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From Beyonce to Bohemia: Reforming Joint Copyright Ownership

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From Beyoncé to Bohemia:
Reforming Joint Copyright Ownership

William Frank Weber*

INTRODUCTION 372

I. BACKGROUND 376

 A. *General History of Copyright Law* 376

 B. *Development of Joint Authorship Law: Intent* 377

 C. *Minority View on Independent Copyrightability* 379

 D. *Majority View on Independent Copyrightability* 381

 E. *Joint Authorship Law in the United Kingdom* 383

II. ANALYSIS 384

 A. *Intent* 384

 B. *Independent Copyrightability* 388

 C. *Proposed Solution* 391

 i. *Taking from the American Law* 392

 ii. *Taking from the United Kingdom’s Law* 393

 iii. *The New Proposed Hybrid Law* 393

CONCLUSION 394

INTRODUCTION

JaQuel Knight. Reading this name, for many, will give them no feeling of recognition. The same people that do not know his name will more than likely immediately recognize this next name, Beyoncé. Her name immediately conjures up iconic images, songs, and music videos. She is a global star that has released six studio solo albums, all of which have reached number one on the U.S. Billboard charts.¹ Two of Beyoncé’s hit songs are “Single Ladies (Put a Ring on It)” and “Formation.” “Formation,” with its numerous Beyoncé dance routines, the solo dance of a young, hooded boy in front of a line of police officers, and powerful message, won eleven different outstanding or best music video awards and currently has over 200

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1. *Beyoncé Chart History: Billboard 200*, BILLBOARD MEDIA, <https://www.billboard.com/music/beyonce/chart-history/TLP> (last visited Dec. 17, 2020).

million views on YouTube.² “Single Ladies (Put a Ring on It)” became an iconic music video, not only because of the hit song but also the familiar, and often imitated dance movements. The track won “best music video” at the 2009 MTV Music Video Awards³ and accumulated over 800 million views on YouTube.⁴ Both of these music videos also won the MTV Video Music Award for Best Choreography in a Video.⁵

The massive success of these projects makes the story of JaQuel Knight a compelling position to consider. The dance movements from “Single Ladies (Put a Ring on It)” have become ingrained into pop culture.⁶ These movements are attributed to Beyoncé, but she did not create them. The creation of these iconic movements, along with the choreography from “Formation” came from JaQuel Knight.⁷ Despite over one billion views between the two of these videos, JaQuel Knight is far from a household name. Knight does not have his name mentioned anywhere as choreographer on the YouTube pages for either of these videos.⁸ This unknown status is reflected in his compensation for the music. While Mike WiLL Made-It, the producer of “Formation,” made millions of dollars off of the song,⁹ Knight, who helped create the iconic imagery responsible for the songs popularity and whose work garnered the song a best choreography award,¹⁰ was treated like a temporary hire and given only a weekly rate.¹¹ The work that came from Knight’s mind was treated as if it belonged to somebody else, and any credit he did receive was often found in a random social media post, which does not bestow ownership or control to the commercial choreographer.¹²

2. Beyoncé, *Beyoncé - Formation*, YOUTUBE (Dec. 9, 2016), https://www.youtube.com/watch?v=WDZJPJV__bQ.

3. *The 2009 MTV VMAs Winners List*, ROLLING STONE (Sept. 14, 2009, 3:56 AM), <https://www.rollingstone.com/music/music-news/the-2009-mtv-vmas-winners-list-81389/>.

4. Beyoncé, *Beyoncé - Single Ladies (Put a Ring on It)*, YOUTUBE (Oct. 3, 2009), <https://www.youtube.com/watch?v=4m1EFMoRFvY>.

5. *VMAs 2016: See the Full List of Winners*, BILLBOARD MEDIA (Aug. 28, 2016), <https://www.billboard.com/articles/news/vmas/7487873/vmas-2016-winners-list>; *The 2009 MTV VMAs Winners List*, *supra* note 3.

6. Rebecca Milzoff, *Inside ‘Single Ladies’ Choreographer JaQuel Knight’s Quest to Copyright His Dances*, BILLBOARD MEDIA (Nov. 5, 2020), <https://www.billboard.com/articles/business/9477613/jaquel-knight-beyonce-megan-thee-stallion-billboard-cover-story-interview-2020/>.

7. *Id.*

8. *Beyoncé - Formation*, *supra* note 2; *Beyoncé - Single Ladies (Put a Ring on It)*, *supra* note 4.

9. Milzoff, *supra* note 6.

10. *VMAs 2016: See the Full List of Winners*, *supra* note 5.

11. Milzoff, *supra* note 6.

12. *Id.*

Knight is lucky, however. With the help of intellectual property attorney David L. Hecht, he was able to win the uphill battle of having his choreography for “Single Ladies (Put a Ring on It)” registered with the Copyright Office on July 9, 2020.¹³ This victory makes Knight “the first commercial choreographer in pop music to succeed” in having his work approved for registration by the Copyright Office.¹⁴ The artistic value of his work can be seen not only in the music videos but in the Labanotations¹⁵ of choreographical works produced by the Dance Notation Bureau as well. Knight is now recognized as the owner of the choreography he has created.

JaQuel Knight may have been granted his rightful recognition, but dramaturg Lynn Thompson was not extended the same recognition for the Broadway musical *RENT*.¹⁶ The music, lyrics, and book of *RENT* are all credited to Jonathan Larson.¹⁷ The original concept behind the show came from Billy Aronson, who wanted to create a musical version of the Puccini opera *La Bohème* with Larson.¹⁸ Unfortunately, Larson and Aronson wanted to take the show in different directions.¹⁹ The two amicably parted ways in 1991, with Larson getting the opportunity to make the show his own, and Aronson getting credit and compensation if a production ever materialized.²⁰ Over the next two years, Larson was able to complete a draft of the show and convince the director of the New York Theater Workshop, James Nicola, to develop the production.²¹ At the first staged reading, in 1993, the songs and music were praised but the story was unclear and had major pacing issues.²² The problems with the structure of the story continued into the spring of 1995, when Nicola insisted that Larson work with Lynn Thompson.²³

13. *Id.*

14. *Id.*

15. Labanotations are like sheet music for dance. The sheets use one vertical staff per performer and different symbols that show body parts, direction, length, and intention of specific movements. *Id.*

16. David Lefkowitz, *Rent Dramaturg Suit Dismissed*, PLAYBILL (July 23, 1997), <https://www.playbill.com/article/rent-dramaturg-suit-dismissed-com-71067>.

17. Rachel Paige, *Rent Will Always Be Relevant—Its Late Creator Jonathan Larson Made Sure of It*, REFINERY29 (Jan. 27, 2019, 3:00 PM), <https://www.refinery29.com/en-us/2019/01/222364/who-is-jonathan-larson-rent-creator-history>.

18. Anthony Tommasini, *Theater; The Seven-Year Odyssey That Led to ‘Rent’*, N.Y. TIMES (Mar. 17, 1996), <https://www.nytimes.com/1996/03/17/theater/theater-the-seven-year-odyssey-that-led-to-rent.html>.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Rebecca Milzoff, *RENT: The Oral History*, VULTURE, <https://www.vulture.com/2016/05/rent-oral-history-c-v-r.html> (last visited Oct. 16, 2021).

The musical would go on to become a success.²⁴ However, shortly before previews began, Larson died from an aortic aneurysm.²⁵ After the success of the show, Lynn Thompson sued the Larson estate, claiming she was underpaid for her efforts on *RENT*.²⁶ She believed she was a joint author on the work, contributing nine percent of the lyrics and forty-eight percent of the libretto.²⁷ Her efforts were scorned by the majority of playwrights, who painted her as a usurper.²⁸ But, Thompson had support from industry luminaries like Tony Kushner and Craig Lucas, who, among others, believed that Thompson transformed the work.²⁹ These supporters saw that Thompson took a show mired in the workshopping process for years and helped rewrite it so it worked for a full production.³⁰ The original case was dismissed, as the judge agreed that Larson did not intend for Thompson, or anyone else to be a co-author.³¹ The parties settled the case outside of court, before the appellate court decided the trial court's dismissal.³²

Regardless of the validity of Lynn Thompson's claim, her story opens a can of worms in intellectual copyright law, especially in extremely collaborative artforms. American copyright law must be reformed to address the idea of joint authorship. This reform should be inspired by the United Kingdom law on joint authorship, while the foundation remains firmly grounded in the American joint authorship law, thereby creating a new law that addresses the inequities of the current joint authorship law.

This Article begins by discussing the development of joint authorship law in the United States and compares it to joint authorship law in the United Kingdom. Part II looks at how the American courts have misinterpreted the Copyright Act. Part II also proposes the new hybrid law that the United States should adopt and shows how this new law addresses the inequities present in the current joint authorship law.

24. Michael Gioia, *The Creation of Rent—How Jonathan Larson Transformed an Idea into a Groundbreaking Musical*, PLAYBILL (Feb. 05, 2016), <https://www.playbill.com/article/the-creation-of-rent-how-jonathan-larson-transformed-an-idea-into-a-groundbreaking-musical>.

25. Tommasini, *supra* note 18.

26. Lefkowitz, *supra* note 16.

27. *Id.*

28. Dan Friedman, *The Dramaturg: Help or Hindrance? (Part 2 of 2)*, BACKSTAGE (Sept. 27, 2002, 12:00 AM), <https://www.backstage.com/magazine/article/dramaturg-help-hindrance-part-19603/>.

29. Lefkowitz, *supra* note 16.

30. Friedman, *supra* note 28.

31. Lefkowitz, *supra* note 16.

32. Friedman, *supra* note 28.

I. BACKGROUND

A. General History of Copyright Law

Historically, copyright law began to develop after Johannes Gutenberg invented the printing press in the West.³³ In England, publishers and judges believed that authors held perpetual property rights in their works through common law.³⁴ This perpetual common law right lasted through multiple statutory schemes until 1710, when the Statute of Anne vested copyright protection only to authors of books for fourteen years, and the chance at an additional fourteen years of protection if the author survived the expiration of the original copyright protection.³⁵ The Statute of Anne, which required registration, was the model statute for state copyright laws that most states passed after gaining independence.³⁶ This state-led approach created choice of law issues, leading to a consensus that a national copyright law was necessary.³⁷

The foundation for the national solution is found directly in the Constitution: “The United States Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁸ The Copyright Clause granted Congress the ability to create national patent and copyright protections. President George Washington advocated for the need for a national intellectual copyright law in his first State of The Union Address. President Washington stated:

[T]here is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is in every country the surest basis of public happiness. In one in which the measures of government receive their impressions so immediately from the sense of the community as in ours it is proportionably essential.³⁹

33. 2 PETER S. MENELL ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: COPYRIGHTS, TRADEMARKS & STATE IP PROTECTIONS* 495 (2019).

34. H. Tomás Gómez-Arostegui, *Copyright at Common Law in 1774*, 47 CONN. L. REV. 1, 9 (2014).

35. MENELL ET AL., *supra* note 33, at 496.

36. *Id.* at 497.

37. *Id.*

38. U.S. CONST. art. I, § 8, cl. 8 (“the Copyright Clause”).

39. George Washington, First Annual Address to Congress (Jan. 8, 1790) (transcript available through the University of California, Santa Barbara’s American Presidency Project at <https://www.presidency.ucsb.edu/documents/first-annual-address-congress-0>).

Washington further stated that enacting a national intellectual property law would contribute to the security of a free Constitution.⁴⁰

The first national copyright law, the Copyright Act of 1790, granted protections to authors for the same fourteen-year period as the Statute of Anne.⁴¹ The 1790 Act had the additional requirements that copyrights must be registered with the local district court and notice of the copyright must be published in local newspapers.⁴² Congress expanded copyright protection in 1909.⁴³ The 1909 Act granted protection to all writings and expanded the length of protection to twenty-eight years, with an additional twenty-eight years upon renewal.⁴⁴ The next big reform occurred in 1976, and “continues to serve as the principal framework for copyright protection in the United States.”⁴⁵ The 1976 Act protected all written works as soon as they were “fixed in a tangible medium of expression” and the duration of protection was vastly expanded to the life of the author plus fifty years.⁴⁶ Numerous amendments and reforms have been added to the 1976 Act since its passage, including the Audio Home Recording Act of 1992, the Digital Performance Right in Sound Recordings Act of 1995, the No Electronic Theft Act of 1996, the Music Modernization Act of 2018, and the Digital Millennium Copyright Act of 1998.⁴⁷ Even with all of these changes to the copyright law, the underlying purpose has remained the same: “to stimulate artistic creativity for the general public good.”⁴⁸

B. Development of Joint Authorship Law: Intent

Joint authorship, or “joint work” as the law refers to it, comes directly from the 1976 Copyright Act.⁴⁹ The 1976 Act defines joint work as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or

40. *Id.*

41. MENELL ET AL., *supra* note 33, at 497.

42. *Id.*

43. *Id.* at 498.

44. *Id.*

45. *Id.*

46. *Id.* The duration of copyright protection was eventually expanded to life of the author plus 70 years in a later reform in 1998. *Id.* at 500.

47. *Id.* at 499.

48. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see also Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“It is intended to motivate the creative activity of authors . . . and to allow the public access to the products of their genius[.]”); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“[T]he primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

49. 17 U.S.C. § 101.

interdependent parts of a unitary whole.”⁵⁰ On its face, the statute seems to require a showing of intent that all of the independent works created be combined into a single work at the end of the process.⁵¹ Furthermore, the courts have found that the intent to create a united work must be present at the time that each independent work is created.⁵²

The establishment of intent as the cornerstone of determining joint authorship comes from the Senate and House notes attached to the 1976 Act.⁵³ The House Report for the statute explains what makes a true joint work: “The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit[.]”⁵⁴ However, immediately before this statement, the House Report gives a broader, more inclusive definition.⁵⁵ “[A] work is ‘joint’ if the authors collaborated with each other, or if each of the authors prepared his 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.’”⁵⁶ This exact passage also appears in the Senate Report for the 1976 Act.⁵⁷

In one of the seminal cases in joint authorship law, *Childress v. Taylor*, the Court of Appeals for the Second Circuit looked to define a joint work under the 1976 Act.⁵⁸ To determine whether a contested play had more than one author, the *Childress* court looked to both the language of the statute and the congressional reports behind the 1976 Act.⁵⁹ The court recognized that the reports indicate there are “two alternative criteria”⁶⁰ to find that a joint work exists, but took a textualist approach and read the statute literally so as to impose the intent requirement in all findings of joint authorship.⁶¹ This decision does not account for the Congressional Reports’ inclusion of two alternative criteria, instead determining that intent is a requirement in all joint authorship scenarios.⁶²

50. *Id.*

51. *Id.*

52. *Weissman v. Freeman*, 868 F.2d 1313, 1318 (2d Cir. 1989).

53. S. REP. NO. 94-473, at 103 (1975); H.R. REP. NO. 94-1476, at 120 (1975).

54. H.R. REP. NO. 94-1476, at 120.

55. *Id.*

56. *Id.*

57. S. REP. NO. 94-473, at 103.

58. *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991).

59. *Id.*

60. *Id.*

61. *Id.* at 506.

62. *Weissman v. Freeman*, 868 F.2d 1313, 1318 (2d Cir. 1989).

C. Minority View on Independent Copyrightability

The second requirement to find joint authorship is that the contribution of each author must be independently copyrightable, a requirement not found anywhere in the text of the 1976 Act.⁶³ Unlike the alternative intent requirement, the independent copyrightability requirement is also not found anywhere in the congressional reports on the 1976 Act.⁶⁴ This requirement has caused a division among copyright scholars and the courts,⁶⁵ with the majority of courts holding that independent copyrightability is a requirement to find joint authorship.⁶⁶

The minority view on independent copyrightability argues that only the final product between the two authors needs to be copyrightable.⁶⁷ The most vocal academic who promotes this point of view is Professor David Nimmer, who carries on the work of his father, the late Professor Melville B. Nimmer (collectively, “Nimmer”). Nimmer speaks to this very issue in his treatise on copyright law.⁶⁸ Nimmer’s argument stands on the fact that the language of the Copyright Act itself contains no requirement that each author “contribute an independently copyrightable component to the product.”⁶⁹ Nimmer also focuses on the fact that the legislative history behind the act “elevates intention as the touchstone, without placing any further parsing as to the copyrightable status of each individual component that the parties intend to contribute to the work as a whole.”⁷⁰

Nimmer also argues that requiring each element to be independently copyrightable goes against the stated goal of granting copyright protection, which is to foster creativity.⁷¹ Nimmer believes that copyright protection should extend to both the “contributor of the skeletal ideas and the contributor who fleshes out the project[,]” because to truly encourage creativity, copyright protection should extend to “all parties who labor together to unite idea

63. 17 U.S.C. § 101.

64. See S. REP. NO. 94-473 (1975); H.R. REP. NO. 94-1476 (1975).

65. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.07 (2020); Timothy J. McFarlin, *Father(s?) of Rock & Roll: Why the Johnnie Johnson v. Chuck Berry Songwriting Suit Should Change the Way Copyright Law Determines Joint Authorship*, 17 VAND. J. ENT. & TECH. L. 575 (2015); Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257 (1996).

66. *Childress*, 945 F.2d at 506.

67. *Id.*

68. NIMMER & NIMMER, *supra* note 65.

69. *Id.*

70. *Id.*

71. *Id.*

with form[.]”⁷² This idea is anchored by the fact that while a contribution may not be protectable, it may be vitally important to the final product.⁷³ All efforts vitally important to the final product should be rewarded and the party that fleshes out the idea should not be made the sole owner of the final product at the expense of the person who contributed a vitally important, but non-protectable expression.⁷⁴

This view, expressed by Nimmer and others, has been flatly rejected by most courts.⁷⁵ But the issue of independent copyrightability is not completely resolved. While the *Childress* court held that each part contributed to the final product must be independently copyrightable, the court opined that the issue was both “open” and “troublesome.”⁷⁶ Even before stating that the contributions all need to be independently copyrightable, the *Childress* court recognized that if the focus of copyright is on encouraging the production of creative works, there is no reason why all of the contributions need to be copyrightable.⁷⁷ The *Childress* court uses the example of a skilled writer that never produces a significant work without an idea supplied by somebody else.⁷⁸ The value of the work should not be diminished because one person contributed an unprotectable idea and the other person provided the expression.⁷⁹ These reservations by the *Childress* court have been further espoused by subsequent court decisions, despite those decisions coming to the same conclusion.⁸⁰

In 2004, Nimmer was finally ready to concede that independent copyrightability was fully accepted by the courts and it was a requirement of finding a joint work exists.⁸¹ However, that same year, the Seventh Circuit accepted Nimmer’s argument against

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* See *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1072 (7th Cir. 1994) (“We agree that the language of the Act supports the adoption of a copyrightability requirement.”); *Tang v. Putruss*, 521 F. Supp. 2d 600, 605 (E.D. Mich. 2007) (“Accordingly this Court will apply the copyrightable subject matter test as set forth in *Erickson*.”); *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 540 (D.N.J. 1999).

76. *Childress v. Taylor*, 945 F.2d 500, 506 (2d Cir. 1991).

77. *Id.*

78. *Id.*

79. *Id.*

80. See *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990) (deciding that independent copyrightability was a necessity but noting that the issue was not completely settled in case law); *Cabrera v. Teatro Del Sesenta, Inc.*, 914 F. Supp. 743, 765 (D.P.R. 1995) (accepting the independent copyrightability test but also noting that it may produce unfair results).

81. NIMMER & NIMMER, *supra* note 65.

independent copyrightability in *Gaiman v. McFarlane*.⁸² Todd McFarlane created the *Hellspawn* comic series, but after the series was criticized for poor writing, McFarlane invited Neil Gaiman to write a new script, where Gaiman introduced three new characters.⁸³ Gaiman gave descriptions of these characters to McFarlane, who then illustrated the debut issue, thus creating the joint authorship issue between the two collaborators.⁸⁴ The court held that independent copyrightability is generally a requirement to find joint authorship.⁸⁵ But the court recognized there are certain types of media where that requirement is not feasible and creates fiercely unjust results.⁸⁶ This includes the paradoxical result where no one could claim copyright over a final product.⁸⁷ Writing for the court and using Nimmer's treatise as a foundation, Judge Richard A. Posner opined on a hypothetical case where one professor has brilliant ideas but the inability to write, and another professor has generic ideas but excels in writing.⁸⁸ If the two professors collaborate, one giving his ideas and the other actually writing the article, Posner believed they should be joint authors even though alone each contribution may not have been independently copyrightable.⁸⁹ With this hypothetical in mind, the court reached the conclusion that in media types where the final product is the result of such contribution and mixing of copyrightable ideas, the independent copyrightability requirement creates unjust and paradoxical results.⁹⁰

D. Majority View on Independent Copyrightability

The majority of courts still institute the independent copyrightability requirement for joint authorship.⁹¹ Even in the Seventh Circuit, where there seemed to be a turn towards rejecting this framework, the court in *Gaiman* only rejected the test in a specific circumstance.⁹² The majority of precedent endorses the independent

82. *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004).

83. *Id.* at 649–50.

84. *Id.* at 650.

85. *Id.*

86. *Id.* at 659.

87. *Id.* at 658–59.

88. *Id.* at 659.

89. *Id.*

90. *Id.* at 658–59, 661.

91. See, e.g., *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071 (7th Cir. 1994) (“We agree that the language of the Act supports the adoption of a copyrightability requirement.”); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989) (“To be an author, one must supply more than mere direction or ideas”); *Tang v. Putruss*, 521 F. Supp. 2d 600, 605 (E.D. Mich. 2007) (agreeing with the Court of Appeals for the Seventh Circuit that requiring independent copyrightability better promotes the primary objective of the Copyright Act).

92. *Gaiman*, 360 F.3d at 659.

copyrightability requirement, as does the United States Copyright Office, which oversees the Copyright Act.⁹³

The courts that require independent copyrightability hang their argument on the definition of "author."⁹⁴ The source of this argument is that in the statute a joint work is defined as a "work prepared by two or more authors."⁹⁵ These courts have held that all parties claiming to be owners of the final joint work must meet the definition of an author.⁹⁶ These courts hold that "to be an author, one must supply more than mere direction or ideas."⁹⁷ The general rule is that the author must be "the person who translates an idea into a fixed, tangible expression entitled to copyright protection[.]" with an exception carved out for "works made for hire."⁹⁸ If a party claiming to be a joint author supplied only an idea, that party cannot claim to be an author because there is no copyright protection for ideas.⁹⁹ According to these courts, a party who merely supplies the skeleton of a project has as much right to be named author as the manufacturer of the book, which is to say that party has no right to be named the author.¹⁰⁰

The courts also look to the predictability that the independent copyrightability requirement provides to parties.¹⁰¹ If all contributed elements are required to be independently copyrightable, then parties are able "to predict whether their contributions to a work will entitle them to copyright protection as a joint author."¹⁰² By requiring independent copyrightability of each contribution, the courts believe there will be certain answers as to whether the party claiming to be a joint author should be viewed as such.¹⁰³ The policy is that because the law is predictable there will be fewer "post-contribution disputes concerning authorship[.]"¹⁰⁴

To the *Childress* court, the most important factor for instituting the independent copyrightability requirement was that this requirement "strikes an appropriate balance in the domains of both

93. *Childress v. Taylor*, 945 F.2d 500, 506 (2d Cir. 1991).

94. *S.O.S., Inc.*, 886 F.2d at 1087.

95. 17 U.S.C. § 101.

96. *S.O.S., Inc.*, 886 F.2d at 1087.

97. *Id.*

98. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (holding that if the work is considered made for hire, then the employer or hiring party is considered the author of the work and the initial owner of its copyright).

99. *S.O.S., Inc.*, 886 F.2d at 1087.

100. *Id.*

101. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071 (7th Cir. 1994).

102. *Id.*

103. *Id.*

104. *Id.*

copyright and contract law.”¹⁰⁵ With a contract, a person is able to hire someone else to create a copyrightable work, and the copyright protection is given to the employer.¹⁰⁶ This same idea applies to joint authorship law.¹⁰⁷ If a person contributes only non-copyrightable material, that person would be able to create a contract to disclose the material in return for gaining authorship status and partial ownership.¹⁰⁸ The existence of a contract also minimizes the risk of subsequent disputes about joint authorship, as the contract preemptively defines the relationships between all parties.¹⁰⁹ If no contract exists, then copyright protection is given only to the parties that created independently copyrightable material.¹¹⁰

E. Joint Authorship Law in the United Kingdom

Under the United Kingdom’s Copyright, Designs, and Patents Act, joint authorship is defined as “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.”¹¹¹ The Copyright Act in the United Kingdom requires that each potential joint author provide an independently copyrightable contribution to the final work, but the statutes do not require any mutual intent on the part of the parties to work together as joint authors at the time of creation.¹¹² This is a stark difference from the joint authorship laws in the United States, that hold intention at the time of creation as the touchstone for finding joint authorship.¹¹³ Instead of requiring intent, the United Kingdom courts require only a showing of collaboration, in addition to the independently copyrightable contribution.¹¹⁴ The United Kingdom courts have interpreted the collaboration requirement to mean that, barring any contractual agreement to the contrary, the contributions from each proposed joint author must be both “significant” and “original.”¹¹⁵

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

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Copyright, Designs, and Patents Act, c. 48, § 10 (UK).

112. David M. Liston, *Songwriter, Side Musician, or Sucker?: The Challenge of Distinguishing Composers from Contributors Under U.S. Copyright Law and the Lessons of a Famous British Case*, 65 RUTGERS L. REV. 891, 911 (2013).

113. *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998).

114. Lior Zemer, *Constitutional Challenges to Copyright: Is Intention to Co-Author an “Uncertain Realm of Policy”?*, 30 COLUM. J.L. & ARTS 611, 611 (2007).

115. Liston, *supra* note 112, at 911–12. See *Fisher v. Brooker* [2006] EWHC (Ch) 3239 [46] (Eng.).

II. ANALYSIS

A. Intent

As stated by multiple courts and the House and Senate Reports behind the 1976 Act, intent at the time of creation is a fundamental requirement to the finding of joint authorship.¹¹⁶ But the courts misinterpret the Act to require intent at the time of creation in every finding of joint authorship. When interpreting statutes, the function of the courts is to “give effect to the intent of Congress,”¹¹⁷ and there seems to be an agreement that this is the Court’s actual function.¹¹⁸ The debate among the courts comes not from the function of the courts, but how to fulfill this function because there is no invariable rule that governs how courts are supposed to find the true intent of Congress.¹¹⁹

The overarching canon of statutory interpretation is the plain meaning rule.¹²⁰ This rule states that the meaning of the statute is to be sought first in the language of the act and if the language of the act is plain, then “the sole function of the courts is to enforce it according to its terms.”¹²¹ When the language of the statute is clear and unambiguous, this language becomes “the sole evidence of the ultimate legislative intent.”¹²² When the meaning of the words used in the statute are clear and unambiguous, then these words are “taken as the final expression of the meaning intended.”¹²³

The 1976 Act, when defining a joint work, seems to be clear and unambiguous in the need for intent to be present for the court to hold that material is a joint work.¹²⁴ But several caveats have been added to the plain meaning rule. If the language is plain and unambiguous it is the “sole evidence of the ultimate legislative intent [.]” unless using the plain meaning leads to absurd or wholly

116. See *Thomson*, 147 F.3d at 199; *Childress v. Taylor*, 945 F.2d 500, 509 (2d Cir. 1991); S. REP. NO. 94-473, at 286 (1975); H.R. REP. NO. 94-1476, at 120 (1975).

117. *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542 (1940).

118. See *Shotz v. City of Plantation*, 344 F.3d 1161, 1178 (11th Cir. 2003); *Swindell-Filiaggi v. CSX Corp.*, 922 F. Supp. 2d 514, 517 (E.D. Pa. 2013); *Shays v. FEC*, 337 F. Supp. 2d 28, 47 (D.D.C. 2004).

119. *Am. Trucking Ass’ns*, 310 U.S. at 542.

120. See *State v. Obas*, 130 A.3d 252, 257 (Conn. 2016) (“We are also guided by the plain meaning rule for statutory construction.”); *Merril v. Sugarloaf Mt. Corp.*, 745 A.2d 378, 384 (Me. 2000) (“The most fundamental rule of statutory construction is the plain meaning rule.”); *Gulf Chem. & Metallurgical Corp. v. Hegar*, 460 S.W.3d 743, 747 (Tex. App. 2015) (“When resolving an issue of statutory construction, we must first and foremost follow the plain language of the statute.”).

121. *Caminetti v. United States*, 242 U.S. 470, 485 (1916).

122. *Id.* at 490.

123. *United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 278 (1929).

124. 17 U.S.C. § 101.

impracticable consequences.¹²⁵ The absurdity canon, which is a default rule that would reflect what any legislature would want, aims to ensure that statutes be interpreted in a way that avoids absurd results.¹²⁶

Lynn Thomson's story of working on *RENT* shows how forcing the intent requirement in every finding of joint authorship leads to absurd results. When Lynn Thomson began her work on *RENT*, she and Johnathon Larson rewrote or substantially altered around 1,212 of the 2,542 lines in the script, resulting in nearly half of the entire work being either completely new or completely different from the original piece.¹²⁷ Thomson contributed around nine percent, roughly 109 lines of the new script on her own.¹²⁸ After *RENT* won the 1996 Pulitzer Prize for Drama, both the director, Michael Greif, and one of the producers, Jeffrey Seller, believed that Thomson's work was integral to *RENT* winning the award.¹²⁹ In fact, Greif told everyone present at the rehearsal where it was announced that *RENT* had won the Pulitzer that everyone should thank Thomson because she helped to make that moment possible.¹³⁰ Even Larson said that Thomson had transformed the show.¹³¹

Yet, Thomson was never credited as a joint author of *RENT*. Thomson was denied joint authorship status because Larson did not intend for her to be a joint author at the time *RENT* was created.¹³² But he could never have intended Thomson to be a joint author at time of creation because *RENT* was created years before Thomson was brought onto the project.¹³³ She is credited by all involved for being the reason why *RENT* won a prestigious award, but does not get a seemingly deserved authorship credit and all that comes with that title. This seems to be an absurd result, thus triggering the absurdity exception to the plain meaning rule of statutory construction.¹³⁴

125. *Caminetti*, 242 U.S. at 490.

126. Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2051 (2002).

127. Faye Buckalew, *Joint Authorship in the Second Circuit: A Critique of the Law in the Second Circuit Following Childress v. Taylor and as Exemplified in Thomson v. Larson*, 64 BROOK. L. REV. 545, 552 (1998).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Thomson v. Larson*, 147 F.3d 195, 206–07 (2d Cir. 1998).

133. Tommasini, *supra* note 18.

134. *Caminetti v. United States*, 242 U.S. 470, 490 (1916).

The problem with the absurdity canon is that proving absurdity is a high bar to clear.¹³⁵ The Supreme Court, very early in its history, said that the absurdity of the result must “be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.”¹³⁶ This test has been reaffirmed in the courts where the Second Circuit held that the absurd result must be one “where it is quite impossible that Congress could have intended the result and where the alleged absurdity is so clear as to be obvious to most anyone.”¹³⁷ This is a difficult test to pass. Even if Lynn Thomson’s situation seems absurd on its face, it would be difficult to prove that the result is “so monstrous, that all mankind . . . without hesitation” would protest the result.¹³⁸

The plain meaning rule is also limited in another fashion. The Supreme Court has cautioned that taking a few words from their legislative context and isolating them to determine their meaning, does not contribute to finding the legislative intent behind the statute.¹³⁹ In fact, the Court has detailed that even “[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”¹⁴⁰ In interpreting statutes the courts must first use the plain language if it is clear and unambiguous, but even then, the plain meaning must support the design of the statute as a whole.¹⁴¹

So, what is the purpose and design of the 1976 Copyright Act? The original purpose of the 1976 Act was to strengthen copyright protection and protect against new forms of piracy that developed with the advent of cable television and jukeboxes.¹⁴² But the power of Congress to enact any copyright legislation comes directly from the Constitution, and the Constitution dictates that the purpose behind the 1976 Act and all additional copyright legislation is “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”¹⁴³ Following on this Constitutional purpose behind copyright legislation, the courts have said

135. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819).

136. *Id.*

137. *Catskill Mts. Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 517 (2d Cir. 2017).

138. *Sturges*, 17 U.S. at 203.

139. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940).

140. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

141. *Id.*

142. *MENELL ET AL.*, *supra* note 33, at 498.

143. U.S. CONST. art. I, § 8, cl. 8.

that the monopoly of copyright is granted to motivate creative activity and allow the American public to benefit from access to the final products.¹⁴⁴ Because even the plain meaning of the statute must support the statutory design as a whole,¹⁴⁵ the intent requirement for finding joint authorship must fit the purpose of motivating creative activities.¹⁴⁶

There is a much lower standard for proving that a statute fails to align with the purpose of the legislation, which only requires a showing that the statute is absurd, futile, or unreasonable.¹⁴⁷ It is clear that even if Lynn Thomson writing one third of *RENT* does not meet the absurdity standard, it is unreasonable that someone credited with completely transforming the work and being the reason it won a Pulitzer is not also named an author of the work. Denying someone who has done this degree of work on a project is also at variance with the purpose to motivate creation. No one wants to work with someone else to create and not get the credit they deserve.

Where the language of the statute results in an unreasonable or absurd outcome which is at odds with the central purpose of the legislation, the Court has expressed that it is “entirely appropriate to consult all public materials, including the background of . . . and the legislative history of its adoption.”¹⁴⁸ The Court has even held that whenever there is any material that can assist in finding the meaning of words there is no rule of law that can forbid its use.¹⁴⁹

This rule justifies incorporating the House and Senate Reports into an interpretation of the Copyright Act of 1976, as background materials that can assist in finding the meaning and Congressional intent.¹⁵⁰ Both reports say that “a work is ‘joint’ if the authors collaborated with each other, or if each author prepared his contribution with the knowl[e]dge and inten[t]ion that it would be merged with the contributions of other authors as ‘inseparable or interdependent parts of a unitary whole.’”¹⁵¹ The key word in that entire definition of a joint work is “or.” The use of the word “or” is a deliberate choice that has great impact on what defines a joint work. Based on the language of the House and Senate Reports, a joint

144. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

145. *K Mart Corp.*, 486 U.S. at 291.

146. *Sony Corp. of America*, 464 U.S. at 429.

147. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

148. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

149. *Am. Trucking Ass'ns*, 310 U.S. at 543–44.

150. S. REP. NO. 94-473, at 286 (1975); H.R. REP. NO. 94-1476, at 120 (1975).

151. S. REP. NO. 94-473, at 286; H.R. REP. NO. 94-1476, at 120.

work seems to be created in two separate instances.¹⁵² In one instance, all that is required is collaboration between those claiming to be joint authors. In the other instance, intent to collaborate at the time each independent work is created is necessary.¹⁵³ If either collaboration or intent is present, then a joint work has been created.¹⁵⁴ The *Childress* court, before determining that it will read the statute literally and impose the intent requirement in all findings of joint authorship, acknowledged that the Congressional Reports indicate that there are “two alternative criteria” to find that a joint work exists.¹⁵⁵

Because the requirement of intent to find joint authorship in all situations leads to unreasonable results at variance with the purpose of the 1976 Act and, arguably, goes against the absurdity canon of statutory construction, the courts should look to background materials to define the functions and protections of the 1976 Act.¹⁵⁶ There is no better background material for the 1976 Act than the two Congressional Reports that flesh out definitions for which works qualify for protection, and provide the courts with a statement of the Congressional intent behind the Act.¹⁵⁷ Congress, through the use of the word “or,” clearly intended for there to be “two alternative criteria”¹⁵⁸ where the courts can find that a joint work exists.¹⁵⁹ One where there is intent at the time of creation, which the courts insist is a standalone criterion, and another when there is merely collaboration between the two parties.¹⁶⁰

B. Independent Copyrightability

The second error that the courts have made is the addition of the independent copyrightability requirement in order to find the presence of a joint work. The courts have inserted this requirement, even though there is no language that indicates this is a requirement of a joint work in the 1976 Act itself or either of the Congressional Reports.¹⁶¹ The courts have given three main reasons for why

152. S. REP. NO. 94-473, at 286; H.R. REP. NO. 94-1476, at 120.

153. S. REP. NO. 94-473, at 286; H.R. REP. NO. 94-1476, at 120.

154. S. REP. NO. 94-473, at 286; H.R. REP. NO. 94-1476, at 120.

155. *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991).

156. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940).

157. S. REP. NO. 94-473, at 286; H.R. REP. NO. 94-1476, at 120.

158. *Childress*, 945 F.2d at 505.

159. S. REP. NO. 94-473, at 286; H.R. REP. NO. 94-1476, at 120.

160. S. REP. NO. 94-473, at 286; H.R. REP. NO. 94-1476, at 120.

161. 17 U.S.C. § 101; S. REP. NO. 94-473, at 286; H.R. REP. NO. 94-1476, at 120.

this requirement is included.¹⁶² The first is because of the way courts have defined “author.”¹⁶³ The second rationale is that the requirement engenders predictability.¹⁶⁴ The third is that the requirement strikes a balance between contract law and intellectual property law.¹⁶⁵ The issue is that all of the rationales behind adopting this never-mentioned requirement are directly adverse to the purpose of the 1976 Act.

The issue with the argument about the definition of “author” is that it is based on a misinterpretation of the meaning of “author.” Courts use a definition of “author” based on the copyright law principle that a person cannot copyright an idea.¹⁶⁶ The definition of “author,” according to Merriam-Webster, is “one that originates or creates something.”¹⁶⁷ Based on this definition, someone who originates the uncopyrightable idea is an author. Consider a recipe, for example, which is not protected by copyright.¹⁶⁸ But the fact that the recipe itself is not copyrightable does not mean that the person who created the recipe is not its author. The courts insist that because the word “author” is included in the definition of joint work, that anyone claiming to be a joint author must be an author of a copyrightable contribution.¹⁶⁹ But this is not the definition of an author in its ordinary sense,¹⁷⁰ and the Act does not give a special meaning to the word “author,” a point that is heavily emphasized by the *Childress* court.¹⁷¹ In fact, if the courts were so strict about the definition of “author” meaning the person who fixes the idea into a protectable expression, then work for hire would not be allowed because, as the *Childress* court points out, the employer is not creating protectable expression, only hiring someone who can.¹⁷²

The best argument made for this requirement is that it makes the law predictable because it allows each contributor to know if they qualify as a joint author.¹⁷³ But predictability of the law should not be elevated at the expense of sacrificing the purpose of

162. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071 (7th Cir. 1994); *Childress*, 945 F.2d at 507; *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989).

163. *S.O.S., Inc.*, 886 F.2d at 1087.

164. *Erickson*, 13 F.3d at 1071.

165. *Childress*, 945 F.2d at 507.

166. 17 U.S.C. § 102(b).

167. *Author*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/author> (last visited Feb. 19, 2021).

168. *Publ'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 480–81 (7th Cir. 1996).

169. *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989).

170. *Author*, *supra* note 167.

171. *Childress v. Taylor*, 945 F.2d 500, 506 (2d Cir. 1991).

172. *Id.*

173. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071 (7th Cir. 1994).

the law. The purpose of copyright is to “motivate the creative activity of authors and inventors by the provision of a special reward[.]”¹⁷⁴ But creation comes in all forms. As Nimmer points out, under the current regime, someone who creates high level ideas but cannot translate them into a tangible, fixed expression cannot be a joint author, but their partner who takes the other’s ideas and writes them down would be eligible for copyright protection.¹⁷⁵ This is unjust because both people worked together to create the final product. The great writer had no ideas so could never actually create something that could be legally protected. The person with amazing ideas lacked writing skills, and so could never fix those ideas into a tangible expression. Each of them individually could create nothing. They had to come together to create a final product, but only the one who fixed the idea would obtain copyright protection because of the independent copyrightability requirement. Even the courts are beginning to recognize that in certain collaborative creative fields, this leads to absurd results where there could be a copyrightable final product, but no one actually holds the copyright because each individual part that was contributed by individual team members is not on its own independently copyrightable.¹⁷⁶ There is no justice in denying someone the protection they deserve simply because the vital part of the project they contributed is not copyrightable on its own.

Nimmer proposes that a version of the *de minimis* test be the alternative to the independent copyrightability requirement.¹⁷⁷ Under the joint author *de minimis* test, which differs from the *de minimis* standard for copyrightability, an author must contribute more than a word or line but something substantial to the work.¹⁷⁸ This test has been rejected by courts because ideas do not receive protection under copyright.¹⁷⁹ This is true but is a misunderstanding of the standard. The *de minimis* test merely recognizes that in collaborative situations, one who contributes a major piece of the work that is not copyrightable on its own still deserves protection and ownership over the final product, which would not have existed without them.¹⁸⁰ A version of the *de minimis* standard is already used to determine if a work obtains copyright.¹⁸¹ In the *Gaiman*

174. Sony Corp. of America v. Universal City Studios Inc., 464 U.S. 417, 429 (1984).

175. NIMMER & NIMMER, *supra* note 65.

176. Gaiman v. McFarlane, 360 F.3d 644, 658–59 (7th Cir. 2004).

177. NIMMER & NIMMER, *supra* note 65.

178. *Id.*

179. 17 U.S.C. § 102(b).

180. NIMMER & NIMMER, *supra* note 65.

181. *Id.*

case, the court expresses that if the *Spawn* characters at issue were just vague ideas floated out by a random contributor or even an editor, then neither party would be deemed a coauthor.¹⁸² But a situation where a party contributes the key, central idea behind a work and that idea is used in the final product, is entirely different and distinguishable from the above scenario. There is some predictability to the *de minimis* test. And while it may not be as predictable as the independent copyrightability standard, it would lead to fewer absurd results that contradict the central purpose behind the 1976 Copyright Act.

The final argument for independent copyrightability—the balance between intellectual property law and contract law—is rather easy to dismiss. The *Childress* court emphasized that the independent copyrightability requirement strikes an appropriate balance between the two domains of law and minimizes disputes between parties at a later date.¹⁸³ The issue is that the independent copyrightability requirement does not exclusively provide this benefit. The court explains that contract law allows a person to hire someone to create a copyrightable work and the employer will be recognized as the author, or work for hire while allowing a person who does not bring any copyrightable contributions to the project to be recognized as an author.¹⁸⁴ This is true, but these facts of contract law are not dependent on the independent copyrightability requirement.

If the standard for joint authorship was instead the *de minimis* standard, contract law would still allow for work for hire contracts and allow creators to sign contracts relating to their authorship status, regardless of what they contribute. Changing the joint authorship law to make it more equitable does not decimate contract law. The *de minimis* standard simply removes some of the inequities that are caused by the independent copyrightability standard, while still maintaining the appropriate balance between intellectual property law and contract law.

C. Proposed Solution

The solution to the problems created by misinterpretation and modification of the joint authorship rule can be found in two main sources. By combining ideas and interpretations from American law and British law, there lies a more fair and equitable joint

182. *Gaiman v. McFarlane*, 360 F.3d 644, 658 (7th Cir. 2004).

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

184. *Id.*

authorship rule that has none of the inequities or absurdities present in these two laws individually.

i. Taking from the American Law

The foundation for the new joint authorship law must come from the American law because the source of all copyright law is the U.S. Constitution.¹⁸⁵ The basis of finding joint authorship should be the “two alternative criteria”¹⁸⁶ found in the Congressional reports behind the 1976 Act.¹⁸⁷ Having both of these criteria written into the joint authorship law will address the inequities from having only the intent requirement, and maintains the intent that Congress articulated in the Congressional Reports.¹⁸⁸ For this Article’s proposed joint authorship law, both collaboration and intent can be used to show that a work of joint authorship exists.

This Article’s proposed joint authorship law expressly rejects the independent copyrightability requirement. This requirement is not mentioned in the 1976 Act or in either of the Congressional Reports.¹⁸⁹ And, as shown above, this requirement goes against the Constitutional purpose behind copyright law.¹⁹⁰ It can also create absurd results that can leave a work—such as one where no one person made an independently copyrightable contribution—without anyone who owns the copyright over the final product.¹⁹¹ The new standard would instead be incorporated into the way that the courts would find collaboration without intent. If the two parties intend to create a joint work, this ends the question of whether a joint work exists. The intention on the part of all parties shows that a joint work exists and there is no need for a second requirement or further inquiry, beyond seeing if the final product itself is copyrightable. But when no intent to create a joint work is present, the courts should use the collaboration standard of the United Kingdom’s joint authorship law.

185. U.S. CONST. art. I, § 8, cl. 8.

186. *Childress*, 945 F.2d at 505.

187. S. REP. NO. 94-473, at 286 (1975); H.R. REP. NO. 94-1476, at 120 (1975).

188. S. REP. NO. 94-473, at 286; H.R. REP. NO. 94-1476, at 120.

189. 17 U.S.C. § 101; S. REP. NO. 94-473, at 286; H.R. REP. NO. 94-1476, at 120.

190. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see also* *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“It is intended to motivate the creative activity of authors . . . and to allow the public access to the products of their genius[.]”).

191. *Gaiman v. McFarlane*, 360 F.3d 644, 658–59 (7th Cir. 2004).

ii. Taking from the United Kingdom's Law

Under the United Kingdom's joint authorship law, the collaboration requirement only means that each proposed joint author must contribute something that is significant and original.¹⁹² The lack of an intent requirement makes the British joint authorship requirements perfect to mix with the American joint authorship statute to create a more fair and equitable joint authorship law. Once again, the independent copyrightability requirement in the United Kingdom's law must be ignored for all reasons stated in Section III.B.¹⁹³ The part of the British law that would be adopted is its focus on collaboration and how the British courts interpret this requirement.¹⁹⁴

iii. The New Proposed Hybrid Law

By taking the foundation of the American joint authorship law and the requirements of the British joint authorship law, legislators can achieve fairness and equity in the interpretation of joint authorship. The new focus would be on intent or collaboration as two alternative criteria to find if joint authorship exists. If intent is present, then there is no need to interpret anymore or find another element because all of the parties intended to act as joint authors and create a work that they own together.

The difference is that there will now be alternative criteria for intent to find joint authorship, as is expressed in the Congressional Reports behind the 1976 Act.¹⁹⁵ Collaboration will be the alternative to intent to find that a joint work exists. Collaboration should be interpreted in the way that the British courts interpret this same term, requiring significant and original contributions made by every party.¹⁹⁶ To be a significant contribution, it would only need to meet the *de minimis* standard as proposed by Nimmer, which requires that a party make more than a suggestion or contribute more than just a line or a word.¹⁹⁷ To be an original contribution, it would merely need to meet the originality requirement that is necessary for any copyright claim. Originality, in the copyright context, "means little more than a prohibition of actual copying."¹⁹⁸

192. Fisher v. Brooker [2006] EWHC (Ch) 3239 [46] (Eng.).

193. See discussion *infra* Section III.B.

194. Fisher v. Brooker [2006] EWHC (Ch) 3239 [46] (Eng.).

195. S. REP. NO. 94-473, at 286; H.R. REP. NO. 94-1476, at 120.

196. Fisher v. Brooker [2006] EWHC (Ch) 3239 [46] (Eng.).

197. NIMMER & NIMMER, *supra* note 65.

198. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951) (quoting Hoague-Sprague Corp. v. Frank C. Meyer, Inc., 31 F.2d 583, 586 (E.D.N.Y. 1929)).

The proposed joint authorship law would remove the inequities of requiring only intent at the time of creation and the independent copyrightability requirement. As evidenced earlier, with the story of *RENT*, this exclusive intent requirement can cost a person who completely transforms a work any ownership protection over what that person contributed. This also removes the possible paradoxical result where because the endeavor is extremely collaborative, no one is able to hold copyright over the copyrightable final product.¹⁹⁹ In the end, the proposed law would express the notion that someone who contributes the skeletal outline for a work or the idea that sparks creation would have rightful ownership over the final product that expresses the ideas within.

With all of this in mind, the proposed joint authorship law would read:

A joint work is a work prepared by two or more authors if the authors collaborated with each other, or if each of the authors prepared the contribution with the knowledge and intension that it would be merged with the contributions of other authors, as inseparable or interdependent parts of a unitary whole.

This proposed law cures the inequities that are present in the current joint authorship law, grants copyright protection to those who deserve it, and promotes the Constitutional purpose behind granting Congress the power to make copyright laws, all while maintaining the appropriate balance between contract law and intellectual property law.

CONCLUSION

If the purpose of extending the monopoly of copyright protection is “to stimulate artistic creativity for the general public good,”²⁰⁰ then the current joint authorship law in America is failing to achieve that purpose. The courts have taken a purely textualist approach to interpreting the joint authorship law,²⁰¹ but failed to consider the unreasonable results. Absent intent at the time of creation, if a party makes an original and significant contribution to the final product, that party should be recognized as a joint author. The party has earned the protection and the recognition that comes from holding copyright through the efforts exhausted in helping to

199. *Gaiman v. McFarlane*, 360 F.3d 644, 658–59 (7th Cir. 2004).

200. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

201. *Childress v. Taylor*, 945 F.2d 500, 505–06 (2d Cir. 1991).

make the final product. The courts have also placed the requirement of independent copyright ability into the joint authorship law, a requirement that has no basis in the text of the statute nor the congressional discussion behind the statute.²⁰² This requirement fails to protect people who make incredibly important contributions to a project, like structure and the original idea that sparks the creation of the project. It also can create results where the copyright over a final product is owned by no one involved in its creation, as evidence by *Gaiman*.²⁰³ Ideally, this requirement should be completely abolished. But if a secondary requirement is necessary, then the *de minimis* standard, as proposed by Nimmer, would suffice to ensure the protections that are needed for equity and fairness.²⁰⁴ Under this system, Lynn Thomson may have had a meritorious claim to copyright protection as a collaborator.

The essence of copyright law is to incentivize creation.²⁰⁵ To properly do this, copyright law must incentivize solo and joint works. The best way to do this is to incorporate the “two alternative criteria”²⁰⁶ Congress focused on when passing the 1976 Act: intent or collaboration.²⁰⁷ Because the American courts have set intent as the sole criterion, the meaning of “collaboration” should be derived from the United Kingdom’s joint authorship law, which has no intent requirement and focuses on collaboration in terms of significance and originality.²⁰⁸ This new joint authorship system would focus not only on intent but also encourage collaboration. This would work to cure the current inequities present in the joint authorship law, opening up a new world of creativity and allowing the public to flourish in a way the Constitution intended.

202. 17 U.S.C. § 101; S. REP. NO. 94-473, at 286 (1975); H.R. REP. NO. 94-1476, at 120 (1975).

203. *Gaiman*, 360 F.3d at 658–59.

204. NIMMER & NIMMER, *supra* note 65.

205. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

206. *Childress*, 945 F.2d at 505.

207. H.R. REP. NO. 94-1476, at 120.

208. *Fisher v. Brooker* [2006] EWHC (Ch) 3239 [46] (Eng.).

