9-1-1998

Joint Authorship: An Uncomfortable Fit with Tenancy in Common

Avner D. Sofer

JOINT AUTHORSHIP: AN UNCOMFORTABLE FIT WITH TENANCY IN COMMON

Avner D. Sofer[*]

I. INTRODUCTION

In 1915, Judge Learned Hand ushered in the beginnings of the joint authorship doctrine stating that he had "been able to find strangely little law regarding the rights of joint authors."[1] For more than sixty years, courts have struggled with the concept of joint authorship, prior to its definition in the 1976 Copyright Act.[2] Today, more than twenty years later, there is "strangely little law" regarding the relationship of joint authors and their rights and obligations toward each other.[3]

The hostility courts have toward the joint works doctrine[4] has resulted in a scarcity of case law. Courts have been hesitant to become involved in the intimate relationship between joint authors, which is a relationship steeped in artistic volatility, yet involving deep contractual and financial disputes.[5] Historically, courts have been loathe to become involved in these intertwined and intricate relationships.[6] Courts have avoided familial disputes, such as those involving husband and wife or father and son, finding it

---

* The author is a writer of fiction and nonfiction and has received first prize in the Nathan Burkan ASCAP writing competition. The author wishes to thank Todd Whitely, Esq., Timothy Griggs, Esq. and Walter DeLorell III, Esq. for their unfailing faith and assistance and Robert Lind, Esq. for his guidance and strength.

1. Maurel v. Smith, 220 F. 195, 199 (S.D.N.Y. 1915).

2. A joint work is a work prepared by two or more authors with the intention that their contributions be merged into "inseparable or independent parts of a unitary whole." 17 U.S.C.A. § 201(a) note (West 1996) (Historical and Statutory Notes).

3. *Maurel*, 220 F.2d at 199.

4. *See* Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 315 (1992) (arguing that "in many particular instances copyright refuses to acknowledge the existence of 'joint authorship,' or does so only grudgingly"); Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1498 (D.C. Cir. 1988), *aff'd on other grounds*, 490 U.S. 730, 753 n.32 (1989) (refraining from passing judgment on the applicability of the joint authorship provisions because neither party sought review of the remand order). "Joint authors co-owning copyright in a work are 'deemed to be tenants in common', [or] with 'each having an independent right to use or license the copyright, subject only to a duty to account to the other co-owner for any profits earned thereby.'" *Id.* (quoting W. Patry, Latmans The Copyright Law 116 (6th ed. 1986)).

5. Jaszi, *supra* note 4, at 315 n.73.

6. J.R. Maurice Gautreau, *Demystifying the Fiduciary Mystique*, 68 CAN. B. REV. 1, 2 (1989).

more convenient and more judicially prudent to allow the parties to resolve their own private matters.[7] The joint author relationship is the copyright law version of a familial relationship. It is the most intimate relationship available under copyright law.

While courts have tripped over each other trying to sweep the joint author issue away, the legislature has remained cryptic and aloof.[8] Although the legislature has stated that joint authors should be "treated generally as tenants in common,"[9] it has not given advice on the issue. Furthermore, the legislature has not conducted any studies to validate its revolutionary proposal that an intellectual property relationship should be seen in the same light as a real property concept. After all, until the 1976 Copyright Act, only one other relationship had ever been categorized as a tenancy in common. Moreover, the legislature has failed to clarify how joint authors are to be "treated generally as tenants in common." It has not explained which tenancy in common rights and obligations affect joint authors, and has instead left these issues to the courts.

Treating joint authors as tenants in common is an intellectually intriguing theory. However, forcing the intellectual property concept of joint authorship into the laws of real property can be an arduous and, at times, controversial task. Most of the remedies available to tenants in common are an uncomfortable fit when applied to joint authors.

Thus far, courts have successfully avoided the issue of joint authors as tenants in common, relegating the issue strictly to dicta.[10] They have found

---

7. *Id.*

8. H.R. REP. NO. 94-1476, at 121 (1976), *reprinted* in 1976 U.S.C.C.A.N. 5659, 5736. (stating joint authors should be "treated generally as tenants in common, with each co-owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other co-owners for any profits."); *see also* MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.09, at 6-29 (1998) [hereinafter NIMMER ON COPYRIGHT].

9. H.R. REP. NO. 94-1476, at 121.

10. *Community for Creative Non-Violence*, 846 F.2d at 1485, 1498; Korman v. Iglesias, 736 F. Supp. 261, 265 (S.D. Fla. 1990) (applying Florida law to the plaintiff's claim for share of royalties derived from joint work noting that other courts have held that "Congress must have intended that co-authors may claim for an accounting or otherwise proceed under common law principles since the Copyright Act makes no mention of how co-authors should enforce their rights to royalties as against each other."); Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640, 646–47 (S.D.N.Y. 1970), *aff'd on other grounds*, 457 F.2d 1213 (2d Cir. 1972).

> It is clearly established that where a truly "joint work", is created, each co-owner is akin to a tenant in common. Accordingly . . . compensation obtained from the unilateral exploitation of the joint work by one of the co-owners without the permission of the others is held in a constructive trust for the mutual benefit of all co-owners and there is a duty to account therefor.

Id. (citations omitted); *see supra* text accompanying note 8 (noting that the relationship of joint owners is that of a tenancy-in-common).

more creative ways of dealing with the problems associated with joint authorship, most notably relying on the more bright-line law of contracts.[11] However, as the entertainment industry grows more sophisticated and the avenues of collaboration diversify, more courts will be forced to address the issues inherent in categorizing joint authors as tenants in common. Perhaps the most important and far reaching dilemma imbedded in categorizing joint authors as tenants in common is whether joint authors possess or maintain a fiduciary relationship. The questions remain as to what duties they owe to each other and what rights each should possess.

This Article develops the proposition that the legal relationship existing between joint authors, each of whom has the right to control and exploit the same creation, is so intertwined and intimate that it establishes a fiduciary relationship similar to, if not more protective, than tenants in common. This Article will further propose that the inherent duties in a fiduciary relationship should be subtly adapted to the more vulnerable and susceptible nature of the joint author relationship.

Part II of this Article explores the definition of the current state of joint authorship, and traces the history of joint authorship through the 1976 Copyright Act. Part III examines the rights and responsibilities of tenants in common and compares them with those of joint authors. Part IV describes the fiduciary relationship, its history and its significance to tenancy in common and joint authorship. Part V discusses the duties joint authors should have as fiduciaries. Part VI explores how traditional fiduciary relationships can be breached, and explains how the uniqueness of the joint author relationship gives rise to the possibility of breaches not found in other areas of the law. Part VII analyzes the remedies available to joint authors for breach of fiduciary duty and abuse of power by co-authors. Finally, Part VIII concludes that joint authors each should be given the status of a fiduciary, along with all of a fiduciary's rights and obligations.

II. JOINT AUTHORSHIP

Joint authors are co-creators of a joint work.[12] Once two or more authors create a joint work[13] they become co-owners[14] of the copyright in that work.[15] Each co-creator has the right to use the work or license its use

11. Papa's-June Music, Inc. v. McLean, 921 F. Supp. 1154, 1155 (S.D.N.Y. 1996).

12. 17 U.S.C.A. § 201(a) note (West 1996) (Historical and Statutory Notes). A joint work is a work prepared by two or more authors with the intention that their contributions be merged into "inseparable or independent parts of a unitary whole." *Id.*

13. *Id.*

14. *Id.*

15. *Id.* (stating that the authors of a joint work are co-owners of copyright in the work). *But*

to a third party.[16] The joint author has an equal right to possess and utilize every part of the jointly owned work.[17] Further, the joint author has the right to make testamentary transfers of his interest and to convey or lease his undivided interest to a third party.[18]

The 1976 Copyright Act[19] was the first legislative attempt to address the issue of joint authorship.[20] Previously it had been a common law principle.[21] The early cases focused on the necessity of a common plan, which required the parties to work together.[22] Thereafter, the emphasis shifted to the

---

see Community for Creative Non-Violence, 846 F.2d at 1496 (maintaining that a made for hire work is not a joint work).

16. H.R. REP. NO. 94-1476, at 121 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736. Co-owner has "an independent right to use or license the use of a work, subject to a duty of accounting to the other co-owners for any profits." *Id.*

17. *See* PAUL GOLDSTEIN, COPYRIGHT PRINCIPLES, LAW, AND PRACTICE § 4.2.2, at 385 (explaining that "each copyright co-owner is entitled to exploit the copyright herself or to license others to do so"); NIMMER ON COPYRIGHT, *supra* note 8, §6.10, at 6-30 (stating that "a joint owner, may, without obtaining the consent of the other joint owners, either exploit the work himself, or grant a nonexclusive license to third parties.").

18. NIMMER ON COPYRIGHT, *supra* note 8, § 6.09, at 6-29.

> Unless expressly so agreed, the relationship is not that of a joint tenancy wherein the last surviving joint owner becomes sole owner of the entire work. The prevailing rule under the concept of tenancy-in-common is that upon the death of each joint owner, his heirs or legatees acquire his respective share of the joint work.

Id.

19. 17 U.S.C. §§ 101–1101 (1996).

20. 17 U.S.C. § 101 (1996) (defining a joint work); SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF SENATE COMM. ON THE JUDICIARY, 86th Cong., (Comm. Print 1960) [hereinafter SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS] (stating that the 1909 Act did not mention joint authorship and that the legislative history to the 1909 Act was also silent); NIMMER ON COPYRIGHT, *supra* note 8, § 6.01, at 6-3 n.1 (stating that "[t]he 1909 Act did not expressly refer to the doctrine of joint ownership").

21. *See generally* NIMMER ON COPYRIGHT, *supra* note 8, § 6.01, at 6-3 n.1.

22. Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944), *modified*, 140 F.2d 268 (2d Cir. 1944) (defining a joint work as "a joint laboring in furtherance of a common design" (quoting Levy v. Rutley, 6 L.R.-C.P. 523, 529 (Eng. 1871)) and stating that the parties must "mean their contributions . . . to be embodied in a single work"); Maurel v. Smith, 271 F. 211, 215 (2d Cir. 1921) ("[t]he pith of joint authorship consists in co-operation, in a common design") (quoting COPINGER, LAW OF COPYRIGHTS 109–110 (4th ed. 1904); Shapiro Bernstein & Co. v. Jerry Vogel Music Co., 115 F. Supp. 754, 758–59 (S.D.N.Y. 1953) (stating that joint authorship has been defined as "joint laboring in furtherance of a common design" (quoting *Levy*, 6 L.R.-C.P. at 529) and that the first author must have intended that his work be complemented by the contribution of someone else), *rev'd on other grounds*, 221 F.2d 569 (2d Cir. 1955), *rev'd on other grounds*, 223 F.2d 252 (2d Cir. 1955); G. Ricordi & Co. v. Columbia Graphophone Co., 258 F. 72, 75 (S.D.N.Y. 1919) (defining joint authorship as "[a] joint labor in carrying out a common design"); *Levy*, 6 L.R.-C.P. at 529 (stating that "to constitute joint authorship there must be a common design"); Maurel v. Smith, 220 F. 195, 199–200 (S.D.N.Y. 1915) (stating "[w]hen several collaborators knowingly engage in the production of a piece which is to be presented originally as a whole only, they adopt that common design").

common intent of the co-authors,[23] and finally to the subjective intent of each author separately.[24] Essentially, the 1976 Act codified this judge made law.[25]

Courts had a number of options after which to pattern the rules of joint ownership. The English rule, developed at the end of the eighteenth century, required all co-owners to consent before any interest could be exploited.[26] However, United States courts rejected this rule because it was too difficult for a copyright licensee to obtain the consent of all co-owners.[27]

The first U.S. rule was formulated in the nineteenth century.[28] It allowed each co-owner to exploit the work freely without the other co-owner's consent and with no duty to account for profits.[29] Eventually, this rule was rejected because it took away the incentive to create joint works since one ambitious owner could overly exploit and destroy the value of the work for the others.[30] Now, each co-owner may exploit the jointly owned work for non-exclusive licenses without the consent of the other owners, so long as they account for all profits that result from the exploitation.[31]

III. TENANCY IN COMMON

American jurisprudence adopted the tenancy in common concept from English common law.[32] Tenancy in common is a form of concurrent ownership, which allows more than one owner to hold an interest in the same

---

23. *See Edward B. Marks v. Music Corp*, 140 F.2d at 267. "[I]t makes no difference whether the authors work in concert, or even whether they know each other; it is enough that they mean their contributions to be complementary in the sense that they are to be embodied in a single work." *Id.*

24. *See* Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1946); Donna v. Dodd, Mead & Co., 374 F. Supp. 429, 430 (S.D.N.Y. 1974); H.R. REP. NO. 94-1476, at 120 (1976), *reprinted in* 1976 U.S.S.C.A.N. 5659, 5736. "The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either 'inseparable' . . . or 'interdependent' . . . ." *Id.*

25. H.R. REP. NO. 94-1476, at 121 (1976), *reprinted in* 1976 U.S.S.C.A.N. 5659, 5726;. S. REP. NO. 94-473, at 104 (1975).

26. Powell v. Head, 12 Ch. D. 686 (Eng. 1879); Cescinsky v. George Routledge & Sons, Ltd., 2 K.B. 325 (Eng. 1916).

27. Proprietors of Monumoi Great Beach v. Rogers, 1 Mass. 159, 163 (1804).

28. Carter v. Bailey, 64 Me. 458 (1874).

29. *Id.*

30. *Accountability Among Co-Owners of Statutory Copyright*, 72 HARV. L. REV. 1550, 1556 (1959).

31. Oddo v. Ries, 743 F.2d 630, 633 (9th Cir. 1984); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 73 F. Supp. 165 (S.D.N.Y. 1947).

32. E. H. BURN, CHESHIRE AND BURN'S MODERN LAW OF REAL PROPERTY 208 (14th ed. 1988).

property.[33] Tenants in common own separate undivided shares of the whole estate.[34] Each tenant has an equal right to possess and utilize every part of the property, limited only by the concurrent rights of the co-owners.[35] Further, each tenant has the right to occupy the entire estate without any obligation to pay rent.[36] However, tenants who utilize minerals or deposits from the property are obligated to pay half the profit to their co-tenant.[37] Similarly, the tenant is obligated to pay any co-tenant in common half the net income received from licensing the minerals to a third party.[38]

Tenants in common hold no right of survivorship.[39] When one tenant in common dies, their interest passes to their heirs.[40] Each tenant in common has the right to make a testamentary transfer of his interests.[41] If a tenant dies intestate, any interest passes under the statutes of descent.[42] The tenant in common has the right to convey the undivided interest or lease it to a third party.[43] Further, tenants in common need not have obtained their interests from the same source or at the same time.[44] Tenants in common can also change their equal rights by agreement.[45] There is no duty to account for

---

33. *Id.* at 207. By concurrent interest it is meant that "[t]he owner of an interest in land may be entitled to possession either alone or in conjunction with other persons. All such persons are said to hold [title] concurrently, or in co-ownership, and to have concurrent interests." *Id.*

34. Tenants in common all occupy "promiscuously." *Id.* at 216. If A and B are tenants in common, "A has an equal right with B to possession of the whole land." *Id.* This united right to possession is the only one of the four unities that tenancy in common shares with joint tenancy. *Id.* Unlike joint tenants, tenants in common "may each hold different interests" (i.e., one may be entitled to two-thirds and the other to one-third, acquired under different titles and at different times). *Id.*

35. CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 216 (2d ed. 1988) ("stating [e]ach co-tenant has the theoretical right to possess and enjoy the entire property, limited only by the concurrent exercise of the same right by other co-tenants"); Wolfe v. Wolfe, 42 So. 2d 438 (Miss. 1949).

36. MOYNIHAN, *supra* note 35.

37. *Id.*

38. *Id.*

39. This distinguishes tenancy in common from joint tenancy. In joint tenancy, there is a right of survivorship. The surviving joint tenant becomes sole owner of the entire estate. *Id.*; *Wolfe*, 42 So. 2d at 438–39.

40. *Wolfe*, 42 So. 2d at 439.

41. Wilk v. Vencill, 180 P.2d 351, 354 (Cal. 1947); Sun Oil Co. v. Oswell, 62 So. 2d 783 (Ala. 1953); Carr v. Deking, 765 P.2d 40 (Wash. Ct. App. 1988).

42. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 5.3, at 207 (1984).

43. PATRICK K. HETRICK & JAMES B. MCLAUGHLIN, JR., WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA §7-6, at 184 (1994).

44. MOYNIHAN, *supra* note 35, at 214. However, the circumstances may be a factor in deciding whether tenants in common are in a fiduciary relationship. *Id.*

45. Miller v. Riegler, 419 S.W.2d 599 (Ark. 1967). The parties agreed that full use of stock would go to one co-tenant. *Id.*

profits unless there is a rental to a third party, a depletion of resources,[46] or ouster where one co-tenant refuses to permit another from using or entering the premises.[47]

Any tenant in common can bring an equitable action for partition.[48] The common law right of partition has been regarded as unconditional and absolute.[49] The court can either divide the property through a partition in kind or sell it and distribute the proceeds through a partition by sale.[50] Courts prefer a partition in kind and will usually approve a partition by sale only if the physical characteristics of the property would make the partition extremely unfair to one or more of the parties.[51] However, partition in kind may not be available in all cases.[52] For example, partition in kind will not be available where it would curtail or defeat the rights of the other co-tenant.[53]

Although real property and intellectual property are very distinct, the principles of tenancy in common and joint authorship are similar. For example, the joint author has an equal right to possess and utilize every part of the jointly owned work.[54] The joint author also has the right to make testamentary transfers of an interest and to convey or lease any undivided interest to a third party.[55] Joint authors, like tenants in common, are presumed to have an equal, undivided interest in a work.[56] However, joint authors have

---

46. White v. Smith, 214 S.W.2d 967 (Tex. 1948). A co-tenant must account for profits of minerals taken from property and he is entitled to a deduction for expenses. *Id.* at 975–78.

47. Ouster is where one co-tenant refuses to permit another from using or entering the premises. Spiller v. Mackereth, So. 2d 859 (Ala. 1976) (stating that ouster is deemed to occur only when one co-tenant refuses a demand by one other co-tenant).

48. 2 RALPH E. BOYER, FLORIDA REAL ESTATE TRANSACTIONS §20.04[3] (1998).

49. Willard v. Willard, 145 U.S. 116, 120 (1892); Saulsberry v. Nichols, No. CA 91-289, 1992 U.S. App. LEXIS 76, at *7 (Ark. App. Feb. 5, 1992); Cheeks v. Herrington, 523 So. 2d 1033, 1035 (Miss. 1988).

50. 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 607(3), at 50-47 to 50-61 (1998).

51. Delfino v. Vealencis, 436 A.2d 27, 30 (Conn. 1980).

52. Baker v. Drabik, 541 A.2d 229, 231 (N.J. Super 1988).

53. *Id.*

54. *See* GOLDSTEIN, *supra* note 17, § 4.2.2, at 385 (explaining that "each copyright co-owner is entitled to exploit the copyright himself or to license others to do so . . ."); NIMMER ON COPYRIGHT, *supra* note 8, § 6.10, at 6-30 (stating that "[a] joint owner may, without obtaining the consent of the other joint owners, either exploit the work himself, or grant a nonexclusive license to third parties.").

55. NIMMER ON COPYRIGHT, *supra* note 8, § 6.09, at 6-29 .

56. H. R. REP. NO. 94-1476 at 51 (1976) *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736. Pye v. Mitchell, 574 F.2d 476, 480 (9th Cir. 1978) (stating "each co-author automatically becomes a holder of an undivided interest in the whole"); Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640, 646 (S.D.N.Y. 1970) (noting that co-owners of a joint work hold their interests as tenants in common), *aff'd on other grounds*, 457 F.2d 1213 (2d Cir. 1972), *cert. denied*, 409 U.S. 997 (1972).

the right to change this equal division through a written agreement that would rebut this presumption.[57]

In addition, when profits are not acquired from the exploitation of a work, a joint author may use the work individually without a duty to account. This is similar to the lack of duty to account for living in a co-tenant's house. Therefore, in this regard, the duty to account is similar in both joint authorship and tenancy in common.

On the other hand, there appears to be a distinction between joint authorship and tenancy in common regarding the duty to account when a work is exploited for profit. Unlike joint authors who are required to account for any profits received as a result of a joint work,[58] co-tenants only have a duty to account for profits acquired through rental, depletion, or ouster.[59] However, the only profits available to the joint author are through an exploitation of the work[60] which reduces the value of the work.[61] This is similar to a depletion of resources in real property. Thus, even under the tenancy in common rule, there would still be a duty to account.

In contrast to the similar principles that exist in joint authorship and tenancy in common, it is difficult to find analogous provisions in joint authorship for the real property concepts of partition in kind and partition by sale.[62] As stated earlier, courts prefer partitions in kind. Many co-tenants resent the division of property. To these co-tenants land is more than just an investment because a great deal of emotion and ego is intertwined in property ownership.

Likewise, joint authors often have a similar emotional bond with their work. However, the emotion and ego involved in the tenancy in common relationship is minor when compared to that of a co-author who has created an artistic work. The emotional bond between the joint author and his work is akin to that of a mother and her child. Remedying joint authorship disputes by using tenancy in common concepts is difficult on all the parties in-

57. Papa's-June Music, Inc. v. McLean, 921 F. Supp. 1154, 1158 (S.D.N.Y. 1996); *see also* NIMMER ON COPYRIGHT, *supra* note 8, §6.08, at 6-28.

58. H.R. REP. NO. 94-1476, at 121 (1976) (stating joint authors should be "treated generally as tenants in common, with each co-owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other co-owners for any profits."); *see also* NIMMER ON COPYRIGHT, *supra* note 8, § 6.06, at 6-14; Strauss v. Hearst Corp., 8 U.S.P.Q.2d 1832, 1837 (S.D.N.Y. 1988).

59. MOYNIHAN, *supra* note 35, at 216.

60. *See generally id.*

61. H.R. REP. NO. 94-1476, at 121.

62. BOYER, *supra* note 48, § 20.04[3], at 20–33.

volved and on the courts. Perhaps this accounts for the courts avoidance of using these concepts for disputes arising among joint authors.

In addition to courts reluctance to apply tenancy in common concepts to joint authors, the Copyright Act is silent on the topics of forced sale and forced partition. It would be very difficult for courts to apply partition in kind to a copyrighted work. First, they would have to divide the bundle of rights among the co-authors, which would require expert testimony and evidence regarding the worth of each right and the future possibilities inherent in each right. Second, courts would have to balance the uncertainties inherent in the value of each right. This would be extremely difficult because courts would be in the unenviable position of evaluating and predicting uncertainties. The study of new and future technologies alone would be overly taxing on a court. For example, a court would have to assign a value to the rights if the work were to be used over the Internet or by any undiscovered technological advances.

Applying a partition by sale remedy to copyrighted work would also be difficult for the court. In a partition by sale, the court would forcibly be removing a work of art from its creator. While this may be appropriate in some tenancy in common cases, it is not an equitable solution in joint authorship. Joint authorship is a relationship based on collaboration and artistic influence, more akin to family law than to property law. Further, a forced partition by sale of a joint work would invoke the wrath and indignity of the creative community and chill joint authorship.

In the event of a breach by a joint author, the remedy available to tenants in common is woefully inadequate. This is due to the extremely vulnerable position of the co-authors. Each joint author has the power to cause great harm to the other's livelihood, well-being, and reputation. Consequently, courts disfavor applying partition remedies to breaches involving joint authorship. Thus, the fiduciary relationship that the majority holds to exist among tenants in common is even more precarious and fraught with commitment in the relationship between joint authors.

IV. FIDUCIARY RELATIONSHIP

A fiduciary relationship is one of trust and confidence where the beneficiary of the trust is owed a duty of utmost loyalty and good faith.[63] This duty is even more protective than the duty owed in a confidential relationship.[64] Traditional fiduciary relationships include employer to employee and

63. DAN B. DOBBS, REMEDIES § 10.4, at 680–81 (1973).
64. *Id.*

agent to principal. A fiduciary duty is also owed by a trustee to his beneficiary;[65] an officer or director to a corporation and its shareholders;[66] a partner to the partnership;[67] joint venturers,[68] spouses;[69] and an attorney to his client.[70] These relationships have appeared in courts with enough regularity to be termed "conventional" fiduciary relationships.[71] Some unconventional fiduciary relationships have been recognized including the relationship between the franchisor and franchisee,[72] vendor and purchaser,[73] and lender and borrower.[74] While fiduciary duties often arise in relationships which require close cooperation,[75] courts have avoided setting specific criteria to determine whether to expand the scope of conventional fiduciary relationships.[76] Commentators theorize that courts are vague about the factors necessary to make a relationship fiduciary, in order to avoid abuse by those who are clever enough to follow the letter of the law, yet break the trust of a fiduciary.[77]

---

65. GEORGE G. BOGERT, TRUSTS § 95, at 341 (6th ed. 1987) (discussing the fiduciary duty of a trustee).

66. HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS § 235, at 625 (3d ed. 1983) (discussing general fiduciary duties).

67. UNIF. PARTNERSHIP ACT § 21, 6 U.L.A. 608 (1996).

68. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. Ct. App. 1928).

69. CAL. FAM. CODE ANN. § 1100(e) (West 1994); CAL. FAM. CODE § 721 (West 1994).

70. DOBBS, *supra* note 63, at 681

71. Gautreau, *supra* note 6.

72. Arnott v. Am. Oil Co., 609 F.2d 873, 884 (8th Cir. 1979). *But see* W.K.T. Distrib. Co. v. Sharp Elecs. Corp., 746 F.2d 1333, 1337 (8th Cir. 1984) (rejecting the theory that parties to franchise relationship owe a fiduciary duty).

73. Consolidated Oil & Gas, Inc. v. Ryan, 250 F. Supp. 600, 605 (Ark. 1966), *aff'd per curiam*, 368 F.2d D.C. 177 (8th Cir. 1966).

74. Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179, 189 (Iowa Ct. App. 1986).

75. Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 91 (1987).

76. Hospital Prods. Ltd. v. U.S. Surgical Corp. (1984) 156 C.L.R. 68 (stating "the authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the fiduciary relationship may be established."); *see also* Gautreau, *supra* note 6, at 1–2.

> [I]t has often seemed as if some sort of mystical invocation were necessary to determine if the new relationship was a fiduciary relationship; and if it was, there then followed some sort of internal laying on of hands which imposed a raft of immovable obligations and duties on to the shoulders of the fiduciary but precisely how this happened remained a mystery.

Id.

77. *See id.* at 3. Even if it were feasible, it might not be desirable for courts to closely define the demarcation line showing the exact transition point where a relationship that does not attract fiduciary duty passes into one that does. *Id.*; *see also* J. A. C. Hetherington, *Defining the Scope of Controlling Shareholders' Fiduciary Responsibilities*, 22 WAKE FOREST L. REV. 9, 11 (1987) (stating that "by obscuring the limits of fiduciary obligations under moralistic rhetoric and by verbally chastising those who are found to have violated the standard, or come close to doing so, the courts seek to maintain the standard by discouraging marginal behavior which might or might not

Courts, however, consider general characteristics when analyzing whether a fiduciary relationship exists. A close relationship of faith and trust is required. The resemblance of an arm's length relationship usually indicates that fiduciary norms do not apply.[78] Many courts have looked at the access the parties have to joint assets and potential for abuse.[79] Further, courts impose a fiduciary obligation to relationships in which one party has control over the other or over the co-owned assets.[80]

A. Duties of the Fiduciary

Uttermost fairness, good faith, selflessness, and protection of a vulnerable party are the cornerstones of a fiduciary relationship.[81] Fiduciaries have a duty to disclose all relevant facts that they know, or should know, when entering into a transaction.[82] Beneficiaries should understand their legal rights and obligations before completing a transaction.[83] In a fiduciary relationship, nondisclosure of material facts is actionable fraud,[84] and a person

---

violate it."); Niels B. Schaumann, *The Lender as Unconventional Fiduciary*, 23 SETON HALL L. REV. 21, 24 (1992) (stating that "the concern is that if fiduciary law were more clear, it would encourage conduct adhering to the letter of the rule while violating its spirit.").

78. DEBORAH DEMOTT, FIDUCIARY OBLIGATION, AGENCY AND PARTNERSHIP: DUTIES IN ONGOING BUSINESS RELATIONSHIPS 472 (1991).

79. Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 310, 347 (1989) ("A person with access is fixed with a fiduciary obligation in order to deter mischievous conduct.").

80. DEMOTT, *supra* note 78, at 915. "A fiduciary obligation is nothing more than a device by which the law responds to situations in which one party's discretion ought to be controlled because of the nature of the party's relationship with another. This instrumental description is the only general assertion about fiduciary obligation that can be sustained." *Id.*

81. WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE LEGAL AND ECONOMIC PRINCIPLES 71 (5th ed. 1993).

82. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106, at 738 (5th ed. 1984); GEORGE T. BOGERT, TRUSTS § 87, 95–96; *see* RESTATMENT (SECOND) OF AGENCY § 381 (1957); RESTATEMENT (SECOND) OF CONTRACTS § 173 (1979); RESTATEMENT (SECOND) OF TORTS, 551(2)(a) (1976); RESTATEMENT (SECOND) OF TRUSTS § 173 (1957).

Ordinarily, a party may be expected to gain whatever knowledge he desires before buying or selling property by making a diligent inquiry and examination. *See generally* RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976). A relationship of trust and confidence may tend to lull even a reasonably prudent party into omitting a full investigation. *Id.* Accordingly, a duty to volunteer material information arises from the expectation of the parties that they will be open and honest in their dealings with one another. *Id.* Even if the parties have no such actual expectation, fiduciary duty doctrine has the effect of imposing it too. *Id.*

83. *See* KEETON, *supra* note 82, at 738; BOGERT, *supra* note 82, at §§ 87, 96; RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 82, at §173; RESTATEMENT (SECOND) OF TORTS, *supra* note 82, at § 551(2)(a); RESTATEMENT (SECOND) OF TRUSTS, *supra* note 82, at § 170.

84. Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946) (finding that the purchaser of stock in a closely-held corporation owes a fiduciary duty to the seller to disclose ex-

with a fiduciary duty must deal fairly and in good faith with the beneficiary.[85]

A fiduciary cannot deal at arm's length.[86] An arm's length transaction is one in which the parties are acting in their own self-interest and owe no special duty to each other.[87] In an arm's length transaction, parties are governed by ordinary protections that govern against misconduct. Most business transactions are commenced at an arm's length and most are subject only to the "morals of the marketplace."[88] In a fiduciary relationship, the fiduciary cannot compete with the beneficiary or act on behalf of a competitor.[89] Furthermore, fiduciaries are under a duty of confidentiality whereby, they cannot use or disclose confidential information obtained in the course of the relationship for their own benefit or against the interests of the beneficiary.[90] Finally, a fiduciary cannot secretly profit from the relationship.[91]

B. Tenancy in Common as a Fiduciary Relationship

Courts are split over the issue of whether tenants in common are fiduciaries. Some courts have found that one legal consequence of co-tenancy is the existence of a fiduciary relationship between the co-tenants.[92] These courts have found that a community of interest, where each member of the community has power over the entire estate, gives way to a community of duty.[93] Overall, most jurisdictions have found tenants in common to be in

---

isting arrangements for the sale of assets to a third party at a substantial profit).

85. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) As Judge Cardozo said "[m]any forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place." *Id.*

86. *Id.*

87. *See* DOBBS, *supra* note 63, at 680.

88. *See generally* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 9-20, at 367 (3d ed. 1987).

89. *See* DOBBS, *supra note* 63, at 680.

90. *Id.*

91. *Id.*

92. Smith v. Borradaile, 227 P. 602, 607–08 (N.M. 1922).

93. NORMAN A. WIGGINS, WILLS AND ADMINISTRATION OF ESTATES IN NORTH CAROLINA, 158 (3d ed. 1993) (stating that "[t]he relationship between co-tenants has been described as a community of interest which gives rise to a community of duty . . . which disables each tenant from doing anything that would prejudice the others in reference to the common property."); Van Horne v. Fonda 5 Johns. Ch. 388, 407 (N.Y. Ch. 1821); Smith v. Smith, 150 N.C. 81, 82 (1908) (stating that "these relations of trust and confidence bind all to put forth their best exertions and to embrace every opportunity to protect and secure their common interest, and forbid the assumption of a hostile attitude by either.").

fiduciary relationships.[94] The basis of these findings is simply the basic existence of a tenancy in common.[95]

On the other hand, a majority of cases dealing directly with the issue of whether tenants in common are fiduciaries have held that the mere fact that parties are tenants in common does not, by itself, create a fiduciary relationship.[96] These courts have found a fiduciary relationship only to exist when co-tenants come into possession of the property through the same conveyance.[97] At the very least these courts have held, if the co-tenancy does not

---

94. Preston v. United States, 696 F.2d 528, 537 (7th Cir. 1982), *reh'g denied*, 709 F.2d 408 (1983) (applying Wisconsin law); United States v. State of Washington, 520 F.2d 676, 685 (9th Cir. 1975) (applying Washington law); McLendon v. Kaolin Co., 782 F. Supp. 1548, 1562 (M.D. Ga. 1992) (quoting Fuller v. McBurrows, 192 S.E.2d 144, 146 (1972)); Aaron v. Puccinelli, 264 P.2d 152, 154 (Cal. Ct. App. 1953); Edwards v. Farm Bureau Mut. Ins. Co., 823 S.W.2d 903, 907 (Ark. 1992); Birnbaum v. Birnbaum, 539 N.E.2d 574, 575 (N.Y. 1989); Uptegraft v. Borne Petroleum Corp., 764 P.2d 1350, 1353 (Okla. 1988); Foster v. Hudson, 437 So.2d 528, 529–530 (Ala. 1983); Jolley v. Corry, 671 P.2d 139, 141 (Utah 1983); Bartz v. Heringer, 322 N.W.2d 243, 244 (N.D. 1982); Colquhoun v. Colquhoun, 88 N.J. 558, 563 (N.J. 1982); Cummings v. Anderson, 614 P.2d 1283, 1288 (Wash. 1980) (en banc); Kennedy v. Rinehart, 574 P.2d 1119, 1121 (Or. 1978); City and County of Honolulu v. Bennett, 552 P.2d 1380, 1390 (Haw. 1976); Kennedy v. Bryant, 252 So.2d 784, 788 (Miss. 1971); Lund v. Heinrich, 189 A.2d 581, 583 (Pa. 1963); Rebelo v. Cardoso, 161 A.2d 806, 810 (R.I. 1960); Goergen v. Maar, 153 N.Y.S.2d 826, 831 (N.Y. App. Div. 1956); Salter v. Quinn, 134 N.E.2d 749, 751 (Mass. 1956); Colby v. Colby, 79 A.2d 343, 344–45 (N.H. 1951); Cecil v. Dollar, 218 S.W.2d 448, 450 (Tex. 1949); Bailey v. Howell, 184 S.E. 476, 478 (N.C. 1936); Smith v. Borradaile, 227 P. 602, 607–08 (N.M. 1922); Van Horne v. Fonda, 5 Johns Ch. 388, 406–07 (N.Y. Ch. 1821); White v. Roberts, 637 S.W.2d 332, 334 (Mo. Ct. App. 1982); Stoltz v. Maloney, 630 P.2d 560, 563 (Ariz. Ct. App. 1981); Watson v. United Am. Bank, 588 S.W.2d 877, 882 (Tenn. Ct. App. 1979); Givens v. Givens, 387 S.W.2d 851, 853 (Ky. Ct. App. 1965); Rider v. Phillips, 178 N.Y.S. 142, 145–47 (N.Y. Sup. Ct. 1919). *But see* Jennings v. Bradfield, 454 P.2d 81, 82 (Colo. 1969) (en banc).

95. *See* DEMOTT, *supra* note 78. The excessive rhetorical force used in promulgating fiduciary doctrine is a necessary control mechanism that results from the imprecision of the standard. *Id.*

96. Merritt v. Nickelson, 287 N.W.2d 178, 181 (Mich. 1980) (stating that "[h]e was not her agent by the mere fact of their joint ownership . . . ."); Masick v. City of Schenectady, 564 N.Y.S.2d 569, 570 (N.Y.App. Div. 1991). William E. Burby has pointed out that:

> [T]echnically, neither a fiduciary nor a confidential relationship arises out of the concurrent ownership of property . . . . But even in the absence of a fiduciary or confidential relationship, it does not follow that there is not a 'guide of conduct' that regulates transactions by and between co-tenants that relates to ownership of the property.

WILLIAM E. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 99, at 231 (3d ed. 1965).

97. JOHN E. CRIBBET ET AL., CASES AND MATERIALS ON PROPERTY 348 (1990). It should not be supposed that co-tenants will always be regarded as having a fiduciary relationship that will prevent one from acting for himself to the possible disadvantage of another. *Id.* It has been suggested that when co-tenants acquire their interests simultaneously by the same conveyance, or by a testate or intestate succession, the relationship should be recognized; otherwise it not should be recognized (e.g. where one co-tenant conveys his undivided interest to an outsider, the latter may well be regarded as having no fiduciary duty to the other co-tenant). *Id.; see also* THOMPSON ON REAL PROPERTY § 1801 (1979); Goergen v. Maar, 153 N.Y.S.2d 826 (N.Y. App. Div. 1956).

give rise to a fiduciary relationship the co-tenants have a duty to act in good faith toward each other.[98] The majority of cases here emphasize the timing of the acquisition in determining whether there is a fiduciary relationship. As long as the property was conveyed at the same time, whether by the same instrument or through inheritance from the same ancestor, the tenants in common have a fiduciary relationship.[99]

Other courts finding tenants in common to be fiduciaries have done so as a result of a wide variety of factual situations, including duties of care,[100] loyalty,[101] cooperation,[102] and against unjust enrichment over the other co-tenant.[103] Also, tenants in common may create a fiduciary relationship by their conduct.[104] Courts have also found that a cause of action for breach of fiduciary duty was available when one co-tenant took an opportunity that properly belonged to the tenancy in common.[105]

C. Joint Authors as Fiduciaries Under Tenancy in Common

Both the minority and majority views consider joint authors to be tenants in common and fiduciaries. According to the minority view, joint authors as members of a "community in interest," are in a fiduciary relationship.[106] However, the majority holds that tenants in common are fiduciaries

98. Laura v. Christian, 537 P.2d 1389 (N.M. 1975). A co-tenant buys outstanding interest is said to be holding that interest on behalf of all co-tenant. *Id.*

99. CUNNINGHAM, *supra* note 42 § 5.10, at 217 (stating "when [the] co-tenants acquire their concurrent interests at the same time, either by the same instrument or by inheritance from a common ancestor, they are held to be subject to fiduciary duties with respect to their dealings with the common property."); Jennings v. Bradfield, 454 P.2d 81, 82 (Colo. 1969) (en banc) (finding that unless they claim under the same instrument, "[t]enants in common are under no greater legal obligation to protect one another's interests than would be required of strangers."). Also significant to the analysis was that the interests were separately assessed and twenty-four years had passed since co-tenants had sought relief. *Id.* at 81. *See also* Dampier v. Polk, 58 So. 2d 44, 51 (Miss. 1952); Watson v. United Am. Bank, 588 S.W.2d 877 (Tenn. Ct. App. 1979).

100. Montcastle v. Baird, 723 S.W.2d 119 (Tenn. App. 1986) (finding a tenant in common to be liable for interest and penalties arising from failure to file federal income tax returns).

101. Birnbaum v. Birnbaum, 539 N.E.2d 574, 576 (N.Y. 1989) (declaring that fiduciary duty of undivided loyalty owed by a co-tenant requires avoidance of conflicts of interest).

102. Bartz v. Heringer, 322 N.W.2d 243, 244 (N.D. 1982) (holding that a co-optionee, a potential co-tenant, has a fiduciary duty to cooperate with fellow co-optionee in exercise of option).

103. Edwards v. Farm Bureau Mut. Ins. Co., 823 S.W.2d 903, 907 (Ark. 1992) (finding that where a co-tenant in possession paid fire insurance premiums and was the named insured, the fiduciary relationship between tenants in common requires that the fire insurance proceeds be held for the benefit of co-tenants).

104. 86 C.J.S. 2d *Tenancy In Common* § 17 (1954).

105. Moore v. Bryson, 181 S.E.2d 113, 117 (N.C. 1971) (suggesting that the purchase of property adjacent to common property may be regarded as having been made for the benefit of all co-tenants).

106. Van Horne v. Fonda, 5 Johns. Ch. 388, 407 (N.Y. Ch. 1821).

only if the conveyance takes place simultaneously by the same instrument.[107] The joint author relationship is similarly created. Copyright law demands that joint authors have the requisite intent to create and merge the work.[108] Thus, similar to a simultaneous conveyance of tenants in common, creation of the work by joint authors is no accident. It is calculated and timed to be completed together or upon merger. Thus, it can be argued that since joint authors agree to simultaneously convey their work, they can be considered fiduciaries and subject to rules governing tenancy in common.

This analysis would be different for co-owners who were not joint authors. All joint authors at some point are co-owners. However, not all co-owners are joint authors.[109] For instance, a co-owner may have bought or inherited his share of the work, independent of other owners. However, under the majority view, tenants in common must come into possession of the property through the same instrument and at the same time.[110] Hence, unless the co-owners of the copyright acquire the property simultaneously and through the same instrument, they would not be fiduciaries.

The joint author relationship is more vulnerable than a co-tenancy because it is entered into voluntarily and requires intent to collaborate as a prerequisite for copyrighting of a joint work.[111] Under copyright law, the joint author has the right to make decisions regarding the work on everything except exclusive licenses.[112] Tenants in common, operate at an arm's length. Because a tenancy in common can be transferred through inheritance, co-tenants often do not have a choice of who the other co-tenant will be. Thus, joint authors are in an even more intimate position than are co-tenants.[113]

Arguably, because joint tenants enter into the relationship voluntarily and with some degree of planning, they should have the foresight to have a written agreement describing the duties of each, rather than depending upon a court imposed fiduciary relationship. However, this foresight is not ex-

---

107. Minion v. Warner, 144 N.E. 665, 666 (N.Y. 1924); Dampier v. Polk, 58 So. 2d 44, 50 (Miss. 1952); CUNNINGHAM, *supra* note 42, § 5.10, at 217.

108. *See* 17 U.S.C. § 101 (1994) (requiring authors to have "[t]he intention that their contributions be merged into inseparable or interdependent parts of a unitary whole for the creation of a joint work").

109. *But see* Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1496 (D.C. Cir. 1988) (discussing works made for hire).

110. CUNNINGHAM, *supra* note 42, § 5.10, at 217 (stating "[w]hen co-tenants acquire their concurrent interests at the same time, either by the same instrument or by inheritance from a common ancestor, they are held to be subject to fiduciary duties with respect to their dealings with the common property.").

111. *See* 17 U.S.C. § 101 (1994)

112. H.R. REP. NO. 94-1476, at 121 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736. Co-owner has "an independent right to use or license the use of a work, subject to a duty of accounting to the other co-owners for any profits." *Id.*

pected of parties in other fiduciary relationships.[114] Because there is an intimacy in the collaborative process of joint authorship and a lack of an arm's length relationship, parties may feel uncomfortable in asking other parties in the relationship to sign documents to protect their interest from these close personal "friends." This close relationship makes it difficult for the parties to put the terms of their relationship in writing. This failure to protect their interests leaves them in a vulnerable situation. It is this intimate relationship that prevents one from protecting his own interests, and has given rise to the imposition of fiduciary relationships by courts.[115]

The real property laws of tenancy in common create a fiduciary relationship between co-tenants with varying conditions depending on jurisdiction.[116] Because the joint author relationship fulfills these conditions, joint authors are fiduciaries. Thus, according to the laws governing tenancy in common, joint authors are fiduciaries to each other and on each other's behalf. Furthermore, due to the precarious and sensitive nature of the joint author relationship, courts should impose a heightened duty beyond that of a fiduciary which is imposed on a co-tenant. This heightened fiduciary relationship would impose more duties on co-authors.

D. Joint Authors as a Fiduciary Relationship

As mentioned before, fiduciary relationships have been imposed where there is a "community of interest"[117] and the parties have access to the same assets.[118] The joint author relationship is a similar relationship. Each co-author has the right to exploit and license the co-owned work, so long as that co-author licenses it non-exclusively,[119] and each co-author has access to the entire work. Similar to a director of a corporation, joint authors can represent themselves to the world as spokesmen for the entire work.[120] Moreover,

---

113. H.R. REP. NO. 94-1476, at 120. "A work is 'joint' if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contribution of other authors as 'inseparable or interdependent parts of a unitary whole.'" *Id.*

114. *See generally* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV 795, 813 (1983).

115. *Id.*

116. *See* discussion *supra* Part IV. B.

117. *See* discussion *supra* Part IV. C.

118. Flannigan, *supra* note 79, at 310.

119. NIMMER ON COPYRIGHT, *supra* note 8, §§ 6.09–6.10, at 6-29 to 6-30. Each co-owner may grant a non-exclusive license subject to a duty to account for the profits; *see also* Strauss v. The Hearst Corp., 8 U.S.P.Q.2d 1832, 1837 (S.D.N.Y. 1988).

120. *See generally* NIMMER ON COPYRIGHT, *supra* note 8, §§ 6.09–6.10, at 6-29 to 6-30.

121. *Id.*

joint authors can introduce themselves as both author and owner of the work.[121] Thus, the joint author is in an even more trusted position than a director of a corporation and is even more vulnerable than a shareholder.

Similar to a spouse, joint authors expose themselves to the other joint author in ways that they may not to the outside world. From the initial exposition of oneself in the artistic process, through the collaborative process, to the exploitation following creation, each joint author wields power over the other. The collaboration process bears the artistic children of the joint author relationship. The bond many artists feel to their work has been compared to that of a mother to her young.[122] Thus, the joint authorship should satisfy both the "trust" and "arm's length" factors common to other fiduciary relationships.

Similar to trustees, joint authors have full and easy access to the work.[123] As discussed earlier, courts place great emphasis on access in determining the existence of a fiduciary duty.[124] There are few relationships with more access to assets than joint authors. Regardless of consent, each co-author has all but exclusive licenses. Courts emphasize access because of the temptations of abuse that come with access to assets.[125] Often a joint author has more access to the co-owned assets than a trustee, who is a fiduciary. Although a partner has a duty to report to other trustees, a joint author only has to report profits from licensing the work.[126]

Similar to a partner, joint authors' legal rights are so intertwined that any use of rights by one co-author has the potential to harm the other.[127] The joint author takes the role of the spouse, partner and director in copyright law. The joint author relationship is accessible and vulnerable enough to be ripe for the abuses against which a fiduciary duty guards. It can be argued that the joint authorship relationship is a "community of interest"[128] and, thus, it should be protected by a "community of duty."[129]

---

122. *Visual Artists Rights Amendment of 1986: Hearing on S. 2796 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. On the Judiciary*, 99th Cong., 2d Sess. 12 (1986).

123. NIMMER ON COPYRIGHT, *supra* note 8, §§ 6.09–6.10, at 6-29 to 6-30.

124. Flannigan, *supra* note 79, at 307–10.

125. *Id.* (stating that "[a] person with access is fixed with a fiduciary obligation in order to deter mischievous conduct.").

126. UNIF. PARTNERSHIP ACT § 21, 6 U.L.A. 608 (1996).

127. Morden v. Mullins, 153 S.E.2d 629, 630 (Ga. Ct. App. 1967).

128. Van Horne v. Fonda, 5 Johns. Ch. 388, 407 (N.Y. Ch. 1821) (stating that a "[c]ommunity of interest produces a community of duty . . . to deal candidly and benevolently with each other."). *Id.* at 407–08.

129. *Id.*

V. DUTIES OF JOINT AUTHORS AS FIDUCIARIES

Joint authors and tenants in common have the duty to account for profits resulting from the use or exploitation of the property.[130] Also, they have the duty not to waste or deplete the co-owned assets.[131] If there is a depletion of the assets, they must account to the co-owners and distribute the profits.[132] A joint author cannot destroy the work, license the work in such a way as to cause its destruction, or grant a license in the only medium available for exploitation.[133] To do so would destroy the value of the work for the co-owners. In other words, as long as the co-owner's ability to exploit the work is not infringed, the owners are free to do as they wish.

Joint authors wield incredible power over one another's assets, ego, and reputation because their work embodies their efforts and personalities. Thus, the fiduciary duty they owe to each other should be heightened beyond that of a co-tenant. Indeed, the difficulty in applying the tenancy in common remedies of partition in kind and partition by sale illustrate the hypersensitivity of the joint author relationship.

Like a corporate director or an attorney, joint authors should owe a duty of confidentiality to each other.[134] Similar to a partner, a joint author should make decisions regarding the work in consideration of not only their interests, but also in the interest of the work as a whole, and where possible, in the interest of the co-author.[135] Like a parent, joint authors should refrain from using the work as a weapon against each other. They should not license or threaten to license the work in a way they know or should reasonably know would antagonize or damage the reputation of the other co-author.

---

130. NIMMER ON COPYRIGHT, *supra* note 8, §§ 6.09–6.10, at 6-29 to 6-30 (stating that co-owners are deemed to be tenants in common and, each co-owner may grant a non-exclusive license subject to a duty to account for the profits; *see also* Strauss v. The Hearst Corp., 8 U.S.P.Q.2d 1832, 1837 (S.D.N.Y. 1988).

131. PAUL GOLDSTEIN, *supra* note 17, § 4.2.2, at 385.

132. *Id.* at 385–86.

133. NIMMER ON COPYRIGHT, *supra* note 8, § 6.19[A] (citing Brown v. Republic Prod., Inc., 161 P.2d 796, 797–80 (Cal. 1945); Maurel v. Smith, 271 F.2d 211, 215–16 (2d Cir. 1921); *see also* Weissmann v. Freeman, 684 F. Supp. 1248 (S.D.N.Y. 1988); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 73 F. Supp. 165, 168 (S.D.N.Y. 1947).

134. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 82, § 173 (1979). Note that while all fiduciary relationships are also confidential relationships, all confidential relationships are not fiduciary relationships. *Id.*

135. UNIF. PARTNERSHIP ACT § 21, 6 U.L.A. 608 (1996); HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 4, at 188, 266 (2d ed. 1990).

VI. BREACH OF FIDUCIARY DUTY

Fiduciaries can breach their duties in a number of ways.[136] A fiduciary relationship is based on trust, loyalty and confidentiality. In addition, any breach of that relationship is actionable, so long as the injured party can prove damages.[137] The conventional fiduciary breaches include: misappropriation,[138] neglect,[139] failure to account for profits,[140] breach of the duty of confidentiality,[141] and waste or depletion of resources.[142]

Due to the unique and vulnerable nature of the joint author relationship, a breach of a fiduciary duty may manifest itself in very subtle ways. For example, a breach could arise by revealing confidences relating to the creative process of the work. Additionally, a breach could occur if joint authors act in their own self-interest to the detriment of the other co-author. For instance, a breach can occur if an author deals with a co-author at arm's length to the co-author's detriment, or if the work is used in such a way to reduce its value as a whole. A breach could also arise when a joint author exploits the work in a way that casts the work and the other joint authors in an unfavorable light. Examples of this could include: if joint authors collaborated on a religious hymn which is then licensed by another joint author to a competing religion; if a vegetarian's co-authored work is used to endorse beef; if a serious noncommercial artist's work is licensed for use in an advertising campaign; or if a politician's work is licensed to a rival. To prove such a breach, a joint author would have to show that there was actual harm to reputation or finances, and that the harm suffered was a result of such a breach.

Ordinarily, fiduciaries are held to a standard of gross negligence.[143] This would probably require a showing of either malice or, at the very least,

---

136. *See generally* Pittman v. Groveowners Loop of Loxahatchee Inc., 534 So. 2d 1207 (Fla. Dist. Ct. App. 1988); Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 552 (1949); United States v. Re Brook, 58 F.3d 961, 965 (4th Cir. 1995); AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 226 (2d ed. 1956 & Supp. 1967).

137. Atwood Grain & Supply Co. v. Growmark, Inc., 712 F. Supp. 1360, 1364 (N.D. Ill. 1989).

138. *See* Pittman v. Groveowners Coop. of Loxahatchee, Inc., 534 So. 2d 1207 (Fla. Dist. Ct. App. 1988).

139. Scott, *supra* note 136, at 552.

140. *Pittman*, 534 So. 2d at 1207. The former member of a marketing cooperative sued the cooperative for breach of fiduciary duty in handling and distribution of profits not in accordance with the contract. *Id.*

141. United States v. Re Brook, 58 F.3d 961, 965 (4th Cir. 1995) (quoting United States v. Chestman, 947 F.2d 551, 556 (2d Cir. 1991) (en banc)).

142. SCOTT, *supra* note 136, § 226.

143. *Id.*

knowledge that such a harm would occur. However, some courts have imposed a standard of mere negligence on the fiduciary relationship[144] whereby the joint author would be liable for any transgression they know or should know would cause reputational damage, according to the reasonable person standard.[145]

VII. CAUSES OF ACTION AND REMEDIES

The only remedy available under copyright law for a breach of joint authorship is to institute a suit for infringement.[146] However, an owner or co-owner of a copyrighted work cannot be sued for infringement of that work.[147] The licensee also cannot be sued if the license was not exclusive and if permission was received from the co-owner, who according to the Copyright Act, had the power to license.[148] Thus, the only recourse left to the injured joint owner is outside the realm of copyright and real property law.[149]

In cases involving a breach of fiduciary duty, actions for an accounting have resulted in the award of compensatory and exemplary damages.[150] The court may exercise a full range of equitable powers, including enjoining the

144. Shannon v. Monasco, 632 S.W.2d 946, 949–50 (Tex. Ct. App. 1982).

145. *Id.*

146. 17 U.S.C.A. § 501 (West 1996).

147. GOLDSTEIN, *supra* note 17, § 4.2.2, at 385 (explaining that "each copyright co-owner is entitled to exploit the copyright herself or to license others to do so.").

148. *Id.* at 385–86.

149. Lanham Act § 43(a) of the Federal Trademark Act has become a law of unfair competition which functions to protect against consumer confusion. Under it, artists have obtained protection of their integrity rights. It protects against confusion of "goods or services . . . use[d] in commerce . . . as to the affiliation, connection, or association . . . as to the origin, sponsorship, or approval" of one's goods, services, or commercial activities by another person. The Lanham Act was revised in 1989 by the Trademark Law Revision Act of 1988. Pub. L. No. 100-667, § 43(a), 102 Stat. 3935, 3946. Lanham Act's protection of artist's paternity and integrity rights has been limited to cases where the artist's name was replaced by another's or the artist's work was mutilated. Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976). However, the language of the Act suggests that it would apply well to works of joint authorship. By using an authored work in a political or religious context, the public can easily be deceived into believing the author endorses it. This would damage her reputation as an artist and as a human being.

150. ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG & RIBSTEIN ON PARTNERSHIP § 6.08(a) (citing Interstate Props. v. Pyramid Co., 581 F. Supp. 982, 990 (S.D.N.Y. 1984) which ordered punitive damages where deliberate disregard of joint venture agreement existed); Liggett v. Lester, 390 P.2d 351, 354–55 (Or. 1964); Int'l Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 584 (Tex. 1963) (holding that exemplary damages should not be precluded where fiduciary relationship was breached); Shannon v. Monasco, 632 S.W.2d 946, 949–50 (Tex. Ct. App. 1982) (holding that exemplary damages should not be precluded where fiduciary relationship was breached); Russell v. Truitt, 554 S.W.2d 948, 955–56 (Tex. Ct. App. 1977) (holding that exemplary damages of eight to one ratio were not excessive where secret agreement existed).

conduct or setting aside the transaction at issue.[151] Further, many courts have attempted to award compensatory damages in numerous cases involving a breach of fiduciary duty.[152] Some argue that courts may also award punitive damages if actual malice is proven.[153]

VIII. CONCLUSION

The joint authorship relationship is unique. It is an intellectual property relationship with some real property characteristics, and is similar enough to a tenancy in common to borrow many of its concepts. However, it is different enough that many of the concepts controlling real property should not be applied to the intellectual property relationship. Under many joint authorship scenarios, neither the laws of copyright nor the laws controlling tenancy in common are adequate. The tenancy in common remedies of partition in kind and partition by sale are especially inadequate to remedy joint author concerns. It is necessary to look outside the realms of copyright and real property law and wander into the meandering world of the fiduciary duty.

The joint author relationship meets all the requirements of the fiduciary relationship. Moreover, fiduciary causes of action and remedies fill the void left by copyright and real property laws and remedies. Therefore, joint authors should be given the status of fiduciaries and bestowed with all their rights and obligations.

---

151. Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 972–75 (2d Cir. 1989) (granting preliminary injunction to prevent monetary payments to partner who breached fiduciary duty); Infusaid Corp. v. Intermedics Infusaid, Inc. 739 F.2d 661, 669 (1st Cir. 1984) (recognizing right of specific performance as remedy for joint venture); Tankersley v. Superior Court, 706 P.2d 728, 731–32 (Ariz. Ct. App. 1984) (holding that full accounting is not necessary where parties have contracted out of accounting, and that suit for damages was still proper).

152. Hanes v. Giambrone, 471 N.E.2d 801, 809 (Ohio Ct. App. 1984) (affirming award of compensatory damages where there was constructive fraud that breached fiduciary duty); Jennison v. Bierer, 601 F. Supp. 1167, 1179 (D. Vt. 1984) (granting compensatory damages to the plaintiff); Prince v. Harting, 2 Cal. Rptr. 545 (Cal. Ct. App. 1960) (ordering partner that breached fiduciary duty to pay damages even where no final accounting occurred); Veale v. Rose, 657 S.W.2d 834, 837 (Tex. Ct. App. 1983) (reiterating that breaches of fiduciary duty may be remedied by awarding compensatory damages to injured partner).

153. *See* Frank J. Cavico Jr., *Punitive Damages for Breach of Contract - A Principled Approach*, 22 ST. MARY'S L.J. 357, 377 (1990). "Punitive damages are appropriate where a breach of contract comprises a breach of fiduciary duty. Even though the relationship may arise from the contract, recovery is grounded upon breach of the implied-in-law duty created by the relationship rather than from the breach of contract itself." *Id.*