

WHAT RIGHTS DO PARTICIPANTS IN THE CREATION OF FICTION HAVE, AND WHEN DO THEY ATTACH?

I. INTRODUCTION

Recently, Stephenie Meyer's "Twilight Saga" has become an international phenomenon across many forms of media. The second installment, entitled New Moon was one of the top Google searches in 2009.¹ Meyer landed as #26 on the 2009 Forbes Celebrity 100 list, beating out such household names as Jay Leno and, even, President Barack Obama²

What makes this more remarkable is the fact that, according to Meyer herself, It seem[ed] kind of presumptuous...[to think that] anyone else would want to read the things that [were] in [her] head.³ She simply had a dream and decided to write it down because she found it particularly captivating, and after some time that dream became a chapter in a completed book.⁴ It was just me spending time with this fantasy world, and then when it was finished it was like, "This is long enough to be a book!"⁵

Many people who enjoy writing fiction, or participating in the writing of fiction through the sharing of ideas or the revision of drafts, probably feel like Stephenie Meyer felt and have no real thought at the outset of the work ever becoming published. It is easy, however, to see that even a writing exercise as simple as recording a dream can escalate into a publishable work. Moreover,

¹ Top 10 Google searches in 2009, Kippreport, December 6, 2009 Sunday.

² http://www.forbes.com/lists/2009/53/celebrity-09_Stephenie-Meyer_NORR.html, last checked December 7, 2009.

³ <http://www.oprah.com/article/oprahshow/20091113-tows-stephenie-meyer-twilight/3>, last checked December 7, 2009.

⁴ <http://www.oprah.com/article/oprahshow/20091113-tows-stephenie-meyer-twilight>, last checked December 7, 2009.

⁵ <http://www.oprah.com/article/oprahshow/20091113-tows-stephenie-meyer-twilight/3>, last checked December 7, 2009.

something very humble can grow into something very profitable. It is not difficult to imagine that there were many who, if they participated in the least bit, would want to share in the kind of literary success that Stephenie Meyer enjoys.

Imagine a work of fiction that grows over time and develops from a humble, half-serious effort into an economically lucrative work. Imagine that through that process of growth and development many people are involved in some way or another. Some might contribute little and then suppose to claim a share. Others might put in a great deal of effort and it may never occur to them that they might be entitled to some rights in the work. What kinds of contributions warrant an interest protectable by copyright? Does the amount of effort correlate to the amount of ownership enjoyed? Do contributions of a greater quality or which contribute more to the financial success of the book warrant greater compensation from the proceeds of the book? It behooves all who participate in the process of fiction to have a basic understanding of the nature of copyright, so that they can understand what rights, if any, they have in the work.

The following fact scenario illustrates some of the ownership questions that may arise when a work of fiction comes into being by virtue of the efforts of a group. Many assumptions regarding allocation of ownership may exist at the outset that will not bear out with the passage of time. This paper illustrates the importance of having an awareness of the law. It only provides a basic foundation so that the novice who participates in any way in the creation of fiction may know which rights exist and when further protection may be necessary via private contract.

II. FACT SCENARIO

Adam and Boyd were roommates during freshman year at Anywhere University. Often, after they were both burned out from studying, they would talk about writing a novel together.

They would spend hours at a time brainstorming details about their characters, settings, plotlines, etc. Eventually, Adam and Boyd got busy with exams. After final exams, they both moved to their respective homes for the summer. Adam earned very high grades his first year and transferred to a prestigious technical college to pursue an engineering degree. Boyd returned to Anywhere U and pursued a degree in history. Over the years, Adam and Boyd lost touch with one another.

Years later, Boyd was working toward an advanced degree in History, hoping to teach the subject at the university level. During this time, Boyd became reacquainted with Charlie, a good friend from high school. Boyd and Charlie began corresponding regularly via email. Charlie is in the military and currently deployed overseas. One day, Boyd and Charlie decided to try writing a novel together; a “whodunit” style thriller. They used email and instant messaging services to send drafts to one another.

During the drafting period, Charlie showed a rough draft of the first 10 Chapters of the work to his bunkmate Dennis. Dennis decided that he would like to participate in the effort and made some verbal suggestions to Charlie. Charlie agreed to pass some of Dennis’ ideas along to Boyd, who liked them very much. Initially, the story was set in Santa Fe, New Mexico, where Boyd and Charlie went to high school together. Dennis was a native born Chicagoan, and Boyd, Charlie and Dennis decided that it made sense to reset the novel in Chicago, feeling the larger city provided a more interesting setting. They relied on Dennis to supply the details of the setting, as neither of them had been to Chicago before.

Boyd and Charlie rewrote the chapters they had drafted prior to Dennis’ involvement to reflect his ideas, and the facts that he had shared about the city of Chicago. Dennis was

reassigned and it became much more difficult to consult him on facts surrounding Chicago.

Boyd and Charlie considered changing the setting back to Santa Fe. However, Boyd was offered a teaching position at a small liberal arts school just outside of Chicago and they decided to keep the story set there, as Boyd could visit the city easily to do whatever additional research was necessary. Eventually, it was unnecessary to consult with Dennis any longer, and Boyd and Charlie lost contact with him.

Boyd became very busy with his new teaching position. He was required to devote a great deal of time to scholarly research and writing. He continued to brainstorm with Charlie on occasion, but Charlie did the bulk of the writing for the last 21 chapters of the book. Boyd hired a recent graduate to work as his personal assistant in order to take some of his work load and to fulfill some of his obligations at his direction. A large portion of the work that came from Boyd in the later stages of the drafting was actually done by Boyd's assistant, under his direction. Boyd left many of the creative and expressive elements to his assistant's discretion.

Once the draft was finished, Boyd and Charlie decided they wanted to seek publication. Boyd's wife Erin majored in English in college and did the proofreading and made substantial style and grammar alterations. Charlie's wife Faith was a psychology major, and made several suggestions regarding character development. Charlie had incorporated a great deal of his wife's ideas into the story.

Boyd and Charlie found a literary agent who wanted to represent them. They started to get excited about the prospect of publishing. Their agent informed them that there was a lot of interest in the book among several publishing houses. The agent told Boyd and Charlie that the book is likely to be a major financial success. Boyd and Charlie each started thinking about how

much of the pie they would like to have for themselves. Boyd noted that, without Dennis to help anymore, his insight into the city of Chicago was crucial to the completion of the book. He also argued that the book will have much more commercial appeal because it is set in a large city. Boyd also felt that without his wife's editing, the manuscript would not have been polished enough to draw the eye of their agent. Charlie argued that he did the bulk of the writing while Boyd was caught up in his career. He also argued that without his wife's insight into the human psyche, their characters would not have had the depth they currently have, which lends to the commercial appeal of the book. Each is jockeying for a larger ownership share than the other. Also, each is claiming an ownership share for their respective wives.

Additionally, Boyd and Charlie have each written short stories based on their jointly developed characters. Each would like to have the option of publishing spin-offs based on the characters in the book, should the book get published and do well enough to warrant sequels. As the jockeying for greater rights in this first book has somewhat soured their relationship, they each plan to pursue these derivative works independently of one another.

Eventually, the book is published and Adam, while browsing in a book store, sees the newly published book and recognizes the name of his old college roommate. He picks up the story and begins to read it. He sees many similarities between the present story and the science fiction story he and Boyd used to talk about writing. Adam goes home and looks through some old computer files and finds a document memorializing some initial brainstorming and drafting of the science fiction book. He feels that the initial chapters of Boyd's and Charlie's best seller sprung largely from his and Boyd's early discussions and drafting, especially with regard to the development of the main character, who was a cynic with a heart of gold. Their character and the character in Boyd's and Charlie's book were both abandoned by their father and had a

mother who was an addict. Adam and Boyd never gave a name to their character and never described his physical characteristics. Their development dealt more with personality and family background. Boyd and Charlie later added a great deal of detail, including a name, unique physical characteristics, and a deep and nuanced back-story. Adam is interested in claiming an ownership interest in the book, as well as in other future books featuring the main character. Adam decided to create a blog entitled "I really wrote this" and he reproduced portions of the book, along with his old documents he discovered, in order to point out the similarities. Further, he transferred several pages of the book onto a t-shirt and wore it while attending a book signing featuring Boyd and Charlie. He loudly and obnoxiously pointed out various on the shirt and claiming that he was one of the original authors.

Dennis also saw a copy of the book in a bookstore and recognized that some of his ideas were used, as well as many facts about the city of Chicago that he had provided. Dennis is likewise interested in claiming an ownership interest in the book.

Finally, Boyd's assistant assumes that she will have an ownership interest in the book. After all, she did most of the work that fell to Boyd during the later stages of the drafting. Although she was paid by Boyd for her time, and was offered several benefits as part of her compensation package, she feels that she should be further compensated for her creative contribution to the book.

III. PRIMER ON THE LAW:

The fact scenario above illustrates that many people might be involved in one way or another as a simple leisurely writing exercise evolves into a marketable work of fiction. To understand which of these people have contributed in such a way as to warrant copyright protection and,

thus, enjoy ownership interests, it is sensible to start with the Patents and Copyright Clause of the constitution, as all authority to grant such protection in the United States springs from this clause. Subsequently, this paper focuses on the basics of copyright: what qualifies as copyrightable material, who qualifies for ownership and what basic rights and duties follow?

a. Copyright Clause

Article 1, section 8, clause 8 of the United States Constitution is the basic starting point for copyright protection.⁶ While this clause of the constitution covers patents as well, this paper only discusses it for its information regarding copyright. Henceforth, this paper refers to this clause by a common nickname, the “copyright clause.”

The copyright clause of the constitution states, in relevant part, that it was the intention of the framers to “promote the progress of...useful arts, by securing for limited times to Authors...the exclusive right to their respective writings...”⁷

We can draw out several concepts from the copyright clause that will need some additional explanation, namely: 1) who qualifies as an author? 2) What qualifies as “writing?” 3) At what point do an author’s writings arise to the level of “useful arts,” thus warranting protection of certain exclusive rights? 4) What does it mean to promote the progress of those arts? 5) What exclusive rights are secured to accomplish the promotion of progress? 6) For what amount of time are those rights secured?

i. Authorship

⁶ USCS Const. Art. I, § 8, cl. 8

⁷ *Id.*

The Supreme Court, in *Burrow-Giles Lithographic Co. v. Sarony*⁸, stated that an author is “he to whom anything owes its origin; originator; maker.”⁹ In *Burrow-Giles*, the court was reviewing whether a photographer could claim ownership of a photograph. The Supreme Court seemed to take a very broad stance as to who may be an author, as they the title can apply to the one to whom anything owes its origin. More importantly for the purposes of this paper, the court went on to state, specifically, that the designation of “author” extends expressly to “one who completes a work of...literature.”¹⁰ These aforementioned statements by the United States Supreme Court in the *Burrow-Giles* case seem to cover the works being addressed by this paper, works of fiction literature, adequately. However, it is not enough to assume that simply writing something down, thereby “creating it” and becoming its author is enough to garner copyright protection. Much more is needed before a copyright comes into being, regardless of whether the something in question has an “author” as defined.

ii. Writing

Again, it is helpful to turn to the Supreme Court decision in *Burrow-Giles* to determine what meaning, exactly, can be attached to the word “writing” as it is used in the copyright clause. The court rejected the argument that the copyright clause protects “writings” only as defined narrowly; rather, the court stated that congress “properly has declared...[writings] to include all forms...by which the ideas in the mind of the author are given visible expression.”¹¹

iii. Useful Arts

⁸ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

⁹ *Id.* at 58.

¹⁰ *Id.*

¹¹ *Id.*

This seems to be a low standard, as illustrated by the U.S. Supreme Court's decision in *Bleistein v. Donaldson, Lithographing Co.* In *Bleistein*¹², the court states that "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [art]."¹³ The court further stated that "worth...is sufficiently shown by the desire to reproduce."¹⁴ Simply put, if the work "command[s] the interest of any public, [it] has commercial value."¹⁵ Furthermore, the court states that attracting a crowd is what gives art "real use, "if use means to increase trade and to help to make money."¹⁶

iv. Promotion of Progress?

The *Bleistein* case shows that "progress," for purposes of the copyright clause, is not restricted anything profound. As indicated by the discussion of the "useful arts" requirement above, the court recognizes congress' power to promote even commercial or monetary progress.¹⁷ The court aptly illustrated this point by stating that "a picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement."¹⁸

v. What Exclusive Rights Are Granted?

This section is meant to deal only with the following exclusive rights: reproduction rights, distribution rights, and rights to prepare derivative works. This section will not address any argued moral rights. To learn more on international moral rights, one might consider studying the Berne convention.

1. Reproduction Right

¹² *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

¹³ *Id.* at 251.

¹⁴ *Id.* at 252.

¹⁵ *Id.*

¹⁶ *Id.* at 251

¹⁷ See, generally, *Id.*

¹⁸ *Id.* at 251.

This right is enumerated in Title 17, section 106(1) of the United States Code. The Code grants the right “to reproduce the copyrighted works in copies or phonorecords.”¹⁹ This paper does not discuss phonorecords because they do not apply to literary works of fiction. However, the right to produce copies required some additional explanation.

To “reproduce a copy” means to “produce a material object in which the work is duplicated, transcribed, imitated or simulated in a fixed form from which it can be ‘perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.’”²⁰ To be deemed a reproduced copy, the fixation must be in “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”²¹

In *Arnstein v. Porter*²², the Second Circuit articulated the ways through which reproduction rights may be infringed: copying, and improper appropriation.²³ A party alleging copying must show, usually through “evidence of access and [evidence that] similarities exist.”²⁴ “If there are no similarities, no amount of evidence of access will suffice to prove copying.”²⁵ In the event that the party cannot prove that the alleged infringer had access, then “the similarities must be so striking as to preclude the possibility that the plaintiff and defendant independently arrived at the same result.”²⁶

¹⁹ 17 USCS § 106(1)

²⁰ 17 USCS § 106, House Report No. 94-1476

²¹ *Id.*

²² *Arnstein v. Porter*, 154 F 2d 464 (2d Cir. 1946).

²³ See, generally, *Arnstein v. Porter*, 154 F 2d 464 (2d Cir. 1946).

²⁴ *Id.* at 468.

²⁵ *Id.*

²⁶ *Id.*

Copying can also be shown when “the similarities between the plaintiff’s and defendant’s work are so extensive and striking as, without more, to justify an inference of copying.”²⁷ It should be noted that subconscious or unintentional copying is still an infringement for which the author may pursue legal action, as illustrated by *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*²⁸, in which the United States District Court for the Southern District of New York noted that “infringement of copyright...is no less so even though subconsciously accomplished.”²⁹

2. Distribution Right

Title 17 of the United States Code also grants exclusive distribution rights to the author in section 106(3), which allows the author to exclusively “distribute copies...of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”³⁰ This right can be infringed upon just by making a copy available for distribution, even if no actual distribution occurred, as was the case in *Hotaling v. Church of Jesus Christ of Latter-day Saints*³¹, where a church operated genealogical library had a single legal copy of a genealogical record, but made illegal copies of it for other branches of the library. The Fourth Circuit determined that “when a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the browsing public, it has completed all the steps necessary for distribution to the public.”³²

Section 109(a) of Title 17 encapsulates the “first-sale doctrine, and states that “notwithstanding the provisions of section 106(3), the owner of a particular copy...or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or

²⁷ *Id.* at 468-469.

²⁸ *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 429 F.Supp. 177 (S.D.N.Y. 1976).

²⁹ *Id.* at 181.

³⁰ 17 USCS §106(3)

³¹ *Hotaling v. Church of Jesus Christ of Latter-day Saints*, 118 F.3d 199 (4th Cir. 1997).

³² *Id.* at 203.

otherwise dispose of the possession of that copy.”³³ In *Bobbs-Merrill Co. v Straus*³⁴, the Supreme court was faced with the issue of whether an author could restrict the sale of a copy of his book because he did not feel the price was satisfactory and held that “one who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser...may sell it again, although he could not publish a new edition of it.”³⁵

3. Right to Prepare Derivative Works

Title 17 of the United States Code, grants, via section 106(2), the exclusive right to “prepare derivative works based upon the copyrighted work.”³⁶ There is a circuit split regarding what is required to constitute a derivative work. The 7th Circuit, in *Lee v. A.R.T. Co*³⁷, determined that transferring copyright art onto ceramic tiles did not amount to infringement of the right to prepare derivative works.³⁸ The court reasoned that this did not amount to transformation, and that to see otherwise would mean that “changing a painting’s frame or a photograph’s mat [would] equally [result in] a derivative work.”³⁹ Furthermore, the 7th Circuit determined that the works were not “recast” or “adapted”...or “transformed in the slightest.”

The 9th Circuit, on the other hand, did find that the transfer of copyrighted prints from a book onto ceramic tiles did amount to infringement, as found in *Mirage Editions v. Albuquerque A.R.T. Co.*⁴⁰, wherein the court stated “under the first sale doctrine...[a party] can purchase a copy...and subsequently alienate its ownership of that [copy]. However, the right to transfer applies only to the particular copy and nothing else. The mere sale of the [copy]...does not

³³ 17 USCS § 109(a)

³⁴ *Bobbs-Merrill Co. v. Strauss*, 210 U.S. 339,(1908).

³⁵ *Id.* at 350.

³⁶ 17 USCS § 106(2)

³⁷ *Lee v. A.R.T. Co.*, 125 F.3d. 580 (7th Cir 1997).

³⁸ See, *Lee v. A.R.T. Co.*, 125 F.3d. 580 (7th Cir 1997).

³⁹ *Id.* at 582.

⁴⁰ *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988).

transfer...the derivative works right.”⁴¹ The court further stated that the transfer of the copyrighted prints onto ceramic tiles was essentially the making of another version of the protected works, which amounted to the preparation of a derivative work.⁴²

vi. For what amount of time are those rights protected?

The contracts clause of the United States Constitution says that exclusive rights are granted to an author for “limited times.”⁴³ However, in *Eldred v. Ashcroft*⁴⁴, the Supreme Court noted that congress...had “extended the baseline United States copyright term to life plus 70 years...to ensure that American authors receive the same copyright protection in Europe as their European counterparts.”⁴⁵ The court further noted that “Congress’ action...[was] not in [its] province to second guess.”⁴⁶

b. BEYOND THE COPYRIGHT CLAUSE

One must look beyond the copyright clause to fully understand the basics of copyright law because not all writings by authors are copyrightable. Title 17, section 102(a) of the United States Code states that “copyright protection subsists...in original works of authorship fixed in any tangible medium of expression.”⁴⁷ Authorship and fixation have been addressed supra.

The requirement that something must be “original” in order to be copyrightable warrants some additional discussion. In *Feist Publications, Inc. v. Rural Telephone Service Co.*⁴⁸, the Supreme Court held that “original, as the term is used in copyright, means only that the work

⁴¹ *Id.* at 1344.

⁴² *Id.* at 1343.

⁴³ USCS Const. Art. I, § 8, cl. 8

⁴⁴ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁴⁵ *Id.* at 206.

⁴⁶ *Id.* at 222.

⁴⁷ 17 USCS § 102(a)

⁴⁸ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

was independently created by the author...and that it possesses at least some minimal degree of creativity.”⁴⁹ Additionally, the court stated that “the requisite level of creativity is extremely low; even a slight amount still suffices. The vast majority of works make the grade quite easily, as they possess creative spark.”⁵⁰ However, the court clarified that “copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity,” giving the example that the rural white pages directory in question, which lists subscriber information in alphabetical order “falls short of the mark.”⁵¹

i. IDEA vs. EXPRESSION

United States Code Title 17, section 102(b) clearly states that “in no case does copyright protection for an original work of authorship extend to any idea...regardless of the form in which it is...embodied in such work.”⁵² The *Feist* case explains that the “very object of publishing on...the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy.”⁵³

ii. PLOT AND CHARACTER PROTECTION

The Second circuit, in *Sheldon v. Metro-Goldwyn Pictures Corp.*⁵⁴, pointed out that out that “in its broader outline a plot is never copyrightable.”⁵⁵ The Second Circuit in *Hoehling v. Universal City Studios, Inc.*⁵⁶, recognized that “because it is virtually impossible to write about a particular...fictional theme without employing certain ‘stock’ or standard literary

⁴⁹ *Id.* at 345.

⁵⁰ *Id.*

⁵¹ *Id.* at 364.

⁵² 17 USCS § 102 (2)

⁵³ *Feist*, 499 U.S. at 350.

⁵⁴ *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2^d Cir. 1936).

⁵⁵ *Id.* at 54.

⁵⁶ *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2^d Cir. 1980).

devices...scenes a faire are not copyrightable as a matter of law.”⁵⁷ Scenes a faire are “sequences of events which necessarily follow from a common theme.”⁵⁸

There exists a reluctance, as illustrated by the Seventh Circuit in *Gaiman v. McFarlane*, to protect stock characters through copyright, lest it be “difficult to write successful works of fiction without negotiating for dozens or hundreds of copyright licenses, even though such stereotyped characters are the products not of the creative imagination but of the simple observation of the human comedy.”⁵⁹ However, the court did note that it is possible for a character to become “sufficiently distinctive to be copyrightable.”⁶⁰

In *Nichols v. Universal Pictures*⁶¹, Judge Hand, of the Second Circuit, stated that “the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.”⁶² How protected are characters? In *Warner Brothers v. Columbia*⁶³, the Ninth Circuit acknowledged that “the practice of writers to compose sequels to stories is old,” and rejected the notion that Congress “intended that the sale of the right to publish a copyrighted story would foreclose the author’s use of its characters in subsequent works for the life of the copyright.”⁶⁴ The court concludes that “even if the owners [assign] their complete rights in the copyright...such assignment [does] not prevent the author from using the characters

⁵⁷ *Id.* at 979.

⁵⁸ See, *Reyer v. Children’s Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976).

⁵⁹ *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004)

⁶⁰ *Id.* at 661.

⁶¹ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

⁶² *Id.* at 121.

⁶³ ⁶³ *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F.2s 945 (9th Cir. 1954).

⁶⁴ *Id.* at 950.

used therein, in other stories. The characters [are] the vehicles for the story told, and the vehicles [do] not go with the sale of the story.”⁶⁵

Thus it seems, based on *Nichols* and *Warner Bros v. Columbia*, that if one does not fail to sufficiently develop characters with adequate distinctness, and the characters are merely vehicles that move a story forward, then the authors would retain copyright protection in the characters and would be free to use them again in another work.⁶⁶ Moreover, if somebody were to write a story with characters “lifted lock, stock, and barrel from [another work], the “appropriation of [the] characters infringes upon the protected expression in the...characters and renders [the new work] an unauthorized derivative.”⁶⁷ Being an unauthorized derivative, “no part of the treatment can be granted copyright protection.”⁶⁸

iii. WORKS MADE FOR HIRE vs. JOINT WORKS

As the focus of this paper is works of fiction which involve multiple people in their creation, it is necessary to point out the distinction between joint works and works made for hire, as each will have some effect on initial ownership.

1. Works Made For Hire

Title 17 of the United States Code, section 201(a) explains initial ownership of a copyright as follows: “copyright in a work protected under this title vests initially in the author or authors of the work.”⁶⁹ However, section b elaborates that “in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for

⁶⁵ *Id. at 951.*

⁶⁶ See Generally, *Nichols*, 45 F.2d 119, and *Warner Bros.* 216 f.2d 945.

⁶⁷ See, *Anderson v. Stallone*, 1989 U.S. Dist. LEXIS 11109, 24-25 (C.D. Cal. APR. 25, 1989).

⁶⁸ *Id.*

⁶⁹ 17 USCS §201(a).

purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”⁷⁰

Section 101 defines a work made for hire as “(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for [one of a handful of enumerated uses].”⁷¹ For purposes of determining whether one is an employee, the Second Circuit in *Aymes v. Bonelli*⁷² noticed that “the copyright act does not define the terms ‘employee’ or ‘employment,’ and, consequently, the application of the these terms is left to the courts.”⁷³ The United States Supreme Court, in *Community for Creative Non-Violence v. Reid*⁷⁴, points out several factors based on common law agency that may be considered in determining whether a hired party is an employee.⁷⁵

This is not a paper on agency and does not discuss these factors in detail. It is worth pointing out, however, that the *Aymes* court did take notice that “every case since *Reid* that has applied the test has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes.”⁷⁶ The *Aymes* court stated that if a party is “an independent contractor when he [creates a work]...that...is not a work for higher. [The independent contractor] therefore owns the copyright as author.”⁷⁷

⁷⁰ 17 USCS §201(b).

⁷¹ 17 USCS §101.

⁷² *Aymes v. Bonelli*, 980 F.2d 857 (2d. Cir. 1992).

⁷³ *Id.* at 860.

⁷⁴ *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

⁷⁵ *Id.* at 752.

⁷⁶ *Aymes*, 980 F.2d at 863.

⁷⁷ *Id.* at 864.

2. Joint-Works

Title 17 United States Code section 201(a) states that “the authors of a joint work are co-owners of copyright in the work.”⁷⁸ Section 101 defines “joint work” as “a work prepared by two or more authors with the intention that their contribution be merged into inseparable or interdependent parts of a unitary whole.”⁷⁹ The Seventh Circuit, in *Erickson v. Trinity Theatre*⁸⁰, held that “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.”⁸¹ Further, the Second Circuit, in *Childress v. Taylor*⁸², explains that parts of a unitary whole are “inseparable when they have little or no independent meaning standing alone,” and are “interdependent when they have some meaning standing alone but achieve their primary significance because of their combined effect.”⁸³ The *Childress* court cited to the House Report and the Senate Report relating to the Copyright act of 1976 and determined that “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

⁷⁸ 17 USCS § 201(a).

⁷⁹ 17 USCS § 101.

⁸⁰ *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994)

⁸¹ *Id.* at 1071, citing Paul Goldstein, *Copyright: Principles, Law, and Practices* § 4.2.1.2, at 379 (1989).

⁸² *Childress v. Taylor*, 945 F.2d 500 (2d Cir 1991).

⁸³ *Id.* at 505.

be absorbed or combined into an integrated unit.”⁸⁴ It should be noted that “ideas, refinements and suggestions, standing alone, are not the subjects of copyrights.”⁸⁵

Once join-authorship is determined, “joint authors hold undivided interests in the work, despite any difference in each author’s contribution...thus, even a person whose contribution is relatively minor, if accorded joint authorship status, enjoys a significant benefit.”⁸⁶ “Each Author has ‘an independent right to use or license the use of the work, subject to a duty of accounting to the other co owners for any profits.’”⁸⁷ If somebody makes “non-copyrightable contributions” then they will only be able “to protect their rights through contract.”⁸⁸

IV. ANALYSIS

a. Regarding Adam

Adam’s best claim would be that he is a joint-author in the original work because he co-created the main character and developed some of the plot. Adam engaged in brainstorming and character development, and he could claim that virtually the same character and a similar plot have been used in Boyd and Charlie’s book.

This line of argument will run into some problems. The character that Adam and Boyd developed did not have a name and did not have a specific physical appearance. He simply had a background which included a deadbeat dad who abandoned him and a mother who was plagued with addiction. He was cynical but had a heart of gold. The Adam/Boyd character did not have particularly unique characteristics and his background was not uncommon. It seems that they fit squarely within the meaning of ‘stock’ according to the scenes a faire doctrine as expressed in

⁸⁴ *Id.*, Citing *H.R. Rep. No.1476 94th Cong., 2d session 120 (1976)*; and *S. Rep. No. 473, 94th Cong., 2d Sess. 103-104 (1975)*.

⁸⁵ *Trinity*, 13 F.3d at 1072.

⁸⁶ *Id.* at 1068.

⁸⁷ *Id.* at 1065, citing *H.R. Rep. No.1476 94th Cong., 2d session 120 (1976)*.

⁸⁸ *Childress*, 945 F.2d at 507

the *Hoehling* case.⁸⁹ The characters share some similarities, but the similarities spring from stereotypes and “observation of the human comedy.”⁹⁰ Such stock or stereotyped characters do not warrant protection through copyright.⁹¹ Adams characters did not involve much by way of “creative imagination”⁹² and therefore will not grant him any interest through copyright. That is the “penalty [Adam] must bear for marking them too indistinctly.”⁹³

Adam might think to argue that he should be entitled to some share because the Boyd/Charlie story has a similar plot structure as the one that he outlined and brainstormed with Boyd years ago. This argument seems weaker even than the argument based on the character development. At least, as discussed above, it is possible for a character to become “sufficiently distinctive to be copyrightable.”⁹⁴ Adam never developed his story with Boyd beyond a broad outline form. Unfortunately for Adam, the *Sheldon* court stated quite plainly that “in its broader outline a plot is never copyrightable.”⁹⁵

In Fact, Adam might be the one against whom some potential recourse may be taken. He took portions of Boyd's and Charlie's book, and reproduced them on his blog. Assuming that he is not a joint author of the characters, and assuming he did not have permission to do so, he is possibly infringing on Boyd's and Charlie's exclusive rights to “distribute copies...of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”⁹⁶ By making large excerpts of Boyd's and Charlie's book available to the public via his blog, Adam's actions look much like the action of the genealogical library in *Hotaling v.*

⁸⁹ See, generally, *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d. cir. 1980).

⁹⁰ *Gaiman*, 360 F.3d at 660.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Nichols*, 45 F.2d at 121.

⁹⁴ *Gaiman*, 360 F.3d at 661.

⁹⁵ *Sheldon*, 81 f. 2d at 54, emphasis added.

⁹⁶ 17 USCS §106(3)

Church of Jesus Christ of Latter-day Saints, where the court found the library's placing of unauthorized copies on their shelves "completed all the steps necessary for distribution to the public."⁹⁷ It seems that placing unauthorized copies on a library shelf is no more available to the public than placing unauthorized copies on a weblog that allows unrestricted public access.

Further, Adam may have created an unauthorized derivative when he transferred pages on the text onto a t-shirt. This will depend on whether the 7th Circuit approach is followed or whether the 9th Circuit approach is followed. Under the 7th Circuit approach, Adams action do not seem to create much problem for him. His action of transferring whole pages of the book onto a t-shirt seem analogous to the action reviewed by the 7th circuit in the *Lee* case, where art work had been transferred onto ceramic tiles. It was argued in *Lee* that this was a transformation that amounted to the creation of an infringing derivative work. The *Lee* court held that such transfers as art to ceramic tiles does not "amount to transformation."⁹⁸ The court held that such behavior was more akin to "changing a painting's frame or a photograph's mat."⁹⁹ Under this kind of reasoning, Adam's transfer of pages to a t-shirt should not be deemed infringing "transformation in the slightest."¹⁰⁰ On the other hand, Adam is held to a 9th circuit standard, as expressed in the *Mirage* case, which addressed facts nearly identical to the *Lee* case, then Adam may have a problem. The *Mirage* court held that such transfers are essential creations of a new, unauthorized version of the protected work, which amounts to infringement.¹⁰¹

b. Regarding Boyd and Charlie

This paper assumes that each has contributed sufficiently to enjoy the status of author and that they meet all the requirements that the courts impose before finding that a work is a "joint

⁹⁷ *Hotaling v. Church of Jesus Christ of Latter-day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

⁹⁸ *Lee*, 125 F.3d at 580.

⁹⁹ *Id* at 582.

¹⁰⁰ *Id.*

¹⁰¹ *Mirage*, 856 F.2d at 1343.

work.” Regarding each author’s claim that his contribution to the work and its success is somehow greater than that of the other, thus warranting a greater share, one must turn again to the *Trinity* case which clearly states that “joint authors hold undivided interests in the work, despite any difference in each author’s contribution.” Thus each will be an equal owner of an undivided interest in the whole work. Even if one, or the other, could prove that his contribution is vastly greater in quantity or quality, “even a person whose contribution is relatively minor, if accorded joint authorship status, enjoys [the] significant benefit [of equal status].”¹⁰² Thus, although Boyd contributed actively to about one-third of the book and Charlie did the bulk of the work on the remaining two-thirds, their share will be equal under the law.

Regarding their desires to write individual derivatives using the characters from their first book, *Childress* stands for the principle that “each author has ‘an independent right to use or license the use of the work.’”¹⁰³ This seems to mean that Boyd and Charlie would be free to use their characters independently. After all, courts, as indicated by the Ninth Circuit’s decision in *Warner Brothers v. Columbia* recognize that “the practice of writers to compose sequels is old” and writers may “use...characters in subsequent works” seemingly independent of the originally copyrighted story.¹⁰⁴ However, as for their desire to pursue future derivative works completely independent on one another, they are still joint-authors in the characters. The great detail in their character development lends itself to the modern trend to protect characters “sufficiently distinctive.” Therefore, Boyd and Charlie will be “subject to a duty of accounting to the other co

¹⁰² *Id.* at 1068.

¹⁰³ *Id.* at 1065, citing H.R. Rep. No.1476 94th Cong., 2d session 120 (1976).

¹⁰⁴ *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F.2s 945, 950 (9th Cir. 1954).

owners for any profits.”¹⁰⁵ Thus, it seems that they will not be free to pursue separate derivative works completely independent of one another.

c. Regarding Boyd's Personal Assistant

Boyd's personal assistant might feel entitled to a share in the work, as she participated in the writing of it. Moreover, she might feel even more entitled to share in the success of the work, because Boyd delegated some of the creative expression to her. It seems, at first glance, that she has contributed original and copyrightable work to the book. However she was an employee of Boyd. It seems that she will be barred from any claim to ownership based on the works made for hire doctrine. Works made for hire are defined as any “work prepared by an employee within the scope of...employment.”¹⁰⁶ She was Boyd's personal assistant. It seems obvious on its face that the scope of her employment extended to assisting him in this manner. He was busy and had responsibilities. He delegated some to her. That seems to be consistent with her employment. If a court were to find that the personal assistant was an independent contractor, then she would own the own copyright as the author of that portion on which she worked. ¹⁰⁷The *Aymes* court observed that when analysis of employee status is performed under the briefly aforementioned Reid test, courts will find that a person is an independent contractor and not an employee if the employer fails to offer benefits and pay social security taxes on behalf of the other.¹⁰⁸ However, here Boyd paid an hourly wage, offered benefits and paid social security taxes. While payment of such is not dispositive, it is another factor suggesting that the personal assistant was an employee. If so, then Boyd, “the employer...for whom the work was

¹⁰⁵ *Id. at 1065, citing H.R. Rep. No.1476 94th Cong., 2d session 120 (1976).*

¹⁰⁶ 17 USCS § 101.

¹⁰⁷ *Aymes*, 980 F.2d at 864.

¹⁰⁸ *Aymes*,

prepared is considered the author.”¹⁰⁹ It is likely that unless Boyd and his assistant “expressly agreed otherwise in a written instrument signed by them, [Boyd] owns all of the rights.

d. Regarding Dennis, Erin and Faith

Neither Dennis nor Faith will likely have any legitimate claim to the work in question. One may safely assume from the facts that neither Dennis nor Faith are authors, in that neither one is an “originator” or a “maker” of anything which can be said to have been contributed.¹¹⁰ All either can be said have contributed are general ideas and facts regarding the setting of Chicago, in the instance of Dennis, and regarding the human psyche and character development in the instance of Faith. Facts are not created.¹¹¹ Moreover, facts are useful knowledge. In the *Feist* case, the Supreme Court pointed out that it is important to publish in order to communicate useful knowledge to the world.¹¹² It would “frustrate” the point if “useful knowledge could not be used without incurring the guilt of piracy.”¹¹³

Moreover, Title 17, section 102(2) states clearly that “in no case does copyright protection...extend to any idea”¹¹⁴ Additionally, neither Dennis nor Faith contributed a “writing” in that their ideas were never given any “visible expression.”¹¹⁵ Thus, neither Dennis nor Faith is a party to whom the copyright clause is meant to extend any ownership rights.¹¹⁶

Regarding Erin, the analysis is simple. Erin has only contributed what can be classified as refinements and suggestions. The *Trinity* court clearly stated that “ideas, refinements and

¹⁰⁹ 17 USCS § 201(b).

¹¹⁰ *Burrow-Giles*, 111 U.S. at 58.

¹¹¹ See, generally, *Int'l News Service v. Assoc. Press*, 248 U.S. 215 (1918).

¹¹² *Feist*, 499 U.S. at 350.

¹¹³ *Id.*

¹¹⁴ 17 USCS § 102 (2)

¹¹⁵ *Burrow-Giles*, 111 U.S. at 58..

¹¹⁶ USCS Const. Art. I, § 8, cl. 8

suggestions, standing alone, are not the subjects of copyrights.”¹¹⁷ Thus, Erin, along with Dennis, Faith and any other parties who may have contributed to the work but fell short of the requirements that would have granted them joint-author status, is out of luck. As the *Childress* court stated, those who make do not make copyrightable contributions should seek “to protect their rights through contract.”¹¹⁸ This can be done through collaboration agreements or other private contracts.

V. CONCLUSION

This paper is not exhaustive, neither in its treatment of copyright law, nor in its illustration of the confusion that may exist when multiple parties all participate in some way in the creation of a work of fiction. It is the hope of this author that this paper will assist all who participate in the creation of fiction to gain an initial understanding of the creation and allocation of copyright protection in fiction writing so that they may be aware of their rights and take necessary measures to protect their interests.

¹¹⁷ *Trinity*, 13 F.3d at 1072.

¹¹⁸ *Childress*, 945 F.2d at 507