

## UNPLANNED COAUTHORSHIP

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*Unplanned coauthorship refers to the process by which contributors to a creative work are treated by copyright law as coauthors of the work based entirely on their observable behavior during its creation. The process entails a court imputing the status of coauthors to the parties ex post, usually during a claim for copyright infringement. For years now, courts and scholars have struggled to identify a coherent rationale for unplanned coauthorship and situate it within copyright’s set of goals and objectives. This Article offers a novel framework for understanding the rules of unplanned coauthorship using insights from theories of shared intentionality. Unplanned coauthorship enables courts to balance copyright’s commitment to authorial autonomy and individual ownership against the demands of cooperation, collaboration, and information sharing that the creative process invariably entails. Through these rules, copyright law recognizes that certain forms of creativity depend entirely on mechanisms of collaboration for their continuing existence. In such instances of collaborative creativity, the very process of collaboration provides creators with additional and independent reasons for their creative endeavor, a motivation referred to as the “collaborative impulse.” Characteristic of all joint activities undertaken with a shared intention, the collaborative impulse derives from a motivational commitment to the joint task that collaborating creators develop, causing them to pay equal attention to both the means and the ends of their creativity. The Article shows how the rules of unplanned coauthorship allow copyright law to nurture these domains of collaborative creativity by protecting the collaborative impulse and simultaneously rendering it fully compatible with copyright’s utilitarian goal of promoting creativity through exclusive rights.*

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## INTRODUCTION

Methodological individualism—the approach to analyzing and explaining social phenomena through individual behavior—is without doubt the dominant way of understanding copyright law today.<sup>1</sup> In its origins and early development, Anglo-American copyright law came to revolve around the normative idea of the individual romantic genius, whose creative expression was worthy of protection against copying.<sup>2</sup> Authorship was thus conceived of principally in individualistic and solitary terms.<sup>3</sup> As the analysis of copyright law became utilitarian and market driven, the individual author came to be conceptualized as a rational utility-maximizer, who was motivated to produce original expression through copyright’s promise of limited exclusivity.<sup>4</sup>

Despite copyright law’s reliance on methodological individualism to understand the author’s motivations and indeed the very concept of authorship, the creative process itself has long known the use of cooperative techniques and processes in the production of creative works.<sup>5</sup>

<sup>1</sup> For a general account of methodological individualism in law and legal analysis, see Robert Ahdieh, *Beyond Individualism in Law and Economics*, 91 B.U.L. REV. 43, 48-57 (2011). For general discussions of methodological individualism, see Geoffrey M. Hodgson, *Meanings of Methodological Individualism*, 14 J. ECON. METHOD. 211 (2007); Lars Udehn, *The Changing Face of Methodological Individualism*, 28 ANN. REV. SOC. 479 (2002); Leon J. Goldstein, *The Inadequacy of the Principle of Methodological Individualism*, 53 J. PHIL. 801 (1956).

<sup>2</sup> See Mario Biagioli, *Genius Against Copyright: Revisiting Fichte’s Proof of the Illegality of Reprinting*, 86 NOTRE DAME L. REV. 1847, 1847 (2011); Peter Jaszi, *Toward a Theory of Copyright: Metamorphosis of “Authorship”*, 1991 DUKE L.J. 455, 462-63 (1991); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author,”* 17 EIGHTEENTH-CENTURY STUDIES 425, 426 (1984).

<sup>3</sup> See Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 189 (2008).

<sup>4</sup> See Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1573 (2009). For an account of copyright’s utilitarian turn as a normative theory, see Shyamkrishna Balganesh, *The Normative Structure of Copyright Law*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 456 (Shyamkrishna Balganesh ed. 2014).

<sup>5</sup> See, e.g., BRIAN VICKERS, *SHAKESPEARE, COAUTHOR: A HISTORICAL STUDY OF FIVE COLLABORATIVE PLAYS* (2004); Heather Hirschfeld, *Early Modern Collaboration and Theories of Authorship*, 116 PROC. MOD. LANGUAGE ASSOC. 609 (2001).

Principal among such methods of creative collaboration was the institution of coauthorship.<sup>6</sup> While scholars disagree about the dominance and pervasiveness of coauthorship norms for various types of creative works during pre-copyright times, they nonetheless all agree that the institution existed as a common mechanism of cultural production by the time that formal copyright law emerged in the early eighteenth century.<sup>7</sup> And yet, it wasn't until a century and a half later that copyright law, on either side of the Atlantic, first wrestled with the institution of coauthorship and its implications for the working of copyright doctrine.<sup>8</sup> When presented with a case of coauthorship in 1915, Judge Learned Hand was thus struck by this anomaly, and observed how he had “been able to find, strangely, little law” on the subject.<sup>9</sup> The result was that through much of the twentieth century, it fell entirely to courts to develop copyright law's rules relating to coauthorship in incremental, common law fashion. In the United States, it wasn't until the passage of the Copyright Act of 1976 that the copyright statute even dealt with the institution of coauthorship.<sup>10</sup>

At its simplest, coauthorship refers to a collective, cooperative process of producing a work of original expression, wherein each contributing member (i.e., each coauthor) makes a contribution to the work and is as a result accorded the designation of “author”. The

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<sup>6</sup> *Id.*

<sup>7</sup> See Jeffrey Knapp, *What is a Co-author?*, 89 REPRESENTATIONS 1 (2005) (critiquing the orthodox historical position, but conceding that coauthorship existed in the 17<sup>th</sup> century).

<sup>8</sup> This was the case of *Levy v. Rutley*, L.R. 6 C.P. 523 (1871). Cases prior to this, and around this period, do mention joint authorship between parties, confirming that the institutional practice was well-established by this period. Yet, no case appears to have dealt directly with the process through which copyright was to recognize or validate the practice of jointly authoring a work. For cases mentioning joint authorship in the nineteenth century in both the U.S. and England, see: *Silver v. Holt*, 84 F. 809, 810 (C.C. Mass. 1895); *Reed v. Holliday*, 19 F. 325, 326 (C.C. Pa. 1884); *Tompkins v. Rankin*, 24 F. Cas. 39, 39 (C.C. Mass. 1876); *Shook v. Rankin*, 21 F. Cas. 1337, 1339 (C.C. Minn. 1875); *Ex parte La Mert*, (1863) 122 Eng. Rep. 578, 578 (K.B.); *Hole v. Bradbury*, (1879) 12 Ch. D. 886, 886 (Ch. D.). See also Laura G. Lape, *A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine*, 61 ALB. L. REV. 43, 45-46 (1997) (“[N]ineteenth-century judicial opinions show that courts assumed that joint authorship could be created, although their opinions did not specify how.”).

<sup>9</sup> *Maurel v. Smith*, 220 F. 195, 199 (S.D.N.Y. 1915).

<sup>10</sup> See 17 U.S.C. §101 (2005) (definition of “joint work”). The first U.S. copyright statute, Copyright Act of 1790, might have contemplated the institution of coauthorship. In delineating the rights of authors, it uses the phrase “author or authors” in multiple places. See Copyright Act of 1790, s. 1. Yet, the Act of 1790 made no special allowances for coauthorship, nor did it specify how such coauthorship was to be determined. Somewhat ironically, the next U.S. copyright statute, the Copyright Act of 1909, changed the statute's approach and focused entirely on a singular “author” right through. 17 U.S.C. §§ 4, 9 (1909); SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION, STUDY NO. 12: JOINT OWNERSHIP OF COPYRIGHTS 89 (Comm. Print 1960) (authored by George D. Carey).

designation is more than just of nominal value, since it also results in each coauthor obtaining an ownership interest in the copyright over the creative work, as a joint owner of the work.<sup>11</sup> Coauthorship is thus of deep economic significance, which explains why courts in the twentieth century came to be increasingly presented with coauthorship disputes, necessitating their creation of a set of rules to deal with the issue.

In developing copyright's rules on coauthorship, courts began by looking to the idea of an "agree[ment]" to collaborate between contributors, and thus inevitably situated their analyses within the framework of contract law.<sup>12</sup> Contributing to the creation of a work in furtherance of an agreement to do so thus emerged as the paradigmatic case of coauthorship. This approach presented courts with few problems, if any, when the parties had explicitly agreed to collaborate and share authorship, in advance of making their creative contributions. Problems arose however, in situations where an actual advance agreement between the parties was altogether absent, and yet the parties had gone ahead and collaborated in the creation of the work. To deny one or more contributors the designation of coauthor in such situations, merely because of the absence of a formal *ex ante* agreement, seemed at once unduly harsh and mechanistic.

Thus emerged the idea of what I describe here as *unplanned coauthorship*. Instead of looking for a formal *ex ante* agreement between the parties prior to their collaboration, courts instead began looking to the very process of collaboration and the parties' behavior therein (as it unfolds during the collaboration) in order to treat the parties as coauthors of the work, based entirely on their actions.<sup>13</sup> The collaborative creativity here—the coauthorship—is "unplanned" only in the sense that it isn't undertaken pursuant to a pre-concerted arrangement between the parties where they agree to their statuses and ownership rights over the final work. The use of the term unplanned is not to suggest that the parties weren't consciously aware of their collaborative activity, or that it was motivated by a degree of spontaneity inconsistent with deliberate action. In this sense, unplanned coauthorship unquestionably always remains an intentional activity.

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<sup>11</sup> *Id.* §201(a).

<sup>12</sup> *Levy*, L.R. 6 C.P. at 529.

<sup>13</sup> For early cases developing this idea see: *Maurel v. Smith*, 220 F. 195 (S.D.N.Y. 1915); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc.*, 140 F. 2d 266, 267 (S.D.N.Y. 1944). See also *Therese M. Brady*, Note, *Manifest Intent and Copyrightability: The Destiny of Joint Authorship*, 17 *FORDHAM URB. L.J.* 257 (1989) (detailing this emphasis on objective intent and arguing for its superiority over subjective intent).

As an analytical matter, unplanned coauthorship initially drew on the common law's objective theory of contract formation for its ideas.<sup>14</sup> Courts relying on the concept thus continued to reiterate that they were merely ascertaining the parties' real "intentions," which they emphasized remained the ultimate basis of coauthorship in this manifestation as well.<sup>15</sup> All the same, it becomes readily apparent that courts developing the idea of unplanned coauthorship were doing much more than just attempting to discern the parties' states of mind. First, in adopting (and preferring<sup>16</sup>) an objective evaluation of intention, courts provided few reasons for why the absence of a formal agreement shouldn't simply be treated as disqualifying on the issue (of coauthorship) in much the same way that copyright law treats the absence of certain other formalities as disqualifying.<sup>17</sup> Doing so would have provided the law with an easy to follow, bright-line, rule that made individual authorship the default form of authorship for copyright law and required parties to enter into a formal contract when they chose to deviate from it.<sup>18</sup> Second, a close scrutiny of courts' use of "intent" as their criterion of scrutiny reveals an extensive variation in their conception and use of the term. Variants include a "cooperative intent,"<sup>19</sup> "shared intent"<sup>20</sup>, "intent to create a joint work"<sup>21</sup>, "intent to work together"<sup>22</sup>, and

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<sup>14</sup> For an overview of the objective theory of contract law, see JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS §2.2, at 26-28 (5th ed. 2003); LARRY A. DiMATTEO, CONTRACT THEORY: THE EVOLUTION OF CONTRACTUAL INTENT (1998); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 209 (1881); Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000).

<sup>15</sup> See, e.g., *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068-69, 1072 (7th Cir. 1994) (emphasizing that collaboration without an intention was insufficient to find coauthorship and then attempting to discern this intention objectively); *Childress v. Taylor*, 945 F. 2d 500, 507-08 (2d Cir. 1991) (discerning an intention among parties to be regarded as joint authors of the work in question from objective evidence); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) (emphasizing that coauthorship under copyright law requires "objective manifestations of a shared intent" among parties).

<sup>16</sup> *Aalmuhammed*, 202 F.3d at 1234.

<sup>17</sup> Copyright law's rules on transfer of ownership are a good example here. These rules invalidate any purported transfer, unless it is "in writing and signed by the owner." Oral transfers are thus rendered inoperative. See 17 U.S.C. §204(a) (2005).

<sup>18</sup> Indeed, we see courts accepting this logic to cabin the objective determination of intent without considering whether it ought to extend to the very process of objectively determining intent. See, e.g., *Childress*, 945 F. 2d at 508 ("Examination of whether the putative co-authors ever shared an intent to be co-authors serves the valuable purpose of appropriately confining the bounds of joint authorship arising by operation of copyright law, while leaving those not in a true joint authorship relationship with an author free to bargain for an arrangement that will be recognized as a matter of both copyright and contract law.").

<sup>19</sup> *Eckert v. Hurley Chicago Co., Inc.*, 638 F. Supp. 699, 704 (N.D. Ill. 1986).

<sup>20</sup> *Aalmuhammed*, 202 F.3d at 1234; *Ulloa v. Universal Music and Video Distribution Corp.*, 303 F. Supp. 2d 409, 418 (S.D.N.Y. 2004).

an “intent to share ownership.”<sup>23</sup> Each conception leads a court to a different outcome and while premised on the same overall idea, nonetheless entails a fundamentally different emphasis in the analysis. This variation once again suggests that courts are, for the most part, using intent (and the unplanned coauthorship inquiry) as a lens through which to undertake a deeper scrutiny of the cooperative process before characterizing the parties as coauthors.

The search for ‘intent’ as part of the unplanned coauthorship inquiry is thus unquestionably a proxy for various normative considerations, which courts have failed to articulate with any degree of coherence. Indeed, when invited to adopt the idea of “intent” in its interpretation of the coauthorship requirement under U.K. law, the U.K. Court of Appeals openly refused to do so, observing that the intent requirement was a conduit for policy considerations, and that U.K. courts needed to avoid stepping “into the uncertain realms of policy.”<sup>24</sup> Courts in the United States however find little reason to stay away from policy considerations in copyright disputes, and perhaps for good reason.<sup>25</sup> The element of intent in coauthorship is no exception.

In this Article, I argue that copyright’s rules on unplanned coauthorship serve an altogether different, and thus far unappreciated purpose. The idea of unplanned coauthorship and the rules governing its invocation derive from the recognition that some creative expression is only ever produced through cooperative behavior among individuals. In these instances, the cooperative enterprise is hardly redundant to the creative process (in the sense of merely representing an alternative mechanism of production) but is instead integral to the very creation of the work by being directly constitutive of the parties’ reasons and motivations for producing it. Situations of unplanned coauthorship represent situations where one collaborator’s contributions are inextricably tied to those of

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<sup>21</sup> *Janky v. Lake County Convention And Visitors Bureau*, 576 F.3d 356, 362 (7th Cir. 2009); *Papa’s–June Music, Inc. v. McLean*, 921 F.Supp. 1154, 1157 (S.D.N.Y. 1996); *Weissman v. Freeman*, 868 F. 2d 1313, 1327 (2d Cir. 1989).

<sup>22</sup> *Janky*, 576 F. 3d at 362.

<sup>23</sup> *Maxwood Music Ltd. v. Malakian*, 713 F. Supp. 2d 327, 344 (S.D.N.Y. 2010).

<sup>24</sup> *Beckingham v. Hodgens*, [2003] EWCA (Civ.) 143, [53]. For an endorsement of this argument, which seems to accept the idea of legislative supremacy in copyright law-making as an immutable rule, see Lior Zemer, *Is Intention to Co-Author an "Uncertain Realm of Policy"?*, 30 COLUM. J.L. & ARTS. 611, 643 (2007).

<sup>25</sup> For a fuller discussion of the role of courts in U.S. copyright law-making, see: Shyamkrishna Balganesh, *Stewarding the Common Law of Copyright*, 60 J. COPYRIGHT SOC’Y U.S.A. 103, 108-16 (2013) (describing such judge made law as the “federal common law of copyright” and providing examples of it).

another and this forms an integral part of each collaborator's incentive to undertake the creative task to begin with. The rules of unplanned coauthorship thus give recognition to the existence of what is best described as the *collaborative impulse*—the motivation to engage in a creative enterprise because of its fundamentally cooperative nature. While this motivation may at times coexist with a creator's other authorial motivations (e.g., market-based ones), it is perfectly capable of providing creators with an independent reason to produce the work. It is this collaborative impulse that discussions of intention in the domain of unplanned coauthorship all too readily mask.

An example helps illustrate the working of the collaborative impulse. The practice of songwriting in the music industry is fairly well-known as a cooperative enterprise, and usually involves a lyricist, who supplies the lyrics for the song, and a composer, who sets the lyrics to music.<sup>26</sup> They usually work together as a team and their contributions are usually inextricably linked together to produce a musical work. While the two contributions might in theory be capable of existing independently, it makes little sense to conceptualize them as such. When it is also indeed the case that the lyricist's reasons for contributing to the song originate in the realization that the composer will be setting it to music and vice-versa, and provide both parties with an additional, yet independent motivation for engaging in their creative endeavor, the collective enterprise can be said to emanate—at least in part, even if not in whole—from a collaborative impulse, enabling the lyricist and composer to be treated as coauthors of the song by copyright law. As should be obvious, it is the last element, i.e., the examination of the parties' motivations that is critical to unplanned coauthorship, and lurks under the varied conceptions of "intent."

All of copyright law is thought to emanate from the foundational idea that its promise of limited market exclusivity forms the principal motivation for creators to produce original expression.<sup>27</sup> Recognizing the existence of a collaborative impulse that provides its own set of motivations for creativity in cooperative settings injects a degree of nuance and qualification into copyright's theory of incentives. Whereas copyright's theory of incentives assumes that utility maximization explains all creative behavior, the possibility that the mere reality of

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<sup>26</sup> See Joe Bennet, *Constraint, Collaboration, and Creativity in Popular Songwriting Teams*, in *THE ACT OF MUSICAL COMPOSITION: STUDIES IN THE CREATIVE PROCESS* 160 (Dave Collins ed. 2012) (describing how widespread this practice is in the industry).

<sup>27</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, J. dissenting).

collaboration might provide creators with added reasons for their creative output suggests that forms of non-individualistic influences may indeed be at play in certain domains of creative activity, and perhaps more importantly, that copyright law and doctrine have already begun to internalize this reality.

Scholars working in the field of philosophy of action have over the last two decades developed a series of important insights into understanding the nature of cooperative behavior.<sup>28</sup> A central theme in this work has been the effort to understand the unique kind of intention that parties possess when they engage in such cooperation, and the nature of motivations that accompany such intention. In addition to being reductive, these understandings also serve to disaggregate and illuminate the precise nature of the various commitments that cooperators (i.e., collaborators) hold during their collective actions. Drawing on this body of work, I unpack the working of the collaborative impulse and the commitments that it connotes, and in so doing provide a framework through which to understand copyright's rules on unplanned coauthorship. Whereas copyright's economic rationale posits that the incentive to create takes shape entirely from the market for the final creative work being produced, studies of cooperative intention suggest that in cooperative creativity a significant part of the motivation takes shape from the creative process, and is thus means- rather than ends-based. While this means orientation certainly doesn't undermine copyright's overall structural focus on the market, it necessitates carving out a domain within this overall focus for additional normative influences on both the creative process and the doctrines analyzing it.

Unplanned coauthorship is thus best understood as an effort to integrate copyright's utilitarian commitment to exclusivity with the demands that collaboration introduces into creators' motivations. And copyright's primary way of achieving this balance is by examining the precise nature and content of the parties' actions and motivations. The rules of unplanned coauthorship, which involve determining the interconnectedness of each party's contributions and their mutual intent,<sup>29</sup>

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<sup>28</sup> For pioneering work in this field see: JOHN R. SEARLE, *MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION* (2010); JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995); JOHN R. SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND* (1983); MICHAEL BRATMAN, *FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* (1999); CONCEPTS OF SHAREDNESS: *ESSAYS ON COLLECTIVE INTENTIONALITY* (Hans Bernhard Schmid et al. eds. 2008); Michael E. Bratman, *Shared Cooperative Activity*, 101 *PHIL. REV.* 327 (1992); Margaret P. Gilbert, *Modeling Collective Beliefs*, 73 *SYNTHESE* 185 (1987); MARGARET GILBERT, *ON SOCIAL FACTS* (1989).

<sup>29</sup> The contours of these rules are of course to be found in the Copyright Act's formal definition of a "joint work" as "a work prepared by two or more authors with the intention that their

in reality represent an effort to determine the existence and pervasiveness of the collaborative impulse underlying the creation of the work in question. The element of interconnectedness ensures that the parties, from an internal point of view, likely conceived of their project as intrinsically cooperative; while the question of “intention” examines their motivations at a deeper level to validate the existence of a commitment to the process of jointly producing the work rather than just producing it.

Copyright’s recognition of the collaborative impulse in its rules of unplanned coauthorship is more than just of relevance to our understanding of coauthorship. It highlights an additional source of normative pluralism within the working of copyright,<sup>30</sup> in the process calling into question monistic, foundational accounts of copyright. In the process, it paves the way forward for a less individualistic conception of creativity and cultural production within copyright law and policy.

This Article unfolds in three parts. Part I begins with an examination of copyright’s rules on unplanned coauthorship by tracing the origins of these rules, the mechanisms employed by courts while creating and developing them incrementally, and the legal implications that flow from being designated as an unplanned coauthor. Part II sets out the idea of the collaborative impulse, by drawing on ideas and insights from the philosophy of action. It examines the ideas of shared agency, collective intentionality, and shared cooperative activity, developed in the work of Michael Bratman, and then unpacks the nature of the collaborative impulse as an independent motivation in human behavior. Part III attempts to reconceptualize the rules of unplanned coauthorship through the collaborative impulse and examines the conceptual, normative, and doctrinal payoffs that flow from adopting this framework to understand the law. It offers a new framework for understanding the idea of mutual intent during claims of unplanned coauthorship, and illustrates its application using one of copyright law’s best-known cases on coauthorship.

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contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. §101 (2005).

<sup>30</sup> For previous suggestions that copyright embodies a commitment to normative pluralism, see: Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203 (2012); Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664 (2012).

## I. UNPLANNED COAUTHORSHIP: THEORY AND PRACTICE

The practice of coauthorship—or cooperative authorship—pre-dates copyright law by at least a century. Historians of the English Renaissance have noted how it was somewhat common practice among playwrights of the period to collaborate amongst themselves in the writing of new dramatic works.<sup>31</sup> While some historians characterize coauthorship in this field and era as the “dominant mode” of production, yet others acknowledge its prevalence, but insist that it was nonetheless outnumbered by solitary authorship.<sup>32</sup> For our purposes though, it is sufficient to note that coauthorship had emerged as a formal mode of cultural production by the early 16<sup>th</sup> century. Indeed, some recent historical work suggests that a good number of plays originally attributed solely to Shakespeare may have indeed been the product of a coauthorship between him and other contemporary playwrights of the period.<sup>33</sup>

Despite this reality, when copyright law first emerged in the early 18<sup>th</sup> century in the Statute of Anne, individual/solitary authorship was taken to be the dominant mode of cultural production.<sup>34</sup> Debates about copyright law revolved around the idealized image of the romantic author who was believed to produce original expression through a predominantly individualistic process.<sup>35</sup> It wasn't until the last quarter of the 19<sup>th</sup> century that courts applying copyright law had to grapple with the institution of coauthorship and apply copyright's nuances to it. And not surprisingly, the first case that a court was presented with involved a dispute between a playwright and his collaborators.<sup>36</sup>

In *Levy v. Rutley*, the plaintiff operated a theatre company and hired the defendant, a playwright, to produce a play for performance at the theatre.<sup>37</sup> When the playwright finished producing the play, the plaintiff and his colleagues made some alterations to the play, including the

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<sup>31</sup> See, e.g., JEFFREY MASTEN, TEXTUAL INTERCOURSE: COLLABORATION, AUTHORSHIP, AND SEXUALITIES IN RENAISSANCE DRAMA 14 (1997); GERALD EADES BENTLEY, THE PROFESSION OF DRAMATIST IN SHAKESPEARE'S TIME, 1590-1642, 199 (1977); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 15-28 (Martha Woodmansee & Peter Jaszi eds. 1994).

<sup>32</sup> MASTEN, *supra* note \_\_ at 14 (characterizing it as the dominant mode); Knapp, *supra* note \_\_, at 1 (questioning this characterization).

<sup>33</sup> See VICKERS, *supra* note \_\_.

<sup>34</sup> See MARK ROSE: AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 2 (1993) (describing how copyright was founded on the idea of individual creativity).

<sup>35</sup> See Woodmansee, *supra* note \_\_, at 24; BENNETT ANDREW, THE AUTHOR 51 (2004).

<sup>36</sup> *Levy v. Rutley*, L.R. 6 C.P. 523 (1871).

<sup>37</sup> *Id.* at 524.

introduction of an altogether new scene.<sup>38</sup> The modified version was produced commercially for the public. Upon the defendant's death, the plaintiff claimed to be a coauthor of the work. In the absence of an express agreement between the parties (about ownership), the court focused its attention on the absence of a "preconcerted joint design"<sup>39</sup> between the parties to find against coauthorship. One judge thus observed:

If two persons undertake jointly to write a play, agreeing in the general outline and design, and sharing the labour of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it. But, to constitute joint authorship, there must be a *common design*.<sup>40</sup>

"Common design" thus emerged as the benchmark for coauthorship in copyright law. When Congress enacted the Copyright Act of 1909 however, coauthorship found no mention whatsoever in the statute and its various rules.<sup>41</sup> Consequently, it fell entirely to courts to extend copyright's basic rules to situations of coauthorship.<sup>42</sup> In one early case, Judge Learned Hand, finding *Levy* to be the only case on the question of coauthorship, extended its logic to the question of coauthorship in the Act of 1909.<sup>43</sup> On appeal, the Second Circuit reiterated the idea, emphasizing the "joint co-operation" between the parties as essential to the issue of coauthorship.<sup>44</sup> In a notable decision some years later, Judge Learned Hand, this time while on the Second Circuit, extended the idea of a "common design" even further, to situations where the parties didn't work in concert and knew nothing of each other.<sup>45</sup> As long as the parties "mean their contributions to be complementary in the sense that they are to be embodied in a single work," they were to be treated as coauthors, under the common design framework.<sup>46</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 528.

<sup>40</sup> *Id.* at 529.

<sup>41</sup> See Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (1940).

<sup>42</sup> SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION, STUDY NO. 12: JOINT OWNERSHIP OF COPYRIGHTS 101 (Comm. Print 1960) (authored by George D. Carey) ("The evolution of the concept of joint authorship, and the incidents of joint authorship have been entirely of a juridical nature.") (hereinafter CAREY, STUDY NO. 12).

<sup>43</sup> *Maurel v. Smith*, 220 F. 195, 199 (S.D.N.Y. 1915).

<sup>44</sup> 271 F. 211, 215 (2d Cir. 1921).

<sup>45</sup> *Edward B. Marks Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 266 (2d Cir. 1944).

<sup>46</sup> *Id.* at 267.

In so expanding the idea to situations where the parties didn't themselves self-identify as coauthors or collaborators at the time the work was created, Judge Hand's expansion effectively paved the way for a purely objective assessment of common design. A common design could now be implied, or imputed to parties, based entirely on the nature of the work and the process through which it was created, even if the parties didn't subjectively contemplate such a design themselves. The common design framework thus opened the door to an entirely ex post approach to coauthorship.

Other cases further applied and developed the idea of the common design, such that this judicially developed set of rules came to be closely reviewed during the drafting of the Copyright Act of 1976.<sup>47</sup> The 1976 Act for the first time defined 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.”<sup>48</sup> The legislative history accompanying the Act makes clear that Congress intended to continue the common design framework, and intended that a “work is ‘joint’ if the authors collaborated with each other, *or* if each prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors.”<sup>49</sup> On the face of things, Congress's use of the disjunctive in its analysis seems to suggest that where the authors were unambiguously collaborating on the production of the work, the question of intent becomes somewhat irrelevant. A collaboration by its very nature clearly evinces a common design between the parties. Yet, later cases construed the intention element as applicable to both prongs, i.e., even to a collaboration,<sup>50</sup> in keeping with Congress's additional observation that “[t]he touchstone here is the intention at the time the writing is done that the parts be absorbed or combined into an integrated unit.”<sup>51</sup> As a result, even when a collaboration was shown to

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<sup>47</sup> See, e.g., *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F. 2d 406 (2d Cir. 1946); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F. 2d 569 (2d Cir. 1955); *Ted Browne Music Co. v. Fowler*, 290 F. 751 (2d Cir. 1923); *Donna v. Dodd, Mead & Co., Inc.*, 374 F. Supp. 429 (D.C.N.Y. 1974); *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640 (D.C.N.Y. 1970); *Szekely v. Eagle Lion Films, Inc.*, 242 F. 2d 266 (2d Cir. 1957). For a review of the case law on the subject between 1909 and 1960, see CAREY, STUDY NO. 12, *supra* note \_\_, at 90-101.

<sup>48</sup> 17 U.S.C. §101 (2005) (definition of “joint work”).

<sup>49</sup> H.R. REP. No. 1476, 94th Cong., 2d Sess. 120 (1976), *reprinted* 1976 U.S.S.C.A.N. 5659, 5734 (emphasis supplied).

<sup>50</sup> *Childress v. Taylor*, 945 F. 2d 500, 505-06 (2d Cir. 1991); *Erickson v. Trinity Theatre, Inc.*, 13 F. 3d 1061, 1068-72 (7th Cir. 1994). For an affirmation of this position, see 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT §5:4 (2013) (suggesting that courts use “or” as illustrative, following the interpretation laid down in *Childress*).

<sup>51</sup> H.R. REP. No. 1476, *supra* note \_\_, at 121.

exist as a factual matter, courts began searching for something else that they might characterize as the parties' 'intent,' in order to satisfy the definition.<sup>52</sup> Common design thus became encapsulated within a framework of active consent, or intention. While this certainly didn't mean that the subjective intent of the parties became the principal standard, it nonetheless meant—at least for courts—that they had to describe their analysis in terms of a search for the parties' *real* intentions.

#### A. Finding Coauthorship Ex Post

In attempting to give effect to the notion of a common design behind the cooperative exercise, the Act of 1976 made the concept of "intention" the touchstone for a work of joint authorship. Indeed, the legislative history leading up to the passage of the Act reveals that the drafters were initially reluctant to use intention as an idea for the concept of coauthorship, worrying that the search for an elusive state of mind among the parties would distract courts from the real essence of coauthorship, namely, the collaboration.<sup>53</sup> Some have argued that in its very genesis, the idea of intention was thus meant to exclude subjective intent, and focus entirely on the objective activities of the parties producing the work.<sup>54</sup>

Despite the codification, courts continued to develop the rules of coauthorship on an incremental basis.<sup>55</sup> In most instances of coauthorship, the parties usually agree with each other in advance, both as to the nature of the collaboration and on their respective ownership claims in the final work, necessitating little judicial interpretation (and validation) of the arrangement. The principal instances that actually reach courts and require their intervention are instead those where there exists no formal agreement between the parties, which in turn necessitates courts' interpretation of the parties' actions and behavior to determine the existence of a common design, or the intention to produce a work of joint authorship. The courts' task in such situations is usually further compounded by the parties'

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<sup>52</sup> See, e.g., *Erickson*, 13 F. 3d at 1068-69 (rejecting the "collaboration alone" standard for determining the existence of coauthorship and requiring additional evidence of "intention").

<sup>53</sup> For a review of this history, see Brady, *supra* note \_\_\_, at 265-66 nn.73-74.

<sup>54</sup> *Id.*

<sup>55</sup> For some prominent cases developing the law further, see: *Childress*, 945 F. 2d at 500; *Erickson*, 13 F. 3d at 1061; *Andrien v. Southern Ocean County Chamber of Commerce*, 927 F. 2d 132 (3d Cir. 1991); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F. 2d 1486 (11th Cir. 1990); *Aalmuhammed v. Lee*, 202 F. 3d 1227 (9th Cir. 2000); *Thomson v. Larson*, 147 F. 3d 195 (2d Cir. 1998); *Gaiman v. McFarlane*, 360 F. 3d 644 (7th Cir. 2004); *Brod v. General Pub. Group, Inc.*, 32 Fed. Appx. 231 (9th Cir. 2002).

fundamental disagreement about their real intentions while undertaking the collaboration. In these instances, the status of coauthorship is determined ex post and imputed to parties, much like the objective theory of contract formation interprets the parties' actions to find the existence of a contract ex post.<sup>56</sup>

This ex post nature of the determination introduces an important nuance into the process of determining whether the parties ought to be classified as coauthors. The absence of an advance ownership arrangement between the parties invariably forces courts to rely extensively on objective evidence of cooperative behavior, often to the exclusion of evidence relating to subjective intention on the question of coauthorship from the time of the work's creation. In other words, the parties' failure to convert their subjective intentions into an ownership agreement (of the final work) is treated as functionally preclusive on the question of subjective intent, and as enabling courts to undertake an in-depth scrutiny of the actual cooperative process to then determine whether the parties ought to be treated as coauthors.

The court's approach in *Strauss v. Hearst Corporation* is a particularly good example of this strong preference for objective evidence.<sup>57</sup> In that case, the defendant magazine had used the services of the plaintiff, a professional photographer, for a photo-shoot relating to one of its articles.<sup>58</sup> During the shoot, the defendant's representative played an active role in positioning the props and selecting the photograph to use, and the magazine's (i.e., defendant's) editors later on re-touched the photograph before its final publication.<sup>59</sup> The parties never entered into a formal contractual arrangement specifying their relationship and ownership over the photographs. At trial, the court concluded that the parties were indeed coauthors of the photographs. The court's decision was based entirely on its analysis of the collaboration involved in producing the photograph.<sup>60</sup> Rather interestingly, the court disallowed any reliance on evidence relating to the parties' subjective state of mind at the time the photographs were taken and before.<sup>61</sup> The plaintiff had sought to argue that he never intended to create a work of joint authorship and would not have consented to it had the matter been discussed.<sup>62</sup> The court

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<sup>56</sup> See generally *supra* note \_\_ and sources therein.

<sup>57</sup> 1988 WL 18932 (S.D.N.Y.)

<sup>58</sup> *Id.* at 1.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 5-7.

<sup>61</sup> *Id.* at 6 n.5.

<sup>62</sup> *Id.*

found this to be entirely irrelevant to its determination of coauthorship, which it based on objective evidence.<sup>63</sup> Indeed in a later case, the Ninth Circuit made this preference explicit, noting how any reliance on subjective intent “could become an instrument of fraud” by allowing one party to conceal its intent from the other and later on take full credit for the work.<sup>64</sup>

In keeping with this idea, over time courts developed a set of indicia for this objective manifestation of intention in determining coauthorship.<sup>65</sup> While they continued to reiterate that subjective intent wasn't altogether irrelevant to the analysis,<sup>66</sup> hardly any decision on the issue has placed emphasis on parties' subject state of mind in the determination of coauthorship. The net effect is that parties can be classified as coauthors of a work even in situations where they subjectively intended not to be coauthors if during the cooperative process of producing the work their behavior manifests the characteristics of such coauthorship. It is in this sense then that copyright law allows courts to validate what is best described as “unplanned coauthorship.” The consequence of this allowance is that parties wishing to avoid the possibility of a coauthorship claim are now obligated to opt out by entering into an express agreement treating the work as a “work for hire.”<sup>67</sup> Alternatively, the parties could simply execute a written transfer of ownership amongst themselves, altering the principal consequence of coauthorship, i.e., proportional co-ownership.<sup>68</sup>

While intention forms the purported touchstone of the courts' scrutiny of the cooperative process, a threshold issue that they often confront before examining the parties' intent relates to the nature of each party's contribution to the final work. The question that emerged was thus whether each party needed to contribute copyrightable expression to the work, or whether it was sufficient if one contributed something even if

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<sup>63</sup> *Id.* (“Such self-serving proclamations are unavailing.”).

<sup>64</sup> *Aalmuhammed*, 202 F. 3d at 1234. *See also* *Easter Seal Soc. for Crippled Children & Adults, Inc. v. Playboy Enters.*, 815 F.2d 323, 337 (5th Cir. 1987) (finding coauthorship based on objective evidence despite parties' denials of any intent to that effect).

<sup>65</sup> *See Thomson*, 147 F. 3d at 201-02 (distilling such indicia from previous case law); 2 PATRY, *supra* note \_\_, at §5:21-27.

<sup>66</sup> 2 PATRY, *supra* note \_\_, at §5: 28 (discussing cases that relied on subjective intent).

<sup>67</sup> *See* 17 U.S.C. §101 (2010) (defining a “work made for hire” as “a work specially ordered or commissioned ... if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire”). Once such an agreement is entered into, the commissioning/ordering party comes to be treated by copyright law as both the author of the work, and as its sole owner. *Id.* §201(b).

<sup>68</sup> The copyright statute requires such an agreement to be in writing. 17 U.S.C. §204(a) (2010).

that something was uncopyrightable as such (e.g., ideas or facts).<sup>69</sup> The issue divided treatise writers early on.<sup>70</sup> In due course though, most courts around the country adopted the position that each coauthor had to make a copyrightable contribution to the work to be entitled to the status of coauthorship.<sup>71</sup> This logic was drawn from the idea that coauthorship was in the end a form of authorship, which in turn necessitated the creation of a work of original expression.<sup>72</sup> Some courts unfortunately however went further than this and insisted that each coauthor's contribution in addition be "independently copyrightable," a position that appears to be fraught with obvious functional difficulties, since the very definition of a joint work requires that the contributions be inseparable or interdependent as such.<sup>73</sup> Before scrutinizing the cooperative process, courts begin by satisfying themselves that each party has contributed actual expression to the final work, to qualify as a coauthor.

Unplanned coauthorship is thus in essence a process wherein courts determine the parties' status as coauthors *ex post*, based on their scrutiny of the cooperative process for objective evidence of such coauthorship. The real puzzle that continues to plague unplanned coauthorship however lies in understanding what precisely it is that courts are looking for when they claim to be ascertaining the collaborating parties' *intentions*, an issue to which the next Section turns.

### B. *The Mystery of Mutual Intent*

"The touchstone [of coauthorship] is the *intention*, at the time the writing is done."<sup>74</sup> This observation, taken from the legislative history accompanying the Copyright Act's definition of a work of joint authorship, has since assumed immense significance in the understanding

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<sup>69</sup> See *Childress*, 945 F. 2d at 506 (adverting to the issue).

<sup>70</sup> See 1 PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* § 4.2.1.2 (1989) (taking the position that each author's contribution needed to be copyrightable); WILLIAM F. PATRY, *LATMAN'S THE COPYRIGHT LAW* 116 (6th ed. 1986) (taking the same view as the Goldstein treatise); 1 MELVILLE B. NIMMER AND DAVID NIMMER, *NIMMER ON COPYRIGHT* §6.07 (1989) (taking the contrary position).

<sup>71</sup> For a survey of this acceptance, see 2 PATRY, *supra* note \_\_, at §5:14 ("Every court to decide the issue has correctly held that, in order to be a joint author, one must contribute expression.").

<sup>72</sup> See *id.* (making this argument). *But see Childress*, 945 F. 2d at 506 (refuting this logic, by noting the concept of author could be used in the ordinary sense of the term).

<sup>73</sup> See, e.g., *Janky v. Lake County Convention and Visitors Bureau*, 576 F. 3d 356, 362 (7th Cir. 2009); *Thomson*, 147 F. 3d at 200; *Erickson*, 13 F. 3d at 1071. For a criticism of this approach, see *Gaiman*, 360 F. 3d at 658-59; 2 PATRY, *supra* note \_\_, at §5:15-16. Nimmer argues that *Gaiman* vindicates the treatise's original position. See 1 NIMMER, *supra* note \_\_, at §6.07.

<sup>74</sup> H.R. REP. No. 1476, *supra* note \_\_, at 121 (emphasis supplied).

of unplanned coauthorship. And without question, it has also been responsible for the rather significant muddying of the law. In keeping with this observation (and the definition's emphasis on "knowledge and intention"<sup>75</sup>), courts attempting to construe the 1976 Act's rules on unplanned coauthorship soon came to reiterate that in addition to an expressive contribution that would qualify each contributor as an author, there needed to also be an *intention* among the contributors that their work would merge together and result in the creation of a joint work.<sup>76</sup>

Simple as it may have seemed in theory, when translated into practice the idea proved to be grossly underspecified. While intention certainly entailed a scrutiny of the parties' state of mind—either subjective or objective—the legislative history was silent on the question of what the intention needed to be directed at to meet the definition's requirement. Was it sufficient if the parties evinced an intention to collaborate in the production of the work? Or, did they need to additionally carry an intention to become coauthors as a legal matter, i.e., produce a work of joint authorship and recognize its consequences? Not surprisingly, courts have struggled to answer these questions—despite their continuing emphasis on the idea of intention.

The Second Circuit's decision in *Childress* is credited with articulating the importance of intention to the question to coauthorship.<sup>77</sup> The court there emphasized that examining "how the putative joint authors regarded themselves in relation to the work" was critical, an observation that later courts echoed.<sup>78</sup> Yet, as Judge Calabresi would point out a few years after, *Childress* and the cases reciting its observations provide very little guidance on the "nature of the necessary intent".<sup>79</sup>

Speaking in the abstract, the parties' intentions during the production of a joint work can be understood as relating to (i) the process of producing the work, i.e., the cooperative activity (the means), (ii) the production of the joint work (the end), or (iii) the legal consequences of the merger. Yet in one form or the other, courts across the country have eliminated *all three* options as viable candidates in understanding the nature of the intention required for unplanned coauthorship.

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<sup>75</sup> 17 U.S.C. §101 (2010) (definition of "joint work").

<sup>76</sup> See, e.g., *Childress*, 945 F. 2d at 507-08; *Thomson*, 147 F. 3d at 201-02; *Erickson*, 13 F. 3d at 1066.

<sup>77</sup> *Childress*, 945 F. 2d at 508. See also *Erickson*, 13 F. 3d at 1067 (describing the addition of intent as a variable in the coauthorship determination as "the *Childress* standard").

<sup>78</sup> *Id.* at 508.

<sup>79</sup> *Thomson*, 147 F. 3d at 201.

A singular focus on “collaboration” was ruled out as insufficient fairly early on. In one notable decision, the Seventh Circuit categorically rejected what it described as the “collaboration alone” standard, which it associated with the idea of a simple “contemporaneous input” by both parties.<sup>80</sup> The court’s logic was that the statute (and the Constitution) mandated more than this, and required establishing an intention to merge the contributions into a unitary whole.<sup>81</sup> Yet in subsequent cases where the parties had in fact merged their contributions into a final work, and obviously done so intentionally, courts again went on to find that the intention was insufficient to satisfy the Act’s requirement.<sup>82</sup> This time, their logic appears to relate to the question of intention only ever indirectly. The Second Circuit’s decision in *Thomson* is illustrative.

In *Thomson*, a noted playwright had sought the assistance of a dramaturg in the production of a show.<sup>83</sup> For months thereafter they “worked extremely intensively together” on the script.<sup>84</sup> The playwright made all the changes and failed to credit the dramaturg as an author.<sup>85</sup> The court eventually concluded that the parties lacked the requisite intent to produce a joint work, citing the playwright’s unilateral decision-making authority as a principal factor.<sup>86</sup> It remains unclear why unilateral decision-making is facially incompatible with the idea of an intention to merge contributions into a single final work. The two parties collaborated intensively with the clear objective of producing a single final work, and each certainly contributed expression to that final work, while all the time recognizing that one contributor was to decide what to keep in and what to keep out (owing to that contributor’s superior expertise). How is this not evidence of an intention among the parties to collaborate in the production of a unified work? The idea seems to have taken root in an effort to avoid coauthorship claims by a party that merely suggests changes as an outsider to a work, and to prevent the primary creator being deterred from sharing the work for fear of such claims later on.<sup>87</sup> Yet this seems to have little to

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<sup>80</sup> *Erickson*, 13 F. 3d at 1067, 1069.

<sup>81</sup> *Id.* at 1068-69.

<sup>82</sup> *Papa's-June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1157 (S.D.N.Y. 1996) (“It is not enough that [the parties] intend to merge their contributions into one unitary work.”)(citing *Childress*).

<sup>83</sup> *Thomson*, 147 F. 3d at 197.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 197-98.

<sup>86</sup> *Id.* at 202-04.

<sup>87</sup> See *Aalmuhammed*, 202 F. 3d at 1235 (“Progress would be retarded rather than promoted, if an author could not consult with others and adopt their useful suggestions without sacrificing sole ownership of the work.”).

do with the absence of an intention to collaborate in the production of the work in cases where the decision-making author himself/herself evinces an intention to use the contribution in the final work. The net effect is that courts have implicitly ruled out a ‘cooperative intent to produce a unified work’ as the primary candidate for intention.

This leaves us with the third candidate, namely, that the parties must evince an intention to bear the legal consequences of coauthorship. Once again, some courts have eschewed this standard as well, and this time by explicitly observing that intention “does not require an understanding by the coauthors of the legal consequences of their relationship.”<sup>88</sup> Nonetheless, they routinely add that “some distinguishing characteristic” of the relationship needs to be present, and use this latter observation to find the presence/absence of what is essentially an awareness of those very legal consequences.<sup>89</sup> Courts thus routinely look to how the parties have billed or credited their roles, and use it to find the absence of an “intent to share ownership.”<sup>90</sup> Ownership and the connected right to be attributed as owner/author are both legal consequences of coauthorship rather than primary facts that go into the construction of coauthorship, rendering the courts’ logic in relying on it somewhat suspect.

It is therefore somewhat surprising that despite their insistence that mutual intention remain the “touchstone” of unplanned coauthorship, and their continuing emphasis on discerning parties’ intentions whenever presented with claims of unplanned coauthorship, courts have found little common ground in unraveling the precise nature and analytical content of this intention. As operationalized today, the question of intention is relegated to the rote examination of a checklist of “objective indicia”<sup>91</sup> by courts, with little scrutiny of how those factors—either contextually or in the abstract—relate to what the element of intention is trying to achieve. In the end then, claims of unplanned coauthorship, centered as they are around mutual intent, appear to be decided on a largely subjective basis despite courts’ recitation of non-dispositive variables during the analysis.

This is hardly to suggest that the question of intention is altogether irrelevant. The key to understanding its role and working lies instead in appreciating how the institution of coauthorship connects to copyright’s overall goal of inducing creativity. Indeed, even *Childress* alluded to this,

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<sup>88</sup> *Childress*, 945 F. 2d at 508.

<sup>89</sup> *Id.*; *Thomson*, 147 F. 3d at 201-02.

<sup>90</sup> *Maxwood Music Ltd. v. Malakian*, 713 F. Supp. 2d 327, 344 (S.D.N.Y. 2010).

<sup>91</sup> *Thomson*, 147 F. 3d at 202.

when Judge Newman observed that coauthorship was doing more than just focusing “solely on the objective of copyright law to encourage the production of creative works.”<sup>92</sup> Yet, it remains true that *Childress’s* promise has hardly been realized in practice given how courts today approach the question of intention in coauthorship.<sup>93</sup> Parts II and III of the Article turn to reconstructing unplanned coauthorship through the vehicle of objective intent.

### C. Implications: Entitlement and Immunity

Before proceeding to understand how unplanned coauthorship and its emphasis on intent can be meaningfully understood within copyright’s overall structural commitment to inducing creativity, it is worth pausing to note that the consequences of classifying a contributor to a work as a coauthor are fairly far-reaching. Once classified as a legal coauthor by copyright law, a contributor becomes a co-owner of the work in question.<sup>94</sup> Perhaps more importantly though, copyright law pays no attention to the relative contributions of the parties, and as a result recognizes each coauthor to have an equal ownership stake in the work in question.<sup>95</sup> Thus, a coauthor who makes minimal contributions to the final work is nonetheless accorded equal share with the other author who makes a more significant contribution.<sup>96</sup> While this may be altered contractually by the parties in advance,<sup>97</sup> in most instances of unplanned coauthorship where coauthorship is determined as an objective matter by courts, the parties are treated as having an equal ownership share in the work.

Since the coauthor is an owner of copyright in the work, several additional legal consequences accrue to the coauthor. First, as a co-owner of the work, a coauthor’s use of the work can never be an act of

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<sup>92</sup> *Childress*, 945 F. 2d at 507.

<sup>93</sup> For a similar criticism, see Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 29, 54-55 (Martha Woodmansee & Peter Jaszi eds. 1994).

<sup>94</sup> 17 U.S.C. §201(a) (2010) (“The authors of a joint work are coowners of copyright in the work.”).

<sup>95</sup> *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988); *Erickson, Inc.*, 13 F.3d at 1068; 1 NIMMER, *supra* note \_\_\_, at §6.08. For a criticism of this approach, suggesting that copyright law adopt a “principle of proportionality” where the ownership interest is in proportion to each author’s contribution, see Rochelle Cooper Dreyfuss, *Commodifying Collaborative Research*, in *THE COMMODIFICATION OF INFORMATION* 397, 412 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002).

<sup>96</sup> *Childress*, 945 F. 2d at 508; 2 PATRY, *supra* note \_\_\_, at §5:7 (“Thus, two joint authors each own a 50% interest in the whole, even if one author contributed only 10% of the work.”).

<sup>97</sup> 1 NIMMER, *supra* note \_\_\_, at §6.08; 2 PATRY, *supra* note \_\_\_, at §5:7.

infringement.<sup>98</sup> Since by definition the owner of a work cannot infringe his/her own work, coauthorship operates as a complete bar to infringement. It is for this reason that some courts have described coauthorship as an “affirmative defense” to copyright infringement, analogous to fair use.<sup>99</sup> This characterization is somewhat misleading, since it characterizes coauthorship as more of an immunity than an entitlement. It underplays (and perhaps ignores) the second legal consequence of coownership, which is that the coauthor is now entitled to use/exploit the entirety of the work in question, without needing prior permission from the other coauthor.<sup>100</sup> Each coauthor can thus license the work to others, commence actions for infringement against third parties, or independently use/transform/adapt the work in any way or form. The only duty imposed on a coauthor is that he/she must subsequently account to the other coauthors for any profits earned from the use of the joint work, and share such profits on a proportionate basis.<sup>101</sup> Such a claim for accounting is however a matter of state common law rather than copyright law.<sup>102</sup> Except for this duty—which comes into play only after the use or exploitation—the coauthor is at complete liberty to use or exploit the work. This explains why unplanned coauthorship remains an economically lucrative claim, and accounts for why courts refrain from finding such coauthorship to exist in a vast majority of cases.

## II. THE COLLABORATIVE IMPULSE

In insisting—at times dogmatically—that “mutual intent” form the touchstone of unplanned coauthorship, courts may have indeed been onto something, though perhaps unwittingly. For quite some time now philosophers of action have argued and shown that what distinguishes cooperative endeavors such as coauthorship from other joint undertakings is a phenomenon that has come to be described as “collective” or “shared”

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<sup>98</sup> *Kwan v. Schlein*, 634 F.3d 224, 229 (2d Cir. 2011); *Weissmann v. Freeman*, 868 F.2d 1313, 1318 (2d Cir. 1989); *Warren Freedendfeld Asscs., Inc. v. McTigue*, 531 F.3d 38, 47 (1st Cir. 2008); 1 NIMMER, *supra* note \_\_, at §6.10[A][1][a] (“One joint owner cannot be liable for copyright infringement to another joint owner, given the baseline proposition that one cannot infringe his own copyright.”).

<sup>99</sup> *See, e.g., SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 314 (S.D.N.Y. 2000); 2 PATRY, *supra* note \_\_, at §5:43.50.

<sup>100</sup> 1 NIMMER, *supra* note \_\_, at §6.10[A].

<sup>101</sup> 1 *id.* §6.12.

<sup>102</sup> H.R. REP. NO. 1476, *supra* note \_\_, at 121; *Gaiman*, 360 F. 3d at 652; 2 PATRY, *supra* note \_\_, at §5:9.

intentionality.<sup>103</sup> Drawing on work in the field of action theory (i.e., the philosophy of action), this Part argues that collective intentionality does under certain circumstances generate a collaborative impulse in actors that can be understood as motivational to the cooperative endeavor being undertaken.

Unpacking and recognizing the salient characteristics of such collective intentionality—when motivational in authors’ participation in the collective endeavor—thus helps identify the presence and influence of the collaborative impulse on the production of the creative work. It is precisely this process that courts’ elusive quest for mutual intent in cases of unplanned coauthorship, can be seen as directed at. This in turn has important implications for our understanding of copyright law, which has long been premised on a particularly simplistic conception of creators’ motivations.<sup>104</sup> In short then, this Part will make three inter-connected claims: (i) that cooperative activities such as coauthorship are characterized by a distinctive collective intentionality, (ii) that such intentionality is produced by a core commitment to cooperation among actors, and (iii) that this commitment is motivational in actors’ participation in the cooperative activity. The collaborative impulse, I will argue here, is but a manifestation of this commitment to cooperate, and acts as an independent reason for action among participants in a cooperative endeavor.

### A. *Collective Intentionality and Cooperation*

Modern discussions of collective intentionality can usually be traced back to a 1990 essay by John Searle on the topic that has since become a classic in the field.<sup>105</sup> In it, Searle sets out to establish that there

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<sup>103</sup> For general, but fairly exhaustive overviews of this literature, summarizing it, see: Abraham Sesshu Roth, *Shared Agency*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. 2011), <http://plato.stanford.edu/entries/shared-agency/>; Deborah Tollefson, *Collective Intentionality*, in THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY (2004), <http://www.iep.utm.edu/coll-int/>.

<sup>104</sup> See *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

<sup>105</sup> John R. Searle, *Collective Intentions and Actions*, in INTENTIONS IN COMMUNICATION 90 (P. Cohen et al eds. 1990). In all fairness, the debate about collective intentionality originated a few years prior to Searle’s entry into the field, with the work of Raimo Tuomela and Kaarlo Miller. See Raimo Tuomela & Kaarlo Miller, *We-intentions*, 53 PHIL. STUDS. 367 (1988). Searle’s essay was in large part a refutation of Tuomela & Miller, though Searle’s own prior work on intentionality is considered seminal in the field. See, e.g., JOHN R. SEARLE, INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND (1983).

is indeed a distinctive cognitive phenomenon known as “collective intention,” and that it cannot be reduced to the individualized intentions of the participants. Or, as Searle puts it, “[c]ollective intentional behavior is a primitive phenomenon that cannot be analyzed as just the summation of individual intentional behavior.”<sup>106</sup>

Searle illustrates the working of collective intentionality through an example. Imagine several people sitting in a park on the grass in various places, and all of a sudden it begins to rain. Each individual begins to run towards the nearest shelter; and while each individual has an intention to so run, that intention is independent of the intentions of the others.<sup>107</sup> This is in contrast to a situation where a dance troupe in that same park converges on a particular point as part of a choreographed performance.<sup>108</sup> While from an outward perspective, the individuals in both instances may *appear* to be behaving in the same way (i.e., running towards a shelter, the convergence point), yet they remain fundamentally different.<sup>109</sup> In the first case (unlike in the second), each individual’s intention can be understood and expressed quite independent of similar intentions held by others in the vicinity; while this is unlikely to be the case in the second example. Searle thus argues that any individual intention in the second case is in a sense “derivative” from a collective intention held by the individuals, but is hardly the same when understood from an internal perspective.<sup>110</sup>

Searle’s paper argues that what makes such collective intention (or “we-intentions”) distinctive is that they must make reference in their underlying structure to a collective process.<sup>111</sup> Searle takes this one step further, and argues that such collective intentionality is a “primitive” phenomenon in the sense of having biological roots, and emanating from the capacity to see others as potential agents for cooperative behavior.<sup>112</sup>

In a series of influential papers—that represent the leading exposition of the idea in the field—Michael Bratman has sought to provide a distinct analytical framework to understand shared/collective

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<sup>106</sup> *Id.* at 90.

<sup>107</sup> *Id.* at 92.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (“Externally observed, the two cases are indistinguishable, but they are clearly different internally.”).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 94-95.

<sup>112</sup> *Id.* at 103-05.

intentions.<sup>113</sup> Unlike Searle's account however, Bratman's is reductive, in the sense of showing that collective (or to use Bratman's term "shared") intention can be usefully reduced to individual intentions. Bratman's account of shared intentions and shared cooperative activity are particularly illuminating in understanding coauthorship and parties' motivations/commitments therein.

According to Bratman, a "shared intention" requires three inter-related elements for its existence. First, each participant must intend to do the joint activity in question.<sup>114</sup> Second, each party's intent to so do the joint activity must originate in (i.e., be "because of") the other's similar intent to do the joint activity and the fact that they have what Bratman describes as "meshing subplans."<sup>115</sup> A subplan refers to a further specification of the broader objective contained in the joint activity. Thus "painting a house" would be a joint activity, and "painting it red" would be a sub-plan under that activity.<sup>116</sup> Bratman's second condition is that while both parties need not have identical sub-plans, they nonetheless cannot "intend that the other's relevant sub-plans be subverted," which is the idea that they merely "mesh".<sup>117</sup> This intermeshing of sub-plans is hardly incidental, and is directly constitutive of each party's intention to perform the joint activity.<sup>118</sup> Each agent's intention to perform the joint activity derives from—and informs—the other's intention and sub-plans underlying that intention that the joint act be so performed. There is thus an indelible reflexivity built into each participant's intention. Third, Bratman argues that a shared intention requires that each party's intention (to do the joint activity) and his/her reasons for it be "common knowledge" to the parties, which is the only way by which it becomes reciprocally motivating to each party's reasons for action.<sup>119</sup>

In so setting up the idea of shared intention, Bratman insists that it remains "primarily a psychological—rather than primarily a normative—phenomenon<sup>120</sup>," in the sense that it does not, on its own, give rise to

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<sup>113</sup> See Michael Bratman, *Shared Intention*, 104 ETHICS 97 (1993) [hereinafter Bratman, *SI*]; Michael E. Bratman, *Shared Cooperative Activity*, 101 PHIL. REV. 327 (1992) [hereinafter Bratman, *SCA*]; Michael Bratman, *Two Faces of Intention*, 93 PHIL. REV. 375 (1984); Michael Bratman, *Intention and Means-Ends Reasoning*, 90 PHIL. REV. 252 (1981); Michael E. Bratman, *Modest Sociality and the Distinctiveness of Intention*, 144 PHIL. STUDS. 109 (2009).

<sup>114</sup> Bratman, *SI*, *supra* note \_\_, at 103-04.

<sup>115</sup> *Id.* at 106.

<sup>116</sup> *Id.* at 106.

<sup>117</sup> *Id.* at 106-07.

<sup>118</sup> *Id.* at 104.

<sup>119</sup> *Id.* at 103.

<sup>120</sup> *Id.* at 112.

obligations even of an interpersonal kind among participants. While such an intention *can* give rise to obligations contextually, a shared intention does not always generate obligations on its own.<sup>121</sup> It is important to understand the sense in which Bratman's view eschews imbuing shared intentionality with a normative dimension. He certainly isn't suggesting that shared intentionality cannot be motivational, or that it is incapable of generating normative obligations; just that it isn't constitutively necessary for his reductive understanding of what shared intentionality needs to entail, at a minimum, for its existence.<sup>122</sup> This narrow understanding of normativity is important to appreciate as we move to using the idea of shared intentionality to understand coauthorship. Bratman is thus hardly suggesting that the intentions underlying the phenomenon of shared intentionality cannot provide independent reasons for parties' behavior, in the sense of being motivational in the formation of their own reasons for actions. To the contrary, their motivational nature is central to his theory.

Somewhat more importantly for us though, Bratman builds his theory of shared intentions, which he describes a certain "attitude" of mind, into a full-blown account of behavior and activity motivated by such intentions. And it is in this account that we see how shared intentions are capable of being motivational in actors' behavior. Using the idea of shared intentions, Bratman identifies an analytically distinct kind of activity that he describes as "shared cooperative activity."<sup>123</sup> Three distinct features are taken to be characteristic of such—shared cooperative—activity. First, the parties performing the activity are "mutually responsive" to each other's intentions and actions.<sup>124</sup> Second, the parties evince a "commitment" to the joint action in question.<sup>125</sup> Third, the parties manifest a commitment to mutually supporting each other during the performance of the activity so as to ensure the successful performance of the joint activity.<sup>126</sup>

It is in the second and third of the above conditions that Bratman then draws the useful distinction between a "joint" activity and a "shared cooperative" activity. Without either of them, mutually responsive action could include the behavior of two soldiers on a battlefield who are responding to each other's moves.<sup>127</sup> It would be odd to characterize their

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<sup>121</sup> *Id.* at 111.

<sup>122</sup> *Id.* at 110-111 ("[S]hared intentions are frequently accompanied by such obligations.").

<sup>123</sup> See generally Bratman, *SCA*.

<sup>124</sup> *Id.* at 328.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 328-29.

activity as joint, shared, or cooperative in any sense of the term. Adding the second feature to the first introduces the idea that each participant has “an intention in favor of the joint activity.”<sup>128</sup> And for this to make logical sense (and avoid a circularity in definition), the activity in question will need to be understood in a cooperatively neutral way that doesn't presuppose the very element of cooperation.<sup>129</sup> Thus, the activity of ‘playing chess together’ is cooperatively loaded since it is incapable of being understood in individualized intentional terms, unlike the act of ‘painting a house,’ which can be understood in both individualized and shared terms. The commitment to performing the activity jointly thus renders the activity a “joint activity” in Bratman's understanding. This commitment is characterized by—in the actors—an intention in each to perform the activity that is built on the meshing sub-plans of the parties that are in and off themselves reciprocal. The content of these sub-plans may be developed during the actual performance, but each actor intends to have them mesh and this in turn form a large part of the intention behind the very performance of the joint activity.<sup>130</sup> For the joint intention to however transcend its status as a mere attitude and become embodied in an activity, this reciprocal reinforcement of sub-plans needs to occur not just at the level of intention, but also at the level of action. Participants in a jointly intentional activity therefore have to be mutually responsive to each other's sub-plans during the performance of the activity.<sup>131</sup>

Note that this this still doesn't introduce the element of cooperation needed to make it a cooperative activity. Such activity in addition requires a commitment to supporting the other participant during the performance of the joint activity. It is thus the introduction of the third feature—the commitment of mutual support—that converts a merely joint activity into a shared cooperative.<sup>132</sup>

The commitment to mutually supporting each other during the performance of the activity introduces a relatively high bar into the analysis of the activity. Bratman illustrates the idea using the example of two singers who set out to sing a duet jointly. He describes how each of

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<sup>128</sup> *Id.* at 329.

<sup>129</sup> *Id.* at 329-30.

<sup>130</sup> *Id.* at 332-34.

<sup>131</sup> *Id.* at 339. It is important to note here that Bratman describes this within the context of shared cooperative activities, but seems willing to extend it to joint activities as well, with the primary difference being the second commitment (to mutual support). Other scholars interpreting Bratman have adopted a similar analysis. See Daniel Markovits, *Contract and Collaboration*, 113 *YALE L.J.* 1417, 1454 (2004) (describing jointly intentional activities as containing an element of coordination even if not cooperation as Bratman suggests).

<sup>132</sup> *Id.* at 336.

them has a set of beliefs and commitments that satisfies each of the three requirements necessary for simple shared intentionality.<sup>133</sup> They may thus be committed to the joint activity, namely, singing the duet together. Yet, he notes they might in addition intend to be unhelpful to each other—in the sense that if one fails during the performance of the duet, the other does nothing to cover, and lets the other publicly fail, as long as the joint end—singing the duet—is realized.<sup>134</sup> This, he argues is antithetical to the idea of shared cooperative activity, even though it remains a joint activity since both parties have a shared intention, and are committed to the joint activity as such.<sup>135</sup> The joint activity would become a shared cooperative activity only if the singers in addition also manifested a second commitment: a commitment to supporting the other during the activity (of singing) so as to ensure that the activity itself is indeed successfully performed.<sup>136</sup> The act need not be successfully performed as such; it merely requires that the parties have an intent to support each other to bring about the success. The precise form and nature of this support will of course vary contextually. Yet, the minimal idea is that there must be some “cooperatively relevant circumstances” where one participant is willing to help the other in the pursuit of the activity, without some new/independent incentive emerging for such support.<sup>137</sup> In other words, the commitment must be to the cooperative nature of the endeavor that transcends a participant’s belief that her doing of only her part will suffice. Only when joint activity is thus “minimally cooperatively stable” in embodying cooperatively relevant circumstances where one actor would support the other, does it become shared cooperative activity.<sup>138</sup>

It is important to note here that Bratman characterizes both the second and third features of shared cooperative activity in terms of “commitments.” Or put another way, a jointly intended activity contains a commitment to the joint activity, and a cooperative activity embodies commitment to both the joint activity and to mutually supporting the other participant in it. Unpacking Bratman’s idea of commitment is thus central to understanding the working of shared intentions and their broader role in motivating human agency during joint and cooperative activities. Intentions—to Bratman—involve commitments to future action.<sup>139</sup> Since

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<sup>133</sup> *Id.* at 336-37.

<sup>134</sup> *Id.* at 337.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 338.

<sup>139</sup> MICHAEL E. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 15 (1987).

they play a fundamentally motivational role, by combining with the agent's prior beliefs to move the agent to act, they embody what he calls "pro-attitudes."<sup>140</sup> Such intentions thus work to control the agent's future actions by providing the agent with a reason to adhere to it in the future, based on the volitional commitment that the agent undertook when generating it. In addition, the existence of such a future directed intention and the volitional commitment underlying it have a characteristic stability that causes the agent to resist reconsideration until the completion of the action associated with the intention.<sup>141</sup> Now this certainly does not imply the irrevocability of the intention; just that absent new reasons, the intention and the commitment work as default reasons of their own to move the agent.

To speak of a commitment to the joint activity is thus to admit that the agents involved in it are motivated to partake in the joint activity because of each other's participation and mutual similar intention and to develop the intermeshing sub-plans needed to perform the activity because of this conduct controlling commitment. The additional commitment to mutual support seen in a cooperative activity is thus a recognition that the parties are additionally moved to support each other during the performance of the activity in the exact same way that they committed to undertake the activity jointly to begin with, i.e., the endeavor provides its own independent reasons for action. In so identifying commitments as central to intentions, and as generating reasons for action that "move" an agent to behave in a certain way,<sup>142</sup> Bratman's account of jointly intentional and cooperative activities is thus in one important sense normative.

Indeed, this motivational dimension of the shared intention in such joint activities is highlighted by what Bratman describes as their end-providing dimension. In describing the intermeshing sub-plans and the interdependent nature of the intention, he observes that it is crucial for the intentions to be "interlocking," such that each actor has an intention in favor of the efficacy of the intention of the other.<sup>143</sup> Thus, he observes, "each agent must treat the relevant intentions of the other as *end-providing* for herself."<sup>144</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 16-17.

<sup>142</sup> *Id.* at 15.

<sup>143</sup> See BRATMAN, *FACES OF INTENTION*, *supra* note \_\_\_, at 102.

<sup>144</sup> *Id.* (emphasis in original).

In summary, collective intentionality denotes a certain attitudinal commitment to joint actions, with joint activity and shared cooperative activity representing categories of activity that harness different features of such intentionality. They both operate through future oriented volitional commitments that the agent undertakes, which remain stable until the completion of the action and provide the agent with a set of reasons for a course of action. It remains then to be seen, what the precise nature of this *commitment* is, and indeed in what sense it might be usefully characterized as motivational, in our understanding of coauthorship, questions to which the next Section turns.

### B. *Commitments as Reasons for Action*

Both joint activities and shared cooperative activities originate in the idea of collective or shared intention. Yet in addition, a hallmark of both kinds of activities is that they characterize individual behavior that originates in a certain kind of *commitment*—to future action. In a joint activity characterized by a shared intention, each actor remains “rationally committed” to realizing the joint end in question by seeking to give effect to the other actors’ intentions.<sup>145</sup> And in a shared cooperative activity, in addition, each actor also evinces a commitment to mutually support the other during the performance of the shared activity.<sup>146</sup> Given the centrality of commitment to activities characterized by a shared intention, it is somewhat crucial to understand what exactly a commitment is and how it remains rather fundamentally different from incentives and desires that are taken to be the principal motivators of behavior among rational actors.

Perhaps the best known attempt to unpack the nature of a commitment and distinguish it from other kinds of motivations for behavior, is that of Nobel Prize winning economist, Amartya Sen.<sup>147</sup> In early work criticizing the behavioral foundations of modern economic theory, Sen argues that individual behavior is routinely driven by “commitment[s],<sup>148</sup>” where a person often “choos[es] an act that he believes will yield a lower level of personal welfare to him than an

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<sup>145</sup> See Bratman, *SI*, *supra* note \_\_, at 109.

<sup>146</sup> See Bratman, *SCA*, *supra* note \_\_, at 336.

<sup>147</sup> See, e.g., Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFFS. 317 (1977); Amartya Sen, *Goals, Commitment, and Identity*, 1 J.L. ECON. & ORG. 341 (1985); Amartya Sen, *When Exactly is Commitment Necessary for Rationality*, 21 ECON. & PHIL. 5 (2005).

<sup>148</sup> Sen, *Rational Fools*, *supra* note \_\_, at 326.

alternative that is also available to him.<sup>149</sup>” A commitment thus often involves a “counterpreferential choice” which can draw a “wedge between personal choice and personal welfare.<sup>150</sup>” Sen uses the idea of commitment to argue that certain kinds of human behavior are motivated by choices and elements that do not necessarily correspond to the idea of preference-maximization that economic theory takes as a given. Commitments in this understanding influence individuals to behave in ways that other kinds of “rewards and punishment[s]” cannot.<sup>151</sup> Yet, this need not suggest that behavior flowing from a commitment is necessarily irrational, since it can routinely satisfy the demands of means-ends coherence and strong consistency.<sup>152</sup>

In further developing the idea of a commitment, Sen makes the somewhat controversial claim that behavior based on commitment can involve a violation of “self-goal choice,” i.e., the reality where an individual’s actions are chosen and guided by the pursuit of one’s own goals.<sup>153</sup> In other words, what Sen is pointing to is the possibility that behavior emanating from a commitment often times involves self-imposed constraints that restrict the realization of one’s own goals and preferences.<sup>154</sup> To Sen, the principal source of such constraint is one’s “identity,” a variable heavily influenced by the considerations of community, group membership and the like.<sup>155</sup>

Philosophers of action have given the idea of a commitment more content and in the process connected it to the concept of intention. To Searle, commitments are independent of an individual’s “subjective motivations” for action.<sup>156</sup> A commitment is instead a “desire-independent reason for action.” It is, in other words, created independent of the agent’s own set of goals and preferences, and forms its own reason for action.<sup>157</sup> In a similar vein, Bratman relates commitments to his theory of planning and treats them as constitutive of future directed intentions.<sup>158</sup> He further argues that a commitment always carries with it a normative dimension, in so far as they guide and inform practical reasoning and planning in

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<sup>149</sup> *Id.* at 327.

<sup>150</sup> *Id.* at 328-29.

<sup>151</sup> *Id.* at 334.

<sup>152</sup> See BRATMAN, *supra* note \_\_, at 109.

<sup>153</sup> Sen, *Goals*, *supra* note \_\_, at 347.

<sup>154</sup> *Id.* at 348.

<sup>155</sup> *Id.*

<sup>156</sup> JOHN R. SEARLE, RATIONALITY IN ACTION 167 (2001).

<sup>157</sup> *Id.* at 173.

<sup>158</sup> BRATMAN, *supra* note \_\_, at 107.

relation to future action.<sup>159</sup> Commitments are thus fundamentally constitutive of intentions, and are in addition motivational.

Sen's notion of commitment begins to assume much significance for discussions of collective intentionality—as a mechanism of explaining joint activities—only when one further unpacks his notion of “identity” as a constraint and treats it as an analytical (as opposed to empirical) device through which to understand interactions. The notion of constraining one's goal choices by reference to those of a group/community that one is a part of, can be understood through the working of collective intention. Hans Bernhard Schmid adopts this approach and argues that the process of identification that Sen emphasizes is in reality a process of “self-contextualization” where an individual replaces his/her goals not with the goals of another, but instead with the goals of the collective of which the individual is a member.<sup>160</sup> The reason for action then originates in the shared goals—defined through the joint or shared cooperative activity—that each individual contributes to and simultaneously holds, and these goals are prioritized ahead of any individual goals, preferences and desires that the individual may hold.<sup>161</sup> A commitment, in Schmid's account, originates in the very nature of collective intention, since “[a]s normative sources, shared intentions, aims, goals, and projects provide [actors] with reasons for individual action.<sup>162</sup>” Commitments do not originate in subjective motivations, but they instead take shape and color from the collective goals of the shared activity in question. They are instead “intersubjective.<sup>163</sup>” Returning to our understanding of shared intention and the working of a shared cooperative activity makes clear exactly how it is that commitments operate.

Recall that in situations of a shared intention, it needs to be the case that both parties intend on doing a certain activity jointly.<sup>164</sup> Yet, the reason for each of their intents is the other's intent to do the same.<sup>165</sup>

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<sup>159</sup> *Id.* (“The normative aspect of commitment consists in the norms and standards of rationality associated with these roles.”).

<sup>160</sup> Hans Bernhard Schmid, *Beyond Self-Goal Choice: Amartya Sen's Analysis of the Structure of Commitment and the Role of Shared Desires*, 21 *ECON. & PHIL.* 51, 57 (2005).

<sup>161</sup> *Id.* at 59-61.

<sup>162</sup> *Id.* at 61.

<sup>163</sup> *Id.* at 62.

<sup>164</sup> Bratman, *SI*, *supra* note \_\_, at 103-04. The explanation here uses Bratman's reductive account of shared intention. The same logic would hold true for non-reductive accounts as well. For a good example explaining the role of participatory commitment in shared intention, but from a non-reductive perspective, see: Abraham Sesshu Roth, *Shared Agency and Contralateral Commitments*, 113 *PHIL. REV.* 359 (2009).

<sup>165</sup> Bratman, *SI*, *supra* note \_\_, at 104.

Expectations about how one's intentions will influence the other's and general expectations about the other's intentions and actions are integral in this formation. As Bratman puts it, actors who have a shared intention "do not see the other's relevant intention merely as a datum, for each intends that the joint activity go in part by way of the efficacy of the other's intention."<sup>166</sup> In so doing, each participant is driven by a commitment to pursuing the means identified, overcoming obstacles, and realizing the joint activity in question.<sup>167</sup> The parties' collective creation of their shared objective, through the process of reciprocal reinforcement, and the creation of inter-meshing subplans produces these commitments, which then provides the parties with sufficient (and independent) reasons for future action to realize the shared goal. Each actor "embrace[s] as her own end the efficacy of the other's relevant intention."<sup>168</sup>

We now begin to see how, much as Sen argued before, participants in a joint activity with a shared intention are motivated to act not just exclusively by their subjective motivations reflective of their individual preferences or desires, but also by their very adoption of the other party's intention in conjunction with their own intention—the shared intention—as an independent, and sufficient reason for action.<sup>169</sup> Very often it will be the case that an individual's preferences remain perfectly allied with the shared goal (or intention), which generates the commitment, since the individual is likely to have been motivated to participate in the creation of a shared intention precisely because of such preferences.<sup>170</sup> Yet once brought into existence, this shared intention embodies its own commitment, and becomes an independent reason for action that bears no subjective connection to the original preference. The same logic holds true, perhaps to an even stronger extent, in instances of shared cooperative activity.

Joint activities and shared cooperative ones both generate commitments among actors as to their future behavior. They produce, *ipso*

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<sup>166</sup> *Id.* at 109.

<sup>167</sup> *See id.*

<sup>168</sup> *Id.*

<sup>169</sup> Schmid, *supra* note \_\_, at 58.

<sup>170</sup> One must take care here to avoid the trap of simply re-defining the actor's motivational set of preferences to now encompass the act of commitment as a preference. In other words, it would be erroneous to simply argue that the actor was behaving in a certain way because of a preference that in turn reflected the commitment. To treat the commitment as embodied within the preference belittles the richness of human motivation, a point that Sen forcefully made in his early work. *See* Sen, *Rational Fools*, *supra* note \_\_, at 322 ("It is possible to define a person's interests in such a way that no matter what he does he can be seen to be furthering his own interests in every isolated act of choice.").

*facto*, commitments to future action.<sup>171</sup> Once produced, they guide the actor's practical reasoning about what to do, and how to do it, ensure a strong consistency in the behavior during the subsistence of the commitment, and constrain the introduction and viability of other reasons into the practical reasoning process.<sup>172</sup>

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In summary then, a commitment represents: (i) a reason for action, (ii) that need not be (and is very often not) consequence-driven, i.e., preference-/goal-based, and (iii) can on its own provide an actor with an independent motivation for action. Searle defines commitments as “the adoption of a course of action or policy ... where the nature of the adoption gives one a reason for pursuing the course.”<sup>173</sup> Applied to the context of shared intentionality, we thus see that the very process of generating a such an intention produces a set of future-directed commitments among actors. The actors' individual agency in generating the shared intention is equally responsible for motivating them through their commitments. Searle goes so far as to identify the ability to *commit* oneself in future actions as the “single most remarkable capacity of human rationality.”<sup>174</sup>

### C. *The Collaborative Impulse*

Having examined the nature and structure of collective intentionality and the commitments that it entails, as well as the structure of commitments more generally, we now proceed to unpacking the idea of

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<sup>171</sup> BRATMAN, *supra* note \_\_, at 106.

<sup>172</sup> *Id.* at 109. It remains a source of deep disagreement among scholars, all of who readily admit the motivational nature of commitments, as to whether the existence of such commitments in addition also produces interpersonal obligations among the parties generating and sustaining a shared intention. Some, such as Bratman, vehemently deny the existence of any such obligations. MICHAEL E. BRATMAN, *FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* 130-31 (1999). Others, most prominent among them the scholar Margaret Gilbert, insist that shared intentions produce “associational,” as opposed to moral or legal, obligations. MARGARET GILBERT, *JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD* 108 (2013). Yet others adopt a midway position and insist that shared intention is a normative phenomenon in the sense of generating *some* obligations through the process of mutual reliance, which is central to the process by which a shared intention is formed. It is somewhat irrelevant for our purposes whether the commitments that a shared intention produces further metamorphoses into an obligation as well, since our primary concern is with the motivational aspect of the commitment rather than its enforceability, or the consequences of deviation from it.

<sup>173</sup> SEARLE, *RATIONALITY*, *supra* note \_\_, at 175.

<sup>174</sup> *Id.* at 167.

the ‘collaborative impulse,’ which builds on the central ideas from collective intentionality and the working of commitments.

As generally used today, an impulse refers to behavior that is sudden, or driven by an urge, commonly captured in the phrase “impulsive behavior.” As understood in the early philosophy of action however (dating back to the Stoics), an impulse is simply a “psychological event which determines or causes an action”.<sup>175</sup> It is, in other words, the very cause “which makes it possible to ascribe intentionality to human behavior.”<sup>176</sup> In this understanding, which differs completely from the more common usage of the idea of impulsive behavior, behavior influenced by an impulse is hardly irrational or unthoughtful. It is instead a “call to action” produced by the mind, based on its acceptance of a certain object or goal as desirable.<sup>177</sup> And it is entirely in this sense that the term is being used here: to connote a behavioral motivation produced by the mind that translates a commitment underlying an intention into deliberate action.

An impulse is therefore the internal/motivational dimension of a future oriented commitment, which causes an agent to behave in a way that is compliant with that commitment, because the mind sees it as contextually appropriate or “right”. Recall that a characteristic feature of volitional commitments is that they tend to resist reconsideration even though they aren’t irrevocable as such.<sup>178</sup> The resistance to reconsideration readily translates the commitment into action, as the future becomes the present. The impulse is then very simply the attitude that the actor embodies—in the present—when the commitment is converted into action and provides an independent reason for certain behavior in the present.

Understood in this vein, the collaborative impulse refers to the behavioral motivation that is generated at the time of action, by an actor’s acceptance and internalization of the commitments that accompany a jointly intentional activity. While both jointly intentional and shared cooperative activities entail a commitment to jointly realizing the activity, recall that the latter (i.e., shared cooperative activity) involves a heightened standard in that it embodies the additional commitment of mutual support.<sup>179</sup> A shared cooperative activity is thus always a jointly intentional one, but not vice-versa. Actors in a shared cooperative activity

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<sup>175</sup> BRAD INWOOD, *ETHICS AND HUMAN ACTION IN EARLY STOICISM* 47 (1985).

<sup>176</sup> *Id.* at 47-48.

<sup>177</sup> See Scott Rubarth, *Stoic Philosophy of Mind*, in *THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY*, <http://www.iep.utm.edu/stoicmind/>.

<sup>178</sup> See BRATMAN, *INTENTION*, *supra* note \_\_, at 16-17.

<sup>179</sup> Bratman, *SCA*, *supra* note \_\_, at 336-38.

might thus exhibit a *cooperative* impulse, motivating them to assist and support each other during the performance of the activity; yet, actors in a jointly intentional activity merely exhibit a collaborative impulse that motivates them to realize the goal in question through the joint process.<sup>180</sup> In a jointly intentional activity, each participant intends the joint activity because of the other's reciprocal intention to so perform it jointly, and the accompanying intermeshing sub-plans that allow their intentions to coordinate in the realization of the final goal. Each actor's intention is accompanied by (i.e., underwritten by) a commitment, which is relatively static over time and by default resists reconsideration. When the time for performance comes, that commitment generates the impulse that in turn motivates the actor to follow through on the original intention and perform the activity as a jointly intentional one.

The working of the collaborative impulse is best illustrated through an example. Take two professional singers, Joe and Ann, who agree to sing a song together as a duet at a local event. Having performed the song together on multiple occasions in the past, they each know the lines that the other prefers to sing solo and accordingly divide up the song into the parts that they will sing together (in chorus) and the parts that each of them will sing individually. Translated into our discussion of collective intentionality: they each can be said to have an intention to jointly perform the song, an intention that in each emerges because of the other's reciprocal intention to so perform the song jointly. In addition, the intention is driven by and made up of their meshing sub-plans to each perform parts of the song such that the song as a whole is optimally performed to the best of their collective ability. In so generating the intention, each of them is driven by a future looking volitional commitment that tends to resist reconsideration absent extreme circumstances. Thus, if Joe hears his favorite singer performing the same song solo on the radio the next day, this commitment underwrites the original intention and resists the urge to simply abandon the idea of performing the song with Anne in favor of performing it solo. It is worth reiterating that this commitment is not an obligation that Joe owes to Ann, and Ann might have well told Joe that he is "free to change his mind" at

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<sup>180</sup> For an analogous but analytically different use of this distinction, within the context of contract theory, see Markovits, *supra* note \_\_, at 1462. Drawing on the difference between jointly intentional and share cooperative activities, Markovits distinguishes between what he calls "cooperative communities" such as marriage, and purely "collaborative communities" characteristic of contracts. He then develops a full-blown moral account of such collaborative communities, noting that they exhibit "forms of respect that arise only unnaturally in connection with cooperation." *Id.*

any point.<sup>181</sup> It is instead, *qua* Bratman, an attitude of mind in each actor that accompanies the intention.<sup>182</sup> Having resisted reconsideration, when the time of the performance arrives, Joe and Ann then each convert this intention into the jointly intentional activity and perform the song together. The same commitment that underwrote the intention and contributed to its stability now generates the motivation in both actors to convert the intention into action—by way of the collaborative impulse.

Much of this will of course seem unexceptional. It might well be thought that Joe's actions based on his commitment map onto his set of preferences when understood to include the reputational harm that abandoning Anne in the last minute might entail or some such similar consequentialist variables. It thus bears emphasis that behavior driven by a collaborative impulse will generally be seen to align itself with utility maximizing behavior. The real nature of the impulse becomes obvious only when one observes a divergence between an actor's actual behavior and what might be taken as the actor's clear utility-maximizing choice. In an overwhelming majority of cases, the impulse and commitment undergirding jointly intentional activity will remain aligned with what appear to be an actor's immediate preferences, but the reality remains that they *need not* be so aligned. And when they aren't aligned, the commitment generates its own reasons for action. Therein lies the working of the commitment, and its ability to produce behavior that isn't necessarily directly in furtherance of what appears to be the utility-maximizing choice. Going back to our earlier hypothetical, assume that the day before Joe and Anne are to perform the song, Joe is approached by Mark and offered a million dollars to perform the work individually, i.e., as a solo. When he refuses to do so (and turns down the money) because of his commitment to jointly performing the song with Anne, he is clearly choosing an option that isn't the obvious utility-maximizing one. Once again, he isn't doing so out of an obligation to Anne, but out of a simple unwillingness to reconsider his commitment, and the conversion of the commitment into an action: the collaborative impulse.

Decades ago, Sen noted the possible convergence of behavior motivated by a commitment and behavior influenced by utility-maximization (i.e., self-interest) and the difficulty involved in disaggregating an actor's reasons when they overlap.<sup>183</sup> He thus notes that the "more difficult question arises when a person's choice [driven by a

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<sup>181</sup> As noted previously, this is a point of disagreement between Bratman and Gilbert. *See supra* note 72 and discussion therein.

<sup>182</sup> BRATMAN, INTENTION, *supra* note \_\_, at 15.

<sup>183</sup> *See* Sen, *Rational Fools*, *supra* note \_\_, at 327.

commitment] happens to coincide with the maximization of his anticipated personal welfare, but that is not the *reason* for his choice.<sup>184</sup> The working of the commitment—and its translation into an impulse—thus become apparent only when a counterfactual condition actually exists, was abjured by the individual, and this is known to others assessing the behavior externally.

All of this raises an obvious question: is behavior driven by the collaborative impulse, necessarily rational at all times? When Joe turns down Mark's lucrative offer in order to act on the commitment to jointly perform the song with Anne, in what sense is Joe's behavior truly rational? It remains a source of deep and continuing disagreement among philosophers, about whether a reason to act that is rationally formed but at the time of performance is seen as irrational, comports with the overall idea of agent rationality.<sup>185</sup> The nuances of this debate need not detain us here. All the same, philosophers seeking to provide a defensible reconciliation of the paradox highlight a point that is of importance to us, namely, that the idea of rational self-interested behavior need not be seen as requiring an agent to be motivated exclusively by such self-interest at all decision points.<sup>186</sup>

The point is best understood by analogy to the distinction between rule and act consequentialism. Both forms of consequentialism agree that the value of an act ought to be measured by its consequences. Yet, act consequentialism requires that the value of each individual act be measured against the consequences that it produces. Rule consequentialism on the other hand merely requires that the value of an act be measured against a set of pre-determined rules or guidelines, which are in turn systemically taken to represent valuable consequences.<sup>187</sup> The rule or guideline intermediates (and constrains) the evaluation, obviating the need for an empirical examination of an act's consequences at each individual instance. The philosopher David Gauthier adopts precisely such

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<sup>184</sup> *Id.*

<sup>185</sup> For some of the most prominent work on this question, see: DEREK PARFIT, *REASONS AND PERSONS* 3 (1984); HOWARD J. SOBEL, *TAKING CHANCES: ESSAYS ON RATIONAL CHOICE* 237 (1994); Gregory S. Kavka, *The Toxin Puzzle*, 43 *ANALYSIS* 33 (1983); Stephen L. Darwall, *Rational Agent, Rational Act*, 14 *PHIL. TOPICS* 33 (1986); David Gauthier, *Assure and Threaten*, 104 *ETHICS* 690 (1994); Joe Mintoff, *How Can Intentions Make Actions Rational?*, 32 *CANADIAN J. PHIL.* 331 (2002).

<sup>186</sup> See, e.g., David Gauthier, *Commitment and Choice: An Essay on the Rationality of Plans*, in *ETHICS, RATIONALITY, AND ECONOMIC BEHAVIOR* 217, 228 (Francisco Farina et al. eds. 1996); Joe Mintoff, *Rule Worship and the Stability of Intention*, 31 *PHILOSOPHIA* 401 (2004).

<sup>187</sup> See Brad Hooker, *Rule Consequentialism*, in *Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed. 2011), <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=consequentialism-rule>.

an approach, to defend as rational, an agent's actions that are irrational when performed, but driven by a commitment that was rational when originally formed.<sup>188</sup> He thus observes:

[S]ometimes my life will go better if I am able to commit myself to an action even though, when or if I perform it, I expect that my life will not thenceforth go as well as it would were I to perform some alternative action. Nevertheless, it is rational to make such a commitment, and to restrict my subsequent deliberation to actions intentionally compatible with it, provided that in so doing I act in a way that I expect will lead my life going better than I reasonably believe that it would have gone had I not made any commitment.<sup>189</sup>

Gauthier's formulation uses the metric of "life going well" as an open-ended consequentialist calculus. His defense of commitment-driven action that is irrational at the time of performance derives from the idea that if it was rational at the time that it was entered into (rational by reference to the metric), it assumes a certain rationality even when actually performed, since the relevant metric is no longer the overall consequentialist idea of "life going well", but rather the reason itself, i.e., the commitment, which the agent undertook as furthering the consequentialist idea.<sup>190</sup> The aim (life going well) becomes manifested in the reason (the commitment), and the action then is measured against the reason rather than directly against the aim. The structure thus maps onto the rule versus act consequentialism divide.

Bratman too adopts a similar line of defense. He defends the rationality of behavior driven by commitment in situations where the non-reconsideration (of the commitment) was driven by general habits that were reasonable (i.e., rational) for the individual to have when they were first formed.<sup>191</sup> Thus, one might post that if Joe's unwillingness to reconsider were driven by the general habit of avoiding the abandonment of a partner in the last minute (as unethical), and we admit the reasonableness of that habit when developed, its application to the specific instance can indeed be seen as rational. The reasonableness of the general habit overrides its application to the specific instance, rendering the act

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<sup>188</sup> See Gauthier, *Assure and Threaten*, *supra* note \_\_\_, at 707.

<sup>189</sup> *Id.*

<sup>190</sup> See Hooker, *supra* note \_\_.

<sup>191</sup> BRATMAN, INTENTION, *supra* note \_\_\_, at 64, 64-70.

rational. Once again, the “two-tiered” structure works to mediate the question of rationality.<sup>192</sup>

In acting on the collaborative impulse that is in turn fuelled by the commitment to jointly performing an action, the agent can be seen as furthering his/her self-interest only ever indirectly. The commitment mediates between the action and the self-interest, and as long as the commitment was formed in the pursuit of rational self-interest, actions based on it can be seen as indirectly furthering that self-interest even if when taken in isolation, they seem to be counter-preferential. If one accepts this structure, behavior commenced in, and undertaken for self-interest can indeed accommodate individualized non-self-interested action, when a commitment—initially driven by self-interest—intervenes, and operates as a reason on its own for such individualized action. The collaborative impulse in other words, may sit comfortably within a broader instrumentalism motivating an agent’s overall behavior, even though on its own and directly measured, the impulse isn’t driven by such instrumentalism. This nesting of the impulse within a broader utilitarian orientation reveals that an agent’s reasons for performing a joint activity may indeed be motivated by a plurality of considerations.

Returning to our hypothetical, Joe may have initially been motivated to perform the song with Anne because of the belief that performing it with her will produce the best outcome, and earn them together a large cash prize. His overall orientation to the action is thus unquestionably instrumental/consequentialist. In forming the intention to perform the song jointly, he develops a commitment to so performing the action that is inter-temporally stable. Once formed, the commitment operates as its own reason for action, allowing him to turn down Mark’s counter-offer. When the time comes for performance, it generates the collaborative impulse, which causes Joe to actually perform the song jointly with Anne. Now while the impulse driven behavior itself isn’t directly self-interested, especially in the face of Mark’s offer, it sits perfectly within Joe’s overall consequentialist orientation, since it was driven by a commitment undertaken in the pursuit of an instrumental goal. In adhering to it, and in acting on it, Joe is hardly undermining his own consequentialism, if we understand the commitment itself as motivated by such consequentialism and mediating between his aims (consequentialism) and actions.

In short then, the collaborative impulse takes the commitment to jointly performing an activity as a *sufficient* reason for action, generally

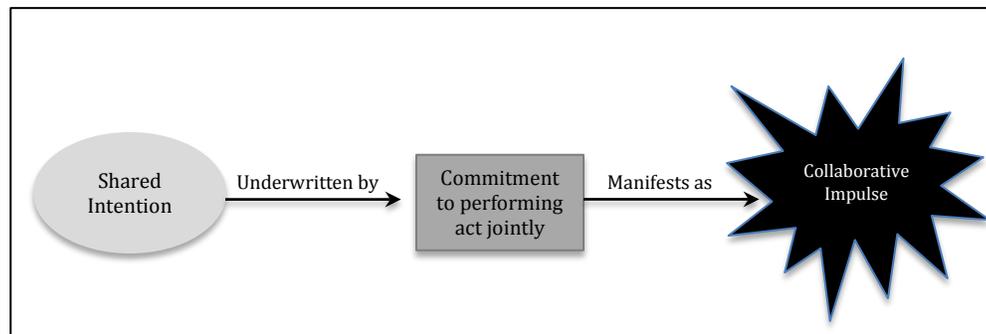
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<sup>192</sup> *Id.* at 60; Mintoff, *supra* note \_\_\_, at 408 (describing Bratman’s theory as two-tiered).

withstands immediate reconsideration and motivates an agent's collaborative action in the performance of the activity. As noted before it works within the interstices of regular utilitarian or consequentialist motivations and is often aligned with them, but its independence and sufficiency as motivations are of central import.

In a sense then, the collaborative impulse can be seen as lying on one end of an analytical—but not necessarily temporal—sequence of attitudes that an agent develops. The agent may thus be motivated by the beneficial consequences of an activity and develop an intention for perform that activity jointly, in order to best realize those benefit. In so developing a shared intention and intermeshing sub-plans, the agents develop a “web of intentions,” which ensures a stable commitment to the joint activity. The commitment is a reason for action, and the shared intention in effect is now motivational. When the time comes for actually performing the activity—i.e., the intention is being converted into action—the commitment to the joint activity produces the collaborative impulse, in turn generating collaborative behavior that is manifested externally. The diagram below captures this analytic sequence.

**Diagram: Analytic Sequence**



We now turn to examining how this matters for our understanding of unplanned coauthorship and the idea of mutual intent therein.

### III. UNPLANNED COAUTHORSHIP THROUGH THE COLLABORATIVE IMPULSE

Having examined unplanned coauthorship, its reliance on the idea of intent, and the collaborative impulse that informs jointly intentional activities, this Part moves to integrating the previous discussions by offering a new way of understanding copyright's rules on unplanned

coauthorship. In specific, it offers an account of unplanned coauthorship that makes sense of courts' overarching focus on intent and situates it within copyright law's broader goals and objectives.

This Part begins by using the framework of jointly intentional activities described previously to understand coauthorship and the motivations of actors therein (III.A). It then attempts to situate the rules of unplanned coauthorship within copyright's overall utilitarian framework, in specific, by showing how the idea of process-based motivations that are characteristic of collaborative creativity can work perfectly within copyright's overall structure as a market-based inducement for creative output (III.B). III.C. reconstructs the rules of unplanned coauthorship to focus on the process-based motivations during the creative enterprise, using the device of mutual intent. III.D. illustrates the working of the reconstructed rules using the facts of a well-known coauthorship decision.

#### A. *Coauthorship as a Jointly Intentional Activity*

Bratman's account of shared intentionality lends itself rather well to understanding the phenomenon on collective authorship. As an example, the philosopher of art, Paisley Livingston, has recently attempted to develop an account of coauthorship using the idea of shared intentionality.<sup>193</sup> Describing himself as a "partial intentionalist,"<sup>194</sup> Livingston develops a descriptive account of coauthorship using Bratman's elements:

[I]f two or more persons jointly author an utterance or work, they must intentionally generate or select the text, artifact, performance, or structure that is its publicly observable component; in so doing, they act on meshing sub-plans and exercise shared control and decision-making authority over the results, furthermore, in making the work or utterance, they together take credit for it as a whole.<sup>195</sup>

Livingstone's account, of course cares very little about the legal framework of coauthorship, i.e., its role within the legal institution of copyright law. It is therefore willing to admit ideas into its conception of authorship and ownership that are legitimately alien to copyright law.<sup>196</sup>

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<sup>193</sup> See, e.g., PAISLEY LIVINGSTON, *ART AND INTENTION* 75-89 (2005).

<sup>194</sup> *Id.* at ix.

<sup>195</sup> *Id.* at 83

<sup>196</sup> For instance, Livingstone cares very much about the difference between "first" and later authors, which matters from an attributive standpoint, but has no legal implications. *Id.* at 85. In

All the same it reveals for us, the fundamental utility of using shared intentionality as a basis for recalibrating mutual intent, the “touchstone” of coauthorship under copyright law.<sup>197</sup>

Choosing to make mutual intent the touchstone of coauthorship, as courts did early on, was therefore analytically sound. In so doing, courts were recognizing that the phenomenon of coauthorship is routinely accompanied by a joint (or shared/collective) intentionality. Drawing this connection out further sheds light on how the element of mutual intent can be meaningfully connected to copyright law’s functioning and to its presumptive purpose.

In Bratman’s account described earlier, a joint activity is characterized by a “shared intention” wherein each participant has an intention in favor of the activity *being done jointly*.<sup>198</sup> The process of coauthorship can be understood as a joint activity, manifesting all of the characteristics demanded by Bratman’s reductive theory. In this sense, the intention guiding the activity is composed of both: (a) the simple intention to author the work (i.e., by producing expression) *and* (b) the intention to do so jointly, i.e., as a work of coauthorship. This composite intention, which we may call the intention to author the work jointly, is undergirded by equivalent commitments in the parties. The shared intention to produce the work jointly is made up of the intermeshing sub-plans of the parties, wherein each contributor seeks to be and in practice is, responsive to the other contributor’s sub-plans and actions; ensuring that they do not conflict but instead reinforce each other.<sup>199</sup> The joint process of authoring the work is motivational rather than merely descriptive. In other words, each party’s reasons for undertaking the task in question, i.e., authoring expression, is driven in some part by the other’s participation in it and vice-versa. Or, to use Bratman’s language, each party’s intention to perform the joint activity is “end-providing” to the other.<sup>200</sup>

Copyright law’s generally accepted account of authorial motivation is driven by its theory of incentives, an account that sits well

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determining authorship, his account also emphasizes the extent to which a creator’s “sensitivity and attitudes” are manifested in the work. *Id.*

<sup>197</sup> See also Sondra Bacharach & Deborah Tollefson, *We Did It: From Mere Contributors to Coauthors*, 68 J. AESTHETICS & ART CRITICISM 23 (2010) (using Margaret Gilbert’s account of collective intentions to understand coauthorship). For non-intentionalist versions of coauthorship, see Berys Gaut, *Film Authorship and Collaboration*, in *FILM THEORY AND PHILOSOPHY* 149-72 (Richard Allen & Murray Smith eds., 1997); Paul Sellors, *Collective Authorship in Film*, 65 J. AESTHETICS & ART CRITICISM 235 (1997).

<sup>198</sup> Bratman, *SCA*, *supra* note \_\_, at 329.

<sup>199</sup> Bratman, *SI*, *supra* note \_\_, at 103-04.

<sup>200</sup> BRATMAN, *FACES OF INTENTION*, *supra* note \_\_, at 102.

with its overall utilitarian justification.<sup>201</sup> According to this account, the copyright system works by promising prospective creators (i.e., authors of original expression) a set of marketable exclusive rights over their works, once brought into existence.<sup>202</sup> The promise of these rights, and the accompanying market space that they carve out for the author, are thought to motivate (or “induce”) the very production of creative expression. While scholars have in recent times called this account into question, and questioned its comprehensiveness, copyright law and policy nonetheless continue to accept its basic premises in their working.<sup>203</sup> And not surprisingly, courts too endorse the theory and affirm the idea that copyright law exists as a mechanism of *motivating* authors to create original expression, when called upon to interpret copyright doctrine, or develop it contextually.<sup>204</sup>

Accepting copyright’s purpose of authorial motivation for our purposes though, what is particularly salient in it is that it views authors/creators as entirely ends-focused in their orientation. Creators are presumed to derive their utility entirely from the market for their works of expression.<sup>205</sup> Creativity and authorship are presumed to be meaningful to the creator because of what it results in, namely, the work—which, in turn is endowed with market potential as a result of copyright’s promise of exclusivity. The presumptive focus of the motivation underlying this account of authorial incentives thus lies in the *product* of the creativity rather than in its *process*. The ends of creativity are taken to be the driver of the process, with little attention paid to the possibility that the means themselves, i.e., the process, might provide actors with its own set of

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<sup>201</sup> For an overview of copyright’s theory of incentives, see: Balganesch, *Foreseeability*, *supra* note \_\_, at 1573; Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1197 (1996); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483 (1996).

<sup>202</sup> *Id.*

<sup>203</sup> For skeptical accounts, see: Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES IN THE LAW 29 (2011); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009).

<sup>204</sup> As an example, consider the Supreme Court’s use of the incentives idea in this regard: *Sony Corp. Amer. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (observing how copyright is “intended to motivate the creative activity of authors by the provision of a special reward”); *Harper & Row Pubs., Inc. v. Nation Enterps.*, 471 U.S. 539, 558 (1984) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“[C]opyright’s purpose is to promote the creation and publication of free expression.”).

<sup>205</sup> See, e.g., *Harper & Row Pubs., Inc.*, 471 U.S. at 558 (describing copyright as “a marketable right to the use of one’s expression”); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212 (2004) (offering a fuller account of copyright’s economic theory using the economics of market-based product differentiation).

motivations. Creativity can however be motivated, at least partially, by the very process of creation.

To the extent that scholars of copyright law and creativity question the dominant account of authorial incentives, they base it on the broad distinction between “extrinsic” and “intrinsic” motivations for creativity.<sup>206</sup> Extrinsic motivations refer to incentives external to the creative task itself, while intrinsic motivations comprise “any motivation that arises from the individual’s positive reaction to qualities of the task itself.”<sup>207</sup> The category of intrinsic motivations suffers from an observable degree of incoherence, and covers a wide variety of inducements ranging from the spiritual and moral, to those originating in reputational consequences, group dynamics, and personal satisfaction (or a “psychic reward”).<sup>208</sup> In addition, the very term “intrinsic” suggests a fundamentally non-instrumental orientation, when in fact several of the motivations covered by the category are indeed palpably instrumental.

If coauthorship is understood as a jointly intentional activity, characterized in turn by a composite intention wherein the joint nature of the creative enterprise forms some part of a creator’s reasons for undertaking the creative activity, the motivational structure must be seen as embodying both ends- and means-based dimensions. This is hardly to suggest that the means-based dimension must necessarily be non-instrumental all the time (though it may at times); since a means-, or process-based instrumentalism remains perfectly rational as a model of instrumental motivation. Instead of characterizing this form of motivation as ‘intrinsic,’ we might therefore call it “process-based,” in recognition of its means-orientation. This way of understanding coauthorship is also fairly consistent with the findings of various empirical studies involving group creativity.

To take just one prominent example: In a study that has since become fairly well-known, Eric von Hippel and Georg von Krogh studied the nature of creator incentives in open source software development, which consists of programmers who “voluntarily collaborate to develop software” and make it “freely available to all” through a mechanism of unrestrictive licensing.<sup>209</sup> They conclude that the open source movement

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<sup>206</sup> ROBERTA KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 11-12 (2010); TERESA M. AMABILE, *CREATIVITY IN CONTEXT: UPDATE TO THE SOCIAL PSYCHOLOGY OF CREATIVITY* 15-16 (1996).

<sup>207</sup> KWALL, *supra* note \_\_, at 11 (quoting Amabile).

<sup>208</sup> Zimmerman, *supra* note \_\_ at, 42-48.

<sup>209</sup> Eric von Hippel & Georg von Krogh, *Open Source Software and the “Private-Collective” Innovation Model: Issues for Organizational Science*, 14 *ORG. SCI.* 209, 209-10 (2003).

represents a “private-collective” innovation model that deviates in significant respects from both a private investment model of creativity and a collective action model, the two dominant theoretical frames used to describe creator motivations.<sup>210</sup> A large component of the participants’ motivations, they observe, originates in their very “participat[ion] in the project ‘community,’” which causes them to view such cooperation, when “intense and sustainable” as a net benefit on its own.<sup>211</sup> Participating in the process of creating the work in question is thus seen as a benefit in itself, causing participants whose behavior would otherwise be characterized by a traditional prisoner’s dilemma to converge towards a common solution characteristic of a coordination game where the combination of market and non-market (i.e., process) benefits produce a plausible equilibrium outcome.<sup>212</sup> Such cooperation “reflects a transformation of individual psychology so as to include the feeling of solidarity, altruism, fairness, and the like” since participation “becomes a benefit in itself.”<sup>213</sup> In short, an actor’s very participation in the process forms an integral part of his/her creative motivation.

Central to coauthorship then, when the institution is understood as a jointly intentional activity, is that true participants in it embody a process-based motivation towards the creative endeavor that it revolves around. This process-based motivation need not operate to the exclusion of a market- (or ends-) based motivation, yet it certainly qualifies the latter’s role as the *only* reason for an actor’s engagement with the creative endeavor.

To the extent that copyright law and policy purport to model themselves on the actual working of inducements in the production of creative works of expression, the law’s understanding of coauthorship must come to reflect a more nuanced formulation of creator motivations in joint activities. In addition, this is fairly easy to accomplish since it doesn’t undermine copyright law’s core utilitarian (and instrumental) orientation in any way or form, an issue to which we next turn.

### *B. Coauthorship and Copyright’s Purposes*

It is almost incontrovertible dogma today that copyright’s main purpose lies in inducing creative expression through a set of marketable

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<sup>210</sup> *Id.* at 212-13.

<sup>211</sup> *Id.* at 216.

<sup>212</sup> *Id.* at 216-17.

<sup>213</sup> *Id.* at 216 (quoting JOHN ELSTER, AN INTRODUCTION TO KARL MARX 132 (1986)).

exclusive rights.<sup>214</sup> While many have questioned the theory or sought to qualify it, the core idea that as rational actors, creators can be motivated to produce an original work of authorship through a promise of exclusive rights in that work is today the accepted way of thinking about copyright law and policy.<sup>215</sup> And as a result, it unquestionably influences the way in which courts, scholars, and lawmakers think about copyright law.

A key challenge for coauthorship in copyright law, ever since its emergence as a viable standalone doctrine, has been in determining how and why it fits within copyright's overall institutional justification: inducing creativity. Since coauthorship—certainly in its unplanned manifestation—results in dividing up ownership over the work between coauthors, courts and scholars have overwhelmingly tended to view the doctrine in distributive terms, and as diluting the dominant model of sole authorship.<sup>216</sup> Perhaps more importantly though, copyright's core idea of providing actors with incentives for creativity is seen as limited to the institution of sole authorship, with coauthorship then seen as a mechanism that dilutes these incentives. Indeed, some regard it as a variable *against which* copyright's goal of incentivizing creativity needs to be balanced.<sup>217</sup> What is altogether missed in this approach, which views coauthorship against the baseline of sole authorship rather than no creativity, is the possible role that coauthorship performs in preserving parties' process-based motivations during the creative endeavor, thereby itself contributing to copyright's overall structure as a mechanism of creative inducement.

In committing itself to operating as an inducement for creative output, copyright law and policy say very little about the precise causal dynamics of that inducement. The dominant understanding of creators as ends-based instrumentalists puts all of its focus on protecting the work of expression once produced, on the assumption that creators care only about the marketable product. Nothing however, either in the Constitution or indeed in copyright's putative basic commitment to utilitarianism prevents its inducement structure from extending to process-based motivations embedded within copyright's ends-based approach. In other words, to the extent that process-based motivations are in certain domains essential to creative output, working to preserve them comports fully with copyright's

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<sup>214</sup> See *supra* text accompanying notes \_\_\_-\_\_\_.

<sup>215</sup> *Id.*

<sup>216</sup> See, e.g., *Aalmuhammed*, 202 F.3d at 1235 (“Progress would be retarded rather than promoted, if an author could not consult with others and adopt their useful suggestions without sacrificing sole ownership of the work.”).

<sup>217</sup> See, e.g., Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 198 & n.24 (2001).

commitment to inducing creativity. The coauthorship inquiry might therefore form one of copyright law's principal mechanisms for achieving this, by validating and protecting the process-based motivational structure that accompanies collaborative creativity when understood as a jointly intentional activity.

Unplanned coauthorship can fruitfully be seen as a legal mechanism for encouraging forms of creativity that benefit significantly from, or rely entirely on, collaborative activity among two or more creators. It realizes this goal by minimizing strategic free riding during collaboration, thereby effectively preserving the parties' process-based motivations for taking part in the creative process. This idea is best understood using Arrow's information paradox. Arrow's information paradox recognizes that in relation to informational resources that are non-excludable, the resource (i.e., the informational good) cannot be evaluated by a buyer until it is disclosed, but upon such disclosure the buyer has no continuing reason to want to buy it since the acquisition has already occurred.<sup>218</sup> Applied to collaborative creativity, Arrow's information paradox suggests that two (or more) creators might be wary of actively collaborating with one another and integrating their contributions into a unitary work for fear that the one of them could lay claim to the work as a sole author and effectively deny the other all benefits.<sup>219</sup> Unplanned coauthorship claims mitigate these risks to a significant degree, since they signal to the contributors that each of their contributions to the work will be scrutinized objectively ex post to determine whether they obtain a co-ownership stake in the final work. Unplanned coauthorship then effectively undermines the possibility for strategic free riding, by detaching the claim from one party's unilateral authority and rendering the determination objective rather than subjective.

Copyright's mechanism of incentives is taken to work through the ex ante signal that the legal regime sends to putative creators. The promise of "authorship" as a legal title, and its economic consequences, are thought to motivate actors to create original works of expression.<sup>220</sup> In this formulation, the authorship signal focuses entirely on the end in question, namely the work. Analogously, the rules of coauthorship can be seen to

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<sup>218</sup> Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INCENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 615 (Nat'l Bureau of Econ. Research ed., 1962).

<sup>219</sup> For similar applications in the context of transactions over intellectual property, see: Michael J. Burstein, *Exchanging Information Without Intellectual Property*, 91 *TEX. L. REV.* 227 (2012); Jonathan M. Barnett, *Intellectual Property as a Law of Organization*, 84 *S. CAL. L. REV.* 785, 794 (2011); Mark A. Lemley, *The Myth of the Sole Inventor*, 110 *MICH. L. REV.* 709, 748 (2012).

<sup>220</sup> See *supra* note \_\_ and sources therein.

send a specific message to actors motivated to engage in the production of creative works but who are motivated to do so for both ends-based and process-based reasons. The signal that coauthorship sends is that their collaboration in the production of the creative work will both (i) result in the exact same legal title, i.e., authorship, and its accompanying consequences and benefits, thereby recognizing that the overall project continues to remain unequivocally instrumental and ends-based, i.e., directed in significant part at the production of a creative work, and (ii) deter strategic behavior by any one contributor to the collaborative endeavor, which might deter the collaboration, by according them *all* copyright's benefits. Notice that in both instances, the signal is tied to copyright's idea of creator incentives, except that in the latter it creates space for process-based motivations to thrive within the overall ends-based orientation of the project.

For the preceding claim to hold true, the collaboration that the category of coauthorship is seen to preserve must of course be seen as valuable, and worthy of encouragement within the creative endeavor. It must, in other words, make for better quality works, or indeed a distinct set of works that would not be produced but for such collaboration. Yet, this is hardly a major assumption. The copyright statute itself goes to some length to treat works characterized by such collaboration as fundamentally different, and afford them protection as an altogether independent category. The Act's definition of coauthorship demands that the contributions of each party be merged into an "interdependent" or "inseparable" "unitary whole".<sup>221</sup> Indeed, the legislative history of the Copyright Act indicates that Congress went to some effort to distinguish a joint work from a mere "collective work," with the latter characterized by situations where two or more works of authorship are merely compiled together without any sacrifice of their independent character.<sup>222</sup> A joint work thus requires contributions that in a sense speak to each other. Yet it isn't sufficient that the contributions are merely integrated in the end. The Act also distinguishes joint works from mere derivative works, which build on pre-existing works and often times transform or adapt them.<sup>223</sup> In a derivative work, the derivative contribution (i.e., the transformation or adaptation) certainly merges with the original work, and yet derivative

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<sup>221</sup> 17 U.S.C. §101 (2010) (definition of "joint work").

<sup>222</sup> *Id.* (definition of "collective work").

<sup>223</sup> *Id.* (defining a derivative work as a "work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted").

works are not the same as joint works under the law. When an author produces a novel and years later it is converted into a movie, the novelist-author and the movie producer are not treated as coauthors, despite the fact that their contributions are now inseparable and/or interdependent in the final work (the movie). What distinguishes the derivative work from a joint work in these situations is the existence of a temporal lag between the contributions and the fact that each contribution was not initially created consciously with the design of being integrated into a whole, but instead as a contribution that could stand alone.<sup>224</sup> Thus, a joint work requires both integration of the contributions and that this come about through the conscious design of the contributors—which in short, necessitates *actual collaboration* between the parties. Consequently, the copyright system does recognize there to be significant value in the collaborative exercise needed to produce a true work of joint authorship, evidenced in its creation of an analytically separate category for such works.

The institution of unplanned coauthorship thus remains perfectly aligned with copyright's overall purpose of inducing creativity through the instrumentalism of the market. It is worth noting that this alignment isn't simply because coauthorship provides creators with an independent incentive to collaborate when they otherwise would not have. Such a claim would undermine the idea that coauthorship as a jointly intentional activity is independently motivated at least in part by process-based motivations. Within copyright law's overall structure as an inducement for creativity, coauthorship carves out a limited space for these process-based motivations to thrive, unimpeded by strategic behavior that might itself be encouraged by copyright's overall instrumental orientation. Whether the rules of unplanned coauthorship exacerbate the incentive to collaborate (rather than just preserve it) is of course a separate empirical question.

### C. *Retaking Mutual Intent*

In using the idea of intention to understand works of joint authorship, courts were headed in the right direction. By emphasizing that the touchstone of coauthorship remain the idea of mutual intent, courts were drawing attention to the role of the parties' motivations in creating the work, taken today to be the central premise behind the working of the

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<sup>224</sup> See H.R. Rep. 94-1476, *supra* note \_\_\_, at 120 (noting that even if the pre-existing work were created with an expectation that it would be transformed or adapted into another work, the lack of a "basic intention behind the writing of the work" for it to be integrated renders it a derivative as opposed to joint work).

copyright system. Yet, in employing a set of easy heuristics to decide cases of coauthorship—the “objective indicia”—courts have eventually come to undermine the very reason why copyright law ought to care about parties’ intentions as a normative matter. This Section translates these theoretical insights into prescriptions that courts might fruitfully adopt in applying the rules of unplanned coauthorship, in order to give the idea of mutual intent meaningful analytical content compatible with copyright’s overall utilitarian orientation.

### 1. The Irrelevance of Objective Indicia

Despite courts’ lack of consensus on the nature of intention needed for coauthorship—routinely referred to as “mutual intent”—the idea of intention continues to remain the touchstone of the unplanned coauthorship analysis. Over the years, scholars too have criticized courts’ reliance on the notion of mutual intent, with some suggesting that it be cabined in purely contractual terms, and others recommending its elimination altogether from the coauthorship inquiry.<sup>225</sup>

Understanding mutual intent in purely contractual terms would certainly simplify the concept quite dramatically. All the same, doing so would undermine the very utility of employing mutual intent as an analytical device in copyright law. In the contract law context, mutual intent (determined through objective evidence) enables courts to find the existence of a *consensus ad idem*, or a meeting of the minds, among the contracting parties.<sup>226</sup> As a species of promising, contract law is thought to enable parties to subordinate themselves to each other’s wills, in the pursuit of a common end.<sup>227</sup> The core idea is thus that in so promising, each party subjects himself/herself to the other party rather than the common end in question. This in turn generates an obligation—to the other contracting party—which produces its own set of normative ideals, and behavioral motivations. The obligation to the other party—not the final goal—forms contract law’s exclusive concern, which explains why ideas such as “efficient breach” find little recognition as a doctrinal

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<sup>225</sup> See, e.g., Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 Brooklyn L. Rev. 123 (2002) (arguing that mutual intent should be cabined in contractual terms); LaFrance, *supra* note \_\_, at 255 (arguing for the elimination of mutual intent as the touchstone of coauthorship).

<sup>226</sup> For an overview of this account, see: Max Radin, *Contract Obligation and the Human Will*, 43 COLUM. L. REV. 575 (1943).

<sup>227</sup> See Markovits, *supra* note \_\_, at 1432 (“A promisor therefore intends, within the sphere of the promise, to defer to her promisee and indeed to subordinate her ends to her promisee’s will.”).

matter.<sup>228</sup> Superimposing contract law's ideals and obligations over those of copyright law makes little sense then in the absence of an affirmative account aligning contract law's normative goals with those of copyright law.

Or put another way, recasting mutual intent in terms of parties' contractual obligations makes little sense unless we deem it normatively desirable to treat their reasons for participating in the creative endeavor in the same way we would treat any of their other contractual undertakings, and not in purely instrumental terms as is the case with copyright law's assumptions about creative motivation. To therefore impose the status of coauthors on parties because they are presumed to have contractually agreed to it—as an objective matter—locates the reasons for the imposition on an element of voluntariness associated with consequences rather than on any independent value in the phenomenon of coauthorship or collaborative creativity.

Eliminating mutual intent from the analysis altogether similarly misunderstands the role that it plays. In criticizing the courts' inconsistent approach to the idea, one scholar thus recommends eliminating the idea of intention in favor of a greater scrutiny of each author's contribution to the final work to ensure that he/she made a "substantial copyrightable contribution" to the final work.<sup>229</sup> This approach, she argues, will produce a more "efficient allocation of the economic rewards" associated with the copyright system.<sup>230</sup> What this prescription misses altogether, and rather starkly, is the possibility that in incorporating a reference to intention in discerning coauthorship, copyright law and policy are committing themselves to more than just the normative goals of efficient resource allocation, and to recognizing the diverse origins of the motivation to create works of expression, when such creation entails a collaboration among actors.

In a recent paper examining the interface between collaborative creativity and organizational theory, Anthony Casey and Andres Sawicki suggest that copyright's rules on coauthorship should be seen as solving "team production problems" characteristic of collaborative creativity.<sup>231</sup>

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<sup>228</sup> See, e.g., Craig S. Wakol, Note, *Resolving the Paradox Between Legal Theory and Legal Fact: The Judicial Rejection of the Theory of Efficient Breach*, 20 CARDOZO L. REV. 321 (1998); Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939 (2011).

<sup>229</sup> LaFrance, *supra* note \_\_\_, at 255-56.

<sup>230</sup> *Id.* at 263.

<sup>231</sup> See Anthony J. Casey & Andres Sawicki, *Copyright in Teams*, 80 U. CHI. L. REV. 1683, 1716 (2013).

The problems of observability, verifiability, allocation (of input to output), and uncertainty—that in their analysis accompany collaborative creation—necessitate solutions that “facilitate efficient ownership and control,” the hallmark of team-production firms.<sup>232</sup> While they rightly point to the failings of the current objective indicia based approach, they rather hastily fault the rules of coauthorship for “doing nothing” to facilitate efficient collaborative creativity.<sup>233</sup> The fallacy of their argument however, lies in its complete (and somewhat surprising) neglect of copyright law’s emphasis on intention and its role in the coauthorship inquiry. Not once do they identify, let alone validate, the emphasis that courts have placed on the question of intent. This leads them to rather simplistically conclude that the coauthorship inquiry should just stick to ensuring that each author makes an inseparable or interdependent contribution to the whole, and that it ought to additionally detach the question of authorship from ownership.<sup>234</sup>

In beginning from the premise that copyright law is concerned—exclusively—with creating an efficient ownership framework for creative products, their paper altogether neglects the possibility that it could harbor other considerations and serve additional purposes that originate in the very nature of collaborative creativity, rather than organizational theory. And the current structure of the coauthorship inquiry, with its focus on intention, can be seen as going quite some distance in realizing this. Indeed, if efficient resource allocation were *all* that copyright law cared about, we might have not just different rules for coauthorship but also a very different basic framework for the institution as a whole.<sup>235</sup> The key lies instead in formulating an approach to mutual intent that focuses on the pluralist motivation that is characteristic of collaborative creativity.<sup>236</sup> Before doing so however, it is important to examine how exactly courts’ current approach to mutual intent—through the use of objective indicia—fails the coauthorship inquiry.

The fault with mutual intent lies in the way in which courts have operationalized it. In attempting to steer clear of any reliance on subjective motivations, which they rightly recognized as open to manipulation, courts developing the rules of unplanned coauthorship have emphasized their

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<sup>232</sup> *Id.* at 1718.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 1720-21.

<sup>235</sup> See Balganes, *Normative Structure*, *supra* note \_\_\_, at 456.

<sup>236</sup> For a less extreme critique of the intent requirement in coauthorship, see Zemer, *supra* note \_\_\_, at 644 (describing the problems of unfettered discretion that enter under the rubric of intention but arguing that it remain an element in the analysis, even if not the *sine qua non* of coauthorship).

reliance on an objective standard of intention for the concept of mutual intent. As an idea this move certainly made a lot of sense at the time, especially given the problems with subjective state of mind that have come to be well recognized in other areas of law. Constructing mutual intent as an objective matter then of course necessitated a reliance on circumstantial evidence of the parties' behavior. And to make this process easy, courts came to develop a set of "objective" indicia or proxies, supposedly taken to be indicative of parties' objective state of mind. Therein began the problem.

As courts began to rely on the objective indicia to find the presence/absence of mutual intent, in due course the indicia came to assume a life of their own. Courts deciding cases of unplanned coauthorship began to apply the criteria mechanistically and formulaically, with little regard for the principal purposes underlying their very use. Consequently, in innumerable cases, courts' rote invocation of the indicia seems palpably counter-intuitive to the coauthorship inquiry and makes very little analytical sense, a reality that other scholars have noted as well.

Consider the best known objective indicium that courts use today: the parties' relative "decisionmaking authority" during the creation of the work in question.<sup>237</sup> In general, when one party (the dominant party) retains most or all such control, courts are reluctant to find the work to have been coauthored, despite the magnitude or centrality of the other's contributions.<sup>238</sup> In one well-known case, the Ninth Circuit treated this element as dispositive on the question, and declined to find coauthorship because the dominant author was "not bound" to accept any of the other contributor's recommendations, and such "absence of control [wa]s strong evidence of the absence of coauthorship."<sup>239</sup> As a preliminary matter, it isn't clear what the connection is between the distribution of decision-making authority and the question of coauthorship. Two or more authors can certainly produce a joint work even when one of them is given a complete veto in determining what goes into the final work. Such a veto may merely reflect their relative competence or experience. Indeed, this is fairly well accepted as a norm in the scientific community, where the lead scientist who heads a research laboratory presumably controls the direction of the experiment and the final writing of the publication, but nonetheless shares authorship with others in the facility who contribute to the experiment and participate in the writing of the paper. The default of

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<sup>237</sup> *Thomson*, 147 F.3d at 202-03; *Erickson*, 13 F.3d at 1071-72; *Aalmuhammed*, 202 F.3d at 1235.

<sup>238</sup> *Id.*

<sup>239</sup> *Aalmuhammed*, 202 F.3d at 1235.

‘distributed control’ for coauthorship thus seems blatantly unrealistic, especially when used as an evidentiary matter. Indeed, a close examination of the origins of this indicator reveal that it emerged from courts’ scrutiny of parties’ relative contributions to the work, under the (independently faulty) reasoning that a party contributing peripheral or non-important expression was unlikely to have been seen by the other as a coauthor.<sup>240</sup> The idea of relative contribution gave rise to the use of relative “control” as a proxy for such contribution, which in due course assumed a life of its own.

The same can be said of “the way in which parties bill or credit themselves,” another well-known indicator that courts use in the determination.<sup>241</sup> In situations where one party is credited on the final work as anything but as an author when the work is finalized, courts impute an affirmative intent to the other author to be treated as the sole author, thereby negating a finding of the requisite mutual intent. Once again, this presents multiple problems. First, merely because a contributor is listed as something other than as an author is hardly reflective of the fact that the party consciously intended that contributor *not to* have the *legal* status of a coauthor. The dominant author’s decision to list himself as “author,” “composer,” or “director”, and the other contributor as “dramaturg,” “consultant” or mere contributor is no more than an indication of an intended lack of parity among the parties. Yet, this has little to do with their *legal* statuses as such, which may not have been in contemplation at all. Second, in many situations, such billing/crediting takes place at the end of the entire process, after both parties have made their contributions. The dominant author is thus in a position to deny the other contributor the status of coauthorship as a formal (titular) matter, without risking the latter’s contribution to the project. Using actual billing/crediting as a variable in the inquiry thus does little to alleviate this situation and is susceptible to the same kinds of strategic posturing that courts worry about in the context of using subjective intent, namely, that *ex post* (i.e., during trial) each party has an incentive to reconstruct its past intent in its own favor. Once again, the origins of this variable lie in court’s attempt to discern the parties’ relative contributions to the work to determine coauthorship, and for which they came to use the parties’ self-designated statuses as a proxy. In due course, the determination of these statuses came to be treated as worthwhile on its own, even though as a logical matter it bears little direction connection to the question of coauthorship.

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<sup>240</sup> See LaFrance, *supra* note \_\_, at 229-30.

<sup>241</sup> Thomson, 147 F.3d at 202-03. See also Childress, 945 F.2d at 508.

In short then, while the turn to objective evidence in lieu of subjective motivation may have had its obvious benefits, courts' further use of specific indicators or "indicia" as shortcuts for the process has resulted in the inquiry routinely bearing no direct connection to the underlying question of coauthorship, except in a very attenuated sense. As a result, the inquiry—as undertaken by courts today—does little justice to the way in which the institution of coauthorship, as a collaborative enterprise actually works, and the interface between ends and means that it invariably produces and requires actors to navigate. What the mutual intent inquiry needs, in place of the formulaic objective indicia, is a process that allows courts to grapple directly with the conflicting demands and motivations that collaborators encounter when producing a putative work of joint authorship.

## 2. Mutual Intent as the Search for a Collaborative Impulse

The suggestion that courts eliminate their reliance on objective indicia for the unplanned coauthorship analysis certainly doesn't imply that they should simultaneously avoid all reliance on mutual intent as well. To the contrary, that would be throwing the baby out with the bath water. The insistence that it is contributors' intentions that provides works of joint authorship (i.e., joint works) with their distinctiveness recognizes that these works are accompanied by a shared intentionality during their creation. And as discussed previously, this intentionality consists of a motivation to participate in the creative collaboration in part because of the shared/collaborative nature of the process. We identified this as a process-based motivation that is capable of subsisting within an overall motivation in favor of the final end in question, namely the production of the work itself. Mutual intent should thus remain the touchstone of the unplanned coauthorship inquiry; and should come to be used by courts to look for the presence of the process based motivation previously identified. It should in other words, be a conduit for courts to inquire whether the parties in question were motivated to produce the work by the collaborative nature of the undertaking.

Recall that the intention to participate in the production of a work because of its joint nature, i.e., the joint intention, is underwritten by a commitment to the joint nature of the activity, which in turn produces—at the time of action—a collaborative impulse.<sup>242</sup> The collaborative impulse, in other words, represents the translation of the motivation/intention

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<sup>242</sup> See *supra* discussion in Part \_\_\_\_.

(which is a state of mind) into action, which then results in a particular result, the creative work. As the external manifestation of the motivation, the collaborative impulse forms a viable probative target for assessing whether the production of the creative work was in fact accompanied by the process-based motivation that distinguishes coauthorship as a joint activity. In effect, this converts the search for a mutual intent into the search for a shared intention accompanying the creative process, the hallmark of a joint activity. Recasting mutual intent along these lines makes courts' reliance on it as the *sine qua non* of coauthorship both justifiable and analytically meaningful.

The justification for connecting mutual intent to the collaborative impulse originates in large part from the Copyright Act's own rationale in distinguishing "joint work[s]" from both collective works and derivative works by insisting that a particular *kind* of collaboration be present for works in the first category, as we noted earlier.<sup>243</sup> Yet, the Act and the accompanying legislative history say very little about what exactly it is that the scrutiny of the kind of collaboration is geared towards. Each actor's contribution is required relate to the other's such that they together form an integrated whole, and in addition such integration must have been consciously designed—both in order to preserve the distinct category of joint works. But why? *Qua* works, joint works are treated no differently from other works. They obtain the same set of protections and are subject to the same limitations and exceptions as are non-joint works.<sup>244</sup> *Qua* author, each coauthor also obtains the same rights and privileges as regular authors. Why go to such lengths then and impose additional adjudicative costs on courts in order to carve out an independent category?

The reason seems to lie in the way in which copyright law divides ownership up between the contributing authors. The law in effect imposes a regime of governance between the authors *inter se* owing to the collaborative process through which the work was produced. Imposing this governance regime on creators makes sense only if the distinct form of collaboration that it is premised on itself contributes to the output of creativity, copyright's primary goal. Indeed absent such a reality, coauthorship might legitimately be seen as a countervailing consideration to copyright's overall purpose, an issue adverted to previously. Consequently, using mutual intent to test whether the collaborative process itself contributed to the creative work, i.e., whether the creative process evidenced a collaborative impulse, seems both analytically and

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<sup>243</sup> See *supra* text accompanying notes \_\_\_-\_\_\_.

<sup>244</sup> See 17 U.S.C. §106 (2010).

instrumentally defensible. In short, a court's search for mutual intent must involve asking whether the collaborative impulse played any meaningful role in the production of the work.

How then might courts go about looking for the collaborative impulse and determine its role in the creative process? The obvious first step lies in their undertaking a closer scrutiny of the actual process—of collaboration—through which the work is created. While courts certainly do take notice of the creative process under the current standard (i.e., the objective indicia), they do so primarily to make sure that each party contributed actual expression to the work, rather than mere ideas or other unprotectible material.<sup>245</sup> The scrutiny never extends to discerning or inferring parties' motivations for creativity during the process, and their connection to the parties' relationship. Courts' current form of scrutiny is further muddied by their over-reliance on the objective indicia as ends in themselves rather than as devices through which they understand the collaboration.

The analysis would be best served by a direct examination of parties' incentives during the collaboration, based of course on objective evidence of the creative process. Courts should be looking for evidence of considerations having entered parties' creative behavior, which suggests that the collaboration was providing creators with an impulse of its own for their endeavor.

(a) *Intermeshing Sub-Plans*. — Jointly intentional activities are characterized by each actor undertaking the project at least in part because of the other's involvement and possession of a reciprocally equivalent reason.<sup>246</sup> This is described as an intention held by each actor to perform the activity jointly, where the joint nature of the activity is motivational to the performance rather than merely descriptive. These reciprocal (or mutual) intentions in turn work by generating intermeshing sub-plans, where each actor's steps are in some minimal sense responsive to the other's.<sup>247</sup> In this formulation, the intermeshing sub-plans are a direct manifestation of the shared intention, or evidence of the process-based reasons for the actor's involvement. The search for the collaborative impulse as part of the mutual intent examination should thus look for

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<sup>245</sup> A good illustration of this phenomenon is *Childress*, where the court provides us with an elaborate overview of the collaboration between the parties. *Childress*, 945 F.2d at 502-04. Yet, the Court uses this largely to answer the question of copyrightable contributions. *Id.* at 504-07. The use of this factual information in the analysis of mutual intent is fairly limited. *Id.* at 509.

<sup>246</sup> Bratman, *SCA*, *supra* note \_\_, at 329.

<sup>247</sup> Bratman, *SI*, *supra* note \_\_, at 103-04.

evidence of intermeshing sub-plans during the collaboration between the putative coauthors.

These intermeshing sub-plans can take a wide variety of shapes and forms during the collaboration to produce the copyrightable work of expression. It can range from the two authors working closely to modify each of their own contributions in light of the other's, to two authors working together to co-produce original expression. When two people set out to write a work of fiction and chain together a series of events in the form of a chain-novel, each of their contributions is responsive to the other's, at least in so far as it doesn't directly contradict the other's contribution. Another example of such intermesh is the traditional collaboration between a lyricist and a composer in the production of a musical work, e.g., George and Ira Gershwin; the composer's music is responsive to the lyrics chosen by the lyricist, which are in turn driven at least in some part by the composer's choice of melody, tempo and rhythm.<sup>248</sup> In both situations, each party's contribution to the work is responsive to the other's and is modified reciprocally in an effort to produce an integrated whole. The collaboration thus presumptively generates an additional reason for the creative output.

Very importantly, the intermeshing sub-plans do not have to be at the level of expressive content. In other words, it should be sufficient to establish—in relation to the search for reciprocal motivations—that one author's contributions at the expressive level were influenced and motivated by mere ideas provided by the other, unprotectible under copyright law on their own. While it is certainly true that copyright law and policy care very little about incentivizing mere ideas (or factual collection) through the provision of exclusive rights,<sup>249</sup> ensuring that each author contributes some expression to the joint work already takes place at the first step of the coauthorship inquiry.<sup>250</sup> To bootstrap that requirement into the element of mutual intent would ensure a level of redundancy that ought to be avoided. Additionally, the theory of jointly intentional activities itself doesn't demand such a circumscribed analysis, and

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<sup>248</sup> For a comprehensive account of collaboration in the songwriting process, including a detailed taxonomy of the forms that this might take, see Joe Bennett, *Collaborative Songwriting – The Ontology Of Negotiated Creativity In Popular Music Studio Practice*, J. ART OF RECORD PROD., Issue 5, July 2011, <http://arpjournal.com/875/collaborative-songwriting—the-ontology-of-negotiated-creativity-in-popular-music-studio-practice/>. For a specific study of the collaboration between the Gershwins, see DEENA RUTH ROSENBERG, *FASCINATING RHYTHM: THE COLLABORATION OF GEORGE AND IRA GERSHWIN* (1998).

<sup>249</sup> See 17 U.S.C. §102(b) (2010); 1 NIMMER, *supra* note \_\_, at §2.03[D]; *Mazer v. Stein*, 347 U.S. 201 (1954).

<sup>250</sup> See *supra* text accompany notes 68-73.

recognizes the possibility that sub-plans can manifest themselves at varying levels of abstraction, in relation to outputs. All that matters is that both actors show some meaningful reciprocal motivation, for which intermeshing sub-plans provide the best evidence.

As an illustration, consider two writers—Jack and Mary—who embark on the project of writing a novel together, which they decide will contain eight chapters. Jack begins by writing the first five chapters of the novel. Mary then reads Jack’s chapters and before she begins writing her own chapters, gives Jack some thoughts on where she intends to take the story and develop the characters in it. Based on this feedback, Jack then decides to rewrite significant portions of his three chapters while Mary is working on her five chapters, such that when Jack is finished with his rewrite and Mary with her chapters (assume that Jack has no comments on Mary’s chapters), the novel is essentially done. Unpacking the collaboration in terms of copyright’s rules on coauthorship; we see that both Jack and Mary contributed expressive content to the work. Moving to the element of mutual intent, we can also legitimately infer that both Jack and Mary were reciprocally motivated in the project by the other’s involvement and contributions. Jack’s reciprocal motivation is evidenced in the extensive rewrite that he engaged in, and Mary’s in the reality that her contributions were based on Jack’s own contributions and integrated into it. It is also true that the evidence of Jack’s reciprocal motivation shows that it originated not from Mary’s expressive contributions as such, since at the time of his rewrite Mary was yet to produce any actual expression; but they were principally driven by Mary’s ideas and suggestions communicated at a more abstract level. This ought to matter little, since it remains unambiguously clear that both parties were reciprocally motivated by the collaboration and developed intermeshing sub-plans during the production of the work.

Locating intermeshing sub-plans to discern a collaborative impulse among actors necessitates probing through the creative process with great detail. An obvious question for the jury,<sup>251</sup> parties should be required to present as much data as is available about the collaboration in question: various versions of their contributions (illustrating possible reciprocal modification), correspondence between them (revealing the intermesh), evidence of actual assistance rendered to each other during the production of the work, and any additional evidence indicating that they had chosen to work together on the project because of the belief that their interaction

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<sup>251</sup> See *Sutton Import-Export Corp. v. Starcrest of California*, 762 F. Supp. 68, 70 (S.D.N.Y. 1991) (finding that the question of joint authorship is a question of fact). This isn’t to suggest that the matter may not be decided on a motion for summary judgment.

would produce a better result, i.e., that the final product would be more than just the sum of their individual contributions to it.

(b) *Intermesh Versus Integration*. — The search for intermeshing sub-plans will not be satisfied by the mere integration of the parties' respective contributions into a unitary work. Indeed, such an interpretation would be palpably tautological by collapsing the mutual intent inquiry into a mere examination of whether the contributions were "inseparable" or "interdependent."<sup>252</sup> The intermesh must involve in addition, the basic question of substantiality, since its role is to provide evidence of the fact that one party was motivated to contribute to the work in some meaningful part by the other's reciprocal intention and contribution. If one party makes a fairly minimal contribution, measured in both quantitative and qualitative terms, which does indeed find its way into the final work, it would be accurate to say that the parties' contributions were interdependent and integrated into a unitary whole. Yet, it would be inaccurate to say that they had intermeshing sub-plans that amount to evidence of a collaborative impulse motivating both parties' actions; since the party contributing most of the expression cannot be said—based on such evidence alone—to have been motivated in some meaningful part by the other's minimal contributions. Recall that intermeshing sub-plans entails actors coordinating their behavior in a way that doesn't just produce the common goal in question, but that in addition seeks to realize that goal jointly.<sup>253</sup> Thus when one party contributes minimally to the final work, the mere fact that his/her contribution was integrated into the work does not reflect the level of coordination needed to rise to the level of intermeshing sub-plans.

The extensiveness and significance of the parties' collaboration are thus as important as is the very existence of such collaboration, in searching for the collaborative impulse. The search for intermeshing sub-plans must internalize this reality. This is also not simply the isolated question of finding a substantial (or more than *de minimis*) contribution, since that alone too need not suggest intermeshing sub-plans.<sup>254</sup> Two parties can produce their contributions completely independently, and following such production choose to merge them into a unified whole at the end. In this situation again, while the contributions are certainly

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<sup>252</sup> 17 U.S.C. §101(2010) (definition of "joint work").

<sup>253</sup> See *supra* text accompanying notes 115-19.

<sup>254</sup> Some courts have treated a "substantial and significant contribution" as an independent requirement of the coauthorship analysis. This approach originated in cases decided under the pre-1976 law. See, e.g., *Childress v. Taylor*, 1990 WL 196013, \*5 (S.D.N.Y. 1990); *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 647 (D.C.N.Y. 1970).

substantial and interdependent, they are hardly reciprocally motivated by the collaborative impulse, i.e., neither party's contributions was meaningfully driven in part by the other's contribution. For an intermesh to thus exist and serve as evidence of the collaborative impulse, there must therefore be a collaborative process through which the final work was produced and in which the contributions are integrated; *and* the parties' contributions within that process must be substantial and meaningful so as to be plausibly motivational.

Measuring the substantiality of the sub-plans is not the same as measuring the substantiality of each party's contribution, though the two might often overlap and seem similar. In the latter, the question is simply an examination of what one party produced measured against the final whole, with an eye towards comparing it against the other party's contributions, in an effort to ensure a measure of equity between them. The former however entails examining what each party contributed during the collaboration, not simply to compare it to the other's, but instead to assess whether it might have been valuable enough so as to have an influence on the other part's own contribution. The difference is thus subtle but important, and lies in the purpose behind the inquiry.

Measuring the substantiality of the sub-plans might seem overly subjective, and perhaps contrary to copyright law's basic ideal of "neutrality."<sup>255</sup> Yet it must be remembered that courts routinely undertake precisely such an inquiry as part of the "substantial similarity" analysis, where they examine whether the defendant's copying was quantitatively and qualitatively significant enough to be wrongful, before making a finding of infringement.<sup>256</sup> In a largely similar vein, the question here should thus be whether each party's contribution during the collaboration was quantitatively and qualitatively enough so as to be plausibly constitutive of the other's reasons for producing his/her contributions.

Introducing the idea that the intermesh involves an element of substantiality serves in addition to alleviate a major concern that seems to have influenced courts in their analysis of the coauthorship question, namely that one coauthor might obtain an ownership stake in the work that is disproportionate to his/her contribution to the work.<sup>257</sup> Such

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<sup>255</sup> See, e.g., Keith Aoki, *Contradiction and Context in American Copyright Law*, 9 CARDOZO ARTS & ENT. L.J. 303, 305-7 (1991); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. Cal. L. Rev. 247, 300 (1998).

<sup>256</sup> *Newton v. Diamond*, 388 F. 3d 1189, 1195 (9th Cir. 2004); *Twin Peaks Prods. v. Publ'ns Int'l Ltd.*, 996 F. 2d 1366, 1376-77 (2d Cir. 1993).

<sup>257</sup> See, e.g., *Aalmuhammed*, 202 F.3d at 1235-36.

“overreaching contributor[s]<sup>258</sup>,” who provide insignificant expression during the collaboration would under this formulation be unable to establish any shared intentionality during the production of the work and thus fail to satisfy the requirements of coauthorship.

(c) *Contractualization*. — In addition, courts should also consider evidence of factors that might have the effect of either diluting or strengthening the working of the collaborative impulse as an independent motivation among the parties. One such factor is the contractualization of the parties’ collaborative relationship through the market. It is very often the case involving two collaborators that one of them is being compensated or was hired/commissioned by the other for his/her participation in the creative endeavor. In various contexts, scholars and empiricists have shown that the introduction of market-based motivations into an actor’s reasons for action can have the effect of either diminishing (i.e., “crowding out”) other pre-existing non-market motives, or alternatively of strengthening (i.e., “crowding in”) their influence.<sup>259</sup> This phenomenon is referred to as the “motivation crowding effect.”<sup>260</sup> It thus need not be the case that simply because parties structure their collaboration in contractual terms, they cannot evince a collaborative impulse during their actions. Determining whether the contractualization diminishes or exacerbates the collaborative impulse requires a closer scrutiny of how exactly the parties reacted to the contractual arrangement during their actual collaboration. In some instances, the hired creator may view the contract as delegating the creative endeavor as a whole to her, and requiring her to produce a creative output that is entirely (or for the most part) hers, with any input from the other actor being suggestive at best.<sup>261</sup> In these situations, the contractualization effectively crowds out the collaborative impulse as a motivation and replaces it with its own set of (new) reasons. Yet, in other situations the contract between the parties

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<sup>258</sup> *Id.* at 1235; *Larson*, 147 F.3d at 200.

<sup>259</sup> For early work identifying this idea, see RICHARD M. TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1970). Titmuss’s initial theory has since been empirically investigated by economists and psychologists. For a sample of this work, see: MARK R. LEPPER & DAVID GREENE, *THE HIDDEN COSTS OF REWARD: NEW PERSPECTIVES ON THE PSYCHOLOGY OF HUMAN MOTIVATION* (1978); Edward L. Deci, *Effects of externally mediated rewards on intrinsic motivation*, 18 *J. PERSONALITY & SOC. PSYCH.* 105 (1971); Edward L. Deci et al., *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125 *PSYCH. BULL.* 627 (1999). For a recent survey of these studies, see Bruno Frey & Reto Jegen, *Motivation Crowding Theory*, 15 *J. ECON. SURVEYS* 589 (2001).

<sup>260</sup> Frey & Jegen, *supra* note \_\_\_, at 589-90.

<sup>261</sup> As an example, consider the case of *Childress*, discussed in detail in the next Section. See *infra* Part III.D.1.

may recede into the background once the relationship is brought into existence, after which the creative process takes on a genuinely non-contractual flavor where neither party is seen to be motivated to generate a creative output as a purely contractual obligation.<sup>262</sup> Here, the contract is in effect crowding in and stimulating the collaborative impulse. Consequently, the mere existence of a contract between the parties is hardly probative on its own; but ought to be scrutinized within the context of overall collaboration that ensues from it.

In speaking of the motivation crowding effect here, care must to be taken to avoid the trap of equating the contractualization of the collaboration with the presumptively market-driven nature of the task that the parties are engaged in, namely, the production of a marketable creative output. The effect being considered is simply of exogenous variables influencing the process-based structure of the collaborative impulse, which to be sure is embedded into an overall instrumentalist (and market-based) orientation.

From an evidentiary standpoint, the most obvious puzzle in discerning the presence of a collaborative impulse arises in situations where the parties have agreed in advance contractually, about the nature of their statuses. Two or more collaborators may thus agree contractually that they should be treated as coauthors, or instead that one of them will be the sole author of the work. In these situations, should courts treat the agreement as dispositive on the question of coauthorship? From a purely objective stand point, an agreement between the parties on the question of authorship should have little say on their legal statuses, which depends entirely on their actions, behavior, and motivations during the collaboration.<sup>263</sup> Thus, two creators cannot simply combine their pre-existing works together to create what is in effect a collective work, and then create an agreement claiming to be coauthors of a joint work. Such an agreement, simply put, cannot confer or deny a status that depends entirely on the law and its accompanying legal standard. Yet, functionally the agreement nonetheless remains important.

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<sup>262</sup> As an example, consider the case of *Lappin Charitable Foundation*, discussed in detail in the next Section. See *infra* Part III.D.2.

<sup>263</sup> Some courts seem to take the position, erroneously, that the question of coauthorship doesn't require an objective determination at all if the parties enter into a contract to that effect. *Aalmuhammed*, 202 F.3d at 1234 (“[S]everal factors suggest themselves as among the criteria for joint authorship, in the absence of contract.”) (emphasis supplied). This position implicitly assumes that a valid contract altogether vitiates the need for a specific kind of intention accompanying the collaboration, or indeed that it is dispositive on the question of intention, both of which are clearly not contemplated by the definition of a joint work. Indeed, the absence of the phrase ‘in the absence of a contract’ in that definition is indicative of this. See LaFrance, *supra* note \_\_\_, at 247-48 n.228 (describing the *Aalmuhammed* court’s observation as “troubling”).

While authorship and coauthorship do carry important attributive benefits with them, recall that their primary consequence at least in so far as copyright law is concerned, relates to the ownership/co-ownership interest that they confer. Consequently, while the agreement cannot confer a legal status on parties without an independently determined objective basis for the status, it can nonetheless effect a transfer of ownership between the parties, as long as it is in writing.<sup>264</sup> To see how this might work, consider two creators whose collaboration does not meet the law's requirements for coauthorship, but who enter into an agreement wherein they agree to treat each other as coauthors and share ownership of the work. Now while they may not qualify as coauthors at first and it would have been the case that one of them was the sole author of the work, the agreement nonetheless has the legal effect of transferring part ownership of the work to the other creator, in effect producing a relationship of co-ownership. Similarly, two creators whose collaboration and behavior would qualify them objectively for the status of coauthors (and the work as a joint work) might agree that one of them is to be treated as the sole author of the work and retain all ownership rights over it. Here too, the agreement doesn't simply negate the status of coauthorship that the law recognizes, but as a functional matter, it has the effect of transferring one coauthor's share to the other, creating a situation of sole ownership.

The only situations where the Act contemplates a contractual arrangement *altering* or *conferring* the status of author on a party relates to works made for hire. These are works specially ordered or commissioned by one party as a contribution to another work or collective work in various contexts.<sup>265</sup> The Act however insists that in addition to having such agreements be in writing, the parties must agree "that the work shall be considered a work made for hire" for the status to attach.<sup>266</sup> Once these formalities are complied with, the commissioning/ordering party comes to be treated by the law as both the "author" and owner of the work commissioned or created.<sup>267</sup> Very few simple collaboration agreements/contracts would satisfy this high bar and explicitly identify the

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<sup>264</sup> 17 U.S.C. §204(a) (2010) (requiring transfers of copyright ownership to be in writing).

<sup>265</sup> *See id.* §101 (definition of "work made for hire").

<sup>266</sup> *See id.*

<sup>267</sup> *See id.* §201(b) (discussing ownership of copyright for a work made for hire). *See also* LaFrance, *supra* note \_\_, at 248 n.228 (discussing the work for hire interpretation of such contracts).

work as a work made for hire.<sup>268</sup> Consequently, ordinary agreements cannot have the same effect.

In this sense, an agreement between authors/co-authors isn't dispositive on their statuses in the abstract; yet functionally, it can indeed be important on the question of ownership, which is the principal consequence of their statuses. Perhaps most importantly though, in situations where an express agreement does exist between the parties, the likelihood of a court being called upon to determine coauthorship remains fairly minimal. Consequently, unplanned coauthorship as a doctrine is almost always invoked in situations where no agreement on authorship and ownership exists between the parties in question.

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In summary then, courts applying the rules of unplanned coauthorship and searching for the requisite mutual intent should focus the inquiry around an examination of whether and to what extent the parties were motivated to create the work by the collaborative impulse. This will obviously entail a fine-toothed investigation of the actual creative process in order to discern the parties' motivations therein, and the possibility of intermeshing sub-plans having influenced the final production of the protected work. Yet, the key lies in examining the collaboration on its own terms, detached and unmoored from the simplistic allure of the objective indicia, which bear no direct connection to the analytical and normative foundations of the institution of coauthorship. As it turns out, the courts that did develop the objective indicia were sitting in appeal, and thus had little ability to further elicit information about the creative process. Their impetus to apply the simplifying indicia seems to have been borne out of an urge to avoid grappling with the complexities of collaborative creativity and parties' motivations therein, an impetus that has resulted in the rules of unplanned coauthorship being viewed in copyright jurisprudence as a distinct anomaly.

#### *D. Childress v. Taylor and the Collaborative Impulse*

Having examined the theory behind the collaborative impulse and the ways in which it might be translated into insights for copyright's rules on unplanned coauthorship, this Section moves to illustrating the working of the collaborative impulse using the fact of *Childress v. Taylor*, the

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<sup>268</sup> See 2 PATRY, *supra* note \_\_, at §5:76 (“An agreement that doesn't *expressly* state that it shall be [a] work for hire is insufficient.”). See also 1 NIMMER, *supra* note \_\_, at §6.07[D] (discussing the relationship between joint works and the work made for hire doctrine).

seminal case on coauthorship where the Second Circuit developed the current formulation of mutual intent.<sup>269</sup> While the Second Circuit today receives much of the credit for its ruling, the district court's factual record on the collaborative process is rich in detail, allowing for a nuanced application of some of the principles illustrated in the previous sections.<sup>270</sup>

The work in question was a play about Jackie "Moms" Mabley, a well-known African-American performer.<sup>271</sup> The defendant, Taylor, was an actress who had portrayed Mabley in different plays previously, and had developed an interest in producing a play specifically about Mabley and her life.<sup>272</sup> She approached the plaintiff, Childress, who was a noted playwright, with her idea.<sup>273</sup> Childress at first turned down the idea, since she was busy with other projects. She later however changed her mind and agreed to work on the play, and to have the project completed in under six weeks.<sup>274</sup> While the parties did not have any "firm" contractual agreement in place, Taylor nonetheless paid Childress \$2,500 before the play was actually produced.<sup>275</sup> The parties at the time did not sign an agreement, nor did they specify the work as a work made for hire.

During the creation of the play, Taylor supplied Childress with an extensive amount of research that she had done about Mabley, her life, and connected ideas, all of which she had diligently collected from multiple sources.<sup>276</sup> This research "consisted of phonograph recordings of performances by Mabley, magazine articles, and tapes of interviews Taylor conducted of Mabley's stepson and brother."<sup>277</sup> Childress however was the only one who actually wrote the script for the play.<sup>278</sup> In writing the script, Taylor did however make suggestions to the script: "she suggested a particular scene in the Play, taking place in Harlem; the inclusion of a card game involving the three characters; descriptions of several of Mabley's personal characteristics; jokes used in a scene describing activities in a bar; and a suggestion that a scene be included of Moms performing in blackface."<sup>279</sup> Nonetheless, during discovery the

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<sup>269</sup> *Childress*, 945 F.2d 500.

<sup>270</sup> *Childress v. Taylor*, 1990 WL 196013 (S.D.N.Y.).

<sup>271</sup> *Id.* at 2.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Childress*, 945 F.2d at 503.

<sup>276</sup> *Childress*, 1990 WL 196013 at 2.

<sup>277</sup> *Id.* at 3.

<sup>278</sup> *Id.* at 2-3.

<sup>279</sup> *Id.* at 3.

actual markups of the play as used during the first production were produced before the court, and it was revealed that Taylor had only contributed “one line of script” to the play.<sup>280</sup>

Following the creation of the work, Taylor attempted to enter into a contract with Childress, which would have treated them as co-owners of the play.<sup>281</sup> Childress refused this arrangement and their relationship deteriorated.<sup>282</sup> When Taylor produced another version of the play using another scriptwriter eventually, Childress commenced an action for copyright infringement, during which Taylor claimed to be a coauthor of the work.

As a threshold issue, the facts suggested that Taylor did indeed contribute some minimal amount of expression to the work. As the Second Circuit, interpreting the record noted, Taylor’s assistance involved “furnishing the results of research concerning the life of ‘Moms’ Mabley...[she] also made some incidental suggestions, contributing ideas about the presentation of the play’s subject and possibly *some minor bits of expression*.”<sup>283</sup> The principal issue was thus mutual intent. Recasting mutual intent in terms of the search for a collaborative impulse, we might thus begin by asking whether Childress and Taylor were each motivated to contribute to the work at least in part because of the other’s reciprocal contribution—such that we might say that they were both committed to producing the work jointly.

From the very beginning, Taylor insisted that her research formed the basis of Childress’s writing. As the district court pointed out, the parties “were in frequent telephone communication during [the writing of the script],” with the process best summarized as one where Taylor researched “while” Childress wrote.<sup>284</sup> It is clear that the parties did not form intermeshing sub-plans at the level of expression, a reality borne out by the fact that Taylor does not appear to have contributed adequate original expression to the final work as such. Yet, as we noted earlier, such intermeshing sub-plans can develop when one party is motivated to produce expression based on another’s ideas/research, assuming that each party did at some point make an expressive contribution to the work. The question thus becomes (i) whether Childress was motivated to write the script in any meaningful part by Taylor’s research, suggestions, and ideas,

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<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 3-4.

<sup>283</sup> *Childress*, 945 F.2d at 509 (emphasis supplied).

<sup>284</sup> *Childress*, 1990 WL 196013 at 2.

and (ii) reciprocally, whether Taylor's own contributions were driven in some part by Childress's writing.

The factual record certainly reveals that Childress integrated many of Taylor's contributions into the final script during her writing. As discussed previously though, the mere integration of another's contribution into the final work doesn't *ipso facto* evidence the existence of intermeshing sub-plans that are meant to be motivational to parties' behavior. It is only when the sub-plans underlying the collaboration are substantial enough from both a quantitative and qualitative standpoint that they can be said to genuinely intermesh rather than just integrate. The factual record, and both courts' description of the parties' testimony in the case suggests that the sub-plans, to the extent that they did exist, were neither extensive nor significant in qualitative and quantitative terms. Indeed, the district court went so far as to observe that Taylor's "creative contributions" did indeed "fall far short" of what was needed.<sup>285</sup> Her contributions were thus found to be insubstantial, which weighed on the court, even though it lacked a legal basis for this fact to matter. Even though the Second Circuit did not address the question directly, its opinion leaves little doubt that it engaged in a direct evaluation of Taylor's contributions to the final work, which it described variously as "incidental"<sup>286</sup>, "minor"<sup>287</sup>, and as mere "helpful advice."<sup>288</sup> All of this suggests that while the parties may have indeed developed sub-plans of some kind, these sub-plans were never substantial enough to rise to the level of an actual intermesh that could presumptively be motivational in their actions. The insubstantiality of the sub-plans underlying the collaboration is also borne out in the evidence suggesting that Taylor's particular research direction, approach, and data weren't directly influenced or informed by Childress's actual writing of the play. In other words, Taylor seems to have done this research out of an interest in producing a play about a historical character and a desire that the play exhibit fidelity to that character's life, but not at the behest of, or in furtherance of Childress's own contributions—once again, diminishing the plausibility of a meaningful intermesh.

In addition, the absence of a collaborative impulse is buttressed by the contractualized way in which the parties approached their collaboration. The parties seem to have conceptualized their arrangement

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<sup>285</sup> *Id.* at 5.

<sup>286</sup> *Childress*, 945 F.2d at 509.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

in purely contractual terms, with Taylor offering Childress an upfront payment for script writing.<sup>289</sup> While his doesn't automatically negate the presence of a collaborative impulse,<sup>290</sup> it merits a closer examination of the effects of the formalized relationship on the parties' behavior and motivations. Taylor treated the parties' arrangement as one where she was commissioning a specific work for compensation. Childress for her part produced the expressive component of the work almost entirely in isolation, and seems to have seen her involvement in the process as deriving from an obligation to generate an actual output (with a deadline determined by the other party). Both parties might have certainly been motivated by copyright to create the work, and it certainly appears that Childress was, given that she registered the work immediately upon its creation.<sup>291</sup> Coupled with the absence of any affirmative evidence of a collaborative impulse, the arm's length nature of the parties' contractual interaction further suggests that neither party was motivated to create the work in any part because of the collaboration in question.

While the district court (and later the Second Circuit) had sufficient evidence to focus on the parties' possible motivations, it placed its attention elsewhere. Focusing on the collaborative impulse would have thus required no additional evidence to be presented, nor would it have imposed added adjudicative costs on the court and parties. If anything, it would have given the court an analytical metric through which to scrutinize the evidence that it was presented with.

## CONCLUSION

Hidden within copyright law's principal focus on the individual creator, unplanned coauthorship attempts to carve out analytical space for collaborative creativity as a distinct mode of cultural production. It remains premised on the idea that the collaborative production of creative expression is more than just the sum of each author's individual contribution, and that the creative works which result from such collaboration—joint works—are worthy of being produced and protected as an altogether separate category. Despite this reality, copyright's rules on unplanned coauthorship have thus far received little systematic scrutiny for their compatibility with copyright's goals and purposes, and as

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<sup>289</sup> *Id.* at 503.

<sup>290</sup> *See supra* text accompanying notes \_\_\_-\_\_\_.

<sup>291</sup> *Childress*, 945 F.2d at 502.

introducing an altogether different set of values into the working of the system. Indeed, courts have long considered them to represent something of an anomaly within copyright's utilitarianism landscape, and its dominant theory of creator incentives.

Perhaps the biggest source of confusion with unplanned coauthorship originates in courts' focus on "intention" as the touchstone of the inquiry. Yet, in failing to specify what exactly the search for intent is meant to achieve normatively, in adopting a multitude of conflicting definitions for such intent, and in utilizing a variety of simplistic shortcuts while searching for intent, courts have allowed this focus to come across as largely misguided in approach and mechanistic in application. This has in turn forced some to argue that unplanned coauthorship ought to abandon its emphasis on intention altogether.

In this Article, I have shown that *intentionality* is indeed central to coauthorship as a collective activity, drawing on insights from the philosophy of action. Indeed theories of collective activity and group activity there have long argued that it is a specific kind of intention, referred to as "shared intentionality" that renders such activities distinctive by imbuing actors with an independent motivation to participate in the activity because of its collective/joint nature. Further, such intentions work by providing actors with their own reasons for action—referred to as commitments—that are distinct from ordinary desires, beliefs, and preferences, even though they may often overlap descriptively.

If courts' emphasis on intention during the unplanned coauthorship inquiry is recast in terms of the search for a shared intention among the putative coauthors, the inquiry begins to assume both analytical and normative significance. Unplanned coauthorship comes to be seen as a mechanism for protecting process-based motivations that are endogenous to the collaboration itself, and which influence creative behavior. The search for mutual intent is in effect an examination of the parties' motives during the collaborative endeavor, to ensure that it evinces a commitment to producing creative expression jointly, a hallmark of jointly intentional activities characterized by a shared intention. This reformulation of the inquiry is fully compatible with copyright's utilitarian orientation. It operates as a form of means-oriented instrumentalism that introduces process-based considerations into copyright's framework for inducing creativity.

While scholars are right to criticize current copyright thinking for its single-minded focus on market incentives and rational utility-maximization, the possibility of using unplanned coauthorship as a mechanism for introducing process-based considerations into the system

should serve as an important point of introspection for copyright debates. Perhaps the real problem isn't copyright's simplistic market-focus or its purported commitment to an empirically-unproven theory of incentives; but rather the copyright law-making community's failure to meaningfully integrate new normative considerations and motivational realities into copyright law's existing doctrinal framework through a process of accretive growth within the system. Understanding unplanned coauthorship through the collaborative impulse represents a modest effort in one important area of copyright law where this might occur. Till such time as the "next great copyright act"<sup>292</sup>, changes our very understanding of copyright law and its purposes, thinking creatively and pragmatically about copyright's existing concepts and analytical devices in this vein will continue to remain essential.

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<sup>292</sup> See generally Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 344 (2013) (articulating a framework for a new copyright act and suggesting that "[t]he next great copyright act is as possible as it is exciting").