Heavy Metal Alloys: Unsigned Rock Bands and Joint Work

Michael S. Young
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UNSIGNED ROCK BANDS AND JOINT WORK

MICHAEL S. YOUNG*

INTRODUCTION: THIS IS MY SONG

In the early stages of forming a rock band, it is common for almost every aspect of the group's existence to remain in mercurial flux. Members come and go, musicians may experiment with several different musical styles and, perhaps most importantly, the power structure changes. The volatile environment often means that the creative process between members of forming bands can become quite unorthodox, and in the process, collaborators often fail to reach clear agreements about what rights arise from each member's contributions. When a song defies the expectations of its creators by attaining popularity, soured relationships and litigation are likely to follow.

This article explores the current topography of the ever-changing legal terrain upstart musicians must navigate when asserting a right in a "joint work" about which there is no explicit agreement. Part I presents a story—culled partly from the biographies of some of heavy metal's most successful bands, as well as the author's own experiences—illustrating a common creative environment for rock stars in the making. Part II offers a brief bird's eye view of copyright, generally, and joint work, specifically, to orient readers to the topic matter. Analysis turns in Part III to a cross-jurisdictional survey of the element at the heart of most joint authorship disputes—shared intent of putative coauthors. Part IV continues in the same fashion by examining the evolution of court-imposed requirements as to the type and amount of a contribution one must make in order to be an author. Part V presents a critique of the deficits of the current modus ope-

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1. SCORPIONS, This is My Song, on FLY TO THE RAINBOW (RCA 1974). The first album recorded by Scorpions with legendary lead guitarist Ulrich "Uli Jon" Roth, following the departure of Michael Schenker, another of metal's most revered lead guitarists.

2. Many styles of music would have sufficed for the purpose of this illustration. Heavy metal was chosen solely because of the author's enduring affection for the classic era of heavy metal as a musical style and cultural movement.

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randi of the federal courts with regard to joint authorship and offers some suggestions for enhancing fairness and responsiveness to the creative reality underlying many joint works.

I. QUEST FOR FIRE: BAY AREA THRASH CRASH LANDS IN QUEENS

As the heavy metal scene withered around them in the winter of 1993, Pete Dominici, a guitarist known for unleashing hellish fury on a Flying V, and Earl "Skinz" Mahoney, a singer with the voice of a psychotic banshee, refused to accept reality. When a representative from a small record label invited them to New York, so that "maybe something could work out," the pair ditched their flat in El Cerrito and hopped a bus for the Big...

3. IRON MAIDEN, Quest for Fire, on PIECE OF MIND (EMI 1983). The group's fourth studio album, it was second record to feature lead singer Bruce Dickinson and the first to feature former Trust drummer Nicko McBrain, both of whom remain active members of the band today. The album's lead single, "The Trooper," recounts events of the Crimean War.

4. "Thrash" is a subgenre of heavy metal originating in the San Francisco Bay Area circa 1982 and heavily influenced by the musical complexity of so-called "New Wave of British Heavy Metal" (NWOBHM) bands (such as Diamond Head, Savage, and Iron Maiden) blended with the raw speed and attitude of 1970s punk rock (the Misfits and the Sex Pistols in particular). GARY SHARPE-YOUNG, METAL: THE DEFINITIVE GUIDE 90 (Joel Melver ed., 2007). Successful thrash bands include Anthrax, Exodus, Megadeth, and Slayer. Metallica, the most popular group to emerge from the thrash movement, has won eight Grammy Awards and in 2008 broke a four-way tie with The Beatles, U2, and Dave Matthews Band to become the only band in history to debut five consecutive albums at #1 on the Billboard Top 200. Ben Sisario, Metallica Tops Charts, N.Y. TIMES, Sept. 18, 2008, available at http://query.nytimes.com/gst/fullpage.html?res=9502E1D81039F93BA2575AC0A96E9C8B63. Metallica is currently the fifth largest selling act in history. Edna Gunderson, Eminem Has All the Moves, USA TODAY, Jan. 6, 2011 at 2d.

5. A guitar produced by Gibson originally in 1958, named for its "V" shaped body. Discontinued only a year later because its advanced design did not appeal to consumers, the instrument enjoyed a revival when blues player Albert King took to it, followed by Jimi Hendrix. The "V" was reissued in 1967, and throughout the 1970s became primarily associated with heavy metal, thanks to players like K.K. Downing of Judas Priest and Michael Schenker of Scorpions and UFO. The design is now a permanent part of the Gibson line and has been duplicated by numerous other manufacturers. See ZACHARY FJESTAD & LARRY MEINERS, THE GIBSON FLYING V 7, 9, 11, 23, 28, 53, 102 (Blue Book 2007).

6. For the purpose of this note, assume a court would not find that the "work for hire" doctrine applies.
Apple. Dominici planned to write an album based on Norse mythology,\* so he convinced Skinz the band should be called Mjöllnir’s Wrath.

The guys slept in the Astoria bus station for two nights until Eddy Dadashian, the record label representative, arrived and drove them to a dingy, cold warehouse in South Jamaica, Queens. The next morning, Pete got a job at a convenience store and received an advance of a dozen packets of lunchmeat. Skinz contributed by donating blood for booze money and finding a functioning TV in a nearby dumpster.

Near dusk, Eddy showed up with a drum kit, a guitar amp, a four track audio recorder, and two more stumbling-drunk 23-year-olds: Bjorn Haglund and Walter Cristo. Haglund was well known as a drummer in his native Sweden, but had not played a single gig since moving to New York. Cristo, a classical pianist from El Paso, had recently turned to playing bass and listening to metal. Both spent more time with mind-altering chemicals than with their music.

The now-complete Mjöllnir’s Wrath fell into a steady rhythm. Skinz slept by his TV, rousing only to drink. Haglund panhandled and complained. Cristo argued with his long-distance girlfriend over a payphone. Dominici, however, began to write and record guitar riffs in the early mornings before his shifts at the convenience store. The riffs were not complete songs, just short cacophonies of galloping guitar mini-assaults, all in the same key and tempo. They were not groundbreaking, but were not identical to any existing work.

\* Not a particularly fresh theme for heavy metal music. Early metal bands like Manowar pioneered the use of Norse mythology in heavy metal lyrics, and the fascination with Scandinavian lore continues to this day, the torch having been passed to thrash-revival bands like Canadian quartet 3 Inches of Blood. “Viking Metal” is now even considered a sub-genre of metal; it is typified by bands such as Amon Amarth, Bathory, and Enslaved. The convergence of Norse legends and heavy metal is also highlighted to glorious and often hilarious effect in the 2009 video game release Brutal Legend, in which the central character navigates a fantasy world inspired by Viking myths and heavy metal album artwork, slaying enemies using an electric Flying V guitar. Seth Scheisel, Where Metal, in Its Infinite Variety, Reigns, N.Y. TIMES, Oct. 19 2009, at CI.

8. Pronounced “myöll’nr.” Mjöllnir is the name of hammer belonging to Thor, the Norse god of thunder. It was made for him by dwarves. See DAVID LEEMING, THE OXFORD COMPANION TO WORLD MYTHOLOGY 266-67 (2005).

9. Not unlike “The Music Building,” where Metallica and Anthrax lived and rehearsed while recording their respective debut albums. Metallica guitarist Kirk Hammett described the experience: “I found a piece of foam on the ground, and I used that as my mattress. . . . I remember washing my hair in the sink using cold water, it was brutal. . . . Anthrax was really nice and helped us out a lot. They gave us a fridge and a toaster oven.” VH1 Behind The Music: Anthrax (VHI television broadcast Mar. 10, 2002); see JOEL MCIVER, JUSTICE FOR ALL: THE TRUTH ABOUT METALLICA 106-07 (2004).

10. The sole ingredient of “loser’s lunch,” a term coined for the bologna-on-hand sandwich that sustained Metallica during their stay in New York while recording their debut record, Kill ‘Em All. VH1 Behind The Music: Anthrax (VHI television broadcast Mar. 10, 2002).
Tensions began to rise. By the middle of the third week, Dominici decided to abandon ship. “I’m gonna go start an alt-rock band with some actual musicians, instead a bunch of lazy, self-absorbed drunks!” he shouted. He stormed out to catch the next bus to Seattle, leaving behind the tapes containing his riffs.

When Eddy learned that Dominici had split, he was not pleased. “This is not your dime, guys,” he told the remnants of the band. “You have 48 hours to put something together or we’re going to have a problem.”

Cristo took the lead. “Eddy scares me; let’s just toss something together and get out of here.” Cristo knew his way around a four-track recorder; he cut and pasted pieces of tape so Dominici’s riffs sounded coherent together. The end result was a five-minute “guitar doodle.” He then plugged in his bass and recorded a bass line, simply doubling the root notes of Dominici’s guitar chords.

Getting the drums on tape proved to be time consuming. Haglund was morbidly hung over; after several false starts, he laid down an uninspired, sloppy beat over the riffs.

Cristo then realized Skinz would never be able to perform vocals sober; after plying him with liquor, Cristo propped him up in front of a microphone. “Just do what comes naturally,” he said. Skinz promptly dropped trou and tied a blanket around his neck. “I meant vocally. Okay, remember, the plan was to do songs about the Norse gods.” Skinz gestured boldly and fell down, shouting incoherently. Cristo pressed the record button. Among the lyrical jewels he recorded were:

“Loki doesn’t wear no pants!
He took my cigarettes and my bike pump!
Where’s my hands, chicken?
*To Serve Man...* it’s a cook book!”

Cristo played the song back for the other two. Skinz fell asleep about a minute in, but Haglund listened attentively through his alcoholic haze. “It’s still awful,” he said. “You need a quiet section before each chorus. Just

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11. Alternative rock, a style of rock originating in Seattle circa 1989, is characterized by introspective lyrics and an eschewing of the technical prowess commonly associated with metal. Thomas Harrison, “Empire”: Chart Performance of Heavy Metal Groups, 1991-1992, 30 Pop. Music & Soc. 197, 199 (2007). The sudden mainstream popularity of alternative rock is often credited with signaling the end of heavy metal, but the genre’s popularity has in fact endured rather well. See id. at 198 (heavy metal/hard rock occupied one of the top two positions in the *Billboard 200* for all but three years between 1990 and 2007).

12. *The Twilight Zone: To Serve Man* (CBS broadcast March 2, 1962). The title of this episode, based on a 1950 short story by Damon Knight, is a play on the double meaning of the work “serve” in English. In the episode, humans translating an alien text entitled “To Serve Man” learn much too late that it is not a manual on philanthropy, but a collection of recipes.
drums and bass. Then it can go back into that heavy thing. And why can’t you take the ‘Loki doesn’t wear no pants’ line and like loop it four times to make the chorus sound right? It’s a complete mess right now; you can’t tell where anything starts or ends.”

“Anything else?” Cristo asked, hoping his Swedish critic would note the sarcasm.

“Yeah! Your bass playing stinks! You’re just copying the guitar; that’s not metal!” Haglund proceeded to sing along to the tape, his voice moving in harmony (thirds) with the existing bass line. “Like that! Fix it!” he insisted.

Cristo was annoyed by Haglund’s overbearing critique, but decided to give the ideas a shot anyway. He re-recorded the bass line employing a harmony line similar to the one Haglund had sung, making slight alterations using the Baroque counterpoint theory he had picked up before dropping out of music school at Baylor.

Cristo agreed that the result was superior and decided to try out Haglund’s other ideas as well. The repetition of the Loki phrase could work for a chorus, and some kind of drum/bass pre-chorus might break up the monotony. Cristo worked through the tedium of fixing the timing of Haglund’s drumming and copied the Loki line and pasted it four times over each of the choruses. Around midnight, he took out the tape, scribbled “Mjöllnir’s Wrath” on it in marker, and played it again for Haglund, who liked it. “I have an idea,” Haglund suggested. “We’ll keep the Norse theme. Let’s call it ‘Kicking Asgard!’ for my Viking ancestors.” Cristo chuckled.

Eddy arrived at about two in the morning, and they played the tape for him. As Eddy listened, a smile crept across his face. “It’s so bad, it’s almost good... but I don’t think I can use it. We’re not making any money off metal right now; the whole label is going ‘alt rock.’ Now clear out so we can use the space.”

Before they left that night, Haglund told Cristo he wanted to keep the tape. “I don’t care,” Cristo told him. “But if you do anything with it, just make sure to let people know I worked on it too.”

Haglund just laughed, saying, “That won’t be an issue.”

That night was the last any of the members of Mjöllnir’s Wrath ever saw one another. Pete Dominici formed a grunge band in Washington, but moved back to New York in 2003, where he channeled his anger into in-
resulting customers at an espresso shop. Walter Cristo moved to Chicago and played bass for a jazz combo, spending all his money in riverboat casinos. Earl “Skinz” Mahoney suffered a terminal cardiac arrest at his parents’ house in Sparks, Nevada in 2002. Haglund fared better; he wound up in Los Angeles, co-producing a sketch comedy television program.

One afternoon, as Haglund was pitching ideas for the show, he remembered that he still had the recording of “Kicking Asgard.” He played it for the other producers, who loved it. That week, the show’s writers penned a scene featuring a band called Mjöllnir’s Wrath performing a re-recorded version of “Kicking Asgard,” also mentioned by name in the sketch.14

The sketch aired the following Saturday night and became an instant hit. The sketch was credited for saving the embattled show, which was promptly renewed for another season. Soon, Pete Dominici, Walt Cristo, and relatives of Earl “Skinz” Mahoney heard it, and each retained lawyers who began to research the laws of the various jurisdictions where suits might be filed.

II. CRASH COURSE IN BRAIN SURGERY15: A JOINT COPYRIGHT PRIMER

The specific rights of copyright holders are spelled out in the Copyright Act,16 but the Constitution itself authorizes Congress to afford creators such protections.17 The founders recognized that America’s long-term economic prosperity and advancement was dependent on promoting “the progress of science and useful arts,”18 which necessitates securing exclusive rights to creators. The rights to which copyright owners may lay exclusive claim are reproduction, adaptation, distribution, display, performance, and in the case of sound recordings, public performance by means of digital audio transmission.19

14. Because fair use is not the focus of this note, assume that a court would find that a fair use defense against infringement could succeed on these facts, due to the commercial nature of the use and the fact the song was used in its entirety. See 17 U.S.C. § 107 (2006). It is also assumed that the re-recorded version is identical to the original in arrangement, so that the question is not one of an implied license to create derivative work, but rather actual infringement of the performance right in the original song.

15. BUDGIE, Crash Course in Brain Surgery, on BUDGIE (Kapp 1971). This groundbreaking Welsh group influenced a number of successful American thrash bands, but never attained massive popularity, possibly due to peculiar song titles including Nude Disintegrating Parachute Woman and Hot as a Docker’s Armpit. GARY SHARPE-YOUNG, METAL: THE DEFINITIVE GUIDE 30 (Joel McIver ed., 2007).


18. Id.

A. The Subject Matter of Copyright

In order for a work to be copyrightable, it must be a work of authorship, it must be fixed in a tangible medium, and it must be original.\textsuperscript{20} Authorship, by itself, only requires that the creation "owe its origin" to the maker.\textsuperscript{21} Authorship has tended not to be as highly contentious in infringement cases brought in regard to putative joint works as the other elements of copyrightability, especially the originality requirement. This is because authorship and originality dovetail— "a work is not the product of an author unless it is original."\textsuperscript{22}

The fixation requirement limits the Act’s applicability to expressions of ideas in tangible form rather than the ideas themselves. Courts have treated this as a Constitutional mandate, because in order to "promote the progress of science and useful arts,"\textsuperscript{23} ideas must be recorded. That no copyright subsists in the mere narration of ideas is "the most fundamental axiom of copyright law."\textsuperscript{24} Simply making a suggestion that ultimately becomes part of the work is not adequate fixation.\textsuperscript{25}

Originality, finally, is a Constitutional requirement—"the \textit{sine qua non} of copyright . . . [the] touchstone."\textsuperscript{26} The originality requirement is the focus of the lion’s share of contention; no shortage of disputes over copyrightability has turned exclusively on this element.\textsuperscript{27} But despite its exalted role in the determination of copyrightability, the bar for originality “is set extremely low.”\textsuperscript{28} Accordingly, “a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.”\textsuperscript{29}

20. 17 U.S.C. § 102 (a) (2006) (declaring that the Copyright Act extends copyright protection only to "original works of authorship fixed in any tangible medium of expression").
27. \textit{E.g.} \textit{Id.} at 365 (noting that where one publisher of a telephone directory produced a volume in which it merely copied many of its records from another publisher, its final product was not copyrightable because it lacked the element of originality).
28. \textit{Id.} at 345.
29. \textit{Id.}
B. Co-ownership of a Copyright

Section 101 of the Copyright Act defines a joint work as one “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” A strictly literal interpretation arguably requires only a showing that two or more authors made contributions, and that they intended that the contributions be merged into a unitary whole, in order to find that a work has been authored jointly. However, each of the circuit courts of appeals discussed in this article has refused that interpretation and has imposed different standards.

The Second Circuit, for example, has held that to require only intent to merge contributions would be an inadequate standard, as it may unjustly reward either persons who do not make a substantial contribution to the work, or persons who are attempting to defy the will of an intended sole author by bootstrapping their way into authorship. The court has instead interpreted the statute to require 1) that putative authors make contributions that are independently copyrightable and greater than de minimis in nature, and 2) mutual intent that rests not on whether contributors intended to merge respective contributions into a single whole, but rather on “how the putative joint authors regarded themselves in relation to the work.”

The Seventh Circuit has in many respects adopted the Second Circuit’s elevation of the applicable standard from one requiring only intent to merge contributions. The court essentially applies the same two basic requirements for a showing of joint authorship: 1) only one who has made an independently copyrightable contribution may claim authorship, and 2) the putative coauthors must intend not only that their contributions be merged, but that they intend to be coauthors of a joint work. The Seventh Circuit has distinguished itself from other circuits most notably by recently crafting an exception to the requirement that all coauthors must make independently copyrightable contributions.

31. See Thomson v. Larson, 147 F.3d 195, 200 (2d Cir. 1998) (citing and approving the court’s reasoning in Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991), in which the court concluded that limiting co-authorship analysis to the plain language of the statute “would extend joint authorship to many persons who are not likely to be within the contemplation of Congress”).
32. Childress, 945 F.2d at 508.
33. Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1066, 1068–69 (7th Cir. 1994). (implicitly approving the district judge’s use of the two-part joint authorship test set forth by the Second Circuit in Childress and expounding its strengths).
34. See id. at 1068–67.
35. Gaiman v. McFarlane, 360 F.3d 644, 658–59 (7th Cir. 2004).
Finally the Ninth Circuit has determined that a joint work has three basic components: 1) that the work in dispute be a copyrightable one, 2) that there be two or more authors, and 3) that the authors intend their contributions be merged into a unitary whole. The Ninth Circuit also applies the "independently copyrightable" requirement to contributions, but explained it as a statutory requirement rather than a judicially imposed elevation of the statutory standard. Chief among the unique features of the Ninth Circuit's analysis is that the "intent" requirement includes an inquiry into the "audience appeal" of the putative coauthor's contribution.

A much more detailed exploration of the courts' approaches to copyright in joint musical works follows, applying the law of the several jurisdictions to the hypothetical illustration from Part I to demonstrate the varied approaches and their implications for collaborators.

III. MASTER OF PUPPETS: COLLABORATION AND DOMINATION IN JOINT WORK "INTENT" ANALYSIS

Section 101 of the Copyright Act requires that coauthors form "the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." The text of the statutory definition could easily lend itself to a lower standard, based only on the intent to contribute, and merge contributions into a unitary whole. Nonetheless, as discussed above, courts are in agreement that more must be required (even if they have not always agreed on the reasons why more is required).

For the purpose of contrasting the varying approaches of the courts to the complex question of intent within joint work, the following section first examines the current evidentiary tests employed by the courts in assessing whether collaborators shared intent of a type warranting status as coauthors, and then turns to a more detailed discussion of the types of evidence considered probative under those tests. The three circuit courts of appeals in the scope of this note have enumerated lists of evidentiary categories that are not entirely congruent with one another. To simplify the discussion, they have been reorganized and classified below as either "subjective"
indicia of intent or "objective" indicia of intent. The final subsection below examines an oft-overlooked element of the courts' intent analysis—the question of whether requisite intent must exist contemporaneously with the act of contribution or whether intent is legally valid even when it forms subsequent to the collaboration.

A. Choosing an Intent Test

Courts have struggled for some time to clearly enunciate the nature of the intent that coauthors must form and share in order to create a joint work. Though Section 101 on its face requires only the intent that "contributions be merged,"43 courts have held that standard to be inadequate. Indeed, the Second Circuit's decisions in Childress v. Taylor and Thomson v. Larson advance an unequivocal doctrine that an approach "more stringent than the statutory language would seem to suggest is required."44 This is because "equal sharing of rights should be reserved for relationships in which all participants fully intend to be joint authors."45 The court justifies this approach on the grounds that mechanical application of the letter of the statute would extend joint author status to "persons who are not likely to have been within the contemplation of Congress."46

The Seventh Circuit has likewise framed the issue in terms of two competing intent tests for joint authorship. It describes one requiring only the intent to collaborate and merge contributions into a single work (which the Seventh Circuit calls the "collaboration test")47 and another based on the intent to be joint authors (which it refers to as the "Childress" test, referencing the landmark Second Circuit decision).48 Ultimately, the Seventh Circuit rejected the "collaboration alone" standard on the grounds that it would frustrate the Copyright Act's goal of promoting the "Progress of Science and the useful Arts," since creators would have a disincentive to seek input from colleagues if they risked losing sole authorship.50

44. Thomson v. Larson, 147 F.3d 195, 200 (2d Cir. 1998); see Childress v. Taylor, 945 F.2d 500, 507 (2d Cir 1991).
45. Childress, 945 F.2d at 509.
46. Id. at 507.
47. Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1067 (7th Cir. 1994).
48. 945 F.2d at 500.
49. Erickson, 13 F.3d at 1067.
50. Id. at 1068–69. The author humbly submits that the Seventh Circuit was less transparent in its interpretation of 17 U.S.C. § 101 than was the Second Circuit. The Second Circuit openly declared that a strict literal reading of the statute was inadequate as a standard because it would distribute the reward of authorship too broadly. See Thomson, 147 F.3d at 200. The Seventh Circuit, on the other hand, asserts that "the statute itself requires that there be an intent to create a joint work." Erickson, 13 F.3d at
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The Ninth Circuit has approached the issue somewhat differently, seeing the “intent” question as merely a guidepost for reaching the ultimate question of authorship. Steered more by the use of the word “author” in Section 101 than by the word “intent,” the court nonetheless reaches the same conclusion that the so-called “collaboration alone” test would be illogical to apply because if intending to make a creative contribution to a work was adequate to demonstrate authorship, “so many people might qualify as an ‘author’... that that test would not distinguish one from another.”

In light of these concerns that a standard requiring only intent to contribute and see the contributions merged into a unitary whole would reward undeserving individuals, discourage collaboration, and undermine the concept of authorship, the courts have each adopted overlapping (though not congruent) means of finding the “intention” required by Section 101.

In the Second Circuit, it is the “intent of both participants in the venture to regard themselves as joint authors” that controls, not merely that they intend to merge respective contributions into a unitary whole. The court’s approach thus authorizes a broad inquiry into both the subjective and objective indicia of intent, including what decision-making authority or control each contributor exercised, billing or listing of credits, written agreements with third parties, whether the parties demonstrated any understanding of the distinguishing characteristics of the joint author relationship, and a catch-all category considering any additional evidence of conduct consistent with intent. Finally, the court has held that the 1976 Copyright Act’s legislative history requires that the intent must have formed “at the time the writing is done.”

1068. The court frames two possible interpretations of the statutory language: one requiring intent to collaborate and one requiring intent to create joint work, and then selects the latter. Neither follows the grammatical construction of Section 101, where the “intention” attaches to the act of merging, not to the collaboration alone, nor the nomenclature of the final work as either “sole” or “joint.”

51. See Aalmuhammed v. Lee, 202 F.3d 1227, 1234-35 (9th Cir. 1999) (framing its analysis of intent in terms of the legal standards of “authorship,” and acknowledging that this approach, while different than that of the Second and Seventh Circuits, mandates the same result—rejection of any test resembling the “collaboration alone” standard).

52. Id. at 1233.


54. See Thomson v. Larson, 147 F.3d 195, 202-05 (2d Cir. 1998); Childress at 508.

55. Childress, 945 F.2d at 505 (quoting H.R. REP No. 1476, 94th Cong., 2d Sess. 120 (1976)); see Edward Marks Music Corp. v. Jerry Vogel Music Co., Inc., 221 F.2d 569, 570 (2nd Cir. 1955), rehearing denied June 8, 1955. The court found requisite intent in that case, even though the composer of a solo piano piece had no idea his piece would be subsequently merged with words by a lyricist he had never met. However, because he transferred the rights to a publishing company, the court instead looked to whether the publisher, as owner of the copyright, had the requisite intent concurrent to collaboration rather than the original author.
The Seventh Circuit, having rejected the collaboration test, has been somewhat less clear about the precise standard it has adopted. Within a single opinion, the court alternatively explained the applicable intent standard as 1) intent that respective contributions be merged, 2) intent to create a unitary work, and 3) mutual intent to create a joint work, referencing three colossally different concepts as though they were interchangeable. Most recently, the court has explained that "the focus is on the parties' intent to work together in the creation of a single product, not on the legal consequences of that collaboration." In the same opinion, however, the court declared that individuals are coauthors only where they "intend to create joint work." These attempts at enunciating the intent standard are difficult to reconcile, because collaborators may intend to create a "single product" without intending that it ultimately be a "joint work." This is particularly vexatious because the term "joint work" has a specific legal meaning, and the court disavows any standard that requires parties to have actual knowledge of the legal consequences of authorship. However difficult it may be to ascertain the controlling question in the Seventh Circuit, the court has explicitly approved of the Second Circuit's Childress approach and has considered the same types of evidence probative.

The Ninth Circuit, effecting its own nuanced take on the Second Circuit intent test, has endeavored to create a functional multi-factor test, with the qualifier that the factors "cannot be reduced to a rigid formula, because the creative relationships to which they apply vary too much." That said, the court has synthesized its own prior decisions, as well as those in the Second and Seventh Circuits and held that most of the considerations probative of intent fit into one of three categories: 1) the amount of control a putative coauthor exerts over the creative process, 2) any objective manifestations of intent to share authorship, and 3) whether it is possible to determine the "audience appeal" that the putative author's contribution added to the work as a whole.

57. Janky v. Lake Cnty. Convention & Visitors Bureau, 576 F.3d 356, 362 (7th Cir. 2009); see Erickson, 13 F.3d at 1068-69.
58. Janky, 576 F.3d at 361.
60. Janky, 576 F.3d at 362.
61. Erickson, 13 F.3d at 1068-69 (7th Cir. 1994).
62. Aalmuhammed v. Lee, 202 F.3d 1227, 1235 (9th Cir. 1999).
63. Id. at 1234.
With these various tests and their fundamental principles in mind, we now turn to the ways courts apply these tests to specific factual evidence, and to how the law might be applied to our friends in Mjöllnir's Wrath.

B. Subjective Evidence of Intent

Because intent is by its nature a subjective mental state, courts often begin their "mutual intent" analysis by attempting to ascertain the mindset of the players. In contemplation of the group's psyche at the time of the collaboration, courts have regularly relied on evidence pertaining to 1) who exerted control of the creative process and 2) whether the collaborators had any understanding of the coauthor relationship.

1. Controlling the Creative Process

Courts reaching the question of joint authorship have considered the ability to exert control over the final creative product a key indicator of the requisite intent in joint authorship for nearly a century. The fact that a particular individual has dominated the process has the effect of enlarging the import of subjective intent analysis because where there is a dominant author, "[i]t is only where the dominant author intends to be sharing authorship that joint authorship will result." In the case of "traditional" musical collaborations, such as where one individual writes music and another writes the words, this factor may warrant "less exacting consideration," presumably because courts are confident in inferring intent to be coauthors in those contexts. By the same reasoning, then, a less traditional creative setting makes the search for a "mastermind" who "superintends the work by exercising control" is even more crucial. The Ninth Circuit has even gone so far as to say that the "control" factor will often be the most important. Yet despite its importance, that court has acknowledged that it is often difficult to determine exactly who is

64. See Maurel v. Smith, 271 F. 211, 214–15 (2nd Cir. 1921) (citing the claimant’s contractual right of final approval on all changes to an opera as powerful evidence of the requisite authorship intent); Thomson v. Larson, 147 F.3d 195, 202–03 (2nd Cir 1998) (“An important indicator of authorship is a contributor’s decisionmaking authority over what changes are made and what is included in the work”).


66. See Id.

67. Aalmuhammed, 202 F.3d at 1234; See Childress, 945 F.2d at 508.

68. Aalmuhammed, 202 F.3d at 1234; Richlin v. MGM, 531 F.3d 962, 970 (9th Cir. 2007).
in “control” of a given creative process, but has suggested that it may be the person most directly responsible for the financing.69

What precisely constitutes control of the creative process has proven to be a definitional challenge for the courts. While it may be said that anyone who successfully manages to see his input realized in the final product has exerted some “control,” courts have held that there is an important difference between offering suggestions that are accepted by another party and issuing actual demands.70 Though it is clear that this critical partition exists, courts have provided little guidance in locating it.

Within the context of songwriting, the Seventh Circuit in Janky v. Lake County Convention and Visitors Bureau recently held that a band member “wielded considerable control over what the song finally looked like” because he recommended revising the song’s lyrics.71 The court later characterized the recommendations as “demands” rather than suggestions—at least nominally differentiating the situation from those in which other courts have held that suggestions are not acts of control. However, his changes only “accounted for 10 percent of the lyrical input,” and the musical structure was already in place by the time he was asked for feedback, so it is unclear how or why he was in control.72

Courts have held that one does not relinquish control and thereby lose status as sole author merely by accepting the suggestions of another collaborator.74 But it is at least also arguable that the fact that an individual’s suggestion is included in the work at least supports an inference that the person exerted some kind of control—perhaps particularly in a case where little is known about the true power dynamic between collaborators.

Attempting to apply the “control” factor to the members of Mjöllnir’s Wrath from the illustration in Part I, the irony of the courts’ enhanced focus  

69. Aalmuhammed, 202 F.3d at 1232 (internal citation omitted) (citing a film critic’s argument that “the person with creative control tends to be the person in whose name the money is raised”). In the context of film alone, the court notes that such a person could be any one of a large number of individuals: the star, director, producer, cinematographer, even an animator or music composer.

70. See Id. at 1234 (making “helpful recommendations” that are accepted is not an act of authorship, unless the other party is bound to accept them); Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1072 (7th Cir. 1994) (authors should not be subject to “the threat that accepting suggestions from another party might jeopardize the author’s sole entitlement to a copyright); compare with Janky v. Lake Cnty. Convention & Visitors Bureau, 576 F.3d 356, 359, 362 (7th Cir. 2009) (collaborator’s “recommendations” were actually “demands”).

71. Janky, 576 F.3d at 362.

72. Id. at 362.

73. Id. at 359–60.

74. See Aalmuhammed, 202 F.3d at 1234 (making “helpful recommendations” that are accepted is not an act of authorship, unless the other party is bound to accept them); Erickson, 13 F.3d at 1070 (authors should not be subject to “the threat that accepting suggestions from another party might jeopardize the author’s sole entitlement to a copyright).
on this factor in less "traditional" collaborations comes into stark relief. It is in precisely those environments where there is least likely to be any such individual exerting the type of control the courts seem to expect they will find.

Dominici, the guitarist, provided the earliest raw material for what ultimately became the song "Kicking Asgard," which could be viewed as important creative decision-making. However, he exercised no decision-making authority at all after that initial contribution, having abandoned the project altogether. Yet if the Ninth Circuit is correct that securing the financing is an indicator of control, the fact that Dominici's convenience store clerking constituted the group's only source of sustenance or cash could arguably play a role in considering his control of the creative process. By that same reasoning, however, Eddy from the record label might also be seen as the dominant force, having provided the venue and equipment.

It is even less clear as between Haglund and Cristo, who could be said to have exercised the most control. Haglund, the drummer, was able to see some of his suggestions realized (the harmony, the structural arrangements, and the title), but it was Cristo, as engineer of the mechanical aspects of the recording process, who implemented them. It is therefore debatable whether Cristo had final discretionary control over what finally ended up on the tape or whether he complied because Haglund ordered him to do so. None of the circuits enunciate a standard for locating the apparently critical line separating "suggestions" from "demands." In any event, Cristo had no say whatsoever in the lyrical content or basic harmonic structure of the song, so it is difficult to make the case that he is the mastermind superintending the song.

Skinz, finally, was really the only collaborator whose contributions were not substantially checked by another band member, seeing almost unfettered realization of his creative input. Additionally, the fact that he contributed lyrics means that his collaboration was of a traditional variety in music, so he will almost certainly be considered an author of some kind. Still, his lack of effort and will in the songwriting process overall makes it inconceivable that a fact finder would call him the dominant author. So this factor, which is said to provide considerable assistance in helping courts assess intent in joint authorship, is ultimately not helpful at

75. See Aalmuhammed, 202 F.3d at 1232.
76. See Childress v. Taylor, 945 F.2d 500, 508 (2d Cir 1991) (identifying a dominant contributor warrants "less exacting" consideration in traditional collaborations, such as where one party contributes lyrics and others contribute music).
all here. The disparity in decision-making power between collaborators in this all-too-common example is either negligible or incapable of being measured.

2. Understanding the Coauthor Relationship

Because the heart of intent analysis is determining "how the putative joint authors regarded themselves in relation to the work," courts have often sought guidance from evidence about the level of understanding collaborators had about the consequences of joint authorship. In order to demonstrate authorship intent, putative coauthors must show they at least "entertain[ed] in their minds the concept of joint authorship." If collaborators show some awareness of the "distinguishing characteristic" of the coauthor relationship, then they can be said to have at least entertained the concept.

One such distinguishing characteristic is that all collaborators are identified as authors to the outside world. Despite the fact that coauthors must have some concept of joint work, they need not understand the legalities of authorship. In fact, evidence that a collaborator entertained the legal consequences of joint authorship may lend weight to a claim that he intended to exclude others from authorship.

Turning back to the example of heavy metal aspirants Mjöllnir's Wrath, there is no evidence that any of the band members knew the legal consequences of coauthoring a song. However, it is arguably within the ambit of common sense that being an author confers some legal benefits that may be accompanied by financial benefits, and that sharing authorship status means, at minimum, sharing those benefits with others. In a highly disorganized creative process like the one employed by Mjöllnir's Wrath, application of this factor adds almost nothing to the intent calculus; it is difficult to imagine a contributor so lacking in basic comprehension of the consequences of authorship.

77. Id.
78. Id.; Erickson, 13 F.3d at 1066.
79. Childress, 945 F.2d at 508; Erickson, 13 F.3d at 1066.
80. Childress, 945 F.2d at 508.
81. See id. (to determine whether putative coauthors understood the coauthor relationship, "a useful test will be whether...each participant intended that all would be identified as coauthors").
82. Id.; Erickson, 13 F.3d at 1066.
83. Thomson v. Larson, 147 F.3d 195, 205 (2d Cir. 1998) (citing the district court's finding that Larson understood that the phrase 'coauthor' was "freighted with legal significance" in affirming the holding that Larson never intended to share authorship status with Thomson).
84. Supra Part I.
Given that each member probably had at least enough of an understanding of co-authorship to surpass the requirement, application becomes unclear. Should one assume that each therefore intended to be a joint author? Or that, operating on self-interest, each intended to be a sole author? In a setting like the one presented here, the fact that members may have had an understanding about what authorship entails sheds very minimal light on “how the putative joint authors regarded themselves in relation to the work.” Application of this factor to the creative environment of most bands yields a result that is either trivially true or else meaningless. Almost everyone in the “mix” will have some understanding of what it means to be a coauthor, so that will not help a fact finder determine which members actually believed themselves to be coauthors. Worse, courts may ultimately wind up looking for who understood the most or who understood the loudest, which rewards those who manipulate uncertainty in the creative relationship.

C. Objective Evidence of Intent

Courts are not entirely oblivious to the subjective evidentiary survey’s potential for rewarding manipulation and domination. Courts therefore attempt to remedy this with an analysis of the objective indicators of shared intent to jointly author a work. This is a necessary check, because, “were the mutual intent to be determined by subjective intent, it could become an instrument of fraud, were one coauthor to hide from the other an intention to take sole credit for the work.” Therefore, in the absence of clear agreement, “the inquiry must of necessity focus on the facts.” However, as demonstrated below, even the objective manifestations of intent examined by the courts are still predominantly probative of one party’s subjective intent.

Courts have enumerated some basic categories of evidence they will consider, but “the factors articulated . . . cannot be reduced to a rigid formula, because the creative relationships to which they apply vary too much.” Regardless, courts have happened upon a certain “greatest hits” of objective intent evidence. A discussion of the commonly considered objective manifestations of intent follows.

85. Childress, 945 F.2d at 508.
86. See Aalmuhammed v. Lee, 202 F.3d 1227, 1234 (9th Cir. 1999); Thomson, 147 F.3d at 201 n.17.
87. Aalmuhammed, 202 F.3d at 1234.
88. Id. at 1235.
89. Id.
1. Billing

The way parties bill or credit themselves in relation to the work carries great significance as an indicator of intent. Though billing is characterized as an “objective manifestation,” courts have recognized that billing is often only a “window on the mind of the party who is responsible for giving the billing or the credit.” Nonetheless, courts regularly consider billing evidence as very compelling; the Second Circuit has gone so far as to say that a writer’s attribution of a work as being one of the writer’s sole authorship is “prima facie proof that [the] work was not intended to be joint.” However, other courts have not appeared entirely in accord with that broad language, explaining that billing alone is not decisive in all cases, because joint authorship can exist in the absence of any explicit agreement or discussion by the parties.

When four people like the musicians from Mjöllnir’s Wrath have a legitimate dispute about who can claim authorship, there may be conflicting billings, and it is unclear which billing the court will consider the authentic billing. Here, Haglund held himself out to a studio as the sole author of the work—constituting a billing. However, Cristo did scrawl the band name on the cassette, arguably billing the work as one of joint authorship. It is hard to see which is entitled to greater weight. Furthermore, in some circumstances, this factor really only demonstrates subjective intent, so again courts are ultimately rewarding control as opposed to collaboration. Only two members of the band in this scenario really had any opportunity to bill themselves, but because they did so, their intentions become more important in the analysis than those of the other two collaborators. The courts’ focus on this factor means that when one collaborator manifests a powerful subjective will to be seen as an author by billing himself as such, that act can assist in overwhelming the significant contributions of others that might ordinarily serve to confer co-authorship.

2. Contracts with Third Parties

In the absence of any written agreements between the parties, courts also consider any written agreements the putative authors enter into with third parties to be helpful evidence of the way contributors regarded them.

90. Thomson, 147 F.3d at 203.
91. Aalmuhammed, 202 F.3d at 1234.
92. Thomson, 147 F.3d at 203 (internal citation omitted) (emphasis added).
93. Weissmann v. Freeman, 868 F.2d 1313, 1320 (2d Cir. 1989).
selves in relation to the work. In particular, when one contributor enters into a licensing agreement with a third party, this is strong evidence that he does not intend to regard other contributors as authors. Similarly, entering into a work-for-hire agreement indicates intent not to be a coauthor. The Second Circuit expressed that the insight provided by looking at parties' agreements with outsiders is "more attenuated" than that provided by the billing, but did not explain why. That court's reasoning may be premised on the idea that while the billing expressly states who is to be considered an author, the intent of a party entering into a licensing agreement may frequently have to be inferred.

Here, the only such agreement is the one between Haglund and the television network that employs him, but this factor is yet another that fails to help determine who can rightfully be called an author of "Kicking Asgard." Because this factor is not dispositive, the fact that Haglund attempted to license the song indicates that he thought he was an author, but sheds no light on whether he believed he was a coauthor. Additionally, Haglund's perception of himself as a coauthor empowered to enter into licensing agreements regarding the work would still be of dubious weight in the intent formulation given his minimal decision-making authority and the court's pronouncement that this factor offers "attenuated" insight into mutual intent.

3. Other Conduct Consistent with Intent

Courts have emphasized that there may be "additional evidence" falling outside the categories above, indicating that a "broader pattern" of conduct may show the parties' intent. This acknowledgment of the possibility that other types of evidence will be useful is necessitated by the concern that application of a "rigid formula" would fail to respect the variety in creative relationships.

One such type of evidence is a collaborator's previous rejection of offers to work with coauthors. For example, in Thomson v. Larson, the

95. Thomson, 147 F.3d at 204.
96. Id. (citing Erickson, 13 F.3d at 1072, for that court's holding that the fact that a playwright entered into a licensing agreement with a third party indicated she did not consider the actors to be coauthors).
97. See Richlin v. MGM, 531 F.3d 962, 969–70 (9th Cir. 2007); Aalmuhammed v. Lee, 202 F.3d 1227, 1235 (9th Cir. 1999).
98. See Thomson, 147 F.3d at 204.
99. Id.
100. Id.
101. Aalmuhammed, 202 F.3d at 1234.
Second Circuit found the fact that Larson had previously rejected the assistance of a book writer in helping him complete the play, *Rent*, to be strong evidence of a “broader pattern” indicating that he never intended to share authorship.102 Another type of evidence courts consider is conversations between the parties to identify a pattern consistent with the intent to share authorship.103 Similarly, the fact that parties never had any conversation about authorship may be considered as evidence that the person bringing the action was not considered an author by other collaborators.104 The Second Circuit also treats the question of whether putative coauthors understood the legal ramifications or “distinguishing characteristic” of the coauthor relationship as one of the “additional” types of evidence.105 This factor is discussed in detail above.106 The willingness to cast a wide evidentiary net allows courts the freedom to consider any and all conduct of the parties and to assess whether it is consistent with the intent to be a coauthor.

Turning back to the metal mayhem of Mjöllnir’s Wrath, it seems clear that Dominici’s conduct in composing and recording guitar riffs manifests intent to be an author. The question, of course, is whether his conduct represents intent to be a coauthor. A court could find the fact that he abandoned the work to be evidence that he intended to end any creative relationship with the other members. Conversely, one could argue that he certainly intended to be a coauthor when he performed the work; the reason he left was precisely because the others were not contributing. Alternatively, a court could find that the fact that he abandoned the tape altogether knowing that the label representative was expecting some kind of demo product suggests he intended for his contributions to be used by the remaining members as part of a joint work.

Similar ambiguity exists in looking at Haglund and Cristo’s behaviors. Courts would very likely attempt to parse their parting conversation about the tape, in which Cristo requested that Haglund let people know he worked on the song. That is certainly not the same thing as saying, “make sure to credit me as a coauthor,” but it is arguably consistent with viewing

102. 147 F.3d at 204.
103. See id. at 205 (conversation in which Larson told Thomson he would “always acknowledge [her] contribution,” and “would never say that [he] wrote what [she] did” was “entirely consistent” with Larson’s purported view of himself as the sole author.)
104. See Aalmuhammed, 202 F.3d at 1235 (citing the absence in the record of any conversations about Aalmuhammed’s authorship in the work as evidence that no one regarded him as an author).
105. Thomson, 147 F.3d at 205 (the fact that Larson understood the term, coauthor, to be “freighted with legal significance” supported the view that he did not intend to be a coauthor).
106. Supra Part III.B.1.
himself as an author. However, the fact that he relinquished the tape to Haglund is more ambiguous. Is it conduct consistent with Cristo’s view of Haglund as a coauthor or evidence that he did not view himself as an author at all?

Finally turning to Skinz, his conduct seems most consistent with the view that he did not think about his relationship to the work at all; he was just far too “out of it.” However, because he contributed lyrics—a “traditional” form of musical collaboration—the courts would be unlikely to worry much about the fact that his conduct does not indicate any discernable intent toward the work.\textsuperscript{107}

4. Audience Appeal

Audience appeal is a consideration unique to the Ninth Circuit, and it arguably has nothing to do with intent. It instead asks whether the audience appeal of the work turns on each of the contributions and whether it is possible to appraise the share of each contribution to the overall success of the work. The courts have not elaborated on how to apply this element, except to essentially acknowledge that it is “nearly impossible” in the context of film.\textsuperscript{108} In \textit{Richlin v. MGM}, the court noted the impracticability of determining how much the characters and story (originated by Richlin), as opposed to Peter Seller’s performance, Henry Mancini’s score, or Blake Edwards’s direction, provided the “main draw” of \textit{The Pink Panther}.\textsuperscript{109} Though the court has offered little guidance in applying the factor, its approach in \textit{Richlin} indicates that the impossibility of determining the “main draw” of a work weighs in favor of the person claiming to be a joint author.\textsuperscript{110}

It is unsurprising, then, that this factor is as treacherous when applied to heavy metal music as it is in the context of a \textit{Pink Panther} film. Perhaps it is possible to imagine what the song would sound like without certain musical contributions, but it is far more problematic to imagine the work’s popularity without any one of these individual contributions. Surely Dominici’s prototypic riffs, Skinz’s manic lyrics, Cristo’s arrangement instincts, and Haglund’s drumming and other feedback all play some role in how audiences relate to and enjoy the work. To the extent that the audience-appeal factor is truly relevant to intent at all, perhaps the fact that no partic-

\textsuperscript{107} See Childress v. Taylor, 945 F.2d 500, 508 (2d Cir 1991); \textit{supra} note 71 and accompanying text.
\textsuperscript{108} Richlin v. MGM, 531 F.3d 962, 970 (9th Cir. 2007).
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
ular contribution accounts for the lion’s share of the song’s reception in the culture supports a finding that the song is a joint work, at least on the basis of intent.

D. The Timing of Intent

The courts are curiously split on the question of whether the requisite intent to create a joint work and the actual creation of the work must exist contemporaneously or whether intent may exist at some later time after some or all of the work is complete. The Second Circuit has held that if intent that one’s contributions be “absorbed or combined into an integrated unit” is to suffice in establishing joint authorship, then that intent must exist contemporaneously with the creation of the putative coauthor’s contribution.\(^{111}\) The Seventh Circuit concurs that putative coauthors must “intend to be joint authors at the time the work [i]s created.”\(^ {112}\) Under this approach, if intent to regard oneself as a coauthor forms after the contribution is crafted, that will not serve the intent requirement of Section 101. Similarly, if such intent evaporates after the fact, that would not negate the once-existing intent to be a coauthor. This may be very difficult to apply in many modern musical settings, where artists do not always do the “work” at the same time, but write and record independently, piece-by-piece. It is not entirely clear what purpose is served by limiting analysis to the intent of the parties at the time the work is being done.

In contrast to that approach, the Ninth Circuit has acknowledged the reality that “relationship[s] may change over time as the work proceeds”\(^ {113}\) and imposes no requirement as to the contemporaneity of intent. This in effect could mean that the court will consider the parties’ intent with regard to the work before, during, and after the creative process is complete. No cases have addressed this issue yet, but it is foreseeable that the Ninth Circuit, by taking into account the evolution of the parties’ intent over time, may reach a result more in line with the expectations of artists, who know all too well that the way a collaborator views himself and others in relation to the work is not a static concept.

Under the view of the Second and Seventh Circuits, the fact that Dominici abandoned the tapes might have no effect. The only consideration would be his intent at the time he was recording the riffs, and at that point it seems likely he intended for the others to contribute and merge their work.

\(^{111}\) Childress, 945 F.2d at 505 (quoting H.R. REP NO. 1476, 94th Cong., 2d Sess. 120 (1976)).
\(^{112}\) Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1070 (7th Cir. 1994).
\(^{113}\) Aalmuhammed v. Lee, 202 F.3d 1227, 1235 (9th Cir. 1999).
with his into a unitary whole. Likewise, Haglund's intent at the time he took the tape containing "Kicking Asgard" or at the time he licensed it to the television network would not be determinative; the only intent that matters is his intent at the time he made the contributions. Cristo's intent toward the work probably did not change much over time, so this factor may not affect analysis with regard to him. Skinz is another matter, because at the time he did the work, he was so drunk arguably that he lacked any capacity to form intent. If he had any intent to be an author of the work, it was formed prior to his contributions or subsequent to them. In this regard, the Ninth Circuit approach would certainly be a boon to Skinz. It may also benefit Dominici by at least allowing for the possibility that though he intended to be a coauthor at the time he did the work, his intent changed once he quit the project.

This analysis of the contemporaneousness element concludes the discussion of "intent" in joint work. The next section explores the amount and nature of the contribution that putative authors must make in order for their intent to be coauthors of a joint work to have any legal effect.

IV. Bring the Noise: Making a Contribution Worthy of an Author

Consistent with the Constitution’s goal of promoting "the progress of science and useful arts," the exclusive rights enjoyed by holders of copyright cannot be enjoyed by anyone but the work’s true creator or creators. Though the Copyright Act does not specify any requisite quantum of contribution an author must make, courts and commentators have agreed that some threshold must be set, but have disagreed as to where. This first following subsection examines the ongoing controversy surrounding the nature of a contribution one must make in order to surpass this initial barrier to entry into the class of authors, and the second assesses the copyrightability of some common contributions made by collaborators in the songwriting process.


A. Independently Copyrightable vs. Non-de minimis Contributions

Currently, all three federal circuits discussed in this note hold that in order to claim authorship in a joint work, a collaborator must make a contribution that would be copyrightable independently of the work as a whole. This requirement, attributed to Professor Paul Goldstein, has been a flashpoint of academic debate.116 Though the opposition, mounted by Professors Melville Nimmer and David Nimmer, failed for years to gather steam, the Seventh Circuit has recently recognized the need to craft an exception to the Goldstein rule.117 However, the precise contours of that exception are hazy in light of subsequent decisions. The first task below will be to compare the reasoning each circuit has applied in adopting the requirement, and then to discuss the Seventh Circuit exception and its import in the evolution of joint copyright law as well as how the exception may have been altered by recent case law.

1. The Rationale of the “Independently Copyrightable” Rule

In determining whether only an independently copyrightable contribution should entitle one to claim authorship, courts have admitted the “troubling” nature of the problem—after all, copyrightable works are, by their very nature, the result of combining a non-copyrightable idea with a tangible expression.118 Even courts adopting the rule have conceded that “the resulting work is no less a valuable result . . . simply because the idea and the expression came from two different individuals.”119

Courts, in seeking to explain the reasoning for adopting this rigid standard, have disagreed on its relation to the text of Section 101 of the Copyright Act.120 The Second Circuit, for example, has explicitly held that the statutory standard is not adequately “stringent” enough to prevent free-loading by “overreaching contributors.”121 By explaining the standard as one not mandated by the text of the Copyright Act, but necessary to effectuate its purpose, the court reasoned that adopting the bright line standard served the necessary interests of reducing spurious claims and striking an

116. The “warring camps” are thought be represented by Professors Melville and David Nimmer on one hand (supporting only a non-de minimis requirement), and Professor Paul Goldstein on the other (supporting a copyrightable contribution requirement). See Erickson, 13 F.3d at 1069–71; infra Part IV.A.1.
119. Id.
“appropriate balance in the domains of both copyright and contract law” by forcing collaborators who make lesser contributions to the work to negotiate for their rights in the work.122

The Seventh Circuit has essentially endorsed the Second Circuit’s reasoning, finding little in the way of support for its interpretation of the statute within the letter of Section 101, but nonetheless rejecting Professor Nimmer’s non-de minimis standard in favor of Goldstein’s independent copyrightability standard.123 The Seventh Circuit’s somewhat varied route to the same destination hinged on its fear that the de minimis standard alone would be unpredictable in application, ultimately restricting the free exchange of ideas and defeating the purpose of copyright writ large.124 However, the Seventh Circuit has had second thoughts with regard to adopting the Goldstein rule and has recently crafted an exception to the requirement of independent copyrightability.

The Ninth Circuit, to the contrary, supported its decision to impose the independently copyrightable contribution standard on putative coauthors on the text of Section 101. The court explained that since Section 101 defines a joint work as one prepared by more than one “author,”125—and that as a threshold issue, one cannot be an author without creating a copyrightable work—the statute therefore requires all coauthors to contribute something copyrightable separate from the work as a whole.126 The court has noted that these are entirely different grounds from those upon which courts in the Second and Seventh Circuits have imposed the same requirement.127

2. *Gaiman*: Toward a More Flexible Contribution Requirement

If the Seventh Circuit approach early on seemed to be essentially co-opting the Second Circuit approach, all of that changed in 2004. In *Gaiman v. McFarlane*, the court saw the necessity of an exception to this rigid rule in cases where, “due to the nature of the creative process,” none of the individual contributions alone could pass the copyrightability test.128 In par-

122. *Childress*, 945 F.2d at 507. This approach has been roundly criticized by the Professors Nimmer in their treatise, and the Seventh Circuit has recently identified the danger of applying this requirement in all creative contexts. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 6.07; *Gaiman v. McFarlane*, 360 F.3d 644, 658–59 (7th Cir. 2004).
124. *Id.* at 1070.
126. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 1999).
127. *Id.*
128. 360 F.3d 644, 658-659 (7th Cir. 2004). The court in that case held that the independent copyrightability test should not apply to establishing coauthorship in comic book characters because comic
ticular, the court identified contributors to “mixed media” creative ventures (specifically, comic books) as qualifying for the exception because in many cases individuals who fully intend to be coauthors in those settings make contributions that, by the nature of the process itself, cannot be copyrighted.129 Echoing Nimmer’s logic, the court explained that in these creative environs, each putative coauthor’s individual contribution fails the copyright test, but remains essential to lending the distinctiveness to the finished work that carries it “over the line into copyright land.”130

Within the creative arenas where the Seventh Circuit’s exception to the independent copyrightability requirement is permitted, a putative coauthor must still demonstrate that his contributions to the work surpass the level of de minimis additions.131 In order to do so, anyone claiming to be a coauthor must have at least contributed some “original expression.”132 So originality still controls, even in absence of the hard line requirement of copyrightability—a person cannot claim to be an author on the basis of contributions that are “so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another.”133 Like the Second Circuit, which held that a contribution amounting to less than nine percent of the total work was found to surpass the de minimis bar,134 the Seventh Circuit recently held that a songwriter who contributed about ten percent of a song’s lyrics had indeed demonstrated he was a coauthor.135

The court, in crafting this exception, did so because in the process of creating certain types of works, “one can imagine cases in which none of the separate contributions” will be independently copyrightable.136 However, in the recent case, Janky v. Lake County Convention and Visitors Bureau, the court implicitly acknowledged that the Gaiman exception might apply to musical compositions, but only when none of the contributions are

books are usually the product of the work of an author, penciler, inker, and colorist and “one can imagine” cases in which none of their individual contributions could be copyrightable.

129. Id. at 658-659.
130. Id. at 659.
131. Id. (acknowledging the “valid core” of Professor Nimmer’s “heretical” argument in favor of applying only a de minimis standard to contributions in evaluating co-authorship).
132. Id. at 658.
135. Janky v. Lake Cnty. Convention & Visitors Bureau, 576 F.3d 356, 362–63 (7th Cir. 2009) (remanding for entry of summary judgment in favor of the Visitors Bureau on finding that licensor of a song to the Bureau who contributed approximately ten percent of the song’s lyrical content was a coauthor and therefore entitled to license the work).
in fact independently copyrightable. If this is true, then *Janky* represents a significant alteration to *Gaiman* by further limiting its application to situations where no one makes a copyrightable contribution. Until the court reconciles these holdings or otherwise clarifies the exception, it appears that if one contributor has made a copyrightable contribution, the class of authors is limited to others who have done the same.

Imagining that the Seventh Circuit had to determine the authorship status of Mjöllnir’s Wrath members in regard to the opus, “Kicking Asgard,” it seems the glimmer of hope *Gaiman* offered members who made non-copyrightable but major contributions is less luminous post-*Janky*. As discussed in the next section, Dominici and Skinz are on relatively solid ground in terms of making copyrightable contributions, but the status of Haglund and Cristo’s contributions is not so assured. If *Janky* is correct, then the *Gaiman* exception cannot apply to them, because once one person makes an independently copyrightable contribution, the exception disappears. In that event, their status as authors may not turn on the intent element; instead, their claims may live or die on the basis of whether they made copyrightable contributions. The copyrightability of various types of contributions is addressed immediately below.

### 3. Copyrightable Musical Contributions

Outside the narrow and uncertain parameters of the *Gaiman* exception in the Seventh Circuit, anyone asserting a right as a coauthor of a joint work must show that the contributions forming the basis of that claim are, themselves, independently copyrightable. The application of this requirement to different types of musical contributions varies across jurisdictions and has evolved over time.

137. *Janky*, 576 F.3d at 362 n.4. In this recent case, the court reasoned that the *Gaiman* exception did not apply to the facts of a songwriting dispute because Janky’s contribution was copyrightable before putative coauthor Farag made any contribution. This is arguably a misapplication of the *Gaiman* rule—the *Janky* court holds that the exception only obtains when none of the contributions are in fact independently copyrightable, but the *Gaiman* decision seems to extend the exception to any creative context in which “one can imagine cases in which none of the separate contributions” will be copyrightable (emphasis added). *Gaiman*, 360 F.3d at 659. The *Gaiman* standard is quite a bit more generous, and would be more likely to encompass songwriting in the abstract.

138. Compare *Janky*, 576 F.3d at 362 n.4 (putative author’s claim, when based on a contribution merged with another individual’s independently copyrightable work, must itself be based on independently copyrightable work) with *Gaiman*, 360 F.3d at 659 (where the nature of the creative process makes it foreseeable that while the finished work will be copyrightable, the individual contributions may not be, a claim of authorship need not be based on an independently copyrightable contribution).

139. See infra Part IV.B.1–5.

140. See supra Part III.
a. Sound Engineering and Arrangement

Courts have shown some comfort with the idea that a collaborator who is responsible for "capturing and electronically processing . . . sounds, and compiling and editing them to make a final sound recording" has made an independently copyrightable contribution allowing the possibility of authorship, because this type of contribution shows a considerable level of "independent thought and creativity."141 The courts' willingness to find that an engineer's contributions are copyrightable is facilitated by the fact that the engineer's work is fixed in a tangible medium and because courts have found legislative history supporting the view that Congress considered the work of sound engineers to be copyrightable.142

However, in the case of one who arranges or rearranges a song, this may not always be the case. As a mechanical matter, the person who is proposing changes to the work may not be the same person responsible for bringing those changes to life. The courts are generally in agreement that where one individual makes suggestions about altering a creative work, but the final discretion rests entirely in the hands of a principal, those suggestions are not copyrightable contributions, and courts have adhered to the rule that "directions" and "ideas" cannot suffice as contributions warranting authorship.143

The Seventh Circuit has recently distinguished that rule by holding that under some circumstances a putative coauthor's recommendations of certain changes to a song suffice as "concrete expressions" and will not be denied copyright protection for lack of tangible fixation.144 Under this ex-

142. See Systems XIX, Inc. v. Parker, 30 F. Supp. 2d 1225, 1228 (N.D. Cal. 1998) (relying on H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 56 (1976) as evidence that Congress specifically contemplated the sound engineer/recording artist relationship as one in which the sound engineer would "usually" be an author in the sound recording, if not the composition).
143. Ashton-Tate Corp. v. Ross, 916 F.2d 516, 521 (9th Cir. 1990); see also Gaiman v. McFarlane, 360 F.3d 644, 659 (7th Cir. 2004); Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1072 (7th Cir. 1994); S.O.S. Inc. v. Payday Inc., 886 F.2d 1081, 1087 (9th Cir. 1989) (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) for the proposition that an "author" is one who translates an idea into a fixed expression).
144. See Janky v. Lake Cnty. Convention & Visitors Bureau, 576 F.3d 356, 362–63 (7th Cir. 2009). In Janky, songwriter Cheryl Janky, on a suggestion by band mate Henry Farag, wrote a song intended for use by the Lake County Convention and Visitors Bureau, located in Indiana's South Shore region. The original version had lyrics focused on Indiana, but not specifically on Lake County and the South Shore. Farag recommended that Janky make changes to about ten percent of the song's lyrics to enhance its appeal to the Visitors Bureau. Ultimately, Farag succeeded in licensing the song to the Bureau, who used it in advertisements and events. Janky sued for infringement, but the court held that Farag was a coauthor, and in the process held that his recommendations for revisions to the song were an independently copyrightable contribution.
panded concept of fixation, recommendations must still rise above the level of “ideas, refinements, and suggestions”; rather, such input must constitute something akin to “demands” on another person who ultimately commits the song to recorded media to meet this standard.\(^{145}\)

This subcategory of creation cuts right to the heart of Haglund and Cristo’s most significant contributions to the song “Kicking Asgard.” Cristo, as sound engineer, might have an easier time convincing a court that his contributions were copyrightable—the benefit of being the engineer is that the very nature of the process results in expressions of ideas being fixed in a tangible medium. Haglund’s proposed changes, on the other hand, will not be seen as copyrightable, unless he brings suit in the Seventh Circuit, where demands are (for the moment) independently copyrightable expressions.

\(b.\) **Song Titles and Lyrics**

Song titles are the classic example of a contribution that is not copyrightable, no matter how original. The modern consensus on this issue is expressed by current Copyright Office Regulations specifying that “[w]ords and short phrases such as names, titles, and slogans” may not be the subject of copyright—a position the Second Circuit and courts elsewhere have been in agreement with since long before the 1976 Act.\(^{146}\) It is worth noting, however, that the Copyright Act does not explicitly preclude song titles from being copyrightable, and some courts have shown some willingness to extend copyright protection to titles of songs, books, or films if they were “arbitrary or fictitious or fanciful or artificial or technical.”\(^{147}\) Indeed, one court even stated in dicta that if a song title is extraordinarily unique, such as “Supercalifragilisticexpialidocious,” an exception might apply.\(^{148}\) For the moment, this issue appears to be settled. Similarly, there is currently no controversy over the fact that, unlike titles, lyrics are independently copyrightable as literary works.\(^{149}\)

145. *Id.* at 363 (quoting Gaiman, 360 F.3d at 658).

146. 37 CFR § 202.1(a) (2009); see also Warner Bros. Pictures, Inc. v. Majestic Pictures Corp., 70 F.2d 310, 311 (2d Cir. 1934) (holding that the copyright protections attending ownership of a play did not extend to the title itself, but nonetheless granting an injunction restricting defendants from using the motion picture title “The Gold Diggers” on trademark grounds); Johnston v. Twentieth Century-Fox Film Corp., 187 P.2d 474, 483 (Cal. App. 2d 1947).

147. Johnston, 187 P.2d at 482.

148. Life Music, Inc. v. Wonderland Music Co., 241 F. Supp. 653, 656 (S.D.N.Y. 1965) (stating, in dicta, that even had defendants only appropriated the use of the title of the popular song from the film “Mary Poppins,” that could “conceivably” have constituted infringement).

149. Leadsinger, Inc. v. BMG Music Publ’g, 512 F.3d 522, 527 (9th Cir. 2007); ABKCO Music Inc. v. Stellar Records, Inc., 96 F.3d 60, 64 (2d Cir. 1996).
It seems evident that Haglund’s naming of the song will not be relevant to determining whether his contributions warrant authorship, because a song title simply cannot be copyrighted. There is similarly little doubt about the copyrightability of Skinz’s lyrics, regardless of the reality that they were the result of stream-of-consciousness rambling.

c. Rhythmic Modifications, Improvisation, and Chord Progressions

A handful of cases preceding the 1976 Copyright Act advance a doctrine that contributions consisting only of “embellishments such as are improvised by any competent musician,” or basic rhythm patterns over an existing piece, are not sufficiently original to be eligible for copyright protection.150 Courts following this reasoning have held that “anything which a fairly good musician can make, the same old tune being preserved, [can] not be the subject of a copyright.”151

More recent cases have allowed that slight modification to basic rhythms may elevate a contribution to the level or originality demanded by copyright, so long as the part is not so “universal” as to be considered “stock.”152 The U.S. District Court for the Southern District of New York has, for example, held that a song “hook” consisting of a short phrase preceded by an ‘eighth note-quarter note-eighth note’ rhythmic beat could be copyrightable.153 The same court has also held that repetition of the word ‘uh-oh’ in a distinctive rhythm was sufficiently original to qualify for copyright protection.154 This comports with the understanding that the bar for originality “is [set] extremely low.”155 A recent unreported Ninth Circuit case specifically addressed percussion, holding that a drummer’s playing was independently copyrightable.156

With regard to guitar riffs, courts have found the requisite creativity to suffice as copyrightable, even where a nearly identical combination of pitch

150. McIntyre v. Double-A Music Corp, 166 F. Supp. 681, 683 (S.D. Cal. 1958); see also Norden v. Oliver Ditson Co., 13 F. Supp. 415, 418 (D. Mass. 1936) (holding that a work that amounts to “a copy of the old, with minor changes which any skilled musician might make” is not a copyrightable work).


153. See id. at *5. Among the purported infringers in that case were hip-hop giants Ludacris and Kanye West.


156. See Lopez v. Musinorte Entm’t Corp., 2007 U.S. App. Lexis 4035 at *3 (9th Cir. 2007). The court held that a drummer’s contributions were independently copyrightable contributions to the recording, but not the compositions themselves, since no one in the band actually wrote the songs. While the case is instructive here, because it was not published, 9th Circuit rules prevent it from being cited as precedent in the circuit.
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progression and rhythm has been used in previous songs, provided the guitarist made at least some minor alteration and no reasonable person could confuse it with another work. Dominici’s guitar riffs would almost certainly surpass the requirements of copyrightability, even if they were completely lacking in innovation, provided they were not identical to a copyrighted work already in existence.

Haglund and Cristo may be able to show that their respective bass line and drum parts were copyrightable, especially under what appears to be a less exacting standard emerging in the more recent cases. The cited cases holding that basic improvisation and rhythm are not copyrightable when added to an existing structure were all decided before the 1976 Copyright Act. However, one could argue that they are still good law because they express a common sense concept that when one musician provides the “seed” for a song, a contribution must truly change the character of the work in order for it to be independently copyrightable. It is at least arguable that a bass part merely doubling the guitar and a drum pattern that does nothing other than keep time does not transform the song in the least, and that therefore both Cristo and Haglund failed to surpass the copyrightable subject matter bar with respect to these contributions.

d. Harmonies

Harmony parts also have dubious standing as to originality, as one court notes, because:

where the composition of the melody is completed by one person and the harmony is thereafter furnished by another, the harmony may be less likely to reflect originality than in those instances in which simultaneous composition of melody and harmony is utilized to create certain musical effects.

Indeed, some courts have been unwilling to hold that copyright protection extends to harmonies at all, observing the composition of harmony as a semi-mechanical process “achieved according to rules which have been known for many years.” However, other courts have noted that certain

157. See ZZ Top v. Chrysler Corp., 54 F. Supp. 2d 983, 986 (W.D. Wash. 1999) (finding that the guitar riff to Z.Z. Top’s La Grange was sufficiently different from pre-existing works to be copyrightable, because even though it used the same rhythm and pitches as previous songs, “no reasonable person could confuse the two,” even if they only heard a few seconds of each).


159. Tempo Music v. Famous Music Corp., 838 F. Supp. 162, 169 (S.D.N.Y. 1993) (addressing copyrightability in the context of a derivative work, the court stated that as a matter of law, harmony alone can be copyrightable—but it is less likely to be when the melody entirely pre-exists it).

harmonies might yet be copyrightable, because the putative author must still make creative decisions about what harmonic interval to use. Those courts, nonetheless, maintain that “[h]armony is a derivative creation almost by definition.”161

The harmonies162 used in “Kicking Asgard” owe their existence in part to both Haglund (who proposed a basic, formulaic harmony) and Cristo (who took that idea and instead applied counterpoint theory to devise a contrasting melody instead). Haglund’s original proposal resembles the mechanically derived part that courts have indicated might be less likely to be copyrightable. Furthermore, even if Haglund’s harmony was sufficiently original, it might not have met the tangible fixation requirement,163 because it was Cristo who ultimately brought the idea to life. Cristo, then, benefits from this analysis in two ways: one, because his use of counterpoint theory to craft a contrasting part is more likely to be considered original, and two, because he physically committed the idea to tape, surpassing the tangible fixation bar.

Now that the copyrightability of various types of contributions has been evaluated, the analysis of the quantum of a contribution required by the federal courts to qualify as an author of a joint work is complete. The final section summarizes the deficits presented by this section and the preceding section on mutual intent.164

V. CAN I PLAY WITH THE MADNESS:165 UNCERTAINTY PERVADES MODERN CO-AUTHORSHIP DISPUTES

The preceding sections of this note surveyed the ways that the courts of the Second, Seventh, and Ninth Circuits approach the question of joint authorship in the absence of written agreements and applied the current approaches to a hypothetical heavy metal band, Mjöllnir’s Wrath. The analysis reveals that the courts’ approach to the question of intent is not well calibrated to deal with situations like this one, because it is too heavily focused on the idea of control to be meaningful in a context where control is hard to define. The analysis also shows that the courts’ approach in re-

162. Contrasting melodies based on counterpoint are not technically “harmonies.” See supra note 14.
163. The Seventh Circuit might find that by demanding the change, he did meet this element. See supra note 142 and accompanying text.
164. See supra Part III.
165. *Iron Maiden*, Can I Play With Madness, on *Seventh Son of a Seventh Son* (Capitol 1988). The album was Iron Maiden’s first to debut at #1 on UK charts. *Gary Sharpe-Young, Metal: The Definitive Guide* 77 (Joel McIver ed., 2007).
requiring that coauthors make independently copyrightable contributions to the work could fail to reward some contributions that are critical to the work's success. The narrow exception to that rule, carved out by the Seventh Circuit, has uncertain applications that are made even more uncertain in light of subsequent cases. The following sections critique in greater detail the current statutory interpretation scheme.

A. Powerslave:¹⁶⁶ Mutual Intent Regime Rewards Domination, not Creation

It is mystifying that the requirement of mutual intent has not been subject of nearly as much controversy as the independent copyrightability requirement. An initial disquieting aspect of the mutual intent approach adopted by these federal courts, albeit in nuanced forms, is the way courts answer the question, “Intent to do what?” Section 101 seems to require only that contributions be merged intentionally,¹⁶⁷ but this so-called “collaboration alone” standard has struck the courts as unsatisfactory because, in their view, it would award authorship status to hordes of the undeserving.¹⁶⁸ However, abandoning that standard in favor of a plethora of multi-factor balancing tests that, as argued below, favors authoritarians as opposed to authors, the courts may have managed to thwart their own policy objective.

At the outset, it is worth noting that “mutual intent” is a figment—there simply is no such thing. Intent, being a subjective state of mind, cannot be shared; this requirement will always necessitate an inquiry into what each individual intended and the extent to which that coincides with what others intended. That would not be so troubling; what is most disturbing about the way mutual intent is dealt with by these federal courts is that each of them have become so fixated on “control” that in many cases the question of joint authorship turns on whether the person who was best able to dominate the creative process was in the mood to share. Thomson is the shining example of how willing the courts have been to allow an opportunistic “dominant” collaborator to secure sole authorship in a work merely by manifesting a powerful subjective intent to exclude.¹⁶⁹ The court implicitly accepted that Thomson’s contributions were independently copyrightable and well beyond de minimis, but Larson’s stated desire to be the sole

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¹⁶⁶ Iron Maiden, Powerslave, on POWERSLAVE (EMI 1984).
¹⁶⁸ Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1069 (7th Cir. 1994).
¹⁶⁹ Thomson v. Larson, 147 F.3d 195, 204 (2d Cir. 1998).
author ultimately trumped his conflicting behavior of allowing someone to rewrite significant portions of his work.

Courts, evidently aware that the mutual intent standard looks a great deal like a subjective adventure into the mind of the chief collaborator, have compensated by enumerating various "objective" indicia of intent in order to further guide analysis.\textsuperscript{170} The problem, of course, is not only that these rarely occur, but when they do, they are highly likely to have been manipulated by an opportunistic collaborator—the same "dominant" person whose subjective intent often becomes synonymous with "mutual intent." The entire intent analysis, then, is biased against a good faith collaborator who comes up short of swagger.

In the context of a band, it is not uncommon for one individual to hold dominion over the others in the creative process. This often has more to do with personality types than with the sheer creative genius of the individual who manages to reign or with the weight of that person's contributions to the work. Nonetheless, such a person is likely to prevail in legal disputes, not only because he can claim to have controlled the process, but also because in the process of so doing, he can ensure that any and all objective evidence of intent corroborates his subjective intent to exclude others. Unfortunately, absent an amendment to the Copyright Act to either clarify or eradicate "intent," courts will likely continue to resort to an intent inquiry that allows ambitious collaborators to outmaneuver other would-be authors.

B. You've Got Another Thing Comin':\textsuperscript{171} Independent Copyrightability Requirement Defies Artist's Expectations and Common Sense

Though each circuit explored here has found a different path to imposing the independently copyrightable requirement, they have each done so. The Seventh Circuit seems to be experiencing buyer's remorse. However, as discussed above, the recent decision in \textit{Janky}\textsuperscript{172} may not leave much of the temporary sanity of \textit{Gaiman}\textsuperscript{173} intact.

\textsuperscript{170} See id. at 202-205; Childress v. Taylor, 945 F.2d 500, 508 (2d Cir. 1991).
\textsuperscript{172} Janky v. Lake Cnty. Convention & Visitors Bureau, 576 F.3d 356, 362 n.4 (7th Cir. 2009).
\textsuperscript{173} Gaiman v. McFarlane, 360 F.3d 644, 658--59 (7th Cir. 2004).
One fault of the requirement is that it is arbitrary in light of the reality that *all* copyrighted works consist of copyrightable and non-copyrightable components. But that is not the greatest threat posed by this standard. Rather, the real problem is that the requirement has the truly unfortunate side effect of either discouraging specialists who work in expressing ideas from ever collaborating or harming them when they do. This grows out of the ignorance about the joint creative process inherent to the requirement—the act of “fixation” is just one stage of collaboration. The requirement of independent copyrightability for any contribution to warrant joint authorship in the work heaps all the rewards on the individual or individuals to whom the work of fixation has been delegated and therefore destroys the rights of those whose expressions of ideas made the fixed contribution a possibility.

Courts have rejected a simple non-*de minimis* standard in favor of this one, primarily in response to a perceived need to short-circuit frivolous claims. However, there is no basis for assuming that doing away with the bright line copyrightable contribution rule would result in chaos. Moreover, given the reality, acknowledged by the Second Circuit in *Childress*, that some persons who are highly skilled in the “fixation” step might never create anything but for the contribution of ideas from another person, it is submitted that no need for predictability should trump the plain injustice of permanently excluding those who work in the medium of ideas from authorship in joint works.

Many successful bands have a member whose primary contributions are ideas—for structural rearrangement, for additional parts, for editing, and so on. Without this person’s “ear” for polishing the work, songs might never reach their potential; as such, this person is an indispensable part of the songwriting process, but rarely contributes a copyrightable element. It would shock many independent musicians to learn that such contributions would not suffice to demonstrate authorship. More importantly, this technicality stands in the way of the Constitution’s goal of promoting progress and advancement in arts and sciences by serving notice to “idea specialists” that their valuable contribution will become the exclusive property of the collaborator who succeeds in achieving its fixation. It is difficult to imagine the inertia shifting overnight, but perhaps Judge Posner’s thoughtful opinion in *Gaiman* will provide fuel and courage to other courts that properly intuit the hazardous byproducts of this antiquated standard.

174. *See Childress*, 945 F.2d at 507.
175. *Id.* at 506.
177. 360 F.3d 644.
C. Endgame: Parting Shots and Final Thoughts

The future of heavy metal is probably not in immediate jeopardy as a result of the inefficiencies and inadequacies presented here—uncertainty and unfairness are, after all, near ubiquitous elements of a struggling artist’s bittersweet diet. But while it is unlikely that Benjamin Franklin would have been a fan of Guns N’ Roses, the fact that the framers of the Constitution sought to build protections for creators directly into the founding document of the United States ought to serve to elevate the issue. Our cultural richness and our nation’s continued ability to remain competitive in the global marketplace are directly related to the way we manage intellectual capital. The systemic problems highlighted in this article place the federal courts out of sync with the letter of the Copyright Act, as well as the purpose of the Constitution’s protections; therefore, the current approaches cannot stand. Whether the work is delegated to Congress or to the court system, it must be done to ensure that creative collaboration is profitable for those who by their skill, labor, and ideas, are helping to progress “science and the useful arts.” The time has come to “up the irons.”

178. MEGADETH, ENDGAME (Roadrunner 2009).

179. The battle cry of Iron Maiden fans around the world. Roughly translated, it expresses the idea that it is time to intensify one’s focus and achieve something spectacular.