

**SONGWRITER, SIDE MUSICIAN, OR SUCKER?: THE CHALLENGE OF
DISTINGUISHING COMPOSERS FROM CONTRIBUTORS UNDER U.S.
COPYRIGHT LAW AND THE LESSONS OF A FAMOUS BRITISH CASE**

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INTRODUCTION

In 2009, the United Kingdom’s highest court upheld a lower court’s decision in *Fisher v. Brooker*, which awarded Procol Harum organist Matthew Fisher a forty percent share in the music copyright for “A Whiter Shade of Pale,”¹ based on Fisher’s performance on that classic recording.² Some

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1. PROCOL HARUM, *A Whiter Shade of Pale*, on GREATEST HITS (A & M Records 1996).
2. *Fisher v. Brooker*, [2009] UKHL 41, [80]–[81] (appeal taken from Eng.); *Fisher v.*

observers hailed the decision as a vindication and a just recognition of an instrumentalist's essential contribution to a song's commercial success.³ Others expressed concern that the decision could start an avalanche of litigation and invite anyone who was involved in the recording of a popular song to claim joint authorship with the original copyright holder.⁴ Although it is unlikely that Fisher's claim would have succeeded under United States copyright law,⁵ there remains the question: *Should* a plaintiff like Fisher be able to bring a successful claim in a United States federal court? Have American courts been taking too strict an approach to ex post facto claims of joint authorship? Should American courts adopt the more flexible approach exemplified by *Fisher*? This Note will argue that although the outcome of *Fisher* may seem just, the court's reasoning should not be imported and applied in United States courts, and that the approach to joint authorship currently taken by most United States courts is more likely to lead to consistent, predictable decisions that promote the purposes of copyright law. This Note will go on to advocate taking an even stricter approach, at least with regard to joint musical works.

Part I will discuss the challenges courts face when deciding cases in which the plaintiff claims to be a joint author of a musical work to which the defendant already holds the full copyright. This Part will look at some of the difficulties inherent in determining the legal authorship of musical compositions developed in a collaborative setting. It will also look at the way in which federal statutory copyright law compounds these difficulties by leaving key terms undefined or only vaguely defined. Part I will then examine how United States courts have approached these challenges. It will describe the tests that courts have developed for determining whether a plaintiff qualifies as a joint author and show how those tests have been applied. The discussion of these tests and their application will also serve as a critique of them, as their shortcomings will be made apparent.

Part II will examine the case of *Fisher v. Brooker* and analyze the decision with regard to the issue of whether the plaintiff qualified as a joint author of the

Brooker, [2006] EWHC (Ch) 3239, [42] (Eng.).

3. See, e.g., Peter Cooper & Ryan Underwood, *U.K. Ruling Intrigues Nashville Musicians*, TENNESSEAN, Jan. 7, 2007, at 1A (discussing some Nashville side musicians' positive reactions to news of the lower court's decision).

4. See, e.g., Steven Van Zandt, *Garage Rock*, BILLBOARD, Jan. 13, 2007, at 15 (remarking in reaction to the lower court's decision and the numerous claims for composer credits that could result: "The sound you hear isn't a thunderstorm. It's lawyers salivating worldwide."); Nigel Reynolds, *'Darker Shade of Black' as Singer Loses Royalties Battle*, DAILY TELEGRAPH (London), Dec. 21, 2006, at 11 (quoting a joint statement by Gary Brooker and Keith Reid, the song's only credited authors prior to the lower court's decision, in reaction to the decision: "'It is effectively open season on the songwriter. It will mean that any musician who has ever played on any recording in the last 40 years may now have a potential claim to joint authorship.' Songwriters and publishers 'now have to view all musicians with suspicion . . .'"

5. See, e.g., Cooper & Underwood, *supra* note 3, at 1A (quoting legal analyst who doubts that a plaintiff like Fisher could bring a successful claim for joint authorship in the United States because United States copyright law requires mutual intent to coauthor on the part of the putative joint authors).

musical work in question. This Part will highlight both the merits of and the problems with the reasoning reflected in the opinions rendered by the Chancery Division and the House of Lords. Part II will consider whether the U.K. courts' opinions offer any lessons that United States courts could apply when hearing joint authorship cases. This Note will ultimately answer that question in the negative and argue that the *Fisher* courts' reasoning with regard to this issue is incompatible with United States copyright law and even, to some extent, inconsistent with the goals of U.K. copyright law.

Part III will discuss the way forward for United States courts confronted with claims of joint authorship in copyrighted musical works. First, this Note will argue that all courts should adopt the Goldstein test,⁶ which is already the test employed by most federal circuits that must determine whether a collaborator's contribution to a copyrightable work rises to the level of joint authorship. This Note will then go a step further and propose that all courts adopt an additional component of the joint authorship analysis—one that was suggested by the Ninth Circuit's holding in *Aalmuhammed v. Lee*⁷ and that this Note will refer to as the "mastermind test." Under the test that this Note proposes, in addition to showing an independently copyrightable contribution to the work, a plaintiff claiming joint authorship would have to prove either (1) that the parties expressly agreed to share authorship of the musical work in question, or (2) that the plaintiff had substantial creative control over the finished form of the work.

It is worth mentioning some issues that will *not* be addressed in this Note but are relevant to the discussion. First, this Note will not discuss musicians' potential claims of joint authorship in sound recordings. It will instead focus narrowly on the issue of joint authorship with respect to the underlying compositions embodied in sound recordings.⁸ Second, this Note will discuss only federal law, not state common law, because the 1976 Copyright Act⁹ "eliminat[ed] common law copyright for most purposes."¹⁰ Third, this Note will discuss joint authorship claims only on the merits and will not consider any of the alternative grounds on which such claims might fail, such as the doctrine of laches where, as in *Fisher*, there has been a long delay in the plaintiff's

6. See *infra* text accompanying notes 81–85 (explaining the Goldstein test).

7. 202 F.3d 1227, 1235 (9th Cir. 2000).

8. See generally *BTE v. Bonnezeze*, 43 F. Supp. 2d 619, 627–28 (E.D. La. 1999) (discussing the distinction between "[s]ound recordings and the underlying musical compositions," which are "separate works with their own copyrights"); Abbott M. Jones, Note, *Yours, Mine, and Ours: The Joint Authorship Conundrum for Sound Recordings*, 10 VAND. J. ENT. & TECH. L. 525, 525–27 (2008) (discussing the uncertainty regarding "who may claim authorship in . . . sound recordings" and anticipating a flood of litigation in pursuit of an answer to that question).

9. 17 U.S.C. §§ 101–805, 1101 (2006).

10. PAUL GOLDSTEIN & R. ANTHONY REESE, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES: CASES AND MATERIALS ON THE LAW OF INTELLECTUAL PROPERTY 658–59 (rev. 6th ed. 2010).

asserting his or her rights in court.¹¹ Finally, and perhaps most importantly, this Note will make no judgments about the artistic merit, importance, or value of any musician's contribution to a musical work. This Note is concerned only with determining which of those contributions should qualify as copyrightable contributions to a "joint work" as defined by federal copyright law.¹²

I. THE CHALLENGES COURTS FACE IN EVALUATING CLAIMS OF JOINT AUTHORSHIP IN MUSICAL WORKS

A. *Music: An Uncertain Subject of Copyright*

Courts have a difficult task in evaluating claims of joint authorship in musical works because this area of the law is fraught with uncertainty at every level. To start, music itself, like any art form, resists definition. The Merriam-Webster dictionary defines the word "music" as "the science or art of ordering tones or sounds in succession, in combination, and in temporal relationships to produce a composition having unity and continuity."¹³ Naturally, various artists have challenged such a definition, an extreme example being American experimental composer John Cage with his piece "4'33," which consists of a performer (of any instrument) "remain[ing] silent for four minutes and thirty-three seconds."¹⁴

Even where the composition in question comports with a conventional definition of music, the circumstances of the composing process are often hazy. This is especially true in a collaborative setting. One reason is that musical collaboration can take many forms, and different collaborators employ different methods. In a straightforward collaboration, there is a clear division between the collaborators' respective contributions to the work, as in a songwriting partnership in which one person composes the music and the other writes the lyrics.¹⁵ In other collaborative situations, there may be a method at work, but the collaborators' roles may not be clearly defined. Such is the case in a rock band

11. *Fisher v. Brooker*, [2009] UKHL 41, [40], [44], [78]–[79] (appeal taken from Eng.) (considering but rejecting defendants' argument that "Fisher had lost his interest in the copyright as a result of estoppel, laches[,] or acquiescence" by waiting more than thirty years to file suit).

12. 17 U.S.C. § 101 (2006). For a discussion of the importance of side musicians in the creation of popular music, see KENT HARTMAN, *THE WRECKING CREW: THE INSIDE STORY OF ROCK AND ROLL'S BEST-KEPT SECRET 5* (2012) (discussing the group of Los Angeles studio musicians known as the Wrecking Crew and stating, "No single group of musicians has ever played on more hits in support of more stars than this superbly talented—yet virtually anonymous—group of men (and one woman)."). See also *id.* at 175–76 (discussing the Funk Brothers and the A-Team, two other important yet long-uncredited groups of studio musicians from the same era).

13. Definition of *Music*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/music> (last visited Aug. 9, 2013).

14. Michael Rodman, *John Cage, Biography*, ALLMUSIC, <http://www.allmusic.com/artist/john-cage-mn0000183867> (last visited Aug. 9, 2013).

15. See, e.g., *Biography*, ELTONJOHN.COM, <http://www.eltonjohn.com/about/> (last visited Aug. 8, 2013) (describing the long and successful songwriting partnership of singer-pianist Elton John and lyricist Bernie Taupin, which consists of Taupin writing lyrics that are then set to music by John).

that generates its musical material by “jamming.”¹⁶ In those situations, it can be difficult to determine which material each collaborator contributed to the finished work. Furthermore, composition may occur spontaneously as the product of no consciously employed method at all, as often occurs when musicians improvise.¹⁷ What’s more, alcohol or drugs often play a role in the creation of musical works and may cloud the creators’ memories.¹⁸ Even absent any evidence of sensory impairment resulting from the use of such substances, there may still be uncertain, dubious, or conflicting recollections as to how a composition came to be.¹⁹

Consider the writing and recording of The Police’s song “Every Breath You Take,”²⁰ a situation that bears some similarities to the writing and

16. See, e.g., BILL FLANAGAN, *U2: AT THE END OF THE WORLD* 183, 195 (1995) (describing the songwriting method of rock band U2 during the mid-nineties as “the four of them getting into a room and jamming until a song emerges. [Producer Brian] Eno or [guitarist The] Edge then go through the tapes, finding sections they like and editing them together into proper song form. Then the band listens, suggests alterations, and tries coming up with words and melodies to go on top of the edited tracks. [Singer] Bono or Edge will then sing these lyrical and melodic ideas into a Walkman while the track plays. When a song has taken shape that way, U2 listens to the tape, goes back into the studio, and tries to play it. . . . Bono calls it ‘songwriting by accident’ . . .”); David Peisner, *The Ties That Bind*, SPIN, Aug. 2007, at 67 (explaining how rock band Interpol’s “[s]ongs are written by committee: [guitarist Daniel] Kessler brings in chord progressions and song sketches, and the others react to his work with their own ideas—rhythms, countermelodies, different instrumentation—before [singer-guitarist Paul] Banks adds vocal melodies and lyrics as the final step.”).

17. See generally PAUL F. BERLINER, *THINKING IN JAZZ: THE INFINITE ART OF IMPROVISATION* 496–97 (1994) (discussing the spontaneous composition that results from interplay among musicians improvising in a jazz ensemble); see also *Ulloa v. Universal Music & Video Distribution Corp.*, 303 F. Supp. 2d 409, 411, 414 (S.D.N.Y. 2004) (finding that a singer may have made a copyrightable contribution to a musical composition where she, “[w]hile at [a recording] studio listening to the unfinished version of” a song, “spontaneously began singing [a] countermelody with the words from the rapped portion of the song”).

18. See, e.g., *60 Minutes: Lady Gaga on “Mastering the Art of Fame”* (CBS television broadcast Feb. 13, 2011), available at http://www.cbsnews.com/8301-18560_162-20066912.html (Lady Gaga states, “I smoke a lot of pot when I write music. . . . I . . . drink a lot of whiskey and I smoke weed when I write.”); Simon Cosyns, *‘My Girlfriend Hopes Sex on Fire Is About Her’—Caleb Followill*, SUN (London), <http://www.thesun.co.uk/sol/homepage/showbiz/sftw/1707285/Exclusive-interview-with-The-Kings-Of-Leon-and-a-review-of-their-new-album.html> (last updated Sept. 19, 2008) (detailing Kings of Leon singer-songwriter Caleb Followill’s one-time addiction to painkillers and his resulting inability to remember his writing of songs for the band’s album *Only by the Night*).

19. Compare FLANAGAN, *supra* note 16, at 11 (describing how the U2 song “One” emerged as the band was working on another song, “Ultra Violet”), with FROM THE SKY DOWN (Mercury Records Limited 2011) (documenting how the U2 song “One” emerged as the band was working on another song, “Mysterious Ways”). See also Paul Cashmere, *Life After Queen Is Another World for Brian May*, UNDERCOVER, available at <http://queen.musichall.cz/en/interviews/brian-may-paul-cashmere-98.html> (quoting Queen guitarist and songwriter Brian May as stating that he wrote “We Will Rock You” after he “woke up about three in the morning and . . . heard the initial beat in [his] head”).

20. THE POLICE, *Every Breath You Take*, on SYNCHRONICITY (A & M Records 1983).

recording of “A Whiter Shade of Pale,” which will be discussed later in this Note.²¹ In particular, consider how the main guitar riff,²² which is featured in the song’s eight-bar introduction, became part of the composition “Every Breath You Take.”²³ Compare the following accounts of the riff’s origin, the first provided by producer-engineer Hugh Padgham:

[Singer-songwriter] Sting introduced “Every Breath You Take” by way of a simple demo, consisting of himself singing over a Hammond organ part that would subsequently be replaced by Andy Summers’s guitar *The demo . . . , according to Hugh Padgham, provided a solid delineation of the song in terms of the main riff, the vocal melody and the already-completed lyrics.*²⁴

While Padgham’s account suggests that Sting composed the riff that would ultimately be played on guitar before he ever presented the song to the rest of the band, drummer Stewart Copeland recalls the sequence of events differently:

In the case of “Every Breath,” what [Sting] brought to the band was . . . simple, so we did a lot to it We threw out the Hammond Organ part completely *Andy went away and worked out that guitar part, and suddenly it all made sense. . . . [I]t wasn’t until Andy came up with the guitar part that it clicked in.*²⁵

When Sting recalls the composition of “Every Breath You Take,” he makes no mention of how the guitar melody came to be part of the song. He says simply (and mysteriously), “I woke up in the middle of the night in Jamaica and went straight to the piano and the chords and song just came out within ten minutes. Wrote the song. Went back to bed.”²⁶

Andy Summers, who actually played the riff, not surprisingly gives the most detailed account, which corroborates Copeland’s version of the story:

[W]e sit on the [studio control room] couch at a creative standstill. Sting

21. *See infra* Part II.A.

22. “Riff” is a term used in jazz and rock music to refer to “a melodic phrase, often constantly repeated, forming an accompaniment or part of an accompaniment for a soloist.” RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1655 (2d ed. 1998).

23. In determining whether the main guitar riff is, in fact, part of the composition, it is worth noting that piano/vocal/guitar sheet music published for “Every Breath You Take” includes that exact sequence of notes. THE POLICE, EVERY BREATH YOU TAKE 2 (Hal Leonard Publ’g Corp. ed., 1983) (sheet music).

24. Richard Buskin, *Classic Tracks: The Police’s ‘Every Breath You Take,’* SOUND ON SOUND (Mar. 2004), http://www.soundonsound.com/sos/mar04/articles/classic_tracks.htm (discussing Padgham’s recollections of the preproduction and recording sessions for “Every Breath You Take”) (emphasis added).

25. Robyn Flans, *The Police’s “Every Breath You Take,”* MIX (Apr. 1, 2003, 12:00 PM), http://www.mixonline.com/recording/interviews/audio_polices_every_breath/ind_ex.html (quoting drummer Stewart Copeland on the preproduction and recording sessions for “Every Breath You Take”) (emphasis added).

26. Vic Garbarini, *The Police Report - The Lion in Winter*, MUSICIAN (June 1983), available at <http://www.sting.com/news/article/23> (quoting Sting on the writing of “Every Breath You Take,” which Sting says “wrote itself”).

leans over and says, “Go on, go in there, make it your own.”

. . . .

. . . The track rolls and I play a sequence of intervals that outline the chords and add a nifty little extension to each one that makes it sound like the Police, root, fifth, second, third, up and down through each chord I play it straight through in one take. There is brief silence, and then everyone in the control room stands up and cheers.²⁷

Summers goes on to cite “the forty-four Bartók violin duets” as an influence for his “Every Breath You Take” guitar part, stating that they are “well suited to the guitar and with their intervallic structures and modal ambience are not a thousand miles from the Police guitar sound.”²⁸

Despite Summers’s significant contribution to the song and its enormous commercial success,²⁹ Sting is the only composer credited on “Every Breath You Take”³⁰ and the sole owner of the copyright for that composition. Accordingly, under United States copyright law, Sting has the exclusive right to exploit the composition, which includes the guitar riff, and collect the royalties associated with its authorship.³¹ These royalties involve a significant amount of money not only because they flow from the commercial success of “Every Breath You Take,”³² but also because the music (and some of the lyrics) of “Every Breath You Take” forms the musical basis of another highly profitable song, Diddy’s “I’ll Be Missing You,”³³ for which Sting received credit as one of the song’s composers.³⁴ If Summers had been given credit as a one of the composers of “Every Breath You Take,” under United States copyright law, he

27. ANDY SUMMERS, *ONE TRAIN LATER: A MEMOIR* 323–24 (2006).

28. *Id.* at 324.

29. See Buskin, *supra* note 24 (“‘Every Breath You Take’ [] sat atop the US chart for eight weeks and the UK chart for a month.”); *Sold on Song: “Every Breath You Take”*, BBC RADIO 2, <http://www.bbc.co.uk/radio2/soldonsong/songlibrary/indepth/everybreathyoutake.shtml> (last updated Apr. 2005) (“[‘Every Breath You Take’] allegedly still earns Sting £715 daily from US airplay alone.”).

30. See THE POLICE, *supra* note 23, at 2 (“Words and Music by Sting”); see also THE POLICE, *BEST OF THE POLICE* 21 (Hal Leonard Corp. ed., 2d ed. 1986) (indicating “Written and Composed by Sting,” even on a note-for-note transcription of Andy Summers’s recorded guitar part for “Every Breath You Take”).

31. 17 U.S.C. §§ 101, 106 (2006).

32. See Buskin, *supra* note 24.

33. PUFF DADDY & THE FAMILY, *I’ll Be Missing You*, on *NO WAY OUT* (Bad Boy Records 1997); John Bush & Bradley Torreano, *Diddy Biography*, ARTISTDIRECT, <http://www.artistdirect.com/artist/bio/diddy/582394> (last visited Aug. 9, 2013) (“*No Way Out* [] shot straight to number one and was certified platinum several times over; in 1998 it won the Grammy Award for Best Rap Album and ‘I’ll Be Missing You’ won the award for Best Rap Performance by a Duo or Group.”).

34. Rodd McLeod, *The Reeducation of Lauryn Hill*, SALON.COM (May 10, 2000, 12:00 PM), http://www.salon.com/2000/05/10/pop_song/singleton (discussing a dispute over songwriting credit involving hip-hop artist Lauryn Hill and mentioning the authorship issues present in “Every Breath You Take” and “I’ll Be Missing You”).

and Sting would own equal shares of the copyright.³⁵ Because he was not given credit as a coauthor (and apparently never thought to ask for credit³⁶), Summers owns no share in the composition's copyright.³⁷

As the case of Andy Summers's contribution to "Every Breath You Take" illustrates, courts that must decide cases involving claims of joint authorship face a tremendous challenge. If Summers were to sue Sting for an equal share in the copyright of that work, the court would be called on to answer puzzling philosophical and musicological questions such as, What makes a song?³⁸ In attempting to answer those questions and apply the answers to the facts of the case, the court could be faced with a murky evidentiary situation with regard to who contributed which material to the work. This situation could include conflicting testimony, forgotten conversations, or lost demo recordings.³⁹ Additionally, in the case of a work as profitable as "Every Breath You Take," the stakes for the parties are high.⁴⁰ Therefore, courts are under great pressure when deciding these kinds of cases, and as will be discussed, the Constitution and Congress offer insufficient guidance.⁴¹

35. Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 193 (2001) ("Absent an agreement to the contrary, each author of a joint work has an equal claim to [exploitation] profits and an equal right to exploit the work, even if the authors' contributions were not equal.").

36. McLeod, *supra* note 34.

37. Although Summers did not receive royalties as a composer of "I'll Be Missing You," he did receive some payment for his contribution to the song. McLeod, *supra* note 34 ("After making a few phone calls, Summers learned that he had received some compensation for the riff—[Puff Daddy's] Bad Boy Records had paid for the actual sample of the Police's album track, which Summers had, of course, performed on.").

38. See generally Gabriel Jacob Fleet, Note, *What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235 (2008) (discussing the difficulty of defining musical compositions and composers in a legal context).

39. See *supra* text accompanying notes 16–19; *infra* Part II.A (discussing Procol Harum members' differing recollections of the form in which "A Whiter Shade of Pale" was first presented to organist Matthew Fisher).

40. See Buskin, *supra* note 24 (mentioning that "Every Breath You Take" by the Police held the top spot for eight weeks on the U.S. chart); Bush & Torreano, *supra* note 33 (stating that Puff Daddy's *No Way Out* album was certified platinum multiple times).

41. Note that many musical collaborators avoid the problem of determining authorship after the fact by simply agreeing prior to the collaboration that they will share equally in the copyright of any works resulting from their collective efforts. See, e.g., JACOB SLICHTER, *SO YOU WANNA BE A ROCK & ROLL STAR* 38 (2004) (recounting how rock band Semisonic's singer-guitarist, Dan Wilson, "suggested that the three band members split everything evenly, including songwriting royalties," even though "he wrote the vast majority of the songs," and explaining that Wilson did so "in order to put the band on equal footing" and in exchange for the other band members' "support [of] his artistic leadership"); Peisner, *supra* note 16, at 64–67 ("From day one, Interpol functioned as a democracy, with everything split equally among all four members and everyone granted an equal say in band decisions."). Alternatively, songwriters who work with other musicians often have those musicians sign agreements in which they relinquish in advance any claim to a share in the copyright of their performance on the recording for which they were hired as an accompanist or "side musician." See RICHARD STIM, *MUSIC LAW: HOW TO RUN YOUR BAND'S BUSINESS* 11/7–8 (3d ed. 2003) (discussing and illustrating a musician release agreement). See generally J. William

B. Joint Authorship of Musical Works: An Uncertain Statutory Foundation

The United States Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴² Pursuant to this grant of power, Congress enacted the Copyright Act of 1976 (“the Act”),⁴³ the source of federal copyright law in the United States today.⁴⁴ The Act provides copyright protection for “original works of authorship fixed in any tangible medium of expression.”⁴⁵

Although the Act includes “musical works” among the categories of works that are the “subject matter of copyright,”⁴⁶ it does not define the term “musical works.”⁴⁷ Congress had avoided this issue in earlier copyright statutes,⁴⁸ and the Act’s legislative history shows that Congress was aware of the omission of a “musical works” definition at the time of the Act’s passage.⁴⁹ Yet Congress chose to avoid the issue again,⁵⁰ leaving courts to define the boundaries of copyrightable musical expression.

At an even more basic level, the Act leaves two essential terms undefined: “original” and “author.”⁵¹ It is therefore not surprising that courts have struggled to identify who is or is not a work’s author and to distinguish expression that is original and copyrightable from expression that is not.⁵² In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the United States Supreme Court declared that “[o]riginality is a constitutional requirement” for

Dockrey, *The Importance of a Written Agreement When Collaborators Create a Copyrighted Work in the Performing Arts*, 28 ENT. & SPORTS LAW. 8, 8 (Summer 2010).

42. U.S. CONST. art. I, § 8, cl. 8. Note that in this clause, “science” is understood as referring to copyright, and “useful arts” is understood as referring to patents. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 n.11.4 (2012).

43. 17 U.S.C. §§ 101–805, 1101 (2006).

44. GOLDSTEIN & REESE, *supra* note 10, at 658–59.

45. 17 U.S.C. § 102 (2006).

46. *Id.* § 102(a)(2).

47. *Id.* § 101.

48. See H.R. REP. No. 94–1476, at 51–52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5664–65 (“The first copyright statute in this country, enacted in 1790, designated only ‘maps, charts, and books’; major forms of expression, such as music . . . achieved specific statutory recognition only in later enactments.”).

49. H.R. REP. No. 94–1476, at 53, *reprinted in* 1976 U.S.C.C.A.N. 5666 (acknowledging “musical works” as one of three categories of copyrightable works not defined in the Act).

50. H.R. REP. No. 94–1476, at 53, *reprinted in* 1976 U.S.C.C.A.N. 5667 (concluding that a definition of “musical works” was unnecessary because the term has a “fairly settled meaning[]” but giving no indication as to what that meaning might be).

51. See 17 U.S.C. § 101 (2006) (defining many other terms used in the Act but omitting definitions of “author” and “original”).

52. See generally Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 803–04 (1993) (discussing the “blurred vision of what the term ‘originality’ means in copyright law”).

copyright and “the touchstone of copyright protection today.”⁵³ Citing earlier Supreme Court copyright cases, the Court continued, “The Court defined ‘author,’ in a constitutional sense, to mean ‘he to whom anything owes its origin; originator; maker.’”⁵⁴ The Court stressed that “originality requires independent creation plus a modicum of creativity.”⁵⁵ Beyond these generalities, however, the Court’s opinion provides neither definitions of the terms “originality,” “creativity,” and “authorship,” nor standards by which lower courts can determine whether these qualities are present in a work for which a party seeks copyright protection.⁵⁶

Things get even more complicated when more than one person claims to be an author of a work. The Act defines the term “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.”⁵⁷ That definition seems straightforward enough, but it has been the subject of differing judicial interpretations. As one commentator has noted,

[i]n the Second and Seventh Circuits, in order to establish that a work is joint, it is now no longer sufficient to show that the co-creators intended, at the time they created their respective contributions, to merge those contributions inseparably or interdependently into a single work. Under the law of these circuits, it is also necessary to show that both authors intended to “regard themselves as joint authors.” In other words, if two persons combine their efforts to produce a copyrightable work, the result is a joint work only if each of them intended to establish a co-authorial relationship with the other.⁵⁸

Nevertheless, the Act requires some form of mutual intent to be shown in all claims of joint authorship, regardless of the jurisdiction.⁵⁹

The case of *Ulloa v. Universal Music & Video Distribution Corp.* offers an example of how application of the mutual intent requirement can result in a plaintiff who made a copyrightable contribution to a musical work being denied joint authorship in the work.⁶⁰ The case also illustrates the aforementioned

53. 499 U.S. 340, 346–47 (1991).

54. *Id.* at 346 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

55. *Feist*, 499 U.S. at 346 (citing *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879)).

56. *See VerSteeg*, *supra* note 52, at 822–42 (discussing the *Feist* Court’s failure to define these terms except by providing examples of what does *not* meet its standard for creativity and originality).

57. 17 U.S.C. § 101 (2006).

58. *LaFrance*, *supra* note 34, at 199–200 (quoting *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991)). *But see Janky v. Lake Cnty. Convention & Visitors Bureau*, 576 F.3d 356, 362 (7th Cir. 2009) (“[T]he intent prong does not have to do with the collaborators’ intent to recognize each other as co-authors for purposes of copyright law; the focus is on the parties’ intent to work together in the creation of a single product, not on the legal consequences of that collaboration.” (citing *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068–69 (7th Cir. 1994))).

59. 17 U.S.C. § 101.

60. 303 F. Supp. 2d 409, 418 (S.D.N.Y. 2004). This case received a significant amount of attention from the news media because it involved rap superstar Jay-Z and one of his biggest hit songs, “Izzo (H.O.V.A.).” *See, e.g., Joe D’Angelo, Jay-Z Sued for Copyright Infringement by ‘Izzo’*

distinction between authors who intend to merge their contributions into a single work and authors who intend to regard each other as coauthors of that work.⁶¹ *Ulloa* further demonstrates the Second Circuit's aforementioned adoption of the latter, more restrictive interpretation of the mutual intent requirement.⁶²

In *Ulloa*, a singer brought a claim of joint authorship against rapper Jay-Z based on the singer's contribution of a countermelody to Jay-Z's hit song "Izzo (H.O.V.A.)" (hereinafter "the Izzo song") from his album *Blueprint*.⁶³ The singer, Demme Ulloa, was present at the studio during the recording of the song.⁶⁴ She was invited not as a hired vocalist but rather as a guest of Samuel Barnes, "a friend and colleague of Defendant Shawn Carter, who is professionally known as 'Jay Z.'"⁶⁵ Barnes had told Ulloa that he was producing the Izzo song, even though he was not.⁶⁶ "The Izzo song consisted of rapped lyrics by [Jay-Z], and an instrumental riff, which previously appeared in the Jackson Five song, 'I Want You Back'"⁶⁷

Ulloa, "[w]hile . . . listening to the unfinished version of the Izzo song, . . . spontaneously began singing [a] countermelody" to the instrumental riff "with the words from the rapped portion of the song."⁶⁸ Jay-Z liked what Ulloa was singing and asked her to record it "for possible inclusion in the Izzo song."⁶⁹ Ulloa did so, but she left the studio without discussing any terms regarding credit or compensation "for the possible use of" her contribution to the song.⁷⁰ After later attempting unsuccessfully to negotiate those terms to her satisfaction, Ulloa retained counsel and eventually brought suit against Jay-Z.⁷¹ Ulloa claimed that the inclusion of her vocal countermelody made her a joint author of the Izzo song.⁷²

It should be noted that although the court refers to Ulloa's vocal part using neutral terms like "countermelody" and "[v]ocal [p]hrase,"⁷³ these terms do not properly convey the importance of Ulloa's contribution to the Izzo song.

Singer, MTV.COM (Nov. 1, 2001, 5:11 PM), <http://www.mtv.com/news/articles/1450451/jay-z-sued-by-izzo-singer.jhtml>.

61. See *supra* text accompanying note 58.

62. See *Ulloa*, 303 F. Supp. 2d at 418 (stating that "parties must intend to share the rights of authorship rather than merely intend to enter into a relationship that results in the creation of a copyrightable work").

63. *Id.* at 411, 417–18.

64. *Id.* at 411.

65. *Id.*

66. *Id.* Barnes did produce another song on *Blueprint* but not the Izzo song. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 412.

72. *Id.* at 417–18.

73. *Id.* at 411.

Arguably, Ulloa gave the song not a “countermelody” but its *principal* melody and main hook.⁷⁴ Nevertheless, the court granted summary judgment for Jay-Z and his codefendants on Ulloa’s joint authorship claim because Ulloa had “proffered no evidence to support an argument that Jay-Z ever intended to share authorship with [Ulloa].”⁷⁵ The court acknowledged that Ulloa might have made a copyrightable contribution to the Izzo song⁷⁶ but concluded that she had failed to satisfy “the requirement that the parties must intend to share the rights of authorship rather than merely intend to enter into a relationship that results in the creation of a copyrightable work.”⁷⁷

C. Joint Authorship of Musical Works: Differing Judicial Interpretations

With only broad, vague, or absent statutory terms to guide them, federal courts have developed a two-part test to determine when a work is a joint work. A party claiming to be a joint author must show (1) intent by both parties to collaborate or coauthor, and (2) some level of copyrightable expression contributed by each party claiming authorship.⁷⁸ In addition to the controversy discussed earlier regarding what kind of relationship between collaborators is required to satisfy the first part of the test, there has also been a split among the federal circuits regarding what level of contribution satisfies the second part of the test.⁷⁹ Courts have developed two additional tests for the purpose of answering this question: the Goldstein test and the Nimmer test.⁸⁰

Under the Goldstein test, which is the test that “has been adopted, in some form, by a majority of courts that have considered the issue,”⁸¹ each putative joint author is required to make a contribution to the work that is independently copyrightable.⁸² “According to Professor Goldstein, ‘[a] collaborative contribution will not produce a joint work, and a contributor will not obtain a

74. See D’Angelo, *supra* note 60 (describing Ulloa’s contribution to the Izzo song as “the melodic hook used in the chorus of the track”). In the context of popular music, the term “hook” is defined as “an appealing melodic phrase, orchestral ornament, refrain, etc., often important to a popular song’s commercial success.” RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 919 (2d ed. 1998). As anecdotal evidence that Ulloa’s vocal melody is the Izzo song’s main hook, the author of this Note attests that after listening to the song with the expectation that Ulloa’s contribution would be minor, Ulloa’s prominent, catchy, and beautifully sung melody became stuck in his head for the rest of the day.

75. *Ulloa*, 303 F. Supp. 2d at 418.

76. See *id.* at 413–14 (denying Jay-Z and his codefendants’ motion for summary judgment on the issue of whether Ulloa’s contribution to the Izzo song was sufficiently original to be copyrightable).

77. *Id.* at 418.

78. See, e.g., *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068–69 (7th Cir. 1994) (discussing the statutory requirements for joint authorship).

79. See *Fleet*, *supra* note 38, at 1248–50 (discussing the split among federal circuits regarding whether the Goldstein test or the Nimmer test, both to be discussed *infra*, is the appropriate test for determining whether a party has made a copyrightable contribution to a joint work).

80. *Erickson*, 13 F.3d at 1069.

81. *Id.* at 1070.

82. *Id.* at 1071.

co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright.”⁸³ For example, in *Balkin v. Wilson*, the court held that songs were not works of joint authorship where one of the two collaborators contributed only “ideas and concepts” to the songs.⁸⁴ Because “ideas and concepts” are not independently the subject of copyright protection, the court said, they do not entitle a party to the status of joint author.⁸⁵

Unlike the Goldstein test, which requires a copyrightable contribution by each joint author, the Nimmer test requires only that “the combined product of joint efforts must be copyrightable.”⁸⁶ According to “Nimmer, the late scholar” after whom the test is named, “all that should be required to achieve joint author status is more than a de minimis contribution by each author. ‘De minimis’ requires that ‘more than a word or line must be added by one who claims to be a joint author.’”⁸⁷ For example, without evidence of some more substantial contribution to a musical work, the sound engineer who recorded the work is unlikely to qualify as a joint author under the Nimmer test, because the engineer’s contribution to the work would be considered too minimal.⁸⁸

Neither the Goldstein test nor the Nimmer test has been problem-free in its application. As the minority view, the Nimmer test has been more widely criticized. The *Erickson* court pointed to two weaknesses in rejecting the Nimmer test in favor of the Goldstein test:

First, Professor Nimmer’s test is not consistent with one of the Act’s premises: ideas and concepts standing alone should not receive protection. . . . Second, contribution of an idea is an exceedingly ambiguous concept. Professor Nimmer provides little guidance to courts or parties regarding when a contribution rises to the level of joint authorship⁸⁹

Interestingly, the same criticism regarding lack of guidance could also be made of the Goldstein test. Indeed, the *Erickson* court and other proponents of the Goldstein test fail to explain in a satisfactory way the test’s requirements for joint authorship, which seem self-contradicting. After all, how can contributions

83. *Id.* at 1070 (alteration in original) (quoting PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 4.2.1.2, at 379 (1989)).

84. 863 F. Supp. 523, 528 (W.D. Mich. 1994); *see also* *Merchant v. Lymon*, 828 F. Supp. 1048, 1058 (S.D.N.Y. 1993) (finding that a studio musician’s saxophone solo was “an ‘incidental’ music change[,] . . . merely an arrangement that followed from the song’s chord progression,” and therefore not an independently copyrightable contribution that would entitle the saxophonist to be considered a joint author of the song in which he played the solo), *rev’d on other grounds sub nom.* *Merchant v. Levy*, 92 F.3d 51 (2d Cir. 1996).

85. *Balkin*, 863 F. Supp. at 528.

86. *Erickson*, 13 F.3d at 1069.

87. *Id.* at 1069–70 (quoting NIMMER & NIMMER, *supra* note 42, § 6.07).

88. *See* *Brown v. Flowers*, 297 F. Supp. 2d 846, 852 (M.D.N.C. 2003).

89. *Erickson*, 13 F.3d at 1070.

that are “*inseparable* or *interdependent* parts of a unitary whole”⁹⁰ also be *independently* copyrightable? In addition, some commentators have criticized the Goldstein test as being simply too difficult to satisfy, resulting in many valuable contributions by collaborators being denied copyright protection.⁹¹

Of course, the disagreement between those who favor the Nimmer test over the Goldstein test or vice versa may involve a distinction without a difference. The United States Supreme Court has set the bar for copyright protection quite low, requiring only “some minimal degree of creativity” for expression to be considered copyrightable.⁹² Therefore, the Goldstein test could in practice be little more restrictive than the Nimmer test and of little more help to courts addressing a joint authorship claim.

II. AN ALTERNATIVE APPROACH FROM THE UNITED KINGDOM: THE REASONING IN *FISHER V. BROOKER*

A. *The Facts, the Issues, and the Evidence*

The case of *Fisher v. Brooker* arose in May of 2005 when, after a failed attempt to avoid litigation, Matthew Fisher, the former organist for Procol Harum, sued his former bandmate Gary Brooker and others for a share of the copyright in the band’s most famous song, “A Whiter Shade of Pale.”⁹³ Despite Fisher’s “hugely famous” organ solo on the recording of that song, Fisher had never received credit as one of the song’s authors.⁹⁴ According to Fisher, he approached the defendants in the summer of 1967, shortly after the song’s release, and asked that his name be added as a cowriter of the song, but he was rebuffed.⁹⁵ Furthermore, he was told that if he pursued the matter, he would be asked to leave the group.⁹⁶

90. 17 U.S.C. § 101 (2006) (emphasis added) (defining “joint work”).

91. See Fleet, *supra* note 38, at 1273 (favoring the Nimmer test over the Goldstein test in cases involving claims of joint authorship of musical works); see also Gaiman v. McFarlane, 360 F.3d 644, 658–59 (7th Cir. 2004) (acknowledging that the Seventh Circuit applies the Goldstein test in joint authorship claims but suggesting that in some cases the Nimmer test may be more appropriate). The *Gaiman* court stated:

[I]t would be paradoxical if though the result of [two or more people’s] joint labors had more than enough originality and creativity to be copyrightable, no one could claim copyright. . . . The decisions that say, rightly in the generality of cases, that each contributor to a joint work must make a contribution that if it stood alone would be copyrightable weren’t thinking of the case in which it *couldn’t* stand alone because of the nature of the particular creative process that had produced it.

360 F.3d at 658–59. *But see* Janky v. Lake Cnty. Convention & Visitors Bureau, 576 F.3d 356, 362–63 (7th Cir. 2009) (citing *Gaiman* but reaffirming independent copyrightability of contributions as a requirement for joint authorship in the Seventh Circuit).

92. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991).

93. Fisher v. Brooker, [2006] EWHC (Ch), 3239, [4]–[5] (Eng.).

94. *Id.* at [4]–[5], [10].

95. *Id.* at [57].

96. *Id.* at [57], [72]; Fisher v. Brooker, [2009] UKHL 41, [35] (appeal taken from Eng.) (“[Fisher] explained that he had not wanted to push his claim as he feared that, if he did so, he would be asked to ‘say goodbye to a career in . . . a number one pop group.’”).

The band Procol Harum came into being in early 1967 after singer-pianist Gary Brooker and lyricist Keith Reid, who were already collaborating as songwriters, decided to form a group that would include a lead guitarist, a bass guitarist, and an organist for the purpose of performing Brooker and Reid's songs.⁹⁷ In the following months, the band rehearsed and recorded Brooker and Reid's song "A Whiter Shade of Pale."⁹⁸ This recording of the song (hereinafter "the Work") included the organ intro and solo⁹⁹ by Fisher that, according to Fisher, made him a joint author of the Work.¹⁰⁰

It should be mentioned that "A Whiter Shade of Pale" is not just any song. Like The Police's "Every Breath You Take,"¹⁰¹ it "was one of the most successful popular songs of" its era and "has achieved something approaching cult status."¹⁰² The song's prevalence and cultural significance are indicated by statements like this one by Baroness Hale of Richmond in the House of Lords' opinion: "As one of those people who do remember the sixties, I am glad that the author of that memorable organ part has at last achieved the recognition he deserves."¹⁰³ Therefore, the stakes were high in this case with regard to the parties' finances, but there were also emotional and cultural components to the case that may have influenced its outcome.¹⁰⁴

To succeed in his claim of joint authorship, Fisher had to convince the court that (1) his organ part was primarily of his own invention, and (2) his organ part was a contribution significant enough to be "capable of conferring on Mr. Fisher an interest in the musical copyright in the Work."¹⁰⁵ In support of his claim that he was a coauthor of the Work, Fisher presented evidence that the version of "A Whiter Shade of Pale" written and copyrighted by Brooker and Reid prior to Fisher's joining Procol Harum (the version hereinafter referred to as "the Song") was substantially different from the version that the band recorded and released with Fisher playing organ—different enough to be considered a separate copyrightable work to which Fisher made a significant contribution.¹⁰⁶

Fisher testified that although "the vocal part and chorus, together with the

97. Fisher v. Brooker, [2006] EWHC (Ch) 3239, [4], [25]–[28] (Eng.).

98. *Id.* at [29]–[32].

99. Note that what Fisher played is not a solo in the strictest meaning of the term. As the court points out, "[a]lthough described as a 'solo', in fact his playing is accompanied but, with the exception of a languorous drum beat, it is difficult to detect any of the other instruments." *Id.* at [9].

100. *Id.* at [42].

101. See *supra* notes 29–33 and accompanying text (discussing the popularity and commercial success of "Every Breath You Take").

102. Fisher, [2006] EWHC (Ch) at [1], [3].

103. Fisher v. Brooker, [2009] UKHL 41, [20] (Baroness Hale of Richmond) (appeal taken from Eng.).

104. See *id.*

105. Fisher, [2006] EWHC (Ch) at [12].

106. *Id.* at [32]–[36].

descending bass line which underlies the organ solo, were written by Mr[.] Brooker and inspired by J[.]S[.] Bach's Air on a G String."¹⁰⁷ the version of the Song that Brooker presented to the band at their first rehearsals did not include the melody played by Fisher in his famous organ solo.¹⁰⁸ That "definitive solo," Fisher testified, was something "he spent some time at home composing. . . . [I]t received the approval of Mr[.] Brooker and the other members of Procol Harum when he played it over to them[,] . . . [and] it was incorporated into the Song when they performed it for the purpose of the recording."¹⁰⁹

As evidence that the organ solo was his own invention, Fisher described in great detail his thought process in composing the piece. Just as Brooker's composition of the Song had been

inspired by J[.]S[.] Bach's Air on a G String . . . , Fisher[] found inspiration for the organ solo in another of J[.]S[.] Bach's works, namely "Wachet auf, ruft uns die Stimme" ("Sleepers awake, the voice is calling"). Having decided that he wanted to incorporate something which reflected that piece in the organ solo, he adapted it, by small changes in note value and pitch, so that it could be combined with the descending bass line provided by Mr[.] Brooker with its echoes of Air on a G String. The working in of this reference to Wachet Auf led to Mr[.] Fisher making, he said, a small alteration to the bass line in bar 8, namely the substitution of a root position G chord for a bass C on the first beat of the eighth bar and the substitution of two first-inversion chords, F and G7, in place of a bottom G in the second half of the eighth bar.¹¹⁰

Brooker, in his own testimony, claimed that "[i]n spite of the differences between the piano and the organ, what was played by Matthew [Fisher] in rehearsal, and on the recording, both in harmonic and melodic terms, was essentially the same as what [he] had composed at the piano."¹¹¹ Reid added that the original version of the Song "had the introduction and melodies that everyone recogni[z]es,"¹¹² and several defense witnesses testified in support of this claim.¹¹³ Unfortunately for the court, there was no recording in existence that could verify any of the testimony regarding whether or not the musical contributions that Fisher said he made to the Work were already present in the version of the Song that Brooker and Reid copyrighted.¹¹⁴ Brooker claims that he made a demo recording of the Song with "himself alone both singing and playing the piano[] on some date prior to" Fisher's joining Procol Harum,¹¹⁵

107. *Id.* at [36].

108. *Id.* at [35].

109. *Id.*

110. *Id.* at [36].

111. *Id.* at [33].

112. *Id.*

113. *Id.* at [33]–[34].

114. *Id.* at [18].

115. *Id.* at [47].

but the demo tape subsequently disappeared.¹¹⁶ Therefore, the court had to base its findings of fact in large part on witnesses' contradicting testimony regarding events that occurred more than thirty years prior to the litigation.¹¹⁷

The court also heard expert testimony from a musicologist who testified for the defendants.¹¹⁸ He made the following general observations about the creative processes of musical groups that arrange and rehearse songs that were written by one of the group's members, and also about the other group members' expectations regarding the copyrightability of their respective contributions:

I myself have been a member of a number of bands since the early 70s and I have frequently been involved in scenarios such as that involving Mr[.] Fisher where I and other band members have been presented with a song in a similar state to that of the Song described by both Mr[.] Brooker and Mr[.] Fisher (i.e. a finished work in terms of vocal melody, lyrics, structure and form) and asked to "rehearse it up" for either recording or live performance or both.

In many instances, significant and original musical material in the form of solos (whether improvised or developed into extra musical parts), intros, outros (codas), musical "hooks[.]"¹¹⁹[] countermelodies and secondary melodies has been input into the arrangement by myself and other band members but, to the best of my knowledge and belief, none of my fellow band members would ever have considered himself to be a joint author of the song.¹²⁰

This testimony was relevant to the case at hand because of the way in which Procol Harum arranged and rehearsed its material, including the Song, in preparation for recording. In these rehearsals, as the defendants conceded, the individual band members would develop their respective parts through improvisation.¹²¹ "[T]he philosophy of the band was that the different musicians each made their own musical contributions. The result was . . . that the individual musicians would feed off each other in what they improvised."¹²²

The Song, as Brooker presented it to the band, contained several instrumental sections.¹²³ In early rehearsals of the Song, Fisher and Brooker, playing organ and piano respectively, would alternately "improvis[e] their

116. *Id.* at [18].

117. *Id.* at [10]–[36].

118. *Id.* at [10].

119. *See supra* note 74 (defining the term "hook").

120. *Fisher*, [2006] EWHC (Ch) at [45] (testimony of Peter Oxendale). The court describes Peter Oxendale as "a musicologist with impressive qualifications and a distinguished track record as an expert in copyright litigation extending over 26 years, together with many years of experience as a keyboard player, music director and producer in the field of popular music." *Id.* at [10].

121. *Id.* at [29]–[31].

122. *Id.* at [30].

123. *Id.* at [29].

respective instrumental sections over the original chord sequence that Mr[.] Brooker had composed.”¹²⁴ Brooker admitted that “Fisher’s improvisations would not be the same as his own and that, when playing the piano, he (Mr[.] Brooker) ‘did not play what Matthew Fisher played on the record.’”¹²⁵

Prior to the recording, it was decided that the recorded version of the Song (i.e., the Work) would include fewer instrumental sections and that Fisher “would perform all of [them] on his Hammond organ.”¹²⁶ The Song’s instrumental sections thus became “the very distinctive organ solo”¹²⁷ that gave rise to Fisher’s joint authorship claim. Fisher testified that he constructed his organ solo by “selecting what [he] considered to be the best ideas that [he] could remember using at rehearsals.”¹²⁸

Within that context of how Procol Harum developed its material and how the Song came to be the Work, the court summarized the joint authorship issue as follows:

[T]he key question is to decide to what extent the Work as recorded differed, so far as the organ part was concerned, from the Song which Mr[.] Brooker had presented to the band for rehearsal. In particular, to what extent was the melodic line of the organ part Mr[.] Fisher’s own invention?¹²⁹

If the court found that the melodic material in question was a sufficiently original contribution by Fisher to the Work, Fisher would be regarded as a joint author.¹³⁰

B. The Chancery Court’s Analysis and Decision

After reviewing the evidence and the arguments, the Chancery Court concluded that Fisher’s organ parts were “sufficiently different from what Mr[.] Brooker had composed on the piano to qualify in law, and by a wide margin, as an original contribution to the Work” and that Fisher “qualifie[d] to be regarded as a joint author of the Work and . . . to share in the ownership of the musical copyright in it.”¹³¹

It must be emphasized that United Kingdom copyright law with regard to joint authorship is fundamentally different from United States copyright law in that United Kingdom law does not require mutual intent on the part of the alleged coauthors in order to find a work of joint authorship.¹³² Whereas a

124. *Id.*

125. *Id.*

126. *Id.* at [31].

127. *Id.* at [41].

128. *Id.* at [39].

129. *Id.* at [32].

130. *Id.* at [42].

131. *Id.*

132. *Compare* Copyright Act, 1956, 4 Eliz. 2, c. 74, § 11(3) (U.K.) (defining a “[w]ork of joint authorship” as “a work produced by the collaboration of two or more authors in which the contribution of each author is not separate from the contribution of the other author or authors”), *and* *Beckingham v. Hodgens*, [2002] EWCA (Civ) 143, [49]–[50] (Eng.) (expressly rejecting the

plaintiff claiming joint authorship in the United States would have to show both (1) the mutual intent of the parties to coauthor the work in question and (2) a copyrightable contribution to the work by the plaintiff,¹³³ in the United Kingdom the plaintiff need only satisfy the second of those two elements. The Chancery Court summarized the requirements for joint authorship under United Kingdom law as follows:

[P]rovided the contribution of the individual band member to the overall work is both significant (in the sense that it is more than merely trivial) and original (in the sense that it is the product of skill and labour in its creation) and the resulting work is recorded (whether in writing or otherwise), that band member is entitled to copyright in the work as one of its joint authors and to any composing royalties that follow. This assumes, of course, that there is no contractual arrangement to the contrary.¹³⁴

Therefore, to conclude that Fisher was a coauthor of the Work, the court did not need to find that Fisher and Brooker intended to be coauthors of the Work. The court needed only to find that Fisher had made a “significant” and “original” contribution to the work.¹³⁵ In concluding that Fisher was a coauthor of the Work, the court noted that its holding was not unprecedented, stating that “at least one of the reported decisions in this field has involved the contribution by a session musician to a musical work when the genesis for the work had already been the subject of an earlier recording”¹³⁶ and that “over the years, musicians have claimed, and successfully claimed, to be joint authors of musical works as a result of their contributions as band members.”¹³⁷

The relief granted to Fisher by the Chancery Court highlights another important difference between United Kingdom and United States copyright law, which is that under United States copyright law, joint authors are entitled to an equal share of the copyright in their joint work, assuming the joint authors have

argument that the Copyright Act of 1956 “requires, as one of the elements of joint authorship, the existence of a common intention as to joint authorship” and concluding instead that “[t]he only requirements for a ‘work of joint authorship’ expressed in [§] 11(3) are that the authors should have collaborated and that their contributions should not be ‘separate’”), *with* 17 U.S.C. § 101 (2006) (defining 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”), *and* Thomson v. Larson, 147 F.3d 195, 199 (2d Cir. 1998) (“The touchstone of the statutory definition [of a joint work] ‘is the intention at the time the writing is done that the parts be absorbed or combined into an integrated unit.’” (quoting H.R. REP. No. 94–1476, at 120–21 (1976))). *See also* Lior Zemer, *Is Intention to Co-Author an “Uncertain Realm of Policy”?*, 30 COLUM. J.L. & ARTS 611 (2007) (discussing the differences among United States, United Kingdom, and Canadian copyright law with regard to the mutual intent requirement for joint authorship).

133. *See supra* Part I (discussing the requirements for joint authorship under United States copyright law).

134. *Fisher*, [2006] EWHC (Ch) at [46].

135. *Id.*

136. *Id.* at [54] (citing *Beckingham v. Hodgins*, [2002] EWCA (Civ) 143, [12] (Eng.)).

137. *Id.* at [60].

made no agreement to the contrary.¹³⁸ United Kingdom copyright law provides no such default apportionment of ownership.¹³⁹ Thus, the court was free to apportion the ownership shares in the Work as the court pleased.¹⁴⁰ Fisher had claimed a fifty percent share, and the defendants had advanced no argument against that apportionment, perhaps assuming that Fisher's joint authorship claim would fail.¹⁴¹ Exercising its considerable discretion on this "highly subjective" question, the court awarded Fisher "a 40% share in the musical copyright."¹⁴² The court reasoned that Fisher's "contribution to the overall work was on any view substantial but not, in [the court's] judgment, as substantial as that of Mr[.] Brooker."¹⁴³

C. *The Problems with Fisher v. Brooker that Make Its Joint Authorship Holding Incompatible with United States Copyright Law*

In finding that Fisher's contribution to the Work was "significant" or "more than merely trivial,"¹⁴⁴ the Chancery Court seemed to place great importance on the "distinctive and famous" quality of Fisher's organ solo.¹⁴⁵ The House of Lords seemed similarly influenced by the Work's fame.¹⁴⁶ This reasoning, which involves consideration of whether a contribution to a musical work is famous or memorable as a factor in determining joint authorship, is one

138. Compare 17 U.S.C. § 201(a) (2006) ("The authors of a joint work are coowners of copyright in the work."), and *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998) ("Joint authorship entitles the co-authors to equal undivided interests in the whole work . . ."), with Copyright Act, 1956, 4 Eliz. 2, c. 74, § 4 (U.K.) (omitting from its provisions regarding copyright ownership any reference to apportionment of ownership among authors of joint works), and *Fisher v. Brooker*, [2006] EWHC (Ch) 3239, [96] (Eng.) ("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." (citing *Bamgboye v. Reed*, [2002] EWHC (QB) 2922 (Eng.) (awarding the claimant a thirty-three percent share of the copyright for a musical work))).

139. See *supra* note 138.

140. *Fisher*, [2006] EWHC (Ch) at [98] ("The [apportionment of ownership] question ultimately is a highly subjective one.").

141. *Id.* at [97].

142. *Id.* at [98].

143. *Id.* Note that in choosing forty percent as the share to which Fisher was entitled, the court disregarded the expert testimony of Mr. Oxendale, see *supra* note 120, who had testified that "in terms of quantity and quality, Mr[.] Fisher's contribution might be thought to justify a three-eighths' share" (37.5 percent). *Id.* at [97]. The court "did not find that [Oxendale's] views provided any assistance beyond what [the court] could assess unaided by his expertise," and so the court made its own subjective calculation. *Id.* at [98].

144. *Id.* at [46].

145. *Id.* at [23]; see also *id.* at [10] (agreeing with musicologist's description of Fisher's "organ solo as . . . hugely famous"); *id.* at [3] (discussing the worldwide popularity of the Work and mentioning that Fisher's organ solo in the Work's introduction is one of the "themes for the song . . . [that] are available as mobile telephone ringtones").

146. See *Fisher v. Brooker*, [2009] UKHL 41, [8] (Baroness Hale of Richmond) (appeal taken from Eng.) (referring to Fisher's contribution to the Work as "the well-known organ solo that did so much to make the song in its final form such a success").

of the problematic aspects of *Fisher v. Brooker*¹⁴⁷ and one of the reasons why the case should not be a model for United States courts.¹⁴⁸

Making consideration of commercial success part of the process for determining whose contributions to protect in a musical work creates a number of problems. In the first place, the purpose of copyright law is not to promote commerce but to “promote the Progress of Science and useful Arts.”¹⁴⁹ In addition, given the unpredictable nature of musical taste and public opinion,¹⁵⁰ making commercial success a basis for granting copyright protection would do little to promote musical innovation, because doing so would falsely assume a direct correlation between commercial success and artistic merit.¹⁵¹

Considering commercial success as a factor in determining whether a contribution is copyrightable creates another problem by expanding the circle of potential joint authors to a point where contributors could claim authorship based on contributions that would not independently be the subject of copyright. For example, the creative sound effect applied to Cher’s voice in her hit song “Believe” was arguably one of the primary factors in that song’s commercial success.¹⁵² If contribution to commercial success were to be considered as a basis for finding a copyrightable contribution to a musical work, then recording engineers like those who created the sound effect in “Believe” could be considered joint authors of that work. Following this reasoning to its logical conclusion, the circle could be expanded even farther to include music video producers, marketing executives, radio station program directors, or anyone else who made decisions that, when viewed retrospectively, could be determined to

147. *Fisher*, [2009] UKHL 41, [80]–[81] (appeal taken from Eng.); *Fisher*, [2006] EWHC (Ch) at [42].

148. Note that this is not only a problem in *Fisher*; it is present to some degree in United States courts as well. See, e.g., *Janky v. Lake Cnty. Convention & Visitors Bureau*, 576 F.3d 356, 363 (7th Cir. 2009) (considering the importance of certain lyrical additions to the “commercial viability” of a song in determining whether the lyricist had made a contribution that was sufficiently significant to make him a joint author of the song).

149. See *supra* notes 42–44 and accompanying text.

150. See generally DANIEL J. LEVITIN, THIS IS YOUR BRAIN ON MUSIC: THE SCIENCE OF A HUMAN OBSESSION 217–40 (2006) (discussing the various factors that influence how each person experiences music and develops musical preferences).

151. See *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 277 (2d Cir. 1936) (Hand, J.) (“Success in [popular] music . . . is by no means a test of rarity or merit; it is a commonplace that the most experienced are usually unable to tell in advance what will hit the public fancy and what will not. Were it otherwise much waste could be avoided.”).

152. See Sue Sillitoe & Matt Bell, *Recording Cher’s ‘Believe’*, SOUND ON SOUND, <http://www.soundonsound.com/sos/feb99/articles/tracks661.htm> (last visited Aug. 10, 2013) (discussing “the first commercial recording to feature the audible side-effects of Antares *Auto-tune* software used as a deliberate creative effect. . . . the ‘Cher effect,’ as it became known”); Roy Wilkinson, *Has Auto-Tune Finally Had Its Day?*, GUARDIAN (Jan. 28, 2010, 5:10 PM), <http://www.guardian.co.uk/music/2010/jan/28/autotune> (discussing the history of Auto-Tune, the technique of using it for creative effect, and the prominence of that technique’s use in popular music since the late 1990s).

have led to a song's commercial success. Surely these are not the kind of authors that the Framers of the United States Constitution intended to protect.¹⁵³ Nor are they the kind of authors apparently intended to be protected by the United Kingdom's copyright law, which, like United States copyright law, aims to promote not commerce but artistic progress.¹⁵⁴

In concluding that Fisher's contribution to the Work was "original" or "the product of skill and labour in its creation,"¹⁵⁵ the Chancery Court noted that evidence showed Fisher's organ solo was "the result of a careful creative process" involving the incorporation of references to Bach and "that he spent some time at home composing the solo."¹⁵⁶ This consideration of the amount of effort that went into the creation of the solo puts the *Fisher* court at odds with courts in the United States, including the Supreme Court, which has expressly disavowed the "sweat of the brow" doctrine.¹⁵⁷ Under the "sweat of the brow" doctrine, copyright was viewed as "a reward for . . . hard work."¹⁵⁸ In *Feist Publications*, the Supreme Court rejected that view,¹⁵⁹ noting that "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'"¹⁶⁰ In light of the fact that "labour in its creation" is elemental to finding a musical contribution copyrightable under British law,¹⁶¹ *Fisher v. Brooker* seems irreconcilable with United States copyright law, for which labor is of little concern.¹⁶² Additionally, as suggested earlier, the labor requirement also seems to contradict the purpose of British copyright law, which also aims not to reward hard work but to promote "innovation and creativity."¹⁶³

Despite the differences in how the United States and the United Kingdom each understand the concepts of significance and originality with regard to the copyrightability of contributions to a musical work alleged to have been jointly authored,¹⁶⁴ the approaches of the two countries' courts are not worlds apart on

153. U.S. CONST. art. I, § 8, cl. 8; *see also* *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) ("The [Supreme] Court said that an 'author,' in the sense that the Founding Fathers used the term in the Constitution, was 'he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.'" (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884))).

154. *See Fisher v. Brooker*, [2009] UKHL 41, [8] (appeal taken from Eng.) ("The benefits that flow from intellectual property . . . provide an incentive to innovation and creativity.").

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

156. *Id.* at [35]–[37].

157. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352–56 (1991).

158. *Id.* at 352.

159. *Id.* at 354 (stating that "[w]ithout a doubt, the 'sweat of the brow' doctrine flouted basic copyright principles").

160. *Id.* at 349 (quoting U.S. CONST. art. I, § 8, cl. 8).

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

162. *See supra* note 157 and accompanying text.

163. *See supra* note 154.

164. *See supra* notes 132–61 and accompanying text.

these points.¹⁶⁵ United States and United Kingdom copyright laws are worlds apart on another issue, however: mutual intent to coauthor.¹⁶⁶ As discussed earlier, United States copyright law only recognizes a work as a joint work where the putative joint authors each show some level of intent to coauthor the work in question; United Kingdom copyright law has no such requirement.¹⁶⁷

So, which approach is the right one? Was Congress wrong to define a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged”¹⁶⁸ In light of the difficulty courts have had interpreting the scope of the mutual intent requirement,¹⁶⁹ should the requirement be abandoned altogether? Some commentators have questioned the value of the “intent to co-author” requirement and criticized the way in which United States courts have applied it, arguing that the requirement can be used to deny legitimate claims of joint authorship.¹⁷⁰ Others have proposed the adoption of a “default joint authorship rule,” whereby any work to which more than one party made a contribution is automatically considered a joint work and all contributors are considered joint authors of that work, absent an agreement to the contrary made prior to the collaboration.¹⁷¹ Those who have criticized courts’ interpretation of the “joint work” definition’s intent-related language as requiring collaborators to “regard themselves as joint authors”¹⁷² have not necessarily proposed doing away with some requirement of intent.¹⁷³ They have argued instead that courts have erred by “focus[ing] on ‘the intended or perceived relationship between putative co-authors rather than on each party’s intent with respect to the creative work itself.’”¹⁷⁴

The distinction between requiring mutual intent to collaborate on a copyrightable work and mutual intent to share authorship of a copyrightable work may make some sense in other creative contexts, but it makes little sense in the kinds of collaborative settings discussed in this Note. If two or more musicians pick up their respective instruments and begin to play together, it goes without saying that they are playing “with the intention that their contributions be merged into inseparable or interdependent parts of a unitary

165. See *supra* notes 152–54 and accompanying text (discussing both American and British courts’ consideration of how a musical or lyrical contribution affected a song’s commercial viability when determining whether the contributor is entitled to be regarded as an author of the song).

166. See *supra* note 132 and accompanying text.

167. See *supra* note 132 and accompanying text.

168. 17 U.S.C. § 101 (2006).

169. See *supra* notes 57–59 and accompanying text.

170. See Zemer, *supra* note 132, at 623 (“Intention to co-author should not become a mechanism in the hands of one principal collaborator to deny rewards of other collaborators.”).

171. George W. Hutchinson, *Can the Federal Courts Save Rock Music?: Why a Default Joint Authorship Rule Should Be Adopted to Protect Co-Authors Under United States Copyright Law*, 5 TUL. J. TECH. & INTELL. PROP. 77, 81, 94 (2003).

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

173. See Hutchinson, *supra* note 171, at 94; LaFrance, *supra* note 35, at 255–63.

174. LaFrance, *supra* note 35, at 255.

whole.”¹⁷⁵ Why else would they be playing together? Even a critic of the courts that have focused on the authorial relationship concedes that “[i]ntention to co-author is an implicit requirement in the very definition of joint authorship.”¹⁷⁶ Because intent to collaborate is inherent in any conscious collaboration, the logical understanding of the Copyright Act’s “joint work” definition and its intent requirement¹⁷⁷ is the one that most courts have adopted, which is that a finding of joint authorship requires not just the parties’ mutual intent to collaborate on a copyrightable work, but also their mutual intent “to share the rights of authorship” in that work.¹⁷⁸

Having determined that courts have correctly interpreted the mutual intent requirement in joint authorship cases like *Ulloa*,¹⁷⁹ the question remains: Is the mutual intent requirement more trouble than it’s worth? Should Congress eliminate the intent-related language from the definition of “joint work”?¹⁸⁰ As Part III of this Note will discuss, the requirement of mutual intent “to share the rights of authorship” serves an important role in U.S. copyright law, at least with regard to claims of joint authorship of musical works, and should therefore be retained.

III. THE WAY FORWARD: A PROPOSAL TO MAKE A RESTRICTIVE JOINT AUTHORSHIP TEST EVEN MORE RESTRICTIVE

Any judicial method for determining whether a contributor to a musical composition is a coauthor of a joint work under federal copyright law must serve the law’s constitutional purpose: “Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors’ labors.”¹⁸¹ With that purpose and the lessons of *Fisher v. Brooker*¹⁸² in mind, this Note makes several proposals regarding the resolution of *ex post facto* claims of joint authorship in musical works.

First, the “joint work” definition’s language regarding intent should be

175. 17 U.S.C. § 101 (2006).

176. *Zemer*, *supra* note 132, at 623 (adding that “intention is present when two or more authors collaborate to produce a work of a single kind in prosecution of a preconcerted joint design”).

177. 17 U.S.C. § 101.

178. *Ulloa v. Universal Music & Video Distribution Corp.*, 303 F. Supp. 2d 409, 418 (S.D.N.Y. 2004).

179. *Id.*

180. 17 U.S.C. § 101.

181. *Eldred v. Ashcroft*, 537 U.S. 186, 247 (2003) (Breyer, J., dissenting) (quoting H.R. REP. NO. 100-609, at 22 (1988)); *see also Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“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.”).

182. *Fisher v. Brooker*, [2006] EWHC (Ch) 3239, [42] (Eng.), *aff’d*, [2009] UKHL 41, [80]–[81] (appeal taken from Eng.).

retained, and all federal courts hearing cases involving claims of joint authorship in musical works should interpret that language in the way the *Ulloa* court did: as a requirement that the putative coauthors “intend to share the rights of authorship rather than merely intend to enter into a relationship that results in the creation of a copyrightable work.”¹⁸³ This stricter interpretation, known as the relationship test,¹⁸⁴ serves copyright’s purpose of culturally enriching the public by rewarding only those creators who, in addition to reaping the benefits of authorship, also assume the risks associated with publishing a work.¹⁸⁵

Consider some of the collaborations discussed in this Note: Sting wrote the song to which Andy Summers later added a guitar part;¹⁸⁶ Gary Brooker and Keith Reid wrote the song to which Matthew Fisher later added an organ part after Fisher was invited by Brooker and Reid to join their group;¹⁸⁷ Jay-Z wrote the song to which Demme Ulloa later added a vocal part while visiting as a guest at the studio Jay-Z had booked for the purpose of recording his song.¹⁸⁸ In each of these cases, one party made the decision and took the initiative to produce and publish a copyrightable work, then initiated a relationship with another party that allowed the other party to contribute to that copyrightable work.¹⁸⁹ It is the former party in each case that is more deserving of copyright’s protection because that is the party without whose efforts the public could not have benefited from the work in question.

The rewards of joint authorship should be reserved for situations in which two or more parties have decided together, prior to completing a copyrightable work, that they are coauthors of the work and as such will share in the risks and costs, not just the benefits, of creating that work and making it available to the public. The goal of copyright law is to protect originators,¹⁹⁰ not those wishing to claim the rewards of a work after it has succeeded commercially. Those who take the initiative to create a copyrightable work, even where creation of that work involves contributions by other parties, should be entitled to a presumption of sole authorship in the work.

183. 17 U.S.C. § 101; *Ulloa*, 303 F. Supp. 2d at 418.

184. *LaFrance*, *supra* note 35, at 225.

185. *See supra* note 181 and accompanying text. For a sense of just one aspect of the risk and sacrifice involved in composing and performing original music, as opposed to music composed by others, see David Browne, *Who Earns What*, *SPIN*, Apr. 2008, at 66 (contrasting the annual income of a musician in an original independent rock band (\$45,000) with that of a singer in a Led Zeppelin tribute band (\$150,000)).

186. *See supra* notes 20–28 and accompanying text.

187. *See supra* notes 97–100 and accompanying text.

188. *See supra* notes 63–72 and accompanying text.

189. *See supra* notes 21–28, 63–72, 97–100, and accompanying text.

190. *See Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (“The [Supreme] Court said that an ‘author,’ in the sense that the Founding Fathers used the term in the Constitution, was ‘he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.’” (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884))).

In addition to serving copyright's purpose of cultural enrichment,¹⁹¹ the relationship test offers predictability regarding the legal consequences of musical collaboration. If the relationship test were universally adopted, musicians would know that any contribution they made to another artist's copyrightable work would not entitle them to joint authorship unless the parties made an explicit agreement to that effect prior to collaborating. Similarly, sole authors would be free to accept inspiration, suggestions, and minor contributions from other parties without worrying about later claims of joint authorship. Predictability is sorely needed in the realm of musical collaboration, where artists frequently visit each other during recording sessions and play and sing together with no thought of compensation or legal consequences.¹⁹²

Second, all federal circuits should unequivocally reject the Nimmer test in favor of the Goldstein test.¹⁹³ As discussed earlier, there is little practical difference between the two tests, given that the Supreme Court has said that only "a modicum of creativity" is required for copyrightability.¹⁹⁴ However, universal adoption of the Goldstein test's requirement of an independently copyrightable contribution by each putative joint author would promote predictability by making it clear to claimants that to be considered an author of a work, one must create, not merely contribute.

Finally, because the aforementioned tests for mutual intent and copyrightability can be difficult to apply where the evidence is scant, courts should follow the Ninth Circuit's reasoning in *Aalmuhammed v. Lee* and consider an additional factor as part of the joint authorship analysis: creative control.¹⁹⁵ In *Aalmuhammed*, the court denied the plaintiff's claim for coauthorship of the Spike Lee film *Malcolm X* because even though the plaintiff had "contributed substantially to the film,"¹⁹⁶ he had "offered no evidence that he was the 'inventive or master mind' of the movie" and therefore did not meet the statutory definition of "author" as the "joint work" definition requires.¹⁹⁷ In applying this test as part of its mutual intent analysis, which this Note will call

191. See *supra* note 181 and accompanying text.

192. See, e.g., *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 953–54 (11th Cir. 2009); *Ulloa v. Universal Music & Video Distribution Corp.*, 303 F. Supp. 2d 409, 411 (S.D.N.Y. 2004); see also BERLINER, *supra* note 17, at 503 ("[F]or some, the commitment to jazz has a moral and ideological aspect. Improvisers embark on their personal odysseys with the conviction that they must share their talents with others, thus helping to maintain and ensure the survival of a unique, indispensable musical tradition. In doing so, they hope to make their mark on a world plagued by social conflict and preoccupied with materialistic values. Improvisers view performance as a positive force that can redress this imbalance . . .").

193. See *supra* Part I.C (discussing the Goldstein and Nimmer tests for joint authorship).

194. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

195. 202 F.3d at 1235 ("[A]bsence of control is strong evidence of the absence of co-authorship."); accord *Corwin v. Quinonez*, 858 F. Supp. 2d 903, 913 (N.D. Ohio 2012) (granting summary judgment for defendant where plaintiff claiming joint authorship could not "show that he exercised decision making authority sufficient to demonstrate a mutual intent to be joint authors").

196. *Aalmuhammed*, 202 F.3d at 1232.

197. *Id.* at 1232, 1235.

the “mastermind test,” the court focused on the constitutional and social policy bases of copyright and reasoned that

[p]rogress would be retarded rather than promoted, if an author could not consult with others and adopt their useful suggestions without sacrificing sole ownership of the work. Too open a definition of author would compel authors to insulate themselves and maintain ignorance of the contributions others might make. . . . [T]he arts would be the poorer for that.¹⁹⁸

In so reasoning, the court implicitly acknowledged that the public benefits from a new work regardless of who gets credit for creating the work. Therefore, courts should be concerned not with fairly apportioning ownership of works but rather with rewarding those authors who are most responsible for bringing the new work to the public.

The *Aalmuhammed* court has been criticized for “false[ly] equating . . . creative control with sole authorship.”¹⁹⁹ Ironically, that criticism is somewhat valid in *Aalmuhammed*’s context, filmmaking, “where ultimate creative control typically vests in a party (typically the producer) who contributes little or none of the detailed creative expression.”²⁰⁰ Yet the mastermind test makes perfect sense in the context of musical collaboration, especially the kind examined in this Note, in which a party contributes an interpretation to a work composed by another party, then claims coauthorship based on that interpretation.²⁰¹ Under the mastermind test, unless a contributing musician could present substantial evidence that the original composer expressly agreed to share authorship, the composer would be presumed to be the sole author, because he or she would have had the power to accept or reject the musical interpretation contributed by the other party. This approach, like the relationship test discussed earlier,²⁰² serves copyright’s purpose by reserving the rewards of authorship status for those who not only create copyrightable material but also take the initiative to make new works available to the public.²⁰³

CONCLUSION

Although it might have seemed unfair to deny songwriting credit to the player of one of the most memorable musical passages of the 1960s, an American court almost certainly would have denied Matthew Fisher’s claim of joint authorship in “A Whiter Shade of Pale,” and it would have been right to do so. As this Note has discussed, the ultimate goal of copyright law is not to fairly compensate creators of copyrightable material; it is to provide authors with an

198. *Id.* at 1235.

199. LaFrance, *supra* note 35, at 254 (discussing “[t]he absurdity of this approach”).

200. *Id.* at 254.

201. See PAUL O.W. TANNER ET AL., JAZZ 4–6 (8th ed. 1997) (discussing jazz interpretation as distinguished from jazz composition).

202. See *supra* notes 182–84 and accompanying text.

203. See *supra* notes 182–85 and accompanying text.

incentive to create works that will benefit the public.²⁰⁴ In the context of musical collaboration, that goal can best be achieved by requiring putative joint authors to show (1) an independently copyrightable contribution by each party claiming to be an author, and (2) mutual intent to share authorship, which would have to be shown by evidence of either an express agreement to that effect or shared creative control, such that each author could be considered one of the work's masterminds.

Musicians who collaborate and who wish to be considered authors of the fruits of their collaborations should make formal agreements to that effect prior to collaborating. Otherwise, they must accept the possibility of being denied a share of authorship, however valuable their contributions might be to the finished work. As the old saying goes, "you don't get what you deserve, you get what you negotiate."²⁰⁵

204. See *supra* note 181 and accompanying text.

205. CHESTER L. KARRASS, "IN BUSINESS AS IN LIFE—YOU DON'T GET WHAT YOU DESERVE, YOU GET WHAT YOU NEGOTIATE" (1996).