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STUDIES 11–13

12. Joint Ownership of Copyrights

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FOREWORD

This committee print is the fourth of a series of such prints of studies on Copyright Law Revision published by the Committee on the Judiciary Subcommittee on Patents, Trademarks and Copyrights. The studies have been prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, United States Code).

Provisions of the present copyright law are essentially the same as those of the statutes enacted in 1909, though that statute was codified in 1947 and has been amended in a number of relatively minor respects. In the half century since 1909 far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are subject to copyright; new uses of these productions and new methods for their dissemination have grown up; and industries that produce or utilize such works have undergone great changes. For some time there has been widespread sentiment that the present copyright law should be reexamined comprehensively with a view to its general revision in the light of present-day conditions.

Beginning in 1955, the Copyright Office of the Library of Congress, pursuant to appropriations by Congress for that purpose, has been conducting a program of studies of the copyright law and practices. The subcommittee believes that these studies will be a valuable contribution to the literature on copyright law and practice, that they will be useful in considering the problems involved in proposals to revise the copyright law, and that their publication and distribution will serve the public interest.

This committee print contains the following three studies relating to the ownership of copyright: No. 11, "Divisibility of Copyrights," by Abraham L. Kaminstein, Chief of the Examining Division of the Copyright Office, with two supplements by Lorna G. Margolis and Arpad Bogsch of the Copyright Office staff; No. 12, "Joint Ownership of Copyrights," by George D. Cary, General Counsel of the Copyright Office; and No. 13, "Works Made for Hire and on Commission," by Borge Varmer, Attorney-Adviser of the Copyright Office.

The Copyright Office invited the members of an advisory panel and others to whom it circulated these studies to submit their views on the issues. The views, which are appended to the studies, are those of individuals affiliated with groups or industries whose private interests may be affected by copyright laws, as well as some independent scholars of copyright problems.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are entirely those of the authors.

JOSEPH C. O'MAHONEY,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. Senate.

COPYRIGHT OFFICE NOTE

The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17 of the United States Code) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in regard to their general subject matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors and not of the Copyright Office.

Each of the studies herein was first submitted in draft form to an advisory panel of specialists appointed by the Librarian of Congress, for their review and comment. The panel members, who are broadly representative of the various industry and scholarly groups concerned with copyright, were also asked to submit their views on the issues presented in the studies. Thereafter each study, as then revised in the light of the panel's comments, was made available to other interested persons who were invited to submit their views on the issues. The views submitted by the panel and others are appended to the studies. These are, of course, the views of the writers alone, some of whom are affiliated with groups or industries whose private interests may be affected, while others are independent scholars of copyright problems.

ABE A. GOLDMAN,
Chief of Research,
Copyright Office.

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Register of Copyrights,
Library of Congress.

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STUDIES IN EARLIER COMMITTEE PRINTS

First print:

1. The History of U.S.A. Copyright Law Revision from 1901 to 1954.
2. Size of the Copyright Industries.
3. The Meaning of "Writings" in the Copyright Clause of the Constitution.
4. The Moral Right of the Author.

Second print:

5. The Compulsory License Provisions in the U.S. Copyright Law.
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STUDY NO. 12
JOINT OWNERSHIP OF COPYRIGHTS

By George D. Cary

August 1958

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JOINT OWNERSHIP OF COPYRIGHTS

I. Introduction and Statement of the Problem

The problems of joint ownership to be considered in this study relate to the situation in which two or more persons together own the same right or rights in the same work. In this situation, a single copyright (or a particular property right comprised therein) is owned by two or more persons jointly, no one of them being the sole owner of the particular right involved. This is sometimes considered analogous to the ownership by two or more persons together of a single undivided piece of land.

It should be emphasized at the outset that this situation is to be distinguished from that involved in the problem of divisibility of copyright [1] which concerns the question of transferring ownership of some one of the several rights comprised in copyright so that different persons own different rights in a work, with any particular right having one owner.

Joint ownership may come about in any of several ways. Primarily, when two or more authors in pursuance of a common design together create a single work (commonly referred to as a "joint work" or "a work of joint authorship") they become joint owners of the work. No one of the coauthors alone owns the "joint work" or any particular right therein; all the coauthors together own all the rights in the one work. And it should be noted that if any one of the coauthors of a "joint work" assigns his interest in the work, his assignee and the other coauthors become joint owners.

A "joint work" must be distinguished from what is commonly known as a "composite work." In broad terms, a "joint work" is a unitary work, the parts of which, although created by several authors, are not considered to be individual works in themselves. A simple example would be a story written by two authors; here the contribution of either one of the authors is not separately identifiable or, though identifiable, is not capable of use as a separate work in itself. A "composite work," broadly speaking, is one which puts together the separate and distinct works of different authors. A clear-cut example would be a magazine containing a number of short stories contributed by various independent authors; here each story is separately identified and capable of separate use as a work in itself. The magazine as a whole would be a "composite work," but neither the magazine nor any of the stories by one author would be a "joint work." The rights in each story would be owned by its author alone (unless of course assigned by him), and the rights in the magazine as a whole would ordinarily be owned by the magazine publisher alone (as the "author" of the "composite work").

[1] The problem of divisibility is dealt with in *Divisibility of Copyrights*, by Abraham L. Kaminstein (Study No. 11 in the present committee print).

One other situation should be noted, in which the labor of several creators is combined to produce a single work, which work is owned solely by one person. Where a work is created by a number of employees for their employer, the employer, whether individual or corporate, is deemed to be the "author" [2] and is the sole owner of the work. A good example is a motion picture for which several employees of the producing company create the script, music, and other components that are merged to make the motion picture. The producing company, as their employer, is deemed the "author" and is thus eligible to become the sole owner of the copyright in the motion picture.[3] Other examples are newspapers, magazines, or encyclopedias for which the component articles are written by staff writers and editors in the employ of the publisher, the latter being deemed the "author," thus becoming the sole owner of the copyright.[4] These, of course, are not instances of joint ownership. Questions regarding the concept of the employer's ownership of works made by his employees are beyond the scope of this study.[5]

The first question to be considered in this study is the preliminary one as to what constitutes a "joint work." [6] In any particular case, have two authors created a single "joint work" so as to make them joint owners of the one combined work, or have they created two separate works, each of which is owned solely by its author?

Aside from works of joint authorship, there are various situations in which a work of a single author, or one owned initially by a single owner, becomes the property of two or more joint owners. (1) A sole author or owner of a work may assign an undivided share of his rights, so that he and his assignee become joint owners of those rights.[7] (2) A sole author or owner may assign his rights entirely to two or more persons jointly, those persons then becoming joint owners. (3) Upon the death of an author or owner, two or more persons may acquire his rights jointly by will or inheritance. (4) Under section 24

[2] 17 U.S.C. § 26.

[3] For example, a composer who is hired by a film studio to create music for a motion picture is not considered to be a joint author of the resulting film. As put by one authority:

"The device by which this nullification is usually accomplished is the employment contract, the document which typically governs the relationship between the film composer and the producer. Besides obliging the composer to render all manner of musical services which may be required, including conducting, this instrument virtually effaces the composer as an independent creator, and, in the eyes of Anglo-Saxon law, relegates him to the rank of the hired worker or employee. As such, his divorcement from copyright is complete, since the Copyright Law accords him no legal identification with or ownership in his production, the musical score. Indeed, the copyright ownership throughout the period of protection—the original term of twenty-eight years, as well as a renewal term of an additional twenty-eight years—is vested exclusively in the employer."

Zissu, *The Copyright Dilemma of the Screen Composer*, in 1 HOLLYWOOD QUARTERLY 317 (April 1946).

[4] If the author of a contribution to a periodical is an employee of the company publishing the periodical, then the publisher, as employer for hire can be said to be the author. If the contribution is written by a freelance author, it is the trade custom for such authors to assign their literary property rights to the publication, which is authorized to obtain copyright for the article under its blanket copyright of the periodical. The publisher will generally, upon request, reassign to the author all rights not inconsistent with its interests. See Wasserstrom, *The Copyrighting of Contributions to Composite Works*, 31 NOTRE DAME LAWYER 381, 401 (May 1956). A searching analysis of the entire relationship between authors and periodical publishers may be found in Henn, *"Magazine Rights"—A Division of Indivisible Copyright*, in 40 CORNELL L.Q. 411-474 (Spring 1955). The case of Arthur D. Morse v. Sidney Fields et al., 127 F. Supp. 63 (S.D.N.Y., 1954) is illustrative of the general problem.

[5] *Works Made For Hire and on Commission* and their ownership are the subject of Study No. 13, by Borge Varmer, in the present committee print.

[6] Pp. 89-92, *infra*. For an excellent treatment of this problem as well as those referred to in footnote 10 *infra*, see: Kupferman, *Copyright—Co-Owners*, 19 ST. JOHN'S REV. 1-16 (April 1945); Rosengart, *Principles of Co-Authorship in American, Comparative and International Copyright Law*, 25 SO. CAL. L. REV. 247-288 (April 1952); and Taubman, *Joint Authorship and Co-Ownership in American Copyright Law*, 31 N.Y.U. L. REV. 1246-1261 (Nov. 1956).

[7] An example of this type of situation of current interest in the music field relates to what is known in the trade as "Splitsville". This term refers to the "splitting" of a copyright between a publisher and a recording company, a recording artist or others. From an economic point of view, if a song becomes a "hit" a share of the copyright may be more remunerative than a flat royalty or fee, especially when it is considered that foreign earnings of the composition are included in the copyright owner's share. For an interesting story concerning "Splitsville", see THE BILLBOARD, April 28, 1958, p. 5.

of the present copyright law [8] when the author of a work is deceased, the renewal copyright may be owned jointly by his widow and children,[9] or by several heirs. There may also be other transactions resulting in joint ownership.

Given a case of joint ownership of a work, a number of questions arise with respect to the rights and obligations of the coowners among themselves and in relation to third persons. May one coowner use the work (in any manner that would infringe the copyright if such use were made by an unauthorized person) without the assent of the other coowner? May one coowner license a third person to use the work without the concurrence of the other coowner? Is such a license granted by one coowner binding on the other? If one coowner derives revenue from his use of the work, or from licensing its use, is he obliged to share the revenue with the other coowner? These are the second set of questions to be considered in this study.[10]

The present copyright statute [11] does not deal with either the first question as to what constitutes a work of joint authorship, or the second set of questions as to the incidents of joint ownership. In fact, the statute does not mention joint authorship or joint ownership, but speaks of "the author" [12] of a work or "the proprietor" [13] of a copyright without reference to the possibility that there may be more than one author or proprietor of a single work. Likewise, neither in the hearings [14] nor in the report [15] accompanying the bill that became the copyright law of 1909, does one find a reference to the problems of joint authorship or joint ownership. These various questions have, however, arisen in litigation and a body of case law has been developed by the courts in decisions handed down before and since the enactment in 1909 of the Copyright Act, which, with some amendments, is the present copyright statute.

II. Judicial Development of the Concept of Joint Authorship

1. GENERAL SUMMARY

With regard to what constitutes a work of joint authorship, the question has arisen most frequently in cases concerning musical works where the music was composed by one author and the lyrics were written by another. Traditionally, where the composer and lyricist worked together for the purpose of creating the music and lyrics in combination, the resulting combination was held to be a single joint work of the two authors.[16] Even though the two authors performed their separate labors apart from each other and at different times, as long as they intended to have the music and lyrics combined into one

[8] Title 17 U.S.C.

[9] De Sylva v. Ballentine, 351 U.S. 570 (1956). In that case the Supreme Court held that the renewal copyright was owned jointly by the widow and the one child of the deceased composer. An unsettled question concerns how the renewal copyright is to be apportioned among the widow and children when there is more than one child.

[10] Pp. 92-101, *infra*.

[11] Title 17, U.S.C.

[12] *E.g.* 17 U.S.C. § 4.

[13] *E.g.* 17 U.S.C. § 9.

[14] *Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly, on S. 6330 and H.R. 19853*, June and December 1906; *Hearings Before the Committees on Patents of the Senate and House of Representatives on Pending Bills to Amend and Consolidate the Acts Respecting Copyright*, March 26, 27, 28, 1908.

[15] H.R. REP. NO. 2222, 60th Cong., 2d Sess.

[16] Levy v. Rutley, L.R. 6 C.P. 523 (1871).

whole, the combination was held to be a single joint work.[17] In a recent case, however, the court went much further: where lyrics were written some years later than the music which had previously been published as an instrumental piece, and even though the lyrics were written at the behest of an assignee of the composer rather than of the composer himself, the music and lyrics were held to be a single joint work, with the result that the two owners of the respective renewal copyrights in the music and the lyrics were held to be joint owners of both.[18] The doctrine of this last case, as it pertains to later additions or revisions of a preexisting work, could have far-reaching consequences, as will be noted below.

2. REVIEW OF THE CASES

In view of the omission from the 1909 copyright law of any reference to joint authorship, it is no wonder that when a case arose in 1915 involving a dispute between several persons who had contributed to a musical operetta,[19] Judge Hand found it necessary to say:

> I have been able to find, strangely, little law regarding the rights of joint authors of books or dramatic compositions. The only case in the books in which the matter seems to have been discussed is *Levy* v. *Rutley*.

Since that English decision is the origin of our present joint authorship doctrine, and so far as is known, contains the first definition of joint authorship,[20] the following language therefrom is worth noting:

> If two persons undertake jointly to write a play, agreeing on the general outline and design and sharing the labor of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it; but to constitute joint authorship there must be a common design.[21]

The ingredients of joint authorship enumerated in this case are collaboration and a common purpose. Joint authorship occurs when two or more authors intend by their combined efforts to create a unitary work and in pursuit of that intent, work closely in collaboration. In the *Maurel* v. *Smith* case [22] this approach was applied to the factual situation where A wrote a scenario for a comic opera, B the libretto, and C the lyrics. Although A's scenario was written first, the court held A to be joint author with B and C with all the rights and obligations which arise from such an undertaking. The common design was found from the fact that all three agreed to contribute to a single work intended for operatic performance. B's use of A's scenario made it easy for the court to find collaboration between these two. Although C's lyrics did not necessarily have any relation to the plot nor did they bear upon A's scenario, the court held that the lyrics were intended to be united with dialogue and plot and music into one composition, and in their presentation the whole was single. One who contributes to such a joint production does not retain any separate ownership in his contribution, but it merges into

[17] Edw. B. Marks Music Corp. v. Jerry Vogel Music Co., Inc., 42 F. Supp. 859 (S.D.N.Y. 1942).
[18] Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co., Inc., 221 F. 2d 569 (2d Cir., 1955) *on rehearing*, 223 F. 2d 252.
[19] Maurel v. Smith, 220 F. 195 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir., 1921).
[20] So said Judge Learned Hand in Edw. B. Marks Music Corp. v. Jerry Vogel Music Co., Inc., 140 F. 2d 266 (2d Cir., 1944), at 267.
[21] See note 16 *supra* at 529.
[22] See note 19 *supra*.

the whole. The Court of Appeals affirmed the decision, and added that in a joint cooperation—

> It is not essential that the execution of the work should be equally divided; as long as the general design and structure was agreed upon, the parties may divide their parts and work separately.[23]

In a situation where a libretto for a comic opera was written, and then subsequently composers were hired to write the music, the court found that there was no collaboration between the librettist and the composers, and so denied a claim of the composer of the music in the entire production.[24] The court relied to some extent on the fact that copyright was secured separately in the vocal score of the operetta, to show that there was no unified whole, but merely two components—libretto and music—which were separable.

In a subsequent case, the court denied to the widow of an author of text matter any right in illustrations which were added to the book in an edition published 15 years after the date of the original edition.[25] Judge Hand, commenting upon this decision in a later case,[26] thought there was no doubt that the author of the text was not a joint author of the illustrations added 15 years later, for, as he expressed it, "there was no change in the work." Presumably, Judge Hand considered that no joint authorship existed when a preexisting work was revised by the addition of some new material, of a separate and distinct nature, by a person other than the original author. In this case, clearly, there was no collaboration.

It is to be noted that in the *Maurel* v. *Smith* case, the collaboration between the multiple authors was coincident in point of time. The question arises as to the effect on the doctrine where the collaboration is between persons who do not know each other, and is removed in point of time. Such a case arose some years later,[27] and the court found that physical propinquity or personal acquaintance with the other persons performing work on the combined composition, was not necessary, so long as all persons knew that their effort was to result in a combined work. Likewise, the fact that the authors labored separately in point of time was of no consequence.

The concept of common design and collaboration was given a broader meaning in a later case. Two persons collaborated in creating an unpublished copyrighted musical composition, one composing the music, the other the lyrics. During the following year, the composer of the music offered the song for sale to a publisher, who did not like the lyrics. With the composer's consent, the publisher hired another to write new lyrics, and the resulting published composition was copyrighted. The court held that the published composition was a "new work" and that the composer of the pre-existing music was a joint author with the newly hired lyric writer.[28] It may be open to question whether there are collaboration and common design when a pre-existing work is adapted in such fashion. But at least the composer had agreed to have his previously unpublished music combined and

[23] *Ibid.*, p. 215 of 2d Cir. opinion.
[24] Herbert v. Fields, 152 N.Y. Supp. 487 (Sup. Ct. Spec. Term, 1915).
[25] Harris v. Coca Cola Co., 73 F. 2d 370 (5th Cir. 1934). *Certiorari denied*, 294 U.S. 709 (1935).
[26] See note 20 *supra*.
[27] See note 17 *supra*.
[28] Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co., Inc., 161 F. 2d 406 (2d Cir. 1946), the so-called "Melancholy Baby" case.

published with the new lyrics. Although the question was not decided in that case, one may theorize that if this concept is valid, and since the music and first lyrics were a joint work, the writer of the lyrics in the earlier unpublished composition, being a joint author of that work, would also become a joint author in the later published version, which conclusion seems to be a reductio ad absurdum.

A further extension of the joint author concept was spelled out in the so-called *12th Street Rag* case,[29] a few years later. A musical composition, without words, had been composed in 1914. Two years later the composer parted with all his rights in the work to a music publisher. In 1918, approximately 4 years after the work had been composed, the publisher, i.e., copyright owner, caused some lyrics to be written for the composition. A dispute arose over the ownership of the renewal rights. In the lower court it was held that the words and music together constituted a composite work, not a joint work; and that the renewal rights of the lyricist covered only the lyrics. The Court of Appeals reversed, and held the work to be a joint work, with the composer and lyricist sharing equally in the renewal copyright. The Court of Appeals relied on the fact that the publisher, as copyright owner of the music, intended that the music and lyrics be performed together as a single work, and that the lyrics were worthless without the music. On rehearing, however, the court recognized that the composer's assignee alone held copyright in the music when it was used without the lyrics.

On the basis of this decision, no longer does there seem to be required a preconcerted common design or any active collaboration. It is now sufficient if there be any "fusion of effort" in the creation of a revision, adaptation or modification of any existing work. The authors of the original work are not required to have any knowledge of the modification, nor do they have to take part in it. Any action on the part of their transferees which utilizes the preexisting work in the creation of a new version thereof is sufficient to make the original creators joint authors with those who later revise their work. Not only does this extension of the joint author concept do violence to the renewal policy of the law, but it would appear to extend, for an indefinite period, the control of the original author over any subsequent revision of his work.

III. Judicial Development of Incidents of Joint Ownership

1. GENERAL SUMMARY

In dealing with the incidents of the joint ownership of copyrights, the courts historically resorted to an anology which they had previously utilized in cases involving jointly owned patents. The joint owners of a patent had been regarded as being in the same relationship to each other as tenants in common of real property,[30] and the cases involving jointly owned copyrights extended this analogy to them.[31]

[29] See note 18 *supra*.
[30] Dunham v. Indianapolis & St. L.R. Co., 8 Fed. Cas. 44, No. 4151 (C.C.N.D. Ill. 1876); Clum v. Brewer, 5 Fed. Cas. 1097, No. 2909 (C.C.D. Mass. 1855).
[31] *E.g.*, Carter v. Bailey, 64 Me. 458 (S.J.C. 1874); Plantadosi v. Loew's Inc. et al., 137 F. 2d. 534 (9th Cir. 1943).

Under the tenant-in-common theory, the courts have generally held that one joint owner of a copyright may freely use or license the use of the work without the knowledge or consent of the other owner. The nonassenting owner has no rights of action for infringement against the coowner who uses or licenses the use of the work, or against the licensee. (Note that an assignee of one coowner becomes himself a coowner and is thereby entitled to use the work without the assent of the other owner.) The nonassenting owner's only remedy is to require the coowner to account for the profits derived by the latter from his own use of the work or from the license granted by him. The licensee who pays his licensor has no liability to the nonassenting owner.

2. REVIEW OF THE CASES

(a) Accounting between coowners

Assuming joint ownership, the question arises as to the rights and obligations of the parties *inter sese*. An early case dealing with such a problem is that of *Carter* v. *Bailey*.[32] Partners in a book business dissolved their partnership and made an agreement to hold the physical property as cotenants. One of the coowners, using his own money, printed a book using the plates formerly owned by the partnership. The other coowner sued for an accounting and profits. The court denied an accounting, using as an analogy the similar situation existing in the patent law, under which each coowner was said to possess an undivided share of the patent and could make use of the patent without accounting to the other coowner.

The court, in the *Carter* case, also pointed out that at common law, each tenant in common of realty was entitled to the enjoyment of the whole property so long as he did not interfere with the like rights of his cotenant. The court went on to say:

> * * * he may maintain such possession and prosecute such use without laying himself under obligation to pay or account therefor, unless he take more than his share of the rents and income, without the consent of his coowners, and refuse, in a reasonable time after demand, to pay such cotenants their share thereof; and then he will be liable to an action of special assumpsit.[33]

One commentator [34] suggests that the court in this case misunderstood the nature of a tenancy in common. Granted that a cotenant could use the property without the consent of the other cotenant, and could permit a third party to do what he could rightfully do, this commentator urges that at common law cotenants were required to account to each other, as where one leased the joint property to third parties. Be that as it may, it was a number of years and many lawsuits later before the obstacle to a joint owner of copyright seeking an accounting from his coowners was successfully overcome.

An English case decided some 4 years after the *Carter* case took issue with the view that coowners of copyrights could be compared with tenants in common of realty.[35] In that case, the plaintiff, owner of an undivided half interest in a copyrighted opera, brought suit against the licensee of the owner of the other undivided half interest, and re-

[32] 64 Me. 458 (S.J.C. 1874).
[33] *Ibid.* p. 465.
[34] Gilbert T. Redleaf, *Co-Ownership of Copyright*, 119 N.Y.L.J. 760, 782, 802, 821 (1948).
[35] Powell v. Head, 12 C.D. 686 (1878).

covered damages under the copyright law then in existence. Although the Master of the Rolls decided the case without resort to any analogy, he indicated that he would not be inclined to extend, to copyright property, the "antiquated and barbarous doctrines * * * which are of a character wholly different from the rights to property to which those ancient doctrines apply." [36] The Master of the Rolls considered that copyright, being incorporeal, was not properly analogized with real property which was corporeal in nature. The fallacy of comparing coownership of a copyright to a tenancy in common seems to be that, in realty, the unity of such a tenancy was possession, whereas in the case of an incorporeal right, such as copyright, there could actually be no "possession" in the same sense.

At any rate, the confusion as to the no-accounting rule in copyright cases continued for many years, and has been alleviated only in relatively recent cases. An entering wedge against the no-accounting rule of *Carter* v. *Bailey* [37] is seen in the *Maurel* v. *Smith* case, [38] referred to above. In that case, although the defendants denied the jurisdiction of the court on the theory that there were no complicated accounts requiring equitable relief, the court found that the plaintiff's rights were based upon a constructive trust, saying:

> The bill lies as against a trustee who repudiates the trust and refuses to pay any share of the profits. An accounting is only an incident to such a bill, though it is a proper incident.[39]

The court of appeals upheld this holding of the trial court, saying:

> Where two or more persons have a common interest in a property, equity will not allow one to appropriate it exclusively to himself or to impair its worth as to others. The settlement of rights between joint tenants or joint owners of property is the subject matter of equity jurisdiction, and we think that such rights are involved in this litigation.[40]

In this case, it is to be noted that the defendant was seeking to profit by an act of his own wrongdoing and, since the legal title to the copyright was in the name of the wrongdoer, the plaintiff was without recourse except in equity.

In the case of *Klein* v. *Beach*,[41] decided about a year after the lower court's decision in *Maurel* v. *Smith*, the court held that the two joint owners of a drama could each do with it what he pleased, with only the duty of accounting over. The court cited as authority for the accounting feature the cases of *Nillson* v. *Lawrence* [42] and *Lalance & Grosjean Mfg. Co.* v. *Nat. Enameling & Stamping Co.*,[43] neither of which can be said to constitute authority for an accounting. The *Nillson* case, which involved a dispute over a play, merely held that

[36] *Ibid.* p. 688. The Master of the Rolls went on to say:
"Indeed, if one were to go by analogy, considering the law, whether as regarded incorporeal hereditaments or as regarded choses in action where there would have been no actual possession of the thing to which the owners were entitled as tenants in common, I should say the analogy was quite in favor of the Plaintiffs. Everybody knows that the right to an advowson, when it passed to the coparceners, was not enjoyed by one to the exclusion of the other, but each took it in turn. So in the case of a manor, where it descended to coheiresses, the courts were held in turn. So, again, with regard to fairs and markets and like franchises the profits were divisible between tenants in common, it being considered a right divisible in its nature * * *

"Now all those rights are much more like the right to copyright, which is an incorporeal thing * * * so that if one is driven to an analogy which I think I am not, as regards the Common Law, I should prefer the more rational analogy and that which is more applicable to the subject matter in question" (pp. 688–689).

[37] See note 32 *supra*.
[38] See note 19 *supra*.
[39] *Ibid.* p. 202.
[40] 271 F. at 216.
[41] 232 F. 240 (S.D.N.Y. 1916).
[42] 133 N.Y. Supp. 293 (1st Dept. 1912).
[43] 108 F. 77 (C.C.S.D.N.Y. 1901).

either tenant in common may license the play without the consent of the other. The *Lalance* case, which involved a patent, held that P's argument that his coowner of the patent could not assign it without his consent, was invalid.

In *Crosney* v. *Edward Small Productions* [44] the owner of one-fourth of the motion-picture rights in a play brought an action for an accounting of profits against a coowner of a one-fourth interest in the movie rights in the same play, which latter coowner had produced a movie thereof. The court thought that the case presented "a clear case for an accounting," in view of the fact that the use by the defendant had served to destroy plaintiff's rights in the play. The court then cited the *Nillson* case and also *Arone Holding Corp.* v. *Fraser*.[45] The *Arone* case involved an action by an assignee of one partner in a lease management operation against the other partner for an accounting of rents received. The court held that the plaintiff was a cotenant with the defendant and so was entitled to an accounting, but cited no authority.

In *Brown* v. *Republic Productions*,[46] the court held that two of three coowners of a musical composition could license its use to another without the consent of the third coowner and that said licensee was not liable to the third coowner for profits and royalties. In so holding, however, the court said:

> Such licensor's sole obligation is to account to his cotenants. Neither can exercise a superior authority.

In 1944, Judge Learned Hand had occasion to comment briefly upon the *Carter* v. *Bailey* case. In making the point that one joint author held a copyright in constructive trust for the other authors, he stated that the *Carter* case—

> turned upon the fact that there was no equity in the plaintiff's bill, but assumed that the cotenant might be liable at law, as he always has been in equity (*Minton* v. *Warner*, 238 N.Y. 413); it accords with what we have held.[47]

In view of the fact that the *Minton* case held that cotenants must account to each other where one of them leases the joint property to third parties, or where there is a breach of fiduciary or quasi-fiduciary relationship, it would appear that the Judge considered that the *Carter* case did not rule out the possibility of an accounting by coowners, as had been widely considered. The Judge seems to have been persuaded that the *Carter* doctrine should be strictly limited.

In the *Melancholy Baby* case [48] the Court of Appeals decided that the authors in question were in fact joint authors, and sent the case back to the district court for consideration. In the district court,[49] Judge Bright referred to the *Carter* case and those other cases referred to above in which an accounting had been allowed. He then pointed out that he was dealing with a case in which one coowner, who owed some duty to the other, dealt with the commonly owned property in such a manner as to deny the other owner any rights therein. "It is obvious," said the court, "that plaintiff has excluded, or at least claimed the right, and has tried, to exclude its coowner from the com-

[44] 59 F. Supp. 559 (S.D.N.Y. 1942).
[45] 209 N.Y. Supp. 756 (Spec. Term. N.Y. County, 1925).
[46] 156 P. 2d 40 (Cal. App. 1945), *aff'd*, 161 P. 2d 796 (S.C. Calif. 1945).
[47] See note 20 *supra*.
[48] See note 28 *supra*.
[49] Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co., Inc., 73 F. Supp. 165 (S.D. N.Y. 1947).

mon property." This violation of equitable principles caused the judge to say:

> I do not understand that any tenant in common ever had or has that right, and its assertion of that right and, as here, its use of the joint property, has thus rendered it liable to account.[50]

The court continued that the rule of no-accountability applied only when the coowner used the property himself, and not when he permitted its use by others and reaped a personal benefit therefrom. As to the *Carter* case, the court said that since that decision—

> Much water has gone over the dam. * * * The potentialities of motion pictures, radio, the "plugging" by torch singers, crooners, popular orchestras and bands, have obviously changed the picture as it existed in 1874. And the benefits to be derived from these changed and changing times, let alone any prediction of what the future holds, justifies, I think, a new conception of the rights of joint owners of copyright. I have been wondering if Judge Learned Hand may have had something of the kind in mind in his criticism of *Carter* v. *Bailey* in the *Marks* case at page 276 of 140 F. 2d.[51]

A few months subsequent to the decision of Judge Bright, a New York State court had before it an action for accounting of profits covering the use of a copyrighted musical composition.[52] The court noted that the rationale of the *Carter* case might apply to a situation concerning the use personally of one coowner and did not pass upon the question of accountability by one coowner to another for personal use of the commonly owned property. But:

> Such holding and reasoning did not extend, however, to a cotenant licensing a third party to employ the work. That goes beyond use by the coowner of his own property. It extends to strangers at large the use of property which belongs quite as much to the nonlicensing owner as to the licensing owner. It does not seem right that such extended use through strangers may be made of the copyright at a profit solely to the owner conveying the license, to the exclusion of an equal owner.[53]

The court considered that the rule of accountability in the circumstances "should promote sound and orderly marketing of a work and a fair division of profits on the basis of mutual interest, rather than a rule which sets owner against owner in the exploitation of common property;" and accordingly entered a judgment entitling the plaintiff to an accounting.

In the recent *12th Street Rag* case,[54] after concluding that the respective assignees of the composer and the lyricist were joint owners of the combined song, the Court of Appeals held that each of them was required to account to the other for the proceeds received from the exploitation of the song.

The above cases indicate that although the courts may have differed somewhat in their rationale, the cases since *Carter* v. *Bailey* have developed the principle that when any one of the coowners of a copyright uses or licenses the use of the work, he must account to the others for the profits derived therefrom.

(b) Use of work by one coowner

In view of the fact that the cases, beginning with *Carter* v. *Bailey*,[55] have developed the concept that a coowner of copyright occupies a

[50] *Ibid.* p. 168.
[51] *Ibid.*
[52] Jerry Vogel Music Co., Inc. v. Miller Music, Inc., 74 N.Y. Supp. 2d 425 (1st Dept. 1947).
[53] *Ibid.*, p. 427.
[54] See note 18 *supra*.
[55] See note 32 *supra*.

status similar to that of a coowner of realty, as a tenant in common, it would appear that a logical development of this concept would reach the conclusion that the coowner of copyright would possess rights similar to those of the tenant in common of realty. In addition to the accounting aspect of the *Carter* case, to which reference has already been made, it is to be noted that one coowner in that case attempted to enjoin the other coowner from using the jointly owned property without the consent of the first. The injunction, as well as the accounting was denied, the court saying:

* * * owners in common of personal property hold by unity of possession—each having an equal right of occupancy * * *. One owner in common, having no superior rights, cannot maintain replevin to recover possession from his coowner; * * * nor trover for the value of his share—unless the treatment of the common property on the part of the owner in possession amount to conversion, the possession of one and its appropriate use not being regarded as inconsistent with the rights of the other. * * *[56]

It has previously been pointed out that the U.S. concept of treating coowners of copyright as analogous to tenants in common in realty is questionable. The English concept, as epitomized by *Powell* v. *Head*,[57] probably is a more accurate legal analysis of the relationships. However, a close reading of the *Carter* v. *Bailey* case gives the impression that the practicalities of the situation may have been persuasive in the mind of the deciding judge. This is evidenced by the court's statement that—

* * * If none be allowed to enjoy his legal interest without the consent of all, then one, by withholding his consent, might practically destroy the value of the whole use.[58]

The philosophical implication of these words is that the court considered it more important to permit the utilization of the copyrighted work, leaving the coowners to straighten out among themselves any difficulties encountered thereby. The English doctrine, promulgated in the case of *Powell* v. *Head*, reflects greater consideration for the property right aspect than to the utilization of the work. As stated by Jessel, Master of the Rolls, in that case:

It is against the very essence of part-ownership or coownership that when there is a tenancy in common, one of the two can dispose of the right of the other, there being no partnership or other form of agency.[59]

In another English case, the court pointed out that if the contrary approach were taken—

* * * a part owner would be at the mercy of his coowners, each of whom, and they might be any number, might issue as many, as large, and as cheap editions as he chose, thus completely ruining the value of the copyright.

That court repeated that—

* * * the old common law rule as to the right of a coowner to use the common property has no application to such a property as a copyright. It seems to me that a sole right of reproducing, though divisible as to title, must be indivisible as to exercise.[60]

Without recourse to a discussion of the relative merits of the two disparate concepts, it may be safely said that in this country each

[56] *Ibid.* p. 465.
[57] See note 35 *supra.*
[58] See note 32 *supra*, p. 463.
[59] See note 35 *supra*, p. 690.
[60] Cescinsky v. George Routledge & Sons, Ltd. [1916] 2 K.B. 325, at p. 330.

coowner of a copyright, without the consent or knowledge of his other coowners, may make such use of the entire work as he wishes. A New York court in 1912 regarded this concept as well-established, and refused to enjoin a coowner of a play from using the play and reaping the profits therefrom, to the detriment of the other coowner. As the court put it:

> It is settled that, with regard to property of this nature, one tenant in common has as good a right to use it, or to license third persons to use it, as has the other tenant in common and neither can come into a court of equity and assert a superior right, unless it has been created by some contract modifying the rights which belong to the tenants in common as such.[61]

Exception: Destruction of the res.—An incident of tenancy in common, while permitting a cotenant to make use of the property, protected a cotenant from such use by a fellow cotenant that amounted to a destruction of the res. If the analogizing of realty law and its concepts with copyright law were accurate, it would seem that a coowner of a copyright would be upheld in urging that his coowner had used the common property in such a manner as to constitute a destruction of the res. So it was urged in *Herbert* v. *Fields*,[62] where the plaintiff contended, *inter alia*, that the defendant coowner's use of the property by licensing it for motion picture production was such use as actually amounted to a destruction of the copyright. To this contention, the court replied:

> It will probably not be disputed that the rights of a coowner do not extend to the destruction of the article owned. To apply that term, however, to the case at bar, would be manifestly to convert words used to describe a physical result into a pure metaphor. Plaintiff urges that the production of the moving pictures to large crowds at low prices of admission "destroys" the work. While the question whether the moving picture production detracts from or adds to its value as a musical comedy may be debatable, it seems perfectly clear that any analogy sought to be derived from the total physical destruction of an article owned in common is utterly inapplicable.[63]

As late as the year 1945, the court in the case of *Brown* v. *Republic Productions, Inc., et al.*[64] refused to entertain the plea that the use by a coowner of a musical composition in a motion picture amounted to a "destruction" thereof, saying:

> * * * the waning of public interest therein cannot be termed either a legal or a factual "destruction" of the composition. Only corporeal things may be destroyed * * * A musical production is an incorporeal entity and cannot be destroyed in the sense intended by those authorities wherein the doctrine is treated.[65]

In the *Shapiro-Bernstein* (Melancholy Baby) case referred to [66] in which the no-accounting rule of *Carter* v. *Bailey* was questioned and effectively disregarded, Judge Bright also took a realistic look at the argument that a musical composition could be effectively "destroyed" by use in a motion picture or other general exposure, and stated:

> * * * it seems reasonable that copyright business, in songs at least, indulged in by one coowner, practically precludes the other from a like use. The use of one owner, by license or personally, in motion pictures, on the stage, by radio, in advertising, in bands or orchestras, can destroy, practically, the copyright so far as the other is concerned. It has been said that copyright, being an incorporeal right, cannot be destroyed. But its broad use by an active publisher can so far

[61] See note 42 *supra*, at p. 295.
[62] See note 24 *supra*.
[63] *Ibid.* at p. 490.
[64] See note 46 *supra*.
[65] *Ibid.* at p. 41 of lower court's opinion.
[66] See note 49 *supra*.

exhaust the popularity of a song, or any other musical composition, as to destroy its value after that use has ended. And the destruction of value of a copyright is, in effect, a destruction of the copyright.[67]

It seems safe to conclude that a coowner of a copyright may have no right to prevent his coowners' use of their joint property unless that use amounts to a destruction of the value of the copyright. It is an open question, however, as to what acts constitute a destruction of the value of the copyright. It is not certain whether courts today would take the pragmatic view of Judge Bright, and reach the conclusion that overexposure of a musical composition by means of radio, television, or motion pictures, might be said to constitute such a destruction of value of the copyright as would permit a coowner to prevent such use.

(c) Infringement action by one coowner against another

No reported cases have been found that squarely pass upon the right of one frustrated coowner to institute an infringement action against his other coowner.[68] However, since an assignee of a coowner stands in the shoes of the assigning coowner, a case in which the assignee of one coowner brought an infringement action against the assignee of the other coowner, would appear to be in point. In *Marks* v. *Vogel*,[69] the assignee of a lyricist who had filed a renewal application for the entire musical composition brought an infringement action against the assignee of the composer of the music, who had assigned his renewal rights to said assignee although he had not filed a renewal application therefor. The court held that when the renewal application was filed by the lyricist, the benefit of the renewal accrued to the composer, and thus the composer's assignee had a right to exploit the entire musical composition, and was not, therefore, an infringer.

(d) Action against a licensee of one coowner

In the early case of *Klein* v. *Beach*,[70] the court expressed a dictum that a frustrated coowner could not seek damages for infringement from his coowner's licensee. Some years later an actual case arose involving this same point, and the Ninth Circuit, in its opinion, stated the matter thus:

> The question, then, is whether a third party licensed to use a copyrighted work by one coowner incurs liability for infringing the copyright to other coowners who gave no consent. * * * Copyrights are similar in purpose to patents, and patent law protects a licensee of a joint owner from suit by another joint owner. * * * It is reasonable that the principle covers copyrights.[71]

In a subsequent infringement action by one coowner against a licensee of another coowner, the Ninth Circuit followed its earlier decision and affirmed the dismissal of such action.[72]

An action against a licensee of a coowner for an accounting resulted in the denial of the action in *Brown* v. *Republic*.[73] The California

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[67] *Ibid.* at p. 168.

[68] In Meredith v. Smith, 145 F. 2d 620 (9th Cir. 1944), which is sometimes cited as authority for the proposition that a co-owner may institute an infringement action against his co-owner, it should be noted that the defendant co-owner was dismissed from the action because the matter in dispute involved a contract relation as to the use of a jointly owned copyright, which was not a Federal question.

[69] See note 17 *supra*.

[70] See note 41 *supra*.

[71] Piantadosi v. Loew's Inc. et al., 137 F. 2d 534 (9th Cir. 1943).

[72] See note 68 *supra*.

[73] See note 46 *supra*.

court in the *Brown* case denied the right of action against the licensee on the ground that the coowner could give to a third party the same right he had, and that the licensor's sole obligation was to account to his cotenant. This reasoning, however, did not reach the heart of the question why a licensee is not liable to account to the nonlicensing coowner. One must necessarily assume that the court was probably concerned primarily with the nature of the licensor-licensee relationship, in which the licensor parts with only a limited and incomplete right; or as stated in *Stephens et al.* v. *Howells Sales Co., Inc., et al.*:[74]

> the copyright is, technically speaking, indivisible, the legal title remaining in the licensor and the licensee having merely an equitable title.

Under the existing legal situation, it would appear in general that a frustrated coowner's main right is that of an accounting from his coowner. He cannot bring an infringement action against his coowner, nor against his coowner's licensee. And be it remembered that his coowner's assignee becomes his new coowner. A possibility exists that if his coowner is so using the jointly owned property as to "destroy" it, the protesting coowner might obtain an injunction. But an accounting seems to be the main remedy.

(*e*) *Parties to infringement suits*

If, as has been indicated, a coowner of a copyright may use or license the work without the knowledge or consent of his coowner, it might be expected that one coowner would be entitled to bring suit for an infringement action against an infringer without joining the other coowner. But formerly it was the rule that all coowners had to be joined—one could not sue alone.[75] However, the matter probably has changed today under the Federal Rules of Civil Procedure.[76]

Rule 17 of those rules provides that "Every action shall be prosecuted in the name of the real party in interest * * *" In one case decided thereunder, the court permitted the assignee of one coowner of a renewal copyright to bring action against an alleged infringer, saying that it was in fact a "real party in interest":

> * * * not, it is true, the only such party, but as much so as [the other coowner]. It was therefore entitled to sue in its own behalf. It was entitled to an injunction; it was entitled to its own damages; it was entitled to some share in any statutory damages; it was entitled to some share in the defendant's profits.[77]

The court then went on to say that the nonjoinder of the successors of the other coowner was not fatal if they could not be served. But of course, the single coowner could not recover any but his own part of the damages and profits.

Rule 19(b) [78] also has a bearing on this problem in requiring the joinder of indispensable parties. In the above case, the court held that the missing coowner was not an indispensable party whose nonjoinder would be fatal, since his rights could be reserved in the judgment.

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[74] 16 F. 2d 805 (S.D.N.Y. 1926).
[75] Stuff v. LaBudde Feed and Grain Co., 42 F. Supp. 493 (E.D. Wis. 1941); Anderson v. Educational Publishers, Inc., 133 F. Supp. 82 (D. Minn. 1950).
[76] 28 U.S.C.A. FRCP Rule 17.
[77] Edw. B. Marks Music Corp. v. Jerry Vogel Music Co., Inc., 140 F. 2d 268 (2d Cir. 1944).
[78] 28 U.S.C.A. FRCP Rule 19(b).

But, in *Curtis* v. *American Book Co.*,[79] while the court agreed that a coowner was not an indispensable party, it held that such a party was a conditionally necessary party in the particular situation therein involved, and under the discretion given by rule 19(b), ordered the joinder of the coowner on the ground that such joinder would obviate a second cause of action against the alleged infringer.

IV. Legislative History

The evolution of the concept of joint authorship, and the incidents of joint ownership have been entirely of a juridical nature. As previously indicated, these matters are not dealt with at all in the legislation nor in the legislative history. No reference to joint authorship or ownership is found in the hearings conducted in connection with the 1909 act,[80] nor in the committee report accompanying the bill that ultimately became the 1909 act.[81] It is not difficult to understand, therefore, why the present law is bare as regards any reference to these matters.

Of the many copyright bills introduced in the Congress since 1909, none proposed to deal with the matter of the incidents of joint ownership. One bill did define joint authorship. In 1924, the original Dallinger bill [82] contained, as section 68(j), a reproduction of the incidental language of section 16(3) of the British Copyright Act of 1911, as follows:

> For the purposes of this Act, "a work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.

Perhaps it is not surprising that this verbatim reproduction of a section of the British Act was included in this bill, since that bill has been described by one commentator as a "scissors and paste job, lifting whole sections from the British Statute." [83]

The same provision appeared in a later modified version of the Dallinger bill.[84]

Outside of the foregoing, it does not appear that any subsequent bill contained any attempt to define a work of joint authorship. However, the so-called Shotwell committee [85] in its early stages appeared to consider that the problem was worthy of study, since it included as one of a series of "undetermined principles" an item headed "Disposition of works in the case of joint owners or joint authors." [86] However, little further seems to have come of this, since, although an early draft of the bill included a definition of joint authorship, the bill as introduced by Senator Thomas in 1940 [87] was devoid of any reference thereto.

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[79] 137 F. Supp. 950 (S.D.N.Y. 1955).
[80] See note 14 *supra*.
[81] See note 15 *supra*.
[82] H.R. 8177, 68th Cong., 1st Sess. (1924).
[83] DeWolf, *Copyright Revision*, p. 10 (1945), a typescript in the files of the Copyright Office.
[84] H.R. 9137, 69th Cong., 1st Sess. (1924).
[85] The Committee on Intellectual Cooperation, a creature of the League of Nations, had as its U.S. representative the National Committee on the United State of America on International Intellectual Cooperation. A Subcommittee thereof called the Committee for the Study of Copyright, headed by Prof. James T. Shotwell, is referred to in this paper as the "Shotwell Committee".
[86] 2 Shotwell Papers, 265 (Copyright Office collections).
[87] S. 3043, 76th Cong., 1st Sess. (1940).

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V. Foreign Laws *

The statutes of 14 countries in various parts of the world have been examined as representative of the various foreign laws on the problem. The statutes of all 14 foreign countries included in this study, unlike the U.S. copyright law, define what is tantamount to "joint authorship."[88] The laws of several foreign countries use the terms "collaborators" or "collaboration,"[89] rather than the terms "joint authors" or "joint authorship." The laws of other countries[90] refer only to works "jointly created," and one country begins its statute, "If several persons jointly are authors * * *."[91] As previously discussed, in the United States the task of defining joint authorship and determining the incidents which accompany the relationship has been left to the courts, and there is considerable basis for concluding that the courts have apparently not yet agreed as to the exact nature of joint authorship.

For the most part, foreign laws more narrowly define coauthorship than do our courts, as will be seen by chart 1, to follow. Foreign countries require that the contributions of each author be "inseparable," or such that they cannot be individually identified. This is similar to the view taken in the earlier American decisions; but the current American view, if the *12th Street Rag* doctrine prevails, requires only a "fusion of effort" as a basis for establishing the relationship.

Whereas American courts generally designate joint ownership of copyrights as a "tenancy in common," foreign copyright statutes generally avoid real property terms when categorizing the joint ownership relationship in terms of property rights.[92] Infrequently one reads that joint authors or collaborators enjoy "equal rights,"[93] or hold "joint property."[94] The implication is that unless specific incidents of ownership are doled out by agreement, "share and share alike" is the rule of the day.

Another provision found in some foreign statutes which differs from American case law dictates that joint authors must get permission from other coauthors of the work before the work is personally exploited or licensed to third persons.[95] In a few countries, there is an added provision allowing one or more joint authors to require the nonassenting joint author to join such an agreement [96] or be indemnified for loss.[97]

Even having established, in some countries, what constitutes joint authorship, one is faced with interpreting the meaing of statutory language to the effect that joint authors hold the property "in common" or "jointly," or that they have "equal rights." Such phrases do not establish the incidents of joint ownership as between the coauthors and in their dealings with third persons. Presumably the

*The author wishes to acknowledge the assistance of John W. Coleman in the preparation of this part V.

[88] See charts 1 and 2, *infra*.

[89] *E.g.* Copyright Law of Argentina, Art. 16; Brazil, Art. 653; Chile, Art. 12; Italy, Art. 40; Japan, § 13. (All references in this paper to copyright laws of foreign countries are to the laws as included in COPYRIGHT LAWS AND TREATIES OF THE WORLD, Unesco-Bureau of National Affairs (1956)).

[90] Austria, § 11(1); Czechoslovakia, § 10(1); German Federal Republic, § 6.

[91] Sweden, § 7.

[92] See chart 2, *infra*.

[93] *Ibid.*

[94] *Ibid.*

[95] Austria, § 11(2); Italy, Art. 10; Sweden, § 7.

[96] Austria, § 11(2); Brazil, Art. 654.

[97] *E.g.* Japan, § 13.

civil codes must be referred to, in some countries on this point but such a task is not within the scope of this paper. However, it should be readily apparent that there is a "great diversity of the principles governing the works of joint authorship throughout the world."[98]

Rarely do foreign copyright statutes mention the rights of coowners (as distinguished from joint authors) of a copyright, possible because often the rights of coowners of property of all kinds are set out by civil codes. It is also reasonable to assume that, in most cases, the rights of coowners are the same as those of joint authors, excluding such refinements as moral rights, or, as in the case of the United States, the renewal right.

The charts to follow are designed to provide an easy method of comparing the statutory provisions of 14 foreign countries which deal with joint authorship of copyrights. They also present a reference table for the subject matter and reflect salient features of foreign law which not only are controversial, but are the heart of the problems attending joint authorship of copyrights.

CHART 1.—*Defining joint authorship in terms of resultant work*

Country	Article or section number	The work product is said to be—
Argentina	17	Such that the copyright cannot be divided without altering the nature of the work.
Austria	11(1)	An inseparable unit.
Brazil	653	Not divisible.
Canada	2(k)	Such that one contribution is not distinct from another.
Chile	12	Such that contributions cannot be separated.
Czechoslovakia	10(1)	An indivisible whole, even if contributions can be distinguished.
France	9	The result of several contributors.
German Federal Republic	6	Such that the contributions cannot be separated.
Italy	10	Made up of indistinguishable and inseparable contributions.
Japan	13	The result of mere collaboration.
Mexico	9, 10	Such that separate contributions cannot be identified or such, that separate contributions though they can be determined, are used together.
Sweden	7	Work not consisting of independent contributions.
Switzerland	7	Such that contributions cannot be separated.
United Kingdom	11(3)	Such that one contribution is not separate from another.

NOTE.—For citations of statutes here used, refer to table on p. 107, *infra*.

Comments.—All of the countries included in this chart define joint authorship by statute, although the terms "collaboration" or "collaborators" are often substituted for "joint authors" or "joint authorship". There is general agreement in 10 countries[99] that joint authorship must be the result of collaboration such that, in viewing the final product, it will be impractical or impossible to separate individual contributions of the work. The other four countries apparently do not require inseparability of contributions.[100] Czechoslovakia requires that the result of the creation be an "indivisible whole * * * even if the individual contribution can be distinguished."

[98] Rosengart, *Principles of Co-Authorship in American, Comparative, and International Law*, 25 SO. CALIF. L. REV. 247, 286 (1952).

[99] Argentina, Austria, Brazil, Canada, Chile, German Federal Republic, Italy, Sweden, Switzerland, and the United Kingdom.

[100] See Chart 1.

The French statute simply defines a work of collaboration as a "work to the creation of which several persons have contributed." The Japanese and Mexican statutes, by way of contrast, have separate clauses or provisions mentioning both separable and inseparable contributions.

In defining joint authorship, the use of variations of the word "separate" apparently has been found more satisfactory than use of such terms as "distinct" or "indistinguishable." The 1956 British Copyright Act has changed the former definition of a work of joint authorship from one reading to the effect that it consists of contributions "not distinct" [101] to read contributions "not separate." [102] The provision of Italy's copyright statute requiring works of joint authorship to consist of "indistinguishable" parts [103] has been criticized by one commentator who concluded that use of the phrase "inseparable parts" would, alone, suffice in defining joint authorship.[104]

As will be illustrated by chart 4, to follow, interpretations differ as to whether or not contributions to songs, operas, cinematographic productions, and similar works, are separable.

CHART 2.—*Defining joint authors in terms of property rights*

Country	Section or article number	The relationship is stated in terms of—
Argentina	16	Collaborators enjoying equal rights.
Austria	11(1)	The property being held jointly.
Brazil	653	Equal rights.
Canada	Case law	A tenancy in common.
Chile	12	Joint property.
Czechoslovakia	10(1)	Belonging to all authors in common.
France	10	Joint property.
German Federal Republic	6	A community of undivided shares.
Italy	10	Belonging to all authors in common.
Japan	13	Jointly held property.
Mexico	9, 10	The rights belonging equally to all coauthors.
Sweden	7	Several persons jointly being authors.
Switzerland	7	A common copyright in the work.
United Kingdom	Case law	A tenancy in common.

NOTE.—For citations of statutes here used, refer to table on p. 107, *infra*.

Comments.—An aura of vagueness pervades foreign statutory provisions which mention joint authorship in terms of property rights. Although there are usually "key" words describing the relationship, there are rarely indicia of what these qualifying terms imply. Joint authors are said to hold the copyright "jointly", or "in common," or they enjoy "equal rights." Presumably these terms refer to definitions found in civil codes. The German statute reads:

> Where several persons have jointly created a work in such a manner that their contributions cannot be separated, there will exist between them a community of undivided shares within the meaning of the Civil Code.[105]

Similarly, the Italian law states that the provisions which regulate property owned in common shall apply to joint authorship of copyrights.[106]

[101] Copyright Act, 1911, §16(3).
[102] Copyright Act, 1956, §11(3).
[103] Italy, Art. 10.
[104] Greco, *Collaborazione Creative E. Comunione dei Diritti di Autore*, N. 1 IL DIRITTO DI AUTORE, 1, 2-7 (1952).
[105] German Federal Republic, § 10.
[106] Italy, Art. 10.

CHART 3.—*Rights of joint authors*

[Col. A: Provisions requiring joint authors to act in concert before using or licensing use of the work. Col. B: Legal remedies against the joint owner who refuses to join the agreement to use or license use of the work. Col. C: Statutes allowing a joint author to sue in his own name]

Country	Article or section No. Col. A	Article or section No.		See also article or section number
		Col. B	Col. C	
Argentina	(*)	(*)	(*)	33, 76 Civil Code.
Austria	11(2)	11(2)	11(2)	13, 39(5), 81.
Brazil	653	654	654	
Canada	Case law	(*)	Case law	
Chile	12	(*)	12	8.
Czechoslovakia	(*)	(*)	10(2)	
France	10	10	(*)	39.
German Federal Republic	(*)	(*)	36	6, Code.
Italy	10	10	10	Charts 4 and 5.
Japan	13, 33	13	34	
Mexico	9, 10	9, 10	60	
Sweden	7	(*)	(*)	
Switzerland	7	(*)	7, 47	
United Kingdom	Case law	(*)	17(1)	19(2).

*No specific provision.

NOTE.—For citations of statutes here used, refer to table on p. 107, *infra*.

Comments.—Column A: The copyright statutes or case law of most foreign countries listed on the chart require joint authors to reach an agreement before using or licensing the use of the copyrighted work.

Typical of such a provision is the Austrian statute, which succinctly states that "Any alteration or use of the work shall require agreement of all coauthors." [107] In Canada [108] and Great Britain,[109] where the statute is silent on this point, the courtmade law has dictated that joint authors must dispose of the work in concert. The Brazilian statute qualifies its provision requiring joint authors to reach an agreement before disposing of the work with the stipulation "except in the case of a collection of the complete works of any such collaborator." [110]

The view of requiring joint authors of copyrights to reach an agreement before disposing of their rights has been previously discussed in connection with the English case law, and the fact that virtually all of the countries studied have adopted this view merits consideration of such an approach.

Column B: In addition to providing by statute that coauthors reach some sort of agreement before economic exploitation of the work begins, one often finds "follow through" provisions in the foreign laws. The function of the "follow through" provisions is to allow adjustments to be made, should a stalemate be reached in negitiations among joint authors. In Brazil,[111] if the joint authors are in dispute, the majority rules, and if there is then objection on the part of the minority faction, the dispute is settled in court. In Japan,[112] in cases where contributions of authors of a joint work are inseparable, it is possible for joint authors to acquire a dissenting joint author's share of ownership in the copyright upon paying him an "indemnity."

[107] Austria, § 11(2).
[108] Massie & Renwick, Ltd., v. Underwriters' Survey, Ltd. [1940] 1 D.L.R. 625.
[109] Cescinsky v. Routledge, [1916] 2 K.B. 325.
[110] Brazil, Art. 653.
[111] *Id.*, Art. 654.
[112] Japan, § 13.

The merits of such "follow through" provisions are debatable. In a sense, it is logical that some remedy should be afforded joint authors who are being unjustifiably "held up" by a dissenter who wants a larger share of the profits-to-be. At the same time, it is not seemingly just to allow a majority of the joint authors to confiscate a fellow collaborator's property. Also debatable is the practice of placing power in the courts to adjudicate essentially private matters.

Column C: Many of the countries listed on the chart specify by legislation that a joint author may institute a cause of action in his own name, without the necessity of joining other joint authors. As to the countries not prossessing such legislation, it has been observed that "It would seem that, even in those countries where the copyright law is silent, a similar rule is applied either under the codes of civil or criminal procedure, or, as in Canada, for example, in the jurisprudence." [113]

CHART 4.—*Coauthorship of works involving music*

Country	Article or section number	Special feature
Argentina	17, 18	If music is joined with words, the music and text are considered separate works. The composer and librettist of an opera may separately exploit their separate contributions.
Austria	11(3)	Music joined with words will not in itself create joint authorship.
Brazil	655	Composer may exploit the music separately, but must indemnify the author of the words.
Canada	Case law	Composer and lyricist are "probably coauthors."
Chile	3	Composer of music to be sung is presumed to own the complete copyright to the work.
Czechoslovakia	8	Song consisting of music and words is considered a composite work.
France	10	Coauthors retain rights in separate contributions, although the song is considered a work of joint authorship.
German Federal Republic	5	Music and words are separate works.
Italy	34	Three-fourths of the profits from exploitation of an opera go to the composer of the music; in the case of songs, operettas, ballet music, the value of the 2 contributions is deemed equal. Generally, authors may dispose of the other rights to these works separately.
Japan	(*)	
Mexico	12	Author of words and author of music own the copyright equally, but each may freely exploit his separate contribution.
Sweden	3, 6	Separate copyrights are retained by separate contributors.
Switzerland		See arts. 15, 17, 18, and 32.
United Kingdom	Case law	Probably considered composite works.

*No specific provision.

NOTE.—For citations of statutes here used, refer to table on p. 107, *infra*.

Comments.—Among the 10 foreign countries listed in this survey whose laws provide that a work of joint authorship consists of contributions which are not separable, there is a disagreement as to the basic nature of works which embody musical compositions. In theory the work of the composer and the lyricist are in fact separable works, and should be so treated. But, for example, Canada has held, in spite of its statutory language, that a comic opera is a work of joint

[113] 2 UNESCO COPYRIGHT BULLETIN, 2-3, p. 112 (1949).

authorship.[114] Italy has provisions in its law which strongly intimate that authors of this type of work are joint authors.[115] And in Brazil,[116] it is provided that in the case of musical compositions combined with a poetic text, the author of the music may "perform and publish the composition * * * independently of the author of the words", but that he must "indemnify the author of the words."

The question is then, for copyright purposes, whether a song or an opera or a dramatico-musical work is to be considered as a single unitary work, or as a composite of separate contributions. This is a problem which requires careful consideration, including practical implications of what such a determination might be.

Table of Statutes Cited in Charts

Country	*Law*
Argentina	Law No. 11.723 of Sept. 28, 1933.
Austria	Act of Apr. 9, 1936, as amended.
Brazil	Law of Jan. 1, 1916, as amended.
Canada	Copyright Act, R.S., c. 32, S. 1 (1952).
Chile	Law No. 345 of Mar. 19, 1925, as amended.
Czechoslovakia	Law of Dec. 22, 1953.
France	Law No. 57–296 of Mar. 11, 1957.
German Federal Republic	Act of June 19, 1901, as amended.
Italy	Law No. 633 of Apr. 22, 1941, as amended.
Japan	Law No. 39 of Mar. 4, 1869, as amended.
Mexico	Law of Dec. 31, 1956.
Sweden	Law No. 381 of May 10, 1919, as amended.
Switzerland	Law of Dec. 7, 1922, as amended.
United Kingdom	British Copyright Act of 1956, 4 and 5 Eliz. 2 ch. 74.

VI. Summary and Conclusion

1. JOINT AUTHORSHIP

As indicated above, the omission from the copyright law of any provisions defining joint authorship, required the courts to deal with this question without the benefit of any legislative directive. Originally, the courts required the pursuance of a common design and close collaboration by the creators in order that the resulting work be considered a joint creation of multiple authorship. Later decisions extended the principle to those works which were produced as the result of a common design, notwithstanding that the collaboration was not coincident in point of time. Logically, there can be no quarrel with this extension. If each contributor to the completed work knew that his effort was part of a complete whole in which several persons were laboring, the status of a joint work would not seem to be prejudiced by the fact that each contributor did not know the other personally, or that the parts of the completed work were produced at different times, and not together.

But a questionable situation was created when the court in the *12th Street Rag* case [117] extended this doctrine to a situation where there could in no sense be said to be a collaboration of the authors in pursuance of a common design. In that case the court adopted a "fusion of

[114] Thibault v. Turcot (1926), 34 REVUE LEGALE [N.S.] 415, 419; *accord:* Fox, CANADIAN LAW OF COPYRIGHT 252 (1944).
[115] Italy, Art. 34 *et seq.*
[116] Brazil, Art. 655.
[117] See note 18 *supra.*

effort" theory by its holding that a lyricist who at the behest of the composer's assignee produced lyrics for a previously created musical composition, became, for renewal purposes, a joint author with the composer, whose labor in producing the music had occurred a number of years prior to the efforts of the lyricist. The lyricist and his assignee thereby became entitled to exploit words and music together.

If the view of the *12th Street Rag* case is followed, the previously existing concept of several creators pooling their efforts to produce a single work, and sharing in whatever commercial success might ultimately be achieved, no longer seems a sine qua non. A fusion by the copyright owner (though not the author) of a preexisting work with new matter by another author is, under this doctrine, sufficient to establish the status of "joint owners" in the combination of the preexisting work and new matter, without regard to any common collaboration of effort, or the pursuance of a common design. A logical result of this concept may be that the heirs or assignees of an author whose work is now in the public domain are considered to be joint owners with one who revised the original work just prior to its lapse of protection. This result fails to take cognizance of the provisions of the copyright law which specify that such a revised work is a "new work," and that protection is available only as to the "new" portion of the work. If this "new work" concept is valid, it is difficult to conceive how the result could be justified that permits the heirs or assignees of the author of the original work, which is in the public domain, to claim to be joint owners of the revised portion which they did not assist in creating. Likewise, it is difficult to see why the author of the new matter should be a joint owner of the original work.

2. INCIDENTS OF JOINT OWNERSHIP

Since the law of real property had long recognized the concept of common ownership of land, the courts found a readymade analogy. The realty concept of tenancy-in-common was applied to copyright cases with the general result that one coowner was held to possess the right to utilize the jointly owned property in any manner as he pleased so long as such use did not amount to a destruction of the res. Although when this concept was originally introduced into copyright case law, the other coowners were held to have no right to obtain an accounting of the proceeds received by the coowner who made use of the work, it is generally held today that such accounting is obtainable.

The English doctrine, on the contrary, considered that while the copyright property right might be shared by several owners, it was indivisible in the exercise of the right of ownership. The English coowner, therefore, could not exercise his right of ownership without the consent of the other coowners.

A sound basis exists for the adoption of either concept. The U.S. doctrine in effect favors commercial exploitation of the property right by permitting one coowner to use the property without the knowledge or consent of the remaining owners, subject to the duty of accounting over to his coowners for their share of the profits.

The relatively recent development of the accounting principle provided a brake upon the unbridled ambition of a coowner who might be inclined to disregard the rights of his colleagues and at the same

time served a useful purpose in permitting an energetic coowner the right to profit from his original labor in creating the work or, if he were a purchaser for value, afforded him an opportunity for realizing on his investment whether or not his other coowners joined with him. One defect in this approach, however, is that it permits coowners to compete against each other, with the normal result that both may suffer financially. This is illustrated in the case of *Jerry Vogel* v. *Miller Music Co.*,[118] wherein two coowners attempted separately to license their musical composition at two different fees to the same movie producer with the not unexpected result that the producer purchased the license at the lower of the two offers.

The philosophic basis of the English doctrine apparently rests upon the premise that the right of a coowner to be secure in his ownership of a share of the whole is more important than facilitating the commercial exploitation of the work by any one coowner. It is therefore desirable, according to that philosophy, to avoid placing a nonassenting coowner at the mercy of his more energetic colleagues. This concept requires what might be termed a monolithic unity of agreement among the coowners before the property right can be exploited.

The U.S. concept has the advantage over its English counterpart that the coowner who possesses the ability to exploit the joint work can in fact seek to realize an income from his part ownership, whereas under the English doctrine, it is conceivable that in some cases the majority of the coowners may be penalized by the willful stubbornness of one of their colleagues. A determination of which concept is preferable rests at bottom upon which of the freedom-of-exploitation or the security-of-ownership philosophies is considered more desirable.

VII. Possible Approaches Toward a Revision Program

1. WHO ARE JOINT AUTHORS?

(a) Severability of contributions

In considering the question of whether and how the present copyright law may be modified to resolve the types of problems that have been referred to above, one might start with the premise that it is desirable to reduce, as far as possible, the frequency of the occurrence of situations in which a given work can be said to be a "joint work." For example, one possibility that suggests itself is to define a "joint work" as one produced by the collaboration of two or more authors in which the contribution of one author is not separable from the contribution of the other author or authors. The British Act of 1956 adopts this viewpoint. The significance of the definition is that if a given work contains separable contributions which are clearly distinguishable, then the work is not said to be a "joint work." Presumably, each of the separable portions is entitled to its separate copyright, and the use of all of the contributions together would necessarily require the assent of the owners of each separable portion.

Under such a definition, it would seem that the words and music of a musical composition would constitute two separate copyrights, one for the lyrics and one for the music. While our courts have, under the present copyright law, ruled that a musical composition is a uni-

[118] See note 52 *supra*.

tary work, it appears that under such a definition as suggested above, the unitary nature of the composition would require reconsideration. It may be correct, from an esthetic viewpoint, to state that a musical composition is a unitary work, but is seems difficult to deny that the words and music are clearly distinguishable from each other and capable of separate use. So far as the question of authorship is concerned, it is easy to admit that one individual may contribute the words and another the music. In this sense, the composition is not unitary, and does in fact contain easily separable contributions.

The adoption of such an approach would in all likelihood serve to eliminate many of the problems that now exist. An examination of litigated court cases in this field reveals that the preponderant number are concerned with difficulties arising from the use of musical compositions, which would be greatly reduced under the suggested approach. During the first term of copyright, assuming the continuance of the renewal feature, it would not seem that any significant change in existing commercial practice would be called for. The result would be that the composer could exploit the music alone and the lyricist the words alone, but both would have to join in exploiting the music and words together. Customarily the composers and lyricists of a composition assign their rights to a publisher, who exploits the work and funnels the incoming royalties to them. The existence of two separate copyrights in a single composition would mean that both the lyricist and composer would assign their separate copyrights to the publisher instead of a single joint interest. The publisher thereafter for all practical purposes would be the copyright proprietor.

If the present renewal system is retained, some complications might arise at the time of renewal, when each contributor to the composition would be required to renew, or absent the author, his statutory successors or representatives. The publisher would then have to make certain that the renewal of each portion of the composition was assigned to him. In one respect, this might have a salutary effect, since it would act as a deterrent to a frequently occurring practice whereby a lyricist for example, assigns his renewal in the entire copyrighted composition to one publisher, and the composer assigns his renewal to another. Some of the present litigation results from the fact that under these circumstances, each publisher feels that he is entitled to use of the entire composition. Under the suggested approach, if a publisher wished to utilize the entire work, he would have to make certain that he obtained the renewals of all the separable portions, or would have to deal with the owner of each other portion.

Another possible source of difficulty under the present renewal system concerns the consequences where no renewal is made, for example, with respect to the music portion, and the publisher ends up with only the exclusive right to the lyrics.

If the new law did not contain a renewal provision, or if a simple extension of the term in favor of the owners were substituted for the present reversionary renewal provisions, these possible difficulties would not need to exist.

Including in the new law a definition of "joint work" as above suggested would not of course affect those types of situations where the resultant work of the coauthors was united into a single unitary work in which it was not possible to distinguish and separate the contributions of each. Existing legal principles would presumably continue to apply.

(*b*) *Collaboration and common design*

A second type of approach would involve the inclusion of a definition of "joint authorship" much in the same manner as the courts have developed the concept; namely, that it results from a collaboration of effort toward a common design, notwithstanding that the collaboration might not be coincident in point of time. This suggested approach might be considered unnecessary if it merely restated the present judicial concepts. Such a definition would be desirable, however, if it was thought proper to eliminate the doctrine of the *12th Street Rag* case from existing law. The definition could make clear that collaboration of effort in a common design was the test, and thus rule out the "fusion of effort" theory of that case.

2. INCIDENTS OF COOWNERSHIP

The foregoing suggestions are concerned with defining what constitutes "joint authorship." We now turn to the broader question of the rights of coowners as between themselves and in relation to transferees.

Under the present law as established by court decisions, any one coowner may use or license the use of the work without the consent of the others, subject only to the restriction that such a use does not destroy the work; but he must account to the other coowners for their share of the proceeds. If this result is deemed appropriate, it may be unnecessary to restate these judge-made rules in the statute.

On the other hand, statutory provisions would be necessary if the English rule were to be adopted; namely, that the consent of all coowners is required before the work can be utilized. Under that view, one coowner or his licensee or assignee who uses the work without the assent of the other coowners would be an infringer against whom the nonassenting coowners could proceed for injunctive relief and damages. Provision might also be made for a proceeding against the coowner who acted without the consent of the others, holding him liable for an accounting of profits, if any.

Under the English rule there might be instances where the use or exploitation of a jointly owned work might be blocked by the refusal of a single coowner to give his assent. If this rule were adopted, perhaps some consideration might be given to a provision which would enable the assenting coowners to proceed with the project when the nonassenting coowners' refusal is unreasonable. This might be done by a petition to a court.

VIII. SUMMARY OF QUESTIONS

1. Should a work of joint authorship (of which the joint authors are coowners) be defined in the statute? If so, should joint authorship be defined in terms of—

(*a*) Inseparability of the contributions of the several authors?

(*b*) Collaboration of the authors for the purpose of producing a single combined work?

(*c*) The combination into a unit of separately created works, regardless of their separability or of collaboration between the authors?

2. Should the statute provide for the rights of coowners to use or license the jointly owned work? If so—

(*a*) Should any one coowner be able to use or license the work without the assent of the other coowners, with the obligation to account to the other coowners for their share of the proceeds?

(*b*) Should the consent of all the coowners be required for use or license of the work? If so, should some provision be made to allow use or license of the work by those coowners wishing to do so when another coowner's refusal is unreasonable?

COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE ON JOINT OWNERSHIP OF COPYRIGHTS

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COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE ON JOINT OWNERSHIPS OF COPYRIGHTS

By Samuel W. Tannenbaum

SEPTEMBER 11, 1958.

The study "Joint Ownership of Copyrights" is a fine treatise covering the development and legislative history of the concept of joint authorship of copyrighted works. It also points up the doctrines which merit further study and consideration.

Charts 1 and 2, which define joint authorship in terms of resultant work and in terms of property rights respectively, summarize graphically the substance of the pertinent sections of the intricate foreign statutes.

In my opinion, the study properly presents two possible alternatives: (1) Shall one coowner have the right to use or license the work without the consent of the other coowners, with the obligation, however, to account to the other coowners for their share of the proceeds; or (2) shall the consent of all the coowners be a prerequisite for the use or license of the work by one coowner or third parties?

The judicial tendency in the United States is to answer affirmatively part (1) in the preceding paragraph. The British law, however, appears to adopt the affirmative of part (2) above.

If we advocate the continuance of the U.S. doctrine, favoring free exploitation of the property, we can rely upon decisions typified by *Jerry Vogel Music Co., Inc.* v. *Miller Music Co.*, 74 N.Y. Supp. 2d, 425 (1st Dept. 1947) (the affirmance of which in 299 N.Y. 782 (1949) was inadvertently omitted in footnote 52 of the study). If it be deemed more desirable, a satisfactory statute codifying the principle of the above case, may be enacted.

On the other hand, if we favor the English doctrine, it would be necessary to resort to statutory enactment.

In determining which doctrine is preferable we must decide between the following philosophies: The English, which as indicated by Mr. Cary, stresses the importance of a coowner being secure in the ownership of his property; or the American, which results in the greater facility of the commercial exploitation of the work.

In my opinion, the U.S. doctrine is preferable. If a coowner, in disposing of the property or an interest therein, perpetrates a fraud or commits a breach of the fiduciary relationship, the innocent victim has adequate legal redress by an action for an accounting or an action for fraud.

In the absence of fraud or breach of good faith, as a practical matter, the coowner who concludes a deal with a third party is just as anxious as the other coowners to obtain the best terms, the benefits of which would accrue to the other coowners.

Once we adopt either one of the above viewpoints, there still remains the question of the apportionment of the proceeds among the coowners.

While *DeSylva* v. *Ballentine*, 351 U.S. 570, 582 (1956), held that the widow and child of the deceased author take the renewal of copyright as a class, the court declined to pass on the question of the apportionment of the proceeds in the renewal, for the reason that the parties had not argued the point nor was it passed on by the lower court.

As the widow and children own the renewal copyright as coowners, it would be most helpful that Mr. Cary's study be not concluded, until consideration be given to the various theories which have been advanced with respect to the apportionment of the proceeds.

May I suggest the following items for further study:

(1) Should the widow take one-half and the children collectively take the other half?

(2) Should each member of the class take per capita, i.e., should the widow together with each child share equally?

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(3) Should the law of descent and distribution of the jurisdiction in which the author was domiciled at the time of his death apply?

As there is no Federal law of descent and distribution, in my opinion, it might be advisable to apply the rationale of the *DeSylva* case (supra) and apply the law of the jurisdiction of the domicile of the deceased author with respect to the apportionment of the benefits among the coowners.

Very truly yours,

SAMUEL W. TANNENBAUM.

By Melville B. Nimmer

SEPTEMBER 15, 1958.

I have read the study entitled "Joint Ownership of Copyrights," by George D. Cary and John W. Coleman, and have the following comments to make in connection therewith.

It seems desirable that a work of joint authorship should be defined by statute in order to clarify the confusion produced by existing case law. Such a definition should not turn upon the question of whether the respective contributions of the several authors are separable or inseparable. Although the lyrics and music of a given song are clearly separable, it nevertheless seems proper that the lyricist and composer should each have an undivided interest in the total product. The lyrics of many popular songs would have no value whatsoever as poems, and yet unquestionably contribute substantially to the popularity of the accompanying music. Likewise, I would reject a definition based upon the combination into a unit of separately created works, regardless of any collaboration between the authors. It seems completely unjustified and gratuitous to create a tenancy in common between two authors who never agreed that their respective contributions should entitle them to ownership in each other's contributions. I would then base such a statutory definition upon the third standard suggested in the study, i.e., collaboration of the authors for the purpose of producing a single combined work. This definition seems to most nearly conform with the intention of authors, as well as with the traditional legal concept of joint authorship.

With respect to the incidents of joint ownership, I would abandon the existing concept that any one coowner may use or license the work without the assent of other coowners, subject only to an obligation to account. I would rather adopt the unitary standard suggested whereby the consent of all coowners is required for use or license of the work. I would reject the presently existing right of any coowner to use the work without the consent of the other coowners, for a reason that is not stressed in the study. That is, under existing law, although any coowner may license the work without the consent of his coowners, such a license, unless joined in by the coowners, must of necessity be nonexclusive. Since most commercial purchasers of literary and musical properties require the acquisition of an exclusive right, the nonexclusive rights of coowners are for all practical purposes unsalable. However, a unitary concept should include some provision whereby a coowner may grant an exclusive license notwithstanding the refusal of another coowner to join in such a license where such refusal is established as unreasonable. The machinery for such a provision requires considerable thought, but a workable provision does not seem to me to be at all insuparable. A determination of value based upon judicial finding or compulsory arbitration could provide the necessary machinery.

I appreciate your reply to my previous comments and hope to find the time soon to comment further on the points you raise.

Sincerely yours,

MELVILLE B. NIMMER.

By Walter J. Derenberg

SEPTEMBER 30, 1958.

I have read with a great deal of interest the essay on *Joint Ownership of Copyrights*, by George Cary. I have always had very great difficulty in understanding and justifying the second circuit doctrine, as embodied in *The 12th Street Rag* decision (*Shapiro, Bernstein & Co., Inc.* v. *Jerry Vogel Music Co., Inc.*, 221 F. 2d 659). Personally, I did not even agree with the earlier decision in the *Melancholy Baby* case (*Shapiro, Bernstein & Co., Inc.* v *Jerry Vogel Music Co., Inc.*, 161 F. 2d 406 (2d Cir. 1946)). In my opinion, any legal doctrine which looks upon two or more authors of separable contributions as coauthors or joint tenants,

although they may never have heard of each other and may have never met, is quite unrealistic and will lead, as in the two cases mentioned—particularly *The 12th Street Rag* case—to certain windfalls on behalf of those who may quite unexpectedly claim joint renewal rights in a popular song on the ground that they have been able to make a deal with a son or relative of someone who had originally and separately contributed to the work. Of course, the entire problem may lose some of its perplexity if our proposed revised copyright act should do away with the renewal right altogether and substitute therefor a single-term copyright based on the life of the author and a certain term of years. It would seem that almost all of the cases in which these complicated issues of joint authorship have been litigated in recent years involved renewal rights of musical works, primarily songs. If a definition of "joint authorship" be included in the proposed new statute, then I would be in favor of adopting the definition of the British Act of 1911, to which reference is made at page 101 of the Cary study. Under this definition, there would be no joint authorship unless there was collaboration between two or more authors and unless each contribution cannot be separated from the other. The British Act of 1956, in substituting the language "not separate" for "not distinct," does not seem to effectuate a substantive change and would be equally acceptable to me. I agree with Mr. Cary that by accepting such a narrower definition of joint authorship many of the vexed problems which have recently arisen could be avoided. On the other hand, it would, of course, be true that in case of a song the lyricist and the composer would have to assign their respective copyrights separately to the publisher, but I do not believe that this would be an undue burden, particularly if the renewal system were abolished.

With regard to the incidents of coownership, I am inclined to favor the present American rule over the more inflexible British theory. In other words, I would be in favor of continuing to treat coowners as tenants in common with the result that they use or license the work without the consent of other coowners. They should, however, be held accountable to each other as was well pointed out and decided by the late Judge Bright in *Jerry Vogel Music Co., Inc.* v. *Miller Music, Inc.*, 74 N.Y. Supp. 2d 425 (1st Dept. 1947). The outer limits of this right of each coauthor should be found in the old doctrine that they may not commit any act which might result in the "destruction" of the work. This, I believe, is quite a workable doctrine and would have better practical results than the rule suggested under 2(b) of the summary of Mr. Cary's study, which would make the grant of any license or other use of the jointly owned work impossible without the consent of all coowners of the work.

Sincerely yours,

WALTER J. DERENBERG.

By Robert Gibbon

(The Curtis Publishing Co.)

OCTOBER 24, 1958.

* * * * * * *

There are some aspects of the law which are troublesome to us and to our writers. These, and the areas in which appropriate legislation can eliminate doubt and misunderstanding, are the source of major concern to us.

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Joint ownership of copyright.—We believe that any revision to the copyright law should include recognition of the possibility of joint ownership of copyright. It would be most helpful to publishers if one joint owner could convey an interest without the joinder of the others, but it would seem appropriate to require that one account to the others for profits. Similarly, we believe any one joint owner should be allowed to renew copyright for the mutual benefit of all.

ROBERT GIBBON.

By Edward A. Sargoy

OCTOBER 24, 1958.

I read with interest this very fine analysis of the problems of the concept of joint ownership, and the incidents of joint ownership as judicially developed in our country, in the absence of statutory provisions in such regard. Quite a number of foreign countries, as the study points out, do attempt statutory provisions.

The determination of the questions posed by the study is a difficult one. I would ordinarily be inclined to continue to leave the questions put in the summary of questions to the courts rather than the statute.

1. In view of the type of result reached by the doctrine of the *12th Street Rag* case, I would be tempted sympathetically to consider a proposed statutory definition of joint authorship.

If there were joint collaboration in the creation of a copyrightable work having separable copyrightable portions, such as a song with its lyric as well as music, I would be inclined to consider the same as a unitary work, owned jointly by its authors, the lyric writer and the composer of the music, or their respective successors in interest. If the American rule as to licensing would be followed, any coowner, without the assent of any other coowner, could license the use of the song as a whole, or the lyrics separately or the music separately, subject only to accounting to the other coowners.

Although theoretically possible, it is unlikely that a lyric or poem independently created by one author could be fit to music created by another author so that they automatically fit each other for the purpose of becoming a song consisting of lyric and music. It would be a remarkable coincidence without the contribution of some additional authorship by way of arrangement or adaptation. The more typical situation would be in all likelihood that of a poem or lyric independently created (and copyrightable on its own account as a literary composition) which could subsequently be set to music by successive composers so as to create one more songs utilizing the same lyric. Or vice versa, music originally composed on its own account (and copyrightable on its own account as a musical composition) could be made into one or more songs by the efforts of various lyric writers applying their respective words to such music. Presumably consent of the author of the poem or lyric (or his successor in interest if assigned, or the author be deceased) would have to be obtained by any music composer who shought to make a song thereof, assuming that the poem or lyric was not in the public domain. Likewise, assent of the music composer (or his successor in interest if he be deceased, or there has been an assignment) will likewise have to be obtained by any lyric writer who subsequently sought to make a song of such music, and the latter was not in the public domain. If the American licensing rule were applied, it would seem to me that if a user sought to use only the part first created (before it was made into a song), whether the lyric had first been independently created or the music, consent would be required of the owner of the material so first created. I do not see why the author of the subsequent contribution thereto which made it into a song (or his successor) should have any right to license the independent use of the original material which he did not created, and not composed as part of a song, nor should there be any accounting to him in such regard by the owners of the original contribution independently used. On the other hand, if the question is one of licensing the song as a whole, I would think that under the American rule, any coowner could license, without the consent of the other coowners, and subject only to accounting to the other coowners. I would think as to the licensing of the subsequent contribution independently, that is, the contribution which made the original work into a song, any of the coowners would have the right to license such contribution independently, without the assent of the others, subject to accounting to the other coowners. In other words, while the owner of music originally composed would have the sole right to license the use of such music alone, if with the consent of such owner, a lyric writer at a later date created a song from such music, the lyric writer and the owner of the musical composition would become coowners of a new unitary work such as the song. Any of the coowners could license the song as a whole, or the lyric independetly, without the consent of other coowners, subject to accounting to the other coowners, but the previously created music could be licensed for independent use as music alone only by the owner of the music.

By eliminating the present renewal concept from any future law (of which I am in favor), we would eliminate most of any other difficulties that might otherwise arise.

2. As to the question of a statutory provision concerning the right of a coowner to use or license the jointly owned work, it is extremely difficult to determine which way to turn. Sould we follow the American concept as judicially developed permitting a coowner to use or license the use of the work without the assent of the other coowners, subject only to accounting to the other coowners? I would be inclined, if I were a user or prospective licensee, strongly to urge the continuation of this concept so that I would not be deemed an infringer if I dealt with one coowner. I would say that the bringing of works to public attention and enjoyment would otherwise be stifled. On the other hand, if I were a coowner of a

right under copyright, I would be very much concerned about any of my other coowners making unbusinesslike, inexpedient or unfortunate licenses without my knowledge and as to which I would be bound. I would then urge the British view looking more toward the security of the coowner's interest, as the study points out, rather than to getting the work to the public. Not having an ax to grind either way, I am somewhat puzzled. For want of any other suggestion at this moment, I would incline somewhat toward the side of keeping the avenues of marketability and alienation open rather than stifled, and this could be done by continuing to leave the matter in the hands of our courts rather than the statute.

Sincerely yours,

EDWARD A. SARGOY.

By Edward Abbe Niles

NOVEMBER 19, 1958.

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I only received the Preliminary Study on Joint Ownership of Copyrights yesterday morning; it is very interesting and I thank you for sending it to me. Rather than delay, perhaps too long while studying it, I do want to say something on one aspect now, which is that of what constitutes "collaboration" or "coauthorship."

The writers of your preliminary study have well covered the recent history on this subject and I more than heartily agree with their criticism of the *Twelfth Street Rag* case (Shapiro v. Vogel, 221 F. 2d 569, 223 *id.* 252). It seems to me where the Second Circuit started off the track was the "*Melancholy*" case (Shapiro v. Vogel, 161 F. 2d 406 and see 73 F. Supp. 165) where the writer of lyrics to be substituted for the original, which original had been copyrighted in unpublished form, was held to be a collaborator with the composer of the music.

In the case the composer, *when he did his work*, intended to collaborate but only with the first lyric writer, and I think that if the terms "collaboration" and "coauthorship" are to have any meaning at all, their applicability should be determinable by the time that the combined work (or for that matter, the work of either writer) is first copyrighted, whether in published form or otherwise. To postpone the decision is simply to leave the field open for judicial legislation, and that is just what occurred in its most blatant form in the *Twelfth Street Rag* case, where the question of collaboration between writers was determined not on the basis of anything the writer did, but on the basis of the consent of a subsequent owner of the original copyright, as if consent—and above all of a third party—had anything to do with authorship. The real basis for Judge Smith's legislative excursion in this case seems to be betrayed by his remark that the district court's rejection of the collabortion theory "would leave one of the authors of the 'new work' with but a barren right in the words of a worthless poem, never intended to be used alone."

In short, Judge Smith, is saying in substance that because Sumner's lyric was worthless it should be made more valuable by giving him equal rights in the music which he did not write, with whose writer he had no contact, and which music alone would serve to sell a copy of the lyric.

This strikes me as pure seizure, albeit in favor of a third party, for the result under the concurrent holding of the court was that Sumner, for his worthless work, became entitled from the date of renewal (or his assignee did) to *publish* not only his own work but Bowman's, in their combination. This would be fair in the case of any genuine collaboration, because there the writers would have in effect dedicated their contributions to each other, but it is nothing short of outrageous in such a case as that of *Twelfth Street Rag*. Another byproduct of the same judicial legislation is that the court willy-nilly has to recognize (while denying) the fact of separate writing and copyrights, by permitting either Bowman or Sumner to publish his own contribution, after renewal, without accountability, so long as he does not use the other's contribution.

Still another noxious feature is that the court held that Bowman's unrestricted sale of his music to his publisher entitled the latter to make Bowman a collaborator with Sumner and thus to encumber Bowman's ultimate renewal rights which by accepted law should have come to him free and clear.

With a definition of collaboration under which the situation would become crystallized when the first copyright was taken out, none of these contradictions and injustices would result.

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EDWARD ABBE NILES.

By Harry R. Olsson, Jr.

FEBRUARY 24, 1959.

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1. (*a*) [A joint] work should be defined in the statute. I do not think it should be defined in terms of collaboration by the authors alone, although I do think that such collaboration in creating a unified work should, of course, result in the creation of a "joint work". It seems to me that a joint work should also be recognized to exist where the owner of a work consents to the creation of a new work employing it by another author. If the author or the owner has assented after the creation of the work to the fusion of it with the work of another I see no weighty argument to counterbalance the interest and convenience of users and the public in having the combined work regarded as joint.

(*b*) The fact the new work is regarded as joint does not necessarily lead to the conclusion that the parts, if separable, must also be regarded as joint works. It seems to me that, if separable, (and in the illustration I have given above at least the first work must be separable) the separable parts should be regarded as being separate property. In other words part A would have a copyright, part B would have a copyright and combination AB would have a copyright. The statute should of course make clear that a performance of AB would result in one infringement only and not in three.

2. The statute should clarify the rights of the coowners to use or license the jointly owned work. Any one coowner should be privileged to use or license the joint work without the assent of the other coowner but with the obligation to account to him for his share of the proceeds. At the time of the collaboration or consent if the authors between themselves wish to provide for their unanimous consent as a condition to a license of the use of the work they may do so contractually. It is true of course that this arrangement would not be binding on those who take a license without notice for value and probably even with notice provided the licensee does not induce the breach. To require that the consent of all the coowners be secured for the use of the work is too great a burden for the law to impose on the user and the public and our copyright law is founded on a determination that the public good outweighs individual privilege in this area.

Fundamentally it is all a question of who shall suffer, the choice being the user, the assenting coauthor (or his successor) and the public on the one hand or the nonassenting coauthor on the other. The choice is not difficult for (*a*) it is the coauthors (or their successors) who have chosen one another in the first instance and (*b*) the coauthors' interests in a case where they are divided (and they necessarily are, or there is no problem) balance one another out leaving only the public and users in the scales both weighing for use of the work.

HARRY R. OLSSON, JR.