

## Apportioning Authorship

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### I. INTRODUCTION

In recent decades, creative collaborators have found it increasingly difficult to be recognized as joint authors under federal copyright law. Rather than adhering strictly to the language of the statute defining a “joint work,” key decisions in influential circuits have engrafted additional requirements which are difficult to satisfy even when the claimant has made a significant creative contribution to the finished work. As a result of the courts’ imposition of this narrowing gloss on the statutory standards, collaborators with meritorious claims can be denied a share of the copyright in a valuable work, losing out on significant economic rewards.

To justify their restrictive approach to joint authorship, these courts openly acknowledge their preference for sole authorship as a matter of policy. In particular, a number of courts have expressed concern that recognizing the authorship claims of those who make relatively small contributions would give those contributors equal ownership shares in the resulting work. This concern arises because, according to these courts, as a matter of law every joint author is entitled to an equal share of the joint work. Thus, recognizing a minor contributor as a joint author would over-compensate the minor contributor, and under-compensate the greater contributor.

While the equal ownership doctrine has been influential, its legal foundation is questionable. It has been treated as settled law by both courts

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and commentators, and its authenticity has never been questioned. It is time for that to change.

As this Article will demonstrate, neither the 1976 Copyright Act nor its legislative history supports the existence of an equal ownership rule. The belief that joint authors are always entitled to equal shares of their joint work reflects an unwarranted inference drawn from a handful of ambiguous cases decided under the 1909 Act. In contrast, a careful analysis of the relevant case law that Congress incorporated by reference in the 1976 Act supports the application of a completely different rule: Joint authors are entitled to ownership shares that reflect their respective contributions to the joint work.

Allocating ownership shares according to authors' contributions would address at least some of the concerns that have led federal courts to disfavor joint authorship. And the model itself is not unprecedented. In the United Kingdom, where the statutory definition of joint works is similar in many respects to the definition in federal copyright law, courts have rejected the equal ownership principle in favor of allocating shares according to contributions.

While adopting the apportionment approach may not alleviate all of the fears expressed by courts that are reluctant to recognize joint authorship, it will eliminate a significant policy argument on which many of these courts have relied. This can open the door to a more thoughtful and author-friendly approach to the analysis of joint authorship claims.

Part II of this Article introduces the restrictive joint authorship tests created by federal courts, and the courts' reliance on the equal ownership principle as a justification for those tests. Part III examines the relevant case law and other authorities addressing the rights of tenants in common under both copyright law and the general law of property, and concludes that, contrary to the views expressed by many courts and commentators, historical precedent and legislative history strongly favor an interpretation of the copyright statutes that apportions joint authorship shares according to the collaborators' respective contributions. Part IV examines the decision of the United Kingdom courts to abandon the equal ownership rule in favor of apportionment. Part V concludes that apportionment not only is consistent with the copyright statutes but also better serves the goals of federal copyright law by providing a more accurate allocation of the rewards of authorship.

## II. EQUAL OWNERSHIP AS JUSTIFICATION FOR RESTRICTING JOINT AUTHORSHIP

Although the Copyright Act of 1976 introduced, for the first time, a definition of a “joint work,” the interpretation of that definition has been problematic in several respects. As discussed below, courts resolving ambiguities in the statutory language have generally done so in a manner that disfavors claims of joint authorship.

### A. *Judicial Adoption of Restrictive Standards*

The Copyright Act defines a “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.”<sup>1</sup> As discussed below, court interpretations of this statute have focused largely on two issues: The nature of the requisite “contribution” and the nature of the authors’ “intention.”

With respect to the first issue, courts have reached a strong consensus that each author’s contribution must consist of copyrightable expression rather than abstract ideas.<sup>2</sup> The second issue, however, has been more problematic.

The statute expressly requires only one element of intent—the authors’ intent to merge their contributions into a “unitary whole.”<sup>3</sup> This distinguishes joint works from collective works, such as anthologies, periodicals, and encyclopedias, in which the authors’ contributions stand on their own as separate copyrightable works.<sup>4</sup> The legislative history makes clear that a joint author must possess the requisite intent to merge at the time he or she creates the copyrightable contribution.<sup>5</sup>

However, at least three circuits have imposed an additional obstacle for authors seeking to satisfy the “intent” requirement. In addition to the collaborators’ intent to merge their contributions into a single unitary work, these courts—the Second, Seventh, and Ninth Circuits—have required each joint author to possess a second kind of intent. Although

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1. 17 U.S.C. § 101 (defining “joint work”).

2. See *Childress v. Taylor*, 945 F.2d 500, 506 (2d Cir. 1991) (collecting cases). *But see* *Gaiman v. McFarland*, 360 F.3d 644, 658–59 (7th Cir. 2004) (questioning this approach).

3. 17 U.S.C. § 101 (defining “joint work”).

4. See 17 U.S.C. § 101 (defining “collective work”).

5. H.R. REP. NO. 94-1476 at 120 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5736 (“The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit . . .”).

this intent has not been clearly defined, generally speaking it has the effect of precluding authorship claims by those who make smaller contributions to a work, unless the larger (or “dominant”) contributor intends to include them as joint authors. In most cases, the dominant contributor is identified as the party that exercised the most control over the work.<sup>6</sup>

The Southern District of New York first articulated the rule as follows:

It does not follow that because suggestions are made and adopted that a joint copyright has been created, because there is this additional requirement of the shared intention that the contributions be merged into a unitary whole, that is to say, into a work of joint authorship. It is only where that dominant author intends to be sharing authorship that joint authorship will result.<sup>7</sup>

Although this initial expression of the rule was dictum, the Second Circuit later applied it to deny a joint authorship claim in the context of a play, in its influential decision in *Childress v. Taylor*<sup>8</sup>:

What distinguishes the writer-editor relationship and the writer-researcher relationship from the true joint author relationship is the lack of intent of both participants in the venture to regard themselves as joint authors. Focusing on whether the putative joint authors regarded themselves as joint authors is especially important in circumstances, such as the instant case, where one person (Childress) is indisputably the dominant author of the work and the only issue is whether that person is the sole author or she and another (Taylor) are joint authors.<sup>9</sup>

A few years later, the Second Circuit expressly relied on this reasoning when it decided *Thomson v. Larson*,<sup>10</sup> the court’s most troubling application of the restrictive gloss on joint authorship. In *Thomson*, the court denied a contributor’s claim to joint authorship of the musical play *Rent*, holding that, even if she had made a significant copyrightable contribution to the script, she could not be a joint author because Jonathan Larson—the writer who was deemed to have made the greater contribution—did not intend to share authorship with her.<sup>11</sup>

The Seventh Circuit applied the *Childress* standard in *Erickson v.*

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6. See Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L. J. 193 (2001) (providing a detailed critique of the dominant contributor standard).

7. *Fisher v. Klein*, No. 86-CV-09522, 1990 WL 10072477 at \*6 (S.D.N.Y. June 26, 1990).

8. 945 F.2d 500 (2d Cir. 1991).

9. *Id.* at 507–08.

10. 147 F.3d 195 (2d Cir. 1998).

11. *Id.* at 205–07.

*Trinity Theatre, Inc.*<sup>12</sup> In that case, it rejected a theatre company’s claim to have jointly authored a play based on the contributions of the actors during the collaborative rehearsal process, finding that “[t]he actors did not consider themselves to be joint authors with Ms. Erickson, and there is no evidence that Ms. Erickson considered the actors as co-authors of the script.”<sup>13</sup> In more recent cases, however, the Seventh Circuit has not applied the requirement.<sup>14</sup>

The Ninth Circuit engrafted its own narrowing gloss on the statutory definition of joint works in *Aalmuhammed v. Lee*, where it established three criteria for treating a contributor as a joint author.<sup>15</sup> First, the collaborator must “superintend[] the work by exercising control.”<sup>16</sup> Second, the putative coauthors must make “objective manifestations of a shared intent to be coauthors.”<sup>17</sup> Third, the court must find that the work’s audience appeal turns on both of the contributions and “the share of each in its success cannot be appraised.”<sup>18</sup>

Thus, while the details differ, each of these circuits has adopted a joint authorship standard that is designed to reduce the likelihood of successful joint authorship claims. While the Seventh Circuit may have since retreated from this approach, the outsized influence of the Second and Ninth Circuits in copyright matters means that their continued adherence is likely to affect joint authorship disputes for the foreseeable future.

### B. Equal Ownership Justification

In adopting joint authorship tests that are likely to reduce the number of successful claims, courts have justified their reluctance to recognize joint authors by suggesting that strict adherence to the statutory standard would permit too many creative contributors to qualify as joint authors.<sup>19</sup> While courts have offered little explanation as to why the recognition of multiple authors would be harmful, they have repeatedly emphasized one concern: That everyone who is recognized as a joint author enjoys equal and undivided ownership of the copyright.

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12. 13 F.3d 1061 (7th Cir. 1994).

13. *Id.* at 1072.

14. See Mary LaFrance, *Joint Authorship and Dramatic Works: A Critical History*, 45 COLUM. J. L. & ARTS 411, 451–54 (2022) (analyzing Seventh Circuit cases).

15. 202 F.3d 1227 (9th Cir. 2000); see also F. Jay Dougherty, Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law, 49 UCLA L. REV. 225, 274–81 (2001).

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

17. *Id.*

18. *Id.* (citation omitted).

19. *Childress v. Taylor*, 945 F.2d 500, 507–08 (2d Cir. 1991).

The impact of this belief is evident from the case law. For example, the Second Circuit relied on this rule in *Childress v. Taylor*,<sup>20</sup> the first appellate opinion to reject the plain language of the statutory joint works definition in favor of a judicially-narrowed gloss. To justify the court's decision, Judge Newman argued that Congress could not possibly have intended the legal consequence of applying the statute as it was written.<sup>21</sup> That consequence, he asserted, was this: "Joint authorship entitles the co-authors to equal undivided interests in the work."<sup>22</sup> This automatic rule of equal ownership played an important role in the parade of horrors that Judge Newman suggested would result from faithful application of the statute:

[A]n inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress. For example, a writer frequently works with an editor who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet very few editors and even fewer writers would expect the editor to be accorded the status of joint author, enjoying *an undivided half interest in the copyright* in the published work.<sup>23</sup>

Thus, in Judge Newman's view, a literal application of the statute would mean that even a small contributor to a work would automatically receive an equal authorship share. Judge Newman rejected that outcome as unacceptable: "[E]qual sharing of rights should be reserved for relationships in which all participants fully intend to be joint authors."<sup>24</sup>

The spectre of equal ownership also haunted the trial and appellate court decisions in *Thomson v. Larson*.<sup>25</sup> Notably, the plaintiff in *Thomson* did not seek an equal share of the copyright in the musical *Rent*.<sup>26</sup> On the contrary, she argued for only a small fractional ownership.<sup>27</sup> Presenting the district court with evidence of her copyrightable contributions as well as an analysis of the ratio of her contributions to those of the other

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20. *Id.*

21. *Id.* at 507.

22. *Id.* at 508.

23. *Id.* at 507 (emphasis added).

24. *Id.* at 509; see also Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK. L. REV. 123, 150–51 (2002) (discussing the rule of equal ownership and noting "[i]t is precisely this concern that led Judge Newman to fashion the *Childress* rule").

25. 147 F.3d 195 (2d Cir. 1998).

26. See *id.* at 198.

27. *Id.*

collaborators,<sup>28</sup> she asserted that she was entitled to a 16% share of the copyright.<sup>29</sup> In settlement negotiations, the estate of the “dominant” author—Jonathan Larson—had offered her up to 2%.<sup>30</sup> Based on the evidence, the trial court determined that her copyrightable contributions amounted to less than 9% of the work, but were “certainly not zero,” and were “not *de minimis*.”<sup>31</sup> However, based on the new standard imposed by *Childress*, the district court refused to recognize her authorship claim at all.<sup>32</sup>

When the Second Circuit affirmed, it, too, relied on the equal ownership rule. Citing *Childress*, Judge Calabresi declared:

Joint authorship entitles the co-authors to equal undivided interests in the whole work—in other words, each joint author has the right to use or to license the work as he or she wishes, subject only to the obligation to account to the other joint owner for any profits that are made.<sup>33</sup>

Judge Calabresi failed to acknowledge, however, that these are not equivalent claims. Interests may be undivided, and subject to a duty of accounting, without necessarily being equal in magnitude.<sup>34</sup>

The equal ownership rule has spread rapidly to other circuits. The First Circuit expressly adopted the rule in *Greene v. Ablon*,<sup>35</sup> quoting directly from *Thomson*.<sup>36</sup> Although the Seventh and Ninth circuits adopted their restrictive approaches to joint authorship without expressly endorsing the rule, both relied on the Second Circuit’s analysis in

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28. *Id.*

29. *Id.*

30. *Id.* at n.8.

31. *Id.* at 200–01, 201 n.14.

32. *Id.* at 201.

33. *Id.* at 199. Although Judge Calabresi also cited Section 201(a) of the 1976 Act as authority for the equal ownership presumption, that statute is silent on ownership shares, stating only: “Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.” 17 U.S.C. § 201(a).

34. In more recent cases, the Second Circuit has continued to apply the equal ownership rule. *See* 16 Casa Duse, LLC v. Merkin, 791 F.3d 247, 259 (2d Cir. 2015); Maxwood Music Ltd. v. Malakian, 713 F. Supp. 2d 327, 343 (S.D.N.Y. 2010); Papa’s-June Music, Inc. v. McLean, 921 F. Supp 1154, 1157–58 (S.D.N.Y. 1996).

35. 794 F.3d 133, 151 (1st Cir. 2015) (“Joint authors share ‘equal undivided interests in the whole work—in other words, each joint author has the right to use or to license the work as he or she wishes, subject only to the obligation to account to the other joint author for any profits that are made.’” (quoting *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998))); *see also id.* (“Even if it is clear that one co-author has contributed more to the work than another co-author, they are nevertheless equal owners of the copyright in the absence of an agreement to the contrary.” (citing 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.08 (2014))).

36. *Id.*

*Childress*.<sup>37</sup> In explaining why a judicially-created test was necessary at all, the Ninth Circuit's opinion in *Aalmuhammed v. Lee* specifically noted Judge Calabresi's concern over "'overreaching contributors,' like the dramaturg in *Thomson*."<sup>38</sup> Since then, the Ninth Circuit has expressly acknowledged and applied the equal ownership rule.<sup>39</sup> District courts in the Fifth and Sixth circuits have endorsed it as well.<sup>40</sup> No American court has considered allocating joint authorship in any other manner.

In adopting the equal ownership presumption, all of these courts have relied on the Second Circuit opinions in *Childress* and *Thomson* and/or the Nimmer copyright treatise. Yet no court or commentator has independently investigated the legal foundations for this presumption.

A handful of federal courts have appended an exception to the equal ownership rule. Under this exception, the presumption of equal ownership can be overcome by an "agreement to the contrary."<sup>41</sup> Each of these opinions, however, relies on the Nimmer copyright treatise as the sole authority for this rule.<sup>42</sup> Another treatise recites the same rule, but its sole

37. In *Erickson v. Trinity Theatre, Inc.*, the Seventh Circuit cited *Childress* extensively, while never actually explaining its own reasons for treating an intent to share authorship as essential to joint work status. See 13 F.3d 1061, 1068–69, 1071–72, 1072 n.10 (7th Cir. 1994).

38. 202 F.3d 1227, 1235 (9th Cir. 2000) (quoting *Thomson*, 147 F.3d at 200). The Nimmer treatise agrees that the equal ownership rule played a significant role in the Ninth Circuit's rejection of Aalmuhammed's joint authorship claim: "Plainly, a result whereby the one-time consultant would succeed to 50% ownership of a major blockbuster was so unpalatable as to be a non-starter." 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.08[B] (rev. ed. 2021).

39. See *Davis v. Blige*, 505 F.3d 90, 98 (9th Cir. 2007); *Softketeers, Inc. v. Regal West Corp.*, No. SACV 19-519 JVS (JDEx), 2020 WL 6747734, at \*4 (C.D. Cal. Sept. 14, 2020), *vacated on other grounds*, 2021 WL 1035122 (C.D. Cal. Feb. 10, 2021); *Creative Dream Prods., LLC v. Houston*, No. CV 14-7714 SS, 2015 WL 12731915, at \*5 (C.D. Cal. Apr. 2, 2015) (citing *Thomson*, 147 F.3d at 199); *Botts v. Kompany.com*, No. SACV 09-00195-JVS (ANx), 2013 WL 12137690, at \*2 (C.D. Cal. Apr. 10, 2013) (citing *Cmt. for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988); *Scorpio Music S.A. v. Willis*, No. 11-CV-01557, 2012 WL 1598043, at \*5 (S.D. Cal. 2012) (citing 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.08 (2011)).

40. See *Corwin v. Quinonez*, 858 F. Supp. 2d 903, 909 (N.D. Ohio 2012) (first quoting *Thomson*, 147 F.3d at 199; and then citing *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991)); *Jordan v. Sony BMG Music Entm't, Inc.*, 637 F. Supp. 2d 442, 458–59 (S.D. Tex. 2008) (citing *Thomson*, 147 F.3d at 199). The presumption was also cited in a concurring opinion in the Fourth Circuit. *Brown v. Flowers*, 196 F. App'x 178, 190 (4th Cir. 2006) (Gregory, J., concurring in the judgment in part and dissenting in part) (citing *Thomson*, 147 F.3d at 201, 202–03, 203, 204).

41. *Greene v. Ablon*, 794 F.3d 133, 151 (1st Cir. 2015); *Gaines v. Fusari*, No. 11-4433 (WJM), 2012 WL 3018293, at \*5 (D.N.J. July 24, 2012); *Scorpio*, 2012 WL 1598043, at \*5; *Sierra-Pascual v. Pina Records, Inc.*, 660 F. Supp. 2d 196, 203 (D.P.R. 2009); *Weissman v. Freeman*, 684 F. Supp. 1248, 1259 (S.D.N.Y. 1988), *aff'd in part, rev'd in part*, 868 F.2d 1313 (2d Cir. 1989).

42. *Greene*, 794 F.3d at 151; *Gaines*, 2012 WL 3018293, at \*5; *Scorpio*, 2012 WL 1598043, at \*5; *Sierra-Pascual*, 660 F. Supp. 2d at 203; *Weissman*, 684 F. Supp. at 1259. In every case but one, the court's statement was dictum, because the authors' respective shares were not at issue. See *Greene*, 794 F.3d at 151; *Gaines*, 2012 WL 3018293, at \*5; *Sierra-Pascual*, 660 F. Supp. 2d at 203; *Weissman*, 684 F. Supp. at 1259. In the one remaining case, no evidence of a contrary agreement was found. See *Scorpio*, 2012 WL 1598043, at \*5.



authority is a 2011 magazine article.<sup>43</sup>

In contrast, one court has effectively rejected the purported “exception” that allows joint authors to apportion their initial ownership shares by agreement. In *Papa’s-June Music, Inc. v. McLean*,<sup>44</sup> the Southern District of New York held that an agreement among joint authors to own unequal shares of their work constitutes a “transfer of copyright ownership” rather than an acknowledgement that their shares were unequal ab initio. Because joint authors are deemed to own equal shares as a matter of law, the court reasoned, any agreement to divide their ownership unequally must be a transfer of ownership in which one author transfers to another a portion of his or her equal share.<sup>45</sup> According to the copyright statutes, however, any transfer of copyright ownership must be in writing in order to be valid.<sup>46</sup> Therefore, the court concluded, oral agreements to hold unequal shares must be disregarded. Under this approach, joint authors are locked into equal ownership shares as a matter of law unless they undertake a formal written transfer. This approach appears to be settled law in the Southern District of New York.<sup>47</sup>

As *Papa’s-June Music* illustrates, in addition to discouraging courts from recognizing joint authorship, treating equal ownership as a rule of law creates an obstacle for joint authors who agree that their contributions are unequal, and want this to be reflected in their ownership shares. The rule of *Papa’s-June*, however, is a logical consequence of applying a rigid presumption of equal ownership. It places the burden on authors to safeguard their interests by undertaking formal legal measures, even though authors are often inexperienced and unfamiliar with legal technicalities, and may be either unaware of the need to seek legal counsel or unable to afford such counsel. The writing requirement also flies in the face of modern copyright law’s general policy of reducing formalities and legal technicalities that can ensnare artists unfamiliar with the law. Even

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43. 3 THOMAS D. SELZ, MELVIN SIMENSKY, PATRICIA ACTON & ROBERT LIND, ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES §16.71 & n.3 (citing a 2011 *Vanity Fair* report that Kurt Cobain coerced his bandmates into giving him a larger-than-equal share of their jointly authored music and lyrics).

44. 921 F. Supp. 1154 (S.D.N.Y. 1996).

45. *Id.* at 1157–58. The court referred specifically to “the statutory presumptions of equal ownership,” as though this presumption was a creature of statute rather than a judicial invention. *Id.* at 1158.

46. 17 U.S.C. § 204(a) (providing that “[a] transfer of copyright ownership . . . is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed . . .”).

47. See *Maxwood Music Ltd. v. Malakian*, 713 F. Supp. 2d 327, 343 (S.D.N.Y. 2010) (citing *Papa’s-June Music*, 921 F. Supp. at 1158). At least one copyright treatise has adopted this rule as well. See 1 HOWARD B. ABRAMS & TYLER T. OCHOA, THE LAW OF COPYRIGHT § 4:1 (2021).

where there is other evidence of the authors' understanding, the formal writing requirement will make it difficult to prove that the collaborators agreed on unequal shares if there is a subsequent dispute—if, for example, many years later the estate of one author believes that its minority share is inadequate.

Treating an allocation agreement as a transfer of copyright between joint authors may also have unintended but serious legal consequences.<sup>48</sup> Under copyright law, any author that transfers a copyright interest has an inalienable and unwaivable right to terminate that transfer and reclaim the copyright interest.<sup>49</sup> This right can be exercised after a term of years specified by the copyright statutes.<sup>50</sup> That term can be as short as 35 years.<sup>51</sup> Even after the author's death, the termination right can be exercised by the author's family or other statutory successors.<sup>52</sup> Therefore, because of the termination right, treating an authorship allocation agreement as a transfer of copyright cannot, as a matter of law, effect a permanent change in the authors' ownership shares.

Congress adopted the writing requirement largely to protect authors from fraudulent claims that they had surrendered their copyrights.<sup>53</sup> Ironically, one consequence of the equal ownership rule is that a writing requirement that was originally intended to protect authors' copyright interests has now been transformed into an obstacle to protecting those interests.

### III. THE SEARCH FOR AUTHORITY

As discussed above, there has been broad and largely unquestioning acceptance of the equal ownership principle by courts interpreting the 1976 Act. It is difficult, however, to find support for this rule either in the language of the Act or in its legislative history.

Both the 1909 and 1976 Acts are silent on the allocation of interests in joint works. The 1909 Act does not address the ownership of joint

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48. In addition to triggering the termination right discussed here, treating the agreement as a transfer of copyright could have tax consequences, since the receipt of a share larger than the author's entitlement under the equal ownership rule could be treated as taxable income. *See* 26 U.S.C. § 61(a) (defining gross income as "all income from whatever source derived," including "compensation for services" and "gains from dealings in property").

49. 17 U.S.C. §§ 203, 304(c).

50. *Id.* §§ 203(a)(3), 304(c)(3).

51. *Id.* § 203(a)(3).

52. *Id.* § 203(a)(2), 304(c)(2).

53. *Konigsberg Int'l, Inc. v. Rice*, 16 F.3d 355, 357 (9th Cir. 1994); *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990).

works at all. The 1976 Act states only that: “Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.”<sup>54</sup>

In the absence of statutory authority, the legislative history of the 1976 Act provides the only evidence of Congress’s intent regarding the respective rights of joint authors. The sole relevant passage, however, is silent on ownership shares:

There is also no need for a specific statutory provision concerning the rights and duties of the coowners of a work; court-made law on this point is left undisturbed. Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use o[r] license the use of a work, subject to a duty of accounting to the other coowners for any profits.<sup>55</sup>

Thus, far from imposing a rule of equal ownership, Congress classified joint copyright owners as tenants in common with the right to an accounting, and stated its intent to leave existing case law undisturbed. What “court-made law” or “present law” was Congress referencing? Unfortunately, this passage contains no supporting detail, such as examples or citations to case law. It is possible that the authors of the House Report simply did not know the state of the law on joint authorship shares as of 1976. Even if they did have that knowledge, however, their failure to convey this information shifted the research burden to the federal courts.

However, the courts have never taken up this research task. Although the courts that have addressed authorship allocation questions under the 1976 Act have often cited this passage in the legislative history, they have made no attempt to examine the law of joint authors, or of tenants in common more generally, as it existed at that time. The same, unfortunately, is true of treatise authors.<sup>56</sup>

It is therefore fitting, and long overdue, to inquire: What was the law regarding joint authorship shares at the time the 1976 Act was enacted? According to the legislative history, the answer to this question should dictate how courts address joint authorship allocations under the 1976 Act. Furthermore, if the pre-1976 case law supports unequal allocations, then the federal courts should not allow a contrary rule to influence their joint

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54. 17 U.S.C. § 201(a).

55. H.R. REP. NO. 94-1476 at 121 (1976); *see also* S. REP. NO. 94-473 at 104 (1975) (containing identical language without the typo).

56. *See infra* notes 134–42 and accompanying text.

authorship determinations under the 1976 Act.

To identify the common law principles which the 1976 Congress might have intended to incorporate by reference, it is necessary to consider two bodies of law. First, the case law interpreting federal copyright law prior to the 1976 Act may indicate whether a presumption of equal ownership was well established by 1976. If the presumption is not dictated by those cases, then it is necessary to look at the broader law of property to determine how courts allocated the rights of tenants in common.

*A. Pre-1976 Act Copyright Cases*

While the rule of equal ownership is widely cited in post-1976 Act cases, it is almost completely absent from the case law predating the 1976 Act. As discussed below, only a handful of cases even tangentially addressed joint authors' relative ownership shares before the 1976 Act. Of these cases, only one expressly endorsed a rule of equal ownership—an unreported 1966 trial court decision. Despite this weak authority, every one of the major copyright treatises presents the rule as settled law,<sup>57</sup> with the Nimmer treatise going so far as to describe it as the “traditional rule” for jointly authored works.<sup>58</sup>

1. A Critical Look at the Cases

A careful review of the cases addressing joint authors' ownership shares prior to the 1976 Act helps to understand how later courts and commentators might have inferred a rule of equal ownership. However, it also demonstrates that the inference is unwarranted. Only five cases even mentioned joint authors' ownership shares during this period, and only the last of these decisions actually endorsed the rule. That endorsement, however, was based largely on the authority of a single influential copyright treatise.

a. *Maurel v. Smith* (1915)

The earliest case awarding equal ownership prior to the 1976 Act is *Maurel v. Smith*.<sup>59</sup> As revealed by the analysis below, however a close examination of both the district and appellate court opinions in that case reveals that the case does not support a presumption that every joint author

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57. See *infra* notes 134–42 and accompanying text.

58. NIMMER, *supra* note 38, at § 6.08.

59. 220 F. 195 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921).

owns an equal share of the joint work.

The plaintiff in *Maurel* brought suit against a collaborator who took out a statutory copyright in their joint work in his own name, and refused to recognize her claim to a share of the profits.<sup>60</sup> Plaintiff Maurel and defendant Harry Smith had agreed to write the text of *Sweethearts*, a comic opera, with Maurel providing the scenario and Smith writing the libretto and lyrics (collectively, the “book”).<sup>61</sup> Smith later brought in his brother, co-defendant Robert Smith, to write the lyrics.<sup>62</sup> A fourth contributor, who was not a party to the litigation, composed the music.<sup>63</sup> Thus, the book of the opera had three contributors, but the complete opera had four. Harry Smith subsequently obtained a statutory copyright on the book in his name alone, and refused to share any of the profits with Maurel, denying that she was a joint author of the book.<sup>64</sup> Accordingly, Maurel asked the court for a declaration of her joint authorship and of her equitable right to an accounting of the profits.<sup>65</sup>

Based on these facts, District Judge Learned Hand held that Maurel was indeed a joint author, and that she was entitled to one-third of the profits earned from Harry Smith’s statutory copyright in the book as well as one-third of the common law copyright in any retained rights.<sup>66</sup> Applying *Levy v. Rutley*<sup>67</sup>—an 1871 English case that was, at the time, one of the few precedents that attempted to define joint authorship—Judge Hand held that the work was joint, because the scenario, music, and lyrics were a unitary whole rather than a collection of separate works.<sup>68</sup> Although the Smith brothers claimed that Maurel was not a joint author because her scenario was not directly reflected in the libretto or lyrics, Judge Hand disagreed, pointing out that the audience experienced the opera as a unitary intertwining of all of the creators’ contributions.<sup>69</sup> When Smith took out a statutory copyright in the book, he destroyed the copyright it had previously enjoyed at common law.<sup>70</sup> As a result, the

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60. *Id.* at 201–02.

61. *Maurel v. Smith*, 271 F. 211, 212–13 (2d Cir. 1921).

62. The appellate opinion identifies Robert as Harry’s brother. *Maurel*, 271 F. at 212.

63. *Id.* at 213.

64. *Maurel*, 220 F. at 201–02.

65. *Id.*

66. *Id.* at 203.

67. *Id.* at 199 (citing *Levy v. Rutley*, L.R. 6 C.P. 523, 529–30 (1871)) (explaining the question of joint authorship under England’s Literary Copyright Act of 1842).

68. *Id.* at 200.

69. *Id.*

70. *Id.* at 201. Under the Copyright Act of 1909, a work was protected by perpetual common

statutory copyright became subject to a constructive trust on behalf of each of the joint authors:

The statutory copyrights have been acquired through the publication, and so the loss, of certain common-law literary property; i.e., a libretto to which all three parties had contributed. The copyright is the resulting res, and by every equitable rule the defendants hold any legal rights they have upon trust in the same proportion.<sup>71</sup>

As this context makes clear, the phrase “same proportion” does not necessarily refer to equal ownership shares, but to shares in the constructive trust that are the same as the contributors’ respective shares of the common law copyright before it was extinguished by publication.

Maurel did not argue for any specific share of the constructive trust. Although she had successfully negotiated for a specific (and relatively large) share of the foreign production rights,<sup>72</sup> she did not ask the court to award her the same share of the constructive trust.<sup>73</sup> Although Judge Hand did not give a detailed explanation for allocating one-third to each of the book writers, he did observe that “if the contributors were to share alike, it could not injure the Smiths to give the plaintiff one-third of their recovery.”<sup>74</sup> The “share alike” reference echoes his observation earlier in the opinion that “[w]hen several collaborators knowingly engage in the production of a piece which is to be presented originally as a whole only, they adopt that common design, mentioned in *Levy v. Rutly* [sic], supra, and unless they undertake expressly to apportion their contributions, they must share alike.”<sup>75</sup>

It is not difficult to see how a commentator might interpret this passage as suggesting a general rule of equal ownership. Yet, at no point in the opinion did the parties present arguments aimed at quantifying their respective shares. The argument for the defense was that Maurel was entitled to no share at all. And Judge Hand himself noted that the outcome

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law copyright until publication, at which point its common law copyright was extinguished and replaced by statutory copyright. Pub. L. No. 60-349, §§ 2, 10, 35 Stat. 1076, 1078 (repealed 1947).

71. *Maurel*, 220 F. at 201.

72. *Id.* at 203. That contract split foreign production royalties one-half to the composer, one-quarter to Maurel, and one-quarter jointly to the Smiths. *Maurel v. Smith*, 271 F. 211, 213–14 (2d Cir. 1921).

73. *Maurel*, 220 F. at 203.

74. *Id.*

75. *Id.* at 200. Later courts interpreted the “share alike” language as distinguishing joint works from collective (or “composite” works). See *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42 F. Supp. 859, 864 (S.D.N.Y. 1942). In other words, the joint authors’ interests were joined together in a unitary work, and they would succeed or fail together in the undertaking. Thus, the phrase does not imply equal ownership shares.

might be different in cases where the parties “undertake expressly to apportion their contributions.”<sup>76</sup>

As noted above,<sup>77</sup> Judge Hand observed that “by every equitable rule” Maurel’s share in the constructive trust should be the same as her share in the common law copyright.<sup>78</sup> The rule of equity most relevant to this context is *Aequitas est quasi aequalitas*—often translated as “Equality is equity.”<sup>79</sup> However, this rule does not mandate equal partitioning of property. Instead, it mandates treating similarly situated claimants equally. For example, at the time of Judge Hand’s opinion, this rule was often invoked to resolve competing claims of creditors and legatees when the available assets were insufficient to satisfy each claim in full. In such cases, the equitable rule of equality mandated that each person’s claim must be abated in proportion, rather than paying some claims in full while forcing the others to suffer losses.<sup>80</sup> Judge Hand’s opinion itself invokes the metaphor of debt. When the defendants argued that Maurel was not a joint author because they had made significant changes to Maurel’s scenario, Hand responded: “It is enough to say that by changes, omissions, additions, and alterations a subsequent author cannot avoid the debt which he owes to the maker of the plot.”<sup>81</sup> Thus, the equitable rule most likely to have guided Judge Hand did not mandate equal ownership shares; rather, it mandated non-preferential treatment for each author.

Judge Hand’s opinion, of course, was not the final word in the case. The Smith brothers appealed the recognition of Maurel as a joint author; notably, however, Maurel did not take the opportunity to contest her one-third allocation. Although the Second Circuit affirmed,<sup>82</sup> the appellate opinion mentioned an additional fact that was not mentioned in the district court opinion, and which may shed light on Judge Hand’s reasoning. Prior

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76. *Maurel*, 220 F. at 200.

77. *See supra* note 71 and accompanying text.

78. *Maurel*, 220 F. at 201.

79. JOSEPH STORY & W.E. GRIGSBY, COMMENTARIES ON EQUITY JURISPRUDENCE § 554 (1st Eng. ed. 1884).

80. *See id.*; *McDonnell v. Bank of China*, 33 F.2d 816, 819 (9th Cir. 1929) (holding that all creditors have an equal right to be repaid, but if available funds fall short, “all the creditors are required to abate in proportion”) (quoting 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 754 (W.H. Lyon, Jr. ed., 14th ed. 1918)); *State v. Spartanburg & U.R. Co.*, 8 S.C. 129, 165 (1875) (similarly quoting to “Mr. Story, in his work on equity jurisdiction, Section 554”); *Green v. Green*, 11 Miss. 256, 263 (1844) (“Courts of equity regard all debts in conscience as equal, *jure naturali*, and equally entitled to be paid . . . [I]f the equitable assets (after payment of debts) are not sufficient to pay all the legacies, the legatees are all required to abate in proportion.” (citing to “1 Story’s Equity, 523, 524; Toller’s Law of Executors, 338”)).

81. *Maurel*, 220 F. at 199.

82. *Maurel v. Smith*, 271 F. 211, 216 (2d Cir. 1921).

to their work on *Sweethearts*, Maurel and Harry Smith had already collaborated on six previous operas.<sup>83</sup> In each case, “the contracts made in respect to these collaborations were upon the basis of equal co-owners.”<sup>84</sup> On each of these prior occasions, Harry Smith had taken out the statutory copyright in his own name, but held it in trust for Maurel with respect to her share of the profits.<sup>85</sup> In contrast to their six prior collaborations, the *Sweethearts* collaboration was the first time that Smith had refused to recognize Maurel’s ownership rights at all.<sup>86</sup> Thus, the parties’ longstanding practice had always been to hold equal shares of their jointly authored books, and it was not until Harry Smith brought in his brother as an additional co-author that he attempted to deny Maurel any authorship rights at all. While Judge Hand’s trial court opinion did not mention the six previous collaborations or the equal ownership arrangements that accompanied them, this part of the evidentiary record may have led him to believe that, based on the parties’ history together, equal ownership shares represented an equitable division in this case as well, even though the book on this occasion had three authors rather than two.

Thus, while certain language in the district court’s opinion in *Maurel* could be read to support a principle of equal shares, the focus of the case was on whether the plaintiff had any authorship share at all. The parties did not present any arguments as to what their respective shares should be if her authorship claim were to be accepted. Furthermore, the resolution adopted by Judge Hand, and affirmed by the Second Circuit, was consistent with the ownership shares to which the parties had agreed on at least six prior collaborations.

b. *Edward B. Marks Music Corp. v. Wonnell* (1945)

It was several decades before another court even mentioned ownership shares. Although the *Wonnell* decision<sup>87</sup> has not been cited by courts or commentators as authority for the equal ownership principle, superficially it could be viewed as supporting that approach. In this 1909 Act case, the Southern District of New York ordered an equal split of a song’s publishing royalties when, nearly thirty years after the song was written, a second songwriter (the ex-wife of the songwriter who took out the

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83. *Id.* at 214.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Edward B. Marks Music Corp. v. Wonnell*, 61 F. Supp. 722 (S.D.N.Y. 1945).



statutory copyright in his own name) came forward and asserted that she was, in fact, the sole author of the song.<sup>88</sup>

Due to the passage of time and possible bias of the witnesses, it was difficult to determine exactly what each writer had contributed.<sup>89</sup> However, after an extensive review of the evidence, the court found that the ex-wife had been the “main author” of the song, that she had collaborated with her ex-husband (her fiancé at the time),<sup>90</sup> and that the latter had made some changes before copyrighting the song in his own name.<sup>91</sup>

In deciding that the ex-wife should receive half of the royalties, the court took note of some additional facts that affected the equities of the case. First, because the copyright registration was in the ex-husband’s name alone, as a matter of law this created a presumption of authorship in his favor.<sup>92</sup> Second, the ex-wife had not asserted any rights in the song during its initial 28-year copyright term.<sup>93</sup> This was not surprising, however, because the song did not achieve any success until its initial copyright term was nearly expired.<sup>94</sup> The court found, therefore, that it was a close question whether the ex-wife’s lengthy delay in coming forward was barred by laches.<sup>95</sup> Finally, by the time she brought her lawsuit, the song’s initial 28-year term had expired, and the ex-husband/collaborator had died, leaving behind a widow who renewed the copyright in the song, now that it had finally become a financial success. In the court’s view, despite the ex-wife’s role as the song’s main author, it would have been “inequitable” to deny the widow a substantial share of the royalties because, had she not renewed the copyright, the song would have entered the public domain by the time the ex-wife came forward, leaving the latter with no royalties at all.<sup>96</sup>

Thus, *Wonnell* can best be described as a messy case. (The court twice referred to the facts as “peculiar.”<sup>97</sup>) Superficially, the decision could be viewed as support for an equal ownership principle. However, closer inspection reveals that the court took account of a number of equitable

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88. *Id.* at 723–24.

89. *Id.* at 725–27.

90. *Id.* at 727.

91. *Id.*

92. *Id.* at 728.

93. *Id.* at 729.

94. To use the court’s words, the song “rested in oblivion” for the first 27 years of its initial 28-year term. *Id.* at 725.

95. *Id.* at 728–29.

96. *Id.* at 728.

97. *Id.*

considerations before deciding on an equal split—most notably, the song’s failure to generate any royalties during most of its initial term, the ex-wife’s lengthy but understandable delay in asserting her claim, and the widow’s crucial role in ensuring future royalties for both parties by renewing the copyright once the song had finally found its audience. Rather than supporting a hard-and-fast rule of equal ownership, therefore, *Wonnell* supports a more nuanced analysis.

c. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.* (1947)

In *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*,<sup>98</sup> a complex and ambiguous decision, a composer (Burnett) and a lyricist (Watson) co-authored a song in 1911, which they did not publish.<sup>99</sup> In 1912, the song was revised by removing the original lyrics and substituting lyrics from a different writer (Norton).<sup>100</sup> Under the 1909 Act, Burnett and Norton were joint authors of the 1912 song, but the court avoided deciding whether Watson was also a joint author.<sup>101</sup> On the one hand, Watson’s 1911 contribution had been completely excised; on the other hand, her contribution had made her a joint owner of the entire 1911 song, including the music that was later combined with new lyrics to create the 1912 song.

The publisher later asserted two-thirds ownership of the 1912 song, as successor to the rights of both Burnett and Watson.<sup>102</sup> Essentially, the publisher was claiming that each of the three contributors—the composer and the two serial lyricists—owned an equal share of the 1912 song. However, the court disagreed, and awarded the publisher only a one-half interest in the 1912 song. The court reasoned that “Burnett was either the owner of a one-half interest in the 1912 composition, or else Burnett and Watson were the owners of that half.”<sup>103</sup> Under either calculus, the publisher could not own more than one half of the 1912 song.

According to this reasoning, the new lyricist, Norton, owned exactly half of the 1912 song. Because the publisher owned Burnett’s music as well as Watson’s original lyrics, the court did not have to decide whether Watson should be considered a joint author of the 1912 song, or whether Watson’s authorship claim was completely displaced when Norton’s lyrics

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98. 73 F. Supp. 165 (S.D.N.Y. 1947).

99. *Id.* at 165. The song in question was eventually released as *My Melancholy Baby*. *Id.* at 166.

100. *Id.*

101. *See id.*

102. Technically, the dispute was about ownership of the renewal copyright in the 1912 song. *Id.*

103. *Id.* at 167.

were substituted.<sup>104</sup>

This ambiguity—whether the 1912 song had two authors or three—makes it difficult to discern what view, if any, the court entertained on the allocation of ownership shares in joint works. If the 1912 song had three authors, then by rejecting the publisher’s claim of two-thirds ownership the court necessarily rejected a rule of equal ownership. However, if the song had two authors, then the court’s holding would be consistent with such a rule. Consistency, of course, is a far cry from endorsement. The court could have been applying a completely different presumption—that the words and music of a song are presumptively equal in value. In that case, the court’s opinion would support a very different rule—one that allocates ownership based on the authors’ respective contributions.

d. *Sweet Music, Inc. v. Melrose Music Corp.* (1960)

One of the cases most frequently cited in support of the equal ownership rule is the 1960 decision in *Sweet Music, Inc. v. Melrose Music Corp.*<sup>105</sup> In this case, one joint author of a musical work died before the copyright was renewed.<sup>106</sup> After determining that the renewal term itself was jointly owned, the court set out to determine the owners’ respective shares.<sup>107</sup> The deceased author had co-written the lyrics with the surviving author, who also was the sole composer of the music.<sup>108</sup> However, there was no evidence indicating the magnitude of each writer’s contribution to the lyrics.<sup>109</sup> Despite this, the composer’s assignees argued that they were entitled to a three-fourths share of the renewal copyright—a half share for composing the music, plus an additional quarter share for co-authoring the lyrics.<sup>110</sup> The district court rejected this claim, and ruled that the two songwriters—and therefore their successors—were equal owners of the entire song.<sup>111</sup>

However, this allocation was not based on any general rule of equality. Instead, it was based on evidence of the joint authors’ intent and understandings with regard to their shares. The district court looked for evidence that “the ownership was intended as other than an undivided one-

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104. *See id.*

105. 189 F. Supp. 655 (S.D. Cal. 1960); *see, e.g.,* NIMMER, *supra* note 38, at § 6.08 n.1 (citing *Sweet Music*).

106. *Sweet Music*, 189 F. Supp. at 657.

107. *Id.* at 659.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

half interest for each of the co-authors,” but found none.<sup>112</sup> On the contrary, the evidence affirmatively suggested that they intended to hold equal shares: In an assignment agreement that provided for advance royalties, the songwriters had specified that the royalties were “to be divided equally between them.”<sup>113</sup> Since this was the only evidence pertinent to the parties’ intent, understanding, or contributions, the court simply could not have justified any other result. Accordingly, each of the co-authors held an undivided half share of the musical work, and their successors in interest owned the renewal term in the same proportions.<sup>114</sup>

As additional support, however, the court pointed to “the analogy of tenants-in-common generally,” quoting “the long-settled rule” that “if their shares are not fixed in the deed or will creating the cotenancy, they take in equal shares.”<sup>115</sup> This could arguably support a presumption of equal ownership by joint authors. However, the court’s description of this “long-settled rule” is not entirely accurate. The court attributed this rule to James Casner’s 1952 *American Law of Property*, but in quoting this short excerpt the court overlooked the rest of Casner’s analysis, which supports an allocation based on contributions:

Though there be no provision that the tenants hold in unequal shares, an intent that they hold different fractional shares may be established by the circumstances, as where no family relation or intent to make a gift exists, and the tenants have contributed to the purchase price in amounts varying considerably.<sup>116</sup>

In addition, the rule attributed to Casner pertained only to a tenancy in common arising from a *transfer* of property. Joint authorship, in contrast, arises from the *creation* of property. Thus, there is no deed, will, or other instrument of conveyance that could address—or fail to address—the joint

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112. *Id.*

113. *Id.* The idea that music and lyrics deserve equal weight in apportioning ownership of a jointly authored song is a theme that unites *Sweet Music* and *Shapiro, Bernstein & Co. v. Jerry Vogel Music*. It may have reflected a standard practice of the music industry at the time. Another case from the same period fits the same pattern: In *Jerry Vogel Music Co. v. Miller Music*, 74 N.Y.S.2d 425 (N.Y. Sup. Ct. 1947), which involved a jointly-authored song, one co-writer’s successor in interest sought and obtained a 50% accounting from the other co-writer’s successor in interest. Because the dispute focused on whether an accounting was required at all, and neither party claimed more than a 50% share, the court naturally awarded a 50% accounting. *Id.* Here, too, one co-writer composed the music, and the other contributed the lyrics. See *California State Song Lyrics*, LYRICS ON DEMAND, <https://www.lyricsondemand.com/miscellaneouslyrics/statesongslyrics/californiastatesonglyrics.html> [<https://perma.cc/XTT4-DXDD>].

114. *Sweet Music*, 189 F. Supp. at 659.

115. *Id.* at 659 (quoting 2 AMERICAN LAW OF PROPERTY § 6.5 (A. James Casner ed., 1952)).

116. 2 AMERICAN LAW OF PROPERTY § 6.5, at 20 (A. James Casner, ed., 1952).

authors' relative ownership shares in newly created property. Notably, the *Sweet Music* court did not refer to any common law rules governing the ownership of newly created property. Yet, as discussed in Part III.B. below,<sup>117</sup> such rules existed well before 1960.

Thus, nothing in *Sweet Music* suggests that co-authorship automatically—or even presumptively—leads to equal ownership shares. Instead, the court made a fact-based determination. The only relevant evidence available to the court was the royalty agreement, which evidenced the parties' shared understanding that they held equal shares.<sup>118</sup> The case therefore supports treating ownership shares as a question of fact, not a rule of law. It also supports giving significant weight to evidence revealing the parties' own understanding of their respective shares.

e. *Eliscu v. T.B. Harms Co.* (1966)

Finally, there is one pre-1976 Act case that unambiguously endorsed an equal ownership principle—*Eliscu v. T.B. Harms Co.*,<sup>119</sup> an unreported 1966 decision by a New York state trial court. Its endorsement, however, was based largely on the authority of a recently published treatise.

The plaintiff, a lyricist, sought a decree that he owned a one-third share of the renewal rights in four musical compositions that he co-wrote with two other songwriters.<sup>120</sup> The songwriters had assigned the initial term of copyright to the defendant publisher, but they had not assigned the renewal term.<sup>121</sup> The sole issue in the case was whether the compositions were works made for hire; if they were, then the plaintiff would have no rights in the renewal term. However, the trial court determined that the compositions were not works made for hire, and therefore awarded the plaintiff the one-third interest he requested.<sup>122</sup> Even though there was no dispute regarding the ownership interests of the other co-writers, and therefore no analysis of their respective shares, the court recited a variation on the equal ownership rule: "Plaintiff as a joint contributor to the compositions is entitled to share equally with the other collaborators, absent any agreement to the contrary."<sup>123</sup> For support, the court relied on

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117. See *infra* notes 143–82 and accompanying text.

118. *Sweet Music*, 189 F. Supp. at 656–57.

119. 151 U.S.P.Q. 603, 1966 WL 7662 (N.Y. Sup. Ct. 1966).

120. *Id.* at \*1.

121. *Id.*

122. *Id.* at \*2.

123. *Id.* (citations omitted).

*Sweet Music* and the Nimmer treatise,<sup>124</sup> which included this rule even in its first edition.<sup>125</sup>

*Eliscu* was the last decision in this series of five cases, and the only one to expressly articulate a rule of equal ownership. It was also the only one of these cases that was decided after the initial publication of the Nimmer treatise in 1963. Other than these five cases, every case that has articulated the equal ownership doctrine has been decided under the 1976 Act,<sup>126</sup> and thus could not have been part of the existing body of court-made law that Congress incorporated by reference into the 1976 Act.<sup>127</sup> In addition, most of the 1976 Act cases endorsing equal ownership have relied heavily, or entirely, on the Nimmer treatise for support.<sup>128</sup> Thus, Professor Nimmer's early articulation of the doctrine, rather than any clear judicial consensus, may have been the actual impetus for its broader adoption by the federal courts.

## 2. Explaining the Dearth of Case Law

As discussed above, there are remarkably few cases discussing the respective shares of joint authors prior to the 1976 Act, and most of these cases offered no definitive guidance on how to quantify ownership shares. Accordingly, when Congress enacted the joint works provisions of the 1976 Act, there was very little law addressing the rights and obligations of joint authors. Thus, the copyright cases from this period do very little to fill the interpretive gap in section 201(a).

Why were apportionment issues so rarely addressed in the pre-1976 Act cases? There are two reasons. First, the broad interpretation of works made for hire under the 1909 Act completely eliminated many joint authorship claims.<sup>129</sup> Second, even where joint authorship was

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124. *Id.* The court also cited a third case, but that case provides no support, because it does not address ownership shares at all. See *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266, 267 (2d Cir. 1944) (holding that song was a joint work rather than a composite work).

125. That edition stated: "In the absence of an agreement to the contrary all joint authors share equally in the ownership of the joint work. This is true even where it is clear that their respective contributions to the joint work are not equal." MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 75 (1963) (footnotes omitted) (first citing *Maurel v. Smith*, 220 F. 195 (S.D.N.Y. 1915); then citing *Sweet Music*, 189 F. Supp. 655; and then citing Cal. Civ. Code § 981(a) (West 1872)).

126. The first of these was *Community for Creative Non-Violence v. Reid*, which mentioned the rule in dicta. 846 F.2d 1485, 1498 (D.C. Cir. 1988) (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 6.08, at 6–20 (1985)), *aff'd*, 490 U.S. 730 (1989).

127. See *supra* note 55 and accompanying text.

128. See, e.g., *Cnty. for Creative Non-Violence*, 846 F. 2d at 1498 (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 6.08, at 6–20 (1985) as the sole authority).

129. *Id.* at 1497 n.17.

recognized, for much of this period there was little need to quantify the authors' respective shares. Once the identities of the joint authors were determined, their respective shares mattered little. As discussed below, absent an agreement to the contrary, each author was free to exploit the entire work without sharing the profits.

Today, it is well-settled that, absent an agreement to the contrary, each owner of a joint work has a duty to account to the other joint owners for any profits derived from licensing the work.<sup>130</sup> This rule, however, was not widely recognized until the 1940s. Until then, the majority of courts addressing joint works applied the same rule that applied (and still applies) to jointly owned patents: Absent an agreement to the contrary, each co-owner of a patent can exploit the invention without accounting to the other co-owners.<sup>131</sup> Under this rule, regardless of their respective ownership shares, each joint author was free to exploit the copyrighted work without accounting to the other joint authors for any share of the profits. *Maurel v. Smith* was a rare exception to the prevailing practice during this period<sup>132</sup> and, it turns out, was a harbinger of things to come. For half the duration of the 1909 Act, then, there would have been little reason for joint authors to litigate their respective ownership shares, because each author was free to exploit the work without sharing the profits with the others.

Beginning in the 1940s, however, courts addressing copyright cases began to reject the patent rule and began to require accountings between joint authors.<sup>133</sup> It was only at this point that a joint author's relative ownership share began to have economic significance: The greater the

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130. See, e.g., *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 223 F.2d 252, 254 (2d Cir. 1955); *DeBitetto v. Alpha Books*, 7 F. Supp. 2d 330, 335 (S.D.N.Y. 1998).

131. See *Noble v. D. Van Nostrand Co.*, 164 A.2d 834, 837–38 (N.J. Super. Ct. Ch. Div. 1960) (discussing a shift from the early American rule that each co-owner of a copyright could reproduce the work without consent or an accounting, to a “middle path” that requires an accounting); see also *Shapiro Bernstein & Co. v. Jerry Vogel Music Co.*, 73 F. Supp. 165, 167–68 (S.D.N.Y. 1947) (stating in a copyright case that it had been determined that a co-owner of a patent may not compel an accounting against another); *Jerry Vogel Music Co. v. Miller Music, Inc.*, 74 N.Y.S.2d 425, 426 (N.Y. App. Div. 1947) (same), *aff'd*, 87 N.E.2d 681 (N.Y. 1949); *Silverman v. Sunrise Pictures Corp.*, 273 F. 909, 914 (2d Cir. 1921), *disapproved of by* 290 F. 804 (2d Cir. 1923) (same); *Nillson v. Lawrence*, 133 N.Y.S. 293, 295 (N.Y. App. Div. 1912) (stating in a copyright case the rule against compelled accounting against a co-owner “with regard to property of this nature”); *Carter v. Bailey*, 64 Me. 458, 463–64 (1874) (same).

132. See *supra* notes 59–86 and accompanying text.

133. See *Noble v. D. Van Nostrand Co.*, 164 A.2d 834, 837–38 (N.J. Super. Ct. Ch. Div. 1960); *Harrington v. Mure*, 186 F. Supp. 655, 657 n.4 (S.D.N.Y. 1960); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569, 571, *on reh'g*, 223 F.2d 252, 254 (2d Cir. 1955); *Shapiro Bernstein & Co. v. Jerry Vogel Music Co.*, 73 F. Supp. 165, 168 (S.D.N.Y. 1947); *Crosney v. Edward Small Prods.*, 52 F. Supp. 559, 561 (S.D.N.Y. 1942); see also Luiz S. Rosengart, *Principles of Co-Authorship in American, Comparative, and International Copyright Law*, 25 S. CAL. L. REV. 247, 255 (1952); Note, *Accounting Between Co-Owners of a Copyright*, 48 COLUM. L. REV. 421, 426–27 (1948).

ownership share, the larger the share of royalties to which the author (or the author's successor in interest) was entitled. It is not surprising, then, that most courts prior to this period had little occasion to address ownership shares with respect to jointly authored works. Of the five cases discussed above, all but *Maurel* were decided in the 1940s or later, when the right to an accounting had become more widely acknowledged.

### 3. Endorsement by Copyright Treatises

Despite the weakness of these precedents, copyright treatises have depicted equal ownership as settled doctrine, never questioning its authenticity. Each of the four major copyright treatises, as well as Tentative Draft No. 2 of the ALI Restatement of Copyright, presents the doctrine as settled law.<sup>134</sup> The Nimmer treatise calls it the “traditional rule,”<sup>135</sup> while Abrams and Ochoa describe it as “doctrinally straightforward.”<sup>136</sup>

However, the authors of these compendia provide little support for their assertions. The Goldstein treatise provides no supporting citations at all.<sup>137</sup> Of the authorities cited in the other sources, many are circular (that is, cases that cite the treatise itself as support),<sup>138</sup> others are drawn from the ambiguous cases discussed above,<sup>139</sup> and most of the others are court opinions that were issued long after the 1976 Act took effect.<sup>140</sup> This last group of opinions were clearly not part of the body of law which Congress expressly endorsed in the 1976 Act's legislative history, and many of them rely on Nimmer's treatise for support.<sup>141</sup> The result is an echo chamber, in which the cases cite the treatises, and the treatises cite those same cases for support.<sup>142</sup> Thus far, no court or commentator has broken free of this self-referential circle to examine the law as it actually existed when

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134. ABRAMS & OCHOA, *supra* note 47, at §§ 4:1, 4:37; PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 4.2 (3d ed. 2005 & Supp. 2009); 2 WILLIAM PATRY, PATRY ON COPYRIGHT § 5:7 (2022); NIMMER, *supra* note 38, at § 6.08; AMERICAN L. INST., RESTATEMENT OF THE LAW COPYRIGHT TENTATIVE DRAFT NO. 2 § 23 (2021) (stating the rule more than once, and providing several illustrative hypotheticals).

135. NIMMER, *supra* note 38, at § 6.08.

136. ABRAMS & OCHOA, *supra* note 47, at § 4:1.

137. GOLDSTEIN, *supra* note 134, at § 4.2.

138. *E.g.*, NIMMER, *supra* note 38, at § 6.08 n.1.

139. *E.g.*, *id.* (first citing *Sweet Music, Inc. v. Melrose Music Corp.*, 189 F. Supp 655 (S.D. Cal. 1960); and then citing *Maurel v. Smith*, 271 F. 211 (2d Cir. 1921)).

140. *E.g.*, *id.*

141. *E.g.*, *id.* (relying on cases that cite the treatise).

142. *See* Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. CIN. L. REV. 581, 595 (2004) (describing this result as “an infinite loop of logrolling”).



Congress incorporated it into the 1976 Act.

*B. Tenancy in Common in the General Law of Property*

Given the dearth of authority on the respective shares of joint authors prior to the 1976 Act, what body of law pertaining to tenants in common could Congress have been referencing in the legislative history of section 201(a)? There is only one possibility: the general law of property.

Congressional reliance on the common law of property as a gap-filler to address the rights of joint authors would have been consistent with the long-standing practice of the judiciary. Under the 1909 Act, and continuing under the 1976 Act, courts have consistently analogized to the law of real property in determining the rights and obligations of joint authors.<sup>143</sup>

Therefore, because courts addressing joint ownership claims have traditionally relied on principles of real property law, it is instructive to examine how courts in the pre-1976 period treated tenants in common under the general law of property. As discussed below, a careful look at the pre-1976 case law regarding tenants in common provides a much clearer picture of the common law ownership rules that were incorporated by reference in the 1976 Act. This case law does not support a universal rule of equal ownership regardless of contribution. On the contrary, the weight of authority supports a very different rule, under which tenants in common who make unequal contributions to acquiring or creating the jointly owned property are presumed to own shares in proportion to their contributions.

Throughout the nineteenth and twentieth centuries, the majority of courts addressing the ownership interests of tenants in common applied the following rules: If property was conveyed to recipients as tenants in common,<sup>144</sup> and the instrument of conveyance was silent as to shares, the

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143. See *Sweet Music*, 189 F. Supp. at 659; *Noble v. D. Van Nostrand Co.*, 164 A.2d 834, 838 (N.J. Super. Ct. Ch. Div. 1960); *Silverman v. Sunrise Pictures Corp.*, 273 F. 909, 914 (2d Cir. 1921), *on reh'g*, 290 F. 804 (2d Cir. 1923); *Maurel*, 271 F. at 214 (noting that “there is no distinction, independent of statute, between literary property and property of any other description”); see also GOLDSTEIN, *supra* note 134, at § 4.2 (stating that case law under both the 1909 and 1976 Acts “generally follows the rules of real property law that prescribe the rights and liabilities *inter se* of tenants in common of real property”); NIMMER, *supra* note 38, at § 6.09 (“In determining the rights and duties of joint owners of copyright, the courts analogize to applicable rules relating to joint ownership of real property.” (footnotes omitted)).

144. These rules did not apply to a tenancy by the entirety, because husband and wife always took the property in equal shares. See, e.g., *Secrist v. Secrist*, 132 N.Y.S.2d 412 (N.Y. App. Div. 1954), *aff'd*, 125 N.E.2d 107 (N.Y. 1955).

tenants in common were presumed to take equal shares.<sup>145</sup> However, this presumption was rebuttable.<sup>146</sup> If the parties made unequal contributions to the purchase price, this not only rebutted the presumption of equal ownership, but also gave rise to a new presumption—that the parties intended to share in proportion to the amount of their respective contributions.<sup>147</sup> With few exceptions,<sup>148</sup> the case law was consistent across most jurisdictions.<sup>149</sup>

Although one court rejected the rule basing shares on contributions, it did not rely on a rule of equal ownership; instead, it held that the parties' intentions should dictate their shares.<sup>150</sup> Those intentions were presumed to be reflected in the deed of conveyance; if it was silent as to shares, then it was presumed that the parties intended to hold equal shares.<sup>151</sup>

Therefore, the principle that co-tenants' unequal contributions could overcome a presumption of equal ownership was already well established when Congress drafted the 1976 Act. In fact, as discussed below, several of the leading cases preceded the 1909 Act as well.

As early as 1891, the Supreme Court of Louisiana held in *Oxford v. Barrow* that, where a deed conveys land to several persons without specifying their respective ownership shares, they take those shares in proportion to their individual contributions.<sup>152</sup> In this action for partition, a widow had purchased land for \$2300, using \$1100 of funds she owned before her marriage, and \$1200 that she received during the marriage.<sup>153</sup> Because the widow and the four children of the marriage were each

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145. *Williams v. Monzingo*, 16 N.W.2d 619, 621 (Iowa 1944).

146. *Id.*

147. *See, e.g., id.*

148. *See, e.g., Anderson v. Anderson*, 22 P.2d 471, 472–73 (Kan. 1933) (rejecting presumption based on contributions, and presuming instead that grantees' intentions were manifested in deed, which was silent as to shares); *see also* Annotation, *Presumption and Proof as to Shares of Respective Grantees or Transferees in Conveyance or Transfer to Two or More Persons as Tenants in Common, Silent in that Regard*, 156 A.L.R. 515 (1945) (describing the exceptions as “isolated cases”).

149. *See Mayo v. Jones*, 505 P.2d 157, 158 (Wash. Ct. App. 1972); *Johnson v. Depew*, 305 N.Y.S.2d 243, 244 (N.Y. App. Div. 1969); *Schroeder v. Todd*, 86 N.W. 2d 101, 104 (Iowa 1957); *Iredell v. Iredell*, 305 P.2d 805, 807 (Wash. 1957); *Taylor v. Taylor*, 17 N.W.2d 745, 746 (Mich. 1945); *People v. Varel*, 184 N.E. 209, 211 (Ill. 1932); *McGreggor v. Walters*, 230 N.Y.S. 590, 591 (N.Y. Sup. Ct. 1928); *Osborne v. Osborne*, 156 N.E. 306, 307 (Ill. 1927); *In re McConnell*, 197 F. 438, 440 (N.D.N.Y. 1912); *Perrin v. Harrington*, 130 N.Y.S. 944, 947 (N.Y. App. Div. 1911); *Jackson v. Moore*, 87 N.Y.S. 1101, 1103 (N.Y. App. Div. 1904); *Bittle v. Clement*, 54 A. 138, 139–40 (N.J. Ch. 1903); *Cage v. Tucker's Heirs*, 37 S.W. 180, 180 (Tex. App. 1896); *Oxford v. Barrow*, 9 So. 479, 479 (La. 1891).

150. *See, e.g., Anderson*, 22 P.2d at 473 (holding that the purchasers' intentions were manifested in the deed, and because it did not designate unequal shares, their shares were equal).

151. *Id.*

152. 9 So. 479 at 480.

153. *Id.* at 479.

entitled to equal shares of the \$1200 (that is, \$240 each), her personal contribution to the purchase totaled \$1340, and each of the children had, in effect, contributed \$240.<sup>154</sup> The widow claimed half ownership of the land, leaving the remaining half to the couple's four children.<sup>155</sup> One of the children, however, asserted that the widow could own only 20 percent, because each of the five tenants in common was entitled to an equal share.<sup>156</sup> The court ruled in the widow's favor, finding that her contribution of \$1340 toward the \$2300 purchase price "would entitle her to a proportion larger than the half which she claims, and with which she appears content."<sup>157</sup>

In *Bittle v. Clement*, a 1903 action for partition or sale, the New Jersey Court of Chancery held that, in the absence of a written agreement or other "forceful evidence," tenants in common owned their property in proportion to the funds each contributed to the purchase.<sup>158</sup> This result followed even though the deed was silent as to their individual shares.<sup>159</sup> The court referred to this as a "resulting trust:"

There was no agreement between Daniel and Benjamin as to their several interests in the purchase, nor any arrangement whereby the one who contributed the most agreed that the other should equally share with him in the purchase. In such cases, unless the parties stand to each other in the relation of parent and child, or husband and wife, the law raises a presumption called a 'resulting trust,' whereby each party holds a share in the property purchased according to his contribution to the purchase money.<sup>160</sup>

The Iowa Supreme Court reached a similar conclusion in 1919, holding in *Lowell v. Lowell*<sup>161</sup> that two tenants in common owned their land in proportion to the amount of the purchase price each had paid.<sup>162</sup> The same result would follow, the court reasoned, whether it (1) applied the resulting trust doctrine, or (2) presumed that the parties intended to hold the land in proportion to their contributions to the purchase.<sup>163</sup>

Courts applied the same approach to purchase price contributions

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154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 479–80.

158. 54 A. 138, 139–40 (N.J. Ch. 1903).

159. *Id.* at 140.

160. *Id.*

161. 170 N.W. 811 (Iowa 1919).

162. *Id.* at 812 (collecting cases).

163. *Id.*

made by divorced couples after the divorce had converted the tenants by the entirety to tenants in common. Even though, regardless of their contributions, a husband and wife owned equal shares as tenants by the entirety prior to their divorce,<sup>164</sup> from that point on they became tenants in common whose shares would become unequal if either of them made additional contributions to the property.<sup>165</sup>

Unequal contributions also led to unequal ownership in cases where a marriage was discovered to be invalid after the couple acquired property together. The leading case for this principle was the 1911 case of *Perrin v. Harrington*,<sup>166</sup> in which property had been conveyed to a “husband and wife, as tenants of the entirety.”<sup>167</sup> Upon determining that the couple had never been legally married,<sup>168</sup> however, the court held that they took the property as tenants in common.<sup>169</sup> Although the defendant claimed a 50 percent share,<sup>170</sup> asserting the presumption that tenants in common take in equal shares,<sup>171</sup> the court rejected this claim, holding that the presumption was rebutted by evidence that the man and woman had made unequal contributions to the purchase price.<sup>172</sup> Because the man had contributed two-thirds of the cash consideration, and the woman contributed one-third, both the trial court and the court of appeal concluded that they held their ownership shares in that same ratio.<sup>173</sup>

Other jurisdictions applied the *Perrin* rule in similar contexts, apportioning property between parties who were in unlawful marriages, or who did not purport to be married at all, according to their respective

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164. *Secrist v. Secrist*, 132 N.Y.S.2d 412, 414–15 (N.Y. App. Div. 1954) (discussing a tenancy by the entirety), *aff'd*, 125 N.E.2d 107 (N.Y. 1955).

165. *See, e.g.*, *Hosford v. Hosford*, 80 N.Y.S.2d 306, 309 (N.Y. App. Div. 1948); *Cosgriff v. Foss*, 46 N.E. 307, 308 (N.Y. 1897); *Ford v. Knapp*, 6 N.E. 283, 285 (N.Y. 1886); *Green v. Putnam*, 1 Barb. 500, 501 (N.Y. Sup. Ct. 1847); *Hannan v. Osborn*, 4 Paige Ch. 336, 342–43 (N.Y. Ch. 1834).

166. 130 N.Y.S. 944 (N.Y. App. Div. 1911) (deciding an action for partition).

167. *Id.* at 945.

168. *Id.* at 946.

169. *Id.*

170. *Id.* at 945–46.

171. *See id.* at 947.

172. *Id.* (citing *Oxford v. Barrow*, 9 So. 479 (La. 1891)).

173. *Id.* at 945–47. The rule of *Perrin* was followed in *Bambauer v. Schleider*, 163 N.Y.S. 186 (N.Y. App. Div. 1917), where property was conveyed to a couple as tenants by the entirety, but it was determined later that, unknown to the woman, they were not legally married. After a jury found that the couple had an agreement to hold the property as joint tenants with the right of survivorship, the trial court treated this agreement as dispositive. *Id.* at 563. The appellate court disagreed, noting that, even if the woman had entered this agreement, she did so by mistake, based on her erroneous belief that they were married. *Id.* at 564. Therefore, the purported agreement should be disregarded. *Id.* “What she would have done had she known she was not his wife is the question.” *Id.* Instead, the court followed *Perrin*, holding that a failed tenancy by the entirety became a tenancy in common. *Id.*

contributions to the acquisition.<sup>174</sup> Only one case appears to have rejected this approach, but its reasoning was based on effectuating the apparent intent of the parties to hold equal shares.<sup>175</sup>

The apportionment rule was also endorsed by contemporaneous property treatises. For example, the 1911 *Cyclopedia of Law and Procedure* stated:

Where a conveyance to purchasers of a tenancy in common is silent as to the interest of each, such interests are ordinarily presumed to be equal. But such presumption is rebuttable. There is a presumption that purchasers of a common estate hold shares therein in proportion to their contribution to the purchase price, if the contributions to the purchase price be shown to have been unequal; but, if the deed to purchasers does not show their respective interests in the common property, the presumption arising from the deed may be overcome by the presumption arising from the amount of contribution.<sup>176</sup>

Casner's *American Law of Property*, published in 1952, notes that one of the key differences between joint tenants and tenants in common was that the latter need not hold equal interests.<sup>177</sup> Casner traces this rule to the early fourteenth century.<sup>178</sup> While noting that, as a general rule, if a deed or will creates a co-tenancy without specifying the tenants' shares, "they take in equal shares,"<sup>179</sup> he adds that even where the conveyance to tenants in common does not specify unequal shares, "an intent that they

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174. A New York court explicitly endorsed the *Perrin* approach in *McGreggor v. Walters*, 230 N.Y.S. 590 (N.Y. Sup. Ct. 1928), in which a couple who purchased two parcels of land were later found not to be lawfully married. *Id.* at 591. In a partition action after the death of one of the parties, the court held that "a court of equity may take into account the amounts invested in the property by the respective tenants in common, in determining the shares thereof to which they are entitled." *Id.* at 592.

The Supreme Court of Missouri adopted the same rule in *Anderson v. Stacker*, 317 S.W.2d 417 (1958), where a couple purchased property in both of their names, but never married. *Id.* at 418. The court held that property conveyed to an unmarried couple will be apportioned to them as tenants in common, "the apportionment not always being in equal shares but according to the proportionate contribution of each of the grantees toward the acquisition of the property." *Id.* at 421 (quoting R.P. Davis, Annotation, *Rights and Remedies in Respect of Property Accumulated by Man and Woman Living Together in Illicit Relations or Under Void Marriage*, 31 A.L.R. 2d 1255, § 20 (1953)).

175. In *Bell v. Little*, 197 N.Y.S. 674 (App. Div. 1922), property was conveyed to couple whose marriage was later invalidated. *Id.* at 677–78. The court held that the couple owned equal shares even though only one had paid for the purchase. *Id.* at 678. The court's rationale seemed to be that the intention of the parties, believing themselves to be married, was to hold equal shares. *See id.*

176. DAVID ASH, 38 CYCLOPEDIA OF LAW AND PROCEDURE 74 (William Mack ed., 1911) (citations omitted); *see also In re McConnell*, 197 F. 438, 441 (N.D.N.Y. 1912) (quoting the same).

177. AMERICAN LAW OF PROPERTY, *supra* note 116, at § 6.5, at 19.

178. *Id.* at § 6.2, at 8–9 (noting that a tenancy in common lacks one of the four unities required for a joint tenancy—time, title, interest, and possession).

179. *Id.* at § 6.5, at 19 & n.4 (collecting cases).

hold different fractional shares may be established by the circumstances, as where no family relation or intent to make a gift exists, and the tenants have contributed to the purchase price in amounts varying considerably.”<sup>180</sup>

Historically, most of the case law addressing the ownership shares of tenants in common has involved disputes over inheritance or acquisitions rather than creation of property. This is not surprising, since real property normally is not created, but is simply transferred from one owner to another. However, this highlights one difference between ownership issues involving real property and those involving the authorship of copyrightable works, thus raising the question: Is there support in the general law of property for a rule that allocates ownership based on contributions to the creation of property?

The answer is yes. Courts of equity have also applied the contribution-based allocation rule to improvements made by tenants on commonly owned property.<sup>181</sup> Throughout the United States, case law from both the nineteenth and twentieth centuries recognized that where one tenant-in-common had contributed toward improvements on land that subsequently became the subject of a partition proceeding, as a matter of equity the party who paid for the improvements should receive either the improved portion of the property or suitable compensation for the improvements.<sup>182</sup> When carefully considered, this situation provides a closer analogy to intellectual property rights than land itself. By creating something new (the improvements), the co-tenant’s share of the jointly owned property effectively increased. If both co-tenants contributed to the improvements, their relative shares would change to reflect the ratio of their respective contributions.

As this discussion makes clear, at the time Congress drafted section

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180. *Id.* at § 6.5, at 20 & n.6 (collecting cases).

181. The rule was recognized in the leading nineteenth century treatise on co-tenancy and partition: ABRAHAM CLARK FREEMAN, *COTENANCY AND PARTITION* §§ 509–10 (2d ed. 1886).

182. *See* Rutledge v. Rutledge, 132 S.E.2d 469, 475–76 (Va. 1963); Shotwell v. Shotwell, 119 S.E.2d 251, 255 (Va. 1961); Thomas v. Thomas, 352 P.2d 279, 280 (Colo. 1960); Batchelder v. Munroe, 139 N.E.2d 385, 387 (Mass. 1957); Burkholder v. Burkholder, 135 N.E.2d 504, 504–05 (Ill. App. Ct. 1956); Indra v. Wiggins, 28 N.W.2d 485, 489 (Iowa 1947); Bishop v. Lynch, 111 P.2d 996, 1002 (Wash. 1941); Pynes v. Pynes, 225 S.W. 777, 779–80 (Tex. Civ. App. 1920); Ford v. Knapp, 6 N.E. 283, 285 (N.Y. 1886); Sarbach v. Newell, 1 P. 30, 31 (Kan. 1883); Beam v. Scroggin, 12 Ill. App. 321, 326–27 (Ill. App. Ct. 1882); Atha v. Jewell, 33 N.J. Eq. 417, 422 (N.J. Ch. 1881); Paddock v. Shields, 57 Miss. 340, 345 (1879); Roberts v. Beckwith, 79 Ill. 246, 248 (1875); Burton v. Little, 72 Ky. 307, 313 (1872); Reeves v. Reeves, 58 Tenn. 669, 675 (1872); Spitts v. Wells, 18 Mo. 468, 471 (1853); Green v. Putnam, 1 Barb. 500, 501 (N.Y. Sup. Ct. 1847); Louvalle v. Menard, 6 Ill. 39, 45 (1844); Brookfield v. Williams, 2 N.J. Eq. 341, 345–46 (N.J. Ch. 1840); Sneed’s Heirs v. Atherton, 36 Ky. 276, 281 (1838); Town v. Needham, 3 Paige Ch. 545, 553 (N.Y. Ch. 1832); *see also*, STORY & GRIGSBY, *supra* note 78, §§ 655, 656b–656c.

201(a) and expressly endorsed the existing common law rules on the rights of tenants in common, the common law of property clearly recognized ownership allocations that reflected each tenants' contributions to the acquisition or improvement of the property. This approach was widely endorsed by courts throughout the United States and was reflected in secondary sources as well. In contrast, very few copyright cases had addressed ownership allocations at that time, and the analysis in those cases was ambiguous at best. Thus, an overwhelming body of court-made law recognized that tenants in common were entitled to ownership shares that reflected their respective contributions to the property. In appropriate cases equal ownership could be awarded regardless of contributions, but only when the parties failed to request an alternative allocation, failed to present evidence supporting such an allocation, or manifested an intent to hold equal shares. This is the body of law that Congress implicitly incorporated into the 1976 Act, but which courts and commentators have completely failed to acknowledge.

#### IV. APPORTIONING AUTHORSHIP IN THE UNITED KINGDOM

While adherence to an untethered rule of equal ownership has made United States courts reluctant to recognize joint authorship claims,<sup>183</sup> courts in the United Kingdom have taken the opposite approach. Although the UK courts briefly entertained a rule of equal ownership during the 1990s, they decisively abandoned this rule in a series of decisions beginning in 2002.<sup>184</sup> As discussed below, even in the absence of a statutory mandate, recent decisions in the UK courts have embraced unequal apportionment when the evidence shows that joint authors made unequal contributions.

The current statutory definition of a joint work under British law is similar, though not identical, to that of the 1976 Act: “a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.”<sup>185</sup> In another

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183. See *supra* notes 19–40 and accompanying text.

184. See generally Tehila Rozencwaig-Feldman, *The Author and the Other: Reexamining the Doctrine of Joint Authorship in Copyright Law*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 172, 196–99 (2021) (surveying English cases).

185. Copyright, Designs and Patents Act 1988, c. 48, § 10(1) (UK) [hereinafter CDPA] (emphasis added). The case law suggests that contributions are distinct when they can stand on their own as copyrightable works, see *Martin v. Kogan* [2017] EWHC (IPEC) 2927, [13]–[15] (UK) (holding that distinctness would be found, for example, “where the contributions in question are distinct literary works published in a single compilation”), but not when the contributions are inseparable, see *Martin*

parallel to U.S. law, the UK statutes provide no guidance with regard to the ownership shares of joint authors. Therefore, like the federal courts, the British courts have had to develop their own jurisprudence regarding authorship shares.

For a brief period, from the mid-1990s to 2002, the English High Court—like its American counterparts—simply assumed that joint authorship led to equal ownership absent an agreement to the contrary, even though that precise question had never been adjudicated. The first opinion that expressed this assumption was *Stuart v. Barrett*.<sup>186</sup> In a somewhat bizarre passage, the High Court cited no supporting authority other than a “hypothetical innocent bystander”:

It seems to me that in the absence of any express agreement between the parties, the hypothetical innocent bystander would have concluded that if copyright was shared it would be shared equally between those who significantly participated in the creation of the musical composition pursuant to a common design.<sup>187</sup>

Based on this assumption, the judge awarded a band’s drummer a one-quarter share of music that was collaboratively composed by all four band members.<sup>188</sup>

Relying solely on *Stuart*, the High Court applied the same presumption in its 1995 decision in *Godfrey v. Lees*.<sup>189</sup> In that case, Judge Blackburne ruled that an orchestral arranger was a joint author of six

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v. Kogan [2021] EWHC (Ch) 24, [323] (holding that two authors’ contributions to a screenplay would not be distinct because “trying to separate them would be like trying to unmix purple paint into red and blue”). If a song has two authors, their contributions are distinct if one author contributes only the lyrics and the other contributes only the music. See H.I.L. Laddie, Peter Prescott & Mary Vitoria, *The Modern Law of Copyright and Designs* ¶ 3.97, at 122 & n.6 (2011) (citing *Chappell & Co. Ltd v. Redwood Music Ltd*, [1981] RPC 337, HL). In contrast, federal copyright law states that joint authors’ contributions to a joint work may be inseparable or merely interdependent. 17 U.S.C. § 101 (“joint work” definition).

186. *Stuart v. Barrett* [1994] EMLR 448 (Ch).

187. *Id.* at 460. The judge need not have relied on his bystander, however, because a leading English copyright treatise had proposed the same rule. See WALTER ARTHUR COPINGER & E.P. SKONE JAMES, *COPINGER AND SKONE JAMES ON COPYRIGHT, INCLUDING INTERNATIONAL COPYRIGHT* § 692 (11th ed. 1971), quoted in *Prior v. Landsdowne Press Pty. Ltd.* [1977] RPC 511 at 515 (“Co-authors hold the copyright as tenants in common rather than as joint tenants, and, presumably, in the absence of agreement to the contrary, in equal shares.”); see also WALTER ARTHUR COPINGER & JAMES MARSHALL EASTON, *THE LAW OF COPYRIGHT* 238 (5th ed. 1915). The same language also appeared in a much older edition of the treatise, again without authority. Unfortunately, the treatise cited no authority for the presumption.

188. *Stuart v. Barrett* [1994] EMLR 448 (Ch) at 463. The judge, Thomas Morrison QC, was actually a barrister, sitting part-time as a Deputy High Court Judge. See *id.* at 448.

189. *Godfrey v. Lees* [1995] EMLR 307 (Ch) at 329 (UK) (“In the absence of any express agreement to the contrary, that copyright is shared equally between the joint authors.”).



musical compositions created by a band, and that his ownership share was equal to that of the other authors.<sup>190</sup> Notably, however, the issue before the court was whether the arranger was a joint author at all, and neither party argued for unequal allocations.<sup>191</sup>

By 1999, the High Court was treating the presumption as settled law:

[A]ll the cases (including *Godfrey v. Lees*) agree that, if two or more persons are joint authors, they own the copyright in equal shares (unless of course they have made an agreement which specifies different shares). It would be surprising if a slight contribution was enough to make a person a joint author and thereby make him an equal owner with another or others who had contributed far more than he had.<sup>192</sup>

In 2002, however, the High Court abruptly changed course. Although the presumption was mentioned briefly in dictum in *Beckingham v. Hodgens*,<sup>193</sup> a different High Court judge expressly rejected it in *Bamgboye v. Reed*.<sup>194</sup> After holding that the claimant's creative contributions to the song "Bouncing Flow" made him one of two joint authors of the musical work,<sup>195</sup> the court rejected his claim of fifty percent authorship.<sup>196</sup> Judge Williamson explained: "[T]here is no requirement that joint authorship necessarily involves equality on a 50:50 basis. It would be possible for there to be, as it were, a joint authorship in unequal shares in principle."<sup>197</sup> After evaluating the specific details of the claimant's "significant creative input" to the music, Judge Williamson held that he was entitled to only one-third of the copyright.<sup>198</sup>

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190. *Id.* at 329–32. Just a few years later, however, Judge Blackburne reversed course, and endorsed unequal allocations. See *infra* notes 198–203 and accompanying text.

191. *Godfrey v. Lees* [1995] EMLR 307 (Ch) at 307–12 (UK).

192. *Hadley v. Kemp* [1999] EMLR 589 (Ch) at 643 (Eng.).

193. *Beckingham v. Hodgens* [2002] EWHC 2143 (Ch), [52] (“[J]oint authors normally own the copyright in equal shares.” (citing *Stuart v. Barrett* [1994] EMLR 448 at 460)). The allocation of ownership was not at issue in the case, which was concerned solely with the question whether a musical work was jointly authored. In upholding the decision on appeal, the appellate court did not discuss ownership shares at all. *Beckingham v. Hodgens* [2003] EWCA (Civ) 143.

194. *Bamgboye v. Reed* [2002] EWHC (QB) 2922, [41]–[42] (Eng.).

195. Under UK law, the definition of a musical work excludes any accompanying lyrics. CDPA § 3(1).

196. *Bamgboye v. Reed* [2002] EWHC (QB) 2922, [77] (Eng.).

197. *Id.* at [42]. Judge Williamson is actually a barrister specializing in real property; she presided over this case as a part-time deputy High Court judge. Her resume highlights her “extensive experience” in arbitration and mediation. See Hazel Williamson QC, *Case Law Kaleidoscope*, [http://www.pla.org.uk/images/uploads/library\\_documents/Case\\_Law\\_Kaleidoscope\\_by\\_Hazel\\_Williamson\\_QC.pdf](http://www.pla.org.uk/images/uploads/library_documents/Case_Law_Kaleidoscope_by_Hazel_Williamson_QC.pdf). [<https://perma.cc/5AZF-9WJJ>]. This background might have influenced her willingness to embrace a more nuanced apportionment of authorship as opposed to a rigid legal presumption.

198. *Bamgboye v. Reed* [2002] EWHC (QB) 2922, [76]–[77] (Eng.).

Subsequent courts—including the UK’s highest judicial authority—have consistently followed Judge Williamson’s lead. In 2006, the High Court in *Fisher v. Brooker* addressed a joint authorship claim involving the Procol Harum song “A Whiter Shade of Pale.”<sup>199</sup> After holding that the claimant was indeed a joint author of the musical work,<sup>200</sup> Judge Blackburne rejected his claim for fifty percent of the work’s copyright,<sup>201</sup> and awarded him only forty percent.<sup>202</sup> Citing *Bamgboye*,<sup>203</sup> Judge Blackburne explained:

I see no reason in principle why Mr Fisher’s share in the Work should not be something less than an equal undivided share if the circumstances justify that result. . . . The question ultimately is a highly subjective one. Doing the best I can I have come to the view that Mr Fisher’s interest in the Work should be reflected by according him a 40 per cent share in the musical copyright. His contribution to the overall work was on any view substantial but not, in my judgment, as substantial as that of Mr Brooker. As between the two it seems to me that Mr Brooker should be accorded the greater share.<sup>204</sup>

This decision was upheld by the House of Lords,<sup>205</sup> which functioned as the UK’s highest appellate court at that time. Thus, this was the equivalent of affirmance by the UK Supreme Court, which today has taken over the appellate role of the House of Lords.<sup>206</sup>

Both *Bamgboye* and *Fisher* required courts, in their capacity as fact finders, to assess the relative contributions made by joint authors of musical works. This required the courts to describe those contributions in detail, to analyze their significance qualitatively and/or quantitatively, and ultimately to draw conclusions about the value of each contribution.

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

200. *Id.* at [42]. His contribution consisted of an 8-bar organ solo that was repeated in the song. *Id.*

201. *Id.* at [97]–[98].

202. *Id.* at [98].

203. *Id.* at [96].

204. *Id.* at [96], [98]. Notably, this was the same Judge Blackburne that had applied the equal ownership presumption in his 1995 decision in *Godfrey v. Lees*. See *supra* notes 189–191 and accompanying text.

205. *Fisher v. Brooker* [2009] UKHL 41. This was a partial reversal of the intervening decision by the England and Wales Court of Appeals, which had affirmed the joint authorship determination but held that, due to the claimant’s 38-year delay in bringing his claim, as well as several intervening events, the claimant had surrendered his copyright share. *Fisher v. Brooker* [2008] EWCA (Civ) 287 (Eng.).

206. In 2009, the UK Supreme Court was established, taking over the former appellate authority of the House of Lords. THE SUPREME COURT, <https://www.supremecourt.uk/about/the-supremecourt.html> [<https://perma.cc/Y3R4-W93U>].

Notably, the courts did not opine on the artistic merit of each contribution, or of the finished work itself; rather, they attempted to assess the significance of each contribution to the totality of the work. In addition, the courts did not feel bound to choose between the parties' competing estimates; their ultimate allocations reflected their own independent evaluations.

*Bamgboye*, for example, involved electronic music. Evidence of each party's contributions consisted largely of the parties' own testimony, which was sharply conflicting. After extensive discussion of the conflicting testimony and evidentiary inconsistencies, Judge Williamson determined that the claimant (the lesser contributor) had contributed the melody, that he had "contributed significantly to the drum pattern and [cymbal] crashes," and that he had contributed other musical "effects."<sup>207</sup> The defendant, in turn, had contributed "hugely" to the piece, notably through "effects, embellishments and [the] general arrangement of the piece."<sup>208</sup> In addition to his own contributions, the defendant also had the final say in which of the claimant's ideas were incorporated in the piece, and indeed rejected a number of those ideas.<sup>209</sup> For these reasons, Judge Williamson awarded the defendant a 67 percent share.<sup>210</sup>

The dispute in *Fisher* involved the extent of the claimant's contribution to a copyrightable arrangement (the "Work") of a pre-existing song (the "Song").<sup>211</sup> Both the claimant and the defendant had contributed to the arrangement during improvisational rehearsals.<sup>212</sup> There was conflicting testimony as to the claimant's contributions—specifically, whether certain key elements of the Work were already present in the Song before the claimant became involved.<sup>213</sup> Crucially, however, the defendant conceded that the claimant had contributed the Work's distinctive organ solo.<sup>214</sup> This solo, which constituted the first eight bars of the Work, served as an instrumental introduction, and was also repeated later in the Work.<sup>215</sup> At the trial, an expert musicologist described the solo

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207. *Bamgboye v. Reed* [2002] EWHC (QB) 2922, [76] (Eng.).

208. *Id.* at [77].

209. *Id.*

210. *Id.*

211. Under English law, an arrangement of an existing musical work is copyrightable if "by comparison with the original work the arrangement exhibits a sufficient degree of originality, namely the application by its author of skill and labour in its creation." *Fisher v. Brooker* [2006] EWHC (Ch) 3239, [44] (Eng.) (citing *Redwood Music Ltd. v. Chappell & Co. Ltd.* [1982] RPC 109).

212. *See id.* at [29].

213. *Id.* at [33]–[37].

214. *Id.* at [37].

215. *Id.* at [8]–[9], [42].

as “significant” and “hugely famous.”<sup>216</sup> Although Judge Blackburne identified other smaller components authored by the claimant, he concluded that the solo was by far his most significant contribution.<sup>217</sup> Compared to the underlying Song, the organ solo was “sufficiently different . . . to qualify in law, and by a wide margin, as an original contribution to the Work.”<sup>218</sup> The musicologist opined that the claimant deserved a “three-eighths” share of the copyright,<sup>219</sup> which was not far from the forty percent share that Judge Blackburne ultimately awarded.

After the House of Lords upheld Judge Blackburne’s decision in *Fisher*, apportionment became settled law in the UK. In its 2015 decision in *Minder Music Ltd v. Sharples*, the High Court examined at length the disputed evidence of a songwriter’s contribution to the music and lyrics of a song revision, concluding that, while he did not contribute any lyrics, he made a “small but significant original contribution to the composition of the music.”<sup>220</sup> After rejecting his claim to a one-third share, the court awarded him twenty percent instead.<sup>221</sup>

Apportionment of authorship in the UK is not limited to musical works. As discussed below, the UK courts have recognized the potential for apportioning authorship of a motion picture, and have carried out apportionment rigorously with respect to a screenplay.

In *Slater v. Wimmer*, a producer and director were found to be joint authors of a film, and therefore tenants in common.<sup>222</sup> With respect to their ownership shares, although the court noted that “usually the shares will be equal,” it also acknowledged that this determination was “subject to the particular circumstances.”<sup>223</sup> In this case, however, a detailed apportionment was unnecessary, because neither party argued for unequal allocations.<sup>224</sup>

In *Martin v. Kogan*,<sup>225</sup> Judge Meade of the High Court applied a detailed apportionment analysis to the authorship of the screenplay for *Florence Foster Jenkins*, a biographical film about a woman who fancied herself a gifted opera singer despite her lack of talent. Even though the

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216. *Id.* at [10].

217. *Id.* at [36]–[37], [41].

218. *Id.* at [42].

219. *Id.* at [97].

220. *Minder Music Ltd. v. Sharples* [2015] EWHC (IPEC) 1454, [90].

221. *Id.*

222. *Slater v. Wimmer* [2012] EWPC 7, [86].

223. *Id.* at [89].

224. *See id.* at [90].

225. *Martin v. Kogan* [2021] EWHC (Ch) 24.

defendant had asserted that he was the sole author, Judge Meade ruled in favor of joint authorship, and in the final decision on remand he awarded unequal shares based on the parties' respective contributions.

In its earlier decision remanding the case, the Court of Appeal had noted: "[I]t is common ground that the shares of two joint authors are not required to be equal. If Ms Kogan and Mr Martin are joint authors, the court will have to go on and apportion the ownership according to their respective overall contributions."<sup>226</sup> On remand, however, the lesser contributor sought a fifty percent share, based on a presumption of equal ownership.<sup>227</sup> Judge Meade refused, stating that a fifty percent allocation would be "an obvious injustice."<sup>228</sup> Instead, he awarded her a twenty percent share based on the extent of her creative contribution.<sup>229</sup> He was not deterred by the challenge of assessing the authors' relative contributions: "[I]f circumstances justify a different result than equal shares the Court may so decide, assigning shares pro rata to their individual contributions. The decision is a highly subjective one and may be approached on a broad-brush basis."<sup>230</sup>

Before arriving at the twenty percent figure, Justice Meade conducted a detailed analysis of the parties' evidence and their conflicting assertions regarding their respective contributions to the screenplay. The evidence included witness statements<sup>231</sup> as well as a large number of emails and Skype transcripts of the parties' discussions,<sup>232</sup> in particular during a critical stage of the creative process.<sup>233</sup> Judge Meade also considered discussions between the litigants and with third parties that shed light on their perceptions of the nature and significance of the claimant's contributions,<sup>234</sup> as well as the litigants' own evaluations of their authorship contributions.<sup>235</sup>

The UK courts' willingness to analyze each author's contributions to a joint work, and to assign relative weights to those contributions, stands in sharp contrast to the practice of U.S. courts. It also corresponds to the greater willingness of the UK courts to recognize joint authorship in the

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226. *Martin v. Kogan* [2019] EWCA (Civ) 1645, [52] (Eng.).

227. *Martin v. Kogan* [2021] EWHC (Ch) 24, [325]–[327].

228. *Id.* at [338].

229. *Id.* at [417].

230. *Id.* at [330].

231. *Id.* at [202]–[203].

232. *Id.* at [115]–[200], [231]–[241].

233. *Id.* at [150].

234. *Id.* at [234]–[253].

235. *Id.* at [256]–[272].

first place. Despite similarities in the statutes defining joint works, the UK courts have declined to adopt the narrowing interpretation favored by so many U.S. courts. As a result, UK courts will find that a work is joint if the contributors intended to merge their contributions into a unitary whole, without regard to whether they intended to form a joint authorship arrangement.

The UK courts' greater openness cannot be ascribed to lesser consequences of recognizing joint authors. If anything, recognizing joint authorship carries greater legal significance in the UK than in the U.S. This is true of both economic rights and moral rights.

With respect to authors' economic rights in the U.S., in the absence of an agreement to the contrary, each joint author is free to exploit the work in its entirety, subject only to a duty of accounting for any profits derived from licensing.<sup>236</sup> In addition, U.S. law provides that a joint work can be the subject of a non-exclusive license by one joint author, without the consent of the other joint authors.<sup>237</sup>

In contrast, under UK Law, any exploitation of a joint work—even a non-exclusive license—requires the consent of all of the joint authors.<sup>238</sup> Any non-consenting joint authors can sue the licensee for infringement to the extent of their shares of the copyright.<sup>239</sup>

In addition, authorship in the UK creates not only economic rights, but moral rights, including the inalienable rights of attribution and integrity.<sup>240</sup> Moral rights in the UK apply to a wide variety of copyrightable works, including some of those most likely to be jointly authored, such as dramatic and musical works.<sup>241</sup> One joint author cannot waive these rights with respect to other joint authors.<sup>242</sup> Thus, as is true of economic rights, any exploitation of a work that might violate the rights of attribution or integrity will require the consent of all joint authors.

In contrast, joint authorship rarely has an impact on moral rights in the U.S., where such rights are extremely limited. Moral rights in the U.S.

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236. See, e.g., *Guardian Music Corp. v. James W. Guercio Enters.*, 459 F. Supp. 2d 216, 221 (S.D.N.Y. 2006), *aff'd*, 271 F. App'x 119 (2d Cir. 2008); *Noble v. D. Van Nostrand Co.*, 164 A.2d 834, 837–38 (N.J. Super. Ct. Ch. Div. 1960).

237. See *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007).

238. CDPA §§ 16(2), 173(2); *Cescinsky v. George Routledge & Sons, Ltd.* [1916] 2 KB 325 at 326; *Powell v. Head* [1879] 12 Ch D 686 (Eng.).

239. See *Cala Homes (S.) Ltd. v. Alfred McAlpine Homes E. Ltd.* (No. 1) [1995] FSR 818 (Ch) (Eng.); *Prior v. Landsdowne Press Pty. Ltd.* [1977] RPC 511.

240. CDPA §§ 77, 80, 84.

241. Moral rights apply to literary, dramatic, musical, and artistic works; motion pictures; and, to a more limited extent, architectural works. *Id.*

242. *Id.* § 88(3).

apply only to specific types of works that are rarely jointly authored—such as paintings, sculptures and photographs—and even then the rights apply only to the initial fixation of the work, rather than to mass-produced copies.<sup>243</sup> Therefore, moral rights in the U.S. have no impact on the categories of works that are most likely to be jointly authored, such as literary works, musical works, dramatic works, sound recordings, and motion pictures.

Therefore, the greater willingness of the British courts to apportion the rights of joint authors cannot be dismissed by suggesting that the legal consequences of recognizing joint works status are somehow less significant in the UK. Rather, the British courts have chosen not to be bound by a poorly-reasoned precedent adopting an equal ownership rule that had no foundation in prior law.

## V. RECOMMENDATIONS

Although influential federal court decisions have relied on the rule of equal ownership to justify imposing a non-statutory test for joint authorship, those courts have simply assumed the authenticity of this rule without investigation. A careful examination of the 1976 Act's legislative history, and the case law that it incorporated, reveals that the so-called "rule" not only mischaracterizes the copyright precedents but contradicts established principles of property law under which tenants in common who make unequal contributions to their jointly owned property are generally presumed to own their shares in proportion to those contributions.

While American courts have thus far failed to apply the common law apportionment rule to copyright cases, nothing forecloses them from adopting this approach in the future, as the UK courts have already done. The rule of equal ownership would thereby be replaced by a presumption that joint authors own their work in proportion to their creative contributions.

By freeing courts to award smaller shares to lesser contributors, apportionment would remove one of the justifications on which courts have relied in engrafting on the statutory joint works definition a mutual intent requirement that has no foundation in the statute or its legislative history, and which can deny authorship rights to meritorious collaborators.

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243. 17 U.S.C. § 106A(a) (limiting protection to "works of visual art"); *id.* § 101 (defining "works of visual art"). The only exception is for signed, numbered limited editions of 200 copies or fewer. *Id.*

By significantly reducing the likelihood of winner-take-all outcomes that favor a “dominant” author, giving courts the freedom to apportion ownership will also encourage settlements. The “dominant” author of a work will no longer expect to emerge from litigation as the sole owner of the entire copyright. Reaching a settlement that awards a small copyright share to a lesser contributor will be far less expensive than protracted litigation leading almost certainly to the same result.

The apportionment approach does not foreclose courts from considering allocation agreements that have been executed by the joint authors. On the contrary, such agreements could serve as useful evidence of the parties’ own perceptions as to their respective contributions. In general, more weight should be given to agreements that are made close to the time of the work’s creation, for two reasons. First, such agreements are more likely to reflect the creators’ contemporaneous perceptions of their authorial contributions, whereas agreements entered into long after the work’s creation are more likely to be the result of bargaining or coercion. Second, creators’ perceptions of their respective contributions are likely to be more accurate when the creative process is still fresh in their minds, as opposed to years after the fact, when their memories may be clouded by the passage of time or colored by the work’s financial success. Accordingly, when ownership agreements are entered into long after a work’s creation, it could be more appropriate to treat them as transfers of copyright ownership rather than as memorializations of the parties’ actual contributions.

Imposing the statutory formality of a signed writing on these long-after-the-fact agreements would be consistent with congressional intent to protect authors from fraudulent claims.<sup>244</sup> In contrast, when collaborators enter a contemporaneous agreement that is close in time to the creative process, imposing formalities at this stage would embroil creators in legal technicalities at a time when they may be unfamiliar with legal requirements, may not have access to competent legal representation, and may be unaware of the potential legal consequences of the transaction, including the potential for the exercise of termination rights. If initial authorship allocation agreements are treated as copyright transfers, then the author accepting the smaller copyright share will be able reassert a right to a larger share at a future date by exercising the termination right. This might be appropriate where the agreement is the result of an actual post-creation bargain, but not where the purpose of the agreement is simply to memorialize the collaborators’ mutual understanding as to their

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244. See *supra* notes 48–53 and accompanying text.



authorship shares. Thus, the rule of *Papa's-June Music* requiring joint authors' allocation agreements to be in a signed writing should apply only to agreements that resemble true assignments rather than collaboration agreements.

As illustrated by the United Kingdom cases, a rule of proportionate authorship requires courts to evaluate evidence of the parties' respective contributions. This task can certainly be time-consuming. However, it would not place a greater burden on the courts than they already bear under the *Childress* and *Aalmuhammed* tests. Each of those tests already requires the courts to consider the disputing parties' evidence of their contributions, as well as the credibility of witnesses. The only difference is that, after the courts have considered all the evidence, the proportionate authorship approach will allow them to reach a more nuanced result rather than compelling them to resolve all of the evidentiary uncertainties in favor of one party.

In addition to lacking a foundation in the historic case law, the equal ownership doctrine also represents poor public policy. As the Supreme Court stated in *Mazer v. Stein*:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.<sup>245</sup>

By discouraging courts from recognizing joint authors, the equal ownership doctrine fails to provide those authors with rewards that reflect their creative efforts.

Accordingly, the equal ownership doctrine should no longer be recognized as a rule that governs all joint works. At most, it should be considered a rule of last resort. Consistent with the historical treatment of tenants in common, equal authorship should be awarded only when the collaborators do not present evidence of the proportions they contributed or of their mutual understanding as to the ownership shares merited by those contributions. By allocating authorship according to contributions rather than turning the law of joint authorship into a winner-take-all contest, courts will enable copyright law to provide creative collaborators with copyright shares that are commensurate with their respective contributions.

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245. 347 U.S. 201, 219 (1954).