

PRESERVING THE COLLABORATIVE SPIRIT OF  
AMERICAN THEATER: THE NEED FOR A  
“JOINT AUTHORSHIP DEFAULT RULE”  
IN LIGHT OF THE *RENT* DECISION’S  
UNANSWERED QUESTION

INTRODUCTION

Jane was always a creative individual, with many artistic talents and a profound appreciation for the theater. This innate gift of artistic creation ultimately propelled her into a professional career as a musical theater dramaturg.<sup>1</sup> Focusing her skills in the “behind the scenes” creative process, Jane’s role often became that of a transformer – serving as a catalyst by working with raw but promising theatrical pieces, and fine-tuning them into works ready for Broadway production. With this profession came the opportunity to work with a *mélange* of theater professionals, ranging from playwrights and composers, to directors and actors. She was always a willing participant in this collaborative artistic process, unconcerned about the financial and legal intricacies of her contributions – until one day.

Jane was given the opportunity to work with a gifted but unknown playwright on a musical theater piece with enormous potential. Wrapped up in the spirit of artistic creation, the two went to work on “transforming” the play into a masterpiece. Immersed in the creative process, the two neglected to put into writing any formal agreement regarding their collaboration.

Upon its theatrical debut, the play was an immediate success. Financially, the product of Jane’s and the unknown playwright’s collaboration yielded tremendous profits. As an afterthought to the gratification that came from bringing a beautifully artistic work into existence, Jane’s financial and legal interests in the work became of some concern. In the absence of a written contract that delineated her rights, Jane looked to the United States copyright law and its joint authorship provisions for authority. Claiming joint

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<sup>1</sup> A dramaturg’s function in theater is not clearly defined, as it varies from job to job. Dramaturgs may assist directors and playwrights, contribute to research for period productions, and even act as a literary or production critic during development of a new work. See Jane C. Lee, Comment, *Upstaging the Playwright: The Joint Authorship Entanglement Between Dramaturgs and Playwrights*, 19 *LOV. L.A. Ent. L.J.* 75, 77 (1998); see also Nelson Pressley, *Dramaturg’s Legal Lament About ‘Rent,’* *WASH. TIMES*, Aug. 24, 1997, at D2. “Dramaturgy” is defined as “the art or techniques of dramatic composition and theatrical representation.” Webster’s Ninth New Colliate Dictionary 381 (1985).

authorship of the masterpiece she helped create in her role as a dramaturg, negotiations between herself and the *now* celebrated playwright broke down. Turning to the judicial system for a determination on her interests in the play, Jane was denied such joint authorship status. Thus, she was left uncertain about the financial and legal interests to which she was rightfully entitled in her role as dramaturg.

When the legal system fails to provide a definitive answer to a crucial legal question, the effect is profound. Apprehension emerges over the possibility of losing one's interest in a work she significantly helped to create.<sup>2</sup> Uncertainty in the law regarding authorship interests has the frightening potential to chill the creative process and quash the highly prolific spirit of artistic collaboration.

Moving away from this unfortunate, *but merely hypothetical*, story of Jane, this Note turns to an analysis of the realistic effect of such ambiguity in United States copyright law. To an outsider, the Broadway smash hit *Rent*, a modern-day rock musical, appeared to be the great success story of a young, starving artist fulfilling his dream. Yet shrouded amidst its critical acclaim, masked from its adoring audience, and hidden far behind its velvet stage curtain, lies a disheartening tale.

In a time when the collaborative spirit, the commingling of ideas, and the collective power of creation are finding force in the artistic world, the Second Circuit's *Rent* decision has left American theater discontented and fearful for its future.<sup>3</sup> And how times change. "Fifty years ago, in Vichy France, opportunistic French collaborators were reviled as traitors. Today, in contrast, collaboration is touted as the breakthrough process that will ensure the very survival of nonprofit organizations. Those who forge collaborative alliances are praised for their creativity and pragmatism."<sup>4</sup> Currently, modern American theater is witnessing its community's increased reliance on the communal spirit of artistic endeavors, as well as the

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<sup>2</sup> This sentiment must also be looked at from the flipside of the collaborative coin—the side of the original creator. It is possible that, "[t]hose seeking copyrights would not seek further refinement that colleagues may offer if they risked losing their sole authorship." *Erickson v. Trinity Theatre*, 13 F.3d 1061, 1069 (7th Cir. 1994).

<sup>3</sup> See *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998). The Second Circuit hears a majority of the copyright appeals, and therefore, is particularly influential regarding the establishment of precedent within the discipline. See Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 194 (2001) (citing H.R. REP. NO. 94-1476, at 121 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736-37).

<sup>4</sup> *Arts Law Memo, The Making of A Successful Collaboration*, available at <http://www.vlaa.org/pdfs/TheMaking.pdf> (last visited Dec. 20, 2001) [hereinafter *Arts Law Memo*].

emergence of the abstruse dramaturg.<sup>5</sup> More than ever, American theater is looking to copyright law for guidance and structure in defining the roles and rights of such collaborations. However, the statutory language and judicial interpretation of the United States copyright law have failed to provide definitive answers and adequate authority. A clear definition and understanding of joint authorship is necessary in order to comply with relevant constitutional enumerations.<sup>6</sup> Yet, the United States copyright law remains vague, inadequate and ineffectual.<sup>7</sup>

Already a disconcerting area of copyright law, the muddled

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<sup>5</sup> Although the dramaturg originated in Eighteenth century Germany, it did not become a visible force in American theater until an estimated fifteen years ago. See Robert Simonson, *'Rent' Dramaturg Sues Larson Estate*, BACKSTAGE, Dec. 6, 1996, at 1. "Dramaturg is a German word; the English equivalent is playwright or translator." Dan Burns, *An Interview with the Dramaturg for Cloud Nine*, at <http://people.clemson.edu/~cleyes/public.www/interview.htm> (last visited Mar. 7, 2001). The dramaturg's assimilation in the United States can be described as follows:

A dramaturg might help select a season at Lincoln Center, write a program note for a production of *Misalliance*, collaborate with a director on a new approach to *Midsummer Night's Dream*, work with a playwright like Tony Kushner on the creation of a new play, lead an after show discussion at the Goodman or prepare a new translation of a play by Marivaux. She might work at a regional theatre in Washington, D.C., a high school in the Midwest, or with a dance company in Germany. Films have listed dramaturgs in their credits; puppeteers have employed their expertise. Individuals might study for the position in a graduate program at Yale . . . . As role or function, dramaturgy often traces its origins to eighteenth century Germany but it has antecedents throughout theatre history (East and West); the function itself is probably as old as theatre and fundamentally inseparable from it. Some of the best dramaturgs are actors, directors, designers, playwrights, play-doctors, and producers, even though they might not use this word to describe what they do. Dramaturgy might be performed by a single individual or by an entire production ensemble. Its close cousin and some would even say identical twin in America is the literary manager.

Few terms in contemporary theatre practice have consistently occasioned more perplexity. Individuals who find themselves listed as dramaturgs on theatre programs grow tired of explaining just what it is they do whether they are talking with someone who has never been in a play or to one of their fellow professionals . . . . [T]he injection of the idea of the dramaturg and dramaturgy into American theatre and the effort to come to terms with just what this term might mean for the ways in which we make plays is one of the most significant developments in American theatre in the last quarter of the twentieth century. It has created a space where academic and professional theatre makers (often opposed to one another in American culture) can meet and exchange energies.

SUSAN JONAS ET AL., INTRODUCTION, *DRAMATURGY IN AMERICAN THEATRE: A SOURCE BOOK* (Harcourt Brace College Publ'g. 1996).

<sup>6</sup> See U.S. CONST. art. I, § 8, cl. 8. The United States Constitution 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." *Id.*

<sup>7</sup> See Copyright Act of 1976, 17 U.S.C. §§ 101, 201(a) (1999). Section 101 defines joint work as, "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." *Id.* § 101. Section 201(a) addresses initial ownership by stating, "[t]he authors of a joint work are co-owners of copyright in the work." *Id.* § 201(a).

conception of joint authorship has reached its zenith. American theater has not been able to find any comfort in the determinations made by its judicial system. The courts have refused to explicate the legal implications of collaborative efforts, and subsequently, have neglected to provide default joint authorship provisions for unusual or exceptional situations.<sup>8</sup>

Most recently, and more specifically, the *Rent* decision has served to highlight the need for a clearer "Joint Authorship Default Rule."<sup>9</sup> The Second Circuit's uncertainty on the law was illustrated by its recognition of, *but refusal to address*, the issue of a non-joint author's interest in her individual contributions.<sup>10</sup> The question raised, but not answered, was whether a contributor of copyrightable material retains an independent interest as a sole author of her contributions, even if the evidence does not establish joint authorship.<sup>11</sup> Had the Second Circuit attempted to answer the aforementioned question, it would have found itself searching to no avail within the statutory language of the Copyright Act. Unfortunately, joint authorship provisions, as they currently exist, do not provide stipulations necessary to address the American dramaturg collaboration.<sup>12</sup> Thus, the *Rent* decision has left the theater world still unclear in its attempt to define the roles and rights of the dramaturg.<sup>13</sup> When artists collaborate, "there may be additional challenges revolving around credit, compensation, and control. Unfortunately, the law does not always coincide with how artists view their collaborative relationships."<sup>14</sup> As the dramaturg begins to establish itself as a more fundamental and conventional part of the American theater team, United States copyright law must respond accordingly.

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<sup>8</sup> "[T]he prevailing judicial gloss on the joint works definition leads to uncertainty and unfairness in determining which creative collaborators are entitled to enjoy the economic and moral rights of authorship." LaFrance, *supra* note 3, at 194 (critiquing prevailing joint authorship analysis and proposing an alternative approach).

<sup>9</sup> See generally Thomson, 147 F.3d 195. "The central ethical issue is that of collaborators in the theater being equitably remunerated for labor contributed." Letter from Tony Kushner, Craig Lucas, Morgan Jenness, Mark Bly, and Anne Cattaneo (members of the theater community), available at [dramaturgy.net](http://dramaturgy.net), *Rent: The Trial*, at <http://www.dramaturgy.net/RENT/Note.html> (last visited Dec. 20, 2001).

<sup>10</sup> See Thomson, 147 F.3d at 206; see also Recent Cases, *Copyright-Joint Authorship-Second Circuit Holds That Dramaturg's Contributions To The Musical Rent Did Not Establish Joint Authorship With Playwright-Composer*—Thomson v. Larson, 112 HARV. L. REV. 964, 966 (1999) [hereinafter Recent Cases].

<sup>11</sup> See *United States-Joint Authorship Not Intended In Dramaturg's Work on Rent*, 12 WORLD INTEL. PROP. REP. 270 (1998); see also Thomson, 147 F.3d at 195.

<sup>12</sup> See generally 17 U.S.C. §§ 101, 201 (a).

<sup>13</sup> See Greg Evans, *Court Evicts Lawsuit Over 'Rent' Control*, DAILY VARIETY, July 28-Aug. 3, 1997, at 61.

<sup>14</sup> *Arts Law Memo*, *supra* note 4.

Upon a comparative analysis of Anglo-American copyright law's joint authorship provisions,<sup>15</sup> and an ultimate determination of its ineffectual guidance in solving this legal question, this Note will tender a response to the question left unanswered in the Second Circuit's *Rent* decision by proposing a "Joint Authorship Default Rule" amendment to the current Copyright Act.

Part I of this Note will provide a brief synopsis of the *Rent* story. Part II will serve to delineate the present state of joint authorship in United States Copyright law. Specifically, it will provide a brief history of the law, the current school of thought regarding the evaluation of joint authorship, the judicial interpretation of joint authorship and collaboration, and finally, an analysis of the *Rent* decision and its flawed judgment. Part III will explicate the current joint authorship law of other Anglo-American countries and speculate as to whether or not the *Rent* decision and United States copyright law could benefit from their example. Namely, this part will highlight that these other Anglo-American countries, and their respective legal approaches to collaborative efforts in artistic works, are unable to remedy the current ambiguity embedded in the language of United States copyright law. Part IV will explore alternate solutions that have already been proposed and highlight their respective shortcomings. Furthermore, and most importantly, this section will propose to amend the United States Copyright Act's Joint Works provision to include a "Joint Authorship Default Rule" establishing a type of rebuttable presumption of joint authorship modeled from one of the aforementioned, already-existing proposals, but firmly rooting itself in statutory law. This section will create a paradigm from which the United States may fashion such a rule, and in effect, answer the unanswered question of the *Rent* decision. Ultimately, Part V will conclude by reiterating the import of the communal spirit of theater and the need to statutorily resolve any uncertainty that exists in the joint authorship provisions of the United States Copyright Act.

## I. THE STORY BEHIND THE STORY: *RENT*'S JOURNEY TO BROADWAY

From the outset, the development of the Broadway musical *Rent* relied upon collaboration. In attempt to update Puccini's *La Bohème*, playwright Billy Aronson set the musical in New York City focusing on the lives of downtown Bohemians struggling and cop-

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<sup>15</sup> Specifically, this Note will discuss the copyright laws of the United Kingdom and Canada, as well as their respective joint authorship provisions.

ing with the AIDS virus.<sup>16</sup> Recognizing his need for a composer, Aronson teamed up with Jonathan Larson, and in 1989, the two commenced the creation of *Rent*.<sup>17</sup>

In 1993, the Aronson-Larson collaboration ended in a formal written agreement.<sup>18</sup> Aronson granted Larson permission to finish the play without him, so long as Larson promised that “the title will always be *Rent*, a rock opera by Jonathan Larson. Original concept and additional lyrics by Billy Aronson.”<sup>19</sup> In addition, Aronson forfeited any claims of co-authorship.<sup>20</sup>

Larson went to the New York Theater Workshop with his script and developed the play over the next two years.<sup>21</sup> Throughout this time, Larson continuously refused to accept the aid of any collaborators.<sup>22</sup> But, after poor feedback from theater industry experts, Larson reluctantly agreed to hire someone “who was not an acknowledged co-author” but whose work with Larson would incorporate writing.<sup>23</sup> With the play still requiring work, the Workshop’s artistic director, James Nicola, felt that the most effective way to bring this play to a commercially-produceable level was to hire a dramaturg.<sup>24</sup>

In June of 1995, Lynn Thomson entered into a contractual agreement with the New York Theater Workshop to assist Larson

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<sup>16</sup> See Brief for Appellant at 4, *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998) (No. 97-9085), available at [dramaturgy.net](http://www.dramaturgy.net), *Rent: The Trial*, at [http://www.dramaturgy.net/RENT/](http://www.dramaturgy.net/RENT/Appeal-Brief.html#N_2_) (last visited Dec. 20, 2001) [hereinafter Brief for Appellant].

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> *Id.*

<sup>20</sup> See *id.* Ultimately, Aronson’s involvement concluded with a transfer of his copyright interests to Larson’s heirs in exchange for four percent of the author’s share of royalties. See *id.*; see also Faye Buckalew, *Joint Authorship In The Second Circuit: A Critique Of The Law In The Second Circuit Following Childress v. Taylor and as Exemplified in Thomson v. Larson*, 64 BROOK. L. REV. 545, 549 (1998).

<sup>21</sup> See Brief for Appellant, *supra* note 16, at 5. The New York Theater Workshop, the initial sponsor of *Rent*, is a not-for-profit theater company that sought to help Larson develop and restructure his script.

[These] such theaters provide constant nourishment, guidance and input from a full-time staff, dedicated to restructuring and reworking the musical. These are invariably not-for-profit theaters, which have now become the birth-mothers of most major successful New York commercial productions. Of the current shows on Broadway, which are neither revivals nor had their origin in England, 50 percent originated in a regional or a not-for-profit theater.

Alvin Deutsch, *La Boheme-Revisited*, 45 J. COPYRIGHT SOC’Y U.S.A. 652, 656 (1998).

<sup>22</sup> See Brief for Appellant, *supra* note 16, at 5.

<sup>23</sup> *Id.* at 6; see also Buckalew, *supra* note 20, at 550. In addition to Larson’s contribution as the playwright, several other collaborators helped develop *Rent* into a critical, artistic, and commercial success. “These collaborators included the artistic director of the New York Theater Workshop, the show’s director, and Lynn Thomson, the dramaturg.” Lee, *supra* note 1, at 75.

<sup>24</sup> See Lee, *supra* note 1, at 75.

in developing *Rent* for Broadway.<sup>25</sup> Thomson understood her intended contractual duties to be similar to those she had performed during her twenty years as a professional dramaturg.<sup>26</sup> Yet, the contractual language did not address the scope of Thomson's responsibilities.<sup>27</sup> In fact, the contract was silent on the subject of copyright and extended only to the production of *Rent* at the New York Theater Workshop.<sup>28</sup> Thomson, however, had no intention of giving up the copyrights in her work, as it related to the *Rent* project, to the New York Theater Workshop.<sup>29</sup>

Nevertheless, the Thomson-Larson collaboration resulted in the complete rewriting of the *Rent* script, as they mutually shared artistic control over the script's direction.<sup>30</sup> Their work together began to develop into a relationship more akin to that of joint authors than that of dramaturg to playwright.<sup>31</sup> In fact, testimony before the district court, which the court accepted as true, revealed that before *Rent* opened anywhere, Larson asked Thomson to work with him as *playwright*.<sup>32</sup> Larson assured Thomson, "I'll always acknowledge your contribution . . . . I would never say that I wrote what you did."<sup>33</sup> Larson's actions served to illustrate his sentiment.<sup>34</sup> For example, he gave credit to Thomson on the copyright page of the script.<sup>35</sup> Furthermore, Larson never asked Thomson to consider her contributions as a "work made for hire" nor did he request that she should transfer her copyright interests in the work.<sup>36</sup>

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<sup>25</sup> Lynn Thomson was a professor of advanced playwrighting at New York University. See *Thomson v. Larson*, 147 F.3d 195, 197 (2d Cir. 1998). At the suggestion of the New York Theater Workshop, Thomson was eventually hired, under contract to the Workshop—not Larson—to render services as a dramaturg. See Deutsch, *supra* note 21, at 652.

<sup>26</sup> See Brief for Appellant, *supra* note 16, at 7. "In most German theatres the chief dramaturg holds a position of considerable power and often dominates even the top man, the artistic director. . . . Often very sharp conflicts develop between them . . . ." Martin Esslin, *The Role of the Dramaturg in European Theatre*, in 10.1 THEATRE 48 (1978).

<sup>27</sup> The contract stated that Thomson's work would "include, but not be limited to services as a dramaturg." Brief for Appellant, *supra* note 16, at 7. This initial contract was apparently silent on the flow of rights.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*; see also Buckalew, *supra* note 20, at 551.

<sup>30</sup> See Brief for Appellant, *supra* note 16, at 8.

<sup>31</sup> See Buckalew, *supra* note 20, at 551.

<sup>32</sup> See Brief for Appellant, *supra* note 16, at 9.

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

<sup>34</sup> "Although business in the arts community is often conducted on a handshake and oral contract may be binding, movie mogul Sam Goldwyn was right when he said: 'A verbal contract is not worth the paper it is written on.'" *Arts Law Memo*, *supra* note 4.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.* A "Work Made For Hire" is defined as:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a

The Thomson-Larson collaboration began to payoff in September of 1995.<sup>37</sup> In drafting the final version of *Rent*, this creative duet “entirely rewrote or substantially altered” an estimated 1,212 of the 2,542 lines in the script.<sup>38</sup> As a result of this collaboration, nearly forty-eight percent of the script was totally new or significantly different.<sup>39</sup> In fact, Larson credited Thomson with “transforming the show.”<sup>40</sup> Thomson’s contributions were repeatedly acknowledged and revered as integral to the success of the finalized *Rent* script.<sup>41</sup>

Immediately prior to *Rent*’s triumphant Broadway debut, Larson unexpectedly passed away,<sup>42</sup> but expectedly, negotiations followed between Thomson and Larson’s heirs regarding the appropriation of royalties.<sup>43</sup> Larson’s heirs reportedly offered Thomson a “gift” of one percent of the author’s royalties.<sup>44</sup> When this offer was rejected, and negotiations broke down, Thomson sued the estate of Larson for sixteen percent of Larson’s share of the proceeds “because of her respect for Larson’s role as the principal creator of the work.”<sup>45</sup> The coupling of this monetary claim for royalties together with Thomson’s judicial request for a declara-

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collective work. . .if the parties agree in a written instrument signed by them that the work shall be considered a work made for hire.

Copyright Act of 1976, 17 U.S.C. § 101 (1999). The Copyright Act of 1976 rejected the long-standing “Implied Conveyance Theory” that when the party commissioning a work also had the power to supervise the creative process, that party had an implied conveyance of copyright. This refutation, in effect, “insured that copyrights would more often vest in the actual creators of a work rather than the parties that hired and supervised them.” LaFrance, *supra* note 3, at 195. That the doctrine of Implied Conveyance was eradicated, the likelihood *increased* that any given collaborative work would be found to have multiple authors under copyright law. *See id.* (citing *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1497 n.17 (D.C. Cir. 1988), *aff’d*, 490 U.S. 730 (1989) (predicting that the narrower scope of the “Work Made For Hire” doctrine under the 1976 Act would result in more multiple authorship disputes being litigated as joint authorship cases)).

<sup>37</sup> *See* Brief for Appellant, *supra* note 16, at 12.

<sup>38</sup> *Id.* at 11-12. Anne Cateneo of Lincoln Center and Susan Jonas of the New York State Council on the Arts characterized the transformation as one in which an “unproduceable draft [was made into a] major hit.” Buckalew, *supra* note 20, at 553 (quoting Brief for Appellant, *supra* note 16, at 12).

<sup>39</sup> *See* Brief for Appellant, *supra* note 16, at 12.

<sup>40</sup> *Id.* at 10. *Rent* subsequently won the 1996 Pulitzer Prize for Drama and Tony Award for the Best Musical. *See id.* at 11.

<sup>41</sup> Approximately nine percent of the new script was contributed exclusively by Thomson. *See id.* at 12. When it was announced that *Rent* had won the 1996 Pulitzer, Director Michael Grief remarked that “now is a good time for all of us to thank Lynn Thomson, who helped make this possible.” Buckalew, *supra* note 20, at 552 (quoting Brief for Appellant, *supra* note 16, at 11).

<sup>42</sup> After the show’s final dress rehearsal before the off-Broadway opening, Larson died of an aortic aneurysm. *See* Lee, *supra* note 1, at 75 n.3.

<sup>43</sup> *See* Buckalew, *supra* note 20, at 553.

<sup>44</sup> *See Arts Law Memo*, *supra* note 4.

<sup>45</sup> *Thomson v. Larson*, 147 F.3d 195, 198 n.11 (2d Cir. 1998) (quoting Brief for Appellant, *supra* note 16, at 49-50). The sixteen percent figure reflected Thomson’s belief that she was entitled to one-half of one-third of the royalties, since she contributed to at least



tion of her rights as a co-author of *Rent* thus created the legal battle that ensued, and that is also at issue in this Note.<sup>46</sup>

## II. JOINT AUTHORSHIP UNDER UNITED STATES COPYRIGHT LAW

### A. *Joint Authorship: A Brief Historical Overview*

The 1909 Copyright Act<sup>47</sup> never expressly referred to the concept of joint works or joint authorship.<sup>48</sup> Thus, common law served to establish the joint works principle.<sup>49</sup> At common law, a joint work was found even when two authors did not work together, did not make their contributions at the same time, and did not even know one another.<sup>50</sup> This broad application of joint works is evidenced by the Second Circuit's decision in *Edward B. Marks Music*

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one-third of the changes to the script. *See id.* This conclusion is derived in the following way:

[Thomson] alleges that 48 percent of the *Rent* script is new in relation to the 1994 Workshop version (prior to her involvement); as co-author, she is, therefore entitled to 50 percent of this part (or 24 percent of the total revenues); but since there are three components to *Rent* (book, lyrics, and music) and she did not contribute to one (music), she is entitled to 2/3, or 16 percent of the total revenues.

*Id.* Playwright Tony Kushner, for example, agreed to pay two dramaturgs more than *fifteen percent* of his royalties in recognition of their assistance with his Pulitzer Prize-winning play, *Angels in America*. *See Arts Law Memo, supra* note 4.

<sup>46</sup> It was reported on August 26, 1998, that a settlement in the Thomson-Larson dispute had been reached. "Lawyers for Thomson and the estate confirmed the settlement, which includes the money and a credit for Thomson as a dramaturge on the title page of the 'Rent' playbill." *CNN.com, Showbuzz*, at <http://www.cnn.com/SHOWBIZ/News/9809/10/showbuzz/> (last visited Dec. 20, 2001).

The heirs of Jonathan Larson finally . . . addressed the claims of Lynn Thomson regarding credit, royalties, and other issues concerning her participation in the writing and rewriting of *Rent's* script. The terms of the settlement are confidential and may not be disclosed by either side, pursuant to a court order. Nevertheless, it is safe to say that Lynn is glad the litigation finally is over. This marks the successful end of a heroic battle by a dramaturg who rightfully has been called the "Rosa Parks" of the theatre industry. Like Parks, Lynn Thomson refused to give up her place, either on the title page or in the royalty pool.

*The Rent Settlement*, at [http://www.talkinbroadway.com/rialto/past/1998/8\\_26\\_98.html](http://www.talkinbroadway.com/rialto/past/1998/8_26_98.html) (last visited Dec. 20, 2001).

<sup>47</sup> 17 U.S.C. § 24 (1909) (amended 1976).

<sup>48</sup> *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.01, at 6-3 n.1 (Matthew Bender & Co. 1998). The 1909 Copyright Act implicitly acknowledges that a copyright renewal can be jointly owned by more than one person, such as the author's children, executors, or next of kin. *See* 17 U.S.C. § 24.

<sup>49</sup> *See, e.g.,* *Levy v. Rutley*, 6 L.R.P.C. 523, 529 (Eng. P.C. 1871) (defining first a joint work as "a joint laboring in furtherance of a common design").

<sup>50</sup> *See, e.g.,* *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir.), *modified*, 140 F.2d 268 (2d Cir. 1944) (holding that the resulting song was a joint work because the lyricist intended his words to be set to music and the composer understood he was composing for particular lyrics). Subsequently, this definition was even more broadly applied in federal cases governed by the Copyright Act of 1909. *See, e.g.,* *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569 (2d Cir.), *modified on reh'g*, 223 F.2d 252 (2d Cir. 1955) (extending radically the joint work doctrine in holding a piano solo piece to be a joint work of the lyricist and composer). This case was also known as the "Twelfth Street Rag" case. *See* NIMMER, *supra* note 48, § 6.03, at 6-9.

*Corp. v. Jerry Vogel Music Co.*<sup>51</sup> The *Marks* court held that for a joint work to exist, "it makes no difference whether the authors work in concert, or even whether they know each other; it is enough that they mean for their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such."<sup>52</sup>

Under the 1976 Copyright Act, Congress attempted to narrow the definition of joint works.<sup>53</sup> Upon enacting such statutory provisions, to be considered a joint work, authors must have *intended* for their contributions to be merged into a common whole.<sup>54</sup> This language implies that either the act of collaboration alone, or the authors' knowledge and intent to merge their contributions, is sufficient to create a joint work.<sup>55</sup> Also, the definition of a joint work implicitly defined the concept of joint authorship, whereby "authors of a joint work [would be] co-owners of copyright in the work."<sup>56</sup> This entitles joint owners of a work to maintain equal and undivided interests in the whole work.<sup>57</sup> In other words, each joint

<sup>51</sup> 140 F.2d 266 (2d Cir. 1944). In *Marks*, a lyricist wrote the original words for unwritten music, and his publisher subsequently employed a composer to write the music. *See id.* at 267.

<sup>52</sup> *Id.*

<sup>53</sup> *See* Copyright Act of 1976, 17 U.S.C §§ 101, 201(a) (1999). The 1976 Copyright Act became effective on January 1, 1978. Thus, the 1909 Copyright Act governed through December 31, 1977. *See* NIMMER, *supra* note 48, § 6.06[A], at 6-17 n.3.

<sup>54</sup> *See* 17 U.S.C. § 101 (emphasis added); *see also* H.R. REP. NO. 94-1476, at 121 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5735 (stating that the "touchstone of the statutory definition is the intention at the time the writing is done that the parts be absorbed or combined into an integrated unit").

<sup>55</sup> The 1976 Act's legislative history is inconsistent with the statute's plain language. The legislative history employs the "collaboration alone" standard. *See* H.R. REP. NO. 94-1476, at 120. It allows a joint work to result from mere collaboration rather than from an intent to merge each author's contribution. *See id.* Yet, the statute states that joint authors must create their work while knowing that it will be merged into a whole. *See* 17 U.S.C. § 101; *see also* *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1069 (7th Cir. 1994) (holding that company actors who assisted in developing a playwright's three plays were *not* joint authors). The legislative history's "collaboration alone" requirement has the potential to discourage authors from writing since mere editorial comments by third parties could divest an author of his sole authorship. *See Erickson*, 13 F.3d at 1069. This notion of collaboration would be destroyed since it could too easily result in unwelcomed joint authorship. *See id.* This standard for joint authorship frustrates the goal of the Constitution's copyright clause. *See id.*

<sup>56</sup> 17 U.S.C. § 201(a); *see also* Lee, *supra* note 1, at 83. However, the concept of a joint work is broader than that of joint authorship because not all joint works are necessarily products of joint authorship.

<sup>57</sup> *See* 17 U.S.C. § 201(a). It is important to distinguish joint works from derivative and collective works. A derivative work is a "work based upon one or more preexisting works, such as a translation, [or] musical arrangement." *Id.* § 101. A collective work is a "work, such as a periodical issue . . . in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." *Id.* Derivative and collective works do not require authors to intend to create a joint work. This distinction of joint works from derivative and collective works is essential because it determines the rights an author will acquire. The former authors own equal and undivided interests in the entire

author has the right to use or license the work as they so desire, subject only to the obligation that they share any profits with the other joint authors.<sup>58</sup> “Perhaps the most significant legal consequence of joint authorship is joint ownership, under which the 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.”<sup>59</sup> For the time being, the enactment of Sections 101 and 201(a) of the Copyright Act of 1976 allowed the notion of joint authorship to become a more palpable and comprehensible legal concept.

### B. *How To Evaluate the Contributions of Joint Authors*

Courts are split in evaluating the contributions of authors who claim joint authorship status.<sup>60</sup> Federal courts have demonstrated their own concern with the breadth of the Copyright Act of 1976’s definition of “joint works,” and have created several tests for determining which “creative contributions rise to the level of joint authorship.”<sup>61</sup> The minority approach requires that the *combined* result of the joint collaborative efforts be copyrightable.<sup>62</sup> Conversely, and more stringently, the majority approach requires that the individual contribution of *each* joint author be copyrightable.<sup>63</sup>

#### 1. The Nimmer Approach: A Minority Proposition

In his interpretation of the Copyright Act of 1976, Professor Melville Nimmer asserts that each contribution be merely “more than *de minimis*” or that “more than a word or a line . . . be added.”<sup>64</sup> Nimmer argues that it is not legislatively necessary to require both collaborators to provide separate copyrightable contributions to a work for them to be considered joint authors.<sup>65</sup>

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work, while the latter authors own only their respective contributions. See Lee, *supra* note 1, at 75.

<sup>58</sup> See *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991); see also *Community For Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988) (“Joint authors co-owning copyright in a work are deemed to be tenants in common, with each having an independent right to use or license the copyright, subject only to a duty to account to the other co-owner for any profits earned thereby.”).

<sup>59</sup> LaFrance, *supra* note 3, at 193.

<sup>60</sup> See, e.g., *Erickson*, 13 F.3d at 1069; *Childress*, 945 F.2d at 506.

<sup>61</sup> LaFrance, *supra* note 3, at 193-94.

<sup>62</sup> Professor Melville Nimmer supports this proposition. See 1 NIMMER & NIMMER, *supra* note 48, § 6.07, at 6-23.

<sup>63</sup> Paul Goldstein supports this approach. See PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW & PRACTICE, § 4.2.1.2 (1994).

<sup>64</sup> 1 NIMMER & NIMMER, *supra* note 48, § 6.07, at 6-23. Non-de minimis (“not of a minimum”) in this context refers to more than a minimum amount of contributions. See *id.*

<sup>65</sup> See *id.*

It is possible for two people to be joint authors even if only one provides separate copyrightable material, so long as the other author provided some substantial contribution of a creative nature to the work.<sup>66</sup>

This minority approach is not without its share of criticism. Since this view does not require each individual contribution to be copyrightable, an individual need only provide more than a *de minimis* contribution to be deemed a joint author. This collaboration standard has the potential to “chill the creative process” since authors would hesitate to ask for assistance in developing their projects out of fear that any help received may result in a joint authorship relationship.<sup>67</sup>

Another shortcoming of the Nimmer view is the inherent ambiguity in determining the *non-de minimis* standard. There is little guidance in assessing whether a contribution rises to the level of joint authorship. Despite both the quantity and the quality of the contributions that must be taken into consideration, there is no definitive way to quantify what constitutes more than *de minimis*.<sup>68</sup> Thus, courts would likely end up with dissimilar interpretations of what counts as “more than a word or line.”<sup>69</sup> The ambiguity of the “Nimmer Approach” could cause artists to resist collaboration for fear of difficulties in predicting how joint authorship claims would be resolved.

## 2. The Goldstein Approach: A Majority Proposition

The Register of Copyright, as well as a majority of the courts, support Goldstein’s view that *each* contribution must be independently copyrightable.<sup>70</sup> Though textual support for Goldstein’s approach is lacking (the Copyright Act does not explicitly mention that each contribution to a joint work must be copyrightable), common law has chosen to embrace and employ its principles.<sup>71</sup> By requiring copyrightable contributions from all putative authors, the Goldstein approach prevents frivolous claims instituted by those seeking to share the profits of a work, in effect, created by a sole author.<sup>72</sup>

In the absence of a contract providing otherwise, copyright

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<sup>66</sup> See Buckalew, *supra* note 20, at 546 n.5.

<sup>67</sup> See *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1070 (7th Cir. 1994).

<sup>68</sup> See *id.*

<sup>69</sup> 1 NIMMER & NIMMER, *supra* note 48, § 6.07, at 6-23.

<sup>70</sup> See, e.g., *Erickson*, 13 F.3d at 1065; *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991); *Cabera v. Teatro Del Sesenta, Inc.*, 914 F. Supp. 743, 764 (P.R. 1995).

<sup>71</sup> See *Childress*, 945 F.2d at 506.

<sup>72</sup> See *id.* at 507.

vests in only those authors who created the copyrightable contributions.<sup>73</sup> As the Second Circuit remarked in *Childress v. Taylor*,<sup>74</sup> Copyright law best serves the interest of creativity when it “carefully draws the bounds of ‘joint authorship’ so as to protect the legitimate claims of both sole authors and co-authors.”<sup>75</sup> The “Goldstein Approach,” in requiring that all contributions to an artistic work be independently copyrightable, effectively protects such interests.

C. *The Judicial Approach to Collaboration:  
Determining Joint Authorship*

1. *The Childress Test*

a. *Factual Background*

*Childress v. Taylor*<sup>76</sup> set precedent in the Second Circuit regarding the definition of “joint authorship” under the auspices of the Copyright Act of 1976. The *Childress* case remains the controlling law for determining the copyright interests in an artistic work in holding that not every individual who contributes to the creative process should be granted joint authorship status.<sup>77</sup> The *Childress* court fashioned a two-pronged test to determine whether the plaintiff was a joint author of the resulting play. The test, habitually employed in other jurisdictions, requires that each putative author: (1) make an independently copyrightable contribution, and (2) intend to regard each other as joint authors at the time the work was created.<sup>78</sup>

Incorporating the Goldstein approach, the independently copyrightable prong of the *Childress* test requires that each author contribute, what amounts to, a copyrightable original work of authorship to the final project.<sup>79</sup> Since the plaintiff in *Childress* simply offered advice, her contribution did not amount to independently copyrightable material, and as such, the court held that she failed to satisfy the first prong of the test.<sup>80</sup>

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<sup>73</sup> See *id.* A person who contributes non-copyrightable material to a copyright owner can contractually agree to collaborate for an assignment of part ownership in the copyright. See *id.*

<sup>74</sup> *Id.* at 500.

<sup>75</sup> *Id.* at 504.

<sup>76</sup> *Id.* at 500. In *Childress v. Taylor*, actress Clarice Taylor developed an idea for a play and hired playwright Alice Childress to write it. Taylor’s contribution consisted of assembling research materials, conducting interviews with people upon whom the play’s characters were based, and recommending that certain scenes and characters be included. See *id.* at 502.

<sup>77</sup> See *id.* at 501.

<sup>78</sup> See *id.* at 509.

<sup>79</sup> See *id.* at 506; see also GOLDSTEIN, *supra* note 63, § 4.2.1.2.

<sup>80</sup> See *Childress*, 945 F.2d, at 507. “To the extent that the plaintiff made creative sugges-

The mutual intent prong is clearly the more controversial. The legislative history of the Copyright Act of 1976 requires only intent and knowledge that the contribution be merged into a unitary whole.<sup>81</sup> Yet, the Second Circuit in *Childress* heightened the scrutiny by questioning whether “each participant intended that all would be identified as co-authors . . . [and] how the parties implicitly regarded their undertaking.”<sup>82</sup> In order to obtain joint authorship status, artists must have regarded each other as joint authors, whether or not they fully appreciated the legal ramifications of that relationship.<sup>83</sup> The *Childress* definition is clearly a more stringent application of the mutual intent prong than earlier employed. It takes this concept of intent beyond a mere superficial interpretation and narrows it to a specific understanding of the relationships among the contributors to an artistic work.

In the absence of a contractual agreement allocating authorship interests, the *Childress* test requires the court to consider certain secondary factors such as decision-making authority, billing, and credit so as to determine whether the artists at issue *intended* to regard each other as joint authors.<sup>84</sup> Upon applying this stringent “mutual intent” prong, the *Childress* Court held that neither plaintiff’s nor defendant’s conduct supported the claim that they intended to regard each other as joint authors at the time the play was created.<sup>85</sup>

#### b. Flaws Latent Within the *Childress* Test

Looking at the *Childress* test and its progeny is informative as it illustrates that the recent influx of joint authorship lawsuits are arising in the context of new play development, a highly collaborative process.<sup>86</sup> The *Childress* court had deemed its test as finding “an appropriate balance in the domains of copyright and contract

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tions to the play, her efforts fall far short of that ‘substantial and significant contribution’ which is required to reach a finding of joint ownership.” *Id.* More recently, the Ninth Circuit in *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000), despite appearing to observe the Second Circuit’s analysis of joint authorship disputes, impliedly suggested that the independently copyrightable contribution made by a supposed collaborator must satisfy the test of “originality” more stringently than the originality test for the copyright of a work of individual authorship. *See id.* at 1232-34. It should be noted that the Ninth Circuit test for a joint work “requires each author to make an independently copyrightable contribution” to the disputed work.” *Id.* at 1231 (quoting *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990)).

<sup>81</sup> *See Lee*, *supra* note 1, at 89 (citing *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994)).

<sup>82</sup> *Childress*, 945 F.2d at 508.

<sup>83</sup> *See id.*

<sup>84</sup> *See id.*

<sup>85</sup> *See id.*

<sup>86</sup> *See Lee*, *supra* note 1, at 92; *see also* discussion *infra* Part II.C.2.b.

law.<sup>87</sup> However, the *Childress* two-pronged test is not without its deficiencies. In its effort to protect the rights of authors, this test has the potential to deny a person the copyright in his/her own artistic contributions.<sup>88</sup> As a result, the question has been raised as to whether the *Childress* test should, in fact, be applied uniformly to all types of collaborative relationships.<sup>89</sup>

## 2. The Second Circuit's *Rent* Decision

### a. The Facts

Before *Rent*'s Broadway opening, Thomson signed a contract with the show's Broadway producers, who agreed to pay her \$10,000, plus \$50 per week, in exchange for her dramaturgical services.<sup>90</sup> Furthermore, Thomson requested a percentage of the royalties derived from the play from Larson's heirs, yet negotiations between the parties failed to reach a final agreement.<sup>91</sup> As a result, Thomson brought suit against the Larson Estate raising two independent claims: (1) that *Rent* was in fact a joint work, which Thomson co-authored, and therefore was entitled to sixteen percent of Larson's share of the royalties;<sup>92</sup> and, (2) in the alternative, even if

<sup>87</sup> *Childress*, 945 F.2d at 507.

<sup>88</sup> See Buckalew, *supra* note 20, at 580; see also *BTE v. Bonnezaze*, 43 F. Supp. 2d 619, 1999 U.S. Dist. LEXIS 4895 (E.D. La. 1999) (holding that a former drummer for the rock band "Better Than Ezra" was not a joint author of his band's songs since they were not fixed in tangible form). The band conceded that Bonnezaze was the joint author of the Better Than Ezra recordings on which he played. See *id.* at 628. Yet, Bonnezaze further claimed he was a joint author of the songs the band had recorded, and thus was entitled to part of the songwriter's mechanical royalties (as well as his share of recording artist royalties). See *id.* at 621. Applying the *Childress* test, the court determined that Bonnezaze collaborated in the creation by making valuable contributions to nothing more than the "rough drafts" supplied by the lead vocalist. See *id.* at 627. Bonnezaze's contributions had to be independently copyrightable, and as such, among other things, his contributions had to be fixed in a tangible medium of expression. See *id.* at 628. The court held the contributions were not fixed, as there is an important distinction between the copyright in a song and the copyright in the recording of that song. See *id.* at 627. The judge stated, "The sound recordings of the songs cannot serve as the tangible form required for Bonnezaze to meet the independently copyrightable test required for proving joint authorship." *Id.* at 628.

<sup>89</sup> See Buckalew, *supra* note 20, at 580.

<sup>90</sup> See *Thomson v. Larson*, 147 F.3d 195, 198 (2d Cir. 1998). This was Thomson's second contract. Her first was a written agreement with the New York Theater Workshop. It should be noted, though, that neither of Thomson's contracts were with Larson.

<sup>91</sup> See *id.* Thomson's lawyers argued that:

None of [the *Rent* producers] ever has paid (or ever has offered to pay) [Thomson] any portion at all from the many millions of dollars in profit which they have reaped from the commercial exploitation of the script which she co-wrote. (Gross receipts are already in excess of \$150 million.). None of the persons and entities profiting from Lynn's work have offered even to enter into negotiations on the subject, despite numerous good faith efforts on her part to reach a reasonable accommodation.

*Introductory Note By Attorneys For Lynn Thomson*, at <http://www.dramaturgy.net/RENT/Oral-Intro.html> (last visited Jan. 8, 2002) (on file with author) [hereinafter *Introductory Note*].

<sup>92</sup> See discussion *supra* note 45.

she was not found to be a joint author, Thomson automatically retained an exclusive copyright interest in the artistic material she contributed to creation of the Broadway-ready version of *Rent*.<sup>93</sup>

The Second Circuit began its analysis by raising the issue of “whether what happened between Lynn Thomson and Jonathan Larson met the statutory definition . . . of a joint work.”<sup>94</sup> In order to answer this question, the Second Circuit applied the *Childress* joint authorship doctrine. Upon finding in favor of the Larson family, the *Rent* court held, with regard to Thomson’s first claim, that Thomson was clearly not a joint author.<sup>95</sup> Though the court acknowledged her independently copyrightable contributions as a dramaturg,<sup>96</sup> in the absence of a written contract or a finding mutual intent to be co-authors,<sup>97</sup> Thomson could not be considered a joint author with Larson under the *Childress* test.<sup>98</sup>

Thomson’s second claim, regarding owning the copyright in a non-joint author’s contribution to a work (in the absence of any written contract), was purposely not addressed. Since Thomson did not plead infringement of any such putative copyright interest, this second claim was not properly before the court, and therefore went undetermined.<sup>99</sup>

#### b. The *Childress* Test as Applied to the *Rent* Decision

The independently copyrightable prong raises concern over Thomson’s role in the creation of this Broadway musical. Analysis of Thomson’s individual contributions to *Rent* results in her indisputable satisfaction of the independently copyrightable prong of the *Childress* test.<sup>100</sup> Thomson and Larson significantly revised the script together. Thomson developed the plot and theme, contributed to the story, developed some characters, and re-wrote a significant portion of the dialogue and lyrics.<sup>101</sup> Experts deemed

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<sup>93</sup> See *Thomson*, 147 F.2d at 196.

<sup>94</sup> *Id.* at 205.

<sup>95</sup> See *id.* at 196.

<sup>96</sup> See *id.* 200-01.

<sup>97</sup> See *id.* at 205.

<sup>98</sup> See *id.* at 200-01.

<sup>99</sup> See *id.* at 196, 206. Thomson later brought a suit on infringement grounds against a number of defendants, including the Larson estate. The case settled on undisclosed terms as the heirs of Jonathan Larson eventually addressed the claims of Lynn Thomson regarding credit, royalties, and other issues concerning her participation in the writing and re-writing of *Rent*’s script. See Jesse McKinley, *Family of ‘Rent’ Creator Settles Suit Over Authorship*, N.Y. TIMES, Sept. 10, 1998, at B3. See *supra* note 46.

<sup>100</sup> See *Thomson*, 147 F.2d at 200-01. “Without making specific findings as to any of Thomson’s claims regarding lyrics or other contributions, the district court concluded that Thomson ‘made at least some non-de minimis copyrightable contribution.’” *Id.* at 200.

<sup>101</sup> See *id.* at 198 n.10.



Thomson and Larson's collaborated version of *Rent* as a "radical transformation of the show."<sup>102</sup> Thomson clearly contributed original artistic work, and as a result, the court concluded that her contributions to the *Rent* libretto were "certainly not zero."<sup>103</sup>

With regard to the mutual intent prong of the *Childress* test, the court found that Larson never intended to have a joint authorship relationship with anyone, including Thomson.<sup>104</sup> In the absence of a written agreement between Thomson and Larson, the court found itself focusing on whether Thomson and Larson had the requisite mutual intent that *Rent* be a joint work at the time of its creation.<sup>105</sup> Although neither billing nor credit is considered decisive, the court stated that these secondary factors are a "window [into] the mind of the party who is responsible for giving the billing or the credit" and "[a] writer's attribution of the work to [himself] alone is persuasive proof that [he] intended [the work] to represent [his] own individual authorship."<sup>106</sup> Thus, the Second Circuit turned to an examination of the factual indicia of ownership and authorship relevant to the case.<sup>107</sup>

An important indicator of authorship is a contributor's decision-making authority over what changes are made and what is included in a work.<sup>108</sup> It was determined that Larson retained final decision-making authority over the script in part because a November agreement between Larson and the New York Theater Workshop expressly stated that Larson had the final approval over all changes to *Rent* and that all such changes would become Larson's

<sup>102</sup> *Id.* at 198.

<sup>103</sup> *Id.* at 201 (quoting Judge Kaplan of the district court). Judge Kaplan stated that "there are lines in *Rent* that originated verbatim with Ms. Thomson. I don't think they amount to 9 percent, and certainly not zero. There is probably enough there that it is not *de minimis*." *Id.* at 201 n.14 (quoting Judge Kaplan of the district court).

<sup>104</sup> *See id.* at 204. In response, Thomson raised several cases in which collaborators that were found to be statutory joint authors had no subjective idea that they would eventually be deemed co-authors entitled to equal rights in the work. *See, e.g.,* Community For Creative Non-Violence v. Reid, 490 U.S. 730, 753 (1989) (suggesting, in dicta, that two self-alleged sole authors might be held to be joint authors if they "prepared the work 'with the intention that their contribution be merged into inseparable or interdependent parts of a unitary whole'" (internal citation omitted)); *Easter Seal Soc. for Crippled Children & Adults, Inc. v. Playboy Enters.*, 815 F.2d 323, 337 (5th Cir. 1987) ("Although the parties have refused to acknowledge it . . . it seems clear to us that [their contributions] were interdependent joint works of authorship."); *Strauss v. Hearst Corp.*, 1988 U.S. Dist. LEXIS 1427, 8 U.S.P.Q.2d (BNA) 1832, 1837 (S.D.N.Y. 1988) (finding co-authorship despite one party's denial of co-authorship intent).

<sup>105</sup> Because Thomson testified as to her intent, the court's analysis focused on whether Larson, who passed away before the filing of the suit, intended to regard Thomson as a joint author. *See Lee, supra* note 1, at 106 n.187 (citing *Thomson*, 147 F.3d at 198).

<sup>106</sup> *Thomson*, 147 F.3d at 203 (quoting *Weissman v. Freeman*, 868 F.2d 1313, 1320 (2d Cir. 1989)).

<sup>107</sup> *See id.* at 202.

<sup>108</sup> *See id.* at 202-03.

property.<sup>109</sup>

Thomson argued that Larson's decision to credit her as "Dramaturg" on the final page of the *Rent* scripts reflected some co-authorship intent.<sup>110</sup> However, Thomson was never billed as co-author; Thomson even conceded that she never sought equal billing with Larson.<sup>111</sup> The court concluded that the "manner in which [Larson] listed credits on the scripts strongly supports the view that he regarded himself as the sole author."<sup>112</sup>

A party's agreement with outsiders can provide insight into co-authorship intent, although to a somewhat more attenuated degree.<sup>113</sup> Larson's agreement with the New York Theater Workshop indicated his intention to remain the show's sole author.<sup>114</sup> In addition to maintaining exclusive credit for the authorship of *Rent*, Larson also designated himself the sole author of the new revisions in all subsequent contracts with the New York Theater Workshop.<sup>115</sup> That Larson entered into such contracts without Thomson's consent indicates that he did not regard her as a joint author.<sup>116</sup> Moreover, Larson agreed to an option deal specifying that all royalty payments were to flow to him as the "Author."<sup>117</sup> This agreement did not even mention Thomson.<sup>118</sup> As a result, the court concluded that Thomson failed to meet the requirements of the mutual intent prong.<sup>119</sup>

The Second Circuit's determination of Thomson's failure to satisfy the mutual intent prong allowed for a finding against Thomson's joint authorship claim.<sup>120</sup> Although the *Rent* court correctly applied the *Childress* joint authorship test, its decision brings to light the flaws inherent in the *Childress* doctrine.<sup>121</sup> Thomson, herself, remarked that this case is "the first case in which a contributor

<sup>109</sup> See *id.* at 203.

<sup>110</sup> See *id.* Thomson claimed that this "unprecedented" credit on the copyright page of the script distinguishes her role from that of Larson's many other collaborators. See *id.* at 203 n.23.

<sup>111</sup> See *id.* at 203.

<sup>112</sup> *Id.* at 204.

<sup>113</sup> See *id.*

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See *id.* Responding to the Larson heirs' argument that Thomson was intentionally left out of the authorship contracts and therefore does not have authorship rights of any kind, Judge Bright noted, "[t]o tell you the truth . . . your argument . . . is about 180 degrees away from the language of the Copyright Act, when you're saying that the dramaturg or whoever contributes has to have a contract in doing business with the primary author. I don't read the cases that way, and I don't read the copyright law that way." *Id.*

<sup>117</sup> *Id.* at 204 n.26.

<sup>118</sup> See *id.* at 204.

<sup>119</sup> See *id.* at 205.

<sup>120</sup> See *id.* at 206-07.

<sup>121</sup> See Recent Cases, *supra* note 10, at 966.

of non-de minimis copyrightable material has co-created a joint work within the statutory definition, yet has been denied the rights of joint authorship."<sup>122</sup> Upon its determination of Thomson's failure to satisfy the mutual intent requirement, the court's analysis revealed that Thomson did in fact contribute independent copyrightable material to *Rent*.<sup>123</sup> Yet, this finding was left unaddressed.<sup>124</sup> Satisfaction of one prong of the *Childress* test, but not the other, was a scenario that both the current statutory and common law were not prepared to resolve. "The *Childress* court itself acknowledged that assessing a collaborator's contributions can prove to be 'troublesome' and adopted its copyrightability prong with admitted hesitance."<sup>125</sup>

The dissimilarity of the facts in the *Rent* and *Childress* cases highlight additional flaws in the test, and raise concern over whether or not the *Childress* test should have been applied without any modification. The *Rent* decision is merely the latest in a series of judicial indications that the *Childress* two-pronged joint authorship test is inadequate.<sup>126</sup> Thus, in addition to the application of the *Childress* test, the effects of stringently applying it to collaborative relationships must be re-examined.<sup>127</sup>

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<sup>122</sup> Brief for Appellant, *supra* note 16, at 16.

<sup>123</sup> See *Thomson*, 147 F.3d at 200-01. In a supporting letter that appeared on a dramaturg Internet cite concerning the *Rent* decision, several prominent theater-industry figures remarked:

[w]e appeared as witnesses in the Lynn Thomson *Rent* case. You may not be aware that the judge completely accepted Lynn Thomson's claim to have written significant and copyrightable portions of *Rent* . . . . This is an important decision which impacts directly on the lives of many of us: the central ethical issue is that of collaborators in the theater being equitably remunerated for labor contributed.

A Supporting Message from Tony Kushner, Craig Lucas, Morgan Jenness, Mark Bly, and Anne Cattaneo, at <http://www.dramaturgy.net/RENT/Note.html> (last visited Jan. 8, 2002) (on file with author).

<sup>124</sup> See *Thomson*, 147 F.3d at 201. Since the court decided the case on the second *Childress* prong of mutual intent, it never reached the issue of the individual copyrightability of Thomson's varied contributions (plot developments, thematic elements, character details, and structural components). See *id.*

<sup>125</sup> Recent Cases, *supra* note 10, at 967 (quoting *Childress v. Taylor*, 945 F.2d 500, 506 (2d Cir. 1991)). It is quite a challenging determination to make, deciphering who contributed what, since the respective contributions of the *Rent* decision are "akin to scrambled eggs." Deutsch, *supra* note 21, at 657.

<sup>126</sup> See, e.g., *Cabera v. Teatro Del Sesenta*, 914 F. Supp. 743 (P.R. 1995) (holding that a scriptwriter who collaborated on a play contributed copyrightable material to the first act, but failed to establish mutual intent, and thus was held not to be a co-author under the *Childress* rule). The court recognized that the *Childress* two-pronged test "may create problems in cases . . . in which the parties have collaborated in some sense of the term but are at odds as to whether or not there was mutual intent to create a joint work." *Id.* at 763-64.

<sup>127</sup> See Buckalew, *supra* note 20, at 579.

## c. A Question Raised and Unanswered

“Aha!” said Thomson in her appeal. “Then, if I am not a joint author and if, as I claim, I have made copyrightable contributions to *Rent*, I alone control my rights as an author with respect to my contributions, having never assigned nor transferred them to Larson.”<sup>128</sup> Thomson raised two points: (1) if not deemed a co-author, nevertheless she had copyright interests in the material that she contributed to *Rent* or, alternatively (2) that she has the right to grant Larson a license to use the material that she purportedly contributed to *Rent*.<sup>129</sup> Thomson ingeniously argued that the only alternative to finding joint authorship is to split a co-created work into its components.<sup>130</sup> In other words, Thomson claims she had exclusive rights with respect to the independently copyrightable material she contributed to *Rent*.<sup>131</sup>

The question remained as to whether Thomson is the separate “sole author” of her own material, which would allow her to: (a) require users of the material to pay a license fee; and (b) to pull her material from the play if no agreement is reached on such a license.<sup>132</sup> This line of legal reasoning, in effect, asserts that use of copyrighted contributions, without written permission of the copyright owner, would constitute infringement.<sup>133</sup> In the absence of a work-for-hire agreement or any explicit contractual assignment, each author retains her rights in her own contribution.<sup>134</sup> Thus,

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<sup>128</sup> Deutsch, *supra* note 21, at 656.

<sup>129</sup> See Thomson v. Larson, 147 F.3d 195, 206 (2d Cir. 1998).

<sup>130</sup> See Deutsch, *supra* note 21, at 656.

<sup>131</sup> See Thomson, 147 F.3d at 206.

<sup>132</sup> Thomson’s attorneys argued that:

[E]ven though the “sole author” theory would give Thomson far more rights, including the right to shut down *Rent* if the persons profiting from her work continue to refuse to compensate her . . . [Thomson] never has sought to have that power. She would be happy to receive a modest author’s royalty, title-page dramaturgical credit, and the right to quote from the scripts which she co-wrote, in a scholarly book which she intends to publish on the subject.

*Introductory Note, supra* note 91.

<sup>133</sup> See Deutsch, *supra* note 21, at 656. It is interesting to note that certain basic truths are common to all theatrical agreements. For example, production contracts, under standard theatrical practice (standard practice is an estimated ninety percent of the time), give the producer the exclusive right to present a play on the living stage in the United States, England and possibly other territories. See *id.* It is one of the two rights that an author does not control under standard theatrical contract procedure. See *id.* at 658. Thomson and Larson each had separate contracts with the New York Theater Workshop, the producer of *Rent*. As such, both authorized the producer to prepare the off-Broadway and Broadway stage product of *Rent*. Thus, certain questions must be asked. Under what legal theory would Thomson bring an infringement lawsuit against Larson? What act was authorized or performed by Larson that amounted to an infringement of any copyrighted contributions of Thomson? See *id.*

<sup>134</sup> See Thomson, 147 F.3d at 205. “In theater, as opposed to film and television, dramatists retain copyright to their work, and are independent contractors. In film and televi-

neither party would be entitled to exploit the merged work without consent of the other unless the circumstances were such as to create an implied license.<sup>135</sup> However, at issue here, in the absence of a written contract granting joint authorship, a playwright typically will not regard his dramaturg as a joint author.<sup>136</sup> Therefore, although a dramaturg provides copyrightable work, she will not be considered a joint author if she does not satisfy the mutual intent prong of the *Childress* test.

Though the Second Circuit correctly applied the *Childress* joint authorship test, its *Rent* decision sheds light on the intrinsic flaws of that doctrine.<sup>137</sup> The *Rent* case raises, but does not decide, the issue of what happens when two collaborators each contribute copyrightable subject matter that is merged into one artistic work, but do not share the intent to be co-authors.<sup>138</sup> In dicta, the Second Circuit discussed the possibility that a collaborator, such as Thomson, might retain an interest in her independently copyrightable contributions.<sup>139</sup> Yet, the court declined to rule on the matter because Thomson did not raise the issue in the lower court, and therefore, it was not properly before the Second Circuit in this instance.<sup>140</sup>

In mentioning the idea that a non-joint author could retain independently copyrightable interests in the work, the Court revealed its tentativeness in making such a determination. "If it were to be affirmed that *Rent* is *not* a statutory joint work, [Thomson] then would be awarded rights which she never imagined, much less sought, and which she would be loathe to enforce."<sup>141</sup> Thomson argued that, under Section 106 of the Copyright Act of 1976, a non-joint author plaintiff such as herself might "have the right to enjoin any use of her contributions in any stage production, book,

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sion, virtually all writers are work-for-hire, lacking any control over the final cut or indeed whether they will even be credited." Deutsch, *supra* note 21, at 658.

<sup>135</sup> See Gary H. Moore, *Joint Authorship of Intellectual Property: Issues and Pitfalls*, 1132 PLI/CORP. 215 n.10 (1999).

<sup>136</sup> See Lee, *supra* note 1, at 97.

<sup>137</sup> See Recent Cases, *supra* note 10, at 966.

<sup>138</sup> See *Thomson*, 147 F.3d at 205.

<sup>139</sup> See *id.* at 206. Judge Calabresi noted:

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 contributions.

*Id.*

<sup>140</sup> See *id.*

<sup>141</sup> Brief for Appellant, *supra* note 16, at 44. In other words, Thomson contends that "other than an argument of joint authorship between Thomson and Larson, there would be no defense to an infringement suit brought by Thomson." *Id.*

cast album, or motion picture.”<sup>142</sup> Under such a regime, a plaintiff who failed to meet the mutual intent prong of the *Childress* test, yet satisfactorily proved to the court a *non-de minimis* copyrightable contribution, could threaten that the creative work be performed without her copyrightable contributions or not at all.<sup>143</sup>

*Childress* seems to have envisioned only two categories of collaborators: (1) joint authors and (2) non-joint authors with no copyright interests.<sup>144</sup> The court left all other types of collaborators “to protect their rights through contract.”<sup>145</sup> What the *Childress* test fails to provide for is situations in which a party might, in the absence of contract, satisfy *only* the independently copyrightable prong of its test.<sup>146</sup>

Concedingly, it is understood that contract law has the ability to solve this predicament by delineating the copyright interests of collaborators from the outset.<sup>147</sup> Nonetheless, United States copyright law should be equally competent in its ability to provide the answers to such collaboration questions. Thus, in order to do this, United States copyright law should provide an alternative – a “Joint Authorship Default Rule” – for such situations, no matter how few or infrequent.<sup>148</sup>

### III. A COMPARATIVE LOOK AT JOINT AUTHORSHIP: ANGLO-AMERICAN COPYRIGHT LAW

The collective power of creation, while just beginning to permeate the American theater world, has long been a commonplace practice in the art communities of both the United Kingdom and

<sup>142</sup> Recent Cases, *supra* note 10, at 967 (quoting Brief for Appellant, *supra* note 16, at 44).

<sup>143</sup> *See id.* at 969 n.36. It is important to realize, as the *Childress* court notes, that “care must be taken . . . to guard against the risk that a sole author is denied exclusive authorship status simply because another person render[s] some form of assistance.” *Childress v. Taylor*, 945 F.2d 500, 504 (2d Cir. 1991).

<sup>144</sup> *See* Recent Cases, *supra* note 10, at 963.

<sup>145</sup> *Childress*, 945 F.2d at 507. *Childress* did not address whose burden it was to form such a contract. *See Thomson v. Larson*, 147 F.3d 195, 206 n.30.

<sup>146</sup> In the *Rent* decision, Judge Calabresi noted that, “*Childress* did not . . . address . . . whether, in the absence of a contract, a contributor (who is not a joint author) of copyrightable expression retains rights in the contributed material.” *Thomson*, 147 F.3d at 206. *Childress* did not contemplate or explicitly describe how such rights would be allocated when such material became part of a unified whole. *See Childress*, 945 F.2d at 507.

<sup>147</sup> “The sharing of benefits in . . . the creation of a copyrightable work can be more precisely calibrated by the participants in their contract negotiations regarding division of royalties or assignment of shares of ownership of the copyright.” *Thomson*, 147 F.3d at 206 n.30 (citing Copyright Act of 1976, 17 U.S.C. § 201(d) (1999)).

<sup>148</sup> The joint work doctrine’s primary purpose is “to provide a starting point for allocating rights and liabilities between co-authors of collaborative works . . . . The collaborators are free to alter this . . . allocation of rights and liabilities by contract.” Recent Cases, *supra* note 10, at 969 n.49 (quoting Goldstein, *supra* note 63, § 4.2, at 4:6).

Canada.<sup>149</sup> The United Kingdom has bore witness to its own internationally renowned theater world's evolution into an epicenter of collective creation.<sup>150</sup> As uncertainty in the joint authorship provisions of United States copyright law has begun to rear its ugly head, an analysis of Anglo-American copyright law will serve to highlight the potential in alternate approaches to dealing with collaborative efforts. Additionally, this comparative look at joint authorship will aid in deriving an answer to the unanswered question of the *Rent* decision, and in effect, help fashion the paradigm for a "Joint Authorship Default Rule."

### A. *Joint Authorship & The United Kingdom*

#### 1. Current Law

The court in *Stuart v. Barrett*<sup>151</sup> asserted, "[u]ltimately . . . the question of whether a person is a joint author or not within the Copyright Act is simply a question of fact and degree."<sup>152</sup> English copyright in a "work of joint authorship" is held by all of its co-authors.<sup>153</sup> Joint authorship is premised upon satisfaction of two conditions: (1) the work must be produced by the collaboration of two or more authors; and (2) their contributions must not be distinct from each other.<sup>154</sup>

The first condition of collaboration in a joint work mandates that the work be made "in prosecution of a preconcerted joint design," or at least on the basis of cooperation between the authors.<sup>155</sup> The second condition has two components. First, each of

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<sup>149</sup> However, it is interesting to note that the muddled conception of a dramaturg seems to extend beyond the United States and permeate internationally. Canadian dramaturgs, themselves, find difficulty in defining their roles. "A dramaturg is . . . um, dramaturgy is . . . the art of theatrical production, the theory of drama and dramatics, or the application of this, and a dramaturg is a specialist in theatrical production of a dramatist." Guy Sprung, *Dramaturgy at the 'Shop,'* at <http://www.playwrightsworkshop.org/drama2.html> (last visited Jan. 8, 2002) (on file with author).

<sup>150</sup> The celebrity of London's West End Theater District can be equated with New York's Broadway Theater District. Its history dates as far back as 1576, when the first theater in London, *The Shoreditch*, was erected. See *London Theater Chronology—1660-1800*, University of Florida, at <http://www.ucet.ufl.edu/%7Ecraddock/lonthe1.html> (last visited July 31, 2001) (on file with author).

<sup>151</sup> [1994] E.M.L.R. 448.

<sup>152</sup> *Id.* at 458.

<sup>153</sup> See INTERNATIONAL COPYRIGHT LAW § 4[1][a][i], at UK-49 (1999).

<sup>154</sup> See Copyright, Designs and Pats. Act, 1988, c. 48, § 10(1) (Eng.) (discussing works of joint authorship); see also §§ 77, 88 (discussing the right to be identified as author or director, and the application of provisions to joint works); *Cala Homes (South) Ltd. v. Alfred McAlpine Homes East Ltd.*, [1995] F.S.R. 818, 834 (accepting that there were two requirements for joint ownership: (i) collaboration; and (ii) some significant contribution from each of the authors).

<sup>155</sup> INTERNATIONAL COPYRIGHT LAW, *supra* note 153, at UK-49.

the joint authors must have contributed to the work.<sup>156</sup> Second, all individual contributions must be indistinct upon completion of the work.<sup>157</sup> Furthermore, this contribution must be protectable by copyright, as it must be a creative statement rather than a mere idea.<sup>158</sup> It will suffice if the contribution is a “significant and original” one, even if it is not equivalent in terms of quantity or quality to that of other contributors.<sup>159</sup>

In the recent decision of *Hadley v. Kemp*,<sup>160</sup> several members of a former pop-group, Spandau Ballet, brought suit against another band member concerning the legal interests in their music.<sup>161</sup> The plaintiffs’ claim was for communal joint authorship of the existing copyrights in Spandau Ballet’s work.<sup>162</sup> This joint authorship claim proceeded on the basis that, although the defendant started the composition process for each song, thereafter all five members worked collectively on the song and developed it into its final composition.<sup>163</sup>

In finding that plaintiffs were *not* collective joint authors of the songs, the *Hadley* court remarked that when the defendant presented a song to the band, “the melody was complete, the chord structure was complete, the rhythm or groove was apparent in the song as presented, and the structure of the song from start to finish was already laid out.”<sup>164</sup> Very few changes were made in the process leading up to the songs’ recording, and defendant had the final word on all changes.<sup>165</sup> Thus, plaintiffs were not able to achieve communal joint authorship status.<sup>166</sup> This case is exemplary of English copyright law’s tendency to give protection to the interests of the original authors in an artistic work.

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<sup>156</sup> See *id.*

<sup>157</sup> See *id.* A scenario where one person writes the lyrics and another person writes the music to a song would be excluded from joint authorship since the contribution must not be distinct. See, e.g., *Chappell & Co. Ltd. v. Redwood Music, Ltd.*, [1982] R.P.C. 109 (holding that separate copyrights arose in the new arrangements of a song).

<sup>158</sup> See *Robin Ray v. Classic FM PLC*, [1998] F.S.R. 622, 636 (“what is required is . . . a direct responsibility for what actually appears on the paper”).

<sup>159</sup> *Stuart v. Barrett*, [1994] E.M.L.R. 448, 449; see also *Godfrey v. Lees*, [1995] E.M.L.R. 307, 325-28 (finding that a classically-trained musician who acted as orchestral manager for a rock band *was* a joint author of a number of arrangements which included orchestral passages linking the verses and choruses). But see *Tate v. Thomas*, [1921] 1 Ch. 503 (suggesting the title, leading characters for a play, a few catchwords, and scenic effects did *not* constitute having contributed to the play as a joint author).

<sup>160</sup> [1999] E.M.L.R. 589 (Transcript at ¶ N.1).

<sup>161</sup> See *id.* ¶ A.

<sup>162</sup> See *id.* ¶ N.1.

<sup>163</sup> See *id.*

<sup>164</sup> *Id.* ¶ N.5.

<sup>165</sup> See *id.*

<sup>166</sup> See *id.*



## 2. Application of United Kingdom Copyright Law to the *Rent* Decision

The United Kingdom's considerations concerning the joint authorship issue in the *Hadley* decision can be factually distinguished from those in the *Rent* decision. Thus, the possibility does exist for Thomson to have benefited from a judgment rendered under the auspices of English jurisprudence. As in *Hadley*, Thomson was presented with the *Rent* script in its raw but generally established form.<sup>167</sup> However, unlike *Hadley*, Thomson clearly aided in the transformation of the play. In fact, the *Rent* court even acknowledged that her contributions amounted to independently copyrightable material.<sup>168</sup> The *Hadley* court based its denial of communal joint authorship primarily on the plaintiffs' minimal contributions to the end product.<sup>169</sup> Contrastingly, Thomson had contributed significantly to the final version of *Rent*. This factually-based comparison creates the possibility that: if decided under the auspices of United Kingdom copyright law, *Thomson v. Larson*<sup>170</sup> may have rendered a more favorable judgment as related to Thomson's joint authorship claim.

However, this conjecture is admittedly a far stretch, and as such, holds little weight when set up against common and statutory law of the United Kingdom in its entirety. English copyright law has made numerous and meticulous determinations regarding the interests of contributors to a creative work.<sup>171</sup> The United Kingdom's joint authorship provisions are premised upon satisfaction of *two* conditions: (1) the work must be produced by the collaboration of two or more authors, and (2) such contributions must not be distinct from each other.<sup>172</sup> Under these two conditions, the

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<sup>167</sup> When Thomson joined the *Rent* production project at the New York Theater Workshop, Larson had already created, for the most part, the substantive story, characters, and music. Though she helped to transform the script into a Broadway smash hit, concedingly, its basic components had been created prior to her arrival. See generally Thomson v. Larson, 147 F.3d 195 (2d Cir. 1998).

<sup>168</sup> See *id.* at 200-01.

<sup>169</sup> See *Hadley*, [1999] E.M.L.R. 589 at ¶ N.5.

<sup>170</sup> 147 F.3d at 195.

<sup>171</sup> However, these determinations are not dispositive. British collaborators raise concern over the rights of their screenwriters:

[U]nlike a novelist, the [United Kingdom copyright] law bestows on [the screenwriter] none of the same status, and she receives no copyright in the envisaged product of her labours. While [the screenwriter] is given the copyright in the screenplay itself, the "recipe" from which the film is made, no such rights are given vis-a-vis the finished motion picture.

Anthony Mosawi, *An Upheaved in Film and Television Law in England*, 144 New L.J. 1654 (1994) (Eng.).

<sup>172</sup> See Copyright, Designs and Pats. Act, 1988, c. 48, § 10(1) (Eng.) (discussing works of joint authorship).

*Rent* decision may have been affirmed upon a determination of the lack of severability of Thomson's contributions from Larson's contributions. Furthermore, that Thomson was never billed as co-author of *Rent* could have contributed to a court's denial of her joint authorship claim since the billing factor holds great weight under United Kingdom Copyright law.<sup>173</sup> Applying the most recent and well-settled determinations under English copyright law to the *Rent* decision ultimately serves to support the proposition that Thomson will find herself denied joint authorship status once again.

## B. *Joint Authorship & Canada*

### 1. Current Law

Canadian law recognizes only one type of joint work: the collaborative work.<sup>174</sup> Like English law, copyright may be owned by co-authors of a joint work.<sup>175</sup> In other words, joint authorship exists when "a work [is] produced by the collaboration of two or more authors in which the contribution of one author is *not* distinct from the contribution of the other author or authors."<sup>176</sup> However, merely suggesting ideas for a work, without contributing to its expression, does not make a person a joint author with the person who transforms the ideas into tangible form.<sup>177</sup>

In the Canadian Act, as in the English Act, it is recognized that

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<sup>173</sup> "[W]ith respect to literary, dramatic, musical or artistic works . . . [w]here a name purporting to be that of the author appeared on copies of the work as published or on the work when it was made, the person whose name appeared shall be presumed. . . to be the author of the work. . ." *Id.* § 104 (1989) (dealing with presumptions relevant to literary, dramatic, musical and artistic works).

<sup>174</sup> See INTERNATIONAL COPYRIGHT LAW, *supra* note 153, § 4[1][a][i], at CAN-46.

Under the contemporaneous intent standard, [even] an interview qualifies as a joint work because the interviewer and interviewee meet with each other for the express purpose of conducting an interview. This goal is a manifestation of their intent to merge their respective contributions into one work, thereby establishing a work of joint authorship.

Hager v. ECW Press Ltd., [1999] 2 F.C. 287, 308 (quoting A.S. Hirsch, *Copyrighting Conversations: Applying the 1976 Copyright Act to Interviews*, 31 AM. U. L. REV. 1071, 1082-83 (1981)).

<sup>175</sup> See INTERNATIONAL COPYRIGHT LAW, *supra* note 153, at CAN-46.

<sup>176</sup> Copyright Act, R.S.C., ch. C-42, § 2 (1985) (Can.) (defining a "work of joint authorship") (emphasis added); see also *Spiro-Flex Industries, Ltd. v. Progressive Sealing, Inc.*, [1986] D.L.R. 201, 213 (regarding a jointly compiled brochure); *Bradale Distribution Enterprises, Inc. v. Safety First, Inc.*, [1987] 18 C.S. 71, 85 (holding that the work may be joint even if the authors collaborate at different times). This statutory provision sounds similar to the United States joint authorship definition, yet employs different language. Compare Copyright Act, ch. C-42, § 2 (Can.), with Copyright Act of 1976, 17 U.S.C. § 101 (1999).

<sup>177</sup> See INTERNATIONAL COPYRIGHT LAW, *supra* note 153, at CAN-46; see also *Gould Estate v. Stoddard Publ'g Co.*, [1998] 161 D.L.R.4th 321 (O.A.C.) (demonstrating that under Anglo-Canadian law, in so far as private interviews are concerned, it is the person who reduces the oral statements to a fixed form that acquires copyright therein—that individual is considered the originator of the work).

a collective work may have a copyright of its own.<sup>178</sup> It is understood that there may be a copyright in the collective work as well as a copyright in the work of joint authorship.<sup>179</sup> For example, Canadian copyright law stipulates there may be a copyright in the music, as well as a copyright in the words, all by different persons.<sup>180</sup>

Recently, the Supreme Court of British Columbia ruled on a joint authorship matter,<sup>181</sup> and based its decision on leading American precedent as construed in *Childress v. Taylor*.<sup>182</sup> In *Neudorf v. Nettwerk Productions*,<sup>183</sup> the court ruled that pop singer Sarah McLachlan was not required to give co-writing credit to musical associate Darryl Neudorf, despite having contributed independently copyrightable material to her 1988 song *Steaming*.<sup>184</sup> The Court found that neither McLachlan nor Neudorf had intended to be joint authors in the music for her debut album.<sup>185</sup> With respect to three of the four songs at issue, the Court found that although Neudorf did make *some* contributions, they were not great enough to constitute an original expression.<sup>186</sup> With regard to the fourth song, the Court held that Neudorf had contributed original expression, but failed to demonstrate a mutual intent to co-author the

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<sup>178</sup> See Copyright Act, ch. C-42, § 2; see also *ATV Music Publ'g of Canada, Ltd. v. Rogers Radio Broad.*, [1982] 65 C.P.R.2d 109,113 (holding that the names of two authors would indicate that the work falls within the definition of a work of joint authorship for which there would be one copyright of which the plaintiff is the owner).

<sup>179</sup> Collective work is defined, under Canadian law, as a work written in distinct parts by different authors or in which works or parts of works of different authors are incorporated. See *ATV Music*, 65 C.P.R.2d at 113-14.

<sup>180</sup> See *id.* at 114; see also *Kane v. Hooper*, [1996] 68 C.P.R.3d 267, 269 (holding that the action was based on infringement of copyright, not on partnership and contract).

<sup>181</sup> See *Neudorf v. Nettwerk Productions Ltd.*, No. C950847, 1999 B.C.D. Civ. J. LEXIS 3986 (B.C. S.C. Dec. 10, 1999).

<sup>182</sup> See generally 945 F.2d 500 (2d Cir. 1991); see also Bill Rogers, *Ruling on Pop Tune Copyright Follows Childress Precedent*, LAW. WKLY., Jan. 14, 2000, at 1, available at LEXIS, News Library. The facts of this case are similar to the facts and determinations concerning *Thomson v. Larson*. See *Neudorf*, 1999 B.C.D. Civ. J. LEXIS 3986, at \*10-12. The court also found a collaborator contributed independently copyrightable material, but did not award him joint authorship status. See *id.* at \*182.

<sup>183</sup> 1999 B.C.D. Civ. J. LEXIS 3986, at \*182.

<sup>184</sup> In the recording industry, a producer directs the recording process which often includes some degree of collaboration on the songs being recorded by an artist. Often the question arises as to when does a music producer's input reach a level of joint authorship or even ownership? See David J. Moser, *Copyright Joint Ownership: When Does A Record Producer's Input Rise to the Level of Co-Authorship?*, ENT. L. & FIN., Feb. 2000, at 1, available at LEXIS, News Library.

<sup>185</sup> See generally *Neudorf*, 1999 B.C.D. Civ. J. LEXIS 3986. The court broke the *Childress* test into three parts instead of its traditional two-pronged analysis: (i) whether a plaintiff contributed significantly original expression to songs; (ii) if yes to the first question, whether the parties intended that their contribution be merged into a unitary whole; and (iii) if yes to the second question, whether the parties intended the other to be a joint author of the songs. See *id.* at \*77.

<sup>186</sup> See *id.* at \*86.

song with McLachlan.<sup>187</sup> McLachlan's intention alone was enough to defeat Neudorf's joint authorship claim, regardless of the extent of Neudorf's contributions or his own claim of intent.<sup>188</sup> Therefore, Neudorf was ultimately denied joint authorship status.<sup>189</sup>

Under Canadian jurisprudence, for a joint work to exist, each of its co-authors must contribute an original expression to the work that would be separately copyrightable on its own.<sup>190</sup> For example, if someone merely added a few words to a song's lyrics, that person would not be considered a joint author since her contribution would not be copyrightable on its own. This scenario is clearly distinguishable from Thomson's contribution, as she undoubtedly provided more than mere words to a song in *Rent*. In fact, the court in the *Rent* case acknowledged that her contribution amounted to independently copyrightable material.<sup>191</sup>

## 2. Application of Canadian Copyright Law to the *Rent* Decision

As in *Neudorf*, it was under the mutual intent prong of the *Rent* Court's analysis that rendered Thomson unable to assume joint authorship status (despite having recognized her independently copyrightable contributions).<sup>192</sup> Had the *Rent* decision been adjudicated under the auspices of Canadian copyright law, Thomson would most likely have ended up with the same result handed down by the Second Circuit. While her individual copyrightable interests in *Rent* would be recognized, like Neudorf's claim regarding his interest in the fourth song, the most recent determinations made under Canadian jurisprudence suggest that Thomson would not have been awarded joint authorship status for lack of mutual intent to be a joint author.<sup>193</sup>

### C. *Why Anglo-American Copyright law Doesn't Solve the Problem*

A legal action has yet to come before the English judicial system that warrants a determination under the copyright law regard-

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<sup>187</sup> See *id.* at \*98. This claim is most similar to that of the *Rent* decision. The *Neudorf* court followed the majority of United States decisions that go beyond the literal language of the intention requirement of § 201(a) of the Copyright Act of 1976, and interpreted the intention requirement to mean contributors must *each* intend to treat each other as joint authors. See *id.* at \*61-65 (emphasis added). In *Neudorf*, Sarah McLachlan testified that she never thought that she was writing songs with Neudorf. Therefore, she did not regard him as a co-author. See *id.* at \*99-100.

<sup>188</sup> See *id.* at \*182.

<sup>189</sup> See *id.* (holding that Neudorf's claim failed its three-part test for joint authorship).

<sup>190</sup> See INTERNATIONAL COPYRIGHT LAW, *supra* note 153, at CAN-46.

<sup>191</sup> See Thomson v. Larson, 147 F.3d 195, 200-01 (2d Cir. 1998).

<sup>192</sup> See *id.*

<sup>193</sup> See generally *Neudorf*, 1999 B.C.D. Civ. LEXIS 3986.

ing a non-joint author's interests in the material she contributed to the work. In other words, the question raised in the *Rent* case concerning Thomson's individual copyright interests in her contributions to the play has not, in any way, come before the English courts. Although the dramaturg and this notion of collaboration have had a place in British theater for far longer than in the United States, current United Kingdom copyright law has yet to dispositively address such a collaborator's legal interest.

In the wake of Canada's *Neudorf* decision, and its affirmation of the use of the *Childress* test in settling such disputes, current Canadian copyright law, like that of the United Kingdom, has yet to address the unanswered question of the *Rent* decision. Stemming from a fear of this uncertainty in the law, music industry insiders have begun vigorously to advise artists who choose to work together to draft co-authorship agreements up front.<sup>194</sup> Yet, the reality of the creative process and its impulsive nature negates any possible "quick-fix" resolution to such a complex legal issue. It is unrealistic to rely upon, and hold responsible, the artists to draft contracts that delineate and delegate all the interests in an artistic collaboration. Thus, as with United States and United Kingdom copyright law, current Canadian copyright law fails to provide a remedy for this joint authorship dilemma.

#### IV. ANSWERING THE UNANSWERED QUESTION ON JOINT AUTHORSHIP

##### A. *The Problem Restated*

"The Thomson court's reliance on *Childress*' porous doctrine, in particular its misguided faith in contract to prevent copyright disputes, underscores the need for a clearer joint authorship background rule."<sup>195</sup> The *Childress* case has been much criticized because it seems to impose an extra hurdle, which Congress never intended to impose, upon persons seeking to establish co-authorship rights.<sup>196</sup> Although the current United States copyright law states that joint authors include any group of two or more authors who prepare a work "with the intention that their contributions be merged,"<sup>197</sup> *Childress* requires that they also must "entertain in their

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<sup>194</sup> See Rogers, *supra* note 182. The question in the *Neudorf* case, however, was how to resolve an authorship dispute in a situation where there was no clear, upfront credit-sharing deal. See *id.*

<sup>195</sup> Recent Cases, *supra* note 10, at 966-67.

<sup>196</sup> See *id.* at 966.

<sup>197</sup> Copyright Act of 1976, 17 U.S.C. § 101 (1999).

minds the concept of co-authorship.”<sup>198</sup>

This more demanding mutual intent requirement is the result of the recognition of the sentiment that since co-authors are given equal rights in a co-authored work, the “equal sharing of rights should be reserved for relationships in which all participants *fully intend* to be joint authors.”<sup>199</sup>

Hence, *Childress* seems to have envisioned only two categories of collaborators: (1) joint authors and (2) non-joint authors with no copyright interests.<sup>200</sup> The *Childress* test has been faithfully implemented across the board to all types and varieties of collaborative relationships. Accordingly, *Childress* has denied copyright interests to collaborators unable to fall neatly into one of the aforementioned categories – a test created so “black and white” that anything (or anyone) in between stands to lose recognition for or entitlement to its independently copyrightable artistic contributions.<sup>201</sup> In effect, *Childress* has left in a category all to themselves those contributors who might not be joint authors,<sup>202</sup> but who have contributed independently copyrightable material to the work.<sup>203</sup> The United States copyright law must be able to account for this “default” category of artists.

B. *A Proposal to Statutorily Amend United States Copyright Law: Crafting a Joint Authorship Default Rule*

A proposal to create a “Joint Authorship Default Rule” requires an articulation of the joint work doctrine’s fundamental purpose. Its aim is “to provide a starting point for allocating rights and liabilities between co-authors of collaborative works.”<sup>204</sup> This

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<sup>198</sup> 945 F.2d 500, 506 (2d Cir. 1991). Yet, a “sole author” need only prove that he or she has created “original” material which is “fixed in a tangible medium.” 17 U.S.C. § 101. Professor Goldstein also criticized *Childress*’s deviation from the plain text of § 101 of the Copyright Act of 1976. See Recent Cases, *supra* note 10, at 967 n.41 (citing GOLDSTEIN, *supra* note 63, § 4.2.1.1, at 4:11-4:12).

<sup>199</sup> *Childress*, 945 F.2d at 509 (emphasis added).

<sup>200</sup> See Recent Cases, *supra* note 10, at 963.

<sup>201</sup> In the *Rent* decision, Judge Calabresi noted that, “*Childress* did not . . . address . . . whether, in the absence of a contract, a contributor (who is not a joint author) of copyrightable expression retains rights in the contributed material.” *Thomson v. Larson*, 147 F.3d 195, 200 (2d Cir. 1998). *Childress* did not contemplate or explicitly describe how such rights would be allocated when such material became part of a unified whole. See *Childress*, 945 F.2d at 507.

<sup>202</sup> These contributors are *not* joint authors for the reason that they have failed to satisfy the mutual intent prong of the *Childress* test.

<sup>203</sup> See, e.g., *Thomson*, 147 F.3d 195. The *Rent* decision is merely the latest in a series of indications of the inadequacy of the *Childress* test, a doctrine that has exhibited warning signs since its formulation. See Recent Cases, *supra* note 10, at 967.

<sup>204</sup> Recent Cases, *supra* note 10, at 969 n.49 (quoting GOLDSTEIN, *supra* note 63, § 4.2.1.2, at 4:6). “The collaborators are free to alter this . . . allocation of rights and liabilities by contract.” *Id.*

basic tenet of joint authorship law calls for an analysis of those instances where such rights and liabilities have *not* been delineated through contract, an examination of collaborations from alternative angles – as that was the case in the *Rent* decision.

The court’s “flirtation with the idea that a [non-joint author] could retain an individual copyright interest in a collaborative work – an abstemious yet provocative dictum with murky implications for the entertainment industry – flowed inevitably from its adherence to the already wobbly *Childress* test.”<sup>205</sup> Thomson, herself, remarked that this case is “the first case in which a contributor of non-de minimis copyrightable material has co-created a joint work within the statutory definition, yet has been denied the rights of joint authorship.”<sup>206</sup> Joint authorship law must be able to account for the differences implicit in the nature of collaborative relationships.

### 1. Other Proposals

Widespread recognition of the flaws inherent in the *Childress* test has generated great debate and even resulted in the proposition of a variety of solutions.<sup>207</sup>

#### a. The Equity Route

To resolve this joint authorship problem within the common law, scholars have suggested amending the *Childress* test.<sup>208</sup> A more equitable test has been proposed; one fashioned out of *Childress*, rather than overruling it.<sup>209</sup> This test would require a *non-de minimis* amount of copyrightable contributions and an objective inquiry into the intent of all parties based on a reasonable person

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<sup>205</sup> *Id.* at 966.

<sup>206</sup> Brief for Appellant, *supra* note 16, at 16.

<sup>207</sup> Alternate approaches to the *Childress* test for joint authorship have been advanced. For example:

(1) Professor Goldstein has proposed a means of dealing with *Childress*’ complicated mutual intent requirement in his implied license approach to joint authorship. See GOLDSTEIN, *supra* note 63, § 4.2.1, at 4:11-4:12. He argues that “absent an express contract allocating full rights to one co-author or the other, a court . . . could imply a transfer of ownership from one to the other based on the nature of their relationship.” *Id.*

(2) The Appellees in the *Rent* decision (Larson’s heirs) argued for another, more austere, approach to resolving this joint authorship dilemma. They argued that courts should simply deny the contributing non-joint author any copyright interests whatsoever. See Thomson, 147 F.3d at 206. They maintained “because she is not a joint author, Thomson has no rights.” *Id.* (quoting Brief for Appellee at 46, Thomson v. Larson, 147 F.3d 195 (2d Cir. 1998) (No. 96 Civ. 8876) (internal quotation marks omitted)).

<sup>208</sup> See Buckalew, *supra* note 20, at 580.

<sup>209</sup> See *id.*

standard.<sup>210</sup> This proposal maintains that such a test would allow for an equitable distribution of copyright interests among joint authors in an artistic work,<sup>211</sup> and that this revised test would be more "fair than the traditional grant of an undivided interest to each joint author."<sup>212</sup>

This proposal has some shortcomings. Though courts could possibly find themselves better equipped to tailor their rulings to fit individual circumstances of artistic endeavors, this judicial freedom may "open floodgates." Contracts have the potential to end up an afterthought in the minds of those artists who choose to rely on the equity of the courts to solve any potential legal problems. Though the free exchange of ideas among collaborators is indispensable to the process of artistic creation,<sup>213</sup> contractual agreements between such collaborators remains the ideal resolution for joint authorship disputes. This proposed increase in judicial deference, to invoke equity when deemed appropriate, has the potential to diminish the import of contract law in the collaborative art world.

Congressional reports prepared at the time of the 1976 revision of the Copyright Act had specifically stated that it "will not provide a statutory scheme dictating the rights and duties of joint authors . . . . [I]t intends to allow court-made law to stand regarding the rights and duties of joint authors, that 'co-owners of a copyright would be treated generally as tenants in common.'"<sup>214</sup> In awarding deference to the courts regarding the rights and duties of co-authors, Congress has sanctioned the courts' handling of questions of joint ownership, and also provided them with the opportunity to render equitable decisions should such a case arise.<sup>215</sup>

Yet, these stipulations were made in 1976, a different time culturally, economically and jurisprudentially. American theater has significantly evolved since this revision of the Copyright Act of 1976.<sup>216</sup> The dramaturg, and other types of collaborators, have grown to become a visible staple in United States copyright law

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<sup>210</sup> See *id.* at 580-81.

<sup>211</sup> See *id.* at 581.

<sup>212</sup> *Id.*

<sup>213</sup> See *id.* at 582.

<sup>214</sup> *Id.* at 572 (quoting H.R. REP. NO. 94-1476, at 180 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736).

<sup>215</sup> See *id.* at 572-73.

<sup>216</sup> See generally Peter Jaszi, *On The Author Effect. Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992). Jaszi describes copyright law's adherence to an individualistic or "Romantic" notion of authorship despite the increasingly "collective, corporate, and collaborative" nature of writing. *Id.* at 302.



since 1976.<sup>217</sup> Copyright jurisprudence has since evidenced the reality that deference to the courts may not be the most suitable means for handling the collaborative process.

### b. The Rebuttable Presumption

One of the more viable proposals to solve the joint authorship quandary departs from any inquiry into the collaborators' subjective perceptions of their relationship to one another.<sup>218</sup> Rather, where each party's contributions to the finished work are both substantial and independently copyrightable, joint authorship would be presumed. A rebuttable presumption follows from this determination, requiring the moving party to demonstrate that the "contribution in question was incorporated into the finished work under an express or implied derivative work license."<sup>219</sup>

This notion of a "more flexible rule," under which authorship would be distributed according to the proportional amount of each party's contribution to the total creative work, fails for one simple reason. Placing the joint authorship determination wholeheartedly back into the judicially-based fact-finding domain, only further exacerbates the burden on the courts to efficiently and equitably decide these types of cases. Apprehension surrounds the unavoidable uncertainty that would remain embedded deep within joint authorship determinations – "the kind of aesthetic judgment (with regard to qualitative assessments of each party's contributions)" many hope to eliminate from joint authorship analysis.<sup>220</sup>

## 2. Instead: A "Joint Authorship Default" Rule

A Joint Authorship Default Rule, in order to effectively solve the joint authorship dilemma, must be rooted in statutory law. Furthermore, it should be consistent with the legislative purpose behind the Copyright Act: "to encourage creation and dissemination of original expression that will ultimately enrich the public domain."<sup>221</sup> A joint authorship test that denies authorial status to persons who make significant artistic contributions to a work, and ultimately discourages creative contributions, will not advance such a purpose.<sup>222</sup> Any sort of test will deny these collaborators the eco-

<sup>217</sup> See discussion *supra* note 5.

<sup>218</sup> See generally LaFrance, *supra* note 3.

<sup>219</sup> *Id.* at 203.

<sup>220</sup> *Id.* at 257.

<sup>221</sup> See *id.* at 201 (citing *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (articulating the economic philosophy behind the Constitution's enumeration empowering Congress to grant patents and copyrights)).

<sup>222</sup> See *id.*

conomic rewards that might encourage them to maintain such creative efforts.<sup>223</sup>

Court-made law cannot provide definitive solutions, as it works on a case-by-case basis. Even if some line must be drawn to distinguish helpful observations from joint authorship in an artistic work, in selecting such a method, the *Childress* court proffered no justification for its two-pronged test.<sup>224</sup> *Childress'* underdeveloped test cannot be applied to those circumstances it did not foresee, but should have anticipated.<sup>225</sup> The American theater world needs certainty in the very law it depends on for protection.

The question raised in the *Rent* decision was whether a contributor of copyrightable material retains an independent interest as a sole author of her contributions, even if the evidence does not establish joint authorship.<sup>226</sup> The mere fact that a artistic collaborator may "accurately be described as an editor, a colleague, a co-worker, a *dramaturg*, a consultant, or even a research assistant should not mean that such a person cannot, under appropriate circumstances, be found [to] have made a contribution sufficient to qualify as a joint author."<sup>227</sup> As in the case of Lynn Thomson, "[o]n some occasions, persons acting in these capacities may very well contribute large amounts of copyrightable expression to the finished work."<sup>228</sup> The only way in which to resolve this unanswered question is to account for these default situations.

An effective resolution must be rooted in the principal statutory authority for joint authorship determinations. Relying on the courts, who have consistently fumbled through their analysis, attempting to reconcile its binding precedent with the factual circumstances of each case, has proved to be inefficient, and at times, inequitable. The current Copyright Act of 1976 must be amended so as to provide definitive authority outlined in a subsection of the "Joint Works" provision of the Act, referred to as a "Joint Authorship Default Rule."

While this Note does not submit the actual language for such a provision, it proposes that this Joint Authorship Default Rule take its lead from the aforementioned suggestion regarding a rebutta-

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<sup>223</sup> See *id.* It should be noted that the converse is also true. A test of joint authorship fails to advance the legislative purposes behind the Copyright Act if it results in the granting of economic and moral rights to non-authors. This would, in effect, deprive the true author of the exclusivity "that accounts for so much of the value of those rights." *Id.* at 202-03.

<sup>224</sup> See *id.* at 256.

<sup>225</sup> See Recent Cases, *supra* note 10, at 968.

<sup>226</sup> See generally *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998).

<sup>227</sup> *LaFrance*, *supra* note 3, at 256 (emphasis added).

<sup>228</sup> *Id.*

ble presumption of joint authorship, and amend it so as to instead ground itself in statutory, rather than common law.<sup>229</sup> The *only* viable means to remedy this joint authorship problem is within the confines of the very statutory law that created it.

#### CONCLUSION

Courts continue to struggle with the definition and application of joint authorship.<sup>230</sup> In *Thomson v. Larson*,<sup>231</sup> what emerged as “[t]he central ethical issue [was] that of collaborators in the theater being equitably remunerated for labor contributed.”<sup>232</sup> In the absence of “[t]he best objective manifestation of a shared intent . . . a contract saying that the parties intend to be or not to be co-author . . . the inquiry must of necessity focus on the facts.”<sup>233</sup> As in the *Rent* case, there are those copyright interests in an artistic work that are not able to conform to those categories advanced in the *Childress* test. Such joint authorship disputes are not so easily remedied by the application of a common-law-created test, thereby necessitating a statutory resolution to this problem.

The current common and statutory copyright laws of the United States, the United Kingdom and Canada have failed in their attempt at providing such protection. The addition of a Joint Authorship Default Rule provision to the Copyright Act of 1976 will not only have the potential to remedy the present uncertainty in the law, but contemporaneously provide relief to those individuals who want whole-heartedly, in the absence of any fear, to embrace the collaborative spirit of American theater.

*Paulette S. Fox\**

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<sup>229</sup> See *supra* Part IV.B.1.b (referencing and analyzing Mary LaFrance’s proposal to create this rebuttable presumption of joint authorship where the contribution of each author is substantial and independently copyrightable, but disagreeing with basing the proposal’s authority in the judicial system and its common law).

<sup>230</sup> See Recent Cases, *supra* note 10, at 964.

<sup>231</sup> 147 F.3d 195 (2d Cir. 1998).

<sup>232</sup> Letter from Tony Kushner, Craig Lucas, Morgan Jenness, Mark Bly, and Anne Cataneo, *Rent: The Trial*, available at <http://www.dramaturgy.net/RENT/Note.html> (last visited Dec. 20, 2001) (on file with author).

<sup>233</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000).

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