DEFINING “AUTHOR” FOR PURPOSES OF COPYRIGHT

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INTRODUCTION

The U.S. Constitution establishes that Congress shall have the power “To Promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their ... Writings.”¹ The U.S. Supreme Court has interpreted “writings” to mean the “physical rendering of the fruits of creative intellectual or

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¹ U.S. CONST. art. I, § 8, cl. 8 (emphasis added).
aesthetic labor." Unlike the original 1909 Copyright Act, the present statute does not encompass all "writings" of authors. Rather, the 1976 Copyright Act (1976 Act) uses the phrase "works of authorship" instead of "writings." This change in phraseology was intended to clarify the congressional intent not to extend protection to the outer limits of the constitutional grant. Simply stated, all works of authorship are writings but not all writings are works of authorship. The present law does not protect as much subject matter as the constitutional grant could permit.

In accordance with the Constitution's reference to "authors," the 1976 Act provides that the initial ownership of copyright belongs to a work's author. Much recent scholarship has concentrated on the

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5. H.R. REP. No. 1476, 94th Cong., 2d Sess. 47 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664 [hereinafter H.R. REP. No. 1476]. Although the 1909 Act protected "all the writings of an author," 1909 Act, supra note 3, § 4, the 1976 Act provides that "[c]opyright protection subsists ... in original works of authorship." 17 U.S.C. § 102(a). This particular provision received a great deal of attention during the legislative process. In conjunction with the 1976 Act, the 94th Congress issued what has come to be known as the House Report. H.R. REP. No. 1476, at 47. The House Report consists of commentary designed to assist in the interpretation of the 1976 Act. Id. The House Report explains the use of the phrase "original works of authorship" as follows:

In using the phrase "original works of authorship," rather than "all the writings of an author" now in § 4 of the statute, the committee's purpose is to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase. Since the present statutory language is substantially the same as the empowering language of the Constitution, a recurring question has been whether the statutory and constitutional provisions are coextensive. If so, the courts would be faced with the alternative of holding copyrightable something that Congress clearly did not intend to protect, or of holding constitutionally incapable of copyright something that Congress might one day want to protect. To avoid these equally undesirable results, the courts have indicated that "all the writings of an author" under the present statute is narrower in scope than the "writings" of "authors" referred to in the Constitution. The bill avoids this dilemma by using a different phrase—"original works of authorship"—in characterizing the general subject matter of statutory copyright protection.

6. 17 U.S.C. § 201(a) (1994). The legislative history explains why initial ownership vests in the author:

[What we must impress on Congress, or those Congressmen who are not aware of it, is that what they are being asked to do, and what they have done in the 1909 Act, and in every copyright act, is to say that one creator of property and the creator or the possessor of that property (who I think has the greatest claim of all, because it isn't a claim based on finding something, or buying something, or inheriting something, or swindling somebody out of something; he created it; it's not even like a patent where he found something that somebody else might have found; he created something that nobody else in the world could have created, and but for him wouldn't have exist-
historical development of "the author" and the question of whether authors should have the right—natural or otherwise—to control their works. Still others have examined the scope of the rights afforded to an author. One scholar has even remarked that "[t]he author has been under siege in the United States." Another distinguished authority on copyright law paints a picture of authors as strange personages who shun their own work in favor of self-indulgence and sloth:

The biographies of authors show that they are more subject than most men to indolence. It is pleasanter to satisfy their active minds with conversation and observation and random reflections than to sit for many lonely hours at a table and push a pen. They must somehow be blasted out of this agreeable aimlessness, and one of the best ways is the hope of providing a competence for their children.

ed)—you're saying to a Congressman, "this really doesn't belong to him." Well, nothing belongs to anybody unless Congress, or a State legislature, or a court, says it does.


Professor Kaplan states:

There is an apparent tracing of rights to the ultimate source in the fact of authorship, but before attaching large importance to this we have to note that if printing as a trade was not to be put back into the hands of a few as a subject of monopoly—if the statute was indeed to be a kind of "universal patent"—a draftsman would naturally be led to express himself in terms of rights in books and hence of initial rights in authors.

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See generally BARBARA FRIEDMAN, FROM DEONTOLOGY TO DIALOGUE: THE CULTURAL CONSEQUENCES OF COPYRIGHT, 13 CARDozo ARTS & ENT. LJ. 157, 157-85 (1994) (reviewing historical justifications for granting copyright protections to authors); Marci A. Hamilton, Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works, 42 J. COPYRIGHT SOCy 93 (1994) (noting that definition of "author" affects amount of control author has over work); Yen, supra note 7, at 554-57 (advocating natural law copyright theory).

9. Hamilton, supra note 8, at 129.

Instead of entering these debates, this Article asks a different question: Who is an author? In other words, what does a person have to do in order to be characterized as an "author" for purposes of copyright? This seemingly simple question is actually complex. The Supreme Court has defined the word "author" twice; but only in dicta. This Article examines the definition of "author."

Parts I and II review the contemporary majority and minority case law definitions of "author." By examining the language of the 1976 Act and its legislative history, case law under prior copyright statutes, the legislative history of the 1909 Copyright Act (1909 Act), and evidence from eighteenth century definitions, these parts attempt to hypothesize what the Framers meant when they referred to "authors" in the Constitution. Part III proposes a definition of "author" that is different from the one currently recognized by the federal judiciary.

I. THE CONTEMPORARY DEFINITION: MAJORITY VIEW

Generally speaking, contemporary cases that have defined "author" for purposes of copyright have focused their inquiry on one basic question: Has the putative author produced something that is copyrightable? There are two versions of what is really the same "rule" of copyright law that have led courts to ask this question. One version of the "rule" comes from Justice Thurgood Marshall's statement in Community for Creative Non-Violence v. Reid: "As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection." The other version of the "rule" comes from the discussion of joint authorship in Professor Goldstein's treatise on copyright law: "A collaborative contribution will not produce a joint work, and a contributor will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright." Thus, according to Professor Goldstein, in order to be

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11. Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) ("As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection." (citing 17 U.S.C. § 102 (1994)); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) ("An author... is 'he to whom anything owes its origin; originator; maker...').
12. See infra note 18 (noting decisions considering meaning of term "authorship").
an "author," one must contribute something that is independently copyrightable. Taken together, courts have used these two versions to forge the rule that a person must fix his idea in a tangible medium of expression in order to be considered an "author" under the 1976 Act.¹-six This Article refers to this hybrid rule as the "Marshall-Goldstein" rule.

The Marshall-Goldstein approach has a certain logical appeal. The 1976 Act could not be clearer: "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."¹-seven In order to be copyrightable—that is, subject to copyright protection—a work must be fixed in a tangible medium. Because a work cannot be copyrightable unless it is fixed, it stands to reason that a person cannot be considered an author for purposes of copyright unless he has fixed his work in a tangible medium. The cases so holding are legion.¹-eight Judge after judge who has considered this issue has cited with approval Justice Marshall and/or Professor Goldstein, and has held that being an author depends upon whether one has fixed something in a tangible medium.¹-nine Childress v. Taylor,²⁰ typical of these cases, may be the

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¹-six. See infra note 18 (listing decisions that have considered authorship aspect of copyright law).
¹-eight. See, e.g., Erickson v. Trinity Theatre, Inc., 18 F.3d 1061, 1071 (7th Cir. 1994) (noting that person who fixes ideas in tangible expression qualifies as author); Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991) (remarking that expression must be fixed before creator is considered author); Ashton-Tate Corp. v. Ross, 916 F.2d 516, 521 (9th Cir. 1990) (noting general rule that person must translate ideas into copyrightable expression to be considered author); M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1493 (11th Cir. 1990) (noting authorship requirement applies to joint authors); Riley Home Bldg. Corp. v. Cosgrove, 864 F. Supp. 1034, 1037 (D. Kan. 1994) (stating that copyright ownership vests only in person who creates fixed, tangible expression); Balkin v. Wilson, 863 F. Supp. 523, 527-28 (W.D. Mich. 1994) (discussing requirement that one must fix idea into tangible form to be author); Whelan Assoc., Inc. v. Jislaw Dental Lab., Inc., 609 F. Supp. 1507, 1518-19 (E.D. Pa. 1985) (analyzing requirements for joint authorship), aff'd, 797 F.2d 1222 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987); Renbrooke Fabrics, Inc. v. Material Things, 223 U.S.P.Q. (BNA) 1039, 1044-45 (S.D.N.Y. 1984) (discussing authorship requirement in terms of work for hire); Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co., 542 F. Supp. 252, 259 (D. Neb. 1982) (describing joint authorship requirements); Meltzer v. Zoller, 520 F. Supp. 847, 857 (D.N.J. 1981) (remarking that work is not created until it is fixed in tangible form); see also Edward Valachovic, The Contribution Requirement to a Joint Work Under the Copyright Act, 12 Loy. L.A. Ent. L.J. 199, 199 (1992) ("Recently, courts have found it more expeditious to dismiss a claim of joint authorship by applying the bright-line rule of 'copyrightability' to each putative author's contribution . . . ." (footnote omitted)).
¹-nine. See supra note 18 (listing decisions that have considered authorship aspect of copyright law).
²⁰. 945 F.2d 500 (2d Cir. 1991).
best known. Thus, it serves as a valuable first illustration of the contemporary majority definition of “author.”

In Childress, Clarice Taylor, an actress who had built a reputation by impersonating the black entertainer “Moms” Mabley, approached the plaintiff, Alice Childress, a playwright, and convinced Childress to write a play about the life of “Moms” Mabley. Taylor researched Mabley and provided her research to Childress. Subsequently, Childress asked Taylor for additional biographical investigation and then routinely consulted with Taylor as the writing of the play evolved. During this process, Taylor recommended detailed scenes, jokes, and characters for the play. According to the Second Circuit, “Taylor contributed facts and details about 'Moms' Mabley's life and discussed some of them with Childress. However, Childress was responsible for the actual structure of the play and the dialogue.” The Second Circuit affirmed summary judgment for Childress on the basis that the intent necessary for joint authorship was lacking. The 1976 Act defines a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” Thus, in order to be considered “joint authors,” the putative joint authors must manifest this intention.

Nevertheless, the court also addressed the definition of “author” in dicta, a sensible strategy. After all, “[b]y definition the party raising the joint authorship claim (or defense) must be an ‘author’ of

22. Id.
23. Id.
24. Id.
25. Id.
26. Id. at 507-08.
28. Childress, 945 F.2d at 507. Judge Newman interpreted this statutory requirement of intent in a curious manner. According to Judge Newman, "What distinguishes the writer-editor relationship and the writer-researcher relationship from the true joint author relationship is the lack of intent of both participants in the venture to regard themselves as joint authors." Id. (emphasis added). Judge Newman clarified his interpretation of the "joint work" intent requirement as follows:

Focusing on whether the putative joint authors regarded themselves as joint authors is especially important in circumstances, such as the instant case, where one person (Childress) is indisputably the dominant author of the work and the only issue is whether that person is the sole author or she and another (Taylor) are joint authors. Id. at 508 (citations omitted). This interpretation is different from what the language of the statute actually says. The statute does not say that the putative authors must intend to be "joint authors." It says that they must intend to merge their contributions into either inseparable or interdependent parts of a unitary whole. See 17 U.S.C. § 101.
29. Childress, 945 F.2d at 506 (noting that person who creates work is author regardless of whether work is copyrightable).
the copyrightable work."30 The Childress decision recognized that the authorship question in the context of joint authorship is particularly sensitive and difficult:

Care must be taken to ensure that true collaborators in the creative process are accorded the perquisites of co-authorship and to guard against the risk that a sole author is denied exclusive authorship status simply because another person rendered some form of assistance. Copyright law best serves the interests of creativity when it carefully draws the bounds of "joint authorship" so as to protect the legitimate claims of both sole authors and co-authors.31

Judge Newman noted pointedly that "[a] more substantial issue arising under the statutory definition of 'joint work' is whether the contribution of each joint author must be copyrightable or only the combined result of their joint efforts must be copyrightable."32 After acknowledging the competing views of Professors Nimmer33 and Goldstein,34 Judge Newman noted, "The case law supports a requirement of copyrightability of each contribution."35 Therefore, on one level, Childress establishes that in order to be considered an "author," one must contribute something that is copyrightable. The Seventh Circuit adopted this position in a case which provides another good example of the contemporary approach to defining "author," Erickson v. Trinity Theatre, Inc.36

Erickson involved a claim of joint authorship by a theater performing the plays of a playwright.37 Although playwright Karen Erickson

31. Childress, 945 F.2d at 504.
32. Id. at 506.
33. See infra text accompanying notes 62-69 (discussing Professor Nimmer's view that each author's contribution need not be copyrightable itself to have joint work).
34. See Goldstein, supra note 15 (concluding that joint work is only produced when each author contributes some expression that itself would be copyrightable).
35. Childress, 945 F.2d at 506.
36. 13 F.3d 1061 (7th Cir. 1994).
37. Erickson v. Trinity Theatre, Inc., 13 F.3d 1061 (7th Cir. 1994). The playwright, Karen Erickson, sued the Trinity Theatre, requesting that it be enjoined from performing her plays. Id. at 1065. The Trinity Theatre responded that it was a joint author by virtue of the contributions of its actors. Id.; see 17 U.S.C. § 101 (1994) (defining joint work as that "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole"). See generally MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 5.2, at 148-55 (2d ed. 1995). The court in Erickson explained why the claim of joint authorship by Trinity Theatre was an important aspect of the case:

In a joint work, the joint authors hold undivided interests in a work, despite any differences in each author's contribution. Each author as co-owner has the right to use or to license the use of the work, subject to an accounting to the other co-owners for any profits. Thus, even a person whose contribution is relatively minor, if accorded joint authorship status, enjoys a significant benefit.
was the sole writer of the plays in question, the Trinity Theatre argued that its actors had contributed a great deal to the finished products and, therefore, it should be deemed a joint author. 38

The circumstances in Childress and the circumstances surrounding the development of Much Ado and Prairie Voices [two of the plays at issue in the case] are very similar. Here, the actors provided suggestions and contributed ideas; their contributions merely arose from a different process than in Childress. Indeed, Taylor presented a somewhat stronger case. She was able to identify specific material attributable to her. Trinity actors, with one exception, were unable to identify specific contributions they had made. 39

The court postulated that "[e]ven if two or more persons collaborate with the intent to create a unitary work, the product will be considered a 'joint work' only if the collaborators can be considered 'authors." 40 The court analyzed the Nimmer and Goldstein approaches to defining an "author" for purposes of joint works, and concluded, like the court in Childress, that Professor Goldstein's copyrightability method was preferable. 41 The court emphasized that the 1976 Act dictates that a "joint work" be "prepared by two or more

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38. Erickson, 13 F.3d at 1065.
39. Id. at 1072.
40. Id. at 1068 (emphasis added).
41. Id. at 1069-70. The court in Erickson stated that the copyrightability approach fosters certain policy goals of copyright law:

The copyrightability test advances creativity in science and art by allowing for the unhindered exchange of ideas, and protects authorship rights in a consistent and predictable manner. It excludes contributions such as ideas which are not protected under the Copyright Act. This test also enables parties to predict whether their contributions to a work will entitle them to copyright protection as a joint author. Compared to the uncertain exercise of divining whether a contribution is more than de minimis, reliance on the copyrightability of an author's proposed contribution yields relatively certain answers. The copyrightability standard allows contributors to avoid post-contribution disputes concerning authorship, and to protect themselves by contract if it appears that they would not enjoy the benefits accorded to authors of joint works under the Act.

We agree with the Childress court's observation that the copyrightability test "strikes an appropriate balance in the domains of both copyright and contract law." Section 201(b) of the Act allows any person to contract with another to create a work and endow the employer with authorship status under the Act. A contributor of uncopyrightable ideas may also protect her rights to compensation under the Act by contract. Section 201(d) of the Act provides in part that any of the exclusive ownership rights comprised in a copyright may be transferred from the person who satisfied the requirements for obtaining the copyright to one who contracts for such rights. Thus, anyone who contributes to the creation of a work, either as patron, employer, or contributor of ideas, has the opportunity to share in the profits produced by the work through an appropriate contractual arrangement.

Id. at 1071 (quoting Childress, 945 F.2d at 507) (citations omitted).
And the court then quoted Justice Marshall's dictum in Reed, stating, "An author is 'the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.'" The court then latched onto the phrase "fixed, tangible expression" and quoted the Copyright Act's definition of "fixed."

As to the requirement of fixation, § 101 states that "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." The Erickson court concluded that "[t]o qualify as an author, one must supply more than mere direction or ideas." Applying these rules of law, the court determined that the Trinity Theatre could not be a joint author: "In order for the plays to be joint works under the Act, Trinity also must show that actors' contributions to Ms. Erickson's work could have been independently copyrighted." The court punctuated its decision with an almost irrefutable maxim of copyright law: "Ideas, refinements, and suggestions, standing alone, are not the subjects of copyrights."

Both Childress and Erickson seem appealing. The basic copyright doctrine they espouse is that an author is the person who creates a copyrightable work. And, in order to be copyrightable, a work must be "original" and "fixed" in a "tangible medium of expression." Thus, if a putative author produces something that is not fixed—in other words, something that is an intangible idea—he is not an "author" for copyright purposes.

Although many cases prior to Childress and Erickson had championed this approach, two groups of cases (with facts similar to one another) had firmly established this copyrightability requirement. Meltzer v. Zoller, Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co., and M.G.B. Homes, Inc. v. Ameron Homes, Inc. are

42. Id. (citing 17 U.S.C. § 101 (1994)).
43. Id. (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989)).
44. Id.
46. Id. (citing Reid, 490 U.S. at 737).
47. Id. at 1072.
48. Id.
50. 520 F. Supp. 847, 857 (D.N.J. 1981) (holding that architectural firm was author for copyright purposes).
cases involving homeowners who drew sketches and made suggestions for their architects. Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.; S.O.S., Inc. v. Payday, Inc.; and Ashton-Tate Corp. v. Ross are cases where individuals provided a list of specifications and made suggestions to a computer programmer. In both of these situations, the outcomes are consistent. The architects and programmers successfully argued that the parties who had provided only sketches, specifications, and suggestions could not be considered "authors" because they had contributed merely intangible ideas that were uncopyrightable. The Ninth Circuit's holding in S.O.S. is representative of this approach. The S.O.S. court, relying on Justice Marshall's dictum in Community for Creative Non-Violence v. Reid, held that "[t]o be an author, one must supply more than mere direction or ideas; one must 'translate[] an idea into a fixed tangible expression entitled to copyright protection.' Thus, the contemporary, majority definition of "author" is clear, because the majority of cases decided under the 1976 Act hold that an author is someone who contributes something that is copyrightable on its own. And the 1976 Act is clear that in order to be copyrightable things must be "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Therefore, to be an author for purposes of copyright law, one must fix his original

52. 903 F.2d 1496, 1492-93 (11th Cir. 1990) (holding that house builder was not entitled to copyright protection as author of floor plans).
54. 886 F.2d 1081, 1086-87 (9th Cir. 1989) (holding that licensee employee was not coauthor for merely informing author of information requirements).
55. 916 F.2d 516, 521 (9th Cir. 1990) (holding that author of user commands was not joint author and not entitled to copyright protection).
work in a tangible medium of expression; intangible ideas are not enough.

Furthermore, as far as the definition of "author" is concerned, the cases do not distinguish situations involving single authors from joint authors. The criteria for being labeled "author" are apparently the same. The issue is routinely litigated in the context of joint authors because in this scenario it is most important to discriminate between activities that qualify someone for status as an "author" versus status as a "non-author" (i.e., someone who merely contributes non-copyrightable elements—such as ideas—to the finished product). In fact, the question of defining an author for purposes of copyright is probably best resolved in the context of a joint authorship dispute because, as a practical matter, the real question is whether one of the parties can be characterized as an "author," and therefore entitled to share the spoils with the other person claiming to be the author. One commentator summarizes the crux of the dispute as follows:

Joint authorship is a central issue in determining whether an accounting is actually due: if the party seeking an accounting is not actually an author, he has no ownership interest in the work and is entitled to nothing from the other party unless he can prove ownership by some other means. 61

II. THE CONTEMPORARY DEFINITION: MINORITY APPROACHES

The most well-known minority definition of authorship is Professor Nimmer's de minimis approach. In *Erickson v. Trinity Theatre, Inc.*, the court summarized Nimmer's de minimis view on authorship as it applies in a joint authorship setting:

Professor Nimmer, the late scholar on copyright, took the position that all that should be required to achieve joint author status is more than a de minimis contribution by each author. "De minimis" requires that "more than a word or line must be added by one who claims to be a joint author." Professor Nimmer distinguishes his de minimis standard from the standard for copyrightability. As an example, Professor Nimmer asserts that if two authors collaborate, with one contributing only uncopyrightable plot ideas and another incorporating those ideas into a completed literary expression, the two authors should be regarded as joint

authors of the resulting work. This position has not found support in the courts.  

According to Nimmer, a person who contributes non-copyrightable elements to a work—a work that ultimately attains copyrightable status as a whole—should be considered a joint author.  

Under Nimmer's view, a joint author shares equally in the benefits of initial copyright ownership.  

Although most courts have rejected Professor Nimmer's de minimis approach in favor of Professor Goldstein's copyrightability rule, a few courts have either mentioned it without expressly rejecting it or have actually approved of it. For example, Judge Ruth Bader Ginsburg's D.C. Circuit Court opinion in Community for Creative Non-Violence v. Reid, noted:

If Nimmer is correct on the point that the contribution of a joint author need not be copyrightable 'standing alone,' even CCNV's choice of the title 'Third World America' and the legend for the pedestal... while not independently copyrightable... may count along with other CCNV contributions, toward meeting the "more than de minimis" threshold required for joint authorship.

In addition to Judge Ginsburg's reference in Reid, two district courts recently have adopted and applied Professor Nimmer's de minimis...
rule: *Words & Data, Inc. v. GTE Communications Services, Inc.*\(^{68}\) and *Napoli v. Sears, Roebuck and Co.*\(^{69}\)

A few courts have marched to their own drummer. Occasionally a court confronted with the need to define "author" has focused on some criterion other than either the copyrightability of a putative author's contribution (Goldstein-Marshall) or the significance of that contribution (Nimmer). For example, in *Respect Inc. v. Committee on the Status of Women*,\(^{70}\) the court remarked that a putative author's contribution must be original in order for him to be an author.\(^{71}\)

Without explaining its conclusion, the court in *Production Contractors, Inc. v. WGN Continental Broadcasting Co.*\(^{72}\) had this to say about "authorship":

> When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public

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68. 765 F. Supp. 570 (W.D. Mo. 1991). The court stated the rule of law as follows:
The respective contributions of authors to a single work do not need to be "equal either quantitatively or qualitatively in order to constitute such contributors as joint authors. It would seem, however, that each such contribution must, in any event, be more than *de minimis*. That is, more than a word or a line must be added by one who claims to be a joint author." Thus, although Words & Data intended to merge its contribution with that of Sprint, joint authorship will not be found if Sprint's contribution was *de minimis*.


69. 835 F. Supp. 1053 (N.D. Ill. 1993). The court framed its rule of law regarding joint authorship as follows:

> [W]e must consider whether Sears' contributions . . . were sufficient to make Sears a joint author of the [computer] system, or at least sufficient to establish a genuine issue as to joint authorship. . . . In order to demonstrate joint authorship, the contributions of the authors do not need to "be equal either quantitatively or qualitatively . . . . It would seem, however, that each such contribution must, in any event, be more than *de minimis*. That is more than a word or a line must be added by one who claims to be a joint author."


> By definition the party raising the joint-authorship claim (or defense) must be an "author" of the copyrightable work. Although the Act does not define "author," the Supreme Court—distilling a definition from the constitutional use of the word in U.S. Const. art. I, § 8, cl. 8—long has construed the term to mean "he to whom anything owes its origin."

> It necessarily follows (from both constitutional as well as statutory sources) that a contributor must have contributed something original to be deemed an author for purposes of the 1976 Act.

*Id. at 1120* (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)) (footnote omitted).

and in what order, there is little doubt that what the cameramen and director are doing constitutes "authorship."\textsuperscript{73}

One case deserves special mention—\textit{Andrien v. Southern Ocean County Chamber of Commerce}.\textsuperscript{74} In \textit{Andrien}, the Third Circuit considered the authorship claim of James Andrien, a real estate agent, who prepared a map, using as its basis other pre-existing maps and his "own personal survey" of "civic landmarks, fishing sites and previously unlisted street names."\textsuperscript{75} Andrien then "determined the scale to be used on the finished map by driving his automobile between intersecting streets and measuring the distance on [his car's] odometer."\textsuperscript{76} He next engaged A & H Printing, whose employee, Carolyn Haines, was responsible for "coordinating the scales, relettering the street names and adding designations for the diving sites as well as for local points of interest."\textsuperscript{77} In addition, "Haines photographed the various maps to synchronize the scales and typed individual labels for the street names."\textsuperscript{78} At trial, the district court determined that Andrien was neither the author nor a joint author. The Third Circuit reported:

The [district court] judge believed that Andrien had not translated his idea into a fixed, tangible expression but that had been done by A & H Printing, "or more specifically, Carolyn Haines." The judge also rejected joint authorship, "I think since Andrien supplied information and ideas from which A & H and Haines created the map, Andrien cannot even claim to be a joint author with A & H Printing."\textsuperscript{79}

The district court's opinion thus follows the Marshall-Goldstein definition of "author." Because A & H Printing had fixed Andrien's ideas (not Andrien himself), A & H was the author, not Andrien.

The Third Circuit, however, analyzed the issue differently. The act of fixation is not what makes someone an author, the court said.\textsuperscript{80} If that were the case, then printers, typesetters, and stenographers

\textsuperscript{73} Production Contractors, Inc. v. WGN Continental Broadcasting Co., 622 F. Supp. 1500, 1503 (N.D. Ill. 1985); H.R. REP. No. 1476, 94th Cong., 2d Sess. 52 (1976), \textit{reprinted in} 1976 U.S.C.C.A.N. 5659, 5665 (allowing for future possibility of copyright of derivative works); \textit{see also} Easter Seal Soc'y for Crippled Children & Adults v. Playboy Enters., 815 F.2d 323, 337 (5th Cir. 1987) (holding that plaintiff was not statutory author for purposes of copyright infringement action under "work for hire" doctrine).

\textsuperscript{74} 927 F.2d 132 (3d Cir. 1991).

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id. at} 134.

\textsuperscript{80} \textit{Id. at} 135.
would wrest authorship from the grasp of those who actually generate the ideas. The court began its analysis by quoting the language of the 1976 Act: "The Copyright Act defines a work as ‘fixed’ in a tangible medium of expression when ‘its embodiment in a copy . . . by or under the authority of the author, is sufficiently permanent . . . to permit it to be . . . reproduced." The court recognized a simple fact that many courts following the Marshall-Goldstein definition had overlooked:

The critical phrase is "by or under the authority of the author." That statutory language and the Supreme Court's guidance produce a definition of an author as the party who actually creates the work, that is, the person who translates an idea into an expression that is embodied in a copy by himself or herself, or who authorizes another to embody the expression in a copy. The definition, however, has limits. When one authorizes embodiment, that process must be rote or mechanical transcription that does not require intellectual modification or highly technical enhancement.

Poets, essayists, novelists, and the like may have copyrights even if they do not run the printing presses or process the photographic plates necessary to fix the writings into book form. These writers are entitled to copyright protection even if they do not perform with their own hands the mechanical tasks of putting the material into the form distributed to the public.

The Third Circuit's approach in Andrien is very different from the Marshall-Goldstein definition. It is also quite different from Professor Nimmer's definition, although the Court did cite Nimmer approvingly when formulating its own approach. Judge Weis, who wrote the opinion, never inquired whether Andrien's contribution was de minimis. Rather, the judge apparently believed that what Andrien had done entitled him to be characterized as an "author." Nevertheless, the Andrien court failed to state a positive rule that explained why what Andrien had done made him an author. Instead, to his credit, Judge Weis did at least hold that fixation was not a prerequisite to the characterization as "author."

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81. See infra note 83 and accompanying text (indicating that if mere fixation were equated with authorship, then those entrusted with fixation would receive undue copyright protection).
83. Id. at 134-35 (quoting 17 U.S.C. § 101).
84. Id. at 135 ("Significant to the case at hand is Nimmer's comment emphasizing that a party can be considered an author when his or her expression of an idea is transposed by mechanical or rote transcription into tangible form under the authority of the party.").
85. Id. at 135-36.
III. CRITIQUE OF CONTEMPORARY DEFINITIONS: AUTHOR AS COMMUNICATOR

A. A New Interpretation of "Author"

In addition to the broad support that the Marshall-Goldstein copyrightability definition of "author" has received in the courts, Nimmer's de minimis definition of "author" has received harsh criticism in the scholarly literature and only limited backing. Courts and commentators applaud the Marshall-Goldstein definition because it provides a bright-line rule. In almost the same breath, courts and commentators criticize Nimmer's de minimis definition because the 1976 Act clearly tells us that intangible ideas are not protectible. Other scholars wax eloquent about the author as a "creative genius" or implore that we recognize this characterization as an archaic, romantic hoax. Curiously, despite this case history and scholarly commentary, there is still no genuinely viable definition of "au-

86. See supra note 65 and accompanying text (indicating that Goldstein's standard is preferred).
87. See, e.g., Friedman, supra note 8, at 175 n.124 ("The word 'author' is used throughout this Note in its broad copyright sense as any creator of a work entitled to copyright protection."); Kugele, supra note 61, at 841 (concluding that "copyrightability standard provides better gauge of risks in litigation and so provides incentives for authors to create works"); Shari Ilene Fine, Note, The Fate of Joint Authorship After Community for Creative Non-Violence v. Reid, 9 CARDOZO ARTS & ENT. L.J. 151, 158-62 (1990) (noting that majority of courts require copyrightable input by all parties before finding joint authorship).
88. See, e.g., Kugele, supra note 61, at 811, 837, 841 (endorsing Goldstein's copyrightability over Nimmer's de minimis standard); Fine, supra note 87, at 162-63 (noting that Nimmer preferred no reason for why copyrightability should not apply to contributions by joint authors); cf. Valachovic, supra note 18, at 217-19 (arguing that intent of parties and de minimis standard are better criteria for determining joint authorship than copyrightability).
89. See, e.g., Childress v. Taylor, 945 F.2d 500, 506-07 (2d Cir. 1991) (adopting Goldstein's views on joint authorship over Nimmer's de minimis approach); Kugele, supra note 61, at 827.
90. See, e.g., Childress, 945 F.2d at 505 n.3 (criticizing Nimmer's approach to joint authorship); Kugele, supra note 61, at 837 (showing inconsistencies between Nimmer's approach and 1976 Act).
91. See generally KAPLAN, supra note 7, at 23-24 (discussing historical development of "author" in light of fixation by distinct party); Boyle, Search for an Author, supra note 7, at 625. Describing the romantic vision of art and authorship, Professor Boyle states, "The author is presumed to have an almost transcendental insight—something which cuts beneath the mundane world of everyday appearance. This transcendental insight or genius plays a very important role in establishing the author as the ruler of the text." Id. at 629; see also Boyle, Theory of Law, supra note 7, at 1415. "It is my argument in this Article that much contemporary economic analysis conceals these tensions, aporias, and empirically unverifiable assumptions by relying unconsciously on the notion of the romantic author." Id. at 1453. "Even the most cursory historical study reveals that our notion of 'authorship' is an invented concept of relatively recent provenance." Id. at 1468.
The Marshall-Goldstein definition is clearly wrong; the court in *Andrien* identified the fallacy of that definition. The statute allows that a work may be “fixed” either “by or under the authority of the author.” Thus, fixation cannot be the key to becoming an author. Similarly, it seems unlikely that Professor Nimmer’s definition can be right since the 1976 Act does insist that ideas are not copyrightable and it would be inconsistent with established copyright law and policy to characterize the generator of an abstract idea as a “copyright author.” In short, it seems that no one has gotten it completely right. Judge Weis in *Andrien* comes the closest, but he has left out several steps along the way. The statute does, indeed, make it clear that an author need not necessarily fix his work himself or else lose his status as “author.” Rather, the statute provides that an author may “authorize” another to fix his work. Thus, the statute contemplates that becoming an author is not contingent on a work ever being fixed. Copyright protection may, and indeed actually does, hinge on fixation, but the status of “author” does not.

A close reading of the statute suggests that the *sine qua non* of becoming a “copyright author” is the act of communication. On the most elementary level, a copyright author is a communicator. To be an “author” for purposes of copyright, one must communicate original expression either directly—by fixing the expression in a tangible medium oneself—or indirectly—by communicating it to another who fixes the expression in a tangible medium of expression. Whether the fixator to whom the author has communicated his original expression (for whom the appellation “scribe” or “amanuensis” may be appropriate) can also be characterized as an

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92. See Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 235-37 (1991) (indicating that debate continues regarding “authorship” definition). In an influential article, Professor Litman defined “author” “in the copyright sense of anyone who creates copyrightable works, whether they be books, songs, sculptures, buildings, computer programs, paintings or films.” *Id.* at 236 n.5. The ambiguity here is troublesome too. The word “creates” causes the problem. Does the word “create” mean creation in one’s imagination, creation in tangible form, or rather does it refer to activity that is “creative?”

93. See supra text accompanying note 83 (identifying potential problem of non-authors claiming author status due to acts of fixation). A student note also made this point even before *Andrien*. See Therese M. Brady, Note, *Manifest Intent and Copyrightability: The Destiny of Joint Authorship*, 17 FORDHAM URB. L.J. 257 (1989). “Erroneous expansions of authorship within the joint authorship doctrine include: the `de minimis doctrine,’ the `fixer’ qualifying as creator without authoring the expression, and ideas qualifying as contributions in a joint work.” *Id.* at 284 (emphasis added) (footnotes omitted). “The statutory definition of ‘fixed’ requires fixation by or under the authority of the author; therefore, authorship exists prior to fixation.” *Id.* at 293.


95. *Id.* § 102(b).

96. *Id.* § 101.
author himself will depend on whether his contribution is also an original expression.\textsuperscript{97}

In addition, an author ordinarily does something prior to the act of communication. As a precursor to the communication component of being an author, an author generally, consciously or subconsciously, conceives a mental image (either visual or auditory) of his original expression. Many courts and commentators have focused on this mysterious, mental dimension of authorship.\textsuperscript{98} This element, however, is not necessarily always present. It is entirely possible for an author to produce original expression without first forming a mental conception of that expression.\textsuperscript{99} When a pop artist throws paint at a canvas, he does not necessarily picture in his mind what the expression will look like after the paint settles. Nevertheless, his failure to conceptualize the expression mentally before its physical creation does not prevent the work from being copyrightable, nor does it prevent him from being an author.\textsuperscript{100} Thus, first and foremost, the definition of "author" depends on the act of communicating original expression. Although we may find the mental aspect—either conscious or subconscious—of authorship emotionally appealing, it is not a prerequisite to being a "copyright author."

To explain why this definition of author is correct, one need only examine the language of the 1976 Act itself. Furthermore, additional evidence reinforces this definition. The legislative history of the 1976 Act, the legislative history of the 1909 Act, cases decided under that
Act, as well as the eighteenth century understanding of "author" as the Framers of the Constitution used that term, all support this definition of author as communicator.

B. Language of the 1976 Copyright Act

The 1976 Act does not explicitly define "author." Nevertheless three sections combine to create the definition. First, § 102(a) provides:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.\(^{101}\)

Therefore, in order for something to receive copyright protection under the 1976 Act, it must be "original," a "work[] of authorship," and "fixed in a tangible medium of expression."

Case law has defined a work as "original" when it is created independently and evinces a "modicum of creativity."\(^{102}\) The 1976 Act itself does not define a "work of authorship" but it does list eight categories of things deemed to be "works of authorship": (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.\(^{103}\) The 1976 Act defines "fixed" as follows:

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be

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perceived, reproduced, or otherwise communicated for a period of more than transitory duration.\textsuperscript{104}

The court in \textit{Andrien} succinctly pointed out how the Act's definition of "fixed" makes it possible for something to be a "work" and for someone to be an "author" \textit{before} the moment of fixation.\textsuperscript{105} This statutory provision also establishes two concrete things, and the doing of either one will qualify someone as an "author"—the initial owner of the copyright. An author either fixes or authorizes another to fix his work.

Section 102(b) of the Act completes the picture by barring copyright protection for ideas, procedures, and methods, regardless of the manner in which they might be embodied.\textsuperscript{106} Thus, under §§ 101, 102(a), and 102(b) of the 1976 Act, an author is the person who either fixes or authorizes fixation of an original expression: something that is not an idea, procedure, or method barred by the prohibition in § 102(b). Hence, an author communicates his original expression either directly or indirectly. In order to be a copyright author, therefore, one must meet three criteria: (1) the putative author must communicate something that is original; (2) that original something communicated must be expression; and (3) the putative author must communicate that original expression (a) directly himself through the act of fixation or (b) indirectly by authorizing another to fix it. Many who have discussed the role of "author" have explored the cerebral aspects of authorship.\textsuperscript{107} Nevertheless, the statutory definition avoids this problem by recognizing that authors often create spontaneously without first conceptualizing the expression either consciously or subconsciously.\textsuperscript{108}

\footnotesize

\begin{itemize}
\item[\textsuperscript{104}] \textit{Id.} § 101 (emphasis added).
\item[\textsuperscript{105}] \textit{See supra} notes 82-83 and accompanying text (noting that person need not personally fix work in order to be considered its "author"). A student author recognized this fact observing: "Thus, the statute contemplates that authorship precedes fixation, and therefore, fixation does not itself confer authorship status on the fixer." \textit{Brady}, supra note 93, at 293 n.241. Professor Kaplan even suggested that Congress' constitutional power could permit copyright protection for unfixed works. "The draftsman evidently believed that the copyright clause in speaking of 'Writings,' confines the federal power to works that are 'fixed.' I should rather think the copyright power supplemented by the 'necessary and proper' clause permits federal regulation of a work anticipating its fixation." \textit{Kaplan}, supra note 7, at 97-98.
\item[\textsuperscript{106}] 17 U.S.C. § 102(b).
\item[\textsuperscript{107}] \textit{See Hughes}, supra note 99, at 311 (stating that execution of work can occur before idea).
\item[\textsuperscript{108}] \textit{See infra} notes 166-224 and accompanying text (discussing origin and intellectual history of concept of "author").
\end{itemize}
C. The Three Statutory Elements: An Explanation

1. Originality

In order to be copyrightable, a work must be "original," and in fact, the Supreme Court has recognized that originality is the *sine qua non* of copyrightability.\(^{109}\) The 1976 Act requires originality\(^{110}\) and the Supreme Court has held that the Constitution established originality as a requirement for copyrightability.\(^ {111}\) In *Feist Publications, Inc. v. Rural Telephone Service Co.*,\(^ {112}\) the Supreme Court explained that "[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."\(^ {113}\) Some evidence suggests that the phrase "minimal degree of creativity" should be interpreted to mean that the work is something more than a trivial variation of its precursors.\(^ {114}\)

The legislative history of the 1976 Act shows that some drafters were particularly troubled by the phrase "works of authorship" and sought to

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111. *Feist*, 499 U.S. at 346. The Court asserted:

Originality is a constitutional requirement. The source of Congress' power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to "secur[e] for limited Times to Authors ... the exclusive Right to their respective Writings." In two decisions from the late 19th Century—*The Trade-Mark Cases*, 100 U.S. 82 (1879); and *Burrow-Gies Lithographic Co. v. Sarony*, 111 U.S. 55 (1884)—this Court defined the crucial terms "authors" and "writings." In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality. *Id.*

114. See Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 841-43 (1993) (describing trivial/distinguishable analysis) [hereinafter VerSteeg, *Rethinking Originality*]. Under the trivial/distinguishable analysis, courts have held that a "copy of something in the public domain" can be copyrightable if it is a "distinguishable variation" or the author contributes more than a "merely trivial" variation. *Alfred Bell & Co. v. Catalda Fine Arts*, Inc., 191 F.2d 99, 102 (2d Cir. 1951). Professor Kaplan recognized the link between these two concepts (i.e., "creativity" and a variation that is "more than "trivial"").

Some have thought it inherent in the very notion of "personality," of spontaneity, that a copyright claimant must exceed the utterly stilted or trite, must satisfy some threshold requirement of "creativity." And though Judge Frank pushed hard in the *Alfred Bell* case to show the theoretical protectibility of any original production, he still admitted that a variation, say, on a public domain work must be more than "trivial" to support copyright.

*KAPLAN, supra* note 7, at 45 (citations omitted).
find meaning in the word “authorship.” They were concerned that judges in the future might interpret the word “authorship” to require some elevated sense of “originality” or “author:”

But may [future judges] not be misled into thinking that we mean to distinguish between the works of those who are authors by profession, as opposed to those who write only as a hobby? Surely we don’t mean to exclude amateur authors; but isn’t there a danger that a court might... be misled into thinking that that’s what we meant?

Another dictionary definition of “authorship” is “Origination, esp. of a literary work.” Again, we have the conflict between the categories and the definition’s reference to literary works. And I’m troubled by what a court might do confronted with “original originations.” Such a double stress on originality, I fear, may bring in, with another word, all the difficulties we’ve hitherto had over “creativity.” There is, I think, a real danger of this kind in this apparent redundancy, quite apart from the offense to one’s sense of aesthetics to which it gives rise.116

Indeed, the 1976 Act does not require that an author be a professional. Similarly, the Act does not require “creativity,” it requires “originality.” “It necessarily follows (from both constitutional as well as statutory sources) that a contributor must have contributed something original to be deemed an author for purposes of the Act.”118

2. Expression

The word “author” in the 1976 Act has a more narrow meaning than the word “author” as it is generally used in the English language. For example, as “author” is generally used in English, it can be said that Einstein was the “author” of the theory of relativity and the concept that E=mc². The theory of relativity and the concept that energy is equal to mass times the speed of light squared, however, are not “writings,” they are uncopyrightable ideas. Thus, Einstein cannot

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117. See generally Russ VerSteeg, Sparks in the Tinderbox: Feist, “Creativity,” and the Legislative History of the 1976 Copyright Act, 56 U. Pitt. L. Rev. 549, 550 (1995) (challenging Supreme Court’s conclusion that creativity is necessary for copyrightability) [hereinafter VerSteeg, Sparks in the Tinderbox].
be said to be the "author" for purposes of copyright (the "copyright author"). During the drafting of the 1976 Act, attorney John Whicher pointed out this potential error in interpreting the word "author." He noted that one "dictionary definition of 'authorship' is 'Instigation; as authorship of a crime.'" Perhaps recognizing that a copyright author must produce "expression" (not facts or ideas), Whicher remarked, "I don't think this definition is terribly relevant to anything before us."

This means that not everyone who has an idea qualifies as a "copyright author." As previously noted, one of the fundamental principles of copyright is that ideas are not copyrightable; only the expressions of those ideas are copyrightable. While a comprehensive review of the idea/expression dichotomy is beyond the scope of this Article, for purposes of defining the copyright author, these concepts are critical. A person who mentally conceives an idea—as the word "idea" has been defined as a term of art in copyright law—cannot become a copyright author solely by virtue of that conception. A person who mentally conceives an "expression" cannot become an author solely by virtue of that conception either. Unlike

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120. Id., reprinted in 4 OMNIBUS, supra note 6, pt. 5, at 340 (statement of John F. Whicher).

121. See supra notes 41, 46, 48, 62, 90, 95 and 106 and accompanying text (describing various theories of copyright that protect expression of ideas, but not ideas themselves).

122. See Yen, supra note 7, at 537-38 (describing natural law roots of idea/expression dichotomy). Professor Yen observed that "[e]xpressions such as the text of a work are the proper subject of copyright because they are sufficiently concrete for the law to transform them into property. By contrast, ideas are so incorporeal that the law simply cannot make them into property." Id. at 538. He continued, "The origin of this notion can be traced directly to Roman times. In an apparent reference to res communes, the Roman Seneca stated that 'ideas are common property.'" Id. at n.138 (citing Epistles 12, 11, quoted in 1 NIMMER & NIMMER, supra note 62, § 16.01, at n.4); see also 7 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 480 (1926) ("[A]ccording to Roman law, occupatio[n], being founded on possessio[n], and only corporeal things being capable of possessio[n], it was only corporeal things which could be thus acquired."). Yen, supra note 7, at 538 n.138. In an excellent exploration of this subject, Professor Leslie Kurtz states:

The basic principle underlying the dichotomy is that expression is protected but ideas are not. These unprotected ideas, however, tend to exist, at least in the context of copyright cases, within works that are copyrightable and copyrighted. Ideas, like facts, scenes a faire, and expressions that can only take a limited number of forms, are termed unprotectible elements within that protected work.

Leslie A. Kurtz, Speaking to the Ghost: Idea and Expression in Copyright, 47 U. MIAMI L. REV. 1221, 1232-33 (1993) (citations omitted); see also KAPLAN, supra note 7, at 47-53 (examining idea/expression as applied in numerous cases); Hughes, supra note 99, at 295 (stating that "bundle of rights" that drapes around idea extends not to "abstract lines" but to "concrete, tangible or physical embodiment of an abstraction").
the person who mentally conceives a mere idea, however, a person
who mentally conceives an expression can become an author if she
then fixes that expression or authorizes another who fixes it. When
a composer thinks about writing a melody that will evoke in the
listener a mood of summertime, that mental process does not make
her a copyright author because the composer has merely conceived
an “idea.” Once the composer “hears” the music in her head and
then either fixes it herself or communicates it to another for the
purpose of fixation, however, she qualifies as an author because the
mental conception of the notes constitutes “expression,” not merely
an “idea.”

This proposition—that mental expression exists—is
perfectly obvious. “Expression” need not be fixed in a tangible
medium in order to create authorship. Fixation is a requirement of
copyrightability but it is not a statutory requirement of authorship.

Johannsen v. Brown illustrates this idea/expression problem in
the context of defining “author.” In Johannsen, the issue was whether
an employee’s contribution to an artist’s work, which became a cover
on Relix Magazine, was significant enough to make the employee a
joint author of a magazine cover. Les Kippel, the employee,

conceived of the entire idea of substituting skeletons for the
farming couple in the work “American Gothic.” He entitled the
piece “American Relix,” using the association of Grateful Dead fans
with Relix magazine and playing on the meaning of the word
“relics.” He specified all details, including colors, hair style, jewelry
and the substitution of a guitar for the farmer’s pitchfork.

Even though the employee had conceptualized the work in such vivid
detail and had communicated that image to the artist, the court
quoted Justice Marshall’s Community for Creative Nonviolence v. Reid
dictum, and held that the employee “cannot, as a matter of law,

124. See Yen, supra note 7, at 538 (distinguishing “expression” from “ideas” on basis that
expressions are more concrete than ideas). Professor Kurtz also has offered a number of
suggestions that should prove useful in helping a court determine when something is an “idea”
and when it is an “expression.” Kurtz, supra note 122, at 1241-61. Professor Kurtz points out
the fallacy of defining things as “ideas” merely because they are intangible. She states, “However
an idea gets into the mind, whether impressed upon it from the outside, produced from within,
or innately residing there, ‘idea’ means something that exists within a human mind.” This
meaning will not suffice, in copyright terms, to divide protectible expression from unprotected
idea. Id. at 1243.


contribution had been significant enough to make him a joint author, then the magazine would
be considered the joint author, due to the work-for-hire doctrine. See generally LEAFFER, supra
note 37, § 5.2, at 148-55.


author is person who translates idea into fixed or tangible medium); see supra note 14 and
be considered a joint author of 'American Relix.'" According to the court in *Johannsen*, "[a]n author is a ‘party who actually creates the work, that is, [a] person who translates an idea into a fixed, tangible expression entitled to copyright protection." The court further held that "[f]or the purposes of joint authorship, each author must ‘make an independently copyrightable contribution.’" Predictably, the court equated existence in a state of intangibility with the existence of an "idea."

Kippel's contributions to "American Relix" were to suggest to [the artist] Johannsen how the work should appear and to create the title for the work. However, "[a] person who merely describes to an author what the commissioned work should . . . look like is not a joint author for purposes of the Copyright Act." Kippel's conception of the idea behind "American Relix" is insufficient, as a matter of law, to make him a joint author of the work.

The real problem with *Johannsen* is the court's confusion about "ideas." Because Kippel's contribution was intangible, the court jumped to the conclusion that it was an "idea" without actually examining whether it was an "idea" as the word "idea" is used as a term of art in copyright law. Kippel's contribution was probably far more than an idea—it was probably expression. The detail with which Kippel described to the artist what to do probably pushed his contribution over the line of idea into the realm of intangible expression. Thus, Kippel's participation in the magazine's cover, in all probability, should have been sufficient to make him a joint author.

Many courts and commentators who have examined the issue of defining "author"—particularly in the context of joint authors—have accompanying text.

130. Id. (quoting *Reid*, 490 U.S. at 737).
131. Id. (quoting Ashton-Tate Corp. v. Ross, 916 F.2d 516, 521 (9th Cir. 1990)).
132. Id. (quoting S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1087 (9th Cir. 1999)).
133. See *Leaffer*, supra note 37, § 2.12, at 58 (noting that copyright law protects expression of ideas, but not ideas themselves and that process of separating idea from its expression is *ad hoc*, balancing tension between defining idea versus expression broadly).
134. This conclusion assumes, of course, that the intent element of joint authorship was also present. In addition, it must be remembered that Kippel's employer would have been the legal author under the work-for-hire doctrine. See supra notes 37 and 126 (describing conditions necessary to make employee joint author under work-for-hire doctrine).
135. Two cases whose results are consistent with using the idea/expression dichotomy to determine the definition of "author" are *Mister B Textiles, Inc. v. Woodcrest Fabrics, Inc.*, 529 F. Supp. 21, 25 (S.D.N.Y. 1981) (holding that plaintiff's employee's pictures of garments and modifications she wanted made constituted sufficient participation to award plaintiff with joint authorship), and *Kenbrooke Fabrics, Inc. v. Material Things*, 223 U.S.P.Q. (BNA) 1039, 1044-45 (S.D.N.Y. 1984) (holding that textile converter was not author of design he had commissioned when his only contribution was general request for design incorporating stripes and floral border).
failed to appreciate that what separates idea from expression is not the act of fixation.\textsuperscript{135} This is one of the harmful defects in cases like Johannsen that follow Childress. When two people combine their efforts to produce a copyrightable work, let us call them A and B, and if B embodies A’s intangible contribution, that embodiment is ordinarily done with A’s permission. Thus, there is no fixation problem as long as A’s intangible contributions are not merely “ideas” in the “idea/expression” sense of the word “ideas.” The dispositive question should be whether A’s intangible contribution rises to the level of copyrightable expression as opposed to merely an uncopyrightable idea.\textsuperscript{136} Tangibility does not distinguish idea from expression; the dichotomy is far more sophisticated than that. And although this sophistication may make the line difficult to draw, that is where Congress has chosen to draw it, and that is where sound copyright doctrine and policy dictate that it be drawn.\textsuperscript{137}

\textsuperscript{135} See, e.g., Brady, supra note 93, at 295. Brady is correct in her criticism of Justice Marshall’s dictum in Reid, 490 U.S. at 730. Justice Marshall wrote that “[a]s a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression . . . .” Id. at 737. Brady observes that “[Reid] approaches the idea/expression dichotomy with the erroneous assumption that fixing an idea makes it an expression and, therefore, copyrightable. The idea/expression dichotomy is not contingent on a fixing of the work; making an abstract idea concrete does not convert it into expression.” Brady, supra note 93, at 295 (footnotes omitted). Brady further states that “[t]he fixation requirement is separate and distinct from the idea/expression dichotomy.” (footnote omitted). Id. Last, Brady states that “[t]o qualify as an author, one must contribute expressions, not ideas, whether the work is to be solely or jointly owned.” Id. at 296.

\textsuperscript{136} When A’s contribution is not an expression but only an uncopyrightable idea, it may be that parties ordinarily intend to create an implied contract for joint ownership (not joint authorship). In exchange for A’s idea, B can give part of the copyright ownership to A. This concept is similar to protection of ideas in a corporate setting. If ideas are sufficiently concrete and given to another under circumstances where compensation is expected, then B can be granted one-half ownership. See, e.g., Murray v. National Broadcasting Co., 844 F.2d 988, 993 (2d Cir. 1988) (holding that television program format, titles, set designs, theme music, stories, scripts and artwork created under contract would be considered property, although mere idea for sitcom about non-stereotypical black family is not property); Hamilton Nat’l Bank v. Belt, 210 F.2d 706, 708 (D.C. Cir. 1953) (holding that individual has property rights in ideas that are original, concrete, and useful, even if such ideas are disclosed in contemplation of compensation). Courts have traditionally tried to shoehorn this implied contractual relationship between A and B into the rubric of “authorship.” Perhaps, however, this is the problem. In some cases there is a contract or an implied contract for joint ownership absent technical joint authorship. In copyright law, there are subtle differences between the rights of joint owners as opposed to those of joint authors. See Leaffer, supra note 37, § 5.4[c], at 158-59; see also 17 U.S.C. § 203(a) (1994) (noting that author, not necessarily owner, has right to terminate transfers after 35 years); 17 U.S.C. § 302(b) (1994) (stating that in jointly authored works, copyright lasts for 50 years after death of last surviving author).

\textsuperscript{137} Professor Kurtz has suggested that there are certain “symptoms” that may help a court separate protectible expressions from unprotectible ideas. See Kurtz, supra note 122, at 1253-60. Specifically Kurtz noted that when something is simple, general, or conventional, courts tend to label that something as an “idea.” See Kurtz, supra note 122, at 1253-56. On the other hand, things that are complex, specific, or unorthodox are likely to be characterized as “expressions.” Kurtz, supra note 122, at 1252-60; see also Hughes, supra note 99, at 319-23 (observing that “everyday ideas” are not protected by copyright law).
3. Communication by fixation and the red herring of conceptualization

a. Communication by fixation

When a blind poet dictates her poetry to a personal secretary, although the secretary is responsible for the words gaining their existence in a tangible form, the poet is the copyright author, not the secretary. Clearly, the secretary is not the author even though, as a scribe, he is a "but for" cause of the poem's physical embodiment. Similarly, when a writer sends a manuscript to a publisher or editor, the publisher or editor generally helps the writer by "editing." This process of editing routinely involves an editor making suggestions and corrections. These range from wholesale revision of a work to the addition of a comma, and everything in between. An editor might add, delete, or rearrange punctuation, words, phrases, sentences, paragraphs, or chapters. But these additions, deletions, and rearrangements do not necessarily make the editor an author.

Justice Marshall was clearly correct when he stated that an author as a general rule is the person who translates an idea into a tangible medium of expression. The presumption should be that the fixator is also the author. That is why when someone directly fixes his work in a tangible medium we assume that he is the author. Not every author, however, fixes his own expression into a tangible medium. The poet and secretary example illustrates this proposition. The title "author" cannot attach to the person who merely fixes another's ideas, imagery, words, or expression. Under the provisions of the 1976 Act, if Ella Fitzgerald sings and a listener presses the "record" button on a tape recorder, the listener is not the author. If a dancer performs an original dance and an observer—without her knowledge or permission— captures the dance on videotape, the dancer remains the author of that expression. The observer may be the author with respect to the light and angles, but the choreography belongs to the dancer. Suppose further that the observer takes the videotape to another choreographer who watches the tape and then meticulously transcribes the dancer's steps and movements into Labanotation. Now assume that the observer registers the copyright to the choreography using the choreographer's Labanotation, falsely
claiming to be the author. The first dancer is still the author of the choreography. The observer is the author of the videotape—in terms of the selection of light and angles. Furthermore, now that the dancer’s steps have been embodied in a tangible medium of expression (actually two tangible media—the videotape and the Labanotation), the dancer’s choreography could qualify for copyright protection under the 1976 Act if she were to authorize those embodiments.\footnote{4}

The videotape actually has layers of contributions. However, like someone who compiles a list of Major League Baseball batting averages from the highest to the lowest or someone who photographs one of Picasso’s paintings, the videotaper (in the example above) has no copyright interest in the first layer—the dancer’s choreography. The compiler cannot be the author of the batting averages. The photographer cannot be the author of the Picasso.\footnote{141} The photographer may be the author of the photograph of the Picasso, but she is the author only to the extent that her contribution is deemed original.\footnote{142}

A fixator has no more copyright interest in a work created by another than a compiler of facts has in the facts themselves.\footnote{143} If

\begin{itemize}
\item \footnote{140} See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 53 (1976). “[A] work should be considered ‘fixed in a tangible medium of expression’ if there has been an authorized embodiment in a copy or phonorecord . . . .” Id. (emphasis added). The record does not state whether such authorization can come after the act of embodiment. Id. It is probably useful to be careful about how one uses the verbs “fix” and “embody.” According to the 1976 Act, fixation is a special kind of embodiment—the only kind of embodiment that leads to copyright protection. See 17 U.S.C. § 101. Fixation is embodiment that is quite permanent or stable, brought about either directly by the author or indirectly with the permission (“authorization”) of the author. Id. An unauthorized embodiment, under the language of the 1976 Act, is not “fixed” because it lacks the essential element of “authorization.” Id.


\item \footnote{142} See VerSteeg, ReThinking Originality, supra note 114, at 801 (discussing legal meaning of word “originality” and offering standards for evaluating copyright originality); see also Friedman, supra note 8, at 157-58 (explaining that originality, and hence copyright protection, does not spring from mechanical process like printing press but rather only in those instances where person exercises “self expression”). Presumably, the dancer, as author, could have a number of common law causes of action against a clandestine videotaper (e.g., invasion of privacy, infringement of a right of publicity, defamation, false representation). See Kaplan, supra note 7, at 98.

\item \footnote{143} See 17 U.S.C. § 101. For an interesting case decided under the 1909 Act holding that the scribe (who most certainly had contributed significant material to the finished work product) became the copyright “author” when the dominant author authorized fixation but failed to “reserve his common law copyright,” see Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 256 (N.Y. 1968).

\end{itemize}
the fixator's contribution can qualify as original expression itself, then the fixator can also be an "author"—but not an author of the underlying work and not even, necessarily, a joint author. The fixator is not a joint author unless both the creator and fixator intend that their contributions be merged into an interdependent whole.\textsuperscript{144}

The legislative history of the 1976 Act supports the theory that a copyright author is someone who communicates expression. The legislative history also buttresses the notion that an author need not be a fixator. Comments of the drafters of the 1976 Act illustrate that one can be an author prior to the moment of fixation. For example, one Senate Report explained:

Under the bill, the concept of fixation is important since it not only determines whether the provisions of the statute apply to a work, but it also represents the dividing line between common law and statutory protection. As will be noted in more detail in connection with section 301, an unfixed work of authorship, such as an unrecorded choreographic work, performance, or broadcast, would be subject to protection under State common law or statute, but would not be eligible for Federal statutory protection under section 102.\textsuperscript{145}

This language—specifically, the phrase "an unfixed work of authorship"—shows that Congress did not intend that a "work of authorship" had to be fixed; rather, an author can be an author without fixa-

\textsuperscript{144} Hotchner[, a close friend of Hemingway's and a lesser known author,] to draw freely on their conversation in writing about him and to publish such material. What we have said disposes of the plaintiffs' claim both to exclusive and to joint copyright and we need not consider this aspect of the case any further. \textit{Id.} at 256. The definition of "fixed" in the 1976 Act would make such a decision unlikely today because Hemingway's authorization of fixation would make him at the very least a joint author, and more probably the sole author. \textit{See} 17 U.S.C. § 101.

\textsuperscript{145} \textit{See supra} notes 26-28 and accompanying text. Thus, when courts and commentators embrace the Marshall-Goldstein position that each joint author's contribution must be independently copyrightable in order for joint authorship to exist, the only way to salvage that position to make it tenable is to interpret it to mean that each contribution must be an "original expression" not idea. Each author's contribution need not, however, be fixed.

The House Report adopted this language from the Senate Report almost verbatim.

Regarding whether the act of fixation itself could qualify as authorship, Joseph Dubin of Universal Pictures and Abe Goldman, counsel for the Copyright Office, had the following exchange during the drafting process of the 1976 Act:

Dubin. You mean the mere mechanical acts of recording will be deemed to be a work of authorship?

Goldman. It will be, in much the same way as the mere mechanical act of photographing a motion picture.

Dubin. I am concerned about the physical act rather than what is contained in the recording.

Goldman. Well, this would cover the recording, meaning what's contained in the recording, of course.

Robert Evans of CBS pressed Goldman on this issue: "I wanted to ask Mr. Goldman if it is the act of recording that creates the subject matter of copyright?" Goldman responded: "It's the product of the act of recording." Evans tried to clarify: "The product. That is to say, a record containing bird calls or sound effects would be a subject of copyright." To that, Goldman replied: "I suppose it might be. If it's an original work of authorship, and I can conceive that this could be so.

With respect to this same issue, during the drafting process of the 1976 Act, the Speech Association of America was troubled by the prospect of having no copyright protection for unfixed oral presentations. Their expression of concern, however, displays a misunder-

146. See Easter Seal Soc'y, Inc. v. Playboy Enters., 815 F.2d 325, 337 (5th Cir. 1987) (stating that when football game is being covered by four television cameras with director guiding activities and choosing which electronic images are sent out to public and in what order, "'there is little doubt that what the cameramen and the director are doing constitutes 'authorship'" (quoting H.R. REP. No. 1476, 94th Cong., 2d Sess. 52, reprinted in 1976 U.S.C.C.A.N. 5659, 5665). The court continued:

On the other hand, we agree with the Society that at least the musical performance by its volunteers—if not the staged parade—was a work of authorship that needed only fixation to be copyrightable. And in this case, the process of fixation was sufficiently creative and original to be a work of authorship.

Id. (emphasis added). This statement recognizes that it is possible for something to be a "work of authorship" without being fixed.

147. See HOUSE REPORT, supra note 5, at 52 (discussing scope of term "fixation").

148. See HOUSE REPORT, supra note 5, at 52 (discussing scope of term "fixation").


150. See 3 OMNIBUS, supra note 6, pt. 3, at 61.

151. See 3 OMNIBUS, supra note 6, pt. 3, at 61.

152. See 3 OMNIBUS, supra note 6, pt. 3, at 61.

153. See 3 OMNIBUS, supra note 6, pt. 3, at 61; see supra notes 141-42 and accompanying text.
standing of some of the fundamental mechanics of the 1976 Act: "We
regret the fact that H.R. 4347 [the bill] omits, under the subject
matter of copyright (sec. 102), the category 'lectures, sermons,
addresses (prepared for oral delivery)' contained in the present
copyright law."¹⁵⁴ The Association's written comments continue:

In his supplementary report, the Register explains in considerable
detail the rationale behind the elimination of all common law
protection in H.R. 4347. He indicates, however, that impromptu
speeches, unrecorded performances, and improvisations, since they
would not be "fixed in any tangible medium of expression" would
continue to be protected under common law. We submit that
additional wording is needed in the legislation itself, to make this
concept clear.

... Does this suggest that there may be some doubt as to who owns
the copyright when a professor's lecture is recorded either for
transmission at a later date or spuriously by a student in his class?
By virtue of such a recording, the lecture, unless previously
recorded or written out in full, becomes immediately subject to
statutory copyright, but, apparently, the ownership of the rights
remains in doubt. We cannot believe that these ambiguities are
intentional, nor do we suggest specific remedies. We simply call
to your attention in the hope that both clarification and
adequate protection for extemporaneous materials may be achieved
through suitable amendments."¹⁵⁵

One misinterpretation of the 1976 Act that is apparent in the Speech
Association's comment is the assumption that statutory copyright
would exist for a teacher's lecture "immediately." This supposition
misses important details of copyright law. First, the lectures are not
protected by copyright "immediately" upon presentation. They are
only protected "immediately" upon fixation. According to the § 101
definition of "fixed," however, a lecture "recorded ... spuriously by
a student," is not fixed at all, because the adverb "spuriously" makes
it clear that the embodiment is not authorized by the "author."¹⁵⁶
Thus, in the "spurious student" hypothetical, no statutory copyright
exists due to the lack of authorization. Thus, there is no "ownership
question"—at least in terms of copyright ownership. Nevertheless,
even though the lecture would not be protected by copyright under

¹⁵⁴. See 5 OMNIBUS, supra note 6, pt. 1, at 439 (House Hearings, 1965) (statement of W.
Work, Executive Secretary, The Speech Association of America). Section 5(c) of the 1909 Act
was the provision to which Work referred.
¹⁵⁵. See 5 OMNIBUS, supra note 6, pt. 1, at 439.
the 1976 Act, technically the professor still would be the "author" of the lecture.\textsuperscript{157} Whether a state's common law would protect the author is a different question.\textsuperscript{158}

One Senate Report explains this essential aspect of the statute's definition of "fixed." "The definition of 'fixed' is contained in § 101. Under the first sentence of this definition, a work would be considered 'fixed in a tangible medium of expression' if there has been an authorized embodiment in a copy or phonorecord and if that embodiment is 'sufficiently permanent or stable'..."\textsuperscript{159} Thus, an unauthorized embodiment is insufficient to provide the author with copyright protection because an unauthorized embodiment does not qualify as "fixation" under the § 101 definition of "fixed." So, even though such a work might be embodied in a tangible form and be original, the author has no federal copyright protection under the 1976 Act.

Therefore, it is important to distinguish between the act of fixation and the act of authorship. Obviously, in many situations, and perhaps in most, the two acts blend into one when the author directly fixes his expression in a tangible medium. But it is the act of communication that makes him an author, not the simple embodiment.

Although the 1909 Act itself did not define the word "author,"\textsuperscript{160} it did not mandate that an author be a fixator. Section 62 codified the "work-for-hire" doctrine, which instills author status on an employ-

\textsuperscript{157} This statement assumes that the copyright would not be considered "work-for-hire." \textit{See Leaffer, supra note 37, § 5.2[B], at 149 n.11 (explaining "work-for-hire doctrine"); see also supra note 140 (discussing non-copyrightable status of unauthorized embodiments).}

\textsuperscript{158} \textit{See generally 2 NIMMER & NIMMER, supra note 62, § 8C.01, at 8C-3 to 8C-8 (explaining that 1976 Act made copyright law in United States primarily federal, but state law continues to fill numerous gaps not explicitly governed by federal act).}

\textsuperscript{159} \textit{See S. REP. NO. 988, 98th Cong., 2d Sess. 105 (1974).}

\textsuperscript{160} The 1909 Act did, however, make it clear that the author was extremely important. Section 4 stated, "[T]he works for which copyright may be secured under this Act shall include the writings of an author." 1909 Act supra note 3, § 4 (emphasis added). The legislative history also shows great concern for the characterization of an "author." For example, Richard R. Bowker, Vice President of American (Authors') Copyright League, discussed what "inclusive term" could be used "to designate the creators of intellectual property whose works would be subject to copyright protection."

\textit{You will notice in the resume of the American Copyright League that the word 'author' is held to be comprehensive, and that follows, you will also notice, the word which is used in the Constitution of the United States. Unless artists and musicians and other inventors, so to speak, of different classes of literary property, musical, dramatic and everything else, are included under the term 'authors' their rights would be much more doubtful under the Constitution, and therefore it would be wise to use... the words 'authors of literary or artistic work...'.} 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 40-41 (1976) (remarks of R.R. Bowker) [hereinafter 1 LEGISLATIVE HISTORY 1909 ACT].
er—someone who is not a fixator. Speaking on November 2, 1905, R.R. Bowker, Vice President of American (Authors') Copyright League, said, "You will remember that the Constitution uses the sole word 'author', meaning the creator of any kind of property... [T]he word 'author' should be defined in a single section, which should be absolutely comprehensive." Thoralvd Solberg, Register of Copyrights, read the then-current draft of Division 2 of § 20:

"Author" as used in this act means the writer of any literary work, the writer or speaker of any oration, lecture, or other spoken address, a dramatist or musical composer, a painter or sculptor or the artist of any other [original] work of art, including drawings, models and architectural designs, the maker of a photographic negative, engraving, or other secondary work of art involving original interpretation or distinctive artistic skill, a cartographer, the compiler of compilations or collections, the editor of a distinctive edition, the writer of annotations or additions, the maker of an abridgment, arrangement, dramatization, translation, or other version lawfully made, the conductors of a periodical, the joint authors of a collaborative work, ....

This definition proves that even the drafters of the 1909 Act did not believe that one needed to be a fixator in order to be an author. Thus, the principle that an author need not fix her work as a condition precedent to becoming a copyright author dates back at least to the turn of the century and is still in force today under the 1976 Act.

b. Conceptualization

Many courts and commentators have focused on cognitive activity as being the hallmark of an "author." One case in particular, decided under the 1909 Act, illustrates this fascination with the mental component of being an author. In Oxford University Press, N.Y., Inc. v. United States, the Court of Customs and Patent Appeals

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161. See 1909 Act, supra note 3, § 62 (stating that "the word 'author' shall include an employer in the case of works made for hire").
163. Id. at 144 (remarks of T. Solberg) (emphasis added).
164. See id. at 147 (remarks of Herbert Putnam) (summarizing Bowker's concept of "the author," by stating that "by the author [Bowker] means the originator or maker of the work").
165. See infra notes 166-224 and accompanying text (discussing origins of term "author," historical emphasis on importance of intellectual or cognitive act of creation, and how term has evolved in context of copyright law).
166. 33 C.C.P.A. 11 (1945). Many cases decided under the 1909 Act that offer insight into the nature of authorship look to the question of joint authorship and focus on the issue of the intent of the parties rather than their authorship. See Laskowitz v. Marie Designer, Inc., 119 F.
stressed that mental activity was necessary for authorship. According to the court:

[A]uthorship implies that there has been put into the production something meritorious from the author’s own mind; that the product embodies the thought of the author ... and would not have found existence in the form presented, but for the distinctive individuality of mind from which it sprang.

....

Running through all the cases is the controlling principle that for a thing to be the work of an “author,” it must be something that is more or less the product of mental activity as distinguished from that which is purely mechanical.167

Much of this emphasis on the metaphysical-mental side of being an author can be traced to the historical evolution of authorship during the eighteenth and nineteenth centuries. Therefore, one can appreciate better the role of conceptualization as a constituent element of becoming an author by first understanding the historical background. Initially, scholars and courts defined authorship in terms of a person’s mental process and personality. Toward the twentieth century, copyright law began to recognize communication as the most important ingredient for becoming an author.

To begin with, the English word “author” comes from the Latin noun *auctor*.168 The Latin word *auctor* has several meanings that sound familiar: “originator,” “source,” “inspirer,” “mover,” “proposer,” “the person or thing principally responsible (for an action, situation, etc.),” “the prime mover or agent,” “initiator,” “cause.”169 *Auctor* is the noun form of the Latin verb *augere* which means “[t]o increase in quantity or size, make greater, enlarge, extend, swell.”170 *The Oxford Universal Dictionary* defines “author” as “[t]he person who originates or gives existence to anything.”171 Samuel Johnson’s dictionary, which has been described as “the standard dictionary at the time when the Constitution was framed,”172 contains four definitions for

Supp. 541, 553 (S.D. Cal. 1954) (finding that regardless of extent of contribution that each made to it, case of joint proprietorship or authorship of advertising scheme for benefit of joint venture, ownership inured to benefit of both with right of each to use it not only when the relationship existed, but also afterwards).


169. Id.

170. Id. at 213. This sense of *augere* comports well with the understanding that an author must add distinguishable variation in order to be considered an “author.” See infra notes 198-99, 232 and accompanying text.

171. OXFORD UNIVERSAL DICTIONARY 797 (2d ed. 1989).

172. Arguments Before the Comm. on PATENTS of the Senate and House Conjointly on the Bills S.6330 and H.R. 19853, 59th Cong., 1st Sess. 212 (1906) (written statement of Nathan Burkan, Counsel,
"author:" (1) "The first beginner or mover of any thing; he to whom any thing owes its original;" (2) "The efficient; he that effects or produces any thing;" (3) "The first writer of any thing; distinct from the translator or compiler;" (4) "A writer in general."\(^{173}\)

The Framers of the Constitution knew their Latin. Many of them were authors in the traditional sense. An abundance of recent scholarship has examined the veritable deification of "the author" in the nineteenth century.\(^ {174}\) For example, in his illuminating book, Mark Rose meticulously recounts the concept of "author" as it evolved through the legal and social world during the eighteenth and nineteenth centuries.\(^ {175}\) According to Rose, a "literary expert witness," an author's right to profit from his work is directly linked to the fact that he created it. "[T]he author is conceived as the originator and therefore the owner of a special kind of commodity, the work. . . . Copyright is founded on the concept of the unique individual who creates something original and is entitled to reap a profit from those labors."\(^ {176}\) Rose quotes John Locke's 1690 work, \emph{Two Treatises of Government}, as evidence that one should own the fruits of one's own labor.\(^ {177}\) Rose uses the term "author" to mean "autonomous creator" and suggests that that is what it has come to mean—the "modern notion."\(^ {178}\) This is very different from the concept of "author" revealed in Shakespeare. Rose continues, "Normally Shakespeare's plays use 'author' in the general sense of 'source' or 'originator.'"\(^ {179}\) By the early eighteenth century, some writers began using the metaphor of the author as "father" of the child (book).\(^ {180}\) Others characterized the author as a real property owner—the tiller of the soil and his estate (book).\(^ {181}\)

The first case that began to shape the definition of copyright author was decided in England in 1720, \emph{Burnet v. Chetwood}.\(^ {182}\) \emph{Burnet

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174. \textit{See supra} note 7 and accompanying text (noting development of authors' increased control over their works).

175. ROSE, \textit{supra} note 7, at 31-142. A great deal of this section of the Article relies on Rose's historical account.

176. ROSE, \textit{supra} note 7, at 1, 2.

177. ROSE, \textit{supra} note 7, at 4 (quoting JOHN LOCKE, \emph{TWO TREATISES OF GOVERNMENT} 305-06 (1690)).

178. ROSE, \textit{supra} note 7, at 25.

179. ROSE, \textit{supra} note 7, at 26.

180. ROSE, \textit{supra} note 7, at 38.

181. ROSE, \textit{supra} note 7, at 40-41.

182. ROSE, \textit{supra} note 7, at 49-50.
involved a translation. Defendants argued that the translator was the author of a translation from Latin into English.\textsuperscript{183} Although Lord Macclesfield's decision was decidedly paternalistic,\textsuperscript{184} the truly interesting issue was whether

a translation [was] a new work and was a translator, therefore, an author? Maccelsfield's opinion implied that he was inclined to think that a translator was indeed an author, and a number of years later in \textit{Gyles v. Wilcox} (1740) a similar issue arose. Was an abridgement of an existing book a new work, and was an abridger an author? Lord Chancellor Hardwicke's decision was that an abridgement—a genuine abridgement and not merely a nominal one put together to evade the statute—was indeed a new work and that an abridger, whose efforts required invention, learning, and judgment, was an author. What was an author?\textsuperscript{185}

Rose does not answer this question here. Nevertheless, \textit{The Case of Authors and Proprietors of Books}, printed by booksellers in 1735 while petitioning Parliament for a longer copyright term, explains in fundamental property law terms, what booksellers thought an author was in the early eighteenth century.\textsuperscript{186} "Authors have ever had a Property in their Works, founded upon the same fundamental Maxims by which Property was originally settled, and hath been since maintained."\textsuperscript{187} Presumably, this statement espouses the belief that an author's claim depends upon fundamental property law precepts such as those articulated by Locke.\textsuperscript{188}

One important early development regarding the concept of author occurred in "\textit{Pope v. Curl}, in which the rule was established that copyright in a letter belongs to the writer . . . ."\textsuperscript{189} This decision is particularly important because \textit{Pope} established what Rose characterizes as "a transitional moment in the conception of authorship and a pivotal moment in the production of the concept of intellectual property."\textsuperscript{190} The decision in \textit{Pope} recognized the distinction between a work, which is intangible, and the physical object in which a work is embodied.\textsuperscript{191} Thus, even this early case recognized that

\begin{footnotesize}
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\item \textsuperscript{183} Rose, supra note 7, at 50.
\item \textsuperscript{184} Rose, supra note 7, at 50. Lord Macclesfield said that perhaps the translator owns the translation but the content of this book should be kept in Latin for the educated not "the vulgar." \textit{Id.}
\item \textsuperscript{185} Rose, supra note 7, at 51 (citation omitted).
\item \textsuperscript{186} Rose, supra note 7, at 53.
\item \textsuperscript{187} Rose, supra note 7, at 53 (internal quotation omitted).
\item \textsuperscript{188} See supra note 177 and accompanying text (reiterating Locke's theory that one acquires property by applying his labor to resources).
\item \textsuperscript{189} Rose, supra note 7, at 59-60.
\item \textsuperscript{190} Rose, supra note 7, at 60.
\item \textsuperscript{191} Rose, supra note 7, at 64-65.
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the physical object itself is not what is really important for copyright. This understanding supports the position explained above that an author need not be a fixator and that to be an author one need not fix one's work in a physical form.

In the mid-eighteenth century, a number of prominent participants in the copyright debate expressed the belief that literary authors were somehow superior to inventors who merely fiddled around with their hands. Rose claims that this belief was due to a class distinction, and quotes William Blackstone, arguing the case Tonson v. Collins in 1760: "Mechanical inventions tend to the improvement of arts and manufactures, which employ the bulk of the people . . . But as to science, the case is different. That can and ought to be, only the employment of a few." In the debate about what made someone an author, Rose focuses on one scholar, Hargrave, who was unsure "whether every writer is an author." Pared to essentials, his argument is that since all men are distinct, all compositions must be distinct. But Hargrave is evidently not comfortable with a position that fails to distinguish between an original genius and a hack writer. So he hedges, asserting only that a literary work really original will always be distinguishable. Once qualified in this way, Hargrave's position is transformed, for it now appears that only some men—those blessed with at least modest powers of original genius—can produce distinct literary works.

Rose summarizes his discussion about what qualifies someone as an author by turning to Justice Holmes' observation in Bleistein v. Donaldson Lithographing Co.: "The copy is the personal reaction of an individual upon nature. Personality always contains something unique . . . That something he may copyright." Rose concludes:

What stabilizes the system, however, is the continuing conviction that though there may be exceptional cases, and though legal

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192. See supra note 105 and accompanying text (noting that one can be author before actual fixation of work).
194. ROSE, supra note 7, at 119.
195. ROSE, supra note 7, at 119 (citation omitted). Blackstone was using the word "science" in the same way that the Constitution uses it. U.S. CONSTITUTION art. I, § 8. "Science" comes from the Latin word scientia ("knowledge" or "understanding"). OXFORD LATIN DICTIONARY 1703 (combined ed. reprinted 1983).
196. ROSE, supra note 7, at 127.
197. ROSE, supra note 7, at 127 (internal quotation omitted).
198. ROSE, supra note 7, at 137 (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 299-300 (1903)). I have argued elsewhere that an author's variations are the essence of what the Feist court called a "spark of creativity." VerSteeg, supra note 114, at 824-56. It seems that the something which is unique can only be the author's variation, that which he adds or changes.
fictions [e.g. work for hire] may at times be useful, still there really are such beings as original authors, and these gifted creatures will express themselves in discrete works as readily distinguishable as individual human faces.\(^{199}\)

Thus, history implies that courts in the eighteenth and nineteenth centuries developed the view that authors were special intellects whose minds generated works that reflected their personalities.

It is against this backdrop that Nathan Burkan, attorney for the Music Publishers' Association, submitted a formal statement and a detailed brief to Congress when it was in the process of refining the bill that soon became the 1909 Act.\(^{200}\) Burkan specifically urged that copyright protection ought to be available for phonograph records.\(^{201}\) Burkan's arguments reveal that he clearly comprehended that authors were the people who produced mental conceptions, not merely or even necessarily tangible results. For example, in the statement preceding his brief, he said: "the word 'writings' in the Constitution does not mean the script of an author, but the intellectual production of the author."\(^{202}\) Throughout his introductory statements, Burkan unequivocally stated his belief that an author is the person who engages in mental activity and that a physical product, although it is necessary, is only secondary:

The intent was to protect his writings—that is, the subject of the writings, the intellectual conception embodied in that writing—and whatever form that writing may take, as long as that writing is reduced to some tangible form, as long as the idea, the intellectual production of the author is capable of being identified, capable of being distinguished, then he has a right of property, entitled to protection under that clause of the Constitution.\(^{203}\)

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199. ROSE, supra note 7, at 138. This ambiguous discussion about the mental components of authorship really ignores the true meaning of "originality." In order to be original an author must make an independent contribution of distinguishable variations (but the scope of copyright protection varies [i.e., is greater or lesser] depending upon how great the variation is, because the author's copyright only extends to that which he added or changed). It also ignores the aspect of communication that is a necessary prerequisite to becoming an "author" under the statute. 17 U.S.C. § 102(a) (1994).

200. 4 LEGISLATIVE HISTORY 1909 ACT, supra note 172, at 201-12 (statement of Nathan Burkan, Counsel, Music Publisher's Ass'n); id. at 212-27 (written statement of Nathan Burkan, Counsel, Music Publisher's Ass'n).

201. 4 LEGISLATIVE HISTORY 1909 ACT, supra note 172, at 203-12 (statement of Nathan Burkan, Counsel, Music Publisher's Ass'n); id. at 212-27 (written statement of Nathan Burkan, Counsel, Music Publisher's Ass'n).

202. 4 LEGISLATIVE HISTORY 1909 ACT, supra note 172, at 203 (statement of Nathan Burkan, Counsel, Music Publisher's Ass'n) (emphasis added).

203. 4 LEGISLATIVE HISTORY 1909 ACT, supra note 172, at 203 (statement of Nathan Burkan, Counsel, Music Publisher's Ass'n).
According to Burkan, fixation is an event that may take place long after an author's authorship has been established. "The purpose of printing is to indicate to your senses the ideas embodied in the paper; so in the case of perforated rolls or phonographic disks it is but another method of conveying to the mind the ideas of the author embodied therein." Finally, in commenting on Burrow-Giles Lithographic Co. v. Sarony, the first Supreme Court case to define "author," Burkan again concentrated on the mental aspect of what makes one an author:

In the Sarony case the court said that a photograph is entitled to be protected, not because it is visible or invisible, but because the photograph is representative of the intellectual conception, because the operator exercised his ingenuity. The court said that the operator arranged the draperies, had created the pose, and the photograph embodied the operator's intellectual conception.

In Burkan's brief, he quoted extensively from the British copyright scholar, Eaton Drone, and probed the metaphysical nature of being an author.

Indeed, so complete may be the identity of an incorporeal literary composition that, even when it has no existence in writing or print, it may be preserved in its entirety for ages in the memory, passing from generation to generation, from country to country. The composer will conceive and give expression to a musical composition without putting a note on paper. It is a creation, without material form, in the realm of imagination; but so complete is its incorporeal, invisible form, so marked its individuality, so distinctly perceptible to the musical mind, that another will reproduce it 'by ear,' without the aid of written or printed notes.

Burkan then quotes Drone arguing that "the invisible, intangible, incorporeal creation of the author's brain never loses its identi-
Indeed, even Drone recognized that copyright protection, as a kind of property right, could not manifest until the moment of physical embodiment. But that does not mean that an author is not an author simply because he fails to embody his work in a tangible medium of expression. Burkan also recognized the practical liability of failing to embody one's work: "When a composition has not been reduced to writing it may be more difficult, and in some cases impracticable, to prove the authorship and thereby to establish a title to ownership." Nevertheless, although it may have been impractical, Burkan's observation reveals that, at least to his way of thinking, the definition of "author" is not dependent on a work being "reduced to writing" (i.e. embodied).

According to Burkan, the court in Sarony stated that copyrightable subject matter subsisted in those things "by which the ideas in the mind of the author are given visible expression." Thus, an author is the one whose mind generates ideas capable of copyright protection. Burkan continued: "The court throughout this decision takes the view that what the Constitution intended that Congress should protect was the 'intellectual production,' the 'production of genius or intellect,' the 'product of intellectual invention,' that which is 'representative of intellectual conception.'"

The comments, observations, and conclusions of Rose and Burkan illustrate plainly that the eighteenth and nineteenth centuries emphasized the intellectual/mental side of being an author. This is important to the present discussion for two very different reasons. First, this attention to the cerebral aspects of becoming an author emphasizes again that fixation is not the linchpin of being an author. It was what was going on in a person's head that made them an author in the eighteenth and nineteenth century view. Second, it serves as a useful point of departure for explaining the 1976 Act's

209. 4 LEGISLATIVE HISTORY 1909 ACT, supra note 172, at 217 (written statement of Nathan Burkan, Counsel, Music Publisher's Ass'n) (quoting DRONE, INTELLECTUAL PRODUCTIONS, supra note 208, at 97).

210. 4 LEGISLATIVE HISTORY 1909 ACT, supra note 172, at 217 (written statement of Nathan Burkan, Counsel, Music Publisher's Ass'n) (asserting that "there can be no property in thoughts, conceptions, ideas, sentiments, etc., apart from their association, is clear, for they are then incapable of being identified or owned exclusively" (quoting DRONE, INTELLECTUAL PRODUCTIONS, supra note 208, at 97)).

211. 4 LEGISLATIVE HISTORY 1909 ACT, supra note 172, at 217 (written statement of Nathan Burkan, Counsel, Music Publisher's Ass'n) (quoting DRONE, supra note 208, at 97).

212. 4 LEGISLATIVE HISTORY 1909 ACT, supra note 172, at 215 (written statement of Nathan Burkan, Counsel, Music Publisher's Ass'n).

213. 4 LEGISLATIVE HISTORY 1909 ACT, supra note 172, at 216 (written statement of Nathan Burkan, Counsel, Music Publisher's Ass'n) (quoting DRONE, INTELLECTUAL PRODUCTIONS, supra note 208, at 97) (discussing Sarony).
understanding of "author" because the 1976 Act so clearly does not focus on the conceptual component of authorship. A special study, commissioned early in the process of drafting the 1976 Act, discussed "authors" and "authorship" as set forth in case law from the 1880s to the 1920s. That study highlighted cases that had defined authorship in terms of both its mental and physical elements. One case mentioned in the study is the late nineteenth century English case, Nottage v. Jackson, which characterized authorship as involving "originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph." Another case from the turn of the century cited in the study "stated that if the product would not have found existence in the form presented but for the distinctive individuality of mind from which it sprang, and if in makeup there is evinced some peculiar mental endowment, there is authorship." Lastly, the study quoted Hoague-Sprague Corp. v. Frank C. Meyer Co., which defined authors as "all who exercise creative, intellectual, or aesthetic labor in the production of a concrete tangible form."

The cases cited by the study, as well as Burkan's interpretations, illustrate a transition in copyright law—a moving away from an emphasis on the mental element toward a definition that encompasses the act of communication via a physical element also. This transition is reflected in the 1976 Act's insistence on communication as an element of being an author and fixation as an element of copyrightability. On the other hand, the 1976 Act has not completely abandoned the conceptual component of copyrightability and authorship, because originality is still a cornerstone requirement. Those judges and commentators who choose to accentuate

215. Id. at 86, reprinted in 1 OMNIBUS, supra note 6, at 86 (citing Nottage v. Jackson, 11 Q.B.D. 627 (C.A. 1883)).
216. Id., reprinted in 1 OMNIBUS, supra note 6, at 86 (quoting Nottage, 11 Q.B.D. at 635).
217. Id., reprinted in 1 OMNIBUS, supra note 6, at 86 (quoting National Tel. News Co. v. Western Union Tel. Co., 119 F. 294, 298 (7th Cir. 1902)).
218. 31 F.2d 583 (E.D.N.Y. 1929).
219. Copyright Law Revision, supra note 214, at 86, reprinted in 1 OMNIBUS, supra note 6, at 86 (quoting Hoague-Sprague Corp. v. Frank C. Meyer Co., 31 F.2d 583, 584 (E.D.N.Y. 1929)).
220. The drafters of the 1976 Act also assiduously avoided using the term "creativity" in defining copyrightability. See VerSteeg, Sparks in the Tinderbox, supra note 117, at 558-72 (noting that 1976 Act requires originality rather than creativity which would raise copyrightability bar too high).
221. See supra notes 109-14 and accompanying text (noting that originality is requirement for copyright in Constitution).
the mental aspect of being an author are recognizing that it is common for authors to first conceptualize their works as mental images before they convert them into tangible form. Nevertheless, even though conceptualization is probably an antecedent activity in the process of authorship in the majority of cases, it is not necessarily so; and the 1976 Act recognizes that. The drafters of the 1976 Act expressly avoided mentioning "creativity" in the statute, and Congress expressly rejected novelty, ingenuity, and aesthetic merit as criteria for copyrightability. Instead, the drafters of the 1976 Act made communication—either direct or indirect—an essential element of being a copyright author.

CONCLUSION

The 1976 Act grants initial copyright ownership to "authors." Consequently, it will frequently be vital to determine, as an issue of fact, who is and who is not an "author." But, as is so often the case with determining questions of fact, in order to get the right answers we must ask the right questions. The 1976 Act does not define "author" explicitly. Recent federal cases have asked the wrong questions, placing misguided emphasis on the act of fixation as a prerequisite for becoming an author. Yet, fundamental tenets of copyright prevent characterizing someone who contributes only "ideas" as an "author." These are seemingly inconsistent propositions: (1) an author does not necessarily fix his work in a tangible medium; but, (2) a person who contributes only intangible ideas is not an author. Furthermore, an author need not be a "creative genius."

222. See supra notes 98-99, 124 (finding that originality may or may not be resulting expression of author's mental conception).
223. See supra note 220 (discussing trend toward communication as prerequisite for copyrightability).
224. H.R. REP. NO., 1476, supra note 5, at 5664. Professor Kaplan explained the rationale for rejecting "novelty" as a requirement for copyright: [N]ovelty would in all events be a poor criterion. If it is a difficult, perhaps an illusory, measure in the field of mechanical improvements, how much harder would it be in literature or the other arts. Starting even with the bias of an extreme Romanticism, how does one determine what is "new," or significantly or importantly new? And is it newness, a fresh departure from the past, that we want uniquely to encourage by law? In time a standard of novelty would have to be debased or distorted, else copyright as a system would lose all viability.

KAPLAN, supra note 7, at 43.
226. S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1086 (9th Cir. 1989) (finding that "[a]uthorship is a question of fact") (citing Del Madera Properties v. Rhodes & Gardner, Inc., 820 F.2d 973, 980 (9th Cir. 1987)).
227. See supra notes 91, 197 and accompanying text (discussing position of some critics who dispel notion of authors as creative geniuses).
An author need not be the individual who fixes copyrightable expression, and an author cannot become an author solely by embodying something in a tangible form. Fortunately, the 1976 Act itself, albeit indirectly, provides the right questions to ask to answer the riddle. To ascertain whether someone is an author, we must ask whether he has communicated original expression, either directly (through personal fixation) or indirectly (through authorizing another to fix it). That is what makes someone a copyright author. Without communication, a person cannot be an author. Furthermore, although conceptualization generally may precede the act of communication, it is not a compulsory antecedent to becoming an author under the 1976 Act.

By defining “author” in this manner, the 1976 Act advances several traditional policies of copyright. First, it promotes progress in knowledge by encouraging those who conceptualize original expression to communicate that expression to the public, either themselves or by engaging the services of another to do so. For it is only through communication that people can become authors, and it is only by becoming authors that they can become initial owners of copyright. Second, this definition preserves the importance of protecting expression and not merely ideas. Copyright law has long established that ideas should be freely accessible for the good of humankind. Although drawing the line between idea and expression may be difficult, draw it we must. Making the definition of “author” depend on the demarcation of the idea/expression line promotes the goals of copyright far better than the line of tangibility/intangibility (i.e., physical embodiment). After all, on many occasions the difference between tangibility and intangibility easily could be crossed by the work of a mere scribe or amanuensis. Lastly, the requirement that an author contribute expression that is “original” ensures that copyists will not be considered authors and that authors must contribute distinguishable variations—variations that are greater than merely trivial—to pre-existing works.

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228. See supra note 93 and accompanying text (noting that someone authorized by author may fix author's work).
229. See supra part III.C.2 (noting that one who fixes original idea is author).
230. See Hughes, supra note 99, at 817 (making this point specifically with respect to physical (not intellectual) property by stating that physical property only contributes to economy if owner releases it into market or gives it away, whereas "Locke relies upon the money").
231. See generally Leaffer, supra note 37, § 2.12, at 56-65 (expressing that when author decides to disseminate his ideas to public, public may use author's ideas—author only retains control over way his ideas are expressed).
232. See supra notes 114, 198-99 and accompanying text (finding that work must have great deal of creativity or uniqueness); see also Chafee, supra note 10, at 512 n.19 (noting that minimal
Although the statute does not expressly define "author" and although commentators and judicial decisions have offered definitions with tragic flaws, the 1976 Act does indirectly equip us with the tools needed to uncover the meaning of the word "author." Like the recent discovery of the tomb of the sons of Ramses II in the Valley of the Kings, it has been there for a long time. To find it we merely had to question erroneous assumptions made by previous scholars and clear away debris left by others who did not look closely.

level of "independent effort," such as editing, fingerling, phrasing, is not recognized as copyrightable under law). Professor Chafee, however, also stated that "Toscanini or Benny Goodman does add enough artistic skill to another's music to deserve recognition ..." Zechariah Chafee, Jr., Reflections on the Law of Copyright: II, 45 COLUM. L. REV. 719, 734 (1945) (emphasis added). Prof. Chafee referred to this element as "the added something." Id. Professor Litman has identified the process of variation as the essence of authorship itself. See Jessica Litman, Copyright as Myth, 53 U. PITT. L. REV. 235, 244 (1991) (describing authorship as process of changing and combining concepts and ideas in new ways); see also Hughes, supra note 99, at 353 (noting that from Holmesian perspective, authorship is, at minimum, bringing one's subjective views to "external world").

233. See supra parts I and II (discussing various definitions of "author" established in case law and their inadequacies in context of defining co-author). The Marshall-Goldstein definition produces a result whereby tangibility is the litmus test, and Professor Nimmer's definition produces a result whereby a person who generates an idea can be an author. See supra notes 14-19 (discussing requirement of fixation of work to obtain copyright protection); supra notes 62-69 and accompanying text (setting forth Nimmer's de minimis approach to definition of authorship).


235. Apparently more than one archaeologist has found the entrance to this magnificent tomb. Reibstein & Miller, supra note 254, at 66-67. They, however, relying on the work of prior scholars, erroneously determined that it was insignificant. Id. Howard Carter, the famous British archaeologist and explorer who discovered King Tutankhamen's tomb in 1922, actually used the entrance to the tomb of Ramses II's sons as a spot to discard the detritus from his excavation of the famous tomb of King Tutankhamen. Id. at 66.