Case Study: Better Than Ezra v. Bonnecaze

Introduction: This case, involving a lawsuit brought by a former member of the band Better Than Ezra against the band, illustrates a fairly common dispute in the music industry - members (or more often former members of a band) fighting over songwriting ownership. Since music publishing royalties can be a significant source of income, especially since publishing royalties are not subject to recoupment of recording costs and other recoupable expenses (e.g., tour support advances, video production costs, etc.), band members who receive publishing royalties will often make considerably more money than band members that don't. Sometimes band members will have a clear understanding of how songwriting credit and publishing income will be shared, but more often they don't. In the early stages of a band's career, songs recorded by the band are not likely to earn much if any income so there isn't much to argue over. However, if a band becomes successful, this can change dramatically with even one hit single being worth hundreds of thousands of dollars. When large amounts of money are at stake, there is much greater likelihood of disagreements and disputes over song ownership can lead to band members who started out as best friends becoming worst enemies. In terms of copyright law, these types of disputes involve the issue of joint authorship. Sometimes it can be difficult to determine when someone's contribution to a copyrighted work constitutes joint authorship rather than merely contributing uncopyrightable elements.

Watch video of Better Than Ezra's popular song, "Good."

Case Decision:

Better Than Ezra v. Bonnecaze
U.S. District Court For The Eastern District of Louisiana
43 F. Supp. 2d 619 (1999)

This litigation arose out of the dissociation of Cary Bonnecaze from the rock band "Better Than Ezra" ("BTE") and his dissociation from the limited liability company formed by its members. Bonnecaze was the former drummer for the rock band. Bonnecaze brought claims asserting that as a "joint author" of certain Better Than Ezra songs, he is entitled an to an accounting of his share of copyright royalties, profits and benefits derived from the distribution, sale and reproduction of Better Than Ezra songs. Kevin Griffin, Better Than Ezra's lead vocalist and guitarist, contends that Bonnecaze did not author these songs at all, but that Griffin himself was the sole author. At the very least, Griffin argues that Bonnecaze never fixed any alleged contributions to the underlying musical compositions at issue in any tangible medium of expression (a necessity for independent copyrightability).

Griffin's central contention is that he would introduce the basic underlying musical composition to the band members, who would then aid in refining this initial material into the product heard on the sound recordings. Griffin maintains that these initial offerings to the band were sufficient to refute any claims that Bonnecaze may have to joint authorship of the underlying songs. However, Bonnecaze claims that he contributed inseparable and interdependent parts of certain songs, including "harmony, lyrics, percussion and song rhythms, melody and song and musical

structure." Bonnecaze claims that Griffin merely introduced "rough drafts" to the band, who subsequently aided in the creation of the final fixed composition (*i.e.,* the sound recordings).

Griffin has brought this second motion for summary judgment, contending that under the applicable law, Bonnecaze has failed to meet an essential element necessary to prove his claim of joint authorship of the underlying songs; namely, that Bonnecaze never fixed any alleged contributions in any tangible medium of expression prior to the sound recordings (a requisite in showing independent copyrightability). Bonnecaze opposes this motion, claiming that the sound recordings subsequently released as Better Than Ezra songs (*e.g.*, the sound recordings embodied on BTE's "Deluxe" album) were a sufficient means of fixing his contributions to the underlying songs in a tangible medium of expression.

The Court feels that it is necessary to set forth the applicable law on this copyright issue. The Copyright Act defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. §101. The Second Circuit Court of Appeals has indicated that "the touchstone of the statutory definition of a joint work 'is the intention at the time the writing is done that the parts be absorbed or combined into an integrated unit.'" Thomson v. Larson, 147 F.3d 195, 199 (2nd Cir. 1998). Furthermore, although the statute does not define either "inseparable" or "interdependent," the courts have, based in part on the Copyright Act's legislative history, adopted fairly standard definitions. Parts of a unitary whole are considered "inseparable" when they have little or no meaning standing alone. For example, when two authors collaborate to produce one written text, their contributions are inseparable. Parts of a unitary whole are considered "interdependent" when "they have some meaning standing alone but achieve their primary significance because of their combined effect." The lyrics and music of a song are often such interdependent parts. The authors of a joint work are co-owners of the copyright in that work.

A district court in the Fifth Circuit has recently addressed the issue of joint authorship. *Clogston v. American Academy of Orthopaedic Surgeons*, 930 F. Supp. 1156 (W.D. Texas 1996). The court in *Clogston* stated that "while the terms inseparable, interdependent, and unitary whole have relatively clear meanings, the parties disagree about the nature of the intent necessary to create a joint work. Since the Fifth Circuit has yet to delineate a stance on the elements for finding joint authorship under § 101, this Court will follow the excellent analysis of the Second Circuit, most recently outlined in *Thomson v. Larson*, 147 F.3d 195.

In *Childress*, the Second Circuit construed § 101 of the Copyright Act and set forth "standards for determining when a contributor to a copyrighted work is entitled to be regarded as a joint author" where the parties have failed to sign any written agreement dealing with co-authorship. This Court believes that this directly addresses the matter at issue between Griffin and Bonnecaze. The court in *Childress*, while recognizing that the Copyright Act states only that co-authors must intend that their contributions "be merged into . . . a unitary whole," explains further why a more stringent inquiry than the statutory language would seem to suggest is required: "An inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress. For example, a writer frequently works

with an editor who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet very few editors and even fewer writers would expect the editor to be accorded the status of joint author, enjoying an undivided half interest in the copyright in the published work."

This reasoning evidences a desire to limit the claims of "overreaching" contributors. The court in *Thomson* noted that "the potential danger of allowing anyone who makes even a minimal contribution to the writing of a work to be deemed a statutory co-author - as long as the two parties intended the contributions to merge - motivated the *Childress* court to set forth a two-pronged test." Thus, the Second Circuit has held that a "co-authorship claimant bears the burden of establishing that each of the putative co-authors (1) made independently copyrightable contributions to the work; and (2) fully intended to be co-authors." These requirements are an attempt "to strike a balance between 'ensuring that true collaborators in the creative process are accorded the perquisites of co-authorship,' . . . while at the same time, 'guarding against the risk that a sole author is denied exclusive authorship status simply because another person renders some form of assistance.'

As to "independently copyrightable contributions," this Court adopts the holding of *Childress*, whereby collaboration alone was found to be insufficient to establish joint authorship. What is required, however, is that the contribution of each joint author must be independently copyrightable. The court in *Childress* notes that this is the position taken by the case law and endorsed by the agency administering the Copyright Act.

Secondly, this Court must examine the "intent" of the parties. The court in *Thomson* indicates, with regard to the mutual intent requirement, as follows: "*Childress* mandates that the parties "entertain in their minds the concept of joint authorship." This requirement of mutual intent recognizes that, since coauthors are afforded equal rights in the co-authored work, the "equal sharing of rights should be reserved for relationships in which all participants fully intend to be joint authors."

The Second Circuit has not yet explicitly defined the nature of the necessary intent to be co-authors. However, *Childress* and its progeny have provided a good deal of guidance on the issue of intent, which *Thomson* explains in the following passage: "The *Childress* court stated that "in many instances, a useful test will be whether, in the absence of contractual arrangements concerning listed authorship, each participant intended that all would be identified as co-authors." But it is also clear that the intention standard is not strictly subjective. In other words, co-authorship intent does not turn solely on the parties' own words or professed state of mind. ("Joint authorship can exist without any explicit discussion of this topic by the parties."). Rather, the *Childress* court suggested a more nuanced inquiry into factual indicia of ownership and authorship, such as how a collaborator regarded herself in relation to the work in terms of billing and credit, decision making, and the right to enter into contracts. In this regard, the court stated that "though joint authorship does not require an understanding by the co-authors of the legal consequences of their relationship, obviously some distinguishing characteristic of the relationship must be understood for it to be the subject of their intent."

Moreover, the court in *Childress* emphasized that the requirement of intent must be particularly scrutinized where one person exists clearly as the dominant author of the work, and the only real issue is whether that individual is the sole author or whether the individual and another contributor are joint authors. That is precisely the issue we are facing in the Better Than Ezra dispute. It is important to realize that care must be taken to guard against the risk that a sole author is denied exclusive authorship status simply because another person renders some form of assistance. Under *Childress*, it is clear that a specific finding of mutual intent remains necessary. Even a significant contribution to the work by the alleged co-author does not automatically suffice to confer co-author status on that contributor.

As stated above, to proceed with this "intent" inquiry, a court must engage in an examination of the factual indicia of ownership and authorship. Such factors are as follows: (I) the contributor's decision making authority over what changes are made and what is included in a work, (ii) the way in which the parties bill or credit themselves with regard to the work, (iii) any written agreements with third parties, and (iv) any other additional evidence.

One of the elements that must be established by a co-authorship claimant is that each of the putative co-authors must have made independently copyrightable contributions to the work in question. In holding that the contribution of each joint author must be copyrightable (as opposed to requiring that only the combined result of their joint efforts must be copyrightable), the Court in *Childress* reasoned as follows: The insistence on copyrightable contributions by all putative joint authors might serve to prevent some spurious claims by those who might otherwise try to share the fruits of the efforts of a sole author of a copyrightable work, even though a claim of having contributed copyrightable material could be asserted by those so inclined. More important, the prevailing view strikes an appropriate balance in the domains of both copyright and contract law. In the absence of contract, the copyright remains with the one or more persons who created copyrightable material. Contract law enables a person to hire another to create a copyrightable work, and the copyright law will recognize the employer as "author." 17 U.S.C. §201(b). Similarly, the person with non-copyrightable material who proposes to join forces with a skilled writer to produce a copyrightable work is free to make a contract to disclose his or her material in return for assignment of part ownership of the resulting copyright. And, as with all contract matters, the parties may minimize subsequent disputes by formalizing their agreement in a written contract. It seems more consistent with the spirit of copyright law to oblige all joint authors to make copyrightable contributions, leaving those with non-copyrightable contributions to protect their rights through contract.

The actual test utilized for determining copyrightability has been derived by most courts from Professor Paul Goldstein's copyrightability subject matter test. In part, Professor Goldstein's test provides that "[a] collaborative contribution will not produce a joint work, and a contributor will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright." The court in *Erickson* agreed that the language of the Copyright Act supports the adoption of the copyrightability requirement. The court concluded as follows: Section 101 of the Act defines a "joint work" as a "work prepared by two or more authors." To qualify as an author, one must supply more than mere direction or ideas. An author is "the party who actually creates the work, that is, the person who translates an

idea into a fixed, tangible expression entitled to copyright protection." Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989).

The court further explains that the copyrightability subject matter test, in furthering the principles behind the Copyright Act such as creativity, the unhindered exchange of ideas, and predictability, "excludes contributions such as ideas which are not protected under the Copyright Act. *17 U.S.C. §102(b)* ('In no case does copyright protection for an original work of authorship extend to any idea . . . embodied in such work.')." In other words, helpful guidance, ideas, and contributions to a work are insufficient under this test, unless, among other requirements, those things have been fixed in a tangible form of expression.

In another supportive case, *Cabrera*, 914 F. Supp. at 766, the court held that ideas or non-tangible contributions are not copyrightable. Here, a purported author of a play brought a copyright infringement action against members of a theatre company, alleging that the company was performing the play in violation of his authorship rights. The court noted that the only evidence presented tended to indicate that some of the members of the company provided phrases, lines for the dialogue of the characters and perhaps the lyrics. However, none of the members, except for one, was capable of identifying specific portions of the script that could have been written by them. The court, in adopting the copyrightability test endorsed above, held that the members who could not specifically identify their contributions had failed the copyrightability test. The court stated as follows: Whether or not these defendants actually contributed concrete ideas (which are not copyrightable) that were included in the final product or served merely as "sounding boards" is in fact irrelevant in view of the applicability the "copyrightability test." These defendants have not introduced evidence which indicates to the court that they contributed something copyrightable as the "tangible expression of an idea," in accordance with the purpose of the Copyright Act. Absent this showing, these defendants cannot be held to be co-authors of the play. Having determined the lack of copyrightable contributions of these defendants, the Court need not address the element of intent. Even though these defendants had no copyrightable contribution, there is no doubt however, that they did work and assisted "by giving the best of them" in enhancing the contents and quality of the final work.

Regarding the one member of the company ("Molina") whom the court found did not fail the copyrightability test (although the court eventually found that this individual failed the "intent" requirement for joint authorship), the court held that she had clearly contributed something that had been fixed in a tangible form of expression. Molina had written the initial script for the first act of the play and that script had been "substantially utilized and incorporated in the final version of the play." Moreover, Molina was able to clearly identify her initial manuscript and a revised copy of the first act, contributions fixed in a tangible medium that had obviously found their way into the final version of the play. Molina was distinguished from the other members, in that, although they all claimed contributions of ideas, etc., she was the only one who created some tangible work to point to that eventually ended up in the final version of the play.

In the suit at issue, Bonnecaze claims that he presented valuable contributions to Griffin and the rest of the BTE band in "working up" the songs. Moreover, Bonnecaze claims that these contributions were eventually fixed in a tangible form of expression when the band (including

Bonnecaze) created the sound recordings of the underlying songs. However, Bonnecaze confuses the applicable copyright rules here. Bonnecaze has yet to produce any evidence that any alleged contributions that he made to the underlying songs were ever fixed in a tangible form of expression. Bonnecaze's contributions to the sound recordings are not in dispute. He clearly has a copyright to his contributions that were fixed in the sound recordings. The problem lies in the distinction between the underlying songs and the sound recordings.

Sound recordings and the underlying musical compositions are separate works with their own copyrights. In one case distinguishing the copyrighted musical compositions of "Ol' Man River," written by Jerome Kern and Oscar Hammerstein II, from the sound recording of that composition performed by Frank Sinatra, the court delineated the differences between an underlying musical composition, a sound recording and a phonorecord. *T. B. Harms Company v. JEM Records*, 655 F. Supp. 1575 (D.N.J. 1987). There the court stated as follows:

> A sound recording as copyrightable subject matter must be distinguished from the copyrighted literary, musical or dramatic work embodied in the sound recording and fixed on a phonorecord. When a copyrighted song is recorded on a phonorecord, there are two separate copyrights: one on the musical composition and the other in the sound recording. The sound recording is the aggregation of sounds captured in the recording while the song or tangible medium of expression embodied in the recording is the musical composition. Thus, the rights of an owner of a copyright in a sound recording do not extend to the song itself. A copyright in the recording and in the song are separate and distinct and by statute are treated differently.

The Copyright Act defines sound recordings as: "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords in which they are embodied." *17 U.S.C. § 101*. Pursuant to this distinction, the rights of a copyright in a sound recording do not extend to the song itself and vice versa.

Phonorecords are "material objects in which sounds . . . are fixed by any method . . . and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or a device." *17 U.S.C. § 101*. An example of a phonorecord in our case would be the "Deluxe" CD of "Better Than Ezra" that one could purchase at a music store.

A sound recording must be distinguished from, on the one hand, the material object on which the sound is recorded, and, on the other, the underlying musical composition that is recorded and transposed into aural form by the sound recording. The sound recording copyright does not attach to the underlying work *per se*, but only to the aural version of such work as fixed on the material object. A sound recording is, in this sense, a derivative work. Thus, the originality that may be claimed in a given musical work will not in itself constitute the originality necessary to support a copyright in a sound recording of such musical work.

In the case at issue, BTE and its individual members concede that Bonnecaze has copyright interests in the sound recordings of the songs that he played with the band. However, the defendants correctly contend that a copyright of the sound recordings is separate and distinct from the copyright of the underlying musical composition. While Bonnecaze claims that he contributed ideas and helpful insights in "working up" the songs introduced to the band by Kevin Griffin, Bonnecaze has failed to supply the court with any evidence which could lead a rational trier of fact to find that Bonnecaze had ever fixed those contributions into a tangible form of expression. The sound recordings of the songs cannot serve as the tangible form required for Bonnecaze to meet the independently copyrightable test required for proving joint authorship. Bonnecaze has not indicated to the Court why he should be included as a joint author of these underlying songs. If Bonnecaze had wished to share in the fruits of Griffin's "rough drafts," then Bonnecaze had either to satisfy the requirements of joint authorship (which he has failed to do) or to contract with Griffin for a portion of the royalties. This Court cannot come in now and bestow those rights upon Bonnecaze. Such a ruling would be in contravention of the purposes of the Copyright Act and the well-reasoned requirements for joint authorship.

Discussion Questions:

1. Under the concept of joint authorship of copyright law as discussed in the Better Than Ezra case, if two individuals compose a song, with each contributing to both the music and lyrics, is the result a joint work? Is the result any different if one person writes the lyrics while the other person composes the music? Explain your reasoning based on the applicable law.

2. Uncopyrightable elements of a copyrighted work such as a title can certainly be important. Although copyright law dealing with joint authorship does not consider uncopyrightable contributions to a work to be sufficient for joint author status, how does the law allow for the recognition of the importance of uncopyrightable elements?

3. One of the cases the court refers to (*Cabrera*) involved several cast members of play who claimed to be co-authors. Although the court found that all but one had not contributed a copyrightable contribution, it was clear that one member (Molina) had contributed a substantial copyrightable contribution (i.e., the initial script for the first act of the play). Even so, Molina was held not to be a joint author.

(a) Why did the court decide that Molina was not a joint author?

(b) Do you think this is a good result? Why or why not?

4. The court notes the importance of distinguishing between the copyright in a song and the copyright in a sound recording of that song and further notes that an author of a sound recording is not necessarily also an author of the underlying song. The court consequently concludes that Bonnecaze, although a co-author of the Better Than Ezra sound recordings, was not a co-author of the songs since he did not fix his contributions in tangible form prior to the creation of the sound recordings. Does it make practical sense to require that a co-author must fix his/her contribution to a joint work in tangible form prior to collaboration with a co-author? How would

this be likely to affect co-authorship relationships?

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