

# GAIMAN V. MCFARLANE: THE RIGHT STEP IN DETERMINING JOINT AUTHORSHIP FOR COPYRIGHTED MATERIAL

By Teresa Huang

Currently no universal guidelines exist for determining whether or not a person's contribution to a copyrighted work constitutes joint authorship. While the Copyright Act of 1976 ("the Act") does not define joint authorship, it does define a joint work. As a result, courts traditionally have been stingy with grants of joint authorship status and have rewarded contributors of copyrightable material only if all parties intended to be joint authors. Thus, it came as a surprise when Judge Posner bucked the tradition in the latest joint authorship dispute.

In *Gaiman v. McFarlane*, the Seventh Circuit held that where two or more people intend to create an indivisible copyrightable work and succeed in doing so, each contributor is a joint author.<sup>1</sup> More importantly, and contrary to precedent, the contributor can be a joint author even if the portion he provided would not be independently copyrightable.<sup>2</sup> Judge Posner reasoned that if more than one person labored to create a single, copyrightable work, then it would be "paradoxical" if no one was able to claim copyright because the individual contributions were not themselves copyrightable.<sup>3</sup> In reaching this decision, Judge Posner did not explicitly overturn prior decisions holding that the individual contributions must be independently copyrightable. Instead, he distinguished the facts of *Gaiman* from prior cases and stated that the lower standard for joint authorship only applies to "mixed media" works.<sup>4</sup>

However, Judge Posner did not define "mixed media." For example, many, if not all, comic books and characters—the subject of the *Gaiman* dispute—are the products of a concerted effort and qualify as "mixed media" works. Movies also fall under Judge Posner's idea of "mixed media" works.<sup>5</sup>

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1. 360 F.3d 644, 658-59 (7th Cir. 2004), *reh'g en banc denied*, 2004 U.S. App. LEXIS 6387 (7th Cir. Mar. 31, 2004).

2. *Id.* at 659.

3. *Id.* at 658-59.

4. *Id.*

5. *Id.* at 658.

The issue of copyright ownership in a comic book character becomes more important as the stakes get higher. Based on the success of other comic book heroes in the movie theaters, such as Batman and Spiderman, owning the copyright in a popular comic book character can generate a great deal of profits from licensing and royalty fees.<sup>6</sup> However, Judge Posner's decision in *Gaiman* is not limited to graphic novels and cartoon characters. The decision applies to all joint efforts in movies, sound recordings, and computer programs—all of which can be considered “mixed media.”

At first glance, *Gaiman* might spark a flood of litigation from everyone who has ever contributed ideas to a profitable project in any of the above mentioned industries.<sup>7</sup> Furthermore, the suggestion that an idea can be copyrightable is anathema to copyright doctrine itself.<sup>8</sup> However, a careful reading of Judge Posner's analysis reveals that the ruling is not as heretical as it seems. The Seventh Circuit adopted a joint authorship test which requires both an intention to create a unitary work and a more than “de minimis” contribution.<sup>9</sup> In most situations, people will have a very difficult time proving the intent existed (let alone the contribution of ideas);<sup>10</sup> therefore, it is highly unlikely that the *Gaiman* decision will in-

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6. See, e.g., RONALD V. BETTIG, *COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY* 41 (1996) (stating that Time Warner acquired the copyright in Batman, produced Batman comic books (new editions), movies, soundtracks, music videos, and novels, and licensed a variety of Batman products such as cereal and bedding); Duane Dudek, *Movie List Reads Like an Out-of-Date TV Guide*, MILWAUKEE J. SENTINEL, Aug. 17, 1997, at 10 (noting that the first Batman movie grossed over \$250 million, and that the sequels each grossed over \$100 million); Steve Gormon, *Hands Off: Marvel Wants Its Hero Back*, DAILY TEL., Apr. 26, 2003, at 37 (stating that the first *Spiderman* movie based on the Marvel Comics character grossed over \$1.3 billion worldwide and that Marvel's shares have rallied “as investors assess the licensing potential of its 4700 comic book characters”).

7. Ideas are the foremost examples of what cannot be copyrighted and hence are the focus of this Note. 17 U.S.C. § 102(b) (2000) (denying copyright protection, among other things, to facts, titles, or ideas); see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-45 (1991) (holding that facts are not copyrightable). Ideas can mean an abstract idea for the overall project or specific, concrete suggestions for improving a project. This Note refers to the latter whenever “idea” is used.

8. Copyright protection will not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery.” 17 U.S.C. § 102(b).

9. *Gaiman*, 360 F.3d at 659 (adopting Nimmer's example); see also 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 6.07 (2004).

10. See, e.g., *Thomson v. Larson*, 147 F.3d 195, 206-07 (2d Cir. 1998) (affirming the district court's finding that plaintiff was not a co-author because, even though plaintiff had contributed copyrightable material, Larson did not accept Thomson as his co-author).

crease litigation on the issue. Additionally, what is ultimately copyrighted is the expression of the merged ideas of all the contributors in a fixed, tangible medium.

Part I of this Note provides the possible interpretations of the Act with regard to joint authorship and describes the approaches embodied in two major copyright treatises. These two approaches include the Nimmer approach, which states that joint authorship exists when two or more parties make more than a minimal contribution to a unitary work, and the Goldstein approach, which states that joint authorship exists when each party intends to jointly own the copyright in the final work and makes a contribution that is independently copyrightable (as distinct from the copyrightability of the end product). Part II summarizes *Gaiman*. Part III analyzes Judge Posner's opinion and examines the implications of his decision. Finally, Part IV concludes that the Nimmer approach, applied in *Gaiman*, is preferable because it is the better statutory interpretation, is fairer to the parties, grants broader protection, and promotes creativity.

## I. BACKGROUND

The Act does not provide guidance on how to identify joint owners in a copyright other than a brief definition of a "joint work."<sup>11</sup> Nonetheless, it is understood that a joint author is a co-owner of an undivided interest in the copyright.<sup>12</sup> Status as a joint author is coveted because a joint owner in the copyright can license the work without the consent of the other owners.<sup>13</sup> However, a joint owner who exploits the work for profit must make an accounting to the other joint owners.<sup>14</sup> Furthermore, all such licenses are nonexclusive unless granted by all the joint owners.<sup>15</sup> Protection for a joint work lasts for the life of the last surviving author plus seventy years.<sup>16</sup> The importance of authorship in a copyright makes it critical to

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11. 17 U.S.C. § 101.

12. *Id.* § 201(a).

13. *See* 1 NIMMER & NIMMER, *supra* note 9, § 6.10, at 6-30 (stating that since one cannot infringe his own copyright, a joint owner cannot be held liable for copyright infringement to the other joint owners).

14. *See, e.g.,* *Seshadri v. Kasraian*, 130 F.3d 798, 801 (7th Cir. 1997); 1 NIMMER & NIMMER, *supra* note 9, § 6.10.

15. *United States Copyright Office and Sound Recordings as Work Made for Hire: Hearing on the Issue of Sound Recordings as Works Made for Hire Before the House Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 106th Cong. 37 (2000) (statement of Marybeth Peters, Register of Copyright).

16. 17 U.S.C. § 302(b). While the section only addressed works created on or before January 1, 1978 (the effective date of the Act), § 303 grants protection for the terms in § 302, with some caveats. *Id.* § 303.

interpret the Act, with the aid of the legislative history, so that parties are correctly identified as joint authors and can enjoy the fruits of their labor, and that free-riders are not incorrectly identified as joint authors.

### A. Statutory Interpretations

The 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>17</sup> Components of a unitary work are "inseparable" when they have little or no meaning standing alone (for example, the paragraphs in a novel), and the parts are "interdependent" when they could stand alone but achieve a greater effect when combined (for example, the lyrics and melody of a song).<sup>18</sup> As for the rest of the definition, the committee reports state:

[A] work is "joint" if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as "inseparable or interdependent parts of a unitary whole." The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit . . . .<sup>19</sup>

The first clause focuses on the act of collaboration. The verb "collaborate" principally means "to work together."<sup>20</sup> The second clause looks at the parties' intent. All parties must have the same intentions at the time the work is created to satisfy the intent requirement. The treatises and the courts focus on the second criteria because of the "touchstone" sentence.<sup>21</sup> Judges have found it difficult to imagine collaborative efforts without the intent to create a unitary work and have collapsed the two clauses into one requirement of intent.<sup>22</sup> However, it is possible to collaborate without the requisite intent: people may brainstorm with one another but agree (explic-

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17. *Id.* § 101. The Act does not define "joint author" in this or any other section. Nimmer argues that the explanation actually defines "joint authorship" and is simply designated incorrectly in the Act. 1 NIMMER & NIMMER, *supra* note 9, § 6.01.

18. H.R. REP. NO. 94-1476, at 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736.

19. S. REP. NO. 94-473, at 103 (1975) (emphasis added).

20. WEBSTER'S NEW WORLD DICTIONARY 118 (3d ed. 1990); *see also* RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 402 (2d ed. 1998) (defining the verb principally as "to work, one with another; cooperate as on a literary work").

21. *See, e.g.,* Childress v. Taylor, 945 F.2d 500, 505-06 (2d Cir. 1991); 1 NIMMER & NIMMER, *supra* note 9, § 6.07.

22. *See, e.g.,* Childress, 945 F.2d at 505.

itly or implicitly) to write separately after the session, or people may collaborate but with different intentions.

Additionally, the relation of the “touchstone” sentence is not obvious, and it may refer to the first clause as well as the second. If the drafters believed the word “collaborated” encompassed both the situation where people worked together in the same physical location and the situation where people worked in separate locations but then combined their inputs later to create a whole work, then the first clause would be redundant and unnecessary. Therefore, the two clauses should be distinguished on the basis of a physical requirement rather than on the sole basis of intent. Congress could have contemplated a definition of “joint work” without a separate intent requirement—the physical act of working together would be sufficient evidence of any intent to create a unitary work. Moreover, the “or” may be disjunctive, too—either prong is sufficient. Thus, the statute embodies a “dual” test: 1) actual collaboration (working physically together) and 2) working separately but with the requisite intent.

Courts have not interpreted the statute to have a physical collaboration test, and they have focused instead on the intent.<sup>23</sup> Two of the major treatises also focus on the intent requirement. The Nimmer treatise requires only an intention to form a unitary work. The Goldstein treatise requires the intention to be co-owners in the copyright and independently copyrightable contributions. The Goldstein approach is currently the dominant rule of joint authorship.

## B. The Nimmer Approach

The Nimmer treatise, widely viewed as the leading treatise in the field, proposes that what a person needs to achieve joint author status is to make more than a “de minimis” contribution to the resulting copyrighted work.<sup>24</sup> In other words, “more than a word or line must be added by one who claims to be a joint author.”<sup>25</sup> The contribution must be “one of authorship” (creativity) and not merely one of financing.<sup>26</sup> In order to satisfy the intent requirement in the definition of a “joint work,” all collaborators must work in furtherance of a common goal.<sup>27</sup>

Thus, under the Nimmer approach, a collaborator who contributes only the ideas for a work (that another executes or fixes in a tangible medium) is a co-owner in the copyright so long as the contributions are more than

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23. *See id.*

24. 1 NIMMER & NIMMER, *supra* note 9, § 6.07.

25. *Id.*

26. *Id.*

27. *Id.*

minimal, but a person working alone receives no copyright for pure ideas.<sup>28</sup> In justifying the approach, the Nimmer treatise notes that “copyright’s goal of fostering creativity is best served . . . by rewarding all parties who labor together to unite idea with form, and that copyright protection should extend both to the contributor of skeletal ideas and the contributor who fleshes out the project.”<sup>29</sup> The Nimmer approach has not been widely received and has been “soundly rejected in the architectural context” and in many other cases.<sup>30</sup>

### C. The Goldstein Approach

Professor Goldstein states, “For a joint work to exist, each author must have intended to create a joint work at the time he made his contribution.”<sup>31</sup> He further explains, “A collaborative contribution will not produce a joint work, and a contributor will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright.”<sup>32</sup> Taken together, those two statements suggest that each author must intend to be a co-owner in the copyright and contribute separately copyrightable materials to qualify as a joint author. Goldstein justifies the second requirement by noting that the Act’s use of the word “authors” suggests that each person’s contribution must be copyrightable “works of authorship” within the meaning of § 102(a).<sup>33</sup> Thus, a person cannot be considered an author unless he has fixed an expression of his ideas in a tangible medium.<sup>34</sup>

### D. Cases Adopting the Goldstein Approach and Rejecting the Nimmer Approach

The Second, Seventh, Ninth, and Eleventh Circuits have adopted Goldstein’s formulation of joint authors.<sup>35</sup> While the Third Circuit has de-

28. *Id.*

29. *Id.*

30. *Id.*

31. PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE § 4.2.1.1 (2d ed. supp. 2004).

32. *Id.* § 4.2.1.2.

33. *Id.*; see also 17 U.S.C. § 101 (2000) (“A ‘joint work’ is a work prepared by two or more authors . . . .”); 17 U.S.C. § 102(a) (granting protection to “original works of authorship fixed in any tangible medium of expression . . . .”); 17 U.S.C. § 302(b) (“In the case of a joint work prepared by two or more authors . . . .”).

34. See also Russ VerSteeg, *Defining “Author” for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1327 (1996).

35. See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235-36 (9th Cir. 2000) (holding that the plaintiff was not a joint author because the defendant lacked the requisite intent); *Thomson v. Larson*, 147 F.3d 195, 206-07 (2d Cir. 1998) (same); *Erickson v.*

clined to decide which approach to adopt, a district court in that circuit opted for Goldstein's approach.<sup>36</sup>

The most well-known of these cases is *Childress v. Taylor*.<sup>37</sup> Taylor wished to make a play about the comedienne Jackie "Moms" Mabley.<sup>38</sup> She researched the details of Mabley's life and then asked Childress to write the script based on the results of her research.<sup>39</sup> Although neither party signed a contract, Childress completed the script and Taylor paid her \$2,500.<sup>40</sup> Childress filed for and received the copyright in her name alone. After efforts to formalize their relations failed, Taylor commissioned another playwright to modify the original play and she produced the new version, for which Childress brought suit alleging copyright infringement.<sup>41</sup> The Second Circuit affirmed the district court's finding that Taylor was not a joint owner because her contribution—ideas and research—was not copyrightable independently, and Childress never intended to share the ownership in the copyright.<sup>42</sup>

The Second Circuit examined both the Nimmer and Goldstein treatises, but it ultimately adopted the Goldstein approach. The court noted the considerable number of cases already in line with Goldstein's views.<sup>43</sup> The court also reasoned that the Goldstein approach would prevent people from making "spurious claims" and sharing in the "fruits of the efforts" of a sole author.<sup>44</sup> More importantly, the court viewed the test as the right balance between copyright and contract law.<sup>45</sup> Those who contribute copyrightable material will be protected through copyright law, and those who

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Trinity Theatre, Inc., 13 F.3d 1061, 1071-72 (7th Cir. 1994) (holding that suggestions, ideas, and refinements standing alone are not separately copyrightable and finding that the actors were therefore not joint authors); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1493 (11th Cir. 1990) (holding that the house builder was not entitled to copyright protection for his suggestions to the floor plan).

36. *Andrien v. S. Ocean County Chamber of Commerce*, 927 F.2d 132, 136 (3d Cir. 1991) (declining to decide "whether each author of a joint work must make an independently copyrightable contribution"); *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 540 (D.N.J. 1999) (ruling that plaintiff could not "claim joint authorship in the sound recordings merely because he contributed the idea for the work in the form of suggestions and desires").

37. 945 F.2d 500 (2d Cir. 1991).

38. *Id.* at 502.

39. *Id.* at 503.

40. *Id.*

41. *Id.* at 503-04.

42. *Id.* at 509.

43. *Id.* at 506.

44. *Id.* at 507.

45. *Id.*

contribute non-copyrightable material can protect their rights through contracts.<sup>46</sup>

As for what kind of intent is required on the part of the contributors, the court reasoned that the statutory requirement cast too broad a net and would capture people whom Congress did not intend to be classified as joint authors.<sup>47</sup> For example, the court stated that an editor or research assistant would be a joint author under the statutory definition of intent, but all parties would ordinarily not expect to share the copyright in the resulting work with the primary writer.<sup>48</sup> Again, the Second Circuit emphasized the balance between copyright and contract law. The court suggested that a default rule identifying all collaborators as joint authors would burden the dominant author, but the narrower rule that the court adopted would allow those parties "not in a true joint authorship" to bargain (contract) for rights.<sup>49</sup> The court's primary concern was to prevent situations where someone making a passing remark could reap the benefits of another's hard and creative labor.<sup>50</sup>

Following *Childress*, the Goldstein approach became the majority rule.<sup>51</sup> The Second Circuit did not depart from its approach in *Thomson v. Larson*. In *Thomson*, the New York Theater Workshop ("NYTW") hired Thomson to help Larson, the original playwright, in "clarifying the storyline" of the musical "Rent."<sup>52</sup> NYTW signed an agreement with Thomson and paid her for her services, but the contract failed to mention copyright interests.<sup>53</sup> After Larson's death, Thomson fine-tuned the script with others, but she brought suit when Larson's heirs refused to grant her royalties for the services provided and in recognition of her authorship status.<sup>54</sup> The court concluded that Thomson was not a joint author.<sup>55</sup> Some of the objective factors that the court examined included Larson's contract with NYTW (it listed him as the sole author and gave him rights over all

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 508-09.

50. *Id.* at 507.

51. *See supra* notes 35-36 and accompanying text; *see also* Balkin v. Wilson, 863 F. Supp. 523, 528 (W.D. Mich. 1994) (finding defendant did not make copyrightable contributions).

52. *Thomson v. Larson*, 147 F.3d 195, 197 (2d Cir. 1998)

53. *Id.*

54. *Id.* at 198.

55. *Id.* at 206-07.

changes), how he held himself out to third parties, and how he listed Thomson in the playbill.<sup>56</sup>

Moreover, the Seventh Circuit adopted the Goldstein approach in *Erickson v. Trinity Theatre, Inc.*, after a lengthy examination of both tests.<sup>57</sup> In *Erickson*, Erickson co-founded Trinity Theatre and wrote the scripts for three plays.<sup>58</sup> Other actors made suggestions and contributed ideas, but Erickson made the final editing decisions.<sup>59</sup> Furthermore, plaintiff licensed her plays to the defendant, who paid her royalties until the license expired.<sup>60</sup> After plaintiff left Trinity Theatre, she requested that defendant discontinue performances of her plays, and she sued when defendant did not comply.<sup>61</sup> The court applied the Goldstein rule and found that the actors' suggestions were not copyrightable on their own, and therefore ruled the actors were not joint authors.<sup>62</sup>

In a surprising turn of events ten years later, the Seventh Circuit adopted the Nimmer approach in *Gaiman*.<sup>63</sup> It remains to be seen whether Nimmer's approach will gain in popularity.

## II. CASE REPORT

### A. Facts and Procedural History

Appellee Neil Gaiman ("Gaiman") and Appellant Todd McFarlane ("McFarlane") are famous in the world of graphic novels.<sup>64</sup> Gaiman writes scripts for graphic novels but does not draw.<sup>65</sup> McFarlane writes and illustrates his stories.<sup>66</sup> Both have their own publishing companies (also in-

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56. *Id.* at 198, 202-05.

57. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1067-74 (7th Cir. 1994).

58. *Id.* at 1063.

59. *Id.* at 1064.

60. *Id.*

61. *Id.* at 1064-65.

62. *Id.* at 1072.

63. *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004), *reh'g en banc denied*, 2004 U.S. App. LEXIS 6387 (7th Cir. Mar. 31, 2004).

64. *Id.* at 649. Gaiman wrote the award-winning *Sandman* series. Neil Gaiman, *About Neil: Biography*, at <http://www.neilgaiman.com/about/bio.asp> (last visited Feb. 9, 2005) [hereinafter Gaiman, *About Neil*]. McFarlane has worked on numerous comic book characters, including The Incredible Hulk, Spider-man, Batman, and Spawn. Todd McFarlane, WIKIPEDIA: THE FREE ENCYCLOPEDIA, at [http://en.wikipedia.org/wiki/Todd\\_McFarlane](http://en.wikipedia.org/wiki/Todd_McFarlane) (last modified Jan. 14, 2005).

65. *Gaiman*, 360 F.3d at 649.

66. *Id.* Gaiman also writes traditional novels. Gaiman, *About Neil*, *supra* note 64.

volved in the suit), but Gaiman also produces materials for Marvel Comics and DC Comics on a "work made for hire" basis.<sup>67</sup>

McFarlane wrote and illustrated the comic book *Spawn*, which featured an anguished, undead superhero trapped in a pact with a demon.<sup>68</sup> After readers criticized the poor writing in the first few issues of *Spawn*, McFarlane entered into an oral agreement with Gaiman where Gaiman would furnish the script for one issue (volume 9) of *Spawn*.<sup>69</sup> The agreement did not mention copyright ownership and compensation, save that McFarlane would treat Gaiman "better than the big guys" did.<sup>70</sup> In *Spawn* No. 9, Gaiman introduced three new characters: Medieval Spawn, Angela, and Count Nicholas Cogliostro.<sup>71</sup> Gaiman named the latter two, and described and wrote dialogue for all three characters.<sup>72</sup> Based on the huge success of the issue, McFarlane paid Gaiman \$100,000 (about what Marvel Comics and DC Comics would have paid him for his work according to Gaiman).<sup>73</sup> McFarlane then asked Gaiman to write a mini-series based on the now popular Angela character.<sup>74</sup> McFarlane subsequently created a toy company to produce action figures of *Spawn* characters, including Medieval Spawn; paid Gaiman royalties for his work on the *Angela* series and *Spawn* No. 26, which served as a transition between the main plot and the *Angela* series; and licensed the series for paperback reprints.<sup>75</sup>

In 1996, Gaiman heard McFarlane might sell his enterprise, so he asked for a written contract.<sup>76</sup> Negotiations ultimately fell through, and in 1999, McFarlane sent Gaiman a final offer where McFarlane unambiguously denied that Gaiman ever had a copyright interest in Medieval Spawn and Count Cogliostro, though he did not contest the co-ownership of the copyright in *Angela*.<sup>77</sup> As a result, Gaiman brought suit for declaratory judgment under the Act for acknowledgment as a joint copyright owner in the two disputed characters, damages for breach of his right of publicity,

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67. *Gaiman*, 360 F.3d at 649.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 650.

72. *Id.*

73. *Id.* at 651.

74. *Id.*

75. *Id.* at 651-52. The record did not clearly state for what, exactly, McFarlane paid Gaiman.

76. *Id.* at 651.

77. *Id.* at 652.

and an accounting of McFarlane's profits.<sup>78</sup> The jury found for Gaiman, and the district court entered judgment in his favor and awarded him all the relief he sought.<sup>79</sup> McFarlane appealed to the Seventh Circuit.

## B. Posner's Decision and Reasoning: Joint Authorship

Writing for the Seventh Circuit, Judge Posner limited the appeal to the injunction requiring McFarlane to acknowledge Gaiman as a joint author.<sup>80</sup> The court held that in cases of works involving two or more inputs, each contributor does not need to make a contribution that would be copyrightable if it stood alone.<sup>81</sup> The court acknowledged that the general case was to require an intention to be joint owners of the copyright and provide separately copyrightable contributions.<sup>82</sup>

Judge Posner considered a hypothetical situation where one professor had extremely good writing skills but mundane ideas, while another professor had great ideas but poor writing skills.<sup>83</sup> The two professors combined their abilities and produced an academic article.<sup>84</sup> Referring to *Nimmer on Copyrights* § 6.07, Judge Posner concluded that where both professors collaborate to produce an article and sign as coauthors, the intent to produce a joint work and be joint owners of the work is plain, thus rendering both professors as joint authors under 17 U.S.C. § 201(a).<sup>85</sup> Although one contributed the ideas and the other contributed the wording, both professors together have created an expressive work qualifying for copyright protection. Judge Posner did address the Goldstein approach, approved of in *Erickson*, but he distinguished *Gaiman* on the basis of the

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78. *Id.* at 648.

79. *Id.*

80. *Id.* The accounting was not complete at the time, and so the lower court's judgment was not final. Therefore, the Seventh Circuit limited its review to the injunction. *Id.*

81. *Id.* at 658-61.

82. *Id.* at 658. Most of the opinion examined the three year statute of limitations defense under the Act. Judge Posner went through a detailed analysis (involving the notices and the equitable estoppel doctrine) only to conclude that the jury's determinations were not unreasonable. *Id.* at 652-57. McFarlane's alternate theory was that the disputed characters were not copyrightable under the scenes à faire doctrine, the idea-expression dichotomy, and the derivative works doctrine. *Id.* at 657-62. However, the court duly noted that McFarlane still claimed that he owned the copyrights in those characters (based on his later contributions). *Id.* at 657. After measuring McFarlane's claims against the copyright doctrines, the court rejected his claims. *Id.* at 662. It is beyond the scope of this Note to address these issues, so they will not be mentioned further.

83. *Id.* at 659.

84. *Id.*

85. *Id.* (citing 1 NIMMER & NIMMER, *supra* note 9, § 6.07).

media used: *Erickson* involved a play (single, written medium), whereas *Gaiman* involved a comic book (written medium and a visual medium).<sup>86</sup>

Judge Posner then noted that comic books are generally the joint works of four contributors: the writer, penciler, inker, and colorist.<sup>87</sup> In a hypothetical situation where each contributor creates a stock character (lacking the distinctiveness necessary for copyright protection), it is feasible to create a finished product that is copyrightable.<sup>88</sup> Judge Posner implied that in that situation, the fairest decision is to split the ownership among all the authors where the individual contributions cannot be identified or where the intent to create one unified work exists.<sup>89</sup>

In the case at hand, only two artists were involved; however, the analytical construct remained the same: multiple artists created the work and at least one contributor unable to copyright his portion independently. Judge Posner viewed Gaiman's and McFarlane's contributions as equal.<sup>90</sup> Therefore, Judge Posner ruled that they were co-owners in the copyrights in the disputed characters by virtue of their combined efforts in creating the characters.<sup>91</sup> Accordingly, the Seventh Circuit unanimously affirmed the lower court's grant of declaratory judgment in favor of Gaiman.<sup>92</sup>

### III. DISCUSSION

This Part analyzes the doctrinal approaches to joint authorship, *Gaiman*'s analytical framework, and the potential impact of the decision on highly collaborative works. Section A compares the two treatises with the statutory definition of "joint work" and the legislative history. Section B notes that Judge Posner correctly applied the Nimmer approach but delves into the possible reasons for adopting an approach contrary to the majority rule. Finally, Section C discusses the implications of the decision on future collaborative works and describes the problems that Judge Posner's holding may have.

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86. *Id.* at 658-59.

87. *Id.* at 659. Like magazines, comic books are thinly bound and are published weekly or monthly. Graphic novels, often used interchangeably with comic books, are collections of several comic book issues and may be published as a hardback or paperback book. Graphic novels can also be stand-alone issues. See *Comic Book*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, at [http://en.wikipedia.org/wiki/Comic\\_book](http://en.wikipedia.org/wiki/Comic_book) (last modified Jan. 22, 2005).

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

89. *Id.*

90. *Id.* at 661.

91. *Id.*

92. *Id.* at 662.

## A. The Treatises, Their Statutory Interpretations of the Act, and Their Problems

### 1. *The Nimmer Approach*

The Nimmer approach follows the language in the definition of “joint work” very carefully. The standard requires potential joint authors to intend to create one copyrightable product, without the qualification that the contributions be separately copyrightable.<sup>93</sup> Consequently, if one favors a literal interpretation of 17 U.S.C. § 101, then the Nimmer approach is very appealing.

The Nimmer approach has other advantages. Because of the Nimmer approach’s lower threshold—it only requires an intention to create a unitary work and some contribution above a minimum level—it rewards more people for their contributions and provides an incentive to collaborate. The approach also prevents parties from taking advantage of others.<sup>94</sup> Therefore, this approach also promotes creativity and reaches a fairer result.

However, critics of the approach have pointed out several objections. At first glance, the Nimmer approach seems to grant copyright protection to ideas, which the Act strictly forbids.<sup>95</sup> In another publication, Judge Posner also pointed out the high administrative costs with enforcing rights in ideas.<sup>96</sup> Upon reconsideration, copyright protection is given to the final product, which is an expression of many ideas in a fixed, tangible medium. It might seem unfair that the person who actually expresses the idea must share his reward with the person or people who contributed only ideas, but the project would not exist but for the impetus provided by the idea generators.

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93. 1 NIMMER & NIMMER, *supra* note 9, § 6.07. Contrast that intent with Goldstein’s intent to be joint authors (share copyright ownership) from the start, as explained in Part I.C.

94. For example, A convinces B to help him create a work. They sign a contract, but the contract fails to mention copyright ownership. B makes a significant contribution and helps refine the work for publication. A never pays B for his services and never intends to share the copyright in the work with B. Under the traditional test, B is not a joint owner because A lacked the intent to be a joint owner. See *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998), for a similar fact pattern. Under the Nimmer approach, B is a joint author and is entitled to royalties from the profits that the work generates.

95. 17 U.S.C. § 102(a) (2000) (denying copyright protection to “any idea, . . . concept, [or] principle, . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work”).

96. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 93 (2003) (explaining that courts would have to “define each idea, set its boundaries, determine its overlap with other ideas, and, most difficult of all, identify the original idea in the works of the alleged infringer”).

In addition, the Nimmer approach is not a bright-line rule and therefore is harder to apply. It also does not provide guidelines as to how a court finds the requisite intent in the absence of a contract. Moreover, the approach makes it difficult to value the significance of a person's contribution. The standard requires more than a word or line or suggestion, but it remains silent as to where the threshold contribution lies. What one person views as a minimal contribution may be what another person views as a significant contribution. For example, consider the situation where a person suggests moving a sculpture two inches to the left. On one hand, the move may affect the entire aesthetic feel to the sculpture, and the suggestion is very substantial. On the other hand, one could argue that the move may have merely practical reasons (such as leaving a window unobstructed or avoiding a power line), and therefore the suggestion is less than a minimal contribution to the work.

However, the Nimmer approach is not unreasonable. Courts are used to resolving disputes in the absence of bright-line rules. For example, in the context of a copyright infringement case, fact finders must determine on a case-by-case basis whether a substantial similarity exists between a plaintiff's copyrighted work and the defendant's work.<sup>97</sup> In copyright fair use analysis, judges also lack a bright-line rule and must consider four factors.<sup>98</sup> Judges can also make an analogy to patent law, which codifies a rule for joint inventors that is similar to the Nimmer approach for joint authors.<sup>99</sup>

Critics also contend that an intent to create a unitary work might also be simply too low a threshold. For example, suppose a writer and an editor intend to produce a solitary literary creation. Under the Nimmer approach, an editor could be a joint author along with the writer. On one hand, it

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97. See, e.g., *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977) (stating that while the determination of substantial similarity in ideas may be simple, the determination of substantial similarity between the forms of expression "is necessarily more subtle and complex").

98. 17 U.S.C. § 107; see, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (stating that the fair use factors are to be "weighed together, in the light of the purposes of copyright").

99. With patents, two or more people may be joint inventors "even though (1) they did not physically work together or at the same time, (2) each did not make the same type or amount of contribution, or (3) each did not make a contribution to the subject matter of every claim of the patent." 35 U.S.C. § 116 (2000). A person qualifies as a joint inventor if he contributes "in some significant manner to the conception or reduction to practice of the invention," or he makes a contribution "that is not insignificant in quality," or he does more than "merely explain" existing concepts and current state of the art. *Pannu v. Iolab Corp.*, 155 F.3d 1344, 1351 (Fed. Cir. 1998).

seems unfair to grant copyright ownership to the editor when the writer's act created the work. On the other hand, it seems just as unfair to reward only the writer when the editor has rewritten portions of the text and made other substantial edits to the work. The Nimmer approach would not grant joint authorship to editors who changed a word here or there, but it would reward editors who made more than a minimal contribution; thus, it satisfies an instinctive sense of justice. In any event, this point may be moot since most writers and editors have a contract with each other or through the publisher.<sup>100</sup>

The software industry is another example of where a finding of joint authorship might be problematic. A single program often involves the work of many developers, and clients will often draw specifications and make suggestions so that the end product meets their expectations.<sup>101</sup> If the independent contractors hired to create the software are not covered by the work-made-for-hire doctrine, barriers to the commercial exploitation of the program arise.<sup>102</sup> Under the Nimmer approach, both the client and the developers are joint owners in the copyright.

Problems also arise in the open source licensing context. Computer programs are written in source code (which is what a human can read) and compiled into object code (which is the language of ones and zeroes that a computer can read).<sup>103</sup> Source code contains the innovations in computer engineering which comprise a company's proprietary secrets, so most companies distribute programs in object code only.<sup>104</sup> Open code software projects post the source code to the Internet, and other people can modify the program.<sup>105</sup>

The copyright ownership in modifications poses a similar challenge. One could argue that the modifiers are more like editors for a traditional novel (they both fix errors in the writing), and therefore, modifiers should not be entitled to joint authorship. However, one could also argue that a great deal of innovation is involved in eliminating errors or creating new

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100. Laura G. Lape, *A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine*, 61 ALB. L. REV. 43, 53 (1997) (explaining that editors are normally covered under the work-made-for-hire doctrine).

101. Matthew R. Harris, Note, *Copyright, Computer Software, and Work Made for Hire*, 89 MICH. L. REV. 661, 694-95 (1990).

102. *Id.* at 695.

103. Lawrence Lessig, *The Limits in Open Code: Regulatory Standards and the Future of the Net*, 14 BERKELEY TECH. L.J. 759, 764 (1999); see also Joseph Scott Miller, *Allchin's Folly: Exploding Some Myths About Open Source Software*, 20 CARDOZO ARTS & ENT. L.J. 491, 494 (2002).

104. Lessig, *supra* note 103, at 764.

105. *Id.*

uses for the program or making the program interoperable with others, and therefore, the modifiers should be entitled to joint authorship. Some organizations require all contributors (the original programmers and the modifiers) to assign the copyrights, thus dealing with the problem through licenses.<sup>106</sup> However, the University of California at Berkeley—in its Berkeley Software Distribution (BSD) license—only requires that any redistribution of the source (modified or not) retains the copyright notice in the original source code.<sup>107</sup> Under the Nimmer approach, the project founders intend the source code to be used in other projects or modified in other ways and arguably satisfy the intent to create a unitary work.

However, the problems in the software industry are not insurmountable. Like editors and writers, parties involved in the software industry can resolve copyright ownership issues through contracts, as the Free Software Foundation has done.<sup>108</sup> Again, the Nimmer approach does not grant joint authorship to every individual who satisfies the intent requirement. People must make more than a “de minimis” contribution, and the difficulties in proving such a contribution in the software programming context, combined with the high costs of bringing suit, is likely to act as a deterrent to free-riders. In the open source context, people probably will not claim joint authorship if the program is not well known, so the problem hardly exists.

Joint ownership becomes very problematic when many people share in the copyright. Judge Posner explained:

If every owner of a Batman comic book were also a joint owner of the copyright, someone wanting to make and sell copies would have no difficulty persuading one of the millions of joint owners to license him for a pittance to make an unlimited number of copies. . . . If to solve this problem the law required the consent of the joint owners to be obtained, the transaction costs would be utterly prohibitive; someone one wanting to copy the Batman characters for a movie, television series, or clothing collection would have to obtain licenses from millions of copyright holders. The alternative of the copyright holder's retaining title

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106. See, e.g., Free Software Foundation, Frequently Asked Questions About the GNU GPL, at <http://www.gnu.org/licenses/gpl-faq.html#AssignCopyright> (last updated Dec. 16, 2004).

107. FreeBSD, The 4.BSD Copyright, at <http://www.freebsd.org/copyright/license.html> (last modified Aug. 31, 2003).

108. See *supra* note 106 and accompanying text.

to every Batman comic book and leasing (not selling) them to readers is only a little more attractive.<sup>109</sup>

Although Judge Posner paints a grim picture, his example remains a hypothetical. The Nimmer approach does not encompass every person who is connected to the work remotely or otherwise. Even in the context of a motion picture, courts could define minimal contributions such that only a few people qualify as joint authors under the Nimmer approach.

In sum, some difficulties exist in applying the Nimmer approach, which grants copyright protection to the final product and not bare ideas, but those problems are relatively small or can be addressed through contracts. Furthermore, if the contracts are not feasible or fail, the Nimmer approach is reasonable and leads to just results. A careful application will narrow the pool of possible joint authors to parties who have labored for that right. The Nimmer approach is also a better literal interpretation of the Act.

## 2. *The Goldstein Approach*

In contrast, the Goldstein approach does not follow the definition of a “joint work” closely. Goldstein requires all parties to intend to be joint authors (share the copyright) at the time of the work’s creation.<sup>110</sup> The statutory definition lacks such an intent requirement; the Act only requires the parties to intend that their contributions be merged.<sup>111</sup> The stricter intent requirement (to be joint authors instead of to create a unitary work) comes from an interpretation of the legislative history. In adopting the Goldstein treatise, the Second Circuit collapsed the two criteria in the committee reports—an intent to collaborate and an intent to create a unitary work—into one requirement of intent, and thus read the second sentence as modifying the first.<sup>112</sup> However, the reports do not require an intention to be co-owners in the copyright at the time of creation. All that the legislative history requires is an intention “that the parts be absorbed or combined into an integrated unit.”<sup>113</sup>

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109. LANDES & POSNER, *supra* note 96, at 126-27.

110. GOLDSTEIN, *supra* note 31, § 4.2.1.1; *see supra* Part II.C.

111. 17 U.S.C. § 101 (2000).

112. However, it is hard to imagine activity that would constitute meaningful ‘collaboration’ unaccompanied by the requisite intent on the part of both participants that their contributions be merged into a unitary whole, and the case law has read the statutory language literally so that the intent requirement applies to all works of joint authorship.

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

113. H.R. REP. NO. 94-1476, at 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736.

Nevertheless, the Goldstein approach arguably serves the intent of the Act. The Act protects “works of authorship” and federal copyright protection only exists for original expressions fixed in a tangible medium.<sup>114</sup> Therefore, a person cannot be an author unless he has fixed the work in a tangible medium. Consequently, a person cannot be an author, let alone a joint author, unless he has produced a copyrightable work or contributed copyrightable material. The Second Circuit described the nature of the contribution as the “more substantial issue” in the joint authorship context.<sup>115</sup>

There are drawbacks to Goldstein’s approach as well. The requirement of separately copyrightable contributions conflicts with the Act, which contemplates the existence of inseparable contributions.<sup>116</sup> For example, movie producers sit in a room and bounce ideas off of each other. It is inefficient for everyone to write down all the ideas; only one person needs to do so. If everyone makes an equal contribution, Goldstein’s approach would yield a perverse result: copyright protection would be granted to the note taker, who may have been selected arbitrarily. It seems unfair to deny copyright protection to the other producers—when no one could have made a creative work without their ideas and suggestions stimulating the project—just because a court cannot determine who contributed what.

The Second Circuit, in adopting the Goldstein approach, noted that those who are not free-riders and contribute non-copyrightable ideas and labors of some significance can protect themselves through contracts.<sup>117</sup> However, contracts are not the perfect substitute for copyright protection.<sup>118</sup> Parties often do not enter into agreements before collaborating, and that leads to difficulties when conflicts arise later. If parties enter into

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114. 17 U.S.C. § 102(a) (2000).

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

116. In fact, the definition of “joint work” states that creators must intend “that their contributions be merged into *inseparable* or interdependent parts of a unitary whole.” 17 U.S.C. § 101 (emphasis added).

117. *Childress*, 945 F.2d at 507; see also LANDES & POSNER, *supra* note 96, at 43.

118. See, e.g., RICHARD WINCOR, *DEALING WITH COPYRIGHTS* 15 (2000) (“Literature as a commodity is unlike the bales of hay and other tangibles. . . . In some degree it eludes doctrine, frequently it defies contract drafting and always, always it stands unique among property assets as a complex of potentials in new form.”); Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1162, 1168-82 (2000) (arguing that “first order private solutions”—otherwise known as contracts—are ineffective because of the transaction costs and because parties often cannot reach a consensus, predict the outcomes of a cooperative project, or value contributions accurately).

agreements prior to collaborating and the contracts are only oral, as in *Gaiman*, then the oral agreements are difficult to interpret.<sup>119</sup>

Depending on the party's bargaining power, those who contribute significant (albeit sometimes unfixed) materials may not get the protection they should get. Consider the mentoring system of graduate students. The students may run a significant portion of the experiments and write the majority of the draft report. However, rarely will professors acknowledge student contributions.<sup>120</sup> Additionally, developments are difficult to predict and provide for in a contractual provision. Finally, collaborators' interests are adversarial outside of the creation of the joint work, and a contract may not be able to resolve those issues.<sup>121</sup> For example, parties may never be able to resolve the issue of compensation when a person, who contributed 20% of the materials, boosted the success of the resulting work by an undeterminable amount.<sup>122</sup>

Though courts are concerned with the free-rider problem, one commentator has suggested that the intent to be co-authors could allow the dominant party "to lure others into contributing material to a unitary work, all the while withholding the intent to share in its economic and reputational benefits."<sup>123</sup> The subjective intent of the parties is insufficient to meet the requirement.<sup>124</sup> However, objective determination of the parties' intent may yield an unsatisfactory decision.<sup>125</sup> For example, in *Thomson*, the court determined that the original playwright never intended to share the ownership in the copyright and, therefore, ruled that Thomson was not a joint author of "Rent."<sup>126</sup> One commentator notes the difficulty in dis-

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119. See, e.g., *Gaiman v. McFarlane*, 360 F.3d 644, 650 (7th Cir. 2004), *reh'g en banc denied*, 2004 U.S. App. LEXIS 6387 (7th Cir. Mar. 31, 2004).

120. Dreyfuss, *supra* note 118, at 1230 (stating that "there has always been something of a tradition to ignore student input into faculty research").

121. *WINCOR*, *supra* note 118, at 3 (stating that "collaborators are adversaries one to the other").

122. *Id.* at 21 (concluding that the only solution to this hypothetical may be an arbitration clause in the contract).

123. Dreyfuss, *supra* note 118, at 1206.

124. *Id.* at 1206; see also *Childress v. Taylor*, 945 F.2d 500, 507-08 (2d Cir. 1991).

125. It seems somewhat unfair to require an objective intent when the parties often lack it or entertain misconceptions about the other's intent. See, e.g., *Childress*, 945 F.2d at 508-09 (finding that defendant's claim of co-authorship was "properly rejected" though she commissioned the work, contributed research and suggestions, and had the notion that they were co-authors of the play); see also *WINCOR*, *supra* note 118, at 22 (stating that courts will have to impute intent when the parties failed to consider the authorship issues in the first place).

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

covering Larson's intent in advance and hence the inability to avoid being taken advantage of.<sup>127</sup>

Furthermore, when a court finds that a product is not a joint work, questions remain as to who has rights in the output of non-author contributions.<sup>128</sup> Usually movies, sound recordings, and the like are created under the work-made-for-hire doctrine.<sup>129</sup> However, other collaborations, such as serial collaborations (works with consecutive contributions) may not qualify under that doctrine, especially works created over the Internet.<sup>130</sup> Under the traditional test for joint authorship—intent to be joint authors and materials furnished must be separately copyrightable—a court is not likely to find that an Internet serial collaboration is a joint work.<sup>131</sup>

For example, suppose a person posts a poem to a listserv or online bulletin board, a second person adds a melody and posts the modified result to the same bulletin, and then either the poet or the songwriter markets the song and makes a fortune. When the song was created, the poet did not intend to make a song at all, and so the requisite intent is absent since both parties must have intended to be joint authors at that time. But, a classification of the song as a joint work benefits all parties: one joint author gets to use and license the work, and the other shares in the profits generated.<sup>132</sup> If the song is not a joint work, then it is an infringing, unauthorized derivative work or a licensed derivative work (the license being implied from the circumstances).<sup>133</sup> If classified as an infringing derivative work, then the infringer cannot copyright the work (thus, losing the ability to exploit the work), and he cannot use the work without permission and is now liable to the other for damages.<sup>134</sup> If considered a licensed derivative

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127. Dreyfuss, *supra* note 118, at 1206.

128. *Id.* at 1180 (stating that the entire play in *Thomson* “fell into a kind of void” because the court’s decision failed to determine who had rights in Thomson’s contributions).

129. 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, 228 (2001).

130. Lape, *supra* note 100, at 75 (stating that the work-made-for-hire doctrine will have “little impact in the Internet setting, where a recipient could rarely be construed as having been hired by the author of transmitted material”).

131. *Id.* at 76.

132. *Id.* at 80-81.

133. *Id.* at 76.

134. *See, e.g.,* Gracen v. Bradford Exch., Inc., 698 F.2d 300, 303 (7th Cir. 1983) (stating that if plaintiff “had no authority to make derivative works from the movie, she could not copyright the painting and drawings, and she infringed [defendant’s] copyright by displaying them publicly”); Anderson v. Stallone, No. 87-0592 WDK (Gx), 1989 U.S. Dist. LEXIS 11109, at \*29 (C.D. Cal. Apr. 26, 1989) (finding that plaintiff’s movie

work, then the non-marketing party loses out on the profits. With both contributions being equal, the finding of a derivative work seems most unfair. Yet that is the only outcome left under Goldstein's approach.

## B. Analysis of *Gaiman*

Judge Posner's decision is perplexing for several reasons. First, the key part of his decision is that for mixed media works, there is no requirement that the individual contributions be eligible for copyright protection on their own; instead, he emphasized the intent to create an expressive work together as the lynchpin for deciding whether collaborators are joint authors.<sup>135</sup> One cannot distinguish the cases on the media used, and further, the outcomes of those cases would be different under the Nimmer approach. Thus, while Judge Posner stated that his decision does not overturn precedent, he has effectively mandated a new standard for copyright joint authorship cases. Second, Posner's rejection of Goldstein's bright-line rule also conflicts with his past preference for clear evidentiary rules. Finally, Judge Posner also adopted a new approach when he did not necessarily need to. In the end, perhaps he decided to in order to reach an equitable solution.

### 1. "Mixed Media" and Past Precedent

Judge Posner has not defined "mixed media." Rather, he has given examples of comic books and movies.<sup>136</sup> The definition may encompass any work other than a novel, but such a definition is probably too broad. But, perhaps it refers to only works with a visual and a narrative component. However, Judge Posner uses as his primary example an academic article, a work that clearly involves only a single medium.<sup>137</sup> It is impossible to distinguish *Gaiman* from past cases on the basis of an undefined term.

"Mixed media" most likely encompasses movies, computer programs, sound recordings, and other highly collaborative works.<sup>138</sup> Yet, those works have been around for some time now, and judicial treatment of cartoons and comic books is certainly not new.<sup>139</sup> Courts have not treated

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treatment was not entitled to copyright protection because it was an unauthorized derivative work).

135. *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004), *reh'g en banc denied*, 2004 U.S. App. LEXIS 6387 (7th Cir. Mar. 31, 2004).

136. *Id.* at 658.

137. *Id.* at 659.

138. Each item listed has multiple components. For example, computer programs may utilize written media as well as audio and visual media.

139. *See, e.g.*, *D.C. Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24 (2d Cir. 1982) (*Batman*); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (*Mickey*

such “mixed media” any differently than traditional literary works, such as novels, poems, and plays.<sup>140</sup> The underlying analysis remains the same regardless of the medium in dispute: while there are more contributors, only one person or a handful of people *control* the translation from ideas to expression. Courts still require an intention to be joint authors before they will grant co-ownership in the copyright.<sup>141</sup>

Given that mixed media are not really new media, it is puzzling why Judge Posner adopted the Nimmer approach when the Seventh Circuit had already adopted Goldstein’s approach in *Erickson*.<sup>142</sup> Additionally, application of the Nimmer approach to older cases yields different outcomes. The court would have found joint authorship in *Childress* because both parties intended to create a unitary work (a play about Mabley’s life) and the defendant made more than a minimal contribution (Taylor extensively researched Mabley’s life and suggested general scenes and characters).<sup>143</sup> The court would also have found joint authorship in *Thomson* under the Nimmer approach because the parties intended to create a unitary work (“Rent”) and Thomson contributed a substantial amount (she worked “intensively” with Larson and continued fine-tuning after his death).<sup>144</sup>

Most likely, the *Gaiman* court distinguished the case on the basis of “mixed media” to reach an equitable result and tactfully avoid stating that it was ignoring precedent.<sup>145</sup> Therefore, the “mixed media” distinction is not significant, and for all practical effects, Judge Posner has now decreed that the approach in the Seventh Circuit is the Nimmer approach for all copyright joint authorship cases, at least until a party challenges his decision. If the Seventh Circuit, hearing a matter en banc, ever formally ap-

Mouse and others); *Detective Comics, Inc. v. Brun Publ’ns*, 111 F.2d 432 (2d Cir. 1940) (Superman); *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F.2d 276 (2d Cir. 1934) (Betty Boop).

140. See *WINCOR*, *supra* note 118, at 17 (warning that “obsession with technology never must eclipse its magic content”). Compare *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) (play), and *Kaplan v. Vincent*, 937 F. Supp. 307 (S.D.N.Y. 1996) (manuscript), with *Ulloa v. Universal Music & Video Distrib’n Corp.*, 303 F. Supp. 2d 409 (S.D.N.Y. 2004) (sound recording), and *Morill v. Smashing Pumpkins*, 157 F. Supp. 2d 1120 (C.D. Cal. 2001) (videotaped band performance), and *Ashton-Tate Corp. v. Ross*, 728 F. Supp. 597 (N.D. Cal. 1989) (computer spreadsheet program).

141. See *supra* note 140 and accompanying text.

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

143. 945 F.2d at 502.

144. *Thomson v. Larson*, 147 F.3d 195, 197-98 (2d Cir. 1998).

145. As a member of a three-judge panel, Judge Posner lacked the authority to do so. Technically speaking, only en banc decisions may overturn prior precedent in a circuit.

proves the *Gaiman* decision and overturns the *Erickson* decision, the circuits will be split.<sup>146</sup>

## 2. Evidentiary Consequences

In the past, Judge Posner favored rules that minimized administrative costs.<sup>147</sup> In *Gracen v. Bradford Exchange, Inc.*, he held that derivative works must be original (in the legal sense as opposed to the artistic one) or else proof of copyright infringement would be monumental.<sup>148</sup> Plaintiff entered a competition to paint Dorothy as played by Judy Garland in "The Wizard of Oz."<sup>149</sup> When she refused to sign a contract, her employer turned to another artist and gave him the plaintiff's painting to help him do his own.<sup>150</sup> Gracen sued defendants for copyright infringement for selling plates with her painting on them, and defendants counterclaimed for infringement of the copyright in the movie.<sup>151</sup>

Judge Posner affirmed the dismissal of the complaint because plaintiff's copyright registrations were invalid.<sup>152</sup> In reaching this decision, he offered the following hypothetical:

Suppose Artist A produces a reproduction of the Mona Lisa, a painting in the public domain, which differs slightly from the original. B also makes a reproduction of the Mona Lisa. A, who has copyrighted his derivative work, sues B for infringement. B's defense is that he was copying the original, not A's reproduction. But if the difference between the original and A's reproduction is slight, the difference between A's and B's reproductions will also be slight, so that if B had access to A's reproductions the trier of fact will be hard-pressed to decide whether B was copying A or copying the Mona Lisa itself.<sup>153</sup>

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146. See *supra* notes 35-36 and accompanying text.

147. Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 706 (2003) (stating that "the most famous and complete articulation of the evidence theory" was in Judge Posner's *Gracen* opinion). The evidence theory suggests that evidentiary issues would be "too complex if courts were to allow copyright in miniscule variations." *Id.* The logical conclusion is that courts should adopt rules that simplify evidentiary issues to conserve judicial resources.

148. *Gracen v. Bradford Exch., Inc.*, 698 F.2d 300, 304-05 (7th Cir. 1983).

149. *Id.* at 301.

150. *Id.*

151. *Id.*

152. *Id.* at 304-05 (holding that Gracen's works lacked originality and therefore were derivatives that were ineligible for copyright protection).

153. *Id.* at 304.

To avoid the difficulty and problems of evidence, Judge Posner ruled that plaintiff's depictions were not original derivative works contemplated in the Act.<sup>154</sup>

Yet, the Nimmer approach which Judge Posner has adopted presents evidentiary problems similar to those in *Gracen*. Courts will have a difficult time deciding when someone has made more than a minimal contribution when the alleged portion is a bundle of ideas, suggestions, facts, or other non-copyrightable material. It is unlikely that parties will keep strict records for future litigation (for example, meeting minutes, copies of suggestions or research). Judge Posner seems to have shifted away from the bright-line rules adopted in *Gracen* and *Erickson*.

Admittedly, bright-line rules are easier to apply. But in some cases, such as computer programs, the difficulty in proving more than a minimal contribution may deter some parties from bringing suit, which increases administrative efficiency because the court would hear fewer cases. In any event, courts are accustomed to adjudicating disputes in the absence of such rules, and judges can look to patent cases for guidance.<sup>155</sup>

### 3. *Equities*

Perhaps Judge Posner rejected the Goldstein treatise in *Gaiman* because he wanted to ensure that declaratory judgment in favor of Gaiman would not be disturbed in case other judges disagreed with his application upon appeal. However, Gaiman arguably qualified as a joint author even under Goldstein's approach. One could argue that McFarlane intended to jointly own the characters with Gaiman when he promised to treat Gaiman "better than the big guys" did and when he sent Gaiman royalty reports referring to Gaiman as a "co-creator" of one of the characters.<sup>156</sup> In any event, the "more substantial issue" in the Goldstein approach, as the Second Circuit applied it, was whether each contribution is separately copyrightable.<sup>157</sup> Gaiman's contributions satisfied this requirement.

Gaiman wrote the dialogue for the characters—a fact that Judge Posner did not emphasize.<sup>158</sup> While copyright protection of a cartoon charac-

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154. *Id.* at 305. Judge Posner limited his ruling to derivative works and noted that nothing prevents an artist from claiming copyright if he paints from real life, even though it looks exactly like a photograph of the subject. *Id.*

155. See *supra* notes 97-99 and accompanying text.

156. *Gaiman*, 360 F.3d at 650, 652.

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

158. While Judge Posner acknowledged that Gaiman contributed "expressive content," he stated that Gaiman's contributions "may not have been copyrightable by itself." *Gaiman*, 360 F.3d at 661.

ter does not extend to “intangible attributes,” a character’s speech is “written expression contained in the work,” which is protectible.<sup>159</sup> Perhaps McFarlane regarded the character’s speech as irrelevant to the determination of royalties for an action figure. However, every joint author is entitled to a portion of those royalties, and the dialogue is a significant factor in the finding of joint authorship.<sup>160</sup>

For instance, suppose person A writes the script for “The Masked Infringer” (a cartoon character) and person B illustrates the character. “The Masked Infringer” is considered a joint work. If A and B license “The Masked Infringer” to company C, and C keeps the text but hires a new illustrator when C publishes the character, B (the original illustrator) still gets a part of the royalties paid because B is a joint author. “The Masked Infringer” would not exist without the contributions of B, and A would not have been able to license the character without B’s input. Therefore, though B’s original input is no longer being used, it is only fair to give him part of the royalties.

Perhaps Judge Posner wishes to promote collaborative efforts and grant joint author status to more people. Certainly there are many advantages. As one commentator notes, “the social cost of incorrectly stripping someone of authorship is higher than the cost of incorrectly classifying someone as a joint author.”<sup>161</sup> Joint authorship maximizes dissemination because every author can exploit the work without permission from others.<sup>162</sup> Also, since every author owes a duty of accounting to the others, no one can “grab an unjust share of the rewards.”<sup>163</sup> By rewarding all parties who make more than minimal contributions, the Nimmer approach helps Judge Posner achieve his goals of providing incentives for people to collaborate and granting joint copyright ownership to more people.

### C. Implications

Those who favor the Goldstein approach fear increased litigation. Parties may be concerned that the *Gaiman* decision blurs the line between suggestions and contributions constituting joint authorship and that it may take the courts a long time to determine what constitutes more than a “de

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159. U.S. COPYRIGHT OFFICE, CIRCULAR 44, CARTOONS AND COMIC STRIPS (2002).

160. *Gaiman*, 360 F.3d at 661 (holding that once the character was “drawn and named and given speech he became sufficiently distinctive to be copyrightable” and therefore became the joint work of the parties).

161. Dreyfuss, *supra* note 118, at 1207.

162. 1 NIMMER & NIMMER, *supra* note 9, § 6.10; *see also* Dreyfuss, *supra* note 118, at 1207.

163. Dreyfuss, *supra* note 118, at 1207.

minimis" contribution. Parties may also believe they have to litigate the definition of "mixed media" in the Seventh Circuit; otherwise, *Erickson* (the Goldstein approach) is the rule of thumb.<sup>164</sup> However, as discussed above, Judge Posner has effectively adopted the Nimmer approach for all works. Also, experienced parties usually anticipate such problems beforehand, so the amount of litigation will not likely increase dramatically.

The Nimmer approach creates other problems when it grants rights to nonessential players. For example, if a percussionist (who is not covered by the work-made-for-hire doctrine) ad-libs a few phrases in the recording studio, he would be a joint author under the Nimmer approach. For that relatively small contribution, he can terminate transfers of the copyright in the song thirty-five years from now.<sup>165</sup> Record companies cannot force him to assign his termination rights because those rights are inalienable.<sup>166</sup> The termination of transfers coupled with joint authorship status under the Nimmer approach create an incentive for the other authors to destroy the value of the work by licensing the work indiscriminately because they have no duty to account if no profits are made on the licenses.

Nonetheless, the court's decision is not as fearsome as it first appears. Most parties anticipate some profits from collaborative efforts and therefore enter into arrangements under the work-made-for-hire doctrine to begin with (as DC Comics and Marvel Comics have done with Gaiman) or contract around the problem beforehand (have the contributors assign all copyright interests before the project begins).

Where the work-made-for-hire doctrine fails or the contracts are not signed, the Nimmer approach affords broader protection to creative inputs. For example, movie producers often hire others to write the script and translate the producers' ideas from storyboards to the final product. The Nimmer approach grants copyright protection to producers' ideas, once merged with the other contributions of expression. In *Thomson*, Thomson wrote a portion of the lyrics and the script, but the court held she was not a joint author because Larson did not intend for them to be joint authors.<sup>167</sup> Under the Nimmer approach, Thomson's contributions would be pro-

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164. *Gaiman*, 360 F.3d 644, 659 (stating that the opinions that follow the Goldstein treatise do so "rightly in the generality of cases" but also stating that those opinions have failed to consider mixed media works where contributions cannot stand alone), *reh'g en banc denied*, 2004 U.S. App. LEXIS 6387 (7th Cir. Mar. 31, 2004).

165. 17 U.S.C. § 203 (2000); *see also* David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y U.S.A. 387, 397 (2001).

166. Nimmer & Menell, *supra* note 165, at 397.

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

tected. Finally, parties in working relationships, such as a client who works closely with an architect to tailor the designs to the client's needs, will not fear an infringement suit if the architect reuses the sketches or ideas later.<sup>168</sup>

The Nimmer approach will also not negatively impact creativity. Some people already share ideas without regard to idea protections.<sup>169</sup> It is more likely that the broader scope of coverage may encourage creativity. With greater protection, people will be more willing to share ideas. It may also encourage parties to contract before pursuing endeavors.<sup>170</sup> Anticipating and providing for problems before they arise leads to greater clarity of law and predictability. The smaller the risks, the greater the likelihood of investment becomes.

Granted, this approach may lead to decreased collaborations. Extended, complicated negotiations may deter some artists from pursuing the project, especially since artists tend to distrust lawyers.<sup>171</sup> Yet for all their dislike of attorneys and contracts, artists have signed contracts and made movies, records, and other highly collaborative projects in the past, and they will probably continue to do so in the future.

#### IV. CONCLUSION

It is an encouraging sign that a federal circuit court of appeals has finally adopted the Nimmer approach. The hypothetical applications suggest that this approach goes beyond Judge Posner's limitation to "mixed me-

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168. However, the Nimmer approach has been outright rejected in architectural cases. *See, e.g., MGB Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990) (finding a lack of intent that the sketch become a part of the finished plans). Whether the court's finding was correct is questionable. *See Lape, supra* note 100, at 54 (wondering why a client would produce a sketch if it was not going to be incorporated or why an architect would take the job if he was not going to meet his client's specifications).

169. Parodists or creators of fan fictions will often merge their ideas with pre-existing materials and then share their ideas with major studios or companies in the hopes of getting a big paycheck. However, most of their work product are considered unauthorized derivatives. *See, e.g., Sobhani v. @radical.media, Inc.*, 257 F. Supp. 2d 1234 (C.D. Cal. 2003) (finding that plaintiff's commercials, which spoofed the movie *Cast Away*, were unauthorized derivative works based on Jack-in-the-Box commercials); *Anderson v. Stal-lone*, No. 87-0592 WDK (Gx), 1989 U.S. Dist. LEXIS 11109, at \*15-16 (C.D. Cal. Apr. 26, 1989) (finding that plaintiff's treatment for *Rocky IV* was not entitled to copyright protection because it was an unauthorized derivative work).

170. *Dreyfuss, supra* note 118, at 1217-18 ("So long as dominant authors know they cannot silently veto the expectations of others, they will be forced to lay their plans on the table and negotiate.").

171. *Id.* at 1172 (noting that many authors have "cultural aversions to lawyers and legal matters").

dia.” While the Nimmer approach may result in decreased collaboration or an exponential increase in litigation, those outcomes have a very low probability. Furthermore, the Nimmer approach is better because it is fairer to the parties and grants broader protection in the absence of a contract. The Nimmer approach is also a more faithful interpretation of the Act, and it will promote and foster creativity and the arts. The advantages of the approach offset any costs to efficiency.