of the creative contributors to the work became joint authors. This holding—that the co-authors need not work together from the start, if the first contributor intended to find future collaborators—has never been rejected.<sup>202</sup>

Even though the *Maurel* court clearly recognized the existence and common-law history of joint authorship, the 1909 Act's failure to mention joint works, or to distinguish them from what we recognize today as collective or derivative works, sowed confusion in other cases during this period. The 1909 Act clearly recognized the *concept* of derivative works, even if it did not address the *authorship* of such works.<sup>203</sup> The concept of joint works, in contrast, received no explicit recognition at all. One statutory provision referenced "composite works or periodicals," but did

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199. *Maurel v. Smith*, 271 F. 211, 215 (2d Cir. 1921).

200. *Id.*

201. *Id.* (quoting *COPINGER*, *supra* note 125, at 109–10).

202. The rule was applied in later cases under the 1909 Act. *See, e.g.*, *Shapiro, Bernstein & Co. Inc. v. Jerry Vogel Music Co. Inc.*, 161 F.2d 406 (2d Cir. 1946) (known as the *Melancholy Baby* case); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co. Inc.*, 140 F.2d 266 (2d Cir. 1944); *see also infra* notes 214–223 and accompanying text. It is also fully consistent with the language and legislative history of the 1976 Act. *See infra* notes 228–231 and accompanying text; *see also* MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 6.03 (rev. ed. 2021) [hereinafter *NIMMER ON COPYRIGHT*].

203. While the 1909 Act did not use the term "derivative works," it did state that the copyright in "compilations or abridgements, adaptations, arrangements, dramatizations, translations or other versions" of existing works, and "works republished with new matter" did not affect the copyright in the underlying works. *Id.* § 7 (repealed 1976) (numbered § 6 as originally enacted in Act of Mar. 4, 1909, Pub. L. 60-349, 35 Stat. 1075 (amending and consolidating the acts respecting copyright)).

not define “composite works” or distinguish between the author of the composite work and the authors of the individual components thereof.<sup>204</sup> The statutory phrasing—lumping composite works together with periodicals—implies that “composite works” were limited to what the 1976 Act later referred to as “collective works,”<sup>205</sup> rather than encompassing other kinds of works with multiple authors, such as joint works.<sup>206</sup> These legislative gaps in the 1909 Act left courts largely to their own devices when faced with various types of collaborations.

Joint authorship was at the center of another case involving a dramatico-musical work, decided in the same year as the district court decision in *Maurel*, but receiving much less attention from later courts. In *Herbert v. Fields*, a producer hired a writer (Smith) to translate and adapt a German play.<sup>207</sup> Soon after that, he hired a composer and a lyricist to turn it into a musical comedy.<sup>208</sup> Although the composer claimed to be a joint author of the entire work, the New York court found it “quite probable” that he was only a joint author of the songs, because “the libretto may be regarded as a separate creation” authored by Smith and owned by the producer.<sup>209</sup> The court distinguished *Maurel*, because the scenario in that case was intertwined with the other elements of the work in an “indissoluble” way.<sup>210</sup> In contrast, Smith had written (actually, adapted) a play that could stand on its own, even though the producer eventually turned it into the libretto of the musical. Accordingly, the court treated the libretto and the songs as separate works.<sup>211</sup> In effect, the court treated the musical comedy as a composite (that is, collective) work made up of two elements—the libretto and the songs. Today, in contrast, the musical play would be treated as a derivative work (adapted from Smith’s underlying play) that was jointly authored by the composer and the lyricist (in addition to anyone who revised the text of the underlying play), even if, as is often the case, their music could be enjoyed separately from the text.<sup>212</sup> This marks another distinction from *Maurel*, where the “common design” supporting joint authorship already existed at the time *Maurel* began writing

204. Section 3 of the 1909 Act stated that the copyright in “composite works or periodicals” conveyed the same rights as if each component of the work were individually copyrighted. 17 U.S.C. § 3 (repealed 1976).

205. See 17 U.S.C. § 101 (definition of “collective works”).

206. This interpretation is supported by one of the studies on Copyright Law Revision prepared for Congress as it undertook the legislative overhaul leading to the 1976 Act:

[A] joint work is a unitary work, the parts of which, although created by several authors, are not considered to be individual works in themselves. . . . A “composite work,” broadly speaking, is one which puts together the separate and distinct works of different authors.

George D. Cary, *Study No. 12: Joint Ownership of Copyrights*, in STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG. 87 (Comm. Print 1958).

207. *Herbert v. Fields*, 152 N.Y. Supp. 487 (Sup. Ct. 1915).

208. *Id.* at 488.

209. *Id.* at 489.

210. *Id.*

211. In the alternative, the court ruled, even if the composer were a joint author of the musical comedy, he could not, on his own, prevent another party from using the libretto if the other joint owners consented. *Id.*

212. Under the 1976 Act, joint authors’ contributions to a work may be either “inseparable” or “interdependent” components. 17 U.S.C. § 101 (definition of “joint work”).

her scenario; thus, the finished opera was a unitary work. In *Herbert*, Smith had already written the play before the producer decided to turn it into a musical; thus, there was an underlying work (the play) with a single author as well as a derivative work (the musical) with two authors.

Although these dramatic works cases were the first to construe joint authorship under the 1909 Act, many of the subsequent joint works cases during this period dealt with musical compositions.<sup>213</sup> As discussed below, courts continued to experience difficulty distinguishing among composite or collective works, joint works, and what today would be considered derivative works.

In the 1944 case of *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, the Second Circuit expressly held that joint authors need not work together at the same time.<sup>214</sup> In that case, a writer created the lyrics for a song, and a publisher later engaged a composer to set the lyrics to music.<sup>215</sup> Evidencing his belief that the statutory phrase “composite works” did not include joint works, Judge Learned Hand concluded that the resulting song was a joint work, and not a composite work, because “it was the indivisible product of ‘joint authors.’”<sup>216</sup> As he had in *Maurel*, Judge Hand applied *Levy v. Rutley*’s definition of joint works as “a joint laboring in furtherance of a common design” or “an agreement ‘to write a piece, there being an original joint design.’”<sup>217</sup> He added, however, that joint authors could make their contributions at different times, and without actively collaborating: “It 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.”<sup>218</sup>

213. There are a few exceptions, but these received little attention in subsequent case law. For example, in *Richmond v. Weiner*, 353 F.2d 41, 46 (9th Cir. 1965), the Ninth Circuit held that a medical book was jointly authored where the two parties jointly “conceived, compiled, and created” the book, even though one of the parties had registered the copyright as a sole author. In *Harris v. Coca-Cola*, 73 F.2d 370 (5th Cir. 1934), the publisher of an illustrated book commissioned additional illustrations for a new edition without any input from the author of the text. The author’s widow asserted an ownership interest in the new illustrations, but the court rejected her claim. *Id.* at 372. Because only the *new* illustrations were infringed, the court found it unnecessary to decide whether the author’s widow had any rights in the *original* illustrations, which had been created in consultation with the author. *Id.* The court also declined to decide whether the book should “be considered a composite work consisting of the literary contribution of Mr. Harris and the artistic efforts of others,” defining a “composite work” as a work “composed of the copyrightable work of several persons.” *Id.* Thus, the court did not decide whether the text and the original illustrations were separate works collected in a single volume, as opposed to a unitary work of joint authorship. This case further illustrates the difficulties courts experienced in sorting through joint authorship claims without clear guidance on distinguishing among joint, collective, and derivative works.

214. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir. 1944).

215. Specifically, the writer sold the song lyrics to the publisher, who hired a composer to set them to music and then registered the resulting song as a musical composition. Later, the lyricist claimed the renewal copyright in the entire song. As Judge Hand interpreted the statute, if the song was a joint work, then the lyricist could claim the entire renewal copyright (subject to a constructive trust in favor of the composer), but if the song was a composite (that is, collective) work, the lyricist could renew only the copyright in his lyrics. *Id.* at 267.

216. *Id.*

217. *Id.* (quoting *Levy v. Rutley* [1871] L.R. 6 C.P. 523, 529 (Keating, J.), 530 (Montague Smith, J.)).

218. *Id.*

Hand implicitly rejected *Herbert*'s requirement that the elements of a joint work be "indissoluble";<sup>219</sup> even though the lyrics and the music of the song could be used separately, "that was not their purpose; the words and the music were to be enjoyed and performed together; unlike the parts of a 'composite work,' each of which is intended to be used separately, and whose only unity is that they are bound together."<sup>220</sup>

Unfortunately, Judge Hand also used the term "joint work" to refer to what today would be considered a *derivative* work, even as he pointedly distinguished between authors who share a common design and those who do not:

[I]f the first part is composed without any common design, its author retains power to forbid publication of the joint work. Whatever popularity the second author's contribution may have added to the first's, which will survive their divorce, he must be content to release to the first author; whatever popularity his own contribution has gained from the association, he must be content to lose. Not so, when both plan an undivided whole; in that case unless they stipulate otherwise in advance, their separate interests will be as inextricably involved, as are the threads out of which they have woven the seamless fabric of the work.<sup>221</sup>

The first two sentences clearly refer to an underlying work (the "first part") and a derivative work (that of the "second author"), while the second sentence describes the creation of a true joint work, "when both plan an undivided whole." However, this passage also posits, in dictum, that the person who creates a derivative work automatically surrenders his or her authorship rights to the creator of the *underlying* work, who thereby becomes the sole author of the *derivative* work. This "winner-take-all" approach—carried over from the nineteenth-century cases—involves an implied assignment that is precisely the *opposite* of the derivative works rule that Congress later adopted in the 1976 Act, under which a person who makes alterations to an underlying work with the consent of the underlying work's author becomes the sole author of the derivative work, while the authorship of the underlying work remains unchanged.<sup>222</sup> Despite Congress's clear rejection of the implied assignment

219. See *supra* notes 210–211 and accompanying text.

220. *Edward B. Marks Music*, 140 F.2d at 267. The rule announced by Judge Hand in *Edward B. Marks Music*—that joint authors need not actively collaborate—was applied two years later in the *Melancholy Baby* case, *Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co., Inc.*, 161 F.2d 406 (2d Cir. 1946), with Judge Hand on this panel as well. In *Melancholy Baby*, a composer and lyricist jointly authored a song and registered the copyright. When a potential purchaser wanted to hire another writer to replace the lyrics, the composer gave his consent. The purchaser then acquired the copyright in the song as well as the replacement lyrics. In resolving a dispute arising from the copyright renewal, Judge Swan held that the composer and the second lyricist were joint authors of the revised song, because the composer's intent to combine his music with another's lyrics did not depend on the identity of the lyricist. The revised song was both a "joint work" and a "new work" that was separately copyrightable from the previous version of the song. *Id.* at 410. The court did not consider whether the original lyricist should be also considered a joint author of the revised song. See Cary, *supra* note 206, at 92.

221. *Edward B. Marks Music*, 140 F.2d at 267.

222. Under the 1976 Act, the creator of a licensed derivative work is the author thereof, although the copyright in the underlying work remains the property of the licensor. 17 U.S.C. § 103(b).

approach when it revised the copyright laws in 1976, Judge Hand's theory later resurfaced in the Second Circuit's interpretation of joint works under the 1976 Act.<sup>223</sup>

The Second Circuit used the implied assignment theory again in 1972, in *Picture Music, Inc. v. Bourne*, reviewing a district court's holding that: (1) the author of a song did not collaborate with a later songwriter who revised the song with the consent of the copyright owner; and (2) the latter's revisions were not substantial enough to amount to joint authorship.<sup>224</sup> The district court concluded that the two songwriters were not joint authors, and the second songwriter had no ownership claim whatsoever in the revised song. On appeal, the Second Circuit did not adopt the district court's reasoning; instead, it held that the second writer's contribution was a work made for hire, leaving her with no authorship rights at all.<sup>225</sup> Thus, the Second Circuit reached the same outcome as the district court, but employed a different rationale—the implied assignment of authorship rights.

As these cases demonstrate, courts applying the 1909 Act embraced the “common design” requirement for joint authorship that still persists today. However, a lack of guidance under the 1909 Act made it difficult for the courts to resolve joint authorship claims that today would be analyzed as derivative works claims, leading them in some cases to reject contributors' claims under an implied assignment theory derived from nineteenth-century case law on commissioned works.

As discussed in Part IV below, Congress rejected the implied assignment concept in the 1976 Act and clarified the law regarding works made for hire, joint works, collective works, and derivative works. However, even after the 1976 Act drew these lines more clearly, the “winner-take-all” approach of the nineteenth century and cases decided under the 1909 Act resurfaced in a series of paradigm-shifting cases involving dramatic works, in which courts quietly reintroduced the implied assignment theory, elevating outdated case law over the plain language of the copyright statutes. As will be seen, these decisions demonstrate a continued preference for the concept of the romantic author with respect to dramatic works, in ironic contrast to the collaborative origins of Anglo-American drama.

223. See *infra* notes 245–277 and accompanying text. The Second Circuit took *Edward B. Marks Music* one step further in the much-criticized *Twelfth Street Rag* case, which held that a song was a joint work even though the composer had created the music purely as an instrumental piece, after which the assignee of his copyright hired a writer to add lyrics. *Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co.*, 221 F.2d 569 (2d Cir. 1955), *modified on reh'g*, 223 F.2d 252 (2d Cir. 1955) (the *Twelfth Street Rag* case). For criticism of the case, see Cary, *supra* note 206, at 92; *Gilliam v. Am. Broad. Co.*, 538 F.2d 14, 22 (2d Cir. 1976); *Szekely v. Eagle Lion Films, Inc.*, 242 F.2d 266, 268 (2d Cir. 1957). The definition of a “joint work” in the 1976 Act legislatively overruled the *Twelfth Street Rag* doctrine by requiring that both joint authors have the intent to merge their contributions into a single unitary work at the time they make those contributions. 17 U.S.C. § 101 (definition of “joint work”); see *Batiste v. Island Records, Inc.*, 179 F.3d 217, 222 n.7 (5th Cir. 1999) (noting the legislative overruling); *Corbello v. DeVito*, 844 F. Supp. 2d 1136, 1160 (D. Nev. 2012) (similar), *rev'd in part, vacated in part, remanded on other grounds*, 777 F.3d 1058 (9th Cir. 2015); see also *infra* notes 228–231 and accompanying text. Today, the song would be considered a derivative work, because it was an adaptation of a preexisting work. See 17 U.S.C. § 101 (definition of “derivative work”).

224. *Picture Music, Inc. v. Bourne*, 314 F. Supp. 640, 645, 647 (S.D.N.Y. 1970), *aff'd*, 457 F.2d 1213 (2d Cir. 1972).

225. *Picture Music*, 457 F.2d at 1215.



#### IV. THE 1976 ACT: THE EVOLVING DEFINITION OF JOINT AUTHORSHIP

##### A. STATUTORY CHANGES

The Copyright Act of 1976 Act eliminated many of the ambiguities of the 1909 Act. It defined joint works, derivative works, and works made for hire, replaced the undefined “composite works” category with a more clearly defined concept of “collective works,” and expressly addressed the scope of copyright protection for collective works and derivative works.<sup>226</sup> It also eliminated the doctrine of implied assignment by requiring all copyright assignments and exclusive licenses to be in writing.<sup>227</sup>

The 1976 Act provided, for the first time in federal copyright law, a statutory definition of a joint work: “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>228</sup> To interpret this definition, courts have relied heavily on the language of the accompanying House Report, in which the influence of prior case law is manifest:

[A] work is “joint” if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as “inseparable or interdependent parts of a unitary whole.” The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either “inseparable” (as the case of a novel or painting) or “interdependent” (as in the case of a motion picture, opera, or the words and music of a song).<sup>229</sup>

The temporal aspect of the joint works definition—requiring that both of the parties already intend to merge their contributions at the time they create their contributions—distinguishes joint works from derivative works.<sup>230</sup> It carries forward the “common design” requirement adopted by Judges Keating and Montague Smith in the nineteenth-century English case of *Levy v. Rutley*.<sup>231</sup>

Despite these statutory clarifications, the concept of joint authorship continued to trouble the federal courts. Their concerns focused on two issues: (1) the nature of

226. 17 U.S.C. §§ 101, 103 (definitions of “joint work,” “derivative work,” “work made for hire,” “collective work,” and “compilation”).

227. *Id.* § 204(a).

228. *Id.* § 101 (definition of “joint work”). It also corrected such judicial missteps as the doctrine of the *Twelfth Street Rag* case. *See supra* note 223.

229. H.R. REP. NO. 94-1476, at 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736–37. Cases relying on this language include *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994); *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991); *Cabrera v. Teatro Del Sesenta, Inc.*, 914 F. Supp. 743, 763 (D.P.R. 1995); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 258–59 (D. Neb. 1982).

230. Under the 1976 Act, a derivative work is “a work based upon one or more preexisting works,” in which the preexisting work is “recast, transformed, or adapted.” 17 U.S.C. § 101 (definition of “derivative work”).

231. *See supra* notes 164–180 and accompanying text.

the contribution that a collaborator must make; and (2) the type of intent that a collaborator must harbor.

With respect to the first issue, the vast majority of courts held that a joint author's contribution must consist of copyrightable expression rather than abstract ideas.<sup>232</sup> Although one case from the Seventh Circuit entertained the possibility that, under certain circumstances, contributing ideas may be enough,<sup>233</sup> this has not altered the majority view.

The second issue—the nature of the intent necessary to create a joint work—has been more problematic. In addressing this question, three circuit courts have felt the need to go beyond the statutory language, adding a judicial gloss that amounts to a heightened intent requirement. The trend began with the Second Circuit, then spread to the Seventh and Ninth Circuits. Remarkably, each of the cases announcing this heightened standard did so in the specific context of dramatic works.

Before examining the case law, it is worth noting the common factor that links the three circuits that developed this heightened standard: These circuits exercise geographic jurisdiction over three American cities that are especially renowned for the creation and execution of dramatic works, either for live performance or for filmed entertainment: New York (Second Circuit), Chicago (Seventh Circuit), and Los Angeles (Ninth Circuit). That these three circuits should emerge as the standard-bearers for a rule that favors sole authorship over collaborative authorship could, of course, be mere coincidence. Alternatively, it could reflect the courts' desire—conscious or otherwise—to protect the established hierarchies of the commercial entertainment industries that contribute to their regional economies.<sup>234</sup> Whatever their motivation, the courts' reasoning in these cases reflects a mindset predisposed toward the romantic notion of sole authorship—in contradistinction to the historical roots of collaborative dramatic writing.

## B. SECOND CIRCUIT: SETTING A NEW STANDARD

After the 1976 Act took effect, the first series of joint authorship decisions from courts in the Second Circuit applied the new statutory test without embellishment. These decisions assessed the nature and substantiality of each person's creative contribution and analyzed (sometimes cursorily) whether, at the time the parties made their contributions, each had the intent to merge those contributions into a unitary work. These courts did not inquire whether the parties viewed one another as joint authors or intended to share credit for the work, or whether one party

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

233. See *Gaiman v. McFarland*, 360 F.3d 644, 658–59 (7th Cir. 2004) (considering multiple contributors to a comic book).

234. The Sixth Circuit—with jurisdiction over Nashville—might be expected to follow suit. Although the Court of Appeals itself has not had occasion to address the intent requirement for joint works, several district courts have already adopted the heightened standard. See, e.g., *Navarro v. Procter & Gamble Co.*, 515 F. Supp. 3d 718, 748 (S.D. Ohio 2021); *Corwin v. Quinonez*, 858 F. Supp. 2d 903, 910–11 (N.D. Ohio 2012); *Tang v. Putruss*, 521 F. Supp. 600, 606–07 (E.D. Mich. 2007).

exercised more creative control over the project. Notably, none of these cases involved dramatic works.<sup>235</sup>

While most of these early decisions were at the district court level, there was one detailed opinion from the Second Circuit. The 1989 case of *Weissmann v. Freeman* involved an authorship dispute between two physicians.<sup>236</sup> Weissman had written a book chapter that incorporated material from earlier works she had jointly authored with Freeman, and Freeman claimed that this also made him a joint author of Weissman's chapter. In rejecting Freeman's claim, the Second Circuit stated that each co-author of a joint work "must intend to contribute to a joint work at the time his or her alleged contribution is made."<sup>237</sup> It did not impose any other intent requirement.

Just two years later, however, the Second Circuit adopted a significantly different approach when faced with a joint authorship claim involving a play. To understand how the court could change its analysis so quickly requires taking a closer look at dictum from an intervening district court decision.

*Fisher v. Klein* was a 1990 case from the Southern District of New York that involved a jewelry design.<sup>238</sup> Judge Leval's actual holding in that case was unremarkable, as it was entirely consistent with the definition of joint works under the 1976 Act: The two designers were joint authors, because both made copyrightable contributions with the intent to merge their contributions into a single design.<sup>239</sup> In dictum, however, the judge distinguished two district court cases from other circuits holding that architectural plans were not joint works authored by the architect and the client.<sup>240</sup> Although the client in each of those cases failed to make a sufficient copyrightable contribution to the plans, and could have been denied joint authorship status on that basis alone,<sup>241</sup> Judge Leval suggested that the clients were not joint authors for another, independent reason:

It does not follow that because suggestions are made and adopted that a joint copyright has been created, because there is this additional requirement of the shared intention that the contributions be merged into a unitary whole, that is to say, into a work

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235. See *Weissman v. Freeman*, 868 F.2d 1313 (2d Cir. 1989) (chapter in medical book); *Fisher v. Klein*, 1990 WL 10072477 (S.D.N.Y. June 26, 1990) (jewelry design); *Morita v. Omni Publ'ns Int'l, Ltd.*, 741 F. Supp. 1107, 1113 (S.D.N.Y. 1990) (photograph), *vacated pursuant to consent judgment*, 760 F. Supp. 45 (S.D.N.Y. 1991); *Geshwind v. Garrick*, 734 F. Supp. 644, 651 & n.1 (S.D.N.Y. 1990) (computer graphics animation), *aff'd without op.*, 927 F.2d 594 (2d Cir. 1991); *Strauss v. Hearst Corp.*, No. 85 Civ. 10017, 1988 WL 18932, at \*5–6 (S.D.N.Y. Feb. 19, 1988) (photograph); *Kenbrooke Fabrics, Inc. v. Material Things*, No. 82 Civ. 7187, 1984 WL 532 (S.D.N.Y. June 28, 1984) (fabric design); *Mister B Textiles Inc. v. Woodcrest Fabrics, Inc.*, 523 F. Supp. 21, 24–25 (S.D.N.Y. 1981) (fabric design).

236. 868 F.2d 1313 (2d Cir. 1989).

237. *Id.* at 1318.

238. *Fisher v. Klein*, 1990 WL 10072477 (S.D.N.Y. June 26, 1990).

239. *Id.* at \*6.

240. *Id.* (citing *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252 (D. Neb. 1982); *Meltzer v. Zoller*, 520 F. Supp. 847 (D.N.J. 1981)).

241. *Aitken*, 542 F. Supp. at 259 (finding that client's contribution was either an uncopyrightable idea or de minimis); *Meltzer*, 520 F. Supp. at 857 (finding that client contributed only uncopyrightable ideas).

of joint authorship. *It is only where that dominant author intends to be sharing authorship that joint authorship will result.*<sup>242</sup>

Although Judge Leval cited no supporting authorities, the first sentence of this dictum is consistent with two sources over a century apart: (1) the statutory definition of joint works in the 1976 Act;<sup>243</sup> and (2) the 1871 decision of the Court of Common Pleas in *Levy v. Rutley*—specifically, the opinion of Judge Montague Smith.<sup>244</sup> In contrast, the second sentence does not appear to be based on any authority, either statutory or judicial. Thus, Judge Leval left no clue as to why he converted the intent to merge contributions into an intent to share authorship—or what he meant by such intent.

In addition, this passage marks the first appearance of the phrase “dominant author” in any law report. Judge Leval’s opinion made no attempt to define this term, and offered no hint of how he derived it.

One year after *Fisher v. Klein*, the Second Circuit relied heavily on Judge Leval’s dictum when it decided *Childress v. Taylor*, a joint authorship dispute involving a play, and the most influential joint authorship opinion ever issued in the United States.<sup>245</sup> When actress Clarice Taylor became interested in creating a play about “Moms” Mabley, she gathered historical material and asked Alice Childress, an experienced playwright, to do the writing.<sup>246</sup> Most of Taylor’s contributions consisted of uncopyrightable research, although she did suggest one scene.<sup>247</sup> Some ideas for additional scenes came out of her research, but even she could not recall who suggested them.<sup>248</sup> Thus, at most, Taylor contributed uncopyrightable facts and some general ideas. After the play’s initial production, Taylor decided to produce a revised version of the play, but Childress sued her for infringement. Taylor argued that she was a joint author of the play, while Childress asserted sole authorship.<sup>249</sup>

Judge Newman expressly adopted the majority rule that a joint author must contribute copyrightable material, and could easily have rejected Taylor’s claim on this basis alone, without adopting any new gloss on the “joint work” definition.<sup>250</sup> Instead, however, he seized on Judge Leval’s dictum in *Fisher v. Klein*. Adopting Leval’s modified version of the “intent” requirement as well as his novel concept of the “dominant author,” Judge Newman used this as his sole rationale for denying Taylor’s joint authorship claim:

242. *Fisher*, 1990 WL 10072477 at \*6 (emphasis added).

243. 17 U.S.C. § 101 (definition of “joint work”).

244. *See supra* notes 175–179 and accompanying text.

245. *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991). *Childress* is the joint authorship precedent cited most frequently by the federal courts, and has been cited in virtually every joint authorship opinion since 1991.

246. *Id.* at 502.

247. The scene involved a speaker in Harlem. *Id.*

248. *Id.*

249. *Id.* at 503–04.

250. *Id.* at 503–04, 506–07.

What distinguishes the writer-editor relationship and the writer-researcher relationship from the true joint author relationship is the lack of intent of both participants in the venture to regard themselves as joint authors.

Focusing on whether the putative joint authors regarded themselves as joint authors is especially important in circumstances, such as the instant case, where one person (Childress) is indisputably the dominant author of the work and the only issue is whether that person is the sole author or she and another (Taylor) are joint authors.<sup>251</sup>

In announcing this rule, the Second Circuit used the concept of the “dominant author” to empower one author to unilaterally prevent other collaborators from being recognized as co-authors. Like Judge Leval before him, Judge Newman made no attempt to define what he meant by a “dominant author.” Without a definition, it is hard to see how the court could conclude that one collaborator was “indisputably” dominant. Nor did Judge Newman explain why one person’s dominance in the creative process should end the inquiry into another person’s authorship. The “dominant author” label thus became outcome-determinative without ever being defined or justified.<sup>252</sup>

Even as he established this high bar for co-authorship of dramatic works, Judge Newman suggested that the bar should be lower for non-dramatic works. The question of how the contributors regarded one another, he asserted, “requires less exacting consideration in the context of traditional forms of collaboration, such as between the creators of words and music of a song.”<sup>253</sup> Thus, he explicitly embraced a double standard, apparently based on his personal perception of the genres in which collaboration was traditional. Even though he acknowledged that “[c]o-authorship was well known to the common law,”<sup>254</sup> Judge Newman was seemingly unaware that the tradition of collaborative dramatic writing dates back to at least the sixteenth century.<sup>255</sup>

The *Childress* court’s eagerness to embrace a non-statutory narrowing of the joint works definition in the specific context of dramatic works also reflected its fear of the legal consequences of taking a more generous view of multiple authorship:

The insistence on copyrightable contributions by all putative joint authors might serve to prevent some spurious claims by those who might otherwise try to share the fruits of the efforts of a sole author of a copyrightable work, even though a claim of having contributed copyrightable material could be asserted by those so inclined. . . .

The wording of the statutory definition appears to make relevant only the state of mind regarding the unitary nature of the finished work—an intention “that their contributions be merged into inseparable or interdependent parts of a unitary whole.” However, an

251. *Id.* at 507–08.

252. This became apparent a few years later in *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998), when the Second Circuit applied the “dominant author” concept to reject a joint authorship claim by a collaborator even though she had made a copyrightable contribution to the work. *See infra* notes 270–271 and accompanying text.

253. *Childress*, 945 F.2d at 508.

254. *Id.* at 504.

255. *See supra* notes 23–44 and accompanying text.

inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress.<sup>256</sup>

Whatever parade of horrors the court was envisioning here, there is no evidence in the legislative history that Congress intended to give courts the discretion to apply a more demanding test than it had expressed in the statute itself.<sup>257</sup> However, Judge Newman's fears echo the concern over conflicting claimants that Judge Byles expressed in his 1871 opinion in *Levy v. Rutley*.<sup>258</sup> They also suggest that Judge Newman was influenced by a preference for the romantic view of authorship as the product of solitary genius rather than an intertwining of creative contributions from multiple sources—the same preference that led seventeenth-century literary critics to disparage collaborative playwriting.<sup>259</sup>

Although Judge Newman relied heavily on Judge Leval's "dominant author" dictum from *Fisher v. Klein*, he also invoked several 1909 Act cases to support his novel interpretation of the 1976 Act. One of these was *Maurel v. Smith*, the 1915 case in which Judge Learned Hand ruled in favor of a joint authorship claim involving a dramatic-musical work.<sup>260</sup> However, rather than recognizing *Maurel* as contrary or, at best, neutral authority decided under a long-repealed statute,<sup>261</sup> Judge Newman simply referenced Learned Hand's finding that the authors in *Maurel* "agreed to a joint authorship in the piece, and . . . accepted whatever the law implied as to the rights and obligations which arose from such an undertaking,"<sup>262</sup> as though this fact finding from a 1915 case should control the interpretation of the 1976 Act.<sup>263</sup>

The second 1909 Act case on which Judge Newman relied was *Gilliam v. American Broadcasting Companies, Inc.*, in which the Monty Python comedy troupe sued ABC for infringing a television script.<sup>264</sup> *Gilliam* stated that no joint work exists

256. *Childress*, 945 F.2d at 507–08.

257. Neither the statutory definition of a "joint work," 17 U.S.C. § 101, nor the sparse legislative history addressing that definition, *see supra* notes 226–229 and accompanying text, indicates that Congress intended courts to exclude particular kinds of contributors.

258. *Levy v. Rutley* [1871] L.R. 6 C.P. 523.

259. *See supra* notes 63–68 and accompanying text.

260. *Maurel v. Smith*, 220 F. 195 (1915), *aff'd*, 271 F. 211 (2d Cir. 1921).

261. *Maurel* was decided under the 1909 Act, which was repealed and replaced by the 1976 Act.

262. *Childress*, 945 F.2d at 508 (quoting *Maurel*, 220 F. at 198).

263. Judge Newman also cited the Second Circuit's opinion in *Weissman v. Freeman*, 868 F.2d 1313 (2d Cir. 1989), which addressed an authorship dispute between two physicians under the 1976 Act. Weissman had written a book chapter that incorporated material from earlier works she had jointly authored with Freeman. In rejecting Freeman's claim that he was a joint author of the chapter, the *Weissman* court stated that each co-author "must intend to contribute to a joint work at the time his or her alleged contribution is made." *Weissman*, 868 F.2d at 1318. Judge Newman quoted this passage, *see Childress*, 945 F.2d at 508, without noting the language that immediately followed it: "Because § 103(b) extends independent protection to derivative works, an intent to contribute or an actual contribution to previous works does not serve as proof of ownership in the derivative work." *Weissman*, 868 F.2d at 1318. Because the distinction between joint and derivative works was not at issue in *Childress*, *Weissman* does not provide the support that Newman implied.

264. *Gilliam v. Am. Broad. Co., Inc.*, 538 F.2d 14, 17, 20 (2d Cir. 1976). The troupe had licensed the BBC to create, broadcast, and license the transmission of a program based on their script, but expressly retained all other rights in the script, including the right to license it to other parties in the future. ABC was the BBC's licensee. *Id.* at 22.

unless “‘at the time of creation by the first author, the second author’s contribution [is envisaged] as an integrated part of a single work,’ and the first author intends that the final product be a joint work,”<sup>265</sup> a viewpoint that was consistent with the common law requirement of a “common design” as well as the rule ultimately adopted in the 1976 Act. The troupe’s contractual retention of most rights in their script contradicted the defendants’ claim that the troupe created their script with the intent to merge it with the BBC’s contribution in order to produce a single joint work.<sup>266</sup> This context is important to understanding the *Gilliam* court’s statement—which Judge Newman quoted out of context<sup>267</sup>—that the parties’ explicit licensing arrangement indicated that they “did not consider themselves joint authors of a single work.”<sup>268</sup> Simply put, the troupe did not intend to merge their script with the BBC’s contributions in order to produce a unitary work; they intended to license their completed script to the BBC for the creation of a *derivative* work.

Despite the flaws in Judge Newman’s reasoning,<sup>269</sup> the *Childress* opinion has had far-reaching influence on the joint works doctrine. Its influence has been most pronounced, however, in cases involving collaborative dramatic works, including both plays and motion pictures.

The Second Circuit’s next application of the dominant author/shared intent analysis once again involved the authorship of a play. In *Thomson v. Larson*, the district court found that dramaturg Lynn Thomson had made copyrightable contributions to the Pulitzer- and Tony-winning musical *Rent*, including some of the dialogue, even though Jonathan Larson was credited as the sole author.<sup>270</sup> Despite Thomson’s contributions, Judge Calabresi rejected her joint authorship claim for the *sole* reason that Larson never intended to share authorship with her: “*Childress* makes clear that the contribution even of significant language to a work does not

265. *Id.* (citing NIMMER ON COPYRIGHT, *supra* note 202, §§ 67–73). *Gilliam* also rejected the defendants’ attempt to argue that the television program was a joint work under the *Twelfth Street Rag* doctrine, pointing out that the analysis in that case had been roundly criticized and arguably rejected in the Second Circuit. *Id.*

266. *Id.* Specifically, they retained all rights that were not expressly granted to the BBC. *Id.*

267. *Childress*, 945 F.2d at 508.

268. *Gilliam*, 538 F.2d at 22.

269. Judge Newman also cited, without explanation, *see Childress*, 945 F.2d at 508, the original trial court opinion in *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640 (S.D.N.Y. 1970), *aff’d on other grounds*, 457 F.2d 1213, 1215 (2d Cir. 1972). The trial court in that case found that: (1) the writer of a song did not collaborate with a second songwriter who, with the copyright owner’s permission, made subsequent revisions to the song for publication; and (2) the latter’s revisions were not substantial enough to amount to joint authorship. *Picture Music*, 314 F. Supp. at 647. However, the appellate court rejected the trial court’s analysis, and affirmed the decision on grounds unrelated to joint authorship, holding that the revisions were a work made for hire under the 1909 Act. *Picture Music*, 457 F.2d at 1215. In addition, the appellate court expressly declined to decide whether the reviser’s contributions would be substantial enough for joint authorship. *Id.* Thus, neither the trial court nor the appellate opinions in that case support Judge Newman’s reasoning.

270. *Thomson v. Larson*, 147 F.3d 195, 201 & n.14, 203–04 (2d Cir. 1998). Her revisions produced “a radical transformation of the show.” *Id.* at 198, 203–04. *See also* Ben Brantley, *Enter Singing: Young, Hopeful and Taking on the Big Time*, N.Y. TIMES, Apr. 30, 1996, at C13 (review of 1996 Broadway opening).

automatically suffice to confer co-author status on the contributor. Under *Childress*, a specific finding of mutual intent remains necessary.<sup>271</sup>

Thomson, it turns out, was not the only uncredited writer who contributed to the play. After Larson's sudden death shortly before the play's opening, three other writers worked with Thomson "to fine-tune the script."<sup>272</sup> Those three, however, signed waivers disclaiming any copyright interest; only Thomson refused.<sup>273</sup> With so many writers contributing to the script *after* Larson's death, the court's reliance on Larson's desire to be the sole author seems misplaced.

Ironically, Judge Calabresi's opinion openly acknowledged that *Rent* originated as "the joint project of Billy Aronson and composer Jonathan Larson."<sup>274</sup> The collaborative origin of the work, combined with the contributions of multiple uncredited writers, mirrors the collaborative foundations of English-language drama, but was insufficient to shake the Second Circuit's predisposition in favor of romantic authorship.

The Second Circuit declined to rule on whether Thomson owned the copyright in her contributions to *Rent*.<sup>275</sup> Although the court thereby avoided finding an implied assignment, this still left her ownership rights in a legal limbo. The fragments she was left with may have had no separate marketability and might have been useful only in suing the producers for infringement.<sup>276</sup>

In other cases, courts in the Second Circuit have repeatedly applied the *Childress* test to motion pictures,<sup>277</sup> using the rule to deny joint authorship status to creative contributors even though their contributions were not works made for hire.<sup>278</sup> In one

271. *Thomson*, 147 F.3d at 202. Even though Larson had died several months before Thomson asserted her joint authorship claim, and thus could not testify as to his intent, Judge Calabresi inferred his intent from several pieces of evidence: (1) Thomson's own statements that, during the creative process, she presented her contributions as suggestions which Larson had the power to accept or reject, *id.* at 203; (2) Larson's unilateral decision to credit himself as author and Thomson as "dramaturg" on the *Rent* script and to describe himself as the "author/composer" in the biography he submitted to *Playbill*, *id.* at 203–04; (3) Larson's decision to name himself as the author in the contract with the New York Theater Workshop (the off-Broadway theater which initially produced the play), *id.* at 204; and (4) Larson's vehement rejections of the theater's repeated suggestions that he work with another writer in order to improve the script, even though he eventually agreed to accept Ms. Thomson's help, *id.*

272. *Id.* at 198.

273. *Id.* at 198 n.7.

274. *Id.* at 197. When they ended their collaboration, they entered an agreement authorizing Larson to continue the project on his own. *Id.* The agreement specified that Aronson would "not . . . be considered [an] active collaborator or co-author," but that he would be publicly credited for the "[o]riginal concept and additional lyrics." *Id.*

275. *Id.* at 206. For this reason, it also did not address the possibility of an implied license. *Id.*

276. See David Lefkowitz, *Original Rent Cast-Member Rapp Speaks Out on Dramaturg Lawsuit*, PLAYBILL (June 24, 1998), <https://perma.cc/WC5T-CC6Y>. The parties eventually settled out of court. Jesse McKinley, *Family of "Rent" Creator Settles Suit Over Authorship*, N.Y. TIMES, Sept. 10, 1998, at B3.

277. *Marshall v. Marshall*, 504 F. App'x 20, 22 (2d Cir. 2012) (unpub.).

278. *Brooks v. Dash*, 852 F. App'x 40, 41–42 (2d Cir. 2021) (mem.); *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247 (2d Cir. 2015); *Webber v. Dash*, 19 Civ. 610, 2019 WL 1213008 (S.D.N.Y. Feb. 25, 2019); *Horror, Inc. v. Miller*, 335 F. Supp. 3d 273 (D. Conn. 2018) (appeal filed); *Lindsay v. The Wrecked & Abandoned Vessel R.M.S. Titanic*, No. 97 Civ. 9248, 1999 WL 816163, at \*6 (S.D.N.Y. Oct. 13, 1999). In holding that a director had no authorship rights in his film, the *16 Casa Duse* court found it unnecessary to reach the producer's alternative argument that, if the director owned any copyright in the film, he had



case involving a film, the district court went so far as to declare that mutual intent to share authorship “is the *sine qua non* of the co-authorship inquiry”<sup>279</sup>—despite the fact that it is nowhere mentioned in the 1976 Act or its legislative history.

The Second Circuit courts have also been fairly consistent in applying *Childress* to other categories of copyrightable works,<sup>280</sup> with one notable exception. In *Perry v. Mary Ann Liebert, Inc.*, a case involving a scientific manuscript, the Southern District of New York ignored *Childress* completely.<sup>281</sup> The court instead relied on *Weissman v. Freeman* (the pre-*Childress* case involving a medical article)<sup>282</sup> as well as a district court case from a different circuit involving a scientific paper,<sup>283</sup> as though scientific writing as a category merits a different standard. This is permissible, of course, under Judge Newman’s express statement in *Childress* that some works of authorship can be subjected to a less demanding test than dramatic works.<sup>284</sup> It is also consistent with a bias in favor of romantic authorship for highly creative works, and a greater tolerance for multiple authorship of fact-based works.

### C. SEVENTH CIRCUIT: TREATING DRAMATIC WORKS DIFFERENTLY

The preference for romantic authorship of dramatic works is even more pronounced in the Seventh Circuit. In this circuit, dramatic works have been subject to a more demanding joint works analysis than any other category of copyrightable works.

As was true in the Second Circuit, courts in the Seventh Circuit at first applied the 1976 Act’s joint authorship test without adding any additional requirements. None of these early cases involved dramatic works.<sup>285</sup> However, *Erickson v. Trinity Theatre, Inc.*, the first case under the 1976 Act that reached the Court of Appeals, did

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granted an *implied license* to the producer. In dictum, however, the court suggested that the implied license approach was unsatisfactory since the license would be rescindable. *16 Casa Duse*, 791 F.3d at 259 n.5.

279. *Webber*, 2019 WL 1213008, at \*5.

280. See *Richard J. Zitz, Inc. v. Pereira*, 225 F.3d 646, 2000 WL 1239830, at \*4 (2d Cir. 2000) (unpub.) (architectural work); *CDS Inc. v. Zetler*, 298 F. Supp. 3d 727 (S.D.N.Y. 2018) (software); *Maxwood Music Ltd. v. Malakian*, 713 F. Supp. 2d 327, 343–44 (S.D.N.Y. 2010) (song); *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 315–16 (S.D.N.Y. 2000) (photographs); *Maurizio v. Goldsmith*, 84 F. Supp. 2d 455, 465–66 (S.D.N.Y. 2000) (novel), *aff’d on other grounds*, 230 F.3d 518 (2d Cir. 2000); *Design Options, Inc. v. BellePointe, Inc.*, 940 F. Supp. 86, 90 (S.D.N.Y. 1996) (sweater designs); *Papa’s-June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1157 (S.D.N.Y. 1996) (songs).

281. *Perry v. Mary Ann Liebert Inc.*, No. 17-CV-5600, 2018 WL 2561029 (S.D.N.Y. June 4, 2018).

282. *Weissman v. Freeman*, 868 F.2d 1313 (2d Cir. 1989) (cited by *Perry*, 2018 WL 2561029, at \*9).

283. *Mallon v. Marshall*, 95 F. Supp. 3d 274, 277 (D. Mass. 2015) (cited by *Perry*, 2018 WL 2561029, at \*9).

284. *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991) (requiring “less exacting consideration in the context of traditional forms of collaboration, such as between the creators of words and music of a song”).

285. See *Bodenstab v. J.R. Blank & Assocs., Inc.*, 1990 WL 251818 (N.D. Ill. Dec. 27, 1990) (software), *vacated on other grounds on reconsideration* by 1991 WL 33647 (N.D. Ill. Mar. 8, 1991); *Johnstone v. Fox*, No. 85 C 3179, 1987 WL 45233, at \*3 (N.D. Ill. June 12, 1987) (drawing of kitchen design); *Eckert v. Hurley Chi. Co., Inc.*, 638 F. Supp. 699, 702–04 (N.D. Ill. 1986) (sales brochure).

involve a dramatic work.<sup>286</sup> In that decision, the Seventh Circuit adopted the *Childress* approach.

*Erickson* involved three plays developed through an improvisational rehearsal process.<sup>287</sup> The theater company asserted joint authorship based on the contributions made by its actors during the development of the plays, but the Seventh Circuit rejected the claim, expressly adopting the *Childress* requirement of intent to share authorship:

[Actor Michael Osborne] conceded that whether his contributions were included and where they went into the compilation were entirely [writer] Ms. Erickson's decisions. Furthermore, neither Ms. Erickson nor Trinity considered any of the actors to be co-authors with her in *Much Ado*. . . . Similarly with *Prairie Voices*, Ms. Erickson provided the stories on which the play was based, and she decided which of the actors' suggestions were incorporated into the script. The actors did not consider themselves to be joint authors with Ms. Erickson, and there is no evidence that Ms. Erickson considered the actors as co-authors of the script. Because Trinity cannot establish the requisite intent for *Much Ado* or *Prairie Voices*, the actors cannot be considered joint authors for the purposes of copyright protection.<sup>288</sup>

Only after reaching this conclusion did the court note that the actors could not identify their specific contributions to the plays.<sup>289</sup> Yet this evidentiary failure, by itself, would have been sufficient grounds to reject the theater's joint authorship claim under a straightforward reading of the statute. Here, again, a federal court went out of its way to narrow the statutory definition of a joint work in order to lend support to the tacit presumption that dramatic writing is not collaborative.

The Seventh Circuit quickly abandoned this approach when faced with a dispute that did not involve a dramatic work. Decided just three years after *Erickson*, *Seshadri v. Kasraian* involved a student and a professor who collaborated on an academic article.<sup>290</sup> In holding that they were joint authors, Judge Posner's opinion focused only on the fact of collaboration and the substantiality of each party's contribution.<sup>291</sup> Posner cited *Childress* and *Erickson*, but only for the rule that "a collaborator must contribute significant copyrightable material"; he did not mention those courts' holdings that the joint authors must intend to share authorship with one another.<sup>292</sup> While Posner found it relevant that the parties' initial manuscript listed

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

287. *Id.*

288. *Id.* at 1072.

289. *Id.*

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

291. *Id.* at 803 ("Anyone reading the correspondence between Seshadri and Kasraian would conclude that the article was indeed a joint work."). In that correspondence, the professor expressly acknowledged that both had contributed written expression. *Id.* at 802–03. Noting that the article listed the student's name first, Judge Posner observed that "it would be odd for a senior professor to list a graduate student's name before his own if the student had contributed nothing more to the article than the usual assistance that a research assistant provides." *Id.* at 803. Because the judge did not cite any evidence from the record supporting his opinion as to normal practice in professional academic writing, he may have been relying on his own experience as a law professor. See *Richard A. Posner Faculty Web Page*, UNIV. CHI., <https://perma.cc/RUR2-D39D> (last visited Jan. 14, 2022).

292. *Seshadri*, 130 F.3d at 803.

both parties as authors, placing the student's name first, he found this significant not as an indication of intent to share authorship but merely as evidence that the student contributed "significant copyrightable material."<sup>293</sup> At no point did he acknowledge that he was departing from the test that his own court had adopted in *Erickson* to reject joint authorship claims. As a result, the Seventh Circuit applied a significantly less stringent joint authorship test to academic writing than it had applied to dramatic works just three years earlier.

In the years that followed, the Seventh Circuit continued to apply a less demanding joint authorship test in cases that did not involve dramatic works, even when the works in question were highly creative. For example, *Gaiman v. McFarlane* involved the authorship of comic book characters.<sup>294</sup> With Judge Posner once again writing the opinion, the court rejected a claim of sole authorship by the artist who drew the characters, holding instead that the creator of the characters' descriptions and dialogue was a joint author.<sup>295</sup> Judge Posner did not discuss the parties' intent at all; instead, his analysis focused solely on the nature of their respective contributions.<sup>296</sup> He also applied a relaxed standard for assessing whether each author had made a sufficient contribution to the work.<sup>297</sup>

Just two years after *Gaiman*, another Seventh Circuit panel revealed a sharp split over *Erickson*'s intent requirement. In a 2009 case involving joint authorship of a song, *Janky v. Lake County Convention & Visitors Bureau*, one band member (Janky) wrote a song, then accepted the revised lyrics suggested by a second band member, but later argued that she, Janky, was the song's sole author.<sup>298</sup> Applying *Erickson*, the magistrate agreed that the two writers did not intend to be co-authors, and that the second writer's lyric revisions were too "minimal" to be copyrightable contributions.<sup>299</sup> However, a split Seventh Circuit panel disagreed, ruling that the song was a joint work.<sup>300</sup> In contrast to the magistrate, the majority construed *Erickson* to require only: (1) copyrightable contributions from each party; and (2) an "intent to work together in the creation of a single product," which the court expressly distinguished from an "intent to recognize each other as co-authors for purposes of copyright law."<sup>301</sup> The majority found the requisite intent based on: (1) the second band member's degree of control over the finished product; and (2) Janky's initial characterization of the work as joint, even though she changed her mind later.<sup>302</sup> Because the lyric revisions were significant concrete expression rather

293. *Id.*

294. *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004).

295. *Id.* at 661.

296. *Id.* at 658–59.

297. *Id.* at 659 ("The decisions that say, rightly in the generality of cases, that each contributor to a joint work must make a contribution that if it stood alone would be copyrightable weren't thinking of the case in which it *couldn't* stand alone because of the nature of the particular creative process that had produced it.")

298. *Janky v. Lake Cnty. Convention & Visitors Bureau*, 576 F.3d 356, 359–60 (7th Cir. 2009).

299. *Id.* at 361.

300. *Id.* at 363.

301. *Id.* at 362.

302. *Id.*

than mere ideas, the song was a joint work.<sup>303</sup> The dissent, in contrast, called for a stricter application of *Erickson* and *Childress*, requiring proof that the parties “intended to be joint authors.”<sup>304</sup> The dissent also believed the lyric revisions to be uncopyrightable ideas.<sup>305</sup>

The Seventh Circuit continued to ignore *Erickson*’s heightened intent requirement in *Sullivan v. Flora, Inc.*, a case involving illustrations that an artist created for use in a company’s advertising campaigns.<sup>306</sup> Quoting the joint authorship test in *Janky*, and failing to even mention *Erickson*, the court approved a jury instruction on joint works that required only an intent to merge contributions, rather than an intent to share authorship.<sup>307</sup>

The emerging pattern in the Seventh Circuit is striking. As noted earlier, the district courts in the Second Circuit have been somewhat consistent in applying *Childress* to non-dramatic works,<sup>308</sup> with one notable exception.<sup>309</sup> In contrast, the Seventh Circuit has been strangely consistent in its inconsistency: After taking a hard line on joint authorship of dramatic works in *Erickson*, the Seventh Circuit took a decidedly softer stance in the context of other works.

#### D. NINTH CIRCUIT: AN UNCERTAIN STANDARD

In the Ninth Circuit, joint authorship cases under the 1976 Act applied only the statutory requirements until the early 1990s.<sup>310</sup> After the decisions in *Childress* and *Erickson*, cases in the Ninth Circuit became inconsistent, with some decisions continuing the earlier approach<sup>311</sup> (including a case involving a screenplay<sup>312</sup>), and others beginning to apply the heightened intent requirement.<sup>313</sup> In a striking example

303. *Id.* at 363.

304. *Id.* at 364–65 (Ripple, J., dissenting). Rather than referencing *Childress* directly, the dissent cited *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998). *Thomson* is discussed *supra* notes 270–276 and accompanying text.

305. *Janky*, 576 F.3d at 365 (Ripple, J., dissenting).

306. *Sullivan v. Flora, Inc.*, 936 F.3d 562, 575 (7th Cir. 2019).

307. *Id.*

308. *See supra* note 280 and accompanying text.

309. *See supra* notes 281–283 and accompanying text.

310. *See Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 520–22 (9th Cir. 1990) (software); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1086–87 (9th Cir. 1989) (software); *Sinkler v. Goldsmith*, 623 F. Supp. 727, 731–32 (D. Ariz. 1985) (letters). In *Ashton-Tate* and *S.O.S.*, the court did not reach the intent requirement, because it found that only one party contributed copyrightable expression.

311. *Leicester v. Warner Bros.*, No. CV95-4058-HLH(CTX), 1998 WL 34016724, at \*4 (C.D. Cal. May 29, 1998) (architectural work), *aff’d*, 232 F.3d 1212 (9th Cir. 2000); *Johannsen v. Brown*, 797 F. Supp. 835, 842 (D. Or. 1992) (illustration).

312. *Bencich v. Hoffman*, 84 F. Supp. 2d 1053, 1055–56 (D. Az. 2000) (finding intent to merge contributions). The district court issued this opinion just a few days after the Ninth Circuit adopted the heightened intent requirement in *Aalmuhammed v. Lee*, 202 F.3d 1127 (9th Cir. 2000), and did not take account of that decision.

313. *Campbell v. Lavery*, 106 F.3d 406 (9th Cir. 1997) (unpublished table decision) (software); *Vondran v. McLinn*, No. C 95-20296, 1995 WL 415153, at \*5 (N.D. Cal. July 5, 1995) (article for trade publication); *Konigsberg Int’l, Inc. v. Rice*, No. CV 91-6398, 1992 WL 315225, at \*1 & n.2 (C.D. Cal. Mar. 20, 1992) (treatment for novel and other projects).

of a court subjecting dramatic works to differential treatment, one district court expressly held that *Childress* applied to plays but not to sound recordings.<sup>314</sup>

In 2000, however, the Ninth Circuit created its own version of the heightened intent requirement, and it did so in the context of dramatic works—specifically, motion pictures. *Aalmuhammed v. Lee* involved a dispute over the authorship of a motion picture that arose when a film producer failed to secure a work-made-for-hire agreement from one of the film’s creative participants, who later asserted joint authorship.<sup>315</sup> In addition to requiring that each author make a copyrightable contribution to the joint work, the Ninth Circuit applied three criteria for treating a contributor as a joint author: (1) the collaborator must “superintend” the work by “exercising control”; (2) the “putative coauthors [must] make object manifestations of a shared intent to be coauthors”; and (3) the work’s audience appeal must turn on both contributions and “the share of each in its success cannot be appraised.”<sup>316</sup> The court added, however, that “[c]ontrol in many cases will be the most important factor.”<sup>317</sup> Thus, while the *Aalmuhammed* test differs slightly from the *Childress* test, it incorporates both the “dominant author” concept (by focusing on control) and the requirement of intent to share authorship rather than simply an intent to merge contributions into a unitary work.

In adopting this test, the Ninth Circuit acknowledged that it was following the lead of the dramatic works cases from the Second and Seventh Circuits.<sup>318</sup> However,

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314. *Systems XIX, Inc. v. L. Parker*, 30 F. Supp. 2d 1225, 1228 (N.D. Cal. 1998). The court refused to apply *Childress* to sound recordings because of this passage in the 1976 Act’s legislative history:

The copyrightable elements of a sound recording will usually, though not always, involve “authorship” both on the part of the performers whose performance is captured and on the part of the *record producer* responsible for setting up the session, capturing and electronically processing the sounds, and compiling and editing them to make a final sound recording.

*Id.* (quoting H.R. REP. NO. 94-1476, at 56 (1976)). The court also cited a similar opinion from the Copyright Office: “Sound recording authorship may be contributed by the performer or the record producer. Usually, authorship is contributed by both performer and producer.” *Id.* at 1228–29 (quoting COMPENDIUM OF COPYRIGHT OFFICE PRACTICES, U.S. COPYRIGHT OFF., § 495.01 at 400–37 (1984)).

315. *Aalmuhammed v. Lee*, 202 F.3d 1127 (9th Cir. 2000). For a detailed analysis of the case, see LaFrance, *supra* note 189, at 246–55; *see also* F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225 (2001).

316. *Aalmuhammed*, 202 F.3d at 1231, 1234. The court drew the first two factors from *Thomson*, but modified the second factor out of concern that reliance on purely subjective statements of intent could be an instrument of fraud. *Id.* (citing *Thomson v. Larson*, 147 F.3d 195, 202 (2d Cir. 1998)). The court also purported to draw the first factor from the pre-1909 Act case of *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884), which the Ninth Circuit inaccurately characterized as stating that a person who poses for a photographer cannot be considered one of the authors of the photo. *Aalmuhammed*, 202 F.3d at 1232–33. In fact, the identity of the author(s) was never at issue in *Burrow-Giles*, which simply held that a photograph may be creative enough to qualify as a work of authorship eligible for copyright protection. *See* LaFrance, *supra* note 189, at 250–52. The Ninth Circuit drew the third factor from the 1944 case of *Edward B. Marks Music*, a case that applied the 1909 Act rather than the 1976 Act. *Aalmuhammed*, 202 F.3d at 1234 (citing *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266, 267 (2d Cir. 1944)); *see supra* notes 214–223 and accompanying text.

317. *Aalmuhammed*, 202 F.3d at 1234.

318. “The Second and Seventh Circuits have . . . concluded that contribution of independently copyrightable material to a work intended to be an inseparable whole will not suffice to establish authorship of a joint work.” *Id.* at 1233.

the Ninth Circuit's application of the judicially-heightened joint authorship test to motion pictures is all the more remarkable because the 1976 Act created an easy mechanism for avoiding joint authorship of motion pictures—a mechanism that is not available for other dramatic works, such as plays, musicals, monologues, or operas. This is the use of a written contract to create a work made for hire, a category that was significantly clarified in the 1976 Act. Indeed, motion pictures are one of the few types of copyrightable works for which legal authorship can be established by contract.<sup>319</sup> Under the heightened joint authorship test, however, filmmakers who neglect to undertake the simple task of using work-made-for-hire contracts can enjoy a “second bite at the apple,” enabling them to eliminate joint authorship claims even when asserted by substantial creative contributors. Ironically, the legislative history of the 1976 Act expressly cites motion pictures as examples of joint works—not once, but twice.<sup>320</sup>

Since the *Aalmuhammed* decision, courts in the Ninth Circuit have applied the heightened intent requirement to most, but not all, joint authorship disputes.<sup>321</sup> In a pair of cases involving concert videos, the Central District of California looked for heightened intent in one case,<sup>322</sup> but not the other.<sup>323</sup> Several cases applied the heightened intent requirement to sound recordings,<sup>324</sup> in spite of the earlier, 1998

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319. Those categories, which are listed in the “work made for hire” definition, include works “specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas.” 17 U.S.C. § 101.

320. In giving examples of joint works composed of “interdependent” rather than “inseparable” parts, the House Report lists “a motion picture, opera, or the words and music of a song.” H.R. REP. NO. 94-1476, *supra* note 229, at 120. The Report later notes: “It is true that a motion picture would normally be a joint rather than a collective work with respect to those authors who actually work on the film, although their usual status as employees for hire would keep the question of coownership from coming up.” *Id.*

321. See, e.g., *Direct Techs. LLC v. Elec. Arts, Inc.*, 836 F.3d 1059, 1068–69 (9th Cir. 2016) (flash drive design); *Brod v. Gen. Publ'g Grp., Inc.*, 32 F. App'x 231 (9th Cir. 2002) (finding that book author was joint author of photographs even though he gave photographer sole credit in book's copyright notice); *Softketeers, Inc. v. Regal W. Corp.*, No. 8:19-CV-00519-JWH (JDEx), 2021 WL 1035122, at \*3-4 (C.D. Cal. Feb. 10, 2021) (software); *Jefferson v. Raisen*, No. CV 19-9107-DMG (MAAx), 2020 WL 6440034 (C.D. Cal. Aug. 14, 2020) (finding that song was separately created derivative work rather than continuation of joint work).

322. *Morrill v. Smashing Pumpkins*, 157 F. Supp. 2d 1120, 1123 (C.D. Cal. 2001) (finding joint authorship).

323. *Eagle Rock Ent., Inc. v. Coming Home Prods., Inc.*, No. CV 03-571 FMC (AJWx), 2004 WL 5642002, at \*13–14 (C.D. Cal. Sept. 1, 2004). In this case, the court recited and purported to apply all three of the *Aalmuhammed* factors in finding joint authorship, but its analysis completely ignored the heightened intent factor.

324. *Yellowcake, Inc. v. Hyphy Music, Inc.*, No. 1:20-CV-0988, 2021 WL 3052535, at \*6 (E.D. Cal. July 20, 2021); *Yellowcake, Inc. v. Morena Music, Inc.*, F. Supp. 3d 747, 763 (E.D. Cal. 2021); *Armes v. Post*, No. 2:20-cv-03212-ODW (PJWx), 2020 WL 6135068, at \*6 (C.D. Cal. Oct. 19, 2020); *Taylor v. Universal Music Corp., Inc.*, No. CV 13-06412, 2014 WL 12607685, at \*3–4 (C.D. Cal. Mar. 10, 2014); *Lopez v. Musinorte Ent. Corp.*, No. CV 03-167 TUC DCB, 2004 WL 7324723, at \*4–6 (D. Az. Dec. 29, 2004), *rev'd and remanded on other grounds*, 2007 WL 579746 (9th Cir. Feb. 21, 2007) (mem.).

opinion holding that the requirement did not apply to sound recordings.<sup>325</sup> In two cases involving artwork, one court applied the heightened intent requirement,<sup>326</sup> but the other did not.<sup>327</sup>

Several of the post-*Aalmuhammed* cases can only be described as peculiar. In what amounts to a double time-warp, the Ninth Circuit in *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*,<sup>328</sup> applied *Aalmuhammed* to a motion picture that was made in the 1960s, and which was, therefore, governed by the 1909 Act. The court asserted, however, that the 1976 Act's definition of joint works simply reflected the case law that had developed under the 1909 Act.<sup>329</sup> Another oddity is *Corbello v. DeVito*,<sup>330</sup> which involved an unpublished biography that was used as source material for the musical *Jersey Boys*. Musician Tommy DeVito asked writer Rex Woodard to write his biography, and the two executed a contract stating that Woodard would do the writing, DeVito would have "absolute and exclusive control over the final text," and both of them would be listed as co-authors.<sup>331</sup> The evidence showed that Woodard had done all the writing and creative work, and DeVito merely looked the text over and asked for "minor edits."<sup>332</sup> Nonetheless, DeVito argued that he was the sole author because he had the right to control the finished work and did not intend to share authorship.<sup>333</sup> In rejecting DeVito's sole authorship claim, the district court noted that "it is a close question whether DeVito would even be a joint author" were it not for their contract.<sup>334</sup> The court's treatment of the contract as dispositive is consistent with *Richlin*,<sup>335</sup> while its willingness to overlook DeVito's degree of control amounts to a small rebellion. Nonetheless, had the court simply applied the joint works analysis without the *Aalmuhammed* gloss, in all likelihood it would have found Woodard to be the sole author, because DeVito's contributions were probably not substantial enough to be copyrightable. Ironically, the court allowed authorship

325. *Systems XIX, Inc. v. L. Parker*, 30 F. Supp. 2d 1225, 1228 (N.D. Cal. 1998) (citing H.R. REP. NO. 94-1476 (1976)); see *supra* note 314 and accompanying text.

326. *Moi v. Chihuly Studio, Inc.*, No. C17-0853RSL, 2019 WL 2548511, at \*3 (W.D. Wash. June 20, 2019), *aff'd*, 846 F. App'x 497 (9th Cir. 2021).

327. *Fleming v. Miles*, 181 F. Supp. 2d 1143, 1155-57 (D. Or. 2001).

328. *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962, 968-70 (9th Cir. 2008).

329. *Id.* at 968. Although the court rejected the plaintiff's claim to joint authorship of the film, its entire joint works analysis was unnecessary. The film in question was a derivative work in which the plaintiff was not a creative participant. The plaintiff was merely a joint author of the underlying treatment and had assigned his rights in the finished treatment to the movie makers. Thus, the court reached the right result, but for the wrong reason.

330. *Corbello v. DeVito*, 844 F. Supp. 2d 1136 (D. Nev. 2012), *rev'd in part, vacated in part, remanded*, 777 F.3d 1058 (9th Cir. 2015).

331. *Id.* at 1141.

332. *Id.* at 1163.

333. *Id.*

334. *Id.*

335. The idea that a contract is dispositive of joint authorship originated with the *Richlin* court, which mistakenly drew this inference from *Aalmuhammed*. *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962, 969 (9th Cir. 2008) (citing *Aalmuhammed v. Lee*, 202 F.3d 1127, 1234 (9th Cir. 2000)). However, *Aalmuhammed* merely stated that a contract is "the best objective manifestation of a shared intent," indicating that a contract is relevant to one factor in its analysis, not that a contract is dispositive of the ultimate question. *Aalmuhammed*, 202 F.3d at 1235.

to be determined by a contract that would not have met the requirements for creating a work made for hire.<sup>336</sup>

Perhaps the strangest—and most notorious—case of all is *Garcia v. Google*, where the Ninth Circuit initially held that an actress was not a joint author of the film in which she performed, solely because she disavowed any intent to create a joint work; the court held instead that she possessed a separate copyright in her “performance.”<sup>337</sup> Although this absurd result was rejected in the en banc rehearing, the Ninth Circuit’s eventual conclusion—that the actress had no copyrightable interest at all—was essentially the same as saying that she was not a joint author and that she had implicitly assigned her contribution to the production company,<sup>338</sup> a result that is clearly at odds with the 1976 Act’s rejection of implied assignments.<sup>339</sup>

## V. RESISTING THE ROMANTIC AUTHOR

As this history reveals, the conceit of the romantic author is alive and well in the jurisprudence of joint works, and that jurisprudence is overwhelmingly attributable to disputes involving dramatic works, beginning with music and texts created for live performance, and extending more recently to motion pictures. Three leading circuits have adopted rules that privilege a work’s dominant or controlling author by imbuing that party with the unilateral power to deny authorship status to other contributors, regardless of the creativity and substantiality of their contributions. These circuits have constrained joint authorship in a way that facilitates attribution to a single creative “genius.”

Under the influence of the romantic view of authorship, each of these circuits departed from the statutory test of joint authorship by adopting a modern version of the “implied assignment” rationale that had enabled nineteenth-century courts to reject the authorship claims of writers and composers who created commissioned or derivative works.<sup>340</sup> Too often, the effect of the heightened intent requirement has been to strip creative contributors of their rights to share in the value of what they create, on the theory that they implicitly agreed to surrender the rights to their contributions. Yet Congress clearly rejected the concept of implied assignments in the 1976 Act when it: (1) created a definition for joint works;<sup>341</sup> (2) required all copyright assignments and exclusive licenses to be in writing;<sup>342</sup> and (3) replaced the broad judicial concept of works made for hire with a narrower statutory definition under which a surrender of authorship can be inferred only in a bona fide

336. Literary works such as biographies are not eligible for work-made-for-hire contracts. 17 U.S.C. § 101 (definition of “work made for hire”).

337. *Garcia v. Google*, 766 F.3d 929, 933 (9th Cir. 2014), *reh’g en banc*, 786 F.3d 733, 742 (9th Cir. 2015). The actress may have disclaimed joint authorship because she did not want to be identified as responsible for the film’s objectionable content.

338. *Garcia v. Google*, 786 F.3d 733, 742 (9th Cir. 2015) (en banc).

339. *See supra* note 222 and accompanying text.

340. *See supra* notes 103–106, 149, 180, and accompanying text.

341. 17 U.S.C. § 101 (definition of “joint works”).

342. *Id.* § 204(a).



employment relationship.<sup>343</sup> By adopting the conceit of the dominant author and giving that party the unilateral right to foreclose authorship claims by other collaborators, these federal courts have undermined Congress's decision to narrow the concept of works made for hire and restore the authorship rights of creative workers. The rule that "dominant authors" can nullify the authorship claims of their collaborators while reaping the benefits of their contributions is simply a thinly disguised reincarnation of an obsolete doctrine.

In many cases, the jurisdictions that have embraced heightened scrutiny for joint authorship of dramatic works have been disinclined to extend this analysis to other categories of works.<sup>344</sup> This suggests that there is something about dramatic works that triggers the romantic author conceit. Historically, dramatic works were among the earliest works to be scrutinized from the romantic author perspective, when the mid-seventeenth century saw the English theater world plummet from a golden age of collaboration to an era in which joint conception was viewed as evidence of creative vacuity. This led many literary scholars to embrace the false narrative of Shakespeare as a solitary genius. Could this history explain the predilection for solitary authorship of dramatic works?

A trip across the pond suggests that this is not entirely the case. Even though the federal law on joint works is rooted in English case law, recent decisions from the courts of the United Kingdom have rejected a restrictive approach to joint authorship. The UK copyright statutes define joint works in language that is similar, though not identical, to that of federal copyright law.<sup>345</sup> Most English courts, however, have expressly declined to impose the dominant author/heightened intent paradigm on joint authorship disputes,<sup>346</sup> and the minor linguistic differences in the statutes do not explain these divergent outcomes. Simply put, in the land of Shakespeare and his

343. Unlike a party that commissions an independent contractor, an employer does not need a signed writing to claim authorship of an employee's work. 17 U.S.C. §§ 101 (definition of "work made for hire"), 201(b) (stating that the person for whom the work made for hire was prepared is considered the author); see *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (distinguishing the two categories of works made for hire and establishing criteria for bona fide employment relationships).

344. See *supra* notes 235–237, 281–284, 290–314, 327, and accompanying text.

345. As originally enacted, section 11(3) of the Copyright, Designs and Patents Act (CDPA) defined a "work of joint authorship" as "a work produced by the collaboration of two or more authors in which the contribution of each author is not separate from the contribution of the other author or authors." See *Beckingham v. Hodgens* [2003] EWCA (Civ) 143, [2004] E.C.D.R 6, para. 10. Some years later, this provision was renumbered as CDPA § 10(1) and slightly rephrased, referring to "a work produced by the collaboration of two or more authors in which the contribution of each author is not *distinct from that* of the other author or authors." (emphasis added to highlight rephrasing). See *Kogan v. Martin* [2019] EWCA (Civ) 1645, [2020] E.C.D.R. 3, para. 30.

346. *Kogan*, [2019] EWCA Civ 1645, paras. 48–49, 53; *Beckingham*, [2003] EWCA Civ 143, paras. 49–51; *Bamgboye v. Reed* [2002] EWHC 2922 QB, [2004] EMLR 5, para. 61. *Kogan* also held that decision-making authority (which party has the "final say") is not dispositive. *Kogan*, [2019] EWCA Civ 1645, paras. 50–51, 53. The only English case that is even partially to the contrary is *Brighton v. Jones*, [2005] FSR 16, para. 56(iv) (stating that which author has the "final say" is a factor to be considered), but this holding was largely disapproved in *Kogan*, [2019] EWCA (Civ) 1645, para. 51.

many co-writers, the conceit of the romantic author has not been allowed to nullify the rights of collaborators.<sup>347</sup>

Perhaps, then, it is the structure, economics, and power of the American entertainment industries that have created pressure to concentrate ownership of valuable works in the hands of a single owner, even when those properties were not created as works made for hire. As noted earlier,<sup>348</sup> the three federal circuits that have embraced the dominant author approach all have geographic jurisdiction over regions where major industries depend on the exploitation of dramatic works.

In distorting the concept of authorship, these federal courts have done a disservice to creative collaborators. Judicial reluctance to recognize joint authorship of dramatic works reflects a bias in favor of the image of the romantic author. Yet, when we incorporate a greater understanding of the early history of English-language dramatic writing, the predominant image of the solitary playwright laboring to produce a work of genius proves to be not only ahistorical but unduly influential in the assessment of joint authorship claims. The dominant author is simply the romantic author in disguise.

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347. In Canada, another country whose copyright law descended from English common law, courts have reached conflicting conclusions on the heightened intent requirement for joint works. Although some trial courts have followed *Childress*, see, e.g., *Neudorf v. Netzwerk Prods., Ltd.* (1999) 71 B.C.L.R. 3d 290 (Can. B.C. Sup. Ct.), the Federal Court expressly rejected that approach in *Neugebauer v. Labieniec*, 2009 FC 666, 349 F.T.R. 53 (FC), where the court relied instead on *Levy v. Rutley*. Canada's Copyright Act is similar to that of the United Kingdom, defining a joint work as "a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors." Copyright Act, R.S.C. 1985, c. C-42, sec. 2.

348. See *supra* note 234 and accompanying text.