Joint Authorship: Becoming an "Author" and Resolving Disputes Against Co-Authors.

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I. Introduction

The United States Constitution empowers Congress "To 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."\(^1\) To this end, they have enacted various copyright statutes, the most current in 1976.\(^2\) Even in this most recent incarnation of copyright law, however, what happens when multiple artists (joint authors) work together to create a single piece of work is unclear. Also unclear is what remedies one of these authors may have against the others (if any).

This paper addresses these issues by examining a hypothetical situation involving multiple authors. It first outlines the requirements of joint work. It then examines the circuit split surrounding the second requirement for a joint work, authorship. The paper then examines rights co-authors have against each other (or lack thereof). It then concludes that current remedies against co-authors are insufficient, and proposes additional equitable remedies that should be available.

II. Hypothetical

Allan, a guitar player and singer, is the front man to a rock group, (The Band). He, working with his band mates, have written a few songs which The Band plays at local music venues. They are relatively successful for their area, pulling in a large group of fans for every show they play. After one particular show, Bradley, a music producer,
approaches Allan and his band mates. Bradley believes that he can make The Band "a huge hit," and can leverage his musical connections to The Band's advantage. Bradley then proposes that Allan and his band work with him (Bradley) to create an album at Bradley's home studio.

Allan and his band agree. Shortly thereafter all of them begin work on the new album in Bradley's studio. Allan and his bandmates, while at the studio, write a series of guitar parts, bass parts, drum tracks and melodies which are ultimately intended to be used in their forthcoming album. Upon hearing a few of the parts, Bradley, who plays no instrument and has not previously been an author or co-author of a musical composition, spontaneously starts to hum and sing a few original melodies in Alan's vicinity. Alan hears Bradley, and then "writes" a few musical parts that are substantially similar to what Bradley sang, which are then recorded by Alan and his band in the studio.

Other than this "contribution" Bradley mostly does the recording and the "mastering." (Mastering is the process of combining all of the different recorded tracks into one single track, adding effects, and polishing the sound, among other things). Bradley also does the "arranging," that is, he takes the various parts that the band comes up with, and combines them to make a cohesive song. Both of these processes are integral to the creation of a song/album and require many hours of work, and years of experience to do properly.

At first the relationship between The Band and Bradley is amicable. Bradley, however, then starts to insist on taking The Band in a more "popular" direction. Allan and his band mates insist that the reason they have maintained their fan base is because the band has stayed true to their music; they have never "sold out."
The relationship quickly deteriorates; Bradley and The Band part ways, but not until after Allan and his band mates record a substantial number of melodies, guitar lines, and other musical parts. Among these are what would ultimately become a song called "Freedom of Music."

A few months later, Allan and his band record a new version of their song "Freedom of Music." This version has a substantially similar melody and guitar line to the parts recorded in Bradley's studio. The arrangement is also strikingly similar. The main guitar "riff" is substantially similar to one of the melodies that Bradley "sang" while in the studio. The band uploads the song to the internet, deciding to allow anyone who wishes to download the song for free.

The band becomes a hit. Their decision to "give away" their music for free makes them an overnight sensation. As a result, the band derives very little revenue directly from their copyright interest, but become vastly wealthy due to their media presence, (some members of the band start guest starring on talk shows, hosting their own reality shows and making other media appearances.).

Bradley then sues, seeking a declaratory judgment that he is a joint author of "Freedom of Music," an accounting for his share of the copyright revenue, damages for "waste" to his copyright interest, and damages due to Alan and his bandmates "unjust enrichment."
A joint copyright arises when multiple "authors" create a "joint work." A joint work is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." Courts interpreting this language have extracted two elements that must be present for a joint copyright to exist: 1. Intent and 2. Authorship.

The first element, intent, requires that each collaborator in a prospective joint work must have "intended to merge the contributions into 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..." Indeed, what is required "to constitute joint authorship [is] a common design." Each individual author need not intend to merge his work with another specific author; it is sufficient that he merely intend that his own work will later be merged into a larger whole. Nor does each author's work need to be equal to the other authors, it just must be "significant both in quality and quantity to permit an inference that the parties intended a joint-work."

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3 See 17 U.S.C. § 201(a) (1976)("copyright in a work... vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work").
5 See e.g. Aalmuhammed v. Lee, 202 F.3d 1227, 1231 (9th Cir. 2000).
9 See Edward B. Marks Music Co. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d. Cir. 1944)(The authors did not even know each other when they constructed their individual parts, still considered a "joint work").
10 See id.
Both Bradley and The Band likely had the requisite intent. First, with respect to Bradley’s production and arranging work, both parties’ mindsets establish this prong. Both parties agreed beforehand that Bradley would do these tasks, and these tasks are necessary to create the final album.

Bradley’s hummed riff poses more problems for intent than his production work does. But, he will still be able to demonstrate the requisite intent even though neither party foresaw him making this “contribution” at the time their working relationship was being hashed out. Both parties, (Bradley, and the Band as a whole) were, at the time, actively working towards a common design. Both parties specifically intended to create one album which would contain the work of both parties involved.

That one party (Bradley) made unforeseen contributions somewhere along the creative process does not destroy the parties’ intent. Parties working together to create a unitary piece of art frequently make contributions that the other did not foresee; this is one of the reasons why artists working together is so valuable. Moreover, Bradley was actively involved with the band (with their agreement) at the time he made his contribution; this is not the case where a complete stranger spontaneously sang an important countermelody. And then The Band used his contribution. Thus, the first element of joint authorship is present.

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12 It is unclear whether a specific intent, which looks to each specific potential contribution, like the one utilized in this paper, is necessary, or if a general intent to work together is enough. This is especially complicated because some jurisdictions would not allow Bradley’s arranging and production work to qualify as “authorship.” Under a “general” intent philosophy he would nonetheless be able to establish joint authorship, the intent derived from the original intent to do non-copyrightable acts (production and arranging work), and the authorship derived from the copyrightable riff he ultimately, and potentially unforeseeably wrote.

13 See Ulloa v. Universal Music and Video Dist. Co., 303 F. Supp. 2d 409, 418 (S.D. N.Y 2004). (note that because the court denied the plaintiff joint authorship status here, the plaintiff was able to establish actual authorship over her individual contribution).
Even though Bradley and The Band likely have to requisite intent to fulfill the first element for a joint work, Bradley must also establish "Authorship" to have any rights in “Freedom of Music.” And this second element, Authorship, is more difficult to infer from the facts.

The authorship requirement is derived out of the statutory language of the Copyright Act, which requires the "work" (here, "Freedom of Music") to have been prepared by two or more "authors." What exactly this means, and thus what the statute requires, have been the subject of disagreement among courts and scholars. One interpretation, espoused by Professor Goldstein states that to establish "authorship" each putative coauthor's contribution must be independently copyrightable. The alternative approach, advocated by Professor Nimmer requires that a putative author merely make a non-deminimus contribution to establish "authorship."

As discussed below, under the Goldstein approach to “authorship,” Bradley would likely prevail with respect to his “hummed” melody if he can prove he did actually generate it, but lose with respect to the sound engineering and arranging work he did (even if all the facts stated above are deemed to be true). However, under the Nimmer view, he could win with respect to both the “hummed” melody and the engineering and arranging work he did. This paper discusses, compares and contrasts the two approaches, and ultimately concludes that the Nimmer view is the superior approach.

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14 While not dispositive on its own, this fact, combined with the pre-existing working relationship Bradley had with the band makes it far more acceptable to state that Bradley and the band had the requisite intent. Because of this previous relationship there is little fear that artists could be held to account in court for "contributions" made by unsolicited artists along the way.
16 See Goldstein, supra note 8.
18 And can establish the other elements of copyright, like fixation.
A. Jurisdictions That Require an "Independently Copyrightable Contribution" to Establish Authorship.

The predominant view of “authorship,” espoused by Professor Goldstein, is that each putative co-author must make an independently copyrightable contribution for that author to establish authorship. Proponents of this view argue that the text of the copyright act, when defining and describing a joint work, refer to “authors” as the creators or originators of the work. Authors create works of “authorship,” which is a term also defined in the Copyright Act. And in this definition of authorship are certain “categories” of works that are entitled to be considered works of authorship, all of which are independently copyrightable.

Thus, because works of authorship must, themselves, be copyrightable, for a putative co-author to become an author, he must also make an independently copyrightable contribution. In other words, because a work requires copyrightability to be a work “of authorship,” so too must a creator of a join work contribute something copyrightable to be considered an “author.”

Proponents of Goldstein’s view also argue that requiring an independently copyrightable contribution is sound policy. They argue that “[b]y requiring a contribution to be copyrightable, creative efforts will be encouraged because there is no

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19 See supra Part III.
21 See 17 U.S.C § 101, 302.
22 See Balkan, 863 F. Supp. at 526.
23 See 17 U.S.C. § 102(a)
24 Id. Also, because §102(a) doesn’t have any “catchall” phrase at the end (such as “or any other tangible mediums of expression”) expressio unis est exclusio alterius suggests that the list is exhaustive. See Id.
25 There are no works of authorship defined under § 102 that are not independently copyrightable.
26 See e.g. Balkan, 863 F. Supp. at 526-7.
risk that a copyright on a finished work will be later found to be co-owned by a second person who has contributed or collaborated in some manner regarding the work where such contribution was not itself so creative as to be individually copyrightable.” 27 Indeed, "the threat that accepting suggestions from another party might jeopardize the author's sole entitlement to a copyright could hinder creativity and the free exchange of ideas contrary to the purpose of the Copyright Act.” 28

Essentially, proponents of this viewpoint see independent-copyright eligibility, and thus the authorship requirement, as a gatekeeper. Without this safeguard, opportunistic “contributors” could claim a copyright interest in an artist's work by arguing that the artist's product used some amorphous idea(s) that the "contributor" came up with.

Under this view, Bradley would likely be able to establish he is an “author” of “Freedom of Music” because of the melody he “hummed” (if he can prove he did actually hum the melody, and that the Band used it in the song), but not because of his work as a song engineer or as an arranger.

The melody is relatively easy to analyze for the purpose of establishing authorship; it is, on its own copyrightable. It is a finished product that could be fixed (recorded) into a tangible medium if Bradley chose to do so. 29 All Bradley would have to do is pick up a microphone in his studio, hit record, and a copyright would then exist.

27 Id. at 528.
28 Id. at 527 Citing Erickson, 13 F.3d at 1070 (internal citations omitted).
29 Whether it was actually fixed at the time of the suit is probably not important. Goldstein's view of authorship requires independent copyrightability, or an independent copyrightable contribution. Thus, all that is required is fixability in a tangible medium, not actual fixation. See e.g. Easter Seal Socy. v. Crippled Children and Adults of La., Inc. v. Playboy Enters., 815 F.2d 313, 337 (5th Cir. 1987). In any case, in the facts the riff was ultimately recorded under Bradley's direction at his home studio.
The major difficulty for Bradley here is in proving his case. He was in the recording studio with Alan and his Bandmates (the obvious potential witnesses), who are now adverse parties. There is nothing in the facts that states any neutral parties were present, or there was any recording of the creative process. And even if he could demonstrate that he (Bradley) hummed a melody, he would then have to prove that he hummed the melody that The Band ultimately ended up using. Alan and his Bandmates are not likely to be cooperative in this regard.  

Bradley’s arrangement efforts will likely establish authorship in “Freedom of Music.” Bradley would also like to establish authorship in “Freedom of Music” via his production work. Under the Goldstein standard, however, he will fail. Bradley made no independently copyrightable contribution when he merely “produced” the record. Producing music does not typically involve any independent contributions; it is taking the recordings produced by the band members and adding effects, cleaning up the tracks, and essentially making them sound good. There is no independent part one could point to (or bring into a court) that could exist without Alan and his bandmates’ underlying musical composition. Bradley is merely altering Aland and his bandmates’ contributions. And yet anyone who has messed around with a home recording device knows just how important this process is towards making an album that sounds good and that people will buy.

30 Even under these circumstances, however, this is enough to establish a prima-facie case, and he will get to present his case to the factfinder. As a result, Alan and The Band will have to put on their case, and will thus have a strong incentive to settle with Bradley.  

31 See Feist Publ’n, Inc. v. Rural Telephone Serv. Co., Inc., 499 U.S. 340, 340-341 (1991)(a compilation is copyrightable if its underlying parts have been selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. Must establish a “modicum of creativity... to transform mere selection into copyrightable expression”).  

32 See Brown v. Flowers, 297 F. Supp. 2d. 846, 852 (M.D. N.C. 2003)(holding that a “producer” was not a joint author).
This result is manifestly unfair. The production process requires a heavy involvement in the songs, and the creative process as a whole. It require time, energy, expertise and knowledge. And the skill of the producer is typically vital to the creation of the final product, often playing a huge role in the final quality of the song. Indeed, many times the final songs could not even exist (at least in their current, commercially successful state) without this process being done. And it is for these reasons, and others (as discussed below) that Goldstein’s interpretation of “authorship” is unfairly and unwisely narrow.

One problem with the textual interpretation put forward by Goldstein and his supporters is that it puts too much emphasis on language that would seem to be otherwise innocent. Author, in sections 101, 102(a) and 302 of the copyright act is freely and continuously used, without any quotations around it, or anything else that would suggest the enhanced meaning that Goldstein and his proponents have attached to it. Thus, instead of creating a mountain out of a mole hill, courts should look to the plain meaning of the word author. "Author" refers to a person" who is the source of some form of intellectual or creative work."33 This is further defined as "one that originates, makes, or gives existence," or "one that brings about or is the efficient cause of an action."34 Thus, "author" merely "connotes some significant form of original expression made in connection with an artistic endeavor."35

Moreover, if Congress had intended Goldstein’s interpretation to be the law, they would have removed all ambiguity and included a definition of “author” in §101. Instead,

34 Id.
both the Congressional record and case law espousing Goldstein’s view lack specific language that demonstrates this view was Congress’s intent. Instead Congress “elevated intention [of the putative authors] as the touchstone, without placing any further parsing as to the copyrightable status of each individual component that the parties intended to contribute to the work as a whole.”36

Furthermore, instead of facilitating the free and clear creation and expression of ideas, Goldstein’s interpretation champions implementation of an idea to the exclusion of creation. Both are necessary for any kind of art or creative work to exist. To demonstrate: under this interpretation, if one author (working alone) creates a work of authorship, all of his ideas, even intermediate ones that were not independently copyrightable at the time of conception or for a long while after, included in the finished project are protected. In a scenario with two creators, where one creator generates only ideas, and the other creator merely implements (with minimal contributions of his own), the implementing creator receives copyright protection over the entire work (including the ideas generated by the other creator) while the idea creator receives nothing.

In both scenarios one party generates an idea, and another party implements the idea. In both scenarios only the implementing party receives a copyright; the generating party in the first scenario only receives anything by virtue of being the implementing party. Thus, under Goldstein’s interpretation of “authorship” it is only the integration process that is protected; the idea creation process is left entirely unprotected.

Moreover, the fear that artists would be besieged by “contributors” looking to add tiny “contributions” solely for the purpose of cashing in on a true “author’s” work is overblown. There are still many safeguards for artists along the way, such as the intent

36 Id. citing Nimmer, supra note 17 at 6.07[A].
requirement discussed above. An artist could, for instance, have basic contracts with their intended co-authors to heavily weigh against finding intent with a non-contracting “co-author.”

Or, as discussed below, a court could merely change the remedies co-authors have as against each other in such a way as to deny a potential author’s financial incentive to sue. For instance, instead of allowing a co-author to receive some percent of the financial proceeds by default via an accounting, a court could simply give a co-author a nominal fee for their “contribution.” Thus, instead, as discussed below, Nimmer’s view is the better policy.

B. Jurisdictions That Require a Non-"deminimus" Contribution to Establish Authorship

At least one jurisdiction follows Professor Nimmer’s view of “authorship,” and requires a putative co-author merely to demonstrate that he made a “non-deminimus contribution” to the joint work. While Nimmer’s view is certainly the minority one, it is the correct viewpoint.

Indeed, advocates of this view of authorship argue that “[c]opyright'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 [be] extended both to the contributor

37 See infra Part IV.B.
38 Gaiman v. McFarlane, 360 F.3d 644 (7th Cir. 2004).
39 Along with intent, see supra Part III.
40 See Nimmer, supra note 17.
of the skeletal ideas and the contributor who fleshes out the project."41 Moreover, [t]he 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.42 Even Goldstein concedes this last point to a certain degree.43

Art should not be hamstrung by courts imposing arbitrary and unnecessary requirements in an attempt to keep out illegitimate authorship claims. Individuals looking to exploit the copyright code, and exploit the artwork of others for their own gains will figure out what hoops need to be jumped through and adjust accordingly anyway.44 As a result, a large cumbersome catch-all rule is not effective to curb this kind of conduct. Instead, it will only harm legitimate authors ignorant of this rule, and stop legitimate authors aware of this rule from engaging in creative processes not protected in this interpretation of authorship, stifling creativity.

Moreover, the work-for hire doctrine still exists.45 So do contracts. Authors who do not wish to share their authorship can always contract around the default copyright rules. And most sophisticated authors (i.e. the ones with money to be sued for) are likely to have the resources to write and utilize these contracts.

41 Gaiman, 360 F.3d at 659.
42 Id.
43 See Goldstein, Supra note 8 at 4.2.1 (recognizing a "narrow, and expedient, exception[:] where no one has contributed protectable expression to the creation of the work in issue, but the resulting work is itself expressive, and consequently copyrightable").
44 See e.g. Dave Mustaine & Joe Laden, MUSTAINE, 255-58 (Harper Collins Publishers 2010) (during the writing process less productive members of the band would frequently make small, seemingly unimportant alterations to the lyrics of the songs to establish joint authorship).
Thus, there is no reason to fear massive litigation surrounding large artistic projects like movies.\footnote{46} Nor is there reason to require a special rule in those circumstances; these kinds of projects are large enough and sophisticated enough that utilizing a simple work-for-hire contract is not an undue burden.

Under Professor Nimmer’s view, Bradley would likely be able to establish authorship in “Freedom of Music.” All Bradley’s contributions, his hummed riff,\footnote{47} his production work and his arranging work all necessary and important parts of the final song. Indeed, the final song likely could not even exist in its current incarnation without them. Thus, they are likely not-deminimus. And this is sufficient for the Nimmer’s view of authorship.

Thus, under Nimmer’s (correct) view of authorship, Bradley would likely be able to establish that he is a joint author. He, as discussed above,\footnote{48} had the requisite intent (along with Alan and his Band), and made enough of a contribution\footnote{49} to establish authorship. However, Bradley must also establish that he is entitled to a remedy, and what the scope of that remedy is.

\textbf{IV. Remedies against Co-Owners of a Joint Copyright}

Co-owners of a copyright each own an undivided interest in their shared work.\footnote{50} This interest is analogous to a tenancy in common in real property law.\footnote{51} And ordinarily,
in real property law, joint owners of property held by a tenancy in common have certain rights as against each other. However, the Copyright Act is statuatory more complicated; it only specifically gives remedies against infringers of copyright. A joint author, as an "author" cannot infringe against their own work. Thus, the Copyright Act does not explicitly give a remedy to Co-Authors as against each other. But this does not end the issue; the act does not foreclose a remedy either.

Indeed, the authors of the Copyright Act fully intended to allow remedies between Co-Authors, leaving "undisturbed" the "court-made law" between Co-Authors that already existed at the time the 1976 Copyright Act was passed. And courts have consistently found at least one remedy, an accounting for profits. However, as discussed below, while an accounting for profits can do much to help an aggrieved co-author, it is not a perfect remedy; other remedies should be available to courts when the facts warrant them.

51 See Goldstein, supra, note 8 at 4.2.2 4:25-26 ("Courts deciding disputes between copyright co-owners have generally looked for analogies to the law governing real property tenancies in common.") See also, Id. (Listing cases).
52 See e.g. Bankers Trust Co. v. Woodall, 144 P.3d 126, 129 (NM. 2006).
53 As a result, it preempts common law rules on the subject where it speaks. 17 U.S.C. § 301.
55 Oddo v. Ries, 743 F.2d 630, 632-633 (9th Cir. 1984) ("[a] co-owner of a copyright cannot be liable to another co-owner for infringement of the copyright").
56 Nor can a court create common law Federal Rules to supplement the remedies outlined by Congress. See Eerie R.R. Co. v. Thompkins, 304 U.S. 64 (1938).
57 See e.g., Foad Consulting Group, Inc. v. Azzalino, 270 F.3d 821, 827 (9th Cir. 2001) ("[i]n enacting the Copyright Act, Congress did not preempt the field. Thus, where the Copyright Act does not address an issue, we turn to state law to resolve the matter, so long as state law does not otherwise conflict with the Copyright Act").
58 See H.R. Rep. No. 94-1476 ("[t]here is also no need for a specific statutory provision concerning the rights and duties of the coowners of a work; court made law on this point is left undisturbed. Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use or license the use of a work, subject to a duty of accounting to the other coowners for any profits").
59 See e.g. Royal v. Leading Edge Prod., Inc., 833 F.2d 1 (1st. Cir. 1987).
60 Indeed, as discussed in this paper, it would not do much to help Bradley in this fact pattern.
While the courts and the legislature seem to recognize an accounting as a remedy between co-authors, this does not necessarily preclude other potential remedies. Instead, the text of the 1976 Copyright Act specifically authorizes this. According to the act “\(b\) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to…\(3\) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.” And § 106 only deals with rights that, if violated, would constitute infringement. Thus, "A right equivalent to copyright is one that is infringed by acts that constitute copyright infringement." As a result, a right not equivalent to copyright, such as a state law equitable remedy between co-owners, would be specifically authorized by the act.

Moreover, as the source of the duty to account comes from “equitable doctrines relating to unjust enrichment and general principles of law governing the rights of co-owners,” it would seem that other equitable doctrines, such as unjust enrichment at the very least, should be available. After all, an accounting may not be sufficient in all

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61 See e.g. Oddo v. Ries, 743 F.2d 630, 633 (Defendant “may also be liable [to plaintiff] under California partnership law… in addition to being required to account to plaintiff”).
63 Id.
64 See 17 U.S.C. § 106 (“The owner of copyright under this title has the exclusive rights to do and to authorize any of the following…(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work… [etc.]”).
66 Harrington v. Mure, 186 F. Supp. 655, 657-58 (S.D. N.Y. 1960)(pre-1976 Copyright Act case, but the principals articulated are not superseded by the new statute) See also Oddo, 743 F.2d at 633.
67 See Don Johnson., 91 U.S.P.Q.2d at 7 (unjust enrichment claim between co-owners allowed to proceed).
circumstances. This is especially true when one co-owner’s actions hinder or destroy co-owners’ ability to profit off of the shared property. To this end, while “[i]t has been said that copyright, being an incorporeal right, cannot be destroyed…” “[t]he use of one owner, by license or personally, in motion pictures, on the stage, by radio, in advertising, in bands or orchestras, can destroy, practically, the copyright so far as the other is concerned.” Indeed, “its broad use by an active publisher can so far exhaust the popularity of a song, or any other musical composition, as to destroy its value after that use has ended. And the destruction of value of a copyright is, in effect, a destruction of the copyright.”

Under this particular set of circumstances, (which is similar to the circumstances set forth in my hypothetical) a court applying an accounting methodology would merely give some percentage of the profits the defendant received. This remedy has, at best, a tenuous connection to the harm that the plaintiff actually received. It only really effectively makes the plaintiff “whole” if the defendant efficiently used the property to generate revenue, and if the court can actually trace the revenue generated to the jointly held property. Both of these premises are not necessarily present in all circumstances, and the absence of either would lead to a plaintiff being undercompensated (or, as discussed below, possibly overcompensated) for their actual harm suffered.

Alternatively, an accounting might be an unfair remedy to the defendant.,

Allowing one co-author to sit around idly by while the other actively promotes the

69 Consider, for instance, the hypothetical. It would be difficult to trace The Band’s profits directly back to the song that Bradley co-authored (assuming, for the purpose of this section, that he prevails on that issue). Here, the accounting remedy would be near worthless to Bradley.


71 Id.
copyrighted work, then springs in to collect a percentage of the total revenue after much of the work was done also seems manifestly unfair.

In my hypothetical, applying the accounting rule demonstrates both problems articulated. Under the current accounting rule, Alan and his Band were able to exploit the jointly held work repeatedly, generating large amounts of popularity and other intangible benefits for themselves. They did so without paying Bradley a dime. Because they gave away licenses in the jointly held song for free, they completely destroyed any market Bradley may be able to capitalize on. Thus, they obliterated any value Bradley may have in the jointly held work, and therefore “destroyed” his copyright.

And then after exploiting the joint work this way, Alan and the Band were able to turn their popularity (which was generated by exploiting the joint work) into a substantial financial profit. But, because the profits were indirectly earned, and cannot be seen as proceeds of use of the copyrighted song, an accounting would not likely compensate Bradley. The end conclusion is that two co-authors who labored together in creating a joint work ended up, by exploitation of that work by one party, in diametrically opposite states, with one receiving substantial financial benefit and the other receiving essentially nothing.

But yet, under the facts, this is probably the best result. After all, Bradley did not really do anything with the joint work between the recording sessions and Alan and his Band’s breakout into popularity. He likely did not even know that the joint work would be as valuable as it ultimately ended up becoming (at least for Alan and his Bandmates).

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72 Allowing an accounting to reach these kinds of proceeds would likely be unfair in most contexts, as artists frequently profit by piggybacking on past successes.
He essentially sat around idly and then tried to collect a lot of money for someone else’s hard work and labor. Granting him a remedy would essentially amount to a windfall.

However, even small changes in the facts would change whether Bradley “should” prevail but not the legal analysis. For instance, if Alan and the Band had instead directly profited from the song, Bradley would receive a portion of those proceeds while not having done anything. If Bradley had instead assisted the Band in their rise to fame, and been there every step of the way, he “should” receive compensation, but under the original fact pattern would receive nothing.

Instead, the proper rule should be to allow other state law equitable remedies. For instance, if Alan and the Band had profited directly from the song, Bradley could be denied compensation via a counter-claim by the band for unjust-enrichment. Or if Bradley had directly assisted the band in their rise to fame (and received nothing because an accounting would not adequately trace the proceeds), he would be entitled to quantum merit, or possibly an unjust enrichment claim himself.

V. Conclusion

This paper examines two issues in copyright law: authorship, and remedies that joint authors have against each other. Under the 1976 copyright act what constitutes "authorship" is still unclear and is an important issue that the United States' Court of Appeals have failed to properly resolve. It has led to a circuit split with the majority of courts adapting the wrong interpretation. This paper, through its examination of a hypothetical, demonstrates this.
This paper also looks to the remedies co-authors have against each other and concludes they are insufficient to address the potential grievances these individuals may have. It does so by examining a hypothetical situation where these grievances exist. The paper then suggests that additional remedies, available in other contexts, should also be available here. It concludes by showing how these remedies would potentially redress the grievances present in the hypothetical.