

## Failure of Three Factor Test Spells End to Joint Authorship Claim

Legal Alert  
July 1, 2019

In a recent opinion out of the Western District of Washington Chihuly Studio successfully defeated a case brought by a former Chihuly assistant claiming to be a joint author of more than 200 works.

Copyright provides the author of original works with the exclusive right to exploit that work. In certain scenarios, a single original work may be prepared by multiple authors and is a joint work when the multiple authors intend that their contributions be merged into one single work. In a joint work, the joint authors hold undivided interests in a work, despite any differences in each author's contribution. Each author, as co-owner, has the right to use or to license the use of the work, subject to an accounting to the other co-owners for any profits. The unintentional creation of a joint work can pose a problem where the interests of the authors are not aligned. By way of example, one author may desire to keep the works exclusive, and the other would happily sell the right to reproduce them for \$1. This is the type of situation Chihuly successfully avoided.

In *Moi v. Chihuly Studio*, Michael Moi was part of a team of assistants who collaborated with Dale Chihuly to create a large portfolio of paintings and drawings for Chihuly to then put additions on and be sold as Chihuly work. Moi was instructed to and attempted to follow the styles favored by Chihuly and to create backgrounds that looked like Chihuly's existing body of work. Moi claimed to be responsible for a few unique background styles, but did not expect attribution and considered the paintings to be Chihuly's. Once the background was laid down, Chihuly utilized it as a backdrop for his artistic vision with no input from Moi. There was no written agreement defining their relationship between the parties or specifying compensation. After a falling out with Chihuly, Moi asserted that he had an ownership interest in over 200 different works as either a joint author, or, alternatively, by way of an independent interest.

### Contact

Benjamin J. Hodges

### Related Services

IP & Technology

## Failure of Three Factor Test Spells End to Joint Authorship Claim

---

To qualify as an author as a joint work, each author must have done enough that their contribution could be independently copyrighted. If that is satisfied, the Court then looks to a three factor test to determine a claim of co-authorship:

1. whether the claimed author "superintended" the work by exercising control;
2. whether the parties made "objective manifestations of a shared intent to be coauthors"; and
3. whether "the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised."

Here, the Court found that (1) Moi had little control, since his goal was to "utilize the styles and techniques that Chihuly showed him," and, in practice, Chihuly had unilateral control over the work, its publication, and commercialization; (2) there was no contract, nor evidence the parties ever discussed or intended for a joint authorship to be created, and there was a mutual understanding that the works were created *for* Chihuly; and (3) that any market appeal comes from Chihuly and his style, rather than any of Moi's contributions. The Court, following 9th Circuit Court of Appeals guidance, found that the first factor, control, is the most important factor and that strongly favored Chihuly.

### **INDEPENDENT COPYRIGHT CLAIMS**

Even without joint authorship, Moi's own contributions could potentially have independent copyright, but the Court also ruled against that. First, the Court noted that Moi didn't include that claim in his Complaint. Second, the Court noted that Moi could not define, even if he was successful, what his rights would be since all his contributions were part of Chihuly's works now. Finally, Moi could not, or did not, clearly describe what his separate contributions that would warrant their own copyright were. He could not clearly and definitely identify which paintings and contributions were his and which were other assistants, with some exceptions, because they were all trying to mimic the same style: Chihuly's.

### **VAGUE PROMISSORY ESTOPPEL CLAIMS**

Moi also alleged that Chihuly promised to compensate Moi for his artistic contributions and that Chihuly should be prevented from disavowing that promise. In reviewing the facts, the Court found Chihuly's statements, and any facts supporting a claim for promissory estoppel, were vague as they lacked details such as how compensation was to be calculated. The Court ruled against Moi's claim upholding Washington law refusing to enforce ambiguous statements.

### **TAKEAWAYS**

Don't wait until a relationship breaks down before memorializing an understanding regarding authorship, copyright ownership, and compensation. If the relationship between collaborators breaks down, collect all the facts necessary to support a case before filing, this includes a detailed list of contributions relative to the work as a whole, and facts to support more than simply contribution to the work as a whole. And if litigation becomes necessary, plead all

## Failure of Three Factor Test Spells End to Joint Authorship Claim

---

possible relief and claims, not just some.

If you have questions about the implications of this case on a copyright matter, please contact a member of Foster Pepper's [Intellectual Property](#) group.