Janky v. Lake County Convention and Visitors Bureau: The Doo-Wop Ditty Did it Right

DENIELLE STRITCH*

ABSTRACT

In Janky v. Lake County Convention and Visitors Bureau, the Court of Appeals for the Seventh Circuit held that a song produced by the doo-wop group Stormy Weather was a joint work, warranting a finding of co-authorship for the song’s two authors. According to the Copyright Act of 1976, a “joint work” is “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” Since the landmark decision in Childress v. Taylor in 1991, most courts have required co-authors to show a copyrightable contribution and that both authors subjectively intended to create a joint work. Other courts have modified the Childress test, however, following only some or none of its required elements.

This Comment argues that, while Janky departs from the established Childress test, it was correctly decided because the court looked at all forms of intent, considering subjective and objective intent of the co-authors as opposed to only one form of intent. This Comment asserts that the Janky decision was rightly determined because the court adjusted the standard of copyrightability when the co-author’s otherwise minor input altered the essence of the work, protecting original expression as Congress intended. Further, this Comment argues that Janky correctly provides accessibility to copyright for contributors of original, creative expression who were left out of previous tests. This comprehensive analysis is more in line with the intent of Congress in protecting co-authors than more restrictive readings of past analyses.


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INTRODUCTION

In August 2009, the U.S. Court of Appeals for the Seventh Circuit overturned a jury verdict for the Northern District of Indiana honoring Cheryl Janky as the sole author of the song Lake County, Indiana and awarding her $100,000 in damages.\(^1\) When Janky sat down to write a song for the Lake County Convention and Visitors Bureau (“Bureau”), she felt that lyrics such as “Hoosier hospitality,” and “riverboats, lakefront, [] and the dunes,” were appropriate to describe the Wonders of Indiana.\(^2\) However, Henry Farag, founder and lead singer of the doo-wop group Stormy Weather,\(^3\) suggested that the song should incorporate a stronger feel of Lake County, instead of Indiana as a whole.\(^4\) Three years of nonexclusive use by the Bureau were followed by the breakup of the group and years of litigation that placed a local doo-wop jingle on the national map as a struggle between protecting a dominant author’s rights and giving credit for a joint work.\(^5\)

For years, the definition of “joint authorship” was the subject of court decisions.\(^6\) Then, the Copyright Act of 1976 (“Act”) superseded these common law definitions by defining joint work as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” By including a definition of a joint work in the Act, Congress codified the grant of ownership rights to co-authors.\(^8\) Unfortunately, the “issue of joint authorship is a sticky one that frequently comes up in the music industry.”\(^9\)

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\(^1\) Janky v. Lake Cnty. Convention & Visitors Bureau, 576 F.3d 356, 358, 364 (7th Cir. 2009), cert. denied, 130 S. Ct. 1740 (2010).


\(^4\) See Janky, 576 F.3d at 359-60. Specifically, Farag suggested that Janky incorporate the words “Lake County, Indiana” and “Chicago’s neighboring south shore” into the song. Id. at 360.

\(^5\) See id. at 359-64.

\(^6\) See Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944) (defining “joint authorship” as “a joint laboring in furtherance of a common design” and providing the foundation on which the common law built protection for co-authors).


The landmark decision by the Court of Appeals for the Second Circuit in Childress v. Taylor parsed out the requirements for a joint work based on the Act’s definition. Since the 1991 decision in Childress, most courts have required co-authors to show a copyrightable contribution and that both authors subjectively intended to create a joint work. The Court of Appeals for the Ninth Circuit took a different view however, considering parties’ objective intent. As opposed to a “more than de minimis” contribution by a co-author, Childress required a finding of copyrightability, a view that has largely withstood scrutiny by the courts.

This Comment argues that while Janky departs from the established test, it was correctly decided because the court looked at all forms of intent, considering subjective and objective intent of the co-authors as opposed to only one form of intent. This Comment asserts that the Janky decision was rightly determined because the court adjusted the standard of copyrightability when the co-author’s otherwise minor input altered the essence of the work, protecting original expression as Congress intended. Further, this Comment argues that Janky correctly provides accessibility to copyright for contributors of creative expression who were left out of previous tests. This comprehensive analysis is more in line with the intent of Congress in protecting co-authors than the more restrictive readings of past analyses.

Part I of this Comment examines the development of joint works and how courts have determined whether a joint work was created. Part II of this Comment outlines the Janky holding. Part III.A demonstrates that Janky correctly examined both subjective and objective intent in search of a joint work because this test protects contributors’ creative and original works more accurately than old tests, as Congress intended. Part III.B shows that Janky rightly applies the proper, lower standard for copyrightability intended by Congress because the Janky standard protects all contributions.

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10 See 945 F.2d 500, 506-07 (2d Cir. 1991); infra Part I.
11 See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.07[A][3][a]-[b] (2d ed. 1999). Intention is the touchstone of a joint work, and copyrightability has become the “prevailing view in the case law.” See id.
12 Aalmuhammed v. Lee, 202 F.3d 1227, 1234-35 (9th Cir. 2000).
13 NIMMER & NIMMER, supra note 11, § 6.07[A][3][a].
14 Childress, 945 F.2d at 506-07. A copyrightable work combines a “non-copyrightable idea with a copyrightable form of expression.” Id. at 506. A work is copyrightable if it is “original expression that could stand on its own as the subject matter of copyright.” 1 PAUL GOLDSTEIN, COPYRIGHT § 4.2.1.2 (2d ed. 1999).
15 See Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1069-71 (7th Cir. 1994); Childress, 945 F.2d at 506-07. Nimmer said that a “more than de minimis” contribution may be original expression, but his view is not widely followed. See NIMMER & NIMMER, supra note 11, § 6.07.
16 See H.R. REP. NO. 94-1476, at 51 (1976) (Conf. Rep.) (indicating that the Act is intended to protect original, creative expression).
essential to the final product, instead of the more restrictive past standard that mistakenly excluded some original, protectable expression.

I. Development of a Dual System of Analysis for Creation of a Joint Work

The main purpose of copyright law is to promote creativity and originality of authors in the arts and sciences by granting to “Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”17 As the definition of an “author” adapted with the evolution of creative mediums, the law of copyright adapted as well.18 Under the old Copyright Act of 1909 (“1909 Act”), which did not include a definition of a joint work,19 co-authorship was established by common law through cases like Edward B. Marks Music Corp. v. Jerry Vogel Music Co.20 and Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.21 Marks held that joint works required contribution “to be complementary in the sense that they [were] to be embodied in a single work.”22

Congress chose to codify a definition of a joint work in the Act to protect this form of expression while withholding protection for mere ideas.23 Therefore, as of 1976, a joint work was defined as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”24 Seemingly straightforward, this definition has required courts to determine exactly what a party must show to prove existence of co-authorship.25 While “there is no universally accepted test for determining joint authorship, some consistent principles have emerged through case law.”26 When a joint work is copyrighted, two or more creators of the work

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17 U.S. CONST. art. 1, § 8, cl. 8; see also GENERAL GUIDE, supra note 7, at 1:1 (explaining that “the primary purpose of copyright legislation is to foster...creation”).
18 See Mark H. Jaffe, Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording, 53 J. COPYRIGHT SOC’Y USA 139, 143 (2005).
20 See 140 F.2d 266, 267 (2d Cir. 1944).
21 See 161 F.2d 406, 409-10 (2d Cir. 1946).
22 Marks, 140 F.2d at 267. The definition of a “joint work” in § 101 of the 1976 Act overruled Marks and any definition of joint copyright it purported. GENERAL GUIDE, supra note 7, at 5:1.
25 See Childress v. Taylor, 945 F.2d 500, 504-07 (2d Cir. 1991). The Second Circuit discussed cases attempting to flush out the elements of a joint work. See id. at 506. Congress indicated its intention to leave much of court-made law undisturbed, but was unclear about what that meant with regard to requirements for co-authorship. See H.R. REP. NO. 94-1476, at 121.
26 Jaffe, supra note 18, at 175; see also Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1069-71 (7th Cir. 1994) (discussing two different tests for joint work: the de minimis standard and the
receive 100% joint ownership in the work, much like that of tenants in common.\textsuperscript{27} A co-author’s rights endure for an extraordinarily long term, "consisting of the life of the last surviving author."\textsuperscript{28} Therefore, Congress stressed that the "touchstone . . . is the intention [of the authors] at the time the writing is done," when considering who qualifies for such expansive protection.\textsuperscript{29}

A. Intent to Create a Joint Work

1. Subjective Intent to Create a Joint Work

The Second Circuit articulated a new test for intent in the landmark case, \textit{Childress v. Taylor}.\textsuperscript{30} In \textit{Childress}, the court examined both the Act’s definition of a joint work and the case development following the Act and determined that Congress intended to require a showing of intent and copyrightability to establish a joint work.\textsuperscript{31} Since this decision, courts have either followed the \textit{Childress} test for a joint work or refuted a portion of the test, but most adjudications of co-authorship address the case head on as the primary precedent when determining whether a joint work was created, regardless of which test they apply.\textsuperscript{32}

In \textit{Childress}, the Second Circuit denied co-authorship to an actress who argued that her contributing research and ideas during the writing process of a play made it a joint work.\textsuperscript{33} The court required intent to create a joint work at the time of creation and a copyrightable contribution to show co-

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\textsuperscript{27} General Guide, supra note 7, at A2:03. The Act asserted the validity of co-authorship and indicated that joint work creators were co-owners of the work, but adopted court-made law regarding ownership, which equated a joint work with a tenancy in common. See id. A tenancy in common is "tenancy by two or more persons . . . [with] an equal right to possess the whole property but no right of survivorship." Black's Law Dictionary 1604 (9th ed. 2009). So, "the co-owners shall have the right to free use of the jointly owned property, subject only to the duty to account to one another for the profits." General Guide, supra note 7, at 5:1.

\textsuperscript{28} 17 U.S.C. § 106A(d)(3).

\textsuperscript{29} H.R. REP. NO. 94-1476, at 120.

\textsuperscript{30} See Childress, 945 F.2d at 504-07; Mary LaFrance, Authorship, Dominance and the Captive Collaborator: Preserving the Rights of Joint Authors, 50 Emory L.J. 193, 220 (2001).

\textsuperscript{31} See Childress, 945 F.2d at 507.

\textsuperscript{32} See, e.g., Aalmuhammed v. Lee 202 F.3d 1227, 1233-35 (9th Cir. 2000) (deviating from Childress by using objective intent to find co-authorship); Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1068-71 (2d Cir. 1994); Herbert v. United States, 36 Fed. Cl. 299, 308-10 (1996).

\textsuperscript{33} Childress, 945 F.2d at 505-09 (explaining that the court should "apply the standards of the [Act] and endeavor to achieve the results that Congress likely intended").
authorship.\textsuperscript{34} The court said that parties must share a subjective intent to be identified as co-authors; actions like sharing billing or credit with another would indicate an individual’s subjective intent.\textsuperscript{35} In that case, intent was not present because the actress could not show that the playwright “had the state of mind required for joint authorship.”\textsuperscript{36}

The Childress dual system of analysis has been applied in most joint authorship situations.\textsuperscript{37} In Erickson \textit{v. Trinity Theatre, Inc.}, the Seventh Circuit followed the guidance of Childress when it held that members of a theater company did not show intent to create a joint work because the majority of the work was completed prior to the theater’s affiliation with the author.\textsuperscript{38} The court considered subjective intent, demonstrated by the author’s utterances and particular conversations by theater company members.\textsuperscript{39} Childress required contributors to regard themselves as joint authors;\textsuperscript{40} the Erickson analysis looked for facts indicating the same regard, considering whether contributions by the theater company were mere suggestions.\textsuperscript{41} The Second Circuit reinforced the requirement of a shared subjective intent in Thomson \textit{v. Larson}, when it denied joint authorship to the dramaturg of a Broadway show.\textsuperscript{42} The court found that subjective intent was absent because the author fought all of the producers’ attempts to include a co-author and required that the play include only his name as author in the credits.\textsuperscript{43}

2. Objective Intent to Create a Joint Work

Childress is generally acknowledged as the leading case in adjudications of joint works, but some courts refute the Childress test, opting for a different determination of intent.\textsuperscript{44} Critics of the use of

\begin{itemize}
  \item See id. at 507.
  \item Id. at 508.
  \item Id. at 509.
  \item See, e.g., Erickson, 13 F.3d at 1071; Gaylord v. United States, 85 Fed. Cl. 59, 66-68 (2008).
  \item Compare Childress, 945 F.2d at 504-07 (using subjective intent), with Aalmuhammed, 202 F.3d at 1231-34 (considering objective intent).
  \item See Erickson, 13 F.3d at 1068-69.
  \item Id. at 1068, 1071-72.
  \item See Childress, 945 F.2d at 505-06.
  \item See Erickson, 13 F.3d at 1068-69, 1072.
  \item See 147 F.3d 195, 200-03 (2d Cir. 1998). A dramaturg’s job “can include any number of the elements that go into the crafting of a play.” Id. at 197 n.5.
  \item Id. at 203-04.
  \item See Richlin v. Metro-Goldwyn-Mayer Pictures, Inc., 531 F.3d 962, 968 (9th Cir. 2008); Aalmuhammed v. Lee, 202 F.3d 1227, 1234-35 (9th Cir. 2000) (finding that objective intent, shown through control over a work, is the appropriate analysis for a joint work).
\end{itemize}
subjective intent as a joint work criterion argue that the Act’s definition of a joint work does not mention a shared intent to be co-authors, only “[an intent] that their contributions be merged into inseparable or interdependent parts of a unitary whole.” The Ninth Circuit felt that this implied a requirement of objective manifestation of intent, which it endorsed in Aalmuhammed v. Lee. In that case, Denzel Washington requested that Jeffrey Aalmuhammed be present on the set of a movie he was filming with director Spike Lee. Aalmuhammed later alleged that he contributed scenes and characters to the film, directed Washington himself, and was part of the editing process. The court asserted that control over a project was an objective indication of intent and was one of the most important factors in discerning co-authorship, but Aalmuhammed’s contributions did not show such intent because the control he had over the project was not sufficient. The Ninth Circuit reinforced this view in Richlin v. Metro-Goldwyn-Mayer Pictures, Inc., holding that, “[i]n the absence of a contract, [it will] look to other objective evidence of intent.” Thus, in Richlin, the creator of a treatment was not a co-author of the movie script because he sold his rights to MGM Pictures and took no further part in the script’s creation; he could not show objective intent, as the co-author had no control over creation.

Application of an objective standard of intent is “arguably a departure from [Childress], which permitted inquiry into the state of mind.” Examining objective intent decreases the risk of fraud that is possible when considering party’s state of mind because the inquiry is focused on the outside perception of an act, as opposed to the malleable thoughts of a potential author. Objective intent may be a good standard because it is a straightforward framework that aids courts in uniform application of the law. However, until the Janky decision, courts largely accepted the examination of either subjective or objective intent to determine whether a

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45 17 U.S.C. § 101 (2006); see Jaffe, supra note 18, at 176-77.
46 202 F.3d at 1234-35 (contending that objective intent to create a joint work should be examined if a person wishes to be considered a co-author of a work).
47 Id. at 1229.
48 Id. at 1230.
49 Id. at 1234-35.
50 531 F.3d 962, 969 (9th Cir. 2008).
51 A “treatment” is a “brief outline, in prose, describing the actions of a movie plot, indicating characters along the way with little or no dialogue” and is a “source for a script.” Id. at 964 n.1.
52 Id. at 969-70.
53 Jaffe, supra note 18, at 177.
54 See id.
joint work was created. These divided camps have not yet managed to reach a consensus that applies either subjective or objective intent.  

B. The Copyrightability or "More than De Minimis" Debate

Copyrightability is not explicitly required in 17 U.S.C. § 101 with respect to joint works, but some level of original expression has been consistently required since joint works were still governed entirely by common law. Controversy exists, however, in determining how much contribution is enough to constitute original expression that is worthy of co-authorship status. When the Childress court considered the issue, it debated which test it should employ to ensure status as a joint work was only awarded to original expression: the "more than de minimis" test or the copyrightability test. Childress eventually came down on the side of the copyrightability test, but other courts later analyzed the issue for themselves.

It has been argued that a joint author need not make an "independently copyrightable" contribution of expression; rather, mere ideas or suggestions are sufficient to obtain copyright protection of a contribution. This "more than de minimis" standard may serve "copyright's goal of fostering creativity" by "rewarding all parties who labor together to unite idea with form" and does not require an independently copyrightable contribution. Under the "more than de minimis" view, even a nominal contribution may protect a co-author. If a contribution need only be "more than de minimis," more than a word or line satisfies co-authorship.

Childress, however, deemed original expression copyrightable on its own—essential to "prevent some spurious claims by those who might

56 See, e.g., Aalmuhammed v. Lee, 202 F.3d 1227, 1234-35 (9th Cir. 2000); Childress v. Taylor, 945 F.2d 500, 507-08 (2d Cir. 1991).
57 Compare Childress, 945 F.2d at 507-08 (subjective intent), with Aalmuhammed, 202 F.3d at 1234-35 (objective intent).
58 See Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944) (defining joint works as complementary contributions that are "embodied in a single work to be performed as such").
60 See Childress, 945 F.2d at 506-07.
61 See Aalmuhammed, 202 F.3d at 1232-33; Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1068-71 (7th Cir. 1994).
62 ABRAMS, supra note 59, § 4:30; see also Jaffe, supra note 18, at 175-76.
63 NIMMER & NIMMER, supra note 11, § 6.07[A][3][a].
65 NIMMER & NIMMER, supra note 11, § 6.07[A][1].
otherwise try to share the fruits of the efforts of a sole author.”66 In Erickson, the Seventh Circuit also found that the “more than de minimis” standard was inconsistent with the Act’s purpose because it came too close to allowing copyright of mere ideas alone.67 As mere ideas were traditionally excluded from copyright, Erickson rejected the “more than de minimis” standard in favor of the same copyrightability test utilized in Childress.68 Erickson asserted that a contribution must be a complete original expression, copyrightable in its own right and more than “mere direction or ideas.”69 The court felt that this standard advanced creativity and protected authorship rights better than the “more than de minimis” test.70 Therefore, a party who only contributed ideas or suggestions to a playwright did not create a copyrightable work of his own, so co-authorship did not exist.71 Courts employing the copyrightability test understand the term “authors” in the definition of a joint work to mean that a contribution must be copyrightable because status as an author under copyright is only awarded when a person creates a copyrightable work of his own.72 Therefore, if one party only contributed an “unprotectable expression,”73 a joint work was not created.74

Under the copyrightability test, each contributor need not put their portion into a tangible expression; as long as their portion is an original contribution of more than mere ideas, copyrightability for the purposes of a joint work will be present.75 Marybeth Peters, the former Register of Copyrights,76 subscribes to this position.77 While Childress’s copyrightability

67 Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1070 (7th Cir. 1994).
68 Id. at 1070-71; see also GOLDSTEIN, supra note 14, § 4.2.1.2 (endorseing the copyrightability test).
69 Erickson, 13 F.3d at 1070-71.
70 Id. at 1071.
71 See id. at 1072-73.
72 See Thomson v. Larson, 147 F.3d 195, 200-01 (2d Cir. 1998); Erickson, 13 F.3d at 1070-71; GOLDSTEIN, supra note 14, § 4.2.1.2.
73 An “unprotectable expression” does not satisfy the definition of a joint work as laid out in the Act; a contributor lacking either the intent or a satisfactory level of creativity and originality (what exactly that level must be is the subject of the copyrightability debate) will not amount to a joint work, but an unprotectable expression. See GOLDSTEIN, supra note 14, § 4.2.1.2; see also Childress v. Taylor, 945 F.2d 500, 505-07 (2d Cir. 1991) (insisting on copyrightable efforts “by all putative joint authors”).
74 GOLDSTEIN, supra note 14, § 4.2.1.2.
75 Id.
76 The Register of Copyrights is the director of the U.S. Copyright Office. 17 U.S.C. § 701(a) (2006). The Register of Copyrights advises Congress and conducts studies related to copyright; the position is appointed by the Librarian of Congress. Id. § 701(a)-(b).
77 Jaffe, supra note 18, at 175. Peters became the Register of Copyrights for the U.S. Copyright Office in 1994. Marybeth Peters, Register of Copyrights, Biographical Information, U.S.
standard has prevailed over time, dictum from that 1991 decision regarding the “more than de minimis” test is repeatedly addressed, and even the Childress court admitted that the concept was “open” and “troublesome.” Even when a final decision sides with Childress, many courts award the copyrightability criterion extensive discussion and consideration.

II. Janky v. Lake County Convention and Visitors Bureau

In a town southeast of Chicago, a doo-wop group named Stormy Weather heard that the Lake County Convention and Visitors Bureau was looking for a jingle to represent Lake County, Indiana. Founder Henry Farag suggested that the doo-wop group try to write a song; and Cheryl Janky, a group member and songwriter, took the chore upon herself. Janky wrote and copyrighted a song, originally entitled Wonders of Indiana, in May 1999 and listed herself as the sole author. Janky then played the song for Farag, who suggested she include the phrase “Chicago’s neighboring south shore,” a reference to the area’s ethnic diversity, as well as more specific references to Lake County. Janky re-wrote the lyrics to incorporate Farag’s ideas, titled the new version Lake County, Indiana, and then re-filed for a copyright in December 1999, “styling the effort [as] a ‘joint work.’” She also filed papers with the American Society of Composers, Authors, and Publishers (“ASCAP”), asserting that Farag’s contribution was a ten-percent share. Farag then made a “handshake


77 See Childress, 945 F.2d at 505-07; Nimmer & Nimmer, supra note 11, § 6.07[A][3][b].
78 See, e.g., Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1069-71 (7th Cir. 1994); Ashton-Tate Corp. v. Ross, 916 F.2d 516, 521 (9th Cir. 1990).
81 Janky, 576 F.3d at 359.
83 Id. at 359-60.
84 Id. at 360 & n.3.
85 Id. ASCAP is a membership association created and controlled by composers, songwriters, and music publishers, aimed at protecting the rights of members by licensing and distributing royalties. About ASCAP, ASCAP, http://www.ascap.com/about/ (last visited Apr. 8, 2011). The organization represents every kind of music and “ensure[s] that music
agreement to license the song at no cost to the tourism bureau,” and the Bureau used the song as hold music, sold it on CDs, and commissioned a live performance by Stormy Weather.86

Janky filed yet another copyright registration form in 2003, indicating that any reference to Farag on the previous form was a mistake.87 Janky informed the Bureau that she was the exclusive author and owner of Lake County, Indiana, and the Bureau no longer had permission to use the song.88 The Bureau believed that Farag was a co-author and refused to stop using the song, since he had not retracted his permission.89 Janky then filed a complaint alleging that the Bureau’s use of the song was illegal.90 Janky argued that she never intended for Farag to be considered a joint author; she only placed his name on the registration form “as an indication of [her] gratitude . . . and to demonstrate that [she] appreciated every little bit of support.”91 Janky asserted that Farag was not a co-author because his was merely a de minimis contribution,92 which did not satisfy the requirement of copyrightability set out in Erickson.93 The Bureau argued that Farag’s contribution to the song was significant enough to constitute a copyrightable work because it was much more than mere ideas—it altered the very essence of the song.94 It argued that, while Janky may have retracted her permission for use of the song, Farag’s permission giving the Bureau non-exclusive use was still active, making its continued use legal.95 The magistrate judge found in favor of Janky, holding that “Farag’s contributions were nothing more than ‘minimal revisions’ of a song Janky already composed.”96 A jury concluded the same, awarding Janky $100,000

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86 Janky, 576 F.3d at 360; Steve Schmadeke, A Short Telephone Jingle Leads to a Lawsuit Tangle, CHI. TRIB., Aug. 30, 2009, at 8.
87 Janky, 576 F.3d at 360.
88 Id. at 360-61. When Janky left the band, she notified the Bureau that their use of the song was unauthorized because the copyright belonged to her, not Farag. Janky v. Farag, No. 3:05-CV-217PRC, 2006 WL 842391, at *6 (N.D. Ind. Mar. 29, 2006).
89 See Janky, 576 F.3d at 360. Co-authors of a joint work each possess a 100% share ownership, which gives each author the unfettered right to bestow nonexclusive licenses; a co-author’s only obligation to another co-author is an accounting of profits. See supra note 27 and accompanying text.
90 Janky, 576 F.3d at 360-61.
91 Id. at 360.
92 Id.
93 See Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1071 (7th Cir. 1994).
94 See Janky, 576 F.3d at 363.
95 See id. at 361.
96 Id. (citing Janky v. Farag, No. 3:05-CV-217PRC, 2006 WL 842391, at *9-10 (N.D. Ind. Mar. 29, 2006)).
in damages.97

The Seventh Circuit reversed however, holding that co-authorship existed, so the Bureau’s continued use of Lake County, Indiana was legal.98 The court analyzed the facts surrounding the creation of the song and found that both Farag and Janky intended to create a joint work at the time the work was made.99 Using subjective intent, the court asserted that by including Farag as a co-author Janky meant to create a joint work.100 Then, focusing on Farag’s objective manifestation of intent, the court found that Farag’s artistic control over the product of the work was sufficient to constitute intent to create a joint work.101

In concluding that “this doo-wop ditty is a joint work,” the court found that Farag’s contribution satisfied copyrightability because, while he contributed merely suggestions, his input was important to the essence of the final sound and commercial viability of the song.102 The court acknowledged that “were [it] to deem every person who had a hand in the process [as] a co-author, ‘copyright would explode.’”103 However, it found that Farag’s so-called “minor contribution” must be protected because copyright law requires promotion of the progress of the arts; excluding protection for Farag’s work would counteract that goal.104 The court held that a joint work was created.105

III. Discussion of the Janky Test

A. Congress’s Regard for Subjective and Objective Intent

In Janky, the court analyzed both subjective and objective intent to find co-authorship between Janky and Farag, rather than addressing only one form or the other.106 This analysis was intended by Congress when they included a definition of a joint work in the Act; it differs from past decisions by considering all evidence of intent to more accurately award co-authorship through a fully informed decision.107 Janky appropriately

97 Id. at 363.
98 See id. at 362.
99 Id. at 361-62.
100 Janky, 576 F.3d at 362.
101 See id.
102 Id. at 363.
103 Id. (quoting Gaiman v. MacFarlane, 360 F.3d 644, 658 (7th Cir. 2004)).
104 See id. at 363.
105 Id. at 358, 362-63.
106 See Janky, 576 F.3d at 362. Childress, the landmark case, only advocated analysis of subjective intent. See Childress v. Taylor, 945 F.2d 500, 505-07 (2d Cir. 1991).
107 See H.R. REP. NO. 94-1476, at 2, 120-21 (1976) (Conf. Rep.) (stressing the importance of intent to the determination of a joint work and emphasizing that the analysis of intent must be
analyzed co-authorship because it made intent “the touchstone” of a joint work, as Congress intended, by ensuring that any evidence showing intent was acknowledged. The exploitation of both subjective and objective intent of these co-authors was a better analysis of the creation process because, had the court considered only one or the other, it would have denied co-authorship. The \textit{Janky} decision better served Congress’ intent to protect joint works than other analyses because the court focused its decision on rewarding creativity and original expression by accepting all evidence of each co-author’s intent, rather than restricting its examination to certain accepted evidence.\footnote{See id. at 120; \textit{cf.} VerSteeg, \textit{supra} note 55, at 168 (highlighting the value of the objective intent model for achieving equitable results).}

\textbf{1. Importance of Examining Objective and Subjective Intent}

Holding that “‘billing’ or ‘credit’ may be evidence of intent to create a joint work,”\footnote{See Janky v. Farag, No. 3:05-CV-217PRC, 2006 WL 842391, at *9-10 (N.D. Ind. Mar. 29, 2006) (considering only Farag’s subjective intent to hold that his minimal contributions did not constitute co-authorship deserving of copyright protection).} \textit{Janky} made it clear that subjective intent was required for a finding of co-authorship; in this case, whether Janky or Farag personally considered each other to be co-authors.\footnote{See H.R. REP. NO. 94-1476, at 120 (emphasizing that the purpose of copyright is to protect originality and creativity and intent is essential to determining whether a creative, original joint work was made).} The court emphasized that Janky showed her subjective intent to create a joint work when she filed the December 1999 copyright registration form, giving Farag public credit for creation of the work by listing him as co-author.\footnote{\underline{Janky}, 576 F.3d at 362 (citing Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1072 (7th Cir. 1994)).} Just as a playwright’s willingness to share credit with another demonstrated intent,\footnote{See \textit{id.; see also} Childress v. Taylor, 945 F.2d 500, 508 (2d Cir. 1991) (denying co-authorship where a playwright never personally intended to create a joint work).} Janky’s acknowledgement of Farag’s contribution showed that she personally intended to create a joint work.\footnote{\underline{Janky}, 576 F.3d at 362.} By issuing the use license to the Bureau, Farag showed he had control over the promotional song and thus demonstrated objective intent to be a co-author.\footnote{See Thomson v. Larson, 147 F.3d 195, 203-04 (2d Cir. 1998) (holding that a lack of such billing showed that no intent existed).} Janky and Farag began the project because the Bureau wanted a jingle that would promote Lake

\textit{Janky v. Lake County Convention and Visitors Bureau} 517
County, and Farag completed it by awarding the Bureau a non-exclusive license for use.\textsuperscript{117} Farag’s actions, including suggesting changes and improving the song’s commercial viability, showed enough control to satisfy objective intent.\textsuperscript{118}

\textit{Janky} was correct to consider objective and subjective manifestations of intent because the combination of the two resulted in co-authorship and protection of the rights of two original contributors, as Congress intended.\textsuperscript{119} Copyright should protect creative input, and, in this case, the court must be free to look for evidence of both subjective and objective intent in order to glean the true intentions of the putative co-authors. By using both forms of intent, \textit{Janky} applied the correct test to protect Farag’s creative contribution.\textsuperscript{120}

2. \textit{How Janky Serves the Purpose of Copyright Better Than Previous Tests}

The \textit{Janky} test serves the purpose of copyright\textsuperscript{121} better than previous tests because it does not ignore any showing that co-authorship was intended simply because that evidence is subjective or objective.\textsuperscript{122} When Congress included a definition of a joint work in the Act, it indicated that “[t]he touchstone here is the intention, at the time the writing is done, that the parts be . . . combined into an integrated unit.”\textsuperscript{123} Congress did not specifically designate the use of subjective or objective intent,\textsuperscript{124} but made it clear that the purpose of recognizing many forms of expression was to protect originality and creativity—fundamental criteria of copyright.\textsuperscript{125}

By addressing all available indications that creation of a joint work was intended by its authors, the Seventh Circuit created a test that protected as

\begin{footnotesize}
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\item \textsuperscript{117} \textit{Id.} at 359-60.
\item \textsuperscript{118} See Aalmuhammed v. Lee, 202 F.3d 1227, 1234-35 (9th Cir. 2000) (establishing control over a work as a significant showing of objective intent but denying co-authorship to a man who contributed suggestions for Muslim activities in a film because they were not enough to establish control).
\item \textsuperscript{119} The magistrate judge was unable to find co-authorship when he analyzed only the subjective intent to create a joint work. See Janky v. Farag, No. 3:05-CV-217PRC, 2006 WL 842391, at *8-10 (N.D. Ind. Mar. 29, 2006); see also E. Scott Johnson, Avoiding Joint Pain: Treatment of Joint Works of Authorship Conditions, MD. B.J., May 2010, at 13, 14.
\item \textsuperscript{120} Cf. H.R. Rep. No. 94-1476, at 5-6 (1976) (Conf. Rep.).
\item \textsuperscript{121} See \textit{GENERAL GUIDE}, supra note 7, at 1:1 (indicating that the purpose of copyright is to protect creativity and original expression).
\item \textsuperscript{122} See H.R. Rep. No. 94-1476, at 120 (emphasizing that Congress included a definition of a joint work in the Act because it found that co-authors whose work was creative and original deserved copyright protection).
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} See \textit{id.}
\item \textsuperscript{125} See \textit{GENERAL GUIDE}, supra note 7, at 1:1.
\end{enumerate}
\end{footnotesize}
much creativity as could be found in the facts; the all-encompassing criteria correctly awarded copyright ownership for as much creative contribution as possible, serving the interests of the Act. The Congress included a definition of a joint work in the Act to protect creativity and originality—not to protect only the creativity of a co-author who managed to publicly manifest his intentions of creating an original work. The Janky test serves the creative purpose of copyright better than previous tests because it does not ignore evidence that may show the existence of intent to create a joint work due to a categorization of that intent. Janky serves this purpose by awarding co-authorship when any evidence of intent of co-authorship is found.

3. Greater Access to Copyright Protection

If the court did not consider objective intent, co-authors would be inappropriately denied access to copyright protection after supplying original work to satisfy congressional intent. The Janky court held that Farag showed an objective intent to create a joint work because he “wielded considerable control over what the song finally looked like.” Farag’s individual intent to create a joint work when he gave Janky suggestions was not blatantly obvious because he made no public assertions of authorship. In fact, he did not even sign the copyright papers himself—his signature was forged by Janky. Therefore, without addressing both subjective and objective intent, Janky would not have resulted in a finding of co-authorship. Congress intended to allow joint work protection in a situation like Janky because both authors contributed

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126 Id. (indicating that the purpose of copyright is to protect and expand creativity and to give creators of a work their due reward). Giving every potential author the opportunity to protect his creation serves the original purpose of copyright. See supra note 17 and accompanying text.

127 See H.R. REP. No. 94-1476, at 120. Congress made no indication that they intended to differentiate between some creative contributors and others. See id.

128 But see Thomson v. Larson, 147 F.3d 195, 200 & n.13 (2d Cir. 1998) (holding that co-authorship did not exist, despite the significant script-altering input a party had, merely because the original author emphatically refused to share authorship during creation).

129 But see Childress v. Taylor, 945 F.2d 500, 509 (2d Cir. 1991) (denying co-authorship to an actress even though she played a major part in storyline development).

130 See, e.g., Thomson, 147 F.3d at 201-02 (denying creation of a joint work even though a dramaturg demonstrated significant control over a completed script).

131 Janky v. Lake Cnty. Convention & Visitors Bureau, 576 F.3d 356, 362 (7th Cir. 2009); see also Aalmuhammed v. Lee, 202 F.3d 1227, 1234-35 (9th Cir. 2000) (holding that artistic control objectively manifested intent).

132 See Janky, 576 F.3d at 364 (Ripple, J., dissenting).


134 Compare Childress, 945 F.2d at 505-07, with Janky, 576 F.3d at 362-64.
creative and original work in their own way; denying co-authorship status would reject access to the copyright protection that original, essential expression, like Farag’s, deserves.\textsuperscript{135}

B. An Adjusted Standard for Copyrightability

1. Originality Required

In \textit{Janky}, the court purportedly agreed with the copyrightability test,\textsuperscript{136} but stretched that criterion to its breaking point by allowing Farag’s contribution of a few words to satisfy the requirement simply because it altered the essence and commercial viability of the work.\textsuperscript{137} In doing so, \textit{Janky} analyzed the existence of a joint work as it should be assessed according to Congress’ definition, providing “copyrightability” status to any contribution that is original and essential to the work as a whole.\textsuperscript{138} This appropriately avoids providing co-author status to a minor contributor who does not deserve such acclaim because he did not provide any original expression, while it rewards a legitimate contributor with co-ownership rights.\textsuperscript{139}

By designating Farag’s contribution as copyrightable expression, the court departed from the path set by previous decisions that made no exception for mere ideas that altered commercial viability.\textsuperscript{140} While Farag did not personally combine his ideas with any form of expression (he simply suggested that a few key words should be added to the song), the court correctly found co-authorship because Farag’s ideas were original;

\begin{footnotesize}
\footnotesize{\textsuperscript{135} See H.R. REP. No. 94-1476, at 75 (1976) (Conf. Rep.) (indicating congressional intent to protect a broad range of works displaying creativity and original expression).  
\textsuperscript{136} \textit{Janky}, 576 F.3d at 363-64. The Seventh Circuit previously decided \textit{Erickson}, which followed the \textit{Childress} test, requiring copyrightability, defined as “original expression that could stand on its own as the subject matter of copyright”; the applicability of the “more than \textit{de minimis}” test was denied. See Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1070 (7th Cir. 2009) (quoting \textit{GOLDSTEIN}, supra note 14, § 4.2.1.2).  
\textsuperscript{137} See \textit{Janky}, 576 F.3d at 363-64. Farag suggested that the doo-wop ditty include a specific reference to Lake County and a reference to “Chicago’s neighboring south shore.” \textit{Id.} at 360.  
\textsuperscript{138} See 17 U.S.C. § 101 (2006). \textit{Janky}’s analysis protects contribution inseparable from the other portions of the work, without which the work wouldn’t succeed. See \textit{id}.  
\textsuperscript{139} In \textit{Erickson}, co-authorship was denied to contributors who provided an author with ideas and suggestions that were eventually worked into a play, although it may have been argued that, without those contributions, the play would not have succeeded. \textit{Erickson}, 13 F.3d at 1071-72. But co-authorship was awarded in \textit{Janky} for a contribution of mere ideas because those ideas altered the commercial viability of the work. \textit{Janky}, 576 F.3d at 362-63.  
\textsuperscript{140} Compare \textit{Childress} v. Taylor, 945 F.2d 500, 505-07 (2d Cir. 1991) (finding that a contribution was copyrightable only when the potential co-author combined a “non-copyrightable idea with a copyrightable form of expression”), \textit{with} \textit{Janky}, 576 F.3d at 363-64 (finding suggestions copyrightable when they significantly altered the essence of the work).}
\end{footnotesize}
they took the song in a new direction geared more specifically toward Lake County than Janky’s contribution. As copyrightability rests heavily on originality, Farag’s input deserves protection. The court still required more original expression than the “more than de minimis” standard required, but it correctly copyrighted more minor contributions when the essence of the work lay with that contributor’s input. Janky’s interpretation of what satisfied the copyrightability standard withheld copyright protection for mere ideas that had no significant effect on the work as a whole. However, it protects contributions that may seem quantitatively minor, but without which the work would not succeed.

The Constitution intends to protect “authors” ; it is widely established that mere ideas are not enough to constitute authorship. Therefore, Janky’s denial of the “more than de minimis” test was correct because that test protected those contributing merely a word or a line. However, the previous copyrightability standard would also deny co-authorship to Farag, so the Janky court correctly adjusted the test for contributions that alter the essence of a work because those contributions are original in the context of the work. They are small suggestions with large creative effects, serving the purposes of copyright. 

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141 See Janky, 576 F.3d at 363-64 (emphasizing that Farag contributed information to Lake County, Indiana that Janky’s original version neglected to include). This was “original” as Congress intended because it was Farag’s “own intellectual effort.” GENERAL GUIDE, supra note 7, at 3:1.
142 See H.R. REP. NO. 94-1476, at 120 (1976) (Conf. Rep.) (showing Congress’s intent to protect creative expression, not simply original expression).
143 Cf. LaFrance, supra note 30, at 196-97 (asserting that the copyrightability test has been well received as assurance that copyright will protect original expression, not mere ideas).
144 See GENERAL GUIDE supra note 7, at 3:1 (requiring “an appreciable amount” of creative input in order to qualify for copyrightability); Johnson, supra note 119, at 14 (“[A] putative joint author must contribute authorship, and not merely funding . . . .”).
145 See, e.g., Thomson v. Larson, 147 F.3d 195, 201-03 (2d Cir. 1998) (finding co-authorship did not exist even though a party helped revamp a script significantly). Under the Janky test, Thomson might have been decided differently.
146 U.S. CONST. art. 1, § 8, cl. 8.
147 See Childress v. Taylor, 945 F.2d 500, 505-07 (2d Cir. 1991) (holding that while a definition of “author” does not appear in the Act, it is most likely used “only in its ordinary sense of an originator”); GOLDSTEIN, supra note 14, § 4.2.1.2.
148 See Childress, 945 F.2d at 507 (emphasizing that a contribution must be original to be protected by copyright).
2. Essential Contributors Not Excluded

Janky appropriately adjusted the threshold for works deemed copyrightable to a level that provided protection for the smallest original contribution because an adjusted standard was necessary to protect those that the copyright statute is geared toward—authors essential to a work’s creativity.151 Acknowledging that Farag’s suggestions to Janky could be the quantitative equivalent of “mere suggestions or ideas,”152 the Seventh Circuit said his contributions were still copyrightable because the suggestions were “concrete expressions,” important to the final sound and commercial viability of the song.153 The court posited that it was likely that the Bureau, looking to stress the enjoyments of their county, would have rejected Janky’s Wonders of Indiana. Farag made the song commercially viable by altering its essence to focus on Lake County, instead of Indiana as a state.154 While these mere ideas would not be “original expression that could stand on [their] own . . . ,” as a few words do not form a song, they were copyrightable because they altered the essence of the work and without them, the work itself would not exist in that form.155

Copyright is intended to protect creativity and original expression; without Farag, Janky’s original expression may have gone nowhere.156 Copyright should secure exclusive rights for all authors and inventors,157 as Congress did not write a definition of joint works into the Act that was only intended to protect the dominant author.158 Instead, the definition was included to promote the progress of the arts through protection of all established authors,159 which Janky v. Lake County Convention and Visitors Bureau correctly accomplished by protecting Farag when he suggested significant improvements to Janky’s work.160 The song would not have satisfied its purpose, promotion of tourism in Lake County, without Farag, so Janky correctly discards the rigidity of the previous standard of

151 See 17 U.S.C. § 101 (2006) (requiring joint works to be comprised of interdependent parts, each essential to the work as a whole); Nimmer & Nimmer, supra note 11, § 6.07[A][3][a].
153 Id.
154 Id.
155 Compare Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1072 (7th Cir. 1994) (refusing to qualify the contributions of theater company members as a joint work, even though they arguably encompassed enough creativity to alter the essence of the work), with Janky, 576 F.3d at 363 (finding this factor important enough to warrant co-authorship).
156 See Schmadeke, supra note 86 (stating that the Bureau used the song in an effort to “promote tourism in Lake County, Ind[iana]”).
157 U.S. Const. art. I, § 8, cl. 8.
160 See Janky, 576 F.3d at 363.
copyrightability. By adjusting the standard to include ideas that significantly altered the essence of the work, Janky protected more original expression than previous tests.\textsuperscript{161} This accomplished the goals of the Act because Congress intended to protect creativity and originality, and Janky correctly protects those whose creative ideas altered the essence of the song so much that the work would not have met its composers’ purpose without them.\textsuperscript{162}

3. Importance of an Adjusted Standard of Copyrightability

Without the Seventh Circuit’s emphasis on the commercial viability of the song and subsequent creation of an adjusted copyrightability standard, Farag’s suggestions would have constituted a few, non-original words that would not have qualified his input as copyrightable.\textsuperscript{163} Finding this way would deny access to copyright for authors like Farag who, though not supplying the majority of the work, were indispensible to the creation of an inseparable work.\textsuperscript{164} Congress intended to protect creative and original works that furthered the progress of the arts, and denying copyright to a contributor without whom a work would not have succeeded does not serve that goal, as it keeps creative expression away from the public instead.\textsuperscript{165}

The Janky court allowed mere suggestions to satisfy copyrightability as long as they significantly altered the essence or commercial viability of the work.\textsuperscript{166} This new standard protected creative contributors when previous analyses did not.\textsuperscript{167} Because Congress intended that copyright protection extend to those who made a significant, inseparable contribution to the overall work with the intention to create a joint work,\textsuperscript{168} Janky articulated the correct test because it ensured that any creative contributor, no matter

\textsuperscript{161} Compare id. at 363-64, with Erickson, 13 F.3d at 1071-72 (denying a finding of copyrightability to idea-contributing actors).


\textsuperscript{163} See Janky v. Farag, No. 3:05-CV-217PRC, 2006 WL 842391, at *9-10 (N.D. Ind. Mar. 29, 2006) (holding that Farag’s contributions were too minimal to qualify for joint ownership under copyright law).

\textsuperscript{164} See, e.g., Thomson v. Larson, 147 F.3d 195, 201-03 (2d Cir. 1998) (denying co-authorship even though a dramaturg’s contributions were essential to the success of the final script).

\textsuperscript{165} See H.R. REP. NO. 94-1476, at 120 (1976) (Conf. Rep.) (asserting that a joint work is found when an author contributes original expression).

\textsuperscript{166} See Janky, 576 F.3d at 363-64.

\textsuperscript{167} See, e.g., Richlin v. Metro-Goldwyn-Mayer Pictures, Inc., 531 F.3d 962, 969 (9th Cir. 2008) (finding that creation of a treatment, which developed the very premise of a film, was not sufficiently original to satisfy copyrightability); Erickson v. Trinity Theater, Inc., 13 F.3d 1061, 1069-71 (7th Cir. 1994) (holding that a contribution must constitute original expression to satisfy copyrightability).

\textsuperscript{168} See H.R. REP. NO. 94-1476, at 120.
how minor the actual words they contributed, is protected by copyright when a work could not have existed without them.\textsuperscript{169}

**CONCLUSION**

Stormy Weather worked cohesively for years, producing ten albums and performing live throughout northwest Indiana.\textsuperscript{170} When Janky quit the doo-wop group intending to take at least one song with her, Farag was amazed that “all this [litigation came] from [him] and . . . Janky writing a song in [his] living room, a song that in total didn’t sell 2,000 records.”\textsuperscript{171} The short-lived glory the song enjoyed was overshadowed by the over-litigated case that required the Seventh Circuit to put “shoulder to the wheel [and] forge on.”\textsuperscript{172} The court carried its burden to a desirous end for Farag, the Bureau, and future contributors in adjudications of co-authorship disputes, ultimately deciding that *Lake County, Indiana* was a joint work. In coming to this conclusion, the Seventh Circuit correctly addressed both the intent and the copyrightability requirements of the definition of a joint work to ensure that original expression is awarded proper protection, as Congress intended in the Act. Examining subjective and objective intent of the potential co-authors, the court made every effort to find a contribution worthy of co-authorship status, appropriately addressing intent—the “touchstone” of a joint work analysis.\textsuperscript{173} This all-encompassing analysis departed from the *Childress* path, but did so to the benefit of future authors, as creativity is more adequately protected by *Janky* than by its predecessors.\textsuperscript{174}

Allowing the mere suggestions to constitute copyrightability because they altered the essence of the work, *Janky* adjusted the previously accepted test for a copyrightable work to a level that better protects as much original expression as Congress and the Constitution desire. By altering the analysis of criteria for a joint work, the Seventh Circuit better served the goal of Congress in the Act; originality and creativity are protected and encouraged because authors are awarded for original contributions without which a work would not be the same. Therefore, *Janky’s* all-encompassing intent analysis and adjusted standard of

\textsuperscript{169} Compare Childress v. Taylor, 945 F.2d 500, 505-07 (2d Cir. 1991) (providing no protection for an actress who helped with a script), with *Janky*, 576 F.3d at 363-64 (adjusting the standard and providing access to co-authorship rights for essential contributors).

\textsuperscript{170} Group Biographies, supra note 3.

\textsuperscript{172} Schmadeke, supra note 86.

\textsuperscript{173} Compare Childress v. Taylor, 945 F.2d 500, 505-07 (2d Cir. 1991), with *Janky*, 576 F.3d at 360-64. *Childress* required only the use of subjective intent and the old standard of copyrightability. See *Childress*, 945 F.2d at 504-07.
copyrightability established a more accurate assessment for use in joint work disputes than its previous counterparts.