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Is It So Easy a Monkey Can Do It: Joint Works and the Unintended Collaborator

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NOTE

IS IT SO EASY A MONKEY CAN DO IT?: JOINT WORKS AND THE UNINTENDED COLLABORATOR

I. INTRODUCTION

The year was 2011.¹ The place: North Sulawesi, Indonesia.² A photographer³ took his weapon⁴ of choice and ventured into the wilderness⁵ looking for his subject.⁶ With the help of a tour guide, David Slater followed a troop of the rare crested black macaques for three days, hoping to snap a few unique pictures.⁷ The macaques were inquisitive creatures, and as such their interest in the objects Slater was carrying prompted them to venture closer to Slater, most likely in hopes of figuring out what his shiny, reflective things do.⁸ In time, they did.⁹

1. Andres Guadamuz, *Can the Monkey Selfie Teach Us Anything About Copyright Law?*, WORLD INTELL. PROP. ORG. (Feb. 2018), http://www.wipo.int/wipo_magazine/en/2018/01/article_0007.html.

2. *Id.*

3. David J Slater, DJS PHOTOGRAPHY, <http://www.djsphotography.co.uk/davidj Slater.htm> (last visited Nov. 18, 2019). David J. Slater is a British wildlife photographer who is recognized as being able “to achieve award winning images” of wildlife and its surrounding nature. *Id.*

4. Guadamuz, *supra* note 1. Slater’s equipment included a camera, a wide-angle lens, and a tripod. *Id.*

5. Samuel Osborne, ‘Monkey Selfie’ Case: Photographer Wins Two Year Legal Fight Against Peta over the Image Copyright, INDEPENDENT (Sept. 12, 2017, 10:30 AM), <https://www.independent.co.uk/news/world/americas/monkey-selfie-david-slater-photographer-peta-copyright-image-camera-wildlife-personalities-macaques-a7941806.html>. Slater was visiting the Tangkoko Reserve, a national park in Indonesia. *Id.*

6. David J. Slater, *Monkey Selfie*, DJS PHOTOGRAPHY (Sept. 2016), <http://www.djsphotography.co.uk/monkeyselfie.htm>. The reason Slater visited this specific island of Indonesia was to photograph the crested black macaques. *Id.* He knew these animals were extraordinary, but also knew they were severely threatened, and hoped that photographing and then publicizing their plight would help spread awareness to conservation efforts. *Id.*

7. Steven Morris, *Shutter-Happy Monkey Turns Photographer*, THE GUARDIAN (July 4, 2011, 2:34 PM), <https://www.theguardian.com/world/2011/jul/04/shutter-happy-monkey-photographer>.

8. *Id.*

9. *Id.*

Though Slater is an accomplished, award-winning photographer,¹⁰ and though he spent an ample amount of time taking pictures of the monkeys, none of these photos quite panned out the way Slater hoped they would.¹¹ Unbeknownst to him, he needed help; he needed Naruto.¹² Naruto¹³ is one of the macaques that Slater had befriended during his observation of these beautiful creatures.¹⁴ He is curious, mischievous, and imaginative, seemingly possessing the skills of a great photographer.¹⁵ With Slater strategically leaving his equipment out, Naruto's magnetic pull to the lens led him to finally showcase his talents.¹⁶ He and the rest of the members of his troop began jumping all over the equipment, unsure what result would follow.¹⁷ Then, Naruto clicked the button.¹⁸ While his friends scurried away in fear, Naruto was in awe of the sound it made.¹⁹ Naruto continued to click the button again and again, unknowingly baring his teeth for what would become one of the most astounding, once-in-a-lifetime photos that ever captured such an expression of pure joy and self-awareness in an animal: the infamous "monkey selfie."²⁰

The photograph became an instant phenomenon, promising financial success for Slater.²¹ However, such possible financial success was short-lived when Slater's copyright ownership of the photo was questioned.²² Wikipedia²³ began using Slater's photo without his

10. David J Slater, *supra* note 3. His awards include ninth place out of fifty-nine competitors in the NBC Most Important & Arresting Image of the Decade, USA 2009 and Winner of the Animal Behavior section of the British Wildlife Photography Awards, 2009, among others. *Id.*

11. Guadamuz, *supra* note 1.

12. *Id.*

13. Jennifer S. Holland, *For These Monkeys, It's a Fight for Survival*, NAT'L GEOGRAPHIC, Mar. 2017, at 90, <https://www.nationalgeographic.com/magazine/2017/03/macaques-monkeys-indonesia-endangered-pet-trade>. The macaque in question was recognized to be "Naruto" by primatologist Antje Englehardt, of England's Liverpool John Moores University. *But see* Slater, *supra* note 6 (claiming that the macaque was actually a female named Ella). For the purposes of this Note, the macaque will be referred to as Naruto.

14. Morris, *supra* note 7.

15. *Id.*

16. *Id.*; *see also* Guadamuz, *supra* note 1.

17. Morris, *supra* note 7.

18. *Id.* The "button" refers to the shutter-release button on the camera. *Id.*

19. *Id.*

20. Guadamuz, *supra* note 1.

21. Olivier Laurent, *Monkey Selfie Lands Photographer in Legal Quagmire*, TIME (Aug. 6, 2014), <http://time.com/3393645/monkey-selfie-lands-photographer-in-legal-quagmire>.

22. Zachary M. Seward, *Who Owns This Monkey's Selfie?*, QUARTZ (Aug. 6, 2014), <https://qz.com/245627/who-owns-this-monkeys-selfie/#>.

23. Matthew Sparkes, *Wikipedia Refuses to Delete Photo as 'Monkey Owns It'*, TELEGRAPH (Aug. 6, 2014, 12:03 PM), <https://www.telegraph.co.uk/technology/news/11015672/Wikipedia-refuses-to-delete-photo-as-monkey-owns-it.html>. Wikipedia is run by the United States organization, Wikimedia. *Id.* Wikimedia has an online collection of millions of images and videos

permission; its editors believed that the photo was in the public domain because, “as the work of a non-human animal, there is no human author in whom copyright is vested.”²⁴ Slater was poised to go to court and assert his copyright, but legal experts believed that he would not win.²⁵ To some intellectual property experts,²⁶ Slater’s claim to copyright seemed “ridiculous”²⁷: “To have copyright, you’ve got to create something; it has to be an expression of your personality. [The monkey selfie is] not.”²⁸

Slater had not yet formally put this issue before the courts in the form of a lawsuit when the United States Copyright Office (“USCO”) weighed in on the matter in 2014.²⁹ The USCO stated that “[b]ecause copyright law is limited to ‘original intellectual conceptions of the author,’ the Office will refuse to register a claim if it determines that a human being did not create the work.”³⁰ Consequently, that means that “[t]he Office will not register works produced by nature, animals, or plants.”³¹ The USCO’s proclamation seems like a simple concept, and the premise that an animal could ever own a copyright even seems a little comical.³² However, People for the Ethical Treatment of Animals (“PETA”) did not think such a proposition was a laughing matter.³³ One

that are free to use by anyone online; this collection is known as the “Wikimedia Commons.” *Id.* Editors soon added the monkey selfie to the Wikimedia Commons, and the picture can still be found there today. *Id.*; see also *Category: Monkey Selfie*, WIKIMEDIA COMMONS, https://commons.wikimedia.org/wiki/Category:Monkey_selfie (last visited Nov. 18, 2019).

24. Laurent, *supra* note 21 (quoting Wikipedia’s group of editors).

25. *Id.*

26. Charles Swan, SWAN TURTON, <http://swanturton.com/people/charles-swan> (last visited Nov. 18, 2019). Charles Swan, head of a London-based Swan Turton’s Photography & Visual Arts Groups, is one of the experts that spoke out on the monkey selfie matter. *Id.*

27. Laurent, *supra* note 21 (quoting Charles Swan).

28. *Id.* (quoting Charles Swan, who believed that the monkey selfie was not an expression of Slater’s personality).

29. Samuel Gibbs, *Monkey Business: Macaque Selfie Can’t Be Copyrighted, Say US and UK*, THE GUARDIAN (Aug. 22, 2014, 12:01 PM), <https://www.theguardian.com/technology/2014/aug/22/monkey-business-macaque-selfie-cant-be-copyrighted-say-us-and-uk>.

30. *Id.* (quoting U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT PRACTICE § 306 (3d ed., rev. 2017) [hereinafter COMPENDIUM]).

31. *Id.* (quoting COMPENDIUM, *supra* note 30, §313.2). Interestingly enough—and most likely a result of the debate surrounding the monkey selfie—the most recent version of the USCO’s compendium specifically clarifies that “[a] photograph taken by a monkey” does *not* qualify for copyright protection. COMPENDIUM, *supra* note 30, § 313.2.

32. See generally Sarah Jeong, *Wikipedia’s Monkey Selfie Ruling Is a Travesty for the World’s Monkey Artists*, THE GUARDIAN (Aug. 6, 2014, 4:56 PM), <https://www.theguardian.com/commentisfree/2014/aug/06/wikipedia-monkey-selfie-copyright-artists> (satirizing the fact that a monkey could ever own a copyright by stating that being a photographer is difficult, but being a monkey who is a photographer is even more difficult).

33. PETA Sues Nature Photographer in Hopes of Giving a MONKEY Copyright Ownership of Selfie, DAILY MAIL (Sept. 23, 2015, 3:51 PM), <https://www.dailymail.co.uk/news/article->

of the lawyers representing PETA³⁴ took the stance that the USCO's policy "is only an opinion."³⁵ Subsequently, PETA, on behalf of Naruto, sued Slater for copyright ownership of Naruto's selfie.³⁶

Putting aside the complicated issue of Naruto's primal nature, the question of who owns a photograph generally has a simple answer.³⁷ The USCO has specified that "[t]he owner of the 'work' is generally the photographer or, in certain situations, the employer of the photographer."³⁸ Therefore, whoever presses down on the shutter button would normally be considered the copyright owner of the resulting image.³⁹ While the rule is simple, when applying it to the case of the monkey selfie, the law completely overlooks the fact that the photo was taken *as a result* of Slater's efforts.⁴⁰ The selfies were the consequence of Slater's "ingenuity in coaxing the monkeys into pressing the shutter while looking into the lens."⁴¹ As Slater stated, "[i]t wasn't serendipitous monkey behavior . . . it required a lot of knowledge[,] . . . a lot of perseverance, sweat and anguish, and all that stuff."⁴² He created the conditions that allowed the photograph to be created: Why should he not own the copyright for his work?⁴³

3245807/PETA-sues-nature-photographer-hopes-giving-MONKEY-copyright-ownership-selfie.html [hereinafter *PETA Sues Nature Photographer*].

34. *PETA Appeals 'Monkey Selfie' Case on Grounds That Monkey Owns Copyright*, PETA (July 11, 2017), <https://www.peta.org/blog/peta-appeal-monkey-selfie-case-grounds-monkey-owns-copyright>. Jeffrey Kerr was general counsel for PETA in the lawsuit between Naruto and Slater. *Id.*

35. *PETA Sues Nature Photographer*, *supra* note 33 (quoting Kerr).

36. *Id.*

37. U.S. Copyright Office, *Can I Use Someone Else's Work? Can Someone Else Use Mine?*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-fairuse.html> (last visited Nov. 18, 2019).

38. *Id.*

39. *See, e.g., Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (holding that the photographer—the person who pressed down on the shutter-button to capture a picture of his subject—was the author of the photograph and thereby retained copyright protection of his work); *see also* Laurent, *supra* note 21 ("If a monkey takes a picture, that can be considered an author's intellectual creation. The fact that [David Slater] owns the camera has nothing to do with [holding the copyright to the photograph].").

40. Julia Carrie Wong, *Monkey Selfie Photographer Says He's Broke: 'I'm Thinking of Dog Walking'*, THE GUARDIAN (July 12, 2017, 8:22 PM), <https://www.theguardian.com/environment/2017/jul/12/monkey-selfie-macaque-copyright-court-david-slater>.

41. *Id.*

42. *Id.* For a firsthand account of Slater's experience with the monkeys, see David J. Slater, *Sulawesi Macaques*, DJS PHOTOGRAPHY, http://www.djsphotography.co.uk/original_story.html (last visited Nov. 18, 2019).

43. *Id.* As aforementioned, *Burrow-Giles* held that photographs are copyrightable works. *Burrow-Giles*, 111 U.S. at 61. However, when discussing why the photographer owned his photograph, the court did not so much linger on the fact that the photographer pressed the button, but rather, it focused on the originality, intellectual production, thought, and conception the photographer put into creating the photograph:

[T]he photograph in question . . . is a "useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same . . . entirely from his own original

Moreover, what if there were only human contributors to the photograph, as opposed to animal contributors?⁴⁴ Such a debate revealed itself when the infamous Ellen DeGeneres selfie was taken at the 2014 Oscars⁴⁵:

It's not clear . . . who owns the copyright . . . [was it] Ellen DeGeneres, who coordinated the photo? Bradley Cooper, who actually took it? Samsung, which made the camera and played a role in arranging the stunt? Or perhaps the Academy of Motion Picture Arts and Sciences, which hosts the Oscars? And does it matter that the selfie was distributed on Twitter, a social media platform?⁴⁶

Using the default rule stated above, Bradley Cooper—the one who physically pressed the shutter button—would own the copyright, even though all he did, in reality, was press a button.⁴⁷ Yet, neither Bradley Cooper nor his primal counterpart, Naruto, clicked the button with the *intent* of creating a copyrightable work of authorship.⁴⁸ Naruto is only a monkey, and his selfie was a result of Naruto's pull towards the reflective camera lens and his enjoyment of the sound the shutter made when he clicked it;⁴⁹ similarly, Bradley Cooper only pushed the camera button because his arm is longer than Ellen DeGeneres's.⁵⁰ How can their lack of intent coupled with the simple act of pressing down on a shutter button compare with the lengths that Ellen DeGeneres and David Slater went through to actually create the circumstances that made the photo a success?⁵¹

mental conception, to which he have visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produce the picture in suit."

Id. at 60. Undoubtedly, the court was focused on the conditions the photographer constructed to be able to produce such a picture; should the same not be focused on for Slater? *Id.*

44. See, e.g., Philip Bump, *Paging Bradley Cooper's Lawyers: He Might Own Ellen's Famous Oscar Selfie*, THE ATLANTIC (Mar. 3, 2014), <https://www.theatlantic.com/politics/archive/2014/03/paging-bradley-coopers-lawyers-you-might-own-ellens-famous-oscar-selfie/358758>.

45. *Id.*

46. Seward, *supra* note 22.

47. Bump, *supra* note 44.

48. See *infra* Part III for the definition of "intent."

49. Laurent, *supra* note 21.

50. Bump, *supra* note 44; Ellen DeGeneres (@TheEllenShow), TWITTER (Mar. 2, 2014, 7:06 PM), <https://twitter.com/theellenshow/status/44032224407314432?lang=en>.

51. *Gaiman v. McFarlane*, 360 F.3d 644, 658-59 (7th Cir. 2004) (stating that the contributions of both authors could not stand alone, and without either of their respective contributions, the work would not exist).

Should Ellen DeGeneres not get credit for arranging all the other famous people⁵² in the photo?⁵³ What about for posting the selfie on Twitter⁵⁴ where it gained unprecedented popularity?⁵⁵ And how about David Slater, the photographer that walked the jungles of North Sulawesi for days trying to form the perfect picture of the mesmerizing macaques?⁵⁶ Should he have to relinquish his rights to the photo of Naruto *just because* Naruto was the one to press the button, even though Slater was the person who created the conditions that allowed Naruto's world-stopping selfie to be taken?⁵⁷ Conversely, it is obvious that without the contribution of the button-presser—Naruto and Bradley Cooper—the respective resulting photographs might not exist.⁵⁸

The default “pressing-of-the-shutter-button” rule is one of the ways that an unintended author could receive copyright credit *over* the author that intended to create such a photo in the first place.⁵⁹ However, there are also many instances in which an unintentional author contributes so heavily to a work that—without their contributions—there would be no masterpiece; in these cases, that unintended author is not given any rights to the work due to the fact they did not have the necessary intent.⁶⁰

This Note therefore proposes a solution that will focus on the intricate matter of joint ownership and how to better meet the needs of both the intended author, who took the time and effort to create something, and the unintended contributor, who fortuitously contributed to the resulting work and achieved ownership due to a technicality in the law.⁶¹ Conversely, this solution also ensures that those unintended

52. Christopher Hooton, *Ellen DeGeneres Takes Oscars 'Selfie' with Every A-Lister in Existence and Breaks Twitter Record*, INDEPENDENT (Mar. 3, 2014, 4:25 PM), <https://www.independent.co.uk/news/people/news/ellen-degeneres-takes-oscars-selfie-with-every-a-lister-in-existence-9164456.html>. Those captured in the photo are Jared Leto, Jennifer Lawrence, Channing Tatum, Meryl Streep, Julia Roberts, Kevin Spacey, Bradley Cooper, Brad Pitt, Lupita Nyong'O, Peter Nyong'O, and Angelina Jolie. *Id.*

53. Hannah Flint, *Sorry Ellen! Bradley Cooper Owns the Rights to the Most Famous Selfie in History... Because He Took the Photo*, DAILY MAIL (Mar. 4, 2014), <https://www.dailymail.co.uk/tvshowbiz/article-2572822/Bradley-Cooper-owns-right-famous-selfie-history-took-photo.html>.

54. DeGeneres, *supra* note 50. The photo has been retweeted over 3.2 million times since its initial posting. *Id.*

55. Flint, *supra* note 53.

56. Wong, *supra* note 40.

57. *Id.*

58. Flint, *supra* note 53 (“Ellen Degeneres [sic] may have orchestrated the most famous selfie in the world, but she doesn't actually own it. Bradley Cooper was the one to click the button on the Samsung smartphone and capture the moment”); Wong, *supra* note 40.

59. *See, e.g.*, Flint, *supra* note 53.

60. *See infra* Part III.B (describing cases in which there were multiple contributors to a work, yet not all collaborators were given due credit for their contributions).

61. *See infra* Part IV.

contributors get the rights they do deserve in cases where they would normally have none.⁶² Part II of this Note explains the history of the current copyright law, including the reasons for its enactment, the scope of its protection, and the workings of the current multi-author models.⁶³ Part III then expands on joint ownership; specifically, it details the main issues in regard to interpreting the law and understanding the amount of intent and contribution necessary for one to actually be a co-author under the statute.⁶⁴ Additionally, it explains the need for a change in the law due to today's overly technological society.⁶⁵ Ultimately, Part IV supplies an amendment to the existing framework of the copyright law, finally codifying certain precedents already set in the law regarding joint ownership but allowing such precedents to apply to situations such as that of David Slater and Ellen DeGeneres.⁶⁶

II. GETTING DOWN TO MONKEY BUSINESS: THE MAKING OF THE COPYRIGHT ACT OF 1976

Though copyright protection is not a novel concept, the United States' current copyright law has only been in existence for less than fifty years.⁶⁷ This Part focuses on the history of copyright law in the United States and the way it has evolved over time.⁶⁸ Specifically, Subpart A discusses the reasons the current copyright law came into existence.⁶⁹ Subpart B expounds on the requirements of the Copyright Law of 1976, as well as the protections it provides to the works that meet such requirements.⁷⁰ Finally, Subpart C discusses the specifics of multi-authored works, and how the doctrine of joint copyright has evolved since its utilization in American courts.⁷¹

A. *Need for Change: Why the Copyright Act of 1976 Came into Existence*

Copyright is a form of protection ingrained in United States law since the country's creation of its Constitution.⁷² The Copyright Clause

62. *See infra* Part IV.

63. *See infra* Part II.

64. *See infra* Part III.

65. *See infra* Part III.

66. *See infra* Part IV.

67. H.R. REP. NO. 94-1476, at 1 (1976) (detailing amendments made to the Copyright Act).

68. *See infra* Part II.

69. *See infra* Part II.A.

70. *See infra* Part II.B.1-2.

71. *See infra* Part II.C.

72. U.S. CONST. art. I, § 8, cl. 8.

provides that “Congress shall have Power . . . [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[.]”⁷³ Any subsequent copyright legislation was meant to “foster the creation and dissemination of intellectual works for the public welfare,” as well as “give creators the reward due [to] them for their contribution to society.”⁷⁴ As was usual during the beginning years of the United States, each state drafted and passed its own versions of copyright laws based on England’s Statute of Anne.⁷⁵ However, the lack of uniformity in state copyright laws guided the first Congress to pass the Copyright Act of 1790.⁷⁶ Authors, artists, and scientists were granted the rights of printing, reprinting, and publishing their work for fourteen years, including the option to renew for another fourteen years.⁷⁷ This monopoly was meant to provide an incentive to create original works, but the limit on the monopoly helped stimulate creativity by allowing wide access to works in the public domain.⁷⁸ A major revision was completed in 1909; this revision lengthened the protection period to twenty-eight years with a possible renewal term of twenty-eight years.⁷⁹ Though Congress attempted to amend the law for the better, there was

73. *Id.*

74. U.S. COPYRIGHT OFFICE, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, at 1:1 (1977) [hereinafter GENERAL GUIDE].

75. Act for the Encouragement of Learning, 1709, 8 Ann., ch. 21 (Eng.); see, e.g., 1786 N.Y. Laws 298-300 (referencing “AN ACT to promote literature”); 1784 S.C. Acts 49-51 (referencing “AN ACT For the Encouragement of Arts and Sciences”); 1785 Va. Acts 8-9 (referencing “An ACT for securing to the AUTHORS of LITERARY WORKS an exclusive PROPERTY therein for a limited Time”).

76. Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790). Comprehensive revisions were enacted in 1831, 1870, and 1909. H.R. REP. NO. 94-1476, at 47 (1976).

77. *Copyright Timeline: A History of Copyright in the United States*, ASS’N OF RES. LIBR., <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline> (last visited Nov. 18, 2019) [hereinafter *Copyright Timeline*].

78. *Id.* It was recognized in *Wheaton v. Peters* that copyright law is a statutory creation, and therefore, the author has no natural right to the protection of intellectual property. *Wheaton v. Peters*, 33 U.S. 591, 663-64 (1834). The Supreme Court further distinguished in subsequent cases that “reward to the owner [is] a secondary consideration” to the benefit received by the public. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). More recently, Justice Stewart summarized the Court’s current view of the balance of copyright in *Twentieth Century Music Corp. v. Aiken*:

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts.

The immediate effect of our copyright law is to secure a fair return on the ‘author’s’ creative labor. But the ultimate aim is . . . the general public good.’”

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

79. *Copyright Timeline*, *supra* note 77.

much dissatisfaction with the 1909 revision,⁸⁰ and Congress sought a more major adjustment of the law.⁸¹

The Copyright Act of 1976⁸² was the “most substantive change in copyright law since the ratification of the Constitution.”⁸³ Register of Copyrights, Barbara Ringer, described the statute as a “completely new copyright statute, intended to deal with a whole range of problems undreamed of by the drafters of the 1909 Act.”⁸⁴ Not only did this statute completely restructure the American copyright system during that time period, but it became the basis for the modern copyright law that exists today.⁸⁵ Using an advisory council of more than 100 industry representatives, “the Copyright Office and the interested parties hammered out the basic structure of the entire statute before including Congress [in the legislative process].”⁸⁶

This large-scale change in copyright law occurred for multiple reasons.⁸⁷ First, the influence of new technological developments could no longer be ignored.⁸⁸ The 1909 Act was based on the printing press being the primary circulator of information, but the Act was not fluid enough to contend with the other technological advancements that were fast-approaching at the time, such as the radio, television, computers, photocopying machines, and video recorders.⁸⁹ Such developments created new forms of creative expression that had never even existed before, thereby requiring an extension of what copyright law protected.⁹⁰

80. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 858 (1987) (“Courts ‘stretched the limits of statutory language’ in order to make the obsolete 1909 Act serviceable. By the time Congress replaced the 1909 Act, courts had embroidered the old statute with a wealth of common law interpretation.” (quoting U.S. COPYRIGHT OFFICE, BRIEFING PAPERS ON CURRENT ISSUES, reprinted in *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Judiciary Comm.*, 94th Cong., 1st Sess. 2053 (1975))).

81. Michael Jones, Note, *Eldred v. Ashcroft: The Constitutionality of the Copyright Term Extension Act*, 19 BERKELEY TECH. L.J. 85, 89 (2004). Though a number of copyright law revision measures were introduced between 1924 and 1940, they failed to be enacted. H.R. REP. NO. 94-1476, at 47.

82. Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2012).

83. Jones, *supra* note 81, at 90 (citing Christina N. Gifford, Note, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 370 (2000)).

84. Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977).

85. Gifford, *supra* note 83, at 370.

86. Litman, *supra* note 80, at 870-72. Professor Litman observes that though this may seem to be an overly broad delegation of legislative authority, it can also be seen as an “ingenious solution” to tackle a complicated matter. *Id.* at 879.

87. See, e.g., H.R. REP. NO. 94-1476, at 47 (1976).

88. *Id.*; *Copyright Timeline*, *supra* note 77.

89. GENERAL GUIDE, *supra* note 74, at 1:1.

90. H.R. REP. NO. 94-1476, at 47.

These developments would undoubtedly begin to impact what was copyrighted, how those copyrighted materials could be copied in the future, and furthermore, how copyrighted materials could be infringed upon.⁹¹

Attempting to combine all interests and all concerns in a way that satisfied artists and Congress members alike proved to be no easy feat:

The bill as a whole bespeaks concern for literally hundreds of contending and overlapping special interests from every conceivable segment of our pluralistic society. It was not enough to reach compromise over one particular point; all compromises had to be kept in equilibrium so that one agreement did not tip over another.⁹²

Parties with an economic interest in the property rights conferred through copyright were ordered by Congress to “sit down with one another and reach mutually agreeable solutions on substantive issues.”⁹³ Though it was a long process, with many players and conflicting ideas, a revision was not only created, but it “somehow . . . succeeded in the end.”⁹⁴

Another major reason that Congress labored over creating new copyright law was because the United States sought to update their laws in order to be able to join the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”).⁹⁵ The Berne Convention wanted to achieve uniform international copyright

91. *Copyright Timeline*, *supra* note 77; *see also* H.R. REP. NO. 94-1476, at 47 (“The technical advances have generated new industries and new methods for reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.”).

92. GENERAL GUIDE, *supra* note 74, at 1:2 (quoting the Register of Copyrights, Barbara Ringer); *see also* Litman, *supra* note 80, at 862 (“During more than twenty years of negotiations, the substantive content of the statute emerged as a series of interrelated and dependent compromises among industries with differing interests in copyright.”).

93. Jenny L. Dixon, Comment, *The Copyright Term Extension Act: Is Life Plus Seventy Too Much?*, 18 HASTINGS COMM. & ENT. L.J. 945, 959 (1996) (citing Litman, *supra* note 80, at 871).

94. GENERAL GUIDE, *supra* note 74, at 1:3 (quoting the Register of Copyrights, Barbara Ringer).

95. *Copyright Timeline*, *supra* note 77; *see also* GENERAL GUIDE, *supra* note 74, at 2:4. The original Berne Convention was signed on September 9, 1886, in Berne, Switzerland. Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 15 (1988). The original text of the Convention did not establish a minimum term of protection because of the difficulty of coming to an agreement given the variations among contracting states at that time. *Id.* at 17. The Berlin Revision of 1908, however, introduced a new term of protection into the Convention: life plus fifty years after the author’s death. *Id.* at 23. United States copyright law had an identical copyright term when it initially passed the Copyright Act of 1976. GENERAL GUIDE, *supra* note 74, at 2:3. However, after the Sonny Bono Copyright Term Extension Act, the copyright term was extended from fifty years after the author’s death to seventy years. Gifford, *supra* note 83, at 364.

protection through basic principles, which ultimately provide that authors should receive the same protection that is available to them in their home countries in all other member countries.⁹⁶ The United States' change in its law brought the country into accord with international copyright law, practices, and policies, making it possible for the United States to become an even more dominant member in its international trade pursuits.⁹⁷

B. Scope of Protection Under the New Copyright Law

Unsurprisingly, with the revolutionary new law came a host of new requirements necessary for protection under the law.⁹⁸ However, these protections did not surmount other competing interests; accordingly, this Subpart not only explains the requirements needed to be guaranteed protection of one's work, but also facilitates an understanding regarding the concepts of appropriation, fair use, and infringement, and how these concepts can affect an author's rights.⁹⁹

1. Requirements for Protection of Copyrightable Material

Under the Copyright Act of 1976, copyright protection resides “in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated[.]”¹⁰⁰ Simply put, “[t]he two fundamental criteria of copyright protection [are] originality and fixation in a tangible medium.”¹⁰¹

For a statute that was as meticulously constructed as the Copyright Act, having an undefined “originality” requirement seems surprisingly ambiguous; however, the legislature purposely left “original works of authorship” undefined because it preferred to retain the definition used by the courts under the previous copyright statute.¹⁰² Correspondingly, to

96. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/berne/summary_berne.html#_ftnref1 (last visited Nov. 18, 2019).

97. Gifford, *supra* note 83, at 371 (“[T]he United States joined the Berne Convention in 1988, having come into compliance with the technical requirements of membership by passage of the 1976 Act.”)

98. *See infra* Part II.B.1–2.

99. *See infra* Part II.B.1–2.

100. Copyright Act of 1976, 17 U.S.C. § 102(a) (2012).

101. H.R. REP. NO. 94-1476, at 51 (1976).

102. *Id.* “This sentiment [that the legislature wished to keep the standard view regarding the definition of ‘originality’] was echoed by the Copyright Office: ‘Our intention here is to maintain the *established standards* of originality’” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 355 (1991) (quoting HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF U.S.

meet the “originality” standard, the work need only be independently created by the author and possess at least some minimum degree of creativity,¹⁰³ no “novelty, ingenuity, or esthetic merit” is required.¹⁰⁴ Coupled with this lenient standard for originality, the 1976 Act also included an expansive definition of “works of authorship.”¹⁰⁵ Again, Congress purposely desired a broad meaning of the term, as history demonstrated that copyright law is always gradually expanding, so a broader term would encompass more for a greater amount of time.¹⁰⁶

Naturally, the fixation requirement is—as the rest of the statute—broad.¹⁰⁷ The statute of the language dictates that “[a] work is fixed in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”¹⁰⁸ This expands the scope of works protected—to motion pictures and sound recordings, for example—as long as the content of the live transmission is being recorded simultaneously with its transmission.¹⁰⁹

Though the fixation requirement is not burdensome, it is tremendously important in terms of protection: “[I]t is what separates protectable from unprotectable original works of authorship.”¹¹⁰ Copyright law is not necessarily just interested in artistic thoughts and

COPYRIGHT LAW 3 (Comm. Print 1965)).

103. *Feist*, 499 U.S. at 345-46 (reaffirming the precedent set in *Trade-Mark Cases* regarding the originality requirement).

“[W]hile the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are the *fruits of intellectual labor*, embodied in the form of books, prints, engravings and the like.”

Id. (quoting *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879). “The originality requirement articulated in *The Trade-Mark Cases* . . . remains the touchstone of copyright protection today.” *Feist*, 499 U.S. at 347.

104. H.R. REP. NO. 94-1476, at 51.

105. *Id.*

106. *Id.* While the definition of “works of authorship” is expansive, section 102 of the copyright law nonetheless outlines the subject matter of the material protected. Copyright Act of 1976, 17 U.S.C. § 102 (2012). This subject matter includes “literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.” *Id.*

107. H.R. REP. NO. 94-1476, at 52.

108. 17 U.S.C. § 101 (2012).

109. H.R. REP. NO. 94-1476, at 52-53.

110. See Evan Brown, *Fixed Perspectives: The Evolving Contours of the Fixation Requirement in Copyright Law*, 10 WASH. J.L. TECH. & ARTS 17, 18 (2014) (“[Fixation] is the reason why novel utterance is not protected but a novel sound recording is.”).

ideas; rather, copyright law is geared towards the encouragement of artistic production, and a way to guarantee that ingenious ideas are becoming precious pieces of work is through the fixation requirement.¹¹¹ Additionally, the concept of fixation not only helps determine whether provisions of the Copyright Act apply, but also represents the line between common law and statutory protection.¹¹²

Taking the legislative history of the 1976 Act into consideration, the statute was therefore intended to be interpreted as immediately extending copyright protection¹¹³ to an author as long as the author's work possessed the low level of requisite creativity¹¹⁴ and was fixed in a tangible medium.¹¹⁵

2. The Limits of Copyright Protection

Copyright law generally protects an original work of authorship from infringement.¹¹⁶ Infringement “occurs when a copyrighted works is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner.”¹¹⁷ However, due to the Fair Use Doctrine—which was finally codified in the 1976 Act¹¹⁸—there is a limit on what is due exclusive protection under the Act.¹¹⁹

Though authors are afforded the rights of protection from infringement, it does not undermine other author's abilities to make “fair

111. *Id.*

112. H.R. REP. NO. 94-1476, at 52. Though an unfixed work of authorship—such as an improvisation or an unrecorded choreographic work, performance or broadcast—could be subject to protection under state common law or statute, it would not be eligible for federal statutory protection under section 102. *Id.*

113. 17 U.S.C. § 106 (2012). Section 106 details the exclusive rights in copyrighted works. *Id.* Generally, there are five fundamental rights: reproduction, adaptation, distribution, performance, and display. *Id.*

114. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

115. H.R. REP. NO. 94-1476, at 51-52; *see also* Edward Valachovic, Comment, *The Contribution Requirement to a Joint Work Under the Copyright Act*, 12 LOYOLA L.A. ENT. L. REV. 199, 200 (1992) (“The author is the person who actually creates the work, the person who translates an idea into a fixed expression entitled to copyright protection.”). The only exception to the authorship rule is the “work made for hire” doctrine, where the author is the employer of the creator of the work, unless otherwise agreed upon. *See* 17 U.S.C. § 201(b) (2012). Though there are other considerations that may limit the amount of protection received originality and fixation prove to be main considerations when considering the copyrightable nature of a work. *See, e.g.*, 17 U.S.C. § 104 (referencing some other considerations).

116. *Copyright Frequently Asked Questions*, TEACHING COPYRIGHT, <https://www.teachingcopyright.org/handout/copyright-faq.html> (last visited Nov. 18, 2019).

117. U.S. COPYRIGHT OFFICE, *Definitions*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-definitions.html> (last visited Nov. 18, 2019).

118. 17 U.S.C. § 107 (2012).

119. *Id.*; H.R. REP. NO. 94-1476, at 65.

use” of the earlier writer’s work.¹²⁰ “Fair use” is not easily defined, but the 1961 Register’s Report described “fair use” as “a reasonable portion of a copyrighted work [that is] reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owners’ marker for his work.”¹²¹

Unsurprisingly, “[t]he judicial doctrine of fair use [is] one of the most important and well-established limitations on the exclusive right of copyright owners”¹²² Though the criteria of those judicial rules could be stated a number of different ways, the standards to be analyzed were formulated into section 107 in the following way:

- (1) the purpose and character of the use, including whether such use is of commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹²³

Just as everything else with the Copyright Act, fair use was another compromise that had to be made¹²⁴: “The wording of the fair use provision . . . emerged from a hard-fought compromise involving protracted, down-to-the-wire negotiations among representatives of authors, composers, publishers, music publishers, and educational institutions.”¹²⁵

C. *How Copyright Ownership Exists in Multi-Authored Works*

Since the Copyright Act of 1976 was intended to be created broadly,¹²⁶ it leaves itself vulnerable to different statutory interpretations, and thereby, lawsuits.¹²⁷ However, of the “hotly litigated issues”¹²⁸ that

120. Harper & Row, Publs. v. Nation Enters., 471 U.S. 539, 547 (1985).

121. HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24 (Comm. Print 1961).

122. H.R. REP. NO. 94-1476, at 65.

123. 17 U.S.C. § 107.

124. Litman, *supra* note 80, at 876. One of the main disagreements was regarding the scope of the fair use under the then-existing law. *Id.*

125. *Id.* at 869.

126. See *supra* text accompanying notes 102-09.

127. See, e.g., *Naruto v. Slater*, 888 F.3d 418, 426 n.9 (9th Cir. 2018) (demonstrating that PETA relied on the fact that the 1976 Act did not specifically denote that animals could not hold copyright, thereby allowing for suit against Slater on behalf of the monkey).

128. See, e.g., *Brown*, *supra* note 110, at 17 (discussing the issues there are with the fixation requirement due to authors and lawyers “pushing the conceptual boundaries of communicative

have entered the courtroom since the enactment of the 1976 Act, ownership has become an increasingly complex area of the law.¹²⁹ When one person is both the sole creator and sole funder of his or her work, then the initial issue of copyright ownership is no issue at all: That creator would own his or her work.¹³⁰ However, as soon as another person—or, for example, a button-pushing monkey—is involved, the issue of ownership becomes more involved as well.¹³¹ This Subpart delves into the doctrine of joint works that existed prior to Copyright Act of 1976 in order to jump into the shoes of the legislature of that time and understand its reasoning for codifying “joint works.”¹³² This Subpart then discusses how joint works were treated after the codification.¹³³

1. Joint Works Prior to 1976

The 1976 Act contains the first statutory definition of joint work.¹³⁴ However, prior to this codification, the doctrine of joint authorship owed its origins to Judge Learned Hand.¹³⁵ In *Maurel v. Smith*,¹³⁶ Judge Hand, using English law,¹³⁷ held that joint authorship would arise “when parties contribute labor to work under a common and preconcerted

media”).

129. Michael Landau, *Joint Works Under United States Copyright Law: Judicial Legislation Through Statutory Misinterpretation*, 54 IDEA 157, 158 (2014).

130. *Id.*

131. *Id.*; see, e.g., Laura G. Lape, *A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine*, 61 ALB. L. REV. 43, 43 (1997) (detailing another example of how determining copyright ownership is not necessarily straightforward under the doctrine of joint works).

132. See *infra* Part II.C.1.

133. See *infra* Part II.C.2.

134. Landau, *supra* note 129, at 166. “Joint work” was a judicially created doctrine. *Id.* The 1909 Act was silent on the definition of joint ownership, so common law was the basis of the definition of joint works for the 1976 Act. Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Right of Joint Authors*, 50 EMORY L.J. 193, 194-95 (2001).

135. Lape, *supra* note 131, at 45; see also Landau, *supra* note 129, at 160 (noting that New York federal courts were largely responsible for the formulation of the joint authorship doctrine).

136. 220 F. 195 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921). This case involved a plaintiff claiming that he and the defendant were joint authors of an opera. *Id.* at 197. The plaintiff wrote a story for an opera and made a subsequent agreement with the defendant to write the libretto; however, the defendant, without informing the plaintiff, finished the libretto and contracted with another party to publish and copyright the entire opera. *Id.* at 196-97.

137. Judge Hand admitted that he could find “strangely little law regarding the rights of joint authors of books or dramatic compositions.” *Id.* at 199. Instead, he heavily relied on the notions stated in *Levy v. Rutley*. *Id.* (“If two persons undertake jointly to write a play, agreeing on the general outline and design and sharing the labor 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 common design.” (quoting *Levy v. Rutley* (1871) 6 Eng. Rep. 521 [530] (Ct. Com. Pl.))).

design.”¹³⁸ “Common design”—the intent to contribute to one work—became the basis for finding joint authorship.¹³⁹

Judge Hand further developed the doctrine in 1944 with the Second Circuit case *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*¹⁴⁰ Similar to the prerequisite of current joint ownership law, Judge Hand clarified that intent is the hallmark of joint authorship: “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 complementary in the sense that they are to be embodied in a single work to be performed as such.”¹⁴¹ Accordingly, under *Marks*, it was not necessary for authors of a joint work to have worked together—or to have even known each other—for the work to be legally categorized as a “joint work.”¹⁴²

The holding in *Marks* was stretched too far in 1955 in *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*,¹⁴³ also known as the 12th Street Rag case.¹⁴⁴ Here, the Second Circuit held “[a] combined work could be considered a ‘joint work’ even if one of the creators of a component part *did not have any intent to merge* his or her part into a larger unitary whole.”¹⁴⁵ Furthermore, “it allowed the assignee of the composition to have the necessary intent, as opposed to the author himself or herself . . . eliminat[ing] any requirement of collaboration on the part of the parties involved.”¹⁴⁶

138. Landau, *supra* note 129, at 161 (paraphrasing the rule stated in *Maurel v. Smith*).

139. Lape, *supra* note 131, at 46; *see, e.g.*, *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266, 267 (2d Cir. 1944) (defining a joint work as “‘a joint laboring in furtherance of a common design’” (quoting *Levy*, 6 Eng. Rep. at 527) and stating that the parties must “mean their contributions . . . to be embodied in a single work”); *Maurel v. Smith*, 271 F. 211, 215 (2d. Cir. 1921) (stating that “the pith of joint authorship consists in co-operation, in a common design”) (internal citations omitted)).

140. *Marks*, 140 F.2d at 266. This dispute centers around Edward B. Marks, lyricist who wrote a song and brought it to a publisher of songs, Harding, who bought it. *Id.* Harding, without informing Mark, engaged Loraine to compose music for the words, and thereafter published the song. *Id.* Since Marks gave the words to Harding with the intent that they be put to music, it was held that, from the start, each contributor intended the work to be performed as a whole, and therefore, should have rights as joint authors. *Id.* at 267.

141. *Id.* at 267.

142. *Id.*

143. 221 F.2d 569 (2d Cir. 1955). In this case, Euday L. Bowman had composed a piece that was intended to be an instrumental piano solo. *Id.* at 570. He then assigned his rights in the piece to J.W. Jenkins Music Company, and this assignee employed James S. Sumner to write lyrics for Bowman’s music. *Id.* The Second Circuit held that the final product was also a “joint work.” *Id.*

144. Lape, *supra* note 131, at 47-48.

145. Landau, *supra* note 129, at 164.

146. *Id.* at 162. Said another way, the Second Circuit held that “the intent to contribute to a larger work can be conceived long after the first contribution had been produced, and can be conceived by someone other than the author of the contribution.” Lape, *supra* note 131, at 45-46 n.7

It was after the widely-criticized decision in *12th Street Rag* that major legislative efforts were undertaken to reshape copyright law and finally add a statutory definition of “joint work.”¹⁴⁷ The resulting 1976 Act was not intended to depart from prior case law,¹⁴⁸ but rather, was intended to discount the *12th Street Rag* rule and those cases that felt bound to its precedent.¹⁴⁹

2. Joint Works After 1976

Under the 1976 Act, “joint work” is defined as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹⁵⁰ Therefore, in order for a work to garner the classification of “joint work,” there must be a “desire to make the contributions part of a single end product . . . evidenced at the time of creation.”¹⁵¹ With that intent, the authors of the resulting product would become proportional¹⁵² co-owners of copyright in the work,¹⁵³ treated as tenants in common, “with each co[-]owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other co[-]owners for any profits.”¹⁵⁴ However, though the 1976 Act added “joint work” to its list

(citing *Shapiro*, 221 F.2d at 570) (“[T]he test [should be] the consent of whoever holds the copyright on the first author’s product at the time of the collaboration.”).

147. Lape, *supra* note 131, at 44.

148. *Id.* at 45. It is important to highlight that the holding in *Marks* would be consistent with the 1976 Act, but the holding in the *12th Street Rag* case would not. *Id.* at 48.

149. See, e.g., *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 22 (2d Cir. 1976) (holding that application of the *12th Street Rag* doctrine would be necessary for a finding that the television program at issue was a joint work); *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 647 (S.D.N.Y. 1970) (subverting use of the *12th Street Rag* doctrine by holding that the song in question was not considered a joint work because there was no substantial contribution to the song after it was composed by the original author).

150. Copyright Act of 1976, 17 U.S.C. § 101 (2012).

151. Landau, *supra* note 129, at 166-67. “Joint ownership should not be confused with ownership of a derivative work, which occurs when copyrightable expression is incorporated into another person’s solely authored, and thus exclusively owned, work assuming he or she lawfully used the pre-existing material.” John M. Neclerio & Urmika Devi, *Joint Ownership of Patents, Copyrights and Trade Secrets in the United States*, DUANE MORRIS LLP 1, 7 (2011), https://www.duanemorris.com/articles/static/joint_ip_memo_neclerio.pdf; see also 17 U.S.C. § 103 (2012) (noting that section 102 of the Copyright Act extends protection for derivative works only when used lawfully, and such protection does not “affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”).

152. Landau, *supra* note 129, at 168.

153. 17 U.S.C. § 201(a) (2012).

154. H.R. REP. NO. 94-1476, at 121 (1976). “An exception is that a joint author may not assign the work or grant an exclusive license to the work without permission of the other authors.” Landau, *supra* note 129, at 168.

of definitions, issues in regard to what constituted “joint work” and “joint authors” nevertheless persisted.¹⁵⁵

III. THROWING A MONKEY WRENCH INTO THE INTERPRETATION OF THE “JOINT WORK” DOCTRINE

Of the consequences that may arise from joint authorship, joint ownership could be one of the most severe.¹⁵⁶ Due to the fact that those considered joint owners of a work are given such extensive rights,¹⁵⁷ it is important to understand how to interpret “joint ownership” so as give those extensive rights to the correct parties.¹⁵⁸

Under joint ownership, “[a]bsent an agreement to the contrary, each author of a joint work has an equal claim to those profits and an equal right to exploit the work, even if the author’s contributions were not equal.”¹⁵⁹ According to the statute’s language, its sole requirement is that there be an intent to combine the work.¹⁶⁰ Nonetheless, the 1976 Act is silent as to what amount of contribution is necessary from each author for the resulting work to be considered a “joint work.”¹⁶¹ Currently, the framework that has been used to understand whether a piece of authorship is a “joint work” requires two major enquires that encompass both issues of “intent” and “amount of contribution”: “first, what type and amount of creative contribution is necessary to establish that a particular contributor is an ‘author’?, and second, what type of subjective intent is necessary to establish a person’s co-authorial status?”¹⁶²

As a result, many diverse judicial efforts have been taken to better understand what joint ownership means in practice.¹⁶³ Subparts A and B focus on the tests currently in use after the enactment of the Copyright Act of 1976, from those tests submitted by commenters¹⁶⁴ to those

155. See *infra* Part III.

156. LaFrance, *supra* note 134, at 193.

157. See *id.* (“[T]he authors enjoy equal and undivided ownership of the copyright, allowing each to exploit the work freely, subject to a duty to account to the others for a ratable share of the exploitation profits.”); see also *Weissmann v. Freeman*, 868 F.2d 1313, 1318 (2d Cir. 1989) (“[A]n action for infringement between joint owners will not lie because an individual may not infringe on his own copyright.”).

158. See *infra* Part III.C (explaining the reasons it is important for the correct parties to receive ownership rights).

159. LaFrance, *supra* note 134, at 193.

160. Landau, *supra* note 129, at 166; see also *Neclerio & Devi*, *supra* note 140, at 7 (“[J]oint works are distinguished based on the intent of the participants.”).

161. Landau, *supra* note 129, at 167.

162. LaFrance, *supra* note 134, at 194.

163. Landau, *supra* note 129, at 172.

164. See *infra* Part III.A.

actually utilized by the courts.¹⁶⁵ Not only are the downfalls of these tests considered within this analysis, but additionally, the consequences of not having a more accurate test are discussed in Subpart C to demonstrate the pertinence of developing a better framework for joint ownership analysis.¹⁶⁶

A. *Professor Nimmer vs. Professor Goldstein: Disagreement Among Commentators*

There have been differing approaches as to what amount of contribution rises to joint authorship, but there are two main competing tests for assessing supposed co-authors.¹⁶⁷ The first approach—the “de minimis” test espoused by Professor William Nimmer—is usually contrasted with Professor Paul Goldstein’s “copyrightability subject matter test.”¹⁶⁸

Professor Nimmer’s de minimis test requires that a joint author’s contribution be more than a de minimis rather than independently copyrightable expression.¹⁶⁹ De minimis is a shortened version of *de mini mis non curat lex*, which translates as “[t]he law doth not regard trifles.”¹⁷⁰ Though there is debate as to what the exact translation is, “the basic meaning of the maxim is clear: the law will not resolve petty or unimportant disputes.”¹⁷¹

Accordingly, under the de minimis test, Professor Nimmer believes that each author’s contribution should be more than de minimis, more than just a few simple words or phrases.¹⁷² The contribution need not be independently copyrightable;¹⁷³ accordingly, “a party that contributes only abstract ideas or information, but not copyrightable expression, may be a joint author.”¹⁷⁴ Professor Nimmer believes that only

165. See *infra* Part III.B.

166. See *infra* Part III.C.

167. Neclerio & Devi, *supra* note 140, at 7.

168. *Id.* at 7-8.

169. *Id.* at 7.

170. Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 MICH. L. REV. 537, 537-38 (1947); see also *Porter v. Rushing*, 65 F. Supp. 759, 760 (W.D. Ark. 1946) (defining the maxim as “the law cares not for small things”).

171. Andrew Inesi, *A Theory of De Minimis and a Proposal for Its Application in Copyright*, 21 BERKELEY TECH. L.J. 945, 948 (2006). The maxim could also be used as an adjective to describe things that are trifling, unimportant, or insufficient. *Id.* at 950.

172. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.07 (2018) (“[A] person must add more than a word or a line to qualify as a joint author.”).

173. *Id.*

174. LaFrance, *supra* note 134, at 196; see, e.g., NIMMER & NIMMER, *supra* note 172, § 6.07 (“[I]f authors A and B work in collaboration, with A contributing sparkling plot ideas and B weaving them into a completed screenplay, it cannot be doubted that both have made more than a *de minimis*

contributing “intellectual modification” can make someone a joint author; thus, physical labor nor financial contribution can turn a person into a joint owner of the copyright.¹⁷⁵ This more expansive view of joint ownership has been criticized as being impractical and difficult to apply by courts that favor a restrictive view of joint ownership.¹⁷⁶

According to those courts, there are several weaknesses inherent within Professor Nimmer’s test.¹⁷⁷ The main area of contention is the fact that Professor Nimmer’s test supposedly is not consistent with one of the Copyright Act’s premises¹⁷⁸: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”¹⁷⁹ Courts read Professor Nimmer’s test as stifling creativity because if there is “the threat that accepting suggestions from another party might jeopardize the author’s sole entitlement to a copyright,” authors may not collaborate at all.¹⁸⁰

Additionally, Professor Nimmer was said to provide little guidance on how much contribution would rise to the level of “joint authorship,” except to state that the contribution must be “more than a word or a line.”¹⁸¹ What little guidance Professor Nimmer does give would be insufficient when trying to resolve cases.¹⁸² For complex cases in which the brainstorming process resulted in valuable contributions to a work, Professor Nimmer’s test does not set out a direction for courts to advance in to ascertain where exactly joint authorship began.¹⁸³

Conversely, most courts favor Professor Goldstein’s “copyrightability subject matter test.”¹⁸⁴ This test requires each author to make a contribution that would be independently copyrightable.¹⁸⁵ “This test draws support from the notion that authorship always requires creation of original *expression* as distinct from mere *ideas*.”¹⁸⁶ Distinct from Professor Nimmer’s test, a collaborator who only contributes facts or ideas cannot be a co-author of the work because ideas are not

contribution to the resulting script.”)

175. NIMMER & NIMMER, *supra* note 172, § 6.07.

176. LaFrance, *supra* note 134, at 196.

177. Erickson v. Trinity Theatre, 13 F.3d 1061, 1070 (7th Cir. 1994).

178. *Id.*

179. Copyright Act of 1976, 17 U.S.C. § 102(b) (2012).

180. Erickson, 13 F.3d at 1070.

181. NIMMER & NIMMER, *supra* note 172, § 6.07.

182. Erickson, 13 F.3d at 1070.

183. *Id.*

184. LaFrance, *supra* note 134, at 197.

185. PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW, & PRACTICE § 4.2.1.2 (1989).

186. Neclerio & Devi, *supra* note 140, at 8.

copyrightable.¹⁸⁷ Professor Goldstein—and courts adopting this view—justify this position by using sections 102 and 302(b).¹⁸⁸

This standard creates a narrower concept of joint copyright, and the courts' preference for this standard demonstrates the belief that a copyrighted work should have a very limited number of authors.¹⁸⁹ However, critics do not believe it is fair that one sole author who draws its inspiration from many sources should receive a monopoly on the rights of the work: Why is his or her contribution more valuable or more essential to the work of authorship than any other contribution from any other author?¹⁹⁰

B. Illustrative Cases: Disagreement Among the Courts

The majority of courts agree with the standards set out in *Childress v. Taylor*,¹⁹¹ which is largely based on Professor Goldstein's approach to

187. *Id.*; see also WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5:14 (2012) (“In order to be a ‘joint’ author, one must be an ‘author.’ To be an author, one must independently create and contribute at least some minimal amount of expression. . . . From a policy perspective, the requirement ensures that the scope of the joint authorship doctrine is not expanded to include editors, research assistants, actors in plays, and movie consultants.”).

188. *Erickson*, 13 F.3d at 1070-71. Professor Goldstein notes that “§ 101's and § 302(b)'s use of the word ‘authors’ suggests that each collaborator's contribution must be a copyrightable ‘work of authorship’ within the meaning of § 102(a).” *Id.*

189. LaFrance, *supra* note 134, at 197-98.

190. *Id.* at 198.

191. 945 F.2d 500 (2d Cir. 1991). There were two important precursors to the *Childress* decision, the first being *Weissmann v. Freeman*, and the other being *Fisher v. Klein*. LaFrance, *supra* note 134, at 213, 216.

Weissmann not only rejected the joint intent standard of the 12th Street Rag doctrine—which stated that there could be a joint work even if there was no intent to merge contributions—but also added a distinct new element of intent. *Id.* at 213. *Weissmann* featured a conflict between professor and assistant, in which—after a long relationship of researching and co-authoring scholarly works together—the assistant individually wrote what she considered her own work, and the professor, believing himself to be a co-author, used the assistant's work and styled it as his own. *Weissmann v. Freeman*, 868 F.2d 1313, 1315-16 (2d Cir. 1989). The Second Circuit held that each author must contribute to the work and that each author must intend to create a joint work at the time his or her contribution is made; this was not present in the facts as presented. *Id.* at 1318. The holding of *Weissman* increased the confusion surrounding the “intent” requirement: The Second Circuit interpreted “intent” to require that both authors share *not only* a contemporaneous intent to merge their creative efforts *but also* a contemporaneous intent to create a joint authorship relationship to one another. LaFrance, *supra* note 134, at 214.

The other precursor to *Childress* was *Fisher*, which was not striking due to its holding but rather due to its dicta. *Id.* The *Fisher* case dealt with a joint authorship dispute between two jewelry designers. *Fisher v. Klein*, 16 U.S.P.Q.2d (BNA) 1795, 1795 (S.D.N.Y. 1990). The presiding judge, Judge Leval, articulated two novel concepts: first, that within joint works, there is a “dominant author,” which he does not explicitly define; secondly, that a joint work will not arise from a collaboration unless that dominant author intends their authorship with another person. *Fisher*, 16 U.S.P.Q.2d (BNA) at 1798. *Childress* relied heavily on *Weissman* and *Fisher*, leading to a test that seems to have led courts to endorse “misattribution as a device by which one author can obtain sole

copyright.¹⁹² However, that is not the only illustrative case on the subject, as each jurisdiction has made their own decisions in interpreting “joint ownership” and “joint authorship.”¹⁹³ *Childress v. Taylor* addresses a joint ownership issue stemming from the co-creation of a play.¹⁹⁴ Defendant Clarice Taylor, an actress, became interested in developing a play based on the legendary Black comedian Jackie “Moms” Mabley’s life, after portraying Mabley in an off-off Broadway production.¹⁹⁵ After Taylor began doing the preliminary research and gathering the necessary materials, she contacted plaintiff, playwright Alice Childress, about actually writing the play.¹⁹⁶ Childress agreed, and together they created a play about Mabley, with Taylor providing the research, and Childress creating the actual structure and dialogue of the play.¹⁹⁷

Childress received the copyright for the play in her name, and Taylor produced the play.¹⁹⁸ However, as with many relationships without formal agreements, after the second production of the play, the relationship between Taylor and Childress deteriorated, with any proposed agreements falling through.¹⁹⁹ Taylor decided to mount another production of the play without Childress and hired another writer, Ben Caldwell, to write yet another play featuring Mabley.²⁰⁰ Using Childress’s script, she informed Caldwell of the elements she wanted changed, and he complied.²⁰¹ When the play was produced again with the revised script, there was no mention of Childress’s name anywhere, though there was reference to the original production of the play in a casting notice published in a trade paper.²⁰² This set off a chain reaction in which Childress sued Taylor for violations of the Copyright Act; Taylor defended herself, contending she was a joint author with

copyright in a collaborative work,” harming the other contributors in the process. LaFrance, *supra* note 134, at 220.

192. LaFrance, *supra* note 134, at 220-21.

193. Landau, *supra* note 129, at 172.

194. *Childress*, 945 F.2d at 501-02.

195. *Id.* at 502.

196. *Id.* Taylor knew Childress since the 1940s, as they were both associated with the American Negro Theatre in Harlem and Taylor had acted in a number of Childress’s plays. *Id.*

197. *Id.* Not only did Taylor conduct the research, but she additionally conversed with Childress daily, discussing with her the inclusion of certain scenes and characters within the play. *Id.* She also interviewed family members, made character decisions, and suggested scenes. *Id.*

198. *Id.*

199. *Id.* at 503.

200. *Id.*

201. *Id.*

202. *Id.* There were other references, such an advertisement for Taylor’s production of Caldwell’s play which mentioned reviewed garnered after the production of Childress’s play. *Id.* at 504.

Childress and therefore shared the rights to the play.²⁰³ In assessing Taylor's claim to joint ownership, the Second Circuit Court of Appeals came up with two requirements for a work of authorship to be considered a "joint work": "(1) that each of the parties contribute an independently copyrightable contribution and (2) that the parties intended to be joint authors when they were working on their respective contributions."²⁰⁴

The independent copyrightable contribution is not stated anywhere in the Copyright Act.²⁰⁵ However, the court was persuaded by the Register of Copyright's stance, which supports the view that there must be an independent copyrightable contribution by putative co-authors.²⁰⁶ Taking this stance does not only help 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,"²⁰⁷ but also "strikes an appropriate balance in the domains of both copyright and contract law."²⁰⁸

Though the independent copyrightable contribution presents the first obstacle a putative joint author must pass in order to gain joint ownership of the work, the other obstacle is the cornerstone of joint ownership: intent.²⁰⁹ "[T]he court acknowledges that there is no intent provision in the statute itself," but "attempted to fill in the statutory language by interpreting 'intent' to mean, not intent to *merge* the contributions, but intent to *jointly own*."²¹⁰ The court primarily takes this stance because an expansive definition of intent would extend that joint authorial status to "many persons who are not likely to have been within

203. *Id.*

204. Landau, *supra* note 129, at 175-76. This rule is called the "relationship test" by some authors. See LaFrance, *supra* note 134, at 220 ("[T]he Second Circuit converted the *relationship test* into a new rule of law after subjecting it to only a minimal level of scrutiny.") (emphasis added).

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

206. *Id.* at 507. The independent copyrightable contribution—also known as the "copyrightability" test—is the test articulated by Professor Goldstein. See *supra* Part III.A.

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

208. See *id.*

In the absence of [a] contract, the copyright remains with the one or more persons who created copyrightable material. . . . It seems more consistent with the spirit of copyright law to oblige all joint authors to make copyrightable contributions, leaving those with non-copyrightable contributions to protect their rights through contract.

Id.

209. *Id.*

210. Landau, *supra* note 129, at 181; see *Childress*, 945 F.2d at 507 ("The wording of the [statute] 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.'"); see also *id.* at 508 (stating that, in order to determine whether there is joint-authorship, it must be determined whether, in the absence of contractual agreements concerning listed authorship, each participant intended that they would be identified as co-authors).

the contemplation of Congress.”²¹¹ Therefore, even if one of the putative co-authors believed the work was a joint work, *all* of the co-authors must believe the work to be a joint work.²¹²

Though the rule formulated in *Childress* seems like an easily ascertainable standard, there are some obvious issues with its application.²¹³ Specifically, these issues stem from the “intent to be joint authors” requirement.²¹⁴ When deciding to embark on a creative venture, the parties involved usually do not notify their legal counsel to define the rights and obligations of each party; co-writers just write, co-artists just draw, each respective putative author hoping to capture his or her vision in the joint work.²¹⁵ Since there is usually no tangible evidence that each author intended to jointly own the work, any disagreement down the road may lead one author to claiming to solely own the work, thereby destroying any possibility of meeting the intent requirement.²¹⁶

An additional problem with the *Childress* test is that, while there are two prongs to the test, the Second Circuit stopped the analysis after concluding that the “intent to be joint authors” prong was not met.²¹⁷ However, does such an incomplete analysis truly give justice to

211. *Childress*, 945 F.2d at 507. The court goes on to distinguish which types of relationships would not be in Congress’ purview when initially drafting the Copyright Act. *Id.* These relationships include the writer-editor relationship and the writer-researcher relationship, as—according to the court—these relationships lack the intent of both participants in the venture to regard themselves as joint authors. *Id.*

The court’s handling of these types of relationships has been criticized, as many writer-editor or writer-researcher relationships can be filed under the “work made for hire” doctrine, in which the editors or researchers work for a larger firm, contracting to do the work with the knowledge they would not be given the credit for it. Landau, *supra* note 129, at 182. Additionally, there have been cases in which researchers not under the “work made for hire doctrine” have been given the title of joint author. *See Seshadri v. Kasraian*, 130 F.3d 798, 803 (7th Cir. 1997) (holding that a professor’s graduate student was held to be a “joint author” of a journal article with the university professor, as the graduate student made “significant” contributions to the article, as determined by the court).

212. *Childress*, 945 F.2d at 509 (“[W]hatever thought of co-authorship might have existed in Taylor’s mind ‘was emphatically no shared by the purported co-author.’ There is no evidence that Childress ever contemplated, much less would have accepted, crediting the play ‘as written by Alice Childress and Clarice Taylor.’”). In *Childress*, it was ruled that even if Taylor’s contributions were independently copyrightable, there is no evidence from which a trier of fact could infer that Childress had the state of mind required for joint authorship. *Id.*

213. Landau, *supra* note 129, at 181.

214. *Id.*

215. *Id.* at 179-82.

216. *Id.* at 182.

217. *Childress*, 945 F.2d at 509 (“We need not determine whether we agree with [Judge Haight’s] conclusion that Taylor’s contributions were not independently copyrightable since, even if they were . . . we agree that there is no evidence from which a trier could infer Childress had the state of mind required for joint authorship.”).

Taylor?²¹⁸ What if her contributions *were* independently copyrightable?²¹⁹ Should she not be protected in some way, given rights to the characters she helped to craft or the scenes she helped to create?²²⁰ The *Childress* test leaves these questions open, not only possibly curtailing the rights deserved by one author, but also, most likely lengthening the litigation period in such a way that is unduly burdensome to all parties involved.²²¹

Childress was followed by the Seventh Circuit case, *Erickson v. Trinity Theatre*.²²² This case involved Karen Erickson, one of the founders of Trinity Theatre, who served the theatre in various capacities;²²³ this case specifically revolved around her capacity as a playwright.²²⁴ When compiling and writing plays,²²⁵ actors frequently made suggestions that were incorporated into the play.²²⁶ When Trinity began producing the plays, Trinity credited Erickson as playwright and began paying her royalties for the performances.²²⁷ However, these royalty payments stopped; accordingly, Erickson registered the works in her name and sued Trinity for copyright infringement.²²⁸ Trinity defended itself, claiming that it was a “joint author” with Erickson due to all of the contributions to the plays made by the employees—such as the actors—of the theatre.²²⁹

The court held that in order for a work to garner “joint authorship” status, the two-pronged test articulated in *Childress v. Taylor* must be met.²³⁰ The Seventh Circuit continued on to explain that “[i]deas, refinements, and suggestions, standing alone, are not the subjects of copyright.”²³¹ However, what if those “refinements” and “suggestions”

218. Landau, *supra* note 129, at 183.

219. *Id.*

220. *Id.*

221. *Id.*

222. 13 F.3d 1061 (7th Cir. 1994).

223. *Id.* at 1063. Erickson served as playwright, artistic director, actress, play director, business manager, and member of the board of directors. *Id.*

224. *Id.*

225. *Id.* The plays at issue here were *Much Ado About Shakespeare*, *The Theatre Time Machine*, and *Prairie Voices: Tales from Illinois*. *Id.*

226. *Id.* at 1063-64. For example, one of the actors, Michael Osborne, testified that as Erickson was compiling *Much Ado About Shakespeare*, revisions on the script were made during rehearsals; he specifically suggested some ideas that lead to the creation of certain passages. *Id.*

227. *Id.* Erickson had a two-year license agreement with Trinity that listed her as “playwright” and agreed to pay her royalties for the term of that agreement. *Id.*

228. *Id.* at 1064-65.

229. *Id.* at 1065.

230. *See id.* at 1071 (“We agree with the *Childress* court’s observation that the copyrightability test ‘strikes an appropriate balance in the domains of both copyright and contract law.’”).

231. *Id.* at 1072. As a result of such a holding, though some actors were able to point out specific contributions they had made to Erickson’s work, these contributions were not

led to a substantial change in the work?²³² Where is the justice for those in the Trinity Theatre, for example, who convened over a significant time period with Erickson to create a play that became successful?²³³ Are exceptional “suggestions” and “refinements” not the foundation of a transcendent piece of work?²³⁴

Another Second Circuit case that slightly altered the joint authorship definition yet again is the high-profile case of *Thomson v. Larson*.²³⁵ The musical *Rent* began as a joint project of Billy Aronson and composer Jonathan Larson.²³⁶ However, after an amicable separation, Aronson agreed he would not be considered an active collaborator of the musical.²³⁷ Larson’s *Rent* script was received well by the Artistic Director of the New York Theatre Workshop (“NYTW”), which encouraged the development of Larson’s script.²³⁸ Still working with the project, Larson agreed to NYTW’s hiring of Lynn Thomson as a dramaturg²³⁹ to assist him in clarifying the storyline of the musical.²⁴⁰ Though there was an agreement between the two,²⁴¹ the agreement was silent as to copyright interests or any issue of ownership with respect to the final work.²⁴²

Though Thomson and Larson worked extensively on the script together, Larson was given a majority, if not all the credit.²⁴³ That is until Larson died suddenly and various members of NYTW and Thomson had to work together to fine-tune the script.²⁴⁴ It was at this point that Thomson sought more compensation and credit for her work.²⁴⁵ When this did not happen, she sued, claiming that she was a co-author and therefore deserved the related rights to the script.²⁴⁶

independently copyrightable, therefore not meeting the *Childress* prongs. *Id.*

232. Landau, *supra* note 129, at 186.

233. *See id.*

234. *See id.*

235. 147 F.3d 195 (2d Cir. 1998).

236. *Id.* at 197.

237. *Id.*

238. *Id.*

239. *Id.* Dramaturgs provide a range of services to playwrights and directors in connection with the production and development of theater pieces, including help with plot elements, dramatic structure, character details, themes, and even specific language. *Id.* at 197 n.5.

240. *Id.* at 197.

241. *Id.* The agreement stated that NYTW would pay a fee of two thousand dollars in full consideration of the services rendered, as well as provide for billing credit for Thomson as “dramaturg.” *Id.*

242. *Id.*

243. *Id.* at 197-98.

244. *Id.* at 198.

245. *Id.* Thomson had approached Larson’s heirs to discuss settlement agreements regarding how much of the royalties that Thomson should get, yet those agreements went nowhere. *Id.*

246. *Id.*

Again, the *Childress* factors were adhered to in this case.²⁴⁷ The court viewed the intent requirement in *Childress* as requiring that “the parties ‘entertain in their minds the concept of joint ownership.’”²⁴⁸ It would not be enough that the parties intended to merge their contributions into one unitary work, but rather, they must have intended to be joint authors.²⁴⁹ Additionally, the court in this case proceeded to examine “factual indicia,” such as how a collaborator regards himself or herself in relation to the work in terms of billing and credit, decision-making, and the right to enter contracts.²⁵⁰

This adds another layer to the *Childress* test, but does it solve the problems illuminated by the previous cases, or does it just continue to confuse the doctrine?²⁵¹ The Ninth Circuit adds a twist to the joint works doctrine, actually moving away from *Childress* in *Aalmuhammed v. Lee*.²⁵² In another high-profile case, Jefri Aalmuhammed claimed to be a co-author of the movie *Malcom X*,²⁵³ directed by Spike Lee²⁵⁴ and starring Denzel Washington.²⁵⁵

There was no contract between Aalmuhammed and Warner Brothers, Lee, or Lee’s production companies.²⁵⁶ Though he was compensated by both Lee and Washington, Aaluhammed aspired to receive co-authorial status on the work; not only was he denied, but when the film was released, Aalmuhammed was given inconsequential credit.²⁵⁷ Consequently, Aalmuhammed applied for a copyright with the

247. *Id.* at 200-05 (analyzing the facts of the case according to the *Childress* test).

248. *Id.* at 201 (citing *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991)).

249. *Id.* (citing *Papa’s-June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1157 (S.D.N.Y. 1996)).

250. *Id.* at 201 (citing *Childress*, 945 F.2d at 508); *see id.* at 202-05 (describing how the “factual indicia” were analyzed in *Thomson* itself).

251. LaFrance, *supra* note 134, at 239; *see also Thompson*, 147 F.3d at 206 (discussing the inability of the court to classify *Thompson*’s contributions under the current doctrine: “Our circuit has not decided whether a person who makes a non-*de minimis* copyrightable contribution but cannot meet the mutual intent requirement of co-authorship, retains, in the absence of a work-for-hire agreement or of any explicit contractual assignment of the copyright, any rights and interests in his or her own contribution.”).

252. 202 F.3d 1227 (9th Cir. 2000); LaFrance, *supra* note 134, at 246.

253. *Aalmuhammed*, 202 F.3d at 1229. Aalmuhammed’s evidence that he was extensively involved in the movie-making process included the following: reviewing the shooting script for Spike Lee and suggesting extensive revisions; directing Washington and the other actors while on set; creating two entire scenes with new characters; editing parts of the movie during post-production; and meeting with numerous Islamic organizations to persuade them that the movie was an accurate depiction of *Malcom X*’s life. *Id.* at 1230.

254. *Id.* at 1229. Lee co-wrote the screenplay, directed, and co-produced the movie. *Id.*

255. *Id.* Washington had actually asked Aalmuhammed to assist him in his preparation for the starring role, as Aalmuhammed not only knew a lot about *Malcom X*, but he had also written, directed, and produced a documentary film about *Malcom X*. *Id.*

256. *Id.* at 1230.

257. *Id.* He was credited as “Islamic Technical Consultant” way down the list of credits. *Id.*

USCO, claiming to be co-creator, co-writer, and co-director, and then sued Lee and his production companies, among others, for declaratory relief and accounting under the Copyright Act.²⁵⁸

The court primarily utilized the “author theory” discussed in *Burrow-Giles Lithographic Co. v. Sarony*²⁵⁹ to distinguish who is an “author.”²⁶⁰ *Burrow-Giles* contemplated the question of who is the author of a photograph: the person who sets it up and snaps the shutter, or the person who makes the lithograph.²⁶¹ The court ultimately decided that an author is the person who originates, makes, produces, and is the inventive mastermind of the thing to be protected; in other words, an author is “the man who really represents, creates or gives effect to the idea, fancy, or imagination.”²⁶² Utilizing this definition as a foundation for its analysis, the court in *Aalmuhammed* further stated the author of a work to be the person to whom the work owes its origin and who superintended the whole work—thereby insinuating that directors, producers, starring actors, or screenwriters would gain this “master mind” title.²⁶³

Combining the author theory with the “thoughtful opinion” in *Thomson*, the court enumerated three factors as criteria for joint authorship in the absence of a contract.²⁶⁴ First is the idea that the author “superintends the work by exercising control.”²⁶⁵ Secondly, “putative coauthors make objective manifestations of a shared intent to be coauthors”²⁶⁶ And finally, “the audience appeal of the work turns on both contributions and ‘the share of each in its success cannot be appraised.’”²⁶⁷ However, though this test might prove useful in the film-

258. *Id.*

259. 111 U.S. 53 (1884).

260. *Aalmuhammed*, 202 F.3d at 1233.

261. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 54-55 (1884); *see also supra* Part I (describing the situation of the “monkey selfie” and the Ellen DeGeneres selfie in which this rule would be applicable).

262. *Burrow-Giles*, 111 U.S. at 61.

263. *Aalmuhammed*, 202 F.3d at 1233. These people are contrasted from others that work on the set:

Everyone from the producer and director to casting director, costumer, hairstylist, and “best boy” gets listed in the movie credits because all of their creative contributions really do matter. It is striking in *Malcolm X* how much the person who controlled the hue of the lighting contributed, yet no one would use the word “author” to denote that individual’s relationship to the movie. A creative contribution does not suffice to establish authorship of the movie.

Id.

264. *Id.* at 1234.

265. *Id.*

266. *Id.*

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

making context because of “the plethora of the court’s feared ‘claim-jumping’ contributors, it is at odds with the copyrightable contribution requirement added by the Second and Seventh Circuits,” further adding to the confusion of the joint works doctrine.²⁶⁸

C. *Consequences of Incorrectly Naming Joint Authors*

As noted in the Subparts above, though the courts try to remain consistent, most of the time, courts are guessing at what analysis was meant to accompany the definition of “joint works” in the Copyright Act.²⁶⁹ As a result, a lot of putative joint authors are spending time and money to litigate claims that seem as if they have a legal bearing on their face, only to be told that their contributions are not worth enough to gain any rights to them.²⁷⁰ It is important that there is a clearer, more precise test for determining what constitutes joint ownership so as to help correctly identify joint authors.²⁷¹ Unsurprisingly, authors want to be recognized for their contributions.²⁷² Part of the reason is psychological: People want to get acknowledged for their role in creating a masterpiece.²⁷³ Economically speaking, however, people also want to be compensated for their time.²⁷⁴ Being acknowledged and compensated for one’s work not only gives the author satisfaction in the moment, but it can also lead to more opportunities and success in the future for that author.²⁷⁵

Additionally, having a well-defined test will decrease any litigation between the parties contending to be owners of the work.²⁷⁶ David Slater, the alleged “photographer-turned-dogwalker,”²⁷⁷ had to address PETA’s claim to copyright over multiple years, losing any economic

268. Landau, *supra* note 129, at 198.

269. See *supra* Part III.B (depicting cases in which the joint works doctrine is skewed in different directions depending on the jurisdiction).

270. See *supra* Part III.B (discussing cases where there are multiple collaborators to a work, yet those collaborators are not given equal ownership for their contributions).

271. See Valerie Peterson, *What Authors Need to Know About Copyright*, BALANCE CAREERS (Aug. 6, 2019), <https://www.thebalancecareers.com/what-is-copyright-and-why-is-it-important-to-authors-2800060> (describing why copyright is important to authors).

272. Sherri Burr, *Creating and Selling Films & Printed Documents: The Challenge of Joint Authorship and First Sale Doctrine*, 39 OHIO N.U. L. REV. 675, 679 (2013).

273. *Id.*

274. *Id.*

275. See generally *id.* at 679-80 (discussing the impact that acknowledgement has on the entertainment industry).

276. See Wong, *supra* note 40 (describing the “years of arcane legal wrangling” Slater has had to address due to the question of authorship of the monkey selfie).

277. *Id.* Slater has not yet become a dogwalker, but he is thinking of doing so in order to provide for himself. *Id.*

stability he would have had had there been an optimized way of tackling the issues presented by the lawsuit.²⁷⁸ He cannot afford to replace his broken camera, compensate the attorney that has been defending him since the suit began in 2015, or even pay his income tax bills.²⁷⁹ Most surprising, the issue of ownership in Slater's case is centered around a photographer and a *monkey*, which seems to have a simple solution considering animals do not even have the standing to sue for copyright ownership, much less can garner the belief that they should have any type of ownership interest.²⁸⁰ One cannot even begin to fathom the countless costs that would be associated with a litigation that revolved around two putative *human* authors in the same situation.²⁸¹

Furthermore, joint authors receive undivided interest in the copyright, meaning that a joint author is able to do what he or she wants with the copyright rights *without* the approval of the other.²⁸² If a co-author instead licenses the work to another, he or she still has to share whatever profits stem from the license.²⁸³ However, none of the co-authors can grant exclusive rights to any other person or entity without the agreement of all co-authors, which can be detrimental to forming any kind of agreement with a publisher, producer, or potential purchaser of the rights of the joint work.²⁸⁴ Therefore, it is important that the concept of joint work is applied correctly and comprehensively so as not to shaft any of the authors, or conversely, so not to provide any of the authors with rights they should not have.²⁸⁵

IV. QUIT MONKEYING AROUND: A SOLUTION TO THE ISSUE OF THE UNINTENDED COLLABORATOR

Part III discussed a plethora of available approaches used to distinguish who would be considered a joint author, and as a result, what

278. *Id.*

279. *Id.*

280. *See* *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2017).

281. *See, e.g.,* Jaelyn Peiser, *It Took 17 Years: Freelancers Receive \$9 Million in Copyright Suit*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/business/media/freelancers-digital-copyright-lawsuit.html> (describing a copyright infringement suit that took seventeen years to reach a settlement).

282. Scott Boone, *Co-authors, Collaboration, and Joint Authorship – Part I of All That*, WRITER L. (Sept. 5, 2013, 4:03 PM), <https://writerinlaw.com/2013/09/05/co-authors-collaboration-and-joint-authorship-part-i-of-all-that>.

283. *Id.* For example, if a co-author would like to post a novel online for free, and the other would like to offer it up for sale, both authors are allowed to take their respective actions. *Id.* However, if any profits are made from the sale, half of those profits go to the other co-author by default. *Id.*

284. *Id.*

285. *See* Peterson, *supra* note 271.

would be considered a joint work.²⁸⁶ Though there are other notable cases that further explain courts' interpretation of joint works,²⁸⁷ there is a clear theme: Each court is estimating the intentions of the 1976 Congress, therefore possibly mistaking which rights *really do* belong to which authors.²⁸⁸ Due to the need for a clear, uniform standard, Subpart A proposes an amendment to the current Copyright Law that will finally codify the current jumbled joint work doctrine.²⁸⁹ It will additionally illustrate how this amendment would apply to the case of the monkey selfie, who would be considered an "unintended collaborator."²⁹⁰ Subpart B then discusses possible criticisms of the proposed amendment and why such criticism will fail upon closer review of the statute.²⁹¹

A. Proposed Amendment to the Current Copyright Act

The proposed amendment below would be added to section 102 of the current Copyright Law:

(c) In the case of the joint works, copyright protection *may* extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery if:

- (1) There is an actual completed work of authorship that is covered under the subject matter requirements of subsection (a) of this section; and
- (2) Without the idea, procedure, process, system, method of operation, concept, principle, or discovery proposed by the putative co-author, the work of authorship would not exist in its final completed form. This may be measured by the following factors which shall be given roughly equal weigh in the corresponding analysis:
 - (i) The extent of the collaboration;
 - (ii) The timing that each contribution occurred;
 - (iii) The added value of each putative author's contribution to the final work of authorship; and
 - (iv) The intent of each author, which shall include both a

286. See *supra* Part III.A–B.

287. See, e.g., *Janky v. Lake Cty. Convention & Visitors Bureau*, 576 F.3d 356, 363 (7th Cir. 2009) (holding that the "doo-wop ditty" was a joint work because the purpose of copyright law would be defeated if important contributions are denied copyright protection); *Gaiman v. McFarlane*, 360 F.3d 644, 658-59 (7th Cir. 2004) (arguing that Professor Nimmer's de minimis test is more in line with the meaning of section 201(a)).

288. See, e.g., *supra* Part III (considering multiple sources in which courts and commentators construe the joint works doctrine in different ways); see also Landau, *supra* note 129, at 211 (suggesting that the courts are misconstruing the statute).

289. See *infra* Part IV.A.

290. See *infra* Part IV.A.

291. See *infra* Part IV.B.

determination of whether each putative author intended to contribute to the work of authorship and whether each putative author believed the work to be a joint work.

(3) However, if there is a contractual or formal agreement in place at the time the collaboration is set to occur, such contractual or formal agreement shall be the determining factor in deciding the rights of each putative author, unless justice so requires otherwise.²⁹²

Each piece of this proposed statute has been inspired by the different conclusions drawn by commentators and courts alike, yet it is drafted in such a way as to form a cohesive codification of those conclusions so as to limit any undue burden on litigation.²⁹³

To prove the thoroughness of this amendment, it would be helpful to apply the amendment to the case of Naruto and the monkey selfie.²⁹⁴ Though, as discussed in Part I, Naruto was the one who pushed the shutter button on the camera, leading to the infamous picture, it was Slater, the photographer, who had the idea.²⁹⁵ He wanted to acquire pictures of the rare creatures, so he packed up his things, flew to Indonesia, and followed the monkeys around for days, trying to get the perfect photo.²⁹⁶ He put in the time, the effort, and the preparation—not to just *think* about the idea of taking a picture—but to actually put the idea in motion.²⁹⁷ It was by sheer luck that Naruto was the one that was able to take the picture.²⁹⁸

Under traditional law, Naruto should have gotten all rights to the photo due to his act.²⁹⁹ However, under the proposed amendment, Slater's ideas would not automatically be swept to the side as irrelevant to any copyright claim under section 102(b).³⁰⁰ Rather, Slater would be able to turn to section 102(c) to give him the rights he might deserve for

292. See Copyright Act of 1976, 17 U.S.C. § 102 (2012) (illustrating where the proposed amendment would fit in the existing framework).

293. See *supra* Part III.A–B (examining conclusions drawn by courts and commentators).

294. See *supra* Part I (describing the issues regarding the creation of the monkey selfie). For argument's sake, this application of the amendment will forgo the fact that Naruto is a monkey.

295. See *supra* Part I.

296. See *supra* Part I.

297. See *supra* Part I.

298. See *supra* Part I.

299. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (holding that the person who physically pressed down on the shutter-button was the author of the photograph and thereby retained copyright protection of his work).

300. Copyright Act of 1976, 17 U.S.C. § 102(b) (2012). Under section 102, Slater's actions would probably be classified as an "idea" and therefore his contributions would not garner copyright protection. *Id.*

being the brains behind the action.³⁰¹ Under section 102(c)(1), it would be concluded that Slater's idea to take a picture of the macaques actually resulted in a work of authorship covered under section 102(a)(5).³⁰² Additionally, without Slater's idea to take the photo, that specific photo would not exist.³⁰³ Naruto never had the premeditated idea to take a picture of himself, nor to follow his troop around trying to capture candid photographs of them.³⁰⁴ Therefore, the factors of section 102(c)(2) would be the next step in the analysis.³⁰⁵

Under section 102(c)(2), all of the factors seem to weigh in Slater's favor as well.³⁰⁶ He greatly contributed to the work, from working the angles, to positioning the camera, to spending the grueling hours in the jungle patiently waiting for the perfect picture.³⁰⁷ Naruto's collaboration occurred contemporaneously with Slater's vision; Naruto snapped the picture under the surveillance of Slater.³⁰⁸ Again, the value of Slater's contributions could be said to outweigh those of Naruto's; circumstances that can be taken into consideration under this factor are the tests articulated by Professor Nimmer and Professor Goldstein.³⁰⁹ The amendment is flexible enough to allow the court to utilize either the *de minimis* test or the independent copyrightability test, yet it does not confine the analysis to these two very fact-specific standards; allowing in the other facts of the proposed amendment would greatly aid the court in coming to a fairer conclusion for all parties involved.³¹⁰ Finally, factor (iv) of the proposed amendment, regarding the intent of the author, may be subjected to the intent test articulated in *Childress*, but is not *limited* to that test in cases where that standard of intent provides too narrow a view.³¹¹ Therefore, in cases like Naruto and Slater's, whether

301. See *supra* Part IV.A (detailing the proposed amendment).

302. See *supra* Part IV.A; see also 17 U.S.C. § 102(a)(5) (including pictorial works under the scope of copyright protection).

303. See *supra* Part IV.A (detailing the proposed amendment); see also *Gaiman v. McFarlane*, 360 F.3d 644, 658-59 (7th Cir. 2004) (stating that the contributions of both authors could not stand alone, and without either of their respective contributions, the comic book would not exist).

304. See *supra* text accompanying notes 13-20 (describing the way in which Naruto was drawn to the camera lens and fortuitously pressed the shutter button).

305. See *supra* Part IV.A (detailing the proposed amendment).

306. See *supra* Part IV.A (detailing the proposed amendment).

307. See *supra* text accompanying notes 40-43 (describing Slater's efforts in taking the photos).

308. See *supra* text accompanying notes 13-20.

309. See GOLDSTEIN, *supra* note 185, §4.2.1.2; NIMMER & NIMMER, *supra* note 172, § 6.07 (describing the way in which Nimmer believes joint authors should be identified).

310. See *supra* Part IV.A (detailing the proposed amendment in which there are multiple factors available for the court to assess).

311. *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991) (describing the intent test applied in this case).

both putative authors meant to contribute to the photograph may be a more encouraging analysis than whether both putative authors meant for the picture to be a joint work.³¹²

Additionally, though not applicable in *Naruto* and *Slater*'s case, section 102(c)(3) provides a mechanism by which co-authors working under a contract cannot sue for more rights than contracted for, thereby limiting fruitless claims that may arise in the courts.³¹³ Since there was no contract between monkey and man, under the proposed amendment, both *Slater* and *Naruto* would rightly gain the title of co-author of the monkey selfie.³¹⁴

B. Possible Critiques of the Proposed Amendment

The biggest critique to this proposed solution is that the Copyright Act specifically dictates *against* allowing ideas to be the basis of a copyrightable work of authorship.³¹⁵ However, it cannot be denied that, in the field of joint ownership, ideas, thoughts, suggestions, and the like prove to be valuable enough to transform an ordinary work into an extraordinary work.³¹⁶ Arguably, the most significant purpose of the Copyright Act is to promote the expression of ideas so that the public will have access to innovative work.³¹⁷ Why would authors continue to express their ideas if they are not given their due credit and compensation for their efforts?³¹⁸ The United States Supreme Court provided some insight on this inquiry:

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.³¹⁹

If people are consistently denied rights because their contributions are not technically copyrightable under *Childress*, for example, people

312. See *supra* Part IV.A (detailing the proposed amendment).

313. See *supra* Part IV.A (detailing the proposed amendment). This also maintains the distinction discussed in the *Childress* court. *Childress*, 945 F.2d at 507.

314. See *supra* Part IV.A (using the proposed amendment to come to a conclusion regarding ownership rights).

315. See Copyright Act of 1976, 17 U.S.C. § 102(b) (2012).

316. See *supra* Part III.B (detailing the cases in which the contributions of putative co-authors transformed the original work of authorship).

317. Valachovic, *supra* note 115, at 210.

318. *Id.*

319. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431-32 (1984).

will cease discussions in open forums and collaboration will be stilted, leading to a decrease in the ultimate expression that comes from such collaboration.³²⁰ That might mean that society may have to accept subpar work from an author with great ideas but atrocious writing skills because he may risk his right to copyright through uncontracted collaboration.³²¹ Consequently, a fantastic writer may never find his muse because those with the ideas refuse to participate in a cycle that ultimately leaves them with no end product and no rights.³²² The proposed amendment has the ability to solve these problems in a fair way.³²³

On that note, the amendment is written this way as to coincide with the drafting intent behind the 1976 Act.³²⁴ Throughout the legislative history of the Copyright Act, it is acknowledged that the Act revolved around one word: broad.³²⁵ Congress drafted the Copyright Act with the knowledge that there would continually be new mediums of expression and innovative ways of manifesting ideas.³²⁶ However, Congress also recognized that these innovations would be entirely impossible to foresee:

The bill does not intend either to freeze the scope of copyrightable technology or to allow unlimited expansion into areas completely outside the present congressional intent. Section 102 implies neither that that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.³²⁷

Therefore, the statute is broad, not because the 1976 Congress necessarily wanted to include every and any possible form of expression, but because it foresaw the possibility that future Congresses—such as the 2019 Congress that has to consider the effect avenues such as social

320. Valachovic, *supra* note 115, at 210-11 (“[T]he adoption of an underinclusive [sic] method of defining joint authorship equally defeats the purpose of the Act.”).

321. *Cf.* Gaiman v. McFarlane, 360 F.3d 644, 658-59 (7th Cir. 2004) (describing the ideal collaborative situation: “This is a typical case from academe. One professor has brilliant ideas but can’t write; another is an excellent writer, but his ideas are commonplace. So they collaborated on an academic article, one contributing ideas, which are not copyrightable, and the other the prose envelope, and . . . they sign as coauthors.”).

322. *Id.*

323. *See supra* Part IV.A (exemplifying how the proposed amendment would solve the problem Slater and Naruto).

324. *See supra* Part II.A–B (explaining the intent behind the Copyright Act).

325. *See supra* text accompanying notes 105-13 (describing the intent behind the Copyright Act); *see also* H.R. REP. NO. 94-1476, at 52 (1976) (“[T]he coverage of the present statute is very broad . . .”).

326. H.R. REP. NO. 94-1476, at 51.

327. *Id.*

media have on authorship—may want to incorporate other mediums of expression under section 102.³²⁸

The 1976 Congress was aware that there was the possibility of technological advancements, and consequently, the expansion in the interpretation of the Copyright Act to accommodate such advancement;³²⁹ it follows that the 1976 Congress must also have figured other provisions of the Copyright Act would be affected as well, namely joint works.³³⁰ Had the 1976 Congress wanted joint works to be defined in a certain way, it would have not only created an explicit standard in the actual statute, but it would have also explained “joint works” more thoroughly in its extremely extensive and detailed report.³³¹ The fact that the 1976 Congress had not done so—nor the fact that the current Congress has not taken steps to strictly redefine it today—suggests that the joint works doctrine is open to a broader interpretation than the federal courts care to allow.³³² This proposed amendment allows for that broadened view.³³³

V. CONCLUSION

As noted in Part III, there is no perfect way of defining joint ownership,³³⁴ and yet, joint ownership is becoming an increasingly prevalent problem in today’s modernized society, where the effort to create something is extremely low, yet the number of collaborators can be limitless.³³⁵ The fact that people have the ability to take out a phone from their pocket and automatically make—or have someone help them make³³⁶—a work of authorship completely changes the nature of the copyright game.³³⁷

328. *See id.* at 52 (“[T]here are unquestionably other areas of existing subject matter that this bill does not propose to protect that future Congresses may want to.”).

329. *Id.* at 51-52.

330. *See id.*

331. *See generally id.* at 120-21 (discussing the interpretation of section 201 and joint works in a very limited way).

332. Lape, *supra* note 131, at 44-45. The 12th Street Rag decision provided the impetus for major legislative efforts to be taken to reshape the current copyright law so as to bypass the decision, hence, the formulation of the 1976 Act. *Id.* However, despite the various interpretations of the joint works doctrine that have occurred since the enactment of the 1976 Act, there has been no legislative push to narrowly define joint authorship in a certain way through some sort of codification. *Id.*

333. *See supra* Part IV.A.

334. *See supra* Part III.A–B.

335. *See Lape, supra* note 131, at 43 (“Increased opportunities for collaborative efforts have developed during the tenure of the Copyright Act of 1976 in fields such as scientific research, the computer industry, and the entertainment industry.”).

336. *See supra* Part I (describing the monkey-selfie and the Ellen DeGeneres selfie).

337. *See Lape, supra* note 131, at 43. Lape describes such an analogous example:

Therefore, while, for example, the default “pressing-of-the-shutter-button rule,” has been used for over a century, such a rule does not account for all possible scenarios, nor does it really benefit all parties in the scenario.³³⁸ This Note’s solution forms a better foundation for joint ownership that would ensure all parties and contributions are accounted for.³³⁹ Though Slater and Naruto cannot necessarily use this amendment to solve their legal issues, the same analysis could be applied to any issues arising from the analogous situation of the Ellen DeGeneres-Oscar selfie, hopefully lessening the law’s ability to make a monkey out of anyone.³⁴⁰

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Let’s start with a classic example transposed to a new setting. A contributor posts to a listserv what looks like a poem, or maybe lyrics. A second subscriber adds a melody and posts the result. The first or second contributor then markets the song and makes a mint. Who owns the copyright to the song? Resolution of this question depends upon the copyright doctrine of joint works, which governs collaborative creation.

Id.

338. *See, e.g.,* Wong, *supra* note 40 (describing Slater’s descent into indigency due to the extensive litigation surrounding the monkey selfie).

339. *See supra* Part IV.A.

340. *See supra* text accompanying notes 44-55.

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