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UNITED STATES COPYRIGHT CLAIMS BOARD

LAHNA TURNER, Claimant, v. MICHAEL BLOOM, ET AL., Respondents.	Docket No. 22-CCB-0045

CLAIMANT LAHNA TURNER'S
REQUEST FOR RECONSIDERATION
UNDER 17 U.S.C. § 1506(w) AND 37 C.F.R. § 230.1-.2
OF THE JANUARY 6, 2025, FINAL DETERMINATION (Doc. 55)

I. INTRODUCTION

17 U.S.C. § 1506(w) and 37 C.F.R. § 230.1-.2 provide for reconsideration of a Copyright Claims Board Final Determination where the requesting party identifies a clear error of law or fact material to the outcome or a technical mistake. Claimant respectfully requests reconsideration of the Board's January 6, 2025, Final Determination ("Determination") in the instant action, identifying the following clear errors of law and fact material to the outcome:

- Raising co-authorship as a new, dispositive, issue on Respondents' behalf after Claimant submitted her reply materials and then expressly precluding Claimant from submitting further party and witness statements to address the new issue;
- Resolving the question of co-authorship based on the Copyright Act and legislative history without applying the standards required by judicial precedent; and
- Concluding that Bloom is a co-author of Just Correct and that he did not assign rights to Melee when Bloom's Party Statement and submissions show otherwise.

For the reasons set forth below and in her earlier submissions, Claimant asks the Board to issue an amended Final Determination concluding that Bloom is not a co-author of Just Correct and that Claimant is entitled to the relief she requested. Alternatively, Claimant asks the Board to withdraw its Final Determination and allow Claimant to submit further evidence, including party and witness statements and a copy of Just Correct, so that the Board may thoroughly examine the issue of co-authorship under the applicable judicial precedent.

II. LAW AND ARGUMENT

A. It Was Clear Error For The Board To Decide The Case in Respondents' Favor Based On An Issue That The Board Raised, For The First Time, After Claimant's Reply, Without Allowing Claimant To Submit Additional Party And Witness Statements To Address The New Issue.

Claimant submitted her reply materials on May 15, 2024. On October 8, 2024, the Board issued an Order asserting that Respondent Bloom could be a joint author of Just Correct because he is identified as the director. *See* Doc. 53 ("Order"). The Order gave the parties two weeks to

submit "documentary evidence" and "agreement[s]" related to Bloom's possible status as a co-author, but specifically stated that "[n]o further party statements or witness statements may be filed." Doc. 53. It was clear error, and a violation of due process, for the Board to raise a dispositive issue on Bloom's behalf and then prohibit Claimant Turner from arguing that issue through party statements, witness statements, and other non-documentary evidence.

Although Respondent Bloom bears the burden of proof on the issue of co-authorship (*see Thomson v. Larson*, 147 F.2d 195, 200 (2d Cir. 1998)), Bloom never asserted that he was a co-author. He only asserted that owned all rights in Just Correct by virtue of two written agreements with Melee Entertainment, L.L.C. ("Melee"), which Bloom never produced. As the Board correctly noted, Claimant's infringement claim includes only two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Final Determination at 6 (Doc. 55) ("Determination"). The second element is not disputed. Bloom's claim that he is the exclusive owner of Just Correct goes to the first element—Claimant's ownership of a valid copyright. However, Bloom never argued that he "owned" Just Correct by virtue of being a co-author with May (or Melee, as the hiring party under a work-for-hire agreement). Rather, Bloom argued that he became the owner of Just Correct in 2012, 2014, or 2015 (depending on his submission) when rights "returned" to him by agreement with Melee.

Respectfully, it was clear error to rule against Turner on an issue that only the Board raised where Turner was precluded from presenting party and witness statements addressing the applicable test, refuting Bloom's claims, and offering additional evidence. The Determination based its finding on a "preponderance of the evidence" (Determination at 7), but because the decision was based on an issue that Respondents never raised, Turner had had no reason to submit countervailing evidence or arguments. Turner was not on notice of the co-authorship

issue until the Order raised it, yet the Order precluded her from submitting party and witness statements to controvert a possible conclusion that Bloom was a co-author.

This is material. Had the Order allowed submissions beyond "documentary evidence" and "agreement[s]," including party and witness statements, Turner could have submitted:

- Witness statements by individuals who were present during the filming of Just Correct, including Claimant Turner and Jamie Masada (May's manager and the venue owner), describing the contributions to the recordings and the control of the performances;
- A witness statement by Claimant Turner describing the creation of the Iraq feature, including filming, overdubbing, and post-production;
- Witness statement(s) adding specificity to Bloom's general description of the services that he allegedly rendered in connection with the work, as well as May and Melee's artistic control over the work;
- The work itself, which Turner did not submit because it is not a document or agreement;
- A Claimant party statement thoroughly setting forth legal arguments including, for example, the applicable standards for joint authorship considered against Bloom's contributions to Just Correct, the copyrightability of Bloom's contributions, the intent of Bloom, May, and Melee at the time, Bloom's work-for-hire status even absent a written agreement, and the timeliness of a claim that Bloom is a co-author.[1]

Judicial precedent holds that determining co-authorship requires a "nuanced inquiry" into the facts surrounding the creation of a work. *Thomson*, 147 F.3d at 201 (citing *Childress v. Taylor*, 945 F.2d 500, 508–09 (2d Cir. 1991)). "In the absence of a contract, the inquiry must of necessity focus on the facts." *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000). Precluding Turner from submitting party and witness statements after the Board *sua sponte* raised the issue of joint authorship foreclosed the required inquiry. The Order shifted the burden of proof from Bloom to Turner, required Turner to prove the negative, then limited Turner to doing so only with "documentary evidence" and "agreement[s]." This was a clear error of law.

[1] Documents already in the record support these arguments. By precluding party statements, however, the Order precluded Claimant from making the arguments.

B. It Was Clear Error To Resolve The Question Of Joint Authorship Without Applying The Test Required By Judicial Precedent.

The Determination's conclusion that Bloom was a co-author relies most heavily on the Copyright Act's definition of "joint work" and the related legislative history. *See* Determination at 7 (focusing on party collaboration and the intention that contributions would be merged). Claimant respectfully submits that it was a clear material error to limit the analysis to the statute and legislative history rather than applying the federal courts' test for co-authorship. The Board must render its determinations, *inter alia*, "on the basis of…judicial precedent." 17 U.S.C. § 1503(b)(1). Under judicial precedent, analysis of co-authorship requires "a more stringent inquiry than the statutory language would seem to suggest." *Thomson*, 147 F.3d at 200.

> [A]n inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress. For example, a writer frequently works with an editor who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet very few editors and even fewer writers would expect the editor to be accorded the status of joint author, enjoying an undivided half interest in the copyright in the published work.

Id. (quoting *Childress*, 945 F.2d at 507 (rejecting claim of co-authorship)).

> The potential danger of allowing anyone who makes even a minimal contribution to the writing of a work to be deemed a statutory co-author—as long as the two parties intended the contributions to merge—motivated the [*Childress*] court to set forth a two-pronged test. A co-authorship claimant bears the burden of establishing that each of the putative co-authors (1) made independently copyrightable contributions to the work; and (2) fully intended to be co-authors.

Thomson, 147 F.3d at 200 (citing *Childress*, 945 F.2d at 507-08).[2]

In evaluating whether a putative co-author made independently copyrightable contributions to a joint work, a majority of courts, including the Second and Ninth Circuits, adopt the "copyrightable subject matter test" formulated by Professor Paul Goldstein. *See M.G.B.*

[2] *Thomson* and *Aalmuhammed* were the state of the law when the work was created and provided the framework that the parties could have reasonably expected would apply to the work.

Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1493 (11th Cir. 1990); *see also Childress*, 945 F.2d at 507; *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 520–21 (9th Cir. 1990). According to Professor Goldstein, "[a] collaborative contribution will not produce a joint work, and a contributor will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright." *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1070 (7th Cir. 1994).[3]

Second, under *Childress* and *Thompson,* "each putative co-author must intend to be a co-author in order to give rise to a co-author relationship." *Thompson*, 147 F.3d at n. 20 (citing *Childress*, 945 F.2d at 508). Even a significant contribution "does not automatically suffice to confer co-author status on the contributor. Under *Childress,* a specific finding of mutual intent remains necessary." *Thompson*, 147 F.3d at 202 (citing *Childress*, 945 F.2d at 508).

The Ninth Circuit applies a similar test to claims of joint authorship of a motion picture, such as Just Correct. *See Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000) (affirming summary judgment that plaintiff was not a co-author). Citing the Second and Seventh Circuits, the Ninth Circuit has set forth three factors among the criteria to be weighed when determining joint authorship under 17 U.S.C. § 101 in the context of a motion picture production, and in the absence of a contract: "First, an author superintends the work by exercising control." *Aalmuhammed*, 202 F.3d at 1234. This may likely be "the inventive or master mind who creates, or gives effect to the idea." *Id.* "Second, putative coauthors make objective manifestations of a shared intent to be coauthors." *Id*. "Third, the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised." *Id.* "Control in many cases will be the most important factor." *Id.* Although the Final Determination cites

[3] The Determination cites *Erickson* but does not address whether Bloom's contribution was copyrightable. At a minimum, Turner should have had the opportunity to argue that it was not.

Aalmuhammed, the Final Determination does not apply its test, and the Order precluded Claimant from arguing it.

Additionally, in the Ninth Circuit, a contributor claiming to be a co-author must demonstrate "authorship," namely that she is an "author" *of the joint work* within the meaning of 17 U.S.C. § 101. *Aalmuhammed*, 202 F.3d at 1232. Demonstrating "authorship of the joint work" requires *more than* demonstrating that the contributor made a valuable and copyrightable contribution to the work. *Id*. (granting summary judgment of no joint authorship even though plaintiff demonstrated genuine issues of fact regarding a copyrightable contribution and an intent to merge his contributions into the work). The Ninth Circuit specifically stated that "[a] creative contribution does not suffice to establish authorship of the movie." *Id*. at 1233. The Determination did not apply the federal courts' test, limiting inquiry instead (contrary to judicial precedent) to the statutory language and legislative history. And even if the Determination were to have applied the *Aalmuhammed* test—or if the Board were to do so now and find in Bloom's favor—such application would be improper because Claimant never had a fair opportunity to respond fully to the argument that Bloom was a co-author of Just Correct.[4]

C. It Was Clear And Material Error To Conclude That Bloom Was A Co-Author, Even Without The Additional Material That Turner Could Submit.

As noted above, the test for co-authorship set forth in *Aalmuhammed* controls here. The Determination's only reference to *Aalmuhammed*, however, is in connection with the clear factual error, based on an incomplete record, that "Bloom effectively superintended the Work as

[4] In the case of irreconcilable conflict between circuits, "the Copyright Claims Board shall follow the law of the Federal jurisdiction in which the action could have been brought" (17 U.S.C. § 1506(a)(2)), which, in this case, would be the Ninth Circuit. Claimant resides in California and Bloom exploited the work through InGrooves and YouTube, both of which are headquartered in California. The Ninth Circuit, however, has noted that the "practical results" that the Second and Seventh Circuits reach are consistent with its results. *See Aalmuhammed*, 202 F.3d at 1233-34 (analyzing *Thomson v. Larson*).

its director and one of its producers." Determination at 9 (suggesting that Bloom had "artistic control" because the credits identify him as the director and producer). With Bloom's own statements—and even without allowing countervailing statements from Claimant and her witnesses—it is a clear error of fact to conclude that Bloom was the author or "master mind" behind Just Correct. *See Burrow–Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1883) (using that term). Even with Bloom's statements, uncontroverted, the record shows that Bloom did not maintain "artistic control" over Just Correct. *See Aalmuhammed*, 202 F.3d at 1233.

Specifically, the record does not support a conclusion that Bloom made an independently copyrightable contribution to Just Correct or that he was an author of Just Correct as a whole within the meaning of 17 U.S.C. § 101. Although Bloom says he "created the video special" (Determination at 3), the specific contributions he describes, at best, constitute hiring production and post-production techs, taping at May's direction May's performances of jokes and voiceovers that May wrote, and editing and "sweetening" May's performances into a broadcast presentation. *Id*. While not invaluable, those contributions—separately or in combination—are not independently copyrightable contributions to the work. The *Aalmuhammed* Court stated:

> We hold that authorship is required under the statutory definition of a joint work, and that authorship is not the same thing as making a valuable and copyrightable contribution….The issue we deal with is a different and larger one: is the contributor an author of the joint work within the meaning of 17 U.S.C. § 101.

Aalmuhammed, 202 F.3d at 1232. Even if Bloom made an independently copyrightable contribution, the record does not allow a finding that Bloom was an "author" of the whole work.

In addition to not showing that Bloom's contributions to Just Correct were independently copyrightable, the record does not contain evidence that any of Bloom, May, or Melee intended Bloom to be a co-author. As noted above, to determine whether this mutual intent requirement is satisfied, courts conduct a "nuanced inquiry into factual indicia of ownership and authorship,

such as how a collaborator regarded herself in relation to the work in terms of billing and credit, decisionmaking, and the right to enter into contracts." *Thomson*, 147 F.3d at 201 (citing *Childress*, 945 F.2d at 508–09). *Thomson* and *Childress*

> mandate[] that the parties "entertain in their minds the concept of joint authorship." This requirement of mutual intent recognizes that, since coauthors are afforded equal rights in the co-authored work, the "equal sharing of rights should be reserved for relationships in which all participants fully intend to be joint authors."

Id. (quoting *Childress*, 945 F.2d at 509). The record shows that neither side, let alone both as required, entertained the concept that Bloom would be a joint author.

First and foremost, Bloom proffered nothing showing that May and/or Melee intended for him to be a co-author, or that he intended to be an author himself. The only documentary support on this point are Bloom's producer and director credits on the DVD. *Aalmuhammed* noted that movies "generally limit authorship to someone at the top of the screen credits, sometimes the producer, sometimes the director, possibly the star, or the screenwriter—someone who has artistic control." *Aalmuhammed*, 202 F.3d at 1233. Bloom is not at the top of the credits for Just Correct. Bloom's producer credit appears eleventh on the list (behind Turner's), even before his director credit, which appears thirteenth. Exhibit AA. In contrast, May's "starring" credit appears first. May also has the only "written by" credit, and that credit appears before Bloom's director credit. *Id.* The presence of only one "written by" credit suggests that the parties anticipated that there would only be a single author. May also has an executive producer credit, which appears before Bloom's credits. *Id.* While the DVD insert credits and thanks multiple people, it does not even mention Bloom anywhere. *Id*. Bloom's only criticism of the credits related to Turner's producer credit; Bloom did not dispute any of May's credits, or the placement of his own.

Additionally, the letter agreement between Melee and May (Exhibit C (Dkt. 29)), which was sent to May care of Jim Kellem (whom Bloom admits was his agent as well as May's)

shows that May's intent and Melee's intent (as the hiring party under a work-for-hire agreement) were not to be co-authors with Bloom. Rather, the agreement shows that May and Melee intended that Melee would hold all rights in Just Correct and all related masters exclusively. *See* Exhibit C at 8. Additionally, Melee and May controlled the recording procedure, not Bloom. *Id.* at 6. May was also responsible for the recording process pursuant to the agreement, not Bloom. *See id.* May could not conduct recording sessions for the show without Melee's approval (*id.* at 6), which meant that Bloom could not do any filming without Melee's approval. May, with Melee's approval, decided when and where to film Just Correct, and May, by deciding what to perform, determined what would be filmed. While Bloom claims that he "ensured it met all industry broadcast standard requirements" (Determination at 3), Melee actually set those standards and requirements, and May was required to enforce them. *See* Ex. C at 2 (Masters "shall be technically satisfactory to Melee" and "commercially satisfactory to Melee," and shall feature performances by May "of the same quality, style and caliber as [May's] prior successful recordings," none of which Bloom directed). The agreement provides that "[t]he final mix/cut of each LP/DVD shall be subject to [May's] and Melee's mutual approval." *Id*. at 7. Although Bloom did not sign this agreement, the fact that Bloom and May knew Just Correct would be delivered to Melee before the project started and knew Melee's rights and May's obligations with respect thereto shows that Bloom did not control the project or its requirements. Additionally, the agreement was delivered to May through Bloom and May's agent. *Id.* at 1. Bloom also received the benefit of the agreement because the agreement provided that Melee would pay production costs up to $25,000 per contract period. *Id.* at 3.

"Just as the parties' written agreements with each other can constitute evidence of whether the parties considered themselves to be co-authors…so the parties' agreements with

outsiders also can provide insight into co-authorship intent." *Thomson*, 147 F.3d at 204. On this point, *Aalmuhammed* is particularly instructive:

> Warner Brothers required Spike Lee to sign a "work for hire" agreement, so that even Lee would not be a co-author and co-owner with Warner Brothers. It would be illogical to conclude that Warner Brothers, while not wanting to permit Lee to own the copyright, intended to share ownership with individuals like Aalmuhammed who worked under Lee's control, especially ones who at the time had made known no claim to the role of co-author. No one, including Aalmuhammed, made any indication to anyone prior to litigation that Aalmuhammed was intended to be a co-author and co-owner.

Aalmuhammed, 202 F.3d at 1235. The relationship above is directly analogous to the one with Melee, May, and Bloom. Accordingly, Melee's and May's execution of the work-for-hire agreement shows that there was no intention by either of them to be co-authors with Bloom.

Finally, the Determination paraphrases the witness statement by Melee's General Counsel, Attorney Freund, and uses this paraphrasing in favor of Bloom. Attorney Freund, however, actually says, "Melee never entered into any 'shared rights' agreement with anyone in connection with the Just Correct work, including Michael Bloom and/or Solaris Entertainment." Doc. 50, ¶ 9. Freund's statement further evidences Melee's intent <u>not</u> to share rights in Just Correct with anyone, including Bloom, as co-author, co-owner, or otherwise.

> [T]he *Childress* court emphasized that the requirement of intent is particularly important where "one person...is indisputably the dominant author of the work and the only issue is whether that person is the sole author or she and another...are joint authors." "Care must be taken...to guard against the risk that a sole author is denied exclusive authorship status simply because another person render[s] some form of assistance."

Thompson, 147 F.3d at 202 (quoting *Childress*, 945 F.2d at 508, 504, alterations in original).

"In cases in which none of the multiple-author scenarios specifically identified by the Copyright Act applies, but multiple individuals lay claim to the copyright in a single work, the dispositive inquiry is which of the putative authors is the dominant author." *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 260 (2d Cir. 2015). Such is the case here. As between Bloom and May,

May is undeniably the dominant author. The credits support this conclusion, giving May "written by," "starring," and "executive producer" credits. Ex. AA. Bloom agrees that May wrote all of the content in Just Correct. Bloom's copyright application (Doc. 38) identifies Bloom's "authorship" only as "production, direction." The application lists Bloom's only new material as "producer and Director of the video recording of a comedy performance" and specifically excludes "Jokes written by Ralphie May" from Bloom's copyright claim. *Id*. Bloom refers to May's performance as "his [May's] show." Respondent's Party Statement at 1; Determination at 3. May's contributions, admitted by Bloom, undeniably dominate over Bloom's recording of May's performances at May's direction (which the letter agreement required Melee to approve in advance) and Bloom's technical contributions of editing the raw footage into a broadcast production, subject to May and Melee acceptance and approval. Unlike Turner, who selected specific portions of May's Iraq trip to film, Bloom filmed May's entire performance. *See* Determination at 3 (quoting Bloom, "I wanted to shoot the same show 4 times….[May] performed his show as close to identical as anyone could 4 times."). By deciding what material to perform, May (not Bloom) determined what Bloom would film.

Finally, even if Bloom's contributions to the work did somehow elevate him to the status of co-author, it was clear error for the Determination to conclude that "there is no evidence that demonstrates that Bloom's copyright interest passed to Melee." Determination at 7. This assertion begs the question of co-authorship by presuming that Bloom held a copyright interest to pass to Melee in the first place. As noted above, the record, when considered against judicial precedent, does not allow such a conclusion. And even if it did, Bloom repeatedly argued that he did transfer his rights to Melee through at least two agreements two agreements, which rights would "return" to Bloom in 2014. *See* Determination at 4 (quoting Respondents' Party Statement

at 1). For rights to "return" to Bloom from Melee, Bloom must have transferred them to Melee. Additionally, as Bloom bears the burden of proof on the issue of co-authorship (*Thomson*, 147 F.2d at 200), Bloom's failure to introduce documents showing what he did and/or did not transfer to Melee, and what would or would not "return" to him should be construed against him. At a minimum, Bloom's failure to introduce his records should not work in his favor.

Based on the foregoing, even acknowledging Bloom's credits and contributions to the final product, and even without the evidence that Turner could have offered if she had been allowed to do so, the evidence in the limited record does not allow a finding that Bloom and May (and Melee as the author under a work-for-hire agreement) shared a mutual intent for Bloom to be a co-author under the applicable standard announced by the federal courts or that Bloom was an author of the work as a whole. The Determination's conclusion that Bloom is a co-author constitutes clear error.

III. CONCLUSION

For the reasons set forth above, as well as those in Claimant's earlier submissions, Respondent asks the Board to issue an amended Final Determination concluding (1) that Bloom is not a co-author of Just Correct under the applicable standard, (2) that Bloom has infringed Just Correct as alleged, and (3) that Claimant Turner is entitled to the damages requested. Alternatively, Claimant respectfully requests that the Board withdraw its Final Determination and allow Claimant to submit further evidence, including party and witness statements and a copy of Just Correct, so that the Board may thoroughly examine the issue of co-authorship under the applicable judicial precedent.

Respectfully submitted,

Dated: February 5, 2025

/s/ T. Earl LeVere
T. Earl LeVere
Attorney for Claimant Lahna Turner

Proof of Delivery

I hereby certify that on Wednesday, February 05, 2025, I provided a true and correct copy of the Claimant Lahna Turner’s Request For Reconsideration of the January 6, 2025, Final Determination to the following:

Michael Bloom, represented by Michael A Bloom, sr, served via ESERVICE at solaris.em@me.com

Signed: /s/ T. Earl LeVere