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# An Idea of Authorship: Orson Welles, *The War of the Worlds* Copyright, and Why We Should Recognize Idea-Contributors as Joint Authors

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AN IDEA OF AUTHORSHIP:  
ORSON WELLES, *THE WAR OF THE  
WORLDS* COPYRIGHT, AND WHY WE  
SHOULD RECOGNIZE IDEA-  
CONTRIBUTORS AS JOINT AUTHORS

*Timothy J. McFarlin*<sup>†</sup>

ABSTRACT

Did Orson Welles co-author the infamous *War of the Worlds* broadcast? The Ninth Circuit Court of Appeals has told us no, primarily because he only contributed the idea behind the broadcast, and ideas alone can't be copyrighted. "An Idea of Authorship" challenges this premise—that ideas, no matter how significant, cannot qualify for joint authorship in collaborative works—and argues that we as a society should, under certain circumstances, recognize idea-contributors like Welles as joint authors. We should do so to further our society's interest in encouraging future creations, as well as out of a sense of equity and fairness to idea-contributors, acknowledging the value of ideas to creative work. Recognizing idea-contributors as joint authors would increase the contractual bargaining power of many of our society's most creative minds and ultimately better foster the free flow of ideas essential to the constitutional goal of promoting the "Progress of Science and useful Arts."<sup>1</sup>

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1. U.S. CONST. art. 1, § 8, cl. 8.

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INTRODUCTION

*“Miss Kael glosses over the following point . . . ‘[Koch] says it was . . . Welles’s idea that he do the Martian show in the form of radio bulletins.’ This is a meaningless sentence for those unfamiliar with the broadcast, and easily missed by those who may vaguely remember it now. Listen to it, though . . . and you will see that it is precisely this conception which was the guide for the dialogue, radio effects, the whole organization of the material. It is the heart of the matter.”*

*—Filmmaker and Orson Welles confidant Peter Bogdanovich—  
writing together with Welles himself—responding to film critic*

*Pauline Kael's accusation that Welles improperly claimed authorship credit for the War of the Worlds broadcast*<sup>2</sup>

“ORSON WELLES CAUSES PANIC”

—*Times Square news ticker, hours after the broadcast*<sup>3</sup>

Flash! Radiating from a CBS broadcast room in New York City the night before Halloween, 1938, the news that murderous, alien creatures had landed in the small town of Grover's Mill, New Jersey spread across the country like wildfire—the Martians had invaded.<sup>4</sup> Headlines the next day oozed fear: “Radio Listeners in Panic, Taking War Drama as Fact,” in the *New York Times*, “FAKE RADIO ‘WAR’ STIRS TERROR THROUGH U.S.,” from the *Daily News*, “RADIO PLAY TERRIFIES NATION,” in *The Boston Globe*.<sup>5</sup> While recent research convincingly argues that the papers exaggerated the panic and invented the legend that entire towns ran for the hills, the research also confirms

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2. Peter Bogdanovich, *The Kane Mutiny*, *ESQUIRE*, Oct. 1972, at 99, 188; see also Peter Bogdanovich, *New Introduction: My Orson*, in ORSON WELLES & PETER BOGDANOVICH, *THIS IS ORSON WELLES* xxiv (Da Capo Press 1998) (1992) (revealing that “Orson had taken a strong hand in revising and rewriting” “The Kane Mutiny,” which was published under only Bogdanovich’s name). In their “Kane Mutiny” article, Bogdanovich and Welles primarily sought to challenge Kael’s main contention from her 1971 essay “Raising Kane” that Welles, not satisfied with merely being its director and lead actor, improperly took credit for helping write the screenplay of his most famous film, *Citizen Kane*. *Id.* at xii–xxvii.

A more recent analysis of script drafts that were either unavailable to or unexamined by Kael appears to have soundly disproven her claim. See ROBERT L. CARRINGER, *THE MAKING OF CITIZEN KANE* 16–35 (rev. ed. 1996) (discussing Welles’s involvement in writing *Citizen Kane*). In other words, it now seems safe to say that Welles did in fact help write *Kane*’s script. *Id.*; see also Christopher Saunders, *Kael v. Kane: Pauline Kael, Orson Welles and the Authorship of Citizen Kane*, <http://www.popoptiq.com/kael-vs-kane-pauline-kael-orson-welles-kane-authorship-citizen-kane/> [<https://perma.cc/2TWF-KXY3>] (May 10, 2015).

It was during her discussion of *Kane* that Kael briefly mentioned her understanding that Welles had also disingenuously sought credit for authoring the *War of the Worlds* broadcast. See Pauline Kael, *Raising Kane*, in *FOR KEEPS* 274–75, 335 (1994) (originally published in the February 20 and 27, 1971 issues of *The New Yorker*). It was to this passing shot that Bogdanovich and Welles were responding in their quote above.

3. FRANK BRADY, *CITIZEN WELLES: A BIOGRAPHY OF ORSON WELLES* 173 (1989).
4. A. BRAD SCHWARTZ, *BROADCAST HYSTERIA: ORSON WELLES’S WAR OF THE WORLDS AND THE ART OF FAKE NEWS* 3–7, 65–79 (2015).
5. *Id.* at 115; HOWARD KOCH, *THE PANIC BROADCAST* 17–18 (5th ed. 1973).

that many people, perhaps thousands, *did* in fact worry—and sometimes truly believe—that the invasion was real.<sup>6</sup> Why?

By all accounts, listeners believed it because the broadcast was written and performed in the style of actual news bulletins, complete with breaking announcements, field reporting, and official public alerts.<sup>7</sup> Had the broadcast used a purely narrative form like the H.G. Wells novel on which it was based, it's almost inconceivable that anyone who tuned in to the show, much less thousands across America, would have actually worried that Martians were taking over the Earth.<sup>8</sup> And without this reaction, it's equally unlikely that radio's *War of the Worlds* would have become the cultural phenomenon and legendary mass media event that we remember today.

So who caused this reaction? Who was the broadcast's author? Most of us, thinking back to our school days or simply reaching into our brain's pop culture databanks would likely say "Orson Welles," or we'd at least guess that he played some significant role in its authorship. We'd be wrong, though, at least if we asked the courts. That's because in 1962, in the case of *Welles v. CBS*,<sup>9</sup> the Ninth Circuit Court of Appeals affirmed a trial court ruling that Orson Welles was "neither author nor a co-author" of the *War of the Worlds* broadcast.<sup>10</sup>

Despite ruling against Welles, the courts did recognize that it was his idea to adapt the *War of the Worlds* novel into a series of radio bulletins describing the Martian invasion as it was happening.<sup>11</sup> No one

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6. SCHWARTZ, *supra* note 4, at 65–94; *see also* Joy Elizabeth Hayes & Kathleen Battles, *Exchange and Interconnection in US Network Radio: A Reinterpretation of the 1938 War of the Worlds Broadcast*, in *WAR OF THE WORLDS TO SOCIAL MEDIA: MEDIATED COMMUNICATION IN TIMES OF CRISIS* 28–31 (Joy Elizabeth Hayes et al. eds., 2013) (describing various reactions that listeners had to the *War of the Worlds* broadcast).

7. *See* Hayes & Battles, *supra* note 6, at 24–25; SCHWARTZ, *supra* note 4, at 69–82.

8. Or worried that some other disaster had befallen our country, like a major meteor-strike or a terrestrial invasion by the Germans, which many who had heard only part of the broadcast or got their news second-hand apparently thought had happened. *See* SCHWARTZ, *supra* note 4, at 88–90. Wittily commenting on the audience's fearful reaction, and referencing the top-rated competing show that night (which featured the Charlie McCarthy ventriloquist act), the renowned critic for *The New Yorker* Alexander Woollcott telegrammed Welles soon after the broadcast: "This only goes to prove, my beamish boy, that the intelligent people were all listening to a dummy, and all the dummies were listening to you." WELLES & BOGDANOVICH, *supra* note 2, at 18.

9. 308 F.2d 810 (9th Cir. 1962).

10. *Id.* at 812 n.1.

11. *Id.* ("Plaintiff conceived the idea of presenting said radio broadcast of an adaptation of H. G. Wells' novel, 'The War Of The Worlds' and also conceived

disputed that Welles, as the broadcast's lead producer and director, had asked his co-producer John Houseman to communicate this bulletin idea to one of the writers they worked with, Howard Koch, with the instruction to draft a script in that form.<sup>12</sup> Houseman did so, and Koch wrote a simulated live news broadcast announcing the Martian invasion of Earth described in the novel.<sup>13</sup> Welles edited and approved the script, and then he, along with other actors from his and Houseman's Mercury Theatre group, performed *War of the Worlds* on the radio that fateful night of October 30, 1938.<sup>14</sup> Though Welles testified that he helped more with the writing of the script (not simply its editing) than either Koch in his deposition or Houseman in his memoirs would admit, nobody challenged these basic facts of Welles's creative involvement.<sup>15</sup>

Why then, despite these facts, did the trial court find, and the Ninth Circuit affirm, that Welles played no part in authoring the *War*

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the idea of dramatizing said novel by means of radio announcements describing the contemporaneous invasion of Martians.”).

12. SCHWARTZ, *supra* note 4, at 44–46. Lawyers and law students might best know John Houseman from his late-career renaissance as an actor, most particularly in his Oscar-winning role as Harvard Law Professor Charles W. Kingsfield, Jr. in the 1973 film *The Paper Chase*. JOHN HOUSEMAN, UNFINISHED BUSINESS: A MEMOIR 459–73 (1989). In yet another connection between *The War of the Worlds* and the law, Howard Koch was a Columbia Law graduate who left the practice to become a writer, eventually winning an Oscar for co-writing the screenplay for *Casablanca*. HOWARD KOCH, AS TIME GOES BY 35–41, 76–84 (1979).
13. SCHWARTZ, *supra* note 4, at 49–51.
14. *Id.* at 58–64. Other members of the Mercury Theatre group, such as associate producer Paul Stewart, may well have helped edit and shape the script into its final form during the rehearsal process, but the exact extent to which they were involved—given the hurried nature of the broadcast's preparations and the limits of human memory—is ultimately unclear. *Id.* at 58–64, 252–54.
15. *Id.* at 247–48 n.95, 252–54; see *infra* notes 90–114 and accompanying text (discussing Welles's testimony about the conception of the *War of the Worlds* broadcast). Houseman was not called to testify in the lawsuit, for reasons unclear. See *Welles*, 308 F.2d at 813. Though the full, tempestuous story of Welles and Houseman's friendship and creative partnership is outside the scope of this Article (indeed it could form its own small book), it suffices to say here that not long after the broadcast the two men ended their partnership, and a deep gulf grew between them. Their broken friendship is my best guess as to why Welles's lawyers did not take Houseman's deposition in the case, i.e., Welles could reasonably have feared that Houseman's testimony would only hurt him. See, e.g., WELLES & BOGDANOVICH, *supra* note 2, at xxii–xxiii (relaying a fairly incendiary claim by Welles that Houseman, though married, “had been in love with Welles” and that Welles had said “he had probably not handled this right and instead got into a terrible public row with Houseman,” thus ending their partnership); HOUSEMAN, *supra* note 12, at 340–41 (describing a later chance encounter with Welles where, “I could feel the muscles of my arms tensing—ready to fly up to parry the haymaker that would be aimed at my head or to return the bear hug in which I would be enveloped.”).

of the *Worlds* radio play? Under prevailing law, both in 1938 and today, the contribution of ideas and ideas alone—no matter how vital—did not and does not constitute authorship of a copyrightable work.<sup>16</sup> In other words, if you contribute ideas to a collaborative creation but your collaborator is the only one who writes them down (or puts them into some other tangible medium of expression), you cannot qualify as a joint author of that creation.<sup>17</sup> So, because the trial court found that Orson Welles contributed only ideas to the *War of the Worlds* radio play, he did not share in any part of its authorship. Howard Koch, who wrote the script that incorporated and expressed Welles’s idea, was the sole author.

I believe that this rule—collaborators who contribute ideas, and ideas alone, cannot be joint authors of copyrightable works—reflects a fundamentally flawed conception of authorship, one which ignores the reality of the creative process and prevents artists like Welles from obtaining the credit and compensation they deserve. Sometimes, as with *The War of the Worlds*, an idea can be so vital to a collaborative work—indeed, in the words of Bogdanovich and Welles,<sup>18</sup> it can be the very “heart of the matter”—that the idea’s generator deserves to be considered the work’s joint author.

In a previous article, I examined how copyright’s current joint authorship tests would have blocked a non-dominant collaborator, the pianist Johnnie Johnson, from any chance of establishing joint authorship of a significant number of Chuck Berry’s songs, despite compelling

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16. *Foster v. Lee*, 93 F. Supp. 3d 223, 227–28 (S.D.N.Y. 2015) (“[T]o qualify as a joint work . . . the contribution of each author must itself be independently eligible for copyright protection.” (citing *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991))); 17 U.S.C. § 102(b) (2012) (“In no case does copyright protection . . . extend to any idea.”); *Welles*, 308 F.2d at 814; *Baker v. Selden*, 101 U.S. 99, 101–02 (1879). See generally 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.07 (2015) [hereinafter NIMMER] (discussing the law of joint authorship).

17. See, e.g., NIMMER, *supra* note 16, at § 6.07 (discussing the law of joint authorship). This is true unless you have a written contract to the contrary. But see Shyamkrishna Balganes, *Unplanned Coauthorship*, 100 VA. L. REV. 1683, 1748–50 (2014) (noting the Copyright Act does not expressly contemplate that parties can contract around its definition of “joint work” but that a written agreement between or among collaborators can function as an assignment of copyright ownership that results in a jointly owned work even if, by the strict terms of the Act, the work was not actually created jointly). For why the possibility of entering into a contract is not a sufficient solution for idea-contributors in these situations, see *infra* notes 178–194 and accompanying text. A few judges have questioned the independent copyrightability requirement for joint authorship, but they’re in a very small minority. See *infra* note 39.

18. See *supra* note 2 and accompanying text.

evidence that he helped Berry create them.<sup>19</sup> Here, *Welles v. CBS* shows how the law's present formulation of joint authorship isn't just stacked against non-dominant collaborators (i.e., those who contribute to the creation of a copyrightable work but who aren't making the final creative decisions).<sup>20</sup> By the current tests' bright-line requirement that each collaborator contribute independently copyrightable expression, even dominant collaborators like Orson Welles can be unfairly and improperly blocked from the status and rewards of joint authorship. The contribution of ideas, because they aren't by themselves copyrightable,<sup>21</sup> will not qualify even the most dominant and genius of collaborators for authorship in a jointly created work.

Thus, regardless of whether the courts or Congress adopt a new formulation of joint authorship like my previously proposed "Berry-Johnson" test,<sup>22</sup> the *Welles* case compellingly illustrates why the independent copyrightability requirement should be discarded from any test

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19. Timothy J. McFarlin, *Father(s?) of Rock & Roll: Why the Johnnie Johnson v. Chuck Berry Songwriting Suit Should Change the Way Copyright Law Determines Joint Authorship*, 17 VAND. J. ENT. & TECH. L. 575, 602 (2015).

20. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) (observing that an author is usually "the inventive or *master mind* who 'creates, or gives effect to the idea.'" (emphasis added) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884))); see also 16 *Casa Duse, LLC v. Merkin*, 791 F.3d 247, 260 (2d Cir. 2015) (citing *Lee* on this point with approval); *Garcia v. Google, Inc.*, 786 F.3d 733, 742 (9th Cir. 2015) (approving *Lee*'s determination of joint authorship). See McFarlin, *supra* note 19, at 647–51, for a fuller discussion of the problems with *Lee*'s "mastermind" view of joint authorship.

21. 17 U.S.C. § 102(b) (2012) ("In no case does copyright protection . . . extend to any idea."); see also *infra* notes 24–35 and accompanying text.

22. McFarlin, *supra* note 19, at 654–55. The Berry-Johnson test would require a joint authorship claimant to establish two things:

- (1) all purported joint authors intended to merge their contributions into one work; and
- (2) the claimant substantially contributed to the essence of the work.

*Id.* at 654. To decide the second requirement, the test directs the court to consider:

- (1) the impact that the claimant's contribution had on the work relative to that of other contributions;
- (2) any evidence that other contributors viewed the claimant as having substantially contributed to the essence of the work; and
- (3) any relevant custom or practice, in the industry or field in which the work was created, that treats (or does not treat) contributions similar to the claimant's as joint authorship of works similar to the one at issue.

*Id.* at 654–55.



to determine whether a copyrighted work was authored jointly. Not only is the current rule unjust to Welles and other idea-contributors, but removing this barrier will also promote the arts by encouraging the free flow of ideas among future creative collaborators.

To further explain why the contribution of ideas should qualify for joint authorship, Part I of this Article explores how and why the courts imported copyright's "expression-only" rule into joint authorship in the first place. Part II then details the creation of *The War of The Worlds* in print and on the radio—most particularly as it was described in the sworn testimony of Orson Welles and Howard Koch in *Welles v. CBS*—and demonstrates that, through his idea, Welles contributed substantially to the broadcast's creation. Last, Part III addresses concerns over expanding joint authorship to include ideas, and it ultimately suggests why and how idea-contributors like Orson Welles should qualify as joint authors of collaborative works.

## I. COPYRIGHT AND IDEAS: AN UNEASY RELATIONSHIP

*"The working out of the idea is in the script. There is no right in an idea."*

—Federal District Judge Leon Yankwich, ruling from the bench in *Welles v. CBS*<sup>23</sup>

### A. *The Uncopyrightable Idea*

Copyright protects only the expression of ideas, not ideas themselves. We find this principle at the start of the Copyright Act itself, which firmly tells us that "[i]n *no case* does copyright protection . . . extend to *any* idea."<sup>24</sup> Though first codified in 1976, this expression-only rule dates back in the common law for more than a century, and courts both state and federal, trial and appellate have placed their trust in it in the years since.<sup>25</sup> Indeed, the U.S. Supreme Court has called it the "most fundamental axiom of copyright law."<sup>26</sup>

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23. Reporter's Transcript of Proceedings at 202, *Welles v. Columbia Broad. Sys., Inc.* (C.D. Cal. 1961) (No. 1014-59-Y) [hereinafter "Transcript"].

24. 17 U.S.C. § 102(b) (2012) (emphasis added).

25. See, e.g., NIMMER, *supra* note 16, § 2.03[D] (discussing the history of the distinction between ideas and expression); Leon R. Yankwich, *Originality in the Law of Intellectual Property (Its Meaning from a Legal and Literary Standpoint)*, 11 F.R.D. 457, 457–61 (1952) (affirming that copyright protects not ideas but the expression of ideas); RONALD B. STANDLER, IDEAS NOT COPYRIGHTABLE (2013) <http://www.rbs2.com/cidea.pdf> [<https://perma.cc/M9JZ-83VX>] (referring to the legion of cases cited therein).

26. *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–45 (1991). Some states, however, such as California and New York, recognize a limited right to protect an idea—not under copyright law—but under state contract law.

Copyright's expression-only rule serves a vital purpose. It encourages people to transfer ideas from mind to print (or other media) so that we as a society might fully reap their benefit. If the architect of the Empire State Building, for instance, had a wonderful idea for a structure but didn't first put pen to paper for the blueprints, we wouldn't have that beautiful building to use and admire.<sup>27</sup>

This pen-to-paper principle also serves other vital purposes. First, it creates a tangible way with which to draw the bounds of copyright protection. An idea by itself can be hazy, uncertain—limitless even—whereas its expression, whether in print, on record, film, or other material, has much more finite and observable contours.<sup>28</sup> Our legislators,

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*See generally* David E. Fink & Damaris M. Diaz, *Hey That Was My Idea! Understanding Damages in Idea Submission*, 2012 COMM. LAW. 4, 4 (“It is long established that ideas, ‘free as the air’ as they may be, are sometimes protectable by implied contracts.”). For example, plaintiffs in “idea submission” cases under California law must prove:

- (1) they clearly conditioned the submission of their ideas on an obligation to pay for any use of their ideas;
- (2) the defendants, knowing this condition before the plaintiffs disclosed the ideas, voluntarily accepted the submission of the ideas; and
- (3) the defendants found the ideas valuable and *actually used* them—that is, the defendants based their work substantially on the plaintiffs' ideas, rather than on their own ideas or ideas from other sources.

*Spinner v. Am. Broad. Companies, Inc.*, 215 Cal. App. 4th 172, 184 (2013) (citing *Mann v. Columbia Pictures, Inc.* 180 Cal. Rptr. 522, 533–34, 533–34 n.6 (1982)). For the problems with relying on a state-by-state contract law solution to protecting idea-contributors, see *infra* notes 182–184 and accompanying text.

27. 17 U.S.C. § 102(a) (2012) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . . Works of authorship include . . . architectural works.”); *see also* Mary Jane Augustine & Christopher S. Dunn, *Consequences of Ownership or Licensing of the Project Drawings-If You Pay for It, Do You Own It?*, 28 CONSTR. LAW. 35, 64 n.66 (2008) (noting that the copyright in a building's design will likely vest, absent a work-for-hire situation, in the “design professional who draws the plans”).

Walter F. Lamb of the architectural firm Shreve, Lamb & Harmon designed the Empire State Building, which was inspired in part by an earlier design the firm had done for the Reynolds Building in Winston-Salem, North Carolina. *See Empire State Building, A Landmark*, CBS FORUM (Feb. 17, 2004), <http://www.cbsforum.com/cgi-bin/articles/partners/cbs/search.cgi?template=display&dbname=cbsarticles&key2=empire&action=search&dbdisplay> [<http://perma.cc/J77J-DBK8>]; Owen Covington, *A Look at the Historic Reynolds Building*, TRIAD BUS. J. (Jan. 5, 2012), <http://www.bizjournals.com/triad/blog/2012/01/a-new-start-for-historic-rj-reynolds.html?page=all> [<http://perma.cc/Q6FC-727G>].

28. *See, e.g.*, Todd Marabella, Note, *Elemental Copyright: The Complexity of Ideas and the Alchemy of Mind-Share*, 90 B.U. L. REV. 2149, 2155 (2010)

judges, and juries can use these contours to decide the scope of protection a creative work should receive under copyright law. A building's blueprints allow a judge or jury to determine the protectable elements of the building's design—such as the particular arrangement and composition of its spaces—and then decide whether another architect has improperly copied those elements in his or her own design.<sup>29</sup>

Second, the expression-only rule prevents copyright from treading too heavily on our freedom of speech. Copyright, of course, inherently intrudes to a certain extent.<sup>30</sup> Our speech is not so free that we can, without legal consequences, intentionally write the same (or even substantially the same) book as one that is copyrighted. But we *are* free to use the general ideas incorporated in the book.<sup>31</sup> So, while we can't write a novel about a young wizard named Harry Potter who studies at Hogwarts, we can write one about young wizards at school.<sup>32</sup> This distinction—between an idea and the protectable expression of an

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(“By granting a copyright monopoly over the idea of a shoe to one person, a court would in fact be granting a monopoly over the boundless range of all the different types of shoes.”).

29. See, e.g., *Oravec v. Sunny Isles Luxury Ventures L.C.*, 469 F. Supp. 2d 1148, 1169 (S.D. Fla. 2006), *aff'd*, 527 F.3d 1218 (11th Cir. 2008) (analyzing a copyright infringement claim concerning competing architectural designs) (“In evaluating substantial similarity in this case, the Court has viewed the competing designs side by side to identify and evaluate their shared characteristics. Specifically, with the parties’ assistance, the Court has compiled a list of elements in Oravec’s design which he alleges evidence substantial similarity. The Court has then evaluated those elements to determine whether they are features which copyright protects. Finally, the Court has analyzed these elements, individually and collectively, to determine whether there is enough similarity so that a reasonable jury, properly instructed, could return a verdict for Oravec that the designs are substantially similar.”).
30. Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work’s “Total Concept and Feel”*, 38 EMORY L.J. 393, 393–94 (1989) (“To the extent that copyright dictates the manner in which an author may express herself, it infringes the author’s freedom of expression.”); Amaury Cruz, Comment, *What’s the Big Idea Behind the Idea-Expression Dichotomy?—Modern Ramifications of the Tree of Porphyry in Copyright Law*, 18 FLA. ST. U. L. REV. 221, 230 (1990) (“The apparent contradiction between the freedom of speech guaranteed by the first amendment and the copyright clause which limits such freedom, creates a unique constitutional conflict.”).
31. See Yen, *supra* note 30, at 394; Cruz, *supra* note 30, at 230; see also Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Melville Nimmer, *Does Copyright Abridge First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).
32. See J.K. ROWLING, *HARRY POTTER AND THE PHILOSOPHER’S STONE* (1997). For a more detailed discussion of why an author cannot copyright the concept of young wizards going to school, see *infra* notes 199–206 and accompanying text.

idea—is not always easy to make, but the very fact that the distinction exists allows the courts to do their best to prevent a monopolization of ideas that would limit the progress of the arts instead of promoting it.<sup>33</sup>

We can see, then, that an idea in the copyright context has come to mean creativity that either (a) has yet to be fixed in a tangible medium of expression, or (b) is too abstract or common to form the basis of a valid infringement action.<sup>34</sup> And we also see that there are very good reasons why such creativity, on its own, is uncopyrightable.

But if an idea *has* been expressed in a tangible medium, and we can thereby both benefit from that idea and specify its limited protectable contours, why then should it matter that it was the idea-generator's *collaborator* that put the idea into a tangible medium and not the idea-generator himself? The audience for the work doesn't care—the idea has been expressed and can now be enjoyed, regardless of how that expression occurred. Other artists shouldn't care either, in that the original expression of the work is the only aspect that courts will look to in deciding whether another work has infringed its copyright. Everyone is still free to use the idea.

In other words, we're not talking about granting a monopoly in ideas, we're talking about protecting (or ignoring) the rights of those who contribute ideas to tangibly expressed works—a close but vital distinction. Just because an idea alone is uncopyrightable, this doesn't mean that the person who contributes an idea to a tangibly expressed work can't share in its copyright.<sup>35</sup>

For example, if U.S. copyright law had recognized Orson Welles as a joint author of the final written script for the *War of the Worlds* broadcast, that wouldn't have made Welles the owner of the idea he contributed. It would simply have made him a co-owner, with Howard Koch, of the final written script. Welles could not have prevented others

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33. See Goldstein, *supra* note 31, at 1016–20; U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

34. See NIMMER, *supra* note 16, at § 2.03[D] (discussing the distinction between ideas and expression); 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 4:31 (2015).

35. I'm not saying that we can't judge a given idea in a given case to be too abstract or general (*see supra* notes 30–32 and accompanying text) to entitle its contributor to joint authorship in the final work. To the contrary, as detailed *infra* in notes 199–206 and accompanying text, I propose that we use the relative specificity of an idea as a vital consideration in deciding joint authorship on a case-by-case basis. I'm simply saying here that the mere fact the contribution is an idea—either in the sense that it hasn't been put into a tangible medium or in the sense that it might, standing alone, be too abstract or common to form the basis of a valid infringement action—should not disqualify its contributor from joint authorship as a matter of law.

from doing fake news broadcasts. He and Koch could only have controlled the use of whatever parts of the script that constituted protectable expression, such as the dialogue specifically created for the broadcast.

Therefore, if we truly want to examine why we should or shouldn't recognize idea-contributors as joint authors, we can't just say "ideas are uncopyrightable" and stop there. We need to dig deeper. We need to look, first, at the underlying reasons why courts have shut idea-contributors out of joint authorship.

*B. Why the Expression-Only Rule Has Become Part  
of Joint Authorship Doctrine*

*"The supplier of an idea is no more an author of a [computer] program than is the supplier of the disk on which the program is stored."*

—*Ninth Circuit Judge Betty Binns Fletcher, in the case of S.O.S., Inc. v. Payday*<sup>36</sup>

The incredible quote—equating, in terms of authorship, the brilliant concept behind Twitter with the plastic of an old floppy disk—illustrates the depth of disdain the courts presently have for idea-contributors in collaborative creative endeavors. How did we get to this point? While the Copyright Act expressly forbids copyright in ideas alone, thereby making tangible expression a prerequisite for copyright in a creative work, nowhere does it state that *each* joint author must contribute tangible expression.<sup>37</sup> Regarding joint authorship, the Act simply states that "[a] 'joint work' is 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>38</sup> In other words, the Copyright Act does not expressly state that each and every joint author of a creative work must put his or her ideas into a tangible medium of expression. Why then have the courts interpreted the Act this way?

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36. 886 F.2d 1081, 1087 (9th Cir. 1989). This direct quote was recited as recently as 2010 by the Eastern District of California. *Credit Bureau Connection, Inc. v. Pardini*, 726 F. Supp. 2d 1107, 1119 (E.D. Cal. 2010). Courts have cited *S.O.S.* with approval on this point, as counted by Westlaw, thirty-nine times.

37. See Roberta Rosenthal Kwall, "Author-Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine," 75 S. CAL. L. REV. 1, 53 (2001). The concept is also absent from the legislative history leading up to the 1976 Act. See *id.* at 37, 48, 53, 57–59; Laura G. Lape, *A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine*, 61 ALB. L. REV. 43, 44–74 (1997).

38. 17 U.S.C. § 101 (2012).

From the surprisingly few cases where courts have actually explained why they've imported this expression-only requirement into joint authorship, two main reasons emerge: (1) they believe that the word "author" as used in the Copyright Act necessarily means a person who contributes tangible expression, and (2) they're concerned that bringing idea-contributors into the joint authorship fold would invite frivolous litigation.<sup>39</sup>

With respect to the first reason, courts have interpreted "author" to mean "the fixer" (i.e., the one who actually fixes the idea or ideas into a tangible medium of expression).<sup>40</sup> And because, to these courts,

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39. For cases relying on the meaning of the word author, see, for example, *Nordstrom Consulting, Inc. v. M & S Tech., Inc.*, No. 06 C 3234, 2008 WL 623660, at \*5 (N.D. Ill. Mar. 4, 2008); *BancTraining Video Sys. v. First Am. Corp.*, 956 F.2d 268 (6th Cir. 1992); *BTE v. Bonnecaze*, 43 F. Supp. 2d 619, 626 (E.D. La. 1999). For cases citing public policy reasons, see, for example, *Childress v. Taylor*, 945 F.2d 500, 504–05 (2d Cir. 1991), and its progeny.

A few judges in recent years have, however, challenged this anti-idea-contributor orthodoxy. Judge Richard Posner of the Seventh Circuit Court of Appeals, in 2004, recognized that where a copyrightable work is created by multiple persons, but none of them in isolation contributed independently copyrightable expression to the work, the independently copyrightability requirement logically *must* be discarded, or else there would be no legal owner of the work. See *Gaiman v. McFarlane*, 360 F.3d 644, 658–59 (7th Cir. 2004).

Fourth Circuit Judge Roger Gregory, in 2006, dissented in an unpublished case dismissing a copyright joint authorship claim on the ground, among others, that the plaintiff failed to allege that he made an independently copyrightable contribution to the work at issue. *Brown v. Flowers*, 196 F. App'x 178, 183–91 (4th Cir. 2006) (Gregory, J., dissenting). Judge Gregory stated his belief that a "substantial original contribution" to a work would qualify a contributor for joint authorship. *Id.* at 189.

And in a decision that was later vacated (due to the orthodox rule), former federal district Judge Marvin Aspen stated that the proper standard for evaluating a joint authorship claim is whether a collaborator made a "significant creative contribution." *Napoli v. Sears, Roebuck & Co.*, 835 F. Supp. 1053, 1062–63 (N.D. Ill. 1993), *vacated on reconsideration*, 858 F. Supp. 101 (N.D. Ill. 1994), *and vacated sub nom.*, 926 F. Supp. 780 (N.D. Ill. 1996).

Most recently, the First Circuit, without acknowledging the potential conflict with the orthodox rule, stated (albeit in dicta) that "[i]t is not necessary that the authors' contributions be quantitatively or qualitatively equal, only that each author's contribution be more than de minimis." *Greene v. Ablon*, 794 F.3d 133, 151 (1st Cir. 2015).

These judicial views are, at least at present, in the extreme minority. Even courts who have expressed some support for Judge Posner's *Gaiman* decision have refused to extend it past the "only if *no* collaborator contributed independently copyrightable expression" scenario. See *Janky v. Lake County Convention & Visitors Bureau*, 576 F.3d 356, 362 n.4 (7th Cir. 2009); *Woods v. Resnick*, 725 F. Supp. 2d 809, 819 n.3 (W.D. Wis. 2010).

40. See *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071 (7th Cir. 1994) ("An author is 'the party who actually creates the work, that is, the person who

a collaborative endeavor can constitute a joint work “only if both the collaborators can be considered an author independently,”<sup>41</sup> each joint author must necessarily contribute original, tangible expression to the overall creative work.<sup>42</sup> As for the second reason, courts have openly worried that recognizing idea-contributors as joint authors could encourage “spurious claims by those who might otherwise try to share the

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translates an idea into a fixed, tangible expression entitled to copyright protection.” (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989))).

It is noteworthy that *Erickson* and similar cases have selectively omitted the first part of the quotation from Justice Thurgood Marshall’s opinion in *CCNV*, which in full reads, “As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.” *Cmty. for Creative Non-Violence*, 490 U.S. at 737 (emphasis added); see also Russ Versteeg, *Defining “Author” for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1326 (1996).

A limited exception that the courts have recognized to this definition of author as “fixer” is where the person who fixes the work only performs the work of a stenographer. See, e.g., *Andrien v. S. Ocean Cty. Chamber of Commerce*, 927 F.2d 132, 135 (3d Cir. 1991). So, for instance, where an attorney is orally dictating a memorandum to her assistant who is typing the exact dictation into a memo, the attorney would be the author, not the assistant.

Some, like the former Register of Copyrights, have suggested that the independent copyrightability requirement may be constitutionally mandated through its use of the term “authors.” *Childress*, 945 F.2d at 505; see 2 PATRY, *supra* note 34, § 5:14 (referencing expression as necessary to “the constitutional requirement of being an ‘author’”). That argument has not appeared to have taken hold like the statutory argument—and it was expressly questioned by *Childress*, the case most responsible for cementing the independent copyrightability requirement into joint authorship doctrine—though at least one court has approvingly cited the Constitution in denying a joint authorship claim. Compare *Childress*, 945 F.2d at 506 (“[T]he Register’s tentative constitutional argument seems questionable. It has not been supposed that the statutory grant of ‘authorship’ status to the employer of a work made for hire exceeds the Constitution, though the employer has shown skill only in selecting employees, not in creating protectable expression.”), with *Gillespie v. AST Sportswear, Inc.*, No. 97Civ.1911(PKL), 2001 WL 180147, at \*7 (S.D.N.Y. Feb. 22, 2001) (“Miles’s contributions went beyond mere ideas, which, under the Copyright Act, the Constitution, and common law, are not copyrightable.”). See *infra* notes 146–149 and accompanying text for further discussion of the constitutionality of recognizing idea-contributors as joint authors.

41. *Beasley v. Commonwealth Edison Co.*, No. 11 CV 4973, 2013 WL 4564857, at \*6 (N.D. Ill. Aug. 28, 2013).
42. *Medforms, Inc. v. Healthcare Mgmt. Sol., Inc.*, 290 F.3d 98, 107–108 (2d Cir. 2002).

fruits of the efforts of a sole author.”<sup>43</sup> In other words, straying outside the bounds of tangible expression—hence, outside the bounds of hard, hold-in-your hands, see-with-your-eyes proof—might invite imposters to claim that they contributed an idea to what in reality was a solely authored work.

Addressing these concerns—both statutory and policy-based—we’ll look here at the language of the Copyright Act, as well as at our common-sense understanding of authorship, and see that the better reading of the word “authors” includes idea-contributors. We’ll also look at the policy arguments for and against recognizing idea-contributors as joint authors. These arguments prove to be more complicated than determining the meaning of authorship, but I think that what we as a society can gain from recognizing idea-contributors will ultimately outweigh any real (or imagined) concerns over frivolous litigation and other possible problems.

But before we delve into the Copyright Act’s wording or the policy arguments, let’s first examine *The War of the Worlds*’ creation, as well as the unfortunate struggle over its copyright. Through this examination we might better understand how and to what extent an idea can influence the final product of a collaborative copyrighted work. We might also more fully appreciate the consequences of leaving idea-contributors like Orson Welles unprotected by copyright. And finally, our judgments about if and how to recognize idea-contributors as joint authors can more firmly root themselves in the realities of the creative process.

## II. ESSENTIAL IDEAS: *THE WAR OF THE WORLDS*’ CREATION IN PRINT AND ON THE AIR

*“We laymen have always been curious to know . . . from what source that strange being, the creative writer, draws his material, and how he manages to make such an impression on us with it.”*

—Sigmund Freud<sup>44</sup>

The “panic broadcast,” as *The War of the Worlds* is now infamously remembered, has ceased to exist as simply a creative work; it has ascended into the clouds of cultural legend. The details of the show itself—Orson Welles’s narration at the show’s start, full of sinister foreboding, followed by what promised to be a night of banal orchestral

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43. *Childress*, 945 F.2d at 507. *E.g.*, *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 315 (S.D.N.Y. 2000); *BTE v. Bonnecaze*, 43 F. Supp. 2d 619, 625 (E.D. La. 1999) (quoting *Childress*).

44. As quoted in Scott Barry Kaufman & James C. Kaufman, *Preface to THE PSYCHOLOGY OF CREATIVE WRITING*, at xix (Scott Barry Kaufman & James C. Kaufman eds., 2009).



music, suddenly interrupted by bulletins of a strange landing, gruesome creatures, and ultimately chaos, destruction, and death—have been recounted in a multitude of articles, studies, and books across academic disciplines.<sup>45</sup>

So too has the reaction that followed—people praying, fleeing their homes, calling the police, newspapers screaming suicide, heart attack, and general pandemonium—been thoroughly documented elsewhere, most recently in A. Brad Schwartz’s excellent book *Broadcast Hysteria: Orson Welles’s War of the Worlds and the Art of Fake News*.<sup>46</sup>

Here then we’ll not rehash all the particulars of the performance or its chaotic aftermath, but instead focus our attention on its genesis, from book to broadcast, seeking to mine from it some truth about the collaborative process and the importance of an idea.

A. *First Conception: The Wells Brothers*

*“[I]ntellec[t]s vast and cool and unsympathetic, regarded this earth with envious eyes, and slowly and surely drew their plans against us.”*

—H.G. Wells, from the novel *The War of the Worlds*<sup>47</sup>

One spring day in 1895, Herbert George Wells, a twenty-eight-year-old former science teacher turned critic and novelist, left his home in the town of Woking, England for a walk with his brother Frank.<sup>48</sup> Strolling down the tranquil pathways, the brothers began to speak of England’s recent atrocities in colonial Tasmania, off the coast of Australia. There, in the name of civilization, their nation had all but eliminated the indigenous Aborigines, a people who had made the island their home

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45. See SCHWARTZ, *supra* note 4; KOCH, PANIC BROADCAST, *supra* note 5; JOHN GOSLING, WAGING THE WAR OF THE WORLDS: A HISTORY OF THE 1938 RADIO BROADCAST AND RESULTING PANIC, INCLUDING THE ORIGINAL SCRIPT (2009); THE WAR OF THE WORLDS: MARS’ INVASION OF EARTH, INCITING PANIC AND INSPIRING TERROR FROM H.G. WELLS TO ORSON WELLES AND BEYOND (Sourcebooks Mediafusion 2005); Harry M. Geduld, *Welles or Wells?—A Matter of Adaptation*, in PERSPECTIVES ON ORSON WELLES (Morris Beja ed., 1995); ALAN GALLOP, THE MARTIANS ARE COMING! THE TRUE STORY OF ORSON WELLES’ 1938 PANIC BROADCAST (2011); Michelle Spietz, *Aural Chiaroscuro: The Emergency Radio Broadcast in Orson Welles’s The War of the Worlds*, 46.1 ENGLISH LANGUAGE NOTES 193 (Spring/Summer 2008).
46. SCHWARTZ, *supra* note 4; e.g., Hayes & Battles, *supra* note 6; KOCH, PANIC BROADCAST, *supra* note 5; HADLEY CANTRIL, THE INVASION FROM MARS: A STUDY IN THE PSYCHOLOGY OF PANIC (1940).
47. H.G. WELLS, THE WAR OF THE WORLDS: A CRITICAL TEXT OF THE 1898 LONDON FIRST EDITION, WITH AN INTRODUCTION, ILLUSTRATIONS AND APPENDICES 52 (Leon Stover ed., 2001).
48. SCHWARTZ, *supra* note 4, at 47–48.

for thousands of years.<sup>49</sup> Looking over the serene English countryside and pondering the carnage wrought overseas, Frank Wells thought aloud to his brother, “Suppose some beings from another planet were to drop out of the sky suddenly, and begin laying about them here!”<sup>50</sup>

Frank Wells’ idea—that a seemingly secure, powerful people would suddenly find themselves under the thumb of a vicious, technologically superior race—sparked his brother’s imagination. H.G., who was already about to publish the first of his novels, *The Time Machine*, decided to use the idea as the basis for his next project, the story of an alien invasion.<sup>51</sup>

H.G. Wells’ new novel told a tale of advanced beings, launched from Mars in metallic, missile-like craft, which land in Wells’ town of Woking.<sup>52</sup> There the Martians construct gigantic three-legged war machines that, with the aid of “heat rays” and poison “black smoke,” sweep across England, decimating its military and rendering its population defenseless.<sup>53</sup> The novel’s protagonist and narrator—an unnamed writer similar to Wells himself—struggles to get to his wife while witnessing such ghastly sights as the invaders guzzling his countrymen’s blood.<sup>54</sup> Finally reaching his wife in London, the narrator finds the Martians dying from exposure to earthly germs, ones that had “taken toll of humanity since the beginning of things,” but which had now become its “microscopic allies” and the invaders’ doom.<sup>55</sup>

Upon its publication, and in the years to follow, *The War of the Worlds* became a worldwide sensation and the cornerstone of a new genre: science fiction. Wells dedicated the first edition with the inscription, “To My Brother Frank Wells, This Rendering of His Idea.”<sup>56</sup>

Forward in time, then, forty-one years later, and unbeknownst to the Wells brothers, *The War of the Worlds* was to take on a new and altogether unexpected existence, owing to another mind, that of a man with nearly the same last name.

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49. *Id.* This conflict was known to the British as the “Black War.” *Black War: Australian History*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/event/Black-War> [<http://perma.cc/KU8L-BFZ2>] (last visited Dec. 30, 2015).

50. SCHWARTZ, *supra* note 4, at 47–48.

51. *Id.*

52. *Id.*; WELLS, *supra* note 47, at 52–71.

53. WELLS, *supra* note 47, at 72–125.

54. *Id.* at 175, 187.

55. *Id.* at 241.

56. *Id.* at 49, 284; *see also* SCHWARTZ, *supra* note 4, at 47–48 (discussing Frank Wells’ role in creating the *The War of the Worlds*).

B. *Mercury Rising*

*“My big inventions were in radio and the theatre. Much more than in movies.”*

—Orson Welles<sup>57</sup>

Across the Atlantic, forty years after the *War of the Worlds* novel was first published, a precocious young actor, writer, and director was causing quite a stir. Twenty-three-year-old George Orson Welles had by 1938 already acted in over thirty different stage productions, directing many of them as well.<sup>58</sup> He had also voiced characters on over thirty radio broadcasts, often shuttling in a matter of minutes (sometimes via a rented, sirens-blaring ambulance) from a just-completed Broadway production to the studio to begin a live show.<sup>59</sup> “[T]he brightest moon that has risen over Broadway in years,” gushed *Time*, “Welles should feel at home in the sky, for the sky is the only limit which his ambitions recognised.”<sup>60</sup>

Coveting this fount of talent, the Columbia Broadcasting System offered Welles his own radio series in the spring of 1938.<sup>61</sup> As it gave him what he desired most—complete creative control and enough money to help finance his stage productions—Welles leapt at the chance.<sup>62</sup>

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57. As quoted in PAUL HEYER, *THE MEDIUM AND THE MAGICIAN: ORSON WELLES, THE RADIO YEARS, 1934–1952* vii (2005).

58. WELLES & BOGDANOVICH, *supra* note 2, at 326–42.

59. ORSON WELLES ON THE AIR: *THE RADIO YEARS 43–50* (1988) [hereinafter *THE RADIO YEARS*]. Filmmaker Henry Jaglom would recall what Welles had told him of those ambulance trips:

Orson said there were many nights when he took an ambulance three to four times, back and forth. He also said that those were the moments when he felt most creative, because he’d lie down in the back of the ambulance and start thinking about what he was doing next . . . speeding through the New York theater-time traffic on the way between the radio station and the theater.

*Id.* at 43.

60. SIMON CALLOW, *ORSON WELLES: THE ROAD TO XANADU 377* (1995) (quoting *TIME MAGAZINE*).

61. HEYER, *supra* note 57, at 45; *see also* SCHWARTZ, *supra* note 4, at 39–40.

62. Heyer, *supra* note 57, at 45. Welles and Houseman published a manifesto for the series (perhaps foreshadowing Charles Kane’s manifesto in the *Inquirer*) in the *New York Times*: “Mercury . . . plan[s] to bring to radio the experimental techniques that have proven so successful in another medium and to treat radio itself with the intelligence and respect such a beautiful and powerful medium deserves.” GOSLING, *supra* note 45, at 32; *see also* *THE RADIO YEARS*, *supra* note 59, at 50; CALLOW, *supra* note 60, at 372 (stating that CBS “offered Welles a total budget of \$50,000 for nine programmes, out of which he had to pay for everything but the orchestra”). Welles’s \$50,000

Originally titled *First Person Singular*, later renamed to *The Mercury Theatre on the Air*, the CBS series featured Welles's deep, sonorous narration complemented by a chorus of talented actors from the Mercury Theatre, the Broadway troupe headed by Welles and his co-producer John Houseman.<sup>63</sup> Beginning with their July 11 debut and continuing each week into December 1938, Welles and his Mercury collaborators transformed classic and contemporary literature into live radio broadcasts, bringing exciting new narration, dialogue, sound effects, and dramatic timing to such renowned works as *Treasure Island*, *Dracula*, *A Tale of Two Cities*, *The Count of Monte Cristo*, *Julius Caesar*, and *Around the World in Eighty Days*.<sup>64</sup>

But creating a live adaptation of a new literary work each week was no easy task. As a general routine, Welles and Houseman would on Monday select a novel from a pool of previously designated source material and begin the process of adapting it into a radio play.<sup>65</sup> Though

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budget was nearly \$850,000 in today's dollars, adjusted for inflation. CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=50%2C000&year1=1938&year2=2015> [<https://perma.cc/H54Q-JJR4>].

63. SCHWARTZ, *supra* note 4, at 40–43; *see also* HEYER, *supra* note 57, at 46–47 (noting that Welles's series first served as a replacement for Cecil B. De Mille's *The Lux Radio Theatre* series, then with the tenth episode it became a permanent CBS show).
64. THE RADIO YEARS, *supra* note 59, at 50–52; *see also* HEYER, *supra* note 57, at 45–71; *see also* SCHWARTZ, *supra* note 4, at 40–43.
65. “[T]he material was chosen by Welles and myself,” Houseman recalled in his memoirs, “on the basis of contrast and personal preference with occasional suggestions from the outside.” HOUSEMAN, *supra* note 12, at 180. H.G. Wells apparently granted CBS permission to adapt the *War of the Worlds* novel for radio, at least orally through his agent. *See* ORSON WELLES: INTERVIEWS 7 (Mark W. Estrin ed., 2002) (H.G. Wells' agent Jacques Chambrun stated that “In the name of Mr. H.G. Wells, I granted the Columbia Broadcasting System the right to dramatize Mr. H.G. Wells's novel, *The War of the Worlds*, for one performance over the radio”).

Welles later testified on some of his own memories (or lack thereof) about the process:

Q. When was work started on the script?

A. That I do not recollect.

Q. Could you give an estimate as to a week before, 10 days before, 3 days before?

A. I can only estimate.

Q. Give us an estimate.

A. Probably a week. It might have been as much as three. It depended on our subjects. There was not a fixed system or a fixed schedule or length of time given for the preparation of any script. They averaged between five days and three weeks to prepare. . . .

Welles was the only one the Mercury promotional materials mentioned by name (“Welles writes, adapts, casts, directs, and acts in the great ‘first person’ stories of literature for radio”),<sup>66</sup> Houseman recalled that he was the one who would make the first effort at writing the adaptation, “usually in bed, over a period of three to four days,” creating a draft script which the troupe would then use to perform a dry-run rehearsal in the studio, sans Welles.<sup>67</sup> Welles would listen to this initial rehearsal’s recording and order changes, usually minor but sometimes substantial, and Houseman would incorporate the changes into the script over the next few days.<sup>68</sup>

At the end of this week of writing, Welles would arrive at the studio on Sunday around noon to lead the show’s formal dress rehearsal. It was then, in the words of his biographer Simon Callow, that “all hell broke loose.”<sup>69</sup> “There was absolute chaos—absolute chaos, every week. Welles [was] a very destructive man, he ha[d] to destroy everything, then put it back together again himself, and there were endless passionate discussions between him, Houseman and me,” recalled Paul Stewart, another vital Mercury collaborator.<sup>70</sup> “Then suddenly someone would

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Q. When was the dress rehearsal generally for these Sunday shows?

A. There was no general system. It varied considerably. This was because I was also at that time engaged in the running and directing of a theatre and the rehearsals of the radio show had to adapt themselves to our working schedule in the theatre. There therefore was no regular system.

Transcript, *supra* note 23, at 92–93, 104.

66. See BROADCAST MAGAZINE 7 (Aug. 15, 1938); see also CALLOW, *supra* note 60, at 370 (The epigraph for the series was “written, directed, produced and performed by Orson Welles”).

67. HOUSEMAN, *supra* note 12, at 180–81; see also CALLOW, *supra* note 60, at 376. According to Houseman:

[The Welles-only billing] was one that I approved and encouraged. In the first place it was true: Mercury of the Air *was* Orson’s show. In the second, it was good showmanship and sound business to publicize and exploit one dominant, magnetic personality. But its effect on our association and on the future course of the Mercury was deep and irreversible. From being Orson’s partner I was becoming a senior member of his staff.

HOUSEMAN, *supra* note 12, at 181.

68. CALLOW, *supra* note 60, at 376–77.

69. *Id.* at 377.

70. *Id.* Stewart, a veteran radio actor and director, was heavily involved in structuring the rehearsals and shepherding the show from conception to broadcast. *Id.* at 376. Stewart explained that he was needed because Welles was “a very

say ‘We’re on the air in two minutes.’ The ground was strewn with paper. That we got on the air at all was a weekly miracle, because it was always like that.”<sup>71</sup>

No matter the chaos, airtime came at 8 p.m. eastern each Sunday night. Not long after the on-air sign alit and the show was introduced, Welles’s deep baritone would intone the opening lines of the final script—final not necessarily by design but by the press of time. And atop a podium at the center of the studio, surrounded by his fellow actors, Welles would direct the show like he was conducting an orchestra. “[H]e waved his arms” and signaled “every music, sound and speech cue” from the first moment until the very last.<sup>72</sup>

With the week’s show complete, Welles and Houseman, exhausted but exhilarated, would the next day, Monday, select another work to adapt, and the process began again.<sup>73</sup> In Houseman’s succinct description, “It was a loose but viable collaboration and it worked with surprising efficiency.”<sup>74</sup>

However, at the end of their first run of shows, Welles decided to deviate from this practiced routine. Perhaps testing whether he could, alone, do all of the feats for which he was getting credit, he insisted on scripting a show entirely by himself, an adaptation of the novel *The Man Who Was Thursday*.<sup>75</sup> Because, when all was said and done, the

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poorly organised man,” and “Houseman, at least at the beginning, knew nothing about radio and was of no use except in matters concerning the script—few people better understood rewriting, reshaping or reworking a script.” *Id.*

71. *Id.* at 377.

72. *Id.* (quoting Richard Barr’s unpublished memoir). Houseman described Welles’s work on the day of the show as “a great victory snatched from the jaws of disaster . . . [f]or, what Orson accomplished each week in those eight terrible hours was extraordinary.” HOUSEMAN, *supra* note 12, at 191.

73. See HOUSEMAN, *supra* note 12, at 181. This general Monday-to-Sunday time-frame began with the tenth show, on September 11, 1938. Prior to that, the series aired on Monday nights. See MERCURY THEATRE OF THE AIR: 1938, <http://www.mercurytheatre.info/mercurylog> [<https://perma.cc/WN8T-VYLY>].

74. HOUSEMAN, *supra* note 12, at 181.

75. CALLOW, *supra* note 60, at 387. *The Man Who Was Thursday* aired on September 5, 1938. THE RADIO YEARS, *supra* note 59, at 51. Welles himself would later testify, however, that he worked on more than just that one script by himself: “For clarification I should say that on many occasions I wrote entire scripts in less than two days and completely rewrote scripts in less than one day.” Transcript, *supra* note 23, at 94. *But see* THE RADIO YEARS, *supra* note 59, at 16–17 (Houseman recalling in an interview from the 1980s that, although Welles had told Houseman that he would write *The Man Who Was Thursday* by himself, by the day before rehearsal he hadn’t written a word, so the two of them “patched it together as best we could by returning to the novel.”). Houseman, however, remembers Howard Koch working for the Mercury at this time even though Koch didn’t start

broadcast ran short of the normal one-hour running time—the announcer had to fill the final minutes—Welles learned, or at least relearned, a valuable lesson.<sup>76</sup> He couldn't do everything himself.

In light of this lesson, as well as the breakneck pace even *when* Houseman did the initial drafts, the two men decided by the fall of 1938 that they needed someone who could dedicate himself exclusively to the scripts.<sup>77</sup> As luck would have it, Houseman had recently met a young lawyer-turned-playwright named Howard Koch.<sup>78</sup> Houseman had seen Koch's first play, *The Lonely Man*, starring future Hollywood icon John

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until five shows later, calling into question his precise recollection of these events. *Id.*

76. See CALLOW, *supra* note 60, at 387 (Houseman recalled that the ad-libbing at the end of the broadcast consisted of him “thrust[ing] various great novels into Welles’ hands” as “a trailer for future shows.”). *But see The Mercury Theatre: The Man Who Was Thursday*, CBS (Sept. 5, 1938) <http://sounds.mercurytheatre.info/mercury/380905.mp3> (surviving audio of the broadcast includes only the announcer Dan Seymour seeming to fill time at the end). Welles ad-libbed a speech at the end of the Mercury’s second broadcast, *Treasure Island*, which Houseman may have been thinking of, at least in part. CALLOW, *supra* note 60, at 387; SCHWARTZ, *supra* note 4, at 247 n.78.
77. The strain upon Welles and Houseman in writing the radio shows was compounded greatly by their simultaneous Broadway endeavors, particularly since the preparations for their next stage production, *Danton’s Death*, were not going well. See CALLOW, *supra* note 60, at 389–98 (detailing the mounting challenges to *Danton’s Death*, including Welles forgetting the script in a taxi); SCHWARTZ, *supra* note 4, at 59, 167–168 (“[*Danton’s Death*] died onstage after twenty-one performances, and it took the Mercury down with it.”); see also HOUSEMAN, *supra* note 12, at 190 (“[E]veryone was perpetually overworked. Shows were created week after week under conditions of soul- and health-destroying pressure.”).
78. Koch would later testify, when asked what prompted his career change, that “I found myself such a bad lawyer that on behalf of my clients I gave it up immediately.” Transcript, *supra* note 23, at 181.

Huston as Abraham Lincoln, and was impressed.<sup>79</sup> Perhaps more importantly, Koch, who had a wife and two children, was desperate for work.<sup>80</sup>

Houseman hired Koch with Welles's blessing in October 1938 at a weekly salary of \$75.<sup>81</sup> Koch's first assignment was to adapt the historical novel *Hell on Ice*, which he did, at least in draft form, even before meeting Welles in person.<sup>82</sup> As Koch later recalled with a mix of fondness and awe:

When I wrote my first of the radio plays for the *Mercury Theatre on the Air*—a real-life saga of misadventures in the Arctic called *Hell on Ice*—I still had not met Orson and was not at all certain of my tenure on the program. The day it was finished I had a call from a secretary to come to his office. My first impression of him was one of size; he seemed to fill the room. His gaze was penetrating, more than a look—it was also an appraisal. There was scarcely any introduction, Orson having little time or patience for the amenities. In his hands he had my opened script and read aloud a line from one of the scenes, a poetic image that could be visualized by a radio audience. His question was right to the point. “Is that a quote or is it your own line?” When I said I had written it, he made no comment, but I knew I was “in,” that Houseman’s

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79. The play imagined what Abraham Lincoln would think and do had he lived in the twentieth century. SCHWARTZ, *supra* note 4, at 44; *Howard Koch*, BARD C. ARCHIVES & SPECIAL COLLECTIONS, <http://www.bard.edu/archives/voices/koch/koch.php> [<http://perma.cc/C4HB-X6PT>] (last visited Dec. 19, 2015). In Koch's own words:

Q. Going back to the fall of 1938, would you describe your first contact with the Mercury Theatre, with whom the contact was and how this arrangement came to be?

A. Yes . . . I had written a play called ‘The Lonely Man,’ which was produced in Chicago with John Houston [sic]. And Mr. Welles or Mr. Houseman saw the play and liked it, and they were thinking of doing it on Broadway.

And then one or two other Lincoln plays came in first, one being Robert Sherwood’s.

So, they decided not to do it on Broadway, but they apparently read the play and when they wanted a writer for their programs—as they were at first writing their own programs—they just found it too much to do with all the other production details—they apparently thought of me. And Mr. Houseman called me from Woodstock to New York to talk about it . . . .

Transcript, *supra* note 23 at 163.

80. HOUSEMAN, *supra* note 12, at 190.

81. Transcript, *supra* note 23, at 94.

82. THE RADIO YEARS, *supra* note 59, at 29.



selection had been confirmed. I mention this incident to illustrate how Orson's mind worked. Given a leaf, he saw the tree.<sup>83</sup>

With his job secure, and fresh from the *Hell on Ice* broadcast's success, Koch proceeded to script the Mercury's next two shows, *Seventeen* and *Around the World in Eighty Days*, which aired on the 16th and 23rd of October, respectively.<sup>84</sup> For his third assignment, the October 30th show, Koch was tasked with adapting a work he'd not previously read, a science fiction novel by H.G. Wells.<sup>85</sup>

C. *Second Conception: Wells to Welles*

*"The War of the Worlds was a magic act, one of the world's greatest, and Orson was the man to bring it off."*

—John Houseman<sup>86</sup>

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83. *Id.* For more about the Mercury's production of *Hell on Ice*, see Jacob Smith, *Devil's Symphony: Orson Welles's Hell on Ice as Eco-Sonic Critique*, SOUNDING OUT! (Dec. 2, 2013), <http://soundstudiesblog.com/2013/12/02/devils-symphony-orson-welles-hell-on-ice-as-eco-sonic-critique/> [<http://perma.cc/5G35-2ME6>]. The piece refers to it as the broadcast that "radio enthusiasts routinely name as Welles' best," and also notes that its "proto-environmental critique" that has chilling (no pun intended) parallels with our current eco-crises. *Id.*

Koch, after writing for *The Mercury Theatre on the Air*, went on to an illustrious career in television, theater, and Hollywood. His *Welles v. CBS* testimony detailed his experience, particularly in film:

Q. For the benefit of the Court, would you recount briefly your experience as a writer . . . ?

A. I have spent most of my career as a writer in writing for films. And among the films that I have written or collaborated in writing have been 'The Letter' with Bette Davis; 'Sergeant York,' Gary Cooper, which I wrote with John Houston [sic]; 'Casablanca,' with Humphrey Bogart and Ingrid Bergman; 'No Sad Songs For Me,' Columbia Pictures, with Margaret Sullivan; 'Letter From An Unknown Woman,' which I wrote for Universal, with Joan Fontaine, Louis Jourdan; and perhaps a half dozen others during my Hollywood years.

Transcript, *supra* note 23, at 161–162.

84. MERCURY THEATRE OF THE AIR: 1938 (Aug. 24, 1998) <http://www.mercurytheatre.info/mercurylog> [<http://perma.cc/D566-W8V3>]; THE RADIO YEARS, *supra* note 59, at 29. Koch's hiring, as he recounted in his memoirs, didn't much change Welles and Houseman's pace: "They considered sleep a luxury that, for the most part, they denied themselves as well as their staff." KOCH, *supra* note 12, at 3.

85. KOCH, *supra* note 12, at 3–5; SCHWARTZ, *supra* note 4, at 45.

86. HOUSEMAN, *supra* note 12, at 197.

For a month or more before that fateful night of October 30, 1938, Welles had been ruminating on a concept he wanted to introduce to the show: a fake news broadcast. Looking back, the previous month's shows had seemingly been building up to the idea, both with Welles introducing the adaptation of John Drinkwater's *Abraham Lincoln* as something that the audience "would recognize . . . much of it is news as if it were happening in the White House tonight," as well as with the Mercury's adaptation of Shakespeare's *Julius Caesar* employing a well-known CBS newsman as narrator and Welles, in his introductory remarks, noting the tale's relevance to the dark events then transpiring in fascist Europe.<sup>87</sup>

By the time of their October 30th show, the idea had taken full bloom. *The Mercury Theatre on the Air* would adapt *The War of the Worlds* as a simulated contemporary newscast.<sup>88</sup>

1. Orson Welles Testifies About the Broadcast's Creation

As Welles, under oath, would later testify:

Q. Who conceived the original idea of this presentation?

A. I did.

Q. In such conception, did you collaborate with anyone else? I mean just in the conception.

A. In the conception, no. I then explained it to people, who carried out my ideas, but the original conception was my own.

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A. . . . I had conceived the idea of doing a radio broadcast in such a manner that a crisis would actually seem to be happening, and would be broadcast in such a dramatised<sup>89</sup> form as to appear to be a real event taking place at that time, rather than a mere radio play. The final choice of the story to be used for this device was H. G. Wells' 'War of the Worlds'. I do not recollect whether that choice was mine or not. A number of different properties were discussed which might be used as a basis for this idea of mine.<sup>90</sup>

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87. SCHWARTZ, *supra* note 4, at 51; HEYER, *supra* note 57, at 66–67. The newsman was H.V. Kaltenborn. *Id.*

88. HEYER, *supra* note 57, at 66.

89. The transcript, taken at the American Embassy in London, contains numerous British-style spellings such as this. *See* Transcript, *supra* note 23, at 70–71.

90. *Id.* at 67 (reading the deposition of Orson Welles, July 8, 1960, into evidence at trial). Welles was, in years prior, apparently less generous in crediting

How did Welles come up with this idea to do a simulated news broadcast? Though not asked this question in his testimony, it's clear that Welles did not conjure it from thin air. Responding to a reporter directly after the broadcast on whether he was "aware of the terror" it would cause, Welles remarked, "I'm terribly shocked by the effect it's had. The technique I used was not original with me, or peculiar to the Mercury Theater's presentation. It was not even new. I anticipated nothing unusual."<sup>91</sup>

When and where then did Welles hear this "technique" before? Media researchers have identified the most likely sources. The first, written by Father Ronald Knox and aired on January 16, 1926 by the British Broadcasting Company (BBC), was titled *Broadcasting the Barricades*. Listening to a broadcast of election returns, as Knox recalled, "I endeavoured to visualise the breathlessness there would be throughout the country during a revolution, and I tried to imagine the news bulletins during such a time of popular excitement. I put my ideas on paper and then attempted to burlesque them."<sup>92</sup> In the process, Knox created what was likely history's first fake news broadcast.<sup>93</sup>

Knox began his show by reading a series of mock bulletins, including sports scores and a weather forecast, culminating in a report of an unruly mob of unemployed workers who systematically began attacking Parliament, Big Ben, and finally the BBC's headquarters from where his character, William Donickson, was conducting the show.<sup>94</sup> *Broadcasting the Barricades* inspired some frightened responses, causing listeners to call the papers as well as the places that the mob supposedly attacked, despite the fact that soon after the broadcast the BBC announced, "London is Safe. Big Ben is still chiming, and all is well."<sup>95</sup>

Though it aired twelve years before the *War of the Worlds* broadcast, Houseman expressly recalled reading about *Broadcasting the*

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Koch's work, including sending a telegram that read, in part, "Howard Koch did not write War of the Worlds." HEYER, *supra* note 57, at 109.

91. *The Aftermath: Orson Welles "The War of the Worlds Halloween Press Conference," 1938*, WELLESNET.COM (Oct. 31, 2008), <http://www.wellesnet.com/the-aftermath-orson-welles-the-war-of-the-worlds-halloween-press-conference-1938/> [<http://perma.cc/X3LY-5QM2>]. See also BRADY, *supra* note 3, at 173.
92. Paul Slade, *Holy Terror: The First Great Radio Hoax*, PLANETSLADE.COM, <http://www.planetslade.com/ronald-knox.html> [<http://perma.cc/3LQ8-ZD67>] (last visited Dec. 19, 2015); SCHWARTZ, *supra* note 4, at 53–58.
93. SCHWARTZ, *supra* note 4, at 53–58.
94. *Id.*
95. *Id.*

*Barricades* in the newspapers, and years later Welles referred to a British broadcast from the twenties as a direct inspiration.<sup>96</sup>

Welles's other likely influence for the simulated news concept was more contemporary as well as closer to home. Playwright and fellow radio pioneer Archibald MacLeish had, prior to the *War of the Worlds* broadcast, written two shows for the *Columbia Workshop*, another CBS series that began two years before the *Mercury Theatre on the Air*.<sup>97</sup> For the *Workshop*'s April 11, 1936 episode, MacLeish penned *The Fall of the City*, a play written in poetic verse.<sup>98</sup> Influenced by the Nazi annexation of Austria, MacLeish's play took the form of a news broadcast from a plaza in an unnamed mythical city, announcing its citizens' surrender to a conqueror who, it's ultimately revealed, was just an empty suit of armor.<sup>99</sup> The role of the narrator/announcer reporting on these events was voiced by none other than Welles himself.<sup>100</sup>

A little over a year later, MacLeish wrote a similar poetic verse-play for the *Columbia Workshop*, this time taking the form of a broadcast of an aerial attack on a small European village.<sup>101</sup> Inspired by Franco's bombing of Guernica during the Spanish Civil War, MacLeish's *Air Raid* was broadcast on October 27, 1938, a mere three days before the *Mercury*'s performance of *War of the Worlds*.<sup>102</sup> While the *Mercury*, at the start of that week, had already begun adapting *The War of the Worlds* as a fake news broadcast, MacLeish had been writing *Air Raid* for the previous seven months, and Welles had sat in on rehearsals for the show.<sup>103</sup> Although Welles apparently never cited *The*

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96. *Id.* at 251 nn.45–46.

97. *Id.* at 36–37. MacLeish led an eventful life outside of his radio work. FDR, for instance, nominated him to serve as the ninth Librarian of Congress, a position which he held from 1939 to 1944. *Librarians of Congress, JEFFERSON'S LEGACY, A BRIEF HISTORY OF THE LIBRARY OF CONGRESS*, (Jan. 11, 2006) <http://www.loc.gov/loc/legacy/librs.html> [<https://perma.cc/HH7L-BV54>]. Bob Dylan also figured in his story: MacLeish met and collaborated with him late in life. BOB DYLAN, I CHRONICLES 107110 (2004).

98. SCHWARTZ, *supra* note 4, at 36; *The Fall of the City*, WNYC NEWS (May 3, 2009), <http://www.wnyc.org/story/86853-the-fall-of-the-city/> [<https://perma.cc/QUL7-5RYN>].

99. SCHWARTZ, *supra* note 4, at 36

100. *Id.* at 52.

101. *Id.*

102. *Id.* For the full script, see Archibald MacLeish, *Air Raid* (Oct. 27, 1938) (unpublished script) <http://www.genericradio.com/objects/airraid19381027.pdf> [<http://perma.cc/2T5E-VWSP>] (last visited Dec. 19, 2015).

103. SCHWARTZ, *supra* note 4, at 52.

*Fall of the City* or *Air Raid* as inspirations for the *War of the Worlds* broadcast, they couldn't have been anything else.<sup>104</sup>

So, looking back to both Welles's testimony and the historical accounts, we see that his idea to describe *The War of the Worlds*' Martian invasion as a contemporary news broadcast had several key influences.

How then, specifically, was his idea executed? Welles, continuing his testimony, was asked to explain:

A. [Mr. Koch's] principal job was to cut and edit the material . . . particularly with reference to the second half of the script, which adhered very closely to H. G. Wells. He was given the outlines of my ideas for the broadcast itself, or I assume he was given them, since I so instructed Mr. Houseman, and a script was presented to me which contained not only this dramatisation of the H. G. Wells material, but also the earlier material, which was more creative; that is, which owed nothing, in other words, to H. G. Wells.<sup>105</sup>

Welles thought of the *War of the Worlds* script as two halves: the first written much more in the form of a fake news broadcast, which he considered to be "more creative" than the second half, which "adhered very closely" to the book.<sup>106</sup> Asked to clarify this concept, Welles went on:

A. . . . I am trying to explain that the script is divided into two sections, the first of which is almost entirely original, based only on the plot situation implied in the Wells story, and the second half of the script, which is an edited version of the H. G. Wells story was what I would call the non-creative part. It was an adaptation of Wells rather than being invention. That was the distinction I was trying to make.<sup>107</sup>

To more fully explain how these two sections of the script came to be, Welles discussed Koch's role in their creation:

A. He worked on both, since he was one of those writers hired by myself to develop the ideas which I got for my show.

Q. Who gave him the information for the creative portion of the script?

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104. *Id.*

105. Transcript, *supra* note 23, at 70.

106. *Id.*

107. *Id.* at 71.

A. I gave my ideas to Mr. Houseman and Mr. Stewart. How this was passed on to Mr. Koch, I am in no position to say.<sup>108</sup>

Welles further testified that his next involvement with the script came once a “rough draft,” written by Koch, was presented to him.<sup>109</sup> Welles was asked how, from that draft, the script was molded into its final, on-air form.

A. To the best of my recollection, the rough draft was dramatised, or perhaps it might be more accurate to say developed, in technical radio terms; that is, the use of interruptions, news broadcasts, switch-overs from various radio stations and to mobile units. Information of this kind could not have been available to Mr. Koch and was, therefore, provided mainly by Mr. Stewart from his own technical experience.

Q. To a certain extent is this what you refer to as “stage business”?

A. No; very much more actual text itself. This show purported to begin as a musical broadcast from an hotel. There was then an interruption with a piece of news. We then went back to the station. There were then further interruptions. There was then the apparent use of newscasting techniques, the apparent use of amateur radio channels, and so on. This whole system of devices, originally conceived by myself, was perfected in committee by all of the people working for myself on this broadcast, and finally revised and in considerable measure rewritten by myself, as the last stage.<sup>110</sup>

Welles here described a highly collaborative process through which the simulated news idea was infused into the script—not just at its beginning, before Koch prepared the first draft, but throughout the writing process.

Pressed ultimately to identify the person who wrote the final script that was used on the air, Welles replied:

A. “My organisation,” is the correct answer. That included Mr. Koch, who did a great deal of work. I do not recollect any other writers whose only function was to write, but production associates worked on the writing, as they did on other shows, and in

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108. *Id.* at 71–72.

109. *Id.* at 69–70. Houseman was presumably the one who gave Welles the draft, though Welles was not asked who actually presented him with it. *Id.*

110. *Id.* at 72–73.

this case rather more than usual, because the actual writing depended on the use of radio techniques.

Q. Did Paul Stewart take a part in that?

A. Yes, Paul Stewart and others. How to apportion the contribution of these various people would be very difficult to say in exact percentages, but it was a collaborative effort, which was commenced and then concluded by myself.<sup>111</sup>

“A collaborative effort . . . commenced and then concluded by myself,” was how Orson Welles then, in the final analysis, described the creation of the *War of the Worlds* radio play. Starting with an idea conceived by him, communicated to his collaborators, developed by his organization (comprised of Welles, Koch, Houseman, Stewart, and others), and performed on the air by Welles and his fellow voice actors.

2. Howard Koch Testifies About Writing the Script.

Howard Koch, on the other hand, did not remember the *War of the Worlds* radio play—at least its script—as such a collaborative effort. Asked under oath whether he wrote it “alone or in collaboration with anyone else,” Koch testified:

A. Alone, as far as being a writer was concerned. As you know, there are always relationships with the producer, sometimes with the director and a sort of supervising relationship. And in this case . . . it was with Mr. Houseman who came up to my apartment at various times and would talk over various parts of the script as it was progressing.

Q. Did you have any contact with Mr. Welles about this particular script?

A. I had no contact with Mr. Welles during that—during the writing of the script, that I can recall. As nearly as I can remember, I saw him only at the dress rehearsals at the studio, and then very briefly.

Q. You received your instructions from his associate; Mr. Houseman; is that correct?

A. Yes.<sup>112</sup>

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111. *Id.* at 73.

112. *Id.* at 147 (reading deposition of Howard Koch, July 6, 1960, into evidence at trial). Expounding on his relationship with Houseman, and the suggestions Houseman communicated, Koch explained:

However, in describing Houseman's instructions, particularly those given to him before he began writing, Koch made it clear that the idea behind the script was not his own:

A. After I had finished the second week, and they wanted to continue the relationship, Mr. Houseman told me that the next one they wanted to do would be based upon H. G. Wells' 'The War of the Worlds.' He asked me to read it, the story. I did.

He then told me that they wanted to do it in an entirely different way from the way the story was written. They wanted to do it as a series of radio broadcasts involving the present invasion of the Martians. And, outside of this, I was free to go my own way. But this was a stipulation.

I considered this for a few hours, and I remember calling him back and saying that I didn't think this could be done in a week. It was just too much of an original job. I could get very little out of the story in this particular—if we are going to do it in this particular form.

Mr. Houseman then went back and talked to Mr. Welles. He called me back and said that Mr. Welles insisted that we should go ahead on this, because he very much wanted to do it.

So, I started—I started the script immediately after that.<sup>113</sup>

So, though Koch didn't know at that time whether the idea came from Welles, or from Welles and Houseman together, Houseman made it clear that Koch was to adapt *The War of the Worlds* into a series of

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Q. When Houseman would drop by when you were working on this script, what sort of suggestions would he make, if you can remember? . . .

A. . . . I'd say their nature would be such as, 'I think that you can get more out of this scene; I think this is too long here; I suggest that we bring in another character here; I don't think this will hold so long; I think you can get a little more color into this broadcast.' . . .

Q. Would you say, then, that these were, in effect, criticisms and having heard the criticisms you would continue writing or make changes?

A. Yes, sir, if I agreed with the criticisms, I would make the changes. If I disagreed with them, we would talk it out.

Q. Did he contribute anything in the sense of writing; in other words, dialogue or characters?

A. No, he was always very careful, Mr. Houseman, not to do that. He wanted it to retain the original flavor of the author.

*Id.* at 165–66.

113. *Id.* at 165.



radio bulletins describing the invasion as if it were happening in real-time. Moreover, Koch's first reaction after reading the book was that he could not do the work in a week if it was to be done in this new, fake-news form. He only began to write once Houseman made it clear that Welles insisted he go forward in the fashion prescribed.

With respect to *how* he went about adapting the book in the fashion in which Welles insisted, Koch was asked:

Q. Could you state how much of the material was actually taken from the book, percentagewise?

A. It's awfully hard to say. Because, for instance, I remember taking in the first part the description of the Martians, as I described them in it. You know, the business of the script, I described them as Mr. Wells—H. G. Wells—described them. And that was about all I can remember in Part I.

Well, the description of the machines, too. In other words, the physical descriptions, I went to as much as possible.

But the form in which I was doing this was so entirely different from Mr. Wells' story form, it made it practically an original script.

In Part II, there was an encounter between Prof. Pearson [sic] and a survivor that I think I took quite a good deal of that scene from H. G. Wells' story. And perhaps some other descriptions from that section of the story which was near the end. This was about the last quarter of the script.

Let's say, all together, that somewhere around one-fifth or one-tenth might have been taken from the original.<sup>114</sup>

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114. *Id.* at 151–52. Koch also, in his memory, provided the announcer cues and other radio effects, with no major changes made after he turned in the script. *Id.* at 159. Welles, for his part, recalled things somewhat differently:

Q. Did this script have the sound effects written in, to your memory?

A. A writer often indicates sound effects, although there were only a few radio writers capable of being helpful in that direction. We did not actively discourage the writing of these directions, although we found them useless.

Q. Did it have the various dialogue to be spoken by the various characters so indicated?

A. Did it have the dialogue? Yes; that is the definition of a script.

Q. So referring now to the script which we have here—I think there is a copy in front of you—for instance down near the bottom of page 1 it says: 'Announcer cue:', and then another voice breaks in '. . . for

Koch's description of what he took from the H.G. Wells book, and how much he thought was different, is very telling. "*The form in which I was doing this* was so entirely different from Mr. Wells' story form, it made it practically an original script," Koch testified, demonstrating his view that the news-bulletin format, conceived and insisted on by Orson Welles, was what led to the creation of material that was distinctly original from the book.

Despite their divergent recollections about how much Welles participated in the scriptwriting—according to Welles, much, according to Koch, none—one central point went without dispute. Orson Welles came up with the idea to adapt *The War of the Worlds* into a series of fake news bulletins, he then communicated it to John Houseman, who then communicated it to Howard Koch, who used this idea to script an original adaptation of H.G. Wells' novel for radio. The rest, heard on radios across America that night before Halloween, 1938, was history.

*D. Creative Litigation: Welles v. CBS*

The Mercury's *War of the Worlds* broadcast—the ground-breaking style, the public reaction, the media sensation—has continued to grip our imaginations, not just in America but around the world.<sup>115</sup> Much less remembered, however, is Orson Welles's battle for co-ownership and control of its copyright. Although a complete history of the Welles litigation would not suit our purposes here, some brief background on his claims and the courts' rulings will aid our ensuing look at idea-contribution and joint authorship, helping us understand both why

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the next twenty four hours not much change in temperature'. Was that sort of thing in the script?

A. Some of it. Much of it incorrectly in the script. There was an effort by Mr. Koch to indicate this, but owing to his lack of knowledge of radio procedure (that is not radio writing indicating horses' hooves, and so on, but radio procedure particularly called for in the script) I remember that most of his indications were useless to us.

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Q. . . . So would it be fair to say in this script that he turned in we would have the break from one type of broadcast to the other, then back to the hotel and then over to the newsflash?

A. Some of these were indicated as used in the show, but only some.

Q. Then you made some additions and changes?

A. I rewrote a great section. This was my normal procedure with all scripts and does not cast any reflection on Mr. Koch. He probably forgets that system of work which pertained at that time.

*Id.* at 104–06 (reading deposition of Orson Welles, July 8, 1960, into evidence at trial).

115. SCHWARTZ, *supra* note 4, at 220–29.

Welles lost his bid for a share in the copyright as well as how we might view things differently today.

1. Welles's Claims

Almost twenty years after *The War of the Worlds* first blazed across the airwaves, television had overtaken radio as the news and entertainment epicenter of American life. CBS, the former patron of Welles's radio work, decided that it wanted to do a "docudrama" about the public's frightened reaction to the radio broadcast, and so it produced the movie *The Night America Trembled*.<sup>116</sup> Televised in 1957, it included scenes depicting the Mercury actors reading lines from the script, intercut with mock footage of a terror-stricken audience.<sup>117</sup>

A few months before *The Night America Trembled* aired, CBS had reached out to offer Welles an acting part in it. Welles, believing he controlled the rights to the *War of the Worlds* broadcast, replied with a demand that he write and direct it instead.<sup>118</sup> CBS had already reached an agreement with Howard Koch, however, granting it the right to use the script in the movie, and so CBS proceeded without Welles's involvement or permission.<sup>119</sup>

Welles sued on September 8, 1959, in California state court, and CBS quickly removed the case to the U.S. District Court for the Southern District of California, Judge Leon R. Yankwich presiding.<sup>120</sup>

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116. *Id.* at 206.

117. *Id.*

118. *Id.* As Welles would later explain:

I was sure a serious mistake had been made by CBS, and that, on a moment's reflection, they would see that they did not have a right to make a telecast either based on my production or dealing with it without not only my permission, but my creative collaboration. I offered my services in a creative capacity as an alternative to playing a role in this show; in other words, I offered to write and produce the show for them or, at the very least, to prepare a treatment of what such a show might be.

Transcript, *supra* note 23, at 81.

119. SCHWARTZ, *supra* note 3, at 206.

120. Transcript, *supra* note 23, at 3–5; *Welles v. Columbia Broad. Sys.*, 308 F.2d 810 (9th Cir. 1962). Welles also named Westinghouse, the corporate sponsor of *The Night America Trembled*, as a defendant in the action. *Welles*, 308 F.2d at 811. "Removal" is the procedural mechanism by which defendants can automatically transfer a case from a state court to a federal court because the plaintiff's claims arise under federal law or there is a diversity of citizenship between the parties and the amount in controversy is sufficiently high. 14B CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721 (4th ed. 2015). This second reason, known as federal "diversity jurisdiction," was the mechanism by which the defendants here removed the case to federal court. *Welles*, 308 F.2d at 811. Welles was a resident of Rome, Italy while CBS and Westinghouse had their corporate

A Romanian-born Franklin Delano Roosevelt appointee and U.S. Army veteran of the First World War, Judge Yankwich had also built a formidable reputation as an intellectual property scholar, deciding important Hollywood cases and publishing articles on the subject in the University of Chicago's and University of Southern California's law reviews.<sup>121</sup>

Most notably, Judge Yankwich was the first to apply the now commonly used term "scènes à faire" (i.e., "scenes which must be done") to the copyright doctrine which says that where certain elements are indispensable, or at least standard, in expressing a particular idea (e.g., using the elements of a craft flying through space to express the idea of invading aliens), those expressive elements are as unprotectable as the idea.<sup>122</sup> Given Judge Yankwich's knowledge of the field as well as his skepticism toward the protection of ideas, Welles could not have found a much tougher audience for what was, ultimately, a novel series of claims.

In the first of these claims, Welles alleged that because he "conceived, originated, devised, [and] created [the] style" of the *War of the Worlds* broadcast, he was its "co-author and proprietor."<sup>123</sup> As such, Welles asserted that he was the "proprietor of the entire right, title and interest in and to" the broadcast, "together with common law copyrights and of all rights and privileges secured thereby" and that CBS had infringed his copyright because *The Night America Trembled* used a portion of the *War of the Worlds* script without his permission.<sup>124</sup>

Welles's two other claims centered on his previous contractual relationship with CBS as head of *The Mercury Theatre on the Air*. Specifically, Welles alleged in his second claim that CBS had breached an implied term of his radio contract that required his permission if

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places of residence in New York and Pennsylvania, respectively. Transcript, *supra* note 23, at 4. Welles was seeking a total of \$425,000 in damages, easily exceeding the \$10,000 amount-in-controversy requirement (the present-day requirement is \$75,000). *Id.*; 28 U.S.C. § 1332 (2012).

121. *Biographical Directory of Federal Judges: Yankwich, Leon Rene*, FED. JUD. CTR. <http://www.fjc.gov/servlet/nGetInfo?jid=2670&cid=999&ctype=na&instate=na> [perma.cc/3CS7-HVKZ]; Leon R. Yankwich, *What Is Fair Use?*, 22 U. CHI. L. REV. 203 (1954); Leon R. Yankwich, *Intent and Related Problems in Plagiarism*, 33 S. CAL. L. REV. 233 (1960). For an article Judge Yankwich wrote that dealt extensively with originality and ideas in copyright, see Yankwich, *Originality in the Law of Intellectual Property*, *supra* note 25.

122. NIMMER, *supra* note 15, at § 13.03[B][4] (internal quotation marks omitted); Peter Decherney, HOLLYWOOD'S COPYRIGHT WARS: FROM EDISON TO THE INTERNET 86–87 (2012) (detailing Judge Yankwich's involvement in the case of *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013 (S.D. Cal. 1942), in which he first used the term "scènes à faire").

123. Transcript, *supra* note 23, at 22.

124. *Id.* at 22–23.

CBS wanted to use any of the shows directed and produced by Welles.<sup>125</sup> In his third and final claim, Welles alleged that another implied term in his CBS contract was that CBS must grant him the first opportunity to serve as “producer, director and consultant” on any “production, adaptation or revision” of the shows he produced for CBS, including the *War of the Worlds* broadcast.<sup>126</sup>

## 2. Trial and Appeal

The only testimony taken in the case was that of two former members of *The Mercury Theater on the Air*—Welles himself, in a July 8, 1960 deposition at the American Embassy in London, and Howard Koch, at a deposition taken a month earlier in New York City (testimony which, in relevant part, was quoted above).<sup>127</sup> The parties agreed to try the case before the judge, not a jury, and also agreed to simply read the depositions into evidence at the trial as opposed to calling live witnesses.<sup>128</sup>

At the conclusion of the trial, Judge Yankwich told the parties that they didn’t have to wait for his decision, and, in announcing his ruling from the bench, he quickly disposed of Welles’s second and third claims, explaining that the nature and language of Welles and CBS’s contract did not support the broad implied terms that Welles ascribed to it.<sup>129</sup> In other words, CBS would not, without expressly stating it in the contract, have given Welles the perpetual right to control what CBS did with any show he had produced.<sup>130</sup>

So, as Judge Yankwich remarked from the bench, “[i]t seems . . . that the whole matter here turns upon the copyright.”<sup>131</sup> Yankwich discounted Welles’s testimony about his heavy involvement in writing the script—believing Koch’s version of events instead—but he gave Welles credit for conceiving the idea behind it.<sup>132</sup> This conception, however, because it was merely an idea, could give Welles no copyright in the *War of the Worlds* radio play. “The working out of the idea is in the script,” the Judge informed the parties, “[t]here is no right in an idea.”<sup>133</sup>

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125. *Id.* at 24.

126. *Id.* at 25.

127. *See supra* Part II.C.

128. *See supra* Part II.C.

129. Transcript, *supra* note 23, at 198.

130. *Id.*

131. *Id.* at 199.

132. *Id.* at 206.

133. *Id.* at 202. Note that, because Welles, in his pleadings, only claimed co-authorship, not sole authorship, the court may well have been able to resolve

Cementing this ruling, Judge Yankwich issued his written Findings of Fact and Conclusions of Law on May 4, 1961, which firmly stated, “Although plaintiff made some minor changes and modifications in said script after it had been completed by Howard Koch, plaintiff was neither author nor a co-author thereof.”<sup>134</sup>

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the case without deciding whether Welles was in fact an author of the broadcast or not. See *infra* note 222 and accompanying text. Further, most likely because Welles’s attorney raised the issue at trial, the court found also that CBS did not engage in unfair competition with Welles, because there was no risk that an audience would have confused the actors and reading the script on *The Night America Trembled* with Welles’ own original performance on the radio. Transcript, *supra* note 23, at 43.

The court further found that Welles had abandoned whatever copyright he had in the script based on Welles’s decision not to sue when Koch had earlier licensed the script for use in Hadley Cantril’s book *The Invasion from Mars*, which studied the panic resulting from the broadcast and the reasons behind it. *Id.* The Ninth Circuit did not reach this issue on appeal—perhaps because, at least under Welles’ theory that he was a co-author of the work along with Koch, it would be strange to find that his failure to sue his co-author for a prior use of the work would constitute abandonment. See generally *Welles v. Columbia Broad. Sys., Inc.*, 308 F.2d 810 (9th Cir. 1962) (describing the court’s reasoning and conclusions of law). Note, however, that Welles’s failure to contest Koch authorizing Cantril’s publisher, the Princeton Press, to register the copyright in its name, presumably for Koch’s benefit, could have started the statute of limitations running on any claim Welles would have had against Koch. *Id.*

Last, although Judge Yankwich did not include it as a basis for his ruling in his Findings of Fact and Conclusions of Law, the Ninth Circuit discussed Koch’s assertion that John Houseman, implicitly on behalf of Welles, told Koch that he would have full copyright ownership in all of the scripts that he wrote for The Mercury Theatre on the Air—an agreement that, if enforceable against Welles, would have made Koch the sole legal owner of the *War of the Worlds* radio play’s copyright regardless of whether Welles was its coauthor. *Welles*, 308 F.2d at 813 (“[It] clearly appears . . . from Koch’s deposition, that Koch dealt with one Houseman entirely and that the arrangement with Houseman was that, after a limited time, in view of the small fee paid Koch for writing the script all rights in the script would belong to Koch and not to appellant Welles.”).

The biggest problem with Koch’s assertion there is that, to be legally enforceable, such an agreement would likely have had to be in writing. See *NIMMER*, *supra* note 16, at § 10.03(A)(1)(a) (citing Section 28 of the 1909 Act, which required that a complete assignment of copyright in a work must be in writing). Koch apparently never asked for or received anything on this in writing. See Transcript, *supra* note 23, at 149 (“Q. In your employment by the Mercury Theatre, were you employed by written contract? A. I believe not. I have looked it up in my records and could find none.”).

134. See *Welles*, 308 F.2d at 812 n.1.

Welles appealed the ruling to the Ninth Circuit, which issued its decision on October 3, 1962, affirming the trial court's decision.<sup>135</sup> Most pointedly, the Ninth Circuit recited the general rule that "ideas per se are not copyrightable, but that the words or means of embodiment or expression of those ideas are," a rule which the Ninth Circuit noted was determinative of Welles's copyright claim.<sup>136</sup> Welles thus recovered nothing from his case against CBS.

A much more far-reaching consequence of Welles's failed suit, however, was the cementing of Howard Koch's legal status as the broadcast's sole author. Ever since the Ninth Circuit's ruling, Howard Koch has been the only member of the *Mercury Theatre on the Air* to profit from the copyright in the *War of the Worlds*.<sup>137</sup> Koch's descendants, since his death in 1995, continue to receive royalties from anyone who wants to rebroadcast, perform, or adapt the radio play.<sup>138</sup> Welles and his descendants have received nothing.<sup>139</sup>

### III. RECOGNIZING IDEA-CONTRIBUTORS AS JOINT AUTHORS

Orson Welles, as Martin Scorsese has perceptively observed, was an iconoclast.<sup>140</sup> Whether it was film, theater, or radio, he blatantly bucked convention, fighting to bend the systems in which he worked to his own vision. So too then, in his suit against CBS, Welles tried to bend the law to his vision of what it should be—a vision that he, as co-author and "proprietor" of the *War of the Worlds* broadcast, had the right to

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135. *Id.* at 810. The Ninth Circuit affirmed the trial court based on only a certain few of its conclusions of law. *Id.* at 814 ("Our rulings on Conclusions of Law Nos. 1, 3, 8 and 9 are determinative of the merits of this case, and it will therefore be unnecessary to pass upon the others.").

136. *Id.* at 814.

137. KOCH, *supra* note 12, at 8 ("[T]he copyright of my *War of the Worlds* radio play is in my name with the various benefits that have since accrued").

138. For example, in 2003, Howard Koch's widow sued Clear Channel Communications, XM Satellite Radio, and Glenn Beck for copyright infringement as a result of the defendants' unauthorized use of the *War of the Worlds* radio play, "with Glenn Beck in the Orson Welles role." See Permanent Injunction, Koch v. Clear Channel Comm'ns, Inc., No. CV03-03430-NM(PJWx) (C.D. Cal. Aug. 1, 2003). The parties settled for an undisclosed amount. See *id.*

139. Welles died in 1985 and was survived by his partner, Oja Kodar, and several children. Linda Christmas, *In My Father's Shadow: A Daughter Remembers Orson Welles by Chris Welles Feder: Review*, TELEGRAPH (Feb. 1, 2010, 6:20 AM), <http://www.telegraph.co.uk/culture/books/book-reviews/7094071/In-My-Fathers-Shadow-a-Daughter-Remembers-Orson-Welles-by-Chris-Welles-Feder-review.html> [<http://perma.cc/6M27-HTLR>].

140. A PERSONAL JOURNEY WITH MARTIN SCORSESE THROUGH AMERICAN MOVIES (British Film Institute 1998).

dictate whether and how CBS used it, despite the fact that CBS had already acquired that right from his co-author Howard Koch.<sup>141</sup>

That Welles ultimately failed in this attempt should come as no real surprise—a co-author cannot block another co-author from licensing a copyrighted work, nor can he stop the licensee from using it.<sup>142</sup> He has only the right to demand from his co-author an equal share of the profits.<sup>143</sup> And had the courts who heard Welles’s suit decided it on that ground, and that ground alone, there could be little complaint with their ruling. In hindsight, Judge Yankwich likely should have dismissed the case against CBS and told Welles that, assuming he had any rights in the *War of the Worlds* radio play, his only recourse was to sue Mr. Koch for a share of the proceeds.

Instead, the trial and appellate courts decided to expound on whether Welles was a co-author at all. And in so doing, they infused their rulings with the same problem that continues to plague the courts today—the misconception that because an idea standing *alone* is uncopyrightable, it must follow that a person who contributes only ideas cannot be a joint author in a *collaborative* copyrighted work.

Let’s examine, first, why this is a misconception and why we should dispel it.

A. *Why We Should Recognize Idea-Contributors*

1. An Author is More Than an Expressionist

Courts, as we saw earlier, have largely defined an “author” as an expressionist: a person “who translates an idea into a fixed, tangible

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141. Welles’s vision of what his rights in the *War of the Worlds* broadcast *should* have been were perhaps influenced by continental Europe’s recognition of the “moral rights” of an author, particularly given Welles’s affinity for Europe and the fact that he was living in Rome at the time of his suit against CBS. *See supra* notes 117–125 and accompanying text. *See generally*, ROBERTA KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2010); Peter K. Yu, *Moral Rights 2.0*, in *LANDMARK INTELLECTUAL PROPERTY CASES AND THEIR LEGACY* 13, 13–32 (Christopher Heath & Anselm Kamperman Sanders eds., 2011) (explaining moral rights in intellectual property).

142. This is true under the current Copyright Act as well as the 1909 Act that governed the *Welles* case. NIMMER, *supra* note 16, at § 6.10(A)(2)(a) (citing *Geshwind v. Garrick*, 734 F. Supp. 644, 651 (S.D.N.Y. 1990), *aff’d mem.*, 927 F.2d 594 (2d Cir. 1991) and *Meredith v. Smith*, 145 F.2d 620 (9th Cir. 1944)). But this is true only with respect to a co-author’s granting of a non-exclusive license. *Id.* at § 6.10(A)(2)(b). An exclusive license (without a concomitant license from the other co-authors) would effectively block other co-authors from licensing the work, defeating the purpose of the rule. *Id.* at § 6.10(A)(2)(d).

143. *See id.* at § 6.10(A)(1)(b) (explaining that joint owners may each make use of the copyrighted work, but must account to all other joint owners for any resulting profits).



expression entitled to copyright protection.”<sup>144</sup> And because the Copyright Act’s definition of “joint work” speaks of “a work prepared by two or more *authors*,” courts have denied joint authorship to idea-contributors on the basis of this definition of “author.”<sup>145</sup> In other words, if an author is someone who expresses an idea in a fixed, tangible medium, a person who contributes only intangible ideas cannot be an author.

The premise—one must be an author to be a joint author—is correct, but is the definition? Before delving into the statutory language, we should begin with the document that provides the Copyright Act’s underlying legal authority, the U.S. Constitution, and the Constitution’s use of the word “authors,” for the basic reason that even if idea-contributors can qualify as joint authors under the Act, if the Constitution doesn’t permit it, the case is already closed.<sup>146</sup>

The Constitution authorizes Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to *Authors* and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>147</sup> As noted above, courts have largely declined to rely on this language to deny idea-contributors copyright joint authorship, apparently because no court has seriously questioned the constitutionality of the Copyright Act’s work-for-hire provisions—provisions which recognize an employer as the “author” of an employee’s copyrightable creations even where the employer has creatively contributed *nothing* to the work, much less an idea. In other words, if we presume that the work-for-hire doctrine is constitutional, then we can’t say with a straight face that the Constitution bars idea-contributors from joint authorship.

However, even if one thinks the work-for-hire doctrine unconstitutional—that is, that recognizing non-creative contributors as “authors” stretches the Constitution’s language past the breaking point—I don’t believe that recognizing idea-contributors suffers from the same infirmity.<sup>148</sup> The question is whether the combination of the word “authors”

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144. See *supra* notes 35–41 and accompanying text.

145. 17 U.S.C. § 101 (2012); see also *supra* notes 35–41 and accompanying text.

146. See U.S. CONST. art. 6 (cementing the supremacy of the Constitution over all other federal or state law).

147. U.S. CONST. art. 1, § 8, cl. 8 (emphasis added).

148. See 2 PATRY, *supra* note 34, at § 3:18 (describing some possible connotations of the term “authors” in the Constitution:

Although the Constitution refers to “authors,” the term is not defined and has at least three possible connotations. The first is those individuals or entities that may qualify as authors. Congress could, for example, decide that only individuals, and not juridical entities, should be authors, or that juridical entities can be authors only in certain circumstances. Second, “author” could be merely an instrumental term, denoting the initial owner of all rights in a protected work. Under this view, there is no constitutional import to the term “author” so long

with the words “their . . . writings” prevents an idea-contributor who doesn’t put her idea into writing from constitutionally qualifying for authorship. In my view, the answer is no. The premise behind recognizing an idea-contributor as a joint author, as detailed in this Article, is that in contributing her ideas she is working together with a person who is physically putting pen to paper, such that the final product—the writing—owes its existence to the combination of two (or more) creative contributions. If the writing would not have existed in its final form *but for* the input of the idea-contributor, then I think we can readily—and constitutionally—say that the “writing” is that of multiple “authors,” one of whom is the idea-contributor. And again, as explained above, we are not giving the idea-contributor ownership of her idea. We are simply giving her joint authorship—and thus co-ownership—of the writing that owes part of its existence to her.

Next, let’s return to the meaning of the term “authors” in the Copyright Act, most specifically whether the Act requires fixation to be an author. The Act tells us that “[a] work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>149</sup> This language presupposes that a work can exist, and be authored, prior to fixation, a presupposition which makes sense—the fact that a piece of improvised jazz music performed live and without recording equipment has not been fixed doesn’t mean that the musicians are not authors or that there is no work. The work simply hasn’t been fixed in a tangible medium of expression.<sup>150</sup>

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as an original work has been created, Congress is free to assign initial ownership as it sees fit.

The final connotation of “authors” is that it refers to things authors do—acts that may be said to involve “authorship.” Under this connotation, authors are not determined by who they are but by what they do. As we shall see, this connotation of author is synonymous with “originality”: authors are those who create original works.).

Additionally, other scholars have noted that Congress’ separate constitutional power to regulate interstate commerce arguably provides a basis for the protection of unoriginality via copyright. *E.g.*, Michael B. Gerdes, *Getting Beyond Constitutionally Mandated Originality As A Prerequisite for Federal Copyright Protection*, 24 ARIZ. ST. L.J. 1461, 1464 (1992) (“The Court, however, is mistaken in its implication that Congress lacks power to grant federal copyright protection for non-original works. Congress could grant such protection pursuant to its power to regulate interstate commerce.”).

149. 17 U.S.C. § 101 (2012).

150. See Lape, *supra* note 37, at 65–74; VerSteeg, *supra* note 40, at 1347–64 (detailing why authorship is not dependent on fixation). But where I go beyond VerSteeg is the recognition that an author is also more than someone who

Now, the Act also defines when a work is “created,” specifying that it’s when “it is fixed in a copy or phonorecord for the first time.”<sup>151</sup> This definition could indicate that there is no work before fixation, and thus no authorship before fixation. But the definition, read more properly in my view, simply assigns an exact time of creation for purposes of the Act’s protections. It strains reality to say that an improvised jazz piece was not created when it was played for the first time, live, in front of an audience. It simply doesn’t receive protection under the Act—and thus is not “created” for purposes of the Act—until it’s fixed.

Professor Paul Goldstein, in his eminent treatise *Goldstein on Copyright*, asserts that the Act’s use of the term “authors” in its definition of a joint work implies that each such author must contribute a “work of authorship” as that term is used in Section 102 of the Act.<sup>152</sup> This, in turn, necessarily means that in Goldstein’s view each such “work of authorship” must be copyrightable by itself.

But the term “works of authorship” in Section 102 is preceded by the term “original” and followed by the language “fixed in any tangible medium of expression.”<sup>153</sup> Thus, I think the better reading is that the phrase “works of authorship,” or more specifically the word “authorship,” does not imply independent copyrightability. Instead, the surrounding language indicates that “authorship” can be both unoriginal and unfixed. Otherwise, the language surrounding “authorship” would be redundant and unnecessary.

Again, practically speaking, this should make sense. An improvised, live, unrecorded jazz piece is a work of authorship, just not one that’s fixed in a tangible medium of expression. Originality is a more complicated concept, but similarly, authorship can be, at least in part, unoriginal, in that it can (and typically does) incorporate original and unoriginal components.<sup>154</sup>

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uses a stenographer. *See infra* notes 195–204 and accompanying text. He holds back from that final step to which his full and enlightening explanation of the meaning of the word “author” naturally should lead. VerSteeg, *supra* note 40, at 1347–65.

151. 17 U.S.C. § 101 (2012).

152. 1 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 4.2.1.2 (3d ed. 2009).

153. 17 U.S.C. § 102 (2012) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . .”).

154. *See* Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505, 1507 (2009) (proposing a copyright scheme that protects “highly original” works more than “minimally original works”); Theo Austin Bruton, *Mind-Movies: Original Authorship as Applied to Works from “Mind-Reading” Neurotechnology*, 14 CHI.-KENT J. INTELL. PROP. 263, 270–272 (2014) (discussing how the U.S. Supreme Court has addressed the issue of originality). To be clear, a work that has zero originality, such as a photocopy, is not a work of authorship at all. There is no authorship in the end product, so no

Consider an artist who paints a replica of a painting in the Louvre.<sup>155</sup> The only authorship enforceable against a third party in that replica is the original expression added by the author (e.g., the pattern of the brush strokes, a deviation in the colors used, etc.).<sup>156</sup> This doesn't mean that the rest of the painting—the unoriginal expression—is not a part of the author's authorship. The overall work of authorship is the sum of both the original and unoriginal components.

To further illustrate, let's say that two artists are creating, together, a new painting that borrows from two existing paintings in the Louvre. Each one's input is, standing alone, unoriginal, but the combination (or transposition) of both of their unoriginal copying of the two existing works is, as a whole, an original and protectable copyrighted work. Neither artist has, alone, contributed original expression. Does that make neither of them authors? I believe the answer is no, and it demonstrates that the word "original" is not a redundant part of the statute.<sup>157</sup>

Authorship involves much that, by itself, would not constitute protectable authorship. A book's authorship involves ideas, which standing alone, would not constitute authorship, as well as unoriginal expression, which on its own, would not constitute authorship. But do we deny that these things, especially the ideas that formed the genesis of the book, are a *part* of the book's authorship? I don't believe we do. We simply deny protection as against third parties to any part of the book that is unoriginal or unfixable.

The key is that the combination of all of these elements—ideas and expression, both original and unoriginal—results in a final, fixed work of authorship that has some originality. In this way, originality and

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part of it can be authorship. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362–64 (1991) (holding that an alphabetized collection of names and telephone numbers lacked originality).

155. *See* DAVID McCULLOUGH, *THE GREATER JOURNEY: AMERICANS IN PARIS* 61–101 (2011) (describing the tradition of painting in the Louvre).

156. *See Feist*, 499 U.S. at 345 (“To be sure, the requisite level of creativity [for copyright] is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”) (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.08 [C][1] (2015)).

157. This is similar to the situation encountered by Judge Posner in *Gaiman v. McFarlane*, 360 F.3d 644, 658–59 (7th Cir. 2004); *see also supra* note 39, and I think it demonstrates that his logic in that case should not just be limited to cases of multiple contributors in which none of them have made independently copyrightable contributions. *Gaiman* is not an exception to the rule that “authorship” equals an independently copyrightable contribution; it is an example that proves (what should be) the rule that “authorship” need not be independently copyrightable in the joint authorship context.

fixation should—and by proper application of the statutory language *are*—required when we’re evaluating the copyrightability of a work as a whole, or when we’re judging what is protectable as against third parties, but not when we’re determining authorship.

The language of the Copyright Act shows, then, that authorship can be either unoriginal or unfixed, or both, and if so, it isn’t—standing alone—subject to federal copyright protection.<sup>158</sup> But unoriginal or unfixed authorship that, when combined with another’s fixed expression, creates an original, fixed work is (and should be recognized as) authorship that contributes to a copyrightable work.<sup>159</sup> And the contribution of such authorship—an idea for instance, such as the idea to adapt *The War of the Worlds* as a series of fake news bulletins—should thus qualify someone as one of the “authors” of a joint work under the language of the Copyright Act.

The above reading of the Copyright Act is of course merely my own, aided by principles of statutory construction and the analysis of other commentators. I don’t claim that it’s the only reasonable reading of the text. Though I believe the better reading of “authorship” is that it precedes and is separate from fixed expression, the meaning of “authors” and “authorship” is ultimately—absent a firm, express statutory definition—the subject of reasonable debate. This is particularly true given that the Copyright Act’s legislative history is essentially silent on the issue.<sup>160</sup>

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158. Unfixed expression has traditionally been the domain of common law copyright protection, which varies state by state. NIMMER, *supra* note 16, at § 2.02; *see also* Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 255 (N.Y. 1968) (containing a notable early discussion of whether oral statements qualify for common law copyright protection). For an amusing anecdote from Orson Welles regarding his relationship with Ernest Hemingway, *see Orson Welles on Hemingway*, YOUTUBE, <https://www.youtube.com/watch?v=NyTi9v9QPxE>.

159. If two people are creating a work, and one contributes an idea that, standing alone, is unoriginal, but when combined with the other’s originality it becomes protectable expression, the statute’s use of the word “original” does not preclude the recognition that authorship—for purposes of determining who are a work’s joint authors, not for determining what is protectable against others—can be unoriginal. *See also* Lape, *supra* note 37, at 65 n.113 and accompanying text (explaining how Congress in 1989 attempted but failed to amend the Copyright Act to insert the word “original” in the definition of joint work, such that the amended definition would have read “A ‘joint work’ is a work prepared by two or more authors with the intention that their *original* contributions be merged into inseparable or interdependent parts of a unitary whole”) (emphasis added).

160. Fourth Circuit Judge Roger Gregory has argued that “the legislative history undermines the notion that authorship, as it is understood in the joint-work context, requires an independently copyrightable contribution,” pointing to the absence of congressional discussion over the nature of contribution necessary for joint authorship. *Brown v. Flowers*, 196 F. App’x 178, 186–91

For instance, someone insistent on reading it the other way might say, “Well, the term ‘authors’ implies more than just the contribution of a ‘work of authorship,’ it implies the contribution of a ‘work of authorship’ *that is protected by the Act*, and the only kind that’s protected by the Act is an original, fixed work of authorship.” I don’t think we can say for certain that this analysis is wrong.

So, at the very least, courts and commentators who want to require independent copyrightability in joint authorship can, with a straight face, interpret the Act’s words to require it. The statutory language provides no clear answer.

In the end, it’s a question of policy.

## 2. Promoting Collaborative Creativity

As a matter of public policy, why should we recognize idea-contributors as joint authors? First, we should do so because it will incentivize creation in collaborative settings. The social significance of collaborative creativity, particularly in the twenty-first century, has been so thoroughly detailed in both academic studies and business commentary that no one doubts its importance.<sup>161</sup> From crowd-sourced web design,

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(4th Cir. 2006) (Gregory, J., concurring in part and dissenting in part) (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.07[A] (2015)). Of course, if the legislative history contained a favorable mention of the independent copyrightability standard, such mention would be compelling evidence that this is the proper standard. But unlike Professor Nimmer or Judge Gregory, I find it much less compelling in favor of a different standard that Congress failed to mention the issue at all.

161. Creative psychologist Keith Sawyer’s work, in particular, has thoroughly demonstrated the importance and success of creative collaboration. *E.g.*, R. KEITH SAWYER, EXPLAINING CREATIVITY: THE SCIENCE OF HUMAN INNOVATION 231–33 (2d ed. 2012) (describing the effect of collaboration on the success of scientific papers); KEITH SAWYER, GROUP GENIUS: THE CREATIVE POWER OF COLLABORATION 15 (2007); R. KEITH SAWYER, *Writing as a Collaborative Act*, in THE PSYCHOLOGY OF CREATIVE WRITING (Kaufman & Kaufman eds. 2009); *see also* Meghan M. Biro, *Smart Leaders and the Power of Collaboration*, FORBES (Mar. 3, 2013), <http://www.forbes.com/sites/meghanbiro/2013/03/03/smart-leaders-and-the-power-of-collaboration/> [<http://perma.cc/6SW4-X5WR>] (attributing the success of certain technologies and leaders to collaboration); Carlin Flora, *Dream Teams*, PSYCHOLOGY TODAY (May 1, 2008), <https://www.psychologytoday.com/articles/200805/dream-teams?collection=126232> [<http://perma.cc/33AA-PHUZ>] (telling stories of successful collaborations); *Proving the Power of Collaboration in Mathematics*, EUROPEAN RESEARCH COUNCIL (Aug. 8, 2014), <http://erc.europa.eu/erc-stories/proving-power-collaboration-mathematics> [<http://perma.cc/2TF6-EKD9>] (describing a mathematician who credits collaboration for his research success).

to television writing staffs, to both hard- and soft-science research, we enjoy the benefits of collaborative creativity throughout our society.<sup>162</sup>

Furthermore, it's a maxim of creativity that ideas matter.<sup>163</sup> This is true in both solitary and collaborative creative contexts. A brilliant artist has an idea of what he wants to paint before or while she paints it.<sup>164</sup> A gifted group of television writers begin with ideas of what to write about before or while they write it.<sup>165</sup> To whom do we look for creative new approaches or solutions? The "idea person."

The fact that copyright doesn't protect these ideas, by themselves, doesn't mean that they aren't of central importance to copyright. We've designed copyright for the express goal of incentivizing the expression of *ideas*, not expression for its own sake.<sup>166</sup> But this rule that idea-contributors can't be joint authors cuts the legs out from this goal with respect to collaborative creativity.

Think of Orson Welles. In order to most effectively bring his radio program to audiences each week, he chose to collaborate in the writing process, first with John Houseman, then with Howard Koch.<sup>167</sup> The one time that Welles decided to take on a script by himself, it resulted in an abbreviated program.<sup>168</sup> So, to increase the speed and quality of their script-production, Welles and Houseman hired Koch, and Welles relied on him to develop his ideas in script form—specifically, here, the idea

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162. See Biro, *supra* note 161 (recognizing collaboration as the "keystone of leadership success").

163. See, e.g., *About Ideas Matter*, IDEAS MATTER, <http://www.ideasmatter.com/about> [<http://perma.cc/V6WV-DPEA>] ("Ideas Matter is a consortium of cross-sector enterprises, small and medium-sized businesses and trade associations that aims to expand awareness and promote the benefits of intellectual property (IP). We firmly believe that ideas are important to the economy, important to society, important to companies both large and small. In other words, Ideas Matter.").

164. See, e.g., SUE PRIDEAUX, EDVARD MUNCH: BEHIND THE SCREAM 120 (2005) (reprinting one of the artist's writings, which describes a painting he is imagining).

165. SAWYER, *Writing as a Collaborative Act*, *supra* note 161, at 169–70.

166. VerSteege, *supra* note 40, at 1365 ("[T]he 1976 Act . . . promotes progress in knowledge by encouraging those who conceptualize original expression to communicate that expression to the public . . ."). There is such a thing as expression without an idea. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 311–12 (1988). But this type of creation is certainly at the fringes of copyright and is not its main thrust.

167. See *supra* Part II.B.

168. The remainder of the airtime was filled by the announcer. See *supra* note 76 and accompanying text. One could easily imagine that, under different circumstances, CBS would have fired Welles (or another artist in his shoes) over such an incident.

to describe *The War of the Worlds*' events as a contemporary news broadcast.<sup>169</sup>

Welles's decision to delegate the expression of his ideas thus resulted in, first, the hiring of a talented writer, giving him his first real training and experience (in Koch's words, "Only later did I realize that the fringe benefits of training and discipline were worth many times my salary"), a writer who later coauthored one of our most beloved films, *Casablanca*.<sup>170</sup> It led, second, and most immediately, to the massive success of the *War of the Worlds* broadcast. Had Welles tackled this script on his own, he probably would have failed to deliver the quality of material that he and Koch, together, were able to produce. Welles also would have had less time to devote to the work he was doing on Broadway, a medium in which he was simultaneously achieving new and exciting innovations.<sup>171</sup>

So what lesson should we take from copyright failing to recognize Welles's contribution? "When in doubt, don't share your idea, develop it yourself, or you could be left with no rights in the work that your idea spawned."<sup>172</sup> Or perhaps it's "make sure you write down all of your

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169. See *supra* notes 78–85 and accompanying text (describing the first writing assignments that Koch completed for Houseman).

170. KOCH, *supra* note 5, at 13; see *supra* note 13 and accompanying text.

171. See *supra* notes 58–60 and accompanying text.

172. This, as my colleague and economics expert Saurabh Vishnubhakat pointed out to me, is very similar to the Arrow information paradox, in which economist Kenneth Arrow theorized that a purely market-based sale of technology—without patents—would likely fail, in that the purchaser of technology, in deciding whether to buy it, would want sufficient information about the technology in order to make a purchasing decision. KENNETH J. ARROW, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609 (Universities-National Bureau ed. 1962); see also Balganes, *supra* note 17, at 1731 (noting the application of the Arrow information paradox to joint authorship generally). Once the purchaser has that information, however, he has in effect obtained the capability to create the technology without having to pay for it. *Id.*; see also Glynn S. Lunney, Jr., *Copyright, Derivative Works, and the Economics of Complements*, 12 VAND. J. ENT. & TECH. 779, 805 (2010) (describing an "information paradox" that harms licensing markets). *But see* Michael J. Burstein, *Exchanging Information without Intellectual Property*, 91 TEX. L. REV. 227 (2012) (questioning the paradox and arguing that alternative strategies for engaging in information exchange may be available to avoid it).

Here, with respect to copyright, once one collaborator has orally communicated an idea to another collaborator, present copyright law (or at least its present judicial interpretation) allows the receiver of that idea to take and exploit it by himself without compensating the idea's generator. Koch, for example, could have taken Welles's idea and—perfectly in line with copyright law—used it to write a broadcast for a competing station.



ideas yourself first, or get your collaborator to sign a contract before you share your idea, no matter the whims of inspiration, the time crunch of deadlines, or the demands of other artistic endeavors in which you're engaged." Both of these lessons represent major roadblocks to the free flow of ideas—and to creative collaboration as a whole—built right into copyright, the law that's supposed to exist for the express purpose of promoting the progress of knowledge and the arts.<sup>173</sup>

Some, however, have argued the flipside—that recognizing idea-contributors as joint authors would actually disincentivize collaboration. This, the argument goes, is because one who's already contributing expression wouldn't want to risk working with someone who could claim joint authorship in an idea.<sup>174</sup> But this, I think, is a fallacy.

First, if a person is getting a truly valuable idea from a collaborator, then the overall benefit of that idea to the value of the copyright in the work will likely outweigh the potential burden of having to share authorship (and thus copyright ownership) with the idea-contributor.

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In addition to disincentivizing the free flow of ideas, this off-shoot of Arrow's paradox also creates an inequitable or illusory contractual bargaining position for the idea-generator. See *infra* notes 188–194 and accompanying text (explaining how idea-contributors suffer from diminished bargaining power in contract negotiations).

173. U.S. CONST. ART. I, § 8, cl. 8 (“Congress shall have Power . . . To secure to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”). As David Olson has noted, “At the time of the constitutional convention, the word ‘science’ was understood to have a broad meaning, certainly broader than current definitions referring to areas of research that rely on the scientific method. ‘Science’ referred more generally to knowledge and the liberal arts.” David S. Olson, *A Legitimate Interest in Promoting the Progress of Science: Constitutional Constraints on Copyright Laws*, 64 Vand. L. Rev. 185, 187 (2011).

Of course, there is also the question of whether copyright incentivizes creation at all, see Laura J. Murray et al., *Putting Intellectual Property in its Place: Rights Discourses, Creative Labor, and the Everyday* (2014), a question which a recent historical study answers with a “yes, it can,” see Michela Giorcelli & Petra Moser, *Copyright and Creativity—Evidence from Italian Operas 1–3*, 27–29 (2015), <http://ssrn.com/abstract=2505776> [<http://perma.cc/LNR7-9R95>] (suggesting that copyright laws adopted after Napoleon's military victories in Northern Italy encouraged the creation of a greater number of high-quality operas in that region). But assuming for sake of argument that copyright doesn't incentivize creation, or that we can't know for sure if it does or not, then as I have suggested elsewhere, let's simply align copyright as best we can with the reality of artistic creation, and let the chips fall where they may. McFarlin, *supra* note 19, at 639–40.

174. George W. Hutchinson, *Can the Federal Courts Save Rock Music?: Why A Default Joint Authorship Rule Should Be Adopted to Protect Co-Authors Under United States Copyright Law*, 5 TUL. J. TECH. & INTELL. PROP. 77, 83 (2003) (noting how courts deciding cases under the current joint authorship rules have indicated that “unwelcome joint authorship would create a disincentive to collaborate”).

Otherwise, wouldn't the same problem dissuade two expression-contributors from collaborating? Why should anyone collaborate and share ownership with anyone?

Second, to the extent that the concern is false claims of idea-contribution, a person who contributes expression will naturally be in a strong position to defend against such claims. The expression-contributor has her tangible expression as evidence to prove her authorial contribution to the work. The only evidence a false idea-contributor has is her own testimony, coupled at most with the testimony of any conspirators in her fraudulent scheme, which would not likely get far against the expression-contributor's hard evidence.<sup>175</sup>

The statutory requirement of intent to create a joint work is of course the other dam against which the feared flood of false or weak joint authorship claims would crash.<sup>176</sup> And as I detail further below, I propose that courts require exacting evidence of such intent in idea-contribution cases, going so far as to require evidence that the collaborators had a preexisting working relationship before such a claim could proceed to a jury.<sup>177</sup>

As we've seen, then, the contribution of ideas is unquestionably vital to the collaborative creative enterprise. And by failing to recognize idea-contributors as joint authors, we risk disincentivizing collaboration. Conversely, if we can find a way to give joint authorship status to the contributors of valuable ideas, it should incentivize collaborative creativity, particularly if we do so in a way that places fair limitations on such claims.

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175. This of course is also an evidentiary concern for a valid claim of idea-contribution asserted against a lying expression-contributor. I think this just goes to further show that concerns over a flood of joint authorship claims if the idea-contribution rule were to be changed are most likely exaggerated, as the issues of proof are daunting.

176. 17 U.S.C. § 101 (2012) (requiring "the intention that [the authors'] contributions be merged into inseparable or interdependent parts of a unitary whole"). There is also the likelihood that, if we began recognizing idea-contributors in the limited way I propose here, social norms would prevent a flood of joint authorship litigants. For instance, the social norm that goes, in essence, "professors at conferences offering their thoughts to a presenter on her work does not make them the presenter's co-authors" would likely dissuade such professors from filing suit for joint authorship, for fear that they would be ostracized within that academic community. Cf. Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1825–26 (2008) (explaining a social norm among stand-up comedians that disfavors claims of joint authorship in jokes, specifically where one comedian who developed a joke's premise would be considered within the comedy community the joke's sole author, even if a second comedian had contributed the joke's punch-line).

177. See *infra* Part III.B.2.

A typical objection raised at this point in the discussion, though, is that Welles should have entered into contract with his collaborator Koch, because contract law is the best way to protect idea-contributors, not copyright. So let's examine that objection.

3. Ensuring Rightful Credit, Compensation, and Bargaining Power

*“Did my poverty help my creativity? Uh, no.”*

*—Orson Welles, looking back on his career*<sup>178</sup>

Some might dismiss his failed stab at recognition as a joint author of the *War of the Worlds* broadcast as purely Welles's folly, an outlier where he simply should have known well enough to have secured a contract protecting his rights, or to at least have written down his idea before he had Koch script it. I think there are a few important responses to this way of thinking.

In the first place, Orson Welles was working under tight deadlines in what was, at the time, a cutting-edge artistic endeavor. Taking a Broadway theatre company to the radio was a new concept in a relatively new industry, and there had not yet been time to develop an iron-clad industry custom for contractual relationships (such as the system in place in Hollywood today).<sup>179</sup> In this environment, is it surprising that a twenty-three-year-old Welles did not draw up a contract regarding his share in the copyright to the scripts?

Next, what was his real-time incentive to do so? No one truly expected the mass public reaction to the *War of the Worlds* broadcast, and thus no one knew its potential value. Indeed, Koch's approximately fifteen other *Mercury Theatre on the Air* scripts produced zero copyright-related income in the twenty years after he wrote them.<sup>180</sup> So, juggling his hectic Broadway and radio schedules, is it surprising that Welles did not write out a contract with Koch delineating his rights in something that no one expected would be worth anything?

My overall point is that we should primarily view copyright's default joint authorship rules as a way to credit and compensate cutting-edge artists that are creating works whose ultimate value is uncertain

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178. *MAGICIAN: THE ASTONISHING LIFE & WORK OF ORSON WELLES* (Cohen Media 2014).

179. See *FILMCONTRACTS.NET*, <http://www.filmcontracts.net/> [<https://perma.cc/2J6T-VJTH>] (containing a massive directory of film industry template contracts). Needless to say, a similar resource was not available to Orson Welles in his 1930s radio work.

180. Transcript, *supra* note 23, at 160 (“Q. Of these 15 scripts, approximately are there any others that you have ever sold rights to . . . anyone else? A. No, there were no others.”).

at best.<sup>181</sup> Many if not most of these artists are not going to enter into a contract delineating their rights before they collaborate, no matter how much we in the legal profession try to encourage them to do so. But if they have a general sense that copyright will recognize their authorship and protect them if and when their endeavor becomes valuable, instead of a distrust of copyright stemming from stories like that of Orson Welles, these artists might be more inclined to pursue such new and uncharted artistic courses.

Contract law, on the other hand, is more useful for artists operating within established industries like the Hollywood studio system, where there are accessible funding sources, the creative product is a known and thus more easily valued commodity, and there has been time to develop a customary system of contractual relationships and division of rights among creative collaborators.<sup>182</sup>

So, recognizing idea-contributors as joint authors would protect innovators' creative investment and not leave it entirely to the state-by-state vagaries of contract law. Our Constitution has empowered Congress to establish a uniform national system of copyright law to "promote the Progress of Science and useful Arts," and it has given the judiciary the job of interpreting copyright law in line with this goal.<sup>183</sup> Leaving contract law—a non-uniform, state-by-state system—as idea-contributors' only recourse defeats, in my view, copyright's national constitutional purpose and responsibility with respect to these artists.<sup>184</sup>

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181. Here, when I speak of credit, I refer primarily to the general association in the public mind between original copyright ownership (as opposed to ownership obtained via a transfer from the original owner) and authorship. The work of Roberta Kwall, particularly in her book *The Soul of Creativity*, argues persuasively that U.S. copyright law, like that of many other countries, should require that works be attributed to their authors. KWALL SOUL OF CREATIVITY, *supra* note 141. Many outside of the world of intellectual property law would, I think, be surprised to learn that this is not already required under U.S. copyright law and that authors not properly credited for their work must resort to other enforcement mechanisms. *See* 3 NIMMER, *supra* note 16, at § 8D.03[4]; McFarlin, *supra* note 19, at 587 n.25.

182. Of course, practical political reality gives established industries a better ability to lobby Congress for copyright protections than cutting-edge artists. *See, e.g.,* Julian Hattem, *Study: Film Industry Beefing Up Lobbying*, THE HILL (Feb. 27, 2014) ("The film lobby has been dramatically beefing up its presence in Washington."). But at least on this specific issue—in which life-tenured federal judges are deciding which interpretation of already-present statutory language is better policy—cutting-edge artists *should* have a better chance at a fair shake.

183. *See* U.S. CONST. art. I, § 8, cl. 8; art. III.

184. *See supra* note 25 for an example of how some, but not all states recognize "idea submission" claims under a theory of implied contract. These claims could help an idea-contributor seeking compensation for her work, but they obviously lack national uniformity and could create choice of law issues for collaborations occurring across state lines. With the ever-expanding use of

If an idea-contributor's contract is invalidated under a given state's law,<sup>185</sup> then he or she is simply out of luck, as opposed to the expression-contributor, who would still have the default protections of federal copyright law on which to fall back.

A similar problem faces those who would argue that copyright's work-for-hire provisions already adequately protect high-level idea-contributors like Welles.<sup>186</sup> Welles (or at least his legal counsel) apparently thought so too—having made the belated argument on appeal that he, as Koch's employer, was the owner of Koch's creative output—but Welles's argument fell on unsympathetic ears, with the Ninth Circuit deciding that the evidence did not support a finding of an employer-employee relationship.<sup>187</sup> Given that the question of whether such a relationship exists is dependent on multiple, uncertain factors,<sup>188</sup> an idea-contributor can, like Welles, be easily left with no rights in the work, whereas an expression-contributor, again, always has joint authorship on which to fall back.

Further, in the instances where collaborators do negotiate a contract, the default copyright authorship rules provide a baseline for negotiations.<sup>189</sup> By excluding idea-contributors from authorship, we place them in an unequal bargaining position in such negotiations. If an idea-contributor were entitled to a co-equal ownership share by default, this

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the Internet for collaborative creativity, such issues can only increase in the coming years. State law contract claims also, at a basic level, do not offer plaintiffs the public perception of authorship in the overall work that comes with copyright.

185. See, e.g., 5 WILLISTON ON CONTRACTS § 9:1–9:3 (4th ed.) (noting different state laws regarding minors' capacity to contract). And in the situation of a collaboration across multiple states, such as an internet collaboration, which state's contract law will apply? The answer is often difficult and is left up to rules designed long before the advent of the Internet. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).
186. See 1 GOLDSTEIN, *supra* note 152, at § 4.2.1.2 (noting that joint authorship questions are often “resolved under the work for hire provision”).
187. *Welles v. Columbia Broad. Sys., Inc.*, 308 F.2d 810, 813 (9th Cir. 1962).
188. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (“Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. No one of these factors is determinative.”).
189. See KWALL, SOUL OF CREATIVITY, *supra* note 141 (noting that creative collaborators negotiate contracts on top of, and in relation to, the default rules set by copyright law).

would give her added leverage to bargain for more of the ownership pie, more rights, more money.<sup>190</sup> If the idea-contributor, at the start, is entitled to nothing, then she loses that significant bargaining chip.

In Welles's case, as producer and director of *The Mercury Theatre on the Air*,<sup>191</sup> he would have had other negotiating leverage—he could, for instance, have fired and replaced Koch if Koch insisted on owning the copyright in the scripts—but if the shoes were on the other feet, and Koch was the idea-contributor, what bargaining power would he have had? Little to none. So, even where artists are negotiating their respective rights as a matter of contract, the joint authorship default rules still make a difference.

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190. Commentators have argued that U.S. copyright law should, like several other countries, allow for sliding-scale ownership allocation in joint authorship litigation, as opposed to the mandatorily equal shares the law currently assigns to joint authors who have no contrary agreement. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Copyright Trust*, 100 CORNELL L. REV. 1015, 1056–57 (2015); Gregory N. Mandel, *LeftBrain Versus Right-Brain: Competing Conceptions of Creativity in Intellectual Property Law*, 44 U.C. DAVIS L. REV. 283, 352–57 (2010); Benjamin E. Jaffe, Comment, *Rebutting the Equality Principle: Adapting the Co-Tenancy Law Model to Enhance the Remedies Available to Joint Copyright Owners*, 32 CARDOZO L. REV. 1549, 1571–79; Susan Keller, Comment, *Collaboration in Theater: Problems and Copyright Solutions*, 33 UCLA L. REV. 891, 933–37 (1986).

As Roberta Kwall has explained, joint authorship under U.S. copyright law stems from the “tenants in common” model of property ownership, a model which generally allows for co-ownership of unequal shares in a piece of property. KWALL, SOUL OF CREATIVITY, *supra* note 141. Given that the Copyright Act does not expressly mandate coequal ownership, courts could change their present stance that joint authors (in the absence of a contract providing otherwise) must share ownership equally and, instead, courts could choose to allocate unequal ownership shares in some joint authorship disputes. *Id.* However, given judges’ historic disinclination towards the type of decision-making that such sliding-scale ownership allocation would require—e.g., trying to figure out the exact percentage a piano player’s input contributed to the creation of the overall work: 30%, 60%, 42%, 77%?—I don’t expect that the courts will change their position on this issue. *E.g.*, *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”). I tend to agree with this rationale for the courts’ present position—that the difficulties involved in determining sliding-scale percentages for multiple creative contributions outweigh the equitable benefits of doing so—and, accordingly, one of the reasons I advocate for requiring that a joint author have “substantially contributed to the essence of the work” is to ensure that where a coequal share is awarded, it is awarded to a major contributor. *See* McFarlin, *supra* note 19, at 662.

191. *See supra* notes 56–71 and accompanying text (explaining Welles’s role in creating, writing, and directing *The Mercury Theatre on the Air*).

Finally, I believe it helps here to take a long-view of Welles's career. We tend, if we don't look too closely, to remember him as a hugely successful artist. If we measure success in lasting influence and respect, then we're certainly right. But if we measure it in dollars and cents, then we're very wrong. After leaving radio to pursue a career in film, Welles made movies that—though many now regard them as great artistic achievements—were usually box-office failures.<sup>192</sup> He soon had to take bit acting roles and scrounge for investors, often putting his films on hold for years until he could find more money to finish them.<sup>193</sup> Some he never finished.<sup>194</sup>

If he had been able to financially benefit from the *War of the Worlds* broadcast as its joint author and co-owner of its copyright, Welles may well have used that money to fund his films.<sup>195</sup> Instead, as an idea-contributor, this potential income source was closed to him, and thus our copyright law failed to promote the progress of at least one significant artist's work.

### B. *How We Should Recognize Idea-Contributors*

We've now looked at some compelling reasons for why we should recognize idea-contributors as joint authors. But it's not enough to stop there. To change the ingrained judicial prejudice against these idea-contributors, we need to figure out *how* to recognize them.

Some very valid questions need to be answered: are all ideas worthy of joint authorship? If not, where do we draw the line? Can we do this in a way that doesn't cause a flood of joint authorship claimants? I think there are three primary ways to answer these questions and thereby define how we can, in a practical manner, bring idea-contributors into the joint authorship fold.

#### 1. Substantial Creative Contribution

First, we need to decide whether all ideas contributed with the requisite intent to create a joint work should qualify for joint authorship. The answer in my view is no, not all ideas—only substantial ones. There are ideas on the fringes, having only a minimal impact on the work, which I think most of us would reasonably agree do not constitute authorship of a creative work. For example, if Orson Welles had told Howard Koch to describe one of the characters in the *War of the Worlds* broadcast as wearing a blue suit, I don't think anyone would think an

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192. BRADY, *supra* note 3, at 460, 550; HEYER, *supra* note 57.

193. See HEYER, *supra* note 57.

194. *Id.*

195. Regarding the benefits that accrued to Howard Koch and his descendants, see notes 135–136 and accompanying text.

insubstantial idea like that—“make a character wear a blue suit”—would or should constitute authorship.

On the other hand, the more substantial the impact an idea has (or ideas have) on the essence of the work, the more it takes the form of authorship. As Welles himself remarked, the idea to do the *War of the Worlds* broadcast as a series of fake news bulletins “was the guide for the dialogue, radio effects, the whole organization of the material. It is the heart of the matter.”<sup>196</sup> The very essence of the broadcast was influenced—dictated is perhaps the better word—by Welles’s idea. Koch wrote the expression—the dialogue, the effects, the description of events—in a manner reflecting and conforming to the idea that Welles provided.<sup>197</sup>

Of course we’re not compelled to agree with Welles’s characterization of his idea as “the heart of the matter,” but I believe that a judge or jury should be able to decide—as a question of fact—whether an idea like Welles’s is substantial enough to constitute joint authorship in a work.

Using a contribution’s substantiality as the basis for evaluating joint authorship claims—with respect to ideas but also with respect to expression—provides a benchmark which helps to ensure that the credit and financial compensation attached to joint authorship are reserved for the major contributors to a copyrighted work.

I believe substantiality also aligns with the use of the term “authors” in the Copyright Act’s “joint work” definition. A sole author has inarguably substantially contributed to the essence of a copyrighted work: she has contributed *all* of the essence of the work. Thus, requiring a substantial contribution by one who claims to be a joint author lines up at a common-sense level with the joint work definition’s use of the plural term “authors.” We’re looking for people who have contributed to a work in a way that’s something less than a contribution of the entire essence of the work but something more than tangential or very minor input.

I’ve explained elsewhere my proposed use of this substantiality concept in joint authorship generally,<sup>198</sup> but with respect to the contribution of ideas there are a few points that bear specific elaboration here.

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196. See *supra* note 2 and accompanying text.

197. See *supra* notes 110–112 and accompanying text. For further specifics on how I define the “essence” of a work and why I believe that this term is useful in the joint authorship context, see McFarlin, *supra* note 19, at 653–62. The use of the term “essence” also helps distinguish my proposed use of substantiality from the one criticized in *Aalmuhammed v. Lee*, which basically equated the term “substantial creative contribution” with a contribution of anything more than de minimis creative input. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232–34 (9th Cir. 2000).

198. See McFarlin, *supra* note 19, at 653–62 (arguing that the touchstone of the joint authorship analysis should be whether a collaborator “substantially



contributed to the essence of the work”). Mary LaFrance has used the term “substantial” in proposing an approach to determining joint authorship contrary to the one the Second Circuit adopted in the *Childress* decision. Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 194 (2001); *see also* Balganes, *supra* note 17, at 1745–46 (explaining that his proposal to improve how courts determine the requisite intent for joint authorship necessarily involves a determination of whether putative coauthors’ respective contributions were substantial enough to plausibly motivate each other to create a work together). My proposed use of substantiality builds on that first proposed by LaFrance, but seeks to add a more specific and stringent formulation of the concept. *See* McFarlin, *supra* note 19, at 653–62 (factoring in industry custom and requiring that a contribution not only be substantial but also one that affects the essence of the work). I believe, also, that my proposed definition and use of substantiality would fit rather naturally within Balganes’s proposed improvement to the intent requirement.

Additionally, Judge Roger Gregory in a 2006 dissenting opinion similarly suggested that a “substantial original contribution” standard should replace the independently copyrightable contribution requirement, explaining his view that “[a]lthough 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. Further, this standard is more consistent with the plain language and legislative history.” *Brown v. Flowers*, 196 F. App’x 178, 189 (4th Cir. 2006) (unpublished) (Gregory, J. dissenting); *see also supra* notes 146–162 and accompanying text.

Where I respectfully diverge from Judge Gregory, at least regarding this issue, is that I would not mandate that the contribution be independently original. *See supra* notes 151–160 and *infra* notes 217–222 and accompanying text. (It seems that Judge Gregory and I might also disagree on the type of intent required for joint authorship.) *Compare Flowers*, 196 F. App’x at 190–91, *with* McFarlin, *supra* note 19, at 635–40.

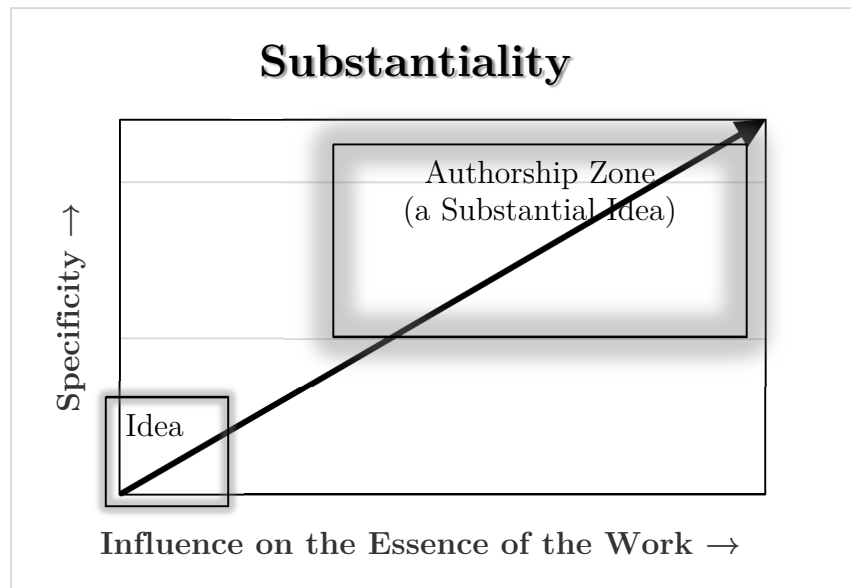
It is also worth noting here that (to the extent it was not clear already by the Berry-Johnson test’s use of the word “author” in the term “joint author”) a substantial contribution naturally must be one of authorship, i.e., creative activity that does not simply comply with another’s direction. *See supra* note 22 and accompanying text. For instance, if Johnson was merely playing the exact notes that Berry told him to play in the exact manner that Berry instructed him, then Johnson would not have made a substantial contribution to the essence of the songs at issue in that case. *See* McFarlin, *supra* note 19, at 582 n. 11 and 657.

Here, similarly, Houseman’s listening to Welles’s idea and then relaying it exactly to Koch would not alone have constituted a substantial contribution to the essence of the *War of the Worlds* radio play. *See supra* notes 106, 112, and accompanying text. A judge would easily have found this to have been a matter on which no reasonable jury could have decided otherwise.

However, hypothetically speaking, if Houseman had changed Welles’s idea in relaying it to Koch (such as instructing Koch to write not merely in the form of a news bulletin but a news bulletin done entirely in the form of a government agency’s emergency notification), and Koch had integrated Houseman’s emergency notification idea into the script, then it is possible—

First, courts have largely labeled as an “idea” any creative contribution that is either unfixed, too abstract to be considered “expression,” or both.<sup>199</sup> This is the starting line for determining an idea’s substantiality. An idea that has little to no influence on the essence of a copyrighted work’s final, fixed, original expression (like the “make a character wear a blue suit” example, above) or that is so unspecific as to be useless to the final, fixed, original expression (like “write me a radio play”) would certainly be insubstantial, in that no one would reasonably argue it should qualify for authorship in a work.

However, as an idea moves up each of these scales—influence on the work’s essence and specificity—it becomes more substantial and thus closer to authorship. Visually, it would look something like this:



The commissioning of a work—that is, requesting that it be created—provides a good context in which to illustrate this concept. Courts have regularly refused to recognize as a joint author someone who commissions a work.<sup>200</sup> For example, in 2010, the Federal Circuit discussed two hypothetical situations where a person commissioning a work would, in the court’s view, not be a joint author:

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under the Berry-Johnson test—for Houseman to have a colorable joint authorship claim based on his having substantially contributed to the essence of the broadcast. In other words, in that hypothetical scenario, it likely would have been an issue for a jury.

199. See *supra* notes 26–32 and accompanying text.

200. See NIMMER, *supra* note 16, at § 6.07 (summarizing cases on commissioned and architectural works).

If one commissioned a work for a cowboy riding a horse, that contribution would not constitute copyrightable expression . . . .  
If one later instructed the artist to depict the cowboy as weathered, wearing a cowboy hat, and riding slowly in calm wind, that would not rise to the level of copyrightable expression.<sup>201</sup>

The reason the court gave for denying joint authorship in each of these cowboy drawings is that ideas and directions—absent tangible expression—are insufficient for joint authorship.<sup>202</sup>

But isn't there a difference between the two examples? In the first, the commissioner provides little guidance for the expression of the work. A "cowboy riding a horse" is a very unspecific idea, providing little detail for the actual expression of the artwork. On the other hand, "depict the cowboy as weathered, wearing a cowboy hat, and riding slowly in calm wind" more substantially guides the expression of the artwork. And to take the Federal Circuit's example a few steps further, what about the contribution of an idea to draw a "cowboy with a dog's face, riding his horse upside down, floating over the surface of Mars, with lightning bolts shooting out of his eyes"? Is this idea still unworthy of joint authorship, if the completed work incorporates every aspect of it?

Courts, I think, get incorrectly caught up in whether a work has been "commissioned" or not. There are, as detailed above, situations where a person commissioning a work can contribute an idea or ideas that guide the work's expression, such that—absent a contract to the contrary and presuming the existence of the requisite intent—that person should have a colorable claim to joint authorship. A person who says "draw me a picture" or "paint me someone's portrait" or "write me a novel" is commissioning a work—no more, no less. There's no question of authorship in the picture, portrait, or novel.

But a person who says "draw me a picture of X," or "paint me a portrait of Y," or "write me a novel about Z" is contributing an idea that guides the expression of the work. The idea may not be worthy of joint authorship, but if so, this should be because a judge or jury decides that the idea did not guide the work's expression substantially enough, and not because of a black and white rule that ideas cannot constitute joint authorship. For example, if a person based a joint authorship claim on X="a cowboy on a horse," Y="a tall tree," or Z="a beautiful

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201. *Gaylord v. United States*, 595 F.3d 1364, 1379 (Fed. Cir. 2010) (citation omitted).

202. *Id.*

woman,” a court could easily dispose of the claim on a motion to dismiss, deciding as a matter of law that the idea is insufficiently specific and influential to constitute joint authorship.<sup>203</sup>

I think it’s much more difficult, however, to deny that X=“a cowboy with a dog’s face, riding his horse upside down, floating over the surface of Mars, with lightning bolts shooting out of his eyes” guides the person who puts pencil to paper to an extent that it should, at least arguably, constitute joint authorship in the work as a whole. In grayer areas like this one, whether the contribution of an idea qualifies as joint authorship—i.e., whether it lands in the “Authorship Zone” shown on the chart above—should be a question of fact decided by a judge or jury.<sup>204</sup> And, in my view, the primary guidepost for that decision should

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203. Case-specific context, though, is still important. The idea to “draw a cowboy on a horse” in the context of a final work that is more than a rudimentary drawing—e.g., a drawing that involves creative choices like perspective, scenery, shading, etc.—would easily be too unspecific and uninfluential on the drawing’s final, fixed, original expression to constitute joint authorship. But if the drawing is a simple stick-figure human on a stick-figure horse (and presuming that the requisite joint authorship intent exists), whether the idea is substantial enough to constitute joint authorship in that stick-figure art could be a question of fact for a jury. In real life, of course, rare would be the legal dispute arising over the authorship of stick figures.

On the other hand, a minimalist conceptual piece, where one contributor’s abstract idea greatly influenced the other contributor’s minimal amount of expression (e.g., dip an orange in blood, symbolizing the blood spilled from the workers who pick them), *could* become the subject of litigation, giving us a real-life example of why we need to judge specificity and influence on a spectrum, rather than on a hard dividing line.

204. See also Robert Pechina, Note, *The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976*, 62 N.Y.U. L. REV. 373, 393–402 (1988). Pechina proposes that where the commissioning party dictates expression to the commissioned party, then the work could be, under Pechina’s proposed amendment to the Copyright Act, a work made for hire. *Id.* Under Pechina’s proposal, however, the result is still zero-sum, making only one party the author. Also, in practice, as detailed above, it’s not easy to determine where to draw the line between idea and expression, particularly when, as is often the case, both commissioner and commissionee are contributing a mix of ideas and expression. Pechina does note though that joint authorship is another possible solution. *Id.* at 394 n.171. I believe my proposed substantiality standard can turn that possibility into reality.

And, with respect to the line between idea and expression, let’s consider Russ Versteeg’s example of “writing a melody that will evoke in the listener a mood of summertime.” Versteeg, *supra* note 40, at 1346. The idea “I’d like us to write a melody” is devoid of any guide for expression, but the idea of “I’d like us to write a melody that will evoke in the listener a mood of summertime” is an idea that, in my view, *does* guide how a work will be fixed into a tangible medium of expression. It may be found that it is still too abstract or uninfluential to qualify for joint authorship, but that should be a determination for a judge or jury. VerSteeg would apparently limit joint authorship to actually hearing the exact notes of the melody and then communicating

be substantiality.<sup>205</sup>

Here, in Orson Welles's case, if he'd simply told Koch to "write me a radio play," he had have commissioned the *War of the Worlds* broadcast and nothing more. But instead Welles contributed an idea that guided *how* that work was to be expressed in a tangible medium, and Welles should have had the opportunity (if contested by Koch) for a judge or jury to decide, based on the specificity and influence of his idea on the essence of the broadcast, whether he was, with Koch, its joint author.<sup>206</sup>

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it to another. *Id.* I think this is unnecessarily limiting and essentially takes us back to requiring that each author contribute separately copyrightable expression. But if an idea contributed by one person substantially guides the expression of another, then it's true that two people have collaborated to create the same, indivisible expression. If the collaborator is inspired to choose certain notes by the suggestion that they evoke the mood of summertime, then the collaborators have together created one inseparable expression—notes evoking the mood of summertime. *See id.*

One thing this discussion ultimately reinforces is that copyright has two understandings of the term "idea." One is any creative contribution that isn't put into a tangible medium of expression. The other is an abstract thought, like "a melody in a summertime mood," as opposed to a specific thought (or series of thoughts) such as the exact musical notes of a melody. Some would deny joint authorship for any contribution falling within the first definition ("unfixed"). Others, like VerSteeg, would appear to only deny joint authorship for contributions falling with the second ("abstract"). I believe that both of these definitions are, in the context of joint authorship, artificial. I argue that all of the above—unfixed highly specific ideas, unfixed abstract ideas, and fixed abstract ideas—can, if their impact on a completed collaborative work is determined to be substantial, constitute joint authorship. *Cf.* Christopher Buccafusco, *A Theory of Copyright Authorship*, 101 VA. L. REV. (forthcoming 2016) (rejecting the idea/expression dichotomy entirely and proposing that authorship be defined as intentionally creating mental effects in an audience).

205. Another possible approach is assigning proportionate ownership interests. *E.g.*, Bell & Parchomovsky, *supra* note 190, at 1056–57 ("In determining the ownership share, the court would take into account the relative contribution of each of the parties to the final product."). As discussed above, I believe that a substantiality standard, maintaining the coequal share approach is better primarily because it's an easier, more efficient standard for judges and juries to apply. *See supra* note 190. A judge or jury is better equipped to decide whether a creative contribution is substantial enough to deserve a coequal ownership share than it is to decide whether a contribution constituted, for example, twenty percent of the work versus fifteen percent of the work, or seventy versus seventy-three percent, or twelve versus eight percent of the work, etc. It also avoids expending judicial resources on what are ultimately creatively marginal contributions (for example, eight percent of a work created by two authors) and ensures that where authorship is litigated, it's only regarding creatively substantial contributions.

206. A judge or jury would also of course decide whether Welles and Koch intended to merge their contributions together into inseparable or interdependent

2. Exacting Evidence of Intent: A Preexisting Working Relationship

In addition to substantiality, another way to delineate where we should recognize idea-contributors as joint authors is for courts in such cases to require exacting evidence of the intent to create a joint work, going so far as to require a preexisting working relationship among the collaborators.

Proponents of the present rule—that each joint author’s contribution be independently copyrightable—have raised the concern that permitting ideas to qualify for joint authorship could restrict the flow of ideas.<sup>207</sup> That is, they think that if Jill has an idea, and describes it out loud, then Jack should be able to use that idea in a copyrighted work without worrying whether Jill will later assert a joint authorship interest in the work.

I appreciate this concern, and I think it’s one we should address. One way to deal with it would be to require exacting, objective evidence that the collaborators intended to create a joint work.<sup>208</sup> The Ninth Circuit, for instance, has pointed to whether the collaborators shared authorship credit on the final product as a type of objective evidence of intent.<sup>209</sup> I’ve noted elsewhere the problems that exist with using the sharing of credit as evidence of intent in the joint authorship context, in that it focuses more on whether the parties *thought* of themselves as joint authors as opposed to whether they *actually* intended to merge their contributions together into one work, per the statutory definition of a joint work.<sup>210</sup>

But here, given the reasonable concern that an unlimited recognition of idea-contribution as joint authorship could dissuade idea-sharing, I think that a heightened examination of objective criteria, such as how the contributors billed themselves, would be appropriate in deciding an idea-contributor’s joint authorship claim.

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parts of a unitary whole. 17 U.S.C. § 101 (2012). For further discussion on how an improved joint authorship rule can provide better results in situations regarding commissioned works, see Julie Katzman, Note, *Joint Authorship of Commissioned Works*, 89 COLUM. L. REV. 867, 867 (1989) (explaining that “joint authorship is the more principled, efficient, and equitable model for courts to apply in the commissioned work context”).

207. 1 GOLDSTEIN, *supra* note 152, at § 4.2.1.2; *see also supra* notes 172–175 and accompanying text.

208. The Copyright Act’s definition of a “joint work” requires “the intention that [the authors’] contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101 (2012).

209. *E.g.*, *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) (providing the authorship of the *Pirates of Penzance* as “Gilbert and Sullivan” as an example of objective intent to be coauthors).

210. McFarlin, *supra* note 19, at 635–40.

A specific type of evidence that I believe courts can and should examine is whether a preexisting working relationship existed between the idea-contributor and her purported joint author(s). Requiring that such collaborators have a preexisting working relationship would help resolve the potentially problematic scenario where Jack is talking about his art (e.g., a cowboy drawing)<sup>211</sup> at a dinner party, Jill tells him how he should draw it (with a dog's face, riding his horse upside down, floating over the surface of Mars, with lightning bolts shooting out of his eyes),<sup>212</sup> Jack replies, "That's a great idea!" and he proceeds to draw the cowboy in that fashion. It's arguable under a very broad reading of the joint work definition that the work was "prepared" by both with an intent to merge their contributions.<sup>213</sup>

But on a policy level, I agree with the concerned crowd that giving Jill a basis to claim joint authorship in a situation like this *would* discourage the free flow of ideas. Jack and Jill had no prior relevant working relationship based on which Jill should reasonably expect to gain credit and compensation for contributing her idea, and Jack should not reasonably expect to have to share it with her.

But if, for instance, Jill and Jack were two independent contractors working for the same advertising company discussing the concept for their next campaign,<sup>214</sup> and Jill came up with the idea of using the concept of a space cowboy, on Mars, with a dog's face, and lasers shooting from his eyes, and Jack took this idea and made drawing of it, then Jill should reasonably expect to have a claim for joint authorship in that drawing. Their working relationship creates a reasonable expectation that the law should acknowledge and protect—namely, that if Jill contributes an idea in a situation in which Jack and Jill are already working together, she should, as a default rule, be entitled to joint authorship if that idea substantially guides the expression of a tangible, copyrightable work drawn by Jack.<sup>215</sup> Given these reasonable expectations, we can also draw a reasonable inference that Jack and Jill intended to jointly author the work.

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211. See the example discussed *supra* in Part III.B.I.

212. *Id.*

213. See 17 U.S.C. § 101 (2012).

214. They are independent contractors instead of employees so as to take this hypothetical out of a work-for-hire scenario.

215. For a detailed discussion regarding the use of the law to protect people's reasonable expectations, see Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19 (1997). And to those who would say that, by considering the parties' reasonable expectations, it sounds like I'm importing an implied contract-type of analysis into copyright law, I would say first that no, I simply think parties' reasonable expectations are relevant to an objective evaluation of their intent, and second that a uniform national way of examining parties' reasonable expectations in

With respect to the *War of the Worlds* broadcast, Welles and Houseman had hired Koch as an independent contractor to write scripts for the *Mercury Theatre on the Air* series before the *War of the Worlds* show was even discussed.<sup>216</sup> Given this preexisting working relationship—one that was relevant to the copyrighted work at issue (e.g., they weren't two teammates on the New York Yankees discussing ideas for a radio play)—Welles could reasonably expect to be able to claim joint authorship in his fake-news-bulletin idea that Koch used to guide the script, and Koch in turn could reasonably expect to share authorship with Welles. Koch couldn't reasonably claim that he didn't intend to jointly author the work, nor could Welles reasonably disclaim it.

With respect to the novel, however, H.G. Wells and his brother Frank had no relevant prior working relationship—e.g., they did not regularly coauthor science fiction stories—so Frank would have had no reasonable expectation that uttering his extemporaneous idea (“Suppose some beings from another planet were to drop out of the sky suddenly, and begin laying about them here!”) would entitle him to joint authorship in his brother H.G.'s book, nor would H.G. have reasonably expected to need to share the copyright with Frank.<sup>217</sup> H.G. could not later reasonably claim that he intended to author a novel with his brother based on that idea.

Ultimately, then, I think that courts can use this “preexisting working relationship” concept as—if not a requirement (since it's not expressly in the Copyright Act)—at least a highly relevant consideration in determining whether purported collaborators actually intended to prepare a work together, as the Copyright Act requires.<sup>218</sup> This in

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a creative collaboration is preferable to ceding the job to the state-by-state vagaries of contract law. See *supra* notes 182–185 and accompanying text.

216. See *Welles v. Columbia Broad. Sys., Inc.*, 308 F.2d 810, 813 (9th Cir. 1962); see also *supra* notes 134–136 and accompanying text.

217. See *supra* notes 186–188 and accompanying text. This preexisting working relationship requirement would thus address Paul Goldstein's concern, described in more detail *infra* at notes 224–225 and accompanying text, where “a nonagenarian author would . . . be able to use the ‘ideas’ provided by his infant great-granddaughter as the basis for a claim that the two are co-authors of a joint work whose copyright will only expire seventy years after the death of the last of them to die.” 1 GOLDSTEIN, *supra* note 152, at § 4.2. One would hazard to guess that the nonagenarian author and his infant great-granddaughter were not publishing books together beforehand.

And, on a related note, if this nonagenarian-fraud scenario was a real concern, wouldn't we be seeing, under present law, older authors claiming that their fifteen-year old granddaughters have contributed a page of independently copyrightable expression to a book, in order to increase the length of copyright? In other words, I don't think the problem—to the extent it actually exists—is exclusive to “ideas.”

218. 17 U.S.C. § 101 (2012).



turn should make it easier for a court to decide in a given case whether an idea-contributor is a joint author.

### 3. Originality as a Prerequisite?

Another possible requirement for an idea-contributor to qualify as a joint author is that his or her idea be “original,” since, per the Copyright Act, “[c]opyright protection subsists . . . in *original* works of authorship.”<sup>219</sup> As we discussed above, although I believe that a better reading of this language is that it applies only to works as a whole (and not to joint authors’ respective contributions),<sup>220</sup> I do still think that originality could be used as a way—from a policy perspective—to narrow the types of ideas that qualify for joint authorship. In so doing, we would be saying essentially that only original ideas, i.e., ones that were not taken from someone else, are worthy of joint authorship.

Using originality in this way has an undeniable surface attraction. In theory it would promote new creative thinking, as opposed to the recycling of old ideas, and it could lessen the number of joint authorship claims brought to the courts. But there are at least a couple of problems with this.

First, I don’t think it reflects the reality of creative collaboration. Creative teams often use preexisting ideas in new and exciting ways to create what is, as a whole, original expression. Orson Welles, as we’ve seen, was not the first person to come up with the idea of doing a radio play in the form of fake news bulletins.<sup>221</sup> Ronald Knox in England and Archibald MacLeish in the United States had created broadcasts in this format before.<sup>222</sup> But applying the fake bulletin idea in the context of adapting H.G. Wells’ *The War of the Worlds*, as expressed through Koch’s scriptwriting, resulted in a fake broadcast of a present-day Martian invasion that was, on the whole, original. Had Welles not contributed this idea, regardless of its origins, then the final broadcast would not have been expressed in the same way, nor would it have had the same impact on its audience.<sup>223</sup>

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219. 17 U.S.C. § 102(a) (2012) (emphasis added).

220. See *supra* Part III.A.1 (discussing the type of contribution required in order to constitute “authorship” under the Copyright Act).

221. See *supra* notes 92–105 and accompanying text (discussing Welles’s likely influences).

222. Arguably, though, Welles’s idea *was* original. No one had thought to adapt and perform *The War of the Worlds* as a fake news broadcast, which, with its alien invaders and disastrous destruction, ended up having a much larger impact than its fake news predecessors *Broadcasting the Barricades*, *The Fall of the City*, or *Air Raid*. See *supra* notes 92–105 and accompanying text.

223. I’m not saying we should engage in *ex post* judgment of authorship based on later commercial success, like the Ninth Circuit in *Lee* would have us do, I’m simply saying that we should recognize the importance of ideas in guiding expression, and that because we don’t know what aspect of the work

We could, furthermore, actually expend *more* judicial resources in deciding whether an individual contribution was, in fact, original. Courts in joint authorship lawsuits could, first, easily get tied up in analyzing voluminous numbers of tangible works to try to determine whether the idea at issue is encapsulated within them. Second, and perhaps worse, courts might have to examine evidence of ideas communicated by people who aren't parties to the suit and have no interest in it. For example, Koch here, if he were contesting a joint authorship claim by Welles, could hypothetically seek to put on testimony that ten years prior, someone had given Welles the idea to adapt *The War of the Worlds* as a fake news broadcast. On the other hand, if we view originality as only a concern for the work as a whole—thereby acknowledging that collaborators can combine unoriginal but creatively substantial elements to build an original work—we would avoid such evidentiary quagmires.

I believe, then, that we should protect all substantial, intentional contributors to a collaborative creation, regardless of whether their individual contributions when dissected do not meet copyright's originality requirement.<sup>224</sup> However, I also believe that recognizing substantial idea-contributors as joint authors, with the requirement that their ideas be original, would be better than completely barring them from copyright joint authorship, as we currently do. It would at least be a step in the right direction.

### *C. The Benefits Outweigh the Fears*

In discussing the merits of recognizing idea-contributors as joint authors, we've already touched on several of the fears raised by those opposed to such recognition. For example, we looked at how some have worried that recognizing idea-contributors as joint authors would impede the free flow of ideas in creative work, and we saw that it would more likely have the opposite effect: it would encourage idea-sharing within collaborations. Additionally, we saw how false claims of idea-contribution would face strong, built-in defenses—the intent requirement and the hard evidence of written expression—so that, as a result,

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will ultimately bring it success we should protect *all* substantial creative contributions to a work, whether idea or expression. *See* *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) (stating that “audience appeal” is a factor in determining joint authorship); *McFarlin*, *supra* note 19, at 651–53 (criticizing Lee's “audience appeal” joint authorship factor).

224. Or attempted to be dissected, particularly in the case of inseparable contributions. *See* 2 *PATRY*, *supra* note 34, at § 5:15 (“[R]equiring all joint authors to contribute separately copyrightable material is fatally at odds with the statute, which defines ‘joint work’ as encompassing both ‘interdependent’ and ‘inseparable’ contributions. Obviously, these terms connote different concepts, and it is equally obvious, therefore, that an inseparable contribution need not be interdependent.”).

false claims should not pose a significant concern. But because *Childress* and *Erickson*—the decisions most responsible for cementing independent copyrightability as a joint authorship requirement—relied on copyright scholar Paul Goldstein’s support for this requirement,<sup>225</sup> we should address a remaining concern that he’s raised, one regarding the length of copyright.

Goldstein has essentially argued that, without the independent copyrightability requirement, joint authorship could open up too wide to too many people, which would unduly increase the length of copyright protection that works receive, keeping them longer from free public use.<sup>226</sup> This is because, under current law, copyright will protect a work for seventy years after the death of its last surviving author.<sup>227</sup> Putting aside the policy question as to whether longer copyright protection for works is, in general, good or bad, I agree with Professor Goldstein that it’s an important goal to reserve joint authorship for those who we believe really deserve it, and that the impact joint authorship rules have on the length of copyright is another good reason we should care about them. I disagree, however, with the premise that we need the artificial construct of independent copyrightability in joint authorship to accomplish this goal.

If we judge contributions to collaborative works by their substantiality, as I’ve proposed, we’ll still be able to determine their worthiness of being designated as authorship—we’ll just be able to do it better. A contribution could, for instance, be independently copyrightable, like a few paragraphs of a radio script, but very insubstantial compared to the idea driving the script, such as the one behind the *War of the Worlds* broadcast. Would we rather have the length of copyright determined by the life of the contributor of a short sentence or two of expository narration, or by the life of Orson Welles, the one who contributed an idea that “was the guide for the dialogue, radio effects, the whole organization of the material”?<sup>228</sup> I vote the latter.

Accordingly, with respect to the length of copyright, as well as the other concerns (some more real than others) raised by supporters of the status quo, I believe that the benefits of recognizing idea-contributors as joint authors outweigh the fears. By recognizing idea-contributors, we’ll be encouraging the free-flow of ideas within collaborative creative teams and, when such ideas contribute substantially to the form and content of copyrighted works, we’ll be giving fair credit and compensation to those who generated that value.

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225. *Childress v. Taylor*, 945 F.2d 500, 506 (2d Cir. 1991); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1070–71 (7th Cir. 1994).

226. 1 GOLDSTEIN, *supra* note 152, at § 4.2.

227. 17 U.S.C. § 302(b) (2012).

228. *See supra* note 2 and accompanying text.

If we do this with some structure—requiring that idea-contributions be substantial as well as that they exist within the context of a pre-existing working relationship—then I think we can help dispel the fears associated with what would be a truly positive change in joint authorship doctrine. And, perhaps, we can increase the chances that the courts or Congress will make it a reality.

#### CONCLUSION

*“I have a sentimental inclination toward hope.”*

—Orson Welles<sup>229</sup>

Mark Rose, chronicler of authorship’s conceptual origins in copyright, has observed that our attempts to draw the line between idea and expression are, paradoxically, both futile and necessary.<sup>230</sup> “Futile because the concept of literary property is itself finally an oxymoron. But necessary because the institution of copyright is deeply rooted both in our economic system and in our conception of ourselves.”<sup>231</sup> In claiming that he co-authored the *War of the Worlds* radio play, Orson Welles didn’t ask the courts back then, or us today, to ignore the line between idea and expression. To the contrary, I think he merely asked us to understand that we don’t need to draw this line—and in fact we shouldn’t draw it—between creative collaborators.

These collaborators, and indeed society as a whole, would be better off if we recognized that idea-generation can constitute authorship just as much, and sometimes more, than expression. And if two or more artists decide to work collaboratively—together generating ideas and converting them into expression for our enjoyment—we should be open to rewarding through copyright not just the ones who express the ideas but also those who generate them.

“[T]he French believe there *are* no works, only authors,” Peter Bogdanovich recalls telling Orson Wells. “‘Well, I disagree,’ Orson said heatedly. ‘I believe there are only *works*.’”<sup>232</sup> If we here, in the collaborative context, begin to focus more on *works*—understanding that they’re often a complex web of contributors’ ideas and expression, not merely the welding of separate authors’ independent expression—I believe we can improve copyright and increase the chances that we’ll enjoy the fruits of talents like Welles’s in the future.

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229. MAGICIAN, *supra* note 178.

230. MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 8 (1993).

231. *Id.*

232. WELLES & BOGDANOVICH, *supra* note 2, at xxxi.