

Case Study: Brown v. Flowers

Introduction: This case deals with the often complicated area of [joint authorship](#) of copyrighted works. It also shows that even judges can sometimes disagree on how copyright law should be applied to specific situations. In this case, two of three [appellate court](#) judges agreed with the [district court's](#) decision dismissing the [plaintiff's](#) claim that he is a joint author/owner of the copyright in certain sound recordings. The third judge disagreed with most of the majority's decision and therefore wrote a partially [concurring](#) and partially [dissenting](#) opinion. Although the majority decision is the only one that counts legally, it is the dissenting opinion that is most interesting since it examines the role of engineers and producers in the creation of sound recordings and addresses the issue of whether contributions of engineers and producers can constitute joint authorship of sound recordings.

Case Decision:

Eli Brown III v. Michael C. Flowers, a/k/a Mike City
U.S. Court of Appeals for the Fourth Circuit
No. 05-2177 - Unpublished opinion; Decided: July 28, 2006

Eli Brown, III (Plaintiff) sued Michael Flowers, aka [Mike City](#) (Defendant) for violation of the [Copyright Act of 1976](#) (the Copyright Act) [and various state law claims not included in this edited decision]. [Defendant](#) moved to dismiss the entire complaint. Although the district court granted dismissal of Plaintiff's federal copyright claim, it allowed Plaintiff's remaining state law claims to proceed. Defendant subsequently moved for [summary judgment](#) on the remaining state law claims, which motion the district court granted.

On appeal, Plaintiff challenges the district court's dismissal of his federal copyright claim. Our review of the district court's dismissal of the Plaintiff's federal copyright claim focuses only on the legal sufficiency of the complaint. A complaint need not "*forecast evidence sufficient to prove an element*" of the claim. Rather, the complaint need only allege facts sufficient to state the substantive elements of the claim.

In reviewing a district court's grant of summary judgment, we must construe the facts in the light most favorable to the non-moving party, here, Plaintiff. Having thoroughly reviewed the district court's opinions and the parties' briefs and submissions on appeal, and having heard oral argument in this case, we conclude that the district court did not err in granting dismissal of Plaintiff's federal copyright claim. We, therefore, affirm on the reasoning of the district court.

Finally, we are compelled to respond to two points made by the dissent. First, even assuming, as the dissent would recognize, that an individual who, in collaboration with another, provides a substantial original contribution to a copyrightable work qualifies for authorship status in the joint-work context of the Copyright Act, Plaintiff's complaint fails to state a copyright claim in the joint-work context. Contrary to the dissent's assertion otherwise, Plaintiff's complaint does not allege "that he made significant engineering contributions in producing Flowers's R&B recordings." In fact, Plaintiff's complaint lacks even a single allegation that he made any creative, original, or expressive contribution to the song recordings at issue. Rather, at most, Plaintiff's complaint generically alleges that he acted as a recording engineer and

producer of the songs at issue. In an attempt to morph this generic allegation into one of significant creative contribution able to withstand Defendant's Rule 12(b)(6) motion, the dissent relies upon Plaintiff's detailed explanations in his appellate briefs regarding the substantially creative role that a recording engineer and producer plays in recording a song of the rhythm and blues genre. Clear precedent requires that the allegations to be considered in ruling on a Rule 12(b)(6) motion be alleged in the complaint, with no exception for consideration of embellishments and explanations offered in an appellate brief. In conclusion, we affirm.

GREGORY, Circuit Judge, [concurring](#) in the judgment in part and [dissenting](#) in part:

This case presents a novel question of federal copyright law. Nevertheless, the majority adopts the cursory reasoning of the district court in upholding that court's dismissal of Eli Brown's federal copyright claim, and its grant of summary judgment as to Brown's remaining state law claims. Because I cannot agree with that reasoning or the results reached by the district court with respect to the copyright claim and several of the state law claims, I dissent in part.

Brown and Michael Flowers met in Durham, North Carolina, in the late 1980s, while Flowers was studying music at North Carolina Central University. In 1989, Flowers hired Brown to be his manager, and the parties continued under that arrangement until 1992, when Flowers moved to Atlanta, Georgia. In 1995, shortly after Flowers moved back to Durham, he and Brown formed a partnership, which they later named "Hectic Records." According to Brown, the partners endeavored (1) to produce low cost 12" vinyl recordings for play in clubs; (2) to provide engineering and remixing services to other recording artists; and (3) to market Flowers's songwriting talents and Brown's engineering and production skills to established recording artists. Brown later suggested to Flowers that the partners expand the scope of their original business plan to include recording R&B songs and selling them to other artists. According to Brown, the parties agreed to divide the proceeds derived from these undertakings equally.

Over the course of the next four years, Brown and Flowers continued their Hectic Records partnership. For the most part, they achieved only modest success. In 1996, the partnership recorded an album for the group "Lost Souls." Brown worked on the production and engineering responsibilities for the album, while Flowers focused on marketing. Flowers ultimately signed a distribution deal with Ichiban Records to distribute the Lost Souls album. Unfortunately for the Hectic Records partnership, the album was not a commercial success.

At the same time Brown and Flowers were working on the Lost Souls album, Flowers, with Brown's assistance, recorded hundreds of demo R&B songs in Brown's Durham studio. Although it is undisputed that Flowers composed and performed initial versions of many of these songs on his personal recording device called an "iDAC," Brown contends that Flowers invariably brought copies of his unrefined iDAC recordings to Brown's Durham studio. On these occasions, Brown, in his capacity as a sound engineer and producer, added riffs and beats in compiling a master recording. In so doing, Brown was responsible for establishing tempo, ambiance, echo, reverberation, treble, bass, frequency, gain, bandwidth, distortion, and equalizing, all of which, he argues, are distinctive and essential elements of R&B recordings.

According to Brown, in 1999, Flowers traveled to New York and New Jersey ostensibly to promote songs that the partners had recorded under their Hectic Records label. During this trip, Flowers arranged to distribute one of the songs that Brown had engineered and produced, entitled "[I Wish](#)," to [Carl Thomas](#) and producer [Sean "Puffy" Combs](#). Thomas eventually

re-recorded “I Wish” in New York and included it on an album that went on to achieve platinum status.

By the end of 1999, Brown learned that “I Wish” was getting significant air-time on radio stations in the New York area. According to Brown, when he confronted Flowers with his discovery, Flowers admitted that he had sold a couple of songs to Carl Thomas, but reassured Brown that he “could expect a check from Puffy Combs.” Despite this assurance, Brown never received the promised check. During a subsequent conversation, Flowers expressed his desire to terminate the partnership and told Brown that he would never receive proceeds from the sale of “I Wish.”

After dissolving the Hectic Records partnership in 1999, Flowers moved to California with copies of several master recordings that he and Flowers had produced in Durham. At some point thereafter, Flowers applied for and received copyright registrations for these recordings. According to Brown, Flowers subsequently licensed these recordings to other artists, who, in turn, made re-recordings. As of this appeal, Flowers resides in California, where he works for Warner-Chappell Music as a song writer.

In 2002, Brown filed suit against Flowers in the Middle District of North Carolina under the Copyright Act of 1976, 17 U.S.C. § 101 et seq. In support of his copyright claim, Brown asserted alternative theories of recovery. Brown contended that, by operation of the work-for-hire provision of 17 U.S.C. § 101, he was the exclusive owner of the copyrights in the recordings, and, accordingly, that Flowers had infringed on his copyrights. Alternatively, Brown asserted that he and Flowers were joint owners of the copyrights, and, therefore, that he was entitled to share in the royalties derived therefrom.

Flowers filed a motion to dismiss the copyright claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion in its entirety, concluding that Brown could not establish ownership rights in the copyrighted songs. Brown timely appealed, contending that the district court erred in dismissing his copyright claim. As discussed below, I conclude that the district court erred in dismissing Brown’s copyright claim.

I begin with the district court’s dismissal of Brown’s federal copyright claim. As a threshold matter, we must examine the nature of the copyrights at issue. “Copyright protection extends to two distinct aspects of music: (1) the musical composition, which is itself usually composed of two distinct aspects--music and lyrics; and (2) the physical embodiment of a particular performance of the musical composition, usually in the form of a master recording.” *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 61 (D.D.C. 1999).

Brown concedes that Flowers composed the music and lyrics for the recordings at issue. Accordingly, he does not dispute that Flowers had the exclusive right to copyright compositions that embodied these elements, had he chosen to do so. Brown contends, however, that Flowers copyrighted and subsequently licensed to other artists the physical embodiments of those compositions--i.e., the master recordings that Brown had engineered and produced - instead of merely copyrighting his raw compositions. Indeed, Brown asserts that “the only media in which any copyright has been fixed in connection with this case, as is common with ‘R&B’ music and the beats and riffs they contain,” are the master recordings. In support of this argument, Brown contends that re-recordings made by other artists contain beats and riffs that are similar or virtually identical to the beats and riffs that Brown had incorporated into Flowers’s iDAC compilations.

Brown first claims that the recordings at issue are works for hire and that he is the sole

owner of the copyrights in those works. Thus, Brown contends that Flowers is liable to him for infringement. As the district court correctly concluded, however, Brown has not alleged that Flowers was his employee or that he specially commissioned Flowers to record songs for him. To the contrary, the central allegation in Brown's complaint is that he and Flowers were business partners who jointly endeavored for the success of their Hectic Records label. Thus, the district court correctly concluded that Brown had not alleged ownership under work-for-hire doctrine.

I believe that the district court erred in reaching a similar conclusion with respect to Brown's joint-work theory. Brown argues that the master recordings constitute joint works, for which he made an original contribution as a sound engineer and producer. Specifically, Brown contends that these recordings constitute a compilation of Flowers's lyrical and musical contributions and his engineering and production contributions. Brown alleges that, by virtue of his and Flowers's collaborative efforts, the former partners own equal and undivided interests in the copyrights of their joint works--the master recordings. Thus, Brown asserts that he has the right to an equal share of the profits derived therefrom.

A "joint work" under the Copyright Act is one "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 language of the statute, therefore, provides that for a work to be a "joint work," there must be (1) a copyrightable work, (2) two or more "authors," and (3) a mutual intent of the authors to merge their work. The parties do not dispute that the first requirement is satisfied. Therefore, the dispositive inquiry focuses on whether Brown has sufficiently alleged authorship and mutual intent.

Because the statute does not define the term "authors," two competing interpretations have emerged. The significant issue that distinguishes these two interpretations is whether a joint-work claimant must have contributed material that, standing alone, would be entitled to copyright protection, or whether only the combined result of the parties' efforts must be copyrightable.

The Second and Ninth Circuits have espoused the former interpretation, requiring a joint-work claimant to demonstrate that his contribution was independently copyrightable. See *Childress*, 945 F.2d at 507 ("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 contracts.").

Applying this standard, the Second Circuit in *Childress* concluded that an actress who had taught the playwright about her true-life character's career was not an author of the play. Similarly, in *Aalmuhammed*, the Ninth Circuit rejected the contention that the plaintiff, an Islamic scholar who had consulted with director Spike Lee during the filming of the movie *Malcolm X*, qualified as an author. 202 F.3d at 1236. In so doing, the court in *Aalmuhammed* announced that "[a] creative contribution does not suffice to establish authorship of a movie."

Professor Nimmer argues against a requirement that a contribution be independently copyrightable, primarily on the grounds that it is not supported by the plain language and legislative history of 17 U.S.C. § 101. Nimmer § 6.07[A][1].

Because the statute does not provide an express definition for the term "author," I would "construe this statutory term in accordance with its ordinary or natural meaning." As it is understood in this context, the word "author" refers to a person "who is the source of some form of intellectual or creative work." Webster's Third International Dictionary 146 (2002). An "author" is further defined as "one that originates, makes, or gives existence," or "one that brings

about or is the efficient cause of an action.” Id. Thus, the term “author” merely connotes some significant form of original expression made in connection with an artistic endeavor.

The legislative history further undermines the notion that authorship, as it is understood in the joint-work context, requires an independently copyrightable contribution. The House Report accompanying the Copyright Act of 1976 provides:

[A] work is joint if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as “inseparable or interdependent parts of a unitary whole.” The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit . . .H.R. Rep. No. 94-1476, at 120 (1976).

As Professor Nimmer notes, the legislative history “elevates intention as the touchstone, without placing any further parsing as to the copyrightable status of each individual component that the parties intended to contribute to the work as a whole.” According to Professor Nimmer, the contributions of putative joint authors do not have to be equal, “either quantitatively or qualitatively, in order to constitute them as joint authors.” Although Nimmer recognizes that the contribution of each must be more than “de minimus,” he takes the position that an interpretation of authorship as requiring an independently copyrightable contribution is overly restrictive and potentially inequitable. In support of this interpretation, Nimmer posits the following hypothetical:

[I]f authors A and B work in collaboration, with A contributing sparkling plot ideas and B weaving them into a completed screenplay, it cannot be doubted that both have made more than a de minimus contribution to the resulting script. On that basis both A and B should be considered joint authors of the work, even though, standing alone, plot ideas may not be copyrightable.

With its recent decision in *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004), a panel of the Seventh Circuit adopted Nimmer’s interpretation of authorship. The facts of that case were as follows. The defendant, the creator and illustrator of a faltering comic book series, invited the plaintiff to write a script for one issue. Subsequently, the plaintiff wrote a script in which he introduced three new characters to the series. Based on the plaintiff’s verbal description of the characters and his written dialogue, the defendant drew these characters into the series. Thereafter, the plaintiff brought suit, contending that he was entitled to an ownership interest in the copyright by virtue of the joint-work provision. With respect to the authorship requirement, Judge Posner recognized that although a contribution of “some original expression” is required for authorship status, he rejected the notion that such contribution must always be independently copyrightable. In so doing, Judge Posner reasoned as follows:

But where two or more people set out to create a character jointly

in such mixed media as comic books and motion pictures and succeed in creating a copyrightable character, it would be paradoxical if though the result of their joint labors had more than enough originality and creativity to be copyrightable, no one could claim a copyright. That would be peeling the onion until it disappeared. The decisions that say, rightly in the generality of cases, that each contributor to a work must make a contribution that if it stood alone would be copyrightable weren't thinking of the case in which it couldn't stand alone because of the nature of the particular creative process that had produced it. *Id.* at 660.

Applying this logic, the court concluded that the plaintiff's creative contribution to the comic book series, although not independently copyrightable, was sufficient to accord him authorship status.

Thus, as it stands today, there is a division of authority as to whether a joint-work claimant must make an independently copyrightable contribution in order to satisfy the authorship requirement. As noted above, our court has never addressed this issue, and, therefore, the district court had to determine which approach to follow. After briefly identifying the lead cases from the Second and Ninth Circuits, and without discussing the contrary view of Professor Nimmer and Judge Posner, the district court determined (1) that an allegation of an independently copyrightable contribution was required to show authorship and (2) that Brown had failed to make such an allegation. I disagree with both conclusions.

First, I disagree that an independently copyrightable contribution is always required to show authorship. As Professor Nimmer has recognized, "copyright's goal of fostering creativity is best served . . . by rewarding all parties who labor together to unite idea with form, and that copyrightable protection should extend both to the contributor of the skeletal ideas and the contributor who fleshes out the project." Nimmer § 6.07[A][3][a].

Accordingly, I would recognize that an individual who, in collaboration with another, provides a substantial original contribution to a copyrightable work satisfies the authorship requirement, regardless of whether his contribution, standing alone, would be individually copyrightable. Although this standard necessarily entails a more exhaustive assessment of the respective contributions of the parties and the particular media at issue, I believe that it is a more thorough and equitable approach. Because Brown has alleged that he made significant engineering contributions in producing Flowers's R&B recordings, he has satisfied this less stringent authorship standard.

However, even assuming that the district court correctly surmised that this court would adopt the approach of the Second and Ninth Circuits to require an independently copyrightable contribution, the district court failed to recognize that the allegations in Brown's Complaint satisfy this more stringent authorship standard. Brown alleges in his Complaint that he acted as recording engineer and producer of the master recordings. As explained below, the few district courts to have addressed the authorship requirement within the specific context of the music recording industry have recognized that substantial engineering and production contributions accord authorship status. In *JCW Investments, Inc. v. Novelty Inc.*, 289 F. Supp. 2d 1023 (N.D. Ill. 2003), the district court noted that "[a] record producer may be an author when he or she is 'responsible for setting up the session, capturing and electronically processing the sounds, and

compiling and editing them to make a final sound recording.” Id. at 1032(quoting H.R. Rep. No. 94-1476, at 56 (1976)). Similarly, in *Morrill v. J.M. Productions*, 157 F. Supp. 2d 1120, 1122 (C.D. Cal. 2001), the district court noted that the plaintiff’s contributions in producing and editing a music video satisfied “the requisite level of copyrightable expression necessary to support a claim of joint authorship.” Even though the joint-work claimant in *Morrill* had not composed or performed the lyrics, the court nevertheless recognized that his contributions in producing, engineering, and editing the music video constituted a significant original contribution, such that he should be deemed an author of that work.

As noted above, Brown alleges that, in his capacity as an engineer and producer, he compiled master recordings of Flowers’s performances. In that role, Brown explains that he was responsible for selecting and incorporating tempo, ambiance, echo, reverberation, treble, bass, frequency, gain, bandwidth, distortion, and equalizing, all of which, he argues, are distinctive and essential elements of R&B recordings. Thus, accepting Brown’s allegation as true, I conclude that Brown satisfies the authorship requirement for a joint work.

In addition to satisfying the authorship requirement, a joint-work claimant must demonstrate that both parties intended their contributions be “merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101. As the Second Circuit recognized in *Childress*, parts of a unitary whole are inseparable “when they have little or no independent meaning standing alone.” Parts of a unitary whole are interdependent “when they have some meaning standing alone but achieve their primary significance because of their combined effect, as in the case of words and music of a song.”

As the Second Circuit recognized in *Childress*: 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. Further, “since co-authors 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.’” *Thomson v. Larson*, 147 F.3d 195, 201 (2d Cir.1998) (quoting *Childress*, 945 F.2d at 509). In *Thomson*, the Second Circuit recognized that an important indicator of the parties’ intent is whether a joint-work claimant has “decisionmaking authority” over the substance and form of a work. Id. at 202-03.

The court in *Thomson* also recognized that the way in which the parties hold themselves out to third parties is also significant. Finally, the court noted that the parties’ written agreements with each other provides insight into whether they intended to create a joint work. To determine whether the parties intended to create a joint work, the Ninth Circuit has suggested its own three criteria: (1) whether the putative co-author exercises some measure of control over the venture; (2) whether the parties make objective manifestations of their shared intent to be co-authors; and (3) whether the audience appeal of the work is attributable to the contributions of both parties. Although each of these factors should be considered, “[c]ontrol in many cases will be the most important factor.”

Thus, applying the requirements of the Second and Ninth Circuits, I recognize that Brown had to allege: (1) that he had significant decisionmaking authority over the form and substance of the master recordings; (2) that he and Flowers made objective manifestations of their intent to be co-authors to each other and to third parties; and (3) that the audience appeal of the master recordings was attributable to the contributions of both parties.

Because Brown alleges that he served as the engineer and producer of the master recordings, I conclude that he had significant decisionmaking authority over the substance and form of the master recordings. Thus, Brown satisfies the first requirement. Second, as to Brown's allegations that the parties collaborated over a period of four years in recording demo R&B songs under their Hectic Records partnership label and in attempting to distribute those recordings to third parties under that label, I conclude that Brown has sufficiently alleged that the partners made objective manifestations of their intent to be co authors. Finally, because the audience appeal of R&B songs is attributable in large measure to their underlying riffs and beats, which, invariably, are incorporated into those songs by recording engineers and producers, I conclude that Brown's allegations satisfy the third requirement. Accordingly, the district court erred in concluding that Brown's allegations did not satisfy the mutual intent requirement.

In sum, applying Brown's factual allegations to the statutory requirements of authorship and intent, I conclude that Brown has stated a claim under the joint-work provision of 17 U.S.C. § 101. Accordingly, I would vacate the district court's Rule 12(b)(6) dismissal of the copyright claim and remand for further proceedings.

Questions:

1. To have a joint work, most courts believe that each contributors must make a contribution to the work that is independently copyrightable (separate from any co-contributors' contributions). However, the dissenting opinion argues that all that should be required is that the combined result of the parties contributions must be copyrightable. Which do you think is the better rule and why?
2. What does the dissenting judge believe should be the test for determining joint authorship? Do you think this would be a suitable test? Why or why not?
3. Under the majority decision (which is the rule recognized by most courts), do you believe that an engineer's contribution to a sound recording will usually be sufficient to give the engineer joint author status? Why or why not?